PACIFIC RIM ADVISORY COUNCIL

Pacific Rim Advisory Council
May 2016 e-Bulletin

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

PRACites @ INTA Orlando
No Host Gathering
Saturday May 21 - 2.30 pm
The Brickhouse Tavern & Tap

60th International PRAC Conference
Manila
Hosted by SyCip Salazar Hernandez & Gatmaitan
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BAKER BOTTS ADDS NEW ENERGY, INFRASTRUCTURE & CONSTRUCTION PARTNER IN LONDON

LONDON, 03 May 2016: Baker Botts LLP, a leading international law firm, announced today that Stuart Jordan has joined the firm's London office as a partner in the Global Projects Group.

"We are delighted that Stuart is joining us as we continue to grow our London office," said Andrew M. Baker, Managing Partner of Baker Botts. "Adding a lawyer of Stuart's caliber is a natural extension of our strength as a leading global energy firm," added Mr. Baker.

Mr. Jordan's practice focuses on the oil, gas, power, transport, petrochemical, nuclear and construction industries. His work has also centered on professional appointments, technology licenses, Operations & Maintenance (O&M) and concession agreements.

He has extensive experience in the Middle East, Russia and the UK. Mr. Jordan joins the firm from King Wood & Mallesons. He graduated from London's Guildhall University with a Bachelor of Laws in 1998.

"Stuart is a great addition to our firm. His wide-ranging global experience in the energy, construction and infrastructure arena will add significant value for our international clients," said Mark Rowley, Partner in Charge of the London office.

For more information, please visit www.bakerbotts.com

CLAYTON UTZ WELCOMES NEW PARTNER TO PRIVATE EQUITY TEAM

Sydney, 06 May 2016: Private equity specialist David Stammers has joined the Clayton Utz Corporate national practice group as a partner, based in Sydney.

David was a partner at Clayton Utz for over a decade, having joined the firm in 2004. Most recently he was practising at an international firm.

David has acted for major private equity funds including Ironbridge Capital Limited, Archer Capital and Pacific Equity Partners. In 2014, he led the firm's team in advising NYSE listed Arthur J. Gallagher & Co. on its acquisition of Wesfarmers' insurance broking and premium funding operations, a deal valued at over $1 billion. David also led the Clayton Utz team that acted on the float of Eclipx Group Limited (a former Ironbridge Capital portfolio company) in 2015.

Commenting on his appointment, David said: "I'm pleased to be returning to Clayton Utz and to the Private Equity team. It was the right time and opportunity for me given the strategic focus of my practice and the firm more broadly."

For additional information visit www.claytonutz.com

FORMER U.S. ATTORNEY JOHN MCKAY JOINS FIRM AS CHAIR OF GOVERNMENT INVESTIGATIONS AND CRISIS MANAGEMENT GROUP

SEATTLE, 20 April 2016: John McKay, the former U.S. Attorney for the Western District of Washington, has joined Davis Wright Tremaine LLP in Seattle as chair of the firm's government investigations and crisis management group.

McKay was appointed U.S. Attorney by President George W. Bush in 2001 and served in that position until 2007. He previously spent many years in private practice, representing local and national companies in complex commercial litigation.

As U.S. Attorney, McKay played a vital role in the fight against terrorism. He helped lead the investigation and prosecution of James Ujaama, who pled guilty to assisting the Taliban and later cooperated in terror investigations. He also spearheaded sentencing of Ahmed Ressam, who sought to bomb Los Angeles International Airport.

In 2007, McKay received the U.S. Navy's highest civilian honor, the Distinguished Public Service award, for his innovative leadership in creating a center for real-time analysis of criminal and terrorist threats and a cutting-edge method for sharing law enforcement records.

Under McKay's leadership, the Seattle U.S. Attorney's office became a national leader in prosecuting computer crimes, identity theft, and multinational criminal drug organizations. McKay spearheaded successful civil and criminal investigations into hospital overbilling of Medicare and Medicaid.

At Davis Wright Tremaine, McKay will work closely with attorneys across the firm, including two former colleagues from the U.S. Attorney's office, Mark Bartlett and Jeff Coopersmith. Davis Wright has a long history of helping companies navigate critical government enforcement cases and investigations. The firm has a special focus on companies in highly regulated industries, such as health care, energy, communications, and finance.

"Davis Wright stands for legal excellence and industry expertise," said McKay. "That combination, along with the team's depth in Seattle and reach across the country and abroad, gives clients a tremendous advocate to represent their interests in highly challenging situations."

"Litigation and investigations involving the government always present high stakes, whatever the forum, matter of law, or industry," said Rob Maguire, chair of the litigation practice at Davis Wright Tremaine. "John's exceptional expertise and long history with high-stakes matters will be tremendous resources for our clients."

McKay's dismissal as U.S. Attorney by the Bush Administration in 2007 created significant controversy. The Washington State Bar recognized McKay with its "Courageous Award" for "bringing credit to the legal profession" through his handling of the affair.

For more information, visit www.dwt.com

GIDE PROMOTES NINE TO COUNSEL

PARIS: 28 April 2016: Gide is pleased to announce the promotion to Counsel of nine promising young lawyers in in six practice areas. The appointments are effective as of 1 January 2016.

Franck Audran - Competition & International Trade

Ronan Diot - Mergers & Acquisitions / Corporate - Competition

Guillaume Goffin - Banking & Finance

Matthias Grolier - Mergers & Acquisitions / Corporate

Julien Guinot-Deléry - Intellectual Property, Telecommunications, Media & Technology

Yan-Eric Logeais - Employment

Antoine Mary - Real Estate Transactions & Financing

Constantin Miliotis - Real Estate Transactions & Financing

Ségolène Pelsy - Competition & International Trade

The new status highlights an excellent career to date within Gide. Each candidate was unanimously backed by his or her practice group, received individual sponsorship, and was approved by a commission comprising four partners. The Management Committee has awarded the Counsel status for an initial period of three years.

Partner Laurent Modave, member of the Management Committee, says: “On behalf of all the partners, I would like to congratulate these young lawyers, who are among the most promising we have at Gide. I would also like to thank them warmly for their daily commitment in the service of our clients.”

For additional information visit www.gide.com

NAUTADUTILH BELGIUM LAUNCHES LAWYERINSIGHT BLOG

BRUSSELS, 29 April 2016 |Today, NautaDutilh Belgium launched a new blog, lawyersinsight. A team of lawyers from various practice groups will provide general and legal perspectives on current events, developments and/or trends.

"At NautaDutilh, all our lawyers invest heavily in keeping up to date with new trends and developments in the sectors in which our clients are active. This blog was created to share our views and opinions on - legal and other - trends and developments", says Maxime Colle from the Brussels Corporate/M&A department.

The first post, entitled "The Call of NASDAQ: 5 Reasons why European Companies Choose NASDAQ"", was published today and can be found at http://www.nautadutilh.com/en/blog/.

For additional information visit www.nautadutilh.com

ROUSAUD COSTAS DURAN SLP SET TO HOST PRAC 59TH INTERNATIONAL CONFERENCE

BARCELONA, 10 May, 2016: Pacific Rim Advisory Council ("PRAC") member firm Rousaud Costas Duran SLP ("RCD") will host the 59th International PRAC Conference in Barcelona, May 21-24, 2016. Member firm delegates from around the globe will be gathering in Barcelona to attend the four day business conference featuring topical professional development programs and business development opportunities.

Among the business sessions on tap for Barcelona:

Business Session #1 | Country Briefing presented by Rousaud Costas Duran

Business Session #2 | Regional Reporting on significant changes impacting industries and jurisdictions

Business Session #3 | Business Development Meetings
| Series of business development group round-table discussions among firms;
| Member Firm Spotlight – Kochhar & Co. - New Delhi, India

Business Session #4 | Special Guest Presentation: Alex Valls, CEO, Mobile World Capital Barcelona

Business Sessions #5-7 | PRACtice Management – Leadership Workshop Discussion Forums
| *Compensation Issues and Challenges*
| *Alternate Fee Arrangements - No Longer a Matter of IF, But When to Use*
| *Strategic Differentiation - How Firms are Differentiating from Their Competition*

Business Session #8 | PRACtice Development - TPP Reactions, Opportunities and Challenges

Event is exclusive to PRAC Member Firms. For event details visit www.prac.org/events.php

PRAC2016
Barcelona

About Rousaud Costas Duran SLP

We are a leading independent, dynamic and innovative law firm and a reference for providing comprehensive legal advice.

TEAM With offices in Madrid and Barcelona, our greatest asset is a team made up of 29 partners and 200 professionals committed to excellence and client service. Ever since its establishment, the firm retains its youthful and very competitive spirit, which have contributed to its strong and unstoppable growth.

CLIENTS The profile of companies and institutions that rely on our firm is diverse and both national and international in scope. Among our clients there are multinationals, technological companies, start□ups, private foundations, family businesses, venture capital entities and public entities.

PRACTICE We adopt a multidisciplinary approach covering over 20 legal practices. Thanks to our experience and knowledge of key economic sectors, we provide high quality answers and solutions focused on our clients' needs.

MARKET POSITION We are the fastest growing firm in recent years and rank among the top 15 leading Spanish law firms. The most prestigious international legal directories such as Chambers & Partners and Legal500 have recognized our firm, year after year, for the counsel we've offered in our core practice areas.

We are also one of the most active law firms in the Spanish market by number of transactions. This has been recognized by major international rankings such as TTR (Transactional Track Record) and Bloomberg. In the first quarter of 2016, we were positioned in the top 3 in Bloomberg's ranking by transaction volume in the Iberian market. Throughout 2015, RCD was among the top tier in TTR's ranking of most active legal advisors by number of transactions: we led the ranking in private equity and venture capital, and ranked second in M&A.

For further information about Rousaud Costas Duran SLP, please visit us at www.rcdslp.com

ARIAS & MUNOZ

ASSISTS GRUPO UNICOMER WITH ACQUISITIONS IN THE CARIBBEAN

El Salvador, April 2016 : Grupo Unicomer has concluded the acquisition of assets of electronics store Omni; operating in the islands of Curacao, St. Maarten and Bonaire through 6 stores. The closing took place on April 11, 2016.

This acquisition represents an important step in Unicomer's expansion strategy within the Dutch speaking Caribbean; where they began with operations in Aruba in 2014.

Omni was established in Curacao in 1982, expanding presence in St. Maarten in 1989 and Bonaire in 1998. Today, it is an important player in these islands specializing in the commercialization of A/C units, electronics, home appliances, office automation and solar products.

Zygmunt Brett, partner at Arias & Muñoz El Salvador, coordinated the transaction of Grupo Unicomer, demonstrating once again the experience and knowledge to carry out cross-border transactions, beyond jurisdictions where the firm currently has offices. Zygmunt relied on the support of BBV Legal in Curacao, to assist with local law related matters of the deal.

The acquisition of Omni allows Unicomer to expand its regional presence from 21 to 24 countries and adds 110 jobs to the 15,000 currently generated by the company.

For additional information visit www.ariaslaw.com

ARIAS FABREGA & FABREGA, BRIGARD & URRUTIA, CAREY

ASSIST AUSTRALIAN PACKAGER AMCOR IN MULTIJURISDICTIONAL LATAM ACQUISITION

Arias, Fábrega & Fábrega, Brigard & Urrutia and Carey Assist Australian Packager AMCOR in multijurisdictional LatAm acquisition

03 May, 2016: PRAC member firms Arias, Fábrega & Fábrega in Panama City; Brigard & Urrutia Abogados in Bogotá; and Carey in Santiago assisted with Australian packager Amcor's acquisition of Chilean counterpart Techpack's flexible packaging unit for US$435 million.

Techpack is an investment vehicle owned by Chilean business group Luksic. The sale of Alusa hands Amcor an operational presence in Argentina, Chile, Colombia and Peru, where Alusa produces a range of packaging materials. Shareholders that controlled indirect stakes in Alusa's Colombian and Peruvian branches through a holding company in Panama added an extra leg to the sprawling transaction.

Member firms among the LatAm counsel to Amcor Flexibles, included: **Arias, Fábrega & Fábrega** Partner Roy Durling and associates Pilar Castillo and Fernando Arias in Panama City; **Brigard & Urrutia Abogados** Partner Sergio Michelsen Jaramillo and associates Richard Galindo, Laura Ribero Diaz and Maria Camila Pineda in Bogotá; **Carey** Partners Pablo Iacobelli and Salvador Valdés, and associates Cristian Figueroa, Patricia Silberman and Alejandro Montt in Santiago.

For more information visit **Arias, Fábrega & Fábrega** www.arifa.com ; **Brigard & Urrutia** www.bu.com.co ; **Carey** www.carey.cl

BAKER BOTTS

REPRESENTS EQT IN $407 MILLION ACQUISITION OF STATOIL'S MARCELLUS CORE ACREAGE

02 May, 2016 – EQT Corporation (NYSE: EQT) today announced that its subsidiary EQT Production Company has signed a definitive agreement to acquire 62,500 net acres, and current natural gas production of 50 MMcfe per day from Statoil USA Onshore Properties, Inc. (Statoil) for $407 million, subject to customary closing conditions. The transaction is expected to close on or about July 8, 2016.

