Pacific Rim Advisory Council

March 2015 e-Bulletin

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  Brisbane - Hosted by Clayton Utz
  April 18 - 21, 2015
- **PRAC @ INTA** San Diego May 2, 2015

PRAC @ IPBA Hong Kong May 7, 2015

- **PRAC @ IBA** Vienna October 5, 2015
- **58th International PRAC Conference**
  Vancouver - Hosted by Richards Buell Sutton LLP
  September 26 - 29, 2015

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►BENNETT JONES Osisko Gold Royalties in $461 million Acquisition of Virginia Mines, Inc.

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BENNETT JONES WELCOMES 10 NEW PARTNERS

Toronto - 09 March, 2015: Bennett Jones is proud to announce 10 new partners to the firm. The new partners are: **Robert Bothwell, Alixe Cameron, Kristopher Hanc, Karen Keck, Justin Lambert, James McClary, Duncan McPherson, Aaron Sonshine, Geoff Stenger,** and **Alexis Teasdale**.

"Bennett Jones is delighted to welcome these talented and committed lawyers into the partnership", said Hugh MacKinnon, Chairman and CEO. "The admission of new partners – especially in such number – is a testament to the firm's ability to produce such talent, and a testament to the character and quality of the individuals themselves."

The new partners were introduced on Saturday, March 7, in Toronto at the Annual General Meeting of the Bennett Jones Partnership.

They represent practice areas that include corporate commercial and real estate law, mergers and acquisitions, securities law, and project development.

For additional information visit www.bennettjones.com

DAVIS WRIGHT TREMAINE ADDS LABOR EMPLOYMENT LAWYER

03 March, 2015: Patricia Vecera, an experienced labor/employment lawyer, has joined the Anchorage office of Davis Wright Tremaine LLP (DWT) as Counsel. Vecera defends private and public employers in a full range of employment disputes and is also known for her labor law expertise. She joins DWT after spending 15 years at the Anchorage-based firm of Turner & Mede, P.C.

"We're very pleased to have Patti further expand our leading Alaska employment practice," said Joseph L. Reece, DWT's Anchorage Partner-in-Charge.

"Davis Wright Tremaine is regularly recognized for having one of the finest employment practices in the state—and for good reason," said Vecera. "I look forward to adding my expertise to this excellent team of lawyers."

Vecera defends employers in breach of contract, wrongful discharge, harassment, discrimination and wage and hour claims; provides day-to-day employment-related counseling; oversees and conducts investigations into issues of harassment and other workplace misconduct; and represents clients in negotiating collective bargaining agreements and grievance arbitration proceedings, including appearing before the National Labor Relations Board and the Alaska Labor Relations Board.

Vecera received her B.S. from Chapman College and her J.D. from Gonzaga University School of Law.

For additional information visit www.dwt.com

GIDE STRENGTHENS CAPITAL MARKETS PRACTICE WITH SENIOR HIRES

Warsaw - 17 February 2015: International law firm Gide strengthens its capital markets practice in Poland with the addition of a new partner, **Mateusz Chmielewski**, who will lead the Capital Markets department in Warsaw. In early March, **Dorota Jenerowicz,** an experienced capital markets lawyer, will also join the firm.

Mateusz Chmielewski has considerable international experience in providing legal advice on capital markets transactions. He has advised leading financial companies and institutions on important private and public offerings of shares, bond issues (including high-yield bonds and convertible bonds), as well as medium-term bond programmes. Mateusz Chmielewski graduated in law from the University of Warsaw and the University of Cambridge. Before joining Gide, he worked for Greenberg Traurig in Warsaw, and before that, as a solicitor in the London and Singapore offices of Ashurst. After returning to Poland, Mateusz Chmielewski worked on many of the largest IPOs and secondary offerings of shares.

In March, Gide will also be joined by Dorota Jenerowicz, an advocate with extensive experience in capital markets, who previously worked for Greenberg Traurig.

“It is with great pleasure that we welcome Mateusz and Dorota to our team. I am convinced that their experience and expertise will help us to further develop the capital markets practice in Gide’s Warsaw office, which will henceforth operate as a stand-alone department headed by Mateusz Chmielewski," said Dariusz Tokarczuk, partner in charge of Gide Warsaw.

"Gide has a strong international capital markets practice, which is especially dynamic in Europe. I am sure that, through combining our experience and knowledge, we can offer top quality legal services for capital transactions at both local and international levels," added Mateusz Chmielewski.

For additional information visit www.gide.com

HOGAN LOVELLS ADDS TO FINANCE PRACTICE

New York, 02 March, 2015 – Hogan Lovells announced today that **Ron Silverman** has joined its Finance practice as a Business Restructuring and Insolvency (BRI) partner. He will reside in the firm's New York office.

Silverman previously practiced as a partner with Bingham McCutchen. His practice is focused on the representation of financial institutions, hedge funds, and other sophisticated investors, in the context of financial restructurings, insolvencies, and distressed acquisitions. He has handled Chapter 11 and Chapter 15 work on both the Debtor and creditor side.

A significant portion of his practice involves cross-border transactions whose geographic scope spans South America, Europe, the Middle East, Africa, and Asia, with a particular focus in China. He also has experience in restructuring transactions with a concentration in the oil and gas industry.

“Ron’s practice and expertise further diversifies our already established BRI practice in New York,” said Sharon Lewis, global Finance practice group leader. “His focus in the oil and gas industry will be an incredible asset as restructurings in the industry are expected to increase in the next few years, both in the United States and abroad.”

“Hogan Lovells’ global platform and the support of the cross-border BRI practice provide an ideal opportunity to better serve my client base,” said Silverman. “As we see an increase in the numbers of cross-border restructurings, I am looking forward to working alongside such a prominent and forward-thinking global team.”

Silverman received his J.D. from University of Connecticut School of Law and his B.A. with honors from Trinity College.

For additional information visit www.hoganlovells.com

NAUTADUTILH WELCOMES ADMINISTRATIVE LAW SPECIALIST

Anne-Marie Klijn (1964) has joined the firm as partner at NautaDutilh. Anne-Marie, who specialises in the fields of administrative law and environmental law, has spent more than 25 years counselling companies, civil-society institutions, and governments regarding the areas where governments exercise direct influence on society.

Her expertise ranges from general and European administrative law, spatial planning law, environmental law, and government liability, to enforcement and supervision. She was closely involved with the new Environment and Planning Act through her membership of the Minister for Infrastructure and the Environment's advisory committee on the new act. Anne-Marie has years of experience of judicial process management, providing strategic and politically sensitive advice, and representing clients before administrative law and other courts.

Erik Geerling, Chairman of the Board at NautaDutilh: "We are delighted that Anne-Marie will be working with us as a partner. Her many years of experience and wide range of expertise will strengthen and broaden our administrative law practice."

Anne-Marie is a Qualified Member of the Royal Institution of Chartered Surveyors, an institution for construction and real estate professionals. She is also a member of the advisory committee on the new Environment and Planning Act, the Association of Construction Law Attorneys ('Vereniging Bouwrecht-Advocaten') and the Association of Environmental Law Attorneys ('Vereniging van Milieurecht Advocaten'). She frequently gives lectures and publishes on her areas of expertise. The Chambers legal directory praises her 'excellent performance before the Council of State, as well as her commercial advice.' Anne-Marie, who has been practising law since 1990, had been a partner at Boekel de Nerée since 1997.

For additional information visit www.nautadutilh.com

ROUSAUD COSTAS DURAN REINFORCES INSURANCE PRACTICE

Madrid - January, 2015: Rousaud Costas Duran SLP (RCD) reinforces their insurance practice with the hiring of **Pablo Wesolowski** as a partner in Madrid office, where he leads a team of professionals providing multidisciplinary advice to insurance companies, mediators and other national or international entities in the sector. Among the additions two new partners including Isabel Burón, with extensive experience in defending insurance companies in all types of civil liability claims and Ruth Duque, State Insurance Inspector on sabbatical leave with a wide-ranging knowledge in supervising insurance entities.

A founder of the DAC Beachcroft office in Spain, where he developed his career over the past 25 years, Pablo has extensive experience in managing complex claims and providing multidisciplinary advice to renowned companies in the insurance sector. Having practiced law in England and Spain, Pablo is Secretary of the Board at Lloyd's Iberia and acts as a tax representative for around 20 European insurers, while being the General Representative of others. He has been involved in important international D&O disputes, machinery breakdown, business interruption, cyber risks, and others, as well as specializing in both national and international insurance regulatory matters.

Adolf Rousaud, RCD's managing partner, highlights Pablo´s key contributions to the firm: "Pablo´s wide-ranging national and international experience, along with his profound understanding of the legal issues that underpin the insurance sector, will be crucial for the expansion of the firm´s insurance practice."

A law graduate with a Master's degree in Business Law from the University of London, Pablo explains why he chose RCD over the numerous other offers received: "RCD offers a solid structure, rapid growth, and a markedly international nature thanks to the profile of its professionals and clients, as well as law firm alliances in the most strategic locations. I am very excited to join a team of professionals with such high values and technical abilities, and I want to contribute with my experience and enthusiasm by continuing to offer leading expert advice in the sector."

For additional information visit www.rcdslp.com

SIMPSON GRIERSON NEW SENIOR COUNSEL AND PARTNER APPOINTMENTS

New Zealand - 18 February, 2015: Simpson Grierson strengthened its corporate practice with the appointment of **James Hawes** to the partnership. James has established an impressive track record in mergers and acquisitions, joint ventures, private equity and venture capital. He has advised on a significant number of capital markets transactions over the past year. Prior to joining Simpson Grierson, James worked at Slaughter and May in London and as in-house counsel to Balderton Capital, a leading European venture capital fund.

"We are delighted to welcome James to the partnership," says Simpson Grierson Chairman Kevin Jaffe. "He is a highly regarded corporate lawyer who achieves great outcomes for his clients."

Simpson Grierson announced three new senior associates.

Sarah Lee advises a range of clients, including local subsidiaries of multi-nationals and locally grown medium to large sized businesses, on a range of commercial and corporate issues. She specialises in sales and marketing, consumer and fair trading laws.

Ruth McLean is a commercial property expert specialising in forestry and carbon leasing. She advises clients on a variety of matters including commercial property sales and acquisitions, agribusiness and Overseas Investment Office (OIO) applications.

Nicki Montgomery works in the transactional banking and finance group. She advises banks, financial institutions and corporate borrowers on all aspects of banking law with a particular focus on leveraged finance, cross-border acquisition finance, restructuring and non-contentious insolvency.

For additional information visit www.simpsongrierson.com

TOZZINI ANNOUNCES THREE NEW PARTNERS

TozziniFreire starts 2015 with three new partners: **Fernanda Bianco Pimentel**, in the Labor practice area; **Oduvaldo Lara Júnior**, in the Corporate and Foreign Investment area; and **Tatiana Lins Cruz**, in Antitrust. They were already part of the firm's team of lawyers and were promoted.

Fernanda Bianco Pimentel works in the areas of litigation management, labor and pension law. She has a specialized degree in corporate management from Business School São Paulo, labor law from PUC-SP and civil procedural law from PUC-Campinas.

Oduvaldo Lara Júnior is specialized in assisting investors and companies from different sectors, both foreign and domestic, notably matters involving corporate law, and themes related to capital markets and open capital companies. He has a specialized degree in corporate management from Business School São Paulo and an MBA in business management from FGV.

