NOVEMBER 2004 e-BULLETIN

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FRASER MILNER CASGRAIN – LEADING LIGITATION GROUP JOINS FIRM

Ottawa October 20, 2004

Tom Houston, Managing Partner of the Ottawa office of Fraser Milner Casgrain LLP, today announced that K. Scott McLean, Leigh Ann Kirby, Y. Monica Song, David R. Elliott and Corey Villeneuve have joined the firm's Ottawa Litigation Group.

Scott has joined the firm as a Partner and has also become the Ottawa Litigation Practice Group Leader. He brings with him a wealth of experience in the area of corporate/commercial litigation, and has appeared at all trial and appellate levels in Ontario, and at all federal levels, including the Supreme Court of Canada.
Leigh Ann Kirby, Y. Monica Song and David R. Elliott have joined the group as Senior Associates. In addition to general commercial litigation matters, Leigh Ann has considerable expertise on insolvency and restructuring matters, Monica has extensive experience in regulatory matters, and David has substantial experience in employment law litigation. Corey will be working closely with the group as a Senior Paralegal in support of our Supreme Court of Canada Agency practice, our CITT practice and commercial litigation matters generally.

"As a result of these hirings, we will now have one of the stronges t litigation groups in Ottawa. This group will complement our Corporate/Technology, Federal Regulatory, Government Relations, Intellectual Property, Financial Services, Real Estate and Employment and Labour groups and confirms our commitment to delivering top tier specialized legal services to the Ottawa marketplace" explains Houston.

"We are very pleased with this move and with the opportunity it presents to continue to expand our commercial litigation practice in the company of such confident, talented and forward looking colleagues" said McLean.

For more than 165 years, Fraser Milner Casgrain LLP has distinguished itself as one of Canada's leading business law firms. With more than 550 lawyers in six full-service Canadian offices, and an office in New York, FMC offers the depth of experience and trusted legal advice to help clients succeed.

For more information visit www.fmc-law.com

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HOGAN & HARTSON – ASSISTANT U.S. ATTORNEY BOB TROYER JOINS LITIGATION GROUP

Highly-regarded Colorado prosecutor brings added capabilities to Hogan & Hartson's nationally-recognized litigation group

DENVER, November 15, 2004 — Hogan & Hartson L.L.P. announced today that Robert C. Troyer has joined the firm's litigation practice group as a partner in the Denver office. He most recently served in the U.S. Attorney's Office for the District of Colorado.

"Bob's success as a prosecutor and extensive experience as a commercial litigator will be invaluable to our clients and members of the litigation group," said Tom Strickland, managing partner of Hogan & Hartson's Denver office. "I had the privilege to work with Bob when I was U.S. Attorney for the District of Colorado and regard him as one of the best prosecutors in this region. We are delighted to have him join us and add his talents to our nationally-recognized securities and commercial litigation practices."

In his five years at the U.S. Attorney's Office, Troyer prosecuted a wide variety of violent and non-violent crimes, including homicide, gun, drug, immigration, and prison cases.

In four of his five years as a federal prosecutor, he received the USAG's Outstanding Performance Award. In 2003, he was awarded the Organized Crime Drug Enforcements Task Force Award for prosecuting a 53-defendant, multi-state drug distribution organization. In 2002, he received the El Paso County Sheriff's Award for his prosecution of a drug conspiracy homicide.

At Hogan & Hartson, Troyer will focus on representing clients in complex commercial and white-collar litigation, as well as internal investigations.

Before joining the U.S. Attorney's Office for the District of Colorado, Troyer was a shareholder at Brownstein, Hyatt & Farber, P.C. in Denver, where he litigated a wide range of commercial, environmental and regulatory cases. He began his law career as a litigator at Ropes & Gray in Boston.

Troyer received his J.D. from the Boston College Law School in 1990 and his B.A. in English literature from Pomona College in 1984. While at Pomona he played varsity soccer. Prior to attending law school, Troyer taught English at The Edmund Burke College Preparatory School, where he also coached the soccer and track teams.

Active in the Denver community, Troyer served on the board of directors for the Urban League of Metro Denver from 1996 to 2003.

About Hogan & Hartson

Hogan & Hartson is one of the largest law firms in the Rocky Mountain region, with 80 lawyers in offices in Denver, Boulder, and Colorado Springs. The firm has close to 1,000 attorneys practicing in 21 offices around the globe and serves local, national, and international clients in a broad-based practice that 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 Beijing, Shanghai, and Tokyo; 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.

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HOET's BRUNO CIUFFETELLI and TOZZINI'S MOIRA HUGGARD-CAINE NAMED IBA CO-CHAIRS LATIN AMERICAN AND CARIBBEAN FORUM

Congratulations to **Bruno Ciuffetelli**, Partner in Venezuela's **Hoet Pelaez Castillo & Duque**, and **Moira Huggard-Caine**, Partner in Brazil's **Tozzini, Freire, Teixeira e Silva Advogados**, have been named co-chairs of the Latin American and Caribbean Forum of the Legal Practice Division at the International Bar Association.

Ciuffetelli commented: "We are all very excited with this new position. We have different plans to be implemented within the new structure of the Latin American and Caribbean Forum within the Legal Practice Division of the IBA. We will be working together with the Public and Professional Interest Division of the IBA in the organisation of a programme for training judges in the region in various areas of business law, including banking, securities, antitrust, trade and others."

"Additionally, we will be working hard on the organisation of two conferences next year in the region; the first will be in March in Miami, together with the Tax Section, on Tax Incentives in Latin America; and the second will be in May in Rio de Janeiro, together with the Antitrust Section. We will also be organising the sixth regional conference of the group, which will be held in Caracas in March 2006."

