PACIFIC RIM ADVISORY COUNCIL

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November 2014 e-Bulletin

MEMBER NEWS

► CAREY Launches Water Reform Website
► CLAYTON UTZ Ramps Up National Real Estate Team
► DAVIS WRIGHT TREMAINE Names Firm Managing Partner
► HOET Adds Accounting and Tax Expertise
► HOGAN LOVELLS Adds FDA Senior Counsel
► McKENNA LONG Welcomes 8 New Associates
► NAUTADUTILH Appoints Belgium Managing Partner
► TILLEKE Adds Senior IP Enforcement Partner in Vietnam
► TOZZINI Adds Real Estate Partner to Team

COUNTRY ALERTS

► AUSTRALIA New South Wales Opens the Door to more Coal Seam Gas Projects But More Details to Come CLAYTON UTZ
► BRAZIL Enacts Convention of Contracts for Sale of International Goods TOZZINI FREIRE
► CHILE Financial Stability Council and Amendments to General Banking Law and Insurance Law CAREY
► CHINA Widens Entry to Medical Device Market DAVIS WRIGHT TREMAINE
► COLOMBIA Implementation of Pacific Alliance TP-7 Visa BRIGARD & URRUTIA
► HONG KONG Court Concludes Friendly Discussions Clause is Enforceable HOGAN LOVELLS
► HUNGARY Further Provisions of Foreign Exchange Loan Agreements GIDE
► INDONESIA Amendment to Release of Convertible Production Forest Areas ABNR
► MALAYSIA Proposed Framework for Equity Crowdfunding SKRINE
► NETHERLANDS Supreme Court Puts An End to Loan Agreements Uncertainty NAUTADUTILH
► NEW ZEALAND Significant Appeal Decision on Redundancy SIMPSON GRIERSON
► PANAMA New Electronic Public Registry System in Place ARIFA
► SOUTH AFRICA South African Wine at Greater Risk of Fraud WERKSMANS ATTORNEYS
► TAIWAN TIPO Considers Relaxing Grace Period Regulations LEE & LI
► UNITED STATES
► Energy Update— Impact of off-lease drilling in light of the San Antonio Court of Appeals recent decision in Lightning Oil Co. v. Anadarko BAKER BOTTS
► California's "Online Eraser" Law for Minors to Take Effect Jan. 1, 2015 DAVIS WRIGHT TREMAINE
► WTO Rules Against United States on Revised Country of Origin Labeling HOGAN LOVELLS
► San Francisco Compromise Leaves Basic Chain Store Regulations in Place, Tightens Some Controls McKENNA LONG & ALDRIDGE

CONFERENCES & EVENTS

MEMBER DEALS MAKING NEWS

► ARIAS & MUNOZ El Salvador Assists Aeroman Expand Repair Services
► ARIAS FABREGA & FABREGA Advises Banco General in precedent setting real estate transaction
► BAKER BOTTS Advises Halliburton in one of the largest energy deals of 2014
► CAREY Advises EWOS in USD$183 million Acquisition Chilean Fish Farm
► CLAYTON UTZ Acts in Tasmania's Huon Aquaculture's $420 million IPO and ASX listing
► GIDE Advises Eiffage on Europe's largest photovoltaic power project
► HOGAN LOVELLS Advises Olson on its Acquisition by ICF International
► NAUTADUTILH Advises ForFarmers in new credit facility
► RODYK Acts for Fragrance Group Ltd in Issue of notes and perpetual securities
► TOZZINI FREIRE Acts for Chemtura in USD$1billion sale of agrochemical business to Platform Specialty Products

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CAREY LAUNCHES WATER REFORM WEBSITE

SANTIAGO, 4 November 2014 The Chilean Government sent indications to Congress in a draft bill that amends the Water Code, presented in March 0f 2011.

The government seeks to amend the water rights concept, to limit its use, to provide a temporary character for private companies to establish caducity conditions, to facilitate basins intervention by the state and to reform the fee payment system for non-use.

With the aim of keeping our clients and others interested in the topic informed, we have launched a website about the reform, which will be constantly updated. Click here to view the website: http://reformacodigodeaguas.carey.cl/en/

For additional information visit us at www.carey.cl

CLAYTON UTZ RAMPS UP NATIONAL REAL ESTATE TEAM IN PERTH AND CANBERRA

28 October 2014: Clayton Utz has attracted two of the market's leading real estate lawyers to the firm as partners in the national Real Estate team.

Simon Taskunas will join the practice in Perth, where he worked before relocating to Singapore 8 years ago. In Singapore, Simon led the Real Estate team at Herbert Smith Freehills. He specialises in multidisciplinary real estate sector work for an Asia Pacific client base that includes institutional fund managers and sovereign, listed, and unlisted investors. Simon is experienced in structuring and investments, M&A, joint ventures, leasing, finance and property developments across all property classes including commercial office, retail, industrial and logistics, hospitality, and high-end residential in Australia and across Asia. Simon also has significant experience working on the project delivery side of major infrastructure and resources projects throughout Asia and previously in Perth.

Danielle Mildren will join the Canberra Real Estate team from Minter Ellison, where she was a senior member of the firm's property team. Danielle has many years' experience acting for a range of private and government clients in all aspects of property and planning law. Her experience spans leasing, sales and purchases, joint venture agreements, development agreements, retirement living, agreements for lease and general property and planning advice.

The head of the Clayton Utz national Real Estate team, Nikki Robinson, said Simon and Danielle would make valuable additions to the practice. "Simon's broad-ranging experience, particularly in major projects work and inbound investments for Asia-based clients, perfectly complements the experience of our national team. Together with Mary Pringle, Simon's addition to our Perth team means we can offer our clients an even greater depth of legal experience across the full range of real estate transactions. In Canberra, Danielle joins a market-leading team led by Alfonso del Rio and will add significantly to our offering to clients in that market."

Simon said that a number of factors attracted him to the firm: "Firstly, Clayton Utz is Australia's leading independent law firm, it's Australian owned, and it's focused on domestic and foreign clients doing business in Australia.

"The firm's values and their new generation leadership team impressed me. I liked that they are committed to growing real estate as a key practice area in Perth and across Australia.

"My family and I are excited to be returning to Perth. I look forward to joining Clayton Utz and working with their partners and staff to offer clients a market leading service."

Simon will join the firm in January 2015. Danielle will start in November 2014.

For additional information visit www.claytonutz.com

DAVIS WRIGHT TREMAINE NAMES NEW FIRM MANAGING PARTNER

SEATTLE, 30 October 2014: Having guided Davis Wright Tremaine (DWT) for the past eight years, Dave Baca will be stepping down as the firm's Managing Partner. Jeff Gray, former Partner-in-Charge of DWT's San Francisco office, will assume the role on January 1, 2015.

During his tenure, Baca successfully led the firm through the 2008 financial crisis and its aftermath. The firm has steadily increased profitability and has successfully built or transformed a number of key practices through targeted recruiting and internal development. "One lesson we learned through the last downturn is that uncertainty in the marketplace creates opportunities to strengthen and build the platform," said Gray. "We're stronger today because we had the vision and resolve to get better."

"Our success has been driven by focusing on what we do best—working efficiently and collaboratively across a portfolio of strong industry practices," said Baca. "Two years ago, we also established the DWT De Novo innovation team to help identify ways to improve service and lower costs. Today, we partner better with our clients and do more to tailor our services to meet their particular needs."

"Across the firm, there is a commitment to our core principles of excellence, collaboration, and engagement," said Gray. "When your most successful partners are out in front of building the business through their work with clients, commitment to associate development, and support for diversity and inclusion initiatives, it sets a great example and is a very 'sticky glue' that binds us together."

Baca will remain with the firm but will not return to full-time practice. "We have plenty of strong corporate lawyers," he said. "I am going to be a resource to Jeff, mentor some of our up-and-coming stars, and be more active in the nonprofits I have been involved with for years. And I have a lot more fly-fishing to do."

"Dave has set a very high bar," said Gray. "We have no debt and a history of steady, stable growth through some turbulent times. We have a really sharp, inspiring group of associates and young partners ready to grow into leadership roles in the profession, with our clients, and in the firm. We are ambitious and I am very enthusiastic about our future."

Gray, 49, practices in the firm's energy and environmental group, focusing on energy regulatory matters. He has been included in the Chambers USA guide to "America's Leading Lawyers for Business" each year since 2008, and has been listed as one of the "Best Lawyers in America" in Energy Law by Best Lawyers for the past three years. He is married to Salle Yoo, General Counsel at Uber Technologies. They serve together on the Council of The Asian Art Museum of San Francisco.

For more information, visit www.dwt.com

HOET PELAEZ CASTILLO & DUQUE BOLSTERS PRACTICE WITH ADDITION OF ACCOUNTING AND TAX SPECIALIST

CARACAS, 05 November 2014: Hoet Pelaez Castillo & Duque is pleased to announce the recent addition of the accounting and tax specialist Damerys Silva to its work team.

For additional information visit www.hpcd.com

HOGAN LOVELLS ADDS FDA SENIOR COUNSEL TO GOVERNMENT REGULATORY PRACTICE

WASHINGTON, D.C. 03 November 2014: Hogan Lovells is pleased to announce that Heidi Gertner has joined the firm as a partner in the firm's Government Regulatory practice. She will be part of the Pharmaceutical and Biotechnology practice group.

Gertner comes to Hogan Lovells from the Office of the Chief Counsel (OCC) of the U.S. Food and Drug Administration (FDA), where she was most recently a Senior Counsel to the Center for Drug Evaluation and Research (CDER), and leader of the OTC Drugs Team and FDAAA Safety Team. During her 13-year tenure at FDA, Gertner focused on legal and policy issues related to drug advertising and promotion (she was the most senior lawyer advising the Office of Prescription Drug Promotion); drug safety issues, including Risk Mitigation and Evaluation Strategies (REMS), safety labeling changes, and post-marketing requirements; and combination products and product jurisdiction, among other areas.

"Heidi's experience with issues that our clients confront every day is exactly what we need to continue expanding our thriving practice," said Meredith Manning, co-director of Hogan Lovells' Pharmaceutical and Biotechnology practice group.

"The knowledge she has from 13 years at FDA – not just about the law, but about FDA policies, priorities, and practices – will allow Heidi to join us in providing creative, practical advice to help clients successfully conduct their business, which is what we do," continued Philip Katz, practice group co-director.

In addition to practicing law, Gertner has completed post-doctoral fellowships in bioethics both at The Cleveland Clinic Foundation and the National Institutes of Health, and was a visiting assistant professor of bioethics at the law and medical schools of Case Western Reserve University. She is currently an adjunct associate professor at American University's Washington College of Law, a position she has held for 14 years and will continue while at Hogan Lovells. She is a widely published author of articles in law reviews, medical journals, and ethics journals, as well as book chapters.

"I am eager to become part of Hogan Lovells," said Gertner. "I look forward to helping the firm continue building and growing its leading drug regulatory practice."

Gertner received her J.D. from Washington University School of Law and her B.A. from Binghamton University (State University of New York).

For more information, see www.hoganlovells.com

MCKENNA LONG & ALDRIDGE WELCOMES 8 NEW ASSOCIATES

Firm Expands Six Practices in Five Offices

ATLANTA, 08 November 2014: Eight new associates have joined McKenna Long & Aldridge LLP. The newest associates expand McKenna's Corporate, Government Contracts, Intellectual Property, Litigation and Real Estate practices.

The new associates in each of the McKenna locations include:

Atlanta:
Greg Fosheim is a member of McKenna's Litigation practice. He received his J.D. from Georgia State University College of Law, a MPH in Epidemiology from Emory University and a B.A. in biology from Luther College.

Josiah Heidt is a member of the firm's Litigation practice. He received his J.D. from Cornell Law School and a B.A. in history and philosophy from Emory University.

Brian Mink is a member of the firm's Real Estate practice. He received his J.D. from University of Virginia School of Law, and a B.A. in political science from the University of Georgia.

Denver:
Jeremiah McIntyre is a member of McKenna's Government Contracts practice. He received his J.D. from the University of Georgia and a B.A. in classical languages from Carleton College.

Los Angeles:
Andy Jinnah is a member of McKenna's Litigation practice. He received his J.D. from Loyola Law School and a B.A. in business-economics from UCLA.

San Diego:
Crystal Culhane is a member of McKenna's Intellectual Property practice. She received her J.D. from California Western School of Law, and a Ph.D.in Chemistry from The Johns Hopkins University.

Mero Marme' is a member of the firm's Real Estate & finance practice. He received his J.D. from the University of San Diego School of Law, and a BA in business administration from the University of San Diego.

And in Washington, Elysse Stolpe is a member of McKenna's Litigation practice. She received her J.D. from the University of Virginia School of Law and a B.A. in history and international studies from Hollins University.

For additional information visit www.mckennalong.com

NAUTADUTILH APPOINTS NEW BELGIUM MANAGING PARTNER

BRUSSELS, 14 November 2014: Philippe Péters has been appointed the new Managing Partner of NautaDutilh Belgium for a three-year term. He has been a partner with the firm since the establishment of its Brussels office, which he co-founded, in 1994. Philippe is an intellectual property specialist and has headed the firm's Intellectual Property & Information Technology department for many years.

Philippe Péters succeeds Philippe François, who was appointed managing partner in 2006. After eight years, Philippe will return full-time to his position as head of the Employment & Pensions practice group. Together with his team, he advises clients in all areas of employment law, with a particular focus on restructuring, transfers of undertakings, outsourcing and employee consultation requirements.

Philippe Péters: "It is with great joy and enthusiasm that I take up the reins, in the year in which we mark our 20th anniversary. I've been fortunate enough to have witnessed the growth of NautaDutilh Belgium for the past 20 years. In accordance with our core values, which we have upheld since our establishment, we will listen to the actual needs of our clients more than ever and provide them with to-the-point and pragmatic advice and solutions. We will be attentive to the new challenges posed by a rapidly evolving society, in keeping with our motto of "challenge the obvious".

For additional information visit www.nautadutilh.com

TILLEKE ADDS SENIOR IP ENFORCEMENT LAWYER IN VIETNAM

HO CHI MINH CITY, November 2014: Tilleke & Gibbins is pleased to announce the addition of associate Trung Nguyen to head the firm's expanded IP enforcement team in Ho Chi Minh City.

A seasoned IP professional with more than 15 years of experience in Vietnam, Trung was previously the head of the patent team and the dispute resolution team at Rouse Legal in Vietnam. Prior to joining Rouse, Trung had been head of investigation and enforcement at Investip. Trung is a qualified lawyer and registered IP agent, and also holds a degree in mechanical engineering.

"Our IP enforcement team has been doing excellent, groundbreaking work from our Hanoi office," said Thomas J. Treutler, Partner and Managing Director of the firm's Vietnam offices. "By adding Trung and expanding our in-house IPR investigation practice in Ho Chi Minh City, we will be able to take even more aggressive action on behalf of our clients against infringers and counterfeiters in Vietnam's largest market."

For additional information visit www.tilleke.com

TOZZINI ADDS REAL ESTATE PARTNER TO TEAM

SAO PAULO, 08 November 2014: Pablo Meira Queiroz is the new partner in TozziniFreire Advogados Sao Paulo office's Real Estate practice area. With approximately 15 years in the market, Queiroz is experienced in structuring real estate operations, including investment and financing in asset and succession planning, structuring of bonds in financing operations for the production of agricultural commodities, and matters of contractual law in general.

