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CONFERENCES & EVENTS

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

IBA Washington, D.C. Member Reception
September 20 - hosted by Hogan Lovells

PRAC 61st International Conference
Hong Kong
Hogan Lovells
April 22 - 25, 2017

PRAC 62nd International Conference
Brazil
TozziniFreire
October, 2017

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MEMBER DEALS MAKING NEWS

►ALLENDE & BREA Advises Bodegas y Vinedos Huarpe wine merger
►ARIAS & MUNOZ Advises Optima on Financial Services Expansion for SMEs
►BAKER BOTTS Advises Starz on its Acquisition by Lionsgate for $4.4 billion
►BENNETT JONES Advises Stantec Inc. with Acquisition of MWH Global, Inc.
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►CLAYTON UTZ Advises Spookfish Ltd on license, royalty and equity investment by Vista Equity via EagleView Technologies
►GIDE Advises Enablon Shareholders on Sale to Wolters Kluwer
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►NAUTADUTILH Core Laboratories completes fast-track USD 197.8 million equity offering

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GIDE FORMER DEPUTY GENERAL MANAGER FINANCE FOR HSBC GROUP JOINS FIRM AS SENIOR ADVISOR

PARIS, 30 June 2016: Former Deputy General Manager, Chief Risk Officer of HSBC France and President of International Institutional Relations for Europe for HSBC Group, Gilles Denoyel has in-depth knowledge of the European financial sector gained from a significant professional career: he held a number of positions within the French Finance Ministry and the Treasury Department for 15 years, and was involved in the major privatisations of the 1990s. He then joined the CCF in 1996 until its acquisition by British group HSBC in 2000, where he remained until 2016.

Gilles Denoyel will support the development of our Banking & Finance and Mergers & Acquisitions / Corporate practice groups as Senior Advisor, and will act on banking and financial regulation issues, as well as on matters of compliance and risk management, particularly as regards the acquisition and restructuring of financial institutions.

A graduate of the top French engineering school “École des Mines de Paris”, the Paris Institute for Political Studies and the senior civil servant school “Ecole Nationale d’Administration”, Gilles Denoyel was appointed to the Ministry of Finances Inspectorate at the French Finance and Economy ministry in 1981. In 1985, he joined the Treasury department as project manager, then secretary general (1987) to the CIRI, supervisor of the French Export Credit Agency, head of the Financial Market supervision and regulation office (1989-92), assistant director of the French Insurance Industry (1992-94), and assistant director of privatisations and state-owned companies (1994-96). He then joined group CCF in 1996 as financial director, becomes secretary general in charge of Strategy, IT and Operations in 1998, then Deputy General Manager in charge of Finance in 2000. He is in charge of a major part of the CCF’s integration within HSBC after its acquisition, where he continues his career as Deputy General Manager Finance of HSBC France (2004), in charge of central and financial issues. In 2006, he is in charge of asset management, insurance activities and non-financial central functions, and from 2007 he supervises all risk and compliance functions and relations with regulatory authorities. In 2012, he is appointed deputy general director of HSBC France, then President of International Institutional Relations Europe for the group (2015).

Jean-Guillaume de Tocqueville, partner in Gide's Banking & Finance practice group, said: "I am very pleased that Gilles Denoyel has joined our firm. His expertise and insights as regards banking and finance represent a considerable asset for our clients."

For additional information visit www.gide.com

GOODSILL WELCOMES NEW PARTNER

HONOLULU, 01 July, 2016: David A. Gruebner has joined Goodsill Anderson Quinn & Stifel as a partner.

David concentrates his practice in the areas of medical malpractice, products liability, construction litigation and other general civil litigation. He has been practicing law in Hawai‘i for over 20 years and was most recently with the law firm Chong Nishimoto Sia Nakamura & Goya LLP. A graduate of University of Illinois at Urbana-Champaign, David received a Juris Doctor degree from Drake University Law School.

For additional information visit www.goodsill.com

HOGAN LOVELLS ADDS LATERAL PARTNER IN LOS ANGELES

LOS ANGELES, 05 July 2016: Hogan Lovells announced today that Michael Turrill has joined the firm's Los Angeles office as a partner in the Litigation, Arbitration and Employment (LAE) Practice Group.

Turrill focuses his practice on complex commercial litigation, including the defense of consumer-related class actions under federal and state consumer protection laws, business torts and unfair competition litigation, intellectual property matters, employment litigation and contractual and partnership disputes. He represents clients in multiple industries including real estate, consumer goods, food and beverage, financial services, energy, and entertainment and media sectors.

"Mike's extensive commercial litigation expertise complements our capabilities to address a number of rising issues across a variety of industries," said Dennis Tracey, Head of Litigation in the Americas at Hogan Lovells. "His diverse background in the litigation space and team-focused qualities exemplify the firm's approach to collaboration across several practices to better serve our clients."

Prior to joining Hogan Lovells, Turrill was a partner in the L.A. office of an AmLaw 200 law firm. Turrill's experiences include litigating in both state and federal courts as well as before arbitration panels around the country and internationally.

"Mike's work in the real estate, consumer class action and media and entertainment space, including digital media, fit squarely within the core practice areas of the Los Angeles office and the firm," said Barry Dastin, Office Managing Partner of Hogan Lovells' Los Angeles office. "He is a well-known and widely respected lawyer in the community, and his arrival builds upon significant recent additions to our office, including Stephanie Yonekura, former Acting U.S. Attorney for the Central District of California, and Paul Salvaty, both of whom have strengthened our litigation team led by Michael Maddigan."

Turrill earned his J.D. from the University of Southern California Gould School of Law, and his B.A. in History from Brown University. He was previously named Pro Bono Attorney of the Year by the University of Southern California's Public Interest Law Foundation. Mike served for three years as adjunct professor at the USC Gould School of Law.

For more information, see www.hoganlovells.com

ALLENDE & BREA

ADVISES BODEGAS Y VINEDOS HUARPE WINE MERGER

BUENOS AIRES 04 July 2016: Allende & Brea has helped Bodegas y Viñedos Huarpe merge with fellow Argentine high-end wine producer Bodega Riglos.

The transaction closed on 15 June.

The merger unites two of the best terroirs in the wine-producing Mendoza province, Gualtallary and Agrelo, under one roof. While the Huarpe and Riglos brands will remain separate, the two companies will share assets, equipment and distribution channels.

Bodegas y Viñedos Huarpe is owned by the Hernández Toso family, while the Werthein family owns Bodega Riglos.

Counsel to Bodegas y Viñedos Huarpe Allende & Brea Partner Carlos Melhem and associates Fernando Martínez Zuviría, Lucía Ibarreche Brühl and Camila Fernández Llorente in Buenos Aires.

Bodega Riglos represented in the deal by In-house counsel - Pablo Tarantino and Agustín Griffi.

For additional information visit www.allendebrea.com.ar

ARIAS & MUNOZ

ADVISES OPTIMA ON EXPANSION OF ITS FINANCIAL SERVICES FOR SMES

EL SALVADOR , 08 July, 2016: Optima Financial Services turned to Arias & Muñoz for legal assistance in the acquisition of operations of Finca El Salvador. Both companies are dedicated to providing micro-credit to micro, small and medium enterprises.

With the consolidation of both companies, Optima will expand its services to 19 branches with coverage throughout the country, 300 employees and nearly 14,000 customers.

Zygmunt Brett, Partner at Arias & Muñoz in El Salvador, led the transaction with the support of associates Rolando Alvarenga and Antonella Imbers. The firm provided counsel on all legal aspects of the transaction until its closure on June 28, 2016.

For additional information visit www.ariaslaw.com

BAKER BOTTS

ADVISES STARZ ON ITS ACQUISITION BY LIONSGATE FOR $4.4 BILLION

NEW YORK, June 30, 2016: - Baker Botts L.L.P., a leading international law firm, today announced that it has been advising its client, Starz (NASDAQ: STRZA, STRZB) on its sale to Lionsgate (NYSE: LGF) for a combination of cash and stock totaling $4.4 billion, creating a global content powerhouse positioned to capitalize on growth opportunities worldwide.

Under the terms of the agreement, each share of Lionsgate common stock will be reclassified into 0.5 voting and 0.5 newly created non-voting shares. Holders of each share of Starz Series A common stock will receive $18.00 in cash as well as 0.6784 of a share of Lionsgate non-voting stock based on a fixed exchange ratio. Based on Lionsgate's 20-trading day volume weighted average price ("VWAP"), as of June 28, 2016, the offer represents a total value of $32.73 per share to Starz shareholders, an 18% premium to Starz's 20-trading day VWAP as of the same date. Holders of each share of Starz Series B common stock will receive $7.26 in cash and 0.6321 of a share of Lionsgate voting stock and 0.6321 of a share of Lionsgate non-voting stock.

The agreement has been approved by the boards of directors of Lionsgate and Starz and will be submitted to their respective shareholders for approval as well as to regulatory authorities. The proposed creation of Lionsgate non-voting stock is also subject to shareholder approval. Closing is expected to occur by year-end.

Baker Botts lawyers acting on behalf of Starz includes: Corporate: Renee Wilm (Partner, New York), Jonathan Gordon (Partner, New York), Buzz McGrath (Partner, New York), Courtney York (Partner, Dallas), Brittany Uthoff (Associate, New York), Justin Blass (Associate, New York), Andrew Ligon (Associate, New York), John Kaercher (Associate, Austin) and Rachel Ratcliffe (Associate, Austin); Finance: Andrew Thomison (Partner, Houston) and Chad Barton (Associate, Houston); Tax: Tamar Stanley (Partner, Washington), Robert Fowler (Partner, Houston), John Lobb (Senior Associate, Houston) and Jessica Stricklin (Associate, Houston); Antitrust: Stephen Weissman (Partner), Paul Cuomo (Partner) and Ryan Foley (Senior Associate).

For additional information visit www.bakerbotts.com

BENNETT JONES

ADVISES STANTEC INC WITH ACQUISITION OF MWH GLOBAL, INC.

- Date Announced: March 28, 2016
- Date Closed: May 05, 2016
- Deal Value: $1,250,000,000

On May 6, 2016, Stantec Inc. (NYSE, TSX: STN), announced that it had completed its previously announced acquisition of Broomfield, Colorado-based MWH Global, Inc. ("MWH") (a global engineering, consulting and construction management firm with special expertise in water and natural resources projects built for infrastructure and the environment) (the "Acquisition"). Stantec acquired all of the issued and outstanding capital stock of MWH for a purchase price of approximately US$793 million.

In connection with the closing of the Acquisition, Stantec completed the financing of $1.25 billion syndicated senior secured credit facilities, comprised of an $800 million senior secured revolving credit facility, and a $450 million senior secured term credit facility (the "Credit Facilities"). The Acquisition and the refinancing of Stantec's existing debt was funded by net proceeds of approximately $786 million drawn under the Credit Facilities, and the net proceeds of approximately $580 million from Stantec's previously announced offering of 19,964,000 subscription receipts, inclusive of 2,604,000 subscription receipts issued pursuant to the exercise in full of the underwriters' over-allotment option.

