

Message from Our Managing Attorney

In this issue, we examine corporate governance, business and investing worldwide.

In the boardroom, Roger Lane and Courtney Worcester offer a “practical checklist for corporate directors,” and Valérie Demont examines considerations when deciding “to be or not to be a public company.” Across the globe, Len Schneidman shows how the new draft Indian Direct Tax Code could significantly affect the use of income tax treaties for investments in India. In other investment news, Ivan Knauer, Greg Nowak and Matthew Silver discuss, in a Pepper webinar recording, how a proposed new act could subject advisers with even limited contact with U.S. clients to U.S. registration and enhanced scrutiny. And in the workplace, in a Pepper podcast Amy McAndrew discusses labor and employment pitfalls of company holiday parties. It’s more than just lampshades on heads – eat, drink and be wary, she advises, in matters such as gift-giving, holiday bonuses and more.

On a personal note, I’m proud of our office’s accomplishments over the years, and I confidently leave our continuing success in Thomas P. Wilczak’s capable hands as he succeeds me as our managing partner in January.

We welcome comments, questions and suggestions.

Barbara Rom, Of Counsel

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Thomas P. Wilczak Named New Head of Pepper’s Detroit Office

Thomas P. Wilczak, a partner and head of Pepper Hamilton’s Environmental Practice Group in the Detroit office, will become the new managing partner of Pepper’s Detroit office in January 2010. He will succeed Barbara Rom, the office’s attorney-in-charge since January 2005.

Mr. Wilczak focuses his practice on matters related to environmental counseling, compliance, permitting, regulatory affairs, and environmental issues pertaining to litigation and transactional matters, as well as managing other litigation and regulatory matters for clients. He also is a member of the firm’s Sustainability, CleanTech and Climate Change Team.

The Detroit office, which is celebrating its 30th anniversary this year, has been a cornerstone office of Pepper Hamilton since 1979. The office grew quickly from its original emphasis on labor relations to include bankruptcy and reorganization, corporate and securities, environmental, employment, litigation and real estate. Partners in the Detroit office have led the Detroit Metropolitan Bar Association, major sections of the State Bar of Michigan, and INSOL, the leading international organization of bankruptcy professionals.

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Method in the Madness: A Practical Checklist for Corporate Directors

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The variety, complexity and urgency of issues presented to directors for action or assessment can sometimes threaten to overwhelm the fundamentals of sound board practice.

By what means can corporate directors have confidence that they are discharging their core obligations of stewardship and oversight effectively, amid the onslaught of information and advice now visited upon them, and how can management and corporate counsel best facilitate that process?

Directors are called upon to review or make decisions regarding dozens of issues every quarter over a broad range of topics, which can include strategic alternatives, operations, finance, accounting, R&D, executive compensation, and so forth.

These issues, moreover, can range from pivotal corporate events to matters that, in days gone by, would have been considered routine. In the former category, one can readily identify a sale of the company, discontinuing a major line of business, a recapitalization or a bankruptcy filing as a fundamental matter to which conscientious directors will naturally direct their attention. In addition, the corporation's outside advisors will be armed to the teeth with PowerPoint presentations and memoranda to confront such extraordinary situations.

Thus, directors can readily prepare and be prepared to deal with the known and the extraordinary; it is the overlooked and the seemingly unexceptional that most often bedevil them. Indeed, one of the ironies of many corporate upheavals over the past two decades is that they did *not* arise from momentous events or high-profile schemes, but from an accumulation of smaller errors or transgressions that the conscientious director could not detect from a summary presentation of sales or operational results, or a review of standard financial statements: "side letters" issued to individual customers and "bill and hold" arrangements that preclude revenue recognition; overcharging Medicare or Medicaid by pennies per product; capitalizing run-of-the-mill business expenses; "fudged" results at the individual store, facility or business-unit level; misdated or backdated individual option

grants; and so on. How are directors to have comfort that some such issue – as yet unknown, or at least not identified as such – is not lurking somewhere beneath the surface? Codes of conduct, compliance programs and audits are the tools frequently deployed to sniff out issues of this kind, but how are the directors to know that *these* tools are working?

