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January 2015 e-Bulletin

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- **PRAC @ PDAC** Toronto March 3, 2015
- **57th International PRAC Conference**
  Brisbane - 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
- **58th International PRAC Conference**
  Vancouver - Hosted by Richards Buell Sutton LLP
  September 26—29, 2015

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BAKER BOTTS EXPANDS BANKRUPTCY PRACTICE

Baker Botts Expands Bankruptcy Practice with Arrival of New York Partner Emanuel Grillo

NEW YORK, 06 January, 2015: Baker Botts LLP, a leading international law firm, is pleased to announce that Emanuel ("Manny") Grillo has joined the firm as a partner in the Bankruptcy Group. Mr. Grillo brings more than 20 years of bankruptcy and restructuring experience to Baker Botts, and is based in the firm's New York office.

"Adding bankruptcy expertise in the New York office augments our nationwide presence and allows us to support our clients' needs anywhere in the country," said Baker Botts Managing Partner Andrew M. Baker.

Prior to joining Baker Botts, Mr. Grillo was a partner in Goodwin Procter's Financial Institutions Group and chaired its Financial Restructuring Practice. Mr. Grillo has broad-based experience representing secured and unsecured creditors, debtors and court-appointed trustees, as well as both sellers and purchasers in distressed mergers and acquisitions conducted under the auspices of the Bankruptcy Code. His experience includes cross-border and prepackaged bankruptcy cases. Mr. Grillo completed his J.D. from Fordham University School of Law in 1991 and B.S.F.S. from Georgetown University in 1988.

For additional information visit www.bakerbotts.com

RODYK FURTHER STRENGTHENS INTERNATIONAL ARBITRATION PRACTICE

SINGAPORE, 02 January 2015: Rodyk & Davidson LLP is pleased to announce the admission of a new partner, Iain Sharp. The commercial litigation and arbitration specialist brings with him significant experience in representing clients in multiple industries such as international trade and commodities, oil and gas, shipping, banking and finance disputes, defence products, civil fraud, intellectual property and technology and insurance/reinsurance.

Recognised by Asia Pacific Legal 500 as a leading individual for his international arbitration and shipping practice, Iain has conducted major arbitrations and dispute resolutions in London, Scandinavia, Continental Europe, Dubai, Hong Kong, China, India, Singapore, Japan and South Korea, and is well versed in the various institutional rules, ad-hoc arbitrations and trade association rules. Prior to joining Rodyk, Iain was the managing partner of Bryan Cave in Singapore.

Iain will join Rodyk's multi-jurisdictional arbitration team, providing significant additional English law capability. In addition to its leading Singapore practitioners, including senior counsel Philip Jeyaretnam, SC, and Lok Vi Ming, SC, the practice boasts German law and Indian law capability with experienced partners Patrick Dahm and Ganesh Chandru.

Philip Jeyaretnam adds: "Iain's arrival is timely given the rapid growth of Singapore as an international arbitration centre, including for English law-governed commodity arbitrations. Rodyk is confident both that this growth will continue, as the Asia-Pacific region develops, and that Rodyk will remain at the heart of international arbitration in Singapore."

For additional information visit www.rodyk.com

PROMINENT ENTERTAINMENT BOUTIQUE JOINS DAVIS WRIGHT TREMAINE

LOS ANGELES, 08 JANUARY, 2015: The lawyers of the boutique law firm Wyman & Isaacs LLP have joined Davis Wright Tremaine LLP, bringing expanded expertise and services to Davis Wright's nationally renowned entertainment and media practice.

Bruce Isaacs and Bob Wyman come to the firm's L.A. office as partners, and Cheryl Nelson has joined as counsel. The three lawyers have represented many of the largest motion picture production studios and TV networks, as well as many other leading players in the entertainment industry.

"We are thrilled to have this trio of seasoned attorneys further strengthen our outstanding media and entertainment team," said Mary Haas, Los Angeles partner-in-charge at Davis Wright. "The Wyman & Isaacs group brings tremendous depth of experience and very sophisticated skills."

"The opportunity to partner with Davis Wright's exceptional lawyers, who are well-known for handling cutting-edge issues, was one we couldn't resist," said Isaacs. "After 26 years together, Bob and I are energized to be part of a practice that complements our past experience while allowing us to expand into related areas in which we are interested."

"We will remain efficient and responsive to our clients," said Wyman, "while working on challenging and interesting new matters in a collaborative, large firm environment."

"We have always made the highest standards of service a priority," said Nelson, who will supervise production legal services for current DWT (and former Wyman & Isaacs) clients as well as new film, television, and digital production company clients. "I am delighted to be able to contribute to this team and to help grow this area of practice"

The entertainment group at Davis Wright is regularly ranked among the best in the nation. The firm was named 2015 "Law Firm of the Year" in the area of Entertainment Law – Motion Pictures and Television by Best Lawyers and *U.S. News*, and the firm's media practice was recognized last year with the Chambers USA Award for Excellence. Chambers also recognized 13 DWT partners individually in 2014 in various Media & Entertainment subcategories.

Over his 33-year career in litigation, Bruce Isaacs has handled matters for motion picture studios, insurance companies, producers, directors, distributors, and many others in the entertainment industry. He has represented plaintiffs and defendants in major copyright, idea submission, trademark, right of publicity, and other intellectual property, contract, and business matters.

He also has considerable experience with profit participation disputes. He recently represented 40 game developers who were profit participants in the multi-billion dollar video game franchise "Call of Duty" – "Modern Warfare." As reported in the *Los Angeles Times*, Wyman & Isaacs' clients received a $42.3 million payment just weeks before the trial was scheduled to commence, and thereafter the case settled as to all plaintiffs in the $140 to $180 million range, as estimated by the *Times*.

Isaacs is rated AV Preeminent® (5 out of 5) by Martindale-Hubbell. He received his B.A. from Pomona College and his J.D. from Loyola Law School.

Bob Wyman has been practicing in the transactional entertainment area for 30 years. He has been involved in all aspects of motion picture and television development, production, financing, and distribution, including work in digital technology. He has been engaged as an expert witness in litigation concerning the entertainment industry, including lawsuits involving profit participation claims, the valuation of intellectual property rights, clearances procedures, motion picture industry guild agreements, and production insurance coverage issues.

Wyman is also rated AV Preeminent® by Martindale-Hubbell. Wyman received his B.S. from Northwestern University and his J.D. from Georgetown University Law Center. He has been a lecturer at UCLA and USC.

Cheryl Nelson has handled production legal services for feature films and television productions (including unscripted television) for over 25 years. She has represented producers, independent production companies, studios, writers, and directors in matters pertaining to film, theatrical, television, and direct-to-DVD productions. Nelson received her B.A. and J.D. from the University of Minnesota. She too is rated AV Preeminent® by Martindale-Hubbell.

For more information, visit www.dwt.com

GIDE PARTNER APPOINTMENTS

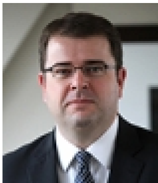
PARIS - 18 December 2014: Gide is pleased to announce the appointment of two new equity partners: Capucine Bernier, a member of the Insurance, Industrial Risk & Transport practice group, based in Paris, and Jean-François Levraud, a member of the Real Estate Transactions & Financing practice group, based in Casablanca. These appointments are effective from 1 January 2015.

Commenting on the appointments, Gide Senior Partner Baudouin de Moucheron said: "Congratulations to our two new partners: their appointment reflects their talent and daily commitment to the firm and its clients. With the integration of seventeen partners in a single year, Gide once more confirms its strategy, based on multidisciplinarity and excellence, that aims for permanent adaptation to market requirements and the consolidation of our key areas of expertise, both as advisors and litigators."

Capucine Bernier

Admitted to the Paris Bar in 1998, Capucine Bernier specialises in insurance law and civil liability. She acts most particularly in disputes pertaining to non-life insurance (damages, civil and professional liability, unusual and industrial risks) as well as life insurance. She advises and assists both traditional and bank insurers, and various industrial players in the management of disputes that are either sensitive or have a major strategic and economic impact. Capucine is a member of the Union of young French insurers and reinsurers (UJARF), the Insurance and Reinsurance Lawyers Association (AJAR), the International Association of Insurance Law (AIDA), and is the vice-chair of the Paris Insurance Institute alumni association (ADIAP).

Capucine is also a regular speaker at conferences and a contributor to a number of specialist publications. She holds a degree from the Paris Insurance Institute, and two Master's degrees, respectively in insurance law and in business law, from the University of Paris I - Panthéon Sorbonne and Paris V.



Jean-Francois Levraud

Admitted to the Paris Bar in 2003, Jean-François Levraud co-heads Gide's Casablanca office. He specialises in providing advice on real estate transactions, particularly sale and lease-back transactions. He also assists clients on construction transactions and real-estate developments and has, in addition, developed a comprehensive practice with regard to sales and acquisitions. Jean-François joined the Gide office in Casablanca in September 2013 to strengthen the real estate activity and practice of the office, for both French and Moroccan clients of the firm.

A graduate of the Bordeaux Institut d'Etudes Politiques (IEP) (1997) and of the Ecole Supérieure de Commerce de Paris (ESCP - Paris Business School) (2000), he also holds a postgraduate degree in French, European and International Litigation from the University of Paris V Descartes (DESS de Contentieux national, européen et international) and a postgraduate degree in Public Law from the University of Paris I - Panthéon Sorbonne (DEA de Droit public interne) (2002).

For additional information visit www.gide.com

MCKENNA LONG & ALDRIDGE WELCOMES NEW HEALTH CARE PARTNER

Amy E. Fouts Returns to McKenna's Atlanta Health Care Practice

ATLANTA – 20 November, 2014: Amy E. Fouts rejoins McKenna Long & Aldridge LLP's Health Care practice as a partner in Atlanta. Ms. Fouts focuses on health care compliance and regulatory matters, primarily counseling public and private hospitals and health care systems, physician groups, hospice and home health agencies and individual practitioners. Her skills include assisting health care providers with a wide range of federal and state fraud and abuse issues, including government and commercial payor audits, government investigations and compliance program development and review.

Ms. Fouts routinely counsels providers regarding privacy and data security, HIPAA compliance and breach response. She also represents health care clients in the defense of civil False Claims Act actions, whistleblower suits and medical staff and board inquiries.

"We are delighted to have Amy rejoin MLA," said Kathlynn Butler Polvino, head of MLA's Health Care practice. "Her experience and substantive knowledge about compliance and reimbursement matters will further expand the firm's capability to serve our health care clients."

Ms. Fouts has presented at national and regional seminars on Medicare and Medicaid audit programs, the Stark Law and Anti-Kickback Statute, and compliance and regulatory matters. She received her J.D. and bachelor's degree from the University of Georgia.

For more information, visit www.mckennalong.com

SIMPSON GRIERSON APPOINTS PUBLIC POLICY HEAD

AUCKLAND - 11 November, 2014: Simpson Grierson announced today that Tony Ryall will be joining the firm as Head of the Public Policy practice, starting at the end of January next year.

In this role, Mr Ryall will provide strategic and operational leadership to Simpson Grierson's Public Policy practice nationally and internationally. He will work closely with all other practice leaders in the firm in conjunction with Simpson Grierson's Chairman, Kevin Jaffe.

"Tony brings to Simpson Grierson a long and impressive track record in public life" Mr Jaffe said, "and he will be a strong contributor to the firm's senior leadership team. This appointment is another significant initiative in the development and growth of our firm.

Tony Ryall

Tony is a proven leader who has gained wide respect across the political spectrum as well as from community and business leaders. During his parliamentary career he has compiled an impressive ministerial record while leading a number of large, complex ministries. He's a strategic thinker with strong analytical and problem-solving strengths.

Over the years Tony has developed an in-depth knowledge of public policy issues across government and business, giving him a diverse and unique view across the New Zealand and wider regional economy."

Mr Ryall has thoroughly enjoyed his political career but is now very focussed on his future as a key member of the Simpson Grierson executive team.

"The interface between the public and private sectors in New Zealand is increasingly important, and I am looking forward to working at that interface with Simpson Grierson and its clients."

During a distinguished parliamentary career, Mr Ryall has held the following portfolios: Minister of Health, Minister of State Owned Enterprises, Minister of State Services, Minister of Justice, Minister in charge of Housing New Zealand Limited, Minister of Local Government, and Minister in Charge of the Audit Department.

For additional information visit www.simpsongrierson.com

ALLENDE & BREA

ASSISTS WELL FARGO (LENDER) IN US$96.5 MILLION ENERGY FINANCING

Buenos Aires - 10 November 2014: Argentina's Allende & Brea Abogados advised Wells Fargo, as well as the loan's guarantor, the Export-Import Bank of the United States, with financing arrangements to Argentine subsidiary of UK energy company Pan American Energy with a US$98.5 million loan to fund oil and gas exploration works in the Golfo San Jorge and Neuquén basins.

The loan was signed on 10 October.

Allende & Brea Abogados Partner Jorge Mayora and Valeriano Guevara Lynch and associates Maria Cecilia Victoria and Marcos Patron Costas acted in the transaction.

