PACIFIC RIM ADVISORY COUNCIL

JULY e-BULLETIN

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HOGAN & HARTSON'S JACK KEENEY NAMED PRESIDENT OF D.C. BAR

FOR IMMEDIATE RELEASE

WASHINGTON, June 23, 2004 – John C. (Jack) Keeney Jr., a partner in Hogan & Hartson's Washington, D.C., office was sworn in as the 33rd president of the 78,000 member District of Columbia Bar today.

Keeney focuses his trial practice on complex litigation matters. He has defended law firms and attorneys in numerous malpractice claims, handled litigation matters involving securities, fiduciary duties, civil rights and RICO issues, and is nationally recognized for his experience in federal election law. He has represented witnesses in investigations by independent counsels, the Federal Election Commission and congressional committees.

An active member of the D.C. Bar for many years, Jack has served as a member of the board of governors and executive committee and formerly served as chair of the legal needs subcommittee of the pro bono committee. At Hogan & Hartson, Keeney chairs the firm's ethics committee and is the former chair of the firm's nationally recognized pro bono department.

Keeney holds a law degree, *cum laude*, from Harvard Law School and a bachelor's degree from the University of Notre Dame. He is married to Kathy Gunning, an appellate attorney and former president of the Women's Bar Association. They are adoptive parents of four-year old twin daughters from Leping, China.

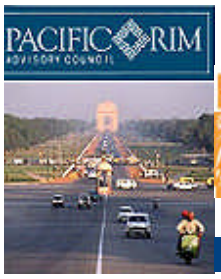
About Hogan & Hartson

Hogan & Hartson is an international law firm headquartered in Washington, D.C., with close to 1,000 attorneys practicing in 20 offices around the globe. The firm's broad-based international practice cuts across virtually all legal disciplines and industries.

Hogan & Hartson has European offices in Berlin, Munich, Brussels, London, Paris, Budapest, Prague, Warsaw and Moscow; Asian offices in Tokyo and Beijing; and U.S. offices in New York, Baltimore, Northern Virginia, Miami, Los Angeles, Denver, Boulder, Colorado Springs and Washington, D.C.

For more information about the firm, visit www.hhlaw.com.

Editor's note: E. Tazewell (Ted) Ellet, current president of the Virginia State Bar, is also a partner with Hogan & Hartson's D.C. office.



PRAC INDIA 2004 CONFERENCE

New Delhi / Agra October 30 - November 5, 2004

Hosted by Kochhar & Co.
New Delhi . INDIA

HOST FIRM MESSAGE

07 July 2004

Dear PRAC Members,

It gives us great pleasure to host the 36th Pacific Rim Advisory Council Conference in New Delhi from 30th October to 3rd November, 2004 and a follow-on in Agra from 3rd November to 5th November, 2004.

We have endeavoured to prepare what we hope will be an interesting and exciting programme for all the delegates. Delhi, the capital of India, is a fascinating old and new city. For almost 3000 years, India has witnessed the rise and fall of various rulers - the Aryans, the Mauryas, the Guptas, the Turko-Afghan Slave Dynasty, the Mughals and the British - each of these rulers have left an indelible print on this historic city, the centre of power for much of this period. Delhi's culture, architecture and its cuisine reflects these various influences. We have attempted to prepare a programme that we hope would enable the delegates to experience some of these influences.

The business programme will cover multiple Practice Group meetings and include a Public Seminar on "International Finance", featuring guest and PRAC speakers and be attended by local industry leaders.

Earlier this year we received your Early Indications and we hope that all of you will now formally register. We have planned events and sightseeing during your stay in New Delhi and Agra and encourage your earliest attention to registration so as to avoid any disappointment. November is a busy time for Agra and we would not want you to miss visiting the monument that was inspired by love.

This is the first time PRAC is coming to India and we are looking forward to welcoming you all to our country.

Host Committee:

Rohit Kochhar
Manjula Chawla

KOCHHAR & CO.
ADVOCATES & LEGAL CONSULTANTS

Please Note : Deadline for Registration is August 15
Delegates must register On Line @ PRAC Web Site www.prac.org

KING & WOOD PRC LAWYERS – BEIJING OFFICE RELOCATES

Please note our Beijing Office has relocated effective June 28. Kindly note our new office address, telephone and fax details below:

31st Floor, Office Tower A,
39 Dongsanhuan Zhonglu
Chaoyang District
Beijing, 100022, China
Tel:86-10-5878-5588
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LOVELLS WINS LEGAL EDUCTION AWARD

25 June 2004

Lovells' leading edge approach to legal education is to be recognised with a major award for the firm's in-house 'TransAct' training programme. The International Association for Continuing Legal Education's (ACLEA) 'Professional Excellence' award for 'Best Programme' is the top award in that category and is one of only 16 annual awards granted to ACLEA members representing more than 300 organisations.

TransAct is a series of specialist business simulation programmes which are used to train Lovells lawyers and their clients in international transactions conducted in English. Each programme, developed by a Lovells project team working with consultants from Sherwood PSF Consulting, is tailored for use within a specified area of legal practice. For example, 'TransAct Corporate' trains lawyers in the conduct of cross-border acquisitions using the simulated acquisition of an international pharmaceutical company. Lawyers work at their own desks and form teams with colleagues in other jurisdictions, communicating by email and telephone and dealing with a number of realistic issues as they arise.

TransAct is part of a full programme of training and development activities that enables Lovells to provide consistent high quality legal services to clients; provides broad business and personal skills development for all members of the firm; supports the raising of performance standards throughout the firm; facilitates international integration by using training and development as a vehicle for closer working relationships and practice; and ensures the firm complies with its obligations for training.

ACLEA members are professionals in the fields of continuing legal education and legal publishing. The annual ACLEA awards recognise the most noteworthy from among the thousands of projects produced each year by ACLEA members. The award for 'TransAct' was granted in recognition of the **'highly interactive problem situations that lead participants through learning experiences.....that surely result in stimulating and lasting education benefits'.**

Suzanne Fine, Lovells' Head of Legal Training said:

"The TransAct simulation has had an immediate beneficial impact on the way we serve our clients. It champions communications across legal and geographical boundaries and, ultimately, ensures that the client's instructions are fulfilled by drawing upon knowledge and experience from across the international firm.

We believe this is the first use of such detailed business simulation for law firm training. TransAct provides a novel and practical way of improving standards of practice - an issue for law firms in this era of corporate globalisation. We have copyrighted TransAct and are developing the concept for other areas of the law. We are delighted that our efforts in developing the programme have been recognised by ACLEA in this way."

The award will be officially presented at ACLEA's annual meeting in Colorado on 2 August 2004.

For further information please contact:

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LUCE FORWARD HAMILTON & SCRIPPS CHARLES A. BIRD HONORED WITH STATEWIDE BAR ASSOCIATION AWARD

Charles A. Bird, a partner in the San Diego office and member of the San Diego County Bar Association ("SDCBA"), will receive a special award from the statewide Conference of Delegates of California Bar Associations ("CDCBA") at a dinner on July 10, 2004. Mr. Bird is being honored for having been “an influential delegate, providing invaluable expertise and guidance in floor management and debate.”

