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# August 2013 e-Bulletin

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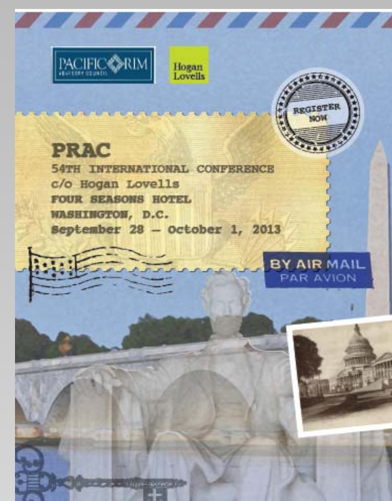
PRAC @ IBA Boston
October 7, 2013
PRAC Members Gathering

PRAC @ PDAC Toronto
March 4, 2014

Taipei , Taiwan 2014
PRAC 55th International Conference
April 26-29
Hosted by Lee and Li

PRAC @ INTA Hong Kong
May 10, 2014

Santiago, Chile 2014
PRAC 56th International Conference
November 8 - 11
Hosted by Carey/




PRAC 54th International Conference
Washington, D.C. 2013
September 28 - October 1
Hosted by Hogan Lovells

Details online www.prac.org

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## BAKER BOTTS LATERAL MOVES IN MIDDLE EAST

**Lateral Moves Turn Baker Botts Into Dominant Legal Force in Middle East**

*Corporate and Disputes Practice Group Joins Firm in Dubai, Riyadh, Abu Dhabi*

**July 16, 2013** -- A highly-regarded group of lawyers with accumulated experience of more than a century of practice in Gulf Cooperation Council (GCC) countries -- including eight partners who specialize in a wide range of transactional and dispute matters -- joined Baker Botts L.L.P. today. The lawyers will work from firm offices in Dubai, Riyadh and Abu Dhabi.

The Middle East group -- a total of 14 lawyers and a significant number of support staff -- moved to the firm from Norton Rose Fulbright. It includes John Lonsberg, who established Fulbright & Jaworski's presence in the Middle East when he joined Fulbright in 2005 and served as the partner in charge of that firm's Middle East practice; fellow partners Mark Bisch, Jonathan Sutcliffe, Joseph Colagiovanni, Hassan Elsayed, Richard Devine and Philip Punwar in Dubai, and Sam Eversman in Riyadh, Saudi Arabia.

This move, along with the alliance agreement signed with the International Legal Group in Kuwait earlier this year, enhances Baker Botts' reputation as a significant legal force in the region and allows the firm to provide an even broader range of service and capabilities to clients. This includes providing extensive counsel to foreign companies active in Kuwait and the UAE or Kuwait- and UAE-based companies active internationally.

"This team -- considered 'go-to' choices for any business requiring legal counsel in the Middle East -- has extensive experience in the region over a wide range of industry segments and practice areas that goes back for more than 30 years," said Baker Botts Managing Partner Andrew Baker. "They are frequently referred to as 'the region's lawyers,' and we are pleased to have them join the firm and our Middle East team. This affirms our commitment to having a strong presence in the region and to support clients, whether based in the Middle East or elsewhere, regarding their business interests in the region."

The new lawyers joining Baker Botts focus primarily on corporate and commercial transactions, regulatory and compliance, project finance, international arbitration and dispute resolution matters, and local law across a range of industries, including energy, technology, aviation and defense, construction, hospitality and consumer products with the added dimension of anti-bribery and related corporate compliance and internal investigations.

With this move, Baker Botts now has 40 lawyers in its Middle East offices, giving it one of the largest team of any U.S.-headquartered firm in the region. Baker Botts has more than 700 lawyers in 14 offices around the world.

The group collectively brings multiple decades of experience serving international and locally-based clients throughout the region. They are well-versed in local law and business custom and have developed long-term relationships with Middle East-based businesses and government entities.

"This group of talented and experienced lawyers will cement our position as one of the dominant legal forces in the region," said Robert Jordan, former U.S. Ambassador to Saudi Arabia and Partner in Charge of the firm's Middle East practice. "This team significantly enhances our ongoing efforts to build a broad portfolio of capabilities in the Middle East in order to help clients address the growing demand for sophisticated legal services on a wide of array of complex issues."

Jamie Baker, International Partner for Baker Botts, said, "Over many years we have become familiar with John and several of his partners and their ability to successfully represent clients on transactions and disputes across the GCC countries. It was always clear that we share similar approaches to the practice of law. We see a lot of synergy with the group and look forward to expanding the services we can offer our collective client base."

Lonsberg said, "I knew the firm was interested in growing its platform and practices, and I saw our team's 30 years presence in the Middle East as a full complement to what Baker Botts has developed here in recent years."

Michael Goldberg, co-chair of the International Arbitration and Dispute Resolution practice at Baker Botts, said, "We are excited about bringing on board this top-notch dispute resolution group in the Middle East. Jonathan and Philip and their team, when added to our existing practice, continues our expansion around the world in order to assist our clients with quality and experience with disputes which is second to none."

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## BAKER BOTTS LATERAL MOVES IN MIDDLE EAST

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The group joining Baker Botts has received recognition from publications that annually evaluate the legal profession. In the *2013 Chambers Global* rankings, for instance, the Middle East practice was recognized for representing a major local energy company in a high-profile joint venture with a Chinese counterpart.

Beyond the natural resources sector, *Chambers* editors wrote, "the group is also well-known for its experience in defense and security work and counsels several multinationals on their regional activities."

For more information, please visit www.bakerbotts.com

**Background on Baker Botts' new Middle East partners**

**John Lonsberg** | John has been engaged in an international transaction, regulatory and dispute resolution practice since 1979. He has particular experience in the Middle East starting in 1980, where he continues to practice extensively today. He has also practiced throughout Asia and Europe since the mid-1980's and was a resident in London for part of that time.

**Mark Bisch** | Mark Bisch is an advisor to international and domestic clients on their operations throughout the Middle East, North Africa and South Asia. Mark has more than a decade of experience residing and working in the Middle East. Clients rely on Mark's expertise in advising on a wide range of international commercial transactions, including joint ventures,
mergers and acquisitions, corporate formations and governance, banking and finance matters, real estate and construction, technology transactions, intellectual property issues, labor and immigration matters and resolution of international disputes.

**Joseph Colagiovanni** | Joe Colagiovanni practices in Dubai and St. Louis. His practice centers on construction, architectural, engineering and development law (including related finance), both domestically and internationally. He has been involved in major construction projects, including utility and infrastructure systems, bridges and roadways, water treatment and distribution facilities, large-scale commercial and residential complexes, industrial and manufacturing facilities, hospitals, hotel and resort developments, power plants, renovation and rehabilitation of historic structures, research facilities, museums and entertainment complexes.

**Richard Devine** | Richard Devine represents clients doing business in the Middle East and internationally. His practice is principally focused on energy and covers the spectrum of energy matters. Richard works in the firm's Dubai and Abu Dhabi locations and has counseled energy clients on a variety of transactions related to upstream oil and gas, energy M&A, energy regulation, energy transportation and energy trading. He has lived and worked in London, Cairo and Dubai.

**Hassan Mostafa Kamel Elsayed** | Hassan Mostafa Kamel Elsayed has broad corporate and commercial law experience in the Middle East, including international arbitration, litigation, international commercial and corporate matters, joint ventures and government procurement and claims. He works across the entire Middle East and North African region and has experience that includes handling a large number of arbitrations on behalf of Egyptian industries before the International Chamber of Commerce in Paris and local arbitration and litigation.

**Sam Eversman** | Sam Eversman focuses his practice on international transactions, corporate and project finance, joint ventures, intellectual property transfers and Saudi income tax for clients doing business in the Middle East. He also has experience in assisting Middle Eastern clients (both governments and businesses) with transactions and disputes outside the Middle East. He regularly assists businesses with the exploration, structuring, establishing and conducting of operations in the Middle East.

**Philip Punwar** | Philip Punwar was called to the Bar of England & Wales by the Honorable Society of the Inner Temple in 1989. He practiced as a Barrister in London until November 2005, when he joined a leading regional dispute resolution law firm based in the Dubai International Financial Centre. Philip has appeared as counsel in a wide range of domestic and international proceedings in court and arbitration.

**Jonathan Sutcliffe** | Jonathan Sutcliffe has significant experience in international arbitration and dispute resolution and has represented clients on a diverse range of international commercial arbitration, ADR and litigation matters in the energy, construction, hospitality, real estate, defense, insurance, international joint venture and film sectors and on investor-state disputes. Jonathan also sits as an arbitrator.

*###*

## CLAYTON UTZ ADDS LEADING SECURITIZATION PARTNER

**August 8, 2013 --** Clayton Utz has significantly boosted its offering to its financial services industry clients with the appointment of Sonia Goumenis as a partner in the Firm's securitisation practice.

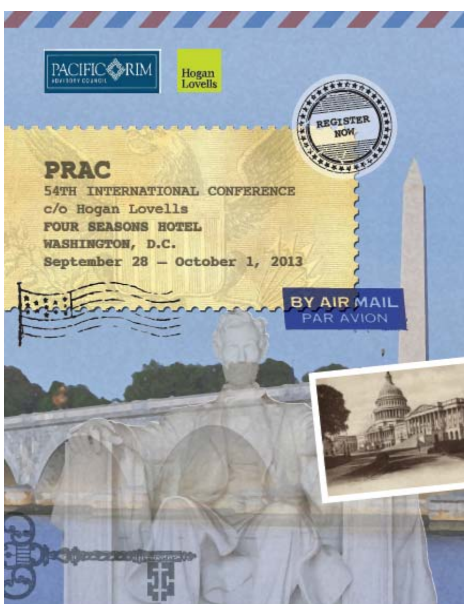
Sonia has over 12 years' experience in securitisation transactions, acting for a range of participants including sponsors, arrangers, facility providers, investors and trustees in both domestic and cross-border deals. Her experience covers a broad range of asset classes. She has acted for Australian issuers in establishing their global covered bond programmes and her experience also extends to debt capital markets issues, derivatives, structured products and portfolio acquisitions.

Sonia began her career at Clayton Utz as a graduate, becoming a partner in January 2008. She will return to the Firm to work in the national securitisation practice led by partner, Andrew Jinks. Andrew is widely recognised as one of Australia's leading securitisation lawyers, with over 25 years' experience in legal practice. Andrew joined Clayton Utz as a partner in August 2010, from Allens. Sonia's practice and client base will strengthen and be supported by the services and market position of Clayton Utz as Australia's leading independent firm, with its strong domestic focus and broad-based practice and industry offering.

Andrew Jinks said Sonia's addition to the team met a strategic client need and growing demand for specialist services in the securitisation area.

"We anticipate that securitisation will be a significant growth area as confidence returns to the Australian and global debt capital markets and clients look to raise more capital through issues into both the domestic and international markets. This requires an in-depth understanding of regulatory changes and an ability to provide clients with innovative and cutting-edge product and services," Andrew said. "Sonia has built a strong reputation in the market and her appointment will add significantly to our ability to service our clients' needs in this area."

For additional information visit www.claytonutz.com

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## DAVIS WRIGHT TREMAINE ADDS TO GROWING TECHNOLOGY, TRANSACTIONS AND M&A PRACTICE

***Wendy Kearns Joins Firm***

**July 22, 2013—-** Wendy Kearns, a lawyer with extensive experience representing a wide variety of technology clients, has joined the growing technology transactional and M&A practice at Davis Wright Tremaine LLP.

Kearns brings 14 years of practical experience to the firm, including being in-house at the world's largest software company, working at Heller Ehrman/Venture Law Group in Seattle and Silicon Valley, and, most recently, running her own boutique technology firm.

"Wendy brings an extraordinary set of skills and background to Davis Wright," said Dan Waggoner, co-chair of the firm's communications, media & information technology (CMIP) practice. "The breadth of her knowledge will provide our tech clients with acute insight, whether they are seeking assistance with transactional matters, IP, distribution, advertising, or any other issue in this dynamic sector."

"I am thrilled to be able to bring my practice to Davis Wright's thriving platform," said Kearns. "My areas of experience are highly complementary to the firm's existing team of highly talented lawyers. I look forward to bringing my skills to bear for the firm's stellar roster of technology clients, as well as bringing my current clients the benefits of Davis Wright's full-service model."

In addition to licensing and technology transactions, Kearns has extensive experience with cloud services agreements, video game industry agreements, marketing and advertising agreements, and university intellectual property transactions, along with the IP aspects and transactional diligence for mergers and acquisitions.

Kearns was a software developer beginning in her teens, and went directly to law school. She received her J.D. from Santa Clara University School of Law, where she was managing editor of the High Tech Law Journal. She is admitted to practice in Washington, California, and Arizona.

