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

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Hosted by SyCip Salazar Hernandez & Gatmaitan
September 24 - 27, 2016

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MEMBER DEALS MAKING NEWS

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BAKER BOTTS OPENS SAN FRANCISCO OFFICE, APPOINTS NEW PARTNER-IN-CHARGE; ENHANCES GLOBAL SERVICES

SAN FRANCISCO - 29 October 2015: Baker Botts L.L.P., a leading international law firm, today announced that it is opening an office in San Francisco.

This new office will enhance the global reach of the firm's market leading practices and will be located at 101 California St. in the city's Financial District.

Patricia Stanton, Chair of the firm's Real Estate practice, who currently serves as the Partner-in-Charge of the firm's Dallas office, will assume the role as Partner-in-Charge of the San Francisco office.

"Opening a San Francisco office builds upon our robust growth in Palo Alto and allows us to expand the work we are already performing for our clients in California," said Andrew M. Baker, Managing Partner of Baker Botts.

"We are thrilled that Pat Stanton will be assuming the leadership of the new San Francisco office. Pat is a seasoned and experienced real estate lawyer, and over the past three years she has done an outstanding job leading our Dallas office. She is the ideal choice to lead our new San Francisco office," added Mr. Baker.

"San Francisco traditionally has been viewed as the region's financial and cultural center, as well as a gateway to Asia, but increasingly it has become a destination for both established and start-up technology companies. Adding an office in San Francisco is a natural strategic development for the firm given the depth and breadth of our practices in the technology sector," added Mr. Baker.

"This is a unique opportunity and one I am thrilled to accept," said Pat Stanton. "Baker Botts has worked hard to establish and grow a significant California presence. Our new San Francisco office will draw upon our reputation for outstanding client service and firm-wide expertise in areas such as technology, corporate, patent litigation, real estate, life sciences, energy and white collar to add significant value for our clients," added Ms. Stanton.

This will mark the second California office for Baker Botts. The Palo Alto office, which the firm opened in 2008, has since grown to over 30 lawyers.

The firm anticipates growing the San Francisco office and its practice capabilities quickly to meet client demand and take advantage of growth opportunities.

The San Francisco and Palo Alto offices will be highly integrated.

"Our clients, well-established in the Silicon Valley or with major interests in the Bay Area, continue to fuel our growth since opening our office in Palo Alto seven years ago," said John Martin, the Partner-in-Charge of the Palo Alto office.

"As our clients increasingly demand support in the region, we will add strategic resources to ensure we maintain our high level of professional excellence and client service that has been a hallmark of Baker Botts for 175 years," added Mr. Martin.

In addition to Ms. Stanton, a number of experienced Baker Botts partners resident in the Palo Alto office will also spend significant time serving clients out of the San Francisco office, including partners Bryant (B.C.) Boren (IP litigation); Kevin Sadler (trial); Eliot Williams (IP litigation and counseling) and Brian Lee (corporate).

The firm also announced that Jeremy Taylor joined the firm as special counsel to be resident in the San Francisco office. Mr. Taylor is recognized for his experience in intellectual property litigation and counseling. He joins the firm from Kirkland & Ellis, L.L.P., where he was a partner.

"Baker Botts has a well-earned reputation as a leader in patent prosecution and litigation, and California and Texas are two of the most active regions. Continuing our growth in Palo Alto and establishing a strong San Francisco presence demonstrates Baker Botts' commitment to being a world-class technology law firm," said Bart Showalter, Chair of the firm's Intellectual Property Practice.

Replacing Pat Stanton as the Partner-in-Charge of the Dallas office will be Tim Durst, the head of the firm's Dallas Litigation practice.

For more information, please visit www.bakerbotts.com

CLAYTON UTZ PARTNER APPOINTMENTS

SYDNEY - 16 October 2015: Leading Australian law firm Clayton Utz is proud to announce the following partner appointments, effective 1 January 2016.

Lina Fischer,
Major Projects & Construction, Sydney

Lina joined Clayton Utz in 2002 and settled in the Major Projects & Construction team in 2005. She has over 10 years' experience as a specialist front-end construction and infrastructure projects lawyer, acting for both government and private sector clients. Lina has acted on many of Australia's most significant infrastructure projects across a variety of industry sectors. She has strong skills in traditional construction contracts and a deep understanding of the full range of project delivery models. Her appointment will strategically support Clayton Utz' market-leading national PPP and construction practice, as well as the demand for construction contract expertise across the Firm.

Cain Sibley,
Public Sector, Canberra

Cain joined the Clayton Utz Public Sector practice from a Commonwealth agency in 2011, where he was general counsel. Cain's expertise is in public law (both advisory and litigation) and his experience working for government supports clients with navigating difficult legal, political and reputational risks. He has acted in some of the most high profile and sensitive judicial review matters in recent times. Cain also advises on information law issues and privacy issues associated with health and service delivery projects. Cain's appointment gives added depth and capacity to the Canberra practice and reflects Clayton Utz' focus on continuing to be the leading private sector provider of legal services to government.

Peter Staciwa
Banking & Financial Services, Sydney

Peter joined the Clayton Utz Project Finance team in 2012. With over 13 years' domestic and international top tier finance and projects experience, Peter's elevation emphasises the Firm's growing ability to advise the private sector, acting for both sponsors and banks in significant infrastructure, energy and resources transactions. Peter will also support the expansion of the Firm's traditional government side infrastructure capabilities, with his focus on the development and implementation of innovative infrastructure financing techniques and structures.

CLAYTON PARTNER APPOINTMENTS ...CONT'D

Lucy Terracall
Insurance, Melbourne

Lucy has practised in the Insurance team at Clayton Utz since 2007. With over 10 years' experience in insurance law and significant experience in insurance regulation and compliance, Lucy is uniquely placed to litigate and advise on a broad range of insurance and reinsurance related matters. Lucy's proven relationships with existing clients, her reputation outside Clayton Utz and her existing networks place her in an optimal position to continue to build the national Insurance practice and reinforce the Firm's market leading insurance capability.

Tim Webb
IP & Technology, Sydney

Tim joined Clayton Utz in 2003. His practice focuses on complex commercial litigation and dispute resolution, particularly for clients in the technology, media and telecommunications (TMT) sectors, and assisting clients with intellectual property law in both contentious and non-contentious matters. Tim practices across the spectrum of intellectual property issues, including copyright, trademarks, patents, advertising, breach of confidence, domain names and anti-counterfeiting. Tim also has significant experience assisting public sector clients on both dispute resolution and intellectual property matters.

Clayton Utz Chief Executive Partner Rob Cutler said the appointments reflected the Firm's client service focus. "Our new partners are talented lawyers, client focused and collaborative team players. They know what it takes to deliver exceptional client service." said Mr Cutler. "They are among our next generation of leaders and I congratulate them on their appointments."

For additional information visit www.claytonutz.com

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DAVIS WRIGHT TREMAINE ADDS REGULATORY COUNSEL

OCTOBER 26, 2015: Thomas Scanlon, most recently senior counsel at the Department of the Treasury and formerly counsel at the Board of Governors of the Federal Reserve System, has joined the financial services and payments practice groups at Davis Wright Tremaine LLP as counsel.

For more than 15 years, in both private practice and public service, Scanlon has advised clients on transactions and compliance matters relating to financial services regulation, particularly involving consumer financial products or services.

“Since Tom’s arrival in Washington in 1999, he’s been—in both private practice and public service—at the heart of enormous changes to the rules and laws affecting financial products and services,” said Claude Goetz, chair of the financial services practice at Davis Wright Tremaine. “Those rules and laws, to name a few, include Regulation P, Title X of the Dodd-Frank Act, and most recently the new rule that implements the Military Lending Act. The expertise and relationships Tom has accumulated through these years of outstanding service will be of great value to our practice’s clients as they continue to develop products and services in an evolving regulatory landscape.”

“Financial products and services continue to develop in an environment marked by the varying needs of customers, innovative technologies, and the interests of regulators,” agreed Scanlon. “DWT represents some of the industry’s most nimble and dynamic players, and I’m honored to be in their company. The quality of lawyering from these practice groups is impressive, and I’m excited to work helping DWT clients better assess their challenges and achieve their goals, both in negotiating transactions and adapting their own operations.”

Scanlon served as the principal Treasury attorney who drafted Title X of the Dodd-Frank Act. During that legislative process, he was instrumental in the work to amend the standards for preemption of state consumer financial laws. Scanlon also advised Treasury officials on the regulation of retail payments, including matters relating to the CFPB’s proposal to regulate a prepaid account and the CFPB’s rule for remittance transfers. Most recently, Scanlon was integrally involved in the work of the Department of Defense on its rulemaking under the Military Lending Act.

Prior to serving the Treasury, Scanlon worked for Morrison & Foerster LLP, assisting banks, investment funds, and other clients with banking and payments transactions, services to regulated financial institutions, and compliance with data security and privacy laws. Earlier in his career, Scanlon served in the Board’s Legal Division, where he was instrumental in drafting rules and interpretations for the privacy and data security provisions of the Gramm-Leach-Bliley Act, the customer identification program requirements of the USA PATRIOT Act, and several sections of the Fair and Accurate Credit Transactions Act of 2003.

Scanlon served as a law clerk to United States District Judge W. Louis Sands, in the U.S. District Court for the Middle District of Georgia. Scanlon earned his B.A. and M.A. from the University of California, San Diego, and his J.D. from the University of California, Berkeley, School of Law.

For more information, visit www.dwt.com.

GOODSILL WELCOMES NEW ASSOCIATES

HONOLULU- 15 October, 2015: Lauren K. Chun and Ewan C. Rayner have joined Goodsill Anderson Quinn & Stifel as associates.

Lauren Chun centers her practice in litigation. While attending the University of California Los Angeles School of Law, she completed an externship at the Los Angeles District Attorney's Office, Major Crimes Division. Just prior to joining the Firm she clerked for the Honorable Katherine G. Leonard of the Hawai'i State Intermediate Court of Appeals.

Ewan Rayner concentrates his practice in the areas of litigation and environmental law. He is a graduate of the William S. Richardson School of Law at the University of Hawai'i and has served as law clerk to the Honorable Mark E. Recktenwald, Chief Justice of the Hawai'i Supreme Court. Ewan was also a former volunteer summer clerk with the Honorable Karen T. Nakasone of the First Circuit Court of Hawai'i.

For additional information visit www.goodsill.com

HOGAN LOVELLS GROWS COMMUNICATION PRACTICE IN D.C.

WASHINGTON - 09 November 2015: Hogan Lovells is pleased to announce that Thomas Sugrue has joined the firm's Washington, D.C. office as of counsel in the Communications Practice Group.

Prior to joining Hogan Lovells, Sugrue was Senior Vice President of Government Affairs at T-Mobile USA, where he directed T-Mobile's regulatory and legislative activities at both the federal and state levels. Previous to his work at T-Mobile, Sugrue served as head of the Federal Communications Commission's (FCC) Wireless Bureau for more than four years, and as Deputy Administrator of the National Telecommunications and Information Administration (NTIA) for six years. Sugrue earned his B.A. in physics and mathematics from Boston College, his Master's degree in Public Policy from the John F. Kennedy School of Government of Harvard University, and his J.D. from Harvard Law School.

For additional information visit www.hoganlovells.com

SIMPSON GRIERSON LAUNCHES HEALTH & SAFETY CONSULTANCY

AUCKLAND - October 18, 2015: Simpson Grierson has launched a health and safety consultancy with the recruitment of Terry Johnson as Director, Health & Safety Advisory Services. Terry's appointment complements Simpson Grierson existing legal services in this area.

Terry has more than 20 years' experience working on health and safety programmes for leading businesses in New Zealand and Australia, including Fonterra and Du Pont. His work at Simpson Grierson will focus on helping clients to develop and implement their health and safety strategies. This will include providing leadership and operational training, and advising on governance, reporting and audit processes.

"Health and safety is a critical issue for all organisations. I'm looking forward to helping clients make their processes robust and keep their people safe" says Terry. "I was attracted to Simpson Grierson because of its strong existing reputation as a legal adviser in this area."

"Health and safety consultancy is a natural area for Simpson Grierson to expand into" says Kevin Jaffe, the firm's Chairman. "With the impending legislative changes in this area, we are seeing strong demand from our clients for a broader service offering. The move is also consistent with our strategy of introducing new service lines beyond our traditional legal offering."

For additional information visit www.simpsongrierson.com

ALLENDE & BREA

ASSISTS OLIN IN DOW SPIN OFF OF US$2.6 BILLION GLOBAL TRANSACTION

BUENOS AIRES - 30 October 2015: US chemical company Dow spun off its chlorine business and merged it with Missouri-based counterpart Olin, in the Argentine leg of a US$4.6 billion global transaction.

Cravath, Swaine & Moore LLP in New York and Allende & Brea Abogados in Buenos Aires represented Olin in the transaction, which was approved by Argentina's National Registry of Chemical Precursors on 21 October.

The deal saw Dow spin off its chlorine businesses into a separate entity, which was acquired by Olin. The newly created company then issued shares worth 50.5 per cent of its net value to Dow's shareholders, thereby creating a joint-venture entity controlled by Dow.

Counsel to Olin Corporation; Cravath, Swaine & Moore LLP; Allende & Brea Abogados Partners Valeriano Guevara Lynch and Nicolás Grandi and associate Marcos Patrón Costas in Buenos Aires'

Counsel to Dow Chemical In-house counsel – Guadalupe De Latorre; Shearman & Sterling LLP; Marval, O'Farrell & Mairal.

For additional information visit www.allendebrea.com.ar

BAKER BOTTS

REPRESENTS ALZARD AS FINANCIAL ADVISOR TO FURMANITE IN $335 MILLION MERGER WITH TEAM, INC.

HOUSTON - 03 November 2015: (NYSE: TISI) ("Team") and Furmanite Corporation (NYSE: FRM) ("Furmanite") today announced that the Boards of Directors of both companies have unanimously approved a definitive merger agreement under which Team will acquire all of the outstanding shares of Furmanite in a stock-for-stock transaction valued at approximately $335 million, including the assumption of debt, which is intended to be tax-free to Furmanite stockholders for U.S. federal income tax purposes.