Pablo Meira Queroz

He is a graduate of the School of Law of Pontifícia Universidade Católica de São Paulo (PUC-SP), and is currently enrolled in Fundação Getulio Vargas' (FGV) Masters in Business Law. He is now part of the team coordinated by partners Paulo Augusto Furtado Mendonça and Vladimir Miranda Abreu, which is also made up of 09 additional lawyers.

TozziniFreire's Real Estate practice provides full legal counsel in planning and implementing large real estate projects, such as resorts, shopping malls, high end office buildings, factories and distribution centers. The practice also acts in processes of real estate purchase, sale and rental, including alignment to zoning laws and constitution of encumbrances, such as mortgages and easement.

The team also aids clients in the employment of legal structures that enable the attraction of resources from the capital market for the development of real estate projects, as well as structuring real estate investment funds, real estate credit securitization operations, and built-to-suit operations.

For additional information visit www.tozzinifreire.com.br

ARIAS FABREGA & FABREGA

ADVISES BANCO GENERAL IN PRECEDENT SETTING REAL ESTATE TRANSACTION

PANAMA, September 2014: ARIAS, FABREGA & FABREGA acted as transaction counsel to Banco General in connection with the US$30 million registered public offering on the Panamanian Stock Exchange of Verdemar Investment Corporation's cumulative preferred shares owned by Grupo Verdeazul, S.A., acquired in exchange for a spin-off of a portfolio of Grupo Verdeazul's real estate assets.

This is the first time that the registration and offering of preferred shares has been made by an entity that had previously acquired the preferred shares and not directly by the issuer of the preferred shares.

Grupo Verdeazul, S.A., one of Panama's largest real estate developers, spun off a portfolio of its real estate assets to Verdemar Investment Corporation, S.A., which in exchange issued 30,000 cumulative preferred shares to be registered and publicly offered by Grupo Verdeazul through the Panamanian Stock Exchange.

ARIFA team was led by Estif Aparicio, partner; Cedric Kinschots, international associate; Marianne N. Romero, associate; and Javier Yap Endara, associate.

For additional information visit www.arifa.com

ARIAS & MUNOZ

ASSISTS AEROMAN EXPAND REPAIR SERVICES

EL SALVADOR, November 2014: Arias & Muñoz (El Salvador) has helped Salvadorean aircraft maintenance and repairs company Aeroman secure a land lease for a US$55 million hangar from the government.

The Salvadorean port authority (CEPA) granted Aeroman a 40-year lease on 10 November. The lease covers 165,000 square metres of land near the country's main international airport. The firm also helped negotiate private construction contracts for the hangar with third-party companies.

The 10,000-square-metre hangar is expected to increase the number of planes Aeroman can simultaneously service from 12 to 28. Gallardo says the new administration was particularly keen to support the expansion plan and went out of its way to fast-track the process. The project is expected to generate 2,300 jobs for the aviation sector once completed in 2015.

The Arias & Muñoz (El Salvador) team was led by Partner Roberta Gallardo and associates Flor de María Rodríguez and José Ernesto Sánchez.

For additional information visit www.ariaslaw.com

BAKER BOTTS

ADVISES HALLIBURTON IN ONE OF THE LARGEST ENERGY DEALS OF 2014

Halliburton and Baker Hughes Reach Agreement to Combine in Stock and Cash Transaction Valued at $34.6 Billion

HOUSTON, 17 November 2014 - Baker Botts lawyers represent Halliburton in one of the largest energy deals of 2014. Under the deal, Halliburton will acquire all the outstanding shares of Baker Hughes in a stock and cash transaction. The transaction is valued at $78.62 per Baker Hughes share, representing an equity value of $34.6 billion and enterprise value of $38.0 billion, based on Halliburton's closing price on November 12, 2014, the day prior to public confirmation by Baker Hughes that it was in talks with Halliburton regarding a transaction. Upon the completion of the transaction, Baker Hughes stockholders will own approximately 36 percent of the combined company.

The transaction combines two highly complementary suites of products and services into a comprehensive offering to oil and natural gas customers. On a pro-forma basis the combined company had 2013 revenues of $51.8 billion, more than 136,000 employees and operations in more than 80 countries around the world.

Baker Botts along with Wachtell, Lipton, Rosen & Katz acted for Halliburton.

For additional information visit www.bakerbotts.com

CLAYTON UTZ

ACTS ON TASMANIA'S HUON ACAUACULTURE'S $420 MILLION IPO AND ASX LISTING

Melbourne, 24 October 2014: Clayton Utz has acted for premium Tasmanian salmon farming operator Huon Aquaculture Group Ltd (Huon Aquaculture) on its Initial Public Offering (IPO) and listing on the Australia Securities Exchange, announced to the market yesterday.

Clayton Utz Corporate partner Brendan Groves and partner-elect John Brewster led the firm's team, which included lawyers Peter Hamblin and Kate Allison.

The IPO raised $133 million, giving the company a market capitalisation of approximately $420 million. Capital raised will be used to expand the company's operations and invest in future fish farming operations.

Huon Aquaculture was founded at Hideaway Bay in 1986 by couple Peter and Frances Bender. The business now employs over 500 people and produces around 15,000 tonnes of salmon annually.

John said Clayton Utz was pleased to be part of Huon Aquaculture's next stage of growth. "Huon Aquaculture is an example of a highly successful business that was founded on hard work and a quality product. Our team at Clayton Utz is excited to see the business take this next step in growing its operations."

Brendan commented that the Huon IPO demonstrates the strong appetite in the market to support quality businesses in growth sectors. "Huon Aquaculture's culture of constant innovation and improvement in an industry that has excellent growth prospects was recognised by the market in its strong support for this IPO. We're delighted to have worked with the Huon team in achieving this important milestone for the business."

For additional information visit www.claytonutz.com

TOZZINI FREIRE

ACTS FOR CHEMTURA IN USD $1BILLION SALE OF AGROCHEMICAL BUSINESS TO PLATFORM SPECIALTY PRODUCTS

Brazil – November 3, 2014: Chemtura Corporation ("Chemtura") completed the sale of its agrochemicals business, Chemtura AgroSolutions, to Platform Specialty Products Corporation ("Platform"), a global specialty chemicals company, for approximately US$ 1 billion, consisting of US$ 950 million in cash and 2 million shares of Platform's common stock.

With the completion of the sale, Chemtura's core platform is focused around Industrial Performance Products (IPP) and Industrial Engineered Products (IEP) (flame retardants, brominated products and organometallics), global leaders in the markets they serve. Chemtura Agrosolutions is a leading provider of seed treatment and agrochemical products for a wide variety of crop applications in attractive geographies

Among several other law firms worldwide, TozziniFreire Advogados was involved in the Brazilian part of the deal and also coordinated advices from several law firms in Latin America with respect to transfer of product registrations in each jurisdiction.

More about Chemtura: Chemtura Corporation, with 2013 net sales of $2.2 billion[1], is a global manufacturer and marketer of specialty chemicals. Additional information concerning Chemtura is available at www.chemtura.com.

TozziniFreire Advogados team was led by Partner Claudia Muniz Levasier Mahler; and Partner Ana Claudia Akie Utumi; and Elysangela de Oliveira Rabelo; and Associates Thiago Luiz de Araujo e Silva, Tatiana Gualberto Kascher, Rafael Balanin and Carolina Benedet Barreiros Spada.

For additional information visit www.tozzinifreire.com.br

GIDE

ADVISES EIFFAGE ON EUROPE'S LATEST PHOTOVOLTAIC POWER PROJECT

PARIS, 07 November 2014: A consortium comprising Eiffage, acting through its Clemessy subsidiary (consortium leader), Schneider Electric and Krinner has been awarded a contract for the construction of a solar farm and an extra-high voltage substation – representing the largest photovoltaic power project in Europe - in Cestas, near Bordeaux, France. The consortium will also be responsible for the plant's operation and maintenance.

Work on this project, worth nearly EUR 285 million, is to begin immediately.

The project will call on the expertise of Clemessy subsidiary RMT for engineering studies, Eiffage Energia for connection work, Eiffage Travaux Publics for earthworks, Schneider Electric for the electrical conversion chain and Krinner GmbH for screw-in foundations and photovoltaic structures.

This project, developed by Neoen, a leading French player in renewable energies, will provide a total peak capacity of 300 MW.

The farm will be connected directly to the very-high voltage power grid and is to come on line in October 2015. It will generate more than 350 gigawatt-hours a year, enough to cater for the daytime power consumption of the entire population of Bordeaux.

Financing agreements were executed on November 4.

Eiffage received legal counsel from Gide, which set up a team comprising counsel Marie Bouvet-Guiramand, and associates Victor Grandguillaume and Clément Nourrisson on Project issues and counsel Sylvain Bergès and associate Sarah Becker on Energy and environmental issues.

For additional information visit www.gide.com

CAREY

ADVISES EWOS IN USD$183 MILLION ACQUISITION CHILEAN FISH FARM

SANTIAGO, 04 November 2014: Carey acted as local counsel to EWOS, the Norwegian supplier of feed for the aquaculture industry, in the acquisition of the Chilean fish farming company Nova Austral and its subsidiary Comercial Austral for USD183 million app. The acquisition of Nova Austral was made under the bankruptcy of its controlling shareholder Acuinova.

Simultaneously with the closing of the acquisition, EWOS and Nova Austral entered into a USD100 million Senior Facilities Agreement with DNB Group, Agencia en Chile and other banks and financial institutions, including a term loan facility for the refinancing of the existing debt of Nova Austral; and a multicurrency revolving facility for financing or refinancing working capital and general corporate purposes.

Ewos is owned by a joint venture between private equity firms Bain Capital and Altor.

Carey advised Ewos through a team led by partners Pablo Iacobelli, Salvador Valdés, Guillermo Acuña and associates Elena Yubero, Alejandra Donoso, Juan Pablo Navarrete, Jaime Carey Jr., Josefina Marshall, Antonia Vial and Jaime Coutts.

For additional information visit www.carey.cl

RODYK

ACTS FOR FRAGRANCE GROUP LTD IN ISSUE OF NOTES AND PERPETUAL SECURITIES

Rodyk is acting for Fragrance Group Ltd in its inaugural issue of notes and perpetual securities under its S$1 billion multicurrency debt issuance programme (the Programme). DBS Bank Ltd is the sole arranger and dealer of the Programme. The firm also acted for the company in its establishment of the Programme in October 2013.

Rodyk corporate partner Marian Ho is leading the deal, and real estate partner Tang Woon Ee is advising on the real estate aspects.

For additional information visit www.rodyk.com

HOGAN LOVELLS

ADVISES OLSON ON ITS ACQUISITION BY ICF INTERNATIONAL

DENVER, 05 November 2014: Hogan Lovells is pleased to announce that a cross-practice team advised client Olson on its acquisition by ICF International ("ICF"), a leading provider of consulting services and technology solutions to government and commercial clients.

Under the terms of the agreement, Olson will continue operating as such, but will now be a key component of an end-to-end service offering comprised of strategic consulting, creative, proprietary technology and analytics, and implementation services that ICF can deploy on behalf of existing and new commercial clients. By joining ICF, Olson will be able to better serve clients as well as secure future growth domestically, internationally, and across various client categories.

Keith Trammell, a Corporate partner in the Denver office led the Hogan Lovells team that also included Benefits partner Carin Carithers (D.C.), Tax partner Scott McClure (D.C.), Intellectual Property partner David Toy (Denver), Employee counsel Marianne Hallinan (Denver), and Corporate associates Joshua Clark (Denver), Allison Donovan (Denver), and Jim Fipp (Denver).

For more information visit www.hoganlovells.com

NAUTADUTILH

ADVISES FORFARMERS IN NEW CREDIT FACILITY

AMSTERDAM 28 October 2014: ForFarmers B.V. and certain of its subsidiaries entered into a EUR 300 million multicurrency revolving credit facility with ABN AMRO, BNP Paribas, Lloyds Bank PLC, and Rabobank. This new facility replaces the existing facilities for ForFarmers B.V. and BOCM Pauls Ltd., amounting to EUR 120 million and GBP 86 million respectively, due to mature in 2015, 2017 and 2019.

The existing financing structure is renewed to align the terms and conditions of the various existing facilities into one new multicurrency revolving credit facility. The new facility establishes a larger and more flexible uniform group financing structure at favourable conditions, supporting ForFarmers in realizing its strategy through organic growth and through acquisitions.

ForFarmers is an internationally operating company active in the area of conventional and organic feed solutions for livestock.

The Dutch team of NautaDutilh consisted of David Viëtor, Niels Hagelstein, Michelle van Doren, Kim Veenman, Gijs van Nes, Judith de Snoo, Nina Kielman en Nico Blom. The Belgium team of NautaDutilh consisted of Nathalie van Landuyt and Thibaut Willems.

For additional information visit www.nautadutilh.com

UPCOMING PRAC EVENTS

- **PRAC @ PDAC** Toronto 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 26—29, 2015

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2014 EVENTS

PRAC monthly e-Bulletin

Member Firms are encouraged to contribute articles for future consideration.

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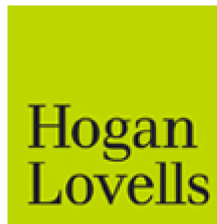

CLAYTON UTZ

14 November 2014

NSW opens the door to more CSG projects, but more details to come

More coal seam gas (**CSG**) projects are likely to be on the way, following the release of the NSW Government's new Gas Policy, but the freeze on new petroleum exploration licences will continue until the full framework is in place, which will be mid-2015. In addition, any current applications for licences will be extinguished by legislation.

The O'Kane report recommendations accepted

All 16 recommendations by the NSW Chief Scientist, Professor O'Kane, in her September 2014 report on CSG projects, have been accepted, including:

- new data-gathering processes, and a comprehensive, publicly available information portal;
- development of centralised risk management and impact prediction resources, to improve the quality and consistency of project environmental assessments;
- creation of an expert scientific and engineering advisory body, to advise the Government on matters such as CSG industry impacts, science and technology developments, and the assessment of NSW sedimentary basins;
- full cost recovery for the regulation and support of the CSG industry;
- a plan to manage legacy matters (such as abandoned CSG wells and incomplete compliance checking);
- a single regulatory regime for all onshore subsurface resources (excluding water) in the State; and
- separation of the process for allocating rights to exploit subsurface resources (excluding water) from the regulation of the activities required to give effect to that exploitation (ie. exploration and production activities), but with a single independent regulator.

Petroleum exploration licences and applications

There will be a one-off buy-back offer of existing issued petroleum exploration licences for "limited compensation" offered by the Government. All current applications for licences will be extinguished by legislation (with the only compensation for applications being a refund of application fees). New licences will not be issued until the new framework is in place, which is expected to be mid-2015. These will be subject to new licence conditions and codes.

Petroleum exploration titles will be removed from National Parks, and other titleholders will be subject to a very strict "use it or lose it" policy.

Determining where CSG exploration can take place

A new Strategic Release Framework will control the release of areas of NSW for gas exploration from 1 July 2015. This will involve an assessment of economic, environmental and social factors, similar to the approach to coal exploration recommended by ICAC.

Petroleum licences will be put out for public expressions of interest, so that the Government can identify the most suitable and capable proponents.

