PACIFIC RIM ADVISORY COUNCIL

Pacific Rim Advisory Council
February 2015 e-Bulletin

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- **57th International PRAC Conference**
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  April 18 - 21, 2015
- **PRAC @ INTA** San Diego May 2, 2015

PRAC @ IPBA Hong Kong May 7, 2015

- **PRAC @ IBA** Vienna October 5, 2015
- **58th International PRAC Conference**
  Vancouver - Hosted by Richards Buell Sutton LLP
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Events open to PRAC member firms only
www.prac.org

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PACIFIC RIM ADVISORY COUNCIL WELCOMES BENNETT JONES LLP

TORONTO - 19 January 2015: The Pacific Rim Advisory Council ("PRAC") is pleased to welcome Canada's premier business law firm, **Bennett Jones LLP** to membership effective 01 January.

With a 90-year history and unparalleled depth in energy, natural resources and project development, Bennett Jones has over 380 lawyers advising clients on corporate, commercial and restructuring mandates and litigation matters. With exceptional experience in complex cross-border and international transactions, the firm is well equipped to advise foreign businesses and investors with Canadian ventures, and connect Canadian businesses and investors with opportunities around the world.

Established in the early 1920s in Calgary, Bennett Jones grew with the Western economy, expanding to Edmonton (1982) and then eastward to Toronto (1989) and Ottawa (2009). The firm's first expansion outside of Canada came in 2010, opening a representative office in Beijing and a law office in the UAE. The firm's expansion in the Gulf region continued in early 2012 with the opening of an office in Doha, Qatar. In 2013, the firm opened an office in Washington, DC, its first in the United States and, in 2014, the firm opened offices in Vancouver and Bermuda. Bennett Jones is also proud to have been recognized for 13 consecutive years as one of Canada's 50 Best Employers.

Commenting on the latest addition to membership, PRAC Membership Chairman, Marcio Baptista (TozziniFreire, Brazil), said: *"Canada is a key focus not only for PRAC's Asia centric members, but also our membership worldwide. Bennett Jones' formidable track record is unsurpassed. PRAC members know and have worked with its good friends at Bennett Jones in several capacities and are confident in their ability to be able to provide clients with a powerful team of independent-minded individuals who share a common service ethos."*

Bennett Jones Chairman and CEO. Hugh MacKinnon adds, *"We are delighted to join PRAC"*, observing that *"the expertise, the values and the aspirations of the PRAC membership are fully aligned with those we have built at Bennett Jones over our 93 year history.*

Bennett Jones

For more information about Bennett Jones LLP, visit www.bennettjones.com

PACIFIC RIM ADVISORY COUNCIL

For additional information about Pacific Rim Advisory Council or our member law firms, visit us online at www.prac.org

The Pacific Rim Advisory Council ("PRAC") is an international law firm association with a unique strategic alliance within the global legal community providing for the exchange of professional information among its 31 top tier independent member law firms. Since 1984, PRAC member firms have provided their respective clients with the resources of our organization and their individual unparalleled expertise on the legal and business issues facing not only Asia but the broader Pacific Rim region. With over 12,000 lawyers practicing in key business centers around the world, including Latin America, Middle East, Europe, Asia, Africa and North America, PRAC member firms provide independent legal representation and local market knowledge.

CAREY APPOINTS NEW DIRECTOR

SANTIAGO - 29 January 2015: Francisco Corona, a lawyer with extensive experience in Natural Resources, Mining and Environment, has been as appointed Director, at Carey.

Mr. Corono studied law at Undersidad de Chile and was admitted to the bar in 2001. He also has an L.L.M. in Natural Resources and Environmental Law and Policy, with a specialization in mining and energy, from the University of Denver Law School. He is a member of the firm's Natural Resources, Energy and Environment Group.

Francisco Corona is a member of the Rocky Mountain Mineral Law Foundation, and has been as Assistant Professor of Mining Law at Universidad de Chile since 2004.

Carey's Natural Resources, Energy and Environment Group is the largest practice in Chile dedicated to this specialization.

For additional information visit www.carey.cl

SYCIP APPOINTS CORPORATE SERVICES HEAD

MANILA: SyCip Salazar Hernandez & Gatmaitan (SyCipLaw) is pleased to announce the appointment of **Simeon Ken R. Ferrer** as the new head of the firm's Corporate Services Department. His four-year term began on December 1, 2014, after the retirement of **Emmanuel C. Paras** who continues to serve the firm as Of Counsel.

Mr. Ferrer's practice areas include banking, finance and securities, foreign investments, mergers and acquisitions, and corporations. He has assisted Philippine and foreign banks and other financial institutions in connection with equity, debt and derivative securities issues, as well as securitization transactions by Philippine corporations and the Republic of the Philippines.

He also assists foreign investors in structuring their direct investments in the Philippines, such as through special economic zone facilities, joint ventures, subsidiaries and branches. He acts as director, corporate secretary or assistant corporate secretary of various Philippine and multinational corporations engaged in diverse economic activities, such as power distribution, car assembly, mineral processing, manufacturing, pharmaceuticals, semiconductors, and property holding and development.

Mr. Ferrer is a member of the Philippine Bar Association and a Fellow of the Institute of Corporate Directors. He is also the International Alumni Contact for the Philippines of the University of Michigan Alumni Association and heads the firm's Hiring Committee.

The firm's Corporate Services department assists both domestic and foreign clients in setting up business vehicles in the Philippines, such as subsidiaries, branches, representative offices, and regional headquarters. It also renders corporate services and provides general business law advice to support clients' operations and compliance needs.

For additional information visit www.syciplaw.com

DAVIS WRIGHT TREMAINE LAUNCHES PRIVACY & SECURITY PRACTICE 24/7 BREACH RESPONSE TEAM

SEATTLE— 02 FEBRUARY 2015: The privacy and security practice group at Davis Wright Tremaine LLP announces the launch of its 24/7 breach response team, reachable with a single phone call in the event of a suspected breach.

"Data breaches are now a global reality across every industry, and a swift, skilled response is absolutely essential to containing the damage," said Christin McMeley, chair of the firm's privacy and security practice. "We are very pleased to offer organizations access to our trusted and skilled advisors at any hour of the day or night."

The response team's 24/7 hotline is: 844-GoToDWT (844-468-6398).

From lost laptops to sophisticated network intrusions, Davis Wright regularly advises companies of all sizes on how to prepare for, respond to, and recover from information security incidents. The firm's six regional breach response teams include experienced breach coaches who can help determine whether a security incident rises to the level of a breach under the various state and international laws.

"Every security incident has its own distinct characteristics," said McMeley, "so we offer highly customized, yet cost-effective, service based on the organization's size, location, industry, and scope."

If a breach occurs, the team can help address whether consumer, regulatory or other notifications are required or recommended.

Among the many other services offered by the team are:

- Planning for incident response, including tabletop exercises
- Conducting proactive risk assessments
- Counseling on compliance with HIPAA and PCI DSS requirements
- Leading independent investigations and assessments of security incidents
- Counseling on and reviewing insurance coverage
- Assisting with the retention of forensic, security, public relations and other incident response vendors
- Coordinating with federal and state law enforcement
- Notifying regulators and providing follow-up communications
- Notifying consumers and assisting with remediation efforts
- Advising on legal requirements or advantages to providing identity theft protection services
- Defending litigation, including class actions and labor relations claims
- Defending of regulatory investigations and enforcement actions.

The firm can work seamlessly with internal business teams and coordinate with other external professionals, as needed.

For more information, and to meet the members of the team, visit www.dwt.com/incidentresponse.

GIDE ANNOUNCES PROMOTION OF TAX PARTNER AND WELCOMES NEW ADDITION TO COMPETITION & EU REGULATORY PRACTICE

PARIS - 08 February 2015: Gide announces the promotion of Sara Verkest as Tax partner and the arrival of new associate and German lawyer Dr. Angela Guarrata in its Competition and EU Regulatory practice.

Sara Verkest heads the U.S. tax practice in New York. She joined Gide in New York in 2008 and she specializes in the U.S. tax aspects of cross-border transactions (both inbound and outbound). She regularly advises sponsors and participants in the global capital markets on tax efficient structured financings, including cross-border securitizations and securities offerings. She also advises funds and investors on tax issues associated with the structuring, funding, and operation of investment funds and other joint ventures. Sara is a member of the New York Bar, and holds a law degree from the Katholieke Universiteit Leuven (Belgium), as well as a Master's degree in taxation from the Université Libre de Bruxelles (Belgium) and an LL.M. in U.S. international tax from the University of Florida. Sara speaks English, Dutch, French and German.

Commenting on this appointment, Chistopher B. Mead, the partner in charge of Gide's New York office, said: "This promotion is the result of her outstanding work in providing high quality tax advice to our clients. I am confident that Sara will make a great contribution to the growth of our tax practice worldwide."

Admitted to the Cologne and Brussels Bars, **Angela Guarrata's** practice covers all aspects of EU and German competition and regulatory law, with a particular focus on network industries, such as energy and transport, as well as on the agriculture, environment and waste sectors. Prior to joining Gide, Angela was an associate at the Brussels office of German law firm Becker Büttner Held (BBH), where she focused on German and EU competition law particularly in the energy and infrastructure sectors, from 2011 to 2014. Previously, she served as a Senior Research Assistant at the Institute of Air and Space Law of the University of Cologne with a special emphasis on competition law issues in the aviation sector (airports and airlines), from 2009 to 2011. Angela holds a Doctorate in Law from the Institute of Air and Space Law of the University of Cologne, and a post-graduate diploma from the German University of Administrative Sciences (Speyer). She wrote her doctoral thesis on EU State aid law as applied to the financing of airport infrastructure ("Die Finanzierung von Flughafeninfrastruktur und das Europäische Beihilfenrecht im Wandel"). She also studied European and international law at the University of Montpellier, France, as part of the Erasmus programme. In addition to her native German, Angela is fluent in English and French.

"Angela is an experienced German lawyer, in particular in the fields of State aid, public procurement law and aviation law, and we are very happy to welcome her to our team. We already handle a significant number of cases in German, and Angela's arrival will greatly strengthen that capacity", says Gide partner Benoît Le Bret.

For additional information visit www.gide.com

MCKENNA LONG & ALDRIDGE WELCOMES CONGRESSMAN OWENS

Former U.S. Representative from New York brings deep experience to firm's Canada-U.S. practice

12 January 2015: McKenna Long & Aldridge LLP is pleased to announce that Congressman **Bill Owens** is teaming with the firm's Public Policy and Regulatory Affairs practice as a senior strategic advisor. Based on his extensive experience in federal policy in the context of the Canada-U.S. relationship, Congressman Owens will advise Canadian and U.S. clients regarding cross-border commerce. In addition, he will apply his congressional experience as part of the firm's Federal as well as State and Local Government Affairs practice in New York, with offices in New York City and Albany.

"The addition of Congressman Owens further enables our Canada-U.S. practice to provide clients with the strategic insight to operate effectively," said Ambassador Gordon Giffin, former U.S. ambassador to Canada and chair of McKenna Long's International department. "Bill's valuable experience serving in Congress and in the private sector will benefit our clients and further strengthen our accomplished federal, New York State, and Canada-U.S. practices."

Prior to joining McKenna Long, Congressman Owens represented New York's 21st Congressional District in the U.S. House of Representatives. During his years in Congress, he developed a deep understanding of issues impacting constituents and businesses alike, including matters related to U.S.-Canada trade and cross-border investment, health care, and agriculture, among others. As a member of the House Appropriations Committee's Defense and Homeland Security subcommittees, Congressman Owens worked to strengthen existing resources in the region vital to job creation and the local economy, including Fort Drum and the Canadian border.

For additional information visit www.mckennalong.com

GOODSILL WELCOMES TWO NEW ASSOCIATES

HONOLULU – 07 January 2015: – Lisa Y. Tellio and Jennifer F. Chin have joined Goodsill Anderson Quinn & Stifel as associates.

