Pacific Rim Advisory Council

July 2015 e-Bulletin

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  Pan Pacific Vancouver Hotel
  Hosted by Richards Buell Sutton LLP
  September 26—29, 2015

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

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

Registration open to PRAC member firms
www.prac.org

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►BAKER BOTTS Represents Williams Partners L.P. in its US$13.8 billion Acquisition by The Williams Companies, Inc.
►BRIGARD & URRUTIA Assists Colombia's Ecopetrol Issuance US$1.5 billion in notes
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ALLENDE & BREA MANAGEMENT CHANGES HANDS

BUENOS AIRES - 6 July 2015: Corporate and M&A lawyer Valeriano Guevara Lynch will continue Allende & Brea Abogados' drive to diversify away from its core practice area and focus on East Asia after assuming full control of the firm last week.

Valeriano Guevara Lynch

Guevara Lynch, 44, took up the position on 1 July, six months after being unanimously elected to the post by the firm's four-strong management committee on 1 January. Over the last six months, he has worked closely with Pablo Louge, 48, who has been managing partner at the firm for the last nine years, to get to grips with the role.

Guevara Lynch, who is a distant relative of Argentine revolutionary Ernesto "Che" Guevara, brings 20 years' experience working in Allende & Brea's corporate practice and eight sitting on its management committee. He takes up the position halfway through the implementation of a five-year plan introduced by Louge in 2013.

The plan seeks to build Allende & Brea's reputation outside its core areas of corporate, M&A and litigation by developing the firm's antitrust, employment, IP, insurance, natural resources and regulatory practices. Guevera Lynch says he will maintain his predecessor's focus on these areas as managing partner and will continue to develop them through targeted associate hires, internal training and promotions. Under Louge, this led to the appointment of partners to head five of the six areas and continues a policy of internal growth, which has seen 11 associates promoted to the partnership over the past nine years.

Allende & Brea's five-year plan also seeks to strengthen the firm's connections with East Asia, which accounts for a growing proportion of Argentine trade. In 2014, China was the country's biggest trading partner after Brazil, while Japan is the tenth -largest behind France. These factors led the firm to establish an Asia group, which focuses on maintaining and courting clients in the region. "This group is made up of the partners most used to dealing with Asian clients," elaborates Guevara Lynch, adding the firm previously assigned work on a practice-by-practice basis, but this failed to account for cultural differences. He says the focus on East Asia will continue under his watch.

On the management front, Guevera Lynch will continue applying reforms under Louge, which encourage partners outside of the managing committee to voice their opinions on how the firm should be run. He suggests this policy will yield better results in the years to come as the firm continues its drive towards more specialised practice areas and new viewpoints are added to the debate over direction and strategy. "We have achieved a lot over the past three years, but a lot remains to be done," he adds.

Louge steps down after first taking the top job in 2006. However, he will remain on the firm's management committee and continue his corporate and M&A practice, which he began 28 years ago when he first joined Allende & Brea.

Louge is the first of Allende & Brea's managing partners to step down before reaching the age of 65, the nationwide statutory age of retirement for men. Guevara Lynch says his colleague had long argued for the importance of managerial change as a way to bring fresh ideas into the management committee, but was discouraged from resigning by the partnership.

Allende & Brea counts 17 partners and 59 lawyers in total, making it one of the larger Argentine firms. It was among the top firms in Latin Lawyer's M&A tables for volume last year.

For additional information visit www.allendebrea.com.ar

BENNETT JONES WELCOMES THE HONOURABLE JOHN BAIRD AS SENIOR ADVISOR

26 May, 2015: Bennett Jones LLP, one of Canada's leading business law firms is pleased to welcome The Honourable John Baird, P.C., Canada's former Minister of Foreign Affairs (May 18, 2011 – February 3, 2015), to the firm as a Senior Advisor.

"Mr. Baird's expertise in government, domestic and international business and natural resources will provide invaluable advisory insight and counsel to our clients," says Hugh MacKinnon Chairman and CEO of Bennett Jones. "Mr. Baird adds significant depth to our Public Policy & Government Affairs practice including Leo de Bever, David Dodge, Eddie Goldenberg, Alan Gotlieb, Michael Horgan, Mark Jewett, Michael Kergin, Jack Major, Anne McLellan and John Weekes."

A native of Ottawa and a graduate of Queen's University, Mr. Baird has held a variety of portfolios in the Government of Canada, including President of the Treasury Board (2006 - 2007), Minister of the Environment (2007 - 2008, 2010 - 2011), Minister of Transport, Infrastructure and Communities (2008 - 2010), Leader of the Government in the House of Commons (2010 - 2011), and Minister of Foreign Affairs (2011 - 2015). Previously he served as a member of the Ontario Legislature (1995 – 2005), which included service in the Government of Ontario as Minister of Community and Social Services, Minister of Energy and Government House Leader.

"Bennett Jones' domestic and global reach across diverse economic sectors and its commitment to being Canada's leading resources focused business law firm, made it a natural fit for me," stated John Baird. "I look forward to working with Bennett Jones and their clients to provide strategic counsel in relation to their plans in Canada and abroad. This work will not include making representations to the Government of Canada. In particular, I am excited to continue my interest in Canada-China relations, the Bennett Jones office in Beijing being a further draw for me to the firm."

For additional information visit www.bennettjones.com

TOZZINI STRENGTHENS COMPLIANCE PRACTICE WITH LATERAL HIRE

SAO PAULO, 22 June 2015: TozziniFreire Advogados has recruited a compliance partner from São Paulo-based full service firm Aidar SBZ Advogados in response to a sharp increase in casework. Giovanni Paolo Falcetta, 35, joined the firm boosting the partnership to 79. At Tozzini he will focus on prevention and investigation work within the compliance practice.

Practice head Shin Jae Kim says she was very familiar with Falcetta's work from overlapping cases and conferences. "Giovanni is well recognised in the market, an excellent lawyer, is well-received by his clients and well known in the compliance field," she says.

Falcetta's hire is a result of a substantial increase in demand for Tozzini's compliance practice, which has grown from 24 partners and associates three years ago to four partners and around 70 lawyers today. Jae Kim attributes the sharp uptick in work to both the anti-corruption investigation into Petrobras' contractual dealings and governments putting a greater emphasis on tracking down corrupt practices worldwide. The expanded definition of corruption under the US Foreign Corrupt Practices Act, the UK's Bribery Act and Bazil's Clean Companies Act means companies suspected of malpractice abroad are likely to face investigation from multiple foreign authorities. US government agencies' prominent role in the Petrobras case provide a clear example of this. This situation has led many companies to overhaul their entire corporate governance structure. She says Falcetta's clients will come from local and international companies looking to strengthen their compliance procedures not only in the countries they are based, but also in their subsidiaries abroad. Listed state-owned companies in Brazil may be another source of work as the government hurries to reverse the damage done by the Petrobras scandal and prevent another major scandal from happening again.

The hire forms part of a wider expansion process that is several years in the making. "We have anticipated the market's upcoming need for compliance counseling and prepared for this [increase in] demand," says Jae Kim, who spearheaded the practice nine years ago. "When we started our compliance practice group, Brazil did not have the Clean Company Act nor high-profile corruption scandal cases, so we worked hard, purely on the belief that as Brazil became a global player, compliance would become more important."

For additional information visit www.tozzinifreire.com.br

HOGAN LOVELLS EXPANDS MIAMI OFFICE WITH LITIGATION PARTNER MARTY STEINBERG AND COUNSEL RAFAEL RIBEIRO

MIAMI, 6 July 2015: Hogan Lovells announced today the expansion of its Miami office with the addition of Litigation partner Marty L. Steinberg and counsel Rafael R. Ribeiro.

"Marty and Rafael will be welcome and strong additions to our Florida team, adding depth and a wealth of commercial litigation and arbitration experience to our existing group," said Richard Lorenzo, managing partner of the firm's Miami office. "We are proud to be joined by lawyers of the caliber and with the stellar reputations of Marty and Rafael."

Steinberg, a fellow of both the American College of Trial Lawyers and of the International Academy of Trial Lawyers, is a nationally recognized trial lawyer with a focus on commercial litigation, including contract disputes, class actions, business torts, securities litigation, healthcare fraud and abuse, intellectual property, antitrust, and product liability. He has represented more than 65 of the Fortune 500 companies in major cases as either lead counsel or national coordinating counsel.

"Because my practice includes several unique specialties, such as international investigations and FCPA work, certain of my clients urged me to join a larger international firm with global reach. Hogan Lovells is one of the most respected law firms in the world fitting this description," said Steinberg. "I am looking forward to collaborating with the firm's unparalleled litigation talent, expanding the scope of services I will be able to provide to my clients, and working with Hogan Lovells firm clients where my trial experience can be helpful to the team."

Ribeiro's practice is focused on internal investigations, international arbitration, cross-border litigation, and commercial litigation. He speaks Portuguese, Spanish and French, and has represented clients before the American Arbitration Association and the International Centre for Dispute Resolution, as well as in state and federal courts.

"I am very excited to join one of the leading international arbitration and cross-border litigation practices," said Ribeiro. "The firm's global profile will be a tremendous asset to my practice."

Steinberg received his J.D. from the Ohio State University Moritz College of Law and his B.S. from the University of Pittsburgh. Ribeiro received his J.D. from the University of Florida and his B.A. from the New College of Florida.

For additional information visit www.hoganlovells.com

Reserve your spot now
Registration deadline is **15 August, 2015.**

PRAC @ Vancouver 2015 Conference
Hosted by Richards Buell Sutton LLP
September 26 - 29, 2015

Included among the business session topics:

- **Business Session #1** | Country Briefing presented by Richards Buell Sutton
- **Business Session #2** | Regional Reporting on significant changes impacting industries and jurisdictions
- **Business Session #3** | Business Development Meetings and Member Firm Spotlight- a series of business development discussions among firms
- **Business Session #4** | Special Guest Presentation: *LNG – British Columbia's Opportunity* – The Honorable Rich Coleman, Minister of Natural Resources and Deputy Premier of British Columbia
- **Business Session #5** | PRACtice Management – *Succession Planning: What's Required To Do It Right?* — Tim Leishman, Guest Facilitator
- **Business Session #6** | PRACtice Management – *Developing the Next Generation of Business Developers* — Tim Leishman, Guest Facilitator
- **Business Session #7** | PRACtice Management – *Improving Referrals Amongst PRAC Member Firms* — Tim Leishman, Guest Facilitator
- **Business Session #8** | PRACtice Development - *Trends, Challenges and Opportunities in the Legal Profession* – panel review of current trends, opportunities and challenges in their respective jurisdictions
- **Business Session #9** | PRACtice Area Spotlight - *Cross-border Litigation - How Companies are Managing the Globalization of Disputes and Regulation*

Details and online registration **http://www.prac.org/events.php**

CAREY PARTICIPATING IN LAUNCH OF LEARNING TO LEAD MENTORING PROGRAM

SANTIAGO, 23 June 2015: The Cyrus R Vance Center for International Justice, Chilean firm Carey and local department store chain Falabella have launched a nine-month mentorship programme that aims to foster leadership skills among female lawyers and increase the number of women in senior legal positions in Chile. The launch event was attended by lawyers from different law firms, companies and members of the public sector.

The program "Learning to Lead" aims to increase the number of women reaching senior positions, which in Chile, is particularly low in the case of lawyers. It aims to mentor nine promising young female lawyers drawn from law firms, companies and universities by pairing them with lawyers and professors drawn from Bofill Escobar Abogados, Carey, Morales & Besa, Falabella's in-house team, the Universidad Católica de Chile and the Universidad de Chile. The mentors will hold five confidential 90-minute one-to-one sessions with their pupils between now and January 2016. Participants are also expected to attend five group training classes.

The sessions and classes cover a variety of topics, ranging from strategic career planning and work-life balance to communications skills and lawyer-client dynamics. All the courses are analysed from the perspective of gender and are accompanied by an extensive reading list.

"Learning to Lead" is formed by a group of mentors composed by Paola Bruzzone, in-house counsel of Falabella; Lorena Pavic and Jessica Power, partners at Carey, Loreto Silva, partner at Bofill Escobar; Paulina Veloso, partner at Veloso y Cía.; Ximena Fuentes, professor at Universidad de Chile and Universidad Adolfo Ibáñez; Myriam Barahona, partner at Morales y Besa; Paola Cifuentes, legal counsel of Anglo American and María Agnes Salah, professor at Universidad de Chile.

Carey Senior Partner, Jorge Carey will serve on the Advisory Committee.

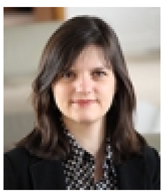
For additional information visit www.carey.cl

GIDE PROMOTES EIGHT LAWYERS TO COUNSEL

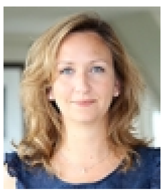
16 June 2015: Gide is delighted to announce the promotion of Counsel to eight promising young lawyers in Casablanca, London and Paris, in five practice areas. The appointments are effective as of 1 June, 2015:

Simon Auquier

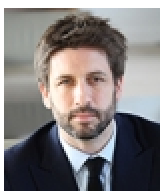
Olivier Bernardi



Elisa Bocianowska



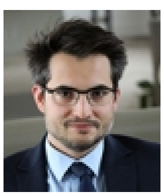
Laura Castex



Guillaume Jeannet

William Oliver

Natasha Peter



Jean-Philippe Pons-Henry

CASABLANCA
Mergers & Acquisitions / Corporate
Simon Auquier

LONDON
Banking & Finance
William Oliver

PARIS
Dispute Resolution
Natasha Peter
Jean-Philippe Pons-Henry

Competition & International Trade
Laura Castex

Banking & Finance
Olivier Bernardi

Real Estate Transactions & Financing
Elisa Bocianowska
Guillaume Jeannet

The new status highlights an excellent career to date within Gide. Each candidate was unanimously backed by his or her practice group, received individual sponsorship, and was approved by a commission comprising four partners. The Management Committee has awarded the Counsel status for an initial period of three years.

Laurent Modave, member of the Management Committee, says: *"This is the second group of young lawyers to be promoted to Counsel. A strict selection process was put in place, which reflects the firm's values of excellence and thoroughness. On behalf of all the partners, I would like to congratulate these young lawyers, who are among the most promising we have at Gide. I would also like to thank them warmly for their daily commitment in the service of our clients."*

For additional information visit www.gide.com

ARIAS & MUNOZ

ASSISTS DUTCH DEVELOPMENT BANK FMO ON REGIONAL LOAN FACILITY FOR BANCO DE AMERICA CENTRAL

June, 2015: Dutch development bank FMO was assisted by Arias & Muñoz's offices in El Salvador, Nicaragua and Honduras to provide a US$80 million credit facility, in conjunction with German investment bank DEG, to branches of Banco de América Central (BAC) in three Central American jurisdictions.

DEG granted 50 per cent of the loans awarded in Honduras and Nicaragua. BAC relied on in-house counsel. The final loan agreement, signed in Nicaragua, closed on 18 June.

FMO gave a US$30 million loan to BAC's Salvadorean arm, while FMO and DEG provided loans worth US$30 and US$20 million in Nicaragua and Honduras. The loan to BAC's Nicaraguan arm was secured by the bank's portfolio of real estate mortgages.

The regional bank will use the funds to increase its credit portfolio for small and medium-sized businesses.

Arias & Muñoz (El Salvador) Partner Zygmunt Brett in San Salvador; (Nicaragua) Partner Bertha Argüello in Managua; (Honduras)Partner Evangelina Lardizábal in Tegucigalpa.

For additional information visit www.ariaslaw.com

BRIGARD & URRUTIA

COLOMBIA'S ECOPETROL ISSUES US$1.5 BILLION IN NOTES

BOGOTA, 7 July 2015: Brigard & Urrutia Abogados in Bogotá assisted Colombia petroleum company Ecopetrol issue US$1.5 billion in notes.

Credit Suisse and HSBC acted as the underwriters.

Ecopetrol issued the 5.375 per cent notes due in 2026 on 26 June. The company is seeking US$6 billion of investment each year.

Counsel to Ecopetrol: Brigard & Urrutia Abogados Partners Manuel Fernando Quinche and Luis Gabriel Morcillo and associate María Camila Ordóñez in Bogotá.

