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November 2016 e-Bulletin

MEMBER NEWS

►ARIAS & MUNOZ Strengthens Labor Practice Group
►BAKER BOTTS Announces 8 Partner Appointments
►CLAYTON UTZ Announces 2017 New Partner Appointments
►DAVIS WRIGHT Two Experienced Counsel Join the Technology Transactions Team

COUNTRY ALERTS

►AUSTRALIA Clearing the Air – New South Wales Clean Air Paper Proposes Widespread Regulatory Reforms CLAYTON UTZ
►BRAZIL Government Announces Investment Partnership Program TOZZINIFREIRE
►CANADA The Lease of Your Worries: Preserving the Priority of a Lessor's Interest in an Asset BENNETT JONES
►CHILE New Law Authorizes Issuance and Operation of Pre-funded Payment Methods by Non-Banking Entities CAREY
►FRANCE BREXIT: Government Called to Order by the Court GIDE
►HONG KONG Monetary Authority grants first round of Stored Value Facilities Licenses HOGAN LOVELLS
►INDONESIA New Patent Law in Effect ABNR
►MALAYSIA Corporate Insolvency, Corporate Rehabilitation and Receivership in Malaysia SKRINE
►NEW ZEALAND Important Court of Appeal decision released on employment investigations SIMPSON GRIERSON
►NETHERLANDS Legal Obstacles Hamper Dutch Energy Storage Opportunities NAUTADUTILH
►NICARAGUA New Law Enacted for Secured Transactions ARIAS & MUNOZ
►TAIWAN The New Principle for the Investigation of Retroactive Levy of Anti-Dumping Duties LEE & LI
►UNITED STATES
►Department of Transportations Pipeline and Hazardous Materials Safety Administration Releases Civil Penalty Framework BAKER BOTTS
►Federal Antitrust Enforcers Announce Intent to Crack Down on HR Practices That Can Be Illegal DAVIS WRIGHT TREMAINE
►U.S. Election Outcomes –Quick Review and New Political Landscape and What's Expected for remainder 2016 and Year Ahead HOGAN LOVELLS
►VENEZUELA Judicial Solution for an Industrial Property Problem HOET PELAEZ CASTILLO & DUQUE

CONFERENCES & EVENTS

Upcoming Conferences

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

PRAC 62nd International Conference
Sao Paulo - Hosted by TozziniFreire - October 21 - 24, 2017

For more information visit www.prac.org

MEMBER DEALS MAKING NEWS

►ARIAS & MUNOZ helps in Financing of Bank Acquisition in Guatemala
►BAKER BOTTS Represents Hines Real Estate Investment Trust, Inc. in Sale of $1.16 Billion Office Portfolio to Blackstone Real Estate Partners VIII
►BENNETT JONES Acting for DirectCash Payments Inc. in US$460 million Acquisition by Cardtronics plc
►CAREY Assists Chilean Power Company Enersis issue USD600 million bond
►CLAYTON UTZ Acts for Financiers to Successful Consortium on Landmark $16.189 Billion Ausgrid Lease Deal
►GIDE Acts for Mongolia Furui Medical Science Co., Ltd. (FURUI) on its investment in MEDIAN Technologies
►HOGAN LOVELLS Advises on a Trio of Sovereign Sukuk in West Africa
►NAUTADUTILH Assists DELTA Energy B.V. with the sale of its wind and solar activities to Eneco Wind
►SIMPSON GRIERSON Advises State Owned Enterprise Solid Energy New Zealand Limited (Solid Energy) on Sale of its Mines to Three Parties
►SyCipLaw Advises Metro Pacific Tollways Development Corporation and Manila North Tollways Corporation in unsolicited proposal for the NLEX-SLEX Connector Road Project
►TOZZINIFREIRE Advises Canada's Brookfield Asset Management with its latest commitment to Latin America, with Purchase of 70% stake in Brazilian water and sewage company Odebrecht Ambiental

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ARIAS & MUNOZ FURTHER STRENGTHENS LABOR PRACTICE GROUP

GUATEMALA CITY, 19 October 2016: In response to market demand and the continuous efforts to expand and innovate its legal services, Arias & Muñoz Guatemala has strengthened its labor law department by incorporating senior counsel Luis Enrique Solares Larrave, recognized labor attorney and law professor with over 26 years of experience in the field.

Solares is to focus his practice in employment and labor law counseling, with emphasis on collective labor law, labor disputes, as well as in litigation and administrative proceedings, offering the firm and its clients his extensive experience and professional background. "Arias & Muñoz is focused on providing our clients with reliable and comprehensive legal solutions, which is why we are constantly seeking to incorporate renowned lawyers to strengthen our team, and in this case we are very pleased to welcome Luis Enrique Solares", said Mr. Jorge Luis Arenales, founding partner of the firm in Guatemala.

In addition to his recognized experience in the private practice advising companies on labor matters, since 1995 to date Solares has shared his expertise as a professor of the prestigious Guatemalan universities Universidad Francisco Marroquin and Universidad Rafael Landivar, teaching courses of Civil Law, Labor law, Labor Procedural law, among others.

"Luis Enrique Solares adds significant value to our already established labor practice which will begin to offer advice in collective labor law thanks to his well-known experience in this important area of practice," concluded Liz Gordillo, Senior Partner in charge of the Labor Department at Arias & Muñoz Guatemala.

For additional information visit www.ariaslaw.com

BAKER BOTTS ANNOUNCES 8 PARTNER APPOINTMENTS

HOUSTON - 10 November 2016: Baker Botts L.L.P., a leading international law firm, today announced the promotion of eight lawyers to partner, effective January 1, 2017.

“This is an outstanding class of lawyers, who represent the future leaders of our firm. This diverse class of new partners represents the communities in which we work and live, and speaks to our ongoing commitment of providing our clients with the highest level of service,” said Andrew M. Baker, Managing Partner of Baker Botts.

The 2017 class of partners includes lawyers based in Houston, New York, Palo Alto and Washington.

Harper Batts - Intellectual Property, Palo Alto
Heather Souder Choi - Litigation, Washington
Rachael L. Lichman - Corporate, Houston
Jon Lobb - Tax, Houston
Jeremy Moore - Corporate, Houston
Clint Rancher - Corporate, Houston
Jennifer C. Tempesta - Intellectual Property, New York
Gregory S. Wagner - Global Projects, Washington

For more information, please visit www.bakerbotts.com

CLAYTON UTZ ANNOUNCES 2017 NEW PARTNER APPOINTMENTS

SYDNEY - 26 October 2016: Clayton Utz is pleased to announce the appointment of eight new partners across five national practice groups, effective 1 January 2017.

Clayton Utz Chief Executive Partner Rob Cutler said the appointments reflected the firm's commitment to investing in its bright future by bringing through new partnership talent and ensuring it delivered an exceptional client service experience. "Our new partners are outstanding lawyers - many have grown their careers with us - who have built strong relationships with their clients through a commercial, solutions-focused, approach and an understanding of what truly exceptional client service means. We are delighted to welcome them to the partnership."

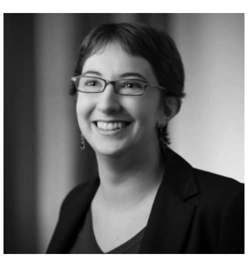
The new partners are:

David Benson
Commercial Litigation
Perth

David joined the Clayton Utz Commercial Litigation team in Perth in 2005. A formidable litigator known for delivering cost effective solutions to problems confronting businesses, David regularly acts for clients in significant cases in the superior courts of Australia. David also has an IP/IT practice that extends to both contentious and non-contentious matters across the full gamut of intellectual property rights, and he advises financial service providers on regulatory issues.

Christy Miller
Workplace Relations
Employment & Safety
Brisbane

Christy joined the Clayton Utz Workplace Relations, Employment and Safety Practice in 2004, and has over 14 years' specialist experience in complex employment, industrial and discrimination law. Based in Brisbane, Christy acts for a range of public sector and private sector clients locally and nationally, providing practical guidance and support in navigating the often difficult and sensitive legal and reputational risks that can arise in employment-related matters and litigation. Christy has established a reputation among her clients for outstanding client service and working collaboratively with them to achieve practical, commercial outcomes



Pip Mitchell
Commercial Litigation
Melbourne

Pip has practised in Clayton Utz's Commercial Litigation team since 2003. Based in Melbourne, Pip acts for a range of public and private sector clients who value her strategic and practical approach to their legal, reputational and commercial concerns. She has built a formidable reputation in the market for her technical expertise in public law and general commercial disputes, and in managing both high profile complex litigation, and high volume judicial review and merits review applications. Pip's appointment strengthens Clayton Utz's eastern seaboard offering as the leading private sector provider of government legal services.

CLAYTON UTZ ANNOUNCES 2017 NEW PARTNER APPOINTMENTS

Kounny Rattley
Corporate, M&A and Capital Markets
Sydney

Kounny joined Clayton Utz in 2003 and has built a reputation among her clients for practical, solutions-focused advice on M&A and Private Equity transactions. Kounny acts for clients in a range of industry sectors, most notably health, financial services and consumer goods, on all aspects of M&A including management and leveraged buy-outs, capital raisings, restructures and joint ventures. Kounny's clients praise her ability to listen to their needs and work with them to achieve commercial outcomes

Cilla Robinson
Workplace Relations Employment & Safety
Sydney

Cilla has practised in the Workplace, Relations, Employment & Safety team at Clayton Utz since 2002. She has over 14 years' experience advising in all aspects of industrial relations and employment law, acting for both government and private sector clients. Cilla has a depth of strategic knowledge relevant to enterprise transformation and the ongoing imperative to leverage core businesses for new growth. This experience, coupled with her strategic involvement in numerous industrial strategies for both government and private sector clients, is a valued skillset in the management of modern workforces. Clients also value Cilla's commercial and pragmatic approach to legal practice and client service.

Carrie Rogers
Real Estate
Sydney

Carrie has been a part of the Clayton Utz Real Estate team since 2005. Based in Sydney, Carrie acts for many high- profile private sector and government clients who all value her approach of working alongside them to deliver practical and commercial solutions. Carrie's practice spans property development and structuring, integrated anchor leasing arrangements, commercial and industrial leasing together with acquisitions, disposals and leasebacks. Carrie's appointment reinforces the market-leading position of the Clayton Utz national Real Estate practice.

Jonathan Slater
Commercial Litigation
Sydney

Jonathan joined the Clayton Utz Commercial Litigation practice in 2006. He has over 20 years' commercial litigation experience acting for large domestic and multi-national organisations. Jonathan's expertise, particularly in tax litigation, large-scale investigations and financial services litigation, and his client service approach, have established him as an outstanding commercial litigator among clients and in the wider market. Jonathan's appointment strengthens the firm's market-leading litigation practice in Sydney

Chris Slocombe
Major Projects & Construction
Brisbane

Chris joined the Clayton Utz Major Projects and Construction team in 2011. Chris has over 12 years' domestic and international experience as a specialist front-end construction lawyer, acting for the full range of industry participants across a variety of industry sectors. Clients value Chris' ability to cut through complexity, and effectively communicate simple, commercial solutions to difficult issues. Based in Brisbane, Chris' appointment to the partnership reflects the strength and continued success of the firm's leading national Major Projects and Construction Practice Group.

For additional information visit www.claytonutz.com

DAVIS WRIGHT TREMAINE—TWO EXPERIENCED COUNSEL JOIN THE TECHNOLOGY TRANSACTIONS TEAM

SEATTLE – 14 October 2016: The technology transactions group at Davis Wright Tremaine is expanding with the addition of two highly-regarded former in-house counsel.

Joining the firm in DWT's Seattle office are **Martha Phelps**, a lawyer with nearly two decades of experience, including most recently at Amazon.com and Best Buy, and **Barry Stulberg**, whose career includes 15 years as a Senior Attorney at Microsoft and several years in private practice.