Lisa Y. Tellio concentrates her practice in the areas of trusts and estates. Prior to joining the firm she served as a law clerk to the Honorable Colleen K. Hirai (ret.) of the First Circuit Court of the State of Hawai'i and the Honorable Derrick H.M. Chan, Chief Judge of the First Circuit Court of the State of Hawai'i. After her clerkships, Ms. Tellio was a transactional associate at a mid-sized Honolulu law firm where she focused on trusts and estates, real property and bankruptcy law.

Jennifer F. Chin centers her practice in real estate transactions. Previously, she clerked for the Honorable Gonzalo P. Curiel, United States District Judge for the Southern District of California. While attending law school, Ms. Chin participated in an externship with the Honorable Richard Clifton of the United States Court of Appeals for the Ninth Circuit, and also served clients as a student attorney in the University of California, Irvine School of Law Family Violence and Immigrant Rights clinics.

For additional information visit www.goodsill.com

ARIAS FABREGA & FABREGA

SECURIES FIRST SYNDICATED LOAN FOR BANCOLCOMBIA SUBSIDIARY BANISTMO

PANAMA - 01 January 2015: Panama's Arias, Fábrega & Fábrega have helped Bancolombia subsidiary Banistmo secure a US$400 million syndicated loan.

The Bank of Tokyo-Mitsubishi UFJ, JP Morgan and Wells Fargo were lead arrangers and The transaction closed on 7 October.

The transaction is the first global syndicate loan obtained by Banistmo, and will be payable over a three-year term.

Arias, Fábrega & Fábrega team was led by Partner Estif Aparicio, senior counsel Cecilio Castillero and associate Cedric Kinschots in Panama

For additional information visit www.arifa.com

MUNIZ

ACTS FOR ICB PERU IN BLADEX LOAN

LIMA - 29 January 2015: Banco Financiero del Perú obtained a US$40 million loan from a group of international lenders. The loan was arranged by Banco Latinoamericano de Comercio Exterior (Bladex). Bladex local counsel was represented by Peruvian firm Muñiz Ramírez Pérez-Taiman & Olaya. Other banks in the syndicate were Panama's Banco Aliado, Bancaribe Curaçao Bank in the Caribbean, ICBC Perú, German development bank KFW IPEX and Panama's Multibank.

The loan will be used to finance Banco Financiero's trade transactions in Peru. It closed on 27 November.

Counsel to Bladex Muñiz Ramírez Pérez-Taiman & Olaya, with a team led by Partner Andrés Kuan-Veng and associate Guillermo Flores in Lima.

For additional information visit www.munizlaw.com

CLAYTON UTZ

ADVISES AMCON TELECOMMUNICATIONS LTD ON SCHEME OF ARRANGEMENT OF VOCUS COMMUNICATIONS LTD

PERTH - 17 December 2014: Clayton Utz is advising ASX listed telecommunications and IT company Amcom Telecommunications Limited (ASX:AMM) in respect of its entry into a Scheme Implementation Agreement with ASX listed Vocus Communications Limited (ASX:VOC), announced today.

Under the agreement, Vocus will acquire the outstanding 90 per cent of shares it does not already own in Amcom via a scheme of arrangement. The scheme will be subject to, among other things, Amcom shareholder and Court approvals. If approved, Amcom shareholders will receive 0.4614 Vocus shares for each Amcom share, representing a value of $2.45 per Amcom share.

Clayton Utz Perth corporate partner Mark Paganin is leading the firm's team with support from senior associate Stephen Neale and lawyer Gabrielle Pugh.

For additional information visit www.claytonutz.com

BAKER BOTTS

TRIAL LAWYERS SECURE BILLION DOLLAR DEFENSE WIN IN A NEARLY DECADE LONG LEGAL BATTLE

10 February, 2015: Litigation Update

Background: In a high-stakes, high-profile international dispute, Baker Botts defeated Texas-based Moncrief Oil International in its $1.37 billion dollar lawsuit alleging theft of trade secrets against firm client OAO Gazprom, the Russian-based oil and gas company. The dismissal ended a nearly decade-long legal chess game as the parties battled in federal court and state court. For the last 10 years, Michael Goldberg has been leading the efforts for OAO Gazprom in this dispute. Our partners Michael Calhoon and Van Beckwith were the lead lawyers at trial, for which American Lawyer named them Litigators of the Week.

For a complete case timeline, please click here http://www.bakerbotts.com/file_upload/documents/VanBeckwithAlertTimeline_005.pdf

2015: The Voir Dire, The Testimony, The Document and The Dramatic Ending

The Voir Dire: Mr. Calhoon conducted the voir dire which included 150 prospective jurors from Tarrant County, an exceptionally large pool necessary to work through the possible bias in favor of the hometown Moncrief against the Russian OAO Gazprom and other defendants. After three days of jury selection that included over 70 jurors self-identifying as having some bias against a Russian defendant, a jury of 14 was seated to hear the case.

The Testimony: The court allowed 45 minutes for opening statements. During opening statements, Van Beckwith began laying the foundation for the trial themes -- the supposed trade secret was nothing more than a sales proposal and no interference occurred. Moncrief then called the company's founder and chairman as its lead and centerpiece witness. After a full day of direct examination, Mr. Calhoon cross examined him for two days and received key admissions undercutting the supposed trade secret and any claim of tortious interference. The company president, Jeff Miller, followed and on cross examination by Mr. Calhoon admitted that the supposed trade secret and joint venture with Occidental were far from what was portrayed on direct examination. Then followed the company's former chief financial officer David Maconchy.

The Document: The document -- Plaintiff's Exhibit 1, a supposed discounted cash flow analysis of the trade secret -- was produced late, in response to a Motion to Compel we filed requesting Moncrief to disclose more details about the alleged trade secret. On January 24, when Mr. Beckwith was preparing for cross examination of Mr. Maconchy at trial, he along with senior associate John Lawrence discovered that photographs and cost data buried in the document were pulled from an University of Texas June 2012 article, and could not have been created and printed in December 2004 as suggested on the document. The challenge was on.

The Dramatic Ending: Mr. Beckwith was able to show in cross-examination that the document could not have been created and printed before 2012, and not in 2004 as Mr. Maconchy testified. Our associates then brilliantly assembled during the night a motion for sanctions that was followed by a declaration from the author of the article confirming that the photographs and cost data did not exist earlier than June 2012. The case ended 24 hours later.

Baker Botts Team Members: Partners included Van Beckwith, Michael Calhoon, Michael Goldberg, Ryan Bangert, Tom Phillips, Macey Reasoner Stokes, Aaron Streett and our associates John Lawrence, Kristin Cope, Eddie LaCour, Chequan Lewis, Melissa Hurter, Monica Hughes, Mark Little and Russ Herman.

For additional information visit www.bakerbotts.com

BENNETT JONES

ADVISED REPSOL ON $15.1 BILLION ACQUISITION OF TALISMAN ENERGY

CALGARY - 16 December, 2014: Repsol S.A. ("Repsol"), global energy company headquartered in Madrid, Spain, has entered into an agreement to acquire all outstanding common shares of Canadian oil company Talisman Energy Inc. at $9.33 each, plus assumption of about $5.48 billion of debt.

The deal will transform Repsol into one of the largest energy groups worldwide, adding operations in Colombia, Norway, North America and Southeast Asia, reinforcing its upstream business, which has become the company's growth engine.

The $15.1 billion transaction will be completed pursuant to a Plan of Arrangement and is expected to close in mid-2015. This is the largest international transaction by a Spanish company in the last five years.

Bennett Jones LLP represents Repsol with support of in-house counsel Luis Suárez de Lezo Mantilla, Miguel Klingenberg Calvo and Pablo Blanco Perez, with a team led by David Spencer, that included Jon Truswell and Colin Perry (M&A and securities); Jean Pierre Pham (International Due Diligence); Vivek Warrier (Canadian Due Diligence); John Gilmore (Employment); Susan G. Seller (Pensions); Karen Dawson (Banking & Finance); Don Greenfield (Investment Canada) and Melanie Aitken (Competition).

For additional information visit www.bennettjones.com

HOGAN LOVELLS

ADVISES ALBERTSONS SENIOR MANAGEMENT IN US$9 BILLION ACQUISITION OF SAFEWAY

LOS ANGELES - 30 January 2015: Hogan Lovells has advised senior management of grocery store chain Albertsons LLC in its US$9.2 billion acquisition of Safeway Inc. The deal, approved by the Federal Trade Commission on 27 January, brings together two of the largest grocery store chains in the United States.

The deal was backed by a financial group led by Cerberus Capital Management LP and funded by US$1.25 billion in equity contributions and cash, in addition to approximately US$7.6 billion in debt financing. Albertsons LLC will pay Safeway Inc. shareholders US$32.50 per share in cash and the Safeway Inc. shareholders have or will receive other payments from Safeway, which combined would total approximately US$40.00 per share. Additionally, the company is selling 168 stores to four buyers: Haggen Holdings LLC, Supervalu Inc., Associated Food Stores Inc., and Associated Wholesale Grocers, Inc.

Los Angeles Office Managing Partner Barry Dastin, along with Los Angeles Partner Russ Cashdan, Washington, D.C. Partner Carin Carithers and New York Partner Mark Weinstein, led the Hogan Lovells team. They represented Albertsons' CEO Robert G. Miller and the other members of Albertsons' senior management team in connection with the transaction, with respect to their equity ownership in the combined company and their executive compensation arrangements.

For additional information visit www.hoganlovells.com

BRIGARD & URRUTIA

ACTS FOR GASPROM IN COLOMBIA LNG DEAL WITH CANADIAN OIL & GAS EXPLORATION COMPANY PACIFIC RUBIALES ENERGY

BOGOTA - 03 February 2015: Canadian oil and gas exploration company Pacific Rubiales Energy has closed an agreement to supply Russia's Gazprom liquefied natural gas (LNG) via the world's first floating offshore gas terminal it operates off the coast of Colombia.

The five-year sale and purchasing agreement, announced in November 2013, commits Pacific Rubiales to pipe 0.5 million tons of LNG per year from La Creciente natural gas field in northern Colombia to the world's first floating liquefaction and re-gasification storage unit three kilometres offshore from the municipality of Tolú, on Colombia's Caribbean coast. Gas allocated to Gazprom will comprise a quarter of the pipeline's annual capacity.

Gazprom agreed to pay an undisclosed amount for the gas, which is calculated based on a number of factors, including the international price of crude oil. Reuters estimates the deal to be worth between US$150 million and US$200 million.

To reach an agreement, both parties also had to take into account Colombia's recently amended gas export regulations, which gives the state the ability to suspend gas export contracts in the event of national shortages; requiring legal counsel to draft adequate risk allocation schemes into the contract in the event of the regulation being enacted. Under the new regulations, exporters would be entitled to receive compensation from Colombia's internal supplier.

Gazprom's Singapore-based trading arm retained Colombia's Brigard & Urrutia Abogados. Brigard & Urrutia Abogados Team was led by Partners Carlos Umaña and José Francisco Mafla and associates Claudia Navarro Acevedo and Juan Martín Estrada in Bogotá.

For additional information visit www.bu.com.co

CAREY

ASSISTS MEXICAN CINEMA CHAIN CINEPOLIS ENTER CHILEAN MARKET

SANTIAGO - 22 January 2015: Carey has helped Mexican cinema chain Cinépolis enter the Chilean market through the acquisition of Cine Hoyts from local entertainment conglomerate ChileFilms.

Cinépolis picks up 143 cinemas spread across eight of Chile's 15 regions as a result of the transaction. The acquisition makes Cinépolis the largest cinema chain in the country and further consolidates its presence in Latin America, where it has operations in Mexico, Brazil, Colombia, Costa Rica, Guatemala, Honduras, Peru and El Salvador.

Carey's team was led by Partner Francisco Ugarte and associates Alejandra Donoso, Eugenio Gonzalez, Josefina Joannon and Raúl Morales.

For additional information visit www.carey.cl

GIDE

ADVISES GDF SUEZ ON SIGNIFICANT CONTRACT SIGNING IN CHINA

BEIJING - 02 February 2015: Gide has advised GDF SUEZ, the world's largest independent utility company, on the creation of a joint venture with Sichuan Energy Investment Distributed Energy Systems (SCEI DES) for the development of distributed energy projects in Sichuan.