A Master's student in international law, Tatiana Lins Cruz has over 10 years of experience in administrative and judicial processes involving antitrust practices, notification of operations that must be submitted for approval by the Brazilian antitrust body (Conselho Administrativo de Defesa Econômica – CADE) and the creation and implementation of antitrust compliance programs.

The promotion of new partners is in line with the growth seen in the firm's client base, which increased in most practice areas. Three new partners were also hired during the second semester of 2014, two of them being for the Antitrust area and one for Real Estate.

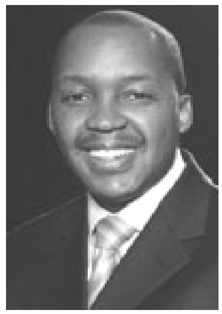
For additional information visit www.tozzinifreire.com.br

WERKSMANS ANNOUNCES NEW CHAIRMAN AND NEW TAX DIRECTOR

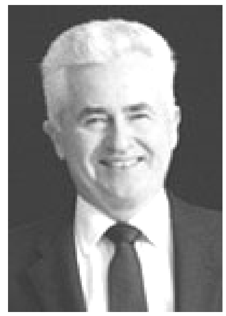
Johannesburg - March, 2015: David Hertz has been appointed Chairman effective March 1. Hertz joined the firm in 1989 and has led the Dispute Resolution Practice for ten years. His focus practice areas are dispute resolution, financial services regulation, energy, mining and natural resources. Hertz will work closely with Kevin Trudgeon, Head of the Commercial Department, and Corlett Manaka, Head of the Litigation Department.

David Hertz

Kevin Trudgeon



Corlett Manaka



Des Williams

Michael Honnibal

Des Williams, a Director since 1979 and Chairman since 2005, will step down as of March 1 to resume his full time litigation and arbitration practice. During Williams' term, Werksmans staff contingent increased 70 percent. Williams played a significant role in developing the firm's international profile and was responsible for its initial involvement in the International Bar Association.

Michael Honnibal has joined the firm as a Director, Head of International Tax. Honnibal has extensive international and corporate tax advisory experience and is consistently and highly recognized in international rankings.

For additional information visit www.werksmans.com

RODYK

ACT FOR DAIWA IN S$758 MILLION IPO OFFERING

Singapore - February, 2015: Rodyk acted as Singapore counsel to Daiwa, a company listed on the Tokyo Stock Exchange, and together with certain entities held by Daiwa, in their roles as issue manager and underwriter in the initial public offering (the IPO) of Accordia Golf Trust (AGT) on the Mainboard of the Singapore Exchange Securities Trading Limited (the SGX-ST), as well as trustee-manager and asset manager of AGT, in respect of certain issues relating to the Singapore Code of Takeovers and Mergers, substantial shareholding and other Singapore regulatory matters and security agreements.

The IPO is raising total gross proceeds of approximately S$758 million at the close of the IPO. AGT is also Singapore's first business trust with golf course assets in Japan to be listed on the SGX-ST.

Rodyk corporate partner Ng Eng Leng led, supported by partner Nicholas Chong, senior associates Grace Ong, Tong Junming and associate Wong Hui Yi.

For additional information visit www.rodyk.com

CAREY

HSBC SECURITIES AND SCOTIABANK INITIAL PURCHASERS OF CENCOSUD NOTES ISSUANCE FOR USD$1 BILLION

Santiago - March, 2015: HSBC Securities and Scotiabank acted as initial purchasers of Cencosud Notes Issuance totaling USD$1 billion.

The deal closed on 12 February. Cencosud will use the proceeds from the double issuance to repay current debt, including an outstanding bridge loan.

The first series, due in 2025, has a value of US$650 million with a 5.15 per cent interest rate. The second series, covering the remaining US$350 million, is due in 2045 with a higher 6.652 per cent interest rate.

Counsel to HSBC Securities and Scotiabank (in addition to Shearman & Sterling LLP), Carey Partner Diego Peralta and associates Patricia Silberman, Camila Noreña, Mariana Gómez and Paluska Solar in Santiago.

For additional information visit www.carey.cl

CLAYTON UTZ AND SIMPSON GRIERSON

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

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

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

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

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

BAKER BOTTS

REPRESENTS EQT CORPORATION AND MOUNTAIN VALLEY PIPELINE IN SALE OF INTERESTS TO WGL HOLDINGS AND VEGA ENERGY PARTNERS

Austin - 12 March, 2015: Mountain Valley Pipeline, LLC, a joint venture between affiliates of EQT Corporation (NYSE: EQT) and NextEra Energy, Inc. (NYSE: NEE), announced that a subsidiary of WGL Holdings, Inc. (NYSE: WGL), WGL Midstream, Inc., has acquired a 7% ownership interest in the joint venture, and a subsidiary of Vega Energy Partners, Ltd., Vega Midstream MVP LLC, has acquired a 3% interest. NextEra Energy will hold a 35% interest; and as previously announced, EQT Midstream Partners, LP (NYSE: EQM) is expected to assume EQT's 55% majority interest in the joint venture and to operate the proposed Mountain Valley Pipeline.

The Mountain Valley Pipeline is expected to provide at least 2.0 Bcf per day of firm transmission capacity and has secured commitments at 20-year terms for this minimum capacity amount. The estimated 300-mile long pipeline is currently targeted at 42" in diameter, with an approximate project cost of $3-$3.5 billion. Subject to approval by the Federal Energy Regulatory Commission (FERC), the pipeline is expected to be in-service during the fourth quarter of 2018.

As part of the agreement, WGL Midstream, Inc. will be a shipper on the proposed Mountain Valley Pipeline (MVP) and has also committed to buying a significant amount of natural gas at Transcontinental Gas Pipeline Company's (Transco) Zone 5 compressor station 165 in Pittsylvania County, Virginia.

Baker Botts represented EQT Corporation and Mountain Valley Pipeline in the transaction.

Baker Botts Lawyers/Office Involved: Mike Bengtson (Partner, Austin); Jon Nelsen (Partner, Austin); John Kaercher (Associate, Austin); Scott Looper (Associate, Houston); John Craven (Associate; Houston); Leah Davis Patrick (Associate, Houston)

For additional information visit www.bakerbotts.com

BENNETT JONES

OSISKO GOLD ROYALTIES $461 MILLION ACQUISITION OF VIRGINIA MINES, INC.

On February 17, 2015, Osisko Gold Royalties Ltd (Osisko) acquired Virginia Mines Inc. (Virginia) for approximately $461 million, pursuant to a plan of arrangement. The consideration received by shareholders of Virginia consisted of an aggregate of 29,964,240 shares of Osisko, which entitled each former shareholder of Virginia to receive 0.92 of a share of Osisko for each share of Virginia held.

As a result of the transaction, Osisko immediately became an intermediate gold royalty and exploration company with two world-class royalties on producing gold mines in Quebec, Canada, one of the world's premier mining jurisdictions, as well as exploration stage assets.

Bennett Jones LLP represented Osisko in the transaction with support of in-house counsel André Le Bel, with a team led by Sander Grieve, Linda Misetich Dann and John Sabine (mining, M&A and securities) that included Ian Goldberg, Jeffrey Kerbel, Jamie Au, Andrew Disipio and Ian Minz (mining, M&A and securities); Thomas Bauer, Martin Sorenson, Philip Ward and Andrew Sullivan (tax); and Randal Hughes and Adam Kalbfleisch (competition).

For additional information visit www.bennettjones.com

GIDE

ADVISES SYNDICATE LENDERS ON EIFFARIE AND APR €3.3 BILLION DEBT REFINANCING

Paris - 24 February 2015: Eiffarie and the motorway concession holder APRR (Autoroutes Paris-Rhin-Rhône), which both are owned by Eiffage and Macquarie managed funds, have completed on 23 February 2015 the second refinancing, for an amount of €1.5 billion, of the debt initially incurred by Eiffarie for the acquisition of APRR and the implementation of a new revolving credit facility (RCF) for APRR in an amount of €1.8 billion. This new credit facility, replacing the €0.7 billion existing undrawn revolving facility, increases APRR's liquidity by €1.1 billion.

Gide advised the syndicate of lenders, consisting of 18 banks, with a team led by Eric Cartier-Millon, partner, with the support of Laetitia Lemercier, counsel, Nathalie Benoît, Ginevra Marega and Aline Lariitchouk on the debt aspects, and Karine Imbrosciano, partner, and Claire-Marine Costa-De Jonckheere on Eiffarie's rate hedging agreements.

For additional information visit www.gide.com

HOGAN LOVELLS

FILES AMICUS BRIEFS IN SUPPORT OF SAME-SEX MARRIAGE EQUALITY

Washington, D.C. - 10 March 2015: Global law firm Hogan Lovells recently filed two amicus briefs with the U.S. Supreme Court in support of same-sex couples seeking the right to marry. The two briefs highlight the importance of marriage equality from two different perspectives: history and public health.

Hogan Lovells filed an amicus brief on behalf of the Organization of American Historians, supporting the petitioners who are challenging the Sixth Circuit Court of Appeals' refusal to strike down laws that ban same-sex marriage. The brief details the long and continuing history of discrimination against gay men and lesbians, from the colonial period until today. It also explains how the same-sex marriage bans in Kentucky, Michigan, Ohio, and Tennessee are simply more recent iterations of that longstanding discrimination. The full amicus brief can be found here http://www.oah.org/site/assets/files/5849/obergefell--_oah_amicus.pdf.

The pro bono team was led by partners Cate Stetson and Erica Knievel Songer, and associates Mary Helen Wimberly, Madeline Gitomer, and Katherine Duncan in the Washington, D.C. office.

The second brief was filed on behalf of American Public Health Association (APHA) and Whitman-Walker Health. The brief highlights a growing body of social science that has linked discriminatory marriage policies with adverse mental and physical health effects on lesbian, gay, and bisexual (LGB) individuals. The brief states that eliminating same-sex marriage bans would not only help mitigate these negative health effects, but also allow individuals in same-sex relationships to avail themselves of the mental and physical health benefits that have long been associated with marriage. The full amicus brief can be found here: http://www.hoganlovells.com/custom/documents/APHA-Whitman-Walker-Amicus-Brief-Final.pdf .

The pro bono team was led by partners Ken Choe and Sheree Kanner in the Washington, D.C. office, and associates David Skaar in the Los Angeles office, Thomas Cummins in the Northern Virginia office and Margia Corner and Elizabeth Lockwood in the Washington, D.C. office. Hogan Lovells' co-counsel for the amicus brief was Skadden, Arps, Slate, Meagher & Flom LLP.

The Court is slated to hear the four consolidated landmark cases concerning the freedom of same-sex couples to marry on 28 April 2015.

For additional information visit www.hoganlovells.com

NAUTA DUTILH

ASSISTS WOONSTAD ROTTERDAM WITH ACQUISITION 7,000 ACCOMMODATION UNITS FROM VESTIA HOUSING CORPORATION

Rotterdam - March, 2015: NautaDutilh's Real Estate team assisted Woonstad Rotterdam in the take-over of more than 7,000 units from Vestia's housing corporation Stadswonen. The sale will be completed in May 2015.

Stadswonen Vestia provides accommodation to students and other youngsters, especially on the so-called KennisAs ('Knowledge axis'). The sale consists of more than 6,000 rooms, studios and appartments and 1,000 office spaces and parking places. Woonstad has the objective to bind talented young people to the city of Rotterdam and providing appropriate housing is part of its strategy.

NautaDutilh's team was led by David van Dijk and consisted of Petra de Rooy, Jorieke van Strijen, Esther Vochteloo, Annette Vis, Emma de Groot, David Wumkes, Jeroen van Gelderen , Gijs van Nes, Kees Koetsier and Frank Spraakman.