For more information, visit www.dwt.com

## DENTONS EXPANDS WITH VETERAN ENERGY PARTNER

***Veteran Energy Lawyer Adds to Energy Transportation and Infrastructure Practice***

**August 1, 2013—-** Dentons announced today that Andrew D. Schifrin, a veteran energy lawyer, has joined its preeminent Energy, Transportation and Infrastructure practice as a partner in the New York office. Schifrin joins from Dickstein Shapiro LLP, where he was a partner. He previously was at Torys LLP and King & Spalding LLP.

Schifrin's practice encompasses sophisticated transactions in the energy and infrastructure industries, including project development and finance, mergers and acquisitions, joint ventures, public-private partnerships, various commercial arrangements and energy regulatory matters. He also represents clients before the Federal Regulatory Commission and state public utility commissions.

"Dentons provides an unrivalled global energy platform for our clients," said Clint Vince, chair of Dentons' global Energy, Transportation and Infrastructure practice in the US. "Andrew's depth of experience adds to our already deep bench of talent in the sector."

Schifrin has successfully completed numerous high profile deals in the global infrastructure and energy industries. He recently represented Syncora Guarantee, Inc. in multiple financings, including the restructuring of the $3.6 billion Reliance Rail Project, the largest public-private partnership in Australian history. During his career, Schifrin has represented power project developers that rely on a wide-variety of generation technologies, and in recent years, he has represented many developers of renewable power plants, including Competitive Power Ventures (with respect to its 152 MW Keenan II Project in Oklahoma and the 140 MW Cimarron II Project in Kansas), and Tessera Solar in connection with the 850 MW Calico Project in California.

"Energy sits at the intersection of many complex disciplines," said Dentons US managing partner Mike McNamara. "With more than 20 years of diverse experience across the energy spectrum, Andrew is a perfect fit for our Firm."

Schifrin is ranked in the areas of projects and energy and natural resources by legal ranking publications. He frequently writes on matters of interest to the energy industry, including in *Energy Law Journal*, *Competitive Utility*, *Energy Buyer*, and *Natural Gas & Electricity*, and often lectures for industry associations. Schifrin received his JD from New York University and his bachelor's degree from Cornell University.

For additional information visit www.dentons.com

## GIDE LOYRETTE NOUEL PARTNER APPOINTMENTS FOCUS ON INTERNATIONAL DEVELOPMENT IN 2013

**July 2, 2013—**- Gide is strengthening its international network with the appointment of 11 new partners drawn from all regions in which the Firm operates.

These appointments are a further demonstration of the Firm's long-term commitment in Asia, Western Europe, Central and Eastern Europe, Russia and Africa. The new partners represent the following international practice groups, which Gide is keen to develop: Banking & Finance, Projects (Finance & Infrastructure), Mergers & Acquisitions / Corporate, Competition & International Trade and Tax.

Fernand Arsanios (Banking & Finance)
Gilles Cardonnel (Projects (Finance & Infrastructure) - M&A / Corporate)
Rebecca Finn (Banking & Finance)
Fiona Gulliford (Banking & Finance - Projects (Finance & Infrastructure)
Guo Min (Tax - Projects (Finance & Infrastructure)
Karine Imbrosciano (Banking & Finance / Derivatives)
Ákos Kovách (Competition & International Trade - M&A / Corporate)
Phung Pham (Banking & Finance/ Derivatives)
Christina Renner (Competition & International Trade)
Mariam Rouissi (Banking & Finance)
Tim Théroux (Banking & Finance)

Commenting on the appointments, Senior Partner Baudouin de Moucheron said:

*"Gide has always made the development of its international business central to its strategy. In 2013, we are celebrating major anniversaries for a number of our offices. These appointments are confirmation of our on-going commitment to recruiting and promoting the very best legal specialists in all regions of the world in which we operate. I congratulate our new partners and thank them for all their efforts and expertise in the interests of Gide's clients."*

For additional information visit www.gide.com

## MCKENNA LONG ALDRIDGE CONTINUES CORPORATE EXPANSION

McKenna Long & Aldridge LLP (MLA) announced the addition of Michael A. Rule as a partner in MLA's Corporate practice. Based in Orange County, Rule has a national middle-market practice and regularly serves as lead transactions counsel and outside general counsel to both public and private companies. He is the eighth addition to MLA's Corporate practice this year.

"We are thrilled to have Mike join the Firm," said Wayne Bradley, Corporate Department Chairman. "He is an integral part of our continued efforts to strategically expand the transactional services we provide on the West Coast, and in particular, in Southern California."

Rule represents clients in a broad range of industries, including numerous high profile clients in restaurants, food and beverage, and packaged goods, among others.

Rule's practice encompasses the negotiation and documentation of both buyer side and seller side stock and asset deals, mergers and acquisitions, financing transactions, supply and distribution agreements, leases and assignments, and all stages of clients' IP portfolios, including initial searches and clearance, USPTO pursuit and maintenance of registrations, cease and desist activities, protection of proprietary technology, and related transactions and litigation support. He also actively represents clients in the counseling and development of mass media campaigns, public advertising, internet communications matters, and FDA and other regulatory guidance.Rule spent several years as in-house Transactions and IP counsel and subsequently Executive Vice President and General Counsel for the publicly-traded Prandium, Inc. and Koo Koo Roo Enterprises, Inc. This in-house experience provides him with unique insight on delivering legal services in a practical, business-oriented manner.

"I am excited to join MLA and its Corporate practice," said Rule. "The commitment to grow the practice to offer increased value to clients is an excellent platform for me to enhance the delivery of quality legal services to them in all aspects of their business."

"With the integration of Luce Forward complete, we continue our expansion plans in Southern California," said Jess Bressi, Managing Partner of the Orange County office. "Mike is an important step in this expansion and will take a leadership role in growing the Firm in Orange County."

For additional information visit us at www.mckennalong.com

## BAKER BOTTS

### LYONDELLBASELL'S SELLING SHAREHOLDER CLOSES SECONDARY OFFERING OF ORDINARY SHARES

**August 6, 2013** -- On August 6, 2013, certain affiliates of Apollo Management Holdings L.P., one of the largest shareholders of LyondellBasell Industries N.V. (NYSE: LYB), completed a public offering of 16.5 million ordinary shares of LyondellBasell.

The net proceeds to Apollo were $1.117 billion. LyondellBasell did not receive any proceeds from the offering. After the offering, affiliates of Apollo still own 9.6% of the outstanding ordinary shares of LyondellBasell.

Barclays Capital Inc. was the sole underwriter for the offering.

Baker Botts represented LyondellBasell in the matter.

For additional information visit www.bakerbotts.com

## CAREY

### ACTS FOR BANCO DE CHILE IN THREE BONDS' ISSUANCE AND PLACEMENT IN SWITZERLAND

Carey acted as local counsel to Banco de Chile in the three bonds' issuance and placement in Switzerland during 2013. The latest issuance closed on July 25th, for USD133 million app., at 1.125% per annum, due 2017.

The first bond was issued in May for USD275 million at 1.125 per annum, due in 2018; and the second one, in July 18th, for USD239 million with floating rate, due in 2016.

Carey advised Banco de Chile through a team led by partner Diego Peralta and associates Sebastián Monge and Felipe Zaldívar.

For additional information visit www.carey.cl

## SYCIP LAW

### COUNSEL TO PHILIPPINE NATIONAL BANK AND ASIA UNITED BANK FOR PHP3.5 BILLION LOAN FACILITY OBTAINED BY STAR INFRASTRUCTURE DEVELOPMENT CORPORATION

**July 25, 2013 --** SyCip Salazar Hernandez & Gatmaitan (SyCipLaw) acted as counsels to the Philippine National Bank and Asia United Bank in connection with a PhP3.5 billion loan facility obtained by Star Infrastructure Development Corporation.

The proceeds of the facility will be used principally to finance the total cost of the remaining construction works for the Southern Tagalog Arterial Road Project (STAR). STAR is a 42-kilometer toll way facility linking the southern Tagalog provinces of the Philippines to the National Capital Region. STAR traverses the towns of Sto. Tomas, Malvar and Ibaan, Batangas and the cities of Tanauan, Lipa and Batangas. Republic Act No. 6462 officially renamed STAR as the Apolinario Mabini Superhighway.

The SyCipLaw team consisted of partner Mia G. Gentugaya, senior associate John Paul V. De Leon and associates Maricar G. Ramos, Leanne Herschel C. Que, Patrick Henry D. Salazar, Diana S. Gervacio and Irene B. Balmes.

For additional information visit www.syciplaw.com

## TOZZINI FREIRE

### PUBLIC ISSUANCE OF DEBENTURES BY COMPANHIA MARANHENSE DE REFRIGERANTES

Tozzini Freire acted in the Public Issuance of Debentures by Companhia Maranhense de Refrigerantes, a company controlled by Renosa Participações S/A which produces and distributes The Coca-Cola Company brands in the States of Mato Grosso, Maranhão, Alagoas, Sergipe, Tocantins, Goiás and Bahia.

Banco Bradesco BBI S.A. acted as underwriter. TozziniFreire Advogados acted as deal counsel.

Alexei Bonamin, partner at Capital Markets TozziniFreire's practice group, was in charge of the transaction with assistance of the firm's associate Debora Cristina Seripierri.

For additional information visit www.tozzinifreire.com

## GIDE LOYRETTE NOUEL

ACTS ON SEGUIN ISLAND MUSIC CITY PARTNERSHIP CONTRACT: FIRST BOND FINANCING OF A PPP IN FRANCE

**July 11, 2013—-**The Département des Hauts-de-Seine and the project company, Tempo - Île Séguin, entered into a 30-year partnership contract for the design, construction, financing, maintenance and operation (together with all related services) for the operation of the Music City to be built on Seguin Island in Boulogne-Billancourt (west of Paris).

The project company Tempo - Île Séguin is a joint venture between Bouygues Bâtiment Île-de-France, Sodexo Group and investment fund InfraVia Projets (OFI Group). The architect firm, Shigeru Ban, is responsible for the design of the Music City and Bouygues Bâtiment Île-de-France will be responsible for its construction. Maintenance of the Music City and related services will be performed by Excel (Sodexo Group).

The Music City will be comprised primarily of a 1,100 seat auditorium to be used primarily for classical and contemporary music concerts and a large 4,000 seat concert hall which will be home to modern music. The concert hall will be adaptable and will be able to host up to 6,000 peoples (either seated or standing) and will be the only concert hall in France able to offer up to six shows within a 48 hour period. The Music City will also comprise recording facilities and rehearsal rooms, training rooms, a 2,660 m2 business space, catering and shops. In addition, the Music City will host two resident music groups: Laurence Equilbey's Insula Orchestra and the Maîtrise des Hauts-de-Seine.

Besides the public service concerts, the Music City will be operated by S.T.S Événements, a joint venture between TF1 and Sodexo. S.T.S Événements, which will develop a musical programme focused on excellence and innovation. The programme will be centred around culture and the arts, particularly classical music, jazz, world music and shows allying music, dance and video.

The total construction cost for the Music City will amount to EUR 170 million, of which EUR 127 million will be financed by bank loans, arranged and subscribed by HSBC France, The Bank of Tokyo-Mitsubishi UFJ and Bayerische Landesbank. The construction completion date is scheduled for June 2016. One innovative aspect of this project is the refinancing of the construction loan by a French securitization vehicle (a fonds commun de titrisation or "FCT") put in place by Allianz Global Investor Europe. The FCT has issued 30-year bonds, which have been fully subscribed for by Allianz funds.

This deal is the first bond financed PPP in France and will, thus, be a reference for all future infrastructure financings, which will doubtless use capital markets and institutional investors in the coming months and years.

Around 30 Gide lawyers have worked on this deal since early 2012. Our primary role has been to act as legal advisor to Bouygues Bâtiment Île-de-France, Sodexo and OFI InfraVia since the start of the competitive dialogue procedure launched by the Département des Hauts de Seine until contract signature. This team, led by Thomas Courtel, also comprised Marie Bouvet-Guiramand, Laetitia Lemercier, Raphaëlle Gout and Anne Framezelle, as well as Emmanuel Vital-Durand and Julien Sauvé on town planning issues and Xavier de Kergommeaux and Judith Rousvoal for securitization. A second Gide team has been specifically mandated by TF1 to structure the operation of the Music City. This second team, led by Bénédicte Mazel, also comprised Stéphanie Berland-Basnier and Tiphanie Mareuse.