For additional information visit www.bu.com.co

BAKER BOTTS

REPRESENTS WILLIAMS PARTNERS L.P. IN US$13.8 BILLION ACQUISITION BY THE WILLIAMS COMPANIES, INC.

HOUSTON, 13 May 2015: Earlier today, The Williams Companies, Inc. announced a definitive agreement pursuant to which it will acquire all public equity of its MLP, Williams Partners L.P. The deal, valued at $13.8 billion, is structured as an all stock-for-unit transaction, with Williams Partners public unitholders receiving 1.115 Williams shares for each Williams Partners unit. Upon completion of the proposed transaction, the combined entity is anticipated to be one of the largest C-Corps in the energy sector.

Baker Botts, a leading international law firm, represented the Conflicts Committee of Williams Partners L.P. in the transaction.

Baker Botts Lawyers/Office Involved: Corporate: Josh Davidson (Partner, Houston); Tull Florey (Partner, Houston); Travis Wofford (Associate, Houston); Alyssia Bernazal (Associate, Austin); Jennifer Wu (Associate, Austin); Rachel Ratcliffe (Associate, Austin); Tax: Michael Bresson (Partner, Houston); Chuck Campbell (Special Counsel, Houston); Litigation: David Sterling (Partner, Houston); Bill Kroger (Partner, Houston); Danny David (Partner, Houston).

For more information, please visit www.bakerbotts.com

CAREY

HELPS COLOMBIA VEGETABLE OILS COMPANY BUY CHILEAN BAKER

SANTIAGO, 15 June 2015: Carey assisted Colombian vegetable fats and oils producer Team Foods buy Chilean frozen bakery products company BredenMaster. Team Foods paid an undisclosed amount for BredenMaster. The deal closed on 29 May.

Bredenmaster has operations in Chile, Peru and Colombia.

Carey Partners Pablo Iacobelli and Guillermo Acuña and associates Patricia Silberman, Isabel Espinoza, Héctor Herrera, Antonio Vial, Jaime Coutts and Sebastián Gazmuri in Santiago assisted in the transaction.

For additional information visit www.carey.cl

CLAYTON UTZ

ADVISES AMCOM ON SUCCESSFUL SCHEME OF ARRANGEMENT WITH VOCUS

PERTH, 8 July 2015: Clayton Utz congratulates its client Amcom Telecommunications Limited, as well as Vocus Communications Limited, on the successful implementation of its merger by scheme of arrangement today. The acquisition implied an equity value for Amcom of approximately $700 million, with the combined Amcom and Vocus Group's market capitalisation expected to be approximately $1.3 billion. Amcom shareholders were today issued ASX listed shares in Vocus as consideration for their Amcom shares, and 3 Amcom directors will be appointed to the Vocus board.

Amcom is an IT and Telecommunications company that is a provider for the converging Information, Communication and Technology (ICT) needs of business and government across Australia. It was incorporated in 1993 and listed on ASX from the time of its 1994 initial public offering until delisting, which is expected to occur shortly given the scheme's implementation. Clayton Utz has acted as legal adviser to Amcom since 2009.

Clayton Utz Perth partner Mark Paganin led the firm's team together with partner Cameron Belyea, with key support from senior associates Stephen Neale and Liz Humphry and lawyers Thomas Parker and Alex Snell.

For additional information visit www.claytonutz.com

GIDE

€9 BILLION SHAREHOLDER LOAN OFFERED TO ORGAN AT END 2002 CANNOT BE CLASSIFIED AS STATE AID

PARIS, 9 July 2015: The 9 billion euro shareholder loan offered to Orange by the French authorities at end 2002 cannot be classified as State aid: Orange, advised by Gide, obtains the annulment of the European Commission’s decision.

New success for Orange (previously France Télécom) and the French State following the annulment by the General Court of the European Union, for the second time, of the decision rendered by the European Commission in the financial measures case. Following the Court of Justice’s ruling of 19 March 2013 annulling its previous judgment, the General Court’s ruling of 2 July 2015 considers that the European Commission was wrong to classify as State aid the 9 billion euro shareholder loan to Orange in December 2002, in the context of the company’s financial restructuring plan. The General Court’s ruling is a landmark decision that specifies the application conditions for the “prudent private investor” test.

The General Court reminds that the prudent private investor test should be applied in relation to the time when the measure at issue was taken by the French State. In the case at hand, while the measure in question (shareholder loan offer first announced to the market and then sent to the company) was adopted in December 2002, the Commission applied the test on a situation that existed prior to the first declaration of support by the French authorities, i.e. July 2002. For the General Court, this appreciation of the situation is wrong. The Commission can of course have regard to prior events and objective facts that form part of the context of the measure in question. However, in this case, all events that took place before the adoption of the measure and that determined the French State’s decision in 2002 also had to be taken into account.

The General Court then highlights that the French State, just like any other investor or private shareholder, can make use of the financial markets’ specific operating rules. In this regard, the fact that the declarations of support by the French State may be perceived by the market as a commitment, is not sufficient to conclude that these declarations are likely to lead to economic or legal consequences and that that they are thus capable of committing State resources. In essence, the State must provide a clear, precise and firm commitment to support the company. In the case at hand, the declarations were, as regards the form, scope and conditions of potential future intervention by the French State, of an open, general and conditional character. They therefore contained no irrevocable commitment of support or investment by the State. Without commitment to act prior to December 2002, the State adopted the same prudent attitude as a prudent private investor who waits for all requisite conditions to be met before committing resources.

Orange was represented before the General Court and the Court of Justice by Gide partner Stéphane Hautbourg and counsel Sophie Quesson. For additional information visit www.gide.com

HOGAN LOVELLS

ADVISES ON TWO SIGNIFICANT CAPITAL MARKETS TRANSACTIONS WITH A TOTAL VALUE OF US$164 MILLION

HONG KONG, June 2015: Hogan Lovells has successfully advised on two capital markets transactions with a combined value of over US$164 million.

On the first transaction, we advised CLSA Limited on the placing of 302 million new shares of CITIC Dameng Holdings Limited, listed on the Hong Kong Stock Exchange, for approximately US$50.7 million. CITIC Dameng is one of the world's largest vertically integrated manganese producers, engaging in the production and sales of manganese products at all stages of the production chain.

In addition, the team advised Tongda Group Holdings Limited, also listed on the Hong Kong Stock Exchange, on the issue of US$113.5 million convertible bonds to PA Marco Opportunity VIII Limited. Tongda Group Holdings is a one-stop service provider of consumer electronics casings products.

The team advising on both transactions was led by partner Terence Lau and supported by other members including partners Andy Ferris and Thomas Tarala, senior associate Priscilla Lee, and associates Henrietta Addams Williams, Don Chan and Ryan Spence.

For additional information visit www.hoganlovells.com

NAUTADUTILH

ASSISTS UNDERWRITERS IN THE IPO OF KIADIS PHARMA N.V.

AMSTERDAM, 08 July 2015: NautaDutilh together with Sidley Austin LLP successfully assisted Kempen & Co, KBC Securities, and Peel Hunt in their role as underwriters in the initial public offering of Kiadis Pharma N.V. and the listing of its shares on the Amsterdam and Brussels market of Euronext.

Trading in the shares commenced 2 July. Kempen & Co acted as Sole Global Coordinator and Kempen & Co and KBC Securities together acted as Joint Bookrunners. Peel Hunt was appointed Co-Manager. While many biotech companies favour NASDAQ in New York, Kiadis has opted for Euronext which, according to CEO Manfred Rüdiger, was a conscious choice.

Kiadis Pharma is a clinical stage biopharmaceutical company focused on research, development and future commercialisation of cell-based immunotherapy products for the treatment of blood cancers and inherited blood disorders. Kiadis Pharma is committed to developing innovative and potentially life saving therapies for patients with late-stage blood cancers and patients with inherited blood disorders, who are in need of a transplant, an area of significant unmet medical need.

The Offering. The book was well subscribed with demand from both generalist and specialist investors from the Netherlands, Belgium, France, the United Kingdom, Scandinavia and the United States. Kiadis Pharma issued 2,613,636 new shares with an offer price of EUR 12.50 per share. Taking into account the offer price and the prior existing shares, Kiadis Pharma has an market capitalization of EUR 166.4m. The gross proceeds of the IPO for the Company amount to approximately EUR 32.7m. A total of approximately 20% of the total offering of shares was allocated to retail investors from the Netherlands and Belgium. The offering was successful despite difficult market conditions due to the Greek default situation.

The NautaDutilh team advising the Underwriters consisted of Petra Zijp, Jochem Polderman, Joppe Schoute and Paul van der Bijl.

For additional information visit www.nautadutilh.com

NAUTA DUTILH

ASSISTS GALAPAGOS ON LARGEST BIOTECH IPO ON NASDAQ IN RECENT YEARS

May, 2015: NautaDutilh has assisted clinical-stage biotech company Galapagos (Euronext Brussels and Euronext Amsterdam) on its 280 million EUR NASDAQ IPO, which closed in May 2015.

The global offering was composed of a public offering in the United States of ordinary shares in the form of American Depositary Shares and a concurrent private placement of ordinary shares in Europe.

Morgan Stanley, Credit Suisse and Cowen and Company acted as joint bookrunners.

The transaction was a huge success: it is the largest biotech IPO on NASDAQ in recent years and the second largest ECM transaction to date in 2015 on Euronext Brussels. NautaDutilh acted as Belgian and Dutch counsel.

The team of NautaDutilh was headed by Nicolas de Crombrugghe and Christiaan de Brauw; the core team was composed of Philippine De Wolf, Louis Lantonnois, Paul van der Bijl and Philip Silvis.

For additional information visit www.nautadutilh.com

HOGAN LOVELLS

SUCCESSFULLY OBTAINS LEAVE TO APPEAL ON HIGH PROFILE TRADE MARK CASE

HONG KONG - 26 May 2015: Hogan Lovells won a significant victory in the Hong Kong Court of Final Appeal in the case of Tsit Wing (Hong Kong) Company Limited v TWG Tea Company Pte (FAMV 6/2015) in which the Appeal Committee granted TWG Tea Company Pte Ltd ("TWG Tea") leave to appeal two adverse decisions of the Court of First Instance and the Court of Appeal. This case will inevitably be important in clarifying the state of trade mark law in Hong Kong, and involves issues which should considerably clarify and simplify the application of the law.

Tsit Wing (Hong Kong) Company Limited ("Tsit Wing") registered two device marks in 2006 containing the letters "TWG" for goods including coffee and tea. TWG Tea adopted its name in 2008 and operates tea shops around the world. Its first tea shop opened in Hong Kong in December 2011 under signs also containing the letters "TWG". Tsit Wing alleges that TWG Tea's use of its signs infringe the registered trade marks and constitutes passing off. Tsit Wing was successful at first instance and on appeal to the Court of Appeal.

On 20 May, the Court of Final Appeal granted leave to appeal in relation to six questions, namely:

Whether the test for infringement of marks under section 18 (3) the Hong Kong Trade Marks Ordinance (which refers to the issues of similarity of marks and signs, goods and/or services separately from the issue of use likely to cause confusion) is the same as under Section 10(2)(b) of the UK Trade Marks Act (which, following European law, refers to the likelihood of confusion because of the similarity of marks and signs, goods and/or services).

Whether similarities between marks and signs and the likelihood of confusion are to be judged of the basis of the "essence" or "dominant features" of the marks in issue or with respect to features which have "trade mark significance".

Whether in assessing the distinctive and dominant components in a mark comprising letters and devices "words speak louder than devices".

Whether marks registered in black and white are in effect registered in respect of all colours.

Whether a colour mark may be registered in series with a monochrome mark even if the colours are expressly claimed as elements of the mark.

Whether dilution of a trade mark may be claimed as a head of damage under the law of passing off.

The case is set for a full hearing before the full Court of Final Appeal in January 2016.

Hogan Lovells' team advising TWG Tea was led by Hong Kong IP partner Henry Wheare, supported by associates Serena Lim and Valerie Suen. Martin Howe QC and Doug Clark, instructed by Hogan Lovells, appeared for TWG Tea.

For additional information visit www.hoganlovells.com

RODYK

ADVISES ON S$175 MILLION INVESTMENT IN PROPERTYGURU PTE LTD

SINGAPORE, June 2015: Rodyk acted for Jani Antero Rautiainen and Stephen Nicholas Melhuish (Founders) and the minority shareholders in the sale of certain existing shares and investment in PropertyGuru Pte Ltd for an aggregate consideration of S$175 million from a "strategic consortium" of three investors.

The consortium comprises of Indonesian media company PT Emtek, venture capital firm Square Peg Capital, and private equity firm TPG.

PropertyGuru is a well-known entity in Singapore. Rodyk also acted for the clients in an initial investment by Immobilien Scout GmBh in 2012 which was the largest investment in a start-up in South-East Asia at that time. The current investment will fuel PropertyGuru's expansion in the Southeast Asia region, as well as its marketing and innovation efforts.

Corporate partners S Sivanesan and Sunil Rai led the Rodyk team.

For additional information visit www.rodyk.com

SIMPSON GRIERSON

ADVISES MARLBOROUGH LINES ON ITS ACQUISITION OF YEALANDS WINE GROUP LIMITED

AUCKLAND, 06 Jul 2015: The Simpson Grierson team of Michael Pollard and Anastasiya Gutorova has recently advised Marlborough Lines Limited in its acquisition of Yealands Wine Group Limited.

Yealands Wine Group is one of New Zealand's biggest wine companies and exporters. Its sale to Marlborough Lines (a Marlborough-based electricity supply company) is said to allow the business to remain local to the region.

Partner Michael Pollard says, "it was great to be involved in a key deal for the Marlborough region like this one and deeply satisfying when it all came together in the end."

For additional information visit www.simpsongrierson.com

SANTAMARINA Y STETA

ACTS FOR FIDELITY NATIONAL'S MEXICAN INSURANCE SUBIDIARIES IN LANDMARK SALE TO BERMUDA BASED INSURANCE COMPANY ARMOUR GROUP

MEXICO CITY: *Sale made possible by a recent change in the law allowing countries without free trade agreements with Mexico to buy up to 100 per cent of capital stock in Mexican financial institutions.*

The transaction closed April 22, 2015. The legal work involved preparing and negotiating the transactional documents – including a share purchase agreement and stock pledge agreement – and several ancillary documents. These included minutes of the shareholders' meetings of Fidelity Mexico and other Mexican subsidiaries approving the transaction, the creation of a pledge, and other related resolutions. Until January last year, foreign investment in insurance companies was limited only to qualified investors, such as foreign financial institutions, from countries that had a free trade agreement with Mexico that permitted the establishment of affiliates.

Commenting on the transaction, Santamarina y Steta's lead partner **Jorge Leon Orantes** said: "Considering the new legal insurance framework which entered into force on April 2015, and the new set of regulations and corporate governance rules deriving from this law, you can expect there will be many more M&A transactions in the insurance sector."

For additional details visit www.s-s.mx

TOZZINI FREIRE

ACTS FOR UNIAO QUIMICA IN PURCHASE OF NOVARTITIS PHARMA PLANT

SAO PALO, April 2015: TozziniFreire São Paulo office has helped local pharmaceutical company União Química acquire a drug manufacturing facility from the Brazilian subsidiary of Swiss-based Novartis.

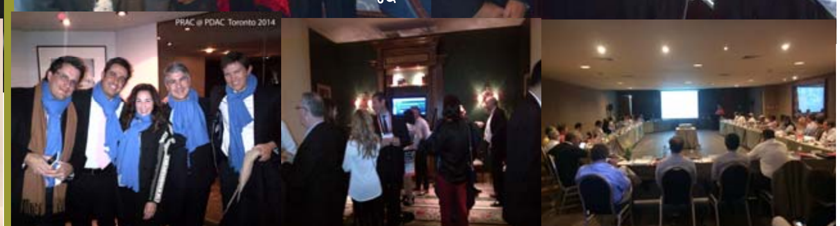
The deal closed for an undisclosed amount on 13 February. CADE approved the deal in April. The plant is situated in Taboão da Serra in the state of São Paulo and becomes the fifth in União Química's portfolio.

