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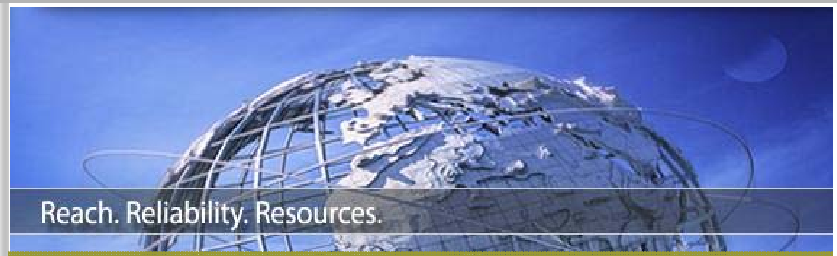

Pacific Rim Advisory Council
October 2016 e-Bulletin

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PRAC @ Manila 2016

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BAKER BOTTS - TOP RANKED RUSSION LITIGATORS JOIN FIRM

MOSCOW - 21 September 2016: Baker Botts, L.L.P., a leading international law firm, announced today that Ivan Marisin and Vasily Kuznetsov have joined the firm's Moscow office as Partners.

"Both Ivan and Vasily are outstanding lawyers and highly regarded litigators with a wealth of experience, representing both Russian and international clients. They have a deep seated understanding of the Russian legal system," said Andrew M. Baker, Managing Partner of Baker Botts.

"They will both add significant value for our Russian and international clients and their arrival also speaks to the commitment that we have made to continue to grow our international network," added Mr. Baker.

"Vasily and Ivan are terrific lawyers with a great deal of trial and international arbitration experience. Their addition highlights the growing strength of our global litigation and dispute resolution capabilities," said David Sterling, Chair of the firm's Litigation department.

"Upon joining the firm, Ivan becomes Co-Chair of the firm's International Disputes Resolution (IDR) Practice while Vasily will play a key role in managing our Russian IDR Practice," added Mr. Sterling.

"We are delighted to welcome Ivan and Vasily as our new Partners in Moscow. Their extensive experience in dispute resolution, both international and domestic, will complement our already strong Russian law offering in Moscow," said Maxim Levinson, Partner-in-Charge of the Moscow office.

"Ivan and Vasily's expertise will enable us to build upon the services we offer our clients in areas such as energy, technology, banking and finance, real estate and construction, and aviation," added Mr. Levinson.

Mr. Marisin has represented Russian clients in matters across the globe, as well as international clients in disputes in Russia. He has also advised Russian and foreign clients on corporate, banking and foreign investment matters. Mr. Marisin obtained his law degree from Moscow State University in 1986. Chambers Europe described Mr. Marisin as "a star disputes lawyer."

Mr. Kuznetsov has been representing domestic and international clients in major litigations and arbitrations since 2002. Chambers Global describes Mr. Kuznetsov as "a rising star." He is a graduate of Moscow State University.

Mr. Marisin and Mr. Kuznetsov join Baker Botts from Quinn Emanuel.

For more information, please visit www.bakerbotts.com

CAREY NAMES FIVE NEW COUNSELS

SANTIAGO – 10 October 2016: In order to continue providing a service of excellence and quality, Carey appointed five new counsels to enhance and strengthen its practice areas. **Patricia Silberman, Paulina Silva and Felipe Meneses**, all of them lawyers with vast experience, were designated counsels for Corporate Law, Mergers and Acquisitions; Intellectual Property and Information Technology, and Environmental Law areas, respectively. **Alejandra Risso and Mariela Riquelme**, both Certified Accountants, were elected as counsels for Carey's Tax group. The above is in addition to the recent appointment of three new partners giving Carey a total of 28 partners and eight counsels.

Patricia Silberman focuses her practice on corporate transactions, mergers and acquisitions, global finance, securities, capital markets and international trade. She studied Law at Universidad de Chile (Summa Cum Laude) and also has an LL.M. from University of Pennsylvania, USA (2006). She is admitted to the New York Bar, and worked as associate at law firms in that city for almost six years.

Paulina Silva's practice areas are focused on technology contracting, electronic commerce, and data protection. She studied Law at Universidad de Chile, and in 2008 she obtained a Master of Commercial Law specialized in E-law, from University of Melbourne, Australia.

Felipe Meneses focuses his practice on environmental law, indigenous regulations and regulatory matters by advising on project development and environmental assessment, legal opinions, environmental audits, and litigation, among others. He studied law at Universidad Católica de Chile, and in 2005 he obtained a Master of International Service from American University, USA. He has been recognized as a leading individual in his area by Chambers and Partners (2015).

Alejandra Risso is a Certified Accountant who studied at Universidad de Concepción, and holds a Master in Tax Management and Administration from Universidad Adolfo Ibáñez (2010). Her work is mainly focused on tax audits, tax due diligence, advising domestic and foreign clients on personal and corporate tax planning, local and international tax consulting, and mergers and acquisitions.

Mariela Riquelme is a Certified Accountant who received her degree from Universidad Tecnológica Metropolitana, and in 2010 she obtained a Master in Tax Management and Administration from Universidad Adolfo Ibáñez. Her work is mainly focused on tax audits, tax due diligence, advising domestic and foreign clients on personal and corporate tax planning, local and international tax consulting, and mergers and acquisitions.

For additional information visit www.carey.cl

DAVIS WRIGHT TREMAINE ADDS LEADING FOOD & BEVERAGE COUNSEL

Leading Food and Beverage Lawyer Rebecca Cross Joins the "No Dabblers" Team at Davis Wright Tremaine

SAN FRANCISCO - 28 September, 2016: Rebecca Cross, a leading food and beverage lawyer, has joined the nationally recognized food and beverage team at Davis Wright Tremaine as counsel in the firm's San Francisco office.

Ms. Cross comes to the firm from BraunHagey & Borden. She brings more than a decade of experience counseling and litigating on behalf of food, beverage, and restaurant companies and the venture capital and private equity funds that invest in them.

She has particular experience advising clients on regulatory compliance and litigation risk concerning labeling and advertising, as well as defending clients in consumer class actions related to labeling and advertising claims.

"The 'food court' in California is full of these kinds of cases, so we are delighted to have one of the best lawyers in the country to help our clients anticipate these tough issues," said Jesse D. Lyon, chair of Davis Wright Tremaine's food, beverage, and agriculture practice. "Rebecca's experience with leading-edge plant-based protein companies and concepts will be especially helpful to our firm and our clients."

The 29-lawyer-strong food and beverage group at Davis Wright Tremaine spans the country and covers all major areas of the industry. The team motto is "No Dabblers"—each member is devoted to food and beverage, agriculture, and alcohol supplier projects every day. Experienced, practical, and connected, the group has significantly expanded its presence in the Bay Area.

"I'm thrilled to be joining such a robust, experienced and passionate team," said Ms. Cross. "What really attracted me to the firm is the broad and deep scope of legal services it can provide to food clients—from brand protection to food safety to venture financing and more—and its dedication to the food industry. This group's innovative work has been critical to the growth and success of many leading companies in the food and beverage space, as well as to emerging ones. My clients will get tremendous benefit from the DWT platform, and I look forward to being a part of this devoted group of food lawyers."

Ms. Cross has served as outside general counsel to a number of consumer product clients. In addition to her work reviewing labeling and marketing claims, she counsels clients on: brand protection strategies; managing food safety issues, recalls, inspections and regulatory enforcement actions; commercial contracts and transactions. She also conducts pre-exit and pre-acquisition due diligence related to regulatory and litigation risk.

Ms. Cross has been widely quoted in the media on food and beverage legal issues and has served as an expert speaker at events hosted by the American Bar Association, UCLA Law's Resnick Program for Food Law & Policy, American Conference Institute, and others.

"I'm proud that Davis Wright Tremaine continues to serve as a destination for the best and brightest legal minds in the food and beverage space," said Lyon.

Ms. Cross received her B.A. from Gettysburg College and her J.D. from Fordham University School of Law. She serves as active pro bono counsel for the Plant Based Foods Association.

For more information, visit www.dwt.com

GIDE STRENGTHENS ITS ENVIRONMENTAL LAW PRACTICE

PARIS - 07 September 2016: Gide is pleased to welcome new partner **Jean-Nicolas Clément** within its Public and Administrative Law / Environment practice group in Paris, as well as two of his associates, **Alice Bouillié** and **Marylène Fourès**. This team will strengthen Gide's expertise in both environmental and energy law, as well as synergies with other practice groups, Mergers & Acquisitions, Real Estate and Projects (Finance & Infrastructure) in particular.

Jean-Nicolas Clément was admitted to the Paris Bar in 1990. He provides advice as well as assistance in litigation matters pertaining to industrial environmental law (installations classified for the protection of the environment, water, waste), nuclear law and energy law (regulation of the electricity sector, renewable energies: wind, solar, hydro, etc.), mining law and mining activities. Prior to joining Gide, Jean-Nicolas was a partner at law firm UGGC for 14 years as head of their Environment-Energy department. He had also practised with law firm Lafarge-Flécheux for over 12 years as an associate and partner, and began his career as a legal consultant within EDF's equipment department. Jean-Nicolas is a member of the French Environment Ministry's workgroup on contaminated sites and soil, and teaches environment law at the Université Paris I (Master II in "Construction, town planning, contracts"), and the law school of Sciences-Po. He is regularly cited as one of the best specialists in environment law by the various French and Anglo-saxon legal ranking publications (Chambers, Legal 500, Best Lawyers, etc.). He is a graduate of the Institut d'Etudes Politiques of Paris (public service section), and holds a postgraduate degree (DEA) from the University of Paris II - Panthéon-Assas (Environmental Law).

Admitted to the Paris Bar in 2002, Alice Bouillié is specialised in environmental, mining and nuclear law. Her prior experience includes 12 years at UGGC, Lafarge-Flécheux and the Court of Justice of the European Communities in Luxembourg. Alice is in charge of "Environmental law" training at the Ecole Supérieure des Métiers de l'Immobilier and a lecturer in nuclear law at Paris V (Master's degree in "Sustainable development law"). Alice holds a postgraduate degree (DEA) from the University of Paris I - Panthéon Sorbonne (Environmental Law, 1997), and is a graduate of the Institut de Droit des Affaires (1996).

Marylène Fourès was admitted to the Paris Bar in 2006. She specialises in environmental, mining and nuclear law, and has worked as an associate for UGGC for ten years. Marylène holds two postgraduate degrees, one in Environmental Law (DEA, 2003) and one in European Law (DESS, 2002) from the University of Paris I - Panthéon Sorbonne, and is a graduate of the Toulouse Institut d'Etudes Politiques (2000).

Gide senior partner **Baudouin de Moucheron** states: "*I am very pleased to welcome these three environmental law specialists and to see Jean-Nicolas Clément appointed as partner in our firm. Jean-Nicolas is one of the most renowned experts in the field and his precise knowledge of all environmental issues and regulations is a precious asset to meet the various challenges of our clients in their industrial, real estate and infrastructure projects.*"

For additional information visit www.gide.com

HOGAN LOVELLS GROWS GLOBAL LEGAL PROJECT MANAGEMENT TEAM

Hogan Lovells is expanding the firm's global Legal Project Management (LPM) team with the recruitment of Leslie Brown as Head of Legal Project Management for the Americas. Leslie will join Stephen Allen, who joined the firm this week as global Head of Legal Services Delivery and the firm plans to further expand the team and the global LPM client offering over the course of 2016/17.

Leslie has extensive experience in LPM in the U.S., having practiced as an attorney before moving into Knowledge and LPM. She has spent many years implementing plans and strategies for establishing LPM in law firms. She joins the firm from Ogletree Deakins and previous to this she was at White & Case, Weil Gotshal & Manges and WilmerHale.

In addition, Christine Siler, Legal Project Manager in London, will be transitioning to the firm's Paris office to become Head of Legal Project Management for Continental Europe.

The firm is now actively recruiting for other Legal Project Managers for the UK, who will report into Stephen Allen, along-side Leslie and Christine, as the team expands its capability globally.

The team will be working closely with the firm's Pricing team. Stephen's role will have oversight across LPM globally and in the UK as well as focusing on all the firm's alternative legal delivery models. Stephen is a leader in legal innovation having spent time at both DLA Piper as their Director of Service Delivery and Quality and at PwC as their Head of Global Legal Services Transformation.

Steve Immelt, CEO of Hogan Lovells, said: "This investment into our Legal Project Management offering is critical to our growth. The team will be standardizing many of our LPM tools and significantly developing our offering to ensure that we are leading the way in this area. It's imperative that every one of our client solutions is bespoke, innovative and always maintains the high quality they expect to see from Hogan Lovells."

For additional information visit www.hoganlovells.com

ROUSAUD ADDS TO DATA PROTECTION AND FAMILY LAW TEAMS

RCD adds Victor Altimira and Irene Lopez to the Data Protection team, and Carmen Calderón to the Family Law team

BARCELONA – 06 September, 2016: RCD - Rousaud Costas Duran has strengthened its data protection practice by adding Victor Altimira and Irene Lopez. Both contribute their experience in internet law and information and communication technologies (ICT) to a well-established department, which has been recognized in recent years by main international legal directories, such as Chambers and Partners or Legal 500.

Victor Altimira is a lawyer who specializes in digital law and ICT. He has over 13 years of consulting experience regarding the protection of personal data, e-commerce, and computer-related crime, among other areas. Additionally, he has ample teaching experience in master's degrees for the Association of Economists of Catalonia, The Institute of Continuing Learning (IL3) at the University of Barcelona, and the Open University of Catalonia (UOC).

Irene Lopez has spent more than 16 years providing legal counsel to companies regarding Internet law, ICT, e-commerce, and intellectual property. Furthermore, she is a consultant for the Catalan Association of Executives, Managers and Entrepreneurs (ACEDE) and a professor in various master's and postgraduate programs at the UOC and the University of Barcelona´s IL3.

Before joining RCD, both professionals developed their professional career, in part, at the law firm Logic Data Consulting, of which they were founding partners.

These hires are joined by Carmen Calderón, a lawyer who specializes in family law. Carmen has over 15 years of experience advising on marriage and family matters, especially in the area of legal custody. Before joining RCD, she developed part of her career in her own law office, which specialized in marriage and family law.

With the addition of Carmen Calderón, RCD is strengthening its marriage and family law practice, providing legal representation in a wide range of negotiation procedures and before courts.

For additional information visit www.rcdslp.com

BAKER BOTTS

ENERGY LITIGATION LAWYERS SECURE COMPLETE WIN FOR COURSON IN OIL, GAS LEASE INTERPRETATION CASE

HOUSTON - 12 October, 2016: Baker Botts L.L.P, a leading international law firm, announced a victory for firm client Courson Oil and Gas, Inc., when the Amarillo Court of Appeals yesterday upheld the validity of a large oil and gas lease in Roberts County, which is co-owned by Courson.

"This is an important win for Courson, but also an important decision for Texas oil and gas jurisprudence," said Partner Bill Kroger, co-chair of the firm's Energy Litigation Practice Group and a lead lawyer on the case. "The court's outcome applies and affirms the longstanding principles that production on any part of a lease perpetuate the entire lease, and that retained acreage clauses do not typically apply until the end of continuous drilling or other savings provisions at the end of the secondary term of a lease. The decision is also important because it affirms the longstanding rule that leases be construed as a whole, and not in a piecemeal fashion as advocated for by Mayo and Latigo."

The issue of the case was around the proper interpretation of the lease with regard to the application of a retained acreage clause. Baker Botts successfully obtained summary judgment in favor of Courson's interpretation of the lease, and the Amarillo Court of Appeals affirmed on October 11, 2016.

