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June 2014 e-Bulletin

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BAKER BOTTS WELCOMES INAUGURAL ONRAMP FELLOWS TO FIRM

Inaugural OnRamp Fellows Join Baker Botts in Houston, New York: Experienced Women Lawyers Re-Entering the Legal Profession. The OnRamp Fellowship is an innovative, new program in the legal profession aimed at facilitating the re-entry of experienced women lawyers.

HOUSTON, 19 May 19 2014 -- In a positive step toward replenishing the law firm talent pipeline with high-performing women lawyers, Baker Botts has selected two women to be members of the inaugural OnRamp Fellowship class: **Heather Hewitt** will join the firm's Corporate Department in its Houston office in August; and **Yvette Lanneaux** will join the Corporate Department in New York later this month.

Seven additional women were selected as OnRamp Fellows at the three other Pilot law firms, joining Hewitt and Lanneaux as part of this inaugural class.

"Baker Botts is committed to fostering the recruitment, retention, development, and promotion of women lawyers, and we are thrilled be a part of the OnRamp Fellowship," said Baker Botts Managing Partner Andrew Baker. "We are excited to have two incredibly talented lawyers, Heather and Yvette, as part of our first Fellowship class."

Hewitt earned her law degree from The University of Texas School of Law. She worked at law firms in Houston for a number of years specializing in commercial litigation as an associate. She left the legal profession in 1999 to raise a family.

John Porter, Partner in Charge of the firm's Houston office said, "We are thrilled that Heather has chosen to become a part of the Baker Botts team. Heather will be working with a wonderful group of talented lawyers, and there is no better place for her to return to the practice of law."

Why did Hewitt decide to apply for an OnRamp fellowship at Baker Botts?

"The OnRamp fellowship was like a godsend," Hewitt said. "It offered to me the unique opportunity to reenter the legal field after a 15 year hiatus, with the huge added bonus of being basically re-trained by a group of phenomenal lawyers. For women like me who have chosen to leave behind promising careers to be stay-at-home moms, this kind of program offers not only the chance to get back in to law, but also the benefit of entering gradually and with guidance."

Hewitt added that she plans to take full advantage of the wisdom and experience offered by each member of the Baker Botts team she will be working with, and in particular, the incredibly accomplished women who will be her mentors.

Lanneaux was an attorney for CNBC and MSNBC before leaving the legal profession a few years ago. She is a graduate of Harvard Law School, and her past legal career includes time in private practice with an international law firm's office in Japan.

Rob Scheinfeld, Partner in Charge of the firm's New York office, said "This is a win-win-win; a win for Yvette, a win for the Firm, and especially a win for our clients. Yvette's media experience fits perfectly with the focus of our New York office. She will be working hand-in-hand with our media legal team that has represented clients such as Liberty Media for more than two decades. We are excited to have someone with her background joining us through the OnRamp Fellowship program."

Lanneaux said: "Over the course of the fellowship, my goal is to learn as much as I possibly can, and to grow my skills and confidence as a lawyer. I hope also to be able to add value to the corporate practice as the year progresses. I chose the OnRamp Fellowship because its goal of reintegrating lawyers in my situation (those who have taken time off from careers for family and personal matters) into the private sector synchs with my professional goals. I was impressed with the participation of law firms committed to making this a success."

Created by lawyer recruitment, development, and diversity veteran Caren Ulrich Stacy, the OnRamp Fellowship is a re-entry platform that matches experienced, women lawyers returning to the profession with law firms for a one-year, paid training contract. Through the Fellowship, returning women lawyers will have an opportunity to demonstrate their value in the marketplace while also broadening their experience, skills, and legal contacts.

All of the 2014-15 OnRamp Fellows completed a rigorous screening process that highlighted their impressive qualifications, including years of service at a variety of legal organizations. During their hiatuses, which ranged in length from three to twenty years, the Fellows continued to develop their skills in leadership roles in organizations like the Military Spouse JD Network, while earning advanced degrees, and holding elected offices.

Caren Ulrich Stacy, Founder of the OnRamp Fellowship, said, "It is gratifying to see these lawyers, who excelled in their careers before opting out, rejoining the legal profession in a way that values their skills as well as offers them an environment in which they can broaden their experience and accumulate new legal contacts. I have no doubt that this group of Fellows will lead the way in demonstrating the depth and breadth of this untapped pool of talent."

For more information visit www.bakerbotts.com

DAVIS WRIGHT TREMAINE—FORMER LEAD CYBER ATTORNEY FOR U.S. DEPARTMENT OF JUSTICE IN OREGON JOINS FIRM

09 June 2014 - Sean Hoar, a veteran Assistant U.S. Attorney with the Department of Justice, and the agency's lead cyber attorney in Oregon, has joined the national privacy and data security team at Davis Wright Tremaine LLP.

"Our clients in every industry, sector, and geographic market have an urgent need to protect their data, comply with increasingly complex technical and regulatory challenges, and limit their exposure to litigation," said Christin McMeley, chair of Davis Wright Tremaine's Privacy & Data Security practice. "We are thrilled that Sean will be putting his extraordinary depth of knowledge and practical experience in this area to work for our clients."

Hoar brings to the firm over two decades' of work prosecuting complex white-collar and high-tech crime, including intellectual property theft, computer intrusions, defense procurement fraud, identity theft, Internet fraud, and securities fraud. He has spoken, taught, and published widely on all of these topics, and currently serves as an Adjunct Professor on cybercrime at both Lewis & Clark Law School and the University of Oregon School of Law.

As the lead cyber attorney for the DOJ in Oregon, Hoar was the principal contact with the FBI and the Secret Service in Oregon when there was a system intrusion or data theft that warranted federal investigation.

"Sophisticated criminals are relentlessly targeting businesses and their customers," said Hoar. "Confidential data is being stolen, sold, and misused for corporate espionage and large-scale theft. Davis Wright Tremaine's sophisticated national team offers me a tremendous platform to continue to help companies protect themselves."

Hoar received his B.A. from Linfield College and his J.D. from the University of Oregon School of Law. He is a Certified Information Privacy Professional – U.S. He will be based in Davis Wright Tremaine's Portland office and work with clients in Oregon and around the country.

For more information, visit www.dwt.com

NAUTADUTILH APPOINTS FIVE PARTNERS

May, 2014 - - NautaDutilh is pleased to announce the appointment of two new partners and three associate partners. The two new partners are both based at NautaDutilh Brussels. Their appointment is an acknowledgment of their contribution to the firm and a sign that NautaDutilh is committed to retaining and promoting the best legal talent. Moreover, it reflects an increased client demand in the area of litigation, restructuring, corporate M&A and finance law.

Sophie Jacmain - litigation & arbitration
Nicolas de Crombrugghe - banking & finance, Corporate M&A

One new associate partner is based in the Netherlands. The other new associate partners are based at NautaDutilh Avocats Luxembourg, which has a flourishing practice and is noted for its responsive, international approach. These appointments further boost NautaDutilh Avocats Luxembourg, especially in the field of corporate law advice, restructurings, private equity and IP and ICT regulations.

Jaco Belder - banking & finance
Romain Sabatier - corporate and M&A
Vincent Wellens - IP/ICT regulation

For more information visit www.nautadutilh.com

HOGAN LOVELLS EXPANDS BAY AREA OFFICES WITH CORPORATE PARTNERS NATHANIEL P. GALLON AND VERONICA K. MCGREGOR

SAN FRANCISCO, 12 May 2014 – Hogan Lovells today announced the expansion of its San Francisco and Silicon Valley offices with the addition of Corporate partners Nathaniel P. Gallon and Veronica K. McGregor.

"We are very excited to welcome Nate and Veronica to the corporate team," said Stuart Stein, Global Co-Head of the Hogan Lovells Corporate practice group. "Having two partners of this caliber join our strong corporate practice in Northern California is a powerful signal to the market of our commitment to Northern California, and the advantages of our global platform and client base. We will continue to expand with high quality colleagues who can support and grow our practice in our strategic priorities."

"Nate and Veronica are rising stars in important areas of the economy," added Michael J. Shepard, Office Managing Partner for the two Northern California offices. "They fit perfectly with our approach of combining our global reach and regulatory expertise with top-notch local skill and knowledge."

Gallon practices corporate and securities law, with a focus on technology, working with companies from start-ups to large public companies. He advises on venture capital financings, mergers and acquisitions, public and private offerings, governance, SEC, and regulatory compliance. Gallon received his J.D. from Yale Law School and received his B.A. from Yale University.

"I was drawn to the high quality of the Silicon Valley office coupled with Hogan Lovells' global law platform and its expertise across practice areas," said Gallon. "The integrated nature of the firm's approach will allow me to bring to clients in this market a very powerful level of counsel that matches their ambitions."

McGregor's practice focuses on payments including virtual and crypto currencies, mobile payments, mCommerce, eCommerce, stored value systems, consumer lending, privacy, anti-money laundering compliance, credit/debit networks, and technology licensing. McGregor received her J.D. from the University of California, Hastings College of Law, where she was editor-in-chief of the law review.

"I am very impressed with Hogan Lovells' deep global payments expertise, and the coordination that occurs across the firm, payments is increasingly global and it is critical to have not only domestic expertise, but international as well," said McGregor. "I am particularly impressed by the collaboration between the bank regulatory group, technology practice, and privacy group which all provide high-quality service to clients. This sort of coordination is absolutely necessary for clients in the financial technology space."

For more information visit www.hoganlovells.com

SANTAMARINA Y STETA OPENS OFFICE IN QUERETARO

Santamarina y Steta is please to announce the opening of its new office in Querétaro, in the thriving region of "El Bajío".

The Queretaro office will focus on providing legal services to local and international clients seeking to establish businesses in the region, and will allow the Firm to strengthen the local attention to its clients mainly in the following areas: corporate, labor, transactional, tax, real-estate projects, environmental, aeronautical and automotive, besides having the support of the rest of its offices for the other areas, with the advantage of a personalized liaison at a local level.

Santamarina y Steta, is a a full service firm, leader in the market, with full knowledge and experience in national and international matters, global quality standards and a regionalized coverage in Mexico City, Monterrey, Tijuana and now in Querétaro.

For additional information, please visit www.s-s.mx

SKRINE ADDS BANKING PARTNER TO BANKING & PROPERTY GROUP

We are pleased to announce that Oon Hooi Lin has joined SKRINE as a Partner in the Banking & Property Practice Group of the firm.

Hooi Lin read law at Queen Mary College, University of London and is a member of the Honourable Society of Lincoln's Inn.

She was called to the English Bar in 1993 and was admitted to the Malaysian Bar in January 1995. Her areas of practice are conveyancing and real estate, corporate, retail and housing banking work, trusts & estate planning and probate & administration. She also has experience in licensing, distribution, agency agreements, employment law and family law.

This appointment will further enhance and strengthen our Firm's capabilities in delivering premium legal services to our valued clients.

For additional information visit www.skrine.com

UPCOMING PRAC EVENTS

- **PRAC @ IBA Tokyo** October 20, 2014
- **PRAC @ PDAC** Toronto Conference March 3, 2015
- **PRAC 57th International Conference**
  Brisbane, Australia
  Hosted by Clayton Utz
  April 18—21, 2015
- **PRAC @ INTA** San Diego May 3, 2015
- **PRAC @ IPBA** Hong Kong May 7, 2015
- **PRAC @ IBA** Vienna October 5, 2015
- **PRAC 58th International Conference**
  Vancouver
  Hosted by Richards Buell Sutton LLP
  September-October, 2015

PRAC CHILE 2014

- **PRAC 56th International Conference**
  San Pedro de Atacama, Chile
  November 8-11, 2014

Hosted by

/Carey

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ARIFA

ADVISES LEAD ARRANGERS ON THE US$273 MILLION FINANCING FOR CONTRUCTION OF PANAMA'S THIRD HIGH-VOLTAGE POWER LINE

PANAMA CITY, 26 May 2014 -- Arias, Fabrega & Fabrega has advised The Bank of Nova Scotia and Banco General S.A. in connection with the US$273 million factoring agreement with ETESA (Empresa de Transmisión Eléctrica), the Panamanian government-owned company in charge of constructing and managing Panama's electricity transmission infrastructure, providing financing for the construction of the country's third high-voltage power line connecting the western part of the country with Panama City.

This third power line will allow electricity providers in western Panama to provide the capital and its surrounding areas with the additional electricity required not only to resolve recent shortages but also to support continued economic growth.

Other lenders involved are Banco Nacional de Panamá and Global Bank Corp. (through its affiliate Factor Global Inc.).

Completion date: May 26th, 2014

ARIFA's key attorneys who handled the matter were Estif Aparicio, partner and Cedric Kinschots, international associate

For additional information visit www.arifa.com

BAKER BOTTS

ADVISING CHESAPEAKE ON SPINOFF OF OILFIELD SERVICES BUSINESS

HOUSTON, 09 June 2014 -- Chesapeake Energy Corporation (NYSE:CHK) announced today its board of directors has approved the spin-off of its oilfield services business. The spin-off will be accomplished through a pro rata distribution of 100% of the outstanding shares of common stock of Seventy Seven Energy Inc. to Chesapeake shareholders. The distribution is scheduled to take place on or about June 30, 2014 to shareholders of record on June 19, 2014. Seventy Seven Energy Inc. has applied to list its shares of common stock on the New York Stock Exchange under the trading symbol "SSE".

Baker Botts represented Chesapeake Energy Corporation on the spinoff.

For additional information visit www.bakerbotts.com

BRIGARD & URRUTIA

ADVISES OCENSA ON US$500 MILLION FIRST OFFERING

BOGOTA, 04 May 2014 - - Colombia's Brigard & Urrutia Abogados acted as local counsel to assist Oleoducto Central (Ocensa), the operator of Colombia's largest crude oil pipeline, with a US$500 million notes offering. Underwriters were Citi and HSBC. Ocensa made the offering, which is its first international capital markets issuance, to finance a US$685 million expansion of the pipeline, which is expected to come into operation in 2015 and will boost the oil transporter's capacity by 20 per cent.

The pipeline operator manages the main pipeline between Colombia's Llanos region and the port of Covenas on the Atlantic coast and handles around 70 per cent of all crude oil exports from the country.

US private equity firm Advent International bought a US$1.1 billion 22 per cent stake in Ocensa in a leveraged buyout deal that took place last year, involving Brigard & Urrutia.

The offering closed on 30 April. Brigard & Urrutia counsel team was led by Partner Manuel Quinche and associate Laura Villaveces in Bogotá.
For additional information visit www.bu.com.co

CAREY

ACTS FOR CASA SABA IN US$638 MILLION SALE TO ALLIANCE BOOTS; ALSO FOR ENDESA IN US$400 MILLION BOND REPLACEMENT

SANTIAGO, May 2014 - - Carey acted as local counsel to Casa Saba, a retail pharmacy business, in its sale to Alliance Boots for USD638 million. The operation includes Casa Saba's Chilean and Mexican businesses.

Carey advised Casa Saba through a team led by partners Pablo Iacobelli, Salvador Valdés, Alex Fischer and associate Daniela Pfeffer.

In another bond transaction, Carey acted as local counsel to Endesa in the issuance and placement of a Yankee bond of USD400 million at a rate of 4.250% due in 2024.

Carey advised Endesa through a team led by partner Claudio Lizana and associates Patricia Silberman and Camila Noreña.

For additional information visit www.carey.cl

CLAYTON UTZ

ADVISES AMCOM TECOMMUNICATIONS LIMITED ON SUCCESSFUL AU$40MILLION PLACEMENT

PERTH, 06 June 2014 - - Clayton Utz has advised ASX-listed information technology and telecommunications company Amcom Telecommunications Limited (ASX: AMM) on its successful AU$40 million placement of shares to sophisticated and professional investors, announced today.

Proceeds raised will be used to fund potential acquisitions by Amcom of complementary businesses which are aligned with Amcom's current capabilities.

Clayton Utz Perth corporate partner Mark Paganin led the firm's team with support from senior associate Stephen Neale and lawyer Sarah Croft.

For additional information visit www.claytonutz.com

DENTONS

ACTS FOR KEYERA CORP PUBLIC OFFERING AND SALE OF ADDITIONAL SHARES

CALGARY, May 2014 - - A Dentons team led by Calgary Partner Tim Haney and including Lucas Tomei and Dan Shea acted as counsel for the underwriters in the successful completion of Keyera Corp.'s public offering of 3,750,000 common shares, as well as the sale of an additional 562,500 common shares pursuant to the over-allotment option exercised by the underwriters in connection with the public offering.

The total number of common shares sold by Keyera in the public offering was 4,312,500 and these were priced at $73.75 per common share for gross total proceeds of approximately CA$318 million.

The issue was made through a syndicate of underwriters co-led by RBC Capital Markets and National Bank Financial Inc. and included TD Securities Inc., CIBC,BMO Capital Markets, Scotiabank, Peters & Co. Limited, FirstEnergy Capital Corporation, GMP Securities L.P. and Macquarie Capital Markets Canada.

Keyera Corp. operates one of the largest natural gas midstream businesses in Canada. Its business consists of natural gas gathering and processing as well as the processing, transportation, storage and marketing of natural gas liquids (NGLs), the production of iso-octane and crude oil midstream activities. Keyera's gas processing plants and associated facilities are strategically located in the west central, foothills and deep basin natural gas production areas of the Western Canada Sedimentary Basin.

For more information visit www.dentons.com

GIDE

ADVISES PILMICO FOODS CORPORATION ON ACQUISITION OF VINH HOAN 1 FEED JSC MARKING ENTRY INTO VIETNAMESE MARKET

HO CHI MINH CITY, May 2014 - -Gide advised Pilmico Foods Corporation, the food subsidiary of Manila-based conglomerate Aboitiz Equity Ventures on the acquisition of Vinh Hoan 1 Feed JSC, the fourth largest aqua feed producer in Vietnam and a subsidiary of Vinh Hoan Corporation - Vietnam's largest exporter of pangasius (Asian catfish).

