PACIFIC RIM ADVISORY COUNCIL

Pacific Rim Advisory Council
January 2016 e-Bulletin

MEMBER NEWS

►ARIAS & MUNOZ Appoints New Partners
►BAKER BOTTS Opens San Francisco Office
►BRIGARD & URRUTIA Partner and Director Appointments
►CLAYTON UTZ Board and Partner Appointments
►DAVIS WRIGHT TREMAINE Partner Appointments
►HOGAN LOVELLS Partner and Counsel Appointments
►NAUTADUTILH Partner Appointments; Rotterdam Office Move

COUNTRY ALERTS

►AUSTRALIA Negotiating Agreed Penalties with Regulators is OK, Says High Court CLAYTON UTZ
►BRAZIL Review of Bilateral Income Tax Treaty with Canada TOZZINIFREIRE
►CANADA TSX Outlines Proposed Venture Exchange Forum BENNETT JONES
►CHILE New Direct Foreign Investment Law CAREY
►CHINA Anti-Terrorism Law Released, Impacting Telecom and Online Business in China DAVIS WRIGHT TREMAINE
►COLOMBIA Simplification of Registration Procedures of Foreign Investment BRIGARD URRUTIA
►COSTA RICA New Employees May Be Immediately Payroll Registered ARIAS & MUNOZ
►FRANCE Amendment to France-Luxemburg Tax Treaty Not Applicable Until 2017 GIDE
►INDONESIA New Regulation on Importers' ID Number ABNR
►MEXICO National Hydrocarbons Commission Round One - Fourth Call SANTAMARINA Y STETA
►NETHERLANDS Legislative Basis of Dutch Banking Code Withdrawn NAUTADUTILH
►NEW ZEALAND Disclosure Regulations for Third Party Fundraisers SIMPSON GRIERSON
►SINGAPORE Court of Appeal Clarifies Minority Claims are Arbitrable RODYK
►TAIWAN Establishment of Special Committee for Mergers and Acquisitions of Public Issuing Companies LEE & LI
►UNITED STATES
►Supreme Court Upholds $76 Million Judgment Against a Financial Advisor for Aiding and Abetting a Board's Breach of Fiduciary Duty BAKER BOTTS
►New California Law Strengthens Requirements for Outpatient Surgery Settings DAVIS WRIGHT TREMAINE
►FAST Act Securities Provision Ease Regulatory Requirements for Smaller Issuers HOGAN LOVELLS

CONFERENCES & EVENTS

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

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

Visit www.prac.org
for these and other event details

MEMBER DEALS MAKING NEWS

►ARIAS & MUNOZ Assists Regal Forest Holding Acquisition of Electronic Retail Chain Stores in Paraguay
►BAKER BOTTS Acts for Tallgrass Development, LP Sale of an Additional 31.3% Interest in Tallgrass Pony Express Pipeline, LLC
►CAREY Acts for IFM Investors in US$2Billion Sale of Pacific Hydro Sale to China's State Power Investment Corporation
►CLAYTON UTZ Northern Territories $800 million NEGI Pipeline Project Milestone
►DAVIS WRIGHT TREMAINE Helps Achieve a Major Employment Litigation Victory for Los Angeles Times Communications LLC
►GIDE Advises Société Générale and Crédit Agricole Corporate and Investment Bank in €95 Million PP of Financière Spie Batignolles
►MUNIZ local counsel for Credit Suisse in US$200million Loan to Peruvian Infrastructure Conglomerate Graña y Montero (GyM)
►NAUTADUTILH Assists Acerta Pharma B.V. in landmark Dutch Pharma Deal
►HOGAN LOVELLS Closes US$2.45 Billion Term and Revolving Facilities for Tencent
►RODYK Acts in Facilities Grant to CMA CGM S.A. for Partial Finance of Acquisition of Neptune Orient Lines Limited - Value S$3.4 Billion
►ROUSAUD COSTAS DURAN Advises Rastar Group on Acquisition of Spanish Soccer Club RCD Spanyol's Share Capital
►SANTAMARINA Assists Mexican Home Builder GEO Complete Landmark Restructuring
►TOZZINIFREIRE Assists Paema Embalagens in Sale to Smurfit Kappa

PRAC TOOLS TO USE

PRAC Contacts PRAC Member Directory Events
Visit us online at www.prac.org

ARIAS & MUNOZ APPOINTS NEW PARTNERS

Arias & Muñoz begins 2016 with new Partners

Arias & Muñoz has announced the appointment of 3 new Partners from January 1, 2016, totaling 33 Partners region-wide.

Tania Solis

Edgard Torres

Ximena Tercero

Tania Solis, Edgard Torres and Ximena Tercero have been promoted to Partners in recognition to their legal performance and commitment to the firm.

"The appointment of the new Partners is due in part to the growth of their practices in their respective offices and also in the result of highly professional and human qualities demonstrated by the attorneys that today are Partners of Arias & Muñoz", expressed Armando Arias, Managing Partner of the firm.

These new appointments represent the growth and strength of Arias & Muñoz, which since its establishment in 1942 has been characterized as an innovative pioneering firm and a leader in providing comprehensive legal solutions to clients within and outside the central American region.

Currently, Arias & Muñoz has 33 Partners and over 160 lawyers in the region.

In recent years, Arias & Muñoz has been granted important recognitions such as "Central American Law Firm of the Year", "Regional Client Service Award", "Tax firm of the Year", "Women in Business Law Award", "Deal of the Year", among others.

For additional information visit www.ariaslaw.com

BAKER BOTTS OFFICIALLY OPENS SAN FRANCISCO OFFICE

SAN FRANCISCO, January 2016: Baker Botts, L.L.P announced that it has officially opened its new office in San Francisco. In October, the firm announced that it was opening a new office in San Francisco and at the same time announced the appointment of Patricia Stanton as the new Partner in Charge. This will be the firm's second California office. The firm opened its Palo Alto office in 2008.

The San Francisco office is located in the heart of the Financial District at 101 California Street, Suite 3070. The local phone number is +1.415.291.6200.

For more information, please visit www.bakerbotts.com

BRIGARD & URRUTIA PARTNER AND DIRECTOR APPOINTMENTS

BOGOTA – January, 2016: Brigard & Urrutia is pleased to announce that it has appointed two new partners and two new directors, effective January 1, 2016. Our new partners and directors are highly recognized and reputed attorneys both nationally and internationally in their respective areas of practice.

The new partners are *Alejandro García*, who leads the area of Antitrust and Competition and *Catalina Santos*, who leads the Labor & Employment practice.

The new directors are *Laura Carreño,* a member of the Corporate M&A Team and *Carolina López* who is part of the Litigation, Arbitration and Insolvency practice team.

In a statement about these designations, **Carlos Umaña**, **Brigard & Urrutia's Managing Partner,** highlighted that "the appointment of new partners and directors recognizes distinguished attorneys that have outstanding personal qualities as well as professional competencies, are leading practitioners in the Colombian legal market and have led an important and remarkable career path in the firm." Carlos Umaña further expressed that "these appointments are also indicative of our commitment to provide to our clients legal services of the highest quality."

For additional information visit us at www.bu.com.co

CLAYTON UTZ BOARD AND PARTNER APPOINTMENTS

1 December 2015: The Board of Clayton Utz is pleased to announce the appointment of ***Christine Bartlett*** as an external director, with effect from 1 January 2016.

Christine has extensive board and corporate sector experience. She is a non-executive director of Mirvac Limited, GBST Holdings Limited and The Smith Family, and has had a highly successful executive career across several senior management roles, at National Australia Bank (as Executive General Manager, NextGen, the bank's business transformation program), Jones Lang LaSalle Australia (CEO), and IBM Asia Pacific (COO, Business Consulting Services).

Christine is a member of Chief Executive Women and the Australian Institute of Company Directors, and of UNSW's Australian School of Business Advisory Board.

Clayton Utz Board Chair Ross Perrett said Christine would be a valuable addition to the Board. "We are very pleased to have a director of Christine's experience and commercial acumen join us as a Board member," said Ross.

The Clayton Utz Board comprises the Chief Executive Partner, six elected Clayton Utz partners, and two external directors. Christine joins Peter Hawkins as the Board's other external director.

Clayton Utz is proud to announce the following partner appointments, effective 1 January 2016.

Lina Fischer,
Major Projects & Construction, Sydney

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

Cain Sibley,
Public Sector, Canberra

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

CLAYTON UTZ BOARD AND PARTNER APPOINTMENTS CONTINUED

Peter Staciwa
Banking & Financial Services, Sydney

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

Lucy Terracall
Insurance, Melbourne

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

Tim Webb
IP & Technology

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

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

For additional information visit www.claytonutz.com

DAVIS WRIGHT TREMAINE PROMOTES THREE TO PARTNER

SEATTLE – 06 January, 2016: Davis Wright Tremaine LLP is pleased to announce the promotion of three attorneys—***Patrick J. Ferguson, John A. Goldmark,*** *and* ***Dipa N. Sudra***—to partnership.

"Patrick, John, and Dipa are outstanding lawyers who exemplify our firm's commitment to excellence in client service," said Jeff Gray, managing partner of Davis Wright Tremaine. "They have incredibly bright futures and I'm delighted to welcome them to the partnership."

Ferguson practices out of the San Francisco office, where he focuses on energy and environmental matters. He represents utilities and independent power producers in proceedings before the California Public Utilities Commission and the California Independent System Operator; structures and negotiates power purchase agreements and other energy-related contracts; and works to shape California energy policy and regulation. He has significant litigation experience and has also helped companies through government investigations and enforcement actions in both the civil and criminal arenas.

Ferguson received his B.S. and B.B.A. in Management Science from Georgetown University's McDonough School of Business and his J.D. from Columbia Law School. He is on the board of directors of the Power Association of Northern California.

Goldmark is a litigator in the Seattle office, where he represents clients from a variety of industries, including online retail, software, telecommunications, international import, national retail and distribution, health care, and financial services. He has hands-on experience in a wide variety of matters, including intellectual property litigation (plaintiff and defense), consumer class actions, state and federal securities fraud claims, contract disputes, and appellate litigation.

Goldmark received his B.A. in Biophysics, Biochemistry, and Molecular Biology from Whitman College and his J.D. from the University of Washington School of Law. He was selected by Thomson Reuters/Super Lawyers to the Washington "Rising Stars" list each of the last three years.

Sudra helps her clients solve their most complex benefits issues, ensuring compliance with myriad rules and regulations. Her extensive experience includes providing sophisticated advice and counsel on ERISA, the Tax Code, ACA, COBRA, HIPAA, and GINA. She has in-depth knowledge and insight on a wide variety of plans: defined contribution (401(k), 403(b), money-purchase and profit-sharing), defined benefit, health and welfare (wrap, HRA, retiree, MEWA), fringe benefit, non-qualified deferred compensation, and cafeteria. Sudra also represents employers in M&A-related benefits issues. She is regularly called upon to lead training sessions for clients on matters such as fiduciary issues relating to ERISA plans.

Sudra received her B.A. in Jurisprudence from the University of Oxford, her M.A. from the University of Oxford, her LPC (Legal Practice Course) qualification from The College of Law, Guildford, and her ATII (Associate of the Taxation Institution Incorporated) qualification from the Chartered Institute of Taxation.

For more information, visit www.dwt.com

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

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

Visit www.prac.org for these and other event details

HOGAN LOVELLS ANNOUNCES 24 PROMOTED TO PARTNERS AND 45 PROMOTED TO COUNSEL

5 January 2016: Hogan Lovells has announced the promotion of 24 new partners, effective 1 January 2016. The global law firm includes more than 800 partners in offices across Africa, Asia, Europe, the Middle East, and the Americas. Collectively, the group of new partners represents each Hogan Lovells practice group:

Nine in Corporate (including in Corporate, Pensions, Real Estate, and Tax)

Seven in Litigation, Arbitration and Employment (including in Employment and Litigation)

Five in Government Regulatory (including in Antitrust, Competition, and Economic Regulation, Drug, Food, Health, International Trade, and Pharma)

Two in Finance (in Banking and International Debt Capital Markets)

One in Intellectual Property

The jurisdictional spread reflects the broad international nature of Hogan Lovells' practice: 12 in Europe, 10 in the United States and 2 in Asia.

In addition to the 24 new partners, 45 new appointments to the role of counsel have been made.

CEO Steve Immelt said:

“Hogan Lovells’ continued investment in developing the best talent is a central tenant in our global client service strategy. As the firm continues to accelerate into the future with practice and firm-wide innovations, we are confident these partners exemplify the depth and breadth of the firm globally. We are proud of these individuals and wish them the best in their careers.”

For more information, see www.hoganlovells.com

NAUTADUTILH PARTNER APPOINTMENTS; ROTTERDAM OFFICE ON THE MOVE

NautaDutilh Announces Six Appointments

January, 2016: NautaDutilh has appointed Allart Haasjes, Frans van der Eerden and Tanguy de Haan as partners. Furthermore, Barbara Nijs and Francien Rense have been appointed associate partners and Bastiaan Assink as of-counsel.

Allart Haasjes (37) (partner, Financial Litigation) focuses on conducting proceedings for financial institutions in various areas, including banking liability, collective actions, collecting claims and processing personal information.

Frans van der Eerden (35) (partner, Banking & Finance) specialises in financial regulation. He advises Dutch and international financial institutions with regard to securities law, fund structuring, derivatives and financial supervision.

Tanguy de Haan (38) (partner, Intellectual Property/Litigation) is an intellectual property specialist working from Brussels. He focuses particularly on patent, trademark and model disputes and is often involved in cross-border litigation.

Barbara Nijs (associate partner, Competition) specialises in European and Dutch competition law. She has wide experience in advising on, for instance, merger control filing, cartels, compliance issues and cooperation arrangements such as joint ventures.

Francien Rense (41) (associate partner, Litigation & Arbitration) focuses on enforcement and sanctions issues. She has wide experience in processes with authorities relating to compliance with laws and regulations and sanctions in that respect. Francien advises on prevention, compliance, internal and external investigations, as well as on repression and punishment by means of criminal prosecution. Before she was appointed at NautaDutilh, Francien was a partner at Leijnse Artz.

Bastiaan Assink (38) (of-counsel, Litigation & Arbitration) advises on and conducts proceedings relating to (complex) corporate-law issues and disputes. He focuses on international arbitration and proceedings before courts, including the Netherlands Enterprise Court and the Dutch Supreme Court. Bastiaan is also Professor of Corporate Law at Erasmus University Rotterdam and deputy justice in the Arnhem-Leeuwarden Court of Appeal.

‘We are proud of the appointment of these talents’, says Erik Geerling, chair of the executive board of NautaDutilh. ‘They can continue to advise our clients enthusiastically in their new role. The number of appointments underlines NautaDutilh’s growth. It also shows that we face the future full of confidence.’

In other news, NautaDutilh Rotterdam is moving!

On 8 February 2016 we will move to our new offices in the FIRST Rotterdam building (22nd to 30th floor). FIRST Rotterdam, located in the heart of Rotterdam’s Central District, has an ‘Excellent’ BREEAM rating (sustainability), which fits in perfectly with our corporate social responsibility strategy.

This is our new address from 8 February 2016:

NautaDutilh N.V.

Weena 800

3014 DA Rotterdam

The Netherlands

Our telephone and fax numbers, as well as our P.O. box address remain unchanged.

For more information visit us at www.nautadutilh.com

ARIAS & MUNOZ

ASSISTS REGAL FOREST HOLDING ACQUISITION OF ELECTRONIC RETAIL CHAIN STORES IN PARAGUAY

December 24, 2015: Regal Forest Holding Co. Ltd. Has signed a Share Purchase Agreement for the acquisition of operations and financing operations of Wisdom Product SAECA (Electrofacil), a chain of electronic retail stores located in Paraguay, for which Arias & Muñoz El Salvador acted as the buyer's lead counsel.

Partner Zygmunt Brett coordinated the transaction acting in representation of Regal Forest Holding Co. Ltd. with the collaboration of Ferrere in Paraguay. The team conducted the due diligence as well as the drafting and negotiation of all transaction documents.

This acquisition is part of the ongoing LATAM and Caribbean expansion of Regal Forest (Unicomer), whom recently signed the acquisition of operations of Unico, an electronic retail chain located in Aruba.

Arias & Muñoz El Salvador coordinated Regal Forest's 2015 acquisition of the Radio Shack franchise for Central America, South America and the Caribbean.

For additional info visit us at www.ariaslaw.com

BAKER BOTTS

REPRESENTS TALLGRASS DEVELOPMENT, LP IN SALE OF AN ADDITIONAL 31.3% INTEREST IN TALLGRASS PONY EXPRESS PIPELINE, LLC.