Huggard-Caine will be the first woman to co-chair the group, and told **LATIN LAWYER**: "This is a challenging position due to the importance of Latin America in the world economy. We are proud our region has been selected to open the first IBA regional office, which will be in full operation in São Paulo, at the beginning of 2005. We expect to work closely with the regional office to enhance the Latin American presence in the IBA."

For additional information contact **Bruno Ciuffetelli at bciuffetelli@hpcd.com** or **Moira Huggard-Caine at mhuggardcaine@tozzini.com.br**

KING & WOOD APPOINTS HANDEL LEE AS NEW CHAIRMAN

Beijing, October 19, 2004

King & Wood, China 's largest law firm, announced that Handel Lee has joined the firm and has been appointed the Chairman of its management committee. Mr. Lee comes to King & Wood from Vinson & Elkins L.L.P., where he was the co-administrative partner of its Greater China Practice.

" Handel Lee is certainly one of the most prominent international lawyers practicing in China, and we are most happy that he is joining us, " said Mr. Wang Junfeng, founder and former Chairman of King & Wood. " His presence and influence in our firm will certainly boost the quality and competitiveness of the practice at King & Wood so as to enhance our service to our clients. "

" Wang Junfeng and I believe that now is the critical juncture for the evolution of law firms and the practice of law in China. We will focus on speeding the development of the firm's quality control, professional education, internal administration and internationalization, " said Handel Lee. " We will put in place a concerted program to expend even more time and resources on legal training, legal ethics, recruitment, control systems, and practice area development. "

Mr. Lee, born in Washington, D.C., is a transactional lawyer whose practice primarily focuses on mergers and acquisitions, energy, and project finance, and was selected for the 1999, 2001, and 2003 editions of *Euromoney*'s Guide to the World's Leading Energy and Natural Resource Lawyers. Mr. Lee is active in the development of Chinese contemporary arts and culture, including ownership of two art galleries and in Beijing and Shanghai and a cultural-based project known as " Three on the Bund ". He also sits on the Board of Arts at George Mason University. Mr. Lee will maintain a consulting relationship with Vinson & Elkins, advising on strategic and policy matters for the firm's China practice.

King & Wood is a full service law firm based in Beijing and is China's leading law firm with over 90 partners and over 300 associates and patent agents in Beijing, Shanghai, Shenzhen, Chengdu, Guangzhou, Hong Kong and San Francisco. For three consecutive years (2002-2004) King & Wood has been recognized as the " Best Law Firm in China " by *Asia Legal Business*. King & Wood may be best known for its work in China-related IPO's including People's Insurance Company (issuer's counsel), China Life Insurance Company, (issuer's counsel), PetroChina (issuer's counsel), and the ongoing Air China (underwriter's counsel), Bank of Communication (issuer's counsel) and Bank of China (underwriter's counsel) initial public offerings.

For additional information visit www.kingandwood.com

HOGAN AND HARTSON ADVISED TEXTRON IN 10 YEAR $1.1 BILLION OUTSOURCING DEAL

Hogan & Hartson L.L.P. helped Textron Inc. (NYSE: TXT), one of America's largest multi-industry companies with subsidiaries Bell Helicopter, Cessna Aircraft, E-Z-GO and Greenlee, among others, structure and close a deal worth approximately $1.1 billion with Computer Sciences Corporation (CSC) that provides for the outsourcing to CSC of Textron's global information technology infrastructure. The term of the agreement is 10 years. Pursuant to the agreement, as of January 2, 2005, CSC will provide help desk services and also operate and manage the information technology infrastructure systems of the company, consisting of mainframe computer systems, midrange computer systems, workstation and lap top computers, and the voice and data telecommunications networks.

Approximately 250 Textron employees who currently manage the company's information technology infrastructure will be offered employment by CSC on or after the effective date of the agreement. In addition to the transfer of assets and employees, Textron will assign or novate certain of its existing service and maintenance agreements to CSC.

The Hogan & Hartson team was led by Northern Virginia-based partner Phil Porter, and included a team of 13 additional technology, corporate and securities, IP, data privacy, and employment lawyers from the firm's offices in Northern Virginia, Colorado, Paris, Berlin, and London. The team included Lori Jenkins, Robin Everett, Tracy Gray, Winston Maxwell, Rich Parrino, Brian Lynch, Mike Lorenger, Nicola Walker, Gernod Meinel, Markus Plesser, Valerie Brennan, Michael Larner, and Kraig Washburn.

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NAUTADUTILH ADVISES ISPAT IN STEEL INDUSTRY'S MERGER; INVOLVED IN ACCORD BETWEEN DUTCH STATE, SHELL AND EXXON MOBIL

This is in exchange for the issue of new shares in Ispat valued at 13.3 billion US dollar (at Friday, October 22nd's closing share price on the NYSE) to the shareholder of LNM Holdings. The NautaDutilh team is led by partner Gerard Carriere and includes partners Petra Zijp and Marc Anker.

For further information regarding this transaction please visit www.nautadutilh.com , or questions regarding Dutch law or NautaDutilh's role, please contact Gerard Carriere at gerard.carriere@nauatudutilh.com.

The NautaDutilh-team, headed by Peter Goes, provided legal, notarial and tax-related support to the State and will continue to provide assistance in working out the details of the accord. Further details about the restructuring plans are set out in a letter sent by the Minister of Economic Affairs to the Lower House of Parliament.

For further information regarding this transaction please visit www.nautadutilh.com, or questions regarding Dutch law or NautaDutilh's role, please contact Peter Goes at peter.goes@nautadutilh.com .

Government

print

Welcome to the November edition of Clayton Utz Government Insights. In this edition we'll look at the effect on Government of the important NT Power case, and when Government activity becomes Government business.

Government takes legal advice all time - but when is it protected by legal professional privilege? And when is that privilege lost? Some recent cases give some answers. We'll also catch up on the latest developments in the law on implied freedom of political communication, and fair and reasonable termination of employment – when the employer gets it right.