"Martha and Barry bring to the firm exceptional insight into the needs of clients in the digital economy," said Wendy Kearns, co-chair of the Technology, Advertising, Trademark, and Entertainment (TATE) practice at Davis Wright Tremaine. "Their skills will be immensely beneficial as we continue building out the leading technology transactions team in the Northwest and our national technology, branding, and digital media practice."

Ms. Phelps was most recently counsel for Best Buy Co.'s e-commerce business during the company's historic turnaround. She has an in-depth understanding of the consumer goods and services industries with particular focus on retail (across all channels) and media (books/publishing, music, movies, software, games). At Amazon, she oversaw legal support for, and advised, the Books, Canada, Global Ops, Kindle Content, and other media-related business units. In addition to her substantive legal skills, Ms. Phelps has built a reputation for service innovation and simplification, having implemented transactional process improvements at both her prior companies that helped speed time to contract and enabled businesses to scale.

Mr. Stulberg represents start-ups, emerging companies, and global conglomerates in an array of transactions involving software, hardware, cloud services, digital health, mobile technology, and online media. At Microsoft, he led global legal support for a number of business lines in the OEM, MSN, Server & Tools, and Research divisions. Mr. Stulberg also headed the advertising law team and counseled leadership on corporate communications and marketing campaigns. He has extensive experience with product development, licensing and distribution, data privacy/information security, strategic alliances, and many other matters, serving industries as varied as health care, financial services, branded merchandise, and entertainment.

"Technology transactions have become critical to every business," said Kraig Baker, co-chair of the TATE practice. "In addition to their first-rate legal skills, Martha and Barry bring a real-world understanding of how to support business success in the current strategic environment."

Davis Wright Tremaine's technology group works closely with the firm's advertising and brand protection, entertainment, and IP prosecution practices to provide full service counseling to clients. In addition to Ms. Phelps and Mr. Stulberg, two lateral associates and one additional attorney are joining the firm's technology transactions practice this month.

Ms. Phelps received her A.B. from Smith College and her J.D. from Boston College Law School. She is on the board of directors of AdoptAClassroom.org, a nonprofit that seeks to provide needed supplies to under-resourced schools.

Mr. Stulberg received his B.A. from the University of California, Berkeley, and his J.D. from Loyola Law School. He also has an M.A. in Clinical Psychology from Seattle University. He is a member of the board of directors of Cancer Pathways, a Seattle nonprofit that provides education, support, and community events for people of all ages living with cancer.

For more information, visit www.dwt.com

ARIAS & MUNOZ

ASSISTS IN FINANCING OF BANK ACQUISITION IN GUATEMALA

Three Arias & Muñoz offices have acted as legal local counsel for Bladex, Credit Suisse and Deutsche Bank in connection with a syndicated credit facility of up to US$223,000,000.00 for Promerica Financial Corporation, destined to finance the acquisition of Citibank's credit card business and consumer banking in Guatemala. As stated in its press release, with this acquisition, Grupo Promerica strengthens its position in Guatemala, reaching total assets of US $ 1.6 billion and becoming the 7th bank (by asset size) in the country (from the current 10th position). The combined assets of Promerica Group amount to date to $ 12.3 billion.

Jorge Luis Arenales, Partner in Arias Guatemala was the lead counsel and coordinated the deal which included El Salvador and Honduras offices as well. "The importance of the transaction is that we worked together with the M&A team of both parties in order to secure local guarantees of Grupo Promerica and the target companies in all the pertinent jurisdictions prior and post-closing, depending on the authorization of the Guatemalan banking authority. The timing and guarantees structures were a significant challenge to overcome in transaction", stated Jorge Luis Arenales.

The firm provided assistance in the analysis of the local structures, due diligence, of the local entities involved; as well as the review, draft and negotiation of all relevant documents/agreements, which included, review of master credit agreement, draft local guarantees, PoAs, trust agreement, corporate resolutions, legal opinions and other documents requested by Bladex Credit Suisse and Deutsche Bank, and necessary by law.

The closing took place on October 31st, 2016.

Team involved: Guatemala (Coordinating office): Jorge Luis Arenales, Lead Partner; Ximena Tercero, Partner; Juan José Del Pino, Senior Associate; El Salvador - Zygmunt Brett, Partner; Mariana Nóchez, Senior Associate;
Honduras - Evangelina Lardizábal, Partner, Bertha Argüello, Partner in Nicaragua

For additional information visit www.ariaslaw.com

BAKER BOTTS

REPRESENTS HINES REAL ESTATE INVESTMENT TRUST, INC. IN SALE OF $1.162 BILLION OFFICE PORTFOLIO TO BLACKSTONE REAL ESTATE PARTNERS VIII

DALLAS - 14 November 2016: Hines Real Estate Investment Trust, Inc. (“Hines REIT”), one of three public non-listed REITs sponsored by Hines, completed the sale of seven West Coast office assets containing more than 3M square feet in a cash transaction for $1.162 billion to an affiliate of Blackstone Real Estate Partners VIII (“Blackstone”).

Baker Botts represented Hines REIT in connection with the real estate aspects of the Blackstone sale.

Baker Botts Lawyers/Office Involved: Jon Dunlay (Partner, Dallas); Connie Simmons Taylor (Partner, Houston); Jessica Boccio (Associate, Dallas); Whitney Crayton (Associate, Houston); Kelsey Ferrari (Associate, Dallas).

For additional information visit www.bakerbotts.com

BENNETT JONES

ACTING FOR DIRECTCASH PAYMENTS INC. IN CONNECTION WITH US$460 MILLION ACQUISITION BY CARDTRONICS PLC

- Date Announced: October 03, 2016
- Date Closed: TBD
- Deal Value: US$460,000,000
- Client Name: DirectCash Payments Inc.

On October 3, 2016, DirectCash Payments Inc. ("DirectCash") (TSX: DCI) announced that it entered into an agreement with Cardtronics Holdings Limited, a subsidiary of Cardtronics plc ("Cardtronics") (NASDAQ: CATM), pursuant to which Cardtronics will acquire all of the issued and outstanding common shares of DirectCash for $19.00 per common share. Subject to the satisfaction of the satisfaction of certain closing conditions, including the approval of the transaction by the shareholders of the DirectCash, the transaction is expected to close in the first quarter of 2017.

DCPayments is a leading global ATM services provider with approximately 25,000 ATMs, with primary operations in Canada, Australia and the United Kingdom and established footprints in New Zealand and Mexico.

For additional information visit www.bennettjones.com

CLAYTON UTZ

ACTS FOR FINANCIERS TO SUCCESSFUL CONSORTIUM ON LANDMARK $16.189 BILLION AUSGRID LEASE DEAL

MELBOURNE - 25 October 2016: Clayton Utz has acted for the financiers to the consortium comprising IFM Investors and AustralianSuper that has successfully bid for the partial lease of electricity and energy services distributor Ausgrid, a milestone transaction for the State of New South Wales.

Partner Dan Fitts led the Clayton Utz deal team, which included special counsel Trish Moloney and special counsel Maria Ratner.

The NSW Government announced on 20 October the Sale and Purchase Agreement with the successful consortium, which was accompanied by a fully underwritten and documented financing package. Under the Agreement, the consortium will acquire 50.4% of the long-term lease of Ausgrid, with the NSW Government retaining a 49.6 percent stake.

The NSW Government will apply the proceeds raised towards funding critical infrastructure projects as part of its $20 billion Rebuilding NSW plan.

Lead partner Dan Fitts said Clayton Utz was pleased to be part of one of the year's biggest financing deals. "This is a significant deal for NSW in providing critical funding to enable the NSW Government to advance its infrastructure agenda. It involved a collaborative effort between the purchasers' and financiers' teams to meet the Government's requirements and achieve this outcome and we congratulate all involved."

Clayton Utz' role on this transaction reinforces the firm's reputation for acting on large acquisition financings. The team recently advised the financiers to the Rail Consortium (consisting of Canada Pension Plan Investment Board, GIP, CIC Capital, GIC, and British Columbia Investment Management Corp) that acquired the Asciano rail business as part of the $9.2 billion takeover of Asciano Limited in August.

For additional information visit www.claytonutz.com

HOGAN LOVELLS

ADVISES ON TRIO OF SOVEREIGN SUKUK IN WEST AFRICA

DUBAI - 20 October 2016: Hogan Lovells has advised the Islamic Corporation for the Development of the Private Sector (ICD) as Lead Arranger on the issuance of three sovereign sukuk in West Africa.

These include sophomore issuances for the Government of Cote d'Ivoire and the Government of Senegal, and a debut issuance for the Republic of Togo.

The sukuk were listed on the Bourse Régionale des Valeurs Mobilières (BRVM) at a ceremony in Abidjan, Cote d'Ivoire on 18 October, together with the debut issuances for Senegal and Cote d'Ivoire, resulting in a listing of a combined issuance of CFA766bn. Investors originated from a number of different countries across the Gulf and the Far East.

Hogan Lovells has worked extensively with ICD in Africa over the last few years, having advised on the initial sukuk issuances for Cote d'Ivoire and Senegal

Hogan Lovells has a first-rate reputation as a leader in Islamic finance, having advised on many first-of-their-kind transactions, such as the first major sukuk by an African sovereign, the first convertible sukuk, the first equity-linked sukuk, the first Sharia-compliant securitisation, the first international sukuk al-mudaraba and sukuk al-musharaka, the first sukuk buy-back, and the first Multilateral Investment Guarantee Agency (MIGA) guaranteed Islamic project financing.

For additional information visit www.hoganlovells.com

GIDE

ACTS FOR MONGOLIA FURUI MEDICAL SCIENCE CO., LTD (FURUI) ON ITS INVESTMENT IN MEDIAN TECHNOLOGIES

PARIS - 9 November 2016: Gide is advising Inner Mongolia Furui Medical Science Co., Ltd. (FURUI), a Chinese company listed on ChiNext GEM Board and dedicated to pharmaceutical, diagnosis and medical services, on its investment in MEDIAN Technologies, a company listed on Alternext specialized in medical imaging software and services dedicated to oncology clinical trials, cancer screening and clinical practice.

The transaction, which is subject to customary conditions precedent, will consist in a capital increase of MEDIAN Technologies at a price of €13 per share, representing a total amount of €19,599,996 reserved to Furui Medical Science Company Luxembourg, a wholly owned subsidiary of FURUI. The completion of the transaction will allow Furui Medical Science Company Luxembourg to hold 13.01% of the share capital and 13.03% of the voting rights of MEDIAN Technologies.

The Gide team advising FURUI on this transaction comprises Antoine Tézenas du Montcel (partner), Régis Henry and Elise Bernard in Paris and Ronan Diot (counsel) in Beijing.

MEDIAN Technologies was advised by PDGB Avocats.

For additional information visit www.gide.com

SIMPSON GRIERSON

ADVISES STATE OWNED ENTERPRISE SOLID ENERGY NEW ZEALAND LIMITED (SOLID ENERGY) ON SALE OF ITS MINES TO THREE PARTIES

AUCKLAND - 02 November 2016: Phoenix Coal Limited (a joint venture company between Talley's Group and Bathurst Resources Limited) has purchased the Stockton mine on the West Coast, as well as the Rotowaro and Maramarua mines in the Waikato region.

Meanwhile, Greenbriar has bought the New Vale and Ohai coal mines in Southland, and Birchfield Coal Mines has purchased the Strongman and Liverpool mines on the West Coast.

Simpson Grierson's team was led by partner Kevin Jaffe and included Victoria Anderson, Josh Cairns, Michael Wood, Peter Eady, James Craig and Tara Wylie.

For additional information visit www.simpsongrierson.com

NAUTADUTILH

ASSISTS DELTA ENERGY B.V. WITH SALE OF ITS WIND AND SOLAR ACTIVITIES TO ENECO WINDS

AMSTERDAM - 01 November 2016: NautaDutilh assisted DELTA Energy B.V. with the sale of its wind and solar activities to Eneco Wind.