Primarily located in Wetzel, Tyler, and Harrison Counties of West Virginia, the acquisition adds a sizeable amount of acreage within EQT's core development area and complements the Company's adjacent operations in Wetzel County, West Virginia. The 62,500 acre acquisition includes existing Marcellus production and approximately 500 undeveloped locations that are expected to have an average lateral length of 5,600 feet. Much of this acreage is contiguous with EQT's existing development area; therefore, the lateral length of 106 existing EQT locations can now be extended from 3,000 to 6,500 feet, which will reduce overall costs and deliver stronger well economics.

Baker Botts is representing EQT Corporation and EQT Production Company in the transaction.

Baker Botts Lawyers/Office Involved: Mike Bengtson (Partner, Austin); Coleson Bruce (Senior Associate, Houston); John Kaercher (Associate, Austin); Robert Goodin (Associate, Austin); James Chenoweth (Partner, Houston).

For more information visit www.bakerbotts.com

BENNETT JONES

ACTS FOR COLUMBIA PIPELINE GROUP INC IN US10.2 BILLION SALE TO TRANSCANADA CORPORATION

Date Announced: March 17, 2016

Date Closed:

Deal Value: $13,000,000,000

Client Name: Columbia Pipeline Group, Inc.

TransCanada Corporation entered into an agreement on March 17, 2016, to acquire Columbia Pipeline Group, Inc. for US$10.2 billion. Under the agreement, TransCanada will acquire each share of Columbia Pipeline Group, Inc. for US$25.50 per share and assume approximately US$2.8 billion in debt. Bennett Jones was Canadian counsel to Columbia Pipeline Group, Inc.

For additional information visit www.bennettjones.com

GIDE

COUNSEL TO SOCI ETE GENERALE O N ACQUI SI TI ON OF BANQUE PS A FI NANCE ASSETS IN CENTRAL EUROPE

25 April 2016: Gide has advised Société Générale and Komerční banka in the context of the acquisition by their subsidiary Essox s.r.o. of 100% of the share capital of PSA Finance Česka Republika s.r.o. and of PSA Finance Slovakia, s.r.o., the Czech and Slovak subsidiaries of Banque PSA Finance.

Both companies provide financing to automotive dealerships and clients of the Peugeot, Citroën and DS brands. Essox s.r.o. is one of the main non-bank providers of financial services in the Czech Republic. Its share capital is 50.93% owned by Komerční Banka and 49.07% by SG Consumer Finance, Société Générale group. These operations are subject to the local competition authorities' approval.

They follow the acquisition by Société Générale, in February 2016, of BPF Financiranje d.o.o., subsidiary of Banque PSA Finance in Slovenia, and on which Gide had already advised Société Générale.

The Gide team was comprised of partner Guillaume Rougier-Brierre, Christophe Monnet and Alexandre Heydel.

For additional information visit www.gide.com

CLAYTON UTZ

ADVISES JOIN LEAD MANAGERS ON GOLD ROAD RESOURCES AU$74 MILLION EQUITY RAISING

Perth, 29 April 2016: Clayton Utz has advised Macquarie Capital (Australia) Limited and Argonaut Securities Pty Limited, as Joint Lead Managers, in connection with the A$74 million raising by ASX-listed Gold Road Resources Limited. The transaction was announced to the market on 27 April 2016.

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

The raising comprises a A$43 million share placement to institutional and sophisticated investors, undertaken via an institutional bookbuild. The raising will also comprise an accelerated 1 for 10 non-renounceable entitlement offer at the same price as the placement (A$0.44) to raise total proceeds of A$31 million. The share placement and institutional component of the entitlement offer was successfully completed today. The retail component of the entitlement offer opens on 3 May 2016.

Macquarie Capital (Australia) Limited is underwriter to the retail component of the entitlement offer.

For additional information visit www.claytonutz.com

HOGAN LOVELLS
ACTS ON TASTY DEAL IN THE GULF

DUBAI, 04 May 2016: Hogan Lovells has advised on the sale of Multibrands, one of the largest food and beverage distributors in the Middle East.

Multibrands Trading Company has been acquired by Gulf Capital, a major alternative investment firm. Hogan Lovells' Middle East team represented the sellers, Kuwait-based Sadita Holding Company, working with NBK Capital as financial advisers to Sadita.

With an annual turnover of US$100 million, Multibrands is one of the leading food and beverage distributors in Saudi Arabia. It distributes more than 50 brands across five main product categories, through retail chains, hotels, cafes, bakeries and restaurants.

Hogan Lovells' team was led by Dubai-based corporate partner Imtiaz Shah, with support from Blake Harley (Senior Associate, Dubai) and Irfan Butt (Counsel, Jeddah).

Commenting on the deal, Imtiaz Shah said: "This is a major transaction in one of the fastest growing sectors in the region. We expect to see more deal activity in the GCC food and beverage market during the coming months, as investors seek to diversify their portfolios away from oil and capitalise on areas of growth."

For more information, see www.hoganlovells.com

MUNIZ
HELPS LAUNCH LINDLEY TENDER OFFER

LIMA, 6 May 2016: Peruvian Coca-Cola bottler Corporación Lindley has launched a cash tender offer to buy back US$200 million worth of notes with help from Muñiz Ramírez Pérez-Taiman & Olaya in Lima and the New York office of Paul Hastings LLP.

Citigroup and JP Morgan acted as the dealer managers in the transaction and called on Cleary Gottlieb Steen & Hamilton LLP in New York and São Paulo. The tender offer closed on 2 May.

Lindley launched a tender offer to buy back notes due in 2021 and 2023, the latter of which it issued in 2013.

Counsel to Corporación Lindley Muñiz Ramírez Pérez-Taiman & Olaya lead by Partners Andrés Kuan-Veng and Jorge Otoya Cabrera, and associate Guillermo Flores Borda in Lima.

For additional information visit www.munizlaw.com

NAUTADUTILH

ADVISES CASINO ON DISPOSAL OF BIG C THAILAND AND VIETNAM FOR EUR 4 BILLION

AMSTERDAM, 03 May 2016: NautaDutilh advised Casino on Dutch law aspects in connection with the disposal of its stake in Big C Thailand and Vietnam.

NautaDutilh advised Casino on Dutch law aspects in connection with the disposal of its stake in Big C Supercenter PCL, listed on the Stock Exchange of Thailand ("Big C Thailand"), for EUR 3.1 billion (excluding debt) to the TCC Group, one of the leading conglomerates in Thailand, with operations in the retail, commercial and industrial business, food and beverage, finance and insurance, property and real estate, agricultural and agro industrial sectors. Big C Thailand is a leader in food retail and commercial real estate in Thailand, operating a large network of more than 700 stores, including 125 hypermarkets, with a turnover of EUR 3.4 billion in 2015. The transaction closed on 21 March 2016.

NautaDutilh also advised Casino on Dutch law aspects in connection with the sale of Big C Vietnam for an enterprise value of EUR 1 billion (proceeds for Casino: EUR 920 million) to Central Group, one of the main family-owned conglomerates in Thailand with interests in real estate, department stores, retailing, hospitality and restaurants. Big C Vietnam is a leading food retailer in Vietnam, operating a network of 43 stores and 30 shopping malls, with a turnover excluding taxes of EUR 586 million in 2015. The transaction closed on 29 April 2016.

The transactions are part of Casino's EUR 4+ billion deleveraging plan.

NautaDutilh had already advised Casino on various other transactions, including the creation and subsequent IPO of Cnova N.V.

The NautaDutilh team included Leo Groothuis, Hein Hooghoudt, Jaap Stoop, Paul van der Bijl, Stefan Wissing and Pieter van Drooge (all Corporate M&A).

For additional information visit www.nautadutilh.com

ROUSAUD COSTAS DURAN SLP

ADVISES NETQUEST ON ITS SALE TO GERMAN GROUP GFK

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

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

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

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

For additional information visit www.rcdslp.com

TOZZINI FREIRE

ADVISES DURATEX IN AGRIBUSINESS OFFERING

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

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

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

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

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

For additional information visit www.tozzinifreire.com.br

SYCIP LAW

ADVISES IN SYNDICATE FINANCING FOR THE MACTAU CEBU INTERNATIONAL AIRPORT

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

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

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

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

For additional information visit www.syciplaw.com

UPCOMING PRAC EVENTS

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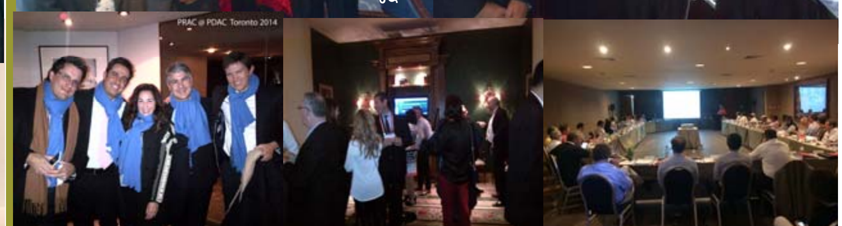

The Pacific Rim Advisory Council is an international law firm association with a unique strategic alliance within the global legal community providing for the exchange of professional information among its 28 top tier independent member law firms.

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

www.prac.org

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

ALLENDE & BREA

Argentine Government announces tightening of Antitrust Enforcement

In a recent media appearance, the new President of the Argentine Antitrust Commission (CNDC) and the Trade Secretary, gave some insights into the current status of the local antitrust regime and announced the introduction of several changes and amendments:

• The CNDC will launch 11 market investigations with the objective of assessing their level of competition. Markets under investigation will include that of milk; meat; laundry detergent; cooking oil; mobile communications; credit cards; air and ground passenger transportation; steel, aluminum; and petrochemicals.

• The CNDC is revamping its internal structure and it has cut its staff by one-third. Furthermore, the appointment of the four remaining commissioners of the CNDC, which will work alongside President Greco, is expected soon. Candidates for these offices are two economists, Fernanda Viecens and Marina Bidart; and two lawyers, Eduardo Stordeur and Pablo Trevisán.

• In the short term, the Argentine Government will issue a decree to improve the CNDC's human resources and working capacity.

• In the upcoming months, the Argentine Government will introduce a bill to amend the current Antitrust Law. Pursuant to media releases, these amendments are expected to include: the establishment of a new institutional framework; the creation of an automatic adjustment system in the amounts of fines and in the merger notification thresholds; and the introduction of a "fast track" mechanism for those mergers carried out by companies that lack enough market power to hinder competition.

• The CNDC is also seeking to resume its relations with international counterparts. It has already signed agreements with the U.S. Federal Trade Commission and the U.S. Department of Justice for the CNDC's employees to receive training on mergers and acquisitions and with the World Bank in connection with training on cartels and IT forensics.

Lastly, the CNDC's President Greco released the results of an internal audit he performed as soon as he took office. He acknowledged that in the recent past the CNDC has failed to comply with the terms established in the Antitrust Law in connection with the analysis of both mergers and conducts cases. The vast majority of the 608 cases that are currently under the analysis of the CNDC have been running for several years. At present, the CNDC has in the pipeline 334 economic concentration transactions, 221 anticompetitive conduct cases, and 53 market investigations. Greco stated that conduct cases and market investigations that were initiated with purposes different from protecting competition will be dismissed and closed.

For further information on this topic please contact Julián Peña y Federico Rossi Rodríguez

CLAYTON UTZ

Clayton Utz Insights

28 April 2016

Act commences to extend legal responsibility for environmental harm in Queensland

By Kathryn Pacey and Nicole Besgrove.

Key Points:

The regulator can now extend responsibility for clean-up, rehabilitation and associated costs to a "related person".

The Queensland Parliament passed the Environmental Protection (Chain of Responsibility) Bill 2016 with amendments on 22 April 2016. The Act commenced on assent yesterday and will allow the regulator to extend responsibility for clean-up, rehabilitation and associated costs to a "related person". The definition of a "related person" is central to the Act and was the subject of the key amendments made in Committee.

We previously examined the Bill when it was referred to the Agriculture and Environment Committee; its report into the Bill was released on 15 April 2016.

Overview of key provisions of the Environmental Protection (Chain of Responsibility) Act

The Act:

- allows the chief executive administering the Environmental Protection Act to issue environmental protection orders (**EPOs**) to a "related person" in certain circumstances, including where an EPO is issued to a company or in relation to a "high risk company";
- allows the chief executive administering the Environmental Protection Act to amend an environmental authority (**EA**) to include a financial assurance condition where it is being transferred, whether that is by way of transfer between entities or by share sale;
- limits the Court's ability to stay a financial assurance condition that is being challenged only to cases where 75% of the decided financial assurance has been paid.

Agriculture and Environment Committee recommendations

In the very compressed submission period, 89 submissions were made to the Committee about the Bill, mostly about the breadth of the definition of "related person".

The Report contained six recommendations, including that the Committee could not agree whether the Bill should be passed.