All applications for gas exploration licences will be assessed and determined by the Minister for Resources and Energy, while either the Minister for Planning or the independent Planning Assessment Commission will assess and determine all applications for gas production leases.

Projects which provide substantive amounts of gas into the NSW market will be designated as Strategic Energy Projects and get a case manager to provide whole of government coordination for approval processes, but must still meet environmental standards and the community consultation requirements.

The current hold on exploration and extraction of natural gas from coal seams in the "Special Areas" zone in Sydney's drinking water catchment will continue while the Government does more research.

New royalties, gas pipelines and a public benefit test

A secure gas supply to NSW is a priority for the Government, but at present NSW currently imports about 95 percent of its gas from interstate. To increase fuel security for NSW:

- the Government will work with other State and Territory Governments and the private sector to explore the possibilities for gas pipelines to NSW;
- gas companies will be asked to demonstrate how projects that develop NSW gas reserves will benefit NSW gas consumers; and
- royalties will be reviewed.

To this end, the NSW Government has also recently announced a Memorandum of Understanding with the Northern Territory Government concerning the development of a pipeline connection from the Northern Territory to the eastern gas markets.

The EPA to be the new regulator

The Environment Protection Authority will be the lead regulator for gas exploration and production.

As a consequence, it seems likely that requirements for EPA licences will be broadened to cover more gas projects.

Landholder and community compensation

Landholders will have a mandated right for compensation, and the Independent Pricing and Regulatory Tribunal will advise landholders on benchmark compensation rates for gas exploration and production.

Gas companies and the NSW Government will make contributions to a new Community Benefits Fund, which will fund local projects in communities where gas exploration and production occurs. The Government has said that it will consult specifically on its approach to the Fund, but has signalled already that up-front contributions to the Fund might generate credits against future royalty payments.

Next steps for gas in NSW

The Government introduced legislation to extinguish petroleum exploration licences on the day of announcing its Gas Policy, and that legislation is moving quickly through Parliament. It's also planning to start consultation on the proposed approach to licence conditions and codes this year.

Other legislation and policy documents are proposed, including changes to State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 to allocate responsibility for assessing and approving CSG projects, but the timeframe for these initiatives hasn't been publicly announced yet.

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INTERNATIONAL TRADE

Brazil enacts the Convention on Contracts for the International Sale of Goods

With the publication of Decree 8,327, on October 17, 2014, Brazil completed the process for adopting the United Nations Convention on Contracts for the International Sale of Goods – UNCITRAL, also known as "CISG", which had been ratified by the country in 2012.

When properly used, the CISG facilitates the dynamics of international trade, gives more certainty to the parties and avoids disputes involving domestic laws.

From now on, unless a specific agreement provides otherwise, the CISG will apply to international sales of goods involving Brazilian parties and parties from countries that have also adopted the CISG. Therefore, Brazilian companies involved in international trade must get acquainted with the CISG and take it into account when structuring their deals.

/Carey

Financial Stability Council and Amendments to General Banking Law and Insurance Law

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

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

On November 6, 2014, Law No. 20,789 was published in the Official Gazette, granting legal status to the *Cor*
Estabilidad Financiera (Financial Stability Council or "CEF"). The CEF is part of the Ministry of Finance, and was o
created in 2011 by means of a ministerial decree.

The CEF is chaired by the Minister of Finance and comprised also by the Superintendents of each of the Superintend
Securities and Insurance ("SVS"), of Banks and Financial Institutions ("SBIF") and of Pensions (collectively the "F
Superintendencies"). The Chairman of the Chilean Central Bank may participate as advisor to the council.

The purpose of the CEF is to oversee the stability of the Chilean financial system and facilitate the technical coordina
exchange of information among its participants on matters regarding the prevention and handling of situations th
constitute risk to the financial system.

Among others, the CEF may (i) commission or request the Financial Superintendencies to perform studies for pur
monitoring the stability of the financial system; (ii) request from the Financial Superintendencies any information
subject to reserve– that may be necessary to identify or assess possible risks to the financial stability; and (iii) reco
to competent services or agencies policies that contribute toward the financial stability.

The new law sets forth a framework for joint action among the Financial Superintendencies, which shall report to
the facts, circumstances or events of their relevant sectors which may have systemic consequences.

Additionally, along with granting legal status to the CEF, the law introduces significant changes to the legislation ap
to each Financial Superintendency, which may now require from the entities subject to their supervision sufficient
information regarding all persons and entities that belong to their conglomerate group, who could materially imp
financial condition or safety and soundness of the entity, that would permit it to assess the financial situation of a
person or entity, and such additional information concerning the relationship among the parties through owne
control, as well as transactions among the members of the conglomerate group.

The new legislation amends the General Banking Law to impose a new solvency requirement for the controlling share
of a bank, requiring from such shareholders, individually or as a whole, to permanently maintain consolidated net a
an amount equal to their ownership proportion of the bank's basic capital. In the event of a breach of this requireme
term longer than the cure period determined by the SBIF, the SBIF will have the right to presume that a serious issu
which may materially impact the financial condition or safety and soundness of the bank. Under such circumstan
Superintendent has the authority to designate a delegated inspector who may suspend any resolution or action
bank's board of directors or its senior executive management. Alternatively, with the prior agreement of the Chilean
Bank, the SBIF can appoint a temporary receiver, which shall have all the power to take such actions and directive
law or organizational documents of such bank permits the Board of Directors or senior executive management of t
to undertake on a day-to-day basis.

The new law amends the Insurance Law to incorporate a new solvency requirement applicable to the co
shareholders of insurance companies. In this sense, when the level of solvency of the controlling shareholders
individually or jointly, is reduced to an amount less than the risk assets established in said regulations, and i
remedied within the period determined by the SVS for these purposes, the SVS has the authority to instruct the co
to refrain from effecting transactions and operations with their related persons or through them, up to a perio
months, renewable for an equal term. Furthermore, under these circumstances, the SVS may suspend the manage
all or some of the company's operations, thereby designating a manager for that purpose.

The new law entered into force with its publication. However, exceptionally, the new solvency requirements me
above will be enforceable 12 months as of the law's coming into force.

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

Davis Wright Tremaine LLP
DEFINING SUCCESS TOGETHER

China Widens Entry to Medical Device Market to Investment, Innovation While Tightening Regulations on Existing Market Products

10.13.14

By Vincent X. Wang and Sherry Zhang

As the medical device industry in China continues accelerated growth, investors seek to capitalize on a roughly $65 billion market that is growing at an annual rate of 21 percent. Under recent changes to the regulatory framework governing medical devices, this will become an industry more accessible to investors in China, although newcomers must be familiar with various compliance requirements in order to succeed in this evolving market.

On March 7, 2014, the State Council of the People's Republic of China ("PRC" or "China") announced revisions to the country's fundamental medical device regulation, *the Regulations on Supervision and Administration of Medical Devices* (the "2014 Regulations"). The revisions aim to encourage investment and innovation by relaxing the requirements of gaining entry to the market but also increasing government regulation over the entire life-cycle of medical devices in the Chinese market. The 2014 Regulations took effect on June 1, 2014, and replaced the previous version issued by the same authority starting in 2000 (the "2000 Regulations").

Over the last 14 years, the Chinese medical device market has changed significantly, requiring substantial improvement and adjustment to the regulatory system established under the 2000 Regulations. For instance, under the 2000 Regulations, the classification system was not sophisticated and flexible enough to address the different classes of medical devices and instead focused on uniform industry-entry and pre-market product approvals. At the same time, the 2000 Regulations failed to effectively monitor and control products that had gained entry to the market, and potential legal liabilities were not severe enough to deter violators. In order to adapt to the changes in the market and enhance protection of public health, the 2014 Regulations respond affirmatively and effectively with macro regulatory improvements.

Improvements to medical devices classification-based administration

Under the 2014 Regulations, medical devices are still classified into three classes based on their risk levels, but the big-picture definitions for those three classes are adjusted to allow more accurate classification. Class I medical devices refer to medical devices with low risks. Their safety and effectiveness can be ensured through routine administration.

Class II medical devices refer to medical devices with moderate risks, which require strict control and administration to ensure their safety and effectiveness. Class III medical devices refer to those with relatively high risks, which require strict control and

administration through special measures to ensure their safety and effectiveness. Further changes to the classification system are foreseeable.

Medical devices in different classes are subject to different levels of scrutiny with respect to product registration, manufacturing, distribution, and use permit. The 2014 Regulations introduced a number of new policies designed to relax industry entry and product access requirements for the purpose of encouraging investment and innovation and optimizing the review and approval process:

Product registration

- The 2000 Regulations required product registration for medical devices of all classes and any changes to the registered medical devices before they are put onto the market. Under the 2014 Regulations, no product registration is required for Class I medical devices and all non-substantial changes to existing registered medical devices. Instead, product filing for record will suffice in such situations.

- In general, product registrations for Class II or Class III medical devices require clinical trials. However, the 2014 Regulations provide exemptions for clinical trials if certain conditions are satisfied, such as demonstrated long-term safety and effectiveness of the same type of medical devices manufactured through the same process and used for the same routine usage, non-clinical evaluation, or data from clinical trials of similar types of medical devices. The China National Food and Drug Administration ("CNFDA") will publish and maintain a list of medical devices exempted from clinical trials. In addition, in situations where the clinical trial cannot be exempted, pre-trial approval is required only for Class III medical devices, and pre-trial filing for records is sufficient for Class II medical devices.

Manufacturing

- The 2000 Regulations required Class II and III medical devices manufacturers to obtain the Manufacturing Permit before applying for products registration, which left the investment in such manufacturing business uncertain. The 2014 Regulations instead allow a potential Class II and III medical devices manufacturer to apply for product registration, enabling the manufacturers to make more certain investment decisions.

- For Class I medical device manufacturers, the 2014 Regulations conveniently allow the filing for manufacturing records to be made at the city level CNFDA, not the provincial level CNFDA as required under the 2000 Regulations.
- Although the industry entry threshold is relaxed to some extent, the statutory requirements for ongoing operation, particularly those regulating quality standards, are enhanced. For example, all manufacturers are required to establish and maintain proper quality standards and should stop production if quality standards and conditions are not met. Detailed rules are imposed on product manual and marks. Contracting manufacture is not allowed for certain high-risk medical devices that are on the list to be released by the CNFDA.

Distribution and use

- The 2000 Regulations required Class I medical device distributors to file for records and Class II and III medical device distributors to obtain permits for their distribution businesses. Under the 2014 Regulations, nothing is required to engage in Class I medical device distribution, but Class II must file for records and Class III must obtain administrative permits to engage in medical device distribution.

- Additionally, the 2014 Regulations impose additional obligations on medical institutions using medical devices. Such obligations cover all aspects of use including storage, records of purchase, personnel training, maintaining records for large medical devices that have long shelf lives, reporting potential or suspected safety issues, and requesting Chinese language documents for imported medical devices.

Adverse events monitoring and recall system

In order to enhance supervision of medical devices on the market, the 2014 Regulations added one chapter entitled "Adverse Event Treatment and Products Recall," which aims to effectively identify problematic medical devices in use and provide statutory remedies to prevent manufacturing, sales, distribution, and use of unsafe medical devices in the market. This new chapter requires that:

- Technical institutions will be established to evaluate the reported adverse events and provide suggestions to the CNFDA authorities. The CNFDA authorities may, based on the evaluation result, release the warning information, order a suspension of production, sale, import, and use of the reported medical devices, or take other measures.

- Provincial level CNFDA will have the right to re-evaluate any defective medical devices, and if the safety and effectiveness of such product cannot be ensured through such re-evaluation, the provincial level CNFDA can revoke any registration certification of the medical devices in concern, and stop the manufacturing, import, distribution, and use of such devices.

- Medical device manufacturers, distributors, and users should monitor the adverse events of the medical devices produced, operated, or used, and if any medical device adverse event or a suspected adverse event is discovered, it must be reported to the technical institutions monitoring such adverse events. Any other entity or individual that discovers such an event also has the right to report the event to such institutions.
- If any medical device manufacturers or distributors discover that the medical devices produced or distributed by them fail to comply with the compulsory standards or the technical requirements for the products, or have any other defects, they shall immediately notify the other parties involved, and recall all products in the market and take remedial measures. The recall and treatment shall be reported to the relevant CNFDA or hygiene authorities.

Enhanced liabilities

Finally, to deter violations of the 2014 Regulations, more severe administrative sanctions than those in the 2000 Regulations have been enacted.

For example, if any entity engages in medical device-related manufacturing or distribution business without proper permit, administrative penalties of up to 20 times the value of the products manufactured may be imposed, whereas before the penalty only was up to five times the value. Moreover, under “severe circumstances,” both the entity and its responsible executive officers will be barred from applying for any new licenses or permits for five years and may be even subject to criminal liabilities.

Conclusions

The revisions in the 2014 Regulations demonstrate the Chinese government’s resolution and efforts to maintain a comprehensive and effective regulatory framework for the medical device industry in China. On the same day of the release of the 2014 Regulations, CNFDA also issued a series of accessory rules, either in official regulation or in drafts seeking public comments, covering medical device registration, products classification, and distributor inspection criteria.

Under the 2014 Regulations and its accessory rules, the medical device industry in China will be more accessible to interested investors, but understanding the operational compliance framework will become more important as an element to success.

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BRIGARD & URRUTIA

Implementation of pacific alliance - TP-7 visa

The Ministry of Foreign Affairs implemented the Pacific Alliance – TP-7 Visa this week. This permission is granted to Chile, Peru, and Mexico nationals seeking to carry out tourism activities in Colombia.

Although the Pacific Alliance – TP-7 visa enables the foreign national to perform education and training activities for up to two months, the foreign national's main purpose must be tourism related.

The foreign national may also partially wok in order to sustain needs such as accommodations and food. However, work activities must be constituted as the main activity during the foreigner's stay in Colombia

Even when TP-7 visas are granted generally for a 1-year period, Pacific Alliance visas are bound to Visa Officer discretion. Therefore, the visa application reviewing officer will determine the longevity of the visa.

For more information please contact

- Omar Hernández Hussein

Calle 70A No. 4 - 41
Phone: (+57-1) 346 2011
Fax: (+57-1) 310 0609 - (+57-1) 310 0586
info@bu.com.co
Bogotá - Colombia
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Bring on the competition – Hong Kong Competition Commission publishes draft guidelines

The Hong Kong Competition Commission ("**HKCC**") , together with the Communications Authority, today published six long-awaited draft guidelines ("**Guidelines**") on how it intends to enforce the Hong Kong Competition Ordinance ("**Ordinance**"), which was enacted in June 2012. Three of the Guidelines set out substantive aspects on how to interpret the Ordinance and three relate to procedural aspects.

HKCC is now requesting comments from all interested parties. The deadlines for submission of comments are 10 November and 10 December 2014 for the procedural and substantive Guidelines, respectively.

After receiving comments, HKCC will amend the Guidelines if appropriate and will consult with the Legislative Council and other stakeholders on the amended drafts. Once the consultation process has concluded, HKCC will look to finalise the Guidelines in the first half of 2015.

Scope of the Guidelines

On the substantive side, HKCC released guidelines on how it expects to interpret the First Conduct Rule (which concerns agreements between one or more undertakings), the Second Conduct Rule (which relates to the conduct of a single undertaking with a substantial degree of market power) and the Merger Rule (which applies only to telecommunications licensees).

