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►BAKER BOTTS Represents Kinder Morgan Energy Partners (KMP) and Kinder Morgan Management (KMR) in $70 Billion Purchase of KMP, KMR and El Paso Pipeline Partners (EPB) by Kinder Morgan, Inc. (KMI)
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LEADING REAL ESTATE FINANCING DUO JOINS HOGAN LOVELLS

LONDON, 10 July 2014 - Hogan Lovells has recruited real estate finance partners Andrew Flemming and Jo Solomon to join the London finance practice. Andrew and Jo join from Berwin Leighton Paisner and bring a wealth of real estate finance experience with them.

Andrew's transactional experience includes advising Barclays Capital on a £660m loan-on-loan to Maybourne Finance Limited and advising Lloyds Banking Group on a £266m investment facility to Peel Holdings to refinance a large portfolio of UK regional properties, which involved acting for a club of five lenders.

Jo's deals include advising on the St. David's Limited Partnership, a joint venture between Land Securities Group PLC and Capital Shopping Centres PLC, to refinance the cost of acquisition and development of the St David's and St David's 2 shopping centres in Cardiff; and advising Blackstone on the development finance provided by Lloyds TSB Bank Plc in relation to the development of building 6 at Chiswick Park.

Commenting on their arrival, Sharon Lewis, global head of Hogan Lovells finance practice, said:

"First class strength in depth in a wide breadth of different banking specialisations is vital to maintaining our position as a leading adviser to banks and other key financial institutions so continuing to grow our finance practice globally is a key strategic priority for the firm. Andrew and Jo's expertise is a natural fit with our banking and real estate practices. I am delighted that they will be joining our team".

Andrew said:

"Hogan Lovells has a thriving global finance practice with numerous high profile clients across a range of sectors and a truly collaborative culture. I am looking forward to working closely with the banking and real estate teams to continue to build the strength and depth of Hogan Lovells' real estate finance practice".

Jo added:

"Hogan Lovells' international platform is a significant benefit to global borrowers and lenders in being able to offer them a seamless international service that few other firms can provide. I'm delighted to joining a firm with such a stellar real estate reputation and with such strong expertise across a number of different practice areas that are needed to carry out complex, high value real estate finance deals."

For additional information visit www.hoganlovells.com

MCKENNA LONG & ALDRIDGE ADDS DISTINGUISHED TRANSPORTATION AND AVIATION LITIGATOR IN NEW YORK

Diane Westwood Wilson brings noted expertise to multijurisdictional litigations, arbitrations and aviation product liability cases

NEW YORK, NY August 6, 2014: Diane Westwood Wilson joins McKenna Long & Aldridge LLP's Aviation and Transportation practice as a partner in New York. A Chambers-ranked, "brilliant" aviation lawyer with broad commercial ligation and arbitration experience, Wilson represents aviation industry and insurer interests internationally in complex aerospace, aviation, product liability and construction disputes.

Recognized in The International Who's Who of Aviation Lawyers, Wilson's expansive, multijurisdictional experience spans from the EL AL Israel Airlines v. Tseng landmark U.S. Supreme Court treaty case to dismissal of a $150M product liability action against a Dutch satellite manufacturer in Astrium v. TRW, to an enforcement of arbitration clause in a Nigerian contract in Travelport v. Bellview Airlines. She is known among market commentators as a "very strong strategist and tactician."

"Diane's practice is a perfect complement to McKenna's world leading aviation and transportation law team and expands our on-the-ground presence in New York," said Dane Jaques, head of the firm's Aviation and Transportation practice. "Our legal experience coupled with our knowledge of technical aviation issues enables us to advise clients successfully on how to structure business deals, avoid and manage litigation and comply with transportation regulations, statutes and treaty requirements, as well as respond to accidents and major incidents."

McKenna's Aviation and Transportation Practice - McKenna Long represents clients in all sectors of the aviation industry, including airlines, aircraft and component manufacturers, airports, charter and fractional ownership operators, corporate flight departments, fixed-base operators, maintenance repair and overhaul facilities, air traffic control service providers, aircraft ground handling service providers and others. The firm handles National Transportation Safety Board (NTSB) accident and incident investigations, Federal Aviation Administration (FAA) and European Aviation Safety Administration (EASA) regulatory matters, personal injury and wrongful death litigation, employment litigation, product liability litigation, contracts, transactions, risk counseling, insurance and international matters.

For additional information visit www.mckennalong.com

SIMPSON GRIERSON APPOINTS NEW SENIOR ASSOCIATE

WELLINGTON, New Zealand - 04 Aug 2014: Simpson Grierson has strengthened its Wellington local government and environment team with the appointment of Lizzy Wiessing as senior associate.

Lizzy Wiessing

Lizzy has a particular interest in rating and valuation law, and expertise in local government funding, judicial review litigation, and district planning processes and resolution of appeals. She started her career in local government as a strategic policy analyst at the Western Bay of Plenty District Council.

For additional information visit www.simpsongrierson.com

SYCIP LAW ANNOUNCES NEW DEPARTMENT HEADS

Manilla, July 25, 2014: SyCip Salazar Hernandez & Gatmaitan (SyCipLaw) is pleased to announce the appointment of Rocky Alejandro L. Reyes as the new head of the firm's Special Projects Department and of Luisito V. Liban as the new head of the firm's Human Resource Practice Group.

Rocky Alejandro L. Reyes

Mr. Reyes was appointed head of the Special Projects Department after the retirement of Andres B. Sta. Maria, Jr. The department undertakes the firm's project and transactional work, including mergers and acquisitions, privatization, power and energy, mining and natural resources, infrastructure, construction and real estate, telecommunications, aviation, shipping and transportation.

Mr. Reyes specializes in taxation, project finance, construction, leveraged leases and infrastructure projects. Mr. Reyes acted as legal advisor in connection with the drafting of the proposed implementing rules and regulations for the revised Build-Operate-Transfer (BOT) Law of the Philippines and had advised on the drafting of proposed legislation to create the Private Sector Infrastructure Development Fund. He is involved in various private power and other infrastructure projects in the Philippines and other Asian countries.

Luisito V. Liban

Mr. Liban takes over the Human Resource Practice Group from Lozano A. Tan who continues to serve as head of the firm's Personnel Committee. Concurrently, Mr. Liban sits on the Executive Committee.

Mr. Liban specializes in labor and employment, litigation, and special projects. His transactions include the acquisition of Mirant's power plant assets in the Philippines by Crimson Power and the merger of Sanofi-Synthelabo Philippines, Inc. and Aventis Philippines. He sits as director of various corporations and is a member of the International Bar Association.

For additional information visit www.syciplaw.com

CAREY

ADVISES GNL QUINTERO IN US $100 MILLION ISSUANCE AND SALE OF NOTES

SANTIAGO, August 2014 - Carey acted as local counsel to GNL Quintero, one of the leading LNG terminals in Chile for the reception, unloading, storage and regasification of liquid natural gas, in connection with the issuance and sale of USD1,100 million, at 4.634% Notes due 2029.

Carey advised GNL Quintero through a team led by partners Jorge Carey and Diego Peralta, and associates Elena Yubero, Patricia Silberman, Mariana Gómez, Mariana Tupper, Sebastián Monge and Camila Noreña.

For additional information visit www.carey.cl

CLAYTON UTZ

ADVISES NIDO PETROLEUM LIMITED ON AU$120 MILLION TAKEOVER

PERTH, 4 August 2014 - Clayton Utz is advising ASX-listed Nido Petroleum Limited (Nido) in connection with the A$120 million recommended off market conditional cash offer by BCP Energy International Pte. Ltd (BCPE), a wholly owned subsidiary of The Bangchak Petroleum Pubic Company Limited, a company listed on the Stock Exchange of Thailand.

The offer follows BCPE's agreement to acquire a relevant interest in Nido of approximately 19.66 per cent from Petroleum International Investment Corporation, a major shareholder of Nido.

Clayton Utz Perth Corporate partner Mark Paganin and senior associate James Clyne led the Clayton Utz team.

Nido is a South East Asian focused oil and gas exploration and production company whose primary focus is in the North West Palawan Basin in the Philippines and the Penyu and West Natuna basins in Indonesia.

For additional information visit www.claytonutz.com

ALL EN DE & B REA

ASSISTS ENTRAVISION IN US$15 MILLION ACQUISITION OF PULPO MEDIA

BUENOS AIRES, 24 July 2014 - Argentina's Allende & Brea Abogados assisted California-based media company Entravision in the Argentine leg of its US$15 million acquisition of digital advertising company Pulpo Media.

As well as paying US$15 million in cash for Pulpo, Entravision, which owns Spanish-speaking TV and radio stations across the US and Mexico, will also pay up to US$3 million in additional earn-out payments, depending on the advertising company's performance in the coming years. While the global deal was structured as a share purchase agreement, the Argentine leg included a direct quota purchase agreement for 40 per cent of the Argentine subsidiary.

Allende & Brea Partner Valeriano Guevara Lynch and associate Laura Kurlat acted in the transaction.

For additional information visit www.allendebrea.com

BRIGARD & URRUTIA

ACTS FOR SHIKUN & BINUI-GRODCO IN US$932 MILLION HIGHWAY CONSTRUCTION CONCESSION

BOGOTA, 31 July 2014 - Colombia's Brigard & Urrutia Abogados has helped Israeli-Colombian construction consortium Shikun & Binui-Grodco win a US$932 million concession to build a highway on the eastern outskirts of Bogotá.

The country's infrastructure agency, ANI, handed Shikun & Binui-Grodco the project on 23 July. Shikun & Binui-Grodco will now handle the construction of the tolled 153-kilometre north-south highway which will be located east of Bogotá in the central department of Cundinamarca.

The concession is the sixth to be awarded under the government's fourth-generation concession toll road programme. Kicked off in October last year, the programme seeks to lay down road totalling 8,000 kilometres through a series of public-private partnerships, which are to be awarded over the next seven years.

Brigard & Urrutia Abogados Partner Carlos Umaña and associates Omar Andrés Martínez, Julián Parra and Juan Martín Estrada acted in the transaction.

For additional information visit www.bu.com.co

GIDE

COUNSEL TO BNP PARIBAS CARDIF ON ACQUISITION OF ICARE

PARIS, 29 July 2014 - Gide is advising BNP Paribas Cardif on the agreement entered into with Europ Assistance Holding S.A. for the acquisition of 100% of Icare SA, the parent company of the Icare group.

The acquisition remains subject to approval from the French Competition and Prudential Supervision & Resolution Authorities.

Icare is a major player in marketing and managing insurance cover and services for the automotive market in France and a pioneer in mechanical breakdown warranties and maintenance contracts in France.

Gide legal counsel for BNP Paribas Cardif: Jean-Gabriel Flandrois (partner) and Baba Hady Thiam on corporate aspects, Richard Ghueldre (partner) and Sophie Creusvaux on insurance aspects and Emmanuel Reille (partner) on competition aspects.

Group Legal Department, BNP Paribas - Stéphane Martin

For additional information visit www.gide.com

NAUTADUTILH

ASSISTS PRIVATE EQUITY HOUSE CHARTERHOUSE CAPITAL PARTNERS IN SALE OF BUREAU VAN DIK ELECTRONIC PUBLISHING TO EQT VI

Founded in 1991, Amsterdam based BvD is a leading global publisher of financial and commercial information, e.g. Bankscope, Amadeus, Mint, Zephir and Orbis. BvD has over 650 employees operating from 33 offices across Europe, the Americas and the Asia Pacific region.

Charterhouse will retain a minority stake in BvD. Goldman Sachs Principal Investment Area will acquire a minority stake in the company. The transaction was signed on 28 July. Closing of the transaction is expected in September 2014, subject to customary anti-trust approvals.

NautaDutilh's core team consists of Joost den Engelsman, Jeroen Preller, Wendy Guépin, Roderik de Roo, Maarten Buma, Renate Huizer, Lex Klapwijk, Kathrin Bungenberg for the Netherlands, and Dirk van Gerven, Patrick Geeraert and Karel Nijs for Belgium.

For additional information visit www.nautadutilh.com

BAKER BOTTS

REPRESENTS KINDER MORGAN ENERGY PARTNERS AND KINDER MORGAN MANAGEMENT IN $70 BILLION PURCHASE OF KMP, KMR AND EL PASO PIPELINE PARTNERS

HOUSTON, August 10, 2014 -- Earlier today, Kinder Morgan, Inc. (NYSE: KMI) announced its intention to acquire by merger of all of the outstanding equity securities of Kinder Morgan Energy Partners, L.P. (NYSE: KMP), Kinder Morgan Management, LLC (NYSE: KMR) and El Paso Pipeline Partners, L.P. (NYSE:EPB), all of which are controlled by KMI. The proposed mergers, the consideration of which is valued at approximately $70 billion in the aggregate, collectively represent the largest energy M&A transaction since the merger of Exxon and Mobil. The combined entity will be the largest energy infrastructure company in North America and the third largest energy company overall with an estimated enterprise value of approximately $140 billion.

Baker Botts represented the Audit and Conflicts Committee of Kinder Morgan Energy Partners and the Special Committee of Kinder Morgan Management.

Baker Botts Team includes involved: Corporate: Joshua Davidson (Partner, Houston); Tull Florey (Partner, Houston); Jeremy Moore (Senior Associate, Houston); James Marshall (Senior Associate, Houston); Laura Katherine Mann (Associate, Houston); Chelsie Gonzales (Associate, Houston); Sarah McDermand (Associate, Houston); Tax: Michael Bresson (Partner, Houston); Don Lonczak (Partner, Washington); Chuck Campbell (Special Counsel, Houston); Litigation: David Sterling (Partner, Houston); Danny David (Partner, Houston).

For additional information visit www.bakerbotts.com

HOGAN LOVELLS

ADVISES NEXTNAY IN US$70 MILLION FINANCING

MCLEAN, VA, 25 July 2014 – Hogan Lovells today announced that it advised NextNav LLC ("NextNav") on its US$70 million Series D funding led by venture capital firms New Enterprise Associates and Oak Investment Partners, along with Columbia Capital, Telcom Ventures, and Goldman Sachs Investment Partners. The deal is 2014's largest venture capital funding to date for a D.C.-area tech company.