"While these principles are not new, the Amarillo decision applies them to the plain language of the lease in a way that upholds the intent of the parties to the lease where aggressive drilling during times of higher oil and gas prices be rewarded by banked time," said Jason Newman, Baker Botts energy litigation partner in the case. "This then allows the lessee to hold the entire lease during times when lower prices make continuous drilling uneconomic."

Baker Botts energy litigation lawyers argued for Courson that the duration of the lease was defined by continuous drilling in a way that allowed the lessee to bank time for wells drilled faster than every 180 days. The banked time credits extended the time to drill the next well required to perpetuate the lease, with the retained acreage clause applying at the end of continuous drilling and the expiration of banked time.

At trial and on appeal, Mayo, the lessor under the lease, and Latigo, a co-lessee and 60 percent working interest owner, had aligned to try and terminate production units from the lease by arguing that the lease's retained acreage clause operated in an atypical way to create a "dual track" for operations under the lease. Under Mayo and Latigo's interpretation, operations on undeveloped acreage under the lease were governed by the continuous drilling and banked time provisions, but once acreage was developed, the retained acreage clause applied to create rolling terminations of production units where a well went down and no production or reworking operations were timely resumed.

The Baker Botts team representing Courson at trial and on appeal includes: Bill Kroger (Partner, Houston), Jason Newman (Partner, Houston), Amy Hefley (Partner, Houston), and Ben Sweet (Senior Associate, Houston), with assistance from paralegals Sheila Bickel and Leigh Whiting.

For additional information visit www.bakerbotts.com

BENNETT JONES

ADVISING CANSO INVESTMENT COUNSEL LTD IN CONNECTION WITH PROPOSED $600MILION RECAPITALIZATION OF POSTMEDIA NETWORK INC.

- Date Announced: September 07, 2016
- Date Closed: October 05, 2016
- Deal Value: $600,000,000
- Client Name: Canso Investment Counsel Ltd.

On September 7, 2016, Postmedia Network Canada Corp. (TSX: PNC.A, PNC.B) ("PNCC") announced that the shareholders and noteholders of Postmedia Network Inc. ("PNI") voted in support of the approximately $600 million proposed recapitalization of PNI (the "Transaction"). The Transaction is to be implemented by way of a court-approved plan of arrangement under the Canada Business Corporations Act (the "Plan of Arrangement"). The Ontario Superior Court of Justice (Commercial List) is expected to consider the approval of the Plan of Arrangement at a hearing currently scheduled for September 12, 2016, and it is expected that the Transaction will be implemented on or about September 30, 2016.

The Transaction involves the restructuring of PNI's existing debt obligations, including: (i) significant amendments to the outstanding 8.25% senior secured notes issued by PNI (the "First Lien Notes"); (ii) a paydown of approximately $78 million on the First Lien Notes; (iii) the exchange of the outstanding 12.50% senior secured notes issued by PNI for approximately 98% of the issued and outstanding shares of PNCC on completion of the Transaction; and (iv) the issuance of approximately $110 million of new U.S. dollar denominated second lien secured notes.

In connection with the Transaction, Bennett Jones LLP is advising Canso Investment Counsel Ltd., holder of approximately 82% of the First Lien Notes, in its capacity as portfolio manager for and on behalf of certain accounts that it manages.

The Bennett Jones team includes Mark Rasile, David Rotchtin and Daniel Cipollone (Financial Services/Corporate Finance), S. Richard Orzy and Sean Zweig (Restructuring/Insolvency), Jeffrey Kerbel and Kristopher Hanc (Securities/Corporate Finance), and John van Gent and Douglas Chen (Real Estate).

For additional information visit www.bennettjones.com

CLAYTON UTZ

ADVISING ON SALE OF POLITIX

MELBOURNE - 6 October 2016: Clayton Utz has advised the owners of the Politix retail fashion business on the sale of the business to the Country Road Group. The Clayton Utz team advised the vendor on the full transaction process, including transaction strategy, negotiation with bidders and deal execution.

The transaction, which was announced on 5 October 2016, is subject to a number of customary conditions before completion occurs. At this stage, completion is anticipated to occur on or about 31 October 2016.

Clayton Utz Melbourne Corporate partner Michael Linehan led the team, with support from senior associate Quentin Reidy and lawyer Kate Allison. This deal adds to the team's strong track record of advising clients in the retail industry on various high-profile corporate transactions.

For additional information visit www.claytonutz.com

HOGAN LOVELLS

ADVISES SHAFTESBURY ON ITS £285M BOND ISSUE

LONDON - September, 2016: Hogan Lovells, London has advised Shaftesbury, the listed UK REIT, in connection with its issue of Guaranteed First Mortgage Bonds in a deal worth £285 million.

With a coupon of 2.487% and maturity in September 2031, the Bonds are expected to be admitted to listing on the Official List of the Financial Conduct Authority and to trading on the Main Market of the London Stock Exchange on 10 October 2016.

The cross-practice team was led by London corporate partner, Nigel Read, London real estate partner, Gill McGreevy and London debt capital markets partner, Andrew Carey.

Commenting on the transaction, Nigel Read, said:

"This deal illustrates that appetite for investment in good quality assets in London's West End is alive and kicking post-Brexit vote. The issue is one of the first wholesale secured property bonds in the London market in recent years and significantly increases Shaftesbury's financial resources for further investment in its portfolio."

For additional information visit www.hoganlovells.com

GIDE

ADVISES KORELYA CAPITAL ON STRUCTURING ITS FIRST INVESTMENT FUND

PARIS - 4 October 2016: On 29 September 2016, the former French Minister for Digital Economy and Minister of Culture, Fleur Pellerin, announced having raised 100 million euros for her investment fund K-Fund 1, which will be operational in November. The funds were raised with South Korean IT company Naver and its subsidiary, the highly popular instant messaging service Line. Founded in 1999, Naver is the leading web search portal in Korea. The company employs 6,000 people and its market capitalisation reaches USD 27 billion.

Gide advises Korelya Capital, formed by Fleur Pellerin and Antoine Dresch, on the structuring and formation of the K-Fund 1 fund. The fund aims to contribute to the financing of the ecosystem of European start-ups, and of French start-ups in particular. Korelya Capital will serve as a gateway to France for the fund’s Korean investors, and its objective is to bring to the fore "at least one unicorn" in France and in Europe in the coming years.

Gide’s team on this transaction included partners Ann Baker and Christian Nouel, counsel Rima Maîtrehenry, and associate Arnaud de Keulenaer.

For additional information visit www.gide.com

NAUTADUTILH

ASSISTS EPCO AUCTION SALE OF STAKE TO THE RIVERSIDE COMPANY

08 September 2016: NautaDutilh assisted the founding shareholders (who also comprise the management) of EPCO SA (European Panel Company) with the auction sale of a majority interest in EPCO SA.

Following an intense auction process funds managed by The Riverside Company were chosen as the purchaser and investor alongside the founding shareholders/management.

EPCO SA is an innovative manufacturer of high quality sandwich panels for industrial and residential sectional doors with an exceptional high-tech production line, located in Tournai, Belgium.

The Riverside Company is a global private equity firm focused on making control and non-control investments in growing businesses valued at up to USD 400 million. The deal was signed on 16 July 2016; closing is expected in Q3 2016.

The NautaDutilh team consisted of Joost den Engelsman, Elke Janssens, Michaël Zadworny, Heidi Waems, Mark den Bleijker, Barbara Nijs, Babs Schoenmakers-Van der Heijden. Financial advisor is Abundanza Corporate Finance.

For additional information visit www.nautadutilh.com

ROUSAUD COSTAS DURAN SLP

ADVISES HAWKERS ON THE CLOSING OF ITS FINANCING ROUND

BARCELONA - 05 October, 2016: The firm has been commissioned to provide advice throughout the process. The Saldum Ventures Group owns the Hawkers, Miss Hamptons and Wolfnoir brands.

RCD has advised Saldum Ventures, parent company and owner of brands such as Hawkers, Miss Hamptons or Wolfnoir, in a financing round funded by O'Hara Financial, together with a group of independent and private investors. This is one of the most important investments with these features leveraged in Europe. It also highlights the speed with which the operation was completed, terminating just one month after the start of negotiations.

RCD has advised Saldum Ventures and its promoters in the first investment that Hawkers has accepted in two years. the investment will be allocated to continuing the international consolidation of the company as well as opening a new and disruptive concept shop at street level.

For additional information visit www.rcdslp.com

SYCIPLAW

ADVISES BORROWERS IN TIWI-MAKBAN GEOTHERMAL PLANTS PROJECT

MANILA – 29 September, 2016: SyCipLaw acted as borrower's counsel for AP Renewables, Incorporated (APRI), a unit of Philippine energy company Aboitiz Power, in the issuance of a landmark climate bond worth P10.7 billion ($225 million) for the Tiwi-MakBan geothermal power facilities.

The local currency bond is added to a direct P1.8 billion ($37.89 million) ADB loan, with the form of a guarantee of 75% of principal and interest on the bond. The use of credit enhancement for the bond shows ADB's strategy to support investments on infrastructure in Asia and the Pacific. This is the first climate bond issued in Asia-Pacific, and the first ever climate bond for a single project in an emerging market. It will be done in the Philippines with the backing of Asian Development Bank (ADB), and has been certified by the Climate Bonds Initiative.

APRI got the Tiwi-MakBan geothermal plants from the Power Sector Assets and Liabilites Management Corporation (PSALM) in 2009, and since then, had invested in facility-rehabilitation for performance improvement and extension of operating life. The geothermal plants have a combined generating capacity of 390 megawatts.

The SyCipLaw team was led by partners Marievic G. Ramos-Añonuevo and Melyjane G. Bertillo-Ancheta, with support from senior associates Jan Celine C. Abaño-Ranada and Bhong Paulo A. Macasaet, and associates Aldous Benjamin C. Camiso, Rhey David S. Daway, Rose Angelique P. Dizon and Alyssa Carmelli P. Castillo.

For additional information visit www.syciplaw.com

SANTAMARINA Y STETA

ADVISES CONSORTIUM MEXICAN SUBSIDIARY CONSOLIDATED WATER CO LTD IN PPP PROJECT OF LARGEST DESALINATION PLANT IN THE AMERICAS

MEXICO CITY - 13 September, 2016: The Mexican law firm Santamarina y Steta advised the consortium comprised by N.S.C. Agua, S.A. de C.V, subsidiary of Consolidated Water Co. Ltd (Nasdaq: CWCO), NuWater de México, S.A.P.I. de C.V., and Degrémont, S.A. de C.V. in the preparation and filing of the proposal that won the bid for the construction and operation of the Americas' largest, and world's third-largest, water desalination plant, that shall be located in Playas de Rosarito, Baja California.

The investment is estimated in 9 billion pesos.

The plant shall at least supply drinking water to Playas de Rosarito and Tijuana

The investment, of approximately 9 billion pesos, will enable the plant to fill the shortage of drinking water that has affected Playas de Rosarito and Tijuana in recent years. After its opening, estimated for late 2019 or early 2020, the plant shall produce approximately 50 million gallons of potable water per day. In a second phase, scheduled for 2024, the plant shall double its production capacity.

For the award of this project, Santamarina y Steta advised the winning consortium in the analysis of the unsolicited proposal, including preparation of the project, as well as in the filing of the offer and execution of the Public Private Partnership (PPP) with the Baja California government.

The team that advised the consortium was led by Jose Ramon Ayala, partner of Santamarina y Steta whose professional practice is focused on mergers and acquisitions, and finance and restructuring. Additionally, the associate Guillermo Moreno, expert in mergers and acquisitions, joined the efforts regarding this project.

For additional information visit www.s-s.mx

TOZZINIFREIRE

ASSISTS VONPAR IN SALE TO COCA-COLA FEMSA

SAO PAULO - September, 2016: Vonpar, one of Brazil's largest independent bottling companies, relied on TozziniFreire Advogados in São Paulo for the deal, which was signed last Friday.

Coca-Cola Femsa acquired Vonpar through its local subsidiary, Spal Industria Brasileira de Bebidas. The Brazilian company has three bottling plants, five distribution centres and almost 4,000 employees, who serve over 15 million consumers. These assets will all go to Coca-Cola Femsa, with the exception of its mineral water business, which Vonpar will continue to manage independently.

Counsel to Vonpar In-house counsel – Lucio Cintra

TozziniFreire Advogados Partners Luis Renato Ferreira da Silva, Mauricio Chapinoti, Francisco Eumene Machado de Oliveira, Daniel Oliveira Andreoli, Andreia Andrade Gomes, Luiz Fernando Visconti, Paulo Augusto Furtado Mendonça, Roberto Bersch and Rafael Mallmann, and associates Maria Bofill, Eduardo Petry Terra Werneck, Rafael Balanin, Vivian Anne Fraga do Nascimento, Arruda Jackson Ferreira de Freitas, Alberto Esteves Ferreira Filho, Luis Felipe Soares da Cunha and Euzébio Guilherme Nitshcke in São Paulo.

For additional information visit www.tozzinifreire.com.br

PRAC EVENTS


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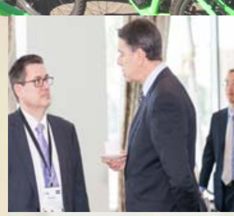


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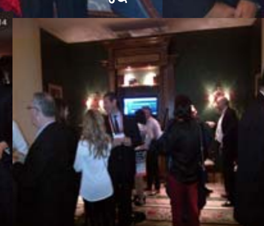

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CLAYTON UTZ

13 OCT 2016

Changes to ASIC financial reporting relief for wholly-owned companies

BY DAVID LANDY, SIMON TRUSKETT

To add a new company to an existing deed of cross guarantee for the purposes of the benefit of the ASIC financial reporting relief for wholly-owned companies, the existing deed of cross guarantee will need to varied, or a new deed of cross guarantee entered into, to reflect the new ASIC Pro Forma.

On 28 September 2016, the Australian Securities and Investments Commission remade its financial reporting relief for wholly-owned companies – ASIC Corporations (Wholly-owned Companies) Instrument 2016/785. The new ASIC instrument replaced ASIC Class Order [CO 98/1418].

The new ASIC Instrument applies in relation to a financial year ending on or after 1 January 2017. The old ASIC Class Order continues to apply, despite its repeal, in relation to a financial year ending before 1 January 2017.

ASIC has continued the substance of the financial reporting relief except that it no longer provides relief to bodies regulated by the Australian Prudential Regulation Authority.

Effect on existing deeds of cross guarantee

One of the conditions of the ASIC relief is that before the end of the relevant financial year the company seeking relief must be a party to a deed of cross guarantee (as an original party or pursuant to an assumption deed) which has been lodged with ASIC.

A consequence of the remaking of the ASIC relief is that in order to join a company to a deed of cross guarantee executed before 28 September 2016, a new deed of cross guarantee will need to be executed or the pre-existing deed of cross guarantee varied to reflect the revised ASIC Pro Forma deed of cross guarantee (ASIC Pro Forma 24). The pre-existing deed may be varied if it has a variation power in it.

The obligations of a party to the deed of cross guarantee under group finance documents may require that party to obtain the consent or approval of its financier to such a variation of the pre-existing deed of cross guarantee or the entry into of a new deed of cross guarantee.

GET IN TOUCH

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TozziniFreire Advogados

NEWS, ARTICLES AND NEWSLETTERS

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.

LEGAL FLASH

October, 2016

ARIFA
CORPORATE SERVICES

We would like to let you know that...

The BVI Government extended the free filing period to 31 December, 2016 for filing the private registers of directors on behalf of BVI business companies.

The extension means an existing BVI Business Company (one on the register at 1 April, 2016 when the requirement took effect) will have until 31 December, 2016 to make the initial private filing of its register of directors for free. After 31 December, 2016 and until 31 March, 2017 filing fee will be USD$25.00 and after 1 April, 2017 filing fee will be USD$50.00 plus penalties. For New Business Companies or changes in the register of directors of companies that have already filed their registers, filing fee is USD$50.00. Administrative handling fee will be applicable to all filings.