The documents issued on procedural aspects are the Guideline on Complaints, the Guideline on Investigations and the Guideline on Applications (on exclusions and exemptions).

In addition to the Guidelines themselves, HKCC published an overview document which includes FAQs, as well as a press release explaining some of the background to the consultation and drafting process.

Initial assessment

A first reading of the Guidelines indicates that HKCC intends to provide clarity where needed, yet also tries to stay close to the text of the Ordinance. In many instances, the authority is successful in this attempt. On other occasions, the effect of the guidance provided is more mixed.

Undertakings

The Guidelines attempt to provide clarifications on the concept of "undertaking," to which the substantive rules of the Ordinance apply. The Guidelines explain that "undertaking" is a broader concept than "company," and may encompass a variety of legal entities within a "single economic unit."

On the upside, the Guideline on the First Conduct Rule explains that the Ordinance does not apply to agreements between companies in the "same economic unit," such as parent and subsidiary. On the downside, however, the fines that can be imposed may be calculated by reference to the turnover of the "undertaking" in question – the maximum fine is expressed as a percentage (10%) of the undertaking's Hong Kong turnover. Logically, this cap is higher if calculated by reference to the turnover of a group of companies rather than a single company. In European Union law, it is precisely this aspect of the "undertaking" concept – or the European Commission's interpretation of it – that is hotly debated. Here, learning from European Union law is not without controversy.

Vertical agreements and RPM

Resale price maintenance ("**RPM**") is another area where the Guidelines may draw attention. RPM occurs where a manufacturer sets the price that its distributor can charge to the latter's customers. The Ordinance does not explicitly mention RPM, nor other types of potentially illegal clauses in vertical agreements. Yet the Guideline on the First Conduct Rule seems to take a tough stance on RPM. HKCC goes as far as stating that "[a]s a general rule, the Commission will consider that RPM arrangements are by their nature harmful competition." This approach could lead to a de facto presumption of illegality of RPM. Further, the Guidelines state that RPM may in certain cases amount to "serious anti-competitive conduct," for which the Ordinance foresees different procedural steps than for other agreements.

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Beyond RPM, the Guidelines do not exclude that other types of clauses in vertical agreements fall foul of the Ordinance – the Guidelines mention exclusive distribution or customer allocation, and recommended and maximum resale price restrictions, as "examples of conduct which *may* have the effect of harming competition."

Market share

In the Guideline on the Second Conduct Rule, HKCC resisted calls by numerous stakeholders to provide market share thresholds above which a company will be presumed to have "substantial degree of market power" – triggering the application of the Second Conduct Rule – or below which the company could benefit from a safe harbour. Instead, HKCC states that it intends to assess substantial market power on a case-by-case basis. This is an instance where HKCC follows a more cautious approach.

Way forward

Overall, the Guidelines issued today in draft form for public comment provide very useful and welcome clarifications on how HKCC intends to enforce the Ordinance. To the authority's credit, the Guidelines are drafted in clear language, with numerous illustrative hypothetical case studies, which seek to provide helpful pointers. The publication is likely to serve as a further prompt to companies operating in Hong Kong markets to work towards implementing effective compliance procedures.

Interested parties are invited to provide comments on the Guidelines, though HKCC's intention to make public the submissions made by stakeholders may deter some.

HKCC notes that the content of the Guidelines circulated today already reflects input given by stakeholders up to now, for example in relation to the quite detailed guidance on information sharing between competitors. With this, HKCC gives a signal to stakeholders that their participation matters, which should boost further input by interested parties.

HKCC has also signalled that it will be publishing additional guidance materials, including education materials such as leaflets and booklets, to further assist businesses before the substantive sections of the Ordinance come into force in 2015. Furthermore, the authority also promises guidance on additional areas, including on its leniency policy for cartel whistle-blowers and a statement of enforcement priorities, alongside additional clarification materials targeted at small and medium enterprises.

Although the Guidelines, once finalised, will not have the power of legislation and will not be binding on the Competition Tribunal or the Hong Kong courts, they could prove to be influential in practice. Today's issuance of the first round of drafts of the Guidelines is a substantial step in Hong Kong's march to a fully-fledged competition regime.

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

Patrick Sherrington, Partner
patrick.sherrington@hoganlovells.com
+852 2840 5088

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

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GIDE LOYRETTE NOUEL

newsletter

ADDENDUM | BANKING & FINANCE | HUNGARY | OCTOBER 2014

BANKING & FINANCE LAW

Follow-up on foreign exchange loan agreements

In our latest newsletter of 24 September 2014, we informed you of the adoption of Act XXXVIII of 2014 on the Settlement of particular issues related to the Uniformity Decision of the Supreme Court ("**Act 1**") which sets out the nullity of certain provisions of foreign exchange lease agreements.

While we were publishing this newsletter, the Hungarian government adopted the new Act XL of 2014 (**"Act 2**") on Further Provisions and Rules of Settlement, which were left out of Act 1. Act 2 completes and modifies Act 1, and sets out rules on the legal structure and the guiding principles that influenced the legislator in setting out the basic rules of settlement. It was promulgated on 6 October 2014 and came into force on 15 October (certain provisions will come into force on 1 November).

As indicated in our latest edition, Act 1 states that the exchange rate gap clauses (i.e. clauses under which different exchange rates apply to disbursement and repayment) inserted in foreign exchange or Hungarian Forint credit and loan agreements and financial lease agreements related to consumers, shall be deemed invalid, together with the unilateral amendment option clauses presumed to be unfair. The invalidity only applies to the prohibited clauses. The other provisions of the agreement remain in force, notably the interests, costs, fees or rates applicable when the agreement was concluded.

When such clause is annulled, a refundable amount called "overpayment" should be paid back to the consumer. Under the Act 2, the amount of the overpayment shall be the following:

- in the case of exchange rate gap: the difference between (i) the amount of the loan disbursed under the invalid clause and then converted according to the official foreign exchange rate of the Hungarian National Bank ("**HNB**") valid on the day of performance, and (ii) the amount of the instalment payments performed by the invalid clause and converted according to abovementioned HNB exchange rate;

- in the case of unfair unilateral amendment option clauses: the margin of the converted instalment payments that favours the client, calculated upon disregarding interests, costs and fees paid after the invalid clause.

Consequently, the first step of the settlement is the calculation of the consumers' claim. This calculation, based on the construction of prepayment, requires a special method which is will shortly be set out in an HNB decree.

Act 2 applies to all consumer loan contracts still in force. It also applies to those terminated either after 26 July 2009 or before 26 July 2009, but, in the latter case, to which no statute of limitations has been applied or which have been transferred to a factor. This means that, for contracts still in effect, capital sums due by the consumer shall be reduced by the amount of the overpayment. For terminated contracts, overpayment may be claimed in court.

Furthermore, it is important to mention that Act 2 stipulates specific rules to consumers falling within the scope of final repayments or exchange rate caps, and whose real property was purchased by the National Asset Manager. Moreover, in order to re-establish some order in a Hungarian legal system that is struggling to cope with the widespread concern deriving from the settlement of foreign exchange loans, new provisions were introduced as regards civil procedure, judicial enforcement and accounting in addition to the moratorium on the unilateral increases in interests, costs and fees, which will be borne by financial institutions until 30 April 2016.

Financial institutions must settle with their clients according to strictly prescribed dates between 15 January 2015 and 30 November 2015 and automatically send the settlement agreements by letter to the consumers' concerned. Legal redress is also available for consumers who may contest the content of the settlement by filing a complaint and, in the event of dismissal, by filing an appeal against the decision to HNB, which is in charge of checking the settlement. Furthermore, the government intends to convert all Swiss franc- and euro-denominated consumer loans into forints and to ban all FX loans before the end of 2014.

CONTACTS

FRANÇOIS D'ORNANO
ornano@gide.com

ÁKOS KOVÁCH
kovach@gide.com

You can also find this legal update on our website in the News & Insights section: **gide.com**

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30/09/2014

THIRD AMENDMENT TO REGULATION NO. P.33/MENHUT-II/2010 REGARDING MANNER AND PROCEDURE FOR THE RELEASE OF CONVERTIBLE PRODUCTION FOREST AREAS

The Minister of Forestry ("Minister") has issued Regulation No. P.28/Menhut-II/2014, which amends for the third time the above captioned Regulation No. P.33/Menhut-II/2010. The amending regulation ("Regulation No. 28/2014") has the purpose of speeding up the process of the release of a convertible production forest area.

In line with its purpose, Regulation No. P.28/2014 simplifies the procedure for the application for a forest area release, which must now be submitted only to the Minister with no requirement to send a carbon copy to the Secretary General of the Ministry of Forestry, the Director General of Forest Planology and the Director General of Forestry Business Development as required under the previous Regulation No. P.33/Menhut-II/2010. This regulation also provides shorter timelines for acceptance and rejection of the applications.

However, Regulation No. 28/2014 adds a new requirement to the administrative requirements stipulated in the previous regulation. The Statement of Undertaking in a notarial deed form which must be submitted by the applicants now has an additional point, to the effect that the applicant concerned undertakes to build a community garden in the forest surrounding, of an area of at least 20% of the released forest area. The community garden may be cultivated by the respective company as a plantation. (*by: Pakerti Wicaksono Sungkono*)

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THE PROPOSED FRAMEWORK FOR EQUITY CROWDFUNDING IN MALAYSIA

The Securities Commission of Malaysia ("SC") released a consultation paper on 21 August 2014 ("Consultation Paper") to seek feedback from the public on the Proposed Regulatory Framework for Equity Crowdfunding. After the consultation period closed on 5 September 2014, the SC issued a Public Response Paper on 22 September 2014 ("Public Response Paper") to respond to the feedback received on the Consultation Paper.

This article provides an overview of crowdfunding and the framework proposed by the SC for the introduction of equity crowdfunding in Malaysia ("ECF framework").

WHAT IS CROWDFUNDING?

Crowdfunding is a way of raising funds by obtaining small sums of money from a large number of people. It is carried out primarily through a web-based platform on the internet. The UK Crowdfunding Association ("UKCFA") traces the origins of crowdfunding back to 1997 when fans of Marillion, a rock band, raised US$60,000 through the internet to enable the band to perform concerts in the United States.[1]

According to the UKCFA, there are three types of crowdfunding: donation/reward crowdfunding, debt crowdfunding and equity crowdfunding.[2]

Donation/Reward Crowdfunding

Donation crowdfunding is a form of crowdfunding whereby a person donates money to a cause without receiving any return, except for the satisfaction of having contributed to a cause which he believes in. It has been reported that blogger, Roy Ngerng, raised S$81,000 from more than 1,000 donors within five days through donation crowdfunding by posting a plea on his blog for assistance to defray the legal expenses in defending a defamation suit by Singapore Prime Minister, Lee Hsien Loong.[3]

Like donation crowdfunding, reward crowdfunding is often motivated by the donor's desire to support a cause; the difference being that in the case of reward crowdfunding, the donor receives a form of reward, such as event tickets, gifts or coupons, in return for his donation.

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[1] http://www.ukcfa.org.uk/what-is-crowdfunding.
[2] The SC divides donation/reward crowdfunding into separate categories of crowdfunding (Paragraphs 1.3 and 1.4, of the Consultation Paper).
[3] The Straits Times, 4 June 2014 (online edition).

Unit No. 50-8-1, 8th Floor, Wisma UOA Damansara, 50 Jalan Dungun, Damansara Heights, 50490 Kuala Lumpur, Malaysia.
T: +(603) 2081 3999 F: +(603) 2094 3211 E: skrine@skrine.com W: www.skrine.com

Debt Crowdfunding

Debt crowdfunding is a form of fundraising whereby investors advance money to the promoter of a project.[4] Debt crowdfunding may be on an interest or non-interest bearing basis.

Equity Crowdfunding

In equity crowdfunding, an investor receives shares or stocks in return for his investment in the enterprise which promotes the business. The value of the investment is likely to rise or fall in tandem with the fortunes of the enterprise's business.

THE ECF FRAMEWORK

The ECF framework applies only to equity crowdfunding and not to the other forms of crowdfunding.[5] It seeks to provide an alternative and non-traditional means of funding to small and medium enterprises, particularly those that require funding to develop innovative ideas.

The detailed proposals of the ECF framework are contained primarily in the Consultation Paper. However, several of the original proposals were revised by the SC after considering the feedback received during the consultation period. As these revisions are set out in the Public Response Paper, the Consultation Paper must be read with the Public Response Paper to obtain an accurate understanding of proposals comprised in the ECF framework.

The ECF operator

Equity crowdfunding will be carried out in Malaysia through an operator of a web-based platform which will host the equity offerings by issuers ("ECF operator"). An ECF operator will be regulated as a registered electronic facility ("REF") under Subdivision 4 of Division 2 of Part II of the Capital Markets and Services Act 2007 ("CMSA").[6] At an appropriate juncture the ECF operator may, upon the initiative of the ECF operator or the SC, be converted from an REF to an approved stock exchange under the CMSA.[7]

An entity which seeks to be registered as an ECF operator under the REF framework must satisfy the SC that:

(a) it is fit and proper to operate an ECF platform;

[4] Debt crowdfunding is also known as "*peer-to-peer lending*" or "*p2p lending*".
[5] Paragraph 2.1, Consultation Paper.
[6] Paragraph 3.3, Consultation Paper. Refer to paragraph 3.4 of the Consultation Paper for details of requirements that must be satisfied in order for an entity to be registered to operate an REF.
[7] Paragraph 3.5, Consultation Paper.

Unit No. 50-8-1, 8th Floor, Wisma UOA Damansara, 50 Jalan Dungun, Damansara Heights, 50490 Kuala Lumpur, Malaysia.
T: +(603) 2081 3999 F: +(603) 2094 3211 E: skrine@skrine.com W: www.skrine.com

(b) it has sufficient financial, human and other resources to ensure that the market it operates will be fair and orderly; and

(c) it has processes and procedures in place to monitor compliance with the obligations imposed on it or on the market; and to identify and report to the SC any breach of its ECF platform rules or material change in circumstances relating to an offering and an issuer.[8]

The SC has stated that it may consider allowing a foreign operator to provide, operate or maintain an ECF platform through a locally incorporated entity.[9]

In addition to hosting offerings, an ECF operator will provide a public communication channel to facilitate discussions about the offerings on its platform, as well as ancillary services, such as screening and preparing of standardised documents.[10]

An ECF operator must ensure that only qualified investors participate on the platform.[11] It is expected to conduct background checks on an issuer and to conduct due diligence to verify the information in the disclosure document submitted by an issuer.[12] An issuer is required to provide certain financial documents to the ECF operator to enable the latter to discharge the aforesaid functions.[13] An ECF operator is also expected to undertake due diligence on the directors, officers, controlling owner and substantial shareholders of an issuer.[14]

An ECF operator is not permitted to:

(a) offer investment advice;

(b) compensate any person for the solicitation or sale of securities on its ECF platform;

(c) provide financial assistance to investors to invest in shares of an issuer hosted on its platform; and

(d) compensate any finder or introducer for providing the ECF operator with information about potential investors.[15]

An ECF operator is permitted to invest in shares of an issuer hosted on its platform, subject to a maximum 30% stake and full disclosure of its holding of that interest. Directors and shareholders of an

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[8] First and second sub-paragraphs of paragraph 3.4(a), Consultation Paper.
[9] Third sub-paragraph of Paragraph 3.4(a), Consultation Paper.
[10] Paragraphs 3.6(b) and 3.6(d), Consultation Paper.
[11] Paragraph 3.6(c), Consultation Paper.
[12] Paragraph 3.8, Consultation Paper.
[13] Paragraph 4.34, Consultation Paper. This paragraph sets out the details of the financial documents to be provided by an issuer.
[14] Paragraph 3.8, Consultation Paper. This paragraph also sets out other responsibilities of an ECF operator.
[15] Paragraphs 3.7 and 3.25, Consultation Paper and 2.6.9, Public Response Paper.