NextNav, launched by former XM Satellite Radio CEO Gary Parsons, is a leading provider of location services for indoor and urban environments. The financing will be used to extend the commercialization of NextNav's revolutionary Metropolitan Beacon System ("MBS") positioning network. MBS provides reliable, accurate horizontal and vertical location services inside buildings and in urban areas where satellite-based GPS signals aren't available or reliable.

NextNav is deploying its MBS network much like a cellular network, resulting in wide-area coverage that delivers its location services to every building within its network footprint.

Corporate partner Richard Becker led the Hogan Lovells team with assistance from Corporate partner Randy Segal, Tax partner Shawna Tunnell, Antitrust partner Michele Harrington, and Corporate associate Gabrielle Witt.

For more information visit www.hoganlovells.com

MUNIZ

ASSISTS BBVA AND CITIBANK IN EDELNOR US$42 MILLION MULTI-LOAN

LIMA, 25 July 2014 - Peruvian power distributor Edelnor obtained three credit facilities worth a combined US$42 million. The deal saw Muñiz Ramírez Pérez-Taiman & Olaya counsel BBVA and Citibank while Scotiabank relied on in-house counsel. BBVA provided a loan worth US$13 million, Citibank, US$11 million and Scotiabank, US$18 million.

The facilities' structure allows the company to borrow at any time and with a fixed rate of interest. Proceeds will be used for general corporate purposes.

Edelnor provides power to over 1 million Peruvians.

Counsel to BBVA* and Citibank** Muñiz Ramírez Pérez-Taiman & Olaya Partner Sergio Oquendo* and associate Mercedes Fernandez* and partner Andrés Kuan Veng** and associate Guillermo Flores**

For additional information visit www.munizlaw.com.pe

TILLEKE & GIBBINS

ADVISES IN LANDMARK WIN IN LAFARGE DOMAIN NAME DISPUTE

August 2, 2014: On April 22, the People's Court of the city of Da Nang issued a decision ordering the revocation of the "lafarge.com.vn" domain name registered by a Vietnamese individual, giving Lafarge S.A. of France a 10-day "sunrise" period to register the domain name itself. This brought to a conclusion a five-year battle over cybersquatting and set a precedent for domain name cases in Vietnam.

In a report on the settlement, Vietnam's national domain-name administration agency VNNIC stated, "This is the most prominent court settlement of a domain name dispute so far, and can be seen as a model for judicial bodies to apply for the settlement of disputes going forward."

Tilleke & Gibbins advised Lafarge on the case.

For additional information visit www.tilleke.com

MCKENNA LONG & ALDRIDGE

SCORES COMPLETE VICTORY FOR KBR IN $55M CASE

27 June, 2014 -- Last week, MLA achieved a complete victory for KBR in an important $55M case before the Armed Services Board of Contract Appeals (ASBCA). The case involved KBR's contract to provide logistical support services—including feeding the troops—during the Iraq War from 2003 to 2006. The Government asserted that KBR and its subcontractors improperly used private security contractors (PSCs) in support of their work in Iraq and that the Government was not responsible for the costs allegedly associated with that use.

In 2013, a team composed of Herb Fenster, Ray Biagini, Jason Workmaster, Dan Russell, Alex Sarria, and John Sorrenti tried the case before the ASBCA for 24 days. Among the numerous witnesses were four Army general officers—including General Ricardo Sanchez, the commanding general in Iraq from mid-2003 to mid-2004. The testimony at trial overwhelmingly supported KBR's contention that the use of PSCs was absolutely necessary in order to accomplish the mission of supporting the troops, due to the Government's failure to provide adequate force protection, and that the Army was aware of that use at the time. The evidence also demonstrated that the Government's claim against KBR was politically motivated and that, before asserting its claim, the Government had done nothing to determine whether it had met its force protection obligations under the contract.

In its decision in KBR's favor, the ASBCA agreed entirely with KBR that the Government's claim was devoid of merit. Specifically, the ASBCA found: (1) that the Government waited too long to properly assert its claim against KBR; (2) that KBR's contract did not prohibit the use of PSCs in general or require case-by-case permission to use PSCs; (3) that, because the Army in the field lacked the necessary resources to meet the Government's force protection obligations, KBR and its subcontractors reasonably chose to use PSCs; and (4) that the amount allegedly charged for that use was reasonable.

In reaching this decision, the ASBCA rejected the Army's argument that, when the Government failed to provide adequate force protection, KBR and its subcontractors should simply have waited to perform their mission. In this regard, the ASBCA stated: "Fortunately for the troops that depended on KBR and its subcontractors for their life-support and other logistical support services, KBR and its subcontractors did not adopt the attitude now suggested by the government as their only remedy for the government's failures to provide force protection."

The fact that MLA sought $55M and that our client was awarded every penny makes this a tremendous victory and vindication for KBR.

For additional information visit www.mckennalong.com

SANTAMARINA Y STETA

ASSISTS GEO WITH US$1.5 BILLION RESTRUCTURING PLAN

MEXICO CITY April, 2014: Santamarina y Steta is assisting Mexican homebuilder GEO restructure over US$1.5 billion worth of debt, after reaching a deal with creditors which provides an important template for other companies in Mexico's struggling homebuilding industry.

GEO and 15 of its subsidiaries announced on 20 March that they had filed for a pre-packaged bankruptcy proceeding, putting forward a restructuring plan for 50 per cent of the homebuilder's outstanding indebtedness.

GEO filed for bankruptcy in April last year and began negotiations with creditors in September after running into difficulty because of the challenging macro-economic environment in which financing has been scarce for Mexico's homebuilding industry in response to a change in government housing policy to prioritise vertical development over urban sprawl. Other developers such as Urbi and Homex have also filed for bankruptcy.

The deal also allows for a new equity injection, which is open to both third parties and existing shareholders. Backstop commitments were negotiated from bondholders to make the injection themselves in the event that a third party or shareholder is unable to be found over the course of the restructuring plan.

GEO waited to file its plan for the approval of amendments to Mexico's bankruptcy law, which were rolled out as part of wider financial reform at the beginning of 2014. The new legislation makes it easier for companies to receive third-party financing during restructuring proceedings, which will allow GEO to acquire Debtor In Possession (DIP) financing in order to continue running as the new funding is given priority over existing debt commitments. The law has also enabled GEO to make a filing for both the company and its subsidiaries as a group, rather than individually.

Local counsel for Corporacion GEO - Santamarina y Steta was led by Partners Fernando del Castillo and Alfonso Castro, and associates Adriana Padilla, Yoare Heredia, Ana Paula Buchanan and Camilo Vázquez in Mexico City.

For additional information visit www.s-s.mx

TOZZINIFREIRE

ASSISTS IBM IN ACQUISITION OF SCOPUS TECNOLOGIA IT SALE

SAO PALO, 07 August 2014 - TozziniFreire Advogados has helped the Brazilian arm of US technology company IBM acquire software support and maintenance company Scopus Tecnologia from Brazilian bank Bradesco. The transaction closed on 29 July. The deal's value has not been made public.

"In addition to the acquisition of the company, IBM also negotiated a long term service agreement with the entire Bradesco group," says TozziniFreire Advogados partner Marcio Mello Silva Batista. Under the partnership agreement, IBM will continue to provide the bank with Scopus's IT support services. It is IBM Brazil's first deal in the country – until now it had only been involved in acquisitions by the global IBM group.

CADE, Brazil's antitrust authority, is yet to approve the sale.

Counsel to IBM In-house counsel - Carlos Virgiliis and Fernanda Fauze Carlos

TozziniFreire Advogados Partners Marcio Mello Silva Baptista and Maria Beatriz Bueno Kowalewski, and associates Silvia Castro Cunha Zono and Jacques Abi Ghosn acted for IBM.

For additional information visit www.tozzinifreire.com.br

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- **PRAC @ PDAC** Toronto Conference March 3, 2015

- **PRAC 57th International Conference**
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Hosted by Clayton Utz
April 18—21, 2015

- **PRAC @ INTA** San Diego May 3, 2015

- **PRAC @ IPBA** Hong Kong May 7, 2015

- **PRAC @ IBA** Vienna October 5, 2015

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CLAYTON UTZ

08 August 2014

Overhaul of Queensland's planning laws takes next step with release of draft Bills

The Queensland Government's overhaul of the State's planning laws has taken an important step with the release of consultation drafts of the Planning and Development Bill and the Planning and Environment Court Bill for public comment.

Under this proposal, the current Sustainable Planning Act 2009 would be repealed and replaced. The Planning and Environment Court would continue, but have its own separate legislation.

The terminology for many of planning concepts would change, and a number of processes deregulated.

Importantly, the draft Bills would remove:

- State planning regulatory provisions and standard planning scheme provisions;
- the EIS process;
- designations of land for community infrastructure by a local government; and
- compliance assessment.

For **local government**, these changes would mean new assessment and approval processes, new planning instruments, and some new compliance obligations.

For **developers**, the key issues will be the whole of the assessment process, and the transitional arrangements for any applications under way.

You can get more information in our Planning and Development Bill Briefing Note.

Submissions are due by **26 September 2014**. The Government will consider them and then release final versions of the Bills, which could be later this year.

If you'd like to understand the full impact of these proposals on your organisation, or would like help in writing a submission, please contact us.

You might also be interested in...

- Major changes for the Queensland resources sector: Regional Planning Interests Act commences today
- Regional Planning Interests Bill passed
- Queensland's new generation Regional Plans and Review of Strategic Cropping Land

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TELECOMMUNICATIONS/INFORMATION TECHNOLOGY

Brazil: Public Notice for New 4G Auction

On July 17th, the Brazilian National Telecommunications Agency (Agência Nacional de Telecomunicações – ANATEL) approved the draft of the public bid notice relating to the 700 MHz frequency for fourth generation mobile services (4G).

The minimum bid prices will be disclosed only with the publication of the final version of the public notice, whose draft is still being evaluated by the Federal Audit Court (Tribunal de Contas da União – TCU). The document will also set the maximum amount that bid winners will have to spend to “clean” the 700 MHz frequency, currently occupied by analogue broadcasting signals.

The TCU will also establish the amounts for mitigating any interference in the signals and for the purchase of digital TV converters for approximately 13 million households listed in the “Bolsa Família” program.

According to the draft public notice, three lots will be offered for the rendering of services throughout the entire Brazilian territory, and other three with a regional coverage.

The draft states that, in the cities of São Paulo and Rio de Janeiro, due to the greater complexity of spectrum use, the operation of 4G should begin 12 months after the “cleaning” of the frequency in all other cities of the corresponding State. In other parts of the country, where the spectrum use is less complex, the period of 12 months applies individually to each city.

The date has not been confirmed, but the public bid is expected to occur in early September.

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NEWS & EVENTS

BRITISH COLUMBIA COURT OF APPEAL: YOU CANNOT WAIVE LIABILITY FOR MOTOR VEHICLE ACCIDENTS

June 18, 2014

Peter W. Lightbody

The BC Court of Appeal recently ruled that waivers purporting to exclude liability for motor vehicle accidents are unenforceable because such waivers are contrary to public policy. The decision may spark debate outside of the insurance industry as it raises a fundamental philosophical question: when, if ever, should freedom to contract yield to protection of the public good?

The public good at issue in *Niedermeyer v. Charlton*, 2014 BCCA 165 of course relates to minimizing harm arising from the use of motor vehicles, and regulating the flow of compensation for that harm. Stated in wordier fashion, it is in the collective interest of British Columbians to enjoy roads that are safe and regulated in accordance with the policy initiatives reflected in British Columbia's universal compulsory motor vehicle insurance scheme. The court has ruled, though not unanimously, that this collective interest is akin to the protection of fundamental human rights, and as such, one cannot contract out of it.

The Facts

Ms. Niedermeyer was badly injured during a zip-line excursion at Whistler in 2008. The injuries arose not during the actual zip-line activity, but afterwards while the plaintiff was riding back to Whistler Village on the zip line operator's bus. The comprehensive waiver in issue contained language excluding claims for injuries arising during "travel to and from the tour area".

The Ruling At Trial

The case was heard on a summary trial, where the plaintiff challenged the waiver on a number of fronts. She argued that it was unconscionable, that it was never properly brought to the plaintiff's attention and that it was contrary to public policy. Each argument failed. On the public policy issue, the court decided the issue was not engaged at all, stating that this debate would arise only in the event that the universal motor vehicle

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insurance scheme was somehow triggered and it was not triggered because the release itself precluded the advancement of a claim.

The Ruling at Appeal

The Court of Appeal disagreed with the trial judge only on the public policy issue. The court found the trial judge too technical in rejecting the public policy argument. Because an otherwise enforceable release might shut a claimant out from the benefits of the statutory motor vehicle scheme, reasoned the higher court, this does not oust a public policy analysis. The policy debate is much wider than that. The fact of the "longstanding statutory scheme" the court wrote "is a strong indication that there is a public policy interest engaged when motor vehicle accidents are at issue". In other words, the analysis is immersed in the policy debate from the get-go where a contract purports to eliminate liability for losses caused by a car crash.

The Court of Appeal's reasons go on to trace the history of government initiatives to deal with the destructive reality of cars, including the genesis of British Columbia's compulsory auto insurance scheme and the establishment of the Insurance Corporation of British Columbia in 1973. In the discussion, certain aspects of the scheme are highlighted, such as its compulsory nature, the minimum prescribed policy limits, the availability of compensation for loss caused by uninsured and unidentified motorists and ICBC's growing role in provincial road safety initiatives.

Practical Considerations for Insurers

On a public policy level, the Court of Appeal has stated that the need to look after each other in the face of danger posed by cars is paramount to values that underpin freedom to contract. We are left to wonder where the application of public policy may lead if it gains momentum. Is there a reasonable argument that federal legislation that now regulates boaters, for example, is evidence of a "social contract" that should prohibit exclusion of liability for boating accidents?

On a practical level, the impact of the decision is obvious for primary and excess automobile insurers in both the private and commercial motorist contexts. For example, insurance policies written in the recreation and tourism industry, where waivers may be material to the risk insured, ought to be reviewed and the risk reconsidered. Further, claims handlers must be mindful of the need to determine if the injuries arose out of the use or operation of a motor vehicle for if they did, waivers of liability for such injuries, for the moment, are unenforceable.

