MAY / JUNE 2004 e-BULLETIN

Page

MEMBER NEWS

- Kochhar & Co. PRAC New Delhi / Agra Conference – Early Indication Deadline June 15 2
- Lovells Expands Asia Corporate Practice in Hong Kong 3
- Nauta Boosts its Competition Law Practice in Belgium 5

MAKING NEWS

- NautaDutilh Reaffirms Capital Markets Position 6
- Wilmer Cutler Pickering Hale and Dorr LLP – Jury Finds for EMC in Patent Infringement Case 6

COUNTRY ROUNDUPS

- AUSTRALIA Clayton Utz – Insolvent Trading: Odds Stacked Against Directors 7
- BRAZIL – Tozzini Freire Teixeira e Silva – New Taxation on Import Transactions 10
- INDONESIA – Ali Budiardjo Nugroho Reksodiputro – Circular Issued for Application of Risk Management in Internet Banking 11
- JAPAN – Asahi Koma Law Offices – New Limited Partnership Law 12
- MALAYSIA – Skrine Co. - Legal Aspects of Outsourcing 14
- TAIWAN – Lee and Li – Land Value Increment Tax Can Be Deferred Over Multiple Mergers 17
- UNITED STATES – Hogan & Hartson LLP – AntiTrust Update 19

MEMBERSHIP Events

- October 30 – November 5 New Delhi/Agra 2004 Conference
  Attention: All Delegate Members must register on line @ www.prac.org by June 15

Tools to Use

- PRAC Contacts Matrix & Email Listing - June Update (member version only) 26
- PDF version Directory 2003-2004 Member Firms **available** at PRAC web site
- Expert System 2003 available at PRAC web site Private Libraries
- PRAC Peru Conference Materials now available at PRAC web site Private Libraries

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PACIFIC RIM ADVISORY COUNCIL

PRAC INDIA 2004 CONFERENCE

New Delhi / Agra October 30 - November 5, 2004

Hosted by Kochhar & Co.
New Delhi . INDIA

HOST FIRM MESSAGE

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.

We hope that all of you will stay back for the follow-on in Agra where we have arranged for the delegates to see the Taj Mahal and other sights. The Taj Mahal needs no introduction and we think it would be a fitting end to the conference and for you to leave India with memories of a monument that was inspired by love - something that our troubled world needs more of these days.

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

Early Indication Form Deadline is June 15
Delegates must register on line at PRAC web site www.prac.org

LOVELLS EXPANDS ASIA CORPORATE PRACTICE

Jamie Barr joins Lovells as Asia Corporate Practice expands again

International law firm Lovells is building on the momentum in its Asian corporate practice with the lateral hire of Jamie Barr as a partner based in the firm's Hong Kong office. Jamie's arrival, on 1 May 2004, marks the latest in a series of recent regional appointments to the practice, which brings the total complement in Asia to six corporate partners and 29 other fee earners.

Jamie Barr has substantial experience both as a corporate finance lawyer with leading firms in London and Hong Kong and as an investment banker with Hambros Bank. Throughout his career, he has worked on a range of cross-border and domestic corporate and corporate finance matters including privatisations, IPOs, mergers & acquisitions, takeovers, joint ventures and private equity transactions.

Lovells has a long-standing commitment to its corporate practice in Asia. The significance of the Asian practice to the international firm continues to grow with China's accession to the World Trade Organisation and its rapid economic growth, and with the regional economic recovery. This trend was recognised last June with the appointment of Greg Terry to lead the firm's Asian corporate practice, since when there have been seven notable appointments:

? December 2003: Le Yanwen - joined the firm to lead the corporate practice in Shanghai

? March 2004: Andrew James McGinty - joined the firm as a consultant in Beijing

? March 2004: Bill Wang - joined the firm as a senior associate in Hong Kong, travelling regularly to the Beijing and Shanghai offices

? March 2004: Rocky Lee - joined the firm as an associate in Beijing

? May 2004: Peng Ren - joins the firm in Beijing

? May 2004: Colin Law - elected as a partner based in the Beijing and Hong Kong offices

? May 2004: Jamie Barr - joins the firm as a partner based in Hong Kong

Commenting on Jamie Barr's election, Greg Terry, head of Lovells' Asian corporate practice, said:

"Jamie is a top corporate finance lawyer. He has exactly the sort of professional background we at Lovells look for in our corporate finance partners in Asia, combining legal practice at the highest levels with strong investment banking and local market expertise. We have seen a lot of interest in our corporate practice over the last nine months, encouraged by rapidly improving market conditions in Greater China and the region. Clients will appreciate this further strengthening of our resource - and Jamie's skills and reputation will be an important part of the ongoing success of the practice."

Jamie Barr said:

"Lovells offers a tremendous platform for developing my corporate finance and private equity practice in Asia, working with my new colleagues here, in Europe and in the USA. I have been impressed with the firm's international expansion in recent years, particularly the development of the corporate practice in Hong Kong and China. Lovells has demonstrated the vision and drive to undertake corporate transactional work at the highest level around the world and is increasingly recognised for delivering the goods here in Asia. I am delighted to be joining the firm."

For further information please contact:

Greg Terry, head of Lovells Asian corporate practice

May Law, Business Development & Public Relations Manager, Asia +852 2840 5994

Karen Snell, Press Office Manager, London+44 (0) 20 7296 2076

Notes for editors:

? Jamie Barr read law at Oxford University and the College of Law, Guildford.
? Most recently, Jamie was a consultant in the corporate finance practice of Johnson Stokes & Master, Hong Kong, having been recruited from Freshfields in London. Prior to that, he spent six years in the corporate finance department of Hambros Bank in London. He qualified as a solicitor in England in 1985 and in Hong Kong in 2001.
? He has advised governments, most leading investment banks, blue chip corporates and private equity firms. He has particular experience of the energy and power and Technology, Media and Telecoms sectors. Some of his most significant transactions include advising Amoco on its merger with British Petroleum; AirTouch on its merger with Vodafone; Chevron on its global gas-to-liquid fuel joint venture with Sasol; Cathay Pacific Airways on its regional express parcels joint venture with DHL; and 3i Group, Development Bank of Singapore, International Finance Corporation and others on their private equity investment in CSMC Technologies Corporation, a PRC-based microchip manufacturer.
? CV information is also available on the six other recent appointments.
? Lovells is a leading international business law firm, with over 340 partners, 1,600 lawyers worldwide, and a total of more than 3,200 staff across 26 offices in Europe, Asia and North America.
? In Asia Lovells has 20 partners and over 100 lawyers based in its six regional offices.
? Lovells' Asian offices are: Hong Kong (1982), Tokyo (1990), Beijing (1992), Ho Chi Minh City (1994), Singapore (1998) and Shanghai (2003).
? Lovells international corporate practice includes 104 partners and 235 fee earners, focused on the following main areas: mergers and acquisitions, capital markets, private equity and venture capital, foreign direct investment, corporate advisory and other corporate services.