Pilmico Foods Corporation will acquire an initial 70% equity stake in VHF and will purchase the remaining 30% within five years at a pre-agreed price.

Pilmico Foods Corporation is one of the Philippines' largest flour-milling companies and has been ranked among the top three domestic flour producers in the country. This is an important transaction for Pilmico Foods Corporation in terms of international expansion as well as a strategic partnership to enter the Vietnamese market.

Gide Vietnam advised Pilmico Foods Corporation: the transaction was led by Samantha Campbell (Partner) and Nasir PKM Abdul (Of Counsel), assisted by associates Long Huynh and Minh Nguyen.

For additional information visit www.gide.com

HOGAN LOVELLS

SECURES MAJOR WIN FOR BAY BILLS INDIAN COMMUNITY IN TRIBAL IMMUNITY SUPREME COURT SUIT

WASHINGTON, D.C. 27 May 2014 - - Hogan Lovells secured a landmark victory today in the Supreme Court on behalf of its client, Bay Mills Indian Community, in Michigan v. Bay Mills Indian Community. The justices ruled that tribal sovereign immunity prevents a state from suing in federal court to enjoin a tribe from violating the Indian Gaming Regulatory Act (IGRA) outside of Indian lands. The victory is a rare major Supreme Court win for Indian Tribes.

Partner Neal Katyal, who argued the case, stated today: "Congress and the Supreme Court have long recognized that a State cannot interfere with an Indian Tribe's sovereignty. We are gratified that the Court reaffirmed that longstanding principle today. Bay Mills, a federally recognized Tribe, depends for its livelihood on revenues from gaming activities conducted in accordance with the Indian Gaming Regulatory Act. The Court's decision affords proper deference to Congress' judgment, and it will ensure that Tribes like Bay Mills can continue to fund tribal education and perform other sovereign functions."

The case arose when Michigan attempted to force the Tribe to shut down its off-reservation casino. The Hogan Lovells team argued that the longstanding tradition of Tribal immunity barred Michigan from doing so.

The Supreme Court decision siding with Bay Mills held that as ""'domestic dependent nations,'" Indian tribes exercise "inherent sovereign authority" that is subject to plenary control by Congress."

Neal Katyal, a partner at Hogan Lovells and the former Acting Solicitor General of the United States, argued the case before the Court, his 21st argument before the Court, with 19 of them occurring in the last five years. A team of Hogan Lovells lawyers from the Washington, D.C. office, including Appellate Partner Jessica Ellsworth and associates Amanda Rice and Jonathan Shaub, joined him on the briefs. In the upcoming Supreme Court Term, Hogan Lovells expects to argue several major cases at the Court.

For more information visit www.hoganlovells.com

KING & WOOD MALLESONS

ADVISED QINGDAO HAIER ON EXTERNAL INVESTMENT IN ITS MEDICAL BUSINESS DIVISION

BEIJING, 26 April 2014 - - King & Wood Mallesons ("KWM") represented Qingdao Haier Co., Ltd ("Qingdao Haier") (SSE stock code: 600690) in signing the Equity Transfer and Capital Increase Agreement with Qingdao Haier Venture Investment Co., Ltd. ("Haier Venture", a subsidiary of Haier Group), Beijing Carlyle Investment Center ("Carlyle") and Vivo Capital ("Vivo") with respect to an equity transfer and capital increase in a subsidiary controlled by Qingdao Haier, Haier Medical and Laboratory Products Co., Ltd. ("Haier Medical").

According to the transaction documents, Haier Venture, Carlyle and Vivo will acquire a portion of Haier Medical's equity interests, and the three parties will further increase the capital of Haier Medical.

Haier Medical is Qingdao Haier's platform for the development and manufacturing of low-temperature medical products and scientific instruments, and it primarily focuses on the innovation, R&D and manufacture of low-temperature cold chain products for medical use. This strategic cooperation provides a prime opportunity for Haier Medical to accelerate the development of the company and become a global leading provider of bio-science services.

Acting as the legal counsel of Qingdao Haier, the KWM team led by Ms. Xu Ping and Ms. Song Yanyan fully participated in all aspects of the transaction, including planning the transaction structure, the drafting and negotiation of the transaction documents, as well as advising on information disclosure, etc.

With strong support by the KWM team, the parties successfully executed the transaction documents, a significant milestone for this transaction. KWM will continue to assist Haier with pre-closing matters to facilitate the successful closing of the transaction.

For additional information visit www.kingandwood.com

NAUTADUTILH

OXBOW CARBON ACQUIRES 50.1% STAKE IN OVET HOLDINGS BV

ROTTERDAM May 2014 - - NautaDutilh assisted Oxbow Carbon LLC and its Dutch subsidiary Oxbow Coal B.V. (Rotterdam) in the acquisition of a 50.1% stake in Ovet Holding B.V., currently a joint venture between ArcelorMittal and, indirectly, H.E.S. Beheer N.V.

Ovet Holding B.V. has a number of subsidiaries including Ovet B.V. and OBA Group B.V., which operate dry bulk terminals in Amsterdam, Terneuzen and Vlissingen, specialised in the storage, transhipment and processing of solid fuels, ores and minerals. Ovet and OBA handle coal, agribulk, minerals and biomass. Oxbow Carbon LLC is one of the world's largest recyclers of refinery and natural gas byproducts. Following closing, which is expected for June 2014, Ovet Holding B.V. will be a joint venture between Oxbow Coal B.V. (50.1%), and, indirectly, H.E.S. Beheer N.V. (49.9%).

The core team for this transaction comprises of Joost den Engelsman, Silvia Hubers and Lex Klapwijk (Corporate/M&A), Marianne de Waard and Renate Punt-Huizer (Civil law notaries), Leo Groothuis (Public M&A), Jaap Feenstra and Thomas Verstraeten (Competition) and Albert van der Kolk (Employment).

For additional information visit www.nautadutilh.com

MCKENNA LONG & ALDRIDGE

SECURES VICTORY FOR CERTAINTEED IN LIVING MESOTHELIOMA CASE - JURY HANDS MCKENNA DEFENSE WIN AFTER FIVE-WEEK TRIAL

SAN FRANCISCO 03 June 2014: McKenna Long & Aldridge California Litigation attorneys Michelle Jackson and Frank Berfield successfully defended CertainTeed Corporation in Contra Costa County, Calif. Superior Court trial that concluded on May 12. The claim alleged that "take home" exposure to asbestos dust caused plaintiff Pamela O'Bryan to develop mesothelioma, a cancer of the lining of the lung. The defense verdict is the sixth consecutive victory for McKenna's California Litigation team.

Pamela O'Bryan was diagnosed with malignant pleural mesothelioma in July 2013, and claimed her mesothelioma was the result of exposure to asbestos dust that her father, Ken O'Bryan, brought home on his clothing CertainTeed denied that plaintiff had ever been exposed to it's brand of asbestos cement pipe.

At trial, plaintiff's counsel asked the jury for an award of $9.56 million in non-economic damages and an assessment of liability of 48% against CertainTeed. Plaintiff's counsel also asked the court to find "malice, fraud and oppression" in the first phase of the trial.

After a five-week trial and after deliberating for almost four days, the jury found in favor of CertainTeed.

For additional information visit www.mckennalong.com

MUNIZ RAMIREZ PEREZ-TAIMAN & OLAYA

ASSISTS INTEROIL IN LANDMARK ENVIRONMENTAL PRECEDENT

LIMA May 2014: A recent resolution issued by the Appellate Court of the Peruvian Agency For Environmental Assessment and Audit (OEFA) declared that Interoil Peru, a subsidiary of a Norwegian petroleum company with operations in Peru, did not break the law when it decided to move the location of four wells located in Block III, an oilfield located in the Piura Region, in north west Peru.

The case dealt with four programmed oil wells that were originally approved to be drilled in four different locations. These four wells were in practice drilled from a single platform using directional drilling instead. This situation, not considered in the Environmental Impact Assessment submitted by Interoil, caused the Peruvian authority to impose a strong sanction on Interoil. The Court, in a second instance within OEFA, determined that the company actions created a lesser impact for the fauna and flora, less quantity of toxic emissions, among other good consequences.

Through this case, OEFA set the criteria to admit practical amendments to an EIA if they create an "environmental improvement".

"This is a landmark precedent that opens a new way of understanding the environmental engagements assumed by oil & gas companies. It can perfectly apply to other sectors linked to the exploitation of natural resources, such as mining and electricity", says Jenny Caldas, partner of Muñiz, Ramírez, Pérez-Taiman & Olaya, who led the legal team that represented Interoil before OEFA.

For additional information visit www.munizlaw.com

SANTAMARINA Y STETA

ASSISTS GEO WITH US$1.5 BILLION RESTRUCTURING PLAN

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

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

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

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

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

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

For additional information visit www.s-s.mx

RODYK

WINS IN CLAIM FOR RETURN OF INVESTMENTS US$100 MILLION

SINGAPORE June 2014: Rodyk successfully acted for clients in a claim for the return of their investments in various private equity funds and other direct investments worth in excess of US$100 million, and for, among other things, an account of all the monies that had been entrusted by the clients to the defendants for the clients' investments as aforesaid.

Litigation & arbitration partner Philip Jeyaretnam, SC led, supported by partners Foo Maw Shen, Daryl Ong and Chu Hua Yi. They are assisted by senior associate Charmaine Kong and associate Aw Jansen.

For more information visit www.rodyk.com

TOZZINI FREIRE

ADVISES ROLLS-ROYCE IN US$1.3 BILLION SALE OF GAS TURBINE AND COMPRESSOR BUSINESS TO SIEMENS

SAO PALO, 04 JUNE 2014: Brazilian firm TozziniFreire Advogados has advised Rolls-Royce in its US$1.3 Billion sale of its gas turbine and compressor business to Siemens.

As part of the deal, Siemens also signed a 25-year technology partnership with Rolls-Royce which will give it exclusive access to 4 to 85 megawatt gas turbines developed by Rolls-Royce, for which it paid an additional US$327 million.

Rolls Royce’s gas turbines were originally developed to be used in the aviation industry, but have since been used to supply power in the oil and gas sector, particularly on offshore oil platforms.

The deal was announced on 6 May and is expected to close in December.

TozziniFreire Advogados Team was led by Partners Pedro Dittrich, Leonardo Ventura and Alvaro Barbosa and associates José Augusto Dias de Castro, Guilherme Manier Carneiro Monteiro and Pedro Faya Pontes Malta in Rio de Janeiro and partners João Busin, Vera Kanas Grytz and Mihoko Sirley Kimura and associate Flavia Fonseca Busch Strumpf in São Paulo.

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

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

- **PRAC 57th International Conference**
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April 18—21, 2015

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

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

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

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CLAYTON UTZ

19 May 2014

More progress on bilateral agreements under EPBC Act, and draft approvals bilateral agreements

Streamlined Federal environmental assessments and approvals are one step closer with the introduction of changes to the Environment Protection and Biodiversity Conservation Act 1999 into Federal Parliament, and the release of new draft approvals bilateral agreements for New South Wales and Queensland.

The biggest changes in the Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014 are the removal of the CSG water trigger, and the restriction of the referral process.

Coal seam gas water trigger to be removed

The Bill proposes to remove the "Windsor amendments", so that actions that involve coal seam gas development or large coal mining development that are likely to have a significant impact on a water resource can be subject to an approvals bilateral. This would greatly increase the utility of approvals bilateral agreements, particularly in jurisdictions with a higher number of resources projects.

Referral process restricted where a bilateral in place

Consistent with encouraging use of the accredited approvals process of the relevant State or Territory, the referral process will not be available to actions already approved under a bilateral agreement, or actions that are being, or are to be, assessed under a bilaterally accredited authorisation process.

The Minister has a discretion to determine whether these changes apply to actions referred before the amendments' commencement date.

Depending on the particular authorisation process, this proposed amendment potentially impacts on the ability of proponents to seek a "not a controlled action" determination, or elect whether to proceed through the EPBC Act process or a State or Territory process for the assessment and approval.

Regulations and planning instruments will be considered for the approvals bilateral agreement

The effect of an approvals bilateral is that the Minister can accredit a process set out in a law of a State or Territory, and approvals under that accredited law do not need a separate approval under the EPBC Act, for the matters specified.

This accreditation is proposed to be extended beyond a "law" so that the Minister may accredit an authorisation process set out wholly or partly in a law of the State or Territory or an instrument made under such a law. There will be a mirror extension to the definition of "authorisation process".

Local government to be authorising entities for an approvals bilateral agreement

The restriction that approvals bilaterals can only apply to actions approved by a State or Territory will be removed, so that other entities (eg. local governments) could be the authorising entities for an approvals bilateral.

Amendments to State law won't automatically derail bilaterally accredited authorisation process

If a State or Territory amends the law that is the bilaterally accredited authorisation process, the Minister will have a new power to determine that the process may continue without further accreditation for the purposes of a bilateral.

This is subject to the amendment not having, or being unlikely to have, a material adverse impact on a matter protected under the EPBC Act, or a person's ability to participate in the authorisation process.

Transitional arrangements for projects when the approvals bilateral agreement no longer applies to them

If a project is undergoing assessment and the bilateral agreement is either no longer applicable (for example, if the relevant action is removed from the class of actions covered in the bilateral), or is cancelled or suspended, the Bill sets out a transitional process.

In the circumstances, the action will be deemed to have been referred to the Commonwealth Environment Minister. The Minister will be able to declare that a partly or fully completed assessment under a State or Territory process can be used for assessing the relevant impacts of the action under the EPBC Act.

Draft approvals bilateral agreements

Draft approvals bilaterals for New South Wales and Queensland were released on 14 May 2014 for public comment by Friday 13 June 2014.

Under the Memorandum of Understanding with the State of Queensland and the NSW Governments, it is intended that the Commonwealth Minister will have concluded an approvals bilateral with both States by approximately mid-September 2014.

INTELLECTUAL PROPERTY NEWS / JUNE 2014

Brazil: Patent does not expire if the owner resumes paying annual fees

The highest Brazilian federal court for non-constitutional matters (Superior Tribunal de Justiça – STJ) has decided that a patent will not be revoked if, after failing to pay the applicable annual fees, the patent owner resumes paying these fees in subsequent years.

The decision was rendered in a case where the Brazilian Patent and Trademark Office (INPI) tried to revoke a patent owned by a technology company after lack of payment of annual fees.

The STJ determined that, by making future payments, the patent owner demonstrates its interest in maintaining the patent. The decision also acknowledged that the purpose of the patent is to protect inventions that are still useful and economically exploited.

Brazil: Court of Rio de Janeiro Issues Decision Involving Highly-renowned Trademark

A lower Federal Court in Rio de Janeiro has ruled that a shoe manufacturer cannot use the trademarks “Perdigão” and “Perdigão Boots” to identify its shoes. This is because “Perdigão” is a highly-renowned trademark owned by a food company.

The decision follows the same position adopted by the Brazilian Patent and Trademark Office (INPI), which had previously denied the trademark application filed by the shoe manufacturer. The reasoning was that, although the trademarks would be used in different products, the reputation of the food company could still be harmed. In addition, the shoe manufacturer could take advantage, unfairly, of the reputation associated with the trademark of the food company.

The shoe manufacturer claims that (i) it has been using the trademark for more than 20 years, and (ii) it has filed its trademark application before the status of “highly-renowned” was granted to the trademark of the food company. The decision from the Rio de Janeiro Court is still subject to appeal.

Recent amendments to the Canadian export controls list

May 29, 2014

On April 23, 2014, Canada issued an **Order Amending the Export Control List** (the “Order”) pursuant to the ***Export and Import Permits Act***. These amendments came into force with immediate effect on May 22, 2014. The amendments correct, clarify or remove certain existing controls and add some new items to the Export Control List (ECL). This alert will briefly discuss the Order in the context of the export control regime in Canada and will outline the various considerations for exporters.

The ECL provides product-specific restrictions on foreign exports. Typically, goods and technologies are controlled where a) they could be detrimental to the security of Canada should they fall into the wrong hands, b) where Canada has decided it has an interest in tracking such goods for strategic, economic or other reasons, or c) where Canada incurs control obligations under various multilateral export control regimes.

The ECL is periodically revised to reflect changes to Canada’s international agreements and the evolving nature of strategic goods or technologies. The latest Order is in accordance with Canada’s commitment to four multilateral export control regimes: the *Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies*, the Nuclear Suppliers Group, the Missile Technology Control Regime and the Australia Group. As a signatory to these conventions, Canada implements changes to the ECL on the basis of lists negotiated with other signatories.

The Order lists over 250 amendments that fall under nearly all of the taxonomic headings in the ECL. In some cases, export controls have been clarified, relaxed or deleted entirely, which could reduce the administrative burden on some exporters. Specific changes include the decontrol of certain types of cryptographic hardware components used in mass market products. Other potentially relevant amendments consist of clarifications made to the controls applicable to certain telecommunications technologies.

A **summary list of the amendments** has been published by the Export Controls Division of the Department of Foreign Affairs, Trade and Development (DFATD), and the entire ECL is published in the **Guide to Canada’s Export Controls**. Please note that at the time of publication of this alert, the DFATD website had not yet updated to the most recent (2012) version of the Guide.

As a result of these changes, Canadian-resident businesses that export (including intangible exports or transfers by way of electronic media) goods, software or technology should review the amendments to ensure they are compliant. The amendments may also be relevant to businesses contemplating the acquisition of a Canadian exporter, since the changes could result in new compliance risks and opportunities.