07 January 2016: Tallgrass Energy Partners, LP (the "Partnership") (NYSE: TEP) acquired an additional 31.3% interest in Tallgrass Pony Express Pipeline, LLC ("Pony Express") from a wholly-owned subsidiary of Tallgrass Development, LP, bringing the Partnership's total membership interest in Pony Express to 98%.

The drop-down was negotiated on behalf of the Partnership by the Conflicts Committee of the Board of Directors of the general partner of the Partnership and the aggregate consideration for the transaction was approximately $743.6 million, consisting of $475 million in cash and the issuance of 6,518,000 common units (based on the closing price of TEP's common units on December 31, 2015 of $41.21). As part of the transaction, Tallgrass Development granted the Partnership an 18 month call option to repurchase the newly issued 6,518,000 common units at a price of $42.50.

Pony Express currently owns an approximately 764-mile crude oil pipeline commencing in Guernsey, Wyoming, and terminating in Cushing, Oklahoma.

Baker Botts Lawyers/Office Involved: Mike Bengtson (Partner, Austin); Mollie Duckworth (Partner, Austin); Jon Nelsen (Partner, Tax); Mike Bresson (Partner, Houston); Robert Montgomery (Associate, Austin); Shana Mackey (Associate, Austin)

For additional information visit www.bakerbotts.com

CAREY

ACTS FOR IFM INVESTORS IN US$28 BILLION SALE OF PACIFIC HYDRO TO CHINA'S STATE POWER INVESTMENT CORPORATION

SANTIAGO, January, 2016: On December 16 China's State Power Investment Corporation and Australian renewable energy company Pacific Hydro agreed to the US$2.2 billion sale and acquisition. Pacific Hydro has assets in Brazil and Chile.

Carey acted as Chilean counsel to IFM Investors. Leading Partners were Francisco Ugarte and Alberto Cardemil, and associates Tomás de la Maza and Eugenio González in Santiago.

For additional information visit www.carey.cl

GIDE

ACTS FOR SOCIETE GENERAL AND CREDIT AGRICOLE IN €95 MILLION PP OF FINANCIERE SPIE BATIGNOLLES

PARIS, 21 December 2015: Gide advised Société Générale and Crédit Agricole Corporate and Investment Bank in connection with the issue by Financière Spie Batignolles of its €95 million 4.00 percent notes due July 2022. Financière Spie Batignolles was assisted by Simmons & Simmons LLP.

Gide's team was led by Hubert du Vignaux, assisted by Laurent Vincent and Guillaume Leteurtrois.

For additional information visit www.gide.com

DAVIS WRIGHT TREMAINE

HELPS ACHIEVE A MAJOR EMPLOYMENT LITIGATION VICTORY FOR LOS ANGELES TIMES COMMUNICATIONS LLC

LOS ANGELES, 12 January 2016: The Employment Services Group at Davis Wright Tremaine LLP (DWT), working with its client, Los Angeles Times Communications LLC, was successful in reversing a $7.1 million verdict in a high-stakes employment litigation matter.

Plaintiff T.J. Simers, 63, a former sportswriter at the L.A Times, resigned from the paper after being disciplined for not fully disclosing a conflict of interest. He later filed suit in state court, claiming he had been "constructively discharged" and that the paper had forced him out because of his age and health issues.

After a jury awarded Simers $2.1 million in economic damages and $5 million in noneconomic damages, the Times filed motions for a Judgment Notwithstanding The Verdict (JNOV) and a new trial. This week, Los Angeles County Superior Court Judge William A. MacLaughlin granted the motions in large part, agreeing that Simers' constructive discharge claim—and resultant economic damages—were not supported by the evidence.

Judge MacLaughlin also granted the Times' motion for a new trial on the constructive discharge claim in the event his decision is overruled. In doing so, the judge also agreed that the amount of noneconomic damages would need to be retried—without any reference to the constructive discharge.

As a result, Simers' damages award has been reduced to zero.

JNOV motions are rarely granted, and the judge's ruling is a reflection of the strong case put on by the Times during trial.

The case was tried by Emilio Gonzalez and Evelyn Wang of DWT and Linda Savitt from Ballard Rosenberg Golper & Savitt LLP. DWT lawyers Rochelle Wilcox, Scott Commerson, Kelli Sager, and Jason Harrow assisted the trial team with post-trial motions.

For additional information visit www.dwt.com

CLAYTON UTZ

CONGRATULATES NT GOVERNMENT ON $800 MILLION NEGI PIPELINE PROJECT MILESTONE

SYDNEY, 23 November 2015: Clayton Utz congratulates our client the Northern Territory (NT) Government on successfully closing the first stage of the landmark $800 million North East Gas Interconnector (NEGI) project.

The NT government announced last Tuesday 17 November that it had selected Jemena Northern Gas Pipeline Pty Ltd (Jemena) to construct and operate the 622 kilometre NEGI pipeline. The pipeline will run between Tennant Creek in the NT and Mount Isa in Queensland, delivering gas from the NT to eastern gas markets

A multidisciplinary and cross-office Clayton Utz team advised the NT Government on all aspects of this first stage. Their role included developing the strategy for delivery of the project (involving two competitive processes in parallel, for the sale of surplus gas, and for the delivery of the NEGI and associated gas transportation services), negotiating the project documents with the two preferred proponents, evaluating initial and final proposals, and drafting the final project documents.

Partners Owen Hayford and Margie Michaels co-led the firm's project team, which included senior associate Gavin Phillips and senior lawyer Dipesh Jasmat in the Darwin office, Brisbane partner Andrew Smith and senior associate Natalie Watson, and lawyer Hannah Stewart-Weeks in Sydney. They were supported by a multidisciplinary Clayton Utz transaction team drawn from across the firm's Sydney, Darwin, Brisbane and Perth offices, which provided specialist input on workplace relations, insurance, finance, competition, environment and planning and native title law.

Co-lead partner Owen Hayford said the NEGI was the first infrastructure project in Australia in many years that has involved multiple jurisdictions and associated legal expertise. "With Margie Michaels leading our experienced infrastructure and energy team in Darwin, Clayton Utz was able to draw on the specialist skills of our lawyers across Australia in advising on all aspects of major infrastructure projects to assist the NT Government to achieve contractual close within 13 months with their chosen proponent, on very favourable terms," he said.

"The Northern Territory Government has secured in return for baseline gas shipments an entirely private sector financed, funded and developed pipeline. That is a great outcome for the NT Government and Territorians. At a macro level, it will significantly improve security of gas supplies to the Eastern seaboard and provide NT gas producers with a new market into which they can sell their gas, as well as stimulating the development of the Territory's vast on-shore gas reserves."

The NT has an estimated 200 trillion cubic feet of gas, which could power Australia for more than 200 years. NT chief minister Adam Giles described the project milestone as a "great outcome" and the first step towards a truly national gas grid.

The NT Power and Water Corporation (PWC) will be a foundation customer of the NEGI, having entered into a 10-year gas sale agreement with Incitec Pivot, at Phosphate Hill near Mt Isa.

For additional information visit www.claytonutz.com

HOGAN LOVELLS

CLOSES US$2.45 BILLION TERM AND REVOLVING FACILITIES FOR TENCENT

HONG KONG, 6 January 2016: Hogan Lovells has advised the syndicate of lenders on US$2.45 billion five-year term and revolving facilities to Tencent in its major syndicated loan, which involved 19 lenders.

The syndicate of lenders we advised as senior mandated lead arrangers, bookrunners and underwriters includes Australia and New Zealand Banking Group Limited, Bank of China (Hong Kong) Limited, China Merchants Bank, Off-Shore Banking Center, Citibank N.A., Hong Kong Branch, Citigroup Global Markets Asia Limited, The Hongkong and Shanghai Banking Corporation Limited and Mizuho Bank Limited. The firm also advised Citicorp International Limited as facility agent. Three other banks joined as senior mandated lead arrangers and ten more banks joined as mandated lead arrangers.

The facility was split into a US$1.225 billion term loan and a US$1.225 billion revolver, offering an all-in pricing of 125 basis points based on a margin of 110 basis points over LIBOR and a 20 basis points commitment fee.

Founded in 1998, Tencent is a leading provider of Internet value added services in China and is rated A2/A/A+ (Moody's/S&P/Fitch).

Our team was led by Hong Kong Banking partner Owen Chan and supported by counsel Salam Bassili.

For additional information visit www.hoganlovells.com

MUNIZ RAMIREZ PEREZ-TAIMAN & OLAYA

LOCAL COUNSEL FOR CREDIT SUISSE US$220 MILLION LOAN TO PERUVIAN INFRASTRUCTURE CONGLOMERATE GRAÑA Y MONTERO (GYM)

LIMA, January, 2016: Muniz GyM will use the loan, which was closed on 10 December, to finance a portion of its equity contributions to Gasoducto Sur Peruano, a consortium comprised of Spain's Enagás and Brazil's Odebrecht, which is developing a pipeline running from the Peruvian Amazon to the cities of Cusco, Apurimac, Puno, Arequipa, Moquegua and Tacna.

Muñiz Ramírez Pérez-Taiman & Olaya Partners Andres Kuan-Veng and Jorge Otoya and associate Guillermo Flores in Lima acted locally in the transaction.

For additional information visit www.munizlaw.com

RODYK

ACTS IN FACILITIES GRANT TO CMA CGM S.A. FOR PARTIAL FINANCE OF ACQUISITION OF NEPTUNE ORIENT LINES LIMITED—VALUE SGD 3.4 BILLION

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 CGM CGM S.A., a French shipping company for all the issued and paid up ordinary shares in the capital of Neptune Orient Lines Limited (NOL), Southeast Asia's largest container shipping company, 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.

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

NAUTADUTILH

ASSISTS ACERTA PHARMA B.V. IN LANDMARK DUTCH PHARMA DEAL

December, 2016: This is the largest Dutch pharma deal (in size) ever. Acerta Pharma was founded by two Dutch researches from Oss (former Organon). The agreement also includes options which, if exercised, provide the opportunity for Acerta shareholders to sell, and AstraZeneca to buy, the remaining 45% of shares in Acerta. The options can be exercised at various points in time, conditional on the first approval of acalabrutinib in both the US and Europe and when the extent of the commercial opportunity has been fully established, at a price of approximately USD 3 billion net of certain costs and payments incurred by AstraZeneca and net of agreed future adjusting items, using a pre-agreed pricing mechanism. This would lead to a total deal value of up to USD 7 billion.

NautaDutilh worked alongside with Morgan, Lewis & Bockius LLP in drawing up and negotiating the sale and transfer of the shares in Acerta Pharma B.V. and the Dutch law governed shareholders' agreement.

NautaDutilh also represented Acerta Pharma on the USD 375 million private placement round it did in May (2015). Earlier this year NautaDutilh acted on for the acquisition by Amgen of Dezima Pharma for USD 1.4 billion and the very successful IPO of ProQR. NautaDutilh also assisted Johnson & Johnson on its approximate USD 2 billion acquisition of Crucell (2010).

NautaDutilh's team was led by Ruud Smits (lead partner) and further comprised of Christiaan de Brauw, Rebecca Pinto, Bart van Kempen (all corporate M&A), Wijnand Bossenbroek, Julian Blüm, Esther Vochteloo and Roderick Hanrath (civil law notary), Paul Olden, Frans Overkleeft (both corporate litigation) and Gijs van Nes (employment).

For additional information visit www.nautadutilh.com

SANTAMARINA Y STETA

ASSISTS MEXICAN HOME BUILDER GEO COMPLETE LANDMARK RESTRUCTURING

MEXICO CITY, 11 January 2016: Mexican homebuilder GEO, the first company to file and receive court approval for a pre-pack bankruptcy proceeding under the country's new insolvency regime, has restructured approximately US$4.5 billion in debt with the help of Santamarina y Steta.

The company re-listed its shares on the Mexican Stock Exchange on 16 December, marking its emergence from bankruptcy a day after it completed an equity raise of 3.5 billion Mexican Pesos (US$200 million).

GEO's was the first restructuring to be filed in Mexico through a pre-packaged bankruptcy proceeding since amendments to the insolvency law came into effect in January 2014, amended so that any company can restructure in Mexico provided at least one of its Mexican subsidiaries is insolvent. Prior to this amendment, the controlling company had to be resident in Mexico for any of its group companies to restructure there.

Under the new law, bankruptcy proceedings are now heard solely before commercial district courts and require companies to restructure within one year of filing for bankruptcy.

GEO is one of the largest housing developers in Latin America. It operates in 52 Mexican cities across 16 states. The company engages in all aspects of design, development, construction, and sales of primarily low-income housing developments in Mexico.

For additional information visit www.s-s.mx

ROUSAUD COSTAS DURAN

ADVISES RASTAR GROUP ON ACQUISITION OF SPANISH SOCCER CLUB RCD ESPANYOL'S SHARE CAPITAL

December, 2016: Rousaud Costas Duran has advised Rastar Group, a leading manufacturer and distributor of electronic toys in China, on the acquisition of 45.1% to 56% of the share capital of the Spanish soccer club RCD Espanyol.

According to the agreement, the Chinese group will pay 78€ per each of the club's share, which represents a total deal value of 14.3 to 17.6 million euros. Once the operation is completed, Rastar will control over 50.1% of RCD Espanyol. Moreover, Rastar will acquire in the next 4 years the rest of the 5% of the shares that will remain in hands of the sellers after the sale transaction.

The transaction has been led by Rousaud Costas Duran's corporate & commercial department and demonstrates once again the firm's experience in the field of M&A as well as in sports. Adolf Rousaud, managing partner of the firm and head of the corporate & commercial practice, highlights the importance of the transaction: "It's been an honor to accompany our client in a transaction in which the legal and the market knowledge have conjugated with an international component."

For additional info visit www.rousaudcostasduran.com

TOZZINIFREIRE

ASSISTS PAEMA EMBALAGENS IN SALE TO SMURFIT KAPPA

SAO PALO, January, 2016: Ireland's Smurfit Kappa, E urope's largest paper packaging company, with the acquisition of two Brazilian paper product producers, marks the packager's entry into Latin America's largest economy.

The Irish paper company bought Paema Embalagens and INPA Embalagens for a combined US$200 million. INPA and Paema run three recycled paperboard mills and four corrugated packaging factories located across Brazil.

Counsel to Paema Embalagens TozziniFreire Advogados led with Partner Gustavo Nygaard and associates Eduardo Petry Terra Werneck, Maria Medeiro Bofill and Daniele Russi Campos.

For additional information visit www.tozzinifreire.com.br

UPCOMING PRAC EVENTS

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

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

The Pacific Rim Advisory Council is an international law firm association with a unique strategic alliance within the global legal community providing for the exchange of professional information among its 28 top tier independent member law firms.

Since 1984, Pacific Rim Advisory Council (PRAC) member firms have provided their respective clients with the resources of our organization and their individual unparalleled expertise on the legal and business issues facing not only Asia but the broader Pacific Rim region.

www.prac.org

With over 12,000 lawyers practicing in key business centers around the world, including Latin America, Middle East, Europe, Asia, Africa and North America, these prominent member firms provide independent legal representation and local market knowledge.

CLAYTON UTZ

09 December 2015

Negotiating agreed penalties with regulators is OK, says High Court

Regulators and the businesses they regulate can avoid lengthy court proceedings and negotiate an agreed set of facts and a proposed penalty, following a decision by the High Court this morning (Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate [2015] HCA 46).

Going to court is expensive for all parties, so regulators have often, in appropriate cases, tried to limit the amount of court days by negotiating agreed sets of facts and penalties, including pecuniary penalties, with the business. These agreed facts and penalties were, until the case in the Federal Court last year presented to the court in joint submissions. The court does not accept these blindly; it considers them, but is free to reject them and set its own penalty.

In Barbaro, the High Court had previously held that in criminal proceedings prosecutors and the accused could not agree upon sentences to present to the court. Did this mean in civil proceedings regulators and companies couldn't agree upon suggested penalties? The Full Federal Court thought so, saying in May that agreed penalties limit the Court's discretion in applying the appropriate sentence.

This meant that both regulators and businesses lost a powerful incentive to negotiate and avoid a full trial on all the issues.

The High Court's decision today overturned the Full Federal Court, and reinstated the previous settlement process, saying that civil penalty proceedings and criminal proceedings have different goals. The regulator in a civil penalty case is trying to protect the public and therefore wants to achieve compliance, prevention and, possibly, compensation. In criminal cases, sentencing has those aims, but in addition it must deal with the accused's retribution and rehabilitation.

In this case, the Building and Construction Industry Improvement Act does not expressly rule out agreed penalties: in fact, "by providing for civil penalty proceedings, it implicitly assumes the application of the general practice and procedure regarding civil proceedings and eschews the application of criminal practice and procedure".