In respect of the Credit Facilities, Stantec was advised by Bennett Jones LLP (as lead Canadian counsel) with a team led by Mark Rasile, that included Kristopher Hanc, Denise Bright, David Rotchtin, Michelle Seto and Daniel Cipollone (Financial Services/Corporate Finance), Peter Inglis, Jason Banack and Nicholas Chan (Corporate/Commercial), Thomas Bauer (Tax), Carl Cunningham (Employment), Susan Seller (Pensions) and Sarah Gilbert (Environmental).

For additional information visit www.bennettjones.com

CAREY

ADVISES EMPRESA NACIONAL DE ELECTRICIDAD (ENDESA CHILE) IN SHARE PURCHASE AGREEMENT WITH ENAGAS CHILE

SANTIAGO: Carey advised Empresa Nacional de Electricidad (Endesa Chile) in the negotiation and execution of a share purchase agreement with Enagás Chile, subsidiary 100% controlled by the Spanish company Enagás, by which Enagás Chile will acquire the entire stake of GNL Quintero owned by Endesa Chile, corresponding to a 20% shareholding.

The sale of the stake to Enagás Chile is subject to satisfaction of conditions precedent customary for this type of transactions, including the lack of exercise of the first offer right by the other shareholders of GNL Quintero, pursuant to the terms and conditions provided in the shareholders' agreement between the shareholders of such company. It is expected that the closing and transfer of shares take place during the second term of this year.

Carey advised Endesa Chile through a team led by partners Alfonso Silva and Salvador Valdés and associate Cristián Figueroa.

For additional information visit www.carey.cl

GIDE

ADVISES ENABLON SHAREHOLDERS ON SALE TO WOLTERS KLUWER

PARIS, 06 July 2016: Gide has advised all Enablon shareholders on the sale to Wolters Kluwer of Enablon's entire share capital and voting rights. The operation, amounting to over 250 million euros, was finalised on 1 July 2016. Established in 2010, Enablon is active in SaaS solutions dedicated to risk management and sustainable development issues. Enablon employs over 300 people throughout the world (France, United Kingdom, United States, Canada, Australia) and generated a turnover of 45 million euros in 2015.

With this sale operation, Enablon will become an operational unit of Wolters Kluwer's Legal & Regulatory division. Enablon will thus be able to rely on Wolters Kluwer's strong international presence in over forty countries, with a turnover of 4.2 billion euros.

Legal counsel to Enablon shareholders:

Gide M&A: Anne Tolila (partner), Matthias Grolier (counsel), Grégoire Debit and Julien Négroni; Tax: Christian Nouel (partner); Employment: François Vergne (partner), Bénédicte Perier; IP-TMT: Thierry Dor (partner), Jean-Hyacinthe de Mitry, Aurélie Pacaud.

For additional information visit www.gide.com

CLAYTON UTZ

ADVISES SPOOKFISH LTD ON LICENSE, ROYALTY AND EQUITY INVESTMENT BY VISTA EQUITY VIA EAGLEVIEW TECHNOLOGIES

Perth, 17 May 2016: Clayton Utz is advising ASX listed geospatial imagery products and services company Spookfish Ltd (ASX: SFI) in respect of its entry into license, royalty and equity investment agreements with EagleView Technologies Inc, a North American market leading provider of aerial imagery, data analytics and GIS solutions, announced today.

EagleView is a portfolio company of Vista Equity Partners, a leading private equity firm with US$20 billion in capital commitments and a focus on investing in software and technology-enabled businesses.

Under the agreements, Spookfish will provide EagleView with an exclusive long-term licence to operate Spookfish Capture Platform technologies and sell output products in North America. Spookfish will receive a long-term royalty consisting of a fee per square mile captured and a share of revenues generated from Spookfish Capture Systems.

EagleView will invest A$6m via unsecured, interest free convertible notes which convert into a 10% interest in Spookfish, and receive options to acquire an interest of up to 9.9% of Spookfish upon satisfaction of revenue milestones. The issue of options is subject to any necessary Spookfish shareholder approvals.

Clayton Utz Perth corporate partner Mark Paganin and senior associate Stephen Neale are leading the firm's team with support from special counsel David Benson, senior associate Annie Atkins and lawyer Thomas Parker.

For additional information visit www.claytonutz.com

HOGAN LOVELLS

ADVISES ON BROWN-FORMAN'S €300 MILLION AND £300 MILLION NOTES OFFERINGS

WASHINGTON, 7 July 2016 – Hogan Lovells advised Brown-Forman Corporation in its recently completed offering and sale of €300 million aggregate principal amount of 1.200% Notes due 2026 and £300,000,000 aggregate principal amount of 2.600% Notes due 2028. Barclays Bank PLC, Citigroup Global Markets Limited, Deutsche Bank AG, London Branch and Merrill Lynch International acted as joint book-running managers and representatives of the several underwriters.

Both offerings were launched and priced on the same day, 30 June, only one week after the U.K.'s referendum on Brexit. The transactions closed simultaneously on 7 July 7. The Sterling notes deal was the first by a U.S.-based corporate issuer post-Brexit referendum.

Brown-Forman is one of the largest American-owned spirits and wine companies and sells its brands, including Jack Daniel's Tennessee Whiskey, in more than 160 countries. Brown-Forman intends to use the net proceeds from these offerings for general corporate purposes and to repay commercial paper indebtedness, a portion of which was incurred in connection with its recent acquisition of The BenRiach Distillery Company Limited, which brought three Single Malt Scotch Whisky brands, The GlenDronach, BenRiach, and Glenglassaugh, into Brown-Forman's growing whiskey portfolio.

The Hogan Lovells team advising Brown-Forman on the notes offerings was led by Washington, D.C.-based partner John Beckman, with support from partners Eve Howard (Washington, D.C) and Sylvain Dhennin (London). George Naya and Liz Banks (both Washington, DC) were the lead associates on the team.

For more information, see www.hoganlovells.com

NAUTADUTILH

CORE LABORATORIES COMPLETES FAST-TRACK USD$197.8 MILLION EQUITY OFFERING
CAL COUNSEL FOR CREDIT SUISSE US$220 MILLION LOAN TO PERUVIAN INFRASTRUCTURE CONGLOMERATE

AMSTERDAM, 27 June 2016: NautaDutilh assisted Core Laboratories N.V. with a USD 172 million equity offering which launched and closed within an unprecedented one week period. This was followed by the cross-listing of the shares issued under the offering on the New York Stock Exchange and Euronext Amsterdam. Ten days later, the deal was upsized to a total of USD 197,8 million.

Core Laboratories is a leading provider of reservoir description, production enhancement, and reservoir management services to the world's major, national, and independent oil companies in order to optimise recovery from existing oil fields.

The deal team was led by Jaap Stoop and Paul van der Bijl and also consisted of Dewi Walian and Jules van de Winckel.

For additional information visit www.nautadutilh.com

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Skrine

Brigard & Urrutia

理律法律事務所 — Lee and Li — Attorneys-at-Law

SyCip Salazar Hernandez & Gatmaitan

/Carey

Clayton Utz

Mulla & Mulla & Craigie Blunt & Caroe — Advocates, Solicitors and Notaries

TozziniFreire Advogados

ALLENDE & BREA

First Renewable Energy Public Bidding Process

On May 18, 2016, the Executive Branch of Argentina announced a public bidding process for the generation of electricity from renewable sources, the first one of a series to be made within the new Regulatory Framework for the Promotion of Use of Renewable Energy in Electric Power Generation (the "Regulatory Framework"), which sets forth milestones for the satisfaction of electric power demand from renewable sources. Pursuant to the Regulatory Framework, the percentage of electric power demand to be satisfied from renewable sources should increase to 8% by the end of 2017 and continue to grow up to 20% by 2025. The launch of the public bidding process includes the publication of the preliminary bidding specifications and power purchase agreement (the "Preliminary Documents") to be entered into by the winners of the bidding process and the Wholesale Electricity Market Administration Company ("CAMMESA", for its Spanish acronym).

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1. Source and Total Power to be Tendered

According to the Preliminary Documents, the type of source and total power to be tendered in this first round are the following:

Source	**Power Requested**
Wind	600 MW
Solar	300 MW
Biomass	65 MW
Biogas	15 MW
Mini hydro	20 MW
Total	**1.000 MW**

2. FODER Trust Fund Guaranty

The Regulatory Framework also sets forth creation of a Trust Fund for the Development of Renewable Energies ("FODER", for its Spanish acronym), in an effort to finance, make capital contributions and guaranty projects of electric power generation from renewable sources approved by the Ministry of Energy and Mining. The Preliminary Documents set forth that the FODER will guarantee to the power producers the payment of an amount equivalent to the payments for the following 12 months under the power purchase agreements awarded, on a rolling basis.

3. World Bank Guaranty

The Preliminary Documents provide that the World Bank will issue a US$500 million guarantee that would protect the FODER from the potential failure of the Ministry of Treasury and Public Finance to provide funds to the FODER in case the FODER is required to pay certain termination amounts to the project company in connection with the proposed power purchase agreement, and the FODER does not have the funds allocated to do so. The guarantee will be allocated to the different projects on a US$500,000 per MW basis.

4. Consultation Process

The Preliminary Documents have been made available to the general public so that, during a period of 20 calendar days as from May 18, 2016, any interested party may make comments or suggestions in relation to the Preliminary Documents to CAMMESA.
The publication of the final documents and start of the term to make offers is expected for July 1, 2016.

* * *

For additional information on this matter or any other matter related with Energy and Natural Resources in Argentina please contact Marcos Patron Costas at mpc@allendebrea.com.ar or (+54 11) 4318-9943.

For further information on this topic please contact Marcos Patrón Costas

CLAYTON UTZ

23 JUN 2016

New duty and land tax surcharges for foreign buyers of land in Australia

Foreign persons purchasing residential real estate in New South Wales will now have to pay a duty surcharge from 21 June 2016 and land tax surcharge from and including the 2017 land tax year, in measures announced in this week's State Budget.

The Treasurer also announced that foreign investors will no longer be entitled to the 12 month deferral for the payment of stamp duty for off-the-plan purchases of residential property. Foreign persons will not be provided with a tax-free threshold for the land tax surcharge, nor will there be an exemption for the principal place of residence.

This brings New South Wales into line with the other States on the eastern seaboard.