It is a common misconception that goods and technologies are listed on the ECL because they are “dangerous” in the sense that they have obvious military or criminal uses. Exporters should not assume that they are exempt because their products have no obvious nefarious application. If goods are listed, a permit is required to export them beyond Canadian or U.S. borders. Export permits are granted and managed by DFATD, and the Minister has very broad discretion to grant or refuse permits and to impose terms and conditions on permit holders.

Canadian companies who fail to comply with the new amendments may be subject to seizure of their goods, an investigation by the Canada Border Services Agency and penalties including fines and even imprisonment, for corporate officers or directors who “direct, authorize, assent, acquiesce in or participate in” the commission of an offence under the Act.

As the global trade landscape grows increasingly complex, Dentons’ international trade lawyers and professionals around the world are equipped to help you minimize risk and maximize opportunity for your international business.

Key contacts

Martha Harrison
Partner, Toronto
D +1 416 862 3421
martha.harrison@dentons.com

Paul M. Lalonde
Partner, Toronto
D +1 416 361 2372
M +1 416 414 5833
paul.lalonde@dentons.com

Jaime Seidner
Senior Customs Consultant, Toronto
D +1 416 863 4756
jaime.seidner@dentons.com

James M. Wishart
Associate, Ottawa
D +1 613 783 9651
james.wishart@dentons.com

Olivia Wright
Associate, Ottawa
D +1 613 783 9652
olivia.wright@dentons.com

/Carey

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

Ricardo Reveco
Partner
+56 2 2928 2213
rreveco@carey.cl

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

New Chilean Insolvency Act

• **Background**

In October of 2014, Law No. 20,720 will enter into effect. This act replaces the current bankruptcy law, and creates a new reorganization and liquidation regime for both corporations and natural persons.

The main purposes of this new act are (a) to ease the negotiation and approval of the debtor's reorganization agreements; (b) to improve the creditors' recovery rate in insolvency procedures, creating a more effective and efficient procedure; and (c) to regulate the effects of cross-border insolvency procedures.

• **Main Innovations**

1. Insolvency Financial Protection in Case of Reorganization Agreements

Under the new law, pre-bankruptcy agreements, currently known as *convenios*, are renamed as *acuerdos de reorganización* (reorganization agreements). Given the focus of the new law, which favors reorganization over liquidation, protection for the debtor during the reorganization process will increase.

The debtor will only need to file a reorganization request form in order to obtain insolvency financial protection from the court (which may last between 30 to 90 business days, depending on the percentage of the creditors supporting said request). Under the financial protection, payment terms in contracts to which the debtor is a party will remain unaltered. The debtor's contracts may not be terminated merely on the grounds of insolvency, and their guarantees may not be foreclosed. Claims held by creditors violating these rules will be subordinated, and be paid after unsecured and "related person" creditors.

Creditors providing goods and services (including foreign trade operations) during the reorganization shall be paid with a preference over all creditors.

2. Secured Creditors and Reorganization Agreements

Under the new act, secured creditors may vote without losing their preference. However, if the reorganization agreement is approved by creditors representing at least 66% of the debtor's liabilities, secured creditors will be subject to the terms of said agreement even if they voted against it. This could mean, for example, that secured creditors will not be allowed to foreclose the assets that guaranteed their credits if (i) the reorganization agreement establishes so, and (ii) the court declares that said assets are essential for the debtor. This is a major shift from the current law, under which secured creditors that vote against the reorganization agreement may always foreclose on liened assets, even when reorganization proceedings are on course.

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3. Revocatory Actions

This new law also improves the regulation of revocatory actions, granting more legal certainty to creditors that provide loans or enter into transactions with the debtor before its declaration of bankruptcy, as it explicitly provides that transactions may only be revoked if they caused harm to creditors.

Objective revocatory actions allow creditors to revoke certain transactions (such as early payments made by the debtor to a third party, payments made in due time, but in a different manner than as originally agreed [e.g., accord and satisfaction], and mortgages and pledges granted in the debtor's assets to secure pre-existing debts), that were executed during the year before the commencement of the proceedings. If any of the aforementioned transactions has been entered into by a related person of the debtor, or constitutes a gratuitous act or contract, the avoidance action may be filed with respect to transactions that occurred during the two years prior to the commencement of the reorganization or liquidation proceedings.

Subjective revocatory actions, on the other hand, allow to creditors to revoke transactions executed during the two years prior to the commencement of the debtor's insolvency proceedings, if the following conditions are present: (i) bad faith of the non-debtor party concerning the transaction; and (ii) the transaction caused harm to creditors. The act introduces an objective standard to determine whether harm has been caused to creditors (i.e. market conditions and fairness tests).

Finally, amendments to the debtor's bylaws made within the six months prior to the commencement of insolvency proceedings may be avoided if they cause a decrease in the debtor's equity.

4. Voting Rights and Quorum

The quorum for approval of reorganization agreements has been amended, being lowered from creditors representing 75% of the debtor's liabilities to creditors representing 66.6% of the debtor's liabilities. Also, related parties will have no voting rights regarding both reorganization agreements and liquidation procedures. This is an innovation with respect to the current law, under which related parties are able to vote concerning liquidation procedures.

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5. Cross-Border Provisions

For the first time in Chile, regulations regarding cross-border insolvency have been adopted, providing as a general principle that all creditors, Chilean or foreign, shall have the same rights regarding an insolvency proceeding and with respect to creditor participation in those proceedings. These new provisions will undoubtedly be of help for foreign investors, as they facilitate the cooperation between the insolvency institutions and courts of Chile and foreign countries.

6. Specialized Courts and New Insolvency Authorities

Insolvency cases will hereafter be assigned to special courts, and will not be randomly distributed among civil judges as they currently are.

The new act creates new authorities such as the observer, in charge of reorganization procedures, and the liquidator, in charge of the liquidation of assets.

7. Online Platform

Finally, a free online platform has been created, on which most insolvency court decisions will be published for notice purposes. This innovation will make insolvency cases faster and less expensive, as it replaces the current publications in the official gazette.

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China Bulletin | May 2014

Highlights

China's (Shanghai) Free Trade Zone Paves Way for Foreign Investment in China's Value-added Telecommunication Service Market

Wang Rui | Ge Yibo

1.Introduction

China's (Shanghai) Pilot Free Trade Zone ("**FTZ**") has attracted global media attention ever since it was established in September 2013.This can largely be attributed to the new FTZ rules that relax restrictions on foreign investment in China's markets.In particular, the value-added telecommunication services ("**VATS**") sector in the FTZ opens up foreign investment in two main ways: (1) lifts bans on foreign investment in foreign invested telecom enterprises ("**FITE**") in certain service areas, *e.g.*, in information services (only applicable to application stores); and (2) opens up four new types of VATS services previously closed to foreign investment (*i.e.*, call center services, internet access services, domestic multi-party communication services, and domestic internet VPN services). In mid-April of 2014, the government further issued detailed procedures and guidelines on the establishment of FITEs in the FTZ. This Article aims to provide an update of these new developments in the FTZ.

2.FTZ opens up VATS to foreign investment

On January 6, 2014, the Ministry of Industry and Information Technology ("**MIIT**") and the Shanghai Municipal Government issued the Opinions on Further *Opening up Value-added Telecommunication Business to Foreign Investments in the China (Shanghai) Pilot Free Trade Zone* (《关于中国（上海）自由贸易试验区进一步对外开放增值电信业务的意见》)(1)("**Opinions**").The Opinions introduce a number of new initiatives that increase participation by foreign investors in the telecom industry.
For example, the Opinions open up **seven** types of VATS services to FITEs that are incorporated in the FTZ and that have all their service facilities located in the FTZ.More specifically, a FITE incorporated in the FTZ is authorized to provide:
•**five** kinds of telecom services without any restrictions on foreign investment, *i.e.* the foreign investor can make up to 100% investment in the FITE, including in: (i) application store services, (ii) store-and-forward business services, (iii) call center services, (iv) internet access services (provision of internet connection services to online users), and (v) domestic multi-party communication services(2);
•**two** kinds of telecom services, subject to restrictions on foreign investment, including: (i) online data and trade processing services (*i.e.*, operating e-commerce businesses), subject to a 55% investment restriction, and (ii) domestic internet virtual private network (VPN) services, subject to a 50% investment restriction(3).
All of the above mentioned services can be provided on a nationwide basis, except internet access services which are only allowed to be provided to customers in the FTZ.Since the FTZ is a pilot zone to test reform initiatives that may significantly impact China's relevant markets, the Opinions serve as an important signal to show that the government is moving towards liberalizing the telecom industry.

3.More specific guidelines for FITEs in the FTZ

The procedures and requirements to establish FITEs in the FTZ are now different from the general requirements to establish FITEs in China in several aspects. On April 15, 2014, to provide foreign investors with more detailed rules on investment in the VATS sector in the FTZ, the MIIT issued the *Administrative Measures for the Pilot Operation of Value-added Telecommunications Business by Foreign Investors in China (Shanghai) Pilot Free Trade Zone* (《中国（上海）自由贸易试验区外商投资经营增值电信业务试点管理办法》) ("**FTZ FITE Measures**").In addition to the general requirements on *FITEs under the current Administrative Provisions on Foreign Invested Telecom Enterprises* (《外商投资电信企业管理规定》)(4)("**General FITE Provisions**"), the *FTZ FITE Measures* provide the following specific requirements for the establishment and operation of FITEs in the FTZ:

•The registered capital of a FITE incorporated in the FTZ must be 1 million RMB or more.(5) This is only 10% of the registered capital required by a FITE (providing VATS nationwide) under the *General* FITE Provisions.(6)

•The Shanghai Branch of the MIIT ("**MIIT Shanghai Branch**") is the competent authority to examine and approve applications to operate VATS businesses in the FTZ. Under the *General FITE Provisions*, the competent authority to deal with similar issues (for FITEs providing VATS services nationwide) is the MIIT.

•The MIIT Shanghai Branch is empowered to decide whether or not to approve an application for operating VATS businesses within 60 days. This is significantly less than the time needed for the MIIT to make such decisions under the *General FITE Provisions* (around 5 months in total)(7).

•The license to be granted by the MIIT Shanghai Branch to qualified applicants for operating VATS businesses is called the *License for Pilot Operation of Value-Added Telecommunications Business by Foreign Investors in China (Shanghai) Pilot Free Trade Zone* (《中国（上海）自由贸易试验区外商投资经营增值电信业务试点批复》) ("**FTZ VATS License**").The MIIT Shanghai Branch needs to file the information of each FTZ VATS License with the MIIT within 10 days after the license has been issued.

•An FTZ VATS License is valid for a period of 3 years(8), which is 2 years shorter than that of a VATS license under the *Measures for the Administration of Telecom Service Operations* (《电信业务经营许可管理办法》)(9).

4.Influence of the FTZ regulations in practice

In general, the new FTZ regulations open up foreign investment to various businesses involved in the Chinese telecom industry, *e.g.*, cloud computing, and more specifically, e-commerce. However, since the release of the *Opinions* in January 2014, the government has taken a cautious regulatory approach in approving the establishment of FITEs in the FTZ. In the approval process, the government authorities will consider the investor’s reputation and creditworthiness in the industry, as well as the potential influence of the project.Consequently, up until the *FTZ FITE Measures* were issued, the government rarely granted FITEs with VATS licenses in the FTZ.

E-commerce market

In recent years, foreign investors have shown increasing interest in the Chinese e-commerce market – in particular in operating online platforms to sell third party goods in China.However, this is considered to involve a type of VATS ("online data and trade processing services"), which is generally subject to a 50% restriction in foreign investment under China’s WTO commitments.

In theory, the *Opinions* bring good news to foreign investors that seek to gain a foothold in the e-commerce business as they can now hold majority shares (55%) in e-commerce businesses based in the FTZ. However, as mentioned above, the government has currently adopted a strict regulatory approach that makes it difficult for foreign investors to obtain the relevant license(s) in practice.

One company that successfully acquired a VATS license to provide e-commerce services in the FTZ is Newheight E-Commerce (Shanghai) Company Ltd. (纽海电子商务（上海）有限公司) ("**Newheight E-Commerce**"). Newheight E-Commerce was established on November 14, 2013. This company intends to support the technical operation of a well-known online supermarket called "YHD" (一号店) (http://www.yhd.com/), which is controlled by Wal-Mart Stores, Inc. ("**Wal-Mart**"). The two shareholders of Newheight E-Commerce include (i) a Chinese domestic company and a (ii) Hong Kong incorporated company named Newheight Corporation Limited, which is ultimately controlled by Wal-Mart(10).Newheight E-Commerce is currently permitted to provide information services (excluding fixed network telephone information services) and online data and trade processing services.Now, the online platform (http://www.yhd.com/) effectively integrated the access to the web-mall business of Wal-Mart (platform for independent third party vendors) ("1MALL"一号商城) and its core web-store business (online store selling its own products) ("**YHD**"一号店).

Cloud computing

China's cloud computing industry has experienced fast and dynamic growth in recent years, which has attracted an increasing amount of interest from foreign investors.Although there is no specific telecommunication legislation that covers cloud computing yet, the majority of cloud computing services fall under the PRC Telecommunication Regulations （《中华人民共和国电信条例》）as VATS, which are tightly restricted in China.Since cloud computing services encompass a wide range of services, market suppliers may need various kinds of VATS licenses to provide these services (depending on the type of their cloud computing services).

The Opinions open up several kinds of VATS businesses to foreign investment in the FTZ that may allow foreign investors to provide certain cloud computing services (if they can obtain the corresponding VATS license(s)). For example, foreign investors may now provide "domestic multi-party communication services" (*e.g.*, audio/visual conference call services) through a FITE business structure within China. Nevertheless, against many expectations, certain key VATS businesses that are required to provide certain cloud computing services remain closed to foreign investors. For example, internet data center services ("**IDC**"), which are largely used as the fundamental IT infrastructure in the provision of cloud computing services, are still closed to foreign investors.As a result of the existing restrictions, foreign investors tend to use other structures to enter China's VATS markets.

One of the ways foreign investors can enter the VATS market is to partner up with Chinese companies that can obtain (or already have obtained) the relevant VATS licenses required to provide cloud computing services.In June 2013, Microsoft launched 'Microsoft Azure' in China, together with Chinese partner 21Vianet, to provide businesses with computing, storage, database, integration, connectivity and support for open-source software over the internet.(11) In December 2013, Amazon.com signed a memorandum of understanding with the Beijing and Ningxia governments to develop cloud computing services in China.(12) To do so, Amazon.com will partner up with several Chinese providers, including ChinaNetCenter and SINNET, who will provide the IDC and ISP services required to deliver the relevant cloud computing services in China. On the exact same day of the Amazon.com announcement, IBM also announced its agreement with Chinese partner, 21Vianet, to provide 'IBM SmartCloud Enterprise', private cloud infrastructure and managed services in China.(13)

5. Comments

The FTZ rules are fairly new and there are not many examples available to show how the government adopts the rules in practice - but it does introduce a new trend.That is, the adoption of the FTZ rules illustrates part of a wider effort of the Chinese government to liberalize foreign investment in China's VATS businesses.In line with this trend, we expect to see more VATS businesses opening-up to foreign investment nationwide in the future.It will be interesting to see what this trend will mean for the Chinese telecom industry and what kind of opportunities it will bring to both foreign and domestic players in the market.

Special thanks to Rebecca Brust for her great help.

Notes:

1. Promulgated on January 6, 2014 and became effective on the same date.
2. See Article 2 of the Opinions.
3. Ibid.
4. Promulgated by the State Council on December 11, 2001 and last revised on September 10, 2008.
5. See Article 3 of the FTZ FITE Measures.
6. See Article 5 of the General FITE Provisions.
7. See Article 11 and 17 of the General FITE Provisions.
8. See Article 6 of the FTZ FITE Measures.
9. See Article 13 of the Measures for the Administration of Telecom Service Operation, which was promulgated by MIIT on March 1, 2009 and became effective on April 10, 2009.

10. See http://finance.ifeng.com/a/20131212/11262595_0.shtml and http://it.southcn.com/9/2013-12/12/content_87041184_2.htm

11. See http://www.scmp.com/business/companies/article/1271351/microsoft-promote-cloud-computing-china .

12. See http://www.noodls.com/view/9641BFF4004BB085814C1FC04FF3046B3D4D1708?5876xxx1387358190 .

13. See http://usa.chinadaily.com.cn/business/2014-01/02/content_17210951.htm and http://www.thewhir.com/web-hosting-news/ibm-enterprise-cloud-services-available-china-via-21vianets-beijing-data-centers

Colombia Open Round - Current Schedule 2014

Mon, 05/05/2014 - 15:27
NewsFlash: 243

Natural Resources and Environmental Law

Current Schedule for the Colombia Open Round 2014

The Colombia Open Round 2014, referred to E&P contracts and TEAs that will be awarded this year by the National Agency of Hydrocarbons (ANH)) is still on course.

The ANH has adjusted the preliminary schedule of the Round 2014, establishing essentially the following:

On September 19th, 2014, the Biding Process will be formally opened and the Definitive Terms of Reference will be published. Then, all interested bidders and/or investors will be able to present or submit their qualification documents (from September 22nd to October 22th, 2014).

After that, on October 22nd the Preliminary Qualification List of the bidders and/or investors will be published, and from October 22th to October 29th, 2014 the mentioned participants will be able to formulate the corresponding observations.

Once the Definitive Qualification List of the bidders and/or investors is published on October 31st, 2014, the process of submission of proposals, Bid Bonds and Public Hearing for opening Bids, will develop on November 12th, 2014. Subsequently, the Preliminary Eligibility List of awarded areas will be published on November 18th, 2014 and commented by the participants from that same date to November 21st, 2014.

Finally, the 24th November the Definitive Eligibility List and granting or void declaration of areas will be published and from the 25th November the stage of contract signing will begin.