Having said this, certainly there is no reason to stop using these sorts of waivers. The dissent at the Court of Appeal is an indicator that the final word on this issue may still come from the Supreme Court of Canada.

NEWSALERT

July, 2014

/Carey

Report by the OECD: Assessment of Merger Control in Chile

1. Introduction

In July, 2014 the OECD Secretariat launched a report called "Assessment of Merger Control in Chile". This report analyzes the Chilean merger control system, identifies its chief problems and makes recommendations in order to overcome such shortcomings. The main conclusion of the report is that the Chilean merger control regime "*lacks transparency, legal certainty and predictability*"[1]. Following such statement, the OECD Assessment suggests several proposals in order to correct the regime's failures.

2. Main Recommendations

a) Add the merger control regime to the Competition Act (DL 211).

b) Within the scope of Merger Control:

- Make a legal definition of "Concentration Operations", in order to identify the operations that will be under the competition authorities' scrutiny;
- Set forth a merger notification system before the enforcers. A mandatory or hybrid[2] notification regime is recommended. Likewise, sanctions should be established in case of failure of notification.
- Establish notification thresholds.

c) Regarding the Review Powers and Procedures:

- Adopt a two-phase specific merger procedure. In the first stage, unproblematic operations would be assessed and cleared. In the second, only complex mergers requiring a substantive in depth analysis would be evaluated. The report recommends the reviewing powers to be exercised by the National Economic Prosecutor ("FNE") and the Antitrust Court ("TDLC").
- The OECD Assessment also proposes two different models implementing the two-phase procedure:
  - Option 1: Phase I before the FNE, and Phase II with TDLC;
  - Option 2: Phase I and II before the FNE, and judicial review exercised by the TDLC.

- Fulfill the fair conditions in the merger control review. In order to achieve that, the following must be ensured:

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[1] Assessment of Merger Control in Chile, Report by the OECD, OECD 2014, p.7

[2] Compulsory system if certain thresholds are achieved.

  - A reasonable and determinable period of time;
  - That Parties obtain the required information, transparency in the decision-making procedure, and that Parties are well informed about how and when to propose remedies or conditions;
  - A suspensory effect on the reviewing process established by law;
  - General transparency, with the purpose of informing the rules to the public; and
  - Confidentiality, namely to protect confidential and privileged information provided during the assessment.

- Specify the rules applying to the un-notified mergers, which do not reach the thresholds, but still raise competition concerns. Such rules should determine whether un-notified mergers can be reviewed *ex officio*, and if so, under which circumstances and conditions.
- Issue a policy regarding the statute of limitations with respect to the review powers, both *ex ante* and *ex post.*

d) Establish by law the merger control substantive standards review. Also, provide proper guidance relating to qualitative and quantitative factors that are significant within the substantive assessment process. The report suggests as well, incorporating a fast track procedure together with a simplified notification form, to be applied in mergers that surpass the notification thresholds, but do not raise anticompetitive concerns.

e) Add to the DL 211 sanctions and enforcement tools against rules violations; such as the failure to notify, consummation of an operation being assessed, obstruction of the information gathering and non-compliance of remedies. These sanctions would be different from those contained in Article 26 of the DL 211 (which apply with respect to anticompetitive acts or deeds).

3. Conclusion

This report is the outcome of an investigation carried out by the OECD, and it mainly contains recommendations. The conclusions and proposals offered by the Assessment have not yet been discussed by the appropriate Chilean authorities. Recently, the Chilean Government has stated that it will prepare a bill to be sent to Congress, with the purpose of improving the current merger control regime, adopting measures in line with the OECD Report.

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LABELING OF PHARMACEUTICALS IN GUATEMALA

We inform you that on May 21st of this year, the COMIECO resolution number 340-2014 taken by the Cabinet of Economic Integration in which it was agreed to amend by adding to the Central American Technical Regulation RTCA No. 11.01.02:04 Pharmaceuticals, was published in the official Gazette. Pharmaceutical Labeling, which now states: "Gluten. Drugs that contain traces of gluten or gluten containing sources, for example wheat, starch, oats, barley, rye or triticale and its derivatives, should add a legend equal to or similar to the following: Caution contains gluten."

As a result of this modification, a transitional article was added to the RTCA referred to above, which will require that medication containing traces of gluten or gluten containing sources that are already on the market, will have a period of 12 months from the publication of the resolution above indicated to implement the legend on the package labeling.

For additional information on this topic, please contact us:

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"Guidance on the concept of de facto and shadow director ." Hogan Lovells , 05 August 2014

Chris Dobby, Timothy Hill, Allan Leung, Mark Lin, Patrick Sherrington, Damon So

The English Court of Appeal has given useful guidance on how to determine whether a person is a *de facto* or shadow director, in *Smithton Ltd (formerly Hobart Capital Markets Ltd) v Naggar* (10 July).

This question is of crucial importance as persons, such as directors of the holding company, may be considered *de facto* or shadow directors of a subsidiary despite not having been formally appointed as a director, on account of their function and status. They would therefore subject to additional obligations under the Companies Ordinance (Cap 622) and at common law. Even a single directorial act could lead to liability in an exceptional case.

In *Smithton*, the English Court of Appeal held that there was no definitive test to determine who was a *de facto* director. However, the court will generally examine:

- the company's corporate governance structure to decide whether a person assumed the status and function of a director (e.g. by performing acts directorial in nature) so as to make himself responsible as if he were a director;
- whether the company considered that person to be a director and held him out as such; and
- whether third parties considered that he was a director.

In a more complex scenario, the court may also consider in what capacity the director was acting. For instance, in the case of a person who was a director of a holding company that is its subsidiary's corporate director, so long as what that person did was done entirely within the ambit of his duties and responsibilities as a director of the corporate director/holding company, his acts would not make him a *de facto* director of that subsidiary (as in the present case).

As regards the concept of a shadow director i.e. a person in accordance with whose instructions the directors of the company are accustomed to act, the court noted that a person can be both a shadow director and a *de facto* director at the same time. Also, the role of a *de facto* or shadow director need not extend over the whole range of a company's activities. Ultimately, the question of whether a person was a *de facto* or shadow director is a question of fact and degree.

The case

The claimant, formerly Hobart, is a brokerage company. Hobart was initially set up as a division of a group of financial service companies (DDI), of which the defendant (Naggar) was chairman. Later, Hobart was spun off into a separate joint venture company in which DDI was a majority shareholder. Although under the joint venture agreement Hobart had three directors and three appointees from DDI, Naggar was not one of them.

As part of its work, Hobart undertook contracts for difference (CFDs). In Feb 2007, Naggar concluded that certain shares were undervalued and Hobart began writing CFDs for them, some of which were placed with clients Naggar recommended. In order to hedge the CFDs, Hobart purchased the physical shares and the shares declined in value. DDI collapsed and Hobart sought to recoup its losses of some £4 million by seeking an indemnity from Naggar claiming, *inter alia*, that Naggar had been either a *de facto* or shadow director of Hobart and had acted in breach of his duties owed to Hobart.

The trial judge Rose J dismissed this claim, holding that Naggar was neither a *de facto* nor shadow director. Firstly, there was nothing that went beyond the involvement that one would have expected to see from a person who combined the roles of major client and chairman of the majority shareholder. Secondly, there was no evidence that the majority of Hobart's board were accustomed to acting in accordance with Naggar's instructions. The Court of Appeal dismissed Hobart's appeal and confirmed Rose J's decision. The appellate court held that there was no basis for setting aside the judge's conclusion that Naggar had been involved with Hobart's affairs other than in his capacity as a director of DDI or some other capacity than that of director of Hobart.

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NEWS DETAIL

11/08/2014

OJK REGULATION ON ALTERNATIVE DISPUTE RESOLUTION IN THE FINANCIAL SECTOR

The Financial Services Authority (*Otoritas Jasa Keuangan* or "**OJK**") issued on 16 January 2014, its Regulation No. 1/POJK/2014 regarding Alternative Dispute Resolution Institutions ("*Lembaga Alternatif Penyelesaian Sengketa* or "**LAPS**") in the Financial Sector ("**Regulation 1/2014**").

The following are the provisions of note:

Establishment of the LAPS

- The LAPS is established by the respective financial services institution by coordinating with the relevant association in the respective financial services sector. Included in the financial institution category are banking, capital market, insurance, pension fund and financing institutions as well as other financial institutions such pawnshops, guarantee institutions, the Indonesian export financing institution, and institutions which perform mandatory public fund management such as providers of social security programs.
- Financial service institutions are obliged to be a member of the LAPS in the financial sector where they conduct their activities. A financial service institution which conducts activities in more than one financial sector is only be obliged to be a member of one LAPS which is relevant to its main business activities.
- The LAPS in the banking, financing, pawnshop and guarantee sector must be established by 31 December 2015. If after the lapse of such period the LAPS is not established consumers may request OJK to facilitate their dispute resolution.

Dispute settlement by the LAPS

- All customer complaints must first be handled by the respective financial service institution for their resolution, failing which the parties may seek an out of court or in court resolution of their complaint/dispute.
- Out of court settlements are to be processed through the LAPS. The LAPS must be a LAPS which is listed in OJK's list of LAPS.
- Dispute settlements through a LAPS is confidential in nature. The decision of the LAPS regarding the dispute will not be published. The financial service institution concerned is required to abide by the decision of the LAPS.

Prior to the issuance of Regulation 1/2014, three LAPS had been established, namely, (i) Indonesian Capital Market Arbitration Board (*Badan Arbitrase Pasar Modal Indonesia*), (ii) Indonesian Insurance Mediation Board (*Badan Mediasi Asuransi Indonesia*), and (iii) Pension Fund Mediation Board (*Badan Mediasi Dana Pensiun*). To date no additional LAPS have been established. (*by: Novario Asca Hutagalung*)

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Luxembourg

The immobilisation of bearer shares in Luxembourg

Monday 21 July 2014

On 16 July 2014, the Luxembourg Chamber of Deputies passed Bill n°6625 (the "Immobilisation Law"), further to which the notion of immobilisation of bearer shares was introduced, pursuant to which bearer shares will have to be put in the hands of a depositary and information concerning their holder contained in a specific registry. Immobilisation duty concerns all bearer shares issued before and after the entry into force of the Immobilisation Law.

Bearer shares' legal nature does not change as the Immobilisation Law does not create a new class of shares, but merely provides for a new practical modality.

1. AMENDMENTS

1.1 Creation of a depositary

Henceforth, bearer shares shall be deposited with a recognised depositary, whom shall be appointed by the board of directors or the management board of the S.A. or the S.C.A. This depositary shall be held to a number of strict conditions and may be chosen from an exhaustive list which includes notably lawyers admitted to the Luxembourg Bar (Lists I and IV), financial institutions, family offices, professionals of the financial sector and so forth.

1.2 Creation of a registry

Bearer shares shall be entered into a specific share register. Said register shall contain detailed information concerning the bearer shares' holder (including the holders' identity, the date of the shares' deposit, the date of transfer of shares and so forth).

Such register is not intended to be publically accessible but rather to allow an easier access for information by judicial and fiscal authorities whilst maintaining confidentiality with regard to third parties and shareholders of the issuing company.

1.3 Ownership

Bearer shares' ownership is subject to registration in the official register. Any disposal is made effective by a detailed entry in such register by the depositary.

1.4 Transitory provisions

Some transitory provisions are provided for by the Immobilisation Law, including a six-month period from the date of entry into force of the Immobilisation Law for the shareholder to appoint a depositary and a period of eighteen months to deposit the bearer shares with the chosen depository.

At the end of this six-month period, if bearer shares have not been registered and deposited, voting rights attached to such shares will be automatically suspended until the immobilisation procedure is fulfilled.

Furthermore, in order to ensure legal certainty, the bearer shares which have not been deposited within eighteen months after the entry into force of the Immobilisation Law shall be cancelled.

Finally, criminal penalties are foreseen for non-compliance with the Immobilisation Law for the depositary and management entity (EUR 125,000 if the depositary is not designated within the specified deadline).

2. OPEN QUESTIONS

Certain queries remain open, but to which only practice may bring an answer. We notably refer to the unclear superimposition of the delay to appoint a depositary and the delay to immobilise shares (six months). In addition, as the function of depositary per se is new, in practice the delays may well turn out to be unreasonably short.

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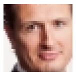

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RED FLAGS ON HIGH SEAS

Siva Kumar and Trishelea Sandosam highlight specific limitations under Malaysian shipping laws

Shipping activity is fraught with risks. Whether due to weather perils, navigational error or negligent crewmen, those involved in shipping activities face potentially multi-million dollar risks of loss and damage to property or loss of life in their everyday trade.

Due to these great risks, the laws that govern shipping transactions have sought to impose limitations on the liabilities of shipowners and carriers, and limit the time period within which actions may be brought against them.

The limitations set by law are key to facilitating the sustained development of international trade and the shipping industry as a whole; and prevent the costs of freight, insurance and ultimately the price of goods from increasing significantly.

This article provides an overview of the time and liability limitations applicable in Malaysia. It is crucial that everyone having business dealings with the shipping industry are aware of these limitations to be able to adequately assess their potential risks and costs. The two main pieces of legislation which provide for these limitations are the Carriage of Goods by Sea Act 1950 ("COGSA 1950") and the Merchant Shipping Ordinance 1952 ("MSO 1952").

COGSA 1950

COGSA 1950 gives effect to the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Brussels 1924 ("Hague Rules"), which is set out in the First Schedule of COGSA 1950. The Hague Rules impose a non-excludable minimum standard of duty on carriers and provide for the liabilities of carriers and the limitation thereof.

COGSA 1950 applies to a contract of carriage by sea in ships carrying goods from any port in Malaysia to any other port whether in or outside Malaysia (Section 2, COGSA 1950). The term "contract of carriage" applies to contracts of carriage covered by a bill of lading, or any similar document of title, in so far as such document relates to the carriage of goods by sea.

MSO 1952

MSO 1952 is the main regulatory framework in Malaysia covering, amongst others, ship registration, licensing, safety and security, load line and loading, liability and limitation of liability of shipowners.

The Merchant Shipping (Amendment and Extension) Act 2011 ("MSO Amendment Act 2011"), which came into force on 1 March 2014, has introduced several important amendments to MSO 1952.

