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April 2016 e-Bulletin

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60th International PRAC Conference
Manila
Hosted by SyCip Salazar Hernandez & Gatmaitan
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BAKER BOTTS REAPPOINTS ANDREW BAKER MANAGING PARTNER

HOUSTON, March 9, 2016 - Baker Botts L.L.P., a leading international law firm, today announced that Andrew M. Baker has been reappointed as Managing Partner for a second term that expires in 2019. First appointed in 2012, Mr. Baker is the 14th individual to hold the role in the firm's 176 year history.

Mr. Baker joined Baker Botts' Houston office in 1979, shortly after graduating from the Cornell Law School. In 1985, he relocated to Dallas to help open what is now the firm's third largest office. In 2012 he returned to Houston when he was first elected Managing Partner.

"Serving as Managing Partner of Baker Botts has been the highlight in my over 30 year legal career. I am delighted and honored that my partners have asked me to serve in this capacity again," said Andrew M. Baker.

"Over the last four years, our focus has been on providing the highest levels of client service, and on innovating and modernizing our business, while at the same time remaining true to our firm's core values of professional excellence, teamwork and collegiality, integrity and service to the communities in which we practice. This will remain our focus over my second term," added Mr. Baker.

During Mr. Baker's first term, the firm embarked on a program of innovation and investment, focusing on creating close client relationships, pricing and value delivery, practice management, talent acquisition and retention, marketing and business development, professional development, diversity, and state of the art information technology systems.

For more information, please visit www.bakerbotts.com

BENNETT JONES LAUNCHES KICKSTART FOR STARTUPS AND ENTREPRENEURS

April 07, 2016: Bennett Jones is today launching Kickstart, a program to provide startups and entrepreneurs with the legal advice they need to help them grow. The firm is teaming up with Innovate Calgary, VA Angels, District Ventures and the Entrepreneurs' Organization for this initiative. Bennett Jones has long-standing relationships with these organizations.

"Our business grows by helping new businesses grow," says Karen Keck, partner in Bennett Jones' Calgary office. "Kickstart will allow us to work even more effectively with startups as they grow their businesses."

"The program will enable us to develop tailored plans for entrepreneurs to manage legal concerns relevant to their businesses, and provide them with legal advice they need during critical stages of development—all on a cost-effective basis," says Kelly R. Ford, associate in Bennett Jones' Calgary office.

Access to Bennett Jones Kickstart includes:

- a 3-hour face-to-face diagnostic Kickstart consultation with the Kickstart team composed of experienced Bennett Jones lawyers from a full spectrum of practice areas, including corporate, securities, private equity, intellectual property, information technology, banking, tax, employment, real estate and litigation;
- a customized legal services plan designed to implement the recommendations developed from the diagnostic Kickstart consultation;
- special-access to Bennett Jones' predictable fee arrangements to implement legal services plans on a cost-effective and predictable basis; and
- introduction to our network of investors, advisors and strategic partners.

Kickstart is initially launching in Calgary. Organizations from all business sectors are welcome.

For more visit www.bennettjones.com

TRIO OF CORPORATE LIFE SCIENCE PARTNERS JOIN THE HOGAN LOVELLS PHILADELPHIA OFFICE

PHILADELPHIA, 11 April 2016 – Hogan Lovells announced today the appointment of three new partners to expand the Philadelphia office. The move reinforces the firm's strategy to deepen its life sciences, capital markets, and M&A capabilities in the United States.

Steven Abrams and Rachael Bushey concentrate their practices on life sciences capital markets, M&A, transactional, and corporate governance matters. John Duke brings additional corporate, capital markets, and M&A experience in the consumer products, food and beverage, FinTech, and manufacturing industries.

"The addition of this group to our corporate practice further strengthens our capabilities in the life sciences and consumer products transactional space, in one of the leading markets for pharmaceutical and medical technology companies, as well as consumer products, food and beverage companies," said David Gibbons, global head of the firm's Corporate Practice Group. "The collaborative nature of these three partners combined with their established individual practices will be a tremendous fit for the regulatory and litigation offerings already in place in our Philadelphia office."

Hogan Lovells' Philadelphia office is known for its strength in the life sciences sector, particularly as it relates to regulatory, civil litigation and white collar investigation issues.

"Hogan Lovells' strong global platform provides an ideal opportunity for us to better serve our clients in the middle market life sciences sector, while continuing to build our individual practices across a broader scope of industries," said Abrams. "The additional resources, regulatory capabilities and global reach of the firm increases what we are able to deliver to clients in this rapidly evolving sector."

The group joins Hogan Lovells from Pepper Hamilton, where Abrams, Duke, and Bushey served as partners in the Corporate and Securities Practice Group, focused in the life sciences and food and beverage sectors. Abrams was the Co-Chair of Pepper's Life Sciences Practice and Co-Chair of Pepper’s Corporate & Securities Practice Group. Duke was Co-Chair of Pepper's Food & Beverage Practice and Co-Chair of Pepper's Commercial Department.

Duke earned a J.D. from University of Pennsylvania Law School and a B.B.A. from Loyola College. Abrams also earned his J.D. from University of Pennsylvania Law School after receiving a B.A. from Rutgers University. Bushey received a J.D. from Villanova University School of Law, as well as a B.A. from Lafayette College, and is the former vice president, deputy general counsel and corporate secretary of West Pharmaceutical Services, Inc.

For more information, see www.hoganlovells.com

ARIAS & MUNOZ GUATEMALA

TAX TEAMS ACHIEVES FIRST ADVANCE RULING OF ORIGIN IN THE FRAMEWORK OF CAFTA-DR

February 2016: The tax teams of Arias & Muñoz worked together through three jurisdictions in obtaining the first Advance Rulings of Origin issued by the tax authorities of Guatemala and Costa Rica under the rules of the Free trade Agreement between the United States, Central America and the Dominican Republic (CAFTA-DR), setting an important precedent regarding tax benefits and customs legal certainty for companies which operates under special customs rules or free trade zones rules.

The Advance Ruling of Origin issued by the Ministry of Economy of Guatemala and the Customs Administrations of Costa Rica, confirms that the products complying with the rules of origin of the CAFTA-DR and which are imported between the Central America countries, will be eligible for the benefits of such treated even if they are produced in a free zone or are manufactured by an entity under a special custom regime.

In these particular cases, our firm acted on behalf of a company specialized in manufacturing and commercializing preforms and containers of plastic in Central America and the Caribbean. The company was exploring the possibility of applying the tax benefits under the CAFTA-DR framework; hence Arias & Muñoz assisted the client in petitioning for an Advance Ruling of Origin to local authorities in Guatemala and Costa Rica, obtaining favorable results for customer operations. The resolutions were issued in February 2015 in the case of Guatemala and February 2016 in the case of Costa Rica.

The case has the peculiarity that in both countries there is no history of such resolutions and that it was a joint effort between the tax teams of Guatemala, Costa Rica, and with support from the tax team of El Salvador. In Guatemala the case was leaded by Ximena Tercero with support of Jorge Luis Arenales. For Costa Rica, Carlos Camacho and Laura Fajardo were in charge of the process.

For additional information visit www.ariaslaw.com

BAKER BOTTS

REPRESENTS BARCLAYS IN QUITY OFFERING BY SPECTRA ENERGY CORP

HOUSTON ,06 April 2016 : Deal Description: On April 4, 2016, Spectra Energy Corp (NYSE: SE) ("Spectra Energy") priced a public offering of 14,000,000 shares of common stock at $30 per share to the public. Barclays Capital Inc. ("Barclays") is the sole underwriter in the offering. In addition, Barclays has a 25-day option to purchase up to 2,100,000 additional shares. .

Spectra Energy expects to use the net proceeds from the offering to purchase additional common units from Spectra Energy Partners, LP (NYSE: SEP) ("SEP") in a private placement.

Baker Botts is representing Barclays in the offering.
Client: Barclays Capital Inc.
Outside Counsel to Spectra Energy Corp: Gibson, Dunn & Crutcher LLP
Other Party: Spectra Energy (as described above)
Outside Counsel to the Underwriter: Baker Botts L.L.P.
Value: Up to $483,000,000 (including overallotment)

For more information visit www.bakerbotts.com

BENNETT JONES

ACTING FOR WASTE CONNECTIONS INC ON APPROX. $13 BILLION MERGER WITH PROGRESSIVE WASTE SOLUTIONS

On January 19, 2016, Waste Connections, Inc. announced that it entered into an agreement with Progressive Waste Solutions, Ltd. to merge in an all-stock transaction, on completion of which stockholders of Waste Connections will own approximately 70% of the combined company, and shareholders of Progressive Waste Solutions will own approximately 30% of the combined company.

- Date Announced: January 19, 2016
- Date Closed:
- Deal Value: $13,000,000,000
- Client Name: Waste Connections, Inc.

The combined company will use the Waste Connections, Inc. name and it is anticipated that its shares will trade on the New York Stock Exchange and the Toronto Stock Exchange. The transaction is expected to close in the second quarter of 2016.

Waste Connections is an integrated solid waste services company that provides waste collection, transfer, disposal and recycling services in mostly exclusive and secondary markets. Shares of Waste Connections common stock trade on the New York Stock Exchange under the symbol "WCN".

Progressive Waste Solutions provides non-hazardous solid waste collection, recycling and disposal services to commercial, industrial, municipal and residential customers in 14 U.S. states and the District of Columbia and six Canadian provinces. Its shares are listed on the New York Stock Exchange and the Toronto Stock Exchange under the symbol "BIN".

Bennett Jones is Canadian counsel to Waste Connections with a team led by Brent Kraus and Harinder Basra and including Kelly Ford, Eric Chernin, Steve Gow (Capital Markets and M&A), Anu Nijhawan (Tax), Karen Dawson (Banking), Beth Riley (Regulatory), Susan Seller, Mariette Matos (Pension & Benefits) and Carl Cunningham (Employment).

For additional information visit www.bennettjones.com

BRIGARD & URRUTIA

COLOMBIAN COUNSEL IN €1,35 BILLION OFFERING

BOGOTA, 4 April 2016: Brigard & Urrutia Abogados in Bogotá and Sullivan & Cromwell LLP in New York advised the underwriters in Colombia issuance of sovereign bonds worth 1.35 billion euros (US$1.5 billion) in a heavily over-subscribed offering that takes advantage of attractive Eurozone borrowing costs. The deal closed on 22 March and was 2.6 times oversubscribed.

Colombia last issued bonds in euros 15 years ago when it settled for a far higher interest rate of 11.3 per cent. It will use the proceeds from the current offering to finance its 2016 budget.

Counsel to Goldman Sachs, JP Morgan and BBVA - Brigard & Urrutia Abogados team led by Partners Carlos Urrutia and Carlos Fradique-Méndez, and associate María Camila Ordóñez in Bogotá.

For additional information visit www.bu.com.co

GIDE

ADVISES CLEAVELAND ON ITS SALE TO EDMOND DE ROTHSCHILD

PARIS, 4 April 2016: Gide has advised the real estate investment management company Cleaveland and its shareholders on signing an agreement for its sale to the Edmond de Rothschild Group. This acquisition remains subject to approval from the French financial markets authority.

A leading independent real estate asset management company for third parties, Cleaveland covers the entire value-chain of real estate management activities (OPCI management company, asset management and property management) and handles over EUR 2.5 billion of assets.

This acquisition will enable the Edmond de Rothschild Group to design a comprehensive property offer that combines real estate management and investment.

Hugues Moreau, partner in Gide's Real Estate Transactions & Financing practice group, advised Cleaveland and the sellers on this transaction.

For additional information visit www.gide.com

CLAYTON UTZ

ACTS FOR PRIVATE EQUITY CONSORTIUM ON US$7.75 MILLION MARTABE MINE LBO

MELBOURNE, 1 April 2016: Clayton Utz has acted for a consortium comprising EMR Capital, Farallon Capital and partners on its US$775 million acquisition of a 95% stake in Indonesia's Martabe Mine, from HK-listed G-Resources Group Limited. The transaction represents one of the largest leveraged buy-outs of a gold-producing asset, globally.

Clayton Utz senior corporate adviser Rod Lyle and partner John Brewster led the Clayton Utz deal team, which included lawyer Aimee Nguyen.

As lead legal counsel to the consortium, Clayton Utz provided strategic and deal structuring advice, led negotiations with the vendor on the transaction documentation, and coordinated input from foreign legal counsel and other advisors to the consortium.

The transaction involved complex cross-border negotiations, which spanned more than 24 months, among a number of stakeholders, including the vendor, the consortium, mezzanine lenders and senior debt providers.

The transaction positions EMR Capital as a significant resources private equity fund in the region.

The Martabe Mine is a major producing gold and silver mines in Asia and was the main asset of G-Resources Group Limited prior to this transaction.

The transaction was recently approved by shareholders of G-Resources Group Limited in Hong Kong and then completed on 17 March 2016.

For additional information visit www.claytonutz.com

HOGAN LOVELLS

ADVISES TESARO ON GLOBAL PROSTATE CANCER COLLABORATION WITH JANSSEN

WASHINGTON, 6 April 2016: Hogan Lovells advised TESARO, Inc., an oncology-focused biopharmaceutical company, on its global collaboration and licensing agreement with Janssen Biotech Inc., focused on the development and commercialization of the drug niraparib specifically for the treatment of prostate cancer.

