PACIFIC RIM ADVISORY COUNCIL

Pacific Rim Advisory Council
December 2013 e-Bulletin

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CONFERENCES & EVENTS

PRAC @ PDAC Toronto
March 4, 2014

PRAC @ IBA Tokyo
October 20, 2014

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

PRAC Chile 2014

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

PRAC @ INTA Hong Kong
May 10, 2014

Details at www.prac.org

MEMBER DEALS MAKING NEWS

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►BRIGARD URRUTIA Advises in Avianca's SEC Registered IP 27,234,910 American Depositary Shares or Ads
►CAREY Acts as Local Counsel to HSBC Securities USA and Citigroup Global Markets
►CLAYTON UTZ Congratulates INSW and SHFA on Financial Close of Darling Harbour Live Precinct PPP Project
►DENTONS Canada Gives Start Ups a Helping Hand with Startup Program
►GIDE LOYRETTE NOUEL Advises Wendel on acquisition of 100 million-euro stake in Saham Group
►HOGAN LOVELLS Scores Major Victory in High-Profile Freedom of the Press Case
►KING & WOOD MALLESONS Advises PAMC on Successful Forming the First Insurance Asset-backed Scheme to Indirectly Invest Successfully in S. F.
►McKENNA LONG & ALDRIDGE Data Treasury Corporation Prevails In 10-Year, $100 Million Litigation With Former COO and Director
►NAUTADUTILH Advises Gimv and the Gimv Health & Care Fund with investment in Eurocept
►RODYK Acts For Heineken Successful Resolve to Competition Commission Singapore Investigation of Soft Drinks Non-compete Agreement
►SKRINE Acts for Versalis S.p.A. Joint venture with PETRONAS to Develop Elastomer Plant
►TOZZINI FREIRE Acts for SBA Torres Brasil Acquisition of a large wireless telecom company

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BAKER BOTTS NAMES 13 NEW PARTNERS EFFECTIVE JANUARY 1, 2014

Promotions Showcase Firm's Commitment to Client Service, Future and Growth

HOUSTON, 2 December 2013: Baker Botts L.L.P. today promoted 13 lawyers to partnership status effective January 1, 2014, as the firm begins its 174th year of operations.

"We are promoting outstanding lawyers into the firm's partnership ranks across our wide geographic span. The admission again this year of so many reaffirms the importance that Baker Botts places on maintaining the highest levels of service to our valued clients, and reflects our confidence in the firm's future," said Baker Botts Managing Partner Andrew Baker. "These soon-to-be Baker Botts partners exemplify the tradition of excellence and dedication to the practice of law that has been a hallmark of our firm since its beginnings."

2014 new partners for Baker Botts are:

Ryan Bangert -- Litigation, Dallas

Neil Coulson -- Intellectual Property, London

Mollie Duckworth -- Corporate, Austin

A.J. Ericksen -- Corporate, Houston

Joey Gray -- Intellectual Property, Austin

Josh Mandell -- Tax, Dallas

Chad McCormick -- Tax, Houston

Brooke McNabb -- Litigation, Houston

Jason Newman -- Litigation, Houston

Christa Brown-Sanford -- Intellectual Property, Dallas

Anthony Speier -- Global Projects, Houston

Jon Swenson -- Intellectual Property, Palo Alto

Evan Young -- Litigation, Austin

For more information, please visit www.bakerbotts.com

CLAYTON UTZ APPOINTS NEW CHIEF EXECUTIVE PARTNER TO LEAD FIRM FROM 2014

SYDNEY, 10 December 2013: The Board of Clayton Utz has appointed Robert Cutler to succeed Darryl McDonough as the next Chief Executive Partner of Clayton Utz from 1 July 2014.

Rob joined Clayton Utz in Sydney in 1991 and became a partner of the Firm in 1998. He carved out a successful career in Litigation and Dispute Resolution, with a focus on commercial disputes and government litigation, particularly in the areas of telecommunications and intellectual property. Rob served as partner in charge of the Canberra office from 2000 to 2004.

Board Chair Ross Perrett said Rob's appointment reflected his significant experience and history with Clayton Utz, and his clear vision for the Firm's future as Australia's leading independent law firm.

"The Australian legal services market is rapidly evolving, in the face of continued global economic uncertainty. As with all businesses, Clayton Utz must respond to the challenges and opportunities presented by our clients' changing needs and expectations. We must ensure we have the best people to assist us achieve that outcome. With his experience and client focus, the Board is confident Rob Cutler will be a strong and capable leader of Clayton Utz as we consolidate our position as Australia's pre-eminent independent law firm," said Ross.

For additional information visit www.claytonutz.com

DENTONS CANADA WELCOMES 3 PARTNERS

5 December, 2013: David Carbonaro and Andrew Elbaz have joined the Toronto office of Dentons Canada LLP as partners in the firm’s Corporate Finance and Securities group. Edward B. (Ted) Claxton has joined Dentons Canada LLP’s Montréal office as a partner in the Corporate and Commercial Law practice.

David Carbonaro has extensive experience in mining, corporate finance and international law. David advises public companies, securities dealers and investment banks on corporate finance matters in what has become a rapidly changing and demanding regulatory landscape. David focuses internationally on China and the Middle-East and is devoting his legal and business expertise to assisting Canadian companies in accessing the tremendous opportunities available in these emerging markets. David is recognized by Chambers Global as a leading lawyer in Energy & Natural Resources: Mining, and Corporate/Commercial (Saudi Arabia) and by Lexpert as a leading lawyer in Global Mining.

Andrew Elbaz also specializes in the mining and corporate finance sectors. Andrew acts for issuers, agents and underwriters on domestic and cross-border public and private financings in a variety of industries. Andrew advises on initial public offerings, private placements, mergers, acquisitions, and joint ventures. Andrew also has significant experience working with Canadian and other companies on international transactions in Africa, Central and South America, the Middle-East and North Africa.

“David and Andrew are important additions to the firm, and they will help us to strengthen and grow our Corporate Finance and Securities practice in Toronto and across the country,” says Mike Kaplan, Managing Partner at Dentons Canada’s Toronto office.

Ted Claxton has extensive cross-border experience through more than 25 years of practice focused on mergers and acquisitions of both private and public companies, securities (both public offerings and private placements), venture capital, private equity and derivative product structures and transactions.

“Ted is a welcome addition to our team in Montréal, and we are very pleased to have someone with his impressive experience and knowledge and long history of excellent client service joining our team,” says Claude Morency, Managing Partner of Dentons’ Montréal office.

Ted is a member of the Quebec Bar and the Law Society of Upper Canada. He is also an associate member of the New York State Bar Association and the American Bar Association.

For additional information visit www.dentons.com

GIDE BOOSTS KIEV WITH 9 LAWYER TEAM

2 December 2013 - A team of nine lawyers including two partners, Julian Ries and Oleksiy Feliv, from German law firm Beiten Burkhardt will join Gide's Kiev office on 1 January 2014.

Julian Ries joined Beiten Burkhardt in 2004, and was promoted to partner in 2009. As managing partner of the Kiev office, he advises national and international companies in the agricultural and renewable energy sectors on corporate, tax and restructuring issues, as well as in large commercial real estate transactions. Julian is a seasoned corporate lawyer.

Oleksiy Feliv is a leading Ukrainian real estate lawyer recognised for his results-oriented advice to international investors and is known for his litigation and arbitration practice. Oleksiy Feliv joined Beiten Burkhardt in 2005. Over the years, he has advised a wide variety of foreign clients active in the construction and renewable energy sectors, as well as investment funds, on real estate operations and investments. During his time with Beiten Burkhardt, he worked in the firm's Munich and Frankfurt offices.

The two partners will join Gide together with seven Ukrainian lawyers from Beiten Burkhardt: Daniyil Fedorchuk, Vasyl Yurmanovych, Olesya Stolyarska, Khrystyna Fedunyshyn, Nika Varvaryuk and Olena Nagorianska.

Oleg Zagnitko, head of Beiten's Ukrainian banking practice, will become Gide's Banking & Finance co-head together with Igor Krasovskiy. Gide Kiev has established a reputable banking practice and belongs to the very few firms with a strong practice of infrastructure and PPP and benefits from its integrated UK law capability through its London office.

Karl Hepp de Sevelinges, a French and German qualified partner who opened Gide's Kiev office in 2006, said: "We have been looking to grow and this project makes a lot of sense as we have known the lawyers joining us for years. Their practice complements ours perfectly, will boost our expertise in real estate, M&A / Corporate and banking, and will facilitate our access to German and Austrian investors".

Stéphane Puel, Gide's managing partner, adds: "Gide's strategy in Central and Eastern Europe is to achieve a leading market position in countries with strong investment potential. Despite the current economic context, we believe in further growth and are delighted to welcome such a recognised and experienced team. The German and Ukrainian lawyers will contribute to ascertain Gide's position in Central & Eastern Europe as a leading European player."

Gide's Kiev office, comprising 20 lawyers and legal consultants, will be headed both by Julian Ries and the current partner in charge of the Gide office, Bertrand Barrier. Karl Hepp de Sevelinges, now based in Paris, will stay involved in the future activities of Gide in Eastern Europe and particularly in Ukraine.

For additional information visit www.gide.com

HOET ADDS 9 LAWYER TEAM

Hoet Pelaez Castillo & Duque expands its labour, corporate and dispute resolution practices with the incorporation of the 9-lawyer team from leading boutique law firm Mangieri Benavente & Asociados (MBA)

On 1 November 2013, the 9-lawyer team from boutique Mangieri Benavente & Asociados (MBA) incorporated into leading full-service law firm Hoet Pelaez Castillo & Duque. Mangieri Benavente & Asociados (MBA) is a highly specialised firm, focused on labour law and both labour and commercial litigation. The firm also has a burgeoning corporate practice.

The entire 9-lawyer team joined H PCD, bringing with it a strong client portfolio including many high profile national and multinational clients, such as Diageo Venezuela, C.A.; Ferrostaal de Venezuela, S.A.; China Aluminum International Engineering Co, LTD; Servicios Med icos Asis-med, C.A. (Clfnica La Urbina); Farmacia Locate!, S.A. (Master Franchise); Consorcio Credicard, C.A.; La Oriental de Seguros, S.A.; Seguros Guayana, S.A.; Corporaci6n Digitel, S.A.;Spirax Sarco; Impsa; and Rotork Control de Venezuela, C.A. The team comprises 7 lawyers focused on labour law and litigation, including commercial litigation, and 2 lawyers specialised in corporate matters. Senior founding partner of MBA Pablo Benavente will be joining HPCD as equity partner, Mark Mellili as partner, Leopoldo Ignacio Sarria as junior partner and the rest of the team as associates.

The addition of 7 labour specialists will see H PCD's labour department more than double (HPCD's labour department currently comprises 6 members), making it one of the largest and most experienced labour departments in Venezuela. With equity partner Pablo Benavente and partner Mark Mellili both joining this team, the newly-merged 13 lawyer department will count 6 partners among its ranks.

HPCD's market-leading dispute resolution department will also grow with partner Mark Mellili set to divide his time between the firm's labour and dispute resolution departments, bringing his expertise in labour, civil and commercial litigation to the table. Similarly, the firm's thriving corporate department will benefit from the addition of junior partner Leopoldo Ignacio Sarria and one associate.

HPCD's co-managing partner Luis Lopez-Duran commented on the incorporation: "We are thrilled to welcome the entire MBA team to HPCD. The advantages to both firms are evident, with HPCD gaining highly skilled and experienced lawyers in core practice areas and the MBA team integrating into a market- leading, full-service structure. Furthermore, Pablo Benavente is one of the most highly respected labour experts in Venezuela and we look forward to working alongside him, his partners and other team members."

Carlos Dominguez-Hernandez, HPCD's co-managing partner added: "At HPCD, we are placing great emphasis on building for the future, in order to ensure that the firm remains a market leader in Venezuela and our clients continue to receive the best possible service. This is a huge step in that direction."

Senior founding partner of MBA Pablo Benavente also commented: "This is a very exciting opportunity for all of us at MBA. We have built a highly successful boutique law firm with outstanding lawyers and a strong client base. We will now be able to take our services to the next level with the full-service platform provided by HPCD, a firm with a longstanding reputation as a market leader in Venezuela. We look forward to combining our expertise and experience and providing clients with comprehensive services of the highest quality. "

Please see the profiles of the three new partners below:

Pablo Benavente-Martinez has almost 20 years' experience in labour matters and safety in the workplace, as well as in litigation (particularly labour and corporate litigation). Pablo advises on individual and collective labour matters; he participates in labour planning for employee hiring and termination; institution of policies, regulations and programmes of compensation, benefits and other labour matters in corporations; transfer and negotiations with expatriates; complex union procedures and collective bargaining, including collective labour agreements; and application and enforcement of regulations regarding safety and health in the workplace. He has also been entrusted with the design and implementation of labour audits. Pablo is a frequent speaker at labour conferences and seminars and he advises and is a member of the labour and social affairs commission of FEDECAMARAS. He holds Master's degrees in Business Law and Labour Law and previously worked at law firms Anzola Raffalliy Rodriguez and Gomez Cottiny Tejera-Paris.

Continues next page..

HOET ADDS 9 LAWYER TEAM ..CONT'D

Mark Melilli-Silva has 14 years' experience advising local and international corporations on labour, civil and commercial litigation as well as I P litigation. He regularly participates as speaker in academic events addressing labour, civil and procedural law matters. Mark has worked in the judicial system as the Clerk of the Tenth Trial Court for Civil, Business and Transit Matters of the Judicial Circuit of the Metropolitan Area of Caracas and was formerly a member of the law firms Grau Hernandez y Monaco and Anzola Raffalliy Rodriguez. He holds Master's degrees in Procedural Law and Business Law and is currently a university lecturer in civil law and in civil procedural law.

Leopoldo Ignacio Sarria Fernandez specialises in corporate matters and stands out for his international experience. His practice includes advising new investors, including multinationals, on the incorporation, structure and execution of their business in Venezuela. He also has expertise in international taxation and fiscal planning. Prior to joining MBA, Leopoldo worked at Hogan Lovells, where he participated in several international arbitration processes and advised clients on the negotiation and execution of E PC contracts. He holds a Master's Degree in Comparative Law and a Certificate in Law and Business from Vanderbilt University, USA and also worked at Venezuelan law firm Anzola Raffalliy Rodriguez.

For further information visit www.hpcd.com

UPCOMING PRAC EVENTS

PRAC @ PDAC Toronto
March 4, 2014

PRAC @ IBA Tokyo
October 20, 2014

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

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

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PRAC @ INTA Hong Kong 2014
May 10

Events Open to PRAC Member Firms Only

HOGAN LOVELLS EXPANDS LOS ANGELES OFFICE WITH ADDITION OF PROMINENT CORPORATE TRANSACTION TEAM

WASHINGTON, D.C. 18 November 2013: Hogan Lovells today announced the expansion of its Los Angeles Office with the addition of a prominent, long-standing corporate transactional team. Veteran Los Angeles corporate and mergers and acquisitions partner ***Barry Dastin***, prominent media and entertainment partner ***Sheri Jeffrey***, and corporate and M&A partner ***Russ Cashdan*** will join Hogan Lovells' Los Angeles office. The three partners have worked together as a team for more than fifteen years.

"The profile and experience this group brings to our Los Angeles office are precisely what we are focused upon at Hogan Lovells," said Warren Gorrell, Co-CEO of Hogan Lovells. "Barry, Sheri, and Russ will complement our firm-wide Corporate Transactional Group, increasing both our breadth and depth on the West Coast, and their cross-border and domestic practices will integrate well with our global practice."

Barry Dastin and Russ Cashdan bring a wealth of experience handling a wide variety of corporate transactions, including representation of boards of directors, special committees, and investment banks in major acquisitions and sales, going private transactions, and financings. Sheri Jeffrey brings significant expertise and entertainment transactional experience, as lead outside counsel in the complex legal management of major theatrical motion pictures, television programming, and the interplay between media and new technologies, beginning from rights acquisitions through worldwide financing and distribution arrangements. The group joins Hogan Lovells from a New York-based Am Law 100 firm.

"We are thrilled to have such well-established members of the Los Angeles business and legal communities join our firm," said Los Angeles office Managing Partner Stephen Kay. "Their addition strengthens both our domestic and cross-border M&A practice, as well as our global Technology, Media and Telecommunications team."

Dastin commented on the move, "I have known key members of Hogan Lovells for a long time and have had the highest regard for the firm. We are excited to have the opportunity to help build Hogan Lovells' West Coast presence and to take advantage of the firm's unique cross-border platform."

