PACIFIC RIM ADVISORY COUNCIL

Pacific Rim Advisory Council

January 2014 e-Bulletin

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PRAC @ PDAC Toronto
March 4, 2014

PRAC @ IBA Tokyo
October 20, 2014

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

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

PRAC @ IPBA Vancouver
May 9, 2014

PRAC @ INTA Hong Kong
May 11, 2014

Details at www.prac.org

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BAKER BOTTS MOSCOW LATERAL HIRE EXPANDS GLOBAL PROJECTS PRACTICE

Leading M&A Lawyer Mikhail Semyonov Joins Baker Botts in Moscow - Lateral Hire Expands Firm's Global Projects Practice in Russia

MOSCOW, January 7, 2014: Leading mergers & acquisitions lawyer Mikhail Semyonov has joined Baker Botts as a Global Projects partner in its Moscow office.

Semyonov has spent more than 11 years representing clients in major M&A and energy transactions in Russia and has extensive experience in the establishment of joint ventures for both Russian-based and international clients. Over the last two years, he has advised multinational energy clients regarding some of the largest and most innovative investments being made in the oil and gas industry in Russia. The 2013 edition of *Legal 500* notes that Semyonov 'is excellent at the detail and has expert knowledge'.

"Mikhail enhances our strength in providing counsel to clients on complex M&A transactions," said Maxim Levinson, Partner in Charge of the Moscow office for Baker Botts.

"Our recruitment of Mikhail demonstrates our continued commitment to maintaining the Moscow office as a global resource to our clients in the region or who are doing business here."

Mikhail recently advised Rosneft in relation to the agreements with ExxonMobil and Statoil for joint development of difficult-to-extract resources of hydrocarbons in Russia. Other notable transactions included advising Gazprom on the acquisition of Sibneft (Gazpromneft) and Huadian, one of China's major state owned power companies, on the formation together with TGK-2 of a joint venture project company to develop a 450MWt gas fueled power plant in the Yaroslaval region of Russia.

In addition to his M&A and joint venture work, Semyonov's practice includes providing corporate and transactional guidance to clients such as Unilever, Inchcape and PepsiCo.

Prior to joining Baker Botts, Semyonov was with the Moscow office of Linklaters as counsel. He earned his legal degree with honours from the Moscow State University.

For additional information visit www.bakerbotts.com

ALLENDE BREA PARTNER PROMOTION

BUENOS AIRES, January, 2014: Allende & Brea is pleased to announce the promotion of NICOLÁS GRANDI to partner effective January, 2014.

For additional information visit www.allendebrea.com.ar

CLAYTON UTZ APPOINTS NEW PARTNER IN MELBOURNE CONSTRUCTION AND MAJOR PROJECTS TEAM

MELBOURNE, 17 December 2013: Clayton Utz has appointed Jonathan McTigue as a partner in the Firm's national Construction and Major Projects practice, with effect from 1 January 2014.

Based in Melbourne, Jonathan has broad-ranging litigation and dispute resolution experience, particularly in complex and large-scale projects disputes. He has advised principals and contractors on the commercial resolution of disputes in a diverse range of projects including mining and hydrocarbon extraction infrastructure, pipeline installations, road, rail, Defence and social infrastructure projects.

Jonathan was previously a special counsel in the Melbourne Construction and Major Projects group. His promotion to the partnership reflects both his significant experience and capabilities, as well as the reputation of Clayton Utz as the market leader in both front and back end construction and major projects work.

Clayton Utz Chief Executive Partner Darryl McDonough said: "I congratulate Jonathan on his appointment, and the contribution he has made to the Firm since coming on board in 2002. He is an example of the diverse depth of talent we have at Clayton Utz, particularly in the area of construction and major projects."

Jonathan joins Orla McCoy, Scott Grahame and Anna Casellas as new partners on 1 January 2014.

For additional information visit www.claytonutz.com

DAVIS WRIGHT TREMAINE LEADING MEDICAL STAFF ATTORNEY JOINS GROWING HEALTH CARE PRACTICE

LOS ANGELES, 12 November, 2013: Abbie P. Maliniak, an attorney with more than 30 years of experience representing health care providers and medical staffs, has joined the growing health care practice at Davis Wright Tremaine LLP in the firm's Los Angeles office.

Maliniak handles a broad range of administrative and regulatory matters, and counsels health care providers on a wide variety of operational issues, including compliance with HIPAA and the California Confidentiality of Medical Information Act. She has successfully argued cases before state appellate and supreme courts, and reached positive outcomes for her clients in many arbitrations and mediations.

She joins the firm from Fenton Nelson, where she has been a partner since 2010.

"We are very pleased to add Abbie to our team," said Rick Ellingsen, chair of the health care practice at Davis Wright. "From the new HIPAA compliance rules to the constantly evolving regulations regarding medical staff, our health care clients, and the many other clients touched by health care laws, need clear and decisive advocacy. Abbie brings that kind of knowledge and leadership."

Maliniak's arrival follows closely on the addition of three other attorneys to Davis Wright's health care team: partner David Gee, partner Emily Studebaker, and senior associate Amy Kauppila. Maliniak is joining the firm as of counsel.

"The depth of experience and commitment to client service at Davis Wright makes it an ideal place to practice health care law," said Maliniak. "I am delighted to offer my current and future clients the benefit of this firm's commitment to excellence."

Maliniak received her B.A. from UCLA and her J.D. from Rutgers University School of Law, Newark.

For more information, visit www.dwt.com

GIDE ANNOUNCES FIVE NEW EQUITY PARTNERS

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

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

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

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

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

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

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

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

For additional information visit www.gide.com

HOGAN LOVELLS BOLSTERS TMT PRACTICE WITH LEADING HONG KONG HIRE

HONG KONG, 13 January 2014 – Hogan Lovells has recruited Mark Parsons into its Corporate/Commercial team in Hong Kong as a partner with a particular focus on complex commercial transactions and regulatory matters in the TMT sector. Mark is expected to join around the end of January 2014.

Mark was formerly a partner at Freshfields Bruckhaus Deringer in Asia where he led their IP/IT practice and their work in the TMT sector. Within a practice covering a wide range of commercial, regulatory and intellectual property matters, Mark is particularly experienced in the negotiation of multi-jurisdictional outsourcing, technology licensing and distribution agreements, as well as advising on commercial matters in the internet and e-commerce space. Mark also has a well-developed practice advising on Asia's fast developing telecommunications, media and data privacy regulations. Mark is a highly regarded TMT practitioner and is listed in Chambers as a leading individual, where clients reported "He has a very positive and solution-based approach to problems, and is an excellent technician as well."

Mark's hire adds further breadth and depth to Hogan Lovells' leading global Commercial practice and the well-established multi-disciplinary TMT practice across the Asia region.

Commenting on Mark's arrival, Peter Watts and Robert Waldman, global Co-Heads of Hogan Lovells' Commercial practice, said:

"We are delighted that Mark Parsons will be joining us in Hong Kong to strengthen our team. Mark is a leading practitioner in the TMT sector and he brings a unique blend of genuine commercial, corporate and sector experience that perfectly aligns with our practice both in Asia and globally.

Mark's arrival in our TMT sector team comes shortly after that of LA based media and entertainment partner Sheri Jeffrey who also has a significant Asian component to her practice. This underlines our commitment to further enhance our market leading capability serving the TMT sector in Asia and across our global network. "

Mark added:

"I am delighted to be joining an outstanding practice in Hong Kong and look forward to working closely with the Hogan Lovells' teams globally to provide our clients with the highest level of support in Asia's increasingly important and dynamic markets."

For more information, visit www.hoganlovells.com

NAUTADUTILH APPOINTS TWO TO PARTNERSHIP

AMSTERDAM, 18 December 2013: At NautaDutilh's General Meeting of Shareholders, **Barbara Rumora-Scheltema** and **Sjoerd Meijer** were appointed as partner.

Barbara Rumora-Scheltema specialises in corporate and commercial litigation and insolvency law, advising and litigating for national and international clients. She assists them among other things in restructuring and insolvency issues, commercial conflicts and cases concerning the recognition and enforcement of international rulings (including arbitral awards) in the Netherlands. Barbara has been working at NautaDutilh since 2001 and is one of the driving forces in NautaDutilh's Benelux Restructuring & Insolvency Team. Barbara regularly teaches in her field and is a frequent speaker at international conferences. She is also a member of various associations of insolvency specialists such as INSOL Europe and Insolad. In 2011, Barbara became European Regional Director on the International Board of IWIRC, the International Women's Insolvency and Restructuring Confederation.

Sjoerd Meijer has been a lawyer at NautaDutilh since 2008 where he mainly advises and litigates in the areas of insurance and liability law. He also advises clients such as (consumer) insurance companies, financial institutions and intermediaries on issues relating to regulation. Sjoerd advises clients on the effects of the Act on Financial Supervision (Wft) on their business. Sjoerd was formerly a lecturer at the VU University in Amsterdam, where he received a PhD for a thesis on indirect representation (middellijke vertegenwoordiging) in 1999. Sjoerd regularly teaches and publishes on issues regarding insurance law and contract law. He is also a member of the editorial board of the journal Aansprakelijkheid, Verzekering & Schade and of the Association for Insurance Research.

For additional information visit www.nautadutilh.com

UPCOMING PRAC EVENTS

PRAC @ PDAC Toronto
March 4, 2014

PRAC @ IBA Tokyo
October 20, 2014

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

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

PRAC @ IPBA Vancouver 2014
May 9

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PRAC @ INTA Hong Kong 2014
May 11

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MCKENNA LONG GROWS CORPORATE PRACTICE IN NEW YORK

McKenna Long & Aldridge LLP Kicks Off 2014 with Growth of Corporate Practice in New York

NEW YORK, 3 January 13, 2014: McKenna Long & Aldridge LLP (MLA) announces the addition of **Richard M. Ornitz** as senior counsel in MLA's Corporate practice. Based in the New York office, Ornitz is a recognized market leader in infrastructure and focuses his practice on international, privatization, private equity and cross-border finance matters. He is Chairman of Infralinx, a specialist infrastructure investment and development company, and he serves on the board of the United Nations Public Private Partnership Council. He previously served as Co-Chairman of the International Section of the American Corporate Counsel Association, as founder and Chairman of the European American General Counsels Group, as a member of the Private Advisory Board to the U.S. Secretary of State and as Vice Chairman of the Structured Finance GmbH of Creditanstalt Bank in Austria.

"Richard is an excellent example of the firm's strategic commitment to continue to expand the services we provide to clients out of the New York office," said Tony Williams, New York Co-Executive Partner. "His reputation and experience in infrastructure will benefit clients focused on project finance both in the U.S. and internationally."

Ornitz, who is the sixth addition to the New York office since January 2013, has closed in excess of $40 billion of infrastructure deals around the world, including a precedent-setting social infrastructure project for a courthouse in California, the M1/M15 and M5 motorway precedent deals in Central and Eastern Europe, the original IDB transportation A/B loan financings in Latin America and renewable energy projects in North America.

"We are excited to have Richard join the firm," said Wayne Bradley, Corporate Department Chair. "His unique background naturally complements our Corporate practice and his role as Chairman of Infralinx will enhance the value and service offerings we provide clients, particularly related to infrastructure."

Ornitz is a trained engineer who spent 12 years as General Counsel and in senior management with Degussa AG, a foreign Fortune 100 company. He received a B.S. in engineering from Cornell University, a Juris Doctor from New York University School of Law and a senior executive certificate from MIT Sloan.

"MLA offers me the perfect combination of skill, quality and stature to advance public private partnerships in the U.S. market and to help further their success internationally," said Ornitz. "Having spent 30 years in infrastructure working as each an engineer, lawyer and banker, I am proud to be a part of the MLA team and look forward to working with my new colleagues on helping to fulfill part of the substantial need for roads, bridges, ports, airports, courts, pipelines, power plants, grids, renewable energy facilities, communication systems and similar infrastructure assets around the world. Together with our clients we can make a difference."

For additional information visit www.mckennalong.com

MUNIZ ANNOUNCES PARTNER APPOINTMENTS

Muñiz, Rámirez, Pérez-Taiman & Olaya has promoted new partners linked to different practice groups.

María del Pilar Flórez and **Ricardo Vilchez**, members of the Labour practice group. Both have gained strong experience dealing with a wide number of matters regarding Labour Law, from collective bargaining to obtaining work permits for foreign workers in several industries, such as oil and mining.

Eliana Lesem, member of the Competition practice group. She holds a Master's degree from NYU University. She is directly responsible for all our advertising, unfair competition, trade barriers and consumer protection cases.

Jorge Otoya, member of the Tax practice group. He is an expert in dealing with complex tax planning. He's been involved in some of the most important transactions carried out in Peru in recent years.

Juan Carlos Velez and **Santiago Quiroz**, members of the M&A practice group. Both have worked in well known transactions regarding companies from different industries. Velez has provided legal advice to Auna, a Peruvian network of health centers focused on cancer treatment, in different acquisitions across the country and Quiroz is an expert particularly involved in acquisitions in the fishing industry.

Manuel Quiroga is in charge of the Insurance, Maritime and Ports practice group. Mr. Quiroga was the Chief Legal Officer of the National Ports Authority since its inception and also was part of the National Ports Development Plan's drafting team.

Gabriela Jáuregui is in charge of the Mining practice group. She has work experience at the public and private sector. She currently provides legal advice on regulatory compliance of mining obligations to key players in the mining industry.

Juan Carlos Salinas is in charge of the Agriculture, Agribusiness and Forestry Business practice group. He's a former adviser of the Minister of Agriculture. He is well known expert in acquisitions of lands, water rights and forestry concessions.

Bruno Merchor is in charge of the Patents practice group. He is a former director of the Inventions and New Technologies Directorate at Indecopi, the Peruvian agency in charge of promoting fair competition and protecting all forms of Intellectual Property.