Please find below the Current Schedule for the Colombia Open Round 2014:

Schedule	
Activity	**Date**
Pre-launch of the process in Bogotá	December 17th, 2013
Launch of the process in Bogotá	February 19th, 2014

Workshop of Exploratory Opportunities		February 20th, 2014
Publication of the draft containing the Terms of Reference		February 21st, 2014
Road Shows	**Calgary**	February 27th and 28th, 2014
	Houston	From March 3rd to March 7th, 2014
	London	March 17th and March 18th, 2014
	Yakarta	April 3rd and April 4th, 2014
Publication of Terms of Reference and contract first draft		June 30th, 2014
Formal opening of the Biding Process and Publication of the Definitive Terms of Reference		September 19th, 2014
Submission of the Qualification Documents of the bidders and/or investors		From September 22nd to October 22th, 2014
Publication of the Preliminary Qualification List of the bidders and/or investors		October 22nd, 2014
Observations to the Qualification List of the bidders and/or investors		From October 22nd to October 29th, 2014
Publication of the definitive Qualification list of the bidders and/or investors		October 31st, 2014
Submission of proposals, Bid Bonds and Public Hearing for Opening of Bids		November 12th, 2014
Publication of the Preliminary Eligibility List of awarded areas		November 18th, 2014
Comments to the Preliminary Eligibility List of awarded areas		From November 18th to November 21st, 2014
Publication of the Definitive Eligibility List and granting or void declaration of areas		November 24th, 2014
Beginning of contracts signing		From November 25th, 2014

Download here a memorandum with more information regarding the oil & gas open round and its terms of reference.

Memorandum - ReferenceTerms

Please do not hesitate to contact us if you need additional information in relation with the bidding process of exploration areas that will be awarded this year 2014.

For more information please contact to

- Carlos Umaña Trujillo
- María Luisa Porto
- Eduardo del Valle Mora
- Juana Valentina Micán

CONTACT US

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

GIDE

GIDE LOYRETTE NOUEL

FRANCE EXTENDS RESTRICTIONS ON FOREIGN INVESTMENTS

On May 14, 2014, the French government issued a new decree (the "**New Decree**") that extends the list of protected sectors for foreign investments. From May 15, all new foreign investments in these areas will require prior authority approval (the "**Approval**").

NEW ACTIVITIES SUBJECT TO APPROVAL

The French Financial and Monetary Code (the "Law") provides for the free financial relationship between France and other countries. However, it also authorises the Minister in charge of the Economy (the "**Minister**") to restrict certain foreign investments that may endanger national security.

In this respect, the New Decree adds six areas to the list of protected sectors. They are:

- Energy (oil, gas and electricity);
- Water;
- Transportation;
- Communications;
- Facilities of vital importance; and
- Public health.

Other sectors under a previous decree issued in December 2005 and modified in May 2012 remain protected. Such sectors notably include gambling, regulated private security, some communications equipment, weapons for military purposes, and national defence.

The New Decree enlarges a protection that was previously limited to activities participating in the exercise of public authority, likely to endanger public order, public safety or national defence, or linked to weapons. While the language of the New Decree is very broad, the newly protected sectors should nevertheless still be limited to those whose protection is "essential" for safeguarding the nation's interests.

THE APPROVAL

Existing investments in these sectors do not need to obtain Approval under the New Decree. However, investors looking to implement any new project after the New Decree went into effect on May 15 must now first submit their project to the Minister for Approval.

The Minister may sometimes subjoin his Approval with special conditions to ensure that the planned project does not jeopardise national interests.

To ensure that such requirements are met, the Minister may take action against any foreign investment when it is being, or has been, made in violation of the Law. For example, the Minister may order investors to stop the transaction, to make changes to the nature of their investments or restore the status *quo ante* at their own expense. Failure to comply with such orders may result in a fine of up to twice the amount of the illegal investment.

Moreover, any undertaking, agreement, or contractual clause leading to a foreign investment that does not comply with the Approval is null and void.

CONCLUSION

The New Decree seems to be intentionally wide in scope, and many investors may now find themselves affected by its broad reach. Indeed, legal requirements may become more burdensome, particularly in the new restricted activities.

We will continue to follow the developments as the New Decree takes effect and keep you updated as the Minister and the French government issues more guidance and clarify the scope of the New Decree. In the meantime, please feel free to contact us if you have any questions regarding this or any other issue.

CONTACTS

THOMAS URLACHER
urlacher@gide.com

GUO MIN
guo@gide.com

GILLES CARDONNEL
cardonnel@gide.com

REBECCA FINN
rebecca.finn@gide.com

ANTOINE DE LA GATINAIS
gatinais@gide.com

PAUL-EMMANUEL BENACHI
benachi@gide.com

FAN JIANNIAN
fan@gide.com

CHARLES-HENRI LEGER
leger@gide.com

GUILLAUME ROUGIER-BRIERRE
rougier@gide.com

STÉPHANE VERNAY
vernay@gide.com

DAVID BOITOUT
boitout@gide.com

Guidelines to the Hong Kong Competition Ordinance: the Commission invites stakeholders' views
June 2014

The Hong Kong Competition Commission ("**Commission**") is setting to work on one of its crucial tasks in the implementation of the Competition Ordinance ("**Ordinance**"): drafting guidelines that will inform the market as to how the Commission expects to implement – and enforce – the Ordinance in practice. It is anticipated that the guidelines will address procedural issues including complaints, leniency applications and investigations, as well as guidance on exemptions.

To start the ball rolling, on 26 May 2014, the Commission has invited any interested stakeholders to submit their views and to provide information on trade practices in Hong Kong markets. The information gathered will assist the Commission in producing the draft guidelines, which are expected to be available towards the end of 2014. The Commission's paper "*Getting Prepared for the Full Implementation of the Competition Ordinance*," published on 26 May, requests in particular feedback from stakeholders on the following issues:

- common trade practices in Hong Kong which may have anti-competitive risk;
- experiences of vertical agreements, in particular resale price maintenance, and their efficiencies and risks;
- views on how to analyse market power and factors to take into account;
- experiences of information sharing and joint purchasing agreements;
- experiences of tying and bundling practices; and
- concerns on the application of the merger rule in telecommunications markets

The Commission aims to complete its preparatory work by the first half of 2015, and has provided the indicative timetable below.

May to July 2014

- publish information about the Ordinance and give context to the development of the guidelines;
- engage with major stakeholder groups; and
- obtain feedback from stakeholders and members of the public

September 2014 onwards

- publish draft guidelines; and
- consult with the Legislative Council, stakeholders and the public on the text of the draft guidelines

First half of 2015

- finalise the guidelines after consultation; and
- develop education and compliance tool kits

The Commission's objective is to publish practical guidelines that assist businesses in analysing their own market practices, with a view to determining whether their conduct may contravene the Ordinance. The guidelines will not form part of the legislation and they will not be binding on the Competition Tribunal or the Hong Kong courts, but could prove to be influential in practice. It is anticipated that the guidelines will evolve over time with the Commission's growing enforcement experience.

The Commission's paper has also provided an indication of the areas in which the Commission considers that it is likely to focus its energies, at least in the early period of its mandate. Those areas cover cases of:

- conduct that resulted in, or is likely to result in, substantial harm to consumers or businesses;
- conduct that has a substantial impact on the Hong Kong economy;
- conduct in concentrated markets in Hong Kong which restricts new entry or expansion in those markets;
- conduct that blatantly contravenes the law; and
- conduct where there is a history of previous contraventions of the Ordinance.

These 'markers' make it easier for businesses to kick-start their efforts to comply with the Ordinance, if they have not already done so.

Beyond this initial stage, it is not difficult to anticipate that, during the period where the guidelines are drafted and discussed, some businesses will be keen to give input to the Commission to shape the content of the guidelines.

Once enacted, the guidelines will hopefully give the much-needed predictability and legal certainty for companies to ensure their business practices are fully in line with the requirements of the Ordinance after its complete entry into force anticipated for 2015.

If you would like further information on any aspect of this note, please contact a person mentioned below or the person with whom you usually deal:

Beijing

Adrian Emch, Partner
adrian.emch@hoganlovells.com
+86 10 6582 9510

Hong Kong

Henry Wheare, Partner
henry.wheare@hoganlovells.com
+852 2840 5087

Laura Patrick, Senior Associate
laura.patrick@hoganlovells.com
+852 2840 5978

COUNSELLORS AT LAW

NEWS DETAIL

12/05/2014

FUTURES REGULATOR INTRODUCES NEW DERIVATIVES CONTRACTS

The Indonesian Commodities Futures Trading Supervisory Agency (“Bappebti”) recently issued Regulation No. 109/BAPPEBTI/PER/01/2014 regarding Derivative Contracts Traded on the Alternative Trading System (the “Regulation”).

With the issuance of the Regulation, Bappebti now allows futures exchanges in the country, though still subject to Bappebti’s further approval. At the same time it also introduces contracts for differences for three commodities/instruments, respectively stock indexes, foreign currencies, and commodities (the “Contracts”). The Regulation sets out requirements for the trading of these Contracts on the alternative trading system (“ATS”). The ATS is basically an over the counter trading system which is separately regulated under Bappebti Regulation No. 95/BAPPEBTI/PER/06/2012.

The Regulation also imposes on the futures exchanges (bursa berjangka) the obligation to ensure that Contracts traded by their members meet the following requirements:

a. There is a reliable price reference from other derivative markets which can be continually accessed;
b. There are at least two brokers that are interested in the Contract;
c. The Contract is traded under a set of specification standards; and
d. There is economic benefit in that the Contract can be used as a hedging instrument.

The Regulation revokes two previous Bappebti regulations, being: i. Regulation No. 72/BAPPEBTI/PER/09/2009 on Derivative Contracts Traded on the Alternative Trading System; and ii. Regulation No. 89/BAPPEBTI/PER/09/2011 on Types of Derivative Contracts that must be Reported to the Futures Exchange and Registered with the Futures Clearing House. (by: Hamud M. Balfas).

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LEGAL UPDATE

May 7, 2014

MEXICO ADOPTS A NEW COMPETITION LAW

On April 29, 2014, the Mexican Congress approved a new Federal Law on Economic Competition (the “**New Law**”) and, also, amended the Federal Criminal Code. Its publication is pending.

The New Law will become effective 45 calendar days following its publication in the Official Gazette of the Federation.

The need to amend the legislation on economic competition derives from the constitutional amendment of June 2013, which provided the general guidelines on this matter and created a new constitutional autonomous entity, the Federal Economic Competition Commission (“**COFECE**”, as per its acronym in Spanish), and also transferred to the new telecommunications regulatory entity, the Federal Telecommunications Institute (“**IFETEL**”, as per its acronym in Spanish), the authority to regulate all competition matters related to telecommunications and broadcasting industries. However, the New Law goes far beyond from what is necessary in order to implement such constitutional amendment, granting some discretional authority to both COFECE and IFETEL. Since the provisions of the New Law will govern the performance of both COFECE and IFETEL on competition matters, we will refer hereinafter to both entities as the “**Competition Authority**”.

NEW POWERS OF THE COMPETITION AUTHORITY

Barriers to Competition. The New Law creates the concept of “barriers to competition”, which does not necessarily imply unlawful acts nor the performance of monopolistic practices or prohibited concentrations, but, in general, existing market restrictions that interfere with its proper functioning, and empowers the Competition Authority, after following a new procedure created for such purpose, to adopt measures aiming to remove said barriers and even order a divestiture of assets. Regarding any legal statutes or regulations that are determined to be unduly limiting or distorting free market competition, the Competition Authority will only issue a recommendation to the competent authority, and the latter will “determine whatever it deems appropriate”, in order to avoid invading the jurisdictional scope of other authorities.

Essential Inputs. Also, the New Law introduces the “essential inputs”[1] concept, similar, but not identical, to the Anglo concept of “essential facilities”. To determine the existence of an

[1] That the New Law defines as “Any structural characteristic of the market, event or act of the Economic Agents that has the purpose or effect of preventing the access of competitors or limit their ability to compete in

essential input, the Competition Authority will take into consideration the number of economic agents that control the input, the feasibility of reproducing it, its indispensability for the provision of goods or services in a market, and the circumstances under which the economic agent or agents came to control it. In case of determining the existence of an essential input, the Competition Authority will be empowered to regulate access to it, to establish regulations on prices and rates for that input, and even their technical and quality specifications.

Failing to comply with the regulation on essential inputs, or failing to comply an order to remove a barrier to competition, may result in the imposition of fines up to 10% of the economic agent's annual taxable income.

<u>Formal Opinions</u>. The economic agents may ask the Competition Authority formal opinions on free concurrency and competition matters, with regards to new matters or those that are unresolved. The opinions so issued will have binding effect to the CompetitionAuthority and will be published in their respective website.

INVESTIGATIONS

The Competition Authority will have its own investigative body, endowed with certain autonomy (as it will be appointed and removed by the Board of the Competition Authority) and in charge of carrying out the investigation phase (the "**Investigating Authority**").

The Competition Authority is no longer obliged to publish in the Official Gazette of the Federation an extract of the resolution initiating an investigation, which will facilitate conducting dawn raids. It can also require from the staff of the visited economic agent, or from their representatives, explanations on facts, information, or documents related to the subject matter and purpose of the visit.

Under the New Law, the Competition Authority will have broader powers in the verification visits ("*dawn raids*"), since they are not limited to review information and documents associated with the subject of the visitation order. Also, if the visited economic agent does not allow access to its premises or does not provide the information and documents requested or if there is opposition to the visit, the facts attributed to the economic agent being investigated may be presumed by the Competition Authority to be true.

Also, the statute of limitation that the Investigating Authority has to initiate an investigation is doubled from 5 to 10 years, counted from the date that the prohibited concentration took place or the unlawful conduct ceased.

ABSOLUTE MONOPOLISTIC PRACTICES

According to the Federal Law of Economic Competition currently in force, the exchange of information among competitors constitutes an absolute monopolistic practice (per se violation), when its purpose or effect is price fixing. The New Law extends the scope of this provision to include as a conduct constituting an absolute monopolistic practice, any exchange of information among competitors whose purpose or effect is the commission of

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markets; that impede or distort the process of free competition and concurrency, as well as the legal provisions issued by any level of government that unduly impede or distort the process of free competition and currency".

any absolute monopolistic practice, for example, segment markets, or coordinate bids in tenders.

RELATIVE MONOPOLISTIC PRACTICES

According to the New Law, sales below cost will be considered as relative monopolistic practices (those subject to the rule of reason analysis), even if the same can be occasional, unlike the current legislation which limits the scope of such practice to "systematic" sales.

Also, the New Law defines two new relative monopolistic practices:

a) The price squeeze, which occurs when a vertically integrated economic agent reduces the margin between the price at which provides an essential input and the price of the good or service to which this same economic agent sells the final product or service to the consumer or end customer, using for its production the same input.

b) The denial or restriction of access to an essential input (determined as such by the Competition Authority, and without the Competition Authority following the overall determination procedure set forth in the New Law) or access to the same in discriminatory terms and conditions.

Also, regarding relative monopolistic practices, the New Law retakes the concept of "joint-substantial-power" or "joint-dominance" that two or more independent economic agents may have on the same market, evidently without any coordination or understanding between them. As it has been pointed out since its introduction in 2011, this concept deviates from international practice and, given the difficulties in determining it, creates a considerable level of legal uncertainty for economic agents.

Finally, for purposes of determining the existence of a relative monopolistic practice, anti-competitive effects that such conduct may have, will be considered not only in the relevant market, but also in related markets.

CONCENTRATIONS

The main changes that the New Law provides on concentrations matters are:

a) According to the New Law, it will be mandatory to wait always for obtaining the authorization from the Competition Authority to close a concentration (sale of shares or assets, mergers, and other combinations) that must be notified before the Competition Authority, even if (as in most cases) the transaction has absolutely no anti-competitive effect. Please recall that under the current legislation the authority may issue a "no closing order" when it considers necessary to review more carefully a transaction and, in the event of not issuing such order, the parties can freely close the transaction, assuming of course the risk of a negative final resolution.

b) Under the New Law, if a concentration that should be notified to the Competition Authority is carried out without its authorization, it will produce no legal effects.

c) In addition, the term for issuing a resolution with respect to a concentration is extended from 35 to 60 business days, counted as from the date of filing of the notice, or from the submission of the additional information requested by the Competition Authority.

d) It is clarified in one of the thresholds that determine when to notify a concentration, that the annual sales or assets of the economic agents are only those originated or located, respectively, in the Mexican territory.

e) Notices under a simplified “merger review” procedure in cases when it is evident that the concentration does not have anticompetitive effects, now should include all of the information that is required in the normal procedure (including, for example, market shares). In this case it will be understood that there is no objection to carry out the concentration if the Board of the Competition Authority fails to resolve in 15 business days counted as from the date of admission of the notice of concentration.

DIVESTITURE OF ASSETS AND SPECIAL PROCEEDINGS

The New Law establishes that it may be ordered to an economic agent to divest assets, rights, shares or partnership interests in two cases:

a) As a necessary measure for the elimination of anti-competitive effects and ensure proper functioning of a market, when the Competition Authority has determined the existence of barriers to competition or to essential inputs; or

b) As a sanction, when an economic agent incurs into a monopolistic practice, having previously been sanctioned for engaging in any monopolistic practice (absolute or relative) or a prohibited concentration.