The sale comprises three operational wind parks with a capacity of 28.7 megawatt, two ready-to-build wind parks with a capacity of 11.5 megawatt, a number of wind development projects with a contemplated capacity of c. 60 megawatt and four solar projects with a contemplated capacity of 10 megawatt.

The NautaDutilh team consisted of Joost den Engelsman, Harm Kerstholt, Lisa Schoenmakers, Mirjam Klompenhouwer (Corporate M&A/Energy); Arief van Rhee, David Wumkes and Anne Postuma (Real Estate); Marianne de Waard-Preller and Dido Wolvius (Corporate Notarial); Barbara Nijs and Emma Hameleers (Competition); Edward Rijnhout and Frederike Manzoni (Tax).

For additional information visit www.nautadutilh.com

SYCIP LAW

ADVISES METRO PACIFIC TOLLWAYS DEVELOPMENT CORPORATION AND MANILA NORTH TOLLWAYS CORPORATION IN UNSOLICITED PROPOSAL FOR THE NLEX-SLEX CONNECTOR ROAD PROJECT

MANILA - 25 October 2016: SyCipLaw acted as counsel to Metro Pacific Tollways Development Corporation (MPTDC) in relation to its unsolicited proposal for the design, development, financing, construction, operations and maintenance of the NLEX-SLEX Connector Road.

The NLEX-SLEX Connector Road is an 8km elevated toll expressway utilizing the right of way of the Philippine National Railways starting at the junction of the North Luzon Expressway (NLEX) Segment 10 at C-3 Road/5th Avenue in Caloocan City and connecting to the South Luzon Expressway (SLEX) through the Metro Manila Skyway Stage 3 Project in the City of Manila. It is expected to help ease congestion in Metro Manila and to reduce the travel time between NLEX and SLEX to just 15 to 20 minutes from 1.5 to two hours at present.

SyCipLaw assisted MPTDC, as original proponent, during the negotiations of the toll concession agreement (TCA) with the Department of Public Works and Highways (DPWH). Following the conduct of the Swiss Challenge as required by law, the DPWH issued the Notice of Award (NOA) on September 16, 2016. MPTDC complied with the requirements under the NOA on September 27, 2016.

The SyCipLaw team was composed of partners Angel M. Salita, Jr., Arlene M. Maneja and senior associate John Paul V. De Leon.

For additional information visit www.syciplaw.com

TOZZINIFREIRE

ASSISTS CANADA'S BROOKFIELD ASSET MANAGEMENT WITH ITS LATEST COMMITMENT TO LATIN AMERICA IN PURCHASE OF 70% STAKE IN BRAZILIAN WATER AND SEWAGE COMPANY ODEBRECHT AMBIENTAL

SAO PAULO - 09 November, 2016: Odebrecht Ambiental is the largest private water and sewage company in Brazil. The acquisition was announced by Brookfield on 27 October. Brookfield agreed to pay US$768 million for a majority stake in the Odebrecht subsidiary, as well as pledging a further US$125 million in working capital. The private equity investor may spend a further US$110 million depending on Odebrecht Ambiental reaching certain milestones.

Fundo de Investimento do Fundo de Garantia do Tempo de Servico, a federal government infrastruture fund managed by state development bank Caixa Econômica Federal, will continue to control the remaining 30% of Odebrecht Ambiental.

Counsel to Brookfield Business Partners and institutional clients of Brookfield Asset Management:

Debevoise & Plimpton LLP Partner Maurizio Levi-Minzi, and associates Camila Amaral Surcan and Rafael Thor in New York;

TozziniFreire Advogados Partners Maria Beatriz Bueno Siqueira Nunes Kowalewski, Martin Miralles Pose, Claudia Elena Bonelli, Shin Jae Kim, Maria Elisa Gualandi Verri and Oduvaldo Lara Junior, and associates Silvia Martins de Castro Cunha Zono and Daniela Contreras Bochi in São Paulo

Counsel to Odebrecht Ambiental Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados

For additional information visit www.tozzinifreire.com.br

PRAC EVENTS


PRAC2016 Barcelona
PRAC 59th INTERNATIONAL CONFERENCE
21 - 24 MAY 2016
RCD ROUSAUD COSTAS DURAN SLP
PACIFIC RIM


PRAC @ Taipei 2014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ADVISORY COUNCIL

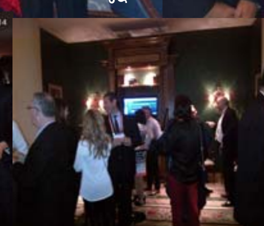

PRAC @ Vancouver 2015


PRAC @ Brisbane 2015


PRAC @ INTA San Diego


PRAC @ IPBA Hong Kong


PRAC @ PDAC Toronto 2014



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NautaDutilh

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r | b | s richards buell sutton LLP

ARIFA ARIAS, FABREGA & FABREGA

Hogan Lovells

RCD ROUSAUD COSTAS DURAN SLP

DENTONS RODYK

BAKER BOTTS LLP

KIM, CHANG & LEE

SANTAMARINA STETA law solutions

Bennett Jones

KOCHHAR & CO. ADVOCATES & LEGAL CONSULTANTS

Simpson Grierson

SKRINE

BRIGARD & URRUTIA

理律法律事務所 LEE AND LI ATTORNEYS-AT-LAW

SYCIP SALAZAR HERNANDEZ & GATMAITAN

/Carey

CLAYTON UTZ

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

TOZZINIFREIRE ADVOGADOS

CLAYTON UTZ

10 NOV 2016

Clearing the air – NSW Clean Air paper proposes widespread regulatory reforms

BY NICK THOMAS AND GRANT WIBLIN

The NSW Government is proposing wide-ranging strategies to improve air quality, affecting manufacturing, energy generation, mining, construction, waste management and transport. Consider whether you would like to make a submission by 20 January 2017.

At the end of October 2016, the NSW Government released a draft consultation paper, Clean Air for NSW, which focuses on improving air quality across NSW between 2017 and 2027.

The Paper proposes significant regulatory changes across a wide range of industries, as well as changes to the way in which the Government assesses and responds to air pollution incidents.

The extensive reach of the Paper's proposals, and the possibility of important regulatory changes, mean that industry participants should review the Paper and consider making a submission.

Broad coverage

The Paper aims to address air quality issues across a broad spectrum of air pollutants, including particles (primarily PM_{10} and $PM_{2.5}$), ozone, nitrogen dioxide, sulfur dioxide, carbon monoxide and lead.

It is based on assessments of air quality across several key areas of NSW, including the Sydney metropolitan area, the Upper and Lower Hunter Valley, the Central Coast, the Illawarra and rural NSW.

Priority actions

The Paper outlines a series of actions covering many key industries in NSW. Some key actions are outlined below:

- **Mining**: The Paper proposes to strengthen mining rehabilitation controls, including via changes to standard mining lease conditions, with a focus on final land-use. The proposal include a mandatory rehabilitation code of practice.
- **Energy generation:** The Paper outlines a project to strengthen air emission controls for power stations, especially coal-fire stations, based on a review of international best practice controls.
- **Hunter rail:** Strategies for minimising dust exposure in the Hunter Valley rail corridor are proposed in the Paper.

- **Diesel emissions for stationary sources and rail:** The paper proposes some possible actions to reduce diesel emissions from the construction and infrastructure sectors, extractive industries and waste management facilities. We expect this to be high priority, given the comment in the Paper that about 96% of all non-road diesel emissions in the greater Sydney metropolitan area come from industrial on-road vehicles and equipment, locomotives and shipping combined.
- **Petrol stations:** The Paper proposes further consideration of the use of vapour recovery equipment NSW, for sources such as vapour escaping from petrol stations.
- **Roads:** One of the Paper's proposals is to pursue air quality by encouraging cleaner vehicles (eg. electric and hybrid vehicles), reducing road congestions (NorthConnex and Westconnex are cited as example projects here) and increased use of public transport and "active transport (eg. cycling and walking).

What's next?

The Paper is said to reflect work from several collaborating Government agencies, including the EPA (as chair), OEH, NSW Health, Transport for NSW, the Department of Planning and Environment, the Department of Industry, and the Department of Premier and Cabinet. The Paper represents the first public step in a 10 year overall strategy.

A Clean Air Summit will take place in Sydney in early 2017, about six months from the date of release of the Paper. The Paper will inform discussions at the Summit. The Paper requests comment and will be finalised in the second half of 2017.

Industry participants should consider making a submission before 20 January 2017 via email to air.policy@epa.nsw.gov.au.

GET IN TOUCH

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NEWS, ARTICLES AND NEWSLETTERS

‹ Back

September 16, 2016

NEWSLETTER: BRAZILIAN GOVERNMENT ANNOUNCES INVESTMENT PARTNERSHIP PROGRAM - PPI

On last 13th September, 2016, the board of the Investment Partnership Program - PPI held its first meeting, in which the Brazilian government announced 34 infrastructure projects (concessions and privatizations).

The government has also announced the 10 main guidelines of the Program, included in Federal Law No. 13.334/2016 (PPI Law), enacted this week:

i) Use Technical standards;
ii) Focus on services quality;
iii) Clearly define services quality indexes;
iv) Strengthen the authority of regulatory agencies;
v) Submit projects to public consultation and approval by the Federal Court of Audits – TCU before tender;
vi) Publish tender documents both in English and Portuguese;
vii) Allow 100 days between tender publication and proposal submission;
viii) Require preliminary environmental license (or guidelines for obtainment of such license issued by environmental agency) before tender;
ix) Require long term financing to be contracted at the very beginning of the concession; and
x) Submit possible alternative solutions to existing concessions to public consultation.

In an attempt to reduce private investors' risks, one of the main announcements relates to eliminating the bridge loans, as well as including other financial institutions into the model, such as: Banco do Brasil, Fundo de Garantia do Tempo de Serviço - FI-FGTS, Caixa Econômica Federal – CEF, Banco Nacional de Desenvolvimento Econômico e Social – BNDES and private banks.

All projects are expected to have at least 20% equity and BNDES is able to subscribe up to 50% of the infrastructure debentures to be issued for each project, jointly with FI-FGTS and CEF.

The Lease of Your Worries: Preserving the Priority of a Lessor’s Interest in an Asset

November 08, 2016 | Aaron Rankin, Denise Bright and Alexis Teasdale

Unless a long-term lease of an asset is registered in the Personal Property Registry (PPR), the leasing arrangement may fail to protect the priority of the lessor’s ownership interest. The Alberta Court of Appeal in *Fast Labour Solutions (Edmonton) Limited v Kramer’s Technical Services Inc*, 2016 ABCA 266 ("*Kramer's*") held that the owner and lessor of a valuable asset (a crane) had a lower-priority claim than an unsecured judgement creditor of the lessee. Any lessor who might be considered to be “regularly engaged in leasing goods” can avoid such outcomes by ensuring that leases longer than one year or leases that could be longer than a year based on possession or renewals are registered in the PPR.

Facts

An Iowa demolition company (“Kramer’s Iowa”) incorporated an Alberta operating company (“Kramer’s Alberta”) to facilitate the performance of a contract to dismantle facilities in Edmonton. Kramer’s Iowa leased a crane to Kramer’s Alberta but did not register a financing statement in respect of the lease (the “Lease”) in the PPR. The crane was in possession of Kramer’s Alberta for more than a year. A judgment creditor of Kramer’s Alberta, Fast Labour Solutions (“Fast Labour”), seized the crane to satisfy its writ of enforcement. There was evidence before the Court that Kramer’s Iowa did not regularly lease to arm's length third parties. The main issue before the Court of Appeal was whether Kramer’s Iowa’s interest in the crane ranked lower than that of Fast Labour because Kramer’s Iowa had not registered its security interest in relation to the Lease in the PPR.

