Pacific Rim Advisory Council

August 2015 e-Bulletin

MEMBER NEWS

- ►CLAYTON UTZ Announces Special Counsel, Partner and Senior Associate Promotions
- ►DAVIS WRIGHT TREMAINE Expanding Employment Practice Adds Two Highly Experienced Lawyers in San Francisco
- ►GIDE Strengthens Projects Finance and Infrastructure Banking Practices in Turkey
- ►RICHARDS BUELL SUTTON Set to Host PRAC 58th International Conference
- ►ROUSAUD COSTAS DURAN Partner Appointment

COUNTRY ALERTS

►AUSTRALIA Queensland's Market-Led Proposal Guidelines CLAYTON UTZ

►BELGIUM Legal and Commercial Guarantees for Online Sales NAUTADUTILH

►BRAZIL Federal Gov't Listens to Market and Increases Internal Rate of Return for New Concessions TOZZINI FREIRE

►CANADA Alberta Court of Appeal Addresses the New Limitation Period for Third-Party Claims BENNETT JONES

►CANADA Can an Employee Rely Upon Facts Unknown at Time of Termination to Prove Constructive Dismissal ? RICHARDS BUELL SUTTON

►CHILE ComDer Counter Party Now Operating to Manage Netting and Settlement of Financing Instruments CAREY

►COLOMBIA New Immigration Regulations BRIGARD & URRUTIA

►HONG KONG Privacy - A Right to be Forgotten? HOGAN LOVELLS

►INDIA Employment Law Update KOCHHAR & CO

►MALAYSIA Examination of Securities Commission's Guidelines on Equity Crowdfunding SKRINE

►MEXICO Guidelines for Granting Concessions of Telecom and Broadcasting SANTAMARINA Y STETA

►NEW ZEALAND Drone Regulation Taking Off SIMPSON GRIERSON

►TAIWAN Amendment to Enforcement Rules of the Taiwan Fair Trade Act LEE & LI

►UKRAINE New Banking Sector Reform Brings Revision of Many Substantial Rules Dealing with Insolvent Banks GIDE

►UNITED STATES

►Master Limited Partnership Parity Act Reintroduced BAKER BOTTS

►Possible Circuit Split as 9th Circuit Declines 2nd Circuit's Invitation to Narrow Insider Trading Liability DAVIS WRIGHT TREMAINE

►New Hawaii Laws That Could Affect Your Business GOODSILL

►OIG Clears a Path for Limited 'Quick Start' Program in New Advisory Opinion HOGAN LOVELLS

►VENEZUELA Foreign Exchange Commission Obligations Will Not Need Verification in Customs HOET PELAEZ CASTILLO & DUQUE

UPCOMING CONFERENCES & EVENTS

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

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

- **59th International PRAC Conference Barcelona**
  Hosted by Rousaud Costas Duran SLP
  May 21—24, 2016

- **60th International PRAC Conference Manila**
  Hosted by SyCip Salazar Hernandez & Gatmaitan
  September 24— 27, 2016

Visit www.prac.org for these and other event details

MEMBER DEALS MAKING NEWS

►BAKER BOTTS Represents Lazard as Financial Advisor to the Conflicts Committee of TerraForm Power in TerraForm and SunEdison's $2.2 Billion Acquisition of Vivint Solar

►BENNETT JONES Helps Ontario Teachers' Pension Plan Acquire Heritage Royalty Limited Partnership for $3.3B

►CAREY Advises Barrick Gold in USD$1.5B Sale Agreement of 50% interest in Zaldívar copper mine in Chile to Antofagasta Plc

►CLAYTON UTZ Advises Joint Lead Managers on Gold Road's A$39 million Equity Raising

►GIDE Counsels Cisco on Envisaged Sale of its Connected Devices Division to Technicolor

►HOGAN LOVELLS Advises AUDI, BMW, and Daimler on Acquisition of HERE Maps

►MUNIZ Helps Votorantim Take Up Stake in Peruvian Miner Milpo

►NAUTADUTILH Advises Q-Park in EUR 925 million Refinancing

►RODYK Acts in Listing and IPO Offering of Choo Chiang Holdings Ltd on Catalist Board

►SANTAMARINA Pemex settles 14 year refinery dispute with Conproca

►SIMPSON GRIERSON Advises on Largest Block Trade Ever Undertaken in New Zealand

►TOZZINIFREIRE Acts for Cemig in US Renewables Developer SunEdison Purchase of Wind Power Developments

PRAC TOOLS TO USE

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CLAYTON UTZ ANNOUNCES SPECIAL COUNSEL, PARTNER AND SENIOR ASSOCIATE PROMOTIONS

Clayton Utz is pleased to announce the following promotions, effective 1 July 2015:

Tax Counsel

Craig Boyle
Melbourne

Special Counsel

Peter Bowden
Restructuring and Insolvency
Melbourne

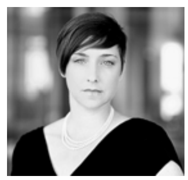
James Clyne
Corporate
Perth

Eleanor Dickens
Public Sector
Brisbane

Chris Keane
Major Projects and Construction
Brisbane

Johnson Lo
Corporate
Brisbane

Maria Ratner
Banking and Financial Services
Sydney



Elizabeth Richmond
Competition
Sydney

Alexandra Rose
Commercial Litigation
Sydney

Natalie Shoolman
IP and Technology
Sydney

Xuelin Teo
Commercial Litigation
Melbourne

Senior Associate

Peter Abraham - Construction and Major Projects, Sydney

Kezia Adams - IP and Technology, Melbourne

Mark Brady - Environment and Planning, Sydney

Sabrina Buck - Real Estate, Brisbane

Emma Forbes - Commercial Litigation, Sydney

Dean Gerakiteys - IP and Technology, Sydney

Trina Gledhill - Environment and Planning, Brisbane

Leigh Howard - Workplace Relations, Melbourne

Alexandra Kennedy-Breit - Commercial Litigation, Sydney

Jessica Keogh - Workplace Relations, Perth

Michelle Larin - Construction and Major Projects, Sydney

Michael Lucey - Public Sector, Brisbane

Rebecca Magee - Restructuring and Insolvency, Perth

Danijela Malesevic - Construction and Major Projects, Melbourne

Jerome Martin - Real Estate, Melbourne

Claire McKenzie - Construction and Major Projects, Melbourne

Alex Meguid - Construction and Major Projects, Sydney

Greg Midgley - Construction and Major Projects, Brisbane

Nathan Moy - Workplace Relations, Canberra

Sarah Newman - Public Sector, Darwin

Kelvin Ng - Tax, Sydney

Hai-Van Nguyen - Pro Bono, Sydney

Belinda Nisbet - Construction and Major Projects, Melbourne

Bree O'Connell - Construction and Major Projects, Melbourne

Jessica Salinger - Corporate, Sydney

Rachael Schulz - Construction and Major Projects, Brisbane

Tania Scott - Commercial Litigation, Sydney

Natalie Speranza - Construction and Major Projects, Melbourne

Laura Thomson - Construction and Major Projects, Brisbane

Kathryn Warner - Corporate, Brisbane

Prue Warner - Corporate / Native Title, Brisbane.

Clayton Utz CEP Rob Cutler said: "I congratulate our new Tax Counsel, Special Counsel and Senior Associates on their well-deserved promotions."

For additional information visit www.claytonutz.com

DAVIS WRIGHT TREMAINE EXPANDING EMPLOYMENT PRACTICE - ADDS TWO HIGHLY EXPERIENCED LAWYERS IN SAN FRANCISCO

SAN FRANCISCO 03 August 2015: Two highly experienced employment lawyers have joined the expanding labor and employment practice at Davis Wright Tremaine LLP in San Francisco.

Tracy Thompson comes to the firm as partner and brings over three decades of experience representing employers in all areas of labor and employment law. M. Michael Cole joins as counsel. Both practiced together most recently at Miller Law Group.

"We've had the pleasure of working alongside Tracy and Michael in a number of matters and have been consistently impressed with their skills, strategic acumen, and focus on the client's vision of success," said Henry Farber, chair of the employment practice at Davis Wright Tremaine. "They will be an excellent fit for our team."

Thompson brings to the firm significant experience in handling wage and hour class actions in both state and federal court. She also defends employers against claims of discrimination, harassment, and wrongful termination in single and multi-plaintiff actions, and represents clients in traditional labor law matters. Thompson has successfully defeated class certification, as well as prevailed on motions for summary judgment, in several of the class actions she has handled.

Cole has a decade of experience in employment law. His counseling experience includes drafting, leading, and participating in trainings for HR professionals and in-house counsel. He has also litigated the full spectrum of single-plaintiff and class action employment matters.

Thompson and Cole join a growing national employment practice at Davis Wright, which this year expanded to the East Coast with the addition of a five-lawyer team from Vedder Price in New York. Last year, the firm's San Francisco office added two from Winston & Strawn LLP: Jeff Bosley, a 20-year veteran of employment law, and associate Colin Wells.

For more information, visit www.dwt.com

GIDE STRENGTHENS PROJECTS FINANCE & INFRASTRUCTURE BANKING PRACTICES IN TURKEY

ISTANBUL 2 July 2015: GIDE is pleased to announce that Erkan Ayaz, a lawyer specialising in project finance, banking & finance and infrastructure projects, has joined its associated firm in Turkey Özdirekcan Dündar Şenocak as Counsel.


Erkan Ayaz

Erkan Ayaz has extensive experience in banking and finance transactions, in particular project finance, leveraged/acquisition finance, Islamic finance, real estate finance, asset finance and structured finance, and acts on legal and regulatory matters for banks, financial institutions, sponsors and other transaction parties in domestic and international projects in the fields of energy (oil & gas, mining, hydro and renewable), transportation (airports, highways, maritime ports), hospitals or other infrastructure projects. He is widely recognised as a leading finance expert, having worked on a number of benchmark transactions since 199 on the Turkish market.

Erkan joins from Clifford Chance's associated law firm in Turkey where he was Of Counsel. With his in-depth experience in structuring energy and infrastructure project, preparing tendering documents, drafting and negotiating project and financing documents, he will strengthen both Gide Turkey's Banking & Finance and Projects (Finance & Infrastructure) practices.

"It is with great pleasure that I welcome Erkan to our team. I am confident that his contribution as a very experienced practitioner in banking & finance and infrastructure projects will add a significant expertise to our team, at a time when project financing is booming in Turkey as it seeks to develop its infrastructure", says Gide's resident partner in Turkey, Matthieu Roy.

For additional information visit www.gide.com

RICHARDS BUELL SUTTON SET TO HOST PRAC 58TH INTERNATIONAL CONFERENCE

VANCOUVER 13 August 2015: Pacific Rim Advisory Council ("PRAC") founding member firm Richards Buell Sutton LLP ("RBS") will host the 58th International PRAC Conference in Vancouver, September 26-29. Member firm delegates from around the globe will be gathering in Vancouver to attend the four day business conference featuring topical professional development programs and business development opportunities.

Among the business sessions on tap for Vancouver:

- **Business Session #1** | Country Briefing presented by Richards Buell Sutton
- **Business Session #2** | Regional Reporting on significant changes impacting industries and jurisdictions
- **Business Session #3** | Business Development Meetings - a series of business development discussions among firms and Member Firm Spotlight – Santamarina y Steta - Mexico
- **Business Session #4** | Special Guest Presentation: *LNG – British Columbia's Opportunity*
  The Honorable Rich Coleman, Minister of Natural Resources and Deputy Premier of British Columbia
- **Business Sessions #5-7** | PRACtice Management – Tim Leishman, Guest Facilitator
  Succession Planning: What's Required To Do It Right?
  Developing the Next Generation of Business Developers
  Improving Referrals Amongst PRAC Member Firms
- **Business Session #8** | PRACtice Development - *Trends, Challenges and Opportunities in the Legal Profession*
  panel review of current trends, opportunities and challenges in their respective jurisdictions
- **Business Session #9** | PRACtice Area Spotlight - *Cross-border Litigation*
  How Companies are Managing the Globalization of Disputes and Regulation

Event is exclusive to PRAC Member Firms. For event details visit http://www.prac.org/events.php

About Richards Buell Sutton

Our Philosophy Passion, dedication and a commitment to our clients are a few of the qualities responsible for our longevity in this profession. 140 years have been put into understanding the legal profession for real people. We have grown to become leaders in our community, in turn staying in touch with what really matters to our clients. We are committed to delivering the highest standard of service to our clients. Our first priority is to develop an in-depth understanding of your situation or your business. We then draw upon our legal expertise to develop innovative and cost-effective solutions to help you achieve your strategic objectives. Whether we are acting as counsel for a corporation, a partnership, a family trust, or an individual, we are dedicated to developing strong and lasting relationships.

Our professional team provides a variety of legal services. We work across the boundaries of traditional thinking to supply our clients with effective and innovative legal solutions for the issues that arise in business and personal life.

We also offer our services in Mandarin, Cantonese, Spanish, French, Japanese and Russian.

What We Do Our Professional Team Provides a variety of legal services. We work across the boundaries of traditional thinking to supply our clients with effective and innovative legal solutions for the issues, transactions and disputes that arise in business and personal life. The Areas of Service which we have listed provide only a general background of our services.

Asia Pacific Services | Advanced Education and Research | Business Transactions | Commercial Real Estate Development, Leasing, Lending | Construction | Craft Breweries and Distilleries | Employment | Family | Immigration | Insolvency | Insurance | Intellectual Property | International Legal Access | Litigation and Dispute Resolutions | Personal Injury | Privacy Law | Securities and Corporate Finance | Tech Start-Ups | Wealth Preservation - Estate & Trust Administration, Personal Estate Planning, Succession Planning for Privately Owned Businesses, Estate Litigation | Mediation and Arbitration | Corporate Services | Trademark Services |

For more information visit us at www.rbs.ca

ROUSAUD COSTAS DURAN SLP PARTNER APPOINTMENT

BARCELONA 01 July 2015: The partnership board, on 1st July, named Iñaki Frías as a new partner in Corporate & Commercial. Iñaki is an expert in family businesses, corporate law, mergers and acquisitions (M&A), corporate restructuring, corporate governance, private equity, venture capital and contractual law. He has advised on very notable transactions for all types of organizations and also has great experience in advising family businesses and leads this department within the firm.

Iñaki Frías

The appointment of Iñaki, who has risen through the ranks over the past ten years, highlights RCD's commitment to their professionals, who are the key to the firm's growth and maintaining their DNA.

Ignasi Costas, partner and head of Human Resources, explains: "RCD offers opportunities for growth. We like to discover, strengthen and recognize the professional's talent. Some of the current partners began their careers at the firm."