Agreeing facts and pecuniary penalties with regulators

Although the decision was based on the Building and Construction Industry Improvement Act 2005 (Cth), the decision affects various Commonwealth regulators (and possibly state regulators), such as the ACCC the Fair Work Ombudsman, ASIC, the ATO, ACMA, and APRA.

For businesses which want to avoid lengthy court hearings to establish facts, liability, and any penalty, this decision is good news. The basic settlement process is:

- The regulator and the business will be able to negotiate and come to an agreed set of facts and suggested penalty.
- The court will need to be persuaded that this agreement is accurate and that the penalty which the parties propose is **an** appropriate remedy in the circumstances. It does not have to be the penalty the court itself would have imposed, as long as it is not an inappropriate one, in the context of previous decisions.
- If the court considers the agreed penalty is not appropriate, it can give the parties an opportunity to withdraw their consent or otherwise be heard.

TOZZINI FREIRE TAX BLOG:
Tax Treaty Series: The Bilateral Income Tax Treaty between Brazil and Canada

By Ana Cláudia Utumi, in Base Erosion and Profit Shifting - BEPS BEPS CFC Rules International Taxation OECD Tax Sparing Tax Treaties Taxation on Non-Residents Treaty to Avoid Double Taxation Withholding income tax ("WHT")

This is the first of our series of posts on Brazilian tax treaties. In each post we will provide an overview of a specific tax treaty between Brazil and a particular foreign country, as well as comments on any Brazilian administrative or judicial precedents applying the treaty, and highlights on the impact of the OECD Base Erosion and Profit Shifting (“BEPS”) project in its application.

Overview of the treaty

Decree 92,318, published on January 23, 1986, contains the text of the Bilateral Income Tax Treaty signed by Brazil and Canada (“Treaty”). This Treaty is aimed at preventing double imposition and double non-imposition of income taxes in cross-border operations between the two countries.

For Brazilian purposes, as of December 09, 2015, the treaty applies not only to the Individual and Corporate Income Taxes (“IRPF” and “IRPJ”) and to the Withholding Income Tax (“WHT”), but also to the Social Contribution on Net Profits (“CSLL”).

With regards to CSLL, even though this tax is not expressly mentioned in the Treaty, this tax was created after the signature of the Treaty, and as a partial replacement of IRPJ. In addition, recent Law no. 13,202/2015 included an article clarifying that double taxation treaties signed by Brazil include CSLL:

Art. 11. For purposes of interpretation, the international agreements and conventions signed by the Government of the Federative Republic of Brazil to avoid double taxation include CSLL. (…)

Please note that our reference to withholding income tax (“WHT”) in the next paragraphs does not describe the entire tax burden imposed on certain income streams, such as royalties, for example. Other taxes may be imposed on cross-border royalty payments (such as the Special Tax on Royalties (“CIDE”), the Municipal Tax on Services (“ISS”) and the Tax on Foreign Exchange Transactions (“IOF-FX”)), but because these taxes do not qualify as “income taxes”, they are outside of the scope of the treaty.

The Treaty was generally based on the OECD Draft Convention available at the time (1977), as well as on Brazilian tax treaty practice prior to 2000. Key aspects of this Treaty from a Brazilian perspective are:

•Source taxation

Dividends, interest and royalties earned are generally subject to WHT in Brazil and WHT credit in Canada.

Specifically for dividends, interest and royalties, a limit of 15% WHT applies, except in case of loans with maturity of 7 years or more, guaranteed or secured by the Canadian EDC (limit of 10%), and of trademark royalties (limit of 25%). Based on Brazilian domestic law, currently the applicable WHT on those payments is 15%, except in relation to dividends that are currently exempt.

In addition, the Treaty provides for:

•exemption on dividends received by a Canadian company holding 10% or more of the Brazilian company´s shares and the profits arose from operational activities;

•if this exemption does not apply, credit of Brazilian Corporate Income taxes in case of dividends received by Canadian company holding 10% or more of the Brazilian company´s shares, limited to Canadian corporate income tax levied on the same dividends.

Capital gains, differently from the OECD Model Treaty, is taxable in both countries, and there is no WHT limitation in the Treaty. The only exception Article 13, paragraph 1, which determines that gains obtained from alienation of ships and aircrafts are taxable only in the country where the headquarter of the company is located.

Based on domestic law, capital gains obtained by Canadian residents are subject to 15% WHT, which applies even in case of non-resident seller and buyer – in this case, the buyer is responsible to withhold the corresponding amount, nominate an attorney-in-fact in Brazil and cause this attorney-in-fact to collect the WHT due.

There is intention to increase the WHT from 15% to 22.5% according to the most recent version of the law project proposed by the Government to the Brazilian Congress. This bill, if approved, will be enforceable as of the following calendar year.

•Beneficial ownership

Though the expression “beneficial owner” is mentioned in Articles 10, 11 and 12 of the Treaty, the treaty does not define what “beneficial ownership” means (only in recent treaties Brazil has acquiesced to a specific Limitation on Benefits clause, and only in broad terms).

Brazilian tax authorities view the absence of a treaty definition of “beneficial ownership”, as is the case with the Treaty between Brazil and Canada, as a permission for tax authorities of the State applying the treaty to interpret the expression as they see fit.

•Tax sparing

The Treaty contains a tax sparing clause, which is a treaty provision that requires Canada to grant tax credits at a deemed WHT rate for specific payments made by Brazilian residents (not by Canadian residents to Brazilian recipients, even though this reciprocal provision does exist in other treaties signed by Brazil, such as the one with Ecuador).

The tax sparing credit is usually greater to the WHT rate applicable under the treaty or domestic law.

In the Treaty, the tax sparing credit for the gross amount of profits to which Article 10, paragraph 5(b) applies is 25%. For the gross amount of interest and royalties not arising from trademarks, the credit is set at 20%.

•Interaction with Brazilian CFC rules

In 2013, a binding decision issued by the Federal Supreme Court (“STF”) in ADI 2588/DF defined that Brazilian Controlled and Affiliated Foreign Company (“CFC”) rules could apply to controlled foreign companies in blacklisted jurisdictions (“tax havens”) and could not apply to affiliated foreign companies out of blacklisted jurisdictions.

Among the questions not answered by STF in the 2013 decision is whether controlled foreign companies in Treaty countries would be exempt from CFC rules. Decisions issued by STJ and by the Administrative Court of Tax Appeals (“CARF”) have already dealt with this subject, mostly in favor of the taxpayers, but STF is yet to confirm that position from a constitutional perspective.

While STF does not issue a final ruling on this subject, Brazilian tax authorities rely on references in the text of treaties (or on the absence thereof) to impose CFC rules. Though there are treaties that either exempt undistributed profits (such as our Treaty with Denmark) or dividends (such as our Treaty with Spain), our Treaty is not a part of that group. Safe for a systematic interpretation of Article 7th, there is no provision in the text of the Treaty between Brazil and Canada that would prevent the application of Brazilian CFC rules.

Administrative and judicial case law

There are no recent cases either in CARF or STF that specifically address the provisions of the Treaty between Brazil and Canada.

STJ analyzed one landmark case dealing with the Treaty between Brazil and Canada: REsp 1161467/RS, decided on May 17, 2012, and referred to in the previous section. In that case, the taxpayer made payments to German and Canadian entities in compensation for technical services performed without any transfer of technology. Though STJ confirmed the position of the taxpayer and applied Article 7th to exempt payments from WHT, Interpretive Declaratory Act 05, of June 16, 2014, would indicate that the current tax treatment of these remittances should be the one applicable to royalties (Article 12).

BEPS highlights

Both Canada and Brazil (respectively a member and an associate country of the OECD) have actively participated in the drafting of the final reports for the 15 Actions of the Base Erosion and Profit Shifting ("BEPS") project. The two countries have distinct tax systems and tax treaty networks, but the OECD expects that Brazil, Canada, and all the other G20 countries are able to implement BEPS proposals in a consistent and seamless manner.

Among the BEPS aspects associated with the application of the Treaty between Brazil and Canada, we would like to highlight the following:

•Hybrid Mismatches (Action 2)

The OECD proposals on treaty issues associated with hybrid mismatches are mainly focused on two separate areas: (i) treaty residence of dual-resident entities; and (ii) a clarification of the entitlement to benefits of transparent entities.

According to the OECD,[1] tax authorities should be able to decide, on a case-by-case basis, the State of residence of so-called dual-resident entities (entities that either by virtue of treaty provisions, domestic law, or a combination of both, are regarded as resident in two separate jurisdictions). If tax authorities are not able to reach an agreement, the taxpayer would not be entitled to any treaty benefit (except for the ones agreed upon by competent authorities of both States).

In the Treaty between Brazil and Canada, the clause that would have to be modified (or overridden) for this proposal to become effective is Article 4th, paragraph 3, which currently allows case-by-case decisions, but does not claim that the lack of an agreement would prevent access to treaty benefits (unlike our Treaty with Turkey, for example, that contains this final statement).

Also, according to the OECD,[2] "income derived by or through an entity or arrangement that is treated as wholly or partly fiscally transparent under the tax law of either Contracting State" should be regarded as "income of a resident of a Contracting State", but only to the extent that the income is treated, for purposes of taxation by that State, as the income of a resident of that State.

The inclusion of this proposal in Article 1st of the Treaty between Brazil and Canada (possibly through a Multilateral Instrument) would affect not only WHT reductions (which could be partially denied if the person ultimately receiving the income is not a resident from Canada), but also the entitlement to tax sparing credits, established in Article 23, paragraph 3, as explained earlier.[3]

•Entitlement to Treaty Benefits (Action 6)

The final report of Action 6 recommends the adoption of an "Entitlement to Benefits" clause, inspired by the Limitation on Benefits clause present in the United States Model Income Tax Convention.[4]

The purpose of the new "Entitlement to Benefits" clause would be to prevent granting treaty benefits to persons that should not be entitled to them, either because doing so is not in the interest of either Contracting State, or because the relevant taxpayer has employed a structure completely devoid of economic substance for the sole or main purpose of enjoying protection under the treaty. The proposed clause is divided into a set of objective and subjective criteria (the "principal purpose test", or PPT section), and if its text is included in the Multilateral Instrument of Action 15, taxpayers wishing to enjoy treaty benefits must comply with both criteria.[5]

At this stage, it is difficult to forecast whether Brazil will sign up or not for a Multilateral Instrument containing this proposed clause. Remember that the majority of Brazilian treaties either (i) do not have a Limitation on Benefits clause, but do mention the expression “beneficial owner”, or (ii) have a Limitation on Benefits clause that is significantly broader than the already quite broad proposal issued by the OECD. Would Brazil be willing to relinquish its all-encompassing interpretive power of “beneficial ownership” in favor of a streamlined clause that would supersede provisions in all of its existing treaties? As implementation of BEPS proposals goes on, Brazilian policymakers will be compelled to provide a clear answer to this question.

For further comments on the application of the Treaty between Brazil and Canada, please do not hesitate to contact our firm.

(*) With the collaboration of our associate Lucas de Lima Carvalho (lcarvalho@tozzinifreire.com.br)

[1] OECD. Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 – 2015 Final Report. OECD/G20 Base Erosion and Profit Shifting project. OECD: 2015, pp. 137-138. Available at: <http://dx.doi.org/10.1787/9789264241138-en>.

[2] See note 1 above. OECD: 2015, pp. 139-143.

[3] The final report provides an example that illustrates the interplay between hybrid mismatch rules and a tax sparing clause, such as the one in the Treaty between Brazil and Canada, in the proposed item 26.7 to the OECD Commentary: “[Brazil] and [Canada] have concluded a treaty identical to the Model Tax Convention. [Brazil] considers that an entity established in [Canada] is a company and taxes that entity on interest that it receives from a debtor resident in [Brazil]. Under the domestic law of [Canada], however, the entity is treated as a partnership and the two members in that entity, who share equally all its income, are each taxed on half of the interest. One of the members is a resident of [Canada] and the other one is a resident of a country with which [Brazil] and [Canada] do not have a treaty. The paragraph provides that in such case, half of the interest shall be considered, for the purposes of Article 11, to be income of a resident of [Canada].” In this example, only half of the interest received would be associated with a tax sparing credit of 20%, in line with Article 23, paragraph 3, of the Treaty.

[4] OECD. Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 – 2015. Final Report. OECD/G20 Base Erosion and Profit Shifting project. OECD: 2015, p. 11. Available at: <http://dx.doi.org/10.1787/9789264241695-en>.

[5] See note 4 above. OECD: 2015, pp. 21-69.

(*) With collaboration of the associate lawyer Lucas de Lima Carvalho (lcarvalho@tozzinifreire.com.br)

www.tozzinifreire.com.br

TSX Outlines Proposed Venture Exchange Reform

December 21, 2015 | James A. Clare and Christopher J. Doucet

On December 17, 2015, the TSX Venture Exchange (TSXV or the Exchange) published a White Paper on its proposed broad-based reforms to various TSXV rules, policies and strategies aimed at fostering renewed interest in the Exchange and its services in the wake of ongoing sluggish capital markets conditions for junior issuers. The White Paper, *Revitalizing TSX Venture Exchange: Canada's Public Venture Market*, was the result of a lengthy consultative process, during which more than 130 clients and key stakeholders from many of the TSXV's most important industry sectors (including natural resource, science and technology and financial services) provided feedback to the Exchange that was then examined by various advisory committees across Canada. The White Paper synthesizes their recommendations into a three-pronged strategic reform program aimed at: (1) reducing the financial burden of compliance for listed issuers; (2) attracting new and more diverse capital to the Exchange; and (3) broadening and diversifying the base of listed issuers on the Exchange. The proposed initiatives within each prong range from general to specific and from conceptual to technical, but the TSXV has indicated its intention to implement these initiatives on an "aggressive timeline", subject in certain cases to regulatory approval.

Cost of Compliance

The White Paper identified the financial requirements of ongoing compliance with Exchange rules as a key growth constraint for existing listed issuers in difficult market conditions. While many of the compliance obligations derive from securities laws applicable to venture companies, as opposed to from the Exchange itself, the perception that the red tape of audit compliance, resource sector compliance (such as technical reports in the mineral and oil and gas sector) and general disclosure compliance is too burdensome may be slowing the growth of listed issuers and discouraging potential Exchange clients from seeking a listing in the first place. To combat this perception and to ease the financial burden on junior issuers, the Exchange proposes to implement a series of rule changes, many of which will require significant amendments to the TSX Venture Exchange Corporate Finance Manual, including:

- Eliminating the general requirement for sponsorship of new issuers or issuers undertaking a reverse-takeover (RTO), change of business (COB) or other business combination;
- Narrowing the application of shareholder approval requirements for inactive issuers undertaking an RTO or COB;
- Implementing a director and officer NEXUS-type status certification program to reduce or eliminate ongoing requirements for certain established and proven individuals and extending the shelf life of on-file personal information forms for directors and officers from three to five years;
- Eliminating escrow requirements that overlapped with similar requirements of the Canadian Securities Administrators, and which in certain cases could be more onerous; and
- Implementing an automated system for transaction filing and accelerating response times to speed up overall transaction processing, including a commitment to provide comments on filings within a specified number of days.

By implementing the initiatives listed above, the TSXV hopes to meaningfully reduce the cost of compliance for existing and potential issuers and change the perception that such costs are too restrictive for market participants and new entrants. At the same time, the Exchange is not of the view that the reforms are so dramatic as to undermine the Exchange's reputation for credibility and market integrity that is essential to the other two prongs of the White Paper strategy.

Bringing the Brokers

The White Paper notes that the flow of capital to early-stage public issuers has been noticeably reduced in recent years, both due to market trends, such as sector rotation away from areas in which Exchange listings have historically been concentrated, as well as shifts in strategy within the investment brokerage and securities dealer community. While the Exchange is keen to highlight the number of TSXV graduates that subsequently list on the Toronto Stock Exchange and become mature public companies with fully-developed capital structures as a means of downplaying the speculative component of public venture capital, the White Paper does grant that strategic measures are needed to restore and bolster interest in TSXV-listed issuers within the investment community. Though the initiatives proposed are less technical and less defined than the proposed compliance policy changes noted above, the Exchange has proposed:

- Undertaking active and ongoing promotion of TSXV-listed issuers through roadshow presentations to fund managers, retail investors, investment advisors and bankers and research analysts and instituting an ongoing streaming summary service of available public offerings;
- Introducing an new market making program to be administered by the Exchange;
- Advocating for securities law reform to increase the number of available prospectus exemptions and lower the regulatory barriers to United States investors participating in the Canadian public venture market;
- Introducing new research products aimed at providing information to potential investors about Exchange issuers that are typically too small to be covered by traditional research analysts; and
- Investing in financial literacy at the post-secondary level.