If you hold more than 5 companies under your administration, please complete the attached Register of Directors registration template provided by the BVI Financial Services Commission (FSC). This template can hold a maximum of 150 companies to be registered as a batch in the Register's system.

Tips for using the FSC template:

1. Use Microsoft Excel and enable contents and macros.
2. Open the FSC template which is actually a data entry form.
3. Accurately complete data fields with information of the correct data type.
4. Data in the fields must be in English.
5. Once all date is submitted, click **Add Record**.
   The excelsheet is updated and form is refreshed.
   Enter **Next Record** for next information.
6. To view data in Excel Workbook, click **Exit Form Mode**.
7. To go back to the **User** form, save the workbook, close Excel and reopen.

Important: All clients should send their Registers of Directors to bvi@arifacorporate.com for filing by 1 December, 2016, in order to effectively submit the filing prior 31 December, 2016.

Please contact any of our offices for further information.

BVI News

FREE FILING PERIOD EXTENSION

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Bennett Jones

New Capital-Raising Initiatives for Alberta-based Start-up Businesses

September 26, 2016 | Karen Keck, Juliamai Giffen, Kelly Ford and Kevin Zhou

On July 26, 2016, the Alberta Securities Commission (ASC) adopted a start-up business exemption (ASC Rule 45-517 Prospectus Exemption for Start-up Businesses), which is designed to be a simpler and less costly capital-raising alternative for Alberta-based start-up businesses. The start-up business exemption is intended to respond to the difficulties that start-up businesses may encounter when they are unable to cost-effectively rely on other capital-raising exemptions.

The start-up business exemption provides a prospectus exemption for Alberta-based start-ups for capital raising up to $250,000 per distribution and up to a lifetime aggregate of $1 million. In addition, the exemption can be used with or without a funding portal or other registered dealer.

In addition, the ASC has also proposed to adopt a crowdfunding exemption (Multilateral Instrument 45-108 Crowdfunding), which provides a prospectus exemption for crowdfunding financings conducted through an online funding portal. If adopted, the crowdfunding exemption would facilitate larger financings than those permitted under the start-up business exemption.

The Start-up Business Exemption

1. Who can Use the Exemption?

The start-up business exemption is available to an issuer who is not an investment fund or reporting issuer in any jurisdiction of Canada and is not subject to similar reporting obligations in a foreign jurisdiction. The head office of the issuer must be located in Alberta or a jurisdiction of Canada that has adopted a corresponding prospectus exemption substantially similar to the Alberta rule.

An issuer may concurrently conduct a "start-up business distribution" (referring to a distribution under ASC Rule 45-517 or a corresponding exemption) in both Alberta and one or more of the jurisdictions with a similar rule; however, the corresponding exemptions currently in existence do not contemplate a start-up business distribution under ASC Rule 45-517.1

2. What Type of Securities are Eligible?

To rely on the start-up business exemption, an issuer may only distribute the following eligible securities:

a. common shares;
b. non-convertible preference shares;
c. securities convertible into common shares or non-convertible preference shares;
d. non-convertible debt securities linked to a fixed or floating interest rate;
e. limited partnership units; or
f. investment shares that are non-convertible preference shares issued by a cooperative organized under the Cooperatives Act (Alberta).

3. What are the Capital-Raising Limitations?

Issuer Limitations

Under the start-up business exemption, the issuer cannot raise more than $250,000 per distribution. In addition, the issuer can only conduct two start-up business distributions in each calendar year with a lifetime aggregate limit of $1 million for all start-up business distributions. All funds raised by the "issuer group" count towards these limits.

The capital-raising limitations are applicable to an issuer and other members of the "issuer group", which includes each affiliate of the issuer and each other issuer that is engaged in a common enterprise with the issuer or within an affiliate, or has the same founder as the issuer does. A "founder" is a person who takes the initiative in founding, organizing or substantially reorganizing the business of the issuer, and at the time of the distribution or trade is actively involved in the business of the issuer.

Investment Limits

The exemption also sets forth a limit on the amount that can be raised from any particular investor. The maximum amount of any single subscription cannot exceed $1,500; however, if a registered dealer provides advice that the subscription is suitable for the investor, then the maximum subscription from that purchaser increases to $5,000.

No Commissions or Fees

The exemption prohibits payment of a commission, fee or similar payment to the issuer group or any of their principals, employees or agents with respect to a start-up business distribution; however, this is not intended to prevent payments for professional services in connection with a distribution, such as accounting or legal fees.

4. What are the Disclosure Requirements?

Offering Document and Risk Acknowledgements

To rely on the start-up business exemption, the issuer or the dealer is required to deliver to each investor an offering document to enable such investor to make an informed investment decision. Such offering document must be in the required form, which includes certain information about the issuer's business, its management, the offering and the minimum offering amount. In addition, a signed risk acknowledgement in the prescribed form must be obtained from each investor, which sets out certain risks associated with the distribution.

Cancellation

Investors may cancel their offers to purchase the securities within 48 hours by delivering a notice to the issuer or the dealer (if any).

Closing Requirements

If the minimum offering amount has been raised within 90 days, the issuer may proceed to close the distribution. Within 30 days following the closing, the offering document and a report of exempt distribution must be electronically filed through SEDAR. Also, within such period, the issuer must deliver to each investor a confirmation setting out: (a) the date of the subscription and the closing of the distribution; (b) the quantity and description of the securities purchased; (c) the purchase price per security; and (d) the total commission, fee and other similar amounts.

The Crowdfunding Exemption

If adopted, the crowdfunding exemption would allow Alberta issuers to raise somewhat larger amounts through crowdfunding offerings across multiple jurisdictions in Canada. The framework of the proposed exemption consists of the following two parts:

1. a prospectus exemption; and
2. a requirement that the distribution be conducted through a funding portal that is registered as either a "registered dealer funding portal" or a "restricted dealer funding portal".

Both the offering parameters and investment limits are higher under the crowdfunding exemption than under the start-up business exemption as follows:

●The total proceeds raised by the issuer group in reliance on the crowdfunding exemption cannot exceed $1,500,000 within a 12-month period.

●If an investor is not an accredited investor, the issuer cannot accept a subscription of more than $2,500 per distribution from that investor (and in Alberta and Ontario, not more than $10,000 in all distributions under the crowdfunding exemption in a calendar year).

If an investor is an accredited investor (but not a permitted client), the issuer cannot accept a subscription of more than $25,000 per distribution from that investor (and in Alberta and Ontario, not more than $50,000 in all distributions under the crowdfunding exemption in a calendar year).

Notes

1. On May 14, 2015, British Columbia, Manitoba, Nova Scotia, New Brunswick, Québec and Saskatchewan adopted local blanket orders, which provide registration and prospectus exemptions for crowdfunding offerings. ASC Rule 45-517 is drafted to facilitate a start-up business distribution in Alberta and one or more of the jurisdictions that have adopted these local blanket orders; however, the blanket orders do not contemplate a distribution under ASC Rule 45-517.

Amendments to Chilean Decree with force of Law No. 211

The Law Decree No. 211 was amended on August 30th, 2016 by Law 20,945 (the "New Law"). The following are the main amendments:

1. **Amendments on collusion**

   The New Law amends the **crime of collusion** introducing the *per se* standard to punish hard core cartels, providing evidence of the existence of an agreement being sufficient, independently of the power of the parties in the market and the anti-competitive effects.

   Another innovation of the New Law is the **criminalization of collusion** punished with imprisonment that may range from three years and one day to 10 years. In the event alternative punishment may apply, it can only be requested after the convict has been imprisoned for one year.

   Also, **additional penalties are imposed for collusion**: **(i)** Absolute temporal disqualification of seven years and one day to 10 years to act as a director or manager in an openly-held corporation or in a corporation subject to special regulations, a State-owned company or one in which the State has an interest in, or in a trade or professional union; and **(ii)** Prohibition to enter into any type of agreement with State bodies, as well as the prohibition to be awarded any concession of the State, up to a five-year term.

   Pursuant to the **leniency**, the New Law introduced criminal liability exemption for the crime of collusion to individuals who have first provided background information to the National Economic Prosecutor ("FNE" for its acronym in Spanish which stands for *Fiscalía Nacional Económica*). Those who provide information at a later time will be awarded a reduced punishment and will be able to access an alternative punishment without having to effectively comply with the one-year imprisonment penalty.

2. **Mandatory and *ex-ante* controls for concentration operations**

   Concentration operations may be performed by merger, acquisition of rights that allow, either individually or collectively, to decisively influence the management of another company, any type of association and the acquisition of control on the assets of another company in any way. In these cases, notice shall be given to the FNE on the concentration operations where: **(i)** the total sales in Chile by economic agents that intend to concentrate are equal to or higher than the threshold established by the FNE, and **(ii)** sales which have individually been performed in Chile by at least two of the economic agents that intend to concentrate the market are equal to or higher than the threshold established by the FNE.

After the operation has been informed, it cannot be closed until its timely approval by the FNE or the Antitrust Court ("TDLC" for its acronym in Spanish which stands for *Tribunal de Defensa de la Libre Competencia*). FNE may assess the operation within a 30-day term, when it must adopt one of the following decisions: **(i)** unconditionally approve the operation; **(ii)** approve the operation subject to the condition that all measures offered by the notifying party are complied with; or **(iii)** extend the investigation for another 90 days to gather more background information. If the FNE does not provide an answer within said term, the operation will be considered as approved. In the event the FNE decides to extend the investigation, it may: **(i)** unconditionally approve the operation; **(ii)** approve the operation subject to the condition that all measures offered by the notifying party are complied with; or **(iii)** prohibit the notified operation.

Finally, a special remedy for revision may be filed before the TDLC in the event the FNE bans the operation, to which end the interested party shall have a 10-day term as of the resolution being notified.

3. **Crossed Ownerships and Interlocking**

The New Law adds as a new counter-competitive conduct that of simultaneous participation of persons in relevant executive posts or as board members in two or more competing companies (*interlocking*), provided the corporate group achieves annual revenues that exceed UF 100,000 (approximately USD4 million) over the prior calendar year and, 90 days having elapsed as of the end of the calendar year in which the foregoing threshold had been exceeded, such interlocking still remained in place.

Likewise, the New Law incorporates the obligation of notifying the FNE, within 60 days, about the direct or indirect acquisition of more than 10% of a competing company's equity, whenever both the acquiring company and the acquired one record, separately, annual revenues on sales that exceed UF 100,000 (approximately USD4 million) over the prior calendar year.

4. **Increase in the Amounts of Fines**

The fines applied by the TDLC shall correspond to 30% of the breaching party's sales corresponding to the product line or services associated to the breach during the period for which it had taken place, or up to twice the economic benefit reported for the breach. If either the sales or the economic benefit cannot be determined, the TDLC may apply fines of up to 60,000 UTA (*Unidad Tributaria Annual*, Indexed Unit of Account (inflation-adjusted) used in Chile for tax and fine-application purposes. Current values may be found at: http://www.sii.cl/pagina/valores/utm/utm2016.htm).

For the purposes of establishing the amount of the fine, the following shall be taken into consideration: **(i)** economic benefit that might have been attained on account of the breach, **(ii)** seriousness of the conduct, **(iii)** deterrent effect, **(iv)** whether or not there is reoccurrence (having been previously sentenced for counter-competitive behavior over the past 10 years), **(v)** economic ability of the breaching party, and **(vi)** collaboration rendered by the breaching party to the FNE before or during the inquiry.

5. **New Powers and Authorities of the FNE**

The New Law confers the FNE the following powers and authorities: **(i)** Filing criminal lawsuits; **(ii)** setting thresholds and being served/notified; **(iii)** performing studies on competitive evolution of the markets; **(iv)** recommending regulatory amendments; and **(v)** ensuring resolution compliance.

6. **Damages Compensation and Actions towards the Protection of General or Widespread Interest**

   The damages compensation action applicable due to the passing by the TDLC of a final judgment may be filed before the TDLC itself. Likewise, it may be filed for pursuant to the procedure set forth in law No. 19,496 that Sets Forth Rules on the Protection of Consumer Rights for class actions before the TDLC, and in the face of breaches to said legal text.

   Damages compensation shall cover all damages caused during the period in which the breach had been in place.

7. **Sanctions for Those Hindering FNE Inquiries**

   Those hindering FNE inquiries shall be subject to imprisonment in case of concealment of information or supply of false information in the context of an inquiry, and to fines in the event the parties under inquiry not to answer or only partially answer the information requests without any justification to such end.

8. **Exclusive Dedication and Incompatibilities of the TDLC Tribunal Members**

   TDLC have exclusive dedication, with the exception of scholarly work, to which they may destine up to 12 weekly hours.

   As for Deputy Justices, their post shall be incompatible with that of advisor or renderer of professional services in matters associated to free competition.

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

www.carey.cl

A sigh of relief: Guangdong Higher People's Court reduces record trademark damages award in its New Balance appeal judgment

August 2016

Hogan Lovells

A sigh of relief: Guangdong Higher People's Court reduces record trademark damages award in its New Balance appeal judgment

On 23 June 2016, the Guangdong Higher People's Court handed down its long-awaited judgment in the New Balance/新百伦-case. In its judgment, the Court upheld the finding of trademark infringement by New Balance, but reduced the damages granted in first instance from RMB 98 million by nearly twenty-fold, to 'only' RMB 5 million (approximately USD 750,000). This judgment comes in the wake of the Castel judgment handed down by the Supreme People's Court, which reduced the damages granted by a lower court in a somewhat similar case of opportunistic trademark filing by a local Chinese entity. The New Balance judgment was long-awaited, because the damages that New Balance was ordered to pay in first instance were seen by many as excessive, and as a further incentive for trademark squatting in China.

Background

Zhou Lelun, a local shoe manufacturer from Guangdong, Southern China, initially sued New Balance for infringement of Zhou's "新百伦" ("Xin Bai Lun") and "百伦" ("Bai Lun") trademarks. Those marks were formerly used by New Balance as its Chinese brand and trade name.

The Guangzhou Intermediate Court found that New Balance's unauthorized use of the 新百伦" mark constituted bad faith trademark infringement, and, consequently, awarded Zhou record damages amounting to RMB 98 million (i.e. half of New Balance's profits obtained while using Zhou's trademarks). For more details on the first instance judgment, please refer to our article "New Balance ordered to pay RMB 98m in damages to alleged hijacker".

Appeal decision

Upon appeal, the Guangdong Higher People's Court upheld the lower court's finding of trademark infringement and maintained its injunction, but reduced the damages to 'only' RMB 5 million. The Higher Court motivated its decision as follows:

- Zhou did not provide any direct evidence of his losses caused by the use of his trademarks by New Balance.
- The court also held that granting half of the profits New Balance obtained while using Zhou's trademarks was wrong, because not all of New Balance's profits could be attributed to the use of the "新百伦" mark. Those profits were also attributable to New Balance's own marks and to the intrinsic quality of its products. Specifically:
  - In its product description and promotional materials, New Balance consistently used the "新百伦" mark in combination with its own "N", "NB" and "New Balance" marks.
  - Given New Balance's size, scope of business and reputation, and given the superior quality of its products, the goodwill in the "N", "NB" and "New Balance" marks carried more weight than the Chinese "新百伦" mark when consumers decided to purchase New Balance products.
- The Court then held that it must grant reasonable damages, at an amount higher than the highest statutory damages (i.e. RMB 500,000, under the former Trademark Law, applicable to this case) because New Balance's own evidence showed that the use

of the "新百伦" mark resulted in a profit of at least RMB 1.45 million.