The business of Government is "business" the NT Power case and state enterprises

When does a Government enterprise become a Government business? We looked at this issue in our last Insights, but an important High Court decision handed down since then highlights the extent to which the Act applies to Government. The decision in *NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48 (6 October 2004) may mean a review of many Government arrangements to ensure they do not contravene the *Trade Practices Act*.

The NT Government's power authority

The Power and Water Authority (PAWA) is a body corporate constituted under the *Power and Water Authority Act* (NT). It operates a vertically integrated electricity enterprise in which it generated electricity or purchased electricity generated by others. That electricity is then transported from generation sites to distribution points via transmission equipment. Using distribution equipment it then goes from distribution points to the customers. Finally, PAWA charges the customers who buy the electricity.

NT Power wanted access to PAWA's electricity transmission and distribution infrastructure services so that it could sell electricity to consumers in competition with PAWA. Though there was no safety, technical or other problem preventing PAWA from allowing NT Power to use those services, PAWA rejected the request. This was because NT Power wanted to supply the markets that are cheaper to access, and therefore more profitable. PAWA must also service more remote, and therefore less profitable, places, and this obligation hampered its ability to compete. It seemed that NT Power was trying to cherrypick the most profitable customers. PAWA was to be privatised and an access regime to be put in place, so it was decided not to give NT Power access.

NT Power took legal action, alleging that PAWA had taken advantage of its market power for a prohibited purpose, which is a breach of section 46 of the *Trade Practices Act*. The Act doesn't apply to the Crown or its agencies (either State via section 2B or Commonwealth via section 2A of the Act) unless they are "carrying on a business". Since PAWA is a Government authority, NT Power first had to show that it was carrying on a business and was not covered by the Crown immunity.

If it calls itself a business, it probably is one

Many Government agencies describe themselves as business-like in their activities, and PAWA is no exception. That self-description was crucial in this case.

PAWA is required to produce an Annual Report which the Minister then makes public. In its 1998 Report (which was prepared around the time NT Power requested access), references were made to:

- PAWA's entire operation as a "business" having a "power" segment, with "upstream (generation ...) and downstream (transmission, distribution and reticulation networks, and retail) components"
- PAWA's "core business"
- the fact that it was undergoing "commercialisation"
- its "commercial functions"
- its vision "to thrive in the competitive north Australia utility services market"
- "like all business, [PAWA] needs to generate a return on the very significant amount of capital invested"
- the need for efficiency and cost-effectiveness
- indicators like the rate of return on assets and the debt to capital ratio
- the transmission and distribution facilities, which were described as "business products" and the use of them as "electricity transmission services" and "commercial services".

This language and the form of the accounts correspond with those in any non-Governmental trading corporation, said the High Court. Furthermore, these phrases were held by the High Court to be admissions. They were made to fulfil statutory duties and in a document which under legislation had to be made public, and as a result "they are of the utmost solemnity. The admissions in relation to the transmission and distribution facilities, in particular, are totally inconsistent with the case on the application of section 2B which PAWA propounded in this litigation."

Apparently as a result of these admissions, the High Court did not consider in detail the factors laid down in *JS McMillan v Commonwealth of Australia*, ie. were the activities in the nature of Government activities or commercial activities, and were they undertaken with repetition, system and regularity? It did note however that:

- "business" has a wide and general meaning, and includes activities which aren't profitable
- whether it's a business is not found by defining a market and asking what the Government entity does in it, but by looking at the activities
- the conduct alleged to breach the *Trade Practices Act* must be engaged in the course of the Government entity's carrying on a business, but it need not itself be the actual business engaged in.

However, the extent of the ramifications of these findings are uncertain. In the case the High Court noted that PAWA carried on a substantial retail business as it had sales revenue in one year of $253,181,000 of which $206,272,000 were from power sales. The question turned on whether NT Power had to establish that PAWA was carrying on the business of transmitting or distributing electricity. This is different from other cases, such as *The State of New South Wales v. R.T. & Y.E. Falls Investments Pty. Ltd* [2003]

NSWCA 54, where the court found that the mere fact that an Annual Report stated that a Government compensation scheme was to be operated in a "business-like way" did not convert the compensation scheme into the carrying on of a business.

Ministerial directions and implementing policy don’t matter

Having found that PAWA was carrying on a business and that it breached section 46 in the course of carrying on that business, the High Court next had to ask whether if the business does its actions to implement a public purpose or policy, has it breached the *Trade Practices Act*?

To breach section 46, a business must not only take advantage of its market power, but must do so for a prohibited reason (in this case, preventing a competitor from entering a market). PAWA said it had done neither of these things as it had declined to give NT Power access because the Minister for Essential Services had given it a direction under section 16 of the PAWA Act (this is a binding direction).

Even if a section 16 direction had been given (and the evidence of that was sketchy), the High Court said it didn’t matter. Assuming it was a binding direction, what PAWA did in response to a direction of the Minister was PAWA’s conduct, and the Minister's accompanying mental state was PAWA's mental state. The mental state of those who advised the Minister to recommend as he did, and of the Minister himself, was to deter or prevent NT Power from participating in the transmission or distribution markets and in the electricity supply market (in which it was likely that its prices would undercut PAWA) until the Northern Territory introduced an access regime.

The Minister did this for what seemed a sound reason: by preventing short-term competition, he hoped to gain time to introduce a proper access regime and thereby ensure the long-term competitiveness of the electricity supply market. NT Power’s entry might also cause PAWA such losses that it would no longer subsidise services to remote communities. He wanted "sensible competition".

As laudable as the underlying policy is, it was simply irrelevant. The High Court said that section 46 does not allow the distinction. It reminded the Government that it was in a different arena:

"In truth, [sensible competition] is a reference to the process by which an inefficient monopolist sought to give itself time to reorganise its affairs by obstructing emerging competition. Paternalistic control from a monopolist is antithetical to competition, and a construction of section 46 which permitted it, even if only in the short term, is inconsistent with the structure of the section and the legislation as a whole."