Dastin's practice has constituted a mix of cross-border and domestic transactions, both private and public, including acting as lead counsel for the special committee of a leading West Coast based public company in its sale to top tier private equity firms at a US $28 billion dollar enterprise value. His industry transactional expertise ranges from media and entertainment, aerospace and defense, technology, consumer products, and retailing. Over the course of his career, he has served as counsel for the issuers or investment banks in a large number of public offerings and private placements of debt or equity. He also has acted in various major restructurings of Latin American sovereign debt. Dastin received his B.A. magna cum laude from Yale College and his J.D., cum laude, from Harvard Law School.

Jeffrey's practice covers a wide range of entertainment matters. She has been lead counsel in the development, distribution and financing, and worldwide exploitation of numerous major theatrical motion pictures, including two Academy Award Best Picture films Argo and The Departed, as well as Hugo, The Aviator, Gangs of New York, and the upcoming feature film Jersey Boys. She also acted as lead bank counsel in The Lord of the Rings feature films. Currently, she has taken an active role in the growing interplay between Chinese media companies and investors and Hollywood. Jeffrey works as a fully integrated part of the team, particularly with respect to merger and acquisition transactions in the media and entertainment sector. She received her B.S., cum laude, from Loyola Marymount University, her J.D. from Loyola Law School, and her LL.M. from New York University.

Cashdan works primarily on mergers and acquisitions, finance, and general corporate matters. Having been trained at Skadden Arps, his clients have included public and private companies, banks, venture debt funds, private equity funds, underwriters and investment bankers, special committees, officers, and directors. Cashdan received his B.A., summa cum laude, from the State University of New York at Albany and his J.D. from the University of Southern California Gould School of Law.

For more information, see www.hoganlovells.com

BAKER BOTTS

REPRESENTS UNS ENERGY CORPORATION IN $4.3 BILLION ACQUISITION BY FORTIS UTILITY GROUP

NEW YORK, 11 December 2013: On December 11, 2013, the Board of Directors of UNS Energy Corporation (NYSE: UNS) unanimously approved a definitive merger agreement with Fortis, Inc. (TSX: FTS), Canada's largest investor-owned gas and electric distribution utility, that calls for Fortis to acquire all of the outstanding common stock of UNS Energy for $60.25 per share in cash.

The $4.3 billion transaction, which includes the assumption of approximately $1.8 billion in debt, would provide additional capital and new resources for UNS Energy's subsidiaries, including Tucson Electric Power (TEP) and UniSource Energy Services (UES). Both companies will remain headquartered in Tucson under local control with current management and staffing levels and no planned changes to existing operations or rates.

Baker Botts represented UNS in the transaction.

For more information, please visit www.bakerbotts.com

CAREY

ACTS FOR HSBC SECURITIES USA AND CITIGROUP GLOBAL MARKETS ISSUANCE AND PLACEMENT OF USD $1BILLION SENIOR NOTES

Carey acted as local counsel to HSBC Securities (USA) and Citigroup Global Markets, as representatives of the Initial Purchasers, in the issuance and placement of USD1 billion in Senior Notes due 2024 by Empresa Nacional de Telecomunicaciones (ENTEL), a leading Chilean telecommunication company.

Carey advised this clients through a team led by partners Juan Guillermo Levine and María Fernanda Carvajal and associates Sebastián Monge, Felipe Zaldívar and Felipe Artigas.

For additional information visit www.carey.cl

BRIGARD & URRUTIA

AVIANCA'S SEC-REGISTERED INITIAL PUBLIC OFFERING OF 27,234,910 AMERICAN DEPOSITARY SHARES OR ADS

BOGOTA, November, 2013: Colombian law firm Brigard & Urrutia Abogados assisted J.P. Morgan Securities LLC and Citigroup Global Markets Inc., which acted as global coordinators and joint book-running managers and as representatives of the underwriters in connection with the offering of the Panamanian company Avianca Holdings S.A. and its offering of preferred shares in the form of Rule 144 A ADSs and Regulation S ADSs.

Merrill Lynch, Pierce, Fenner & Smith Incorporated; UBS Securities LLC; Banco BTG Pactual S.A. - Cayman Branch and Deutsche Bank Securities Inc. also participated as underwriters in the transaction.

This is the first ADSs issue from a foreign issuer (Avianca Holdings S.A.) over shares which are listed in the Colombian Stock exchange. Therefore, the transaction was particularly challenging from a legal perspective considering it was a SEC-registered IPO and considering there were several foreign exchange issues involved. Also, because the ADSs were to come from (i) a new issue of preferred shares; and (ii) the conversion of some common shares into preferred shares; the transaction entailed a detailed analysis of various legal and operative aspects.

Avianca Holdings S.A. expects to use the proceeds to finance the fleet modernization plan and to use the remainder for general corporate purposes.

Brigard & Urrutia lawyers involved in this transaction included Carlos Fradique-Méndez (Partner), Luis Gabriel Morcillo (Director Associate) and Laura Villaveces (Associate).

For additional information visit www.bu.com.co

DENTONS CANADA

GIVES STARTUPS A HELPING HAND WITH STARTUP PROGRAM

November 19, 2013: "Dentons Canada LLP is extremely excited to announce our Dentons Canada Startup Program. We have acted for many of Canada's leading startups. Our new program, and the appointment of Andre Garber as our first Director of the Startup Program, will further enhance the support we can provide to startups," says David Little, Chair of Dentons Canada's Venture Technology and Emerging Growth Companies practice group.

The Dentons Canada Startup Program provides an affordable and predictable fee arrangement for incorporation and access to a proprietary suite of legal documents and policies designed for startups and which are readily customizable, along with advice on intellectual property and licensing strategy by experienced practitioners.

"We know that startups are lean on cash, but they still need legal support to get off the ground and get their product to market. Our program gives them the benefit of a highly experienced global team and our bank of legal resources, on a cost-deferred, fixed fee basis," says Andre Garber, Director of the Dentons Canada Startup Program.

In addition to the extensive set of documents, startups get plugged into Dentons' deep network of venture capitalist investors, advisory board members, and seasoned tech industry executives through Dentons offices across Canada and in global technology hubs including Silicon Valley, San Francisco, New York, Boston and Berlin.

"Dentons has a long history of supporting Canadian technology companies, including important advocacy on tax changes to jumpstart foreign investment in Canadian technology companies by Tom Houston, and more recently advocacy on opening access to crowdfunding in Canada by Andrea Johnson, two partners at Dentons Ottawa. This new initiative by Dentons focused on startups further confirms Dentons' commitment to innovation in Canada," says John Reid, President of the Canadian Advanced Technology Alliance (CATA).

Whether the aim is to launch and expand a new venture into the next technology giant or to successfully exit through IPOs or M&A transactions, Dentons can provide the legal guidance to help startups reach their goals.

"Dentons is well known as a leading provider of legal advice to venture backed companies and venture capital investors. Access to top level legal advice at an early stage can have a tremendous impact on a company's success," says Richard Rémillard, Executive Director of Canada's Venture Capital & Private Equity Association (CVCA).

Startups also gain access to Dentons' Intellectual Property practice, which is a necessary value-add for mobile technology and life sciences startups looking to go global.

Dentons also maintains a popular on-line resource for tech startups at TechStartupCenter.com which covers a full range of practical and legal topics for entrepreneurs, startups, executives and investors active in the technology space, tweets the latest tech startup news on @DentonsTech, and offers on-going social and educational programs in its offices.

For additional information visit www.dentons.com

CLAYTON UTZ

CONGRATULATES INSW AND SHFA ON FINANCIAL CLOSE OF DARLING HARBOR LIVE PRECINCT PPP PROJECT

SYDNEY, 9 December 2013: The revitalisation of Darling Harbour is another step closer to being realised, with the Darling Harbour Live (DHL) precinct project reaching financial close on 5 December – another significant project milestone for Clayton Utz and our clients, Infrastructure NSW (INSW) and Sydney Harbour Foreshore Authority (SFHA).

Clayton Utz was appointed in August 2011 as primary legal advisers to SFHA, and then to INSW, on the circa $1billion DHL precinct project. The project involves expanding and enhancing Sydney's existing international convention, exhibition and entertainment complex, including developing new facilities and refurbishing existing facilities across the Darling Harbour precinct.

The DHL precinct project is unique in involving the interface of a Public Private Partnership (PPP) structure for the Convention, Exhibition and Entertainment components. It will feature a major new hotel within the North Darling Harbour precinct, and a significant new mixed use development in the south precinct of Darling Harbour, involving substantial new residential, retail, commercial and public domain built form.

When delivered, the DHL precinct project will provide Sydney with world-class facilities for a diverse range of onvention, exhibition and entertainment events.

A multidisciplinary Clayton Utz team, led by Real Estate partner Gary Best and Construction and Major Projects partner Stuart Cosgriff, has advised on the project from its inception: from the procurement process to the formal awarding in December last year of the project contract to the Darling Harbour Live consortium. The Darling Harbour Live consortium comprises Lend Lease, Capella Capital, AEG Ogden and Spotless.

Commenting on this latest project milestone, Stuart Cosgriff said: "The Darling Harbour Live project is a landmark project for Sydney that will play a significant part in the revitalisation of Darling Harbour. We have enjoyed the opportunity to bring our significant experience in large, complex infrastructure PPPs and commercial developments to support our clients SHFA and INSW in helping to deliver what will be world-class convention, exhibition and entertainment facilities that will enhance Sydney's reputation as a truly global city."

For additional information visit www.claytonutz.com

CAREY

ACTS AS LOCAL COUNSEL TO HSBC SECURITIES USA AND CITGROUP GLOBAL MARKETS

Carey acted as local counsel to HSBC Securities (USA) and Citigroup Global Markets, as representatives of the Initial Purchasers, in the issuance and placement of USD1 billion in Senior Notes due 2024 by Empresa Nacional de Telecomunicaciones (ENTEL), a leading Chilean telecommunication company.

Carey advised this clients through a team led by partners Juan Guillermo Levine and María Fernanda Carvajal and associates Sebastián Monge, Felipe Zaldívar and Felipe Artigas.

For additional information visit www.carey.cl

NAUTADUTILH

ADVISES SENTINEL CAPITAL PARTNERS WITH ACQUISITION OF ELECTRICAL BUSINESS ACTUANT (MASTERVOT)

01 November 2013 - NautaDutilh assisted Sentinel Capital Partners alongside Kirkland & Ellis LLP in Sentinel's acquisition of the multi-jurisdictional electrical business of Actuant (formerly known as Applied Power), including the leading Dutch-based electrical specialist Mastervolt. The transaction has a value of USD 258 million.

Established in 1991, Mastervolt International employs approximately 115 full-time staff in seven countries and has its headquarters in Amsterdam, the Netherlands. Mastervolt is a designer, developer and global supplier of highly innovative, branded power electronics. Its products provide the technology associated with the efficient conversion, control, storage and conditioning of power and are utilised in various end markets including solar photovoltaic (PV), marine and specialty vehicles. Actuant acquired Mastervolt in November 2010 for EUR 115 million.

The core team of NautaDutilh consisted of Joost den Engelsman, Ruud Smits, Wendy Guépin, Silvia Hubers, Valerie Verberne and Lisa Schoenmakers.

For additional information visit www.nautadutilh.com

HOGAN LOVELLS

ADVISES ON HK$362.3 MILLION TOP-UP PLACING OF TRIGIANT GROUP

HONG KONG, 25 October 2013 – Hogan Lovells has advised CLSA Limited ("CLSA") and CITIC Securities Corporate Finance (HK) Limited ("CITIC Securities") as the joint placing agents in respect of a placement of 115 million existing shares in Trigiant Group Limited ("Trigiant") for approximately HK$362.3 million (US$46 million). In addition, the same number of new shares was issued to its controlling shareholder Trigiant Investments Limited.

Trigiant is one of the leading PRC manufacturers engaged in research, development and sales of cable series, new-type electronic components and other accessories for use in mobile communications and telecommunications equipment. Trigiant is a listed company on the Hong Kong Stock Exchange.

This is the firm's second transaction for CLSA and CITIC Securities this year. In September, Hogan Lovells advised the banks as the joint placing agents in respect of a placement of 180 million existing shares in Xinyi Glass Holdings Limited for approximately HK$1.206 billion (US$155 million).

The team was led by Hong Kong corporate partner Terence Lau and included associates Sheryl Cheung and Priscilla Lee.

For additional information visit www.hoganlovells.com

HOGAN LOVELLS

SCORES MAJOR VICTORY IN HIGH-PROFILE FREEDOM OF THE PRESS CASE

NEW YORK, 10 December 2013: New York's highest court today issued a decision quashing a subpoena to Fox News reporter Jana Winter to testify as a witness in the James Holmes murder proceeding in Colorado. The subpoena called for Winter to reveal her confidential sources.

The court's opinion holds that New York has a strong public policy that bars such subpoenas. The court traced that robust public policy back to New York's colonial era, emphasizing that this "common law, statutory and constitutional tradition . . . has played a significant role in this State becoming the media capital of the country if not the world."

"Today's decision is a landmark ruling for press freedom. The court has held that a New York reporter should never be threatened with jail just for doing her job of informing the public," said Hogan Lovells appellate partner Chris Handman, who argued the case on 12 November.

In a 4-3 decision, the New York Court of Appeals reversed the Appellate Division and ordered the subpoena quashed. The decision arrived less than a month after oral argument and conclusively determines that Jana Winter will not be required to appear in Colorado any further, nor face the threat of jail time.

"This is not only a victory for Jana Winter, but a win for all journalists and the public because it supports the right to know information from confidential sources," said Dori Hanswirth, head of the Hogan Lovells New York-based Media Law Group and Winter's lead counsel.

Winter had been under subpoena to testify about confidential sources relating to her coverage of a movie theater shooting in Aurora, Colorado, in 2012. She reported that a "chilling notebook" had been sent to the University of Colorado by the defendant James Holmes, citing two unnamed law enforcement officials as her sources. The lower court in New York approved of a subpoena directing Winter to appear and testify in the Colorado case. The Colorado court ordered Winter's appearance for 3 January 2014.

In representing Winter in the New York Court of Appeals, the Hogan Lovells team maintained that forcing Winter to travel out-of-state for the purpose of revealing her confidential sources violated New York's clear policy and tradition "of providing the utmost protection of freedom of the press." That policy was evidenced by New York's Shield Law for journalists, the strongest such law in the nation. The Court of Appeals agreed, finding that "safeguarding the anonymity of those who provide information in confidence is perhaps the core principle of New York's journalistic privilege." According to the Court of Appeals, this principle represented a "New York public policy of the highest order," and forcing Winter to travel to Colorado to testify "would offend our strong public policy" and "the core protection of the Shield Law."

The Hogan Lovells team advising Jana Winter was led by litigation partners Dori Ann Hanswirth (New York), Chris Handman (Washington), and Michael Theis (Denver), supported by associates Theresa House, Nathaniel Boyer, Benjamin Fleming, Patsy Wilson (New York), Sean Marotta (Washington), Christopher Murray, Korey Christensen, Toren Evers-Mushovic, and Emily Lyons (Denver).

For more information, visit www.hoganlovells.com

GIDE

ADVISES WENDEL ON ACQUISITION OF 100 MILLION EURO STAKE IN SAHAM GROUP

4 December 2013: Gide's Casablanca office has advised Wendel, one of Europe's leading listed investment firms, on its acquisition of a stake in pan-African Saham Group, based in Morocco and majority-owned by its founder and chairman Moulay Hafid Elalamy.

To support Saham Group over the long term in its upcoming development stages, Wendel has decided to invest an initial amount of 100 million euros in exchange of 13.33% of the group's capital, by way of a share capital increase, in order to raise the group's resources and speed up its growth in Africa and the Middle-East.

Wendel was advised by Gide, with a team comprising partner Julien David and senior associate Simon Auquier.

For additional information visit www.gide.com

NAUTADUTILH

ADVISES GIMV AND THE GIMV HEALTH & CARE FUND

6 December, 2013: NautaDuilh assisted Gimy and the Gimy Health & Care Fund with their investment in Eurocept, a company that sells and markets specialised medicines and provides medical homecare services. With this substantial investment, Gimv acquires a minority interest next to the founder and CEO Mike van Woensel.

The financing will be used to further strengthen Eurocept's leading position in the Netherlands and to roll out the business model to neighbouring countries through organic growth and strategic takeovers. The completion of this transaction will be subject to the necessary approval of the Dutch competition authority.