With regard to limitation of liability, the MSO Amendment Act 2011 has given the Convention on Limitation of Liability for Maritime Claims 1976, as amended by the Protocol of 1996 ("Limitation Convention"), the force of law in Peninsular Malaysia and Labuan, replacing the International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships 1957 ("1957 Convention"). Sabah and Sarawak continue to apply the 1957 Convention.

LIMITATIONS

Time Limitation

Article III rule 6 of the First Schedule to COGSA 1950, i.e. the Hague Rules, provides that any claims against a carrier must be brought within one year from when the goods were delivered or should have been delivered. "Carriers" are defined to include the owner or the charterer who enters into a contract of carriage with a shipper. This one year limitation is to be contrasted with the Limitation Act 1953 ("LA 1953") which provides for a limitation period of six years for contractual and tortious claims from the date the cause of action accrues (Section 6(1), LA 1953).

In a carriage of goods by sea transaction to which COGSA 1950 applies, the one year time bar will generally override the general limitation period provided in the LA 1953 (Section 3, LA 1953).

The limitation period under the Hague Rules is unique in that, unlike the time limitation under the LA 1953, it is a substantive time bar that effectively extinguishes the claim and does not merely bar the remedy (*Aries Tanker Corporation v Total Transport Limited* [1977] 1 All ER 398, *"Kusu Island" v The Owners of Cargo Lately Laden on Board the Ship or Vessel "Brani Island"* [1989] 3 MLJ 257 and *Trengganu Forest Products Sdn Bhd v Cosco Container Lines & Anor* [2007] 5 MLJ 486).

In view of the significantly shorter limitation period and the substantive nature of the time bar under the Hague Rules, plaintiffs are advised to obtain legal advice as soon as possible when a dispute arises and file legal action expeditiously to protect their rights.

Limitation of Liability

The Hague Rules provide for a package limitation where carriers may limit their liability to £100 per package or unit unless the nature and value of such goods have been declared by the shipper before shipment and have been inserted in the bill of lading (Article IV rule 5, Hague Rules).

While the Singapore High Court in *The "Vishva Pratibha"; Sarathi Co v "Vishva Pratibha" (Owners Of); Port Of Bombay, India* [1980] 2 MLJ 265 held that £100 refers to the paper value of 100 pounds sterling, the more judicially accepted view is that the sum of £100 is to be taken as the gold value of the sterling pound, as opposed to its paper value (Article IX, Hague Rules; *The Rosa S* [1989] 1 QB 419; *The Thomaseverett* [1992] 2 SLR 1068). To ascertain the limit of liability, the gold value of £100 at the date of the breach is to be calculated by reference to the English Coinage Act 1870.

One problem which arises with the interpretation of Article IV rule 5 is the meaning of the term 'package' or 'unit' as these terms are not defined in the Hague Rules. It has been decided by the English courts that where goods are loaded into a container and the bill of lading specifies the content of that container as being packed in smaller articles of transport, such as packets or bundles, each article would be treated as one package or

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unit (*The River Gurara* [1996] 2 Lloyd's Rep 53). On the other hand, if no reference is made to the smaller articles, then each container would be considered as one package or unit. Further, the 'package' or 'unit' limitation is almost impossible to apply in the case of liquids or bulk cargo.

Tonnage Limitation

The Limitation Convention is set out in the Sixteenth Schedule of MSO 1952. Shipowners, salvors and any person whose act, neglect or default the shipowner or salvor is responsible for, are entitled to limit their liability for losses not resulting from their personal act or omission, committed with the intent to cause such loss or recklessly and with knowledge that such loss would probably result (Article 4, Part 1, Sixteenth Schedule). A shipowner includes a charterer, manager and operator of a ship (Article 1, Part 1, Sixteenth Schedule).

The claims which are subject to limitation of liability include the following:

- Claims in respect of loss of life or personal injury or loss or damage to property, occurring on board, or in direct connection with the operation of, a ship;
- Consequential losses arising from the above; and
- Claims in respect of loss caused by delay in the carriage of cargo or passengers.

The tonnage limitation limits the liability of shipowners based on the gross tonnage of the ship and the value of Special Drawing Rights (Article 6 and 8, Part 1, Sixteenth Schedule). The Special Drawing Rights value is determined by the International Monetary Fund and the amount will be converted into the national currency of the country in which limitation is sought, according to the value of the currency at the date the limitation fund is constituted, payment is made or security is given for the claim. This works out to be a much higher amount than the limitation amount provided for under the 1957 Convention.

A claimant who seeks to break limitation has the burden of proving that the loss resulted from the personal act or omission of the person seeking to limit liability which was committed with the intent to cause such loss or recklessly and with knowledge that such loss would probably result. This is to be contrasted with the '*actual fault and privity*' test under the 1957 Convention, where the burden of proof rests with the person seeking to rely on limitation. The effect of this change is that it is now almost impossible for the claimant to break limitation as he needs to prove a 'personal' act or omission. The rationale for imposing a higher threshold to break limitation is to balance the interests of the person seeking limitation with the interest of the claimant who now enjoys a higher limit of liability.

Limitation of liability under the Limitation Convention can be invoked even if a limitation fund has not been constituted (Article 10, Part 1, Sixteenth Schedule). If the person seeking to limit his liability chooses not to set up a limitation fund, Article 12 will apply in respect of distribution of the fund to competing claimants, with questions of procedure decided in accordance with the national law of the country in which the action is brought. Should the person seeking to rely on limitation choose to set up a limitation fund, a limitation action is to be commenced. This practice is commonly adopted where there are several claims or potential claims arising from an incident.

The procedure relating to limitation actions is contained in Order 70 rules 35 to 38 of the Rules of Court 2012. If the Court decides that the shipowner is entitled to limit his liability, it will further determine the amount to which the liability is to be limited. A limitation fund will be subsequently constituted in accordance with Article 11, Part 1 of the Sixteenth Schedule, and all claimants will have a share in that fund. If there is only one claimant, limitation proceedings do not need to be commenced and the shipowner should just plead limitation as part of his defence or counterclaim.

Where a limitation fund is constituted by the person seeking to rely on limitation in accordance with Article 11, a claimant who makes a claim against the fund will be barred from exercising any rights against any assets of the person for whom the limitation fund was constituted (Article 13, Part 1, Sixteenth Schedule).

Further, once the limitation fund is constituted, any property belonging to the person for whom the limitation fund was constituted which has been attached or arrested within the jurisdiction of a state party, may be released by the court of the state. However, the release of property which has been attached or arrested is mandatory in certain situations, such as, where the limitation fund is constituted at the port where the occurrence took place, at the port of discharge in respect of cargo or in the state where the arrest was made (Article 13 paragraph 2, Part 1, Sixteenth Schedule).

The person who applies and obtains an order for the release of the property is deemed to submit to the jurisdiction of that court in relation to the claim for which the property was attached or arrested (Article 7, Part II, Sixteenth Schedule).

CONCLUSION

The long awaited amendments to MSO 1952 which have taken more than two years to come into force are much welcomed and make Malaysia one of the first countries in Asia to adopt the Limitation Convention, along with maritime giants such as the United Kingdom. It remains to be seen whether the amendments will make Malaysia a more favourable jurisdiction for claimants in admiralty claims due to the increased limits of liability.

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MEXICO ENERGY REFORM - UPDATE

August 11, 2014

On August 11, 2014 the Federal Executive Branch issued decrees implementing at the the federal law level the reforms to the Political Constitution of the United Mexican States, integrating historic changes in the manner in which the energy industry will be developed in Mexico, generating an increase in investment by allowing private participation, the transformation of the state-owned companies that currently manage the sector, and the strengthening of the institutions that govern the activity of that industry.

The oil and gas and electric power sectors are emphasized. In both cases, the active participation of the private sector is encouraged, allowing participation in activities that were previously reserved to the State through its state-owned companies, Petróleos Mexicanos ("Pemex") and the Federal Electricity Commission ("CFE"). In addition, the powers of the governmental institutions to regulate the new market niches created with this process are reinforced, through the institutional strengthening of the regulatory bodies of the sector, the creation of independent operators and the redistribution of powers among the relevant authorities.

With this new regulatory framework positive consequences are expected for the sector, among which are: (i) an increase in the production of oil and gas and derivative products, (ii) the strengthening of the energy security of the country; (iii) the eventual decrease of electricity rates and gasoline prices; (iv) an increase in investment in the power industry and; (v) an increase in the Gross Domestic Product of the country estimated at 1% (one percent) annually, among others.

1. Background

On December 20, 2013 the *"Draft decree reforming and adding articles 25, 27 and 28 of the Political Constitution of the United Mexican States in energy matters"*, was approved by the Senate of the Republic, in general and in particular, with 95 votes in favor and 28 against.

This decree, in addition to reforming the mentioned articles, included 21 transitory articles that specify the guidelines that should be reflected in the legislation that would implement it, and the time periods for carrying out certain actions in relation to the corresponding process.

On April 30, 2014 the Federal Executive Branch sent energy reform bills to the Senate of the Republic. The package of secondary legislation in energy matters is composed of 21 laws grouped in 9 blocks, of which 9 are new laws and the remaining 12 are laws that would be amended.

The Senate began debating in extraordinary sessions. Four rulings containing the proposed laws were formulated. The rulings were discussed and approved by the Senate and subsequently sent to the Deputies Chamber, where the legislative process continued. Once the rulings were approved by both chambers (including additional rulings on revenue laws), an extraordinary period was opened for the comprehensive approval of the Energy Reform.

The secondary legislation of the energy reform was finally approved in full and issued by the Federal Executive Branch on that date.

2. Secondary Legislation

The changes made by the energy reform will be implemented through a profound modification of the legal framework that has governed the development of the energy industry in the country, which involves, as indicated previously, the entrance into force of new laws and the amending of current laws.

The new laws are listed below:

1. Oil and Gas Law
2. Electric Industry Law
3. Geothermal Energy Law
4. Petróleos Mexicanos Law
5. Federal Electricity Commission Law
6. Energy Regulatory Bodies Law
7. National Industrial Safety and Environmental Protection Law of the Oil and Gas Sector
8. Mexican Petroleum Fund for Stabilization and Development
9. Oil and Gas Revenue Law

Additionally, 12 laws were amended in order to unify their content with the new regulatory framework.

The following are the amended laws:

1. Foreign Investment Law
2. Mining Law
3. Private Public Partnerships Law
4. National Water Law
5. Federal Law of Government-Owned Entities
6. Public Sector Acquisitions, Leases and Services Law
7. Public Works and Related Services Law
8. Organizational Law of the Federal Government
9. Federal Fees Law
10. Fiscal Coordination Law
11. Federal Budget and Treasury Accountability Law
12. General Public Debt Law

3. Relevant points of the Secondary Legislation of the Energy Reform

Oil and Gas

In relation to oil and gas, the secondary legislation attempts to replicate proven development and private investment schemes successfully undertaken in the international sphere, so that Mexico is able to reach important objectives, including, in relation to energy security, the strengthening of the infrastructure and the increase of industrial activity in the sector. To implement these changes, the Oil and Gas Law and the Oil and Gas Revenue Law were created, and the Foreign Investment Law and the Public Private Partnership Law were amended. Some relevant points include the following:

- Incorporation of the so-called *Zero Round* giving Pemex preference in selecting those projects it will continue to develop, based on the proven capacity of the company.

  Pemex has requested certain fields for their development; that request is being evaluated by the Energy Ministry ("SENER"), aided by the National Oil and Gas Commission ("CNH") and, tentatively, in mid-

September (or sooner as announced by the Federal Executive Branch) the relevant fields will be decided, which may be (i) retained by Pemex for their development; (ii) developed by Pemex, together with another company from the private sector or (iii) not granted to Pemex, and assigned for development by the private sector, under one of the contractual schemes established in the Oil and Gas Law.

- Redefinition of the concept of oil and gas permits, clarifying aspects such as the authorities responsible for granting and regulating them, causes of rescission, and activities allowed under this right.

- Incorporation of contractual models for activities of exploration and exploitation of oil and gas that admit the participation of the private sector: (i) shared production contracts; (ii) profit-sharing contracts; (iii) licenses and (iv) services contracts, and combinations of these.

  The compensation for these contracts is defined in the Oil and Gas Revenue Law.

- Development of new niches in the industry such as the exploration and exploitation of deep and ultra-deep water oil and gas fields and shale fields, including shale gas and shale oil, currently inaccessible due to Pemex's technological and financial limitations.

- Granting of permits to carry out the allowed activities, including storage, transportation and distribution by petroleum pipelines and other petroleum products, as well as ethanol, propane, butane and naphthas; the regasification, liquefaction, compression and decompression of natural gas; as well as petroleum treatment and refining, processing of natural gas, and exporting and importing of oil and gas, according to Official Mexican Standards, tariff methodologies and model contracts for providing the applicable services.

- Creation of the National Center for Control of Natural Gas ("CENAGAS") responsible for operating the national system of transport and storage pipelines. Pemex and its subsidiaries must transfer funds for CENAGAS to acquire and manage the corresponding infrastructure, as well as the contracts they have signed.

- Amendment of the Foreign Investment Law in order to (i) adapt it to the new definitions of the Oil and Gas Law and the Electric Industry Law, in relation to the functions reserved exclusively to the State; (ii) exempt the retail sale of gasoline and liquid petroleum gas distribution from the economic activities and companies that are reserved exclusively to Mexicans or Mexican companies with a clause excluding foreigners; and (iii) exempt ship owners engaged in providing services for the activities of petroleum and other oil and gas exploration and extraction, the activities of pipeline construction for the transport of petroleum and its derivatives, and the drilling of oil and gas wells, from the requirement of obtaining a favorable resolution of the National Foreign Investment Commission for foreign investment to participate in a percentage greater than 49% in companies related to those activities.

- Amendment of the Mining Law in order to (i) be consistent with the new definitions of the oil and gas sector; (ii) establish that the preferential nature of the mining industry will not affect the activities of the oil and gas industry and the public service of transmission and distribution of electric power; (iii) adjust the powers of SENER in mining matters, considering the new provisions in the oil and gas sector; (iv) include the oil and gas exploration and extraction contracts within the premises for execution of mining construction and works; and (v) establish reporting obligations in case of finding any oil or gas in the area subject to a mining concession.