Derivative crown immunity and the wholly owned subsidiary

Gasgo is a company in which PAWA beneficially holds all the issued shares. It has entered a long-term gas purchase contract, the Mereenie Agreement, with certain suppliers. It has habitually sold the gas supplied to NT Gas Pty Ltd, which on-sells to PAWA. Clause 2.26 of the Mereenie Agreement gives Gasgo a pre-emptive right in relation to the sale of gas by the suppliers to customers other than Gasgo, at the price offered to the third party.

NT Power required gas from the suppliers for its generator, and requested that Gasgo give an undertaking that it would not insist on its pre-emptive rights. Gasgo declined to give that undertaking, and NT Power said that was a breach of section 46. Whether it was has never been determined. The threshold question is whether Crown immunity or derivative Crown immunity apply to Gasgo.

The High Court held Gasgo was not "an emanation of the Crown in right of the Northern Territory". It is a trading corporation, not established by statute, its articles of association are standard, and its directors have no special duties above those normally borne by directors. There are non-Governmental entities in its supply chain. There was insufficient evidence to indicate the NT Government wanted it to share in its immunity.

Derivative Crown immunity is another issue entirely. The question is whether section 46, in preventing enforcement of a clause in a contract between two parties, neither of whom is the Government, caused "some impairment of the existing legal situation of" the Northern Territory Government in this case. The interference to be looked for is a "divesting" of proprietary, contractual and other legal rights and interests belonging to the Government and not otherwise. This pulls back from the wider statement in *Bass*.

Gasgo acknowledged that no legally enforceable interest of the Northern Territory Government was prejudiced, and that its only prejudice was financial, and invited the court to extend the law. Gasgo did not advance any argument of sufficient merit to justify that extension.

What flows from this decision?

Many Government bodies have assumed they are not affected by the *Trade Practices Act* and organised their affairs accordingly, but that underlying assumption could be wrong.

Secondly, the trend towards corporatisation and Public Private Partnerships in the public sector is clearly not without costs. If Government agencies wear the trappings of a private business, and assert them in public documents, this case suggests they might have admitted to being a business, with all the consequences under competition law that flow from that fact.

Finally, decisions that are taken for policy reasons or at the request of a Minister aren't quarantined from the *Trade Practices Act*. Here, the purpose of refusing access was a prohibited one (ie. to prevent a competitor's entry into a market). The underlying policy - a refusal in the short-term would help ensure long-term competitiveness - was irrelevant to finding a breach of section 46. This sets up a tension between the delivery of Government policy (particularly via corporatisation) and *Trade Practices Act* compliance.

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INDONESIA – Ali Budiardjo Nugroho Reksodiputro – Ministerial Decree on Company Registration

November 2, 2004

The Minister of Industry and Trade on 23 September 2004 issued Decree No. 596/MPP/KEP/9/2004 regarding Standards for the Implementation of Compulsory Company Registration (the "Decree"). The Decree, which revokes the earlier Decree No. 12/MPP/Kep/I/1998 (as amended) on the same subject matter, has been issued as part of the implementation of the regional autonomy under Law No. 22/1999.

While the Decree is almost identical to the old decree it replaces, it contains new elements that are apparently meant to complement the provisions from old decree. Among the new provisions, an important one is that regarding the requirement for business entities with a headquarter status to file annual financial reports, which provision has as a matter of fact been adopted from Government Regulation No. 24/1998 regarding Company's Annual Financial Information (as amended). Under this new provision, the annual financial report requirement applies to the following companies:

i. public companies;
ii. companies which business acitivities include public fund raising;
iii. companies which issue debt securities instruments;
iv. companies with assets of not less than twenty five billion;
v. companies that are bank debtors and required by the bank to have their annual financial reports audited.

In line with the regional autonomy policy, the Decree specifies that companies are to register themselves with the company registration office in the regency or city where they are located, and places the task to implement the compulsory registration in each region/municipality to the respective regent/mayor.

The Decree also shortens the reporting period for changes in the company data, which used to be 90 days under the old decree, to 30 days.

In addition to the Decree, separately the Minister of Industry and Trade also issued its Decree No. 597/MPP/KEP/9/2004 regarding guidance on the administrative costs of company registration. As reflected in the name, the decree contains information on the administrative costs involved in the registration of a company as well as costs that may be imposed in obtaining information on company registration

For Additional information contact Ali Budiardjo Nugroho Reksodiputro in Jakarta

THE NEW FIC GUIDELINES - PART I

In the first of a two-part series, Kok Chee Kheong discusses the FIC's new Guideline on the

INTRODUCTION

As part of the Economic Stimulus Package introduced on 21 May 2003 ("Economic Stimulus Package"), the Government of Malaysia announced that the Guidelines on Acquisition of Assets, Mergers and Take-Overs introduced in 1974 will be replaced by the following -

- Guideline on the Acquisition of Properties by Local and Foreign Interests ("Property Guideline"); and
- Guideline on the Acquisition of Interests, Mergers and Take-Overs by Local and Foreign Interests ("Acquisition Guideline").

Although the Property Guideline and Acquisition Guideline were released on 1 August 2004, they are deemed to have come into force on 21 May 2003 to tie-in with the effective date of the Economic Stimulus Package.

> Part IV of the Acquisition Guideline sets out 10 categories of transactions that require approval of the FIC.

The objective of this article is to provide a brief introduction to the Acquisition Guideline and to examine whether it has enhanced Malaysia's ability to attract foreign investment.