NautaDutilh's team consists of Lieke van der Velden, Rebecca Pinto, Wijnand Bossenbroek, Thijs Olthoff, Inge Wolswijk, Laura Brummelhuis-Luijten, Ernst van der Touw (all Corporate), Herman Speyart en Babs Schoenmakers - van der Heijden (both Competition).

For additional information visit www.nautadutilh.com

KING & WOOD MALLESONS

ADVISES PAMC ON SUCCESSFUL FORMATION FIRST INSURANCE ASSET-BACKED SCHEME TO INDIRECTLY INVEST SUCCESSFULLY IN S.F.

November, 2013 : From May 2013 to October 2013, King & Wood Mallesons ("KWM") has been assisting Pacific Asset Management Co., Ltd ("PAMC") on setting up an asset-backed scheme for a special funding project through raising insurance funds ("Asset-backed Scheme"). This project is the first Asset-backed Scheme that has been approved by CIRC and established by an insurance asset management company with an equity fund as the investment target. The project can be referred as precedential exploration and innovation carried out in accordance with relevant principle provisions of the CIRC regarding the pilot schemes of asset management product launched by insurance asset management companies.

The Asset-backed Scheme was indented to enable PAMC, as the trustee, to invest in Oriza S.F. Equity Investment Corporation (a limited partnership) in Suzhou Industrial Park with the raised insurance funds in a total amount of RMB 550 million in term of contribution from limited partnership ("Target Fund"). Through equity investment, the Target Fund eventually invested in S.F. Holding (Group) Limited and its affiliated companies ("S.F. Express").

S.F. Express is a leading private express-delivery company in China. It is reported that the annual revenue of S.F. Express is more than RMB 20 billion with a market share of approximately 20%, and it ranked first among private express-delivery companies. The funds raised in this transaction's financing is about RMB 8 billion in total, and in addition to PAMC, 10 other partners of the Target Fund has participated in this financing in various ways. S.F. Express will leverage this financing opportunity and continue to reinforce and expand of its core business resources.

During the process of the project, KWM actively assisted PAMC in multiple rounds of communications with the CIRC with respect to the project's specific implementation plan and requirements for approval, and supported the client in multiple rounds of negotiations, and provided professional advices in revisions of complicated equity structure and multiple trenches of ROI standards as well as rights and obligations among partners of the Target Fund. Eventually, KWM facilitated the successful set-up of the Asset-backed Scheme for this project, and helped achieve the objective of negotiation as PAMC had expected.

King &Wood Mallesons acted as the counsel for the investor. This project was led by partner Mr. Zhang Yi.

For additional information visit www.kingandwood.com

MCKENNA LONG & ALDRIDGE

DATA TREASURY CORPORATION PRVELAS IN 10 YEAR, $100 MILLION LITIGATION WITH FORMER COO AND DIRECTOR

NEW YORK, 21 November 2013: New York State Supreme Court Commercial Division Justice Emily Pines recently dismissed a complaint brought by Michael Trimarco, the former Chief Operating Officer and a member of the Board of Directors of DataTreasury Corporation, a company founded on Long Island and now based in Plano, Texas, which owns patents that cover technology relating to the electronic imaging, storage and retrieval of checks. Trimarco had alleged that, under the terms of an option agreement, he was entitled to the value of 1.5 million stock options pursuant to a December 31, 2002 option agreement that he contended were worth more than $100 million.

In a detailed 83-page Decision after a trial that lasted 41 days over 10 months, Justice Pines found that Trimarco failed to perform under the option agreement and an earlier consulting agreement by virtue of misconduct throughout his affiliation with the company, which violated the duty of loyalty and other fiduciary duties that he owed to DataTreasury as an officer and director. The Court also found that Trimarco had violated the implied covenant of good faith and fair dealing in his contracts with the company. Finally, the Judge stated that she agreed with DataTreasury's position that Trimarco's attempted exercise of only 100 stock options out of a total of 1.5 million "failed to comply with the specific terms of the parties' option agreement" but held that "such agreement was already unenforceable" by virtue of Trimarco's misconduct.

The Judge specifically stated that she found to be credible testimony by all of DataTreasury's witnesses that Trimarco's disloyal behavior toward the company began early in his consultancy and that it involved various efforts to divert corporate opportunities away from DataTreasury in favor of a company in which Trimarco and family members had substantial ownership interests. One such opportunity involved efforts by DataTreasury not long after 9/11 to assist in improving security at a Long Island airport through the use of biometrics technology that the company owned in the hope that such effort could be expanded to improve airport security elsewhere in the United States. Testimony supported that those efforts were thwarted by Trimarco.

Justice Pines also concluded that, contrary to Trimarco's testimony at trial, his actions in early 2003 made it clear he understood that an entity named Infinity Payment Systems "was part and parcel of the Data Treasury corporate entity" and that his "activities in both late 2002 and continuing through March and April of 2003 regarding Infinity Payment Systems were both a violation of the covenant of good faith and fair dealing embedded by implication in all his contracts with DTC and a breach of his fiduciary duty to that entity as an employee, chief operating officer, an executive vice president and a member of the board of directors."

Another action involved Trimarco's efforts to induce the sales manager of DataTreasury's Infinity subsidiary to quit and join a credit card processing company that Trimarco was forming for the sole purpose of competing with the DataTreasury subsidiary. Trimarco's conduct and his efforts to coach the employee as to how to deceive DataTreasury's CEO concerning why the employee was leaving were well documented in a series of emails that McKenna Long & Aldridge (MLA) partner Richard Friedman, who has handled the case since April 2006, uncovered during discovery. The emails were the subject of extensive videotaped deposition testimony of the former employee that were shown at trial to contradict the former employee's trial testimony.

"This decision underscores the need for companies in New York and elsewhere to give serious consideration to taking legal action against disloyal employees, even when they are officers, because there is a long established body of law that will not allow such employees to benefit from their misconduct," Friedman said. "The Court's decision, although very fact intensive, stands squarely for the proposition that a disloyal employee's compensation is forfeited if it is provided during the period of disloyalty. Justice Pines did an extremely thorough job in sifting through extensive trial and deposition testimony to get to the core of the matter: this COO and director violated time-honored duties to the company he was supposed to serve."

Friedman was assisted at trial by MLA partner Alan Kaufman. Data Treasury Corporation was also represented at trial by Scott Mollen and Christopher Greeley of Herrick, Feinstein LLP and John Bracken and Linda Margolin of Bracken Margolin Besunder LLP.

For additional information visit www.mckennalong.com

TOZZINI FREIRE

ASSISTS TORRES BRASIL ACQUISITION OF A LARGE WIRELESS TELECOM COMPANY

TozziniFreire Advogados assisted SBA Torres Brasil in the acquisition of a company controlled by Telemar Norte Leste and Brt Serviços de Internet, which owns 2,007 wireless telecommunication sites and towers.

SBA Torres announced that it has entered into a definitive agreement with subsidiaries of Oi SA ("Oi"), one of Brazil's largest telecommunications service providers, and its affiliates, under which SBA will acquire 2,007 wireless sites in Brazil. Upon closing of the transaction, Oi will enter into a long-term lease with SBA, with monthly lease payments, for antenna space on each of these sites. The sites currently have 1.6 tenants per site (including Oi) and include leases with all of the major wireless carriers in Brazil.

The transaction, subject to customary closing conditions, is expected to close on or before March 31, 2014. This transaction follows SBA's previously announced acquisition of use rights to 2,113 sites from Oi, which transaction closed November 26, 2013. Upon consummating this transaction, SBA will own or have use rights with respect to over 5,000 sites in Brazil.

Fernando Cinci Avelino Silva, partner in the Mergers and Acquisitions practice group at TozziniFreire, was in charge of the transaction with assistance of associates Karen Dagan and Felipe Borges Lacerda Loiola.

For additional information visit us at ww.tozzinifreire.com.br

SKRINE

ACTS FOR VERSALIS SPA JOINT VENTURE WITH PETRONAS TO DEVELOP ELASTOMER PLANT

Corporate Partner, Faizah Jamaludin and Corporate Senior Associate, Fariz Abd Aziz acted for Versalis S.p.A., a subsidiary for ENI, which entered into a joint-venture with PETRONAS Refinery and Petrochemical Corporation Sdn. Bhd, a subsidiary of PETRONAS for the development, construction and operation of the elastomers plants in Pengerang, Southern Johor, Malaysia.

For additional information visit www.skrine.com

RODYK

ACTS FOR HEINEKEN IN SUCCESSFUL RESOLVE TO COMPETITION COMMISSION SINGAPORE INVESTIGATION OF SOFT DRINKS NON-COMPETE AGREEMENT

Last year, Rodyk acted for Heineken International B.V. (Heineken), in obtaining a successful merger clearance decision by the Competition Commission of Singapore (CCS) on 5 November 2012, for its high-profile S$ 8.1 billion acquisition of Asia Pacific Breweries Limited (APB) and Asia Pacific Investment Pte Ltd (APIPL) from Fraser & Neave Limited (F&N) (the "Transaction"). The Transaction was subsequently completed on 15 November 2012.

In January of this year however, the CCS commenced an investigation (the "Investigation") of a clause contained in the Share Purchase Agreement of the Transaction, restricting Heineken from engaging in the manufacture, distribution and sales of soft drinks, for a period of two (2) years, expiring on 14 November 2014 (the "Non-compete Clause"). In the course of the Investigation, Rodyk assisted Heineken in its responses to the CCS.

F&N subsequently gave a signed undertaking to the CCS, voluntarily agreeing not to enforce the Non-compete Clause against Heineken with respect to the Singapore market. As a result, CCS exercised its discretion to cease the Investigation earlier this month, without a finding of liability against both Heineken and F&N.

In its media release dated 4 November 2013, announcing the cessation of its investigation of this matter, the CCS stated, "...CCS is of the view that the contractual impediment to Heineken to enter the local soft drinks market is now removed. Accordingly, CCS has ceased its investigations but will continue to closely monitor market practices in the local soft drinks market."

Rodyk's competition team is privileged to have acted once again for Heineken in this matter. We are pleased with both the CCS' approach, and the outcome of its investigations, which have been lauded as being simultaneously responsive to competition concerns, efficient, and pro-business in nature.

For additional information visit www.rodyk.com

UPCOMING PRAC EVENTS

PRAC @ PDAC Toronto
March 4, 2014

PRAC 55th International Conference
Taipei April 26-29, 2014

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PRAC 56th International Conference
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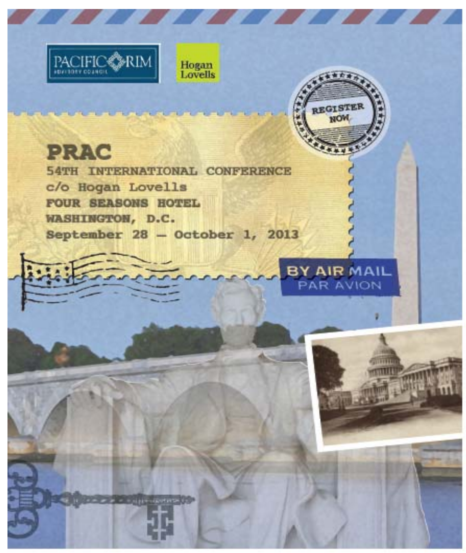

PRAC 54th International Conference
Washington, D.C. 2013
September 28 - October 1

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TOZZINIFREIRE ADVOGADOS

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WERKSMANS ATTORNEYS

CLAYTON UTZ

10 December 2013

Methods of medical treatment patentable in Australia infringement by cross label use fact dependent

The High Court's finding this morning that a method of medical treatment can be a "manner of manufacture" and thus a patentable invention, is not only consistent with the long-held view but demonstrates Australia's perspective that these patents bring demonstrated economic benefit. Its finding on cross-label use and patent infringement demonstrate that indirect infringement will depend on the facts in each case (Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd [2013] HCA 50).

Sanofi's psoriasis compound and Apotex's generic

Sanofi-Aventis Deutschland GmbH was the registered owner of a patent which claimed a method of preventing or treating psoriasis by using a compound called leflunomide.

Apotex Pty Ltd registered its generic version of leflunomide on the Australian Register of Therapeutic Goods with the intention of selling it to treat rheumatoid arthritis and psoriatic arthritis. Almost every person with psoriatic arthritis has or will develop psoriasis.

Sanofi-Aventis argued this would infringe its patent; Apotex responded in the usual way by challenging the validity of the patent. By the time the case got to the High Court, the issues had been refined to two questions:

- could a method of medical treatment be a "manner of manufacture" and thus patentable?
- if a patent covers a method of treating a disease using a product (in the present case, leflunomide), does another person infringe that patent by supplying that product with instructions that it be used to treat a different disease?

A method of medical treatment can be a manner of manufacture

This was dealt with in great depth by the Court, with four of the five judges finding a method of medical treatment can be a "manner of manufacture", and thus patentable. A majority of the Court found seven separate legal and commercial bases justifying the patentability of these methods, including the patient benefits they bring and their economic utility.

Infringement by supply of products instructions

If the use of a product by a person would infringe a patent, supplying the product can also infringe a patent in certain circumstances, which are set out in section 117 of the Patents Act.

The primary argument put by Sanofi-Aventis relied on section 117(2)(c), which refers to:

"the use of the product **in accordance with any instructions** for the use of the product, or any inducement to use the product, given to the person by the supplier or contained in an advertisement published by or with the authority of the supplier." (emphasis added)

Apotex's instructions specifically said its product was not indicated for non-arthritic psoriasis. This, said the majority, was an "emphatic instruction to recipients of Apo-Leflunomide from Apotex to restrict use of the product to uses other than use in accordance with the patented method in claim 1. Apotex's approved product information document does not instruct recipients to use the unpatented pharmaceutical substance, which it proposes to supply, in accordance with the patented method, and therefore the product information document does not engage section 117(2)(c) of the 1990 Act."

No evidence of a reason to believe

In the alternative, Sanofi-Aventis said that Apotex was indirectly infringing the patent pursuant to section 117(2)(b), which refers to:

if the product is not a staple commercial product—any use of the product, **if the supplier had reason to believe that the person would put it to that use**. (emphasis added)

The High Court majority also rejected this argument. The Court made it clear that whether a generic company has reason to believe that a product it supplied would be put to an infringing use will depend on the facts of each case.

Here, the claim was construed narrowly so as to only cover a method of treatment of psoriasis. Sanofi’s problem was that the evidence at trial disclosed that dermatologists were not prescribing leflunomide for the treatment of non-arthritic psoriasis.

The High Court thus found that the evidence did not show, and did not allow an inference to be drawn, that Apotex had reason to believe that its products would be used in accordance with the patented method – particularly given that Apotex’s approved product information specifically directed that it not be used in this manner.

What does this mean for cross labelling and medical treatment patents generally

The High Court has come down on the side of common sense and the status quo when it comes to patentability, giving all industry players some level of comfort.

When it comes to generics and cross-label or off-label use, the wording of the generic company’s product information will be closely scrutinised.

This case was very much dependent on its particular facts and, especially, the specific nature of the directions provided in the Apotex product information and the absence of sufficient evidence about the manner in which the product would actually be used. However, if there had been evidence that the product would be used in an infringing way, and that Apotex ought to have known this was the case, the outcome may well have been very different.

In addition, finding evidence of a supplier’s “reason to believe” that its product would be put to an infringing use could be as simple as putting forward its representatives’ sales pitch. Given the high stakes involved in pharmaceutical patents, we doubt this avenue will remain unexplored.

You might also be interested in...

- Federal Court decides isolated DNA is patentable subject matter

BRAZIL: RELEVANT NEWS - IP/IT

Resolution No. 1 of the Brazilian National Council to Combat Piracy created The National Directory to Combat Trademark Counterfeiting

Resolution No. 1 of the Brazilian National Council to Combat Piracy, in force since December 3, 2013, created The National Directory to Combat Trademark Counterfeiting.

The Directory aims to (i) facilitate the interaction between public authorities in charge of enforcing anti-piracy laws and the owners of trademarks registered with the Brazilian Patent and Trademark Office (INPI) and (ii) assist the authorities in conducting procedures under their responsibility.

Enforcement agents will have exclusive access to the Directory's data base. The information contained therein may be used, for example, for comparisons between original products and counterfeit products, as evidence in investigation procedures, in the preparation of expert appraisals and reports etc.

In turn, trademark owners will have the opportunity to include information about their trademarks in the system. By doing this, they will provide elements that may assist authorities in the fight against counterfeiting. Therefore, we recommend that trademark owners obtain information about the mechanism for registering data in the Directory, taking advantage of this opportunity to better protect their trademarks.