— On the basis of these elements, the Court fixed damages at RMB 5 million and found:
  — willful infringement of Zhou's trademarks: New Balance continued to extensively use the "新百伦" mark even after losing its opposition procedure against that mark;
  — Zhou suffered losses arising from New Balance's infringement;
  — New Balance infringed Zhou's marks on a large scale: New Balance had large sale volumes and over 800 brick-and-mortar and internet stores in China.
  — New Balance's infringement took place over several years (July 2011 to February 2014); and
  — Zhou's had to make considerable expenses for the enforcement of his rights.

Conclusion

The main point of interest in this case is the guidance from the Higher Court on damages calculation for trademark infringement, which, in China, typically varies widely from case to case and court to court.

In the case at hand, both the first instance and the appeal courts held that New Balance committed willful infringement, and also took into account the scope and actual use of the marks. However, the essence of the appellate court's decision was its finding that not all of New Balance's profits were directly linked to New Balance's unlawful use of the "新百伦" mark. This was one of the most contentious points in the case.

According to the appellate court, the plaintiff bears the full burden of proof regarding the amount of damages. However, by referring to a third party audit report submitted by New Balance itself, the Court seemed to hint that such reports could be acceptable evidence of the extent of profit connected to the use of an infringing mark.

This judgment comes with a sigh of relief for both right owners and the China IP practice, which generally saw the record damages granted in first instance as excessive, especially given the factual background of the case. Similar to the Supreme People's Court's Castel judgment, the Guangdong Higher People's Court seems to be willing to reduce the incentives for and financial gains of trademark squatting or IPR grabbing (as was arguably the case here).

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Regulation for the Allocation of Areas

Wed, 09/14/2016 - 12:02
NewsFlash: 349
[Natural Resources and Environmental Law]

The ANH publishes a new draft Regulation for the Allocation of Areas

Since the end of 2015, the National Hydrocarbons Agency **("ANH")** has been working on a new regulation for the Allocation of Areas, for the purpose of setting the rules for the objective selection of contractors and the allocation of areas. The ANH published a first draft on December 29, 2015 in order to receive comments from the public.

To satisfy the needs of the country and of the industry, and to move forward the procedure to regulate the allocation of areas, on September 6 the ANH published a new draft Regulation for the Allocation of Areas of Exploration and Production of Hydrocarbons **(the "Draft Regulation"**), which is the result of the analysis of the comments made by the public.

The purpose of the Draft Regulation is to establish the criteria for allocation of exploration and production agreements, the different modalities of contractor´s selection process, a new scoring system to evaluate exploratory programs and provisions related to the content of E&P agreements. The final Regulation for the Allocation of Areas will supersede Agreement No. 4 of 2012, regarding the criteria for the administration and allocation of areas.

The document is open for comments until September 18, 2016, through the following email: asignaciondeareas@anh.gov.co. The email with comments must indicate name, company or entity and the relevant contact information.

Please follow the link http://www.anh.gov.co/Asignacion-de-areas/Paginas/Reglamento-de-Asignaci%C3%B3n-de-%C3%81reas-para-la-exploraci%C3%B3n-y-producci%C3%B3n-de-hidrocarburos.aspx
to consult the full text of the Draft Regulation, as well as its Glossary of terms, Units and Equivalences.

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COMPLIANCE: A MARKET DIFFERENTIATOR

After several economic crises – especially, the most recent in 2008 - businesses have had to reinvent themselves to prove to their clients, partners, employees, and stakeholders that their values and ethics have become stronger and that they are completely trustworthy at every level of their operations.

Having a strong and effective compliance program is no longer an option, but a smart and strategic business requirement that leaders must demonstrate to prove that they are offering something over and above profitability. They must offer a "risk management" and stable environment, within which they can still achieve their goals and increase earnings.

Under the compliance umbrella, anticorruption, trade, antitrust, anti-bribery, data privacy, and anti-money laundering are only a few examples of the areas being covered. Additionally, a company needs to execute its internal controls policy to ensure both compliance transparency and employee adherence behavior. Multinational companies that decide to operate in both high-risk and emerging markets often represent a bigger challenge to compliance because of the business environment and how they operate with third parties and their clients.

At Arias & Muñoz we strongly believe that the key factors for companies to achieve a high-risk control environment, embed a compliance culture, and build trust and sustainability are both having an effective compliance policy in place as a market differentiator and being able to lead with integrity while still making sure their business operations continue delivering the growth, market, and financial results that their stakeholders expect.

For more information about our Compliance Services and how we support our clients - from both the legal and business perspective - in creating, implementing and improving their compliance policy programs, please do not hesitate to contact us. We will be happy to assist you.

Adriana L. Fernández Cabrera
International Compliance Consultant
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E-COMMERCE | EU | 4 OCTOBER 2016

SUMMARY OF THE EUROPEAN COMMISSION'S PRELIMINARY REPORT ON THE E-COMMERCE SECTOR INQUIRY

On 15 September, the European Commission published its Preliminary Report on the E-commerce Sector Inquiry. As a reminder, the Commission had decided on 6 May 2015, as part of its Digital Single Market strategy, to launch a sector inquiry to assess and collate elements that could help identify potential barriers to competition in the e-commerce sector. To this end, the Commission sent highly detailed questionnaires to various market players active in the sector and in particular to manufacturers of branded products, resellers (*pure players* or not) and marketplaces.

Well aware that competition conditions may vary from one product category to another, the Commission purposefully sent its questionnaires to market players operating in various product categories in order to integrate this variable in its preliminary report. Product categories concerned are (i) clothing, shoes and fashion accessories, (ii) consumer electronics, (iii) electrical household appliances, (iv) computer games and software, (v) toys and childcare articles, (vi) media, (vii) cosmetics and healthcare products, (viii) sports and outdoor equipment and (ix) house and garden products.

After conducting an in-depth analysis of competition conditions in the e-commerce sector (**I**.) and resulting changes to the organisation of distribution patterns (**II**.), the Commission reviews certain restrictions inherent to these markets, such as physical point of sale criterion, the use of marketplaces, price comparison tools and recommended retail pricing (**III**.).

Simultaneously, the Commission organised a public consultation to enable interested stakeholders or professional organisations to send their comments about the preliminary findings of the sector inquiry presented in the Preliminary Report. The deadline for submitting such contributions is set at 18 November 2016.

I. HOW COMPETITION WORKS IN THE E-COMMERCE SECTOR

The main features of competition in the e-commerce sector

The Commission is reviewing the main elements driving competition between the various actors of the distribution chain. This review shows that, depending on their position in the production and distribution chain, economic players will not make the same efforts to differentiate themselves from their competitors.

The results of the inquiry indicate that, for manufacturers, the most important parameters of competition are: product quality, brand image, the novelty of the product and thus the renewal of ranges and innovation, as well as safety and design.

For distributors, the key element of competition is price, followed by wide product range and the availability of the latest models. For marketplaces, the key elements that drive competitiveness are wide product range, image and reputation of the marketplace, ease of use and price.

The review of the Commission highlights the fact that price is not the only competitive and differentiating factor, for both offer and demand. Indeed, manufacturers consider that their differentiating items are rather the renewal of product ranges, innovation and the quality of their products, and direct their efforts and investments towards these objectives in order to meet the expectations of consumers. It is therefore essential to uphold the capacity of major brands to innovate and improve the quality of their products.

Price transparency

The Commission observes the existence of high price transparency in e-commerce. It is inherent to online commerce and has a significant impact on the behaviour of consumers, who can immediately compare prices online and very easily move from online to offline channels, and vice versa.

Price transparency is emphasised by the IT tools used by distributors. The Commission states that over half of distributors say they monitor their competitors' prices and adapt their own pricing accordingly (up to several times a day for certain types of goods).

As regards dual pricing, only a small minority of cross-channel market players admit to applying different prices for online and offline sales. Some explain this difference by the intensity of competition on online prices. Others explain that dual pricing can be justified by the lower costs of e-commerce (no operation costs of a physical POS, no pre-sales costs).

II. BRANDS' RESPONSE TO THE DEVELOPMENT OF E-COMMERCE

Manufacturers develop their own retail website and open up to pure players

Price transparency, quick price erosion and difficulties for major brands to maintain a consistent brand image online and offline, have together affected manufacturers' distribution strategies. To meet the threat of the development of e-commerce, the Commission observes that big brand names have launched their own retail website and/or have opened up the distribution of their products to pure players.

As regards the development of retail websites by brands, the Commission notes that the phenomenon has led to the vertical integration of distribution by the brands. This is particularly true in the cosmetics and sportswear sectors, where over 80% of manufacturers are present at a different level in the production/distribution chain. This integration, which constitutes one of the strongest reactions to the development of e-commerce, has, according to the Commission, enabled brands to benefit from the development of e-commerce while at the same time increasing their control over the distribution of products, including on quality and price.

As regards pure players, the Commission notices that, although major brands open distribution of their products to retail websites that do not have any physical points of sale, certain pure players face a refusal of access to certain products because of their low price policy.

Additionally, the Commission notes that, despite the development of e-commerce, a number of manufacturers, especially luxury industry players, stress the importance of selling their products in physical points of sale. Luxury industry players consider that the traditional purchase experience in a sales environment that is specific to luxury, with an additional service during the sale, is essential in the positioning of their products and in meeting the expectations of consumers. In this context, some market players of the luxury industry indicate that the launch of retail websites for certain luxury brands and products was disappointing, with consumers preferring the purchase of high-price products in a luxurious and traditional shopping environment.

Lastly, although major brands have adapted to the development of e-commerce and benefit from it, half of those manufacturers who answered the Commission's inquiry consider that marketplaces could have a negative impact on their business.

An increasing use of selective distribution

19% of manufacturers admit to having put in place a selective distribution system to counter the development of e-commerce, while 67% of manufacturers have introduced new selection criteria, in particular via the creation of an "internet addendum". The development of e-commerce may have led to an increasing use of selective distribution and/or to an adaptation of quality criteria to the e-commerce context.

The Commission is conducting an interesting analysis of the various reasons put forward by manufacturers, and observes that the reasons highlighted are not very different from one product category to another. They include: protection of market positioning, preservation of the brand's image, sales environment that reflects the brand's image, preservation of the prestige and perception of the brand's luxury image, delivery of pre-sale and after-sale services and provision of quality and/or professional advice, personalised advice, technical advice from a specialist, etc.

In addition, the Commission is conducting an in-depth analysis of the various selection criteria applied either to both online and offline channels, or to just one of the two channels. For further information, please refer to pages 82 to 86 of the Preliminary Report.

The Commission notes that, although as a general rule the selection criteria applied may vary significantly from one channel to another, the development of e-commerce has led to the implementation of more stringent selective distribution and quality criteria.

Although major brands justify this stringency by the need to ensure a high level of quality in the distribution of their products, the Commission considers that certain selection criteria go beyond what is necessary and is conducting an in-depth analysis of certain restrictions, such as the physical point of sale criterion, the ban from using marketplaces, price comparison tools and the instauration of recommended retail prices.

III. COMPETITION RESTRICTIONS REVIEWED

The physical point of sale criterion

The Commission observes that the physical point of sale requirement is usually driven by the need to ensure proper advice to customers by qualified staff; the possibility to demonstrate the operation and technical specificities of the product; the possibility for customers to visualise the product; the luxury contextual sale environment ; the special shopping experience, with tailored care and attention given by the staff; or the need to provide safety guidelines.

As regards the validity of the physical point of sales criterion, the Commission recalls that such a qualitative criterion indicated in a selective distribution agreement that links a manufacturer and a retailer whose market share does not exceed 30% and that does not contain a hardcore restriction, benefits from the exemption provided for by the exemption regulation no. 330/2010. However, it also recalls that when the characteristics of a product do not require a selective distribution network or the application of certain selection criteria, and if the restriction(s) in question generate anti-competitive effects on the market that are not likely to be counterbalanced by efficiency enhancing effects, the benefit of the Block Exemption Regulation may be withdrawn, in line with article 29 of regulation 1/2003.

In this regard, the Commission finds that selective distribution has increased considerably these last few years for a wide range of product categories. It then considers that the obligation for retailers to operate a physical point of sale, when it is generally covered by the exemption regulation, could require further examination in certain individual cases when, for certain product categories or product lines, pure players could be approved on the basis of equivalent criteria. The Commission concludes that the criterion of a physical point of sale could, in some cases, go beyond what is necessary to maintain a high quality of distribution.

Since the Commission suggests that the physical point of sale criterion may not be justified for some product categories, it may nonetheless be justified for the other product categories.

It thus seems that the Commission will not review its position on the physical point of sale criterion for products that have always been the object of a selective distribution whose justification was recognised by the Commission and EU courts, and for which the investments in pre-sale services, such as personalised advice, the *touch and feel* as well as the sales environment, are essential in maintaining the quality and good use of the product, the brand's image and/or its luxury or premium positioning on the market.

It will be necessary to closely monitor the Commission's position on this precise matter, particularly in the final report that will follow the public consultation recently launched.

The use of marketplaces

48% of manufacturers that answered the Commission's inquiry consider that marketplaces have a negative impact on their business. The Commission states nonetheless that the negative impact of marketplaces on manufacturers' business depends on the characteristics specific to each of these marketplaces. Indeed, in certain cases, the marketplaces respect the identity of the brands and deliver enough information to consumers on the characteristics and qualities of the products, in such a way that these marketplaces could increase online sales of a given product without affecting their brand's image. The Commission does not issue an opinion however on marketplaces that do not respect brand identities.

The Commission then reviews the various justifications put forward by manufacturers to limit or better regulate the use of marketplaces by retailers: (i) the protection of product positioning and brand image, (ii) the protection of products against counterfeits, (iii) ensure a good level of pre-sale and after-sale services, (iv) protect existing distribution networks (free-riding), (v) the dominant position of certain marketplaces and the ambiguous relations they have with consumers. At the same time, the Commission states, relatively succinctly, that certain marketplaces have made, or are making, efforts to adapt to the qualitative criteria of brands.

The Commission observes that, beyond the absolute ban to the use of marketplaces, some qualitative criteria of manufacturers could have the same effect as an absolute ban. This may, for example, be the case if the retailer's website has to appear under a domain name which contains the name of the retailer's business, if the website on which products are sold has to be operated by the retailer, or in case of a prohibition to sell via marketplaces that have their logo visible. In this last example, the Commission refers to the "logo clause" that sparked great debate in Germany and on which the ECJ should render a decision in the context of the Coty case.

Some manufacturers require specific approval for any marketplace via which the retailer intends to sell their products. The Commission considers that the result of such approval requirements may be the same as an explicit prohibition to sell via marketplaces. Retailers may not request such an approval and even if they do request it, a rejection of their request may follow. The Commission’s position seems tough. It is based on the premise that manufacturers would systematically refuse that retailers place their products on marketplaces when the latter make a request thereto, which can evidently not be demonstrated *a priori*.

It is regrettable that the Commission is considering the instauration of incompatibility presumption for the criteria, which would require the retailer to inform its manufacturer and ask it to verify the compatibility of the platform in question with the retailer’s sales standards. Such a presumption would in fact significantly reduce the manufacturer’s ability to monitor the consistency of its network, in particular as regards the marketplaces used by its approved retailers.

The Commission states that the restrictions imposed by certain manufacturers may have the effect of excluding marketplaces as a sales channel. However, the fact of knowing whether a restriction leads to the exclusion of most marketplaces can only be determined on a case-by-case basis. This point has its importance since the Commission refuses to consider that such or such restriction affecting the use of marketplaces could constitute a restriction by object, requiring a concrete analysis as regards the nature of the product, the market structure and the effects of the restriction in question (which would obviously make the work of the competition authorities more complex).