Hugo Sarria is in charge of the Administrative Permits, Projects and Construction Law. His experience in these matters has been crucial for all our clients involved in the construction sector, a key player in the strong expansion of the Peruvian economy during these years.

For additional information visit www.munizlaw.com

TILLEKE STRENGTHENS INSURANCE PRACTICE

BANGKOK, 7 January, 2014: Tilleke & Gibbins has strengthened its insurance practice group with the addition of Michael Turnbull, who will serve as an Of Counsel in the firm's Bangkok office.

Mike has substantial experience in both contentious and non-contentious insurance-related matters. His work is primarily focused on insurance commercial litigation, having acted for reinsurers, insurers and insureds, brokers, and loss adjusters in various legal jurisdictions (including the PRC) on a range of claims-related issues arising from critical policy disputes, high-stakes inter-insurance commercial disputes, and mediation of insurance-related disputes. On the non-contentious side, Mike has advised brokers on regulatory issues relating to doing business throughout Asia, and he has assisted international insurers to establish their operations in numerous jurisdictions.

Mike joins Tilleke & Gibbins from leading Hong Kong–based firm Deacons, where he served as a partner for 15 years. With his particular expertise in insurance litigation, Mike has received international recognition as a leading insurance lawyer. Chambers Asia-Pacific called him "an impressive lawyer who provides significant skill and know-how in his advice."

This represents another addition to Tilleke & Gibbins' growing insurance practice. In early 2013, the firm hired Aaron Le Marquer from AIG, where he served as Assistant General Counsel to the company's regional headquarters. Thanks to these hirings, Tilleke & Gibbins has strengthened its ability to serve clients across their full range of insurance-related legal needs.

Mike joins Tilleke & Gibbins in January 2014. He can be contacted at +66 2653 5808 or michael.t@tilleke.com.

For additional information visit www.tilleke.com

DENTONS

ADVISES RM2 INTERNATIONAL ON £278 MILLION AIM IPO—LARGEST AIM FLOAT OF 2013

LONDON 18 December, 2013: Dentons has advised on the largest AIM float of the year, acting for international pallet manufacturer RM2 International S.A. (RM2) on its £278 million AIM IPO. The deal was announced on Wednesday 18 December with RM2 raising £137million before expenses through an institutional placing. Admission to trading on the London Stock Exchange is expected on 6 January 2014.

RM2 is a fast-growing business which manufactures pallets for use by some of the world's largest companies. It has designed and manufactured the BLOCKPal, a multi-trip pallet made of a glass fibre and resin composite. Its high profile board includes chairman Ian Molson, former chair of the eponymous Canadian brewer, Sir Stuart Rose, former chief executive of Marks & Spencer and Paul Walsh, former chief executive of drinks giant Diageo.

John Walsh, CEO of RM2, commented: "This was a very important deal for RM2 and Dentons really delivered a great service for us."

Neil Nicholson, Partner in Dentons' corporate practice, said: "This IPO represents a significant development for RM2, one that will help position RM2 as a leader in the global pallet market."

The Dentons team was led by Neil Nicholson and included associates Max Moore, Tom Causer and trainee Kathrine Chase.

For additional information visit www.dentons.com

CLAYTON UTZ

COLLINS FOODS TURNS TO CLAYTON UTZ TO SNAG COMPETITIVE FOODS FOR $55.6 MILLION

BRISBANE, 6 December 2013: Clayton Utz has provided legal advice and support to our client ASX-listed Collins Foods Limited in respect of its strategic acquisition of KFC fast food restaurant franchisee, Competitive Foods Pty Ltd, for a purchase price of $55.6 million. The deal was signed on 28 November.

Clayton Utz Corporate / M&A partner Andrew Hay led the firm's multidisciplinary transaction team, which included Corporate partner Stuart Byrne and senior associate Esteban Gomez, Banking partner Alex Schlosser and senior associate Kathryn Mitchell, and Real Estate special counsel Matthew Castley.

The acquisition, which remains subject to certain conditions, will see Collins Foods expand its network of KFC outlets outside of the East coast to Western Australia and the Northern Territory. Competitive Foods is one of the largest operators of KFC fast food outlets in Western Australia.

A Clayton Utz team, led by Andrew Hay, has also advised Collins Foods' wholly owned subsidiary, Collins Foods Group Pty Ltd, on its acquisition of a 50 per cent stake in gourmet hotdogs start-up business, The Snag Stand Group, for $2.25 million. The transaction, which involved pre-completion restructuring of the Snag Stand Group, completed on 29 November. Clayton Utz acted for Collins Foods on its Initial Public Offering and listing on the ASX in 2011.

For additional information visit www.claytonutz.com

BAKER BOTTS

REPRESENTS LIBERTY MEDIA CORPORATION IN PROPOSAL TO MAKE SIRIUS A WHOLLY OWNED SUBSIDIARY

NEW YORK, 7 January, 2014 -- Liberty Media Corporation ("Liberty") (Nasdaq: LMCA, LMCB) announced that it has made a proposal to Sirius XM Holdings Inc. (Nasdaq: SIRI) ("Sirius") that outlines the terms by which Sirius public shareholders would become shareholders of Liberty in a tax-free transaction.

Each share of Sirius common stock would be converted into 0.0760 of a new share of Liberty Series C common stock, and, immediately prior to such conversion, Liberty intends to distribute, on a 2:1 basis, shares of Liberty's Series C common stock to all holders of record of Liberty's Series A and B common stock to create a liquid trading market for Liberty's Series C common stock.

Upon the completion of the proposed transaction, Liberty expects that Sirius' public shareholders would own approximately 39% of Liberty's then-outstanding common stock.

For more information, please visit www.bakerbotts.com

NAUTADUTILH

ADVISES AERCAP HOLDINGS IN TRANSFORMATIVE USD$26 BILLION ILFC ACQUISITION FROM AIG

AMSTERDAM, 16 December, 2013: NautaDutilh advises long-standing client AerCap Holdings N.V., ("AerCap"), on a transformative transaction in which it will acquire 100% of the common stock of International Lease Finance Corporation ("ILFC"), a wholly-owned subsidiary of American International Group ("AIG").

Under the agreement, AIG will receive $3.0 billion in cash, and 97,560,976 AerCap shares and AerCap will assume outstanding ILFC net debt of USD 21 billion. Upon closing of the transaction, AIG will own approximately 46% of the combined company, while the existing AerCap shareholders will own approximately 54% of the combined company.

AerCap's CEO Aengus Kelly commented: "AerCap's acquisition of ILFC will create the leading global franchise in the aircraft leasing industry. The combination presents a unique strategic opportunity to bring together the outstanding and experienced personnel from both companies, along with a diverse portfolio of modern aircraft and customers, coupled with an attractive order book comprised of state-of-the-art aircraft. These combined resources along with a strong liquidity profile provide the opportunity to drive high levels of stable long term profitability and cash flows for the benefit of all our stakeholders."

The team of NautaDutilh consisted of Jaap Jan Trommel, Ruud Smits, Wijnand Bossenbroek, Walter Schellekens, Homme ten Have, Christiaan de Brauw, Pieter van Drooge, Robrecht Timmermans, Sjors Panis, Noura ten Kate, Lisa Schoenmakers and Paul Storm.

For additional information visit www.nautadutilh.com

GIDE

ADVISES ZF FRIEDRICHSHAFEN ON SALE OF ITS RUBBER AND PLASTICS BUSINESS

PARIS, 8 January, 2014: Gide has advised ZF Friedrichshafen AG on the French legal aspects of the sale of its Rubber & Plastics business unit to Shanghai-listed Zhuzhou Times New Material Technology Co., Ltd. (TMT).

The sold business unit includes nine sites across Europe, North and South America, Asia and Australia, with approx. 3,300 employees for estimated revenues of 700 million euros in 2013. The transaction is still subject to regulatory approvals, including in China and Europe.

The sale of this business unit is a landmark transaction, one of the largest Chinese direct investments in Germany so far.

This transaction underlines the growth of Gide's Franco-German practice.

The Gide team advising ZF Friedrichshafen AG was led by partner Karl Hepp de Sevelinges, and included partner Foulques de Rostolan (employment law) and associate Erwan Ogier (M&A).

For additional information visit www.gide.com

RODYK

ACTS FOR PROPOSED SA$200 MILLION SALE OF WAH LOON GROUP

Rodyk is acting for the founders/shareholders of Wah Loon Engineering group of companies (Wah Loon Group) on the proposed sale of Wah Loon Group to SGX Catalist-listed KLW Holdings Ltd (KLW) (and third parties identified by KLW) for a purchase consideration of S$200 million.

Wah Loon Group is a specialist integrated one-stop M&E solutions and was ranked first in the SME Enterprise 50 awards for 2011.

The Rodyk team consists of corporate partners Kenneth Oh, Hsu Li Chuan, and associates Glenda Lee and Goh Chaoqin.

For additional information visit www.rodyk.com

HOGAN LOVELLS

ADVISES TOWNE PARK ON RECAPITALIZATION BY TA ASSOCIATES

WASHINGTON, D.C. 6 January 2014: Towne Park, a provider of outsourced parking management and other specialized hospitality services to the hotel and healthcare industries has completed a recapitalization in which TA Associates, a leading global growth private equity firm, made a majority investment. Hogan Lovells advised Towne Park in the transaction.

As part of the deal, Towne Park management maintained a significant stake in the company. In addition, existing investor Camden Partners sold its stake in Towne Park, and HarbourVest Partners, also a current shareholder, re-invested in the company.

The Hogan Lovells team was led by Corporate Partners Henry Kahn (Baltimore) and Greg Parisi (Washington, D.C.) and included Corporate Partner Richard Horan (Northern Virginia), Corporate associates Nathaniel DeRose (Washington, D.C), Brandon Simmons (Washington, D.C.), and Derrik Forshee (Baltimore), Tax Partner Scott McClure (Washington, D.C.), Employee Benefits Partner Christian Chandler (Washington, D.C.), Employee Benefits associate Margaret McIntyre, Finance Partner Gordon Wilson (Washington, D.C.), Employment Counsel Christine Burke (Northern Virginia), Hart-Scott-Rodino Partner Michelle Harrington (Northern Virginia), and Hart-Scott-Rodino associate Charles Dickinson (Washington, D.C.).

For additional information visit www.hoganlovells.com

MCKENNA LONG & ALDRIDGE

ADVISES SILVERGATE BANK ON SALE OF LANCASTER BRANCH TO AMERICAS UNITED BANK

SAN DIEGO, 31 December 2013: McKenna Long & Aldridge LLP announced that client Silvergate Bank, a wholly-owned subsidiary of Silvergate Capital Corporation, and Americas United Bank (OTCQB: AUNB) have entered into a purchase and assumption agreement for Americas United Bank to acquire the deposits and branch facility of Silvergate Bank's full service branch office in Lancaster, California.

Under the terms of the agreement, Americas United Bank will assume substantially all of the deposits, totaling approximately $45.7 million, and purchase certain assets related to the branch. The transaction is expected to be completed in late first quarter or early second quarter of 2014 subject to regulatory approval and other customary closing conditions.

MLA partners Kurt Kicklighter and Chad Ensz served as legal advisors to Silvergate Bank.

For additional information visit www.mckennalong.com

KING & WOOD MALLESONS

ADVISES THE FIRST CASE OF B-SHARES CONVERSION INTO A-SHARES—ZHENENG ELECTRIC POWER BEING THE ONLY NEW A-SHARES TO BE LISTED IN 2013

On November 19, 2013, King & Wood Mallesons ("KWM") advised Zhejiang Zheneng Electric Power Co., Ltd. ("Zheneng Electric Power") to get successfully listed on the Shanghai Stock Exchange (SSE) through shares swap absorption merger with Zhejiang Southeast Electric Power Company Limited ("East Power B"), hence Zheneng Electric Power became the only new company which got its A-share listed this year.

The transaction has initiated the first case of B-Shares conversion into A-Shares in China's stock markets, and most importantly, this transaction reflected innovation and even breakthrough in the process of structuring, releasing and execution, as well as in the process of common stock issuance, common stock registration, common stock transaction, foreign investment, foreign exchange and even regulatory aspects, etc.

Zheneng Electric Power, as the merging party, was the largest electric power company based in Zhejiang province in East China, and East Power B (stock code: 900949), the target company, was a B-shares company listed on the SSE focusing on thermal power business. Zheneng Electric Power will still focus on Zhejiang province, seeking for nationwide development in the long term to become the top tier listed electric power company in China with remarkable advantage of scope, leading energy-saving technologies, internal operations with high efficiencies. Meanwhile, the successful result of this transaction can be referred as a typical model case for the domestic capital market which contributed to resolve the B-shares legacy problems.

As the merging party's legal counsel, KWM provided full legal services in this deal. This project was led by partners Mr. Zhang Xingzhong and Mr. Jiao Fugang. Partners Ms. Yang Xiaolei, Ms. Susan Ning, Mr. Zhang Yongliang, Ms. Jiang Yifeng, Mr. Zhang Mingyuan, Ms. Zhou Ning and Mr. Mu Peng provided strong support to the project.

For additional information visit www.kingandwood.com

TOZZINIFREIRE

ACTS FOR ELIS IN ACQUISITION OF ATMOSFERA

TozziniFreire assisted Elis, European leader in linen rental and laundry services, in the acquisition of Atmosfera, Brazilian leader in linen rental and laundry services, from the private equity firms Advent International and Alothon Group. With its 8 industrial sites located in the regions of Sao Paulo, Rio de Janeiro, Belo Horizonte and Salvador de Bahia as well as in the state of Santa Catarina, Atmosfera processes 95,000 tons of laundry every year and delivers to 2,800 clients from the healthcare, industrial and hotel sectors. The company has 3,500 employees and should generate revenue of around BRL 280 million (i.e. nearly €90 million) in 2013.