NAUTA BOOSTS ITS COMPETITION LAW PRACTICE

Amsterdam/Brussels, 14 June 2004 – International law firm NautaDutilh announced today that Mr. Charles van Sasse van Ysselt will join as partner and head of its EC law and competition practice in Brussels. Mr. Van Sasse van Ysselt joins NautaDutilh from the Brussels office of Clifford Chance, where he headed the Dutch competition law and international trade practice.

The managing partner of NautaDutilh, Mr. Job van der Have: "We are experiencing a significant increase in demand for competition-related legal services, in particular M&A. Charles brings more than 20 years of experience to our competition practice, at both Dutch and EC levels".

The managing partner of NautaDutilh Brussels, Mr. Benoît Strowel: "A strong EC competition department is indispensable to a credible Brussels practice. The arrival of Charles with his international profile fits our strategy of expanding the Brussels office".

Mr. Van Sasse van Ysselt is a Dutch lawyer and a member of both the Amsterdam and Brussels Bars. He is ranked as one of the leading competition law practitioners in *Chambers Global* and *Legal 500*. In his own words, "I feel privileged; I am moving from one excellent firm to another. I look forward to working with a firm of the calibre and reputation of NautaDutilh".

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.

For further information, please contact:
Benoît Strowel – telephone +32 2 566 84 46
Job van der Have – telephone +31 10 224 01 68

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Please Note :
As of 21 June 2004, the new address, telephone and fax of NautaDutilh's Amsterdam office:
Strawinskylaan 1999, 1077 XV Amsterdam, the Netherlands
Telephone: +31 20 717 1000
Fax: +31 20 717 1111

The mailing address remains: PO Box 7113, 1007 3C Amsterdam, the Netherlands

Our Amsterdam office will be closed on Friday 18 June 2004.

NAUTADUTILH REAFFIRMS PROMINENT CAPITAL MARKETS POSITION

FOR IMMEDIATE RELEASE

NautaDutilh reaffirms prominent Capital Markets position

NautaDutilh N.V. advises Global Co-ordinator ABN AMRO Rothschild on the IPO and listing of Spyker Cars N.V.

Amsterdam, the Netherlands, 27 May 2004 - NautaDutilh has acted as counsel for Global Co-ordinator and Bookrunner ABN AMRO Rothschild on the IPO and listing of Spyker Cars N.V. at the Euro.NM market of Euronext Amsterdam which took place today. Spyker is a manufacturer of high-end sports cars in the Netherlands.

Job van der Have, managing partner of NautaDutilh: "This is one of the three equity capital markets transactions involving a first listing at Euronext Amsterdam this year. We are proud to have been involved in each and every one of them. This confirms our prominent position in capital markets transactions, a field in which our advisers have an excellent track record."

The NautaDutilh team was led by Corporate Finance Partner Petra Zijp and also consisted of Corporate Partner Gaike Dalenoord and associates Léontine Hijmans, Annemarie den Tex and Esther Schut.

About NautaDutilh
NautaDutilh is one of the largest Benelux law firms with its offices in the Netherlands, Belgium, Luxembourg, London and New York and offers a broad range of top level legal expertise. NautaDutilh is an independent legal practice with close but non-exclusive ties with prominent law firms in all major cities of the world.

For further information please contact Petra Zijp at tel. +31 20 541 4865, petra.zijp@nautadutilh.com

(Should you not wish to receive any further press releases from NautaDutilh, please reply to research@kempenpr.nl or react via phone number + 31-70-3463760)

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WILMER CUTLER PICKERING HALE AND DORR LLP - JURY RULING IN PATENT INFRINGEMENT CASE FINDS IN FAVOR OF EMC

Jury in U.S. District Court Finds in Favor of EMC in Patent Infringement Case
May 28, 2004

Hopkinton, MA, May 17, 2004—A U.S. District Court jury today found that HP is infringing three EMC Corporation patents. After a two-week trial here, the jury found that HP's OpenView Continuous Access Storage Appliance (CASA) product infringes EMC's core patents related to the company's SRDF and TimeFinder software products, which perform remote mirroring and local mirroring functions. In addition, the jurors also found the three EMC patents in this suit to be valid over prior art cited by HP. EMC intends to seek an injunction based on the verdicts.

EMC filed the original complaint against StorageApps in October 2000, claiming that StorageApps' SANLink appliance (now referred to by HP as CASA) infringed on EMC core patents related to remote and local mirroring. HP acquired StorageApps in July 2001. This case is separate from other pending patent litigation between the companies in San Jose, Calif.

William F. Lee, Cynthia D. Vreeland, Peter M. Dichiara, Richard W. O'Neill, Elizabeth M. Reilly and David A. Giangrasso represented EMC before Judge Gorton of the United States District Court for the District of Massachusetts, Worcester Division.

AUSTRALIA – Clayton Utz – INSOLVENT TRADING: Odds Stacked Against Directors

Directors have only a one in four chance of beating an insolvent trading claim.

A new report by Clayton Utz (Paul James, Partner) and the Centre for Corporate Law and Securities Regulation (The University of Melbourne) (Professor Ian Ramsay) has found that 75 per cent of cases against directors for insolvent trading end up in a loss for the director (see article on page 7 of today's *Australian Financial Review*).

This statistic is dramatic evidence of why insolvent trading has become a bogeyman for company directors. Our research also highlights some industries in which insolvent trading is particularly significant.

103 cases in 40 years

Our research found 103 insolvent trading cases that have gone to judgment over the last 40 years (many cases are of course settled). Courts held the directors liable in 75 per cent of those cases. These findings may suggest that usually only the strongest cases make it to court. Nevertheless, it is probable that one knock-on effect of this statistic is that directors are more willing to settle insolvent trading claims out of court.

From the statistics it would also appear that the directors most at risk are executive directors of private construction companies:

- excluding those cases where the type of director was unknown, 55 per cent of the cases involved executive directors and 22 per cent involved non-executive directors;
- 91 per cent of the companies alleged to be engaged in insolvent trading were private companies; and
- construction companies featured in 22 per cent of cases, followed by companies in retail trade and manufacturing (accounting for 17 per cent each).