For additional information visit www.rousaudcostasduran.com

BAKER BOTTS

REPRESENTS LAZARD AS FINANCIAL ADVISOR TO THE CONFLICTS COMMITTEE OF TERRAFORM POWER IN TERRAFORM'S AND SUNEDISON'S $2.2 BILLION ACQUISITION OF VIVINT SOLARS

HOUSTON July 20 2015: - SunEdison, Inc. (NYSE: SUNE), Vivint Solar, Inc. (NYSE: VSLR) and TerraForm Power, Inc. (Nasdaq: TERP) today announced that SunEdison and Vivint Solar have signed a definitive merger agreement pursuant to which SunEdison will acquire Vivint Solar for approximately $2.2 billion, payable in a combination of cash, shares of SunEdison common stock and SunEdison convertible notes.

In connection with SunEdison's proposed acquisition of Vivint Solar, SunEdison has entered into a definitive purchase agreement with a subsidiary of TerraForm Power which, concurrently with the completion of SunEdison's acquisition of Vivint Solar, will acquire Vivint Solar's rooftop solar portfolio from SunEdison, consisting of 523 megawatts (MW) expected to be installed by year-end 2015, for $922 million in cash. The 523 MW of residential solar projects are expected to provide a 10 year average unlevered CAFD of $81 million, and provide a ten-year average levered cash-on-cash yield of 9.5%.

Baker Botts represented Lazard who served as financial advisor to the Conflicts Committee of TerraForm Power.

Baker Botts Lawyers/Office Involved: William S. Lamb (Partner, New York); Stephen Massad (Partner, Houston); Brendan Dignan (Senior Associate, New York)

For more information visit www.bakerbotts.com

BENNETT JONES

BENNETT JONES HELPS ONTARIO TEACHERS' PENSION PLAN ACQUIRE HERITAGE ROYALTY LIMITED PARTNERSHIP FOR $3.3B

TORONTO 30 July 2015: On July 30, 2015, Ontario Teachers' Pension Plan (Teachers') completed the $3.3-billion acquisition of Heritage Royalty Limited Partnership (HRP), a former subsidiary of Cenovus Energy Inc. (Cenovus) that holds a broad portfolio of oil and gas royalties in Western Canada.

- Date Announced: July 30, 2015
- Date Closed: July 30, 2015
- Deal Value: $3,300,000,000
- Client Name: Ontario Teachers' Pension Plan

HRP owns approximately 4.8 million fee title acres in Alberta, Saskatchewan and Manitoba and also holds gross overriding royalties on 0.5 million acres at Cenovus' Pelican Lake and Weyburn properties, two large-scale, long-life oil projects. HRP's approximately 40 employees are being brought together in one Calgary office location.

The Bennett Jones transaction team consisted of transaction lead Pat Maguire, tax lead Thomas Bauer, Vivek Warrier, Kieran Ryan, Kevin Myson, Christopher Yang, Christopher Pardell, Domenic Puglia and Helen Cox (Energy), John Batzel (Employment), Beth Riley (Competition) and Andrew Sullivan (Tax).

For additional information visit www.bennettjones.com

CAREY

ADVISES BARRICK GOLD IN USD$1.5B SALE AGREEMENT OF 50% INTEREST IN ZALDÍVAR COPPER MINE IN CHILE TO ANTOFAGASTA PLC

SANTIAGO August 2015: Carey has advised Barrick Gold Corporation in an agreement to sell a 50% interest in the Zaldívar copper mine in Chile to Antofagasta Plc ("Antofagasta") for a total consideration of USD1,005 billion in cash, forming a new partnership with one of the world's leading copper companies. The transaction is expected to be completed in late 2015 and is subject to customary closing conditions.

Under the new ownership structure, Zaldívar will have a joint Barrick-Antofagasta Board of Directors consisting of three Barrick nominees and three Antofagasta nominees. Antofagasta will act as the operator of the mine and will be subject to oversight and direction by the Board.

Carey advised Barrick through a team led by partners Francisco Ugarte and Alex Fischer, and associates Jorge Ugarte, Alejandra Donoso, Isabel Espinoza, Camila Noreña, Raúl Morales, Josefina Joannon, Macarena Pivcevic, Héctor Hernández, José Tomás Barrueto, Miguel Saldivia and Tomás de la Maza.

For additional information visit www.carey.cl

CLAYTON UTZ

ADVISES JOIN LEAD MANAGERS IN GOLD ROAD'S A$39MILLION EQUITY RAISING

PERTH 04 June 2015: Clayton Utz has advised Macquarie Capital (Australia) Limited and Argonaut Securities Pty Ltd, as joint lead managers and bookrunners in connection with the A$39 million placement by Perth based Gold Road Resources Limited, announced to the market on 4 June.

Perth Corporate Advisory/M&A partner Mark Paganin and senior associate James Clyne led the Clayton Utz team.

The raising comprises a A$39 million institutional share placement to institutional and sophisticated investors, undertaken via institutional bookbuild at a price of A$0.44 per share. Gold Road's equity raising will also include a share purchase plan capped at A$10 million.

For additional information visit www.claytonutz.com

GIDE

COUNSELS CISCO ON ENVISAGED SALE OF ITS CONNECTED DEVICES DIVISION TO TECHNICOLOR

PARIS 29 July 2015: GIDE advised Cisco, worldwide leader in information technologies listed on NASDAQ, on the French law aspects relating to the envisaged sale of its Connected Devices business (connected home terminals and video solutions) to Technicolor, a worldwide technology leader in the Media & Entertainment sector listed on Euronext Paris. The sale is valued at approximately 550 million euros.

According to the terms of the exclusivity agreement, upon the closing of the transaction, Cisco will receive approximately 413 million euros in cash and approximately 137 million euros in newly issued Technicolor shares, subject to certain adjustments provided for in the agreement.

The Gide team comprised partners Anne Tolila and Antoine Tézenas du Montcel on M&A aspects, and partner François Vergne on employment aspects.

For additional information visit www.gide.com

HOGAN LOVELLS

ADVISES AUDI, BMW AND DAIMLER ON ACQUISITION OF HERE MAPS

NEW YORK July 2015: Hogan Lovells has advised on the acquisition of Nokia's digital map unit HERE by a Consortium of AUDI AG, BMW Group, and Daimler AG.

The deal will allow the Consortium to take a pioneering role in using map technology to develop autonomous driving navigation systems, combining it with real-time vehicle data to improve road safety and create innovative new products and services. The knowledge will be to the benefit of all carmakers and their customers. Therefore, with the joint acquisition of HERE, the auto consortium wants to secure the independence of this central service for all vehicle manufacturers and suppliers and customers in other industries.

Led by New York-based partner Bill Curtin, Global Head of the firm's M&A Group, a cross-border Hogan Lovells team served as Co-Negotiation Lead, Intellectual Property, Benefits, U.S. Regulatory, and Due Diligence counsel to the Consortium, and as M&A counsel to Daimler.

M&A partner Bill Curtin was supported by New York partner Audrey Reed, who led on Intellectual Property and Commercial matters, as well as Celine Crowson on Intellectual Property; Carin Carithers on Employee Compensation & Benefits matters; and Brian Curran on U.S. regulatory matters. In Germany, Frankfurt partner Dr. Dietmar Helms advised on the financing for the transaction and Munich-based partners Dr. Steffen Steininger and Dr. Stefan Schuppert advised on Intellectual Property matters.

Commenting on the transaction, Bill Curtin said:

"This is a landmark transaction for three giants of the automotive sector. This deal paves the way for market-leading innovation that will put Audi, BMW, and Daimler on the map in more ways than one. Our team at Hogan Lovells is extremely proud to be associated with such leaders in their field."

For additional information visit www.hoganlovells.com

MUNIZ

HELPS VOTORANTIM UP STAKE IN PERUVIAN MINER MILPO

LIMA 03 August 2015: Muñiz Ramírez Pérez-Taiman & Olaya has helped a Peruvian subsidiary of Brazilian industrial conglomerate Votorantim up its stake in local miner Compañía Minera Milpo (Milpo) for US$121 million, bringing Votorantim's stake in Milpo to just over 60 per cent.

Zinc producer Votorantim Metais-Cajamarquilla (VMC) bought a 10 per cent stake in Milpo through a tender offer that closed on 21 July. The acquisition was structured in line with Peruvian securities law, which states that an acquisition of more than a 60 per cent stake in a company automatically triggers a tender offer for all shares. Inteligo Sociedad Agente de Bolsa acted as the brokerage house for the tender offer. VMC bought the bulk of the new shares from three Peruvian pension funds; Integra AFP and two other funds that have been kept confidential. The pension funds relied on in-house counsel.

Votorantim bought a controlling stake in Milpo for US$420 million in 2010. Muñiz Ramírez and Bellido Saco-Vertiz acted in the same roles, while White & Case LLP advised the guarantor JP Morgan Chase.

Counsel to Votorantim Metais and Votorantim Metais-Cajamarquilla Muñiz Ramírez Pérez-Taiman & Olaya Partners Jorge Muñiz, Andres Kuan-Veng, Mercedes Fernandez and Rocio Izquierdo

For additional information visit www.munizlaw.com

SIMPSON GRIERSON

ADVISES ON LARGEST BLOCK TRADE EVER UNDERTAKEN IN NEW ZEALAND

AUCKLAND 05 August 2015: The Simpson Grierson team of Michael Pollard and Andrew Matthews recently advised Macquarie Capital on the $1.81 billion sale by Origin Energy of its 53.1% shareholding in Contact Energy.

The sell down was the largest secondary markets transaction in New Zealand in the last 10 years and one of the largest deals ever undertaken in New Zealand.

The deal involved a number of technical firsts under the new Financial Markets Conduct Act. Michael Pollard says, "The trade was genuinely a landmark capital markets transaction. It had a fair amount of complexity and it was extremely satisfying to be involved in it."

For additional information visit www.simpsongrierson.com

NAUTADUTILH

ADVISES Q-PARK IN EUR 925 MILLION REFINANCING

AMSTERDAM 04 August 2015: On 30 July 2015, the Q-Park group obtained a EUR 925 million facility from ABN AMRO, Rabobank, ING, HSBC and KBC as refinancing of an existing EUR 1,158 billion facility.

NautaDutilh Amsterdam acted as lead counsel for Q-Park, managing multiple best-friends law firms in 12 jurisdictions, including the Belgium and Luxembourg offices.

The Amsterdam team was led by Diederik Vriesendorp and further consisted of Cathelijn Frederiks, Boudewijn Smit and Lesley van Cappellen. The other NautaDutilh lawyers involved were Thibaut Willems, Audrey Zegers and Nathalie van Landuyt from Brussels and Josée Weydert, Nicolas Bonora and Thibaud Muller from Luxembourg.

Last year NautaDutilh assisted Pricoa in its EUR 240 million financing of Q-Park. This facility stays in place alongside the new one.

For additional information visit www.nautadutilh.com

RODYK

ACTS IN LISTING AND IPO OFFERING OF CHOO CHIANG HOLDINGS LTD ON CATALYST BOARD

SINGAPORE July 2015: Rodyk acted in the listing and initial public offering of Choo Chiang Holdings Ltd on the Catalist Board. The invitation was in respect of 33.28 million existing vendor shares. The gross proceeds from the invitation was approximately S$11.65 million.

With retail presence of more than 20 years in Singapore, Choo Chiang Holdings Ltd is one of the leading retailers and distributors of electrical products and accessories in Singapore. It offers an extensive range of electrical products and accessories for residential and industrial use at its nine retail branches, which are strategically located across different parts of Singapore.

Corporate partner Chan Wan Hong led, supported by associates Chiam Jia Xin and Desiree Lee.

For additional information visit www.rodyk.com

TOZZINI

ACTS FOR CEMIG UN US RENEWABLES DEVELOPER SUNEDISON PURCHASE OF WIND POWER DEVELOPMENTS

SAO PAULO 23 July 2015: US renewables developer SunEdison sign an agreement with Brazilian counterpart Renova to purchase 11 wind power developments in a sprawling multi-stage transaction that hands the world's largest non-conventional energy company over 2.2 gigawatts of installed power.

Renova, Brazil's second largest renewables company, signed on 15 July. TozziniFreire Advogados assisted Renova's minority stakeholders, Brazilian energy company Cemig.

The transaction is comprised of two agreements. The first covers the projects under construction by Renova, which have a combined value of over US$4.2 billion and will be transferred to SunEdison in exchange for shares in the US company's subsidiary, Terraform Global. Renova's equity interest in Terraform will be increased each time a renewables plant becomes operational, according to the project's value. The first of the 11 energy projects is set to start producing power in 2017 and the last in 2020.

The second part of the transaction is an options agreement that gives Terraform the right of first refusal until the end of 2016 to buy any of the Brazilian company's projects once they sign a long-term power purchase agreement (PPA) with public or private contractors. Renova will get shares in Terraform if the US energy developer decides to go ahead with an individual project's purchase. The number of shares Renova will obtain in Terraform will be based on a given project's projected proceeds, minus its operational expenses, in the years following a PPA's signing.

The agreements form part of a wider transaction in which Renova has agreed to divest close to US$5 billion worth of assets to SunEdison and TerraForm. The US company already paid US$533 million for three hydroelectric power plants and 14 wind farms from Renova in May and agreed to purchase Light Energia's 16 per cent interest in Renova for US$250 million on the same date as the current deal.

The entire deal is conditioned on regulatory approval and the successful IPO of TerraForm.

Renova's massive divestment programme is part of a wider strategy, whereby the company sells its operational power plants to obtain a large injection of cash which it will use to fund new projects and bolster its liquidity.

Counsel to Cemig TozziniFreire Advogados Partners José Luis de Salles Freire and Pedro Seraphim in São Paulo.

For additional information visit www.tozzinifreire.com.br

SANTAMARINA Y STETA

PEMEX SETTLES 14 YEAR REFINERY DISPUTE WITH CONPROCA

MEXICO CITY 12 August 2015: Mexican state oil company Pemex has paid US$295 million to a South Korean-German consortium to settle a 14-year dispute over a refinery upgrade that gave rise to an ICC arbitration and a racketeering lawsuit.

Pemex announced on 20 July that it had signed an agreement with Conproca, a joint venture between South Korea's SK Engineering and Construction and Germany's Siemens, to resolve all legal disputes between them.

The deal brings an end to Conproca's efforts to enforce an ICC award against Pemex that had been estimated to be worth at least US$435 million including interest, and perhaps as much as US$590 million.

An arbitral tribunal seated in Mexico City issued the award in 2011 after a decade-long arbitration concerning excess costs incurred during the upgrade of a Pemex oil refinery in Cadereyta, in the northeastern state of Nuevo León. **Santamarina y Steta** Partners Fernando del Castillo, Cecilia Flores Rueda in Mexico City were among the firms acting as Counsel to Conproca in the ICC proceedings 2001-2012. Conproca had begun work on the project in 1997.