The collaboration, in which Janssen will develop and commercialize niraparib for patients with prostate cancer worldwide, except in Japan, will accelerate efforts to expand the treatment options available for men with prostate cancer. Niraparib is a potent and highly selective PARP inhibitor that is currently being evaluated in Phase 3 clinical trials for ovarian and breast cancer.

Under the terms of the agreement, TESARO will receive an upfront payment of US$35 million, and is eligible to receive additional milestone payments of up to US$415 million. Janssen will be responsible for funding all development and commercialization activities related to niraparib in prostate cancer. Separately, Johnson & Johnson Innovation (JJDC, Inc.) is making a US$50 million equity investment in TESARO at a price of US$44.24 per share.

The Hogan Lovells team was led by Asher Rubin, and included Adam Bellack, William Intner, Drew Cook, Tom Kennedy, Alison Lehner, Adriana Tibbitts, Bob Leibenluft, Alan Dye, Michele Harrington, Dan Davidson, Meredith Manning, Phil Katz, Scott Haiber, Lauren Battaglia, Arlene Chow, Alan Hicks, Jim Johnson, Annie Purcell, Nick Hoover, Peter Noh, Christine Lane, Joanna Yoon, Kirsten Young, Tina Debeljak, Marta Miglietti, and Joerg Schickert.

To learn more about the deal, read TESARO's press release here. http://ir.tesarobio.com/releasedetail.cfm?ReleaseID=963728

For more information, see www.hoganlovells.com

NAUTADUTILH

ADVISES DELTA LLOYD IN EUR 650 MILLION RIGHTS ISSUE

AMSTERDAM, 23 March 2016: Delta Lloyd announced the terms of its EUR 650 million rights offering. The rights will be traded on the regulated markets of Euronext Amsterdam and Euronext Brussels.

NautaDutilh advised and continues to advise Delta Lloyd on the Dutch and Belgian law aspects of this offering. The offering is a critical component of Delta Lloyd's capital plan, and the receipt of its gross proceeds is expected to add approximately 25% points to Delta Lloyd's Solvency II standard formula ratio.

The offering is underwritten by a syndicate of banks led by Goldman Sachs International acting as Sole Global Coordinator and Joint Bookrunner, as well as BofA Merrill Lynch and Barclays, acting as Joint Bookrunners. ABN AMRO and Rabobank are acting as Joint Co- Manager.

For additional information visit www.nautadutilh.com

MUNIZ RAMIREZ PEREZ-TAIMAN & OLAYA

ASSISTS BBVA IN EDELNOR BOND OFFERING

LIMA, 29 March 2016: Muñiz, Ramirez, Perez Taiman & Olaya has advised BBVA in its role as arranger and placement agent in a 110 million Peruvian Sol (US$30 million) bond offering by Peruvian power company Edelnor. Edelnor called on Lazo, De Romaña & Gagliuffi to issue the bonds.

The transaction closed on 14 March.

Counsel to BBVA Muñiz, Ramirez, Perez Taiman & Olaya Team led by Partner Andres Kuan-Veng and associate Rocio Izquierdo.

For additional information visit www.munizlaw.com

RODYK

SINGAPORE COUNSEL FOR SGD 3.4 BILLION FACILITIES GRANT TO CMA CGM S.A. FOR PARTIAL FINANCE OF ACQUISITION OF NEPTUNE ORIENT LINES LIMITED

SINGAPORE: Rodyk & Davidson LLP acted as Singapore counsel to a group of banks comprising:

ING Bank N.V.,
J.P. Morgan Limited,
J.P. Morgan Securities plc,
BNP Paribas,
Unicredit Bank AG
Société Générale CIB
HSBC France and HSBC BANK PLC,

as arrangers and/or initial lenders in the financing of a pre-conditional voluntary general cash offer by French shipping company CGM CGM S.A., for all the issued and paid up ordinary shares in the capital of Neptune Orient Lines Limited (NOL). Nepute Orient Lines Limited (NOL) is Southeast Asia's largest container shipping company. The transaction is subject to the satisfaction of the pre-conditions specified in such announcement.

The deal value of this transaction amounts to nearly SGD 3.4 billion.

Rodyk finance partner Lee Ho Wah led with support from corporate partner Ng Eng Leng, and both were supported by finance partner Lee Kee Min and corporate senior associate Grace Ong.

For additional information visit www.rodyk.com

ROUSAUD COSTAS DURAN

ADVISES NETQUEST ON ITS SALE TO GERMAN GROUP GFK

BARCELONA, 13 March 2016: Rousaud Costas Duran's Innovation and Entrepreneurship team has advised Netquest, a leading access panel provider, on its sale to German group GfK, a global benchmark in the market research sector. The agreement also includes Wakoopa, a Netquest subsidiary.

Netquest is the leading provider of cross-device digital panels and online behavioral data in Latin America, Spain and Portugal, and it is present in a total of 21 countries. Through Wakoopa, the company globally offers passive measurement software, technology services and cross-device behavioral data collection.

Thanks to this agreement, GfK will be able to expand its global digitalization and Netquest and Wakoopa will continue to operate in the market under their existing brand and will globally widen its range of activity.

Since its inception, RCD has maintained a strong commitment to entrepreneurship and innovative projects. Thus, our pioneering firm has become a beacon for legal advice in this area. Our clients include companies from the technology, biotechnology and pharmaceutical industries, to which we provide comprehensive and specialized advice.

For additional information visit www.rcdslp.com

SYCIP LAW

ADVISES IN SYNDICATE FINANCING FOR THE MACTAU CEBU INTERNATIONAL AIRPORT

MANILA, March 8, 2016: SyCipLaw acted as Philippine counsel to a syndicate of Philippine banks (composed of BDO Unibank, Inc., Bank of the Philippine Islands, Development Bank of the Philippines, Land Bank of the Philippines, Metropolitan Bank & Trust Company and Philippine National Bank) and Asian Development Bank for the financing of the rehabilitation and development of the Mactan Cebu International Airport that was awarded by the DOTC and the MCIAA under the private-public partnership program of the government to the consortium between Megawide Construction Corporation and GMR Infrastructure. The financing is composed of (1) Php20 Billion (approx. US$446,773,200) commitment of the Philippines syndicate banks and (2) US$75 Million commitment of ADB.

The Mactan Cebu International Airport is important and strategic infrastructure for the Philippines. It is located in the province of Cebu, considered the gateway to central Philippines and a popular tourist destination. The province is the second most important economic center in the country and the second most populated province. The airport PPP project, estimated to cost Php33.3bn (US$740m), is timely as the existing facility is already overstretched. It involves construction of a new passenger Terminal 2 and renovation of the existing passenger Terminal 1, the operation and maintenance of both terminals, construction and operation of aprons, ground handling, daily slot management and bay allocation. The financing of the project,

The SyCipLaw team was composed of partner Marievic G. Ramos-Anoñuevo, senior associate Bhong Paulo A. Macasaet and associate Aldous Benjamin C. Camiso.

To date, the project was awarded as “Asia-Pacific Transport Deal of the Year” at Thomson Reuters' Project Finance International (PFI) Awards 2015 and “Asia Pacific PPP Deal of the Year” at the Euromoney-IJGlobal Awards 2015.

For additional information visit www.syciplaw.com

TOZZINIFREIRE

ASSISTS DURATEX IN AGRIBUSINESS OFFERING

SAO PALO, 06 April 2016: TozziniFreire Advogados has helped Brazilian wood panel maker Duratex raise 675 million reais (US$185 million) through an agribusiness receivables offering.

Ourinvest Securitizadora issued the securities on behalf of Duratex Florestal, which is a subsidiary of Duratex. Pinheiro Guimarães - Advogados advised the underwriters for the transaction, which closed on 1 April.

Agribusiness receivables are debt securities issued by securitisation companies on behalf of agricultural producers. The debtor then pays back the issuer with future revenues.

Counsel to Duratex Florestal, Duratex and Ourinvest Securitizadora:
In-house counsel to Duratex Florestal – Ivan Diniz, Danielli Gilbert de Souza and Marina Foltran Nicolosi

TozziniFreire Advogados Partner Alexei Bonamin and associates Débora Seripierri and Laís Monte Claudio.

For additional information visit www.tozzinifreire.com.br

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GIDE

GIDE LOYRETTE NOUEL

NEW CODE OF PUBLIC TENDERS ENTERS INTO FORCE IN ALGERIA

A new regulation governing public tenders and public service delegation contracts, implemented by Presidential Decree no. 15-247 dated 16 September 2015 ("**Decree 15-247**") entered into force on 20 December 2015, i.e. three months after its publication in the Official Journal, in line with the provisions of its article 219.

Decree 15-247 upholds the main rules and provisions already in place under the previous regulation. In particular, it confirms the exclusion of public economic companies from the scope of the public tenders regulation, making them only responsible for "*drafting and ensuring their management bodies adopt procurement procedures, depending on their specificities, which are based on principles including free access to the tender process, equal treatment of bidders and transparency of procedures*".

Decree 15-247 further specifies the implementing procedures of a certain number of provisions in order to facilitate their application, and contains substantial modifications such as:

- **Raising the application thresholds for the public tender procedure**. From now on, public works and public supply contracts whose price is below 12,000,000 Dinars and study and service contracts whose price is below 6,000,000 Dinars are no longer required to implement a public tender procedure.

- **Explicit framework for the negotiation of "contract execution conditions"**. As regards tender procedures, Decree 15-247 clearly re-states the prohibition in principle of any negotiation, while nonetheless enabling the service contractor, with the prior approval of the tenderer, to “review the contract and optimise its offer”.

  As regards procedures, whether in direct award or after consultation, Decree 15-247 expressly imposes the implementation of a negotiation committee and traceability of the negotiation proceedings.

- **Driving the promotion of national production**. As well as maintaining the application of a national preference margin, Decree 15-247 imposes that contracting services launch national tender procedures whenever "*national production or the national manufacturing entities*" can meet their needs. Additionally, except where impossibility is duly justified, foreign companies bidding alone for a tender are obliged to subcontract at least 30% of the contract price to Algerian companies.

- **Strengthening the supervision of public procurement contracts and of ethics in the granting of such contracts**. An authority for the supervision of public contracts and public service delegations has been set up, which enjoys autonomous management. The role of this authority is to draw up and monitor the implementation of the public tender regulation, and to rule on disputes arising from the execution of public tender contracts entered into with foreign companies.

  Additionally, this authority must draft a code of ethics for public officials involved in the supervision, awarding and execution of public tender and public service delegation contracts.

  Lastly, Decree 15-247 has abolished the Commission Nationale des Marchés (National Contract Committee). Contract supervision now falls within the scope of public contract committees working within the contracting services, and of sector-based public contract committees, depending on the contract price. This new organisation should, in principle, accelerate supervision procedures.

- **Limiting contentious appeals, in particular international arbitration**. In line with a recent trend of Algerian authorities, Decree 15-247 strengthens the case for friendly dispute settlements and limits resorting to arbitration in public tender procedures. Such approach is aimed at considering the recourse to arbitration as an exceptional means of dispute settlement, and was already retained in an Instruction by the Prime Minister in early 2015.

  Committees for the friendly settlement of disputes have thus been set up with each minister, public institution manager and Wali. Contracting services must indicate, in their specifications document, that they will resort to these committees before taking a matter to court. The role of these committees seem to be restricted to national public markets, with article 154 of Decree 15-247 limiting their competence to "*disputes arising from the execution of public contracts entered into with national contracting partners*".

  Additionally, when proposed by the minister concerned, resorting to an international arbitration body in the event of disputes arising from the execution of a public tender is now subject to prior approval formulated during a government meeting.

The main addition of Decree 15-247 resides in the implementation and express organisation of a **public service delegation mechanism**. Public entities or legal persons in charge of a public service can thus entrust the management of said public service to a private player through a concession, leasing, governance or management contract. Payment of such private player is ensured for the most part by the operation of the public service.

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Regulatory Framework for the Promotion of Use of Renewable Energy in Electric Power Generation

On March 30, 2016, the Executive Branch of Argentina issued Decree No. 531/16, which regulates laws 26,190 and 27,191, and initially establishes the Regulatory Framework for the Promotion of Use of Renewable Energy in Electric Power Generation (the "Regulatory Framework").

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1. Purpose

The Regulatory Framework sets forth the following milestones for the satisfaction of electric power from renewable sources:

Percentage of electric power demand to be satisfied from renewable sources	Deadline
8%	12/31/2017
12%	12/31/2019
16%	12/31/2021
18%	12/31/2023
20%	12/31/2025

2. Fees

Large Consumers of the Electrical Wholesale Market and High Demands that are Customers of the Providers of the Distribution Public Service or of the Distributors Agents, with a power demand equal or higher than 300 KW, shall **individually** comply with the milestones mentioned in section 1 above through (i) individual power purchase agreements, (ii) auto-generation or cogeneration, or (iii) the joint purchase mechanism to be implemented by Wholesale Electricity Market Administration Company ("CAMMESA" for its Spanish acronym).