The proposals above are a mix of concrete and more conceptual initiatives and, particularly in the case of investing in new research products and financial literacy education, the results and benefits are likely to be borne out over a much longer period of time, but the TSXV hopes that they will serve to position the Exchange as an attractive destination for capital in a wider segment of the investing community.

Problem of Perception

The third prong of the White Paper's strategy is to increase the number of Exchange issuers by combating the perception that the TSXV is primarily a natural resources-focused market and promoting its services across a wider array of industries. While maintaining its reputation as the premier market for junior mining and junior oil and gas issuers, the TSXV seeks to broaden its client base by:

- Implementing changes to the Capital Pool Company (CPC) program to widen its usage to a broader set of industries and build on the success of the almost 30 percent of listed graduates that are former CPCs;
- Showcasing the TSXV amongst the private venture capital community, including VCs and other late stage private equity investors to promote a listing as a viable exit strategy;
- Building partnerships with other exchanges to expand the international reach of listed issuers and promote long-term liquidity;
- Exploring the creation of TSXV-specific basket products such as ETFs to foster investment in junior issuers with more diversification and less risk; and
- Advocating for tax reform to allow early stage public issuers to become eligible for Scientific Research & Experimental Development tax credits in the same way private companies of similar development are.

The proposed initiatives clearly express the Exchange's desire to expand its client base primarily into the innovation, science and technology sector, where private capital currently dominates the investment landscape. Nearly 500 non-resource companies currently list on the TSXV and the growth of this figure in the medium term is likely to be a key metric of success for this third prong.

Moving Forward

The Exchange has yet to propose any specific rule changes or publish any specific amendments, draft policies or program guidelines, however it is likely that many of these will be seen following a series of town hall meetings the Exchange proposes to host in the early part of 2016, at which the Exchange will entertain feedback on the White Paper's strategy and proposed initiatives. Existing issuers and those other stakeholders who stand to benefit significantly from these reforms should continue to monitor these developments in the coming months.

/Carey

New Direct Foreign Investment Law

On January 1, 2016 Law No. 20,848 which sets forth a new legal framework for foreign direct investment in Chile (the "New Law") was enacted. The New Law also regulates the effects of contracts entered into during the term of Decree Law No. 600 of 1974 ("DL 600"), in order to guarantee the full validity of the rights and duties acquired by foreign investors under said legal regime. Foreign investors which executed foreign investment agreements with the Republic of Chile under DL 600 before January 1, 2016, will preserve all rights and obligations thereunder.

The New Law introduces a series of modifications:

First, it includes a definition of direct foreign investment, which involves any transfer of foreign capital or assets into Chile, owned by a foreign investor or controlled by it, in an amount equal to or higher than USD5,000,000, through the transfer of freely convertible foreign currency, the contribution of physical assets, the reinvestment of earnings, the capitalization of credits, or the transfer of technology that may be capitalized or credits associated with foreign investments from related parties.

Furthermore, the New Law incorporates new criteria to define direct foreign investment. Under the new criteria, investments of at least USD5,000,000 which are transferred to Chile by means of the acquisition of or participation in the capital or equity of a Chilean company and which result in the control of at least 10% of the voting shares or rights of said company will be considered direct foreign investment

The New Law specifically defines foreign investor as any individual or legal entity incorporated abroad, not residing or domiciled in Chile, that transfers capital to Chile under the terms stated above. The foregoing determines who will benefit from and who may join the new investment regime.

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

Francisco Ugarte
Partner
+56 2 2928 2201
fugarte@carey.cl

Elena Yubero
Associate
+56 2 2928 2216
eyubero@carey.cl

Eugenio González
Associate
+56 2 2928 2231
egonzalez@carey.cl

Carey y Cía. Ltda.
Isidora Goyenechea 2800, 43rd Floor
Las Condes, Santiago, Chile.
www.carey.cl

The New Law establishes a series of rights for the foreign investor: (i) to remit abroad the transferred capital and the net profits generated by the investment, upon fulfillment of the relevant tax obligations; (ii) access to the formal (banking) exchange market to settle or obtain foreign currency; and (iii) not to be discriminated against when compared to domestic investors. The New Law grants the above rights without requiring authorization from any foreign investment regulatory entities. Such authorization previously required the execution of a contract between the Republic of Chile, represented by the Foreign Investment Committee, which was responsible for approving the entrance of foreign capital and establishing the terms and conditions of each foreign investment contract (the "Committee"), and foreign investor. In order to evidence the existence of the regime, only an application for a certificate issued by the Agency for Promotion of Foreign Investment will be required, which will be issued only if the USD5,000,000 investment has been materialized or upon the acquisition of assets or participation in the capital or equity of a Chilean company, which grants the control of at least 10% of the voting shares or rights of such company.

The New Law does not change the rights and obligations contained in Chapter XIV of the Compendium of Foreign Exchange Regulations issued by the Central Bank that apply to loans, investments and capital contributions coming from abroad.

In order to facilitate direct foreign investment, the New Law eliminates: (i) the deadline for the entering of foreign capital into the country and (ii) the requirement to wait one year from the time that the investment enters the country before remitting the capital.

Regarding tax matters, the New Law sets forth a more expeditious procedure to request VAT exemptions in the import of capital goods.

Strategy to promote foreign investment

The New Law also establishes as a task for the President of the Republic, the development of a strategy for the Promotion of Foreign Investment that includes among its main objectives: (i) foreign investment promotion, (ii) positioning Chile at an international level and as a center for foreign businesses and investments and (iii) facilitating collaboration between foreign investors and domestic companies.

The New Law also creates two new institutions to replace the former Committee with the aim of boosting investment into Chile:

- A Committee of Ministers, chaired by the Minister of Economy, Development and Tourism, and comprised of the Minister of Finance and other ministers ,as determined by the President of the Republic, who will advise the President on the promotion of foreign investment

- The Agency for the Promotion of Foreign Investment, which will replace the former foreign investment Committee. This new agency will be in charge of promoting Chile and attracting capital inflows and foreign investment, coordinating policies entrusted by the Committee of Ministers in order to foster foreign investment into Chile and to issue investment certificates to enable foreign investors to access the new investment regime, among others matters.

China's Anti-Terrorism Law Released, Impacting Telecom and Online Business in China

12.31.15

By Jay Si and Ron Cai

Amid controversies, the Anti-Terrorism Law of the People's Republic of China ("Anti-Terrorism Law") was promulgated by the Standing Committee of the National People's Congress of China ("SCNPC") on Dec. 27, 2015, and will become effective on Jan. 1, 2016. Several clauses in this Anti-Terrorism Law will likely have significant impact on telecom service and online business in China.

Terrorism and Terrorist Activities

According to the Anti-Terrorism Law, "terrorism" refers to claims and acts that, through such methods as violence, destruction, or intimidation, etc., cause public fear, endanger public security, cause personal death or injury or property damage, or threaten government authorities or international organizations, to realize any political, ideological or other goals.

According to the Anti-Terrorism Law, "terrorist activities" refer to the following activities of the nature of terrorism:

- a.) organize, plan, attempt to implement, implement activities that cause or are intended to cause serious damages to the society, such as death or personal injury, material loss or dangers to property, damage to public facilities, disorder of society, etc.;

- b.) advocate terrorism, incite implementation of terrorist activities, or illegally possess items that advocate terrorism, force other people to wear clothes or logos that advocate terrorism in public places;

- c.) provide such support, assistance or convenience as information, funds, materials, labor, technologies, premises, etc.to terrorism organizations, terrorists, terrorist activities or the training of terrorist activities; and

- d.) other terrorist activities.

Key Clauses Relating to Telecom Services and Online Business

1. Technical Support and Assistance

Section 18 of the Anti-Terrorism Law states that telecom and Internet service providers ("Service Providers") should provide technical support and assistance, including provision of technical interface and decryption, to the public security authorities for the prevention of or investigation into terrorist activities.

SCNPC released the draft Anti-Terrorism Law in November 2014 ("Draft Law"), which specified that the public security authorities, for the purpose of preventing or investigating terrorism activities, may use the technical interface of telecom networks or the Internet, or demand that related Service Providers or users provide decryption assistance. The Anti-Terrorism Law seems to enhance the obligations of Service

Providers. According to the Draft Law, it seems Service Providers only need to provide support and assistance, when they are required by the government to do so. In the final version of the Anti-Terrorism Law, it appears that Service Providers may need to make the technical interface and decryption functions ready, and, once the government requires, they should provide such support and assistance immediately.

The Anti-Terrorism Law does not contain detailed provisions for such technical support and assistance. For example, it is unclear what exactly such "technical interface" refers to, and (ii) whether Service Providers need to hand over the decryption key to the government. In addition, it appears the Anti-Terrorism Law does not exhaust the technical support and assistance may be required by the government. It is unclear whether some sensitive business information, such as source codes, will be required to be submitted to the government, when it is deemed necessary.

2. Censorship of Content

According to Section 19 of the Anti-Terrorism Law, Service Providers are required to censor the content, and should prevent the spread of information containing terrorism or extremism. When they become aware of any such information, they should immediately stop the transmission of such information, keep relevant records, delete related information and report to the public security bureau or other related government agencies. In addition, the government may require the service providers to shut down related websites or stop related services.

It is noteworthy that the Draft Law did not include the term of "extremism", which is new in the Anti-Terrorism Law. However, unlike "terrorism", the term of "extremism" is not defined under the Anti-Terrorism Law. It is unclear (i) how the government will interpret "extremism", and (ii) whether the inclusion of "extremism" in fact will broaden the scope of censorship.

3. Identity Verification

Section 21 of the Anti-Terrorism Law requires Service Providers to verify the identities of their respective users, and should not provide services to those without clear identities or those who refuse to cooperate in the identity verification process.

4. Liabilities for Violation

Section 84 of the Anti-Terrorism Law provides that, if the Service Providers fail to perform their obligations with respect to technical support and assistance as well as censorship of content, they may be subject to administrative fines of more than RMB 200,000 (without a cap), and the persons in charge may be subject to administrative fines of up to RMB 500,000 and administrative detention of 5 to 15 days.

Section 86 of the Anti-Terrorism Law also provides that the Service Providers that fail to perform their obligations relating to identity verification may be required to correct their failures. If they refuse to correct, then such Service Providers may be subject to administrative fines of more than RMB 200,000 (without a cap), and the persons in charge may be subject to administrative fines of up to RMB 500,000.

Possible Impact

As the Anti-Terrorism Law becomes effective on Jan. 1, 2016, Service Providers need to immediately implement the Anti-Terrorism Law. Without detailed implementation rules, there are questions surrounding this Anti-Terrorism Law for Service Providers. They may need to update their service terms to address anti-terrorism related issues. For example, they may need to include terms to notify users that their information will be disclosed to or monitored by the government for anti-terrorism purposes. Service Providers may also need to consult with the government for clarifications with respect to the technical interface and decryption assistance. For most Service Providers, especially international technology companies, the disclosure of source code or other sensitive business and technical information may trigger a change of their strategic business plans in China.

Disclaimer

This advisory is a publication of Davis Wright Tremaine LLP. Our purpose in publishing this advisory is to inform our clients and friends of recent legal developments. It is not intended, nor should it be used, as a substitute for specific legal advice as legal counsel may only be given in response to inquiries regarding particular situations.

Registration Procedures of Foreign Investment

Wed, 12/23/2015 - 15:06
NewsFlash: 312

Forex, Derivatives and Structured Finance

Amendment to the External Regulatory Circular - DCIN-83 issued by the Colombian Central Bank

Simplification of Registration Procedures of Foreign Investment

By means of Notice No. 62 dated December 14, 2015, the Colombian Central Bank amended Regulation DCIN 83, aiming at simplifying the foreign investments regime. Such modifications shall be effective as of January 4, 2016.

The Colombian Central Bank abolished certain requirements related to supporting documentation necessary to request the registration, cancellation and substitution of foreign investments in Colombia, as well as any amendment to the capital structure of local companies (recipients of foreign investment). These amendments are applicable to foreign direct investments in Colombia, Colombian investments abroad, financial investment abroad and Colombian investments in foreign assets abroad. According to the above, transactions to be registered from January 4, 2016, will not require the submission of statutory auditor, public accountant or legal representative's certifications, nor the corporate documents supporting such transactions.

Instead of the abovementioned documents (which are no longer required), the Colombian Central Bank issued certain new exchange declarations to be used in each specific case. In any case, such exchange declarations must be signed by both public accountants or statutory auditors and the foreign investor. The new exchange declarations are:

1. Form No. 11 "Declaration of Foreign Investment Registration" for the request of registration and substitution of foreign investments;
2. Form No. 11 A "Declaration of Foreign Investments resulting from Corporate Reorganizations", applicable to the request of substitution and cancellation of foreign investment records derived from corporate reorganizations (i.e. merges and acquisitions);

3. Form No. 12 “Declaration of cancellation of foreign investments records” applicable to the cancellation of foreign investment records;
4. Unique Declaration for amendments to the capital structure; and
5. Unique Declaration for the substitution of financial investments and Colombian investment in foreign assets abroad.

However and despite of the aforementioned changes, representatives (e.g. attorneys) acting on behalf of foreign investors by means of a mandate or power of attorney must still file with the Colombian Central Bank a copy of such mandate/power of attorney dully legalized, notarized, translated and apostilled.

For more information please contact

- Carlos Fradique Méndez
- Carlos Kure Cantillo
- Mariana Galindo Sánchez

CONTACT US

Calle 70A No. 4 - 41
Phone: (+57-1) 346 2011
Fax: (+57-1) 310 0609 - (+57-1) 310 0586
info@bu.com.co
Bogotá - Colombia

www.bu.com.co

IN COSTA RICA: NEW EMPLOYEES MAY BE IMMEDIATELY REGISTERED ON-LINE IN THE CCSS PAYROLL AS OF JANUARY 2016

Starting January 2016, the Social Security Institure (CCSS) will allow employers, through its digital payment system SICERE (Sistema Centralizado de Recaudación), to enroll new employees from any part of the Country in the CCSS payroll, starting from their first day of employment.

This new feature seeks to improve the accuracy of the SICERE database, particularly with regards to the employee's actual start date, and the exact dates of the employment relationship. This change also seeks to eliminate the inconvenience of having to obtain a temporary social security slip for new employees before they are permanently registered.

Now, thanks to this change, employers will no longer be required to provide the provisional social security slip. Instead, the new hire may go to any CCSS branch and personally request a social security slip, which will include a note stating "advance registration."

Despite this change, we would like to remind you that the monthly deadline to submit the payroll has not been modified, and it must still be done between the 26th of each month up to the 4th business day of the following month.

If you have any questions regarding how to correctly register your new hires in the SICERE system, or regarding any other Social Security, Worker's Compensation or Labor Law issues, please feel free to contact Arias & Muñoz's Labor Team through ajimenez@ariaslaw.co.cr or call (+506) 2503-9800 to receive personalized legal advice.

Amendment to the France-Luxembourg Tax Treaty: not applicable until 2017!

15 December 2015

Client Alert | France | Tax

The French National Assembly (lower house of parliament) has just voted in favour, on first reading, of a bill authorising approval of the 4th amendment to the tax treaty between France and Luxembourg. The Government has implemented the expedited procedure for this bill, meaning that it will be submitted to a vote in the French Senate (upper house of parliament) on 16 December 2015. On the Luxembourg side, the treaty has already been ratified.

Even if the bill is passed and the exchange of ratification instruments occurs before the end of the year, the amendment would enter into effect as from 1 January 2016 but, in accordance with the provisions of Article 2(2), would in fact only apply to financial years, taxable events or sums taxable as from 1 January 2017 onwards.

Luxembourg companies holding securities in French real-estate companies will therefore continue to be exempt from tax in France on the corresponding capital gains received in 2016.

Loophole in freezing order closed off

December 2015

Hogan Lovells' London litigation team has secured a landmark victory in the UK Supreme Court, closing off a loophole in the English standard form freezing order.

The UK Supreme Court held that defendants subject to an English freezing order will no longer be able to direct the payment of loan proceeds, *even if those monies never come into their own hands*, as those proceeds are "assets" within the meaning of the freezing order.

Although the wording of the Hong Kong standard form freezing order differs from the English wording, this robust and pragmatic decision safeguarding the effectiveness of the freezing order regime provides useful guidance that, in appropriate cases, the Hong Kong courts can be asked to ensure Hong Kong freezing orders apply the intended effect of the English standard form.

In "the absence of good reason to the contrary" the Hong Kong court rules require the court's standard form freezing order wording to be used. However, this case and the suggestion that assets may be dissipated in this way by an unscrupulous defendant, could provide "good reason" to request the Hong Kong court to include additional wording similar to the English standard form wording, which would include proceeds of a loan in the definition of "asset".

