PACIFIC RIM ADVISORY COUNCIL

Pacific Rim Advisory Council

April 2015 e-Bulletin

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CONFERENCES & EVENTS

- **57th International PRAC Conference**
  Brisbane - Hosted by Clayton Utz
  April 18 - 21, 2015

- **PRAC @ INTA** San Diego May 2, 2015

PRAC @ IPBA Hong Kong May 7, 2015

- **PRAC @ IBA** Vienna October 5, 2015

- **58th International PRAC Conference**
  Vancouver - Hosted by Richards Buell Sutton LLP
  September 26 - 29, 2015

Events open to PRAC member firms only
www.prac.org

MEMBER DEALS MAKING NEWS

►ALLENDE & BREA Assists PagaTodo top up of Assets with Fullcarga Acquisition in Seven Jurisdictions

►BAKER BOTTS Advises Global Geophysical Services In Successful, Complex In-Court Restructuring Despite Sharp Decline in Oil and Gas Prices

►CAREY Helps Steer Financing for the Teniente Mine

►CLAYTON UTZ Japan Post in $6.5b Offer for Toll Holdings

►DAVIS WRIGHT TREMAINE Congratulates David Adjmi for His Victory in New York Federal Court; Judge Rules His Play "3C" Does Not Infringe "Three's Company"

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►NAUTADUTILH Assists FedEx in Public Offer of TNT Express Shares Valuing EUR4.4 billion

►RODYK in Landmark Decision: Court Injuncts Ex-employees From Making Use of Former Employer's Secret Manufacturing Process

►SIMPSON GRIERSON Team Up with CLAYTON UTZ to Help Propel Accel Partners into Strategic Xerox Investment

►SyCipLaw Light Rail Manila Consortium – LRT 1 Concession Awarded for Php65 Billion

►SANTAMARINA Y STETA Helps Guide Rassini Share Sale

►TOZZINIFREIRE Assists Indian agribusiness UPL Buy Out of Brazilian Partners

CLAYTON UTZ BRISBANE SET TO HOST PRAC 57TH INTERNATIONAL CONFERENCE

BRISBANE - 15 April, 2015: Pacific Rim Advisory Council ("PRAC") founding member firm CLAYTON UTZ will host the 57th International PRAC Conference in Brisbane, April 18-21. Member firm delegates from around the globe will be gathering in Brisbane to attend the four day business conference featuring topical professional development programs and business development opportunities. Among the programs on tap for Brisbane:

| Keynote Speaker Address – Hon. Stephen Martin, Chief Executive, The Committee for Economic Development Australia ("CEDA").

| **PRACtice Management** *"Leading in Challenging Times"* – Delegate workshop with guest facilitator Dr. Terry Lee, Director, Leading Psychology (Australia).

| **Business Development Meetings** - series of meetings among member firms.

| **Delegation visit** at Government House with His Excellency the Honourable Paul de Jersey AC .

| **Regional reporting** on developments in the legal profession in Australia and the Asia Pacific Region presented by Rob Cutler, Chief Executive Partner, Clayton Utz.

| **PRACtice Management** *"Digital Disruption and the Transformation of Law Firms"*, with guest speaker Peter Williams, Founder, Deloitte Digital, and Chief Edge Officer, Deloitte Centre for the Edge; in discussion with PRAC delegates from various jurisdictions.

| **PRACtice Development** *"Major Projects Disputes"*, with guest panelist John Wilmott, Principal, E3 Advisory in discussion with PRAC delegates from various jurisdictions.

About Clayton Utz
Clayton Utz is one of Australia's leading law firms, with a reputation for standing out – and for being outstanding. With 186 partners and over 1,300 employees across six offices, we continue to build on our reputation for confident, innovative and incisive legal advice.

With a genuine commitment to client service, we are trusted advisers to a diverse base of private and public sector organisations. Our clients include many of Australia's top financial institutions, multinational corporations operating in a range of sectors, and state and Australian government departments and agencies.

We are also a global leader in pro bono, with one of the largest pro bono practices of any law firm outside of the US. As an independent firm, we have relationships with leading firms around the world. That means our clients can be confident they have access to the best possible advice, wherever and whenever they need it.

We offer the sharpest legal minds. The clearest advice. And an unshakeable sense of what's possible.

www.claytonutz.com

CLAYTON UTZ

BAKER BOTTS BOLSTERS DUBAI OFFICE WITH CORPORATE AND DISPUTE RESOLUTION PARTNERS

DUBAI, UAE, March 30, 2015 - Baker Botts LLP, a leading international law firm, announced today that Abdullah Mutawi has joined the firm as a partner in the Corporate Group, and Lucas Pitts has joined the firm as a partner in the firm's International Dispute Resolution Group. Both will be based in the firm's Dubai office.

"Both Abdullah and Lucas have a deep background and wealth of experience throughout the Middle East and Africa. Their addition will increase our regional and international capabilities in the areas of Corporate law and International Dispute Resolution," said Andrew M. Baker, Managing Partner.

"We are committed to growing our Dubai and international presence by adding highly qualified lawyers who possess both local market and international expertise while providing the highest levels of client service across multiple disciplines," added Mr. Baker.

Abdullah Mutawi – Partner Mr. Mutawi is a leading Corporate lawyer with significant cross border M&A securities and capital market expertise and experience. His practice has focused in the financial institutions and telecommunications arenas.

In addition to advising on private equity deals and public listings, he has been involved in telecom licensing and M&A transactions covering assets in twenty three emerging and developing countries. Mr. Mutawi has also advised on a number of high profile insolvencies and restructurings often involving regulatory matters and complex cross-border disputes. Mr. Mutawi is fluent in Arabic and English.

Lucas Pitts – Partner Mr. Pitts is a noted International Dispute Resolution lawyer with experience in the U.A.E, Saudi Arabia, the United States, Africa and Europe. He has advised on disputes related to telecommunications, banking, insolvency, fraud, breach of fiduciary duty and aviation.

Mr. Pitts has significant experience advising on cases under the ICC, GCC Commercial Center, Civil Procedures Rules of English Court, LCIA and DCIA arbitrations proceedings under the 1996 Arbitration Act and Oman Arbitration Act.

"Both Lucas and Abdullah are outstanding and well known lawyers in the Middle East, and their addition to our team will continue to add value for our clients while increasing the depth and breadth of services which we can offer from our Dubai office," said John Lonsberg, Partner In Charge of the Dubai Office.

For additional information visit www.bakerbotts.com

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Visit us online at www.prac.org

GIDE SPONSORS EIGHTH OXFORD UNIVERSITY FRENCH LAW MOOT

LONDON - 24 March 2015; Gide was again delighted to sponsor Oxford University's French Law Moot, which was held on Monday, 16 March 2015. The event, now in its eighth year, brings together teams of "mooters" from some of Europe's leading universities to debate a question of French law. The competition is organised by the university's Institute of European and Comparative Law and the Institute's Director, Stefan Vogenauer, said of the event: "The moot is an important part of the French law teaching that we provide for our undergraduate students. It also reinforces the leading role that Oxford has as a centre for the study of French law in the English-speaking world."

Since its inception at Oxford University in 2008, the Oxford French Law Moot ("Concours de plaidoiries en droit français") has developed from a national competition to a European event, made possible through the financial support of Gide, the first international law firm to originate in France, and the involvement of the Association Henri Capitant des amis de la culture juridique française. "The Oxford moot has now become a major event for students who study French law throughout the world; it also is a great example of the common achievements that Association Henri Capitant and Gide can carry together in the course of this special relationship", said Philippe Dupichot, Secretary General to the Association, Senior Counsel and member of Gide's Scientific Council.

This year, teams entered from the Universities of Birmingham, Bristol, Cologne, Essex, Exeter, Florence, Kent, Leuven, Oxford, Warwick, King's College London and Trinity College Dublin.

The participants presented arguments in relation to a property dispute between an elderly landlady and a ferret-housing tenant. The finalists from the University of Leuven and the University of Cologne battled it out in front of a judging panel chaired by Alain Lacabarats, President of the 3rd Division of the Court of Cassation, France's highest court for private disputes. Mr Lacabarats was joined by Muriel Fabre-Magnan, Professeur à l'École de droit de la Sorbonne (Université Paris I Panthéon-Sorbonne), and Clotilde Lemarié, Partner in Gide London's International Dispute Resolution practice group. Lord Mance, Justice of the Supreme Court of the United Kingdom, assumed the role of amicus curiae.

The judges commended the teams for their courage, confidence and, in the case of Leuven, their entertaining responses. The level of both teams was very high and it was a close final, however, it was the University of Cologne that emerged triumphant. The team comprised mooters Morgane Cauvin and Paula Fischer and their mentor, Antonio Musella.
Clotilde Lemarié, Gide London Partner and Final judge, said of the event: "We were very impressed by the participants and thrilled to see them argue a case in French. We are delighted to support the event and to see it grow year on year."

For additional information visit www.gide.com

ARIFA OPENS OFFICE IN URUGUAY

01 March, 2015 : As our firm celebrates its 100th anniversary, we would like to share with you, our clients and friends, the opening of our new office in Uruguay.

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NAUTADUTILH LAUNCHES NEW PUBLIC LAW PRACTICE GROUP

01 April 2015: With effect from 1 April, NautaDutilh will be combining its knowledge and experience of government, administrative, and regulatory law in its new **Public Law practice group.** The group's work will be based on a comprehensive approach to administrative law cases that will guarantee high level of quality and service firm-wide, also from a European and international perspective.

The Public Law practice group will be led by general administrative law specialist Norbert de Munnik; environmental law specialist Anne-Marie Klijn will also play an important role within the group. The Public Law practice group will serve all of the sectors that deal with the government, including the government itself. These areas of law will include environmental law, every type of market regulation, subsidies, and permits and licences.

In addition to practice group manager Norbert, Anne-Marie, and new associate partner Saskia Nuijten, the group will in any case include Berend Haagen, Tim Grundmeijer, Harald Wiersema, Jurian Bos, Jolize Lautenbach, Silvia Gawronski and Niels Haasnoot.

For additional information visit www.nautadutilh.com

HOGAN LOVELLS SENDS TOP ENERGY LAWYERS TO THRIVING NORTH DAKOTA SHALE FIELDS

DENVER, 2 April, 2015: Hogan Lovells is pleased to announce the expansion of its legal practice into the booming North Dakota oil and gas market. The move will provide vital legal advice to the firm's many clients already doing business in the state.

Scot Anderson and Andrew Lillie, partners in the firm's Energy and Natural Resources Group in Denver, have become the first Hogan Lovells lawyers licensed in North Dakota. The duo brings powerful transactional, regulatory, project development and litigation experience to the region.

Anderson has more than 25 years of experience in the mining, oil and gas and energy industries, and has already provided daily operational and transactional advice to many businesses involved in shale development. He brings unparalleled expertise in transactions, regulatory matters and project development to North Dakota's Bakken Shale development. Lillie brings a similar wealth of experience and knowledge in natural resources litigation, regulation and compliance.

Representing Denver-based Antero Resources, he and a team of Hogan Lovells lawyers recently won significant victories in two of the first tort cases to arise from hydraulic fracturing, including the dismissal of one of the first putative class action cases.

"Our team in Denver is among the best in the energy business, and has been working on shale matters for years," said Hogan Lovells CEO Steve Immelt. "We are excited to further enhance our oil and gas capabilities across North America and offer invaluable counsel to clients on the ground in North Dakota."

"Oil and gas companies face complex legal issues working in the Bakken. We think we are uniquely qualified to assist our clients in addressing those issues," said Anderson.

"We want those businesses to know that we would love to help," added Lillie.

For more information, visit www.hoganlovells.com

MUNIZ WELCOMES HOME OIL & GAS CO-HEAD

LIMA: Muñiz Ramírez Pérez-Taiman & Olaya has rehired Augusto Astorga as partner a year after the oil and gas co-head left the firm to join Hunt Oil as deputy legal manager.

Augusto Astorga

Astorga, 46, returned to Muñiz Ramírez earlier this year, a move he describes as being "like returning home" to the oil and gas team he helped establish over a 15-year career at the firm. In his new role, Astorga re-takes his former position as co-head of Muñiz Ramírez's oil and gas department; reuniting with energy partners Jorge Pérez-Taiman and Ricardo Silva.

Pérez-Taiman says Astorga's departure to Hunt Oil was on "very amicable terms", and he welcomes the return of a partner who is "very active in oil and gas" work and "considered to be the top of the practice in Peru."

Over the last year, Astorga assisted Hunt Oil on several of the company's ongoing projects, including assisting on a natural gas exploration project in a reservation area of the Peruvian rainforest (which he describes as a "challenge for the company, as well as for all the professionals involved") and advising Hunt Oil as part of the consortium developing the US$2.7 billion Camisea gas field project.

In his new role, Astorga says he will also resume contact with several former clients, including energy company Gran Tierra Energy; pipeline operator Transportadora de Gas del Perú, which he helped to issue notes in the largest placement on record for a Peruvian corporate issue in 2013; and oil and gas company Perenco, which he defended in a case before Peru's Constitutional Court over consultations with indigenous groups.

Predicting a challenging year ahead for both in-house and external counsel involved in the oil and gas industry, Astorga says the "current prices scenario" for natural resources means "cost efficiency shall be at the top list for the international industry": "As for Peru, it needs to come to terms with its laggard situation in the business, update its legislation that was good in the early '90s and endeavour to grant flexible conditions for the upstream companies that dare to invest in a country that lacks infrastructure near its more geologically promising areas," he adds.