Acting as Counsel to União Química were TozziniFreire Advogados Partners Elysangela de Oliveira Rabelo, Cláudia Muniz Levasier Mahler, Daniel Oliveira Andreoli, Vladimir Miranda Abreu, Bianca Signorini Antacli, Vera Kanas and Mauricio Braga Chapinoti and associates Vivian Anne Fraga do Nascimento Arruda, Felipe de Andrade Krausz, Tatiana Gualberto Kascher, Bruno dos Reis Neto Auada, Felipe Borges Lacerda Loyola, Otavio de Moraes Attuy and Mariana Figueiredo de Sá .

For additional information visit www.tozzinifreire.com.br

UPCOMING PRAC EVENTS

- **58th International PRAC Conference**
  Vancouver
  Hosted by Richards Buell Sutton LLP
  September 26—29, 2015
- **PRAC @ IBA** Vienna October 5, 2015
- **PRAC @ PDAC** Toronto, March 8, 2016
- **PRAC @ IPBA** Malaysia, April 14, 2016
- **PRAC @ INTA** Orlando, May 22, 2016
- **59th International PRAC Conference**
  Barcelona
  Hosted by Rousaud Costas Duran SLP
  May 21—24, 2016
- **PRAC @ IBA** Washington September 19, 2016



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CLAYTON UTZ

Clayton Utz Insights

09 July 2015

NSW Government seeks your views on removing resource significance provisions of mining policy

By Nick Thomas and Claire Smith.

Key Points:

Stakeholders have until 21 July to comment on the proposed Mining SEPP amendment.

The NSW Government has released a draft amendment to its State mining policy which would remove the requirement to make the significance of a mineral resource the "principal consideration" under that policy in the determination of an application for planning approval for mining.

What is the proposed change?

The proposed amendment would remove clause 12AA of State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (**Mining SEPP**), which deals with the significance of the resource in the assessment of such applications.

Clause 12AA was added to the Mining SEPP in November 2013, in order to require expressly that the consent authority consider the relative significance of the resource and the economic benefits of developing the resource, both to the State and the region in which the development is proposed to be carried out. It also provides that the significance of the resource is to be the consent authority's "principal consideration" under Part 3 of the Mining SEPP, where Part 3 deals with a range of considerations which are relevant for mining projects.

Why is it being proposed?

Clause 12AA provides useful guidance on the way in which the significance of a resource is to be considered when assessing a proposal for mining that resource. However, the Government now proposes to remove that clause, referring to "community and stakeholder concern that the social and environmental impacts of a proposal are not being adequately considered or given appropriate weighting".

The Government has said that the removal of clause 12AA would "build community confidence in the rigour of the assessment process" and provide "a balanced framework for decision makers to assess the likely impacts of mining developments".

What effect would it have?

The Environmental Planning and Assessment Act 1979 makes it clear that economic and social factors as well as environmental factors must be taken into account in assessing an application for planning approval, and the removal of clause 12AA will not change that.

MEDIATION

The New Brazilian Mediation Law

Law N. 13,140 (known as the Brazilian Mediation Law) was enacted on June 29, 2015. It provides for mediation involving individuals and private entities, as well as the settlement of disputes involving public entities.

The new law, which comes into effect in 180 days, regulates extrajudicial and judicial mediation.

The provisions on judicial mediation must be interpreted together with the new Brazilian Civil Procedure Code. The Code will come into effect in March 2016 and provides for a mediation or a conciliation hearing in the early stages of most lawsuits. The Code also regulates the activities of mediators in judicial proceedings.

Extrajudicial mediation involving individuals and private entities has been already used in some cases, since it does not require a specific law regulating the matter. But it is expected that the new legal framework will boost the adoption of mediation and provide comfort to parties that are not familiar with this method of conflict resolution.

The new law establishes that parties to an agreement may provide for a mandatory mediation meeting if a dispute arises. Like an arbitration clause, this mediation clause will have a binding effect. According to certain studies, the binding effect of the mediation clause contributes significantly to the development of the mediation proceeding and to the resolution of conflicts without arbitration or judicial proceedings.

With respect to disputes involving public entities, the new law provides for the future creation of administrative resolution and conflict chambers. It allows, however, the immediate adoption of *ad hoc* proceedings while these chambers are not constituted.

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Mônica Mendonça Costa
Partner – São Paulo

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It is also important to keep in mind that the "principal consideration" requirement in clause 12AA applies only to the various considerations in Part 3 of the Mining SEPP, and it does not make the significance of a resource the "principal consideration" of all considerations under the Act.

Consequently, even if the proposed amendment is made, a consent authority will need to consider the significance of the resource, and the economic and social effects of the proposal to extract it, when assessing a development application for that proposal.

As we said recently, the Government is currently preparing economic guidelines for the assessment of mining projects, as part of its new Integrated Mining Policy. We anticipate that these will provide some guidance for proponents, consent authorities and other stakeholders in assessing mining projects.

What's next?

Stakeholders have until 21 July to comment on the proposed Mining SEPP amendment.

The Government is currently reviewing the whole of the Mining SEPP, and expects to hold further discussions about this later this year.

You might also be interested in...

- Stage 1 of the NSW Integrated Mining Policy released for public comment

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NEWS & EVENTS

DEFEND AN OCCURRENCE OUTSIDE THE POLICY PERIOD?

June 25, 2015

Ryan A. Shaw
Richards Buell Sutton Insurance Newsletter

At issue in *Canadian Northern Shield Insurance Company v. Intact Insurance Company*, 2015 BCSC 767 ("*CNS*"), was whether the defendant insurer had a duty to defend an insured under a homeowner's policy. The question arose in respect of actions brought against the insured for damages occurring after the policy had expired.

THE FACTS

The loss stemmed from a landslide that occurred on January 9, 2005 in North Vancouver after an unusually heavy rainfall. The landslide originated from property on Berkeley Avenue, situated at the top of an escarpment, and struck the property below causing substantial damage to that property and injuries to its inhabitants. Lawsuits were brought against the current and former owners of the Berkeley Avenue property.

The plaintiff insurer defended the former owners of the Berkeley Avenue property in the lawsuits pursuant to their homeowner's policy. Those actions eventually settled. The plaintiff insurer then brought the within action seeking a declaration of entitlement to equitable contribution from the defendant insurer toward defence and settlement costs. The defendant insurer held a policy with the former owners of the Berkeley Avenue property for a ten year period, which ended about three months before the landslide occurred (the "Intact Policy"). The Intact Policy provided coverage for "accidents or occurrences" which take place during the policy period. There was no definition of "accident" or "occurrence" in the Intact Policy.

For the purpose of the proceeding, the defendant insurer admitted its insured committed negligent acts during the policy period, such as failing to implement adequate drainage and altering and removing vegetation continuously over the course of the policy period, which caused or contributed to the landslide.

THE POSITION OF THE PARTIES

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Ryan A. Shaw

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The question for the court's determination was whether the terms "accident" or "occurrence" as used in the Intact Policy apply to negligent acts or omissions of the insured occurring within the policy period in circumstances where damage or injury does not result until after the policy has expired. Both parties argued that the language used in the Intact Policy was unambiguous, but asserted opposite interpretations. The plaintiff insurer argued that the words "accident" and "occurrence" must be interpreted broadly in favour of the insured and, subject to policy language to the contrary, can refer to the insured's acts or omissions alone to trigger coverage. The defendant insurer argued that no ordinary person reading the policy would think a negligent act or omission was an accident or occurrence unless there was resulting damage during the policy period.

THE RULING

The court ultimately answered the question in the negative. Firstly, the court considered the relevant policy wording in the context of the policy as a whole. The court found that while the words "accident" and "occurrence" were not ambiguous in themselves, the lack of an express definition with some temporal restriction to damage created some ambiguity. As a result, the court preferred an interpretation determined to be consistent with the reasonable expectations of the parties and that given to similar policies.

The court relied on *Pickford Black Ltd. v. Canadian General Insurance Co., [1977] 1 SCR 261*, for the proposition that an "accident" as used in its natural an ordinary meaning is not defined by the act or omission which caused it. The plaintiff insurer attempted to distinguish *Pickford Black* by drawing an analogy to *Cansulex Ltd. v. Reed Stenhouse Ltd. (1986),* 1992 CanLII 1545 (BC CA). In *Cansulex*, a geographical policy limitation was at issue. The insured had loaded a cargo of sulpher in a vessel under conditions that caused the vessel's hull to corrode over time. The court in that case found that the corrosion damage was caused by an accident or occurrence that arose in Canada (i.e. the loading of the vessel) even though the process of corrosion was such that the damage occurred outside the country.

The court did not accept that *Cansulex* was analogous but rather followed the reasoning in *Landry v. Fenton*, [1994] BCJ No 1472 (SC), a case which involved the interpretation of a similarly worded homeowner's policy in comparable circumstances. In *Landry*, the plaintiff suffered a slip and fall and sought damages for the negligent act of the former owner, specifically construction of a walkway on the subject property. The construction of the walkway occurred during the policy period but the plaintiffs fall happened after the policy had expired. In that case, the court held that the insurer could only be responsible for a loss to the insured that arose during the policy period; loss, in the court's view, being a claim for compensable injuries that are occasioned at least in part during the policy period.

PRACTICAL CONSIDERATIONS FOR INSURERS

At first glance *CNS* may not appear to warrant consideration, as many insurers will assume the duty to defend cannot be engaged where damages occur outside the policy period. However, a careful review of the decision brings that view into question. For instance, what if the coverage phrase "This insurance applies to accidents and occurrences which take place during the period this policy is in force" was not included in the policy. This appears to have been a key consideration for the court in determining the reasonable expectations of insurer and insured. Additionally, a policy containing definitions of "accident" or "occurrence" could have led to a different result. Finally, one has to wonder as to the potential result in this case had there been standard "deeming" language such as "property damage…shall be deemed to occur at the time of the "occurrence" that caused it".

Insurers should also be aware of the more recent decision in *Selk Ventures Corporation v. Canadian Northern Shield Insurance*, 2015 BCSC 964, where the court determined the insurer under a CGL policy had a duty to defend a claim that involved a loss which happened outside the policy period. In *Selk*, the court was satisfied that allegations of defective workmanship might be construed as an "occurrence" within the policy period, even though the loss (i.e. the collapse of a building's roof) came after the policy had expired.

These recent decisions serve as a useful reminder to carefully consider the policy wording in situations where loss or damage has occurred after the expiration of the policy. It may not be so clear such loss cannot attract coverage.

Davis Wright Tremaine LLP
DEFINING SUCCESS TOGETHER

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

03.02.15

By Ron Cai, Alan Huang, and Lin Zhu

Background

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

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

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

Return and repair obligation – 15 days

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

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

- *Interpretations of other related laws*

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

Penalty

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

Fraud on consumers

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

- *Intentional fraud*

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

- *Fraud per se*

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

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

Penalty

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

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

Fraud per se in special service industries

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

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

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

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

Misleading and fraudulent publicity

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

Prepayment arrangements

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

Protection of personal information of consumers

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

Form contracts

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

Conclusion

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

Disclaimer

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New regulation on the transport of crude oil by pipeline allows free negotiation of the agents.

On June 30 2015, Resolution No. 31325 of 2015 was enacted amending the methodology for setting prices for the transportation of crude oil by pipeline, which was originally established in Resolution No. 72146 of May 7, 2014.

This Resolution is issued in the framework of the National Development Plan 2014-2018, as an additional element to mitigate the negative impact of the fall in international prices for hydrocarbons, by allowing the negotiation process of the agents involved in the transportation of crude oil by pipeline, that is, between the carrier and the remitter of each pipeline system.

Resolution 31325 implements a process of negotiation between the agents involved in the transport of crude oil by pipeline that seeks to achieve agreements not only in respect to the applicable transport rate, but also on the monetary conditions for each route and the annual increases to the rate during said period. In the absence of agreement between the agents, the Direction of Hydrocarbons will determine the applicable rate according to the criteria of the formula set forth in Article 7 of the Resolution, which must be then published in the BTO by the carrier.

Please note that the above procedure shall only apply for the fixing of rates for the period 2015-2019.

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REVISION OF THE MERGER CONTROL REGULATIONS UNDER THE INDIAN COMPETITION ACT

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The Competition Commission of India (**"CCI"**) has revised the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (**Combination Regulations**), making them more forward looking, in keeping with some of the best practices in other jurisdictions. The instant revision is the fourth instance in the four years since the introduction of the merger control regime in India.

The changes to the to the Combination Regulations, which draw heavily from CCI's experiences thus far under the merger control provisions of the Indian Competition Act (**"Act"**), are founded on the principles of transparency, flexibility and simplicity. The revised Combination Regulations are intended to make the paperwork for Mergers and Acquisitions (**M&As**) simpler by providing "flexibility to parties regarding signing of the notice" and deciding to invite public comments for all transactions under its review.

This article reviews the impact of the key revisions to the Combination Regulations going forward.

(a) Transparency

The revised Combination Regulations provide that a brief summary of every combination that CCI is reviewing will be put up on the CCI's website to ensure greater transparency. Such an initiative will also allow stakeholders to submit their comments on the same to the regulator.

Additionally, the CCI has decided to give fifteen (15) days to third parties to comment on proposed deals in the first phase of review. Such a move provides a clearly identifiable timeline for collation of third party comments to proposed combinations, thereby making it easier for the enterprises to determine the timelines involved with the merger notifications under the Act.

(b) Flexibility

Prior to the instant revision of the Combination Regulations, only the managing director was permitted to verify the contents of a notification on behalf of the relevant party, unless the company authorized a director or a company secretary to do so by way of a specific board resolution. This restriction, in turn, gave rise to practical difficulties, due to the absence in certain jurisdictions, of designations that were equivalent of a 'managing director' or 'company secretary'.

Under the revised Combination Regulations, the CCI has provided flexibility to the board of directors of companies to authorise any person to sign the notice seeking CCI's approval.

(c) Simplicity

In line with the requests from stakeholders, CCI will revise Form I that is required to be filed for notifying a combination. Notes to the forms will soon be published to provide guidance to the notifying parties regarding the information required to be filed in a notice.

Additionally, per the revised Combination Regulations, the number of copies of the notice to be filed, will also be reduced. Currently, three copies of the notice is to be filed with the CCI – two in hard copies, and an electronic version thereof.

(d) Certainty

Previously, the trigger events for a notification to the CCI were restricted to passing of board resolutions, execution of definitive documents or any other document for an acquisition. In cases where no binding document conveying an intention or decision to acquire had been executed, the term "other document" encompassed any communication of the intent to acquire to the Central Government or State Government or a Statutory Authority.

The erstwhile definition of "other document" had the potential to trigger the notification requirement upon *any* communications to statutory authorities, including the Insurance Regulatory and Development Authority, Department of Industrial Policy and Promotion and /or the Foreign Investment Promotion Board, at a stage when parties were yet to finalise the details of the transaction in question, let alone its potential effect on competition.

A key change brought in the amendments is in relation to the definition of the term "*other document*". To bring in more certainty, scope of the term "other document" has now been limited to a specific communication conveying the intention to make an acquisition to a statutory authority.

(e) Timelines

Under the revised Combination Regulations, the CCI has modified the timeline for the first phase of review to thirty (30) "**working**" days. Previously, the statute provided for a first phase of review to be completed within thirty (30) "calendar" days earlier.

Final Words

The revisions to the Combination Regulations are a seemingly welcome addition to the M&A filings made to the CCI. The fair trade watchdog's move would help in avoiding undue delays as well as usher in greater transparency into its decision-making process.

About The Author

Piyush Gupta is a partner at Kochhar & Co. and heads the competition advisory practice group of the firm.

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

Disclaimer

The contents of the above article are intended to provide a general guide to the subject-matter and should not be treated as a substitute for specific professional advice for any particular course of action as the information above may not necessarily suit your specific business and operational requirements. It is to your advantage to seek legal advice for your specific situation. The firm has a team of lawyers with knowledge and experience in this area, and who are able to help analyse the clients' competition law queries, conduct competition compliance audits as well as draft competition law compliance manuals for the clients' internal purposes.

About Kochhar & Co.

Kochhar & Co. is one of the leading and largest corporate law firms in India. The Firm enjoys the distinction of being the only Indian law firm with full service offices in the six prominent Indian cities of New Delhi, Mumbai (Bombay), Bangalore, Chennai (Madras), Gurgaon and Hyderabad, and five overseas offices in the United States (Atlanta, Georgia), Singapore, Tokyo, Jeddah and Riyadh. The opening of the Middle East office in Saudi Arabia and the Tokyo office makes the Firm the first and only Indian law firm to have offices in these countries.

