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June 2015 e-Bulletin

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CAREY ANNOUNCES PARTNER APPOINTMENT

SANTIAGO - 20 May, 2016: Carey has promoted an associate to partner in its real estate and engineering and construction practices.

Juan Pablo Stitchkin, 36, took up the position on 13 May. He co-heads the firm's engineering and construction practice alongside Oscar Aitken, and the real estate practice with Alfonso Silva. Stitchkin joined Carey as an associate in 2010.

As well as advising clients on infrastructure projects, energy contracts and real estate developments, he also practises insurance and general corporate law.

Stitchkin was part of the team that advised the Overseas Private Investment Corporation and the International Finance Corporation on their US$289 million loan to US renewables company First Solar in 2014.

For additional information visit www.carey.cl

CLAYTON UTZ LAUNCHES SAFETY AND ENVIRONNMENT CRITICAL INCIDENT RESPONSE APP

01 May 2015 - Clayton Utz has launched a first-of-its-kind interactive app to guide companies through the critical first 48 hours of responding to a serious safety and/or environment accident or incident.

The **CU SAFE** (Serious Accident, Fatality and Environmental) Incident Response app provides a step-by-step guide on what to do in the event of a serious accident or incident by particular type - workplace health and safety, electrical, petroleum, gas, mining, pollution or contamination.

CU SAFE sets out by State and Territory the legal reporting obligations that apply depending on the location of the incident. It also contains practical tips on how to contain the situation, minimise risk to people, property or the environment, and notify the relevant authorities.

"We know from experience that the first 48 hours after a serious safety or environmental incident are the most critical," said Clayton Utz Workplace Relations and Safety partner, Shae McCartney. "We wanted to make it make it as easy as possible for people to quickly and decisively respond to a range of scenarios.

"Even experienced environment and safety professionals and managers can find themselves and their incident response process derailed by conflicting demands and priorities. That means the interests and safety of workers, protection of the environment and the company's legal position are at risk," said Shae.

Clayton Utz Environment and Planning partner Claire Smith said a key feature of the app was its versatility. "The **CU SAFE** app can be loaded onto any desktop and mobile device and has offline capability so that it can be used in remote locations. It is unique in providing practical steps and tips that will guide any individual - be they an environment and safety professional or manager, on-site manager, a member of operational staff, or one of the company's lawyers - through those critical first steps in responding to an environment or safety incident. **CU SAFE** is an extra pair of safe hands."

CU SAFE is a joint initiative of the Clayton Utz Workplace Relations and Safety and Environment and Planning teams.

To find out more about **CU SAFE**, please contact Clayton Utz via this link:
https://www.claytonutz.com/publications/social/cusafe_app.page

TWO HIGHLY EXPERIENCED ENERGY ATTORNEYS JOIN NEW YORK OFFICE OF DAVIS WRIGHT TREMAINE LLP

JUNE 8, 2015 – Davis Wright Tremaine LLP is pleased to announce the significant expansion of its energy practice with the addition of two highly experienced lawyers at the firm's New York office. **Nicholas A. Giannasca** has joined as a partner and **Carlos E. Gutierrez** has joined as counsel. Both were most recently at Blank Rome LLP.

Giannasca brings to Davis Wright Tremaine more than 27 years of practice in the energy industry. He has represented a broad array of utility, institutional, and developer clients in transactional, regulatory, and administrative matters, including matters before the Federal Energy Regulatory Commission ("FERC") and state public utility commissions.

Gutierrez has a decade of energy experience, including serving as in-house counsel with the New York Power Authority, the nation's largest state-owned electric utility. At Blank Rome, he represented energy clients before FERC, the North American Electric Reliability Corporation ("NERC"), and other state public utility commissions, including on enforcement matters.

"We're very pleased to add these two highly skilled energy practitioners to our team," said Craig Gannett, co-chair of the energy practice group at Davis Wright Tremaine.

Giannasca began his legal career at a boutique energy firm that served as outside general counsel to New York State Electric & Gas Corporation and its parent company, Energy East Corporation (now known as Iberdrola USA). Over the years, he has regularly represented clients on electric transactional and regulatory matters, including competitive electric and gas supply, electric and gas commodity transactions, FERC electric compliance, NERC reliability standards, generation interconnection, and wholesale power transactions. He is also very active representing developers and hosts in distributed generation, including solar and cogeneration.

At Blank Rome, Giannasca and Gutierrez's diverse experience included representing a large public utility holding company on FERC and NERC compliance and enforcement matters; representing an environmental asset management firm in the financing of California renewable energy facilities; representing a leading national energy supplier in several refinancings and acquisitions; representing a bank in connection with a construction loan for development of solar generation facilities; and representing a methane gas recovery company in the portfolio sale of 11 landfill projects.

"Their extensive experience in FERC and NERC matters, combined with their considerable project development and finance work, make Nick and Carlos perfectly complementary to DWT's areas of strength, and further bolster the firm's full-service model," said Scott MacCormack, co-chair of the firm's energy practice. "We look forward to bringing the full breadth of their skills to bear for our clients."

Giannasca received his B.A. from Columbia University and his J.D. from Fordham University School of Law. Gutierrez received his B.A. from Texas A&M University and his J.D. from Cornell Law School.

For more information, visit www.dwt.com

GIDE STRENGTHENS PROJECTS FINANCE & INFRASTRUCTURE PRACTICE

WARSAW - 8 May 2015: Gide is pleased to announce that Konrad Kosicki, an advocate specialising in energy law and infrastructure projects, has joined its Warsaw office as counsel. Konrad Kosicki has extensive experience in the energy sector, particularly in matters relating to the acquisition, development and financing of projects involving conventional and renewable energies. He also advises on regulatory issues and trading in electricity, natural gas, green certificates, emissions allowances and Kyoto units. He has represented many energy companies before courts and the President of the Energy Regulatory Office, as well as in arbitration proceedings. His experience includes advising on infrastructure projects such as highways and stadiums. Konrad joins from the Polish office of law firm Norton Rose Fulbright, and alongside coordinating partner Piotr Sadownik and senior associates Grzegorz Banasiuk (an expert in public procurement matters) and Tomasz Pyrkowski (who specialises in energy and renewable law issues), he will strengthen both Gide Poland's Projects (Finance & Infrastructure) and Public & Administrative Law departments.

"It is with great pleasure that I welcome Konrad to our team. I am confident that his contribution as a very experienced practitioner in energy law and infrastructure projects will help meet our clients' expectations, especially in light of the recent major changes to the Polish energy legislation framework" said Dariusz Tokarczuk, partner in charge of Gide's activities in Poland.

"I am joining Gide at a very interesting time for the energy sector. Renewable energy is growing in importance and some new trends are emerging in the conventional energy sectors. Nearly two weeks ago, in early May, the RES Act came into force. It provides for a completely new support system based on auctions, which will take effect at the beginning of 2016. A tender is expected to be announced this year for the first nuclear power plant in Poland, which will also be a breakthrough. In addition, there is the planned consolidation of the energy sector, and the plans for the introduction of a capacity market," added Konrad Kosicki.

For additional information visit www.gide.com

PRAC 2015 VANCOUVER

PRAC @ Vancouver 2015 Conference
Pan Pacific Vancouver Hotel
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*

Reserve your spot now for the Vancouver conference. Registration deadline is **15 August, 2015.** **Registration open to PRAC member firms only.** Full details and online registration available here**:** **http://www.prac.org/events.php**

SYCIP LAW ADMITS FOUR TO PARTNERSHIP

SyCip Salazar Hernandez & Gatmaitan is pleased to announce the admission of **Maria Jennifer Z. Barreto, Melyjane G. Bertillo-Ancheta, Hiyasmin H. Lapitan,** and **Jose Florante M. Pamfilo** to the partnership.

Maria Jennifer Z. Barreto's practice experience is in corporate and business law. She has done significant work in natural resources, especially in mining and renewable energy. She has acted as counsel to investors in various Philippine mining projects, such as the Rapu-Rapu Polymetallic Mining Project and the Far South East Gold–Copper Porphyry Project, and on investments in hydro, wind, coal and biomass power projects, including the acquisition of the 600MW coal-fired thermal power plant in Masinloc, Zambales and the hydroelectric power station of Agusan Power Corporation in Agusan del Norte, Mindanao.

Ms. Barreto lectures on accounting for the Finance and Accounting Department of the Ateneo de Manila University's School of Management.

Melyjane G. Bertillo-Ancheta specializes in securities regulation, including securities registration and listing, and banking and finance. Her transactional work includes the financing of projects under the Philippine Government's Public-Private Partnership program, specifically the infrastructure project for public schools and the NAIA Expressway project. She has worked on several international securities offerings of Philippine companies, including Petron Corporation's 2013 issuance of undated subordinated capital securities. In 2014, she worked on the domestic liability management transaction of the Republic of the Philippines which involved offers to exchange eligible bonds and subscribe for new ROP bonds.

Ms. Bertillo-Ancheta also has a Master's degree in business Administration from the Ateneo Graduate School of Business.

Hiyasmin H. Lapitan is a member of the firm's special projects; tax; banking, finance and securities; and corporate services departments. She specializes in insurance law and has broad experience in investments in, and regulation of, this sector. Her recent projects include the structuring of the transfer of the insurance portfolio of a non-life insurance company; the licensing of a newly-formed insurance agency; the development, equity structuring, construction, and financing of a 50 MW geothermal power generation project in the Visayas region; the sale of interests in commonly-owned facilities of petroleum companies; the reorganization of a group of advertising agencies; and the formation of a joint venture for the supply of bulk water.

Jose Florante M. Pamfilo's practice areas include investments, mergers and acquisitions, and the energy and international trade law sectors. His projects have included the sale of a controlling stake in a publicly-listed dairy manufacturing company; the sale by a Dutch bank of its Philippine trust and investment unit; and financing for the acquisition of a controlling stake in one of the Philippines' leading sugar mills. He has represented clients before the Appellate Body and dispute settlement. Mr. Pamfilo received his Master of Laws from the University of Michigan Law School as a DeWitt Fellow and was admitted to the New York State Bar in 2012.

For additional information visit www.syciplaw.com

ARIAS & MUNOZ

ASSISTS MOMOTOMBO POWER COMPANY IN 85MW HYDROELECTRIC PROJECT

NICARAGUA Arias & Muñoz has assisted Momotombo Power Company in the acquisition of a 50% stake of the 85 MW El Carmen Hydroelectric Project.

The firm represented Corporación de Energías Renovables de Centroamérica, S.A., an affiliate of Momotombo Power Company, in the negotiations, execution and closing of the share purchase agreement and ancillary documents for the acquisition of 50% of Aguas El Carmen, S.A., the project company developing the El Carmen Hydroelectric Project that will generate approximately 85 MW in the Departments of Boaco and Matagalpa, Nicaragua.

The transaction value remains undisclosed, but the development and construction of the Project will require approximately US$ 330 million.

The deal was completed in February, 2015, and was led by partner Bernard Pallais assisted by associate, Rodrigo Ibarra.