For additional information visit www.nautadutilh.com

SYCIPLAW

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

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

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

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

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

For additional information visit www.syciplaw.com

UPCOMING PRAC EVENTS

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CLAYTON UTZ

02 March 2015

Pfizer case shows protecting your own position isn't anti-competitive

Commercial strategies and practices used by Pfizer to counter the expected loss of revenue caused by the expiry of its patent over Lipitor, its bestselling cholesterol drug, were neither misuses of market power nor exclusive dealing and did not contravene Australian competition laws (Australian Competition and Consumer Commission v Pfizer Australia Pty Ltd [2015] FCA 113).

In yet another high-profile loss for the ACCC, the Court held that steps taken by Pfizer in offering stock and making bundled offers were carried out for a purpose of defending Pfizer's sales in response to strong competition from generics. In effect, the Court found Pfizer's strategies were legitimate forms of competition in the face of sustained attack by generics.

Pfizer's commercial strategy to deal with the patent expiry

Pfizer needed to manage the erosion of revenue that would come from the expiry of its patent over the molecule atorvastatin, which it sold as Lipitor, and the subsequent increase in competition from generics, so it took a number of steps:

- it announced it would no longer supply prescription pharmaceuticals through wholesalers; henceforth it would sell directly to community pharmacies (the “Direct-to-Pharmacy Model”);
- it established an Accrual Funds Scheme – a percentage of the price of purchases of Pfizer pharmaceutical products was credited to an account created for each pharmacy to be rebated on terms which would be announced at a later date; and
- it offered terms upon which it would supply Lipitor and its own generic Atorvastatin Pfizer to all, or virtually all, community pharmacies. These terms tied the rebates that were available from the accrual fund to the quantity of Atorvastatin Pfizer that the pharmacy purchased.

The ACCC took Pfizer to the Federal Court, alleging it had contravened the Competition and Consumer Act 2010 (Cth) by:

- using its substantial power in the market for atorvastatin for an anti-competitive purpose – to deter or prevent a person from engaging in competitive conduct in the market (section 46(1)(c)); and
- engaging in exclusive dealing with the effect of a substantial lessening of competition (sectfion 47).

Pfizer's actions were not misuse of market power

Until late 2011, Pfizer did possess "substantial market power" in the market for atorvastatin as the sole supplier of that product. This is the requisite level of market strength for the application of section 46 and is a key threshold provision in any misuse case. The limited degree of price regulation under the PBS was not sufficient to prevent Pfizer being assessed as having substantial market power.

But section 46 requires that the conduct in question must represent a taking of advantage of substantial market power **for a purpose of deterring other parties from competing**.

Pfizer's declining market power

By the time Pfizer made its bundled offers to customers in January 2012, its power had already weakened. Well before Pfizer's patent expired in May 2012, other generic manufacturers planned their onslaught on the market. Pfizer's market power gradually decreased as the patent expiry date grew nearer. Pfizer maintained some degree of market power up to May 2012 because of its unique ability to exploit the marketing of Lipitor at a premium price and to package its generic in a very similar manner.

But from January 2012 Pfizer's power was not substantial, because:

- from late 2011, a generic rival, Ranbaxy had been promoting the sale of its generic at discounts of 85% off the chemist list price and could enter the market from 19 February 2012 and pose a serious challenge;
- a number of other generics had registered their competing products with the Australian regulatory authorities;
- Apotex was holding discussions with key customers regarding its offers and arranging for its stock to be flown to Australia the very day the patent expired;
- Alphapharm told customers in January 2012 it would beat Pfizer's offer and offered 12 months' worth of products;
- Ascent was marketing to pharmacies not to succumb to a Pfizer offer;
- Sandoz was writing to all customers advising them to seek advice on whether to accept Pfizer's offers.

Rebates not a marketing method unique to companies with substantial market power

The Court held that Pfizer was pursuing no different strategy than what was open to any other supplier. To offer a rebate doesn't involve taking advantage of market power.

Granted, it was only by reason of Pfizer's market power in January 2011 that it could announce a rebate scheme without telling pharmacies how they could recover the moneys that were accumulating for their benefit. But Pfizer was not taking advantage of market power in making the offers in January 2012.

Even if Pfizer did supply its generic below cost, the offers were made during launch phase for a relative short period of time and did not establish a "taking advantage" of market power.

Pfizer did not have anti-competitive purpose

The Court rejected a finding that Pfizer's action indicated that it had a purpose of preventing other generics from supplying the market.

Pfizer accepted that competition was inevitable from generics, and its documents referred to "blocking" generics.

The Court held that the desire to cause harm to competitors is not necessarily proof of anticompetitive purpose. Pfizer took the steps it did to avoid being "slaughtered".

Effect of Pfizer's marketing strategy

The Court noted that Pfizer rapidly lost market share in the market after the patent expiry to generics, so it was difficult to see that generics had been seriously damaged or deterred by Pfizer's actions. In other words, anti-competitive effects did not arise from Pfizer's conduct.

Exclusive dealing

The ACCC's case failed because the judge found the purpose was to maximise Pfizer's sales for its products and that was not a purpose of substantial lessening of competition. The ACCC did not allege that Pfizer's conduct had the effect of substantially lessening competition.

Impact of the Pfizer case

The judgment comes on the back of increased scrutiny worldwide, particularly in the US and EU, of commercial strategies used by pharmaceutical patent holders to delay or deter generic entry and competition.

More close to home in Australia, the ACCC has flagged competition and consumer issues in the medical and health sectors as a priority enforcement area, and the Harper Review Panel in its root and branch review of competition laws is considering calls for an effects-based test to be added to the misuse of market power provisions of the Competition and Consumer Act 2010 (Cth).

It's also the second of three high-profile cases on misuse of market power issued by the ACCC in the last three or so years. The ACCC has not succeeded in establishing contraventions of the misuse of market power provisions in the first two. The last of these cases (ACCC v Visa) is currently before the Federal Court of Australia.

The result in ACCC v Pfizer could add weight to calls by the ACCC and others for reform of the misuse of market power provisions of the Competition and Consumer Act. Critics have argued for some time that the law in this area is deficient and that the misuse of market power provisions are not an effective enforcement tool. However it is questionable whether the ACCC would have succeeded with an "effects test" law in this case of the kind it has been pushing for. The fact that the ACCC has failed again in such a case, though not for the same reasons as earlier cases, where the "taking advantage" limb of the test has been difficult to overcome, might encourage the Harper Review Panel to find that an effects-based test (in addition to the current "purpose" test) is necessary. How this plays out when the Harper Review Panel issues its final report later this month will be interesting viewing.

It is not yet known whether the ACCC will seek to appeal the decision.

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INTELLECTUAL PROPERTY / IT/TELECOM NEWS

Brazil: Public Consultation – Regulation of the Brazilian Internet Act and Bill of Law on Personal Data Protection

On January 28, 2015, the Brazilian government submitted to a Public Consultation the regulation of the Brazilian Internet Act (Law 12,965/2014). During 30 days, the public in general may present contributions and comments on the draft Presidential Decree that will regulate the act ("Decree").

The main points pending regulation are:

(i) Neutrality: the Decree will regulate the exceptions to the network neutrality principle. Pursuant to the Brazilian Internet Act, the neutrality will not be mandatory when (a) it is incompatible with essential technical requirements of services and applications; and (b) degradation of traffic and data is necessary to prioritize emergency services;

(ii) Privacy: the Decree will regulate the security and secrecy standards applicable to the storage of personal data;

(iii) Penalties: the Decree will regulate the procedure for the assessment of violations to the Brazilian law in the collection, storage and treatment of personal data.

This is an important point of the regulation, considering the penalties imposed by the Brazilian Internet Act in connection with such violations (that range from warnings to prohibition of activities and fines up to 10% of the net revenues of the infringer's economic group in Brazil).

On the same date and also for a 30-day period, the Bill of Law on Personal Data Protection was also submitted to public consultation. The main points covered by the bill are:

(i) Definition of personal, sensitive and anonymous data;

(ii) Definition of the rights of personal and sensitive data subjects;

(iii) Definition on the possible forms of treating personal and sensitive data;

(iv) Definition of the categories of agents involved in the treatment of personal and sensitive data, and the creation of different levels of liability applicable to those that control the treatment of data and those that simply treat data following third parties' instructions; and

(v) Specific rules applicable to international transfer of personal data.

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NEWS & EVENTS

THE $1 MILLION LESSOR'S LIABILITY CAP IN BRITISH COLUMBIA - REVISITED AND REVISED

February 27, 2015

C. Nicole Mangan
Richards Buell Sutton's Insurance Newsletter

In *Stroszyn v. Mitsui Sumitomo Insurance Company Limited*, 2014 BCCA 431, the British Columbia Court of Appeal reconsidered the liability cap for lessors of motor vehicles in British Columbia. The court concluded that under section 82.1 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 (the "Act") the amounts paid under a primary policy reduced any payment obligations owed by the lessor, therefore, in this case, the excess policy was not required to respond. The court also found that the insurer's failure to comply with section 61 of the Act, which requires express warning provisions if contractual terms in an optional insurance contract differ from the underlying policy, resulted in coverage for additional insureds despite express, contrary, policy terms to this effect.

This decision brings the law regarding lessor's liability in British Columbia more in line with that law in Ontario, however, each legislative scheme differs and may not always produce the same result.

The Facts

On May 15, 2008 a vehicle driven by Mr. Stroszyn was struck by a vehicle driven by Jason Chen and leased by Mary Chen from Honda Canada Finance Inc. ("Honda"). Ms. Chen's lease agreement with Honda required her to carry $1 million of liability insurance and name Honda as an insured. Honda was also an insured under an excess insurance policy to a limit of $9 million (the "Excess Policy") with Mitsui Sumitomo Insurance Company Limited. It was agreed by all parties in the tort action that Mr. Stroszyn's damages were $1.6 million. One million was paid by Ms. Chen's primary insurer and a determination as to the excess insurer's responsibility for the remaining $600,000 was sought.

The Lessor Cap Issue

LAWYERS

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Mr. Stroszyn argued that the lessor was liable to the extent of $600,000 because s. 82.1 of the Act did not contain specific language which would make amounts recovered under the primary policy deductible from the cap where the primary policy was "issued to or obtained by lessees or drivers". The lessor argued that the fundamental common law principles of joint liability dictated that the payment by or on behalf of one jointly liable party discharged the liability of all other jointly liable parties to the extent of that payment - therefore Honda's liability of $1 million had been completely discharged. The lower court concluded that the lessor's liability was not reduced by the $1 million payment under the primary policy. On appeal, the court determined each insured could treat the entire primary policy payment as reducing their liability to the plaintiff to the extent of the amount paid. The statutory cap on the lessor's liability then resulted in all the lessor's obligations under the Act being discharged.

The Excess Coverage Issue

The Excess Policy contained an endorsement that only Honda was an insured in respect of leased vehicles. The plaintiff argued that the Excess Policy must pay $600,000 to him on behalf of the driver and the lessee because, despite the endorsement, the driver and lessee were entitled to coverage pursuant to section 61 of the Act. The excess insurer argued that the Excess Policy's plain wording provided insurance for only Honda and the legislative scheme did not alter the result.