This acquisition has greatly accelerated Elis' international development: under Eurazeo's ownership, 20 external growth transactions have been completed outside France, representing a total annual revenue, including Atmosfera, of €217 million. International business now represents more than 25% of the company's revenue on a full-year basis, compared to 13% in 2007 when Elis was acquired by Eurazeo. This transaction will be completed in the 1st quarter of 2014.

Martin Miralles Pose and Maria Beatriz Bueno N. Kowalewski, partners in the Mergers and Acquisitions practice group at TozziniFreire, and Ana Cláudia Utumi, partner in the Tax practice group, were in charge of the transaction with assistance of the associates Edgard Pascarelli Assumpção and Rafael Balanin.

For additional information visit www.tozzinifreire.com.br

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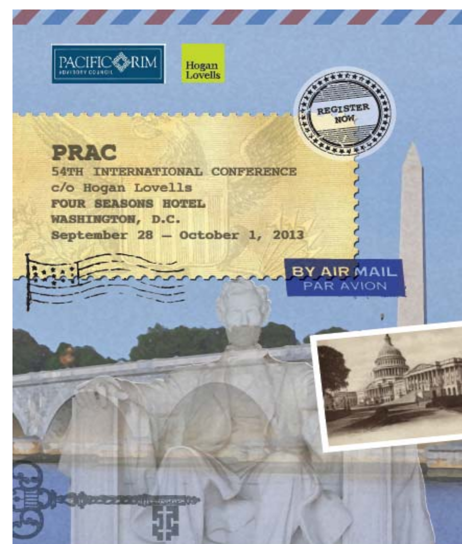

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CLAYTON UTZ

04 December 2013

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

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

Sanofi's psoriasis compound and Apotex's generic

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

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

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

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

A method of medical treatment can be a "manner of manufacture"

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

Infringement by supply of products: instructions

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

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

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

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

No evidence of a "reason to believe"

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

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

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

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

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

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

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

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

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

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

You might also be interested in...

- Federal Court decides isolated DNA is patentable subject matter

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NautaDutilh

Competition Newsflash

Belgian Competition Authority Issues Guidelines for Dawn Raids **7 January 2014**

This newsletter is sent by NautaDutilh

When investigating violations of competition law, the Belgian Competition Authority ("BCA") can carry out unannounced on-site inspections at the premises of undertakings, associations of undertakings and natural persons. Such inspections are known as dawn raids. Before launching an inspection, the BCA provides guidelines to the undertaking concerned, setting out the applicable procedure. The BCA has now decided to codify these guidelines and make them public.

The following points should be noted:

- In the guidelines, the BCA notes that it can start the inspection as soon as the undertaking concerned receives the orders issued by the competition prosecutor (*auditeur/auditeur*) and the investigating magistrate. It is not obliged to await the arrival of external counsel. In practice, however, the BCA will usually wait 30 minutes in order to allow external counsel to reach the premises.

- Electronic data and documents are increasingly crucial when it comes to proving potential violations of competition law. The guidelines explain in detail the methods the BCA applies to search for such documents and data.

  The guidelines provide much-needed insight into the various methods used to search for electronic documents and data during a dawn raid and appear to apply the best practices for seizing digital data established by the Brussels Court of Appeal in its judgment of 18 April 2013. Pursuant to this judgment, the documents must be selected in the company's presence. Secondly, the selection should be made using keywords, which should be closely connected to the practices under investigation. Hence, general keywords covering a wide array of subjects are not allowed. In addition, the selection of documents on the basis of keywords should be double checked using another set of keywords and spot checks. Finally, the company should be given sufficient time to review the selection, taking into account the complexity of the case. The prosecutors should permanently delete documents deemed to fall outside the scope of the investigation.

- In the guidelines the BCA expressly recognises that the attorney-client privilege extends to opinions issued by in-house counsels, who are members of the *Instituut voor Bedrijfsjuristen/Institut des juristes d'entreprise.*

Click here to view the guidelines in full.

Contact

For further information, please contact:

Belgium

Thomas Verstraeten
(T. +32 2 566 8344)

Geneviève Borremans
(T. +32 2 566 8328)

Luxembourg

Vincent Wellens
(T. +352 26 12 29 34)

The Netherlands

Herman Speyart
(T. +31 20 71 71 557)

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

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TAX AND OIL & GAS

Brazil: new regulations for the oil & gas special customs regime (REPETRO)

Instruction 1,415 of the Brazilian Federal Revenue established new rules for the oil & gas special customs regime named REPETRO.

REPETRO is the main tax incentive in Brazil for the oil & gas sector and represented a tax waiver of R$ 10 billion in 2011. A summary of the main changes is presented below:

- Scope: REPETRO's new regulation also encompasses the activities of exploration and production under the Onerous Assignment regime (Law n. 12,276 of 2010) and Production Share regime (Law n. 12,351 of 2010) in addition to the activities related to the Concession regime (Law n. 9,478 of 1997);

- Eligible Companies: Companies holding concession rights may apply, as well as those companies contracted under Onerous Assignment or Production Sharing regimes. Consortia also may apply, provided that they comply with specific tax rules for consortia. The new regulation also lists the companies allowed to apply as services providers and time charterers, as well as its subcontractors, and foreign trading companies. National manufacturers do not need qualification for the "fictitious export" custom mode;

- Eligible Goods: machinery, spare parts and pieces used for allowing the operation of key goods already admitted under REPETRO and whose unit customs value is less than US$ 25,000.00 are no longer eligible;

- Qualification Procedures: the application shall be made electronically through the software available at the Brazilian Federal Revenue's website. Additionally, companies must have a functioning "Electronic Tax Address" created according to tax regulations;

- Guarantees: the limit for the waiver for payment guarantee of suspended taxes rose from R$ 20,000.00 in taxes to R$ 100,000.00. Guarantees granted by any company whose net worth exceeds US$ 5,000,000.00 are now admitted. The need for a guaranty is dismissed for companies qualified in the Express Customs Clearance ("Blue Line").

- Termination: the reversion of goods to the Federal Government is admitted as a way to terminate the benefits of the regime, as provided for in the Concession and Production Sharing contracts. The situation in which goods cannot be removed from the place of production due to regulatory or environmental issues is also regulated, and their destruction or disposal shall be certified by a technical report.

- Simplified Procedures: The joint use of a good admitted under REPETRO, by the same beneficiary, for using under other service agreements entered into with the same or other contractor is allowed. The sending of goods abroad for maintenance and repairs without terminating REPETRO's benefits is allowed, however without suspension or interruption of its term.

- Transition Rules: pending decisions in applications for granting, extension or simplified procedures made before the publication of Instruction 1,145 will be assessed and judged according to the new rules; however, the US$ 25,000.00 threshold for acceptance of a good into the regime shall not apply to such pending applications.

Law No. 20,715:
On protection to debtors of money loans

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

Diego Peralta
Partner
+56 2 2928 2216
dperalta@carey.cl

Francisco Ugarte
Partner
+56 2 2928 2201
fugarte@carey.cl

Felipe Moro
Partner
+56 2 2928 2231
fmoro@carey.cl

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Carey y Cía. Ltda.
Isidora Goyenechea 2800, 43rd Floor
Las Condes, Santiago, Chile.
www.carey.cl

On December 13, Law No. 20,715 was published in the Official Gazette, after an intense debate in the financial industry and over 2 years of discussion in Parliament. The new law modifies Law No. 18,010 on regulations on money loan transactions, Law No. 19,496 on protection of consumer rights and the Chilean Tax Code.

In what refers to money loan transactions, Law No. 20,715 extends the application of the regulations for credit transactions and other money obligations to family assignation compensation institutions, insurance companies or savings and loans cooperatives, or any other institution placing funds by means of large money loan transactions, so that said entities will be subject to the supervision of the Superintendency of Banks and Financial Institutions (the "SBIF").

As for the determination of the current interest, the law allows the SBIF to establish the limits to the current interest by segments of credit considering the market's relevant aspects such as: volume, current interest rates, usual interest rates of effective and substitute transactions and credit cards' revolving interest rates.

The law forbids from setting an interest exceeding the product of the corresponding principal and the higher of: (a) 1.5 times the current interest rate in force at the time of the agreement, as determined by the SBIF for each kind of money loan transaction and (b) the current interest rate in force at the time of the agreement increased in 2 annual percentage points, being either a fixed or variable rate. This interest limit will be the new maximum conventional interest.

If any entity does not comply with the regulations of the new law, the SBIF may sanction it with: (i) warning or admonishment and (ii) a fine of up to UF 5,000 (US$220,000). In a case of repeated infractions of the same nature, a fine of up to five times the aforementioned amount may be applied.

In addition, special rules are also established regarding maximum rates for loans under UF 200 (US$8,800) and, in the case of microfinance, for those under UF 40 (US$1,750). It should be noted that the latter will enter into force on June 14, 2014.

Additionally, the law allows prepayment a loan, even against the will of the creditor, if the loan does not exceed the equivalent of UF 5,000 (US$220,000) and prepayment covers certain minimum expenses and exceeds 20% of the balance of the obligation.

Regarding the compliance of loan and money obligations, the law states that debtors whose commitments are of a principal below UF 200 will not be enforceable unless 60 continuous days as of the debtor's default have passed. This exception will also apply to money loan transactions with mortgage guarantees whose principal is equal or below UF 2,000 (US$88,000). It should be noted that any agreement to the contrary of such provisions will be deemed void.

Finally, the law forbids charging extrajudicial collection costs in amounts exceeding the percentages established in the regulation, stating that said charges may only be applied after 20 days of default, while the unpaid principal of the debt is not paid in full. It is also established that the charges of extrajudicial collection may not, in any case, accrue an interest higher than the current amount nor may they be capitalized for purposes of increasing the allowed amount of collection expenses.

CLOUD COMPUTING: KEY TELECOMMUNICATION REGULATORY ISSUES FOR FOREIGN SERVICE PROVIDERS IN CHINA

By Wang Rui* Qiu Shaolin**

China Bulletin Dec 2013

Introduction

Cloud computing has become quite a hot topic for discussion over the past few years. However, although recent interest in cloud computing has increased, it is not a completely new type of service. For example, when you send an email through Gmail, or store pictures on social media websites, you are using cloud computing services.

In China, cloud computing services has experienced fast and dynamic growth in recent years. The market value of China's public cloud computing services for the year of 2012 increased by 73 per cent compared to 2011, and the estimated market value for 2013 is expected to reach RMB 6.3 billion.[1] The growth of China's cloud computing industry has aroused great interest among foreign service providers. In May 2013, Microsoft Corporation announced that it would add several thousand employees to its work force in China as part of a long-term investment in the cloud computing market.[2] However, since foreign investment in the Chinese cloud computing industry is restricted, there are concerns about the short and long term benefits of foreign investment due to the limited participation of foreign investors in the market.[3]

This article will discuss key telecommunication regulatory issues for foreign companies that want to provide cloud computing services in China. Section I will explain the term "cloud computing" and three different types of service models. In Section II, the article will examine the regulation of cloud computing services by foreign companies in China. Lastly, Section III will discuss the recent "opening up" of the IDC industry in order to reflect on the current policy trends that regulate foreign related cloud computing services in China.

I. Defining "Cloud Computing"

Currently, "cloud computing" is a term without a common unequivocal scientific or technical definition.[4] However, it is generally accepted that cloud computing exhibits five essential characteristics: (i) on-demand self-service: a consumer can unilaterally order cloud computing services at any point in time, which becomes available on demand; (ii) broad network access: computing capabilities are available through widespread network accessibility, *e.g.* phone, tablet, computer; (iii) resource pooling: the computing resources are pooled; (iv) rapid elasticity: computing capabilities can be provisioned and released (sometimes automatically) and are available on an "as needed" basis; (v) measured service: cloud systems control, track and optimize resource use.[5]

These five characteristics are identified and well explained in the definition of cloud computing provided by the National Institute of Standards and Technology ("NIST")[6]. According to the NIST's definition, cloud computing is defined as "*a model for enabling convenient, on-demand network access to a shared pool of configurable computing resources (e.g. networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or cloud provider interaction.*"[7] For example, in the case of software as a cloud computing service, customers can subscribe to the service to receive access to specific business applications from cloud providers (*e.g.* through an internet browser), depending on their administrative, operational and sales needs. These applications are stored in a "cloud" and operated by cloud providers. As a result, customers do not need to purchase the application software or manage the infrastructure and platform where the applications run, which simplifies maintenance and support for the customer.

Three Major Service Models

As shown in Table 1, there are three fundamental service models for cloud computing: Infrastructure as a Service (IaaS), Platform as a Service (PaaS) and Software as a Service (SaaS). Each service category may be implemented independently or consumed in combination with other service tiers. In the most basic cloud-service model, IaaS, users may be provided with web-based access to virtual computing resources such as processing power, storage and networks (*e.g.* Dropbox).[8] The providers of PaaS deliver a computing platform that typically includes a set of development and deployment capabilities (such as an operating system, programming language execution environment, database and web server). A well known example of PaaS is the Google App Engine. Today, SaaS is the most mature area of cloud computing which provides users with complete business applications over the web[9] (*e.g.* Google Docs).