For additional information visit www.ariaslaw.com

BRIGARD & URRUTIA

ASSISTS OPAIN, EL DORADO AIRPORT CONCESSIONAIRE, REFINANCE A LOAN WORTH US$500 MILLION USED TO MODERNISE COLOMBIA'S LARGEST AIRPORT

BOGOTA - May, 2015: Brigard & Urrutia assisted Opain, El Dorado airport concessionaire, refinance a loan worth US$500 million used to modernise Colombia's largest airport.

The deal closed on 8 May.

The Colombian government granted Opain the concession in 2006. The company will use the money to expand, modernise and operate Colombia's largest airport, which they committed to in an EPC agreement signed in 2012.

Brigard & Urrutia Partner Manuel Quinche and associates César Rodríguez and Juan Martín Estrada acted in the transaction.

For additional information visit www.bu.com.co

ARIAS FABREGA & FABREGA

ASSISTS BANCO LATINOAMERICANO DE COMERICO EXTERIOR (BLADEX) ISSUE EURO NOTES IN LUXEMBOURG

PANAMA - May, 2015: Arias, Fábrega & Fábrega in Panama City have helped Panama-based Banco Latinoamericano de Comercio Exterior (Bladex) issue notes worth US$350 million under its medium-term note programme.

The transaction closed on 7 May. The notes were listed on the Luxembourg Stock Exchange and admitted for trade on the euro multilateral trading facility.

ARIFA is regular counsel to Bladex and helped the bank issue US$156.6 million in bonds on the Mexican market in 2012.

Arias, Fábrega & Fábrega team included Partner Ricardo Arango and associate Michelle Dueñas in Panama City.

For additional information visit www.arifa.com

CAREY

ACTS FOR ANTOFAGASTA RAILWAY COMPANY AND INVERSIONES PUNTA DE RIELES IN SALE OF AGUAS DE ANTOFAGASTA

SANTIAGO, May 2015: Carey acted as local counsel to Antofagasta Railway Company and Inversiones Punta de Rieles, subsidiaries of Antofagasta PLC, in the USD$965 million sale of 100% of Aguas de Antofagasta, a company dedicated to production and distribution of potable water and recollection, treatment and disposal of sewage.

Aguas de Antofagasta supplies more than 162,000 clients in six borrows in the north of Chile and to the mining business, to Empresas Públicas de Medellín, a Colombian holding with public utilities companies in Colombia, El Salvador, Guatemala, México, Panamá and Chile.

The agreement is subject to the approval of state-owned ECONSSA Chile and other conditions stated in the share purchase agreement.

Carey advised Antofagasta Railway Company and Inversiones Punta de Rieles through a team led by partners Salvador Valdés and Cristián Eyzaguirre, and associates Francisco Guzmán, Ignacio de Solminihac, Nicolás Calderón, Giannina Veniú, Irene Barros, Francisco Urcelay, Miguel Saldivia and Camila Lavín.

For additional information visit www.carey.cl

BAKER BOTTS

LIBERTY BROADBAND SUPPORTS CHARTER COMMUNICATIONS IN MERGER WITH TIME WARNER CABLE AND ACQUISITION OF BRIGHT HOUSE NETWORKS; LIBERTY BROADBAND TO INVEST $5 BILLION, FUNDED IN PART BY COMMITTED EQUITY SUBSCRIPTIONS

NEW YORK - 23 May, 2015: Liberty Broadband Corporation ("Liberty") entered into an agreement with Charter Communications, Inc. ("Charter") to invest $4.3 billion in Charter at a price of $176.95 per share in connection with Charter's proposed merger with Time Warner Cable, Inc. ("TWC"). The deal values TWC at $78.7 billion. Liberty (which is currently Charter's largest stockholder) also reaffirmed its commitment to purchase $700 million at a price of $173 per share in connection with Charter's proposed acquisition of Bright House Networks ("Bright House") from Advance/Newhouse Partnership ("A/N") for $10.4 billion. In connection with these transactions, it is expected that Charter will undergo a corporate reorganization, resulting in a current subsidiary of Charter becoming the publicly traded parent company ("New Charter").

In support of the Charter-TWC merger, Liberty will purchase $4.3 billion of New Charter Class A Common Stock (the "New Charter Shares") using the proceeds from $4.4 billion of subscriptions for newly issued shares of Liberty Series C Common Stock (the "Liberty Shares") at a price of $56.23 per share. The purchasers of the Liberty Series C Common Stock include Liberty Interactive Corporation ("LIC") through the Liberty Ventures Group and several third party investors, including Coatue Management LLC, JANA Partners LLC and Soroban Capital Partners LP. The subscriptions are on similar terms and subject to customary closing conditions and the completion of the Charter-TWC merger. Each of Charter and Liberty intend to seek stockholder approval for the issuance of the New Charter Shares and the Liberty Shares, respectively. If Liberty does not receive the requisite approval for the issuance of the Liberty Shares, the purchasers will instead acquire a limited number of Liberty Shares, together with shares of a newly issued series of non-convertible preferred stock of Liberty.

Also in connection with the Charter-TWC merger, Liberty entered into an agreement with Charter pursuant to which it has agreed to vote all of its shares of Charter's Class A Common Stock in favor of the Charter-TWC merger and any related proposal, and an agreement with LIC that grants Liberty a proxy over shares of New Charter that LIC receives in the transaction. Liberty and LIC have also entered into an agreement with Charter which provides that Liberty and LIC will exchange, in a tax-free transaction, the shares of TWC common stock held by each company for shares of New Charter Class A common stock (subject to certain limitations).

Separately, Liberty reaffirmed its commitment to purchase up to $700 million in New Charter Class A Common Stock at a price per share of $173 in connection with the Bright House acquisition. The terms of a new stockholders agreement among Charter, New Charter, Liberty and Bright House remain substantially the same as previously announced, except that restrictions on Liberty's ability to utilize shares of New Charter in connection with financing transactions have been eliminated, and Bright House will be entitled to designate two director nominees (reduced from three), among other things. A/N and Liberty will also enter into a proxy agreement to vote shares of New Charter held by A/N, capped at 7% of New Charter's outstanding shares.

Following the Charter-TWC merger and the Bright House transaction, Liberty is expected to control approximately 25.01% of the aggregate voting power of New Charter, and is expected to be New Charter's largest stockholder.

The firm represented Liberty in the transactions.

The Baker Botts team: Corporate: Buzz McGrath, Renee Wilm, Jonathan Gordon, Kate Jewell, Brendan Dignan, Brittany Uthoff, Justin Blass; Tax: Tamar Stanley, Scott Langley, Peter Farrell.

For additional information visit www.bakerbotts.com

CLAYTON UTZ

MARKS MILESTONE OF JAPAN POST'S ACQUISITION OF TOLL

June 2015: Clayton Utz congratulates its client Japan Post Co. Ltd (Japan Post) as well as Toll Holdings Limited (Toll) on the successful implementation of its merger scheme of arrangement on 28 May 2015.

This was the largest acquisition of an Australian company in the year to date, implying an equity value for Toll of approximately $6.75 billion and an enterprise value of approximately $8.02 billion.

Japan Post's acquisition of Toll is a very significant milestone for both companies. Japan Post has acquired Toll in order to diversify and expand internationally, pending its parent company Japan Post Holding Co. Ltd's proposed IPO and listing on the Tokyo Stock Exchange.

It also marks a new era for Toll, which was founded in 1888 by Albert Toll and grew to become one of Australia's most successful logistics businesses. It was listed on ASX from the time of its 1993 IPO until last week.

Japan Post appointed Clayton Utz to act as Australian legal counsel on the transaction in 2014, approaching Corporate Partner and Japanese Bengoshi **Hiroyuki Kano**.

The deal was consummated by Clayton Utz M&A Partners **Andrew Walker** and **Darryl McDonough**, with key support from **John Brewster** and **Tony Lalor**.

Clayton Utz worked alongside Japanese firm Nishimura & Asahi, **Simpson Grierson** as New Zealand legal counsel, Gresham Partners as financial adviser and KPMG as accounting and tax advisers.

Lazard and Herbert Smith Freehills advised Toll.

For additional information visit www.claytonutz.com

GIDE

REPRESENTS THE REPUBLIC OF CÔTE D'IVOIRE IN THE DISPUTE WITH GHANA OVER ITS MARITIME BORDER

28 May 2015: Gide has for a number of years acted as counsel to the Republic of Côte d'Ivoire in its negotiations with its neighbour, Ghana, to delimit the maritime border between the two countries.

Both parties lay claim to a zone covering over 30,000 km² and including a number of offshore oil fields representing several hundred million barrels worth of oil.

At the same time, Ghana has unilaterally authorised the exploration and exploitation by various international operators of the resources in the disputed zone.

The parties have referred the dispute to the International Tribunal for the Law of the Sea, in Hamburg, which will rule on delimitation of the border in 2017.

Pending such ruling, an international team led by Michel Pitron and Maître Kamara, of the Ivory Coast bar, and made up of legal, oil, cartography and environmental experts, filed an urgent application with the Tribunal for provisional protective measures.

In its ruling of 25 April 2015, the Special Chamber of the Tribunal, presided by Mr Bouguetaia, prohibited Ghana from carrying out any further drilling in the disputed zone, as well as from using any confidential information in its possession to the detriment of the Republic of Côte d'Ivoire, and ordered the parties to cooperate in order to preserve the surface and subsurface resources and the marine environment, pending the border ruling.

This is the first time that the International Tribunal for the Law of the Sea has ordered such measures in a dispute of this nature.

For additional information visit www.gide.com

MUNIZ

HELPS MASTERCARD AND TELEFONICA LAUNCH E-MONEY REVOLUTION IN PERU

LIMA - 15 May, 2015: Muñiz Ramírez Pérez-Taiman & Olaya has helped Jupiter Technology, a joint venture company formed by Mastercard and Telefónica, register as Peru's first electronic money platform before the Peruvian Superintendence of Banking and Insurance (SBS) and the Peruvian Central Bank.

Its publication on 4 May in the Official Gazette follows Jupiter Technology's launch of an electronic wallet product at the end of last year. The e-money platform allows low-income individuals to conduct basic financial transactions through mobile phones on Telefónica's Movistar mobile phone network.

Jupiter Technology has 110,000 selling points across Peru, such as at chemists, newsagents and petrol stations, where customers can put cash on to their phones. Movistar has more than 17 million mobile users across the country – more than half the population – and Mastercard ensured that more than 60,000 commercial establishments will accept payment from Jupiter's e-money wallet.

E-money allows individuals and companies without access to a bank account to store cash digitally and make payments. The customer gives physical money to a mobile phone provider, or a dedicated e-money platform. They then transfer the cash value electronically onto their phone or computer. The physical money is held in a financial trust until the customer makes a purchase.

Partner Andrés Kuan-Veng at Muñiz Ramírez says Jupiter Technology's aim is to bring low-income families, who have a traditional aversion to banks, into the formal economy.