For additinal information visit www.allendebrea.com.ar

ARIAS & MUNOZ

ASSISTS BANCO G&T WITH HONDURAS' FIRST SOLAR ENERGY PROJECT

December 2014: Arias & Munoz Honduras assisted Banco G&T in a syndicated loan to Energía Básica S.A. (Enerbasa) of the Lufussa group, to be used for the construction and development of what would be the first Solar Energy Project to operate in Honduras.

Partner Mario Agüero headed the deal with the help of Associate René Serrano, both members of Arias & Muñoz Honduras.

This is the first financing approved and granted to a solar energy project in Honduras and the plant is expected to begin operations in March 2015, with an important generation of clean energy that aims to contribute to the diversification of energy sources in the country.

For additional information visit www.ariaslaw.com

BAKER BOTTS

ENERGY TRANSFER PARTNERS AND ENERGY TRANSFER EQUITY ANNOUNCE FINAL TERMS OF BAKKEN PIPELINE PROJECT AND SXL GP/IDR EXCHANGE

HOUSTON - 24 December, 2014: Energy Transfer Partners, L.P. and Energy Transfer Equity, L.P. announced that the conflicts committees and the Boards of Directors of ETP and ETE have approved the final terms of the previously announced transaction involving the Bakken pipeline project ("Bakken Pipeline") and Sunoco Logistics Partners L.P. (NYSE: SXL) general partner interest (GP) and incentive distribution rights (IDR) exchange.

In the transaction, ETP will receive for redemption the 30.8 million ETP common units currently owned by ETE, ETE's 45% interest in the Bakken Pipeline, and $879 million in cash, plus reimbursement for development expenses related to the Bakken Pipeline, in exchange for an additional 40% interest in the SXL GP/IDRs represented by additional Class H units to be issued by ETP. In addition, ETP and ETE have agreed to reduce existing IDR subsidies from ETE to ETP by $55 million in 2015 and $30 million in 2016 (see updated IDR subsidy schedule in Exhibit A below).

The transaction is expected to close in February 2015 after the record date for fourth quarter distributions on both the SXL GP interest and IDRs and ETP common units, but will be effective as of January 1, 2015.

Baker Botts was counsel to Goldman Sachs.

Baker Botts Lawyers Involved: Hillary Holmes (Partner, Houston), Joshua Davidson (Partner, Houston), Monica White (Associate, Houston) and Mike Bresson (Partner, Houston).

For additional information visit www.bakerbotts.com

BENNETT JONES

ADVISES REPSOL ON $15.1 BILLION ACQUISITION OF TALISMAN ENERGY

CALGARY - 16 December, 2014: Repsol S.A. ("Repsol"), global energy company headquartered in Madrid, Spain, has entered into an agreement to acquire all outstanding common shares of Canadian oil company Talisman Energy Inc. at $9.33 each, plus assumption of about $5.48 billion of debt.

The deal will transform Repsol into one of the largest energy groups worldwide, adding operations in Colombia, Norway, North America and Southeast Asia, reinforcing its upstream business, which has become the company's growth engine.

The $15.1 billion transaction will be completed pursuant to a Plan of Arrangement and is expected to close in mid-2015. This is the largest international transaction by a Spanish company in the last five years.

Bennett Jones LLP represents Repsol with support of in-house counsel Luis Suárez de Lezo Mantilla, Miguel Klingenberg Calvo and Pablo Blanco Perez, with a team led by David Spencer, that included Jon Truswell and Colin Perry (M&A and securities); Jean Pierre Pham (International Due Diligence); Vivek Warrier (Canadian Due Diligence); John Gilmore (Employment); Susan G. Seller (Pensions); Karen Dawson (Banking & Finance); Don Greenfield (Investment Canada) and Melanie Aitken (Competition).

For additional information visit www.bennettjones.com

GIDE

ACTS ON ISSUANCE OF EUR800 MILLION UNDATED SUBORDINATED NOTES BY SOGECAP

PARIS - 5 January 2015: Gide advised ABN AMRO Bank N.V., Banco Bilbao Vizcaya Argentaria, S.A., Santander Global Banking & Markets and Société Générale Corporate & Investment Banking as joint lead managers on the issuance by SOGECAP of 800 million euros undated subordinated notes, admitted to trading on the Euro MTF market of the Luxembourg Stock Exchange.

Gide's team was led by Hubert du Vignaux (partner), assisted by Bastien Raisse.

For additional information visit www.gide.com

CAREY

ADVISES HAPAG LLOYD IN MERGER WITH CONTAINER SHIP BUSINESS COMPANIA SUD AMERICANA DE VAPORES

SANTIAGO - 04 November, 2014: Carey acted as local counsel to Hapag Lloyd in the merger and combination of the container ship business with Compañía Sud Americana de Vapores.

Carey advised Hapag Lloyd through a team led by partners Marcos Ríos, Pablo Iacobelli, Oscar Aitken and associates Juan Pablo de la Maza, Patricio Laporta, Fernanda Anguita, Francisco Arce and Nicole Finkelstein.

For additional information visit www.carey.cl

BRIGARD URRUTIA

ASSISTS APOLLO CAPITAL MANAGEMENT IN US$100M FLOATING RATE NOTE AGREEMENT WITH CANCOL ENERGY COLOMBIA

BOGATA - 3 December 2014: Brigard & Urrutia Abogados have helped US real estate investor Apollo Capital Management enter into a US$100 million floating rate note agreement with Canacol Energy Colombia.

Geoproduction Oil and Gas, a subsidiary of Canacol, was guarantor for the issuance. Under the agreement, Canacol can access US$50 million immediately and the remaining US$50 million over the next 18 months. It will use the funds to finance its oil and gas operations in Colombia and elsewhere in Latin America.

Brigard & Urrutia Abogados Partner Carlos Fradique-Méndez and associates David Lopez Bruce, Julián Hurtado and Daniel Santiago assisted in the transaction.

For additional information visit www.bu.com.co

CLAYTON UTZ

ADVISING PENINSULA ENERGY ON $69.4 MILLION EQUITY AND DEBT FUNDING

PERTH - 17 December 2014: Clayton Utz is advising ASX-listed uranium miner Peninsula Energy Ltd (ASX:PEN) on its A$69.4 million equity and debt funding, to enable Peninsula to complete stage 1 construction and commence production at its Lance ISR projects in Wyoming.

The funding arrangements include a A$16.8 million institutional placement, a A$52.6 million accelerated renounceable entitlement offer and a US$15 million debt facility.

The Clayton Utz team is led by Perth corporate partner Matthew Johnson and senior associate James Clyne.

For additional information visit www.claytonutz.com

KOCHHAR & CO.

ASSISTS SOFTBANK IN HISTORIC INVESTMENT IN SNAPDEAL

Kochhar & Co. recently assisted SoftBank in closing its historic investment in Snapdeal - one of India's leading and largest e-commerce companies. The transaction involved infusion of US$ 627 million by SoftBank Corporation and is the single largest investment in the Indian e-commerce sector.

Kochhar & Co. was involved in conducting the due diligence on the investee company, providing structuring advice with respect to the instrument, preparation and negotiation of the transaction documents, providing advice on regulatory, corporate and other compliances under Indian law including assistance with closing.

HOGAN LOVELLS

ADVISES DUN & BRADSTREET IN ACQUISITION OF NETPROSPEX

WASHINGTON, D.C. - 8 January, 2015: Hogan Lovells has advised Dun & Bradstreet, a leading source of commercial information and insight on businesses, on its acquisition of NetProspex, a Massachusetts-based company and leader in B2B professional contact data and data management. The transaction, which closed on 5 January 2015, was valued at US$125 million net of cash assumed.

The acquisition joins NetProspex’s comprehensive professional contact database with Dun & Bradstreet’s proprietary global business data and analytics. The two companies believe that their combination of leading capabilities and complementary technologies and expertise will help their collective customers to better segment, target and understand their ideal customers, identify and prioritize opportunities, and grow their business.

Hogan Lovells Washington, D.C. corporate partners Joseph Gilligan and Allen Hicks led the multidisciplinary team advising Dun & Bradstreet with assistance from relationship partners Randy Segal (corporate, Northern Virginia) and Marcy Wilder (privacy, Washington, D.C.) and partners from the antitrust, employee benefits, intellectual property, litigation, privacy, and tax practice groups, including: Carin Carithers, Dan Davidson, Joe Krauss, Scott Loughlin, Leigh Oliver, Audrey Reed, Evans Rice, and Tim Tobin.

For additional information visit www.hoganlovells.com

MCKENNA LONG & ALDRIDGE

OBTAINS DEFENSE VERDICT IN ASBESTOS LIABILITY TRIAL

SAN FRANCISCO - December, 2014: McKenna Long & Aldridge successfully defended building products manufacturer CertainTeed Corporation from a suit filed by the family of a deceased plumber, claiming that his use of CertainTeed asbestos pipes caused his death from lung cancer. On December 16, 2014, an Alameda County Superior Court jury in Oakland, CA, returned a defense verdict for CertainTeed Corporation. CertainTeed was represented at trial by McKenna partner Chris Wood.

Plaintiffs claimed that CertainTeed was liable for exposing the decedent to asbestos from cutting of asbestos cement pipe. CertainTeed showed that the employer of the decedent knew about the health risks of improper handling of its asbestos cement pipe based on CertainTeed's efforts to inform its customers and users. CertainTeed put on evidence that the employer had implemented a policy for safe handling of the A/C pipe. The jury voted unanimously that the CertainTeed asbestos cement pipe did not fail to perform as safely as an ordinary consumer would have expected starting in 1978. The jury determined that CertainTeed wasn't negligent and that if there were insufficient warnings, they were not a substantial factor in causing the decedent's lung cancer.

While the jury also found that the A/C pipe had "potential risks" that were known and that the risks presented "a substantial danger," when asked "Do you find the ordinary consumer would NOT have recognized these risks?" They answered: "No." The "ordinary consumer" was defined as someone at the time of the decedent's exposures (1978-1986).

The lengthy trial, presided over by Judge Jo-Lynne Lee, spanned 2 months, starting with opening statements on October 29, 2014 and finishing with closing arguments on December 15, 2014. The jury deliberated 5 ½ hours, later indicating that they spent over four hours on the question of whether asbestos caused the lung cancer. CertainTeed and co-defendant Buttes Pipe & Supply (which also received a defense verdict) had put on evidence that decedent was a smoker and had been exposed to extensive second-hand smoke as a child. Evidence that asbestos caused the lung cancer rested on a finding of uncoated asbestos crocidolite fiber found on autopsy in the lungs. On pathology, there were no asbestos bodies, no pleural plaques and no asbestosis. Pathological evidence of smoking consisted of emphysema as well as anthracotic pigment. Jurors told counsel that they were split on whether plaintiffs had met their burden of proof on asbestos as a cause, and so turned to the warnings and state-of-the-art knowledge questions to reach their verdict.

For additional information visit www.mckennalong.com

NAUTADUTILH

VICTORY FOR BASIC-FIT BEFORE THE LIEGE COURT OF APPEAL IN GENERAL DISCRIMINATION CASE

BRUSSELS - November, 2014: On 4 November 2014, NautaDutilh won a significant victory for Basic-Fit before the Liège Court of Appeal. The appellate court overturned the Liège Court of First Instance's decision of January 2014 in a gender discrimination case.

In response to market needs, Basic-Fit decided to turn one of its fitness centres in Liège into a ladies only club. A male member challenged the decision and initiated legal proceedings before the Liège Court of First Instance, which ruled against Basic-Fit.

However, on 4 November 2014, the Liège Court of Appeal overturned the earlier judgment, on the ground that men and women have different physiques and, therefore, fitness clubs may treat them differently.

The NautaDutilh team consisted of François Tulkens (administrative law), Barbara François and Philippe François (employment law).

For additional information visit www.nautadutilh.com

RODYK

ACTS FOR HL BANK ACQUISITION OF PORTFOLIO LOANS FROM NATIONAL AUSTRALIA BANK LIMITED

SINGAPORE: Rodyk acted for HL Bank in the acquisition from National Australia Bank Limited of a portfolio of property and term loans granted to medical practitioners and medical and dental clinics in Singapore ("Portfolio"). The Portfolio was transferred pursuant to Section 55C of the Banking Act and required the approval by the Monetary Authority of Singapore and the High Court.

The matter involved extensive due diligence to ensure that all loan and security documents were properly executed, and that they were legally binding and enforceable, including carrying out and reviewing title searches on all properties, borrowers and security providers.

Corporate partner Jacqueline Loke led, supported by partner Terence Lin. Real estate partner Norman Ho led on the real estate aspects, supported by partner Chou Ching, senior associates Ngaim Yi Ling, Woon Jing Yi and associate Er Ewen.

For additional information visit www.rodyk.com

SIMPSON GRIERSON

ADVISES GRAYMONT ON PURCHASE OF MCDONALDS LIME AND TAYLOR LIME

AUCKLAND - 15 December, 2014: Simpson Grierson partner Michael Pollard, senior associate Mark Tan and solicitor Kate Teppett have acted for Canadian lime business Graymont in its purchase of McDonalds Lime from Holcim New Zealand and New Zealand Steel for an undisclosed sum and the purchase of Taylors Lime from Holcim.

Graymont is the second largest supplier of lime and lime-based products in North America. This is the Canadian company's first investment outside North America.