The contract was signed during the visit of the French Prime Minister Manuel Valls to China.

The agreement with SCEI DES creates a joint venture for the development and operation of natural gas distributed energy projects in Guang'an Huixiang Innovation Park in Yuechi, Sichuan Province. GDF SUEZ has a 49% stake in the joint venture company, while SCEI DES holds the remaining 51%.

Hans-Eckart Niethammer coordinated the GDF SUEZ legal team.

The Gide team, based in Beijing, was led by partner Thomas Urlacher and assisted by associate Chen Xi.

For additional information visit www.gide.com

MCKENNA LONG & ALDRIDGE

OBTAINS DEFENSE VERDICT IN ASBESTOS LIABILITY TRIAL

SAN FRANCISCO - December, 2014: McKenna Long & Aldridge successfully defended building products manufacturer CertainTeed Corporation from a suit filed by the family of a deceased plumber, claiming that his use of CertainTeed asbestos pipes caused his death from lung cancer. On December 16, 2014, an Alameda County Superior Court jury in Oakland, CA, returned a defense verdict for CertainTeed Corporation. CertainTeed was represented at trial by McKenna partner Chris Wood.

Plaintiffs claimed that CertainTeed was liable for exposing the decedent to asbestos from cutting of asbestos cement pipe. CertainTeed showed that the employer of the decedent knew about the health risks of improper handling of its asbestos cement pipe based on CertainTeed's efforts to inform its customers and users. CertainTeed put on evidence that the employer had implemented a policy for safe handling of the A/C pipe. The jury voted unanimously that the CertainTeed asbestos cement pipe did not fail to perform as safely as an ordinary consumer would have expected starting in 1978. The jury determined that CertainTeed wasn't negligent and that if there were insufficient warnings, they were not a substantial factor in causing the decedent's lung cancer.

While the jury also found that the A/C pipe had "potential risks" that were known and that the risks presented "a substantial danger," when asked "Do you find the ordinary consumer would NOT have recognized these risks?" They answered: "No." The "ordinary consumer" was defined as someone at the time of the decedent's exposures (1978-1986). The lengthy trial, presided over by Judge Jo-Lynne Lee, spanned 2 months, starting with opening statements on October 29, 2014 and finishing with closing arguments on December 15, 2014. The jury deliberated 5 ½ hours, later indicating that they spent over four hours on the question of whether asbestos caused the lung cancer. CertainTeed and co-defendant Buttes Pipe & Supply (which also received a defense verdict) had put on evidence that decedent was a smoker and had been exposed to extensive second-hand smoke as a child. Evidence that asbestos caused the lung cancer rested on a finding of uncoated asbestos crocidolite fiber found on autopsy in the lungs. On pathology, there were no asbestos bodies, no pleural plaques and no asbestosis. Pathological evidence of smoking consisted of emphysema as well as anthracotic pigment. Jurors told counsel that they were split on whether plaintiffs had met their burden of proof on asbestos as a cause, and so turned to the warnings and state-of-the-art knowledge questions to reach their verdict.

For additional information visit www.mckennalong.com

NAUTADUTILH

ADVISES WP CAREY IN INVESTMENT IN NEW RABOBANK HEADQUARTERS

AMSTERDAM - 04 February 2015 : US-based investor WP Carey entered into a build-to-suit transaction for Rabobank from Dutch developer OVG. The transaction is one of the largest single asset investment transaction of the past months.

The new 25,000 m2 building will be located at Rabobank's current Eindhoven headquarters' site and is expected to be completed in 2017. The building has been designed to realise an attractive and flexible working environment for 1,500 Rabobank employees. The floors of the building are divisible into independent units, so that multi-tenanting is possible in the future.

NautaDutilh's team consisted of David van Dijk, Kees Koetsier, Frank Spraakman, Niels Hagelstein, Carola Houpst, Daan Jacobs and Tim Grundmeijer.

For additional information visit www.nautadutilh.com

RODYK

ACTS FOR PANASONIC IN SHARE ACQUISITION IN RFNET TECHNOLOGIES PTE LTD

SINGAPORE: Rodyk acted for Panasonic Asia Pacific Pte Ltd (Panasonic) in its acquisition of shares in RFNet Technologies Pte Ltd (RFNet) from various shareholders as well as subscription ofadditional shares in RFNet for a confidential sum. RFNet is a Singapore-based custom wireless, surveillance and networking solution company. Following the completion of this transaction, Panasonic will become the majority shareholder of RFNet.

The transaction forms part of Panasonic's expansion of its commercial wireless network business in Asia as RFNet's product development capabilities, local market understanding and firm establishment in the public transportation and education sectors complement Panasonic's expansion of its infrastructure solution offerings across the region.

This transaction was led by corporate partner Gerald Singham, supported by partners Sarah Choong and Mariko Nakagawa, associate Nicole Teo and foreign lawyer Yoshihiro Obayashi.

For additional information visit www.rodyk.com

TOZZINIFREIRE

ACTS FOR CHEMTURA IN USD $1BILLION SALE OF AGROCHEMICAL BUSINESS TO PLATFORM SPECIALTY PRODUCTS

BRAZIL – 03 November 2014: Chemtura Corporation ("Chemtura") completed the sale of its agrochemicals business, Chemtura AgroSolutions, to Platform Specialty Products Corporation ("Platform"), a global specialty chemicals company, for approximately US$ 1 billion, consisting of US$ 950 million in cash and 2 million shares of Platform's common stock.

With the completion of the sale, Chemtura's core platform is focused around Industrial Performance Products (IPP) and Industrial Engineered Products (IEP) (flame retardants, brominated products and organometallics), global leaders in the markets they serve.

Chemtura Agrosolutions is a leading provider of seed treatment and agrochemical products for a wide variety of crop applications in attractive geographies

Among several other law firms worldwide, TozziniFreire Advogados was involved in the Brazilian part of the deal and also coordinated advices from several law firms in Latin America with respect to transfer of product registrations in each jurisdiction.

More about Chemtura: Chemtura Corporation, with 2013 net sales of $2.2 billion[1], is a global manufacturer and marketer of specialty chemicals. Additional information concerning Chemtura is available at www.chemtura.com.

[1]2013 net sales of $2.2 billion reflects discontinued operations treatment for the sale of Chemtura's Antioxidants and Consumer Products businesses.

More about Platform: Platform is a global producer of high-technology specialty chemical products and provider of technical services. Platform manufactures a broad range of specialty chemicals, created by blending raw materials, and the incorporation of these chemicals into multi-step technological processes. These specialty chemicals and processes together encompass the products sold to customers in the electronics, metal and plastic plating, graphic arts, and offshore oil production and drilling industries.

More information on Platform is available at www.platformspecialtyproducts.com

TozziniFreire Advogados team was led by Partner Claudia Muniz Levasier Mahler; and Partner Ana Claudia Akie Utumi; and Elysangela de Oliveira Rabelo; and Associates Thiago Luiz de Araujo e Silva, Tatiana Gualberto Kascher, Rafael Balanin and Carolina Benedet Barreiros Spada.

For additional information visit www.tozzinifreire.com.br

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- **PRAC @ PDAC** Toronto March 3, 2015
- **57th International PRAC Conference**
  Brisbane
  Hosted by Clayton Utz
  April 18—21, 2015
- **PRAC @ INTA** San Diego May 2, 2015
- **PRAC @ IPBA** Hong Kong May 7, 2015
- **PRAC @ IBA** Vienna October 5, 2015
- **58th International PRAC Conference**
  Vancouver
  Hosted by Richards Buell Sutton LLP
  September 26—29, 2015

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17 December 2014

New international compliance standard launched

The International Organization for Standardization has now published the international standard for compliance management systems ISO 19600-2014.

ISO 19600 is based on and will replace AS 3806-2006, the Australian Standard for compliance programs – as a result, when regulators adopt ISO 19600 as their compliance benchmark for regulated entities, Australian companies who already have an AS 3806-aligned compliance system will find they have a competitive advantage when they compete internationally.

What do you need to do now?

The principles in ISO 19600 are substantially similar to those in AS 3806, so any organisation whose compliance system already aligns with AS 3806 will have little to do apart from a quick health check.

For those organisations with compliance systems that needed some work to make them align with AS 3806, this is a further reason to finalise this.

Australian organisations which have adopted AS 3806 should take note of the following requirements of ISO 19600:

- consider compliance obligations which are mandatory (eg. legislation, licences and permits) and voluntary (eg. internal codes of conduct, industry codes);
- ensure your compliance management system is planned and developed within the context of your organisation's commercial environment, objectives, strategic direction and organisational values;
- the express list of the kinds of documentation which must be present to support the compliance management system;
- adopt a risk-based approach to compliance and in particular, develop an organisational risk appetite for legal compliance risks;
- integrate your compliance management system with your business processes;
- align your operational targets with compliance obligations;
- ensure your organisational culture and the actions taken by your leaders promote a compliance culture; and
- engage with external and internal stakeholders to determine their compliance expectations of your organisation.

These features are arguably implicit in AS 3806, but have been given greater, stand-alone emphasis in ISO 19600.

Randal Dennings was the Law Council of Australia's representative on the Australian ISO Committee which provided significant drafting input into the creation of ISO 19600.

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LIFE SCIENCES & HEALTHCARE

Foreign Investment in the Brazilian Healthcare Sector

Law 13,097 of 2015, which resulted from the conversion into law of Provisional Measure 656 of 2014, amended Section 23 of the National Healthcare System Law of 1990 to allow foreign investment in the Brazilian healthcare sector.

Prior to this change, the participation of foreign investors in the Brazilian healthcare sector was limited by the Federal Constitution, which establishes that foreign capital or companies are not allowed to participate in the sector, directly or indirectly, except for specific cases provided for by the law.

The previous wording of Section 23 of the National Healthcare System Law allowed the participation of foreign capital or companies only in the event of: i) technical cooperation, financing and donations made by international organizations linked to the United Nations Organization; and ii) non-profit health assistance services maintained by companies to assist their employees, with no cost to the Brazilian public healthcare system (Sistema Único de Saúde – "SUS"). In addition, another statute (Law 9,656 of 1998) also allowed foreign entities to invest in companies managing private health insurance plans in Brazil.

The law now authorizes the full participation of foreign capital (including the holding of a controlling stake), either directly or indirectly, in Brazilian companies that operate general or specialized hospitals, policlinics, and general or specialized clinics.

It also authorizes the full participation of foreign capital in activities related to healthcare support, including laboratories of human genetics, production and supply of drugs and health products, and laboratories for clinical, pathology and imaging diagnostics.

The reason underlying the change is to increase competition and, ultimately, to improve the quality and quantity of health services rendered to the Brazilian population.

OSC Proposes New Whistleblower Program, with Financial Awards

February 04, 2015 | Alan P. Gardner, Jeffrey S. Leon, Usman M. Sheikh, Jonathan Ip and James T. McClary

Ontario may soon become the first Canadian jurisdiction to implement a whistleblower program for suspected securities law violations.

On February 3, 2015, the Ontario Securities Commission (OSC) issued Staff Consultation Paper 15-401 – *Proposed Framework for an OSC Whistleblower Program* seeking comment on their proposed whistleblower program. The program, which would offer the potential for substantial financial awards to individuals who come forward with possible breaches of Ontario securities law, would be the first of its kind for securities regulators in Canada and has similarities to the widely-publicized whistleblower program adopted by the United States Securities and Exchange Commission (SEC).

The whistleblower proposal follows the recent implementation of several other enforcement-related initiatives by the OSC, including no-contest settlements, a clarified process for self-reporting and enhanced public disclosure of credit granted for cooperation (OSC Adopts New Initiatives to Strengthen Enforcement), which were designed to resolve enforcement matters more quickly and effectively.

