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March 2016 e-Bulletin

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

60th International PRAC Conference
Manila
Hosted by SyCip Salazar Hernandez & Gatmaitan
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BENNETT JONES NAMES EIGHT NEW PARTNERS

07 March 2016: Bennett Jones LLP is pleased to announce that eight lawyers have been admitted to the partnership.

“The admission of eight new partners is a testament to the firm's ability to produce such talent, and to the character and quality of the individuals themselves,” says Hugh MacKinnon, Chairman and Chief Executive Officer of Bennett Jones. “We welcome each of them to the Bennett Jones partnership.”

Bennett Jones’ new partners are:

Jonathan G. Bell
Aleksandra B. Finelli
Laura M. Gill
David R. McKinnon
Wesley R. Novotny
Kieran F. Ryan
R. Blake Williams
Sean Zweig

For additional information visit www.bennettjones.com

NAUTADUTILH STRENGTHENS LITIGATION TEAM

18 February 2016: Marike Bakker, who specialises in Fraud and White Collar Crime, joined NautaDutilh’s litigation team on 1 March. She has been appointed partner at NautaDutilh. She will be assisting clients dealing with investigations in the field of financial and economic criminal law, compliance issues, internal investigations and market abuse.

Marike Bakker (46) has been practising law since 1995 and has spent the last seven years leading the White Collar Crime practice at Ploum Lodder Princen. She has a great deal of experience of advising companies in criminal investigations that touch on a variety of industries, such as the financial sector, the construction, chemical and petrochemical industries, and the ICT sector. Her profile is in line with those of the other members of NautaDutilh’s current litigation team.

Associate partner and counsels: The team was strengthened earlier this year with the arrival of Francien Rense (41) as associate partner, on 1 January. Francien, too, assists clients in their dealings with authorities, in relation to both compliance and sanctions. She also advises on prevention, internal/external investigations, enforcement and financial/ economic criminal law matters.

Frans Overkleeft (33) and Philip Malanczuk (34) of our litigation team have been appointed counsel. They have both been with NautaDutilh since completing their studies. Frans specialises in corporate law disputes, director liability and internal investigations. He also advises on matters relating to corporate governance, takeovers and joint ventures. Philip specialises in commercial litigation. He represents and advises clients with regard to a wide range of commercial matters, including commercial contracts, post-takeover disputes, civil liability and cartel damages actions.

Our litigation team has seen an ever-continuing increase in clients’ demands. They are calling on us to handle international disputes about public tenders and other transactions, but also major liability cases, such as those involving the recovery of cartel damages, and cases involving director liability. More and more often, our clients in our home countries and abroad are calling on us to conduct internal investigations into possible irregularities. That is why we are so delighted that these professionals are joining our litigation team and expanding both the breadth and depth of our expertise’, says Erik Geerling, chairman of the Board of NautaDutilh.

For additional information visit www.nautadutilh.com

GIDE STRENGTHENS ITS PUBLIC & ADMINISTRATIVE AND PROJECT FINANCE PRACTICES WITH NEW PARTNERS IN PARIS AND MOROCCO

Paris, 09 March 2016: ***Gide is pleased to welcome new partner Philippe Logak within its Public and Administrative Law practice group in Paris.*** Effective from 1 March 2016, Philippe Logak will contribute his extensive experience in public business law, as well as his in-depth knowledge of the public sector, publicly funded companies and regulated sectors, in particular in the media and telecommunications fields. Philippe will also be able to offer his experience in compliance and risk management as regards documents pertaining to international trade.


Philippe Logak

Philippe Logak, 47, joins Gide from the Thales group, where he acted as General Secretary between 2013 and 2015.

A member of the French Council of State (Maître des requêtes au Conseil d'Etat), a graduate of the Ecole Polytechnique (1992) and the Ecole nationale supérieure des Mines de Paris (1995), Philippe Logak began his career at the French MoD's general delegation for armaments (Délégation Générale pour l'Armement). He then joined the Council of State (Conseil d'Etat) as rapporteur within the home affairs and dispute resolution sections (1999-2003).

After practising as a lawyer within Bredin Prat (2003-2005), he was then appointed as deputy director in public and international law within the Legal Affairs Department of the French Ministry for Economy, Finance and Industry (2005-2007), before being called up in 2007 to serve as legal counsel in the cabinet of the then Minister of Economy, Finance and Industry, Mrs Christine Lagarde. He was then appointed as deputy director of the Minister of Justice cabinet (2008-2009), before joining SFR as General Secretary from 2010 to 2013.

Gide senior partner Baudouin de Moucheron states: "I am very pleased to have Philippe Logak join Gide. His previous experience and in-depth knowledge of the various challenges faced by public sector companies and major international corporations will be precious assets in the service of our clients."

Philippe Logak adds: "I am very happy to be joining Gide. The excellent reputation of the Public and Administrative Law department, as well as the firm's multidisciplinarity, mean that we can offer the best possible advice to publicly funded companies on their operations and on complex regulatory issues. The firm's strong international dimension will also give me the opportunity to counsel major industrial and service corporations as part of their continued development."

Gide's Paris-based Public and Administrative Law practice group numbers 20 lawyers, including seven partners.

Gide is pleased to announce the arrival to its Casablanca office of new partner Wacef Bentaibi, who specialises in project financing in the fields of energy, infrastructure and transport.


Wacef Bentaibi

Admitted to the Paris Bar in 2005, Wacef Bentaibi, 36, acts both for sponsors and lenders on cases for the design, financing, development and operation of public and private infrastructure projects in Morocco and Africa. He has in-depth experience in foreign investment matters and regularly works with international investors and public entities in the structuring, drafting and negotiation of complex industrial agreements and investment agreements.

Wacef has also developed a leading expertise in the mining and upstream oil & gas sectors, and assists a number of operators and public bodies in Morocco and in the MENA region. Prior to joining Gide, Wacef had practised within Gide and Allen & Overy in Morocco and Paris. He holds an LL.M. from the University of Oslo (2003), a certificate in EU/EEE public procurement law from the University of Bergen (2002) and a Master's degree in business law from the University of Paris X-Nanterre (2002).

"I am very pleased to have Wacef re-join our team. He is an experienced practitioner, and his arrival will bolster our capacity to offer specific project-related expertise in the energy and infrastructure sectors, which are significant development avenues for our office", states Jean-François Levraud, partner in charge of Casablanca.

Gide's managing partner Stéphane Puel adds: "Gide has acted on all major operations in North Africa for over 15 years and we consider Morocco, where we set up our office in 2003, as a key and high-potential hub that is at the heart of our development strategy. Wacef's appointment reflects our wish to further develop our firm in Morocco and Africa".

For more information visit www.gide.com

HOGAN LOVELLS TO ESTABLISH GLOBAL BUSINESS SERVICES CENTER IN LOUISVILLE, KENTUCKY

LOUISVILLE, KY, 25 February 2016: Global law firm Hogan Lovells is establishing its second global business services center, and the first in the United States. The center will be based in Louisville, Kentucky and provide U.S. time zone support as well as connecting to services delivered through the firm's other global business services center in Johannesburg, South Africa.

"As one of the world's most influential law firms, Hogan Lovells' decision to locate a business services office in Kentucky is a testament to the quality of our workforce and the desirability of our location," said Kentucky Governor Matt Bevin.

The move follows a strategic review of how the firm provides business services support and the center is expected to be up and running by late summer 2016 with an expected 50 roles in the first year.

"We have concluded that a significant number of our business services need to remain close to our lawyers while others can be readily performed from a remote location with no impact to quality," said Alice Valder Curran, Hogan Lovells' Washington, DC Regional Managing Partner. "The key is to find a location with quality and readily available personnel in a time zone that can support our Americas offices."

"We chose Louisville as it has an excellent supply of talented people, is well placed in terms of time zones and offers good opportunities for cost savings when compared to Washington, DC and a number of our other existing office locations," said Cole Finegan, Hogan Lovells' Regional Managing Partner for the Americas.

"We believe that this approach to how we deliver our business services is innovative, pragmatic and strategically sensible in light of market and client expectations," added Scott Green, Hogan Lovells' Global Chief Operating and Financial Officer. "The center in Louisville will work closely with its counterpart in Johannesburg to create an extended working day, helping us gain the benefits of the global nature of the firm."

For more information, see www.hoganlovells.com

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For additional information visit www.nautadutilh.com

SIMPSON GRIERSON WELCOMES FOUR NEW SENIOR PARTNERS

NEW ZEALAND - 29 February, 2016: Simpson Grierson is delighted to welcome four new senior partners across its New Zealand offices.

Matt Conway becomes a partner in the firm's Wellington local government and environment group. Matt is well-known for his resource management policy and planning advice.

Stuart Evans is a transactional banking and finance expert. He is experienced in both domestic and international banking and finance transactions, and specialises in property and development financing. Stuart is based in the firm's Auckland office.

Andrew Matthews has established an impressive track record in public and private mergers and acquisitions, capital raisings and corporate governance. He has advised on a significant number of capital markets transactions over the past year. Andrew is based in the firm's Auckland office.

Helen Smith joins the firm's Christchurch office after a long and successful career with a large national law firm. She is a litigation and dispute resolution specialist having acted for clients on a wide range of complex commercial matters.

"We are delighted to welcome Matt, Stuart, Andrew and Helen to the partnership," says Simpson Grierson Chairman Kevin Jaffe. "The appointments show the firm's strength across New Zealand and across a wide variety of business sectors."

For additional information visit www.simpsongrierson.com

PRAC2016
Barcelona

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  May 21—24, 2016
  Registration Deadline March 19

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  September 24— 27, 2016

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

ARIAS & MUNOZ GUATEMALA

ASSISTS PUBLIC BID FOR AWARD TRANSPORT LEASING

Arias & Muñoz provided legal advice according to the applicable legislation in Guatemala regarding administrative, corporate and public procurement law for the participation and final award for the Guatemala Branch entity of ARRENDAMIENTO MERCANTIL S.A. (AMSA) - Volvo Brasil dealer in Guatemala- of the Public tender called "Lease with Option to Purchase Three Bi-articulated Buses for the Southern Axis Transmetro" (NOG: 4393635 Guatecompras).

The importance of this transaction is the significant amount of foreign investment in Guatemala for an important public service: Public Transportation. Our client was awarded on January 22, 2016, and was assisted by José Augusto Toledo and Vivian Lucia Morales Herrera.

For additional information visit www.ariaslaw.com

ARIAS FABREGA & FABREGA

REPRESENTS LEAD ARRANGERS IN USD$40 MILLION CREDIT FACILITY FOR GRUPO SURA FINANCE

Panama, 01 March 2016: ARIAS, FABREGA & FABREGA acted as counsel to Merrill Lynch, Pierce, Fenner and Smith, and JPMorgan Chase Bank, as lead arrangers, in connection with a USD$540 million credit facility for Grupo Sura Finance, an affiliate of Grupo de Inversiones Suramericana S.A. (Grupo Sura). The credit facility was entered into in connection with the acquisition by Grupo Sura of shares of SURA Asset Management from General Atlantic Coöperatief U.A.

About Grupo SURA Grupo de Inversiones Suramericana S.A., Grupo Sura, is the principal shareholder of a group of leading companies that operate primarily in Colombia. The group's companies include: Bancolombia S.A., the largest bank in Colombia; Suramericana S.A., the holding company for the largest life and property and casualty insurance companies in Colombia; Grupo Nutresa S.A., the largest processed food conglomerate in Colombia; Grupo Argos S.A., the majority owner of Cementos Argos, S.A., Colombia's largest cement producer; and SURA Asset Management, a Latin American company with operations in the areas of pensions, savings and investment in Mexico, Peru, Chile, Uruguay and Colombia.

Key ARIFA attorneys acting in the matter include Rodrigo Cardoze, partner, Fernando Arias F., associate.

For additional information visit www.arifa.com

BAKER BOTTS

CLIENT LIBERTY MEDIA SETTLES LITIGATION WITH VIVENDI UNIVERSAL

NEW YORK, 26 February 26 2016: Baker Botts L.L.P. today announced that it successfully represented Liberty Media in the settlement of its lawsuit against Vivendi Universal S.A. Under the agreement, Vivendi S.A. has paid $775 million to Liberty.

The lawsuit stemmed from a complex transaction between Vivendi and Liberty Media in 2001. After a four-week trial, a jury sitting in the Southern District of New York found Vivendi liable for breach of contract and securities fraud, and awarded Liberty Media €765 million (excluding interest). Today's settlement will result in a dismissal of all appeals and mutual releases of the parties.

Lawyers from Baker Botts represented Liberty Media in the original jury trial as well as in the settlement.

"This settlement brings to a close one of the highest profile securities fraud cases in the last twenty years. We are delighted that Liberty Media has reached a fair and equitable resolution of this case," said Michael Calhoon, Partner and the lead lawyer on this case.