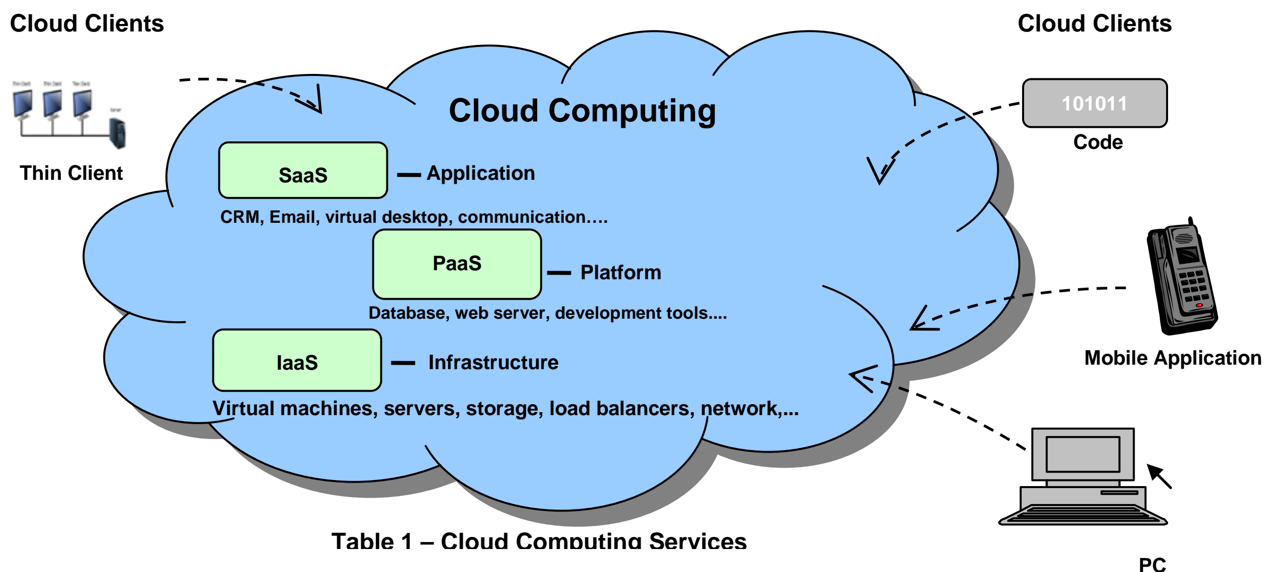

Table 1 – Cloud Computing Services

II. China's Telecommunication Regulation on Cloud Computing Services

Does a "Cloud Computing Service" License exist?

Currently, there is no specific legislation that directly addresses cloud computing services in China. However, since cloud computing services assist cloud users to store, process and transmit information through a real time network, such as the Internet, the *PRC Telecommunications Regulations* (《中华人民共和国电信条例》) (**"Telecommunications Regulations"**)[10] and other related rules will apply to regulate the provision of cloud computing services. Furthermore, a majority of cloud computing services are likely to be categorized as value added telecommunication services ("**VATS**") under the Telecommunications Regulations because such services are provided through basic public network facilities, such as the Internet.[11]

In general, telecommunications services are divided into specific service categories, for which a specific license is required, as listed under the Circular of the Ministry of Information Industry on the Readjustment of the Classification Catalogue of Telecommunication Services (《信息产业部关于重新调整<电信业务分类目录>的通告》)("**2003 Classification Catalogue**")[12]. Since cloud computing is a relatively new concept in China's telecom sector, it was not included as a specific service category under the *2003 Classification Catalogue*. However, if the features of the particular cloud computing services are caught by one or more of the existing service categories under the *2003 Classification Catalogue*, the service provider will need to get the corresponding license(s) for operating such services. For example, if the cloud computing services involve the provision of IDC services, an IDC Service license will be required.

The rules are different for cloud computing services that do not fall within the service categories under the *2003 Classification Catalogue*. Theoretically, the service provider will only need to file and record the case with the provincial counterparts of the MIIT before commercially operating the services.[13] According to our anonymous consultation with the MIIT, however, in practice, there is currently no specific procedure in place to fulfill such record-filing requirements,[14] and only a few companies have actually completed the record-filing process with the MIIT. Neverthelss, the information about the aforesaid successful cases for record-filing is not publicly accessible.

Restrictions on Foreign Investment in the Provision of Cloud Computing Services

In 2001, when entering the WTO, China made commitments related to telecommunication services in Annex 9 (*Schedule of Specific Commitments on Services-List of Article II MFN Exemptions*) of the *Protocol of Accession of the PRC* ("**Annex 9**"). In this regard, foreign service providers are only permitted to provide the telecommunication services listed in *Annex 9* to Chinese customers, unless the Chinese government decides to expand foreign entrance to other service categories.[15] Furthermore, in order for a foreign service provider to provide any of the services listed in *Annex 9* to its Chinese customers, it must first establish a commercial presence in China. Foreign service providers may not provide cross-border telecommunication services to China, regardless of whether the particular service category is open to foreign party.

As such, if a foreign company wants to provide cloud computing services in China, it must establish a foreign invested telecommunication enterprise ("**FITE**") in China, in accordance with the relevant requirements set forth in the Catalogue of Industries for Guiding Foreign Investment (《外商投资产业指导目录》)[16] ("**Foreign Investment Catalogue**"), the *Telecommunication Regulations*, the *Provisions on Administration of Foreign-Invested Telecommunications Enterprises* (《外商投资电信企业管理规定》)[17] ("**FITE Provisions**") and other related rules. Presently, the proportion of foreign capital investment in FITEs providing BTS should not exceed 49% and for VATS-type FITEs should not exceed 50% in total.[18]

The substantial requirements for establishing a FITE that wants to operate VATS include: (i) the corporate structure of the firm shall be a Sino-foreign equity joint venture[19]; (ii) the proportion of capital invested by the foreign company shall not exceed a total of 50%[20]; (iii) the registered capital shall be or more than RMB 10 million (if it wants to provide services nation-wide); and (iv) the foreign investor shall have a record of good performance and operating experience in managing value-added telecommunications business[21].

In the application process, there are a few procedural requirements to be followed. First, the principal Chinese party ("**Principal Chinese Investor**") should obtain the *Examination Opinion on Foreign Investment Engaging in Telecommunication Business* from the MIIT or its provincial counterparts, which is equivalent to the consent of the Chinese government from the industry regulatory perspective. Second, the Principal Chinese Investor should obtain the *Foreign Investment Enterprise Approval Certificate* from the Ministry of Commerce or its provincial counterparts. The third step is for the Principal Chinese Investor to apply for the relevant telecommunication service license from the MIIT. Lastly, the proposed FITE should register with the State Administration for Industry and Commerce or its local counterparts to obtain a Business License. Once the Business License is obtained, the FITE is considered to be duly incorporated under Chinese law, and it must provide telecommunication services in accordance with its operational scope as approved.

In practice, however, the establishment of FITEs in China is relatively restricted. For instance, since the promulgation of the *2003 Classification Catalogue*, only around 28 FITEs have managed to obtain the telecommunication license in China so far.[22] Also, the Chinese government is making it increasingly difficult for FITEs to obtain ICP licenses because of the tightening policies on internet censorship.

III. New Trend in the Regulation of Cloud Computing Services in China

Proposed Amendment to the 2003 Classification Catalogue

In line with the rapid progression of the cloud computing industry, and its significance to the global comptetition of the countries in the era of information, China has made tremendous efforts to promote the development of this industry. In 2012, the Chinese government formed a specific five year plan for developing cloud computing technology.[23] Furthermore, cloud computing services and the relevant equipment are also considered as two key categories

under the *Guiding Catalogue on Key Products and Services in Strategic Emerging Industries* (《战略性新兴产业重点产品和服务指导目录》)[24].

Moreover, the MIIT has strengthened its efforts to regulate the cloud computing industry. To this end, among other things, MIIT circulated an updated version of the *2003 Classification Catalogue* on May 25, 2013 ("**2013 Draft Classification Catalogue**"), to solicit public comments.[25] Compared with the *2003 Classification Catalogue*, the *2013 Draft Classification* Catalogue has added several service categories for both BTS and VATS services.

Although the *2013 Draft Classification Catalogue* did not add a "cloud computing service" category, it introduced a new service category named "Internet Resources Collaboration Services" in the VATS Section. According to the *2013 Draft Classification Catalogue*, "Internet Resources Collaboration Services" refers to "the use of equipment and resources constructed on data centers, and through the internet or other networks, to provide customers with services, **including, data storage, development environment for internet applications, deployment of internet applications and operation management** to users by way of easily accessible, use on-demand, easily expanded and/or collaborative sharing." The addithion of this service category, and other new relevant categories such as the "Content Distribution Network Services", to the Classification Catalogue is probably intended to capture or facilitate the development of cloud computing.

Will the Urge of Promoting Industry Outweigh Restrictions to Foreign Investment?

If the *2013 Draft Classification* Catalogue is approved, and if the two above-mentioned service categories related to cloud computing services are still included therein, then the new catalogue is likely to expand the service scope of foreign service providers in the Chinese market. In practice, however, it remains uncertain whether the Chinese government will loosen the tight restrictions imposed on foreign service providers in the telecommunication industry, and more specifically in the cloud computing industry.

For example, IDC is largely used as the fundamental IT infrastructure in the provision of cloud computing services. The IDC Service itself is an exisiting service category listed in the *2003 Classification Catalogue*, and it remains a separate service category in the *2013 Draft Classification Catalogue*. In 2008, however, the government suspended the MIIT's issuance of IDC Service licenses to combat rampant internet obscenity in China.[26] At the time, the suspension order applied to both domestic and foreign service providers.

The ban lasted for almost five years up until the end of 2012, after which the suspension was lifted by the *Notice of MIIT on Further Regulating the Market Access of Internet Data Center Service and Internet Access Service* (《工信部关于进一步规范因特网数据中心业务和因特网接入服务业务市场准入工作的通告》) ("**IDC/ISP Notice**").[27] However, the ban was only lifted for domestic investors and those investors from Hong Kong or Macau, foreign companies (including companies from Taiwan) are precluded from investing in China's IDC industry.[28] The newly promulgated policy for the Shanghai Free Trade Zone is even more stringent to foreign investment in the IDC industry.[29] As such, although the IDC/ ISP Notice is expected to promote

the development of the cloud computing industry[30], foreign investors are still restricted from operating in this area.

Collaboration with Chinese Partners

At the present stage, the opportunities for foreign investment in the cloud computing service sector are still very limited. Therefore, some foreign service providers have decided to seek foothold in the Chinese market by collaborating with local Chinese enterprises that have already obtained the required telecommunication operational licenses. For example, in order to provide its cloud-based platform Windows Azure in China, Microsoft entered into a three-party agreement with Shanghai Municipal Government and 21Vianet Group Inc. (世纪互联), a Chinese Internet infrastructure provider, in 2012.[31] Chinese clients use the Windows Azure platform to run corporate programs, websites and applications from Windows Azure data centers (operated by 21 Vianet).[32] Although the detailed arrangements for the Microsoft-21 Vianet partnership are not publicly available[33], it seems that this collaboration is unlikely to be challenged on grounds that it circumvents existing restrictions on foreign service providers because the Shanghai Municipal Government is also a party to the arrangement.[34]

IV. Conclusion

The rapid development of China's cloud computing industry has offered great opportunities for foreign cloud computing service providers. However, since the telecommunication (internet in particular) sector is, and has always been, highly regulated in China, foreign companies providing (or that want to provide) cloud computing services in China still face stringent regulatory challenges from the telecommunication regulation perspective. It will be interesting to see what the future has in stall for the cloud computing industry in China.

Special thanks to Ge Yibo, Rebecca Brust and Yang Xiande for their contributions to this article.

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

* Wang Rui is a partner in King & Wood Mallesons' M&A Group, Beijing Office.

** Qiu Shaolin is an associate in King & Wood Mallesons' M&A Group, Beijing Office.

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[1] See the Article titled *The Message Conveyed by the Investigation Report on the Development of China's Public Cloud Computing Services* （《<中国公共云服务调查报告>传递出的信息》） (http://www.chinacloud.cn/show.aspx?id=12508&cid=18, last accessed on October 28, 2013). However, the *Investigation Report on the Development of China's Public Cloud Computing Services* (2012) (《中国公共云服务发展调查报告（2012 年）》) issued by the China Academy for Telecommunication Research of the Ministry of Information and Industry Technology ("**MIIT**"), which is the data source of this article, is not publicly available on the Internet.

[2] See http://usa.chinadaily.com.cn/epaper/2013-09/12/content_16963392.htm, last accessed on October 28, 2013.

[3] *Ibid*.
[4] See http://en.wikipedia.org/wiki/Cloud_computing, last accessed on October 28, 2013.
[5] See http://www.inforisktoday.com/5-essential-characteristics-cloud-computing-a-4189, last accessed on October 28, 2013.
[6] NIST is a non-regulatory agency of the United States Department of Commerce. The institute's official mission is to promote U.S. innovation and industrial competitiveness by advancing measurement science, standards, and technology (http://en.wikipedia.org/wiki/National_Institute_of_Standards_and_Technology, last accessed on October 28, 2013).
[7] *See Guidelines on Security and Privacy in Public Cloud Computing* (http://www.nist.gov/customcf/get_pdf.cfm?pub_id=909494, last accessed on October 28, 2013).
[8] See page 14 of *A Quick Start Guide to Cloud Computing*, by Dr Mark I Williams, published in 2010 by Kogan Page Limited.
[9] See page 10 of A Quick Start Guide to Cloud Computin, by Dr Mark I Williams, published in 2010 by Kogan Page Limited.
[10] Promulgated by the State Council on September 25, 2000 and effective as of the date of promulgation.
[11] According to Article 8 of the *Telecommunications Regulations*, telecommunication services are classified into two categories, i.e. basic telecommunication services ("**BTS**") and VATS. BTS refers to the provision of basic public network facilities, public data transmission and basic voice communication services, whereas VATS refers to the provision of telecommunication and information services using basic public network facilities.
[12] Promulgated by MIIT on February 21, 2003 and effective as of April 1, 2003.
[13] See Article 9 of the *Telecommunications Regulations*.
[14] In this regard, MIIT issued the draft *Administration Provisions for Trial Operation of New Type Telecommunication Services* (《试办新型电信业务管理办法（征求意见稿）》) on April 27, 2013 seeking public comments, which have not taken effect yet. According to Article 9 of the draft Provisions, as long as the relevant filing-record procedures are duly complied with, for those companies that have obtained a BTS license, the trial operation of new services for providing basic public network facilities, public data transmission and basic voice communication services is permissible, for those cpmpanies that have obtained a VATS license, the trial operation of new services for providing telecommunication and information services using basic public network facilities is permissible.