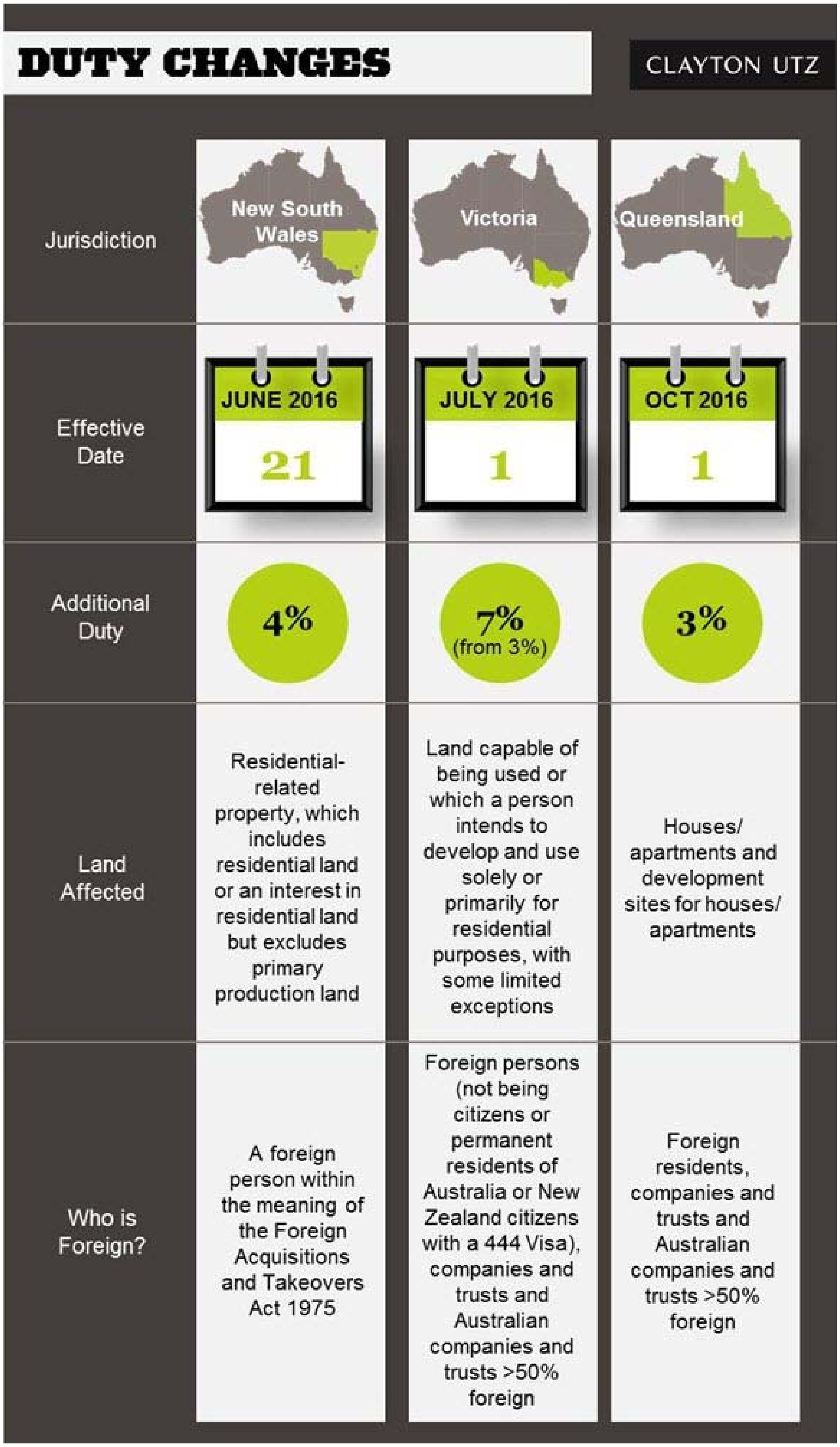
Victoria

From 1 July 2016, the State Government is proposing that Victoria will have a 7% foreign investor surcharge on residential stamp duty (increasing from the current 3%). From 1 January 2017, it is also expected that the existing 0.5% land tax surcharge will increase to 1.5%.

Queensland

Queensland also recently announced a 3% duty surcharge on the foreign acquisition of residential property, with effect from 1 October 2016.

As a result, foreign entities should carefully check the jurisdiction specific requirements for surcharge duty and land tax before entering into new transactions.



Duty surcharge at a glance

Rate of duty surcharge

New South Wales: 4% surcharge from 21 June 2016.

Victoria: 7% surcharge proposed from 1 July 2016 (increasing from 3%).

Queensland: 3% from 1 October 2016 - known as AFAD (Additional Foreign Acquirer Duty).

Type of property affected

New South Wales: Residential-related property, which includes:

- residential land in New South Wales;
- an option to purchase residential land in New South Wales (including nominations or assignment of the option).

Residential land includes:

- a parcel of land on which there are one or more dwellings;
- a strata lot;
- a utility lot;
- a parcel of vacant (or substantially vacant) land that is zoned for residential purposes,

but does not include any land used for primary production.

The definitions of "residential-related property" and "residential land" are complex and the above summary is intended as a guide only.

Victoria: For contracts entered into on or after 1 July 2015 but before 1 July 2016, residential property is either:

- land that has a building on it; or
- land that is vacant but on which a foreign purchaser intends to construct a residential building.

For contracts entered into on or after 1 July 2016, it is proposed that residential property include:

- land;
- land which includes a building, or part of a building, that a person intends to refurbish or extend;
- land on which a person intends to construct a building;
- land in respect of which a person has undertaken or intends to undertake land development for the purposes of constructing a building,
  to be used solely or primarily for residential purposes and which may lawfully be used in that way. Some exceptions are expected to apply for commercial residential premises, residential care facilities, supported residential services and retirement villages.

Queensland: Residential land is land that is or will be solely or primarily used for residential purposes, and on the land:

- there is or will be a building designed or approved by a Council as a single family residence;
- there is or will be a number of lots in a strata title building;
- an existing building will be renovated to be a house or apartment complex,
  or development land in respect of any of the above.

Who does it affect?

New South Wales: A foreign person within the meaning of the Foreign Acquisitions and Takeovers Act 1975 of the Commonwealth, as modified for individuals by the Duties Act (section 104J), being:

- an individual not ordinarily resident in Australia (except for Australian citizens or a New Zealand citizen who holds a Special Category Visa (Subclass 444)); or
- a corporation or trustee of a trust in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest (20%); or
- a corporation or trustee of a trust in which two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest (40%); or
- a foreign government; or
- any other person, or any other person that meets the conditions, prescribed by the Foreign Acquisition and Takeovers Regulation, which includes a foreign government investor.

Victoria: Foreign purchasers, who are foreign natural persons, being persons who are not:

- citizen or permanent residents of Australia; or
- New Zealand citizens with a Special Category Visa (Subclass 444).

Foreign corporations, including:

- corporations incorporated outside Australia; and
- corporations incorporated in Australia if a foreign natural person, another foreign corporation or a trustee of a foreign trust and their associates have a controlling (> 50% or the ability to control) interest in the corporation.

Trustees of a foreign trusts, being trustees of trusts in which a substantial interest (>50% or the ability to control) is held by a foreign natural person, a foreign corporation or the trustee of another foreign trust and their associates, noting that any foreign beneficiary of a discretionary trust will be deemed to hold the maximum interest in the trust that the trustee has power to distribute to it.

Queensland: Foreign persons are:

- Individuals who are not Australian citizens or permanent residents (including the Subclass 444 visa New Zealanders);
- Companies incorporated outside Australia, or Australian companies in which foreign persons have an interest of 50% or more; and
- A trust where 50% of the "trust interests" are held by foreign persons. For a unit trust this will simply mean looking at the unit register, and in the case of discretionary trusts, identifying the "takers in default" to see if any are foreign persons. The trust interest is simply the proportion available to each taker in default - in a case where there were two takers in default, if one was a foreign person the trust would be a foreign person also.

Are indirect acquisitions caught?

New South Wales: Yes. An acquisition by a foreign person of an interest in a landholder which has an interest in residential land will be subject to the surcharge where the acquisition is otherwise dutiable.

Victoria: Yes. Any acquisition by a foreign purchaser of an interest in a landholder which has an interest in residential property will be subject to the surcharge where the acquisition is otherwise dutiable.

Queensland: Yes. Any acquisition by a foreign person of an interest in a landholder which has an interest in residential land will be subject to the surcharge where the acquisition is otherwise dutiable.

When does it apply?

New South Wales: Surcharge duty transactions entered into on or after 21 June 2016.

Victoria: Contracts entered into (or relevant acquisitions made) on or after 1 July 2015.

Queensland: Contracts entered into on or after 1 October 2016, whether or not pursuant to a pre-existing option.


LAND TAX CHANGES

CLAYTON UTZ

Jurisdiction	New South Wales	Victoria	Queensland
Effective Date	DEC 2016 midnight 31	JAN 2017 1	N/A
Additional Land Tax	.75%	1.5% (⇧from .5% for 2016 land tax year)	Nil
Land Affected	Residential land	All land subject to land tax in Victoria	N/A
Who is Foreign?	A foreign person within the meaning of the Foreign Acquisitions and Takeovers Act 1975	Absentee Persons: ‣ People who are not Australian or New Zealand citizens or permanent residents of Australia ‣ Foreign companies and Australian companies > 50% foreign ‣ Trusts with at least one absentee beneficiary	N/A

Land tax surcharge at a glance

Rate

New South Wales

1.5% surcharge from 2017 land tax year

- No tax-free threshold for the surcharge
- No principal place of residence exemption

Victoria

- 0.5% from 1 January 2016
- 1.5% proposed from 1 January 2017

Queensland

No land tax surcharge to be applied in Queensland

Type of property affected

New South Wales: Surcharge land tax is payable in addition to any land tax payable in respect of the residential land under the other provisions of this Act, and is so payable even if no land tax is payable under those other provisions.

Residential land has the same meaning as for the amendments to the *Duties Act* for the surcharge duty.

Victoria: All land subject to land tax in Victoria.

Who does it affect?

New South Wales: The land tax surcharge applies to the same foreign persons as the surcharge duty.

Victoria: "Absentee persons", being:

- A natural person absentee: a person that is not an Australian or New Zealand citizen or a permanent resident of Australia, who does not ordinarily reside in Australia;

An absentee corporation: a corporation incorporated outside Australia or a corporation in which an absentee person, or that person together with another absentee person, has a controlling interest; or

A trustee of an absentee trust: a trust that has at least one absentee beneficiary.

When does it apply?

New South Wales: From midnight on 31 December 2016

Victoria: From 1 January 2016.

Responding to the duties surcharge

Purchasers of residential land in NSW, Victoria and Queensland should carefully consider whether they are "foreign" for the purpose of the relevant jurisdiction and, if so, whether the surcharge will apply to the land or interest being acquired.

If the surcharge applies, purchasers will then need to carefully consider what consequences this might have on the purchase price and the transaction structure more generally (for example, nominations or assignments of options to purchase residential land).

In Victoria and Queensland, purchasers should also consider whether they are eligible for a discretionary exemption from the Commissioner. For example, in Victoria, the Treasurer and Commissioner have discretion to exempt persons where the activities of the entities they control or have a substantial interest are involved in the development or re-development of property that adds to the supply of housing stock in Victoria. There is currently no similar exception in NSW, although it is anticipated that there may be a similar process in Queensland.

Queensland retains the lowest duty rate on the East Coast, and moreover there is still a window of opportunity to invest in Queensland property without the duty surcharge applying until 1 October 2016.