The Superior Court of Justice ("STJ" – Brazil's highest Court for non-constitutional matters) recently decided, in a case involving the use of counterfeit software, that damages resulting from violation of copyrights over software shall have a "punitive and pedagogical character". Such decision was rendered in a case involving Microsoft Corporation and STF Sistemas de Transferência de Fax Ltda., and is only effective for such parties, but nonetheless confirms the interpretation that that has been adopted by the STJ in similar cases.

The STJ held that a compensation equivalent to merely the price of legitimate licenses of the counterfeit software is not sufficient to cover all losses sustained by the owner of the copyrights over the software. Specifically, the Reporting Justice of the STJ (Nancy Andrighi) stated that "the mere financial compensation is not only conniving to the illicit conduct, but it also stimulates the practice, by making preferable to assume the risk of using the software illegally, because, if caught and prosecuted, the violator would only be required to pay the copyright owner the amount corresponding to regular licenses".

Based on this interpretation, the STJ ordered the defendant to pay Microsoft Corporation the amount equivalent to ten times the market value of each of the 19 computer programs at issue.

The Government of Canada has announced that the majority of Canada's Anti-Spam Legislation (CASL) will enter into force on July 1, 2014

December 5, 2013

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Background

The CASL regime is aimed at unsolicited commercial electronic messages (CEMs). It also includes provisions addressing the installation of computer programs, and unfair or deceptive online practices. As it is based on opt-in consent to send CEMs, CASL effectively raises the bar for organizations that have long communicated with customers and other organizations on an opt-out basis. Since CASL is a new regime, contains a private right of action and significant administrative monetary penalties (maximum $10 million), and is **broader in scope than the anti-spam laws of the US** and other countries, many organizations within and outside Canada have been monitoring its status closely. Some have already begun to take steps and adopt practices intended to allow them to comply with the Act.

The CASL regime consists of the Act itself and three sets of regulations. These include the much-anticipated **Industry Canada Regulations** which were published today, December 4. The Act was passed in 2010, and contains certain limited exceptions to allow organizations to send commercial electronic messages without meeting all of the CASL's many requirements. It was widely understood by interested stakeholders that the Industry Canada Regulations would represent the best opportunity to obtain a phased-in implementation, additional exceptions, and important clarifications.

Also Applies to Non-Canadian Organizations

Importantly, CASL has extraterritorial implications. For example, the CASL regime applies to CEMs originating in or being sent to Canada, with some minimal exceptions. Although many Canadian organizations have already begun preparations, organizations based outside of Canada should consider what measures they should begin to implement in order to comply.

Phase-in

As noted above, most of CASL's provisions will enter into force on July 1, 2014. The private right of action will not enter into force until July 1, 2017, giving stakeholders three years to get a better sense of the complexity and interpretation of CASL's requirements.

Exceptions

CASL and the Industry Canada Regulations provide limited exceptions for certain types of CEMs, including:

- messages between individuals with personal or family relationship;
- inquiries or applications to a person engaged in a commercial activity;
- quotes or estimates requested by the recipient;
- facilitating, completing or confirming a pre-existing transaction;
- warranty, product recall or safety/security information;
- factual information regarding subscriptions, memberships, accounts, loans;
- messages within organizations, or between organizations in a relationship
- legal notices;
- one-time third-party referrals;
- limited-access, two-way accounts (e.g. banking sites); and
- charities and political parties soliciting funds.

Installation of Computer Programs

As noted, CASL also applies to the installation of "computer programs" as well as to certain deceptive practices regarding the transmission of messages. The definition of a "computer program" is broad. One aspect of the regulation of the installation of computer programs that may have broad application to organizations that operate websites and electronic marketing relates to the use of cookies and other similar technologies. Although consent is "deemed" for some of these technologies, an organization may only rely on deemed consent where the "person's conduct is such that it is reasonable to believe that they consent to the program's installation." Organizations may wish to consider whether their disclosure and opt-out regarding cookies and other similar technologies is sufficient to rely on this deemed consent.

Clarification and Interpretation

The Industry Canada Regulations' Regulatory Impact Analysis Statement (RIAS) states that two **Interpretation Bulletins** published a year ago by the Canadian Radio-television and Telecommunications Commission (CRTC) are not legally binding, and that Information Bulletins are not meant to be exhaustive. While the RIAS does attempt to clarify certain questions raised by stakeholders during regulatory consultations – including what constitutes a "CEM", whether consents that were valid under pre-existing privacy law are valid for CASL purposes, and whether CASL applies to communications on social media – stakeholders should take note that the interpretation and application of CASL will be an ongoing process.

/Carey

CLPTO's new policies for .cl Domain Names

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Carey contact.

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Starting on December 1, 2013, NIC Chile will apply new application policies and dispute settlement procedures concerning .cl Domain Names.

The most important changes introduced are the following:

- Instant registration of a Domain Name: Pending applications will seize to exist and requested domain names will be registered at the moment of submitting an application, prior fee payment. NIC Chile will publish all registrations and enable immediate operation of the newly registered domain names.
- Revocation requests will replace Domain Name oppositions.
- User account system for comprehensive management of Domain Names portfolio: Operations such as application, renewal and other proceedings, may be managed through this platform.
- Clearly defined roles and functions for Domain Name agent managers: holder, commercial manager, technician and administrative.
- Removal of Mediation stage, which will be replaced by online arbitration.
- Standardization of Arbitrators' fees, which will be announced by NIC Chile.

For a better service, and keeping in mind our clients best interest, we are taking all necessary actions in order to keep you informed of any important issue that may arise and that may require your attention.
Carey will be monitoring and immediately notify our clients of any eventual Domain Name revocation application which must be filed within 30 days of the Domain Name's registration, only based on "preferential interest" or "better right".

If you have any doubts or questions regarding this new policy, please send an e-mail to **careydomain@carey.cl**

KING&WOOD MALLESONS
金杜律师事务所

Who Can Initiate Class-action Lawsuits under the Draft Environmental Protection Law?

By Harry Du * and Tom McGinn **

China Bulletin October 2013

At the end of October 2013, the Standing Committee of China's National People's Congress (NPC) finalized the third draft of amendments to China's Environmental Protection Law (《环境保护法修正案（草案）》).

In light of the extensive debate so far, many speculate that the Law will undergo a fourth draft before the New Environmental Protection Law enters into force[1]. Such changes would constitute the first amendment to the Law since it came into force in 1989.

Luo Jianhua (骆建华), the former deputy head of the NPC's Environment Protection and Resources Conservation Committee, explained that the amendments made so far emphasize seven key areas: i) the overall role of the law, ii) the responsibilities of local governments, iii) the sharing of environmental data, iv) preventing pollution related to farming in rural areas, v) public participation, vi) information transparency and vii) punishment[2].

The issue that has taken center stage in the debate so far surrounds class-action law suits against environmental polluters. Under the current Law, the list of claimants that can initiate class-action law suits against polluters on behalf of the public is limited, with perhaps the best known being the quasi-governmental All-China Environment Federation (中华环保联合会).

In order to effectively address areas v), vi) and vii), many argued, during the public comment phase on the second draft that, that the list should be extended to cover more claimants. Doing so might help to create, in the words of lawmaker, “a law with teeth that can bite”[3].

The third draft seems to reflect that the legislature is convinced by these arguments. It stipulates that “relevant organizations” must, in order to initiate an environmental class-action lawsuit, satisfy five conditions:

1. Be a national organization,

2. Be registered with the Civil Ministry,

3. Have been continuously active for at least 5 years, and

4. Have a “good standing”.

Currently 13 organizations satisfy the requirements (1) – (3). However, as the "good standing" condition gives the court a wide discretion to reject applications, it is difficult to determine who will be able to claim if the amendment is passed.

Class-action law suits generally are a contentious topic in many countries.

The United States is often accredited with introducing the concept as way to level the playing field between individual claimants and larger, often corporate, defendants. As such, there are several examples of an individual bringing a class-action lawsuit against an environmental polluter. Perhaps the best known involves residents of the town of Hinkley in California defeating The Pacific Gas & Electric Company in what became the basis of the Hollywood film Erin Brockovich.

In Canada, there is also precedence for class-action law suits. However the grounds on which to initiate such claims are far narrower. While it is possible in the U.S. to bring a claim for mental anguish or emotional distress[4], such claims are unlikely to succeed in Canada. For example, in order for a member to raise a class action in Ontario, he must demonstrate that the class has "common issues"[5]. In light of pollution often having divergent effects on peoples' health, such "common issues" have only been established in cases involving damage to property[6].

In the United Kingdom class-action lawsuits are not possible. The most similar mechanism is the Group Litigation Order. This involves parties demonstrating to the court that their cases "give rise to common and related issues" and should therefore be managed collectively[7]. It is at the complete discretion of the Judge to award such an Order. In the most recent case involving an environmental pollutant, the Court of Appeal declined to group 500 individuals claiming damages on the ground that the parties' cases were not sufficiently similar in law and in fact[8]. This case is often cited to demonstrate the difficulty in establishing such similarity.

German law is similarly restrictive in allowing multi-party litigation. With very few exceptions – environmental claims against non-governmental polluters not being one of them – German law does not recognize class-action law suits. The parties can however apply to have their cases managed collectively[9].

On June 11 2013 the European Commission, the executive body of the European Union, issued a Recommendation[10] indicating that within two years Member States should adopt a mechanism for "collective redress" so as to allow claimants to seek damages or injunctive relieve on a collective basis. It specifically states that the availability of such redress would be of value for environmental protection[11]. Therefore, despite the Recommendation being non-binding, it may result in class-action lawsuits against pollutants becoming available across Europe.

It is not yet possible to determine which organizations would be able to initiate class-action litigation under the third draft of the Environmental Protection Law. However moving away from a definitive list of claimants to a 4-stage test would make the law more flexible. While the status quo may be retained, it is also possible that more NGOs may be allowed to initiate proceedings.

In any case, the public debate about extending the number of parties that can initiate class-action lawsuits against polluters is a welcome one. While this may foster access to justice, it may also create the "litigation culture" that the U.S. is often criticized for. Especially in the politically sensitive area of environmental protection, this may do more harm than good. The hesitation of the Canadian, UK and German legal systems in adopting class-action law suits demonstrates this risk.

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1 http://www.kankanews.com/BCmoney/news/2013-09-22/3539575.shtml（last visit on November 7,2013）

2 http://www.eeo.com.cn/ens/2013/0712/246452.shtml (Last visit on November 7, 2013)

3 http://www.npc.gov.cn/englishnpc/news/Legislation/2013-06/28/content_1799075.htm (last visit on November 7, 2013)

4 http://www.michbar.org/journal/article.cfm?articleID=484&volumeID=36 (last visit on November 7,2013)

5 Class Proceedings Act S.O 1992, s. 5.1(c)

6 Such as Pearson v. Inco Ltd. (2005), 205 O.A.C.

7 Civil Procedure Rule 19.10

8 Austin & Others -v- Miller Argent (South Wales) Ltd [2011] EWCA Civ 928

9 Through an application for a "Prozessverbindung" under § 147 ZPO

10 http://ec.europa.eu/justice/civil/files/c_2013_3539_en.pdf (lastvisit on November 7, 2013)

11 Under clause (7)

Insurance products abroad

Tue, 12/03/2013 - 11:28
NewsFlash: 215

Insurance and Reinsurance

Limits to acquisition of insurance products abroad.

By means of legal opinion No. 2013046201-005, the Colombian Superintendence of Finance (SFC) established the scope of paragraph 2, Article 39 of the Organic Statute of the Financial System (EOSF), which provides the possibility for Colombian residents to acquire insurance products abroad.

The SFC stated that at the time of the conclusion of the insurance contract, the Colombian resident must be physically located outside the national territory.

As a result, the SFC determined that the commented legal disposition does not allow the conclusion of “distance” insurance contracts, since the general rule establishes a prohibition for concluding insurance contracts with foreign insurers within Colombian territory.

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November 29, 2013

National Frequency Assignment Plan Reform

An update to the National Frequency Allocation Plan ("PNAF") was published on 27 November 2013 enabling frequencies owned by the Costa Rican Institute of Electricity (ICE) to render fourth generation services.

Due to the increasing demand for frequencies, the Telecommunications Sector Directorate has been making constant updates to the PNAF to ensure the effective use of the frequencies. The most recent modification made to the PNAF includes the following ranges of frequencies: 2500 MHz to 2520 MHz, 2520 MHz to 2655 MHz, 2655 MHz to 2670 MHz and 2670 MHz to 2690 MHz ("2.6 GHz band").

These segments had previously been used for 34Mb/s trunks of the main telephone transit centers. However, with this modification they can now be used to develop IMT services (International Mobile Telecommunications).

Formerly, the use of these segments to provide services to end-users has been under dispute by different companies of the telecommunications market.

Arias & Muñoz' Telecommunications specialists can advise in analyzing this modification, preparing proposals to modify the PNAF, as well as monitoring new modification proposals.

For additional information visit www.ariaslaw.com

ABNR
COUNSELLORS AT LAW

14/11/2013

NEW REGULATIONS ON BANKS MINIMUM CAPITAL REQUIREMENTS AND MULTIPLE LICENSING

The Indonesian central bank, Bank Indonesia, recently issued two regulations which will change the way banks in this country do their business. These two regulations regulate the business activities of a bank on the basis of the bank's capital. As a result, commercial banks which in the past had more freedom in their operation thanks to Law No. 7/1992 regarding Banking (as amended) are now only allowed to conduct business transactions which are in line with their capital strength.

The two new regulations are: (i) Bank Indonesia Regulation No. 14/26/PBI/2012 regarding Banks' Business Activities and Core Capital Based Office Network, dated 27 September 2012 (**"BIR 14/26"**), and (ii) Bank Indonesia Regulation No. 14/18/PBI/2012 regarding Minimum Capital Adequacy Requirement For Commercial Banks, dated 28 November 2012 (**"BIR 14/18**").

It is clear that with BIR 14/26 and BIR 14/18 Bank Indonesia wants on the one hand to ensure that banks in Indonesia run their business in accordance with their capital strength and on the other hand that these banks boost their capital up to international level while being more resilient to risks faced in light of changes in the global financial system.

Capital Requirement

BIR 14/18 follows the international practice of linking a bank's capital with its risk profile. It requires that the capital of a bank is in line with the bank's risk profile.

The minimum capital requirement for local banks is calculated by using the Minimum Capital Adequacy Requirement ratio. BIR 14/18 stipulates the following minimum capital requirements for the various risk profiles:[1]

i. 8% (eight percent) of the Risk Weighted Assets (ATMR) for banks with a rating 1 (one) risk profile;
ii. 9% (nine percent) to less than 10% (ten percent) of the ATMR for banks with rating 2 (two) risk profile;
iii. 10% (ten percent) to less than 11% (eleven percent) of ATMR for Banks with a rating 3 (three) risk profile;
iv. 11% (eleven percent) to 14% (fourteen percent) of ATMR for Banks with a rating 4 (four) or rating 5 (five) risk profile.

For banks with subsidiary companies, the above minimum capital adequacy requirements apply to the banks individually as well as in consolidation with their subsidiaries. To further ensure compliance with the requirement, BIR 14/18 prohibits a bank from distributing its profit if the profit distribution results in the bank's capital requirement inadequacy.

Local Banks

BIR 14/18 futher regulates banks' capital based on the banks' residency status or where the bank is established. For banks with a head office in Indonesia, the capital consists of: (i) **core**

capital (tier 1); (ii) **supplementary capital (tier 2)**; and (iii) **additional supplementary capital (tier 3)**.

Core Capital

The structure of a local bank's core capital is determined by taking into consideration the following deduction factors:[2]

a. Goodwill;
b. Other intangible assets; and/or
c. Other core capital deduction factor, such as:[3]
    i. the bank's equity participation, which covers the bank's participation in its subsidiaries, excluding temporary equity participations in credit restructuring and entire equity participations in an insurance company;
    ii. shortfall from completing the minimum solvability ratio level (Risk Based Capital/RBC minimum) of the insurance company owned and controlled by the bank; and
    iii. securitization exposure.

The above deduction is deducted by as much as 50% (fifty percent) from the core capital and 50% (fifty percent) from the supplementary capital. The entire capital deduction factors shall not be taken into consideration in the ATMR for Credit Risk.