For more information visit www.munizlaw.com

BRIGARD & URRUTIA

ASSISTS COLTEL ISSUANCE OF RARE HYBRID BONDS IN COLOMBIA

Brigard & Urrutia Abogados assisted fixed-line operator Colombia Telecomunicaciones (ColTel) issue US$500 million in hybrid securities, thought to be the first hybrid offering from a Colombian company. The deal closed on 25 March. Spain's Telefónica owns 70 per cent of ColTel, while the Colombian government controls the remaining stake.

Hybrid bond offerings are uncommon in Latin America and ColTel's are believed to be the first from a Colombian corporate company. Although legislation was passed in Colombia last year allowing financial entities to issue hybrid instruments, a regulatory framework is yet to be put in place, says Carlos Fradique of Brigard & Urrutia, who calls the offering a "novelty for the Colombian capital markets".

Due to the lack of regulation, the lawyers involved in the transaction had to work closely with the Colombian Central Bank and other local banking authorities to determine the exchange controls and registration of the bonds. "The structuring of this issuance differs substantially from any other executed by a Colombian company before, because it offered for the first time an instrument that provides equity and debt benefits and rights to the holders," he explains.

Brigard & Urrutia Abogados team including Partners Carlos Fradique and Luis Gabriel Morcillo and associates Laura Villaveces and Maria Camila Ordoñez in Bogotá.

For additional information visit www.bu.com.co

CLAYTON UTZ

JAPAN POST IN $A6.5 BILLION OFFER FOR TOLL HOLDINGS

BRISBANE, 14 April 2015: Japan Post Co., Ltd an entity owned by the Japanese government, has entered into a scheme of arrangement with Australian logistics company Toll Holdings Limited to acquire all of its shares at a price of $A9.04 per share being a total consideration in excess of $A6.5bn.

The transaction is the largest Australian M&A deal this financial year; is the largest by an overseas buyer in over five years; and is the first acquisition by a Japanese government owned entity in Australia.

Japan Post has sought to acquire Toll to reinforce its domestic operations while focusing on the fast-expanding Asian market as part of its efforts to grow as a comprehensive international logistics company.

Toll has a strong presence in the Asia-Pacific region, which has excellent logistics growth potential, and has a portfolio that is balanced by business and region. Toll is engaged in forwarding and third-party contract logistics operations overseas and has ample experience in multinational corporate management, so Japan Post will position Toll as a platform for cultivating global business, leveraging that company's expertise to expand global logistics' operations and revenues.

The acquisition is expected to be finalised next month following a shareholder meeting and final approval by the court. Nishimura & Asahi, lawyers to Japan Post, have worked with Australian firm Clayton Utz on behalf of Japan Post in respect of the negotiation and execution of the transaction. Masakazu Iwakura led the Nishimura & Asahi team with the Clayton Utz team being led by partner Hiroyuki Kano a Japanese bengoshi.

For additional information visit www.claytonutz.com

ALLENDE

ASSISTS PAGATODO TOP UP OF ASSETS WITH FULL-CARGA ACQUISITION IN SEVEN JURISDICTIONS

BUENOS AIRES, March, 2015: Mexican mobile phone top-up company PagaTodo has bought Spanish counterpart Fullcarga with help from five firms in seven jurisdictions, including Argentina, Colombia, Chile, Mexico, Peru, Ecuador and Spain.

PagaTodo picks up mobile phone top-up operations across Latin America, the US and Spain as a result of the deal.

PagaTodo sought counsel from Allende & Brea Abogados in Buenos Aires. Allende & Brea Abogados team including Partner Valeriano Guevara and associate Fernando Martinez Zuviría in Buenos Aires.

For additional information visit www.allendebrea.com.ar

CAREY

HELPS STEER FINANCING FOR THE TENIENTE MINE

SANTIAGO, 09 April 2015: Carey has helped the Chilean subsidiary of Canadian mining company Amerigo obtain syndicated finance worth US$64 million to expand its operations at the world's largest underground copper mine. The transaction closed on 25 March.

Amerigo's Minera Valle Central (MVC) will use the funds to develop copper and molybdenum deposits at the Teniente mine in the Libertador General Bernardo O'Higgins region of central Chile.

Chilean state mining company Codelco, the mine's owner, granted Amerigo the right to exploit Teniente's tailings – the waste material created when ore is first extracted from rock – last year. MVC will spend US$152 million exploiting the tailings and expects to double the amount of copper and molybdenum it extracts.

Chile is the world's biggest exporter of copper, but is facing declining production as the deposits currently in use are depleted. The government hopes to combat the decline by encouraging companies to open new mines.

Counsel to Amerigo's Minera Valle Central, the Carey team included Partners Rafael Vergara and Felipe Moro and associates Loreto Ribera, Manuel José Prieto and Borja Coz.

For additional information visit www.carey.cl

SIMPSON GRIERSON AND CLAYTON UTZ

TEAM UP TO HELP PROPEL ACCEL PARTNERS INTO US$100 MILLION STRATEGIC INVESTMENT IN XERO LIMITED

13 March 2015: Clayton Utz acted as Australian legal counsel and Simpson Grierson as New Zealand legal counsel, to Silicon Valley based venture capital firm Accel Partners on its $NZ132.9 million (approximately $US100 million) strategic investment in Xero Limited (Xero), an NZ and ASX listed software company that develops cloud-based accounting software. The transaction completed today.

Corporate partner Jonathan Algar led the Clayton Utz transaction team, which included director Natasha Davidson and lawyer Nathan Lim. Simpson Grierson's Michael Pollard and Andrew Matthews acted as NZ Counsel to Accel Partners.

Accel Partners is known for being an early stage funder of a range of start-up and growth tech businesses including Atlassian, Campaign Monitor, Capital Access Network, Dropbox, Etsy, facebook, Invoice2Go, OzForex, 99designs and Spotify.

For additional information visit www.claytonutz.com and www.simpsongrierson.com

BAKER BOTTS

ADVISES GLOBAL GEOPHYSICAL SERVICES IN SUCCESSFUL, COMPLETX IN-COURT RESTRUCTURING DESPITE SHARP DECLINE IN OIL AND GAS PRICES

DALLAS, March 31, 2015 -- On February 9, 2015, the business day following confirmation of its chapter 11 plan of reorganization (Plan) by the United States Bankruptcy Court for the Southern District of Texas, Corpus Christi Division, Global Geophysical Services, Inc. (GGS), a geophysical services company with operations in North America, Latin America, the Middle East and Africa, exited bankruptcy less than one year after filing for chapter 11 protection. The restructuring resulted in a significant reduction of the Company's indebtedness. Operations around the world were maintained without interruption during the case.

In achieving the successful restructuring, Baker Botts utilized a number of restructuring tools only available to a debtor in an in-court restructuring solution, including:

Prevailing in a contested priming debtor-in-possession (DIP) interim loan funded by an ad hoc group of existing GGS bondholders early in the case;

Initiating cross-border proceedings in Colombia to preserve assets from local creditor enforcement action ;

Negotiating and closing a rights-offering backstop and debt conversion agreement with the ad hoc group of DIP lenders—designed to right-size the balance sheet of the Company in a challenging commodity price environment for companies in the energy sector. The rights offering provided accredited holders of bonds and other financial claims the opportunity to purchase at a discount to the Plan set-up value equity in a new parent holding company created under the Plan and organized as a limited liability company ;

Utilizing as negotiating leverage a debtor's ability (i) to reject out-of-market contracts and (ii) to challenge pre-bankruptcy asset transfers that may be viewed as harming creditors, Baker Botts also assisted the Company in its negotiation of more favorable terms for key revenue and supplier contracts to improve EBITDA on a go-forward basis .

During the course of the chapter 11 proceedings, Baker Botts also counseled and assisted the Company in a variety of matters including restatements of the Company's historical financial statements and responding to a related SEC investigation, various SEC reporting matters and ultimate suspension of the Company's periodic SEC reporting obligations. Moreover, Baker Botts assisted the Company in negotiating and closing new exit credit facilities—a first lien term and revolving facility and a second lien term facility—during the downturn in oil and gas prices. With the successful restructuring of the Company, Baker Botts has some of the most recent and relevant restructuring experience in the energy sector.

For additional information visit www.bakerbotts.com

GIDE

COUNSELS FEV GMBH ON THE ACQUISITION OF D2T

PARIS, 30 March 2015: Gide has advised German company FEV GmbH on its acquisition of D2T, its subsidiaries in Germany, China and the U.S., as well as its interests in South Korea and Japan, from IFP Investissements part of the group IFP Energies nouvelles (IFPEN), a public-sector research, innovation and training center active in the fields of energy, transport and the environment. D2T is a test systems and engineering service provider for engines and powertrains, employing over 450 people worldwide.

The team comprised M&A partner Karl Hepp de Sevelinges and Aménis Bererhi.

For additional information visit www.gide.com

DAVIS WRIGHT TREMAINE

CONGRATULATES DAVID ADJMI FOR HIS VICTORY IN NEW YORK FEDERAL COURT; JUDGE RULES HIS PLAY “3C” DOES NOT INFRINGE “THREE’S COMPANY”

SEATTLE – 01 April, 2015: Davis Wright Tremaine LLP is pleased to congratulate our client, the playwright David Adjmi, for his victory in New York federal court. A judge ruled yesterday that Adjmi’s play "3C" does not infringe the copyright in the television series "Three’s Company."

Adjmi had gone to court seeking declaratory relief after the owner of "Three’s Company," DLT Entertainment, threatened to sue for copyright infringement. U.S. District Judge Loretta A. Preska agreed with Adjmi that his play was “a highly transformative parody” of the chirpy 1970s series, and clearly allowed under the doctrine of fair use.

Adjmi has built a reputation for provocative work that combines disparate styles and influences, often including the tropes and clichés of pop culture. "3C" was produced Off-Broadway in 2012, but Adjmi was not able to take up offers to publish the work and license it for future productions while under the cloud of a potential lawsuit.

In October 2013, the playwright enlisted Davis Wright Tremaine partner Bruce Johnson to help him resolve threats from the TV show’s owners. Johnson was joined in the pro bono representation by partner Ed Davis and associate Camille Calman.

“The quality of representation was astoundingly high,” said Adjmi. “I knew DWT had a great reputation, but I really was expecting a kind of perfunctory blow-by-blow in the legal briefs, where the legal marks would be hit and that would be the end of it. I was not at all prepared for the kind of in-depth weaving of historical context, aesthetics, and detailed cultural criticism that made up content of the briefs.”

The DWT team brought considerable experience and passion to the case. Johnson is a long-time trustee of the Seattle Repertory Theatre, and also serves on the advisory committee for Theatre Communications Group, a national organization supporting the country’s professional, non-profit theaters. Davis has extensive experience with First Amendment issues in the cultural sphere. Calman spent years as a theatrical stage manager prior to law school. She took the lead in writing the briefs.

“I felt a true partnership on every level from Ed, Camille, and Bruce and I loved being in partnership with them,” said Adjmi. “They were so respectful and so humane and caring. I am deeply grateful for the rigor and seriousness with which they approached the case and I’m thrilled that Judge Preska has rewarded that work with a judgment in our favor.”

“From the very beginnings of theater, parody has been a part of the playwright’s arsenal,” said Johnson. "Aristophanes’ The Frogs—which opened in 405 B.C.—was a parody of other plays. Hamlet includes a parody of Christopher Marlowe, one of Shakespeare’s competitors. Parody survives the development of modern copyright laws. For example, the first great novel in the English language, "Pamela," was immediately followed by the parody, "Shamela."”

Johnson also expressed gratitude to the Dramatists Legal Defense Fund, which submitted an important amicus brief in the case. The fund was represented by David H. Faux and by Ralph Sevush, general counsel of the Dramatists Guild of America.

Three entities that produced the off-Broadway run of "3C"—Rising Phoenix Repertory, Inc., Rattlestick Productions, Inc., and piece by piece productions, Inc. —were brought into the case as counter-defendants by DLT Entertainment, and were represented by Toby Butterfield and Andrew Ungberg of Frankfurt Kurnit Klein & Selz PC.

For more information, visit [www.dwt.com.](http://www.dwt.com)

HOGAN LOVELLS

ADVISED CLARINET GROUP ON NEW FINANCING ARRANGEMENTS

LONDON, 2 April, 2015 - Hogan Lovells has advised new client Claranet on a new £107m super senior and unitranche financing package provided by Ares Management, Goldman Sachs and The Royal Bank of Scotland plc. The firm separately advised Claranet on the extension of its financing arrangement with ABRY Partners.

Claranet is one of the leading independent managed service providers in Europe, offering businesses integrated network and hosting services. It was recently recognised as a "Leader" in Gartner's Magic Quadrant for Cloud-Enabled Managed Hosting, Europe (2014). The total contracted future revenue of the Group is in excess of €250 million.

The Hogan Lovells team was led by London-based banking partner Stuart Brinkworth (assisted by associate Graham Greenwood) and included partners Michel Quere (Paris), Wouter Jongen (Amsterdam), Katlen Blocker (Frankfurt) and Jose Luis Vazquez (Madrid). Hogan Lovells worked with Claranet's existing Portuguese counsel Pedro Oliveira Cardo (Lopes Dias & Associados) and Jersey counsel Tim Pierce (Bedell Cristin) on Portuguese and Jersey law issues.

Commenting on the transaction, Stuart Brinkworth said:

"We are very pleased to have been able to bring to bear our expertise in the alternative lender space to help one of Europe's most dynamic companies in the managed services sector. This deal shows that unitranche financing is not the sole preserve of private equity".

Nigel Fairhurst, Chief Financial Officer of Claranet Group commented:

"These new facilities show the confidence that our funders have in Claranet and put us on a strong financial footing for further growth in Europe. Hogan Lovells was critical to the process and throughout the negotiations provided advice built upon a solid understanding of our business needs and the technology sector".