Pemex sought to attack the award on a number of fronts. It lost a petition to set aside the award in a Mexican district court in 2013 but then brought a constitutional challenge, known as an amparo, which was rejected by the Fourth Collegiate Court last August.

The state entity appealed that decision to Mexico's Supreme Court. The presiding judge in the case circulated a draft opinion in May in Conproca's favour, but the appeal was withdrawn as a result of the settlement before a final judgment was issued.

In 2013, Pemex also filed a lawsuit against Conproca's shareholders in the Southern District of New York under the Racketeer Influenced and Corrupt Organizations (RICO) Act. It accused them of bribery of Mexican government officials in relation to the same refinery upgrade. The case was dismissed for lack of jurisdiction, a decision upheld by an appeal court in July last year. Siemens had accused Pemex of using the RICO suit as leverage to evade payment of Conproca's ICC award. Pemex did not make any bribery allegations in the Mexican set-aside proceedings.

The value of the ICC award was the subject of disagreement in the US confirmation proceedings. Last December, the court ordered Pemex to post almost US$593 million in security, representing what it said was Conproca's fullest possible recovery under the award. But Pemex argued that the most Conproca could hope to recover was US$538 million even if it prevailed on all its arguments; and that Mexican-law issues might further limit its recovery to US$435 million. In June, Pemex agreed to furnish Conproca with a US$435 million letter of credit as security while the confirmation petition was pending. The letter of credit has also been relinquished as part of the settlement deal.

Pemex announced the settlement in a press release last month but did not confirm the amount it had paid; however, local press reports have cited government sources stating that Pemex paid US$295 million.

For additional information visit www.s-s.mx

UPCOMING PRAC EVENTS

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

PRAC @ IBA Vienna October 5, 2015

PRAC @ PDAC Toronto, March 8, 2016

PRAC @ IPBA Malaysia, April 14, 2016

PRAC @ INTA Orlando, May 22, 2016

59th International PRAC Conference - Barcelona
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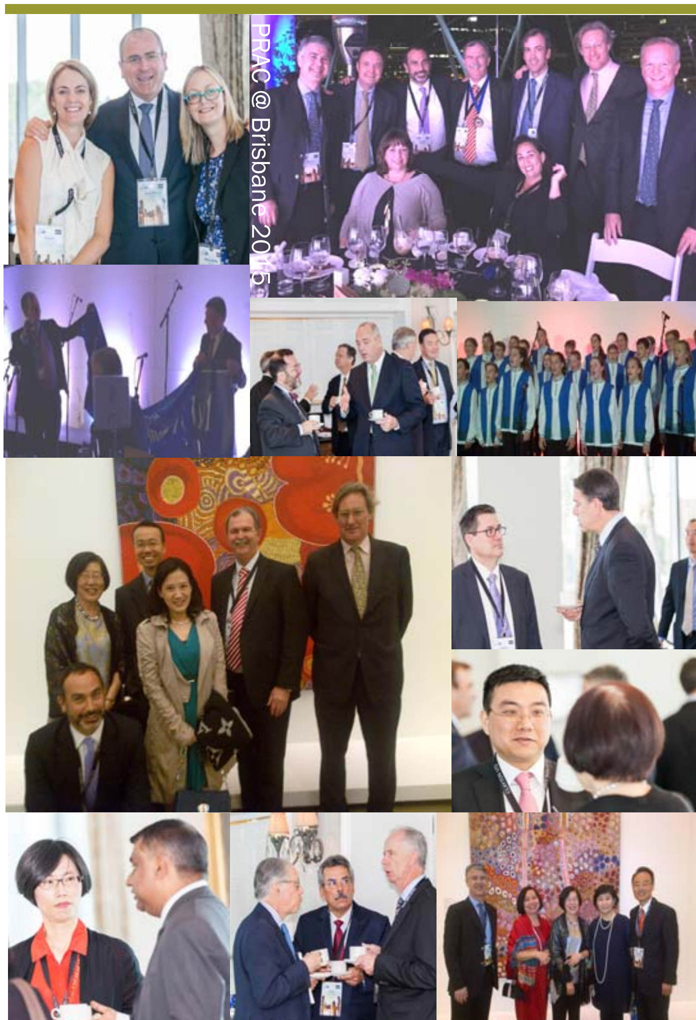

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CLAYTON UTZ

17 July 2015

Queensland's Market-Led Proposal Guidelines

As part of the Queensland State Budget, the Palaszczuk Government has introduced new market-led proposal guidelines (**MLP Guidelines**), aimed at harnessing the knowledge and expertise of the private sector in developing their market-led proposals (**MLP**) through the provision of a transparent and accountable methodology. The Government intends that these MLP Guidelines will allow government to engage more seamlessly with industry to secure new projects and investment, by providing proponents with consistency and clarity about the Government's assessment process.

The MLP Guidelines provide a similar process to the unsolicited, or market-led, proposal regimes that have been updated in New South Wales and Victoria in the last 18 months, both of which promote the development of market-led proposals for private sector investment in State infrastructure. Queensland's previous regime for unsolicited proposals, or 'exclusive mandates', was brief, set a high benchmark, and described a strong preference to maximise competition to gain value for money, with 'exclusive mandates' only to be considered in exceptional circumstances.

Market-led Proposal Guidelines 2015

The MLP Guidelines set out a three stage process consisting of:

1. Initial Proposal;
2. Detailed Proposal; and
3. Final Binding Offer.

The MLP Guidelines also make provision for an optional, but strongly recommended, pre-submission review stage, where private sector proponents can formally explore with Queensland Treasury as to whether the proposal is likely to meet the Stage 1 assessment criteria, having regard to key attributes, benefits, requirements and assumptions.

Stage 1 consists of a tiered evaluation, where the MLP must satisfy the 'Stage 1A - Preliminary Assessment' criteria, and may be progressed to 'Stage 1B - Strategic Assessment' if additional information is required. During Stage 1, the MLP Panel will form an assessment team, which will include consultation with Building Queensland where the proposal relates to infrastructure, to identify benefits to Government and determine whether or not a recommendation will be made to Government.

Stage 2 of the MLP Guidelines requires the proponent to prepare and submit a detailed proposal, as well as additional information on request, which will be assessed and a recommendation will be made to the MLP Panel, which will in turn make a recommendation to Government.

Stage 3 will consist of the Proponent, Queensland Treasury and the Line Agency negotiating legal and commercial terms (including an 'exclusive mandate contract'). Queensland Treasury and the Line Agency will then complete a comprehensive assessment of the Final Binding Offer executable documentation, which will then be prepared for consideration by Government.

The Government will have regard to the following criteria when assessing a market-led proposal and considering whether to provide an exclusive mandate:

(a) community need / government priority;
(b) value for money;
(c) uniqueness and intellectual property;

(d) benefit of proponent's preliminary investment;
(e) risk / cost allocation;
(f) capacity and capability of proponent;
(g) feasibility;
(h) public interest and benefits to the government; and
(i) competing proposals.

The MLP Guidelines specifically reserve Government's right to subject any MLP to competitive processes, or not proceed at all, if the proposal fails to meet any of the criteria to the Government's satisfaction at any point during the assessment process.

As part of the new MLP Guidelines, an online portal will be introduced, enabling proponents to put forward proposals for priority consideration. This will be particularly important for complex proposals, with interest from multiple government departments. The portal is expected to go live this week.

Comment

These MLP Guidelines are particularly important for Queensland, where an ever increasing need for public infrastructure and a constrained fiscal environment highlight the importance of encouraging private sector involvement in the investment in infrastructure. The Government has opened the doors for private sector investment in infrastructure, and in doing so, Queensland will obtain the benefit of innovation and opportunities that MLPs can present.

NautaDutilh

Consumer Goods

Belgium

Legal and Commercial Guarantees for Online Sales

Wednesday, 29 July 2015

On 1 June 2015, the economic inspectorate of the FPS Finance participated in a European investigation intended to detect violations of the guarantee legislation for online sales (the investigation in question concerned electronics but the rules are identical regardless of the type of consumer good being sold).

The Belgian investigation extended to 59 websites and revealed problems on 27 of these sites.
The most common breaches were an absence of or lack of clarity with respect to mentions concerning the guarantee (warranty), the seller's liability under the legal guarantee (statutory warranty), and the conditions to benefit from a commercial guarantee.

Below we briefly recall the applicable requirements in this regard.

Online sales are considered by the legislature to be distance sales and are thus governed by specific provisions intended to protect and inform consumers.

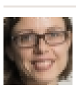
In order to meet the statutory requirements applicable to a guarantee, the seller must:

- expressly and clearly inform consumers of the existence of a legal guarantee (two years for new goods and at least one year for second-hand goods);
- if applicable, disclose the existence of a commercial guarantee and the conditions to benefit from it; it should in particular also indicate that the commercial guarantee is without prejudice to the legal guarantee.

It is important to keep in mind that under no circumstances can a trader pass off a legal guarantee as a commercial one.

The fines for such violations can reach EUR 150,000.

For more information, please contact us



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INFRASTRUCTURE / PUBLIC PROCUREMENT

Brazilian Federal Government listens to the market and increases the Internal Rate of Return for new concessions

Aiming at increasing the participation of the private sector in the new round of concessions included in the second phase of the Program for Investment in Logistics ("PIL 2"), the Ministry of Finance has updated the parameters for the calculation of the reference Internal Rate of Return (*Taxa Interna de Retorno*, or "TIR") for the upcoming concessions. This change meets a request of the private sector that has been debated since the first phase of the plan ("PIL 1"). According to the Ministry of Finance, the methodology for the calculation of the TIR is the same that was used for the previous concessions. There are four criteria used for the update of the TIR, of which three include risk rates. It is worth noticing that the rates of the TIR disclosed do not necessarily correspond to the effective rate of return of the investment made by the companies, which will depend on the actual operation of the relevant projects by each investor, including, for example, the financing conditions.

Airports
With the update, the TIR for the airport concessions increased from 6.63% per year (used in the prior auctions) to 8.5% per year. According to the federal government, this value will be used only to define the minimum granting amount (*i.e.* amount to be paid by the winner of the auction to the government). The current plan is to carry-out the concessions of the Porto Alegre (RS), Florianópolis (SC), Fortaleza (CE) and Salvador (BA) airport terminals next year. The winner will be the company or consortium that presents the highest granting amount.

Ports
The government has also indicated that port tariffs shall increase. The Ministry of Finance established a TIR of 10% for the ports concessions in the PIL 2, compared to a rate of 8.3% in the PIL 1.

Toll-roads
The Ministry of Finance increased the TIR for the concession of toll-roads to 9.2%, compared to a rate of 7.2% in the PIL 1.

Railways
There is an expectation that the TIR for railways concessions will be set above a rate of 10%, considering that such projects seem to have higher risks among all the projects included in the new concession plan.

The federal government expects the new round of concessions of infrastructure projects to foster the economy – and the clarification of strategic points for investors, which include, among other matters, the definition of the return rates – are essential not only to increase the investments, but also to sustain their long-term growth.

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Breathing Room: The Alberta Court of Appeal Addresses the New Limitation Period for Third-Party Claims

August 13, 2015 | Christopher Petrucci

The limitation period for a defendant seeking contribution from a third party has changed. In last month's Alberta Court of Appeal decision of *Whitecourt Power Limited Partnership v Elliott Turbomachinery Canada Inc.*, 2015 ABCA 252 (*Whitecourt Power*), the Court interpreted a recent amendment to the *Limitations Act* in respect of third party claims.

The introduction of this amendment, and the Court's interpretation of it, modifies the law in a manner that may provide a defendant named in a lawsuit with a longer limitation period for filing a third-party claim. This change in the law is significant for industries where the defendant is often faced with the question of third-party liability, such as project construction, energy, and industrial manufacturing.

Prior to the amendment, which became law on December 14, 2014, the limitation period for a defendant seeking contribution from a third party where the third party may be liable to the *plaintiff*, started from the time that the plaintiff knew or ought to have known of its claim against that third party. The difficulty created with this approach is that the defendant was often at the mercy of the plaintiff's limitation period relative to the third party even though the defendant may not have yet been sued. This limited the defendant's ability to bring third parties into the lawsuit where the limitation period between the plaintiff and the third party had expired.

The limitation period analysis that was the focus in *Whitecourt Power* should not be confused with Rule 3.45 of the *Rules of Court*, which requires a third-party claim to be served by the defendant within six months of receiving a statement of claim. The six-month requirement is often extended upon an application to the Court (and sometimes retroactively), particularly in complex litigation. In light of the new limitation period for claims by a defendant against third parties, Courts may be more willing to extend the six-month requirement, however, that remains to be seen.

Analysis

In *Whitecourt Power*, the plaintiff, Whitecourt, sued the defendant, Interpro, alleging breach of contract and negligence in respect of Interpro's 2008 overhaul of a turbine-generator belonging to Whitecourt. Whitecourt served its statement of claim on Interpro on August 20, 2010. Interpro filed and served its statement of defence on October 1, 2010. Later, on October 12, 2012, and after obtaining permission from the Court, Interpro filed a third-party claim against Elliott Turbomachinery, which was responsible for balancing the turbine rotor of the turbine-generator.

The third-party claim sought contribution from Elliot partly on the basis that Elliot owed a duty to Whitecourt directly in respect of the balancing work, otherwise commonly known as a contribution claim under the *Tort-Feasors Act*. Interpro also alleged, in the alternative, that Elliot owed Interpro a duty to balance the rotor, which is sometimes referred to as a common law claim of contribution

Elliott brought an application to summarily dismiss the third-party claim on a number of grounds, including the assertion that the third-party claim was barred by the *Limitations Act*. Elliot argued that since over two years had passed from the time that Whitecourt knew or ought to have known of a claim, to the time that Interpro filed its third-party claim against Elliott, Interpro was statute-barred.

The application was first heard before a Master who found as fact that Whitecourt was aware of a potential claim against the third party, Elliott, on March 24, 2009 (2014 ABQB 135). Because Interpro's third-party claim was not filed within two years from that date, the Master concluded that Interpro's claim under the *Tort-Feasors Act* was statute barred. However, the Master dismissed the other grounds of Elliot's application with the result that Interpro's claim for common law claim for contribution survived and Elliot remained in the lawsuit.

The Master's decision was upheld by the Court of Queen's Bench. Elliott appealed again to the Court of Appeal. During the course of its appeal, the amendment to the *Limitations Act* concerning limitation periods for third-party claims was passed. Pursuant to the transitional provisions associated with the amendment, the new law applied to Elliott's appeal. In light of the amendment, Interpro cross-appealed, alleging that its claim under the *Tort-Feasors Act* was not statute barred.

The Court of Appeal dismissed Elliott's appeal and allowed the cross appeal. In respect of the cross appeal, the Court overturned the decisions below that struck the third-party claim as it related to claims for contribution under the *Tort-Feasors Act*. In doing so, the Court relied on new sections 3(1.1) and (1.2) of the *Limitations Act*. Applying those provisions, the Court found that the earliest possible date for limitation purposes is when Interpro was served with the Statement of Claim by Whitecourt on August 20, 2010.