One of the largest frauds in history

When BTA Bank, one of Kazakhstan's largest systemic banks, discovered a multi-billion dollar black hole at the heart of its accounts in 2009, it instructed Hogan Lovells to bring claims against its former chairman, Mukhtar Ablyazov - who had fled from Kazakhstan to take up residence in London - on the basis that he had committed one of the largest frauds in history.

The first step we took was to obtain a worldwide freezing order from the English Commercial Court to lock down Mr Ablyazov's assets pending trial of BTA's multiple claims against him.

That freezing order has, in various iterations, helped hold the ring around assets stolen from BTA whilst the claims have played out in the courts. As of today, Hogan Lovells has obtained judgments against Ablyazov in BTA's favour totalling in excess of US$4.5 billion.

Using loans to side-step a freezing order

The existence of the freezing order over Mr Ablyazov's assets has generated a litany of satellite litigation over the past few years, and has led to more than 50 decisions in the English High Court and Court of Appeal. In October, one long-running dispute over the scope of the standard form freezing order was finally - and unanimously - resolved by the UK Supreme Court, giving renewed clarity to the funding arrangements that can be put in place by a defendant and the ways in which those arrangements are restricted and monitored.

In this instance, after the freezing order was put in place Mr Ablyazov took out a series of purported third party loans and ran up £40m of unsecured debt. Unbeknownst to BTA or the Court, he used these funds to pay for his own and other defendants' legal bills, as well as the up-keep of his mansion in London and the funding of various associates who were involved in the administration of his (largely undisclosed) assets.

Under the loan contracts, Mr Ablyazov had the right to direct to whom the lenders should pay the proceeds of the loans. Because the money was paid directly by the lender to the various recipients, and never came into Mr Ablyazov's own hands, he argued – and the Court at first instance and the Court of Appeal agreed – that these payments were not his "assets" for the purposes of the freezing order, meaning that they were not subject to the inherent protections and restrictions that limit a defendant's spending.

The UK Supreme Court confirms loan proceeds can be frozen – even when they do not come into the defendant's hands

We challenged this narrow interpretation of the freezing order.

The Supreme Court considered the way assets were defined in the Ablyazov freezing order, which is in the same terms as now appear in the widely-used English standard form freezing order. This includes a provision that the defendant's "assets" for the purpose of the order *"include any asset which he has power, directly or indirectly, to dispose of or deal with as if it were his own"*, and goes on to clarify that *"The [defendant] is to be regarded as having such power if a third party holds or controls the assets in accordance with his direct or indirect instructions."*

The Supreme Court held that where a defendant is directing the payment of loan proceeds, even if those monies never come into his own hands, those proceeds are "assets" within the meaning of the English freezing order under the above "expansionary" wording – and these monies are therefore frozen on the terms of that order.

The following protections provided by the freezing order therefore bite:

- any spend on ordinary living expenses is subject to a specified weekly cap;
- any spend on the defendant's own legal advice and representation must be reasonable and must be notified to the claimant;
- money cannot be spent on anything else outside the ordinary course of the defendant's business – such as other defendants' legal costs (as was the case here); and
- because the proceeds of the loans are regarded as "assets", they become subject to the disclosure obligations imposed on the defendant – meaning he is required to inform the claimant's solicitors about them.

The Bank also invited the Supreme Court to find that Mr Ablyazov's right to draw down under the loan agreements was in and of itself an asset caught by the terms of the order, but the Court declined to take that additional step.

Another instance of the English Court strengthening the freezing order regime

The Supreme Court judgment in this case closes the loophole that previously allowed an unscrupulous defendant access to substantial funds without disclosing their existence, and without any control on how or to whom they could be dissipated. It is an innovative victory for our client, and another step forward in the significant ongoing asset recovery work.

The judgment (which can be downloaded here) has immediate relevance to freezing orders on the current English standard terms – including those that have already been made.

Hogan Lovells

Hogan Lovells' global litigation practice has acted for clients in many of the leading reported cases on freezing order jurisdiction, and our work on the BTA case alone – the largest ever fraud case in the English courts, which has resulted in a number of precedent-setting decisions – has earned us significant global recognition as a market-leading litigation firm.

If you would like to discuss any of the issues raised in this bulletin, please contact the individuals listed or your usual Hogan Lovells contact. We would be more than happy to assist.

ABNR

COUNSELLORS AT LAW

NEWS DETAIL

25/11/2015

NEW REGULATION ON IMPORTER'S IDENTIFICATION NUMBER

The Indonesian Minister of Trade just renewed the regulation on Importer's Identification Number (Angka Pengenal Importir or "API"), by issuing Regulation No. 70/M-DAG/PER/9/2015 ("New Regulation"). This New Regulation was enacted on 28 September 2015, but will only come into force on 1 January 2016.

When the New Regulation comes into force, the old Regulation No. 27/M-DAG/PER/5/2012 (as amended several times, lastly by Regula ion No. 84/M-DAG/PER/12/2012) ("Previous Regulation") will cease to be in effect. However, all of the implementing regulations of the Previous Regulation will continue to be in force as long as they are not in conflict with the provisions of the New Regulation or as long as the new implementing regula ions have not been issued.

The New Regulation maintains the categorization of the API into General API ("API-U") and Producer API ("API-P"). The API-U is issued to companies for the importation of certain goods for trading purposes, whereas the API-P is issued to companies for the importation of goods for their own use and purpose as capital goods, raw material, supporting material, and/or material to support their production process. The goods imported under the API-P may not be traded or transferred to other parties.

Two important changes as a result he New Regulation:

1. Removal of the Producer Importer (Produsen Importir) permit

   The Previous Regulation provides API-P holders with an opportunity to obtain a permit as Producer Importer, which would allow them to import certain goods for the purpose of their business development, which goods may be traded and transferred to other parties provided that hey will only be used for market test purposes or as complementary goods.
   The New Regula ion takes away the provision on Producer Importer, which means that API-P holders can now only import goods for their own production process purposes. The existing permits as Producer Importer continue to be valid until their expiration.

2. Removal of importation restriction and conditions imposed on API-U Owners

   Under the Previous Regulation, API-U holders could only import goods under one section of the Harmonized System (HS Code) as stipulated in their API-U Certificate. There are certain conditions allowing the API-U holders to import goods under more than one section of the HS Code, such as that the goods are imported from an overseas company which has a special relationship with the API-U holder; or hat all or part of the API-U holder's capital is owned by the state.

   The special relationship as mentioned above could be acquired through:
   - Contractual agreement to share control over an economical activity;

- Shares ownership;
- Articles of association;
- Agency/distributorship agreement;
- Loan agreement; or
- Supplier agreement.

The provisions of the Previous Regulation regarding importation of goods under the specified HS Code and the conditions for the importa ion imposed on API-U holders have been removed by the New Regulation. API-U holders can now import goods under several sec ions of the HS Code without the need to have a special relationship with their overseas exporters.

The transitional provision of the New Regulation states that all API-Ps and API-Us which had been issued under the Previous Regulation must be adjusted to be in line with the provisions of the New Regulation at the latest by 30 June 2016. (*by: Nina Cornelia Santoso*)

LEGAL UPDATE

December 2015

ROUND ONE
FOURTH CALL-TO-BID

On December 17, 2015, fourth call-to-bid number CNH-R01-C04/2015 for International Public Bid number CNH-R01-L04/2015 regarding the process known as Round One, issued by the National Hydrocarbons Commission (*Comisión Nacional de Hidrocarburos*) (CNH) as a Coordinated Regulatory Agency, was issued in the Federal Official Gazette (*Diario Oficial de la Federación*).

Said bidding process includes 10 contractual areas located in deep waters in the Gulf of Mexico, within the oil provinces of Cinturón Plegado Perdido, off the coast of Tamaulipas (4 areas), and Salina Basin, off the coast of Veracruz (6 areas). The private sector will be able to operate such contractual areas through License Contracts to develop hydrocarbon exploration and extraction activities, in order to obtain revenue for the State that will contribute to the long-term development of the Nation, as the Government will be responsible to carry out exploration and extraction activities for oil and other hydrocarbons through allocations to Productive State-Companies or through contracts with Productive State Companies or with the private Sector.

In order to participate in the referred bid as an operator or as an investor in contractual areas in deep waters, participants must comply, among others, with the following requirements:

1. Regarding technical and execution expertise and capability for operators:

   I. Evidence of a) experience as operator during 2011 – 2015, in at least one exploration and/or extraction project in deep waters, with a taut exceeding 1,000 meters, and b) capital investments in exploration and/or extraction projects in an aggregated total amount of at least US$2,000 million Dollars, and

   II. Evidence of experience in industrial safety and environmental protection matters during the last five years; that is, the operator must be experienced in the implementation and operation of industrial safety, operational safety, and environmental protection management systems in exploration and/or extraction facilities or projects.

2. Regarding financial capability for operators:

   I. Evidence of equity of at least US$2,000 million Dollars, or

II. Evidence of total assets worth at least US$10,000 million Dollars and an investment grade credit rating (Fitch Ratings, Moody's Investors Service, or Standard & Poors).

3. Regarding financial capability for investors: evidence of a net worth of at least US$250 million Dollars.

Additionally, within the pre-qualification requirements, the Bid Rules indicate that those companies which were positively pre-qualified in aspects regarding the data room, source of financial resources, and legal documents during bidding number CNH-R01-L01/2014 (regarding the award of Production-Sharing Contracts for Hydrocarbon Exploration and Extraction in Shallow Waters, First Call-to-Bid) and/or in public bid number CNH-R01-L02/2015 (regarding the award of Production-Sharing Contracts for Hydrocarbon Exploration and Extraction in Shallow Waters, Second Call-to-Bid) will be considered to have automatically evidenced such aspects for this fourth bidding process.

Finally, as previously mentioned, through the publication of this bidding process, all private companies (whether domestic or international), including Productive State Companies, are called to participate, pursuant to the provisions set forth in the rules of the bid, same which are available for consultation in the following website http://www.ronda1.gob.mx.

In case of requiring further information, please contact the partner responsible for your affairs or one of the following attorneys.

Mexico City Office: *Juan Carlos Machorro G., jmachorro@s-s.mx (Partner)*
Bernardino Arenas F., barenas@s-s.mx (Associate)
Cecilia Sarabia D., csarabia@s-s.mx (Associate)
Tel: (+52 55) 5279-5400

Monterrey Office: *Jorge Barrero S., jbarrero@s-s.mx (Partner)*
Tel: (+52 81) 8133-6000

Tijuana Office: *Aarón Levet V., alevet@s-s.mx (Partner)*
Tel: (+52 664) 633-7070

Oficina Querétaro: *José Ramón Ayala A., jayala@s-s.mx (Partner)*
Tel: (+52 442) 290-0290

NautaDutilh

Corporate Governance

Netherlands

Legislative basis of Dutch Banking Code withdrawn | Code Banken niet langer wettelijk verankerd

Thursday 17 December 2015

Legislative basis of Dutch Banking Code withdrawn

Effective 1 January 2016 the decree requiring Dutch banks to report on their compliance with the old Banking Code in their annual reports will be repealed. As from that date, only the reporting requirements set out in the new Banking Code, which replaced the old one on 1 January 2015, will apply.

The reasons given by the Minister of Finance for the repeal are that (i) the Dutch Banking Association (Nederlandse Vereniging van Banken) did not request that the new Code be given a legislative basis, (ii) banks have already proceeded to implement the principles in the new Code on a sector-wide basis and (iii) the most important principles are already laid down in law and consequently the supervision of compliance with those principles – an important reason for giving the old Banking Code a legislative basis – already occurs. Furthermore, the banks have developed a system of disciplinary rules which provides a supplementary form of supervision and is helping restore confidence in the sector.

As from 1 January 2016, reporting by banks on their compliance with the new Code will be based on self-regulation. The main consequence of this change is that reporting on the bank's website will be sufficient. Reporting in annual reports will no longer be mandatory, although it will still be possible. Therefore, a bank's auditor will no longer have to check whether the bank's annual reports contain a statement about its compliance with the Code.

Transitional rules apply to financial years commencing before 1 January 2015. For those years banks are still required to report on their compliance with the old Code in their annual reports.

Code Banken niet langer wettelijk verankerd

Per 1 januari 2016 wordt het besluit ingetrokken op grond waarvan banken in hun jaarverslag moeten rapporteren over de naleving van de oude Code Banken (Stb. 2015/441 en Stb. 2010/215). Met ingang van deze datum geldt enkel het rapportage-regime uit de nieuwe Code.

Als redenen noemt de Minister dat de NVB niet heeft verzocht om verankering van de nieuwe Code, de banken de beginselen sectorbreed zijn gaan implementeren en de belangrijkste beginselen in wetgeving zijn vervat waardoor voorzien is in toezicht op sectorbrede naleving van deze beginselen, wat een belangrijke reden voor verankering was.

Bovendien levert het systeem van tuchtrecht een aanvullende vorm van toezicht op die bijdraagt aan herstel van vertrouwen in de sector.

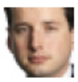
Banken rapporteren dus met ingang van 1 januari 2016 over de naleving van de nieuwe Code op basis van zelfregulering. Het belangrijkste gevolg daarvan is dat rapportage primair op de website geschiedt; in het jaarverslag mag wel, maar hoeft niet. Dat laatste brengt overigens met zich dat de accountant ook niet langer hoeft na te gaan of rapportage over naleving van de Code in het jaarverslag heeft plaatsgevonden.

Er is een overgangsregeling voor jaarverslagen die betrekking hebben op een boekjaar dat is aangevangen voor 1 januari 2015. In deze jaarverslagen moet nog wel worden gerapporteerd op grond van de oude Code in het jaarverslag.

Contact me

Geert Raaijmakers | Amsterdam | +31 20 71 71 992

Maarten ten Kate | Amsterdam | +31 20 71 71 923



Jos Beckers | Amsterdam | +31 20 71 71 545

Simpson Grierson

Disclosure regulations for third party fundraisers

December 15, 2015

Contacts

Partners **Peter Stubbs (http://www.simpsongrierson.com/people/peter-stubbs)**
Senior Associates **Sarah Lee (http://www.simpsongrierson.com/people/sarah-lee)**

Many direct sellers engage in soliciting donations as part of their product sales or fundraising for charity. In this email update, we discuss a recent proposal to tighten up the rules regarding disclosure of information when soliciting donations.

What is being proposed?

On 11 December 2015, Commerce and Consumer Affairs Minister Paul Goldsmith released a consultation document seeking comment on whether businesses fundraising for charities should divulge certain information to the donating public.

Background

In 2012, the government amended the Fair Trading Act 1982 to allow for disclosure regulations for third party fundraisers but none have been made yet (see section 28A).

Section 28A was enacted due to third party fundraisers retaining a disproportionate amount of donated money without the knowledge of the donating public. This document discusses whether introducing information disclosure regulations should be introduced that, for example, would require a third party fundraiser to disclose any financial benefits they will receive as a result of soliciting for charitable donations.

What are third party fundraisers?

Third party fundraisers are commercial enterprises used by many charities to raise funds. They fall into two broad categories: professional fundraisers and commercial participators.

Professional fundraisers are used by many charities to raise money on their behalf, often by telemarketing, street collecting or door knocking. Commercial participators trade in goods or services and promote their business or display 'corporate social responsibility' by advertising that a portion of their profits from the sale of goods or services are donated to one or more charities.

The requirements

The requirements are modelled off England and Wales' comprehensive disclosure regime. Disclosure of financial and non-financial benefits to the fundraiser would be required.

Next steps

Comments should be submitted in writing no later than 5pm on 24 March 2016. The Minister of Commerce and Consumer Affairs will then determine how the Ministry will proceed. If you would like assistance drafting your submission or advice on what this could mean for your business, feel free to get in touch.

Further information

The MBIE consultation document can be viewed in full here (http://reporting.demand.co.nz/t/r-i-vnlihl-l-j/).

Advertising (/resources/advertising)

Contributors kent.teague@simpsongrierson.com (mailto:kent.teague@simpsongrierson.com)

Singapore Court Of Appeal Clarifies That Minority Oppression Claims Are Arbitrable

A case study of *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57

Executive summary

In the seminal decision of *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57, the Singapore Court of Appeal considered an application to stay court proceedings in favour of arbitration under s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) (the "**IAA**").

The decision of the Singapore Court of Appeal is significant for four reasons.

(1) First, the court confirmed that when hearing a stay application under s 6 of the IAA, a Singapore court should adopt a *prima facie* standard of review, instead of a full merits approach.

(2) Second, the court held that a dispute over minority oppression or unfairly prejudicial conduct was arbitrable.

(3) Third, where the court proceedings which were sought to be stayed were in respect of more than a single "matter", the court's obligation was to stay only that part of the court proceedings which concerned the matter or matters that fell within the ambit of the arbitration clause.

(4) Fourth, where only part of the court proceedings were subject to a mandatory stay in favour of arbitration, the court demonstrated how its inherent power to stay court proceedings in the interests of case management pending the resolution of a related arbitration was exercised.