Michael Pollard says of the work, "This was a challenging process with significant interest shown in the businesses from both New Zealand and offshore buyers. Graymont is a specialist lime producer and it has been exciting to hear of their plans for the businesses in New Zealand, particularly given the broad uses of lime. Coupled with their expertise, the Graymont team is very inclusive and they will be great investors in New Zealand."

For additional information visit www.simpsongrierson.com

TOZZINIFREIRE

ADVISES SAAB AB IN NEGOTIATION WITH BRAZILIAN GOVERNMENT AGREEMENT FOR 36 SAAB GRIPENING ULTRASONIC FIGHTER AIRCRAFT

SAO PAULO: TozziniFreire is assisting SAAB AB, the Swedish defence, aerospace and security company ("SAAB") in the negotiation with the Brazilian Government (Ministry of Defense through COMAER) of (i) an agreement governing the development and supply of 36 SAAB Gripen NG ultrasonic fighter aircraft, (ii) an industrial cooperation agreement governing the offset projects to be developed by SAAB in Brazil in connection with the aircraft supply, and (iii) the contractor logistic support agreement related to maintenance of such aircraft.

Value of deal US$ 5.4 billion; Date of deal 27 October, 2014.

In the early 2000s, with renewed economic stability, the Brazilian Air Force ("FAB") started an extensive renewal of its inventory through several acquisition programs, the most ambitious of which was the acquisition of 36 fighter aircraft to replace its Mirage III. After several postponements, the project was restarted on 4 November 2007, and named the F-X2 Project. On 18 December 2013, SAAB was announced by the Brazilian Government as the company selected to start exclusive negotiations with the Aeronautics Command ("COMAER") aiming at the development and supply of the SAAB Gripen NG fighter aircraft, beating strong competitors such as the U.S.-based Boeing and the French Dassault.

On 27 October 2014, SAAB signed a historic contract with the Brazilian Federal Government (Ministry of Defense through COMAER) covering the development and production of 36 Gripen NG fighter aircraft for FAB. The total order value is approximately SEK 39.3 billion (approximately, US$ 5.4 billion). SAAB and COMAER have also signed an industrial co-operation contract to deliver substantial technology transfer from SAAB to the Brazilian industry, and is finalizing details for execution of the contractor logistic support agreement related to maintenance of such aircraft in the future.

The contracts will come into effect once certain conditions have been fulfilled. These include, among others, the necessary export control-related authorizations. All of these conditions are expected to be fulfilled during the first half of 2015. Gripen NG deliveries to FAB will be undertaken from 2019 to 2024.

Counsel to Saab TozziniFreire Advogados. José Luis de Salles Freire – founding partner (general supervision); Pedro G. Seraphim – partner (Main coordinator of negotiation team); Alexei Bonamin – partner; Jun Makuta – partner; Heloísa Ferreira Scaramucci – partner; Claudia Boneli – partner (Administrative Law matters); Andreia de Andrade Gomes – partner (IP matters); Jerry Levers de Abreu – partner (Tax matters); Mihoko Kimura – partner (Labor matters); Ana Cândida de Lemos Carvalho – associate; Walkyria Kluge – associate; Jacques Abi Ghosn – associate; Roberta Aronne – associate; Thaísa Longo – associate; Marjorie Iacoponi – associate.

For additional information visit www.tozzinifreire.com.br

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  April 18—21, 2015
- **PRAC @ INTA** San Diego May 3, 2015
- **PRAC @ IPBA** Hong Kong May 7, 2015
- **PRAC @ IBA** Vienna October 5, 2015
- **58th International PRAC Conference**
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11 December 2014

Draft Mining Industry Action Plan proposes radical reforms for NSW

By Nick Thomas and Tom Dougherty.

Key Points:

The Planning Assessment Commission would be history, if the NSW Minerals Industry Taskforce's recommendation are accepted.

The NSW Minerals Industry Taskforce has issued a draft report calling for the removal of the Planning Assessment Commission (**PAC**) and other radical regulatory financial measures, with a view to reigniting and sustaining the development of the minerals industry in NSW.

The Taskforce was appointed by the NSW Minister for Resources and Energy primarily from the resources industry, and is one of eight industry taskforces [1] formed to prepare 10 year action plans outlining:

- the issues raised by industry and what industry leaders believe needs to be done to continue to grow their sector domestically and overseas; and
- recommendations for action by Government, industry players and research institutions.

The Government intends that, once the action plans are adopted, priority actions will be tracked and performance will be reported at an annual Business Leadership Forum.

The NSW Government released the Taskforce's draft Action Plan (dated October 2014), in late November. It proposes a 25 year strategy with 12 recommendations for urgent action. Public submissions are invited until Friday 19 December.

Remove or reduce the PAC

According to the draft Action Plan, "the single most important initiative that the NSW Government can take to support the development of the industry is to provide greater certainty, transparency and timeliness to the planning and regulatory decision-making regime".

The Taskforce's primary concerns are that the PAC members are not elected, so they are not accountable in the same way as ministers are, and they are established to operate independently of Government policy, so there is limited transparency and certainty in decision-making.

The Taskforce also notes that "NSW is the only jurisdiction in Australia where major projects are often approved by an independent body, not the relevant minister". The PAC determines most State significant project development applications, under delegated authority from the Minister for Planning.

The Taskforce's primary recommendation is that the relevant minister hold decision-making power for approvals for major projects, so that the Government is accountable for project approval decisions. Consequently, it recommends that

the PAC be abolished, or that its role be limited to an advisory one. Even then, the Taskforce views the PAC as unnecessary, given that the Department of Planning and Environment provides a comprehensive assessment of major project applications.

It will be interesting to see how the Government responds to this recommendation, given that the Minister for Planning delegated decision-making authority to the PAC in order to de-politicise decisions, but the PAC has come under fire recently for decisions in relation to some mining projects.

Other recommendations on the regulatory system

The Taskforce's other recommendations on the regulatory system for mining exploration and production include:

- establishing a lead agency to drive cross-agency decisions within agreed time-frames;
- streamlining the decision-making processes for exploration and mining activity and addressing policy gaps, with an emphasis on risk-based regulation (to reduce process and time frames) and provision of greater certainty in approach (as an example, the Taskforce proposed a broader power to modify planning approvals for mining);
- demonstrating excellence in service delivery for, and regulation of, the resources sector;
- communicating more clearly the comprehensiveness and robustness of the NSW regulatory regime; and
- continuing to improve community engagement in the mining assessment process.

Recommendations for fiscal certainty

In order to reduce the financial burden on the NSW, the Taskforce recommends that:

- current royalty rates be held for 25 years to create greater security; and
- the current list of overall fees and levies be consolidated and reduced in real terms over time.

Developing skills and providing supporting infrastructure

The Taskforce recommends that the NSW Government:

- work with industry to provide a skilled workforce to enhance the NSW mining industry's international competitiveness;
- commit to investing in the availability, accessibility and promotion of geosciences information to current and potential explorers in Australia and overseas;
- work with researchers and industry to fund research in deep cover exploration, mining operations productivity and low emission energy technology; and
- work with the Commonwealth Government to boost the competitiveness of the freight network available in NSW.

Importance of the Action Plan

The Taskforce notes that:

- NSW coal production is set to fall without significant investment to expand existing mines and develop new ones; and
- the production of no-coal resources will also fall sharply without an increase in mineral exploration – specifically, six of the State's 12 large-scale mines are expected to close between 2021 and 2027.

The Action Plan is intended to reverse these trends.

The Action Plan comes at a time when the State Government is reviewing its regulatory schemes for minerals and onshore petroleum, in response to recommendations from the NSW Chief Scientist.

Next year is shaping up to be a significant one in terms of regulatory reform for the resources industry.

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[1] The other taskforces cover agriculture, creative industries, the digital economy, international education and research, manufacturing, professional services and the visitor economy. [back]

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MINING NEWS

Ordinance no. 541/2014 from DNPM's Head Director

It was published on the Official Gazette on December 19th, 2014, the Ordinance no. 541/2014, issued by the Head Director of the National Department of Mineral Production (DNPM). The new Ordinance establishes several new proceedings to be adopted by the mining companies before Brazilian Authorities, and changes several previous regulations, such as assignment of mining rights, issuance of permits for temporary extraction (Guia de Utilização – “GU”) and the clearance of encumbered areas available for new miners, among others. The Ordinance will be enforceable on February 2nd, 2015 and will be valid for the proceedings already ongoing before DNPM, in accordance to their stages.

One of the main changes is related to the requirements for assignment of mining rights. From February on, the approval and annotation of the assignment before DNPM will be conditioned to the non-existence of outstanding debts inscription in regard to the Financial Compensation for Exploitating Mineral Resources (Compensação Financeira pela Exploração de Recursos Minerais – “CFEM”).

On the other hand, if an installment program was initiated for the Annual Fee per Hectare (Taxa Anual por Hectare – “TAH”), this will not be a condition anymore for the denial of the assignment of mining rights. If there are TAH debts pending, the assignee can provide a debts assumption agreement, which will allow the assignment.

The issuance of GUs for temporary extraction of mineral substances before the mining concession is ruled was also subject of major changes. Besides the payment of a tax of BRL 5,000 (five thousand Brazilian Reais) by the miner, the DNPM will not issue new GUs in the case of (i) need of mineral substance supply on the market; and (ii) to finance the mineral research. Instead, the GU should be issued according to the public policies, on DNPM's sole discretion.

Furthermore, the GU will lose its effects after 60 (sixty) days of its expiry date, even if an extension was requested by the miner and DNPM has not analyzed such request.

From February on the mining concession will also be conditioned to the filing of the proper environmental licenses, beyond the requirements already set forth on article 38 of the Brazilian Mining Code.

Moreover, the new Ordinance determines which way the mining companies should prove the mining operation funds availability, obligation set forth on item VII of article 38 of the Brazilian Mining Code. In addition to a certificate issued by the banks, the miner can prove its funds availability by any other means, such as proof of machinery and equipment ownership, and also by balance sheets.

In addition, the processing of the requirement for mining exploration regime change was also ruled by the new Ordinance, either from licensing regime to small scale mining regime, or from small scale mining regime to licensing regime.

arias & muñoz
The law firm for Central America

New trade policy seeks to simplify customs procedures, reduce costs and enhance competitiveness.

On November 27th, the World Trade Organization (WTO) General Council agreed to include the 2013 Trade Facilitation Agreement (TFA) into WTO's provisions. The agreement was the result of the Bali Ministerial Conference of December 2013 and will come into force once two-thirds of the WTO members have concluded the necessary ratification and internal procedures. The new legal framework aims to simplify customs procedures and reduce waiting time at borders.

Specifically, the goals of the new trade facilitation provisions are to reduce barriers to trade, decrease costs resulting from inefficient processes, as well as to promote access to information. In order to achieve this last objective, the agreement also includes a clause that offers members technical expertise so that they can easily implement and comply with the new procedures.

One of the main provisions of the agreement is to encourage countries to exhibit more clarity in their processes and to have information readily available. By requiring the signing members to share their customs information online, the WTO expects to enhance transparency, avoid unnecessary waiting times at borders and boost efficiency of international trade.

CENTRAL AMERICA AS A REGION

Central America understands that trade is a key agent of economic growth and development. The region, for the most part, has adopted this principle and engineered multilateral agreements to promote trade.

At present, the region has trade agreements with the biggest commercial partners, such as the United States of America and the European Union. Furthermore, Central America has been working in the creation of the Central American Customs Union, the members of which have undertaken important efforts to consolidate customs information, and streamline cargo procedures, as well as reduce costs.

However, there is still a long way to go in terms of establishing a Central America trading block. In order to truly become more competitive, the region needs to address the issues of the current multi-inspection process whenever goods cross borders. By pushing for further integration of customs processes, and coordination between governmental institutions, the Central American countries could reduce the high costs associated with freight and enable them to endeavor into new markets.

The numbers support the potential benefits. According to the World Bank, logistics costs in Central America represent about 40% of the good's final price value. When compared to countries like Chile and the OECD countries, logistics only accounts for 18% and 8%, respectively.

The adoption of the TFA is a very clear signal of Central America´s continuing efforts to promote trade and development. However, support of the new guidelines needs to come from governments, producers and politicians in Central America. It is of paramount importance that the TFA is agreed swiftly in order to further perpetuate the attractiveness of the region for trade and investment.

Guidelines issued by the Environmental Assessment Service on environmental approval resolutions expiration

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

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As of January 26, 2015, the Environmental Assessment Service ("**SEA**") may declare the expiration of the Environmental Approval Resolutions ("**EAR**") for those projects which have not initiated its execution within the terms established in Law 19,300 (“**LBGMA**”) and the Regulations of the Environmental Impact Assessment System (the "**Regulations**").[1]

In order to establish the criteria to verify when a project or activity has started its execution, the SEA issued the Guidelines on "Expiration of the Environmental Approval Resolution" (the "**Guidelines**").[2]

1. OBLIGATION OF EAR HOLDERS

According to the LBGMA and the Regulations, if the project or activity has not initiated its execution, the EAR will expire five years after its notification date. The execution of a project or activity will be deemed initiated when acts or works towards construction are carried out in a systematic, continuous and permanent manner.[3]

The notice of initiation of the construction phase shall be made to the Executive Direction of SEA. However, the Superintendency of the Environment ("**SMA**") is responsible for overseeing compliance with this legal provision and legally entitled to require the SEA to declare the expiration in the case of breach.