Long Term Leases and the Personal Property Security Act (PPSA)

In order to generate a return on an asset, its owner must often part with possession while continuing to retain ownership. A lease is one legal arrangement to preserve the owner’s title. If the lease is long-term, however, third parties doing business with the lessee may assume that the lessee owns the asset. There is a perceived policy risk arising from this possible misperception. A third party doing business with the lessee might take note of the lessee’s ostensible ownership of the asset, and therefore take fewer steps to protect itself from the lessee’s contractual non-performance.

The *PPSA* addresses this possible policy risk by requiring the lessor to register its interest in the leased asset where the lease is for a term of more than one year. A security interest is not perfected unless it is registered in the PPR. Pursuant to the *PPSA*, a “lease for a term of more than one year” includes:

"i. a lease for an indefinite term even though the lease is determinable by one or both parties within one year after its execution,

ii. subject to subsection (3), a lease initially for one year or less than one year if the lessee, with the consent of the lessor, retains uninterrupted, or substantially uninterrupted, possession of the leased goods for a period in excess of one year after the date the lessee first acquired possession of the goods, and

iii. a lease for a term of one year or less that is automatically renewable or that is renewable at the option of one of the parties, or by agreement, for one or more terms, the total of which, including the original term, may exceed one year."

Thus a lease which is initially for less than a year may still need to be registered to protect the lessor's interest.

It is important to note that "a lease involving a lessor who is not regularly engaged in the business of leasing goods" is excluded even if it is for more than one year. However, Alberta courts have held that whether a lessor is engaged in the business of leasing should be interpreted expansively.

Outcome of the Case

Kramer's Iowa was held to be regularly engaged in the business of leasing goods to Kramer's Alberta, and the Lease exceeded a year in duration. Therefore, because Kramer's Iowa had not registered the Lease in the PPR, its interest was subordinate to that of the judgment creditor's. priority in that property. The practical consequence was that Fast Labour Solutions could enforce against the crane to satisfy its writ of enforcement in priority to Kramer's Iowa.

Takeaways

If a lease might be (or be deemed to be) for a term of more than a year, and if there is a possibility the lessor might be held to be regularly in the business of leasing goods, it is prudent to register a security interest at the PPR in respect to the leased assets. In considering the issue of whether a lessor is in the business of leasing goods, note that:

- if the lease is for a commercial purpose and is part of an overall business strategy in which a holding company owns all the assets of an enterprise and then leases them to their operating company, that may make the lease (if over a year) a security lease;
- in *Kramer's*, the lessor sent monthly invoices for various pieces of equipment for several years which the lower court found showed a regularity in the activity of leasing; and
- it is *not* determinative how frequently leasing occurs, or that no profit is derived or intended to be derived from the leasing transaction: *National Bank of Canada v Merit Energy Ltd* (2001), 294 AR 1 at para. 55, 27 CBR (4th) 283.

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NEWSALERT

Law No 20,950 – Authorizes the issuance and operation of pre-funded payment methods by non-banking entities

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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Law No 20,590 (the "**Law**"), that authorizes the issuance and operation of pre-funded payment methods or any other similar system (the "**Prepaid Cards**"), by non-banking entities, when these systems involve that the issuer or the operator regularly engages in monetary obligations with the general public or to specific sectors or groups thereof, was published and came in force on October 29, 2016.

Its main provisions are the following:

Requirements to incorporate Issuers or Operators

The non-banking Prepaid Card issuers or operators (the "**Issuers**" and the "**Operators**", respectively) must be incorporated as special purpose corporations according to Law No 18,046, and their exclusive corporate purpose must be the issuance or operation of Prepaid Cards. The Operators may also be incorporated as bank supporting companies, according to the General Banking Act.

The Law also modifies Law No 18,772, empowering the Republic to issue and to operate pre-funded payment methods, establishing a special regulation applicable to Metro S.A. (the Santiago underground train).

Common rules to Issuers and Operators

- Both are subject to the supervision of the Superintendence of Banks and Financial Institutions ("**SBIF**") and both are required to report to the Financial Analysis Unit (the Chilean AML entity), when corresponds.
- The Chilean Central Bank will dictate rules to set their minimum operational requirements: paid up capital and minimum reserves, liquidity, risk management and control, among others.
- The Issuers can operate their own Prepaid Cards.
- The requirement to have an exclusive corporate purpose shall not prevent the entity from issuing or operating different types of payment methods.

System Operation

(i) Receipt of money from the public

The Issuers are empowered to receive money from the public, which can only be used to:

- Make payments for the use of the Prepaid Cards;
- Charge the correspondent commissions;
- Reimburse the funding received from the cardholder.

(ii) Applicable regime to the deposited money

The cardholders' money shall be accounted for and kept segregated from any other operations performed by the Issuer. It will not accrue interests or indexations in favor of the cardholder.

These funds shall not be confiscated nor can be subjected to injunction or any other ownership limitations arising from obligations assumed by the Issuer different from those described in (i) above.

The funds must be kept in the Issuer's account or be invested in financial instruments authorized by the Chilean Central Bank.

The cardholder may redeem the funds at any time.

(iii) Prepaid Cards Issuance

The Issuers may issue Prepaid Cards either in a nominative form or to the bearer, according to the following:

a) Nominative Prepaid Cards: They can be issued without a determined term of validity. The funds that the cardholder delivers to the Issuer are subject to expiration, under Article 156 of the General Banking Act, which broadly states that such sums must be transferred to the national treasury after 5 years of inactivity.

b) Prepaid Cards to the bearer: They must always be issued with a term of validity. When this term expires, the cardholder has a 6 month term to redeem the funds, and if this does not occur, the Issuer must transfer the funds to the Regional or Provincial Treasury of its main primary domicile.

(iv) Use of Prepaid Cards

The Law does not regulate the businesses in which the Prepaid Cards can be used, or its national or international character, so we expect that the Chilean Central Bank and the SBIF will clarify this matter at a later date.

Despite these changes to the law, passengers' access to the public transportation system shall continue to be regulated by the Chilean Transport and Telecommunications Ministry.

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GIDE
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client alert

BREXIT: GOVERNMENT CALLED TO ORDER BY THE COURT

On 3 November 2016 the English High Court released its judgment in the case brought against the Government regarding the proper method of triggering Article 50 of the EU Treaty.

Article 50 is the provision which says that a Member State may decide to withdraw from the EU "in accordance with its own constitutional requirements".

The argument against the UK Government - with which the Court agreed - was that the way in which the Government was proposing to trigger Article 50 was not in accordance with the UK's constitution because the Government should first obtain Parliament's approval to do so.

The Government's stance is that it is entitled to act unilaterally, further to the result of June's referendum, relying on the concept of the "royal prerogative".

This refers to the power of the Government to act in certain circumstances without first obtaining Parliament's consent.

The question before the Court was thus whether this power extends to the giving of notice under Article 50.

SUMMARY OF THE ARGUMENTS

In summary the Government's position was (and remains) that the royal prerogative covers the entering into of - and exiting from - international treaties, and that notice under Article 50 was simply the first step of exiting from a treaty and (possibly) entering into a new one.

The Court agreed that the Government alone is entitled to negotiate and withdraw from international treaties, but importantly held that this applies only where such Government action does not have the effect of changing UK law. Here that would not be the case.

The Court emphasised that it is one of the fundamental principles of the UK's constitution that the Government does not have the power to vary the law through the exercise of the royal prerogative.

The Court agreed with the Claimants' argument that the European Communities Act of 1972, and a series of later related Acts of Parliament, had conferred rights directly on individuals and companies in the UK and that those rights could not be removed by the Government acting alone.

The Court indeed went further than this, stating that the profound effect of entering the EU, with all of the associated consequences for domestic legislation, meant that it was very unlikely that when doing so in 1972 Parliament envisaged that all such consequences could be reversed at the Government's discretion.

> *"Parliament having taken the major step of switching on the direct effect of EU law in the national legal systems by passing the ECA 1972 as primary legislation, it is not plausible to suppose that it intended that the Crown should be able by its own unilateral action under its prerogative powers to switch it off again."*

It was agreed by the parties before the Court that a notice under Article 50 is irrevocable and cannot be qualified. Accordingly, notice under Article 50 would inevitably result in the loss of rights granted by the ECA 1972. The fact that Parliament might potentially be invited to review or approve the terms of a deal negotiated with the EU at some time in the future would not change that. Notice under Article 50 would have a direct effect on the relevant rights, even if the Article 50 process might take years to work through.

Finally and importantly, the Court made it clear that the result of the referendum, held pursuant to the Referendum Act of 2015, was not legally binding and did not confer any authority on the Government to issue the notice under Article 50.

The result is that the Secretary of State does not have power to give notice pursuant to Article 50.

WHAT NEXT?

The Government has announced its intention to appeal the decision.

The appeal will be heard by the Supreme Court in early December. A judgment of the Supreme Court in the Government's favour could leave the Prime Minister's current planned timetable for the triggering of Article 50 unchanged; but a further decision against the Government would mean that parliamentary approval would be required first.

The question then arises as to the basis on which any such approval might be given.

It seems probable that Members of Parliament would, as a minimum, want to know the terms on which the Government intends to leave the EU (notwithstanding that any such position would be subject to negotiation with the EU Member States). MPs are already calling for the Government to disclose its position.

This is very likely to entail significant delay, while the proposed terms of the UK's exit from the EU are debated.

Equally importantly, being forced to "reveal its hand" in public in this way would be wholly inconsistent with the approach taken by the Government so far, which has been not to publicise its intended negotiating strategy at all ahead of the commencement of negotiations.

There are thus numerous reasons why the Government will be keen for the Supreme Court to reverse the High Court's decision.

However, in delivering such a clear-cut and unambiguous judgment, the High Court has ensured that the Government faces an uphill struggle in this regard.

And although the legal action brought before the High Court was ostensibly brought not to challenge the principle of leaving the EU but only the process, the Court's decision introduces an additional hurdle into the Brexit process - making the UK's actual exit from the EU less of an inevitability than it might otherwise have been.

If the Government proves unable to persuade a majority of Members of Parliament to vote in favour of triggering Article 50, then this could result in the calling of a General Election.

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Check out our dedicated **Gide / Brexit** LinkedIn page to learn more about the consequences and legal implications of Brexit.

Hong Kong Monetary Authority grants first round of Stored Value Facilities licences

30 August 2016

On 25 August 2016, the Hong Kong Monetary Authority (the "HKMA") announced a first round of five successful Stored Value Facilities ("SVF") licensees under the Payment Systems and Stored Value Facilities Ordinance (the "Ordinance"). The successful applicants are Alipay, HKT, Tencent, TNG and Octopus.

The Ordinance commenced operation on 13 November 2015 with a one year transition period allowing existing SVF issuers to apply for licences. Upon the expiry of this one year period, i.e. from 13 November 2016 onwards, it will be unlawful for any person to issue or operate a SVF in Hong Kong without a licence (or the benefit of an exemption). The SVF licences awarded to Alipay, HKT, Tencent and TNG have immediate effect. Octopus's SVF licence will take effect from 13 November 2016. The announcement comes at a time when Hong Kong is making a considered push to be a fintech leader in the Asia-Pacific region. In the wake of Financial Secretary John Tsang's encouraging allocations towards fintech in the 2016-17 budget (including $2 billion earmarked for an Innovation and Technology co-investment fund), it is clear that this emerging sector has the government's attention. The HKMA has moved to establish a Fintech Facilitation Office and the Securities and Futures Commission has established a Fintech Contact Point. Both initiatives are squarely directed at creating space for engagement by regulators with start-ups and others in the fintech ecosystem.