- Amendment of the Public Private Partnerships Law in order to expressly prohibit carrying out activities related to the exploration and extraction of oil and gas under this concept.

Electricity

As a result of the energy reform, the electricity sector will become a chain of activities vertically integrated in a partially privatized sector, open to private investment in which, although the CFE will keep control, the possibility of private sector investment will be increased through a more flexible regulatory scheme that permits the execution of contracts to carry out various activities and the creation of new markets in the electricity sector. Among the most significant changes are the following:

- Participation opened to the private sector in the generation of electricity through a permit granted by the Energy Regulatory Commission ("CRE"). Private parties may also sell the energy generated and transmitted by CFE.

- Participation of the private sector, together with CFE, in the activities of transmission and distribution through contracts.

- Participation of the private sector in activities of financing, maintenance, management, operation and expansion of the power infrastructure through service contracts with CFE, with adequate compensation.

- Transformation of the National Center for Energy Control ("CENACE"), currently under CFE, into a decentralized public body responsible for the operational control of the National Electric System ("SEN"), so that it is an impartial third party and not the CFE that operates the wholesale electricity market, guaranteeing open access to the SEN, for both transmission and distribution of electric power.

- Creation of the Wholesale Electricity Market ("MEM"), operated by the CENACE, in which the participants may carry out electric power purchase and sale transactions through contracts between the participants in the MEM. The CENACE will be responsible for managing the supply and demand of the MEM participants, carrying out transactions and generating prices continuously. The price that will be paid in the MEM transactions will be a competitive price, reflecting the costs of generation and other operating costs of electricity, as well as the volume of electric power demanded and supplied in the MEM.

- Creation of the trader, under the new Electric Industry Law, as the holder of a *market participant* contract the purpose of which is to carry out trading activities (execution of contracts for purchase and sale of electricity within the MEM, among others). The traders may sign contracts with qualified users (through the supplier trader), or execute such contracts with other traders (non-supplier trader).

- The permits granted by the CRE under the now repealed Electric Power Public Service Law ("LSPEE"), will continue in force under its terms. The holders of those permits that choose to remain under the LSPEE rules may, at any time, transfer to the new rules.

- The Geothermal Energy Law ("LEG"), the purpose of which is to regulate the recognition, exploration and exploitation of geothermal resources for the use of underground thermal energy within the limits of Mexican territory, in order to generate electricity or use it otherwise.

- The activities regulated by the LEG are considered to be in the public interest and their development will have preference over activities of other sectors when there is a conflict.

- The activities pursued under the LEG will be carried out through different registries, permits, authorizations and concessions granted by the competent authorities applicable for each case. For exploration activities a permit will be sufficient, while for exploitation activities a concession will be required.

- Amendment of several articles of the National Water Law, for the purpose of (i) adapting certain definitions of that law to the new definitions introduced by the LEG; (ii) including geothermal fields under regulated, prohibited or reserved zones and; (iii) establishing the obligation of requesting the relevant permits, authorizations and concessions from the National Water Commission in order to engage in the activities of geothermal fields exploration.

Renewable Energy

Although it is expected that several bills focused specifically on renewable energy will be published soon, the energy reform will generate the following relevant effects in this area:

- The privatization of activities of generation and commercialization set forth in the reform will give great impetus to the development of renewable energy projects under the more flexible scheme that is expected, where the self-supply companies will disappear and individuals and entities can freely generate and deliver energy.

- The concept of *sustainability* is included at the constitutional level in article 25, with which it is inferred that the promotion of renewable energy will become a primary objective in economic activities regulated by the State. In this regard, public policies should contemplate sustainability as a primary objective, making the development of renewable energy more accessible and attractive.

- In a term of 365 days from the date of issuance of the reform, the legal framework must be adjusted in order to promote environmental protection, through various mechanisms such as: (i) efficiency in energy use; (ii) decrease in the generation of greenhouse gases; (iii) efficiency in the use of natural resources; (iv) decrease of waste and emissions; and (v) a lower carbon footprint.

Transformation of State Companies

It is important to mention the transformation that will occur within the state-owned bodies of the energy sector (Pemex and CFE), which currently conduct the majority of the activities of the industry, exercising a monopoly role under the legal framework in effect until the passage of the energy reform. This transformation will consist of transforming Pemex and CFE into *State Production Companies* ("EPEs") in a term of 2 years, in order to insert them into the new competitive schemed that is expected with the implementation of the reform.

The transformation of Pemex and CFE into EPEs implies a change in their corporate governance, the insertion of a business mentality, the decentralization of functions, the granting of new powers as well as the reorganization of their structure, among other things. The most important aspects are mentioned below.

- The Petróleos Mexicanos Law and the Federal Electricity Commission Law, which regulate the organization, management, functioning, operation, control, evaluation and accountability of the state production companies, and to establish their special regime in the areas of (i) subsidiary production companies and affiliates; (ii) remuneration; (iii) acquisitions, leases, services and works; (iv) assets; (v) liabilities; and (vi) state dividend.

- Both laws establish that the purpose of the EPEs is to have business, commercial, economic and industrial activities of various kinds, different from those they carry out now. Similarly, they establish the respective purposes and activities of the EPEs under the new dynamic of the industry, which may be carried out by them or through their affiliate companies.

- New provisions are established in corporate governance, with respect to the administration, the formation and functioning of the board of directors, as well as a liability regime for the board members, provisions regarding the committees and the oversight and auditing of both organizations. With this it is sought to transform the nature of Pemex and CFE, allowing them to function more efficiently.

- More freedom is given to both Pemex and CFE in relation to the remuneration they will pay their employees, generating a special regime for them, thereby allowing them to attract greater talent.

- Several provisions are established in relation to transparency and accountability for both EPEs, which will be subject to stricter controls and obligations intended to guarantee the proper carrying out of their functions.

- Due to the organizational changes to Pemex and CFE, the Federal State-Owned Entities Law is reformed so that the EPEs and their subsidiaries are excluded from the application of that law.

- The Public Sector Acquisitions, Leases and Services Law is also reformed, as is the Public Works and Related Services Law, for the same purpose of establishing that the state production companies and their subsidiaries will be excluded from the application of that law, due to the fact that they will have an exempt regime in relation to public procurement.

Institutional Reinforcement

Due to the structural changes in the reform and the new market dynamic that will govern the industry, the institutional environment of the sector must be strengthened, in order to better regulate the development of the energy industry. For that purpose the energy sector regulators (CRE and CNH) are strengthened, and institutions are created that respond to the new challenges of the industry:

- Through the Energy Regulating Bodies Law, in order to regulate the organization and functioning of the CRE and the CNH in carrying out their tasks.

- The functions of both regulators are strengthened, being given new powers to address the new challenges and regulate the new activities in the industry, through the possibility of granting new permits, issuing regulatory instruments, assigning contracts and conducting bids, and to impose penalties.

- Organizationally the regulators are also strengthened, their nature being changed in order to have greater autonomy, with their own legal capacity, technical, operating and management autonomy, and greater budgetary freedom. The regulators are also strengthened in relation to human resources, growing in structure and increasing their plenary body from five to seven Commissioners.

- The National Industrial Safety and Environmental Protection Agency is created as a decentralized body of the Environmental and Natural Resources Ministry; this agency will receive revenue from the contributions and fees established by the law for its services of regulation and supervision of facilities, oil and gas sector activities, the dismantling and abandonment of facilities, and comprehensive waste control.

- Amendment of the Organizational Law of the Federal Government in order to include the new regulatory bodies in the administrative structure of the State, and to redistribute powers of certain agencies (such as the SENER).

Fiscal Matters

The changes occurring in the regulatory framework resulted, among many other things, in the need to adjust the regime applicable to the energy industry in tax and revenue matters through the issuance and amendment of several laws. The following are among the most important elements:

- The Oil and Gas Revenue Law, the purpose of which is to establish (i) the regime of the revenue that the Mexican State will receive from the activities of *exploration and extraction* done through the permits and contracts referred to in article 27, seventh paragraph, of the Political Constitution of the United Mexican States and the Oil and Gas Law, as well as the compensation that will be established for those contracts; (ii) the provisions on the management and supervision of the financial aspects of the contracts; and (iii) the obligations in relation to transparency and accountability with the resources referred to in the LIH.

- The concept of regulatory contributions is established in the Federal Fees Law, making it possible for the regulatory bodies to receive certain amounts paid to the State as fees for carrying out their regulatory activities.

- Chapter XII "Oil and Gas" of the same law is repealed, in order to harmonize its content with the Oil and Gas Revenues Law, which will go into effect as of December 1, 2015.

- Articles of the Tax Coordination Law are amended in order to exclude from taxable federal collection (i) the activity of extraction of oil, (ii) the Income Tax from the contracts and permits for the exploration and extraction of oil and gas referred to in the Oil and Gas Revenue Law, and (iii) the tax on the activity of exploration and extraction of oil and gas set forth in the Fourth Title of the Oil and Gas Revenue Law.

  That law also establishes the obligation of using funds from the Mexican Petroleum Fund for Stabilization and Development (the "Mexican Petroleum Fund") for the municipalities on the border or coasts through which the oil and gas materially leaves the country.

  The permit holders for the sale to the public and distribution of gasoline and diesel are also included under the law where previously there was only Pemex.

  Finally, the manner in which the Oil and Gas Extraction Fund will be formed is redefined, establishing that its resources will be transferred by the Mexican Petroleum Fund.

- The Mexican Petroleum Fund for Stabilization and Development Law is issued, the purpose of which is to establish the rules for the creation and operation of the Mexican Petroleum Fund, a public trust managed by the Bank of Mexico, which will receive, manage, invest and distribute the income from the permits and contracts referred to in the seventh paragraph of article 27 of the Political Constitution of the United Mexican States, with the exception of the taxes, in terms of article 28 of the Constitution and the transitory articles of the energy reform Decree issued in December of last year.

- The Federal Budget and Treasury Accountability Law is amended in order to: adapt it to the new definitions and concepts of the other amended laws; (ii) exclude the EPEs from its provisions; (iii) guarantee the continuity of the subsidies to electricity in case of increases in its price, (iv) make it possible to offset the revenue of the State with the funds of the Mexican Petroleum Fund, when it is due to lower petroleum income; (v) consider the regulatory fees as part of the Revenue Budget; and (vi) add the title "Transfers from the Mexican Petroleum Fund" as the fifth title of the law.

- The General Public Debt Law is amended, including the following elements: (i) to include the EPEs as entities having public debt, and (ii) make it possible for the Federal Government to be able to assume a proportion of the labor liability of Pemex and CFE in relation to pensions and retirement funds currently being paid, and those corresponding to active workers of those organizations, conditioned on the renegotiation of the collective bargaining agreement of both companies.

Infrastructure and Expected Investments

The opening of the energy sector is the first step for generating various positive effects in the industry, and in the economy and the development of the country in general, as well as the strengthening of the energy sector infrastructure, and an important increase in investments in the activities of the sector.

The lack of adequate and sufficient infrastructure has been ongoing in several sectors, including the energy sector, largely halting the development of the industry. Currently there is insufficient infrastructure in the various links of the production chain, which generates problems like an excess of demand in midstream activities (storage, transportation and distribution of gas, among others) or insufficient energy generated to satisfy industrial and domestic consumer needs.

Therefore, it is intended to strengthen the National Gas Pipeline System with at least 16,000 kilometers of gas pipelines, with an approximate investment of 50 billion pesos. Similarly, CFE intends to construct at least 27 thermoelectric plants through bidding processes.

For this purpose it is intended to double the investment in infrastructure, raising it to 3.9 billion pesos at the end of this administration, within the National Infrastructure Plan 2014-1018[1]. Of that amount, Pemex will spend 80%, and CFE the remainder; in addition, approximately 50% of the budget contemplated for the National Infrastructure Fund would be used for the energy sector during the next 5 years.

With the publication and implementation of the secondary legislation it is expected that there will be an important increase in the investment required for the proper functioning of the energy sector. For the next 10 years, it is estimated that the accumulated investments in the energy industry will reach 10 billion dollars in the electricity sector and 60 billion in the oil and gas sector[2].

It is important to emphasize that since 1995 investments have been received of around 9.5 billion dollars for carrying out activities of gas transportation, storage and distribution, which activities permit private participation, and that around forty percent of the electricity generated in the country comes from private generators, through the restrictive schemes available. These figures are very encouraging taking into account the magnitude of the Reform and the opening that it will promote, since the investments existing today with a narrow margin of private investment are very significant, and therefore it is expected that those investments will increase greatly when other sectors of the industry are opened.

Finally, various provisions of the different laws making up the energy reform, as well as their respective transitory articles, establish that regulatory instruments will be issued, such as regulations, directives and other specific regulatory instruments in order to properly implement the reform. The issuance of the regulations of the recently created laws is stipulated in the majority of cases for within 120 to 180 days, while other regulatory instruments have up to 18 months, although the Federal Executive Branch has announced that such regulations will probably be ready before these deadlines.

If you need additional information please contact **Lic. Juan Carlos Machorro** jmachorro@s-s.mx **(+52 55) 5279-5463, partner in charge of the energy department of the firm**, or the partner responsible for your matters or one of the attorneys mentioned below.

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(1) Of the 3.9 billion dollars invested, 2.8 billion would come from the Federal Government and the rest from the private sector, according to government predictions. http://www.sener.gob.mx/portal/Default_blt.aspx?id=2857

(2) Estimates made by Francisco Salazar, President of the Energy Regulatory Commission. http://eleconomista.com.mx/industrias/2014/01/29/estima-cre-inversiones-10000-mdd-reforma-energetica

Simpson Grierson

Intellectual Property

22 Jul 2014

Island time: Pacific Island trade marks get their day in the sun

While popular holiday destinations like Fiji, Vanuatu and Samoa are some of our closest neighbours, New Zealand businesses have traditionally been reluctant to pursue trade mark protection in these jurisdictions. However, with recent law changes and increasing exports to the Pacific, the time may be ripe to expand your trade mark protection to the Pacific Islands.