TRANSACTIONS REQUIRING FIC APPROVAL

Part IV of the Acquisition Guideline sets out 10 categories of transactions that require approval of the FIC. They include the following -

1. Any acquisition of interest in a local company/business which is RM10 million or more in value, by local or foreign interests;
2. Any acquisition of interest of a local company/business by any means, which results in the transfer of ownership or control to foreign interests;
3. Any acquisition of interest by:-
   i. any foreign interest of 15% or more of the voting rights of a local company/business OR which results in an increase of voting rights of foreign interests to 15% or more in a local company/business; or
   ii. any associated or non-associated group of foreign interests, in the aggregate of 30% or more of the voting rights of a local company/business OR which in the aggregate results in an increase of voting rights of foreign interests to 30% or more in a local company/business;

   regardless of the value of the transaction with the exception of open market acquisitions on Bursa Malaysia for short term holdings;
4. Any acquisition of interest and control of more than 50% of the voting rights in a local company/business by local interests, regardless of the value of the transaction;
5. Any merger or take-over of a local company/business by local or foreign interests;
6. Any proposed joint venture involving two or more parties in a local company;
7. Any control of a local company/business through any form of management agreement, technical assistance agreement or other arrangements;
8. Any charging of shares in a local company to any foreign interest where the value of the loan or market value of the shares is RM10 million or more.

Where a proposal is subject to the approval of the Securities Commission ("SC"), the proposal is required to be submitted only to the SC and not the FIC.

EXEMPTIONS

Part VI of the Acquisition Guideline sets out the transactions that are exempted from the guideline. They include the following -

1. any acquisition by Ministries, Government Departments, the Minister of Finance Incorporated, Menteri Besar Incorporated or the State Secretary Incorporated;
2. any acquisition of interest in manufacturing companies licensed by the Ministry of International Trade and Industry ("MITI) – approval for such acquisitions fall under the purview of MITI;
3. any acquisition of interest in Multimedia Super Corridor (MSC) status companies or companies that have been granted special status by the Ministry of Finance, MITI or other ministries such as International Procurement Centre, Operational Headquarters, Representative Office, Regional Office and Labuan offshore companies;
4. any privatisation project, whether at Federal or state level, insofar as it relates to the companies or parties who are the original signatories to the privatisation contracts. The exemption does not extend to subsequent dealings in such interests.

CONDITIONS OF APPROVAL

An FIC approval is subject to the conditions set out in the Acquisition Guideline, namely equity conditions, share capital conditions and employment conditions.

Equity Conditions

Companies which do not have Bumiputera or have less than 30% Bumiputera equity are required to increase their Bumiputera equity to 30%. This requirement for at least 30% Bumiputera equity is to be applied uniformly unless otherwise stated by the Government. The remaining equity may be held by local interest, foreign interest or both.

> With respect to companies that are involved in national interests ... participation by foreign interests is limited to 30%.

With respect to companies that are involved in national interests, such as defence and security and supply of water and electricity, participation by foreign interests is limited to 30%. The Government may impose other conditions such as the issuance of a "golden share" that confers certain veto powers on the Government.

Acquisition of Interests, Mergers and Take-Overs released on 1 August 2004.

Companies that already have 30% or more Bumiputera equity are required to maintain at least 30% Bumiputera equity holding. Similarly companies having 51% or more Bumiputera equity are required to maintain at least 51% Bumiputera equity holding.

Equity conditions may be waived for companies that have incurred losses and are undertaking a debt restructuring exercise. In such event the equity structure will be reviewed three years after FIC's approval letter.

No equity conditions will be imposed on non-licensed manufacturing companies incorporated after 31 July 1998.

Companies that seek listing on the Main Board or Second Board of Bursa Malaysia are required to have 30% Bumiputera equity only upon listing. Companies that apply for listing on the MESDAQ Market are required to comply with the Bumiputera equity stipulated in the Listing Requirements for the MESDAQ Market.

Companies having major foreign-based operations (as defined in the SC's Policies And Guidelines On Issue/Offer Of Securities) that seek listing are not required to comply with the 30% Bumiputera equity condition.

Where a corporate transaction involves an increase in the paid-up capital of a company and results in the dilution of Bumiputera equity, 30% of the new shares must be offered to Bumiputera investors.

Equity conditions imposed, if any, are to be complied with within two years from the date of the FIC's approval letter. The status of compliance must be reported to the FIC at least one month before the deadline for compliance or whenever requested by the FIC. The compliance period may be extended by one year based on the merits of each case.

Share Capital Conditions

A local company owned by foreign interest that has a paid-up capital of less than RM250,000 is required to increase its paid-up capital to at least RM250,000 within six months from the date of the FIC's approval letter.

A local company owned by local interest that has a paid-up capital of less than RM100,000 is required to increase its paid-up capital to at least RM100,000 within six months from the date of the FIC's approval letter.

Employment Condition

Companies are required to use their best endeavours to recruit and train Malaysians so as to reflect the country's population composition at all levels of employment.

APPLICATION PROCEDURE

The onus of submitting an application falls on the purchaser. However the FIC will also accept an application from the vendor.

> ... all equity in a company, other than 30% Bumiputera equity, may be held by local interest or foreign interest or both.

The applicant is fully responsible for the accuracy of the information submitted. A director of the company or any individual authorised by the company is required to submit a statutory declaration to confirm the accuracy of the information provided and to confirm whether the conditions set out in the Acquisition Guideline are complied with and, if not, to undertake compliance within the period to be stipulated in the FIC's approval letter.

The FIC has, in paragraph 21 of the Acquisition Guideline, committed to make a decision within 10 working days of its receipt of a complete application.

CONCLUSIONS

The Acquisition Guideline sets out clearly the transactions that require the approval of the FIC and the conditions to which each approval will be subject.

The application procedure has been streamlined as the number of documents to be filed has been reduced. An application to the FIC is dispensed with where a proposal is subject to the approval of the SC. These changes will reduce bureaucratic red-tape involved in the process.

The commitment of the FIC to make a decision within 10 working days of its receipt of a complete application is a significant reduction of the processing period which had hitherto required six to eight weeks.