However, Interpro was still faced with a limitations problem since Interpro did not file its third-party claim until October 12, 2012, which was more than two years after it was served with the statement of claim. In determining this issue, the Court applied statutory interpretation principles and decided that the amendments contemplated a limitation period start date later than the service of the statement of claim. The Court recognized that a defendant may not know, or ought to have known, of its contribution claim against a third party even after being served with a claim. In this case, the Court found that it was unclear as to when Interpro would have discovered its third-party claim against Elliot and therefore declined to summarily dismiss it.

The amendment to the *Limitations Act*, together with the Court's interpretation of it, provides defendants with some added reassurance that they may not lose an opportunity to recover against a third party because the limitation period between the plaintiff and third party expired. They can take some comfort with the fact that the earliest date that the limitation clock will begin to run for a claim of contribution under the *Tort-Feasors Act* is when the defendant is served with a statement of claim. This change in the law will be particularly helpful for defendants that operate in industries where the question of third-party liability often arises.

Of course, as with all matters concerning limitation periods, it is prudent to identify potential claims as early as possible and to take steps that preserve those claims.

Christopher Petrucci appeared as lead counsel for the plaintiff, Whitecourt, before the Master and the Court of Appeal.

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NEWS & EVENTS

CAN AN EMPLOYEE RELY UPON FACTS UNKNOWN AT THE TIME OF TERMINATION TO PROVE CONSTRUCTIVE DISMISSAL?

July 29, 2015

Peter W. Lightbody
Richards Buell Sutton Employment Newsletter

Sometimes the law permits a person to rely on facts unknown to him or her at a material point in time. Employment law is no exception. It is well established (and perhaps counter-intuitive) that an employer, who bears the burden of proving "just cause" for dismissal, may rely on facts unknown to the employer at the time of termination. This applies even where, to the employer's knowledge, there exist zero facts in support of a "cause" argument at the time of termination.

The British Columbia Court of Appeal recently affirmed this doctrine, known as "after acquired cause", in a case called *Van den Boogaard v. Vancouver Pile Driving Ltd*., 2014 BCCA 168, where the employee had been expressly terminated without cause. The employer learned after the termination that the employee, a supervisor in a safety sensitive industry, had sent text messages to another employee under his supervision seeking to purchase illegal drugs. The court applied this doctrine of "after acquired cause" and ruled the employee was fired with good cause.

Turning to constructive dismissal cases, where the employee generally has the onus of proof, what use can the employee make of unknown facts? ("Constructive dismissal" arises where the employer breaches the employment agreement in some significant way, thereby permitting the employee to treat the employment agreement as terminated, and triggering a notice entitlement for the employee as if the employee had been wrongfully dismissed.) Can the employee later rely on facts that were unknown to him or her at the time the employee takes the position that a constructive dismissal has occurred? According to the Supreme Court of Canada's (SCC's) decision in *Potter v. New Brunswick Legal Aid*, 2015 SCC 10, the answer is not straight forward. The answer is "yes, and no".

The Facts In *Potter*

LAWYERS

Peter W. Lightbody

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The dispute in *Potter* arose from the suspension of the Executive Director of New Brunswick's Legal Aid Society. Potter had been appointed for a seven year term, but the relationship soured after four years and the parties began discussing a buy-out of his contract. Potter then went on sick leave and, during that leave, he was suspended with pay. Subsequently, and unbeknownst to Potter, the employer wrote to the Minister of Justice recommending that Potter be terminated with cause. Potter claimed the actions of the employer amounted to constructive dismissal, and commenced a legal proceeding. When he took the position he had been constructively dismissed, he was unaware of the letter to the Minister recommending he be terminated with cause.

The Trial and Court of Appeal Decisions in *Potter*

Both the Trial Court and Court of Appeal for New Brunswick found no constructive dismissal. The Trial Judge concluded that Potter, by taking the "precipitous course" of commencing a legal proceeding, rather than giving the employer opportunity to lift the suspension, had effectively precluded a productive working relationship and had thereby repudiated the employment relationship. On whether the employee could rely on the letter to the Minister recommending termination with cause, the Trial Judge stated "he could hardly allege he was constructively dismissed based on something the employer did unbeknownst to him."

Although the Court of Appeal agreed with the Trial Court in the result, it suggested the Trial Judge may have erred in ruling the employee could not rely on the letter to the Minister. But the Court of Appeal saw the error as "wholly harmless". The Court of Appeal agreed with the lower court that Potter's commencement of legal proceedings in these circumstances amounted to a repudiation of the employment contract by Potter.

The Decision of the SCC

The SCC overturned the lower courts, finding Potter had been constructively dismissed. The panel of seven judges, however, disagreed on the extent of the employee's right to rely on facts of which he was unaware at the time he took the position he was constructively dismissed.

To understand how the unknown letter to the Ministry was dealt with by the SCC, one must first look to the SCC's reiteration of the test for constructive dismissal. In summary, according to the SCC, proving constructive dismissal involves a two-step analysis. The employee must prove (1) the employer's breach of the contract, and (2) that the breach is substantial enough to demonstrate a repudiation of the contract by the employer. A central question in the case was: at which stage of the analysis might the employee be entitled to rely on unknown facts?

Turning to step one (whether there is a breach by the employer), the SCC did find the letter relevant and admissible. At this preliminary stage, the letter to the Minister was relevant and could be relied upon because the focus here was on whether the suspension was "authorized", and this question was not dependent on the employee's state of knowledge.

But the SCC split on whether the employee can rely on unknown facts at the second step of the test, where the issue is whether the breach by the employer amounts to repudiation. The minority of two judges decided firmly that the employee may indeed rely upon unknown facts at this stage. The minority noted this was the "mirror image" of the "after acquired cause" doctrine (addressed in the *Van den Boogaard* decision), where facts unknown operate in the employer's favour. The minority wrote:

> … the trial judge excluded from consideration the fact, unknown to Mr. Potter at the time, that the Commission on the very day that it suspended him, sought as well to put in motion the steps to have him dismissed for cause. To exclude this evidence from consideration, as I see it, would be to make the employee's right to claim constructive dismissal depend on whether the employer has succeeded in concealing his or her true state of mind… Happily, the authorities do not support that unattractive position.

Disagreeing with this, the five judge majority ruled that the letter should not be admissible at the second stage of the test. The majority wrote:

> Accordingly, the perspective at the second step … at which the issue is whether the breach was substantial…is that of a reasonable person in the same circumstances as the employee… The question is whether, given the totality of the circumstances, a reasonable person in the employee's situation would have concluded that the employer's conduct evinced an intention no longer to be bound by it. However…the perspective here cannot be stretched so far as to allow the employee to rely on grounds that, although real, were unknown to him or her at the relevant time. Such an approach would risk encouraging disgruntled employees who have quit their jobs to allege constructive dismissal and engage in fishing expeditions against their employers in the hope of identifying evidence in support of their claims.

The policy rationale invoked by the majority is noteworthy. They suggest the law must protect employers from disgruntled employees tempted to engage in "fishing expeditions" for evidence to support a constructive dismissal. Is there not an equally compelling policy rationale that might be raised against the doctrine of "after acquired cause"; that is, to protect employees from unfair post-termination fishing expeditions by mean-spirited employers? One is left wondering whether the minority decision, that would have allowed the employee a broader reliance on the unknown facts, would have been the more fair result. Shouldn't that which is good for the goose be good for the gander?

With a split decision at the SCC on these issues, we can expect that the question of facts unknown to the employee will be a future battleground in constructive dismissal cases. This is particularly so in cases like *Potter*, which involve administrative decision-making to which the employee is not privy until litigation is underway.

/Carey

Comder Central Counterparty S.A. becomes operational

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

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On Thursday, July 30th, 2015, ComDer Central Counterparty S.A. began its operations, with the objective to manage netting and settlement of financial instruments.

To date, each bank typically performed derivatives transactions with customers or other banks on a bilateral basis; however, after the financial crisis of 2008, this became one of the most questionable practices. The laws regarding this matter began to be amended around the globe, and Chile wasn´t an exception. In this context, law 20,345 was enacted on June 6th, 2009, and gave the legal framework for the Financial Instruments Netting and Settlement Systems, but it wasn't until this year that this law took capital importance, due to the creation of the Netting and Settlement Systems for OTC Derivative Instruments, known as COMDER CENTRAL COUNTERPARTY S.A. (ComDer).

ComDer is a company incorporated in accordance with Title II of Law 20,345, to manage netting and settlement of financial instruments, and that will act as a Central Counterparty. A Central Counterparty is the entity with which all operations that would otherwise be settled directly between the parties are settled on a multilateral basis. This system includes a Registration and Confirmation of Operations module and Repository Centralized Operations module. The Central Counterparty acts as a buyer for every seller and as a seller for every buyer, assuming each transaction payment liability and diminishing the bilateral direct interconnection between the institutions involved.

The shareholders of this entity are Servicios de Infraestructura de Mercado OTC S.A. and the Association of Banks and Financial Institutions of Chile AG. ComDer´s direct participants are 17 banks and it has an investment portfolio in highly liquid financial instruments. In this sense, ComDer limits its market risk exposure by investing their surpluses in documents issued by the Central Bank, or fixed income financial instruments issued by banks and financial institutions, or fixed income mutual funds. Investments in financial instruments are short term. The financing policy gives preference to acting with ComDer's own resources.

ComDer will operate by high security electronic means for reception, confirmation, acceptance, netting and settlement of compensation orders received from participants. Specifically, the buyer and seller encapsulate a message through the SWIFT global network, then ComDer matches the information and confirms that the transaction is correct. Once confirmed, the novation of the contract is made by the House, which requests the guarantees and makes the corresponding margin calls.

The acceptance and compensation process is made in real-time and ComDer counterpart will always be a bank. The Central Counterparty objective is to avoid the system´s default, which is accomplished by requesting guarantees from the participants. If one of them is not able to comply with its obligations, the Central Counterparty takes the administration of its portfolio and its guarantees, managing the positions.

Among the main benefits attributed to this new system are the increase in transparency and security in derivatives markets, a better balance between risk management and liquidity cost, operational efficiency improvements and, of course, reduced systemic risk. In addition, when transferring the operational risks to ComDer, the banks are releasing lines and capital requirements.

Finally, on July 23rd, 2015, ComDer received Exempt Resolution No. 226 issued by the Chilean Superintendency of Securities and Insurances, which gave the necessary authorization to initiate its activities, completing the final stage prior to its operation.

Under this authorization, the board of ComDer set as the starting date of operations Thursday, July 30th, 2015 as stated in the plan of implementation. With this commissioning, one of the items of the global regulatory agenda of the Chilean Central Bank was met.

Resolution 0714 of 2015

Thu, 08/06/2015 - 12:20
NewsFlash: 298

Immigration

Resolution 0714 of 2015

Resolution 0714 of June 12, 2015, is issued. This resolution establishes the criteria for compliance with immigration obligations and punitive procedures of the Special Administrative Unit of Migration Colombia.

What Changed?

- The concept of activities that generate profit
- The criteria for the implementation of the **Amendment Opportunity** for companies that do not complete the respective reports through the Information System for Reporting Foreign Nationals (SIRE), due to ignorance of the rule or untimely reports.
- The criteria for irregular entrance and irregular immigration status in Colombia.
- Minor infringements before Migración Colombia.
- The grounds for cancellation of visa or residence permit, as well as the procedure that needs to be undertaken, stay permits, use of the cancellation stamp or termination of the visa, registration in the Platinum Migration Colombia System and communication to the Ministry of Foreign Affairs of Colombia.

Which are the effects of this change?

The "activities that generate profit", have been defined as all the activities that foreign nationals perform, use, add or sum for a third party, with the purpose of participating, attending, receiving, or providing a service, obtaining or not an economic benefit.

The criteria for the application of the Amendment Opportunity for those companies that fail to report through SIRE, due to ignorance of the rule or untimely reports, are:

- **Temporal.** The assigned agent will evaluate the possibility to grant the Amendment Opportunity, assessing the time that has passed between the commission of the offence and the identification by the immigration authorities, being applicable the rule: the longer the time, less possibility of being granted;
- **Extra-process.** The possibility to correct or normalize the migratory situation in the cases mentioned above, is only applicable when there is not a sanction process initiated;
- **Requirement.** The natural or legal person who is granted with the amendment, shall remedy the migratory novelty throughout a requirement, for which it will be asked to sign a letter of commitment where the record will be registered. After expiration of the term of ten (10) business days, the migratory authorities will verify the compliance of the obligation. If the requirement was not responded, the penalty process will start;
- **Recognition.** The opportunity to amendment is a mere possibility to the criteria of the Agent or Professional Immigration Officer that conducts the review and evaluates the application criteria. This petition will operate only

once in the same calendar year and for immigration violations. The recurrence of novelties will result in a penalty process.

The irregular entry as well as the irregular migratory condition, will cause the irregular presence of the foreign national under the following criteria:

- **Irregular Migratory Condition.** Acts attributable to a foreigner due to visa or permit granted and held, or for expiration thereof as a result of force majeure.
- **Irregular Entry.** The foreigner that has entered the country through a non- permitted entrance; avoiding or omitting the migratory control or without the require documentation or fraudulent documentation.

The following minor infractions have been modified:

- Engaging in illegal stay after the five (5) business days granted to foreigners who did not exit the country after being provided with sufficient means by their former employer or contractual partner, within 30 days of the termination of the contractual or employment relationship, cancelation or termination of the visa in the terms of Art. 2.2.1.11.5.7 of Decree 1067, 2015. This provision does not apply to the TP-9 and resident visas.
- Not renewing the Foreigner's ID card within the following 15 calendar days of expiration date.
- Entering or leaving the country without meeting the following legal requirements:
    - The Colombian national who enters or leaves the country without the documents that identifies them as such.
    - Entering the country through a non-permitted entrance.
    - Entering the country through a permitted entrance but avoiding or omitting the migration controls.

The grounds for visa cancellation are the following:

- At any time and by written record. There will not be an opportunity to appeal the decision.
- By deportation or expulsion.
- When it evidences the existence of fraudulent or malicious acts by the applicant to evade the compliance of legal requirements to induce the issuance of a visa. The foreigner who obtains a visa without observing the limitations imposed by national legislation to settle in certain areas of the national territory and to exercise certain activities, will be subject to cancellation of his/her document.

The Special Administrative Unit of Migration Colombia has discretionary powers to cancel a permit of stay in the exercise of its functions and whenever it identifies circumstances that violate the Colombian legal system.

Effective date?

Resolution 0714 is effective as of June 12, 2015 and derogates s Resolution 0360 of April 6, 2015.

For more information please contact to

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Disclaimer

A Right to be Forgotten in Hong Kong?