The other Committee recommendations in summary are:

- **comprehensive list of definitions:** the Minister consider amendments to include other terms such as "executive officer" and "related person" in the new chapter regarding to whom an environmental protection order (EPO) can be issued;
- **land owners:** omit the words "the person who owns land on which the company carries out, or has carried out, a relevant activity" of who is a "related person" as inclusion of these words along with the definition of "owner" in the Act includes persons who may not be in a position to influence or control the activities conducted by the company;
- **statutory guideline:** require the Minister to table a statutory guideline outlining how the Department of Environment and Heritage Protection will administer its powers in relation to "related persons" and determine whether a person has a "relevant connection" to a company;

- **issuing EPOs:** allow the administering authority to issue an EPO to a related person of a company only if an EPO has also been issued to the company (where the company still exists); and
- **stay of decisions on financial assurance:** direct the Department to consult industry and legal bodies in relation to a stay of decisions about the amount of financial assurance required under a condition of an EA, to find a less onerous percentage than the proposed 85% of the amount of financial assurance that was decided by the administering authority.

What's different in the Act?

The Act was passed with a number of amendments, most notably to the definition of "related person" of a company to exclude from the definition:

- landowners for land on which a resources activity is carried out, unless the person is an associated entity of the company:
- registered native title parties and certain interests under the Aboriginal Land Act 1991 and Torres Strait Islander Land Act 1991.

Other amendments made in Committee concerned:

- amendments to ensure that "mum and dad investors", contractors and employees are not a "related person" by requiring that any financial benefit received or capable of being received be "**significant**";
- excluding from the financial benefit considerations benefits under a native title agreement, compensation payable under resources legislation or make good arrangements under the Water Act;
- what is a transfer that triggers the ability to amend an EA to include a financial assurance condition, to extend it to changes in control of a holding company (designed to capture share sales);
- guidelines to be made under the EP Act that must be considered in deciding whether to issue an EPO to a "related person";
- a review of the operation of the new provisions within two years after commencement;
- the decision about financial assurance may only be stayed where the administering authority has been given security for at least 75% of the decided amount – the Bill originally required 85%.

How does the Act apply?

The amending legislation commence on assent yesterday, however some provisions will operate retrospectively, including that:

- Decisions about whether a person or entity constitutes a "related person" may consider circumstances before the commencement of the amending legislation.
- The power to issue an EPO to particular persons is extended to include a person who becomes a related person during the transitional period (ie. the period from the start of the introduction day (the day the Bill was introduced into the Legislative Assembly, 15 March 2016) to the day the amending Act commenced).
- An EPO may impose requirements relating to a relevant activity carried out, or environmental harm caused, before the commencement.

NautaDutilh

Belgium

Blockchain Technology in the Financial Sector

Thursday, 10 March 2016

Much has been written about Bitcoin since its creation in 2008 by Satoshi Nakamoto. Indeed, the high volatility of and scandal after scandal involving this new digital currency have been amply documented in the press. In recent months, however, the price of Bitcoin has stabilised at around 40% of its record high and appears to be rising. One reason for this is the financial sector's interest in the technology underlying Bitcoin, namely the blockchain.

This article first explains blockchains in very simple terms, how they work and how this technology can revolutionise the financial industry. It concludes with a closer look at certain concrete efforts the financial sector has made in this regard.

Blockchains for dummies

A paradigm shift

The blockchain is heralded as the fifth disruptive computing paradigm after mainframes, personal computers, the internet and social networks/mobile phones.[1] Although it has become increasingly difficult to imagine a world without the aforementioned technologies, most of us don't understand how they work. In our daily lives, however, even the least tech savvy amongst us is able to see the clear advantages they bring.

To date, however, blockchains (and similar distributed ledger technologies) have primarily been used by issuers of digital currency. In the absence of other concrete applications, the underlying technology and the advantages of the distributed ledger remain largely a mystery. Therefore, we first explain below the structure behind a blockchain and its advantages.

A decentralised ledger

In short, a blockchain is a digital, publicly available ledger, register or record book. In Bitcoin's case, the blockchain records every transaction made and allows users with proper identification to verify their ownership of Bitcoin at any time. This description, however, is too simplistic. To uncover the blockchain's true potential, it's necessary to dig a little deeper.

The revolutionary and paradigm-shifting nature of the blockchain is due to its decentralised and distributed form, as a result of which it functions independently from a central authority, such as a central bank.

Decentralisation is obtained by saving a copy of the entire block chain on every user's computer, both when joining the network and upon every change of content. As each member has a copy of the ledger and transactions are verified by comparing them with the latest version before validation, malicious intent is virtually eliminated.

"Smart" property

Before taking a look at concrete applications, it's helpful to clarify how any type of asset can be recorded on a blockchain. As Bitcoin is a virtual currency, it's represented by a letter and number combination. Obviously, any other type of (tangible) asset can be reduced to a similar combination and recorded and traded on a distributed ledger, thus rendering it "smart". At present, every digital file (containing for example a description of a tangible asset) can be transformed into a sequence of up to 64 numbers and letters.

Likewise, smart contracts are those whose terms are recorded in a computer language and which can thus be automatically executed by a computing system, thereby significantly reducing enforcement and compliance costs.

Blockchain applications

Initially, blockchains were designed to enable the creation of and trade in Bitcoin. It quickly became clear, however, that distributed ledgers have much more potential.

In a recent report, the World Economic Forum identified "distributed trust" as one of the six megatrends that are shaping society, as "the blockchain replaces the need for third-party institutions to provide trust for financial, contract and voting activities".[2]

The UK Government Office for Science summarises the potential for distributed ledger technology as follows:

"[…] distributed ledger technology provides the framework for government to reduce fraud, corruption, error and the cost of paper-intensive processes. It has the potential to redefine the relationship between government and the citizen in terms of data sharing, transparency and trust. It has similar possibilities for the private sector."[3]

Although the possibilities currently appear endless, the following discussion is limited to how distributed ledger technologies are expected to impact the financial industry.

Disintermediation

Oddly enough, R3CEV's[4] chief technology officer compares Bitcoin's innovative character to that of physical cash. Physical cash is indeed unique, as it can be transferred between two people without the involvement or permission of any third parties. Bitcoin and its blockchain have shown how such transfers can be performed electronically. Since every type of asset can be traded using a blockchain, this technology has the potential to virtually eliminate middlemen and enable direct contact between the parties involved in any type of transaction, for example issuers and investors , without the need for traditional intermediaries such as exchanges, brokers, central counterparties (CCPs) or central securities depositories (CSDs).[5]

Permissioned and unpermissioned distributed ledgers

Part of Bitcoin's success is due to the fact that it operates independently of a central authority. This means that private parties, in Bitcoin's case "miners", are required to validate transactions. In exchange for their services, they are rewarded with Bitcoin. Since every transaction must be validated by the entire network, the possibility of individual fraud is excluded. This type of ledger is called an unpermissioned ledger, as opposed to a permissioned ledger, which requires trusted players (such as governments or banks), rather than unknown members of the network, to validate transactions. Therefore, in the case of a permissioned ledger, the system is maintained by a well-defined pool of participants whose membership is not open to the public.

At a recent hearing of the European Parliament's Economic and Monetary Affairs Committee, Primavera De Filippi, a researcher at the National Centre for Scientific Research (CNRS) in Paris, stated that blockchain technology can be regarded as "a type of regulatory technology, enabling laws to be enforced more transparently and more efficiently".

Instant settlement

The potential to significantly reduce financial institutions' compliance, infrastructure, logistics and transaction costs has many experimenting with the new technology. SETL, a company whose mission is "to deploy an institutional payment and settlement infrastructure based on blockchain technology", is one such party. It is building a system that will enable market participants to transfer cash and assets directly between themselves, thus facilitating the immediate and final settlement of market transactions.

Since the SETL system is being designed to meet the needs of the finance industry it will use a permissioned distributed ledger rather than an unpermissioned one. In this way, they plan to eliminate the disadvantages related to, for example, Bitcoin's blockchain, such as anonymity, which makes it difficult for financial institutions to meet their anti-money laundering (AML) and know-your-customer (KYC) obligations. In addition, unpermissioned ledgers require some type of virtual currency to reward transaction validators.

R3CEV is another initiative based on blockchain technology. It is currently backed by 42 of the world's largest banks and aims to achieve faster transactions in the areas of trade financing, syndicated loan processing, the settlement and clearing of OTC derivatives, and marketplace lending.

Nasdaq, on the other hand is experimenting in-house. Linq, part of Nasdaq Private Market, is the first platform by a stock exchange, or any financial services firm for that matter, to demonstrate how asset trading can be managed digitally through the use of a blockchain. In Belgium, KBC-broker Bolero indicated that it has started a project to trade unlisted shares and bonds via a blockchain.

A number of public initiatives have also been launched. The Bank of England recently stated that it is undertaking work "to understand the implications of new digital or e-monies and new methods of payments and financial intermediation […]."[6]

What's next?

According to a report by the Depository Trust & Clearing Corporation (DTCC), the current state of distributed ledger technology still poses some challenges: "it is immature, unproven, has inherent scale limitations in its current form and lacks underlying infrastructure to cleanly integrate it into the existing financial market environment".[7]

It appears, however, that the financial sector is determined to address these challenges and that the development of a permissioned distributed ledger will be the way forward.

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[1] See e.g. M. Swan, Blockchain: Blueprint for a New Economy. O'Reilly, Sebastopol, 2015.

[2]World Economic Forum, Deep Shift Technology Tipping Points and Societal Impact. Survey Report, September 2015.

[3]UK Government Office for Science, Distributed ledger technology: beyond block chain. A report by the UK Government Chief Scientific Adviser, January 2016, p. 8.

[4] See infra "Instant settlement".

[5] Euroclear SA/NV's feedback on ESMA's call for evidence, "Investments Using Virtual Currency or Distributed Ledger Technology", 21 July 2015.

[6] "A New Heart for a Changing Payments System", speech by Minouche Shafik, Deputy Governor of the Bank of England with responsibility for markets and banking, 27 January 2016.

[7] DTCC report, "Embracing disruption: tapping the potential of distributed ledgers to improve the post-trade landscape", January 2016, p. 20.

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TOZZINIFREIRE
ADVOGADOS

Provisional Presidential Decree increases the limit for foreign capital in Brazilian airline companies from 20% to 49%

14 March, 2016

By Ana Cândida de Mello Carvalho, Claudia Elena Bonelli e Antonio Felix de Araujo Cintra,

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.

WCO Technical Committee on Customs Valuation Sanctions Use of Transfer Pricing Studies

May 09, 2016 | Darrel Pearson

To support the use of transfer pricing studies as an aid in establishing that prices paid or payable are not influenced by the relationship between vendor and purchaser, the World Customs Organization (WCO) has sought for many years to reconcile differences between transfer prices for tax purposes and customs values for import appraisal purposes.

Concerns centered around the differences between the price of imported goods considered deductible as a cost of goods sold for tax purposes and the transaction value based on that price but adjusted to derive the customs value for import appraisal purposes. Generally, transfer pricing studies rely on OECD tax principles; economists apply these principles with a focus on income tax outcomes. Because of these differences, transfer pricing studies are not sufficiently granular, and fail to take into account the periodic (tax) versus transactional (customs) nature of the required analyses.

Customs legislation requires that the importer appraising its imports purchased in related party transaction be positioned to demonstrate that prices paid or payable are not influenced by the relationship if it chooses to appraise its imports based on the transaction value methodology, failing which an alternative method of appraisal must be undertaken. It offers two alternative tests that may be used to establish the lack of influence:

1. demonstrating that the declared value closely approximates one of four test values; or
2. demonstrating that the vendor and purchaser settled the transaction price as if they had been dealing at arm's length, the so called "circumstances surrounding the sale" test.

The WCO Technical Committee on Customs Valuation recently published a commentary on the use of transfer pricing documentation in the form of case study 14.1, which remains subject to approval by the WCO Council. The document describes the use of a transfer pricing study, based on the Transactional Net Margin Method (TNMM), to meet the second test and concludes that the circumstances of sale test may be satisfied by reference to a transfer pricing study. However, the impact of the case study on domestic customs authorities is likely to be much reduced by the carefully crafted, restricted facts scenario, and the caution that use of transfer pricing studies must be considered on a case by case basis.

The case study relies on a number of facts that undermine its utility, key amongst which are:

1. The transfer pricing study is prepared by an independent firm;
2. The transfer pricing study is based on the TNMM;
3. The transfer pricing study is reviewed by the tax authorities of both the exporting and importing countries, and the arm's length profit range has been approved by the tax authorities;
4. The transfer pricing study is a key component of an Advance Pricing Agreement (APA) reached by the tax authorities and the exporter and importer;
5. No adjustment of the price paid or payable is required to determine the customs value, implying that the price paid or payable is inclusive of all dutiable costs and does not include any non-dutiable costs;
6. The importer does not make any compensating adjustments for tax purposes in respect of the year covered by the transfer pricing study;
7. The price paid or payable, the basis of import appraisal, does not undergo significant changes over the course of the year under review;
8. All operating expenses incurred by the importer are paid to unrelated parties;
9. It is not possible to establish a lack of influence by reference to the test value method.

Customs authorities have been left with many ways to distinguish the facts, and therefore the conclusions reached, of the case study. Dismissal of the ability to rely on a transfer pricing study to establish a lack of influence should not flow from a failure to find comparability of (i) the facts of a dispute relating to influence on the transaction value with (ii) the listed undermining facts of the case study, whether the latter are taken alone or cumulatively.