Mr. Bird has served as a member of the SDCBA’s delegation to the Conference for nearly 25 years. He received the Bar’s Outstanding Attorney of the Year Award for 2003. (See related story - "Charles A. Bird Honored With California Lawyer Attorney of the Year Award, Appellate Division, for 2003."

From the *SDCBA Bar Report Update*, July 7, 2004: "The CDCBA was formed as an independent 501(c)(6) non-profit corporation in 2002. It is the successor organization to the State Bar Conference of Delegates and the combined organizations have an almost 70 year history. With its new name and status, CDCBA has been reinvented and reinvigorated as the voice of the lawyers of California. Participation is open to all local, minority, statewide and specialty voluntary bar associations in California. CDCBA employs a lobbyist in Sacramento to implement its legislative program. CDCBA is funded entirely by voluntary contributions. No State Bar mandatory dues are used in its operations."

Mr. Bird specializes in appeals and writs in all California and federal appellate courts. He has been the lead counsel in more than 40 cases with published opinions, including U.S. Supreme Court, California Supreme Court, and U.S. Ninth and Tenth Circuits. He has handled more than 100 appeals and writs as lead counsel.

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NAUTADUTILH ELECTS NEW BOARD AND STRUCTURE; APPOINTS NEW PARTNERS

Amsterdam, June 28th 2004 – The international law firm NautaDutilh has chosen a new board structure and elected a new board during the annual spring meeting of the partners last weekend. The new management board will be chaired by Marc Blom and will further consist of Tjitske Cieremans, Robert ten Have and Benoît Strowel. Later this year they will be joined by a fulltime professional manager from outside NautaDutilh.

Until now two partners were in charge of the management of the firm. Joan van Marwijk Kooy and Job van der Have, who formed the board for almost five years, have initiated the new management board structure. This new structure will improve the managerial efficiency of the Netherlands' largest law firm NautaDutilh and enable the partners in the board to remain active in their practices.

Departing managing partner Job van der Have: "After our appointment to the board, Joan and I started a process of change in which a new phase has now begun. This new structure is in line with our ideas to enhance the efficiency of our management and it is a good moment to let others take over."

The four new board members will be responsible for NautaDutilh's policy in specific subject areas. Marc Blom, Banking & Finance partner in Amsterdam, will as chairman have the overall responsibility for NautaDutilh's strategy and policy. Benoît Strowel, managing partner of the Brussels office, will focus on client relationships. Robert ten Have, Corporate/M&A partner in Amsterdam, will be in charge of NautaDutilh's practice. Tjitske Cieremans , Insurance & Liability partner in Rotterdam will be responsible for human resources. The fulltime professional manager still to be appointed will become responsible for the operational management of NautaDutilh.

"Our decision to change our board structure is in line with our vision for the future. We find ourselves in the middle of a process of innovation. We are working on moving our firm forward by continuously strengthening and broadening the quality of our services and our position on the labour market. Improving the efficiency of our management structure and the operational support to our practice is crucial to this process," says Marc Blom, the new chairman of NautaDutilh.

During the coming months Joan van Marwijk Kooy and Job van der Have will hand over their management tasks. Subsequently Joan van Marwijk Kooy will return to his Corporate/M&A practice in Rotterdam. Job van der Have will for some time assist the new management board; he intends to continue his career in management outside the legal profession in the not too distant future.

Appointment five new partners

During the partner meeting five new partners of NautaDutilh were appointed. Daan Lunsingh Scheurleer, Banking & Finance in Amsterdam, Daniella Strik, Corporate & Commercial Litigation and Jennifer Willemsen, Employment in Rotterdam, were appointed partner in the Netherlands. Yvette Verleisdonk, Corporate/M&A and Structured Finance, and François Tulkens, Administrative Law will become partners of NautaDutilh's Brussels office.

About NautaDutilh

NautaDutilh is the largest independent Benelux law firm with offices in the Netherlands, Belgium, Luxembourg, London and New York offering a broad range of top-rate legal expertise. NautaDutilh maintains close but non-exclusive ties with prominent law firms worldwide.

Contact for the media:

Margaret van Kempen, telephone +31 (0)70 346 3760 and mobile +31 (0)6 53 805 856

NAUTADUTILH Amsterdam Offices Relocates

PRESS RELEASE

NautaDutilh Moves To New Amsterdam Office

Amsterdam, 21 June 2004 – Today the Amsterdam office of NautaDutilh has moved to a new office building.

NautaDutilh's new offices are situated within the World Trade Center complex located at the Strawinskylaan in Amsterdam. The WTC complex is home to several hundred internationally orientated companies and a wide range of business and personal facilities. "We have taken great care to offer the maximum in comfort to both our employees and our clients. The open and accessible character of the building reflects our vision for the provision of quality international services" says Job van der Have, Managing Partner of NautaDutilh.

The office will offer room to approximately 400 fee earners and staff from NautaDutilh's current Amsterdam office. The NautaDutilh office offers access to 14 boardrooms, has modern telecommunication and audiovisual facilities, and houses a staff restaurant.

About NautaDutilh
NautaDutilh is the largest independent Benelux law firm, with offices in the Netherlands, Belgium, Luxembourg, London and New York offering a broad range of top-rate legal expertise. NautaDutilh maintains close but non-exclusive ties with prominent law firms in all major cities worldwide.

The new address of NautaDutilh in Amsterdam is:

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telefax + 31 (0)20 717 1111

Contact for the media:
Margaret van Kempen
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PLEASE NOTE:

From 21 June 2004, the new address of NautaDutilh's Amsterdam office will be:

Strawinksylaan 1999, 1077 XV Amsterdam, the Netherlands; telephone +31 20 7171 000, fax +31 20 7171 111.
The mailing address remains: P.O. Box 7113, 1007 JC Amsterdam, the Netherlands.

For the route description, please see our web site at www.nautadutilh.com

RODYK ENHANCES PRACTICE AREA LEADERSHIP WITH NEW PARTNERS

Rodyk has appointed five Partners to Equity Partner positions within their respective practice groups. The new appointments strengthen the leadership of the firm's practice areas.

Doreen Sim heads Rodyk's Banking Practice within the Finance & Corporate Practice Group. She specialises in general banking, finance and security transactions and advises banks, financial institutions and borrowers on a wide range of loan and other local and international debt related transactions. Doreen also advises on banking and other financial laws and regulations, electronic banking and derivative transactions, bankruptcy and insolvency laws and debt restructuring.

The Litigation Department sees Ling Tien Wah and Christopher Chong take on Equity Partner positions. Ling Tien Wah specializes in real estate and construction litigation. His general areas of practice include landlord and tenant litigation and advice, general commercial litigation and insurance disputes. Christopher handles commercial matters and specialises in insurance and professional malpractice litigation. His clients include leading insurers, hospitals and medical defence organisations.