August 2015

A recent appeal against an enforcement notice issued by the Privacy Commissioner for Personal Data of Hong Kong raised an interesting and highly controversial issue as to whether, and to what extent, individuals in Hong Kong have a "right to be forgotten" entitling them to deletion of personal data in the public domain.

This label of "right to be forgotten" gained significant publicity following a landmark ruling of the European Court of Justice (ECJ) in May 2014 where it held that under certain circumstances search engines are obliged to remove results if they link to webpages that contain information infringing the privacy of EU citizens. The rationale behind this right is to avoid indefinite stigmatisation or censure due to information available about a specific action performed in the past, or at least to avoid search engines producing results that aggravate the resulting harm to affected individuals.

David Webb's case in Hong Kong – a right to remove personal data available in the public domain?

David Webb is a former investment banker turned activist who runs a website at Webb-site.com offering investors information on corporate and economic governance in Hong Kong. The website contains a database which compiles information about the various roles certain individuals play in the financial and public sectors in Hong Kong, for example, directorships in listed companies or membership in governmental advisory bodies. The database also includes reports and links to public documents about that person, such as press articles and court judgments.

The personal data in question in this case are the full names of the parties set out in the court judgments of a matrimonial case heard in open court in Hong Kong. The judgments were published on the Hong Kong Judiciary's website during 2000 to 2002. Some ten years later, in 2010 and 2012, the Judiciary redacted the names in the files on its website and, acting on one of the data subject's complaint, the Privacy Commissioner ordered Webb to follow suit and remove the names from his reports on Webb-site.com.

Mr. Webb refused to follow suit, and in August, 2014 the Privacy Commissioner issued an enforcement notice under the Personal Data Privacy Ordinance ("**PDPO**") against Mr. Webb ordering him to remove the names of the data subjects in question. The ground on which the Privacy Commissioner issued his enforcement notice was apparently Data Protection Principle 3 ("**DPP3**") of the PDPO, which requires that processors of personal data only use personal data for the purposes for which it has been collected, or any directly related purpose. The Privacy Commissioner's position was that Mr. Webb, by maintaining the reports and hyperlinks in the Webb-site.com archives, breached DPP3 by using personal data for a purpose other than the purpose for which it was to be used at the time of collection of the data. Under the PDPO, failure to comply with an enforcement notice constitutes an offence.

While taking down the reports in the interim, Mr. Webb filed an appeal against the enforcement notice, arguing that the personal data was collected at a time when it was publicly available, and so should continue to be accessible. Mr. Webb commented that the enforcement notice, if upheld, "would have a chilling effect on publishing within Hong Kong", with newspapers and websites potentially being ordered to take down articles about convictions, bankruptcies or divorces, information about which is already public.

Mr. Webb's appeal was heard by the Administrative Appeals Board ("**AAB**") in a public hearing on 13 July 2015. The AAB's decision is yet to be published.

Hong Kong law – is there a right to be forgotten?

The treatment of personal data in the public domain is a controversial subject, and has been the subject of enforcement under the PDPO in the past. The Privacy Commissioner issued an enforcement notice in July 2013 to the operator of a smartphone application known as "Do No Evil", which enabled searches for target individuals' litigation, bankruptcy and company directorship data obtained from public databases. Users reputedly made use of the smartphone

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application for due diligence and background check purposes. The Privacy Commissioner determined that the use of personal data obtained from the public domain for due diligence review and background checks was inconsistent with the original purpose of data collection by the Judiciary, the Official Receiver's Office and the Companies Registry, whether such purposes were expressly stated by the relevant registrar or were as determined by the Privacy Commissioner following his review of the functions of these registries. Use of data in such a way "*obviously exceeded the reasonable expectation of the data subjects on public disclosure of their litigation and bankruptcy data*". The Privacy Commissioner stated that "*[t]his case highlights a common misunderstanding that personal data collected from the public domain, not from the data subjects direct, is open to unrestricted use*".

As the law stands now then, there clearly is some basis in Hong Kong law, or at least in the Privacy Commissioner's enforcement policies, for a "right to be forgotten".

The position in Europe: a judicially sanctioned right to be forgotten

In a landmark ruling in May 2014, the ECJ held that under certain circumstances search engines may be required to remove search results if they link to webpages that contain information infringing the privacy of EU citizens.

The ECJ case concerned a Spanish national who requested a search engine to remove certain search links to newspaper announcements of 1998 regarding the forced sale of properties arising from social security debts that contained his name.

The ECJ found that in this particular situation, the processing of the personal data by the search engine was no longer relevant because the original publication was 16 years old and it could not be justified in the public interest or otherwise. An important point made by the ECJ is that whilst the legal basis for a 'right to be forgotten' exists under the EU Data Protection Directive ("**the Directive**"), its exercise needs to be considered on a case by case basis, by considering whether the public interest in accessing the information overrides the individual's right to privacy. In practical terms, an individual could argue that the processing of their data by a data controller is inadequate, irrelevant or excessive; such data is not kept up to date; or the data is being kept for longer than necessary.

It should be remembered that this "right to be forgotten" is a narrow one. The ECJ ruling concerns the de-listing of Internet search results only. The original information continues to exist at the source and can be accessed online directly or by search using search terms other than the individual's name.

Beyond the Webb case: what will happen in Hong Kong?

It will be interesting to see how the AAB decides on the Webb case, which involves a fundamental conflict between the right to privacy, freedom of expression and the right to use personal data in the public domain.

It is clear that ECJ rulings do not bind Hong Kong courts or the AAB and, in any event, the basis of the Privacy Commissioner's enforcement notice differs significantly from basis for the European enforcement action. Commenting on the ECJ litigation on his blog, the Privacy Commissioner noted that "*prima facie, the approach [the ECJ] has taken is not applicable under the Ordinance [PDPO]*". In particular, the Privacy Commissioner expressed the view that a search engine would not be considered a "data user" in Hong Kong; whereas in contrast the ECJ considered the search engine operator a "data controller" (the EU equivalent of a "data user") subject to the Directive.

Furthermore, the ECJ case turned on a finding that the linking to prejudicial data in relation to the individual in questions was "excessive" use of that data rather than the use of personal data for a new, unrelated purpose than for which it was collected (the basis for the Hong Kong enforcement action against Mr. Webb). The ECJ held that the search engine had breached the principle in Article 6(1)(c) that the personal data collected or processed "must be adequate, relevant and not excessive in relation to the purposes for which it is collected and/or further processed". The gist of the ECJ ruling is that the processing of accurate personal data for the purposes for which it was lawfully collected may, in the course of time, become incompatible with the Directive. The Hong Kong enforcement action against Mr. Webb takes a different line of argument that the purpose of placing personal data into the public domain may over time be discharged, at least when the primary publisher of the personal data, in this case the Judiciary, ceases to make the information public.

The issues under deliberation in Mr. Webb's case are perhaps narrower than those at issue in the "Do No Evil" case, where the personal data in question was ordered removed even though the data continued to be published by its primary sources. The forthcoming decision in Mr. Webb's appeal will necessarily, however, explore in much the same way the clashing of policy interests that arise when the interest in having a free flow of news and information poses challenges for privacy interests. Hong Kong's understanding of rights of privacy has expanded considerably in recent years. These issues are increasingly relevant in Hong Kong as elsewhere, and the decision in Mr. Webb's case will be an important one to watch.

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EMPLOYMENT LAW UPDATE

July, 2015

WHAT'S INSIDE

Notifications

- Shops in Maharashtra can now stay open 7 (seven) days a week
- Maharashtra government permits maintenance of records/registers in electronic format
- Short code sms service for employees provident fund members

Proposed Legislation

- Labour Code on Industrial Relations
- Unified Wage Code

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Employment Law Update

A- NOTIFICATIONS

1. SHOPS IN MAHARASHTRA CAN NOW STAY OPEN 7 (SEVEN) DAYS A WEEK

With a view to give businessmen more flexibility, the Industries, Energy & Labour Department, Government of Maharashtra has issued a notification dated March 17, 2015 allowing all retail shops registered under Maharashtra Shops and Establishment Act, 1948 to remain open on all 7 (seven) days of the week. However, it has further clarified that:

(i) The exemption shall remain in operation for a period of 1 (one) year from the date of the said notification;

(ii) The shop shall not remain open after 10 p.m on any day, as opposed to the earlier deadline of 8:30 p.m;

(iii) Even though shops have been allowed to remain open for certain additional hours, no female employee would be allowed to work after 9:30 p.m;

(iv) The employees shall be entitled to overtime wages if they work for more than 9 (nine) hours in a day in accordance with Section 63 of the Maharashtra Shops and Establishment Act, 1948;

(v) Taking into consideration the additional hours so permitted, the employer may appoint new staff or schedule the shifts in a manner that the spread over of an employee shall not exceed 11 (eleven) hours in a day and that no employee shall be required to work for more than 9 (nine) hours in a day or for more than 48 (forty eight) hours in a week.

2. MAHARASHTRA GOVERNMENT PERMITS MAINTENANCE OF RECORDS/REGISTERS IN ELECTRONIC FORMAT

The Maharashtra Government vide a notification dated April 8, 2015 has permitted all organizations/establishments/factories complying with the following acts to maintain their employee related records/registers electronically:

1. Factories Act, 1948 and Maharashtra Factories Rules, 1963 under Rules 96, 99, 105, 106;

2. Maharashtra Shops & Establishment Act, 1948;

3. Minimum Wages Act, 1948 (hereinafter referred to as "**MW Act**");

4. Payment of Wages Act, 1936 (hereinafter referred to as "**PW Act**");

5. Equal Remuneration Act, 1976 (hereinafter referred to as "**ER Act**");

6. Payment of Bonus Act, 1965 (hereinafter referred to as "**Bonus Act**"); and

7. Maternity Benefit Act, 1961.

Notwithstanding the above, organizations/establishments/factories, as the case may be, shall make such records available in hard copy as and when required by the concerned authorities.

3. SHORT CODE SMS SERVICE FOR EMPLOYEES PROVIDENT FUND MEMBERS

On March 11, 2015, the Ministry of Labour and Employment, Government of India launched an additional facility of short code SMS for Employees' Provident Fund (**EPF**) members who have activated their Universal Account number (**UAN)**. The facility will provide the EPF members with their details as available with the Employees' Provident Fund Organization (**EPFO**). The members of EPFO who have activated their UAN can send an SMS from their registered mobile number. This facility is available in ten languages.

B- PROPOSED LEGISLATIONS

The Central Government plans to replace 44 (forty four) labour laws with 5 (five) codes relating to industrial relations; wages; social security; industrial safety and welfare. The said move is aimed to decrease the multiplicity of compliances in labour laws, improve labour relations along with easing the process of doing business in India to boost the 'Make in India' initiative of the Government of India.

These proposed codes, once passed by the Parliament, are expected to overhaul the labour law framework in India. Pursuant to discussion with all stakeholders, the Government is likely to introduce two codes pertaining to industrial relations and wages, namely, the Labour Code on Industrial Relations 2015 (hereinafter referred to as "**LCIR Bill**") and the Labour Code on Wages Bill, 2015 (hereinafter referred to as "**Wage Code**") in the monsoon session of the Parliament (August 5, 2015 to September 30, 2015).

Please find hereinbelow a brief write up providing an insight into the codes as proposed to be introduced.[1]

1. LABOUR CODE ON INDUSTRIAL RELATIONS

The Government has proposed to integrate 3 (three) important labour law statutes, viz., the Industrial Disputes Act, 1947 ("**ID Act**"), the Trade Unions Act, 1926 ("**TD Act**") and the Industrial Employment (Standing Orders) Act, 1946. In this regard, the Labour Ministry has introduced a first draft of the LCIR Bill in May, 2015. The following are some of its key features:

(i) The LCIR Bill proposes to increase the quantum of compensation for retrenchment and closure to 45 days' average pay for every year of continuous service from the current provision of 15 days' average pay for every year of service. Further, an industrial establishment employing

[1] Kindly note that the provisions mentioned herein are proposals which are subject to change pursuant to discussions and debate in both houses of Parliament of India.

less than 50 (fifty) workers is not required to follow the procedure of retrenchment, i.e., giving 1 (one) months notice, 45 (forty five) days average salary for every completed year, etc.

(ii) An industrial establishment in which less than 300 (three hundred) workers are employed would not require prior government permission/approval for retrenchment, lay off and closure of the industrial establishment. Currently, as per the ID Act, every undertaking employing more than 100 (hundred) workers has to apply to the appropriate Government for prior permission at least 90 (ninety) days before the date on which the intended closure becomes effective.

(iii) An industrial establishment employing more than 50 (fifty) but less than 300 (three hundred) workers shall serve a 60 (sixty) days notice to the appropriate Government, before the date on which the intended closure is to become effective. The reasons for closing down the industrial establishment have to be stated in the notice. As per the provisions of the ID Act, at present, every undertaking having more than 50 (fifty) workers but less than 100 (hundred) workers has to send a notice to the appropriate Government at least 60 (sixty) days before the date on which the intended closure is to become effective, stating clearly the reasons for the intended closure of the undertaking.

(iv) 100 (hundred) workers or 10% (ten percent) of the total workers employed in an establishment, undertaking or industry can join together to form a Trade Union and register the same under the LCIR Bill. Currently, 7 (seven) or more people are required to get a Trade Union registered under the Trade Union Act.

(v) In an industrial establishment in which 100 (hundred) or more workers are employed in the preceding 12 (twelve) months, the employer shall necessarily need to constitute a works committee consisting of representatives of employer and workers engaged in the establishment. A works committee would be required to promote measures for securing amity and good relations between the employer and the employee.

(vi) Workers employed in an industrial establishment cannot go on a strike without giving a 14 (fourteen) days notice to the employer. Further, if 50% (fifty percent) or more workers take casual leave on any given day, it will be treated as a strike. Currently, only employees working in a Public Utility Service are required to give notice before going on strike.

2. UNIFIED WAGE CODE

By introduction of the **Wage Code** on March 19, 2015, the Labour Ministry has proposed to merge 4 (four) legislations, namely, MW Act, PW Act, Bonus Act and ER Act into a comprehensive code. Each of these laws defines wages differently. In order to simplify the implementation of the provisions, the Wage Code has adopted the definition of 'wage' as stipulated by the MW Act.

Salient Features of the Proposed Wage Code:

(i) Under the MW Act, both the Central Government and the State Governments are empowered to fix, revise, review and enforce the payment of minimum wages to workers in respect of 'scheduled employments' (i.e., a specified list of employments provided under the MW Act which include inter alia employment in industries such as oil, rice mill, flour mill, mines, sweeping & cleaning, stone-breaking & stone-crushing, etc.) under their respective jurisdictions. The Wage Code proposes to remove the concept of 'scheduled employments' as provided under the MW Act, thereby extending the applicability of the statutory minimum wages to all workmen employed in the State.