Expanding markets

The Pacific Islands are, perhaps surprisingly, New Zealand's sixth or seventh largest export market in any given year. In 2012, New Zealand exported goods worth more than NZ$1 billion to Pacific Island countries. Fiji is New Zealand's biggest individual Pacific Island market with Papua New Guinea, French Polynesia and New Caledonia following close behind.

In line with this, we have noticed a growing trend of leading international brands either establishing or gradually increasing their trade mark portfolios in the Pacific. We expect this trend to continue, particularly as access to the Internet in the region improves.

Increasingly sophisticated intellectual property laws

For years, brand owners have been concerned that the protection obtained from Pacific Island trade mark registrations is less valuable than protection elsewhere due to the relative lack of sophistication of intellectual property laws in the region. While countries such as Tuvalu, Kiribati and Solomon Islands still have basic trade mark systems dependent on United Kingdom trade marks, new trade marks legislation has recently been enacted in a number of other Pacific Islands.

Vanuatu, Samoa and Tonga now each have their own independent trade mark registration systems based on legislation that is similar to trade mark laws in Australia and New Zealand. While there have been some teething problems as the newly established trade mark registries get to grips with the new processes, it is clear that trade mark practice is now much more developed in these countries. As examples, the legislation in all three countries now provides for:

- filing applications for services;
- multi-class applications;
- trade mark opposition procedures;
- revocation of trade marks for non-use; and
- trade mark infringement.

As a result, brand owners can feel more certain about the rights and remedies available to them (at least in Vanuatu, Samoa and Tonga!). Correspondingly, trade mark registrations in these countries are more useful for their intended purpose - protecting brand owners' rights.

Strategic advantages

Pacific Island trade mark registries can also be used by brand owners who are looking for strategic advantages over their competitors. In general, trade mark registers in Pacific Island nations are not available for online searching. While this is frustrating for trade mark practitioners, the inaccessibility of the trade mark registers can be beneficial to brand owners.

Consider the scenario where a business is developing a new product or considering a complete rebrand that it wants to keep quiet from the market. It would like to file a trade mark application in New Zealand prior to launching the brand to protect its rights, but it is aware that its competitors monitor trade mark filings in New Zealand (and, often, other key trading nations). Filing a trade mark application in a Pacific Island country such as Samoa has a number of strategic advantages, namely:

- Interested third parties are unable to carry out online searches of the trade mark registers. Although manual paper searches are possible, they are usually expensive and are not particularly quick.

- Depending on the country selected, Convention priority can be claimed from the application filed in the Pacific Island for a trade mark application filed in New Zealand (or elsewhere) within six months. This allows the brand owner to claim the date that the application was filed in Samoa, for example, as the filing date of its later applications, essentially back-dating its rights.

As a result of this, businesses are able, to some degree, to secure protection for their trade marks should the mark be misappropriated by another business before launch in New Zealand (or elsewhere).

AUTHORS

Conclusion

As with all intellectual property rights, it pays to have trade mark registrations before you need them. The Pacific Islands are on the rise, both in terms of a key trade market and trade mark prosecution sophistication. If your business is considering expanding into the Pacific, or already has a Pacific presence, now is a good time to review your current trade mark protection as it is not as daunting a task as it used to be.

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client alert

INTERNATIONAL TRADE | RUSSIA | 8 AUGUST 2014

RUSSIA – IMPORT BAN ON AGRICULTURAL AND FOOD PRODUCTS

In response to the implementation of economic and financial sanctions against Russia by the US and the EU over the past month, which was shortly followed by restrictive measures from Switzerland and Lichtenstein to prevent these countries being used to circumvent the EU Sanctions, Russia has announced the imposition of sanctions.

On 6 August 2014, the Russian President signed a Decree imposing a full embargo on certain foods and agricultural products and raw materials which originate from any country which has imposed sanctions against Russia, or which has acceded to such sanctions. This import ban is effective from 7 August 2014 and will last for one year. It follows a series of import bans on certain products from Ukraine, Poland and Romania.

On 7 August 2014 the Russian government published the list of sanctioned products through the Council of the Eurasian Economic Commission's Decision No. 54 of 16 July 2012 on Approval of the Customs Union Common Foreign Trade Commodity Nomenclature and on the Customs Union Common Customs Tariff. The list includes beef, pork, poultry, fish (and shell fish, clams and other water invertebrates), fruit and vegetable produce, cheese, milk and dairy products. The Russian Prime Minister stated that, subject to certain limitations, individuals may purchase such goods abroad and bring them into Russia (but not for resale). The embargo applies to EU countries, the US, Canada, Australia and Norway. It should be noted that:

- in relation to the types of meat concerned, the embargo applies to fresh, chilled and refrigerated meat as well as salted, pickled, dried and smoked meat. It also applies to all edible poultry by-products;
- in relation to finished products of meat or fish, the embargo applies to sausage and other similar meat products, meat by-products, blood and other food products of animal origin or made with meat; and
- the embargo applies to various products containing milk and based on vegetable fats, as well as finished products including cheese and cottage cheese based on vegetable fats.

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Notably, the embargo does not apply to:

- other types of meat such as lamb, goat, donkey or horse meat;
- wine and spirits;
- citrus peel, melon crust, eggs and natural honey, which are specifically excluded from the list; and
- food listed in the nomenclature which is intended for consumption by children.

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THE SOUTH AFRICAN DEPARTMENT OF ENERGY GEARS UP FOR COAL BASELOAD PROCUREMENT PROGRAMME

by: Astrid Berman, director , Chris Moraitis, director , Richard Roothman, director: Head of Banking & Finance practice

On 26 June 2014 the South African Department of Energy ("DoE") formally released a request for registration ("RFR") to prospective independent power producers who anticipate submitting a bid response in the Coal Baseload IPP Procurement Programme ("Programme").

Prospective projects are to be registered by 25 July 2014. Whilst making submission of a registration response is not compulsory, only those prospective bidders who have submitted a registration response will be invited to meetings with the DoE and other relevant stakeholders to discuss their potential projects.

The RFR is available at www.ipp-coal.co.za.

Bidders who register will generally not be held to the information submitted in their registration response and will, subject to certain exceptions (namely project name, the name of the prospective bidder and the general description of where the project is located), be able to change any of the details submitted.

The DoE will release the Request for Proposal in due course but it is hoped that this will occur as early as August 2014.

It is anticipated that the Programme is likely to be based and structured on a similar basis to the Renewable Energy Independent Power Produce Procurement Programme. Bid response will initially be assessed against legal, technical, financial and economic development criteria in order to determine the compliance of the bids. If a bid is evaluated as compliant, such bids will then be evaluated on a comparative basis with regard to price and economic development.

The DoE envisages that projects submitted in the first bid submission phase of the Programme must be capable of commercial operation by the end of June 2019.

In our experience and based on similar projects undertaken by the DoE, participating in the process at an early stage affords developers and other parties who intend to participate, a competitive advantage and the ability to address legal, land and environmental requirements at an early stage. This will be important where time periods for submitting bids are curtailed and qualification criteria will not allow for the submission of bids without the requisite approvals and consents.

For further information please feel free to contact the authors.

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New Patent Border Protection Measures in Taiwan

07/25/2014 Winona Chen

Article 97-1 to 97-4 of the Patent Act regarding the "patent border protection" system passed by the Legislative Yuan on January 3, 2014 was promulgated by a Presidential Order dated January 22, 2014. The Legislative Yuan had stipulated that the relevant provisions would come into effect upon completion of the relevant implementation regulations by the Executive Yuan. Thereafter the Ministry of Economic Affairs (MOEA) and Ministry of Finance (MOF) jointly announced on March 24, 2014, the "Regulations Governing Customs Detaining Goods Suspected of Patent Infringement" (Jing-Zhi-Zi-10304601440 and Tai-Cai-Guan-Zi-1031006024). On the same day the Executive Yuan announced implementation of Article 97-1 to 97-4 of the Patent Act on March 24, 2014.

Before the implementation of patent border protection measures on March 24, 2014, there had been specific and fairly comprehensive regulations for trademarks and copyrights, as evidenced in the "Regulations Governing Customs Measures in Protecting the Rights and Interests of Trademark," "Implementation Regulations for Customs to Detain Articles Infringing the Rights in the Trademark," "Matters concerning Handling by the Directorate-General of Customs of Trademark Complaint Cases involving Import and Export of Counterfeit Goods," and "Implementation Regulations for Suspension of Release of Goods Infringing on Copyright or Plate Rights by Customs Authorities," etc. With respect to patent border protection, although Customs can implement it by way of the "Operational Directions for Customs Authorities in Implementing Measures for Protecting the Rights and Interests of Patents, Trademarks, and Copyrights," the said Guidelines did not contain specific regulations on the procedure and mode of implementation for seizure of infringing items by Customs and those on revocation of such seizure, thus significantly reducing the effect of patent border protection. This point is illustrated by statistical data compiled by the Customs Administration, MOF under "Border Measures for Intellectual Property Rights." Customs seizes or detains tens of thousands of imported items that are alleged to infringe trademarks, and thousands of imported items that are said to infringe copyrights, but has never seized any imported items that are said to infringe patents (see http://web.customs.gov.tw/lp.asp?CtNode=13159&CtUnit=998&BaseDSD=7).

The newly-implemented "Regulations Governing Customs Detaining Goods Suspected of Patent Infringement" ("Regulations") are specific implementations of Articles 97-1 to 97-4 of the Patent Act. Their key points are as follows:

1. Documents and materials to be submitted when applying for inspection and seizure (Article 2):

Where a patent holder suspects an infringement of its patent, it can apply in writing to Customs of the place of import for seizure. It should also attach documentary proof of its patent rights (for new utility patents the patent holder should also submit the new utility patent technical report), documentary proof of the patent holder's qualifications, analysis reports of the infringement, and explanations such as to identify the alleged infringing goods (sample or photograph, catalogue and pictures of infringing goods), and explanations such as to enable Customs to identify the goods to be seized (importer, uniform code, customs declaration form number, name of goods, model, specifications, likely date of import, port of entry or transportation means etc.)

2. Type of comparable security to be provided (Article 3):

Where a patent holder applies to Customs for seizure of alleged infringing items and such application has been approved by Customs on the ground of conformity with requirements, the patent holder should, upon notification, furnish cash security based on the amount assessed by Customs or comparable security. As for the type of security, the Regulations stipulate government bonds, bank certificate of deposit, certificate of deposit issued by a credit cooperative, over one year’s trust certificate from an investment company, and guarantee from a loan institution, etc.

3. When seizing the goods, Customs can enlist the assistance of the patent holder. It should also notify the patent holder and the importer of the seized goods in writing (Articles 4 and 5).

Time is of the essence with respect to border seizure by Customs. Out of prudence, the customs agency can, if it is necessary, enlist the assistance of the patent holder before seizure to identify the alleged infringing goods. Customs should notify all parties concerned in writing when carrying out seizure.

4. Procedure for applications to inspect seized items and implementation method (Article 6):

After Customs has carried out seizure, the parties concerned can apply to inspect the seized items in accordance with Paragraph 5, Article 97-1 of the Patent Act. They should do so in writing and to Customs of the place at which the goods are imported. Furthermore, in order to prevent disclosure of confidential materials relating to the seized goods, the parties should carry out their inspection in accordance with the time, place and method stipulated by Customs, thereby ensuring protection of their rights.

5. Commencement date for deadline before which a patent holder should institute litigation (Article 7):

Upon application by the patent holder for seizure of goods and upon seizure of such goods by Customs pursuant to Article 5 of the Regulations, both the patent holder and the importer should be notified in writing. The patent holder should institute infringement litigation within 12 days following that on which it receives such notice, and notify Customs with respect to such litigation. If the patent holder has already instituted litigation before seizure by Customs, it should also notify Customs to facilitate follow-up enforcement. Customs shall have the discretion to extend the aforesaid deadline by another 12 days.

6. Where the importer intends to provide counter-security with respect to its application for revocation of seizure, and where the litigants apply for revocation of seizure on the ground of non-infringement as adjudicated, documents should be provided (Articles 8 and 9).

Upon the patent holder's application for seizure, the importer may provide security amounting to twice the value assessed by Customs or its equivalent, and apply in writing to Customs for revocation of seizure (Article 8). Upon application by the patent holder for seizure of goods and upon seizure of such goods by Customs, and the patent holder's litigation has been dismissed by the court with respect to the issue of whether or not there is infringement, either the patent holder or the importer may apply in writing to Customs for revocation of seizure by submitting the judgment (Article 9).

7. Where the importer provides counter-security with respect to its application for revocation of seizure, Customs can obtain representative samples before allowing customs clearance as per normal procedure (Article 10).

After Customs has revoked seizure in accordance with regulations, Customs will proceed with customs clearance as per normal procedure. In order to maintain integrity of relevant evidence and materials for the case, as well as to facilitate subsequent processing, Customs may, with respect to goods for which seizure has been revoked by reason of the importer provided counter-security, obtain representative samples before allowing customs clearance as per normal procedure.

8. Documents to be submitted in application for return of security deposit or guarantee (Article 11):

The Article expressly provides the documents to be submitted by the parties concerned with respect to their application for return of security deposit or guarantee (documentary proof which has similar binding effect as the court's decision, agreement for settlement between the parties, documentary proof of a party giving the other party 20 days or more to exercise its rights and such other party fails to so exercise, or documentary proof of the other party's consent to return).

Conclusion

As with the "Operational Directions for Customs Authorities in Implementing Measures for Protecting the Rights and Interests of Patents, Trademarks, and Copyrights," the patent holder should still be required with regard to the seized imported or exported infringing items, to apply to the court for issuance of provisional injunction or prohibition of import or export of the infringing goods. Upon obtaining such order, it should also apply to the court for it to deliver such order (which should include the alleged infringing party's information, name of goods involved, specifications, model number or other information) to Customs for enforcement. Under Articles 97-1 to 97-4 of the Patent Act which came into effect and the Regulations, with respect to the seizure of alleged infringing imported products, the patent holder, instead of spending effort, time and expenses to obtain a provisional injunction in advance, can apply to Customs for seizure of suspected infringing goods, and upon payment of security deposit or comparable guarantee of an amount assessed by Customs, Customs can implement such seizure. The procedure no doubt offers better protection of the patent holder's rights.