Unit No. 50-8-1, 8th Floor, Wisma UOA Damansara, 50 Jalan Dungun, Damansara Heights, 50490 Kuala Lumpur, Malaysia.
T: +(603) 2081 3999 F: +(603) 2094 3211 E: skrine@skrine.com W: www.skrine.com

ECF operator are also permitted to invest in an issuer hosted on that operator's platform, but the ECF operator is required to have an internal code of ethics and risk management processes to manage any potential conflict of interest situation.[16]

An ECF operator is also required to have in place an internal dispute resolution mechanism to resolve any disputes between the issuers and investors throughout the offering process, but not after the completion of the offering.[17]

The issuer

An issuer which proposes to issue securities under the ECF framework must be a locally incorporated private company (other than an exempt private company)[18] which may be controlled by Malaysians or non-Malaysians[19]. Certain companies, such as listed companies and their subsidiaries, companies with no business plans and companies which have already raised RM5.0 million paid-up share capital on an ECF platform[20], will not be allowed to raise funds through the ECF platform.[21]

The shares must be a primary offering (i.e. the issue of new shares) and not the sale of issued shares by existing shareholders.[22] The shares may be ordinary shares or preference shares and both may be offered in the same offering.[23] However, an issuer is not allowed to be hosted concurrently on more than one ECF platform.[24]

Limits on fund-raising

An issuer will only be permitted to raise up to RM3.0 million in a 12 month period and a total of RM5.0 million through the ECF platform.[25] An issuer's own capital contribution and funding through private placements will not be taken into account in determining whether the RM5.0 million threshold has been reached.[26] Subject to the aforesaid financial limits, an issuer is allowed to accept an oversubscription provided that it has reserved the right to do so, and has disclosed to investors as to how it proposes to use the oversubscribed amount.[27]

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[16] Paragraph 2.6.7, Public Response Paper. The SC had originally proposed in paragraphs 3.24 and 3.25 of the Consultation Paper to prohibit an ECF operator and its directors and officers from having an interest in an issuer other than by way of acceptance by an ECF operator of shares in an issuer as payment of the operator's fees, provided that such arrangement is disclosed to investors.
[17] Paragraph 3.21, Consultation Paper.
[18] Paragraph 4.6, Consultation Paper.
[19] Paragraph 3.1.12, Public Response Paper.
[20] It appears from paragraph 4.12 of the Consultation Paper that the RM5.0 million issued capital refers only to the capital raised on the ECF platform and does not include the issuer's own capital contribution or funding raised through private placements.
[21] Refer to paragraph 4.10 of the Consultation Paper for the complete list of companies which are not permitted to raise funds through an ECF platform.
[22] Paragraph 3.27, Consultation Paper.
[23] Paragraph 3.2.6, Public Response Paper. The SC also clarified in this paragraph that the prohibition proposed in paragraph 4.15 of the Consultation Paper against more than one class of shares being offered in any one offering only applies where more than one class of ordinary shares (with different voting rights) are offered in the same offering.
[24] Paragraph 4.18(d), Consultation Paper.
[25] Paragraphs 4.18(a) and 4.18(c), Consultation Paper.
[26] Paragraph 4.12, Consultation Paper.
[27] Paragraph 4.21, Consultation Paper.

Unit No. 50-8-1, 8th Floor, Wisma UOA Damansara, 50 Jalan Dungun, Damansara Heights, 50490 Kuala Lumpur, Malaysia.
T: +(603) 2081 3999 F: +(603) 2094 3211 E: skrine@skrine.com W: www.skrine.com

The above limits will not apply to an issuer which is a microfund, i.e. an entity that provides small amounts of funding to seed-stage businesses.[28] However, the following restrictions apply to a microfund:

(a) it must be a venture capital company that is registered with the SC;

(b) it must have a specified investment objective; and

(c) it can only raise funds from sophisticated investors.[29]

Safe harbour

The SC recognises that the offering of shares on an ECF platform by a private company may be viewed as an invitation to the public to subscribe for shares, which is not allowed under section 15(1)(c) of the Companies Act 1965. Accordingly, the SC has stated that it is in discussion with the Companies Commission of Malaysia to create a safe harbour provision to enable private companies to offer their shares through an ECF platform.[30]

Notwithstanding the above, an issuer remains responsible for monitoring that it does not exceed the 50 shareholder limit[31] imposed on a private company by section 15(1)(b) of the Companies Act 1965.[32]

Disclosure document

The offering of shares on an ECF platform will not require the SC's approval and will be exempted from the prospectus requirements under the CMSA.[33] Instead, an issuer must lodge a standardised disclosure document with the ECF operator when it applies to host its offering on the platform.[34] The disclosure document must contain basic information about the issuer and the offering, e.g. its objective, targeted investment amount and the offer period.[35] The information is to be provided on a self-declaratory basis[36] and must not contain any inaccurate, false or misleading statement.[37]

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[28] Paragraph 3.1.19, Public Response Paper. The SC had originally proposed in paragraph 4.8 of the Consultation Paper that microfunds would only be allowed to use the ECF platform at a later stage of the development of equity crowdfunding.
[29] Paragraph 3.1.18, Public Response Paper.
[30] Paragraph 4.3, Consultation Paper.
[31] The 50 shareholder limit does not include shareholders who are employees or former employees of the company or its subsidiaries.
[32] Paragraph 4.4, Consultation Paper.
[33] Refer to sections 212 and 232, paragraph 2(j)(i) of Schedule 5 and paragraph 17 of Schedule 6 of the CMSA.
[34] Paragraph 4.28, Consultation Paper.
[35] Paragraph 4.28, Consultation Paper.
[36] Paragraph 4.28, Consultation Paper.
[37] Paragraph 4.29, Consultation Paper. The liability for false or misleading statements is set out in section 92A(2) of the CMSA.

An issuer is not permitted to advertise its offering except through the ECF platform and through a notice which directs prospective investors to the disclosure document that has been lodged with an ECF operator.[38]

The investor

Equity crowdfunding will be accessible to both sophisticated investors, i.e. accredited investors, high-net worth entities and high-net worth individuals, as specified in Part 1 of Schedules 6 and 7 of the CMSA, and to retail investors, i.e. those who are not sophisticated investors.[39]

There will be no limit as to the amounts which a sophisticated investor can invest, but a retail investor will only be allowed to invest a maximum of RM5,000 per issuer and a total amount not exceeding RM50,000 in a 12 month period.[40] An angel investor, i.e. one who is recognised by the Malaysian Business Angels Network, who is not a sophisticated investor is permitted to invest up to a limit of RM5,000 per issuer, and a maximum of RM500,000 in a 12 month period.[41]

An investor will be required to self-declare to the ECF operator that he complies with the relevant investment restrictions and to acknowledge the investment risks before he invests.[42] To safeguard the issuer, an investor who is in breach of his investment restriction will not be allowed to withdraw his investment.[43]

Investor safeguards

To safeguard investors, the SC proposes to adopt the '*all or nothing*' (AON) model, whereby an issuer will only be entitled to the proceeds raised on an ECF platform if it has successfully raised the targeted investment amount, instead of the '*keep-it-all*' (KIA) model, where an issuer will be entitled to receive the proceeds raised even if it falls short of the targeted investment amount.[44]

A cooling-off period is proposed to enable an investor to withdraw his investment within six business days of making his investment.[45] An investor will also be given the right to opt-out of his investment

[38] Paragraph 4.31, Consultation Paper.
[39] Paragraph 5.3, Consultation Paper.
[40] Paragraph 5.3, Consultation Paper and paragraph 4.1.5, Public Response Paper. The SC had originally proposed that a retail investor be allowed to invest RM3,000 per issuer and a maximum of RM30,000 in a 12 month period. After receiving feedback, the SC revised the limit per issuer to RM5,000 and increased the 12 month limit to RM50,000.
[41] Paragraph 4.1.6, Public Response Paper. The higher maximum investment limit of RM500,000 for an angel investor who is not a sophisticated investor was introduced after receiving feedback from the public.
[42] Paragraphs 5.4 and 5.7, Consultation Paper.
[43] Paragraph 5.4, Consultation Paper.
[44] Paragraph 3.13, Consultation Paper. Refer to paragraphs 3.9 to 3.12 of the Consultation Paper for a discussion on the merits of the AON and KIA models as well as footnote 13 of the Consultation Paper on an intermediate model, i.e. the '*minimum-maximum*' model, whereby a minimum amount of securities must be sold within the offering period for the contingency to be satisfied, and the amount of securities sold cannot exceed the specified maximum.
[45] Paragraph 4.40, Consultation Paper.

Unit No. 50-8-1, 8th Floor, Wisma UOA Damansara, 50 Jalan Dungun, Damansara Heights, 50490 Kuala Lumpur, Malaysia.
T: +(603) 2081 3999 F: +(603) 2094 3211 E: skrine@skrine.com W: www.skrine.com

within two weeks if a material adverse change occurs which affects the issuer or the project.[46] A material adverse change includes:

(a) the discovery of a false or misleading statement in, or a material omission of information from, the disclosure document; or

(b) a material change or development in the circumstances relating to the offering or the issuer, such a winding-up petition against the issuer or a material litigation that may affect the financial position of the issuer or enforcement action by a regulatory authority.[47]

To give effect to the above safeguards, an ECF operator is required to hold the amounts raised in a trust account[48] until the following conditions have been satisfied:

(a) the targeted amount to be raised has been met;

(b) no material adverse change has occurred during the offer period; and

(c) the cooling off period of six business days has expired.[49]

To provide a measure of liquidity in investments, the SC will allow investors to dispose of their shares through an ECF platform during a window period of two weeks for every six months in a year.[50]

CONCLUSION

As acknowledged by the SC, investing in private companies comes with attendant risks; in particular, that the project or issuer may fail, the lack of an active secondary market for the issuer's shares, and the inability to obtain a return due to non-declaration of dividends by the issuer. Time will tell whether equity crowdfunding will develop into a vibrant alternative market for private companies to raise capital in Malaysia.

KOK CHEE KHEONG
SKRINE

[46] Paragraph 4.36, Consultation Paper.
[47] Paragraphs 3.16 and 3.17, Consultation Paper. The SC has imposed the responsibility on the issuer to inform the ECF operator of the occurrence of a material change in a timely manner and on the ECF operator to notify the investors of the change (Paragraph 4.37 of the Consultation Paper).
[48] Paragraph 3.15, Consultation Paper.
[49] Paragraph 3.19, Consultation Paper. An ECF operator is allowed to impose additional conditions for the release of monies from the trust account, provided that such conditions serve the investors' interests (paragraph 2.4.7, Public Response Paper).
[50] Paragraph 2.7.6, Public Response Paper. In this regard, the SC had originally stated in paragraphs 3.27 and 3.28 of the Consultation Paper that the ECF platform is not intended to function as a secondary market for securities and should only facilitate the primary offering of an issuer's shares.

Unit No. 50-8-1, 8th Floor, Wisma UOA Damansara, 50 Jalan Dungun, Damansara Heights, 50490 Kuala Lumpur, Malaysia.
T: +(603) 2081 3999 F: +(603) 2094 3211 E: skrine@skrine.com W: www.skrine.com

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Introduction

Thursday 30 October 2014

In a recent landmark judgment[1], the Dutch Supreme Court has clarified the test that must be applied when determining whether a lender has validly required repayment of a loan prior to its specified maturity or made use of a right to cancel and require repayment of an uncommitted facility, or both (both referred to here as 'acceleration'). This judgment is important because it is the first of its kind and because it finally puts an end to more than a decade of uncertainty: uncertainty that was due, in part, to a judgment rendered by the Arnhem Court of Appeal in 2003.[2]

The implications of the Supreme Court judgment for credit relationships between lenders and professional borrowers or (large) corporate borrowers (both referred to here as 'professional borrowers') are discussed below. First, we will briefly examine the 2003 Arnhem Court of Appeal judgment.

The Arnhem Court of Appeal judgment

According to the Arnhem Court of Appeal the question of whether or not a lender may validly accelerate must be determined on the basis of the standards of reasonableness and fairness, taking into consideration all relevant circumstances. Even if an agreement expressly sets out a right of acceleration, the application of these standards may entail that a lender is only entitled to exercise that right if there are sufficiently serious grounds for doing so. The court added that, given its role in society, a bank has a special duty of care towards its clients as well as towards third parties if, according to generally accepted unwritten rules of law, it is required to observe the interests of these parties. The scope of this duty of care should be determined on a case-by-case basis. In the court's opinion, this implies that an acceleration should comply with the standards of proportionality and subsidiarity. According to the court, factors that may be relevant in determining whether a lender is entitled to accelerate include the nature of the credit relationship, the borrower's creditworthiness and the bank's credit risk (taking into consideration value of existing collateral or the expected value of any collateral that can still be provided, or both), the gravity of any breaches of the credit agreement by the borrower, the likelihood of a successful restructuring or refinancing, and broader public interests (such as the continued existence of jobs).

For more than five years, the Arnhem Court of Appeal judgment was considered the leading case on acceleration and received wide support in decisions by lower courts and from legal commentators. The general view was that under the judgment the position of the borrower was relatively well protected under Dutch contract law and that acceleration by a lender was not an easy exercise.

Not surprisingly, however, as the credit crunch unfolded, opposition to the judgment started to be voiced by legal commentators.[3] And at the same time, a large number of courts began to adopt approaches that differed in whole or in part from that of the Arnhem court.

The first point of criticism related to the way in which the Arnhem court applied the standards of reasonableness and fairness to the relevant credit agreement, using them to supplement the terms of that agreement (section 6:248(1) of the Dutch Civil Code ('DCC')). These standards can, for instance, provide a basis for the termination of an agreement despite the absence of termination provisions in that agreement. However, given that the credit agreement that was the subject of the Arnhem court proceedings did contain such provisions, as credit agreements invariably do, the court should instead have invoked the 'restricting effect' of reasonableness and fairness (section 6:248(2) DCC), which entails that a contractual provision (or the exercise of rights thereunder) does not apply to the extent that, in the given circumstances, this would be unacceptable according to the standards of reasonableness and fairness. The second point of criticism was that the reference to the standards of proportionality and subsidiarity is unclear and confusing since these standards are not defined in Dutch contract law. The third point of criticism was that the Arnhem Court of Appeal wrongly assumed a 'special' duty of care of banks towards their clients, whereas generally there is no such special duty under Dutch law in a credit relationship between a bank and a professional borrower.