In about 64 per cent of the cases, the debt being claimed from the director related to the purchase of goods or services by the company. Loans from a bank or another financier accounted for another 8 per cent of the cases. This probably reflects the fact that banks will often have taken personal guarantees from directors (especially in the case of small companies), and so can recover directly from the directors without having to make an insolvent trading claim.

Compensation orders the most common penalty

Although insolvent trading can result in a director being fined or banned, it is far more likely that the director will simply be faced with an order to pay compensation to the company and/or the company's creditors.

Nevertheless, the size of that compensation order can be as crippling as a fine or ban. The smallest compensation order revealed by our research was $517. However, the largest was $96.7 million, and the median amount of compensation was $110,600. It should be noted that such compensation orders are directly linked to the amount of unpaid debts incurred during the period the company traded whilst insolvent.

Other orders, such as banning a director from managing companies for a specified period of time or imposing pecuniary penalties are relatively rare: our research reports only seven cases in which these punitive orders were imposed (of which only two cases involved banning orders). However, civil penalty provisions (under which pecuniary penalties and management banning orders are made) have only been in force since 1993. Further, with the relatively recent introduction of the National Insolvency Coordination Unit by ASIC and other associated ASIC initiatives, the number and proportion of these cases may increase.

What's the future for insolvent trading cases?

From our research, we've discovered that the number of cases rose steadily from 1961 and peaked in the 1990s (over half the cases are from the 1990s). Since the end of the 1990s there have only been 15 cases decided.

The implementation of the Harmer Report's recommendations in 1993 may have contributed to this fall in the number of insolvent trading cases being brought before the courts. While the drop in the number of cases could be caused by various factors, it may in part be related to the changes which removed creditors' primary right to initiate insolvent trading proceedings. In this regard, creditors have been plaintiffs in far fewer proceedings relating to post-Harmer provisions than they were before.

Conversely, the Harmer amendments gave liquidators the primary right to initiate insolvent trading proceedings (whereas there was only a limited right under the pre-Harmer provisions). This amendment has resulted in liquidators being involved in significantly more cases post-Harmer, but, as the person with the primary right to initiate proceedings, they do not appear to have been as active post-Harmer as creditors were pre-Harmer.

Accompanying these changes is a drop in the number of cases brought by the authorities (ie. corporate regulators and the DPP) since the implementation of the Harmer Report's recommendations. Once again, given the implementation of recent initiatives by ASIC in relation to insolvent trading (see above), it seems possible that this trend will start to turn around soon.

For more information please contact:

Name:	**Paul James - Partner (Melbourne)**	**Name:**	**Jennifer Ball - Partner (Sydney)**
Tel:	+61 3 9286 6927	**Tel:**	+61 2 9353 4214
Fax:	+61 3 9629 8488	**Fax:**	+61 2 8220 6700
Email:	pjames@claytonutz.com	**Email:**	jball@claytonutz.com
Name:	**Graeme Gurney - Partner (Sydney)**	**Name:**	**Brigitte Markovic - Partner (Sydney)**
Tel:	+61 2 9353 4152	**Tel:**	+61 2 9353 4131
Fax:	+61 2 8220 6700	**Fax:**	+61 2 8220 6700
Email:	ggurney@claytonutz.com	**Email:**	bmarkovic@claytonutz.com
Name:	**Karen O'Flynn - Partner (Sydney)**	**Name:**	**Ron Schaffer - Partner (Sydney)**
Tel:	+61 2 9353 4146	**Tel:**	+61 2 9353 4157
Fax:	+61 2 8220 6700	**Fax:**	+61 2 8220 6700
Email:	koflynn@claytonutz.com	**Email:**	rschaffer@claytonutz .com

Name:	**Brian Thomas Wilson - Partner (Sydney)**
Tel:	+61 2 9353 4113
Fax:	+61 2 8220 6700
Email:	bwilson@claytonutz.com

Name:	**Christopher Dale - Partner (Melbourne)**
Tel:	+61 3 9286 6164
Fax:	+61 3 9629 8488
Email:	cdale@claytonutz.com

Name:	**Sally Sheppard - Partner (Melbourne)**
Tel:	+61 3 9286 6206
Fax:	+61 3 9629 8488
Email:	ssheppard@claytonutz.com

Name:	**Quentin Solomon - Partner (Melbourne)**
Tel:	+61 3 9286 6151
Fax:	+61 3 9629 8488
Email:	qsolomon@claytonutz.com

Name:	**Gareth Jenkins - Partner (Brisbane)**
Tel:	+61 7 3292 7208
Fax:	+61 7 3003 1366
Email:	gjenkins@claytonutz.com

Name:	**Lloyd Nash - Partner (Brisbane)**
Tel:	+61 7 3292 7013
Fax:	+61 7 3003 1366
Email:	lnash@claytonutz.com

Name:	**Cameron Belyea - Partner (Perth)**
Tel:	+61 8 9426 8510
Fax:	+61 8 9481 3095
Email:	cbelyea@claytonutz.com

Name:	**Rob McKenzie - Partner (Perth)**
Tel:	+61 8 9426 8443
Fax:	+61 8 9481 3095
Email:	rmckenzie@claytonutz.com

Name:	**Brian Loftus - Special Counsel (Canberra)**
Tel:	+61 2 6279 4025
Fax:	+61 2 6279 4099
Email:	bloftus@claytonutz.com

Name:	**Amanda Turnill - Partner (Adelaide)**
Tel:	+61 8 8111 2010
Fax:	+61 8 8111 2099
Email:	aturnill@claytonutz.com

Name:	**Mark Spain - Partner in Charge (Darwin)**
Tel:	+61 8 8943 2512
Fax:	+61 8 8943 2500
Email:	mspain@claytonutz.com

INDONESIA – Ali Budiardjo Nugroho Reksodiputro – Circular Issued for Application of Risk Management in Internet Banking Services

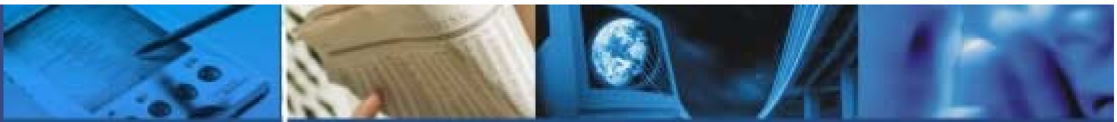
To promote the application of risk management in the banking industry and given the widespread rise in the use of internet within the banking industry, Bank Indonesia on 20 April 2004 issued its Circular Letter No. 6/18/DPNP regarding Application of Risk Management in the Provision of Banking Services Through the Internet (Internet Banking).