Another irony – further compounding the directors' challenge – is that when they meet, it is not as if the directors have only a bare-bones agenda before them and otherwise lack information. To the contrary, the mass of compliance legislation and rule-making that followed the last recession has resulted in directors routinely receiving mountains of data, qualitative information, and expert advice of all stripes – some not previously recognized as such, for which many consultants are deeply grateful – all in an effort to "amp up" the thoroughness, comprehensiveness and depth of the directors' oversight. But is it the right information? Is it useful, or even digestible? One fears that the human mind has not evolved to process this onslaught in real time, except with primordial "fight or flight" instincts. The result? The important bits are at risk of being diluted, if not washed away, in the deluge of stuff.

Our basic model of corporate governance, in contrast, does not require or even *seek* to have individual directors, or the board as a whole, possess expertise in all possible subjects of board action. Nor does the model require or seek to have directors undertake day-to-day management duties, or to veto all corporate risk-taking. In fact, the model is *opposed* to all such concepts as being inefficient, counter-productive, and potentially inimical to oversight in its most fundamental sense: the application of detached practical judgment and the exercise of disinterested common sense.

These cross-currents may be difficult to harmonize conceptually, and they are certainly difficult to live with on a practical level. Some commentators – influenced by the meltdown in the real estate, credit, and financial markets – will suggest that the basic corporate governance model is itself outmoded and in need of an overhaul. Further, some will argue that the entire apparatus of federal securities regulation and enforcement is broken, while still others will point more narrowly to specific failures in

financial-industry regulation. Whatever specific view or views may ultimately prevail, it is apparent that the present drift of public opinion and governmental reaction is for more, not less, scrutiny of corporate officers and directors, more regulation, more enforcement, and more lawsuits. It will be a veritable festival of hindsight.

All of which is perfectly understandable, given the economic meltdown we are experiencing. It is not, however, of any help to directors as they seek to guide their companies forward from where they are *right now*. In particular, the state of overload in which many corporate directors now find themselves is not going away any time soon: an expanding board agenda, in which no item, it seems, is entirely “routine” or free of risk, accompanied by an explosion in the amount of information, data and advice that directors are expected to process in making decisions.

In this environment, it is critical that the *nature* of the director’s task – and the corresponding measure of personal liability – be clearly understood. The director’s task is not to “take charge” of management itself, but to oversee and guide, as a steward. That does not require having expertise on all *possible* subjects, or knowledge of all *possible* details. Rather, it fundamentally involves asking questions of those persons *charged with* that knowledge and expertise, evaluating their input and advice thoughtfully, and reaching objective, reasoned decisions. There is nothing more a director can or should do.

What follows, then, is a set of ten practical guidelines that together constitute a basic methodology for directors to discharge

their duties as corporate stewards. These same guidelines provide a basis for management and corporate counsel to support the directors in this effort, and for the two camps to have a productive dialogue about process improvements over time.

STEP 1 – DEFINE THE TASK

Notoriously overlooked, but extremely useful, is the simple step of defining at the outset exactly *what* the directors are being asked to do with respect to each item on the board agenda. Consistently applied, this simple step is a powerful tool for the selection and preparation of appropriate meeting materials, effective meeting preparation, and productive conduct of the meeting itself.

Clarity on this point assists all involved in identifying and focusing on *what* information is pertinent to the task at hand, and *how much* of it is needed – be it a particular type of raw data or data analysis, qualitative information, professional advice, or identification of the practical implications for the business.

As important, the nature of the directors’ action can have a significant impact on the degree of deference courts will accord that action in the event of a subsequent legal challenge, and the relative likelihood and scope of regulatory intervention. In practical terms, clarity at the outset on *what* the directors are being asked to do translates into more timely and effective risk management – for the corporation itself and for its individual directors.

To illustrate, is the full board (a) receiving a routine status report, with no major surprises or developments; or (b) receiving notice



Peppercast: Holiday Parties - Eat, Drink and Be Wary!

It’s that time of year again. Even with many employers cutting back during these difficult economic times, most still want to find special ways to thank their employees and acknowledge the hard work they have put in over the last year.

In this podcast, **Amy McAndrew**, of counsel in the Berwyn office of Pepper Hamilton and a member of the firm’s Labor and Employment practice, discusses issues employers should be aware of during the holiday season, including holiday parties, employee gift giving and holiday bonuses.