The Supreme Court judgment

The Supreme Court makes clear that if a lender exercises a contractual right of acceleration, the validity of such acceleration indeed needs to be determined on the basis of section 6:248(2) DCC. This means that such exercise will be valid unless, having regard to the relevant circumstances, it must be considered unacceptable based on standards of reasonableness and fairness.[4] The Supreme Court added that the application of section 6:248(2) DCC does not preclude a court from weighing the interests of the parties involved. Circumstances that may be considered include that the bank was subject to a duty of care-obligation pursuant to its own general banking conditions and that the acceleration triggered an obligation for the borrower to pay to the lender the net present value of the interest payments that the lender would forgo as a result of the early repayment by the borrower.

What does this judgment mean for lenders and borrowers in the Netherlands?

The judgment underlines that under Dutch contract law 'freedom of contract' and 'pacta sunt servanda' (agreements must be kept) are leading principles. If a lender is contractually authorised to accelerate, it may exercise such authority in accordance with its terms, unless such exercise must be considered to be unacceptable based on standards of reasonableness and fairness. The burden of proof is on the borrower and, although a court must consider all relevant circumstances, the Supreme Court has repeatedly ruled that the courts must exercise great restraint in refusing to enforce otherwise binding rules on the basis of standards of reasonableness and fairness.[5] Moreover, the Supreme Court has ruled that in dealings between professional parties, the courts must exercise even greater restraint.[6] In our view, an acceleration can only be unacceptable if no person acting reasonably would have done this in the same way under the same or similar circumstances. It should also be noted that section 6:248(2) DCC allows that lenders exercise their rights, even where this would be disproportionally prejudicial to the borrower's interests. Any exercise is allowed, unless, in the given circumstances, this would be unacceptable according to the standards of reasonableness and fairness.

Is the judgment now a licence for lenders to do as they like? No. A lender should always carefully consider, and prepare for, an acceleration. It must strictly observe the terms of the credit agreement, communicate with the borrower in a clear and unambiguous way and, if requested, be able to demonstrate that it has taken into account all relevant circumstances, including the interests of the borrower.

And does this mean that borrowers should be more concerned when it comes down to an acceleration? Not necessarily. After all, the Supreme Court judgment does not in itself improve, or change, the lender's contractual right to accelerate. It only confirms that as a general rule the terms of credit agreement are determinative of the parties' rights and obligations. Having said that, if one compares the position of a borrower under the Arnhem Court of Appeal judgment, with the position of a borrower under the Supreme Court judgment, it is clear that under the latter a borrower will be relatively less protected under Dutch contract law. This, in our view, may urge a borrower not to just sit and wait but to pro-actively approach a lender as soon as it becomes aware of any events that trigger, or may potentially

trigger, the lender's authority to accelerate to discuss the situation and possible solutions. This may improve the borrower's chances in successfully arguing that the lender has taken an unacceptable approach.

Special duty of care for banks

A 'hot' issue that remains unresolved is whether banks are subject to a special duty of care in their dealings with borrowers.[7] By way of explanation: the word 'special' is often used to distinguish this duty of care from the 'general' duty of care that by operation of law applies to all participants in social and economic life (and which has been incorporated in the general banking conditions that are used by all major Dutch banks, in particular in their dealings with consumers and small and midsized corporate borrowers).[8] However, unlike a special duty of care, this general duty of care is not very strong, particularly in relationships between a lender and a professional borrower.

In our view, in particular in relation to professional borrowers, no such special duty of care exists. This view is supported by, among others, Supreme Court Advocate General Wuisman in his advisory opinion for the Supreme Court judgment of 13 May 2011[9], in which he took the view that a special duty of care only exists in 'special' circumstances, e.g. in situations in which a client of the bank has engaged that bank (given the latter's expertise and experience) to render advice on matters involving high financial risks for the client (given his income or assets), which risks are apparent to the bank and for which that client (given his frivolity or lack of expertise, or both) needs to be protected.

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[1] Supreme Court 10 October 2014, ECLI:NL:HR:2014:2929.

[2] Arnhem Court of Appeal 18 February 2003 ECLI:NL:GHARN:2003:AF5233 (Rabobank/Aarding).

[3] See, for example, D.A. Viëtor 'Opeising of weigering van krediet en uitwinning van zekerheden door een bank', TFR 2009-7/8, p. 264-275 and D.A. Viëtor 'Toetsing van de rechtmatigheid van opzegging van krediet door een bank', TFR 2011-11, p. 341-348.

[4] In its judgment of 9 January 1998, NJ 1998, 363 (Apeldoorn/Kinderdagverblijf Snoopy), the Supreme Court has made it very clear that it does not accept a courts using 'alternative' formulations if it tests the acceptability of a contractual provision under section 6:248(2) DCC. Examples of such inappropriate formulations that have been explicitly rejected by the Supreme Court are that the party exercising a contractual right must demonstrate that it has 'a reasonable interest' in doing so, that such exercise must not be disproportional as compared to the interests of the counterparty and that such exercise must not violate the standards of reasonableness and fairness.

[5] See, for instance, Supreme Court 9 January 1998, NJ 1998, 363, Supreme Court 17 December 2004, NJ 2005, 271 and Supreme Court 24 February 2006, RvdW 2006,232.

[6] Supreme Court 15 October 2004, NJ 2005, 141 (GTI Zwolle/Zürich).

[7] The reason for this is that the existence of a special duty of care was not accepted by the Amsterdam Court of Appeal in the appeal proceedings and therefore could not be a subject in the cassation proceedings.

[8] Supreme Court 15 November 1957, NJ 1958, 67 (Baris/Riezenkamp).

[9] ECLI:NL:HR:2011:BP6921. Similarly, B. Bierens 'Het waarheen en waarvoor van de bancaire zorgplicht', NTBR 2013/3.

Contact us

David Viëtor | Amsterdam | +31 20 71 71 464

Teun Struycken | Amsterdam | +31 20 71 71 861

Marc Orval | Amsterdam | +31 20 71 71 927

DISCLAIMER

Simpson Grierson

Significant Court of Appeal decision on redundancy

11 Nov 2014

The Court of Appeal has just issued an important decision on redundancy.

In 2013 the Employment Court had found (in the case of *Grace Team Accounting v Brake*) that an employee's dismissal on the grounds of redundancy from a small accountancy practice was not justified under section 103A Employment Relations Act. The Employment Court had held that the redundancy was "genuine" (in that it was not "*a mask for some other ulterior motive*") but that due to some incorrect information having been given to the employee in relation to the proposed restructuring, the redundancy was not what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

On appeal, Grace Team Accounting argued that the Authority and Courts should not be entitled to second-guess an employer's business decision, where it has been held to be a genuine restructuring.

However, the Court of Appeal has held that section 103A has significantly changed the law on redundancy. The principles in the well-known redundancy cases of *Hale* and *Aoraki* are no longer applicable. The Court has held that what is required is strict adherence to the "*explicit requirements for disclosure of information and consultation that now apply in redundancy situations*".

This means that employer decisions in relation to redundancies will potentially be subject to even greater scrutiny from the Authority and Courts going forward.

The Court of Appeal did state however, that "*if an employer can show the redundancy is genuine and that the notice and consultation requirements of s 4 of the Act [regarding good faith] have been duly complied with, that could be expected to go a long way towards satisfying the s103A test.*"

What this means for employers is that there may now be increased compliance costs in redundancy processes. The need to have a genuine reason for a redundancy has not changed, but the level of disclosure and consultation required to justify a dismissal on the grounds of redundancy, appears to have just got significantly higher.

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ARIFA LEGAL FLASH

17.11.2014

Beginning Friday, October 24, the Public Registry of Panama launched its new Electronic Registration System (SIR). With the implementation of this modern platform, new registration procedures will receive a *"Folio Real Electrónico"*, replacing the old registration system.

Each company will receive a unique number (*Folio number*) and all documents of the company will be recorded under the Folio number (similar to BVI).

From now on, the registration details will be in a separate sheet which is a certification and which carries a Security Verification Code (CSV) in order to verify its authenticity. Please keep this *"Certificate of registration"* attached to the public instrument.

The Public Registry of Panama has announced that it is currently undergoing a time of stabilization and normalization of the service system, with the subsequent difficulties and delays in the procedures for the electronic processing of documents and deeds, and new inscriptions. Consequently, the registration process is delayed.

We apologize for any inconvenience this may cause in the coming weeks. Our legal team is in regular and direct communication with the Public Registry of Panama authorities to monitor the procedures of our clients until all inconveniences are solved and the agility of the registration service is restored.

WHAT YOU SHOULD KNOW ABOUT THE NEW ELECTRONIC REGISTRATION SYSTEM AT THE PUBLIC REGISTRY OF PAMANA

A partir del viernes, 24 de octubre, el Registro Público de Panamá puso en funcionamiento su nuevo Sistema Electrónico de Inscripción Registral (SIR). Con esta moderna plataforma, los nuevos trámites e inscripciones que se ingresen a partir de la fecha, recibirán un *Folio Real Electrónico*, reemplazando así los antiguos sistemas de inscripción.

Cada sociedad tendrá un número único (similar a BVI). El número de folio representa un historial que recopila todos los movimientos administrativos que realice la sociedad.

De ahora en adelante, la información de inscripción será reflejada en una hoja independiente que es generada con un certificado reconocido legalmente el cual lleva un Código Seguro de Verificación ("C.S.V.") con el que se podrá verificar la autenticidad del documento (ver adjunto). Favor conservar la *"Constancia de Inscripción"* junto a la escritura.

Actualmente la institución ha informado que se encuentra en un momento de estabilización del sistema y normalización del servicio, con los respectivos inconvenientes y demoras en los procedimientos para el trámite electrónico de documentos y escrituras, así como las inscripciones en el nuevo sistema. En consecuencia, los trámites de inscripción están dilatados.

Ofrecemos disculpas por las incomodidades que esto pueda ocasionarle durante las próximas semanas. Nuestro equipo legal se encuentra en permanente y directa comunicación con las autoridades del Registro Público de Panamá para dar seguimiento a los trámites de nuestros clientes mientras se solucionan los inconvenientes presentados y se restaura la agilización del servicio registral.

LO QUE USTED DEBE CONOCER SOBRE EL NUEVO SISTEMA DE INSCRIPCIÓN REGISTRAL DEL REGISTRO PÚBLICO DE PANAMA

ARIAS, FABREGA & FABREGA
Plaza 2000, 16th Floor,
50th Street
P.O. Box 0816-01098
Panama, Republic of Panama
Tel.:+507 205 7000
Fax:+507 205 7001/02
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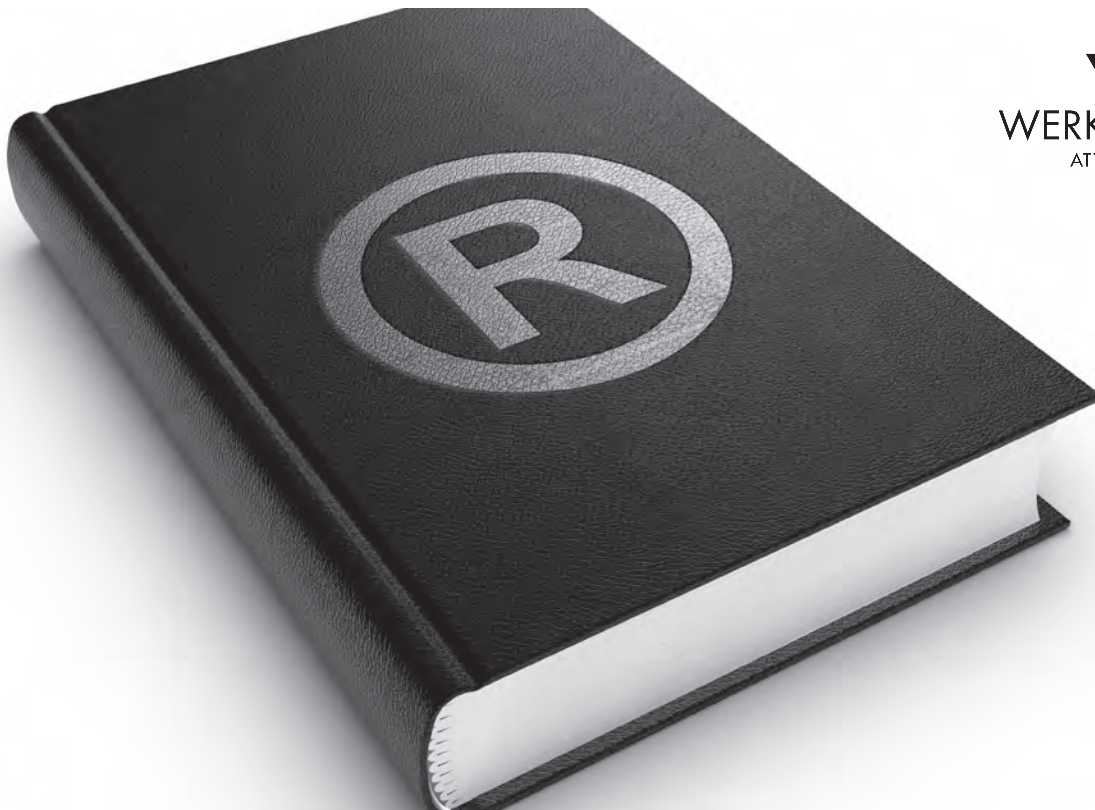

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SOUTH AFRICAN WINE AT GREATER RISK OF FRAUD

by Donvay Wegierski, Director

LEGAL BRIEF
NOVEMBER 2014

The annual Cape Wine Makers Guild Auction is reputed for premium quality wines, attracting both private collectors and trade buyers. The recent Nedbank Cape Wine Makers Guild Auction recorded the highest sales of top South African wines in its 30-year history reaching sales of over R11 million. Another first was the application of security foil strips to each bottle of wine on auction, each foil strip bearing its own security code embedded in a hologram which is only system readable - a pledge of origin.

INTRODUCTION

The popularity of SA wines has grown immensely. This however heightens the threat of fraud and counterfeiting - a reality we are all familiar with as it has far-reaching implications both financially and undisputedly to personal health and safety. Although the problem of counterfeit wines is believed far more extensive outside of South Africa, the reality remains that a successful brand will in all likelihood be counterfeited. Applied security foils to the auction wines no doubt reassure buyers.

The need to reassure is however ultimately intertwined with a brand, the primary attraction and badge of origin. The experience people associate with branding should never be underestimated. Needless to say the damage caused by counterfeit products to the reputation of a brand and producer can be detrimental.

The value attributable to branding requires protection which could extend to trade marks, designs, patents, copyright and domain names - collectively referred to as "IP" or intellectual property.

IP protection is by its nature an involved process and for the purpose of this article, is briefly alluded to below.

THE POWER OF TRADE MARK REGISTRATION

Trade mark protection, registration and maintenance are vital contributors to the success of any business.

As a consequence of the territorial nature of intellectual property rights, a trade mark registered in South Africa is not automatically available for use or registration in foreign countries. It is therefore essential to first ascertain by searching the relevant registers whether the proposed trade mark is available in the relevant market, and that the use thereof will not infringe an existing local trade mark.

Trade mark registration is recommended in every relevant country and consequently, while essential principles of trade mark law provide guidance, trade marks are governed by country-specific acts and regulations.

While it is possible to lodge individual national applications in most territories, there are currently two types of registrations available

to South Africans that confer trade mark protection in a number of territories by filing a single application.