Responding to the land tax surcharge

Purchasers of residential land in NSW and Victoria will also need to consider the long-term holding costs for residential land (in NSW) and all land subject to land tax (in Victoria) having regard to the stamp duty surcharge.

In NSW, for residential developers, along with the abolition of the 12 month deferral for the payment of stamp duty for off-the-plan purchases of residential property, two other changes could have an impact on off-the-plan sales: the abolition of both principal place of residence exemption and the tax free threshold for land tax for foreign persons.

Bennett Jones

Ontario Encourages Gender Diversity Targets for Boards

June 09, 2016 | Adrienne Moore, Juliamai Giffen, Will Osler and Harinder Basra

The Ontario Government has announced a target that women comprise at least 40 percent of appointments to provincial boards and agencies by 2019 and is encouraging businesses to set gender diversity targets for their boards of directors.

The announcement follows the June 7, 2016, release of a report prepared by Catalyst Canada and commissioned by the Ontario Government. The government accepted all 11 recommendations set out in the report, including the following recommendations for companies:

- set the following targets by the end of 2017: 30 percent women board directors for all issuers that currently have at least one woman director; and one woman board director for all issuers that currently have no women directors;
- achieve the applicable target within three to five years;
- use director term and/or age limits to facilitate board renewal;
- establish a written policy describing the issuer's plans to increase representation of women on its board;
- require that the list of potential board candidates and interview pool for board positions consist of at least 50 percent women;
- remove restrictions on external board service and implement programs to match talent with board vacancies for both executive and non-executive director positions; and
- address gender equity at all levels of the company.

The government also accepted the recommendation that it encourage companies to set the specific targets identified in the report and the recommendation that it consider legislative or regulatory approaches if sufficient progress is not made toward the 30 percent target.

A steering committee will be convened by the government to advise on the implementation of the recommendations in the report. The committee members will include, among others, the Ontario Minister of Finance and the Chair of the Ontario Securities Commission.

The current “comply or explain” regime requires TSX-listed issuers to disclose the following gender diversity policies and practices in its annual filings or explain why it has not adopted such policies and practices:

- director term limits or other board renewal mechanisms;
- any written policy regarding the representation of women on the board (and if the issuer has a policy, a summary of it and disclosure of implementation, achievement of objectives and measurement);
- consideration of the level of representation of women in the director identification and selection process;
- consideration of the level of representation of women in executive officer appointments;
- any targets voluntarily adopted regarding the representation of women on the board and in executive officer positions; and

- the number and proportion of women on the issuer's board and in executive officer positions with the issuer and its major subsidiaries.

A review by certain Canadian securities regulators of over 700 TSX-listed issuers and their compliance with the "comply or explain" regime found that, of the issuers reviewed:

- 49 percent had at least one woman on their board;
- 15 percent added one or more women to their board in the past year;
- 60 percent with a market capitalization of greater than $2 billion had two or more women on their board;
- 62 percent with market capitalization under $1 billion had no women on their board;
- 7 percent set a target for women directors;
- 19 percent adopted director term limits;
- 56 percent adopted a mechanism of board renewal other than director term limits;
- more than 30 percent with a market capitalization greater than $2 billion adopted a written policy for identifying and nominating women directors; and
- of those issuers with written policies, 48 percent adopted or updated those policies in the past year.[1]

Bennett Jones will continue to monitor disclosure requirements for gender diversity on boards and provide updates on further developments.

Notes

1. Canadian Securities Administrators, *CSA Multilateral Staff Notice 58-307 Staff Review of Women on Boards and in Executive Officer Positions – Compliance with NI 58-101 Disclosure of Corporate Governance Practice* (September 28, 2015).

NEWSALERT

New guideline for the supervision and regulation of the nutritional composition and advertisement of foodstuff

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

García, Fernando
Director
+56 2 2928 2665
fgarcia@carey.cl

Gillmore, Ignacio
Associate
+56 2 2928 2612
igillmore@carey.cl

Hube, Constanza
Associate
+56 2 2928 2665
chube@carey.cl

Recently the "guideline for the supervision and regulation of the nutritional composition of foodstuff and its advertisement ("**the guideline**") was published by the Undersecretary of Health.

The guideline´s main objective is to, "guide the process of supervision and regulation of foodstuff", taking into consideration the upcoming implementation of Decree No. 13 (June 27, 2016), which modifies the Health Regulations for Food Products.

This document puts special emphasis on two main articles of the Decree No. 13 (articles 120 bis and 110 bis), which regulate the use of the warning sign "HIGH IN", advertisements targeted at children who are 14 years of age or younger and sales and marketing of foodstuff in pre-school, elementary and secondary educational institutions.

Thus, some relevant aspects raised by the guideline are related to the advertisement of "HIGH IN" foods and the difference between fair use of a registered trademark and advertising activities.

Regarding advertising, the guideline distinguishes between activities related to marketing and those that involve mass media advertisements. In this context, the guideline refers to the **shape of the product** (for example a cookie or a candy with an animal shape). The guideline allows the use of these kinds of shapes and the use of the product's image in the packaging, provided it is a **realistic** depiction. In this regard, the guideline provides that, "*the elements directed at children 14 years of age or younger and which have been registered as trademarks, may be used in the labeling and wrapping in **the same way in which they have been accepted in their trademark registration,** otherwise these elements will be considered as advertisement. On the contrary, fantastic or unreal images of the product, such as disproportionate images will be considered as advertising directed at children who are 14 years of age or younger"* (emphasis added in the guideline).

Furthermore, the guideline states that **elements registered as trademarks** may be used in the labeling or packaging of the products but only if used in the same way in which they have been registered, otherwise they will be considered as advertising. Indeed, the guideline sustains that, "*the elements directed at children 14 years of age or younger and which have been registered as trademarks, may be used on the packaging, wrapping or labeling in the same way in which they **have been accepted in their trademark registration,** otherwise these elements will be considered as advertisement* (emphasis added in the guideline)".

Please take into consideration that, although the guideline is a helpful resource to know the criteria of the health authority in light of possible future infringement procedures, the guideline is not binding and thus it is not possible to assume that this criteria will remain consistent in the future.

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

FTAs between Colombia and Korea and between Colombia and Costa Rica will soon enter into force

The FTA between Colombia and Korea will enter into force on July 15. This is Colombia's first FTA with an Asian country. Through this FTA, Colombia aims to strengthen trade relations with one of the most dynamic regions of the world as well as to attract investment.

This FTA is of great importance for the Colombian agricultural sectors, as Korea is a major importer of these goods. Also, Colombia expects to attract investment in sectors such as high-tech and infrastructure. Moreover, this FTA establishes an immediate removal of 98% of tariff lines for industrial products.

On the other hand, on August 1, the FTA between Colombia and Costa Rica will enter into force. This trade agreement is the result of Colombian efforts to achieve preferential access in different markets for products and services.

The FTA with Costa Rica establishes the conditions for market access of goods between the two countries and includes modern rules on investment protection and trade in services. It also covers disciplines such as public procurement and cooperation, among others. Regarding tariffs, this FTA provides tariff reliefs for 81% of agricultural products and 98% of industrial goods. In addition, about 75% of these goods are granted immediate tariff elimination.

This FTA will consolidate trade relations with Central America, and will complement the existing FTA between Colombia and the Northern Triangle (El Salvador, Guatemala and Honduras).

Our practice of Customs and International Trade will gladly provide more information on these trade agreements, as well as on how to benefit from them.

For more information, please contact:

- José Francisco Mafla

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 Disclaimer

www.bu.com.co

COSTA RICA

COSTA RICA MOVES FORWARD TO □ECOME PART OF THE OECD

Since early 2010, Costa Rica began an interinstitutional coordination process, led by the Ministry of Foreign Trade, focused on becoming part of the OECD. In 2013, the country expressed formal interest in becoming a member of the organization, which led to a formal invitation to begin the accession process in April of 2015. During the next two years Costa Rica will be evaluated in 22 areas (e.g. Taxes, Competition, Anticorruption) by the organization´s committees through accession reviews. This process is expected to end in 2018 with the approval of the final accession protocol.

What is the OECD and how it works?

The Organization for Economic Co-operation and Development´s mission is to promote policies aimed at improving economic and social well-being of people around the world. It was founded in 1961 and has 34 member countries. It has been called “The Club of Rich Countries” because its members represent 70% of the world market. To become a member, countries must be invited. It also promotes a model of inclusive economic growth respectful with the environment, and seeks a more efficient and transparent Government.

The challenges Costa Rica faces?

Costa Rica faces multiple challenges during the accession plan; these challenges are related to three main areas: adjusting regulations to ensure OECD standards, improved public policies to have a more efficient public expenditure and adjusting – improving indicators to OCDE´s standards.

If you have any inquiry on this issue, or if you would like more information on how this process may affect your business, our practice of Governmental Affairs will gladly assist you.

Laura Pérez
Governmental and International Affairs Coordinator
lperez@ariaslaw.co.cr

arias & muñoz

EL SALVADOR

GUARANTEES PROVIDED BY THE STABILITY FOR INVESTMENT LAW

The Stability for Investment Law guarantees legal security to investors by implementing Legal Stability Contracts, the Law is applicable to sectors such as energy, telecommunications, manufacturing, agribusiness, aeronautics, logistics and health services, among others.

Applicants shall file a request within the Promoter Export and Investment Agency of El Salvador (PROESA by its acronym in Spanish), once the request is approved a Legal Stability Contract is executed between the Ministry of Economy and the investor, after the execution of such Contract the investor shall have the right to tax stability at the national level, tax stability at the municipal level, stability in tax exemptions, customs procedures stability, stability in the free transfer abroad of funds from foreign investment, among others.

This law is intended to attract and promote local and foreign investment through a legal framework that ensures legal certainty to investors, by implementing Legal Stability Contracts.

For any further information regarding the benefits granted by this Law and who can benefit from it, please contact us.

Luisa Rivas
Associate
Luisa.Rivas@ariaslaw.com

ABNR

COUNSELLORS AT LAW

NEWS DETAIL

03/05/2016

INDONESIAN GOVERNMENT ISSUES PRESIDENTIAL REGULATION TO ACCELERATE ELECTRICITY INFRASTRUCTURE DEVELOPMENT

On January 19, 2016, the Government of the Republic of Indonesia (GoI) promulgated Presidential Regulation No. 4 of 2016 concerning Acceleration of Electricity Infrastructure Development (“PR 4/2016”). The issuance of PR 4/2016 is part of the GoI’s commitment to ensure the success of its 35,000 MW program.

PR 4/2016 outlines the rules of the game for the implementation of the Electricity Infrastructure Development (EID) by PT Perusahaan Listrik Negara (Persero) (PLN). It provides PLN with two options in managing the EID projects: by self-managing or by way of electricity supply cooperation through PLN’s subsidiary or with power plant developers (PPDs). The first option of self managing may be taken if the following conditions are met: (i) PLN has the financing capability to fund the equity and the project is has low cost fund resources, (ii) the construction risks are low, (iii) availability of the fuel supply, (iv) availability of a peaker to ensure a reliable operation and/or (v) development of an isolated system.