Listen today by visiting the Labor and Employment Law section of www.pepperpodcasts.com.

of a significant operational, regulatory or other development; or (c) providing input or guidance with respect to an ongoing process that is being spearheaded, under appropriate authority, by management or a board committee, or (d) is the board itself making a definitive decision on a significant matter? As one moves through the progression of increasing board involvement and decision-making, the raw amount of information the directors require, and its granularity, necessarily increases until, at the outer limit, the directors are expected to review individual contract terms before they approve a sale of the company. The information that is produced for and provided to the board with respect to each agenda item should be calibrated accordingly.

Similarly, is the full board relying upon information or reports that have been provided by management or by a board committee, as part of the board's decision-making process? If so, the directors may rely in good faith on the information that is presented to them from these sources, absent any "red flags" to the contrary. Directors are not expected to reproduce the efforts of, or independently test information and reports provided by, other corporate fiduciaries who have been charged with such tasks, unless there is some reason – such as a palpable conflict of interest – that such reliance would be misplaced. Indeed, doing so would defeat the purpose of delegation. In such circumstances, it is not the proceedings of the *board* that provide the granular "record" of the basis for this input, but the corporate records from which management drew its information, or the proceedings of the relevant board committee. What the board needs in such circumstances is a report that is sufficient for the board to understand the methodology and conclusions of the reporting fiduciaries; it does not need a complete reproduction of their working files.

STEP 2 – MEETING PREPARATION

It goes without saying that directors should prepare for meetings and devote adequate time to that task, and likewise that materials should be distributed to directors sufficiently in advance of a meeting to afford a reasonable amount of time for review, unless circumstances truly do not permit. Because these are truisms, this segment focuses on *enabling* that process and, in particular, on encouraging the dialogue with management and corporate counsel that will support and improve the process over time.

Thus, flowing directly from the prior segment, directors should be provided with information that is sufficient to enable them to execute on each agenda item *in light of* the particular action they are being asked to take. Here, the touchstones are the scale and accessibility of the information provided, relative to the task

at hand. *How* information is presented is important, and this is the step that is all too easily overlooked. In particular, it is all too easy for outside advisors and management personnel to present information in a fashion that is familiar *to them* and their respective disciplines. But is it useful in that form *to the board*?

If, for example, the directors are well aware of the metrics by which operational performance is judged from quarter to quarter, a seemingly telegraphic presentation may be adequate, assuming the business is behaving well. In contrast, if some aspect of the business is behaving badly, or some other material development (positive or negative) has arisen, it may be necessary to step back and consider *how* the directors are best informed. Importantly, this is not a time for management to "go underground;" the task is one of truly educating the directors, presenting potential responses and their implications, and soliciting the directors' input.

In addition, consideration should be given to such mundane issues as effective delivery of meeting materials to the directors. Are all of the directors comfortable with e-mails, PDF files and external portals, or do they need (or prefer) that hard copies be delivered to them? To what address? Does it depend on the season, and where individual directors are then located? By the same token, will some directors rarely receive, still less carry with them in their travels, voluminous hard copies of documents? Rather than operating on assumptions, inquire as to the needs of the individual directors and design delivery systems to meet their needs. There is perhaps nothing more discouraging than discovering in the midst of a meeting that half of those in attendance have never seen the material that is to be discussed. In sum, step back and structure a process that will work.

STEP 3 – COMPANY INFORMATION

Whenever an issue arises, it seems that everyone rushes to call the accountants, the lawyers and the consultants. A sound strategy, but never overlook the obvious: directors also need to receive pertinent information that is available directly from *company* sources, undiluted by third-party summarization or interpretation. The range of potential topics is as broad as the business itself, and determined by the issues at hand – operations, sales and marketing, finance/accounting, management performance, industry trends or conditions, and so forth.

The task is to determine *what* is needed and *in what form*, to provide the directors with a handle on the corporate data upon which they are to act, or the outside advisors are to offer input. Generally speaking, undigested computer databases will not be

helpful; thought should be given to the preparation of reports and summaries that accurately reflect the underlying data. What lies behind this is the notion of an iterative process, through which puzzles and anomalies – in data, information or outside advice – can be hammered out until the directors feel they have a stable platform for decision-making.