Subsection 61(1) states that when an optional insurance contract extends the limit of coverage it must do so for every insured on the same terms and conditions. Subsection 61(1.1) permits certain prohibitions, exclusions and limits to coverage under optional insurance contracts however subsection (2) creates an immutable condition precedent to the availability of any prohibition, exclusion or limit. Importantly, subsection (2) requires the policy to contain, in a prominent place, in conspicuous letters, the words: "This policy contains prohibitions relating to persons or classes of persons, exclusions of risks or limits of coverage that are not in the insurance it extends" for any such prohibition, exclusion or limit to be effective. These words were not contained in the Excess Policy. The effect of the lack of this wording, prominently displayed, was to extend coverage under the Excess Policy to both the driver and lessee. Honda's excess insurance was deemed to cover these two people beyond the limits available under their primary policy.

Excess Coverage in Ontario

In *Xu (Litigation guardian of) v. Mitsui Sumitomo Insurance Co.,* 2014 ONCA 805, the court concluded that section 267.12 of the Insurance Act, R.S.O. 1990, c. C.25, which expressly reduces the liability of a lessor to the extent of any payment under a primary policy, cannot be interpreted to extend coverage under the lessor's policy to the lessee. The section 61 issue from *Stroszyn* would not arise in Ontario as the O.E.F. 110 endorsement to the Standard Excess Policy Form expresses that drivers of leased vehicles are not covered by a lessor's insurance policy.

Practical Considerations for Lessors and Insurers

All out of province insurers must remember that their license to issue insurance operative in British Columbia, and any deposited Power of Attorney or Undertaking (PAU), will limit their ability to raise defences that could not be raised if the policy was issued in British Columbia. The Act prevails over express policy terms that are contrary to its provisions.

Lessors and insurers of vehicles licensed or operated in British Columbia must be aware that, in British Columbia, a lessor's liability of $1 million is fully reduced by any payment made on behalf of all liable parties including drivers and lessees.

To avoid insuring anyone under an excess policy who is otherwise expressly excluded by a policy's terms, the language of s. 61 requires the following "conspicuous" wording to be included in a prominent place on any policy: "This policy contains prohibitions relating to persons or classes of persons, exclusions of risks or limits of coverage that are not in the insurance it extends". Lessors and insurers are well advised to take immediate steps to make certain that the mandatory language contained in subsection 61(2) of the Act is properly included in their policies.

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.

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BRIGARD& URRUTIA

Colombia grants entry permit without visa to certain Asian nationalities

What changed? Resolution 0572/2015 completely replaced Resolution 6588/2013, which regulates restricted and non-restricted nationals.

What does this change mean? Chinese, Indian, Thai, and Vietnamese citizens may now enter Colombia without previously requesting a visa as long as they hold a Shenghen C o D visa type or USA visa with the exception of transit C-1 visa.

Who can benefit from this new measure? Chinese, Indian, Thai, and Vietnamese citizens holding a Shenghen C o D visa type or USA visa with the exception of transit C-1 visa.

Effective date: February 3rd, 2015

Impact on timeframe: There's no direct impact on processing times. However, foreign nationals granted with an entry permit, may request their visa in country. Nonetheless, it is important to point out that the Ministry of Foreign Affairs has full discretionary power to provide approvals and rejections, as well as requesting additional documents or steps to visa applicants. Therefore, in country applications may not be acceptable in some cases.

Red Flags

- Must hold a valid Shenghen C o D visa type or USA visa with the exception of transit C-1 visa in order to be eligible.
- Must hold a passport with a valid Schenghen C o D visa type or USA visa with the exception of transit C-1 visa when requesting entry to Colombia
- Some Migration Colombia officers may not be aware of this program, therefore it is important to carry additional documentation such as company invitation letters or even Resolution 0572/2015 itself
- Entry permits (with the exception of PIP-7) are granted for a 90 calendar day period. Such entries may be extended for another 90 calendar days as long as an extension is applied for before Migration Colombia before the first 90 day period expires

B&U Assessment: This new measure is a useful tool for foreign nationals willing to visit Colombia for business or marketing purposes as long as they belong to those countries included in this program. Nonetheless, travelers may need to provide additional documentation when entering the country as Migration Colombia officers may not be completely aware of this new regulation due to its recent publication. Moreover, this new measure may also positively affect the visa application processes for the citizens included in this program.

NEW REGULATIONS FOR ENVIRONMENTAL IMPACT STUDIES IN GUATEMALA

On March 2, 2015, Government Decree No. 60-2015 which includes the REGULATIONS ON ENVIRONMENTAL ASSESSMENT, CONTROL, AND OVERSIGHT, was published in the Official Gazette, which came into effect on March 3, 2015. These regulations completely substituted those included in Government Decree No. 431-2007 and its amendments.

The new Regulations on Environmental Assessment, Control and Oversight establish the approval provisions for the different environmental management studies, which include Environmental Impact Studies (EIA). These regulations create a new classification for environmental instruments, regulate their requirements and establish the procedure to obtain Environmental Licenses, among others.

Also, the TAXATIVE LIST OF PROJECTS, CONSTRUCTIONS, INDUSTRIES OR OTHER ACTIVITIES, included in Government Decree No. 61-2015 and published in the same newspaper, as complement to the new Regulations on Environmental Assessment, Control and Oversight. The Taxative List locates in one of the different environmental categories, each of the activities that require the approval of an environmental study for their development.

For additional information please contact us.

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NEWS DETAIL

30/09/2014

GEOTHERMAL FEED-IN TARIFFS (Regulation of the Minister of Energy and Mineral Resources Number 17 of 2014)

The above captioned Regulation of the Minister of Energy and Mineral Resources Number 17 of 2014 was issued on 3 June 2014. It increases the purchase price payable by the state-owned power utility company PT Perusahaan Listrik Negara (Persero) for the electricity produced by geothermal power plants and for the geothermal steam used in generating electricity.

The new regulation provides that the highest benchmark price, in the range of 11,8 – 29,6 US$/kWh, shall be determined based on the Working Area and the year when the Commercial Operation Date (COD) occurs – a change from the old regulation (Regulation of the Minister of Energy and Mineral Resources Number 22 of 2012) which determined the highest benchmark price, in the range of 10 – 18,5, US$/kWh, on the basis of the Working Area and the Capacity.

In relation to the changes in the highest electricity benchmark price, holder of an electricity business license who obtained their geothermal license after the enactment of Law Number 27 of 2003 (the previous Geothermal Law) and had entered into a Power Purchase Agreement before the issuance of the Regulation, may propose an adjustment to their electricity selling price.

As for geothermal development projects which are currently not running, the government is giving to the developers the option to return their geothermal license and/or electricity business license to the regent or local governor within a certain time limit, upon which the working area will be offered again in a new bid with a new price. Developers who do not return their geothermal license and/or electricity business license within the time limit will not be allowed to participate again in the bidding process in that particular area. (*by: Herry Kurniawan/Zefanya S. Sahusilawane*)

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NautaDutilh

Intellectual Property & Tax

Luxembourg

Luxembourg government announces overhaul of IP tax regime and confirms grandfathering of the existing scheme until June 2021

Thursday 5 March 2015

Luxembourg Minister of Finance announces that Luxembourg will amend its IP Income Tax Regime so as to align it with the “nexus” approach agreed upon within the OECD as from 1 July 2016. Undertakings that benefit from the current tax regime before that date will continue to do so until 30 June 2021.

At the end of 2007, in the framework of the Lisbon strategy for growth and employment in the EU, the Grand-Duchy of Luxembourg introduced a beneficial tax regime applicable to income from qualifying intellectual property rights. On the basis of this regime, which is embedded in Article 50*bis* to the Income Tax Act 1967 (the "50*bis* Regime"), Luxembourg undertakings and Luxembourg branches of foreign companies can benefit from an exemption of 80% on revenues derived from and capital gains realized on patent, trademark, design and domain name rights as well as from copyrights on software, to the extent that such rights have been established or acquired after 31 December 2007. The exemption brings the effective tax rate for such revenues to approximately 5.85%.

IP box regimes in several EU Member States including Belgium, Hungary, France, Luxembourg, the Netherlands, Spain and the UK were criticised for not requiring sufficient substantial activities and presence for the tax benefits to apply. These regimes were under scrutiny of the EU Code of Conduct Group on Business Taxation and of the European Commission under EU state aid rules. In addition, a common set of rules were being elaborated at the level of the OECD in the setting of the Base Erosion and Profit Shifting (“BEPS”) initiative. These developments created significant uncertainty around the future of the IP tax regimes concerned.

The European Commission has now dropped its state aid investigation. This change in approach was prompted by a joint proposal for rules on preferential intellectual property tax regimes that was made by Germany and the United Kingdom made in November 2014. The proposal is based on the so-called “nexus” approach, which makes the benefits under the IP tax regime conditional on the extent of the R&D activities pursued by the beneficiaries of this regime. The compromise has been accepted within the OECD and has been laid down in the document “OECD/G20 BEPS Project - Action 5: Agreement on Modified Nexus Approach for IP Regimes”. The agreement foresees that the current regimes should be closed to new participants as of 1 July 2016 and that taxpayers benefitting from the current regimes before that date will be able to continue to do so until 30 June 2021.

On 26 February 2015 the Luxembourg Minister of Finance declared in his reply to several questions raised by a member of the Luxembourg Parliament that the 50*bis* Regime will be amended in order to bring it in line with the internationally agreed "nexus" approach. He further confirmed that Luxembourg would close the regime to new entrants by 30 June 2016 and that a transitional grandfathering period would be foreseen until 30 June 2021.

Pending the introduction of the new regime, it will be important for companies that are considering to roll out a new intellectual property strategy under the existing Luxembourg tax rules to do so by 30 June 2016, i.e. before the date on which the 50*bis* Regime is likely to be closed to new entrants, whilst being mindful that the structure would possibly have to be revisited after 5 years.

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SANTAMARINA STETA

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LEGAL UPDATE

March 2015

SECOND CALL FOR ROUND ONE

On February 27, 2015 second call number CNH-R01-C02/2015 for International Bidding process CNH-R01-L02/2015, regarding the procedure known as Round 1, initiated by the National Hydrocarbons Commission (Comisión Nacional de Hidrocarburos) (CNH) as a Coordinated Regulatory Agency, was published in the Official Federal Gazette.

Said bidding process includes □ fields to be developed in shallow waters, comprising an area of 280 km2 (square kilometers), which will be available for the private sector to develop through five production-sharing contracts.

In order to participate in the said bidding process, the interested party is required, inter alia, to (i) provide evidence that it has acted as operator in at least one extraction project in shallow or deep waters, (ii) provide evidence of having an aggregate minimum production of ten thousand barrels of oil per day, and (iii) in case the interested party wants to participate through a consortium, have a capital of at least 1,000 million, same which must be preserved throughout the entire life of the contract.

On the other hand, within the prequalification requirements, the bidding guidelines indicate that companies which have been prequalified favorably in the first call for bidding process CNH-R01-L01/2014 (on the allocation of certain Production Sharing Contract for the Exploration and Extraction of Hydrocarbons in Shallow Waters), in technical or financial capacity, will automatically prequalify for the areas in this second bidding.

Pursuant to the above, by means of the publication of this bidding process, private sector companies (whether domestic or foreign), including the productive state companies, are called to participate in the referred bidding process, in terms of the provisions set out in the bidding guidelines, available on the web site http://www.ronda1.gob.mx

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

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Simpson Grierson

FYI

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INTELLECTUAL PROPERTY LAW

SUPREME COURT REFUSES LEAVE TO APPEAL TRADE MARK "AWARENESS" CASE

Only a few trade mark cases make it to the Supreme Court. New Zealand's highest Court has confirmed that the "Sex Wax" case will not be one of them. Although it denied the trade mark applicant leave to appeal the Court of Appeal's decision, the Supreme Court has helpfully affirmed the Court of Appeal's clarification of the test for "awareness" of a trade mark.