Circular letter No. 6/18/DPNP defines "internet banking" as banking service that enables bank customers to access information and to communicate and conduct banking transactions through the internet. The circular letter furthermore regulates that the provision of internet banking services cannot be conducted exclusively, and that therefore the establishment of banks with internet banking activities only, is prohibited.

Under the circular letter, banks that offer internet banking services are required to effectively apply management risk principles by conducting: (a) active supervision by the board of commissioners and the directors; (b) security control; (c) special management of legal and reputational risks. The application of risk management has to be put in a written policy, procedure and guidance in line with the guidance which is attached to and constitutes an integral part of the circular letter. Banks that already have its internet banking policies and procedures laid out in writing before the issue of this circular letter are required to adjust them to make it in line with the guidance attached to the circular letter.

For Additional information contact Ali Budiardjo Nugroho Reksodiputro in Jakarta

Tozzini Freire Teixeira e Silva Advogados



TFTS News

no. 14/2004

May 10, 2004

Latest Issues

- Brazil: New Regulations for Public Offerings of Securities
- Brazil: A New Model for the Power Sector
- Brazil: New Regulations for Public Offerings of Securities
- Brazil: Proposed Regulations for Digital Communication Services

Tax Matters

BRAZIL: NEW TAXATION ON IMPORT TRANSACTIONS

By virtue of Law 10,865/04, any importation of goods or services into Brazil is now subject to taxation by two social contributions known as COFINS and PIS. The respective rates of COFINS and PIS are generally 7.6% and 1.65%, although different rates are applicable for certain specific products (e.g., automobiles, gasoline, certain medicines and pharmaceutical products).

The payment of COFINS and PIS shall occur upon the clearance of the imported products with the customs authorities or, in the case of services, concurrently with the payment for the respective imported services.

Imported services are defined as those rendered by non-Brazilian residents and that are either (i) executed in Brazil or (ii) executed abroad, provided that the corresponding results are verified in Brazil.

The law also establishes that the companies responsible for providing local or international transportation services with respect to the imported goods shall be jointly liable with the importer for the payment of COFINS and PIS.

If certain conditions are met, Brazilian companies will be allowed to recognize the amounts of COFINS and PIS paid with respect to import transactions as tax credits, which would enable such companies to offset equivalent amounts of COFINS and PIS payable on local sales of goods and services.

Mario Antonio Romaneli
Partner - São Paulo
mromaneli@tozzini.com.br

Ana Claudia Akie Utumi
Partner - São Paulo
autumi@tozzini.com.br

Fabio Moreira de Albuquerque Nonô
Partner - Rio de Janeiro
fnono@tozzini.com.br

Alde da Costa Santos Júnior
Partner - Brasília
alde@tozzini.com.br

Gladson Wesley Mota Pereira
Partner - Fortaleza
gpereira@tozzini.com.br

Gustavo Nygaard
Partner - Porto Alegre
gnygaard@tozzini.com.br

JAPAN – Asahi Koma Law Offices – New Limited Partnership Law

In Japan, the Limited Partnership Act for Investment (the "Investment LP Act") became effective as of the end of April, 2004. This law allows "investment business limited partnerships" ("JLP") to be created. A JLP may, among other certain limited activities, subscribe for stocks of, and corporate bonds issued by, companies in which the JLP invests (the "Targets"), purchase and hold loans (debtors of which are Targets), and make new loans to Targets. Targets may be large corporations and listed companies.

Tokumei kumiai, or the silent partnership ("TK") under the Commercial Code of Japan has been referred to as being most similar in form to the U.S. limited partnership ("LP"). TK may, however, have only one silent partner who enjoys limited liability. The JLP may have two or more limited liability partners, and thus, it can be said that the JLP is the most similar one in form to the LP in that it may have and is suppose to have two or more limited liability partners.

It is anticipated that the JLP would attract more investors including wealthy retail investors. Unlike the U.S. securities law, the Securities and Exchange Law of Japan (the "SEL") does not extend its reach to investment schemes in general. The SEL regulates such "securities" as are expressly listed therein, and does not regulate the JLP. An interest in a JLP (i.e., limited liability partner interest) is not listed as a type of security in the SEL.

For protection of non-institutional investors who could be misled by solicitation, the Investment LP Act has certain provisions requiring solicitees to be so called QIIs (i.e., qualified institutional investors so defined under the SEL) in principle. This requirement will be lifted when the SEL will be amended to regulate the JLP.

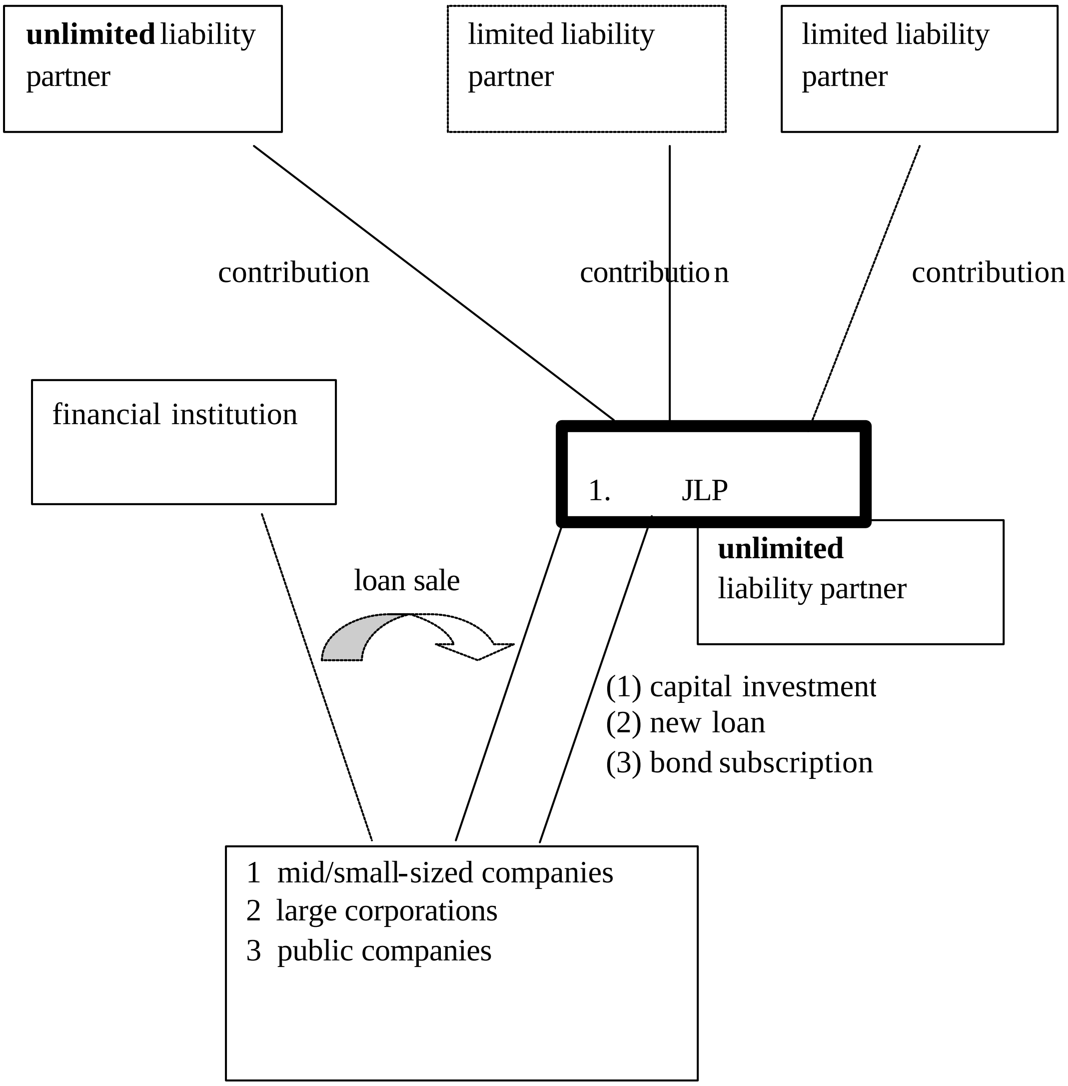
The JLP will certainly help the recovery of Japanese economy. What we could expect next would be a Japanese equivalent to the U.S. LLP or LLC.