Baker Botts represented Lazard Frères & Co. as financial advisor to Furmanite in the transaction led by Josh Davidson (Partner, Houston); Laura Katherine Mann (Associate, Houston)

For additional information visit www.bakerbotts.com

BRIGARD & URRUTIA

ASSISTS INTECPLAST US $14 MILLION FUNDING

BOGOTA - 05 November 2015: US private equity group Acon Investments obtained a combined US$40 million credit line to refinance the cost of its acquisition of Colombian plastic packaging manufacturer Intecplast and Peruvian counterpart Pieriplast. Intecplast obtained US$14 million in funding from Banco Bilbao Vizcaya Argentaria Colombia and Banco Colpatria Multibanca Colpatria, which both turned to Brigard & Urrutia Abogados in Colombia.

The loans will be used to refinance Acon's acquisition of the two companies, which it carried out using holding company Amfora Packaging earlier this year. During negotiations with the banks, Acon acted as an intermediary between the two packagers and the banks, but the agreements were signed directly by Intecplast and Pieriplast. Each company signed separate loan agreements, Intecplast's governed by Colombian law and Pieriplast's by Peruvian. The loans closed on 14 October.

Counsel to Banco Bilbao Vizcaya Argentaria Colombia and Banco Colpatria Multibanca Colpatria represented was by Brigard & Urrutia Abogados Partner Manuel Fernando Quinche and associates Cesar Felipe Rodríguez, Clara Robledo and Maria Jimena Rojas in Bogotá.

For additional information visit www.bu.com.co

CAREY

ASSISTS IN LANDMARK ACQUISITION

SANTIAGO - 23 October, 2015: Chilean firm Carey assisted Banco de Crédito e Inversiones in its acquisition of City National Bank of Florida, the second largest bank in Miami, marking the first time ever a Chilean bank has bought a US counterpart.

BCI's holding company, Empresas Juan Yarur (EJY), paid US$946 million for a 100 per cent stake of CM Florida Holdings, the holding company that owned the Floridian bank. The acquisition closed in October after BCI received approval from the Federal Reserve's board of governors on 21 September.

BCI spent two-and-a-half years persuading US regulators to approve the tie-up and overcoming a number of regulatory hurdles relating to the differences between US and Chilean supervision of bank holding companies. Chilean regulators approved the deal in late 2013, with the country's Central Bank following suit in February 2014.

The deal is only the second example of a Chilean financial institution buying outside of its home country and follows Corpbanca's acquisition of Colombia's Helm Bank for US$1.28 billion in 2012. It also broke new ground for Chilean legislation as BCI had to convince regulators the acquisition fell under local regulations allowing Chilean banks to acquire other banks abroad directly, despite the regulations not expressly regulating the possibility of acquiring a holding company.

Counsel to Banco de Crédito e Inversiones represented by Carey Partner Francisco Ugarte and associate Eugenio González in Santiago; Simpson Thacher & Bartlett LLP New York; Ávila, Rodríguez, Hernández, Mena & Ferri Miami

Counsel to City National Bank of Florida Sullivan & Cromwell LLP New York.

For additional information visit www.carey.cl

CLAYTON UTZ

ACTS FOR JLMS ON FIRST OF ITS KIND SIMPLE CORPORATE BONDS OFFER BY AUSTRALIAN UNITY

MELBOURNE - 10 November 2015: Clayton Utz has acted on Australian Unity's offer of Series B Australian Unity Bonds to raise approximately $200 million, announced to the market yesterday. The offer represents the first in Australia under the simple corporate bonds regime introduced in 2014.

Corporate partner Brendan Groves led the firm's team which included senior associate Warrick Louey and lawyers Kate Allison and Craig McDermaid.

Clayton Utz acted for Evans and Partners and National Australia Bank as Joint Arrangers and Joint Lead Managers, and ANZ as Joint Lead Manager, to the offer.

Under the offer, Australian Unity is offering interest paying, unsubordinated and unsecured bonds with a face value of $100 each, which mature on 15 December 2020. The bonds are expected to be listed on the Australian Securities Exchange from mid December 2015.

Australian Unity is a national healthcare, financial services and retirement living organisation providing services to around 850,000 customers, including 300,000 members nationwide.

Commenting on the transaction, Brendan Groves said: "We are very pleased to have been involved in Australian Unity's offer of simple corporate bonds, and to have worked along-side the Joint Lead Managers in bringing this transaction to market.

"It's pleasing to see this first offer of simple corporate bonds under the new legislative regime, which we believe provides issuers with a more streamlined and cost effective avenue to raising funds. We anticipate that the market may consider further offers under the simple corporate bonds regime, which allows issuers to diversify their funding options (as a supplement to traditional equity raisings and bank debt)".

For additional information visit www.claytonutz.com

DAVIS WRIGHT TREMAINE

COURT DISMISSS CITY'S COPYRIGHT CLAIM AGAINST CRITIC FOR USING COUNCIL MEETING CLIPS IN YOUTUBE VIDEOS

A California city cannot hold one of its citizens liable for copyright infringement for using clips of city council meetings in his critical YouTube videos, a federal judge has ruled.

The August 20, 2015, Order in City of Inglewood v. Joseph Teixeira, C.D. Cal. No. 15-1815, makes clear that California governmental agencies cannot enforce copyright in public records absent specific statutory authorization. The decision by United States District Judge Michael W. Fitzgerald of the Central District of California also bolsters a growing consensus among federal courts that it is proper to dismiss copyright actions on the basis of fair use at the earliest stages of the proceedings where the defense is apparent from the works themselves.

The action arose from several documentary-style videos posted to YouTube by Joseph Teixeira, a resident of Inglewood, a city of about 112,000 people located near Los Angeles International Airport. The videos are sharply critical of the public statements and conduct of Inglewood's Mayor James T. Butts, Jr. at city council meetings. They feature short clips from the city's official recordings of these public proceedings, heavily modified with original text and narration that consists of Mr. Teixeira responding to the mayor's remarks and criticizing his political positions.

In one video, for example, Mr. Teixeira juxtaposes his original footage documenting traffic problems near a well-known Inglewood event venue with short clips of Mayor Butts positively characterizing the traffic situation in remarks at a council meeting. He also criticizes the mayor's remarks directly with on-screen text superimposed over the meeting footage and narration accusing the Mayor of lying. Other videos use similar techniques to address municipal issues such as crime, governmental transparency, and a controversy about the mayor's residency at the time he ran for office.   The city filed suit against Mr. Teixeira on March 12, 2015, claiming that his use of footage from the city's public meeting videos constituted copyright infringement. The city's complaint sought actual damages and attorneys' fees, as well as injunctive relief.

Mr. Teixeira moved to dismiss, arguing that: (1) the city is precluded by California law from asserting copyright protection in public records of its council meetings and (2) his videos are protected by the fair use doctrine. In a comprehensive opinion granting Mr. Teixeira's motion and dismissing the complaint with prejudice, the court agreed with both points.

On the threshold issue, the court noted that while the "Copyright Act bars protection for works created by the federal government, … whether state and local governments can claim copyright protection is governed by state law." After examining the relevant state law, the court concluded that "absent particular statutorily provided exceptions, California public entities are prohibited from enforcing any copyrights they may acquire as a matter of federal law. Whether in the eyes of federal law the city holds a copyright in the videos is irrelevant in the face of the state's decision that its entities may not act to enforce that copyright."

The court relied primarily on the California Court of Appeal's decision in County of Santa Clara v. Superior Court, 170 Cal. App. 4th 1301 (2009). That court reasoned that the California Constitution and California Public Records Act (CPRA) create a broad presumption of unrestricted disclosure of public records that "overrides a governmental agency's ability to claim a copyright in its work unless the legislature has expressly authorized a public records exemption." Id. at 1335. The court also noted that California has a number of statutes specifically authorizing public agencies to assert copyright protection in certain enumerated items, such as computer software and educational materials, suggesting that such specific statutory authorization is a prerequisite to copyright enforcement. Id.   Because Inglewood did not identify any specific grant of authority permitting it to enforce copyright protection in its video recordings of its city council meetings, the court held that its complaint failed as a matter of law.

The court also proceeded to consider Mr. Teixeira's alternative argument that his videos are protected by the fair use doctrine. Citing recent case law such as the 7th Circuit's opinion in Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687 (7th Cir. 2012), the court found it appropriate to resolve Mr. Teixeira's fair use argument on a motion to dismiss because it was clear that the defense applied based on a review of the allegedly infringing works themselves, which were incorporated by reference into the complaint. Before issuing its ruling, the court allowed Inglewood to conduct limited discovery solely to confirm the authenticity of the copies of the videos that Mr. Teixeira submitted to the court.

The judge determined that each statutory factor favored a finding of fair use: (1) Mr. Teixeira's videos are "quintessential transformative works for the purpose of criticism and commentary on matters of public concern" (while Mr. Teixeira's videos are non-commercial, the court found them to be transformative even assuming a commercial use for the sake of argument); (2) given the "barely creative nature" and "informational purpose" of the council meeting videos, "they enjoy very narrow copyright protection"; (3) Mr. Teixeira "uses only small portions of the total works and uses them for very specific and particular purposes"; and (4) "there can therefore be no commercial market for the city council videos and no activity by Teixeira can deprive the city of any revenue," given that California law bars the city from charging anything more than the "direct costs of duplication" when providing copies of public records. Moreover, the court found that Mr. Teixeira's sharply critical videos would not be a substitute for the city's unadorned council meeting videos, even assuming a market could exist. — CONTINUES NEXT PAGE—

DAVIS WRIGHT TREMAINE CONT'D

COURT DISMISSS CITY'S COPYRIGHT CLAIM AGAINST CRITIC FOR USING COUNCIL MEETING CLIPS IN YOUTUBE VIDEOS

In sum, the court concluded that it could "scarcely conceive of works that are more appropriately protected by the fair use doctrine … than the Teixeira Videos. He is engaged in core First Amendment speech commenting on political affairs and matters of public concern." Finding that any amendment would be futile, the court dismissed the city's complaint without leave to amend.

Davis Wright Tremaine LLP attorneys Thomas R. Burke, Dan Laidman, and Diana Palacios represent Mr. Teixeira in this matter.

For additional information visit www.dwt.com

GIDE

ADVISES UNDERWRITING SYNDICATES IN TWO PARALLEL U.S. DOLLAR BOND OFFERINGS BY EDF (USD $3.5 BILLION AND USD $1.25 BILLION)

PARIS - 22 October 2015: Gide advised the underwriting syndicates in the context of two U.S. dollar bond offerings by EDF in the form of private placements.

The first offering was a $3.5 billion senior bond issue in four tranches, including:

$1.5 billion, with a 5-year maturity and a fixed coupon of 2.350%

$500 million, with a 20-year maturity and a fixed coupon of 4.750%

$1.15 billion, with a 30-year maturity and a fixed coupon of 4.950%

$350 million, with a 40-year maturity and a fixed rate coupon of 5.250%

The second offering was a $1.25 billion Green Bond issuance with a 10-year maturity and a fixed coupon of 3.625%. This offering constitutes the largest ever USD denominated Green Bond from a corporate issuer.

The Gide team was led by Melinda Stege Arsouze and Chris Mead, U.S. law partners, and Arnaud Duhamel, a French law partner, assisted mainly by Scott Logan and Théophile Strebelle.

For additional information visit www.gide.com

HOGAN LOVELLS

ADVISES CHINA CINDA ASSET MANAGEMENT CO LTD ("CINDA") ON US$1.6 BILLION REAL ESTATE TRANSACTION

BEIJING—03 November 2015: Hogan Lovells has advised China Cinda Asset Management Co., Ltd. ("Cinda"), a leading distressed investor in China, on the acquisition of all the rights and benefits of, including certain liabilities owed to, the seller in relation to a real estate development project in China from GuocoLand (China) Limited, a company incorporated in Bermuda, for a total cash consideration of RMB10.5 billion (US$1.6 billion).

The real estate project is located in downtown Beijing, with a planned gross floor area of approximately 510,000 square meters, comprising of shopping centers, an office building with twin towers, apartments and hotels.

The transaction was signed and closed on 20 August 2015. Hogan Lovells advised on the offshore side of the transaction together with Cinda's PRC counsel.

The Hogan Lovells team advising Cinda was led by Beijing corporate partner Liang Xu, supported by Hong Kong corporate partner Tim Fletcher, senior associate Kevin Ng, associates Katherine Tsang, Shaokai Wang and Xiaoyi Zhao, and trainee solicitor James Richardson.

For additional information visit www.hoganlovells.com

NAUTADUTILH

MISC BERHAD'S DIVESTMENT OF 50% SHAREHOLDING IN VTTI B.V. COMPLETED

ROTTERDAM - 10 November 2015: NautaDutilh's corporate energy team lead advised MISC in relation to the sale of its 50% stake in global tank terminal operator VTTI B.V. to Vitol Investment Partnership Limited for a cash consideration of USD 830 million.

The transaction was completed on November 9th, after all conditions precedent were satisfied.

MISC is a subsidiary or PETRONAS. Vitol Partnership Limited in an investment vehicle managed by the Vitol Group.

For additional information visit www.nautadutilh.com

RODYK

ACTS IN SALE OF SHS HOLDINGS REFINED PETROLEUM DISTRIBUTION BUSINESS—APPROX. S$100 MILLION

Rodyk advised SHS Holdings Ltd, a Singapore-listed company in the sale of its entire interests in the TAT Group and Axxmo International Pte Ltd, which collectively operate a distribution business for refined petroleum products, to Brenntag (Holding) BV, a subsidiary of German chemical distribution company Brenntag AG, for approximately S$100 million.

Corporate partner Ng Eng Leng led, supported by partner Barry Koh, senior associate Grace Ong and associate Vivian Ip.

For additional information visit www.rodyk.com

SANTAMARINA Y STETA

ASSISTS CAISSE DE DEPOT ET PLACEMENT DU QUEBEC (CDPQ) IN US$2BNILLION JOINT VENTURE WITH AN INFRASTRUCTURE INVESTMENT FUND

Canada's CDPQ buys into Mexican infrastructure

MEXICO CITY - 24 September 2015: Santamarina y Steta has helped Canadian pension fund manager Caisse de dépôt et placement du Québec (CDPQ) agree to a US$2 billion joint venture with an infrastructure investment fund and carry out the venture's first investment, in a group of highway concessions.