Preparation of transfer pricing reports by independent firms is commonplace, but not necessary. The taxpayer/importer/exporter may be sufficiently resourced to produce its own transfer pricing reports based on OECD principles and sufficiently astute to make allowances as required to ensure that the study is useful for import appraisal. Tax and customs authorities should not presume that the transfer pricing study is flawed, intentionally or not, because it has been prepared by the taxpayer/importer/exporter.

Is the TNMM the only OECD principled means of conducting a transfer pricing study that is useful for customs purposes?

Why must the transfer pricing study be sanctioned by a tax authority in order that a customs authority may rely upon it? Why must the transfer price be the subject of an APA? Must we presume that the customs authority has no independent means of establishing its utility for import appraisal purposes?

How do adjustments for tax or customs purposes deny the ability to rely on the transfer pricing study? And why must not the importer's operating expenses be incurred to related parties? Can these elements not be accommodated in the analysis?

The temporal distinctions drawn for tax and customs purposes are the basis of the condition that there be no significant changes in the prices paid or payable during the course of the year under transfer pricing study. However, the concern raised may be eliminated by further development of the scope of the transfer pricing study.

Finally why, as implied, must the circumstances of sale test take a back seat to the test value method?

While the WCO Technical Committee has taken an important step in the harmonized use of transfer pricing studies for tax and customs purposes, it will be well worth watching to see whether its recommendations result in significant global use with positive results, or in general dismissal based on tax/customs distinctions or the over-conditioned facts of the case study. Some countries, such as Canada, already permit importers to make wide use of transfer pricing studies to demonstrate a lack of influence by the relationship on prices paid or payable in the transaction value, and do not require that each of the fact boxes of this case study be checked.

The case study also serves as a reminder of the importance of developing and maintaining contemporaneous documentation for tax and customs transfer pricing purposes. However, this documentation is not limited to transfer pricing reports. It includes written agreements binding the transfer pricing parties in respect of the sale/supply of goods, services and intellectual property rights with reference to the transfer pricing report and related principles. These are best drafted by experienced lawyers in order to ensure they are legally robust and properly cross referenced. Tax and customs planning advice relating to the structuring and documenting of international transactions benefits from solicitor-client privilege that exists only when taxpayers/importers work with lawyers.

NEWS & EVENTS

NEW BOUNDARIES FOR THE HOUSEHOLD RESIDENT EXCLUSION IN BRITISH COLUMBIA?

April 27, 2016

Ryan Shaw
Richards Buell Sutton Insurance Newsletter

Insurers are undoubtedly aware of the need to look at the policy as a whole when interpreting an insurance contract. A recent case from the British Columbia Supreme Court, *Gill v. Ivanhoe Cambridge I Inc./Ivanhoe Cambridge I Inc.,* 2016 BCSC 252, has underscored the importance of this guiding tenet of contractual interpretation and should serve as a reminder to insurers to thoroughly consider the language of the whole of the policy when making decisions on coverage.

THE FACTS

In *Gill*, at issue was an exclusion clause in a homeowner's policy, often referred to as the household resident exclusion and referred to by the court as the "Family Exclusion". In the policy at issue, the Family Exclusion specifically barred claims "arising from… bodily injury to the Insured or any person residing in the Insured's household other than a Residence Employee."

The insured, Mr. Gill, had commenced an action on behalf of his 2-year old son as a result of injuries the boy sustained falling through a missing glass partition on the second floor in a shopping mall. In the action, three of the defendants filed third party claims against Mr. Gill alleging that he was negligent for failing to properly supervise his son. Mr. Gill reported the third party claims to his insurer and the insurer denied coverage relying on the Family Exclusion. Mr. Gill claimed for a declaration of coverage and the insurer applied to have that claim dismissed.

At the hearing it was agreed by all that Mr. Gill and his son would be entitled to personal liability coverage under the policy unless the Family Exclusion applied. The insurer argued that the language of the Family Exclusion was clear and unambiguous and ought to apply to claims by insureds directly and indirectly against one another as in this case. As there was no BC jurisprudence directly on point, the insurer relied heavily on a decision from the Ontario Court of Appeal, *Quick v. MacKenzie* (1997), 33

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O.R. (3d) 362 (C.A.).

In *Quick*, the Court upheld an insurer's denial of coverage under a similarly worded exclusion clause. In that case, the infant plaintiff was attacked by a dog and brought a suit against the dog-owner. The dog-owner claimed against the plaintiff's parents for failing to supervise the infant and the parents sought coverage under their homeowner's policy. Deciding in favour of the insurer, the Court in *Quick* found that the exclusion was unambiguous, noting that the language of the clause was "precisely focused" and the claim by the dog-owner against the parents could be considered one "arising from" bodily injury to their daughter. Notably, the decision in *Quick* was recently reaffirmed in *Allstate Insurance Company of Canada v. Aftab,* 2015 ONCA 349. In both *Quick* and *Aftab*, only limited portions of the coverage and exclusion provisions in the policies in question were referred to in the reported decisions.

THE RULING

Despite the strength and recency of *Quick* and *Aftab* respectively, the Court in *Gill* refused to follow these decisions. Rather, the Court distinguished the Ontario precedents by focusing on the wording of other exclusion clauses in the policy at issue. In *Gill,* the phrase "arising from" was found in various other exclusion clauses in the policy, but the language used in those other clauses specifically demonstrated an intention to exclude coverage for both direct and indirect claims. For example, there was a clause in the policy which excluded loss or damage arising from drug activity, "whether or not the insured has knowledge of such activity." Further, the clauses in the policy excluding claims arising from terrorism and mould both contained language that left no doubt that the exclusions applied to both direct and indirect claims. In the Court's view, the absence of similar language in the Family Exclusion rendered that clause ambiguous.

To resolve the ambiguity the Court examined the historic purpose of the Family Exclusion in order to find an interpretation consistent with the reasonable expectation of the parties. The Court noted that the jurisprudence made clear the purpose of the Family Exclusion was to prevent collusive claims by residents of the same household against one another. In other words, the purpose of the exclusion was to preclude coverage for direct claims by household residents as opposed to indirect claims such as those in *Gill*. As there was no allegation of a collusive claim being raised by Mr. Gill or his son the Court found that reading the Family Exclusion as the insurer proposed would strip Mr. Gill of coverage the policy was intended to provide.

PRACTICAL CONSIDERATIONS FOR INSURERS

Gill is of practical import to insurers for a number of reasons. Firstly, the case demonstrates both the need to look to the language of the policy as a whole to determine if ambiguity exists as well as the utility of considering the purpose or object of an exclusion clause to resolve that ambiguity. Secondly, the decision serves as a caution to insurers to be weary of relying too heavily on seemingly persuasive judicial authority when making coverage decisions. A careful consideration of the wording of the policy as a whole may negate or at least temper reliance on judicial authority that otherwise seems to be on all fours with a position. Finally, as a result of *Gill*, insurers should reconsider the wording of the household resident exclusion in their homeowner policies. Insurers that want to exclude claims made by third parties arising from injuries to household residents should add the following wording suggested by the Court to the end of the exclusion: "… *whether such claims are brought by the insured, a person residing in the same household, or any other person*."

It is notable that the insurer has appealed the decision so it is likely the BC Court of Appeal will have the final say on whether the aforementioned interpretation is correct.

NEWSALERT

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

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

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

1.- **Criteria before the Ruling**

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

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

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

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

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

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

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

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

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22 APRIL 2016

China Food and Drug Administration Issues New Guidance Documents on Foods for Special Medical Purposes

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On April 18, 2016, the China Food and Drug Administration (CFDA) published a series of guidance documents as the most recent part of its efforts in revamping its regulations on foods for special medical purpose (FSMP) to better promote and protect public health.[1] These guidance documents provide detailed guidelines on how to prepare submissions to CFDA for FSMP registration, and follow the CFDA's publication of its Administrative Measures for Registration of Medical Foods on March 10, 2016.[2] Comments on these guidance documents are due on May 15, 2016.

The term "foods for special medical purpose" or FSMP is defined by CFDA as "foods specially formulated to satisfy the unique nutritional or dietary needs for patients with diet intake restriction, malabsorption, or metabolic disorders."[3] FSMP also includes infant formulas that are designed to meet the unique medical needs of certain infants.[4] The FSMP concept is comparable to the "medical food" in the U.S., which offers specially formulated foods for patients with distinctive nutritional needs that cannot be met by a normal diet alone. However, unlike the medical foods regulated by the U.S. Food and Drug Administration (FDA) in the U.S., marketing of FSMP in China requires pre-market approval from CFDA, which may involve extensive review of manufacturing and clinical trial data, as well as on-site inspection.

Specifically, according to CFDA's Administrative Measures for Registration of Medical Foods, which becomes effective on July 1, 2016, all FSMP manufactured, sold, or imported in China must register with CFDA. The following documents need to be submitted for registration:

1. Petition for the registration of FSMP;
2. Product development plan, formulation, and rationale;
3. Manufacturing process;
4. Specifications;
5. Product labels, example instruction for consumers;

6. Product sample lab testing reports;
7. Supporting materials for research, manufacturing, and testing;
8. Other evidence to support the product safety, nutritional completeness, and efficacy.

For certain categories of FSMP, clinical trial data are also required.

The purpose of the guidance documents just issued by CFDA is to provide more detailed guidelines for FSMP manufacturers when they prepare their submission to CFDA for pre-marketing approvals. In particular, these guidance documents include:

- Administrative guidance for registration of FSMP;
- Guidance on FSMP's label and instructions for consumers;
- Guidance on quality management of clinical trial data for FSMP;
- Guidance on FSMP product stability;
- Guidance on on-site inspection of facilities that manufacture FSMP.

Businesses that manufacture or sell FSMP in China should review these guidance documents and assess how these regulatory requirements would affect their operation.

We will continue to monitor all developments related to China's CFDA. If you have any questions, or if we can be of any assistance, please do not hesitate to contact us.

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1. See "总局办公厅关于公开征求《特殊医学用途配方食品注册管理办法》相关配套文件的意见" available at: http://www.sda.gov.cn/WS01/CL0782/150540.html.
2. See "特殊医学用途配方食品注册管理办法》（国家食品药品监督管理总局令第24号) available at: http://www.sda.gov.cn/WS01/CL0053/146741.html.
3. See "特殊医学用途配方食品注册管理办法》解读" available at: http://www.sda.gov.cn/WS01/CL1297/146743.html.
4. See id.

External Regulation DCIN 83

Mon, 04/25/2016 - 09:48
NewsFlash: 333

[Forex, Derivatives and Structured Finance]

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

By means of Notice No. 17 dated April 20, 2016, the Colombian Central Bank amended the External Regulation DCIN 83, aiming at updating certain procedures related to international trade transactions and registration of foreign investments.

The Colombian Central Bank now allows cancelling the foreign exchange channel associated with international trade transactions (importations and exportations) by means of a dation in payment. Therefore, foreign exchange declarations, corresponding to the payment of importations or the refund of exportations, will include (i) the dation in payment as an alternative to complete the transaction through the foreign exchange market and (ii) the equivalent dollar value of the traded goods. When agreeing in a dation in payment the obligation of conducting foreign trade operations through the foreign exchange market will be accomplished.

Additionally, the Colombian Central Bank clarified certain procedures regarding international investments. First, amendments to Forms No. 15 (for companies) and/or Forms No. 13 (for branches), will have to be made electronically.

Second, registration of foreign investments (whether derived from the transfer of funds or any other type of investment) will be subject to the following rules:

1. When the foreign investor -legal entity- acts through its legal representative, it is necessary to file a certificate of incorporation and good standing evidencing its capacity as such. The certificate must be issued by the relevant authority of the foreign investor's domicile, and must be authenticated, legalized or apostilled.
2. If the foreign investor grants a power of attorney to a third person, a copy of such power of attorney must be filed jointly with the documents to register the investment. The power of attorney must be duly authenticated, legalized or apostilled. If the power is granted in Colombia, the power of attorney must be authenticated before a notary public.

Amendments to the External Regulation DCIN-83 will be effective as of April 20th, 2016.

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Decision of 15 April 2016 on the reimbursement of state aid: consequences for French wind farms benefitting from FIT 2008

21 April 2016

Client Alert | France | Energy

On 15 April 2016, France's Supreme administrative Court, the *Conseil d'Etat*, ruled once again on the matter of the subsidies granted to wind power generators under Ministerial Order of 17 November 2008.

In two previous decisions of 15 May 2012 and 28 May 2014, the *Conseil d'Etat* had declared that this Ministerial Order was void due to the lack of prior notification to the EU Commission of the state aid granted to wind power generators. The Ministerial Order was cancelled with retroactive effect, but was soon to be followed by a new Order passed on 17 June 2014 that maintained the same tariff paid by EDF to wind farms.

The French government tried to limit the consequences of the cancellation on wind power generators.

EU regulations impose that an illegal state aid must be reimbursed by its beneficiaries, in order to give full effect to state aid rules. This reimbursement obligation, however, is limited when it applies to an illegal state aid that was ruled compatible with the European market. This was the case for the state aid in the Ministerial Order of 17 June 2014, which was considered compatible by the EU Commission on 27 March 2014.

In such cases, the state must only request the reimbursement of the "*interest which would have been paid by generators on the amount in question of the compatible aid, had it had to borrow that amount on the market pending the Commission's decision*" (EUCJ, 12 February 2008, *CELF*, C-199/06).