Within the Real Estate Practice Group, Leong Pat Lynn and Melanie Lim now lead the Developers and Institutional Property Practice. Pat Lynn and Melanie have extensive experience in representation of major real estate developers and investors in the negotiating and documenting of transactions in the areas of sale, acquisition, leasing, development, construction, and operation of real property in Singapore. Pat Lynn has also represented various real estate developers and privatised statutory boards in the leasing of commercial/industrial complexes for entertainment, shopping centre, office and warehousing space in Singapore

DAVIS WRIGHT TREMAINE LLP US Supreme Court Voids Washington State Sentencing System; Ruling Affects Numerous Other States; Thousands of Felony Sentences Cast Into Doubt

June 24, 2004 --The United States Supreme Court today ruled that Washington State's "sentencing guidelines" are unconstitutional because they allow defendants' sentences to be increased by judges instead of juries. The decision rests on "basic principles of procedural fairness," said Jeffrey Fisher of the law firm of Davis Wright Tremaine, who made the winning argument in the Court.

Under Washington's guidelines -- which were enacted as part of the Sentencing Reform Act of 1981 and implemented in 1984 -- every person who is convicted of a felony is assigned a "standard sentencing range" based on his criminal history and the seriousness of his crime. The guidelines, however, permit courts to adjust a defendant's actual sentence upward or downward based on additional "aggravating" or "mitigating" factors. If there is a factual dispute about the presence of an aggravating fact, the guidelines permit judges to make findings by a "preponderance of the evidence" (or more likely than not) standard.

It was this procedure for finding aggravating facts that the U.S. Supreme Court invalidated today, in a case called *Blakely v. Washington*, No. 02-1632. The Court, by a 5 -4, vote, held that the Sixth and Fourteenth Amendments require that any facts that subject defendants to heightened punishment must be found by a jury beyond a reasonable doubt. Rejecting a 2001 decision by the Washington Supreme Court holding that these rules did not apply to Washington's guideline system, Justice Scalia explained for the High Court's majority that "When a judge inflicts punishment that a jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to punishment, (citation omitted), and the judge exceeds his proper authority." Slip op. at 7. Justices Breyer, O'Connor, and Kennedy all authored separate dissents, joined also by Chief Justice Rehnquist.

Since 1980, 16 other states have adopted guideline-type systems, and eight of those systems -- Alaska, Michigan, Minnesota, North Carolina, Ohio, Oregon, Pennsylvania, and Tennessee - operate like Washington's. Several other states, such as Colorado and Arizona, have non-guideline systems that also contain "aggravating fact" procedures that mirror Washington's and that may be implicated here. One additional state, Kansas, originally enacted a guideline system like Washington's but later amended it to require that any aggravating facts be found by a jury beyond a reasonable doubt.

Federal law also contains a sentencing guideline system, and today's decision casts doubt on that system as well. One federal court, in fact, ruled on June 21 in anticipation of today's Supreme Court decision that the Federal Sentencing Guidelines were unconstitutional for the same reason that Washington's now are. See *United States v. Green*, No. 02-10054 (D. Mass. June 18, 2004), at pp. 63, 133 (http://pacer.mad.uscourts.gov/dc/cgi-bin/recentops.pl?filename=young/pdf/supersentencing%20memo.pdf)
(Due to the length of this URL, it may be necessary to copy and paste this hyperlink into your Internet browser's URL address field.); see also (http://www.nytimes.com/2004/06/23/national/23judge.html)(*New York Times* story). In a dissent from the bench today, Justice O'Connor said that "starting today" the legality of the federal guidelines is under great uncertainty.

"Today's decision means that states like Washington need to adjust their sentencing laws to operate the way Kansas's guidelines do," said Fisher. "Someone should not get extra years added to his sentence unless a jury has made sure that the factual basis for that increase actually happened."

The Supreme Court's decision came in the case of an Eastern Washington man, Ralph Howard Blakely, Jr. In 1999, Blakely pleaded guilty to second degree kidnapping with a deadly weapon for abducting his estranged wife from their home near Spokane. His standard sentence for the crimes was 49-53 months. After hearing testimony from the wife and others, however, the judge found that the crime involved "deliberate cruelty" and domestic violence in the presence of the couple's child. (The judge reached this conclusion despite acknowledging that Blakely suffered from personality disorders such as schizophrenia that affected his mental state). Based on these aggravating facts, the judge increased Blakely's sentence by 37 months above the top of the standard range, to 90 months.

The Supreme Court's decision invalidating this 37-month increase throws thousands of similar "exceptional sentences" into doubt. Each year, Washington courts impose hundreds of exceptional sentences, sometimes

increasing defendants' prison time by several years. See Statistical Summary of Adult Felony Sentencing, Fiscal Year 2002 at 44 (645 such sentences in 2002) (www.sgc.wa.gov/Stat%20Report%202002.pdf). Every one of these defendants now has a claim that the increased portion of his sentence must be invalidated.

This is the second Supreme Court victory for DWT's Fisher in the last few months. On March 8, 2004, the Court sided with Fisher in reversing another Washington decision, *Crawford v. Washington*, ruling that the Sixth Amendment right to confront adverse witnesses affords defendants an absolute right to cross-examine their accusers.

Today's Supreme Court's decision in *Blakley v. Washington* can be accessed at http://supct.law.cornell.edu/supct/html/02-1632.ZS.html.

Fisher is a fifth year associate in DWT's Seattle office, who focuses his practice in constitutional appellate work. A national firm, with more than 410 attorneys in eight offices in the United States and one in Shanghai, China, Davis Wright Tremaine is a business and litigation law firm well-known for its national media and First Amendment, intellectual property, corporate finance, health law, and energy practices.

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Barrie K. Handy, 206-628-7404, barriehandy@dwt.com

NAUTADUTILH Counsel to Stichting Democratie in Sale Majority of Shares

NautaDutilh acted as counsel to Stichting Democratie en Media ("SDM"), Stichting De Volkskrant, Stichting ter Bevordering van de Christelijke Pers in Nederland (the "Sellers") and PCM Uitgevers N.V. ("PCM") on the sale of the majority of the shares in the PCM to funds advised by APAX Partners Worldwide LLP ("APAX") (the "Acquisition").

On 30 June 2004 funds advised by APAX acquired 52.5% of the ordinary shares in PCM. The Sellers jointly hold the remaining 47.5% of the shares in PCM.

NautaDutilh has acted as counsel to PCM and its subsidiaries in connection with the financing of the Acquisition and the refinancing of the corporate debt of PCM and its subsidiaries.

In November 2003 SDM and PCM agreed to restructure the ownership structure of PCM and in December 2003 jointly started a search process for an appropriate strategic and/or financial partner. NautaDutilh has assisted SDM and PCM in the auction process for the sale of the majority of the shares in PCM. As a result of the auction process negotiations were started with APAX.