The two types referred to are Europe's Community Trade Mark ("CTM"*) and West Africa's OAPI/AIPO** registration. Both are attractive options for exporters wanting to protect their trade marks in the European Union and in West Africa respectively - proving to be both time and cost-effective.

The international registration of trade marks, the Madrid System, offers another option to trade mark owners to secure protection of their trade marks in a number of countries. This is done by filing a single international registration application with a centralised office in Madrid.

South Africa approved the ratification of the Madrid Protocol but has not yet acceded to it. The Madrid Protocol requires member countries to examine trade marks within a certain time frame; one of the reasons for South Africa not joining to date.

South Africa's Companies and Intellectual Property Commission ("CIPC") has since September 2013 accepted electronically-lodged trade mark applications which may reduce current time frames. India and Mexico recently joined, and with a number of Asian countries set to join in 2015, it will hopefully be a matter of time before South Africa also becomes a member of the Madrid Protocol.

CONCLUSION

The advantages of trade mark registration include the below:

> The proprietor or licensee is afforded a statutory and exclusive right to use a trade mark in respect of the goods and/or services for which it is registered;

> Once filed, the application presents an obstacle to latter-filed same/similar applications in that territory;

> Unauthorised use of the trade mark can constitute trade mark infringement for which the proprietor can claim damages;

> Trade marks can be licensed to third parties to which the parties may agree to payment of royalties;

> Customs authorities in certain territories can prevent the unauthorised importation of goods bearing the registered trade mark; and

> Trade marks can be renewed, usually every ten years, in perpetuity.

It can be seen from the above that the advantages of trade mark registration should clearly inform any filing approach. Both in the wine industry and beyond, brand value continues to increase over time; steadily proving that above all else, it is brand loyalty that triggers purchase.

***CTM:** *A CTM covers all 28 member countries of the EU, namely Austria, Belgium, Bulgaria, Croatia, Cyprus, The Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the UK*.

****OAPI:** *Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Congo, Comoros, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Ivory Coast, Mali, Mauritania, Niger, Senegal and Togo*.

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ABOUT THE AUTHOR

DONVAY WEGIERSKI

Title: Director
Office: Stellenbosch
Direct line: +27 (0)21 809 6009
Email: dwegierski@werksmans.com

Donvay Wegierski is a director of Werksmans Attorneys and member of the firm's Intellectual Property (IP) Practice in Stellenbosch. She specialises in all aspects of IP law and related matters, including trade mark screening and registration, trade mark infringement and passing off, domain and company names, and counterfeit goods. Donvay's particular area of focus is on IP law and related matters outside of South Africa.

A highly-recommended expert in her field, she is named in the World Trademark Review's 2014 rankings, noted for her 'razor-sharp strategic advice'.

Donvay is also a member of the South African Institute of Intellectual Property Law (SAIIPL) and has a B SocSc LLB from the University of KwaZulu-Natal.

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TIPO Considers Relaxing Grace Period Regulations

09/30/2014
Ivy Chin

Overview

In the context of patent filing, a grace period refers to the period during which a patent application can be filed following certain types of disclosure of the invention to the public. The rationale behind the grant of grace periods is that such types of disclosure are often deemed "non-prejudicial." The concept of grace periods is found in the patent filing systems of many countries, albeit in varying degrees of detail. For an applicant who plans to submit a patent application in multiple countries for the same invention, it is possible that he/she may claim a grace period in one country but not in another because of the difference in regulations. This makes it difficult to formulate a transnational application strategy in advance. This is particularly true for applicants who are individuals with relatively limited resources or small and medium enterprises without a dedicated patent department. For these applicants, they often choose to disclose their invention only after filing a patent application, or claim the grace period only in the event of an accidental disclosure of their invention. From the Taiwanese Intellectual Property's (TIPO) perspective, conflicting grace periods may cause different results when determining patentability. Such discrepancies may also undermine the efforts of respective patent offices in promoting the free exchange of resources.

In recent years, Taiwan has actively lobbied to join the Trans-Pacific Partnership Agreement (TPP), and the issue of patent grace periods is one of the items being actively negotiated by the TIPO. Clearly, aligning the grace period provisions will be an important legislative issue. On August 11, 2014, the TIPO held a public consultation session on the rationale for the proposed relaxation of grace period regulations. During the session, TIPO Director Wang Mei-Hua indicated that the Patent Act should be amended as soon as it is confirmed that Taiwan will join the TPP and that the TIPO will consult the public about possible amendments.

Current grace period regulations in Taiwan

According to Article 22, Paragraph 3 of the Patent Act, the grace period is 6 months. The grace period applies to the assessment of both novelty and inventive step. The modes of public disclosure for which a grace period can be claimed are:

(1) *Disclosure as a result of experimentation*

The term "experimentation" refers to an experiment on the effects that can be achieved by an invention regardless of the purpose of the public disclosure of the invention. Therefore, this mode of disclosure applies to both commercial experiments and academic experiments.

(2) *Disclosure as a result of publication*

This mode of disclosure covers both commercial and academic publications.

(3) Disclosure as a result of exhibitions organized or recognized by the government

Exhibitions organized or recognized by the government are exhibitions that are held locally or overseas and are organized or agreed to in advance or retroactively by any government body in Taiwan.

(4) Disclosure against the will of applicant

The benchmark date for determining whether an applicant may claim the 6-month grace period is the filing date of the patent application. Even if international priority is claimed, the patent application must still be filed within 6 months of the public disclosure if any of (1) to (4) above applies. If, before filing, a third party has independently created an identical invention and disclosed it to the public, the invention will generally be considered prior art.

Possible amendments to grace period regulations

At present, the major differences in grace period regulations among different jurisdictions are as follows:

1. the duration of the grace period (which is either 6 months or 12 months);
2. the benchmark date for determining whether an applicant may claim the grace period (either the filing date or priority date);
3. the modes of disclosure based on which the grace period can be claimed;
4. the procedural requirements for claiming the grace period; and

5. whether the disclosure of an identical independent invention by a third party precludes patentability.

According to statistics released by the TIPO, more than 97% of patent applications claiming the 6-month grace period in Taiwan in recent years were from local applicants. Over 80% of those local applicants were academic and/or research institutions. The other 20% were from local companies and individuals. For this reason, the TIPO considers that any reforms with respect to grace period regulations should be mainly based on local applications. The TIPO also indicates that the wishes of companies and individuals should be taken into account as well.

In general, the right to obtain a patent can be better protected if the 6-month grace period is extended. For example, if the grace period is extended to 12 months, or if the benchmark date for determining whether an applicant may claim a grace period is changed from the filing date to the priority date, researchers and inventors will have more time to prepare patent applications and will be able to obtain the desired scope of protection. They would definitely benefit from a longer grace period. For a third party who learned about an invention that was disclosed before filing, although grace period regulations can help determine whether the inventor can still obtain patent rights—thereby avoiding the situation of making a similar invention and wasting time and resources—the third party may however be misled into believing that the invention is no longer patentable and proceed to invest resources in developing a similar invention, for which the third party may be sued for infringement. To prevent this situation, the TIPO believes that the grace period regulations should be in simple and clear language in order to ensure certainty in law.

With respect to the procedural requirements, when claiming a grace period based on any of the modes of disclosure in (1) to (3) above, the applicant should state the facts of the public disclosure of the invention (including the date of disclosure). For malicious disclosure against the will of applicant, , the applicant should, at the time of filing, state that its invention has been disclosed by a third party. A grace period may still be claimed even if the applicant is not aware of the third party disclosure until after filing. However, no grace period may be claimed if the application is not filed within six months of the third party disclosure. To avoid uncertainty in the determination of prior art, the TIPO is at present more inclined to retain these procedural requirements.

With regard to the modes of disclosure, small and medium enterprises and academic research institutions have greater motivation to “disclose” their inventions before filing a patent application as this could attract more funds. Indeed, small and medium enterprises often decide whether or not to apply for a patent based on the public acceptance of their inventions. Therefore, the TIPO believes that small and medium enterprises will be encouraged to create more inventions if more modes of "non-prejudicial" disclosure are available. This is because they would then have more flexibility in disclosing

their inventions. However, the TIPO indicates that due to the absence of dedicated personnel in small and medium enterprises to handle intellectual property matters, grace period regulations should be sufficiently simple in order to avoid placing additional burdens on these enterprises.

As to the question of whether the disclosure of an identical independent invention by a third party precludes patentability, it is generally agreed, except by a few countries including the United States, that regardless of whether the disclosure is made before or after a “non-prejudicial disclosure” made by the applicant, the disclosure will preclude patentability. The TIPO indicates that any relaxation of regulations in this regard will depend on the views of experts in the relevant field.

Conclusion

It appears that the TIPO is inclined to extend the grace period and introduce more modes of "non-prejudicial" disclosure as exceptions to destruction of novelty or inventive step while keeping the current procedural requirements for claiming the grace period. In the meantime, the content of the actual amendments and their possible impact remain to be seen.

BAKER BOTTS

For more information please contact:

Bill Kroger

Jason Newman

ENERGY UPDATE - NOVEMBER 11, 2014

The impact of off-lease drilling in light of the San Antonio Court of Appeals recent decision in *Lightning Oil Co. v. Anadarko*

On October 29, 2014, the San Antonio Court of Appeals issued its decision in *Lightning Oil Co. v. Anadarko*, holding that Lightning Oil was not entitled to a temporary injunction enjoining Anadarko from drilling through Lightning Oil's leasehold estate from an off-lease location to reach the minerals under Anadarko's Lease. Anadarko, which owned a lease on the Chapparal Wildlife Management area, was prohibited from drilling on the surface of the wildlife management area, and received permission from the surface owner of Lightning Oil's lease tract to drill horizontal wells from a surface location on the Lightning lease tract.

Lightning Oil argued in the trial court that Anadarko's wells would potentially harm its mineral estate and development plans. At the temporary injunction hearing, the court heard evidence from Lightning Oil witnesses that a casing failure could harm the ground water on the Lightning Oil lease tract, and that Anadarko's drilling would interfere with Lightning Oil's own drilling program. The main issue at the trial court was whether Anadarko's wells, which would pass through Lightning's leasehold estate, was a trespass. The trial court denied Lightning Oil's request for a temporary injunction.

The San Antonio Court of Appeals upheld the trial court's ruling, finding that Lightning Oil had failed to prove that Anadarko's wells presented imminent, irreparable harm. The court found that Lightning Oil's evidence was speculative, and that there was no evidence that Lightning could not be compensated in money damages for any harm caused by Anadarko's drilling. The court did not address the issue of whether Anadarko's wells, by passing through Lightning Oil's leasehold estate, presented a compensable trespass.

This case is an important development for operators forced to access minerals through off-lease drilling locations, in that it may prove difficult to enjoin off-lease drilling in light of the court's ruling. Whether off-lease drilling is a trespass will likely be decided in subsequent opinions.

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California's "Online Eraser" Law for Minors to Take Effect Jan. 1, 2015

11.17.14

By Thomas R. Burke, Deborah A. Adler, Ambika K. Doran, and Tom Wyrwich

On Jan. 1, 2015, California's "Online Eraser" law will take effect, requiring websites and other online service operators to delete on demand any content posted by minors. The law also prohibits such operators from sharing minors' personal information with third parties for the purpose of marketing particular products or services to them. The new law, however, is ambiguous and possibly unconstitutional.

Law Will Require Websites to "Erase" Content Posted by Minors

California S.B. 568 mandates that operators of websites, online services, and online and mobile applications permit minors who are registered users to remove (or request and obtain removal of) content they have posted on the operator's website. It also requires operators to provide notice of the right to remove, and instructions for exercising it. The law does not apply to third parties that operate, host, or manage online services on behalf of others.

The law does not apply if: (1) the law requires the operator to maintain the content; (2) a third party—not the minor—posted the material; (3) the material was posted anonymously, or the operator anonymizes the material so that the minor cannot be individually identified; (4) the minor failed to follow posted instructions to obtain the removal of content; or (5) the minor received compensation "or other consideration" for providing the content. To comply with a request for removal, an operator need only make the user's posted material invisible to the public; it need not delete all content from its servers or delete material copied and posted by third parties.

The statute also requires operators to take "reasonable actions in good faith" to not publish online advertisements for 19 categories of products and services, ranging from alcohol to spray paint, on websites that are directed to minors or if the website operator has actual knowledge that the website visitor is a minor and the advertisement is specifically directed to them. In addition, the new law prohibits operators from disclosing minors' personal information to third parties with actual knowledge that it will be used to advertise or market those prohibited items.

California S.B. 568, which will soon be Chapter 22.1 of the California Business and Professions Code, does not itself provide a private right of action. However, any affected minor could try to bring a civil action under California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, which allows for injunctive relief and civil penalties of up to $2,500 per violation.

Ambiguities in the Law

As the bill's effective date nears, significant questions remain as to key provisions.

First, the law is unclear as to which operators must comply with the new regulations. The restrictions are intended to apply to two kinds of operators: (1) those with ***actual knowledge*** that a user is a minor, and (2) those whose forums are ***directed to minors.*** The bill does not define "actual knowledge," and it expressly states that operators are not required to collect age information about its users. Nor is it clear what it means for a forum to be "directed to minors." The law defines such a forum, or portion thereof, as one "created for the purpose of reaching an audience that is predominately comprised of minors, and is not intended for a more general audience comprised of adults." Although the federal Children's Online Privacy Protection Act ("COPPA"), 15 U.S.C. §§ 6501–6506, and the FTC's COPPA Rule, 16 C.F.R. Part 312, regulate children's privacy and have led to some guidance on when websites are "directed to minors" (as well as on the ways "actual knowledge" of a minor's status is obtained outside of collecting date-of-birth), COPPA and the FTC's rules apply only to minors under 13. This necessarily leaves courts with little guidance whether a forum is directed to teenagers rather than adults.

Second, the law is ambiguous as to ***when*** a person can procure removal of material posted when they were a minor. On its face, the statute only allows "a minor" to do so—meaning that a minor must request removal ***before*** turning 18.

Constitutional Challenges Ahead

The law will almost certainly face significant legal challenges as potentially violating the dormant Commerce Clause and the First Amendment. It is also inconsistent with federal statutes, including the Communications Decency Act of 1996, 47 U.S.C. § 230, the statute that provides significant protection from state-law claims for hosting third-party content.

Perhaps most concerning are the law's First Amendment implications. As written, the bill requires operators to delete information, even if it is newsworthy or if other users have commented on it or otherwise interacted with it (e.g., "liked," shared, or retweeted the content). In contrast, newspapers or magazines can publish a minor's comment without obtaining the minor's permission. The law is also likely to face a challenge that it is not narrowly tailored to serve a compelling government interest.

The Center for Democracy and Technology, an organization devoted to Internet free speech, has already opposed the law because "legal uncertainty for website operators will discourage them from developing content and services tailored to younger users, and will lead popular sites and services that may appeal to minors to prohibit minors from using their services." Ultimately, the Center concluded, the bill may lead to "reducing minors' access to information and platforms for expression online." California Senate Rules Committee, Senate Floor Analyses, S.B. 568, at 9 (Aug. 29, 2013).

Regardless of whether the law is ultimately declared unconstitutional, it takes effect in 2015, meaning any operator of a forum used by minors should closely examine whether it applies to them—and if so, take any feasible steps to comply with the law.