STEP 4 – INDEPENDENT INFORMATION AND ADVICE

When the matter at hand implicates a field of specific professional expertise (legal, accounting, investment banking, commercial banking, or otherwise), directors will naturally call upon outside advisors to assist. More interesting are those situations in which the directors need to ensure that they are receiving an *independent, competent* set of eyes – either because regular corporate counsel may be conflicted or lack experience in a particular area, or the directors seek market metrics to assess corporate performance or arrangements (*e.g.*, executive compensation) relative to such metrics.

The critical issue for the directors is to confirm that the outside advice they intend to use is advice upon which they can rely – that such advice is both competent and uncompromised by conflicts. Generally speaking, board committees that are formed to address particular issues – such as internal corporate investigations or the assessment of stockholder demands or derivative claims – require independent counsel, and industry consultants should be independent as to the issues they address (*e.g.*, executive compensation consultants should not be chosen by management).

STEP 5 – POTENTIAL CONFLICTS

Does the matter at hand present any actual or potential conflicts of interest, and if so, have appropriate protective measures been taken (*e.g.*, by recusal of interested directors, the formation of a board committee, or other means)? Areas where conflicts may arise include executive compensation, and transactions in which management, a director or a director-affiliated person or entity has a personal financial interest. In assessing these issues, directors should consider that the *appearance* of a conflict may be just as distracting (and costly) as an actual conflict, because the law, in effect, subjects *potential* conflict situations to increased scrutiny – rendering it more difficult to dispose of lawsuits and regulatory inquiries. In this context, an ounce of prevention may be worth substantially more than a pound of cure.

STEP 6 – TECHNICAL COMPLIANCE

Directors should confirm – by the simple expedient of asking – whether the proposed action before them, and the procedures surrounding it, are in technical compliance with all pertinent laws, regulations, governance requirements, contracts and the like. Is the proposed action consistent with internal corporate requirements, such as the corporate charter and by-laws, stockholder agreements, investor rights agreements, stock option plans, and so forth? Have all pertinent corporate, tax, accounting and other relevant statutes, rules and regulations been considered? Are any third-party consents required? Is further monitoring (*e.g.*, until a proposed transaction closes) necessary, and if so, has the apparatus been put in place to do so?

STEP 7 – ADEQUATE DELIBERATION

It goes without saying that directors should be afforded adequate time to probe the issues, review relevant information and advice, deliberate, and reach a considered decision. What *amount* of time is adequate will, of course, depend upon the nature of the decision being made and the surrounding circumstances, including the process *leading up to* the final decision. To be sure, in a crisis, prompt action may be required, and no one of sound mind will dispute that. The issue is one of structuring reasoned decision-making *in light of* the surrounding circumstances.

STEP 8 – MAKING THE RECORD

A conscientious board should document its efforts. *All* proceedings of the board and its committees should be recorded in contemporaneous minutes or written consents – such a record is the most credible evidence of a fiduciary's care and diligence, and a record created after the fact has far less weight. The minutes should reflect the directors' process of deliberation over time, including the consideration of pertinent data and, where applicable, outside advice. The minutes should also reflect any protective measures taken in light of potential conflicts of interest – the recusal of interested directors, the formation of special committees, and the like. The record should also include appropriate exhibits, including approved documents, non-privileged presentations and reports.

STEP 9 – DISCLOSURE

To whom must a particular corporate action be disclosed, when, and in how much detail? Generally, matters that are still in process are not fit subjects of disclosure, and matters that are not material need not be disclosed. But regulatory requirements and

credit agreements may require disclosure above and beyond that required by corporate law or the federal securities law. Simply ask – it is a technical legal question – and proceed accordingly.

STEP 10 – A FINAL GUT CHECK

Everything should now be done. Nonetheless, step back and ask: Is there anything that seems incomplete, puzzling, or somehow

“sideways” – about the situation, the process, the information or advice that was received, or the result? If something doesn’t sit well, please say so. This piece is intended to help directors confidently take ownership of their actions and decisions. If something seems awry, the time to speak is before the decision is final.

To Be or Not to Be a Public Company

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A flurry of initial public offering activity, which had been unseen since the beginning of the credit crisis, indicates a further sign of revival of the U.S. capital markets. The new IPOs should be good news to many companies that had been effectively shut out of various financing sources — debt and equity — over the past year. This year, more than 55 companies have filed IPO registration statements with the U.S. Securities and Exchange Commission. Most are U.S. companies, joined by a few foreign companies, especially from China. Many of them are REITs and technology-based services providers, with a few in the financial services, power, retail and other sectors. About 23 companies effectively completed their IPOs this year, a far cry from 2007’s 282 IPOs or even 2008’s 51 IPOs, but the recent increase in the number of IPO filings over the past few weeks is cause for optimism.