For additional information visit www.gide.com

## DENTONS CANADA LLP

ADVISES CANADIAN WHEAT BOARD ON LANDMARK $150 MILLION INFLATION LINKED ANNUITY POLICY AGREEMENT

**June 19, 2013 - -** Dentons Canada LLP is proud to be Canadian Wheat Board's legal advisor regarding a $150-million inflation-linked annuity policy agreement – the first such transaction in Canada. The agreement, signed by Canadian Wheat Board (CWB) and Sun Life Assurance Company of Canada, a wholly-owned subsidiary of Sun Life Financial Inc. (TSX/NYSE: SLF), transfers investment and longevity risk from CWB's defined benefit pension plan to Sun Life Financial.

The project was led by Scott Sweatman and Mary Picard, Partners in Dentons Canada's Pension & Benefits group, with additional counsel from pension Associate Colin Galinski. The team provided legal advice to CWB, supporting the organization in navigating a complex business and legal landscape to arrive at an optimal pension solution for CWB. Based on a creative "annuity buy-in," this solution delivers long-term security for CWB pension plan members.

"At Dentons, we are excited to be an integral part of the effort that launched this unique annuity product," said Scott Sweatman. "This transaction would not have been possible without the innovative thinking of CWB and the close working relationship with the project teams at Aon Hewitt and Sun Life."

An annuity buy-in is a type of investment held in a pension fund that allows investment and longevity risk to be transferred to an insurance company, while preserving members' pension benefits. This investment strategy increases long-term pension security for plan members by better aligning pension plan promises and investment assets. A $150-million inflation-linked annuity policy agreement between Canadian Wheat Board and Sun Life is the largest single-day purchase of inflation-linked annuities in Canada and the largest single-day purchase of a next-generation annuity buy-in in the country.

"A buy-in annuity does not transfer plan administration obligations to an insurance company. Instead, it's designed to relieve employer headaches caused by the uncertainty of future contribution obligations," said Mary Picard. "That makes it an interesting choice in the toolbox of de-risking strategies available to employers who sponsor defined benefit pension plans."

For additional information visit www.dentons.com

## HOGAN LOVELLS

ADVISES BILFINGER BERGER GLOBAL INFRASTRUCTURE ON £85M EQUITY RAISING

**July 23, 2013—-** Hogan Lovells has advised Bilfinger Berger Global Infrastructure SICAV S.A. (BBGI) on its successful placing, open offer and offer for subscription raising £85 million, announced on 12 July 2013.

Hogan Lovells previously advised BBGI on its initial public offering in December 2011, the first ever Luxembourg SICAV to be admitted to the Official List of the UK Listing Authority as a closed-ended fund, and last week announced and closed a further equity raise which was significantly over-subscribed.

BBGI invests in PFI/PPP projects around the world and this latest equity raise will fund the acquisition of further interests in PFI/PPP infrastructure projects from the Bilfinger group.

The Hogan Lovells team advising BBGI was led by London investment funds partner Erik Jamieson, assisted by tax partners Kevin Ashman in London and Michael Dettmeier in Dusseldorf, Infrastructure partner Philip Brown, and investment funds senior associate Amelia Stawpert.

Commenting on the transaction, Erik said:

*"We are pleased to have advised BBGI on this equity raise which was a natural progression from their IPO on which we also advised in 2011. Clients consistently cite our ability to put together a team which combines both infrastructure and funds expertise which few firms can match as the reason why we are the go-to firm for this work".*

For more information, see www.hoganlovells.com

## MUNIZ RAMIREZ PEREZ-TAIMAN & OLAYA

PROMIGAS WINS BID TO SUPPLY LIQUEFIED NATURAL GAS TO PERU'S NORTHERN REGIONS

Muñiz, Ramirez, Perez-Taiman & Olaya advised the Colombian joint venture Promigas/Surtigas in its successful bid under the tender for the Nor Peruvian natural gas masification program called by Peruvian Agency "*Proinversión*", aimed at supplying the northern regions of Peru with Liquified Natural Gas. Promigas/Surtigas will invest approximately US$ 150 million in bringing natural gas to 150,000 users in the next few years.

Jorge Pérez-Taiman, head of the Oil & Gas Practice of Muñiz, commented that the Colombian experience of Promigas/ Surtigas and their knowledge of the Peruvian market will be very valuable to expand the use of natural gas in the northern regions of Peru.

The Joint venture will get the LNG from Peru LNG plant located 170 kms. south of Lima and it will transport it in trucks to Ancash, Lambayeque, La Libertad and Cajamarca, in northern Peru, in an effort to bring cheap and environmentally friendly energy to these regions.

For additional information visit www.muniz.com

## NAUTADUTILH

ASSIST PROSIEBENSAT.1 GROUP IN RESTRUCTURING CREDIT FACILITIES

**August 01, 2013**—- NautaDutilh assisted the ProSiebenSat.1 Group as local counsel in respect of its early repayment, extension and restructuring of parts of the originally 4.2 billion credit facilities made available to it under its senior secured syndicated facilities agreement.

The NautaDutilh team was led by Annegien Kooij and further consisted of Mohamoud Asker and Julian Blum, David Viëtor acted as responsible partner..

For additional information visit www.nautadutilh.com

## KING & WOOD MALLESONS

ADVISES DAIMLER AG TO SUCCESSFULLY SIGN PACKAGE DEAL WITH BAIC TO ESTABLISH A STRATEGIC COLLABORATION

On 1 February 2013, King & Wood Mallesons represented Daimler AG ("Daimler") and Daimler Northeast Asia Ltd. ("DNEA") to successfully sign a package deal with BAIC Motor Corporation Ltd. ("BAIC Motor") and its parent company Beijing Automotive Group Co., Ltd. ("BAIC Group") that includes the Share Subscription Agreement. According to the agreement, Daimler AG will invest RMB 5.13 billion for 12% stake in BAIC Motor by way of share subscription. This important joint strategic move comes ahead of BAIC Motor's intention to launch an initial public offering (IPO) in the future.

Daimler AG with its headquarters in Stuttgart, Germany, is the world's largest manufacturer of commercial vehicles as well as one of the largest manufacturers of premium cars in the world. Its business divisions include Mercedes-Benz Cars, Mercedes-Benz Vans, Daimler Trucks, Daimler Buses and Daimler Financial Services. In 2011 Daimler AG has sold 2.1 million vehicles worldwide and generated revenue of Euro 106.5 billion, among which 220,000 vehicles were sold in China and generated revenue of Euro 11 billion.

As the legal counsel of Daimler, King & Wood Mallesons took the lead and was fully engaged in all aspects of this transaction including, inter alia, providing legal advices at the pre-transaction stage, the design of transaction structure, legal due diligence of the target company, negotiation and execution of transaction documents. According to Ms. Xu Ping, the lead partner in the Beijing office, "This project involves complex package deals that consist of strategic equity participation, the business restructuring of the joint ventures, sales business integration and technology cooperation. In particular, Daimler's strategic equity participation in its Chinese joint venture partner will serve as the benchmark in China auto industry where equity joint venture is the dominant form of cooperation. The King & Wood Mallesons team was honored to be a part of this package deal and facilitate the parties to enter into this comprehensive and in-depth strategic cooperation."

This project was led by partner Ms. Xu Ping of Beijing Office along with a group of core team members with the assistant of Mr. Liu Cheng, a partner of the Beijing Office and Ms. Candy Chan,by providing supports in anti-trust filing and Hong Kong listing respectively. The execution of the agreements is a key milestone for the project. After the signing, the King & Wood Mallesons team will continue to participate in the transaction to procure a speedy and successful consummation of this package deal. The team led by Ms. Xu Ping has represented Daimler AG in its various commercial and investment deals in China.

For additional information visit www.kingandwood.com

## UPCOMING PRAC EVENTS

**PRAC 54 International Conference**
**Washington, D.C. 2013**
**September 28 - October 1**
Hosted by Hogan Lovells

**PRAC @ IBA Boston**
**October 7 2013**
PRAC Members Gathering

PRAC @ PDAC Toronto
March 4, 2014

**PRAC 55th International Conference**
Taipei 2014
Hosted by Lee and Li
April 26-29

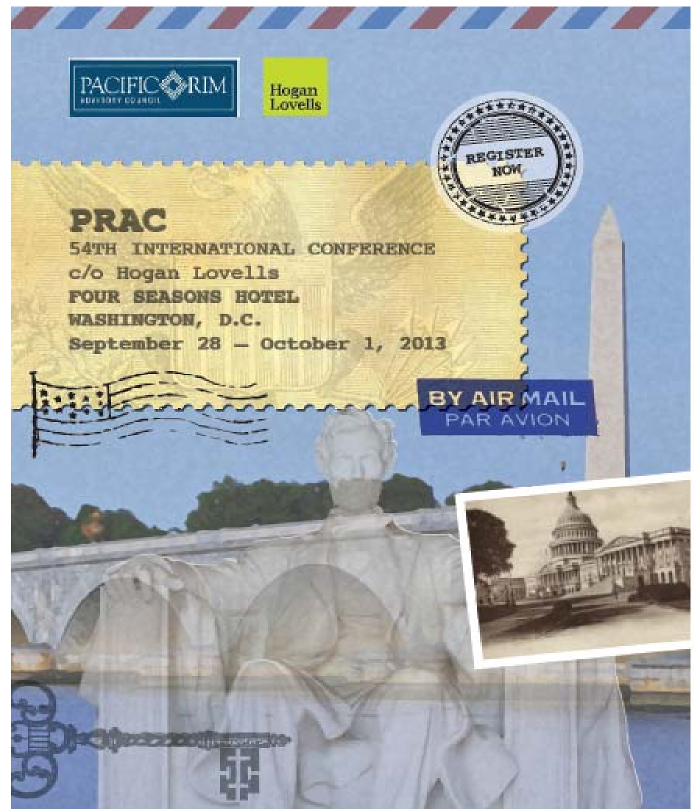
**PRAC @ INTA Hong Kong 2014**
May 10

**PRAC 56th International Conference**
Santiago 2014
Hosted by Carey/
November 8-11

Visit www.prac.org/events
for details and to register for these and other events

Events Open to PRAC Member Firms Only

## HOGAN LOVELLS TO HOST PRAC 54TH INTERNATIONAL CONFERENCE




**PRAC 54th International Conference**
**Washington, D.C. 2013**
**September 28 - October 1**

Hosted by Hogan Lovells

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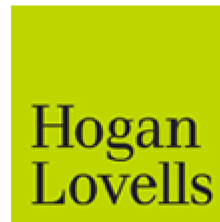

CLAYTON UTZ

**07 August 2013**

# Mining tax beats challenge… and what it means for you

The High Court of Australia has this morning upheld the Federal Government's Minerals Resource Rent Tax (**MRRT**), ruling that the arguments forwarded by the plaintiff (Fortescue Metals Group (**FMG**)) were insufficient to overturn the controversial tax (Fortescue Metals Group Limited v The Commonwealth [2013] HCA 34).

The judgment is a win for the Government and means that the MRRT will remain in place, subject (of course) to any action to repeal it taken by a potential Coalition Government following 7 September's Federal election.

**The important points**

The decision means that the tax remains for coal and iron ore miners with mining profits greater than $75 million in the year.

Even if the Coalition is elected on 7 September and decides to proceed with its promised repeal of the MRRT, amending legislation still needs to be prepared and passed by both houses of Parliament, which is likely to take some time.

Accordingly, for the foreseeable future (and in all likelihood for the third and fourth instalment quarters of the 2013-14 year at least) miners should calculate their projected MRRT liability based on existing rules.

**The arguments**

FMG had argued that the tax:

- discriminated between the States contrary to section 51(ii) of the Constitution;
- gave preference to one State over another, contrary to section 99 of the Constitution; and
- with respect to iron ore, rendered "illusory or inefficacious" a State's ability to encourage mining, at odds with section 91 of the Constitution.

Essentially, FMG argued that because State royalties were allowances able to be deducted against MRRT revenue, there was discrimination between the States because the amount of MRRT payable will vary depending on the amount of royalty payable to the State in which the miner was located.

Similarly, this meant that States could not differentiate themselves by lowering or raising royalties (because in real terms, the varying MRRT would effectively cancel out any difference).

The Attorneys-General of Western Australia and Queensland intervened in support of the plaintiffs, reiterating the arguments made by the original plaintiffs and contending that the MRRT curtailed State sovereignty contrary to the "Melbourne Corporation" principle.

Submissions in the hearing followed those in the filed documents, supplemented by arguments relating to section 51(ii) and the "Melbourne Corporation" principle by the Solicitors-General of Queensland and Western Australia respectively.

On behalf of the Government the Commonwealth Solicitor-General contended that it was the royalties (and not the MRRT Act) which differentiated between the States, royalties were but one "allowance" leading to variance in the amount of MRRT collected (and should not be considered in isolation) and that the "discrimination" complained of was not of the type prohibited by the Constitution, as described by the High Court in Conroy.