Supplementary capital

Supplementary capital (tier 2) which consist of supplementary capital upper level (upper tier 2); and supplementary capital lower level (lower tier 2) can only be taken into consideration at the highest as 100% (one hundred percent) from the core capital.[4] Whilst Supplementary capital lower level (lower tier 2) can only be taken into consideration, the highest at 50% (fifty percent) from the core capital.[5]

Upper level supplementary capital (upper tier 2) consists of:[6]

i. capital instrument in the stock form or other capital instruments that fulfill the requirements as referred to in Article 16;
ii. parts of innovative capital that cannot be taken into consideration in the core capital;
iii. fixed asset revaluation which covers: the difference in value of fixed assets revaluation which were classified into profit balance, as much as 45% (forty five percent); and the increasing in value of fixed assets were unrealized which have previously been classified into profit balance, as much as 45 % (forty five percent);
iv. general reserves of PPA over productive assets which obliged to be formed with the highest amount at 1.25% (one point twenty five percent) from ATMR for Credit Risk; and
v. Other comprehensive earnings, the highest at 45% (forty five percent), which is the unrealized profit that arises from the increasing in fixed value inclusion that classified in the available for sale category.

Lower level supplementary capital (lower tier 2) consists, among others, of preferred shares that can be withdrawn after a certain period of time (redeemable preferred shares) and/or subordinated loan or subordinated obligation.

Additional supplementary capital

To be qualified as additional supplementary capital (tier 3), the capital must fulfill the following conditions and requirements:[7]

i. It is used only for measuring the Market Risk;
ii. It is not more than 250% (two hundred and fifty percent) of the bank's core capital which being allocated to calculate the Market Risk; and
iii. Together with the supplementary capital, it does not total to more than 100% (one hundred percent) of the core capital.

Included in this tier 3 capital are the following:

i. Short term subordinated loans or subordinated bonds;
ii. Supplementary capital which is not allocated to cover capital charges of Credit Risk and/or capital charges of Operational Risk, but which fulfill the requirements for supplementary capital (unused but eligible tier 2); and
iii. The rest of the lower level supplementary capital (lower tier 2) in excess of the lower level supplementary capital limit.

Supplementary capitals (upper tier 2 and lower tier 2 as well as tier 3) which are in the form of capital instruments must fulfill, among others, the following requirements:[8]

i. They are issued and fully paid up;

ii. For upper tier 2: they are not restricted by a payment time limit and requirement (for upper tier 2), and the validity period of the agreement is at least 5 years. For tier 3, the validity period of the agreement is at least 2 (two) years and the settlement requires the approval of Bank Indonesia (for lower tier 3) .
iii. They are able to absorb losses where the amount of the bank's losses exceeds the profit retained and deposits which include core capital although the bank is not in liquidation and is subordinated, which facts are clearly declared in the publishing documentation/agreement;
iv. The principal payment and / or earning yield is being suspended and accumulated in between period (cumulative) if the referred payment can cause the ratio of KPMM, whether individually as well as consolidated, to fall short of the requirements stipulated by BRI 14/18.
v. They are not protected or not guaranteed by the Bank or Subsidiary Company;

Supplementary capitals of upper tier 2 and lower tier 2 and tier 3 which bear "call option" features are required to fulfill the certain conditions imposed by BIR 14/18 before the call options can be exercised.

Foreign banks

Foreign banks are subject to CEMA.
Unlike banks with a headquarter in Indonesia which are subject to the above mentioned capital requirement, branches of foreign banks operating in Indonesia (currently limited to 10 foreign banks) are subject to the Capital Equivalency Maintained Assets (CEMA) requirement. BIR 14/18 stipulates that the capital of these branch offices consists of:[9]

i. business funds;
ii. profit retained and last year's profit after excluding certain factors such as deferred tax; the difference in value of fixed assets revaluation; the increase in value of fixed assets; and profit on sale of assets in the transaction of securities (gain on sale)
iii. 50% (fifty percent) of current year profit after excluding certain influence factors such as those mention earlier in ii;
iv. general capital reserves;
v. reserve capital purpose;
vi. fixed asset revaluation with certain coverage and calculation; and
vii. general reserves for provision for write off of asset losses over productive assets using certain calculation.

Banks are required to determine the financial assets for inclusion in the CEMA to meet the minimum CEMA. Once made, the determination cannot be changed until the next period of CEMA fulfillment. The following are assets that may be included and calculated as CEMA:

i. Securities issued by the government of the Republic of Indonesia and held until their maturity;
ii. Investment grade debt securities issued by banks with Indonesian legal entity and/or Indonesian legal entities and are issued not for trading purpose by the issuing banks; and/or
iii. "A" rated debt securities issued by Indonesian legal entities. The value of the corporate debt securities is limited to 20% (twenty percent) of the total minimum CEMA required of the bank.

Multiple Licensings
To improve the resiliency, competitiveness and efficiency of Indonesian banks, the central bank imposes rules on banks' eligibility to enter into different types of business transactions on the basis of the banks' capital strength. As a result, in the future banks in Indonesia will be categorized in accordance with their core capitalization into four categories or "BUKUs" (as BIR 14/26 calls them) with BUKU I being the lowest rank and BUKU IV being the highest rank. The provisions of BIR 14/26 will only take effect on banks in 2016, except that for regional/provincial government owned banks it will take effect only in 2018.[10]

In relation to the categorization of banks into BUKUs, BIR 14/26 stipulates the following core capital amounts for the BUKUs:[11]
a. BUKU 1 : Banks with Core Capital of up to less than Rp.1.000.000.000.000,00 (one trillion Rupiah or **equivalent to around USD 90 million**);
b. BUKU 2 : Banks with minimum Core Capital of Rp.1.000.000.000.000,00 (one trillion Rupiah or **equivalent to around USD 90 million**) up to less than Rp5.000.000.000.000,00 (five trillion Rupiah or **equivalent to around USD 450 million**);
c. BUKU 3 : Banks with minimum Core Capital of Rp.5.000.000.000.000,00 (five trillion Rupiah or **equivalent to around USD 450 million**) up to less than

Rp.30.000.000.000.000,00 (thirty trillion Rupiah or **equivalent to around USD 2600 million**); and

d. BUKU 4 : Banks with minimum Core Capital of Rp30.000.000.000.000,00 (thirty trillion Rupiah or **equivalent to around USD 2600 million**).

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The categorization of banks into BUKUs will not only affect banks in terms of how they will conduct their businesses and serve their customers (BUKU I banks will not have the same ability to enter into businesses as BUKU IV banks [12]), but will also affect them in terms of their ability to enter into capital investment/participation and to channel loans (BUKU I banks will not be able to channel as many loans compared to BUKU IV banks). Regarding capital investment, BIR 14/26 stipulates the following maximum limits:[13]

a. BUKU 2 : 15% (fifteen percent) of the Bank's capital;
b. BUKU 3 : 25% (twenty five percent) of the Bank's capital; and
c. BUKU 4, at 35% (thirty five percent) of the Bank's capital.

BIR 14/26 also determines banks' obligation to channel loans or financing facilities to productive businesses in line with their BUKU categories, as follows:[14]

a. minimum 55% (fifty five percent) of the total loan or financing, for BUKU 1;
b. minimum 60% (sixty percent) of the total loan or financing, for BUKU 2;
c. minimum 65% (sixty five percent) of the total loan or financing, for BUKU 3; and
d. minimum 70% (seventy percent) of the total loan or financing, for BUKU 4.

A banks' BUKU category also determines its branching ability. The opening of an office network overseas, for instance, may only be conducted by banks of BUKU 3 and BUKU 4 categories with further restriction for BUKU 3 banks. BUKU 3 banks may only open office networks in Asia whereas BUKU 4 may open office networks in all territories overseas/worldwide.[15]

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[1] Article 2 section 3 of BIR 14/18
[2] Article 14 of BIR 14/18
[3] Article 21 of BIR 14/18
[4] Article 15 of BIR 14/18
[5] Article 18 of BIR 14/18
[6] Article 17 of BIR 14/18
[7] Article 22 of BIR 14/18

SKRINE

MALAYSIA
CORPORATE INSOLVENCY, CORPORATE REHABILITATION AND RECEIVERSHIP

September, 2013

Lee Shih highlights the main changes to the corporate insolvency and rehabilitation procedures under the Companies Bill 2013

The Companies Bill 2013 (“Bill”), which revamps the Companies Act 1965 (“Act”), is based on the recommendations made by the Corporate Law Reform Committee (“CLRC”) back in 2008. The Companies Commission of Malaysia published a copy of the Bill for public consultation and is presently reviewing the feedback received.

This article will touch on areas of the Bill which help to reform the existing areas of receivership, winding up and schemes of arrangement. In order to better promote a corporate rehabilitation framework, the Bill also introduces the new mechanisms of the judicial management scheme and the corporate voluntary arrangement.

RECEIVERSHIP

Appointment

The receivership provisions in the Bill substantially expand on the existing provisions in the Act. Clauses 372 and 373 of the Bill set out the manner of appointing a receiver or a receiver and manager (“R&M”) under an instrument or by the Court.

Clause 372(2) of the Bill expressly sets out the agency status of a receiver appointed under a power conferred by an instrument (and presumably, the final version will also spell out the corresponding status of an R&M). The present legal position is that a receiver or R&M becomes an agent of the debtor company by virtue of the inclusion of provisions to that effect in the debenture under which he is appointed. The codification of the agency status of the receiver and R&M helps to remove some of the present ambiguities on the status of the receiver or R&M. It makes clear the ability of the receiver or R&M to contract on behalf of the company or do any act as an agent of the company to enable him to perform his functions.

In the case of a Court appointment, clause 373 of the Bill lists out three specific grounds upon which the Court may appoint a receiver or R&M, which are essentially where the company has failed to pay a debt due to a debenture holder, or the company proposes to sell the secured property in breach of the charge, or it is necessary to do so to preserve the secured property.

However, the Bill appears to omit other instances under the common law where a Court may appoint a receiver or R&M, such as where there is a management deadlock or oppressive conduct by the majority shareholders. It is hoped that these omissions will be clarified in the final version of the Bill so that these common law rights of appointment will not be abrogated.

Personal Liability of the Receiver and R&M

The original recommendation by the CLRC in its Final Report was for the receiver or R&M to be personally liable for debts incurred by him unless there is a specific agreement to the contrary between the contracting parties. However, clause 378 of the Bill does not make this clear and in fact imposes personal liability for such debts incurred by him in the course of receivership “notwithstanding any agreement to the contrary”, thereby not allowing the parties to contract out of this provision.

Further, the wordings which impose personal liability described above appear to conflict with clause 379(2) which purports to give effect to the CLRC's recommendation that the "terms of a contract … may exclude or limit the personal liability of the receiver …"

It is hoped that the final Bill will resolve these conflicting provisions and carry into effect the CLRC's recommendation.

Powers of Receiver and R&M
Clause 380 of the Bill introduces a welcomed codification of the express powers of a receiver or R&M which are set out in the Seventh Schedule of the Bill. Presently, a receiver or R&M would have to derive his powers solely from the provisions of the debenture under which he was appointed, and it is not uncommon to encounter situations where the powers listed in the debenture are inadequate or ambiguous.

This codification of a minimum list of default powers exercisable by a receiver or R&M is in line with the approach taken in the United Kingdom, Australia and New Zealand.

WINDING UP

Presentation of a Petition
Clause 447(1)(a) of the Bill increases the threshold of a debt for the statutory demand from RM500 to RM5,000 in order for a company to be deemed unable to pay its debts for the purposes of a compulsory winding up.

This higher threshold attempts to balance the need to ensure that the amount is not too high as to preclude small creditors from initiating legitimate claims whilst being high enough to avoid trivial claims.

Further, clause 447(2) of the Bill states that a winding up petition must be filed within six months from the expiry date of the statutory demand. The aim of this is to reduce the possibility of the statutory demand being abused and to prevent the threat of a winding up petition from continuing to hang over the debtor company for an inordinately long period of time.

Void Dispositions
The void disposition provision as contained in clause 453 of the Bill makes it clear that any disposition of property by the company, other than an exempt disposition, made after the presentation of a winding up petition shall be void, unless the Court otherwise orders. Similar to the equivalent Australian provision, the intent of this amended provision is to list out certain exempt dispositions which would not require a validation order.

However, the specified exempt dispositions contained in clause 453(2) do not significantly eliminate the need to obtain a validation order as it covers only a disposition by a liquidator or an interim liquidator of the company. The present wording of the void disposition provision in the Bill would still disallow a payment out of a bank account of the company made in good faith and in the ordinary course of business.

Powers of Liquidators
The powers of the liquidator in a court winding up situation are set out in clause 468 read with the Eleventh Schedule of the Bill. Part I of the Eleventh Schedule lists out the powers that the liquidator may exercise with the authority of the Court or the committee of inspection ("COI") while Part II of the Eleventh Schedule lists out all the powers that may be exercisable with, or without, the aforesaid authority.

In particular, the Bill permits a liquidator to carry on the company's business so far as necessary for the beneficial winding up of the company for a period of 180 days after the making of the winding up order. Thereafter, the liquidator is required to obtain the authority of the Court or the COI to continue with the carrying on of such business. This is a welcomed increase from the present period of only 4 weeks allowed for under the Act.

Termination of Winding Up
Under the Act, the only way in which a winding up order can be brought to an end is through an order for a stay of winding up under section 243. In considering whether to grant a stay, the Court would take into account factors such as the interests of the creditors and liquidator and whether it is conducive or detrimental to commercial morality.

In addition to the power to stay a winding up under clause 476, the Bill introduces a new clause 477 which allows the Court to terminate the winding up of a company. In determining whether to terminate a winding up, the Court may consider various factors, such as the satisfaction of the debts, the agreement by both parties, or other facts as it deems appropriate. This appears to allow for an easier route to bring to an end the winding up where the debtor company has satisfied the debts owing to the petitioning creditor.

SCHEME OF ARRANGEMENT

The scheme of arrangement provisions remain largely the same except for three of the more significant changes reflected in the Bill.

Additional Safeguard of Independent Assessment
Clause 432 introduces an additional safeguard to the scheme of arrangement framework by allowing the Court, upon application, to appoint an approved liquidator to assess the viability of a proposed scheme. This would enable an independent professional in the field of insolvency to determine the viability of the scheme and take into account the interests of all the stakeholders. It is to be noted that this is not a mandatory requirement and the applicant company is not obliged to take such a step from the outset. Thus, the initiative lies with the other stakeholders in a proposed scheme to seek such an appointment.

Extension of the Restraining Order
For the extension of a restraining order, clause 434(2) provides that the Court may grant a restraining order for a period of not more than 90 days and may "extend this period for another two hundred seventy days" if certain requirements are met. This appears to be an attempt to give effect to the CLRC's recommendation that the maximum period of a restraining order should be a year.

However, it is submitted that the present drafting could be made clearer as to whether each extension of the restraining order after the initial 90 days would be limited to a maximum period of 90 days, subject to the maximum extension of 270 days. A literal reading of clause 434(2) suggests that after the initial 90-day period, the Court may extend the restraining order for a further 270 days. As it is in the interest of all stakeholders that a scheme of arrangement should be finalised without undue delay, it is hoped that this issue will be clarified in the final Bill.

Restraining Order Will Not Extend to Regulators
Clause 434(7) makes it clear that a restraining order which restrains further proceedings against the company except by leave of the Court will not apply to any proceeding taken by the Registrar of Companies or the securities market regulator.

Further, clause 434(8) states that a restraining order will not have the effect of restraining further proceedings against any person other than the applicant company. So for instance, the directors of a company who are subject to legal proceedings on a guarantee given by them for the applicant company's debts will not be able to rely on the restraining order granted in respect of the company.

JUDICIAL MANAGEMENT

The judicial management mechanism, modeled after the Singapore model, is a new component under the Bill to provide a further option to rehabilitate a financially distressed company. It allows for an application by a company or a company's creditors for an order to place the management of a company in the hands of a qualified insolvency practitioner. A moratorium which gives temporary respite to the company from legal proceedings by its creditors is put in place automatically both during the time of the application for a judicial management order until the making or dismissal of such an application and during the period that the judicial management order is in force.

Requirements for the Grant of a Judicial Management Order

The Court is empowered under clause 392 of the Bill to grant a judicial management order if and only if -

a. it is satisfied that the company is or will be unable to pay its debts; and

b .it considers that the making of the order would be likely to achieve one or more of the following purposes:

i. the survival of the company, or the whole or part of its undertaking as a going concern;
ii. the approval of a compromise or arrangement between the company and its creditors;
iii. a more advantageous realisation of the company's assets would be effected than on a winding up.

The judicial management order shall, unless discharged, remain in force for 180 days and may be extended on the application of the judicial manager for another 180 days.