The joint venture will invest in a group of Mexican infrastructure concessions .

CDPQ holds a 51 per cent stake in the joint venture, while CKD Infraestructura commands the remaining 49 per cent.

Structuring the deal saw CDPQ sell CKD Infraestructura a 49 per cent stake worth US$400 million in a joint venture already set up by CDPQ with Mexico's largest infrastructure and construction company, Empresas ICA.

For the joint venture, Counsel to Caisse de dépôt et placement du Québec. representated by Santamarina y Steta Partner Juan Carlos Machorro and associates Ricardo Orea and Cecilia Sarabia

For additional information visit www.s-s.com.mx

TOZZINIFREIRE

ASSISTS RADIUS WORLDWIDE WITH FIRST ACQUISITION IN BRAZIL

SAO PALO - 20 October 2015: Global growth expert Radius has acquired B&B Gestão, a São Paulo-based accounting and services firm that helps organizations that are expanding into Brazil assess risks, pinpoint opportunities, and operate more efficiently.

Adding these complementary resources and capabilities enables Radius to meet rapidly increasing demand for growth expertise in Brazil, and throughout South and Central America.

The value of the deal is confidential.

TozziniFreire lawyers acting for Radius Worldwide were Marcela Ejnisman (partner), Felipe Borges Lacerda Loiola (associate) and Ana Cristina Izu Medeiros (associate).

For additional information visit www.tozzinifreire.com.br

SIMPSON GRIERSON

ADVISES AUSTRALIAN INSURER NIB ON PURCHASE OF ONEPATH LIFE NZ

AUCKLAND - October 16, 2015: Simpson Grierson partner Michael Pollard recently advised Australian insurer nib on its purchase of the medical insurance division of New Zealand life insurer OnePath Life (NZ) Limited.

OnePath Life NZ is a fully owned subsidiary of ANZ Bank New Zealand. It is New Zealand's fifth-largest health insurer. Following the purchase, nib will be providing health insurance to over 200,000 New Zealanders.

nib established itself in New Zealand in 2012 with the purchase of the Tower medical insurance business.

Michael Pollard says, "We're delighted to be helping nib grow its New Zealand business."

For additional information visit www.simpsongrierson.com

For additional information visit www.simpsongrierson.com

UPCOMING PRAC EVENTS

PRAC Conference - Barcelona
Hosted by Rousaud Costas Duran SLP
May 21-24, 2016

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

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CLAYTON UTZ

20 October 2015

Major shakeup of Australia's financial services sector on the way

The Federal Government has accepted the vast majority of changes recommended by the Financial System Inquiry headed by David Murray, and set out a roadmap for the biggest reforms in 20 years under five themes.

While superannuation will be the most obviously affected area, the changes range across the whole financial sector, and will affect capital raising (simple corporate bonds and derivatives), retail banking, e-banking, insurance, regulation and enforcement.

Resilience

The Government says that Australia's banking market has a certain concentration of risk, and therefore needs greater mortgage risk weights.

By end-2015: Develop legislation to facilitate participation of Australian entities in international derivative markets and better protect client monies.

By mid-2016: Consult on measures to ensure financial regulators have the tools they need to manage any future financial crisis.

By end-2016: APRA to take additional steps to ensure our banks have unquestionably strong capital ratios.

Beyond 2016: APRA to ensure our banks have appropriate total loss-absorbing capacity and leverage ratios in place.

Superannuation

The biggest change will be moving towards giving workers under industrial awards more choice in their superannuation funds by reviewing the default funds system.

The Government will also clarify the purpose of superannuation, which will then guide further reform, and further down the track introduce director penalties.

Legislation will be developed to allow superannuation trustees to provide pre-selected retirement income products, including through increased private retirement incomes, and better protection against longevity risks. The Government will continue to work to remove impediments to product development.

Although the Government has rejected the recommendation to ban limited recourse borrowing arrangements by superannuation funds, there will be increased monitoring of this area.

By end-2015: Develop legislation to improve governance and transparency in superannuation. Progress the Retirement Income Streams Review. Task the Productivity Commission to immediately develop and release criteria to assess the efficiency and competitiveness of the superannuation system and to develop alternative models for a formal competitive process for allocating default fund members to products.

By end-2016: Develop and introduce legislation to enshrine the objective of the superannuation system. Consult on legislation to facilitate trustees of superannuation funds providing pre-selected comprehensive income products for retirement.

Beyond 2016: Implement legislation to introduce director penalties. Consult on legislation to improve member engagement, consistent with the recommendations in the Inquiry. Monitor leverage and risk within the superannuation system.

Innovation

The Government has committed to some reforms, but otherwise has not grappled too much with emerging products such as Bitcoin, with the biggest change under this heading being the curb on credit card surcharges.

It has however flagged changes which could benefit capital raising.

By end-2015: Consult on legislation to support crowd-sourced equity funding. Consult on crowd-sourced debt financing. Task the Productivity Commission to review access to and the use of data.

By mid-2016: Develop legislation to ban excessive card surcharges and better protect consumers using electronic payment systems. Develop legislation to reduce disclosure requirements for issuers of simple corporate bonds. Establish the Innovation Collaboration Committee.

By end-2016: Give legal effect to the Asian Region Funds Passport initiative. Consider technology neutrality in financial sector regulation.

Beyond 2016: Facilitate rationalisation of life insurance and managed investment scheme legacy products.

Consumer outcomes

Financial advisers will become more professional under this set of reforms. In addition, issuers of financial products will be more accountable for them, and ASIC more able to intervene in respect of those products.

By end-2015: Develop measures to address the misalignment of incentives arising from conflicted remuneration in life insurance, stockbroking and mortgage broking.

By mid-2016: Develop legislation which provides a professional standards framework for financial advisers. Consult on development of accountabilities for issuers and distributors of financial products and ASIC product intervention powers.

By end-2016: Develop legislation to give ASIC the power to ban individuals from managing financial firms. Consult on strengthening ASIC's enforcement tools in relation to the financial services and credit licensing regimes. ASIC will review remuneration arrangements in the mortgage broking industry.

Beyond 2016: Consult on and develop legislation to enable innovative disclosure for financial products and to improve the regulation of managed investment schemes. ASIC will review stockbroking remuneration arrangements.

Regulatory outcomes

There's a greater emphasis on competition in financial services. ASIC's mandate will also now include competition, and competition in the sector as a whole will be the subject of a Productivity Commission inquiry.

In addition, all regulators will have new KPIs, and their operational capabilities will be reviewed.

By end-2015: Complete a capability review of ASIC. Complete consultation on industry funding arrangements for regulatory activities undertaken by ASIC. Appoint new members and revise the Terms of Reference of the Financial Sector Advisory Council.

By mid-2016: Update the Statement of Expectations for APRA, ASIC and the Payments System Board to provide additional guidance about the Government's expectations for their strategic direction and performance and improve regulator accountability. Consider ASIC capability review and, as appropriate, develop legislation to enhance operational capabilities of regulators.

By end-2016: Introduce competition into ASIC's mandate.

Beyond 2016: Commence a review of ASIC's enforcement regime. Task the Productivity Commission to review the state of competition in the financial system.

Murray recommendations rejected by the Government

Importantly, although it will make changes to regulators' powers and KPIs, it has rejected the recommendation to create a new Financial Regulator Assessment Board.

Other rejected recommendations are:

- prohibiting limited recourse borrowing arrangements by superannuation funds – but the Council of Financial Regulators and the Australian Taxation Office will monitor leverage and risk in the superannuation system and report back to Government after three years; and
- more frequent post implementation reviews, as it has already implemented changes to strengthen the review regime in 2014.

Belgium

Recent Changes in Commercial Litigation: Small but Far-reaching

Wednesday, 4 November 2015

On 19 October 2015, the federal legislature passed the so-called "Potpourri I Act" reforming civil procedure. The act purports to render legal proceedings swifter and more efficient while reducing the number of needless or even dilatory cases.

Certain measures provided for by the reform entered into force on 1 November 2015. Please find below a brief overview of the new measures, both current and future.

One key measure is the extension of res judicata to cover facts regardless of their legal basis. This means that if a party loses a case, it can no longer bring proceedings based on the same cause of action and the same set of facts, simply by citing a different legal basis for the action.

To streamline and expedite proceedings, new nullity (avoidance) rules have been introduced. All so-called absolute or incurable grounds for avoidance have been done away with, at least in civil proceedings. Such grounds may henceforth not result in avoidance unless the party raising this argument demonstrates, at the commencement of proceedings, that it was wronged. The court can no longer raise these grounds of its own motion.

Likewise, the appeal of interlocutory judgments (for example, an investigative measure or the grant of security) will not be possible until the time comes to appeal the final judgment. The idea, of course, is to prevent the lodging of dilatory appeals.

Another radical shift in the same vein is that the suspensive effect of an appeal is no longer the rule but rather the exception. The enforceability of a decision that has been appealed will only be suspended if the court which issued the decision expressly so decides.

The ratio legis for these changes is to avoid the lodging of appeals for the sole purpose of staying execution of the underlying judgment. That being said, provisional enforcement of a judgment is always at the risk of the enforcing party.

Another new measure is that in the event of default by a party, the court will grant the claims of the appearing party, unless and to the extent these claims violate public policy.

A final long-awaited measure pertains to the facilitation of the recovery of certain uncontested claims between traders. Such disputes constituted a heavy burden for the judiciary, which was somewhat absurd considering that the courts' role in these cases was to issue enforceable titles for uncontested claims rather than actually settle a dispute. This type of action has now been diverted from the courts, which will only be involved exceptionally and a posteriori. Rather bailiffs will now play a central role, provided they are instructed by a lawyer. Given the adjustments it requires, this new recovery procedure will enter into force by royal decree, no later than 1 September 2017.

Our Litigation department, composed of seasoned practitioners who also hold academic appointments, has of course followed these new legislative developments closely and is already hard at work advising clients on the most technical aspects of the reform.

Thus, of-counsel Jean-François van Drooghenbroeck, a professor of civil procedure and respected legal practitioner in our team, has played an active role in all reforms of the Judicial Code over the past ten years. He also advises the Order of French- and German-speaking Bars of Belgium and the Brussels Bar on the development, support and implementation of civil procedure reforms.

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TOZZINIFREIRE ADVOGADOS

TAX

Brazil: New Rules for Capital Gains Tax and "PRORELIT"

On September 22, Provisional Measure No. 692/2015 ("PM 692/2015?) was published in the Official Gazette, amending certain rules on (i) the income tax payable on capital gains and (ii) the Program of Tax Litigation Reduction – PRORELIT.

PM 692/2015 established new rates to be applied on capital gains earned by individuals, as follows:

(i) 15% rate on the portion of the gains up to BRL 1,000,000.00;

(ii) 20% rate on the portion of the gains from BRL 1,000,000.01 up to BRL 5,000,000.00;

(iii) 25% rate on the portion of the gains from BRL 5,000,000.01 up to BRL 20,000,000.00;

(iv) 30% rate on the portion of the gains above BRL 20,000,000.00.

If a given asset or right is transferred in parts, the combination of all partial transfers will be treated as a single transaction for tax calculation purposes. To that end, the capital gain will be added to the gains earned in previous transactions, and the amount of tax paid in previous transactions will be deducted. Moreover, transfers of shares of the same legal entity sold in parcels or installments will also be treated as a single transaction.

PM 692/2015 further establishes that capital gains obtained by a legal entity on the sale of fixed assets will be taxed at the rates mentioned above, except for legal entities taxed based on actual profit, presumed or arbitrated.

These new rules for capital gain taxation will become effective on January 1, 2016.

In addition, PM 692/2015 alters the Tax Litigation Reduction Program – PRORELIT as follows:

– Extension of time for joining the program until October 30, 2015;

– Reduction of the minimum payment percentage in cash (formerly 43%) to:

(i) 30% of the consolidated amount of the debt for payment to be made until October, 30th of 2015;

(ii) 33% of the consolidated amount of the debt for payment to be made in two installments, due by the last business day of the months of October and November 2015; or

(iii) 36% of the consolidated amount of the debt for payment to be made in three installments, due by the last business day of the months of October, November and December 2015.

In relation to the payments under the second and third items above, the amount of each monthly installment will be increased by the SELIC rate for federal bonds, accumulated monthly, calculated from the month following the consolidation until the month prior to the payment, and 1% for the month in which the payment is being made.

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Key Policy Initiatives from Canada's New Liberal Government You Need to Anticipate

October 26, 2015 | Eddie Goldenberg, C.M., John R. Baird, P.C., and Claire M.C. Kennedy

The Canadian election last week (October 19) produced a new government under Liberal Party leader Justin Trudeau. Defying speculation of a minority government, the Liberals won a clear majority, defeating the NDP and Stephen Harper's Conservative government to mark a decisive return to a centre-left government in Canada.

Key elements of the Liberal election platform were:

- deficit spending but with a commitment to continued reduction in the debt to GDP ratio;
- large expenditure on public infrastructure;
- a strong commitment to action on climate change;
- a different and more multilateral approach to foreign policy; and
- no increase in general corporate tax rates but tax relief for middle class Canadians and personal tax increases for those earning over C$200,000 per annum.

Here is what you need to know about how the new Liberal government's policies will affect investment in Canada:

Tax & Investment Policy

- The economic policy of the government will be pragmatic and will be welcoming to foreign investment.
- The government will not raise general corporate income tax rates.
- A stimulative fiscal policy will be moderate but with a commitment to a continuing year over year reduction in the debt to GDP ratio.
- The commitment to fostering economic growth through large infrastructure spending will create particular opportunity for international investment.

Energy & Pipelines

- The Liberal government will be committed to getting oil to markets and breaking the current logjam.
- The Liberal government believes that "social licence" is necessary to achieve approval for pipelines. Expect a greater collaboration with First Nations and a move away from the streamlined permitting process that had been championed by the prior administration.
- The Keystone pipeline remains solely in the hands of President Obama.
- The Northern Gateway pipeline in British Columbia will likely not be approved as the Liberal government is opposed to tanker traffic along the Pacific coast.
- Energy East and Trans Mountain pipelines are difficult but not impossible projects.
- The Liberal government will support investment in LNG export projects. LNG investment is strongly supported by the BC provincial Liberal government.