**The decision**

The Court unanimously held (in four separate judgments – Chief Justice French, Justices Hayne, Bell and Keane, Justice Crennan and Justice Kiefel) that the MRRT legislation was not invalidated by the Constitution, because:

- following the High Court's decision in Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic) (2004) 220 CLR 388 and despite FMG's contentions that the Court should ignore aspects of that case, a law would only be found discriminatory if the distinction drawn by it was not "appropriate and adapted to the attainment of a proper objective";
- the "high purposes" protected by the Constitution "are not defeated by uniform Commonwealth laws… which have different effects between one State and another because of their… interactions with different State legal regimes";
- it is not right to say that the tax differs depending on the location of the miner; it remains at 22.5% irrespective of the State in which the miner operates. It is State royalties which vary;
- because the laws did not **discriminate** between one State and another (in contravention of section 51(ii) of the Constitution), neither did they give **preference** to one State over another (contrary to section 99 of the Constitution);
- the MRRT legislation was not aimed at States and did not impose any special burden or disability on the exercise of powers and fulfilment of functions of States that contravened the "Melbourne Corporation" principle; and
- finally, section 91 of the Constitution was not framed in terms of a prohibition but rather, preserved States' legislative powers with respect to granting certain kinds of aid or bounty; it did not limit the legislative powers of the Federal Parliament. Accordingly, neither did the MRRT Act contravene section 91.

**Where to from here?**

It is noted that the Court's decision was not entirely unexpected, with many Constitutional and tax law experts considering that the challenge had, at best, a moderate chance of success.

As the ultimate court of appeal in Australia, the High Court's decision has meant that the MRRT may now only be removed by amending legislation passed by both houses of Parliament. The constitution of the Senate following the election may therefore be of particular importance to interested parties, as the Coalition has indicated that if elected it intends to repeal the legislation.

Notably for petroleum producers however, in April the Coalition indicated that even if elected it intends to retain the extension of the Petroleum Resource Rent Tax to onshore projects.

Disclaimer
Clayton Utz communications are intended to provide commentary and general information. They should not be relied upon as legal advice. Formal legal advice should be sought in particular transactions or on matters of interest arising from this bulletin. Persons listed may not be admitted in all states or territories.

# BRAZILIAN GOVERNMENT AUTHORIZES BIDDING ROUND FOCUSED ON SHALE GAS

Resolution 6/2013 from the Brazilian National Council for Energy Policy (CNPE, in the Portuguese acronym) was published on August 7, 2013, and authorizes the Brazilian National Agency of Petroleum, Natural Gas and Biofuel (ANP, in the Portuguese acronym) to hold the 12th Bidding Round of blocks for exploration and production of oil and natural gas.

According to the Resolution, ANP will offer 240 exploratory blocks in 7 basins: Acre, Parecis, São Francisco, Paraná, Parnaíba, Recôncavo and Sergipe-Alagoas.

The 12th Bidding Round is expected to be held in November 2013 and will be the first auction focused on the exploration and production of unconventional gas (shale gas) in Brazil.

DENTONS

# Canada Strengthens its Laws Against Bribery of Foreign Public Officials

June 20, 2013

Amendments to the *Corruption of Foreign Public Officials Act* (CFPOA) that were proposed in Bill S 14 earlier this year were passed into law on June 19, 2013.

The amendments are aimed at addressing international criticism of Canada's efforts to implement the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (the Convention). Specifically, the amendments address certain criticisms from the Organisation for Economic Co-operation and Development (OECD), an international organization of 34 countries of which Canada is a member. The OECD's Working Group on Bribery had criticized the CFPOA as deficient in certain respects in a report issued in March 2011, but endorsed Bill S 14 in its follow-up report issued in May 2013 on Canada's progress in implementing its obligations under the Convention.

The CFPOA makes it a crime to bribe a foreign public official in order to obtain or retain an advantage in the course of business. To date, three companies have pleaded guilty and been convicted of offences under the CFPOA, the latter two resulting in fines of approximately $10 million each. There are approximately 35 active investigations currently underway by the Royal Canadian Mounted Police (RCMP).

As a result of the passage of Bill S 14 into law, the CFPOA has been amended as follows:

- the offence of bribing a foreign public official has been expanded beyond business carried on "for a profit" to include activities not carried on for profit. As a result, the CFPOA will apply to charities and other not-for-profit organizations in addition to for-profit corporations;
- the maximum period of imprisonment for bribing a foreign public official has been increased from 5 years to 14 years;
- instead of requiring a "real and substantial connection" between Canada and the location where acts of bribery occur as was previously the case, the CFPOA now applies to acts of bribery anywhere in the world where such acts are conducted by Canadian citizens, permanent residents present in Canada, Canadian corporations or other entities created under the laws of Canada or a province;
- "facilitation payments" (generally, payments to a public official to expedite a routine governmental act that is part of the official's duties, and not to obtain or retain business or any other undue advantage) will be eliminated as an exception to the offence of bribing a foreign public official and will therefore become illegal at a future date to be set by the Governor in Council;
- a new offence of manipulation or falsification of accounting records to conceal bribery has been created, which attracts a maximum sentence of 14 years in prison; and
- the RCMP have been given exclusive jurisdiction to charge persons for offences under the CFPOA.

It is important for companies operating internationally, especially in developing nations, to have appropriate policies and procedures in place to ensure compliance with the CFPOA and other applicable anti-bribery legislation throughout the world. When entering into transactions with companies that also operate internationally, it is important to ensure appropriate due diligence is conducted and appropriate language is contained in contracts relating to the transaction to minimize the possibility that your corporation will attract liability under the CFPOA and other applicable anti bribery legislation through its association with proposed business partners or other counterparties.

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## CHINA LAW INSIGHT

# China Tax: Unveiling the International Secondment Arrangement

by Tony Dong, Daisy Duan and Jiang Junlu

Over the years, it has been common practice for a multinational company **("Home Entity")** to dispatch expatriate employees ("Secondees") to its affiliated enterprise in China **("Host Entity")** to hold senior management or other technical positions. Usually, the Home Entity and the Secondee will retain the employment relationship. The Home Entity will pay the salary and social security contribution for the Secondee in the home country, and will be reimbursed by the Host Entity. A Chinese tax clearance certificate is usually required when the Host Entity makes the reimbursement payment, so the Chinese tax authority needs to determine whether the Home Entity constitutes an establishment/place of business **("taxable presence")** or a permanent establishment **("PE")** under the relevant tax treaty and thus be liable to Enterprise Income Tax **("EIT")** consequence in China. The tax authorities and the Host Entity may have different views due to the ambiguity of tax regulations in the assessment of taxable presence or PE for cross-border secondment arrangements. As a result, the Host Entity often has difficulty in obtaining the tax clearance certificate and cannot remit the payment to its overseas Home Entity.The situation is likely to change from June 1, 2013.

On April 19, 2013, the State Administration of Taxation**(SAT)** issued the Announcement on Issues Concerning Enterprise Income Tax on Services Provided by Non-resident Enterprises through Seconding Personnel to China **("Announcement 19")**, Which provides clearer guidance over the criteria for determining whether the Home Entity under a secondment arrangement will constitute a taxable presence or a PE in China. Announcement 19 is based on tax circular Guoshuifa [2010] No.75 (Circular 75) and is a further development in respect of the PE assessment for international secondment in China. Where the Home Entity constitutes a taxable presence or a PE in China, (apart from Individual Income Tax (IIT) which usually apply to the Secondees) EIT will be imposed on the Home Entity. This new policy will significantly impact the tax cost of Home Entities and the pattern of structuring international assignments.

Based on the salient points of Circular 75 and the latest Announcement 19, we summarize below the issues concerning the assessment of taxable presence or PE under secondment arrangements.

## Criteria determining the constitution of taxable presence or PE in China

According to Circular 75, if at the request of its PRC subsidiary, the overseas parent company dispatches personnel to work for the subsidiary, and such personnel enter into formal employment with the PRC subsidiary which has command over their work, and the work responsibilities and risks are entirely assumed by the subsidiary, instead of the parent company, then the activities of such personnel shall not trigger a taxable presence or a PE of the parent company in China. In this case, the fees paid, directly by the PRC subsidiary or indirectly through the parent company to such personnel, shall be deemed payroll expenses paid to the PRC subsidiary's employees.

Moreover, Announcement 19 clearly states that, where the Home Entity dispatches personnel to render service in China, if the Home Entity bears all or part of the responsibilities and risks in relation to the work of the Secondees, and normally reviews and evaluates the job performance of the Secondees, the Home Entity shall be deemed as having a taxable presence in China. If the Home Entity is a tax resident of a country/region that has entered into tax treaty with China, such establishment and place of business may create a PE in China if the criteria of PE have been met under the applicable treaty provisions, for instance, the Secondees' stay in China has exceeded 183 days or 6 months in any consecutive 12 month period.

When doing the above assessment, the following factors shall be taken into consideration:

- The Host Entity makes payments to the Home Entity in the nature of management fees or service fees;
- Payments from the Host Entity to the Home Entity exceed the Secondee's salaries, bonus, social security contributions, and other expenses as advanced by the Home Entity;
- Not all related expenses reimbursed by the Host Entity are paid to the Secondees, instead, the Home Entity retains a portion of such payments;
- IT has not been reported and paid based on the full amount of the Secondee's salaries; and
- The Home Entity is the decision maker in terms of the number, the qualification, the remuneration and the working locations of the Secondees in China.

Generally speaking, if one of the above factors is met and the work of Secondees has substantial connection with the Home Entity, the Home Entity is likely to be assessed as having a taxable presence or a PE in China.

In addition, Announcement 19 stipulates that, if the Home Entity constitutes a taxable presence or a PE in China, the Host Entity and the Home Entity shall perform tax registration or record-filing with the tax authorities, and file EIT based on the actual income generated in China, if it is not feasible to accurately calculate the taxable income, the tax authority is empowered to deem the taxable income in accordance with relevant regulations.

**KWM Observation**

1. With the release of Announcement 19, it is expected that the tax authorities will strengthen their oversight of secondments between multinationals and their subsidiaries in China. It is suggested that enterprises review their existing secondment arrangements and assess the underlying tax risks. The bright side of Announcement 19 is that it provides greater certainty about the tax treatment of secondments, and will facilitate smoother tax clearance when Host Entities make reimbursement payments overseas.

2. Where PRC IIT is paid on the full amount of the Secondee's salaries, then even if the Home Entity bears part or all of the expenses, it is not likely to create a taxable presence or a PE for the Home Entity because it does not bear the Secondee's salary and does not derive a profit through the secondment arrangement.

3. This Announcement clarifies that where the Home Entity assigns its expatriate employees to China solely to exercise its shareholders' rights and safeguard the shareholders' interest, the Home Entity will not be deemed to have a taxable presence or a PE in China.

4. Enterprises should establish the factual background to substantiate the connection between the work of Secondees and the Host Entity. It is of vital importance to put in place proper documentation about the work reporting requirements and evaluation mechanism of job performance, The documentation should include: (1) relevant contracts of employment and/or secondment; (2) Secondee's job description for the Home Entity or the Host Entity, including responsibilities, role, performance indicators and assumption of risk of the Secondees; (3) the terms governing payments to be made by the Host Entity to the Home Entity and accounting treatment, and the IIT filing and payment records of the Secondees in China; and (4) information about whether the Host Entity treats a Secondees' expenses by way of offsetting inter-company accounts, waiver of creditor's rights, related party transactions or other means, in lieu of reimbursement,

Announcement 19 becomes effective from June 1, 2013, and also applies to existing secondments where the tax treatment has not been confirmed or the reimbursement has not been made. It is suggested that enterprises shall assess the tax implications of Announcement 19 on their current secondments and, where needed consider restructuring the international assignment arrangement and put in place proper documentation to safeguard the parent company's tax

position and mitigate PRC tax risks.

(This article was originally written in Chinese, and the English version is a translation.)

*Tony Dong is a partner in King & Wood Mallesons' Tax Group, Beijing Office.*
*Daisy Duan is a counsel in King & Wood Mallesons' Tax Group, Beijing Office.*
*Jiang Junlu is a partner in King & Wood Mallesons' Labor Group, Beijing Office.*

# Amendments Regulation DCIN-83

Thu, 08/01/2013 - 13:59
*NewsFlash: 203*

*Forex, Derivatives and Structured Finance*

## Amendments to External Regulation DCIN-83.

We wish to inform you that on July 19, 2013 the Colombian Central Bank announced several changes to the External Regulation DCIN-83. The most relevant changes are as follows

1. Advance payments for future capitalizations

Foreign investors are required to be registered as shareholders in local companies´ stockholders ledger, within twelve months immediately after the advance payment for future capitalization is made, and within the same timeframe foreign investors must also report such receipt to the Colombian Central Bank by amending the relevant exchange declaration form. Formerly there was no legal deadline to amend the exchange declaration.