There is currently a debate, in particular in some Member States, as to whether marketplace restrictions that are not linked to qualitative criteria (absolute or per se marketplace bans) amount to hardcore restrictions. A reference for a preliminary ruling is currently pending in this regard before the Court of Justice. The Commission thus seems to take note that this question will be addressed by the Court in the coming months.

The Commission then moves on to an *a posteriori* explanation of its guidelines published in 2010, and indicates that it had not considered at the time that a ban on the use of marketplaces would constitute a hardcore restriction.

The Commission then explains its appreciation to-date of the absolute ban to use marketplaces. Based on the Pierre Fabre judgment, it considers first of all that a ban on the use of marketplaces could constitute a restriction by object of passive sales in that it prevents the use of the Internet as a sales channel.

On this matter, the Commission indicates that the results of the sector inquiry do not show that absolute marketplace bans amount to a *de facto* prohibition to sell online. Marketplace bans can therefore not be treated in the same way as a prohibition to sell online. Indeed, marketplaces do not constitute the main sales channel on the Internet, and half of retailers do not today sell via marketplaces.

The importance of marketplaces as an online sales channel differs from one Member State to another to a significant extent (while in Germany, more than 60 % of retailers reported to be selling via marketplaces, less than a quarter of retailers did so for other Member States such as

Italy, Belgium or Sweden). The importance of marketplaces as a sales channel also varies from one product category to another. Marketplace sales are more important for smaller and medium-sized retailers than for larger retailers, yet for this category of retailers, over half sell only on their own website.

The preliminary findings of the sector inquiry do not indicate that marketplace bans should be considered as hardcore restrictions within the meaning of Article 4 of the Vertical Block Exemption Regulation since they do not restrict the territory or the customers to whom the retailer in question may sell, and do not restrict active or passive sales to end users. The Commission confirms that this approach is in line with the guidelines it issued in 2010.

This does not mean that the Commission considers absolute marketplace bans in all cases compatible with European competition law. The Commission recalls that such bans may fall within the scope of article 101(1) TFEU if market shares of the parties to a distribution contract exceed 30%. The Commission or national competition authorities may also decide to withdraw the benefit of the Vertical Block Exemption Regulation pursuant to Article 29 of Regulation 1/2003. In this context, the Commission indicates that the credibility of brand protection considerations and the need for pre- and post-sale advice will be important elements in the analysis.

The position adopted by the Commission on the ban of marketplaces, which it considers to be in line with its guidelines of 2010, offers new insight since it confirms the lack of qualification of this type of clause as a hardcore restriction. Consequently, where parties to a selective distribution agreement have a market share of less than 30%, any contestation as to the validity of this type of clause would force the Commission or the national competition authorities to withdraw the benefit of the Block Exemption Regulation per category, in line with article 29 of regulation no. 1/2003. The competition authority must then establish that the ban to use marketplaces does not respect the conditions of article 101(3) TFEU. Such an analysis in particular requires the demonstration that the product concerned does not need heightened protection of its brand image and the maintenance of pre-sale and post-sale advice.

Price comparison tools

Price comparison tools allow consumers to find retailers that offer certain products, compare prices and retain the offers they consider most suitable.

According to the preliminary findings of the sector inquiry, the use of price comparison tools is widespread. 36 % of retailers reported that they supplied data feeds regarding their products to price comparison tool providers in 2014.

9% of distributors reported that they have agreements with manufacturers which contain some form of restriction in their ability to use price comparison tools, ranging from a full ban through to the imposition of qualitative criteria.

The findings show that quite a few manufacturers are critical of price comparison tools as they focus only on price, when other elements are of high importance for the attractiveness of a product, such as quality, luxurious image, design, etc.

The issues arising from the use of marketplaces and price comparison tools differ in a number of respects. Unlike marketplaces, price comparison tools redirect potential customers to the website of the authorised distributor, from which the product can be purchased, leading the customer to browse the retailer’s interface that fulfils all the brand’s quality criteria.

While the Commission considers that absolute bans on price comparison tools that are not linked to quality criteria may limit the ability of distributors to use this promotion method for their product and to generate traffic for their own website, it also considers that manufacturers operating selective distribution systems are in principle allowed to require quality standards in the use of these tools by their retailers.

Recommended retail prices

The Commission observes that at least one-third of retailers in each category of the products concerned receive pricing recommendations from the manufacturers. The Commission notes that, according to manufacturers, the communication of a recommended price constitutes the best way of communicating on the quality and positioning of the brand.

Some 30% of manufacturers systematically monitor the prices practiced in retail resale. Other manufacturers track the prices practiced by their retailers in a more targeted way, preferring to monitor certain products or certain key markets. Additionally, 67% of manufacturers use manual price tracking, while 40% use price-tracking software.

The Commission observes that it is now easier to detect deviations from manufacturers' pricing recommendations, which could allow manufacturers to take steps to limit such deviations. It also considers that increased price transparency that is inherent to e-commerce and the tracking of competitor prices by the retailers could reduce the incentive to deviate from the recommended retail price.

The Commission nonetheless indicates, without going into further detail, that some pricing agreements between manufacturers and their retailers may need further investigation on a case-by-case basis.

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COUNSELLORS AT LAW

NEWS DETAIL

03/05/2016

REGISTRATION PROCEDURE OF IP LICENSING AGREEMENT

The Ministry of Law and Human Rights of the Republic of Indonesia (“**MOLHR**”) has issued a new regulation which requires that all IP licensing agreements be registered for recordation at the ministry. The regulation is MOLHR Regulation No. 8 of 2016 regarding Rules and Procedures for the Recordation of Intellectual Property License Agreements (“**Regulation No. 8 / 2016**”).

Regulation No. 8 / 2016 applies to all of the intellectual property rights, namely, copyright and related rights, patents, marks, industrial design, integrated-circuit layout design, and trade secrets. For the recordation an application must be submitted by the licensor or the licensee or their representative. The application may be submitted either electronically or non-electronically. Below are the basic rules and procedures.

<table>
<tr><td>Electronically</td><td></td><td>Non-Electronically</td></tr>
<tr><td colspan="3"></td></tr>
<tr><td>The application is to be submitted through the official website of the Directorate General of Intellectual Property’s (“DGIP”). The below documents must be uploaded along with the application:</td><td></td><td>The application is to be manually submitted to the Ministry. The below documents must accompany the application:</td></tr>
<tr><td colspan="3"></td></tr>
<tr><td colspan="3">◦ A copy of the License Agreement or another evidence thereof;
◦ A copy of the certificate of the respective patent, mark, industrial design, integrated circuit layout design or ownership evidence of the respective copyright, related right, or trade secret which is still valid;
◦ Original specific power of attorney, if the application is made through a proxy; and
◦ Original receipt of the payment of the application fee.</td></tr>
<tr><td colspan="3"></td></tr>
<tr><td>In addition to the above, the applicant must complete and submit the electronically available Declaration Form which states that the intellectual property right referred in the respective license agreement:</td><td></td><td>In addidtion to the above, the applicant must complete and submit the Declaration Form provided as an attachment to Regulation No. 8 / 2016 which states that the intellectual property right referred in the respective license agreement:</td></tr>
<tr><td colspan="3"></td></tr>
<tr><td colspan="3">◦ is still validly protected;
◦ does not prejudice national economic interests;
◦ does not inhibit the development of technology;
◦ is not contrary to the provisions of the prevailing laws, morality and public order;</td></tr>
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Foreign applicants must be represented by an IP consultant who is domiciled in Indonesia.

Under Regulation No. 8 / 2016, the processing of an application should not take more than 10 days as of the acceptance of the application. Incomplete applications will be returned to the applicants and the applicants will have no more than 10 days as of the date of the notification to complete the application. Failure in submitting the application within the prescribed time frame will result in that the application will be deemed as withdrawn. Successful recordation applications will be announced in the official website of the DGIP. The recordation is valid for 5 years, at the end of which the applicant may re-apply for the continued recordation.

This regulation has been in force since 24 February 2016. All recordation applications which were submitted before this issue of this Regulation No. 8 / 2016 will be processed on the basis of the provisions of Regulation No. 8 / 2016. (*by: Evelyn Irmea Sinisuka*)

NautaDutilh

Corporate

Luxembourg

Modernisation of Luxembourg Company Law: Minority Shareholders' Rights

Tuesday 27 September 2016

The recently adopted Luxembourg Act of 10 August 2016, modernising Luxembourg company law, reinforces the rights of minority shareholders. The four major changes in this respect relate to the rights of such shareholders to (i) bring an action against the company's management (action sociale), (ii) request the adjournment of a shareholders' meeting, (iii) request an independent investigation, and (iv) consent to a transfer of shares in an S.à r.l. (société à responsabilité limitée).

The following provisions have been inserted into or amended by the new act to enhance the rights of minority shareholders, i.e. shareholders that do not exercise control over a company:

(i) New Article 63bis - liability action against management

New Article 63bis allows minority shareholders to sue the company's directors and members of its management and supervisory boards. Such an action may be brought by one or more shareholders and/or the holders of founders' shares (*parts bénéficiaires*) representing 10% or more of the company's voting rights. Previously, such an action could be initiated only by a simple majority of shareholders.

The purpose of this provision appears to be to encourage directors to be more diligent in the performance of their duties, thereby avoiding negligence and mismanagement. It should be noted that this type of action can be brought only by shareholders of an S.A. or S.C.A., not an S.à r.l.

(ii) Amended Article 67(5) - request to adjourn a general meeting of shareholders

Former Article 67(5) allowed the shareholders of an S.A. representing 20% or more of its share capital to request the adjournment of a general meeting. This threshold has now been lowered to 10%. Here again, the legislature wished to strengthen the rights of minority shareholders. This amendment is consistent with Article 70, which provides that a general meeting must be held at the request of shareholders representing at least one-tenth of the company's capital. This article is not applicable to shareholders of an S.à.r.l.

(iii) Amended Article 154 - general right to submit questions to management and request an independent investigation

Minority shareholders representing at least 10% of the share capital and/or voting rights can ask the board of directors or management body questions about the management and operations of the company or one of its affiliates. Previously, this right could be exercised only in the event of "extraordinary circumstances".

If the company's board or management body fails to answer these questions within one month, the shareholder(s) may petition, as in summary proceedings, the president of the district court responsible for commercial matters (*président du tribunal d'arrondissement siégeant en matière commerciale et comme en matière de référé*) to appoint one or more independent experts to draw up a report on the issues to which the questions relate.

(iv) Amended Article 189 - consent to a transfer of shares in an S.à r.l.

To date, a minority shareholder that wished to transfer its shares in an S.à r.l. to a third party needed to obtain the consent of shareholders representing at least three-quarters of the company’s capital, given at a general meeting. Article 189 has now been amended to introduce more flexible rules in this regard. The threshold can now be lowered in the company's articles of association to half the share capital, and a decision can be taken in writing (in lieu of a general meeting) if the company has fewer than 60 shareholders.

Under the new rules, if the transfer request is not approved, the non-transferring shareholders have the right to acquire the shares or have them acquired from the transferring shareholder, if the latter still wishes to proceed with the transfer. The company may also decide, with the consent of the transferring shareholder, to reduce its share capital and redeem the shares. If the shares are not acquired or redeemed within the period provided for by amended Article 189, the transferring shareholder shall be entitled to proceed with the initially proposed transfer. This new mechanism is designed to avoid a (minority) shareholder being locked up in the absence of specific transfer provisions in the company's articles or a separate shareholders' agreement.

This newsflash forms part of a series which aims to provide insight into certain changes introduced by the Act of 10 August 2016. For further information and a general overview of the amendments please refer to our earlier newsflash "Modernisation of Luxembourg Company Law - What's new?".

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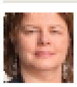
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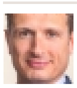
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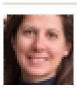
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A REVIEW OF THE COMPANIES ACT 2016 – PART 2*

Hui Jin discusses the "No AGM Regime" and requirements for member's written resolutions

The Companies Act 2016 ("Act") became law on 16 September 2016 and will come into operation on a date to be determined by the Minister. In this article, we continue our review of the Act by examining the requirements pertaining to the dispensation of annual general meetings and to member's written resolutions.

THE NO AGM REGIME

Applicability of the No AGM Regime

The present act, i.e. the Companies Act 1965 ("CA65") requires every company to hold an annual general meeting ("AGM") once in every calendar year and not later than 15 months after the date of the preceding AGM.

The Act introduces a new regime whereby it will no longer be mandatory for a private company to hold AGMs. The rationale stems from the notion that AGMs are unnecessarily burdensome and serve little purpose as members of a private company are usually involved in the management of the company and thus, already have access to its corporate information.

The "No AGM Regime" does not apply to a public company which is required under Section 340 of the Act to hold an AGM in every calendar year within six months of its financial year end and not later than 15 months after the last preceding AGM.

Consequential changes from the No AGM Regime

The Act introduces new provisions to facilitate the "No AGM Regime" by addressing matters which are usually dealt with at an AGM. First, a private company will be required to circulate its financial statements and reports to its members within six months of its financial year end (Sections 257 and 258).

Secondly, Sections 267(4)(a) and 267(6) of the Act require the members to appoint an auditor for a private company by way of an ordinary resolution 30 days before the end of the period for submission of the previous year's financial statements to the Registrar, or if such financial statements were lodged earlier than the foregoing submission deadline, then the appointment must be made before the financial statements are lodged.

* The first part of our review of the new Companies Act 2016 of Malaysia was published in June 2016 issue of the Pacific Rim Advisory Council e-Bulletin.

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Thirdly, in respect of the retirement of directors of a private company, which is an ordinary business to be transacted at an AGM under the CA65, the Act provides that the retirement of a director of a private company may be determined by the passing of a written resolution (Section 205(2)).

Section 132 of the Act authorises the directors to make such distribution as they consider appropriate to the members of a company. Hence, the Act dispenses with the requirement for members to approve the payment of a final dividend at an AGM.

Section 165(4) of the CA65 requires an annual return to be lodged with the Registrar within one month after the company's AGM. Under Section 68(1) of the Act, an annual return will have to be lodged by a company within 30 days from each anniversary of its incorporation date. The Act dispenses with the aforesaid requirement for the calendar year in which a company is incorporated.

MEMBER'S WRITTEN RESOLUTIONS

Section 152A of the CA65 sets out the requirements for a member's written resolution. This provision applies to both a private company and a public company. It also requires such resolution to be passed by unanimous approval of the members.

Applicability of the Member's Written Resolution Regime

The Act draws a distinction between the manner in which a private company and a public company may pass a member's resolution. Section 290(1) provides that a private company may pass a member's resolution either at a meeting or by a written resolution. On the other hand, Section 290(2) provides that a public company may only pass a member's resolution at a meeting of its members. In other words, the provisions relating to a member's written resolution in Sections 297 to 308 of the Act apply only to private companies.

Notwithstanding the above, a public company which has only one member may resort to Section 344 of the Act to formalise decisions in respect of matters that require the approval of its members in general meeting.

Approval thresholds

The requirement for unanimity under Section 152A of CA65 for a member's written resolution of a private company will be abolished when the Act comes into force. A member's written resolution in respect of an ordinary resolution is to be passed by a simple majority of members, and in respect of a special resolution, by not less than 75% majority (Section 306(4) read with Sections 291 and 292).

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Initiation of member's written resolution

A member's written resolution may be proposed by the board of directors or a member (Section 297(1)). The Act expressly prohibits two matters from being decided by a written resolution, namely, the removal of a director or an auditor before the expiration of their respective terms of office (Section 297(2)). Thus, a physical meeting has to be convened to consider such resolutions.

Circulation of written resolution

To prevent the reduced approval threshold for written resolutions from being abused, the Act requires a proposed written resolution to be circulated to every eligible member (i.e. those entitled to vote on the resolution on the circulation date of the written resolution) (Section 298).