In order to determine the existence of barriers to competition or essential inputs, the Competition Authority shall carry out a procedure, which is entitled to initiate ex oficio or by request of the President of the United Mexican States. Before the investigation phase, which duration is limited, the Competition Authority shall issue a preliminary decision and shall grant the interested economic agents the right to a hearing. Once the file is integrated, it shall issue a resolution that can include (i) recommendations to other authorities so they can determine the proper corrective action that are entitled to implement within the scope of their attributions; (ii) eliminate the barriers to competition, (iii) determine the existence of essential inputs or guidelines to regulate the access, pricing or tariffs, and specifications of the good or service to which they are applied, depending on the case, as well as the respective timeframe for their application, or (iv) the divestiture of assets of the interested economic agent, in the required ratio in order to eliminate the anticompetitive effects. The divestiture will only “proceed when other corrective measures are not sufficient to solve the identified competition problem”.

In all the mentioned cases, the Competition Authority will not impose the above measures when the economic agent demonstrates, in the pertaining procedure, that barriers to competition and essential inputs generate profits on efficiency and favorably affect the competition process, exceeding their possible anticompetitive effects, and result in an improvement to consumer welfare.

CRIMINAL SANCTIONS

The criminal sanction for officers of economic agents that incur into an absolute monopolistic practice is increased to 5 to 10 years of imprisonment and a fine from 1,000 to 10,000 fine-days.

Criminal action may be brought against an allegedly responsible, even though it still has not been determined guilty, in which case the administrative procedure before the Competition Authority shall be processed in parallel to the criminal proceedings.

Likewise, imprisonment of 1 to 3 years, and a fine from 500 to 5,000 fine-days, can be imposed, to whom in the course of a verification visit, destroys, obstructs or disturbs documents, images or files, in order to divert, obstruct or prevent the investigation of a possible unlawful conduct.

Considering to the changes contained in the New Law, we advise to carefully review the business practices of the companies and to intensify the training of their staff, particularly in the case of sales personnel or anyone who is in contact with competitors, in order to train them on the scope of the new provisions on competition matters and, in particular, on the limitations in communications with competitors, *inter alia*.

Also, we suggest to review the agreements executed in order to detect if any provision may be deemed as anticompetitive.

Likewise, it will be necessary to plan well in advance any concentration transaction that must be notified before the Competition Authority, due to the longer term granted to it for issuing its resolution.

If you need any additional information, please contact the partner in charge of your affairs or one of the lawyers mentioned below:

Mexico City Office:	***Mr. Ernesto Duhne B., eduhne@s-s.mx (Partner)*** ***Mr. Vicente Grau A., vgrau@s-s.mx (Partner)*** ***Ms. Andrea Kaiser J., akaiser@s-s.mx (Associate)*** ***Tel: (+52 55) 5279-5400***
Monterrey Office:	***Mr. Jorge Barrero S., jbarrero@s-s.mx (Partner)*** ***Ms. Bárbara Asiain, basiain@s-s.mx (Associate)*** ***Tel: (+52 81) 8133-6000***
Tijuana Office:	***Mr. Aarón Levet V., alevet@s-s.mx (Partner)*** ***Tel: (+52 664) 633-7070***

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Competition

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New EU Competition Rules on Technology Transfer entered into force on 1 May 2014

Monday 5 May 2014

New EU competition rules governing technology transfer agreements, consisting of a new Technology Transfer Block Exemption Regulation (the "2014 TTBER") and revised Technology Transfer Guidelines (the "2014 Guidelines"), have entered into force on 1 May 2014, replacing the 2004 versions of both texts (the "2004 TTBER" and the "2004 Guidelines").

The new texts contain mainly clarifications and only a very limited number of substantive changes.

Clarifications relate to (i) the scope of the TTBER, which is now explicitly distinguished from that of horizontal block exemption regulations, (ii) the IP rights to which it applies, which are now listed in a clearer way, trademarks still not being covered, and (iii) the calculation of market shares, the shares having been left unchanged,

Substantive changes relate to (i) the relation to the vertical competition rules, (ii) an extension of the catalogue of "hardcore" and excluded restrictions; (iii) guidance on settlement agreements in IP disputes; and (iv) more extensive guidance regarding the compatibility of technology pools with EU antitrust rules.

On the whole, the approach is stricter than ten years ago, especially in relation to non-challenge early termination clauses, which are no longer block exempted in non-exclusive licences. It is therefore adviseable to use the 12 month transitional period for existing licensing agreements to examine their compatibility with the new rules.

I. Relation to distribution situations

The 2014 TTBER applies to the licensing of "technology rights" combined with the licensing of other IP rights (e.g., trademarks, or non-software copyrights) or with provisions relating to the purchase of products by the licensee, insofar as such licensing or purchase is directly and exclusively related to the production of the contract products. This is a change from the 2004 TTBER, which required that such licensing constitute the "primary object" of the agreement in order for the TTBER to apply.

II. "Hard-core" and Excluded Restrictions

a) Licensees' protection from sales by other licensees as "hard-core" restrictions

In the case of technology license agreements between non-competing firms, the 2014 TTBER still allows for the protection of the licensor in its exclusively allocated territory against "passive" sales made from its licensees. However, as opposed to the 2004 TTBER regime, the safe harbour no longer protects licensees from passive sales by other licensees made into their exclusive allocated territories or designated exclusive customer groups during the first two years in which licensees sell products manufactured under license. This revision aligns the TTBER with the rules on vertical agreements.

While the 2014 Guidelines indicate that "restrictions on passive sales by licensees into an exclusive territory or customer group allocated to another licensee [. . .] may fall outside Article 101(1) of the Treaty for a certain duration [of up to two years] if the restraints are objectively necessary for the protected licensee to penetrate the new market," this limited exception will be difficult to invoke in practice, as it transfers the risk and burden of the self-assessment process under Article 101 TFEU entirely to the licensing parties.

b) General blacklisting of exclusive "grant-back" obligations

Under the 2004 TTBER regime, a licensor could benefit from the safe harbour even if it imposed on its licensee an obligation to grant back an exclusive license or to assign it rights with respect to the licensees' own non-severable improvements on the licensed technology. However, in the 2014 TTBER, the Commission removed the benefit as regards the exclusive licensing or assignment obligations of any improvements made by the licensee to the licensed technology (i.e., whether severable or non-severable). Thus, the safe harbour will now cover only non-exclusive grant-back obligations, regardless of whether they: (i) relate to severable or non-severable improvements; (ii) are non-reciprocal; (iii) envisage the payment of consideration; or (iv) entitle the licensor to feed-on these improvements to other licensees. Exclusive grant-back obligations must be assessed individually, but the remainder of the agreement may still benefit from the safe harbor.

c) Exclusion of non-challenge termination clauses in non-exclusive licenses

The Commission has expanded the scope of the exclusion from the safe harbour of non-challenge clauses regarding licensed IP rights. Under the 2014 TTBER, as under the previous 2004 TTBER, non-challenge clauses do not benefit from the exemption, regardless of whether the ultimate beneficiary of such a provision is the licensor or the licensee. However, contrary to the 2004 TTBER, which exempted termination arrangements for any kind of technology transfer agreements, the 2014 TTBER now excludes from the exemption regime any clause that allow for the termination of the technology license agreement in the event of a challenge to the validity of the IP rights concerned in the case of non-exclusive licenses. According to the Commission, such clauses can have the same deterring effect as no-challenge clauses, which do not benefit from the exemption, and would not be justified on the basis of any "exclusive" character of the license in question.

III. Settlement Agreements

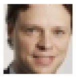
In the wake of fines imposed in the pharmaceutical sector, the 2014 Guidelines clarify that settlement agreements may have anti-competitive outcomes where the licensee agrees, upon being induced by the licensor to accept more restrictive settlement terms than would otherwise have been accepted solely on the basis of the strength of the licensor's technology (so-called "pay-for-delay" or "reverse payment" settlement agreements). Furthermore, the Commission indicates that non-challenge clauses in the context of settlement agreements are likely to be anti-competitive if the licensor knows or could reasonably be expected to have known that the licensed technology was obtained unfairly (e.g., it did not meet the appropriate legal conditions to justify being conferred IP law protection).

IV. Technology Pools

Following an increased demand from industry in the Consultations, the 2014 Guidelines expand the guidance regarding the Commission's competitive assessment of technology pools. The guidance still focuses on the same aspects, i.e. the inclusion of essential patents and the access under FRAND conditions, but gives more examples than the 2004 version.

Contact me

 Herman Speyart | Amsterdam | +31 20 7171 557 | Brussels | +32 2 566 8334

 Thomas Verstraeten | Brussels | +32 2 566 8344

 Geneviève Borremans | Brussels | +32 2 566 8328

 Philippe Péters | Brussels | +32 2 566 8444

 Florence Verhoestraete | Brussels | +32 2 566 8452

 Vincent Wellens | Luxembourg | +352 26 12 29 34

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ENVIRONMENT, ENERGY & NATURAL RESOURCES

"GETTING AHEAD OF THE GAME" - COMMENTS ON THE FINAL FRACKING REPORT

The Parliamentary Commissioner for the Environment (PCE) released her final report on hydraulic fracturing (aka "fracking") and regulation of the onshore oil and gas industry on 4 June 2014.

We consider a pragmatic approach should be taken in implementing the report's recommendations about further regulation. Any regulatory improvements should maintain the effects-based approach at the heart of the Resource Management Act 1991 (RMA). A sense of perspective is also needed and a regulatory sledgehammer should be avoided unless the evidence shows that the nut genuinely warrants it.

What did the report recommend?

The report made six recommendations about how the regulatory framework should be improved, namely through:

1. A national policy statement paying particular attention to 'unconventional' onshore oil and gas exploration and production.
2. Various changes to regional regulation of oil and gas drilling activities, including:
   a. classifying drilling, fracking and waste disposal as "discretionary" activities in regional plans;
   b. making explicit the circumstances when consent applications for such activities will be publicly notified in regional plans; and
   c. regional councils requiring applications for consents to establish well sites and drill wells to be 'bundled' together.
3. Expressly considering environmental effects in well design and monitoring.
4. Imposing costs associated with ongoing monitoring and remediation of wells, including post abandonment, on the oil and gas industry.
5. Requiring regional councils to be legally responsible for enforcing the Hazardous Substances and New Organisms Act 1996 on oil and gas work sites.
6. Resolving landfarming in Taranaki and considering how solid waste from oil and gas wells in the East Coast of the North Island should be disposed of.

Do onshore oil and gas activities justify greater regulation irrespective of their effects?

Some of the report's findings could be seen as pushing back against the effects-based philosophy of the RMA. Encouraging a 'blanket' approach to activities, regardless of their environmental effects, may not yield the most appropriate or consistent environmental outcomes. For example:

- **Is discretionary activity status necessary for all oil and gas activities?** The report recommends that regional councils should review their plans and make drilling, fracking and waste disposal discretionary activities (meaning the council could consider a broad range of environmental effects associated with the activities, and decline consent for them if appropriate).

  We are not convinced that a blanket approach of this nature is warranted. It needs to be remembered that permitted activity status does not mean an activity is unregulated. To the contrary, permitted activity rules can and do have numerous conditions that need to be complied with. The RMA is often criticised for slowing down development, and permitted activities can be an efficient and effective way of managing activities.

  > Reflecting the effects-based approach in the RMA, there should be evidence of a genuine risk to the environment from the particular activity before increased controls are justified.

  If councils and communities are satisfied that the environmental effects of drilling in certain areas are minor and comparable to other permitted activities that would occur in those areas, then in our view creating a stricter activity status for them may not be justified. Reflecting the effects-based approach in the RMA, there should be evidence of a genuine risk to the environment from the particular activity before increased controls are justified. Risk of contamination of high value aquifers could suffice, but general public suspicion or disquiet about the industry would not.

- **Is public notification necessary for all oil and gas activities?** The report recommends that councils should make explicit in plans the circumstances in which oil and gas related consent applications will be notified. We agree providing guidance about notification can be useful, and guidance is already provided where appropriate in regional plans for a wide range of activities. We are not so comfortable with the suggestion that a particular industry's applications might need to be notified whether or not the effects-based tests for notification in the RMA are satisfied.

  Such an approach could also be inconsistent with the regulation of offshore exploratory drilling for hydrocarbons under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 and associated regulations. Under that regime, off-shore exploratory drilling for hydrocarbons is currently a non-notified activity, meaning the Minister for the Environment has concluded that offshore exploratory drilling has a low probability of significant adverse effects.

- **Should councils identify areas where drilling for oil and gas should be prohibited?** Prohibited activity status is a tool that is available under the RMA, and could be used if the circumstances were appropriate. It would need to be based on sound environmental reasons, given that it would pre-empt any detailed consideration of the effects of a particular activity. At this stage we have not seen any evidence that widespread use of prohibited activity status for oil and gas activities would be justified or in proportion to the way other activities are treated in regional plans.

So what could be done to better regulate oil and gas activities?

In our view, blanket bans or requiring publicly notified consent applications for all oil and gas activities would be out of step with the way other activities are managed. Onshore oil and gas activities should be regulated based on their actual and potential effects, just as other activities are.

However, it would be prudent for councils to keep a watching brief on the level of regulation of oil and gas activities and seek to apply a consistent and effects-based approach to deciding whether their rules are appropriate. This should be done bearing in mind the level of regulation that is applied to activities with similar effects, and to oil and gas activities in the EEZ.

Should oil and gas activities be consented as a package or sequentially?

The report recommends that regional councils should require consent applications for establishing well sites and drilling wells to be made and considered together on a project basis, rather than allowing applicants to apply for consents on a piecemeal basis.

We agree that it is sensible where practicable to consider applications on a project basis, taking into account all of the effects on the environment. However, from an industry perspective, this may not always be practical. In some cases, it will be inefficient to require an applicant to apply for the full suite of consents it may eventually need to develop a project fully.

The process of progressing from prospecting activities to exploration activities and finally on to production is both long and uncertain. The work programme and types of activities carried out during development of an area are subject to change, and the majority of oil and gas activities will not lead to full-scale commercial production. Consents granted so far in advance of the later stages are likely to require amendment to take into account the evolving nature of operation at the site. Likewise, where a project does not come to fruition, the applicant would have had to seek and obtain (with the associated time and cost) a raft of consents it did not ultimately require.

Is a new national policy statement needed to address unconventional onshore oil and gas activities?

A national policy statement provides central government direction on how councils throughout New Zealand regulate issues of national importance under the RMA. In developing a national policy statement, the Minister for the Environment is required to give the public adequate time and opportunity to submit on the draft statement before it is finalised. Regional policy statements, regional plans, and district plans are all required to give effect to national policy statements.

A national policy statement about onshore oil and gas activities could result in greater consistency in treatment of oil and gas activities, with associated efficiency gains. We envisage industry participants would be grateful for increased consistency in their dealings with councils. Some councils may appreciate having certain contentious aspects of developing their regulatory regime directed by central government, although there still needs to be flexibility to allow for the local environment and preferences.

In order to realise these potential benefits, the national policy statement would need to be practical and clear so that it stood on its own without requiring further guidance to implement it. As the recent *King Salmon*[1] litigation has demonstrated, the step of implementing a national policy statement can itself generate uncertainty and disputes. The scope for argument and litigation can undermine some of the objectives of having a national policy statement, such as increasing efficiency and certainty of regulation of activities on a national scale.

Is it appropriate to impose a levy on industry participants for ongoing monitoring and remediation of wells, including post abandonment?

The report rightly identifies that care needs to be taken to ensure well integrity both now and post-abandonment, although it does not identify any oil and gas related examples of failures in this regard. Our impression is that the industry is supportive of best practice, and regulation has moved to entrench this.

Councils are already empowered to require a bond for remediation and other works as a condition of a resource consent. We note the PCE's comment that bonds appear to have been under-utilised by councils, and it may be that encouraging the use of bonds would be a good place to start. Bonds could be an effective mechanism for incentivising best practice abandonment methods in relation to future wells, but given the advances in industry practices, we suspect any remediation issues are more likely to relate to much older wells, the owners of which may be long gone. If the owner no longer exists, the question that needs further debate is whether the costs of any such issues should be met by current industry participants through a levy or by the government in light of the royalties the government will have received in relation to those past activities.

In our view, bonds and best practice abandonment will serve to minimise the risk of problems actually occurring and ought to be explored as an option more fully before a levy is imposed.

Is there appropriate regulation of landfarming practices?

The comment in the report that landfarming practices (the depositing of solid waste from oil drilling in pastures that may later be converted for stock grazing) need to be resolved "regardless of the actual risk" is difficult to justify other than potentially on the basis that a perception of risk could be sufficient to impact on our export markets. We appreciate the need for perceived risks to be addressed in this regard. Focusing on the evidence about the actual effects of this practice would be a good place to start.

Conclusion

The report provides some useful recommendations, although some of them need to be tempered against evidence and effects-based assessments of oil and gas related activities. Such assessments should guide the preparation of any new national policy statement and the amendment of existing tools such as regional and district plans so that the regulation is in step with regulation of other types of activities. Genuine issues need to be addressed; in our view the more challenging step is determining precisely which issues need a response and what the appropriate response should be.

[1] See *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38.