The move comes a month after the government amended its electronic money laws in April to allow local and foreign companies, and state institutions, to use e-money without a bank account. In 2013, Peru became the first country in Latin America to pass a law on e-money, allowing individuals to use the digital currency.

However, despite legislative advances in support of electronic payments, Kuan-Veng says that currently e-money is "overregulated" in Peru, saying that Jupiter "has to act like a bank"; it is subject to the same regulatory and legal controls of a bank, which Kuan-Veng says is stifling the success of the project. Pointing to a similar set-up called M-Pesa, which has been used in Africa, he says the system succeeded in places like Kenya because there was no regulation. "Financial authorities supervised the system, but they did not regulate it," he says. "They are now loosening all the locks in Peru's regulatory framework, but more needs to be done."

Mastercard and Spanish telecoms provider Telefónica set up the regional joint venture in 2011 to allow mobile phone users across Latin America to use their phones for small financial transactions without a bank account.

Counsel to Jupiter Technology Muñiz Ramírez Pérez-Taiman & Olaya represented by Partners Andrés Kuan-Veng and Gillian Paredes, and associate Juan Antonio Llanos.

For additional information visit www.munizlaw.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

ASSISTS HIAP HOE LIMITED AND SUPERBOWL HOLDINGS LIMITED DISPOSAL OF ENTIRE SHAREHOLDING INTEREST IN HIAP HOE SUPERBOWL JV PTE LTD TO HIAP HOE HOLDINGS PTE LTD

SINGAPORE: Rodyk acted for Hiap Hoe Limited (HHL) in the disposal by HHL and SuperBowl Holdings Limited (SBHL), a subsidiary of HHL, of their entire shareholding interests in Hiap Hoe SuperBowl JV Pte Ltd (HHSBJV) to Hiap Hoe Holdings Pte Ltd (HHH) for a purchase consideration of approximately S$72 million (the Transaction).

HHSBJV is the owner of the residential development (total 48 units) known as "Treasure on Balmoral" located on Balmoral Road (Properties).

The Transaction was an "interested person transaction" and was treated as a "major transaction" under Chapters 9 and 10 of the SGX Listing Manual respectively.

Also assisted HHL in the discharge of the existing securities provided in connection with the Properties and liaising with the Singapore Land Authority on the intended change in shareholders of HHSBJV from HHL and SBHL to HHH.

Rodyk corporate partner Chan Wan Hong led on the corporate aspects, supported by senior associate Nigel Chia. Finance partner Lee Ho Wah, led on the finance aspects, supported by partners Lee Yin Wei, Bernice Ong, senior associate Lee Kee Min and associate Xie Jiayan.

For additional information visit www.rodyk.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 share-holders' 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.

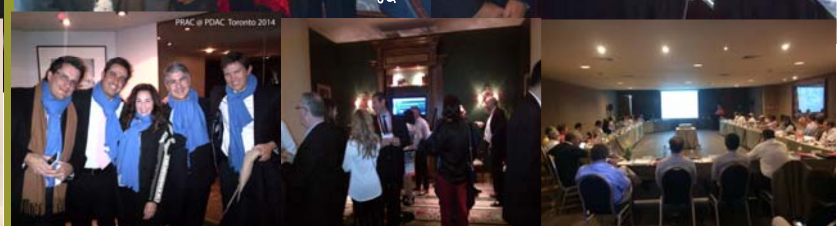
Commenting on the transaction, Santamarina y Steta's lead partner **Jorge Leon Orantes** said: "Considering the new legal insurance framework which entered into force on April 2015, and the new set of regulations and corporate governance rules deriving from this law, you can expect there will be many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

Armour Group was represented by Nader, Hayaux & Goebel.

For additional details visit www.s-s.mx

UPCOMING PRAC EVENTS

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



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CLAYTON UTZ

02 June 2015

Innovators to be hardest hit by PBS Access and Sustainability Package

Innovator pharmaceutical companies will be the hardest hit from the statutory price reductions, price disclosure changes and the speed with which generic drugs can obtain Pharmaceutical Benefits Scheme listing, brought about by implementation of the Government's PBS Access and Sustainability Package.

Elements of the new Package require amendments to be made to the National Health Act 1953. The proposed amendments are contained in the National Health Amendment (Pharmaceutical Benefits) Bill 2015, which was introduced into Parliament on 27 May 2015. According to the Government, the Package will:

- enable net savings to Government of more than $3.7 billion over five years; and
- ensure ongoing access to innovative medicines through a sustainable PBS.

Key amendments to the National Health Act

Statutory price reduction for drugs on the F1 formulary

The Bill proposes a one-off 5% statutory price reduction for all forms and strengths of a drug on the F1 formulary after the drug has been listed on the F1 formulary for five years.

The first reduction day will be 1 April 2016 and the last reduction day will be 1 April 2020.

The Government has clarified that the reduction takes no account of when the drug was listed for extension of indications, only the date on which the drug was first listed. This means that indications that were listed more recently will also bear the 5% price cut.

Price disclosure arrangements for drugs on the F2 formulary

The Bill provides that price disclosure arrangements for multiple-brand medicines that have been listed on the F2 formulary for three years or more will be changed to remove the originator brand from calculation of the weighted average disclosed price. More than one brand may be designated as an originator brand. The first reduction day will be 1 October 2016. This is likely to push weighted average disclosed price down and lead to greater price disclosure percentage reductions for multi-brand medicines on the F2 formulary.

Flow-on price disclosure reductions

The Bill proposes to apply flow-on price disclosure reductions for listed component drugs to multiple brand combination medicines on the F2 formulary. This process will commence on 1 April 2016, with a back-capture day on 1 October 2016 to flow-on any outstanding prior price disclosure reductions for component drugs to multiple-brand combination medicines. This will close a "loophole" which has allowed some companies to avoid price reductions of component medicines by listing a second brand of their own combination drug.

Price reductions on biosimilar listing

The proposed amendments remove uncertainty as to whether the first listing of a biosimilar will cause a 16% price reduction and movement of the biosimilar and its reference product to the F2 formulary. If passed, the amendments confirm that such a 16% price reduction will occur and the biosimilar and reference product will be listed on the F2 formulary. This will give companies greater certainty about the pricing consequences of biosimilar listing.

Proposed changes which affect generic listing and biosimilars

The Government's Package also includes the first ever strategic agreement with the Generic Medicines Industry Association which provides, amongst other matters, for:

- an increase in the number of dates when new brands with price flow-on effects can be listed from three to six times a year, which will bring first generic products to market quicker;
- substitution of biosimilars at the pharmacy level based on PBAC recommendations.

Less time for innovators, faster process for generics

The doubling of the number of listing dates for the first generic drug with price-flow on effects means that the time period between the first generic obtaining registration on the Australian Register of Therapeutic Goods and the generic obtaining PBS listing will be reduced. Innovator companies will therefore have less time to make a decision whether to apply for a preliminary injunction to protect any intellectual property rights they have relating to the drug prior to the generic obtaining listing on the PBS.

Further, if proceedings are commenced for patent infringement and a preliminary injunction is obtained by the innovator company which is discharged at the final hearing, the generic company will be able to get its PBS listing and be on the market in a much shorter time period than is currently the case.

Flagging of biosimilar products for substitution

It will be interesting to see how recommendations of PBAC on the flagging of biosimilar products for substitution with the reference biological medicine at the pharmacy level are applied. Generic companies have been lobbying for substitution and extrapolation across indications.

PBAC has advised that this flagging would occur where the data are supportive of such a conclusion. When establishing that a biosimilar product could be flagged with the originator product, PBAC says it will consider:

- absence of data to suggest significant differences in clinical effectiveness or safety compared with the originator product;
- absence of identified populations where the risks of using the biosimilar product are disproportionately high;
- availability of data to support switching between the originator product and the biosimilar product;
- availability of data for treatment-naïve patients initiating on the biosimilar product; and
- whether the Therapeutic Goods Administration has deemed a product to be biosimilar with the originator product.

Where a biosimilar product could not be flagged at the time of PBS listing, PBAC says data should be collected to support flagging at a later point.

PBAC's intention to look at the absence of data regarding difference in clinical effectiveness or safety compared with the originator product and absence of identified populations at risk from substituting with biosimilar product is particularly problematic as these are negative stipulations. They do not require positive proof of no adverse difference in effectiveness, safety or special risk etc., but rather rely on the absence of data identifying any such issues. This may give rise to safety concerns if the data are absent because no studies have been done for a particular comparator.

Next steps

The Bill is listed in Parliament's indicative programme for further debate before the House of Representatives on 3 June 2015. Should the amendments to the National Health Act pass through both Houses of Parliament and be implemented together with the other aspects of the Government's Package, innovators will need to:

- carefully consider the **impact of pricing changes** on forecasts;
- **re-evaluate the timelines** for seeking preliminary injunctive relief for patent infringement; and

- may also wish to approach PBAC to discuss how it will be **assessing the absence** of data when determining whether a biosimilar can be flagged for substitution.

NautaDutilh

Privacy & Data Protection

Belgium

ENISA Cloud Security Guide for SMEs

Monday, 1 June 2015

The European Union Agency for Network and Information Security (ENISA) recently issued a Cloud Security Guide for SMEs.

For many years, ENISA has been active in the field of cloud computing and has supported a number of initiatives within the European Cloud Computing Strategy for "Unleashing the Potential of Cloud Computing in Europe". In particular, ENISA has participated in the development of cloud certification schemes and standards.

As the title of the strategy suggests, cloud computing has great potential and presents many advantages compared to traditional IT (such as an attractive cost structure). However, cloud computing also entails certain security risks.

In its Cloud Security Guide ENISA identifies 11 information security opportunities and 11 information security risks. The Guide builds on previous ENISA publications, the ENISA Cloud Computing Risk Assessment and the ENISA Assurance Framework for Cloud Computing, but is more concise and user-friendly.

Unlike previous publications, the Guide specifically targets SMEs, which do not always have the resources and/or skills necessary to implement top-notch network and information security or the power to negotiate a contract with cloud computing providers. For such companies, the Guide is a useful tool when it comes to assessing the main opportunities and risks of cloud computing.

Even though the Guide is aimed at SMEs it can, in our view, be used as a reference tool by all types of companies. In particular, it may come in handy when analysing whether a cloud computing provider offers sufficient guarantees in respect of security measures, as required by European data protection law.

For more information, please contact me.

Heidi Waem | Brussels | +32 2 566 8450

TOZZINIFREIRE
ADVOGADOS

CORPORATE - M&A / ARBITRATION

Brazilian Corporations Law Amended with Respect to Arbitration

A recent amendment to Law 6,404 of 1976 (the “Brazilian Corporations Law”) included a new section 136-A in the Withdrawal Rights of shareholders. The new article 136-A establishes that:

• If the shareholders general meeting decides to include an arbitration convention in the bylaws of the company, the convention will bind all shareholders;

• Dissenting shareholders will have the right to withdraw from the company and receive reimbursement for their shares in accordance with the provisions of section 45 of the Brazilian Corporations Law;

• The arbitration convention will become effective only after 30 days as of the publication of the corresponding shareholders general meeting;

• The withdrawal right will not be applicable if the arbitration convention: (i) was inserted in the bylaws as a condition for securities issued by the company being listed in a trading segment requiring minimum dispersion of 25% of the shares of each type or class; and (ii) is included in the bylaws of a publicly held corporation whose shares have liquidity and dispersion in the market, as defined by section 137 of the Brazilian Corporations Law.