For more information visit www.hoganlovells.com

RODYK

ACTS IN LANDMARK DECISION: COURT INJUNCTS EX-EMPLOYEE FROM MAKING USE OF FORMER EMPLOYER'S MSECRET MANUFACTURING PROCESS

Rodyk successfully represented Clearlab SG Pte Ltd, a contact lens manufacturing company, in a claim for breach of fiduciary duty, breach of confidentiality and conspiracy against its ex-employees in the setting up of a competing entity with other non-employees.

In the landmark decision, the Singapore court granted an injunction against Clearlab's ex-employees, and restrained them from making use of the proprietary method of manufacturing contact lens, known as the "spincast" method.

Four of Clearlab's former employees were caught with tens of thousands of documents belonging to Clearlab pursuant to a Search Order. The former employees were also caught deleting large amount of documents just before the service of the Search Order on the defendants. The former employees were alleged to have used these information to set up the competing entity, and conspired with one of Clearlab's former vendors to replicate Clearlab's manufacturing plant and process for the competing entity. The trial lasted about 48 days.

The case is significant because it may be the first where the Courts has granted an injunction against the use of a form of technology that is already in the public domain. This extraordinary remedy was ordered because the Court recognised that there was a real risk that the ex-employees would whitewash and continue using Clearlab's confidential information on the sly and thereby evade detection, and only an injunction of the nature ordered would achieve practical justice between the parties.

Litigation and arbitration partner Lok Vi Ming, SC led, supported by partner Joseph Lee and senior associate Tang Jin Sheng and associate Crystal Goh

For additional information visit www.rodyk.com

NAUTA DUTILH

ASSISTS FEDEX IN PUBLIC OFFER OF TNT EXPRESS SHARES VALUING EUR4.4 BILLION

AMSTERDAM - 07 April 2015: Today, US based FedEx Corporation and Netherlands based TNT Express announced their agreement on FedEx's public offer for all TNT Express shares representing a value of EUR 4.4 billion (USD 4.8 billion). NautaDutilh is assisting FedEx in this deal and is acting as lead transaction counsel for our client.

FedEx and TNT Express reached conditional agreement on a recommended all-cash public offer of EUR 8.00 per ordinary TNT Express share. The offer price represents a premium of 33% over the closing price of 2 April 2015 and a premium of 42% over the average volume weighted price per TNT Express share of EUR 5.63 over the last 3 calendar months.

The transaction is unanimously recommended and supported by TNT Express' Executive Board and Supervisory Board. PostNL has irrevocably confirmed to support the offer and tender its 14.7% TNT Express shareholding. The new combination will transform FedEx's European capabilities and accelerate global growth.

Pre-wired asset sale and liquidation

If FedEx acquires less than 95% but at least 80% of the TNT Express shares, FedEx intends to acquire the entire business of TNT Express at the same price as the offer price pursuant to a 'pre-wired' asset sale, combined with a liquidation of TNT Express, to deliver such consideration to the remaining TNT Express shareholders. The pre-wired asset sale and liquidation, as agreed between FedEx and TNT Express, was pioneered by our firm in the public offer by Johnson & Johnson for Crucell in 2010 and has since then become a widely accepted method of acquiring 100% of a target company's business following a successful public offer. The asset sale and liquidation is subject to TNT Express Extraordinary General Meeting approval.

FedEx and TNT Express are confident that anti-trust concerns, if any, can be addressed adequately in a timely fashion. Both parties anticipate that the offer will close in the first half of calendar year 2016.

NautaDutilh team is led by Christiaan de Brauw and furthermore consisted of Matthijs Noome, Sybren de Beurs, Ernst van der Touw (all corporate), Wijnand Bossenbroek and Gijs ter Braak (civil law notaries), Homme ten Have and Gijs van Nes (employment). Others who have made a valuable contribution to the transaction are Leo Groothuis, Albert van der Kolk, Barbara Nijs, Paul van der Bijl, Pieter van Drooge, Jochem Polderman and Niels Hagelstein.

For additional information visit www.nautadutilh.com

SYCIPLAW

ASSISTS LIGHT RAIL MANILA CONSORTIUM - CONCESSION AWARDED FOR PHP 65 BILLION LRT1

SyCipLaw acted as counsel to the Light Rail Manila Consortium, comprised of Metro Pacific Light Rail Corporation, AC Infrastructure Holdings, Inc. and Macquarie Infrastructure Holdings (Philippines) Pte Ltd., which was awarded the concession for the Php65 billion Manila Light Rail Transit Line 1 Cavite Extension Project.

The project will extend the current LRT Line 1 by 11.7 kilometers, starting from its existing Baclaran Station to the future Niyog Station in Bacoor, Cavite. The whole stretch of the integrated LRT Line 1 will have a total length of approximately 32.4 kilometers and will be operated and maintained by the winning bidder.

After compliance with the post-award requirements, the Department of Transportation and Communications, the Light Rail Transit Authority and the Light Rail Manila Corporation, which was incorporated by the consortium members, signed the Concession Agreement on October 2, 2014.

The SyCipLaw team was composed of partners Rocky Alejandro L. Reyes, Angel M. Salita, Jr. and Arlene M. Maneja and senior associate Diana Grace L. Uy.

For additional information visit www.syciplaw.com

SANTAMARINA Y STETA

HELPS GUIDE RASSINI SHARE SALE

MEXICO CITY – 09 April, 2015 Santamarina y Steta has advised local auto parts manufacturer Rassini on the sale of US$88 million worth of its shares, thought to be the first time a Dutch auction has been used to price shares in a public tender offer in Mexico.

Mexican brokerage Corporativo GBM sold the shares and relied on in-house counsel, while Graham Abogados advised its subsidiary, GBM Grupo Bursátil Mexicano, which acted as leading underwriter. The offer closed on 25 March.

Corporativo GBM sold 18,150,000 shares in Rassini at 30 pesos each and a further 12,675,000 ordinary participation certificates (a type of credit instrument) priced at 60 pesos each; together representing almost 14 per cent of Rassini's capital stock.

The brokerage used a Dutch auction system, where investors submit bids for the number of shares they want to buy at the price they are willing to pay. Once all the bids are received, the price is fixed at the lowest bid for all the shares to be sold, with all successful bidders paying that price. In Rassini's case, each share was priced at 30 pesos, despite GBM Grupo Bursátil Mexicano setting a price range of 27 to 32 pesos per share before the auction. Investors who bid higher than 30 pesos received all the shares they asked for, while those who offered 30 pesos received shares on a pro rata basis. Those that bid below the asking price received none at all. The price of the ordinary participation certificates was fixed at double the price of the shares.

GBM still owns 7 per cent of Rassini's capital stock.

Santamarina y Steta team included Partner Alfonso Castro and associates Alfonso Monroy and Andrés Ferrer.

For additional information visit www.s-s.mx

TOZZINIFREIRE

ASSISTS INDIAN AGRIBUSINESS UPL IN BUY OUT OF BRAZILIAN PARTNERS

SAO PALO – 01 April, 2015: TozziniFreire Advogados has helped UPL, India's largest agrochemicals company, buy the remaining stake it does not already own in its Brazilian business unit.

UPL bought the 27 per cent stake in its Brazilian unit, United Phosphorus Indústria e Comércio de Produtos Químicos, from German counterpart DVA Agro and company chief Carlos Alberto de Paiva Pellicer. Demarest Advogados advised DVA, while ASGV Advogados provided complementary assistance to both Paiva Pellicer and the German company. The deal closed on 18 March.

No value for the transaction was disclosed, but UPL first acquired a majority stake in DVA Agro's Brazilian assets from its parent for US$150 million in 2011.

UPL has sought to consolidate its position in Brazil, one of the world's most important agriculture markets, over the past month. It announced the minority stake purchase of Brazilian company Sinagro on the same date it bought out its business unit in the country.

TozziniFreire Advogados team included Partners Luiz Renato Okumura and Maurício Braga Chapinoti, and associates Lucas de Lima Carvalho, André Maruch and Filipe Hiroshi Kamoei.

For additional information visit www.tozzinifreire.com.br

UPCOMING PRAC EVENTS

- **57th International PRAC Conference**
  Brisbane
  Hosted by Clayton Utz
  April 18—21, 2015

- **PRAC @ INTA** San Diego May 2, 2015

- **PRAC @ IPBA** Hong Kong May 7, 2015

- **PRAC @ IBA** Vienna October 5, 2015

- **58th International PRAC Conference**
  Vancouver
  Hosted by Richards Buell Sutton LLP
  September 26—29, 2015

Events open to PRAC member firms only
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WERKSMANS ATTORNEYS

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23 March 2015

Final Report on the Review of the Personal Property Securities Act released

The Australian Government has released the final report in relation to the statutory review of the Personal Property Securities Act 2009 (Cth) (**PPSA**).

The report is the product of a review process which started with a call for submissions by the Attorney General in April 2014 and included extensive consultation with a wide range of stakeholders. According to the author of the report who has also led the review, Mr Bruce Whittaker, the review received a total of 171 submissions and responses which played a key role in formulating his conclusions.

What does the final report cover?

The final report gives a comprehensive analysis of the PPSA and the operation of PPS register, in each case explaining the relevant issue or concern, discussing the feedback received as part of the consultation process and then making recommendations on how the issue can be addressed.

In most cases the recommendations include suggested changes to the PPSA or the functionality of the PPS register, whereas in other cases the author suggests other steps which the Government can follow to ultimately address the issue or concern.

By way of example, the report recommends that the concept **"chattel paper" be deleted from the PPSA,** whereas in the case of "fixtures", the report recommends that the Government explore with the States and Territories whether a regime can be developed that would allow fixtures to be brought within the PPSA.

The report is an excellent resource for anyone who wishes to understand the background and philosophy that underpins the PPSA and some of the difficulties that parties involved in secured financing transactions and their advisers face.

Next steps

The report and the author's recommendations are currently under consideration by the Government. Should the Government accept some or all of the recommendations, we can expect that the process of drafting a Bill which amends the PPSA will commence in the near future.

Given the complexity of personal property securities and the importance of finance to our economy, the author has urged the Government to diverge from its usual legislative drafting procedures in implementing the recommendations. In particular, the author has suggested a collaborative approach in drafting the amending Bill which should include participation by the Office of Parliamentary Counsel, the Attorney-General's Department and the private sector. Clayton Utz strongly agrees with this suggestion and we hope to play a key role in this process.

The report was tabled before the Commonwealth Parliament on 18 March 2015 and is currently scheduled to be discussed on Tuesday 24 March, after which we may have further guidance on the legislative timeframe and process. We will continue to monitor any developments flowing from the review process.

You might also be interested in...

- Review of the Personal Property Securities Act starts with release of first Consultation Paper
- Register retention of title clauses on the Personal Property Securities Register correctly

CAPITAL MARKETS

Brazil: New Regulations for Management and Administration of Securities Portfolios

Following a period of public consultations dating back to November 2011, the Brazilian Securities Commission (CVM) issued a new ruling dealing with the professional management and administration of securities portfolios (CVM Ruling 558).

CVM Ruling 558 provides for two separate activities, with the corresponding registration categories: “Portfolio Manager” and “Fiduciary Administrator”. This will allow the CVM to adequately allocate attributions and obligations associated with the services rendered by each category.

Registration as a Portfolio Manager authorizes the management of investment portfolios, including the selection of investments on behalf of the investor, and the rendering on consulting services related to securities.

Registration as a Fiduciary Administrator authorizes the exercise of any activities related to the functioning and maintenance of a securities portfolio, including the custody of assets and, generally speaking, overseeing management performance. Only financial institutions and other legal entities that meet certain conditions established in the regulations are allowed to register as Fiduciary Administrators.

CVM Ruling 558 has also modified the requirements that applicants must meet to obtain their registration. In relation to individuals, the major change was the creation of a certification exam. In most cases, applicants will have to pass this exam instead of using the old method of demonstrating past experience in asset management.

In relation to legal entities, the major change is the obligation to appoint an officer to serve as compliance officer for the purposes of CVM Ruling 558, including the supervision of internal rules, policies, procedures and controls to be implemented in connection with CVM Ruling 558.

CVM Ruling 558 has also broadened the range of information to be disclosed periodically by securities managers to the CVM and to the market. A new standardized form for disclosure of information, which was inspired by the reference form (Formulário de Referência) applicable to publicly-held corporations in Brazil, will have to be delivered by securities managers to the CVM until March 31st of each year.

CVM Ruling 558 will become effective on January 4th, 2016. Securities managers already registered with the CVM prior to such date (i) must take the necessary measures to comply with the provisions of CVM Ruling 558 by June 30th, 2016, and (ii) will be allocated under the new registration categories in accordance with a classification report to be issued by the CVM.

Give and Take: Canadian Securities Regulators Ease Disclosure Burdens on Venture Issuers but Enhance Audit Committee Member Requirements

April 13, 2015 | Jon C. Truswell, Christian P. Gauthier, Aaron E. Sonshine and David Bowles

On April 9, 2015, the Canadian Securities Administrators announced amendments to the continuous disclosure and governance obligations of venture issuers in three national instruments: National Instruments 51-102 *Continuous Disclosure Obligations* (NI 51-102), 52-110 *Audit Committees* (NI 52-110), 41-101 *General Prospectus Requirements* (NI 41-101) and related companion policies, which are expected to come into force between June 30, 2015 and January 1, 2016. The amendments, initially proposed in May 2014, were previously discussed in our article, Streamlining Disclosure for Venture Issuers, published on May 29, 2014.

The amendments will generally simplify and reduce the disclosure required of venture issuers in interim management's discussion and analysis (MD&A), management information circulars, business acquisition reports and prospectuses. However, as a result of new requirements that a majority of audit committee members not be executive officers, employees or control persons of the issuer, venture issuers should review the composition of their boards of directors before the January 1, 2016 implementation of this requirement.