CONTACT DETAILS

	**JAMES WINCHESTER – PARTNER** **T.** +64 4 924 3503	**M.** +64 21 303 700	**E.** james.winchester@simpsongrierson.com
	**DAVE TRUEMAN – PARTNER** **T.** +64 4 924 3548	**M.** +64 21 403 612	**E.** dave.trueman@simpsongrierson.com
	**DUNCAN LAING – PARTNER** **T.** +64 4 924 3406	**M.** +64 21 434 713	**E.** duncan.laing@simpsongrierson.com
	**BILL LOUTIT – PARTNER** **T.** +64 9 977 5092	**M.** +64 21 839 422	**E.** bill.loutit@simpsongrierson.com
	**PADRAIG MCNAMARA – PARTNER** **T.** +64 9 977 5095	**M.** +64 21 924 350	**E.** padraig.mcnamara@simpsongrierson.com
	**HEATHER ASH – PARTNER** **T.** +64 9 977 5124	**M.** +64 29 215 4197	**E.** heather.ash@simpsongrierson.com
	**MATT CONWAY – SENIOR ASSOCIATE** **T.** +64 4 924 3536	**M.** +64 21 455 422	**E.** matt.conway@simpsongrierson.com
	**AIMEE SANDILANDS – ASSOCIATE** **T.** +64 4 924 3457		**E.** aimee.sandilands@simpsongrierson.com

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::: AUTHORS :::

Catherine LEE
Partner
Intellectual Property &
Technology
catherine.lee@rodyk.com
+65 6885 3687

Sandeep MENON
Associate
Intellectual Property &
Technology
sandeep.menon@rodyk.com
+65 6885 3717

Confidential Information and Copyright

Invenpro (M) Sdn Bhd v JCS Automation Pte Ltd and another [2014] SGHC 38

Singapore High Court dismisses claims for breach of confidential information and copyright over machine that cleans discs used in the manufacture of hard disk drives

Introduction

The Plaintiff, Invenpro, and the Defendants, JCS Automation and JCS Echigo ("JCS"), are both manufacturers and suppliers of cleaning machines known as batch scrubbers. Batch scrubbers are high precision cleaning machines that clean discs (the hard disk substrate) used in the manufacture of hard disk drives. As the slightest contamination can render a disc unusable as a hard disk, this cleaning process is of paramount importance during the hard disk manufacturing process. Moreover, as the hard disk manufacturing industry is one that is niche, two of the main players, Western Digital Corporation ("WDC") and Seagate, were common customers of both Invenpro and JCS.

In June 2009, Invenpro commenced an action in the High Court against JCS alleging that JCS had made unauthorised use of Invenpro's confidential information and copyright documents in its production of batch scrubbers. JCS denied both claims and argued independent creation of the batch scrubber as, like Invenpro, they had gone through a similar consultative process with their common customer, WDC, to whom the batch scrubber was provided.

JCS counterclaimed that Invenpro had made a defamatory statement to another common customer, Seagate, to the effect that JCS had made an unauthorised use of Invenpro's confidential information in manufacturing the batch scrubber for Seagate. The 9-day long trial was presided over by the Honourable Judicial Commissioner George Wei, a well-respected and renowned expert in intellectual property law with more than 30 years of experience in the field. Rodyk acted for JCS in the action.

Findings of the High Court

The Court dismissed the breach of confidence and copyright claims by Invenpro as well as the defamation counterclaim by JCS.

In coming to its decision, the Court affirmed the trite legal principles that for an action in breach of confidence to succeed, the information must possess the necessary quality of confidentiality, the information must have been imparted in circumstances such as to import an obligation of confidentiality and there must have been unauthorised use of the information and detriment.

Firstly, the Court in analyzing the evidence put forward by JCS concluded that the individual features Invenpro claimed confidentiality in were either public knowledge, a matter of common sense, or generally dictated by WDC (or Komag, WDC's predecessor). Although the Court opined that Invenpro could assert a claim that the solutions it had come up with to improve the batch scrubber design (from WDC's original design), in particular the combination of features, possess a quality of confidence, the Court reasoned that it did not have to come to a conclusive answer in this respect as there was neither a duty of confidence owed by JCS nor unauthorised use of Invenpro's confidential information by JCS.

The claim was brought by Invenpro on the basis that JCS was an indirect recipient (i.e. the information was passed by WDC) of the confidential information. To import an obligation of confidentiality in equity, JCS, as the indirect recipient of the information, must have knowledge that a serious claim for breach of confidence has been made by Invenpro against WDC. On the evidence, the Court was not satisfied that, even if JCS was given confidential information belong to Invenpro, JCS knew at the material time that such access constituted unauthorized use of confidential information. JCS therefore did not owe Invenpro an obligation of confidence.

However, the principal basis for the Court's dismissal of Invenpro's claim was that Invenpro had not established an unauthorized use of its confidential information in the first place.

Although it was typical for plaintiffs in cases involving misuse of confidential information to have to rely on circumstantial evidence and "finger prints" to establish copying or unauthorised use, this did not change the standard of proof to be met. The mere fact that there exists a suspicion of access and copying is insufficient to establish a case of breach of confidence on the balance of probabilities. On the facts, there was no direct evidence that JCS had been given access to any document which contained details of the confidential information.

Although an inference of copying may be established by proving access coupled with sufficient objective similarity, the strength of the inference will depend on the nature of the access and the degree of similarity. In this regard, the Court was not satisfied that the overall mix of similarities in details and concepts were sufficient to establish copying given the evidence of the design process that JCS went through. The Court thus ruled that Invenpro had failed to establish copying and instead found the evidence to be suggestive of independent creation by JCS.

On the issue of Invenpro's "thinly pleaded" copyright case, the Court found that JCS neither had any access to any copyright materials owned by Invenpro nor did Invenpro sustain a case for indirect copying. The evidence adduced by Invenpro was insufficient to establish that JCS was provided with access to the copyrighted works. Further, since WDC had requested for specific components to be used in the production of the respective batch scrubbers and many of the components were obtained "off the shelf", the natural result was a degree of semblance between both parties' batch scrubbers. Invenpro's claim for indirect copying by JCS similarly failed as Invenpro had failed to demonstrate a causal connection between its copyright documents and JCS' alleged infringing article. In any case, the

RODYK & DAVIDSON LLP

SINGAPORE

80 Raffles Place
#33-00 UOB Plaza 1
Singapore 048624
Tel +65 6225 2626
Fax +65 6225 1838
Email mail@rodyk.com

SHANGHAI

Unit 23-11 Ocean Towers
No. 550 Yan An East Road
Shanghai 200001, China
Tel +86 (21) 6322 9191
Fax +68 (21) 6322 4550
Email shanghai.mail@rodyk.com

Court reiterated its finding that JCS' batch scrubber was of independent creation and design.

JCS' counterclaim for defamation was dismissed as the Court held that the contents of the letter in question were not defamatory. Although there was publication of the statement in question to Seagate, the Court opined that purpose of the letter was to put Seagate on formal notice that JCS' batch scrubber incorporates Invenpro's confidential information and to reserve Invenpro's rights. Therefore, looking at the letter as a whole, the statement was merely a warning to Seagate informing that an action has been commenced against JCS (with whom Seagate also has a commercial relationship) and that Seagate may be implicated.

Future Implications

While this case has not fundamentally changed the law of unauthorised use of confidential information or copyright, it is a timely reminder that knowledge of a breach of confidence by the indirect recipient of the information is required for equity's intervention. A party cannot expect the long arm of equity to intervene in cases where the party allegedly in breach has no reason to know or even suspect that the information he is in possession of is another party's confidential information. As a pre-emptive measure and notwithstanding the practice of signing non-disclosure agreements, businesses should clearly put its customers to whom they are divulging sensitive information to on notice that the information provided is not to be disclosed to any third party.

Environmental law compliance – the noose is tightening

By Justin Truter, Director

LEGAL BRIEF | JUNE 2014

Recent developments in the enforcement of our country's environmental laws are likely to see company directors place far greater emphasis on their company's environmental management systems and result in improved environmental monitoring and compliance.

Introduction

The last few years have seen the National Prosecution Authority (NPA) placing far greater emphasis on the prosecution of environmental offences, with a number of significant and forceful judgments being handed down by our courts.
In the matter of ***S v Frylink***[1] , an environmental assessment practitioner was held criminally liable for providing incorrect and misleading information in a basic environmental impact assessment report ("BAR") to the DEA.
The facts were briefly as follows: Frylink, an environmental assessment practitioner ("EAP") employed by Mpofu Environmental Solutions CC, was appointed by the Department of Public Works to conduct a BAR for the proposed development of the Pan African Parliament buildings. The EIA Regulations[2] require, *inter alia*, that the EAP must be independent[3] (and must declare such independence under oath) and further provide that the furnishing of any incorrect or misleading information in the environmental impact assessment ("EIA")process is a criminal offence [4]. In the basic assessment report, Frylinck indicated that there was no wetland present within a 500m radius of the site and had informed the relevant officer at the Department of Environmental Affairs that a wetland delineation study was not necessary. However once construction had commenced, concerns were raised by national and local government departments regarding the existence of a wetland on the site. An investigation was initiated and the presence of a wetland in the area was confirmed.

Contravening regulation 81

Frylinck was charged with fraud and a contravention of regulation 81 of the 2006 EIA Regulations under NEMA. He was acquitted on the fraud charge but convicted on the contravention of regulation 81. The Court held that Frylinck's conduct proved wilful disregard of the required standard of conduct by an EAP in relation to the existence of a wetland on the site, and that the EAP was negligent. The information contained in the BAR was incorrect and the EAP had therefore provided incorrect or misleading information to the competent authority.

1 North Gauteng Regional Court Case Number: 14/1740/2010 (Date of judgement: 6 April 2011)

2 The relevant EIA Regulations at the time of the offence were those contained in GNR 386 of 21 April 2006. These Regulations were repealed and replaced with GNR543 on 18 June 2010.

3 Regulation 17 of GNR 543.

4 Regulation 81 in GNR 386 of 21 April 2006.

He was sentenced to two years' imprisonment or a fine of R80 000 and his firm was sentenced to a fine of R80 000, with half of the fines being suspended for five years. Frylinck's conviction highlights the important role that the EAP plays in the EIA process and the need for the EAP to ensure that he/she presents accurate information in the EIA process and to understand the extent of his or her legal duties under NEMA and the regulations promulgated thereunder.

Learnings from the Frylinck judgement

Since Frylinck, the NPA's focus has shifted to the conduct of company directors and the scope for personal criminal liability for environmental degradation caused on their watch.

In 2012, the Ermelo Regional Court was the first court to invoke the criminal provisions of the NEMA, the National Water Act, No 36 of 1998 (NWA) and the environmental provisions of the Mineral and Petroleum Resources Development Act, No 28 of 2002 (MPRDA), against the managing director ("MD") of a mining company and to hold the MD guilty of the contravention of the provisions of these Acts.

The charges resulted from certain mining related activities which impacted negatively on water resources in the area, including the diversion of water resources, mining within a flood line, the failure to have pollution management mechanisms on site, the dumping of waste rock materials into a water resource and mining within a wetland. The offending activities were also conducted in contravention of the Environmental Management Programme associated with the company's mining right.

The mining company was ordered to rehabilitate the affected environment and the MD was handed a five-year sentence without the option of a fine; on condition that the areas which had been damaged by the illegal mining activities were rehabilitated within three months of the date of judgement.

The landmark Blue Platinum case

More recently the landmark case of ***Blue Platinum Venture***[5] has reflected the direction that environmental enforcement in South Africa will take. The matter arose out of Blue Platinum Venture's clay mining activities conducted outside the village of Batlhabine in Limpopo since 2007, which resulted in environmental degradation. Numerous complaints were lodged by the affected community to the Department of Mineral Resources over the years without any decisive action being taken. When the activities continued unabated, the community laid criminal charges against the mining company and its Managing Director, Matome Maponya, in terms of NEMA. Mr Maponya was sentenced to five years' imprisonment for damage caused to the environment. This sentence was suspended for five years, on condition that the affected areas were rehabilitated within three months, with costs estimated at R6.8 million. Maponya was not given the option of a fine. The case is the first in South Africa where an executive of an offending company was held criminally liable and sentenced without the option of a fine under NEMA for environmental offences relating to mining activities undertaken.

The Blue Platinum judgement will result in company executives paying considerably more attention to the conduct of their employees and the risk of damage to the environment caused by their activities. It is also likely to see company executives placing far greater emphasis on having environmental management systems in place and ensuring that these systems are strictly monitored and enforced.

The judgement will also have significant implications for the insurance industry with executives likely to ensure that their directors' and officers' (D&O) liability cover for environmental degradation, which many business owners have chosen to neglect in the past, is updated or increased. The judgement may also result in an increase in shareholder derivative action claims seeking redress for wrongful acts of the company directors and officers.

The Blue Platinum prosecution and sentence has set a significant precedent for future prosecutions of environmental offences and will empower affected communities to lay criminal charges against offending companies and their directors for environmental damage. It has also shown the willingness of the courts to impose more forceful criminal sanctions for environmental offences, including on directors in their personal capacities without the option of a fine.

These cases have also indicated that the courts are prepared to pierce the corporate veil in circumstances where a director knew or reasonably should have known of the environmental degradation or noncompliance associated with the company's activities and failed to take the necessary measures to prevent such noncompliance or degradation.

The role of the Environmental Management Inspectorate

Having the appropriate training and operating systems in place to investigate and prosecute cases involving environmental offences is key to bringing offenders to justice.

The mandate and powers granted to environmental management inspectors (EMIs) under NEMA are far-reaching and forceful. This is an indication of the legislator's intentions to strictly enforce environmental compliance. These powers range from arrest and detention to attachment of goods and the forced closure of a facility that does not comply with environmental laws or is causing significant environmental degradation. However, these tools are only effective as a deterrent if they are consistently and successfully enforced by the NPA.

The DEA has embarked on various training and capacity-building initiatives over the last ten years, aimed at ensuring all environmental enforcement actions are legally defensible and to ensure that EMIs are trained to properly investigate environmental offences. Training and capacity building also focuses on non-EMIs in the investigation and prosecution of environmental offences. This training is extended to magistrates and prosecutors through field training, specialised training and short courses.

The DEA has also collaborated with the NPA and has certain cooperation agreements and standard operating procedures in place to ensure the improvement of investigation and prosecution of environmental offences, and to ensure that there are proper lines of communication with the South African Police Service and the NPA.

Importantly, there is also a need to inform and educate the public - particularly the rural communities, which are most often affected by environmental degradation - of their right to lay complaints against companies that cause environmental harm.

Ideally, South Africa should have specialised green courts that sit on certain days in every region to prosecute environmental offences. The original Green Court, in Hermanus in the Western Cape, had a dedicated environmental prosecutor and a conviction rate of more than 80% before it was disbanded.

5 S v Blue Platinum Ventures (Pty) Ltd and Matome Samuel Maponya, case nr: RN126/13, in the Magistrate Court for the Regional Division of Limpopo Province held at Lenyenye.

The South African approach

South Africa is one of the few countries that guarantees the right to a healthy environment as one of its citizens' basic human rights. Our country's environmental laws also contain some of the strictest criminal and civil sanctions for environmental noncompliance and degradation in the world, including sanctions in respect of personal liability for directors, as discussed above. However, South African courts and their staff have significant capacity constraints, not unlike many other jurisdictions in the world. This, coupled with a lack of experience and training in the prosecution of environmental crimes among prosecutors and magistrates, has in the past created an obstacle to the successful prosecution of environmental crimes.

Although still relatively new by global standards, South Africa's EMIs are some of the best trained environmental officers in the world. The Environmental Management Inspectorate is steadily increasing its capacity to investigate environmental offences more consistently. The Inspectorate has trained over 224 officials, magistrates and prosecutors over the last few years.

Conclusion

The recent trend by affected communities to lay criminal charges for environmental degradation by companies and which has seen our courts imposing far stricter criminal sanctions, including personal liability for company directors, is a game changer on numerous levels. Companies and their directors will ensure that their environmental management systems are improved and are properly monitored and enforced. There is likely to be an increase in D&O insurance cover for environmental degradation and banks and financiers are likely to impose far stricter lending criteria - which place greater emphasis on the risks of environmental degradation and the history of contamination and degradation by a company.

About the author

Justin Truter

Title: Director
Office: Cape Town
Direct line: +27 (0)21 405 5232
Email: jtruter@werksmans.com

Justin Truter is a director of Werksmans Attorneys and is currently head of the firm's Environmental Practice in the Western Cape. He specialises in litigation and dispute resolution with a focus on environmental law. While Justin's experience in this field is wide-ranging, he has particular knowledge of environmental law as it relates to mining, energy and natural resources as well as property.

His expertise extends to marine and land pollution and waste management, air quality management, water rights and uses, heritage resource management and land use planning.

In addition to advising on compliance with environmental and mining legislation, Justin often manages environmental application processes and environmental due diligence assessments and compliance audits on behalf of clients. He also has considerable experience in undertaking administrative appeals and judicial review proceedings.

He is the former chairman of the Western Cape Environmental Compliance and Enforcement Forum and former head of the Provincial Department of Environmental Affairs' "Green Scorpions" directorate. He is also currently a member of the Environmental Law Association (ELA). Justin assisted with the drafting of the amendments to National Environmental Management Act No. 107 of 1998 (NEMA) and the regulations in terms of NEMA and has acted in numerous landmark environmental and mining cases.

He holds a BA LLB from Stellenbosch University.

ABOUT WERKSMANS ATTORNEYS

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Taiwan DVD-ROM company held liable for damages of more than NTD72,000,000

05/23/2014 Hsiu-Ru Chien/Winona Chen

The Intellectual Property Court has once again ruled in favor of Toshiba Corporation, one of the leading technology firms in the world. It held that the defendant, a Taiwan DVD-ROM company, committed willful infringement, and shall pay compensation of more than NTD72,000,000 to Toshiba Corporation.

In June 2011, Toshiba brought a patent infringement lawsuit to the Intellectual Property Court against a Taiwan DVD-ROM company for infringing its DVD-ROM patent (Taiwan Patent Certificate No. 098207). The court of first instance delivered its judgment in September 2012, Judgment No. 2011-Min-Zhuan-Su-60, that the defendant committed willful infringement and should pay triple damages, amounting to about NTD5,890,000 plus interest. Upon appeal by both parties, the second judgment of the Intellectual Property Court on February 27, 2014 upheld its original judgment of "willful infringement by the defendant" with Judgment No. 2012-Min-Zhuan-Shang-50. The court held the defendant liable for additional damages of about NTD66,550,000 plus interest. Thus, the total amount of the damage award granted to Toshiba is over NTD72,000,000.