Brief facts

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

The first and second defendants were together the majority and controlling shareholders, while the third to seventh defendants were the directors and/or shareholders of the eighth defendant. The other defendants were not parties to the Share Sale Agreement. The plaintiff alleged that it had been oppressed as a minority shareholder of the eighth defendant and commenced a minority oppression claim pursuant to s 216 of the Companies Act (Cap 50, 2006 Rev Ed) (the "**CoA**") against the defendants, seeking reliefs which included a buyout order, an order to regulate the conduct of the eighth defendant and/or an order for the winding up of the eighth defendant.

The plaintiff's complaint of oppression or unfair prejudice is supported by four broad categories of allegations:-

(1) Share Issuance Allegation
This concerned the issuance of the eighth defendant's shares without commercial justification, and which had the effect of diluting the plaintiff's shareholding in the eighth defendant by more than 50%.

(2) Management Participation Allegation
The plaintiff claimed that there was an understanding or a legitimate expectation on its part that it would participate in the management of the eighth defendant.

(3) Guarantees Allegation
The plaintiff claimed that the eighth defendant executed guarantees securing the obligations of a company which was unrelated to the eighth defendant.

(4) Asset Exploitation Allegation
The eighth defendant expended resources for the benefit of the eighth defendant's majority shareholder.

The defendants applied to stay the proceedings under s 6 of the IAA and/or the inherent jurisdiction of the court. The assistant registrar refused the stay application. On appeal, the High Court similarly refused the stay application.

Judgment

The Court of Appeal considered these four issues:-

(1) the standard of review in a stay application under the IAA;

(2) whether a dispute over minority oppression or unfairly prejudicial conduct was arbitrable;

(3) whether the court proceedings between plaintiff and the first defendant fell within the scope of the arbitration clause of the Share Sale Agreement; and

(4) in the event that the court proceedings between the plaintiff and the first defendant were covered by the arbitration clause and were stayed in favour of arbitration, whether the remainder of the court proceedings should be stayed pending the resolution of the arbitration.

Issue 1: The standard of review in a stay application under the IAA

Section 6 of the IAA provided that the court must stay court proceedings relating to "any matter" that is covered by an arbitration agreement upon an application for a stay by a party to that agreement. The only exceptions were where the court was satisfied that the arbitration agreement was "null and void", "inoperative" or "incapable of being performed".

The court noted that there were two views on the standard of review which the court should adopt when hearing an application for a stay under s 6 of the IAA:-

(1) In the *prima facie* approach, if the court is satisfied on a *prima facie* standard that the conditions for the grant of the stay (i.e. that there exists an arbitration clause which is valid and which covers the dispute at hand) have been met, it should grant the stay and defer to the arbitral tribunal the determination of whether those conditions have indeed been satisfied. This approach preserves the arbitral tribunal's kompetenz-kompetenz to examine the existence and scope of its jurisdiction afresh and determine it fully.

(2) In the full merits approach, the court undertakes an actual determination of the existence and scope of the arbitration agreement when it hears a stay application under s 6 of the IAA. On this view, the court grants a stay if, and only if, it is satisfied that the requirements for the grant of a stay have in fact been met. This approach might have the advantage of expedience in that it allows the court to pronounce with finality on an arbitral tribunal's jurisdiction in the first instance, instead of deferring the question to the arbitral tribunal, only to face the prospect of the same question coming back to the court in the event of an appeal against the arbitral tribunal's jurisdictional ruling, or if the unsuccessful party in the arbitration resists enforcement of the arbitral award or applies to set it aside on the basis of the arbitral tribunal's lack of jurisdiction.

After an extensive review of the *travaux préparatoires* of the Model law and the positions in England, Hong Kong and Canada, the Court of Appeal held that a Singapore court should adopt a *prima facie* standard of review when hearing a stay application under s 6 of the IAA.

In particular, a court hearing such a stay application should grant a stay in favour of arbitration if the applicant was able to establish a *prima facie* case that:-

(1) there was a valid arbitration agreement between the parties to the court proceedings;

(2) the dispute in the court proceedings (or any part thereof) fell within the scope of the arbitration agreement; and

(3) the arbitration agreement was not null and void, inoperative or incapable of being performed.

Once this burden has been discharged by the party applying for a stay, the court should grant a stay and defer the actual determination of the arbitral tribunal's jurisdiction to the tribunal itself. The court would only refuse to grant a stay when it was clear on the evidence placed before it that one or more of the above three requirements had not been satisfied. The arbitral tribunal's determination of its jurisdiction would nonetheless remain subject to overriding court supervision in the form of an appeal under s 10(3) of the IAA against the arbitral tribunal's jurisdictional ruling, or in proceedings for setting aside or refusing enforcement of the award rendered by the arbitral tribunal.

In adopting the *prima facie* standard of review, the court declined to follow the English position because:-

(1) The *prima facie* approach cohered better with intentions of parliament.

(2) The full merits approach had the potential to reduce an arbitral tribunal's kompetenz-kompetenz to a contingency dependent on the strategic choices of the claimant as to whether it would pursue its claim by way of court proceedings or by way of arbitration. That undermined the principles of judicial non-intervention and kompetenz-kompetenz which were at the forefront in the drafting of the Model Law and the enactment of the original IAA.

(3) The fear of resource duplication which, it was said, would arise from the *prima facie* approach was overstated. A robust recognition and enforcement of the kompetenz-kompetenz principle may, on the contrary, deter a plaintiff from commencing proceedings in court in the face of an arbitration agreement.

(4) When s 6 of the IAA required the court to be "satisfied" that the arbitration agreement was not null and void, inoperative or incapable of being performed, it did not require to court to conduct a full merits review of the existence or validity of the arbitration agreement.

Issue 2: Whether a dispute over minority oppression or unfairly prejudicial conduct was arbitrable

The court held that the non-arbitrability of a dispute would be a ground for refusing a stay of court proceedings in favour of arbitration because the arbitration agreement would be either "inoperative" or "incapable of being performed" in relation to a dispute which involved a subject matter that was not arbitrable.

The effect of s 11 of the IAA was that there would ordinarily be a presumption of arbitrability so long as a dispute fell within the scope of an arbitration clause.

This presumption may be rebutted by showing that:-

(1) the parliament intended to preclude a particular type of dispute from being arbitrated (as evidenced by either the text or the legislative history of the statute in question); or

(2) it would be contrary to the public policy considerations involved in that type of dispute to permit it to be resolved by arbitration.

The court held that a dispute over minority oppression or unfairly prejudicial conduct was arbitrable because:-

(1) Section 216 of the CoA was not introduced to protect or further any public interest. Instead, it was concerned with protecting the commercial expectations of the shareholders of a company. Hence, there was, in general, no public element in disputes of this nature which mandated the conclusion that it would be contrary to public policy for them to be determined by an arbitral tribunal rather than by a court.

(2) The fact that the relief sought might be beyond the power of the arbitral tribunal to grant did not in and of itself render the subject matter of the dispute non-arbitrable. In the court's view, there was nothing to preclude the underlying dispute from being resolved by an arbitral tribunal, with the parties remaining free to apply to the court for the grant of any specific relief which might be beyond the power of the arbitral tribunal to award. In so far as any findings had been made in the arbitration in such a case, the parties would be bound by such findings and would, at least as a general rule, be prevented from re-litigating those matters before the court.

(3) The court noted the High Court's concern that sending the dispute in the Suit to arbitration, only to have the parties return to the court for their remedy may lead to procedural complexity in the form of the possibility of conflicting findings between the two sets of proceedings and the possibility that the court would disagree with the arbitral tribunal on findings of fact or on the appropriate remedy to be granted. However, the court held that such procedural difficulties did not render the dispute non-arbitrable because inconvenience was not the threshold that justifies refusing a stay of court proceedings on the basis that the subject matter of the dispute is non-arbitrable.

Issue 3: Whether the court proceedings between plaintiff and the first defendant fell within the scope of the arbitration clause of the Share Sale Agreement

The court held that in considering whether a dispute was covered by an arbitration agreement, the court was concerned with establishing whether the dispute pertained to a "matter" that was subject to the arbitration agreement and there were two stages involved in this process:-

(1) the court must first determine what the matter or matters were in the court proceedings; and

(2) it must then ascertain whether the matter(s) fell within the scope of the arbitration clause on its true construction.

Regarding the principles on determining what the matters were in the court proceedings, the court held:-

(1) Where the court proceedings which were sought to be stayed were in respect of more than a single "matter", the court's obligation was to stay only that part of the court proceedings which concerned the matter or matters that fell within the ambit of the arbitration clause.

(2) The court held that the language of s 6 of the IAA clearly recognised that the court, when faced with a stay application, was not presented with a binary choice which confined it to either staying the proceedings entirely and so forcing the parties to arbitrate, or refusing the stay and allowing the court proceedings in their entirety to continue.

(3) Instead, s 6(2) contemplated that the court was to stay the proceedings "so far as [they] relate to [the] matter". This militated against taking an excessively broad view of what constituted a "matter" or treating it as a synonym for the court proceedings as a whole.

(4) When the court considered whether any "matter" was covered by an arbitration clause, it should undertake a practical and common-sense inquiry in relation to any reasonably substantial issue that was not merely peripherally or tangentially connected to the dispute in the court proceedings. The court should not characterise the matter(s) in either an overly broad or an unduly narrow and pedantic manner.

(5) In most cases, the matter would encompass the claims made in the proceedings. But, that was not an absolute or inflexible rule.

On the specific facts of this case, each of the four categories of allegations made in the Suit raised substantial issues that are neither peripheral nor tangential to plaintiff's claim for relief under s 216 of the Companies Act. Accordingly, the court found that each category was a separate "matter" for the purposes of the defendants' stay application under s 6 of the IAA.

On whether the matters fell within the scope of the arbitration clause, the court held that:-

(1) The dispute was whether the Share Issuance Allegation and the Management Participation Allegation fell within the scope of the arbitration clause in the Share Sale Agreement, as there was no dispute that the other two allegations made by the plaintiff in the Suit did not.

(2) The substance of the controversy pertaining to the Share Issuance Allegation was not one that can fairly be said to arise out of or in connection with the Share Sale Agreement because:-

   (a) The substance of the controversy concerned the issuance of shares by the company after the Share Sale Agreement was concluded and whether there was any commercial justification for that share issuance.

   (b) The issue of whether there was any commercial justification for that share issuance was wholly unaffected by the Share Sale Agreement.

(3) The Management Participation Allegation fell squarely within the ambit of the arbitration clause in the Share Sale Agreement because the Share Sale Agreement was the plaintiff's only basis for asserting that there was an understanding or a legitimate expectation on its part that it would participate in the company's management, and construction of the Share Sale Agreement would form an inescapable and substantial step in establishing the existence of any understanding or legitimate expectation of management participation by the plaintiff.

Therefore, the court held that there was a *prima facie* case that only the Management Participation Allegation fell within the scope of the arbitration clause in the Share Sale Agreement, and accordingly, the court proceedings in respect of this allegation was stayed.

Issue 4: Whether the remainder of the court proceedings should be stayed pending the resolution of the arbitration

This issue related to whether and, if so, how the court should exercise its inherent power to stay court proceedings relating to the other three allegations in the interests of case management pending the resolution of a related arbitration.

The court noted that there were three options available to a Singapore court which was faced with proceedings whose outcome depended on the resolution of a related arbitration, namely:-

(1) stay the whole of the court proceedings pending the resolution of the putative arbitration (ie, resolve the arbitration first);

(2) stay the court proceedings only to the extent that is required under s 6 of the IAA, but on the condition that the putative arbitration proceed only after the resolution of the remaining court proceedings (ie, resolve that part of the court proceedings which falls outside s 6 first); or

(3) stay the court proceedings only to the extent that is required under s 6 of the IAA, and allow the putative arbitration and the remaining court proceedings to run in parallel (ie, concurrent resolution of the arbitration and that part of the court proceedings which falls outside s 6).

The court held that the fact that part of a dispute was sent for arbitration does not mean that the court proceedings relating to the rest of the dispute would be stayed as a matter of course. The court must in every case aim to strike a balance between three higher-order concerns that may pull in different considerations: first, a plaintiff's right to choose whom he wants to sue and where; second, the court's desire to prevent a plaintiff from circumventing the operation of an arbitration clause; and third, the court's inherent power to manage its processes to prevent an abuse of process and ensure the efficient and fair resolution of disputes. The balance that is struck must ultimately serve the ends of justice.

The court stated that the position between the plaintiff and the second defendant were as follows:-

(1) The court proceedings between these two parties in relation to the Management Participation Allegation were subject to a mandatory stay under s 6 of the IAA.

(2) That allegation formed part of the plaintiff's case against all eight defendants named in the Suit, in which plaintiff alleged oppressive or unfairly prejudicial conduct towards it as a minority shareholder of the company. It was not

suggested that the Management Participation Allegation on its own could sustain the oppression claim that the plaintiff wished to pursue.

(3) It would be logical to have the Management Participation Allegation determined first as between the plaintiff and the second defendant by arbitration. This would likely involve a reasonably limited inquiry into the construction of a specific provision in the Share Sale Agreement. Thereafter, the rest of the court proceedings by the plaintiff against the second defendant (i.e. the court proceedings relating to the other three allegations made by the plaintiff in the Suit) could proceed, with the court having the benefit of the arbitral tribunal's award on the Management Participation Allegation.

(4) At the time of the stay application and appeals, there was no arbitration afoot and the plaintiff could elect to forgo its reliance on the Management Participation Allegation as far as the second defendant was concerned, and rest its case against the second defendant in the court proceedings on the remaining three allegations.

The court stated that the position between the plaintiff and the remaining defendants were as follows:-

(1) There was no arbitration agreement between any of these parties.

(2) The remaining defendants sought a stay of the court proceedings against them as a matter of case management. Such a position would be warranted, especially if the remaining defendants were agreeable to being bound by whatever decision reached by the arbitral tribunal on the Management Participation Allegation as between the plaintiff and the second defendant.

(3) The remaining defendants' stance of seeking a stay of the court proceedings against them pending the arbitration of the Management Participation Allegation between the plaintiff and the second defendant was inconsistent with their retaining a right to re-litigate (in the broad sense) that allegation after the arbitration. Any attempt to do so may well fall within the remit of the doctrine of abuse of process.

(4) A situation of such abuse of process would be even more likely to materialise if the plaintiff offered to arbitrate the Management Participation Allegation with the remaining defendants before the same tribunal as that which dealt with this allegation as between the plaintiff and the second defendant, but the remaining defendants declined the offer.

(5) The second defendant's position at the time of the stay application and appeals was that it wished to proceed with the Suit in court.

The court then held that the appeals should be resolved in the following manner:-

(1) The plaintiff should first decide whether it was willing to forgo its claim against second defendant on the Management Participation Allegation.

(2) If plaintiff decided not to pursue the Management Participation Allegation against the second defendant, then there would be no need for the court proceedings in the Suit to be stayed. But in that event, the plaintiff would not be entitled to rely on the Management Participation Allegation against the remaining defendants. If it were to do so, that would be a naked attempt on its part to circumvent the arbitration clause in the Share Sale Agreement. The Management Participation Allegation rested entirely on a clause in the Share Sale Agreement, and the only counterparty to that agreement was the second defendant. Hence, if the plaintiff decided not to pursue the Management Participation Allegation against the second defendant, then this allegation would not form part of its case against the remaining defendants as well.

(3) If, on the other hand, the plaintiff decided to pursue the Management Participation Allegation against the second defendant, then the court proceedings against the second defendant in respect of that allegation would be stayed in favour of arbitration pursuant to s 6 of the IAA.

In addition, the court proceedings against the second defendant in respect of the remaining three allegations made in the Suit would also be stayed pursuant to the court's inherent power of case management, subject to these provisos:-

(a) Since the Management Participation Allegation was subsidiary in importance to the other issues and allegations, if the plaintiff decided to pursue this particular allegation, the stay of the court proceedings would be conditional upon this allegation being arbitrated expeditiously. The parties to any arbitration to resolve the Management Participation Allegation should therefore endeavour to have it resolved by means of any expedited procedures that may be available.

(b) In any case, should the resolution of any such arbitration of the Management Participation Allegation be unduly delayed, any party to the arbitration had liberty to apply to the court for the stay to be lifted and for the court proceedings in respect of the plaintiff's remaining three allegations to proceed.

(4) In scenario (3) above, the plaintiff should consider whether it was willing to offer to arbitrate the Management Participation Allegation with the remaining defendants before the same tribunal as that which was to be constituted to arbitrate this allegation as between the plaintiff and the second defendant. If the plaintiff did make such an offer but the remaining defendants declined that offer,

then that, coupled with their stance of asking for a stay of the court proceedings against them on the basis of case management, would provide strong grounds for finding that it would be an abuse of process for them to seek to re-litigate (in the broad sense) the Management Participation Allegation in court after the conclusion of the arbitration between the plaintiff and the second defendant.