In the case at hand, such interest is due on the price paid by EDF to wind power generators under Ministerial Order of 17 November 2008 and that must be regarded as state aid, from the date it was paid until 27 March 2014.

The French government has six months to request the reimbursement from wind power generators, i.e. before 15 October 2016. Failing this, the government will be charged €10,000 per day of delay.

The exact conditions under which the government must implement this obligation are not yet determined. For each wind fam, the French government could issue revenue orders (*titres de* *recettes*) indicating the amount to be reimbursed. EDF could also be involved in the process.

This decision is of paramount importance for wind farms currently being operated on the basis of Ministerial Order of 17 November 2008. Although its consequences could be limited for projects commissioned in 2013 and 2014, they should nonetheless be assessed as soon as possible, in particular for older projects.

By **Véronique Fröding** and **Pierre-Adrien Lienhardt**

COUNSELLORS AT LAW

NEWS DETAIL

03/05/2016

NEW REGULATION OF THE MINISTER OF ENERGY AND MINERAL RESOURCES REGARDING EXPORT SALES OF PROCESSED AND PURIFIED MINERALS

On 5 February 2016, the Minister of Energy and Mineral Resources ("MEMR") issued Regulation No. 05 of 2016 on Procedure for the Issuance of Recommendation for Export Sales of Processed and Purified Minerals ("Regulation 05").

Regulation 05 revokes the previous MEMR Regulation No. 11 of 2014 and Regulation of the Director General of Minerals and Coal ("DGMC") No. 861K/30/DJB/2014 on the same matter, and is the follow-up regulation for the new regulation of the Minister of Trade on the exportation of processed and purified minerals.

While this new regulation still requires the recommendation from the DGMC ("Recommendation"), it has simplified the procedure for minerals export, among others by revoking the requirement for minerals producers to have certification as a registered mining products exporter (Eksportir Terdaftar (ET)-Produk Pertambangan).

In summary, Regulation 05 regulates the following main points: (i) Export Sales of Minerals; (ii) Procedure for the Issuance of the Recommendation; (iii) Plan for the Construction of Domestic Refining Facility; (iv) Performance Bond to guarantee the construction of the refining facility.

<u>Export Sales of Minerals</u>

Approval for the export of the minerals (Export Approval) from the Ministry of Trade is only required for the export of metal minerals which have passed the minimum processing standard but have not passed the minimum refining standard, and for holders of contracts of work for metal mineral mining which have conducted part of the refining process. The Recommendation is a prerequisite for obtaining the Export Approval.

<u>Procedure for Obtaining the Recommendation</u>

To obtain the Recommendation, an application in the form attached to Regulation 05 must be submitted to the MEMR c.q. the DGMC by enclosing, among others, (i) the Plan of the Construction of Domestic Refining Facility ("Refining Plan") which has been approved by the DGMC on behalf of the MEMR; and (ii) proof of the placement of the Performance Bond.
Under Regulation 05, the DGMC is supposed to issue its decision on the Recommendation within no longer than 20 (twenty) calendar days as of the date the application is declared as completely and correctly submitted. The Recommendation is valid for 6 (six) months and is extendable for another 6 (six) months upon its expiry on the condition that the refining facility construction has been realized to a certain degree. The extension application is to be submitted at the fastest 45 days and at the latest 30 days before the expiration date of the Recommendation.

Refining Plan

The Refining Plan must include a schedule for the refining facility construction, the construction technology, the investment value and the facility's capacity per year. The DGMC's approval is to be issued within no longer than 25 days as of the acceptance of the complete and correct application documents.

Performance Bond

The Performance Bond requirement applies to mineral producers who are holders of:

- IUP OP or contracts of work for metal minerals which intend to construct the refining facility themselves;
- IUP OP or contracts of work for metal minerals which intend to construct the refining facility in cooperation with holders of IUP OP for metal mineral, holders of contracts of work for metal mineral, holders of principle licenses for processing and/or refining, or holders of specific IUP OP for processing and/or refining;
- Production Operation IUP specifically for processing and/or refining which intend to construct the refining facility themselves and have been processing ore into metal mineral concentrates.

(the "Mineral Producers")

The amount of the Performance Bond ("PB") requires the approval of the MEMR, for which an application must be submitted to the MEMR c.q. DGMC by using the prescribed form attached to Regulation 05. Regulation 05 provides guidance for the calculation of the PB amount. This PB must be placed in an escrow account in a state-owned bank in Rupiah. The PB does not affect the obligation of the Mineral Producers to increase the added value of their mining products domestically.

The liquidation of the PB may be applied for upon the completion of 60% of the construction of the refining facility within the 6 months period. Mineral Producers who failed to complete the facility within the first 6 months period will be given 2 grace periods of 6 months each, at the end of which the PB will be liquidated by the DGMC and the amount will be transferred to the state account in the event that the refining facility construction is still not completed (*by: Mahatma Hadhi*).

MALAYSIA LAUNCHES PEER-TO-PEER FINANCING FRAMEWORK

INTRODUCTION

About 14 months after the launch of the equity crowdfunding framework, the Securities Commission Malaysia ("SC") introduced its regulatory framework to facilitate peer-to-peer ("P2P") financing on 13 April 2016.

Simultaneously with the introduction of the framework for P2P financing ("P2P framework"), the SC announced that parties who are interested in establishing and operating P2P platforms in Malaysia may submit their applications to the SC from 2 May 2016 to 1 July 2016, the latter being the closing date for the initial batch of applications.[1] Thus far, the SC has not given any indication as to the number of entities that will be authorised to operate P2P platforms.

The P2P framework is set out in the amended Guidelines on Recognized Markets ("Guidelines") which will take effect on 2 May 2016.[2] The SC also issued a set of Frequently Asked Questions on the Requirements of Peer-to-Peer Financing ("FAQs").

The Guidelines set out the registration and on-going requirements that apply to a person who is registered as a recognized market operator[3] ("RMO") under Section 34 of the Capital Markets and Services Act 2007 ("CMSA") as well as the requirements pertaining to issuers and investors.

This article will highlight some of the requirements in the Guidelines that will apply to the main stakeholders in a P2P framework.

DRAMATIS PERSONAE

There are three main stakeholders in a P2P framework, namely (i) a RMO who is registered to operate a P2P platform ("operator"); (ii) a person who seeks funding on or through a P2P platform ("issuer"); and (iii) a person who provides financing to an issuer through a P2P platform ("investor").

MODUS OPERANDI

A P2P platform is a web-based platform operated by an operator which serves as a market place to enable issuers to seek financing from prospective investors. An issuer who satisfies the criteria laid down by an operator will be allowed to be hosted on the P2P platform operated by an operator to seek financing. An investor may access the P2P platform and if it deems fit, provide financing to an issuer on the terms of the offering hosted on the P2P platform by investing in an investment note or Islamic investment note issued by the issuer.

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[1] Paragraphs 2.02 and 2.03 of the FAQs.
[2] SC Press Release dated 13 April 2016.
[3] RMOs include operators of equity crowdfunding platforms.

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THE OPERATOR

An entity who seeks to operate a P2P platform must be registered as a RMO under section 34 of the CMSA.

Eligibility

An operator must be a body corporate incorporated in Malaysia and have a minimum paid-up capital of RM5.0 million.[4] It must satisfy the SC that –

(1) it is able to operate an orderly, fair and transparent market for securities that are to be traded through its platform;

(2) its board, chief executive, controller and any person responsible for the operations or financial management are fit and proper persons;

(3) it is able to manage risks associated with its business and operations;

(4) it will appoint a responsible person as required under Chapter 4[5] of the Guidelines;

(5) it will be able to take appropriate action against a person who is in breach of its rules as a recognized market;

(6) its rules as a recognized market make satisfactory provision (i) for the protection of investors and public interest; (ii) to ensure proper functioning of the market; (iii) to promote fairness and transparency; (iv) to promote fair treatment of its users and any person hosted on its platform; (v) to ensure proper regulation and supervision of persons using and accessing its platform; and (vi) to provide an avenue for appeal against its decision as a RMO; and

(7) it has sufficient financial, human and other resources for its operation of the recognized market.[6]

In addition to the above, a foreign operator[7] must also satisfy the SC that –

(1) it is authorised to operate a stock market or a derivatives market or carry out similar activity in a foreign jurisdiction;

(2) it is from a comparable jurisdiction with whom the SC has regulatory arrangements on enforcement and supervision; and

[4] Paragraph 13.04 of the Guidelines.
[5]Chapter 4 of the Guidelines requires a RMO to appoint at least one "responsible person" who is to be primarily responsible for its operations and financial management and to be the main contact person to liaise with the SC and perform any duty as directed by the SC.
[6] Paragraph 3.01 of the Guidelines.
[7] Paragraph 1.17 of the Guidelines defines a "foreign operator" as a body corporate or limited liability partnership incorporated outside Malaysia who establishes, operates or maintains a stock or derivatives market.

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(3) it is in the best interest of Malaysia[8] to register the foreign operator as a RMO.[9]

Obligations of an operator

The board or, in the case of a limited liability partnership, the partners of a RMO must, amongst other obligations –

(1) ensure that the RMO complies with all the requirements under the Guidelines, including any direction issued or condition imposed by the SC; and

(2) establish and maintain policies to (i) manage conflicts of interest; (ii) monitor trading and other market activity to detect non-compliance with securities laws or its rules; (iii) ensure that all documents and records of its participants are maintained for not less than seven years; (iv) deal with complaints relating to the operations of the market or conduct of its participants; and (v) ensure compliance with all relevant laws and regulations.[10]

An operator must, amongst other obligations, also –

(1) ensure that it has an efficient and transparent risk scoring system[11] in relation to the investment note or Islamic investment note;

(2) ensure that the disclosure document lodged by an issuer with the operator is verified for accuracy and made accessible to the investors through the platform;

(3) inform investors of any material adverse change to the issuer's proposal;

(4) obtain and retain self-declared risk acknowledgment forms from the investors before they invest on the platform;

(5) have in place processes or policies to manage any default by issuers and use its best endeavours to recover the amount outstanding to investors;

(6) ensure that its rules set out a rate of financing that is not more than 18% per annum and consult the SC if it wishes to impose a rate of financing in excess of that rate.[12]

Furthermore, an operator must establish and operate one or more trust accounts in accordance with the Guidelines.[13]

Risk assessment

An operator is also required to carry out a risk assessment on prospective issuers intending to use its platform.[14] In this regard, the operator must take reasonable steps to (i) conduct

[8] Refer to Paragraph 3.03 of the Guidelines as to the factors which the SC will consider in determining the best interest of Malaysia.
[9] Paragraph 3.02 of the Guidelines.
[10] Paragraph 6.01 of the Guidelines.
[11] Paragraph 13.31(d) of the Guidelines requires an operator to provide explanatory notes on its risk scoring mechanism, methodology and parameters on its P2P platform.
[12] Paragraph 13.05 of the Guidelines.
[13] Refer to Paragraphs 13.07 to 13.15 of the Guidelines for details of obligations relating to trust accounts.

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background checks on the issuer to ensure fit and properness of the issuer, its board of directors, senior management and controlling owner; (ii) verify the business proposition of the issuer; and (iii) carry out an assessment of the issuer's creditworthiness.[15]

Reporting and disclosure requirements

The operator must submit to the SC (i) an annual compliance report to demonstrate its compliance with any conditions imposed by the SC pursuant to its registration as a RMO as well as the CMSA; and (ii) its latest audited financial statements within three months after the close of each financial year or such further period as the SC may allow.[16]

An operator must also disclose and display prominently on its P2P platform relevant information relating to P2P, including the information prescribed in paragraph 13.31 of the Guidelines, such as (i) the criteria by which an investment note or Islamic investment note is regarded as being in default; (ii) statistics on late payment and default rate of issuers hosted on its P2P platform; and (iii) the fees, charges and other expenses that it may charge an issuer or investor.

Islamic investment notes

An operator must comply with the additional requirements set out in Chapter 11 of the Guidelines where an offer relates to an Islamic capital market product, such as an Islamic investment note. Among these additional requirements are the requirement to appoint a qualified Shariah adviser and to provide additional information relating to the structure of such Islamic product.

Managing conflicts of interest

To manage conflicts of interest, an operator and its officers are prohibited from providing financial assistance to investors to invest in any investment note or Islamic investment note offered on its P2P platform.[17] The operator is also prohibited from providing funding to issuers and from investing in any investment note or Islamic investment note offered on its P2P platform[18] unless the operator has in place appropriate process and procedure to manage conflict of interest[19].

THE ISSUER

Eligibility

An issuer which proposes to be hosted on a P2P platform must be a locally registered sole proprietorship, partnership, incorporated limited liability partnership, private limited company or unlisted public company.[20] The Guidelines do not impose any equity restrictions on an issuer.

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[14] Paragraph 13.05(b) of the Guidelines.
[15] Paragraph 13.06 of the Guidelines.
[16] Paragraph 7.01 of the Guidelines.
[17] Paragraph 13.17 of the Guidelines.
[18] Paragraph 13.18 of the Guidelines.
[19] Paragraph 13.19 of the Guidelines.
[20] Paragraph 13.20 of the Guidelines.