An IPO is a transformational event for a company, its management, employees and promoters, and the decision to go public is one that needs to be carefully weighed.

For promoters, an IPO may allow them to monetize their investment by selling down a portion of their holdings in the company at the time of the IPO, yet at the same time retain control of the company. Once the company is public, promoters may also find it easier to sell portions of their ownership over time in additional sales into the public markets.

For companies, an IPO allows them to access, in at times significant amounts, additional capital; raise their profile in the industry and with their clients; facilitate acquisitions and other M&A activity (publicly traded stock can be an attractive alternative to

cash); in certain cases, obtain better loan terms from lenders; and give them additional incentives to attract and retain top talent. Once public, the company may also regularly tap the public capital markets to raise additional funds on an ongoing basis as its business and funding needs evolve.

These considerations must be carefully weighed against the challenges and costs of going public and ongoing compliance and regulatory burdens applicable to public companies, their directors, officers and principal stockholders. Some of these challenges and requirements include:

Independent Board. Unless more than 50 percent of the voting power of the company is held by a shareholder following the IPO, a majority of the board of directors will generally need to be independent. The company will also be required to have a fully independent compensation committee and nominating/corporate governance committee (subject to phase-in periods). With the growing demands on independent directors, finding the right independent directors may be a difficult task, and the company will also need to procure director and officer liability insurance to attract new independent directors.

Audit Committees. Public companies are required to have fully independent audit committees, with audit committee members who meet certain financial literacy requirements.

Independent Auditors. The independent auditors of the company will need to be registered with the Public Company Accounting Oversight Board, or PCAOB. This may require the company to change its auditors and get new audited financials in connection with its IPO. The relationship of the independent auditor with management and the company is regulated, and audit commit-

Webinar: Private Fund Investment Advisers Registration Act of 2009 Set to Impact Many Canadian Hedge and Private Equity Funds

The Private Fund Investment Advisers Registration Act of 2009 (HR 3818) has been approved by the House Financial Services Committee and is on its way to a full House vote. While not quite as expansive as the original proposal made by the Obama administration last July, if enacted, HR 3818 would, among other things and for the first time, subject many advisers, both in the United States as well as Canadian advisers that have contact with the United States solely by virtue of a few U.S. clients (direct or potentially indirect), to U.S. registration and scrutiny.

Pepper attorneys **Ivan B. Knauer**, **Gregory J. Nowak** and **Matthew R. Silver** discussed the effect this legislation will have on hedge funds and private equity funds as the legislative debate is actively taking shape.

Visit http://www.pepperlaw.com/webinars_update.aspx?ArticleKey=1632 to view the recording.

tee preapproval of audit and nonaudit services provided by the independent auditors will be required.

Internal Control Over Financial Reporting. Public companies are required to maintain “internal control over financial reporting.” Management must carry out an annual assessment of the company’s internal control over financial reporting, which, in certain cases, will also need to be passed upon by the company’s independent auditors. Those requirements are complex, time-consuming and costly.

Disclosure Controls and Procedures. Public companies must maintain “disclosure controls and procedures” that ensure internal procedures are in place to timely and adequately dispense information to the public. As with internal controls, these disclosure controls are also subject to effectiveness assessments.

Financial Statements. The IPO prospectus will need to contain audited and unaudited consolidated financial statements of the company for the past three years (and any interim quarterly unaudited financial statements) and selected annual consolidated financial data for the past five years (of which the oldest two years may be unaudited).

Public Scrutiny. Public companies are subject to extensive ongoing reporting, disclosure and other compliance obligations. Among other requirements, the company must make annual and quarterly disclosures as well as ongoing periodic disclosures upon the occurrence of specific events. Those requirements can be difficult when the company is experiencing financial or business

difficulties, contemplating a significant transaction, or entering into strategic agreements that it may have to disclose. The company also will become subject to rules regarding shareholders’ meetings and proxy statements. In addition, it will need to file its material agreements with the SEC. The SEC standards for confidentiality of competitive and other sensitive information are difficult to meet.