[15] For example, compared with the Annex 9's committed service types, the scope of VATS service in the *2003 Classification Catalogue* is borader and included several categories such as IDC Service and IP-VPN Service which are not listed in Annex 9.
[16] The most current version was promulgated by the National Development and Reform Commission and the Ministry of Commerce on December 24, 2011, and effective as of January 30, 2012.
[17] Promulgated by the State Council in 2001 and last revised on September 10, 2008.
[18] See the "Restricted Category Section" of the *Foreign Investment Catalogue*.
[19] See Article 2 of the *FITE Provisions*.
[20] See Article 6 of the *FITE Provisions*.
[21] See Article 10 of the *FITE Provisions*.
[22] See http://bzxx.miit.gov.cn:8080/datainfo/miit/miit10063.jsp, last accessed on October 28, 2013.
[23] See the *Twelfth Five-years Special Plan for Cloud Computing Technology Development of the PRC* (《中国云科技发展"十二五"专项规划》) (http://www.gov.cn/zwgk/2012-09/18/content_2227470.htm, last accessed on October 28, 2013).
[24] Promulgated by the National Development and Reform Commission on March 7, 2013.

[25] The deadline for soliciting public comments has been ended on June 24, 2013 (http://www.miit.gov.cn/n11293472/n11293832/n12845605/n13916913/15422632.html, last accessed on October 28, 2013).

[26] The Ministry of Information and Industry ("**MII**", the predecessor of MIIT) issued the *Circular of MII on Working Plan of Special Action for Combating Internet Obscenity Legally* (《信息产业部关于依法打击网络淫秽色情专项行动工作方案的通知》) and the *Circular on Further Carrying Out the Relevant Requirements on Combating Internet Obscenity Legally* (《关于进一步落实信息产业部依法打击网络淫秽色情专项行动有关要求的通知》), which in fact led the suspension of the IDC Service license.

[27] Promulgated by MIIT on November 30, 2012 and effective as of December 1, 2012.

[28] See the MIIT's answer to Question 7 in the document *Frequently Asked Questions Concerning the Application for IDC/ ISP License* (https://tsm.miit.gov.cn/pages/PublicInformationList.aspx?id=2321, last accessed on October 28, 2013). Also, with the signature of the *Closer Economic Partnership Arrangement* and the Supplements related thereto that are entered into between Mainland China and Hong Kong Special Administrative Region and between Mainland China Macau Special Administrative Region respectively, IDC Services, subject to certain requirement and conditions, are open to the FITEs jointly established by the service providers incorporated in Hong Kong and Macau Special Administrative Region and their Chinese partners.

[29] Accoridng to the 'Negative List' for Foreign Investment in the Shanghai Free Trade Zone, IDC Service is listed as a category in which foreign investment is prohibited (http://www.shanghai.gov.cn/shanghai/node2314/node2319/node12344/u26ai37036.html, last accessed on October 28, 2013).

[30] According to the statistics posted on the official website of MIIT, there are hundreds of companies have passed the technical evaluation, a precondition for issuing the IDC Service license (https://tsm.miit.gov.cn/pages/PublicInformationList.aspx?id=2281, last accessed on October 28, 2013).

[31] See http://www.shanghai.gov.cn/shanghai/node2314/node2315/node15343/u21ai676727.html, last accessed on November 8, 2013.

[32] See http://www.shanghai.gov.cn/shanghai/node2314/node2315/node4411/u21ai748324.html, last accessed on November 8, 2013.

[33] It is also reported that Microsoft will license certain technology to 21Vianet and the latter will operate Windows Azure and Office 365 and provide the related services to Chinese users (http://it.sohu.com/20121101/n356390130.shtml, last accessed on October 28, 2013).

[34] *Supra* note 31.

Insurance technical reserves

Fri, 12/27/2013 - 10:25

NewsFlash: 220

Insurance and Reinsurance

Decree on technical reserves for insurance companies

On December 20, 2013, the Colombian Ministry of Finance and Public Credit issued Decree No. 2973 of 2013, "*by which Decree No. 2555 of 2010 is amended, regarding the rules related to technical reserves of insurance companies*".

Through this decree, the general system of technical reserves for insurance companies was updated, "*in order to adjust in a technical manner, the budgets by which the insurance business must conform to*", regarding technical reserves. Some of the aspects regulated by the decree are the following: (i) the definition of each technical reserve, (ii) the accounting and calculation of each technical reserve, (iii) the regulatory regime for each technical reserve and (iv) special regulatory regimes of technical reserves, for insurance companies that offer insurance products such as earthquake and education insurance.

See Decree 2973 of 2013

For more information please contact

Carlos Umaña Trujillo

Lucas Fajardo Gutiérrez

Juan David Marín

Carlos Andrés Rodríguez

arias & muñoz

January 4, 2014

LEGAL ENTITY TAX PAYMENT

All companies, including representatives of foreign legal entities and individual limited liability companies, must cancel the legal entity tax by January 31st, 2014.

This is a summary of some important aspects to consider about this tax

	CRC ¢	USD$ Aprox.
Active partnerships	199,700.00	400.00
Non-active partnerships	99,850.00	200.00

1. Every entity which has not cancelled the tax payment as of February 1st, will not be able to register documents and obtain digital certificates before the National Registry.

2. Failure to pay this tax will generate a late fee that increases daily.

3. Failure to pay the tax for three consecutive periods will cause the forced dissolution of the company. The year 2014 will mark the third year for this tax, so partnerships which have not made any payment could be dissolved this year.

To obtain legal advice in Corporate and Tax Law in Costa Rica, you can send me an email to cflores@ariaslaw.co.cr or you may call me at + 506 2503.9800.

For additional information visit www.ariaslaw.co.cr

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NEWS DETAIL

14/11/2013

RECENT REGULATION ON FOOD AND DRUG SUPERVISORY AGENCY (BPOM) REGARDING TOBACCO PRODUCTS

In line with the task assigned to it under article 60 (5) of Government Regulation Peraturan Number 109 of 1012 Regarding Health Safety Measures on Material Containing Addictive Substance in the Form of Tobacco Products, i.e. to prepare a regulation regarding supervision of circulated tobacco products, the Indonesian Food and Drug Supervisory Agency ("BPOM") issued, on 28 Juni 2013, Regulation of Head of BPOM Number 41 Tahun 2013 regarding Supervision of Circulated Tobacco Products, Health Warnings on the Advertisements and Packaging, and Promotion. The supervision meant in this regulation is supervision on the tobacco products themselves and on their advertisements and promotion. In brief these are the provisions of note:

- Samples of tobacco products will be randomly collected from tobacco sellers or distributors for the running of tests to find out the real nicotine and tar content as well as for confirming whether the packaging has complied with the requirement of placing health warning and information regarding the tobacco product;
- The following words are specifically prohibited from use in the promotion and marketing of the products: "light", "ultra light", "mild", "extra mild", "low tar", "slim", "special", "full flavor", "premium", and similar words, except for tobacco products of certified marks;
- Supervision of tobacco products advertising and promotion is conducted on the newsprint and all media broadcasts as well on all promotional activities;
- For tobacco products to be produced or imported there is a reporting requirement on the nicotine and tar content test results.

This regulation has been in effect as of 28 June 2013, the date of its enactment. (by: Aldo Ersan Mangasi Sirait)

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SANTAMARINA STETA

México • Monterrey • Tijuana

LEGAL ALERT

December 17, 2013

ENERGY REFORM

On December 11, 2013 the Mexican Senate approved, with 95 votes in favor and 28 against, the so called energy bill which amends and supplements Articles 25, 27, and 28 of the Mexican Constitution on energy matters.

Following said approval, the constitutional process continued. Once approved by the Senate, the bill was sent to the Mexican House of Representatives for approval. On December 12 the bill was approved in all general and particular aspects by the House of Representatives, with a qualified majority of 353 votes in favor and 134 against.

The bill is currently under review by the local legislatures, a majority of which has already approved it, and the document will now be turned to the Executive Branch, it being expected to be enacted in the coming days.

The reform sets out significant changes to the energy industry in Mexico, including the following:

- Pemex (Petróleos Mexicanos) and CFE (Federal Commission of Electricity) become "Productive State Companies", with new effectiveness, efficiency, productivity and transparency criteria applying both from an operational and structural perspective.

- New contractual alternatives are provided for exploration and exploitation activities allowing the private sector to participate. Four contractual models are foreseen: (i) service contracts, (ii) profit-sharing contracts, (iii) production-sharing contracts, and (iv) licenses, each to be specified and detailed through secondary legislation.

- The CNH (National Hydrocarbons Commission) and CRE (Energy Regulatory Commission), both regulators of the energy sector, will be strengthened with new and improved power to regulate activities deriving from the new structure.

- The Natural Gas Control Centre is created, responsible for the operation of the national pipeline and storage system.

- Income from production activities is to be managed more effectively and efficiently. The (i) Mexican Petroleum Fund, a trust responsible for the management of oil revenues,

(ii) Stabilization of Oil Revenues and States Fund and (iii) Extraction of Hydrocarbons Fund are created, with the aim to manage royalties from oil extraction, among others.

- The electric generation and sale markets are to be liberalized. Transmission and distribution activities are to remain, in principle, in the hands of CFE, although the possibility to enter into agreements with the private sector is also foreseen.

- The Oil Union will no longer participate in the board of directors of Pemex.

- Open access to the sector will be encouraged by SENER (the Ministry of Energy) and by CRE.

- The National Agency of Industrial Safety and Environmental Protection is created as an administrative agency of SEMARNAT (the Ministry of the Environment) to ensure the sustainable development of the industry. The concept of sustainability is also introduced to Article 25 of the Mexican Constitution.

Should you require additional information please contact any one of the attorneys listed below.

México City Office: ***Juan Carlos Machorro G. jmachorro@s-s.mx (Partner)***
Mónica Santoyo G. msantoyo@s-s.mx (Associate)
Antonio Massieu A. amassieu@s-s.mx (Associate)
Tel: (+52 55) 5279-5400

Monterrey Office: ***Jorge Barrero jbarrero@s-s.mx (Partner)***
Tel: (+52 81) 8133-6000

Tijuana Office: ***Aarón Levet V., alevet@s-s.mx (Partner)***
Tel: (+52 664) 633-7070

Simpson Grierson

Who owns social media connections made at work?

12 Dec 2013

Social media applications such as Facebook, LinkedIn and Twitter can be valuable tools for promoting business and for professional networking.

Facebook now has over 1 billion users globally, while LinkedIn, the world's largest online professional network, reached a milestone last month, announcing it that it has reached one million members in New Zealand. LinkedIn now has over 259 million members globally and two new users join every second.

Facebook and LinkedIn allow registered users to maintain a list of contact details of people with whom they have some level of relationship. However, the legal position in relation to the ownership of any connections made during employment is uncertain. If the parties do not determine this issue at the outset of the employment relationship, this can lead to disputes when an employee leaves a company to join a new employer.

In the case of *Whitmar Publications v Gamage and ors* which was heard earlier this year in the UK, one of the issues for consideration by the English High Court was the question of ownership of LinkedIn connections.

Three Whitmar employees left the organisation and set up in competition. Whitmar alleged that its confidential information had been used unlawfully in setting up the competing business.

One of the employees, Ms Wright, had maintained a number of LinkedIn groups for Whitmar, which promoted its business and contained details of customers and contacts but on leaving she refused to hand over passwords and access details to these accounts. She claimed that she had maintained the accounts as a "hobby" and that the information should be considered hers. However, the High Court held that she had maintained the accounts as part of her employment duties. There was therefore a strong case that the information in the LinkedIn accounts was the property of, and confidential to, Whitmar.

In a separate ruling by a court in the United States, in the case of *Eagle v Edcomm*, Dr Eagle issued proceedings against Edcomm for unlawful use of her LinkedIn account after the termination of her employment.

Dr Eagle, the former CEO, had shared her account details with other employees who assisted her in maintaining the account, which allowed Edcomm to effectively gain control of the account following her departure.

The Court found that Edcomm encouraged the use and creation of LinkedIn accounts but had no clear ownership polices in place. While Dr Eagle succeeded in a claim for invasion of privacy, the court rejected a counterclaim by Edcomm, as there was no evidence that Dr Eagle's contacts were developed through an investment of Edcomm time and money, as opposed to her own time and past experience. There was also no evidence of Edcomm's ownership of the account.

Until the courts determine the position conclusively in New Zealand, the uncertainty as to ownership is likely to continue unless the employer has a social media policy in place, or the parties agree at the outset of the employment relationship who will own contact information created or maintained during the course of employment.

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

By Pieter Steyn, director

LEGAL BRIEF | DECEMBER 2013

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

Introduction

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

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

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

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

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

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

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

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

Provisions of the Bill

Ambit of Bill

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

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

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

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

Protection of sovereign rights of the South African government

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

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

Qualified national treatment protection for foreign investors

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

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

Provisions on security for foreign investments

Section 7 obliges the government to provide –

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

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

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

Expropriation and compensation

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

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

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

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

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

No right to refer disputes to international arbitration

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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

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

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

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

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

About the Author

Pieter Steyn

Title: Director
Office: Johannesburg
Direct line: +27 (0)11 535 8296
Fax: +27 (0)11 535 8696
Switchboard: +27 (0)11 535 8000
Email: psteyn@werksmans.com

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

Frequently recognised internationally as one of South Africa's foremost competition lawyers, Pieter is an expert on all aspects of South African competition law including cartels, leniency applications, merger control, exemptions and dominance/unilateral conduct from the Competition Act.

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

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

He holds a BSc (in laboratory medicine) and LLB degrees from the University of the Witwatersrand and a Masters of Law degree from the University of South Africa.