2. Substitution of foreign investment and Colombian investment abroad

Whenever a substitution of foreign investment or Colombian investment abroad occurs due to a change of ownership from one investor to another, the registration of such substitution must now be requested by both the former investor (i.e., seller or transferor) and the current investor (i.e., purchaser or assignee), or their agents.

3. Tax information for foreign investment substitution or cancellation requests

Requests in respect of foreign investment substitutions or cancellations resulting from the change of ownership of a fixed asset must be filed along with a document confirming the declaration, settlement and payment of the tax accrued in each transaction.

4. Capital amendments

The amended regulation clarifies that capital amendments that involve a variation in the nominal value of the shares of a foreign investment recipient company must be informed by the statutory auditor, within a month following the date of registration of the statutory reform in the mercantile registry.

5. Granting of collateral and guarantees by Colombian residents.

This recent amendment sets forth new requirements for the granting of guarantees by Colombian residents to other Colombian residents and non-residents in respect of foreign exchange transactions and other transactions conducted abroad.

In case you need further assistance with this update please do not hesitate to contact us.

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For more information please contact

- Carlos Fradique Méndez
- Ana María Rodriguez
- Alejandro Galindo Hurtado


CONTACT US

Calle 70A No. 4 - 41
Phone: (+57-1) 346 2011
Fax: (+57-1) 310 0609 - (+57-1) 310 0586
info@bu.com.co
Bogotá - Colombia


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COSTA RICA

Special Protection for Those Taking Care of Terminally Ill Patients

The Constitutional Court has recently pronounced itself on the issue of workers who make use of the benefit granted by the Costa Rican Social Security Fund (CCSS) to take care of terminally ill patients and has indicated how this leave of absence must classified.

Employees who are responsible for terminally ill patients and require absence from work shall be classified under sick leave and therefore, cannot be excluded from the payroll. Nor can employees be dismissed while on leave.

To enjoy this benefit, employees must fulfill the following requirements:

1. Active insured status under the CCSS;
2. Responsible for looking after a terminally ill patient; and
3. Benefit has been approved by the CCSS.

For additional information visit us at www.ariaslaw.co.cr

*The Labor Law Department at Arias & Muñoz offers legal advice on all matters related to leave of absence and employers' legal duties towards employees.*

**Anna Karina Jiménez**
Partner/ Socia
ajimenez@ariaslaw.co.cr

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**NEWS DETAIL**

25/07/2013

**GOVERNMENT'S FEASIBILITY SUPPORT FOR PPP INFRASTRUCTURE PROJECTS**

The Minister of Finance on 21 December 2012 issued Regulation No. 223/PMK.011/2012 regarding Provision of Feasibility Support by Funding Part of the Construction Cost of Infrastructure Projects Under the Public-Private Partnership Scheme ("Regulation"). This Regulation was issued to implement the Article 17A of Presidential Regulation No. 56 of 2011 regarding Second Amendment to Presidential Regulation No. 67 of 2005 on Public-Private Partnerships in the Development of Infrastructure.

The Regulation sets forth the government's commitment to partially fund the construction costs of Public-Private Partnership ("PPP") infrastructure projects which meet the criteria set up in the Regulation. The feasibility support is a government fiscal policy which aims at promoting business entities and government cooperation in infrastructure projects, and providing affordable infrastructure for the public.

To be qualified to receive the feasibility support, a PPP project must fulfill the following criteria:

a. the project is economically feasible but is not yet financially feasible;
b. the project implements the "users-pay principle";
c. the total investment cost of the project is not less than Rp.100 billion;
d. the project's private partner is determined by the government institution which is responsible for the project (Penanggung Jawab Proyek Kerja Sama or PJPK) by way of a competitive public auction;
e. the project is executed based on a PPP contract which provides for the transfer of the assets and management of the infrastructure from the private partner to the PJPK at the end of the project; and
f. the project's feasibility report among others: (1) states an optimal risk division between the Government/PJPK and the private partner/winner of the public auction; and (2) concludes that the project is economically feasible and qualified to receive the support.

The rules and procedures for the feasibility support as well as the implementation mechanism are regulated in great details in the Regulation's chapters III, IV and V.

The Regulation has been in force since the day of its issue of 21 December 2012. (by: Christine Hakim).

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# MONETISING YOUR INTELLECTUAL PROPERTY

Sri Richgopinath examines the Malaysian Government's proposals to introduce the securitisation of IP

The conventional method of monetising intellectual property (IP) is through its exploitation either by way of creating licenses to use the IP for a fee or selling the rights in the IP for a value. Given the extent of revenue that may be derived from exploiting an IP, many corporations spend millions of Ringgit annually in research and development of IP with expectations of reaping the benefits from future commercialisation and exploitation of the IP. Therefore, there is now a growing consensus that intangible assets such as IP may be more valuable as compared to tangible assets, such as land and building.

Traditionally, corporations use their tangible assets as security to obtain financing from financial institutions. The Prime Minister announced at the 2013 Budget Speech delivered on 28 September 2012 that *"Efforts will also be undertaken to enable SMEs to further expand their businesses by using intellectual property rights (IPR) as a collateral to obtain financing. For this, a valuation model will be created to enable IPR to be valued and commercialised in the market as well as utilised as collateral to obtain financing from financial institutions."* Since then, there has been a growing momentum in the discussions to amend the existing IP related legislation to recognize securitisation of IP.

**" once the amendments and proposed amendments come into operation ... corporations can use their IP as collateral to obtain financing "**

## INDUSTRIAL DESIGNS

The first piece of legislation to introduce amendments that enable IP to be used as collateral is the Industrial Designs (Amendment) Act 2013 which will come into operation on 1 July 2013. The amendments to Sections 29 and 30 of the Industrial Designs Act 1996 provide that a registered industrial design may be the subject of a security interest in the same way as other personal or movable property. It also provides for such an interest to be recorded in the Register of Industrial Designs.

Steps have also been taken by the Government to review several other IP-related Acts and amendments are likely to follow suit.

## PATENTS

The Intellectual Property Corporation of Malaysia (MyIPO), in its Consultation Paper of June 2012 on the Proposed Amendments to the Patents Act 1983, stated as follows:

*"Intellectual Property is a personal property and it can be subject to a charge, mortgage etc. Realising the potential of IP as a financial instrument, MyIPO proposed to give this due recognition for future dealings in financial transaction. The amendment to the Patents Act introduced the concept of mortgage and this is reflected in Section 3 and Section 36(1) of the Act.*

*A mortgage or charge security need not be registered to be valid, but there are advantages from registration, which has been provided for, in the proposed amendments to the Patents Act. It is recommended that the ambit of registration of a securitized IP be left broad. That is to say recognition must be had to the concept of 'mortgage' as well as 'charge' and in addition to that 'liens', 'pledges' and 'hypothecations'. This would essentially reflect as broadly as possible and in as flexible manner as possible the various manner in which securitization may be contemplated by people in commerce and recognized in law, which in essence is the objective of the move for IP monetization."*

## TRADE MARKS

MyIPO also published another Consultation Paper of July 2012 on the Proposed Amendments to the Trade Marks Act 1976 where the following was stated:

*"Intellectual Property is recognized as a personal property and it can be subject to a charge, mortgage etc. Realising the potential of IP as a financial instrument, MyIPO proposed to give this due recognition for future dealings in financial transaction. As a regulatory and registration body, MyIPO plays a role in IP securitization by providing a recordal system of registrable transactions. MyIPO has identified the following transactions as registrable transactions which can be recorded or registered with the Registrar:*

*(a) Grant of a license*
*(b) An assignment of a registered trade mark or any right in it*
*(c) Grant of any security interest (whether fixed or floating) over a registered trade mark or any right in or under it*
*(d) Making of personal representative of an assent in relation to a registered trade mark or any right in or under it*
*(e) An order of the court or other competent authority transferring a registered trade mark or any right in or under it."*

## OTHER INITIATIVES

In line with the Prime Minister's proposal in his Budget 2013 speech, an Intellectual Property Financing Fund scheme amounting to RM200 million will be established. The scheme will be offered through Malaysian Debt Ventures Berhad where the Government will provide a 2% interest rate subsidy and guarantee of 50% through Credit Guarantee Corporation Malaysia Berhad.

The Prime Minister has also stated that the Government will allocate RM19 million under Budget 2013 to MyIPO to conduct training programmes for local IP evaluators as well as to create a

SRI RICHGOPINATH SALVAM

Gopi is an Associate in the Intellectual Property Division of SKRINE. He graduated from the University of London in 2009.

market platform for IP-rights.

The Multimedia Development Corporation (MDeC) announced on 27 April 2012 that it has finalized a study on IP Valuation Model which may assist financial institutions on methodology to be adopted in valuing IP. This study was carried out by MDeC in close collaboration with MyIPO.

Therefore, it appears that once the amendments and proposed amendments come into operation and the policies are implemented, corporations can use their IP as collateral to obtain financing from financial institutions.

## ASSET-BACKED SECURITIES

One interesting aspect of IP securitisation which has been adopted in other jurisdictions is the use of IP as collateral for the issuance of asset-backed securities. It may be possible that once financial institutions in Malaysia recognize the potential of IP as a highly valuable intangible asset, the market for IP securitisation in Malaysia may extend to the creation of such IP asset-backed securities.

The Bowie Bonds were one of the earliest high profile IP asset-backed securities to be issued. In 1997, David Bowie through his investment banker, David Pullman, issued 10-year asset-backed bonds on the basis of future royalties from 25 of David Bowie's albums (about 287 songs). The transaction generated US$55 million which David Bowie obtained upfront in exchange of him forfeiting 10 years' worth of royalties.

**“ it may be possible for an IP to be used as the underlying asset for an asset-backed securitisation transaction ”**

Another well-known IP asset-backed securities transaction was by Dunkin' Brands which owns Dunkin' Donuts and Baskin-Robbins franchises. In 2006, Dunkin' Brands raised US$ 1.7 billion by selling bonds backed by future royalties that it will receive from its franchisees.

In Malaysia, the Securities Commission already has in place *Guidelines On The Offering Of Asset-Backed Securities* (ABS Guidelines) since 2004. The ABS Guidelines regulate the issuance and offer for subscription or purchase of asset-backed securities. Paragraph 4.01 of the ABS Guidelines sets out the criteria that must be fulfilled for an asset to be used as security in a securitisation transaction. These criteria include the following:

(1) The assets must generate cash flow;

(2) The originator must have a valid and enforceable interest in the assets and in the cash flows of the assets prior to any securitisation transaction;

(3) There are no impediments (contractual or otherwise) that prevent the effective transfer of the assets or the rights in relation to such assets from the originator to a SPV. For example, any regulatory or contractual consent which is required to effect the transfer of such assets from the originator to a SPV must be obtained;

(4) No trust or third party's interest appears to exist in competition with an originator's interest over the assets; and

(5) Where the interest of an originator in the assets is as a chargee, the charge must have been created more than six months before the transfer.

Therefore, it appears that it may be possible for an IP to be used as the underlying asset for an asset-backed securitisation transaction if all relevant criteria in the ABS Guidelines are fulfilled. However, this will be subject to the Securities Commission's recognition that such transaction is possible. At the moment, it is not known whether such a transaction will be permitted by the Securities Commission and even if permitted, whether separate or enhanced guidelines will be issued for IP asset-backed securities.

## CONCLUSION

It is not known at this juncture whether steps are being taken to amend the Copyright Act 1987 to enable copyright in works to be used as security.

The Government's concerted efforts through MyIPO and other agencies in acknowledging the potential of IP as assets that are capable of being used as security are much welcomed. In an age where a corporation's intangible assets may be worth more than its tangible assets, it is timely for IP securitisation to be introduced in Malaysia.

Writer's e-mail: **richgopinath.salvam@skrine.com**

NautaDutilh

Energy & Utilities Update

**European Directive on safety of offshore oil and gas operations** **5 August 2013**

*This newsletter is sent by NautaDutilh*

*On 10 June 2013 the Council of the European Union adopted a new directive on the safety of offshore oil and gas operations (the "Directive"; 2013/30/EU). The Directive was published in the Official Journal of the European Union on 28 June 2013 and entered into force on the twentieth day following its publication. EU Member States with offshore waters must transpose the provisions of the Directive into national legislation within two years of that date, i.e. by 18 July 2015. However, existing installations will have until 19 July 2018 to comply with the new requirements.*

**Aim and subject**

The Directive is a direct response to the 2010 Gulf of Mexico disaster. The Directive's aim is to reduce the occurrence of major accidents relating to offshore oil and gas operations, and to limit the consequences of such accidents. To achieve this, it sets out the principle that EU Member States must require operators to ensure that all suitable measures are taken to prevent major accidents. It establishes minimum conditions for safe offshore exploration and exploitation, and improves the response mechanisms in the event of such an accident. Consequently, the Directive is expected to increase the protection of the marine environment and coastal economies against pollution.