Kochhar & Co. offers a wide range of legal services in the areas of corporate and commercial laws and specializes in representing major foreign and domestic corporations with diverse business interests in India. The Firm acts as Indian counsel for some of the largest multinational corporations from North America, Europe, South-East Asia and Japan (including several Fortune 500 companies).

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Kochhar & Co.

Advocates and Legal Consultants

COUNSELLORS AT LAW

NEWS DETAIL

25/03/2015

NEW RULES ON THE MANAGEMENT OF OFFSHORE DEBT BY NON-BANK DEBTORS

Bank Indonesia has issued Regulation No. 16/20/PBI/2014 dated 29 October 2014 (“BI Reg 16”) on the application of prudence principles in managing offshore debt taken out by a non-bank debtor (“NBD”). The requirements entail observance of a hedging ratio, a liquidity ratio and a credit rating. Bank Indonesia has also introduced Circular Letter No. 16/24/DKEM dated 30 December 2014 (“Circular 16”) for the implementation of Regulation No 16. Both BI Reg 16 and Circular 16 have been effective since 1 January 2015.

<u>Main Objectives</u>

Pursuant to BI Reg 16, any non-bank corporation (including a state-owned company) that receives an offshore debt in foreign currency must apply prudence principles by meeting minimum hedging levels and observing liquidity ratios and credit ratings that are stipulated in BI Reg 16. The definition is wide and includes debt owed by Indonesian subsidiaries to their foreign parent companies.

BI Reg 16 does not require government approval for incurring offshore debt; instead it imposes reporting obligations based on self-assessment of balance sheet items: the basis for determining the applicable hedging level and liquidity ratio is the amount of “Foreign Exchange Assets” and “Foreign Exchange Liabilities” of any NBD within three to six months after the end of the most recent quarter (i.e. 31 March, 30 June, 30 September and 31 December).

<u>Application of Prudence Principles</u>

The term “offshore debt” itself is defined broadly in BI Reg 16: indebtedness owed by a resident (a person, a legal entity or another entity that is domiciled in Indonesia or plans to be domiciled in Indonesia for at least one year) to a non-resident in foreign or Rupiah currency, and includes Sharia-based debt.

As indicated above, the main component to calculate the hedging level and liquidity ratio of the NBD is the “Foreign Exchange Asset” and “Foreign Exchange Liability”. Please see below further elaboration on both items.

(A) “Foreign Exchange Asset”

“Foreign Exchange Asset” is defined by BI Reg 16 as including asset in foreign exchange that is used in the calculation of hedging and liquidity ratio. Items that is included as foreign exchange asset is stipulated in Circular 16, which consist of cash, giro, deposit, time deposit, receivables, inventory, other marketable securities and receivables in foreign currency which will be calculated based on its position at the end of each quarter.

Receivables are calculated as part of the NBD’s Foreign Exchange Asset, if it fulfills the following requirements:

- trade receivables to both resident and non-resident that will due (i) up to 3 months after the end of the relevant quarter, and/or (ii) more than 3 months up to 6 months after the end of the relevant quarter, that is a onetime deal (jual putus) or non-refundable and after being deducted with provision for impairment,

- the underlying contract or agreement for the receivables must be signed before 1 July 2015 (for receivables to resident). Trade receivables to resident which underlying contract or agreement is signed on and after 1 July 2015 can still be included as component of foreign exchange asset if it relates to strategic infrastructure project.

Circular 16 also stipulates requirement for inventory, marketable securities as well receivables derived from forwards, swaps, and/or option transactions. According to Circular 16, inventory that will be classified as Foreign Exchange Asset is inventory of an exporter corporation that has export income ratio of more than 50% compare to its income in the preceding one year calendar and the value of inventory will exclude equipments and utilities.

(B) “Foreign Exchange Liability”

The term “Foreign Exchange Liability” is defined as liability in foreign currency that is used in calculating the liquidity and hedging ratio, which will include all liability in foreign currency to resident and/or non-resident including liability derived from forward, swap and/or option transaction that will close within three months after the end of the relevant quarter and/or closing between the fourth and the sixth month after the relevant quarter.

In brief, the prudence principles as stipulated in BI Reg 16 must be implemented as follows:

- Hedging Ratio. Each NBD must effectuate a minimum hedging ratio of 25% of the combined negative spread between its Foreign Exchange Assets and its Foreign Exchange Liabilities which will be due (i) within three months after the end of the relevant quarter, and (ii) between the fourth and the sixth month after the end of the relevant quarter.

  The hedging ratio must be realized by hedging the foreign exchange against the Rupiah by taking out derivative coverage in the form of a forward, a swap and/or an option.

  BI Reg 16 requires that, as of 1 January 2017, the hedging transaction must be done through an Indonesian bank. Hedging transaction that is entered into with an offshore bank before 1 January 2017 will still be acknowledged as Foreign Exchange Assets and used in calculating the minimum liquidity and hedging ratio.

- Liquidity Ratio. The NBD must meet a minimum liquidity ratio of 70%, calculated by dividing the total value of Foreign Exchange Assets that is available up to three months after the end of the last quarter by the amount of Foreign Exchange Liabilities that are due up to three months after the end of the most recent quarter.

- Credit Rating. The NBD must have a credit rating (either an issuer credit rating or a debt credit rating) of at least BB- (or equivalent) issued by an authorized Rating Agency that is acknowledged by Bank Indonesia as set out in the Attachment 1 of Circular 16.

  The rating may not be older than two years, and obligation to fulfill the credit rating for NBD that enters into offshore debt in foreign currency with its holding company or guaranteed by its holding company can be done using the credit rating of the holding company. For NBD that is just established, obligation to fulfill the credit rating can also initially be fulfilled by using the credit rating of its holding company.

Exemptions

(A) Exemption on Hedging Ratio

The minimum hedging ratio as set out in BI Reg 16 is not applicable for NBD that has its financial recording in US dollars and satisfies the following:

- has export-income ratio of more than 50% of its income in the preceding calendar year, and
- has obtained approval from the Minister of Finance to perform its bookkeeping in US dollars currency.

(B) Exemption on Credit Rating Requirements

There are some limited exemptions for offshore foreign debt for infrastructure projects.

Reporting

Compliance with the prudence principles (including for those that are exempted from the hedging ratio and credit rating requirement) must be reported to Bank Indonesia accompanied by supporting documentation.

Supervision

In supervising compliance with the prudence principles, Bank Indonesia will review and examine submitted reports and supporting documents and if it deemed necessary, Bank Indonesia may (i) require the NBD to provide further explanations, evidence, notes and/or other supporting documents, (ii) conduct direct inspection on the NBD, and/or (iii) appoint an external party to undertake the examination on behalf of Bank Indonesia.

Sanctions

BI Reg 16 provides for comparatively mild sanctions. In line with the territoriality principles that underlie all Bank Indonesia regulations, the foreign creditor does not incur liability for non-compliance.

Any NBD that fails to apply the prudence principles in BI Reg 16 or fails to submit the required report incurs merely an administrative sanction in the form of written warning and payment of fine within the range of Rp. 500,000 up to Rp. 10,000,000 per report.

Effectiveness

BI Reg 16 in its transitional provision provides that the provisions of BI Reg 16 will take effect as of 1 January 2015. However, during the first year after effectiveness, a reduced minimum hedging ratio of 20% and a reduced minimum liquidity ratio of 50% apply. The credit rating requirement will also be applied only to offshore debt that is signed or issued on and after 1 January 2016, and the imposition of sanction under BI Reg 16 and PBI No. 16/22/2014 will only commence as of the submission of reports for the third calendar quarter of 2015 (except for sanction that relates to credit rating which will only be applicable for offshore debt that is signed or issued on and after 1 January 2016). (*by: Theodoor Bakker & Elsie F. Hakim*)

CHOLESTEROL: IT'S ALL ABOUT THE NUMBERS, EVEN THE PATENTS

Grace Teoh discusses a dispute on a patent for cholesterol medication

Dave Barry, a Pulitzer Prize-winning American author and columnist, was quoted as saying, "It is a scientific fact that your body will not absorb cholesterol if you take it from another person's plate". On 3 April 2014, the New Straits Times reported in the article "*More than a third of Malaysians suffer from high cholesterol*" that over one-third of Malaysians suffer from high cholesterol due to unhealthy lifestyles.

Lovers of *nasi lemak* in Malaysia with high cholesterol levels requiring treatment may now have access to cheaper generic drugs, as a result of the Malaysian High Court's recent decision in *Winthrop Pharmaceuticals (Malaysia) Sdn Bhd v AstraZeneca UK Ltd* (KLHC CS No. D-22IP-57-10/2011)("Suit 57") to invalidate a particular patent.

CHEM 101, PHARMA 301

One of the treatments for hypercholesterolemia, or colloquially known as high cholesterol, is the use of drugs containing the cholesterol-lowering agent known as statins. Statins reduce the level of low-density lipoprotein (LDL) cholesterol (also known as "bad cholesterol") in the blood by inhibiting the production of it in the liver. One of these statins is "rosuvastatin". Drugs containing rosuvastatin may be administered in various forms, including via injections and orally.

AstraZeneca UK Limited ("AstraZeneca") was the registered proprietor of Malaysian Patent No. MY-136382-A ("Patent 382") for a particular oral dosage form of rosuvastatin; specifically, a drug composition containing 5 to 10 mg of rosuvastatin (or 5.2 to 10.4 mg of rosuvastatin calcium)("Claimed Dosage Range") to be administered to patients orally once daily. Put simply, the patent allowed AstraZeneca to monopolise the right to manufacture and market medicine capsules containing any amount between 5 and 10 mg of rosuvastatin in Malaysia.

AstraZeneca had applied to register the equivalents of Patent 382 in various jurisdictions, including the United Kingdom, Europe, and Australia. The validity of these patent applications or registrations has been attacked by various generic pharmaceutical companies. In *AstraZeneca AB v Apotex Pty Ltd* [2014] FCAFC 99, a five-member panel sitting in the Federal Court of Australia held that the Australian Patent No. 769897 (the equivalent of Patent 382) was invalid.

In Suit 57, Winthrop Pharmaceuticals (Malaysia) Sdn Bhd ("Winthrop"), the Malaysian arm of Sanofi's generic pharmaceuticals business, filed an action in court against AstraZeneca, seeking, *inter alia*, a declaration that the patent was invalid, whether as-filed or as-amended. Winthrop challenged Patent 382 on several grounds: invalid claim to priority dates, lack of novelty, lack of inventive step, lack of support, insufficiency, and invalid claim to entitlement.

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DOCTOR WHO? : THE SKILLED NOMINEE

In order to consider the issues before the Court, the Court first had to establish the "person having ordinary skill in the art", or "the skilled person", to assist the Court in donning the mantle of the notional skilled but unimaginative person faced with the available set of facts and information.

Winthrop and AstraZeneca each tendered their own expert witness in Court. After considering both parties' written submissions on the notional skilled person, and which expert's evidence the Court should prefer, the Court agreed with Winthrop's submissions that the notional skilled addressee should be clinicians working in the area of lipidology, particularly the treatment of high cholesterol.

EENY, MEENY, MINEY, MOE: ARBITRARY SELECTION

It was not AstraZeneca's claim that it invented rosuvastatin; it was agreed that the compound existed before the priority date of Patent 382. Instead, Patent 382 claimed the invention for the selection of the single daily starting dose of rosuvastatin within the Claimed Dosage Range, which according to AstraZeneca, was more efficacious than any other dosage range in the alteration of lipid levels or ratios. The priority dates claimed for Patent 382 were 6 February 1999 and 8 September 1999.

The main thrust of Winthrop's contentions in relation to lack of novelty and lack of inventive step was that the essential elements in Patent 382 were already known to the notional skilled person, long before Patent 382 was filed. Specifically, European Patent Application Publication No. 0521471 published on 7 January 1993 ("Shionogi prior art"), an article in the *Journal of the American Medical Association*, 269(23):3015-3023 published in 1993, and an article in *Bioorganic and Medicinal Chemistry*, 5(2):437-444 published in 1997 ("Watanabe prior art"), had already disclosed the alleged invention claimed in Patent 382.

By 1993, the Shionogi prior art had already disclosed the three essential elements of Patent 382: (i) the use of rosuvastatin to treat hypercholesterolemia, (ii) the fact that rosuvastatin-containing drugs can be administered orally, and (iii) the administration of rosuvastatin in the dosage range of 1 to 100 mg per day, depending on the patient's characteristics, to treat hypercholesterolemia would be more beneficial than any other dosage range.

Winthrop contended that the selection of the Claimed Dosage Range by AstraZeneca was arbitrary as there was no data within the patent specification which demonstrated clearly that the range would have clinical advantages over other ranges.

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TIGER CAUGHT BY ITS TOE: LACK OF NOVELTY

The High Court agreed with Winthrop's submissions on the issue of novelty, or the lack thereof, in Patent 382.

The Court found that all the allegedly novel features of Patent 382 had been previously disclosed by the Shionogi prior art, namely that (i) rosuvastatin can be used in the treatment of cholesterolemia, (ii) rosuvastatin may be given in, amongst others, a single once daily dose, (iii) the dosage range claimed by Patent 382 is within the 1 to 100 mg range disclosed in the Shionogi prior art, (iv) the Shionogi prior art did not distinguish between a starting dose and a continuing dose, and (v) there are clear directions in the Shionogi prior art that the dosage may be administered orally. The Court observed that the rosuvastatin calcium compound, used in Claim 2 of Patent 382, had been described in Example 7 of the Shionogi prior art.

Additionally, the Shionogi prior art also disclosed the fact that clinicians could alter the doses within the 1 to 100 mg range, in accordance with the needs and characteristics of the patient.

The Court was mindful of two further pieces of evidence from AstraZeneca's expert in coming to its conclusion of lack of novelty: first, that the specification in Patent 382 did not disclose any safety data and held no promise as to the safety of rosuvastatin, even though Patent 382 claimed that the Claimed Dosage Range of rosuvastatin was safe for consumption, and second, that the Claimed Dosage Range was no more efficacious than 2.5 to 4 mg.

In the absence of data which demonstrated that the Claimed Dosage Range was particularly efficacious, the Court agreed with Winthrop's contention that AstraZeneca's selection of that range was arbitrary. The selection was motivated by the knowledge that the lower-end of a given statin dosage range was likely to be more effective, that it was safer for statin doses to be prescribed from the lower-end to avoid side effects, and that 5 to 10 mg were historically typical doses of many other statins administered for the treatment of hypercholesterolemia.

WATCHING YOUR DIET: IT'S OBVIOUS

The High Court, donning the mantle of the skilled person, examined Patent 382 through the four steps elucidated in *Windsurfing International Inc v Tabur Marine (Great Britain) Ltd* [1985] RPC 59:

(i) First step: The identification of the inventive concept in the patent. Patent 382 claimed that the Claimed Dosage Range of rosuvastatin (or 5.2 to 10.4 mg of rosuvastatin calcium) provided significantly greater results than any other dosage ranges.

(ii) Second step: The identification of the common general knowledge at the priority date of Patent 382. The Court found, amongst others, that statin drugs had varied recommended dosages including 5 and 10 mg, that the dose-response relationship for statins is non-linear, that the efficacy of higher doses of statin may plateau, and that it was safer to titrate up from lower starting doses.

(iii) Third step: Comparison of the inventive concept against the background of common general knowledge. The Court determined that the dosage range expounded in the Shionogi prior art clearly encompassed the Claimed Dosage Range.

(iv) Fourth step: To consider whether the differences would have been obvious to the skilled person. The Court agreed with Winthrop's submissions that the Claimed Dosage Range would be obvious to the skilled person in light of the Shionogi and Watanabe prior art documents, and given that it is common knowledge that the dose-response relationship for statins is non-linear where there is an initial sharp fall in LDL-C levels at lower doses.

Having done so, the Court found that the selection of the Claimed Dosage Range did not require any degree of inventiveness.

TRIMMING THE FATS: INVALID AMENDMENTS

On 4 February 2000, Patent 382 was filed. Patent 382 claimed the priority date of 6 February 1999 based on GB Patent Application No. 99025900 and 8 September 1999 based on GB Patent Application No. 99210627. Patent 382 was amended on 5 October 2004 and again on 22 January 2008.