• This new amendment to the Brazilian Corporations Law will become effective on July 27, 2015.

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Cambodia's Swift Accession to the Madrid Protocol

The Madrid System for the international registration of marks, governed by the Madrid Protocol, is gaining popularity across Southeast Asia. Several countries in the region are preparing to implement Madrid as part of their commitments toward regional integration via the ASEAN Economic Community, which will be created at the end of 2015.

In the most recent development, Cambodia has surpassed the expectations of many observers by joining the Madrid Protocol on March 5, 2015, with the system set to enter into force on June 5, 2015. Cambodia moved quickly and is now the fourth ASEAN country to join the Madrid Protocol—following in the footsteps of Vietnam, Singapore, and the Philippines, and bypassing regional neighbors like Thailand and Indonesia, which are both in the process of preparing for accession.

As the Madrid Protocol will soon come into effect in the country, we will answer some of the key questions about how Cambodia is preparing to adopt the Madrid System.

How Are the Cambodian IP Authorities Preparing for the New System?

Online Registration of Marks

Article 1 of Prakas No. 206 on the Organization and Functioning of the Department of Intellectual Property, dated July 24, 2014 (Prakas No. 206), provides that the Department of Intellectual Property Rights in Cambodia (DIPR) will establish and manage a website of intellectual property rights to promote public awareness of IP laws and regulations, as well as to clarify registered IP rights.

On March 28, 2015, Mr. Sim Sokheng, Director of the DIPR, confirmed that the DIPR is preparing a website for the public to register and search online for national and international marks. By late August 2015, it will be possible to file for both national and international registration of marks online on the DIPR's website.

The Law Concerning Marks, Trade Names, and Acts of Unfair Competition

Mr. Sim has said that no amendments will be made to the Law Concerning Marks, Trade Names, and Acts of Unfair Competition, in order to comply with the Madrid Protocol. If any provisions of the law conflict with the Madrid Protocol, the Madrid Protocol will take precedence over the preexisting law.

Regulations on the Madrid System's Registration Procedure

The DIPR is also preparing a draft regulation (referred to as a *Prakas* in Khmer) on the Procedures for Registration with the Madrid System, which will detail new procedures. This will come into force no later than June 6, 2015.

Will the IP Office Be Restructured?

According to a source at the Division of the Registration of Marks and Article 3 of Prakas No. 206, two separate divisions will be responsible for the national registration of marks and the international registration of marks. The new *Prakas* will provide further details about any organizational restructuring and the impact on examiners and registrars.

How Will International Applications Be Handled?

Under Article 5 of Prakas No. 206, the Division of International Registration of Marks will be established with the duties to:

- establish procedures for the international registration of marks;
- prepare and implement such procedures;
- manage official fees for the international registration of marks and collaborate with the Administration and IT Division, Accounting Division, and the Financial Department of the Ministry of Commerce;
- provide certificates of internationally-registered marks, as requested;
- remind applicants of the use or non-use of marks;
- fulfill duties to register and protect international marks to comply with the Madrid Protocol and other regulations on behalf of the Office of Origin and the Office of the Contracting Party; and
- other duties assigned by the top management.

What Kind of Training Will Be Offered?

Article 1 of Prakas No. 206 provides that the DIPR will collaborate with the Training and Research Center of the Ministry of Commerce and related ministries to increase public awareness of intellectual property laws and regulations and to educate officers in the relevant government departments.

Mr. Sim has stated that the DIPR will conduct public training in the near future, and that a schedule will later be confirmed by the DIPR. One DIPR officer has said that, within this year, the DIPR will initially provide training to intellectual property agents.

“the Madrid System will provide a means of trademark protection in Cambodia that is faster and more effective than the DIPR's current system of trademark protection”

What Trademark Search Mechanisms Will Be Available?

The DIPR will establish a website where people can conduct trademark searches for national and international marks.

How Will Trademark Owners Benefit?

Trademark owners will benefit greatly from using this tool for the international registration of marks. The Madrid System will provide a means of trademark protection in Cambodia that is faster and more effective than the DIPR's current system of trademark protection, and so we can expect to see a growth in confidence among brand owners with interests in the country.

Bennett Jones Spring 2015 Economic Outlook

Bennett Jones

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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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Foreign Exchange Intermediaries: New Sources for Financing in Foreign Currency

Wed, 05/06/2015 - 16:44

NewsFlash: 289

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Foreign Exchange Intermediaries: New sources for financing in foreign currency

The Colombian Central Bank has recently enacted External Resolution 4 of 2015 ("Resolution 4") amending Article 59 of External Resolution 8 of 2000 ("Resolution 8"), regarding foreign financing transactions authorized to Foreign Exchange Intermediaries ("IMC").

Additionally, External Resolution 5 of 2015 ("Resolution 5") issued by the Colombian Central Bank introduces certain rules in connection with legal banking reserve (encaje bancario), applicable to certain bonds issued by IMC and considered as foreign financing transactions.

The main changes resulting from Resolution 4 and Resolution 5 are as follows:

- Once Resolution 4 comes into force, IMC may obtain foreign financing (i) denominated in Colombian pesos but payable in foreign currency (COP linked-loans and facilities) from non-Colombian residents other than individuals, or (ii) by issuing bonds in international capital markets, denominated in Colombian pesos and payable in foreign currency.
- Similarly, Resolution 4 establishes additional requirements in connection with foreign currency financing obtained by IMC for conducting active credit operations in Colombian pesos, with a term equal or less than the foreign financing obtained and hedged with an FX derivative that is in effect from disbursement to the maturity of the foreign financing.
- The abovementioned transactions are subject to the following common requirements:
    - Such operations are subject to the deposit set forth in Article 26 of Resolution 8, currently established at 0%;
    - Such operations must be registered with the Central Bank as foreign loans, regardless of the purpose for which they are performed (including operations related or complementary to the corporate purpose of IMC);
    - Such operations are not subject to legal banking reserve, except for those bonds denominated in Colombian pesos and payable in foreign currency, issued in international capital markets, with a maturity less than 18 months, which are subject to legal banking reserve at a rate of 4.5%.
    - The proceeds of such operations may be kept in foreign currency while they are used for the authorized operations in Colombian pesos.

Resolution 4 and Resolution 5 in connection with the legal banking reserve applicable to bonds denominated in Colombian pesos and payable in foreign currency, with a maturity less than 18 months, will come into force on June 3, 2015.

KOCHHAR&CO.
ADVOCATES & LEGAL CONSULTANTS

Technology Law Advisory – Section 66A Struck Down by Supreme Court

INTRODUCTION

On March 25, 2015, the Supreme Court of India struck down Section 66A of the Information Technology Act, 2000 ("Act") as being unconstitutional. It also struck down a similar provision of the Kerala Police Act and read down the meaning of section 79 of the Act and its rules.

The ruling is a huge victory for free speech in India in as much as Section 66A used very broad language in criminalizing information sent through electronic communication.

SECTION 66A

This provision, which was introduced by an amendment in 2009, made it a criminal offence to send information which was "grossly offensive" or had a "menacing character". It also criminalized emails which caused "annoyance" or "inconvenience". The language of this provision was obviously very broad and in fact, wider than India's not insubstantial provisions on hate related speech. There had also been several cases where seemingly innocuous conduct had led to people being arrested and facing criminal charges.

The court held that the provision violated the fundamental right to free speech. Under India's Constitution, free speech is subject to eight grounds of "reasonable restrictions". The court considered that only one of them, public order, could possibly justify the provision. The court held that the provision did not have a proximate connection to maintaining public order. Further, the language was open-ended and undefined and that virtually any opinion on any subject could be covered by the provision.

For the same reason, the court also struck down a provision in the Kerala Police Act which also referred to causing "annoyance".

Surprisingly, the court did not apply the doctrine of severability to save one part of Section 66A which used similar words such as annoyance, inconvenience, etc, but required two other ingredients – that the sender must know that the information is false and that it must be sent persistently.

SECTION 69A

The court held as constitutionally valid, the statutory right of the government to block websites, finding that there were sufficient safeguards built in to the provision and the rules. The safeguards include that the grounds for blocking related to the reasonable restrictions on the right to free speech, that there is an elaborate process specified and that there has to be a reasoned order which can be challenged in court.

SECTION 79

The court also held as constitutionally valid but read down the meaning of section 79 and the rules issued there under. This provision provides a safe harbor for intermediaries from liability under all Indian laws in relation to content of others. Unfortunately, the safe harbor is unavailable if the intermediary, on receiving knowledge or on being notified by the government of unlawful content, fails to expeditiously take down such content.

The provision has been assailed on the ground that it forces the intermediaries to determine for themselves whether content is lawful or not, thereby putting themselves in a judicial role. The court read down the provision to hold that "knowledge" refers to knowledge of a court order only.

Surprisingly, having approved section 69A because of the safeguards built in, the court overlooked the fact that similar safeguards are not provided when the government sends notice to an intermediary under section 79. Further, the court missed an opportunity to prescribe a notice and take down procedure (for example, as provided in the USA's DMCA) which would make it possible for persons to approach intermediaries directly rather than being forced to approach courts or the government.

CONCLUSIONS

Overall, this is a big victory for free speech in India and particularly in the context of user generated content on the internet. The failure of the court to do a deeper analysis of the need for notice and take down procedures and it permitting the government the unlimited right to require intermediaries to take down content are unfortunate aspects of the judgment.

ABOUT KOCHHAR & CO

Kochhar & Co is a leading full service commercial law firm with the best national presence among all law firms in India. The firm mostly represents international companies doing business in India and offers a high quality, business oriented service to its clients. The firm takes great pride in its client servicing approach which is focused on clarity, accessibility and providing business solutions. The firm has the largest national presence in India with offices at Delhi, Gurgaon, Mumbai, Bangalore, Chennai and Hyderabad.

TECHNOLOGY LAW PRACTICE

Kochhar & Co set up India's first Technology Law Practice, which has been a leading tech practice in the country ever since. The practice covers areas such as licensing, outsourcing, e-commerce, telecom, intellectual property, regulation of STP/s and SEZ's, privacy, social media, etc. The firm has the largest clientele of international technology companies doing business in India. Chambers rates Kochhar & Co as a Tier 1 law firm in India for TMT work.

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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:

- <u>Hedging Ratio</u>. 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.

- <u>Liquidity Ratio</u>. 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.

- <u>Credit Rating</u>. 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.