(5) If the plaintiff decided to pursue the Management Participation Allegation against the second defendant by arbitration, whether with or without the participation of the remaining defendants, then the rest of the court proceedings in the Suit, whether against the second defendant or against the remaining defendants, would be stayed in the interests of case management.

Significance of the case and comments

Adopting a *prima facie* standard of review when hearing a stay application under s 6 of the IAA

The significance of the court's decision that when hearing a stay application under s 6 of the IAA, a Singapore court should adopt a *prima facie* standard of review, instead of a full merits approach, is that the hurdle for an applicant to stay court proceedings in favour of arbitration is lower, and correspondingly, the hurdle for a party resisting the stay application is higher. The practical effect is that parties should only challenge an application to stay court proceedings if there is clear evidence that there is no valid arbitration agreement, or the arbitration agreement does not apply. The accompanying benefit is that parties to an arbitration agreement will have greater certainty that any court proceedings commenced in seeming breach of an arbitration agreement will likely be stayed in ordinary cases.

Adopting a *prima facie* standard of review demonstrates the court's commitment towards upholding the kompetenz-kompetenz principle, which is the principle that the arbitral tribunal has the jurisdiction to determine its own jurisdiction, as embodied in Art 16 of the UNCITRAL Model Law. Given that a full merits approach might have the advantage of expedience in that it allows the court to pronounce with finality on an arbitral tribunal's jurisdiction, the court's decision is a principled one. This aligns Singapore's position with the other Model Law jurisdictions of Hong Kong and Canada.

A dispute over minority oppression or unfairly prejudicial conduct is arbitrable

It is clear that there is high threshold for a dispute to be rendered non-arbitrable because:-

(1) there is a presumption of arbitrability;

(2) this presumption is only rebutted by contrary intention by the parliament and public policy considerations; and

(3) remedial inadequacy and procedural complexity are not enough to render a particular dispute non-arbitrable.

This is again a very principled reading of the legislation, which happens to be in line with the court's pro-arbitration stance.

Having decided that procedural complexity was not sufficient to render a claim non-arbitrable, the court demonstrated its willingness to give practical effect to the arbitration agreement by exercising its power to stay court proceedings in the interests of case management pending the resolution of the arbitration proceeding. As can be seen from the court's analysis, this entails a close consideration of the circumstances of the case to ensure the efficient and fair resolution of the dispute as a whole. The very precise and nuanced orders by the court are truly laudable.

::: **CONTACTS** :::

Paul WONG
Partner
Litigation & Arbitration
paul.wong@rodyk.com
+65 6885 3631

LAU Wen Jin
Associate
Litigation & Arbitration
lau.wenjin@rodyk.com
+65 6885 2891

About Rodyk & Davidson LLP

Trusted since 1861, Rodyk & Davidson LLP is a large full service law firm with a strong regional practice delivering international client service standards. Rodyk is headquartered in Singapore with an office in Shanghai and an associate office in Jakarta.

Our practices are consistently ranked highly in leading publications and we represent a diverse clientele in a broad spectrum of industries and businesses. At Rodyk, we take pride in providing the highest quality advice to our clients while maintaining strong working relationships with key public sector agencies and leading organisations in the private sector.

Internationally, we enjoy exclusive memberships in the World Law Group and the Pacific Rim Advisory Council, offering our clients seamless and cost effective services in more than 100 cities spanning over 60 countries.

For more information, please see http://www.rodyk.com/.

RODYK & DAVIDSON LLP

SINGAPORE

80 Raffles Place
#33-00 UOB Plaza 1
Singapore 048624
Tel +65 6225 2626
Fax +65 6225 1838
Email mail@rodyk.com

SHANGHAI

Unit 23-11 Ocean Towers
No. 550 Yan An East Road
Shanghai 200001, China
Tel +86 (21) 6322 9191
Fax +86 (21) 6322 4550
Email shanghai.mail@rodyk.com

Rodyk Academy

Rodyk Academy is the professional development, corporate training and publishing arm of Rodyk & Davidson LLP. Arbitration Review is a publication of the academy.

理律法律事務所
LEE AND LI
ATTORNEYS-AT-LAW

Establishment of Special Committee for Mergers and Acquisitions of Public Issuing Companies

12/29/2015

Julia Kuei-Fang Yung

The amendments to the Corporate Mergers and Acquisitions Act ("M&A Act") were promulgated on 8 July 2015 and will take effect on 8 January 2016. To ensure that all the shareholders obtain adequate and appropriate information for resolving on a merger or acquisition transaction, according to Article 6 of the M&A Act, a public issuing company, before the Board of Directors adopts the resolution for such a transaction, should establish a special committee to review the fairness and reasonableness of the transaction and to report the result to the Board of Directors or the shareholders meeting, if applicable.

As authorized by the M&A Act, the Financial Supervisory Commission promulgated the Regulations Governing Establishment and Related Matters of Special Committee for Mergers and Acquisitions of Public Issuing Companies on 17 December 2015 ("Regulations"), which will take effect on 8 January 2016. The major provisions of the Regulations are summarized below:

1. Before a public issuing company holds a meeting of the Board of Directors to resolve on the matters for a merger or acquisition transaction ("Transaction"), it should establish a special committee for mergers and acquisitions ("Special Committee") in accordance with the M&A Act and the Regulations. The power of the Special Committee should be exercised by the audit committee ("Audit Committee") in accordance with the Securities and Exchange Act ("SEA") if the company has already established such Audit Committee in accordance with the SEA. (Article 2 of the Regulations)

   For those matters that are not set forth in the SEA or its relevant regulations, the Audit Committee in exercising the power of the Special Committee should follow the provisions of the Regulations.

2. A public company should stipulate the organizational rules of the Special Committee. The stipulation of such rules and any amendments thereto should be resolved by the Board of Directors. (Article 3 of the Regulations)

   It is anticipated that the Taiwan Stock Exchange and the Taipei Exchange will announce examples of the organizational rules for reference.

3. The Special Committee should have at least three members, to be selected by the Board of Directors. For a company that has independent directors, the Special Committee should be formed by these independent directors. The members of the Special Committee should be independent from the parties of the Transaction and meet the qualifications as set forth in Articles 2 and 3 of the Regulations Governing Appointment of Independent Directors and Compliance Matters for Public Issuing Companies. (Article 4 of the Regulations)

4. When reviewing the Transaction, the Special Committee should engage an independent expert for the fairness opinion with the concurrence of at least 1/2 of the members. The independent expert should be a lawyer, CPA, or securities underwriter independent from the parties of the Transaction. (Article 6 of the Regulations)

5. Important matters for the Special Committee to adopt resolutions: (Article 7 of the Regulations)

    (1) Resolution should be adopted with the concurrence of at least 1/2 of the members.

    (2) Review results should be submitted to the Board of Directors along with the precise concurring opinion and dissenting reasons, if any.

    (3) The members should attend the meeting in person. No proxy or waiver is allowed. Attendance by video conference is deemed as attendance in person.

    (4) Within 2 days of the Board of Directors adopting the resolution, the resolution and the review results of the Special Committee should be publicly disclosed on the Market Overstain Post System with the names of the dissenting Directors and the dissenting members of the Special Committee and their reasons.

6. The meeting minutes of the Special Committee (including the video and audio contents of a meeting by video conference) should be retained by the company permanently. The entire meeting proceeding should be recorded or videoed and the audio and/or video material should be kept for at least five years or until the conclusion of a ligation, if applicable. (Article 10 of the Regulations)

BAKER BOTTS

Ideas

Delaware Supreme Court Upholds $76 Million Judgment Against a Financial Advisor for Aiding and Abetting a Board's Breach of Fiduciary Duty

23 December 2015

Updates

In *RBC Capital Markets, LLC v. Joanna Jervis*, No. 140, 2015 (Del. Nov. 30, 2015), the Delaware Supreme Court affirmed a judgment holding a financial advisory firm liable for $76 million in damages for aiding and abetting a board of directors' breach of fiduciary duty in connection with the sale of the company. The $76 million award constitutes the vast majority of the total damages claimed on behalf of the company's shareholders.

Background. In 2011, a special committee of the board of directors of Rural Metro Corporation selected RBC to analyze the company's strategic future. RBC recommended a sale of the company, but failed to disclose that it was hoping to capitalize on the sale by also representing companies providing financing on the buy side of the deal. After the sale, stockholders brought suit against the board and RBC for proposing a sale that undervalued Rural/Metro. All defendants except RBC settled before trial.

Applying the *Revlon* standard to the board's actions, the Court of Chancery held that the board breached its duty of care by failing to monitor the sale process, and that RBC aided and abetted this breach. The court found that the financial advisor's conflicts were material information not adequately disclosed to the board, and that the board did not appropriately oversee its financial advisor. For these reasons, the court upheld the lower court's decision.

Significance. The court's decision does not represent a sea change in Delaware law. First, the court stated that its decision is limited to the unique facts of the Rural/Metro sale. The court's 105-page opinion contains a detailed description of the facts, which underscores the court's own guidance that its holding is case-specific.

Second, the decision is not a fundamental re-think of aiding and abetting liability. The court expressly rejected the lower court's assertion that a financial advisor should act as a "gatekeeper," and stated that the "narrow" holding in the case did not mean that *any* failure by a financial advisor to prevent directors from breaching their duty of care gives rise to an aiding and abetting claim against the advisor.

Third, the opinion provides useful guidance for how directors should consider conflicts in the engagement of advisory services. "[D]irectors need to be active and reasonably informed when overseeing the sale process, including identifying and responding to actual or potential conflicts of interest. But, at the same time, a board is not required to perform searching and ongoing due diligence on its retained advisors in order to ensure that the advisors are not acting in contravention of the company's interests, thereby undermining the very process for which they have been retained. A board's consent to a conflict does not give the advisor a 'free pass' to act in its own self-interest and to the detriment of its client. Because the conflicted advisor may, alone, possess information relating to a conflict, the board should require disclosure of, on an ongoing basis, material information that might impact the board's process."

The court did not shut the door on engaging conflicted advisors and in fact explicitly addressed that situation: "[D]irectors [should] be especially diligent in overseeing the conflicted advisor's role in the sale process… For instance, the board could, when faced with a conflicted advisor, as a contractual matter, treat the conflicted advisor at arm's-length, and insist on protections to ensure that conflicts that might impact the board's process are disclosed at the outset and throughout the sale process."

Finally, the court emphasized the requirement that an aider and abettor act with *scienter*, making such a claim "among the most difficult to prove." The court stated that in this case, the financial advisor was "propelled by its own motives" when pushing for a sale of Rural/Metro, and was looking out for its own interests when it aided and abetted the directors' breach of fiduciary duty. If anything, the court took pains to say that the unusual facts in this case satisfied that requirement when many ordinary actions of financial advisors would not.

The decision nevertheless highlights the court's concern that conflicted financial advisors have an informational advantage when it comes to knowledge of their real and potential conflicts of interests and thus should disclose all conflicts. It also potentially opens the door for entrepreneurial plaintiffs to attempt claims against financial advisors and other outside professional services providers, which will be subjected to the customary legal standards already in place.

Practices

Litigation

Securities Litigation

Related Professionals

David D. Sterling

Partner

Seth T. Taube

Partner

Danny David

Partner

Tom O'Brien

Partner

Davis Wright Tremaine LLP
DEFINING SUCCESS TOGETHER

New California Laws Affecting Outpatient Surgery Settings Go Into Effect January 1, 2016

12.28.15

By Terri D. Keville and Michaela Bantilan Andrawis

New Development

California Senate Bill 396 (SB 396), which strengthened requirements for outpatient clinics such as ambulatory surgery centers, was recently signed into law and becomes effective January 1, 2016.

What This Means for You

SB 396 builds upon the existing legal requirements that apply to ambulatory surgery centers and office-based surgery practices. Currently, each such outpatient surgery setting must have a medical staff that is professionally qualified and appropriately credentialed, and facilities that are not state-licensed or Medicare certified must be accredited by The Joint Commission or other accrediting agency approved by the Medical Board of California. Beginning on January 1, 2016, SB 396 will also require affected facilities to conduct peer review, obtain reports about medical staff applicants and members from state professional licensing boards, and be subject to "unannounced" accreditation inspections—which may be conducted after notice that an inspection will occur within 60 days.

Summary

A. Statutorily Required Peer Review

Existing law mandates that accredited outpatient surgery settings grant clinical privileges only to physicians who have been appropriately credentialed and determined to be professionally qualified.

With the passage of SB 396, accredited outpatient surgery settings also will be statutorily required to conduct peer review of the physicians on their medical staffs under California Business and Professions Code Section 805.5. Peer review evaluations must occur at least every two years and be performed by physicians who are qualified by education and experience to perform the same or similar types of procedures. The medical staff's peer review findings must be evaluated by the facility's governing body so it can determine whether the physicians reviewed continue to be qualified, and the results must be provided to the accrediting agency at the time of the facility's on-site survey. The surveyor will review the peer review process and findings to ensure the facility's process complies with the applicable accreditation requirements.

B. Obtaining Reports from State Licensing Boards

SB 396 will also allow and require outpatient surgery settings—including licensed, Medicare-certified, and accredited settings—to access information about practitioners that is reported to the Medical Board of California, the Board of Psychology, the Osteopathic Medical Board of California, and the Dental Board of California. Starting January 1, 2016, each such outpatient surgery setting will be required to request a report from the applicable state licensing board to determine, prior to granting or renewing staff privileges, whether the applicant has been denied staff privileges, removed from a medical staff, or had his or her staff privileges restricted.

C. Unannounced Inspections

Existing law also requires that ambulatory surgery centers and office-based surgery practices be accredited if they are neither state-licensed nor Medicare certified. The accrediting agency is required to inspect such outpatient surgery settings at least every three years, and the Medical Board of California also may inspect such facilities as often as necessary, to ensure the quality of care provided.

With the passage of SB 396, approved accrediting agencies also will be authorized to conduct unannounced inspections subsequent to their initial accreditation inspections, as long as the accrediting agency provides specified notice of the unannounced inspection to the outpatient surgery setting. Accredited ambulatory surgery centers and office-based surgery practices that are neither state-licensed nor Medicare certified will receive notification that an inspection will occur within 60 days—so such inspections will not be entirely "unannounced."

Next Steps

SB 396 becomes effective January 1, 2016. To prepare for the new law's changes, accredited surgery centers and office-based surgery practices need to do the following:

1. If accredited, review and update medical staff bylaws, policies and procedures to provide for the state's statutorily required peer review evaluation process;
2. If accredited, implement a peer review evaluation process that complies with the requirements of California Business and Professions Code Section 805.5 prior to renewing medical staff privileges of existing medical staff members;
3. Whether licensed, Medicare-certified, or accredited, if not currently querying the relevant professional licensing agencies as part of credentialing, begin doing so for all applicants for initial granting or renewal of clinical privileges; and
4. If accredited, review facility accreditation requirements and be prepared to undergo an unannounced inspection by the accrediting agency within 60 days following notification that an inspection will occur.

Disclaimer

This advisory is a publication of Davis Wright Tremaine LLP. Our purpose in publishing this advisory is to inform our clients and friends of recent legal developments. It is not intended, nor should it be used, as a substitute for specific legal advice as legal counsel may only be given in response to inquiries regarding particular situations.

SEC Update
December 23, 2015

See note below about Hogan Lovells

FAST Act securities provisions ease regulatory requirements for smaller issuers and create a new resale exemption

On December 4, President Obama signed into law the Fixing America's Surface Transportation Act (FAST Act). Division G (Financial Services) of the FAST Act seeks to promote capital formation by implementing changes to the federal securities laws and directing the SEC to amend its rules to ease regulatory burdens on capital-raising activities by smaller companies.

The new law largely represents a continuation of Congressional initiatives enacted in 2012 through the Jumpstart Our Business Startups Act (JOBS Act). Among its most noteworthy provisions, the FAST Act introduces additional accommodations for "emerging growth companies," a category of small issuers created by the JOBS Act, and directs the SEC to extend to "smaller reporting companies" some registration benefits previously available only to larger issuers. Congress also is requiring the SEC to take additional action to simplify and modernize disclosure requirements for Exchange Act reporting and securities offerings. In a less expected reform, the FAST Act creates a new statutory exemption from Securities Act registration for private resales of securities by affiliates and other security holders.

Some provisions of the FAST Act are self-executing and became effective at the date of enactment, while other provisions will require SEC rulemaking to become operative.

The FAST Act may be viewed here.