There are a couple of limitations on the use of the JLP. First, no less than half of its portfolio should be domestic (i.e., Japanese) investments (as opposed to foreign (non-Japanese) investments). Second, its business purpose is limited strictly to investments. So that the JLP may be used more widely, it is worth considering the elimination of such limitations.

For Additional Information contact Asahi Koma Law Offices in Japan.

Kenji Kawahigashi
Partner
M&A and Finance Practice Groups
Asahi Koma Law Offices
e: kkw@alo.jp
Ph:81-3-3505-3596
F: 81-3-3505-8281
www.alo.jp/english/

(a) New Investment LP Act of Japan



An earlier version of this article was published in the March 2004 issue of **Legal Insights**, **A Skrine Newsletter**.

Outsourcing – The Legal Aspects

Introduction

Outsourcing refers to the transfer of certain business activities or functions to a third party outsourcing vendor, which is usually a specialist in that particular business activity or function. Examples of business activities or functions that are commonly outsourced include information technology related services, contract manufacturing, logistics, marketing and distributorships.

There are numerous benefits to outsourcing. Generally, outsourcing gives an enterprise or principal a competitive edge over its rivals, as it allows the principal to focus more on its core business. In many cases, enterprises outsource in order to achieve a reduction in cost whilst achieving greater operational efficiency. The right outsourcing vendor typically offers greater expertise and specialisation. Outsourcing from an enterprise's perspective is also a solution to insufficient resources such as manpower.

From the legal aspect, there are two main phases in negotiating and concluding an effective outsourcing deal – the pre-outsourcing contract phase and the outsourcing contract phase.

PRE-OUTSOURCING CONTRACT PHASE

Regulatory issues – The outsourcing deal may be subject to certain legal requirements or approvals of certain regulatory bodies, depending on the type of industry the principal is involved in and the activities the principal intends to outsource. For example, banks and financial institutions in Malaysia are required to comply with certain guidelines issued by the Central Bank of Malaysia in relation to their outsourcing activities.

Selecting the right outsourcing vendor – It is common practice for the principal to prepare what is known as the Request for Proposal document ("RFP"). It is always better to include at least the salient or basic terms of the deal in the RFP so that the bidders are aware of such terms even before negotiations on the actual contract commences. The RFP should specify a closing date for the submission of the bidders' proposal or response to the RFP.

Due diligence - Proper and adequate due diligence exercises are essential before entering into any outsourcing deal especially where assets or employees are being transferred to the outsourcing vendor. From the principal's perspective, due diligence enables the principal to ascertain the commercial viability of the vendor and its ability to perform the services at the principal's expected service levels. From the outsourcing vendor's perspective, a due diligence on the current activities or functions that will be outsourced allows the vendor to verify the accuracy of its cost estimation for providing the services. If the cost estimation proves inaccurate, it may then seek to re-negotiate payment or a reduction in the service levels.

Interim agreements - In our experience, structuring and negotiating an outsourcing contract can be a long process depending on the nature and complexity of the deal. If the principal requires the outsourcing vendor to commence providing the services urgently, it may be wise to execute an interim agreement. This agreement is a binding contract albeit a more concise version of the actual outsourcing contract. It sets out the salient terms of the deal such as the scope of work or services, payment and ownership of any intellectual property rights. The outsourcing contract when executed will supersede and replace the interim agreement. There are however some drawbacks in executing an interim agreement. Interim agreements may make it more difficult for parties to back out from a deal and in some cases may also impact or at worse prejudice the bargaining power of a party.

Outsourcing contract phase

The outsourcing contract should capture the actual commercial relationship between the parties. A good contract should always reflect the intention of the contracting parties. The general rule of thumb in negotiating and drafting any contract is that its terms and conditions must be made certain at the outset to avoid any potential dispute from arising later. At the same time because most outsourcing deals tend to be long term in nature, the outsourcing contract must also be flexible enough to accommodate any changes in the deal, which may arise at a later date. It is therefore pivotal to have a strong, balanced and yet flexible outsourcing contract. Here are some important issues to be considered when negotiating an outsourcing contract.

Services or work performed - It is crucial to have a clear and detailed description of the scope of work or services undertaken by the outsourcing vendor. The performance of such works or services is usually measured against certain specified service levels (or benchmarks or performance measures) which must also be clearly set out in the outsourcing contract.

Change management or change control – The outsourcing contract should contain appropriate change management or change control procedures which are simply procedures that set out the manner in which the terms of the outsourcing contract or the scope of services performed may be varied. Change management procedures give the parties a certain degree of flexibility in performing under the outsourcing contract and is particularly important where the scope of services may change over time or where the duration of the contract is rather long.