The Proposed Whistleblower Program

The stated purpose of the whistleblower program is three-fold: (1) motivate those with inside knowledge or information relating to possible securities law breaches to share that information with the OSC; (2) increase the number of complex securities law cases pursued by the OSC and the efficiency in those cases by obtaining high-quality information; and (3) motivate issuers and registrants to self-report misconduct.

The consultation paper addresses several key elements of the proposed program, including:

- **Whistleblower Eligibility** – A whistleblower must be an individual and must voluntarily provide high-quality and original information to the OSC that results in an enforcement outcome (including an outcome following a contested hearing or through a settlement).
- **Financial Incentive** – An eligible whistleblower may receive up to 15 percent of the total monetary sanctions awarded or obtained in a regulatory enforcement case (excluding any costs award), with a maximum limit of $1.5 million on any award. A whistleblower can only recover in cases in which over $1 million in sanctions was awarded or obtained.
- **Confidentiality** – The OSC would make all reasonable efforts to keep the identity of a whistleblower confidential, with some exceptions (for example, where disclosure is required to enable a respondent to make full answer and defence or where required by court order). The OSC is also considering allowing whistleblowers to make anonymous submissions through legal counsel.
- **Whistleblower Protection** – The OSC also intends to pursue legislative amendments to offer statutory protection for whistleblowers, including provisions to: prohibit retaliation against a whistleblowing employee by an employer; provide the employee with a civil right of action against any employer who violates the anti-retaliation provision; and render contractual provisions designed to silence a whistleblower from reporting wrongdoing unenforceable.

Notably, unlike the SEC whistleblower program, the recovery of any award by a whistleblower would not be contingent on the successful collection of monetary sanctions by the OSC. The OSC has also proposed to deny eligibility to whistleblowers in several circumstances, including where: the whistleblower was culpable in the misconduct being reported; the information provided was misleading, untrue, had no merit, lacked specificity or was privileged; the information was provided by a director, officer or the Chief Compliance Officer of an issuer who acquired the information as a result of the company's internal compliance program or investigation process; or where information is provided in circumstances that would otherwise "bring the administration of the [program] into disrepute."

Comparisons with SEC Whistleblower Program and Proposed National Regulator Provisions

While the OSC's proposed whistleblower program is similar in many respects to the SEC whistleblower program administered by the SEC Office of the Whistleblower (particularly the provision of a financial award), there are several key differences:

- **Size of Monetary Recovery** – The SEC program may award whistleblowers between 10 and 30 percent of the monetary sanctions (where sanctions exceed US$1 million) actually collected in any SEC enforcement action, with no maximum recovery cap. The OSC program, however, may make awards up to a maximum of 15 percent of total monetary sanctions (where sanctions exceed $1 million), collected or not, with a maximum award of $1.5 million.
- **Culpable Whistleblowers** – The SEC program may provide culpable whistleblowers with monetary awards but considers culpability a factor in decreasing the amount of a whistleblower's award, while the OSC program considers culpability as a factor that makes the whistleblower ineligible for any award (the OSC is seeking comment on the appropriateness of this exception).
- **Right of Appeal** – The SEC program allows a whistleblower to appeal the SEC's decision to deny an award (no appeal is permitted where an amount awarded is between 10 and 30 percent of the monetary sanctions collected), whereas the OSC program as proposed does not provide for any right of appeal.

The proposed OSC whistleblower provisions also share some similarities with the whistleblower provisions contained within the draft uniform provincial securities legislation (the PCMA) published in connection with the proposed Cooperative Capital Markets Regulatory System (National Securities Regulator Moves Forward; Draft Legislation Published). Several differences are noted, including that the PCMA does not statutorily provide for any financial awards or awards program for whistleblowers, nor does it provide a whistleblowing employee with a civil right of action against their employer for violations of the anti-retaliation provisions of the PCMA.

Next Steps

The OSC has requested comments to the proposed whistleblower program by May 4, 2015. The OSC also intends to host a roundtable during the comment period in order to encourage further discussion. Bennett Jones invites clients to contact the firm with any questions or comments and would be pleased to assist clients in preparing and submitting their comments on the proposal.

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/Carey

List of water use rights affected by the payment of a fine for lack of use

On January 15th, Resolution DGA N° 3,438 was published. It contains a list of water rights subject to the payment of a fine for lack of use.

The fine must be paid during the month of March, 2015. The term to contest such resolution is 30 days, as counted from the date of publishing.

To review the list of water rights affected by the payment of fines for non-use **click here.**

The water regulation calls use the payment of a fine by the owner of the water right that is not being effectively or partially used. The Water Bureau (DGA) publishes a resolution every January 15th that contains a list of every water right that is affected to the payment of the respective fine, establishing the amount that must be paid.

In the determination of the amount to pay for each right, the following criteria are relevant:

1. Geographical location;
2. Flow;
3. Consumptive or non-consumptive;
4. Permanent or eventually exercisable;
5. Height (in the case of not consumptive water rights)
6. Years that have passed in which the water right has not been used.

On the basis of these elements, the law establishes a mathematical formula used by the DGA to calculate the amount of the fine.

The payment must be done during the month of March of every year, in any bank or institution authorized to collect taxes. If an owner of a water right does not pay the fine within the indicated term, a judicial procedure will begin to force its payment, which could end up with the auction of those rights.

It is advisable to made an exhaustive review of the list, since it is very common that water rights that are effectively being used are included, or the information contained is not updated or contains errors.

Given this situation, the law allows every owner of a water right to file reconsideration before the DGA within a term of 30 days as from January 15th and also a claim before the respective Court of Appeals.

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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Draft of China's New Foreign Investment Law

01.29.15

By Norm Page, Ron Cai, and Chao Tong

Background and purpose of the new law

On Jan. 19, 2015, the Ministry of Commerce of China ("MOFCOM") published the draft of the Foreign Investment Law ("draft") to solicit public comments. The draft, once finalized, will replace the existing *Foreign Invested Company Law*, the *Sino-Foreign Equity Joint Venture Law*, and the *Sino-Foreign Cooperative Joint Venture Law* (collectively, the "Three Foreign Investment Laws").

The key purpose of the draft is to grant "national treatment" to all foreign investment, except that which falls under the "Special Administrative Measure List" ("Negative List"). This advisory will summarize the major points of the draft, as well as some issues that need to be further clarified.

Redefining the concept of "foreign investment"

The draft significantly broadens the scope of "foreign investment." This broadened scope will include the following activities conducted by foreign investors: (1) green field investments; (2) acquisitions of Chinese companies; (3) provision of long-term finance to the Chinese subsidiaries of the foreign investors; (4) obtaining a right of resource exploration and infrastructure construction or operation; (5) purchasing real estate; (6) controlling Chinese companies by contracts or trusts; and (7) offshore transactions that result in foreign investors obtaining control of Chinese companies.

More importantly, in addition to the current mechanical and straight-forward standard for deciding whether an investor is a foreign investor (e.g., whether such investor is registered outside China or is not a Chinese citizen), the new standard includes "ultimate control." That means, in addition to the current scope of foreign investors, if a Chinese company that is ultimately controlled by a foreign individual or entity engages in "foreign investment" activities, then such Chinese company and such activities will also be subject to the applicable foreign investment restrictions.

On the other hand, the draft also provides that, if a foreign company is ultimately controlled by a Chinese individual or entity, then when such foreign company invests in an industry which falls within the scope of the Negative List (as defined below), it may apply to the MOFCOM to be recognized as a "Chinese investor" and avoid the Negative List restrictions on foreign investment.

- **Key issue: definition of "control"**
  The draft provides that an individual or entity will be deemed to control company if

he/she/it: (1) directly or indirectly holds more than 50 percent of the equities, shares, or voting rights; or (2) has the power to appoint more than half of the directors or members of similar decision-making bodies or the ability to exert significant influence on such bodies; or (3) may exert significant influence upon the company by contract, trust, or other measures. However, in practice, deciding who has actual control may not be so easy. For example, in case the shareholding structure is dispersed, or there are multiple levels of investment, or when a company is controlled by a fund (with a managing GP and other LPs that are the actual capital contributors), the situation would be more complicated. The draft does not provide detailed guidance for such cases.

Simplified foreign investment process

Under the draft, foreign investors whose investments are not included in the Negative List are no longer required to apply for the approval from the local branch of the MOFCOM. Rather, similar to the Chinese domestic investments, the foreign investors may simply register such investment with the local Administration for Industry and Commerce ("AIC").

The Negative List will be enacted by the State Council separately. According to the draft, the list will further divide the industries on the list into: (1) the Prohibition Category, which is not open for foreign investment; and (2) the Restriction Category, which is restricted for foreign investment.

- **Key issues: comparison to the investment process in the Shanghai Free Trade Zone ("FTZ")**

  1. Negative List

  FTZ has already adopted a similar foreign investment process, e.g., there is no need to obtain MOFCOM approval for foreign investments not included on the Negative List of FTZ. But it is not yet known whether the national version of the Negative List will be broader or narrower than the FTZ version of the Negative List.

  2. Filing requirement

  Under the current FTZ rules, for any foreign investment not included in the FTZ Negative List, the investor must file relevant information with the local MOFCOM before the registration with the local AIC. But under the draft, the investor only needs to file such information with the local MOFCOM after the consummation of relevant investment. It is not yet known whether the FTZ will change its current rules of filing to make them consistent with the draft in the future.

  China is currently negotiating bilateral investment treaties with the United States and the European Union which reportedly will also employ a negative-list structure. If those negotiations are successful, the negative lists in the U.S. and EU investment treaties will presumably be the same, or at least consistent with, the Negative List developed for the draft.

National security review

The draft incorporates a national security review process. The draft provides for a reviewing commission ("Reviewing Commission") to be formed by the MOFCOM, the National Development and Reform Commission, and relevant ministries to conduct the national security review for any foreign investment.

The national security review process may be triggered if: (1) the foreign investors voluntarily apply for the national security review, when they believe there is a risk that the contemplated investment may be found to jeopardize the Chinese national security; or (2) the Reviewing Commission takes the initiative in starting the security review process. The Review Commission may also conduct such a review upon the application of relevant governmental authorities, associations or companies.

At least in concept, this national security review process and the Reviewing Commission appear to be comparable to the review conduct by the Committee on Foreign Investment in the United States (CFIUS), formed pursuant to the 1988 Exon-Florio Amendment to the Defense Production Act, to conduct national security reviews of foreign-controlled investments in the United States.

It is also worth noting that all the administrative decisions under the national security review process are exempt from any judicial review. This provision also has an interesting parallel in the U.S. national security review process. During the summer of 2014, the Court of Appeals for the District of Columbia, in *Ralls Corp. v. CFIUS*, held that a portion of the CFIUS national review process was, in fact, subject to judicial review. The *Ralls* court overturned President Obama's rejection of a windfarm investment by a company controlled by Chinese nationals on the ground that the CFIUS process violated the investors' due process rights.

National security reviews are generally excluded from the "national treatment" requirements of bilateral investment treaties.

- **Key issue: no publicly available list of industries subject to the national security review**
  Chinese national security review has been implemented for around three years. But the Chinese law makers have never published a list of industries subject to the national security review. Therefore, the Chinese authorities have broad discretion in deciding whether a foreign investment should be subject to such review. Subject to the due process limits imposed by the *Ralls* court, CFIUS and the U.S. president also exercise broad discretion in U.S. national security review process.

Information filing obligations
As under the draft, most of the foreign investment will no longer be subject to the approval of MOFCOM, thus MOFCOM needs a new mechanism to collect information regarding foreign investments. As a result, the draft imposes information filing obligations on foreign investors/foreign invested enterprises. According to the draft, certain information in connection with foreign investment should be filed to the local MOFCOM. Such filings are categorized into: (1) filing of new investment; (2) filing of change of investment; and (3) periodic information filing.

Corporate governance

The Three Foreign Investment Laws will be abolished by the draft, and currently there is some inconsistency regarding the corporate governance between the three Foreign Investment Laws and the PRC Company Law. The draft expressly requires that, within three years of implementation, all the foreign-invested companies must adjust their corporate governance structures to make them consistent with the Company Law.