Protection of Debenture Holder's Rights

The CLRC had made recommendations to protect a debenture holder's right to appoint an R&M in the situation where a judicial management order is sought. Accordingly, clause 395(1)(b) of the Bill requires the notice of a judicial management application to be provided to any person who has appointed, or may be entitled to appoint, an R&M of the whole or a substantial part of the company's property. However, clause 395(1)(b) limits the type of qualifying R&M as one appointed under the terms of a debenture secured by a floating charge or by a floating charge and one or more fixed charges. It does not seem to apply to a situation where the security is by way of a fixed charge only and is unclear as to whether it applies to a receiver as well.

This provision is significant as clause 396 of the Bill effectively provides a veto right to a person who is entitled to appoint a qualifying R&M. Clause 396(1)(b) of the Bill provides that the Court shall dismiss a judicial management application if the making of the order is opposed by a person who has appointed, or is entitled to appoint, such a receiver or R&M.

The reasoning behind such a veto right is that it is thought not necessary to make a judicial management order when an R&M could achieve substantially the same objectives and clause 396(1)(b) preserves the right of the debenture holder to appoint an R&M.

Approval of Judicial Manager's Proposals

When a judicial manager is appointed, clause 407 of the Bill provides that he has 60 days (or such longer period as the Court may allow) to send to the Registrar, members and creditors of the company a statement of his proposals for achieving the purposes for which the order was made and to lay a copy of this statement before a meeting of the company's creditors.

As a meeting of the creditors must be summoned on not less than 14 days' notice, the judicial manager effectively only has 46 days to come up with the proposal to rehabilitate the company. Therefore, there is the view that the Bill's 60-day period may in reality be too short unless the Court is more flexible in allowing for more time for the preparation of this statement of proposals.

Clause 408(2) of the Bill requires a judicial manager's proposals to be approved by a majority of 75% in value of the creditors present and voting either in person or in proxy whose claims have been accepted by the judicial manager. Once approved by the required majority, the proposals shall be binding on all creditors of the company whether or not they had voted in favour of the proposals.

CORPORATE VOLUNTARY ARRANGEMENT

The corporate voluntary arrangement ("CVA") is modeled after the corresponding provisions under the UK Insolvency Act. The CVA is a procedure which allows a company to put up a proposal to its creditors for a voluntary arrangement. The implementation of the proposal is supervised by an independent insolvency practitioner who would report to the Court on the viability of the proposal. There is minimal Court intervention in the process.

Initiation of CVA

To initiate a CVA, the directors would have to submit to the nominee, being a person who is qualified to be appointed as an approved liquidator, a document setting out the terms of the proposed voluntary arrangement and a statement of the company's affairs.

Under clause 422 of the Bill, the nominee shall then submit to the directors a statement indicating whether or not in his opinion:

a.the proposed CVA has a reasonable prospect of being approved and implemented;

b.the company is likely to have sufficient funds available for it during the proposed moratorium to enable to the company to carry on its business; and

c.that meetings of the company and creditors should be summoned to consider the proposed CVA.

Under clause 421 of the Bill, once the directors have received a positive statement from the nominee, they can then file this statement with the Court together with the other necessary documents, such as the nominee's consent to act and the document setting out the terms of the proposed CVA.

Moratorium and Required Majority to Approve the Proposal

Upon the filing of the relevant documents pursuant to clause 421, the Ninth Schedule of the Bill provides that a moratorium commences automatically and shall remain in force for a period of 28 days.

Clause 423 of the Bill also provides that once the moratorium is in force, the nominee is to summon a meeting of the company and its creditors within the period specified in the Eighth Schedule of the Bill. The reference in clause 423 to the Eighth Schedule appears to be a typographical error and that the correct reference should be to the Ninth Schedule of the Bill.

Under the Ninth Schedule, such a meeting of the company and creditors must be called within 28 days of the date of the filing of the documents in Court. At the company's meeting, a simple majority is required to pass a resolution to approve the proposed CVA while at the creditors' meeting, the required majority is 75% of the total value of the creditors present and voting in person or by proxy.

If more time is needed for the stakeholders to decide, and in order to extend the moratorium period beyond the initial 28-day period, a meeting can be summoned to extend the moratorium for not more than 60 days if there is approval of 75% majority in value of the creditors and with the consent of the nominee and the members of the company.

CONCLUSION

The Bill brings many welcomed changes in revamping the corporate insolvency and rehabilitation framework in Malaysia. It is hoped that the final Bill will reflect the feedback and comments received through the public consultation process.

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SANTAMARINA STETA
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L E GAL UPDATE

November 21, 2013

DATA PRIVACY
OPERATION OF THE REGISTRY REGARDING SELF-REGULATORY SCHEME COMMITMENTS IS POSTPONED

An Amendment (the "Amendment") to the Parameters for the Adequate Application of the Self-Regulatory Scheme Commitments Referred to in Article 44 of the Federal Law for the Protection of Personal Data in Possession of Private Parties, effective as from January 18, 2013 (*Parámetros para el Correcto Desarrollo de los Esquemas de Autorregulación Vinculante a que se Refiere el Artículo 44 de la Ley Federal de Protección de Datos Personales en Posesión de los Particulares* – the "Parameters") is expected to be published soon in the Official Gazette of the Federation. The Amendment will become effective on the day of its publication in the Official Gazette of the Federation.

On this regard, please bear in mind that, the objective of self-regulatory scheme commitments in personal data protection (the "Schemes") is to complement the Federal Law for the Protection of Personal Data in Possession of Private Parties ("Law"), its Regulations ("Regulations") and any other applicable provisions in personal data protection, and to evidence before the Federal Institute for Information Access and Data Protection *(Instituto Federal de Acceso a la Información y Protección de Datos* - "IFAI") and the data subjects compliance with the Law, Regulations and other applicable provisions.

The Amendment modifies the Third Transitory provision of the Parameters by establishing that the IFAI will start processing registration applications of the Schemes and authorization applications for accreditation entities, until twelve months after the effectiveness of the Parameters, and not in nine months as it was originally stated, which means that the registry of the Schemes, will start operations until January 18, 2014.

For further information in connection with this matter, please contact the partner in charge of your matters or one of the attorneys mentioned as follows:

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EU Proposal for Effective Harmonised Protection of Trade Secrets **4 December 2013**

This newsletter is sent by NautaDutilh

On 28 November 2013, the European Commission released a "Proposal for a Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure".

The proposal was adopted following a study by the European Commission. The results of this study showed that the protection of trade secrets is highly fragmented across the EU Member States (in terms of scope of protection and available remedies), whereas effective protection is needed in order to preserve and further stimulate R&D activity in the EU.

The proposal aims to harmonise the definition of "trade secrets" and the circumstances under which trade secrets will be considered to have been unlawfully acquired, disclosed or used. One of the most noteworthy features of the proposal is the establishment of a common framework for measures, procedures and remedies against the unlawful acquisition, disclosure or use of trade secrets.

Background

The proposal builds on the WTO-administered Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), to which all EU Member States have adhered. Article 39 TRIPS provides for the protection of trade secrets. However, this provision is rarely relied on before the national courts in the EU, most likely due to legal uncertainty as to whether it can be directly raised by applicants.

Definition of a trade secret

The definition of a trade secret is identical to the concept of "undisclosed information" within the meaning of Article 39 TRIPS. A trade secret is information that:

- is secret in the sense that it is not generally known amongst or readily accessible to persons in the circles that normally deal with the kind of information in question;
- has commercial value because it is secret; and
- has been subject to reasonable steps by the person lawfully in control of the information to keep it secret.

Unlawful acquisition, use and disclosure of trade secrets

The proposal contains a non-exhaustive list of circumstances under which the acquisition, use and/or disclosure of trade secrets will be deemed unlawful, if done "intentionally or with gross negligence" through:

- the unauthorised access or copying of documents, objects, materials, substances or electronic files lawfully under the control of a trade secret holder;
- theft, bribery or deception;
- (inducement to) breach a confidentiality agreement or any other duty of secrecy;
- any other conduct which is considered contrary to honest commercial practices.

The use or disclosure of trade secrets is also unlawful when the person concerned:

- intentionally or with gross negligence breaches a duty to maintain the secrecy of the trade secret or to limit its use; or
- knew or should have known that the trade secret was obtained from another person who was using or disclosing the trade secret unlawfully.

Measures, procedures and remedies

The proposal aims to harmonise the procedural rules governing trade secret litigation, in particular:

- the introduction of a safeguard against potential abuse of trade secret litigation;
- the introduction of a limitation period of at least 1 year and at most 2 years from the time the applicant first became aware or should have become aware of the infringement of the trade secret;
- the preservation of confidentiality of trade secrets in the course of legal proceedings;
- the availability of interim measures and measures on the merits to (i) stop the use or disclosure of trade secrets, (ii) stop the production, marketing or use of infringing goods, and (iii) seize and confiscate suspected infringing goods (interim measure) or destroy all infringing goods and other materials containing the trade secret (measure on the merits);
- the availability of effective procedures to claim damages for the infringement of trade secrets.

Practical implications from a Benelux perspective

The proposal comes at a time when the protection of trade secrets is high on the agenda of the national courts. It may benefit innovative companies, whose legal position has recently already improved significantly this year, after the Dutch Supreme Court ruled that the evidence seizure procedures provided for by Directive 2004/48/EC on the enforcement of intellectual property rights can also be used in trade secret cases.

The proposal further bolsters the position of applicants in Belgium and Luxembourg, for example as regards the preservation of the confidentiality of trade secrets in legal proceedings.

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Consumer Law Reform Bill passed by Parliament - summary of changes

12 Dec 2013

The Consumer Law Reform Bill was passed by Parliament on Tuesday 10 December 2013, meaning that the Bill is now in its final form and awaiting enactment.

The Bill brings extensive changes to consumer law in New Zealand. It presents a number of implications that businesses will need to review.

Some of the changes will take immediate effect, while others will take effect within 6 to 15 months. View the table attached containing a summary of changes under the Bill and when the changes will take effect.

As always, if you have any questions, please don't hesitate to contact us.

Summary of changes under the Consumer Law Reform Bill		When the changes will take effect:
Fair Trading Act	**Unfair contract terms:** The Commerce Commission may seek a court order declaring that a term in a standard form consumer contract is "unfair". The Bill provides a list of considerations for whether a term is "unfair". Enforcing or including an unfair contract term will be an offence under the Act, and the offender will be liable to the new increased fines.	**15 months** after the Bill has been enacted
	Unsubstantiated representations: Companies who make a representation about a product or service will need to have reasonable grounds for the representation at the time that representation is made. Those found to have made an unsubstantiated representation will be liable to the new increased fines.	**6 months** after the Bill has been enacted
	Increased fines: Fines will increase nearly three-times. Maximum fines under the Act will become $200,000 for individuals and $600,000 for bodies corporate.	
	Infringement notices and fines: The Commerce Commission will be able to issue infringement notices and fines of up to $2000 for smaller offences.	
	Changes to contracting out: There will be new criteria for contracting out of the Act.	
	Extended warranties: Warranties that provide guarantees over and above those provided in the Consumer Guarantees Act will need to be explained to customers. Customers will be able to cancel an extended warranty within 5 working days of receiving it.	
	Uninvited direct sales (previously known as door-to-door sales): Buyers will be allowed to cancel any uninvited direct sale within 5 days if they have been approached by a seller in person or by phone, while they are at home or at work.	
	Unsolicited goods and services: Businesses will not be able to demand payment for goods or services which the customer has not asked for.	
	Layby sales: What constitutes a layby sale will be defined differently. There will also be new rules about information which businesses must disclose to customers about cancelling a layby sale.	

	Online sales: Businesses who sell online will need to identify themselves as online traders.	
Consumer Guarantees Act	**Changes to contracting out:** The Consumer Guarantees Act contracting out provisions will be changed to align with the new changes to contracting out in the Fair Trading Act. **Consumer Guarantees Act will now also apply to:** Goods sold at auction or by competitive tender. **Delivery guarantee:** This new guarantee means that if a seller is responsible for delivering goods to the customer, the customer will be entitled to reject the goods or obtain compensation from the seller if the goods arrive substantially late.	**6 months** after the Bill has been enacted
Commerce Commission has new powers:	**Compulsory interview powers:** The Commission will be able to require a business to give evidence during a compulsory interview. **Enforceable undertakings:** If a company agrees to a remedy with the Commerce Commission, that remedy will be enforceable in court if necessary. **Management banning orders:** The Court may order up to a 10-year management ban for an individual who breaches significant Fair Trading Act provisions if there are two breaches or more within a 10-year period.	**Immediately** after the Bill has been enacted
Collateral credit agreements:	**New liability for credit agreements:** If a business arranges finance for goods which are then rejected by the customer as faulty, the business could be liable for the credit agreement that provides that finance.	**Immediately** after the Bill has been enacted
Consumer product safety requirements:	**Higher threshold for products that may cause injury:** A product that may cause injury when used in a way that is reasonably predictable but is not the product's intended use, may be declared as an unsafe good. **Product Safety Officers:** The Ministry of Business, Innovation and Employment (MBIE) will have new officers who have powers to inspect goods and business premises. **New "Product Safety Policy Statements":** The Minister of Consumer Affairs will be able to issue statements that provide guidance about product safety issues. **Voluntary recalls must be notified within two days:** Where a company voluntarily recalls an unsafe product, that company will have to notify the MBIE within two working days.	**Immediately** after the Bill has been enacted

The new Promotion and Protection of Investment Bill – an assessment of its implications for local and foreign investors in South Africa

By Pieter Steyn, director

LEGAL BRIEF | DECEMBER 2013

The Promotion and Protection of Investment Bill ("Bill") was published for public comment on 1 November 2013. Interested persons may submit written comments to the Department of Trade and Industry by 1 February 2014.

Introduction

The Bill's publication occurred against the background of the South African government's decision to unilaterally terminate South Africa's Bilateral Investment Treaties ("BITs") with Belgium, Luxemburg, Spain, the Netherlands, Germany and Switzerland.

The government's decision has stirred controversy and been criticised from various quarters (including the European Union's Commissioner for Trade, Mr Karel De Gucht) especially as the European Union is South Africa's largest trading partner and source of foreign direct investment (FDI). South Africa also has a Free Trade Agreement (FTA) with the European Union and an Economic Partnership Agreement (EPA) is currently being negotiated between the European Union and the Southern African Development Community (SADC), a regional body which includes South Africa. The Minister of Trade and Industry, Mr Rob Davies, has stated that the Bill will update and modernise South Africa's legal framework for foreign investment and that BITs will be phased out.

Other countries (including Australia) are currently reviewing their BITs and investment policies and the United Nations Conference on Trade and Development (UNCTAD) has prepared an investment policy framework to assist countries in this regard. South Africa still has 45 BITs, of which only 17 (including with the UK, France, China, Italy, Nigeria, Zimbabwe, South Korea, Mauritius, Cuba and Malaysia) are currently in force. Of the remaining 28 (all of which have been signed), 17 are with African countries and the others include Canada, Russia, Israel and Turkey.

Although each BIT is a separate treaty between two contracting states and must be interpreted in accordance with its wording, there are essentially five core common principles –

- "national treatment" i.e. investors from a contracting state will not be treated less favourably than locals;
- "most favoured nation" status i.e. investors from a contracting state will not be treated less favourably than investors from a third state;

- investments from a contracting state shall be subject to "fair and equitable treatment";
- investments by investors from a contracting state will not be expropriated or nationalised unless this is in the public interest and compensation equal to the fair market value of the investment is paid;
- disputes between an investor from a contracting state and the other contracting state will be resolved by international arbitration; for example under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID).

Foreign investors from countries which don't have a BIT with South Africa (like the USA, Japan and India) currently have no special protections. Happily for them, South Africa's current investment regime does not unduly restrict or discriminate against foreign investors or unduly favour locals.

Foreign investments above certain thresholds in certain sectors (like banking, insurance and broadcasting) require regulatory approval and there is a merger control regime under the Competition Act which applies equally to locals and foreigners but (unlike Canada and Australia) foreign investment is not subject to a general requirement for government approval. Like locals, foreign investors must comply with local laws including laws dealing with competition, tax, exchange control and Black Economic Empowerment (BEE) although foreign multinationals have the option (not available to locals) of scoring BEE ownership points through an "equity equivalent programme" without actually having a BEE shareholder (this allows them to maintain 100% foreign control of their South African subsidiary).

Provisions of the Bill

Ambit of Bill

The term "investor" is defined as anyone who holds an investment in South Africa "regardless of nationality". The Bill accordingly covers both local and foreign investors.