Foreign Direct Investment

- The Liberal government will promote close relations with China and will be more open to approving Chinese investment in Canada.
- The new government may agree to begin negotiations on a free trade agreement with China using the China-Australia free trade agreement as a template.
- The State-owned-Enterprise (SoE) investment rules, which affected Chinese SoE investment in the oil sands, are unlikely to change in the short-term though this may be moot as there is less current interest in the oil sands from China.
- Canada will likely join the Asian Infrastructure Investment Bank (AIIB).

Trade & Foreign Affairs

- The Liberal government will return to a more multilateral foreign policy.

- Improved relations with the US administration will be a priority and it is likely that President Obama will have warmer relations with Prime Minister Trudeau than with Prime Minister Harper.
- The new government is almost certain to pass the Trans Pacific Partnership (TPP) but may not act before a vote in Congress.
- The new government will likely lift the visa restrictions on Mexicans travelling to Canada, which has been damaging to business travel and tourism.
- The Liberal government will support the nuclear agreement with Iran, is likely to re-open the Canadian embassy in Tehran and will encourage resumption of commercial relations with Iran when sanctions are lifted.
- The new government will stop Canadian participation in the bombing missions in Iraq and Syria and will focus on training of Kurdish forces and particularly on humanitarian aid.
- The new government is committed to welcoming 25,000 Syrian refugees before the end of 2015.

Climate Change

- The new government is more aligned with the Obama administration and the EU on international climate change policy.
- Positioning for the climate change conference in Paris at the end of November will be an important priority for Prime Minister Trudeau.
- Large final emitters should expect a more stringent environmental regime.

Next Steps

- The new government will take office on November 4 and the federal cabinet will be revealed then.
- Unlike in the United States, the senior public service in Canada does not change with a change of government. Business dealings with the public service continue in a business as usual manner.
- The new Prime Minister will be busy in November meeting colleagues internationally at the APEC, G-20 and Paris Summits.
- The first budget of the Trudeau government will likely be presented in the first quarter of 2016.

Conclusion

Under the new Liberal government, Canada will remain open to foreign direct investment. There will be opportunity for investors in Canada, especially in infrastructure and public works. The decisive return to a centre-left government means it is time for foreign investors to consider their government relations strategies as they pursue continued investment opportunities in Canada.

About Bennett Jones' Governmental Affairs & Public Policy Group

Staffed by individuals who have played leading roles in the shaping of public policy in Canada and the development of appropriate business responses, the Bennett Jones Governmental Affairs & Public Policy Group is a unique resource among Canadian law firms. Our Group provides clients with strategic legal and policy advice on domestic and international matters ranging from financial services regulation and competition and investment policy to energy, environmental and border measures.

Normalization surtax declared constitutional

Normalization surtax declared constitutional

On August 26, 2015 the Constitutional Court issued Decision C-551 of 2015. By means of such Decision the Constitutional Court declared that the Normalization surtax, introduced by the last tax reform through Law 1739 of 2014, is a legitimate measure from a constitutional perspective, which results appropriate, necessary and helpful to achieve the essential objectives of a Estado Social de Derecho (social state of law). In accordance with the foregoing, the Constitutional Court ruled the constitutionality of the Normalization surtax.

It is important to mention that the Constitutional Court reaffirmed that amnesties on tax matters must obey to exceptional situations and it justification requires a strict proportionality test. However, the Court states that the Normalization surtax is not an amnesty but an actual tax obligation that the taxpayers must comply with, regardless of their willingness to do so.

The Constitutional Court specifically determined that the purpose of the Normalization surtax is to obtain information regarding the assets that Colombian tax residents have not declared, and for which there is no obligation to condone due to the fact that the Colombian Tax Administration has no information regarding such assets. Pursuant to the Constitutional Court, the fight against tax evasion, obtaining complete information about tax residents in Colombia and the normalization of their assets, are paramount to supply the necessary resources in order for the Estado Social de Derecho (social state of law) social and democratic state of law to fulfill its essential purposes.

In consequence, the Constitutional Court established the difference between the Normalization surtax and the amnesty set forth in the tax reform of 2012 (i.e., Law 1607 of 2012, article 163), which was declared inconstitutional in the same year.

In accordance with Decision C-551 of 2015 by the Constitutional Court, the Normalization surtax will remain in force under the terms of Law 1739 of 2014. In accordance with such Law, the Normalization surtax is triggered by the possession of omitted assets and inexistent liabilities (i.e., those not included in national tax returns when it was mandatory to do so), for January 1, 2015 (10% tax rate), January 1, 2016 (11.50% tax rate) and January 1, 2017 (13% tax rate). Finally, it is important to mention that pursuant to Law 1739 of 2014, the rights in private foundations, trusts or other fiduciary business abroad must be declared taking into account the rules governing fiduciary rights held in Colombia (i.e., the equity value will be determined on the basis of Article 271-1 Tax Code).

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NEW SECURED TRANSACTIONS LAW – EXTENDED DEADLINE MAY NOT BE SUFFICIENT FOR SOME CREDITORS

The Movable Secured Collateral Law which came into force on May 20, 2015, is designed to promote access to credit for individuals and small and medium businesses that do not own traditional forms of collateral – such as cars, aircrafts, and ships. The Law also creates a new Registration System to register a wider range of assets that can be offered as collateral for potential borrowers. Assets which may now be used to grant collateral include: tangible and intangible assets, invoices, intellectual property rights, receivables, and essentially any object with economic value.

The immediate effect of the Law is that secured interests over some assets currently enrolled under the traditional system of guarantees (including agricultural equipment, civil works, and trailers) must migrate to the new regime. This will ensure that creditors do not lose their existing priority rights on registered guarantees, in the event a debtor breaches their agreement.

A two-month extension was granted, and therefore all assets should now have migrated to the new Registration System prior to October 20, 2015. However, many stakeholders have not been sufficiently warned about some prerequisites to registration, including requesting a Costa Rican corporate identity card number for foreign companies, and registering their legal entities as creditors at the Secured Transactions Office. Consequently, many may have failed to complete the move on time.

arias & muñoz

COSTA RICA

Arias & Muñoz remains at the forefront of regulatory developments in this field, and is available to assist in the effective migration of existing guarantees to the new system, thus ensuring that your interests are fully protected.

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ENERGY | FRANCE | 9 OCTOBER 2015

THE FRENCH LAW ON ENERGY TRANSITION AND RENEWABLE ENERGY

After several readings in the two chambers of French parliament, the bill relating to the energy transition for green growth (hereinafter the "**Law on Energy Transition**") was adopted by the French Parliament on 22 July 2015. The text was deferred to and generally approved by the French Supreme Court (*Conseil constitutionnel*), in particular as regards the provisions relating to wind power and other renewable energies[1].

Law no. 2015-992 of 17 August 2015 was published in the Official Journal on 18 August 2015.

The Law on Energy Transition defines the new objectives of the national energy policy, including:

- On the one hand, to reduce greenhouse gas emissions and energy consumption.

  The law aims to reduce greenhouse gas emissions by 40% in 2030 (as compared with 1990 levels), and to quarter greenhouse gas emissions between 1990 and 2050.

  To reach these objectives, the law aims to reduce primary energy consumption of fossil energies by 30% in relation to the 2012 year of reference.

- On the other hand, to increase the percentage of renewable energies in the French energy mix.

  The share of renewable energies in the final gross energy consumption will be increased to 23% in 2020 and 32% in 2030. Renewable energies will thus be widely in demand in the energy transition process, since they must represent 40% of electricity production in 2030.

  For its part, the share of nuclear energy in electricity production should reduce to 50% by 2025.

The Law on Energy Transition also provides for the implementation of multiannual energy programming ("**MEP**"). This MEP sets out the objectives and priorities of public authorities in their management of various forms of energy. Consultations for the MEP's drafting will begin before 31 December 2015.

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[1] Decision no. 2015-718 DC of 13 August 2015

As regards the second objective, the Law on Energy Transition includes two main sets of measures concerning renewable energy. It modifies the regime in favour of electricity generated from renewable sources (see chapter 1 of this newsletter) and provides for the application of new rules for the establishment of onshore wind turbines (see chapter 2 of this newsletter). Lastly, the Law on Energy Transition includes measures concerning hydroelectric concessions (see chapter 3 of this newsletter).

1. CHANGES TO THE REGIME IN FAVOUR OF ELECTRICITY GENERATED FROM RENEWABLE SOURCES

Application of Guidelines relating to state subsidies as regards energy and the environment

Guidelines concerning state aids on the protection of the environment and energy for the 2014-2020 period, adopted by the European Commission in June 2014 (the "**Guidelines**"), provide for new principles that apply to all mechanisms in support of renewable energies.

These principles are as follows:

- **From 1 January 2016**, support mechanisms for renewable energy will consist in the **payment of a supplementary remuneration** to reach a pre-determined price.

  This obligation will only apply to power generating facilities whose installed capacity exceeds 500 kW, or 3 MW, or 3 production units for wind turbines.

- **From 1 January 2017, calls for tenders** are to be implemented.

  This procedure only becomes compulsory for power generating facilities whose installed capacity exceeds 1 MW, or 6 MW or 6 production units for wind turbines.

Guaranteed purchase prices can thus be maintained for mechanisms that will be notified to the European Commission in future, for power stations with installed capacity below 500 kW. For wind turbines, the installed capacity must be below 3 MW or 3 production units in 2016, raised to 6 MW or 6 production units in 2017.

Specific case of the French onshore wind sector

The mechanism in favour of onshore wind energy will benefit from special treatment.

The European Commission has authorised member states to retain their pre-existing subsidy measures, which have already been notified to and approved by the Commission, for a period of 10 years at most.

In France, the decree of 17 June setting the purchase conditions for electricity generated by land-based wind facilities, based on electricity buy-back prices, was approved by the European Commission on 25 March 2014, before the entry into force of the Guidelines.

The decree can therefore remain in place without being affected by the deadlines of 1 January 2016 and 2017. Additionally, during the parliamentary debates on the Law on Energy Transition, the government indicated that no changes to this decree were currently under discussion.

Change to the support mechanism in favour of wind energy is nonetheless being considered before the end of the 10-year period, most likely from 2018 onwards.

From the purchasing contract to the supplementary remuneration contract

New supplementary remuneration mechanism

To date, the French energy code only provided for two systems in favour of renewable energy:

- A system known as an "**obligation to purchase**", whereby Electricité de France (hereinafter "EDF") purchases electricity from renewable sources at a pre-determined price above market price, set by ministerial order.

- A **call for tenders system**, organised by the State alongside the French Commission for Energy Regulation, in which operators offer a purchase price for the electricity they generate. If their offer is retained, they enter into a purchase contract with EDF based on the proposed price. This mechanism is not affected by the Law on Energy Transition.

Following on from the Guidelines, the Law on Energy Transition introduces a third mechanism, known as "supplementary remuneration" ("**Supplementary Remuneration**"), whose objective is to integrate into French law the market premium mechanism, which aims to replace the obligation to purchase mechanism for certain renewable energy sectors.

The Supplementary Remuneration is an ex-post premium equal to the difference between the average sale price observed on the market and a target price set by decree for each renewable energy sector.

Energy generators who so desire can enter into an agreement with EDF that includes a supplementary remuneration clause, for a maximum period of 20 years. As concerns calls for tenders, the candidates will either enter into an energy purchasing contract or a Supplementary Remuneration contract.

A **consultative draft bill relating to the supplementary remuneration and purchase obligation** has recently been issued, which details the conditions of the mechanism. This bill, if adopted, will enter into force on 1 January 2016.

The calculation method and the level of supplementary remuneration will be set by regulation. The Law on Energy Transition only takes into account the representative operating expenses and investments of the sector, the costs of integrating the facility into the grid system, and the revenues generated by the facility. The draft bill sets more specific calculation methods, but still refers to the decrees in each sector for the precise level of Supplementary Remuneration.

The Supplementary Remuneration will be supplemented by a **management premium** that aims to compensate the costs of access to the electricity market for electricity generators. This premium, whose amount will be set by decree, will be included in the Supplementary Remuneration contract for its full term.

Sectors concerned by the Supplementary Remuneration mechanism

The list and characteristics of the power facilities that can benefit from the mechanism are not provided for in the law.

The draft bill, in consultation until 4 October 2015, restricts the application of the supplementary remuneration to the following generating facilities:

1. Facilities using hydraulic energy, with power lower than or equal to 1 MW;
2. Facilities that mainly use the energy generated by the heat treatment of household waste;

3. Facilities that mainly use biogas derived from methanisation or waste storage facilities;
4. Facilities that mainly use energy derived from geothermal heat;
5. Natural gas and electricity cogeneration and heat recovery facilities, with an installed capacity lower than or equal to 1 MW.

If the draft bill is adopted as is, the other types of electricity generation facilities, most particularly wind and solar facilities, will not be concerned by this mechanism for the time being. The decree indicates that the following can benefit from purchase obligation: (i) onshore wind farms and (ii) photovoltaic facilities whose power is lower than 100 kW. For the latter, the sale of electricity generated will be conducted as part of a call for tenders.

Additionally, ministerial orders provided for each sector and that cover remuneration conditions may defer the entry into force of the decree.

Long-term application of the supplementary remuneration

Application of the Supplementary Remuneration to the facilities concerned also depends on the progress of the projects:

- **For projects that have already entered into a purchase obligation contract**, the purchase price set will not be modified. Electricity generated by these power generation facilities will thus be purchased at the price indicated in the purchase contract for its full term.

  In principle, these power generation facilities cannot receive any supplementary remuneration. Nonetheless, the draft decree provides for the possibility for electricity generators to terminate their purchase contract early in order to benefit from a Supplementary Remuneration contract, either for the remainder of the term initially provided for in the purchase obligation contract, or for the normal term of the Supplementary Remuneration contract, in particular on the condition of having implemented an investment programme.