<u>Exemptions</u>

(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*)

L E G A L U P D A T E

April, 2015

Amendments to Obligations and Filings before the National Registry of Foreign Investments

On February 23, 2015, the Ministry of Economy published certain ordinances in the Daily Gazette of the Federation (the "Ordinances"), which implement the amendments to obligations and filings before the National Registry of Foreign Investments (the "Registry") mentioned below. The Ordinances complement the amendment to the Regulations of the Foreign Investment Law and the Registry (the "Regulations"), published in the Daily Gazette of the Federation on October 31, 2014.

I. Applicable terms and amounts to comply with obligations before the National Registry of Foreign Investments.

Among others, by means of the amendment to the Regulations, the terms to comply with certain obligations were modified, and now the Ordinances set certain thresholds for filing the respective notices, as mentioned below:

1. Update of the information provided upon application for registration of individuals and legal entities before the Registry.

By means of the amendment to the Regulations, the update must be carried out on a quarterly basis, within the first ten business days following the closing of the quarter corresponding to the amendment (January to March, April to June, July to September and October to December).

Pursuant to the Ordinances, the notice of this update has to be filed only in the event of amendments to the name or corporate name; the economic activity; the tax domicile; the corporate capital and/or share structure, which implies a change in the participation of non-Mexican individuals or legal entities and foreign entities without legal identity, in the corporate capital, in an amount exceeding in the aggregate MX$20'000,000.00.

2. Filing of information to determine the value of certain income and expenses.

The Regulations provide that the income and expenses that shall be reported, are those arising from (a) new contributions and reserves or withdrawal thereof, not affecting the corporate capital; (b) withholding of profits corresponding to the last tax year and disposition of withheld retained profits; or (c) payable or receivable loans to the following foreign residents: (i) subsidiaries; (ii) holding company; (iii) foreign investors participating as partners or shareholders; and (iv) foreign investors who are part of the corporate group to which the person obliged to file such information belongs.

By virtue of the amendment to the Regulations, such filing shall also be made on a quarterly basis, within the ten business days following the closing of the corresponding quarter.

Pursuant to the Ordinances, the information to which this obligation refers, shall only be filed when the income or expenses exceed MX$20'000,000.00.

3. Yearly renewal of the registration.

The amendment to the Regulations provides that this renewal shall be filed in the month of April for persons whose initial letter is from letter A to letter J, and in the month of May for the persons whose initial letter is from letter K to letter Z.

In accordance with the Regulations, in order to obtain this renewal, corporate, accounting, financial, employment, production and economic activity information of the individual or entity subject to registration shall be filed, as well as identification data and data of the person who may be contacted for clarifications.

The Ordinances provide that only the individuals or entities who, during the corresponding year, had total assets, total liabilities, income (domestic or abroad) or expenses (domestic or abroad), whether initial or final, greater to MX$110'000,000.00, are obliged to renew their registration.

4. Update of trusts' information.

With respect to trusts, the amendment to the Regulations did not modify the term to comply with the obligation to update the information provided upon applying for their registration. Notwithstanding, in accordance with the Ordinances, it shall only be necessary to inform on amendments to the trust institution, the subject matter of the trust, or the trust beneficiaries, when a change in the consideration exceeds MX$20'000,000.00 is implied.

II. Filings via Internet.

Pursuant to the Ordinances, the procedures that may be filed via Internet, though the system established by the Registry (the "System"), are as follows: registration before the Registry, amendment of information previously provided to the Registry, cancellation or renewal of the registration, quarterly update of income and expenses data, notices by public attesters, requests for extensions of terms, review of files of the Registry, and consultation in foreign investment matters and issuance of certified copies (only with respect to procedures before the Registry). The System shall provide electronic acknowledgements of receipt with respect to procedures carried out through it.

The individuals that shall carry out filings through the System, shall request their registration in such System, providing, among others, their name and last name, an e-mail address for purposes of notifications and a password, and shall accept the terms and conditions for the use of the System. Thereafter, such individuals shall evidence their authority to file procedures before the Registry that have been granted by individuals or legal entities, foreign or domestic, and trust institutions obliged to carry out procedures before such Registry ("Obligors"), as appropriate. The individual that intends to evidence such authority has to have an Advanced Electronic Signature issued by the Tax Administration Service and an electronic version of the document in which his or her authority is evidenced.

The System allows to apply for (i) the registration of Obligors before the Registry, through the System, and (ii) the link of Obligors previously registered with the Registry, with an account in the System, in order to, in both events, file procedures before the Registry, after the registration.

III. Modifications to formats.

The Ordinances modified certain formats used to carry out physical filings before the Registry, and a couple of formats were deleted, whose filings were consolidated in some of the modified formats.

IV. Regularization Program.

By means of the amendments to the Regulations carried out in 2014, a regularization program was implemented, which shall be in force until April 28 of this year. Such program allows individuals and legal entities having "*pending obligations in connection with the National Registry of Foreign Investments*", to get up to date paying the minimum applicable fine for each late notice, equal to MX$2,103.00. Such pending obligations refer to notices before the Registry related to registration applications, cancellations of registration, yearly economic reports, amendments of information previously provided to the Registry, and quarterly notices.

Upon conclusion of the regularization program, that is, after April 28 of this year, late filing of such notices shall imply the imposition of fines of up to MX$7,010.00, for each late notice.

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May 2015

CORPORATE ADVISORY

TAKEOVERS PANEL RELEASES GUIDANCE ON "ASSOCIATION" UNDER THE TAKEOVERS CODE

The Takeovers Panel has released new guidance on "association" under lock-up agreements and shareholders' agreements (see Code Word 39). There has not been a radical shift in the Panel's approach, but the new guidance offers some helpful clarifications.

For lock-up agreements, we expect the change will result in more pre-bid and intra-bid acquisitions by bidders. It will also mean there is greater certainty about the consideration that a dominant owner will pay under compulsory acquisition following a takeover.

For shareholders' agreements, small code companies will have a clearer view of how to avoid provisions that may give rise to association.

We expand on these points below.

LOCK UP AGREEMENTS

In simple terms, a lock-up agreement is a binding commitment by a shareholder to accept a future takeover offer (ie in advance of the offer being made). They are generally used by bidders to secure acceptances immediately before the time they announce an offer.

Until recently, the Panel viewed lock-up agreements as invariably making the relevant shareholder and the bidder associates. This meant that, for many purposes under the Code, the bidder was treated as if it already owned and controlled those shares.

Under the fundamental rule, a person, together with their associates, cannot increase their total existing ownership or control beyond 20% of the voting shares in a Code company, other than in accordance with the Code. Association arising out of lock-ups often meant that a bidder would be treated as already holding above 20%, meaning their only option for increasing their holding was under the offer itself.

The Panel has now reconsidered its position as a result of market feedback and its experience following the Bridgecorp determination[1]. It has confirmed there is no longer a presumption that parties to a lock-up agreement are associates and offered a non-exhaustive list of factors which would suggest otherwise.

[1] Bridgecorp Capital Limited Determination 2004.

The table below contrasts the two approaches.

Old Approach	New Approach
Parties to a lock-up agreement are presumed to be associates.	No presumption – determined on a case-by-case basis, but presumes: • the agreement is a genuine arm's length transaction; • the agreement does not go beyond making and accepting a takeover offer and does not include ongoing covenants; • there is no ongoing relationship between the parties; • the agreement expressly precludes control of voting rights passing to the offeror prior to the takeover offer becoming unconditional; and • the agreement is short-term, lasting no longer than the settlement or lapsing of the takeover offer.

The change will have two main consequences for the market.

First, if the lock-up parties are not associates, then the offeror does not need to count the locked-up shareholders' shares in assessing whether it can buy further shares pre-bid and intra-bid. Therefore, assuming the bidder does not hold any shares, it will be free to buy on the market (up to 20%) as well as enter into lock-up agreements. We expect this will mean offerors may be able to take a more aggressive approach to bids through more on-market acquisitions and wider use of lock-up agreements.

Secondly, the revised position will reduce the likelihood of a bidder having to get independent adviser certification of its compulsory acquisition price, and shareholders having the right to object to the price. Under the compulsory acquisition provisions of the Takeovers Code, a post-90% holder has the right (and can be required) to acquire outstanding shares. The price payable is the original offer price, if more than 50% of the shares under offer are accepted into the offer. Otherwise the price must be certified as fair, and outstanding shareholders can object. The 50% test excludes the shares held by the offeror and its associates, so it is more likely to be met if shareholding under the lock-up agreements can now be taken into account.

SHAREHOLDERS' AGREEMENTS

The Panel has also taken the opportunity to offer general guidance on association under shareholders' agreements, emphasising that a shareholders' agreement will not, of itself, give rise to association.

The table below compares the likely treatment of the various terms in shareholders' agreements as indicated by the Panel's guidance note, where a "✓" means the term can be included without giving rise to association.

X	✓
Voting requirements or specific rights given to certain shareholders, such as appointment of a director	Pre-emptive rights
Agreement only applies to a select group rather than all shareholders	Drag/tag along rights
Collateral arrangements	

We believe this guidance is useful but falls well short of providing flexibility for shareholders' agreements to include other commonly used terms, such as director appointment rights and reserved matters.

Importantly, the Panel has confirmed that parties may be allowed to unwind a shareholders' agreement in order to "disassociate" themselves, suggesting that an exemption may be useful to assist with this. We hope, reading between the lines, the Panel is also acknowledging shareholders can take their own actions to disassociate themselves by removing offending provisions from their shareholders' agreements. We expect to see more companies taking advantage of this process.

UNCERTAINTY REMAINS

While there is now more guidance around association, there is still considerable uncertainty in assessing whether it exists (by virtue of a shareholders' agreement or otherwise) and we recommend a conservative approach. We are pleased to see the Panel has provided this guidance in these two important areas but we would encourage the Panel to reconsider the approach around association more generally.

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ARBITRATION UPDATE

Setting aside arbitral awards - the high threshold for public policy and natural justice

When contracting parties consider dispute resolution options, one attractive feature of arbitration, as opposed to litigation, is finality of the arbitral award. In jurisdictions which are supportive of arbitration, such as Singapore and England & Wales, the courts will intervene in limited circumstances, for example, where the award is tainted by fraud or corruption, where there has been a breach of natural justice, or where the award has been made beyond the jurisdiction of the arbitral tribunal.

Background

The Singapore case of *Coal & Oil Co. LLC v GHCL Ltd* [2015] SGHC 65 involved a 2007 supply agreement for between 180,000 and 190,000 MT of coal. Following a rise in the market price for coal, the plaintiff ("C&O"), as Dubai-based trader, attempted to renegotiate the contractual price and informed the defendant ("GHCL") that a third shipment of 70,000 MT of coal under the supply agreement would not be delivered unless a price increase was agreed. GHCL initially agreed to the price increase, however, after payment of the increased price and delivery of the shipment was made, it demanded repayment from C&O of the price increase. It argued that the addendum to the agreement was illegal as it had been procured through coercion. C&O refused to repay the demanded sum and therefore, in accordance with the arbitration clause in the agreement, GHCL submitted the dispute to arbitration in Singapore under the 2007 SIAC Rules.