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Estoppel Applies to IP Court Judgments

12/26/2013

Hsiu-Ru Chien

The Taiwan Patent Act permits "anyone" to file a cancellation action against a patent as long as the action is based on different facts and evidence from those used in a previous cancellation action that has been rejected by the Intellectual Property Office (IPO). This gives rise to the situation where the validity of a patent is challenged repeatedly by the same or different parties, especially if the patent involves infringement lawsuits.

When a number of cancellation actions have been made on the same patent at different times, they may enter the subsequent administrative suit stage. In such circumstances, the administrative court may give inconsistent interpretations over the disputed patent and therefore cause even more disputes among the parties involved. In response to this situation, the Supreme Administrative Court had stated clearly in its judgment No. 102-Pan-576 dated 11 September 2013, that: "*Estoppel applies to court judgments.*" The Supreme Administrative Court has further pointed out: "*Under the current patent system, the validity of one patent can be challenged multiple times as long as the grounds are different. However, no matter how many challenges there are, there should be no discrepancies in how the court interprets the disputed patent...*"; the Supreme Administrative Court reminded the lower court that a higher level of discretion must be exercised if the lower court would like to overrule the facts established by a previous judgment that has become final and irrevocable. In such case, the court must adhere to proper procedures and place greater focus on the rationale over substantial issues and legal implications.

In judgment No. 102-Pan-576, the Supreme Administrative Court revoked and remanded the original judgment made by the IP Court because the remanded judgment gave a completely different interpretation of the characteristics and purposes of the disputed patent compared with those interpreted in previous judgments.

Also, in this judgment, the Supreme Administrative Court advised the lower court that each of the three judges of the panel in charge of the remanded case may appoint one technical examination officer for assistance so as to include three technical examination officers in total to review the remanded case. The Supreme Administrative Court considered that by this way, the panel may be better informed to deliver an accurate judgment. This recommendation differs from the current practice of the IP Court, where only one technical examination officer is assigned to each case. It remains to be seen how the Supreme Administrative Court's judgment will affect the operation of the technical examination officer mechanism and/or the trial activities of the IP Court in the future.

BAKER BOTTS

For more information, please contact:

William Kroger
+1.713.229.1736

Jason Newman
+1.713.229.1720

Meghan McElvy
+1.713.229.1196

ENERGY LITIGATION UPDATE - JANUARY 13, 2014

Royalties from Horizontal Well Should Be Allocated Based on Productive Portion of Well, Not Its Entire Length

On December 20, 2013, the San Antonio Court of Appeals issued a decision concerning the proper construction of a contract used to allocate royalties from a horizontal well that traverses two separate properties. The decision, *Springer Ranch, Ltd. v. O.F. Jones III, et al.*, is important for two reasons. It is the first and only other Texas decision to address the proper method for allocating royalties for horizontal wells since the Austin Court of Appeals' opinion in *Browning Oil Co., Inc. v. Luecke* on November 9, 2000. Further, it holds that where a contract requires royalties from a horizontal well to be allocated, they should be allocated based on the productive portion of the well, not its entire length.

The horizontal well at issue in the case (the "SR2 well") began on the tract of the appellant, Springer Ranch, Ltd. ("Springer Ranch"), but ended under the property of Rosalie Matthews Sullivan, one of the appellees (collectively, "the Matthews"). As a result of a prior dispute over royalties, the parties had executed a contract in 1993 which provided in part that: "all royalties payable under the above described Oil and Gas Lease from any well or wells on said 8,545.02 acre tract, shall be paid to the owner of the surface estate on which such well or wells are situated, without reference to any production unit on which such well or wells are located . . . ." The agreement affected six vertical wells at the time it was made.

Springer Ranch argued in a summary judgment motion that because (i) the SR2 well began on its property, and (ii) the 1993 contract prohibited allocation based on the well's production unit, it was entitled to 100% of the royalties from the well. The Matthews, however, argued in their own summary judgment motion that the SR2 well was "situated on" both Springer Ranch's and Sullivan's property and, thus, royalties should be allocated to each party based on the productive portion of the well on their properties.

In support of their motion, the Matthews submitted the affidavit of a petroleum engineer who calculated the allocation of royalties by measuring the total distance between the SR2 well's first and last takepoints within the correlative interval, the distance between its first take point and the property line between Sullivan and Springer Ranch's properties, and the distance between the property line and the well's last takepoint. The expert then multiplied the one-eighth royalty

provided under the lease by the ratio of the total distance between the first and last takepoints to allocate the royalties. Providing this summary judgment evidence was probably prudent given the decision in *Luecke*, in which the Austin Court of Appeals remanded an invalid pooling case for a new trial on damages where the plaintiff failed to present any evidence allowing for a determination of how much production from a horizontal well crossing multiple tracts was attributable to its own property. Importantly, Springer Ranch did not dispute the Matthews' expert's measurements or calculations, nor did it offer evidence of any other basis for determining how much production was obtained from the parties' respective tracts. The trial court ruled in favor of the Matthews, and Springer Ranch appealed.

The court of appeals affirmed the trial court's judgment. In doing so, it first analyzed the key terms of the contract—most importantly the term "well"—and concluded that Springer Ranch's construction of the term conflated the ordinary and technical meaning of the word "well" with "wellhead." It therefore agreed with the trial court that the SR2 well was "situated on" both the Springer Ranch and Sullivan properties for purposes of the 1993 contract, and that royalties must be allocated to each. The court of appeals next addressed the method of allocation. It found that a royalty is a fraction of production, and that production—whether from a vertical or horizontal well—is not obtained from the entire length of the well, but from the part of the well that pierces and drains the reservoir in which the hydrocarbons reside. Thus, the court of appeals held that the trial court correctly allocated royalties based on the producing portion of the SR2 well, not its whole length.

Although the specific contractual language at issue in *Springer Ranch* limits the case's broader application somewhat, the court of appeals' approval of an allocation method for royalties based on the producing portion of a well, rather than its entire length, at least in the absence of any contractual language to the contrary, provides important clarity to operators of horizontal wells in Texas. A copy of the San Antonio Court of Appeals' opinion can be found here.

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California Court Clarifies Controversial Questions About Medical Staff Peer Review Decisions and the Power of Hospital Boards

01.08.14

By Terri D. Keville and Abbie P. Maliniak

Two recent California Court of Appeal opinions decide issues of first impression in the medical staff peer review arena, helping to resolve questions that have long been uncertain and controversial. In the first of the two cases decided by the Fourth Appellate District, Division One, the court clarified that the peer review body's burden in a peer review hearing is only to prove that its action was reasonable and warranted at the time taken, not that it is the appropriate disposition at the end of the hearing. In the other decision, the court held that a hospital governing board has the power to exercise its independent judgment to overturn the decision of a physician hearing committee. Below we discuss each case in turn, and the issue it resolves.

Issue One: Must a Medical Executive Committee (MEC) prove in a peer review hearing that its action continues to be reasonable and warranted at the conclusion of the hearing, or is it sufficient for the MEC to prove that its action was reasonable and warranted at the time taken?

Answer: The MEC must prove only that its action was reasonable and warranted at the time taken. (*M. Mehrdad Sadeghi v. Sharp Memorial Medical Center Chula Vista* (Oct. 23, 2013) ___ Cal.Rptr.___, 2013 WL 6069031.) In ***Sadeghi***, the Court of Appeal held that in considering whether the MEC's actions against Dr. Sadeghi were reasonable and warranted, the JRC had to consider only the propriety of the MEC's actions at the time they were taken, not whether the actions *remained* reasonable and warranted at the time of the JRC's decision. (Click here for the court's decision: http://www.courts.ca.gov/opinions/documents/D060429.PDF.)

The MEC of Sharp Healthcare's Chula Vista hospital summarily suspended Dr. Sadeghi's clinical privileges, and the hearing he requested to challenge that action commenced in July 2007. In March 2009, while the hearing was ongoing, the MEC denied Dr. Sadeghi's request to be reinstated, and his counsel argued the existing JRC should consider that new action also. The hearing officer denied this request, as it involved events that occurred "subsequent to the MEC's actions in 2007." (Slip Opinion (Op.) at 17.)

Dr. Sadeghi's petition for writ of mandate was denied by the trial court, and on appeal Dr. Sadeghi argued that under California Business and Professions (B&P) Code Section 809.3 (b)(3), the JRC was required to consider evidence of his subsequent conduct and determine whether the MEC's actions in 2007 *continued to be reasonable and warranted*

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at the time of its decision in May 2010. Section 809 (b)(3) states: “the peer review body shall bear the burden of persuading the trier of fact by a preponderance of the evidence that the action or recommendation is reasonable and warranted.” The hospital’s medical staff bylaws track the statutory language, except that they use the phrase “*was* reasonable and warranted” (emphasis added). (Slip Op. at 22.)

The Court of Appeal held Dr. Sadeghi was not denied fair procedure by the hearing officer’s decisions to confine the scope of the hearing to the MEC’s 2007 actions and exclude some evidence of later mitigating conduct by Dr. Sadeghi. The court noted that B&P Code Section 809.1(a) grants the right to request a hearing on a “final proposed action,” and opined that such a hearing is a “safeguard to ensure the *prior* actions of a peer review body are justified.” (Slip Op. at 23; emphasis added.) The court added that nothing in the statutory scheme contemplates an “open-ended proceeding” where the JRC effectively takes on the role of the MEC by determining, for example, whether the physician “is later fit for reinstatement.” *(Id.)*

Issue Two: Can a hospital’s governing board, in considering an appeal of a Judicial Review Committee (JRC) decision, overturn the JRC decision using the independent judgment standard of review, if the hospital’s medical staff bylaws specify that standard?

Answer: Yes. (*Michael Michalski v. Scripps Mercy Hospital, et al.* (Nov. 27, 2013) ___ Cal.Rptr. ___, 2013 WL 6184426.) In ***Michalski***, the Court of Appeal’s decision helped further define the role of hospital governing boards in peer review proceedings. (Click here for the court's decision: http://www.courts.ca.gov/opinions/documents/D062270.PDF.) The court held that where permitted by the hospital’s medical staff bylaws, the governing board may, “using its independent judgment, completely overturn the decision of a medical staff-selected hearing committee.” (Slip Op. at 13.) This is the first reported California decision to hold expressly that a hospital board has such power.

Following the revocation of Dr. Michalski’s privileges at Sharp Healthcare’s Grossmont hospital (Sharp) for sexual harassment, he applied for medical staff membership and clinical privileges at three Scripps Health hospitals. In addition to questions about what had happened at Sharp, there were numerous other problems with his application submissions, which resulted in recommendations at all three Scripps hospitals to deny him membership and privileges. He requested a hearing to challenge those recommendations.

The parties agreed to hold a consolidated hearing with a single JRC consisting of seven physician members, with at least two from each hospital’s medical staff. In its decision, the JRC rejected the recommendations to deny Dr. Michalski’s applications, and the MECs then appealed the JRC decision to the Scripps Health Board of Directors (the Board).

Section 7.5-6 of the Medical Staff Bylaws (the Bylaws) established the Board’s

independent judgment standard of review on appeal. (See *Ellison v. Sequoia Health Services* (2010) 183 Cal.App.4th 1486, 1496-1497; B&P Code Section 809.05(a).) The Bylaws also expressly empowered the Board to *"...modify or reverse the decision of the Judicial Review Committee*" (Slip Op. at 8; emphasis in opinion). The Board decided that the recommendations to deny Dr. Michalski's applications were reasonable and warranted.

Dr. Michalski filed a writ of mandate petition, which the trial court denied, and the Court of Appeal affirmed. The appellate court focused first on the Board's primary duty to the hospital's patients to "ensure the competence of its medical staff." (Slip. Op. at 13.) The court then held that, contrary to Dr. Michalski's arguments, the Board properly exercised its independent judgment—because the Bylaws required the Board to do so, and California law clearly allows application of that standard for governing board appellate review, unless the medical staff bylaws mandate greater deference to the JRC.

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Hogan Lovells

SEC Update
January 10, 2014

See note below about Hogan Lovells

SEC proposes amendments to Regulation A to expand access to capital for smaller companies

Contacts

Peter J. Romeo (Co-Editor)
Washington, D.C.
peter.romeo@hoganlovells.com
+1 202 637 5805

Richard J. Parrino (Co-Editor)
Washington, D.C.
richard.parrino@hoganlovells.com
+1 202 637 5530

Kevin K. Greenslade
McLean, VA
kevin.greenslade@hoganlovells.com
+1 703 610 6189

On December 18, 2013, the SEC proposed amendments to Regulation A under the Securities Act to implement a mandate under the Jumpstart Our Business Startups Act (JOBS Act) directing the SEC to adopt rules exempting offerings of up to $50 million of securities annually from Securities Act registration.

The amendments to Regulation A are intended to expand the existing exemption to increase access to capital for smaller companies. The current Regulation A permits unregistered public offerings of up to $5 million of securities in a 12-month period under the small offering exemption from registration provided by Securities Act Section 3(b). The proposed rules would update the existing exemption under Section 3(b)(1) (as Section 3(b) has been redesignated) and new Section 3(b)(2) added by the JOBS Act by authorizing two "tiers" of offerings. "Tier 1" would consist of offerings of up to $5 million in a 12-month period currently covered by Regulation A, while "Tier 2" would consist of offerings of up to $50 million in a 12-month period. In a significant departure from the current exemptive scheme, the proposed rules contemplate preemption of state "blue sky" registration and qualification requirements for Tier 2 offerings.

The SEC proposed the new regulation in a 387-page release (No. 33-9497), which is available here. Comments on the proposal are due by 60 days after publication of the rule release in the Federal Register.