RODYK & DAVIDSON Acting for Contractors in Major Construction Inquiry; CHANG International Airport Services Private Limited

On 20 April 2004, an accident occurred during excavation works at the site of a new underground train station causing a portion of one of Singapore's most used roads – Nicholl Highway – to collapse. Fortunately the collapse occurred during a quiet period. Loss of life and injury was limited. An inquiry has been convened by the Ministry of Manpower and Rodyk has been retained by Nishimatsu-Lum Chang, the main contractors – a joint venture, among the leading construction companies in Singapore. The matter is being lead by the Head of Rodyk's Projects, Construction and Investment Practice Mr Philip Jeyaretnam S.C. who is also Chairman of the Society of Construction Law, Singapore.

The firm's Projects, Construction and Investment Practice provides the full range of legal services in the area of construction and real estate law. The team has extensive experience in disputes arising from international construction projects, delay, defective works and duties of architectural, engineering and other consultancy services. The team has also handled numerous claims and disputes between owners, main contractors and sub-contractors arising out of bespoke and standard form building contracts

Rodyk is acting for CIAS (Changi International Airport Services Private Limited) in the sale of Temasek Holdings (Private) Limited's (Temasek) majority stake in the company. CIAS is one of the two current providers of ground handling, cargo handling and in-flight catering services at Singapore Changi International Airport.

A direct competitior to Singapore Airport Terminal Services with whom Singapore Airlines Group is affiliated, CIAS has nonetheless been able to capture significant market share at Changi Airport. Founded in 1977, CIAS currently provides its ground handling, cargo handling and in-flight catering services to 28 scheduled and over 40 non-scheduled airlines with flights to and from Changi Airport. Over the past year alone, 11 new customers were added including leading airlines such as Cathay Pacific and Emirates and new budget carrier Valuair.

The team acting for CIAS, is lead by S Sivanesan, also joint Head of Rodyk's Finance & Corporate Practice Group

The recent ALRC report on classified material might have been prompted by concerns about terrorism but its recommendations affect day-to-day public service practice including FOI requests and disclosure regimes.

The Australian Law Reform Commission's report "Keeping Secrets - The Protection of Classified and Security Sensitive Information" looks at the effectiveness of the various existing mechanisms for preventing unnecessary disclosure of classified and security sensitive information in the course of official investigations and criminal or other legal proceedings.

Using sensitive material in court cases

The ALRC suggests that a new scheme for the use of the use of classified and security sensitive information in all stages of proceedings in all courts and tribunals in Australia be set out in a dedicated new 'National Security Information Procedures Act' rather than in the *Evidence Act* 1995 (Cth).

Broadly, the proposed scheme would require all parties to an action to notify the court and the other parties as soon as they learn that any sensitive national security information will arise in the proceedings. The court must then convene a special directions hearing to determine the way in which this information will be handled during the proceedings. If the Government is not already a party, the Commonwealth Attorney-General would be notified of the fact that classified or security sensitive information may arise in the proceedings, providing an opportunity to intervene and seek orders governing the protection and use of that information.

After hearing all of the arguments in a particular case, the court might rule that the classified and security sensitive information must be admitted into evidence in open court (despite potential adverse consequences for Australia's national security), or that the classified and security sensitive information must be completely excluded (despite the difficulties this may present to the defendant or non-government party).

New court powers

The ALRC's proposed scheme would give the court a range of options to tailor orders to suit the exigencies of the particular case, including (but not limited to):

- admitting the sensitive material after it has been edited or 'redacted' (the sensitive parts obscured);
- replacing the sensitive material with alternative, less sensitive forms of evidence;
- using closed circuit TV, computer monitors, headphones and other technical means to hide the identity of witnesses or the content of sensitive evidence (in otherwise open proceedings);
- limiting the range of people given access to the sensitive material;
- closing all or part of the proceedings to the public; and
- hearing part of the proceedings in the absence of one of the parties and its legal representatives, but not in criminal prosecutions, and only in other exceptional cases, subject to certain safeguards.

In every case, the court would determine admissibility and how the material is to be handled and protected in the proceedings. However, the Attorney-General would retain the power to certify that the national security information in question is so sensitive that it simply cannot be used under any circumstances. The court can then determine whether and how the proceedings may continue without that material.

In any proceeding in which classified and security sensitive information may be used, the court should have the assistance of a specially trained security officer to advise on the technical aspects of managing and protecting such information.

Classifying material

The Report recommends that the mandatory minimum standards in the Commonwealth Protective Security Manual should be amended to include express statements that:

- information should only be classified when there is a clear and justifiable need to do so;
- the decision to classify should be based on the criteria set out in the Manual; and
- information must not be classified for extraneous reasons such as to conceal breaches of the law, inefficiency, or administrative error; to prevent embarrassment to a person, organisation, or agency; or to prevent or delay the release of information that does not require protection in the interest of national security.

Classified material doesn't always stay that way, of course; often when an FOI request is made for classified material an informal review of its status might happen. The ALRC suggests formalising the review process in a a program in which classified material's status would be reviewed, with a view to declassifying it or reducing its classification. This review would happen:

- when it is first classified in accordance with guidelines in the Manual which indicate when such decisions require review and confirmation by a senior officer, for example, where the classification assigned is not normal or standard for that agency;
- before transfer to the National Archives of Australia, to reduce the amount of unnecessarily classified archived material that it holds;
- in response to any challenge to its classification status (for example, by recipients of information, as suggested in the Manual); and
- when there is any need or proposal to use that information in a public forum, such as in court or tribunal proceedings, or in response to a freedom of information application.

Another recommendation is the automatic declassification of classified material that is no longer sensitive after 30 years (subject to any contrary decision taken at that time).

Disclosing classified material

The current disclosure regime should be reviewed, and a comprehensive public interest disclosures scheme should be introduced to cover all Australian Government agencies, including defence, security and intelligence agencies.

Special procedures would apply for disclosures from and about the defence, intelligence and security agencies and concerning classified and security sensitive information. The ALRC says that these procedures should protect classified and security sensitive information and at the same time:

- encourage public interest disclosures;
- ensure that such disclosures are independently investigated; and
- ensure that those making such disclosures are protected from reprisals.

At the same time, all legislative and regulatory provisions giving rise to a duty not to disclose official information should be reviewed, particularly regulation 2.1 of the *Public Service Regulations* which is the blanket prohibition on disclosure. It predecessor was struck down by the Federal Court last year (see our Alert) and a replacement is currently being drafted. The ALRC recommends that the duty of secrecy is imposed only in relation to information that genuinely requires protection and where unauthorised disclosure is likely to harm the public interest.

The ALRC is also recommending:

- the use of injunctions to stop the threatened publication of classified or security sensitive information;
- suggested improvements to the structure, content and enforceability of the *Commonwealth Protective Security Manual*; and
- methods to monitor the adherence of government agencies to the protective security standards.

Where to now?

At the time the ALRC Report was tabled, the Federal Attorney-General said that the *National Security Information (Criminal Proceedings) Bill* introduced into Parliament in May "is consistent with a number of the Commission's recommendations" but that he would be examining the Bill in further detail in the light of the ALRC's recommendations. The Bill however does not implement the majority of the recommendations made by the ALRC in the Report.