- **Key issue: change of corporate governance structure**
  One of the key differences between the Three Foreign Investment Laws and the Company Law regarding corporate governance is that, for foreign invested JVs, currently there is no requirement for shareholder meetings. Rather, the board of directors is the highest authority in the corporate governance structure. In contrast, under the Company Law, the shareholder meeting is the highest authority, and certain resolutions, such as increase/decrease of registered capital, dissolution, or amendment of the Articles of Association, must be approved at the shareholder meeting. Therefore, after the implementation of the draft, all the existing foreign invested JVs may need to establish procedures for shareholder meetings and amend their Articles of Association accordingly.

Variable Interest Entity ("VIE")

The draft, for the first time under the Chinese law, provides the solution to the VIE structures, which is popular in China for foreign investment in industries not yet open to foreign investors, such as the value-added telecommunication industry.

The draft: (1) includes VIE in the scope of foreign investment, and (2) allows that the existing VIEs may continue their operation on the condition that they apply to the Chinese authorities and prove themselves to be ultimately controlled by Chinese investors. The draft implies, but does not expressly state, that if the existing VIEs are not ultimately controlled by Chinese investors, then they may be forced to terminate the contract and divest their controlled companies.

- **Key issue: impact on the existing VIEs**
  If the draft is passed and implemented, it will affect many existing VIEs, including companies whose shares are listed on foreign stock exchanges and are ultimately controlled by foreign citizens or residents of Hong Kong, Macau or Taiwan. It may significantly impact the private sector of the Chinese economy, especially the value-added telecommunication industry, to which a significant portion of the existing VIEs belong. We hope the final version of the law will provide clearer and more reasonable solutions for the existing VIEs which are controlled by foreign investors.

Relevant reforms corresponding to the draft

As the draft completely changes the system for regulating foreign investment, there are several other relevant laws and regulations, in addition to the Three Foreign Investment Laws, which may also need to be amended or repealed.

For example, as there will be no MOFCOM approval under the draft for most of the foreign investments, the concept of “total investment,” which currently is reviewed and approved by the MOFCOM upon the incorporation of foreign invested companies, may no longer be applicable. Currently, any foreign invested company may borrow foreign debt only up to the amount by which its total investment exceeds its registered capital. Given that the concept of total investment will no longer be used, the law makers must also change relevant foreign exchange rules to adapt to the draft.

Conclusion

To summarize, the draft is a significant reform to the existing foreign investment regulatory environment, and a major step in implementing the economic reform plans announced by the Chinese government at the Strategic & Economic Dialogue held in Washington, D.C., in the summer of 2013. However, there are still some open questions related to the draft, which hopefully will be clarified in the final version, or result in the update of other relevant laws and regulations.

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BRIGARD & URRUTIA

Article 37 New regulation on Protective Measures

Thu, 01/08/2015 - 12:16
NewsFlash: 283

Natural Resources and Environmental Law

Article 37 of the Mining Code – new regulation on Protective Measures

On December 23 2014, the Government issued Decree 2691 of 2014 through which it regulates article 37 of the Law 685 of 2001 (Code of Mines).

The above-mentioned provision of the Mining Code bans territorial entities from excluding parts of its territory, whether permanently or temporarily, of the mining activity.

The Constitutional Court (Judgment C-123 of 2014) declared the enforceability of article 37 of the Law 685 of 2011 on the understanding that in the authorization process of mining exploration and exploitation activities, the competent authorities of the national order must agree with the territorial authorities affected the necessary measures on the protection of the environment, the economic, social, and cultural development of their communities and the health of the population, through the application of the principles of coordination, concurrency, and subsidiarity provided for in article 288 of the Constitution.

In this regard, Decree 2691 of 2014 defines the mechanisms for the territorial authorities and the Ministry of Energy and Mines agree upon such measures of protection against potential harms that might arise as a result of mining operations in their corresponding territories. The request of measures of protection by local and regional authorities shall in any case be supported in technical studies, to account and charge of the relevant territorial entity, containing the analysis of the social, cultural, economic or environmental effects that could arise from the implementation of the measures sought in contrast with the possible impacts that might result from the exercise of the mining activity.

The protective measures taken pursuant to this Decree shall apply to mining concession request in process to the date of publication of the Decree and to those submitted after the date of entry into force of the same.

For more information please contact

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Hong Kong: The "New Normal" of Demanding Data Privacy Compliance Requirements

On 28 January, Hong Kong's Privacy Commissioner for Personal Data (the "**Commissioner**") published his annual report on 2014 complaints and enforcement activity under the Personal Data (Privacy) Ordinance (the "**PDPO**").

The report shows that heightened public awareness of privacy issues, as demonstrated by high levels of complaints, is the "new normal" for Hong Kong. Enforcement action by the Commissioner has continued with the exponential growth that began in the wake of the Octopus direct marketing affair in 2010.

The report is also notable for setting out the Commissioner's statement of priorities for 2015, with focus areas including the public's use of mobile apps, a survey of publicly available government databases and continued advocacy for a comprehensive approach to compliance through his Privacy Management Programme guidance.

High Levels of Public Complaints are the "New Normal"

The Commissioner's report of a year ago showed a significant uptick in the number of complaints in 2013, largely reflective of the implementation of new direct marketing regulations in April of that year. As a consequence of those reforms, in 2013, complaints soared 48% from 1,213 to 1,792. The figures for 2014 suggest this is the "new normal" for privacy awareness, with public complaints to the Commissioner's office more or less holding steady at 1,702 for 2014.

However, it is noteworthy that the sustained high levels of complaints comes notwithstanding a significant drop in direct marketing complaints (the cause of last year's surge) from 538 in 2013 to 277 in 2014, suggesting that the current high levels of complaints come from a broader base of regulated activity than just direct marketing.

Continued Exponential Growth of Enforcement Notices

Corresponding to the sustained public interest in privacy issues now seen in Hong Kong, the number of enforcement notices issued by the Commissioner has continued to soar. In 2011, the Commissioner issued one enforcement notice. In 2012 there were 11 and in 2013 there were 25. Last year saw the number of enforcement notices more than triple, surging to 90.

The First Prison Sentence under the PDPO

2014 saw the first prison sentence handed down under the PDPO. An insurance agent received a sentence of 4 weeks' imprisonment after being found to have given the Commissioner false information. The charges related to the agent's apparent misconduct in selling an insurance policy under the false pretence that he continued to be employed by an insurance company he no longer worked for. The conviction under the PDPO related to information given to the Commissioner in connection with his investigation. The former insurance agent was also convicted of fraud and using false instruments.

Data Security Breaches on the Rise

2014 saw a significant year on year increase in the number of data security breaches reported to the Commissioner, rising from 61 in 2013 to 70 in 2014. Unlawful access to personal data through hacking and other means has been on the rise in Hong Kong as elsewhere, a phenomenon contributing to the continued growth in security breach notifications.

Internet and Telecommunications Infractions

The Commissioner highlighted that much more of his investigatory work in 2014 related to the internet and telecommunications services than ever before, with complaints more than doubling from 93 in 2013 to 206 in 2014. In particular, the Commissioner pointed to mobile apps and social networking, personal data disclosures on the internet and cyber-bullying.

Strategic Focus for 2015

The Commissioner has confirmed that in 2015, amongst other things, there will be a special focus on a number of areas, including the following:

Mobile Apps and Telecommunications: Throughout 2014 the Commissioner was very active in relation to privacy issues surrounding mobile apps, including his leadership in the Global Privacy Enforcement Network's global survey of mobile apps (see Hogan Lovells briefing "Hong Kong Privacy Commissioner takes lead on Privacy Regulation of Mobile Apps", December 2014). The GPEN study found that 85% of the apps surveyed failed to clearly explain how they were collecting, using and disclosing personal information and the Commissioner made it clear that if standards in Hong Kong

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did not improve, enforcement action against offenders would not be ruled out. The Commissioner chose 2014's doubling of complaints relating to mobile apps, internet and telecommunications services as his headline point for his look back at 2014, so we can expect his focus on this area to continue through 2015.

Public Registers: The Commissioner identified the use of personal information held on public registers as a priority for 2015. These large holdings of personal data, including sensitive personal data relating to bankruptcies and legal proceedings, have given rise to enforcement issues in Hong Kong in the past, in particular the "Do No Evil" mobile app that allowed users to search a consolidated database of public register details about prospective employees, tenants and business partners. Publicly available information holds a controversial and hotly debated position in data privacy regulation. In some jurisdictions, such as Singapore, publicly available information is expressly excluded from protection under data privacy law. In Hong Kong, there is no such exemption.

Privacy Management Programme: The Commissioner pledged to continue to press for greater awareness and uptake of his Privacy Management Programme guidance, which encourages businesses to take a "top down" and holistic approach to organisational data privacy compliance, citing increased public awareness and concern for Big Data as the driver for this initiative.

What Does the Commissioner's Report Mean for Businesses?

The Commissioner's report on 2014 is striking for a number of reasons, in particular the sustained public awareness of data privacy issues in Hong Kong, as evidenced by persistently high levels of complaints, and for the increasingly stiff compliance environment for Hong Kong businesses.
The Commissioner is very active in his advocacy of privacy issues, both in Hong Kong and on the international stage. Businesses can expect his priorities for 2015 to reflect both local focus points of public awareness and his role in advancing global privacy initiatives, such as the "Right to be Forgotten" that seeks to require internet service providers to remove links to news stories and moves towards greater transparency in the processing of personal data by mobile apps and social media.

But leaving aside some of the wider initiatives that stand at the cutting edge of data privacy regulation, the Commissioner's advocacy of his Privacy Management Programme is in many ways the most critical aspect of compliance for Hong Kong businesses. A comprehensive review of data processing practices and procedures always has been best practice. The difference now is that the risk of privacy complaints and more aggressive enforcement action make the need for compliance far more apparent.

Key points for business are:

- Do you have a handle on the personal data that you are processing?
- Are your privacy consents and policies up to date, reflecting any changes in the data that you capture, the technology that you use and the purposes for which data is processed?
- As your business moves towards greater use of mobile and cloud technology, social media and data analytics, do you have the right procedures in place to assess potential privacy impacts and keep your practices and procedures up to date?

The Commissioner's media statement concerning the annual report may be found at:

http://www.pcpd.org.hk/english/news_events/media_statements/press_20150127.html

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

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NEWS DETAIL

01/12/2014

NEW BKPM POLICY: ONLINE COMPANY FOLDER

The Investment Coordinating Board (”BKPM”) announced under its Circular Number 252/A.8/2014, that as of 1 October 2014 it will not accept licensing and non-licensing applications from companies which have not made the so called “Company Folder” as their corporate data base for the BKPM online licensing system known as SPIPISE.

The information and guidance for the creation of the Company Folder can be downloaded from http://online-spipise.bkpm.go.id.
With the SPIPISE companies can access their online application and find out the progress of their application, for which purpose they need to first apply for the “right to access”.

Companies which have not obtained their Indonesian legal entity status can register themselves online, and establish their password and user name which would allow them to create their Company Folder and access their online application.
This BKPM Circular was issued on 25 August 2014. (*by: Ayezsa Nafira Harfani*)

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NautaDutilh

Restructuring & Insolvency

Netherlands

Supreme Court renders groundbreaking decision on partnership bankruptcies

Tuesday 10 February 2015

In Dutch case law it has long been held that the bankruptcy of a Dutch partnership automatically entails the bankruptcy of each of the partners. In a decision that explicitly breaks with previous case law, the Dutch Supreme Court found on 6 February 2015 that the bankruptcy of a Dutch partnership does no longer entail the bankruptcy of its partners. If the criteria for bankruptcy (in short: that the debtor has ceased to pay its debts as they fall due) are met by the partnership, the court should only open insolvency proceedings with respect to individual partners after determining that they themselves meet the insolvency criterion.

The Supreme Court notes that – in view of several developments in the law over the past years – there are situations in which an individual partner should not be declared bankrupt. The Supreme Court mentions two specific examples: where the partner has sufficient funds to pay his/its debts or where the partner is an individual who qualifies for the statutory debt scheduling regime. The lower court will now have to investigate separately whether the partner in this case, who was represented by NautaDutilh in the proceedings before the Supreme Court, must be declared bankrupt because he meets the criterion himself.