CONTINUOUS DISCLOSURE AMENDMENTS

Interim MD&A Amendments. For financial years beginning on or after July 1, 2015, all venture issuers may choose to disclose "quarterly highlights" (in lieu of an interim MD&A in the form required by Form 51-102F1). The quarterly highlights are intended to be a brief, focused summary of material updates to the business operations, liquidity and capital resources of a venture issuer since its last annual MD&A. The highlights should include an analysis of financial condition, performance and cash flows; known trends, risks or demands; major milestones; commitments and expected or unexpected events or uncertainties that have materially affected the venture issuer; significant changes to prior disclosure; and significant transactions between related parties.

Executive Compensation Disclosure. A new Form 51-102F6V will apply to venture issuers for financial years beginning on or after July 1, 2015 and will allow for more streamlined disclosure of executive compensation. Under the new Form 51-102F6V, venture issuers:

- may provide less extensive compensation discussion and analysis disclosure;
- are not required to include fair value calculations for stock options and other share-based awards granted to named executive officers (NEOs) or directors;
- are limited to disclosing compensation for three currently employed NEOs instead of five;
- are required to disclose two years of historical compensation information instead of three; and
- are required to disclose perquisites given to a NEO or director only if the value of the perquisites is, in the aggregate, greater than: (i) $15,000 if the NEO or director's salary is $150,000 or less; (ii) 10% of the NEO or director's salary if the salary is greater than $150,000 but less than $500,000; or (iii) $50,000 if the NEO or director’s salary is $500,000 or greater.

Form 51-102F6V must be filed within 180 days after a venture issuer's financial year-end.

Threshold for Business Acquisition Reports (BARs). As of June 30, 2015, venture issuers will be required to file a BAR after a completed acquisition or include a BAR in prospectuses filed to finance proposed acquisitions or information circulars related to proposed acquisitions only if the acquisition exceeds the new 100% threshold under the asset or investment tests set out in Part 8 of NI 51-102. In addition, as of June 30, 2015 venture issuers will not be required to include pro forma financial statements in a BAR.

Annual Information Forms (AIFs) for Mining Issuers. The disclosure to be included in the AIFs of venture issuers with mineral projects has been harmonized with the technical report disclosure rules set out in National Instrument 43-101 *Standards of Disclosure for Mineral Projects*.

PROSPECTUS DISCLOSURE AMENDMENTS

Company History and Financial Statements. Venture issuers will be required to include only two years of company history and audited financial statements in an initial public offering prospectus, instead of the three years required for non-venture issuers.

AUDIT COMMITTEE AMENDMENTS

Audit Committee Members. While venture issuers continue to be exempt from the requirement that every audit committee member be "independent" (as that term is defined in NI 52-110), for financial years beginning on or after January 1, 2016, venture issuers must have audit committees composed of at least three members, the majority of whom cannot be executive officers, employees or control persons of that venture issuer. There are limited short-term exemptions for events beyond the control of venture issuers, such as if circumstances arise that are best addressed by a committee member becoming an officer or employee of the issuer or in the event of the death or resignation of a member. If an exemption is relied upon, it must be disclosed in the venture issuer's annual meeting management information circular, or if the venture issuer is not required to send a circular to shareholders, in its AIF or annual MD&A.

New Measures Clarify Consumer Protection Rights in China, Stipulate Penalties for Misconduct

03.02.15

By Ron Cai, Alan Huang, and Lin Zhu

Background

On Jan. 5, 2015, the Chinese State Administration for Industry and Commerce ("SAIC") promulgated the Penalty Measures for Infringement on the Rights and Interests of Consumers (the "Measures"), which will take effect on March 15, 2015.

The purpose of the Measures is to crystalize certain requirements provided in the *Law on the Protection of the Rights and Interests of Consumers* ("Consumer Protection Law"), which was amended on March 15, 2014. The Measures interpret the existing prohibitions in the Consumer Protection Law by giving examples of merchant misconduct related to: (i) intentional delays or unreasonable refusals of a consumer's return request; (ii) fraud on consumers; (iii) misleading and fraudulent publicity; (iv) prepayment arrangements; (v) consumer personal information protection; and (vi) unfair form contracts.

Fulfilment of return and repair obligation - no intentional delay or unreasonable refusal

Return and repair obligation – 15 days

- *15-day policy*
  For shopping via the Internet, television, telephone and by mail, the Consumer Protection Law entitles consumers to return the products with or without any reason within seven days upon consumer's receipt of such products. The Consumer Protection Law further requires merchants to refund to consumer within seven days upon receipt of consumer's return. In practice, merchants could delay or refuse to respond to the consumer's request to return the products. The Measures set up a 15-day window, meaning the merchant must fulfil the consumer's seven-day no-reason return request within 15 days after the request. Otherwise, the competent counterpart of SAIC could impose administrative penalties on the merchant for "intentional delay or unreasonable refusal."

- *Opening of packaging is not a reason for refusal of return*
  Merchant may not refuse a return request based on its own announcement, without the consumer's consent, that the seven-day no-reason policy does not apply to certain goods. The consumers are entitled to open the package to check the status of the goods, and the merchant may not refuse the return request based on the fact that the package was opened. After receiving the returned goods, the merchant must refund the purchase price to the consumer within seven days.

- *Interpretations of other related laws*

  If, according to any other provision of the Consumer Protection Law, the consumer requests the merchant to return, repair, refund, exchange or compensate, the merchant must satisfy such request within 15 days or expiry of agreed term. Any delay beyond 15 days will be deemed intentional delay or unreasonable refusal.

Penalty

Merchants' intentional delay or unreasonable refusal to fulfil its obligations will be punished by SAIC (including its counterparts on local level) by one or more of the following administrative penalties: (i) a warning; (ii) forfeiture of any illegal gain; (iii) administrative penalties equal to one to ten times of the illegal gains (or in the absence of any illegal gains, penalties of up to RMB 500,000); (iv) suspension of the merchant's business; and/or (v) revocation of the merchant's business license.

Fraud on consumers

The Measures divide fraud on consumers into two categories: (1) intentional fraud, and (2) fraud per se.

- *Intentional fraud*

  If the merchant engages in any of the following types of misconduct, it will bear the burden of proof to show that it had no intent to defraud the consumer. Intentional fraud will be found if the goods/services sold are unsafe, do not have the intended effect, or have deteriorated. Intentional fraud also applies to products that state a fake or false place of origin, name of producer, date of manufacture, or mark of certification or qualification. In addition to the Consumer Protection Law, the Measures stipulate that merchants are committing intentional fraud if they use, without authorization, the registered trademark of other merchants or the distinctive name, packaging, or decoration of other famous products.

- *Fraud per se*

  Fraud per se will be found if the goods/services (a) consist of fake or unqualified goods/services; (b) are prohibited from, or ordered to cease, sales by government; (c) are measured by unqualified measuring instrument; or (d) fail to conform to the agreement.

  Any misleading and fraudulent publicity, as explained further below, also constitutes fraud per se.

Penalty

Both categories of frauds are subject to the same administrative penalties as elaborated in the above section.

In addition to the administrative penalties, merchants that commit fraud can be subject to civil liability for the consumers' actual loss plus punitive damages amounting to the higher of (1) three times the cost paid for the goods/ services, or (2) RMB 500.

Fraud per se in special service industries

In the case of service industries, fraud per se will be found if:

- Merchants providing repair, processing, installation, decoration services: (i) claim false utilization of manpower or materials; (ii) intentionally sabotage or exchange parts or material; (iii) use unqualified or sub-standard parts or material; (iv) unnecessarily change parts; or (v) charge excessive fees; or

- Merchants providing intermediary services (such as introduction of housekeepers or real estate brokerage services) give consumers false information or maliciously collude to cheat consumers.

Unlike the general penalty rule, the administrative penalty for the above types of service industry misconduct is one to three times the illegal gain, not exceeding RMB 30,000 (or in the absence of any illegal gains, penalties of up to RMB 10,000).

Misleading and fraudulent publicity

Merchants must not publicize their goods/services in an untruthful or misleading manner. Specifically, merchants must not boost sales by falsifying transaction volume or comments, or by hiring others to do so. Prices shall not be falsely marked as "clearance price," "lowest price," "promotion price," etc., if untrue. Merchants shall not organize fake "premium sales," "try-before-you-buy sales," or "refund-cost sales." Substandard products shall not be sold as regular goods. Merchants shall not exaggerate about or conceal the information that is material to consumers (e.g., amount, quality, and functionality).

Prepayment arrangements

If the goods/services are purchased by means of prepayments, the merchant must agree with the consumer by stating clearly the number and quality of the goods/services, the price and fee, terms and means of performance, warnings and risks, after-sales services, and civil liabilities. If the goods/services provided do not conform to the agreement, the merchant must cure the deviation or refund the prepayment along with accrued interest and any reasonable expenses incurred by the consumer. If there is no specific agreement regarding refunds, the amount will be calculated in a way favorable to the consumer. Any refusal or delay over 15 days is subject to the same administrative penalties as mentioned in the above section.

Protection of personal information of consumers

The Chinese government has enacted various laws and regulations to protect personal information, including, among others, the *Regulatory Measures for Internet Transactions*, *Regulations on Protection of Personal Information of Telecommunication and Internet Users*, the *Decision on Strengthening Online Information Protection*, and the Consumer Protection Law. Under these laws and regulations, merchants can collect and use consumers' personal information only with prior consent and following the principle of legality, necessity, and legitimacy. The Measures further define the concept of "personal information" to cover any information that may be used alone or in combination with other information to determine the identity of the consumer, including the consumer's name, gender, profession, date of birth, ID number, address, contact information, income and property, health condition, consumption, and spending information. This expanded definition will raise the standard of obligations for merchants, especially online sellers, to collect and utilize the consumer’s personal information.

Form contracts

The Measures provide that merchants shall not, by form contracts, announcements, or notices: (i) exempt or limit the merchants’ obligations to repair, replace, exchange, return, refund, and compensate; or (ii) eliminate or restrict consumers’ corresponding legal rights. Merchants shall not, by form contracts, eliminate or restrict consumers’ rights to file complaints, blow-whistles or bring actions. Form contracts may not be used to require consumers to purchase or use any designated goods/services, and those consumers who refuse to do so may not be turned down for such goods/services or charged any additional cost. Merchants shall not have a unilateral right to change or terminate contracts or the sole power to interpret the contract.

Conclusion

The Measures create a higher standard for merchants to observe in complying with their duties under the Consumer Protection Law and show the pro-consumer attitude of the Chinese government. It would be advisable for online retailers to immediately review their online sale/use terms and policies and make any necessary adjustments.

Disclaimer

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COLOMBIA: Recent changes in visa requirements

NewsFlash: 288

What Changed? Resolution 0532/2015 completely replaced Resolution 4130/2013. These two resolutions' main function is to determine the required documents for all kinds of visas, and due to the newer resolution's publication.

What Does This Change Mean? The publication of Resolution has issued some newer conditions in the visa application and stamping process such as the following:

1.Digital visas must be stamped within 2 months of the visa's approval and publication

2.Foreign nationals holding a visa issued for less than three months may enter and exit the country with their digital visa and without any need of stamping the document in their passport

3.TP-13 visa applications must submit a letter from the public or private entity describing the nature of the technical visit

4.The TP-15 code was added for Mercosur Visas

5.The TP-16 code was added for Pacific Alliance Visas

Effective Date?: According to Art. 28 in Resolution 0532/2015, all the measures stated by this document will start being implemented from the date the Resolution was published, which is February 2, 2015.

B&U Assessment: These new measure could be the result of the trends observed since the current Immigration Decree (0834 / 2013) was published. Accordingly, restricted nationals who will perform technical activities in Colombia can now request a TP-13 visa without having to state an emergency as a reason for their visit. Nonetheless, TP-13 visas are still bound to different requirements depending on the visit's nature and on the entity requesting the visa. Even when some of the changes derived from Resolution 0532/2015 are listed in this article, it is still recommended to contact our B&U Immigration Team before activating any pending immigration process.

www.bu.com.co

Hong Kong Privacy Commissioner for Personal Data issues guidance on the use of drones

April 2015

On 29 March, the Hong Kong Privacy Commissioner for Personal Data (the "**Commissioner**") published a guidance note that supplements previous guidance on the use of closed circuit television systems and for the first time addresses the increasing use of unmanned aircraft systems ("**UAS**", or, more popularly, "drones"). The Commissioner's guidance is the first significant regulatory engagement on the use of UAS by a Hong Kong regulator.

The guidance is timely, as the potential commercial applications for UAS are now becoming more fully understood and are clearly vast, ranging from infrastructure maintenance, crop management and security through to the more headline catching possibilities of delivery of consumer products to your doorstep.

The Consumer Electronics Association forecasts the global market for consumer UAS will approach US$300 million by 2018 on factory-to-dealer sales of just under a million units, up from an anticipated US$84 million in global revenues on sales of 250,000 units in 2014[1].

Earlier this year, the e-commerce giant Alibaba announced the launch of commercial UAS delivery testing in China from its warehouses in Beijing, Shanghai and Guangzhou. Less well-publicised, Hong Kong is itself something of an innovator in the UAS space. In 2013, the Civil Engineering and Development Department acquired a number of UAS vehicles for property surveying purposes, citing tremendous efficiency gains from UAS imaging, particularly in difficult terrain[2].

Hong Kong currently has an estimated 5,000 UAS[3] and that number is predicted to increase as prices fall and people and businesses become more aware of the possibilities for their use. UAS technology is also improving. Manufacturers are experimenting with UAS that can collect thermal images, provide telecommunications services, take environmental measurements and even collect “big data” using a range of different sensors at the same time.