The new SVF regime represents the most significant regulatory development in relation to Hong Kong fintech to date, bringing regulatory oversight to all businesses that enable payments to merchants and amongst peers through any manner of stored value facility. The previous regime applied only to card-based SVF and had Octopus as its sole active licensee. The new SVF regime represents an important updating of the regulation to reflect the advances in payments products made possible by new technologies. We understand that there are more than a dozen other applicants currently seeking SVF licences in time for the expiry of the grace period in November, and others preparing to make applications with a view to launching new businesses in the coming months.

How to obtain an SVF licence?

The HKMA has issued an Explanatory Note on Licensing for Stored Value Facilities (the "SVF Guidance Note"), which sets out the scope of the licensing regime as well as licensing criteria and particulars of the licensing process. The SVF Guidance Note may be found by clicking here.

Apart from the general and high level supervisory principles and approach summarised by the HKMA under the SVF Guidance Note (for analysis on the general licensing criteria and application procedure, please click here), applicants are expected to satisfy certain specific practical regulatory expectations of the HKMA in the course of the application process.

The Principal Business Requirement

The Ordinance requires that the principal business of an SVF licensee must be the issue or the facilitation of the issue of a SVF, and the licensee is not allowed to carry on any money lending services, financial intermediation activities or any other regulated activities. The practical consideration here is that applicants may need to restructure in order to prepare themselves for the application process, which may prolong and complicate the application process, in addition to adding cost.

A frequent question raised by applicants is whether an SVF licensee may also operate a business regulated under the Money Service Operator ("MSO") licensing regime provided for under the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance, given that cross-border remittance and foreign exchange services are often bundled with SVFs in order to enable cross-border payments and redemptions in foreign currency.

In order to avoid regulatory overlap between the SVF regime and MSO regime (which is overseen by the Hong Kong Customs and Excise Department), the HKMA has indicated that SVF licensees are not required to separately obtain an MSO licence, as the relevant anti-money laundering and counter-terrorist financing requirements, being the major regulatory concern under the MSO regime, will be addressed by the SVF regime. While the specific nature of the MSO business needs to be looked at in each case, it is clear that SVF licensees will be able to carry on MSO business without offending the "principal business" rule.

The HK$25 Million Paid Up Capital Requirement

The Ordinance requires that an SVF licensee must either have paid-up capital of no less than HK$25 million (or an equivalent amount in any other currency) or other financial resources that are equivalent to or exceed this amount.

The HKMA has indicated that the HK$25 million is only a minimum requirement, and the regulatory expectation for each SVF issuer varies depending on its size, operations, number of users, business model and products to be launched in the market.

It is clear that the HK$25 million requirement has generated some concerns amongst start-ups seeking to obtain SVF licensees. As there is no general exemption for SVFs having a float below a threshold amount (such as the S$30 million minimum float threshold for SVF licensing in Singapore), smaller businesses wishing to carry on SVF business in Hong Kong are left to try to find an exemption from the licensing regime (for analysis on the exemptions, please click here http://f.datasrvr.com/fr1/416/51171/Hong_Kong_Publishes_Bill_Establishing_New_Regime_for_Stored_Value_Facilities_and_Retail_Payment_Systems_Feb_2015_HKGLIB01_1192792.pdf) or find a collaborative partnership with an SVF licensee or financial institution.

Corporate Governance and a Hong Kong Base

SVF licensees are required to have a clear organisational structure with well-defined, transparent and consistent lines of responsibility. The governance structure is required to be properly documented and implemented in relation to all relevant decision making procedures, reporting lines and communication processes.

Whilst the ultimate responsibility for the overall sound and prudent management of an SVF issuer's business is with its Board of Directors, the day-to-day management and operation of an SVF issuer may be delegated to the senior management team, who remains accountable to the Board of Directors.

One of the challenges faced by SVF licence applicants headquartered elsewhere than Hong Kong is the Ordinance's requirement that: (1) the Chief Executive (including the Alternative Chief Executive) shall be and remain ordinarily resident in Hong Kong; and (2) other senior management team members and key personnel shall be based in Hong Kong. The strict requirement on the Chief Executive means that SVF applicants with overseas backgrounds must locate and assign a competent, proper and trustworthy candidate to be based in Hong Kong on a long-term basis. Nevertheless, the requirement that senior management members be "based in Hong Kong" falls short of a residency requirement, and so there is a degree of flexibility in this regard. The regulatory concern of the HKMA is that senior management of an SVF licensee must be reachable, responsive and contactable by the HKMA in case of any urgent SVF-related matters.

The other challenging aspect under corporate governance requirement is that members of the board have an adequate number and appropriate composition of members to ensure sufficient checks and balances and collective expertise for effective, objective decision-making. The HKMA's expectations have tended to be that one third of a licensee's board members be independent, non-executive directors ("INED"). In practice, some applicants may find it difficult to meet this requirement, either due to financial constraints or an inability to locate appropriately qualified candidates to act as INEDs. The HKMA has demonstrated some degree of flexibility on this point where alternative arrangements enable sufficient checks and balances and ensure adequate collective expertise within, for example, a wider group of companies of which the SVF licensee is part.

Anti-money Laundering and Counter-Terrorist Financing ("AML-CTF") Requirements

One of the major concerns of the HKMA in the regulation of SVF businesses is compliance with AML-CTF requirements. On the one hand, money laundering and terrorist financing has been a growing global concern and most jurisdiction have adopted tighter measures in this area; on the other hand, the specific nature of SVF business, being a business mainly structured on virtual and internet-based payments platforms, requires SVF issuers to adopt user-friendly mobile user interfaces in order to offer a good user experience and succeed in the market. A proper balance is required to be struck between the two competing concerns.

In the press conference held by the HKMA on 25 August 2016 announcing the grant of first batch of SVF licences, the HKMA stated that (1) for device-based reloadable SVFs with maximum stored value not exceeding HK$3,000; and (2) for non-reloadable network-based SVFs with maximum stored value of less than HK$8,000, there is no requirement to conduct any customer due diligence as a condition of taking the customer on (suspicious transaction reporting requirements will of course remain in place). Above these thresholds the requirements become more complex. SVF licence applicants will have had sight of draft AML-CTF guidelines as part of their engagement with the HKMA. These draft guidelines follow a "risk-based" structure similar to that applied by the HKMA to financial institutions regulated under the Banking Ordinance in prescribing criteria for carrying out "simplified" and "enhanced" due diligence. The HKMA indicated that it will publish its formal AML-CTF guidelines for SVF licensees in September 2016.

Based on the draft guidelines made available to applicants to date, it is expected that the HKMA will maintain a flexible, risk-based approach to customer due diligence, drawing distinctions on the basis of a number of characteristics of the specific SVF product and the nature of the issuer's interaction with the customer, in particular in terms of: (1) reloadability; (2) cross-border fund transfer functionality; and (3) cash withdrawal functionality.

As part of the application process for an SVF licence, the HKMA has been applying very close scrutiny to AML-CTF considerations. The business, technology, risk management, legal, compliance and product teams of an SVF licensee are required to work closely to take into account AML-CTF standards, particularly customer due diligence requirements, before launching any SVF product into the market. It is also expected that the customer due diligence requirements for reloadable network-based SVF will be transaction amount-based (annually, bi-annually, etc.) for particular SVF users.

Float Protection Requirements

Apart from AML-CTF issues, another key area of HKMA focus during the SVF licence application process has been scrutiny of the measures taken to manage the float of funds representing users' stored value and the corresponding SVF deposit held by the licensee.

SVF licensees are required to have in place an effective and robust system to protect and manage the float and ensure that the funds are: (1) used only in accordance with SVF users' instructions; (2) protected against claims by other creditors of the SVF issuer in all circumstances; and (3) protected against the risk of misappropriation by any means.

When considering practical measures for the implementation of these general principles, reference can usefully be made to similar regulatory frameworks in other jurisdictions. For instance, in the United Kingdom, the electronic money ("e-money") regulatory regime overseen by the Financial Conduct Authority ("FCA") imposes float safeguarding principles. Electronic money institutions must implement one of two specific float safeguarding measures: (1) a deposit in a segregated bank account with an authorised credit institution or an investment in an approved low risk, liquid asset held by an authorised custodian; or (2) arranging for the funds to be covered by an insurance policy or a comparable guarantee from an authorised insurer or credit institution.

The HKMA has required more comprehensive float protection measures, with the expectation that a trust arrangement supported by a legal opinion will be put in place to ensure priority for SVF users in the event of the insolvency of the SVF licensee. Depending on the specific business model and products of the SVF issuer, the HKMA may also require a bank guarantee or the appointment of a custodian as part of the float security arrangements. The additional safeguards required under the Hong Kong SVF regime above and beyond those required under the UK e-money regime may in part be explained by the fact that the Ordinance does not amend the Hong Kong insolvency rules to provide SVF users with any priority of claims in the event of the insolvency of the SVF licensee. This is a key feature of the regulations underlying the UK e-money regime.

Flexibility: Scope for Outsourcing Arrangements

The HKMA has generally been receptive to applicants' proposals to outsource aspects of their operations to third parties, provided that the applicant can demonstrate the measures will be taken to retain ultimate responsibility for the quality, safety, stability and efficiency of the operations being outsourced.

In line with its material outsourcing guidelines for financial institutions "Supervisory Policy Manual SA-2", the HKMA will be requiring that SVF issuers have adequate arrangements in place to facilitate on-site audits and inspections of outsourced service providers by the HKMA, the SVF issuer itself and the SVF issuer's internal and external auditors. The contractual arrangements with outsourced service providers are therefore key and should be carefully drafted in order to ensure adequate oversight.

Conclusions

As mentioned by Mr. Norman Chan, the Chief Executive of the HKMA, in his remarks on 25 August announcing the first round of licensees, the new SVF regime marks the turning of a new page in the development of retail payments in Hong Kong. The opening of the SVF regime is an important milestone in Hong Kong's advance as a fintech hub.

Some debate remains over how conducive the new regime will be towards encouraging fintech start-ups to enter into the SVF market in Hong Kong. Whilst there are a number of licensing exemptions under the SVF regime that allow certain business models to avoid SVF licensing requirements, these are narrowly crafted to be limited to tightly defined user bases and specific types of products. Fintech start-ups seeking to scale up in Hong Kong's already limited retail market may struggle to find a business logic that works within these constraints. It is clear that the SVF regime places a priority on the security of consumers' money and on maintaining Hong Kong's reputation as a well-run financial services hub, but it is also clear that the regime introduces trade-offs that will limit growth in certain parts of the market. Supporters of the new regime will point to the sheer number of applicants for SVF licences (reportedly over two dozen to date) and conclude that this is evidence that the regulations get the balance right.

We can expect that the HKMA will be gathering valuable experience regulating these new licensees and that the lessons learned will lead to adjustments of the regulator's risk-based assessments over time. The good news for now is that Hong Kong has taken a significant step forward in its regulation of financial services and the market demand for the new licences is strong.

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NEWS DETAIL

21/10/2016

NEW PATENT LAW

On 26 August 2016, the Indonesian Government enacted Law No. 13 of 2016 on Patents (“New Patent Law”). This new law became effective on the enactment date and replaces Law No. 14 of 2001 on the same subject matter (“Old Patent Law”).

The noteworthy provisions of the New Patent Law are as follows:

<u>Scope of Patent Protection</u>

The New Patent Law stipulates in its Chapter II Article 4 that what it means by ‘invention’ does not include:

a. aesthetic creations;
b. schemes;
c. rules and methods to perform (i) an activity which involves a mental activity; (ii) a game; and (iii) a business activity;
d. rules and methods which only contain a computer program;
e. presentation of information;
f. discovery of (i) new usage of an existing and/or known product; and/or (ii) new form of an existing compound which does not have a significant merit improvement and which chemical structure difference is already known.

Item # f is new. It was not regulated in the Old Patent Law. The New Patent Law also acknowledges patents as intangible assets that can be fiduciary collateralized.