The Bill limits the jurisdiction of a court in a federal criminal proceeding to hear or determine a defendant's application under the *Administrative Decisions (Judicial Review) Act* 1977, where the application relates to a certificate decision of the Attorney-General. In addition, the amendment will prevent a person from requesting the Attorney-General to provide reasons for the certificate decision.

It also generally gives jurisdiction to the Supreme Court of the State or Territory in which the prosecution or appeal is before with respect to any matter in which the defendant seeks a writ of mandamus or prohibition or an injunction against the Attorney-General in relation to a certificate decision.

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Arbitration in Brazil — Trends, Issues and Challenges

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Although arbitration has always been addressed by Brazilian laws, namely the Civil Code and the Civil Procedure Code, and even earlier in the Ordinances of the Reign when Brazil was a Portuguese colony, the then-existing framework did not give enough assurance to the parties that, even if they had agreed to submit their contractual disputes to arbitration, the arbitral proceedings would be actually instituted in the event of a dispute.

I. Introduction

Over the last five decades, arbitration has been developed and solidified as an efficient means to settle commercial disputes in various jurisdictions. In Brazil, however, arbitration has experienced a period of stagnation during the same period. Development and solidification implied a move from a legal framework crafted in the 19th century to a modern one, consistent with the intent of the parties, as well as the replacement of Conventions executed in the 1920s by a well received New York Convention in 1958.

Stagnation in Brazil was due basically to two factors: (1) the existence of old fashioned codified rules governing arbitration which had not incorporated and therefore lacked the most modern mechanisms to force the parties to institute arbitration, as previously agreed upon, and (2) the reluctance of Brazil in adhering to and ratifying the 1958 New York Convention.

Although arbitration has always been addressed by Brazilian laws, namely the Civil Code and the Civil Procedure Code, and even earlier in the Ordinances of the Reign when Brazil was a Portuguese colony, the then-existing framework did not give enough assurance to the parties that, even if they had agreed to submit their contractual disputes to arbitration, the arbitral proceedings would be actually instituted in the event of a dispute. Should one of the parties fail to abide by the arbitration clause and actually fail to perform its obligation to arbitrate, the other party would be entitled, at most, to claim damages. The rules governing arbitration failed to create a resort to specific performance, and the absence of an appropriate legal remedy hindered the intended use of arbitration as a dispute resolution mechanism.

Nevertheless, on September 23, 1996, the Brazilian Congressional Houses passed Federal Law No. 9,307, and introduced into the Brazilian legal system the Arbitration Act. This new law provided a solution to the main impediment for the development of arbitration in Brazil by granting specific performance of the arbitration clause. The Arbitration Act also eliminated the legal requirement that prevailed in the country for many decades whereby the enforcement of a domestic arbitral award would be allowed only if ratification by a court had first been secured. Under the Act, the domestic arbitral award has the same effect as a judgment, and whenever it provides for the payment of money by one party to the other, it shall be deemed a title eligible for summary collection proceedings.

The constitutionality of certain sections of the Arbitration Act was challenged as breaching the individual rights provided by the Brazilian Federal Constitution. The Arbitration Act was finally declared constitutional by the Federal Supreme Court, and undoubtedly that decision has paved the road for the development of arbitration in Brazil.

The importance of Brazil having a strong framework for arbitration may be measured by the large number of corporate transactions completed since the beginning of the second half of the last decade, which represents an increase of foreign equity investment in the country and the expansion of investment by local groups. The increasing presence of foreign investors was a strong justification for the introduction of a modern and effective legal statute to allow the parties to resort, whenever necessary, to institute arbitration to settle their disputes.

Although the Arbitration Act contained a set of rules governing the recognition and enforcement of foreign arbitral awards (substantially similar to the principles and language of the New York Convention), an important piece was still missing in that framework. Earlier, Brazil had adhered to and ratified the Panama Convention, but owing to the limited scope of participants, the enhancement and upgrading of the arbitration framework still depended on the ratification of the 1958 New York Convention. That ratification did not occur until 2002. More than 40 years had elapsed since the New York Convention was established when Brazil finally adhered to the text without reservation.

All circumstances are now favorable for the development of arbitration as an effective means for settlement of disputes in Brazil. There is a perfect synchronicity between the momentum of adhesion by Brazil to the Convention and the present stage of implementation of large infrastructure and industrial projects in Brazil. The Brazilian government is fostering and relying on the dissemination in the market-

place of complex and sophisticated transaction structures, such as the U.K.-based public-private partnerships (known by the acronym of PPP) for the enhancement of the infrastructure base. In such cases, the use of arbitration to settle disputes that may arise is not only desirable, but essential, requiring the elimination of doubts and uncertainties as to the effectiveness of the arbitral proceedings.

While issues and doubts with respect to the scope and mode of application of the New York Convention have confronted signatory countries for several decades, Brazil is now having the opportunity to walk that same path. It may be said that Brazil is experiencing the infancy of its relationship with the New York Convention, and the issues which are now being raised in the legal marketplace were expected, and must be seen as a normal stage in the creation of a history of the Convention in Brazil. Furthermore, the adhesion of Brazil to the Convention triggers questions with respect to the interplay between the New York Convention and the Brazilian Arbitration Act. It is there that this article will focus. The intention is not the final settlement of those issues. Our purpose is to put forth some ideas and generate discussion.

II. The Nationality of the Arbitral Award

The first issue to be discussed in this article relates to the nationality of the arbitral award and the legal consequences thereof. In the chapter of the Arbitration Act crafted to deal with the recognition and enforcement of foreign arbitral awards, foreign arbitral awards are defined as "*those which have been passed outside the national territory.*" In other words, any award passed outside the boundaries of the Brazilian territory shall be deemed of a foreign nature.

While we have to abide by the legal criterion of place of arbitration to determine the nationality of the award, we also understand that the nature of arbitration proceedings and of the awards passed therein may not be precisely defined by applying solely such a criterion or, in other words, such a criterion may be insufficient to identify the nationality of the award or indicate its further effects.

One view of an "international" arbitration is that it shall exist whenever local and foreign parties are involved. This approach coincides with the Brazilian approach only if arbitration proceedings take place outside Brazil. One may easily identify several examples of arbitrations held in Brazil that involve parties from countries signatory of the New York Convention that would not seem to be logically characterized as "domestic" awards. This issue is not merely theoretical, but has practical consequences. One practical effect relates to enforcement. In Brazil, a domestic award may be immediately enforced, but foreign arbitral awards may only be enforced after being ratified by the Federal Supreme Court.

References are found in foreign doctrine to domestic, foreign and national awards, depending on the criteria adopted which vary from the place of arbitration to the nationality (or absence of a defined nationality) of the applicable laws. Our analysis, in turn, goes beyond the place of arbitration or nationality of the applicable laws. We understand that there is another category of awards that, irrespective of the place of arbitration, maintain a relationship with parties from a country signatory of the New York Convention or other regional or multilateral conventions.