The circulation date of a written resolution will be either the date on which copies of the written resolution are circulated to the eligible members or if such copies are circulated on different days, the first of those days (Section 299). The written resolutions may be circulated in hard copy or electronic form (Section 300(1)).

The Act also requires a copy of the written resolution to be circulated together with a statement that sets out the procedure for signifying agreement or otherwise to the resolution and the date by which the resolution shall lapse if it is not passed (Sections 301(2) and 303(4)).

Other matters concerning a member's written resolution

A member who holds 5% (or such lower percentage as is specified in the constitution) of the total voting rights of all eligible members may require the company to circulate a proposed resolution as a member's written resolution (Section 302(1)). The request shall be made in hard copy or electronic form, state the resolution and any accompanying statement, and be signed by the member making the request (Section 302(5)).

The Act sets out four situations where a resolution may not properly be moved as a written resolution (Section 302(2)), namely where the resolution -

(a) if passed, would be ineffective whether by reason of inconsistency with any written law or the constitution;
(b) is defamatory of any person;
(c) is frivolous or vexatious; or
(d) if passed, would not be in the best interest of the company.

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The Act also addresses the payment of the expenses incurred by the company for circulating a written resolution proposed by its members. Section 304 of the Act provides that such expenses are to be borne by the members who made the request and that the Company is not required to circulate the resolution unless a sufficient sum to cover the expenses has been deposited with the company.

The company need not circulate a member's written resolution if the court, upon an application by the company or an aggrieved person, is satisfied that the rights under Section 302 are being abused by the member (Section 305(1)). The court may further order the member who requested the circulation of the written resolution to pay the company's costs of such application even if that member is not a party to the application (Section 305(2)).

Procedure signifying agreement

The procedure for signifying agreement to a proposed member's written resolution is set out in Section 306 of the Act which stipulates that a member signifies his agreement when the company receives an authenticated document from the said member which identifies the relevant resolution and indicates his agreement to the resolution (Section 306(1)).

The document may be sent to the company in hard copy or electronic form (Section 306(2)). A member's agreement to the written resolution, once signified, is irrevocable (Section 306(3)). A written resolution will be passed when the requisite majority of members have signified their agreement to it (Section 306(4)).

Section 307(1) states that if a proposed written resolution is not passed within the period of 28 days commencing from the circulation date, it will lapse (unless otherwise provided in the constitution). Further, any agreement of a member obtained after the expiry of the 28-day period will not be effective.

Section 293(1)(a)(i) of the Act provides that in relation to a member's written resolution, every member is to have one vote for every share or stock held by him. As the Act does not contain provisions that address a situation where a company's constitution confers different voting rights on the holders of different classes of shares, it appears that Section 293(1)(a)(i) would override such provisions of the constitution when the company seeks recourse to a member's written resolution.

CONCLUSION

The "No AGM Regime" and the new requirements relating to member's written resolutions under the Act will undoubtedly promote a more efficient framework for the administration of private companies in Malaysia.

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20 September 2016

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SANTAMARINA STETA
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LEGAL UPDATE

August, 2016

Special Economic Zones

On June 1st, 2016, it was published on the Mexican Federal Official Gazette, the decree by which the Special Economic Zones Federal Law was issued (the "Law").

On the other hand, on June 30th, 2016, it was published in the Mexican Federal Official Gazette the regulation of the Law. This new regulation is an innovative and cutting-edge legal instrument that complements and establishes the institutional and legal design of the Law.

In addition, that same day, it, was published in the mentioned Gazette, the decree by which the Federal Authority for the Development of the Special Economic Zones was created.

Background

On September 29th 2015, the President of the Mexican United States, in exercise of his constitutional faculties, sent to the House of Representatives, the Legislative Initiative of the Law. Such initiative aims to set the standards for the planning, establishment and further operation of the Special Economic Zones (the "Zones"), as instruments to contribute and enhance growth and sustainable and balanced economic development of the regions of the country with greater social backwardness and high underdevelopment rates, through the promotion of productive and social investments.

Likewise, on December 14th, 2015, the House of Representatives approved the Legislative Initiative of the Law submitted by the President of the Mexican United States and proceeded to submit the Minute of the Decree of Issuance of the Law to the Senate.

In ordinary session on April 14th, 2016, the Senate approved with amendments the above mentioned Minute, and submitted it to the House of Representatives for the corresponding constitutional approval.

On April 19th, 2016, the Board of the House of Representatives turned over the Minute containing the Decree of Issuance of the Law to its Economic Commission for the corresponding review.

What are the Special Economic Zones?

The Zones are specific geographical areas located within the national borders of the Mexican United States where business rules are different and apply in a special way. Such rules are designed to regulate a free market economy rather than the traditional business rules that prevail in national territory. The Zones are to be used as a tool to boost trade, investment and a differentiated industrial policy, which aims to overcome investment barriers to a wider economy, including security policies, lower governance indexes, inadequate infrastructure and property access problems.

In this regard, the issue of the Law is intended to establish the regulation, planning, establishment and further operation of the Zones, within the framework of the planning of the national development, as an instrument to eradicate inequality and allow to close the everyday growing gaps regarding regional development through an economic, sustainable and balanced economic growth of the regions of the country that present the largest social backwardness levels.

The development of the Zones will be carried out through the promotion and procurement of certain policies, such as investment, productivity, competitiveness, employment and a better income distribution among the population.

In addition, the creation and operation of the Zones by the Federal Government will help position Mexico as a world leader in international trade, while simultaneously developing an innovative process of economic integration with Asia-Pacific markets. This integration, from the commercial and industrial processes point of view, will allow to build an institutional framework based on the legal standards of the North American free trade Agreement, to develop regional competitiveness in order to face new global challenges.

The Zones will be operated following a Master development program with the main objective of establishing the necessary public policies and actions to provide a comprehensive and long-term approach for the establishment and proper way to operate such Zones.

Certain relevant and key aspects of the Law are:

A. Private Sector

The construction, development, management and maintenance of the Zones are expected to be carried out by the private sector when in relation to private real state property, or by the public sector when in relation to Public Federal real state property. Likewise, domestic and foreign companies that meet the necessary requirements and standard issued by the competent authorities are expected to carry out productive economic activities within the Zones.

B. Coordination and Participation of the different levels of Government

The Law addresses the need to celebrate, subscribe and execute certain coordination agreements into by and between the President of the Mexican United States and the heads of the State and Municipal executive power, where the Zones will be located. These agreements will regulate the obligation of the Federal, as well as of the corresponding State and Municipal Governments, to maintain a permanent coordination with each other, in order to perform in a coordinated and efficient way, all actions, procedures and efforts necessary to achieve an optimal development and operation of the Zones.

C. Incentives Tax and Customs Regime

The President of the Mexican United States shall establish and provide certain tax benefits considered to be necessary to promote and enhance the establishment and development of the

Zones. These benefits will aim to encourage the generation of permanent jobs and productive investments that foster the economic development of the Zones, as well as the creation of infrastructure, formation of human capital, training and education of the workers.

In addition, the President of the United States shall create and design a specific customs regime for the Zones. Such regime will be at all times subject to the provisions stated in the Customs Law, and will regulate the import and export of foreign, domestic or nationalized goods, and will also establish facilities, requirements and controls for the import and export of goods, as well as for the activities carried out within the Zones. The aforementioned, in order to promote the development and operation of the Zones.

D. <u>One Stop Shop</u>

Each Zone will have a One Stop Shop, in order to simplify and streamline all formalities and procedures necessary to build, develop, operate and manage the Zones, carry out productive economic activities, or install and operate businesses in the Influence Area of the Zones.

All parties and agents involved in the development and operation of the Zones will have the advantage of a One Stop Shop through which they will be able to submit all procedures and formalities regarding and in connection with the Zones, such One Stop Shop will be responsible to remit and refer all submissions to the competent authorities for their corresponding resolution, thus facilitating the relationship between the involved parties and the competent authorities.

E. <u>Social and Environmental Impact</u>

In order to protect, preserve and respect the human rights of the vulnerable social groups, as well as of the communities situated within the Zones and their Influence Areas. All principles of sustainability, progressiveness and respect for human rights will be taken into account for the development, implementation and installation of the Zones.

In this regard, the Law mandates the realization of a strategic evaluation regarding the environmental and social impact and status regarding the Zones and their Influence Areas. The results and findings of such evaluation will be taken into account and considered for the development plans of the Zones.

Likewise, the realization of a prior, free and informed consultation is considered in the Law in order to consider and respect the rights of the communities and of the indigenous people groups, as well as their interests in the Zones and their Influence Areas, as well as other additional activities necessary for protection of their rights and interests.

F. <u>Federal Authority for the Development of the Special Economic Zones</u>

The Secretary of Finance and Public Credit will be the Authority of the federal government responsible of regulating and ensuring the proper development and implementation of the Zones. Accordingly, the creation of an administrative body of the Secretary of Finance and Public Credit called Federal Authority for the Development of the Special Economic Zones was conducted. Such administrative body will have the necessary authority and sufficient powers to carry out all tasks and functions regarding the regulation of the Zones.

In this respect, on June 30th, 2016, it was published in the Mexican Federal Official Gazette, the decree by virtue of which the Federal Authority for the Development of the Special Economic Zones was created.

In case you require additional information, please contact the partner responsible of your account or any of the following attorneys:

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The statutory framework of New Zealand's local government sector:

is the key legislation working properly?

July 2016

Simpson Grierson

About Simpson Grierson

Simpson Grierson is New Zealand's leading local government law firm. Our expertise ranges from the day-to-day operation of councils in their statutory and political environments, to the highest level strategic developments affecting local government as a whole.

We advise many of the local authorities in New Zealand, including major city and regional councils based in Auckland, Wellington, and Christchurch. We have extensive and long-standing networks with key policy and decision makers throughout local government.

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Introduction and overview

This paper, commissioned by Local Government New Zealand (LGNZ), takes a high-level look at the interrelationships between the Local Government Act 2002 (LGA), the Resource Management Act 1991 (RMA) and the Land Transport Management Act 2003 (LTMA). It comments on the coherence of the statutory framework for local government and on how this statutory framework is holding up in the face of current challenges.

In exploring our brief there were a number of factors which create an important context for developing this paper. The challenges facing New Zealand, and in particular local government, are significant.

A recent Blue Skies discussion document about New Zealand's resource management system by MartinJenkins, also commissioned by LGNZ, notes a number of issues including rising income inequality, declining water quality where land is used intensively, localised strong population growth, extreme rates of biodiversity loss and steadily rising carbon emissions.[1]

That report, together with others, refers to the importance of the interface between the three acts:[2]

"Although the RMA is at the heart of the [resource management] system, the Local Government Act (LGA) and the Land Transport Management Act (LTMA) have a significant bearing on the location, nature and timing of infrastructure development. Decisions under these three Acts affect the nature of both urban and rural development patterns and influence, or sometimes even determine, the extent of property rights and actions of individual landowners."

In particular, the RMA has come under intensive scrutiny regarding its perceived contribution to the housing crisis, but also more generally in relation to its perceived constraint on economic growth. A recent report from the New Zealand Productivity Commission entitled *Using land for Housing* stated that the "planning system is not adequately responsive to changes in demand [for land]".[3] According to the Commission, *"the process requirements in the planning system and the lack of integration between land use, infrastructure and transport planning can make it difficult for local authorities to act promptly and consistently"*.

The latest proposed amendments to the resource management system in the Resource Legislation Amendment Bill (currently before Select Committee) continue this theme. The stated objectives of the Bill include "better alignment and integration across the resource management system".

The spotlight is currently on the need to align the strategic decision-making as it relates to urban areas, making the interrelationship between the LGA, RMA and LTMA particularly important. The need for lined up decision-making goes beyond urban planning and is relevant for addressing many issues facing New Zealand – the relationships between urban growth and energy use, urban growth and water quality, water quality and rural productivity, mining activities and conservation areas.

Our brief from LGNZ did not require us to take a strictly legal approach to the issues, but to incorporate our experience in advising many local authorities over a number of years.

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[1] A 'blue skies' discussion about New Zealand's resource management system: A discussion document prepared for LGNZ by MartinJenkins, (Local Government New Zealand, December 2015)

[2] Page 4

[3] Using Land for Housing (Productivity Commission Report, September 2015)

A summary of our key findings

1. NOT BROKEN, JUST WORSE FOR WEAR

Our major finding is that overall the statutory framework for local government in New Zealand as provided for in the LGA, RMA and LTMA is not broken, but simply worse for wear. For so long as the purpose of local government includes enabling democratic local decision-making and action by, and on behalf of, communities, the consultation and engagement focus in the LGA remains appropriate. Establishing local mandates for infrastructure and its funding takes time.

2. THE THREE STATUTES WERE ORIGINALLY WELL-ALIGNED

Each of the Acts (especially the LGA and RMA) was the product of a comprehensive policy debate producing robust, coherent legislation. This is shown by the high degree of initial alignment amongst the purpose provisions of the three Acts. While each Act has different purposes (reflecting the fact they are designed to do different things) by 2002 when the LGA was enacted there was a strong commonality of purpose. All three Acts referred to sustainability, and both the LGA and RMA were concerned with the social, economic, cultural and environmental well-being of communities. In consequence, the underlying context of decision-making was aligned.

3. AMENDMENTS HAVE ERODED THE ALIGNMENT

Over the past decade or so, there has been a noticeable trend showing a reduction in the alignment of the three Acts. Multiple recent legislative changes, particularly to the LGA and RMA, have undermined the coherence and commonality of purpose of the three Acts. The changes to the purpose provisions in the LGA were a clear signal that the Government wanted local authorities to focus on efficiency and cost-effectiveness over other considerations. Equivalent changes were not made to the purpose provisions of the RMA, which retains its focus on sustainable management whilst balancing the four well-beings.

4. FOCUS ON ECONOMIC EFFICIENCY AT THE EXPENSE OF LOCAL DEMOCRACY

We have identified a trend in recent legislative amendments away from local democracy and toward economic efficiency. Recent changes to the LGA and RMA have had the effect of limiting local decision-making and public participation and had an emphasis on "efficient" outcomes rather than quality ones with wider or longer term benefits. While this is a Government's prerogative, it is producing an incremental reform to the concept of local democracy by stealth (and the Local Government Act 2002 Amendment Bill (No 2) appears to be another instance of this).[4]

5. RECENT LEGISLATIVE CHANGE HAS BEEN SOMEWHAT HASTY

Recent amendments to the legislative framework have been reactive. They have focussed on specific issues, some of those being real (for example, housing affordability crises in certain urban areas) and others more perceived (for example, unconstrained scope of local authority activity), with the aim being to achieve quick solutions. There has generally been a dearth of consultation and informed policy analysis to support the changes (again the Local Government Act 2002 Amendment Bill (No 2) is a case in point).

There are also instances of mixed messages making the legislation less rather than more effective and efficient.

What has been lacking is a measured, consultative process, taking an integrated approach to the wider situation. Genuine engagement with the stakeholders with actual knowledge of the issues and processes (including local government itself) would also aid the development of effective legislative solutions.

6. LESS HASTE, MORE COHERENCE

We suggest better outcomes would be achieved by taking more time to develop coherent, sustainable enhancements to the existing legislation. As a starting point, perhaps the core Acts could be administered by a single well-resourced agency instead of the three disparate agencies as at present: the Department of Internal Affairs, the Ministry for the Environment and the Ministry of Transport. Such an agency would need a strong mandate to engage properly with local government, and the community at large.

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[4] Please refer to our paper Commentary on the Local Government Act 2002 Amendment Bill (No 2) for some further commentary on this Bill.

1. Not broken, just worse for wear

We acknowledge there to be significant and urgent issues facing local government in New Zealand, along with increasing pressure on the statutory framework for local government. However, in our view the system and framework is not broken and a complete overhaul would be unwise and unjustified.