<u>Obligations of Patent Holders</u>

The New Patent Law obligates patent holders to produce the patented products or use the patented processes in Indonesia. The exemption previously provided under the Old Patent Law is removed. The production of the patented products and use of the patented processes must be conducted within the corridors of technology transfer, capital investment and / or creation of new employment.

<u>Registration Procedure</u>

The New Patent Law simplifies the registration process. The application form can now be submitted electronically/online. Previously it could only be submitted manually/offline.

The New Patent Law stipulates a time limit for the announcement to be made by the Minister of Law and Human Rights (“Minister”), of patent applications which have fulfilled the requirements. The announcement must be made at the latest 7 days following the conclusion of a period of 18 months as of the Application Date or the Priority Date, through electronic and/or non-electronic media which is visible and accessible to all persons.

Applicants now have a shorter waiting time for the decision on their application. The New Patent Law regulates that the Minister must issue the decision on the application rejection or approval within 30 months as of the acceptance date of the substantive examination request (for general patent applications) and 12 months as of the filing date (for a simple patent applications).

Transfer of Patent Rights

The New Patent Law adds endowment or waqf (wakaf) to the list of manners by which the right to a patent transfers or be transferred. Under the new law, the right to a patent transfers or can be transferred by way of or due to:
a. inheritance;
b. a grant;
c. a testament;
d. waqf
e. a written agreement; or
f. another reason which is approved by the prevailing laws and regulations.

Payment of Annuity Fees by Patent Holders and Licensees

The New Patent Law changes the timeframe for the annuity fee payments as follows:

a. The first annuity fee payment must be paid at the latest 6 (six) months as of the issuance date of the patent certificate;
b. The next annuity fee payment must be made at the latest 1 (one) month before the anniversary of the Acceptance Date in the following year's protection period;

Nonpayment of the annuity fee within the specified period will result in the deletion of the respective patent registration. Deleted patent registrations can only be revived on the basis of a Commercial Court decision.

Patent holders can apply for a postponement of the annuity fee payment to the Minister.

Criminal Sanctions

The New Patent Law increases the fines for patent infringements:

	General Patent	Simple Patent
New Patent Law	• 4 years imprisonment; and/or • IDR 1 billion fine	• 2 years imprisonment; and/or • IDR 500 million fine
Old Patent Law	• 4 years imprisonment; and/or • IDR 500 million fine	• 2 years imprisonment; and/or • IDR 250 million fine

(By: *Evelyn Irmea Sinisuka)*

CORPORATE INSOLVENCY, CORPORATE REHABILITATION AND RECEIVERSHIP*

The Companies Act 2016 ("Act") was gazetted on 15 September 2016. It will come into operation on a date to be appointed by the Minister, which is expected to be in 2017 and replace the Companies Act 1965 ("Existing Act"). This article will highlight areas of the Act which will reform the existing areas of receivership, winding up and schemes of arrangement. It will also discuss the new mechanisms of the judicial management scheme and the corporate voluntary arrangement which are being introduced to better promote a corporate rehabilitation framework.

RECEIVERSHIP

Appointment

The receivership provisions in the Act substantially expand on the existing provisions in the Existing Act. Sections 375 and 376 of the Act set out the manner of appointing a receiver or a receiver and manager ("R&M") under an instrument or by the Court.

Section 375(2) of the Act expressly sets out the agency status of a receiver or an R&M appointed under a power conferred by an instrument. The present legal position is that a receiver or R&M becomes an agent of the debtor company by virtue of the inclusion of provisions to that effect in the debenture under which he is appointed. The codification of the agency status of the receiver and R&M helps to remove some of the present ambiguities on the status of the receiver or R&M.

In the case of a Court appointment, section 376 of the Act lists out three specific grounds upon which the Court may appoint a receiver or R&M, which are essentially where the company has failed to pay a debt due to a debenture holder, or the company proposes to sell the secured property in breach of the charge, or it is necessary to do so to preserve the secured property. The common law right to appoint a receiver or R&M has been expressly preserved by section 376(4) of the Act.

Personal Liability of the Receiver and R&M

Sections 381 and 382 of the Act deal with the liability of the receiver or R&M. The receiver or R&M is to be liable for debts incurred by him or other authorised person in the course of the receivership or possession of assets unless otherwise provided in the instrument appointing the receiver or R&M.

Similarly, a receiver or R&M is personally liable for a contract entered into by him in the exercise of any of his powers unless specifically provided otherwise in his instrument of appointment. The terms of a contract may however exclude or limit the personal liability of the receiver or R&M appointed under an instrument but this is not applicable to a receiver or R&M appointed by the Court.

Powers of Receiver and R&M

Section 383 of the Act introduces a welcomed codification of the express powers of a receiver or R&M which are set out in the Sixth Schedule of the Act. Presently, a receiver or R&M appointed through a debenture derives his powers solely from the provisions of that instrument and it is not uncommon to encounter situations where the powers listed in the debenture are inadequate or ambiguous. This codification of a minimum list of default powers exercisable by a receiver or R&M is in line with the approach taken in the United Kingdom, Australia and New Zealand.

WINDING UP

Presentation of a Petition

Section 466(1)(a) of the Act empowers the Minister to prescribe the threshold of the debt for the statutory demand in order for a company to be deemed unable to pay its debts for the purposes of a compulsory winding up. The threshold of RM500.00 under the Existing Act is likely to be increased to RM5,000.00.

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* This article is the third part of our Firm's review on the Companies Act 2016.

Further, section 466(2) of the Act requires a winding up petition to be filed within six months from the expiry date of the statutory demand. The aim of this is to reduce the possibility of the statutory demand being abused and to prevent the threat of a winding up petition from continuing to hang over the debtor company for an inordinately long period of time.

Powers of Liquidators

The powers of the liquidator in a court winding up are set out in section 486 read with the Twelfth Schedule of the Act. Part I of the Twelfth Schedule lists out the powers that the liquidator may exercise without the authority of the Court or the committee of inspection (“COI”) while Part II of the Twelfth Schedule lists out the powers that may be exercisable only with the aforesaid authority.

In particular, the Act permits a liquidator to carry on the company’s business so far as necessary for the beneficial winding up of the company for a period of 180 days after the making of the winding up order. Thereafter, the liquidator must obtain the authority of the Court or the COI to continue with the carrying on of such business. This is a welcomed increase from the present period of only four weeks allowed under the Existing Act.

Termination of Winding Up

Under the Existing Act, the only way in which a winding up order can be brought to an end is through an order for a stay of winding up under section 243. In addition to the power to stay a winding up under section 492, the Act introduces a new section 493 which allows the Court to terminate the winding up of a company. In determining whether to terminate a winding up, the Court may consider various factors, such as the satisfaction of the debts or other facts as it deems appropriate. This allows for a more definitive route to bring an end to the winding up.

SCHEME OF ARRANGEMENT

The scheme of arrangement provisions remain largely the same except for three of the more significant changes reflected in the Act.

Additional Safeguard of Independent Assessment

Section 367 introduces an additional safeguard to the scheme of arrangement framework by allowing the Court, upon application, to appoint an approved liquidator to assess the viability of a proposed scheme. This would enable an independent professional in the field of insolvency to determine the viability of the scheme and take into account the interests of all stakeholders.

Extension of the Restraining Order

For the extension of a restraining order, section 368(2) provides that the Court may grant a restraining order for a period of not more than three months and may extend this period for not more than nine months if the prescribed requirements are met.

Restraining Order Will Not Extend to Regulators

Section 368(6) makes it clear that a restraining order which restrains further proceedings against the company except by leave of the Court will not apply to any proceeding taken by the Registrar of Companies or the Securities Commission Malaysia.

JUDICIAL MANAGEMENT

The judicial management mechanism, modeled after the Singapore model, is a new component under the Act to provide a further option to rehabilitate a financially distressed company. It allows a company or its creditors to apply for an order to place the management of a company in the hands of a qualified insolvency practitioner. A moratorium would give the company temporary respite from legal proceedings by its creditors. The moratorium applies automatically from the filing until the disposal of the judicial management application and also while the judicial management order is in force.

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Excluded Companies

Section 403 of the Act provides that the judicial management scheme cannot apply to a company which is a licensed institution or an operator of a designated payment system regulated under the laws enforced by Bank Negara Malaysia or a company which is subject to the Capital Markets and Services Act 2007.

Requirements for the Grant of a Judicial Management Order

The Court is empowered under section 405 of the Act to grant a judicial management order if and only if -

(a) it is satisfied that the company is or will be unable to pay its debts; and

(b) it considers that the making of the order is likely to achieve one or more of the following purposes - (i) the survival of the company or the whole or part of its undertaking as a going concern; (ii) the approval of a compromise or arrangement between the company and its creditors; (iii) a more advantageous realisation of the company's assets would be effected than on a winding up.

The judicial management order shall, unless discharged, remain in force for 6 months and may be extended on the application of the judicial manager for another 6 months.

Right of Veto

Section 408(1)(b)(ii) of the Act requires the notice of a judicial management application to be provided to any person who has appointed, or may be entitled to appoint, a receiver or an R&M of the whole or a substantial part of the company's property under the terms of any debentures of a company.

Section 409 of the Act requires the Court to dismiss a judicial management application where it is satisfied that a receiver or an R&M referred to in section 408(1)(b)(ii) has been or will be appointed, <u>and</u> where the making of the order is opposed by a secured creditor.

Approval of Judicial Manager's Proposal

Section 420 of the Act provides that a judicial manager has 60 days (or such longer period as the Court may allow) to send to the Registrar, members and creditors of the company a statement of his proposal for achieving the purposes for which the order was made and to lay a copy of this statement before a meeting of the company's creditors.

As a meeting of the creditors must be summoned on not less than 14 days' notice, the judicial manager effectively only has a short period of 46 days to come up with the proposal to rehabilitate the company unless he applies to the Court for an extension of that time.

Section 421(2) of the Act requires a judicial manager's proposal to be approved by creditors present and voting who hold 75% in value of the claims which have been accepted by the judicial manager. Once approved by the required majority, the proposal binds all creditors of the company, whether or not they had voted in favour of the proposal.

CORPORATE VOLUNTARY ARRANGEMENT

The corporate voluntary arrangement ("CVA") is modeled after the corresponding provisions of the UK Insolvency Act. The CVA is a procedure which allows a company to put up a proposal to its creditors for a voluntary arrangement. The implementation of the proposal is supervised by an independent insolvency practitioner who would report to the Court on the viability of the proposal. There is minimal Court intervention in the process.

Excluded Companies

In the same vein as section 403 of the Act, section 395 provides that the CVA cannot be carried out in a company which is a licensed institution or an operator of a designated payment system regulated under the laws enforced by Bank Negara Malaysia, and a company which is subject to the Capital Markets and Services Act 2007.

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In addition, the CVA cannot be carried out by a public company or a company which creates a charge over its property or any of its undertaking. The exclusion of the last group of companies may significantly reduce the efficacy of the CVA as a restructuring option as it is likely that many financially distressed companies would have charged some or all of their assets as security for borrowings.

Initiation of CVA

To initiate a CVA, the directors would have to submit to the nominee, being a person who is qualified to be appointed as an approved liquidator, a document setting out the terms of the proposed voluntary arrangement and a statement of the company's affairs.

Under section 397(2) of the Act, the nominee is then required to submit to the directors a statement indicating whether or not in his opinion: (a) the proposed CVA has a reasonable prospect of being approved and implemented; (b) the company is likely to have sufficient funds available for it during the proposed moratorium to enable the company to carry on its business; and (c) the company should convene meetings of its members and creditors to consider the proposed CVA.

Under section 398 of the Act, once the directors have received a positive statement from the nominee, they can then file this statement with the Court together with the other necessary documents, such as the nominee's consent to act and the document setting out the terms of the proposed CVA.