This case has been closely followed by the trade mark community because any change to what constitutes "awareness" (or "reputation") of a trade mark, especially for those opposing trade mark applications on the basis of an unregistered trade mark, is significant for brand owners. See our previous article on the Court of Appeal decision for further details about this case.

Briefly, Sexwax Incorporated, owner of the unregistered Sexwax logo shown above which includes the words "MR ZOGS", opposed registration of the ZOGGS trade mark (applied for in relation to goods including clothing, swimwear, footwear and headgear) by Zoggs International Limited.

The Sexwax logo is used on surfboard wax and associated products including t-shirts.

One of the main issues before the Assistant Commissioner of Trade Marks and the courts was whether or not there was sufficient "awareness" of the Sexwax logo in New Zealand. This is a threshold that owners of unregistered marks will generally be required to meet in order to oppose registration of a trade mark on the basis that the trade mark is likely to cause deception or confusion. If awareness was established, the subsequent issue was whether or not there was a likelihood that a substantial number of persons would be deceived or confused if ZOGGS was registered.

The Assistant Commissioner held that there was sufficient awareness of the Sexwax logo in New Zealand at the relevant date and that registration of ZOGGS would be likely to deceive or cause confusion. The High Court, however, overturned that decision finding no awareness and, as a result, an assessment of deception or confusion was not required. This was despite the High Court's finding that the logo "basically sells itself".

The Court of Appeal then overturned the High Court decision and held that there was both an awareness of the Sexwax logo and a likelihood that a substantial number of persons would be deceived or confused should ZOGGS be registered.

The Supreme Court considered that there were no grounds to justify hearing an appeal against the Court of Appeal decision.

Zoggs International Limited based its appeal to the Supreme Court on four grounds. The ground of most relevance to future trade mark opponents was the question of whether or not the Court of Appeal erred in:

> *confusing the test for reputation by considering the respondent's (Sexwax) reputation among consumers of its own goods rather than consumers of the goods covered by the proposed registration.*

In dismissing leave to appeal, the Supreme Court confirmed the Court of Appeal's clarification of the awareness test. In other words, the correct approach is to first focus on the awareness of the ***opponent's mark*** in relation to prospective purchasers of the ***opponent's goods or services*** and those involved in that trade. The next step, if awareness of the opponent's mark is established, is to assess the risk of confusion "by reference to those who may be exposed to the applicant's mark and are aware of the opponent's mark."

In the last few years in particular, many opponents have struggled with an interpretation of the awareness test that appeared to require opponents to define a relevant market and then assess awareness by analysing the exposure of the ***opponent's mark*** against prospective purchasers of the ***applicant's goods or services***.

The Supreme Court has confirmed that assessing awareness should, in future, be a more straightforward assessment.

This does not necessarily mean that it will be any easier for opponents to succeed in opposition proceedings. Factors such as the degree that prospective purchasers of the respective goods and services overlap will still need to be taken into account, albeit when assessing the likelihood of deception or confusion. The clarified awareness test should, however, mean that owners of unregistered marks stand a better prospect of getting over the awareness "hurdle" in order to be able to at least argue that there is likelihood of deception or confusion.

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GIDE LOYRETTE NOUEL

CORPORATE LAW | RUSSIA | 13 MARCH 2015

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

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

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

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

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

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

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

Please contact us should you require any further clarification.

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MARCH 2015

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ARBITRATION UPDATE

Minority oppression claims and arbitration - can these seat together comfortably - Maybe?

Executive Summary

In *Silica Investors Ltd v Tomolugen Holdings Ltd and others* [2014] 3 SLR 815, the defendants applied to stay court proceedings in favour of arbitration. The decision of the Singapore High Court is significant for two reasons.

First, the Court clarified that, on the issue of the scope of an arbitration clause, if a sufficient part of the factual allegations underlying the claim is related to the contract, then in accordance with the likely intention of parties, the entire claim must be treated as falling within the arbitration clause in the contract.

Second, the Court held that a minority oppression claim under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) may or may not be arbitrable, depending on all the facts and circumstances of the case, but it indicated that many if not most of the minority oppression claims would be non-arbitrable.

Brief Facts

The plaintiff entered into a share sale agreement ("the Share Sale Agreement") with the second defendant for 4.2% of the shares in the eighth defendant. The Share Sale Agreement contained an arbitration clause.

The first and second defendants were together the majority and controlling shareholders, while the third to seventh defendants were the directors and/or shareholders of the eighth defendant. The plaintiff alleged that it had been oppressed as a minority shareholder of the eighth defendant and commence a minority oppression claim pursuant to s 216 of the Companies Act (Cap 50, 2006 Rev Ed) ("the CoA") against the defendants, seeking reliefs which included a buyout order, an order to regulate the conduct of the eighth defendant and/or an order for the winding up of the eighth defendant.

The defendants applied to stay the proceedings under s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA") and/or the inherent jurisdiction of the court. The assistant registrar refused the stay application, and the defendants appealed to the High Court. The High Court similarly refused the stay application.

Judgment (by Quentin Loh J)

These were the two issues before the High Court:

(a) whether the plaintiff's claim fell within the scope of the arbitration clause; and

(b) if issue (a) was answered in the affirmative, whether a claim under s 216 of the CoA was arbitrable.

Issue 1: Whether the plaintiff's claim fell within the scope of the arbitration clause

Section 6 of the IAA stated that the court shall stay the court proceedings in respect of any "matter" which was the subject of the arbitration agreement. The High Court approached this issue in three steps (applying the approach in *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 ("*Larsen Oil*")):

(a) what was the proper characterisation of the plaintiff's claim;

(b) what was the scope of the arbitration clause; and

(c) whether the plaintiff's claim falls within the scope of the arbitration clause.

Regarding what was the proper characterisation of the plaintiff's claim, the Court clarified that the "matter" should be identified by reference to the essential dispute between the parties and not mere issues that were to be determined in the course of the proceedings. In the present case, the Court held that the matter to be determined was whether the affairs of the eighth defendant were being conducted and managed by the defendants in a manner that was oppressive.

As for the scope of the arbitration clause, the Court noted that the approach stated in *Larsen Oil* was that arbitration clauses should be generously construed such that all manners of claims, whether common law or statutory, should be regarded as falling within their scope unless there was good reason to conclude otherwise. In the present case, the Court held that the arbitration clause was very widely drafted and there was no indication that the parties intended to exclude statutory claims, specifically claims under s 216 of the CoA. In addition, the scope of the arbitration clause must be determined in the context of the Share Sale Agreement as a whole, which governed not only the transaction of the shares in the eighth defendant, but also the relationship between the plaintiff and the second defendant as shareholders of the eighth defendant.

Lastly, as to whether the plaintiff's claim falls within the scope of the arbitration clause, the Court noted these principles:

(a) The court had to consider whether the factual allegations underlying the claim were within the scope of the arbitration clause, regardless of the legal label assigned to the claim.

(b) To do that, the court had to ascertain the relationship between the factual allegations underlying the claim and the contract that incorporates the arbitration clause.

(c) The Court noted that the Court of Appeal stated that a matter would fall outside the scope of the arbitration clause only if it was unrelated to the contract that contained the arbitration clause (in *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732). However, this did not necessarily mean that the matter would fall within the scope of the arbitration clause if it was in any way related to the contract containing the arbitration clause.

(d) If a sufficient part of the factual allegations underlying the claim related to the contract, then in accordance with the likely intention of parties, the entire claim must be treated as falling within the arbitration clause in the contract.

In the present case, despite the fact that only two out of the four allegations make reference to the provisions in the Share Sale Agreement, the matter had a sufficiently close connection to the Share Sale Agreement because a sufficient part of the factual allegations underlying the claim related to the contract.

Issue 2: Whether a claim under s 216 of the CoA was arbitrable

Although s 6(2) of the IAA mandated that the proceedings be stayed in favour of arbitration, the Court noted that a stay cannot be granted for a non-arbitrable claim. After an extensive survey of the law in this area in England, Australia and

Canada, and Singapore's approach to arbitrability of statutory claims, the Court concluded that:

(a) A minority oppression claim may or may not be arbitrable, depending on all the facts and circumstances of the case. The remedy or relief asked for should not assume overriding importance as that would enable litigants to manipulate the process and evade otherwise binding obligations to refer their disputes to arbitration.

(b) Many if not most of the minority oppression claims would be non-arbitrable. This would often be in cases where, eg, there were other shareholders who were not parties to the arbitration, or the arbitral award would directly affect third parties or the general public, or some claims fell within the scope of the arbitration clause and some did not, or there were overtones of insolvency, or the remedy or relief that was sought was one that an arbitral tribunal was unable to make.

(c) Minority oppression claims may be more likely to be arbitrable where all the relevant parties (including third parties whose interests may be affected) were parties to the arbitration, and the remedy or relief sought was one that only affected the parties to the arbitration.

In the present case, the Court held that the plaintiff's minority oppression claim against the second defendant was non-arbitrable as there were relevant parties, including other shareholders, who were not parties to the arbitration, and the plaintiff had asked for remedies that the arbitral tribunal could not grant, including winding up.

The Court made a number of notable observations:

(a) Unlike an order for damages, which is essentially *inter partes* and can be granted by the arbitral tribunal pursuant to its power derived from the consent of the parties to the arbitration, there are some statute-based reliefs that would invariably affect third parties or the public at large such that they can only be granted by the courts in the exercise of their powers conferred upon them by the state. Examples include a judgment *in rem* against a vessel under the admiralty jurisdiction of the court and an order to wind up a company under the CoA.

(b) Specific to the remedies which may be granted in the context of minority oppression claims, the arbitral tribunal would not have the general power to vary any transaction or resolution under s 216(a) of the CoA, and that applied with even more force where third parties were involved, including shareholders who were not parties to the arbitration agreement. Absent any conferment of jurisdiction or power by the consent of the parties, or by the law of the seat or the governing law, an arbitral tribunal did not have the general power to order one shareholder-party to buy out the other shareholder-party on specific terms. Similar difficulties applied to an order regulating the future conduct of the affairs of the company or an order providing for a reduction in the company's capital after a compulsory buy-out.

(c) Section 12(5) of the IAA, which provided that the arbitral tribunal "may award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that Court", could not be construed as conferring upon arbitral tribunals the power to grant all statute-based remedies or reliefs available to the High Court. An arbitral tribunal clearly cannot exercise the coercive powers of the courts or make awards *in rem* or bind third parties who are not parties to the arbitration agreement.

(d) The Court considered four alternative approaches to the issue:

(i) The First Approach. The first alternative approach is to allow the arbitral tribunal to make all the necessary findings of fact and whether there has been unfair prejudice or commercial unfairness, and where the tribunal finds that there was oppression, then the oppressed minority shareholder can carry on with the minority oppression claim before the court and it is for the court to make the appropriate orders, including the winding up of the company. However, the Court noted that there was an inherent risk that the court might disagree with the arbitral tribunal on the findings of fact as to the nature, type and extent of the oppression, and on the appropriate order to remedy such oppression. This raised further questions as to whether the court would be entitled to ignore the finding of oppression or refuse to grant the remedy recommended by the arbitral tribunal, and the effect of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

(ii) The Second Approach. The second alternative approach is to allow all minority oppression claims to go for arbitration; if the arbitral tribunal is of the view that a winding up or buy-out order is appropriate, then the parties can go to court to obtain the necessary orders, but if not, the award takes effect in the normal way. In the former case, the court adopts the findings and remedies proposed by the arbitrator and merely proceeds to enforce the same by making the appropriate order. However, the Court noted that the same problems raised for the First Approach applied, and there might be other shareholders who were not bound by the arbitration agreement.