Winthrop challenged the validity of the 2008 amendments to Patent 382. The 2008 amendments had made two vital changes:

(i) Claims 1 and 2 of Patent 382 were amended to include the phrase "single once daily dose"; and

(ii) Page 11A was introduced to Patent 382's specification, where it first mentioned "single once daily dose" in relation to the Claimed Dosage Range of rosuvastatin.

Winthrop's challenge was based on the fact that the phrase "single once daily dose" was never disclosed anywhere in Patent 382 as it was originally filed in year 2000. The application form of Patent 382 had only disclosed that the subject matter, the Claimed Dosage Range, was a "suitable starting dose".

The Court found that the 2008 amendments, as revealed by Patent 382's prosecution history, contravened sections 26A and 79A(2) of the Patents Act 1983 as they introduced a concept that would go beyond the initial application as originally filed in year 2000. In consequence, the Court held that the claims of Patent 382 would not be fully supported by the description disclosed in the initial application, and that the description was insufficient to convey the invention in such

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terms that it can be understood clearly and completely for the skilled person to carry out the invention.

LIMPID LIPIDS: NAME THE INVENTORS

Post-Suit 57, it is clear that patent applicants must be careful in naming the inventor(s) in their patent application. Section 56(2)(d) of the Patents Act 1983 stipulates that the right to the patent must belong to the person to whom the patent was granted.

AstraZeneca had nominated Ali Raza as the inventor of the purported invention claimed in Patent 382. Winthrop's challenge with respect to AstraZeneca's entitlement to Patent 382 was grounded on the fact that the Claimed Dosage Range in the patent was first discovered by the employees of Shionogi Seiyaku Kabushiki Kaisha ("Shionogi Co"). Shionogi Co's employees had in fact, been the authors of the Shionogi and Watanabe prior art documents.

In 1993, Shionogi Co had conducted the first of a series of clinical trials on healthy volunteers using various doses, including the Claimed Dosage Range. In 1994, Shionogi Co had conducted further trials using 5, 10, and 20 mg doses per day. Between 1995 and 1996, Shionogi Co tested the efficacy of rosuvastatin at doses of 1 to 4 mg daily, and noted greater lipid reductions compared to available conventional drugs.

AstraZeneca's involvement only began after it had obtained a licence from Shionogi Co to exploit the rosuvastatin compound in 1998. In the licence agreement, all works relating to the rosuvastatin compound were disclosed by Shionogi Co to AstraZeneca, including the clinical trials conducted by Shionogi Co.

Even after the signing of the agreement, Shionogi Co was still involved in the development of drugs using rosuvastatin. Between September and October 2004, Shionogi Co conducted yet another study using rosuvastatin on patients with mild hyperlipidaemia.

The Court highlighted that AstraZeneca's expert admitted during cross-examination that based on hindsight, it was Shionogi Co who discovered the Claimed Dosage Range. The Court's attention was also drawn to the Australian Federal Court's decision in *Apotex Pty Ltd* (*supra*) where the Australian Federal Court had noted that Shionogi Co was the first to discover the effective use of rosuvastatin at doses of 5 and 10 mg.

Given that the efficacy of the Claimed Dosage Range to lower lipid levels was known as early as 1993, thus long before the 1999 priority dates claimed by Patent 382, the High Court found that AstraZeneca was not entitled to the invention as AstraZeneca's nominee, Ali Raza, was not the inventor of the purported invention in Patent 382.

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CONCLUSION: EAT THE YOLKS!

In short, the High Court found that Patent 382 was invalid for lack of novelty, lack of inventive step, lack of support due to the invalidity of the amendments, insufficiency, and lack of entitlement by AstraZeneca. As the High Court had found Patent 382 invalid, AstraZeneca's counterclaim for infringement was consequentially dismissed. The High Court further awarded costs to Winthrop and directed that Winthrop's damages arising from AstraZeneca's enforcement of Patent 382 be assessed.

It would appear that that the Court's grounds for finding invalidity will not be challenged, as AstraZeneca had only filed a motion for leave to appeal against the decision on costs. The deadline for AstraZeneca to challenge the Court's decision expired on 15 February 2015.

As cheaper generic drugs for high cholesterol may enter the market, it's time to dig in into your *nasi lemak* with extra eggs!

GRACE TEOH WEI SHAN

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L E G A L U P D A T E

June, 2015

ELECTRONIC SYSTEM FOR PUBLICATIONS BY BUSINESS ORGANIZATIONS

I. BACKGROUND.

On June 13, 2014, the so called Mercantile Reform (*Miscelanea Mercantil*), which amended, among others, the Mexican Commerce Code (*Código de Comercio*), the General Law of Business Organizations (*Ley General de Sociedades Mercantiles*) and the General Law of Negotiable Instruments and Credit Transactions (*Ley General de Títulos y Operaciones de Crédito*), was published in the Official Gazette of the Federation (*Diario Oficial de la Federación* or "DOF" for its Spanish acronym). As part of the amendments, Article 50 BIS was added to the Commerce Code, which states that those publications that should be made in accordance with the Mexican mercantile laws shall be carried out through the electronic system to be established by the Secretariat of Economy (*Secretaria de Economia* – the "Secretariat"), in the understanding that such publications shall be effective on the day following their publication, but without prejudice of the publications that shall be made in accordance with other special provisions or laws (the "System").

A year later, on June 12, 2015, and in compliance with the Transitory Article Third of the Mercantile Reform Decree, the Secretariat published in the DOF the *Rules establishing the Electronic System for Publications by Business Organizations and the provisions for its operation* (*Acuerdo por el cual se establece el Sistema Electronico de Publicaciones de Sociedades Mercantiles y las disposiciones para su operacion* - the "Rules"), set forth in Article 50 BIS of the Commerce Code.

The purpose of the Rules is to enhance country's competitiveness and productivity, through modernization and administrative simplification of certain provisions ruling the mercantile business activity.

The operation of the System began on June 15, 2015 and the services provided by it are free of charge.

II. ACCESS TO THE SYSTEM AND SERVICES PROVIDED.

The System is a web-based electronic system available at http://www.psm.economia.gob.mx/PSM/. Publication of communications by business organizations which mercantile laws require to be published (e.g. calls to shareholders' meetings), as well as the correction of errors in said publications, can be made through the System. Likewise, the System grants the general public access to the published information.

Only representatives of the company interested in the publication, users pre-authorized by such company's legal representatives and officials of the Secretariat are allowed to use the System to make publications or corrections. The legal representative shall use his/her advanced electronic signature (*firma electronica avanzada*) and provide the information required by the system, including the company's taxpayer registry number (or RFC for its Spanish acronym), the corporate name of the relevant company, the digital file on "pdf" format (which shall not exceed 1 megabyte) containing the document to be published, among other information. During the process, the legal representative may appoint authorized users or revoke their appointment.

The System will create a publication number and a confirmation ticket (*boleta*) for each publication and correction made. As mentioned, such confirmation tickets can be accessed by any person.

III. **NOTICES SUBJECT TO PUBLICATION**.

As provided in provision Sixteenth of the Rules , the following publications can be made:

I. Call to an Incorporation General Meeting;
II. Call to General Meetings;
III. Call to a Meeting to holders of equity certificates (*certificados de participacion*);
IV. Call to a Meeting by authority order;
V. Meeting's Resolutions regarding the increase of the corporate capital;
VI. Foreign companies' operations balance sheet;
VII. Financial Statements, notes and opinion of the statutory axaminer;
VIII. Balance Sheet of debenture-issuing companies;
IX. Reduction of corporate capital;
X. Merger resolutions, last balance sheet of each merging company, basis for the payment of liabilities of the merged entities;
XI. Spin-off resolutions;
XII. Resolutions on the conversion of the company;
XIII. Notice for the payment of pending contributions to the corporate capital when the payment term or amount is not set forth in the share certificate;
XIV. Resolution of partial distribution of assets of the company subject to liquidation;
XV. Liquidation balance sheet;
XVI. Outcome of the draw (*sorteo*) to determine the shares to be redeemed;
XVII. Regulations applicable to freight service providers; and
XVIII. Other publications set forth in the mercantile laws in accordance with the list set forth in the System.

The System is for publications by business organizations, not by natural persons performing mercantile transactions.

IV. **HIGHLIGHTS**.

Beginning on June 15, 2015, any communication by a business organization that must be published in accordance with a mercantile law shall be published through the System, in addition to the making of such publication through any other means as may be required by special regulation, the relevant company's bylaws or the particular resolutions adopted by the equity holders;

The information crated, sent, received or stored in the System shall be, for all legal effects, considered a data message in terms of Article 89 of the Commerce Code;

Those documents and data messages with the advance electronic signature (*firma electronica avanzada*) shall have the same effects as those bearing a signature and, consequently, shall have the same probative value that applicable provisions grant them in accordance with the terms of Article 89, eighth paragraph, of the Commerce Code;

We recommend the review of the bylaws of each company, as well as the minutes for the issuance of debentures (*obligaciones*) and other documents of business organizations, as it is possible that these documents still reflect what was in effect before the reform of June 13, 2014 and, in such cases, absent an amendment to such documents, we suggest that calls for meetings and other publications required be made through both the System and the means currently established in the aforesaid documents.

As the terms of the Rules are currently written, a publication required by a mercantile law that is not listed either in the Rules or in the list shown in the System would not be subject to publication in the System, even though its publication in the System is required according to Article 50 BIS of the Commerce Code.

It is important to emphasize that the company's legal representatives and authorized users will be liable for the damages and losses that may arise as a result of the publications, as such persons are responsible for the existence and veracity of the information they published.

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

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NautaDutilh

Banking & Finance

Financial Law Netherlands

The Bill implementing the European Framework for Recovery and Resolution (BRRD and SRMR)

Friday 10 July 2015

On 27 May 2015, the bill for the Act implementing the European framework for the recovery and resolution of banks and investment firms (the "**Implementation Act**") and the explanatory memorandum thereto (the "**Explanatory Memorandum**") were published. The purpose of the Implementation Act is to implement the Bank Recovery and Resolution Directive ("**BRRD**") and to facilitate the application of the Single Resolution Mechanism Regulation ("**SRMR**"). This newsletter highlights certain important aspects of the Implementation Act and follows on from our previous newsletter regarding the consultation version of the Act.

1. ENTRY INTO FORCE

The BRRD should have been implemented by 1 January 2015 and, for the most part, should also have entered into force by that date. The Netherlands did not meet this deadline. According to the Explanatory Memorandum, the Implementation Act will enter into force in the course of 2015. It was previously announced that the intended date of entry into force is 1 November 2015. The 1 January 2015 deadline does not apply to bail-ins (a resolution tool to be discussed below), which must be available as from 1 January 2016.

Like the BRRD, the SRMR will enter into force in phases. For instance, the rules on preparation and planning entered into force on 1 January 2015, while the rules on resolution and on the financing of a resolution through the single resolution fund will enter into force on 1 January 2016.

2. RELATIONSHIP AND DIFFERENCES BETWEEN THE BRRD AND THE SRMR

The SRMR implements part of the BRRD at European level for Member States participating in the Single Supervisory Mechanism ("**SSM**"), i.e. Member States within the Eurozone. The Implementation Act implements only those parts of the BRRD that are not covered by the SRMR. In most cases this means that, in practice, both the Implementation Act and the SRMR will have to be consulted in order to determine one's legal position.

The most important differences between the BRRD and the SRMR are the following:

- The BRRD must be implemented in the Member States’ national legislation, whereas the SRMR has direct effect.
- The BRRD contains rules based on minimum harmonisation, which means that Member States may impose more stringent provisions. The SRMR has direct effect and provides for maximum harmonisation in respect of the resolution procedure and resolution tools.
- The BRRD and the SRMR have different scopes of application. The BRRD covers European banks, large investment firms, groups of companies containing such a bank or investment firm and branches of banks and investment firms that are incorporated outside the European Union. The SRMR covers banks incorporated within the Eurozone and groups containing such a bank.
- The national resolution authority is the primary supervisor of compliance with the BRRD rules (in the Netherlands: the Dutch Central Bank, "**DNB**"). Pursuant to the BRRD, DNB (as the national resolution authority and, in addition, the authority responsible for prudential supervision) must put in place measures to prevent possible conflicts of interest between its resolution and supervisory roles. For example, it will appoint a "Resolution Director", who will act independently from DNB in the latter’s supervisory capacity. The SRMR assigns the most important tasks to the Single Resolution Board (the "**Board**"), which will be responsible for decisions regarding the recovery and resolution of banks that are under the ECB’s direct supervision.

3. METHOD OF IMPLEMENTATION

A new Part 3A will be added to the Dutch Financial Supervision Act (*Wet op het financieel toezicht*, "**DFSA**") under the heading "Special measures and provisions regarding financial institutions" (*Bijzondere maatregelen en voorzieningen betreffende financiële ondernemingen*), which will mainly provide for the resolution tools introduced by the BRRD. Although the heading refers to financial institutions and therefore seems to suggest a broader scope than the BRRD, the rules set out in Part 3A will apply solely to the institutions covered by the BRRD.

As a result of the introduction of Implementation Act, Chapter 3.5.4a of the DFSA (which relates to transfer plans) and Chapter 3.5.8 of the DFSA (relating to the rights of counterparties after an intervention measure) will only apply to insurers and will cease to apply to banks. The BRRD rules on preparation and early intervention will be implemented in existing chapters of Parts 1 and 3 of the DFSA.

4. RELATIONSHIP TO THE INTERVENTION ACT, EMERGENCY REGULATIONS AND BANKRUPTCY PROCEEDINGS

The intervention measures provided for in Part 6 of the DFSA - immediate measures (*onmiddellijke voorzieningen*) and expropriation (*onteigening*) - will remain applicable to banks. This seems to be incompatible with the SRMR, which (i) provides for maximum harmonisation of the resolution tools with respect to failing banks, (ii) has direct effect and therefore prevails over Netherlands law and (iii) grants exclusive power to the Board (and not to DNB or the Minister of Finance) to decide upon the resolution of significant banks. The Explanatory Memorandum finds a way around this issue by labelling Part 6 of the DFSA as emergency legislation (*staatsnoodrecht*). However, the Explanatory Memorandum acknowledges that Part 6 of the DFSA will in practice be of little or no importance for banks and groups of companies containing a bank due to the SRMR’s priority over Netherlands law.

Under the current legal framework for banks (and insurers), two types of insolvency proceedings exist alongside the intervention measures based on the Dutch Intervention Act: the special emergency regime (*noodregeling*) and bankruptcy (*faillissement*) proceedings. Although the special emergency regime will for now remain applicable to banks (and insurers), its relevance in addition to the resolution tools under the Implementation Act will be assessed at a later stage.

5. RECOVERY AND RESOLUTION TOOLS

In the following paragraphs, we will elaborate on certain aspects of the recovery and resolution tools as provided for in the Implementation Act.

5.1 Phase I: Preparation

Both the SRMR and the Implementation Act impose certain ongoing obligations regarding (i) recovery plans, (ii) intragroup financial support and (iii) resolution plans.

5.2 Phase II: Early Intervention Measures

If an institution's financial position deteriorates, the resolution authority may apply early intervention measures to restore the institution's financial health and to prevent the need for resolution. These measures include, among others, instructing the institution to implement a recovery plan or to replace or remove members of its senior management or management body if those persons are found unfit to perform their duties.

Under certain circumstances a temporary administrator may be appointed. In such a case, its role, duties and powers will be specified by the resolution authority at the time of appointment. A temporary administrator is somewhat similar to a special administrator within the meaning of Section 1:76 of the DFSA. However, an important difference is that the appointment of a temporary administrator will, in principle, have to be made public, while the appointment of a special administrator will often remain undisclosed.

The conditions under which a temporary administrator may be appointed pursuant to the Implementation Act seem to differ - probably unintentionally - from those set out in the BRRD. Under the BRRD, the resolution authority may require the institution to replace its the senior management or management body (in whole or in part) in the event of a significant deterioration in the institution's financial situation or a serious infringement of the law or the institution's articles of association. The resolution authority may only appoint a temporary administrator if it deems the replacement of management to have been insufficient. If a temporary administrator is appointed, he can work alongside or assume the powers of the institution's management body. Under the Implementation Act, the prior replacement (in whole or in part) of senior management or the management body is not required. Under the Act, a temporary administrator may be appointed if (i) the appointment of a special administrator is insufficient (a condition which is not contained in the BRRD) and (ii) if there is a significant deterioration in the institution's financial situation or a serious infringement of the law or the institution's articles of association (a condition which under the BRRD applies to the replacement (in whole or in part) of senior management or the management body prior to the appointment of a temporary administrator).