Moratorium and Required Majority to Approve the Proposal

Upon the filing of the relevant documents pursuant to section 398, the Eighth Schedule of the Act provides that a moratorium commences automatically and remains in force for 28 days during which no legal proceedings can be taken against the company. It is meant to give some breathing room for the company from creditors' legal proceedings.

Upon the moratorium coming into force, section 399 of the Act requires the nominee to summon a meeting of the company and its creditors within 28 days of the date of the filing of the documents in Court, as specified in the Eighth Schedule.

At the company's meeting, a simple majority is required to approve the proposed CVA while at the creditors' meeting, the required majority is 75% of the total value of the creditors present and voting. With such approval, the CVA takes effect and binds all creditors. The aim of the CVA is that it should apply only to the restructuring of unsecured debts of a company and cannot affect the right of a secured creditor to enforce its security.

If more time is required for the stakeholders to decide on a proposal, the moratorium period can be extended for a further period not exceeding 60 days with the approval of 75% majority in value of the creditors at a meeting and with the consent of the nominee and the members of the company.

CONCLUSION

The Act will bring many welcomed changes in revamping the corporate insolvency and rehabilitation framework in Malaysia when it comes into force. Companies will have more options in this area that have long been available to companies in foreign jurisdictions such as the United Kingdom and Singapore. It remains to be seen how some areas of the Act will be clarified through case law.

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18 October 2016

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Important Court of Appeal decision released on employer investigations

September 08, 2016

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The Court of Appeal decision in *A Ltd v H* [2016] NZCA 419, released yesterday, will have employers breathing a sigh of relief. The judgment makes it clear that employers do not have to conduct investigations "*akin to a judicial inquiry*".

Facts

Mr H was a 51 year-old pilot who was investigated in relation to a claim he had sexually harassed a 19 year-old novice flight attendant (Ms C) during a stopover. A Ltd investigated the claims and eventually dismissed Mr H. He challenged this and the Employment Court held that Mr H's dismissal was unjustified due to several procedural defects in A Ltd's investigation. Mr H was reinstated.

The Court of Appeal decision

The Court of Appeal was required to consider whether, in deciding that A Ltd's investigation was insufficient for the purposes of section 103A of the Employment Relations Act 2000 (**ERA**), the Employment Court had erred in law. The Court of Appeal acknowledged that investigators must be even-handed and adopt a balanced approach. However, the Court rejected the premise that this meant each witness must be questioned in exactly the same manner.

Instead, the focus had to be on what a fair and reasonable employer *could* do in "*all the circumstances*" (section 103A of the ERA). The 2011 change from "*would*" to "*could*" in section 103A was significant, and meant that there was a range of fair and reasonable responses open to an employer in any situation. The Court of Appeal affirmed that the requirement is "*for an assessment of substantive fairness and reasonableness rather than 'minute and pedantic scrutiny' to identify any failings*". The Court of Appeal went on to say that "*[i]n our view, there has been a departure from that requirement in this case*".

The Court of Appeal held that the investigator was entitled to "*structure his approach around the inherent implausibility of an innocent purpose and accidental touching in these circumstances*", given it was a case of a 51 year-old man entering the hotel room of a 19 year-old woman and sitting on the bed with her.

The Court of Appeal also noted that the procedural defects identified by the Employment Court were not significant. For example, although Ms C's story changed in relation to some minor details, the important fact was that she described the touching as "*sexual*", and this did not change. Similarly, although the interviews of other witnesses had not been recorded, as Mr H's had, nothing turned on this as there was no issue as to the accuracy of the notes from those interviews.

The Court of Appeal concluded by answering the question in the affirmative - the Employment Court had erred in law in holding that the investigation had been insufficient. It then set aside the remedies that had been granted (reinstatement, payment of wages and compensation), and referred the decision back to the Employment Court on remedies.

Summary

This case reinforces that while employers should take care to follow a full and fair process, a "text-book" perfect investigation is not required.

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NautaDutilh

Legal obstacles hamper Dutch energy storage opportunities

10/27/2016 | Corporate news

If the Netherlands are serious about playing a role in the field of energy storage, current laws and regulations should be amended to remove a few dozen obstacles. That is one of the main conclusions of the National Action Plan Energy Storage (Nationaal Actieplan Energieopslag), to which NautaDutilh colleague Harald Wiersema contributed. The National Action Plan was presented to Dutch politician Stientje van Veldhoven by the Dutch stakeholders' platform Energy Storage NL on 24 October 2016 in The Hague.

Energy storage is a key technology necessary to make the Dutch energy market more sustainable, reliable and affordable. The technology is sustainable as it prevents unnecessary interruptions of renewable energy generation, reliable because it can bridge differences in demand and supply and affordable because it dampens price spikes. Energy storage is showing rapid growth worldwide as a result of the growth of the share of renewable energy. Market leaders such as the US, Australia, China and Germany are showing double digit growth and are developing new industries and services related to storage of electricity.

At this point, opportunities for innovative, green and sustainable business are wasted, causing the Dutch technology industry to fall behind in this global growth market. Research, development and a better design of the energy market may also help to fully unlock the potential of energy storage. The National Action Plan Energy Storage provides an overview of obstacles in the current market and offers solutions to accelerate the development and deployment of energy storage

Related people

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NICARAGUA

LAW ON SECURED TRANSACTIONS APPROVED IN NICARAGUA

On October 6th, the National Assembly of Nicaragua unanimously approved the Law No. 936 “Law on Secured Transactions”, which was published this Tuesday 25th of October, 2016 in the Official Gazette No. 200. The purpose of this law is to promote the access to credit for micro, small, and medium-size companies, through the expansion of security rights in movable property, rights and assets. A security right is created by means of a written agreement between the grantor and the creditor.

The Article 9 of the Law No. 936, stipulates that the security rights on movable property can be created over one or multiple movable properties, of the debtor or the guarantor, and may be present or future assets, corporeal or incorporeal, determinate or indeterminate, if they are capable of being subject of a monetary value in the moment of the creation of the security right or subsequently. A security right may encumber: a movable asset that is an attachment to immovable property, future assets, all of grantors movable assets, rights or contracts with an economic value, among others.

Likewise, the Law No. 936 provides the creation of the Public Registry of Movable Assets for the registration of the incorporation, amendments, assignments, extension, cancellation and enforcement of the secured transactions, and consequently the publicity of the security rights. The priority of a security right is determined by its publicity, granting to the creditor a better right and payment preference before third parties, therefore, is highly advisable to proceed with the registration of the security rights on movable assets. This registration will be conducted through a physical or electronic standardized format, previously indicated in the technical regulations of the Registry.

On the other hand, the Law No. 936 also establishes that the parties may agree an extrajudicial proceeding and Arbitration as alternative dispute resolutions mechanisms in the occurrence of an event of default of the agreement. In the case that any special proceeding was agreed by the parties, the enforcement of the security right will be processed in accordance with provisions established in the Civil Procedure Code of the Republic of Nicaragua. It’s important to take into consideration that the supervised entities by the Microfinance Nacional Commission (“CONAMI”) and the Superintendence of Banks and other Financial Institutions (“SIBOIF”) maintain the privileges granted in its special legislation.

The Law No. 936 shall enter into force one year after its publication in the Official Gazette.

We invite you to know more about the implications of this new law, and how can it benefit you and your business. If you have further questions or doubts, do not hesitate to contact us.

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The New "Principle for the Investigation of Retroactive levy of Anti-Dumping Duties"

10/20/2016

Doris Lin/Serena Cheng

According to Article 42 of the "Regulations Governing the Implementation of the Imposition of Countervailing and Anti-Dumping Duties", retroactive levy of anti-dumping duties (hereinafter "retroactive levy"), the Ministry of Finance (MOF) adopted the "Principle for the Investigation of Retroactive Levy of Anti-Dumping Duties" on 2 September 2016, which entered into force

I. The requirement of retroactive levy and the determination criteria of MOF (Articles 2 and 5):

1. The product in question has a history of dumping that caused injury: The product in question has a history of dumping that caused injury and the anti-dumping measure has been applied in our territory or is being applied in other territories.

2. The importer is, or should be, aware that the exporter is practising dumping and that such dumping would cause material injury to a domestic industry: When the exporter under investigation sells the product in question to an unrelated importer, the calculation of dumping margins by actual export price is over 25%; when the exporter under investigation sells to a related importer, the calculation of dumping margins by constructed export price is over 15%.

3. Individual importer or importers of the industry import a significant amount of dumped product within a relatively short time, which is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied: From the date of the initiation of the investigation, the import volume during the last three months is higher than previous three months. The determination could be adjusted by the seasons, consumption in importing Member, or other factors.

II. MOF and Ministry of Economic Affairs (MOEA) shall give the importer concerned an opportunity to comment before the determination is made (Article 4). The division of the investigation and determination matters between MOF and Ministry of MOEA is as follows:

1. MOF

(1) The product in question has a history of dumping that caused injury.

(2) The importer is, or should be, aware that the exporter is practising dumping.

(3) Individual importer or importers of the industry import a significant amount of dumped product within a relatively short time.

2. MOEA

(1) The product in question is imported in significant amounts within a relatively short time, which causes injury to domestic industry.

(2) Remedies of anti-dumping duty may be seriously undermined.

III. The authorities make positive determination of retroactive levy when MOF determines that injury is caused by a significant amount of dumped imports of a product, MOEA determines there is material injury to a domestic industry, and both of the said authorities determine that a significant amount of dumped imports of a product within a relatively short time is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied. A definitive anti-dumping duty may be levied on products that entered for consumption not more than 90 days prior to the date of application of provisional measures (Article 6).

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Ideas

Department of Transportation’s Pipeline and Hazardous Materials Safety Administration Releases Civil Penalty Framework

07 November 2016

Updates

On October 17, 2016, the Department of Transportation’s Pipeline and Hazardous Materials Safety Administration (“PHMSA”) released a General Policy Statement announcing the availability of its civil penalty framework, which is now publicly accessible on its website. Previously, PHMSA only provided its civil penalty framework upon request. Effective October 17, 2016, PHMSA will also allow a respondent in an enforcement proceeding to request a more detailed proposed civil penalty calculation. Accordingly, PHMSA’s recent announcement provides greater transparency into a formerly obscure civil penalty process.

Civil Penalty Framework

Following an inspection or investigation of a pipeline facility that reveals a probable violation, PHMSA’s Office of Pipeline Safety prepares a Violation Report to document the violation. Data from the completed Violation Report is then used to calculate a civil penalty, if warranted.

The civil penalty framework now reveals the range for a civil penalty that may be assessed under each assessment factor provided in 49 U.S.C. § 60122 and 49 C.F.R. § 190.225. The assessment factors include: (1) the nature, circumstances and gravity of the violation, including adverse impact on the environment; (2) the degree of the respondent's culpability; (3) the respondent's history of prior offenses; (4) any good faith effort by the respondent to achieve compliance; and (5) the effect on the respondent's ability to continue in business. PHMSA also may consider the economic benefit gained from a violation and such other matters as justice may require.

In order to determine the magnitude of a civil penalty, the civil penalty framework lists the range of conduct under each statutory assessment factor, listed from least to most severe. Ultimately, PHMSA determines a civil penalty by combining the amounts assigned under each assessment factor. The total civil penalty per violation is calculated based on these assessment considerations and adjusted for the applicable daily and series limit. However, despite PHMSA’s increased transparency into its civil penalty process, PHMSA notes that it retains “broad discretion” in its evaluation of the assessment considerations outlined in its regulations.

If a calculated penalty exceeds the maximum amount permitted by statute, the penalty will be reduced by the amount exceeding the cap. For an administrative civil penalty that occurs on or after August 1, 2016, the maximum penalty is $205,638 per day. The maximum civil penalty for a series of related violations that occur on or after August 1, 2016 is $2,056,380.