In our view, it seems myopic to state that awards are either domestic or foreign only. Assuming an international arbitration, irrespective of the place where proceedings are held, it is common sense that the award shall be deemed foreign in the jurisdiction where proceedings have not been held, but domestic in the place of arbitration. But when it is stated that the award is, under one perspective, a domestic award, such award still keeps the nature of an award under the New York Convention. It is precisely in view of that circumstance that we propose, under the existing framework in Brazil, a third category of arbitral awards. We make reference to ***non-foreign awards*** in contrast to domestic and foreign awards. The non-foreign awards, from a Brazilian law perspective, are those passed in the context of international arbitrations but, for the purposes of laws of the jurisdiction where they were passed, are treated identically to the domestic awards. The important feature of such category is the maintenance of its relationship with existing conventions, such as New York, Panama or any other regional text, despite being treated identically to the domestic awards. The quasi-domestic nature of such awards entitles them to be treated identically to domestic awards in Brazil. Nevertheless, in any jurisdiction where the arbitration proceedings have not been held, such awards shall be deemed foreign awards, including for purposes of enforcement against a Brazilian party, if such party has assets outside Brazil and enforcement

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thereof in a third jurisdiction is deemed more convenient to the winning party. In such a case, the nature of the award as a New York Convention award, for instance, would have to be recognized.

This proposed category of awards is not inconsistent with the Brazilian Arbitration Act. In reality, the Act defines explicitly and expressly foreign awards only. Therefore, it is fair to say that, except for foreign awards, any other award shall be deemed a domestic award. We, however, would rephrase such statement to say that, excluding genuine foreign awards, any other award which contains an international feature shall be deemed to produce effects identical to those from which domestic awards benefit.

Section 2, first paragraph of the Arbitration Act states that "the parties are free to choose the law that shall be applicable to the arbitration, provided that the same are not in breach of good morals and public policy."

III. Choice of Law in Arbitration

The Brazilian Law on conflicts of law states that the law of the place where obligations are constituted shall be the governing law. On the basis of such provision, some international law scholars developed the construction that the parties would lack the freedom to choose the applicable law.

This academic position has not prevailed in practice. Practitioners have construed that provision to apply only to cases where the contract is silent, despite the absence of case law addressing the issue. The Arbitration Act also adopts an approach that is different from the academic position. Section 2, first paragraph of the Arbitration Act states that "*the parties are free to choose the law that shall be applicable to the arbitration, provided that the same are not in breach of good morals and public policy.*"

As a law of general application, the Arbitration Act states in Section 1 that the persons capable of entering into contracts may submit to arbitration their disputes regarding any rights that may be freely disposed by them. In our view, the word "persons" should be defined in light of the provisions of the Brazilian Civil Code which encompass public and private persons, including the State and its controlled entities.

Although applicable to arbitration only, the provision of the Arbitration Act mentioned above clearly shows that the legislature has adopted, in the arbitration domain, a general principle different from the alleged public-policy nature of the provision of the law of conflicts of law. Brazilian courts have addressed the legality of Section 2 of the Arbitration Act, concluding that the freedom to choose applicable law is legal and valid and that the provision of the law of conflicts of law shall apply only on a subsidiary basis.

IV. Contracts with the State

The issue regarding the valid submission of the State and State-owned companies to arbitration is not restricted to Brazil only, but is a phenomenon that exists throughout Latin America. In the case of Brazil, recent administrative and court decisions still pending resolution have determined that States and State-owned companies may not validly submit their disputes to arbitration unless authorized by law. The main argument against arbitration in that case is violation of the principle of legality. While individuals and private entities may perform any acts which are not prohibited by law, the legality principle inherent in administrative law conditions the legality of acts by the State and State-owned companies to those acts that are expressly authorized by law.

Contrary to those decisions and their rationale (which are being challenged by the private parties that entered into contracts with the State-owned companies), we submit that the State and its companies are authorized to agree to arbitrate disputes without breaching the legality principle. As a law of general application, the Arbitration Act states in Section 1 that the persons capable of entering into contracts may submit to arbitration their disputes regarding any rights that may be freely disposed by them. In our view, the word "persons" should be defined in light of the provisions of the Brazilian Civil Code which encompass public and private persons, including the State and its controlled entities. Nevertheless, a question will still remain to be resolved on a case-by-case basis — so-called objective arbitrability, i.e., what are the matters that may be submitted by the State and its entities to arbitration? The Arbitration Act clearly states that those matters shall be those which qualify as rights that may be freely disposed of by the parties. There resides the problem.

Based on the principles of administrative law, the State is granted certain special status upon contracting with private parties. The administrative contract contains certain provisions that are unique and that, if inserted into contracts between private parties, would be deemed illegal. Those are the exceptional clauses that derive from the public interest that the State and its entities are obligated to preserve. Those clauses include, among others, clauses granting the State the unilateral right to amend the contract and to rescind or terminate it in certain circumstances. Should the dispute be related to any exceptional clauses, arbitration could not be the mechanism for resolution, and the parties should resort to the courts. In all other matters, the parties, including the State and its entities, may legally and validly submit their disputes to arbitration. In sum, except for the exceptional clauses, the binding effect of the arbitration clause should be strictly observed.

V. Foreign Arbitral Awards and the New York Convention

Another issue which is a source of extreme concern is the construction by a number of professionals in the marketplace as to the possible lifting of the *exequatur* requirement in light of the text of the New York Convention. Based on the language of Article III of the Convention,[1] certain professionals have taken the position that the Arbitration Act's requirement of Supreme Court ratification of foreign arbitral awards is in breach of the text of the Convention.

As per the Federal Constitution,[2] the authority to ratify foreign judgments rests solely with the Federal Supreme Court. Prior to the enactment of the Arbitration Act, the meaning of the expression "*foreign judgment*" has never been discussed, nor has it been challenged. In the past, the Supreme Court adopted the position in its case law that it would only ratify foreign judgments, and not arbitral awards. Until the enactment of the Arbitration Act, the Supreme Court ratified only judgments of foreign Courts.

The enactment of the Arbitration Act represented a change in the existing scenario.[3] As per the Act, the requirement for dual ratification was lifted, and the Supreme Court is now empowered to ratify arbitral awards.[4] Despite the ratification of the New York Convention, the provisions of the Arbitration Act governing the recognition and enforcement of foreign arbitral awards are in full force and effect, and have not been derogated or revoked by such ratification.

Pursuant to the Brazilian law principles, upon ratification of a treaty or a convention, the provisions of the same shall prevail over those contained in the domestic law in force to the extent that such texts are inconsistent or contradictory. In our opinion, it would be a stretch to say that the existing provisions of the Arbitration Act have been revoked by the ratification of the New York Convention. They remain in full force and effect, but with respect to signatories of the Convention, they simply do not apply. We trust that such a construction of the texts is more coherent.

From a Brazilian law standpoint, it is our understanding that any attempt to eliminate the requirement of ratification by the Federal Supreme Court for the purposes of recognition and enforcement of foreign arbitral awards would be deemed unconstitutional. The issue which has been raised in Brazil following the ratification of the New York Convention is whether or not such a constitutional requirement breaches the New York Convention, especially the final portion of Article III. The argument brought by those who challenge the applicability of the ratification requirement is that such a requirement would be deemed a **condition** more onerous than the conditions which are imposed on the enforcement of domestic arbitral awards.[5] Thus, assuming for purposes of argument only that such a ratification requirement should be treated as a condition, we would have to admit that in contrast with the domestic awards, the requirement would be deemed a more onerous condition.