Payment - This is one of the most important commercial terms in the outsourcing contract. The outsourcing contract must specify the amount and manner of payment and whether or not such payments are inclusive or exclusive of any applicable taxes such as service tax. Parties may agree to vary payment where there has been a change in the scope of services pursuant to the established change control procedures.

Ownership of intellectual property rights - Generally, intellectual property rights in an outsourcing deal can be divided into 4 main categories – (i) rights possessed by the principal prior to the outsourcing deal and made available to the outsourcing vendor; (ii) rights possessed by the outsourcing vendor prior to the outsourcing deal and used by the outsourcing vendor in the performance of any services or works pursuant to the outsourcing deal; (iii) rights created or developed in the course of the outsourcing deal; and (iv) rights belonging to third parties that are licensed to either the outsourcing vendor or principal.

Representations and warranties - The principal should also consider obtaining certain representations and warranties from the outsourcing vendor. The type of warranties will depend on the outsourcing activity and the bargaining position of the parties. For example, where certain services are being outsourced, there should be a warranty from the outsourcing vendor that all services will be performed with a high degree of care and skill using only suitably qualified personnel.

Limitation of Liability - It is common practice for outsourcing vendors to limit or exclude its liability for any losses or damages suffered by the principal in connection with the outsourcing deal as such losses or damages can be enormous. However for the principal, ideally there should be no such limit or exclusion of liability. This ultimately depends on the bargaining position of the parties.

Transfer of physical assets - Consider whether there will be any transfer or sale of physical assets (e.g. equipment, computers, machinery, etc.) to the outsourcing vendor as well as the tax and any other legal implications of the transfer.

Third party contracts - In an outsourcing deal, existing contracts between the principal and third parties may be affected. Depending on the terms and conditions of these contracts, the principal may be required to inform the third party of the deal and its impact on the latter. Depending on the nature of the deal, third party contracts may have to be assigned or novated to the outsourcing vendor.

Transfer of employees - Consider also whether there will be a transfer of employees to the outsourcing vendor and if so, the legal requirements of the transfer.

Confidentiality - Confidentiality and non-disclosure of confidential information is a pertinent aspect in any outsourcing deal, especially where the outsourcing vendor will be dealing with sensitive data belonging to the principal or customers of the principal. Similarly, the outsourcing vendor may also disclose valuable proprietary information such as know-how and methodologies. The outsourcing contract should therefore contain adequate provisions that safeguard and protect any confidential information that is disclosed between the parties.

Dispute resolution procedure - In complex outsourcing deals especially where the activity or function being outsourced is technical in nature such as IT, it is advisable to adopt an alternative dispute resolution procedure such as mediation or arbitration.

Termination and consequences of termination - The outsourcing contract must set out the duration of the outsourcing deal as well as the grounds upon which either party is entitled to terminate the contract. It is equally important to specify the consequences that will ensue upon expiration or termination of the contract. For example, there should be some sort of winding-down process where the outsourcing vendor transfers the activity back to the principal or to another outsourcing vendor appointed by the principal.

Conclusion

The issues highlighted in this article are not exhaustive and much depends on the size, nature and complexity of the deal as well as the parties involved. Apart from negotiating and concluding an effective outsourcing deal, parties must properly manage their respective obligations and relationship in accordance with the agreed outsourcing contract. Proper contract management is essential in ensuring a lasting and successful outsourcing deal!

By Chew Yu Shen
(cys@skrine.com)

Skrine
Advocates & Solicitors
Unit No. 50-8-1, 8th Floor, Wisma UOA Damansara,
50, Jalan Dungun, Damansara Heights, 50490 Kuala Lumpur.
url: www.skrine.com

Vincent Tseng

Article 34 of the Corporate Mergers and Acquisitions Act (CMAA) provides that when land is transferred due to a merger, a demerger or an acquisition in which at least 65% of the consideration is give n in the form of shares, land value increment tax (LVIT) can be first calculated and recorded, and payment can be deferred until such time as the acquiring company transfers the land to another party, at which point the deferred tax becomes payable together with the tax arising out of the period following the merger or acquisition.

It is clear that if land acquired through a merger or acquisition is transferred again due to a subsequent merger or acquisition, then the LVIT arising out of the period between the two transactions can be deferred. However, there has been doubt as to whether tax that was deferred at the time of the first M&A transaction can be further deferred, or whether it must be paid at the time of the land transfer pursuant to the second transaction.

According to a literal interpretation of the wording of the CMAA, deferred LVIT becomes payable upon any subsequent transfer of land ownership. The mere fact of a transfer of ownership satisfies the conditions for the tax to become payable, regardless of the reason for the transfer. However, the underlying legal principle that justifies a deferral is that a merger or acquisition is not a substantive disposal of assets, and the transfer of land is merely a change of formal ownership, whereas the benefits and risks of ownership remain in the same hands through shareholding relationships or a general assumption of rights and duties. Therefore deferral of tax is allowed so as not to create a disincentive to a merger or acquisition.

By this line of reasoning, both the first and the second M&A transactions involve merely formal transfers of ownership; therefore, deferral of tax should be permitted on both occasions if the legislative spirit of the provision is to be upheld. Accordingly, on 29 December 2003 the Ministry of Finance (MOF) issued an interpretation stating that if a post-merger company subsequently participates in another merger or demerger, it is permissible to defer LVIT further.

The above interpretation refers only to mergers and demergers, and not to cases in which the second transfer of land ownership is due to an acquisition. Thus doubt remained as to whether such cases could be handled in the same way. On 8 March 2004 the MOF issued a further interpretation stating that if land transferred in a merger is subsequently transferred again because the surviving or newly incorporated post-merger company is acquired by another company, previously deferred LVIT may be further deferred.

However, in the case of an acquisition, the acquiring company does not make a general assumption of the rights and obligations of the acquired company as they existed prior to the acquisition. In view of this, although on the one hand the MOF is willing, in the event of a second M&A transaction, to allow deferred tax to be transferred to the acquiring company and further deferred, on the other hand, if the acquiring company were under no legal obligation to pay the deferred tax, the tax revenue might be lost. Therefore, to avoid subsequent disputes, the in be approved only on condition that the acquisition agreement explicitly requires the acquiring company to assume the duty of paying the previously deferred LVIT, and that the acquiring company provides to the tax collection authority a written undertaking to do so.