**Scope of applicability**

All of the Directive's provisions must be transposed in full by Member States with offshore waters and an existing offshore oil and gas industry. Landlocked Member States, and Member States with offshore waters but no existing oil and gas industry, will only have to transpose a limited number of provisions, in particular those relating to operations outside the EU (see below).

**Licensing**

At the time of an application for the granting or transfer of a licence to carry out offshore oil and gas operations, the applicant's technical and financial capabilities – in particular, its financial capability to cover liabilities potentially arising from its operations – must be assessed. If the applicant cannot show that the required measures to cover potential liabilities have already been or will be taken, it will not be granted a licence. The licensing authority must, where appropriate, consult the competent authority (more on the latter shortly). Operators have to be appointed or approved by the relevant national licensing authority.

**Submission of documents**

The Directive specifies several documents that must be submitted to the national competent authority by an operator, or by an owner in the case of a non-production installation. For example, an operator must submit an emergency response plan, a report on major hazards, a safety and environmental management system applicable to the relevant installation and a corporate major accident prevention plan. All of these documents together should ensure that operations are conducted in a responsible manner. The details of the requirements regarding the policies and reports that must be submitted to the competent authority are set out in the Directive.

**Liability for environmental damage**

The Directive requires Member States to ensure that licensees are financially liable for the prevention and remediation of environmental damage, as defined under the Environmental Liability Directive (ELD), caused by offshore oil and gas activities carried out by, or on behalf of, the licensee or the operator. This means that a licensee that is not the operator is still liable under the ELD. The Directive contains an amendment to the ELD under which the ELD provisions dealing with water damage now also apply to the marine waters of Member States. Consequently, liability under the ELD has been extended.

The Directive does not contain any provisions on civil liability on the part of licensees for loss or damage suffered by third parties. However, in 2012 the European Commission ordered a study into issues relating to such liability, so this topic may very well be covered by EU legislation in the near future.

**Competent authority**

The Directive requires each Member State to appoint a competent authority to be responsible for regulatory functions such as assessing and accepting reports, overseeing compliance by operators with the requirements set out in the Directive, producing reports and making annual plans.

The Directive contains provisions aimed at ensuring the competent authority's independence and objectivity. Member States must at all times prevent conflicts of interest between, on the one hand, the competent authority's regulatory functions relating to offshore safety and the environment and, on the other hand, regulatory functions relating to the economic development of offshore natural resources (including licensing and revenue management). To prevent such conflicts of interest, Member States should ensure a clear separation between the two types of functions.

**Transparency and information sharing**

Under the Directive, Member States must ensure that operators (or owners) provide the relevant competent authority with the information described in Annex IX to the Directive. This includes information relating to any unintended release of oil or gas, any failure of a safety and environmental critical element, any fatal accident, any evacuation of personnel, helicopter accidents, etc. Member States are also required to make such information publicly available.

When reporting the requisite information, operators and owners must do so using a common data reporting format, to be drawn up by the Commission. Member States must submit annual reports to the Commission on offshore safety and environmental impact based on the information provided by operators.

**Cooperation between Member States**

The Directive requires Member States to play an active role in planning and information sharing with each other. Each Member State must ensure that its competent authority exchanges knowledge, information and experience with the competent authorities of other Member States.

In addition, the Directive sets out rules on transboundary emergency preparedness and response. Member States are required to prepare external emergency response plans covering all offshore oil and gas installations (or connected infrastructure) and potentially affected areas within their jurisdiction.

**Operations outside the European Union**

Each Member State must require companies registered in its territory and conducting, themselves or through subsidiaries, offshore oil and gas operations outside the EU as licensees or operators, to report any major accident in which they have been involved to the competent authority in that Member State.

**Impact in the Netherlands**

We expect that the implementation of the Directive will have an impact on the organisation of the supervision of offshore oil and gas operations in the Netherlands. At present the SodM (*Staatstoezicht op de Mijnen*) oversees compliance with the statutory regulations applicable to offshore oil and gas operations, focusing on the aspects of health, safety, the environment and effective extraction. As the SodM is a department of the Ministry of Economic Affairs, which is

responsible for the economic development of offshore natural resources (including licensing and revenue management), this structure may be inconsistent with the Directive. This is because the latter provides that the competent authority is required to carry out its regulatory functions under the Directive independently of any of the regulatory functions under purely national law relating to the economic development of offshore natural resources, licensing and revenue management.

In addition, licensees in the Netherlands (and elsewhere in the EU) will potentially face greater liability under the ELD.

Finally, the Directive will affect operations outside the EU by Dutch licensees.

**Contact**


Harm Kerstholt
T: +31 6 5130 4865
harm.kerstholt@nautadutilh.com

Marinke Israëls
T: +31 6 5046 1470
marinke.israels@nautadutilh.com

Amsterdam · Brussels · London · Luxembourg · New York · Rotterdam



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Simpson Grierson

# Government Releases: Working Safer - a Blueprint for Health and Safety at Work

07 Aug 2013

**New Zealand's workplace health and safety system** faces a major overhaul following this morning's release of *Working Safer - A Blueprint for Health and Safety at Work by the Government*. *Working Safer* outlines a "package of changes" aimed at improving New Zealand's workplace health and safety system across the board to deliver a new, high functioning system.

The reforms are the most significant in 20 years and will affect people operating at all levels of the workforce, from the worker to the director.

The initiatives broadly accept the recommendations of the Independent Taskforce on Workplace Health and Safety in New Zealand. This includes the introduction of a proposed new Act to replace the current Health and Safety in Employment Act 1992. The Act will be the Health and Safety at Work Act and it is expected to be introduced to Parliament in December 2013. This is modelled on the Australian Model Workplace Health and Safety Law and focusses on persons conducting a business or undertaking (PBCU) and imposes new due diligence duties on directors. Regulations, guidance and approved codes of practice will be developed to provide guidance.

Other key reforms include:

- High risk sectors will be focussed on as will major hazard facilities which have potential for major one-off catastrophic events;
- Implementation of stronger penalties;
- Greater worker participation;
- A new Health and Safety professional body will be introduced that will implement a workforce development place to lift capability and knowledge at all levels; and
- Greater enforcement tools for WorkSafe inspectors.

We will be updating you further with details of these reforms and their practical implications in the near future.

For more information, please visit www.simpsongrierson.com

WERKSMANS
ATTORNEYS

# The implementation of carbon tax

*By Happy Masondo, director and Faith Rambau, candidate attorney*

**LEGAL BRIEF** | JULY 2013

A carbon price can drive changes in producer and consumer behaviour, and in so doing, address climate change. Sometimes, the manner in which one can regulate detrimental conduct, is by placing a price on its effects, and this is exactly what an imposition of carbon taxation intends to do.

## Carbon tax in South Africa

According to a Business Day report[1], the aim of the imposition of carbon tax is to "punish polluters in the interest of the planet" and as a result, all South Africans - registered taxpayers or not - should have a basic idea of how the carbon tax affects them. According to the report, KPMG reports that South Africa is the thirteenth most active country in attempts to reduce carbon emissions[2]. South Africa's strategy to make a contribution towards greenhouse gas emissions mitigation was adopted by government in 2011 when Cabinet approved the Government's National Climate Change Response White Paper (gazetted in October 2011)[3]. This was after the commitment made by South Africa at the 2009 Copenhagen Conference of Parties ("COP17") to undertake appropriate national actions to curb greenhouse gas emissions by 34% by 2020 and a further 42% by 2025[4].

South Africa is ranked among the top twenty countries measured by absolute carbon dioxide emissions, with emissions per capita in the region of 10 metric tons per annum. The South African government is of the view that South Africa needs to reduce its greenhouse gas emissions while working to ensure economic growth, increase employment, and reduce poverty and inequality[5]. At COP17 in 2011, the South African government reiterated and emphasised South Africa's commitment to support efforts addressing the adverse factors posed by climate change[6].

The White Paper on the Renewable Energy Policy of the Republic of South Africa (DME, 2003b) ("White Paper") recognised climate change as one of the major environmental threats facing the world today. In its recognition of this, the South African government has taken concerted efforts as a responsible global citizen, in undertaking to reduce its use of fossil fuels through the implementation of renewable energy programmes aimed at reducing South Africa's significant reliance on conventional fossil fuels[7].

South Africa has a number of renewable energy programmes that are currently underway such

[1] Lester M; 2013, "Carbon Tax must be explained to laymen"; (2013) Business Day Live, 19 May.
[2] Ibid.
[3] National Treasury press release; "Updated Carbon Tax Policy Paper"; 2 May 2013.
[4] Ibid.
[5] Carbon Tax Policy Paper; "Reducing greenhouse gas emissions and facilitating the transition to a greener economy"; (May 2013) at section 63.
[6] Ibid.
[7] Ibid, Section 83.

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as the Renewable Energy Independent Power Producer Procurement Programme ("REIPP"). South Africa has a high level of renewable energy potential and presently has in place a target of 10 000 GWh of renewable energy[8]. The Minister of Energy has determined that 3 725 megawatts ("MW") to be generated from renewable energy sources is required to ensure the continued uninterrupted supply of electricity[9]. This 3 725 MW is broadly in accordance with the capacity allocated to renewable energy generation in IRP 2010-2030[10]. The IPP Procurement Programme has been designed so as to contribute towards the target of 3 725 MW and towards socio-economic and environmentally sustainable growth, and to start and stimulate the renewable industry in South Africa[11].

Further, Eskom's Renewable Programme supports the development of the utility's first large-scale wind and Concentrating Solar Power ("CSP") plants[12]. The Sere Wind Farm project, located near Koekenaap, in the Western Cape, will have an approximate installed gross capacity of 100 MW. Cumulative emissions savings from this project, based on an expected annual output of 219 GWh, will be five million tons of $CO_2$ over a twenty-year life of the plant. Eskom's CSP project involves the development of a 100 MW plant, located in Upington in the Northern Cape. CSP is the renewable energy source with the largest potential in South Africa and can provide generation capacity potentially comparable to that of base-load power plants.

## Objectives fuelling the introduction of carbon tax

According to the Policy Paper, the primary objective of implementing carbon taxes is to change current and future behaviour, rather than to raise revenue. It therefore starts with a relatively low carbon price, progressively increasing significantly after five to ten years and beyond. This approach provides industry and other major emitters sufficient time to innovate and invest in greener technologies for the future.

According to the National Treasury's press release on 2 May 2013 ("Press Release"), there are at least three ways in which the imposition of a carbon tax will work to drive changes in producer and consumer behaviour and therefore address the adverse effects of climate change. Carbon pricing is the generic term for putting a price on carbon through subsidies, a carbon tax, or an emissions trading (cap-and-trade) system. Firstly, carbon pricing will encourage a shift in production and consumption patterns towards low carbon and more energy efficient technologies by altering the relative prices of goods and services based on their emissions intensity and encouraging the adoption of cost-effective and low carbon alternatives. Pricing carbon emissions addresses the problem of negative externalities, obliging polluters to pay for their carbon emissions. Secondly, carbon-intensive factors of production, products and services are likely to be replaced with low-carbon emitting alternatives. Finally, a carbon price is envisaged to create dynamic incentives for research, development and technology innovation in low-carbon alternatives in order to achieve the reduction and reduce the price gap between conventional, carbon-intensive technologies and new low-carbon alternatives.

## The proposed carbon tax rate

South Africa is pushing ahead with a carbon tax even as businesses say it will impact on the economy, costing jobs and investment. However, it seems increasingly unlikely that South Africa will finalise legislation and regulations in time to impose a carbon tax from January 2015, according to Jana Marais[13]. Marais says the new law will make South Africa the first developing country to impose a comprehensive tax to cut carbon emissions blamed for climate change. But, notes Marais, critics say it will have a limited effect on global emissions and will render the economy uncompetitive, costing jobs and investment.

The biggest carbon emitters are fossil fuel electricity generators, petroleum producers and manufacturers of steel and cement. According to Marais' report, Cecil Morden stated that: "We hope to have the regime in place by January 2015, but things may happen that force us to push it out by a month or two or three. It is not up for discussion at this stage, but we won't implement something that is not workable." According to Marais, Treasury's Carbon Tax Policy Paper, published last month, is open for public comment until August and follows the Carbon Tax Discussion Paper issued in December 2010.