Electricity supply cooperation through PLN’s subsidiary is applicable if PLN plans to cooperate with a foreign state-owned company through a joint venture. The cooperation with the foreign state-owned company is to be made for the purpose of obtaining funding and/or energy supply for the implementation of the EID.

The cooperation with PPDs is applicable to electricity infrastructure projects which meet the criteria of requiring vast funding, having high construction and infrastructure risks, and requiring high fuel supply, new and renewable energy power plant, the expansion of an existing power plant owned by a PPD and/or the development of a power plant in a new location by several PPDs.

Both options of self managing and the electricity supply cooperation are eligible for a government guarantee. For the guarantee, the President Director of PLN is to submit an application letter to the Minister of Finance. The implementation provisions on the government guarantee will be issued by the Minister of Finance.

The GOI shows its support by stipulating in the PR 4/2016 the prioritization of the utilization of new and renewable energy for the implementation of the EID, and the provision of easy processes of the licenses and permits through the One Stop Services (PTSP) of the Investment Coordinating Board (BKPM). PR 4/2016 also stipulates the prioritization of the GOI’s land procurement for the EID.
(*by: Serafina Muryanti H.P*)

TURNING THE TABLES ON PERPETRATORS OF SEXUAL HARASSMENT[1]

Foo Siew Li explains the introduction of the tort of sexual harassment in Malaysia

The recent ruling of the Federal Court in *Mohd Ridzwan bin Abdul Razak v Asmah binti Hj Mohd Nor* (Civil Appeal No: 01(f)-13-06/2013(W)) has introduced the tort of sexual harassment into our legal system.

BACKGROUND FACTS

Mohd Ridzwan bin Abdul Razak ("Appellant") and Asmah binti Hj Mohd Nor ("Respondent") were employees of Lembaga Tabung Haji ("Employer"). The Respondent was the subordinate of the Appellant and reported directly to him.

Following a complaint of sexual harassment by the Respondent against the Appellant, the Employer inquired into the matter and issued a strong reprimand to the Appellant.

Aggrieved by the complaint which the Appellant claimed to be defamatory of him and led to his contract with the Employer not being renewed, the Appellant commenced an action against the Respondent in the High Court seeking, *inter alia,* a declaration that he had not sexually harassed the Respondent and that he had been defamed by her.

The Respondent filed her defence, detailing the vulgar words and other demeaning remarks she alleged were uttered by the Appellant, and relying largely on a psychiatrist's report, counterclaimed for damages predicated on sexual harassment.

DECISION OF THE HIGH COURT

The High Court made a finding of fact that the allegation of sexual harassment had been established and dismissed the Appellant's claim. The Court also entered judgment for the Respondent's counterclaim and awarded her RM100,000.00 as general damages and RM20,000.00 as aggravated and exemplary damages.

DECISION OF THE COURT OF APPEAL

The Court of Appeal dismissed the Appellant's appeal and affirmed the decision of the High Court. While the learned High Court judge did not state the cause of action relied upon when allowing the counterclaim, the Court of Appeal held that while not in accordance with the pleadings, the cause of action was the tort of intentionally causing nervous shock.

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[1] This article was first published in Issue 2/16 of LEGAL INSIGHTS, a Skrine Newsletter.

Unit No. 50-8-1, 8th Floor, Wisma UOA Damansara, 50 Jalan Dungun, Damansara Heights, 50490 Kuala Lumpur, Malaysia.
T: +(603) 2081 3999 F: +(603) 2094 3211 E: skrine@skrine.com W: www.skrine.com

DECISION OF THE FEDERAL COURT

The Appellant was granted leave to appeal to the Federal Court on the following question of law:

"Is there a valid cause of action for a civil claim on the grounds of sexual harassment under the existing laws of Malaysia?"

The Federal Court considered the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace 1999 ("the Code"), which is not legally binding, and the Employment (Amendment) Act 2012 which introduced a new definition of sexual harassment and added new provisions into the Employment Act 1955 to deal with sexual harassment in the workplace. Their Lordships observed that the Code and the legislation did not confer a cause of action for a sexual harassment victim against the harasser. The Court further observed that there had been no reported case pertaining to the Employment Act 1955 where the individual victim has claimed civil remedies from an alleged perpetrator for sexual harassment.

After much deliberation, their Lordships "*arrived at a decision to undertake some judicial activism exercise and decided that it was timely to import the tort of harassment into our legal system with sexual harassment being a part of it.*"

Their Lordships then proceeded to consider what constitutes sexual harassment. The Federal Court referred to section 2 of the Employment Act 1955, which defines "sexual harassment" as *"any unwanted conduct of a sexual nature, whether verbal, non-verbal, visual, gestural or physical, directed at a person which is offensive or humiliating or is a threat to his well-being, arising out of and in the course of his employment*."

Their Lordships were of the view that the definition in the Employment Act 1955 satisfies the three main elements of sexual harassment, namely: (i) the occurrence of conduct that is sexual in nature; (ii) the conduct being unwanted; and (iii) the conduct is perceived as threatening the victim's ability to perform her job.

After acknowledging that the law of tort in Malaysia is still very much based on English common law principles, their Lordships considered the approach taken in England, Singapore and Hong Kong. The Court concluded that while there is uncertainty in England as to the existence of the tort of harassment, this tort has been recognised in Singapore and Hong Kong in the Singapore cases of *Malcomson Nicholas Hugh Bertam v Naresh Kumar Mehta* (2001) 3 SLR (R) 379 and *Tee Yok Kiat v Pang Min Seng* (2013) SGCA 9 and the Hong Kong case of *Lau Tat Wai v Yip Kuen Joey* (2013) HKCFI 639 respectively.

After considering, *inter alia*, the above-cited cases, the Federal Court stated that "*the recognizable hallmarks of sexual harassment are that they are unwelcome, taking the form of verbal and even physical, which include sexual innuendos, comments and remarks, suggestive, obscene or insulting sounds, implied* *sexual threats, leering, oogling, displaying offensive pictures, making obscene gestures etc. These overtures all share similar traits, in that they all have the air of seediness and cause disturbance or annoyance to the victim (short of a recognized psychiatric illness or physical harm).”*

The Court noted that the Court of Appeal had agreed that the vulgar and sexually explicit words complained of by the Respondent would clearly amount to sexual harassment. Their Lordships were also satisfied that the lecherous behaviour of the Appellant would likewise constitute sexual harassment.

However, the Federal Court disagreed with the Court of Appeal’s view that the acts of sexual harassment in the present case had caused sufficient adverse psychological effect to the Respondent to fall under the tort of intentionally causing nervous shock. Their Lordships held that even though a singular act is sufficient to establish a tort of intentionally causing nervous shock, being a more demanding tort, an aggrieved person must establish that she has suffered physical harm, which, on a balance of probabilities, was not proven in this case.

The Federal Court felt that by proceeding on the basis of the tort of intentionally causing nervous shock, the Court of Appeal had missed the opportunity to discuss the applicability of the tort of harassment.

Their Lordships reiterated that the introduction of the tort of harassment can be justified on the various grounds, including the following:

(1) the tort of sexual harassment had been pleaded and ventilated in the High Court;

(2) the tort of intentionally causing nervous shock was never pleaded in the counterclaim;

(3) there was insufficient evidence or reason to introduce and establish the tort of intentionally causing nervous shock; and

(4) there were more than ample evidence and sufficient reasons to import and establish the tort of sexual harassment.

Their Lordships then addressed the following related issues that were ventilated before the Court:

(1) the requirement for corroboration: Their Lordships held that there was no hard and fast rule that corroboration is required in a tort of sexual harassment case although like in any civil case, the rule of evidence must be stringently upheld;

(2) adequacy of the pleadings: The Court was satisfied that the cause of action of sexual harassment had been adequately pleaded by the Respondent; and

(3) entitlement to damages: Although the Court was not satisfied that the Respondent’s suffering had attained the level of physical harm to qualify for the tort of intentionally causing nervous shock,

Unit No. 50-8-1, 8th Floor, Wisma UOA Damansara, 50 Jalan Dungun, Damansara Heights, 50490 Kuala Lumpur, Malaysia.
T: +(603) 2081 3999 F: +(603) 2094 3211 E: skrine@skrine.com W: www.skrine.com

their Lordships were of the view that it was reasonable in the circumstances for the High Court to award general and aggravated damages for the proven tort of sexual harassment.

The Federal Court, having freshly introduced the tort of sexual harassment, accordingly refrained from answering the leave question and dismissed the Appellant's appeal.

CONCLUSION

The Federal Court concluded its judgment by stating, *"Sexual harassment is a very serious misconduct and in whatever form it takes, cannot be tolerated by anyone. In whatever form it comes, it lowers the dignity and respect of the person who is harassed, let alone affecting his or her mental and emotional well-being. Perpetrators who go unpunished, will continue intimidating, humiliating and traumatising the victims thus resulting, at least, in an unhealthy working environment."*

This decision represents a high-water mark in Malaysian law. First, their Lordships must be commended for consciously embarking on a course of judicial activism to introduce the tort of harassment (which includes sexual harassment) into our legal system.

Secondly, the message from the apex court of Malaysia is loud and clear: sexual harassment at the workplace cannot and will not be tolerated. While the Code and the Employment (Amendment) Act 2012 were well-intentioned, the introduction of a civil remedy will enable victims of sexual harassment to potentially turn the tables on perpetrators of sexual harassment.

This landmark decision heralds a welcomed change and a step towards the creation of a safer working environment for the Malaysian workforce.

FOO SIEW LI (foo.siewli@skrine.com)
21 June 2016

Siew Li is a Senior Associate in the Dispute Resolution Division of SKRINE. Her practice areas include employment and industrial relations law, and shipping and maritime law.

Unit No. 50-8-1, 8th Floor, Wisma UOA Damansara, 50 Jalan Dungun, Damansara Heights, 50490 Kuala Lumpur, Malaysia.
T: +(603) 2081 3999 F: +(603) 2094 3211 E: skrine@skrine.com W: www.skrine.com

NautaDutilh

Corporate

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Four important new laws applicable to businesses and directors to enter into effect on 1 July

Thursday 30 June 2016

On 1 July 2016 four important new laws applicable to businesses and directors will enter into effect. Two of these relate to the combatting of bankruptcy fraud: the Directors Disqualification Act and the Bankruptcy Fraud Criminalisation Act. Another new law is the "House for Whistleblowers" Act, which creates a new government agency for the investigation of suspected wrongdoings in an organisation at a whistleblower's request, increases the legal protection of whistleblowers and requires organisations with at least 50 employees to establish a "speak up" procedure. The fourth new law requires certain enterprises to file their annual accounts with the trade register electronically.