In terms of the legal relationships involved, if an acquisition agreement stipulates that the acquiring company assumes the duty to pay previously deferred LVIT in respect of the transferred land, in effect the previous obligation of the acquired company is transferred to the acquiring company by contract. If the acquiring company fails to perform its obligations under the acquisition agreement, the acquired company can do no more than make a claim against the acquiring company, on the basis of its rights under the agreement, for an amount equivalent in value to the amount of tax due. The public law duty to pay tax cannot itself be transferred by virtue of a private law contract.

Furthermore, an acquisition agreement cannot fully secure the tax authority's rights as a creditor. Liability to pay LVIT is usually secured by the land on which the tax liability arises. But this security only remains effective for as long as the tax liability remains attached to the land on which it arises. If the land is transferred to another entity, but the duty to pay tax remains with the transferor, then the tax authority may find its right unsecured. This explains why tax authorities may have concerns over such deferral.

Thus, the MOF interpretation requires that a company that acquires land by the acquisition of another company must, when reporting the current value of the land at the time of transfer, submit a written undertaking that it is willing to pay the amounts of tax that continue to be deferred. This written undertaking is a public law contract, which gives the tax authority the power to pursue the acquiring company for payment of tax, and places the acquiring company under a duty to pay tax on behalf of the original taxpayer.

Nevertheless, there is a difference in the degree of obligation between a duty to pay tax assumed under such a written undertaking, and one imposed by a general assumption of rights and duties in case of a merger. Thus there may still be different views as to whether the future payment of LVIT deferred under such arrangements takes precedence over all other debts and mortgages. Also, both of the above MOF interpretations refer to a situation in which the first M&A transaction was a merger. Whether this affects the further deferral of LVIT at the time of a second transaction if the first transaction was a demerger or acquisition, is an issue remains to be settled, through on may infer an answer from the above analysis.

For additional information contact Lee and Li in Taiwan.

HOGAN & HARTSON LLP

update

Antitrust

June 2, 2004

Congress Completes Action on Important Changes to U.S. Antitrust Laws

On June 2, 2004, the House passed and sent to the President H.R. 1086, popularly referred to as the "Standards Development Organization Advancement Act" ("the Act") which amends the antitrust laws in four respects:

- The Act grants Standards Development Organizations ("SDOs") the same limited antitrust protection that certain research and production joint ventures currently receive, including an exemption from treble damages and a guarantee of "rule of reason" treatment, provided that the SDO notifies the antitrust agencies of its intended standards-development activities and the agencies do not object to those activities;
- The Act amends the Tunney Act, which applies to Department of Justice ("DOJ") consent decrees to clarify the authority of federal courts to reject or modify an antitrust settlement because it is not "in the public interest." Notably, the Tunney Act amendments were revised substantially after criticism from the business community and the American Bar Association Section of Antitrust Law ("ABA Antitrust Section");
- The Act increases incentives for participants in criminal conspiracies to blow the whistle on their co-conspirators and cooperate with DOJ. These incentives include limiting a cooperating party's civil liability to actual damages, rather than treble damages, and replacing joint and several liability with proportional liability for the cooperating party; and
- The Act increases significantly the maximum criminal penalties for antitrust violations.

Antitrust Protection for Standards Development Organizations

Title I of the Act grants SDOs the same limited antitrust protection that joint ventures currently receive under the National Cooperative Research and Production Act of 1993.[1] In order to take advantage of the new protections, an organization must:

(1) meet the definition of an SDO;[2]

(2) be engaged in "standards development activity;"[3] and

(3) disclose information about the SDO and the nature and scope of its activity to DOJ and the Federal Trade Commission ("FTC") without objection from either agency.[4]

For an SDO meeting these requirements, the Act provides additional antitrust protection in three respects:

- First, damage awards resulting from activities within the scope of the notification provided to DOJ and FTC are limited to single damages, not treble damages, as is otherwise normal in private antitrust cases.[5]
- Second, standards development activities engaged in by an SDO cannot be deemed *per se* illegal under the antitrust laws.[6] Rather, such activities must be evaluated under the "rule of reason" standard under which "all relevant factors affecting competition" are considered.[7]
- Third, the Act includes a "loser pays" provision under which a substantially prevailing plaintiff suing an SDO may be entitled to recover the cost of the suit, including reasonable attorney's fees, and a substantially prevailing defendant SDO may be awarded its reasonable attorney's fees if the claim is found to be "frivolous, unreasonable, without foundation, or in bad faith."[8]

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1. 15 U.S.C. §§ 1401-5.
2. "[A] domestic or international organization that plans, develops, establishes, or coordinates voluntary consensus standards using procedures that incorporate the attributes of openness, balance of interests, due process, and appeals process, and consensus in a manner consistent with the Office of Management and Budget Circular Number A-119, as revised February 10, 1998." Standards Development Organization Advancement Act of 2003, H.R. 1086 § 103(1), 108th Cong. (2003).
3. The Act defines "standards development activity" as "any action taken by an [SDO] for the purpose of developing, promulgating, revising, amending, reissuing, interpreting, or otherwise maintaining a voluntary consensus standard, or using such standard in conformity assessment activities, including actions relating to the intellectual property policies of the" SDO. H.R. 1086 § 103(2). The definition specifically excludes a number of activities that facially violate the antitrust laws including allocating markets, fixing or restraining prices, and exchanging sensitive business information among competitors that is not "reasonably required" to carry out the purposes of the SDO. § 103(2).
4. Information must be disclosed within 90 days of commencing standards development activity.
5. *See* H.R. 1086 § 105.
6. *See* § 104.
7. *See, e.g., State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (stating that under the rule of reason, "the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature and effect").
8. 15 U.S.C. § 4304(a)(2) as amended by H.R. 1086 § 106.

Tunney Act Amendments

The real story with respect to the Tunney Act amendments in the Act is not what was included, but rather what was dropped. Language in predecessor legislation would have significantly impaired the ability of private parties to negotiate antitrust consent agreements with DOJ, while the language passed by Congress will likely have no more than a marginal effect.