The Baker Botts trial team included Mr. Calhoon, Stan Mortenson, Macey Stokes, Evan Werbel, Rich Sobiecki, Vern Cassin, and Julie Rubenstein.

For additional information visit www.bakerbotts.com

BENNETT JONES

ADVISES UNDERWRITERS ON $1BILLION ALGONQUIN POWER OFFERING

- Date Announced: February 09, 2016
- Date Closed: March 01, 2016
- Deal Value: $1,150,000,000
- Client Name: CIBC World Markets Inc.

On February 9, 2016, Algonquin Power & Utilities Corp. announced that it and its direct wholly-owned subsidiary, Liberty Utilities (Canada) Corp. had entered into an agreement with a syndicate of underwriters led by CIBC World Markets Inc. and Scotia Capital Inc., under which the Underwriters agreed to buy, on a bought deal basis, C$1 billion aggregate principal amount of 5.00% convertible unsecured subordinated debentures of Algonquin (the "Debentures") represented by installment receipts.

Algonquin will use the proceeds of the offering to finance part of the US$2.4 billion (C$3.3 billion) purchase price for its recently announced acquisition of The Empire Direct Electric Company ("Empire"), a Joplin, Missouri based regulated electric, gas (through its wholly-owned subsidiary The Empire District Gas Company), and water utility, serving approximately 218,000 customers in Missouri, Kansas, Oklahoma, and Arkansas. Algonquin's acquisition of Empire is expected to close in the first quarter of 2017. Additional debt financing in the amount of US$1.6 billion is expected to be provided by a group of lenders including CIBC, Scotiabank, J.P. Morgan and Wells Fargo.

Bennett Jones is advising the underwriters with a team led by Norman Findlay and Aaron Sonshine and including Rami Chalabi, Christopher Doucet, Lisa Telebar, Ted Gotlieb, Evan Kenyon (Capital Markets and M&A), Matthew Peters (Tax) and Mark Rasile (Financial Services).

For additional information visit www.bennettjones.com

CAREY

ASSISTS IFC IN USD200 MILLION LOAN TO BANCO ITAU

SANTIAGO - January, 2016: The International Finance Corporation hired Chile's Carey to grant a loan worth US$200 million to Banco Itaú's Chilean branch. Banco Itaú, which relied on in-house counsel, will use the loan to bankroll small-scale development projects in the country. The transaction closed on 21 December.

Carey team assisting IFC included partners Diego Peralta and Felipe Moro, and associates Elena Yubero and Paluska Solar in Santiago.

For additional information visit www.carey.cl

CLAYTON UTZ

ADVISING SUNDANCE RESOURCES LTD ON AU$16.5 MILLION EQUITY RAISING

PERTH - 03 February, 2016: Clayton Utz is advising ASX listed Sundance Resources Ltd (ASX: SDL) on its pro-rata renounceable entitlement offer to raise up to $16.5 million, announced today.

The entitlement offer is partially underwritten and offers shareholders 1 new share for every 1 share held at an issue price of A$0.005 per share, together with 1 free attaching option for every 1 share subscribed.

Clayton Utz Perth corporate partner Mark Paganin is leading the Firm's team with support from senior associate Stephen Neale and lawyer Thomas Parker.

For additional information visit www.claytontuz.com

GIDE

ADVISES AGRICULTURAL BANK OF CHINA ON ESTABLISHMENT OF A BANK IN REPUBLIC OF CONGO

4 March 2016: Gide has advised the Agricultural Bank of China (ABC), one of China's Big Four banks, on the establishment of the Sino-Congolese Bank for Africa (BSCA), a new universal commercial bank in the Republic of Congo, along with the Congolese government and other public and private partners.

This landmark transaction is ABC's first overseas joint venture bank project and creates the first Sino-African green-field bank, which aims to expand its business to members of the Economic Community of Central African States and other African countries. BSCA represents an initial investment of USD 100 million, with ABC holding a 50% stake, and was created at the prompting of the Chinese and Congolese heads of state.

Gide advised on all the legal aspects of the project, including banking, corporate, tax, foreign exchange and labour matters, as well as on structuring of the transaction from Chinese and overseas legal and tax perspectives. Gide also participated in the negotiations and drafted all contractual documentation.

The Gide team was led by partner Thomas Urlacher, with the assistance of associate Chen Xi.

For additional information visit www.gide.com

HOGAN LOVELLS

ADVISES LONDON-BASED POLYMETAL ON ACQUISITION IN ARMENIA

Moscow, 10 March 2016: Hogan Lovells assisted Polymetal International Plc ("Polymetal"), major LSE-listed gold-mining group operating in Russia and Kazakhstan in signing a binding agreement for acquisition of the Kapan mine in Armenia from a TSX-listed Canadian international gold mining group Dundee Precious Metals Inc. ("DPM") (the "Transaction"). The Transaction was structured through sale of shares in the Armenian company Dundee Precious Metals Kapan CJSC ("DPMK"). The consideration payable for the shares in DPMK will consist of (i) US$10 million in cash from , (ii) US$15 million in Polymetal shares, and (iii) a 2% net smelter royalty on future production from the Kapan mine capped at US$25 million.

Hogan Lovells advised Polymetal on the entirety of the transaction documents including share purchase agreement and net smelter return royalty agreement. The share purchase agreement is subject to various representations, warranties, covenants and indemnities which are expected for a transaction of this nature. The Transaction is also subject to (i) DPM obtaining its lenders' consent, release and discharge in respect of their security interest over the shares of DPMK and (ii) the parties obtaining all regulatory approvals, including the approval of the State Commission for the Protection of Economic Competition of the Republic of Armenia to transfer the DPMK shares. Closing of the Transaction is expected to take place in the second quarter of 2016.

"Polymetal believes that the acquisition of the Kapan mine will result in the development of a profitable regional processing hub with sizable production which will provide a strong operating platform to pursue further opportunities in Armenia," said Vitaly Nesis, Group CEO of Polymetal.

Managing partner and Head of Corporate Practice of the Moscow office Oxana Balayan says "It is a fantastic piece of work for Polymetal which follows our recent work with Polymetal team on establishment of their production joint venture with Russian No 1 gold producer Polyus Gold in Yakutia, Russia in December 2015. It is great to see such transaction happening now despite hard economic and political times for the Russian business. Polymetal team in Russia and Armenia is a pleasure to work with."

The Hogan Lovells team on the Transaction was led by Managing partner of the Moscow office Oxana Balayan with support from counsel Maria Baeva, and consisted of associates Maria Kazakova and Denis Shakhov.

For additional information visit www.hoganlovells.com

NAUTADUTILH

ADVISES VODAFONE GROUP ON JOINT VENTURE WITH LIBERTY GLOBAL DUTCH OPERATIONS

16 February 2016 : NautaDutilh advises longstanding client Vodafone Group regarding the creation of a joint venture with Liberty Global in the Netherlands. The 50:50 joint venture would incorporate both companies' Dutch operating businesses.

The joint venture will operate under both the Vodafone and Ziggo brands and will create a nationwide integrated communications provider with over 15 million revenue generating units. Combining Ziggo's fiber-rich broadband network with Vodafone's leading mobile operations will create a stronger fixed and mobile competitor in the Dutch market, delivering significant benefits for consumers, businesses and the public sector through investment in digital infrastructure and customer experience.

NautaDutilh team: Deal captains of NautaDutilh's team are Piet Sippens (TMT, account manager), Leo Groothuis and Lieke van der Velden (both corporate M&A). The team further consists of Edger Kleijer, Jacqueline Clement (both corporate M&A), Marlous Schrijvers (TMT), Pieter van Drooge (corporate notarial), Chris Warner and Edward Rijnhout (both Tax)

You can read the full announcement on Vodafone's website http://www.vodafone.com/content/index/media/vodafone-group-releases/2016/lg-vodafone-merge-dutch-operations.html

For additional information visit www.nautadutilh.com

SYCIP LAW

ADVISES THE LIGHT RAIL MANILA CORPORATION ON PHP 24 BILLION PROJECT FINANCING FOR THE LRT1 CAVITE EXTENSION, OPERATIONS AND MAINTENANCE PROJECT

Manila - 01 March 2016: SyCipLaw acted as counsel to the Light Rail Manila Corporation (LRMC) in relation to its Php24 Billion project financing Light Rail Transit Line 1 (LRT1). Around Php8.7 Billion of the total loan amount is allotted to the rehabilitation of the existing LRT1 system and Php15.3 Billion to the 11.7 km extension of LRT1 to Bacoor, Cavite.

On February 11, 2016, LRMC signed the 15-year Omnibus Loan and Security Agreement with Metropolitan Bank & Trust Company, Security Bank Corporation and Rizal Commercial Banking Corporation (as Lenders), Light Rail Manila Holdings Inc., Metro Pacific Light Rail Corporation, and Macquarie Infrastructure Holdings (Philippines) Pte. Limited (as Sponsors), First Metro Investment Corporation, RCBC Capital Corporation, SB Capital Investment Corporation (as Mandated Lead Arrangers), Rizal Commercial Banking Corporation – Trust and Investment Group as the Facility Agent and Metropolitan Bank & Trust Company – Trust Division as the Security Trustee.

The SyCipLaw team was composed of partners Rocky Alejandro L. Reyes and Arlene M. Maneja with senior associate Ma. Christina C. Ortua and associates Earla Khalila Mikhaela C. Langit, Mark Xavier D. Oyales and Jaime Liz F. Yu.

For additional information visit www.syciplaw.com

RODYK

ADVISES SHANGHAI BASED INVESTOR IN ACQUISITION OF S CAPITAL OF CECIL PTE. LTD

SINGAPORE , January 2016: Rodyk advised Shanghai-based investor in the acquisition of the entire issued and paid-up share capital in Cecil Pte. Ltd. from Mr Cheong Sim Lam. Cecil Pte. Ltd. is the registered proprietor of the property at 137 Cecil Street, formerly known as the Aviva Building.

The S$210 million deal was closed on 30 November 2015, and was coupled with a leaseback arrangement to the seller's nominated entity, for a period of at least three years. The newly renovated 13-storey commercial development, which has a mezzanine level and basement carpark, is on a freehold site.

Rodyk also acted in the financing aspects of the transaction, which involved credit facilities of more than S$200 million granted by a local bank to refinance the existing loans.

Real estate partner Norman Ho and corporate partner Ng Eng Leng led in this transaction. They are supported by real estate partners Tan Shijie and Cindy Quek. They are also assisted by real estate senior associate Woon Jing Yi, corporate senior associates Nigel Chia and Wong Hui Yi, litigation senior associate Tang Jin Sheng, corporate associate Glen Chiang, and real estate associates Jamie Tan and Marco Low.

For additional information visit www.rodyk.com

TOZZINIFREIRE

ASSISTS ARVAL BRAZIL IN ACQUISITION OF EMPRESAS RELSA

Arval Brasil, a subsidiary of French bank BNP Paribas and a specialist in corporate vehicles' long term rentals, has acquired 100% of the Brazilian subsidiary of Empresas Relsa, a company that works with the outsourcing of fleets. The companies have signed a deal to create a joint-venture, "Arval Relsa", to be active in Chile and Peru, while Arval Brasil will simultaneously take on the activities of Relsa's subsidary in Brazil.

Arval set up shop in Brazil in 2005, and currently has over 17,500 vehicles in portfolio in South America's largest country. Relsa, which is market leader in Chile and Peru and has operations in Brazil, has a total of 12,000 vehicles under management.

Combined, that gives a fleet of around 30,000 leased vehicles across three South American countries. But the two companies will do more than combine their footprint. Each brings specific qualities to the partnership: Relsa has extensive local knowledge and experience, Arval brims with global networks and best practices, and world-class fleet management techniques.

Arval Brazil was represented by TozziniFreire Advogados (Brazil) led by Partner Marta Viegas and associates Bruno Sbardellini Cossi and Juliana de Mello Mattar.