The dispute was heard by a sole arbitrator in May 2012 and post-hearing submissions were delivered in August 2012. The final award, which as rendered 19 months after the post-hearing submissions, found in favour of the defendant, GHCL. In June 2014, C&O applied to set aside the award, under provisions of the International Arbitration Act[1], on the following bases:

- Issuance of the award was in breach of the parties' agreed procedure (Article 34(2)(a)(iv) of the Model Law[2])
- The award was in conflict with the public policy of Singapore (Article 34 (2)(b)(ii) of the Model Law)
- There was a breach of natural justice (Section 24(b) of the International Arbitration Act)

The bases for setting aside the award rested on two factual premises, as argued by C&O:

- The tribunal had breached its duty under Rule 27.1 of the 2007 SIAC Rules as it had failed to declare the arbitral proceedings closed before it released its award.

- There was an *"inordinate"* delay of 19 months between the parties' post-hearing submissions and the date of the release of the award. This delay justified the setting aside of the award.

The first basis - breach of the parties' agreed procedure

The key question was whether Rule 27.1 should be construed as imposing a 'duty' on the Tribunal to declare the proceedings close, or as conferring a mere 'power'. Having analysed the wording and drafting history of the Rule, the Court concluded that the Tribunal had the power, and not to duty, to declare the proceedings closed before releasing the award. The Court held that the function and purpose of the Rule was case management and therefore C&O's construction was inconsistent with the same. It therefore followed that the Tribunal was not in breach of the Rule when it elected not to make such a declaration before releasing its award. In addition, the Court found that C&O had not advanced any satisfactory explanation as to why the declaration of closure was so important to the arbitral process.

Concerning the argument on delay, the Court observed that apart from Rule 27.1, the 2007 SIAC Rules do not provide for any time limits for the release of international arbitral awards. Further, since the 45-day time limit provided under that Rule did not begin to run until the Tribunal declared the proceedings closed, which it did not, C&O's argument on delay was therefore unsustainable.

The second basis - conflict with public policy

The Court observed that "*despite the very high threshold that has been set, public policy, together with the rules of natural justice, still appear to be the last refuge of the desperate"*. The Court dismissed C&O's allegations that the breaches of the parties' agreed procedure and delay in the issuance of the award constituted breaches of public policy. It found that the alleged procedural breaches were not of interest to the wider community nor did they rise to "*the level of gravity that the notion of public policy contemplates"*.

Concerning the argument on delay, and referring to the Court of Appeal decision in *Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte Ltd* [2000] 1 SLR(R) 510[3], the Court held that a 19-month delay cannot be a sufficient basis for setting aside the award. Were the delay truly intolerable, C&O ought to have applied under Article 14 of the Model Law for the mandate of the arbitrator to be terminated before the award was released. It did not do so, which indicated that C&O had raised the argument because the award was adverse to it and not because of any delay.

The third basis - breach of natural justice

C&O argued that the Tribunal's failure to invite the parties to make submissions on the alleged breach of Rule 27.1 amounted to a denial of its right to be heard. The Court found C&O's arguments to be "*seriously misconceived*":

- Before the award was issued there could not, by definition, have been any breach of Rule 27.1. The Tribunal had no reason to believe at the time it issued the award that there was anything procedurally improper over which it ought to have invited submissions.

- C&O does not have a right under the 2007 SIAC Rules to be heard before the Tribunal makes a decision on whether it ought to declare the proceedings closed before releasing the award.

Concerning the argument on delay, the Court found that C&O had failed to identify which particular rule of natural justice had been infringed and therefore could not see how the rules of natural justice had been breached in this case. Further, the Court noted that it could not see how the delay could have impaired C&O's right to a fair hearing, or how an inference of bias could be drawn against a tribunal on the basis of dilatoriness in the release of an award.

The decision underlines the very high evidential threshold to prove breaches of natural justice and/or public policy as grounds to set aside arbitral awards. Commensurate with its support of arbitration, it also confirms the reluctance of the Singapore High Court to set aside arbitral awards except in egregious cases where the error is "*clear on the face of the record*".

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[1] Including the UNCITRAL Model Law on International Commercial Arbitration 1985 (the "Model Law") as set out in the First Schedule to the IAA.

[2] Under the English Arbitration Act 1996 an English award can be set aside under section 68 of the Act on grounds similar to those set out in Article 34 of the Model Law.

[3] The Court of Appeal held that a delay in releasing an award of more than ten years after the hearings had concluded was not, *per se*, a sufficient basis for setting aside an award which had already been rendered.

Arbitration

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May, 2015

Judicial Yuan and IP Court 2015 Intellectual Property Forum Consensus on IP Issues

05/28/2015 Ruey-Sen Tsai

The Judicial Yuan and the Intellectual Property Court held the "Intellectual Property Forum" at the Intellectual Property Court on 4 & 5 May 2015. The Chief Justice of the Supreme Court moderated the discussions on civil litigation issues while the President of the IP Court moderated the criminal and administration litigation issues. The participants comprised of judges and public prosecutors of the first instance and second instance, attorneys, patent agents and patent attorneys as well as personnel from the Petitions and Appeals Committee of the Ministry of Economic Affairs (MOEA, the authority in charge of administrative appeal) and representatives from the Intellectual Property Office (IPO, the authority in charge of trademark, patent as well as other IP matters).

This forum discussed 12 proposed issues and reached consensus on the following specific issues:

1. For the damage claim against civil liabilities due to trademark infringement, once the unit prices of the various kinds of the seized counterfeit goods are different, the average unit prices of these goods should be cited as the basis for calculation of claimed damages.

2. The defense of prior use in good faith against the registered trademark owner's infringement accusation may just be cited as a defense rather that a right. Nonetheless, while the business is assigned, the assignee may also raise the prior use defense and then may still continue using the prior used trademark as the assignor did.

3. Whether the use of the registered trademark as a company name will violate the Trademark Act should take the provisions of the Trademark Act when the company was established into consideration.

4. Copyright ownership or authorship of the copyrightable works for work for hire may be determined by contact.

5. The Trademark Act may have jurisdiction merely over Taiwan, exclusive of the trademark infringement conducted in China.

6. Public performance of the copyrightable music at KTVs is not a type of renting.

7. Once the patentee loses the patent litigation case and is dead later, the statutory period of the appeal should be renewed when the heir takes over the litigation.

Although the consensus reached at the Intellectual Property Forum cannot be considered as precedents, the public prosecutors and the judges of the courts will usually take such consensus into consideration while examining specific issues of the pending cases. Therefore, the consensus reached by the Intellectual Property Forum does have substantial influence on the investigation and trial of the intellectual property cases.

U.S. Supreme Court Calls an "Easy" One in EEOC v. Abercrombie & Fitch

04 June 2015

Updates

During our labor and employment law update in April, we had mentioned a pending Supreme Court case, *EEOC v. Abercrombie & Fitch Stores, Inc.* A decision in that case was issued on June 1, and it can be briefly summarized as follows:

Samantha Elauf, a practicing Muslim who wore a headscarf as part of her religious observance, applied for a sales job with Abercrombie & Fitch (Abercrombie). Elauf was rated as qualified for employment by an Abercrombie hiring manager, but the manager also inquired of her superiors whether Elauf's headscarf would violate Abercrombie's dress code, called its "Look Policy," which prohibited all caps and other headwear. The hiring manager also expressed her belief that Elauf wore the headscarf for religious reasons. When Elauf was not hired, she complained to the EEOC which filed suit on her behalf for religious discrimination.

The federal Court of Appeals in Denver (10th Circuit) held that there could be no Title VII violation because Elauf had never specifically asked for an accommodation and "an employer cannot be liable under Title VII for failing to accommodate a religious practice until the applicant (or employee) provides the employer with actual knowledge of his need for an accommodation."

The Supreme Court reversed, holding that an applicant need not show actual knowledge of the need for an accommodation; rather, it is sufficient that the "need for an accommodation was a motivating factor in the employer's decision." Because it was undisputed that Abercrombie at least suspected a religious accommodation issue existed, the fact that Elauf did not ask for an accommodation (or point out her need for one) did not defeat her claim.

This was a most unsurprising decision, and it did not effect a significant change in the law. The primary practical lesson of the case is that if circumstances would put a reasonable person on notice that a religious accommodation may be necessary to enable an applicant (or employee) to perform the job, the employer cannot merely rely on the applicant's failure to raise the accommodation issue. Rather, the employer should tactfully inquire further (e.g., "Why are you unable to work on Saturdays?", or "Why can't you comply with our safety face mask seal no beard rule?" or "Can you fulfill all of the requirements in the job description?"). Frankly, asking these questions during an interview are a matter of good HR practice and common sense in

As a necessary predicate to its decision, the Court reaffirmed that, unlike most other areas of disparate treatment law, policies that appear to be neutral may not be a defense to religious accommodation claims. This follows inexorably from the duty to consider reasonable accommodation itself, subject of course to the employer's undue hardship defense.

Finally, some commentators have made much of the Court's declining to decide the question whether an employer can ever be liable in the case where it has no basis for even suspecting that religious accommodation may be at issue. This concern seems unduly alarmist. The Court was merely following its longstanding practice of not deciding issues not presented by the case before it. Moreover, it appears obvious from the structure of the opinion, where in a footnote the majority opinion states, "…it is arguable that the motive requirement itself is not met unless the employer at least suspects that the practice in question is a religious practice…," and Justice Alito's concurrence that some level of intent (in this case, motivating factor) will be a necessary prerequisite to liability.

FDA Issues Draft Guidance for Mandatory Recall Authority

06.08.15

By Allison B. Condra and Chip English

On Thursday, May 7, 2015, the FDA released draft guidance on the implementation of its mandatory recall authority. The guidance itself is not binding on food companies, but provides more information about the FDA's recall authority. Comments received on the draft guidance by July 6, 2015, will be reviewed as the FDA works to finalize the draft guidance.

Among other things, the Food Safety Modernization Act (FSMA) gives the FDA the authority to order a food recall under certain circumstances. Prior to the FSMA, the FDA could only request, but not require, that a food company recall its food products.

Under the FSMA, FDA-registered food facilities are subject to its mandatory recall authority. In order to issue a mandatory recall, the FDA must find that two conditions exist: (1) the FDA must determine that there is a reasonable probability that the food products in question are adulterated or misbranded; and (2) the FDA must determine that there is a reasonable probability that the use of or exposure to those food products will result in severe adverse health consequences or death to humans or animals.

Once those conditions are met, the FDA must give the responsible party (i.e., the food company) a chance to voluntarily recall those food products. This written notice must be promptly delivered. If the responsible party does not voluntarily recall the food products in question, the FDA may order the responsible party to stop distributing the food products, require the responsible party to notify others to stop distributing the food products, and provide the responsible party with an opportunity for an informal hearing. After completing those steps, the FDA may order a recall of the food products if it determines that it is necessary to remove those food products from the stream of commerce.