2. TERMS FOR NOTICE THE START OF CONSTRUCTION

The Regulations sets forth a distinction depending on the time of the EAR’s approval:

> **(i)** Projects or activities environmentally approved before January 26, 2010, which have not initiated execution as of the date of enactment of the Regulations (December 24, 2014), shall demonstrate to the SEA the actions or minimum works towards such initiation **before January 26, 2015**.

[1] Executive Decree No. 40/2012, of Ministry of the Environment, EIAS Regulations.
[2] Instructions No. 142034/2014, of SEA. Available in: http://www.sea.gob.cl/sites/default/files/4514_001.pdf
[3] Article 73, EIAS Regulations.

(ii) Projects or activities environmentally approved after January 26, 2010 and which have initiated execution before the enactment of the Regulations, shall demonstrate to the SEA the actions or minimum works towards such initiation **within five years counted as from the notice of the relevant EAR**.

Holders of projects approved after the enactment of the Regulations are not obligated to report the initiation of its execution to the SEA because the actions or minimum works will be contained in the relevant EAR.

3. CASES OF AMENDMENT AND REVIEW OF AN EAR

According to the Guidelines, the modification of a project or activity which was granted with an EAR does not change the term of expiration of the environmental permit, because the original EAR and its modification resolution are independent. Therefore, if the original EAR expires, only the works approved in the second EAR could be implemented.

Regarding the EAR revision and the consolidated, coordinated and systematized new EAR, in SEA´s opinion, it refers to valid EARs, therefore the expiration does not apply in this case.

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New MOFCOM Regulatory Measures on Outbound Investment Effective as of Oct. 6, 2014

11.24.14

By Ron Cai and Amanda Wu

On Sept. 6, 2014, the Ministry of Commerce ("MOFCOM") promulgated the *Administrative Measures for Outbound Investment* ("2014 MOFCOM Measures"), replacing the original *Administrative Measures for Outbound Investment* that was in effect since March 2009 ("2009 MOFCOM Measures"). These measures are a meaningful step in facilitating outbound investment by Chinese companies consistent with China's "Go Out Policy" and goal of adopting international standards for investment procedures.

Background

MOFCOM and the National Development and Reform Commission ("NDRC") are the two main government agencies that regulate outbound investments by Chinese companies. NDRC authorization is a pre-requisite for the approvals required from MOFCOM.

On April 8, 2014, the NDRC issued the *Administrative Measures for the Verification and Approval and Filing of Outbound Investment Projects* ("2014 NDRC Measures"), which took effect on May 8, 2014 (see our client advisory on this topic here). In response to the 2014 NDRC Measures, the MOFCOM issued the 2014 MOFCOM Measures, which greatly narrow the scope of projects subject to the MOFCOM's approval, make filing procedures available for the projects that do not involve sensitive countries or industries, and shorten the timeline for the approval process.

Below are the primary changes in the 2014 MOFCOM Measures.

Approval vs. filing

Under the 2009 MOFCOM Measures, all the outbound investment projects that involved establishing entities or acquiring ownership or a right to control or manage entities outside of China were subject to approval of the MOFCOM or a MOFCOM provincial office. The 2014 MOFCOM Measures greatly narrow the scope of the projects subject to approval. As a result, projects with an investment amount of USD 10 million or more and projects involving establishment of special purpose vehicles are no longer required to be approved. Instead, they need only be filed with the MOFCOM or its provincial offices.

The filing process is simpler and faster than the approval process. Filing requires fewer application documents than approval. The processing time for approval is 20-30 working days (discussed below), while filing can be completed within three working days.

Under the new rules, only outbound investment projects involving sensitive countries/regions or sensitive industries are required to be approved by the MOFCOM or its provincial offices. All other projects need only be filed with the MOFCOM or its provincial offices, regardless of the investment size.

According to the 2014 MOFCOM Measures, sensitive countries and regions are (i) countries that have no diplomatic relations with China, and (ii) countries subject to sanctions of the United Nations. Sensitive industries are any industries that (i) involve products and technologies restricted from export from China, or (ii) have an impact on the interests of more than one country or region.

Projects invested by "central government-owned enterprises" are to be approved by or filed with the central MOFCOM, and projects invested by "local government-owned enterprises" are to be approved by or filed with the provincial offices of MOFCOM. Pursuant to the 2014 MOFCOM Measures, "central government-owned enterprises" refer to (i) enterprises whose capital is contributed or managed by the national Assets Supervision and Administration Commission and affiliates of the those enterprises, and (ii) other enterprises managed by the central government. The rules do not define "local enterprises."

Timelines

The 2014 MOFCOM Measures shorten the timeline for the approval process in those circumstances where approval is still required. Under the existing rules, it took at least 30 working days to obtain an approval from MOFCOM and 40 working days from the provincial offices of MOFCOM. Under the new rules, it only takes 20 working days for MOFCOM approval and 30 working days for approval from MOFCOM provincial offices.

Filing will be completed within three working days of receipt of the filing application.

In the past, delays and uncertainty for both approvals and filings often presented a serious obstacle to Chinese companies' ability to compete effectively on bids or to close transactions. The definite timelines provide more certainty for the processing time for the MOFCOM approval and filing procedures. The shortened processing time for approvals certainly is welcomed by both Chinese investors and companies being acquired.

Conclusion

Following the 2014 NDRC Measures which were promulgated five months ago, MOFCOM issued the 2014 MOFCOM Measures with the intent to further liberalize outbound investments. Both Measures are expected to make the administration of outbound investment simpler and faster. However, how the rules will be implemented is not yet clear.

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Decree for Offshore Free Trade Zones

Mon, 01/05/2015 - 14:12

NewsFlash: 280

Opportunity for hydrocarbons: Colombian Government issued Decree for Offshore Free Trade Zones

On December 23 the Ministry of Trade, Industry and Tourism issued Decree 2682 which allows the declaration of offshore free trade zones in Colombia. It aims to develop exploitation and exploration projects in the form of free trade zones, which will increase the competitiveness of Colombian hydrocarbons sector.

The Decree states that any non-continental area in the country can be declared an offshore free trade zone. The free trade zone declared area has to be the one agreed in the concession contract signed with the National Hydrocarbons Agency (ANH). Additionally, the Decree allows continental or insular areas to be declared as free trade zones in order to develop logistics activities, compression, processing, liquefaction of gas and all activities directly related to offshore oil and gas sector. Similarly, establishes investment and employment requirements for six years next to the declaration. The investment has to be equal or exceed 150 minimum wages, (approximately USD$38,500) and create and maintain at least 30 new jobs.

Therefore, Colombian Government created the regime of permanent zones exclusively for activities of technical evaluation, exploration and production of hydrocarbons offshore. The Decree provides the integration of the supply chain in order to achieve the investment and competitiveness objectives; connecting not only the maritime activities but others needed to be performed on land.

With this new regime, hydrocarbon producers may benefit from Colombian Free Trade Zones' tax incentives and obtain significant fiscal savings in fiscal. Among these: special rate of income tax (15%) plus CREE tariff; no accrual or payment of customs taxes (VAT and tariff) for foreign goods entering the free zone; VAT exemption for raw materials, supplies and finished goods purchased in the national customs territory; exports likely to benefit from international trade agreements signed by Colombia; possibility of performing partial processing outside the free trade zone up to 9 months; and the possibility to sell the country all the services or goods with no fees or restrictions, prior to its nationalization and payment of the corresponding taxes.

Hogan Lovells

Hong Kong Privacy Commissioner takes lead on Privacy Regulation of Mobile Apps

December 2014

Privacy regulators are increasingly turning their attention to the manner in which mobile apps collect, process and transmit personal data.

On 9 December, 21 privacy enforcement authorities around the world issued an open letter to seven of the world's leading app marketplaces calling on them to make app privacy policies available to users prior to downloading.

The open letter was initiated jointly by the Office of the Privacy Commissioner for Personal Data, Hong Kong (the "PCPD") and the Office of the Privacy Commissioner of Canada. Other signatories to the letter included the UK Information Commissioner, the Privacy Commissioners of Australia and New Zealand and the Vice President of the Korea Internet and Security Agency.

The open letter follows a May 2014 study of over 1,200 mobile apps from around the world which was conducted by the Global Privacy Enforcement Network ("GPEN"), an association of 26 privacy regulators, including the PCPD. The study concluded that a significant number of mobile apps do not make adequate disclosure to users. Specific findings include:

- 85% of the apps surveyed failed to clearly explain how they were collecting, using and disclosing personal information;
- More than half (59%) of the apps left users struggling to find basic privacy information;
- 31% requested an excessive number of permissions to access additional personal information; and
- 43% of the apps failed to tailor privacy communications to the small mobile device screen, either by providing information in a too small print, or by hiding the information in lengthy privacy policies that required scrolling or clicking through multiple pages.

In addition to the open letter sent last week, the PCPD has also recently published its own guidance to mobile app developers in Hong Kong. The Best Practice Guide for Mobile App Development can be downloaded in full here: http://f.datasrvr.com/fr1/814/28028/Mobileapp_guide_e.pdf

While the PCPD's guidance is directed at small and medium sized app developers, the principles set out in the document are important for businesses of all sizes seeking to promote or transact their businesses through mobile apps in Hong Kong or that are engaged in the development of mobile app technologies. In particular, the PCPD's continued advocacy of "Privacy by Design" - the concept that technology should be developed from the outset with privacy concerns in mind - will be an important business consideration.

Overview of the Hong Kong guidance:

Parts A and B of the guidance provide background information on the application of Hong Kong's Personal Data (Privacy) Ordinance ("PDPO") to app development and the six data protection principles that underpin the PDPO.

Part C explains the "Privacy by Design" concept and encourages developers to consider privacy issues throughout the entire development life cycle of the app.

Part D is aimed at apps which access the personal data of their user and provides developers with a checklist for applying the Privacy by Design approach as the app is being developed. Through a series of questions the developer is encouraged to complete a checklist that examines each type of data being collected by the app and to consider, systematically, how the app can be built with the least intrusion to a user's personal data privacy.

Part E provides some best practice recommendations where user data is accessed or collected by an app and is linked to the information compiled by the developer in the checklist in Part D. In particular, app developers are encouraged to only access the types of data necessary for the app and ensure that their privacy statements are tailored for their particular apps. Privacy policies should state clearly whether the apps would access data on the user's smartphone, the types of data that would be accessed and why and how such access would be carried out. This information would then allow users to make an informed decision whether or not to download and use the app.

For apps that do not access or collect personal data, Part F of the guidance reminds developers that transparency is one of the cornerstones of the PDPO. Even if no personal data is being collected from users, developers are advised to make this clear to the user through a privacy statement before the app is installed.

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Compliance is critical:

The results of the 2013 GPEN global survey were equally disappointing, particularly for Hong Kong, where 60 of the most popular local smartphone apps were reviewed, with many found to be defective. Following last year's survey, improving privacy and data protection in the use of apps became a key area of focus for the PCPD, which stepped up its educational efforts by conducting seminars targeted at app developers and launching a dedicated website on online privacy at www.pcpd.org.hk/besmartonline.

Failure to comply with data privacy requirements in Hong Kong can have consequences that go far beyond simply monetary fines and other regulatory sanctions: very often reputational issues are also in play. In the latest published figures for 2013, the PCPD reported a 48% per cent increase in complaints and a doubling of enforcement notices. Moreover, the incident and investigations that followed showed a greater willingness by the Commissioner to "name and shame" businesses that he believes have fallen foul of the law, making the consequences of non-compliance far greater than in the past.

Details of the local results for the 2014 GPEN survey are awaited but the lack of publication of those results by the PCPD as the end of the year approaches suggests that little improvement has been made by developers in Hong Kong in the last 12 months. The Privacy Commissioner has already indicated that if standards do not improve enforcement action against offenders will not be ruled out. The timing of the open letter and this latest guidance note suggests that it may be the first in a series of follow up actions to be taken by the PCPD to try and ensure compliance by mobile app developers.

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:

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NEWS DETAIL Back

02/12/2014

AMENDMENT TO GOVERNMENT REGULATION ON MINERAL AND COAL MINING BUSINESS ACTIVITIES

The Government has issued a third amendment to Government Regulation No. 23 of 2010 concerning Implementation of Mineral and Coal Mining Business Activities ("GR 23/2010"), through Government Regulation No. 77 of 2014 ("GR 77/2014").

The amendments have been made with the following objectives: (i) re-assurance of the business certainty of holders of Mining Business License and Special Mining Business License (IUP and IUPK) in the framework of domestic capital investment, i.e. by stipulating the shareholding composition in the exploration and production operation stages; (ii) reorganization of the Indonesian shareholding participation in the framework of foreign capital investment, by stipulating divestment obligations; and (iii) provision of optimal benefits for the State and business certainty for holders of Contracts of Work and Coal Contracts of Work, by regulating divestment obligations, area coverage and continuity of operation subsequent to contract termination.