For additional information visit www.tozzinifreire.com.br

UPCOMING PRAC EVENTS

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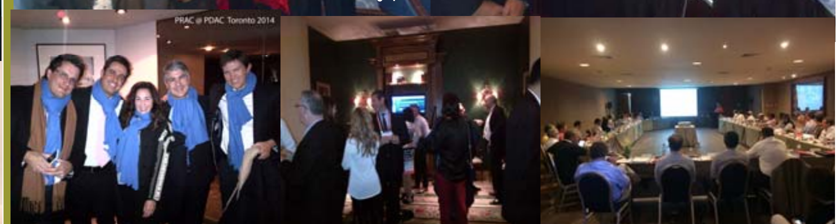

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ALLENDE & BREA

Argentina - Changes in Foreign Exchange regulations

Following the announcements of the Finance Ministry, on December 16, 2015 the Argentine Central Bank issued Communiqué A 5850, establishing significant changes in the regulations of the Argentine Foreign Exchange Market (the "FX Market") by relaxing regulatory and de facto restrictions in place until now. The most significant changes are the following:

Local savings and investments abroad in foreign currency. Purchases and transfers of foreign currency by local residents or companies (other than banks and financial entities) for (i) local savings, (ii) real estate investments abroad, (iii) loans to non-residents, (iv) direct investments abroad, and (v) portfolio investments abroad are now allowed with a cap of USD 2 million per month. Clearance by the tax authority is no longer required. Purchases of foreign currency exceeding USD 500, must be made by debits in bank accounts or wire transfers. In the case of portfolio investments abroad, transfers must be made to accounts opened under the name of the local resident or the company making the transfer, at financial entities incorporated in FAFT-GAFI compliant jurisdictions. In addition, the USD 2 million cap is increased in an amount equivalent to the foreign currency assets repatriated to Argentina by the relevant local resident or company and sold in the local FX Market as from the date hereof.

Tourism and business trips. The new rules eliminate restrictions for the purchases and transfers abroad of payments of tourism and business trips. In addition, the regulation eliminates the restriction that established that foreign currency cash withdrawals from ATMs located abroad, were only allowed against local foreign currency bank accounts.

Intercompany services and leases. Payment of intercompany services and services provided from tax heavens (including leases and rents of local assets, royalties, commissions, trademarks and patents) are no longer subject to prior Central Bank authorization.

Purchases by non-residents individuals (tourists). Purchases of foreign currency by non resident individuals, up to USD 2,500 per month, will not require prior Central Bank authorization.

Arbitrages and swaps. Banks and other entities authorized to trade with foreign currency will be allowed to perform arbitrages and swaps between foreign currencies with its clients, under the following conditions:

i. When the foreign currency entered into the FX Market is not subject the mandatory sale against Pesos (i.e. proceeds from exports of goods and services provided to non-residents), the local resident is allowed to transfer and enter the foreign currency into the FX Market for its deposit at a local bank account denominated in such foreign currency, with no further restrictions and without the obligation to convert the foreign currency into Pesos.

ii. Foreign currency deposited in local bank accounts can be freely transferred abroad with no further restrictions; to the extent such transfers comply with the applicable regulations. Prior conversion into Pesos is no longer required.

iii. In addition, foreign currency deposited in local bank accounts corresponding to collection of foreign indebtedness, liquidation of investments by non residents, and repatriation of portfolio investments of local residents entered in to the country as from the date hereof, which were not sold in the FX Market (i.e. pursuant to i. above), can be transferred abroad, provided the applicable minimum term has been complied.

Foreign indebtedness. Local borrowers are no longer subject to the legal entry and mandatory conversion into Pesos in the FX Market of the proceeds from financings granted by non-residents. However, evidence of the legal entry and conversion to Pesos of the loan proceeds are still required for the local borrower to access the FX Market for the repayment of such foreign indebtedness from Argentina. New financings granted or renewals agreed as from the date hereof shall the subject to a minimum stay of 120 days as from the entry of the loan proceeds into the FX Market. Under prior regulations, the minimum term was 365 days. In addition, prepayment of foreign indebtedness is now permitted at any time, provided the applicable minimum 120- days term of the financing has elapsed.

Advance payment of imports. In the case of advance payment of imports, the term for local importer to evidence custom clearance of non-capital goods was extended from 120 to 180 days as from the date of the advance payment of the relevant import.

Payments of new imports. The payment of new imports of goods (i.e. with shipments made as from the date hereof) is permitted with no amount limits.

Payments of new services from non-residents. The payment of new services by non residents (rendered or accrued from the date hereof) is permitted with no amount limits.

Commercial debts for unpaid imports. Commercial debts for unpaid imports -with customs cleared prior to the date hereof- may be cancelled as they become due with no restrictions, in the following cases: (i) debt from federal or provincial states, including state-owned companies; (ii) imports secured by letter of credits or bonds issued or granted by local financial entities; (iii) debts owed to official or multilateral credit agencies (ECAs) and/or debts guaranteed by such parties.

Cancellation of all other commercial debts for unpaid imports (with customs cleared prior to date) will be allowed, at the prevailing market FX rate of the date of payment, pursuant the following payment schedule established by the Central Bank: (i) up to USD2 million per importer and per calendar month, until 12/31/2015; (ii) up to USD4,5 million per importer and per calendar month, from 1/01/2016 and until 5/30/2016; (iii) as from 6/01/2016, with no amount limitations.

Commercial debts for unpaid services. Cancellation of commercial debts for unpaid services by non-residents (rendered or accrued prior to date) will be allowed, at the prevailing market FX rate of the date of payment, pursuant the following payment schedule established by the Central Bank: (i) up to USD2 million per resident and per calendar month, as from 2/01/2016; (ii) up to USD4 million per resident and per calendar month, from 3/01/2016 and until 5/30/2016; (iii) as from 6/01/2016, with no amount limitations.

From 1/04/2016 and until 1/31/2016, the cancellation of debts for services rendered or accrued until December 16, 2015 will be reduced from the cap of USD 2 million cap per month established for investments.

Portfolio investments by non residents. Non residents will have access to the FX Market, without the need of prior authorization from the Central Bank, to repatriate new portfolio investments entered into the FX Market as from the date hereof, provided the applicable minimum term of stay, 120 days, has elapsed.

Securities investments by local financial entities. Central Bank has reestablished the authorization for local banks and financial institutions to purchase and transfer foreign currency abroad for: (i) repo transactions, (ii) primary subscription of foreign currency denominated sovereign securities issued by the federal government and the Central Bank, and (iii) trading locally with foreign currency denominated securities, for up to 5% of the *Responsabilidad Patrimonial Computable* of the relevant bank/ financial institution.

For further information on this topic please contact Jorge I. Mayora

CLAYTON UTZ

Clayton Utz Insights

03 March 2016

Foreign investment in Australia: Trends and insights from the Treasury

By Graham Taylor, Samy Mansour and Mary Konstantopoulos.

Key Points:

The data in the Working Paper acts as a benchmark for assessing the impact of Free Trade Agreements and changes to the foreign investment regime on particular sectors of Australia's economy.

Calendar year 2015 saw Australia enter into several free trade agreements and the introduction of changes to Australia's foreign investment regime on 1 December. With these changes front of mind, in January 2016 the Treasury Department published a working paper, "Foreign Investment into Australia", setting out key findings and trends in this space, with a number of key takeaway points for a variety of sectors.

Foreign investment in Australia at a glance

Despite there not being a single authoritative source of foreign investment data, the Treasury report was able to set out a number of trends in foreign direct investment in Australia for 2014-2015.

One of Treasury's key findings was that the benefits of foreign investment in Australia are not well understood, despite the total value of foreign investment in Australia standing at $2.8 trillion at the end of 2014.

The available data suggests that, by international standards, the levels of foreign direct investment in Australia are low. According to the International Monetary Fund, Australia's foreign direct inflow was less than 40% of its GDP; by comparison, the United Kingdom's amounted to 60%, and New Zealand's was 43%, of GDP.

Mining and quarrying

Key findings

The key findings were:

- there are 26 major projects in Australia worth $2 billion or more either underway or in early stages;
- most of these projects are joint ventures, with 90% of these projects having some level of foreign ownership;
- the highest levels of foreign investment in these projects are from the United Kingdom (27%) and the United States (26%); and
- surprisingly, China's share of foreign investment in these projects is only 3%.

Between 2010 and 2014, there was significant growth in the amount of foreign direct investment in mining and quarrying, with stocks increasing from $147.5 billion to $264.7 billion in this period. Not only was there significant growth during this period, but the Australian Government's current approach to liberalising international trade (for example, in considering free trade arrangements with the EU), also suggests that this is an area of expected continuing growth.

For example, during the Trans-Pacific Partnership Agreement (**TPP**) negotiations concluded on 6 October 2015, mining and quarrying was an area of focus, with the TPP looking to promote foreign investment in resources and energy in Australia. This will be done by increasing the screening threshold, above which private foreign investments in the mining and energy sectors are considered by the

Foreign Investment Review Board, from $252 million to $1.09 billion for all TPP counties (except in relation to uranium and plutonium extraction and nuclear facilities).

Future trends

We expect that when the TPP becomes operational, Australian companies will have the opportunity to expand their exports and benefit from:

- duty-free access for exports of mining equipment. The TPP will lock in tariffs at zero in countries where Australian exports already have duty-free access; and
- TPP countries agreeing to guarantee access for Australian mining equipment, technologies and services providers.

This, combined with the TPP focus on promoting foreign investment in resources and energy, should see the trend of growth in the amount of foreign direct investment in mining and quarrying in Australia continue to increase.

Agriculture

Key findings

Agriculture has been identified as an area for potential significant growth in foreign investment. Despite this opportunity, in the past, the Treasury's understanding of foreign investment in this sector has been limited because of a lack of data.

Nonetheless, this is an area where there is still tremendous potential for growth, primarily because agricultural assets in Australia are still primarily locally owned. In 2013, local ownership of agricultural business in Australia exceeded 96% and, for agricultural land, just under 90% of Australia's farmland is fully Australian-owned.

The establishment of the ABS Agricultural Land and Water Ownership Survey is an attempt to get more data and thus a clearer picture of foreign agricultural land ownership. On 1 July 2015, the Australian Taxation Office also began to collect information on new foreign investment in agricultural land, such as the location and size of property and the size of the interest acquired. This data will be made available beginning in 2016.

The Government is also currently seeking views on a proposed national register of foreign ownership of water access entitlements. This will further enhance transparency of foreign ownership in the agricultural sector and be a useful tool to gauge emerging investment trends.

Despite a lack of data, the available data reflects the importance of agriculture as a sector for the Australian economy, particularly following entry into various free trade agreements.

For example, there has been a dramatic increase in food exports since entry into the Korea-Australia Free Trade Agreement. In 2015, Australian exports of fresh beef to Korea increased 37% to $396.6 million and exports of fresh cherries increased 1,105% to $4.3 million.

Similarly, following entry into the Japan-Australia Economic Partnership Agreement, Australian exports of fresh table grapes to Japan have increased 1,025% to $6.5 million and exports of shelled almonds have increased 1,413% to $5.4 million.

Future trends

We expect that in the agricultural sector, a key focus going forward will be on obtaining comprehensive data. Opportunities in this sector will continue to grow as we better understand data from:

- as set out above, the ABS Agricultural and Land and Water Ownership Survey; and
- a register of foreign ownership of water access entitlements, if established.

The benefits of the various free trade agreements are being realised and we expect that food exports, particularly to Korea, Japan, China and the TPP countries (when the TPP becomes operational) to continue to grow.

However, changes to the foreign investment regime, which has introduced a general business threshold applied to purchases of agricultural land will increase the red tape for foreign investors in agricultural land and may act as a deterrent to foreign investment.

Additionally, the Government has announced a new set of standard conditions to be imposed on foreign investment approvals which will require multinational companies to comply with Australian tax law and ATO directions to provide information in relation to the investment. These conditions have been drafted broadly and may also prove a burden to foreign companies seeking to invest in Australia.

Surprising trends: who's investing in Australia

What may come as a surprise are the overseas sources of foreign investment. The United States remains the largest source of foreign direct investment into Australia, followed by the United Kingdom and then Japan. China is a relatively minor source of foreign direct investment into Australia and currently represents only 4.4% of the total (despite its becoming the largest source of proposed foreign direct investment in Australia in 2013-2014).

In the context of the China-Australia Free Trade Agreement and the continued rise of real estate applications from $25.8 billion in 2003-04 to $74.6 billion in 2013-2014, we expect that China's share of foreign direct investment into Australia will continue to grow (particularly as it is starting from a low base).

Conclusion: Foreign investment is an opportunity for Australia

The increased numbers of multilateral and bilateral trade agreements aim to promote increased export and import opportunities for Australia and its neighbours. The Australian Government is also working towards a free trade agreement with the European Union. As the benefits of these free trade agreements are realised, countries like Japan, Korea and China should become even bigger players and contributors to Australia's foreign direct investment.

While the data in the Working Paper is limited to 2014-15, it does provide a useful base for discerning trends in foreign investment in particular sectors, and, the next time data is released, allow us to assess the impact of the recent legislative changes more effectively.

You might also be interested in...

- Foreign investors face new tax hurdle to get FIRB approval
- The Trans-Pacific Partnership: Emerging E&R opportunities for Australia

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

Infrastructure / Government, Contracts and Projects

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

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

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

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

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

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

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

NautaDutilh

Belgium

Fair Taxation: Tackling Tax Avoidance
What Can We Expect from the European Commission?