Accommodations for emerging growth companies

The FAST Act eases three existing SEC requirements applicable to the initial public offering (IPO) process for emerging growth companies. The JOBS Act defines an emerging growth company (EGC) as an issuer that had "total annual gross revenues" of less than $1 billion in its most recent fiscal year. The $1 billion threshold, which is indexed for inflation every five years, is high enough to encompass a sizable majority of the companies that have completed IPOs in recent years.

Shortened period between public filing and IPO road show. The JOBS Act permits an EGC to submit to the SEC its IPO registration statement and all amendments on a confidential basis for review by the SEC staff so long as it publicly files the registration statement and all

Contacts

Peter J. Romeo (Co-editor)
Washington, D.C.
peter.romeo@hoganlovells.com
+1 202 637 5805

Richard J. Parrino (Co-editor)
Washington, D.C.
richard.parrino@hoganlovells.com
+1 202 637 5530

Emil Arca
New York, NY
emil.arca@hoganlovells.com
+1 212 918 3009

Laura A. Berezin
Silicon Valley
laura.berezin@hoganlovells.com
+1 650 463 4194

Lewis R. Cohen
New York, NY
lewis.cohen@hoganlovells.com
+1 212 918 3663

Paul Hilton
Denver, CO
paul.hilton@hoganlovells.com
+1 303 454 2414

Peter Humphreys

previously submitted drafts before the start of its IPO road show. The FAST Act reduces from 21 days to 15 days the minimum period during which the IPO registration statement must be on file before the issuer begins the road show. This provision became effective upon enactment. In an announcement concerning the FAST Act issued on December 10, the SEC's Division of Corporation Finance stated that EGCs with registration statements pending before enactment of the new law or at any later date may take advantage of the provision. The Division confirmed that, for any EGC that will not conduct a road show, the FAST Act also has the effect of shortening from 21 to 15 days the minimum period during which the IPO registration statement must be on file before it becomes effective.

New York, NY
peter.humphreys@hoganlovells.com
+1 212 918 8250

William I. Intner
Baltimore, MD
william.intner@hoganlovells.com
+1 410 659 2778

Visit us at
www.hoganlovells.com

Grace period for loss of EGC status. An EGC that initiates the IPO process, either by submitting a draft registration statement or by filing it publicly, could lose EGC status if it crosses the $1 billion revenue threshold while its registration statement is under review. After the adoption of the JOBS Act, the SEC staff issued guidance stating that, if an issuer is an EGC at the time it publicly files its IPO registration statement but ceases to be an EGC during the SEC review process, the issuer may continue to rely on the EGC rules through the effective date of the registration statement. The FAST Act extends the grace period by providing that if the issuer was an EGC at the time it submitted a confidential IPO registration statement (or, if it did not make a confidential submission, at the time it publicly filed the registration statement) and ceases thereafter to be an EGC, it will continue to be treated as an EGC until the date on which it consummates its IPO or, if earlier, until the end of the one-year period beginning on the date it ceased to be an EGC. This provision became effective upon enactment. The Division of Corporation Finance has stated that EGCs with registration statements pending at time of the new law's enactment may rely on the new accommodation.

Simplified disclosure requirements relating to financial information. The third accommodation for EGCs enacted in the new law will permit those issuers to omit from their IPO registration statements during the SEC review process historical financial information for fiscal periods that will not have to be included in the registration statement at the time the offering commences. The new law directs the SEC to revise Form S-1 and Form F-1 under the Securities Act to specify that an EGC may omit from a filed or confidentially submitted registration statement financial information for historical periods that are otherwise required by the SEC's Regulation S-X as long as:

- The omitted financial information relates to a historical period that the issuer reasonably believes will not be required to be included in the registration statement at the time of the offering, and

- Before it distributes a preliminary prospectus to investors, the issuer amends the registration statement to include all financial information required by Regulation S-X at the date of the amendment.

Although the provision will become effective 30 days after the date of enactment (January 3, 2016), the Division of Corporation Finance has stated that it "will not object if EGCs apply this provision immediately."

This change has the potential to streamline the preparation of financial statements and reduce the expense of offerings. EGCs generally are required to include audited financial statements only for the two most recent fiscal years, as well as unaudited financial statements for any subsequent interim period. Under the new relief, if an EGC believes that its offering will occur after a date by which it will have to include audited financial statements for a new fiscal year, the EGC may submit its draft registration statement containing audited financial statements only for the fiscal year it expects will have to be included for the offering, and omit audited financial statements for the prior fiscal year it believes will not be required at the time of the offering.

Forward incorporation by reference in Form S-1 by smaller reporting companies

The FAST Act requires the SEC to amend Form S-1 to allow "smaller reporting companies" to incorporate by reference in a registration statement on that form any documents the company files after the effective date of the registration statement. A smaller reporting company is an issuer that (a) has a common equity public float of less than $75 million or (b) if that float is zero, had revenues of less than $50 million for its most recent fiscal year. The Form S-1 amendments permitting "forward incorporation by reference" by these issuers are required to be adopted by the SEC within 45 days after the enactment date (January 18, 2016).

The approval of forward incorporation extends to the smallest class of issuers in the SEC reporting regime registration benefits that previously were available only to larger companies. In the securities offering reforms of 2005, the SEC for the first time permitted issuers not eligible to use Form S-3 to incorporate by reference in their Form S-1 registration statements Exchange Act reports and other materials filed by them before the registration statements became effective. The SEC, however, declined to permit those issuers to incorporate by reference documents filed after the effective date, alluding to the adverse impact on investor protection that could result from forward incorporation by a class of issuers less widely followed by the marketplace than companies eligible to use Form S-3.

The ability to incorporate by reference all Exchange Act filings will make it easier for smaller reporting companies to maintain current shelf registration statements covering continuous primary securities offerings or resale offerings by security holders. In the absence of forward incorporation, such issuers regularly have had to amend their registration statement disclosures to add information contained in their periodic and current reports under the Exchange Act. If the Form S-1 amendments conform to the current requirements for Form S-3, these companies no longer will have to file amended prospectuses under Securities Act Rule 424 or use the cumbersome post-effective amendment process to update information in their Form S-1 registration statements after they have become effective.

Excluded from the new provision, and therefore still not eligible to use forward incorporation by reference, are those issuers that are both not eligible to use Form S-3 and not smaller reporting companies.

Summary page for Form 10-K

The FAST Act requires the SEC, within 180 days after the enactment date (June 1, 2016), to issue rules that permit companies to include a summary page in their annual reports filed on Form 10-K so long as each item in the summary includes a cross-reference to material contained in the report. In commenting on this provision, the Division of Corporation Finance noted that a reporting company currently may include a summary in its Form 10-K report if the summary fairly represents the material information in the report.

Improvement, modernization and simplification of Regulation S-K

Continuing the focus of the JOBS Act, the new law imposes additional rulemaking mandates on the SEC intended to promote capital formation.

The FAST Act requires the SEC, within 180 days of enactment (June 1, 2016), to revise Regulation S-K to (a) further scale or eliminate requirements relating to EGCs, accelerated filers, smaller reporting companies and other smaller issuers and (b) eliminate provisions that are duplicative, overlapping, outdated or unnecessary.

The FAST Act also directs the SEC to carry out a study of the requirements of Regulation S-K to (a) determine how best to modernize and simplify disclosure requirements, emphasizing a company-by-company approach without boilerplate or static requirements while preserving completeness and comparability of information across registrants, and (b) evaluate methods of information delivery and presentation that discourage repetition and disclosure of immaterial information. The SEC is required to submit a report to Congress within 360 days of the law's enactment (June 1, 2016) that details the findings of its Regulation S-K study, its recommendations on modernizing and simplifying Regulation S-K, and its recommendations on ways to improve the readability of disclosure documents. The SEC already has embarked on a similar Regulation S-K project, called for by the JOBS Act, in which it is evaluating the current disclosure requirements of Regulation S-K to determine how they can be modernized.

The SEC will have 360 days after it submits its report to Congress to issue a proposed rule implementing the recommendations in the report.

The foregoing mandate adds to an already heavy workload for the SEC, which continues to work on studies and rulemaking projects assigned to it by the Dodd-Frank Act and the JOBS Act.

New statutory registration exemption for private resales

One of the more unexpected provisions of the FAST Act is the codification of the informal "Section 4(a)(1½)" exemption for private resales of securities by affiliates and other security holders. The SEC and the courts have long recognized that a hybrid exemption from registration under the Securities Act exists for private resales that satisfy some of the established standards for sales under both (a) Section 4(a)(1) of the Securities Act by security holders who are not statutory "underwriters" and (b) Section 4(a)(2) of the Securities Act by issuers making private offerings. The absence of a formal exemption for private resales that bridges the gap between the two statutory exemptions, however, has inhibited these transactions because of uncertainty regarding the requirements that must be satisfied. New Section 4(a)(7) of the Securities Act, which was added by the FAST Act and became effective upon enactment, eliminates the uncertainty by establishing precise standards for private resale transactions.

Alternative to other resale exemptions. Once a public or private offering of securities has been completed, each subsequent transaction in the securities by a holder must either be registered under the Securities Act or qualify for an exemption from registration. Section 4(a)(7) is available to exempt from Securities Act registration private resales of "restricted securities" that were acquired from the issuer or an affiliate in transactions not involving a public offering and – although not the focus of the exemption – securities that were issued in transactions registered under the Securities Act.

For resales of securities of public companies outside the context of capital-raising transactions, the new exemption likely will not afford a meaningful alternative to Rule 144 under the Securities Act, which provides a safe harbor from registration for resales into the public market of restricted securities and "control securities" held by affiliates of the issuer. Where Rule 144 is available, Section 4(a)(7) often will not be an attractive resale method because of the new exemption's many conditions and because securities purchased in Section 4(a)(7) resales, unlike those purchased under Rule 144, will have the status of restricted securities. Instead, the principal appeal of Section 4(a)(7) is expected to be its availability as a more certain alternative to Section 4(a)(1½) for the exemption of private resales of securities issued in unregistered offerings not conducted in reliance on Rule 144A under the Securities Act.

Private resales of restricted securities sold by public and private companies raising capital commonly have been accomplished (a) pursuant to Rule 144A for resales of the securities by the initial purchasers to qualified institutional buyers (QIBs) or (b) pursuant to the Section 4(a)(1½) exemption for resales of the securities by the original investors to accredited investors. Rule 144A transactions typically are underwritten by investment banks acting as the initial purchasers, and often are viewed as being more liquid than traditional private placements due to their larger issue size, book-entry format (with transfer restrictions to QIBs implemented as part of their registration in the DTC clearing system), more stringent due diligence requirements and greater perceived reputational involvement by the investment banks. In contrast, transactions in which resales are made in reliance on the Section 4(a)(1½) exemption occur more commonly in the traditional private placement market, where investment banks act as placement agents rather than as purchasers. In these transactions, physical securities typically are required, and resales often are effected through the use of transferee certifications. Although the secondary market for the securities sold in traditional private placements generally is less liquid than the secondary market for Rule 144A transactions, those securities may be resold to accredited investors as well as to QIBs.

Section 4(a)(1½) provides an exemption for resales of privately placed securities under circumstances that largely conform to conditions and procedures under Section 4(a)(2) employed by the issuer in originally placing the securities. This resale exemption is now codified in Section 4(a)(7), which exempts from registration private resales of securities to accredited investors if such resales also satisfy the section's other requirements.

Conditions of Section 4(a)(7). The new exemption requires compliance with general conditions and, if the issuer of the securities is neither subject to Exchange Act reporting requirements nor a foreign private issuer exempt from those requirements, compliance with an information condition.

General conditions. Each resale transaction made in reliance on Section 4(a)(7) must satisfy the following conditions, some of which mirror the requirements for a private offering pursuant to the safe harbor under Section 4(a)(2) afforded by Rule 506(b) of Regulation D:

- Each purchaser of the securities must be an accredited investor as defined in Rule 501 of Regulation D
- The securities may not be offered or sold by any form of general solicitation or general advertising
- The seller of the securities may not be the issuer or a direct or indirect subsidiary of the issuer
- Neither the seller of the securities nor any agent receiving selling compensation may be a "bad actor" subject to disqualification under Rule 506(d)(1) of Regulation D or Section 3(a)(39) of the Exchange Act

- The issuer must be “engaged in business,” rather than in the organizational stage or in bankruptcy, and may not be a blank check, blind pool or shell company that has no specific business plan or purpose or has indicated that the issuer’s primary business plan is to engage in a merger or combination of the business with, or an acquisition of, an unidentified person

- The securities to be sold may not be part of an unsold allotment to a broker or dealer acting as an underwriter

- The securities must be part of a class that has been authorized and outstanding for at least 90 days before the resale transaction

Information condition for resales of securities of non-reporting companies. In addition, if the issuer is neither subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act nor a foreign private issuer exempt from reporting pursuant to Rule 12g-3-2(b) under the Exchange Act, the issuer must, upon the seller’s request, make available to both the seller and a prospective purchaser designated by the seller a “reasonably current” statement that includes the following information:

- The issuer’s name and address

- A statement of the nature of the business of, and the products or services offered by, the issuer

- The names of the issuer’s directors and officers

- The issuer’s most recent balance sheet and profit and loss statements and similar statements for the prior two fiscal years or portions thereof in which the issuer has been in operation

- If the seller is a control person, the nature of the seller’s affiliation with the issuer and a certification by the seller that it has no reasonable grounds to believe that the issuer is in violation of the securities laws or regulations

Any financial statements required to be delivered in a transaction relying on Section 4(a)(7) must be prepared in accordance with U.S. generally accepted accounting principles, unless the issuer is a foreign private issuer, in which case the financial statements may be prepared in accordance with GAAP or International Financial Reporting Standards issued by the International Accounting Standards Board.

Section 4(a)(7) also requires the statement to disclose (a) the title and class, par or stated value, and number of shares or outstanding amount of the class of securities being sold as of the end of the issuer’s most recent fiscal year, (b) the name and address of the transfer agent or other person responsible for transferring securities of the issuer and (c) the names and compensation of any registered broker, dealer or agent to be paid any commission or other remuneration in connection with the offering or sale of the securities.

Status of acquired securities. A Section 4(a)(7) resale transaction is deemed not to be a “distribution” for the purposes of Section 2(a)(11) of the Securities Act. Securities acquired under Section 4(a)(7) will be deemed to have been acquired in a transaction not involving any public offering and, as a result, will have the status of restricted securities within the meaning of Rule 144.

Unlike the Section 4(a)(1½) exemption, Section 4(a)(7) does not impose a holding period on an acquiring purchaser before it may resell the securities. Affiliates of the issuer (other than subsidiaries), including control persons who are individuals, that satisfy the requirements of Section 4(a)(7) will be able to sell the securities under the new exemption without regard to the volume and manner of sale restrictions imposed on affiliate resales under Rule 144.

Looking ahead. Some Congressional supporters of the new exemption expect that, by providing certainty as to legal status of resales where none previously existed, Section 4(a)(7) will contribute to the development of a more active secondary market in privately placed securities. Representative Carolyn B. Maloney, for example, expressed the view that the exemption will provide investors with “confidence that they are complying with the law when they resell private securities to other sophisticated investors” and will improve the state of the law in this area by “establishing minimum standards . . . that will protect investors, foster transparency and make [the private] market stronger.”

The exemption will have a broad reach by reason of its availability to any security holder that is not the issuer or one of its subsidiaries. Moreover, securities sold pursuant to the exemption will be deemed “covered securities” exempt from registration under state Blue Sky laws, although, as noted, they will be considered restricted securities in the hands of purchasers.

Section 4(a)(7) affords selling security holders greater legal certainty than the Section 4(a)(1½) exemption that private resales will be undertaken in compliance with the Securities Act. Some of the conditions of Section 4(a)(7), however, may be more restrictive than those observed in some applications of Section 4(a)(1½), which, because it is uncodified, is not uniformly construed in market practice. Section 4(a)(7) states that it is not the exclusive means of establishing an exemption from registration for transactions covered by it. This presumably preserves the ability of sellers in private transactions to continue to rely on the Section 4(a)(1½) exemption. It remains to be seen whether market participants will continue to rely on Section 4(a)(1½) instead of the newly codified exemption that covers the same types of transactions. In light of the uncertainty regarding the circumstances in which resale participants may rely on the uncodified exemption, we would expect that the market will move from reliance on Section 4(a)(1½) to compliance with Section 4(a)(7) for resales of securities issued in traditional private placements.

About Hogan Lovells
Hogan Lovells is an international legal practice that includes Hogan Lovells US LLP and Hogan Lovells International LLP. For more information, see www.hoganlovells.com
Atlantic House, Holborn Viaduct, London EC1A 2FG, United Kingdom
Columbia Square, 555 Thirteenth Street, NW, Washington, D.C. 20004, United States of America