The obligated persons that chose to comply with the milestones by means of individual purchase agreements, auto-generation or cogeneration, shall notify so to the Ministry of Energy and Mining. Otherwise, they shall be automatically included in the joint purchase mechanism to be implemented by CAMMESA.

The agreements executed between said parties under individual power purchase agreements and the agreements executed by CAMMESA under the joint purchase mechanism may not set forth an average price greater than US$ $ 113 per megawatt-hour. On the other hand, in order to meet the demand of users with a power demand lower than 300 KW, CAMMESA shall call a public tender for energy contracts whose price shall not be subject to maximum price mentioned above and for which payment may be guaranteed by the Fund for the Development of Renewable Energies ("FODER" for its Spanish acronym) (see below for brief description of the FODER).

3. Promotion of Development of Renewable Energy

The Regulatory Framework sets forth a Promotion Framework for all investments in generation, auto-generation and cogeneration of electricity from renewable energy sources that imply the construction of new generation plants or expansions and/or re-powering of existing plants, made on new or used equipment, as long as they involve the incorporation of new assets.

The owners of investments in renewable energy approved by the Ministry of Energy and Mining shall enjoy the following benefits, among others:

accelerated depreciation of income tax and anticipated return of value added tax in relation to the execution of infrastructure works;

exemption on the application of the tax on minimum presumed income in connection with the assets involved in the project;

net operating losses carry forward for 10 years;

deduction of losses resulting from interest and currency exchange rate differences arising from the financing of the project;

exemption on the application of dividends or profits distribution tax in case they are reinvested in infrastructure projects in Argentina;

issuance of a tax certificate for a value equivalent to 20% of the national component of the electromechanical equipment, which can be applied to payment of national taxes, provided that the national component of the project is greater than 30%;

exemption from the application of import duties to (a) new capital goods and special equipment or parts or components of said goods, spare parts and new accessories, and supplies, until December 31, 2017;

non-application of specific taxes, fees or royalties, whether national, provincial, municipal or from the City of Buenos Aires regarding the access and use of renewable energy sources until December 31, 2025.

pass-through of any tax increases to contract prices;

dispatch priority treatment; and

priority access to public funding by the FODER for projects with greater local components.

4. Renewable Energy Trust Fund

The Regulatory Framework creates the FODER, a trust fund which purpose is to finance, make capital contributions and acquire any other financial instrument destined for the execution, grant of surety bonds, guarantees and financing, of projects of electric power generation from renewable sources approved by the Ministry of Energy and Mining.

5. Call for tender

The first call for tender is expected for the second quarter of 2016.

* * *

For additional information on this matter on any other matter related with Energy and Natural Resources in Argentina please contact our Energy and Natural Resources Department at mpc@allendebrea.com.ar or jma@allendebrea.com.ar.

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CLAYTON UTZ

Clayton Utz Insights

31 March 2016

ACCC wins air cargo appeal on broader view of the international reach of Australian competition law

By Michael Corrigan, Douglas Thompson and Anchal Kapur.

Key Points:

It won't affect new cartel cases, but the air cargo cartel case is important for understanding what is a market in Australia.

The Australian Competition and Consumer Commission has successfully appealed the decision of the Federal Court in relation to price fixing allegations against PT Garuda and Air New Zealand. The key issue decided by the Full Court was whether Australian price fixing law (as it was before the 2009 cartel amendments) applied to collusion over freight charges for cargo shipped into Australia.

Prior to 2009 the Act required showing that the collusive conduct occurred in a market "**in Australia**". The primary judge held this element was not satisfied for freight rates set in Hong King and Indonesia for cargo shipped to Australia, because that conduct occurred **outside** an Australian market. On appeal however, a 2-1 majority of the Full Court adopted a much broader approach to defining the relevant market and found that Australian law applied to conduct at the point of shipment.

While this decision is of limited significance for the new cartel provisions (which appear not to include any requirement to show the cartel conduct occurred in an Australian market), the Air Cargo decision is of significance for other parts of the Act which continue to require showing a connection to an Australian market, as well as other investigations on foot which concern pre-2009 conduct affecting cargo and freight arrangements into Australia. The case is also relevant to the latest Harper Committee reform proposals for the cartel laws (which the Federal Government supports) to require an **effect on trade within, to or from Australia**.

The ACCC brings a case against 15 airlines

In 2008 and 2009 the ACCC commenced proceedings against 15 international airlines alleging that they had engaged in price fixing in relation to surcharges on air cargo carried to Australia. While 13 of the airlines settled with the ACCC and paid substantial penalties amounting to $98.5 million in total, Garuda and Air New Zealand proceeded to trial, where the trial judge dismissed the ACCC case solely because of the alleged conduct not being in a "market in Australia".

The primary judge found that the markets for airborne cargo out of Hong Kong, Singapore and Indonesia were not markets "in Australia". The court found that the relevant market in which air cargo services were supplied and acquired was located at the geographic point at which a shipper made a choice as to which airline to engage (a "switching decision"). Those choices were not made in Australia, but overseas.

What is a market in Australia?

On appeal, the Full Federal Court overturned the first instance decision 2 to 1, finding that the price fixing conduct had occurred in a market in Australia.

Air New Zealand and Garuda advanced the argument that market definition relied on a geographical dimension. The ACCC in contrast argued that both the product dimension and the geographical dimension of a market needed to be considered.

The majority found that neither of these approaches accorded with the text or purpose of the Act. Rather, the market test is two-fold.

(a) Identification of the relevant market: the identified market will include, “a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first mentioned goods or services.”

(b) Characterisation of whether the identified market is in Australia: While geographical dimensions may easily resolve this issue, the Full Court thought it would be an error to approach the question of characterisation simply by asking if one dimension of the market (eg. the geographic dimension) was in Australia. The entire market must be considered and the other dimensions may be relevant to the question.

In this particular case all aspects of the market were relevant, including the fact that the services were partially supplied in Australia and that some shippers who, as a matter of economic reality were customers of the airlines, were located in Australia.

The Full Court majority thought this broader interpretation of the provision was consistent with the overarching purpose of the TPA being “to enhance the welfare of Australians through the promotion of competition and fait trading and provision for consumer protection”. A narrow interpretation of the Act which focused only on one aspect of a market, such as the location of the supplier or the identification of substitutable services was found by the majority to “lack any textual foundation".

Ultimately, the court held that whether a market is “in Australia” is an evaluative exercise which should not exclude any aspect of the market from consideration. This approach was observed to be consistent with Australian authorities that emphasise various factors other than the location of a supplier, and also consistent with conclusions reached upon similar fact patterns in New Zealand and in the European Union.

Impact of decision on new cartel laws

The Full Court majority's decision may not affect cases pursued under the new cartel laws. Those laws were framed very broadly to apply to any offshore collusive conduct if the parties conduct business in Australia, irrespective of how the market was defined.

Harper Review reforms

The Full Court majority's decision is consistent in a policy sense with the recent recommendation of the Harper Committee to retain the requirement that the Act define "markets" as markets "in Australia" but ensure that competition in Australian markets is understood and applied broadly to include competition from goods and services imported or capable of being imported into Australia. The Government has indicated that it supports that recommendation.

In addition, the Harper Committee also recommended that for cartel conduct to be an offence in Australia, it should have an effect "on trade or commerce within, to or from Australia". If that recommendation is implemented (and it has government backing) it is likely that it would have captured the conduct in the case of Air New Zealand and Garuda.

To the High Court?

It may not end here. Garuda and Air New Zealand may seek special leave to appeal, buoyed by the dissent of Justice Yates who agreed with the trial judge on the market definition question and who would have dismissed the ACCC case. We will be watching this matter for further developments.

NautaDutilh

Intellectual Property - Food

Belgium | Netherlands

EU Court Rejects Glucose Related Health Claims

Thursday, 17 March 2016

Yesterday, the General Court confirmed that the European Commission is entitled to refuse to authorize health claims despite a positive opinion from the European Food Safety Authority (EFSA).

The German company Dextro Energy (Dextro) manufactures energy products consisting almost entirely of glucose. Its products are sold in Germany and other European countries. Dextro applied for authorizations for five health claims related to glucose and contribution to energy-yielding metabolism.

Pursuant to the authorization procedure, the European Food Safety Authority (EFSA) first renders an opinion on the authorization request. This opinion is then submitted to the European Commission, which takes a decision. In its opinion, EFSA concluded that, based on the data provided, a cause and effect relationship had been established between the consumption of glucose and contribution to energy-yielding metabolism and that the wording of the claims reflected the scientific evidence. Despite this positive opinion, however, the Commission refused to authorize the claims.

The Commission's reasoning can be summarized as follows.

Health claims must be based on generally accepted scientific evidence. While the Commission generally takes into account EFSA's opinion, in some cases a scientific risk assessment alone does not provide all relevant information on which a decision should be based and therefore other legitimate factors should also be taken into account, including the fact that health claims may not be inconsistent with generally accepted nutrition and health principles.

In the Commission's opinion, Dextro's claims convey a conflicting and confusing message to consumers, as they encourage the consumption of sugar, which authorities believe should in fact be reduced based on generally accepted scientific evidence.

Consequently, the Commission ruled that the claims do not comply with Article 3.2(a) of Regulation (EC) No 1924/2006, which provides that health claims should not be ambiguous or misleading.

In addition, the Commission ruled that even if the health claims were authorised under specific conditions for use and/or accompanied by additional statements or warnings, it would not be sufficient to alleviate the confusion caused to consumers and, consequently, the claims should not be authorised.

The General Court supported the Commission’s reasoning and ruled that while the task of EFSA is to verify whether health claims are based on scientific evidence (and whether their wording meets certain criteria), the Commission must take account of the applicable EU legislation as well as other legitimate and relevant factors, including generally accepted principles of nutrition and health and the fact that the average consumer is advised to reduce his or her sugar consumption.

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PROVISIONAL PRESIDENTIAL DECREE INCREASES THE LIMIT FOR FOREIGN CAPITAL IN BRAZILIAN AIRLINE COMPANIES FROM 20% TO 49%

Infrastructure / Government, Contracts and Projects

The Provisional Presidential Decree N. 714 / 2016, issued by president Dilma Roussef last week, increases the limit for foreign capital in Brazilian airline companies from the current 20% to 49%. Limit for foreign capital may be even higher than 49% depending on reciprocity agreements to be negotiated on a case by case basis with foreign governments. The transaction through which foreigners purchase voting shares in Brazilian airlines is subject to prior approval by the aeronautics authority.

Other relevant changes brought by the Provisional Presidential Decree can be summarized as follows:

– Extinction of the Additional on the Airport Tariff – Ataero as of January 1st, 2017, with the consequent determination that the National Agency of Civil Aviation (ANAC) raises airport tariffs to incorporate the amount corresponding to the Ataero;

– Amendment of the law which created Infraero, a federal public company set up to operate airports in Brazil, in order to: (I) authorize its contracting by the Federal Union in a direct manner, without the need of a public procurement proceeding; (II) authorize Infraero to set up subsidiaries and participate, jointly with its subsidiaries, with minor or controlling positions, of other public or private companies.

The Provisional Presidential Decree has immediate effects, but will only be converted into law if it is approved by Congress, within a 60-day period, which can be extended by an equal period. In case Provisional Presidential Decree is not converted into law within this period, it will loose its validity. The effects of the acts practiced during the validity of the Provisional Presidential Decree may be preserved as legal, depending on a case by case basis.

With the Provisional Presidential Decree, the Federal Government enforces some measures long discussed and that may have a positive impact in the development of the air sector in Brazil.

Particularly with the increase of the limit for foreign capital in Brazilian airlines, the Government intends to foster foreign investments in the Brazilian commercial aviation, facilitating and increasing the national and international routes and bringing new players to the sector. According to ANAC, more than 97 million passengers were transported in domestic flights during 2015. Also according to the agency, the demand for international flights grew 14% in 2015 in comparison with 2014.

Changes to Canada's Integrity Regime for Public Procurement Create Onerous New Reporting Requirement

April 08, 2016 | Milos Barutciski, Matthew Kronby, Jessica Roberts and George Reid

On April 4, 2016, Public Works and Government Services Canada (Public Works), the procurement arm of the Canadian federal government, announced amendments to rules, known as the Integrity Regime, governing the eligibility of suppliers to enter into contracts and real property agreements with the Government of Canada. The Integrity Regime is intended to foster ethical business practices and reduce the risk of Canada entering into contracts with suppliers convicted of an offence linked to unethical business conduct. This update provides an overview of the Integrity Regime and highlights the recent changes.

Public Works, which administers the Integrity Regime, states that the new amendments are to clarify existing processes in response to feedback received from stakeholders in the procurement community.

However, as discussed in more detail below, the amendments do more than that; they impose an onerous new reporting requirement that when submitting a bid, suppliers provide a certified list of all foreign criminal charges and convictions with regard to the supplier, its affiliates and its subcontractors. The penalty for providing a false or misleading certification is automatic ineligibility to enter into procurement contracts (debarment) for ten years. Further, the definition of “affiliate” has been expanded in conjunction with new anti-avoidance rules aimed at capturing mergers, divestitures and other corporate reorganizations. Collectively, these changes are likely to create a significant new compliance burden, particularly for large, multinational companies.