The possibilities raised by UAS raise significant regulatory concerns, but current regulations are very limited in their scope and do not yet address important issues of privacy. The Commissioner's guidance is a first step in Hong Kong towards a broader debate about UAS.

The Hong Kong Regulatory Regime for UAS

The Civil Aviation Department of Hong Kong ("**CAD**") is responsible for regulating non-recreational UAS weighing over seven kilograms. Flying a UAS weighing 7kg or less for purely recreational purposes is classified as model aircraft flying and no CAD oversight is required.

The expected increase in use of UAS calls the basic regulatory parameters into question. Hong Kong’s urban density and unique geographical features make safety a key concern. For commercial UAS flights in Hong Kong the CAD rules stipulate that no flights are permitted within five kilometres of an aerodrome, over 300 feet above ground and in visibility conditions of less than five kilometres. There is also a requirement that the pilot of the drone must have qualifications to show that he has the required training to fly the device. That being said, the CAD does not issue separate pilots licenses for the operation of UAS. The UAS operator must make an application to the CAD with the relevant information to support the application and to demonstrate their flying experience. Each application is then reviewed by the CAD on a case by case basis. A flight plan must also be submitted to the CAD at least 28 days before take-off although it can take up to 90 days to get flight approval.

Privacy Concerns

The CAD's rules are clearly directed at pilot qualifications and safety concerns. It is not clear that the department is under any duty to consider privacy concerns when it issues its permits. In a blog entry he made last year concerning UAS[4], Hong Kong's Privacy Commissioner for Personal Data expressed his concern that the privacy rights of individuals in Hong Kong need to be better protected as the use of UAS increases. In the Commissioner's view, UAS present unique privacy challenges and their ability "to collect data with great resolution and granularity at distant vantage points, often for

[1] "Let Them Fly: CEA Applauds FAA’s Ruling on Drones" 25 September 2014

[2] 'Drone' aircraft bring survey boost December 23, 2013 http://www.news.gov.hk/en/categories/infrastructure/html/2013/12/20131223_174912.shtml

[3] Editorial "Drone Invasion Needs Regulation" July 13, 2014, South China Morning Post.

[4] The Commissioner's Blog, 29 April 2014 http://www.pcpd.org.hk/english/news_events/commissioners_message/blog_29042014.html

long periods, and on a continuous and covert basis, enables them to conduct effective aerial surveillance of persons of interest in a sustained and surreptitious manner."

The Commissioner's new guidance adds further force to these comments, and suggests some specific compliance measures that UAS operators should take, including carrying out privacy impact assessments as part of flight planning, minimising the amount and types of personal data collected by the drone to that which is essential and taking measures to ensure that data is secure should the drone be lost. The Commissioner also suggests means of alerting the public to the presence of UAS collecting personal data, such as incorporating flashing lights into the aircraft to signal that recording is taking place and pre-announcing through social media and other means that a UAS flight is taking place.

The Commissioner has separately appealed to technology providers to commit to building privacy and data protection into their products and services. As a keen advocate of the "privacy by design" concept, the Commissioner considers it vital to maintaining a privacy-assuring ecosystem.

A Bird's Eye View of Global UAS Regulation

It goes without saying that the issues surrounding the use of UAS are by no means unique to Hong Kong. The approach to regulation of UAS is being evaluated in a number of jurisdictions and by a number of international agencies, but given that the policy remits of the agencies taking the lead relate to aviation, in most cases privacy concerns appear to be hovering at a distance.

European aviation experts and regulators have recently agreed a set of principles for the regulation of UAS, with an overriding objective of seeking to rapidly develop the industry across Europe. The Riga Declaration on Remotely Piloted Aircraft published by the European Commission on 6 March 2015 highlights privacy as a fundamental concern, but defers to national and European Data Protection Authorities on the specific policy-making.

In February 2015 the Federal Aviation Administration (the "**FAA**") issued proposals for new UAS regulation in the United States. These proposals would require UAS to be kept within the operator's line of sight at all times while airborne and prohibit flights over crowds of people. Significantly though, while the new proposals establish safety procedures, despite extensive lobbying from experts and members of the public, the proposals do not address any privacy concerns, a matter which the FAA understands to be beyond the scope of its rule making powers.

The International Civil Aviation Organisation has embarked on the development of international standards to regulate UAS, particularly in airspace used by manned aircraft. The work covers areas such as certification of UAS, competency requirements of the UAS operator/pilot, and guidance on UAS operations, but privacy concerns do not form part of the review.

Blue Sky Thinking About UAS Regulation

The Commissioner's guidance on the use of UAS in Hong Kong adds some helpful discussion to what will likely be an important but complex area of regulation in the coming years. The capacity for UAS to impact personal space in high density urbanised regions such as Hong Kong is clear. The means of ensuring that UAS flights in Hong Kong are compliant with the PDPO will be a matter requiring attention.

If you would like further information on any aspect of this note, please contact a person mentioned below or the person with whom you usually deal:

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THE CURIOUS CASE OF THE AUTO PARTS DECISION v THE SUZUKI MOTORCYCLE DECISION:
WHY IS CCI MUDDYING THE WATERS?

BANGALORE • CHENNAI • NEW DELHI • GURGAON • HYDERABAD • MUMBAI • ATLANTA • SINGAPORE • DUBAI • JEDDAH • RIYADH • TOKYO

On March 19, 2015, the competition regulator in India – the Competition Commission of India ("**CCI**"), passed an order rejecting charges that Suzuki Motorcycle India ("**Suzuki**") had abused its dominant position in the market for manufacturing and sale of two-wheeler vehicles.

The allegation against Suzuki was that it imposed unfair and discriminatory conditions in the sale of its two-wheeler ACCESS 125cc, by limiting the customers' entitlement to avail of Suzuki's free services in the event that the customers visit a local garage for paid services, thereby resulting in a denial of market access to local auto garage owners.

In order to reach the conclusion as set forth above, the CCI determined the 'relevant market' as being only the "market of the manufacturing and sale of two wheeler vehicles in India".

Curiously, however, in recent decision of automobile parts manufacturers[1] ("**Auto Parts case**"), the CCI, while adjudicating the issue of whether automobile manufacturers had engaged in abusive conduct by imposing unfair and restrictive conditions in the after-sales market, had delved into the matter in much greater detail, and had opined that "*<u>there exist two separate relevant markets; one for manufacture and sale of cars and the other for</u> the sale of spare parts and <u>repair services</u> in respect of the automobile market in the entire territory of India*[2]" [emphasis added].

[1] *Shamsher Kataria v Honda Siel Cars & Others*, Case No. 03/2011, decided on 25.08.2014
[2] *Ibid*, at pg 136

The CCI, relying upon the "antitrust theory that each OEM was engaging in anti-competitive practices to prevent independent service repairers from competing with the authorized dealers of such OEMs in the aftermarket for maintenance and repair services of such OEM manufactured automobiles[3]", concluded that the "automobile primary market and the aftermarket for spare parts and repair services does not consist of a unified systems market[4], that each OEM was a monopolistic player in the aftermarket.

In the Suzuki case, if the allegation was of the nature of denial of market access to local garage owners (i.e. independent repairers), which was one of the main issues that the CCI had deliberated upon in great detail in the Auto Parts case, before concluding that each OEM severely limited the access of independent repairers and other multi-brand service providers to genuine spare parts and diagnostic tools required to effectively compete with the authorized dealers of the OEMs in the aftermarket; and that such practices amount to denial of market access by the OEMs under section 4(2) of the Act[5].

If the CCI has taken a view that the sales and the aftersales markets are different in the automobile industry, then surely the same standard needs to be adhered to for evaluating the relevant market in the two wheeler market as well. There might have been other factors that the CCI may have evaluated, which factors, unfortunately have not been discussed in the order dated March 19, 2015, but the author vehemently feels that the CCI has missed a trick by not evaluating the allegations made in the Suzuki case in greater detail.

[3] *Ibid*, at pg 143
[4] *Ibid*, at pg 135
[5] *Ibid*, at pg 156

Since the defining lines have been marked by the CCI in one matter, there needs to be consistency with that line of reasoning for the other matters as well, failing which, the interpretation of the statute will remain muddy, and the same will be the fate of the decisions coming out of the CCI in the coming days.

DISCLAIMER

ABOUT THE AUTHOR

The antitrust / competition advisory practice of Kochhar & Co. is headed by Piyush Gupta. Piyush has more than a decade of trans-national experience in the competition law regimes across India and Singapore. Piyush is well-versed with the complexities of this relatively new entrant in the Indian legal arena and has drafted the competition law compliance manuals and guidelines for companies across various industries. Piyush has also conducted competition law compliance audits for various corporates, in addition to providing training and holding workshops on identification of issues pertaining to competition laws for the purposes of various companies' in-house legal counsels, as well as for various operational personnel, such that competition law issues can be highlighted and dealt with on an immediate basis. In this regard, you may contact Piyush Gupta at +91.124.454.5222 or email him at piyush.gupta@kochhar.com.

COUNSELLORS AT LAW

NEWS DETAIL

25/03/2015

NEW REGULATION REQUIRES LETTER OF CREDIT FOR EXPORT OF PRODUCTS FROM NATURAL RESOURCES

The Minister of Trade issued Ministerial Regulation No. 04/M-DAG/PER/1/2015 (“Regulation No. 4/2015”) on 5 January 2015. Regulation No. 4/2015 comes into effect from 1 April 2015.

Regulation No. 4/2015 applies to the export of the following prescribed products;

1. Coal;
2. Unprocessed or partially refined Minerals including;
   - o Iron concentrate;
   - o Copper concentrate;
   - o Lead concentrate;
   - o Zinc concentrate;
   - o Alumina;
   - o Nickel;
   - o Silver;
   - o Gold;
3. Crude oil;
4. Liquefied Natural Gas;
5. Crude Palm Oil.

Once in effect, Regulation No. 4/2015 will require Indonesian exporters of the prescribed products to obtain a Letter of Credit from their product buyer for an amount equal to the value of the prescribed products sold prior to the export of the prescribed products.

The Letter of Credit must be received by an Indonesian foreign exchange bank.

The prescribed products cannot be exported without a Letter of Credit in compliance with Regulation No.4/2015.

The Minister shall appoint surveyors to confirm that a Letter of Credit has been received by the Indonesian exporter for the value of the prescribed products sold for the equivalent of (or greater than) the “world price” for the prescribed product. The surveyor shall issue a report which is to be provided to certain government agencies including Bank Indonesia and the Ministry of Finance (but not the Director General of Tax). The prescribed products cannot be exported without the surveyor’s report.

Exporters who do not comply with Regulation No.4/2015 may be subject to sanctions. The sanctions are not specified in Regulation No.4/2015 but may ultimately to suspension or revocation of their export and production licenses for ongoing violations. Regulation No.4/2015 is subject to further implementing regulations (which have not yet been issued).

The Minister of Trade issued a similar regulation in 2009 (although the range of prescribed products included more agricultural commodities and less minerals and did not include oil & gas). The Minister of Trade revoked the regulation in 2010 stating that at that time, Indonesia’s foreign exchange reserves had improved and the regulation was no longer required.

The stated purpose of Regulation No.4/2015 is to "*optimize and accurately record foreign exchange derived from exports while maintaining the stability and improvement of prices of exports*".

Regulation No.4/2015 does not include any transitional provisions so it appears actual export deliveries of prescribed products after 1 April 2015 will need to comply with the Regulation, even though the sales may be subject to a long terms sales contract entered before the enactment of Regulation No.4/2015.

Similarly, Regulation No.4/2015 requires the Letter of Credit to be issued for at least the "world price" of the prescribed product but the Regulation does not define the term "world price". One of the major export products subject to Regulation No.4/2015 is coal and the Government of Indonesia has its own "Indonesian Benchmark Price" for coal on which royalty is to be calculated and paid, however, it appears the pricing for coal for the purposes of Regulation No.4/2015 is "world price" and not the "Indonesian Benchmark Price".

Regulation No.4/2015 also does not recognize that there may be many valid reasons for an exporter selling a prescribed product as less than "world price". For example, if a buyer makes advance payments to an exporter or if a buyer commits to a long term supply contract with an exporter. (*by: Philip Payne*)

NautaDutilh

Restructuring & Insolvency

Netherlands

A partner is severally liable for a partnership's liabilities which have arisen prior to joining the partnership

Wednesday 25 March 2015

Under Dutch law each partner of a partnership (other than a limited partner) is severally liable for liabilities of the partnership. The Dutch Supreme Court has recently rendered two important judgments with respect to the liability of partners in a partnership and the consequences thereof if the partnership is declared bankrupt.

In its decision of 6 February 2015, the Dutch Supreme Court found that the bankruptcy of a Dutch partnership no longer entails – by operation of law – the bankruptcy of its partners. A court should only open bankruptcy proceedings with respect to individual partners after determining that they themselves meet the bankruptcy criterion, including that each individual partner has its centre of main interest in the Netherlands. This decision was the subject of the NautaDutilh Newsflash published on 10 February 2015.

On 13 March 2015, the Dutch Supreme Court clarified the extent of the liability of a partner, in particular with respect to a partner who joins a partnership that has already been existing for some time. The Dutch Supreme Court issued a clear-cut rule: each partner (other than a limited partner) is severally liable for all liabilities of the partnership, including liabilities that have arisen prior to that partner joining the partnership.

This means that if a partnership is unable to fulfil its obligations, a creditor of the partnership may demand payment from each partner (other than a limited partner) and take recourse on the assets of each partner, irrespective of whether a partner has joined the partnership before or after the claim of the creditor came into existence. In other words: when a partner joins a partnership, this will lead to additional means of redress for the creditors of the partnership - old and new.