Under the Acquisition Guideline, the general rule is that all equity in a company, other than 30% Bumiputera equity, may be held by local interest or foreign interest or both. The requirement under the previous FIC guidelines that 40% of the equity be held by other Malaysians has been dispensed with.

The relaxation of the equity conditions and the streamlining and acceleration of the approval process under the Acquisition Guideline will undoubtedly enhance Malaysia's competitive position in its quest to attract foreign investment in an increasingly competitive international environment.

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NETHERLANDS – NautaDutilh – Proposed Legislation: Energy Companies Must Spin Off Networks

The Minister announced that he intends to propose legislation which will prohibit the simultaneous direct or indirect ownership of shares in production or distribution companies and network companies. This prohibition will apply to private parties only. Local governments will be exempted from this prohibition.

Should the proposal become law, energy companies in the Netherlands will be required to spin off their networks into separate legal entities. One company, InterGas, is apparently already in the process of doing so.
Minister Brinkhorst intends to submit a legislative proposal to the Council of Ministers at the end of this year with a view to an effective date of January 2007.

Possible allowance of private ownership of networks (after 2007)
Last March, Brinkhorst indicated that transfer of ownership of networks (other than to local governments) will not be permitted until January 2007. In the latest action plan, the Minister announced that he is studying under which circumstances such transfers can be allowed after January 2007. A policy paper on privatization of networks can be expected by the end of this year. The Minister also noted that he is considering whether companies should be allowed to transfer up to 49% of the shares in a network company to private parties prior to 2007. This would apply to fully unbundled companies only.

Requirement network manager to obtain economic ownership postponed
You may be aware that the Electricity Act and the Gas Act were substantially amended effective July 14th, 2004. Under the new law, network owners will be required to transfer economic ownership of the network to the network manager.
The maximum price that may be paid for the economic ownership will be set at the turnover of the network over the last five years based on regulated rates. In last Monday's action plan the Minister stated that these requirements will not come into effect until January 2007.

TenneT to be network manager of kV 110 and up
Finally, the Minister will submit a legislative proposal to require that TenneT is designated the manager for all electricity networks of kV 110 and up. Presently TenneT is exclusively authorized to manage the network from kV 220 and up. However, transfer of legal or economic ownership of the kV 110 networks to TenneT will not be necessary. TenneT is 100% owned by the national government.

For more information, visit our web site at www.nautdutilh.com to read the Minister's action plan in English. For further details, contact **Elizabeth van Schilfgaarde elizabeth.vanschilfgaard@nautadutilh.com** (New York office), **Chris Warner chris.warner@nautadutilh.com** (New York office) or **Chris Fonteijn chris.fonteijn@nautadutilh.com** (Rotterdam office) update

Customs & International Trade

October 2004

The Floodgates of Textile Actions Open: Industry Files Threat-Based China Textile Safeguard Petitions

On October 8, 12, and 15, a coalition representing U.S. textile manufacturers filed a dozen petitions with the Committee for the Implementation of Textile Agreements (CITA), an interagency group chaired by the U.S. Department of Commerce, seeking to impose import restrictions known as safeguards on numerous categories of textile and apparel products from China.

Textile safeguards petitions against China are permitted under a special process that China agreed to when it acceded to the World Trade Organization (WTO). The novel element of this most recent spate of petitions, however, is that they are based on the *threat* of an import surge after textile quotas expire on December 31, 2004 rather than current market disruption. The industry is taking the controversial position that import restrictions should be imposed based on the *threat* that the anticipated increased level of import competition will cause market disruptions and injure U.S. companies. The Chinese government believes that the safeguards action may only be taken after actual market disruption has occurred, and has suggested that it might resort to WTO dispute settlement if the United States imposes textile safeguards based on a threat theory.

The product categories covered in the petitions include cotton trousers, man-made fiber trousers, wool trousers, cotton and man-made fiber knit shirts, cotton and man-made fiber men's and boys' woven shirts, cotton sheets, synthetic filament yarn, and cotton yarn. These comprise 15 of the 91 product categories for which WTO-authorized U.S. quotas will expire on January 1, 2005. On October 15, 2004 the coalition filed an additional safeguard petition covering cotton and man-made fiber underwear.

The coalition has also filed for renewals of three safeguards-measures that are already in place, but which are scheduled to expire on December 23, 2004. These cover cotton and man-made fiber dressing gowns and robes, cotton and man-made fiber brassieres, and knit fabric. On October 15, U.S. Customs and Border Protection (CBP) announced that shipments of these products will be carefully scrutinized for fraudulent country of origin claims as imports from China near the quota cap set for these products.

CITA has 15 business days after the filing of a petition to decide whether it will be accepted for further consideration (as early as November 1, 2004 for trousers). If CITA accepts a petition, a 30-day public comment period would follow, after which CITA has 60 days to decide whether to impose relief. The relief is spelled out in the CITA procedures: if CITA approves the safeguards, a consultation period with China begins, and if no agreement is reached, the United States would limit Chinese imports of the particular products to an amount based on the previous year's imports plus a 7.5 percent growth rate.

While the ultimate disposition of these petitions is difficult to predict, they represent the opening forays into the new textile environment, with no import quotas and visas. There will be a protracted period of textile producers seeking increasing levels of protection as they attempt to adjust to increased import competition.

U.S. Challenges Lack of Uniformity in EU Customs Administration

Responding to growing complaints from U.S. business interests in the express courier, agriculture, high-tech, and textiles sectors, last month the United States filed papers at the WTO that could lead to a dispute settlement action challenging the lack of uniformity in the administration of customs in the 25 member countries of the European Union (EU). The alleged lack of uniformity in EU Customs administration relates to:

- Determinations of tariff classification and valuation of goods imported into Europe;
- Procedures for the tariff classification and valuation of goods, including the provision of binding classification and valuation information to importers;
- Procedures for the entry and release of goods, including use of automation in some member states but not others, different certificate of origin requirements, different criteria among member states for the physical inspection of goods, different licensing requirements for importation of food products, and different procedures for processing express delivery shipments;
- Differences in procedures for auditing entry statements after goods are released into the stream of commerce in the European Communities;
- Differences in penalties and differences in procedures regarding the imposition of penalties for violation of customs rules;
- Differences in record keeping requirements; and
- Differences in appeals procedures.