Concerns with Previous Amendments to the Integrity Regime

The first iteration of the Integrity Regime was announced in July 2012, when Public Works regrouped its existing oversight measures into a formal Integrity Framework. The original Integrity Framework provided for automatic disqualification from public contracts if a company or any of its affiliates was convicted of a list of Canadian offences.

The Framework's listed offences were expanded in March 2014 to include foreign offences unrelated to Canada. The 2014 expansion proved highly controversial with the result that the rules were significantly overhauled in July 2015 and renamed the Integrity Regime (See our July 6, 2015, Update “Canadian Government Overhauls the Integrity Regime for Suppliers”). The April 4, 2016, amendments are the first from the new Liberal Government.

Overview of the Integrity Regime

Affiliate Convictions

Under the Integrity Regime, a supplier may be declared ineligible to bid on public procurements by virtue of a conviction of itself or of its “affiliate”. “Affiliate” has been defined broadly in the Integrity Regime through the concept of “control” taken from the *Bank Act*. Entities are “affiliated” if one directly or indirectly controls the other, or if a third party controls both. As described below, the April 2016 amendments expand the definition further.

Specified Offences and Similar Foreign Offences

Before 2012, the specified offences giving rise to ineligibility were initially limited to offences related to fraud on the government and breach of lobby and conflicts of interest laws. If a supplier or any of its affiliates were convicted of a listed offence, the supplier was ineligible to do business with the Government of Canada. Public Works subsequently expanded the list to include offences under the *Corruption of Foreign Public Officials Act*, the *Competition Act* and other federal laws.

The March 2014 amendments expanded the class of disqualifying offences by including “similar foreign offences” to the specified offences, while also establishing an automatic 10-year debarment period. This expansion had serious consequences for suppliers with foreign affiliates, because a supplier could be automatically debarred for ten years if a foreign affiliate was convicted of an offence in another jurisdiction that was “similar” to a specified Canadian offence. Public Works is the arbiter of whether a foreign offence is similar to a specified offence as well as the fairness and legitimacy of the proceedings that produced the foreign conviction.

The 2014 changes proved highly controversial, with the result that the rules were significantly overhauled in July 2015 to be more flexible, including by giving companies the opportunity to reduce their ineligibility from 10 years to 5 and to avoid ineligibility for the acts of foreign affiliates in which they were not involved. Since the July 2015 amendments, a supplier is ineligible on the basis of an affiliate's offence only if there is evidence that the supplier "directed, influenced, authorized, assented to, acquiesced in or participated in" its affiliate's misconduct.

However, in comparison with debarment regimes in other jurisdictions such as the United States and the European Union, the Integrity Regime affords the Government limited discretion to tailor ineligibility to the seriousness of the offence or the culpability of the supplier; it remains more oriented toward punishment and deterrence of misconduct, including conduct that may have little or nothing to do with government contracting, than with remediation or protecting the integrity of the federal procurement process. (See our July 6, 2015, Update.)

Administrative Process to Determine Ineligibility

One of the most important changes in the July 2015 amendments was the introduction of administrative processes, outside of a specific procurement process, to determine the ineligibility of a supplier under the Integrity Regime. This process can be triggered by the supplier through a request for a determination of its ineligibility, or by Public Works on its own initiative. The recent 2016 amendments clarify that a determination can also be triggered by a request from a government department, agency or other federal entity.

Under the Regime, a supplier is automatically ineligible if it has been convicted of or pleaded guilty to a listed Canadian offence. Where Public Works concludes that circumstances exist resulting in automatic ineligibility, Public Works will issue a Notice of Ineligibility, which is effective immediately.

On the other hand, if Public Works becomes aware of a conviction or guilty plea relating to a foreign offence of the supplier, or an offence (foreign or domestic) of the supplier's affiliate, or where a supplier has been charged with an offence, Public Works can issue a Notice of Intent to Declare Ineligible to that supplier. The recipient of a Notice of Intent may respond to Public Works in writing with an explanation as to why the recipient should not be declared ineligible under the Integrity Regime. Failure to respond to a Notice of Intent may result in a declaration of ineligibility or suspension of eligibility.

A Notice of Intent generally requires the recipient to engage a third party acceptable to Public Works to provide the requested information, rather than the supplier submitting information to Public Works directly. Public Works will require that the third party be independent and hold a recognized designation or accreditation, such as membership in a provincial or territorial Law Society, a Certified Professional Accountant (CPA) license, or public accounting license. Public Works also typically requires the third party to sign a certification form, certifying as to its independence from the supplier. The Minister has the sole discretion to determine whether a third party is sufficiently independent from the potential supplier to provide the services required and, as a matter of practice, Public Works will refuse to recognize a law firm or accounting firm that does unrelated commercial work for the supplier as being independent.

A Notice of Intent to Declare Ineligible puts the burden on the supplier (through its chosen third party) to establish that it is not ineligible under the Integrity Regime. For example, if an affiliate of the supplier has been convicted of a similar foreign offence, the supplier must show that it did not direct, influence, authorize, assent to, acquiesce in or participate in the improper conduct of its affiliate that led to the conviction. The supplier may submit any relevant information or documentation it wishes to establish that it should not be ineligible.

The process of responding to a Notice of Intent to Declare Ineligible is iterative – after a supplier has responded to the initial Notice and provided the requested explanation, Public Works has asked follow-up questions and may sometimes require further information from the third party before a final decision is made as to the supplier's ineligibility. The information required to make a determination will depend on the circumstances of the supplier and the particulars of the conviction.

April 2016 Amendments – Impact Assessment

The new amendments re-state and clarify many of the rules and processes put in place in July 2015. However, they also include changes that suppliers must be aware of in order to avoid potential inadvertent suspension or ineligibility. The most significant changes relate to a new requirement to inform the government of any relevant foreign criminal charges or convictions of the supplier, its affiliates and/or subcontractors, a severe penalty for providing false or misleading declarations or certifications to Public Works in relation to the policy, and new anti-avoidance provisions which broaden the application of the Regime.

Obligation to Inform Public Works of Charges / Convictions

Under the new April 2016 amendments, all bidders, offerors or suppliers must provide a complete a list of all foreign criminal charges and convictions pertaining to itself, its affiliates and its proposed first tier subcontractors that, to the best of the supplier's knowledge and belief, may be similar to one of the listed offences. In submitting a bid, a bidder, offeror or supplier certifies that it has provided a complete list.

Likewise, under the new amendments, a successful supplier must inform Public Works within ten business days if, during the performance of the contract, the supplier, any of its affiliates, or its first tier subcontractor is charged with or convicted of a relevant criminal offence or similar foreign offence. Failure to do so could result in ineligibility of the supplier, and termination of the contract for default.

Satisfying this new requirement could be an onerous task, particularly for larger companies or suppliers with numerous foreign affiliates. On the face of the new procedure, all bidders, offerors and suppliers are now required to be informed of criminal charges, as well as convictions, laid against their foreign affiliates for offences that are "similar" to listed Canadian offences. Suppliers should be aware of the fact that the Integrity Regime lists certain offences, such as false or misleading representation, which may not be considered as corruption offences in every foreign jurisdiction, and thus may go unreported under established corporate compliance and reporting regimes. Suppliers should ensure, when relying on foreign affiliates to report relevant charges and convictions, that those affiliates are aware of what the relevant listed offences are.

Automatic Determination of Ineligibility for False Declaration or Certification

The April 2016 policy amendments also include a harsh penalty for providing a false or misleading declaration or certification in relation to the Integrity Regime. If, in the opinion of Public Works, a supplier has provided a false or misleading certification or declaration, the supplier is automatically ineligible for ten years. It is not clear how this penalty will operate in practice, or to what extent inadvertence or mistake might be taken into account by Public Works in applying this penalty. For example, in submitting a bid, a supplier must certify that it has provided a complete list of all foreign criminal charges and convictions pertaining to itself, its affiliates and its subcontractors that, "to the best of its knowledge and belief" may be similar to one of the listed offences. However, in the event that a supplier certifies an inaccurate list, there is no procedure in the Regime for the supplier to demonstrate that it had no knowledge or reason to believe that the charge or conviction existed when the certification was made. On a strict reading of the Regime, ineligibility appears to be automatic if, in Public Works' opinion, the certification was false or misleading. No reduction of the ten-year ineligibility period is possible, for example through an Administrative Agreement. Suppliers must remain vigilant and take care to ensure that all certifications and declarations provided to Public Works are complete and accurate.

Anti-Avoidance Provisions and the Expansion of "Affiliate" and "Control"

The new anti-avoidance provisions are aimed at circumstances where, in the opinion of Public Works, a corporate succession either occurred for the purpose of avoiding ineligibility or suspension, or would result in the avoidance of ineligibility or suspension. As a related matter, the definition of "affiliate" has been expanded such that two persons are "affiliates" if both persons are under common control, or if each is controlled by a third party and the third party that controls one person is affiliated with the third party that controls the other person. Further, indicia of control now include "identity of interests (often found in members of the same family)" and "shared facilities and management or common use of employees", among others. Suppliers should carefully consider whether they have any "affiliates" that may be captured by this expanded definition, particularly given the reporting requirements related to affiliate charges and convictions, and the harsh penalty for false reporting.

Conclusion

The new provisions do make the Integrity Regime easier to navigate in some respects, while clarifying certain ambiguities and adding procedural details. However the certification requirement with respect to affiliate charges and convictions, in conjunction with the severe penalty for false reporting, seems destined to create compliance nightmares for large multinational companies. Given the broad range of offences – both in Canada and abroad – that might be captured by the new provisions, and the obligation to include charges as well as convictions, this requirement will inject yet further compliance cost and uncertainty into the process for uncertain benefits from the standpoint of preserving integrity in government procurement as opposed to punishment. More generally, the amendments represent a missed opportunity: Public Works has eschewed any substantive changes to the Regime that could have addressed its overemphasis on punishment at the expense of remediation.

NEWSALERT

/Carey

Relevant Change on the criteria regarding the full week benefit ("semana corrida")

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Carey contact.

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On January 29th, 2016, the Supreme Court issued a ruling (hereinafter the "Ruling"), that changed the criteria regarding the requirements that trigger the entitlement to the statutory benefit known as "full week" (semana corrida) which applies to employees who are remunerated based on a fixed salary and a variable compensation.

1.- **Criteria before the Ruling**

The full week benefit was originally applicable to employees remunerated exclusively on a daily basis or by piecework. Since the labor reform introduced by Law #20.281 in 2008, such benefit was also extended to employees who were remunerated in part by a fixed remuneration (i.e. monthly salary) and also in part by a variable remuneration (i.e. sales commissions).

After the 2008 reform, the Labor Board and the Labor Court's criteria were that employees with fixed and variable remunerations would be entitled to the full week benefit regarding the variable portion, only if the variable remunerations:

- **Are accrued on a daily basis,** this is, that they are earned (i.e. become part of the employee´s "property") on a day by day basis, regardless of the fact that their salary is paid monthly; and
- **Are considered principal and ordinary,** meaning that the remunerations are capable of existing by themselves, independently and without consideration to other remunerations to which the employee may be entitled.

2.- **The Ruling and the change of criteria**

The Supreme Court, deciding on a Unification of Jurisprudence Remedy ("Recurso de Unificación de Jurisprudencia"), and in reference to the requirements for the application of the "full week" benefit, has ruled that, "from the words of the law it is not possible to determine that the daily accrual of the variable remuneration is a statutory requirement to make the full week benefit applicable". For this reason, the Ruling states that, "it is possible to assert that the right to be paid the full week benefit set out in article 45 of the Labor Code, which is applicable to employees receiving both a monthly salary and variable payments, is not conditioned to the daily accrual of the variable portion, making it necessary for this Court to unify the case law accordingly".

Therefore, whether the variable remunerations are accrued on a daily basis or not, has become irrelevant in terms of the applicability of the full week benefit.

3.- **Effects on the termination of employment contracts**

The Ruling went even further and also accepted the claim for the nullity of the dismissal based on the nonpayment of social security levied over the full week benefit (which was only determined as due in the Ruling), at the time of dismissal. The Ruling ordered the employer to pay the employee, all remunerations accrued from the time of the dismissal until the date in which such social security payments over the full week benefit are made and informed to the employee.

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China proposes a revamp to its Anti-Unfair Competition Law

Changes relevant to companies' business practices

MARCH 2016

China proposes a revamp to its Anti-Unfair Competition Law

Changes relevant to companies' business practices

On 25 February 2016, the Legislative Affairs Office of the State Council issued a new draft of the amended Anti-Unfair Competition Law (**"Draft"**) for public comment. The Draft entails an important overhaul of the current law, which was first enacted in 1993. It aims to bring the Anti-Unfair Competition Law ("**AUCL**") in line with more recent domestic legislation (e.g., the Trademark Law and the Anti-Monopoly Law), harmonize the Chinese law with international legal standards, codify the majority view in Chinese jurisprudence, and modernize the AUCL through the adoption of an array of brand-new principles and provisions.

The AUCL as it stands is a potpourri of provisions covering a variety of legal fields. Not surprisingly therefore, if adopted, the Draft's updated provisions would have a significant impact in the fields of intellectual property ("**IP**"), antitrust and anti-bribery in China.