This judgment shows the importance of a proper investigation into a partnership's state of assets and liabilities when a party considers joining an already existing partnership. In some cases it may be advisable for the future partner to stipulate guarantees from the existing partners and/or to provide for a contractual arrangement on the contribution of each of the partners for claims of the partnership's creditors.

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FYI

March 2015

INTELLECTUAL PROPERTY LAW

DENIM WARS 2.0

You may recall G-Star Raw's 2013 High Court claim against Jeanswest Corporation (New Zealand) Ltd (*Jeanswest*) in which G-Star was awarded a very meagre $325 in damages for copyright infringement of the "5620 Elwood" jean design. (If not, you can read our article on that decision here.)

Unsurprisingly neither G-Star nor Jeanswest was satisfied with the result. Jeanswest appealed and G-Star cross-appealed the High Court decision.

THE CASE

Wild J's opening paragraph in the Court of Appeal decision set the scene:

"On a wet day in August 1995 Monsieur Morisset was sitting in a café in the south of France. M. Morisset is a French clothes designer. Out the window he noticed a motorcyclist, his trousers sodden by the rain. Inspired by the way the rain had stretched out the motorcyclist's trousers over his knees, with the trousers "crinkled and crumpled in the hollow of the knee", M. Morisset sat at his café table for about half an hour sketching out a design for a pair of biker jeans."

That jean design went on to become the Elwood Jean by G-Star Raw. G-Star claimed Jeanswest had infringed its copyright in the original drawings for the Elwood design by manufacturing, retailing and importing into New Zealand the "Dean Biker Slim Straight" (Dean Biker Jean), which it claimed was a copy of the Elwood Anniversary Jean designed for release in 2006 (the tenth anniversary of the first date of sale of the original Elwood Jean).

Although Jeanswest admitted to importing and selling the Dean Biker Jean, it denied the Dean Biker Jean was an infringing copy of G-Star's Elwood design.

In the High Court, Heath J found Jeanswest had copied the Elwood design and was liable for secondary but not primary copyright infringement.

THE OUTCOME

The Court of Appeal dealt with seven issues on appeal. In short, the Court agreed with Heath J that Jeanswest had copied G-Star's copyright work. It upheld the High Court's finding of secondary infringement but found Heath J had erred in not finding primary infringement. The Court of Appeal found Jeanswest simply had no defence to the primary infringement claim, having copied the Elwood design and admitted to selling the Dean Biker Jean in New Zealand.

Further, the Court of Appeal held that a permanent injunction restraining Jeanswest from selling, manufacturing, importing or otherwise disposing or dealing with the infringing Dean Biker Jean was wrongly granted. This was largely due to the fact that, because the jean design had been industrially applied, G-Star was not entitled to prevent copies of the Elwood Jean being made and sold beyond March 2012, 16 years after the Elwood design was launched in Germany.

Finally and most significantly, the Court of Appeal awarded G-Star additional damages.

ADDITIONAL DAMAGES

Section 121(2) of the Copyright Act gives the Court discretion to award such additional damages as it considers the "justice of the case requires, having regard to all circumstances", including flagrancy.

Awards of additional damages for copyright infringement in New Zealand have tended to be relatively infrequently made and, when awarded, low. Prior to the Court of Appeal's decision, the highest award of additional damages was $20,000 in the *Skids* case.

In the High Court, two considerations persuaded Heath J not to award G-Star additional damages under s121(2):

1. the "non-sinister" motive of Jeanswest; and
2. the fact that the infringement occurred through ignorance of differences between New Zealand and Australian copyright law.

The Court of Appeal considered a number of other factors in assessing whether an award of additional damages should be made, including:

(a) The very small importation into New Zealand (only 63 pairs of the Dean Biker Jean) was held to be intended to "test the market with a view to further importations if the jeans sold well".

(b) Jeanswest immediately desisted selling the Dean Biker Jean when it received a letter from G-Star's solicitors. However, by that time all the imported jeans had been sold.

(c) Aspects of the way Jeanswest defended the claim reflected badly on it such as:

   (i) the very late disclosure of the sample order, which recorded the design process for the Dean Biker Jean and became a critical document at trial;

   (ii) the failure by Jeanswest to call a witness whose availability was a key factor in the trial judge's decision to decline a pre-trial application by G-Star to join two Jeanswest Australia entities as parties; and

   (iii) the glaring inconsistency between Jeanswest's persistent denial of copying and its decision not to call either of the witnesses who could have substantiated that denial.

(d) Although the importation was not a "sinister" attempt by Jeanswest to see whether it could sell the Dean Biker Jean in New Zealand undetected, Jeanswest's process showed a lack of an effective system to establish whether this importation breached New Zealand copyright law. It should have been a simple matter to obtain the required legal advice, a fact further emphasised by the size of the Jeanswest business.

Balancing all the relevant factors, and taking in account the level of awards in comparable copyright infringement cases in New Zealand and Australia, the Court of Appeal awarded G-Star NZ$50,000 in additional damages. In particular, in the Court of Appeal's view, the infringement in *Skids* was "less serious" than the infringement by Jeanswest.

The result in the G-Star case demonstrates that New Zealand Courts are alert to the purposes of the additional damages regime, including punishing flagrant behaviour, deterrence, and compensation to plaintiffs who have been the victims of culpable conduct by defendants. While our Courts have not yet awarded damages to the same level as Australian Courts, additional damages now have some real chutzpah.

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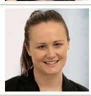

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client alert

CORPORATE LAW | RUSSIA | 13 MARCH 2015

REMINDER | NEW PROCEDURE FOR REGISTRATION OF BRANCHES AND REPRESENTATIVE OFFICES OF FOREIGN COMPANIES

Please be reminded of the amendments introduced to applicable legislation on the opening of representative offices and branches of foreign companies in Russia.

According to these amendments, all representative offices and branches of foreign legal entities must now be entered in the register kept by Russian tax authorities.

While all new representative offices and branches are added to said register upon their establishment, all existing representative offices and branches must apply to tax authorities to be included in the register no later than 1 April 2015.

Those representative offices and branches that fail to do so by the indicated deadline will be subject to liquidation. In addition, those representative offices and branches that are not reregistered in accordance with this new procedure will not be able to request new visas for their employees.

The procedure for registration with tax authorities takes approximately 15-20 business days.

We draw your attention to the very strict deadline for those who have not already started the enlistment procedure.

Please contact us should you require any further clarification.

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

SECTION 4(1)(B) OF THE COMPETITION ACT– A NEW APPROACH TO SETTLEMENT?

By Dominique Arteiro, Director

LEGAL BRIEF
APRIL 2015

The consent agreement between the Competition Commission ("**Commission**") and Mediclinic Southern Africa (Proprietary) Limited ("**Mediclinic**"), Victoria Hospital (Proprietary) Limited ("**Victoria**"), Newcastle Private Hospital (Proprietary) Limited ("**Newcastle**"), Mediclinic Tzaneen (Proprietary) Limited ("**Tzaneen**"), Howick Private Hospital Holdings (Proprietary) Limited ("**Howick**"), Mediclinic Upington (Proprietary) Limited ("**Upington**") and Mediclinic Hermanus (Proprietary) Limited ("**Hermanus**") was confirmed by the Competition Tribunal ("**Tribunal**") on 18 March 2015 ("**Consent Agreement**") and may signify the start of a new approach by the South African competition authorities in settling perceived contraventions of section 4(1)(b)(i)[1] of the Competition Act, No. 89 of 1998 ("**Competition Act**").

INTRODUCTION

On 11 October 2010, the Commission received a complaint in which it was alleged that Mediclinic was engaging in price fixing with Victoria and Newcastle as Mediclinic was setting tariffs for these two private hospitals. In consequence, the Commission initiated an investigation into Mediclinic, Victoria and Newcastle.

On 26 February 2013, the Commission initiated a separate investigation into Mediclinic's relationship with each of Howick, Tzaneen, Hermanus and Upington. The Commission was investigating Mediclinic's conduct of negotiating and setting tariffs on behalf of each of these hospitals[2].

According to the Consent Agreement, Mediclinic operates and manages a number of private hospitals throughout South Africa. It is involved in the financial and operational management of these private hospitals. Certain of these private hospitals are wholly owned by Mediclinic whilst, in the other instances, Mediclinic holds either a majority or minority shareholding. In respect of the managed private hospitals under investigation by the Commission ("**managed private hospitals**"), Mediclinic's shareholding in those managed private hospitals ranged from 15.1% to 49.4%[3] . In each case, the remaining shareholding in the managed private hospitals was widely dispersed among shareholders who did not individually exercise control (for competition law purposes) over the hospital in question[4].

1 Section 4(1)(b)(i) of the Competition Act provides that an agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if it involves directly or indirectly fixing a purchase or selling price or any other trading condition.

2 See paragraph 3.1
3 See paragraph 2.2.
4 See paragraph 2.3.

COMMISSION'S FINDINGS

After investigating, the Commission was of the view that Mediclinic and each of the managed private hospitals were parties in a horizontal relationship (i.e. competitors) as they did not fall within the exclusion in section 4(5) of the Competition Act. Section 4(5) of the Competition Act provides that section 4(1) of the Competition Act does not apply to an agreement between or concerted practice engaged in by:

> a company, its wholly owned subsidiary as contemplated in section 1(5) of the Companies Act, 1973[5] , a wholly owned subsidiary of that subsidiary or any combination of them; or

> the constituent firms within a single economic entity similar in structure to those referred to in paragraph 2.1.1 above.

Accordingly, the Commission regarded Mediclinic's tariff determination on behalf of the managed private hospitals as a contravention of section 4(1)(b)(i) of the Competition Act[6].

A NEW APPROACH

No admission of liability

Despite the Commission's findings that the conduct in question contravened section 4(1)(b)(i) of the Competition Act, Mediclinic and the managed private hospitals did not admit to having contravened the Competition Act. Mediclinic did, however, undertake to bring the conduct in question to an end by acquiring *"control"* [7] over the managed private hospitals so as to ensure that its shareholding in the managed private hospitals and/or the resultant company structure will fall within the exclusion provided for in section 4(5) of the Competition Act.

No administrative penalty

The Commission agreed with Mediclinic and the managed private hospitals that the payment of an administrative penalty would not be appropriate. The reasons advanced in the Consent Agreement for this were, amongst other things, the circumstances in which the conduct occurred and the sanctioning of the Victoria merger by the Commission[8].

The circumstances in which the conduct occurred is summarised in paragraph 2 of the Consent Agreement. In this regard it is recorded that, amongst other things:

> Mediclinic only started negotiating and setting tariffs on behalf of each of the managed private hospitals after it had concluded a management agreement, and after it had a minority shareholding, in each of those managed private hospitals. It was contended that such management agreement, together with Mediclinic's minority shareholding, was a form of *"control"* over the managed private hospitals as envisaged in section 12(2) of the Competition Act[9];

> the Commission was aware that upon the implementation of the Victoria merger, Mediclinic would be negotiating tariffs with healthcare funders on behalf of Victoria. According to Mediclinic, the Commission's unconditional approval of the Victoria merger gave rise to an assumption by Mediclinic that the same conduct in respect of all of the managed private hospitals was lawful[10] ;

> Mediclinic had negotiated tariffs on behalf of the managed private hospitals with full knowledge of other participants in the healthcare industry;

> from the time that Mediclinic concluded separate management agreements with each of the managed private hospitals, Mediclinic regarded the managed private hospitals as being operationally and financially integrated with it;

> the respondents did not regard each other as competitors; and

> the respondents contend that they were *bona fide* in their intentions and actions.

Mediclinic to notify its intended acquisition

Even though the Commission viewed the conduct in question as a contravention of the Competition Act, the remedy agreed to (and confirmed by the Tribunal) was that Mediclinic would notify the Commission of Mediclinic's intended acquisition of control in respect of the managed private hospitals by way of separate merger notifications.

Wits University Donald Gordon Medical Centre

The Consent Agreement records that the Wits University Donald Gordon Medical Centre (Proprietary) Limited ("WDGMC") is a legitimate and *bona fide* public private partnership between Mediclinic and Wits University, which transaction had received the Competition Tribunal's unconditional merger approval [11].

It is expressly recorded in the Consent Agreement that the Commission and Mediclinic agree that Mediclinic's tariff determination on behalf of WDGMC does not amount to price fixing as contemplated in section 4(1)(b)(i) of the Competition Act, despite Mediclinic's minority shareholding in WDGMC amounting to 49.9%.

Future Conduct

Mediclinic undertook not to conduct tariff negotiations or otherwise involve itself in tariff negotiations on behalf of firms that are not its wholly owned subsidiary or constituent firms in a single economic entity with Mediclinic. This undertaking does not, however, apply to *bona fide*, legitimate joint ventures and public private partnerships or conduct which is otherwise authorised in terms of the Competition Act [12].

In this regard, it is recorded that the Commission recognises that forbidding *bona fide*, legitimate joint ventures and public private partnerships between competitors could result in the loss of significant technological, efficiency, pro-competitive and/or public interest gains where those arrangements do not contravene section 4(1)(b)(i) of the Competition Act[13].

CONCLUSION

The contents of the Consent Agreement read differently from consent agreements concluded in relation to price fixing contraventions. In the latter, there is usually an assertion that the offending conduct has ceased, an admission of liability, an undertaking to pay an administrative penalty, etc. This is not, however, how the Consent Agreement reads. It remains to be seen whether the Consent Agreement is a once-off situation based on the unique facts of the case or whether it heralds a new approach to agreeing settlement terms with the competition authorities.