- **For projects that have not yet entered into a purchase obligation contract**, and that belong to the categories of generation facilities subject to Supplementary Remuneration, the Law on Energy Transition provides that they will benefit from the purchase obligation mechanism **if the request is made prior to the entry into force of the regulatory texts** putting in place the supplementary remuneration mechanism, i.e. 1 January 2016.

  Additionally, these electricity generators must also finish construction of those facilities for which they wish to continue to benefit from the former mechanism within the 18 months following the latter date, i.e. 1 July 2017. This deadline can be extended by ministerial decree if conditions pertaining to the construction of the power generation facilities justify it.

Last resort buyer mechanism in the event of market failure

The Law on Energy Transition also provides for a new last resort buyer mechanism. It is now possible for the state to designate, via a transparent procedure, a last resort buyer who must enter into a contract to buy the electricity produced by any power generator who so requests, and who can provide supporting documents as to its inability to sell the electricity generated.

This mechanism enables electricity generators to sell the electricity generated by their facility even if they have not managed to do so on the market. In this case, a last resort purchase contract replaces the supplementary remuneration contract.

The draft decree specifies that resorting to this mechanism will be possible in two cases: (i) if the electricity generator has not been able to enter into a contract with an aggregator[2], and (ii) in the event of aggregator failure.

The sale of electricity via the last resort purchase mechanism cannot, however, lead to a remuneration level exceeding 80% of the total remuneration that would have been received from the sale of said electricity on the market plus the payment of supplementary remuneration. Buyer management fees will also be deducted.

The contract entered into between the generator and the last resort buyer will have a three-month renewable term and will be established on a template approved by the minister in charge of energy matters.

Abolition of the certificate for eligibility to purchase obligation ("**CEPO**")

Lastly, the draft decree organises the abolition of provisions in decree no. 2001-410 of 10 May 2001 relative to the CEPO. To date, this certificate enabled the state to monitor the number of facilities applying for purchase obligation.

EDF will now have to submit to authorities, on request, the information in its possession as regards purchase contract and supplementary remuneration requests, regardless of whether a contract has been entered into.

2. NEW RULES PERTAINING TO THE ESTABLISHMENT OF ONSHORE WIND TURBINES

Minimal distance between wind turbines and housing

In its version prior to the Law on Energy Transition, article L.553-1 of the French Environment Code (*Code de l'environnement*) provided that the delivery of the authorisation to operate (ICPE) a wind turbine be subject to respecting a minimal distance of 500 metres between the wind turbine and local housing.

The Law on Energy Transition made this 500-meter distance the minimal distance allowable between wind turbines and constructions for use as housing. The prefect will now take into account the impact study to assess the appropriate distance between turbine and housing, on a case by case basis.

It is therefore essential that this impact study be carried out sufficiently upstream of the project's definition.

Prior approval of councillors

For towns or public establishments for cooperation between local authorities (*établissements publics de coopération intercommunale*, "**EPCI**") having agreed upon local planning regulations (*plan local d'urbanisme*, "**PLU**"), the construction of wind turbines in areas "incompatible with the neighbouring inhabited areas" is subject to a vote by the EPCI deliberative body or by the council of the town in question.

[2] An aggregator is "a physical or moral person other than the electricity generator who is in charge of selling the electricity generated by the facilities on the electricity markets on behalf of the generator" (draft decree, article 3)

Thus, where a PLU is already in place, favourable vote by the town or EPCI shall be sought. In the event of an unfavourable vote, the project cannot be developed.

Participative funding

The Law on Energy Transition is innovative in that it develops participative funding possibilities for renewable energy projects.

Corporations set up to manage a renewable energy generation project can offer a share of their capital to third parties. Thus, people living in the area of the renewable energy project, as well as the local authorities and their consortia on the land on which the project is located, can take a stake in the capital at the time it is constituted or developed.

These corporations can also offer that these same individuals take part in the financing of the renewable energy generation project.

This possibility of taking a stake in the capital does not constitute a public offer. Additionally, participative funding is not compulsory for operators, as had at one point been considered.

Memorandum for councillors

Adding to article L. 2112-12 of the French General code for local authorities (*Code général des collectivités territoriales*), which provides that, for towns of over 3,500 inhabitants, a memorandum on affairs subject to approval by the town council should be issued, the Law on Energy Transition now provides that such a memorandum should be issued to members of the town council in towns with fewer than 3,500 inhabitants when such deliberations regard a registered environmental facility, such as wind turbines.

Connection timeframe

The Law on Energy Transition provides that the timeframe for connection to the main grid of renewable energy facilities whose power exceeds three kilovoltamperes cannot take longer than 18 months. Not respecting this timeframe could lead to damages being paid to operators, according to a scale set by decree.

Nevertheless, where a request is made by the grid system operator, the administrative authority may extend this connection timeframe, in particular with regard to the size of the facilities and their location in relation to the grid, or when the delay in connection is the result of circumstances outside of the grid system operator's control.

A decree will set the facility categories as well as the circumstances justifying the extension of the eighteen-month timeframe.

Generalisation of the single authorisation

Order no. 2014-355 of 20 March 2014 pertaining to the trial of a single authorisation as regards registered environmental facilities, tested, in certain regions (Champagne-Ardenne, Picardie and Nord-Pas-de-Calais), the implementation of a single prefectural decision, known as "single authorisation". Thus, for wind farm projects located in the trial areas, the authorisations relative to building permits, area clearing, protected species and legislation on classified facilities as regards the protection of the environment, will be delivered upon completion of a single procedure.

The Law on Energy Transition shall extend to all French regions the single authorisation procedure from the first day of the third month following its promulgation, i.e. 1 November 2015.

3. REDEFINITION OF THE HYDROELECTRIC CONCESSIONS REGIME

Changes to the hydroelectric concessions regime have been under discussion for several years now and have been finalised in the Law on Energy Transition.

Its three main points are:

- The possibility of **grouping, by decree, several concessions** using the barycentre method. When several concessions form a “connected hydraulic infrastructure chain”, the administrative authority can decide to group them together to optimise their management, while at the same time guaranteeing the upholding of a prior economic balance.

  Where concessions are operated by several different agents, a common date for the termination of the concessions can be set, by shortening the term of the longest concessions and lengthening that of the shortest. Compensation is then paid by those agents whose contracts are lengthened to those whose contracts are shortened.

- **Modulation in the usage fee rate** paid by the agent to the contractor depending on the electricity sold by the former (i) to companies belonging to the same group, (ii) as a part of long-term electricity provision contracts, and (iii) to energy-intensive companies that invested in the concession and bore part of the risk of the operation.

- The possibility of creating **semi-public hydroelectric companies**, between the state, one or more economic operators, and local authorities, maybe even other legal persons under public law and the companies or bodies they own. These companies are established as private companies and aim to enter into and enforce hydroelectric concession contracts.

  The selection of economic operators and the allocation of the concession to the company are subject to a single of a public competitive tendering procedure.

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COUNSELLORS AT LAW

CLIENT UPDATE

The Minister of Manpower Amended Regulation on Utilization of Foreign Manpower

On October 23, 2015, the Minister of Manpower ("**MOM**") issued a new regulation under number 35 of 2015, ("**Reg 35**") which amends the Minister of Manpower Regulation No. 16 of 2015 on Utilization Procedure of Foreign Manpower ("**Reg 16**").

The important changes made under the new regulation are as follows:

1. Employers (companies and foundations) are no longer required to obtain the Foreign Manpower Utilization Plan ("**RPTKA**") and Permit to Employ Foreign Manpower ("**IMTA**") for (i) foreign directors and commissioners (working in Indonesian companies) or (ii) foreign members of the trustee, Management and Supervisory Board (working in Foundations or Yayasan), who are non-resident;

2. A Domestic Capital Investment Company (*Perusahaan Penanaman Modal Dalam Negeri*) is not permitted to appoint a foreigner as a commissioner (*komisaris*). Previously, this restriction is not regulated under Reg 16;

3. The requirement to maintain foreign manpower and local manpower in the ratio of 1:10 (one to ten) is removed. Previously, Reg 16 requires employers employing foreign manpower to maintain the aforementioned 1:10 ratio;

4. The Temporary RPTKA and Temporary IMTA are no longer required for foreigners visiting Indonesia for the following purposes:

    a. to provide guidance, counseling, and training on the application and innovation of industry technology to improve the industrial product quality and design and overseas marketing cooperation for Indonesia;
    b. to give lectures;
    c. to attend meetings held by the head office or the representative office in Indonesia;
    d. to conduct an audit, production quality control, or inspection of the company branches in Indonesia, if the period of stay is less than 1 (one) month;

e. to foreign workers on probation; and
f. for one-shot employment.

The requirement to obtain Temporary RPTKA and Temporary IMTA are still applicable if the purposes of the visit are:

a. to make commercial films upon acquiring a license/permit from the competent agency;
b. to conduct an audit, production quality control, or inspection of the company branches in Indonesia for a period of exceeding 1 (one) month; and
c. for employment in connection with machine installation, electrical installation, after sales services, or trial products.

5. The MOM will not refund any Foreign Employment Compensation (*Dana Kompensasi Penggunaan Tenaga Kerja Asing* or "**DKP TKA**") which have been paid by employers prior to the issuance of Reg 35 for IMTA applications made under Reg 16.

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THE SAFEGUARD SEQUEL

Lim Koon Huan and Nicholas Lai provide an insight into Malaysia's second safeguard investigation

INTRODUCTION

The Ministry of International Trade and Industry ("MITI") recently released its final determination on Malaysia's second safeguard investigation.

On 29 June 2015, MITI published its finding that the importation of certain grades of hot rolled steel plates (known in the industry as "HRP") from 42 countries into Malaysia was causing serious injury to the Malaysian steel market and industry ("domestic market"). HRP has a wide range of uses - from simple furniture and electrical appliances to heavy industries, such as the construction of highway bridges and shipbuilding.

Pursuant to MITI's findings, safeguard duties starting at 17.40% were imposed on imports from the 42 countries commencing 2 July 2015 to help the domestic market regain competitiveness and market share. These duties would apply for a period of three years, and would gradually reduce to 10.40% in the final year.

This decision is significant as it sees MITI imposing safeguard measures for the very first time since the enforcement of the Safeguards Act 2006 ("Act") and the Safeguards Regulations 2007 ("Regulations") on 22 November 2007. Malaysia's first safeguard investigation in 2011, which was on importation of hot rolled coils ("HRC"), was terminated at the preliminary determination stage.

This article discusses the salient events in MITI's second safeguard investigation.

THE ESSENCE OF A SAFEGUARD INVESTIGATION

In simple terms, safeguard duties are a trade protection measure which aims to counteract the sudden and sharp increase of imports of a particular product which cause injury to the domestic market. While increasing imports may be indicative of a thriving economy propelled by an increase of demand, the suddenness and/or sharpness of such increase in imports may leave domestic producers struggling to maintain competitiveness and market share against the imported goods.

If MITI finds that the domestic market is suffering material injury because of such imports, MITI may (i) impose safeguard duties; (ii) restrict imports by imposing a quota; or (iii) simultaneously impose safeguard duties as well as a quota on imports (section 28 of the Act).

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Safeguard measures are unique in that they are a purely protectionist tool underpinned by the primary concern for the welfare of the domestic market. In contrast, anti-dumping and countervailing measures are strictly to tackle “unfair trade”, though the end goal of remedying the injured market remains the same. As such, it must be recognised that safeguards are a delicate measure as their drastic effects of “restricting trade” may well apply to fairly traded goods in the market.

THE PROCESS

A safeguard investigation may be initiated either upon the initiative of the Government of Malaysia or a written petition by the domestic industry. In the case of a written petition, the domestic industry must consist of either all the domestic producers of the product in question or domestic producers whose collective output make up a major proportion of Malaysia’s total domestic production. Upon receipt of a written petition, MITI must decide whether there is sufficient evidence to initiate an investigation.

On 24 June 2014, Ji Kang Dimensi Sdn Bhd (“Petitioner”) submitted a written petition (“Petition”) requesting MITI to initiate a safeguard investigation on HRP. According to the Petition, there are two domestic producers of HRP in Malaysia and the Petitioner’s output represents 88% of the total domestic production of HRP.

On 18 August 2014, MITI published a gazette notification to initiate a safeguard investigation against HRP imported to Malaysia between 1 January 2011 and 31 December 2013 (“Period of Investigation”). The notice of initiation preliminarily indicated that the import of HRP increased by 13.45% from 2011 to 2012, and by 25.64% from 2012 to 2013. It further claimed that the Petitioner’s documents showed that the increased imports of HRP had caused serious injury to the domestic industry in terms of market share and trade performances.

As safeguard measures affect both exporting and importing communities of HRP, it is incumbent that MITI obtain and consider all views before coming to a decision. The relevant notices and documents were sent to all interested parties, which included local importers, foreign exporters, foreign governments and trade associations across the globe. MITI set a 30 day deadline for interested parties to provide their responses and views to the safeguard investigation.

The feedback from Malaysian importers of HRP is worth noting. The common concern raised was the limited grades of HRP which the Petitioner was able to produce. It was argued that the Petitioner could not be materially injured by imports of grades of HRP that were not in competition with the Petitioner. As such, a blanket safeguard measure would unduly burden the domestic sectors which require and use stringent grades of HRP, such as the oil and gas, automotive, electrical and electronics, shipbuilding and construction sectors.

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On 23 October 2014, MITI conducted a public hearing for the Petitioner and all interested parties to present their arguments before a panel chaired by the Senior Director of Multilateral Trade Policy and Negotiations Division, MITI.

A total of 56 parties attended the public hearing. Notable participants were large steel corporations from Japan and Korea, the Malaysian Iron & Steel Industry Federation (MISIF), the Japanese Iron and Steel Federation (JISF), representatives of the governments of Japan, Korea, India, Indonesia, Taipei and Ukraine as well as a number of domestic end users of HRP products.

Having obtained the views and responses of the Petitioner and all interested parties, MITI had to weigh the evidence and make a preliminary determination. While Regulation 9(1) of the Regulations requires MITI to make a preliminary determination within 90 days from the date of initiation of the Petition, MITI exercised its powers under Regulation 9(2) to extend the time period by an additional 30 days.