IP: streamlined and modernized

In the IP arena, the AUCL is at present often invoked to protect rights which cannot benefit from registration with the authorities, such as unregistered marks, trade dress and product packaging. The Draft effectively brings the AUCL's current provisions in sync with those of the Trademark Law, and codifies the majority view in Chinese jurisprudence.

The Draft proposes to replace the list of unfair competition acts contained in the AUCL's current version with a list that would prohibit creating "market confusion" by way of:

- using similar or identical well-known '*commercial logos*' without permission
- misappropriating registered or well-known signs as business names or
- using well-known trade names or abbreviations in trademarks or domain names.

The impact of this new formulation would be to expand the current scope of IP-related unfair competition acts by giving a very broad, non-exhaustive definition to the term "commercial logo." This term would encompass all features that differentiate products, "including but not limited" to packaging, decoration, shape, abbreviations, webpages, pen names, stage names etc. This would mean that the Chinese trademark unfair competition would protect the right of publicity and begin to lean more towards continental European 'open' standards of unfair competition, or even common law tort of passing off.

As to trade secrets, the current version of the AUCL only explicitly prohibits third parties with actual or constructive knowledge of trade secret theft to obtain, use or disclose those trade secrets. The Draft codifies case law by adding that third parties are furthermore not allowed to *license* such misappropriated trade secrets to others. The Draft also increases the administrative fines for trade secret infringement to RMB 100,000 - 3 million, and allows the burden of proof to be shifted to the defendant as soon as the claimant can establish a presumption of infringement.

Antitrust: new concept of a "relatively advantageous position" and codification

The Draft brings sweeping reforms to the articles of the AUCL that are relevant to Chinese antitrust/competition law.

To begin with, the Draft proposes to delete a range of antitrust provisions such as those on administrative monopolies, predatory pricing and tying from the AUCL, since they are already regulated in the more specialized provisions of the Anti-Monopoly Law. This deletion of largely overlapping provisions across laws reduces uncertainty and should therefore be welcome.

The remaining antitrust-related rules are grouped into a new provision, prohibiting unfair competition through abuse of a "relatively advantageous position." This is a (relatively, though not entirely) new concept in China, seemingly drawing heavily on German – and, to a lesser extent – Japanese and Korean competition laws. The provision attempts to address situations where an entity is not (yet) dominant, but its trading partners significantly depend on it, and have difficulties in switching to a competitor. If found to be in a "relatively advantageous position," a range of broadly formulated prohibitions apply, such as the imposition of unreasonable conditions and restrictions on the trading partners' business dealings with third parties (potentially territorial restrictions on distributors, for example), exclusive purchasing, etc.

While the "relatively advantageous position" concept could potentially be beneficial to small(er) companies, it risks creating a new level of rather opaque compliance obligations and imposing additional burden on companies doing business in China.

Another set of reforms in the competition law sphere can be found in the Draft's new rules on unfair competition in the Internet space.

Drawing on the courts' experience from, *inter alia*, the *Qihoo 360 v Tencent* and *Tencent v Sogou* cases, the Draft proposes to codify some of the existing case law by prohibiting four types of conduct deemed unfair competition in the Internet arena. These proposed rules were previously developed by Chinese courts on the basis of a vague, general provision of the AUCL. In that sense, the codification can be seen as an improvement, if it turns out to increase legal certainty and predictability. At the same time, however, the Internet sector is an industry with fast-moving technologies and business practices and, as such, the Draft risks to address 21st century problems with 20th century-style black letter regulation.

As to sanctions, the Draft provides for increased fines of up to five times of illegal revenues. If those revenues cannot be determined, a statutory fine ranging between RMB 100,000 - 3 million could be imposed.

Anti-bribery: harmonization with international principles

As China's anti-corruption campaign continues unabated, the Draft introduces a number of significant changes to bring anti-bribery laws in line with well-recognized international standards.

Whereas the AUCL currently prohibits bribe payments made in order to "sell or purchase commodities," the Draft expands the definition of "commercial bribery" to conduct whereby "economic advantages" are provided or promised to counterparties or third parties, in order to secure opportunities or competitive advantages. This new proposed definition is broader than the existing standard, and would bring Chinese law into consistency with the US Foreign Corrupt Practices Act and other hallmark legislation by making clear that (1) bribes can be made in any form that provides value; (2) an offense is committed once a promise has been made, regardless of whether any benefits actually exchange hands; and (3) bribes cannot be paid to or via third parties who are likely to influence a transaction.

The Draft further codifies and clarifies the principle of employer liability for bribes provided or promised by its employees – an area of common misconception in China. The Draft states that where an employee engages in bribery in a manner that creates business opportunities or competitive advantages for a company, the bribery should be considered corporate conduct. The new language allows the business operator to proffer a defense, supported by evidence that the bribe conduct is against the company's interest. However, the Draft offers no defense for a company's lack of knowledge of the bribe conduct, or the enactment of a compliance program to prevent such conduct.

As to the sanctions for commercial bribery, the AUCL currently provides for an administrative fine of 10,000 to 200,000 RMB, plus the confiscation of "illegal income". The term "illegal income" often caused confusion as to whether "income" constituted revenue or profit. The Draft attempts to clarify this confusion by setting the penalty for commercial bribery at 10% - 30% of illegal revenue, without a separate administrative fine.

With respect to how multinational companies handle and resolve enforcement actions by local authorities, two provisions of the Draft may raise eyebrows. The Draft provides for a fine of 20,000 to 200,000 RMB where a company "refuses to provide relevant materials or information . . . conceals . . . or otherwise refuses or impedes the investigation conducted by the supervision and inspection agency." Yet there is no clarity as to the proper scope of information that the authorities may seek in furtherance of their investigation, or how the subject of an investigation may challenge that scope.

Moreover, the Draft now provides that an injunction ordering cessation of the illegal activities *must* be issued to entities guilty of commercial bribery. This means that the enforcement authorities – the State Administration for Industry and Commerce and its local offshoots – will no longer have any margin of discretion and will be forced to issue an injunction in each case. Such a provision may require targets of investigation to re-evaluate the risks of settlement with enforcement authorities in order to end an investigation.

Conclusion

The Draft may be viewed as an effort by the Chinese government to modernize and increase the effectiveness of the Chinese unfair competition legislation. Comments on the Draft can be submitted until 25 March 2016, after which the Draft may either be amended another time, or directly sent over to the Standing Committee of the National People's Congress for approval.

This alert is written as a general guide only. It should not be relied upon as a substitute for specific legal advice.

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BILATERAL TREATY BETWEEN THE GOVERNMENT OF COSTA RICA AND THE PEOPLE'S REPUBLIC OF CHINA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

On March 29th the Legislative Assembly approved the "Treaty between the Government of Costa Rica and the People's Republic of China for the promotion and protection of investments".

The agreement sets out the legal framework for the reciprocal promotion, protection and treatment of investments among both countries, for the rules on expropriation, compensation of damages, dispute resolution, amongst other aspects.

This treaty is an essential requirement for the promotion of Chinese-Costa Rican investment and the treaty is expected to significantly boost new ventures between the nations. The approval of the agreement, which was identified as a priority by the Executive Branch, shows the Costa Rican Government's commitment in promoting Chinese investment in the country. Costa Rica is the only country in Central America that has diplomatic relations with China, hence the potential to attract investment to the country is extremely promising.

Since 2007, when Costa Rica and China established diplomatic relations, bilateral cooperation, trade and diplomacy treaties have been ongoing; this agreement of promotion and protection of investments between the two countries will strengthen the two countries as strategic economic partners.

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FAQs – HK Competition Commission responds to common concerns

15 March 2016

New Frequently Asked Questions (**FAQs**) have just been released by the Hong Kong Competition Commission (**HKCC**). The FAQs do not change the laws that came into full force on 14 December 2015 (see **here**) but they do provide businesses with responses and a better understanding of the HKCC's position regarding common concerns on how to comply with the new Competition Ordinance (**CO**).

The key FAQs you need to know are set out in a snapshot below:

Is the HKCC's role to monitor prices? NO

- **The CO does not seek to regulate prices, nor is HKCC's role an enforcement authority for price regulation.** However, the HKCC is initiating a study into the Hong Kong auto-fuel markets in response to public concerns on fuel charges which have been said to be "quick to rise and slow to drop".
- **As long as businesses make their pricing decisions independently, such decisions "*will almost never raise competition concerns*".** Except, if a business with substantial market power independently decides to price below cost (i.e. engages in predatory pricing) to drive out competitors then this may raise a competition concern.
- **In general, the HKCC welcomes businesses charging lower prices** based on competition on the merits.

If prices are the same everywhere, does this mean there's a breach? NO

- **Just because businesses have the same prices does not necessarily mean there is evidence of price-fixing or a breach** of the CO. Market conditions might mean that prices naturally gravitate towards the same price (also called "parallel pricing", and this does not require any arrangements between competitors).

Are mere recommendations on prices acceptable? YES

- **Identifying retail prices as "suggested" or "recommended"** are unlikely to raise competition concerns so long as they are merely recommendations, and retailers are free adjust their prices upwards or downwards to compete with each other. Mere price recommendations are recognised as common practice for many manufacturers and distributors.
- **But be warned, a mere recommended retail price must not be coupled with other measures** (e.g. penalties or a withdrawal of incentives) that effectively requires a retailer to follow the recommendation. Such practice may not be a "true" recommended price and could breach the CO. The HKCC will look to the substance to see if it is a true recommendation.
- **If you are a manufacturer or distributor, and you require a retailer to observe a fixed or minimum resale price**, this could be classified as "resale price maintenance" in breach of the CO.

Should I always use a tender process for goods or services contracts? NO

- **Businesses are generally free to choose how they will contract for goods or services**, and whether or not a tender process is used to select a contractor does not, of itself, raise concerns under the CO.
- **But if you do use a tender to buy goods or services**, concerns in relation to tender procedures may be relevant if there is an indication that bidders who should be competing to win a tender have entered into an anti-competitive arrangement with each other. The CO does not provide that the customer tender must be conducted in a particular way.

Can I offer products in a bundle? DEPENDS

- **For small and medium enterprises**, tying and bundling practices are common commercial arrangements and generally they do not harm competition or breach the CO.
- **But if a business with substantial market power** engages in tying or bundling, this may breach the CO if it harms competition in Hong Kong (e.g. where the conduct results in anti-competitive foreclosure).

Can I appoint an exclusive distributor in Hong Kong to distribute goods? DEPENDS

- **Generally, if your exclusive distribution agreement (i) is unlikely to have an anti-competitive effect on competition in the relevant market; or (ii) has an applicable exemption or exclusion in the CO**, then such distribution agreement should not cause concerns under

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the CO. Harming competition in a relevant market is likely to occur if one of the parties to the agreement has market power and the agreement is likely to foreclose its rivals' access to the market. As the effects of exclusive agreements can vary considerably the HKCC is generally not in a position to provide further guidance in this regard.

- **But, even if an exclusive distribution agreement is considered to have anti-competitive effects**, the agreement may nonetheless benefit from the general exclusion for agreements 'enhancing the overall economic efficiency' under the CO provided the relevant conditions are met.

Can employment contracts have non-compete clauses? YES

- **A unilateral imposition by employers of non-compete obligations on employees is unlikely to harm competition** or breach the CO unless they are of an unduly long duration and/or relate to an expertise which is in very limited supply. This assumes that the imposition of the restriction is an independent decision of the employer.
- **But be warned, competitors sharing or agreeing on certain terms and conditions** of their employees' employment contracts is likely to harm competition and breach the CO.

I'm dealing with an 'exempt statutory body' - do competition laws still apply? YES

- **Businesses who are not exempt but engage in anti-competitive conduct in their dealings with statutory bodies are still subject to competition laws.** A list of exempt statutory bodies can be found **here** in Annex A.
- **Exempt statutory bodies are still expected to adhere to the *'spirit of competition rules'*.** In this regard, we note that the government plans to review the exemption for statutory bodies three years after the full commencement of the CO.

The FAQs serve to remind companies and individuals of the need to consider the implications of the CO and competition laws in conducting their businesses as well as the interaction of the CO with other laws, such as employment law.

For more on Hong Kong's competition law and updates, please visit Hogan Lovells' **Competition Bites** page.

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NEWS DETAIL

12/04/2016

PROVISION OF OVER-THE-TOP APPLICATIONS AND/OR CONTENT SERVICE VIA THE INTERNET

On 31 March 2016, the Minister of Communications and Information Technology ("CIT") issued Circular Letter Number 3 of 2016 concerning Provision of Over-The-Top Applications and/or Content Services via the Internet ("OTT Services") ("Circular Letter").

The Circular Letter begins with a general remark that the CIT Ministry is preparing a regulation regarding OTT Services ("OTT Services Regulation") which will be in effect in the near future, and that the Circular Letter is issued as a form of socialization of the content of the upcoming regulation so that OTT service providers can sufficiently prepare themselves and be ready to comply with the regulation. As such, the provisions of the Circular Letter are not as yet valid and binding .