The Tunney Act[9] was enacted in 1974 in reaction to criticism of certain antitrust settlements entered into by DOJ under President Nixon.[10] It requires that following the filing of a description of a proposed antitrust consent judgment by DOJ and a period for public comment, the federal district court must determine whether entry of the proposed judgment "is in the public interest."[11]

Recent decisions interpreting the Tunney Act, however, have been criticized for prohibiting intervention by the court except in the most extreme circumstances. In particular, a 1995 D.C. Circuit decision suggested that a judge was obligated to accept an antitrust consent decree unless it "appears to make a mockery of judicial power."[12] That same court held that a reviewing court's "function is not to determine whether the resulting array of rights and liabilities is the one that will best serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest."[13]

In light of these decisions, legislation was introduced in the Senate in 2003 (S.1797) to bolster courts' ability to scrutinize antitrust consent decrees.[14] This legislation would have prohibited a court from entering a proposed consent judgment "unless it finds that there is reasonable belief, based on substantial evidence and reasoned analysis, to support [DOJ's] conclusion that the consent judgment is in the public interest."[15]

The ABA Antitrust Section and some in the business community opposed this provision because it would have substantially undermined the ability of parties to enter into binding consent decrees with the government.[16] The ABA Antitrust Section was most concerned that the "substantial evidence" language could have been interpreted to require courts to engage in a lengthy review of each proposed decree, including evidentiary hearings. If such reviews became the standard, parties would have a significant disincentive to enter into settlements with DOJ because the potential delay, cost, and uncertainty of litigation would be offset by concerns about the potential delay, cost, and uncertainty in a Tunney Act

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9. Formally the Antitrust Procedures and Penalties Act, codified at 15 U.S.C. § 16(b)-(h).

10. *See, e.g.*, floor statements of Senator Tunney on Feb. 6, 1973 (19 Cong. Rec. 3451-2) and July 18, 1973 (19 Cong. Rec. 24597-8).

11. 15 U.S.C. § 16(e).

12. *United States v. Microsoft*, 56 F.3d 1448, 1462 (D.C. Cir. 1995).

13. *Id.* at 1460 (emphasis in original) (internal quotations and citations omitted).

14. Antitrust Criminal Penalty Enhancement and Reform Act of 2003, S. 1797, 108th Cong. (2003).

15. *Id.* at § 201(2).

16. *See* COMMENTS OF THE ABA SECTION OF ANTITRUST LAW ON H.R. 1086: INCREASED CRIMINAL PENALTIES, LENIENCY DETREBLING AND THE TUNNEY ACT AMENDMENT (January 2004), ("ABA Antitrust Section Comments") available at www.abanet.org/antitrust/comments/increasedcriminalpenalties.pdf; *see also, e.g.,* Letter from John Castellani, President, Business Roundtable to Senator Mike DeWine, December 2, 2003, available at www.businessroundtable.org.

proceeding.[17] In response to these criticisms, the Senate deleted this provision from the Act, replacing it with a definitive statement that "nothing in this section shall be construed to require the court to conduct an evidentiary hearing or require the court to permit anyone to intervene."

The final Tunney Act amendments include a few provisions that are likely to have little impact,[18] a statement that the purpose of both the Tunney Act and these amendments is to "ensure" that antitrust consent judgments are "in the public interest," and a repudiation of the D.C. Circuit's language stating that the role of the court was limited to "determining whether entry of … consent judgments would 'make a mockery of the judicial function.'"[19] As a result, this provision will likely have little, if any, practical effect on the ability of parties to enter into consent agreements with DOJ.

Incentives for Antitrust Conspirators to Cooperate with DOJ

The Act provides new incentives for firms that have participated in criminal antitrust conspiracies to blow the whistle on their co-conspirators and cooperate with DOJ investigations. Currently, the DOJ's antitrust leniency policy provides that a firm and its directors, officers, and employees ("covered individuals") can avoid criminal prosecution if: (1) the company did not organize the conspiracy; (2) it is the first of the conspirators to approach the Antitrust Division; and (3) it cooperates fully with the criminal investigation and prosecution of the other co-conspirators. There has been a concern among some antitrust enforcers that as a result of treble damages and joint and several liability, some firms that might otherwise report a conspiracy may not do so because reporting the conspiracy could subject them to liability for three times the damages caused by all of the conspirators.

This section of the Act is designed to address these concerns by providing additional incentives for companies to enter into antitrust leniency agreements and to "cooperate" with plaintiffs in any civil action based on the same conduct.[20] "Cooperation" with a plaintiff in a civil action is defined to include:

- Providing a full accounting of all facts relevant to the action;[21]
- Furnishing all documents potentially relevant to the action;[22]
- In the case of a covered individual, making oneself available for interviews, depositions, and testimony in connection with the action;[23]
- In the case of a covered individual, responding "completely and truthfully" to all questions asked in connection with the action;[24] and

17. *See* ABA Antitrust Section Comments at 37-38.
18. *See* H.R. 1086 § 221(b)(1)-(3).
19. *See id.* at § 221(a).
20. *See* § 213(b).
21. *See id.* at (b)(1).
22. *See id.* at (b)(2).
23. *See id.* at (b)(3)(A)(i).
24. *See id.* at (b)(3)(A)(ii).

- In the case of a firm, "using its best efforts to secure and facilitate … cooperation" from current and former directors, officers, and employees covered by the agreement.[26]

If the firm "cooperates" with the plaintiff, the Act provides that the firm's liability in the civil action is limited to the actual damages it has caused rather than treble damages and joint and several liability. The Act thus may dramatically reduce a firm's potential civil liability for reporting an antitrust conspiracy to DOJ.

Increased Penalties for Criminal Antitrust Violations

Finally, the Act stiffens the penalties for criminal violations of the antitrust laws. Specifically, it increases the maximum criminal penalties for individuals from three years imprisonment and a fine of $350,000[26] to ten years and a fine of $1 million.[27] For corporations, the maximum fine is increased from $10 million[28] to $100 million.[29] The practical effect of these increases is limited because DOJ has relied upon the alternative maximum fine provision of 18 U.S.C. § 3571(d), which allows an alternative maximum fine equal to twice the gain or loss from the conduct. For example, under this provision, DOJ has secured many negotiated fines far in excess of $10 million, including $500 million from Hoffman-La Roche[30] and $225 million from BASF.[31]

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25. *See* id. at (b)(3)(B).
26. *See* 15 U.S.C. §§ 1-3.
27. *See* H.R. 1086 § 215.
28. *See* 15 U.S.C. §§ 1-3.
29. *See* H.R. 1086 § 215.
30. *See United States v. F. Hoffman-LaRoche LTD*, No. 99-CR-184-R (May 20, 1999), available at http://www.usdoj.gov/atr/cases/f2400/hoffman.pdf.
31. *See United States v. BASF Aktiengesellschaft,* No. 99-CR-200-R (May 20, 1999), available at http://www.usdoj.gov/atr/cases/f2400/basf.pdf.

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 Antitrust group. If you are interested in any of our other publications, please go to http://www.hhlaw.com/site/publications/.

Janet L. McDavid
202/637-8780
jlmcdavid@hhlaw.com

Jonathan M. Grossman
202/637-3674
jmgrossman@hhlaw.com