Disqualification of directors

The Directors Disqualification Act (Wet civielrechtelijk bestuursverbod) will amend the Bankruptcy Act to make it possible for a court to ban a current or former managing director (or de facto director) of a legal entity that goes bankrupt after 1 July 2016 from acting as a managing or supervisory director. The ban may be imposed if, in the three years preceding the bankruptcy:

- the director has been held liable for clear mismanagement that was an important cause of the bankruptcy;
- the director has performed a voluntary juristic act (such as the sale of assets for less than their market value or the granting of security to creditors) which has been set aside by a court on the grounds that it has harmed creditors;
- the director has fallen seriously short in the performance of his obligation to provide information to and cooperate with the bankruptcy trustee;
- the director has been involved in two other bankruptcies in which his conduct was culpable; or
- an irrevocable penalty has been imposed on the legal entity or director for acts constituting intentional misconduct or gross negligence in violation of the tax return rules.

A request to the court to impose such a ban can be filed by the bankruptcy trustee or the Public Prosecutors' Office. For a maximum period of five years, the director may not be appointed/re-appointed as either managing or supervisory director of the legal entity in question or any other legal entity. The ban in principle also applies to all current positions as managing or supervisory director. The director's name will be put on a public list to be maintained as part of the Trade Register; a bill providing for this is expected to be submitted to the lower house of Parliament (Tweede Kamer) this autumn. If all goes according to plan, the list will have been established by the time bans begin to be imposed.

The new law underlines the importance of complying with the rules on proper management, such as the requirement to maintain proper corporate books and records and to publish the annual accounts before the statutory deadline. If a legal entity is in financial trouble, any proposed transaction should be examined to determine whether it will unlawfully harm creditors. Appointments in violation of the new law will be null and void. As stated in the legislative history, the Chamber of Commerce has a monitoring role when it comes to the registration of new managing directors and supervisory directors. Nevertheless, it is important to check the Trade Register as a standard part of the selection procedure for new directors.

Bankruptcy Fraud Criminalisation Act (Wet herziening strafbaarstelling faillissementsfraude)
Effective 1 July 2016, amendments to the Criminal Code, Code of Criminal Procedure and Economic Offences Act will improve the tools available under Dutch criminal law to combat bankruptcy fraud. The provisions imposing criminal liability for failing to make and retain proper records and furnish them to the bankruptcy trustee have been clarified and strengthened. Even in the absence of intent, an individual, managing director, supervisory director or de facto managing director now risks criminal sanctions for non-compliance with the record-keeping obligations. If, for example, record-keeping activities are outsourced and a managing or supervisory director does not exercise the requisite supervision, his conduct will be culpable. The amendments include new provisions under which a managing director or supervisory director is punishable if he unduly uses, spends or transfers the legal entity's resources, thereby seriously harming the entity and endangering its continuity. These provisions apply even if bankruptcy proceedings do not in fact ensue.

"House for Whistleblowers" Act (Wet huis voor klokkenluiders)
Effective 1 July 2016 every organisation in the Netherlands with at least 50 employees is required to establish a procedure for dealing with whistleblowers. For the purpose of determining whether an organisation is subject to this obligation, "employee" includes all individuals who have an employment contract (within the meaning of the Dutch Civil Code) with the organisation and perform work either in the organisation or elsewhere (on secondment). Under the Act, the procedure for reporting suspected wrongdoing must be available to anyone who performs work for the organisation, whether as an employee or otherwise. This therefore includes independent contractors and others who perform work other than on the basis of an employment contract. The procedure must, at a minimum, cover the following subjects:

- how internal reports of suspected wrongdoing will be handled;
- the criteria for a "suspicion of wrongdoing";
- the identity of the person(s) within the organisation to whom suspected wrongdoing can be reported;
- the organisation's obligation to handle reports confidentially if the whistleblower so requests;
- the whistleblower's right to consult an internal or external adviser in confidence, such as a designated confidential counsellor, a company doctor or a member of the advisory division of the "House for Whistleblowers" (see below);
- information about the legal protection afforded to whistleblowers; and
- the circumstances under which suspected wrongdoing may be reported to an external authority.

The Act does not lay down specific sanctions but it is possible that non-compliance will in certain circumstances be interpreted as evidence of improper management. Non-compliance may possibly also play a role in conflicts with employees who have made an external report.

One of the external authorities to which suspected wrongdoing can be reported is the "House for Whistleblowers". This is a government agency which, at the whistleblower's request, will con-duct an investigation into the suspected wrongdoing and, if desired, into the employer's treatment of the whistleblower in connection with the report. Under the Act, the same individuals who are entitled to make an internal report may also ask the House for advice or request an investigation. The whistleblower is also free to report the suspected wrongdoing elsewhere. The House will initiate an investigation only if there are reasonable grounds for the suspected wrongdoing, taking into account the organisation's interests as well. During the investigation, the whistleblower, witnesses and experts can be summoned to appear and testify but they retain the right to assert a legal privilege. As confidentiality is essential for the whistleblower and other involved parties, their testimony will not be made public or disclosed to third parties and all parties have a duty of confidentiality.

Following an investigation the House will publish an anonymised report containing its conclusions regarding the nature, causes and consequences of the wrongdoing and its recommendations. Nothing in the report will constitute legally binding findings as to civil liability or the commission of a criminal offence.

Private-sector and government employees who have acted properly and in good faith are protected against retaliation: under the Act their legal position may not be adversely affected as a result of having "spoken up". For example, they may not be denied a raise or promotion and their employment may not be terminated. This protection applies from the time they report the suspected wrongdoing. When the Act was passed, a motion was adopted asking the government to extend this protection to workers other than employees (e.g. independent contractors) as soon as possible.

Electronic filing of documents in Trade Register

Starting 2017, enterprises that are required to file their annual accounts in the Trade Register will have to do so in electronic form. The main category of enterprises to which this will apply are legal entities incorporated under Dutch law: BVs, NVs, cooperatives and mutual insurance associations, as well as associations and foundations with a minimum annual turnover of EUR 6 million in two consecutive financial years. The electronic-filing obligation will also apply to "formally foreign" companies under the Companies Formally Registered Abroad Act (Wet op de formeel buitenlandse vennootschappen), to foreign legal entities that operate in the Netherlands and are under an obligation in their home country to file annual accounts, and to organisations in a number of specific sectors (such as pensions and housing).

The obligation will be phased in based on the size of the enterprise in question. For microenterprises and small enterprises, their annual accounts will have to be filed in electronic form as from their 2016 financial year. Medium-sized and large enterprises will be subject to the obligation as from their 2017 and 2019 financial years, respectively. The obligation will not apply to listed companies as they are already subject to EU-level rules on the filing of their annual accounts and other reports. With regard to the method of filing, the Standard Business Reporting programme must be used. This is a system-to-system reporting method making it possible for financial information to be compiled and sent to the tax authorities, the Central Bureau of Statistics and various banks.

Contact me


Geert Raaijmakers | Amsterdam | +31 20 71 71 992


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


Suzanne Rutten | Amsterdam | +31 20 71 71 954

SyCip Salazar Hernandez & Gatmaitan

www.syciplaw.com

Legal Bulletin: Competition Law

Philippine Competition Commission Issues Implementing Rules and Regulations of the Philippine Competition Act and Merger Notification Forms

What it is about

After the conclusion of the public consultations conducted by the Philippine Competition Commission ("*PCC*") on May 24, 2016 and the lapse of the period for the submission of comments and suggested revisions to the draft implementing rules and regulations issued on May 10, 2016, the PCC has published the final implementing rules and regulations (the "*Rules*") of the Philippine Competition Act ("*PCA*") last June 3, 2016. The Rules took effect on June 18, 2016.

The PCA defines, prohibits and penalizes three types of anti-competitive conduct: *anti-competitive agreements*, *abuse of dominant position*, and *anti-competitive mergers and acquisitions*. The PCA, however, provides for a transition period of two years after the effectivity of the PCA to allow affected parties time to renegotiate agreements or restructure their business to comply with the provisions of the PCA and, thus, an existing business structure, conduct or practice or any act that may be in violation of the PCA shall be subject to administrative, civil and criminal penalties only if it is not cured or is continuing upon the expiration of such transition period. Because of this, the Rules largely reiterate the provisions of the PCA regarding anti-competitive agreements and abuse of dominant position. The following provision relating to abuse of dominant position is, however, note-worthy:

- *Abuse of Dominant Position.* Section 3, Rule 3 of the Rules provide that the concerned entity or entities invoking the exception to certain acts that are considered abusive of dominant position based on "*superior product or process, business acumen, or legal rights or laws*" shall clearly establish to the PCC's satisfaction that "*the barrier to entry or anti-competitive act is an indispensable and natural result of [such] superior product or process, business acumen, or legal rights or laws*."

The Rules provide additional guidelines regarding the merger notification regime under the PCA and the following items are note-worthy:

- *Joint Ventures.* Joint ventures are now expressly included in the definition of "mergers" and has been defined as "*a business arrangement whereby an entity or group of entities contribute capital, services, assets, or a combination of any or all of the foregoing, to undertake an investment activity or a specific project, where each entity shall have the right to direct and govern the policies in connection therewith, with the intention to share both profits and risks and losses subject to agreement by the entities*." In relation to the notification requirement, the Rules provide that the contributing entities shall be deemed the acquiring entities and the

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FOR MORE INFORMATION
Please contact your account partner
or the authors of this Client Alert:
Arlene M. Maneja ammaneja@syciplaw.com
Franco Aristotle G. Larcina fglarcina@syciplaw.com
Marianne C. Sibulo mcsibulo@syciplaw.com

MAKATI OFFICE
SyCipLaw Center, 105 Paseo de Roxas
Makati City, Metro Manila
Philippines 1226
Phone +632 982-3500, 982-3600, 982-3700
Fax +632 817-3896, 817-3567
Email sshg@syciplaw.com

joint venture shall be considered as the acquired entity.

- *Thresholds for Compulsory Notification.* The Rules further explain the manner of determining the transaction value threshold of Php 1 Billion, which would trigger compulsory notification. Under the Rules, such determination is differentiated based on the type of transaction (*i.e.* merger or acquisition of assets or voting shares of a corporation or an interest in a non-corporate entity) and, in relation to asset-related merger or acquisitions, whether the assets are inside or outside the Philippines or both.

- *Additional Requirement for Acquisition of Voting Shares or an Interest in a Non-Corporate Entity.* Aside from the requirement that the transaction value should exceed PhP 1 Billion, for compulsory notification to be required in the case of a proposed acquisition of voting shares of a corporation, the entity or entities acquiring the shares, together with their affiliates, should own voting shares of the corporation that, in the aggregate, carry more than 35% of the votes attached to all the corporation's outstanding voting shares or 50%, if the entity or entities already own more than the 35% before the proposed acquisition.

  Similarly, for compulsory notification to take place in the case of a proposed acquisition of an interest in a non -corporate entity, the entity or entities acquiring the interest, together with their affiliates, should hold an aggregate interest in the non-corporate entity that entitles the entity or entities to receive more than 35% of the profits of the non-corporate entity or assets of that non-corporate entity on its dissolution or 50%, if the entity or entities acquiring the interest are already entitled to receive more than 35% prior to the proposed acquisition.