As per the Wage Code, the State Government(s) alone shall have the power to fix the minimum wages for all categories of employment.

In light of the aforesaid provision, with the States alone being empowered for fixing the minimum wages for all employments under their jurisdiction under the Wage Code, there seems to be an ambiguity with respect to the procedure for fixing of wages for employments under the jurisdiction of the Central Government.

(ii) The State Government shall review or revise minimum rates of wages at intervals not exceeding 5 (five) years, if the minimum rates of wages have a component of variable Dearness Allowance worked out on the basis of rise in Consumer Price Index Numbers for industrial workers; otherwise such review or revision shall be made at intervals of 2 (two) years.

(iii) Wage Code is one of the first legislations providing express application of the provisions to transgenders.

(iv) The provisions of the ER Act, 1976 have been watered down to a certain extent. While the Wage Code prohibits discrimination amongst male, female and transgender employees on the grounds of gender in the matter of wages in respect of work of same or similar nature, it remains silent on prohibiting gender discrimination in the recruitment of employees (which was specifically provided in the ER Act, 1976).

(v) The Wage Code has done away with the labour inspector and replaced the same with the post of a facilitator. Unlike the inspectors appointed under the MW Act, it is expected that facilitator(s) appointed by the Government would play a more positive and facilitative role. The facilitator shall be required to supply information and advice to the employers and workers on the most effective means of implementing the provisions of the code. Further, in case of a default, before initiation of prosecution proceedings under the Wage Code, the facilitator shall give an opportunity to the employer by way of a written direction to comply with the provisions of the Wage Code.

(vi) Under the Wage Code the appropriate authority shall maintain a list of defaulting employers.

(vii) While the MW Act imposes a paltry sum of INR 500 (Rupee Five Hundred) as fine in the event wages paid are below the statutory minimum wages prescribed under the MWA, the Wage Code proposes to increase the penalties many fold. Kindly note that the increased penalties as provided under the Wage Code are in addition to the compensation (maximum of upto 10 times) payable to the employee on the directions of the concerned authority appointed under the Wage Code.

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ALMOST READY TO JOIN THE CROWD [1]

Fariz Abdul Aziz examines the Securities Commission's guidelines on equity crowdfunding

BACKGROUND

In "*Joining the Crowd*" in Legal Insights 3/2014, we provided an overview of the equity crowdfunding framework proposed by the Securities Commission of Malaysia ("SC") in its Consultation Paper dated 21 August 2014 and Public Response Paper dated 22 September 2014 on the Proposed Regulatory Framework for Equity Crowdfunding ("Proposal Papers").

On 10 February 2015, the SC released the Guidelines on Regulation of Markets under Section 34 of the CMSA ("REF Guidelines"). The REF Guidelines set out the registration and on-going requirements that apply to a "registered electronic facility" ("REF") under Section 34 of the Capital Markets and Services Act 2007 ("CMSA"). In particular, Part E of the REF Guidelines contains additional requirements that apply to an REF which is an equity crowdfunding platform ("ECF Platform").

On 11 June 2015, the SC announced that it had approved the registration of six out of 27 applicants, namely Alix Global, Ata Plus, Crowdonomic, Eureeca, pitchIN and Propellar Crowd+, to operate ECF Platforms in Malaysia ("Operators"). It is anticipated that the offering of equities *vide* the ECF Platforms will commence by the end of 2015.

In this article, we will discuss the requirements which an entity ("Issuer") will have to comply with in order to be hosted on an ECF Platform as well as the provisions that will apply in relation to fundraising on an ECF Platform.

CROWDFUNDING 101

Crowdfunding is a way of raising funds, primarily through the internet, by obtaining small sums of money from a large number of people. According to the UK Crowdfunding Association, there are three types of crowdfunding: donation/reward crowdfunding, debt crowdfunding and equity crowdfunding.[2]

Donation crowdfunding is a form of crowdfunding whereby a person donates money to a cause without receiving any return, except for the satisfaction of having contributed to a cause which he believes in and the cause promoters retain 100% control over their products and services.

[1] An earlier version of this article (without annotations) was first published in Issue 2/2015 (June 2015) of Legal Insights, a SKRINE Newsletter.
[2] http://www.ukcfa.org.uk/what-is-crowdfunding

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Like donation crowdfunding, reward crowdfunding is usually motivated by the donor's desire to support a cause; the difference being that in the case of reward crowdfunding, the donor receives a form of reward, such as event tickets, gifts or coupons, in return for his donation.

Debt crowdfunding is a form of fundraising whereby investors advance money (whether on an interest or non-interest bearing basis) to the promoter of a project.

In equity crowdfunding, an investor receives shares or stocks in return for his investment in the enterprise which promotes the business.

The REF Guidelines only regulate equity crowdfunding and not the other forms of crowdfunding described above.

THE ISSUER

Eligibility

An Issuer which proposes to offer shares under the ECF framework must be a locally incorporated private company (other than an exempt private company).[3] It may be controlled by Malaysians or non-Malaysians. Certain companies, such as listed companies and their subsidiaries, companies with commercially or financially complex structures, companies with no business plans, companies which have a paid-up share capital exceeding RM5.0 million and companies (other than microfunds) which propose to use the funds raised to provide loans or make investments in other entities, are not allowed to raise funds through the ECF Platform.[4]

An Issuer is not allowed to be hosted on multiple ECF Platforms concurrently.[5]

An Issuer which is a microfund may be hosted on an ECF Platform if it is registered as a venture capital company with the SC and has a specified investment objective.[6] A microfund may only raise funds from sophisticated investors and angel investors.[7]

Disclosure requirements

An Issuer which seeks to be listed on an ECF Platform must submit all relevant information to the Operator, including the following:

(a) the key characteristics of the Issuer;

[3] Paragraph 11.13 of the REF Guidelines.
[4] Paragraph 11.14 of the REF Guidelines.
[5] Paragraph 11.15 of the REF Guidelines.
[6] Sub-paragraphs (a) and (b) of Paragraph 11.16 of the REF Guidelines.
[7] Sub-paragraph (c) of Paragraph 11.16 of the REF Guidelines.

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(b) the purpose of the listing and the targeted amount to be raised;

(c) the business plan of the Issuer; and

(d) the following financial information relating to the Issuer:

- for offerings below RM300,000 - financial statements/information certified by the Issuer's management (if such statements/information is required by the Operator for verification purposes);

- for offerings between RM300,000 to RM500,000 - audited financial statements if the Issuer has been established for at least 12 months or financial statements/information certified by the Issuer's management if the Issuer has been established for less than 12 months; and

- for offerings above RM500,000 - audited financial statements of the Issuer.[8]

Limits on fundraising

An Issuer may only raise up to RM3.0 million in a 12-month period, irrespective of the number of projects for which it may seek funding during the aforesaid period.[9] Further, an Issuer may utilise an ECF Platform to raise a maximum amount of RM5.0 million, excluding its own capital contribution and funding through private placements.[10]

The above limits will not apply to an Issuer which is a microfund that satisfies the criteria set out earlier in this article.[11]

THE INVESTOR

Equity crowdfunding will be accessible to sophisticated investors, angel investors and retail investors.

Investment limits

There are no restrictions on the amounts which a sophisticated investor may invest[12], but a retail investor is only allowed to invest a maximum of RM5,000 in any one Issuer and a total amount not exceeding RM50,000 within a 12-month period.[13]

[8] Paragraph 11.19 of the REF Guidelines.
[9] Sub-paragraph (a) of Paragraph 11.17 of the REF Guidelines.
[10] Sub-paragraph (b) of Paragraph 11.17 of the REF Guidelines.
[11] Paragraph 11.18 of the REF Guidelines.
[12] Sub-paragraph (a) of Paragraph 11.21 of the REF Guidelines.
[13] Sub-paragraph (c) of Paragraph 11.21 of the REF Guidelines.

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An investor that is accredited as an angel investor by the Malaysian Business Angels Network may invest a maximum of RM500,000 within a 12-month period without any limit on the amount which it may invest in each Issuer.[14]

Investor safeguards

To safeguard investors, the SC has adopted an '*all or nothing*' (AON) model, whereby an Issuer will only be entitled to the proceeds raised on an ECF Platform if the targeted investment amount has been met[15], instead of the '*keep-it-all*' (KIA) model, where an Issuer will be entitled to receive the proceeds raised even if it falls short of the targeted investment amount.

An investor has a right to withdraw his investment within a cooling-off period of six business days.[16]

An Operator will not be allowed to release the proceeds of the offer to the Issuer if any material adverse change occurs during the offer period.[17] A material adverse change includes:

(a) the discovery of a false or misleading statement in the disclosure document for the offer;

(b) the discovery of a material omission of information required to be included in the disclosure document; or

(c) a material change or development in the circumstances relating to the offering or the Issuer.[18]

To give effect to the above safeguards, an Operator is required to hold the amounts raised in a trust account until the specified conditions for the release of funds are met.[19]

FALLING BETWEEN THE CRACKS?

The following points which were addressed in the Proposal Papers appear to have been omitted from the REF Guidelines:

(a) the right of an Issuer to accept an oversubscription, provided that the Issuer has reserved the right to do so and has disclosed to Investors as to the manner in which it proposes to use the oversubscribed amount and that the total amount raised, including the oversubscription sum, is within the fundraising limits mentioned above;[20]

[14] Sub-paragraph (b) of Paragraph 11.21 of the REF Guidelines.
[15] Sub-paragraph (a) of Paragraph 11.07 of the REF Guidelines.
[16] Sub-paragraph (c) of Paragraph 11.07 of the REF Guidelines.
[17] Sub-paragraph (b) of Paragraph 11.07 of the REF Guidelines.
[18] Paragraph 11.08 of the REF Guidelines.
[19] Paragraph 11.07 of the REF Guidelines.
[20] Paragraph 4.21 of the Consultation Paper.

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(b) details of the mechanism and the window period within which Investors may dispose of their shares in the Issuer through an ECF Platform in order to provide a measure of liquidity for investments;[21]

(c) the requirement for an offering to be a primary offering (i.e. the issue of new shares) and not the sale of issued shares by existing shareholders;[22] and

(d) the flexibility accorded for shares offered in a single offering to be ordinary shares or preference shares or a combination of both.[23]

Another issue which has not been addressed is the effect of section 15(1)(b) of the Companies Act 1965 ("CA") which, *inter alia*, limits the number of members of a private company to 50 (excluding present and former employees of the company or its subsidiaries). This restriction may affect the efficacy of equity crowdfunding as the *raison d'etre* of crowdfunding is to raise small sums of money from a large number of people.[24]

The omission of the above matters from the REF Guidelines will not preclude the Operators and Issuers from embarking on equity crowdfunding. Nevertheless, the inclusion of those points would have made the crowdfunding framework in Malaysia more complete.

ALMOST THERE …

No doubt the Operators are now in the midst of drafting their rules to comply with the REF Guidelines, including the requirements that have to be complied with for Issuers to be hosted on their respective ECF Platforms and for Investors to invest in the Issuers.

A 'safe harbour' provision will be introduced pursuant to the proposed Capital Markets and Services (Amendment) Act 2015.[25] The proposed new section 40H of the CMSA provides, *inter alia*, that the provisions of the CA relating to the offering of shares to the public by a private company shall not apply where the offer or invitation is made by a private company on a "recognized market", i.e. a stock market operated by an approved operator registered under section 34 of the CMSA. Once the amendment comes into effect, a private company may offer shares on an ECF Platform to members of the public.

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[21] The SC stated in Paragraph 2.7.6 of the Public Response Paper that it proposes to allow platform operators to provide an avenue for investors to dispose of their shares during a window period of two weeks for every six months in a year to facilitate an orderly disposal of shares held by investors.
[22] Paragraph 3.27 of the Consultation Paper.
[23] Paragraph 3.2.6 of the Public Response Paper.
[24] The SC stated in Paragraph 4.4 of the Consultation Paper that a private company remains responsible for monitoring to ensure that the restriction imposed under section 15(1)(b) of the CA is not exceeded.
[25] The Capital Markets and Services (Amendment) Bill 2015 was passed by the Dewan Rakyat and the Dewan Negara on 18 May 2015 and 1 July 2015 respectively. It will become law upon receipt of Royal Assent and come into operation on a date to be determined by the Minister of Finance.

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It would appear that we will be good to go once the rules of the Operators are in place and the safe harbour provision, enforced. Malaysia is almost ready to join the crowd.

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G□IDELINES FOR GRANTING CONCESSIONS OF TELECOMM□NICATIONS AND □ROADCASTING

On □uly 24, 2015, the Guidelines for Granting Concessions of Telecommunications and □roadcasting were published in the Official Gazette of the Federation ("DOF" for its acronym in Spanish). The Guidelines became effective the day after their publication in DOF, this is, □uly 25, 2015.

The Guidelines establish, in a clear and precise manner, the terms and requirements to be met by those persons interested in obtaining from the Federal Telecommunications Institute (*Instituto Federal de Telecomunicaciones*, "IFT", for its acronym in Spanish) a concession of the ones established in the Federal Law on Telecommunications and Broadcasting (the "LFTR" for its acronym in Spanish).

As may be recalled, the LFTR regulates the following types of Concessions:

- Sole Concession, which is used to render all kind of public telecommunications and broadcasting services. For its purposes, the Sole Concession is also classified in (i) commercial use; (ii) public use; (iii) private use; (iv) social use; (v) communal social use; and (vi) indigenous social use.

- Concession of radio spectrum, which is granted to use, develop and exploit frequency bands from the radio spectrum for determined use. For its purposes, the Concession of radio spectrum is also classified in (i) commercial use; (ii) public use; (iii) private use; (iv) social use; (v) communal social use; and (vi) indigenous social use.

- Concession of orbital resources, which is granted to use and exploit orbital resources. For its purposes, this Concession is also classified in (i) commercial use; (ii) public use; (iii) private use; (iv) social use; (v) communal social use; and (vi) indigenous social use.

Likewise, the Guidelines establish those requirements to be met by current concessionaires who obtained their corresponding concessions under the federal laws of telecommunications and radio and television (repealed by the LFTR), to move into the new concession regime set forth by the LFTR. □y virtue of the aforementioned, the Guidelines establish the new requirements for current concessionaires to transit their concession to the sole concession and to consolidate concessions.

In case you require additional information, please contact the partner responsible of your account or any of the following attorneys:

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Simpson Grierson

FYI

July 2015

PRIVACY LAW
DRONE REGULATION TAKING OFF

Drones are a unique piece of technology that have been capturing the headlines in recent months. Drones have many legitimate and advantageous uses, but just as equally, they are capable of misuse. We are seeing a rapid increase in public awareness of the effect this technology may have on safety and privacy.