Some of the provisions of note:

- Maximum foreign shareholding for IUP and IUPK holders change their corporate status from domestic capital investment company to foreign capital investment company will be:
  - 75% for holders of IUP and IUPK Exploration;
  - 49% for holders of IUP and IUPK Production Operation which do not conduct their own processing and/or refining/smelting;
  - 60% for holders of IUP and IUPK Production Operation which conduct their own processing and/or refining/smelting;
  - 70% for holders of IUP production operation and IUPK production operation which conduct underground mining.
    (Article 7C)
- Holders of IUP may apply for a reduction of the mining area;
- Obligation for holders of IUP and IUPK of Production Operation in the framework of foreign capital investment to start the gradual divestment of their shares by offering the shares to Indonesian parties by the end of their 5th production year. The offer must be in made in the following priority order: (i) Central Government, Provincial Government and local Government; (ii) State-Owned Entities and Regional-Owned Entities; and (iii) national private entities. The gradual divestment must be implemented in the following manner (Article 97):
  - Minimum Indonesian shareholding in the holders of IUPs and IUPKs of Production Operation which do not conduct their own processing and/or refining/smelting :

6th (sixth) year	20%
7th (seventh) year	30%
8th (eighth) year	37%
9th (ninth) year	44%
10th (tenth) year	51%

- Minimum Indonesian shareholding in the holders of IUPs and IUPKs of Production Operation which conduct their own processing and/or refining/smelting:

6th (sixth) year	20%
10th (tenth) year	30%
15th (fifteenth) year	40%

- Minimum Indonesian shareholding in the holders of IUP and IUPKs of Production Operation which conduct underground mining :

6th (sixth) year	20%
10th (tenth) year	25%
15th (fifteenth) year	30%

- Minimum Indonesian shareholding in the holders of IUPs and IUPKs of Production Operation which conduct underground mining and open pit mining:

6th (sixth) year	20%
8th (eight) year	25%
10th (tenth) year	30%

- Holders of IUP Production Operation are exempted from the divestment obligation, specifically for processing and/or refining/smelting within the framework of foreign capital investment. It is worth noting that if a IUP or IUPK Production Operation holder's capital increase results in the dilution of the shareholding of the Indonesian shareholder, the said IUP and IUPK Production Operation holder must offer shares to Indonesian parties in the above stipulated manner
- The decrease in the divestment requirement for holders of IUPs and IUPKs of Production Operation which conduct processing or underground mining are consistent with agreements reached between the Government and Contract of Work holders for adjustments of their Contracts of Work.

- Contracts of Work and Coal Contracts of Work which were executed prior to the enactment of GR 23/2010 will remain effective until their termination date. These contracts, can be extended twice if changed to IUPK Production Operation contracts.

  Note that previously, GR 23/2010 provided that Contracts of Work and Coal Contracts of Work would be extended as IUP Production Operations – as a result of GR 77/2014 the extensions will be as IUPK Production Operation. The holders of IUPKs are required to pay an additional 10% of their profit to the government (to be split 4% to the national government and 6% to the regional governments). Essentially, this will increase the corporate tax of the mining companies by 10%.

  Holders of Contracts of Work and Coal Contract of Work which had been producing for less than 5 (five) years before the enactment of GR 77/2014 are obliged to comply with the divestment obligation.

  Holders of Contract of Work and Coal Contract of Work which had been producing for at least 5 (five) years before the enactment of GR 77/2014 are obliged to: (i) divest 20% (twenty percent) of their shares at the latest 1 (one) year as of the enactment of GR 77/2014; and subsequently (ii) divest as per the percentage of the relevant current year at the latest 5 (five) years as of the enactment of GR 77/2014.

GR 77/2014 came into force on October 14, 2014. (*by: Agus Ahadi Deradjat, Philip Payne & Ilham Wahyu*)

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THE MALAYSIAN FRANCHISE INDUSTRY – A REGULATORY PERSPECTIVE

A primer on the franchising industry in Malaysia.

The recent public offering of 7-Eleven (one of the world's most successful franchises) in Malaysia which was oversubscribed by almost 5 times illustrates that franchising is a thriving and lucrative industry in Malaysia. This together with the recently concluded Franchise International Malaysia 2014, the largest annual franchising exhibition and conference in South-East Asia made us think it would be timely to have a short article on the regulatory regime for the franchise industry in Malaysia.

WHAT IS THE LAW AND WHO ADMINISTERS IT?

The franchise industry in Malaysia is regulated by the Franchise Act 1998 ("the Act") which came into force on 8 October 1999. The Act was amended by the Franchise (Amendment) Act 2012 which came into force on 1 January 2013 ("the Amendment Act").

The Act is administered by the Franchise Development Division of the Ministry of Domestic Trade Cooperatives and Consumerism under which there are Development, Registration, Administration and Enforcement Units (the "Franchise Registry").

WHEN DOES AN AGREEMENT COME WITHIN THE ACT?

The Act applies to the sale and operation of any franchise, which is or will be operated in Malaysia regardless of whether the offer to sell or buy the franchise is made and accepted within or outside Malaysia.

So when is an agreement considered a franchise? What is the legal definition of a franchise? The Act provides a comprehensive definition of a franchise. Essentially, a franchise is an agreement by which the franchisor grants the franchisee the right to operate the franchisee's business, according to the franchisor's franchise system and allows the franchisor to maintain the right to administer continuous control over the franchisee's business operations to ensure compliance with the franchise system.

This is different from a license where there is no operating system imposed on the licensee or control over the way in which the licensee's business is operated. It is partly for these reasons that there is more regulation of a franchise agreement as compared to a license agreement.

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What is clear is that it does not matter what the title of the agreement is. As found by the High Court in the case of *Munafsya Sdn Bhd v Proquaz Sdn Bhd* [2013] 2 CLJ 189, it does not matter that the word franchise is not used anywhere in the agreement; the court will look at the terms of the agreement as a whole, the conduct of the parties and the background of the agreement to determine whether it is a franchise. In *Dr Premananthan Vasuthevan v Permai Polyclinics Sdn Bhd* [2013] 1 LNS 1048, the High Court found that, notwithstanding the reference to the franchise fee in the agreement, there was no franchise system or exercise of continuous control over the franchisee's business, and therefore no franchise agreement existed.

WHAT DOES A FRANCHISOR OR FRANCHISEE NEED TO DO?

Franchise system and intellectual property

A franchisor must first reduce his "franchise system" into writing in the form of operation manuals and training manuals. The franchisor also needs to prepare his disclosure documents which should include full particulars of his franchised business, a list of all fees and other financial obligations to be imposed on the franchisee, initial investments the franchisee needs to make, obligations of franchisee and franchisor, territorial and intellectual property rights to be granted to franchisee and financial statements of the franchisor. The franchisor is also required to register his trade marks (including service marks) before applying for registration of the franchise under the Act.

Register the franchise

Before selling or offering to sell the franchise to any person in Malaysia, the franchisor needs to register the franchise with the Franchise Registry. The main requirement when applying for registration is to provide full disclosure regarding the franchise. With the Amendment Act coming into force, there is now a compulsory requirement for all franchisees to register their franchise. All applications for registration are to be made through the online franchise registration system, Malaysian Franchise Express (MyFEX).

A local franchisor who fails to register his franchise commits an offence under the Act and is liable, in the case of a body corporate, to a maximum fine of RM250,000 for a first offence and RM500,000 for a second or subsequent offence. Failure to register may render the franchise agreement null and void for being unlawful, as illustrated in the case of *SP Multitech Intelligent Homes Sdn Bhd v Home Sdn Bhd* [2010] MLJU 1845 where the franchise agreement was found to be unlawful and void *ab initio* and the franchisor was ordered to refund all payments and benefits received to the franchisee.

The Amendment Act makes it an offence, subject to the same fines as set out above, for any person to assume or use the term "franchise" or any of its derivatives in relation to its business without approval of registration by the Registrar.

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Proof of track record

One of the requirements when a franchisor applies for registration is that he must submit audited accounts for the last 3 years of operation of the franchised business which shows the successful operation of at least one outlet. Therefore, a franchisor needs to have operated the franchised business for at least 3 years through self-owned outlets before granting franchises. It is possible to apply for an exemption, although the grounds for exemption are not clear.

Timely provision of documents to franchisee

Once the franchisor has obtained registration, he can enter into the franchise agreement with the franchisee. There is a compulsory requirement for the franchisor to submit to the franchisee a copy of the franchise agreement and disclosure documents at least 10 days before the signing of the franchise agreement. Failure to comply is an offence.

THE FRANCHISE AGREEMENT

Mandatory provisions

The franchise agreement must be in writing and include certain provisions specified in the Act. Failure to include these provisions will render the franchise agreement null and void. For instance, the franchise agreement is required to include a cooling off period of not less than 7 working days during which the franchisee has the option to terminate the agreement and obtain a full refund of all monies paid to the franchisor, save for an amount to cover expenses incurred by the franchisor to prepare the agreement.

The stipulated minimum term of a franchise agreement is 5 years. Where the franchisor requires the franchisee to make any payment for the purpose of the promotion of the franchise, the franchisor must establish a promotion fund to be managed under a separate account and used solely for the promotion of the subject matter under the franchise.

The franchisee needs to provide a written guarantee not to disclose confidential information or carry on any business similar to the franchise business for the duration of the agreement and 2 years thereafter which extends not only to the franchisee but also its directors, employees and spouses and immediate family members of the directors. The prohibition against similar business overrides section 28 of the Contracts Act 1950 which (subject to specified exceptions relating to partnerships and sale of the goodwill in a business) renders any agreement which restrains a person from exercising a lawful profession, trade or business to be void to the extent of that restraint.

Any provision in a franchise agreement purporting to bind a franchisee or franchisor to waive compliance with any provision of the Act is void and unenforceable.

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Conduct and operation of the franchise

A franchisor and franchisee are required to act in an honest and lawful manner, and pursue best franchise business practice in the operation of the franchise.

Termination of the franchise agreement

A franchise agreement may only be terminated for "good cause" as defined under the Act. An example of what constitutes a "good cause" is the failure by the franchisee or the franchisor to remedy a breach of the franchise agreement or any other relevant agreement entered into between them within the period (being not less than 14 days) stated in a written notice given by the non-defaulting party.

Notice and opportunity to remedy is not required in circumstances where the franchisor or franchisee makes an assignment of rights for the benefit of creditors or other similar disposition, becomes bankrupt or insolvent, voluntarily abandons the franchised business, is convicted of a criminal offence which substantially impairs the goodwill associated with the franchisor's trade mark or other intellectual property or repeatedly fails to comply with the terms of the franchise agreement.

Renewal and extension of a Franchise Agreement

The franchisor must renew or extend a franchise agreement where a franchisee applies for an extension by giving written notice to the franchisor no less than 6 months prior to the expiration of the franchise term, provided there is no breach of the existing franchise agreement by the franchisee. The franchise agreement is to be renewed on terms which are similar to, or no less favourable than, the terms in the existing franchise agreement.

It is an offence under the Act for a franchisor to refuse to renew a franchise agreement without compensating a franchisee either by a repurchase of the franchise or by other means at a price to be agreed between the franchisor and franchisee unless the franchisor (at least 6 months prior to the expiration date of the franchise agreement) (a) gives the franchisee written notice of non-renewal; and (b) waives any provision in the franchise agreement which prohibits the franchisee from continuing to conduct substantially the same business under another trade mark in the same area subsequent to the expiration of the franchise agreement.

In *Noraimi Alia v Rangkaian Hotel Seri Malaysia* [2009] 9 CLJ 815 it was found that the non-renewal of the franchise agreement constituted an offence and the franchisee was awarded compensation for the loss of profits that she would have received for the period of renewal expected.

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ANNUAL REPORT

The franchisor is required to submit an annual report to the Registrar in the prescribed form within 6 months from the end of each financial year of the franchise business. The Registrar may cancel the registration of the franchisor if the annual report is not submitted.

CONCLUSION

The Malaysian Government is keen to promote and grow the franchise industry as increased franchising would boost the economy and encourage entrepreneurship development among Malaysians. This is evidenced by the active steps taken by the Government, such as implementing MyFEX, holding the annual Franchise International Malaysia Exhibition and Conference, launching the franchise blue print and providing support to budding franchisees in the form of micro-franchise development schemes. The regulatory regime, through compulsory registration of franchised business and submission of annual reports, enables the Government to gather much needed information on the franchise industry in Malaysia and at the same time monitor and protect franchisees.

Leela Baskaran
30 September 2014

Leela is a Partner in the Intellectual Property Division of SKRINE. Her practice areas include registration and advising on trademarks and other intellectual property and drafting and advising on franchise agreements.

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LEGAL UPDATE

November 28, 2014

RESOLUTION BY THE NATIONAL COMMISSION OF HYDROCARBONS (COMISIÓN NACIONAL DE HIDROCARBUROS) FOR THE ISSUANCE OF THE ADMINISTRATIVE PROVISIONS REGARDING PUBLIC BIDS FOR OIL EXPLORATION AND EXTRACTION CONTRACTS

On November 28, 2014, the National Commission of Hydrocarbons (*Comisión Nacional de Hidrocarburos*), published, in the Official Gazette of the Federation (the *Diario Oficial de la Federación*), its Resolution CNH.11.001, which provides for the administrative provisions regarding public bids for oil exploration and extraction contracts (the "Resolution").