(iii) The Third Approach. The third approach relates to a situation where only some shareholders are bound by the arbitration agreement. In such a case, the court should allow those shareholders bound by an arbitration agreement to proceed to arbitration and stay all the proceedings in relation to those shareholders not bound by the arbitration agreement until the award is made. However, the Court noted that the court may come to a different conclusion from the arbitral tribunal as to the finding of oppression or the recommended remedy because the arbitral tribunal may not be able to compel non-parties to give evidence as witnesses and state their case.

(iv) The Fourth Approach. The fourth approach is that all minority oppression claims are, as a matter of public policy, non-arbitrable. The Court found that the limitations of the powers of an arbitral tribunal to grant certain remedies militate towards this approach.

Significance of the case and comments

It is clear that where the substantive rights and liabilities of the parties under the contract with an arbitration clause are not invoked *per se* (in other words the claim is not one in breach of that contract), but are relied upon as the basis of a claim in statute (for instance, minority oppression in the present case), the claim can still fall within the scope of the arbitration clause.

Even if only some of the allegations forming the claim make reference to the provisions of the contract containing the arbitration clause, the entire claim must be treated as falling within the arbitration clause in the contract if a sufficient part of the factual allegations underlying the claim relates to the contract, then in accordance with the likely intention of parties. This is affirmation of the court's approach of looking at the substance of the claim by considering the factual allegations underlying the claim, rather than being fixated by whether the claim makes express references to the provisions of the contract. This approach should discourage parties from resisting arbitration by taking too pedantic a reading of the claim and the arbitration clause, and is hence consistent with Singapore's pro-arbitration stance.

The Court's preference not to state as a general rule that all minority oppression claims are non-arbitrable gives effect to party autonomy. However, linking the arbitrability of such claims to the remedy or relief sought may bring about difficulties. Even though the Court stated that the remedy or relief asked for should not assume overriding importance in determining whether a minority oppression claim is arbitrable, it indicated that a minority oppression claim was more likely to be arbitrable if the remedy or relief sought was one that only affected the parties to the arbitration. At the same time, the Court noted that because s 216(2) of the CoA provided that the order to be made in a minority oppression claim must be made with a view to bringing to an end or remedying the matters complained of, the nature and extent of the minority oppression would affect the type of remedy that the court may impose under s 216 of the CoA.

Determining that a minority oppression claim is arbitrable on the basis that the minority shareholder is only asking for remedies and reliefs which an arbitral tribunal is able to make may prejudice the majority shareholders as the remedy or relief granted by the arbitral tribunal may not be the most appropriate in the case. Therefore, unless all the shareholders are parties to the arbitration agreement and they agree to limit the remedies or reliefs to those which an arbitral tribunal is empowered to grant where minority oppression is found, the minority oppression claim should not be arbitrable.

The case is pending an appeal before the Court of Appeal this year. It remains to be seen if the apex court will endorse the High Court's approach or select one of the four alternative approaches outlined above.

The author acknowledges and thanks Lau Wen Jin for his contribution in the writing of this article

Arbitration

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COMPETITION COMMISSION'S GUIDELINES FOR ADMINISTRATIVE PENALTIES: FORESEEABILITY VERSUS TRANSPARENCY

By Ahmore Burger-Smidt, Director and Kriska-Leila Goolabjith, Associate

LEGAL BRIEF
MARCH 2015

There are various reasons as to why guidelines relating to the determination of administrative penalties are required. Werksmans Attorneys looks at the foreseeability and transparency of the Competition Commission's draft Guidelines for the Determination of Administrative Penalties.

INTRODUCTION

The growing need from the Competition Tribunal ("Tribunal"), the Competition Appeal Court ("CAC") and various stakeholders, for the Competition Commission ("Commission") to develop guidelines for determining administrative penalties has been recognised by the Commission. In response to this need, the Commission published its draft Guidelines for the Determination of Administrative Penalties for Prohibited Practices ("Guidelines") at the end of 2014 for public comment.

METHODOLOGY

In developing the Guidelines, the Commission conducted an evaluation and comparison of the guidelines and penal codes developed by other competition authorities, specifically the European Commission (**"EC"**) and the United Kingdom's Competition and Markets Authority. In addition, the Commission took into account the principles laid out by the Tribunal[1] (and endorsed by the CAC[2]) in its 6-step methodology.

The Guidelines present the general methodology that the Commission will follow in determining administrative penalties for purposes of concluding consent orders and settlement agreements and recommending an administrative penalty in a complaint referral before the Tribunal. Importantly the Guidelines will not prevent the Commission from exercising its discretion on a case-by-case basis.

The 6-step methodology proposed by the Commission is as follows –

> Step 1: determination of the affected turnover in the base year;

> Step 2: calculation of the base amount being that proportion of the affected turnover relied upon;

> Step 3: multiplying the amount obtained in step 2 by the duration of the contravention;

> Step 4: rounding off the figure obtained in step 3 if it exceeds the cap provided for by section 59(2)[3] of the Act;

> Step 5: considering factors that might mitigate and/or aggravate the amount reached in step 4, by way of a discount or premium expressed as a percentage of that amount that is either subtracted from or added to it; and

> Step 6: rounding off this amount if it exceeds the cap provided for in section 59(2)[4] of the Act.

1 *Competition Commission v. Aveng (Africa) Limited t/a Steeledale, Reinforcing Mesh Solutions (Pty) Ltd, Vulcania Reinforcing (Pty) Ltd and BRC Mesh Reinforcing (Pty) Ltd Case No.: 84/CR/Dec09*

2 *Reinforcing Mesh Solutions (Pty) Ltd and Vulcania Reinforcing (Pty) Ltd v. Competition Commission* 119 & 120/CAC/May2013

3 An administrative penalty may not exceed 10% of the firm's annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year.

4 An administrative penalty may not exceed 10% of the firm's annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year.

There are various opinions as to how foreseeable or predictable fines should be – these range from arguments that it is better to have more predictable fines, to a warning against the risk of too high a degree of predictability[5] . However, it is recognised that there will never be full predictability of the amounts of the penalties due to all the factors that are required to be taken into account when determining a penalty as well as the variety of cases. Without guidelines, the Commission may reach amounts that are chosen arbitrarily and at random. Therefore there must be a policy balance between the needs for transparency and objectivity and the need for the Commission to retain its discretionary power.

WHAT ARE THE AIMS OF ADMINISTRATIVE PENALTIES?

Simply stated, the main aims of administrative penalties are enforcement, punishment and both specific and general deterrence. Administrative penalties are the main way in which to remedy and deter violations of competition law.

As stated by the Commission, the primary objective of the Guidelines is to provide some measure of objectivity and transparency in the method of determining administrative penalties. It is therefore clear from this stated objective, that the aim of the guidelines to determine administrative penalties, is not for entities to be able to determine with predictability the amount of the fine they will pay if found to be in contravention of the Competition Act 89 of 1998 (**"Competition Act"**), but rather to be able to understand the method of calculation and that this method is transparent and objective.

WHY ARE GUIDELINES REQUIRED IN THE DETERMINATION OF ADMINISTRATIVE PENALTIES?

From a brief look at the historic development of Guidelines, as issued by competition authorities, it is apparent that there are various reasons as to why guidelines relating to the determination of administrative penalties are required. These reasons include a need for objectivity by an authority when imposing a fine. Transparency, certainty, consistency, coherency and fairness inform the application of competition law and any authority should strive to ensure these principles are applicable when determining a fine. It is in the interest of all parties concerned that both the authority as well as those that are fined, have clarity as to the method of calculation and more precise guidance on the method of calculation, all underpinned by rational calculations. Such approach will inform equal treatment, impartial decisions and indeed have a sufficient deterrent effect.

Only the future will tell whether this will indeed be achieved in South Africa.

5 Wouter P.J.Wils, The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis, Public Lecture, King's College London, Centre of European Law, 15 February 2007 at page 12

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February, 2015

FSC Issued a Ruling for Domestic Banks Extending Credit to Their Foreign Subsidiary Banks

02/25/2015

Benjamin K. J. Li/ Jeep Chen

Under Articles 32 and 33 of the Banking Act and Article 44 of the Financial Holding Company Act, when extending credit to its related parties, the bank shall comply with the following:

1. Article 32 of the Banking Act: No unsecured credit shall be extended by a bank to enterprises in which the bank holds three percent (3%) or more of the total paid-in capital of said enterprises, to its own responsible person, to its staff members, to its major shareholders or to any interested party of its own responsible person or of a staff member in charge of credit extensions.

2. Article 33 of the Banking Act: For any secured credit extended by a bank to enterprises in which the bank holds five percent (5%) or more of the total paid-in capital of said enterprises, to its own responsible person, to its staff members, to its major shareholders or to any interested parties of its own responsible person or of a staff member in charge of credit extensions, the terms of such extended credit shall not be more favorable than those terms offered to other same category customers. If the credit amount to be extended by a bank exceeds the amount prescribed by the competent authority, the bank needs the concurrence of at least three-quarters of all of such bank's directors present at a meeting attended by at least two-thirds of the directors, to extend such credit.

3. Article 44 of the Financial Holding Company Act: The subsidiary bank of a financial holding company shall not extend unsecured credit to the following persons, and Article 33 of the Banking Act shall apply mutates mutandis to secured credit extension to such persons: (1) a responsible person or major shareholder of the financial holding company; (2) an enterprise solely invested in by or a partnership invested in by a responsible person or major shareholder of the financial holding company or an organization in which such responsible person or major shareholders concurrently acts as the responsible person or representative; (3) a company in which more than one half of the directors concurrently act as the directors of the financial holding company or its subsidiary; or (4) the financial holding company's subsidiary and the responsible persons and major shareholders of such subsidiary.

According to Article 4 of the Enforcement Rules of the Banking Act, the "enterprises" as referred to in Articles 32 and 33 of the Banking Act shall not include foreign financial institutions invested by a bank with the approval of the competent authority and which are wholly owned by such bank or in which such bank owns more than fifty percent (50%) of the shares. Comparing to the Banking Act, there are no similar regulations under the Financial Holding Company Act. In practice, financial institutions (domestic and foreign financial institutions within the same financial holding group) often need to seek intercompany/intra-group loans. This is where the question arose whether Articles 32 and 33 of the Banking Act and Article 44 of the Financial Holding Company Act shall apply.

The Financial Supervisory Commission (FSC) issued a ruling for clarification pertaining to the Banking Act and the Financial Holding Company Act on Nov 20, 2014:

1. The foreign financial institutions invested by a bank with the approval of the competent authority and which are wholly owned by such bank or in which such bank owns more than fifty percent (50%) of the shares referred to in Article 4 of the Enforcement Rules of the Banking Act mean the foreign subsidiary banks incorporated with the approval of the relevant foreign financial authorities.

2. A subsidiary bank of a financial holding company is exempted from Article 44 of the Financial Holding Company Act, when it extends credit (including interbank overdrafts) to its foreign subsidiary banks incorporated with the approval of the relevant foreign financial authorities in which such bank owns more than fifty percent (50%) of the shares.

Based on the aforementioned FSC ruling, a foreign subsidiary bank of a domestic bank (whether or not it is a subsidiary bank of the financial holding company) which is incorporated with the approval of the foreign financial authorities is exempted from Articles 32 and 33 of the Banking Act and Article 44 of the Financial Holding Company Act, when it comes to credit extension between such domestic bank and such foreign subsidiary bank.