The following are some of the provisions of the Circular Letter:

- Definitions of OTT Services:
  "OTT Application Services via the Internet means the use of telecommunication services via an internet protocol based telecommunication network which enables the creation of communication services in the form of short messages, voice calls, video calls, online chatting, financial and commercial transactions, data storage and collection, games, social networking and media and their derivatives."
  "OTT Content Services over the Internet means the provision of all forms of digital information consisting of writing, sound, images, animation, music, video, films, games or combination of part and/or all of the above including those which are streamed or downloaded, by using telecommunication services via an internet protocol-based telecommunication network."
- The provision of OTT Services may be conducted by (i) an Indonesian citizen (individual), or (ii) an Indonesian business entity, whether a legal entity or a non-legal entity, or (iii) a foreign individual or a business entity ("Foreigner"). A Foreigner who wishes to provide OTT Services is required to establish a Permanent Establishment (Bentuk Usaha Tetap or "BUT") in Indonesia in accordance with the prevailing Indonesian taxation laws and regulations[1].
- Obligations of OTT Service providers (among others):

1. Comply with the laws and regulations regarding prohibition against monopoly and unfair business practices;
2. Comply with the laws and regulations regarding trading, consumer protection, intellectual property, broadcasting, film, advertising, pornography, anti-terrorism, taxation, and other related laws and regulations;
3. Conduct data protection in accordance with the laws and regulations;
4. Conduct content filtering in accordance with the laws and regulations;
5. Use censorship mechanism in accordance with the laws and regulations;

6. Use a national payment gateway which is an Indonesian legal entity;
7. Use an Indonesian internet protocol number;
8. Guarantees access for lawful interception and collection of evidence for the purpose of criminal inquiries or investigation by the competent authority in accordance with the laws and regulations;
9. Provide information and/or service usage guide in Indonesian in accordance with the laws and regulations.

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[1]According to Article 2 paragraph (5) of Law No. 7 of 1983 concerning Income Tax as amended several times, lastly with Law No. 36 of 2008, a Permanent Establishment is an establishment used by an individual who does not reside in Indonesia, an individual who has been present in Indonesia for not more than 183 (one hundred and eighty-three) days within the period of 12 (twelve) months, and an entity which is not established and is not domiciled in Indonesia for conducting business or carrying out activities in Indonesia which may include a place/domicile of management; a branch; a representative office; an (physical) office; a factory; a workshop; a warehouse; a space for promotion and selling; a mine and natural resources extraction; an oil and gas mining working area; fishery, animal husbandry, agriculture, plantation, or forestry; a construction, installation or assembly project; any kind of services in any forms provided by the employees or any other persons, to the extent that the services were done within more than 60 (sixty) days within a period of 12 (twelve) months; an individual or entity acting as a dependent agent; an agent or employee of insurance company which is not established and is not domiciled in Indonesia, receiving insurance premium or insuring risk in Indonesia; and computer, electronic agent or automatic equipment owned, rented, or used by any electronic transaction provider to conduct business over internet. A permanent establishment contains the concept of the existence of a place of business, namely facilities that may be in the form of lands and buildings, including machinery and equipment, warehouses and computers or electronic agent of automated equipment owned, rented or used by any electronic transaction provider to carry on business through internet. The place of business is permanent in nature and used to carry out the business or to conduct the activities of any individual not residing or any entity not established and domiciled In Indonesia.

THE FORCE AWAKENS

Kwan Will Sen discusses the proposal to introduce corporate criminal liability for corruption in Malaysia

Should corporations be held liable for corruption offences by their employees? The figures and public sentiment appear to suggest that this is a move in the right direction.

The KPMG Malaysia Fraud, Bribery and Corruption Survey 2013 revealed that 90% of the respondents believe that bribery and corruption are major problems for businesses in Malaysia. Furthermore, the survey revealed that only 26% of the respondents believe that their organisation has adequate anti-bribery and anti-corruption control measures.

In the United Nations 2012 Compact Annual Implementation Survey, which is the largest survey on corporate sustainability practices with input from over 1,700 businesses, 39% of respondents ranked corruption as a major obstacle to sustainable development, highlighting the fact that sustainability and overall market growth cannot be achieved alongside the prevalence of corruption.

In 2015, Malaysia ranked 54th in Transparency International's annual Corruption Perception Index which evaluates nations around the world based on 13 surveys from 12 high level international institutions, including the World Bank and the World Justice Project. Whilst the results are based on perception, the gradual slide in our rankings, from 49th, 50th and 52nd (in 2012, 2013 and 2014 respectively) cannot be ignored.

Going back to the question posed earlier, one of the means proposed by the Malaysian Anti-Corruption Commission ("MACC") to further curb the scourge of corruption in Malaysia is to introduce provisions on corporate liability into the Malaysian Anti-Corruption Commission Act 2009 ("MACC Act") to make corporations liable for the corrupt acts of their employees. Various stakeholders within the Government have indicated that such a move is on the cards.

In August 2013, the Special Committee on Corruption (JKMR) had suggested that the MACC Act be updated to introduce a corporate liability provision (*Sun Daily Online*, 23 August 2013). This call was reiterated in April 2014 and again in December 2014 by the Minister in the Prime Minister's Department, Datuk Paul Low, who in both instances said that the draft amendment was in its "final stage" (*Sun Daily Online*, 22 April 2014 and *Astro Awani*, 10 December 2014). Similarly, the MACC Deputy Chief Commissioner (Prevention), Dato' Sri Haji Mustafar Ali, said that "*the drafting process had been completed*" (*NST Online, 23 December 2014*).

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This article will discuss the concept of corporate criminal liability, the position of corporate criminal liability in Malaysia, the current legal framework in Malaysia *vis-à-vis* anti-corruption laws, and provide a brief overview of the position in other jurisdictions.

THE CONCEPT OF CORPORATE CRIMINAL LIABILITY

Generally, corporate criminal liability is the legal liability of a corporation for criminal actions (or the failure to act in some cases) committed by the corporation's employees for the benefit of the corporation.

This concept can be traced back to the case of *New York Central & Hudson River Railroad Co v United States*, 212 U.S. 481 (1909). In that case, the Supreme Court of the United States of America imposed criminal liability on a corporation by establishing a principal-agent relationship with its employee. The Supreme Court expressed the view that criminal liability can be extended to a corporation if it could be established that the criminal act or omission concerned was committed by its officer, employee or agent within the scope of the latter's authority and at least in part for the benefit of the corporation.

In the English case of *Mousell Bros Ltd v London and Northwestern Railway Co* [1917] 2 KB 836, 846, Atkin J (in referring to the relevant legislation in that case) stated that *"Once it is decided that this is one of those cases where a principal may be held liable criminally for the act of his servant, there is no difficulty in holding that a corporation may be the principal. No mens rea being necessary to make the principal liable, a corporation is in exactly the same position as a principal who is not a corporation."*

In another English case, *ICR Haulage Co Ltd* [1944] KB 551, the Court of Criminal Appeal upheld the conviction of a company, its managing director and nine other persons for criminal conspiracy to defraud. According to Stable J, "… *the acts of the managing director of the company were the acts of the company and fraud of that person was fraud of the company*."

Further, in *Director of Public Prosecutions v Kent and Sussex Contractors Ltd* [1944] KB 146, the Court rejected the finding of the lower court that a body corporate could not be guilty of the offence of intentionally using a document that was false in a material particular on grounds that a body corporate could not be imputed with an act of will (*actus reus*) or state of mind (*mens rea*) that was implicit in the commission of the offence. Instead, the Court held that the acts, knowledge and intention of a responsible agent of the company (in this case, the transport manager), acting within the scope of his authority, must be imputed to the company.

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An interesting development on the jurisprudence on corporate criminal liability can be seen in *United States v Bank of England* (1987) 821 F. 2d 844 (1st Cir.), where the U.S. Court of Appeals affirmed the decision of the lower court which convicted the bank for its failure to report to the Treasury Department a series of withdrawals exceeding USD10,000 made by a specific individual. The Court developed a theory known as the aggregation theory to impose corporate criminal liability, i.e. where the composite knowledge of different employees is aggregated and imputed to the corporation (and consequently, liability). The Court said *"If employee A knows one facet of the currency reporting requirement, and B knows another facet of it, and C a third facet of it the bank knows them all … A collective knowledge is entirely appropriate in the context of corporate criminal liability."*

In short, depending on the circumstances of each case, a corporation can be criminally liable for the criminal acts or omissions of its employees – the fact that it is a separate legal entity may not shield the corporation from the arms of the law.

CORPORATE CRIMINAL LIABILITY IN MALAYSIA

In Malaysia, there are various legislation which impute criminal liability to a corporation. Such legislation typically contain "deeming provisions" which provide that if a person, i.e. an employee, commits an offence, the corporation is deemed to have committed the same offence.

For example, section 138(3) of the Securities Commission Malaysia Act 1993 ("SC Act") provides that *"Where a person who is an employee of a body corporate contravenes any provision of this Act, the body corporate shall be deemed to have contravened such provision."*

Furthermore, section 138(2) of the SC Act states that *"Where an offence against this Act … has been committed by a body corporate, any person who at the time of the commission of the offence was a director, a chief executive officer, an officer, an employee, a representative or the secretary of the body corporate or was purporting to act in such capacity, shall be deemed to have committed that offence unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances."*

Another example is section 144 of the Consumer Protection Act 1999, which provides, *inter alia*, that where an offence is committed under that Act by an employee, agent or employee of the agent of a principal, the principal shall be deemed to have committed that offence unless the contrary is proven.

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These “deeming provisions” do not impose strict liability on a corporation or its relevant officers, as the case may be, but give rise to rebuttable presumptions that shift the burden to the corporation or its officers to prove that they did not commit the offence.

In relation to corruption offences, the MACC Act does not contain such deeming provisions *vis-à-vis* corporations and its officers. Although specific details of the proposed amendments to the MACC Act have not been disclosed thus far, it is possible that the proposed corporate criminal liability provisions to be inserted into the MACC Act could be along similar lines to the provisions of the legislation discussed above. The effect of doing so will be that where employees of a corporation commit offences under the MACC Act (e.g. giving and accepting gratification or bribing an officer of a public body), the corporation (and its directors or officers) would be deemed to have committed the offence unless they prove otherwise.

This would inevitably impose upon an obligation on a corporation to be accountable for the acts of its employees and possibly those of its agents or employees of the agent. In the larger scheme of things, this may lead to a reduction of corrupt practices by corporations.

Based on the English cases referred to above, it is arguable that a corporation can be liable for corruption offences under existing provisions of the MACC Act if it can be proved that the acts were carried out by one or more persons who, in the words of Denning LJ in *H.L. Bolton (Engineering) Co Ltd v T.J. Graham & Sons Ltd* [1959] 1 QB 159, 172, represent “*the directing mind and will of the company and control what it does*.” It is also worth noting that the expression “*person*”, which is found in the various provisions for corruption offences in the MACC Act, is not restricted to a natural person as section 2 of the Interpretation Acts 1948 and 1967 defines a “person” to include *“a body of persons, corporate or unincorporate”*. This point remains to be tested in the Malaysian Courts.

THE LAW IN OTHER JURISDICTIONS

For purpose of comparison (in which the proposed amendments to the MACC Act could be modelled upon), we now examine the legislative framework in the United Kingdom and the United States of America.

United Kingdom

Section 7 of the Bribery Act 2010 (“UKBA”) imposes strict liability for failure by a commercial organisation to prevent bribery by persons associated with it to obtain or retain business or to obtain or retain an advantage in the conduct of business for that

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organisation. However, a commercial organisation could be absolved from liability if it is able to show that it had adequate procedures in place to prevent persons associated with it from committing bribery.

The last quarter of 2015 witnessed two significant developments in relation to the UKBA. On 30 November 2015, the UK Serious Fraud Office ("SFO") entered into the first ever deferred prosecution agreement ("DPA") under the UKBA with ICBC Standard Bank PLC ("ICBCS") in respect of ICBCS's failure to prevent third parties who were closely connected with ICBCS from committing bribery. Under the DPA, ICBCS agreed, *inter alia*, to pay a fine of USD32.2 million and to engage a leading audit firm to conduct an independent review of its procedures and to rectify shortcomings in the same.

In the first ever prosecution under section 7 of the UKBA, Sweett Group PLC pleaded guilty to an offence under that provision on 2 December 2015. The international construction and property consultancy admitted that it had failed to prevent bribery after its staff were found to have paid bribes to secure and retain a £1.6 million contract with Al Ain Ahlia Insurance Company to build a £63 million luxury hotel in Dubai. The company was sentenced on 19 February 2016 and ordered to pay a total penalty of £2.25 million for the offence.

These cases may have set the tone for enforcement actions on corruption offences by the SFO.

United States of America

The Foreign Corrupt Practice Act ("FCPA") contains provisions which apply to corporations. Amongst others, this includes corporations which are either incorporated or have their principal place of business in the U.S. The FCPA has been used on numerous occasions by the Department of Justice and the U.S. Securities and Exchange Commission against corporations which have violated the provisions of the FCPA. Under the FCPA, a corporation could be liable for the wrongful acts of its employees committed in the course of their employment.

CONCLUSION

The Corporate Integrity System Malaysia Framework was introduced in March 2011 to facilitate and streamline the undertaking of the Corporate Integrity Pledge ("CIP") among the public and private sectors alike. The CIP is a voluntary action that companies, businesses and other organisations in Malaysia may undertake by making a unilateral declaration against corrupt practices and expressing their resolve to work towards a highly principled Malaysian business environment. To date, there are 162 signatories from the public sector, 645 signatories from the private sector and 25 signatories from non-governmental organisations. The CIP is a good step forward, but lacks the force of law.