5 Subsidiary relationships are now described in section 3 of the Companies Act, No. 71 of 2008.
6 See paragraph 3.3.
7 In terms of section 12(2)(a), (b) and (c) of the Competition Act. See paragraph 4.2 of the Consent Agreement.
8 According to paragraph 1.15 of the Consent Agreement, the Commission unconditionally approved Mediclinic's acquisition of control of Victoria on 17 October 2003 (case number 2003Oct666).
9 See paragraph 2.4.
10 See paragraph 2.4.3.
11 Mediclinic's acquisition of, amongst other things, 49.9% of the issued share capital of WDGMC was unconditionally approved by the Tribunal on 12 October 2005 (case number 75/LM/Aug05).
12 See paragraph 5.1.
13 See paragraph 5.1.

ABOUT THE AUTHOR

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Dominique Arteiro is a Director at Werksmans Attorneys in the Competition Practice Area and the Healthcare & Life Sciences Practice Area.

His areas of specialisation include obtaining of approval for mergers and takeovers from the competition authorities, lodging and defending of complaints of alleged anti-competitive conduct, and applications for leniency and for exemption from the Competition Act.

Dominique also specialises in conducting compliance audits and developing compliance programmes, responding to summonses from the competition authorities, and search and seizure operations (dawn raids), performing competition law training, and representing firms in market inquiries conducted in terms of the Competition Act.

He was a co-teacher in the Black Lawyers Association's commercial law education pilot project (2004 – 2006) and is a Notary Public.

Dominique holds a BA Law and an LLB from the University of Johannesburg, and was on the Dean's merit list (1998- 2000). He also holds a Higher Diploma in Company Law from the University of the Witwatersrand.

"Novel Features" of a Design Patent and Its Role in Design Patent Infringement Cases

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May Chen

According to the *Design Patent Infringement Assessment Guidelines* of the R.O.C. (“the Guidelines”), the steps for determining whether a product infringes a design patent are as follows:

1. Interpreting the claim scope;
2. Comparing the interpreted claim with the accused product to determine whether the product is visually identical or similar to the design; and
3. Judging whether the accused product has the novel features of the design.

In addition, pursuant to the Guidelines and a recent court judgment (see Intellectual Property Court Judgment No. *102-Year-Min-Zhuan-Shang-55*), a finding that the accused product is visually identical or similar with the interpreted claim scope of the design patent is not sufficient to determine that the product falls within the claim scope; it is necessary to further determine whether the product embodies the “novel features” of the design. As to what constitute the novel features of a design patent, the Intellectual Property Court points out in the aforementioned Judgment No. 102-Year-Min-Zhuan-Shang-55 that the "written description" in the specification given for the design features shown in the drawings serves as the main basis for determination of "novel features." The court concludes in the judgment that the appearance of the product accused for patent infringement not only has such novel features, but is also sufficient to cause consumers to confuse it with the claimed design, so the accused product falls within the claim scope of the design patent. In other words, the more detailed the "written description" of the design features is, the more likely the scope of the design patent will be interpreted as a narrower one containing all the limitations/features mentioned in the "written description," in comparison with that of a design described in less detail.

Intellectual Property Court Judgment No. *103-Year-Min-Su-Zi-73* further points out the following: "Novel features of a design are those that objectively make the design novel and creative over prior art and thus meet the novelty and creativeness requirements for patentability; such features must relate to visual appeal, and not functionality. … When interpreting the claim scope of a design, one should first take the textual content of the patent specification as the basis, and then compare the design and the prior art in order to objectively determine what the novel features which are significant for the creativeness of the design are." Given the above, relevant prior art references listed in the corresponding patent information in the patent gazette can certainly serve as the basis for "comparison of the asserted design patent with prior art." According to this judgment, in addition to the design features described "in writing" in the specification of a design patent, the differences between such design and known "prior art" (in particular, the references cited by the patent office during the examination procedure) should also be taken into consideration in determining the "novel features" of that design. Furthermore, even if an accused product possesses all the features described in writing in a design patent specification, if it does not possess the novel features which are determined as explained above, it will still not be deemed to infringe the asserted design patent.

TXRWH

Tilleke & Gibbins

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Informed Counsel

Analysis of Recent Legal Developments in Southeast Asia

contents

1 Thailand's New Copyright Law

The National Legislative Assembly recently passed into law two copyright bills containing proposed reforms on copyright protection and liability.

Thai Copyright Act Amendments: Updating the Law for the Digital Age

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Thailand's Copyright Act B.E. 2537 (1994) came into force on March 21, 1995. Over the course of the nearly 20 years since its passing, the Act had previously remained unchanged, devoid of any amendments, despite numerous attempts by legislators to strengthen copyright protection and modernize the law to keep up with technological changes.

One of the copyright bills recently introduced by the National Legislative Assembly (NLA) of Thailand contains broader and more advanced tools for copyright owners to tackle copyright infringement. This copyright bill proposes reforms on copyright protection and liability in relation to the protection of Rights Management Information (RMI) and Technological Protection Measures (TPM).

The NLA has now passed this bill into law, having published it in the *Royal Gazette* on February 5, 2015. The bill will come into force 180 days after publication. With this significant development in mind, law enforcers, legal practitioners, and copyright owners need to become familiar with what the new copyright law has in store. This article will examine the protection of RMI and TPM introduced by this copyright bill.

Copyright Infringement Exception under the First-Sale Doctrine

Section 32/1 of the amended Copyright Act explicitly recognizes the exception of copyright infringement under the first-sale doctrine. This new section stipulates that any distribution of original or copied copyrighted work—the ownership of which is lawfully acquired—does not amount to copyright infringement. This exception applies to all copyrighted works that are recognized by the Thai Copyright Act.

Exception for Temporary Reproduction in Computer Systems

With the understanding that copyrighted works sometimes need to be duplicated in order to allow a computer system to function, the amended Copyright Act provides an exception to reflect this need, similar to exceptions contained in the copyright laws of many countries. Section 32/2 stipulates that any duplication of a copyrighted work that is required to be made in order to allow a computer system to function normally shall not be deemed as an act of copyright infringement.

Preliminary Injunctive Relief for Copyright Infringement on Computer Systems

Section 32/3 of the amended Copyright Act will introduce a new injunctive measure which copyright owners can use to prevent the distribution of copyright-infringing content on the computer systems of Internet service providers. Under this section, in the event that a copyright owner has reasonable grounds to believe that a copyrighted work has been the subject of infringement on a computer system, he or she can file a motion with the competent court to request a court order be made against the service provider to stop the infringement. A "service provider," as defined in the Act, includes any person who provides access to the Internet or any services that allow people to communicate with one another over a computer system and any person who provides computer information storage services.

Continued on page 2

Thailand's New Copyright Law (from page 1)

When granting such an injunction, the court will specify the period of time within which the service provider must comply with the court order. After the injunction is granted, the copyright owner is obliged to initiate a lawsuit against the infringer within the period of time ordered by the court for the service provider to take down the infringing content. If the service provider is not the person who controls, initiates, or orders the infringing act to be carried out in the computer system, he or she will be exempt from liability for copyright infringement upon compliance with the court order, and he or she cannot be held liable for any damage incurred by his or her action carried out under the order.

Protection of Performer's Moral Rights

The amended Copyright Act protects the moral rights of performers, similar to those of creators of copyrighted works, under Section 18. Under the new Section 51/1, a performer is entitled to identify himself or herself as a performer in the performance and has the right to protect his or her reputation by prohibiting any person, including the assignee of the performer's rights, to distort, shorten, adapt, or perform any other act with respect to the performance to the extent that such act would cause damage to the reputation or dignity of the performer.

Protection of Rights Management Information

Sections 53/1 and 53/2 of the amended Act stipulate the civil liability of a person who deletes or modifies RMI with the knowledge that such deletion or modification would induce, cause, facilitate, or conceal copyright or infringement of a performer's right, as well as a person who communicates to the public or imports into Thailand for distribution any copyrighted work with the knowledge that the RMI of such work has been deleted or modified.

The liability for RMI infringement is not stipulated without exceptions. Under Section 53/3, exceptions are provided for cases in which:

1. the deletion or modification was made by an authorized official in order to enforce the law or to safeguard national security;
2. the deletion or modification was made by an educational institution, library, or public broadcasting agency for nonprofit purposes; or
3. the communication to the public of copyrighted work, in which RMI has been deleted or modified, was carried out by an educational institution, library, or public broadcasting agency for nonprofit purposes.

Protection of Technological Protection Measures

Circumvention of TPM is prohibited under Section 53/4 of the amended Act—a person who circumvents TPM or provides the service of circumvention can be held liable for infringement if the circumvention was performed with the knowledge that such circumvention would induce or cause infringement on a copyrighted work or a performer's rights. Similar to infringement of RMI, any person who circumvents TPM may be fined and imprisoned in accordance with the penalties specified in Section 70/1.

The exceptions to liability arising out of TPM circumvention are included in Section 53/5, under which the act of a person who circumvents TPM shall not be deemed to be an infringing act under Section 53/4 if such circumvention was:

1. necessary, provided that it falls within the exceptions to copyright infringement under the law;
2. to analyze the components required to cause one computer program to work with another;
3. to conduct research and analysis and identify defects of encryption technology;
4. to test, examine, or repair security systems of a computer, computer system, or computer network;
5. to stop the function of TPM which relates to the collection and dissemination of data that indicates the online activities of an individual;
6. to enforce the law and safeguard national security, which must be made by an authorized official; or
7. to gain access to copyrighted work, which must be made by an educational institution, library, or public broadcasting agency and made for nonprofit purposes.

Punitive Damages

The amended Copyright Act broadens the scope of civil remedies available for copyright infringement by applying the concept of punitive damages. Section 64 of the Act, an existing section, has been amended to include a second paragraph which allows a competent court to double the amount of damages determined under the criteria set out in the first paragraph of the same section in the event that there is clear evidence that the copyright or performer's right was infringed on with the intention to allow the work to be widely accessible by the public.

> “the amendments to the Copyright Act will equip copyright owners with broader and more advanced tools to tackle copyright infringement in the new digital age”

Seizure and Destruction of Counterfeit Goods

The provision on the seizure and destruction of counterfeit goods under the Copyright Act has been changed significantly. Under the new Section 75, copyright owners are no longer entitled to ownership of the infringing articles. Rather, Section 75 grants the competent court the authority to order the infringing articles to be confiscated or destroyed, with the infringer bearing the cost of the destruction.

The amendments to the Copyright Act will equip copyright owners with broader and more advanced tools to tackle copyright infringement in the new digital age. An air of skepticism remains, however, over how well the new measures will be applied in practice. Therefore, it is important for copyright owners to keep a close eye on any new developments that may arise.

BAKER BOTTS

INTERNATIONAL TRADE UPDATE - APRIL 10, 2015

"P5 +1" and Iran Announce Parameters for a Joint Comprehensive Plan of Action Regarding Iran's Nuclear Program

On April 2, 2015, the United States and its partners in the P5 + 1 (China, France, Germany, Russia, and the United Kingdom, coordinated by the European Union's High Representative) reached an agreement with Iran on a framework for a Joint Comprehensive Plan of Action ("JCPOA") regarding Iran's nuclear program. The framework is meant to form the foundation upon which the final text of the JCPOA will be written between now and June 30, 2015. Notwithstanding the issuance of the JCPOA framework, the U.S. government has noted that important implementation details are still subject to negotiation, and nothing is final at this time.

EU, UN and U.S. sanctions targeting Iran will remain in place until at least June 30, 2015. On April 3, 2015, Office of Foreign Assets Control ("OFAC") of the U.S. Department of the Treasury issued guidance relating to the April 2, 2015 announcement of parameters for the JCPOA. OFAC noted that the JCPOA parameters announced on April 2, 2015 do not immediately relieve, suspend, or terminate any sanctions on Iran. The only sanctions relief in force is the relief provided pursuant to the Joint Plan of Action ("JPOA") reached on November 24, 2013 and extended through June 30, 2015. Until a JCPOA is concluded, all U.S. sanctions remain in place and will continue to be vigorously enforced.

According to the White House, the JCPOA framework offers Iran the following sanctions relief if it verifiably abides by its various nuclear-related commitments:

- U.S. and E.U. nuclear-related sanctions will be suspended after the International Atomic Energy Agency ("IAEA") has verified that Iran has taken all of its key nuclear-related steps. If at any time Iran fails to fulfill its commitments, these sanctions will snap back into place.
- The architecture of U.S. nuclear-related sanctions on Iran will be retained for much of the duration of the deal and allow for snap-back of sanctions in the event of significant non-performance.
- All past UN Security Council resolutions on the Iran nuclear issue will be lifted simultaneous with the completion, by Iran, of nuclear-related actions addressing all key concerns (e.g., enrichment, reactors and reprocessing, and transparency).
- However, core provisions in the UN Security Council resolutions – those that deal with transfers of sensitive technologies and activities – will be re-established by a new UN Security Council resolution that will endorse the JCPOA and urge its full implementation. It will also create a procurement channel, which will serve as a key transparency measure.

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Important restrictions on conventional arms and ballistic missiles, as well as provisions that allow for related cargo inspections and asset freezes, will also be incorporated by this new resolution.

- A dispute resolution process will be specified, which enables any JCPOA participant to seek to resolve disagreements about the performance of JCPOA commitments. If an issue of significant non-performance cannot be resolved through that process, then all previous UN sanctions could be re-imposed.
- U.S. sanctions on Iran for terrorism, human rights abuses, and ballistic missiles will remain in place under the deal.

The EU Foreign Minister Federica Mogherini and Iranian Foreign Affairs Minister Javad Zarif have issued a joint statement in which they said that, under the deal, the EU " will terminate the implementation of all nuclear-related economic and financial sanctions and the US will cease the application of all nuclear-related secondary economic and financial sanctions, simultaneously with the IAEA-verified implementation by Iran of its key nuclear commitments," while a UN Security Council resolution "will endorse the JCPOA, terminate all previous nuclear-related resolutions and incorporate certain restrictive measures for a mutually agreed period of time."