In the second-instance judgment, the Intellectual Property Court took into account the argument that "The defendant's DVD-ROM product conforms to the DVD-ROM specification commonly used in the industry," and used the DVD-ROM specification as the basis for analysis of infringement. In addition, the court reaffirmed in the course of calculating the damage amount that the "costs" and "necessary expenses" deductible from the sales income of the infringing product as claimed by the defendant shall refer to the direct cost in accounting, excluding indirect costs. Further, "gross profit" shall serve as the basis for calculation of damages, rather than "net profit" or "net profit after tax." This is in line with recent rulings by the Intellectual Property Court on using "gross profit" as the standard for damage calculation.

The above judgment rejected the defendant's claims that the damage amount should be mitigated because its business failed to generate a profit, having instead incurred a loss. Specifically, the Intellectual Property Court stated that the infringer's costs and expenses including factory rental, cost of maintenance, insurance, depreciation, amortization, royalty fees, labor costs, etc., shall not be deducted from its sales revenue when determining the damage amount. Otherwise, it would be equivalent to the patentee bearing such costs or expenses on the infringer's behalf, which is neither fair nor generally accepted by society.

The judgment of the Intellectual Property Court shows that Taiwan does provide patentees with effective intellectual property protection, and it also reminds companies to respect the intellectual property rights of others.

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INTELLECTUAL PROPERTY REPORT

Microsoft Corp. v. DataTern, Inc.: Suppliers' Standing To Bring A Declaratory Judgment Action Based On Customer Suits

Jeff Quilici

On May 5, 2014, the Federal Circuit issued an opinion in *Microsoft Corporation v. DataTern, Inc.*[1] that clarified, at least in part, the circumstances under which a supplier may bring a declaratory judgment action based on patent infringement allegations directed to its customers. Specifically, suits against customers do not, without more, give a supplier standing to bring a declaratory judgment action. However, where the patent owner relies on the supplier's own documentation or instructions to show infringement by the customers, the supplier may have standing.

Background

DataTern concerns the standard for bringing a declaratory judgment action against a patent owner based on that patent owner's allegations against a third party customer. The Supreme Court previously held that the fundamental question of jurisdiction in this context is whether "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."[2] Building on this standard, the Federal Circuit held four years later in *Arris Group, Inc. v. British Telecommunications PLC* that "where a patent holder accuses customers of direct infringement based on the sale or use of a supplier's equipment, the supplier has standing to commence a declaratory judgment action if (a) the supplier is obligated to indemnify its customers from infringement liability, or (b) there is a controversy between the patentee and the supplier as to the supplier's liability for induced or contributory infringement based on the alleged acts of direct infringement by its customers."[3] To show inducement under the second prong of that test, the patentee must show that the supplier took affirmative steps to encourage infringement, knowing that the actions it encouraged would infringe.[4]

Procedural History

DataTern sued more than 100 Microsoft and SAP customers, alleging that their use of Microsoft's ADO.NET and SAP's BusinessObjects software infringed two patents owned by DataTern: U.S. Patent No. 5,937,402 (the "'402 Patent") and U.S. Patent No. 6,101,502 (the "'502 Patent"). DataTern's infringement allegations contained numerous references to the Microsoft and SAP functionality. For example, the claim charts alleging infringement by SAP customers cite to SAP's user guides and other documentation for every element of the asserted claims in both patents.[5] Similarly, the claim charts alleging infringement of the '502 Patent by Microsoft customers cited to Microsoft documentation for every element. However, the claim charts alleging infringement of the ’402 Patent by Microsoft customers relied only on third-party sources for some key claim limitations.[6]

Microsoft contacted DataTern to discuss the suits after several customers demanded indemnification. DataTern’s CEO told Microsoft that DataTern was pursuing the customers alone and was not interested in suing, or even entering into licensing discussions with, either Microsoft or SAP.[7] Nevertheless, Microsoft and SAP sued DataTern, requesting declaratory judgments of invalidity and noninfringement.[8]

DataTern moved to dismiss for lack of subject matter jurisdiction, arguing that neither Microsoft nor SAP had an obligation to defend its customers and neither faced a threat of suit itself. The district court denied the motion based in part on the claim charts and the indemnification demands.[9] After claim construction, DataTern conceded non-infringement based on the construction of several claim terms, and the district court entered summary judgment.[10]

The Federal Circuit’s Decision

In the majority opinion by Judge Moore, the Federal Circuit affirmed in part and reversed in part, holding that the district court had jurisdiction over the challenges to the ’502 Patent, and SAP’s challenge to the ’402 Patent, but not Microsoft’s challenge to the ’402 Patent.[11] The decision established several guideposts for future litigants.

First, the Federal Circuit held that a mere *request* for indemnification from a customer does not give standing to a supplier. To have standing, the supplier must actually be legally obligated to indemnify its customer. “In that instance, [the supplier] would stand in the shoes of the customers and would be representing the interests of their customers.”[12] In this case, Microsoft and SAP conceded that their customers’ indemnification requests were not valid.[13]

Second, the Federal Circuit held that the *existence* of customer suits, without more, does not give standing to a supplier.[14] Specifically, a patent owner’s allegation that a customer has directly infringed its patent using a supplier’s product does not create a controversy between the patent owner and the supplier regarding direct infringement.[15] Neither does it create a controversy regarding induced infringement, because inducement requires an affirmative act of encouragement from the supplier, with knowledge it is encouraging infringement.[16]

Finally, though, the Federal Circuit held that where the customer suits rely on the supplier’s own documentation to demonstrate infringement of all claim limitations, the supplier *does* have standing. “Providing instruction to use a product in an infringing manner is evidence of the required mental state for inducing infringement.”[17] Because DataTern had cited to SAP documentation for *all* limitations in the asserted claims, and to Microsoft documentation for *all* asserted claims in the ’502 Patent, the Federal Circuit affirmed the district court’s jurisdiction to hear those challenges (and proceeded to consider the merits of the summary judgment motions). However, because DataTern had cited “exclusively to third-party—not Microsoft-provided—documentation for several key claim limitations” in the ’402 Patent, nothing suggested that Microsoft had encouraged any allegedly infringing actions.[18] As a result, Microsoft had no standing to challenge the ’402 Patent.

Roadmap to Avoid Declaratory Judgment Jurisdiction

Although he later recused himself from the case, initially Chief Judge Rader dissented, pointing out several implications of the majority’s reasoning.[19] As the Chief Judge observed, the majority’s reasoning in *DataTern* creates a roadmap that allows a patent owner to avoid declaratory judgment jurisdiction. Any patent owner who wishes to pursue a large number of small settlements with a major corporation’s customers — customers that generally cannot afford to defend a major patent lawsuit — can keep the major corporation on the sidelines by ensuring that its infringement contentions as to at least one key claim limitation are supported without reference to the supplier's documentation. Furthermore, it is unclear what makes a limitation "key" in this context.

1 *Microsoft Corp. v. DataTern, Inc.*, Nos. 13-1184, 13-1185 , ___ F.3d ___, 2014 WL 1760882 (Fed. Cir. May 5, 2014) [*hereinafter DataTern*].
2 *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007).
3 639 F.3d 1368, 1375 (Fed. Cir. 2011).
4 *DataTern* at *3 (citing *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2068 (2011)).
5 *DataTern* at *1.
6 *Id.*
7 *Id.* at *1-2.
8 *Microsoft Corp. v. DataTern, Inc.*, No. 1:11-cv-02365-KBF (S.D.N.Y. filed Apr. 7, 2011); *SAP AG v. DataTern, Inc.*, No. 1:11-cv-02648-KBF (S.D.N.Y. filed Apr. 18, 2011).
9 *DataTern* at *1.
10 *Id.* at *2.
11 *Id.* at *1.
12 *Id.* at *3.
13 *Id.*
14 *Id.* ("To the extent that Appellees argue that they have a right to bring the declaratory judgment action solely because their customers have been sued for direct infringement, they are incorrect.").
15 *Id.*
16 *Id.* at *3.
17 *Id.* at *4 (citing *Golden Blount, Inc. v. Robert H. Paterson Co.*, 438 F.3d 1354, 1363-65 (Fed. Cir. 2006).
18 *Id.* at *4.
19 *See Microsoft Corp. v. DataTern, Inc.*, Nos. 13-1184, 13-1185, ___ F.3d ___, 2014 WL 1327923 (Fed. Cir. Apr. 4, 2014) (Rader, C.J., dissenting); *see also Microsoft Corp. v. DataTern, Inc.* Nos. 13-1184, 13-1185, ___ F.3d ___, 2014 WL 1760859 (Fed. Cir. May 5, 2014) (vacating original panel opinion after Chief Judge Rader's recusal).

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DEFINING SUCCESS TOGETHER

What Everyone Needs to Know About the Coordination of Severance Benefits, COBRA, and the ACA

06.09.14

By Richard J. Birmingham

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RELATED PRACTICES

Employee Benefits

Employment, Labor & Benefits

In a common occurrence throughout corporate America, an employee terminates employment and as a result will lose company-provided health care coverage. To obtain health care coverage, the employee has two options: 1) elect health care coverage for up to 18 months under COBRA, or 2) purchase coverage by utilizing the marketplace established pursuant to the Affordable Care Act ("ACA"). In a severance situation, it is not uncommon for the employer to also pay, pre-tax, the COBRA premium for a few months, enabling the employee to have additional time to consider the available health plan options. While this situation is common and seems straightforward, the coordination of health coverage under COBRA and the ACA contains a number of potential traps for both the employer and the employee. An understanding of the basic coordination problems, and the potential solutions as set forth below, is essential for anyone dealing with employee terminations and severance. In addition, there is a limited opportunity for special relief through July 1, 2014.

COBRA election

If an employee leaves the company, the employee is generally entitled to continue health coverage under COBRA, provided the employer employs 20 or more employees. The employee can elect coverage within 60 days after receiving the COBRA Notice and the coverage is retroactive to the date of the loss of coverage. However, COBRA coverage may be more expensive than coverage provided under the ACA marketplace. In addition, the COBRA Notice is often mailed weeks after the employee's termination, so the employee may already have medical needs before the Notice is received.

ACA election

An employee can also obtain coverage by purchasing an ACA marketplace plan. However, the coverage is prospective. In addition, an employee can only purchase marketplace coverage during the annual open enrollment (Nov. 15 to Feb. 15) or during a "special enrollment period," within 60 days of a "qualifying life event," i.e., loss of health coverage, change in family size, move to a new coverage area, change in premium tax credit eligibility, experience government error, or change in citizenship status. If the employee misses the open enrollment or special enrollment opportunity, the employee must wait until the next open enrollment date. If the employee elects coverage under either the ACA or COBRA and voluntarily drops the coverage, the employee must wait until the next open enrollment period.

Coordination problems

A number of common coordination problems provide a trap for the unwary.

Problem 1. Employee terminates employment on May 29 and employer coverage ends on May 31. Employee has significant medical bills during the month of June. The employee can elect ACA marketplace coverage beginning July 1, but coverage is prospective and the June bills would not be covered. Employee can elect COBRA retroactive to June 1, and the medical bills will be covered, but the COBRA coverage may be more expensive than the ACA coverage.

Problem 2. The employee elects COBRA and pays COBRA premiums for June and July, to get retroactive coverage for the June bills. At the end of July, the employee drops COBRA with the intent of enrolling in a less expensive ACA marketplace plan. The voluntary relinquishment of rights under a plan is not a "qualifying life event" under the ACA. The employee will not be able to enroll in an ACA marketplace plan until November, with an effective date of no earlier than Dec. 1. Unless the employee meets an exemption from the individual insurance mandate, the employee will also be subjected to an ACA penalty for not having insurance for five months.

Problem 3. As part of severance, the employer pays the COBRA premiums, pre-tax, for two months, June and July. If the employee is highly compensated, the payment may constitute a discriminatory health plan under Section 105(h) of the Internal Revenue Code ("Code"), subjecting a participant in a self-insured plan to taxation on the benefits received (or may penalize the employer under the ACA if insured). In addition, with respect to both highly and non-highly compensated employees, if the employee drops the coverage, the employee will not be able to enroll in the ACA marketplace plan until the following November, because, as explained above, the voluntary relinquishment of coverage (COBRA) is not a qualifying life event under the ACA. Again, an employee who is not exempt from the individual mandate will also be subjected to an ACA penalty for not having insurance for five months.

Best practices

These issues can be minimized on a severance situation by making a cash payment to the employee of the COBRA premium that the employer was previously paying on the employee's behalf. The cash payment will avoid the issue of a discriminatory plan under the ACA, because after-tax payments of premiums are not subject to Section 105(h) of the Code. The cash payment will also enable the employee to determine whether to retroactively elect COBRA or to prospectively elect ACA coverage. However, if retroactive COBRA is elected, the employee, to have insurance, must continue that coverage until the next ACA open enrollment period, or until the end of the 18-month COBRA period. While this is not a perfect solution, it is still better than the alternative, until Congress enacts legislation to coordinate the ACA and COBRA. Also, employers should update their COBRA Notice to explain this issue to all their employees.

The Center for Medicare and Medicaid Services (CMS) has established a limited special enrollment period beginning May 2, 2014 and ending July 1, 2014, in which an individual can drop COBRA and enroll in the ACA marketplace plan. This limited enrollment right only applies to federal marketplace plans, and not state plans (but the states can establish a similar special enrollment period). After July 1, 2014, the COBRA and ACA coordination problem will continue to exist for all terminations, unless remedied by Congress. Most employers will resolve the coordination problem as follows:

1. **Educate staff concerning the coordination problems.** Human resources staff and employment and corporate personnel involved in severance situations need to be educated on these coordination issues to ensure proper communication in the termination process. To date, these coordination issues have largely gone unnoticed.
2. **Update employee communications and COBRA Notices.** Employers should communicate that ACA coverage is prospective while COBRA coverage is retroactive. Employees with ongoing health problems may find that COBRA is the only way to ensure that there is absolutely no gap in coverage, while healthy employees might want to wait and elect ACA coverage within 60 days of their qualifying life event. While the Department of Labor (DOL) recently issued, on May 2, 2014, a revised model notice to inform employees of the ACA marketplace plans, employers may wish to add additional examples to the model notice to highlight coordination problems for employees.
3. **Pay any health premium subsidy on an after-tax basis.** To avoid discrimination penalties and to avoid coordination problems caused by a premature COBRA election, any employer payment of COBRA premiums on the employee's behalf should be paid to the employee after-tax in a lump sum payment as part of any severance package.

Disclaimer

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Export Controls Alert
10 June 2014

See note below about Hogan Lovells

Departments of State and Commerce issue final rules to ease U.S. export controls on commercial communications satellites

On 13 May 2014, the Departments of Commerce and State issued interim final rules implementing substantial changes to U.S. satellite export controls. These changes, which follow the proposed rules issued on 24 May 2013, are expected to reduce significantly the administrative and licensing burdens associated with the current export control regime. In particular, commercial satellites and related items will be transferred to the Commerce Department's less restrictive export control regulations and exports to many U.S.-allied countries will be eligible for license exceptions. However, current restrictions on exports and re-exports of commercial satellites and related items to arms-embargoed countries, including China, will remain in place. Accordingly, companies need to assess carefully the full effect of these new rules on existing and future operations.

The new rules will transfer most non-military satellites, including commercial communications satellites (COMSAT) and related parts, components, and services from the State Department's International Traffic in Arms Regulations (ITAR) to the less restrictive "dual-use" controls under the Commerce Department's Export Administration Regulations (EAR). These rules follow the enactment on 3 January 2013, of the National Defense Authorization Act for Fiscal Year 2013, which restored the president's authority to transfer COMSATs and other non-military satellites to the EAR. U.S.-origin COMSATs have been controlled as defense articles under the ITAR since 1999. The rules also are part of President Obama's broader Export Control Reform effort, through which the administration is transitioning from the ITAR to the EAR certain items that the president determines no longer warrant the strict controls imposed by the ITAR. Copies of the Federal Register notices are available here (State Department) and here (Commerce Department).

As outlined below, the new rules:

- amend Category XV of the ITAR's United States Munitions List (USML) to cover a more narrowly defined list of satellites (primarily military, intelligence, and certain remote sensing satellites) and related ground systems, components, parts, software, and technical data;
- exclude telemetry data, as defined in USML Category XV, from the definition of technical data under the ITAR and confirm that

Contacts

Jeanne S. Archibald
Partner, Washington, D.C.
jeanne.archibald@hoganlovells.com
+1 202 637 5740

Anthony V. Capobianco
Partner, Washington, D.C.
anthony.capobianco@hoganlovells.com
+1 202 637 2568

Aleksandar Dukic
Partner, Washington, D.C.
aleksandar.dukic@hoganlovells.com
+1 202 637 5466

Ajay Kuntamukkala
Partner, Washington, D.C.
ajay.kuntamukkala@hoganlovells.com
+1 202 637 5552

Robert D. Kyle
Partner, Washington, D.C.
robert.kyle@hoganlovells.com
+1 202 637 5494

Beth Peters

such telemetry data subject to the EAR generally is classified as EAR99;
- clarify that satellites subject to the EAR remain subject to the EAR even if defense articles subject to the ITAR are integrated into such satellites, unless the satellites take on the characteristics described in Category XV;
- revise Categories IV and XV of the USML to more precisely describe the services that still warrant control under the ITAR, including furnishing assistance related to satellite launches, satellite/launch vehicle integration, and satellite launch failure analysis;
- clarify which special export controls apply to satellite launches conducted outside the United States, including launches of EAR-controlled satellites; and
- amend the EAR to address how items previously controlled under USML Category XV will be controlled on the EAR's Commerce Control List (CCL).

These rules will be effective 10 November 2014, but portions of the rules related to radiation-hardened microelectronic circuits will be effective 27 June 2014. Public comments regarding certain revisions to USML Category XV(a)(7) and (e)(11) and 22 C.F.R. § 124.15 may be submitted by 27 June 2014.