Tilleke & Gibbins
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Informed Counsel
Analysis of Recent Legal Developments in Southeast Asia

contents

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

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

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

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

Copyright Infringement Exception under the First-Sale Doctrine

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

Exception for Temporary Reproduction in Computer Systems

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

Preliminary Injunctive Relief for Copyright Infringement on Computer Systems

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

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Thailand's New Copyright Law (from page 1)

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

Protection of Performer's Moral Rights

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

Protection of Rights Management Information

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

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

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

Protection of Technological Protection Measures

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

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

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

Punitive Damages

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

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

Seizure and Destruction of Counterfeit Goods

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

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

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ANTITRUST UPDATE - MARCH 13, 2015

"Are You Talking to Me?" Antitrust Risks and Guidelines for Earnings Calls and Investor Presentations

Uncertainty is a fact of life for business executives, especially when they are faced with macro-economic events such as the recent sharp decline in oil prices. In such circumstances, executives must make hard decisions regarding pricing and output, amid speculation about what their competitors will do. ("Should our company cut back on production, or should it push ahead in order to gain market share? Should our company suspend introduction of new products until the backlog of unsold products clears, and if we do, won't competitors steal a march on us?")

Invitations to Conspire

The vast majority of executives know that antitrust law forbids them from reducing uncertainty by reaching agreements with competitors on prices, production levels, customers or territories. Moreover, because the existence of an unlawful conspiracy may be inferred from circumstantial evidence, executives are counselled not to communicate on these topics with their peers at competing companies. But this advice is not always heeded: as if to confirm the adage that a bit of knowledge can be dangerous, executives sometimes seize on lawyers' advice that violations of Section 1 of the Sherman Act require an agreement—what the U.S. Supreme Court has referred to as a "conscious commitment to a common scheme designed to achieve an unlawful objective"[1]— and assume that communications with competitors falling short of an agreement do not pose antitrust risk. This is mistaken; federal as well as state antitrust and unfair competition laws reach *attempts* to conspire, with the Federal Trade Commission being particularly aggressive in wielding Section 5 of the FTC Act, which broadly prohibits "unfair methods of competition," against unaccepted invitations to conspire.

Thus, in a recent matter involving three internet resellers of barcodes,[2] the owner of one of the companies importuned the other two, in a series of emails, to raise prices.[3] One of the two competitors responded by encouraging a continuing "dialog," and opined (incorrectly) that an agreement "for one of us to raise prices and then have the others follow" would not constitute illegal price fixing.[4] In the event, the discussed price increases did not come about; nevertheless, the FTC's subsequent complaint challenged the invitation to collude as an unfair method of competition in violation of Section 5 of the FTC

Act. The government's complaint was settled with a consent order.

The FTC Act is not the only statute potentially applicable to invitations to conspire. In the well-known *American Airlines* case, the U.S. Department of Justice brought a claim of attempted monopolization, under Section 2 of the Sherman Act, after American's then-CEO was recorded suggesting that another airline's CEO raise his company's fares.[5]

The Special Problem of Earnings Calls and Investor Presentations

Also mistaken is the view that antitrust is concerned only with private or secret communications, and that statements made openly on earnings calls or in presentations at investor conferences fall within some kind of "safe harbor." On the contrary, the antitrust agencies, as well as plaintiffs' lawyers, pay close attention to companies' public statements and in recent years have been quick to pounce on statements that could suggest an invitation to conspire, if not a completed agreement.

Thus, in the *Valassis* matter,[6] the FTC charged a seller of newspaper advertising inserts with soliciting its sole competitor, through statements on earnings calls, to agree to raise prices and allocate customers. According to the FTC complaint, Valassis and News America were locked in a fierce price war. Knowing that News America listened to its earnings calls, Valassis told the analysts it would: abandon its goal of increasing market share; price at whatever level was necessary to maintain its current share; and observe higher pre-price war rates in its bids to current News America customers. Valassis' executive added that his company would monitor the marketplace for "concrete evidence" of News America's "reciprocity," and would revert to its previous price-cutting strategy if News America continued to pursue Valassis' customers. In its complaint the FTC acknowledged that companies "have many obvious and important reasons for discussing business strategies and financial results with shareholders, securities analysts, and others," but said Valassis' statements "went far beyond a legitimate business disclosure and presented substantial danger of competitive harm." According to the FTC, the information Valassis disclosed was not needed by the securities community and would not have been disclosed by Valassis except to convey an offer to News America.

Comments on earnings calls were also at the heart of the FTC's more recent complaint against U-Haul.[7] As in *Valassis*, U-Haul and a competitor, Budget, were engaged in robust price competition. Internal U-Haul documents discussed a strategy to convince Budget to raise prices through a two-prong approach: direct contacts with local Budget managers, and earnings calls. On one such call, U-Haul's CEO said "we're very, very much trying to function [as] a price leader and not give away share." The executive also made clear that he was monitoring Budget's earnings calls in the hope that Budget would continue to hold the line on prices. The FTC's complaint alleged that "U-Haul acted with the specific intent to facilitate collusion and to achieve market power" and that "[e]ach and all of U-Haul's invitations to collude, if accepted by Budget, would likely result in higher one-way truck rental rates and reduced output."

Earnings calls can also provide fodder for private antitrust suits. For example, in *In re Delta/AirTran Baggage Fee Antitrust Litigation*,[8] a federal district court denied a motion to dismiss Sherman Act claims that were based in part on comments by two airlines' executives on earnings calls and at an industry conference. The calls occurred during a time of rising fuel prices. AirTran led off by saying that the industry needed to reduce capacity and that it was suspending a previously announced plan to increase its capacity by 10 percent. AirTran's CEO went on to note that carriers could "change the revenue environment" by "push[ing] up average fares" as excess capacity was cut.[9] In a

Delta earnings call the following day, which AirTran monitored, Delta stated that it could not achieve meaningful capacity cuts on its own and would watch competitors' actions. Delta further stated that in its view the increased price of fuel necessitated a 10 percent reduction in capacity.[10] In comments at a subsequent industry conference, Delta's CFO said his company would take "a pause" in its capacity reductions while it "watched" its competitors' reactions.[11] Denying the airlines' motion to dismiss, the district court held that the complaint alleged sufficient facts to show a conspiracy, in the form of public statements combined with "plus" factors suggesting agreement. The court said that reducing capacity unilaterally, without agreement, would have been contrary to each airline's independent self-interest. This, when combined with the CEOs' public statements and their companies' subsequent parallel conduct, was sufficient to set forth a plausible price-fixing conspiracy claim.

Guidelines For Earnings Calls and Investor Presentations

Earnings calls and investor presentations must be carefully scripted. Message discipline is critical; executives should be advised on how to handle Q&A sessions and panel discussions at industry events. The following "do's and don'ts" are offered to assist in this preparation.

Do

- ***Remember the purpose of the call or presentation*** – It is appropriate for the company to provide information that is material to investors and potential investors, even if that information might also be of interest to competitors. Ask yourself whether the information the company intends to disclose serves an appropriate purpose.
- ***Understand the risk –*** From an antitrust perspective, statements about *future* business plans, including statements regarding product or region-specific pricing or changes in output, carry the most risk. Antitrust risk is reduced where information about prices, costs or capacity is general, highly aggregated, and historical in nature.
- ***Focus on your company –*** Executives should focus on those business conditions (*e.g.*, demand, costs, lead times) facing the company, and should avoid speaking about the industry as a whole – *e.g.*, "the industry will not improve until …"
- ***Treat Q&As with particular care –*** Statements made in response to questions from investors or analysts carry the same evidentiary weight as formal, planned comments. Executives must be careful when making unplanned, off-the-cuff remarks regarding the future of the company, its competitors and customers.

Do Not

- ***Overshare –*** Avoid disclosing specific pricing or capacity information. Where discussion of either is necessary, all product and geographic information provided should be aggregated to the highest level possible. Margin and other "profit-related" information also should be aggregated across product lines, where possible.
- ***Suggest business strategy depends on competitors following your company's lead –*** Do not announce or discuss business strategies that are conditioned upon the actions of the company's competitors or the industry as a whole. Such announcements may be seen as attempts to "signal" other players in the market about the company's own intentions.
- ***Speculate about the future behavior of others –*** Executives should

not address what the company's competitors "should" or "could" do going forward. Statements regarding the likely behavior of third parties could suggest a desire on the part of the company to improperly influence competitors.

- ***Provide information about specific geographies or markets –*** Do not discuss plans to move equipment in or out of specific areas (e.g., "if prices in the X do not improve, we're leaving"). General discussion about introducing new products or moving equipment or productive capacity from the U.S. to other countries (or vice versa) is less sensitive.
- ***Mention specific competitors by name –*** When discussing product or regional specific pricing, margins or capacity, executives should not mention competitors by name – *e.g.*, "Company X is pricing very aggressively." More general discussion – *e.g.*, "we had a good quarter competing against X" – is less sensitive.
- ***Take ownership of "the industry" –*** The company should not, even if pressed to do so by analysts, purport to speak for the "industry" or "market." If asked to address industry conditions as a whole, do not make statements that call for specific behaviors from industry players (*e.g.*, the need for price or capacity "discipline"). The company should also avoid statements or implications that it is "leading".

Finally, in case of doubt about a contemplated statement, ask: "Who is the intended audience for this statement, and what is the company's purpose in saying this?" If the answer is that the statement is aimed at competitors, and the purpose is to send them a message about the company's intentions (or theirs), reconsider the wisdom of the proposed comments.

1 *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984).
2 *Jacob J. Alifraghis d/b/a InstantUPCCodes.com*, 79 Fed. Reg. 44030 (FTC July 29, 2014) (proposed consent and aid to public comment.)
3 *InstantUPCCodes.com*, FTC Dkt. No. C-4483 (Aug. 20, 2014) (complaint).
4*Id.*
5*United States v. American Airlines*, 743 F.2d 1114 (5th Cir. 1984); *see also Liu v. Amerco*, 677 F.3d 489 (1st Cir. 2012) (holding that § 1 of Sherman Act does not prohibit solicitations to conspire, but remanding to consider alleged violation of state unfair competition law).
6*Valassis Commc'ns*, 71 Fed. Reg. 13,976 (FTC Mar. 20, 2006) (proposed consent and aid to public comment), 2006 LEXIS 26 (F.T.C. 2006) (decision and order).
7*U'Haul Int'l, Inc.*, 75 Fed. Reg. 35,033 (FTC June 21, 2010) (proposed consent and aid to public comment), 2010 FTC LEXIS 61 (F.T.C. 2010) (decision and order).
8*In re Delta/AirTran Baggage Fee Antitrust Litig.*, 733 F. Supp. 2d 1348 (N.D. Ga. 2010).
9*Id.* at 1353.
10*Id.*
11*Id.*

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Court Finds Misappropriation Claims Arising From Licensing of Copyrighted Photographs Are Preempted

03.10.15

By Kelli L. Sager, Karen A. Henry, and Diana Palacios

Judge André Birotte Jr. of the U.S. District Court for the Central District of California has dismissed a lawsuit brought by former college athletes alleging that the licensing of copyrighted photographs from their NCAA playing days violated their rights of publicity. *Maloney v. T3Media, Inc.*, CV14-5048-AB (VBKx) (C.D. Cal. Mar. 6, 2015), Dkt. No. 77 (Minute Order).