Legislation Aimed to Require Congressional Review of the JCPOA: The Iran Nuclear Agreement Review Act of 2015

Many U.S. sanctions restrictions, particularly those that apply to non-U.S. companies, have been codified by Congress, which means that the President has limited authority to relax these sanctions without Congressional notification and, in some cases, approval. At the same time, the Iran Nuclear Agreement Review Act of 2015 (S.615) ("INAR"), a bill that was recently introduced in the U.S. Senate, calls for an amendment to the Atomic Energy Act of 1954 to direct the President, within five days after reaching an agreement with Iran regarding its nuclear program, to transmit to Congress:

- the text of the agreement and all related materials and annexes;
- a related verification assessment report of the Secretary of State;
- a certification that the agreement includes the appropriate terms, conditions, and duration of the agreement's requirements concerning Iran's nuclear activities, and provisions describing any sanctions to be waived, suspended, or otherwise reduced by the United States and any other nation or entity; and
- a certification that the agreement meets U.S. non-proliferation objectives, does not jeopardize the common defense and security, provides a framework to ensure that Iran's nuclear activities will not constitute an unreasonable defense and security risk, and ensures that Iran's permitted nuclear activities will not be used to further any nuclear-related military or nuclear explosive purpose.

The foreign relations committees of the House of Representatives and Senate, during a 60-day period following the transmittal of an agreement by the President, would be required to hold hearings and briefings to review the agreement.

During this review period, the President would not be permitted to waive, suspend, reduce, provide relief from, or otherwise limit the application of statutory sanctions (*i.e.*, sanctions imposed through congressional legislation, including secondary sanctions applicable to non-U.S. persons) with respect to Iran, except for any deferral, waiver, or other suspension of statutory sanctions pursuant to the JPOA.

Senator Bob Corker (R-Tenn.), Chairman of the Senate Foreign Relations Committee and co-sponsor of the INAR, announced earlier this month that the Committee will vote on whether to release the INAR on April 14, 2015. There are 19 members on the committee — 10 Republicans and 9 Democrats. A majority vote would pass the bill out of committee, and Republicans are likely to be joined by at least four Democrats who have expressed support for the bill. However, the White House has notified the Congress that it opposes any legislation passed before June 30, 2015 (*i.e.*, when the JCPOA is to be reached between the P5+1 and Iran) and earlier this week reissued a veto threat against the INAR. Thus, unless the Congress believes that it can override the veto with a two-thirds vote in both the House of Representatives and Senate, it is unlikely that the INAR will be passed before June 30, 2015.

Davis Wright Tremaine LLP
DEFINING SUCCESS TOGETHER

Open Internet Order Published and to Become Effective on June 12, 2015—Numerous New Appeals Expected

04.13.15

By K.C. Halm and John D. Seiver

The FCC's Open Internet Order (the "Order") was published in the Federal Register today, Monday, April 13, and, unless the Order is stayed, will become effective after sixty days, on June 12, 2015. Publication in the Federal Register starts the time for petitioning for judicial review and also provides a timeline for covered entities to begin developing compliance plans—again, unless the Order is stayed.

However, one aspect of the Order, the "enhanced" transparency requirements, will not become effective on June 12. Specifically, the information collection requirements in paragraphs 164, 166, 167, 169, 173, 174, 179, 180 and 181 of the Order impose new information collection obligations on broadband service providers and are therefore subject to further review by the Office of Management and Budget ("OMB"). (For a discussion of these new requirements, see our earlier advisory.) These provisions will become effective after the FCC publishes a separate document in the Federal Register announcing OMB approval and the relevant effective date(s).

Publication in the Federal Register is likely to trigger numerous appeals of the Order. Indeed, two petitions for review have already been filed, though the FCC has taken the position that such appeals were premature, arguing that the period for judicial review does not begin until the Order is published in the Federal Register. While those petitions were consolidated in the D.C. Circuit by the Judicial Panel on Multidistrict Litigation, we do expect that the FCC will to move to dismiss them. We anticipate that new appeals will be filed in several different jurisdictions, which will initiate a 10-day lottery period and require the JPML to select the court (which could be the D.C. Circuit again) that will hear all appeals on a consolidated basis.

As we outlined in our previous advisory, the Open Internet Order imposes significant new operational requirements and obligations on broadband Internet access service providers. Over the next sixty days service providers should be considering how to properly implement processes and procedures necessary to ensure compliance with these new duties (should the Order not be stayed).

Impact of Declining Oil Prices

Issue 7: Employment Implications in the oil sector

Given the recent, sharp decline in the price of crude oil, many businesses operating in the oil sector are considering how to reduce costs to remain profitable. One way to control costs, or in some cases, to survive low commodity prices, is to reduce recurring overhead attributable to labor costs through workforce restructuring or adjustment to employment terms and conditions.

Current market conditions may also affect employment decisions once the price of crude oil rebounds, particularly if the price increase is minimal or subject to volatility. For example, employers who have trimmed their workforce during a down economy are often reluctant to staff back up once conditions, in this case oil prices, improve. Rather than permanently expanding the workforce and committing to the recurring overhead associated with such expansion, employers in rebounding industry sectors often rely instead on temporary workers or contractors to meet staffing needs. In this update, we will provide a brief overview of potential concerns associated with restructuring and rebuilding a workforce during the depressed or unpredictable economic climates currently faced by employers in the oil and gas sector.

Redundancies, reductions in force, and “rightsizing”

Large-scale employment terminations have a multitude of different names depending on the jurisdiction. Commonly known as “redundancies” in the EU and EEA and “reductions in force” or RIFs in the US, these workforce actions have even been termed “downsizing” or “rightsizing,” as least by employers undertaking such actions. Whatever term is used, it is unquestionable that redundancies or RIFs are already being implemented on a significant scale as an immediate cost-control strategy by employers in the oil sector. Indeed, according to a March 20, 2015 report[1], over 100,000 global oil-industry jobs have already been lost. That same report notes that, while some experts believe the price per barrel has bottomed out, others predict it may slide even further to US$20 barrel, making more drilling operations unprofitable and likely necessitating further job cuts by sector employers. And, even if oil prices rebound in the near term, the increased efficiency of oil operations realized by fracking and other innovative techniques has created an oil surplus in the U.S. Such surplus may cause companies to cut production – and employees – in the short term, and may reduce the need for labor in the long term, without regard to the current price per barrel.

It is clear that, no matter what happens with the price of oil, employers in the oil sector are and will continue to consider workforce restructurings as means of meeting business goals. How such workforce actions proceed and what legal risks are created by such actions depend on many factors, including obligations to trade unions by agreement or by law, the presence of individual employment contracts, the size of the proposed action, whether a severance or reduction package will or must be offered, and how employees are selected for inclusion in the workforce reduction.

An employer contemplating any workforce action must consider whether it has any obligations affecting the RIF’s implementation by union agreement or by law. For example, in the EU and EEA, trade unions or other employee representatives must be consulted when collective redundancies are proposed. Time for consultation, the length of which varies widely from country to country, must be factored into any planning process. In the U.S, businesses with unionized workforces will also need to consider whether collective bargaining agreements require notice to or “bargaining” with the union. Such employers must also consult the union contract to determine whether certain procedures, such as selection of employees for reduction in accordance with seniority, must be followed in carrying out the RIF.

Whether cuts occur in the U.S. or elsewhere, employers must also consider any individual employment agreements to determine whether there are pre-existing contractual severance or notice obligations to employees who are parties to such agreements.

Absent individual or union agreements, employees in the U.S. are generally considered to be employed “at-will” and can be legally dismissed on an individual basis from employment, without notice, severance, or cause. However, in the event of large-scale reductions-in-force, notice and/or pay-in-lieu of notice may be required by law. Specifically, the federal WARN Act requires

[1] USA Today, March 20, 2015, http://www.usatoday.com/videos/money/business/2015/03/20/25051529/.

that employers with at least 100 employees (as defined by WARN) provide 60 days notice to employees of certain workforce actions, or pay and benefits in lieu of notice, as well as notices to government officials and union representatives. These requirements may be triggered by RIFs, layoffs exceeding six months, and/or a reduction in employee hours, that in each case, affect at least 50 employees. Employers considering such actions, should seek legal advice regarding the applicability of WARN (or individual state laws, called "mini-WARN" or "baby WARN" acts, which often have their own triggers) to their business and the particular action contemplated and the drafting of any required notices. Even if WARN or its state counterparts do not apply, employers should seek legal advice on how to select employees for reduction in order to minimize legal risk.

Employers also may wish to offer separation or redundancy packages to employees let go in connection with a RIF in order to secure a release of possible employment claims, such as discrimination or breach of contract claims, which predate or are created by the reorganization. Counsel should be consulted when drafting separation agreements and redundancy packages (which have often been generous in the oil industry) that may be offered to employees who are let go in connection with a "rightsizing" effort, as particular language and disclosures are often required in order to secure an effective release of claims, particularly under US law. Additionally, businesses that have historically offered separation or redundancy packages need to determine whether they must continue to do so or whether, in light of current economic conditions, they may reduce the assistance offered, considering the employee relations consequences or potential legal risks associated with the reduction.

Changing terms and conditions of employment

In the longer term, employers may also consider changing the terms and conditions of employment of the remaining workforce to reduce employee overhead and reduce on-going costs. In some cases, employers in the sector, at least for now, are eschewing employee reductions in favor of changes to the terms and conditions of employment, such as reduced schedules, temporary lay-offs, or compensation reductions[2]. But, implementing these types of creative measures may not be straightforward.

In Europe, at the most basic level, employees may have to consent to the changes. Depending on where employees work, and whether they are represented by a union, negotiation and/ or consultation with trade unions or works councils may be needed. This is often time-consuming, and may mean that it is not possible to make the changes, either at all or within the desired time-frame.

In the U.S., employee consent is not required in the absence of a union or individual employment contract and many, if not most, U.S. employees are employed at-will. However, the implementation of such measures should be carefully considered and documented in consultation with counsel, particularly with respect to temporary lay-offs or hour reductions, which may impact employee entitlement to overtime or minimum wages, or as discussed above can also trigger notice or pay in lieu of notice under U.S. federal and state law.

Increased use of atypical workers

Employers that have undertaken workforce reorganizations and survived a period of economic downturn are often reluctant to quickly staff back up once conditions stabilize. For this reason, in the future, businesses in the oil sector may want to consider using atypical worker contracts, staffing agencies, or independent contractors rather than hiring employees, as these measures typically afford employers greater flexibility to respond to market conditions. While the UK and U.S. have relatively flexible labor markets, this is not necessarily the case in other countries, where there may be restrictions on the types of contractual arrangements that can be used for staff.

Employers in all jurisdictions should be wary of the risks of such alternative arrangements; particularly to the extent they are protracted. For example, in the U.S., a business using workers through a staffing agency may still be deemed a joint employer for purposes of U.S. discrimination, leave, and wage and hour laws and find itself subject to unexpected unemployment lawsuits that eat up any cost-savings achieved by the alternative labor arrangement. Additionally, any written agreement for temporary labor – whether with a staffing agency or individual contractor – should be carefully scrutinized in order to minimize legal risks. Nevertheless, no temporary labor agreement can reduce every employment risk. For example, employers should be wary of relying too heavily on independent contractors, as such individuals may be viewed as an employee for purposes of U.S. employment and tax laws.

Conclusion

[2] http://www.manufacturing.net/news/2015/02/north-dakota-oil-industry-avoids-layoffs

Regardless of which measures employers in the oil sector choose to weather the current storm, there are significant local variations in employment law that make it difficult to adopt a "one size fits all" approach – or at least to do so to the same timescale in a number of global locations. For this reason, consideration of how to implement and document such measures should be undertaken with counsel.

The Hogan Lovells Oil, Gas, and LNG Group provides valuable advice and industry knowledge to companies affected by recent oil price volatility, whether you are grappling with restructuring or project development issues, corporate transactions or potential disputes. Find out more about our global team.

The eighth topical alert in our series, covering the implications for U.S. shale production and European Shale policy, will be issued next week. If you would like to subscribe a contact or colleague to this series please contact us.

Flash Legal Report

TAX UNIT (T.U.) INCREASED

FROM VEF 127.00 TO VEF 150.00

The Administrative Ruling N° SNAT/2015/0019, rendered by the National Integrated Service of Customs and Tax Administration (SENIAT), which establishes the readjustment of the Tax Unit[1] from ONE HUNDRED TWENTY-SEVEN BOLIVARS (VEF 127.00) to ONE HUNDRED FIFTY BOLIVARS (VEF 150.00), was published in the Official Gazette N° 40,608 of February 25th, 2015.

The Ruling establishes that in the case of taxes paid annually, the applicable Tax Unit will be the one that is valid during at least one hundred eighty-three (183) consecutive days of the corresponding period, and, in the case of taxes paid in periods other than annual, the applicable Tax Unit will be the one valid at the beginning of the corresponding period, according to Paragraph Three of Article 3 of the Organic Tax Code.

Taking into account the foregoing, it is important to mention that for the Income Tax Return and payment corresponding to the 2014 fiscal period, the applicable Tax Unit is of ONE HUNDRED TWENTY-SEVEN BOLIVARS (VEF 127.00).

For the rest of the cases, the new value of the Tax Unit applies as of the day following the publication of the Ruling, that is, as of February 26th, 2015.

Finally, it is also important to note that with the increase of the Tax Unit, all taxes, fines, tax rates and airport duties, fiscal stamps and any other obligation established in Tax Units, will also increase.

Legal Report
Tax Unit (T.U.) increased from VEF 127.00 to VEF 150.00

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[1] Venezuelan unit of value created for inflation purposes.

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