In an era where computing and technology are ubiquitous, law makers often scramble to catch up with new developments. Yesterday the Civil Aviation Authority (**CAA**) launched new civil aviation rules for the operation of "remotely piloted air crafted systems", that is, drones.

The main focus of the rules are the safe use of drones and privacy. This FYI looks at these new rules and the privacy concerns that go hand-in-hand with using drones.

WHY ARE DRONES SO UNIQUE?

Drones can be purchased online for as little as $300. Unlike most cameras or recording devices, drones operate in the air and are controlled remotely. The person in control may be difficult to identify. Drones are highly mobile and can access angles and pictures previously unavailable to the general public.

This creates a particularly difficult situation for someone recorded by a drone, because in order to take any legal or other action, the operator of the drone invariably needs to be identified.

THE NEW RULES

The new rules deal with the safety (and some of the privacy) issues raised by drones. Coming into force on 1 August 2015, the rules require:

- Operators of certain drones to gain certification from the CAA;
- Drone operators to get permission from property owners (both public and private), before they may fly their drone overhead;
- Drone operators to have the consent of anyone they want to fly over (on both public and private land);
- That drones cannot be flown out of the sight line of the operator (unless they have special certification); and
- That drones cannot be flown at night unless they are flown:
  - indoors; or
  - within 100m of a tall structure, as these areas will not likely present flight risks to other aircraft.

The CAA will be primarily responsible for enforcing the rules. Anyone who breaches the rules may be issued with an infringement notice or have committed an infringement offence. In more serious cases the CAA may prosecute. Infringement offences or prosecution may result in liability to pay a fine. The exact extent of these fines has not yet been released.

DON'T FORGET THE PRIVACY ACT!

The use of drones is on the Privacy Commissioner's radar and operators of drones with cameras must keep in mind their Privacy Act obligations. The Privacy Commissioner has already considered complaints relating to drones. In the Privacy Commissioner's view, the information privacy principles in the Privacy Act are technology neutral, and must be considered by any agency that operates drones.

Any operator of a drone with a camera that is an agency under the Privacy Act could need to explain to any individual who may be recorded:

- That personal information is being collected by way of a recording;
- Why it is collecting the information;
- Who exactly is collecting the information; and
- How it intends to use the information.

The agency will also have to comply with the duties to keep the information safe, make sure only authorised people can access it, and to provide a right of access to the information by the individual or individuals concerned.

COULD A DRONE OPERATOR BE SUED?

Potential liability for privacy breaches has been a developing area of case law in the Courts worldwide. Conceivably, any operator of a drone, whether an agency under the Privacy Act or not, may be exposed to liability for breach of privacy or intrusion upon seclusion, depending on how the drone is used, and what it might record.

A **breach of privacy** will be established if the individual can show the publication of facts in respect of which there was a reasonable expectation of privacy and that publicity of those facts is highly offensive to an objective reasonable person.

Intrusion into seclusion is established if an individual can show:

- an intentional and unauthorised intrusion;
- into seclusion (namely intimate personal activity, space or affairs);
- involving infringement of a reasonable expectation of privacy;
- that is highly offensive to a reasonable person.

Of course, these claims will be subject to the overriding defence of legitimate public interest.

CRIMINAL OFFENCES

The criminal implications of drone activity cannot be ignored.

- **Crimes Act, "Intimate visual recordings":** It is an offence to intentionally or recklessly make an intimate visual recording of another person without their consent. There is an even greater ability to capture this kind of activity with drones and, as we saw in the Christchurch office workers scandal, if people see an intimate visual encounter they could record it and distribute it.
- **Summary Offences Act, "Peeping or peering":** It is an offence to peer into people's homes and record any activity within at night time.
- **Harmful Digital Communications Act 2015:** It is an offence to intentionally cause harm by posting a digital communication where the image/video recorded by a drone is sent/posted as a digital communication without the individual's consent.

MORE REGULATION COMING?

In its 2010 review of New Zealand's privacy law the Law Commission recommended that the Government pass legislation dealing specifically with surveillance devices, such as drones. The Government considered that it was too early in the review of privacy laws to comprehensively consider these recommendations. It remains to be seen whether the Law Commission recommendations will be incorporated into the upcoming privacy law reform.

KEEP IN TOUCH

The new rules apply to both commercial entities and individuals so it is important that both groups understand the legal implications of the use of drones. If you are interested in this area, please get in touch with one of our Key Contacts listed in this FYI to discuss how using drones might affect you.

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A SIMPSON GRIERSON PUBLICATION

24 July 2015

Amendments to the Enforcement Rules of the Taiwan Fair Trade Act

Stephen Wu / Yvonne Hsieh / Wei-han Wu

After the amendments to the Taiwan Fair Trade Act ("TFTA") came into effect earlier this year, the Taiwan Fair Trade Commission ("TFTC") subsequently announced the amendments to the Enforcement Rules of the Taiwan Fair Trade Act ("Enforcement Rules") on July 2, 2015. Below are the key features of the amendments:

(1) The definition of "control/subordinate" relation was newly added.

The "control/subordinate" relation under Article 10 Paragraph 2 and Article 11 Paragraph 2 of the merger control rules of the TFTA is newly included in Article 6 of the Enforcement Rules. To be specific, when enterprise A holds more than half of the shares in enterprise B, or if enterprise A directly/indirectly controls the business operation or the appointment or discharge of the personnel of enterprise B, enterprise A can be viewed as having control over enterprise B. Furthermore, in the event that the whole or the major part of the business or assets of enterprise B is assigned or leased to enterprise A, or where enterprise A operates jointly with enterprise B on a regular basis, or is entrusted by enterprise B to operate enterprise B's business which results in enterprise A having controlling power over enterprise B, this situation can also be seen as a type of "control/subordinate" relation.

Additionally, Paragraphs 3 and 4 of Article 11 of the TFTA provide that a person or an organization that has controlling interest in an enterprise is deemed as an enterprise in terms of a merger filing case under the TFTA. To be in line with the above provisions, the Enforcement Rules stipulate that if a person or an organization and/or its related persons hold a majority of the total number of outstanding voting shares or the total capital of another enterprise, it should be concluded that the "control/subordinate" relation exists among the aforementioned entities.

Moreover, the "control/subordinate" relation is presumed to exist if a majority of the executive shareholders or directors in a company are simultaneously acting as the executive shareholders or directors in another company, or if a majority of the total number of outstanding voting shares or the total amount of the capital interest of a company and another company are held by the same shareholders.

(2) The provisions regarding the party responsible for a merger filing and the required documents therefor

have been amended.

In relation to the filing party, the newly added provision stipulates that in a combination type of acquisition of shares or capital contributions of another enterprise, if a control/subordinate relation exists between the acquirers or the acquirers are under control of one or more entities, the filing party should be the ultimate parent company of the acquirers.

As to the required documentation, to be in line with the amendment to Paragraph 2, Article 11 of the TFTA, the Enforcement Rules stipulate that apart from the participating parties' sales revenue of the previous fiscal year, such sales information of an enterprise that is controlling, controlled by, or affiliated with the enterprise in the combination, and of an enterprise where both it and the enterprise in the merger are controlled by the same enterprise(s) should also be included in the newly added Annex 2 of the merger filing form. Moreover, in the event that a controlling interest exists, as defined by Paragraph 3, Article 11 of the TFTA, the person or the group and their related persons' shareholding status in other enterprises' shares/capital contributions should be provided in the newly added Annex 1-2 of the merger filing.

In the past, many filing parties were unable to collect the information from all related parties due to the party being an international conglomerate, a hostile takeover, or estate disputes among family enterprises, so that the filing of documents could not be completed. Besides, since the new TFTA expanded the scope of merger control to include affiliated enterprises and persons/groups having controlling interests, it is even more likely that the filing parties may face difficulty in collecting the complete information. Thus, as a compromise with the filing practice, the new additions to the Enforcement Rules stipulate that in case there is a justification for the failure of providing required documents, such justification should be explained in the merger filing.

(3) The justification for resale price maintenance was newly added.

According to Article 19 of the TFTA, an enterprise may restrict the resale price of its counterparty if such measure can be justified. As to the "justification," the TFTC, after referring to international trends, introduced/included certain factors in the Enforcement Rules, which include encouraging the downstream enterprises to escalate the efficiency and quality of pre-sale service, preventing free-rider, boosting the entrance of new enterprises or brands, promoting inter-brand competition or other economically reasonable matters related to competition concerns.

(4) The standard test for "inducement with low price" and "likelihood of restraining competition" was newly added.

Article 20 Paragraph 3 of the TFTA stipulates that an enterprise shall not prevent competitors from participating or engaging in competition by inducement with low prices, or other improper means in a way that is likely to restrain competition. The Enforcement Rules provide that "inducement with low price" means offering a price far below cost or extremely disproportionate so as to prevent a competitor from competing. In general, the benchmark for determining inducement with low price is the average variable cost, but on certain exceptional occasions, market structure, product characteristic, average avoidable cost, average incremental cost, or purchase cost can also be considered.

Additionally, Paragraph 2, Article 20 of the TFTA stipulates that an enterprise shall not unreasonably discriminate against another enterprise in a way that is likely to restrain competition. With respect to the determination of the likelihood of restraining competition, the Enforcement Rules provide that the totality of such factors as the intent, purposes, and market position of the parties, the structure of the market to which they belong, the characteristics of the goods, and the impact that carrying out such restrictions would have on market competition shall be considered. Meanwhile, the above-mentioned factors in determining the likelihood of restraining competition can also be applied in an "inducement with low price" case under Paragraph 3 of Article 20 and in an improper restriction case under Paragraph 5 of Article 20.

If you have any further inquiries, please do not hesitate to contact us.

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client alert

BANKING AND FINANCE | UKRAINE 10 AUGUST 2015

NEW LAW: REVIEW OF THE BANKING SECTOR REFORM

Draft Law no. 2045a On Amendment of Certain Laws of Ukraine Related to Improvement of the System for Individual Deposit Guarantee and Removal of Insolvent Banks from the Market has been approved by Verkhovna Rada in July. If signed into law, it will bring a revision of many substantial rules on how insolvent banks are dealt with.

Below are selected changes that will directly affect creditors of sub-standard banks.

RANKING OF THE CREDITORS

The Parliament has amended the ranking of the creditors: now, individual entrepreneurs are at par with ranks 4 and 6 (individual depositors not covered by the DGF payments and claims of the individuals under the checking account agreement, respectively). Two new rankings 7 and 9 were created, respectively: (7) claims of other unaffiliated depositors and of unaffiliated legal entities - customers of the bank; (9) claims of affiliated creditors of the bank. It must be stressed that claimants of the subordinated debt are the only creditors behind the affiliated creditors of the bank and can only improve their position by taking a pledge (mortgage) over the bank's assets.

REVISED RULES FOR THE STATE TO BAIL OUT BANKS

The state of Ukraine must pay for removal from the market of a systemically important bank in one of the following forms or combination thereof:

(i) acquisition by the Ministry of Finance or by a state-owned bank of (a) the insolvent bank or (b) its assets and liabilities; and/or

(ii) transformation of the insolvent bank into a 'transition bank' with the state acting as investor.

We note that potential targets of such mandatory bail out are: four privately owned banks: Delta Bank, Privat Bank, Raiffeisen Bank Aval and Ukrsotsbank; two banks controlled by the Russian Government - Prominvestbank and Sberbank Rossii.

INVALID *AB INITIO.* RESET

The Draft law further expands the grounds to invalidate contracts if the bank - counterparty has become insolvent: when the bank is sub-standard (in the NBU classification), it cannot form new, extend or transform pre-existing contracts if that would result in the increased costs for the removal of such bank from the market. We believe the clause seeks to address, primarily, the issue of attracting (preserving) deposits at higher interest rates or split of large deposit into several small ones to increases exposure of the Deposit Guarantee Scheme. However, this 'catch all' language makes it harder to transact with the sub-standard bank in any type of a contract.

The legislature had mixed progress in clarification of the criteria for ‘creating privileges to one creditor over another’ - the law explains, that the DGF must suspend operation under the transaction that seeks to: (i) secure performance by the bank under the obligation that has arisen prior to the temporary administration of the bank; (ii) change ranking of the creditor; or (iii) perform obligations early.

RING FENCING THE ASSETS OF INSOLVENT BANKS

The Draft law restated key provisions on the rights of third parties to the assets of insolvent banks. First, while the bank is under temporary administration, no foreclosure on its assets can take place, including attachment; existing attachments and public liens on the assets of the bank must be lifted. No creditors of the bank can benefit from the offset (in any way under the Civil Code of Ukraine) during this period.

Second, during the liquidation, the bank can accrue certain interests and penalties, at discretion of the liquidator. Further, the liquidator can allow offsets with unaffiliated creditors, provided they did not acquire their claims to the bank; i.e., such creditors can, if needed, assume the debt to the bank, for example, from the borrowers. The law effectively prohibits consolidation of debt / investment in the claims to the bank. The cross-currency exchange rate applicable to the offset (when such is allowed), is the official rate on the date when the DGF starts removing the bank from the market.

Third, although some MPs proposed to save banks through conversion of deposits into hares, however the sponsors of the law shelved the idea.

PROCEDURAL REMEDIES

Activities of the DGF with respect to the insolvent bank cannot be restrained by a court injunction or attachment of assets. Moreover, any attachment of the bank’s assets instituted prior to the bank becoming insolvent will not prevent a transfer of such assets, e.g. to the transition bank.

Furthermore, neither the insolvent bank, nor its beneficiaries can contest acquisition of the former’s shares or assets and liabilities, claim any direct or collateral damage on the grounds of invalidity or illegality of the transfer; such prohibition comprises non-fallibility of the decisions and actions by the DGF and its counterparties in the above transfers.

LIQUIDATION OF BANKS FROM THE OCCUPIED TERRITORIES

The law resolves situation with the banks registered in the Crimea and East Donbas through liquidation - the National Bank of Ukraine must decide on revocation of the licenses and liquidation of the banks that neither participate in the centralized system of electronic payments nor conduct other banking activities. In practical terms, the DGF will be able to seize and sell the assets of such banks held in ‘mainland’ Ukraine which are within the reach of the executive and judicial authorities. The constitutionality of this approach, however, can be seriously questioned.

DAILY MONITORING

Each bank will be obliged to keep a database of depositors, their deposits and interest liabilities that can be accessed by the Deposit Guarantee Fund (DGF) on a daily basis. In its turn, DGF must publicise certain information with respect to the insolvent bank, in particular:

- financial reports;
- main sections of the assets evaluation report;
- results of the inventory check (actual assets v. assets on the balance);
- ways and means applicable to the disposal of the bank’s assets;
- schedule of expenses incurred by the DGF in administration of such bank.

A bank may not be placed into temporary administration for longer than two months (used to be 3-6 months), including permitted extensions.