It makes sense that the framework be based on three separate statutes, with different spheres of operation.

No one would seriously suggest that the pursuit of national productivity should override the need for local, place-based democracy.

The establishment and constitution of local government itself is contained in the LGA. Through the sophisticated accountabilities of the LGA, communities have a say in what will meet their own current and future needs and well-being, and how that will be funded. Ultimately, this is what the LGA was intended to provide for when it was enacted, and fundamentally it still does.

Transport networks, far more than infrastructure, integrate more than one local area (and, in respect of the State highway system, the whole of the country).

It is therefore appropriate for the planning and management of those transport networks to be focussed nationally and regionally. The LTMA achieves this with local authorities participating through regional land transport committees.

Once democratic local government is provided for at a local level, and land transport is planned and managed at a regional (and national) level, there still needs to be a set of rules governing the use of natural and physical resources and the planning of urban and rural spaces. It is through the RMA that the mechanism exists to balance different private and public rights in respect of the use of resources. Local authorities participate in RMA processes both as a regulator and as a participant in its processes (for example, an applicant for a consent).

Fundamentally, the system is not only functional, but represents a logical and coherent approach to what are essential questions around enabling and providing for democratic local decision-making, managing and providing for communities' needs and well-being, and allocating scarce resources while protecting the environment.

The system is undoubtedly worse for wear – not least due to the combination of current issues putting pressure on the system alongside continuous legislative interventions that, in our view, have complicated rather than simplified the issues.

2. The three statutes were originally well-aligned

At the point at which the LGA was enacted we believe that there was a reasonably high degree of alignment in the purposes of all three Acts. Fundamentally we also believe that the original Acts were sound, coherent law.

The process that was followed for the development and enactment of the LGA covered a period of over two years. In late 2000, the Government released a statement of policy direction in respect of local government. The statement took the position that the Local Government Act 1974 imposed costs on local authorities and required constant amendment to meet changing circumstances. The Government intended to replace the 1974 Act with legislation that clearly established the position of local government in New Zealand's democratic system of government and set out local government's powers, roles and responsibilities.

During 2001, a consultation document was released and submissions received. The Local Government Bill was introduced to Parliament in December 2001, and reported back from the Local Government and Environment Select Committee in December 2002 (which recommended significant amendments to the Bill). It received Royal assent in December 2002 and generally came into effect from 1 July 2003.

At the time of its enactment, the LGA represented a fundamental reform. It picked up decades of developments and changes in local government legislation and took it forward with a rationalised, purpose- and principles-based, regime. Fundamental to this regime was engagement with local communities through well-prescribed accountability and decision-making provisions.

The same can be said of the RMA. In 1988, the Government began a review of a number of statutes dealing with town and country planning, water rights and regulation, air pollution, mining licences, noise control and geothermal energy. At the same time, the Ministry for the Environment prepared a report on the implications for New Zealand of the United Nations World Commission on Environment and Development Report called *Our Common Future*.[5] The report provided various policy recommendations, including to ensure the sustainable use of renewable resources such as fisheries, forestry, soil and water.

[5] This Report is commonly known as the Brundtland Report (named after Gro Harlem Brundtland, ex-Prime Minister of Norway and the Chairperson of the Commission).

There was significant and extensive public consultation with public bodies, interest groups and individuals across New Zealand, and a number of working papers were prepared, before the Government issued a report in December 1988 on its proposals for resource management law reform. The essence of the proposals was that a single statute would replace the various separate rules and processes across several existing Acts.

The intention was that the new Resource Management Act would resolve the problems with the old regime in that it would provide a coherent and consistent framework for managing natural and physical resources in a sustainable way. It was the culmination of a three year process.

When it was enacted in 2003, the LTMA reflected a shift in purpose away from a previous perceived focus on roads (under the Transit New Zealand Act 1989) to the broader land transport system as a whole. It was the product of a process of refinement and improvement which had begun in 1989.

Schedule 3 to this paper addresses the history of the legislation in more detail.

Each of the Acts has a unique purpose reflecting the fact each is designed to do different things:

- The LGA provides for the constitution and empowerment of multi-functional local authorities and their democratic accountabilities
- The RMA addresses the management of natural and physical resources
- The LTMA provides the framework for the delivery of transport networks

At one level the LGA takes precedence as it provides the framework for democratic local government. Local authorities have responsibilities to deliver a wide range of infrastructure including transport networks and to provide regulatory functions including under the RMA.

However, the RMA is the over-arching general legislation regulating any form of development. It therefore regulates local authorities exercising their responsibilities to deliver infrastructure and services, and the Crown and local authorities exercising responsibilities to provide transport infrastructure and networks under the LTMA.

The coherence amongst the three statutes is shown by the alignment of their purpose provisions (these are provided in full in Schedule 1 to this paper). In 2003, the purpose of each of the LGA, RMA and LTMA was relatively well-aligned with each of the others. The purposes all included reference to "sustainability" in one form or another. The LGA referred to providing for local authorities to play a broad role in promoting the well-being of their communities "taking a sustainable development approach". In 2003, the purpose of the Land Transport Management Act 2003 referred to a "sustainable" land transport system. The RMA refers to promoting the "sustainable management" of natural resources.

In addition, both the LGA and the RMA were about promoting (or balancing) social, economic, cultural and environmental well-being. The LTMA was about integrated, safe and responsive transport systems.

Over the past decade or so, this level of coherence has been eroded.

3. Amendments have eroded the alignment

The purpose provisions of the Acts have changed over the past decade or so, dramatically in the case of the LGA and LTMA.

The Local Government Act 2002 Amendment Act 2012 changed one arm of the purpose of local government from:

"promoting the social, economic, environmental and cultural well-being of communities"

to:

"meeting needs to communities for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses".

This change from what were known as the "four well-beings" to a focus on cost-effectiveness is clearly a change directed to the promotion of efficiency over well-being.

The other arm of the purpose, enabling democratic local decision-making by, and on behalf of, communities has remained unchanged.

The LTMA's purpose has changed from:

"achieving an integrated, safe, responsive, and sustainable land transport system" ("affordable" was included in 2008 amendments).

to:

"achieving an effective, efficient, and safe land transport system in the public interest".

While the inclusion of "the public interest" reveals a certain parallel with the original purpose of local government in the LGA (being the four community "well-beings"), the 2013 amendments have some resonance with the amended purpose of local government in the LGA. The focus is on effectiveness and efficiency rather than on the land transport system being "integrated" and "sustainable".

The purpose provisions of the RMA have been relatively static over the period since its original enactment in 1991. The principal purpose of the RMA in section 5 has not changed from promoting the sustainable management of natural and physical resources. The four community well-beings continue to have statutory recognition in the RMA.

There have been some changes to sections 6 of the RMA (being the matters of national importance to be recognised and provided for by decision-makers) and section 7 (being other matters persons exercising functions and powers under the RMA are to have particular regard to). The changes have effectively been the insertion or removal of matters, rather than any fundamental shift in the relative weightings of matters.

Schedule 2 to this report sets out in detail the amendments made to each of the three Acts over their history.

4. Focus on economic efficiency at the expense of local democracy

A theme running through the three key Acts has been the Government's concern with local government getting the "right" answer as an outcome of its processes. In the recent past and at present, the primary focus of the Government's approach to the overall framework and its statutory amendments has been economic outcomes over allowing for effective local democracy.

Although a purpose of local government remains to "enable democratic local decision-making and action by and behalf of communities", changes to the LGA since 2010 have had the effect of limiting local democracy.

This can be seen in the following:

- The change to the purpose of local government creates an objective test for what it is lawful for a local authority to be involved in. The test of "meeting communities' needs cost-effectively" replaces the community-defined test of "promoting community well-being". This change hampers a local authority's ability to balance competing interests and values (a central aspect of democratic representation) by casting debate in an economic cost-benefit light, limiting activity to options that are most "cost-effective".
- Allowing for Ministerial benchmarks to control outcomes is another way that communities lose the ability to define and put into effect their own values (which may or may not put economic values first).
- The opportunities for direct Ministerial intervention have been increased significantly.

As originally conceived, the primary accountability of local government provided for in the LGA was to communities though the very extensive transparency regime of the Act.[6] This accountability regime included and includes:

- general requirements that apply to all decision-making found in Part 6 of the Act;
- explicit obligations to identify and assess different options when making any decision and to consider community views and preferences (found in sections 77 and 78);
- consultation based on several principles (section 82);
- mandatory consultation requirements in certain instances (for example, in relation to strategic assets);
- a three-yearly cycle of audited 10-year plans with extensive prescribed content (**LTPs**); and
- annual planning and reporting cycles.

Since 2010, a series of amendments have been directed to making consultation and engagement with communities more effective (to encourage participation) by providing more targeted documents on which to engage with communities. Those documents include, for example, a financial strategy, an infrastructure strategy with a 30 year focus, a pre-election report and simplified consultation documents for the LTP and annual plan.

Unfortunately, these attempts to improve engagement have been highly detailed, and there has been an increase in prescription as to content and process.

The increased prescription in the content and style of consultation material has been slightly off-set by a "streamlining" of engagement by:

- repealing sections 88, 97(1)(c) and (d) which related to specific consultation obligations;
- simplifying sections 77 and 78 relating to decision-making engagement generally;
- reducing the use of the special consultative procedure in favour of consultation principles; and
- removing the need to consult on an annual plan where there are no material differences from the long-term plan.

The jury remains out on whether community engagement has been improved. The changes have generally made compliance more complicated and

[6] Contrast this with the old local government regime with "hard" financial accountability mechanisms through, for example, borrowing restrictions.

uncertain especially around critical areas such as rates. The processes themselves certainly do not generate efficiencies.

The recent and proposed changes to the RMA also effectively limit opportunities for effective public participation, for example, by removing steps from the process. However, in common with changes to the LGA, the RMA is becoming more directive of particular outcomes, and with a move to greater national standardisation.

Many of the amendments to the RMA over the past decade were intended to make the Act more "forward-leaning" and "development-friendly". The current Resource Legislation Amendment Bill is in a similar "directory" vein. It includes the trimming down of consultation obligations (a key public accountability and engagement mechanism) to facilitate the Government's desired outcomes.

Alongside the resource management law reforms (including the current Bill) is the fact that the RMA itself already has a number of tools for Government to utilise to achieve national policy outcomes (for example, national policy statements and national environmental standards). Many of these tools are only just beginning to be properly used, and yet the underlying legislation continues to be amended.

5. Recent legislative change has been somewhat hasty

In addition to the general focus of the recent changes discussed above, a feature of these legislative developments is that they are reactive, focused on particular issues and legislative provisions, and the result of limited policy analysis or debate.

The local government statutory framework obviously applies to all local authorities in New Zealand and, given the diversity of issues facing different regions, it is essential that the framework be flexible enough to apply appropriately to different circumstances. While some districts experience rapid growth others are in decline. Many of the recent legislative changes have been responses to specific identified issues which are not necessarily of universal national concern. For example, the supply of land for housing is a major issue in growth centres of the country (especially Auckland), but not for all regions. The Housing Accords and Special Housing Areas Act 2013 can be seen as enabling a location-specific solution to housing issues. By circumventing the RMA process it enables fast-tracked development. The long term consequences for local authority infrastructure remain to be seen.

While there is always room for legislation to be improved, not all issues facing the local government sector (and not all outcomes the Government wants local government to achieve) can be solved through amendments to legislation. In our experience, many issues relate to practice rather than deficiencies in the legislation itself. Improving practices takes time, but can lead to more sustainable benefits.

Given the pace of change, there has been limited time for appropriate policy analysis or debate to inform the statutory changes. The nature of the amendments, and especially what we have found in interpreting them, is that they have had the effect of tinkering with the Acts and making them somewhat more confusing and difficult to apply.

A consequence of this approach has been a tendency to create mixed messages. Examples include:

- requirements for local authorities to develop 30 year infrastructure strategies at a time when there is **immediate** demand for essential services to housing development;
- the reduction in the availability and certainty of development contributions, and the proposed repeal of financial contributions, which force urgent growth-related infrastructure spending on to ratepayers, at the same time as other changes create statutory pressures to **reduce** rates funding;
- narrowing the role of local authorities by particularising the purpose provision, then urging them to play a wider part in solving national problems (for example, housing and economic development) which are now arguably out of scope.

Again, not all problems are best solved by legislation. Section 155 of the LGA requires local authorities to specifically decide whether legislating by making a bylaw is the most appropriate way of addressing a perceived problem. Something similar might apply to legislation. As noted earlier, national coherence could have been achieved in the resource management area more effectively if the Crown had progressed key national policy statements much earlier.

In 2012, the Minister of Local Government launched an aggressive campaign on local government with a programme entitled *Better Local Government*. Based on perfunctory analysis, random examples, and information about rates and debt increases (but no analysis of the reasons), this provided a platform for ongoing statutory interventions.

There is now an impatience about change that has not acknowledged, at a national level, which is the essential tenet of the LGA – that engagement with the community produces better and more sustainable decision-making.

6. Less haste, more coherence

It will be evident from the above that we see better, more sustainable solutions to the diversity of issues and circumstances across the country, if more effort were put into engagement ahead of legislative change.

The frameworks of the three Acts are sound, but there has been a fragmented approach to amending them to address particular issues. What is needed is a more measured approach and more coherence. Policy development should be better informed by those at the coal-face, and this importantly includes local authorities.

Policy development would also benefit from being more joined-up. As a random suggestion, perhaps the core Acts could be administered by a single well-resourced agency instead of the three disparate agencies as at present: the Department of Internal Affairs, the Ministry for the Environment and the Ministry of Transport. Such an agency would need a strong mandate to engage properly with local government, and the community at large.

SCHEDULE 1

The current purpose provisions of the three statutes

Local Government Act 2002

3 Purpose

The purpose of this Act is to provide for democratic and effective local government that recognises the diversity of New Zealand communities; and, to that end, this Act—

(a) states the purpose of local government; and

(b) provides a framework and powers for local authorities to decide which activities they undertake and the manner in which they will undertake them; and

(c) promotes the accountability of local authorities to their communities; and

(d) provides for local authorities to play a broad role in meeting the current and future needs of their communities for good-quality local infrastructure, local public services, and performance of regulatory functions.

10 Purpose of local government

(1) The purpose of local government is—

(a) to enable democratic local decision-making and action by, and on behalf of, communities; and

(b) to meet the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses.

(2) In this Act, good-quality, in relation to local infrastructure, local public services, and performance of regulatory functions, means infrastructure, services, and performance that are—

(a) efficient; and

(b) effective; and

(c) appropriate to present and anticipated future circumstances.

Resource Management Act 1991

5 Purpose

(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

(2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—

(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

Land Transport Management Act 2003

3 Purpose

The purpose of this Act is to contribute to an effective, efficient, and safe land transport system in the public interest.

SCHEDULE 2

A brief history of the amendments to the three statutes

Amendments to the Local Government Act 2002

Local Government (Auckland) Amendment Act 2004 (2004 No 57)

The purpose of this Act was to improve the Auckland regional land transport system, and funding for storm water in the Auckland Region. It was repealed by the Local Government (Auckland Transitional Provisions) Act 2010.

Local Government Act 2002 Amendment Act 2004 (2004 No 63)

Most amendments contained in this Act were technical in nature. A Supplementary Order Paper enabled local authorities to provide in their standing orders for a casting vote, in any circumstances where there is an equality of votes. This amendment applied to both council and council committee meetings.

Local Government Act 2002 Amendment Act 2006 (2006 No 26)

Most of the amendments in this Act were technical. They included minor clarifications (such as when the special consultative procedure is required).

Local Government Act 2002 Amendment Act 2007 (2007 No 69)

This Act was split from an omnibus bill that made minor technical amendments to 50 Acts (including the LGA).