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It has been reported that individuals will not be allowed to seek personal financing through a P2P platform.[21]

Certain entities are prohibited from raising funds through a P2P platform. These entities include (i) commercially or financially complex structures (i.e. investment fund companies or financial institutions); (ii) public-listed companies and their subsidiaries; and (iii) companies with no specific business plans or whose business plan is to merge or acquire an unidentified entity (i.e. blind pool) or to use the funds raised to provide loans or make investments in other entities.[22]

An issuer may not be hosted concurrently for the same purposes on multiple P2P platforms.[23] However, it may be permitted to be hosted on a P2P platform and an equity crowdfunding platform concurrently, subject to disclosure requirements as may be specified by the platform operators.[24]

Mandatory risk scoring

All issues, offers or invitations to subscribe or purchase investment notes or Islamic investment notes must be rated by the operator.[25] The final risk scoring for the investment notes or Islamic investment notes must be made available to the investor at the time of the offer.[26]

Disclosure requirements

An issuer which seeks to be hosted on a P2P platform is required to submit the relevant information to the operator, including the following –

(1) information that explains the key characteristics of the business;

(2) information that explains the purpose of the investment note or Islamic investment note and the targeted offering amount;

(3) information relating to the business plan;

(4) information relating to its intention to seek funding from any other P2P platforms concurrently; and

(5) financial statements relating to its business.[27]

An issuer must ensure that all information submitted or disclosed to an operator is true and accurate and does not contain any information or statement which is false or misleading or from which there is a material omission.[28]

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[21] "SC rolls out region's first framework for peer-to-peer financing", TheSunDaily, 14 April 2016.
[22] Paragraph 13.21 of the Guidelines.
[23] Paragraph 13.22 of the Guidelines.
[24] Paragraph 13.23 of the Guidelines.
[25] Paragraph 13.24 of the Guidelines.
[26] Paragraph 13.26 of the Guidelines.
[27] Paragraph 13.29 of the Guidelines. Paragraph 13.31(a) of the Guidelines requires an issuer to display such information on its P2P platform at the time of offering and throughout the tenure of the investment note or Islamic investment note.
[28] Paragraph 13.30 of the Guidelines.

Limits on fundraising

The Guidelines do not impose any limit on the maximum amount which an issuer can raise on a P2P platform.

THE INVESTOR

Sophisticated investors[29], angel investors[30] and retail investors are permitted to invest in any issuer hosted on a P2P platform.

Investment limits

There are no restrictions on the amount which a sophisticated investor or angel investor may invest.[31] However, operators must encourage retail investors to limit their investment on any P2P platform to a maximum of RM50,000 at any period of time and may require retail investors to file a declaration confirming their compliance with the aforesaid investment limit.[32]

Investor safeguards

An issuer is permitted to keep the amount raised on a P2P platform only if at least 80% of the target amount is raised.[33] However, it may not keep any amount raised which exceeds the initial target amount.[34]

An operator will not be allowed to release the proceeds if there is any material adverse change relating to the investment notes or Islamic investment notes during the offer period.[35] An operator is permitted to impose additional conditions precedent before releasing the funds raised provided that the conditions serve the investors' interest.[36]

To give effect to the above safeguards, the SC requires an operator to establish and maintain in a licensed institution[37], one or more trust accounts designated for funds raised in relation to a hosting on its P2P platform.[38] An operator is also required to maintain one or more trust accounts designated for the monies received as repayments to investors.[39]

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[29] A "sophisticated investor" is defined in paragraph 1.17 of the Guidelines as any person who falls within any of the categories of investors set out in Part 1, Schedule 6 and Schedule 7 of the CMSA and includes a venture capital corporation venture capital management corporation, private equity corporation and private equity management corporation registered with the SC.
[30] An "angel investor" is defined in paragraph 13.01 of the Guidelines as an investor who is accredited as an "angel investor" by the Malaysian Business Angels Network.
[31] Paragraph 13.32 of the Guidelines.
[32] Paragraph 13.33 of the Guidelines.
[33] Paragraph 13.27 of the Guidelines.
[34] Paragraph 13.28 of the Guidelines.
[35] Paragraph 13.10 of the Guidelines. Refer to paragraph 13.12 of the Guidelines for examples of events which are regarded as "material adverse change".
[36] Paragraph 13.13 of the Guidelines.
[37] In relation to an Islamic investment note, paragraph 13.11 of the Guidelines requires the operator to maintain the funds in a trust account established with a licensed Islamic bank, licensed bank or licensed investment bank approved to carry on Islamic banking business.
[38] Paragraph 13.09 of the Guidelines.
[39] Paragraph 13.14 of the Guidelines.

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The operator is prohibited from withdrawing or dealing with the investors' money held in a trust account except for the purposes of making a payment (i) to the person entitled thereto (i.e. issuer, investor or operator); or (ii) in accordance with the direction of the SC or by any other enforcement officer as provided under any written law.[40]

The Guidelines do **not** impose any mandatory cooling-off period within which an investor may withdraw his investment made through a P2P platform but an operator is at liberty to provide a cooling-off period for investors in its P2P platform.[41]

COMMENTS

Various measures have been put in place in the Guidelines to reduce the risk of dubious issuers being hosted on a P2P platform. The operator is required to carry out proper risk assessment on prospective issuers and adopt a risk scoring system to rate all investment notes and Islamic investment notes offered on its platform.[42]

Further, the requirement that an operator must have in place processes or policies to manage default by issuers, including using its best endeavours to recover amounts owing to the investors[43] means that an operator cannot wash its hands off an offering once it has received its fees and the funds have been released to an issuer.

The adoption of credible risk assessment and risk scoring systems will be crucial to the success of P2P financing as weaknesses in such systems could contribute to high default rates by issuers. Apart from the Central Credit Reference Information System (CCRIS) which is accessible only to financial institutions, there is currently a lack of existing financial databases, especially with regard to individuals and small businesses, in Malaysia which are readily available to operators of P2P platforms. Thus it is imperative that operators develop or acquire effective risk assessment and risk scoring systems to enable a thorough credit review to be carried out on prospective issuers before they are permitted to be hosted on P2P platforms.

It has been reported that the P2P platforms will be launched in early 2017.[44] From this point forward we can expect to see interesting developments in the P2P ecosystem in Malaysia.

KOK CHEE KHEONG
Partner
20 April 2016

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[40] Paragraph 13.15 of the Guidelines.
[41] Paragraph 5.02 of FAQs.
[42] See Paragraphs 13.05(a), 13.05(b), 13.06, 13.24 to 13.26 of the Guidelines.
[43] Paragraph 13.05(j) of the Guidelines.
[44] "SC rolls out region's first framework for peer-to-peer financing", TheSunDaily, 14 April 2016.

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Warning about intellectual property-related scams

April 14, 2016

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Intellectual property (/resources/intellectual-property)

Intellectual property rights owners are again being targeted by scammers and organisations offering unsolicited and misleading services. If you receive an email or letter from an unfamiliar party or requesting payment for unsolicited IP services, you should treat it with caution.

What types of IP-related scams are there?

The scams and unsolicited communications may take various forms, but are known to include the following:

- **Trade mark database scams**: These scams have become common again, and usually involve an entity sending the form of an invoice for publishing trade mark registrations in an overseas or international database set up by the sender. Such databases have no value. Details of trade mark registrations will already be recorded with the relevant official trade mark registries.

  The Commerce Commission recently issued a warning to New Zealand trade mark owners about invoices sent by TM Publisher. TM Publisher's bank account has been frozen while further investigations are conducted by the Commerce Commission. (See the media release **here (http://www.comcom.govt.nz/the-commission/media-centre/media-releases/detail/2016/new-zealand-trade-mark-holders-warned-about-letters-requesting-payment).**)

- **Unsolicited trade mark renewal reminders**: These "reminder" letters may misleadingly give the impression that they have been sent by official organisations. They will often offer to renew New Zealand trade mark registrations at costs significantly more than reputable IP service providers. They may also not provide additional services usually offered by reputable IP service providers, such as acting as address for service.

- **Domain name squatting**: Entities may contact brand owners claiming that another party has applied to register a domain name that incorporates the relevant brand. Sometimes these entities, or someone related to them, may in fact have registered the domain name themselves and will attempt to sell the domain name to the brand owner at an inflated price.

- **Trade mark squatting in China**: China has a "first to file" trade mark registration system, which unfortunately means that squatters can take advantage by applying to register trade marks that they do not intend to use. Sometimes trade mark squatters may contact brand owners with an offer to sell Chinese trade mark registrations or applications. Of particular concern are unsolicited approaches from overseas lawyers offering to assist with actions against trade mark squatters, where the lawyers (or supposed lawyers) may actually have a connection with the squatters.

What should you do if you receive unsolicited correspondence relating to your IP?

- Be aware that it could be a scam unless it's from your usual IP provider or an official body such as the Intellectual Property Office of New Zealand.
- Contact us in the first instance so we can assess its authenticity.
- Don't engage with the sender.
- Never disclose your credit card or other financial details.

Further information is also available on the Intellectual Property Office of New Zealand website (http://www.iponz.govt.nz/cms/contact/ask-a-question/warning-misleading-invoices).

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DENTONS RODYK

An appeal on the merits unmasked - High Court dismisses application to set aside arbitral award

A case study of *Mount Eastern Holdings Resources Co., Limited v H&C S Holdings Pte Ltd and another matter* [2016] SGHC 01

May 3, 2016

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Introduction

The Singapore High Court's recent decision in *Mount Eastern Holdings Resources Co., Limited v H&C S Holdings Pte Ltd and another matter* [2016] SGHC 01 demonstrates that the court takes great care not to overstep its boundaries when faced with applications to set aside arbitral awards. The grounds upon which the court will set aside an arbitral award are limited and are set out in Section 24 of the International Arbitration Act (IAA) and/or Article 34 (2) of the UNCITRAL Model Law on International Commercial Arbitration (Model Law). The court remains careful to distinguish between cases which properly fall within the scope of Section 24 of the IAA read with Article 34 (2) of the Model Law, and cases which have been packaged to attract the application of those provisions, but in reality fall outside their four corners. The case is a reflection of the court's respect for the finality of arbitral awards.

Brief facts

Pursuant to the terms of a supply contract between Mount Eastern Holdings Resources Co., Limited (Mount Eastern) and H&C S Holdings Pte Ltd (H&C), H&C was obliged to deliver 90,000 wet metric tonnes of iron ore to Mount Eastern. It was undisputed that H&C never effected delivery of the iron ore. Mount Eastern therefore commenced arbitration proceedings against H&C claiming damages for seller's deficiency (on the basis of non-delivery) under clause 13.1.1 of the supply contract.

The material defence raised by H&C during the arbitration proceedings was that Mount Eastern could only claim damages by alleging anticipatory breach and termination of the contract, which it had not done. Anticipatory breach of contract occurs where a contracting party declares to the other party (by words or conduct) that it no longer intends to fulfil its side of the bargain before the time for performance arrives. Clause 14 of the supply contract sets out the mechanism for termination of the supply contract and also entitles the innocent party to claim a termination amount.

Therefore, the structure of the supply contract seemed to give Mount Eastern several options of remedy upon H&C's failure to deliver the iron ore. Mount Eastern claimed damages under clause 13.1.1 while H&C's case was that Mount Eastern had to terminate the contract pursuant to H&C's anticipatory breach of contract and according to the termination mechanism in Clause 14, before Mount Eastern would be able to claim damages.

The tribunal decided in favour of Mount Eastern, holding that the question of termination was not crucial to Mount Eastern's claim for damages under Clause 13.1.1 of the supply contract. Mount Eastern therefore commenced ex parte proceedings in the High Court (i.e. as a single party) and successfully obtained leave to enforce the tribunal's award as a judgment.

The rules of court stipulate a certain time frame within which H&C could apply to set aside the High Court's order granting leave. H&C applied for an extension of time for its application – however, this was refused by the Assistant Registrar (AR) of the High Court. H&C appealed against the AR's decision and concurrently commenced proceedings to set aside the tribunal's award on the grounds of breach of natural justice.

This article is primarily concerned with H&C's application to set aside the tribunal's award and focuses on the High Court's decision as regards H&C's allegation of a breach of natural justice.

H&C contended that either of the following constituted a breach of natural justice by the tribunal:

1. the tribunal had granted damages to Mount Eastern even though Mount Eastern had not pleaded anticipatory breach of contract and that the supply contract was terminated under Clause 14 of the supply contract (the Pleadings Issue); or
2. the tribunal had failed to give H&C a fair hearing.

Mount Eastern's response was as follows:

1. On the Pleadings Issue, Mount Eastern's claim for damages was fully pleaded and based on clause 13.1.1 of the supply contract; its claim did not depend on termination of the supply contract.
2. The tribunal had given H&C a fair opportunity to be heard and had duly considered H&C's arguments before concluding that the issue of termination was not crucial to Mount Eastern's claim for damages.

Findings of the court

Justice Quentin Loh (Loh J) dismissed H&C's application to set aside the tribunal's award, finding that there was no breach of natural justice. In doing so, Loh J reaffirmed the principles in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 i.e. that a party challenging an arbitral award as contravening the rules of natural justice must establish:-

1. which rule of natural justice was breached;
2. how it was breached;
3. in what way the breach was connected to the making of the award; and

4. how the breach prejudiced that party's rights.