The United States has also registered its concern that such differences and lack of uniformity will only increase following the recent EU enlargement, which admitted 10 new states to the EU as of May 1, 2004.

The EU has publicly rejected the U.S. challenge asserting that it has "no legal basis" and that the EU is in full compliance with its WTO obligations. However, bilateral consultations are scheduled to commence on November 16, 2004, and comments are being accepted by the European Commission and the U.S. Trade Representative's Office through November 5, 2004.

CBP Readies Revised Entry Form CF 7501

CBP has invited comments from the importing community on proposed revisions to the layout of the Entry Summary form, officially known as CF 7501. The proposed changes were developed over the past year, with comments and recommendations from CBP field offices and the importing community. The changes affect the layout and format of the form, but the revisions are not intended to affect the data elements required on the form. Major changes include the utilization of a larger font size; moving the "Broker/Importer File No." from block 8 to block 43; and the addition of a field for Broker/Filer Information (new block 42), a field for total entered value (new block 35), and space to describe "Other Fee Summary for Block 39."

The revised CF 7501 can be found at: http://www.cbp.gov/linkhandler/cgov/toolbox/forms/7501.ctt/7501.pdf. CBP will accept comments through October 22, 2004, which should be sent to Bruce Coulliette via e-mail at bruce.couliette@dhs.gov.

For more information on this or any Customs matter, please contact the Hogan & Hartson L.L.P. attorney with whom you work or one of the attorneys listed below.

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New California Legislation 2005: An Overview

October 6, 2004

California Governor Arnold Schwarzenegger proved that he really is the "Governator" by closing out the legislative session on September 30th with the highest veto percentage of any first-year governor since the California Legislature went full-time in 1967. Of the 1,265 bills the legislature sent to him, he vetoed 311 and signed 954. Notwithstanding this veto zeal, he did sign some important employment-related bills. Set forth below are highlights of the bills by category.

1. Mandatory Sexual Harassment Training

AB 1825 This bill requires all employers of 50 or more employees or independent contractors to provide sexual harassment training to all supervisors during the 2005 calendar year. The training must be repeated every two years thereafter, and all new supervisors must receive the training within six months of assuming a supervisory position. Employers may wait until 2006 if they have already delivered such training to their supervisors any time after January 1, 2003.

Using practical examples, the content of the classroom or other "effective interactive training" must cover harassment prevention, discrimination, retaliation and the remedies available to employees under state and federal law. Additionally, the course must be delivered by trainers with "knowledge and expertise" in the prevention of these subject areas.

As with most laws, many questions are raised by this new law, including:

- Must a company employ 50 employees in the state of California to be covered?
- Who should be considered a supervisor, and what if that person resides outside of California?
- What constitutes "effective interactive training?" For example, can employers use computer-based training, or is live training required?
- Is it sufficient for the training to cover sexual harassment, or must it address broader forms of discrimination as well (e.g., gender-based discrimination)?

We will be exploring these and many other issues in a webcast later this month. You will receive an invitation shortly.

For detailed information, please click on the following link:
http://www.leginfo.ca.gov/pub/bill/asm/ab_1801-1850/ab_1825_bill_20040930_chaptered.pdf.

2. Domestic Partner Legislation

AB 205 The California Domestic Partner Rights and Responsibilities Act of 2003 was enacted last year. However, it is important to discuss AB 205 again this year because the new domestic partner law becomes effective on January 1, 2005. AB 205, which amends the California Family Code, generally extends the rights and duties of marriage to registered domestic partners. As of January 1, 2005, registered domestic partners will have many new rights and responsibilities, including community property rights, duties of mutual financial support, and rights and obligations with respect to a child of either domestic partner. However, AB 205 cannot provide registered domestic partners with any of the benefits, protections, or responsibilities provided to opposite-sex couples by federal laws. AB 205 was recently upheld as valid by a Sacramento Superior Court Judge. However, it is expected that the decision will be appealed.

At a minimum, employers should review their domestic partner policies, particularly in light of AB 2208 (see below description). Employers should also review their leave policies (including Family and Medical Care, Paid Family Leave and "Kin Care") to make sure that such policies reference "domestic partner" wherever such policies reference "spouse."

For detailed information, please click on the following link:
http://www.leginfo.ca.gov/pub/bill/asm/ab_0201-0250/ab_205_bill_20030922_chaptered.pdf.

AB 2208 This bill enacts the California Insurance Equity for All Families Act. The bill conforms to the requirements of AB 205, the existing law extending health care benefits to domestic partners. According to current law, group health care service plans and insurance companies are required to offer health coverage for a registered domestic partner that is equal to the coverage offered to the "dependent" of the employee or subscriber. Current law is *revised* to require group health care service plans and insurance policies to provide a registered domestic partner of an employee or subscriber with health benefits on the same terms and conditions as a "spouse," instead of a "dependent," upon application of the employer. AB 2208 applies to group health care service plans or group health insurance policies issued, amended, delivered, or renewed in California on or after January 2, 2005.

In short, if an employer's medical plan offers benefits to employees' spouses and the medical plan is not self-funded, then it is expected that the health care service plan or insurance company will offer such benefits to registered domestic partners on the same terms and conditions as it offers them to spouses. This new law also may apply to employers' life insurance programs for their employees and employees' spouses and domestic partners. It is therefore important to review your health plans, life insurance programs, and domestic partner policies in light of this new legislation.