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Simpson Grierson

New Zealand Food Act 2014: MPI Proposal for Regulations released for comment

28 Jan 2015

The Ministry for Primary Industries (MPI) is seeking feedback regarding proposals for regulations under the new Food Act 2014. The proposal documents can be found here.https://mpi.govt.nz/news-and-resources/consultations/proposals-for-regulations-under-the-food-act-2014/

These proposals apply to food businesses covered by the food sectors in Schedule (Foods subject to Food Control Plans) and Schedule 2 (Foods subject to National Programmes) of the Food Act. They cover a range of areas, including requirements for registration and auditing of businesses, ensuring food is safe, food importing requirements, infringements, exemptions and how existing businesses will make the transition from the Food Act 1981 Act to the new Act. [1]

It is important that you consider these proposals and, where you have any questions or comments, these are raised with MPI.

Submissions can either be given in your own format, or using the MPI's submission form (found here https://mpi.govt.nz/news-and-resources/consultations/proposals-for-regulations-under-the-food-act-2014/) which contains particular questions to be answered.

Deadlines for submissions are:

- 5pm 20 February 2015 for responses to the cost recovery proposals (section 7 of the document)
- 5pm 31 March 2015 for all other proposals

Please let us know if you would like any assistance in preparing any submissions on your behalf.

WERKSMANS
ATTORNEYS

THE REGULATION OF OTC DERIVATIVES: WHAT WILL THE NEW YEAR BRING?

By Ina Meiring, Director

LEGAL BRIEF FEBRUARY 2015

It is well known that underpinning South Africa's commitment to regulating over the counter ("**OTC**") derivatives is the agreement of the G20 Leaders at the Pittsburgh summit in 2009 that "...all standardised OTC derivative contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties by end-2012 at the latest. OTC derivative contracts should be reported to trade repositories. Non-centrally cleared contracts should be subject to higher capital requirements." In November 2011, the G20 Leaders further agreed to add margin requirements for non-centrally cleared OTC derivatives.

INTRODUCTION

The Financial Stability Board ("**FSB**") was established by the G20 in 2009 as a body to promote global financial stability by coordinating the development of regulatory, supervisory and other financial sector policies. In particular, its focus is also on enhancing the transparency of the OTC derivatives market and reducing systemic risk by requiring trading platforms, reporting to trade repositories, the establishment of central counterparties between the two parties to a transaction, and by setting minimum capital and margining requirements.

FINANCIAL STABILITY BOARD PROGRESS REPORT

The FSB reported in its Eighth Progress Report on Implementation of OTC Derivatives Market Reforms (7 November 2014) ("**FSB Report**") on global regulatory reform initiatives that are underway to implement those measures agreed upon by the G20 Leaders. These global measures include the US Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), the Markets in Financial Instruments Directive/Regulation (MiFID II/ MiFIR) and the European Market Infrastructure Regulation (EMIR).

As a member of the G20, South Africa has also made progress in meeting South Africa's obligations regarding OTC derivatives by establishing the necessary regulatory framework in the form of the Financial Markets Act 19 of 2012 ("**FMA**") which became effective on 3 June 2013, and by issuing the draft regulations regarding OTC derivatives in 2014. The draft regulations deal with -

> requirements for the regulation of unlisted securities, including the categorisation of OTC derivatives;

> the requirement to be authorised as an OTC derivative provider as a category of regulated person;

- securities services to be provided by an external central securities depository ("**CSD**") and external clearing members;
- functions and duties that may be exercised by an external clearing house, central counterparty ("**CCP**") or external trade repository (**TR**);
- assets and resources requirements applicable to market infrastructures (a market infrastructure includes a licensed CSD, a licensed clearing house, a licensed exchange and a licensed trade repository);
- regulations applicable to the licensing of TR's;
- assets and resources requirements and functions applicable to a clearing house that is a CCP;
- requirements with which a CSD must comply for approval of an external CSD as a participant.

According to the FSB Report, it is anticipated that reporting requirements for all interest rate derivatives in South Africa will become effective in the second half of 2015. Other asset classes will be phased in over the following twelve months. Of course, this assumes that by that time, a trade repository will have been established and duly licensed as required by the FMA. All trades in interest rate derivatives will then have to be reported to this trade repository and will be monitored. The intention is that the trade repository will maintain a secure and reliable central electronic database of transaction data pertaining to such OTC derivatives, which will be disclosed to the regulators so that they are able to monitor potential risks.

South Africa is reported to be currently assessing its markets to determine whether and which requirements for central clearing may be needed. It is not clear that any mandatory requirements for central clearing will be set in 2015.

South African banks have already implemented the capital requirements of the Basel III framework in 2013. However, the capital charge for credit valuation adjustment ("**CVA**") risk on banks' exposures to ZAR-denominated OTC derivatives and non-ZAR denominated OTC derivatives transacted purely between domestic entities was zero-rated for 2013 and for 2014. (CVA is the difference between the risk-free value of the derivative and the true value, taking into account the expected loss due to counterparty defaults). It is anticipated that this exemption will also be extended in 2015, since a CCP for OTC derivatives has not yet been established.

The FSB Report further indicates that the margin requirements in South Africa will be implemented in accordance with the framework and timetable agreed upon by the Basel Committee on Banking Supervision ("**BCBS**") and the International Organization of Securities Commissions ("**IOSCO**"). The finalised BCBS-IOSCO margin standards set out timelines to phase in requirements beginning in December 2015.

CONCLUSION

The goals of these regulatory changes are to increase the transparency of the derivatives market, reducing counterparty and systemic risks in trading and enhancing market integrity and oversight. As such, it should be supported. Participants in the OTC derivatives market should also carefully monitor the implementation measures referred to above, since the consequences of non-compliance are severe.

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Ina Meiring is a Director at Werksmans and the head of the Financial Services Regulation practice area. She also works in the Banking & Finance practice. Prior to joining Werksmans Attorneys, Ina held the position of Group Legal Counsel at ABSA. She actively participated in various banking industry forums and still serves as a Member of the Standing Committee for Review of the National Payment System Act.

Ina has delivered many papers and contributed to various publications throughout her career. She holds a number of authorships, including being the author of the webpage for South Africa for the IBA Anti-Money Laundering Forum; the author of the chapter on South Africa in Global Legal Insights – Banking Regulation 1st Edition; and the author of the chapter on South Africa in Getting the Deal Through – Banking Regulation (2011 – 2014).

Ina holds a BA (Law) LLB as well as an LLM from RAU, and an LLD from the University of South Africa (UNISA). She was a highly-regarded lecturer at both RAU and UNISA law faculties for 22 years.

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29 January 2015

Amendments to the Taiwan Fair Trade Act

On January 22 2015, the Legislative Yuan approved the amendments to the Taiwan Fair Trade Act ("TFTA"). The amendments tantamount to the most sweeping reform of the TFTA since it came into effect in 1992. The amendments cover a wide range of legal provisions under the TFTA, such as merger control, cartel enforcement, restrictive competition, and unfair competition, which will have significant impact on companies' business operations in the future as well as their compliance guidelines.

Below are the key features of the amendments and our analysis thereof:

I. Merger Control

1. When assessing whether a transaction constitutes a combination and whether any filing threshold is met, the new law prescribes that in addition to the turnovers and shareholding of the party's parent/subsidiary, those of affiliate companies (including brother/sister companies under common control) should also be taken into consideration.

2. Apart from holding shares through corporate entities, it is not uncommon for an enterprise's business operations or appointment of personnel to be under the control of certain individuals. It is also common for an enterprise to hold shares in another enterprise through natural persons or non-corporate entities. As the transactions of the above-mentioned shareholding structures may have the same effect as a combination under the TFTA, the new law stipulates that those natural persons or non-corporate entities, which have controlling shareholding in a company, should also be subject to the merger control rules even though they are not corporate entities.

3. The review period for a merger filing case has been revised from 30 days with a possible extension of an additional 30 days to a possible extension of an additional 60 days as the original period may not be sufficient for the agency to thoroughly analyze a case which may have potential anti-competition effect.

4. With an aim to tailoring appropriate merger control rules for some specific industries, the new law stipulates that the Taiwan Fair Trade Commission ("TFTC") is authorized to publish different turnover thresholds applicable to different industries.

5. It is noteworthy that the amended TFTA follows the old law in implementing a dual filing threshold system. The TFTC's proposal of removing the market share filing thresholds did not pass the Legislative Yuan's final review.

II. Cartel Regulations

1. In the past, the TFTC often ran into difficulty securing direct evidence to prove the existence of a cartel. To enhance the TFTC's enforcement effectiveness, the amended TFTA permits the TFTC to presume the existence of an agreement on the basis of circumstantial evidence, such as market conditions, characteristics of the products or services involved, and profit and cost considerations, etc. By way of this amendment, the new law substantially shifts the burden of proof regarding the existence of an agreement among competitors from the TFTC to the enterprises that are investigated or penalized. Thus, in the future, for an enterprise under investigation, it is advisable to present evidence in a

timely manner to prove that its business decision was made independently and reasonably to rule out any possibility of being viewed as participating in a price-fixing scheme due to parallel activities in the market.

2. The fine for any violation of the cartel regulations as well as other anti-competition practices has been doubled. Under the new law, the fine for a first-time violation ranges from NTD 100,000 to NTD 50 million, and that for repeated violations, from NTD 200,000 to NTD 100 million. Nonetheless, the maximum fine for a material violation of the cartel regulations remains the same as the old law and is still capped at 10% of the violating enterprises' sales revenue in the last fiscal year.

3. By following the Administrative Penalty Act, the new law empowers the TFTC to seize anything found during investigation that may serve as evidence. Nonetheless, the TFTC's proposal of introducing the right to search and seize (i.e., the dawn-raid) did not pass the Legislative Yuan's final review due to the concerns that such dawn-raid power may be unconstitutional.

4. In most cases, the facts associated with anti-competition issues are so complicated that it takes the agency a long time to investigate and analyze. Moreover, the TFTC needs to spend more time in doing economic study and analysis to complete its findings and decisions. Given such, the statute of limitations on administrative sanctions for an anti-competition case has been extended from 3 years to 5 years.

III. Resale Price Maintenance

By referring to the international trends, the resale price maintenance regulations are no longer per se illegal but are amended to adopt the rule-of-reason standard. The new law may offer greater flexibility for pricing arrangements between upstream manufacturers and downstream distributors.

IV. Structure Amendments

1. The TFTC is allowed to abort an investigation to save administrative cost, if the business ceases its illegal conduct and undertakes corrective measures.

2. As the TFTC is recognized as an independent agency, having expertise and credibility, the new law stipulates that without going through the administrative appeal process, the penalized party can directly file a lawsuit with the administrative court to seek a remedy.

As all these changes have resulted in an overhaul of the TFTA, we can expect to have virtually a new competition law environment in Taiwan. Meanwhile, companies are advised to follow the new law to adequately update their internal compliance guidelines.

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

Lee and Li Newsletter is to provide an overview on recent legal development. Due to the generality of this overview, the information contained may not be applicable in all situations and should not be acted or relied upon without special legal advice. For more information or advice on specific legal issues, please approach your regular contact at Lee and Li or the editors of this Newsletter. We welcome your suggestions or opinions.

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GIDE

GIDE LOYRETTE NOUEL

PROJECTS | TURKEY | JANUARY 2015

NEW ENVIRONMENTAL IMPACT ASSESSMENT REGULATION: ESSENTIAL INFORMATION FOR ALL NEW PROJECTS

The Environmental Impact Assessment Regulation (the "**Regulation**") was published in the Official Gazette no. 29186 dated 25 November 2014, abolishing the former regulation. Even though the Regulation entered into force immediately on its publication date, already-submitted project files will benefit from a transition period and accordingly remain subject to the provisions of the former regulation.

The newly adopted provisions of the Regulation have not considerably impacted the stages of the application process for environmental assessment reports and project presentations. Nonetheless, significant changes have been made to the scope of projects subject to the Regulation.