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Hogan Lovells

International Trade Alert
13 November 2014

See note below about Hogan Lovells

WTO rules against United States on revised country of origin labeling

In a recently issued decision, a World Trade Organization (WTO) compliance Panel (Panel) ruled in favor of Canada and Mexico in a dispute over the United States' country of origin labeling (COOL) requirements as they apply to cattle and hog muscle cuts.[1] Although it found that the United States has a right to require country of origin labels for meat products, the compliance Panel concluded that the U.S. Department of Agriculture's (USDA's) revised COOL regulations failed to bring the United States into compliance with earlier Panel and Appellate Body findings that the COOL requirements treat Canadian and Mexican livestock less favorably than domestic livestock in violation of WTO rules.

The United States may appeal the WTO decision. Canada and Mexico are poised to enact retaliatory trade sanctions, however, if the United States loses the appeal, as seems very likely, or if it opts not to appeal the decision and it becomes final. It has been estimated the sanctions could affect US$2 billion in U.S. exports to Canada and Mexico. The USDA could also try to revise the rule again, although it appears unlikely that the USDA would be able to revise the rule in a way the WTO would find acceptable.

Background

The WTO first ruled on the U.S. COOL regulations in November 2011 after Canada and Mexico challenged the requirements. The USDA regulations limited U.S. origin labels to meat from animals born, raised, and slaughtered exclusively in the United States and required origin labeling for products of foreign origin. The WTO ruled that the regulations violated Articles 2.1 and 2.2 of the Technical Barriers to Trade (TBT) Agreement and that a policy that Secretary of Agriculture Vilsack announced in a letter violated the General Agreement on Tariffs and Trade (GATT). The WTO Appellate Body upheld the decision in July 2012, requiring the United States to bring its regulations into compliance.

The USDA responded by amending the regulations in May 2013 to require the labels of muscle cuts of beef, lamb, chicken, goat, and pork to specify the country or countries where the animal was born, raised, and slaughtered, instead of addressing these steps collectively

Contacts

Gary Jay Kushner
Partner, Washington, D.C.
gary.kushner@hoganlovells.com
+1 202 637 5856

Warren Maruyama
Partner, Washington, D.C.
warren.maruyama@hoganlovells.com
+1 202 637 5716

Brian D. Eyink
Associate, Washington, D.C.
brian.eyink@hoganlovells.com
+1 202 637 6406

Leigh A. Gusky
Associate, Washington, D.C.
leigh.gusky@hoganlovells.com
+1 202 637 5438

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through a general origin statement, in effect doubling down on its original rule by making it even more restrictive.[2] The rule prohibits "commingling" livestock, or processing livestock from Canada, Mexico, and the United States during the same processing day and then labeling those products with a "mixed-origin" label. Canada and Mexico challenged the revised regulations, arguing they are even more detrimental to conditions of competition among domestic and foreign products than the original regulations.

The WTO decision

In its most recent decision, the WTO's Dispute Settlement Understanding Article 21.5 compliance Panel evaluated whether the revised 2013 regulation complies with the WTO's earlier ruling, finding that the regulations continue to treat Canadian and Mexican livestock less favorably than U.S. livestock, as was widely anticipated. In fact, according to the Panel, the amended regulations increase the original COOL measure's detrimental impact on the ability of livestock imported in the U.S. market to compete because it "necessitates increased segregation of meat and livestock according to origin, entails a higher recordkeeping burden, and increases the original COOL measure's incentive to choose domestic over imported livestock."[3] The WTO found that the regulations violate two of its governing provisions, but opted not to evaluate a third alleged violation.

Article 2.1 of the TBT Agreement

The Panel found that the revised regulations violate Article 2.1 of the TBT Agreement, which requires that members' technical regulations not discriminate against imported products. In prior cases, the WTO established a two-part test for analyzing potential Article 2.1 violations: (1) a determination of whether a measure has a detrimental impact on conditions of competition for imports; and (2) if so, whether the impact stems from "legitimate regulatory distinctions" between like products.[4] In the instant case, the Panel found that the 2013 revised regulations negatively impact conditions of competition for Canadian and Mexican cattle and hogs, and that these detrimental impacts did not stem from legitimate regulatory distinctions.

As it did in its 2012 analysis, the Panel concluded that the regulation's recordkeeping requirements were disproportionate to the amount of information that consumers received, created a *de facto* incentive to use domestic livestock, and adversely affected conditions of competition in violation of TBT Article 2.1. It also found that the United States arbitrarily applied the measure because it exempts processed meat and restaurants in many situations. The Panel determined that the 2013 rule's more detailed and specific labeling requirements, restrictions against commingling, and elimination of previous flexibilities regarding the order of countries listed on meat labels caused an even greater detrimental impact on Canadian and Mexican producers than the original regulation.

According to the compliance Panel, the USDA's revised rule only increased the incentives for meat processors to refrain from using imported livestock. In effect, the only way to comply with the revised rule is to segregate domestic and imported livestock and track them more closely along the production line, which would increase costs for companies that purchase imported livestock compared to those that purchase only domestic livestock. The Panel reasoned that the prohibition harmed imports by increasing "the practical necessity for private actors to choose domestic over imported livestock."[5] In its arguments, the United States conceded that its goal with the revised rule was to make the labeling required more proportionate with the information it gathered, rather than to address the detrimental impact the Appellate Body identified with its prior decision. It maintained, however, that the USDA's revised rule did not increase the detrimental impact on imports.

When analyzing whether the United States had presented a "legitimate regulatory distinction" that could justify the disparate impact of the rule, the compliance Panel emphasized that the labels could be inaccurate in some situations because the rule allows for flexibility in describing where the animal was raised. Under the rule, if an animal spent 15 days in the United States prior to slaughter, companies could label it "raised" in the United States. The United States argued that this flexibility was necessary to save space on the label and to recognize that any animal born outside the United States would also spend some time in the United States before slaughter. The compliance Panel disagreed, arguing that the flexibility "takes no account of the substantial amount of time that traded livestock typically spend outside the United States."[6] In addition, the

revised rule failed to address the extensive exceptions for restaurants and processed foods, undercutting the rule's purported goal of ensuring that consumers have accurate origin information.[7]

Article 2.2 of the TBT Agreement

In a minor victory for the United States, the Panel did not find that the regulations violate Article 2.2 of the TBT Agreement, which requires technical measures to be no more trade restrictive than necessary to fulfill a legitimate objective. The Panel adopted a holistic approach of "weighing and balancing"[8] a series of factors in determining whether the revised USDA rule complied with Article 2.2, including (1) the rule's degree of contribution to a legitimate objective, (2) the rule's trade restrictiveness, (3) the nature of the risks at issue, (4) whether the proposed alternatives are less trade-restrictive, (5) whether the proposed alternatives would make an equivalent contribution to achieving the rule's policy goals, and (6) whether the proposed alternative is "reasonably available."[9]

As it did in the 2012 decision, the WTO Panel held that providing consumers with information on a product's origin is a legitimate objective. The Panel also considered the risks if the United States did not fulfill the goals of its regulation, which it assessed in terms of "consumer interest in, and willingness to pay for, different types of country of origin information."[10] However, the Panel was unable to ascertain the "gravity of consequences" if these objectives were not met because of USDA's inability to quantify the consumer benefits.[11] In addition, Canada and Mexico proposed four alternative measures they argued could accomplish the United States' goals without restricting competition as much as the COOL regulations. After examining the proposed alternatives, the Panel held that neither Canada nor Mexico established *prima facie* arguments for how the four proposed alternative measures would make an equivalent contribution to the legitimate objective of providing consumers with origin information, would cause less harm to trade than the United States' COOL regulation, or were reasonably available in terms of administrative feasibility.

Article III:4 of GATT

The Panel found that the regulation also violates Article III:4 of GATT, which prohibits members from favoring domestic products over imported products.[12] The Panel based this finding on its conclusion that the amended COOL measure increased the original rule's detrimental effect on the competitiveness of imported livestock compared to U.S. products. In reaching this conclusion, it relied on the same considerations that informed its finding of a detrimental impact under Article 2.1 of the TBT Agreement. Unlike its analysis of the Article 2.1 violation, however, it was not necessary for the Panel to determine whether the detrimental impact stemmed exclusively from legitimate regulatory distinctions in order to find a violation under Article III:4.

Implications of the decision

The United States has 60 days to appeal the Panel's ruling, and the Appellate Body would then issue a final decision within 90 days. In a recent interview, Secretary Vilsack said the U.S. Trade Representative is considering an appeal.[13] He added, however, that the WTO has asked the United States not to appeal the decision until January 2015 to allow it to handle its current backlog of appeals.

Meanwhile, Canada and Mexico have already begun threatening to impose retaliatory tariffs if the United States loses an appeal or opts not to challenge the decision. Those retaliatory tariffs would likely become effective within a year. Canada released in June 2013 a list of 38 products it plans to target with retaliatory measures, including live bovine and swine, bovine and swine meat, offal, cheese, apples, cherries, corn, maple syrup, chocolate, pasta, cereals, bread and pastries, frozen orange juice, ketchup, and wine.[14] Mexico has not released a list of planned retaliatory measures, but it is similarly expected to target agricultural products. Reports estimate the retaliatory tariffs may cost as much as US$2 billion.[15]

In light of the potential detrimental economic impact of these potential tariffs, as well as other concerns, leaders of both the House and Senate agriculture committees are encouraging the administration to reach a settlement instead of continuing to argue the dispute before the WTO. House Agriculture Chairman Frank Lucas (R-OK) said in a statement that it is "time for the Administration to put this case behind us by exercising leadership in order to achieve a lasting compromise that is satisfactory for our producers, processors, retailers, consumers and our trading partners."[16] Similarly, Senate Agriculture Chairwoman Debbie Stabenow (D-MI) issued a press release commenting that the United States "can spend decades litigating the issue at the WTO, or we can work together to find a solution that encourages international trade and gives consumers

what they need to make choices for their families."[17] Secretary Vilsack said he has asked USDA staff to evaluate whether they can revise the labeling requirement in a way that satisfies the agency's congressional mandate to provide specific labeling without running afoul of WTO rules.[18] In the meantime, the COOL regulations will remain in effect.[19]

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We will continue to monitor developments with this dispute and other labeling and international trade issues. Please do not hesitate to contact us if you have any questions.

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[1] World Trade Organization, United States – Certain Country of Origin Labeling (COOL) Requirements, Reports of the Panel, WT/DS384/RW, WT/DS386/RW (20 October 2014) (WTO Report).

[2] Final Rule, Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, 78 Fed. Reg. 31367 (24 May 2013) (to be codified at 7 C.F.R. pts. 60 and 65).

[3] United States – Certain Country of Origin Labeling (COOL) Requirements, World Trade Organization.

[4] WTO Report ¶ 7.61.

[5] *Id*. ¶ 7.167.

[6] *Id*. ¶ 7.243.

[7] *Id*. ¶ 7.272.

[8] The approach closely resembles and was drawn from the Appellate Body's approach to weighing "necessity" in GATT Article XX. *See, e.g.*, AB Report, *Brazil – Tyres*, WT/DS322/AB/R, ¶¶ 142-212 (3 December 2007).

[9] *Id*. ¶ 7.303.

[10] *Id*. ¶ 7.375.

[11] *Id*. ¶¶ 7.422-7.433.

[12] *See id*. ¶ 7.643.

[13] Chris Clayton, *COOL Appeal Likely in 2015: Backlog at WTO May Mean a U.S. Appeal Won't Come Until January, The Progressive Farmer* (27 October 2014, 3:28 p.m.).

[14] Statement by Ministers Fast and Ritz on U.S. Country of Origin Labelling, Government of Canada (7 June 2013).

[15] *Canada threatens tariffs on American wine, orange juice and ketchup in meat labelling dispute,* Financial Post (20 October 2014, 9:48 a.m.).

[16] Chris Clayton, *Views in Congress Vary on COOL*, The Progressive Farmer (20 October 2014).

[17] *Id*.

[18] See Clayton, *supra note* 13.

[19] Despite fervent support in some corners of USDA, the White House, and populist farm groups for COOL, the agency is running out of options, as any fresh effort to maintain the rule is likely to require confronting the exceptions for restaurants and processed foods, which were specifically cited by the Panel. This would likely lead to a serious political backlash from large and small restaurant owners and food companies alike, who would join meat processors and mainstream farm groups in opposition. It would also have the practical effects of making restaurant menus and food labels much longer and virtually unreadable, as well as further driving up food costs for American households.

About Hogan Lovells

Hogan Lovells is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses.

Atlantic House, Holborn Viaduct, London EC1A 2FG, United Kingdom

Columbia Square, 555 Thirteenth Street, NW, Washington, D.C. 20004, United States of America

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San Francisco Compromise Leaves Basic Chain Store Regulations in Place, Tightens Some Controls

November 11, 2014

San Francisco's regulation of chain stores (known in San Francisco as "formula retail") began in 2004 with conditional use requirements in a few neighborhoods, and expanded greatly in 2007 when voters approved an initiative ordinance requiring conditional uses for formula retail in any neighborhood commercial districts (NCD). In general, the Planning Code has required new formula retail uses in NCDs and a few other zoning districts to obtain conditional use approvals from the Planning Commission. A few districts are subject to a flat prohibition on formula retail, while others require conditional use permits for only limited classes of formula retail.

Now, after a year-long comprehensive review by the Planning Department, the Board of Supervisors has adopted a compromise that largely maintains most of the existing formula retail rules while tightening some requirements. Among other things, the new legislation would expand the scope of what counts as formula retail which could make the establishment of some new formula retail stores in the city even more onerous.

As adopted by the Board of Supervisors in early November, the new amendments will:

- Broaden the definition of formula retail to include international locations when determining if a business has the 11 locations that make the use subject to formula retail controls. Previously, only U.S. locations were considered. (Thus, the formula retail requirements apply if a retailer has 11 other branches anywhere in the world, even if the proposed San Francisco location is the first location in the U.S.) Also, under the amendments, any entitled or permitted location would be counted toward the 11-location threshold, even if not yet open for business. (The Planning Department had proposed to increase the formula retail threshold to 19, but this was dropped as part of the compromise.)

- Expand the geographical scope of the conditional use requirements to include the emerging Mid-Market neighborhood. Previously, formula retail was not restricted in any downtown C-3 zoning district.
- Define how the conditional use requirements apply to changes in existing formula retail uses. For example, a change in the owner/operator of a formula retail use would not require full conditional use review in some cases.
- Establish more specific criteria for determining whether conditional uses for formula retail should be approved.
- Require an economic impact analysis for formula retail uses over 20,000 square feet (except for groceries).

Although applications for proposed formula retail uses have often been controversial in San Francisco, the conditional use requirement for formula retail does not always result in disapproval. A Planning Department report prepared in 2013 stated that of approximately 93 formula retail applications filed since 2004, 75 percent were ultimately approved.

After a year long review process and a compromise between those seeking to loosen the formula retail controls and those seeking tighter controls, formula retailers may be able to count on at least some period of stability in the basic rules.

The intensity of San Francisco's concerns about chain stores may appear to be a local phenomenon, but a growing number of jurisdictions across the country are adopting chain store controls. San Francisco's regulation of chain stores thus could continue to serve as a testing ground for limits that may be adopted in other jurisdictions in the future.