For detailed information, please click on the following link:
http://www.leginfo.ca.gov/pub/bill/asm/ab_2201-2250/ab_2208_bill_20040913_chaptered.pdf.

3. Private Attorney General Act (PAGA)

SB 1809 PAGA was the most draconian employment bill signed by ousted former Governor Davis. Recognizing how destructive PAGA, a.k.a. the "Bounty Hunter Law" or "Sue Your Boss" was to the California business community, Governor Schwarzenegger held up California's budget until revisions were enacted. For more information, please see the August 12, 2004 LawFlash at http://www.morganlewis.com/pubs/schwarzenegger.pdf.

For detailed information, please click on the following link:
http://www.leginfo.ca.gov/pub/bill/sen/sb_1801-1850/sb_1809_bill_20040811_chaptered.pdf.

4. Employment Records

SB 1465 This bill requires that when a subpoena for documents is sent to a labor union for records related to a current or former member's employment, a notice must be sent to the union member, just as when a subpoena for documents is sent to an employer for records related to a current or former employee's employment, a notice must be sent to the employee.

For detailed information, please click on the following link:
http://www.leginfo.ca.gov/pub/bill/sen/sb_1451-1500/sb_1465_bill_20040706_chaptered.pdf.

5. Unemployment Insurance

Governor Schwarzenegger signed a number of bills on the topic of unemployment insurance. A few of note are as follows:

AB 2412 Raises the bar if an employer makes a false statement or representation regarding an employee's unemployment insurance eligibility or willfully fails to report a material fact concerning the termination. This bill authorizes the Employment Development Department (EDD) Director to assess a penalty against the employer in an amount not less than two nor more than ten times the weekly benefit amount of that claimant's compensation. In short, this bill makes it very important that employers handle the EDD's inquiries delicately so as not to incur this extra liability.

For detailed information, please click on the following link:
http://www.leginfo.ca.gov/pub/bill/asm/ab_2401-2450/ab_2412_bill_20040927_chaptered.pdf.

AB 2028 Further clarifies that payments received from an employer pursuant to the Workers Adjustment and Retraining Notification Act (WARN) and Cal-WARN may *not* be construed as wages or compensation for purposes of determining eligibility for unemployment compensation benefits. Accordingly, an employee can “double-dip” and the employer's reserve account will be charged. This bill is another reason for employers covered by the WARN acts to consider whether “working notice” is feasible and not too disruptive.

For detailed information, please click on the following link:
http://www.leginfo.ca.gov/pub/bill/asm/ab_2001-2050/ab_2028_bill_20040925_chaptered.pdf.

6. Workers' Compensation

As described in the May 4, 2004 LawFlash, Governor Schwarzenegger signed **SB 899**, which provides strong reforms to the California Workers' Compensation System in an effort to save jobs, reduce costs for employers and improve care for injured workers.

Most sections of SB 899 became effective on April 19, 2004, the date it was signed into law by Governor Schwarzenegger. Some sections will become effective later, on dates specified in the bill, and some sections are retroactive. Many provisions require that the Division of Workers' Compensation DWC adopt implementing regulations. Information on new or revised regulations will be posted on the DWC web site (http://www.dir.ca.gov/dwc) throughout the rulemaking process, including emergency regulations that will allow medical provider networks to begin operating in California. Medical provider networks, which were authorized by SB 899, may be established by employers or insurers on or after January 1, 2005. For more information, please see the LawFlash at http://www.morganlewis.com/pubs/EA62E23E-A707-418F-B0E6BD6AB0647B38_Publication.pdf.

For detailed information, please click on the following link: http://www.leginfo.ca.gov/pub/bill/sen/sb_0851-0900/sb_899_bill_20040419_chaptered.pdf.

7. Whistleblower Poster

AB 1127 This bill clarifies that "14 pica" means "14 point" and the poster must be in at least size 14-point type. Our "model" poster is in compliance - we used 15-point type. For more information, please see the January 12, 2004 LawFlash at http://www.morganlewis.com/pubs/F1D67C12-8C71-45C8-BC59CB851317653E_Publication.pdf.

For detailed information, please click on the following link: http://www.leginfo.ca.gov/pub/bill/asm/ab_1101-1150/ab_1127_bill_20040927_chaptered.pdf.

8. Discrimination

AB 2870 The bill's provision explicitly authorizing the Department of Fair Employment and Housing Commission (DFEH) to conduct mediations is a positive development. The Equal Employment Opportunity Commission has been doing this for some time, but the DFEH has been more informal in encouraging early resolution.

For detailed information, please click on the following link: http://www.leginfo.ca.gov/pub/bill/asm/ab_2851-2900/ab_2870_bill_20040921_chaptered.pdf.

9. Bills of Interest That Were Vetoed

(a) Anti-Offshoring

Siding with the California Chamber of Commerce over labor advocates, the Governor rejected anti-offshoring bills. The vetoed measures would have prohibited shipping homeland security work overseas (**SB 888**); required state contractors to verify that work is done in the United States (**AB 1829**); and imposed penalties for transmitting a patient's personal health information outside the United States (**SB 1492**).

(b) Wage and Hour

AB 2832 This bill would have raised California's minimum wage by $1.00 to $7.75. The California Chamber estimates that if Governor Schwarzenegger had signed AB 2832, employers' costs would have increased by at least $2.08 billion annually, raising costs for consumers and driving employers to other states.

AB 3018 and SB 1538 The Governor vetoed these two bills that would have made changes to California's rigid rest and meal period law. In his veto message, the Governor directed the applicable California agency to prepare regulations to resolve confusion in this law.

AB 2317 This bill would have increased the damages an employee may obtain if successful in bringing an "equal pay" claim against an employer. Considering the fine was already doubled last year, this would have been a huge potential burden for employers.

For more information about these issues, please contact your Morgan Lewis attorney, or one of the contacts listed below:

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