5.3 Phase III: Resolution

5.3.1 Conditions for resolution

The SRMR and the Implementation Act provide that an institution shall be subject to resolution if three conditions are met: (i) the institution is failing or is likely to fail, (ii) there is no reasonable prospect that any alternative private sector or supervisory action would prevent the failure of the institution within a reasonable timeframe and (iii) resolution of the institution is necessary in the public interest.

5.3.2 Write down or conversion of capital instruments

If all conditions for resolution as described in the previous paragraph are met or conditions (i) and (ii) are met, the resolution authority must proceed to write down (i.e. reduce the principal amount) or convert (into equity) capital instruments of the institution under resolution. This is referred to in the Explanatory Memorandum as AFOMKI (i.e. the Dutch abbreviation for writing down or converting capital instruments).

If all conditions for resolution are met, AFOMKI must be applied before applying the resolution tools. Unlike the consultation version of the Implementation Act, and in line with the SRMR and BRRD, the Implementation Act stipulates that prior application of AFOMKI is only allowed if application of a resolution tool would result in a loss for a creditor or in conversion of a claim of a creditor against the failing institution.

5.3.3 Resolution tools

If the resolution authority anticipates that AFOMKI will be insufficient for restoring the viability of the institution and all conditions for resolution are met, the SRMR and the Implementation Act require the resolution authority to proceed to resolution and to make use of (a combination of) the following resolution tools:

- the sale of business tool;
- the bridge institution tool;
- the asset separation tool; and
- the bail-in tool.

In the case of the sale of business tool or the bridge institution tool, the action taken will either involve the sale of shares or other equity instruments or the sale of assets and/or liabilities to a private party for a purchase price or to a bridge institution, respectively. The asset separation tool will be used in order to create a bad bank. This resolution tool can only be used in combination with another resolution tool. These resolution tools (except for the bail-in tool) are somewhat similar to the current transfer plan under the Intervention Act. As stated above, the transfer plan will, after the entry into force of the Implementation Act, cease to apply to banks and only apply to insurers.

Bail-in is a new resolution tool under Netherlands law. In the event bail-in is applied, eligible liabilities of a failing institution may be written down or converted. Bail-in is not restricted to the institution's capital instruments (which instruments may have already been written down or converted as a result of AFOMKI before bail-in is applied), but may be applied in respect of other liabilities, insofar as it does not concern excluded liabilities. Examples of excluded liabilities are covered deposits, secured liabilities (that, in our view, also include financial collateral agreements such as GMRAs and GMSLAs) and amounts owed to employees. Specific rules apply to derivatives in the context of bail-in, as only the liabilities after close-out of the derivative may be subject to bail-in and, where a derivative is subject to a netting agreement (such as close-out netting), only on a net basis.

5.3.4 Exclusion and suspension of contractual rights

The Implementation Act provides that certain contractual rights, such as a right to terminate a contract or close-out, set-off or net obligations, and security interests cannot be exercised if that right has arisen as a result of a crisis prevention measure or crisis management measure or any event directly linked to the application of such a measure, provided that the substantive obligations under the contract, including payment and delivery obligations and the provision of collateral, continue to be performed. The BRRD explicitly states that rights arising as a result of an event that is not a crisis prevention measure or crisis management measure or an event directly linked to such measure, will not be affected. According to the Explanatory Memorandum, it is not necessary to explicitly include such exception in the Implementation Act.

In addition, DNB may suspend certain payment or delivery obligations of an institution under resolution or the rights of a counterparty to terminate an agreement or to enforce a security interest until the end of the business day after the day on which the suspension decision is published. However, termination rights may be suspended only if the institution under resolution continues to meet its substantive obligations to its counterparty.

Under the BRRD, a termination right includes a right to accelerate, close-out, set-off or net obligations. However, the Implementation Act does not define this term nor does the Explanatory Memorandum clarify this concept. This may be problematic, since, under Netherlands law, it is not self-evident that a termination right includes a right to accelerate and to close-out, set-off or net obligations. Finally, we point to the fact that temporary suspension of termination rights may, under certain circumstances, obtain a permanent character for instance because a termination right may only be exercised if a resolution tool is applied and, subsequently, an enforcement event occurs on the part of the transferee.

5.3.5 Safeguards for contractual counterparties

Both the SRMR and the Implementation Act provide for certain safeguards for shareholders and creditors of institutions under resolution.

The principle of no creditor worse off applies to all resolution tools. This means that if rights of a shareholder or creditor of an institution are not transferred in conjunction with a transfer of the institution's shares, assets or liabilities or if such rights are written down or converted under AFOMKI or a bail-in, such shareholders or creditors must not suffer greater losses than they would have suffered if the institution had been wound up under normal insolvency proceedings or became subject to the emergency regime immediately before the resolution decision was taken. We expect that the principle of no creditor worse off will have limited impact in practice during resolution. The effect of this principle will only materialize after resolution of an institution when an independent party will assess whether certain creditors are "worse off". If this is the case, these creditors have the right to be compensated for the difference by the single resolution fund, i.e. a fund financed by the sector in order to limit the funding of resolutions by public means.

In addition to this principle, the BRRD has created a safeguard for creditors facing partial transfer of the assets or liabilities of an institution under resolution, for example assets and liabilities subject to close-out netting. This safeguard has been set out in more detail in the Implementation Act by providing that rights arising from (i) financial collateral agreements (including GMRA and GMSLA), (ii) covered bonds, (iii) structured financing arrangements, (iv) netting agreements, (v) set-off agreements and (iv) security agreements "will not be affected" (i.e. can be exercised continuously) by any such partial transfer of assets or liabilities or if an institution under resolution is replaced as a party to an agreement.

Furthermore, the Implementation Act stipulates that if DNB decides to partially transfer assets or liabilities, or to terminate, cancel or modify the terms of any agreement, or if an institution under resolution is replaced as a party to an agreement, DNB (i) will only transfer assets and liabilities under certain agreements jointly, (ii) will not transfer any asset without the corresponding covered liability and "the benefit of the security" (in the case of security arrangements) and (iii) will not terminate or modify rights and obligations protected under certain agreements (such as a right resulting from a set-off agreement).

We point out that the Financial Markets Amendment Act 2015 (which entered into force as of 1 January 2015 and also applies in case of expropriation) already provides for a similar safeguard regarding set-off and security rights resulting from an agreement pertaining to financial instruments. The safeguard of the Implementation Act has a broader scope. Firstly, the safeguard provided for by the Implementation Act does not allow a partial transfer, whereas the Intervention Act does allow such transfer as long as the partial transfer does not result in an infringement of set-off and security rights. Secondly, the safeguard of the Implementation Act applies to set-off and netting agreements relating to deposits, loans or other instruments that do not qualify as financial instruments. The safeguard as provided for in the Implementation Act does not apply to expropriation under Part 6 of the DFSA. In our view, the scope of this safeguard should also apply in case of expropriation.

If linked assets or liabilities are not transferred jointly, the transfer of assets and liabilities will not be invalid, but these rights "cannot be affected". This means that the rights resulting from, for example, set-off agreements and financial collateral agreements can be exercised although assets and/or liabilities may have been transferred to a third party. Furthermore, the transfer of assets, rights or liabilities of an institution under resolution to another entity using a resolution tool or exercising a resolution power cannot be affected on the basis of actio Pauliana (fraudulent preference) either.

Payment systems are protected by the Implementation Act as well. Consequently, a measure cannot lead to the reversal of transfer orders that have already been entered into such system. In other words, transfer orders that have entered a system cannot be revoked despite such measures. The protection provided by the Implementation Act as it now stands, is limited to "Dutch" systems. Since the BRRD safeguard applies to "European" systems, the reference to "Dutch" systems seems to be too narrow.

6. LEGAL PROTECTION

Provision has been made for various forms of legal protection against decisions taken by the Single Resolution Board and DNB:

- Appeals against decisions by the Single Resolution Board can be submitted to an appeals panel at the Single Resolution Board or to the European Court of Justice. In some instances, appeal can be submitted directly to the European Court of Justice.
- Objections against decisions taken by DNB in its capacity as the national resolution authority (whether on the instruction of the Single Resolution Board or otherwise) can be submitted to DNB, in the event of appeal to the District Court of Rotterdam and, in the event of a subsequent appeal, to the Trade and Industry Appeals Board. Objections against (i) decisions taken by DNB to write down or convert capital instruments (i.e. AFOMKI) or (ii) decisions taken by DNB regarding resolution of an institution cannot be submitted to DNB. Appeal against these decisions must be submitted directly to the Trade and Industry Appeals Board, where expedited proceedings are available. In this way, a judgement on the legitimacy of these decisions, which have a high impact, can be received promptly.

- The Implementation Act provides for the introduction of administrative appeal with DNB against decisions of the (i) liquidator, (ii) special administrator and (iii) special director.

In contrast to the provisions for transfer plans in the current Intervention Act, judicial approval (or review) is not required before a resolution tool may be applied.

7. CONCLUSION

With the entry into force of the Implementation Act, the Dutch intervention framework will be replaced by an European intervention framework. A new resolution tool will be introduced: bail-in. The introduction of a European framework has several implications for the exclusion and suspension of contractual rights and the safeguards for contractual counterparties.

Although some of the flaws in the consultation version of the Implementation Act have been remedied, the current version still contains some imperfections. The decision to retain the instrument of expropriation (provided for in Part 6 of the DFSA) as an intervention tool with respect to failing banks can, in our view, be challenged on the ground that the SRMR contains an exhaustive set of intervention tools. Furthermore, the Implementation Act seems to be inconsistent with the BRRD regarding the conditions under which a temporary administrator may be appointed. In addition, the safeguard provided for payment systems seems too restricted since it is limited to "Dutch" systems only. It remains to be seen whether these defects in the Implementation Act will be remedied as it makes its way through the Dutch Parliament.


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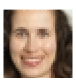
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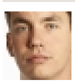
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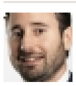
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Privacy Law Update

01 Jul 2015

A focus on mandatory reporting of data breaches

The Government has signalled its intent to repeal and replace New Zealand's existing privacy law regime and Simpson Grierson is keenly tracking the progress of the reforms. A draft Privacy Bill has still to be released but the Government has (through a Cabinet paper issued by the Cabinet Social Policy Committee dated 13 March 2014) indicated some key areas of focus for the new law.

In this Privacy Law update we look at **mandatory reporting of data breaches**, which is expected to form part of the new legislation.

Failure to comply will be a criminal offence

Currently there is no requirement to notify the Privacy Commissioner or affected individuals if there has been a data security breach. Mandatory reporting will change this, and failure to comply is likely to become a criminal offence subject to a fine of up to $10,000. The Privacy Commissioner can also "name and shame" public sector agencies who cannot be subject to fines.

Two levels of breach likely in new Bill

Indications are that the draft bill will introduce a two tier privacy breach notification regime for:

- "material" breaches (tier 1), and
- "serious" breaches (tier 2).

Agencies will have to notify the Privacy Commissioner of both a tier 1 and tier 2 breach (no exceptions). Tier 2 breaches will also have to be notified to affected individuals where there is a "real risk of harm".

Precisely what will be a "material" or "serious" breach is unclear. The Cabinet Social Policy Committee has indicated that notifiable "serious" breaches where there is a "real risk of harm" are likely to involve actual or potential loss, injury, significant humiliation, or adverse effects on rights or benefits.

Mandatory reporting in other jurisdictions

Canada has enacted a Federal Law which requires mandatory notifications for privacy breaches causing "significant harm" which will come into effect when applicable regulations are in place. In the EU there is industry specific legislation which requires notification of privacy breaches by telecommunications companies and ISPs. It is anticipated Australia will introduce mandatory data breach reporting before the end of this year.

Mandatory reporting - a hot topic in New Zealand and around the world

- The Privacy Commissioner labeled 2012 the "year of the data breach" due to large public sector data breaches (ACC and MSD). The Privacy Commission signalled its support for a privacy law update that requires mandatory reporting of data breaches, however noted that "the legislation is taking a while to wind its way through Parliament". Read the full article (http://www.nbr.co.nz/article/2012-year-data-breach-privacy-commissioner-ck-133085) .

- The federal Digital Privacy Act has been recently enacted in Canada; however, the crucial regulations are not in place yet, which means a new obligation for organisations covered by federal law to disclose data breaches to victims has yet to take effect. Those that cover up a data breach, or that deliberately fail to notify affected individuals and the Privacy Commissioner, could face fines of up to $100,000. View the full article (http://www.itworldcanada.com/article/new-federal-privacy-law-in-effect-but-not-data-breach-disclosure-yet/375482) .

Given the potential compliance requirements, fines and reputational damage associated with mandatory data breach reporting, it is important for all businesses to ensure that they comply with any new legislation in this area.

How Simpson Grierson can help you

Simpson Grierson's privacy team has extensive experience on both sides of the privacy coin - compliance and crisis management. Our privacy page (http://www.simpsongrierson.com/corporate/privacy/) provides details on how we can help you, and our team.

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LITIGATION BRIEF

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The Singapore Medical Council Disciplinary Process – A Study Of A Recent Case

In November 2014, the High Court of Singapore (also known as the Court of Three Judges) overturned the Singapore Medical Council (SMC)'s Disciplinary Committee (DC)'s verdict that an obstetrician, Dr Lawrence Ang, was guilty of one charge of professional misconduct (in relation to the need to call for a neonatologist to attend at or be on standby for a delivery) and that, among other penalties, he should be suspended from practice for three months. At the disciplinary committee inquiry, the DC had acquitted Dr Ang of three other charges relating to his obstetric management of his patient.

In doing so, the High Court found that the conviction of Dr Ang on that charge was unsafe, unreasonable and contrary to the evidence as the DC had:

(1) failed to determine the standard of conduct the doctor was to be judged by, or from which his departure could be sufficiently serious to amount to professional misconduct;
(2) failed to explain its reasons for preferring certain medical opinions over others in the face of conflicting medical opinions on key issues;
(3) took into account facts that went beyond the ambit of the relevant charge; and
(4) made at least two factual findings that were contrary to the evidence.

This decision came in the wake of the highly publicised criticisms the Singapore Court had for two decisions which the SMC DC made in 2012, and the announcements the SMC and the Ministry of Health had made in July 2014 with regards certain reforms to be made to the disciplinary process that governs doctors.

What might one glean from these cases?

Some, like the author of a forum letter to the Straits Times (10 December 2014), may think that perhaps the DCs are more stringent in applying medical standards than the courts. On the other hand, this is precisely the point that the High Court in Dr Ang's case, comprising Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Judith Prakash J, found was lacking in the analysis of the DC – there was no determination by the DC of what the standard of care was. In such a case, how does one conclude that Dr Ang had, so to speak, fallen short?

There is a lesson here for those interested in medico-legal matters. The issue of standard of care is crucial in the legal analysis of a complaint or suit brought against a doctor. As to what the standard of care for treatment should be, it does not mean the ideal practice. Instead, the relevant benchmark is what is known as the *Bolam* test. In other words, if the doctor's actions are supported by a responsible body of medical opinion, he would not be negligent. Hence, the fact that a patient has obtained a medical view in support of his complaint or claim does not necessarily mean the doctor had fallen below the standard of care.

Further, the fact that the patient eventually suffered harm does not necessarily mean that there was negligence and/or professional misconduct.

One must determine the standard of care, and whether the doctor has fallen below that standard. In addition, in SMC disciplinary cases, professional misconduct has to be made out. Professional misconduct is made out in at least two scenarios: first, where there is an intentional, deliberate departure from standards observed or approved by members of the profession of good repute and competency; and second, where there has been such serious negligence that it objectively portrays an abuse of the privileges which accompany registration as a medical practitioner.