The Rules also provide for the procedure for the notification, as follows:

- *In General.* Each party to a merger or acquisition required to give notification to the PCC shall submit the Notification Form (the "*Form*") and pay such applicable fees as may be determined by the PCC.

- *Who may execute the Form.* The Form must be signed by a general partner of a partnership, an officer or director of a corporation, or in the case of a natural person, the natural person or his/her legal representative, and certified that the contents of the Form are true and accurate of their own personal knowledge and/or based on authentic records. In all cases, the certifying individual must possess actual authority to make the certification on behalf of the entity filing the notification.

- *Basis of notification.* The parties may notify, on the basis of a binding preliminary agreement in any form, such as a memorandum of agreement, term sheet, or letter of intent. Each of the acquired and acquiring entities must submit an affidavit with their Forms, attesting to the fact that a binding preliminary agreement has been executed and that each party has an intention of completing the proposed transaction in good faith.

- *Waiting Period.* In general, the waiting period begins after all notifying entities have filed their respective Forms, together with the corresponding certifications and affidavits, and have been notified by the PCC that

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FOR MORE INFORMATION
Please contact your account partner
or the authors of this Client Alert:
Arlene M. Maneja ammaneja@syciplaw.com
Franco Aristotle G. Larcina fglarcina@syciplaw.com
Marianne C. Sibulo mcsibulo@syciplaw.com

MAKATI OFFICE
SyCipLaw Center, 105 Paseo de Roxas
Makati City, Metro Manila
Philippines 1226
Phone +632 982-3500, 982-3600, 982-3700
Fax +632 817-3896, 817-3567
Email sshg@syciplaw.com

the Forms are complete. Upon submission of the Form, the PCC shall determine within 15 days whether the Form and other relevant requirements have been completed in accordance with applicable rules or guidelines, and shall inform the parties of other information and/or documents it may have failed to supply, or issue a notice to the parties that the notification is sufficient for purposes of commencing Phase I review of the merger or acquisition. Within thirty (30) days from commencing Phase I review, the PCC shall, if necessary, inform the parties of the need for a more comprehensive and detailed analysis of the merger or acquisition under a Phase II review, and request other information and/or documents that are relevant to its review. The issuance of such request has the effect of extending the period within which the agreement may not be consummated for an additional 60 days, which shall begin on the day after the request for information is received by the parties, *provided that,* in no case shall the total period for review by the PCC exceed 90 days from the time the initial notification by the parties is deemed complete. However, in the event the parties fail to provide the requested information within 15 days from receipt of the request, the notification shall be deemed expired and the parties must refile the notification. Alternatively, the parties may request for an extension of time within which to comply with the request for additional information, in which case, the period for review shall be correspondingly extended.

- *Modifications.* Parties to a proposed transaction under review shall inform the PCC of any substantial modifications to the transaction. On the basis of the information provided, the Commission shall determine if a new notification is required.

FOR MORE INFORMATION
Please contact your account partner
or the authors of this Client Alert:
Arlene M. Maneja ammaneja@syciplaw.com
Franco Aristotle G. Larcina fglarcina@syciplaw.com
Marianne C. Sibulo mcsibulo@syciplaw.com

MAKATI OFFICE
SyCipLaw Center, 105 Paseo de Roxas
Makati City, Metro Manila
Philippines 1226
Phone +632 982-3500, 982-3600, 982-3700
Fax +632 817-3896, 817-3567
Email sshg@syciplaw.com

DENTONS RODYK

Application for leave to continue action against an insolvent defendant: A balancing act

A case study of *W Y Steel Construction Pte Ltd v Tycoon Construction Pte Ltd (in liquidation)* [2016] SGHC 80

June 30, 2016

Key contact

Kirindeep Singh
Senior Partner, Singapore
D +65 6885 3632
kirindeep.singh@dentons.com

Overview

The issue before the High Court was whether leave should be granted to the plaintiff to proceed with an action for breach of contract against an insolvent defendant. The court held that in deciding whether leave should be granted, it must balance the collective interest of the defendant's general body of creditors against the relative hardship and injustice which may be experienced by the plaintiff. As the liquidator had only about S$200,000 available prior to the hearing of the leave application, whereas the plaintiff's claim amounted to more than S$18 million, the court found that allowing the plaintiff to proceed with its claim would exhaust the insolvent defendant's funds even before the claim was concluded. The detriment caused to the general body of creditors would thus far exceed the hardship to the plaintiff. Consequently, the court refused to grant leave to the plaintiff.

Relevant facts

W Y Steel Construction Pte Ltd (plaintiff) was the main contractor for a Housing Development Board project. Tycoon Construction Pte Ltd (defendant) was the sub-contractor engaged by the plaintiff to carry out the construction works under the project.

On 9 October 2014, the defendant submitted a payment claim to the plaintiff for the sum of S$1,878,439.39. Although the plaintiff took the position that the payment claim was served out of time, it nevertheless issued a payment response, but certifying a negative sum of S$666,382.89. This led the defendant to lodge an adjudication application on 30 October 2014 (Adjudication Application). The adjudication determination was rendered on 1 December 2014, and the plaintiff was held liable to pay the defendant the sum of S$1,135,987.04 (Adjudication Sum).

On 10 December 2014, the plaintiff applied to set aside the adjudication determination on the ground that the adjudicator had erred in finding that the payment claim and the Adjudication Application were filed within time (Setting Aside Application). Pursuant to section 27(5) of the Building and Construction Industry Security of Payment Act, the plaintiff paid the Adjudication Sum into court as security. When the defendant applied to enforce the adjudication determination subsequently (Enforcement Application), the plaintiff commenced an action against the defendant for breach of the sub-contract (the Suit) claiming S$18,588,051.25 in damages for claims such as failure to complete the works on time and defective work. The plaintiff also applied for a stay of execution pending the disposal of the Suit in the event the Enforcement Application was granted.

The defendant was subsequently wound up. Consequently, the Setting Aside Application and the Suit were automatically stayed pursuant to section 299(2) of the Companies Act. The plaintiff applied for leave of court to proceed with the Suit against the defendant. The issue before the High Court was whether leave should be granted.

The court's decision

The plaintiff argued that it had legitimate reasons for wanting to proceed with its claims in the Suit outside the insolvency regime of lodging a proof of debt. As the issues in the Suit and the Adjudication Application were the same, disposal of the Suit would at the same time dispose of the Setting Aside Application. If it were not allowed to proceed with the Suit, the plaintiff would have difficulties recovering the Adjudication Sum that was paid into court as security, since the Setting Aside Application was also stayed in view of the winding up. Furthermore, the other unsecured creditors would suffer no prejudice from allowing the plaintiff to recover the Adjudication Sum, since it was paid into court as security and hence did not form part of the defendant's assets.

The High Court disagreed with the plaintiff and refused to grant leave to proceed with the Suit. The court reiterated that in the determination of whether leave should be granted, it seeks to balance the collective interest of the general body of creditors against the relative hardship and injustice which may be experienced by the plaintiff. Ultimately, fair play and commercial morality are the most important considerations.

In coming to its decision, the court rejected the plaintiff's reliance on the principle in *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 that the interests of a party who had paid monies into court pursuant to an adjudication determination, should be protected in circumstances where the initially successful party is in financial distress such that any monies paid to it is unlikely to be recovered by the time the parties' rights are finally determined. The court held that this principle was only relevant to the court's exercise of its discretion to grant a stay of the Enforcement Application which was not in issue before the court.

Most importantly, the court found that the liquidator only had S$203,409.59 available to it as at 23 November 2015, whereas the damages sought by the plaintiff in the Suit amounted to over S$18 million. Considering that the liquidator's and the defendant's solicitors' expenses had not yet been paid, and the fact that considerable costs would be incurred if the defendant was required to defend the Suit, the court held that the plaintiff's claim would, in all likelihood, exhaust the remaining funds of the defendant even before the conclusion of the Suit. This would be a futile utilisation of the defendant's limited assets that would further the plaintiff's interests to the detriment of the remaining creditors. Therefore, if leave was granted, the detriment caused to the defendant's general body of creditors would far exceed the hardship to the plaintiff.

Moreover, the plaintiff still had the recourse of lodging a proof of debt with the liquidators (which it did) in relation to its claim which would be dealt with in the ordinary course of the liquidation.

Conclusion

The High Court's decision clarifies that protecting the interests of a party who had paid monies into court pursuant to an adjudication determination, in the circumstances where there would be difficulty in recovering payment when parties' rights are finally determined, is only relevant in an application to stay enforcement proceedings of an adjudication determination, but not in an application for leave to commence or continue an action against an insolvent defendant. It further demonstrates that the Singapore courts will strive to prevent the dissipation of an insolvent defendant's assets and ensure that the creditors' interests are protected to the fullest extent, unless such interests are outweighed by the injustice to the plaintiff.

The author acknowledges and thanks Toh Cher Han for his contribution in the writing of this article.

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LEE AND LI
ATTORNEYS-AT-LAW

Amendments to the Regulations Governing Security Measures of the Personal Information File for Non-government Agencies Designated by the Financial Supervisory Commission

06/27/2016
Benjamin K. J. Li/Stanley Liu

In response to the amendments to the Personal Data Protection Act (PDPA) promulgated on 30 December 2015 and effective from 15 March 2016, the Financial Supervisory Commission (FSC) amended the Regulations Governing Security Measures of the Personal Information File for Non-government Agencies Designated by the Financial Supervisory Commission (Regulations) on 5 May 2016. The main points of the amendments are as follows:

1. To accommodate the amended PDPA that "special personal data" could be collected, processed or used by the data collector after it has obtained the "written consent" of the data subject, the FSC amended the latter part of Subparagraph 1 of Article 8 of the Regulations. The amendment provides that the data collector shall implement the personal data control procedures to ensure the written consent which it has obtained in respect of the special personal data complies with the relevant "consent" provisions under Paragraphs 1, 2 and 4 of Article 7 of the PDPA, which are applicable mutatis mutandis pursuant to Paragraph 2 of Article 6 of the same Act.

2. To accommodate the amended PDPA that (1) the "written consent" for collecting, processing and using "general personal data" has been replaced with the term of "consent" without necessity of obtaining a written consent and (2) added the provisions of "deemed consent" and "data collector's burden to prove the fact that consent of the data subject has been given", the FSC slightly amended the relevant wordings of Subparagraphs 3 and 4 of Article 8 of the Regulations.

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Ideas

RJR Nabisco, Inc. v. The European Community: Supreme Court Limits RICO's Extraterritorial Reach

27 June 2016

Updates

On June 20, 2016, the Supreme Court handed down its decision in *RJR Nabisco, Inc. v. The European Community*, 579 U.S. ___ (2016), providing greater clarity as to when and how the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1964, applies to foreign conduct. The Court held that private plaintiffs who have not suffered an injury inside the United States may not sue under RICO. The Court also held that RICO applies to some, but not all, predicate acts committed abroad, depending on whether the plain text of the predicate act clearly indicates a congressional intent for it to apply extraterritorially. As a result of this holding, lower courts are now left with the task of interpreting which predicate acts apply extraterritorially.