The referred Resolution responds to the need to provide legal certainty to those who are interested in participating in public bid processes for the award of the so called Oil Exploration and Extraction Contracts (*Contratos para la Exploración y Extracción*), as such are defined in the Oil and Gas Law (*Ley de Hidrocarburos*), as well as for the execution of said contracts. The main purpose of this Resolution is to establish and regulate the corresponding actions that the authorities must undertake throughout these governmental procurement processes and the stages that such processes shall entail, in accordance with the Oil and Gas Law, the Oil and Gas Revenue Law (*Ley de Ingresos sobre Hidrocarburos*), their regulations, and the Energy Regulatory Bodies Law (*Ley de los Órganos Reguladores Coordinados en Materia Energética*).

Among the most relevant aspects provided for in said Resolution are the following: (i) the main principles which shall govern these public bid processes; (ii) the functions of the Public Bids Committee (*Comité Licitatorio*), as defined in the Resolution; (iii) the specific provisions regarding public bid processes for Oil Exploration and Extraction Contracts; and (iv) the general principles applicable to the governmental duties that shall apply in order to participate in the referred public bid processes.

It is noteworthy that, according to the Oil and Gas Law, the award of Oil Exploration and Extraction Contracts shall be governed by the provisions of such law and neither the Law on Public Works, the Law on Procurement, Leases, and Services shall apply.

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NautaDutilh

Banking & Finance

Financial Law Netherlands

Amendments Dutch Financial Regulatory Law 2015

Tuesday 23 December 2014

On 19 December 2014, the final version of the Financial Amendment Decree 2015 (the **"Amendment Decree 2015"**) was published. The final Financial Markets Amendment Act 2015 (the "**Amendment Act 2015**") was published a little earlier, on 5 December 2014.

The Amendment Act 2015 and the Amendment Decree 2015 contain, amongst others, new rules regarding:

- An extension of the scope of the suitability and integrity requirements;
- An extension of the scope of the bankers' oath;
- Close-out netting and the Intervention Act
- The concentration of court cases in first instance with respect to investment services, investment activities or offering of securities to the public at the District Court of Amsterdam;
- The tightening of the regime for group finance companies;
- A legal framework for covered bonds; and
- Amendments in connection with the implementation of Solvency II.

Act on the Remuneration of Financial Undertakings
Due to a second written round of questions from the Upper House (Eerste Kamer) of Parliament, the entry into force of the Act on the Remuneration of Financial Undertakings is delayed. The act will not, as previously envisaged, enter into force on 1 January 2015. It is not yet known when the act will now enter into force.

Contents:

Extension of the scope of the suitability and integrity requirements
Extension of the scope of the bankers' oath
Close-out netting and the Intervention Act
Concentration of court cases regarding investment-related matters
Other changes
Date of entry into force of the Amendment Act 2015 and the Amendment Decree 2015

Extension of the scope of suitability testing and integrity testing

The Amendment Act 2015 extends the existing integrity requirements (betrouwbaarheidseisen) and suitability requirements (geschiktheidseisen) to persons:

1. which have an managerial function directly below the echelon of the day-to-day policy makers; and in addition thereto
2. are responsible for natural persons whose activities have a material impact on the risk profile of the enterprise.

This only applies to persons working under the responsibility of a bank or insurance company.

The explanatory notes to the act state that the extension does not pertain to persons involved in activities affecting the risk profile, but to persons that are responsible for these type of activities. Examples, according to the explanatory notes, are the manager of the persons performing financial transactions and the heads of compliance, risk and audit.

Extension of the scope of the bankers' oath

The obligation to take the bankers' oath is extended in the Amendment Act 2015 to (virtually) all employees of banks. Banks are obliged to ensure that in addition to management and supervisory board members, the following persons that perform activities in the Netherlands also take and comply with the bankers' oath:

- employees with an employment agreement;
- other persons that perform activities without an employment agreement that are part of or arise from the exercise of the banking business, or are part of the essential business processes in support thereof.

In addition, disciplinary law will be introduced.

For financial enterprises not being banks, the Amendment Act 2015 also extends the group of persons that must take the oath or promise, but not as much as for the banks. These enterprises must ensure that the following persons that perform activities in the Netherlands must take and comply with the oath or promise:

- persons whose activities have a material impact on the risk profile of the enterprise; and
- persons directly involved in the provision of financial services.

Close-out netting and Intervention Act

As set out in our newsletter of 18 December 2013, in the financial markets there were concerns regarding the enforceability of netting and close-out rights and security rights in the context of the Intervention Act. In order to address these concerns, the Amendment Act 2015 provides as follows:

- The act confirms that netting rights under a close-out netting provision will not be adversely affected by a transfer plan in respect of the financial institution's assets and liabilities or by an expropriation.
- Furthermore, with a view to addressing concerns relating to the enforceability of security rights, the act confirms that a transfer plan will also not adversely affect ancillary rights, security rights in assets of the problem institution or a third party, or other security rights and privileges in respect of such assets,

provided that such rights and/or privileges could, on the basis of a master agreement or a related agreement, be enforced against the problem institution prior to the approval of the transfer plan.

Concentration of court cases regarding investment-related matters

The entry into force of the provisions regarding the concentration of certain investment-related matters in first instance to the District Court of Amsterdam has for the time ben postponed, pending a further analysis of this concentration.

Other changes

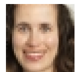
In addition thereto, the Amendment Act 2015 and the Amendment Decree 2015 contain amongst others the following amendments:

- Tightening of the rules for group finance companies;
- Introduction of a legal framework for covered bonds; and
- Amendments in connection with the implementation of Solvency II.

Date of entry into force Amendment Act 2015 and Amendment Decree 2015

The Amendment Act 2015 and the Amendment Decree 2015 will enter into force on 1 January 2015. However, the extension of the scope of the suitability test and the integrity test and the extension of the scope of the bankers' oath will enter into force on 1 April 2015.

Contact me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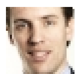
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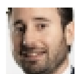
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Simpson Grierson

New Privacy Commission policy - naming and shaming

11 Dec 2014

The Privacy Commission introduced a new policy on 1 December 2014 which means that agencies found to have breached the Privacy Act may be named publicly.

The policy has been introduced to signal the Privacy Commissioner's willingness to treat breaches of the Privacy Act more seriously. The Commissioner intends to 'name and shame' an agency for privacy breaches.

The Privacy Commissioner already had the right, under the section 116(2) of the Privacy Act, to make such disclosures. However, in a move to try to achieve improved compliance by agencies (including all employers) with the Privacy Act, we can expect to see a greater exercise of this power in the future.

The most common circumstances in which employers might be named are where the Privacy Commissioner believes it is in the public interest to identify them. For example, where an employer has demonstrated an unwillingness to comply with the Privacy Act, and naming the employer is likely to promote compliance or enhance accountability.

Naming the agency is likely to be by way of a case note or report, and may be accompanied by a media release. The Commissioner has confirmed that the policy will be exercised on a case by case basis. However, employers should be mindful of this new policy and ensure strict compliance with privacy obligations wherever possible.

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Roadmap To An ASEAN Competition Law And Policy

On 20 November 2007, at the 13th Association of Southeast Asian Nations (ASEAN) Summit held in Singapore, ASEAN Leaders adopted the ASEAN Economic Community (AEC) Blueprint which is a master plan guiding the establishment of the ASEAN Economic Community. This master plan includes the setting up of competition policies by each ASEAN member country on a nationwide basis by the end of 2015.

As the deadline draws closer, and given that the implementation of competition policies are set out specifically in the AEC Blueprint, compliance with the respective competition laws in each of the jurisdictions will be something which business entities in the region are likely to implement going forward. It may be a challenge for entities as they would be required, at one time, to understand the nuances and distinctive features of the competition rules of the ten ASEAN member countries.

This article aims to provide a snapshot of the current situation and set out what to expect in 2015 by exploring the developments of competition policy and law implementation by each ASEAN member and the progress of ASEAN as a whole.

Singapore

Singapore is one of the first few ASEAN members to implement a generic competition law regime. While there have not been huge fines or headline news, the enforcement of competition law in Singapore has nonetheless been active, detailed and based on sound economic and legal principles.

2014 saw the Competition Commission of Singapore (CCS) flexing its muscles against international cartels (i.e. the ball bearings cartel and the freight forwarders cartel), thus sending a signal to the business community that conduct occurring overseas that has an effect on the Singapore market will render local businesses liable under Singapore competition law.

The infringement decisions against the ball bearing manufacturers and the freight forwarders attracted substantial penalties amounting to more than S$9 million and S$7 million respectively. Coupled with its track record of investigating local entities, these decisions quash any speculation that the CCS would not pursue activities involving local entities beyond Singapore's shores or against multi-national corporations with high turnover.

In relation to merger control, the decision in the acquisition of JobStreet Corporation Berhad by Seek Ltd/Seek Asia Investments Pte Ltd marks the first merger in which the CCS has accepted both behavioural (i.e. undertaking to not enter into exclusivity contractual obligations with recruiters) and structural commitments (i.e. divestments of assets of its domain name jobs.com.sg). Rather than deciding that the merger substantially lessened competition and therefore blocking it, the CCS meticulously considered the commitments offered which led to their conclusion that both behavioural and structural commitments were sufficient to ensure the maintenance of competitive market structures within the Singapore market.

In light of the mounting level of competition enforcement in recent years, Singapore business entities should ensure that they are compliant since competition law principles are established and enforcement appears to be steadily increasing.

Malaysia

Since the commencement of Malaysia's Competition Act in 2012, the Malaysian Competition Commission (MyCC) has steadily ramped up its enforcement activity. It has investigated anti-competitive agreements imposed at trade association meetings as well as bilateral anti-competitive agreements between competitors. In a notable decision relating to Malaysian Airline and AirAsia, the MyCC imposed a hefty financial penalty of RM10 million on each party for their participation in a collaboration agreement to share certain routes.

Similarly, in its first abuse of dominance case against Megasteel, the MyCC took an aggressive stance and issued financial penalties amounting to RM4.5 million for Megasteel's margin squeeze (by charging unfairly high rates in the downstream market) abuse in the hot roll coil industry. The financial penalty imposed amounted to 10% of Megasteel's worldwide turnover.

It is likely that the MyCC will face an increment of investigations and will continue to increase its enforcement efforts; it introduced leniency guidelines recently in anticipation of such increase in efforts.

Indonesia

Indonesia was also one of the first ASEAN member states to implement a generic competition law regime in 1999. However, it has only been in recent years that the law became more widely and effectively implemented.

With over 500 local and provincial governments, the Competition for the Supervision of Business Competition (KPPU) faces several challenges in its oversight of competition regulation, especially within public procurement. Fighting corruption and cartel behaviour (through bid-rigging) remains the single top priority of the KPPU and it has entered into Memorandums of Understandings with various government agencies (such as the Corruption Eradication Commission, the Attorney General of the Republic of Indonesia and the National Police Criminal Detective Agency) to strengthen the enforcement of competition law and ultimately promote a healthier business environment in Indonesia.

In recent years, the KPPU has also taken steps to sanction cartel conduct. For example, it has recently investigated six tyre companies (Gajah Tunggal, Bridgestone, Goodyear, Sumi Rubber, Elang Perdana Tyre Industry and Industri Karet Deli) for their alleged price fixing and exchange of information at industry association meetings. It has also investigated cartel activity in the food supplies industry thus uncovering ongoing cartels in the supply of beef, garlic and soybean. Additionally, it is considering implementing a leniency programme (as recommended by the Organisation for Economic Co-Operation and Development) which will most certainly see an increase in cartel investigations.

Indonesia has developed a credible competition regime. While there are some very substantial challenges to effectively permeate the business community's awareness of and compliance with competition law throughout the economy, the KPPU appears committed to the task.

Thailand

Thailand's generic Competition Act has also been in force since 1999 and it seeks to regulate most trade practices of business operators over a broad spectrum of commercial activity. Certain industries, however, are excluded from the purview of the Competition Act, these include the energy industry and the telecommunications industry and they are governed by industry-specific regimes which have the same effect as the national Competition Act. Notwithstanding the existence of written competition legislation, only 93 complaints have been made to the Trade Competition Commission, however, no cases have so far reached trial.

However, Thailand remains keen on developing its enforcement efforts. Recently, from 8 September to 17 September 2014, the Competition Commission of Singapore spoke at a programme for senior judges and court administrators from Thailand's Office of Judiciary. The Thai officials were given a detailed insight into Singapore's competition law regime, as well as CCS's engagements at ASEAN in the area of competition policy and law.

Vietnam

Vietnam's competition law has been in force since 2004 with the Vietnam Competition Council (the Council) actively sanctioning anti-competition conduct.

The Council has aggressively pursued cartel agreements that affect the market in Vietnam. In July 2010, the Council imposed financial penalties amounting to VND 1.9 billion on 19 automobile insurers for their participation in price-fixing agreements. In August 2013, the Council issued an infringement decision against 12 companies (which provided insurance for pupils in the Khanh Hoa Province) for anti-competitive agreements among themselves and this resulted in the companies terminating such agreements. Currently, there are two ongoing investigations against price-fixing cartels – in the roofing panel market in North and Central Vietnam, and the passenger hydrofoil market on the Ho Chi Minh – Vung Tau route.