According to a report by Nelly Magubane, Director-General at the Department of Energy, representatives of companies including Sasol, AngloGold Ashanti and Arcelor Mittal SA say more clarity is needed on how a carbon tax will be implemented in 2015[14]. Magubane's report states that at a National Business Initiative Briefing, the concerns of business representatives from Sasol, AngloGold Ashanti and Arcelor Mittal SA raised about the Carbon Tax Policy Paper seemed to echo those raised earlier this month by Members of Parliament[15]. Magubane further states that Members of Parliament warned that hasty implementation of a carbon tax could have a negative effect on South Africa's rate of growth, and a comparably small effect on global greenhouse gas emissions[16].

The proposed carbon tax seeks to internalise external costs associated with excessive greenhouse gas emissions by adjusting relative prices in order to reflect the social costs of carbon intensive goods and services. Therefore effective tax requires that the tax base be as broad as possible, covering as many greenhouse gases and sectors as practically possible[17].

According to the Press Release, a carbon tax rate of R120.00 per ton of $CO_2e$ increasing at 10% per annum will be implemented from 1 January 2015 to 31 December 2019 (the first phase). When the tax-free threshold and additional relief are taken into account, the effective tax rate will range between R12.00 and R48.00 per ton of $CO_2e$ (and zero for agriculture and waste).

## International carbon pricing policies

South Africa is not the first country to introduce a system of carbon taxation. Various countries in the world have implemented carbon pricing policies. According to the Policy Paper, several countries have implemented carbon pricing policies; including both carbon taxes and cap-and-trade schemes, particularly the Scandinavian nations, who began implementing energy and carbon taxes aimed at reducing emissions and raising revenues. In 2005, the European Union ("EU") introduced the EU Emissions Trading System (ETS) under which several sectors previously covered by carbon taxes were absorbed into the trading system.

## Carbon tax and the energy sector

According to the Policy Paper, pricing energy appropriately is important to ensure that the external costs of climate change and other environmental damage are reflected in the price of energy; and the relative prices of carbon-intensive and low-carbon technologies should be reflected correctly[18]. The energy sector's environmental externalities include greenhouse gas emissions, as well as local air pollution damage through emissions of sulphur oxides and nitrogen oxides. In the case of the electricity sector, it may be necessary to phase out high

8 http://www.ipprenewables.co.za/; accessed 25 June 2013.
9 Ibid.
10 Ibid.
11 Ibid.
12 http://www.eskom.co.za/content/Funding%20for%20Eskom%5C's%20Renewable%20Energy%20Programme.pdf; accessed 25 June 2013.
13 Marais J; "Carbon tax regime faces hurdles"; Business Day; 23 June 2013.
14 Magubane K; "Business calls for clarity on proposed carbon tax"; Business Day; 19 June 2013.
15 Ibid.
16 Ibid.
17 See note 5, Section 40.
18 Ibid, Section 55.

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emissions-intensive power stations over time and provide support for renewables[19].

## Conclusion

The long-debated introduction of carbon tax is seen by some as an individualised penalty for polluting the atmosphere. The reduction of carbon emissions is a long-term goal; similarly, carbon tax is slowly being introduced in South Africa as a means of attempting to find a sustainable way to help reduce emissions of carbon dioxide and other harmful gases into the atmosphere. The imposition of carbon tax is on one hand seen as a positive step towards the reduction of greenhouse emissions and other harmful gas emissions, but on the other hand has been criticised in that it is believed that it will increase unemployment and decrease investments in South Africa. Although the initiatives to reduce harmful emissions are in the form of long-term projects, South Africa is definitely committed to its undertakings to the global community in its endeavours to reduce harmful emissions. South Africa can only hope that its efforts are substantial enough to make a valuable contribution to this worldwide crisis.

## Meet the Authors

**Happy Masondo**

| | |
|---|---|
| Title: | Director |
| Office: | Johannesburg |
| Direct line: | +27 (0)11 535 8264 |
| Fax: | +27 (0)11 535 8664 |
| Switchboard: | +27 (0)11 535 8000 |
| Email: | hmasondo@werksmans.com |


Happy Masondo has been a director of Werksmans Attorneys since 2009. She specialises in commercial law with a particular emphasis on contractual, statutory and regulatory matters in the construction, mining, power and technology sectors. She has extensive experience in drafting agreements specific to these sectors. These range from power purchase, connection, distribution and transmission agreements to agreements for complex construction projects and technology related agreements including those related to IT outsourcing. Happy has a particular affinity for the corporate governance and procurement aspects of her work. She has BA, LLB and LLM degrees from the University of the Witwatersrand and an LLM from Duke University in the USA.

**Faith Rambau**

Title: Candidate attorney
Office: Johannesburg
Direct line: +27 (0)11 535 8463
Fax: +27 (0)11 535 8600
Switchboard: +27 (0)11 535 8000
Email: frambau@werksmans.com


Faith Rambau joined the energy practice at Werksmans as a candidate attorney in 2012. She holds an LLB degree from the University of the Witwatersrand.

[19] Ibid, Section 56.

# Additional Tax Avoidance Rules will likely be Implemented in 2015

◎**Josephine Peng / Li-Ting Chen**

The Legislative Yuan in its first reading on 1 April 2013 passed two tax avoidance rules which were proposed by the Ministry of Finance (MOF) to be incorporated into the Income Tax Act (ITA). The key points of these two rules and our preliminary comments thereon are as follows:

1. Controlled foreign company ("CFC") rule (Article 43-3 of the ITA)

   Effective fiscal year 2015, a Taiwan company that controls (directly or indirectly) an offshore affiliate which was incorporated in a low tax rate jurisdiction (a jurisdiction in which the income tax rate is below 5.1%) will be required to recognize the portion of the offshore affiliate's income that belongs to the Taiwan company as the Taiwan company's investment income and include said portion in its annual income tax return. The definition of an affiliate under the CFC rule would likely be that prescribed under the Taiwan Company Act.

2. Place of effective management ("PEM") rule (Article 43-4 of the ITA)

   Effective fiscal year 2015, if a foreign company's PEM is in Taiwan, it will be deemed a business entity with its headquarters in Taiwan, and be subject to Taiwan income tax accordingly. PEM refers to the place where the foreign company's major and business decisions are made.

3. Our preliminary comments

   Regarding the CFC rule, under current tax regulations, a Taiwan company is required to include as part of its taxable income the dividends distributed by its offshore affiliates. Hence some Taiwan companies would keep their offshore income with the offshore affiliates so as to defer the income tax liability in Taiwan. With the implementation of the CFC rule, Taiwan companies will no longer be able to defer their Taiwan income tax liability on such offshore income; instead, they must include such offshore income in the year it is generated. As a result, the Taiwan companies' income tax liability will increase.

Regarding the PEM rule, currently, a foreign company is subject to Taiwan income tax only on its Taiwan-sourced income. With the implementation of the PEM Rule, if a foreign company is deemed to have its PEM in Taiwan, it will be subject to Taiwan income tax on its worldwide income; as a result, its after-tax net income will be reduced.

It requires three readings by the lawmakers to formally incorporate said two rules into the ITA. The first reading usually takes longer than the second and the third. We will watch the development closely and keep you posted.



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TAX UPDATE - JULY 16, 2013

# Extended Timelines for FATCA Compliance

On July 12, 2013, the Department of the Treasury ("Treasury") and the Internal Revenue Service (the "IRS") issued Notice 2013-43 (the "Notice"), which provides extended timelines and other guidance for the implementation of the requirements of sections 1471 through 1474 of the Internal Revenue Code of 1986, as amended, commonly referred to as the Foreign Account Tax Compliance Act or FATCA.

The Notice provides that Treasury and the IRS intend to amend the Treasury Regulations under FATCA to, among other things, extend the timeline for (i) implementing FATCA withholding and (ii) complying with certain registration and due diligence provisions under FATCA. The Notice states that taxpayers may rely on the provisions of the Notice until Treasury Regulations are amended to reflect such provisions. This update summarizes certain key provisions of the Notice that may be relevant to your business.

**I. Background**

FATCA was added to the Code on March 18, 2010, and requires withholding agents to withhold 30 percent of certain payments to a foreign financial institution (an "FFI") unless the FFI has entered into an agreement with the IRS to, among other things, report certain information with respect to U.S. accounts. FATCA also imposes on withholding agents certain withholding, documentation and reporting requirements with respect to certain payments made to certain non-financial foreign entities.

On January 17, 2013, Treasury and the IRS published final regulations (the "final regulations") under FATCA. The final regulations provided for a phased implementation of the requirements of FATCA, beginning on January 1, 2014, and continuing through 2017. However, Treasury and the IRS have received comments indicating that certain elements of the phased timeline for the implementation of FATCA have presented practical problems for both withholding agents and FFIs. The Notice indicates that, in order to allow for a more orderly implementation of FATCA, Treasury and the IRS intend to amend the final regulations to (i) postpone the start of FATCA withholding, (ii) make corresponding adjustments to various other time frames provided in the final regulations, and (iii) expand the circumstances in which an FFI is permitted to rely on the provisions of an intergovernmental agreement to implement FATCA.

**II. Revised FATCA Implementation Timeline**

The following is a summary of the important changes to FATCA implementation timeline (but does not discuss all such changes) described in the Notice:

A. Timeline for Withholding

The final regulations provided that withholding with respect to certain U.S. source fixed or determinable income would begin on January 1, 2014, and that withholding on gross proceeds from the disposition of property of a type which can generate U.S. source dividend or interest income would begin on January 1, 2017. The Notice postpones the date for such withholding on U.S. source fixed or determinable income to July 1, 2014. The date for withholding on gross proceeds is not affected.

B. Grandfathering

The final regulations provided that FATCA would not apply to certain obligations (not including stock) which are outstanding on January 1, 2014, or which are issued pursuant to agreements in place on January 1, 2014. The Notice states that FATCA will not apply to such obligations outstanding and agreements in place on July 1, 2014. Under both the final regulations and the Notice, obligations or agreements which are materially modified after the relevant date will not be "grandfathered" and thus may be subject to FATCA after they are so modified.

C. Registration

In the preamble to the final regulations, Treasury and the IRS announced their intent to create a FATCA registration website, which would serve as the primary way for FFIs to interact with the IRS to ensure compliance with certain FATCA requirements. The portal was expected to be open by July 15, 2013. The first electronic list of complying FFIs was expected to be posted on December 2, 2013. In order to be on the list, an FFI would have had to register by October 25, 2013. The Notice postpones the opening of the portal until August 19, 2013, the posting of the first electronic list until June 2, 2014, and the date by which an FFI would have to register until April 25, 2014.

Davis Wright Tremaine LLP
DEFINING SUCCESS TOGETHER

# Advisories

## Washington State Enacts Law Restricting Employers' Access to Private Social Media Accounts

08.09.13

*By Peter G. Finch and Angela C. Galloway*

Washington recently joined several states in prohibiting employers from seeking access to their employees' or prospective employees' private social-media accounts.

Washington's law, codified as RCW 49.44, specifically prohibits employers from requesting employees' user names and passwords and substantially restricts when employers may ask employees to reveal the content of such sites. The law took effect July 28, 2013.

**Restrictions**

Employers may not:

1. Request, require, or coerce an employee to disclose login information for a personal social-networking account;
2. Request, require, or coerce an employee to access his or her account in the employer's presence so that the employer can observe its contents;
3. Compel or coerce an employee to add someone as a contact associated with such an account;
4. Request or require that an employee alter a third party's ability to access an account; or
5. Take an adverse action against an employee or applicant for refusing such acts.

**What's Not Restricted**

Employers' access to employer-provided electronic devices (smartphones, laptops, and tablets, for example); online services provided by the employer (including the employer's intranet, website, Facebook site, and Twitter feed); or social media accounts are not subject to the law's restrictions. The law also does not prohibit employers from asking for login or content information associated with a network, intranet, or other platform intended primarily for work-related information exchange, collaboration, or communication.

Finally, employers may still demand access the content of their employees' private social media accounts when conducting certain investigations (although they may never request login information). For example, employers investigating alleged employee violations of

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state or federal laws, regulations, or employee-conduct rules may access the content of social media accounts. Employers may also access the content of social media accounts to investigate allegations that an employee has improperly transferred the employer's proprietary or confidential information, or the employer's financial data.

### Inadvertently Receiving Information

Employers are not liable if they inadvertently receive login information via an employer-provided electronic device, but the employer may not use the information to access the employee's account. Beyond restricting employers' ability to request or coerce from workers access to their private accounts, the new law does not regulate employers' independent access to content of publicly-available personal accounts.

### Right to Sue

The law allows employees or applicants to bring a civil action in state court for alleged violations, and the right to seek an injunction against the employer. Employers that violate the law could be liable for damages, a statutory penalty of up to $500, and the employee or applicant's attorneys' fees and costs. A court may award an employer reasonable expenses and attorneys' fees if the employer prevails in a frivolous action.