The Bill contains a definition of "investment" in section 1 that –

- requires the investment to relate to a "material" economic investment or "significant" underlying physical presence in South Africa (like operational facilities). The terms "material" and "significant" are not defined and will lead to interpretational issues. Moreover, if an investment is "immaterial" or "insignificant", it is not covered by the Bill. Presumably, such investments would be left to be dealt with under local law but this lack of certainty as to whether or not an investment is covered by the Bill will be problematic for foreign and local investors and their advisors;
- excludes commercial contracts for the sale of goods or services and the extension of credit in connection with such contracts. The reason for this exclusion is not explained but it allows the government to adopt procurement policies (for example by preferring locally-manufactured products) without being restricted by the Bill.

The Bill applies to investments made "for commercial purposes" (section 4(1)) - this is not defined but "non-commercial" investments would arguably exclude residential property purchased by foreigners for their own use from the ambit of the Bill. Section 5 adds further requirements for an investment to qualify for protection under the Bill, namely that it was made "in accordance with applicable legislation" and was "acquired and used in the expectation and for the purpose of economic activity or other business purposes". Unfortunately no clarity is given as to how these requirements should be interpreted. For example would shares held by a foreign or local investor in a listed South African mining company qualify (how does one "use" shares)? These issues need to be resolved to prevent uncertainty.

Protection of sovereign rights of the South African government

The Bill is heavily focused on protecting the sovereign rights of the South African government to legislate in the "public interest". Section 3 states that the purpose of the Bill is to promote and protect investment in "a manner consistent with public interest and a balance between the rights and obligations of investors" and to ensure equal treatment between foreign investors and South African citizens "subject to applicable legislation". Section 4 states that the Bill does not preclude the operation of any South African domestic law.

Section 5(3) states that the protection of foreign investment is subject to compliance with applicable domestic laws and international agreements. Section 10 expressly reserves the government's right inter alia to redress "historical, social and economic inequalities", to "promote and preserve cultural heritage and practices and indigenous knowledge", to "foster" beneficiation, to "achieve the progressive realisation of socio-economic rights" and to protect "essential security interests". Section 4(3) states that this may be done, inter alia, through taxation, government subsidies or grants and government procurement processes).

Qualified national treatment protection for foreign investors

Section 6 applies the BITs principle of "national treatment" in favour of foreign investors subject to certain qualifications. For example, it states that -

- foreign investors will not be treated less favourably than local investors "in their business operations that are in like circumstances". This effectively means that foreign investors may be discriminated against if there are no "like circumstances". "Like circumstances" are vaguely defined as a "requirement for an overall examination on a case-by-case basis of all the terms of a foreign investment" - including the effect of the investment on South Africa, the sector and the "aim of any measure relating to foreign investments". This qualification and "case-by-case" analysis is unclear and will lead to interpretational issues and uncertainty;
- the national treatment will only apply to foreign investors and foreign investments "held in accordance with applicable legislation". As the South African government unilaterally controls the content of "applicable legislation", this provides a means to circumvent and neutralise the national treatment principle.

Provisions on security for foreign investments

Section 7 obliges the government to provide –

- Foreign investors with an equal level of security as that provided to other investors but this protection is "subject to available resources and capacity"; and
- "subject to applicable domestic legislation", equal treatment without discrimination to all investors (both local and foreign) if losses or damages are suffered due to war, armed conflict, revolution, a state of national emergency, revolt, insurrection or riot;

- restitution or "appropriate" compensation to all investors (both local and foreign) for loss or damage due to the requisitioning or destruction of property by government "forces or authorities" if such destruction was not caused "in combat action" or required "by the necessity of the situation".

The qualifications to these investor protections are unclear and will result in interpretational issues and provide a means to circumvent and neutralise the protections.

Expropriation and compensation

Section 8 provides that an investment may only be expropriated in accordance with the South African Constitution and in terms of a law of general application for "public purposes or in the public interests under due process of law" and against payment of "just and equitable" compensation (this is the test used in the Constitution). Such compensation must "reflect an equitable balance between the public interests and the interests of those affected".

The market value of the investment is just one factor to be taken into account (others include the current use of the investment, the history of its acquisition and use and the purpose of the expropriation). This is a crucial distinction between the Bill and the usual protections for foreign investors in BITs and under international customary law (which generally require the compensation to be the market value of the investment).

The term "expropriation" is also defined in a restricted manner in section 8 to expressly exclude –

- a measure which has an "incidental or indirect adverse impact on the value of an investment";
- a measure "aimed at protecting or enhancing legitimate public welfare objectives such as public health or safety, environmental protection or state security";
- the issue of compulsory licences in relation to (or the revocation, limitation or creation of) intellectual property rights if this is "consistent with applicable international agreements on intellectual property";
- a measure which deprives an investor of property but where the State does not acquire ownership of the property provided that there is "no permanent destruction of the economic value of the investment" or the investor's "ability to manage, use or control his or her investment in a meaningful way is not unduly impeded".

This definition of expropriation is narrower than the definitions in the BITs and under international customary law. Section 8 also vaguely states that the above acts "are not limited" which compounds the uncertainty caused by the wide wording of these exclusions as it is not clear if other exclusions apply. The effect is that investors (both local and foreign) will not be entitled to compensation under the Bill if the exclusions apply.

No right to refer disputes to international arbitration

The BITs generally permit a foreign investor to refer an investment dispute with a government to international arbitration. This is of particular concern where the local courts and legal system is suspect (which is not the case in South Africa). From a government's perspective, international arbitration is expensive and subjects the government's policies to decision by an unelected outside third party. For example Philip Morris took the Australian government to international arbitration in terms of a BIT with regard to the government's proposed plain cigarette packaging regulations. Awards can be significant (the award in the Occidental/ Ecuador case was USD1.77 billion) and there is usually no right of appeal.

Although arbitrators will apply international law (including the Vienna Convention on the Law of Treaties), there is no binding case precedent in international arbitrations and this may lead to inconsistent and contradictory awards. In the last decade there have been an increasing number of cases of foreign investors referring disputes with governments to international arbitration. In the Foresti case, the South African government's decision to vest all mining rights in the state was subject to international arbitration under the BITs between South Africa and Italy, Belgium and Luxemburg (the case was settled in 2009).

Section 11 provides for a mediation process and also allows an investor to approach a competent court, tribunal or statutory body or refer a dispute to arbitration under the 1965 South Africa Arbitration Act (which is out of date and cumbersome in practice). It is not surprising (given the strong emphasis in the Bill on the South African government's sovereign rights) that there is no provision allowing foreign (or local) investors to refer disputes to international arbitration. This is not prohibited by the Bill but the government's consent would now be required and this is highly unlikely to be granted in practice. This is a major difference between the Bill and the BITs and means that disputes will (unless a BIT or international treaty applies to the contrary) now be determined under South African law and not international law. South Africa's courts and legal system are however independent of government and generally uphold the rule of law. This provides some comfort for foreign investors.

Relationship between Bill and existing BITs and South Africa's other international treaty commitments

The Bill covers foreign "investments" (as defined) made before or after the Bill's commencement (section 4(1)). Section 2 however states that the Bill must be interpreted and applied with due regard to, inter alia, any convention or international agreement to which South Africa is a party. This arguably means that BITs that have not yet been terminated remain binding and override the Bill; i.e. investors from BITs countries will still benefit from the protections provided under the BITs.

Those BITs which have been terminated by the government also continue to apply for between 10 and 20 years after termination (but only with regard to investments existing at termination and not new investments) and will accordingly override the Bill.

Furthermore, South Africa is party to the SADC Protocol on Finance and Investment, which came into effect in April 2010. The Protocol requires signatory states to give investors "'fair and equitable treatment" and pay "prompt, adequate and effective" compensation (which arguably means fair market value) to foreign investors (this term is arguably not limited to investors from SADC member states) in the event of expropriation. It also provides an international arbitration remedy for foreign investors. The conflict between the Bill and South Africa's obligations under the Protocol (which arguably override the Bill) raises interesting issues of interpretation and adds to the uncertainty as to the rights and remedies of foreign investors in South Africa.

South Africa may withdraw from the Protocol on 12 months' notice but, given the importance of SADC membership for South Africa, any such decision would not be taken lightly.

Conclusion

The underlying motivation of the Bill appears more focussed on protecting the government's sovereign rights than the rights of investors. This fits with the government's policy to terminate BITs which potentially allow foreign investors to challenge government policy outside South Africa (as in the Foresti case referred to above). Investor rights and protections in the Bill are subject to qualifications which are often not clear and will lead to interpretational issues and uncertainty. However, on the positive side, the Bill does not impose new obligations on investors and does not implement a new regime to vet and approve all foreign investments (as exists in Canada and Australia).

The Bill has less of an impact on investors from countries which do not have BITs with South Africa (the Bill at least gives them some protection, albeit limited and qualified, that they did not previously have). For investors from countries with a BIT, the government's new policy of terminating BITs is a significant change in the investment framework. When compared to the BITs, the Bill's protections for foreign investment are much more limited and qualified – there is no right to fair and equitable treatment, no right to refer disputes to international arbitration and compensation for expropriation is not guaranteed to be the market value of the investment. The Bill may also be unilaterally amended by the South African government whereas a BIT can only be changed if both governments agree.

It is not clear what effect the termination of the BITs will have in practice but it already appears to have injured South Africa's relations with the European Union and there may well be a chilling effect on investment flows from Europe (especially as investment risk insurance in some countries like Germany is conditional on a BIT being in place). However the existence of a BIT is not necessarily the most important factor in deciding whether or not to invest in a country. Other factors are equally if not more important; for example the availability of business opportunities, the level of return, the costs of doing business, the tax and exchange control regime, governance, labour relations, infrastructure (like reliable sources of electricity) and the regulatory framework in the relevant economic sector (especially the level of regulatory certainty).

BITs give preferential rights to investors from the contracting states when compared to locals and investors from countries which do not have a BIT with South Africa. The Bill is intended to implement a uniform investment protection regime in terms of which locals and all foreigners will be treated equally but is silent on the "most favoured nation" principle referred to above which means that foreign and local investors are not guaranteed protection against more favourable treatment granted to investors from other states (as is currently the case with South Africa's remaining BITs). The continued application of BITs in practice (bearing in mind that most BITs will continue to apply after termination for between 10 and 20 years) however means that a uniform regime will only see fruition once all existing BITs have been terminated and cease to be of effect. This is accordingly a very long term goal and would also require the government to address the issues arising from the SADC Protocol discussed above.

"BITs give preferential rights to investors from the contracting states when compared to locals and investors from countries which do not have a BIT with South Africa."

BIT protections operate reciprocally but in practice much depends on the investment flow between the contracting states. All the BITs which have been terminated thus far have been with European countries. While investment flows between the European Union and South Africa are primarily from the European Union to South Africa, this is not necessarily the case in other countries; especially in Africa where South African business interests are heavily invested. Although Minister Davies has stated that BITs will be phased out, it is unclear how the government will treat BITs with African countries like Zimbabwe and Nigeria (where the BITs primarily protect South African investments) and the BIT with an important trading partner like China. BIT termination is a sensitive issue and its effect on bilateral relations needs to be carefully dealt with to avoid harming South Africa's relationship with its BIT partners (as appears to have been the case with the termination of the European BITs).

It is generally accepted that South Africa needs more foreign direct investment and to attract investment, a clear and certain investment framework is vital. The Bill could be a step in that direction but unfortunately, as currently drafted, its qualifications and exceptions raise several interpretational issues and create uncertainty. The Bill is of course still in draft form and open for public comment. Hopefully the final Bill will balance the legitimate interests of investors with the interests of the government in a manner which actively promotes and maintains South Africa as a "first choice" destination for both local and foreign investors.

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Pieter Steyn is a director of Werksmans Attorneys and specialises in competition/antitrust law. He speaks English, German, French and Afrikaans and is the Vice Chair of the Antitrust Committee of the International Bar Association.

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Pieter has written several articles and spoken and chaired panels at several local and international conferences and seminars on competition law, corporate governance and joint ventures and investment in Africa. He co-wrote the South African chapter of the American Bar Association's treatise on competitor laws outside the USA and the chapter on South African merger control in the 2012 Kluwer Law book on competition law in the BRICS countries. In 2010 and 2013, he participated in a joint American Bar Association/ International Bar Association program for the Competition Commission of India. He has provided pro bono advice for the Jane Goodall Institute South Africa Trust and is a trustee of the Ten Toes Ten Fingers Trust, a trust for the benefit of people with disabilities.

Pieter is the Chairperson of Lex Africa (a network of leading law firms in over 25 African countries) and from 2008 to 2010, he was the head of the Legal Sector of the NEPAD Business Foundation.

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FSC stipulated the Regulations Governing the Sale of Non-Performing Loans

◎Trisha Chang/Emily Hsu

FSC stipulated the Regulations Governing the Sale of Non-Performing Loans on 31 July 2013, effective on the same date. Main points of the Regulations are as follows:

1. Insurance enterprises shall recover non-performing loans themselves; provided that in the following situations, insurance enterprises may sell the non-performing loans:

   (1) the average overdue loan ratio of an insurance enterprise is above 3% at the end of the most recent four quarters; the total amount of secured loans accounts for at least 10% of working capital ratio; the insurance enterprise has failed to improve recovery of non performing loans; and the case has been passed by a resolution of the board of directors/council.

   (2) syndicated loan cases or the case in which the borrower is the same as the borrower in a syndicated loan case which needs to be dealt together with the syndicated loan case.

2. Insurance enterprises' sale of non-performing loans shall stipulate the negative qualification of the legitimate business operator-buyers and the insurance enterprises and the buyers shall agree that inappropriate recovery of non-performing loans is not allowed.

3. Insurance enterprises shall sell the non-performing loans via public auctions and the sale shall be conducted according to the procedure stipulated in these Regulations; in addition, after the resolution on the sale of non-performing loans is passed by the board of directors/council of an insurance enterprise, the related information shall be uploaded to the Market Observation Post System and announced on the company website of such insurance enterprise.

4. Insurance enterprises' sale of non-performing loans shall be conducted in accordance with the content of these Regulations which shall be incorporated into the internal control and internal audit items and the insurance enterprises shall perform internal audit and self assessment according to the Regulations Governing Insurance Enterprises' Implementation of Internal Control and Auditing System.

BAKER BOTTS

INTERNATIONAL TRADE UPDATE - DECEMBER 9, 2013

Agreement on Iran Modifies International Sanctions

On November 23, 2013 the White House announced the outlines of a six-month deal reached between Iran and the five permanent members of the UN Security Council and Germany ("P5+1") intended to curb certain aspects of the Iranian nuclear program in exchange for limited sanctions relief. This diplomatic track opens some very narrow, near-term economic opportunities for companies currently subject to US and EU sanctions. Along with opportunity, however, come the challenges of ensuring continued compliance with the remaining prohibitions and the risk that the suspended measures could be re-imposed should Iran fail to follow through on its commitments.

The initial six-month step encompasses three prongs to address Iran's nuclear program:

- Halting and rolling back some elements of Iran's nuclear program, including the enrichment of uranium over 5 percent, eliminating stockpiles near 20 percent, and freezing further advances in the construction of the Arak reactor.
- Building up additional transparency and intrusive monitoring of Iran's nuclear program by the International Atomic Energy Agency (IAEA), including review of surveillance camera footage, access to facilities, and improved information access.
- Establishment of verification mechanisms by the IAEA and a Joint Commission to be established by the P5+1 and Iran.

In return, the P5+1 have committed to providing limited, temporary, targeted, and reversible relief while maintaining most of the existing sanctions, including those directed at Iran's oil, finance, and banking sectors. Specifically, the P5+1 have committed to:

- Suspend certain sanctions on gold and precious metals, Iran's automotive sector, and Iran's petrochemical exports, potentially providing Iran approximately $1.5 billion in revenue.
- Suspend plans to impose new nuclear-related sanctions during the initial six-month period, if Iran abides by its commitments under this deal, *to the extent permissible within each country's political systems*.
- License aircraft safety-related parts, repairs and inspections inside Iran for certain Iranian airlines.
- Allow purchases of Iranian oil to remain at their currently reduced levels - levels that are 60% less than two years ago. $4.2 billion from these sales will be allowed to be transferred in

installments if, and as, Iran fulfills its commitments. The level of Iranian crude oil sales, however, may not increase in the initial six-month period.
- Allow $400 million in governmental tuition assistance to be transferred from restricted Iranian funds directly to recognized educational institutions in third countries to defray the tuition costs of Iranian students.