The Preliminary Determination

On 11 December 2014, MITI gazetted its affirmative preliminary determination, finding, *inter alia,* that the increase of imports during the Period of Investigation had indeed caused serious injury to the domestic industry in terms of the Petitioner's "*decline in market share, decline in domestic sales, low production and capacity utilisation, decline in cash flow, decline in profitability and inventory, and negative return on investment.*" Pursuant to MITI's affirmative finding, a provisional safeguard duty of 23.93% was imposed on HRP imports from 42 countries with immediate effect.

However, MITI took into account the views of exporters and importers alike by exempting certain grades of HRP from the provisional duty (Schedule 1 of Federal Gazette P.U (B) 543/14). The exemption applied to grades used for the automotive, boiler and pressure vessels, offshore and structural uses and pipelines for the oil and gas sectors.

Pursuant to the affirmative preliminary determination, MITI conducted on-site verification at importers' premises to verify the views and positions set out by the domestic importers. MITI visited a total of 29 domestic importers for this exercise. Interested parties were also free to follow up and meet with MITI to make further representations and comments on the findings of the preliminary determination. Regulation 12 of the Regulations required MITI to make a final determination of the safeguard investigation within 200 days from the preliminary determination.

The Final Determination

On 29 June 2015, MITI gazetted its final determination affirming the findings in its preliminary determination and released a final determination report on 1 July 2015. While the bases for the affirmative determination were maintained, there are material differences that are noteworthy:

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(a) First, it found that the increase of imports during the Period of Investigation appeared to be greater than indicated in the Petition (for the 2011-2012 period, the initial reported increase of 13.45% became 42.17% in the final determination report; while the 2012-2013 period also saw an increase from the initially reported 25.64% to 28.65%). While MITI did not explain how the higher percentages were arrived at, one possible explanation could lie in the removal of exempted grades of HRP from the initial import volume analysis.

(b) Secondly, the provisional safeguard duty of 23.93% was replaced with lower final duties. Safeguard duties were to be imposed over three years with progressive reductions: 17.40% for 2015/6; 13.90% for 2016/7; 10.40% for 2017/8.

(c) Thirdly, MITI took a positive list approach in the final determination as opposed to the negative list approach in the preliminary determination. This means that instead of applying a blanket final safeguard duty on all imported HRP and providing a list of exempted HRP grades, MITI specified the range of HRP products on which final safeguard duties were imposed. By doing so, importers of grades of HRP that fall outside the specified range of HRP products would not be subject to the final safeguard duties.

(d) Lastly, *de minimis* imports were also exempted from the final safeguard duties. Imports from developing countries that did not make up at least 3% individually or 9% collectively of Malaysia's total HRP imports were exempt from the final safeguard duties pursuant to section 33(1) of the Act.

CONCLUSION

While Malaysia is still taking baby steps into the safeguard scene, other Asian and ASEAN countries have long used this trade measure to remedy sudden and unforeseen influx of goods. India is considered the world's most proactive jurisdiction in trade protectionism, having initiated 24 safeguard investigations since 2007 and a total of 39 investigations since its first in 1997. Indonesia is not far behind, having initiated no less than 23 safeguard investigations since 2007, and a total of 26 investigations since its first in 2004.

Malaysia's first two safeguard investigations clearly demonstrate the willingness of MITI to fairly listen to and weigh the arguments presented by all parties concerned. As local industries become more aware of the potential that safeguard measures can offer, we may well see an increase in the number of safeguard investigations being initiated in the years to come. It is incumbent that MITI continues to carry out its duty in balancing the interests of all stakeholders in the domestic market and not unnecessarily impede natural market forces of free and fair trade.

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LEGAL UPDATE

October, 2015

NATIONAL FREQUENCY ALLOCATION TABLE

On October 20, 2015, the Federal Telecommunications Institute (Instituto Federal de Telecomunicaciones, “IFT” for its acronym in Spanish), published in the Official Gazette of the Federation (“DOF” for its acronym in Spanish), the Resolution approving the National Frequency Allocation Table (“CNAF” for its acronym in Spanish) replacing the CNAF published in the DOF on February 28, 2012.

As part of the authorities of the IFT, the IFT has the obligation to draft, publish and keep up to date the CNAF, in order to have a proper planning and administration of the Mexican radio spectrum and guarantee its effective and efficient use, according to the needs and purposes of wireless communication in Mexico.

The CNAF indicates which telecommunication service or services are allocated to each frequency band of the radio spectrum, as well as additional information on the use and planning of certain frequency bands. The CNAF consists of four parts: (i) introduction; (ii) allocation table; (iii) national notes; and (iv) acronyms. The allocation of services in the CNAF is performed in the frequency bands from 8.3 kHz to 275 GHz of the radio spectrum.

This new CNAF considers modifications of category and removal of services, as well as addition of services in the respective frequency bands. It is important to mention that the allocation of services in the new CNAF does not imply retroactive consequences to the concessionaires in connection with the frequency bands currently held through a concession title.

***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

Natural Health Products Bill: Will you be ready?

November 05, 2015

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Proposed changes to the Natural Health Products Bill will increase compliance requirements for manufacturers and distributors. Will you be ready?

Introduction

The Natural Health Products Bill (**Bill**) aims to establish a new system for the regulation of natural health and supplementary products. This is likely to have an impact on your business operations in New Zealand.

Under the existing system, most natural health products are regulated as either dietary supplements under the Dietary Supplements Regulations 1985 or supplemented foods under the New Zealand (Supplemented Food) Standard 2010. The Bill seeks to reform the current regime, with the side-effect of boosting the regulators' abilities to establish and enforce new requirements.

Simpson Grierson is monitoring the progress of the Bill and we have reviewed the current draft in the Consultation Draft Supplementary Order Paper (**SOP**), dated 18 August 2015. If enacted, the proposed amendments will dramatically increase compliance requirements for manufacturers and distributors of natural health products and supplements.

To ensure that your business is ready for the changes, the following provides an overview of the key changes you should be aware of.

Scheme of the Bill

Manufacturing requirements

The Bill establishes a licensing regime for manufacturers of natural health products. All manufacturers of health products must be licenced by the Natural Health Products Regulatory Authority (**Authority**), in order to offer natural health products for sale in New Zealand.

Selling requirements

Under the new regime, natural health products that are to be sold in New Zealand must pass a two-stage test:

1. **Permitted Natural Health Product:** Products must be a "permitted natural health product" ie they must only contain "permitted substances" identified by the Authority. The Authority will maintain an online database listing the permitted natural health products and permitted substances. If a natural health product contains a "new substance", the Authority must first be notified, after which it may undertake a safety assessment or require more evidence regarding the new substance;
2. **Product Notification:** Products must be the subject of a valid product notification made by a New Zealand-based product notifier to the Authority.

Advertising restrictions

Advertising and labelling of natural health products will be unable to make any health benefit claim in respect of any named condition, unless it has been declared an "allowable claim". If a particular health benefit claim, in respect of a particular product or class of product, has not previously been declared an allowable claim, the product notifier must:

1. provide to the Authority a summary of evidence relied on to support the claim;
2. satisfy the Authority that the health benefit claim may be declared an allowable claim based on the nature and quality of the evidence provided; and
3. satisfy the Authority that the level of risk associated with the use of the product or class of product is low.

Enforcement

The SOP proposes offences carrying hefty penalties for individuals or bodies corporate who contravene the Bill. For the most serious offences, fines can be ordered up to NZ$500,000 for bodies corporate. For individuals, a maximum fine of up NZ$100,000 has been proposed or up to 5 years' imprisonment.

The Authority will have powers to:

- determine the list of permitted natural health products and allowable claims;
- audit product notifications;
- suspend or cancel product notifications; and
- charge fees for monitoring compliance on a user-pays basis.

What does this mean for foreign manufacturers?

Foreign manufacturers will need to comply with a new Code of Practice, which will come into force no later than one year after the Bill is enacted. There is no indication as yet about how rigorous this code will be or how complex compliance for manufacturers will be.

However, the Bill does provide a discretionary power for the Authority to deem a foreign manufacturer compliant with the code, in circumstances where the manufacturer is already licensed by a "recognised authority" for the manufacture of the relevant products.**[1]**

If products are manufactured overseas, the product notifier must be the person who imports the products into New Zealand (unless that person imports the products on behalf of another person, in which case the product notifier is that other person). The product notifier must be **resident in New Zealand.** This means that foreign manufacturers intending to sell their products to New Zealand may need to make arrangements with an appropriate person or company based here in New Zealand, before offering products for sale.

Transitional provisions

Fortunately, the Bill does allow some time for manufacturers and suppliers to become compliant. Any products that are sold in New Zealand before the commencement of the Bill, and contain only permitted substances, may continue to be sold provided the product notifier ensures that:

1. the product notification is completed within 1 year;
2. the product complies with the labelling requirements within 2 years; and
3. the manufacturer of the product complies with the requirements of the Bill (including licencing requirements) within 3 years.

How should overseas manufacturers and distributors respond to the Bill?

Dramatic change is on its way. Much of the new scheme is yet to be announced, with several important features to be provided for in regulations under the Bill.

We encourage you to get involved in the law reform process, to reduce the risk of the Bill establishing an unsatisfactory regime for natural health products in New Zealand.

Get in contact with one of our experts if you would like guidance on the law reform process or to discuss how your business may be impacted by the Bill.

[1] See sections 14 and 47 of the Natural Health Products Bill. A foreign regulator, such as the US FDA, will only be declared a "recognised authority" by the Authority if it makes decisions in respect of similar products that require the foreign authority to assess conformity against, or compliance with, standards that are equivalent to or more robust than those under the Bill.

Food law - reform and updates (/resources/food-law-reform-and-updates)

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Supplementary Examination Guidelines For Patent Applications

Executive summary

The Intellectual Property Office of Singapore ("**IPOS**") amended the "Examination Guidelines for Patent Applications" (the "**Guidelines**") with a full chapter on Supplementary Examination.

This article highlights:-

> The stringent standards for determining whether the foreign route may be relied upon for supplementary examination.

> The examination of medical claims for relatedness to a foreign application relied upon in the Singapore application.

Supplementary examination

In Singapore, an applicant may rely on the final search and examination results of certain foreign applications (referred to as the "**foreign route**") instead of requesting for local search and examination. The application will then be subject to supplementary examination.

Grounds for supplementary examination

During supplementary examination only the following grounds are subject to examination:-

> whether each claim in the application is supported by the description of the invention;
> whether each claim in the application is related to at least one claim in the foreign application which has been examined and determined to have satisfied the criteria of novelty, inventive step and industrial applicability;
> whether the invention encourages offensive, immoral or anti-social behaviour;
> whether the invention is a method of treatment or diagnosis practised on the human or animal body;
> whether there is double patenting; and
> whether there is any added matter.

According to the Guidelines, if the foreign search and examination results contain a negative indication for novelty, inventive step or industrial applicability, an application for supplementary examination will be refused by IPOS. Under the foreign route, the applicant may not amend the claims in the Singapore application and/or lodge submissions, for the purpose of "curing" the negative indication in the foreign results.

Foreign route

Foreign route

The foreign applications which may be relied upon are:-

(a) *corresponding* applications in prescribed patent offices; or
(b) a *corresponding* Patent Cooperation Treaty ("**PCT**") application; or
(c) the related national phase application (i.e. the national phase (in a prescribed patent office) of a PCT application which has also entered national phase in Singapore).

"Corresponding" application

A "corresponding" application is one which has a priority link with the Singapore application.

It has to fulfil one of the three criteria below:-

> The Singapore application claims priority from the corresponding application;
> The corresponding application claims priority from the Singapore application; or
> The corresponding application and the Singapore application claim priority from the same application.

The Guidelines make it very clear that the legislation will be strictly construed in determining whether supplementary examination (i.e. the foreign route) is available.

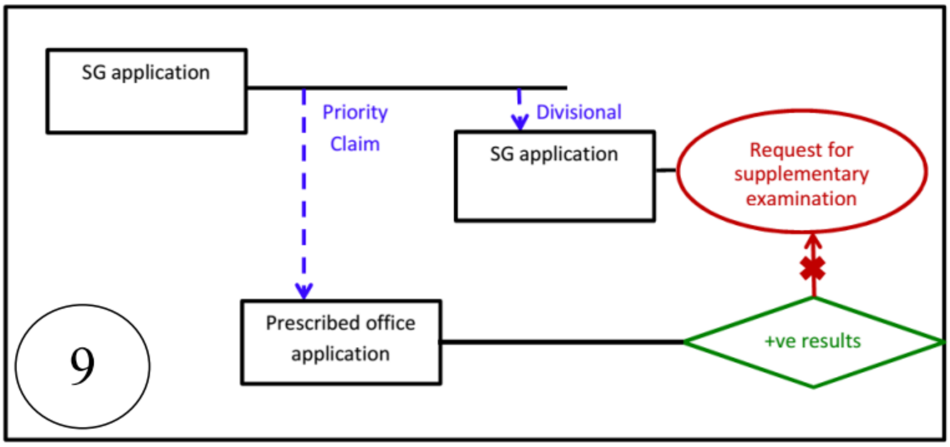
We highlight two examples in this article:-

Example 1

(a) If the parent application of a Singapore divisional application does not contain a priority claim, the foreign route is not available for the divisional application, and supplementary examination of the divisional application is not available.

While a Singapore divisional application is treated under the law as having the same filing date of the parent application, this is not the same as the divisional application claiming priority from the parent application. Hence, if the divisional application has no express priority claim, and the foreign application does not claim priority from the divisional application (even if the foreign application claims priority from the parent application), the divisional application cannot go through the foreign route.