Note to the reader: There are currently about 60 of insolvent banks (UAH 300 billion balance sheet value) under the management of the Fund and its agents. The figure can double or triple under the strategy announced by the National Bank of Ukraine.

BANKING & FINANCE
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MLP Parity Act Reintroduced

24 June 2015

Updates

On Wednesday, June 24, 2015, Senators Chris Coons (D-DE) and Jerry Moran (R-KS), Representatives Ted Poe (R-TX) and Mike Thompson (D-CA), and their co-sponsors introduced the Master Limited Partnerships Parity Act, which would make renewable energy projects eligible for inclusion in MLPs. The proposed legislation is similar to versions introduced in prior Congresses, but it includes some revisions, such as an expansion to cover renewable energy projects that are leased by the MLP to its customers.

Master limited partnerships, or MLPs, use a favorable provision in current tax law that allows a publicly traded entity to be treated as a partnership for federal income tax purposes and thereby avoid federal income tax at the entity level. To qualify for this tax treatment, an MLP must generate at least 90 percent of its income from qualifying sources, such as natural resources, real estate, interest and dividends.

The proposed MLP Parity Act would expand the definition of MLP qualifying income to include certain income from:

- renewable energy projects, including wind, closed and open loop biomass, solar, municipal solid waste, hydropower, marine and hydrokinetic, fuel cells, and combined heat and power
- waste-heat-to-power, carbon capture and storage, and energy-efficient buildings and
- biodiesel, renewable fuels and renewable chemicals.

Enactment of the MLP Parity Act is uncertain at this time, but it has a broad base of political and industry support. Congressional tax writing committees are focused on tax reform, and have been reluctant to refine current tax benefits in the Internal Revenue Code that may be repealed later as part of tax reform. However, due to uncertainties regarding the prospects of tax reform, members of Congress are beginning to evaluate more limited tax legislation packages. Such a package could include member priorities such as the MLP Parity Act. Alternatively, energy legislation could include energy tax provisions such as the MLP Parity Act. Our recommendation is to remain vigilant for such bills, and should they progress, offer your support of them to members of Congress.

The MLP Parity Act, if enacted, would not adversely affect any current MLP. All projects currently eligible for inclusion in an MLP would continue to qualify exactly as under existing law. (However, the IRS has recently proposed regulations that would affect existing MLPs. To download a discussion by Baker Botts MLP tax lawyers on these new proposed regulations, click here.)

To view the press release, summaries and text of the MLP Parity Act, click here.

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Publications

Possible Circuit Split as 9th Circuit Declines 2nd Circuit's Invitation to Narrow Insider Trading Liability

July 2015

By Conner G. Peretti

On July 6, 2015, the 9th Circuit upheld a conviction in a family insider trading scheme in *U.S. v. Salman*, departing from the 2nd Circuit's landmark *U.S. v. Newman* decision that narrowed the definition of "personal benefit" to the tipper sufficient to sustain a conviction (we reported on *Newman* here. http://cdn.ca9.uscourts.gov/datastore/opinions/2015/07/06/14-10204.pdf The possible Circuit split increases the likelihood that the U.S. Supreme Court will decide the issue. The 9th Circuit's opinion in *Salman* is available here. http://cdn.ca9.uscourts.gov/datastore/opinions/2015/07/06/14-10204.pdf

In *Newman*, the 2nd Circuit dismissed indictments against two individual "tippees" convicted of insider trading because the government failed to prove that they knew that the insiders who tipped them the information received a "personal benefit" for the tips. The 2nd Circuit departed from earlier case law and found that a "personal benefit" is sufficient only if it "generates an exchange that is objective, consequential and represents at least a potential gain of a pecuniary or similarly valuable nature."

In *Salman*, the 9th Circuit reverted to earlier Supreme Court case law on the issue, *Dirks v. SEC*, and declined to adopt the 2nd Circuit's analysis. In *Salman*, the first tipper worked at an investment bank and provided confidential information to his brother, who tipped Salman, who was engaged to the first tipper's sister. The 9th Circuit applied the holding in *Dirks* in finding that "personal benefit" included "[p]roof that the insider disclosed material nonpublic information with the intent to benefit a trading relative or friend."

The U.S. Attorney's Office for the Southern District of New York, which prosecuted the *Newman* case, lost its petitions for en banc and panel review in the 2nd Circuit. The *Salman* case may motivate them to seek certiorari from the Supreme Court given a fair argument for a Circuit split after *Salman*.

Also of note is the fact that the author of the *Salman* decision was Judge Jed Rakoff. Judge Rakoff is a district judge from the Southern District of New York who was sitting by designation in *Salman*. It is well known that Judge Rakoff did not agree with the 2nd Circuit's *Newman* decision, but he is bound by that decision sitting as a district judge in New York. By sitting by designation in the 9th Circuit, Judge Rakoff had the opportunity to differ with the reasoning of the 2nd Circuit that usually oversees his work. The 9th Circuit policy is to assign judges to panels randomly.

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Noteworthy

New Hawaii Laws that Could Affect Your Business

07/31/2015

By Anne Horiuchi | First published July 31, 2015 on akamaiemployer.com

The Hawaii 2015 Legislative Session resulted in the passage of several new laws that may impact your business.

For hotels, **Act 137 relating to Service Charges** took effect on June 19, 2015. This law requires hotels to either distribute porterage service charges to employees in full, or notify customers that service charges are being used for other purposes. As defined by Act 137, “porterage” is the “act of moving luggage, bags, or parcels between a guest room and a lobby, front desk, or any area with vehicular access at a hotel, hotel-condominium, or condominium-hotel.”

As of July 1, 2015, technology businesses are prohibited from including non-compete or non-solicit clauses in their employment contracts pursuant to **Act 158 relating to Employment Agreements**. A “technology business” is a “trade or business that derives the majority of its gross income from the sale or license of products or services resulting from its software development or information technology development, or both.” However, any trade or business in the broadcast industry or any telecommunications carrier is exempt from this definition of “technology business.” Act 158 does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before July 1st.

Hawaii law currently prohibits smoking in all enclosed or partially enclosed areas of places of employment, and within 20 feet from entrances, exits, windows that open, and ventilation intakes that serve an enclosed or partially enclosed area where smoking is prohibited. As of January 1, 2016, **Act 19 relating to the Regulation of Tobacco Products** will prohibit the use of electronic smoking devices in places where smoking is prohibited. An “electronic smoking device” is “any electronic product that can be used to aerosolize and deliver nicotine or other substances to the person inhaling from the device, including but not limited to an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, hookah pipe, or hookah pen, and any cartridge or other component of the device or related product, whether or not sold separately.” Employers with no-smoking policies may want to review their policies to ensure that electronic smoking devices are included in those policies by January 1, 2016.

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Health Alert
August 13, 2015

See note below about Hogan Lovells

OIG Clears a Path for Limited 'Quick Start' Program in New Advisory Opinion

Recently, an increasing number of pharmaceutical manufacturers have sought to provide limited free supplies of their drugs to patients initiating therapy, including those who experience delays in obtaining insurance coverage. A significant question facing those manufacturers has been whether to exclude federal healthcare program beneficiaries from such programs to minimize risk under the federal anti-kickback statute. In Advisory Opinion 15-11,[1] issued on August 12, 2015, the Office of Inspector General (OIG) approved a "quick start" program for the first time, concluding that although the program could potentially generate prohibited remuneration under the federal anti-kickback statute, OIG would not impose sanctions based on the program under either the anti-kickback statute or the beneficiary inducement provisions of the civil monetary penalties law. The OIG's reasoning relies heavily on the narrow tailoring of the program, as well as on several unique aspects of the drug itself. As the Advisory Opinion itself acknowledges, OIG might well reach a different conclusion regarding a free supply program that did not include the same requirements, limitations, and scope as the program addressed in the Advisory Opinion.

The Drug

The Advisory Opinion emphasizes several unique characteristics of the drug provided through the requesters' program. The drug is approved to treat two serious and potentially fatal diseases. The Food and Drug Administration (FDA) designated the drug as a "breakthrough therapy," a designation given only to drugs (1) intended to treat a serious or life-threatening disease or condition (alone or in combination with one or more other drugs) and (2) for which preliminary clinical evidence indicates that the drug may demonstrate substantial improvement over existing therapies on one or more clinically significant endpoints.

The drug is taken orally and obtained through specialty pharmacies, so physicians cannot bill either for the drug itself or for its administration. In addition, the drug is indicated only as a second-line therapy, i.e., it is prescribed only after another therapy has been tried and failed. While other on-label treatments exist as a second-line therapy for patients with the diseases, most of those alternative treatments have serious potential side effects, including some that have led the FDA to impose so-called black box warnings on the labels of some of the alternative drugs. However, there is no clinical barrier to switching a patient from the drug to alternative therapies, and the typical response time to the drug is under two months.

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The Free Supply Program

In addition to the unique characteristics of the drug itself, the Advisory Opinion also lays out considerable eligibility requirements and other restrictions that sharply limit the scope of the requesters' program, which OIG refers to as the Free Supply Program.

Basic Eligibility Requirements. To be eligible to receive free products under the program, a patient must have received a prescription for the drug, for an on-label diagnosis, and be insured (either by a public or private payer).

Delay in Insurance Coverage Determination. A patient is eligible for the program only if he or she experienced a delay of at least five business days in obtaining an insurance coverage determination. In practice, the patient submits a prescription for the drug to his or her pharmacy, and if the pharmacy does not receive a determination from the patient's insurer within five business days, the patient's prescriber or pharmacy may submit a request for a free supply of the drug under the program to a contracted pharmacy responsible for dispensing drug under the Free Supply Program.

No Commercial Role for Contracted Pharmacy. The contracted pharmacy verifies eligibility and requests that the patient's prescriber provide a new prescription solely for the purpose of dispensing the free drug supply. The contracted pharmacy only dispenses drug for purposes of the Free Supply Program and other special programs, and is not otherwise involved in commercial distribution and dispensing of the drug. Thus, if the patient's insurance eventually approves the drug, any future orders outside the Free Supply Program must be dispensed by another pharmacy selected by the patient or physician.

Limited Supply. If eligible for a free supply, patients initially receive one 30-day supply. If the insurance coverage delay persists or the insurer has denied coverage but the patient is diligently pursuing appeal rights, the patient may receive one additional 30-day refill. After these two supplies are exhausted, the patient may not receive additional free drug supply under the program, regardless of the status of insurance coverage or appeal.

No Billing. Participants in the program are informed that no patient, pharmacy, or payer may be billed for the free supplies. If the patient is a Medicare Part D beneficiary, the contracted pharmacy notifies the Part D plan that the free supply of the drug should not be counted toward the patient's true out-of-pocket (TrOOP) costs and that no claim should be submitted to the Part D plan sponsor for the free supply. OIG notes that applicable Part D formulary and coverage determination rules make it unlikely that many Part D beneficiaries will be eligible for the program in any case.

No Direct-to-Consumer Advertising. Another significant characteristic of the program is that the requesters certified they will not advertise the program directly to consumers or through third party media, though they will provide information about the program on their own websites and to healthcare providers.

Low-Volume Use of the Program. Finally, the actual volume of patients obtaining free drug supply through the program has been small. Since the program began, 0.0008% of all shipments of the drug were shipped under the program, of which about one third went to Medicare or Medicaid beneficiaries.

OIG's Analysis

In concluding that it would not impose sanctions based on the program under the anti-kickback statute, OIG relies heavily on many of the specific facts and circumstances of the drug and the program laid out above. This highly fact-specific analysis reinforces the extremely narrow scope of the Advisory Opinion's endorsement of this type of free supply program.

OIG's most significant point of emphasis appears to be the distinction between the Free Supply Program and other programs in which the manufacturer offers free or reduced-price drug to steer patients to use that drug and obtain other items billable to federal health care programs. OIG cites the following factors to support its conclusion that there is minimal risk of such steering or "seeding":

- The program is not actively marketed to patients;
- The actual volume of patients using the program has been very low;
- Treatment alternatives for the drug are limited; and

- Patients will incur significant cost-sharing if they choose to remain on the drug.

These factual circumstances appear to have been essential to OIG's analysis. Indeed, OIG underscores the limited scope of its approval by explicitly advising that it might reach a different conclusion on different facts, particularly "if the Arrangement were used as a marketing tool or if the Arrangement appeared to be used at a greater rate than would be expected based on typical insurance approval rates."

OIG also cites other case-specific factors in approving the program. For example, OIG emphasizes the small patient population for the drug, the stringent insurance coverage delay requirement, and the maximum 60-day supply to support its conclusion that the program limits the risk of overutilization. Likewise, OIG cites several factors supporting its conclusion that participants have no opportunity to gain a financial benefit, including that prescribers cannot bill for the drug or its administration, that the contracted pharmacy dispensing the free supply cannot obtain further orders from patients outside the program, and that no party (including federal government payers) may be billed for the free supplies.

Conclusion

Advisory Opinion 15-11 is significant in that it represents OIG's first approval of a program providing free supply of drug for patients experiencing insurance coverage delays. However, because OIG's analysis and conclusion rely to a significant extent on facts particular to the drug and the program at issue in the opinion, manufacturers should continue to carefully analyze the risks raised by such programs.

If you have any questions related to the new OIG advisory opinion, please contact one of the lawyers listed in this client alert, or the Hogan Lovells lawyer with whom you normally work.

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1 OIG, Adv. Op. 15-11 (Aug. 12, 2015), available at http://oig.hhs.gov/fraud/docs/advisoryopinions/2015/AdvOpn15-11.pdf

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Flash Legal Report

Obligations established by CADIVI will not need verification in Customs

On June 16th, Administrative Ruling SNAT/2015/022 was published in the Official Gazette N° 40.683, issued by the National Integrated Service of Customs and Tax Administration (SENIAT), completely repealing Administrative Ruling N° 0345, hereinafter referred to as Ruling 0345, published in the Official Gazette N° 38.177 of May 2nd 2005, also issued by SENIAT.

Annulling Ruling 0345 implies that customs agents will not verify compliance with the requirements established by the Foreign Exchange Administration Commission (CADIVI) for natural or legal persons involved in exports, particularly, those involving the registration in the Registry of Users of the Foreign Currency Administration System (RUSAD) and the obligation of presenting the commercial invoice corresponding to each transaction made in the legal tender of the country of destination, or, otherwise, in USD.

This new Ruling applies exclusively to the actions of SENIAT's officials during exportation processes carried out by natural and legal persons within the territory of the Bolivarian Republic of Venezuela.

Consequently, the aforementioned obligations regarding registration in RUSAD and the invoices of the exports in foreign currency will continue to be valid pursuant to Ruling 113, issued by CADIVI, published in the Official Gazette N° 40.128 of March 13th 2013, which establishes the Requirements and Processes for Exportation Operations. The only difference is that, from now on, compliance with said obligations will not be verified.

The new Administrative Ruling came into force on June 16th 2015.

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July 2015

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