In determining whether to issue a mandatory recall, the FDA will use "all applicable evidence," including:

- Observations made during inspections of the responsible party or other parties;
- Results from sample analyses;
- Epidemiological data;
- Reportable Food Registry data; and
- Consumer and trade complaints.

The draft guidance describes the criteria the FDA uses to determine if a food is adulterated and misbranded; how FDA will publicize information about the mandatory recall; and when user fees will be assessed.

Finally, the draft guidance reminds industry that the FSMA also gave the FDA the authority to assess civil money penalties to any person/food company that does not comply with a recall order.

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"The extent of liability imposed by the Warsaw Convention on international air carriers ." Insurance Newsletter , May 2015

Dimitra Kouvelakis

The exponential growth of air travel in recent years, fuelled by the rise of low cost airlines and the increasingly global nature of business, puts thousands of commercial aircraft in flight on a daily basis. While this has served as an enormous boom for the airline industry, it has also greatly increased risk exposure, for both persons and goods/cargo (and airlines). The cases below outline the parameters of the Warsaw Convention, which some may argue are not as relevant today as they were 60 years ago, particularly in light of our Constitution.

Many challenges to certain provisions of the Convention for the Unification of Certain Rules relating to International Carriage by Air (referred to as the "Warsaw Convention"), as ratified by section 2 of the Carriage by Air Act 17 of 1946 (as amended by Proclamation R294 of 1967), have taken place in the courts, both nationally and internationally.

One such particular challenge was the Supreme Court of Appeal case of *Impala Platinum Limited v Koninklijke Luchtvaart Maatschappij NV and Another 2008 (6) SA 606*, whereby the appellant, a consignor of certain cargo that was lost during air carriage between South Africa and the United States of America (USA), instituted action in the Johannesburg High Court against the airlines that handled the consignment to recover the loss of the cargo. The respondents argued that the appellant had no title (*locus standi*) to sue in terms of international carriage law, in that the loss had been made good by the appellant's insurer and thus the appellant suffered no loss. The High Court held that the appellant company had no *locus standi* to sue for the loss of the cargo and consequently dismissed its claim with costs, including the costs of two counsel. This judgment was taken on appeal to the SCA.

The SCA turned to the terms of the Warsaw Convention and for the matter to be viewed in the context of the Convention's essential character and purpose. A consideration of relevant decisions in foreign jurisdictions was deemed useful for a proper interpretation of how the Convention was to be approached and applied. It was revealed that courts from different countries stressed the desirability of attempting to attain uniformity in relation to international air transportation when the provisions of the Convention were considered.

In the matter of *Sidhu and others v British Airways PLC; Abnett (known as Sykes) v British Airways PLC 1997 1 All ER 193 (HL)* Lord Hope stated:

> "The convention describes itself as a 'Convention for the Unification of Certain Rules relating to International Carriage by Air'. The aim of the Convention is to unify the rules to which it applies. If this aim is to be achieved, exceptions to these rules should not be permitted, except where the convention itself provides for them.
>
> The language used and the subject matter with which it deals demonstrate that what was sought to be achieved was a uniform international code, which could be applied by the courts ….without reference to the rules of their own domestic law. The convention does not purport to deal with all matters relating to contract of international carriage of air. But in those areas with which it deals – and the liability of the carrier is one of them – the code is intended to be uniform and to be exclusive also of any resort to the rules of domestic law."

In the *Sidhu* case the issue was whether, in relation to injuries sustained while in an airport terminal in Kuwait during the Iraqi invasion of that country, passengers could claim for damages from British Airways for the consequences of their captivity. This particular flight was en route from Heathrow to Kuala Lumpur and landed in Kuwait for refuelling (about five hours after Iraqi forces began to invade Kuwait) when the passengers and crew were taken prisoner by Iraqi armed forces. The issue for decision in this case was whether the Warsaw Convention provided the exclusive cause of action and remedy in respect of claims for loss, injury and damage sustained in the course of, or arising out of international carriage by air due to the fault of the carrier under article 17[1]of the Convention. The House of Lords took the view that since the claims were not within the terms of the Convention, the claimants were held to be without a remedy.

The United States Supreme Court held in the case of *Eastern Airlines Inc v Floyd 499 US 530 (1991)* that an air carrier could not be held liable under article 17 when an accident had not caused the passenger's death or to suffer physical injury or any physical manifestation of injury.

In a subsequent decision, *El Al Israel Airlines Ltd v Tsui Yuan Tseng 525 US 155 (1999) USSC* the court was requested to consider the decision reached in *Floyd's* case in that the Convention provided for compensation only when a passenger suffered "death, physical injury or physical manifestation of injury". In the El Al case, the passenger claimed that she sustained psychosomatic injuries as a result of an extremely intrusive body search. She accepted that there had been no bodily injury as that was the term used in the Convention. Her claim was that, on the basis of *Floyd*, the Convention allowed no recovery, but it did not preclude her from pursuing a separate action for damages under "local law". The court held that the Convention precluded a passenger from pursuing an action for personal injury and damages under local law when the claim did not satisfy the conditions for liability under the Convention.

In the case of *Morris v KLM Royal Dutch Airlines; King v Bristow Helicopters Ltd (2002) 2 All ER 565 (HL),* article 17 of the Convention was considered again, particularly the expression "bodily injury". It was held that the expression did not cover a mental injury or illness that lacked a physical cause and that, since the Convention was the sole basis on which claims could be advanced, the claimants were without a remedy.

In the matter of *Potgieter v British Airways plc 2005 (3) SA 133 (C)*, article 17 of the Convention was in the spotlight in our South African courts. In this matter, the plaintiff and his male partner on a flight to London hugged and kissed each other when they were approached by the flight attendants requesting that they desist from this behaviour as it was offensive to other passengers.

The plaintiff alleged he was humiliated and his dignity was impaired. He claimed damages without alleging any physical harm. The plaintiff argued that an action brought in terms of a ground of liability not covered by the Convention, such as the negligent causing of psychological shock to a passenger by an employee of a carrier, could be brought on the basis of domestic law as he could not be left without a remedy were it to be found that the Convention provides an exclusive cause of action. The plaintiff argued that the interpretation of article 17 in the *Sidhu* and *El Al* cases "went too far". The defendant submitted that exclusion clauses are a feature of modern contract law and have found support even within the context of our constitutional jurisprudence. The court held that the highest courts in the United Kingdom and United States together with Canadian jurisprudence have provided careful analysis of the Warsaw Convention as a whole and concluded that article 17 is definitive and the Convention is exclusive of any resort to the rules of domestic law, and thus followed the decisions of *Sidhu, Morris* and *El Al.*

Dealing with the issue of *locus standi*, being the debated issue in the *Impala Platinum* case mentioned above, in the case of *Western Digital Corp and Others v British Airways plc (2001) 1 All ER 109 (CA)* the Appeal Court in England had to deal with the claim for lost cargo, and had to consider whether an owner of lost items, who had not been named as consignor or consignee, had *locus standi* to sue for loss in terms of article 30[2] of the Convention. The court held that although the Convention did not in terms give specific rights to persons such as owners (who were not consignors or consignees) and, even though the nature and standard of any liability on the part of a carrier had to be decided in terms of the Convention, title to sue fell to be determined by domestic law. Consequently, owners and others with recognisable interests were not without remedy. The court was of the view that the decision of *Sidhu* did not preclude this conclusion. In the matter of *Gatewhite Ltd and Another v Iberia Lineas Aereas de Espana SA (1989) 1 All Er 944 (QB)*, after referring to judicial decisions in a number of countries, the court said the following:

> "In my view the owner of goods damaged or lost by the carrier is entitled to sue in his own name and there is nothing in the convention which deprives him of that right. As the convention does not expressly deal with the position by excluding the owner's right of action (though it could so easily have done so) the lex fori, as it seems to me, can fill the gap…."

The last part of the dictum of the *Gatewhite* case addressed the desirability of granting the right to sue to others who have recognisable interests so as to ensure that persons such as true owners of lost cargo are not at the mercy of person such as clearing or forwarding agents.

In the *Impala Platinum Limited* case, the carrier resisted the extension of the right to sue beyond consignors and consignees, on the basis that their liability should be restricted to the persons whose names appear on the waybill, because this would lead to certainty as these are the persons with whom they have direct dealings. The court held that the right to sue was obvious, not only because of the clear wording of the Convention, but because it is the basis on which the international air carriage industry operates. The court further held that to dismiss this appeal would be to disregard the realities of modern day international air carriage and it would make no commercial sense and would offend the need for uniformity. On this basis, the appeal was upheld.

As is evident above, while article 30 dealing with rights in relation to goods/cargo seem to be liberal in its application, article 17 pertaining to passengers can be argued to be too restrictive, as alleged in the *Potgieter* case. Section 9(3) (the right to equality – not to be discriminated against on the ground of sexual orientation), section 10 (inherent dignity and the right to have one's dignity respected and protected) and section 38 (the right to approach a competent court if a right in the Bill of Rights has been infringed or threatened) are entrenched in the South African Bill of Rights. From a South African perspective, it is probable that, sometime in the future, the provisions of article 17 of the Convention and its restriction on precluding an action under domestic law may be challenged as to whether it in fact passes Constitutional muster.

1 The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death of injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

2 (1) In the case of carriage to be performed by various successive carriers and falling within the definition set out in the third paragraph of Article 1, each carrier who accepts passengers, luggage or goods is subject to the rules set out in the Convention, and is deemed to be one of the contracting parties to the contract of carriage insofar as the contract deals with that part of the carriage which is performed under his supervision.
(2) In the case of carriage of this nature, the passenger or his representative can take action only against the carrier who performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.
(3) As regards luggage or goods, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place. These carrier will be jointly and severally liable to the passenger or the consignor or consignee.

Flash Legal Report

CENCOEX vested with inspection, auditing and penalization powers over the Foreign Currency Administration System

On May 28th 2015, the Administrative Ruling N° 038 (hereinafter referred to as "Ruling N° 038"), issued by the Ministry of the People's Power for Economy and Finance (MPPEF), was published in the Official Gazette N° 40.670.

By means of this administrative act, the Ministry is appointing the National Center for Foreign Trade (CENCOEX) as the entity in charge of carrying out inspections and audits related to the foreign currency administration system and of exercising sanctioning powers in exchange matters, pursuant to the Law of the Foreign Exchange System and Foreign Exchange Crimes, which establishes in the last paragraph of Article 11 that *"The Minister of the People's Power with jurisdiction over financial matters, through a Ruling duly published in the Official Gazette of the Bolivarian Republic of Venezuela, may appoint the entity that will be in charge of inspecting and auditing the foreign currency administration system, and that will also exercise sanctioning powers in exchange matters."*

According to Ruling 038, which extends the powers of CENCOEX listed by way of reference and not limitation in Article 4 of Decree N° 601 Decree with Force, Validity and Status of Law of the National Center for Foreign Trade and of the Venezuelan Corporation of Foreign Trade, published on November 29th 2013 in the Special Official Gazette N° 6116, CENCOEX shall present a report of their procedures and actions before the Ministry of the People's Power for Economy and Finance, whenever said entity requires it.