The vast majority of United States-based Iranian sanctions (including those implemented under the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 and the Iran Threat Reduction and Syria Human Rights Act of 2012) will continue to exist and be enforced, with relief limited only to the above enumerated items.

From an EU perspective, the European Commission views the achievement of the E3/EU+3 nuclear talks in Geneva and the mutually-agreed long-term comprehensive solution initiated by the Joint Plan of Action as a testimony of the European Union’s attachment to regional and global stability.

In order to ease the EU sanctions on Iran, the EU must adopt a Decision under the Common Foreign and Security Policy and amend Regulation 267/2012. A meeting between the EU foreign ministers has been scheduled in the following weeks to discuss the details, and the French Foreign Minister Laurent Fabius has declared that a partial lifting of the economic sanctions could be expected in December 2013 or January 2014. Similar to the U.S., it is assumed that the relaxation of the sanctions will be done in a limited, targeted and reversible manner. It has been indicated that the EU intends to raise threshold amount for payments to and from Iran that do not require prior authorization, which will ease legitimate dealings with Iran.

The nature and success of diplomatic engagement to date with Iran has been erratic and typically difficult to implement. The likelihood of reversals remains high, and pressure, particularly within the United States Congress, for a swift re-imposition of sanctions will remain strong. Companies subject to U.S. and EU sanctions, who may be interested in pursuing opportunities in Iran for activities that may be permissible under the proposed suspension measures, should proceed cautiously and with contingency plans to swiftly curtail these activities in the event that this diplomatic track stumbles or fails.

How to Get Your Hospital or Health System Transaction Ready in a Challenging Market

12.05.13

By Robert L. Schuchard

Health care providers are competing in a dynamic environment with a host of challenges and opportunities. With the population aging, reimbursement rates declining, and government regulatory efforts expanding, health care providers are struggling to adapt, survive, and succeed. In response to such challenges, hospitals, medical groups, and other health systems are attempting to align their competitive positions and build economies of scale. Affiliations, mergers, and sale transactions will continue to be a significant trend, particularly with help from the enactment of the Patient Protection and Affordable Care Act.

Any organization considering a merger, sale, or affiliation in response to this challenging market environment should prepare diligently. Here we provide an abbreviated guide to how a hospital or health care system can strategically prepare itself for executing a successful transaction in today's dynamic health care market. For the complete expanded version of this guide, click here.

Build a strategic plan - where do you want to go?

A hospital or health care system should identify its well-performing, core assets and its underperforming, non-core assets (which could be medical office buildings, ASCs or commercial real estate) in its strategic plan. Only after an organization has clearly and honestly defined its objectives and strategies for the future, can it determine whether an affiliation, sale or merger will further these objectives.

If the strategic plan calls for the sale of any non-core assets or the sale of the entire system as a going concern, then the plan should also:

- Build a justifiable valuation of the business (as a whole) or of the specific assets being sold;
- Identify and vet potential buyers or partners;
- Explore various deal structures for the proposed transaction (and the accompanying tax implications of each); and
- Identify any regulatory hurdles that may impact the time in which it takes to close a deal.

Assemble your A team

Health care transactions are more complicated than other sale transactions because of the extensive regulatory environment in which they operate and the serious consequences of regulatory non-compliance. Thus, it is critically important to assemble your "A team" of advisors and consultants that have a track record of successfully negotiating and closing health care deals.

Moreover, the tone set by a counsel can also be important to the success of the negotiations. A combative style is not preferred when one is trying to bring entities together. Prior successful dealings are one indicator of counsel's ability to work with others.

Should you create a special committee?

If your board has many members or is composed of directors with conflicting interests in the transaction, then it is often advised to create a special committee with the full authority to negotiate the transaction and to hire deal advisors. A smaller group focused on the deal points would bring the fully negotiated definitive agreement back to the full board for approval. In appointing such a negotiating committee, the aim should be to find experienced businesspersons and forceful representatives of the various constituencies (i.e., the medical staff, administration, employees, etc.).

Spring" cleaning . . . at any time of the year

Before you start looking for prospective buyers or partners, make sure you do a thorough pre-sale assessment of your business to identify any regulatory, legal or business deficiencies that will likely arise in the buyer's due diligence so that you can get ahead of the curve and quickly address such deficiencies or create a plan to resolve them.

Let's make a deal

A hospital or health care system looking for an affiliation partner will find a variety of interested entities, and it will need to understand and sort through the strengths and weaknesses of each.

The next step is to consider the type of deal structure to pursue with a prospective buyer or partner. Three main types of transactions are:

- Affiliation transaction where a member (or members) of a nonprofit corporation relinquishes its membership in the nonprofit to another member (usually a nonprofit health system parent).
- Stock sale transaction (a structure usually preferred by sellers), where the company's stockholders sell their equity interest in the company to the buyer and, as a result, all of the assets and liabilities remain part of the company—the company simply has changed owners.
- Asset sale transaction (a structure usually preferred by buyers), where a buyer will "cherry pick" and acquire certain key assets of the seller and will only assume certain liabilities of the seller—unwanted assets and liabilities are left with the seller to manage and liquidate after the closing. This structure is also favored by the buyer because it gives the ability of the buyer to receive a "step up" in the basis in the

assets, which is not usually the case in a typical stock sale.

Each transaction comes with unique issues, so seek the advice of your advisors. Finally, it is important to identify the regulatory hurdles you'll face throughout the transaction process. If the buyer proposes an earnout or other contingent payment (based on future performance of the business), then such arrangements should be carefully scrutinized to ensure that such arrangements do not run afoul of regulatory concerns, such as the state and federal anti-kickback statutes.

Timing is everything

Set a reasonably aggressive timeline for completing the sale and try to stick with it. The longer the "deal period," the more time there is for the surfacing of tangential issues or questions that may distract the parties or disrupt productive discussions. For instance, a seller may start to lose key managers who take other jobs, key physicians may start to refer elsewhere (resulting in the loss of business), or the senior management team can lose focus on running the business by prioritizing the deal over running the operations. Set a reasonable timeline and get all parties, including each party's advisors, to agree to use their best efforts to meet the dates in the timeline.

Delivering the goods — the due diligence process

Before the parties engage in the due diligence process, they will need to enter into a confidentiality agreement protecting the information shared between the parties. Often, such confidentiality agreements will contain other provisions, including a buyer's agreement not to solicit your employees for a certain period of time (so-called "no raid" provision). At this time, the parties should also decide whether they want to set forth the principal terms of the deal in a non-binding letter of intent or rather move to definitive agreements. Early in the process, the selling party needs to review a due diligence request list so the magnitude of the project is clear.

We suggest starting with the following:

- Gather all of the contracts and amendments. The contracts aren't always neatly organized and located in one location in the hospital. Find the contracts, organize them, and put them in one place.
- Make sure all contracts with referral sources are up to date, including fully executed and not expired.
- Gather all licenses, permits, and accreditations, and make sure they are not expired.
- Identify and address significant liabilities on retirement and benefit plans, since a buyer will focus on the financial status of such plans.
- Catalogue any regulatory deficiencies for disclosure and, to the extent you can, plans of corrections or other corrective action taken.

Most buyers will not assume contracts they have not reviewed for fear of assuming potential legal issues. Most transactions today will have a closing condition tied to amending contracts to more closely align with applicable regulatory requirements.

Your staff need support too

Organize your due diligence efforts. Appoint a gate keeper for all requests and require the buyer to identify one person to make the due diligence requests on behalf of the buyer—otherwise there is no prioritization of information requests and duplicate requests are commonplace.

All requests for information should be in writing and responses documented and catalogued. Verbal interviews will be a part of the process, but all document requests should be in writing or at least confirmed in writing.

Reoccurring contract diligence issues we see include:

- Not providing the most current version of a contract that has been amended;
- Not being able to find a contract—so the terms cannot be confirmed by the buyer;
- Not having a contract, where an ongoing business relationship is evidenced by other documents, such as a review of payments reflected on an IRS Form 1099;
- Having more than one contract with a party, but only providing one; or
- Providing expired licenses, without explaining where the organization is in the renewal process or providing the new license.

Conclusion

If you are thinking about a deal, prepare diligently. Dust off the strategic plan and make sure you know why a deal makes sense and what your organization needs out of a deal. Assemble a strong team of advisors with a proven track record of success. Organize your corporate records and get your corporate house and documents in order. Be ready to respond promptly and accurately to due diligence requests. Figure out how to support your staff with additional resources. Being prepared will allow your management team to keep the business intact and your team to stay focused on successfully completing the deal.

Disclaimer

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Customs Alert
9 December 2013

See note below about Hogan Lovells

Landmark WTO Trade Facilitation agreement promises to streamline customs clearance procedures around the world

On Saturday, 7 December 2013, the Ninth Ministerial Conference of the World Trade Organization (WTO) announced the successful conclusion of an agreement on Trade Facilitation (Agreement) — an agreement that is intended to streamline customs clearance procedures around the world by imposing new multilateral disciplines on customs procedures in all member countries. The Agreement imposes basic globally applicable principles for transparency, due process, and reasonableness in the development and implementation of customs clearance requirements.

This Trade Facilitation agreement is the first new agreement applicable to all WTO members since the formation of the WTO in 1995. Trade leaders and business representatives around the world have lauded the Agreement and stated it should lead to substantial gains in wealth and job formation for developed and developing countries alike. U.S. Trade Representative Michael Froman estimates that the potential cost reductions to businesses arising from the Agreement will be as much as 10 percent for developed countries and even more (15 percent) for developing countries. Estimates of the total value of such cost reductions for global GDP are about US$1 trillion, and earlier this year, the International Chamber of Commerce estimated that a successful Trade Facilitation agreement would result in an additional 21 million jobs worldwide, with developing countries gaining more than 18 million jobs and developed countries increasing their workforce by three million.[1]

Summary of Agreement

Key provisions of the Trade Facilitation agreement include:

- **Transparency** — WTO Member States are committed to publishing all importation, exportation, and transit procedures for points of entry; applied rates of duties and taxes; fees and charges by government agencies associated with importation and exportation; rules for the classification and valuation of products for customs purposes; penalty provisions for breach of customs procedures; procedures for appealing customs decisions; agreements with any countries relating to importation, exportation, and transit; and quota administration procedures. Member states further commit to make much of this information available on the Internet, where possible, in one of the official languages of the WTO.

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- **Public comments** — Member states are committed to providing an opportunity for traders and other interested parties to comment on proposed regulations related to the movement, release, and clearance of goods prior to the implementation of such rules.

- **Advance classification and country of origin rulings** — Member States are committed to issue advance rulings, upon request, regarding the classification and origin of goods to be imported into their territory and to make such advance rulings available to the public, taking into the account the need to protect commercially confidential information. Member states are also committed to provide any person to whom an administrative decision has been issued a method of appealing such decision, either by administrative or judicial review.
- **Transparency in inspection, detention, and audits** — Member states are committed to bringing greater transparency to their procedures for inspection, detention, and audits of goods crossing their borders.

- **Authorized operators** – Member states are committed to providing additional trade facilitation measures, such as low documentary and data requirements, low rates of inspection, and rapid release times, to authorized operators (operators with a strong record of compliance, internal controls, financial solvency, and supply chain security).

- **Disciplines on fees and charges** — Member States committed to keeping fees and charges (other than export or import duties and taxes) limited to the cost of carrying out the activities associated with importation or exportation.

- **Disciplines on penalty actions** — Member states are committed to imposing penalties for the breach of customs rules only upon responsible persons and to provide a written explanation of the grounds for imposing such penalties; member states are also encouraged to accept and offer mitigation for voluntary self-disclosures of customs breaches.

- **Streamlined entry procedures, including electronic entry** — Member states are committed to establishing procedures for pre-processing import documentation; for electronic payment of duties, taxes, fees and charges; release of goods under bond; and expedited import and export procedures for authorized operators.

- **Free transit of goods through member territories** — Member states are committed to allowing the free transit of goods through their territory and to treat goods that have traversed the territory of third-party states on a non-discriminatory basis.

- **Information sharing** — Member states are encouraged to share information on best practices in managing customs compliance and to exchange information for the purpose of verifying declarations, where there are reasonable grounds to doubt the truth or accuracy of such declarations.

The Agreement is expected to enter into force by 2015 and, upon entry into force, member states will be obligated to adopt implementing legislation in accordance with the Agreement's provisions. The Agreement also provides for the formation of an international Committee on Trade Facilitation and requires member states to form national-level committees to implement and coordinate its provision.

Administration officials expect that implementation of the Agreement can be accomplished in the United States entirely by administrative rulemaking without requiring additional legislation.

[1] As reported by the USCIB, http://www.uscib.org/index.asp?documentID=4646.

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McKenna Long & Aldridge LLP

Government Contracts Advisory

DECEMBER 10, 2013

Proposed Rule Would Expand Counterfeit Parts Regime

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On December 3, 2013, the Federal Acquisition Regulation (“FAR”) Council issued a proposed rule that would revise the FAR to require contractors to comply with higher-level quality standards in acquisitions where there is a high risk of counterfeits and the potential impact of counterfeits is significant. 78 Fed. Reg. 72620. This new rule would be in addition to the electronic counterfeit parts detection and avoidance requirements set forth in the Department of Defense (“DOD”) May 16, 2013 proposed DOD FAR Supplement (“DFARS”) rule implementing Section 818 of the fiscal year 2012 National Defense Authorization Act (“Section 818”) (which we summarized here http://www.mckennalong.com/publications-advisories-3394.html). Notably, the proposed amendments to the FAR, which do not implement any aspect of Section 818, would expand the government’s counterfeit parts regime beyond electronic parts and to agencies other than DOD. A copy of the proposed rule is available here https://www.federalregister.gov/articles/2013/12/03/2013-28930/federal-acquisition-regulation-higher-level-contract-quality-requirements.

As proposed, the new rule would require contracting officers to assess the risk of counterfeit parts during the procurement planning stage, both in terms of likelihood and potential impact of counterfeits, and where the perceived risk is high, impose higher-level quality standards in the solicitation and resultant contract. According to the rule, higher-level quality standards may be appropriate in contracts for complex or critical items; contracts that require control of design, work operations, in-process controls, testing and inspection; or contracts that require attention to organization, planning, work instructions, documentation control and advanced metrology. In such contracts, additional quality standards should be implemented through incorporation of a revised version of FAR 52.246-11, Higher-Level Contract Quality Requirement, which would no longer allow offerors to choose a standard, but instead would require the contracting officer to insert the applicable standard.

When the prime contract includes higher-level quality standards, the new rule would also require that contractors ensure that subcontractors meet these higher standards. Contractor implementation of these quality standards would be assessed by the Defense Contract Management Agency as part of the contractor purchasing system review process.

The proposed rule provides two new examples of higher-level quality standards specific to counterfeit parts: SAE Aerospace Standard 5553, “Fraudulent/Counterfeit Electronic Parts; Avoidance, Detection, Mitigation, and Disposition” (“AS5553”) and Aerospace Standard 6174, “Counterfeit Materiel; Assuring Acquisition of Authentic and Conforming Materiel” (“AS6174”). Many of the requirements of AS5553 should be familiar to contractors, as DOD adopted it in August 2009 and AS5553 forms the basis of many aspects of Section 818, such as the preference for sourcing items from the original manufacturer or an authorized dealer. AS6174, which was published in May 2012 and adopted by DOD on June 17, 2013, is intended to address counterfeit material other than electronic parts. Like AS5553, AS6174 creates a preference for purchase from the original manufacturer and requires additional documentation and testing when items are sourced from non-authorized dealers.

Contractors should be aware that this proposed rule would create yet another purchasing system requirement, providing an additional basis for potential system disapprovals and government withholds. In addition, the proposed rule provides little guidance to contracting officers or contractors on when it would be appropriate to impose higher-level quality standards. For example, the rule does not identify the types of materials that, like electronic parts, are more likely to be counterfeit. Instead, the rule would leave it to agencies to establish appropriate procedures, creating the potential for differing implementations at different agencies.

This rule is the second of three pending rules relating to counterfeit parts. As noted above, DOD implemented portions of Section 818 in its May 16, 2013 proposed DFARS rule, entitled “Detection and Avoidance of Counterfeit Electronic

Parts. Comments were submitted to this proposed DFARS rule on uly 15, 2013 and, as of November 20, 2013, the Defense Acquisition Regulations Council has approved a draft final rule which currently is being processed and should be issued in the coming months. The third rule, FAR Case 2013-002, Expanded Reporting of Nonconforming Supplies, is currently being drafted. Contractors should expect these and additional regulatory and legislative changes to alter the counterfeit parts compliance landscape in 2014 and beyond.