In the area of abuse of dominance, the first case handled by the Council was against the Vietnam Air Petrol Company for its abuse of its monopolistic position in supplying aircraft fuel in Vietnam for which the Council imposed a fine of VND 3.7 billion. The Council is currently investigating a major foreign direct investment enterprise specialising in film importation and distribution for alleged abuse of its dominant position in the distribution of imported motion pictures in Vietnam. This marks the first investigation into foreign direct investment enterprises. However, it is unlikely to be the last as Vietnam appears committed to securing a business-friendly competitive environment.

Brunei Darussalm

Brunei formally commenced the process of drafting its national competition law in 2012.

In February 2014, the final draft of Brunei's Competition Order was at its final stages of review as the Brunei's policymakers carried out preparatory work for the implementation of the Competition Order. Preparatory work for the introduction of a generic competition law included an exchange programme with the CCS to obtain detailed insight into Singapore's competition regime.

Cambodia/Myanmar/Laos Peoples Democratic Republic

The 2015 mandate may be an uphill challenge for developing nations such as Cambodia, Myanmar and Laos People's Democratic Republic as their national competition law either remains in draft form or is unimplemented.

In an interview in October 2014, Penn Sovicheat, director general at Cambodia's Ministry of Commerce, cited the complexities of the competition laws and Cambodia's political economy as one of the reasons for the delays; he noted that Cambodia is "still not half way" in establishing a competition regime.

This view was also shared by Myanmar's director of the Competition Policy Division at the country's Ministry of Commerce who also shared Myanmar's difficulty in meeting the deadline and attributed the lack of competition law experience in both the government and the private sector as key challenges in enacting its competition law.

While, the Laos People Democratic Republic has basic competition legislation since 2004 when the Decree 15/PMO (4/2/2004) on Trade Competition was issued, its plans of implementation are still underway.

Philippines

To-date, the Philippines has implemented a competition regime which consists of a number of sectoral laws that address anti-competitive conduct and unfair competition.

As part of its progression towards the 2015 deadline, the Philippines implemented Executive Order No. 45, series of 2011, designating the United States' Department of Justice as the Competition Authority in Philippines.

With the establishment of a national competition law in October 2014, after the government's house appropriations committee approved the National Competition Policy Bill, Philippines has showed signs of progress towards the 2015 goal.

Conclusion

2015 will see the establishment and formative years of many new competition regulators within ASEAN. Financial penalties and anti-competitive enforcement are likely to increase and regulators within ASEAN would most likely cooperate on investigations and merger control. Businesses would need to embrace competition

law compliance as part of an overall risk management strategy. Compliance programs that have specific competition law modules and training programs that are found in most multinational corporations will soon be found in local or regional entities. Business entities would need to work towards getting their employees updated with competition law principles which would thereby reduce the risks of inadvertent infringements of competition law.

Rodyk's Competition Law Practice comprises a network of regionally qualified professionals with expertise in competition law and the ability to advise on local and regional competition issues, including merger control, antitrust investigations, litigation, compliance training and regulatory and policy development.

The authors acknowledge and thank Gene Chen (Bao Rui Legal) and Robby Sulivan (Darma Legal) for their contributions in this article. Bao Rui Legal and Darma Legal are Rodyk's associate offices in China and Indonesia respectively. Through our regional and global legal networks, our lawyers from the Competition Law Practice is able to assist our clients with comprehensive and integrated services across the globe.

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COMESA MERGER ASSESSMENT GUIDELINES: WHAT YOU NEED TO KNOW

By Paul Cleland, Director and Maphanga Maseko, Associate

LEGAL BRIEF DECEMBER 2014

The COMESA Competition Regulations ("Regulations") came into force in January 2013 introducing, amongst other things, a regional merger control regime covering the COMESA Member States.[1]

INTRODUCTION

The Regulations gave rise to uncertainties regarding the interpretation and application of the merger control provisions, making it difficult to advise firms engaging in merger and acquisition activity in the COMESA region. These difficulties were compounded by the lack of notification thresholds, which in other merger control jurisdictions are used to exclude non-material transactions from merger notification requirements.

On 31 October 2014, the COMESA Competition Commission ("Commission") published formal Merger Assessment Guidelines ("Guidelines"). They address jurisdictional matters, set out a procedure for obtaining transaction-specific guidance from the Commission (through pre-notification and comfort letter procedures) and set out the Commission's substantive merger assessment standards. They are a vast improvement on earlier drafts of the Guidelines.

The Guidelines also offer an amnesty period for previously non-notified mergers.

1 COMESA comprises 19 Member States, namely: Burundi, Comoros, the Democratic Republic of Congo Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

AFFECTED TRANSACTIONS

In stark contrast to the Regulations, the Guidelines recognise that mergers can only have a "regional dimension" if the parties to a merger have material operations within the COMESA region and that those operations are "supra-national" in nature (i.e. they are not limited to a particular Member State only).

Mergers will now be notifiable if the following three requirements are met:

> The target firm must have an annual turnover or have assets of at least US$5 million in one Member State.

AND

> Either the acquiring firm or the target firm must derive annual turnover or have assets of at least US$5 million in two or more Member States.

AND

> Each of the acquiring firm and the target firm must derive at least one third of their annual COMESA turnover from, or have at least one third of their COMESA assets in, two or more Member States.

TRADE BETWEEN MEMBER STATES

Additionally, the merger must have an "appreciable effect on trade between Member States". In this regard, the third requirement above effectively operates as a "safe harbour": if the parties do not meet this criterion, the merger cannot have an appreciable effect on trade between Member States and it will not be notifiable to the Commission. However, the fact that the parties do meet this criterion (and the other two criteria) does not mean that the merger will have an appreciable effect on trade between Member States. For example, the parties could meet the third requirement while not competing in the same markets or in vertically related markets. Such mergers would typically not raise competition concerns. To this end, the Guidelines provide for a "comfort letter" procedure in terms of which parties can request the Commission to express a view as to whether the merger meets the appreciable effect test without a formal notification.

The Guidelines do not stipulate that if the parties meet the three criteria above, they must notify a merger unless the Commission issues a comfort letter. Accordingly, it appears that the parties may conduct their own assessment as to whether the appreciable effect test is met.

As before, the COMESA merger notification requirements are non-suspensory: provided that the parties comply with their notification requirements, they may proceed with implementation before the Commission issues its decision (if they are willing to take the risk of a subsequent prohibition or conditional approval). The parties must notify their merger within 30 days of their "decision to merge". The Guidelines clarify that a decision to merge occurs either as a result of the conclusion of a definitive and binding agreement to carry out the merger, or the announcement of a public bid in the case of listed shares.

AMNESTY PERIOD FOR PREVIOUS NON-NOTIFICATIONS

An important provision is the introduction of a 90-day amnesty period for parties that have failed to notify previous mergers to the Commission. Provided that such non-notification is remedied by a merger notification to the Commission before 29 January 2015, the Commission will not seek penalties for the earlier failure to comply.

The amnesty appears to be a blanket amnesty for all non-notified mergers irrespective of the reasons therefor.

CONCEPT OF CONTROL

The Guidelines provide useful clarity in regard to the various forms of control that may bring about a merger and they adopt principles which will be familiar to anyone who has experience with the European Commission's interpretation of control.

Interestingly, the Guidelines adopt an approach which excludes many transactions that in South Africa would be regarded as mergers, and is thus more business-friendly to such transactions: In relation to "full-function" joint ventures and other contractual arrangements (such as management agreements), such arrangements constitute mergers only where the joint venture or the contract will be for a "long duration", which the Guidelines indicate must typically be for at least five years. Accordingly, there must be some relative permanence to the arrangement, a pragmatic approach which has not as yet been adopted in South Africa.

There are exceptions for internal restructurings, control rights exercised by liquidators and even acquisitions by "interim buyers" with a view to onward sale within a period of less than one year (subject to certain provisos). The Guidelines also contemplate that the Commission may, on a case-by-case basis, exempt mergers which arise as a result of financing transactions (which presumably will apply to banks and financial services providers seeking to exercise security rights). The need to seek such an exemption on a case-by-case basis is unfortunate, as such transactions often need to occur in urgent circumstances.

Finally, the Guidelines adopt the "decisive influence" standard for joint and negative control situations, which is consistent with the European Commission approach and has, in some instances, proven not to capture certain transactions that are caught by the "material influence" standard adopted by some national merger control regimes (e.g. the United Kingdom and South Africa).

COMFORT LETTERS AND PRE-NOTIFICATION PROCESSES

The Commission has already engaged in pre-notification meetings and issued comfort letters in response for requests as to whether specific transactions meet the notification requirements. The Guidelines seek to formalise this process. Notably, they recognise confidentiality of information disclosed in those interactions and they commit the Commission to a maximum response time for comfort letter requests (21 days for a response or a request for further information).

INVESTIGATION TIME PERIODS

The Guidelines clarify that the time periods referred to for the Commission's investigation are now 120 calendar rather than 120 business days. Within this overall time period, the Commission will now adopt a Phase 1 and Phase 2 approach to mergers: only mergers likely to raise substantive concerns (or which indicate a need for extensive evidentiary enquiries to examine potential concerns) will be classed as Phase 2 mergers. Mergers resolved at Phase 1 should be cleared within 45 calendar days.

SUBSTANTIVE ANALYSIS

The Guidelines also set out the Commission's approach to the substantive analysis of horizontal and vertical mergers. This provides useful guidance to parties preparing COMESA merger filings as to how the Commission will view the competition effects of a merger.

FILING FEES

The notification fee payable to the Commission has been a contentious issue as the fee is significant; 0.5% of the merging parties' aggregate revenue within the COMESA Member States, or a maximum of US $500,000. The Guidelines do not address this issue but it is understood that a COMESA Council meeting is due to take place early in 2015 which should hopefully address this.

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Maphanga was part of a team assisting SANRAL to recover possible damages in the High Court from the construction firms that participated in cartels.

He has co-authored three articles on competition law and general litigation, namely: *"Lack of compliance and corporate governance – provoking the revolving prison door",* Lexology (May 2013), *"Procedure – Class actions and civil liability"*, Polity (November 2013), and *"Industry investigations – Construction industry",* Polity (November 2013).

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Draft Regulations Proposed by TIPO on Biological Material Deposit Involved in Patent Application

11/27/2014

Kate Shu-Yin Chu

Pursuant to its announcement on November 6, 2014 under Jing-Shou-Zhi-Zi-10320031330, the Ministry of Economic Affairs has announced draft revision to Articles 11 and 25 of "Regulations on Deposit of Biological Materials pursuant to Patent Application." The reasons for carrying out such revisions are as follows: As the 2013 revision of the Patent Act added a provision under Article 27, Paragraph 5 with respect to mutual recognition of effect of deposits by the R.O.C. and foreign countries, the government has decided to make revisions to the above provisions in consultation with the "Regulations under Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure" in order to foster establishment of mutual recognition with other foreign governments. Article 11 of the Patent Act stipulates that biological materials which are deposited may be withdrawn only before a certificate of deposit is issued by deposit institution. Furthermore Article 25 stipulates the date on which such revisions take effect. These revisions are introduced to make the relevant provisions of the R.O.C. consistent with international regulations.

According to the existing Article 11 of the "Rules on Deposit of Biological Materials pursuant to Patent Application," "An applicant for making deposit may withdraw the materials deposited and apply for refund of partial or full deposit expenses before review of the patent application. In such a case, the depositing institution should destroy the biological materials concerned or return them to the depositor, and duly notify the depositor and patent authority." The effect of the proposed revision would be to nullify the depositor's right to withdraw such materials and receive a refund once a certificate of deposit for biological materials is issued.

BAKER BOTTS

ANTITRUST UPDATE - DECEMBER 1, 2014

7th Circuit Confirms That Sherman Act Does Not Reach Injuries Suffered Outside U.S.

In a decision that could have far-reaching implications for U.S. companies and consumers, the Seventh Circuit Court of Appeals recently reiterated that the U.S. antitrust laws stop at the border and do not reach conduct that causes damages in the first instance outside the United States.

In *Motorola Mobility LLC v. AU Optronics Corp.*, No. 14-8003, 2014 WL 6678622 (7th Cir. Nov. 26, 2014), issued shortly before Thanksgiving, the Court dismissed a Sherman Act Section 1, 15 U.S.C. § 1, claim brought by Motorola against members of the liquid crystal display ("LCD") cartel and affirmed summary judgment for defendants.

The outcome may at first glance be perplexing. The existence of the cartel and its effect on the United States were not in dispute: most of the cartel members had already pled guilty to Sherman Act violations and paid a combined total of more than $250 million in criminal fines. Moreover, it was clear the cartel participants knowingly harmed Motorola and U.S. consumers. Indeed, Motorola directly negotiated purchase prices with cartel members and a substantial portion of the LCD panels it bought were incorporated into cell phones purchased by U.S. consumers.

The failure of Motorola's claim, however, lay in another undisputed fact: Motorola itself did not purchase the price-fixed liquid crystal display panels. Instead, ten of its foreign subsidiaries (primarily in Asia) purchased the panels. The subsidiaries then incorporated the panels into cell phones, many of which were imported by Motorola into the U.S.

The Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), 15 U.S.C. § 6a(1)(A), limits the reach of the Sherman Act to conduct that has a "direct, substantial, *and* reasonably foreseeable effect" on domestic trade and only when that direct domestic effect "gives rise to" the plaintiff's claim.