Plaintiffs Patrick Maloney and Tim Judge, both of whom played on the Catholic University men's basketball team when it won the NCAA Championship in 2001, brought the putative class action, claiming that the licensing of copyrighted photographs from NCAA championship games violated their publicity rights. Defendant T3Media, Inc. ("T3Media") operated an NCAA-sanctioned website through which members of the public could view and purchase non-exclusive licenses to the copyrighted photographs. The court dismissed the claims with prejudice, concluding that the plaintiffs' right of publicity and unfair competition claims—which arose solely from the display, reproduction and distribution of photographs—were preempted by the Copyright Act.

T3Media provides digital hosting and licensing services for a wide variety of content, including news coverage, motion pictures, and photographs and footage of sports events, among other things. Through agreements with the copyright owners, T3Media displays and licenses copyrighted works to third parties, using an online distribution network.

In January 2012, T3Media entered into an agreement with the NCAA to store, host, and license a collection of photographs for which the NCAA owns or controls the copyright (the "NCAA Photo Library"). The collection includes thousands of photographs that visually chronicle more than 70 years of NCAA sports history, focusing on championship games involving almost two dozen sports.

From approximately Jan. 1, 2013 to Aug. 1, 2014, T3Media operated a website,
Paya.com, through which members of the public could view digital samples of photographs in the NCAA Photo Library and obtain non-exclusive copyright licenses that permitted them to download a copy of a photograph for their own personal use. Prospective licensees interested in using photographs for any other use—including advertising—had to obtain any necessary rights from the individuals depicted.

The plaintiffs filed a lawsuit in federal court in Los Angeles on June 27, 2014 (which was subsequently amended), claiming that T3Media's display, reproduction, and license of these photographs violated their common law and statutory rights of publicity and constituted unfair competition under California Business & Professions Code § 17200. The plaintiffs also purported to represent a class consisting of "[a]ny current or former NCAA student-athlete who appears in a photograph that is or was publically available on Paya.com or whose name is or was used on Paya.com."

T3Media filed a Special Motion to Strike under California's anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16, asking that the entire case be dismissed with prejudice, arguing, among other things, that the claims were preempted by federal copyright law. The court agreed, and granted the SLAPP motion, dismissing the case in its entirety with prejudice.

As an initial matter, the court found that T3Media made the threshold showing that plaintiffs' FAC was subject to a SLAPP motion, because each of the claims alleged in the FAC arose from the content of a publicly-accessible website, which is a public forum, and because the photographs at issue concerned a matter of public interest. Because T3Media had satisfied its initial burden under the SLAPP statute, the burden shifted to the plaintiffs under the SLAPP statute to demonstrate a probability of prevailing on each of their claims.

The court held that the plaintiffs could not meet their burden under the applicable two-part preemption analysis.

First, the court found that the photographs fell squarely within the subject matter of copyright, rejecting the argument advanced by the plaintiffs that the claims arose from the "depiction" of their likenesses, rather than from copyrighted photographs. The plaintiffs relied primarily on the 9th Circuit's decision in *Downing v. Abercrombie & Fitch*, 265 F.3d 994 (9th Cir. 2001), which allowed a misappropriation claim that arose from a catalogue that included photographs of the plaintiffs. In *Downing*, the 9th Circuit found that the claim was not preempted, stating that "[a] person's name or likeness is not a work of authorship within the meaning of [the Act] …notwithstanding the fact that [Plaintiffs'] names and likenesses are embodied in a copyrightable photograph." The district court found the case inapplicable, however, noting that the *Downing* court had evaluated the use of photographs in an advertising campaign, not simply the licensing of copyrighted photographs in which the plaintiffs were depicted.

In contrast, the plaintiffs in *Maloney* "d[id] not allege (or offer prima facie evidence to suggest) [T3Media] used their likenesses for any purpose beyond the four corners of the copyrighted photographs themselves." For this reason, the court concluded that the plaintiffs' claims fell within the subject matter of copyright, just like the claims in cases like *Laws v. Sony Music Entm't, Inc.*, 448 F.3d 1134 (9th Cir. 2006), *Fleet v. CBS, Inc.*, 50 Cal. App. 4th 1911 (1996), and *Dryer v. Nat'l Football League*, 2014 WL 5106738 (D. Minn. Oct. 10, 2014).

Second, the court found that the plaintiffs' claims sought to vindicate rights equivalent to those protected under copyright law. The plaintiffs did not dispute that they sought to control the publication and sale of photographs, and the court made clear that this was sufficient to satisfy the second prong of the preemption analysis: "Plaintiffs have not identified a use of their names or likenesses independent of the display, reproduction, and distribution of the copyrighted images in which they are depicted." Absent this "extra element," the court held, "the rights plaintiffs are asserting under state law are equivalent to the exclusive rights contained in section 106 of the Copyright Act[,]" and plaintiffs' right of publicity claims (and their duplicative unfair competition claim) were preempted.

The court noted that plaintiffs already had amended their initial complaint, and because further amendment would be "futile," dismissed plaintiffs' claims with prejudice. The court also denied plaintiffs' request for discovery, noting that none of the topics of discovery that were identified bore on the issue of copyright preemption. Because "further discovery and amendment would be futile and inconsistent with California's substantive interest in providing 'a quick, inexpensive method of dismissing SLAPP suits[,]'" dismissal with prejudice was warranted.

The court did not reach the other defenses raised by T3Media in its SLAPP motion, including defenses arising from the First Amendment to the United States Constitution and state law.

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Energy Alert

New Decision on Clean Air Act Aggregation in the Upstream Oil and Gas Sector: Game-Changer or More of the Same?

The U.S. Court of Appeals for the Sixth Circuit and the D.C. Circuit recently offered some regulatory relief to oil and gas operators under the Clean Air Act (CAA) with respect to aggregating sources for the purposes of CAA permitting. On February 23, 2015, the District Court for the Middle District of Pennsylvania issued an opinion that, consistent with the Sixth Circuit and D.C. Circuit opinions, held certain oil and gas operations should not be aggregated, while indicating that the question of interrelatedness (a concept rejected by the Sixth Circuit) could be appropriate in determining the scope of a stationary source.

Historically, EPA and certain states have directed companies to aggregate emissions from sources dispersed over multiple square miles of operation for purposes of permitting under the CAA. Specifically, EPA's regulations require treatment of sources as a single stationary source when facilities are (1) under common control; (2) belong to the same industrial group (e.g., oil and gas production); and (3) "are located on one or more contiguous or adjacent properties." In 2012, the Sixth Circuit issued a seminal decision in *Summit Petroleum v. EPA (Summit Petroleum)* holding that EPA should only determine whether sources are "contiguous" or "adjacent" based on physical proximity and not based on functional interrelatedness. Following the *Summit Petroleum* decision, EPA issued the *Summit* Directive to all EPA Regional Offices. The *Summit* Directive declared EPA's intent to apply the *Summit Petroleum* decision in all states within the Sixth Circuit only, and apply its "longstanding practice of considering interrelatedness" in all other jurisdictions.

In 2014, an association of resource extraction and manufacturing companies petitioned the United States Court of Appeals for the District of Columbia for review of the *Summit* Directive. In *National Environmental Development Association v. EPA (NEDA)*

—a decision that applies nationwide—the D.C. Circuit vacated the *Summit* Directive on the basis that it plainly violated EPA's "Regional Consistency" regulations by applying different and more stringent tests in different jurisdictions. Thus, in the wake of *NEDA* and *Summit Petroleum*, it would be unlawful for EPA or states to use the "functionally interdependent" test to determine whether equipment and facilities are "adjacent" or "contiguous" for purposes of CAA stationary source permitting determinations. Notwithstanding what appeared to be clear decisions from both the Sixth and D.C. Circuits, the Middle District for the District of Pennsylvania left open the potential for using the functional interdependency test in determining the scope of a stationary source.

At issue in *Pennsylvania's Future v. Ultra Resources, Inc. (PennFuture)* was whether Ultra Resources, Inc.'s (Ultra) eight compressor stations within an approximately five-square-mile area each constituted a separate facility or should have been aggregated as a single facility for air permitting purposes. While none of Ultra's compressor stations individually had the potential to emit more than 100 tons per year (tpy) of oxides of nitrogen (NO_x), collectively, the eight stations had potential to emit over 100 tpy of NO_x. The Pennsylvania Department of Environmental Protection (PADEP) issued Ultra a general permit for each of the eight compressor stations as individual NOx emitting facilities, rather than aggregating the facilities. Citizens for Pennsylvania's Future (Citizens) filed suit, arguing that the compressor stations should have been aggregated because the compressor stations were both physically proximate and functionally interrelated, and should thus have been subject to major source permitting.

Importantly, following the Sixth Circuit's *Summit Petroleum* decision in 2012 (but pre-dating the D.C. Circuit's *NEDA* decision in 2014), PADEP issued final guidance (PADEP Guidance) for determining when sources should be considered "contiguous or adjacent." While the PADEP Guidance specifically states that "the plain meaning of the terms 'contiguous' and 'adjacent' should be the dispositive factor when determining whether stationary sources are located on contiguous or adjacent properties," the PADEP Guidance also states that "interdependence may be considered when conducting a single source determination." Following this guidance, in *PennFuture*, the Middle District of Pennsylvania upheld the PADEP's issuance of general permits to each of the eight compressor stations, but in so doing, departed from the Circuit Court's precedent analysis.

The District Court declared that in certain circumstances, it would be appropriate for a regulatory agency to also apply the functional interrelatedness test:

> We agree with the majority in *Summit Petroleum* that the plain meaning of 'contiguous' and 'adjacent', when applied, should normally operate to allow a determination as to whether stationary sources should be aggregated. However, we recognize that to strictly limit that determination so as to never consider functional interrelatedness would run afoul of PADEP's Guidance and could very likely lead to the anomalous situation wherein emitting sources which are clearly functionally related are able to avoid the more stringent standards applicable to

'major' sources under the CAA and state law because of a wooden and inflexible definition of adjacency.

Ultimately, the Middle District of Pennsylvania found that Ultra's compressor stations were neither physically proximate nor functionally interrelated so as to require aggregation, raising the question of whether this discussion of interrelatedness is dicta.

Despite the clear parameters laid out in *Summit Petroleum* and *NEDA*, the federal district court in *PennFuture* cited to language in a state guidance document to retain the notion that functional interrelatedness might be an appropriate evaluation for determining whether sources are "contiguous" or "adjacent," particularly in circumstances where the sources are attempting to avoid a more stringent permitting regime. It is doubtful that this decision would provide EPA ammunition to enforce aggregation based on interrelatedness because the D.C. Circuit's judgment in *NEDA* prohibits the Agency from departing from the *Summit Petroleum* test of physical adjacency, at least until EPA attempts to amend its regulations to address *NEDA*.

The question is whether states and environmental groups could continue to push for functional interrelatedness in assessing aggregation. While Section 116 of the CCA preserves, under certain circumstances, state authority to impose more stringent emissions requirements, 42 U.S.C. § 7416, several states have enacted laws that prohibit state and local environmental laws from being more stringent than federal law requires. Thus, assessing the risk for any particular project requires careful consideration of applicable state permitting law, among other things. Environmental groups may continue to file aggregation citizen suits, citing to the language in *PennFuture* to muddy the waters on whether functional interrelatedness survives as an independent test of aggregation. But the clear judicial trend is to adopt physical adjacency as the aggregation test and to find that geographically dispersed upstream oil and gas wells, compressor stations, and other facilities are separate emissions sources. Nothing in *PennFuture* indicates that trend will change anytime soon.

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