In Dr Ang's case, the DC relied on the two SMC prosecution expert witnesses' views to conclude that Dr Ang should have acted differently. However, the High Court found that the factors that those two prosecution experts relied on *could not have stood as legitimate bases* for convicting Dr Ang on that charge. This is because the factors the prosecution experts relied on were in respect of an *earlier* period (6.30 pm to 8.15 pm). However, since the DC itself did not take issue with the management during that earlier period (which were the subject of one of the acquitted charges), the DC should focus instead on the events after 8.15 pm. Besides, the DC did not explain why it preferred the evidence of the two prosecution expert witnesses to that of the defence expert witnesses.

The High Court also thought it was important in this case for the DC to identify the point in time at which the duty to call for a neonatologist arose, because if that duty arose at say, 8.30 pm, Dr Ang's breach had to be assessed in light of the fact that by about 8.45 pm, he had asked for a neonatologist to attend to a patient next door, and by around 8.50 pm, he had commenced the delivery of the complainant's baby.

The High Court also commented that while there may be significant practical difficulties in finding the precise answers to those issues, it was nevertheless the responsibility of the SMC to lead the evidence addressing these matters, and the responsibility of the DC to evaluate the evidence before coming to the conclusion. Given the DC's failure to analyse the charge in the aforesaid reasoned manner, that was a fatal flaw that *in itself* warranted the setting aside of the conviction.

Hence, for claimants contemplating legal action against doctors, and for medical experts who are being asked to provide opinions that would be used in medical malpractice litigation or complaints, it is important to first establish what would be the standard of care applicable to that case.

Another significant aspect of the November 2014 judgment by the High Court was its order that the SMC is to pay Dr Ang the costs of the appeal as well as the costs of the inquiry proceedings that took place before the DC.

After the November 2014 judgment, the SMC wrote in to the High Court to clarify this costs order, and the High Court invited both parties to tender submissions on whether the Court had the power to make such a costs order, and if so, whether it should be exercised against the SMC in this particular case.

In March 2015, the High Court released its decision on the costs order. The High Court affirmed its earlier costs order.

In doing so, the High Court held that:

(1) The DC has the power to order costs of the disciplinary committee inquiry against the SMC.
(2) The High Court also has the power to order costs of the disciplinary committee inquiry against the SMC.
(3) There was ample justification in Dr Ang's case to order the SMC to bear the costs of the disciplinary committee inquiry as well as the costs of the appeal.

This is a significant development on two counts. Firstly, because it was hitherto believed that the DC does not have the power to order costs of the disciplinary committee inquiry against the SMC in the event of an acquittal of a charge. Secondly, before this case, the High Court had never ordered the SMC to even pay the costs of the appeal to a doctor even when the latter succeeded in his appeal against a DC decision.

In relation to the power of the DC to order that the SMC pays costs of the disciplinary committee inquiry, the High Court noted that while the Medical Registration Act was silent on the issue of making a costs order against the SMC, the Court also said that it was difficult to imagine that Parliament intended for the SMC to be immune from adverse costs orders. It noted that even the Public Prosecutor was not immune to adverse costs orders.

The High Court held that the DC would have an implied ancillary power to make costs orders against both parties, and not just the doctor alone. Such an implied ancillary power to make a costs order against the SMC could not be easily displaced and indeed could not be displaced just because the Medical Registration Act was silent on the issue.

As for the power of the court, the High Court held that there was an implied ancillary power (to the power to hear and determine appeals from a DC), as well as a power under the Supreme Court of Judicature Act (which vests in the High Court the same powers as that of the Court of Appeal in the exercise of its appellate jurisdiction), to make a costs order against the SMC.

In determining whether the power to order costs against the SMC should be exercised, the High Court in this case cautioned that excessive emphasis should not be placed on the consideration that a public or regulatory function is being exercised by the SMC. This is an important but not conclusive factor.

The High Court found that a multi-factorial approach should apply in deciding whether to order costs against a body exercising a public or regulatory function. Ultimately, what the Court seeks to do in each instance is to make an appropriate costs order that is just and reasonable in the circumstances of the case.

In finding that costs should be ordered against the SMC for Dr Ang's case, the High Court considered the following points:

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(1) It could not be said that the charges were brought against Dr Ang on grounds that appeared to be reasonably sound.

There was no reason available to explain the Minister of Health's decision to require that the disciplinary committee inquiry be proceeded with despite the findings of the Complaints Committee. The DC's reasons for dismissing the first three charges and the High Court's reasons for reversing the DC's conviction on the fourth charge (which was the subject of the appeal to the High Court) are largely similar to the reasons given by the Complaints Committee in dismissing the complaint in the first place.

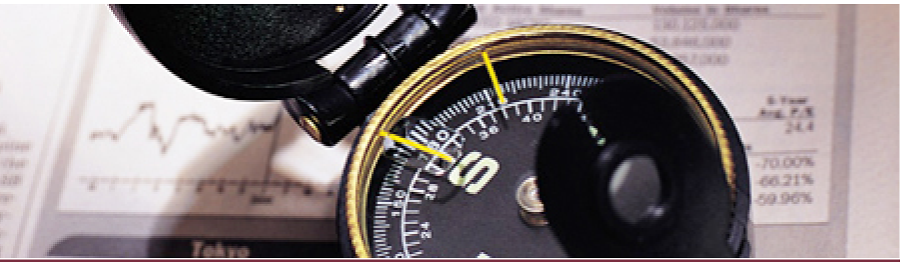
(2) The errors made by the DC in convicting Dr Ang were largely contributed to by the SMC.

The charges were not sufficiently particularised; the type of professional misconduct that Dr Ang was alleged to be guilty of was not specified and this undermined the ability of the DC to properly evaluate the evidence. Further, the DC had considered extraneous facts, and presumably this arose from the SMC's submissions.

(3) Dr Ang was initially cleared by the Complaints Committee but was then made to endure two tranches of proceedings which he should never have been put through. He would have had to incur significant costs in his defence.

The legal principles above were stated by the High Court to also be applicable to disciplinary tribunal inquiries under the current regime of the Medical Registration Act. Dr Ang's case was under the previous regime.

The High Court's decision to order costs against the SMC is the first time the SMC has been asked to bear the acquitted doctor's costs of the disciplinary committee inquiry. Given its relevance to disciplinary tribunal inquiries that may be on-going or are to be undertaken, the High Court's November 2014 judgment as well as its views set out in the March 2015 judgment on costs would have to be considered carefully by the parties and counsel involved in such inquiries.



Amendment to the "Mergers and Acquisitions Act"
June 2015

The Legislative Yuan passed the Bill of Amendment to the Mergers and Acquisitions Act (the "Amendment") on June 15, 2015. Compared to the Bill of the Amendment that was submitted by the Executive Yuan to the Legislative Yuan on November 21, 2013 (the "Bill"), the Amendment is almost the same with the Bill except that it is further stipulated in the Amendment that a person shall report to the competent authorities once it acquires more than 10% of the total shares issued by a public company. The Amendment intends to increase the protection of shareholders, creditors and employees' rights, permit diversified categories of consideration for M&A transactions, simplify the mergers and acquisitions process and improve the flexibility and efficiency of M&A transactions. The Amendment will take effect six months after it is signed into law by the President and is expected to apply beginning from January 2016. Major aspects of the Amendment are as follows:

Increase the protection of shareholders, creditors and employees' rights, and information transparency

The Amendment adds a number of provisions to protect shareholders' interests during an M&A transaction: (a) considering that the protection of the shareholders of a listed company in the event that the listed company becomes delisted or dissolved as a result of a merger or acquisition transaction and the surviving or acquiring company is not a listed company the threshold of the shareholders resolution of the listed company to be delisted or dissolved to approve the merger or acquisition transaction will be raised to require the consent of the shareholders who represent two-thirds or more of the total outstanding shares issued by such a company; (b) a director who has a personal interest in an M&A transaction shall explain to the board and shareholders' meeting the essential aspects of such personal interest and the reasons for his/her support of or opposition to the transaction; (c) a special committee (or audit committee, if any) shall be set up by a public company to deliberate the fairness of an M&A transaction; during the deliberation, independent experts shall be appointed to provide opinions regarding the reasonableness of the consideration of the M&A transaction; the conclusion of the deliberation shall be submitted to the board and shareholders' meeting; (d) when the objecting shareholders have exercised their appraisal rights to request a company to participate in an M&A transaction to buy back their shares but have failed to reach an agreement on the price with the company, the company shall first pay the amount as it considers fair to the shareholders and then file a motion to a court for a ruling on the amount of the price for the share buyback with all the shareholders disagreeing with the price offered by the company as the respondents; and (e) A merger agreement, share exchange agreement, spin-off plan, contents of an M&A resolution of the board, deliberation conclusion of a special committee and opinion of independent experts shall be sent to the shareholders along with the shareholders' meeting notice or the shareholders shall be kept informed of such after the board has adopted the resolution.

Given the impact that a company undergoing an acquisition transaction will have on its creditors is similar to that which occurs during a company spin-off, the Amendment stipulates that creditors of a company shall be entitled to access to the relevant information and shall have the right to object to the acquisition.

With respect to the protection of employees' rights in an M&A transaction, the Amendment requires that the remaining amount in the labor pension fund special account allocated by a company transferring all of its employees with pension liabilities under the old pension system, regardless of whether the amount has reached the threshold triggering suspension of allocation, shall be transferred to the labor pension fund special account of the surviving/acquiring company after the transaction, and removes the current provision which deprives an employee's right to request for severance pay if the employee has accepted continuous employment after the transaction but later refuses to stay on for personal reasons before the effective date of the transaction.

To prevent the hostile takeover of a public company, it is stipulated in the Amendment that if a person acquires more than 10% of the total shares issued by a public company with the intention of effecting a merger/acquisition, that person shall, within 10 days of such acquisition, report to the competent authorities and shall make supplemental filings in the event that any of the reported information changes. A person that violates this rule would not be able to exercise his/her/its voting rights with respect to those shares that exceed 10% of the total shares issued by the public company.

Simplify mergers and acquisition process; diversify the category of mergers and acquisitions consideration; and improve the flexibility and efficiency of mergers and acquisitions

The Amendment supplements five types of simplified M&A procedures which can be conducted with the special resolution of the board of directors, namely, simplified mergers between brother and sister companies; whale-minnow share swaps; simplified share swaps between parent and subsidiary companies; whale-minnow spin-offs; and simplified spin-offs between parent and subsidiary companies.

The Amendment permits shares, cash or other assets to be used as the consideration for a company's share swap or spin-off to diversify the category of M&A consideration.

To improve the flexibility and efficiency of mergers and acquisitions, the Amendment proposes that: (a) to simplify the process of sending/delivering mergers and acquisitions documents, mergers and acquisitions documents are deemed to be sent/delivered to shareholders if a public company publishes them on the website designated by the competent authorities and are available at the company as well as at the site of the shareholders meeting; (b) in the event that a surviving company issues new shares for a merger, or a parent company issues new shares for its subsidiary's merger with another company, the provisions provided in the Company Act and Securities and Exchange Act regarding the pre-emptive rights of employees and shareholders to subscribe to the new shares or the obligation to allocate a certain ratio of the new shares for public offering shall not apply; and (c) it has been specified that in an acquisition or spin-off transaction, even if a company holds the shares of another company participating in the acquisition or spin-off, or such a company itself or its assigned representative has been elected as a director of another company participating in the acquisition or spin-off, such a company may still exercise voting right in the shareholders meeting of such other company to approve the proposed transaction.

Amendments to relevant tax measures

Under the Amendment to the M&A Act, the types of consideration for a “spin-off transaction” would be the same as that which is permitted for an "acquisition". For the sake of implementing fair taxation, the tax treatment for a spin-off transaction should also be the same as that which is provided for in an acquisition. Accordingly, as regards the tax implications on an M&A transaction, the amendments are as follows: (a) stamp duty, deed tax and securities transaction tax and/or other transaction tax may be exempt/deferred under a spin-off transaction, if an existing or a newly incorporated company, which acquires business operations as a result of a spin-off transaction issues new shares with voting rights as the consideration to the spin-off transaction and such shares must be at a value not less than 65% of the total consideration; (b) by virtue of the amendment to Article 39 of the Income Tax Act, from January 1, 2009, a company's losses can be carried forward for 10 years. In conformity with the Income Tax Act, in a merger or a spin-off transaction, losses can be carried over from each party to the merger or spin-off transaction in proportion to the percentage of shares that the party holds in the newly incorporated or surviving company through the merger or the demerger for 10 years; and (c) corporate tax may be exempt under a spin-off transaction, if the consideration is paid by shares with voting rights from an existing or a newly incorporated company and such shares must be at a value not less than 80% of the total consideration, and the company receiving the shares must consequently transfer all the acquired shares to its shareholders.

Our M&A Practice Group has distinguished itself in the industry and is highly regarded for its achievements.

Should your company have any inquiries about the Amendment or other M&A laws and regulations, please do not hesitate to contact us.

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GIDE
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newsletter

MONTHLY LEGAL UPDATE | UKRAINE | 8 JULY 2015

IN THIS ISSUE:

DISPUTE RESOLUTION

Changes to the rules governing court fees

Ukraine undertook towards the IMF and other international donors to improve the financial fit out of the court system. To this end, the Parliament adopted on 22 May 2015 the new law raising the upper limits of court fees and slightly amending the existing rules on court fees. The law introduces a differentiation between court fees' rates for individuals and legal entities, where court fees for legal entities will be higher compared to those for individuals. Besides, the law introduces mandatory payment of court fees *inter alia* for governmental authorities. Since governmental authorities were exempt from court fees in the past, they often used lawsuits and appeals without any legal grounds simply to postpone enforcement of unfavourable court decisions.

The law envisages harmonization of the minimum amounts of court fees payable to courts of first instance in all jurisdictions, while removing some of statutory ceilings for them. In commercial proceedings the statutory ceiling will remain fixed; however, it will be raised from 60 minimum wages (at present) to 150 minimum wages (a little less than EUR 8,000). The rates of court fees for appeals will be increased approximately twofold: (i) from 50% of the initial court fee rate (calculated when filing a lawsuit) to 110% of such a rate for the court of second instance; and (ii) from 70% of the initial court fee rate (calculated when filing a lawsuit) to 120% of such a rate for the court of third instance.

The law has been awaiting Presidential approval for over a month now and should come in force as of 1 September 2015, if signed.

BANKING AND FINANCE

Transactions with Subordinated Creditors

In the rush to restore the confidence of depositors, the National Bank of Ukraine this time focused on subordinated creditors in its Board Resolution No.380 dated 16 June 2015. First, unaffiliated creditors are rewarded with non-interrupted payment of the interest. Second, lenders related to the borrowing bank have to not only subordinate interest payment when the borrowing bank is in crisis, but also limit their appetite with 1/10 of the maximum interest rate allowed by the regulator for subordinated loans denominated in Hryvnia; this combines nicely with the maximum interest of 12-month LIBOR on USD and EUR loans. As a next step, it would be reasonable for the NBU to lift the interest cap for unaffiliated lenders or, if not possible, to establish it pro rata the cap on senior loans.

Reform Sampling

The Ukrainian Parliament has strengthened the institutional capacity of the banking regulator in draft laws Nos. 2742 and 2743 (both are under the President's consideration) that respond to the demands of international creditors and, potentially, may light the way for reform of other regulators.

In particular, the National Bank of Ukraine will set up an independent internal audit body, reduce members of the NBU Council with reduced conflict of interests, less political and business involvement of its members. Finally, the composition of the Council will be reset within two months from the effective date of the law. The Board will become responsible for remuneration of the Council members and reimbursement of their costs, whereas the Chair of the NBU Board will notify the President and the Parliament of the circumstances prompting termination of the membership in the Council.

The Board of the NBU will be reduced and is enabled to form committees on Banking Supervision, Payment Systems Oversight, and Assets and Liabilities Management. Members of the Board will have limited terms of their services and will be dismissed if they compromise their "impeccable reputation".

As a perk, directors, officers and servants of the NBU will be exempt from personal liability for political decisions and protected by the government-sponsored legal aid and insurance programmes.

The NBU is no longer will be planning income (to finance state budget) but will form reserves for interventions in case of crises. The NBU's commercial operations have been expanded by the freedom to acquire and dispose of assets constituting collateral under security provided by Ukrainian banks for the stabilisation or refinancing programmes.

The financial stability, which will put the end to restrictive measures in the currency market and in the banking system, has got its first definition in the law, full of subjective factors and only indirectly correlating with a sustainable growth of the economy.