The powers of CENCOEX concerning sanctioning matters are those provided for administrative violations of the exchange system, which are penalized with fines; to this end, CENCOEX shall follow the procedure established on the Law of the Foreign Exchange System and Foreign Exchange Crimes, published in the Official Extraordinary Gazette N° 6.126 on February 19th 2014.

Ruling 038 establishes that ongoing exchange-related proceedings pending in the General Office of Inspection, Auditing and Public Assets of the MPPEF, which acted as the sanctioning administrative authority in exchange matters, shall be transferred to CENCOEX, which will be in charge of continuing said proceedings, maintaining the validity of prior actions and applying the corresponding regulations to the pending portion of such proceedings, and the final decision on these proceedings will also be rendered by CENCOEX.

The aforementioned administrative act entered into force the day it was published in the Official Gazette, that is, on May 28th 2015.

Flash Legal Report
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June 2015

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client alert

PROJECTS (FINANCE AND INFRASTRUCTURE) | VIETNAM | APRIL 2015

NEW PPP LEGAL FRAMEWORK ISSUED

On 14 February 2015, the Government of Vietnam (the "**Government**") issued the long-awaited Decree No. 15/2015/ND-CP on Investment in the Public Private Partnership Form (the "**PPP Decree**"), which came into effect on 10 April 2015. It was shortly after followed by Decree No. 30/2015/ND-CP dated 17 March 2015 on the implementation of the Law on Tendering regarding selection of investors, which is due to enter into force on 5 May 2015 (the "**Investors Selection Decree**" and, together with the PPP Decree, the "**New PPP Legal Framework**").

The New PPP Legal Framework will replace the existing Public Private Partnership ("**PPP**") regulations in Vietnam, which comprises Decree No. 108/2009/ND-CP on Build-Operate-Transfer Projects (as amended) ("**Decree 108**") and Decision No. 71/2010/QD-TTg on Pilot PPP Projects ("**Decision 71**").

Whilst the New PPP Legal Framework does not fundamentally overhaul the existing PPP regime, it represents a conscious move by the Government to create a robust PPP program in Vietnam by strengthening the bridge of cooperation between State authorities and private investors, by introducing core mechanisms, such as viability gap funding, and PPP-structured feasibility studies to better reflect international practices, introducing additional contract forms, ensuring fairness, competition and transparency in investor selection and broadening the range of projects open to private investment, to include areas such as infrastructure facilities for trade, industrial zones, science and technology and economic zones. Under the existing regime, investment is limited to areas such as transportation infrastructure, electricity, water, health and the environment. As well as the new areas listed above, the Vietnamese Prime Minister can allow private investment in other areas.

The introduction of the New PPP Legal Framework is part of the Government's strategy to attract direct foreign investment into Vietnam to bolster the country's infrastructure development.

This Client Alert highlights the key aspects and changes introduced by the New PPP Legal Framework from an international investor perspective.

KEY REFORMS

Clarification of the institutional framework

The new PPP Decree clarifies the institutional framework for the management of PPPs:

- at the national level, a State Steering Committee for PPPs has been created by the Prime Minister, Nguyễn Tấn Dũng; and

- at the entity level, State agencies authorised to enter into PPP projects must designate or create a "project coordinating unit for PPP activities" as well as a "project management unit".

The new PPP Decree also sets out a more comprehensive framework for the conditions, content and approval of project proposals and feasibility studies. Not only in respect of projects proposed by the Ministries, Branches and Provincial People's Committees but also Investor-Proposed projects (or "**Unsolicited Projects**"). This fits squarely with the new responsibilities of inter alia the Ministry of Planning and Investment, Ministry of Finance, Ministry of Justice, State Bank of Vietnam, Ministry of Construction and various other State ministries and branches, which will all be required to focus on achieving viable and beneficial PPP projects in Vietnam, for both the State and private investors.

Framework for Unsolicited Projects and the introduction of small-scale projects

Unsolicited Projects will be covered by the New PPP Legal Framework, with an express provision enabling investors to propose projects that are not on the Government's approved list of projects. Unsolicited Projects are still open to competitive bidding, however, the investor proposing the project will be responsible for conducting the feasibility study pursuant to a written agreement with the authorised State agency and in return that investor will be entitled to a "5% preference" over the other bidders at the financial assessment stage during the bidding process: that is 5% will be added to the financial proposal of the other bidders, therefore giving a competitive advantage to the investor proposing the project.

The concept of small-scale projects (classified as “Group C Projects” under the Law on Public Investment No. 49/2014/QH13 dated 18 June 2014) has been codified in the New PPP Legal Framework, and the procedures for implementing these projects have been simplified. Unlike Unsolicited Projects, small-scale projects do not require investors to conduct a feasibility study or to create a project enterprise. Therefore, investors will not be required to obtain an Investment Registration Certificate ("**IRC**"). Small-scale projects are generally expected to be subject to domestic bidding only.

Introduction of varied and innovative project structures

Investors will now have the opportunity to cooperate with State authorities under additional contract forms such as BOO, BTL, BLT and O&M contracts (the current regulations only provide for Build-Operate-Transfer (BOT), Build-Transfer-Operate (BTO) and Build-Transfer (BT) contracts). This will enable private investors to recover their investment from various sources. For instance, in the case of BT projects, capital recovery will come by granting land in order to implement "other projects" (rather than through the provision of State capital), thereby implementing PPP projects that will not create an additional burden on the State budget.

Removal of the cap on State investment

The State's investment capital in a project will no longer be capped and the estimated maximum level of State capital will be determined at the approval of the feasibility study phase. Under the new PPP Decree, investors may bear less risk than under the old regime because State investment will no longer be capped at 49% (under Decree 108) or 30% (under Decision 71).

The use and purpose of State capital has also been clarified, giving more certainty to the structure of a project. However, with the exception of BTL and BLT projects, the provisions on the use and disbursement of State capital suggest it can only be disbursed as a grant to support infrastructure projects during the construction stage and not as a service fee during the operation phase of a project.

Selection of investors

The Investors Selection Decree provides that the main form of investors' selection shall be international open bidding. The basic bidding process follows international best practices:

- Pre-qualification of potential investors on eligibility, capacity and experience criteria on a "point-based" system (a 60% minimum score is required to pass the pre-qualification stage);

- Submission of proposals submitted by pre-qualified bidders:
  - Assessment of technical proposals on criteria such as volume and quantity, operation, management, business, preservation and maintenance as well as environmental and safety criteria on a "point-based" system (a 70% minimum score is required to consider that the technical proposal satisfies the technical requirements); and
  - Assessment of financial proposals of investors satisfying technical requirements only (using one of the following criteria: service price, State contributed capital, social benefits and State benefits, or a combined method of those criteria).

However, exceptions to international open bidding are allowed under the Investors Selection Decree:

- **Domestic bidding** will apply in the following cases: (i) in restricted sectors as provided by national and international law; (ii) no foreign investor has participated in or passed the pre-qualification stage; and (iii) for small-scale projects (domestic bidders can, however, partner with international investors if it is necessary to use progressive technology and techniques and/or international managerial experience); and

- **Direct appointment** of investors will apply if: (i) only one investor registers; (ii) only one investor is capable to perform due to intellectual property, commercial secret or funding arrangements; and (iii) Unsolicited Projects that meet requirements on feasibility and efficiency and which aim at protecting national sovereignty, national border or islands following a Prime Minister’s decision (this latter requirement regarding national sovereignty, national borders or islands seems to have been added in the Investors Selection Decree while, as mentioned in one of our previous client alerts, the provisions of the Law on Tendering on direct appointment apply to all PPP projects in general - implementing regulations are expected to clarify this issue).

Project contracts

The completion of a project contract will now comprise of at least two agreements:

- an investor agreement: which will set out the rights and obligations of each party in order to obtain an IRC and to establish the project enterprise; and

- a project contract to be signed with the State authority following the issuance of the IRC (as mentioned, small-scale project are exempted from this procedure as no IRC will be needed).

It is hoped that State authorities will provide assistance prior to the execution of the project contract, and in particular that they will provide assistance in obtaining the IRC. We anticipate that the issuance of the IRC will be smoother now that the new Law on Investment expressly lists the PPP investment form as a form of investment.

Under the New PPP Legal Framework there will be room to negotiate project contracts; the authorised State entity will be required to arrange negotiations on project contracts with investors both prior to signing the investor agreement as well as prior to signing the project contract. The provisions of the Investors Selection Decree are quite vague on the items to be discussed and we hope that this will not be an opportunity for either party to re-negotiate commercial points of the offer.

Choice of applicable law and dispute resolution for projects with foreign investors

Government guarantees and international project contracts (where one of the parties to a project is a foreign investor) may be subject to foreign law.

Such contracts will still be subject to the restriction that the applicability of a foreign law should "not be contrary to the provisions of the law of Vietnam on the selection and applicability of foreign law". However, we consider that this might create a risk that provisions of the Vietnamese Civil Code concerning the application of "fundamental principles of the law of Vietnam" would apply. The lack of clarity on the issue, coupled with a lack of published case law, may act as a deterrent for foreign investors. The expected reform of the Civil Code currently undertaken by the Government will hopefully resolve this issue.

Regarding enforcement, the PPP Decree maintains the principles as in Decree 108: a dispute between an authorised State agency and a foreign investor (or the project enterprise established by the foreign investor) can be resolved by a Vietnamese court, by the Vietnam International Arbitration Centre or by an arbitral tribunal the parties agree to establish. This means that international arbitration is possible. The major change of the PPP Decree in this aspect is to qualify such disputes as commercial disputes that will be enforceable in accordance with the law on recognition and enforcement of awards of foreign arbitrators.

Incentives and guarantees

Other general provisions on contract duration, assignment of rights and obligations as well as provisions on investment incentives (including exemptions of land use fees) and on the mortgage of assets are similar to those contained in Decree 108 and are generally in line with international best practices.

There is a notable improvement regarding lenders' step-in rights. The PPP Decree introduces an option for lenders to appoint another entity to take over a project in cases where an investor has failed to fulfil its obligations, instead of lenders being required to take over the project directly. This is an important breakthrough for the bankability of projects, as lenders tend to lack the requisite experience and human resources to enable them to efficiently take over projects in such instances.

Despite numerous demands from the private sector, the PPP Decree does not contain a general assurance of foreign currency balance for all PPP projects. Instead, such assurance will be granted on an individual basis and managed by a separate agency appointed by the Prime Minister.

CONCLUSION

Whilst the New PPP Legal Framework does not revolutionise the existing legal framework for PPP projects, the PPP Decree and the Investors Selection Decree have clarified the general PPP framework and provide better legal certainty for private investors. The New PPP Legal Framework emphasises the Government's commitment to continue the development of infrastructure in Vietnam.

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