The proposed introduction of corporate criminal liability provisions into the MACC Act is timely. Although the scope of such provisions remains to be seen, it will be interesting to see whether the Government will resort to the "deeming provisions" found in other Malaysian legislation or will seek to impose liability on corporations for failure to prevent corruption along the lines contained in section 7 of the UKBA.

The Minister in the Prime Minister's Department, Datuk Paul Low, has expressed the hope that the Bill will be tabled in Malaysian Parliament this year (*The Star*, 11 March 2016). Without doubt, the introduction of corporate criminal liability into the MACC Act will give the MACC greater powers to combat corruption in Malaysia. Corporations and their officers must re-evaluate the adequacy of the anti-corruption compliance procedures of the corporation in view of the enhanced obligations that will be imposed when this new and powerful force is unleashed.

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17 March 2016

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Writer's Note:

It has been reported on three other occasions that Datuk Paul Low has suggested that a new law will be enacted (*Sun Daily Online*, 9 December 2014, *Malay Mail Online*, 16 October 2015 and *The Star*, 11 March 2016).

Geographical Indications: Registration system not far away

April 07, 2016

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Food law (/resources/food-law) Intellectual property (/resources/intellectual-property)

The Geographical Indications (Wine and Spirits) Registration Act was passed in 2006 but has never been brought into force. Following pressure from the New Zealand wine industry, the registration regime provided for under the Act will finally be implemented once the Geographical Indications (Wine and Spirits) Registration Amendment Bill is passed. Introduction of a registration regime will assist the wine industry to promote and protect its brands from misappropriation by overseas producers, and will allow New Zealand exporters to secure access in certain markets that require government-recognised geographical indications (GI).

What is a GI?

A GI indicates that a wine or spirit comes from a specific region, and possesses particular qualities or characteristics as a result. Well known international examples include Champagne and Scotch Whisky.

The proposed registration regime allows for registration of both New Zealand GIs, which indicate products originating in New Zealand, and foreign GIs, which indicate products originating in countries other than New Zealand.

The Bill is limited to wine and spirit GIs. Under the proposed regime, GIs cannot be registered for other goods, such as cheese. We expect to see increasing pressure in future years for GI protection to be extended to other products.

There are a number of restrictions on what may be registered as a GI. A GI must not be registered if:

- it is identical to an existing GI registration;
- it is identical to the customary name of a grape variety, or a common name for a wine or spirit;
- its use or registration would be likely to offend a significant section of the community, including Māori;
- it is identical or similar to a trade mark registration for the same or similar goods or services, and its use is likely to be deceive or confuse; or
- in the case of a foreign GI, it is no longer in use or protected in the country of origin.

The Bill also provides for three enduring GIs: North Island, South Island and New Zealand.

How can a GI be used?

The general rule is that a GI can be used on a product if the product originated from the region to which the GI relates. A GI cannot be used for a product from outside the relevant region, even if it is accompanied by any of the words “kind”, “type”, “style”, “imitation”, or any similar word or expression.

The Bill proposes a slightly different regime for wine. In order for a wine to be labelled with a GI for a New Zealand region, all grapes from which the wine is made must be harvested in New Zealand. However, only 85% of the grapes need to be harvested from the region to which the GI relates.

If a GI is not used in accordance with the use requirements, the misuse is deemed to be a breach of section 9 of the Fair Trading Act 1986 which prohibits misleading and deceptive conduct in trade.

How long will my GI be registered for?

It is proposed that the registration period for a GI will be 10 years. Like a trade mark, if a GI is not renewed, it will expire at the end of the 10 year term.

When can I apply and how much will it cost?

The Bill has recently been referred to the Primary Production Select Committee for review. It is expected that the Bill will be passed later in 2016. The date from which applications can be filed and official fees for registration of a GI have yet to be confirmed, although there is already strong interest from the wine community. NZWine has indicated that it will pay the New Zealand application fees to register 29 regional names as GIs in New Zealand.

A proposed fee structure and draft regulations are expected to be released later in 2016, which should also provide further information about how the registration regime will work in practice.

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Revisions To Singapore Take-Over Code

Introduction

The Singapore Code on Take-overs and Mergers ("**Code**") was revised by the Monetary Authority of Singapore pursuant to Section 139(6) of the Securities and Futures Act with effect from 25 March 2016. This article aims to highlight the key changes that were made to the Code, and will touch on various amendments including those relating to:

> Competing offers
> Board conduct during an offer
> Prompt disclosure of material changes
> Settlement of acceptances
> No increase / no extension statements

Competing offers

Amendments to the Code were made to provide greater certainty on the applicable procedures and timelines in cases of competitive offers and to increase the prospects of a competing offer that will benefit offeree company shareholders.

Alignment of offer timetables

Timetable in competing offers to follow that of latest competing offeror

The new Note on Rule 22.9 of the Code provides that all offerors will be bound by the timetable established by the despatch of the offer document of the latest competing offeror.

The Code prior to the revision did not clearly state the timelines to be observed by offerors in competitive offers scenarios. This had left open the possibility of typical timelines in the offer process not being observed. The new Note on Rule 22.9 of the Code brings clarity to timelines to be observed by offerors in competitive situations, reducing uncertainty arising from the offer which may otherwise have a destabilising effect on the offeree company.

Default auction procedure

Codification of auction procedure

The new Rule 20.5 in the Code provides that in competitive situations at the later stages of the offer period, the Securities Industry Council ("**SIC**") will normally require revised offers to be announced in accordance with an auction procedure, the terms of which will be determined and announced by the SIC.

Key features of default auction procedure

Such auction procedure will normally be as set out in the new Appendix 4 of the Code, the key steps of which are as follows:

(a) the default auction procedure shall commence only if either or both of the offerors revise their offers on the 46th day following the despatch by the second competing offeror of its offer document ("**Day 46**");

(b) the default auction procedure shall consist of five rounds of bidding with each round to take place each day over the five business days immediately following Day 46;

(c) either or both of the competing offerors will be permitted to announce a revised offer in the first round of the auction;

(d) for subsequent rounds of the auction, a competing offeror will be permitted to announce a revised offer only if the other competing offeror has announced a revised offer in the previous round;

(e) if the auction process enters into the fifth round (meaning that there was a revised offer announced in the fourth round of the auction), both competing offerors will be entitled to announce a revised offer in the fifth and final round; and

(f) if on any day of the auction there are no revised offers announced, the auction will end.

Other features of the auction process include:

> the flexibility to include new forms of consideration during the auction;

> no minimum increment over the latest competing offer; and

> no dealing in shares or procuring irrevocable commitments in relation to shares in the offeree company during the auction process.

The codification of the default auction procedure in the new Rule 20.5 of the Code is intended to provide greater finality, transparency and an orderly conclusion to the competitive bidding process within a reasonable timeframe.

Notwithstanding the greater finality introduced by the new Rule 20.5 of the Code, it is still unclear what factors the SIC would take into account when deciding whether:

(1) to impose the default auction procedure (as the new Rule 20.5 of the Code states that the SIC would "normally" apply the same): and

(2) to adopt any alternative procedure agreed upon between the competing offerors and the board of the offeree company.

Deadline for announcing competing offer

Extension of deadline to "put up or shut up"

The new Note 6 on Rules 3.1, 3.2 and 3.3 of the Code provides the revised deadline for clarification of intention by potential competing offerors.

In the case of a contractual offer, the deadline for a potential competing offeror must make an announcement of its intentions to either make an offer or no bid has been revised from the 50th day to the 53rd day from the date the first offeror despatches its initial offer document.

In the case of a scheme of arrangement, trust scheme or an amalgamation, the deadline for such announcement will be no later than the 7th day prior to the date of the shareholders' meeting to approve such scheme or amalgamation.

The extended deadline will provide more time for a potential competing offeror to consider and finalise the terms of an offer which may increase the prospects of the offeree company shareholders receiving a competing offer.

Board conduct during offer

Amendments to the Code were made to encourage the offeree company boards to take a more active role in procuring a better offer in the interests of the offeree company shareholders.

Offers not amounting to frustration

No restrictions on offeree company board from seeking competing offers

The new Note 8 on Rule 5 of the Code is the codification of SIC's position that an offeree company seeking better and/or alternative offers does not frustrate an existing offer. The new Note may encourage directors of the offeree company to seek better and/or alternative offers if the initial offer is not sufficiently attractive.

Availability of management projections and forecasts

Sharing of management projections and forecasts with IFAs

The new Note 5 on Rule 7.1 of the Code has been introduced to highlight that an offeree board may consider sharing management projections and forecasts with the independent financial advisor ("**IFA**") for the purpose of the latter's advice on the offer. The incorporation of such information into the IFA's valuation process may potentially provide a better gauge of the true value of the offeree company, as compared to relying solely on values of comparable companies in similar sectors especially where such values may have been artificially depressed by market conditions.

Other changes

Prompt disclosure of material changes

Timely disclosure

Note 1 on Rule 8.1 of the Code has been amended to require prompt disclosure of any material:

(1) changes to information previously published in connection with the offer; and
(2) new information which has been required to be disclosed in any previous document or announcement published during an offer period, had it been known at that time.

Settlement of acceptances

Change of deadline for settlement

Rules 16.6 and 30 of the Code has been amended to adopt a 7-business-day settlement period instead of the previous 10-calendar-day settlement period to avoid practical difficulties for an offeror when part of the 10-calendar-day settlement period coincides with public holidays.

No increase and no extension statements

Setting aside of no increase and no extension statements where new material information is released late

The new Notes 4 on Rules 20.2 and 22.7 of the Code clarify that the offeror may reserve the right to set aside a no increase statement/no extension statement in the event the offeree company makes an announcement of material new information after the 39th day following the publication of the initial offer document and such statement is made after that day.

The setting aside of the no increase statement/no extension statement must be announced within four business days after the date of the announcement by the offeree company of such material new information.

Codifying and streamlining existing practices

Codification of pre-conditional offer requirements

The Code has also been amended to:

(1) clarify standards that are required of pre-conditions in a pre-conditional voluntary offer (new Note 5 on Rule 15.1 of the Code);

(2) allow the offeree company to seek approval for the posting of the offer document at an earlier date in a pre-conditional offer (new Note on Rule 22.1 of the Code); and

(3) clarify how the offer value for a different class of shares should be calculated (new Note 1 on Rule 18 of the Code).

Resources

For further details, please refer to the following embedded links:

> Consultation Paper on Revision of the Singapore Code on Take-Overs and Mergers

> Consultation Conclusions on Revision of the Singapore Code on Take-Overs and Mergers

> The revised code

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Taiwan Intellectual Property Office to Amend Guidelines on Assessment of Inventive Step

03/31/2016 By Audrey Lo/Philip Tsai

The assessment of inventive step is of paramount importance in examining patent applications. Very often, examiners have to assess the inventive step of a claimed invention in view of multiple references. The rules in the Patent Examination Guidelines ("Guidelines") regarding the determination of patentability based on multiple references are as follows:

If a claimed invention could have been easily made by combining, modifying, substituting or adapting the teachings of one or more prior art references in view of the common knowledge at the time of filing, then the claimed invention as a whole is obvious. In that case, the examiner should determine that the claimed invention can be easily arrived at.

Because of these rules, examiners treat prior art references as if they were pieces of a mosaic and combine them without indicating which reference is the primary reference. Moreover, examiners often ignore the "teaching away" of the prior art. These practices result in many findings based on hindsight.

At a recent conference held by the Intellectual Property Court, the representative from the Intellectual Property Office ("IPO") discussed possible amendments to the Guidelines to avoid findings based on hindsight. The proposed amendments would clearly define the technical level of a person having ordinary skill in the art ("PHOSITA") at the time of filing and would provide principles to help examiners give objective reasoning based on available evidence. The proposed amendments are expected to make patent examination less subjective. The proposed amendments cover the following areas:

1. Definition of PHOSITA

According to the Guidelines, a PHOSITA as a hypothetical person. However, technological development often involves interdisciplinary knowledge and requires the efforts of a group of persons (such as an R&D or manufacturing team) rather than a single person. Therefore, the IPO plans to adopt the European standards and amend the definition of PHOSITA in the assessment of inventive step to mean a group of skilled persons from different fields.

2. Identification of primary reference

The IPO plans to require examiners to choose the closest prior art reference or the most appropriate prior art reference as the primary reference. This requirement would enable the examiners to determine a starting point for examination.

3. Steps and factors in inventive step assessment

Under the proposed amendments, examiners should, in assessing inventive step, consider the following factors when determining whether there would be motivation to combine two or more references:

●whether the references relate to the same field

●whether the technical problems addressed by the references are the same or related

●whether the effects/functions of the references are the same or related

●the teachings or suggestions of the prior art that are related to the claimed invention

If it is determined that there would be motivation to combine two or more references, then the examiner should proceed to determine whether the claimed invention yields unexpected results.