Foreign Currency Consumer Loans

On 2 July 2015 the Parliament adopted the Law On Restructuring of Foreign Currency Loans (Draft law no. 1558-1), pursuant to which Ukrainian commercial banks are obligated to convert foreign currency consumer loans into Hryvnias at the NBU's exchange rate which was effective on the date when the underlying loan agreements were signed. Besides, the law also provides the borrowers with unprecedentedly favourable restructuring terms, including rescheduling of interest payments, write-off of penalties, fixed interest rates and other borrowers friendly incentives.

The law was called "populist" and has been severely criticized by the banking community for its devastating impact on a fragile baking system. If the law takes effect commercial banks will reportedly sustain billions in losses. However, according to the statement recently made by the President, he will use his veto power as the law is inconsistent with the undertakings assumed by Ukraine towards the IMF

REAL ESTATE

State registrars will render fast-track services

The Government of Ukraine offers an alternative to standard real rights registration procedure to applicants who wish to complete such registration in short terms. In particular, an enterprise as a single real estate property may be registered within 5 working days. Same applies to registration where a new title certificate shall be issued. In other cases real rights registration shall be completed within 3 working days. State registration of encumbrances will take up to 2 hours while a paper form extract from the State Register of Real Rights to Immovable Property will be issued in an hour as of the moment of registration of the relevant application.

According to the Resolution of the Cabinet "On Rendering Fast-Track Services on Registration of Real Rights to Immovable Property" No. 190 dated 8 April 2015 which came into force on 22 June, all these fast-track services except for the registration of encumbrances will cost the double of the regular fee.

RENEWABLE ENERGY

Green Tariff: The Parliament cancelled local content requirement

The Law of Ukraine on Amendments to the Certain Laws of Ukraine Securing Competitive Conditions of Generation of Energy from Alternative Energy Sources (the "Law") adopted by the Parliament on 4 June 2015 confirms firm commitment of Ukraine towards development of alternative energies and will be of great interest to renewable energy producers who will be released from burdensome requirements to keep certain level of local content production.

In particular, the local content requirement will finally be cancelled and replaced with an incentive markup to be paid to the energy producers who utilized local production. The mark-up will be set by the Energy Commission (NERC) and will be added to the green tariff rate. The mark-up will be differentiated (5% or 10%) and will depend on proportion of use of equipment of Ukrainian origin (30% or 50%). The mark-up will apply to facilities to be commissioned from 1 July 2015 till 31 December 2024. Private households will not be eligible for the mark-up.

The Law changes the definition of biomass covering also products (not only waste) and introduces separate green tariff rates for energy producers using geothermal sources.

PHARMACEUTICALS

New rules for recycling and destruction of pharmaceutical drugs

The Ministry of Healthcare has made further attempts for proper regulation on recycling and destruction of the pharmaceutical drugs in Ukraine which still lack mechanisms for tracking the process. With the new Rules, which entered into force on 19 June 2015, defective pharmaceutical drugs (including those expired), as well as unregistered and falsified, must be delivered as waste to companies licensed to handle hazardous waste. Therefore, unlike the previous regulation, the Rules now prohibit recycling and destruction of pharmaceutical drugs by the manufacturer or supplier which makes it easier for the authority to control the proper execution of the recycling and destruction.

PUBLIC REGULATORY

Certification of certain products abolished

On 5 June 2015, the regulation on mandatory certification of products was amended to cancel the certification requirement for a number of products, which are produced mostly abroad. The amendment is aimed at making the domestic distribution of the respective products less burdensome as far as conformity to the national laws is concerned.

More specifically, the following products no longer require certification:

- Shampoo, liquid soap and similar products;
- Baby food;
- Child wear (the certification requirement was postponed since December 2013);
- Baby carriages.

The above exemption was enacted with immediate effect, i.e. starting from June 2015.

Besides, with respect to transportation vehicles, including personal vehicles, trucks, buses, as well as car spare parts the certification requirement will cease to exist from 1 January 2016.■

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MLP Parity Act Reintroduced

24 June 2015 Updates

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

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

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

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

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

The MLP Parity Act, if enacted, would not adversely affect any current MLP. All projects currently eligible for inclusion in an MLP would continue to qualify exactly as under existing law. (However, the IRS has recently proposed regulations that would affect existing MLPs.

To download a discussion by Baker Botts MLP tax lawyers on these new proposed regulations, visit us at www.bakerbotts.com

FDA Extends Menu Labeling Compliance Date

07.13.15

By Chip English, Jennifer L. Brockett, and Allison B. Condra

On July 9, 2015, the U.S. Food and Drug Administration (FDA) announced that it is extending the date for compliance with its menu labeling requirements by one year. Under the new timeframe, businesses covered by the menu labeling final rule, including chain restaurants, covered grocery stores, and others, must comply with the requirements by Dec. 1, 2016.

Congress established national requirements for menu labeling in the Patient Protection and Affordable Care Act of 2010 (ACA). Under the ACA and FDA's final rule, restaurants or similar retail food establishments (who sell restaurant-type food) that are "part of a chain with 20 or more locations doing business under the same name (regardless of the type of ownership of the locations) and offering for sale substantially the same menu items" must comply with the menu labeling requirements. Businesses not covered by the rule may voluntarily comply by registering with FDA every other year. While the compliance date has been extended, the final rule still becomes effective Dec. 1, 2015, strengthening the argument that the ACA's preemption of inconsistent state, local or municipal laws takes effect no later than Dec. 1, 2015.

FDA will provide ongoing support to help covered businesses comply with the final rule. To this end, FDA will answer questions from covered businesses about how the final rule applies in their specific situation. FDA plans to issue a draft guidance document in August 2015 to answer frequently asked questions faced by many covered businesses. Finally, FDA will provide educational and technical assistance to covered businesses and will work collaboratively with individual companies to help those companies come into compliance with the final rule.

Other "similar retail food establishments" covered by the final rule include:

- Bakeries;
- Cafeterias;
- Coffee shops;
- Convenience stores;
- Delicatessens;
- Food service facilities located within entertainment venues (such as amusement parks, bowling alleys, and movie theaters);
- Food service vendors (such as ice cream shops and mall cookie counters);

- Food take-out and/or delivery establishments (such as pizza take-out and delivery establishments);
- Grocery stores;
- Retail confectionary stores;
- Superstores;
- Quick service restaurants; and
- Table service restaurants.

At its most basic, the final rule requires covered businesses to include calorie information on menus, menu boards, or displays (depending on the type of food covered); to provide written nutrition information for standard menu items upon request by a customer (and to note on its menus, menu boards, and displays that this extra information is available); and to include on menus and menu boards a succinct statement concerning suggested daily caloric intake.

Disclaimer

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Supreme Court Rules that Chapter 13 Trustees Must Refund Undistributed Postpetition Earnings to the Debtor Following Conversion

Today, in the case of Harris v. Viegelahn, 575 U.S. ___ (2015), the Supreme Court held that, following a debtor's conversion of a Chapter 13 bankruptcy case to Chapter 7, a debtor is entitled to the return of any postpetition wages not yet distributed by the Chapter 13 Trustee.

The treatment of a debtor's postpetition wages in bankruptcy generally depends on whether the debtor is proceeding under Chapter 13 of the Bankruptcy Code (in which the debtor retains his/her assets subject to a court-approved plan for the repayment of debts) or Chapter 7 (in which the debtor's assets are immediately liquidated and the proceeds distributed to creditors by a chapter 7 Trustee). Id. at 1.

In a Chapter 13 proceeding, postpetition wages earned by the debtor are "[p]roperty of the estate" under 11 U. S. C. § 1306(a), and may be collected by the Chapter 13 trustee for distribution to prepetition creditors under 11 U.S.C. § 1322(a)(1). Id. In a Chapter 7 proceeding, the debtor's postpetition earnings are not estate property; instead, they belong to the debtor. Id. The Bankruptcy Code permits the debtor to convert a Chapter 13 proceeding to one under Chapter 7 "at any time," and upon such conversion, the service of the Chapter 13 trustee terminates. Id.

Charles E. Harris III filed a Chapter 13 bankruptcy petition in February 2010. Id. at 5. At the time of his bankruptcy filing, Harris was indebted to multiple creditors and had fallen $3,700 behind on mortgage payments to Chase Manhattan ("Chase"). Id. Harris' confirmed Chapter 13 plan provided that he would immediately resume making monthly mortgage payments to Chase and $530 per month would be withheld from his postpetition wages and remitted to the Chapter 13 trustee, who would distribute (i) $352 per month to Chase to pay down Harris' outstanding mortgage debt, and (ii) $75.34 per month to Harris' other secured lender. Id. Once Chase and the other secured creditor were paid in full, the Chapter 13 Trustee was to begin distributing funds to Harris' unsecured creditors. Id.

Harris quickly fell behind on his mortgage payments under his Chapter 13 plan, and in November 2010, Chase obtained relief from the automatic stay to foreclose on Harris' home. Id. at 4. Following the foreclosure, the Chapter 13 Trustee continued to receive $530 per month from Harris' wages, but stopped making the payments earmarked for Chase. Id. As a result, funds formerly reserved for payment of Chase's claim accumulated in the Chapter 13 Trustee's possession. Id.

On November 22, 2011, Harris converted his Chapter 13 case to a Chapter 7 case. Id. Ten days later, on December 1, 2011, the Chapter 13 Trustee disposed of the accumulated funds by giving $1,200 to Harris' counsel, paying herself a $267.79 fee, and distributing the remaining money to the other secured creditor and six of Harris' unsecured creditors. Id. at 4-5.

Harris moved the Bankruptcy Court for an order directing refund of the accumulated wages that the Chapter 13 Trustee had given to his creditors asserting that the Chapter 13 Trustee lacked authority to disburse funds to creditors once the case was converted to Chapter 7. Id. at 5. The Bankruptcy Court granted Harris' motion, and the U.S. District Court affirmed. Id. The Fifth Circuit reversed. Id.[1]

Writing for a unanimous Court, Justice Ginsburg wrote:

> By excluding postpetition wages from the converted Chapter 7 estate, [section] 348(f)(1)(A) removes those earnings from the pool of assets that may be liquidated and distributed to creditors. Allowing a terminated Chapter 13 trustee to disburse the very same earnings to the very same creditors is incompatible with that statutory design. We resist attributing to Congress, after explicitly exempting from Chapter 7's liquidation-and-distribution process a debtor's postpetition wages, a plan to place those wages in creditors' hands another way.

Id. at p. 7.

The Court explained that if it is determined that a debtor converts in bad faith—for example, by concealing assets in "unfair manipulation of the bankruptcy system," section 348(f)(2) penalizes bad-faith debtors by making their postpetition wages available for liquidation and distribution to creditors. Id. However, Harris involved a voluntary, good faith conversion.

The Court explained that shielding a Chapter 7 debtor's postpetition earnings from creditors enables the "honest but unfortunate debtor" to make the "fresh start" the Bankruptcy Code aims to facilitate. Id. at 7. Rejecting the stated concern that debtors would receive a "windfall" if they could reclaim accumulated wages from a terminated Chapter 13 trustee, Justice Ginsburg explained that a "debtor's chance of having funds returned" is "dependent on the trustee's speed in distributing the payments" to creditors.

The Court explained that: "Creditors may gain protection against the risk of excess accumulations in the hands of Chapter 13 trustees by seeking to include in a Chapter 13 plan a schedule for regular disbursement of funds the trustee collects." Id. at 11. Therefore, creditors of Chapter 13 debtors should take note of Harris and be sure that all Chapter 13 plans include a regular schedule of payments of postpetition earnings to avoid nonpayment based upon conversion.

# # #

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[1]Some courts had previously relied upon the Ninth Circuit case of Nash v. Kester (In re Nash), 765 F.2d 1410 (9th Cir. 1985) to hold that the debtor did not have a right to the return of postpetition earnings following conversion, although Nash was actually a *dismissal* case.

Hogan Lovells

International Trade Alert

July 9, 2015

See note below about Hogan Lovells

Important New AD/CVD Changes Signed Into Law

The Trade Preferences Extension Act of 2015 (H.R. 1295), which President Obama signed into law on June 29, extends Trade Adjustment Assistance (TAA) and trade preferences and also contains important modifications to U.S. antidumping (AD) and countervailing duty (CVD) procedures (trade remedies). Each of the changes to the trade remedies laws in the act will enable the U.S. Department of Commerce (Commerce) and the U.S. International Trade Commission (ITC) to more easily impose AD and CVD orders, to assess higher duty rates, and to examine fewer respondents. The act also will give Commerce even greater authority to act in a more punitive manner against companies that do not cooperate with the proceeding.

On the other hand, the act does not include proposed procedures for a federal agency (such as Commerce) or interested party to make allegations of a company's evasion of AD and CVD orders to U.S. Customs and Border Protection (CBP). Those "evasion" proposals remain pending in Congress as part of the House and Senate Customs authorization bills and will likely be resolved in conference in the coming weeks.

We briefly summarize below the AD and CVD changes enacted in the act.

- <u>Adverse Inferences Easier to Apply</u> – Section 502 of the act will make it easier for Commerce to impose "adverse inferences" against interested parties (including foreign respondents) in the selection of margins of dumping or subsidization. The law states that Commerce does not need to account for information that the party would have provided in its response:
  "[Commerce] is <u>not required</u> to determine, or make any adjustments to, a countervailable subsidy rate or weighted average dumping margin <u>based on any assumptions about information the interested party would have provided if the interested party had complied</u> with the request for information."
  This provision has been adopted in response to a spate of recent judicial decisions that overturned unrealistically high margins of dumping imposed on respondents where evidence suggested that actual rates were lower. The act also reduces Commerce's obligations to corroborate its adverse inferences imposing higher rates when those are based on other programs, and gives Commerce more leeway to impose punitive rates based on its own discretion, specifically removing

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the requirement that Commerce prove its rates "*reflect[] commercial reality*."

- Material Injury and Profitability – The act provides in Section 503 that, in ITC determinations regarding whether foreign imports materially injure the U.S. domestic industry, the ITC is not permitted to determine that material injury is not present solely because the domestic industry is profitable or because its performance has recently improved. Instead, the Act instructs the ITC to consider a number of broader economic factors, including *"actual and potential decline in output, sales, market share, gross profits, operating profits, net profits, ability to service debt, productivity, return on investments, return on assets, and utilization of capacity."* The provision is intended to increase the likelihood of affirmative injury determinations, although its effect in practice is less certain.

- Cost of Production and Particular "Particular Market Situation" – The act in Section 504 and 505 gives Commerce additional discretion when determining costs of production and constructing normal value in order to calculate an applicable duty rate. The act provides that if Commerce determines that the cost of materials or processing reported *"does not accurately reflect the cost of production in the ordinary course of trade, [Commerce] may use another calculation methodology under this subtitle or any other calculation methodology."* Further, Commerce may find that a sale or transaction is outside of the ordinary course of trade whenever *"[Commerce] determines that the particular market situation prevents a proper comparison with the export price or constructed export price."* The act also makes it easier for Commerce to disregard prices or values it determines are below the cost of production or are related to export subsidies, subsidization, or subject to an AD order. These provisions may very well be intended to support continued application by Commerce of alternatives to market economy treatment for Chinese respondents after the expiration of WTO non-market economy authority at the end of 2016.

- Respondent Selection – The act in Section 506 enables Commerce to investigate fewer parties in its proceedings by making it easier for the agency to decline to review "voluntary" respondents who have requested to be reviewed and have their margins determined on an individual basis based on their own data. This provision, too, is in response to judicial decisions that have faulted Commerce for failing to investigate a sufficient number of respondents willing to participate in Commerce proceedings. The new law will likely perpetuate the practice of reviewing no more than two or three respondents in each review.

Each of these provisions, which Congress has characterized as "improvements" to the trade remedies laws, make it easier for Commerce and the ITC to impose AD and CVD duties on U.S. imports. It will be important for companies involved in trade remedy proceedings to monitor closely how Commerce and the ITC decide to implement these changes, as they could result in new and higher duties being imposed on imported products.

Flash Legal Report

Obligations established by CADIVI will not need verification in Customs

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

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

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

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

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

Flash Legal Report
Obligations established by CADIVI will not need verification in Customs
July 2015

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