Thursday, 10 March 2016

In January, the European Commission presented new measures designed to prevent and combat corporate tax avoidance ("the Proposal"). The Proposal is a coordinated EU-wide response to corporate tax avoidance, following global standards developed by the OECD last autumn. New rules are deemed necessary to align the tax laws of all 28 EU member states in order to fight aggressive tax practices by large companies. This article briefly outlines the content of the Proposal and points out the practices which will be disallowed in the (near) future.

Defining what constitutes fair taxation has always proven to be a challenging endeavour. For companies, taxes are a cost which, like other expenses, should be reduced in order to optimise profits. No one blames (multinational) companies when they try to decrease their tax exposure, provided they pay their "fair share" of tax.

Key features of the Proposal include: (i) legally binding measures to block the most common methods used by companies to avoid paying tax; (ii) a recommendation on how to prevent tax treaty abuse; (iii) a proposal to share tax-related information on multinationals operating in the EU through administrative cooperation; (iv) actions to promote good tax governance on the international scene; and (vi) a new EU process for black-listing third countries that refuse to play fair. The purpose of the Proposal is threefold: hamper aggressive tax planning, boost transparency between Member states, and ensure fairer competition for all businesses in the Single Market. In this way, a level playing field will be created for all businesses, to ensure fair and effective taxation. Below we briefly set out the changes liable to have the greatest impact on your business.

New measures to fight tax avoidance

Effective taxation implies that companies generating profits in the EU should pay their fair share of tax. In practice, multinationals tend to use tax planning to take advantage of mismatches between the tax laws of the member states. The six most common methods listed by the Commission and the proposed methods to tackle them are:

- a) the classic profit shift to group companies in low-tax jurisdictions, thereby reducing taxable profits in the EU: Controlled Foreign Corporation (CFC) rules will be introduced to tax all profits in the EU;
- b) paying interest to a group company in a low-tax jurisdiction, thereby generating a tax deduction: interest limitation rules will be introduced to cap the amount of interest a company can deduct;

- c) hybrid mismatches, e.g. a member state treats a payment as interest while another considers it to be a dividend and both allow a tax deduction: hybrid rules will be introduced to eliminate mismatches, ensuring effective taxation;

- d) the "switchover", by which member states often treat dividends received by EU-based companies as if they had already been properly tax at source (tax exemption for incoming dividends): under the new rules, member states will be able to tax incoming dividends that have not yet been properly taxed;

- e) the "patent flight" by which European companies transfer their IP rights to no-tax countries just before they are finalised: new exit tax rules will ensure that member states can tax IP before it is transferred out of the EU;

- f) a "safety net" or General Anti-Abuse Rule ("GAAR") will be introduced to tackle artificial tax arrangements not covered by specific rules when companies engage in aggressive tax planning to bypass rules and find loopholes in new tax laws.

Prevention of tax treaty abuse

Tax treaties are designed to prevent income linked to more than one country from being taxed twice. In practice, however, such treaties may, under certain circumstances, give raise to non-taxation. The Proposal contains recommendations to shut down treaty shopping. In future, if a group company does not carry out a genuine economic activity, the tax treaty (granting relief from taxation and power to tax) will not be applicable, thus ensuring that it is not abused and that the taxes due are effectively paid in the other country.

Improved tax transparency through administrative cooperation

Several initiatives have recently been enacted to increase the (international) exchange of information. Transparency is crucial to identify aggressive tax planning practices. Under the revised Administrative Cooperation Directive, key tax-related information on multinationals operating in the EU will be exchanged between the national tax authorities, mainly through country-by-country reporting. In brief, the parent company of a multinational group that receives tax-related information for all of its subsidiaries must file a report with the tax administration of the place where it resides. That authority will then share the report with all tax authorities of other states where the group companies are resident. Even though the principle appears straightforward, the exchange of information could prove difficult in practice due to information overlap, language issues, different approaches, etc.

Low-tax or no-tax countries

Relations with low-tax and no-tax countries currently vary from one EU member state to another. The Proposal offers updated tax good governance criteria. After the establishment of a list of countries to be screened using neutral indicators, dialogue should take place with these countries on measures they can take. At the Commission's recommendation, the member states can decide to blacklist a country, which will be removed from the list once it meets the agreed standards.

What to expect in 2016 and 2017

The most discussed measure is the new proposal for a Common Consolidated Corporate Tax Base ("CCCTB"), a single set of rules which companies operating within the EU can use to calculate their taxable profits. In other words, a company will have to comply with a single EU system to determine its taxable income, rather than different rules in each member state in which it operates. However, given that the allocation of taxation rights between the member states is a highly sensitive issue, it is unlikely that a compromise will be reached soon. Other measures which may be expected include a new proposal on enhanced transparency measures, a first common EU list of no-tax/low-tax countries, proposals on transfer pricing and patent box rules and, last but not least, the entry into force of the new EU rules on the exchange of information for tax matters.

We will be sure to update you on future developments.

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Canada Implements New Take-Over Bid Rules

February 29, 2016 | Paul Barbeau, Brent Kraus, Georges Dubé, John Piasta

The Canadian Securities Administrators Implement New Rules to Strengthen the Ability of Target Issuers and their Shareholders to Respond to Hostile Take-Over Bids

Following a lengthy process involving each of the securities commissions in Canada, industry participants and the legal community, on February 25, 2016, the Canadian Securities Administrators (CSA) adopted amendments to Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids* and changes to National Policy 62-203 *Take-Over Bids and Issuer Bids* (the New Rules). The New Rules represent a significant departure from the historic take-over bid regime in Canada. Under the New Rules, shareholders will have a greater ability to make informed tender decisions and target boards will be provided with more time to identify and pursue alternative transactions and/or other defensive measures. The New Rules will come into effect on May 9, 2016, provided that implementation in Ontario may be delayed beyond that date until the relevant legislation is proclaimed into force.

The Prior Regime

Prior to the New Rules, take-over bids in Canada have been required to remain open for acceptance for not less than 35 days, during which period the acquiror could not yet acquire tendered securities. While this relatively short time period has facilitated the efficient completion of friendly acquisitions, in the case of a hostile take-over bid, the board of directors of a target issuer had little time to identify, negotiate and enter into a value-maximizing alternative transaction or implement certain other defensive measures. In response, it became common practice for a target issuer to adopt a shareholder rights plan, or "poison pill", which operated to secure the target board additional time before any securities tendered to a hostile acquiror's bid could be taken up by the hostile acquiror.

In addition, the prior take-over regime did not provide for an irrevocable minimum tender condition or a mandatory bid extension period, meaning the target shareholders received little transparency with respect to the level of overall shareholder support for a particular bid. As a result, the prior take over regime could arguably have permitted the coercion of target shareholders into tendering to a hostile take-over bid for fear that in refraining from tendering, they could be stranded as part of a minority, and potentially illiquid, position in the target issuer once the bid expired.

The New Rules

The New Rules significantly increase the leverage of the board of directors of the target issuer by requiring that all non-exempt take-over bids for Canadian issuers have the following features:

- **105-day Bid Period** – Take-over bids must remain open for a minimum of 105 days, which represents a material increase from the 35-day bid period under the prior regime and the 60-day period typically provided for through the implementation of a shareholder-approved shareholder rights plan by a target issuer. The 105-day requirement is subject to two exceptions:

    - The target issues a news release announcing that a shorter deposit period is acceptable to the target board (but not less than 35 days), in which case all outstanding or subsequently launched bids are only required to be open for not less than the shortened bid period. In other words, if the 105-day period is waived for one acquiror, it is waived for all acquirors.
    - The target issues a news release announcing that it has entered into, or agreed to give effect to, an "alternative transaction" (such as a plan of arrangement or other acquisition agreement), in which case all outstanding or subsequently launched take-over bids are only required to be open for 35 days from their date of commencement.

  As a result, the target board may waive the 105-day requirement to 35 days for a friendly acquisition and, once waived, all subsequent acquirors would be permitted to launch a bid with a 35-day bid period.

  While the CSA had previously proposed a 120-day mandatory bid period, the new bid period has been reduced to 105 days to accommodate the compulsory acquisition provisions contained in Canadian corporate statutes.

- **Irrevocable Minimum Tender Condition** – The New Rules require that at least a majority of all outstanding target securities owned or held by persons other than the acquiror or its joint actors must be tendered and not withdrawn before the acquiror can take up any securities under its bid.

- **10-Day Bid Extension** – The New Rules also require that all bids must be extended for an additional 10 days after the acquiror satisfies the minimum tender condition and the acquiror announces its intention to take up and pay for the securities deposited under the bid. In addition, the acquiror must publicly disclose the number of securities deposited and not withdrawn at the end of the initial bid period. This rule allows non-tendering securityholders the opportunity to evaluate the initial bid response and then retain an opportunity to tender as well.

General Implications

The CSA has not departed from its long-held view that shareholders must ultimately have the opportunity to decide whether or not to tender to an unsolicited take-over bid. However, by imposing a minimum 105-day bid period, the CSA has acknowledged that the playing field was largely tipped in favour of hostile bidders and has introduced a regime that facilitates a more thorough review process by the target board. In addition, by implementing an irrevocable minimum tender condition together with a mandatory 10-day bid extension, the CSA has addressed the aspects of the old regime that permitted coercive tactics. Shareholders may now take a wait and see approach in response to a hostile take-over bid and choose whether or not to tender once initial tender results are known. The CSA's expectation is that the New Rules will result in more value for target shareholders in change of control transactions.

While the New Rules are largely viewed as positive developments for target issuers and their boards, they may deter some potential acquirors from launching unsolicited take-over bids because the New Rules may give rise to higher financial costs due to a longer bid period, may expose the offeror to a longer period of market risk and could increase the cost of acquisition financing. It is also possible that the increased difficulty in executing a hostile take-over bid may result in a greater number of proxy contests for control of the target board.

Use of Defensive Tactics

The New Rules may largely eliminate the use of a shareholder rights plan or "poison pill" as a response to an unsolicited take-over bid because the primary purpose of a shareholder rights plan, securing more time, is achieved with the longer bid period. While it is possible that a "tactical" shareholder rights plan could be implemented to extend the 105-day bid period, we expect that any such plan, absent exceptional circumstances, would be quickly cease traded by the applicable securities regulatory authority. At the same time, a shareholder rights plan may remain useful in precluding "creeping bids", where an acquiror acquires substantial share positions in reliance on exemptions from the take-over bid rules (*e.g.*, the normal course purchase exemption).

The New Rules do not otherwise change the current CSA policy on defensive tactics in the context of take-over bids, such as undertaking an issuer bid, declaring a special dividend, pursuing the purchase or sale of "crown jewels" or issuing securities from treasury (including to a potential "white knight"). These tactics, however, will be scrutinized by the overarching principle that such actions must have a legitimate business purpose. That said, we believe that securities regulatory authorities in Canada may take a more critical view in assessing the business legitimacy of such defensive tactics once the New Rules take effect.

NEWSALERT

February, 2016

/Carey

Law No. 20,894 regarding social security payments for independent employees

On January 26th, 2016, Law N°20,894 was published in the Official Gazette. This law postpones enforcement of the mandate that would require independent employees to pay social security contributions. The new law also provides amendments to certain social security regulations that are currently in force.

Prior to the implementation of this new project, Law N°20.255 stated that the social security reform that required independent employees to enroll in the social security system, would come into force gradually. According to this gradual enforcement process, starting in 2015, independent employees would be required to contribute to a pension fund, with the option to pay for health insurance.

The main amendments introduced by Law N°20,894, are the following:

- **Requirement to pay social security contributions to a pension fund (AFP):** Beginning in 2018 (tax year 2019), independent employees will be required to pay into a pension fund based on 100% of their taxable income. Before December 2017, independent employees will maintain the right to decide whether or not to contribute to a pension fund.

- **Requirement to pay contributions for workers' compensation:** Payment of contributions for workers' compensation insurance will be mandatory starting in 2018.

- **Payments for private health insurance (ISAPRE) and public health insurance (FONASA):** As stated in law N°20.255, health insurance payments will be mandatory beginning in 2018 (tax year 2019), with the amount based on 100% of an independent employee`s taxable income.

- **Basis for payments into pension funds (AFP) and public health insurance (FONASA):** The law allows the decoupling of such payments.

  Currently, payments for workers' compensations and health insurance must be made taking into consideration the same gross income used as a basis for contributions to a pension fund.

  The amendment allows independent employees to contribute to workers' compensation and health insurance based on the gross income declared separately on a monthly basis for such purposes. This differs from pension fund contributions which are determined based on yearly income.

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

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- **Collection of outstanding social security payments:** The ability to collect outstanding social security contributions through a judicial collection procedure is eliminated. Instead, the new law indicates that if there are pending social security payments, they will be collected from the amounts withheld by the IRS in the next tax year.