Both U.S. and non-U.S. companies currently engaged in ITAR-controlled satellite activities will need to assess the benefits and limitations of these new rules on their businesses. Moreover, companies should be mindful that under "transition rules" published separately on 16 April 2013, U.S. exporters will have up to two years after the effective date of these rules to amend or replace existing ITAR authorizations with EAR licenses for items moving from the USML to the CCL.

Department of State interim final rule

Changes to USML Category XV

Currently, virtually all U.S.-origin satellites, including COMSATs, are controlled as defense articles under the ITAR. As a result, COMSATs and other non-military spacecraft have been among the only dual-use items subject to the same strict export controls as major U.S. weapons systems.

The State Department's 13 May interim final rule will significantly narrow the scope of USML Category XV to cover only:

- certain spacecraft, including satellites, with specified missile tracking capabilities, remote sensing satellites, satellites with classified components, and certain other satellites with specified technical characteristics;
- ground control systems and training simulators specially designed for telemetry, tracking, and control of satellites controlled under Category XV;
- Global Positioning System receiving equipment that is military-related or meets certain other technical parameters (such equipment eventually will be moved to a revised USML Category XII);
- space-related parts and components meeting certain technical parameters;
- technical data and defense services directly related to defense articles controlled under Category XV; and

Partner, Washington, D.C.
beth.peters@hoganlovells.com
+1 202 637 5837

Stephen F. Propst
Partner, Washington, D.C.
stephen.propst@hoganlovells.com
+1 202 637 5894

T. Clark Weymouth
Partner, Washington, D.C
t.weymouth@hoganlovells.com
+1 202 637 8633

H.P. Goldfield
Senior International Advisor,
Washington, D.C.
hpgoldfield@hoganlovells.com
+1 202 637 5808

Brian Curran
Associate, Washington, D.C.
brian.curran@hoganlovells.com
+1 202 637 4886

- classified technical data directly related to certain satellite-related items being transferred to the CCL and defense services using such classified technical data.

In a notable exception to the standard ITAR "see through" rule, Category XV also will be revised to clarify that satellites subject to the EAR generally remain subject to the EAR even if defense articles subject to the ITAR are integrated into such satellites, unless the satellites take on the characteristics described in USML Category XV(a). The rule defines primary, secondary, and hosted payloads, and further clarifies that an EAR-controlled satellite generally remains subject to the EAR even if its hosted payload has the characteristics described in USML Category XV(a), but an EAR-controlled satellite becomes subject to the ITAR if its primary or secondary payload has the characteristics described in USML Category XV(a).
Finally, Category XV of the USML also will be revised to allow the State Department to license the export of commodities, software, and technical data subject to the EAR, provided such items are used in or with Category XV defense articles. This authority, however, will be available only when the license would cover both ITAR and EAR items.

Finally, Category XV also will be revised to allow the State Department to license the export of commodities, software, and technical data subject to the EAR, provided such items are used in or with Category XV defense articles. This authority, however, will be available only when the license would cover both ITAR and EAR items.

Satellite launch-related changes to USML Categories XV and IV

The State Department's rule clarifies that these defenses services directly related to satellite launch-related activities remain subject to the ITAR:

- furnishing of assistance (including training) in the integration of a satellite to a launch vehicle, including both planning and on-site support, regardless of (i) the jurisdiction (EAR or ITAR), ownership, or origin of the satellite or (ii) whether technical data is used; and
- furnishing of assistance (including training) in the launch failure analysis of a launch vehicle, regardless of (i) the jurisdiction (EAR or ITAR), ownership, or origin of the launch vehicle or (ii) whether technical data is used.

These defense services clarifications originally were proposed to be included in the revised definition of defense services that was published with the State Department's May 2013 proposed rule for USML Category XV, but they now are incorporated into Categories IV and XV.

The State Department's rule also clarifies that special export controls will continue to apply to satellite launches conducted outside the United States, even launches of EAR-controlled satellites. Licenses are required for launch failure (crash) investigations of EAR and ITAR-controlled satellites launched from a foreign country, and the Commerce Department's 13 May interim final rule imposes certain additional licensing requirements for launches of EAR-controlled satellites from a foreign country.

Exclusion of telemetry data from the definition of technical data

The State Department's 13 May interim final rule will exclude telemetry data, as defined in Note 3 to paragraph (f) of Category XV, from the definition of technical data under the ITAR. Such telemetry data is subject to the EAR and is designated as EAR99. The rule also clarifies that processing such telemetry data does not, by itself, transform such data into ITAR or EAR-controlled satellite technology. Although this exclusion of telemetry data from the definition of technical data codifies existing U.S. government policy and interpretation, the exclusion was not universally understood, particularly among foreign aerospace companies.

Department of Commerce interim final rule

The parallel Commerce Department interim final rule will create new "500 series" Export Control Classification Numbers (ECCN) for spacecraft and related items being transferred to the CCL from USML Category XV. The new ECCNs are:

- 9A515 – spacecraft, including satellites, not enumerated in Category XV of the USML and related hardware;

- 9B515 – test, inspection, and production equipment “specially designed” for the production or development of items enumerated in ECCN 9A515 or USML Category XV;
- 9D515 – software “specially designed” for the development, production, operation, installation, maintenance, repair, overhaul, or refurbishing of items enumerated in ECCNs 9A515 and 9B515; and
- 9E515 – technology “required” for the development, production, operation, installation, maintenance, repair, overhaul, or refurbishing of items enumerated in ECCNs 9A515, 9B515, or 9D515.

The Commerce Department rule also will add to ECCN 9A515 a .y paragraph to which low-level anti-terrorism controls and a prohibition on export to China will apply. This .y paragraph will cover “specially designed” spacecraft parts and components described in 9A515.x that have been identified in an interagency commodity classification review as warranting control under 9A515.y. Under the interim final rule, ECCN 9A515.y is not populated with specific items, but the Commerce Department is accepting requests to populate 9A515.y with specific items via the commodity classification review process.

The Commerce Department rule also will subject the “500 series” items identified above to the following provisions under the EAR:

- Controls – “500 series” items will be subject to national security, regional stability, antiterrorism, and (in some cases) missile technology controls. Export license applications for “500 series” items destined to China, North Korea, or any country that is a designated state sponsor of terrorism will be subject to a policy of denial.
- *De minimis* treatment – Foreign-made items that incorporate any amount of U.S.-origin “500 series” items will be subject to the EAR when destined to a country that is subject to a U.S. arms embargo. A foreign-made item that incorporates U.S.-origin “500 series” items destined to a country that is not subject to a U.S. arms embargo will be eligible for *de minimis* treatment — these items will not be subject to the EAR if the value of all of their U.S.-origin controlled content does not exceed 25 percent of the foreign-made item’s value.
- License exceptions – Many “500 series” items will be eligible for several license exceptions, including LVS (limited value shipments), GOV (governments and international organizations), RPL (servicing and replacement parts), AVS (now renamed aircraft, vessels, and spacecraft), and STA (strategic trade authorization).
    - Under STA, exporters, particularly manufacturers of COMSAT parts and components, will be able to export their products without a license to NATO countries and certain other allies, provided that all of the conditions for the use of this license exception have been met.
    - Under AVS, U.S. universities may export EAR-controlled spacecraft to countries not subject to arms embargoes, when the spacecraft are fabricated only for the purpose of fundamental research.

Implications for the satellite industry

Ultimately, the interim final State Department and Commerce Department rules are expected to reduce significantly the administrative and licensing burdens associated with the ITAR regime. In many cases, companies that now routinely must obtain ITAR licenses and/or agreements to provide COMSATs and related items, services, and technical data to foreign persons will no longer be required to do so. Although these items still will be subject to licensing requirements under the EAR, a number of EAR license exceptions will be available for certain exports and re-exports to NATO and other U.S.-allied countries.

Nonetheless, U.S. and non-U.S. companies engaged in satellite activities subject to the ITAR will need to prepare for the transition of these items from the ITAR to the EAR.

- Companies will need to assess the implications of some or all of their activities becoming subject to the EAR and determine whether such activities are eligible for EAR license exceptions with respect to hardware, software, source code, and technical data.
- Companies will need to determine the extent to which their activities remain subject to the ITAR. Even after these rules go into effect, companies still may need to grapple with the ITAR services related to satellite launches and launch failure analysis that will remain subject to the ITAR.
- Accordingly, many satellite operators and others in the industry will need to maintain their ITAR registrations and will continue to need ITAR authorizations to cover certain aspects of their operations. In addition, such companies will have ongoing ITAR compliance obligations and will need to maintain

robust technology control procedures to protect against unauthorized releases of ITAR and EAR-controlled data.

- Companies should keep in mind that under the new rules the State Department will be authorized to license the export of items subject to the EAR along with items that remain subject to the ITAR, provided such items are used in or with Category XV defense articles.
- Companies will need to review their current list of existing ITAR authorizations and assess the extent to which these authorizations must be replaced with EAR authorizations. This assessment is particularly important with respect to technology transfers.

Given the scope of the changes introduced by these new rules, companies involved in satellite-related activities would be well advised to begin or accelerate planning for the transition to the EAR.

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McKenna Long & Aldridge LLP

Insurance Advisory

JUNE 10, 2014

Eleventh Circuit Boldly Interprets Georgia Precedent on Reservations of Rights Letter

Contacts

For additional information, please contact:

Anthony W. Morris
404.527.8420

When the Eleventh Circuit affirmed a motion for summary judgment in favor of Lexington Insurance Company on May 16, 2014 in *Wellons, Inc. v. Lexington Ins. Co.*, Case No. 13-11512, it set forth a somewhat radial and relaxed interpretation of Georgia law on the required scope of reservation of rights letters that surprised many attorneys practicing in the insurance arena.

Lexington was in a coverage battle with its insured, Wellons, Inc., following an $8.4 million jury verdict in a suit against Wellons claiming that an energy system developed and installed by Wellons did not meet emissions requirements or produce enough heat. Lexington denied coverage, but had made only a prior oral reservation of rights which, in turn, referred to two prior reservation of rights letters in related, but separate, matters that stated that coverage might not be available under a CGL policy because those suits did not involve "property damage" caused by an "occurrence" – the same basis on which Lexington ultimately denied coverage here. Wellons argued that Lexington's oral reservation of rights and reference to prior letters in related matters was inadequate, barring Lexington from asserting coverage defenses, and in fact, Georgia law seemed to support that argument.

But the Eleventh Circuit disagreed with Wellons' asserted specificity requirements for reservations of rights letters under Georgia law, and looked to the Georgia Supreme Court's answers to certified questions from the district court in *World Harvest Church, Inc. v. GuideOne Mutual Ins. Co.*, 695 S.E.2d 6 (Ga. 2010) to do so. In that case, GuideOne had denied coverage to World Harvest after previously defending it without an effective reservation of rights. The Supreme Court held that (a) GuideOne's oral reservation of rights was not effective; (b) GuideOne's ineffective reservation was not overcome by a prior reservation made by the insurer's sister company in a similar suit against World Harvest in another jurisdiction; and (c) GuideOne was estopped from asserting coverage defenses.

But with *Wellons*, the Eleventh Circuit focused on the Georgia Supreme Court's use of "must" and " should" in the *World Harvest* opinion, noting that the Georgia Supreme Court ruled an insurer "must" give its policyholder a fair heads up that the insurer would provide a defense while reserving its right to contest coverage, but an insurer only "should" inform a policyholder about the specific bases for the reservation. The Eleventh Circuit interpreted the "should" language to mean that it was merely a recommendation. Under the Eleventh Circuit's rationale, an insurer does not have to list each and every basis for possibly contesting coverage in order to assert them.

Of course, the safest course is to follow the old standard of listing bases for possible lack of coverage in a reservation of rights letter. But it appears there is no requirement to do so. In practical effect, the *GuideOne* opinion has equiped insurers with a new argument to assert when it fails to list grounds for denial of coverage in a reservation of rights letter.

HOET PELAEZ CASTILLO & DUQUE

FLASH LEGAL REPORT

DECREE FOR EXPEDITING AND SIMPLIFYING IMPORTATION PROCEEDINGS OF PRIORITY GOODS

The Presidency issued Decree N° 928 for expediting and simplifying legally required administrative and operational proceedings for the importation of finished products, supplies and raw materials therein specified so as to guarantee national sourcing and timely supply of essential goods for the life, health and proper nutrition of the Venezuelan people, hereinafter the "Decree" (published in Official Gazette N° 40.397 and dated April 23rd 2014).

PURPOSE

The purpose of the Decree is to expedite the administrative and operational proceedings required to import finished products, supplies and raw materials specified in the Decree, and required to guarantee national sourcing and timely supply of essential goods for the life, health and proper nutrition of the Venezuelan people.

According to this Decree, proceedings to be simplified and expedited shall be subject of review and modification to reduce execution time thereof and increase effectiveness regarding availability of goods specified in the Decree.

PRIORITY GOODS

The Decree provides a list of priority goods, which include goods pertaining to the following sectors:

a) Food.
b) Supplies for priority food items.
c) Land cargo, agricultural or public service transportation.
d) House-cleaning and personal grooming products.
e) Drugs.
f) Surgical and medical supplies.
g) Disposable linen.
h) Electrosurgical devices for radio frequency, electric scalpel.
i) Knee prostheses and intraocular prostheses.
j) Contraception.
k) In vitro diagnosis equipment: all reagents for laboratories, blood banks and radiology, calibrators, analyzers, sample collectors, equipment and material used in clinical laboratories, reference materials and instruments or devices in connection with clinical diagnosis.
l) Products to disinfect surgical areas, enzymatic detergents for instrument cleaning.
m) Dental supplies.
n) Raw materials and supplies.
o) Supplies in connection with the health supplies chain.

Simplified and expedited proceedings established in the Decree shall also apply for products, byproducts, raw materials and supplies required for production processes or threads in the sectors specified above.

IMPORT LICENSES, NON-DOMESTIC PRODUCTION CERTIFICATES, INSUFFICIENT PRODUCTION CERTIFICATES AND AUTHORIZATIONS FOR THE ACQUISITION OF FOREIGN CURRENCY

In order to obtain Import Licenses, Non-Domestic Production Certificates, Insufficient Production Certificates or Authorizations for the Acquisition of Foreign Currency, presentation of solvency certificates will not be required when they involve the sectors specified in the Decree. Nevertheless, failure to present these solvency certificates does not mean that importers will not comply with their obligation to make the corresponding contributions for obtaining them. In these cases, solvency certificates may be required at a later time. If solvency certificates are required at a later time and they are not furnished by the importers, the relevant Ministry may require presentation thereof as a requirement for the issue of new certificates, licenses or authorizations.

Import Licenses, Non-Domestic Production Certificates and Insufficient Production Certificates awarded for the sectors specified in this Decree as of October 1st 2013 and that expired after publication of Decree 430 in the Official Gazette N° 40.268 dated October 9th 2013, which addressed the simplification of administrative proceedings required by the Ministries therein specified for the importation of food, raw materials, essential products and December holidays-related products to protect the food production chain, food security and the timely supply of essential items or products that expire before December 31st 2014, will remain valid until December 31st 2014. In this regard, documents required after the Decree has come into force may not expire prior to December 31st 2014. In addition, Non-Domestic Production Certificates and Insufficient Production Certificates issued by the Ministry of the People's Power for Industries and used in multiple-shipment imports may continue to be used, even if they have expired, until the full importation of the authorized amounts.

LABOR SOLVENCY CERTIFICATE

In order to request the labor solvency certificate, importers of goods specified in the Decree may file the documents specified below, which may be issued up to 6 months in advance or the last contribution made during such period, before the corresponding authorities:

a) Employer or Company Identification (Form 14-01) issued by the Venezuelan Institute of Social Security (IVSS) or Non-Affiliation Certificate of the requesting party and branches.

b) Registration before the National Contribution Registry (RNA) kept by the National Institute of Education Cooperation (INCE), if applicable.

c) Certificate of Affiliation to the Mandatory Savings Fund for Housing issued by the bank, or Certificate of Company Non-Affiliation to the Mandatory Savings Fund for Housing issued by the National Housing Council (CONAVI).

HEALTH PERMITS

The Ministry of the People's Power for Health and the Ministry of the People's Power for Agriculture and Lands will adopt the measures that may be necessary and issue the corresponding resolutions so as to simplify and expedite proceedings in connection with health permits and import permits for fishing and aquaculture.

REGISTRATION IN THE NATIONAL CONTRACTORS REGISTRY

The Executive Vice-President will adopt the measures that may be necessary to expedite and simplify proceedings related to registration of importers of goods specified in the Decree before the National Contractors Registry (RNC) of the National Contractors Service.

LIFE

The Decree came into force on April 23rd 2014 and will be valid until December 31st 2014.

Flash Legal Report

Decree for Expediting and Simplifying Importation Proceedings of Priority Goods

April 2014

Hoet Pelaez Castillo & Duque
Abogados

Offices
Av. Venezuela, Edificio Atrium, piso 3,
Urb. El Rosal, Caracas – Venezuela

Tel.: +58 212 201.8611
Fax: +58 212 263.7744
E-mail: infolaw@hpcd.com
Website: www.hpcd.com

International Mailing Address:
CCS 13031
P.O. Box 025323
Miami, Florida 33102-5323, U.S.A.

Venezuela:
P.O. Box 62.414, Caracas 1060-A

Contact:

Jorge Acedo
E-mail: jacedo@hpcd.com
Tel.: +58 212 201 8505

Luis Lopez
E-mail: llopez@hpcd.com
Tel.: +58 212 201 8515

Gonzalo Capriles
E-mail: gcapriles@hpcd.com
Tel.: +58 212 201 8511