Worthy of note is the point that Articles 97-1 to 97-4 of the Patent Act and the Regulations merely regulate the seizure of alleged infringing imported products; there is no provision for relevant procedure and implementation method for "exported products" which are allegedly infringing. However, under the Patent Act, the patent holder can still exclude sales (including export) of infringing goods. Since seizure of "exported" infringing goods is just as important to the patent holder as that of "imported" infringing goods, it remains to be seen how Customs should implement seizure of "exported" infringing goods, and the actual effect of the newly-implemented seizure regulations for "imported" infringing goods.

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Alternative Means of Allocating Telecommunications Spectrum

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Reports have been circulating since the beginning of this year that the National Broadcasting and Telecommunications Commission (NBTC) is looking to make a number of changes to the Act on Organization to Assign Radio Frequency and to Regulate the Broadcasting and Telecommunications Services of 2010, also known as the Frequency Allocation Act. One of the most talked-about changes would involve Section 45, which deals with allocation of spectrum.

Section 45 currently provides that any person who wishes to use spectrum for the purpose of operating a telecommunications business must obtain a license under the Frequency Allocation Act by means of a spectrum auction, in accordance with the criteria, procedures, duration, and conditions prescribed by the NBTC. In brief, the law stipulates that spectrum must be allocated only by auction.

The proposed change to Section 45 allows for other methods of frequency allocation. While the alternatives have yet to be announced, examples can be seen in other jurisdictions. These include auctions, lotteries and "beauty contests."

In recent years, the auction has the most frequently used method. From an economic standpoint, the best part about auctions—provided they are truly competitive—is that they allocate a spectrum to those who will use it most productively. The concept is that bidders, acting rationally, will make bids based on the profits they project to generate from the spectrum.

Since superior business plans align with projections of greater profits, bidders projecting the highest profits place the highest bids. Of course, bids cannot be arbitrary, because winning bidders must actually pay what they bid, and a tremendous amount of analysis goes into their business plans, both for their own internal purposes and for the purposes of obtaining external financing. Payments for spectrum rights can be enormous, and so a secondary benefit is that the cash yielded can be a boon to government finances.

On the other hand, some have argued that auctions put operators in the position of spending too much merely to acquire spectrum rights—funds that would be better used in building out their networks. They also argue that the expense of spectrum rights ultimately pushes up the prices operators charge their customers. These arguments are not universally accepted, however, and there are solid economic arguments against each of them.

Another possible weakness of auctions is they do not work well when the number of bidders is too low relative to the number of licenses being auctioned. In Thailand, where the three-bidder 3G auction drew widespread criticism, this is the key reason for seeking to amend the law to allow for the use of other methods.

As noted above, lotteries are an alternative. Following this approach, once a group of qualified applicants is established, a lottery is used to select winners at random, and the winners generally pay much lower fees for rights to use the spectrum relative to what would be payable in the context of a competitive auction.

However, one problem with lotteries is bids are often placed by opportunists who do not intend to use the spectrum and simply see an opportunity to obtain it at a low price and then sell it to real operators at a much higher price. So this approach can still result in operators paying high prices for spectrum, but the large profits go to winning bidders rather than to government coffers. Even worse, there are additional transaction costs associated with the sale of spectrum rights by winning bidders to real operators.

The other option is the colloquially termed “beauty contest.” Formally, the process is called a “comparative hearing.” Following this process, applicants must provide detailed information about themselves and their plans. The regulator then selects the strongest applicants with the best plans, and those winners pay fees that are substantially less than in a competitive auction.

But from the standpoint of the regulator running the beauty contest, it can be difficult to choose which criteria will be used to select the winners, and given all that needs to be considered, the selection process can be very lengthy and costly for the regulator.

Once the winners of a beauty contest are announced, there are risks that some applicants might perceive the results to be unfair, and they may challenge the selection. Also, some argue this method favors incumbents, as they are able to demonstrate experience, which would typically be heavily weighted in the regulator's selection process.

Ultimately, all three methods—auctions, lotteries, and beauty contests—are legitimate public policy choices. Different methods can be beneficial in different scenarios, and the challenge is choosing the method that best suits the circumstances.

In the case of Thailand, the primary barrier to successful auctions is the low number of qualified bidders.

One means of increasing the number of qualified bidders would be to ease foreign ownership and control restrictions in the telecommunications sector, so that foreign operators can bid without controversy.

Ultimately, service users would be better served by a market that is more competitive regardless of the nationality of the operators providing service in that market. Until such change is made, it is likely that auctions will not work as intended, and alternative methods will be necessary.

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ENERGY REGULATORY UPDATE - JULY 31, 2014

Transportation Department Proposes Enhanced Rail Car Standards and Controls for Trains Carrying Ethanol and Crude Oil

On July 23, 2014, the Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) issued a Notice of Proposed Rulemaking (NOPR) detailing its proposed revisions to the Hazardous Materials Regulations to improve the safe transportation of large quantities of flammable liquids by rail. The changes primarily impact the transportation of crude oil and ethanol by train because these are the flammable liquids most frequently transported in high volumes. If adopted, the proposed rules could have far-reaching and costly implications for the U.S. fuel transportation industry and producers in regions served by rail tank car transport.

The NOPR is available for review here. Comments will be due 60 days following publication in the *Federal Register*.

High-Hazard Flammable Trains

The NOPR proposes to revise the existing regulations to include additional requirements for high-hazard flammable trains or "HHFTs." An "HHFT" is a single train carrying 20 or more carloads of a Class 3 flammable liquid, which is a liquid that has a flash point of not more than 60.5°C (141°F), or any material in a liquid phase with a flash point at or above 37.8 °C (100 °F), including common fuels such as crude oil and ethanol.

New Tank Cars for High-Hazard Flammable Trains

The proposed regulations will require an enhanced design standard for new tank cars constructed after October 1, 2015 that are used to transport Class 3 flammable liquids in HHFTs. Tank cars built to the proposed new standard will be designated "DOT Specification 117." Unless they are retrofitted to meet the DOT Specification 117 standards, existing DOT Specification 111 rail cars may not be used for HHFT service after October 1, 2017 (in the case of Packing Group I, which are materials posing “great danger”), October 1, 2018 (in the case of Packing Group II, which are materials posing “medium danger”), or October 1, 2020 (in the case of Packing Group III materials which pose “minor danger”).

PHMSA intends to adopt one of three proposed design options as DOT Specification 117 and requests comments on each option. At a minimum, each of the design options would require tank cars with a full-height head shield, an 11-gauge jacket, 100-minute thermal protection, a reclosing pressure relief valve, top fitting protection, a modified or removed bottom outlet handle, and minimum steel standards for the tank and jacket construction. A retrofitted tank car, however, would not be required to include top fitting protection.

Operating Speed Restrictions for High-Hazard Flammable Trains

The proposal would impose a 50-mph speed restriction on all HHFTs and a conditional 40-mph speed restriction unless all tank cars containing flammable liquids meet or exceed DOT Specification 117. All HHFTs also would be required to be equipped with alternative brake signal propagation systems.

Notification to State Energy Response Commissions of Crude Oil Train Transportation

The new rule would further require railroads to provide each State Emergency Response Commission (SERC) with notice if it transports one million gallons or more of Bakken crude oil in a single train. The notice would have to contain: (1) a reasonable estimate of the number of affected trains that are expected to travel, per week, through each county within the State; (2) the routes over which the affected trains will be transported; and (3) a description of the petroleum crude oil and certain emergency response information.

Rail Routing for High-Hazard Flammable Trains

The proposed regulations would expand routing analysis requirements to all HHFTs. Existing regulations require rail carriers transporting certain explosives, poisonous materials, and radioactive materials to engage in an extensive routing analysis that considers 27 safety and security factors. The carrier must then select the route posing the least overall safety and security risk.

Classification and Characterization of Crude Oil of Mined Liquids and Gases

Under existing regulations, it is the responsibility of the offeror (i.e., any person who sells or makes hazardous materials available or any person who performs any pre-transportation function with relation to a hazardous material) to properly “class and describe the hazardous material,” select the most appropriate shipping name, and certify that the material is offered for transportation in accordance with the current requirements. The classification and characterization of a hazardous material dictates what other requirements will apply to the shipment of the material, such as operational controls.

PHMSA proposes to add a sampling and testing program for mined gas and liquids, such as petroleum crude oil, to ensure the proper characterization and classification of these materials. Every offeror would have to certify that it complied with the testing requirement and maintain documentation pertaining to the testing conducted.

Advanced Notice of Proposed Rulemaking

In a related rulemaking docket on July 23, 2014, PHMSA issued an Advance Notice of Proposed Rulemaking seeking comments on potential revisions to the current regulations to expand oil spill response planning requirements to HHFTs based on the volume of crude petroleum transported. Comments will be due within 60 days after the publication of the Advance Notice of Proposed Rulemaking in the Federal Register.

The Advance Notice of Proposed Rulemaking is available for review here.

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NLRB Will Charge McDonald’s as “Joint Employer” For Franchisee Labor Violations

08.05.14

By Rochelle Spandorf

In a move with far-reaching ramifications for all businesses that license their brands to independent contractors including franchisees, the National Labor Relations Board (“NLRB”) announced on July 29, 2014 that it has authorized the filing of administrative complaints against franchise giant, McDonald’s USA LLC, for unfair labor practices involving workers at franchisee-owned restaurants. The NLRB said that it had investigated 181 cases of unlawful labor practices at McDonald’s franchise restaurants since 2012, including reports that employees were fired for participating in worker protests, and found sufficient merit in at least 43 cases to name McDonald’s as the workers’ “joint employer,” creating a legal basis for holding McDonald’s responsible with the franchise owners for the labor violations. McDonald’s has more than 14,000 U.S. restaurants of which approximately 90 percent are franchisee-owned.

The NLRB’s announcement comes as the Board is reconsidering replacing its long-established “joint employer” test under the National Labor Relations Act. In late June, in *Browning-Ferris Industries of California, Inc*., a non-franchise case involving a Teamsters union appeal of a NLRB Regional Director’s decision holding that only independent staffing company employees, and not the plant’s regular employees, could vote in a representation election at a California recycling plant, the NLRB’s General Counsel filed an amicus brief urging the NLRB to scrap its 30-year old “joint employer” standard citing franchise relationships as a reason for change. “[F]ranchising ... illustrates how the current joint-employer standard undermines meaningful collective bargaining. … Although franchisors generally claim that they have no influence over the wages franchisees pay to their employees, some franchisors effectively control such wages ‘by controlling every other variable in the business except wages,’” quoting a 2014 paper by the National Employment Law, a workers’ rights organization.

The NLRB has yet to explain why it believes McDonald’s is a joint employer, but the NLRB’s rationale is likely found in the new “joint employer” test that it is pressing for in *Browning-Ferris*. In its amicus brief, the NLRB’s General Counsel urges the NLRB to replace the current “joint employer” standard, which examines a company’s direct control over another company’s essential employment decisions specifically affecting hiring, firing, supervision and direction of employment, with the pre-1984 broader-based “industrial realities” test, which focuses on the “economic dependence” between two companies and assumes that a company effectively controls another company’s labor decisions if it dictates standards for every other variable of its business.

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The Long Road Ahead for the NLRB and McDonald’s

Numerous constituencies have sharply attacked the NLRB’s Big Mac Attack as upending existing law in order to advance the Obama administration’s pro-union agenda. But, at this point, the development is just an announcement by the NLRB’s chief prosecutor authorizing the filing of complaints against McDonald’s. When complaints are filed, as expected by September, they will involve a cluster of franchisees in New York and others scattered around the country. There is no indication yet if the NLRB will file a one consolidated complaint or separate complaints.

It will then be a long time until a final ruling on McDonald’s “joint employer” liability. Current estimates are for a trial or trials before an NLRB administrative law judge starting possibly as early as December, 2014, that may take until spring, 2015 to conclude. Administrative hearings, while less formal than court proceedings, nonetheless involve motions, briefing, discovery, and live testimony. The full Board would probably not render its decision before mid-2015. If it concludes that McDonald’s is a joint employer, McDonald’s or the franchisee, or both, either together or separately may seek review in one of the federal appellate courts, and eventually, the matter could go to the U.S. Supreme Court, processes that could take years to complete. In other words, it might take years before a ruling is final on whether McDonald’s is the joint employer of the workers involved at the 43 cases presently under review.

Before then, national elections may disrupt the NLRB’s current agenda. Some industry groups are pressing for amendments to the National Labor Relations Act’s “joint employer” test as a more permanent solution to the problem. Meanwhile, pending a final ruling, franchisors among other businesses using licensees or temporary, outsourced and subcontracted workers – all targeted by the NLRB’s General Counsel for the expanded “joint employer” test - face considerable uncertainty on whether to pursue business as usual.

Joint Employer and Vicarious Liability

“Statutory” or “joint employer” liability makes a non-employer responsible for labor violations to the same extent as the worker’s “W-2” employer. The underlying principle is the venerable doctrine of vicarious liability or “business enterprise liability,” which shifts liability from a wrongdoer (agent) to someone else (principal). Vicarious liability’s rationale is that when someone engages someone else to act on its behalf, it should be liable to third parties for the actor’s wrongdoing to ensure recourse for the injured party in case the actor is judgment-proof. “*Respondent superior*, Latin for "let the master answer," rests on the same principle: the law may no longer use antiquated “master/servant” terminology, but it continues to hold an employer liable for an employee’s wrongdoing when the employee acts within the scope of his or her employment.

Franchise relationships are predicated on the assumption shared by both franchisor and franchisee at the outset of their relationship that the franchisee is an independent contractor, not an employee. Franchisees buy franchises in order to own their own business. The franchise business model neatly divides roles and responsibilities:

franchisors own a system for operating a business and license a bundle of intellectual property to franchisees on the condition that franchisees adhere to prescribed operating standards. Franchisees independently choose whom they hire to execute the prescribed business model, control their own operating costs, and reap the profits of their efforts after paying overhead and franchise fees.

Unlike employment relationships, independent contractor relationships do not, as a matter of law, result in vicarious liability: liability depends on proof that the contractor is an agent with actual or apparent authority to bind the non-actor principal. Vicarious liability considers the defendant's right to control the actor's day-to-day activities, which no doubt is a highly subjective test.