- **Prioritization for payments withheld by the IRS:** When the IRS withholds funds due to non-payment, funds will be applied to outstanding social security contributions in the following order: (1) Disability Insurance; (2) Workers' Compensation; (3) contributions to a pension fund through a Fund Pension Administrator (AFP); (4) if there are still funds left over, those amounts will be applied towards any remaining unpaid balance of contributions from the immediate previous order, with applicable readjustments; and finally (5) if there is a remaining balance, it will be used to pay health insurance contributions.

Hogan Lovells

China fences off the World Wide Web with its new Online Publishing Regulations

MARCH 2016

Summary

China's SARFT[1] and MIT[2] recently jointly issued their new Regulations on the Administration of Network Publication Services ("网络出版服务管理规定", "Regulations"). The Regulations contain an important overhaul of the current regulations -which took effect in 2001- and significantly tighten the applicable legislation, reaffirming foreign publishers are cut off from the Chinese online publishing market, and (further) restricting the freedom of operation of Chinese online publishers. The new Regulations will take effect on 10 March 2016. This newsflash summarizes the key changes in the Regulations. As implementation proceeds, we will keep you posted.

Wide scope

The Regulations have a very large scope of application. Online publication services are defined as "*the provision of online publications to the public through the information network*". This definition, if applied strictly, could in theory encompass virtually any uploading activity on the internet by both individuals and businesses in China. However, the Regulations also provide that the "*specific classification*" of online publication businesses "*are to be further clarified*" by the authorities. We expect –and the SARFT informally confirmed- that the scope of the Regulations will be limited to professional online publishers, excluding individuals and entities that only occasionally or incidentally publish online media in China.

As to the types of media covered by the Regulations, the following three –very broad- categories of online publications are listed under article 2:

- works of literature, art, science and technology, including literary works, pictures, maps, videogames, animation, audio, video and audio-visual works;
- digitized books, newspapers, magazines, sound and/or video recordings and electronic publications that were published in other media before;
- online databases of digital works developed from the selection, edition and collection of the above two types of works.

Additionally, the Regulations provide for a catch-all section, allowing SARFT to add other types of media to the scope of the Regulations, e.g. to include novel types of digital works and arguably content aggregators.

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1 *State Administration of Press, Publication, Radio, Film and Television*

2 *Ministry of Industry and Information Technology*

Publication licenses required

Any individual or entity (principally and or professionally?) providing online publications to the public in China must apply for an online publication service license with SARFT. Such license must be obtained *before* the entity can engage in any online publishing in China, and will be valid for 5 years.

Applicants must, inter alia, fulfil the following requirements in order to be eligible for a license:

- The servers used for the online publications must be located in China;
- The legal representative of the applicant must be a Chinese citizen residing in China;
- The applicant must establish a system of self-editing/scrutiny (this provision is unclear, but is probably directed against any "sensitive" content).

Licenses are non-transferable (this includes 'sub-licensing', leasing etc.) and information regarding the license (such as the license number) must be clearly displayed on the publisher's home page.

Anyone providing online publications to the public in China without a license faces administrative penalties (such as deletion of the website, removal of the online publications, confiscation of illegal proceeds and fines of 5 to 10 times the amount of the illegal turnover) and even criminal sanctions.

Foreign entities banned

Foreign entities, including Sino-foreign joint ventures and WOFEs, are banned from providing online publications to the public in China, and are not eligible for a publication license. Sino-foreign publishing "cooperation programs" may, on the other hand, be permissible, but remain subject to SARFT's prior and *ad hoc* approval. This prior approval is a noted tightening compared to the standard "prior security report" used in the 2012 draft Regulations.

However, this seemingly draconic measure does not come as a real surprise, since foreign entities had already been banned from investing in the online publication sector in China under the current (2015) version of the Catalogue for the Guidance of Foreign Investment Industries.

It is currently unclear if foreign media companies with overseas servers will be targeted or whether the Regulations are just targeted at content providers in China.

Increased government control over online publishers

The Regulations provide that online publishers must conduct their business with respect for China's laws and regulations, China's socialist direction and China's socialist core values. Online publishers will need to report annually to the local authorities about, inter alia, their operation, the quality of their publications and their compliance with the laws and regulations. The local SARFT authorities are granted powers of inspection.

If an online publisher is suspected of violating the publishing laws and regulations, committing copyright infringement or other illegal conduct, the local SARFT authorities can suspend its operation for up to 180 days, pending further investigations. The online publisher must then cease all publishing activities for the time of the suspension.

Monitoring obligations for ISPs

The Regulations impose a direct duty of verification on Internet Service Providers ("ISPs") for so-called acts of "active intervention". This means that they are obligated to verify the online publication licenses and the business scopes etc. of online publishers when providing services such as search engine result ranking, advertising and promotion, etc. ISPs that fail to do so face fines of up to RMB 30,000.

Specific rules for online games and minors

As to online (video) games, foreign game developers are required to license their software copyrights to a Chinese online publishing license-holder, since only such license-holders are permitted to publish content online in China. This domestic Chinese license holder will then have to apply for a pre-approval from the local SARFT authority before a game can be published/uploaded on the internet in China. This pre-approval for online games is a requirement for both foreign and domestic games.

The Regulations also provide for specific measures to protect minors. In particular, the Regulations prohibit the online publication of:

- Content encouraging minors to imitate immoral or criminal conduct;
- Content that is deemed horrific, cruel or likely to prejudice the physical or mental health of minors;
- Content that violates the privacy of minors.

For further information or consideration in line with the free trade zones exceptions for certain telecommunication type of services, please see our resources here and here.

Conclusion

The Regulations are the last in a series of laws (about which we reported e.g. in our most recent TMT brief) that significantly tighten the regulation of the internet and the freedom of operation of technology companies in China.

The objective -which was also underlined by President Xi Jingping in his keynote speech at the World Internet Conference in Wuzhen in 2015-, is to make the Chinese internet and IT technology in general more "secure and controllable". This is inter alia reflected in the recent National Security Law, a draft of the China Cyber Security Law, and the Counter-Terrorism Law. This often leads to the exclusion of foreign players and content providers as they are considered less "secure and controllable".

However, notwithstanding the clear tightening of China's internet and technology legislation, the Regulations do leave some loopholes for foreign content providers (e.g. Sino-foreign cooperation programs) and for Chinese publishers to publish their media in China. This should allow market players to continue targeting China's immense online population, estimated at 700 million people, provided they tread carefully and stay within the boundaries of the Government's laws, regulations and policies.

The Regulations seem as of yet incomplete, and will need to be followed by additional clarifications from the authorities (e.g. details regarding the application process for licenses, the application for permission for Sino-foreign cooperation projects and the specific classifications of online publishers are currently still lacking).

We will keep you updated with further developments as soon as they become available.

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Amendment to External Regulation DCIN-83 issued by the Colombian Central Bank - Foreign Exchange Transactions

Mon, 02/15/2016 - 10:38
NewsFlash: 320

Forex, Derivatives and Structured Finance

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

Payments in foreign currency between Colombian residents – Procedures applicable to foreign exchange transactions

By means of Newsletter No. 08 dated February 10th, 2016, the Colombian Central Bank modified certain procedures applicable to foreign exchange operations set forth in External Regulation DCIN 83. The main purpose of the reforms are as follows: (i) **to simplify rules applicable to payments in foreign currency between Colombian residents**, facilitating registration of compensation accounts and (ii) to include certain procedures in connection with the modification and annulment of foreign exchange declarations.

(i)Payments in foreign currency between residents

With the modification occurred on February 10 of 2016, Colombian residents are authorized to complete payments in foreign currency through their foreign accounts, **regardless of whether such accounts are registered as compensation accounts with the Central Bank**. It is important to bear in mind that prior to the abovementioned amendments, Colombian residents were authorized to complete payments in foreign currency between them if and to the extent that such payments were made through compensation accounts previously registered.

Pursuant to these new regulations, **Colombian residents will be able to complete payments derived from internal operations (between Colombian residents) in foreign currency through free market accounts held abroad**. However, it is importante to note that once such payments are made, each Colombian resident must register the free market account through which the payment was made/received as a compensation account before the Central Bank, **within the calendar month following the date of the first payment made in foreign currency.**

According to the above, Colombian residents willing to comply with their internal obligations in foreign currency **no longer depend on the execution of a foreign exchange transaction to be mandatorily traded through the**

foreign exchange market in order to register their foreign bank accounts as compensation accounts with the Central Bank.

(ii)Procedures for the modification and annulment of foreign exchange declarations

Additionally, the Colombian Central Bank expressly regulated the possibility of annulling foreign exchange declarations transmitted by foreign exchange intermediaries and/or compensation accounts owners. In particular, regarding passive and active foreign indebtedness, the following are the most relevant aspects of the new regulations:

1. Colombian residents may annul foreign indebtedness registrations (both active and passive), **provided that no disbursement of funds has been made**. The annulment of the foreign indebtedness reports (Form No. 6 and Form No. 7) must be completed with the foreign exchange intermediary through which the initial registration was made.
2. Additionally, Colombian residents will be able to cancel reports regarding disbursements and payments of foreign indebtedness made through **Form No. 3A**, by means of a formal request to the relevant foreign exchange intermediary or electronically through the compensation account. Therefore, it will now be possible to amend and rectify inconsistencies related to the registration and repayment of foreign loans.

In any case, the annulments and modifications to foreign exchange declarations must reflect the reality of each operation. Otherwise, local authorities may initiate administrative investigations and impose sanctions.

Finally, it is important to mention that these amendments **will facilitate, among others, the structuring and execution of major infrastructure projects in Colombia, simplifying the flow of funds at a local and international level.**

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client alert

ENERGY | FRANCE | 19 FEBRUARY 2016

REMIT: WHAT OBLIGATIONS FOR RENEWABLE ENERGY PRODUCERS?

Although regulation no. 1227/2011 of 25 October 2011 on *wholesale energy market integrity and transparency* ("**REMIT**") entered into force on 28 December 2011, it had not had any immediate consequences on the energy sector's operators. The provisions of the European text only truly began to be applied at the end of 2015.

The regulation was adopted to monitor the wholesale energy markets and support the banning of abusive practices that impact them. Directly applicable in the EU's Member States, REMIT thus prohibits market abuse resulting from insider information or market manipulation. It also forces those operators who are active on the gas and electricity wholesale markets to register and publish data on the operations they conduct.

REMIT is implemented by the Commission Implementing Regulation no. 1348/2014 of 17 December 2014, which focuses specifically on operators' data reporting, a significant part of the mechanism.

In France, the "*Brottes"* law no. 2013-312 of 15 April 2013 gave power to the French Energy Regulatory Commission (Commission de régulation de l'énergie, "**CRE**") to implement REMIT nationally, and to punish any infringing behaviour.

APPLICATION TO RENEWABLE ELECTRICITY PRODUCERS

REMIT applies to all "*market participants*", a concept that is defined by the Regulation as designating "*any person, including transmission system operators, who enters into transactions, including the placing of orders to trade, in one or more wholesale energy markets*" (art. 2 (7)).

Amongst the number of operations targeted by this article, REMIT covers in particular the "*contracts for the supply of electricity or natural gas where delivery is in the Union"* (art. 2 (4)). The regulation excludes however those contracts entered into with final customers whose consumption does not exceed 600 GWh per year.

Renewable energy producers are thus doubly concerned by REMIT:

- **as regards the purchase obligation**: for the electricity they sell to EDF; and
- **beyond the purchase obligation**: for the electricity that they sell either to a supplier or to a final customer whose annual consumption exceeds 600 GWh.

In other words, those that are not concerned by REMIT are those producers that, on the one hand, consume the very electricity they produce or, on the other hand, sell it to a final customer whose annual consumption is below 600 GWh.

REMIT thus concerns a vast majority of renewable energy producers.

DATA REGISTRATION AND COLLECTION OBLIGATION

From 7 April 2016, energy producers concerned by REMIT will be subject to an obligation to declare their transactions.

To this end, they must:

- **register with the CRE before 7 April 2016**

  Unless specifically requested by the Agency for the Cooperation of Energy Regulators ("**ACER**"), the Implementing Regulation of 17 December 2014 specifies that contracts for the physical delivery of electricity **are exempt from** this obligation. provided that they deal with:

  - a single production unit with a **capacity of less than or equal to 10 MW**, or
  - several production units whose combined capacity is less than or equal to 10 MW.

  For other plants, producers must register with the CRE before being able to carry out transactions. The registration process gives producers a single code that enables them to identify the transactions they conduct.

- **from 7 April 2016, send to ACER the data concerning their transactions**

  The nature of data to be reported is appended to the Implementing Regulation of 17 December 2014. For production units operating under the power purchase obligation, EDF shall suggest a template to fill in the data collection fields once the registration complete.