Background

Regulation A provides a simplified capital-raising process for smaller companies. It currently permits an issuer to make unregistered public offerings of up to $5 million of securities in any 12-month period, including no more than $1.5 million of securities offered by the issuer's securityholders. The existing exemption requires the issuer to file in paper form with the SEC an offering statement on Form 1-A containing an offering circular that resembles an abbreviated version of the prospectus used in registered offerings. The offering statement is subject to SEC staff review and must be "qualified" by the SEC, but qualification does not trigger Exchange Act reporting obligations for the issuer. Offerings under Regulation A are public offerings, with no prohibition on general solicitation and general advertising. Securities sold under Regulation A are not "restricted securities" under the Securities Act, and as a result are not subject to the resale limitations that apply to securities sold in small offerings under Rule 505 of Regulation D or private offerings under Securities Act Section 4(a)(2) and Rules 506(b) and 506(c) of Regulation D. Securities offerings conducted under existing Regulation A are subject to state securities law registration and qualification requirements.

Issuers in recent years have rarely utilized Regulation A. A report to Congress by the U.S. Government Accountability Office (GAO) suggested that the reluctance of issuers to use the current exemption may be

attributable to the process of filing an offering statement with the SEC, the need to comply with state "blue sky" laws, and the overall cost of Regulation A compared to offering alternatives. In its rule release, the SEC noted that in 2012 there were only eight qualified Regulation A offerings, for a total offering amount of approximately $34.5 million, compared to approximately 7,700 offerings of up to $5 million pursuant to Regulation D, for a total offering amount of approximately $7 billion. The proposed offering regime, christened "Regulation A+" by some, represents an attempt by Congress to revive the moribund exemption by overhauling the existing rules.

Although the JOBS Act imposed a number of specific requirements for an enhanced version of Regulation A, it also afforded the SEC discretion to adopt additional terms and conditions. Some of the proposed requirements, such as those relating to issuer eligibility and filing and qualification of an offering statement, would apply to both Tier 1 and Tier 2 offerings. These requirements generally are based on provisions of the current exemption, but in some cases have been updated by the SEC in light of current practice in registered offerings. Other provisions contained in the proposal, such as the requirement to provide audited financial statements (which is mandated by the JOBS Act) and the requirement to undertake ongoing reporting (which is permitted, but not required, by the JOBS Act), would apply only to Tier 2 offerings.

Scope and basic requirements of the proposed rules

Ineligible companies. Under the proposed rules, the exemption would continue to be available to companies organized and having their principal place of business in the United States or Canada. As is the case under current Regulation A, the following companies would *not* be able to rely on the exemption:

- Public companies subject to the ongoing reporting requirements of the Exchange Act (or that were public filers in the last two years)
- Companies registered or required to be registered under the Investment Company Act of 1940
- "Blank check" development stage companies that (1) have no specific business plan or purpose or (2) have indicated that their business plan is to engage in a merger or acquisition with an unidentified company or companies
- Issuers of fractional undivided interests in oil or gas rights, or similar interests in other mineral rights

In addition, the SEC proposes to add new categories of ineligible companies, including:

- Companies that have failed to file with the SEC the ongoing reports required by the proposed rules
- Companies that are or have been subject to an order by the SEC denying, suspending or revoking the registration of a class of securities pursuant to Section 12(j) of the Exchange Act (for failure to comply with any Exchange Act provisions, rules and regulations) that was entered within five years before the filing of the Regulation A offering statement

As discussed below, the proposed rules also would align the existing Regulation A "bad actor" rules with the parallel disqualifications set forth in new Rule 506(d) for offerings conducted in reliance on Rule 506.

Eligible securities. The exemption would be available for offerings of equity securities, debt securities and debt securities convertible or exchangeable into equity interests, including guarantees of these securities. The proposed rules exclude asset-backed securities from the list of eligible securities.

Offering limits. The SEC proposes to divide Regulation A into two tiers:

- Tier 1 would encompass offerings of up to $5 million of securities in a 12-month period, including no more than $1.5 million on behalf of selling securityholders.
- Tier 2 would extend to offerings of up to $50 million of securities in a 12-month period, including no more than $15 million on behalf of selling securityholders. As discussed below, Tier 2 offerings would be subject to investment limitations, enhanced disclosure requirements and ongoing reporting obligations.

A company could elect whether to proceed under Tier 1 or Tier 2 for offerings of less than $5 million. The SEC indicates in its rule release that it is considering introducing an intermediate, third tier that might combine features of Tier 1 and Tier 2 offerings.

Investment limitations. The SEC proposes to limit the amount of securities investors may purchase in a Tier 2 offering to no more than 10% of the greater of (1) their annual income and (2) their net worth. The calculations would be made in accordance with the methods used to determine accredited investor status under Rule 501 of Regulation D. Companies would be permitted to rely on an investor's representation of compliance unless the company had actual knowledge the representation was false. There would be no investment limitation for Tier 1 offerings.

Qualification, communications and offering process

The proposed amendments are intended to modernize the qualification, communications and offering process provisions under Regulation A in part to reflect similar provisions of the Securities Act registration process, including by requiring electronic filing of offering materials via EDGAR.

Qualification. The proposed rules would alter the qualification process under Regulation A to ensure that the SEC staff has a chance to review and comment on the offering statement before it is qualified. Under the current rules, an offering statement that does not include a delaying notation on the cover of the form when it is filed will be qualified without SEC action on the 20th calendar day after filing. The new rules would eliminate this process and require every qualification to occur by SEC order.

Form and content of disclosure. The disclosure requirements under the proposed rules largely follow the existing offering statement requirements and structure of Form 1-A. The form currently requires the inclusion of financial statements and descriptions of the issuer's business operations, financial condition and intended use of investor funds.

The SEC is proposing to make some changes to the form. Part II of existing Form 1-A provides companies with three options for their narrative disclosure: Model A; Model B; and Part I of Form S-1. The SEC proposes to eliminate the Model A disclosure option, which permits presentation of information in a question-and-answer format, because the staff believes this format often results in disclosure that lacks uniformity and is difficult to follow. The SEC proposes to retain the Model B disclosure option (which will be renamed "Offering Circular"), but to update it to reflect developments in disclosure requirements for registered offerings. The changes in some cases would require additional information, such as more detailed disclosure in the management's discussion and analysis (MD&A) section of the Offering Circular and more disclosure regarding material legal proceedings, but in other cases actually would reduce the amount of required disclosure, such as by requiring a description of the company's business for a period of three years rather than the five years currently required. The SEC would continue to permit issuers the option of forgoing the Model B disclosures in favor of the alternative narrative disclosures required in Part I of Form S-1.

The new rules would maintain the existing financial statement requirements of Part F/S of Form 1-A for Tier 1 offerings, which do not require financial statements to be audited unless the company already has obtained an audit of its financial statements for other purposes. In the case of Tier 2 offerings, however, the proposed rules would require companies to include audited financial statements in accordance with the financial statement requirements of Article 8 of Regulation S-X and generally as if the issuer were a "smaller reporting company" under the SEC's rules.

Confidential submission. Under either Tier 1 or Tier 2, the proposed rules would permit companies whose securities have not been sold previously pursuant to a qualified offering statement under Regulation A or an effective Securities Act registration statement to submit draft offering statements for non-public SEC staff review before filing, as in the case of an IPO of an "emerging growth company." The initial non-public submission, all non-public amendments to that submission and all correspondence with the staff regarding the submission would have to be publicly filed as exhibits to the offering statement not less than 21 calendar days before qualification of the offering statement. The timing requirements for filing would not turn on whether or when the issuer plans to conduct a road show, which governs when an emerging growth company must first publicly file its IPO registration statement.

Testing the waters. The proposal would liberalize the current rules governing "testing the waters," which is the solicitation process followed by an issuer to obtain indications of interest from prospective investors. Rule

254 of Regulation A currently permits an issuer to test the waters before it files an offering statement, so long as the issuer submits all solicitation materials to the SEC no later than the time the materials are first used. Under the existing rules, issuers must cease using testing-the-waters solicitation materials after the initial filing of the offering statement with the SEC, and are prohibited from making sales under Regulation A until 20 calendar days after the last publication or delivery of the solicitation materials.

Issuers would be permitted to use solicitation materials to test the waters both before and after the offering statement is publicly filed, so long as they comply with rules on filing and disclaimers. Materials used to test the waters after public filing of an offering statement, however, would be required to include a preliminary offering circular or contain a notice informing potential investors where and how they can obtain the most current preliminary offering circular. The changes to Rule 254 also would require the solicitation materials to be submitted or filed as exhibits when the offering statement is either submitted for non-public review or publicly filed, but the materials would no longer be required to be submitted at or before the time of first use. Unlike the rules governing registered offerings by emerging growth companies, the proposed rules would not limit testing the waters to communications with qualified institutional buyers (QIBs) and institutional accredited investors.

Delivery of disclosure document. Under the new rules, the preliminary offering circular would have to be delivered at least 48 hours before any sale, while a final offering circular would have to be delivered within two business days after a sale if the sale was made in reliance on the delivery of the preliminary offering circular. The SEC proposes to adopt an "access equals delivery" approach, so that the delivery requirements for the final offering circular would be satisfied when the document is filed via EDGAR.

Ongoing reporting

Existing Regulation A requires companies to file a Form 2-A with the SEC every six months after qualification to report sales under Regulation A, with a final filing due within 30 calendar days after the termination or completion of the offering. Although they would eliminate Form 2-A, the proposed rules would continue to require all companies to file the information generally disclosed in that form, in an EDGAR filing on a proposed new Form 1-Z or (for Tier 2 companies only) new Form 1-K that would be made only after the termination or completion of the offering.

No other ongoing reporting would be required of Tier 1 issuers. Companies conducting Tier 2 offerings, however, would be subject to a continuing reporting regime. Tier 2 companies would be required to file annual reports via EDGAR on new Form 1-K, which would include, among other information, disclosures about the company, the offering, the company's business, related party transactions, beneficial ownership and executive compensation, as well as two years of audited financial statements and MD&A. Tier 2 companies also would have to file semi-annual updates on proposed new Form 1-SA (an abbreviated version of Form 10-Q), current event reports on proposed new Form 1-U (an abbreviated version of Form 8-K), and notices to the SEC of the suspension of their ongoing reporting obligations on proposed new Form 1-Z. Companies conducting a Tier 2 offering also may be required to provide investors with special financial reports between the time the financial statements are included in the Form 1-A and the date of the first periodic report after qualification of the offering statement.

Reports issued under the Tier 2 reporting regime would satisfy the obligation of broker-dealers under Exchange Act Rule 15c2-11 to review specified information about the issuer and its security before publishing a quotation for the security. The SEC also is considering whether to allow the information in these reports to satisfy the current public information requirement of Securities Act Rule 144.

A Tier 2 company could exit the ongoing reporting regime after completing reporting for the fiscal year in which the offering statement was qualified, so long as:

- The securities of each class to which the offering statement related are held of record by fewer than 300 persons; and
- Offers or sales in reliance on Regulation A are not ongoing.

Bad actor disqualification

The SEC proposes amending Rule 262, the existing "bad actor" provision, to include bad actor disqualification rules in substantially the same form as those recently adopted under Rule 506 of Regulation D, described in

our SEC Update of July 26, 2013, available here. The bad actor rules generally would disqualify securities offerings from reliance on Regulation A (or in some instances require the issuer to make disclosures) if the issuer or other persons (such as underwriters, placement agents, or directors, officers or significant shareholders of the issuer) have been convicted of, or are subject to court or administrative sanctions for, securities fraud or other violations of specified laws. An issuer would not lose the benefit of the Regulation A exemption if it could show that it did not know, and in the exercise of reasonable care could not have known, of the existence of a disqualification.

State securities law preemption

The SEC highlighted in its release the GAO's findings that the lack of preemption of blue sky laws under existing Regulation A may be a key factor for the sparing use of the current exemption. The proposed rules contemplate that state securities law requirements would be preempted for Tier 2 offerings. The SEC believes that investors should be adequately protected by the additional reporting and other requirements applicable to Tier 2 offerings. The preemption would be accomplished by adopting a definition of "qualified purchaser" for purposes of Securities Act Section 18(b)(3) that would include any offeree of a security offered or sold pursuant to Regulation A and all purchasers in a Tier 2 offering.

The proposed preemption has elicited strong objections from the North American Securities Administrators Association (NASAA). As an alternative to preemption of state securities laws, NASAA has proposed a process in which a sole lead disclosure examiner of a state authority would serve as a single point of contact with an issuer and would coordinate the reviews and comments of other state examiners. The SEC indicates in its release that it will monitor the NASAA's efforts to develop such a program and consider further if this approach might provide a workable alternative to preemption.

Conclusion

The amendments to Regulation A are intended to revive and enhance the current exemption to provide smaller businesses seeking capital with a practical alternative to securities-based crowdfunding transactions and Regulation D offerings to accredited investors. Issuers relying on the new Regulation A would not have to comply with such proposed public crowdfunding limitations as the low maximum investment threshold, the use of a broker-dealer or funding portal intermediary in the offering process, and restrictions on transfers of issued shares. Issuers under the new regulation also would not have to contend with accredited investor qualification requirements and restrictions on transfers of issued shares that apply to private offerings conducted in reliance on Rule 506(b) or Rule 506(c). A liberalized Regulation A, however, will not eliminate all significant regulatory burdens on smaller issuers. Issuers will have to evaluate the advantages of the new regulation in light of the final disclosure requirements, investment limitations and ongoing reporting requirements that will emerge from the comment process regarding the SEC's proposal.