The European Community alleged a scheme in which foreign drug traffickers smuggled and sold narcotics in Europe, then used the proceeds to import and sell RJR cigarettes in Europe. It filed suit under 18 U.S.C. § 1964(c), which allows private parties to bring RICO claims.

The Court considered if this right of private action could extend to the European Community's injuries since those injuries occurred outside of the United States. To do so, the Court applied the presumption against extraterritoriality to § 1964(c), examining the plain text of the statute for any evidence of congressional intent for it to apply extraterritorially. The Court found that it did not, instead holding that the language of the statute was too general to find such intent. Section 1964(c) states in relevant part that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court . . . ." The Court found that neither "any person" nor "business or property" indicated an intent for the statute to apply extraterritorially, but it shed little light on how it reached this conclusion, other than noting that the language was "insufficient." Regardless, the Court is now clear: a private party must assert a domestic injury in order to sue under RICO.

Separate from its inquiry into § 1964(c), the Court also considered if RICO's prohibitions against conduct could apply to acts committed abroad. The Court held that whether or not a predicate act can occur extraterritorially and fall within RICO's reach again depends on the application of the presumption against extraterritoriality. This means that for each predicate act committed abroad, the Court must examine whether the plain text of that predicate act indicates a congressional intent to apply extraterritorially.

The Court provided some examples where the text of the predicate act clearly indicates such an intent, including prohibitions against: engaging in monetary transactions in criminally derived property, § 1957(d)(2); the assassination of Government officials, §§ 351 (i), 1751(k); killing a national of the United States while such national is outside the United States, § 2332(a); and hostage taking, § 1203(b). However, its silence as to the vast majority of other predicate acts indicates that it will be up to the lower courts to decide which predicate acts apply extraterritorially and which do not.

This decision greatly clarifies RICO's extraterritorial application, but open questions remain. While the Court has expressly identified some predicate acts that apply extraterritorially, it remains to be seen if other predicate acts will apply based on lower court interpretation. Given its decree that predicate acts must "manifest[] an unmistakable congressional intent to apply extraterritorially," the Court seems to suggest that individual predicate acts must provide a strong textual foundation for extraterritorial application and that congressional intent should not be liberally presumed.

*Emily Wilson, a Baker Botts law clerk, assisted in the preparation of this article.

Related Professionals

William H. Jeffress, Jr.

Partner

Aaron S. Rabinowitz

Associate

Davis Wright Tremaine LLP
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Business Associates Beware: First HIPAA Settlement with Business Associate

07.06.16

By Bryan Thompson, Rebecca L. Williams, and Adam H. Greene

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For the first time, the U.S. Department of Health & Human Services Office for Civil Rights (OCR) has entered into a Resolution Agreement with a business associate over allegations that it potentially violated the Health Insurance Portability and Accountability Act (HIPAA) Security Rule by failing to protect electronic protected health information (ePHI). This first settlement likely portends future enforcement actions against business associates for perceived HIPAA violations.

On June 24, 2016, OCR agreed to settle with Catholic Health Care Services of the Archdiocese of Philadelphia (CHCS), a non-profit organization that provided management and information technology services to its six nursing homes as a business associate. OCR alleged that CHCS potentially violated the HIPAA Security Rule after a CHCS-issued employee smartphone containing nursing home residents' ePHI was stolen.

Specifically, the smartphone – which was not protected by a password or encryption – contained extensive information on 412 nursing home residents, including Social Security numbers, diagnosis and treatment information, and medical procedures. Additionally, CHCS allegedly did not have policies addressing the removal of mobile devices that contain ePHI, had not undertaken a risk analysis, and did not have a risk management plan in place at time of the theft.

As part of the settlement, CHCS agreed to pay **$650,000** and adhere to a **two-year corrective action plan** requiring the business associate to: conduct annual risk assessments; develop, maintain, and revise its policies and procedures to address a number of Security Rule requirements, including encryption of ePHI, audit controls, integrity controls, log-in monitoring, and password management; provide training for all workforce member with access to ePHI; and submit annual compliance reports to OCR, among other provisions.

The Takeaways: What Does this Mean for Other Business Associates?

It seemed only a matter of time for an OCR settlement with a business associate. OCR settlement agreements often come two to three years after an initial incident, providing time for agency investigation. Since OCR first began holding business associates directly liable under HIPAA starting in September 2013, it was likely that the first settlement agreement with a business associate would come around this time close to 3 years later. But it is safe to say that we will begin to see settlements with business associates interspersed with covered entity settlements in the coming years. Accordingly, business associates should view the CHCS settlement as a shot across the bow that OCR will continue to scrutinize business associates' HIPAA compliance in the future.

In the meantime, here are the main takeaways for business associates from the CHCS settlement:

- **The settlement amount was shaped by size and services of the business associate.** In OCR's HIPAA enforcement actions from 2008 through June 10, 2016, the average settlement amount was about $1 million. This settlement was significantly less at $650,000. The press release suggests that this may have been because of the business associate's non-profit status, with any higher settlement amount potentially interfering with CHCS' ability to continue to serve vulnerable and underserved populations. CHCS' corrective action plan timeline is consistent with the average plan length of two

years that we have previously seen. It seems likely that the settlement would have been at or more than the average if the business associate was a larger, for-profit entity.
- Consistent with past covered entity settlements, this case focused on the absence of risk analysis and risk management. Once again, OCR is sounding the alarm for the need for a **risk analysis**. From the press release's description and the CAP requirements, OCR likely could have alleged other categories of violations.

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FCA Penalties Double, Increasing Financial Exposure

The U.S. Department of Justice ("DOJ") will nearly double the statutory penalties under the False Claims Act ("FCA") under an interim final rule it published June 29, 2016. This significant increase gives the government and private whistleblowers even greater leverage when pursuing false claims and will alter the litigation calculus for most defendants facing FCA liability. It will also have a trickle-down effect on state false claims laws.

Under the FCA, each false claim presented to the government gives rise to a separate civil monetary penalty. As of August 1, the minimum penalty for each false claim will increase from $5,500 to $10,781, and the maximum penalty for each false claim will increase from $11,000 to $21,563. This dramatic spike in penalties will expose many defendants to much greater financial risk. The increase will likely have a distinct impact on those in the healthcare, life sciences and other industries that submit hundreds, or even thousands, of separate claims to the government. For instance, in *United States ex rel. Drakeford v. Tuomey Healthcare Sys.*, Inc., 792 F.3d 364 (4th Cir. 2015), the defendant was found liable for 21,730 false claims to Medicare for reimbursement. Even though the district court calculated the penalty using the minimum of $5,500 per claim, the total civil penalty amounted to $119,515,000.[1] Applying the new statutory minimum, the defendant in this case would have been subject to a civil penalty of $234,271,130. The FCA provides for these penalties to be imposed on top of the award of damages, which are calculated at three times the amount of the loss sustained by the government.

This is not the first time the DOJ has increased FCA penalties, but an increase of this size is unprecedented. The DOJ last adjusted the penalties in 1999, increasing the minimum penalty from $5,000 to $5,500, and raising the maximum from $10,000 to $11,000. This change was consistent with the 10% cap in such increases under the 1996 Debt Collection Improvement Act ("1996 Act"). However, the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 ("2015 Amendments") repealed the 1996 Act's 10% cap and created a different statutory formula for calculating annual inflation adjustments.

The 2015 Amendments allow for an initial adjustment based on the cost of living increase between 2015 and the year in which the civil monetary penalty was established or adjusted by a provision of law *other than* the Federal Civil Monetary Penalties Inflation Adjustment Act of 1990 ("Inflation Adjustment Act"). The DOJ had not adjusted the FCA penalties other than through the Inflation Adjustment Act since 1986. That explains why this adjustment is so substantial. In the future, the adjustment will be determined by annual differences in the Consumer Price Index, and therefore further increases in penalties will be in smaller increments.

This increased penalty could create incentives for the government and private litigants who sue on its behalf – known as relators – to pursue FCA claims even where damages may be difficult to prove. For instance, in *United States ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, 741 F.3d 390 (4th Cir. 2013), a relator sued on behalf of the United States for civil penalties only and did not pursue actual damages, while the government itself pursued both penalties and damages. The Fourth Circuit upheld the relator's standing to sue for civil penalties to the exclusion of actual damages and enforced a total penalty of $24 million. The government and relators will now be able to recover even more in statutory penalties even where the evidence of any financial loss to the government may be lacking.

On the other hand, the new maximum penalties may not be enforceable in every case. For those cases involving large numbers of claims but small amounts of actual damages, defendants will have a stronger hand from which to argue that the imposition of statutory penalties in the amounts authorized by law would violate the prohibition on "excessive fines" found in the Eighth Amendment of the United States Constitution. DOJ has, in some cases, offered a voluntary reduction in the number of penalties sought to avoid Eighth Amendment scrutiny. The size of the penalties that will be available after August 1, 2016 will provide additional leverage to defendants who raise constitutional concerns.

The revised penalties will also have a trickle-down effect on state false claims laws. The federal government encourages states to pursue civil Medicaid fraud by allowing the state to retain 10% more than the share to which they would otherwise be entitled from the amount recovered under a state false claims action. To be eligible for this increased recovery, state false claims penalties must be no less than required under federal law. Many states have adopted Medicaid-specific false claims laws to meet this requirement.[2] To continue earning the 10% bonus, states will have to amend their laws to mirror the federal increase.

The changes apply for penalties assessed after August 1, 2016 for violations that occurred after November 2, 2015. Comments to the interim final rule are due August 29, 2016.

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[1] *Id.* at 384. The parties later settled the case for $72.4 million. *See* DOJ Press Release, United States Resolved $237 Million False Claims Act Judgment against South Carolina Hospital that Made Illegal Payments to Referring Physicians (Oct. 16, 2015), *available at* https://www.justice.gov/opa/pr/united-states-resolves-237-million-false-claims-act-judgment-against-south-carolina-hospital.

[2] Currently, 19 states have statutes that are at least as strong as the federal statute and are eligible for the 10% bonus: California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Iowa, Massachusetts, Minnesota, Montana, Nevada, New York, Rhode Island, Tennessee, Texas, Virginia, Washington. *See* U.S. Department of Health & Human Services, Office of Inspector General, State False Claims Act Reviews, *available at* http://oig.hhs.gov/fraud/state-false-claims-act-reviews/.

Contacts

Virginia A. Gibson
Partner, Philadelphia
virginia.gibson@hoganlovells.com

Michael C. Theis
Partner, Denver
michael.theis@hoganlovells.com

Natalie Theresa Sinicrope
Senior Associate, Washington, D.C.
natalie.sinicrope@hoganlovells.com

Philip B. Trout
Senior Associate, Washington, D.C.
philip.trout@hoganlovells.com

hoganlovells.com