  Maximum deadlines are indicated in article 7 of the Implementing Regulation for the communication of data. Such reporting deadlines are summarised in the following table:

		Start of reporting	Reporting frequency
Transaction data	Standard OMP supply contracts + orders to trade	07/10/2015	D+1
	Standard supply contracts exc. OMP	07/04/2016	D+1
	Non-standard supply contracts	07/04/2016	M+1
	Standard primary transmission contracts + orders to trade	07/04/2016	D+1
	Non-standard primary transmission contracts	07/04/2016	M+1
	Standard secondary transmission contracts + orders to trade	07/04/2016	D+1
	Non-standard secondary transmission contracts	07/04/2016	M+1
Fundamental data	Transparency data for electricity and gas (capacity, use of production facilities, consumption and transmission, unavailability of facilities etc.)	07/10/2015	As soon as possible
	Nominations	07/04/2016	D+1
	Other data	07/04/2016	Mainly D+1
Data requested by ACER	Intragroup contracts	31/12/2016	Ad hoc
	Electricity contracts concerning a production unit with capacity lower than or equal to 10MW	31/12/2016	Ad hoc
	Gas contracts concerning a production unit with capacity lower than or equal to 20MW	31/12/2016	Ad hoc
	Electricity and gas balancing and adjustment contracts	31/12/2016	Ad hoc

Source: CRE

The CRE's standing committee for disputes and sanctions is competent to pronounce sanctions if REMIT provisions are not abided by.

PRACTICAL ADVICE

- Registration of operators is carried out on CEREMP, a dedicated online platform, accessible on https://www.acer-remit.eu/ceremp/home?nraShortName=9&lang=en_FR.
- Various companies of a same group must register separately if they each meet the REMIT application criteria.
- **Registration must be carried out as quickly as possible**, considering the lead-times to process registration requests. The process can take several weeks or months. It is mandatory that the registration be completed at the latest by 7 April 2016, since data collection will begin at this time.
- It is possible to partially complete the forms first (filling in only sections 1 to 3, for instance) and to continue at a later date.
- The CRE temporarily recommends that, due to a technical issue, section 5 should not be filled in.

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NEWS DETAIL

02/03/2016

NEW LAW ON PUBLIC HOUSING SAVINGS IMPOSES MANDATORY EMPLOYER CONTRIBUTION

On February 23, 2016, the Indonesian House of Representatives passed the bill on Public Housing Savings into law. The law on Public Housing Savings (Tabungan Perumahan Rakyat / “Tapera Law”) will be the foundation for the government’s Tapera Program, a housing savings program for workers which will be established to help low income people attain proper housing. The Tapera Law is awaiting the ratification by the President.

We highlight the following provisions of the Tapera Law:

- Employees who (i) are at least 20 (twenty) years old or already married at the time of registration, and (ii) earn at least the minimum wage, must join the Tapera Program. Their employers are responsible for their registration in the program. The requirement to join the Tapera Program also applies to foreign workers who hold working visas of more than 6 (six) months.
- Independent workers earning at least the minimum wage are obliged to register themselves in the Tapera Program. Independent workers earning less than the minimum wage have the right but are not obliged to register themselves in the program.
- The Tapera Program will be administered by the Tapera Management Agency (“BP Tapera”), a legal entity which will be established based on the Tapera Law. BP Tapera will inter alia appoint the program’s investment manager, custodian bank and participating banks or financing institutions, and be heir supervisor.
- Each participating employee will have an individual account at the custodian bank. The employer and employee are to jointly deposit on a monthly basis an amount of money being a percentage of the employee’s salary to the account, as the employee’s savings. The employer is to withhold the employee’s portion from the employee’s salary and deposit it along wi h its portion to the employee’s account. The salary percentage for the savings will be determined under a government regulation.
- The savings fund will be invested either conventionally or on the basis of Sharia principles, at the choice of each participating employee. The investment will be managed by an investment manager on the basis of an agreement with the custodian bank.
- The funds of the Tapera program may be used by employees who (i) have been participating in the Tapera program for at least 12 (twelve) months, (ii) have a low income, (iii) do not yet own a house and (iv) use the funds to finance housing ownership, housing construction or housing improvement. The fund will be allocated through banks and financial institutions which are specialising in housing finance and appointed by BP Tapera as participants in he program.
- An employee’s participa ion in the Tapera Program will cease upon either (i) he employee’s retirement, or (ii) the employee’s reaching the age of 58 (in case of independent workers), or (iii) the employee death, or (iv) the employee’s failure

to meet the requirements as a participant for 5 years in a row. Upon the cessation of the participation, the employee' savings along with the accumula ions will be paid to the employee.

The Tapera Law imposes administrative sanctions on all of the parties involved in the Tapera Program for violation of its provisions. Employers who fail to, inter alia, (i) register their employees in the Tapera Program, (ii) collect and deposit the employee's portion into the employee's account, and (iii) update the employee's data (in connection with Tapera membership) will be deemed as having violated the law, for which they face administrative sanctions of written warnings, administrative penalty, publication of the violation, suspension and/or revocation of their business license.

The Tapera Law will come into effect in 2018 at the latest.

The Tapera Law is strongly opposed by employers organisations, which argue that it creates additional financial burden to employers. The Indonesian Employers Association (Apindo) has announced that it will file a judicial review with the Constitutional Court to have the law repealed.

THE CHAMPION ARRIVES

Lee Shih explains the adoption of the multiple derivative action by the Malaysian Courts

The High Court has recently upheld the existence of the multiple derivative action in Malaysia. This is seen in the unreported Grounds of Judgment dated 16 November 2015 in *Ranjeet Singh Sidhu and another v Zavarco plc and 15 others* (Kuala Lumpur High Court Suit No. 22NCC-179-06/2015).

A multiple derivative action is where a shareholder of a holding company files an action on behalf of the subsidiary of that holding company. This common law action would allow shareholders to seek relief against wrongdoings where there are wrongs carried out against subsidiaries further down the corporate structure.

BACKGROUND FACTS

The Plaintiffs are shareholders of Zavarco plc ("Zavarco UK"), a UK incorporated company.

In turn, prior to the dispute, Zavarco Bhd ("Zavarco Malaysia"), a Malaysian incorporated company, is a wholly-owned subsidiary of Zavarco UK. At that material time, Zavarco Malaysia held 91% of the shares in a Malaysian incorporated company, V Telecoms Bhd ("V Telecoms"). V Telecoms was the operating entity within Zavarco UK's group of companies.

Filing of the Civil Suit and the Impugned Consent Judgment

In May 2014, a Malaysian company, Open Fibre Sdn Bhd ("Open Fibre"), filed a suit in Malaysia against Zavarco UK and Zavarco Malaysia. The Plaintiffs alleged that Open Fibre was being controlled by the alleged wrongdoers in this action. Both Zavarco UK and Zavarco Malaysia were represented by Malaysian solicitors in that suit.

In July 2014, Zavarco UK and Zavarco Malaysia entered into a consent judgment. This consent judgment essentially required:

(i) Zavarco Malaysia to transfer all its shares in V Telecoms over to Open Fibre and for Zavarco UK to allow Zavarco Malaysia to carry out this consent judgment;

(ii) Both Zavarco UK and Zavarco Malaysia to transfer control and management of V Telecoms to Open Fibre together with all the documents of V Telecoms; and

(iii) Zavarco UK to issue new shares to Open Fibre equivalent to RM150 million.

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The Plaintiffs alleged that the suit and the consent judgment were sham proceedings pursuant to a conspiracy to defraud Zavarco UK and Zavarco Malaysia. They alleged that these proceedings allowed Open Fibre to misappropriate V Telecoms and to gain control of Zavarco UK and Zavarco Malaysia.

In February 2015, Zavarco UK issued and allotted shares to Open Fibre, resulting in the latter controlling 82.5% of the shares in Zavarco UK.

The Plaintiffs also discovered that all the shares in V Telecoms were then transferred to another Jersey incorporated company called Aries Telecoms Ltd ("Aries"). Aries was essentially controlled by Open Fibre which was in turn controlled by the alleged wrongdoers in this dispute.

Filing of the Multiple Derivative Action in Malaysia

The Plaintiffs filed a multiple derivative action in the Malaysian courts in a representative capacity for the benefit of Zavarco UK and Zavarco Malaysia and for themselves.

The multiple derivative action sought, among others, the following reliefs:

(i) To set aside the consent judgment;

(ii) To unwind the transfer of the shares in V Telecoms to Open Fibre;

(iii) An order for Aries to transfer all the shares in V Telecoms back to Zavarco Malaysia;

(iv) An order for Open Fibre to deliver up to the Plaintiffs all documents of V Telecoms that have been transferred through the consent judgment; and

(v) An order that all shares in Zavarco UK that were issued and/or transferred to Open Fibre through the consent judgment be cancelled and for Zavarco UK's share register be rectified and restored accordingly.

Defendants' Striking Out Applications

The Defendants filed applications to strike out the Plaintiffs' multiple derivative action. One of the grounds for the striking out was the argument that the Plaintiffs did not have standing to file the action due to the failure to obtain permission from the English Courts to file this action.

It was argued that the UK Companies Act had abolished the common law derivative action and that only the statutory derivative action route remained. Therefore, the Plaintiffs as shareholders of Zavarco PLC had to obtain permission from the UK Courts to bring such a statutory derivative action to sue on behalf of Zavarco PLC.

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It was further argued that Zavarco UK was an indispensable party in this action since it was the parent company of Zavarco Malaysia. Hence, the failure to obtain permission from the English Courts meant that the entire Malaysian action crumbled.

FINDINGS BY THE COURT

Ability to File a Multiple Derivative Action

First, the Court referred extensively to the Hong Kong Court of Final Appeal decision in *Waddington Ltd v Chan Chun Hoo Thomas & Ors* [2009] 2 BCLC 82. This was a landmark case which confirmed that a shareholder could bring a multiple derivative action under Hong Kong law. That decision held that if wrongdoers must not be allowed to defraud a parent company with impunity, they must also not be allowed to defraud its subsidiary with impunity.

Secondly, the Court also accepted the reasoning in the English High Court case of *Universal Project Management Service Ltd v Fort Gilkicker Ltd and others* [2013] Ch 551 ("*Fort Gilkicker*"). *Fort Gilkicker* held that the multiple derivative action continued to exist at common law.

The Court held that the right to bring a multiple derivative action also exists in Malaysia. It was a single piece of procedural ingenuity designed to serve the interests of justice. The multiple derivative action allows a member of the company, or a member of its parent company, to be a champion or representative of that company in wrongdoer control. The Court held that there was nothing in principle to prohibit the filing of a multiple derivative action in Malaysia.

The Court instead listed two reasons in support of the ability to file a multiple derivative action:

(i) If there was no recognition of multiple derivative actions, the law would fail in its purpose and injustice would be done without redress. There may be occasions when multiple derivative actions are necessary in the interest of justice so as to safeguard the interests of the companies and their shareholders; and

(ii) Multiple derivative actions may prevent a wrongdoer from benefiting from his own wrongdoing.

The Court went further to approve the approach of allowing a person who was neither a member of the subsidiary nor a member of the parent company to file a multiple derivative action. This was provided that such a person had sufficient interest to sue as the company's representative claimant for the benefit of all its stakeholders or as a suitably interested representative of the wronged company. The Court adopted the approach taken in *Fort Gilkicker* on this point.

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Requirement for the English Courts' permission

The Court did not accept the argument that permission from the English Courts was required to file the multiple derivative action against Zavarco UK. Some of the reasons in rejecting this argument were:

(i) There was nothing in the Malaysian Companies Act that required the English Courts' permission to be obtained before the filing of the multiple derivative action against Zavarco UK;

(ii) In relation to Zavarco Malaysia, section 181A(3) of the Malaysian Companies Act expressly preserves the right of a person to bring proceedings on behalf of a Malaysian incorporated company at common law. Therefore, there was no requirement for leave of a Malaysian Court for the Plaintiffs to file this common law derivative action against Zavarco Malaysia;

(iii) The UK provisions requiring permission was confined to the filing of derivative actions in England, Wales and Northern Ireland. There was nothing in those provisions to indicate that they had extra-territorial effect on derivative actions filed outside the UK;

(iv) The UK provisions envisaged a derivative action only in respect of a cause of action arising from negligence, default, breach of duty or breach of trust. On the other hand, this Malaysian action was based on, among others, the statutory right under section 44 of the Evidence Act 1950 to set aside an earlier judgment or order based on fraud or collusion;

(v) The Court adopted the approach taken in *Fort Gilkicker* which held that the UK provisions did not apply to multiple derivative actions; and

(vi) Even if the Court had erred in the above grounds, the Court found that these issues of law required serious argument and mature consideration at a trial. Hence, it was not appropriate to summarily strike out the suit.

The Court therefore dismissed the striking out applications.