If you have any questions about this SEC Update, you may contact either of the co-editors identified on the first page or any of the following attorneys:

Amsterdam | +31 20 55 33 600
Victor de Vlaam

Baltimore | +1 410 659 2700
Glenn C. Campbell
David A. Gibbons
William I. Intner
Henry D. Kahn

Denver | +1 303 899 7300
George A. Hagerty
Paul Hilton
Keith A. Trammell

Frankfurt | +49 69 962 360
Sina R. Hekmat
Michael Schlitt

Hong Kong | +852 2219 0888
Jamie Barr
Terence Lau
Thomas Tarala

London | +44 20 7296 2000
John Basnage
Peter Kohl
Maegen Morrison

Los Angeles | +1 310 785 4600
Russ A. Cashdan
Barry A. Dastin
Glenn D. Smith

Madrid | +34 91 349 82 00
Jose M. Balañá

Milan | +39 02 7202521
Roberto Culicchi

Moscow | +7 495 933 3000
Michael Pugh

New York | +1 212 918 3000
Emil Arca
Amy Bowerman Freed
Sina R. Hekmat
Peter Humphreys
Christine M. Pallares
Robert A. Ripin
Michael J. Silver
Lillian Tsu

Northern Virgina | +1 703 610 6100
Kevin K. Greenslade

Paris | +33 1 53 67 47 47
Philip Boys
Jean-Marc Franceschi

Silicon Valley | +1 650 463 4000
Laura A. Berezin
John H. Booher
Jon Layman

Warsaw | +48 22 529 29 00
Beata Balas-Noszczyk
Marek Wroniak

Washington D.C. | +1 202 637 5600
C. Alex Bahn
Stuart A. Barr
John B. Beckman
David W. Bonser
Joseph G. Connolly, Jr.
Alan L. Dye
J. Warren Gorrell, Jr.
Eve N. Howard
Michael E. McTiernan
Gregory F. Parisi
James E. Showen
Stuart G. Stein

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Government Contracts Advisory

JANUARY 13, 2014

DCAA Guidance Clarifies Documentation Requirements for Consultant Costs

The Defense Contract Audit Agency recently issued guidance clarifying the agency's view on the types of evidence necessary to substantiate consultant costs. *See* Memorandum to Regional Directors No. 13-PAC-026(R), "Audit Alert on Professional and Consultant Service Costs (FAR 31.205-33) and Purchased Labor." The guidance explains DCAA's position that Federal Acquisition Regulation 31.205-33, which addresses the allowability of consultant costs, does not require the existence of specific types of documents in order for consultant costs to be allowable. This guidance is important because of the recent trend of auditors insisting that FAR 31.205-33 requires contractors to provide specific types of documents, such as invoices, contracts, and work product, as a precondition of consultant cost allowability.

Contacts

For additional information, please contact:

Thomas A. Lemmer
303.634.4350

Steven M. Masiello
303.634.4355

Tyson J. Bareis
303.634.4340

Under FAR 31.205-33(f), "[f]ees for services rendered are allowable only when supported by evidence of the nature and scope of the service furnished." FAR 31.205-33 goes on to state that evidence "necessary to determine that work performed is proper" includes:

> (1) Details of all agreements (e.g., work requirements, rate of compensation, and nature and amount of other expenses, if any) with the individuals or organizations providing the services and details of actual services performed;
>
> (2) Invoices or billings submitted by consultants, including sufficient detail as to the time expended and nature of the actual services provided; and
>
> (3) Consultants' work products and related documents, such as trip reports indicating persons visited and subjects discussed, minutes of meetings, and collateral memoranda and reports.

While DCAA Contract Audit Manual guidance has always indicated that the above evidentiary requirements included an element of subjectivity (DCAM 7-2105.2), auditor insistence on access to consultant work product, detailed written agreements, and itemized invoices has resulted in the disallowance of consultant costs, even when such costs are clearly incurred for appropriate purposes.

The recent DCAA guidance will assist contractors facing such auditor demands. The guidance begins by noting that, while FAR 31.205-33 contains certain evidentiary requirements, "[t]he type of evidence satisfying [FAR 31.205-33's] documentation requirements will vary significantly based on the type of consulting effort and from contractor to contractor." As a general matter, however, the guidance summarizes the evidentiary requirements of FAR 31.205-33 as follows:

- An agreement that explains what the consultant will be doing for the contractor;
- A copy of the bill for the actual services rendered, including sufficient evidence as to the time expended and nature of the services provided to determine what was done in exchange for the payment requested, and that the terms of the agreement were met. ***This documentation does not need to be included on the actual invoice and can be supported by other evidence provided by the contractor***;
- Explanation of what the consultant accomplished for the fees paid [which] could be information on the invoice, a drawing, a power point presentation, or some other evidence of the service provided.

(Emphasis added). Finally, and most directly, the guidance ends its discussion of FAR 31.205-33's evidentiary requirements by stating that "[i]t is important to clarify that the audit team is looking for evidence to satisfy these three areas ***and not a specific set of documents***. Therefore, auditor judgment will be the determining factor on the type and sufficiency of evidence required to satisfy these requirements." (Emphasis added).

We expect the above guidance to be helpful to contractors facing auditor insistence that the FAR 31.205-33 documentation requirements must be met by specific and contemporaneous documents. Rather than the rigid position frequently adopted by government auditors, the DCAA guidance confirms that FAR 31.205-33 sets forth three categories of evidence that auditors must assess based on various sources of information, and not a specific type of documentation.

Other positive aspects of the DCAA guidance include: (1) the explicit acknowledgment that contractors can meet the evidentiary requirements of FAR 31.205-33 by providing noncontemporaneous documentation; (2) the recognition that arrangements providing for flat monthly fees that do not require consultants to record the quantity and/or nature of the support provided to the contractor may, under certain circumstances, be acceptable under FAR 31.205-33; and (3) the clarification that FAR 31.205-33 is not intended to apply to "purchased labor" such as janitorial, clerical, and security services.

This recent DCAA guidance is only one more piece in the complex set of rules and regulations governing cost allowability generally and consultant costs in particular. If you have any questions concerning the DCAA guidance or cost allowability generally, please contact the authors of this article or the McKenna attorney with which you work.

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GIDE
GIDE LOYRETTE NOUEL

client alert

BANKING | VIETNAM | JANUARY 2014

THE VIETNAMESE BANKING SECTOR: revisions to foreign ownership limits and investment criteria

The Vietnamese Government started the New Year by passing long awaited legislation relating to foreign investment in the Vietnamese banking sector.

On 3rd January 2014 it issued *Decree 01/2014/ND-CP on the purchase by foreign investors of shares of Vietnamese credit institutions* ("**Decree 01**") replacing *Decree 69/2007/ND-CP on the purchase by foreign investors of shareholding in Vietnamese commercial banks* ("**Decree 69**").

Decree 01 will become effective on 20 February 2014.

The changes appear to be aimed at supporting the current strategy of the Government to attract capital into the banking sector in Vietnam against the on-going policy of restructuring weaker credit institutions and consolidating the sector, which commenced in 2011.[1]

This Client Alert highlights the most significant changes introduced by Decree 01.

SCOPE OF APPLICATION WIDENED

Decree 01 is broader in scope than Decree 69, as it applies to purchases of shares not only in Vietnamese joint-stock commercial banks, but also in Vietnamese finance companies and finance leasing companies. It does not apply to other types of credit institutions, such as joint venture banks or credit institutions established with sole shareholder ownership.

DEFINITION OF FOREIGN INVESTORS CLARIFIED

Decree 01 has maintained the definition of "*foreign investors*" as comprising "*foreign organisations*" as well as "*foreign individuals*" but has clarified that branches of foreign established entities operating both in Vietnam and abroad will be treated the same way as foreign organisations for purposes of the Decree.

In addition, entities established and operating in Vietnam with more than 49% of foreign ownership (including close-end funds, mutual funds and securities investment companies) are also included in the definition as foreign investors.

1 An ambitious banking sector restructuring scheme for 2011–2015 was approved by the Prime Minister in early 2012 through Prime Minister Decision 254/QD-TTg and is centred on the merger of weak banks with their stronger competitors. Nine weak banks where targeted by the SBV last year. The results, according to official sources, are that eight out of nine weak banks have completed the first stage of the restructuring process and that one foreign bank wanting to buy a controlling stake in a weak bank is waiting for direction from the Prime Minister in order to carry out the purchase, and Decree 01 may form the legal basis for that transaction.

FOREIGN OWNERSHIP LIMITS REVISED

Decree 01 has maintained the previous total aggregate foreign ownership cap of 30% of a commercial bank imposed by Decree 69.

Total foreign investment in a finance company or a finance leasing company will be subject to a 49% cap, which is the limit applicable to public (both unlisted and listed) companies[2].

Decree 01 has aligned the limits applicable to each type of foreign investor with Article 55 of the Law no. 47/2010/QH12 on Credit Institutions dated 16 June 2010 (the "**LCI**") which sets out ownership limits applicable to categories of investors, including Vietnamese investors.

Most importantly, Decree 01 allows the Prime Minister to lift the limits on foreign shareholders' participation in a Vietnamese credit institution, but only for the purpose of (i) restructuring weak credit institutions facing difficulties; or (ii) ensuring the stability of the credit institutions system. The determination of institutions that would fall into this definition will in practice be at the discretion of the SBV or other competent authorities.

The below table provides a comparison between the new caps and the limits set out in Decree 69.

Decree 69		Decree 01	
Type of Investor	**Ownership Limit**	**Type of Investor**	**Ownership Limit**
Non-credit institutional investors (inc. organisations and individual investors) and related parties	5%	Individual investors	5%
Credit institutions and related parties	10%	Organisations	15% (may be lifted by the Prime Minister to restructure or ensure stability of credit institutions)
Strategic investors and related parties	15% (20% with Prime Minister approval)	Strategic investors[3]	20% (may be lifted by the Prime Minister to restructure or ensure stability of credit institutions)
		Related parties cap applicable to all categories of investors	20%
Aggregate foreign ownership	30%	Aggregate foreign ownership applicable to commercial banks	30% (may be lifted by the Prime Minister to restructure or ensure stability of credit institutions)
		Aggregate foreign ownership applicable to finance and finance leasing companies	49% (based on current regulations on foreign ownership of shares in Vietnamese public companies)

[2] The Government is apparently preparing a decree increasing this 49% cap to 60% for all public companies which will in due course increase the foreign cap in finance companies and finance leasing companies following the operation of Decree 01.

[3] A "foreign strategic investor" is defined by Decree 01 as a foreign entity which has financial capacity and has provided a written undertaking from the competent person of the entity to ensure long term partnership with the Vietnamese credit institution and to assist the Vietnamese credit institution in modern technology transfer, developing banking products and services, raising financial, administration and management capacity.

REQUIRED APPROVALS

- **Acquisitions where the resulting shareholding is 5% or less**

Decree 01 has lifted the requirement for prior SBV approval in respect of acquisitions by foreign investors not exceeding 5% of the charter capital of a credit institution.

- **Acquisitions where the resulting shareholding is more than 5%**

SBV approval is required in all cases resulting in the acquiring shareholder owning more than 5% of a credit institution's charter capital.

Decree 01 is silent on the procedures for approval but the SBV is expected to issue detailed guidelines in the near term.

- **Acquisitions where the resulting shareholding is more than 10%**

In addition, where an investment will result in the foreign investor holding more than 10% of the charter capital of a Vietnamese credit institution, the foreign investor must satisfy the following conditions (which are generally less stringent than those set out in Decree 69):

- It is rated by international credit rating institutions (e.g. Moody's, Standard & Poor's, Fitch, etc.) as stable or higher or equivalent rating;
- It has sufficient financial resources to finance the purchase based on the audited financial reports of the year immediately prior to the year of the application;
- The purchase has no impact on the security and stability of the Vietnamese system of credit institutions;
- It has not committed any serious breach of home country and Vietnamese currency, banking and security laws within 12 months preceding the submission of the application; and
- For the year immediately prior to the year of the application, the value of its total assets must have been the equivalent of at least USD 10 billion (if the foreign investor is a bank, finance company or finance leasing company) or the value of its charter capital must have been equivalent of at least USD 1 billion (for other types of entities). The requirement is lower than the current USD 20 billion in total assets required by Decree 69 (applicable to foreign credit institutions).

- **Acquisitions by foreign strategic shareholders**

Foreign strategic investors are subject to the following additional conditions:

- It must be either a bank, a finance company or a finance leasing company authorised to conduct banking activities by its home regulator (while foreign banks can become strategic investor in Vietnamese banks, finance / finance leasing companies, foreign finance companies and finance leasing companies can only become strategic investors of a Vietnamese finance company and finance leasing company respectively)
- It must have minimum 5 years of international operating experience in the banking and finance sector;

- For the year immediately prior to the year of the application, the value of its total assets must have been the equivalent of at least USD 20 billion;
- It must provide a written undertaking on and clear plans for long term partnership with the target Vietnamese credit institution;
- It must not own more than 10% of shares of any other credit institution in Vietnam (which is stricter than Decree 69 which prohibits a strategic shareholder to be a strategic shareholder of another commercial bank); and
- It must undertake to purchase or provide a statement of current shareholding of more than 10% of the charter capital of the target Vietnamese credit institution.

Note that there are also minor changes relating to the conditions which the Vietnamese credit institutions must fulfil in order to qualify for foreign investment.

MANAGEMENT LIMITATIONS

A foreign investor may nominate representatives to participate in operations of the Board of Management of only one Vietnamese credit institution, except where the representatives are appointed to credit institutions which are subsidiaries of the invested credit institution or which are weak credit institutions under restructuring approved by the SBV.

This rule is stricter than its equivalent in Decree 69, which provided that a foreign investor may not nominate representatives to participate in operations of the Board of Management of more than two Vietnamese banks.

LOCK-UP PERIOD

Decree 01 has maintained the following lock-up periods applicable to a foreign investor holding significant stakes in a Vietnamese credit institution: (i) 3 years if they own at least 10% of charter capital of the credit institution; or (ii) 5 years in the case of a foreign strategic investor. However, unlike under Decree 69, the above limitations do not apply to the investor's related persons.

CONTACTS

SAMANTHA CAMPBELL

samantha.campbell@gide.com

BACH DUONG PHAM

bach-duong.pham@gide.com

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