The figure below obtained from the Guidelines illustrates a case in which supplementary examination of a Singapore divisional application is unavailable:-

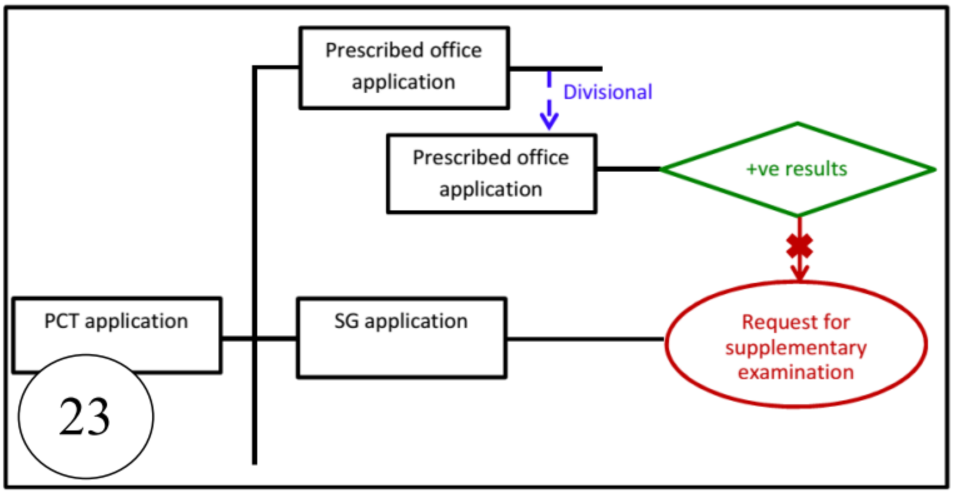


Example 2

(b) Where a PCT application with no priority claim enters national phase in Singapore and in a prescribed patent office, the divisional application of the national phase application in the prescribed patent office cannot be used in Singapore under the foreign route.

The Guidelines clarify that the foreign divisional application is not a related "national phase application" (see (c) under Foreign Route). Since the foreign divisional application has no priority claim, and the Singapore application does not claim priority from the foreign divisional application, the Singapore application cannot go through the foreign route.

The figure below obtained from the Guidelines illustrates a case in which the final results of a foreign divisional application may not be relied upon in supplementary examination:-



Whether different types of medical claims are considered to be "related"

"Related" medical claims

In a supplementary examination, the Examiner will examine whether each claim in the Singapore application is "related" to at least one claim that has been examined in the foreign results relied upon by the applicant.

In this regard, it is stated in the Guidelines that:-

(1) method of medical treatment claims are *not* related to first medical use claims;

(2) Swiss-style claims are *not* related to method of medical treatment claims; and

(3) Swiss style claims are *not* related to European-style second medical use claims.

Note: The foreign route will not be available from 2017. See the article "Singapore's Patents Regime Is Set To Change Again!"

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Taiwan and Mainland China Signed a Cross-Straits Income Tax Agreement

10/23/2015

Tony Chen/Derrick Yang

Taiwan and Mainland China signed the "Cross-straits Agreements for the Avoidance of Double Taxation on Income and Solidifying Cooperation with respect to Taxes" (hereinafter referred to as "Cross-straits ITA") on 25 August 2015. After the draft Article 25-2 of the "Act Governing Relations between the People of the Taiwan Area and the Mainland Area" is passed by the Legislative Yuan and takes effect, the double taxation on the income received by people and enterprises across Taiwan and China may be alleviated.

The contents of the Cross-straits ITA primarily comprise of (i) the measures of exempting/reducing taxes on various types of income, (ii) the disputes resolution mechanism, and (iii) the anti-tax avoidance provisions. The Cross-straits ITA applies to the residents (including individuals and enterprises) in Taiwan and China. For Taiwan investors that indirectly invested in China via a third-area company, if such a third-area company has its place of effective management in Taiwan and has paid taxes as a Taiwan tax resident, the benefits offered by the Cross-straits ITA would also be eligible.

With respect to the measures of exempting/reducing taxes on various types of income, the definition of "permanent establishment" is relaxed in the Cross-straits ITA, when compared to the tax treaties that Mainland China has entered into with other countries. The maximum withholding rate of 5% on dividends, provided that certain circumstances are met, and 7% on interests are more favorable than the terms of the tax treaties between China and other countries. Moreover, the income realized from selling the shares/rights held by Taiwan residents in Chinese companies can be taxed by the Taiwan tax authorities only, without being subject to any tax in China. This is a unique feature that cannot be found in other tax treaties signed by China with other countries.

In terms of disputes resolution, relevant disputes will be negotiated and settled through the platform established by the Ministry of Finance of Taiwan and the State Administration of Taxation of China.

With respect to the anti-tax avoidance provisions, it is agreed that the exchange of information should be subject to the following principles: (i) the information cannot be used retroactively, i.e., the information exchanged by the parties is limited to the information that falls within the tax year starting on or after January 1 of the subsequent calendar year after the Cross-Strait ITA takes effect; (ii) the information cannot be used in any criminal law cases; (iii) the information cannot be used for any purpose other than income tax assessment, collection, mandatory execution and administrative litigation; and (iv) the information must be pertinent to specific cases, which means that neither party is obligated to automatically or voluntarily exchange any information.

BAKER BOTTS

Fair Use and Crying Foul Under the DMCA: The Dancing Baby Case Continues

November 2015

IP Reports

This September, in *Lenz v. Universal Music Corp. et. al*, the Court of Appeals for the Ninth Circuit held that before a copyright holder notifies an Internet Service Provider ("ISP") to remove claimed infringing web content pursuant to Section 512 of the Digital Millennium Copyright Act ("DMCA"), it must first consider whether the accused content is in fact authorized by the fair use doctrine.[1] Failure to do so raises a question as to whether the rights-holder formed the requisite good faith belief that the material was infringing, and a rights-holder who bypasses or merely gives lip service to fair use analysis may be liable to the party who posted the content for nominal damages.

While the ruling might be considered at least a partial victory for plaintiff Stephanie Lenz, whose 29-second home video of her children dancing to Prince's "Let's Go Crazy" had been temporarily removed from YouTube at the defendants' request, both sides have now petitioned for rehearing. The so-called "Dancing Baby" case continues to raise questions about the nature and efficacy of the DMCA's safeguards for Internet users, and about the role of the fair use doctrine in copyright law. This article provides an overview of the ongoing dispute and some of the central issues.

The DMCA's Notice and Takedown Procedures

Section 512 of the DMCA provides the backdrop for the dispute in *Lenz*. The DMCA was enacted in 1998 to address a host of concerns stemming from the rapid growth of digital media and the Internet. Section 512(c) establishes a safe harbor to insulate ISPs from liability for materials stored at the direction of others, provided that the ISPs satisfy certain requirements. One requirement is that the ISP must implement a notice and takedown procedure whereby a copyright owner can alert the ISP to infringing content following procedures prescribed by the Act, and the ISP will expeditiously remove the content. A copyright holder filing a notice under the Act must include a written statement attesting to its "good faith belief" that the "use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law."[2] Section 512(g) provides that the individual who posted the content must be promptly notified of its removal, and sets forth a counter-notice procedure by which the accused party can have the material reinstated.

The notice and takedown procedures offer rights-holders potent, quick relief to online infringement issues. Lenz characterizes Section 512 as being "unique in American law, in that it provides copyright owners with a streamlined, extra-judicial means of silencing speech."[3] To "ensure that material is not disabled without proper justification,"[4] Section 512(f) of the DMCA creates a cause of action for the Internet user who posted the accused content. If a copyright owner knowingly misrepresents that material or activity is infringing, the alleged infringer can sue for any damages incurred, including costs and attorneys' fees.

The Fair Use Doctrine

"[T]he most troublesome doctrine in the whole law of copyright,"[5] fair use, is also central to the dispute in *Lenz*. This codified common law doctrine limits the monopoly that copyright confers on authors of original, creative works by sanctioning certain "fair" uses of those works. Section 107 of the Copyright Act sets forth a multi-factor balancing test for evaluating whether a given use is fair and therefore non-infringing. Specifically, it provides that:

> Notwithstanding [certain provisions of the Copyright Act], the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[6]

The enumerated factors are notably broad and open-ended, and courts considering the issue are free to consider additional facts that they deem relevant.[7]

The Dance Begins

The controversy in *Lenz* arose in 2007, when Universal Music Group ("UMG"), the entity responsible for enforcing Prince's copyrights, filed a DMCA takedown notice with YouTube requesting removal of Stephanie Lenz's 29 second home video. The video, which was shot in Lenz's kitchen, featured her children running around as Prince's "Let's Go Crazy" played in the background.

From off-screen, Lenz asked her toddler what he thought of the music; he "danced."

UMG tasked one employee with scouring YouTube for infringing material. He did this by searching the site for the names of popular Prince songs, and reviewing the hits. If a video contained a Prince song, he considered whether the song "was recognizable, was in a significant portion of the video or was the focus of the video."[8] If the song was deemed to be the focus of a video, the employee added it to a list, and UMG would send a takedown notice to YouTube.[9]

YouTube complied with UMG's request to remove Lenz's video from its site; Lenz objected. While her first counter-notice was incomplete, her second, which alleged that the video made fair use of Prince's music, was successful and the video was reinstated six weeks after it had been removed. It remains live on YouTube today[10] and, to date, has received just over 1.8 million views.

Lenz then sued UMG. Her sole claim to survive UMG's motions to dismiss was her 512(f) claim: that UMG knowingly made a misrepresentation in its DMCA takedown notice. Specifically, Lenz alleged that UMG likely knew that her use of Prince's music constituted fair use, and therefore misrepresented that Lenz's use of the music was not authorized by law when it asked YouTube to remove the video.

In 2012, Lenz and UMG moved for summary judgment on Lenz's 512(f) claim. The District Court for the Northern District of California denied both motions; Lenz and UMG appealed, and oral argument was held on July 7, 2015.

The Ninth Circuit Ruling

In affirming the District Court's decision, the Court of Appeals held that in order to assert a "good faith belief" that particular web content is not authorized by law, a copyright holder must have considered whether the content is authorized by the fair use doctrine, and formed a subjective good faith belief that the use was not a fair use.

Lenz had advocated for an objective standard for evaluating whether a rights-holder possessed a good faith belief. The Court of Appeals rejected that argument as contrary to precedent, citing *Rossi v. Motion Picture Association of America, Inc.*, and held that a subjective standard applies.[11]

The Court in Lenz further stated that while the party filing the takedown must pay more than "lip service to the consideration of fair use" and cannot be willfully blind to avoid learning of fair use, the fair use analysis need not be "searching or intensive" – and it need not be explicit.[12] In fact, the Court left open the possibility that UMG's analysis was "sufficient to form a subjective good faith belief about the video's fair use or lack thereof," and directed that a jury must now decide that very question.[13]

UMG argued that rights-holders need not consider fair use before filing DMCA takedown notices because fair use is an affirmative defense to copyright infringement.[14] According to UMG, as an affirmative defense, the fair use doctrine functions to excuse conduct that would otherwise be considered infringing; because fair use is merely *excused* by law and not *authorized* by it, the DCMA does not require right-holders to consider the doctrine.[15]

The Court of Appeals emphatically rejected this argument, holding that while fair use may function procedurally as an affirmative defense, it is qualitatively different than other affirmative defenses. Fair uses are not simply authorized infringing uses; rather, per the Copyright Act, such uses do not infringe. Based on this, the Court concludes that fair uses are uses "authorized by the law."[16] Thus, while a rights-holder would not necessarily need to consider other affirmative defenses—for example, laches—prior to issuing a takedown notice, the same cannot be said of fair use. In support of this argument, the Court looked to *Bateman v. Mnemonics*.[17]

Judge Smith concurred in the judgment in *Lenz*, but dissented in part. He noted that Section 512 prohibits misrepresentations that a work is infringing, not misrepresentations about "the party's diligence in forming its belief that a work is infringing."[18] In his view, the issue is not whether UMG falsely implied that it had considered fair use when it had not. Rather, "[UMG] may be held liable for knowingly misrepresenting that the video was infringing if, knowing it had not considered whether the video was a fair use, it erroneously asserted that it was infringing."[19] As he sees it, it is clear that UMG did not consider fair use, so the key inquiry becomes whether or not the video makes fair use of the song at issue.

The Dance Continues

As noted above, neither Lenz nor UMG appears to be entirely happy with the Court of Appeals' decision.

In its Petition for Panel Rehearing, UMG argues that the Court lacks jurisdiction under Article III because Lenz suffered no injury and therefor lacks standing; her video was reinstated within six weeks. UMG points out that while the rulings in this case will not "redress any distinct and palpable injury to [Lenz]", the implications for copyright holders are significant.[20] UMG warns that "[b]y reading 'any damages . . . incurred by the alleged infringer' to include 'nominal damages'—which . . . are not damages actually incurred at all—the Court's opinion has the potential to authorize any person subject to a takedown notice to bring suit, and potentially to be part of a class action, without regard to whether that individual suffered any harm."[21] UMG also takes issue with the characterization of its arguments in the opinion, and requests that the Ninth Circuit clarify its opinion to make it clear that Judge Birch was not speaking for the judicial panel as a whole when he addressed the issue of fair use in *Bateman* and stated that fair use is "better viewed as a right."[22]

Lenz in her petition asks the Court to address "[w]hether Congress, in drafting the safe harbor provisions of the [DMCA], intended to grant private parties the practical power to censor speech based on an *unreasonable* belief that a copyright has been infringed, as long as that belief is (like all beliefs) subjectively held."[23] She argues that *Rossi* should be overturned or limited to the facts of that case. In her view, the subjective good faith belief standard embraced by the Court would allow copyright holders to hide behind unreasonable beliefs to attack lawful uses of copyrighted material.

Furthermore, unlike in *Rossi*, which concerned a factual determination (whether the site offered downloads of movies), the belief at issue here concerns a legal determination (whether Lenz's video makes fair use of a Prince composition). Lenz argues that "requiring reasonable legal determinations encourages those who wish to use the law as a sword to muster a basic understanding of the weapon."[24] She further notes that a subjective good faith standard places the burden on parties in her situation to prove to a jury the "subjective belief of the censor—a standard and process that will be all but impossible for most."[25] Lenz contends that construing the statute as the Ninth Circuit has done effectively deprives Internet users of the safeguards that Section 512(f) was intended to create.

Alternatively, Lenz challenges the Court's directive that a jury should now review UMG's analysis of her video to determine whether that analysis was "tantamount" to a fair use analysis. She argues that this is a legal determination – not a factual one – and points out that the district court already concluded that UMG did not consider fair use when it reviewed her video.

Looking Ahead

Time alone will tell how this dance will end for Lenz and UMG. In the wake of the Ninth Circuit's September ruling, however, rights-holders seeking to invoke the DMCA's takedown procedures should proceed with caution as the law seems unsettled at this juncture. Copyright holders should consider fair use when reviewing online material, document that analysis, and confer with counsel prior to moving forward with DMCA takedown notices.