Like their Japanese counterparts, IPO examiners would be required to take into account any "blocking factors" (that is, the "teaching away" of the prior art) in determining whether two or more references are combinable. The blocking factors could include the following:

●The purpose of the secondary reference(s) is opposite that of the primary one.

●It is determined that the combination of the primary reference and the secondary reference(s) would render the invention of the primary reference inoperable.

●The teachings of the secondary reference are incompatible with those of the primary one.

●It is already documented in the art that the teachings of the secondary reference(s) cannot be combined with those of the primary reference, and thus the PHOSITA would not consider such a combination.

It is believed that the above amendments, if adopted, would improve the quality of inventive step assessments.

BAKER BOTTS

Ideas

FCPA Pilot Program

Litigation Update

12 April 2016

Newsletter

On Tuesday, April 5, 2016, the Fraud Section of the Department of Justice's Criminal Division announced a one-year pilot program under which companies that self-report violations of the Foreign Corrupt Practices Act ("FCPA") will receive specific mitigation credit in exchange for their cooperation.[1] The Department is implementing the program to encourage companies to disclose conduct that may have gone undiscovered, and to try to provide greater transparency around the requirements to obtain cooperation credit and the resulting benefits of that cooperation.The program is effective from April 5, 2016 for one year, and applies to all FCPA matters handled by the Fraud Section.

To obtain credit under the pilot program, a company must satisfy three requirements. First, the company must voluntarily disclose the criminal conduct within a "reasonably prompt" period of time after becoming aware of the offense, and prior to an imminent threat of disclosure or government investigation. No specific guidance is offered as to what "reasonably prompt" means, other than that the burden is on the company to establish timeliness. Second, the company must fully cooperate with the Fraud Section, including proactively disclosing facts relevant to the investigation, providing relevant documents and information, and making officers and employees available for interviews by the Fraud Section. Consistent with current Department policy, waiver of the privilege is not required to obtain cooperation credit. Finally, the company must conduct timely and appropriate remediation, including implementing an effective compliance program and ensuring appropriate discipline of employees responsible for the misconduct. The Department has also made clear that, as part of fulfilling these requirements, the company will have to disgorge to the U.S. Government all profits resulting from the violation (even, apparently, in cases where a declination results).

Per the Department's new policy, if a company fulfills these requirements, it will qualify for the full range of potential mitigation credit, including up to a 50% reduction off of the low end of the U.S. Sentencing Guidelines fine range and the possibility that the Fraud Section will decline to prosecute the offense.[2] In addition, an independent compliance monitor -- which settling companies are sometimes made to retain -- will generally not be required at the time of the resolution, provided that the company has implemented an effective compliance program.

The Department has long emphasized that it rewards companies that self-report and cooperate, and long recognized the importance of demonstrating this point clearly so as to properly incentivize would-be self-reporters. The announcement of the pilot program, which is consistent with these messages, also comes about seven months after the issuance of the "Yates Memo," which, among other things, emphasized that cooperating companies must be prepared to turn over all relevant information implicating individuals. This week's announcement balances the Department's prior messages, signaling that while it remains extremely keen to hold individuals accountable for misconduct, it will reward companies for providing information allowing it to do so.

The extent to which the new program will further incentivize self-reporting or otherwise affect current practice remains to be seen, of course. On the one hand, DOJ retains considerable flexibility under the terms of the program. Under the policy, it only says that it "will consider" a declination. Self-reporting companies qualify for "up to" a 50% reduction off the low end of the Guidelines range and "generally" will not need a monitor if they have an effective compliance program. Taking the point even further, when a case settles, the numbers that feed into the sentencing guidelines calculation are typically negotiated, meaning the 50% discount is coming off of a number that is negotiated to begin with.

The counterweight here is that the Department will be highly incentivized to show that it is honoring the terms of the pilot program, and to demonstrate that it the program will result in significant, transparent benefits to self-reporting companies. Moreover, such companies now have an additional basis to argue for reduced penalties and even declinations in cases worked up by the trial attorneys in the FCPA Unit.

One other question mark is what will happen when the year is up. The Department could rescind the program, make it permanent, or perhaps come up with additional ideas to draw out more self-reporting. However, despite the uncertainty ahead, the Fraud Section is continuing its attempt to communicate clearly to the business community about its policies and objectives, providing useful information for corporate decision-makers.

1 The Department's announcement can be found at https://www.justice.gov/opa/file/838386/download.

2 Criminal resolutions will typically include an agreed-upon fine. Resolutions other than Non-Prosecution Agreements are subject to judicial review, but are typically left intact

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M.D. Phone Home: New Legislation Expands Telemedicine in Washington

03.31.16

By Adam D. Romney and Sean R. Baird

On March 29, 2016, as Governor Inslee signed Senate Bill 6519, Washington became a friendlier state for telemedicine. The new law or "Telemedicine Advancement Law" has a long-winded official title: "Expanding patient access to health services through telemedicine and establishing a collaborative for the advancement of telemedicine." The Law includes three key accomplishments. First, it establishes a "collaborative for the advancement of telemedicine" through which industry leaders will develop recommendations for how to identify best practices, expand access and improve coverage and payment for telemedicine in the state. Second, the law relaxes certain regulatory standards, such that the Washington telemedicine parity law will apply to services furnished when patients are at home. Third, the law promotes the delivery of safe and effective telemedicine services, while ensuring patient privacy and security. Each of these aspects of the Telemedicine Advancement Law is discussed in greater detail below.

The Collaborative for the Advancement of Telemedicine

The Telemedicine Advancement Law establishes a "collaborative for the advancement of telemedicine" which will research, analyze, and provide guidance for the benefit of professionals furnishing telemedicine services. The collaborative will be hosted by the University of Washington telehealth services department and will be comprised of legislators, healthcare professionals and representatives from universities, hospitals, insurance carriers, and other interested parties.

The collaborative shall convene by July 1, 2016 and is charged with:

- Developing recommendations on improving reimbursement and access to services including originating site restrictions, provider to provider consultative models, and technologies and models of care not currently reimbursed;
- Identifying telemedicine best practices, guidelines, billing requirements, and fraud prevention developed by recognized medical and telemedicine organizations; and
- Exploring other priorities identified by members of the collaborative.

According to the Telemedicine Advancement Law, the collaborative will recommend whether or not a "technical assistance center" should be established. This center would support providers who are expanding or implementing telemedicine technologies and services.

The collaborative will submit an initial progress report to the legislature by December 1, 2016 with follow-up policy reports and recommendations to be provided by December 1, 2017 and December 1, 2018.

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The Telemedicine Advancement Law also makes it easier for patients to receive telemedicine care from home. Traditionally, state and federal law has restricted coverage for patients seeking to receive telemedicine services while at home. For example, in order for the telemedicine services to be covered by the Medicare program patients must receive the services at a qualifying "originating site." Medicare defines "originating site" narrowly, as a hospital, physician's office, rural health clinic, federally qualified health center or other type of clinical location. The consequence of this restrictive definition is that Medicare currently does not pay for telemedicine services if the patient is at home, in the office, or anywhere that is not a traditional health care setting (except in limited circumstances).

Effective January 1, 2017, Washington's telemedicine parity law will require health plans to "reimburse a provider for a health care service provided to a covered person through telemedicine" when certain preconditions have been met.[1] Similar to Medicare, one of the preconditions in the original parity law was that the patient must be located at an eligible "originating site" such as a hospital, rural health clinic, FQHC, physician office, nursing home, etc. Under the original law, if the patient received telemedicine care at home, health plans had no obligation to pay as the telemedicine parity law did not apply.

The Telemedicine Advancement Law changed the rules by expanding the eligible originating sites to include a patient's "home." Thus, the law enhances patient access to telemedicine services – particularly those patients who are homebound, have limited transportation resources, or who live in extremely rural areas. With this change in the law, health plans will be required to cover telemedicine services furnished to patients in their home, provided that all other applicable criteria are met.

Ensuring Safety, Effectiveness, Privacy and Security

The Telemedicine Advancement Law also conditions the application of the telemedicine parity law to those telemedicine services that are safe and effective and that can be provided in a manner consistent with "generally accepted health care practices and standards." In addition, the technology used to provide the telemedicine services must meet "the standards required by state and federal laws governing the privacy and security of protected health information." Thus, health plans may appropriately deny coverage for telemedicine services that do not meet the standard of care or that are not delivered in a manner that complies with patient privacy and data security standards.

To date, few legal authorities or payors have attempted to define which specific types of health care services, treatments, diagnostics or procedures are (and which are not) appropriate to provide via telemedicine. For example, the Washington Medical Quality Assurance Commission's guidance regarding a physician's use of telemedicine states that "[p]ractitioners using Telemedicine will be held to the same standard of care as practitioners engaging in more traditional in-person care delivery" and "[f]ailure to conform to the standard of care, whether rendered in person or via Telemedicine, may subject the practitioner to potential discipline by the Commission." Until practitioners have a better understanding of the "generally accepted . . . practices and standards" and the "standard of care" that apply to telemedicine, they will be faced with uncertainty regarding the applicability of the parity law to their telemedicine services, and more significantly, whether the Commission could deem them to be practicing telemedicine outside of the scope of their license.

Regarding privacy and security, compliance with federal privacy and security laws (e.g., HIPAA and the HITECH Act) as well as similar state laws (e.g., RCW § 70.02) are now preconditions to the application of the telemedicine parity law. Telemedicine practitioners generally face the same privacy and security issues that affect conventional providers; however, given the technology available, there are increasingly more opportunities for unauthorized third parties to access patient health information. By enacting the above language, Washington seeks to ensure that telemedicine practitioners carefully consider patient privacy and providers should carefully monitor and update their privacy and security policies as they introduce telemedicine into their practices.

Conclusion

In passing the Telemedicine Advancement Law, Washington's legislature has taken a positive step in supporting the advancement and expansion of telemedicine. Establishing the collaborative for the advancement of telemedicine will provide a variety of interested parties with an opportunity to analyze and promote the many benefits that telemedicine services provide to patients. Moreover, by expanding the definition of originating site to include a patient's home, Washington has improved patient access to care. Finally, Washington's legislature has emphasized its commitment protecting patient safety and privacy by requiring telemedicine care to comply with generally accepted standards and applicable privacy and security laws for the parity law to apply.

FOOTNOTE

1 See RCW §§ 70.41.020, 70.41.230 and chapters 41.05 RCW, 48.43 RCW, and 74.09 RCW. For a discussion of Washington's parity law, see "Hold the Phone! Washington Adopts Telemedicine Parity Law," by Adam Romney and Michaela Andrawis.

Disclaimer

March 18, 2016

Taking to the Air: Using Drones to Ensure Regulatory Compliance for Natural Gas and Oil Pipelines and Other Critical Infrastructure Owners and Operators

Energy companies that operate critical infrastructure face regulatory challenges on a daily basis as they strive to provide effective and efficient service safely. Congress may make some of these regulatory challenges less burdensome by lifting restrictions on the use of drones to monitor their assets. *UAVs for Energy Infrastructure Act* (S.2684), sponsored by Senator Jim Inhofe and introduced on March 15, 2016, would enable critical infrastructure operators to use unmanned aerial vehicles (UAVs or so-called drones) to comply with existing federal regulations, as well as to respond to an emergency, natural disaster or severe weather event. Specifically, the bill would allow the use of a drone to conduct any activity already allowed to be accomplished with manned aircraft. Senator Inhofe plans to include the bill in the FAA authorization legislation.

Among other tasks, the bill would permit oil and natural gas pipeline and other critical infrastructure developers, owners, operators, service companies and their agents to use drones to:

- Conduct surveys for construction, maintenance, and rehabilitation;
- Comply with safety requirements to periodically patrol rights-of-way to prevent encroachment and unauthorized excavation;
- Detect evidence of leaks or other conditions that jeopardize safety;
- Prepare for a natural disaster or severe weather event; and
- Respond to other incidents outside of company control that may cause material damage to critical infrastructure.

The use of drones would enable critical energy infrastructure companies to effectively and efficiently comply with federal regulations and permitting requirements, and would help to promote the overarching goal of pipeline and other facility safety. The focus on safety is timely, as the federal agency responsible for pipeline safety has just issued a comprehensive set of proposed rules intended to enhance the safety of the nation’s pipelines.

The Inhofe legislation is intended to enhance the integrity, safety and security of all critical infrastructure. The bill is focused on, but not limited to, the oil and natural gas pipeline system because of its critical value to Oklahoma and the nation. As stated by Andy Black, president of the Association of Oil Pipe Lines, “Drones hold the possibility for additional high tech inspection of pipelines from the air. The Inhofe bill to break down regulatory barriers to using drone technology to keep pipelines safe is

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Allison E. Hellreich

welcome legislation." Martin Edwards, vice president of legislative affairs at the Interstate Natural Gas Association of America, agrees, stating "Unmanned aircraft offer natural gas pipelines a 21st century solution to [ ] regulatory requirement[s], a solution that can be more effective in numerous ways."

Hogan Lovells, which combines a market-leading energy practice with a leading Unmanned Aircraft practice, is uniquely positioned to help pipeline companies, electric transmission and power plant operators, and other companies that operate critical infrastructure to promote the legislation and to take advantage of the use of drones in operating their facilities, including any opportunities that may be afforded by the *UAVs for Energy Infrastructure Act.*

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