Third parties have long sought to hold a franchisor liable for injuries sustained as a result of acts or omissions by the franchisee or the franchisee's employees, whether due to bad food at a franchise restaurant, an accident in the franchisee's parking lot, or sexual harassment by a franchisee's manager. In the franchise context, a disturbing trend in vicarious liability cases is that courts are focusing on the franchisor's detailed operating manual - a classic feature of franchise relationships that has always been understood as a means for a franchisor to protect its trademarks—as evidence of the franchisor's *right to control*. Recent franchise rulings have cited the franchisor's highly detailed operating manual to support the finding of an agency between the franchisor and franchisee and a basis for holding the franchisor liable for the franchisee's acts or omissions. See *Comeaux v. Trahan*, 2012 U.S. Dist. LEXIS 158527 (W.D. La. Nov. 5, 2012); *Leach v. Kaykov*, 2011 U.S. Dist. LEXIS 34235 (E.D.N.Y. Mar. 30, 2011).

Trademark Rationale

The NLRB's "new joint employer" theory echoes this disturbing rationale, that if franchisors have so many detailed rules and standards for every aspect of the franchisees' day-to-day operation they must also control the franchisees' employment practices thereby making them liable for their franchisees' labor violations.

Unfortunately, the NLRB's theory denies the trademark-rooted reasons why franchisors impose detailed rules over their licensees' activities: to maintain product consistency and ensure the consumer's positive experience with the brand. Every franchise is a trademark license, and it is the federal Lanham Act enacted in 1946, nearly a decade before McDonald's sold its first burger and 25 years before the first U.S. franchise law, that requires licensors to impose quality controls over their licensees as a way of accommodating trademark owners who desire to exploit their marks through licensing without affecting the validity of their trademark rights. As the Second Circuit said in *Dawn Donut Co., Inc. v. Hart's Food Stores, Inc.*, 267 F.2d 358, 121 USPQ 430, 436-37 (2nd Cir. 1959): "unless the licensor exercises supervision and control over the operations of its licensees the risk that the public will be unwittingly deceived will be increased and this is precisely what the [Lanham] Act is in part designed to prevent."

The NLRB's "new joint employer" theory has far broader economic consequences than just franchising: it potentially affects all businesses that license their brands to independent contractors, even non-franchise arrangements, upturning everything from manufacturing licenses enabling brand owners to license product developers to expand the scope and geographic reach of their brands, to distributorships enabling suppliers to reach retail shelves by reselling branded products through dealer networks. The technical distinction between a franchise license and non-franchises license turns on whether independent contractors pay a required fee to the licensor for the right to affiliate with the licensor's brand, but the presence or absence of a required fee is of absolutely no importance to the NLRB's new theory, which presumes a licensor controls the licensee's employment decisions if the licensor regulates all other aspects of the licensees' everyday operations.

Implications for Franchisors

Even before the NLRB's decision to pursue McDonald's as a "joint employer," franchisors have been sued as "joint employers" for their franchisees' labor violations. *Compare, Courtland v. GCEP-Surprise, LLC*, Bus. Franchise Guide (CCH) P 15,101; No. CV-12-00349-PHX-GMS, 2013 WL 3894981 (D. Ariz. July 29, 2013) (both joint employer and vicarious liability claims rejected as basis for holding franchisor liable for alleged illegal discrimination against pregnant worker where there was no evidence of franchisor's involvement in the franchisee's human resources matters); with *Cano v. DPNY, Inc*., 287 F.R.D. 251 (S.D.N.Y. 2012) (franchisee workers granted leave to add franchisor Domino's as defendant in lawsuit alleging wage and hour violations at franchised stores).

And the NLRB is not the only public agency to target franchising. David Weil, the Labor Department's new Wage and Hour chief, blames the "fissured" workplace exemplified by franchise relationships for widespread wage and hour noncompliance and promises to accelerate efforts to hold companies accountable for violations suffered by individuals who may not work directly for them.

Under the current legal standard, only franchisors shown to exert a significant and direct degree of control over a franchisee's essential employment decisions pertaining to hiring, firing, disciplining, and supervising franchisee employees are considered "joint employers" and thereby vicariously liable for a franchisee's labor violations. While these cases always turn on their unique facts, they have yielded important lessons for franchisors: stay out of a franchisee's employment decisions; do not set wages or employment policies for franchisees; do not require franchisees to discipline or terminate workers who disobey franchise standards. Needless to say, not all franchisors have heeded this advice in the same way or at all. Over the years, franchisors have debated the wisdom of advising franchisees, typically novice business owners, about best employment practices and this might go as far as furnishing franchisees with a template employee handbook believing the handbook to be no different than supplying recipes and setting cooking temperatures.

While the Big Mac Attack plays out, the best advice for franchisors at the moment is to completely distance all operating advice from anything that could remotely be interpreted as suggesting or recommending particular employment practices. Do not provide template employee handbooks; do not threaten to terminate a franchisee who fails to discipline or fire an errant employee for violating brand standards. Instead, use the threat of terminating the franchise agreement to encourage franchisees to make their own decisions about how to achieve full compliance with system standards. A franchisor cannot, by law, contractually disclaim its “joint employer” status. Its potential liability as a “joint employer” will ultimately depend on the way in which its own employees on its behalf interact with franchisees and their workers.

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Medical Device Alert
5 August 2014

See note below about Hogan Lovells

FDA Issues Final Guidance Regarding In Vitro Companion Diagnostic Devices

Introduction: The Food and Drug Administration (FDA or the agency) announced on July 31, 2014, the publication of a final guidance on in vitro companion diagnostic devices. This guidance finalizes a draft guidance document that the agency issued on July 14, 2011, which in turn followed the agency's 2005 concept paper outlining the FDA's preliminary views on the appropriate regulatory framework for companion diagnostics. Stakeholders sharply criticized the 2005 concept paper as proposing unrealistic and inflexible regulatory requirements, such as concurrent approval of therapeutic agents and companion diagnostic tests. The final guidance, nevertheless, embodies the FDA's policy position that when safe and effective use of a therapeutic product depends on a diagnostic device, the FDA generally will require approval or clearance of the diagnostic device at the same time that the FDA approves the therapeutic product. That said, the guidance allows for two exceptions to the general rule of concurrent drug/device approval – when the therapeutic product is intended to treat serious and life-threatening conditions for which no alternative exists and when a serious safety issue arises for an approved therapeutic agent, and no companion diagnostic test is yet available.

Definition of "IVD Companion Diagnostic Device:" Like the draft guidance document, the final guidance defines an "IVD companion diagnostic device" as one that "provides information that is essential for the safe and effective use of a corresponding therapeutic product." It is important to note that the definition excludes devices that provide useful information regarding a product's use when that information is not a "determining factor" in that therapeutic product's safety and efficacy. This definition draws a regulatory distinction between tests that are intended as adjunctive tools in treatment decision-making (i.e., tests that are not "companion diagnostics") and tests that are critical in determining best responders or identification of patients at risk for serious adverse reactions to a drug/biologic (i.e., companion diagnostics).

An IVD companion diagnostic device that supports the safe and effective use of a particular therapeutic product may be: (1) a novel IVD device (i.e., a new test for a new analyte), (2) a new version of an existing device developed by a different manufacturer, or (3) an existing device that has already been approved or cleared for another purpose.

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Review and Approval Process: For a new device, the agency strongly recommends that a therapeutic product and its corresponding diagnostic device be developed and approved contemporaneously. According to the guidance, novel therapeutic products whose safe and effective use requires the results of a diagnostic test will not be approved unless the FDA has determined that the IVD is “properly validated and meets the applicable standard for safety and effectiveness or for substantial equivalence for the use indicated in the therapeutic product’s labeling.”

While the FDA expects that a companion diagnostic device and the associated therapeutic product will be approved at the same time, there are certain circumstances in which the agency might approve a therapeutic product before the companion diagnostic designated in its labeling is cleared or approved. Specifically, the FDA indicated that it may approve a therapeutic product that is intended to treat a serious or life-threatening condition for which no alternative treatment exists and where the benefits of the use of the therapeutic product far exceed the risks that may be presented with use of that product without an approved or cleared companion IVD.

In addition, the agency states that it may approve a revision to the labeling of an already-approved therapeutic product when it is necessary to include use of an unapproved or uncleared companion diagnostic device to address a serious safety issue. The final guidance explains that the review and approval of a companion IVD and the corresponding therapeutic product will be a collaborative effort of the applicable offices at the FDA. Specifically, approval via a premarket approval application or clearance via a 510(k) premarket notification of the diagnostic device will be subject to the applicable medical device regulations and approval of the therapeutic product will be subject to relevant drug or biologics product regulations.

Importantly, the guidance notes that studies of companion diagnostics used to make critical treatment decisions (e.g., patient or treatment decisions) likely will be significant risk devices that will require an Investigational Device Exemption (IDE) unless the device is used in a matter already cleared or approved by the agency. The FDA states in the guidance that the agency “strongly encourages” sponsors to request meetings “with both relevant device and therapeutic product review divisions as early in development as possible.”

Labeling: The guidance outlines labeling requirements for therapeutic products and their associated companion tests. In general, the guidance indicates that the FDA will require companies to list the type of companion IVDs in a therapeutic product's label, rather than the brand names of the test, to "facilitate the development and use of more than one approved or cleared" test for a specific indication. With regard to a companion IVD, the diagnostic test's label will have to list the specific drug/biologic or therapeutic class for which the diagnostic device is intended to be used. Any change in a diagnostic test's intended use (e.g., if the sponsor wants to market the test in a different disease setting or to determine response to other drugs/biologics) likely will require a new marketing application.

Laboratory Developed Tests: On a related note, the guidance document does not specifically address the FDA’s regulation of laboratory developed tests (LDTs). The FDA has separately issued two draft guidance documents on July 30, 2014, about the agency’s proposed approaches and timing for LDT enforcement. However, the FDA has stated that LDTs that are offered as companion diagnostics will be considered high-risk devices that will require premarket review as well as other FDA regulatory requirements. A separate client update on the proposed LDT approach will be available shortly.

Conclusions: The final guidance is consistent with and reiterates FDA positions regarding companion diagnostics outlined (and informally enforced) since the July 2011 issuance of the draft guidance. During that time, the FDA has been working with sponsors of therapeutic product/diagnostic test combinations on a case-by-case basis, and based on the final guidance document, it appears likely the agency will continue to do so.

Industry and the agency have acknowledged that companion diagnostics are critical to the advancement of personalized medicine. However, given the different timelines associated with the development of drugs/biologics versus diagnostics, the general concurrent approval requirement outlined in the guidance could add significantly to the time required for commercialization of products (both drugs/biologics and diagnostics).

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Latest Executive Order Will Mandate Self-Disclosure of Labor Law Violations

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President Obama’s newest executive order, issued on July 31, 2014, imposes additional labor compliance requirements on companies that choose to do business with the federal government. Entitled “Fair Pay and Safe Workplaces,” the new Order requires contractors and subcontractors to disclose their own violations of a panoply of labor laws and requires federal agencies to consider withholding contract awards from those companies who may not be responsible, based upon their history of labor law violations.

The Order targets four main areas:

1. Disclosure of Labor Law Violations. The Order mandates that solicitations require that contractors seeking to obtain a contract valued in excess of $500,000.00 must disclose whether an administrative merits determination, arbitral award, or civil judgment was rendered against it in the previous three year period. This new disclosure requirement applies to violations of many different labor laws and Executive Orders, including the Fair Labor Standards Act, the Service Contract Act, the Davis-Bacon Act, the Occupational Safety and Health Act, the National Labor Relations Act, and the federal anti-discrimination laws, as well as “equivalent” state laws. The bidding contractor must ensure that any proposed subcontractors that will provide goods and services valued at $500,000.00 or more also disclose any violations of the enumerated labor laws. Contractors and subcontractors will be given an opportunity to disclose steps taken to correct the violations or improve compliance with the labor laws before a contracting officer makes a responsibility determination.

Contractors are also subject to continuing disclosure requirements. Every six months during the performance of the contract, contractors must provide an updated disclosure of violations of the enumerated laws or Orders. If a violation is reported or discovered, a given agency's contracting officer will determine whether remedial action is necessary. Such remedial action could range from providing compliance assistance to contract termination, or even a referral to a debarring official.

2. Agency Monitoring of Compliance. Each federal agency will be required to designate a "Labor Compliance Officer" to assist contracting officers in assessing labor compliance of contractors. Among other things, before contracts are issued, agencies are to determine "whether an offeror is a responsible source that has a satisfactory record of integrity and business ethics," based in part on the contractor's disclosure of past labor law violations.

3. "Paycheck Transparency." The Order also contains new paycheck reporting requirements. Each pay period, contractors must provide their employees with information regarding that employee's hours worked, overtime hours, pay, and any additions or deductions to that employee's paycheck. Contractors must also include in their contracts with subcontractors a requirement that the subcontractor make the same paycheck disclosures. Notably, if the contractor is treating an individual as an independent contractor rather than an employee, the contractor must provide that individual with a document informing him/her of that status.

4. Prohibition of certain mandatory arbitration agreements. In an extension of a rule already familiar to Department of Defense contractors, all federal contractors with contracts valued in excess of $1 million will now be limited in their ability to require arbitration of certain employment claims. Such contractors may now arbitrate claims brought by an employee under Title VII of the Civil Rights Act of 1964, or any tort related to or arising from a sexual harassment or assault, only if the employee or independent contractor agrees to arbitration after the dispute arises. Contractors must also incorporate this provision into any contract with a subcontractor where the value of services rendered exceeds $1 million. The limitations on mandatory arbitration will not apply to employees subject to a collective bargaining agreement, and also do not nullify certain pre-existing arbitration agreements.

The Order directs the Department of Labor and the FAR (Federal Acquisition Regulatory) Council to establish regulations to implement the Executive Order, and it is likely that it will be many months before the full contours of the new obligations on contractors are clear. Nevertheless, in conjunction with the President's other recent executive orders establishing a $10.10 minimum wage for employees of contractors and addressing discrimination against LGBT employees of contractors, federal contractors will have significant new compliance obligations to digest as new regulations are issued over the next year. MLA will continue to monitor developments regarding this new Executive Order and forthcoming regulations.