Higher Penalties Across the Board

Notably, to apply stronger deterrence and drive down incident risk, PHMSA also intends to exercise its current civil penalty authority to impose higher penalties across the board for any violation of Federal pipeline standards. PHMSA will give greater weight to certain factors when assessing civil penalties, specifically for violations that:

1) Are causal to incidents or that increase the severity of incidents, including those involving smaller hazardous liquid spills or resulting in methane releases;

2) Are "repeat offenses" or violations of the same safety standard in the past five years; and

3) Involve multiple instances of the same violation.

PHMSA's General Policy Statement announcing the release of the civil penalty framework is available here.

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Federal Antitrust Enforcers Announce Intent to Crack Down on HR Practices That Can Be Illegal

10.31.16

By Douglas Ross, Henry Farber, David Maas, and Laura Turczanski

The Federal Trade Commission and Department of Justice recently issued Guidance for Human Resources Professionals and others involved in hiring, compensation, and benefits decisions. The guidelines put companies and individuals on notice that the antitrust enforcers intend to investigate and seek criminal and/or civil sanctions for violations of the antitrust laws in connection with human resources practices.

The guidelines focus on the following categories of conduct that run afoul of the antitrust laws: (1) no-poaching agreements; (2) agreements to fix compensation and/or benefits; and (3) disclosures of non-public compensation or benefits information between companies competing for employees. The guidelines point out that companies may compete for employees regardless of whether they compete in their provision of products or services.

The guidelines do not mark a change or clarification of the law. Rather, they underscore generally recognized antitrust principles as applied to hiring and compensation decisions. After such a clear signal of enforcement policy from the federal authorities, the guidelines should be required reading for all HR professionals, executives and managers involved in hiring and compensation, and others with a meaningful role in compensation, hiring, and benefits. At a minimum, companies should distribute to all HR managers the quick reference card included with the more detailed guidelines.

The quick reference card states that antitrust concerns may arise if individuals or companies:

- Agree with another company about employee salary or other terms of compensation, either at a specific level or within a range.
- Agree with another company to refuse to solicit or hire that other company's employees.
- Agree with another company about employee benefits.
- Agree with another company on other terms of employment.
- Express to competitors that you should not compete too aggressively for employees.
- Exchange company-specific information about employee compensation or terms of employment with another company.
- Participate in a meeting, such as a trade association meeting, where the above topics are discussed.
- Discuss the above topics with colleagues at other companies, including during social events or in other non-professional settings.
- Receive documents that contain another company's internal data about employee compensation.

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The more detailed guidelines include specific examples of conduct that is illegal under the antitrust laws. These examples indicate that the enforcers plan to police more than naked wage fixing. For instance, one of the examples indicates that it would be illegal to ask other companies competing for employees to stop offering certain benefits. Another example indicates that agreements to cap raises at a certain percentage are illegal, even if not tethered to a specific compensation amount.

The guidelines should be a helpful resource for HR managers and others involved in hiring, compensation, and benefits decisions vis-à-vis other employers. Individuals and companies should be mindful of these guidelines when participating in conferences, recruiting activities, or social events involving HR professionals from other companies. While the guidelines are directed to HR personnel, these issues can arise when other corporate officers or managers engage with other businesses regarding human resource policies and practices. For instance, private litigation by former employees of Apple, Google, and Adobe challenged an alleged no poaching agreement made by Steve Jobs and executives at Google and Adobe. The case settled for $415 million.

In light of this warning from the antitrust enforcers, companies should consider conducting an internal, confidential, and privileged self-assessment of their human resources practices under the auspices of in-house or outside counsel with antitrust expertise.

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09 November 2016

Government Relations Alert

The surprise election of Donald Trump as President — and the near Republican sweep of contested U.S. Senate elections — have ushered in a new-world order in the United States that heralds significant and sweeping policy changes. Here is a quick review of the new political landscape, and what we can expect for the remainder of 2016 and the year ahead.

The New U.S. Political Landscape

The Executive Branch

Republican candidate Donald J. Trump has been elected with at least 279 electoral votes. At press time former Senator and Secretary of State Hillary R. Clinton won 228 electoral votes, with 31 electoral votes from the states of New Hampshire, Michigan and Arizona not yet assigned.

We expect to start receiving information in the coming days of President-elect Trump's nominees for his cabinet and other key executive branch positions.

The Legislative Branch

At press time Republicans have lost just two seats in the U.S. Senate, a surprising outcome given many projections suggested a likely shift in control of the Senate to the Democrats. In some of the most contested races, Richard Burr (R-NC), Marco Rubio (R-FL), Roy Blunt (R-MO), Pat Toomey (R-PA), and Ron Johnson (R-WI), all retained their seats, with only Mark Kirk (R-IL) losing his seat to Representative Tammy Duckworth (D-IL).

In New Hampshire, Republican Senator Kelly Ayotte lost her election to Democratic Governor Maggie Hassan, though subject to a possible recount. Louisiana faces a runoff election on 10 December 2016 for its open Senate seat between top two finishers Republican John Kennedy and Democrat Foster Campbell.

In the House of Representatives, the Democrats had a net pick-up of a handful of seats (seven at press time), including from several losing Republican incumbents, though with far fewer pickups than many had expected.

Thus, the 115th Congress at this point looks like:

U.S. Senate:

114th Congress: 54 Republicans, 46 Democrats (2 of these Independents caucusing with Democrats)

115th Congress: 51 (possibly 52) Republicans, 48 (possibly 49) Democrats or Independents caucusing with Democrats. New Hampshire and Louisiana elections are still not final.

U.S. House:

114th Congress: 247 Republicans, 186 Democrats

115th Congress: 239 Republicans, 193 Democrats (three races have not yet been called)

Policy Outlook for Year-End 2016 and 2017

Lame Duck 2016 Session

With the vast change in the political landscape coming in 2017, we expect the activity of the lame-duck Congressional session, starting next week, to be much more limited in scope than it might have been if Hillary Clinton had won the election. Since authority to fund the operations of the Federal Government expires on 9 December, the only real "must do" in the lame-duck session is the extension of this funding authority, either in a single omnibus funding package, or in several "mini-buses." In addition, the National Defense Authorization Act will almost certainly pass Congress in early- to mid-December, and the 21st Century Cures Act may pass Congress as well. It is also possible, though not highly likely, that Congress will pass limited tax policy changes.

2017 – New World

We expect a frenzy of activity over the coming months to prepare for significant legislative and executive branch activities in 2017. Among the items we expect on the agenda in the Trump Administration and the 115th Congress:

- **Tax Reform**. House Speaker (and likely soon-to-be Speaker-elect for the next Congress) Paul Ryan has already indicated plans, along with House Ways and Means Chairman Kevin Brady, to move a significant tax reform bill in the next Congress. Both the Ryan/Brady tax reform blueprint and the Trump tax plan call for lower corporate and individual tax rates, and incentives for U.S.-based multinational companies to repatriate foreign earnings. This bill may move early next year, and quickly, via the budget reconciliation process, which would allow the bill to move through the Senate with only a majority vote, protected from a filibuster attempt by the Democrats.

- **Trade**. Trump pledged to renegotiate the North American Free Trade Agreement, and reset terms of trade with China and others. There is less alignment on these issues between Trump and many Congressional Republicans. It is not entirely clear how Trump will proceed, but he does possess sufficient executive authority to take meaningful action without Congressional approval.

- **Health Care**. Trump and congressional Republicans both have pledged to repeal the Affordable Care Act (ACA, aka Obamacare). This will be a difficult task considering it will more likely involve reforming ACA rather than simple repeal. In addition, since it is unlikely that any Senate Democrats would support this effort, Republicans would likely utilize the same reconciliation process they use for tax reform to get a bill through the Senate with just a majority vote. There is also significant bipartisan interest in drug pricing reform.

- **Energy and Environment**. Trump and congressional Republicans are expected to act quickly to dismantle much if not all of the energy/environmental regulatory framework established during the Obama Presidency. During his campaign, Trump issued "An American First Energy Plan," calling for an expansion of U.S. fossil fuel development, rescinding all of President Obama's executive actions, including his Climate Action Plan (and Clean Power Plan), and waters of the U.S. rule, stopping all payments of

U.S. tax dollars to the UN climate change programs, and green-lighting the Keystone XL pipeline among many other items.

- **Financial Services**. Although candidate Trump did not issue a specific financial services proposal, he has repeatedly expressed his interest in repealing the Dodd-Frank Act and shutting down the Consumer Financial Protection Bureau. We expect Congressional Republicans to move legislation to achieve these goals as well, but the Senate Democrats' ability to stop any bill in the Senate that does not have 60 supporting votes will likely make compromise with the Democrats necessary in order to get legislation signed into law.

- **Infrastructure**. Trump has proposed a US$1 trillion infrastructure spending plan to improve America's roads, bridges, airports, water, electricity grid, telecommunications networks, and other infrastructure. As part of this plan, he has proposed tax incentives to encourage private investment as well.

- **Immigration**. Trump in his campaign proposed a 10-point plan to establish new immigration controls. As part of this plan, Trump has proposed the building of a wall on the Mexican border, to be paid for by Mexico. He has also proposed significant enhancements in immigration screening and enforcement, and the suspension of "catch-and-release" policies.

The team

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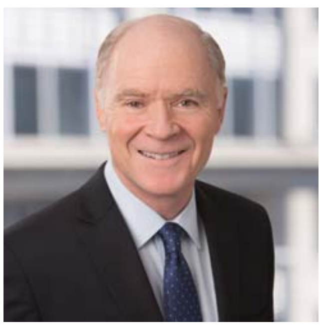

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A Judicial Solution for an Industrial Property Problem

Jose Gregorio Torrealba R.

Nowadays, it is quite infrequent to get a legal victory against any component of the Venezuelan State. Hoet Pelaez Castillo & Duque (HPCD) recently achieved one of these victories in the form of a favorable judgment concerning a nullity claim against the silence of the former Ministry of Commerce in a procedure related to a trademark application before the Autonomous Intellectual Property Service (SAPI, after its Spanish acronym).

The case began in 1997, when our client Alcon Inc. filed a trademark application for the registration of "*Silikon*" and the Industrial Property Registrar rejected it in 2000 arguing that it was similar to the mark "*Siliconbond*." The case was submitted to the attention of the Ministry of Commerce, due to the fact that, in 2004, we filed a hierarchical appeal against the Registrar's decision that declared that our appeal for reversal was inadmissible no longer on the basis of similarity to "*Siliconbond*," but because the Registrar believed that "*Silikon*" was a generic term.

In 2008, the Deputy Minister of Light Industries of the Ministry of Commerce issued an official notice asking all parties interested in judgments concerning hierarchical appeals filed in industrial property matters to ratify their interest, which we did on behalf of our client. By then, 11 years had passed since the filing of the trademark application.

Considering that the official notice of the Deputy Minister restarted the term that is legally established for the Minister to render a decision on the hierarchical appeal, and since no decision was rendered, we initiated a nullity claim in 2009 against the silence of the Ministry before the Political-Administrative Chamber of the Supreme Court of Justice. As of

November 2010, the process had been fully substantiated and the Chamber had to issue judgement, which happened on July 21st 2015.

The judgment of the Political-Administrative Chamber admitted our claim and declared that the actions of the Registrar in 2000 rejecting our client's trademark application were void. The Chamber also ordered the Registrar to render a new decision based on the considerations laid out in the judgment, which stated that there was no possibility of qualifying our client's mark as a generic term.

This favorable judgment means that, once again, HPCD gets ahead in the defense of clients' rights. By rendering specially designed services in the intellectual property area, the Firm was able to create a new solution for the SAPI's severe delay problem that affects all areas thereof when any kind of issue arises in registration processes. The judicial actions that the Firm took allowed the client to get a favorable judgment within a term that was five years shorter than the time that the administrative authorities took to process the trademark application.