FILING FOR ENVIRONMENTAL IMPACT ASSESSMENT AND PROJECT PRESENTATION

As the application scope has been narrowed by providing for higher thresholds with respect to the capacity and the size of the projects, the Regulation's amended provisions have accordingly put in place exemptions for certain projects in terms of environmental impact assessment.

Following the respective changes under the Regulation, certain projects now only require to be presented to the Ministry of Environment and Urbanization (the "**Ministry**") or governorships (if authorized by the Ministry), as opposed to the usually applicable time-consuming process requiring delivery of an assessment report to the Ministry. In this respect, such an assessment report is no longer mandatory for projects such as:

- Railway projects not exceeding 100 kilometres;
- Airport projects comprising runway(s) shorter than 2,100 metres;
- Wind farm projects having a 1 to 50 MWm installed capacity (under the previous regulation, exemptions were applicable for projects with a maximum of 20 turbines);

- Solar power plant projects having an installed capacity between 1 to 10 MWm (under the previous regulation, exemptions were applicable for projects with a maximum of 20 hectares of solar field);

- 5 to 15 kilometre power transmission line projects with a minimum potential of 154 kV;

- Housing estate projects with a minimum capacity of 500 residences (200 under the previous regulation);

- Tourist facility projects with a minimum capacity of 100 rooms.

Please note that the above list is not exhaustive and that the aforementioned projects are only mentioned by way of example.

Contrasting with the general process simplifications brought by the Regulation as mentioned above, other projects such as hydroelectric power plant projects may be considered as having been negatively impacted by such regulatory changes. Indeed, the former regulation provided that any such projects would be subject to obtaining an environmental impact assessment report if their minimum installed capacity was of 25 MWm, whereas the Regulation has brought this threshold down to 10 MWm.

EXEMPTIONS AVAILABLE UNDER THE REGULATION

It shall also be noted that the Regulation also takes into consideration the latest decision of the Constitutional Court which ruled on the cancellation of certain provisions of the Environment Law (providing specific exemptions for projects being at planning or tendering stage). Accordingly, projects that are registered with the Government Investment Program before 23 June 1997, and that are at production or operation stage as of 29 May 2013, shall also be exempted from the Regulation's scope of application.

In compliance with Turkish bar regulations, opinions relating to Turkish law matters which are included in this client alert have been issued by Özdirekcan Dündar Şenocak Avukatlık Ortaklığı, a Turkish law firm acting as correspondent firm of Gide Loyrette Nouel in Turkey.

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BAKER BOTTS

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BANKRUPTCY UPDATE - FEBRUARY 4, 2015

Old is New Again: Courts Rely on Trust Indenture Act of 1939 to Limit Nonconsensual Out-of-Court Restructurings

In a pair of recent decisions,[1] two federal courts in the Southern District of New York have broadly interpreted Section 316(b) of the Trust Indenture Act ("TIA")[2] to limit the ability of parties to strip guarantees from dissenting bondholders in an out-of court restructuring without the bondholders' unanimous consent. In doing so, these courts clearly indicated that Section 316(b) protects bondholders "against non-consensual debt restructurings" that, as a practical matter, materially impair their ability to collect their debt and rejected the narrower interpretation that Section 316(b) only protects bondholders from "majority amendment of certain 'core terms'." These are also important decisions because they protecut a bondholder's substantive right to receive actual payment, and not just the bondholder's procedural right to sue under the indenture. As a result of these decisions, minority bondholders may now have increased leverage when negotiating with issuers and other creditors, which could manifest itself in various ways: (1) a minority bondholder could delay or otherwise disrupt the consummation of some types of out-of-court restructurings with the increased cost, delay, and uncertainty of litigation; (2) issuer's counsel will be more reluctant to issue a legal opinion concerning a proposed indenture amendment; (3) even outside the context of a restructuring, certain exchange offers that involve exit consents may be called into question; and (4) more issuers may resort to Chapter 11 earlier, where unanimity is not required, to effectuate restructurings.

Education Management Corp.

In the first of these decisions, the court in *Marblegate* (hereinafter "*EDMC*") admonished defendant Education Management Corporation ("EDMC") against stripping EDMC's guarantee of notes issued by its wholly-owned subsidiary from Marblegate and its co-plaintiffs (the "EDMC Plaintiff Noteholders") even though the Court ultimately refused their request to enjoin or halt EDMC's out of court restructuring of more than $1.5 billion of debt.[3] As a for-profit college institution that derived almost 80% of its revenue from federal student aid programs under Title IV of the Higher Education Act of 1965,[4] EDMC could not file for bankruptcy without jeopardizing its eligibility to receive Title IV funds and thus, bankruptcy was not a viable option.[5] At the time, EDMC's expert valued the company at $1.05 billion and the $20 million of notes held by the EDMC Plaintiff Bondholders stood behind roughly $1.305 billion of secured debt[6] and consequently, were "out of the money". After extensive negotiations with an ad hoc group of asset management firms that collectively held 80.6% of EDMC's secured debt and 80.7% of the subsidiary's unsecured notes, the parties agreed on a proposed restructuring whereby the outstanding debt would be converted into a smaller amount of debt and equity, through one of two potential paths, depending upon whether unanimous consent was obtained in a proposed exchange offer. As EDMC was unable to obtain the consent of 100% of its creditors, the restructuring support agreement obligated the signatories to implement an alternative transaction pursuant to which (i) the secured lenders would release EDMC of its separate guarantee of the secured debt, thereby triggering an automatic release of EDMC's guarantee of the notes under the indenture; (ii) the secured lenders would foreclose on substantially all of the assets; (iii) the secured lenders would immediately sell the assets back to a new subsidiary of EDMC; and (iv) the new subsidiary would then issue debt and equity to the consenting creditors under the restructuring support agreement.[7] Dissenting creditors, however, would be left with claims against issuers without any assets and would have no recourse against the parent under the guarantee by operation of the senior secured loan documents and the indenture governing the notes.

Finding neither path acceptable, the plaintiffs—non-consenting noteholders—petitioned the court for a preliminary injunction to block the proposed restructuring, arguing that their rights under Section 316(b) of the TIA were violated by the guarantee-stripping amendment. That section provides:

> Notwithstanding any other provision of the indenture to be qualified, the right of the holder of any indenture security to receive payment of the principal and interest on such indenture security, on or after the respective due dates expressed in such indenture security, or to institute suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such holder . . . .[8]

In the end, the court denied the preliminary injunction, refusing to improve the negotiating leverage of holders of $20 million in notes to stop a $1.5 billion restructuring. That said, the Court did not end its analysis there -- which it could have done. Instead, the Court emphatically stated that the EDMC Plaintiff Noteholders had demonstrated a likelihood of success on the merits because Section 316(b)'s protection of the bondholders' "right to receive payment" should be viewed as a substantive right, not merely a legal entitlement to demand payment.[9] Thus, in the Court's view, the termination of the EDMC parent guarantee was a step too far in a nonconsensual out-of-court restructuring – a step prohibited by Section 316(b)'s protection of a bondholder's right to payment. Furthermore, the Court reasoned that the protections afforded by the TIA against nonconsensual out-of-court debt restructurings supersede any terms in the debt instruments that would impair or affect the creditor's right to actually receive payment on its notes.[10] For example, even though the removal of EDMC as a guarantor of the unsecured debt was permitted by the indenture, Section 316(b) of the TIA supersedes those provisions in the context of the particular transaction under review because they would prevent the Plaintiffs from actually receiving payment under the notes. The Court further stated that the proposed restructuring was precisely the type of transaction that the TIA was designed to preclude because it was specifically intended to ensure that dissenters to the restructuring support agreement would not receive payment of their notes notwithstanding the express provisions of the indenture.

<u>Caesars</u>

In reliance in part on the decision in *EDMC*, the Court in *MeehanCombs* (hereinafter referred to as "*Caesars*") also employed Section 316(b)'s protection of the right to receive payment to strike the termination of a parent guarantee in the context of the proposed restructuring of Caesars Entertainment Corp. ("CEC") and its direct operating subsidiary Caesars Entertainment Operating Co., Inc. ("CEOC"). While it is not clear how much debt the plaintiff noteholders held in the aggregate in *Caesars*, the numbers, like those of the holdout noteholders in *EDMC*, were extremely modest in *Caesars* in comparison to the $1.5 billion of notes outstanding and the secured debt that stood ahead of those notes.[11] The Court was clearly not enamored with the out-of-court restructuring approved by CEC, CEOC and their creditors in August 2014 for several reasons. First, in the court's view, the transactions "effectively left CEC free to transfer CEOC's assets without any obligations back to CEOC's debts."[12] Second, consenting creditors were paid "an extraordinary one hundred percent premium over market" in exchange for their consent. Third and most importantly for these purposes, the transactions included the termination of the CEC guarantee which was extremely meaningful given the court's characterization of CEC as the "asset-rich parent company". Accordingly, the Court characterized the removal of the CEC guarantee as "an impermissible out-of-court debt restructuring achieved through [the] collective action [of the majority holders of Caesars' debt]" – a result "TIA section 316(b) is designed to prevent."[13]

Closing Observations

Interestingly, both of these decisions came at the outset of the respective cases: first, in *EDMC* in the context of a request for a preliminary injunction and second, in *Caesars* in the context of a motion to dismiss the complaint. Both courts stressed the importance of the TIA's policy of protecting minority holders from what the courts viewed as oppression by the majority holders and the debtor-issuers. Effectively, the Courts added the existence and continuation of guarantees to the "sacred rights" afforded all lenders or noteholders in most deals and highlighted the importance of bankruptcy as a tool to get a less than wholly consensual deal done despite the fact that EDMC could not file for bankruptcy as a practical matter. Ultimately, in *EDMC*, the Court quoted prior case-law highlighting holders' right to payment as "absolute and unconditional" and drew a line in the sand at the release of the guarantee. In the case of *Caesars*, CEOC ultimately filed for bankruptcy highlighting the importance of the CEC guarantee of the notes. Based on these decisions, troubled companies and their creditors will have to reconsider the extent of what they can accomplish in an out-of-court restructuring on a less than wholly consensual basis. Covenant-stripping that occurs in these exchange and restructuring transactions will not disappear, but relieving a guarantor of its obligations as part of a global resolution will not easily survive judicial scrutiny as a result of these decisions.

1*Marblegate Asset Mgmt. v. Education Mgmt. Corp.*, 14 Civ. 8584 (KPF), 2014 WL 7399041 (S.D.N.Y. Dec. 30, 2014); *MeehanCombs Global Credit Opportunities Funds, LP v. Caesars Entertainment Corp.*, 14 Civ. 7091 (SAS), 2015 WL 221055 (Jan. 15, 2015).
2*See* 15 U.S.C. § 77ppp(b).
3*Marblegate Asset Mgmt.*, 2014 WL 7399041, at *16-17.
4*See* 20 U.S.C. §§ 1070-1099.
5*Marblegate Asset Mgmt.*, 2014 WL 7399041, at *2.
6*Id.* at *3.
7*Id.* at *8.
815 U.S.C. § 77ppp(b).
9*Marblegate Asset Mgmt.*, 2014 WL 7399041, at *19-21.
10*Id.* at *20.
11*Caesars*, 2015 WL 221055, at *1.
12*Id.* at *2.
13*Id.* at *5.

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Hogan Lovells

Unmanned Aircraft Systems Alert

February 6, 2015

See note below about Hogan Lovells

The FAA has issued five more exemptions for commercial use of unmanned aircraft systems

The Federal Aviation Administration (FAA) has granted five more Section 333 exemptions for commercial use of unmanned aircraft systems (UAS) in the United States, bringing the total number of such exemptions granted to 24.

Three of these exemptions were for UAS operations involving aerial photography for the movie and TV industries. Because the FAA basically concluded that these petitions were similar in all material respects to the petitions and relief previously requested in the Astraeus Aerial Exemption and the Team 5 Exemption, it did not include a detailed discussion of each petitioner's case for the exemption or the regulations at issue. Instead, the FAA simply found that the reasoning underlying those earlier exemptions applied to these petitions as well, and therefore granted the exemptions with basically the same conditions as it imposed earlier on Team 5.