This argument should not prevail in light of the text of the Convention. The confusion in the marketplace derives from the reading of the final portion of Article III. Our understanding is that such language, which has been inserted into the text on the basis of a proposal made by the British delegation to the U.N. Conference in 1958, refers solely to conditions and reinforces and emphasizes only the reference to the "*conditions laid down in the following articles,*" having, then, no impact on the freedom granted to the Contracting States to establish at their discretion the procedural rules applicable to the enforcement of foreign arbitral awards. The Convention creates a clear distinction between **procedures** for enforcement and **conditions** for enforcement of foreign arbitral awards. The opening statement of Article III of the Convention grants full authority for local laws to establish the **procedures** for enforcement of foreign awards by stating that "*each Contracting State shall rec-*

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[1] The text of Article III states that "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

[2] Section 102(I)(g) of the Constitution states that it shall be incumbent upon the Federal Supreme Court to ratify foreign judgments.

[3] The text of the Arbitration Act utilizes the expression "sentença arbitral" to refer to an arbitral award. In reality, the word "sentença" is traditionally utilized to refer to a court judgment, but is also used to identify arbitral awards. The use of the same word in Portuguese led to the discussion whether the expression "foreign judgments" provided by the Constitution encompasses Court judgments and arbitral awards.

[4] Section 35 of the Arbitration Act states that for a foreign arbitral award to be recognized or enforced in Brazil, it shall be subject only to the ratification by the Federal Supreme Court. There are already several cases where the Supreme Court ratified foreign arbitral awards and acknowledged the application of the aforementioned Section 35.

[5] Under the Arbitration Act, the domestic arbitral award has the same effects of a court judgment and entitles the winning party to benefit from summary collection proceedings, should the award provide for monetary payments.

ognize arbitral awards as binding and enforce them in accordance with the ***rules of procedure*** *of the territory where the award is relied upon....*" The Brazilian procedural rules are those contained in the Constitution with respect to the incumbency of the Supreme Court. The ratification by the Supreme Court[6] is a requirement that falls within the rules of procedure of Brazil, and no impediment exists in the Convention for the Contracting State to establish them as it may see fit. The spirit and letter of the Convention lead us to conclude that such a mandatory procedure under the Constitution does not violate the Convention.

The ratification by the Supreme Court is a requirement that falls within the rules of procedure of Brazil, and no impediment exists in the Convention for the Contracting State to establish them as it may see fit. The spirit and letter of the Convention lead us to conclude that such a mandatory procedure under the Constitution does not violate the Convention.

We fully agree, however, that any condition imposed by a Contracting State other than those provided by the Convention would be in breach of the letter and spirit of the text. If Brazil still had in force the requirement for prior ratification of the award by a court of competent jurisdiction where the award was passed, such a requirement would be a breach of the Convention by Brazil. But the requirements for Federal Supreme Court ratification are procedures, not conditions, and do not violate the Convention.

In sum, whenever an arbitral award is passed outside Brazil, domestic laws shall treat it as a foreign arbitral award, and recognition and enforcement thereof in Brazil shall require the prior ratification by the Brazilian Supreme Court, even if such award is passed in the context of the New York Convention.

VI. Conclusion

After reading this article, the reader may conclude that the issues mentioned here may be seen as non-issues, and that the conclusions are obvious. Nevertheless, the reader must bear in mind that Brazil is a newcomer to the community of signatory parties of the New York Convention. Due to the long delay that preceded ratification, Brazilians are now faced with the task of resolving a number of issues that other jurisdictions resolved long ago. Nevertheless, this process is so important that we are convinced that we will expedite the analysis of inconsistencies and conflicts and will be able to rescue the time lost.

Despite the issues and challenges addressed in this Article, we are witnessing in Brazil the establishment of arbitration as an effective means for settlement of disputes and the strengthening of the principles inherent in arbitration. It is rewarding to witness the positive approach adopted by the courts and the development of the arbitration law in the seven years since enactment of the Arbitration Act.

Arbitration is a reality, both domestically and internationally. The number of cases brought to the institutional entities in Brazil and internationally is increasing. Issues still exist, but we are convinced that the infancy of arbitration practice in Brazil will be superseded by the critical mass of cases and constant practice, and that arbitration shall play as important a role in Brazil as in other jurisdictions.

[6] The ratification process by the Supreme Court does not allow any retrial or re-examination of the merits of the award passed by the arbitral tribunal. In the course of such process, the Supreme Court will determine whether the award violates public policy, national sovereignty or good morals. The violation of public policy is defined by the Convention as grounds for recognition and enforcement being refused, as per Article V(2)(b).

INDONESIA – Ali Budiardjo Nugroho Reksodiputro – Guidance on Prospectus and Accounting Matters

As part of its ongoing improvement of disclosure of the Indonesian securities industry, the Capital Market Supervisory Agency (BAPEPAM) recently issued two regulations i.e. Regulation No. IX.C.6 regarding Guidance on the Forms and Content of Prospectus In the Offering of Mutual Fund ("Regulation No. IX.C.6") and Regulation No. VIII.G.8 regarding Guidance on Accounting for Mutual Fund ("Regulation No. VIII.G.8"). With the issuance of these new regulations, BAPEPAM has since last October issued seven regulations on mutual fund (three of which are new regulations).

There are a number of changes and new provisions contained in these new regulations. Regulation No. IX.C.6 basically contains the same provisions of its predecessor . However, it introduces certain significant changes in the way a prospectus is written, as follows:

a. A prospectus must contain certain important definitions that are commonly used in the mutual fund industry;
b. There is no need to have a summary of the prospectus;
c. A prospectus must include information on a certain allocation of cost eg., cost assumed by investment manager, the mutual fund as well as those that assumed by the investor;
d. The requirement to purchase and redemption of the fund; and provisions with respect to liquidation and dissolution of the fund;
e. A prospectus has to specify the method of calculation of nett asset value of the fund.

As to Regulation No. VIII.G.8 regarding accounting matters, BAPEPAM introduces certain important changes, among others, the requirement to include a provision on dividend payment in the event of collectibility uncertainty and payment default. Regulation No. VIII.G.8 also requires that management and custodian fees as well as any other costs associated with an open-ended fund must be charged on a daily basis.

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HOGAN & HARTSON LLP

update

Labor and Employment

June 30, 2004

Protecting Your Trade Secrets Without the Inevitable Disclosure Safety Net

Trade secrets and confidential information are critical assets in today's economy. Intangible assets may account for at least 50%, and possibly as much as 85% of the value of U.S. companies.[1] Recent case law highlights the need for a thorough and up-to-date program to protect your company's trade secrets and confidential and proprietary information. This update summarizes recent changes in trade secrets law and sets forth practical ways to protect your company's critical business information.