CONCLUSION

This decision by Wong Kian Kheong, JC is a ground-breaking decision as it confirms the ability to bring a multiple derivative action in Malaysia. This brings Malaysia in line with the common law developments in Hong Kong and the UK.

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This procedural device of a multiple derivative action would serve the interests of justice. In the face of wrongdoings carried out against a company or its subsidiary, the law would clothe a suitably interested representative with the necessary standing to bring an action on behalf of the wronged company and, in the words of Briggs J in *Fort Gilkicker*, to be the company's champion.

It will also be interesting to see how this concept may be extended in the future. The Court was of the view that even a representative who is not a member of the parent company or the subsidiary may have the necessary standing to bring a multiple derivative action. For example, such a representative may be a former member of the wronged company and where the wrongdoings may have resulted in the representative ceasing to be a member.

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9 March 2016

Note:
An article on the multiple derivative action, "*Getting Away With Fraud: Defraud The Subsidiary?*" was published in Legal Insights Issue 3/2015.

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Commerce Commission releases report on unfair contract terms in the telco sector

February 10, 2016

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On 17 March 2015 new provisions came into force under the Fair Trading Act 1986 prohibiting the use of unfair contract terms in standard form consumer contracts.

The Commerce Commission has now completed an investigation into standard form contracts in the telecommunications industry. A copy of their report can be found **here (http://www.comcom.govt.nz/the-commission/consumer-reports/uct-teleco/)**.

The Commission is also conducting a review of standard form contracts in the electricity retail and gym industries. However, the Commission's guidance to the telecommunications industry will be of relevance to other industries seeking to ensure compliance with the unfair contract terms regime.

The Commission examined the standard form contracts across seven telecommunications businesses. It engaged with the industry in relation to 66 contractual provisions which it considered had the potential to be unfair contract terms. These broadly related to four key types of contractual provisions:

1. **Limitation of liability clauses:** the Commission viewed clauses which limited or excluded a Company's liability as being potentially unfair if there was no corresponding limitation on customer liability. It acknowledged that such clauses could be legitimate where (a) the amount of the limitation is sufficient to ensure that customers are not left out of pocket when loss occurs; and (b) customers have the same or similar limitation to their liability as the company.
2. **Rights to unilaterally vary the contract:** the Commission regarded many of these clauses as being drafted too broadly. Rights to unilaterally vary the contract are likely to require a legitimate reason to do so, and also allow a customer to exit the contract without penalty if the variation results in detriment to the customer.
3. **Customer responsibility for unauthorised charges:** the Commission has noted that a business should not make the customer its insurer. However, it has accepted that such terms could be legitimate, provided that there is the opportunity for customers to notify the company of charged for unauthorised use of their services

for the company to then assess each case on its merits to determine where liability for the unauthorised use should lie.

4. **Liability for consequential losses:** while such clauses limiting a company's liability for consequential loss may be legitimate, it must be clear that any limitation does not purport to exclude liability under the Fair Trading Act or the Consumer Guarantees Act 1993 (both of which allow customers to recover compensation for consequential loss arising from a breach of those Acts).

If you have any questions or need assistance reviewing your standard form contracts please contact **Anne Callinan (/people/anne-callinan/)** or **Glen Holm-Hansen (/people/glen-holm-hansen/)**.

Consumer law - reform and updates (/resources/consumer-law-reform-and-updates)

CLIENT ALERT

Philippine Competition Commission Issues Transitory Rules on PSE-related Mergers and Acquisitions

On February 16, 2016, the recently constituted Philippine Competition Commission ("*PCC*"), which was created under the Philippine Competition Act (Republic Act 10667 or the "*PCA*"), issued Memorandum Circular No. 16-002, Series of 2016 (the "*PSE Transitory Rules*"), which provides for the transitory rules and guidelines relating to mergers and acquisitions that were, or are to be, executed or otherwise implemented through the Philippine Stock Exchange ("*PSE*") and after the effectivity of the PCA on August 8, 2015 but before the effectivity of its implementing rules and regulations (the "*PCA IRR*").

Under the PSE Transitory Rules, parties to merger or acquisition agreements:

(a) where the value of the transaction exceeds One Billion Pesos (Php1,000,000,000.00);

(b) where one of the parties is listed in the PSE;

(c) which are to be executed or otherwise implemented after the effectivity of the PSE Transitory Rules but before the effectivity of the PCA IRR; and

(d) where the Securities Regulation Code requires disclosure to the PSE prior to consummation,

shall, prior to executing the transaction, notify the PCC through a letter addressed to the PCC containing the information required under the PSE Transitory Rules. Transactions which fall under (a) to (c) above but are not required to be disclosed to the PSE prior to consummation shall be reported to the PCC before close of business of the next working day.

Mergers or acquisitions covered by the paragraphs above shall be deemed approved and the parties that notify the PCC in accordance with the PSE Transitory Rules may proceed to execute or implement their agreements. Such agreements shall benefit from Section 23 of the PCA and, therefore, may not be challenged under the PCA, except when the notification required under paragraph (b) above contains false material information.

Mergers or acquisitions wherein the value of the transaction exceeds One Billion Pesos (Php1,000,000,000.00) and are not notified to the PCC in accordance with the Transitory Rules will be subject to the provisions of Section 17 of the PCA. Under Section 17 of the PCA, an agreement consummated in violation of the notification requirement to notify the PCC shall be considered void and shall subject the parties to an administrative fine of one percent (1%) to five percent (5%) of the value of the transaction.

The PSE Transitory Rules shall take effect fifteen (15) days after its publication in the Official Gazette and a newspaper of general circulation and will remain valid until superseded by the effectivity of the PCA IRR. The PSE Transitory Rules were published on the Official Gazette and in a newspaper of general circulation on February 22, 2016 and shall take effect on March 8, 2016.

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The Fair Trade Commission Imposed Fines of NT$ 5.8 Billion on Global Capacitor Suppliers for Concerted Actions

Yvonne Hsieh/Wei-han Wu

02/26/2016

The Fair Trade Commission (FTC) resolved at the Commissioner's meeting on December 9, 2015 that seven aluminum capacitor companies, namely Nippon Chemi-Con Corporation (NCC), Hong Kong Chemi-Con Limited (NCC HK), Taiwan Chemi-Con Corporation (NCC TW), Rubycon Corporation (RUBYCON), ELNA Co., Ltd. (ELNA), SANYO Electric (Hong Kong) Ltd. (SANYO HK), and Nichicon (Hong Kong) Ltd. (NICHICON HK); and three tantalum capacitor companies, NEC TOKIN Corporation (NEC TOKIN), Vishay Polytech Co., Ltd. (VISHAY POLYTEC), and Matsuo Electric Co., Ltd. (MATSUO), participated in meetings or bilateral communications to exchange sensitive business information such as prices, quantity, capacity, and terms of trade to reach the agreement on restraint of competition. This conduct was sufficient to affect the market function with respect to supply and demand of capacitors in Taiwan, and was in violation of Paragraph 1, Article 14 of the Fair Trade Act at the time. Therefore, the FTC imposed administrative fines of NT$1,868,300,000 on NCC, NT$82,900,000 on NCC HK, NT$293,800,000 on NCC TW, NT$1,248,000,000 on RUBYCON, NT$76,600,000 on ELNA, NT$842,000,000 on SANYO HK, and NT$111,300,000 on NICHICON HK. The amounts of the fines on the aluminum capacitor companies totaled NT$ 4,522,900,000. The FTC imposed administrative fines of NT$1,218,200,000 on NEC TOKIN, NT$31,200,000 on VISHAY POLYTEC, and NT$24,300,000 on MATSUO. The amounts of the fines on the tantalum capacitor companies totaled NT$ 1,273,700,000. The fines in this case totaled NT$5,796,600,000, and were the highest which have ever been imposed on international enterprises since establishment of the FTC. Moreover, it was the first time the FTC had imposed fines on international enterprises in accordance with the fining principle under Paragraph 2, Article 40 of the Fair Trade Act which aims to penalize serious violation of the concerted action.

The FTC's investigation revealed that Japan capacitor companies had convened several multilateral meetings and engaged in bilateral communication since the 1980's, and had exchanged sensitive business information such as prices, quantity, capacity, and terms of trade to reach the agreement on restraint of competition. Products involved in this case included aluminum capacitors and tantalum capacitors. There are seven aluminum capacitor companies, including NCC, NCC HK, NCC TW, RUBYCON, ELNA, SANYO HK and NICHICON HK, that have been involved in this case, each to a different extent and duration of attending meetings. Starting from 2005 at the earliest to January 2014 at the latest, the companies convened the MK Meeting (Marketing Study Meeting), CUP Meeting (Cost Up Meeting), and SM Meeting (Hong Kong Sales Manager Meeting) in Japan and other countries, or conspired bilaterally via e-mails, telephone calls, or gatherings to exchange sensitive business information such as prices, quantity, capacity, and terms of trade for reaching the agreement on restraint of competition. In addition, the three tantalum capacitor companies, namely NEC TOKIN, VISHAY POLYTEC and MATSUO, also exchanged sensitive business information such as prices, quantity, capacity, and terms of trade for reaching the agreement on restraint of competition in the above-mentioned MK Meeting and conspired bilaterally via e-mails, telephone calls, or gatherings to exchange sensitive business information or discuss the prices.

Despite the fact that such meetings or discussions took place mostly outside the territory of Taiwan, the FTC indicated that the scale of Taiwan aluminum capacitor companies is far smaller than that of the Japanese capacitor companies, and that domestic electronic companies largely rely on the companies involved in this case for the supply of capacitors. Moreover, there are no domestic tantalum capacitor companies, and all tantalum capacitors are fully imported. Besides, the FTC estimated the total sales revenue of the aluminum capacitors and tantalum capacitors of the companies involved in this case at NT$50 billion and NT$16 billion respectively during the term of their concerted action. In addition, the aluminum capacitor companies NCC, RUBYCON and NICHICON are the top three aluminum capacitor companies in the world, and the tantalum capacitor companies involved in this case also have considerable market shares. Hence, the companies' actions in this case have had a direct, substantial, and reasonably foreseeable impact on the domestic market.

The FTC indicated that the unlawful conduct spanned nearly a decade and the illegal profit gained from Taiwan's market was considerably high. Therefore, the FTC has determined that this case is a serious violation punishable by a fine in accordance with Paragraph 2, Article 40 of the Fair Trade Act. It is noteworthy that the FTC calculated administrative fines of no more than 10% of each company's sales revenue in the previous fiscal year on the basis of each company's "global" sales rather than Taiwan sales only. In addition, this case applies to the leniency program, requiring the FTC to keep the identity of the leniency applicant confidential in accordance with the "Regulations on Immunity and Reduction of Fines in Illegal Concerted Action Cases." Hence, the FTC hasn't shown the proportion or amount of each company's immunity or reduction of fines while publishing the table stating the amount of each company's fines.

In the press release, the FTC indicated that it had worked with competition authorities of the US, EU and Singapore in investigation activities since the beginning. In addition to coordinating a synchronized investigation action on 28 March, 2014, the FTC also exchanged experience in evidence collection and investigation with these agencies through telephone conferences or e-mails. The FTC's decision is the first among competition agencies and will be of high attention internationally, as this case is still under investigation at least in countries such as the EU, US, Japan, Korea, Singapore and China etc. This case has shown that the FTC will not treat domestic or international concerted actions leniently, and has shown the FTC's ambition to gear the enforcement to international practices.

BAKER BOTTS

Ideas

Bankruptcy Court Allows Certain Production Dedication Agreements to be Rejected in Bankruptcy

09 March 2016

Updates

Yesterday, a bankruptcy court in New York approved the rejection of several midstream contracts secured by dedications of production, provisionally ruling that, under Texas law, such dedications are neither covenants running with the land nor equitable servitudes. Many midstream companies (some of which are organized as MLPs) rely on dedications of production as a form of credit support from producers to assure the future cash flows necessary to recover the significant capital expenditures incurred by such companies to construct and maintain the gathering, transportation and processing assets built for such producers. Many of our clients, including upstream producers, midstream companies and their respective lenders, are anxious to understand what this decision means for them.

1. <u>Background: Dedications as Covenants Running with the Land</u>

For several decades, midstream companies have relied on upstream producers to help finance the construction and expansion of oil and gas gathering, processing and transportation systems through contracts with producers that granted the midstream companies the exclusive right to gather, process or transport all hydrocarbons produced by such producers from leases and wells located within an agreed geographic area. These contracts included provisions known as "dedications" because they dedicate all hydrocarbon production from identified upstream assets (namely, leases and wells) to a particular midstream asset.

It is commonplace in modern midstream contracts for the parties to treat such dedications as covenants running with the land (rather than merely personal covenants) and to file evidence of their dedications in the county property records to put third parties on notice of the dedications (such that if a producer were to sell its producing assets, then the purchaser of such assets would be subject to the same contractual obligations as the seller). For many years, county clerks have accepted memoranda of dedication agreements and filed them in the property records. No Texas state court has ever expressly ruled, however, on whether a "dedication" is a "covenant running with the land".