Certifications. The CEO and CFO of the company will need to certify the company’s periodic filings. A knowingly false certification could lead to criminal liability.

Loans to Executive Officers and Directors. Any loan or advance extended to directors and executive officers will need to be repaid, forgiven or otherwise unwound as soon as possible prior to the filing of the IPO.

Stockholder Reporting Obligations. Executive officers and directors, as well as 10 percent stockholders, must publicly disclose their securities holdings in the company (including derivative securities). In addition, they must publicly disclose any trades that they make in the company’s securities and will be subject to liability for “short-swing” profits they make on any sales and purchases of the company’s securities occurring within a six-month period. Separately, any person beneficially owning more than 5 percent of the company’s securities must publicly file statements disclosing his or her identity and stock ownership. Violation of these obligations could result in profit disgorgement and other penalties.

Hostile Takeover and Shareholder Activism. Public companies are subject to hostile takeover activity and shareholder activism, both of which are on the rise. Anti-takeover defenses will need to be put in place to protect the continued growth of the business while balancing those needs against a successful marketing of the IPO, the requirements of investors and the positions taken by proxy advisory firms on corporate governance and takeover defenses. For example, opposition is growing against certain forms of takeover defenses, including poison pills, staggered boards and plurality voting.

Employment and Benefit Plans. Employment agreements for senior management and key employees and employee benefit plans (for example, incentive plans, stock purchase plans and director stock option plans) should be put in place at the time of the IPO for retention purposes, IPO marketing reasons and because it is more difficult to put those plans in place once the company has gone public. These arrangements should comply

with the new corporate governance environment on say-on-pay and executive compensation.

Investor Relations. Public companies need to release earnings on a quarterly basis and comply with complex rules on communications. An officer in charge of investor relations and an investor relations firm will need to be hired for that purpose.

Costs. An IPO is an expensive process with underwriter commissions of about 7 percent of the IPO proceeds and legal, accounting, stock exchange and other fees and expenses on top of that. Post-IPO, ongoing compliance and reporting costs can be burdensome, especially for smaller public companies.

Although taking a company public requires much consideration, it can be a very beneficial experience when done correctly. By carefully planning and scrutinizing each step of the process, management and stockholders can ensure that the best interests of the company and its stockholders are being served.

India Makes Another Attempt at the India-Mauritius Tax Treaty

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In yet another attack on the India-Mauritius Tax Treaty (a time-honored route for inbound investment into India), several provisions in the new draft Indian Direct Tax Code (Draft Code), announced on August 12, 2009 and scheduled to come into force on April 1, 2011, could have a significant effect on the continued use of income tax treaties, including the India-Mauritius Income Tax Treaty (Treaty), for direct investments into India. In a significant departure from current tax rules, the Draft Code provides that neither a tax treaty nor the Code would have preferential status by reason of it being a treaty or a law and that, in the case of a conflict between the provisions of a treaty and the provisions of the Code, the one that is effective later in time prevails. Since the Treaty dates back to 1983, the Draft Code would (absent a later renegotiation of the Treaty) be later in time and its provisions would prevail.

Of particular concern to a potential Treaty claimant, Section 5(1)(d) of the Draft Code provides that any income from the transfer, directly or indirectly, of a capital asset situated in India would be deemed to accrue in India and thus would be taxable in India to a nonresident taxpayer. The practical effect of these provisions in the Draft Code would be to eliminate the use of the Treaty

and subject the capital gain on the sale of stock of an Indian company to capital gains tax in India.

In addition, the Draft Code provides for the introduction into Indian tax law of a general anti-avoidance provision (GAAR). The GAAR would allow a commissioner of income tax to declare any transaction as an “impermissible avoidance arrangement” and disregard, combine or recharacterize any step in a transaction or the whole transaction. The discussion note to the Draft Code specifically states that the GAAR provisions will override the provisions of a treaty. Thus, the use of the Treaty to protect against the imposition of Indian capital gains tax would, depending on the specific facts and circumstances, be subject to being disregarded by a tax commissioner as an impermissible avoidance arrangement. The taxpayer, however, would be able to demonstrate the commercial substance of the transaction.

But if past precedence is anything to go by, one can safely bet that the concern about the negative effect on foreign investments coming to India if the lucrative routes through Mauritius did not exist will cause India to take some mitigating steps that will eventually uphold the Treaty.