Loh J noted that H&C's challenge on the basis of breach of natural justice was mounted on the principle that a party must be given adequate notice and an opportunity to be heard.

The pleadings issue

In relation to the Pleadings Issue, Loh J considered H&C's contention and found it to be without merit. Mount Eastern's claim in damages relied solely on clause 13.1.1 of the supply contract instead of the termination mechanism under clause 14 of the supply contract. This was adequately pleaded in Mount Eastern's statement of case.

After reviewing the tribunal's award, Loh J noted that the tribunal had already considered and disagreed with H&C's contention that Mount Eastern had not pleaded anticipatory breach and termination, and should not be entitled to damages. The tribunal specifically found that it was not necessary for Mount Eastern to plead anticipatory breach or termination of the supply contract in order to claim for damages under clause 13.1.1 of the supply contract.

The tribunal therefore had not considered or rendered an award on an issue falling outside the scope of pleadings.

Fair opportunity to be heard

Loh J found H&C's allegations to be wholly unmeritorious in light of the fact that the tribunal's reasoning showed that it had given due consideration to H&C's contentions. Further, parties were also given the opportunity to make oral and written submissions in closing.

In arriving at his decision, Loh J took pains to point out that the real reason behind H&C's dissatisfaction with the award was its view that the tribunal had erred in reaching its conclusion. Loh J noted that this was a question on the merits of the tribunal's decision and not something the court will be entitled to scrutinise.

In view of the fact that H&C's application to set aside the tribunal's award lacked merits, Loh J similarly dismissed H&C's appeal against the AR's decision to disallow an extension of time.

H&C has since appealed the High Court's decision to the Court of Appeal.

Commentary

The High Court's decision is another recent demonstration of the guiding principles for setting aside arbitral awards. The court will take a judicious review of the application to prevent appeals on the merits from masquerading as applications to set aside awards. A common theme runs through this decision and the earlier decision of *AMZ v AXX* [2015] SGHC 283, where the High Court had also dismissed a party's attempts at using the setting aside proceedings as a platform for a second bite of the cherry (You may read the article **here**.). Parties should therefore avoid liberally bandying about allegations of breach of natural justice as such allegations will be scrutinised with the utmost care at setting aside proceedings. It seems clear that it is only in deserving cases where a breach of natural justice – a serious allegation – has indeed been made out, that the Singapore court will be willing to set aside arbitral awards on that basis.

The authors acknowledge and thank Geraldine Yeong for her contribution in the writing of this article.

The Three Broadcast Laws Amended

04/28/2016

by Patrick Marros Chu/Vick Chien

The amendments (the “Amendments”) to the Radio and Television Act (RTA), the Satellite Broadcasting Act (SBA), and the Cable Radio and Television Act (CRTA), were passed by Legislative Yuan on 18 December 2015, were promulgated by the President on 6 January 2016, and took effect starting from 8 January 2016. As the RTA, SBA and CRTA have been amended substantially, which would have a significant impact on the relevant industries, set forth below please find our summaries of the major changes of the Amendments:

1. The major changes of the Amendments held in common

(1) The major changes shared between the RTA and the SBA

A. Adding the provisions with respect to the sponsorship and the placement marketing: In response to market demand, the National Communications Commission ("NCC") promulgated temporary guidelines for the sponsorship and the placement marketing of television programs without legislative authorization. The Amendments require specifically that the radio and television business and the satellite broadcasting business shall clearly disclose the information concerning the sponsors before and after broadcasting programs when accepting the sponsorship. With the premise that the interests of audience shall not be affected, the information concerning the sponsors may appear in sports programs and artistic programs (Article 34-2 of the RTA, and Article 32 of the SBA). In addition, the NCC is authorized to establish guidelines governing the categories of programs which are allowed for the placement marketing, the identification and separation between programs and advertisements inserted therein, the methods, restraints and other matters required for disclosing the information concerning the placing businesses, and the sponsors (Article 34-3 of the RTA, and Article 33 of the SBA).

It is worth noting that the amended SBA requires that the satellite broadcasting business shall not broadcast any programs containing placement marketing placed by the government, and shall not be commissioned by the government to broadcast any programs which are invested, produced, sponsored or subsidized by the government without disclosure of relevant information; news related programs and children’s programs are not allowed for placement marketing; while adopting placement marketing, the satellite broadcasting business shall not deliberately affect the editing content of programs, directly encourage viewers to purchase specific commodities or services, or exaggerate the effect of a product, and shall clearly disclose the information of the placing businesses before and after programs (Article 31 of the SBA). Although the same provisions were amended in the draft amendment to the RTA, such provisions were removed in the end. Therefore, the requirements concerning the sponsorship and the placement marketing in the RTA and SBA are currently not the same.

B. The definition of the term “program” has been clarified: By referring to the laws of the EU and the US, the definition of “program” under the Amendments is redefined as “an independent unit of content consisting of a series of images, sounds, and relevant text, and broadcasted in sequence and at an arranged time," which would only be applicable to linear programs. In other words, non-linear programs, such as video on demand (VOD), would not be deemed as "programs," as defined in the new RTA and SBA.

(2) The major changes shared between the SBA and the CRTA

A. Having shopping channels to be regulated by law: In the past, the NCC restricted the number of shopping channels without legislative authorization. The amended SBA specifically prescribes that the number of shopping channels broadcasted by a direct satellite broadcasting services operator shall be less than 10% of the total amount of channels it broadcasts. Likewise, the amended CRTA authorizes the NCC to limit the number of shopping channels broadcasted by cable radio and/or television system operators (the “SO”) in the cable radio and television system. In addition, the SO shall obtain a "other type of channel program supply business license" if it intends to own its shopping channel, and shall not charge its digital CATV subscribers for any shopping channel broadcasted on its system (Article 24 of the SBA, and Article 38 of the CRTA).

B. It is worth noting that according to one of the amendment versions proposed by some legislators, which is now incorporated into the finalized version, its reason indicates that to facilitate the implementation of digital CATV, the number of shopping channels would be regulated only for those being placed in the basic channels. There is no necessity to regulate the number of shopping channels which are not placed in basic channels. Therefore, it can be expected that the NCC would promulgate the guidelines following this direction.

2. The major changes of the RTA

In order to develop local cultural industries, aside from the provisions stipulating that locally produced programs shall not be less than 70% of the total radio/television programs, provisions have been added to the Amendments requiring locally produced drama programs broadcasted in the main time slots to not be less than 50% of the total drama programs, and authorize the NCC to promulgate regulations governing the determination and categories of locally produced programs, the definition of the main time slot and other matters required (Article 19 of the RTA).

3. The major changes of the CRTA

(1) In the past, the method of determining the indirect foreign ownership of the CATV SO was not clear in the old CRTA, causing disputes and the NCC's decision to be challenged. The Amendments refer to the provisions of the Telecommunications Act and clearly provide that the indirect foreign ownership shall be calculated in accordance with the percentage of the shares held by a domestic legal entity in a SO times the percentage of the shares or equity interests held by foreign nationals in that domestic legal entity (Article 9 of the CRTA).

(2) The Amendments add the matters required to be included in the business plan as follows: the implementation plan of the programs spreading domestic cultures, the plans to set up the cable radio and television system by itself, to rent the transmission equipment owned by Type I telecommunications enterprises or other SOs, and to set up the Head-end backup mechanism, and the list and relevant information of shareholders or subscribers holding more than 10% of the company's issued shares. The existing SOs shall apply with the NCC for changing the business plan and adding such matters within one year after the Amendments took effect (Article 11 of the CRTA). It is worth noting that Article 12 of the amended CRTA requires that the NCC shall reject such application if the eligibility of directors, supervisors, managers and shareholders holding more than 10% of the company's issued shares is deemed by the NCC through public hearing harmful to facilitate market competition, consumer interest and other public interests. Such provisions will result in more uncertainty with regard to the transactions about SOs.

(3) The Amendments specifically provide that the foreign investors shall not affect the national security, impair or hinder the sound development of industry, and interfere or restrain the fair competition when applying to invest in the SOs. Also, when reviewing, the NCC shall require applicants to explain and submit supporting documents with respect to: (i) the openness of public access; (ii) the plurality of content; (iii) the protection and feedback of the interests of consumers; (iv) the improvement in operating efficiency; (v) the impact on the market related to the media; (vi) other matters deemed by the competent authority to benefit the public interests (Article 15 of the CRTA).

(4) For accelerating the digital CATV, the Amendments provide that when entering the market or expanding its service area, SOs shall provide the cable radio and television system service by digitizing techniques; SOs shall not apply with the NCC for examination in order to commence their business or expand its service area until the scope of the system installing service has covered no less than 15% of the total number of households in such service area; the scope of system installing service shall cover no less than 50% of the total number of households in such service area within 3 years; otherwise, the NCC will impose administrative sanctions on the SO (Article 7 and Article 20 of the CRTA).

(5) SOs shall submit the phased implementation plans for the digital CATV to the NCC within 3 months from the effective date of the Amendments, and shall consummate the digitization of cable radio and television system prior to first-time applying with the NCC for renewing the operating license after the effective date of the Amendments; otherwise, the NCC will impose administrative sanctions on the SO or reject such application (Article 48 and Article 64 of the CRTA).

4. The major changes of the SBA

(1) In order to strengthen the media self-regulation and the mechanism of accountability, the Amendments require that satellite broadcasting program suppliers (the "PS") shall set up the internal control mechanism and the system of program editing and reviewing; the PS producing and broadcasting the current affairs programs or designated by the NCC shall set up the self-regulation mechanism which accepts independently the complaints by audience with respect to the correctness, equilibrium and taste of broadcasting content; the PS shall classify and broadcast programs in consideration of their content, and implement the mechanism of accountability (Article 7, Article 8, Article 22 and Article 28 of the SBA).

(2) For developing the production of domestic programs, the Amendments require that the PS shall comply with the provisions with respect to the percentage of locally produced programs when producing programs, and take the plurality of content, human dignity, social responsibility and the protection of domestic culture into consideration when planning programs. The existing PS shall apply with the NCC for changing the business plan within 1 year from the effective date of the Amendments (Article 8 of the SBA).

In summary, the Amendments have significantly revised the current provisions of the three broadcast laws. Above all, as to the operation and transactions regarding SOs, the new law stipulates the controversial factors affecting the examination. It is worth observing how the NCC specifically interprets such general provisions by case in the future.

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Ideas

Michigan Utility Company Hit by Ransomware: Thinking Best Practices

05 May 2016

Updates

A Michigan-based utility company disclosed this week that it has become the first publicly reported victim of a ransomware attack against a public utility in the U.S. The attack highlights the importance of the ransomware threat for many industry sectors and the need for companies to put in place response plans and defensive measures.

On Monday, April 25, the Lansing Board of Water and Light ("BWL") announced that its corporate networks had been infected with ransomware, a type of malware that encrypts data on the systems it targets and holds the data hostage until a ransom is paid.[1] Upon detecting the intrusion, BWL reportedly initiated a self-imposed lockdown of all corporate networks, shutting down accounting, email, and telephone systems.[2] The company reported that no utility functionality was lost as a result of the incident and no customer data was compromised.[3]

According to the company, the attackers were able to deliver the malware through a phishing email, a typical attack vector for ransomware incidents.[4] Phishing, whereby an attacker transmits emails that appear to be from a trustworthy or innocuous sender, delivers malware or redirects a user to a website from which the malware is downloaded, often bypassing basic security measures such as antivirus or firewall software. In this case, reports indicate that a BWL employee unknowingly released the ransomware onto the company's systems by opening an email with an infected attachment. Email systems at BWL remained offline for over a week.[5]

In response to the breach, BWL retained cyber-incident response experts to review and evaluate the company's IT systems and support the return of BWL's administrative services to full functionality.[6] The company is also reportedly working with the Michigan State Police and the FBI to determine the source of the attack.

Best Practices

Although ransomware is only one of a number of cybersecurity threats that are rapidly evolving and proliferating, it has been a lucrative method of attack that, through the use of Bitcoin-based ransom payments, is difficult to investigate and prosecute. Companies should focus on reviewing their information security programs to ensure they are taking the ransomware threat into account. Key mitigation steps include reliable backups of critical data and systems (including, where appropriate, multiple copies of backups to take into consideration newer variants of ransomware that attempt to interfere with or destroy data backups themselves), blocking malicious attachments and websites, and an active training program for employees to sensitize them about the threat.

As with most internet-based attacks, the speed of the attack can be such that a timely and rapid response is essential; these can best be managed though up-to-date incident response plans and pre-emptive work to limit the damage ransomware can cause if an infection occurs. A recommended best practice is for companies to work at the management or Board level with counsel to review their current cybersecurity preparedness and to prepare incident response plans for data and network breaches. Involvement of counsel in managing a post-breach scenario may also help protect legal privileges and company equities in subsequent litigation and can facilitate dialogue with law enforcement.