The two other exemptions granted by the FAA are amendments to previously granted exemptions in order to account for additional models of UAS permitted under the prior exemptions. All of the conditions and limitations in the previous exemptions granted to these two petitioners remain in effect, except that Limitation No. 1 was revised to incorporate the new UAS, and a revised limitation about reporting incidents, accidents, or flight operation transgressions replaced the original Limitation No. 35.

For further information about these new exemptions, or FAA regulation and authorization of UAS operations, please contact E. Tazewell Ellett, Chairman of Hogan Lovells UAS Group, or counsel Patrick R. Rizzi.

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McKenna Long & Aldridge LLP

Government Contracts Advisory

FEBRUARY 9, 2015

ASBCA Orders Government to File Complaint When Government Fails to Explain Rationale for its Claim

The Armed Services Board of Contract Appeals ("ASBCA") recently issued a significant procedural decision ordering the government to file the complaint because the contracting officer failed to provide the rationale for his final decision. *See Kellogg Brown & Root Services, Inc.*, ASBCA No. 59557, slip op. (Jan. 22, 2015). This decision continues the ASBCA's recent trend of ordering the government to file the complaint when the government fails to provide the contractor with its reasoning.

Under the unique procedural rules of the Contract Disputes Act, the contractor must appeal a contracting officer's final decision, regardless of whether the claim itself is first asserted by the contractor or the government. Under longstanding practice, however, the ASBCA can require the government to file the complaint when doing so would facilitate efficient resolution of the appeal. Recent decisions have affirmed that the Board will require the government to do so when relevant information concerning the basis of the claim resides with the government, rather than the contractor. *See, e.g.*, *BAE Systems Land & Armaments Inc.*, ASBCA No. 59374, slip. op. (Nov. 18, 2014); *Beechcraft Defense Co.*, ASBCA No. 59173, 14-1 BCA ¶ 35,592.

In *Beechcraft*, the ASBCA ordered the government to file the complaint explaining the basis for the CAS non-compliance claim at issue because the government bore the burden of proof and was "fully conversant with its own claim." 14-1 BCA ¶ 35,592 at 174,395. In *BAE Systems*, the ASBCA required a government-filed complaint in the appeal of a contractor's claim challenging a defective pricing withhold. It held that, even though the claim was technically a contractor claim, it "would be more efficient if the Board could start with a government articulation for its determination of defective pricing, rather than appellant's speculation about the basis for the government's assertions." *BAE Systems*, slip. op. at 3 (stating that claim was a defense against the government's allegations and not a separate claim). In each case, the ASBCA found that the government was in the best position to set forth the facts and legal arguments at issue. *See also DynPort Vaccine Co. LLC*, ASBCA No. 59298, slip. op. at 8 (Jan. 15, 2015) (ordering government to file initial pleading "[s]ince the CO is the only one that knows specifically what facts he relied on to determine that DVC had failed to perform the requirements . . . and no explicit CO decision was issued").

Under its recent *Kellogg Brown & Root Services, Inc.* decision, the ASBCA further clarified that the analysis depends on which party is in the best position to set forth the relevant facts. In *Kellogg Brown & Root Services Inc.*, the contracting officer issued a final decision challenging $33.9M in subcontractor Defense Base Act insurance premium costs after a Defense Contract Audit Agency ("DCAA") audit. ASBCA No. 59557, slip op. at 9 (Jan. 22, 2015). The government argued that it should not have to file the complaint because the contractor bears the burden to establish the reasonableness of its incurred costs. The ASBCA disagreed and found that, despite the government's arguments to the contrary, neither the contracting officer's final decision, the DCAA audit report, nor communications between the parties articulated a basis for the government's claim or even questioned the reasonableness of the contractor's costs. Accordingly, it ordered the government to file the initial pleading. In doing so, the Board reaffirmed the principle that the "appellant should not have to speculate about the basis for the government's claim in its complaint." *Id.* at 10.

These decisions are significant for contractors as they provide contractors with a potential strategic advantage to force the government to lay out its previously-undisclosed or cryptic legal position at the beginning of the proceeding. Accordingly, in actions before the ASBCA, contractors will need to consider whether (a) the contracting officer's decision includes a rationale, (b) the government is in a better position to possess the relevant facts and legal theories, and (c) it would be advantageous to the contractor for the government to file the complaint.

If you have any questions concerning this Alert, or the pursuing contract claims generally, please contact the authors of this Alert or the McKenna Long & Aldridge attorney with whom you typically work.

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Flash Legal Report

New Foreign Investments Law

On 18 November 2014, Decree N° 1438 was published in the Special Official Gazette N° 6.152. Such Decree with Status, Validity and Force of Foreign Investments Law came into force on that same date.

1. Purpose

According to Article 1 thereof, the purpose of the Foreign Investments Law is to establish the principles, policies and procedures that regulate foreign investors and investments concerning production of goods and services of any kind, so as to achieve the harmonic and sustainable development of the nation, promoting foreign production and diversity to develop the productive potential existing in the country pursuant to the Constitution, laws and the plan of the homeland, so as to consolidate an environment that promotes, favors and gives a predictability character to investments.

2. Application Subjects

The law shall apply for: (i) foreign companies and affiliates, subsidiaries or related companies, whether governed or not by international agreements or treaties, as well as other foreign forms of organization; (ii) Grand Enterprises; (iii) national private, public and mixed corporations and their affiliates, subsidiaries or related companies, whether governed or not by international agreements or treaties, and other organizations with economic purposes that receive foreign investments; (iv) natural or legal persons, whether national or foreign, with registered address abroad and that make foreign investments in Venezuela; (v) foreign natural persons, who reside in the country and make investments.

3. Jurisdiction

Foreign investments are subject to the jurisdiction of the courts of the Republic, and Venezuela may participate and use other means of dispute resolution within the frame of integration of Latin America and the Caribbean.

4. Definitions

The Foreign Investments Law contains new definitions of: (i) investment; (ii) national investment; (iii) foreign investments in contributions that may be: (a) in foreign currency or another exchange mechanism, (b) tangible assets, (c) intangible assets, (d) reinvestments; (iv) reinvestments; (v) foreign investor; (vi) domestic investor; (vii) domestic company receiving foreign investment; (viii) foreign company; (ix) affiliates, subsidiaries or related companies; (x) Grand Enterprises; (xi) technology transfer; (xii) audits.

5. Foreign Investments System

The system is formed by: (i) the ministry of the people's power with jurisdiction over trade, and which acts as governing entity; (ii) the National Center of Foreign

Trade (CENCOEX, after its Spanish acronym), which is the enforcement entity; and, (iii) the ministry of the people's power with jurisdiction over finances, which is in charge of sanctions.

The following will still be entities with concurrent power: those with jurisdiction over oil and mines, banking, securities, and insurance for the analysis, study and issue of Foreign Investments Registration Certificates, Company Classification Certificate, Technology Transfer Contract Registration and the corresponding audits.

Among the powers of CENCOEX that we believe are the most relevant, we can find:

a. Approval, rejection, issue, update, renewal, and frequent review of Company Classification Certificates, National Investor Credentials, Foreign Investments Registration Certificates and updates thereof, Technology Transfer Contract Registration.

b. To substantiate and decide over administrative proceedings that order precautionary injunctions, as well as to audit foreign investments and technology transfer and technical assistance contracts.

c. To approve or reject capital reinvestment.

d. To approve or reject applications for <u>authorization to transfer property of tangible or intangible capital abroad.</u>

In addition, the president of CENCOEX will have, among others, the power to determine the existence of links between the legal persons, in observance of the criteria that shall be established by the minister with jurisdiction over trade, and issue opinions on entering or denouncing international agreements and treaties within the frame of foreign investment.

6. Foreign Investment Treatment

The law establishes the freedom to make foreign investments in any area, sector or economic activity allowed by Venezuelan legislation, seeking to increase the economic and production capacity of towns where they are established, and to contribute to the social development of their people and respect and improvement of environment and public health.

Development of strategic sectors is reserved for the Presidency, in observance of national interests; and the Presidency may establish investments regimes with foreign capitals in percentages other than those provided in the foreign investments law, due to reasons of national security and defense.

The law establishes amounts for the constitution of foreign investment, specifying that the value thereof must be represented in the assets located in the country, namely, equipment, supplies and other goods or assets required to start operations, in at least 75% of the total investment, which, for registration purposes, must be for a minimum amount of USD 1,000,000.00, even if CENCOEX may establish lower amounts of no less than 10% of such amount for the promotion of small and medium businesses. Determination of the value of investment will be made based on the official exchange rate, and only the items that constitute the paid capital may be calculated, which shall be evidenced by means of the foreign investment registration certificate.

7. Rights and Obligations of Foreign Investors

The new Foreign Investments Law establishes that the rights of foreign investors will only be effective from the moment of registration of the foreign investment, and it shall remain within the territory of the Republic for at least 5 years, counted from the date of issue of the certificate, for remittances abroad of invested, registered and updated capital.

In addition, the law establishes that foreign investments must meet the following conditions: (i) to contribute with the production of national goods and services to cover domestic demand as well as the increase of non-traditional exportations; (ii) to contribute with national economic development; (iii) to participate in the policies issued by the Presidency concerning development of local suppliers; (iv) to establish relations under the tutelage of the governing entities with research, development and innovation powers; (v) to implement social responsibility programs; (vi) to have the authorization of the ministry with jurisdiction over indigenous affairs when investment is made in territories inhabited by natives; (vii) to channel their monetary resources deriving from foreign investments through the national financial system; (viii) to ensure enforcement of external or internal credit contracts; (ix) to notify CENCOEX of any investment in national or foreign companies within the national territory, under penalty of nullity of the operation.

8. Capital or Dividend Transfers

Concerning capital transfer or repatriation, the law establishes particular norms for the promotion of profits, which may be paid in Bolivars, remittance of proven profits or dividends up to 80%, income deriving from sale of the investment, reduction of capital, and company wind-up, where only 85% of the total investment may be remitted abroad, except that it is due to the sale of the company receiving the investment to national investors and, concurrently, functioning of operations and stay of goods and technologic knowledge that the investment entailed are demonstrated.

The Presidency reserves the power to limit capital and dividend remittances abroad in case of special economic and financial circumstances that affect the balance of payments, the international reserves of the country, or the economic security of the nation.

9. Sanctions

The law provides sanctions ranging from 1,000 to 100,000 tax units in case of breach of any of the provisions thereof. In case of relapse, the sanction will increase in 100%, and, in any case, sanctions shall be paid within 15 business days.

10. Capital Flight and Money Laundering Prevention

CENCOEX has the power to request information to audited subjects and foreign investors concerning their shareholders, suppliers, clients and, in general, all those natural or legal persons with which they have business relations. In addition, it shall establish the policies, norms, mechanisms and internal proceedings necessary to prevent capital flight and money laundering, as well as any other crime established in the law.

11. Temporary Provisions

The law provides a six month period for the bodies with concurrent powers in foreign investment matters to adapt their norms and procedures. Within the same term, CENCOEX shall issue the decisions necessary in connection with transfers abroad so as to develop the exchange content.

The law provides the elimination of the Foreign Investments Superintendency (SIEX, after its Spanish acronym), which shall temporarily exercise the duties of the administrative unit in charge of the treatment of productive foreign investments of CENCOEX.

The Presidency shall issue the Regulations of the Foreign Investments Law within one year.

12. Repealed Norms

The following were repealed:

a. Decrees 1103 and 2095 addressing the Partial Regulation of the Common Regime for Treatment of Foreign Capital and about Marks, Patents, Licenses and Royalties.
b. Resolution 2912 addressing the Regime for registration of investments made with the sale of foreign currency-denominated securities issued by the Republic.
c. Decree 356 with Status, Validity and Force of Law for the Promotion and Protection of Investments and the Regulation thereof.

Flash Legal Report
New Foreign Investments Law

December, 2014

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