Practically speaking, the primary differences between dedications as a personal covenant and as a covenant running with the land are (1) whether successors are bound and (2) survivability during bankruptcy. A burdensome unperformed contract, including a personal covenant, may be rejected in bankruptcy and replaced with a general unsecured claim for damages. Because unsecured claims share *pro rata* with other unsecured claims after all secured lender claims are satisfied, where the cash flows of upstream companies have dropped due to low commodity prices, such unsecured claims may receive substantially less than the face value of their claims in bankruptcy. In contrast, many courts have ruled that covenants running with the land cannot be rejected in bankruptcy because they constitute interests in real property rather than future performance obligations.

2. <u>Yesterday's Decision: *In re: Sabine Oil & Gas Corporation*</u>

The bankruptcy court's decision, announced yesterday in *In re: Sabine Oil & Gas Corporation, et al.*, Case No. 15-11835, in the United States Bankruptcy Court for the Southern District of New York, brings into question whether under Texas law, a "dedication" is a covenant running with the land and whether gathering agreements secured with a dedication are simply executory contracts that may be rejected by the bankrupt producer.

At issue in the case was the bankrupt producer's argument that it should be able to reject a gas gathering agreement secured by a dedication as an executory contract under Section 365 of the U.S. Bankruptcy Code. By rejecting the contract, the debtor would be free to attempt to arrange alternative gathering services or sell its producing assets without the gathering obligations (e.g. fixed fees, minimum volume commitments, etc.), thereby increasing the value of its assets and conserving cash. At the very least, rejection would give the debtor (or a purchaser of the debtor's assets) leverage in a renegotiation of fees and costs for go-forward gathering and transportation services. Cheniere Energy's Nordheim Eagle Ford Gathering, with whom the debtor entered into the gathering agreement, responded that the gathering agreement's dedication was a covenant running with the land and, therefore, could not be rejected in bankruptcy. The gathering company argued that if the gathering agreement were rejected, then it would be left in the same position as a landlord without a tenant and its rental property would be an $84 million pipeline to nowhere.

The Court concluded that the debtor's rejection is a "reasonable exercise of their business judgment" and allowed the gathering agreements in question to be rejected. The Court did not decide the issue of whether the dedications were "covenants running with the land" because of certain procedural concerns, but it did issue "non-binding analysis" reaching the "preliminary" conclusion that the dedications were not covenants running with the land under Texas law.

The Court found that under Texas law, a covenant runs with the land if all of the following are true:

- the covenant touches and concerns the land;
- the covenant relates to a thing in existence or specifically binds the parties and their assigns;
- the covenant is intended by the original parties to run with the land;
- the successor to the burden has notice; and
- there is horizontal privity of the estate.[1]

During the hearings, the last element above was the major point of contention. The Court, citing *In re: EnergyTec, Inc.*[2], held that horizontal privity was a required element to create a covenant running with the land. Horizontal privity requires a relationship between the original parties to a covenant at the time the covenant was made (*e.g.*, a grant of a legally recognized interest in real property). Stated differently, under the Court's interpretation of *EnergyTec*, in order for a dedication to be a covenant running with the land, there must be (as part of the creation of the dedication) either a conveyance or reservation of a real property interest.

After considering the parties' arguments, the Court did not interpret the agreements under review as having conveyed or reserved to the gathering company any portion of the debtor's real property mineral interests. Thus, the Court's conclusion that the dedications were not covenants running with the land turned heavily on its reliance on *EnergyTec* in holding that there must be horizontal privity of the estate as part of the creation of the dedication.[3] The decision, even as a preliminary ruling, causes producers, midstream companies and their respective lenders to reevaluate their existing arrangements and determine whether there are steps to be taken to address this non-binding ruling.

3. <u>Similar Pending Bankruptcy Cases</u>

Several other bankruptcy courts are currently considering whether similar dedications in other midstream agreements are covenants running with the land. If the courts hearing these other proceedings are inclined to issue a decision informed by the Court's decision in *Sabine*, a string of instructive case law precedents could find their way into state court opinions, recharacterizing many existing dedications as personal covenants and limiting their ability to survive bankruptcy as well as to be filed in county property records where they can provide notice to third parties.

One such case is *In re: Quicksilver Resources Inc.*, Case No. 15-10585, in the United States Bankruptcy Court for the District of Delaware. In that case, a bankrupt producer with dedication clauses in its gathering contracts is arguing for a resolution similar to that achieved by Sabine. The producer has asked the judge overseeing its case to reject a dedication with the operator who took over the producer's affiliated gathering system before the producer filed for bankruptcy in March 2015. Although the bankruptcy court approved the $235 million sale of the producer's upstream producing assets in January 2016, the prospective purchaser indicated that it will terminate its purchase contract unless the dedications set forth in the gathering agreements are rejected.

In another case, *In re: Energy & Exploration Partners, Inc.*, Case No. 15-44931, in the United States Bankruptcy Court for the Northern District of Texas (Fort Worth Division), the bankrupt producer has argued, preemptively, for the court to decide that a dedication in a gathering agreement is not a covenant running with the land – relying on the same arguments raised in *Sabine* – in order to limit a creditor's ability to use the gathering agreement as leverage to setoff amounts owed to it. Although the debtor in this case appears to want to maintain the gathering agreement, its arguments before the bankruptcy court would eliminate any bankruptcy protections from the contract's dedication provisions in much the same way as under *Sabine*.

4. <u>What do These Cases Mean For Our Clients?</u>

This is not the end of dedications-as-credit-support for midstream contracts, but it is undoubtedly the beginning of a period of greater focus on whether and how dedications can achieve their intended result. We expect, and are already starting to see, increased interest from our midstream clients regarding potential ways to address the diminished value of credit support provided by producers under midstream contracts. In addition, our producer clients are interested in what types of additional credit support may be requested by gathering companies with whom they do business. Furthermore, the fate of the gathering contracts in *Sabine* and *Quicksilver* may provide leverage for producers seeking to discard or re-negotiate long-term gathering contracts. All of these issues are likely to be magnified if commercial lenders seek additional credit support from their midstream borrowers to protect against the risk that existing contracts may be rejected in bankruptcy. This is especially acute given the current low commodity price environment and the competing liens of the producers' existing lenders.

Many existing gathering contracts contain "further assurances" provisions relating to the granting of dedications and the filing of information to help perfect and solidify such dedications, as well as "adequate assurances" provisions relating to the times at which, and the types of, additional credit support that a midstream company may request from producers. Under such agreements, producers may be requested to provide adequate assurances of performance that substitute for the diminished value of their dedications as well as undertake other actions to help existing dedications survive future court scrutiny. By making requests of producers under both provisions simultaneously, midstream companies may be able to couple the grant of the dedication with a grant of interests in the mineral estate, thereby securing additional credit support as well as potentially strengthening their existing dedications as covenants running with the land. Other requests may simply seek to require producers to obtain increased lines of credit or new parent guaranties. The ability of midstream companies to obtain this additional credit support from producers will depend on the existing language in the applicable contracts, the overall negotiating strength of the parties and the current liens for borrowed money that exist on the producers' assets, among other things.

Under new midstream contracts, we are seeing midstream companies request from producers enhanced credit requirements that expand beyond the confines of historical midstream contracts. Such new credit requirements may include liens, mortgages or other interests in real property that can support stand-alone dedication provisions to ensure the commercial arrangement is binding on successor owners of the dedicated properties and will not be rejected in bankruptcy. In addition, midstream companies are likely to focus heavily on the structure and wording of the dedications in midstream agreements to address the risks raised by the *Sabine* court and increase the likelihood that such dedications will be treated by future courts as covenants running with the land. To address these issues going forward, each of the interested parties will need to be creative in developing arrangements that are acceptable to producers, midstream companies and their respective lenders.

5. Who Can Our Clients Call For Guidance?

For more information about the implications of these cases on your business, please contact the authors.

[1]*See Inwood North Homeowners' Ass'n v. Harris*, 736 S.W.2d 632, 635 (Tex. 1987); *Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903, 910-11 (Tex. 1982)

[2]*See In re: Energytec Inc.*, 739 F.3d 215, 221 (5th Cir. 2013) (citing *Inwood*, 736 S.W.2d. at 635).

[3]The Court also questioned whether the dedications at issue in *Sabine* satisfy the "touch and concern" prong of the test for running covenants, interpreting the agreements as affecting the debtor's interest in personal property—extracted hydrocarbons needed to perform the agreed-to services—rather than burdening the debtor's interest in real property.

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Menu Labeling Compliance Date Delayed, Again

03.11.16

By Allison B. Condra

Restaurants and other retail food establishments covered by the U.S. Food and Drug Administration's (FDA) menu labeling regulations now have more time to comply with the regulations, according to a statement issued March 9, 2016, by Dr. Susan Mayne, Director of FDA's Center for Food Safety and Applied Nutrition. The compliance date will now be one year after FDA issues final guidance on the menu labeling requirements.

The final regulations were published on December 1, 2014, with an original compliance date of December 1, 2015. In July 2015, FDA announced it was extending the compliance date by one year, to December 1, 2016. FDA issued its draft guidance in September 2015, and took comments on the draft guidance until November 2015.

In late December 2015, as part of its omnibus budget bill, Congress included a section that restricted FDA's ability to enforce the menu labeling regulations. Section 747 states that FDA may not use any of the funds allocated to it by the omnibus budget bill to implement, administer, or enforce the final rule until the later of December 1, 2016 or the date that is one year after the date the final guidance is published. Given that FDA did not finalize its guidance before December 1, 2015, it was forced to delay the compliance date.

On the upside, although it is unclear when that guidance will be finalized, covered retailers have at least another year (and likely more) to bring their menus into compliance with the regulations. On the downside, continued delay in enforcement could impact defenses against local menu labeling requirements, like the recent sodium case out of New York City, where advocacy against enforcement may hinge at least partially on FDA's enforcement of its menu labeling regulations.

RELATED PRACTICES

Food & Beverage

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Disclaimer

March 8, 2016

Federal Reserve Proposes Modified Single-Counterparty Limits Rule

On March 4, 2016, the Board of Governors of the Federal Reserve System (Board) proposed a modified single-counterparty credit limits rule, based on two earlier Board proposals from 2011 and 2012. The proposed rule would create single-counterparty credit limits for banks' trading activity.

To address the risk associated with excessive credit exposures of large banking organizations to a single counterparty, section 165(e) of the Dodd-Frank Wall Street Reform and Consumer Protection Act authorizes the Board to establish single-counterparty credit limits for banks – including both bank holding companies and foreign banking organizations with total consolidated assets of US$50 billion or more. Section 165(e) prohibits covered banks from having credit exposure to any unaffiliated company that exceeds 25 percent of the capital stock and surplus of the bank. The proposed rule implements section 165(e).

Under the proposed rule, a bank holding company's aggregate net credit exposure to a single counterparty would be subject to one of three exposure limits with stringency commensurate with the bank's size and systemic importance:

- A global systemically important bank would be restricted to a credit exposure of no more than 15 percent of the bank's tier 1 capital to another systemically important financial firm, and up to 25 percent of the bank's tier 1 capital to another counterparty;

- A bank holding company with US$250 billion or more in total consolidated assets, or $10 billion or more in on-balance-sheet foreign exposure, would be restricted to a credit exposure of no more than 25 percent of the bank's tier 1 capital to a counterparty; and

- A bank holding company with US$50 billion or more in total consolidated assets would be restricted to a credit exposure of no more than 25 percent of the bank's total regulatory capital to another counterparty;

Foreign banks operating in the U.S. would be subject to similarly tailored credit exposure limits.

Implementation of the rule would follow a tiered schedule. Banks with $250 billion or more in total consolidated assets, or US$10 billion or more in on-balance-sheet foreign exposure would have one year from the final rule's

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effective date to comply. Banks under these US$250 billion/US$10 billion thresholds would be have two years from the effective date to comply. The compliance dates are subject to extension by the Board.

If the rule is finalized as written, compliance will require banks to measure individual counterparty exposures against the bank's regulatory capital. The proposed rule requires the credit exposure measurement to take into account exposures related to: extensions of credit, repurchase or reverse repurchase agreements, derivatives, and securities financings, among other transactions. The proposed rule also provides some key exemptions for the credit exposure calculation, including for derivatives, high-quality sovereign debt holdings, and positions with central counterparties. The compliance burden of the rule would thus involve understanding the requirements for measuring counterparty credit exposure and bringing counterparty credit exposures under the set limits.

The Board is seeking comments, due on June 3, 2016, including responses to the 58 questions incorporated into the proposed rule covering its various aspects, definitions and practical implications.