Could This Scenario Happen To You?

Your market is highly competitive, so you invest heavily in research, development, marketing, and sales. You take reasonable efforts to protect your confidential, proprietary and trade secret information. You decide, however, not to require employees to enter into non-competition agreements.

Then the unthinkable happens:

A trusted employee, Sue, has worked for you in sales, service and marketing for more than ten years. You promote Sue repeatedly, based on her outstanding performance, her relationships with your customers and her extensive understanding of your products and business. Before long, Sue is a district manager in charge of sales in four states. She develops your pricing structures, marketing and business initiatives and sales strategies. Then, unbeknownst to you, Sue decides to go to work for your main competitor. Before leaving, she burns onto cd-roms many of your company's highly confidential documents containing such information as manufacturing costs, pricing information and profit margins. She tries to cover her tracks by deleting all records of these downloads. Sue also retains copies of documents relating to the highly confidential technical specifications for your newest product; later, she will claim that she did not return them because you did not ask. Sue then begins work for your competitor in a capacity that you consider directly competitive. You do not have evidence that she is disclosing or using trade secrets, but you believe it would be impossible for her to do her job without using your trade secret information.

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1 Margaret Blair, New Way Needed to Access New Economy, Los Angeles Times (Nov. 13, 2000) at B7.

What Do You Do?

Can Sue harm you by working for your direct competitor? Absolutely.

Will you be able to stop Sue from working for the competitor? Maybe, although perhaps not under Maryland law.

Did you do everything you should have done to protect your company? No.

In a case of first impression, the Maryland Court of Appeals in LeJeune v. Coin Acceptors, Inc. recently held that facts similar to those above did not warrant injunctive relief because the former employer lacked specific evidence of the employee's use or disclosure of trade secrets. The former employer argued instead that its former employee could not work in a competitive role for a direct competitor without inevitably using its trade secrets. That is, it asserted the "inevitable disclosure doctrine": that the former employee could not do his new job without using or disclosing trade secret information from his previous employer and, whether or not he disclosed trade secrets, he certainly would not pursue blind alleys, which he knows are fruitless based solely on the former employer's trade secrets. The Court, however, refused to adopt the inevitable disclosure doctrine as a theory for finding threatened future disclosure of trade secrets and refused to enjoin the former employee. The Court did not want to give the former employer "the benefit of a [noncompetition] provision it did not pay for," and hinted that the outcome might have been different had the former employer required its employee to sign a confidentiality agreement or a non-competition agreement.

This rejection of the inevitable disclosure reflects what presently is the minority view. Courts in the following states have recognized some form of the inevitable disclosure doctrine: Arkansas, Connecticut, Delaware, Illinois, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, North Carolina, Ohio, Texas, Utah and Washington. Courts in the following states have rejected the inevitable disclosure doctrine: California, Florida, Maryland and Virginia[2]. Even in the states that have recognized the inevitable disclosure doctrine, some courts have limited its applicability significantly.

What Should You Do?

Immediate injunctive relief is absolutely critical in a trade secrets case. Trade secrets are valuable only as long as they remain secret. No court or jury can reverse time and undo lost trade secrets - once disclosed, they are gone forever. Even if damages are available, the prevailing company may not be around to collect.

To maximize the chances for obtaining injunctive relief, all companies should review their intellectual property protections. Most important, ensure that all employees with access to trade secrets or critical confidential or proprietary information agree to reasonable non-disclosure, non-competition and non-solicitation agreements. Most jurisdictions, including Maryland, will enforce reasonable post-employment limitations, without needing to rely on the doctrine of inevitable disclosure. Further, companies should consider implementing some or all of the following procedures to protect their trade secrets and confidential and proprietary information:

Recruitment & Hiring

- Inform and require all candidates that as a condition of employment they will have to enter into the company's form confidentiality, proprietary information and trade secrets agreement, potentially including non-competition and non-solicitation provisions.

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2 This is is not intended to specifically describe the law in any particular jurisdiction or as applied to any specific situation. You should consult counsel before taking any action with respect to trade secret, confidential, or proprietary information.

- Ensure that the recruitment, hiring and orientation process includes explicit reference to the company's intent not to use or access other parties' confidential information;
- Examine applicants' confidentiality and non-competition restrictions from current or past employers; and
- Ensure that applicant does not engage in misconduct as she leaves her present employer, including the retention of confidential materials, beginning work for the new employer or failing her obligations of loyalty to the present employer.

During Employment Period

- Prohibit new employees from the use or disclosure of any confidential or proprietary information acquired in previous employment;
- Communicate in the employee handbook the confidential nature of proprietary business and personnel information and require employees to keep this information confidential;
- Require all employees and independent contractors with access to confidential or proprietary information to sign restrictive covenants, including reasonable non-competition and non-solicitation agreements;
- Consider reasonable limits on activities of new employee so as to avoid opportunities for use or disclosure of past employers' confidential information; and
- Restrict the copying, forwarding, and downloading of confidential, proprietary and trade secret information.

Upon Termination

- Immediately remove employee's access to confidential, proprietary and trade secret information, including hard copy documents and computer files;
- Immediately deactivate the employee's security access codes and any login IDs used by the employee;
- Review confidentiality obligations and restrictive covenants with terminating employee;
- Provide employee with a copy of any documents containing confidentiality obligations or restrictive covenants;
- Require that terminated employees return all confidential, proprietary, and trade secret information, regardless of the medium in which it is contained;
- Retrieve from terminating employee all documents, materials, and copies thereof;
- Require that terminated employees certify in writing that they have returned all confidential, proprietary, and trade secret information;
- Conduct an exit interview;
- Consider whether to inform terminating employee's new employer of employee's restrictions; and
- Be aware of the business activities of key former employees and ensure that they are not competitive with your business.

General

- Require all employees and independent contractors with access to confidential information to sign agreements protecting confidentiality, proprietary information and trade secrets;
- Avoid disclosure to third parties and require a non-disclosure agreement in the event of disclosure;
- Implement electronic safeguards, such as passwords, encryption and firewalls between users;
- Encrypt all electronic communications;

- Limit access to confidential information to a need-to-know basis;
- Implement effective physical security of premises and property;
- Inform those with access of the importance and confidentiality of certain information;
- Ensure that all confidential information bears the "Confidential" legend;
- Implement and enforce effective policies and procedures for ensuring the integrity of trade secret information;
- Require all premises visitors to sign in and out, have an escort and wear a badge that identifies them as guests;
- Retain drafts and copies of materials in accordance with an effective and lawful document retention policy; and
- Consider all means of protecting intellectual property, including patent, copyright, and trademark.

If your company implements an appropriate protection plan using the guidelines above, you will minimize the risk that employees will steal your trade secrets and use them against you.

For more information about the matters discussed in this Update, please contact the Hogan & Hartson L.L.P. attorney with whom you work or any of the attorneys below. You can also go to www.hhlaw.com to contact another member of our Labor and Employment group. If you are interested in any of our other publications, please go to http://www.hhlaw.com/site/publications/.

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