1Nos. 13-16106, 13-16107, 2015 WL 5315388 (9th Cir. Sept. 14, 2015).
217 U.S.C. § 512(c)(3)(A)(v).
3Appellee/Cross-Appellant's Petition for Rehearing En Banc or Panel Rehearing at 7, *Lenz v. Universal Music Corp.*, Nos. 13-16106, 13-16107, 2015 WL 5315388 (9th Cir. Oct. 20, 2015).
4S. REP. No. 105-190, at 21 (1998).
5*Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939).
617 U.S.C. § 107.
7In evaluating the first factor, courts typically look at whether the use is for-profit and whether it is "transformative." While a commercial use may be considered fair, a party in the position of having to defend such a use may face an uphill battle. *See, e.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584-85 (1994) ("the fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use") (internal quotations omitted) (citation omitted). To the extent that a defendant is using plaintiff's materials in the same manner and for the same purpose employed by the plaintiff, this may weigh against him. If, on the other hand, the defendant's work has "new expression, meaning and message," that would tend to support a finding of fair use. *See id.* Recently, in *Author's Guild v. Google, Inc.*, the Court of the Appeals for the Second Circuit noted that "transformative uses tend to favor a fair use finding because a transformative use is one that communicates something new and different from the original or expands its utility, thus serving copyright's overall objective of contributing to public

knowledge." *Author's Guild v. Google, Inc.*, 2015 WL 6079426 *7 (Oct. 16, 2015). It bears mention that the Court of Appeals for the Seventh Circuit has questioned whether the degree of "transformativeness" is the proper inquiry. *See, e.g.*, *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014) ("asking exclusively whether something is 'transformative' not only replaces the list in § 107 but also could override 17 U.S.C. § 106(2), which protects derivative works"). Some courts will also assess whether the parties have acted in good faith.

The second factor addresses the type of work copied. Courts may consider whether this type of use is important to public good. Additionally, if the work was unpublished when it was copied, this may weigh heavily against a finding of fair use. *See, e.g.*, *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 554-55 (1985).

The third factor weighs how much the defendant took from plaintiff's work. Quantity, however, is not the sole consideration. Courts will consider the amount taken in proportion to the entire work, but they will also consider the substance and importance of what was taken. In one famous case, for example, the copying of 300 words out of a 200,000 word biography was found to be infringing in part because what was taken constituted the "heart" of the work. *See id.* at 564-65.

The fourth factor, the impact on the marketability of the original work, is considered to be the most important factor. Here, courts will typically assess whether and to what extent the plaintiff and the demand for its asserted work may be harmed by the defendant's actions. It is not necessary for plaintiff to show actual harm; the potential for harm (such as a decrease in demand for its work) is sufficient. The court may also consider whether permitting a particular type of copying will suppress a useful activity.

8*Lenz*, 2015 WL 5315388, at *1.

9UMG initially argued that its notice to YouTube was not a DMCA takedown notice because YouTube did not qualify for the safe harbor; the district court concluded that YouTube qualified, and that the notice at issue was a "notification of claimed infringement" under the DMCA.

10Stephanie Lenz, *"Let's Go Crazy" #1*, YOUTUBE (Feb. 7, 2007), available here. 11In *Rossi v. Motion Picture Association of America, Inc.*, Rossi had maintained a website that advertised that subscribers to the site could download full length movies. The MPAA concluded that its members' rights were being infringed, and filed a DMCA takedown notice with the site's ISP. Rossi's site did not function as advertised, and subscribers could not download movies. Rossi filed suit alleging tortious interference with contractual relations, tortious interference with prospective economic advantage, libel and defamation, and intentional infliction of emotional distress. The MPAA won on summary judgment, and the Ninth Circuit affirmed that decision. In so doing, the Court held that "a copyright owner cannot be liable simply because an unknowing mistake is made, even if the copyright owner acted unreasonably in making the mistake." 391 F.3d 1000, 1004-05 (9th Cir. 2004) (citations omitted).

12*Lenz*, 2015 WL 5315388, at 7.
13While not at issue in the case, the Court also noted that “the implementation of computer algorithms appears to be a valid and good faith middle ground for processing a plethora of content while still meeting the DMCA's requirements to somehow consider fair use” and suggested that human employee could then review the results. *Id.* at *8.
14In support of its position, UMG cited to various cases, including *Campbell v. Acuff-Rose Music, Inc.*, in which the Supreme Court referred to the doctrine as an affirmative defense. *See, Campbell*, 510 U.S. at 590 .
15UMG also argued that the rights-holder is often not in a position to assess fair use, as it would not necessarily have access to information about the purpose and character of the work.
16*Lenz*, 2015 WL 5315388, at *4.
17*Bateman v. Mnemonics, Inc.*, 79 F.3d 1532 (11th Cir. 1996).
18*Lenz*, 2015 WL 5315388, at *11 (Smith, J., concurring in part and dissenting in part).
19*Id.* at *12.
20Petition for Panel Rehearing at 10, *Lenz v. Universal Music Corp.*, Nos. 13-16106, 13-16107, 2015 WL 5315388 (9th Cir. Oct. 20, 2015).
21*Id.*
22*Bateman*, 79. F.3d at 1542. n.22.
23Appellee/Cross-Appellant’s Petition for Rehearing En Banc or Panel Rehearing, *supra* note 3, at 1.
24*Id.* at 14.
25*Id.* at 12.

NYC to Require Most Employers to Offer Qualified Transportation Benefits

11.09.15

By Laura Sack and Scott M. Cooper

Effective Jan. 1, 2016, the New York City Affordable Transit Act (the "Act") will require covered employers to establish a program allowing full-time employees to designate up to the federal limit of $130 per month in pre-tax income for their qualified transportation needs.

Section 132(f) of the federal Internal Revenue Code excludes "qualified transportation fringe benefits" from an employee's gross income. Qualified transportation fringe benefits include transit passes (such as MTA cards or ferry tickets), qualified parking, and the cost of transportation in a commuter vehicle between the employee's home and worksite. Although federal law merely *allows* employers to offer employees this benefit, the Act now *requires* covered New York City employers to do so.

The Act will cover most employers with 20 or more full-time employees who work in New York City. A full-time employee, as defined by the Act, is one who works for an employer in New York City for an average of at least 30 hours per week.

Exempt from the Act are: (1) government employers; (2) employers that are not required by law to pay federal, state, and New York City payroll taxes; and (3) employers that are party to a collective bargaining agreement, except where the number of full-time employees not covered by a collective bargaining agreement totals at least 20, in which case those employees not covered by a collective bargaining agreement must be eligible for the benefit. Separately, even if an employer is unable to claim one of the above exemptions, it may avoid the Act's requirement to provide the benefit if it can demonstrate to the City's Department of Consumer Affairs ("DCA") that offering the federal commuter tax fringe benefit to employees would cause financial hardship.

Although the Act goes into effect on Jan. 1, employers will be afforded a six-month grace period to comply with its provisions—meaning employers will not face penalties for non-compliance before July 1, 2016. Also, following a first violation, employers will be granted a 90-day cure period to rectify their noncompliance with the Act before being assessed a civil fine. The civil penalty for a first violation left uncured within 90 days can range from $100 to $250. Following the expiration of the 90-day cure period upon a finding of a first violation, the DCA will deem every 30-day period in which the employer fails to offer the benefit to constitute an additional violation of the Act, which will be subject to a civil penalty of $250. Penalties will be limited to no more than one per every 30-day period.

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Hogan Lovells

Medical Device, Pharmaceutical, and Biotechnology Alert
November 4, 2015

Print Forward

See note below about Hogan Lovells

FDA Takes Steps to Clarify Significant Human Tissue Questions

On October 30, 2015, the Food and Drug Administration (FDA) issued a draft guidance document, *Homologous Use of Human Cells, Tissues, and Cellular and Tissue-Based Products* (the *Homologous Use Guidance*), discussing FDA's interpretation of homologous use and how to apply regulatory criteria for human cells, tissues, and cellular and tissue-based products (HCT/Ps).[1] Though FDA does not appear to have changed its definition of homologous use, the guidance provides broader insight into FDA's thoughts on how to determine whether an HCT/P is to be used for or is intended for homologous use. The guidance also includes a series of examples to demonstrate when products would or would not be regulated as HCT/Ps for homologous use. Most of what FDA states in the guidance is unsurprising and is consistent with how FDA has interpreted and applied the HCT/P regulations in recent years. What is most significant is what FDA does not say, inviting comments.

HCT/Ps, as defined in 21 C.F.R. § 1271.3(d), are articles containing or consisting of human cells or tissues that are intended for implantation, transplantation, infusion, or transfer into a human recipient. To be regulated as an HCT/P subject to regulation solely under section 361 of the PHS Act and 21 C.F.R. Part 1271, an HCT/P must meet the criteria in 21 C.F.R. §1271.10(a). To meet these criteria, an HCT/P must be minimally manipulated; be intended for homologous use; not be combined with other articles except specified types of ingredients; and either not have a systemic effect nor depend on the metabolic activity of living cells, or be intended for autologous use or for allogeneic use in a first-degree or second-degree blood relative. If an HCT/P does not meet these criteria, the HCT/P will be regulated as a drug, device, and/or biological product.

FDA defines homologous use as "the repair, reconstruction, replacement, or supplementation of a recipient's cells or tissues with an HCT/P that performs the same basic function or functions in the recipient as in the donor, including when such cells or tissues are for autologous use."[2] FDA notes in the guidance that the agency generally considers an HCT/P to be intended for a homologous use when it is used to repair, reconstruct, replace, or supplement:

- recipient cells/tissues that are identical to donor cells/tissues and perform one or more of the same basic functions in the

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recipient as the cells/tissues performed in the donor; or

- recipient cells/tissues that are not identical to the donor's cells but perform one or more of the same basic functions in the recipient as the cells/tissues performed in the donor.[3]

Generally, FDA states that, if an HCT/P is intended for use as an unproven treatment for a myriad of diseases or conditions, the agency will not consider the HCT/P to be intended only for a homologous use.[4]

FDA attempts to add some clarity to its interpretation of Part 1271 by providing general definitions and examples of "repair, reconstruction, replacement, or supplementation of a recipient's cells or tissues"[5]:

- **Repair:** The physical or mechanical restoration of tissues, including by covering or protecting.
- **Reconstruction:** Surgical reassembling or re-forming.
- **Replacement:** Substitution of a missing tissue or cell.
- **Supplementation:** To add to or complete.

That brief discussion invites comments and elaboration. For example, in illustrating its definition of "replacement," FDA states that the term includes "the replacement of donor hematopoietic stem/progenitor cells in a recipient with a disorder affecting the hematopoietic system that is inherited, acquired, or the result of myeloablative treatment." That language raises questions about the scope of disorders that would be covered, and about the relationship between the homologous use prong and the systemic effect prong. It implies that such "replacement" might not constitute a "systemic effect" that would limit transplantation of the hematopoietic stem/progenitor cells to autologous or close-relative use under 21 C.F.R. § 1271.10(a)(4).

In the new guidance, FDA also states that to meet the definition of "same basic function or functions," an HCT/P would generally be expected to perform the same function in the body of the donor that would be expected to be performed in the recipient. Not all the functions would have to be performed for the HCT/P to fall in the regulatory category of homologous use.[6]

Again, the draft guidance invites questions about what it does not say. For example, on one hand, the guidance declares that using an amniotic membrane product "for wound healing of dermal ulcers and defects" would not qualify as homologous use "because wound healing of dermal lesions is not a basic function of amniotic membrane."[7] On the other hand, the guidance also states that "a homologous use for a structural tissue would generally be to perform a structural function in the recipient, for example, to . . . serve as a barrier or conduit, or connect, cover, or cushion."[8] Further, the guidance also acknowledges that basic functions of amniotic membrane include "covering, protecting, serving as a selective barrier for the movement of nutrients between the external and in utero environment, and to retain fluid in utero."[9] FDA did not explain whether a company may market an amniotic tissue-derived product to serve as a cover or barrier and to retain fluid in dermal lesions, even if the obvious result will be to aid in wound healing.

Finally, the draft guidance also confirms that an HCT/P is intended for homologous use when its labeling, advertising, or other indications of the manufacturer's objective intent refer to only homologous uses for the HCT/P. When an HCT/P's labeling, advertising, or other indications of the manufacturer's objective intent refer to non-homologous uses, the HCT/P would not meet the homologous use criterion. The manufacturer's objective intent is determined by the expressions of the manufacturer or its representatives or may be shown by the circumstances surrounding the distribution of the article. What is particularly significant is that FDA did not elaborate on what circumstances surrounding the distribution, independent of specific communications by the marketing company, could render use to be non-homologous.

On the same date that FDA issued the draft guidance, the agency also proposed a public hearing and re-opened the comment period on three related draft guidances:

- *Human Cells, Tissues, and Cellular and Tissue-Based Products from Adipose Tissue: Regulatory Considerations; Draft Guidance for Industry;*
- *Minimal Manipulation of Human Cells, Tissues, and Cellular and Tissue-Based Products; and*
- *Same Surgical Procedure Exception: Questions and Answers Regarding the Scope of the Exception.*

These actions suggest that FDA may revisit certain critical definitional issues that could affect which HCT/Ps are regulated solely under section 361 of the Public Health Service Act and 21 C.F.R. Part 1271. For that reason, all interested parties should consider submitting comments. Comments on the new draft guidance, as well as on the three re-opened draft guidances, can be submitted electronically at http://www.regulations.gov and are due by **April 29, 2016**.

If you have any questions about this draft guidance or are interested in working with Hogan Lovells to draft and submit a comment to FDA, please do not hesitate to contact one of the authors of this client alert or other lawyers you work with at Hogan Lovells.

1 A copy of the guidance is available at http://www.fda.gov/downloads/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/Tissue/UCM469751.pdf.
2 *Homologous Use Guidance* at 3.
3 *Id.* at 3
4 *Id.* at 4
5 *Id*.
6 *Id*. at 4-5.
7 *Id*. at 6
8 *Id*. at 5.
9 *Id.* at 5-6.