### Similar laws in Other States

This kind of legislation may become commonplace. Similar legislation has been introduced in at least three dozen states; Washington is the eighth to state to enact such a law this year, joining Arkansas, Colorado, Nevada, New Mexico, Oregon, Utah and Vermont.

### Best Practice

Employers should review their hiring and investigation practices to ensure that employees and applicants are not asked for usernames and passwords for their private social media accounts except in the narrow circumstances recognized under the law. Questions regarding permissible access to social media accounts should be referred to an experienced labor and employment attorney to ensure compliance.

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D. Due Diligence.

The final regulations provide complicated rules for due diligence, applicable to withholding agents and FFIs, with respect to accounts. The deadlines for implementing such due diligence procedures have been generally extended.

**III. Intergovernmental Agreements**

The final regulations contemplated that the United States would enter into intergovernmental agreements ("IGAs") with other countries for the implementation of FATCA. Under one model, FFIs would satisfy their FATCA obligations by reporting information about U.S. accounts to their respective tax authorities, followed by the automatic exchange of that information on a government-to-government basis with the United States. Under another model, FFIs would report specified information directly to the IRS, supplemented by government-to-government exchange of information on request. The Treasury Department has concluded a number of IGAs with other jurisdictions based on these model agreements. The Notice provides that a jurisdiction will be treated as having an IGA in effect (meaning that FFIs that are resident in such jurisdiction may rely on the procedures set forth in such IGA) if the jurisdiction has signed an IGA, even if the IGA has not yet been brought into force. However, a jurisdiction will cease to be treated as having an IGA in effect if the jurisdiction fails to perform the steps necessary to bring the IGA into force within a reasonable period of time. In such case, FFIs that are residents of such jurisdictions will no longer be entitled to the status that would be provided under the IGA, and such FFIs must update their status with the IRS accordingly.

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Hogan Lovells

## Government Contracts Alert

8 August 2013

See note below about Hogan Lovells

### Fifth Circuit decision exposes contractors to vicarious liability for double damages when employees receive personal kickbacks

In a case of first impression with potentially far-reaching consequences, the Fifth Circuit has ruled that a contractor may be held vicariously liable for double damages under the Anti-Kickback Act (AKA) even when the kickback is taken by an employee, not the contractor. *United States ex rel. Vavra, et al., v. Kellogg Brown & Root, Inc.* (KBR), No. 12-40447 (5th Cir. Jul. 19, 2013). Thus, having first been victimized by a dishonest and disloyal employee, a contractor may then also suffer enhanced civil penalties in a lawsuit by a *qui tam* relator and/or the Department of Justice. The decision significantly raises the stakes for contractors who fail to monitor their employees or who, despite their best efforts, fall victim to employee self-dealing.

The case arose in connection with KBR's contract to provide support services to the U.S. military in Afghanistan and Iraq. Two KBR employees who administered subcontracts for freight transportation later pled guilty to criminal charges arising from their acceptance of kickbacks from shipping companies, in the form of meals, tickets to sports events, golf outings, and other gifts and entertainment. A *qui tam* relator, later joined by the Department of Justice, filed a civil suit against KBR alleging violations of the federal Anti-Kickback Act. The government sought enhanced damages from KBR—twice the amount of the kickbacks plus up to US$11,000 per kickback. The lower court ruled that KBR was not liable for those enhanced penalties where the kickbacks were received not by the company but by lower-level employees for their personal benefit. The Fifth Circuit reversed, rejecting arguments that violations could be imputed to the employer only if the kickbacks were intended to benefit the company or were known at a higher level of management.

However, corporate vicarious liability under this AKA provision still requires that the company "knowingly" engage in prohibited conduct, a standard which the appellate court noted but did not construe. The ultimate impact on KBR – and contractors generally – will depend greatly on how the district court applies the knowledge standard. Typically, self-dealers try to conceal kickbacks from their immediate supervisors and higher management. If a low-level self-dealing employee's own knowledge is deemed to be company knowledge, then corporate exposure for twice the amount of the kickback is almost unlimited. On the other hand, if knowledge is attributed to the company only if the self-dealing occurs at a higher management level,

## Contacts

**David W. Burgett**
Partner, Washington, D.C.
david.burgett@hoganlovells.com
+1 202 637 6597

**Brendan M. Lill**
Associate, Washington, D.C.
brendan.lill@hoganlovells
+1 202 637 5472

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or is known to officials at a higher management level, then the
exposure is far less.

Even if the knowledge standard is interpreted to place a meaningful limit on exposure, that element poses another type of challenge to a defendant company. Because the questions of knowledge and attribution of knowledge are highly fact-intensive, they are likely to survive dispositive pretrial motions. This increases litigation expense and litigation risk for the defendant corporation, and thereby may tend to increase the likelihood and amount of settlements—a phenomenon that will not be lost on the Justice Department or relators' counsel.

There is ample room in the statutory language for other courts to reach differing conclusions, as the district court did in this case. Moreover, even in courts that interpret the statute as the Fifth Circuit has, there is considerable room for varying and potentially inconsistent applications of the knowledge standard. If a circuit split arises, it is a near certainty that the scope of vicarious corporate liability under the AKA will eventually be reviewed by the Supreme Court. In the meantime, public contractors would be well-advised to review their internal policies and controls for prohibiting, deterring, and detecting employee self-dealing.

This decision and its implications are discussed in greater detail in an article by Dave Burgett and Brendan Lill, published this week in *The Government Contractor*, which is available for download here.

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McKenna Long & Aldridge LLP

Litigation Advisory

AUGUST 7, 2013

# Look Before You . . . Text: FCC's October 16 Deadline Changes Consent Rules for Mobile Marketers

Contacts

For additional information, please contact:

Petrina Hall McDaniel
404.527.4385

Nathan L. Garroway
404.527.4391

Charles E. "Trip" Dorkey III
212.905.8330

With the explosion of text messaging as an advertising tool and the mass proliferation of smartphones, consumers have become highly accessible to and profitable for businesses seeking to market their products using this technology. In an effort to maintain consumer privacy in the face of this rapid transformation, Congress has made significant changes to the Telephone Consumer Protection Act of 1991 (the "TCPA"). The TCPA restricts marketing calls and text messages to cellphones and residential landlines by generally prohibiting communication using automated systems, artificial callers, or prerecorded voices unless the consumer gives "prior express consent." The TCPA also specifies several requirements for fax machines, autodialers and voice messaging systems by requiring the marketer using the device to self-identify and reveal contact information in the message. The act permits a harmed "person or entity" to bring an action to recover monetary loss from such violations, and statutory penalties of $500 per violation, and up to $1,500 per knowing or willful violation.

On June 11, 2012, the FCC published a new interpretation of the "prior express consent" requirement for telemarketing calls that will go into effect on Oct. 16, 2013. The new interpretation requires a signed, written agreement in which the consumer specifically consents to receiving telemarketing calls or text messages via automated systems, artificial callers, and prerecorded voices on a cellphone or residential line. By placing the responsibility on the caller to obtain express consent for the use of automated dialing systems, the new interpretation is significantly more consumer-privacy focused. The new FCC regulations require consumer consent to be unambiguous, which means the consumer must receive a "clear and conspicuous disclosure" of three things: first, that she will receive future calls containing autodialed or prerecorded telemarketing messages on behalf of a specific advertiser; second, that her consent is not a condition of purchase; and third, she must designate a phone number at which to be reached (which should not be pre-populated by the advertiser in an online form). Consent may also be provided electronically and obtained through email, website forms, telephone keypress functions, or any method compliant with the E-SIGN Act. Limited exceptions exist for calls or text messages from the consumer's cellular carrier, debt collectors, schools, informational notices, and health care-related calls.

Significantly, the "established business relationship" exemption will no longer apply after Oct. 16, 2013. Previously, a business could assert that it had an established business relationship with a consumer by demonstrating, for example, that the consumer made a previous purchase. This exemption allowed the business to circumvent the requirement of express consent. Businesses will now be required to show that they have obtained "clear and conspicuous" consent from consumer, whether or not they had established previous business relationships.

The FCC has also promulgated guidelines concerning the legality of confirmatory text messages that involve the definition of "prior express consent." In a ruling issued Nov. 26, 2012, the FCC held that if businesses have obtained prior express consent from consumers to whom the text messages are sent, then the consumer can send one last text message confirming the end of the automated text communication even after the consumer revokes consent. For example, after a consumer responds to an automated text message with the word "STOP," or any word that triggers revocation of express consent, the business may send one last text message confirming revocation of consent, as long as the message complies with FCC regulations for such messages. Importantly, the consumer must have initially given express consent consistent with the regulations discussed above for any of these text messages to be compliant.

**Practice Pointers**

The growing wave of private TCPA enforcement litigation creates additional risks for businesses that rely on telemarketing for advertising and commercial marketing. Understanding how the new regulations work within the TCPA's robust statutory framework will help practitioners avoid litigation and guide businesses in creating legally compliant telephonic marketing strategies, which will lessen their exposure if they are sued:

1. Businesses should consider implementing the new FCC rules for telemarketing calls and texts prior to their effective date of Oct. 16, 2013. The FCC's new interpretation now requires a prior, signed, written agreement that is "clear and conspicuous" in which the consumer specifically agrees to receive telemarketing calls or text messages via auto-dialer and/or prerecorded voice on a cellphone or residential line, and such consent may not be a condition of purchase.
2. "Prior express consent" may be obtained electronically on websites or any method compliant with the E-SIGN Act. Because the TCPA statute of limitations is four years, businesses should maintain evidence of each consumer's written consent for at least this period of time, and preferably longer.
3. Because the "established business relationship" exemption will no longer apply after Oct. 16, 2013, businesses should begin putting the appropriate consent language in boilerplate forms that demonstrate they have obtained "clear and conspicuous" consent from consumers to send text messages and/or make telemarketing calls via autodialer and/or prerecorded voice on a cell phone or residential line. The fact that a previous business relationship existed is now immaterial.

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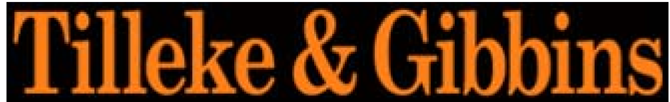

# Legal Update: Highlights of the New Labor Code of Vietnam

July 17, 2013

On May 1, 2013, the new Labor Code (Law 10-2012-QH13 of June 18, 2012) entered into force. This legal update highlights four important changes to the Vietnamese labor laws, introduced by the new Labor Code.

**Working Hours**

Employers may, pursuant to the new Labor Code, determine working hours on a daily or weekly basis. The regular working hours, however, may not exceed 10 hours in one day or 48 hours per week. Further, the new Labor Code imposes limitations on the number of overtime hours that an employee may work. The maximum number of overtime hours that an employee may work is 50% of the employee's regular working hours in one day, 30 hours in a month, and 200 hours in a year. If the employer determines regular working hours on a weekly basis, the working hours and overtime hours together may not exceed 12 hours in one day.

**Internal Labor Rules**

Employers with 10 or more employees were already, under the old Labor Code, required to establish Internal Labor Rules (ILRs) in writing and to register them with the local labor authorities. The new Labor Code amends the provisions of the old Labor Code with respect to both the registration and the contents of ILRs.

The application for registration of the ILRs must, according to the new Labor Code, include an "opinion" obtained from the grassroots-level labor union existing within the employer. Should no such union exist, the district-level labor union (which is usually a government-controlled entity) must be consulted. Thus, obtaining the opinion of a labor union has been made a precondition for obtaining approval for the ILRs.

As for contents, the new Labor Code abolishes as a disciplinary measure "the transfer of an employee to another position with lower wage for a maximum period of six months." Other previously existing disciplinary measures—including reprimand, deferral of wage increase, removal from office, or dismissal—remain intact in the new Labor Code.

**Labor Outsourcing**

The new Labor Code introduces an entirely new section on labor outsourcing, but with fairly extensive restrictions. Most notably, labor outsourcing is permitted for a limited number of jobs only, and the

entity utilizing the outsourced persons must pay salary at least equal to the salary it pays to its own employees who have the same professional qualifications and are doing the same job or a job of the same value. The duration of the labor outsourcing may not exceed 12 months and may not be extended.

**Work Permits**

The new Labor Code abolishes the work permit exception for foreign citizens working in Vietnam for less than three months; all foreign citizens working in Vietnam must have a work permit, regardless of the time they intend to work in the country. However, a few exceptions apply. The work permit requirement is waived for capital-contributing members or owners of limited liability companies, members of the board of the management of shareholding companies, and lawyers, among others. The new Labor Code reduces the maximum term of work permits for foreign employees from three to two years.


*AUTHORS*

*Michael K. Lee T: +84 8 3936 2069*

*Kien Trung Trinh T: +84 4 3772 5567*

*Annika Svanberg T: +84 8 3936 2057*