The Seventh Circuit decision effectively held that the FTAIA meant what it said. The direct effect of the cartel was borne by Motorola's foreign subsidiaries, which paid allegedly inflated prices for panels. The subsidiaries were thus the "immediate victims" of the conspiracy. Domestic commerce was only affected because Motorola's subsidiaries increased the prices of phones that Motorola subsequently imported. But, that effect did not "give rise to" Motorola's claim against the LCD cartel. Motorola was not suing its subsidiaries, and indeed, as the Court later points out, could not do so.

The Court's opinion is thorough and its reasoning goes beyond the complex text of the FTAIA itself. The Court found additional support for its conclusion rooted in fundamental principles of logic. Motorola submitted to foreign laws in setting up its foreign subsidiaries (perhaps, the Court speculated, to take advantage of

foreign tax laws or local markets). Having thus submitted to foreign laws, the subsidiaries must be governed by foreign laws in all respects, including foreign competition laws. “Distinct in *uno*, distinct in *omnibus*.”

Basic principles of corporate law further reinforced that logic, according to the Seventh Circuit, by generally treating parent and subsidiary as distinct and separate legal entities. Motorola’s argument hinged on the proposition that the Court of Appeals should disregard its own corporate structure and treat its subsidiaries as meaningless parts of Motorola itself. “In other words, Motorola is pretending that its foreign subsidiaries are divisions rather than subsidiaries.” The Court rejected Motorola’s novel argument. “Motorola’s foreign subsidiaries... are legally distinct foreign entities and Motorola cannot impute to itself the harm suffered by them.”

The Seventh Circuit also concluded that Motorola’s argument ran head-long into two established antitrust principles, each of which doomed its claim. First, Motorola was simply a shareholder (albeit, the only shareholder) of its subsidiaries. Shareholders of companies do not generally have standing to prosecute antitrust claims suffered by the companies they own. “Derivative injury rarely gives rise to a claim under antitrust law, for example by an owner or employee of, or an investor in, a company that was the target of, and was injured by, an antitrust violation.”

Second, Motorola’s argument collided with the indirect-purchaser doctrine of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which allows only direct purchasers from a cartel to sue for money damages under the Sherman Act and bars the direct purchasers’ customers and all other indirect purchasers from suing for money damages. Motorola’s argument did not survive the collision with *Illinois Brick*. “Motorola’s subsidiaries were the direct purchasers of the price-fixed LCD panels, Motorola and its customers were indirect purchasers of the panels.”

Finally, the Court found support in fundamental principles of international comity. Motorola’s foreign subsidiaries were injured in foreign countries as a result of their purchases from foreign companies. Those countries have different means of enforcing their competition laws than the Sherman Act; few have private causes of action, for example, and none allows the recovery of treble damages. To allow Motorola to sue in the United States would thus constitute an “unjustified interference with the right of foreign nations to regulate their own economies.” And, indeed, the Court noted that a number of those countries had filed amicus briefs urging the Court to reject Motorola’s claims.

The Seventh Circuit’s decision is not surprising, given the FTAIA’s statutory language and these other considerations. It now makes clear that U.S. companies cannot use their subsidiaries’ foreign incorporation as both a sword and a shield.

Additional detail on this case, its long procedural history, and related FTAIA opinions can be found in our prior Client Update www.bakerbotts.com

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FCC Captioning Quality Rules Likely to Be Effective Mid-March

12.18.14
By Bradley W. Guyton

The FCC is expected to announce soon that the bulk of its new closed captioning quality rules will take effect on March 16, 2015, rather than January 15, as originally projected. The specific rules at issue, which were originally adopted by the FCC in February 2014, cover video programming distributor (VPD) recordkeeping of maintenance efforts, the VPD certification process, captioning quality standards, and best practices for programmers, captioning vendors, and captioners. These new rules will apply to programming created or newly captioned after the mid-March effective date. The issue of whether liability for non-compliance should rest solely with MVPDs or be shared with programmers is pending consideration in a *Further Notice*.

The FCC's February 2014 order stated that, because these rules were subject to approval by the Office of Management and Budget (OMB), they would take effect no earlier than Jan. 15, 2015. In a forthcoming Public Notice, the FCC is expected to announce that the rules will be effective some 60 days thereafter.

The portions of the new captioning quality rules that will be effective in March 2015 contain several obligations for VPDs. The new rules require VPDs to use best efforts to obtain certifications from video programmers that the programmers either comply with the new captioning quality standards for accuracy, synchronicity, completeness placement, and or adhere to the newly adopted best practices for video programmers, or that a specific exemption applies. While VPDs may continue to obtain such certifications directly from programmers, VPDs may also obtain certifications posted by programmers on certain websites or other locations. At this time, non-certifying programmers must be reported to the FCC by the VPD. However, this issue is currently teed up for review in a Second Further Notice of Proposed Rulemaking released Monday that asks whether video programmers should be required to file contact information and certification of captioning compliance with the FCC directly, and how video programmer contact information and certifications can be made widely available to the public.

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New York Court of Appeals Confirms the Viability of the Separate Entity Rule in the Wake of Kohler v. Bank of Bermuda

January 8, 2015

In answering a certified question from the Second Circuit, the New York Court of Appeals recently held that the "separate entity rule" was not abrogated by the court's decision in Koehler v. Bank of Bermuda, 12 N.Y.3d 533 (2009). In Koehler, the court had held that a judgment creditor could seek the turnover of stock certificates located outside of the United States as long as the court had personal jurisdiction over the garnishee.

The separate entity rule provides that even when a bank garnishee with a New York branch is subject to personal jurisdiction, its other branches are treated as separate entities with respect to CPLR article 52 post-judgment restraining notices and turnover orders and article 62 prejudgment attachments. Motorola Credit Corp. v. Standard Chartered Bank, 24 N.Y.3d 149, 158 (2014).Courts have generally provided three rationales for the separate entity rule. First, they emphasize the importance of international comity and the fact that "any banking operation in a foreign country is necessarily subject to the foreign sovereign's own laws and regulations." Second, the rule has been considered necessary to protect banks from being subject to competing claims and double liability. Third, the rule has been justified because of the "intolerable burden" that banks would otherwise face if they had to monitor the status of accounts at other branches. Id. at 159.

In Motorola Credit Corporation, Motorola had served a restraining order on the New York branch of Standard Chartered Bank ("SCB"). Motorola was attempting to collect more than $3 billion in judgments against the Uzan family, which controlled a Turkish telecom company to which Motorola had loaned more than $2 billion. In response to the restraining order, SCB did not locate any Uzan property at its New York branch. However, several months later, a global search of SCB's branches revealed Uzan-related assets valued at $30 million in SCB's branches in the United Arab Emirates ("UAE"). SCB froze the assets to comply with the restraining order. However, regulatory authorities in the UAE and Jordan intervened. The UAE Central Bank debited $30 million from SCB's account with the bank and the Central Bank of Jordan seized documents at SCB's Jordan branch. Id. at 157.

SCB sought relief from the restraining order, arguing that its restraint of Uzan's $30 million violated UAE law and subjected the bank to double liability. SCB also argued that as a general matter, under the separate entity rule, the restraining order served on the New York branch was only effective as to assets located in accounts at that particular branch. Motorola contended that the separate entity rule was no longer valid in light of Koehler. Id.

The Court of Appeals held that the separate entity rule was still valid and necessary to promote international comity and avoid conflicts among competing legal systems. Id. at 162. Indeed, the court noted that when SCB complied with the restraining order served on its New York branch and froze the Uzan assets in the UAE, it faced international regulatory and financial repercussions. The court asserted that the "abolition of the separate entity rule would result in serious consequences in the realm of international banking to the detriment of New York's preeminence in global financial affairs." Id. at 163.

Notably, two justices wrote a scathing dissent, arguing that the separate entity rule is obsolete and runs counter to public policy. The dissent noted that any difficulties banks would face if their foreign branches had to comply with post-judgment proceedings would likely pale in comparison to their obligation to comply with governmental regulations such as the U.S. Patriot Act and the Bank Secrecy Act. In addition, any burden on the banks would be far outweighed by the rights of judgment creditors to enforce their judgments. Id. at 169-70.

This ruling is good news for international banks that do business in New York. Not only will post-judgment restraining orders only be effective on assets actually located in New York, but banks will also not have to spend time and resources investigating the location of assets outside of New York.

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Flash Legal Report

NEW ANTITRUST LAW

On 18 November 2014, Decree N° 1.415 with Status, Validity and Force of Antitrust Law came into force.

Purpose:
The purpose of this law is to promote, protect and regulate fair economic competition by prohibiting and sanctioning monopolistic and oligopolistic behaviors, as well as abuse of dominant position, agreed-upon claims, economic concentration, and any other anticompetitive or fraudulent practice.

Subjects:
The law shall apply to public or private natural or legal persons, whether they work for profit or not, and which conduct business activities in national territory or that group persons that conduct such activities.

This law does not apply to:
1. Community organizations.
2. Strategic public companies or joint ventures.
3. State-owned companies that provide public services.
4. Consumers and their organizations, specifically concerning the prohibition to execute actions that restrict economic competition among them, inducement not to accept the delivery of goods or rendering of services, preventing acquisition or rendering thereof, not selling raw materials or supplies or rendering services to others.
5. Small and medium-sized companies, cooperative companies, and those provided in the community economy system, specifically regarding prohibition of economic concentration that produce or reinforce dominant positions.

The law provides a general prohibition of behaviors, practices, agreements, contracts or decisions that prevent, restrict, falsify or limit economic competition.

The law specifically prohibits the following:
1. Abuse of dominant position.
2. Preventing or putting obstacles to the entry or stay of companies, products or services in the entire market or a portion thereof.
3. Restricting economic competition by inducing to not to accept or preventing: the delivery of goods, the rendering of services, and the sale of raw materials or supplies.
4. Manipulating production, distribution, commercialization, technological development, or investments factors.
5. Agreements that restrict or prevent economic competition among their members.
6. Agreed-upon practices or agreements seeking to (i) set prices and other conditions for commercialization or service; (ii) limit production, distribution, commercialization and technical or technological development; (iii) restrict investments involving innovation, research and

development; (iv) allocate markets, territories, supply sectors or procurement sources among competitors; (v) apply unequal conditions for equivalent services; (vi) subordinate or condition the execution of contracts upon the acceptance of supplementary benefits.

7. Economic concentrations that produce or reinforce dominant positions or that may produce effects contrary to effective competition and in the production, distribution and commercialization of goods and services.
8. Unfair competition, which includes:

(i) False advertising.
(ii) Simulation or imitation.
(iii) Commercial bribery.
(iv) Infringement of legal norms or technical rules.

Definitions:

The law provides the definitions of:

1. Economic freedom.
2. Economic activity.
3. Economic competition.
4. Economic concentration.

Exceptions:

The law provides the possibility that the President, in Council of Ministers, authorizes the following practices:

1. Direct or indirect individual or agreed-upon setting of prices.
2. Application of different conditions in business relationships for similar or equivalent services that cause inequality.
3. Exclusive territorial representation.
9. Franchises with prohibition to commercialize other products.

These exceptions are subject to condition when they concurrently

1. Contribute to improve production, commercialization and distribution of goods and services, and to promote technical and economic progress.
2. Offer advantages for consumers.

Antitrust Superintendency:

The law creates the Antitrust Superintendency as a non-concentrated body with no legal personality and with budget, administrative and financial management capacity.

Registry:

The law creates an internal registry where the following acts will be recorded:

1. Investigations initiated by the Superintendency and the results thereof.
2. Measures ordered and provisions provided to ensure compliance therewith.
3. Imposed sanctions.
4. Any resolution or decision affecting third parties or officers of the Superintendency.

Sanctions:

The law establishes the following sanctions:

1. Executing practices that are prohibited in the law:

a. Fine of up to 10% of the value of annual gross income of the infringer, which may be increased up to 20% in case of aggravated circumstances. In case of repeated infraction, the fine will increase to 40%.
b. Imposition of obligations to perform.

2. Failure to comply with the orders of the Superintendency is sanctioned with fines ranging from 1% to 20% of the value of the infringer's equity. They may be increased in 50% of the original amount if they are not paid within the stipulated time.
3. Any other violation of the law and the regulations thereof will be subject to fine ranging from 1% to 20% of the value of the infringer's equity, according to the severity of the offense.

In addition, the law establishes that the authors, accomplices, accessories or instigators of infringements will be jointly and solidarily liable for such violations.
The law also establishes the aggravated and mitigating circumstances.

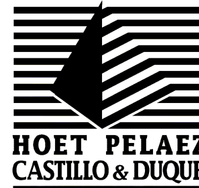
Statute of Limitations:

1. Concerning practices:
    a. The statute of limitations for unfair competition acts is three (3) years.
    b. The statute of limitations for all other violations is five (5) years.
2. The statute of limitations for sanctions is five (5) years, counted from the date when the corresponding resolution was declared final.

Publication and Reprinting:
Decree N° 1.415 with Status, Validity and Force of Antitrust Law dated 13 November 2014 was published in the Special Official Gazette N° 6.151 dated 18 November 2014, and was erroneously reprinted and published in Official Gazette N° 40.547 dated 24 November 2014.

Validity:

Decree N° 1.415 with Status, Validity and Force of Antitrust Law came into force on 18 November 2014.



Flash Legal Report
New Antitrust Law

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