[1] Lansing BWL, Twitter (Apr. 25, 2016, 9:55 AM), https://twitter.com/BWLComm/status/724643002149408768.
[2] Lansing BWL, Twitter (Apr. 25, 2016, 9:55 AM), https://twitter.com/BWLComm/status/724643059510722561.
[3] Lansing BWL, Twitter (May 2, 2016, 11:05 AM), https://twitter.com/BWLComm/status/727197247197188096 (providing responses to frequently asked questions in the wake of the cyber incident).
[4] Lansing BWL, Twitter (Apr. 25, 2016, 9:55 AM), https://twitter.com/BWLComm/status/724643002149408768.
[5] Eric Lacy, Lansing BWL Still Recovering After Cyberattack, LANSING STATE J. (May 2, 2016), available at http://www.lansingstatejournal.com/story/news/local/2016/05/02/bwl-cyberatttack-status/83818068/.
[6] Lansing BWL, Twitter (May 2, 2016, 11:05 AM), https://twitter.com/BWLComm/status/727197247197188096.

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What Does the New Defend Trade Secrets Act Mean for California Employers?

05.04.16

By Emilio Gonzalez and David Quinto

The Defend Trade Secrets Act (DTSA) allows companies for the first time to file civil lawsuits for trade secrets theft under federal law if the trade secret is "related to a product or service used in, or intended for use in, interstate or foreign commerce."

The DTSA does not pre-empt existing state laws; 48 states, including California, have codified versions of the Uniform Trade Secret Act (UTSA), a model statute. Rather, the new federal scheme provides all trade-secret plaintiffs direct access to federal courts.

Aspects of the DTSA that are new to California employers include:

- **Ex parte civil seizure procedures**, which allow enforcement officials to enter land and seize property "necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action" without notice;

- **Whistleblower immunity** for employees who turn trade secrets over to the government to investigate potentially illegal activity or disclose trade secret information when prosecuting a whistleblower retaliation claim; and

- **Notice requirement** for employers, who must provide notice of whistleblower immunity going forward to employees who enter into any form of non-disclosure agreements.

Brief History

In May 2013, the Commission on the Theft of American Intellectual Property, an independent and bipartisan group, recommended that Congress amend the Economic Espionage Act of 1996 to provide a federal private right of action for trade secret theft.

The DTSA was introduced in the Senate on July 29, 2015, as S. 1890 and concurrently in the House as HR 3326. Following amendment, S. 1890 passed the Senate on April 4, 2016. It was quickly—and almost unanimously—approved by the House on April 27. Its enactment stemmed from a bipartisan belief that U.S. businesses are experiencing unprecedented and unsustainable levels of trade secret thefts by foreign governments and foreign competitors, and that state laws protecting trade secrets have proved unable to ensure fair competition.

Potential Impact on California Employers

The DTSA tracks many of the provisions of the California UTSA (CUTSA) and relevant case law (e.g., a three-year statute of limitations; rejection of the inevitable disclosure doctrine; fee shifting if a claim is made or opposed in bad faith). There are, however, differences between the state and federal statute. Some of these differences include:

Civil seizures without notice to opposing party under the DTSA

The most controversial provision of the DTSA is its ex parte civil seizures order provision:

> Based on an affidavit or verified complaint satisfying the requirements of this paragraph, the court may, upon ex parte application but only in extraordinary circumstances, issue an order providing for the seizure of property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action.

Critics of the DTSA expressed concern that civil seizures might be abused and misused for anti-competitive ends such as gaining access to a competitors' trade secret by making sham claims or strangling nascent companies by shutting down their operations as a result of the seizure. To address some of these concerns, the bill was revised to include certain safeguards. As a result, to obtain such extraordinary relief, the applicant must show, among other things, that the person against whom the order is sought "has actual possession" of the trade secret and "would destroy, move, hide, or otherwise make such matter inaccessible to the court, if the applicant were to proceed on notice to such person."

The seizure order must also be narrowly tailored to minimize any adverse impact on third parties and on "the legitimate business operations of the person accused of misappropriating the trade secret." Although the plaintiff must provide security in an amount deemed adequate by the court to cover damages for a wrongful or excessive seizure, the defendant may recover its full damages, including lost profits and punitive damages, even if they exceed the required security. The seized property must be held in the custody of the court and cannot be accessed by the plaintiff except by court order under limited circumstances. A hearing must be set no later than seven days after the seizure order issues to determine whether the order should be dissolved or modified.

Situational immunity for whistleblowers

The DTSA provides immunity to individuals who disclose trade secrets to the federal, state or local governments "solely for the purpose of reporting or investigating a suspected violation of law" or who file their complaint under seal. Employees suing their employer for retaliation for reporting a suspected violation of law are also immune provided that any document disclosing the trade secret is filed under seal.

Notice to employees of immunity

To recover attorneys' fees and punitive damages against a former employee for trade secret theft, an employer must provide notice to its employees of the immunity provisions of the DTSA. Notice may be accomplished by including in the contract or agreement a cross-reference to a document provided to the employee setting forth the employer's reporting policy for a suspected violation of law.

Preservation of state laws limiting enforcement of noncompete agreements

The DTSA expressly prohibits any injunction that conflicts with a state's laws prohibiting the enforcement of noncompete agreements or state laws prohibiting any restraint on the practice of a lawful profession, trade or business (such as California's Business & Professions Code 16600 et seq.).

Mandatory licenses in "exceptional circumstances"

The DTSA expressly provides for the mandatory issuance of a license to the defendant, conditioned upon the payment of a reasonable royalty in "exceptional circumstances that render an injunction inequitable." Thus, a plaintiff worried that its claim is exceptional might not want to assert a DTSA violation.

Federal or State Court?

Employers need to carefully weigh the pros and cons of proceeding in federal or state court.

State court may remain a preferred forum in certain jurisdictions where an ex parte TRO may be obtained upon 24 hours' notice, since some federal courts decide ex parte applications on the briefs and not for many days after filing.

On the other hand, while the CUTSA preempts other related state tort law claims, no such preemption exists within the DTSA scheme, so employers may pursue additional legal theories under the DTSA if they do not allege a CUTSA claim. Furthermore, a federal forum makes it easier to serve discovery on nonparty witnesses and provides nationwide service of process.

The ins and outs of asserting claims under the DTSA will be addressed comprehensively in the fourth edition of *Trade Secrets: Law and Practice*, scheduled for hard-copy and online publication by LexisNexis in July. Co-authored by DWT partners David Quinto and Carla McCauley and Boies, Schiller & Flexner partner Stuart Singer, the book is a national, in-depth guide to all things trade secret—from reducing the risk of misappropriation when an employee takes a job with a competitor or an employer hires its competitor's employee, to investigating suspected misappropriations, prosecuting or defending misappropriation claims in state and federal courts on a state-by-state basis, pursuing claims in the International Trade Commission, conducting discovery in the U.S. for use in foreign misappropriation proceedings, and more.

15 APRIL 2016

New tax rules treat related party debt as stock and impose strict documentation rules

On April 4, the IRS and Treasury issued proposed regulations under section 385 of the Internal Revenue Code that treat related party debt as stock. These regulations are a major game changer. They overturn decades of case law and tax practice and deny interest deductions on financial instruments which would otherwise clearly qualify as debt for tax purposes. It is important to emphasize that although these proposed regulations were issued at the same time that regulations were issued relating to inversion transactions, these rules apply whether or not an inversion transaction has occurred.

The new rules apply to related party debt instruments issued after April 4, 2016 effective 90 days after the regulations are finalized. In other words, if a debt instrument impacted by the new rules was issued on April 15, 2016 and the regulations were finalized on September 15, 2016, the instrument would be deemed to convert from debt to stock on December 14, 2016. Affected instruments issued after the effective date of the final regulations generally would be treated as stock from the date of issuance.

The new rules also impose strict contemporaneous documentation requirements for related party debt and provide that, on audit, the IRS may treat a debt instrument as part debt and part equity.

Related party debt instruments treated as stock

The proposed regulations provide a "General Rule" that treats as stock (i) notes distributed to a related party, (ii) notes issued to acquire stock of a related party and (iii) notes distributed to a related entity as boot in an asset acquisition. Thus, for example, if a U.S. subsidiary pays a dividend in the form of a note to its foreign parent corporation, the note will be treated as stock and the U.S. subsidiary will not be entitled to deduct any interest payments it makes on the note even though the note is "straight" debt and satisfies all of the other requirements for being treated as debt for tax purposes. One exception to the General Rule provides that it does not apply if the aggregate issue price of all related party instruments that would be treated as stock under the rule does not exceed $50 million. [1]

The proposed regulations further provide a "Funding Rule" designed to

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assure that a taxpayer cannot achieve in two steps what it is prohibited from achieving in one step. For example, the Funding Rule covers the situation in which the U.S. subsidiary borrows cash from a related party and then pays a dividend to its foreign parent corporation. More specifically, the Funding Rule generally characterizes a related party loan as stock if that loan is used to fund (i) the distribution of a dividend, (ii) the acquisition of stock in a related entity or (iii) the distribution of boot in asset reorganization. For this purpose, a related party loan made during the 72 month period beginning 36 months before any of these events and ending 36 months after any of these events is generally presumed to be within the scope of the Funding Rule and treated as stock. The determination of whether the Funding Rule applies outside of the 72-month period is a facts and circumstances determination.

For purposes of the regulations, a related party is defined as a member of the "expanded group." An expanded group is an affiliated group under Section 1504(a) of the Code expanded to include (i) foreign and tax-exempt corporations, (ii) corporations held through partnerships and (iii) corporations connected by ownership of 80% vote or value, rather 80% than vote and value. Consolidated groups are treated as one corporation for the purposes of the proposed regulations. Thus, the General Rule and the Funding Rule do not apply to instruments issued by one consolidated group member to another consolidated group member. Special rules apply when an instrument ceases or becomes a consolidated group debt instrument. In this regard, it is important to keep in mind that the proposed regulations apply not only to cross-border loans but also to domestic loans between related parties that are not members of the same consolidated group.

As previously noted, the General and Funding Rules apply to related party debt instruments issued after April 4, 2016, [2] effective 90 days after the regulations are finalized.

Contemporaneous documentation requirements for related party debt of "large" taxpayer groups

The proposed regulations establish contemporaneous documentation requirements which apply if (i) the stock of one or more members of the taxpayer group is publicly traded, (ii) the group has more than $100 million of assets, or (iii) the group has more than $50 million of annual total revenues. If any of those tests are met, the taxpayer must contemporaneously prepare and maintain, for the period that the debt is outstanding and until the period limitations expires for any year for which the treatment of the instrument is relevant, written documentation establishing:

— an unconditional and legally binding obligation to pay a sum certain on demand or at one or more fixed dates;

— that the holder of the instrument has the rights of a creditor to enforce the obligation;

— through, for example, cash flow projections, financial statements, business forecasts, asset appraisals and other information regarding sources of funds, that, as of the date of issuance, the issuer had the ability to repay the debt; and

— that interest and principal payments were made in accordance with the terms of the instrument or, if they were not, describing the holder's reasonable exercise of its creditor rights.

If these documentations requirements are not satisfied, the indebtedness will be treated as stock, unless the taxpayer shows that its failure to satisfy the documentation requirements was due to reasonable cause. If the requirements are satisfied, the determination of whether the indebtedness constitutes debt or stock is made under federal tax principles developed under applicable case law, as modified by the regulations. The documentations requirements are generally applicable to instruments issued on or after the effective date of the final regulations.

Part debt and part stock

Courts have long treated an instrument on an all or nothing basis – it is either debt or stock but not both. Section 385(a) authorizes the Treasury to issue regulations which treat an instrument as part stock and part debt. The proposed regulations provide that, on audit, the IRS (but not the taxpayer) may determine that a related party debt instrument should be treated as part debt and part equity. For this purpose, the definition of related party is expanded by replacing the 80% or more ownership or vote test with a 50% or more ownership or vote test. Unfortunately, the standards for the IRS making such a determination are not clearly defined and it should be expected that this provision will be a source of controversy. The provision generally applies to any instrument issued after the date that the regulations are finalized.

Final comments

The new rules overturn decades of well-accepted tax practice. Not surprisingly, the notice proposing the regulations is quite long (135 pages) and the regulations are quite complex. This note merely summarizes the highlights of the new rules

Finally, there is the question of whether the proposed regulations are valid in so far as they treat as stock certain related party indebtedness that would otherwise qualify as debt. Section 385(a) authorizes Treasury to issue regulations that determine whether an interest in a corporation is to be treated as stock or indebtedness. Section 385(b) lists factors that courts consider in determining whether an instrument should be treated as stock or indebtedness and provides that "[t]he regulations prescribed under this section shall set forth factors which are to be taken into account in determining with respect to a particular situation whether a debtor-creditor relationship or a corporation-shareholder relationship exists." Rather than enumerating the factors to be considered, the proposed regulations simply provide that, without regard to of any of these factors, if a related party debt instrument is issued under certain enumerated circumstances it will be treated as stock even though the same exact instrument would be respected as debt if it was issued to a third party or to a related party under other circumstances.

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[1]/ Other exceptions to the General Rule include situations in which (i) the aggregate amount of any distributions and acquisitions does not exceed the current year earnings and profits or (iii) a corporation transfers property to a subsidiary in exchange for a note and for 36 months after the transfer continues to own, directly or indirectly, 50% or more of the vote and value of the subsidiary.

[2]/ The regulations may also apply to related party debt instruments issued on or before April 4, 2016 which are substantially modified within the meaning of Treas. Reg. section 1.1001-3 after that date.