Local Government Amendment Act 2009 (2009 No 48)

This Act made a minor technical amendment to the Local Government Act 2002 (the Act was divided from the Gangs and Organised Crime Bill).

Local Government Act 2002 Amendment Act 2010 (2010 No 124)

This Act made significant amendments to the LGA mainly focussed on making local authority decision-making more transparent and accountable, and restricting local authorities to the provision of core services (within a defined fiscal envelope). The changes included a new definition of "community outcomes", introducing a list of "core services" that local authorities are to have particular regard to, a requirement to periodically assess the expected returns from investments, removal of certain more prescriptive consultation requirements, a requirement for chief executives to produce a pre-election report, changes in relation to the ownership and management of water assets, and the introduction of the ability of the Secretary of Local Government to make rules specifying performance measures.

Local Government Act 2002 Amendment Act 2012 (2012 No 93)

This Act introduced more significant amendments to the LGA. The changes included major changes to the purpose of local government (and accordingly local authorities' role and powers) to be more focussed on the provision of infrastructure, public services and regulatory functions (rather than the four "well-beings"), providing for greater mayoral powers (along the lines of the Auckland legislation), a greater ability for central Government to intervene in local authorities, and a "stream-lining" of council reorganisation procedures.

Local Government Act 2002 Amendment Act (No 2) 2012 (2012 No 107)

This Act made a minor amendment to Part 2 of Schedule 2 (to omit an item relating to the Banks Peninsula District Council).

Local Government (Alcohol Reform) Amendment Act 2012 (2012 No 121)

This Act made amendments to the LGA required as a result of alcohol law reform.

Local Government Act 2002 Amendment Act 2013 (2013 No 124)

This Act made minor technical amendments to the LGA.

Local Government Act 2002 Amendment Act 2014 (2014 No 55)

This Act made an array of changes to the LGA. The changes included amendments to the development contributions regime, making the local board model available for any reorganisation, requiring councils to review delivery of services and consider collaboration with other councils, the replacement of significance policies with significance and engagement policies, removal of some of the requirement to use the special consultative procedure replaced by obligations to consult in accordance with the principles in section 82, and limiting consultation on annual plan to only material departures from the long-term plan.

Local Government Act 2002 Amendment Act 2015 (2015 No 21)

This Act made minor technical amendments to the LGA.

Amendments to the Resource Management Act 1991

Resource Management Amendment Act 1993 (1993 No 65)

Following the passing of the RMA, a number of technical amendments were recommended to provide clarification. This Act made many minor changes including the provision for esplanade reserves in the case of subdivision and clarifying the procedure for making and changing plans and policy statements.

Resource Management Amendment Act 1994 (1994 No 105)

The aim of this Act was to consolidate discharge controls for the coastal marine area under the umbrella of a single piece of legislation.

Resource Management Amendment Act (No 2) 1994 (1994 No 139)

This Act was largely aimed at removing uncertainty regarding the application of section 32 of that Act. Section 32 is intended to function as a check on unnecessary and unfocused regulations by imposing a duty on Ministers and local authorities to consider alternatives when developing national environmental standards, policy statements, and plans. The amendment sought to clarify the action that must be taken to fulfil the section 32 duty.

Resource Management Amendment Act 1996 (1996 No 160)

This Act made a number of minor changes as well as some more substantive changes to the Planning Tribunal. The more substantive changes included the renaming of the Planning Tribunal as the Environment Court, provision for those who represent some relevant aspect of the public interest to be parties to an appeal and a number of changes to improve efficiencies in the Environment Court process. These changes included increasing the maximum number of judges, removal of the constraint over how many Environment Commissioners may be appointed and a new notification system for proceedings to reduce administration costs.

Resource Management Amendment Act 1997 (1997 No 104)

This Act amended some of the provisions introduced by the Resource Management Amendment Act 1994 and also enabled New Zealand's obligations under the International Convention for the Prevention of Pollution from Ships to be implemented. Furthermore, the Act repealed provisions in the RMA in relation to coastal rentals permitting regional councils to adopt occupation charging regimes and introducing coastal tendering. The Act also made less substantive changes, including alterations to abatement notices, a legislative process in respect of unlawfully claimed land and prohibition on decision makers or consent authorities having regard to the effect of trade competition on trade competitors.

Resource Management (Aquaculture Moratorium) Amendment Act 2002 (2002 No 5)

This Act's purpose was to impose a moratorium on the granting of coastal permits for aquaculture activities. As part of this the Act aimed to provide regional councils with the opportunity, during the moratorium, to provide in their regional coastal plans and proposed regional coastal plans for aquaculture management areas where aquaculture activities could be undertaken only as a controlled or discretionary activity and areas where aquaculture activities are prohibited.

Resource Management Amendment Act 2003 (2003 No 23)

The aim of this Act was to improve the administration of the RMA. Two major changes were made, the limited notifications of resource consent applications were re-introduced, and the recommendation that the Environment Court should be able to hear appeals on council decisions to not notify a resource consent application was taken out.

Resource Management (Energy and Climate Change) Amendment Act 2004 (2004 No 2)

This Act required explicit consideration of the effects of climate change and renewable energy in the exercise of functions and powers set out in RMA. It provided a stronger legal mandate to take into consideration energy and climate change matters and gave effect to the Government's climate change policies and the National Energy Efficiency and Conservation Strategy 2001 as well as New Zealand's obligations as a signatory to the Kyoto Protocol.

Resource Management (Aquaculture Moratorium Extension) Amendment Act 2004 (2004 No 5)

This Act made amendments to the RMA to extend the moratorium on coastal permit applications for aquaculture activities, deeming certain existing coastal permits for aquaculture activities to have been "given effect to", reviving other permits that have lapsed because they were unable to be given effect to, and removing the time limit for the early expiry of the moratorium over specified areas.

Resource Management Amendment Act 2004 (2004 No 46)

This Act made minor amendments in relation to Environment Court judges.

Resource Management (Waitaki Catchment) Amendment Act 2004 (2004 No 77)

This Act amended the RMA to provide for an improved process to determine the use of water in the Waitaki catchment. The Act provided for the Waitaki Catchment Water Allocation Board to be appointed and for it to develop a water allocation framework for the Waitaki River. It also required a Panel of Commissioners be appointed to consider the consent applications together, within the framework.

Resource Management (Foreshore and Seabed) Amendment Act 2004 (2004 No 94)

The purpose of this Act was to vest the full legal and beneficial ownership of the foreshore and seabed in the Crown. It aimed to guarantee public access while recognising ongoing customary rights.

Resource Management Amendment Act (No 2) 2004 (2004 No 103)

This Act introduced a regime relating to the aquaculture industry, specifically making the RMA the main Act for managing aquaculture. The Act aimed to provide marine coastal users with clarity and certainty.

Resource Management Amendment Act 2005 (2005 No 87)

This Act was intended to improve the operation of the RMA in relation to:

- the achievement of nationally consistent standards through national environmental standards and national policy statements;
- the making of decisions by consent authorities and the Environment Court;
- the power of the Minister for the Environment to call in applications for resource consents;
- the development of policy statements and plans by local authorities;
- consultation with iwi and resource planning by iwi;
- the allocation of natural resources;
- other amendments of a minor or technical nature.

Resource Management Amendment Act 2007 (2007 No 77)

A minor amendment was made in relation to the eligibility for appointment as an Environment Commissioner or Deputy Environment Commissioner.

Resource Management Amendment Act 2008 (2008 No 95)

This amendment related to aquaculture legislation as part of changes to several pieces of legislation.

Resource Management (Simplifying and Streamlining) Amendment Act 2009 (2009 No 31)

The goal of this Act was to "simplify and streamline processes and reduce costs, delays and administrative burdens" under the RMA. The amendment introduced different notification and service requirements in relation to consent processing, specifically requiring full notification if the effects would be more than minor. The Act introduced modified requirements for what a resource consent decision must obtain, in particular, decisions can cross-reference other documents instead of repeating them.

Resource Management Amendment Act 2011 (2011 No 19)

This Act related to matters of "national significance". In deciding whether a matter is, or is part of, a proposal of national significance, the Act allows the Minister to have regard to a range of factors. The Minister may also request the EPA to advise him or her on whether a matter is, or is part of, a proposal of national significance. Other minor amendments were made.

Resource Management Amendment Act (No 2) 2011 (2011 No 70)

This legislation aimed to simplify planning by removing the requirement for aquaculture management areas to be established before consent applications can be made. The Act removed the requirement for aquaculture management areas allowing for a return to a consent-based regime for aquaculture. The legislation also made several other minor amendments.

Resource Management Amendment Act 2013 (2013 No 63)

This Act was intended to help create a resource management system that delivers communities' planning needs, enables growth, and provides strong environmental outcomes in a timely and cost-effective way. Changes intended included:

- improving the resource consent regime
- a streamlined process for Auckland's first unitary plan
- a six-month time limit for processing consents for medium-sized projects
- easier direct referral to the Environment Court for major regional projects
- stronger requirements for councils to base their planning decisions on robust and thorough cost-benefit analysis.

Amendments to the Land Transport Management Act 2003

Prior to the LTMA, the Transit New Zealand Act 1989 was relevant.

Transit New Zealand Act 1989

This Act created a new central land transport authority, Transit New Zealand (TNZ) to replace the National Roads Board and Urban Transport Council. TNZ was tasked to provide a new framework for the planning, funding and development for the planning, funding and development of NZ's land transport system. TNZ took responsibility for State highways and the new Land Transport Fund and a Land Transport Account to pay for state highways, local roads, roads safety public transport and administration. All road maintenance work on these highways had to be tendered. Highways were fully funded through National funding, whilst the territorial authorities managed local roading networks (funded by Government and local rates). The Act required regional councils to establish regional land transport committees, and for both regional and territorial authorities to prepare a regional/district land transport programmes. (Note that this Act is still in in force today, but was renamed the Government Roading Powers Act 1989 in 2008).

Transit New Zealand Amendment Act 1990 (1990 No 122)

Insignificant amendments.

Transit New Zealand Amendment Act 1991 (1991 No 57)

Insignificant amendments.

Transit New Zealand Amendment Act (No 2) 1991 (1991 No 86)

Insignificant amendments relating to excise duty.

Transit New Zealand Amendment Act 1992 (1992 No 70)

This Act required regional councils/unitary authorities to prepare future 5 year focussed regional land transport strategies (RLTS). Regional councils must consult before making these strategies, and both regional authorities and territorial authorities must report annually on progress in implementing their RLTSs.

Transit New Zealand Amendment Act 1995 (1995 No 42)

This Act allowed territorial authorities to take over some aspects of passenger transport from regional councils. A new board, Transfund New Zealand was created, and took over the funding aspects of TNZ's role; though TNZ continued to be responsible for State highways. A new funding regime for land transport, based on the newly created National Roads Account and the State Highways Account, was established. TNZ was to operate the State Highways Account. Local authorities were to create and maintain Land Transport Disbursement Accounts, to receive the payments from the National Roads Account. Expenditure out of these accounts by TNZ or local authorities, unless the expenditure was subject to a competitive pricing procedure (tendering).

Transit New Zealand Amendment Act 1997 (1997 No 6)

Insignificant amendments.

Land Transport Management Act 2003

The LTMA reflected a shift in purpose, away from a previous perceived focus on 'roads' to a broader 'land transport system'. This Act altered the way transport funding was prioritised and allocated by establishing a more comprehensive framework to guide decision making, to be guided by the New Zealand Transport Strategy (NZTS). Consultation requirements were streamlined. The Act provided for toll roads and concession schemes.

Land Transport Management Amendment Act 2004 (2004 No 97)

This Act amended the principal Act by dissolving for the Land Transport Safety Authority and Transfund, and replacing them by a new entity, Land Transport New Zealand. The new entity is aligned with the Government's New Zealand Transport Strategy and Land Transport Programme.

Land Transport Management Amendment Act 2008 (2008 No 47)

This Act merged Land Transport New Zealand, the office of the Director of Land Transport, and Transit New Zealand into a single statutory Crown entity the New Zealand Transport Agency (NZTA), and introduced a number of measures allowing for improved regional transport funding and planning.

Land Transport Management Amendment Act 2013 (2013 No 35)

This Act "streamlined transport planning and funding framework by simplifying processes and combining regional and national transport planning documents". It removed the ability of regional councils to raise their own regional fuel tax, simplified the process for approving road tool schemes, and established a new policy framework for planning and contracting public transport by regional councils, known as the Public Transport Operating Model.

Land Transport Management Amendment Act 2008 Amendment Act 2015 (2015 No18)

Very minor amendments.

SCHEDULE 3

A brief outline of the genesis of the three statutes

Local Government Act 2002

Up until the mid-seventies, a large number of Municipal Corporations Acts and Counties Acts provided for urban and rural local government in New Zealand. These were consolidated by the Local Government Act 1974.

In the reforms of the late-eighties, local government was reduced from over 800 local authorities (often with specialist purposes and unique empowering legislation) down to 87 councils. At the same time, new accountability mechanisms were introduced into the legislation. This included annual planning and reporting cycles and consultative procedures. There was also encouragement of separating trading or commercial activities from core service delivery.

In 1996, there were further amendments which removed certain restrictions on local authority borrowing and strengthened financial accountability through prescribed financial management principles, procedures and accountability documents (for example, the long term financial strategy and funding policy). The general trend was to increase the empowerment of local authorities and encourage greater accountability to communities (for example, through mandatory planning documents).

The process that was followed for the development and enactment of the LGA covered a period of over two years. In late 2000, the Government released a statement of policy direction in respect of local government. The statement took the position that the Local Government Act 1974 imposed costs on local authorities and required constant amendment to meet changing circumstances. The Government intended to replace the 1974 Act with legislation that clearly established the position of local government in New Zealand's democratic system of government and set out local government's powers, accountabilities, roles, and responsibilities.

During 2001 a consultation document was released and submissions received. The Local Government Bill was introduced to Parliament in December 2001, and reported back from the Local Government and Environment Select Committee in December 2002 (which recommended significant amendments to the Bill). It received Royal assent in December 2002 and generally came into effect from 1 July 2003.

Resource Management Act 1991

In July 1988 the Government began a review of a number of statutes dealing with town and country planning, air pollution, water rights and regulation, mining licences, noise control and geothermal energy. The Ministry for the Environment prepared a report on the implications for New Zealand of the United Nations World Commission on Environment and Development Report called *Our Common Future* (commonly known as the Brundtland Report). The report provided various policy recommendations, including around the use of renewable resources such as fisheries, forestry, soil and water.

There was significant and extensive public consultation with public bodies, interest groups and individuals across New Zealand, and a number of working papers were prepared, before the Government issued a report in December 1988 on its proposals for resource management law reform. The ultimate outcome of the proposals was a single statute that would replace the various separate rules and processes across several existing Acts.

The Explanatory Note to the Resource Management Bill noted that a large number of existing laws deal with managing and regulating effects on the environment and that these had reached the point where they often conflicted, overlapped with each other and were confusing.

The intention was that the new Resource Management Act would resolve the problems with the old regime in that it would provide a coherent and consistent framework for managing natural and physical resources in a sustainable way.

Similar to the process for the enactment of the LGA, the enactment of the RMA in 1991 represented a coherent response to the position in which New Zealand's environmental legislative framework found itself. It was the culmination of 3 years of work.

Land Transport Management Act 2003

Prior to the LTMA, the Transit New Zealand Act 1989 provided for a central land transport authority (called Transit New Zealand).

Transit New Zealand provided a framework for planning, funding and development of New Zealand's land transport system (including state highways). The Transit New Zealand Act 1989 also provided for regional councils and territorial authorities (recently established as part of the local government reforms of the late eighties) to establish regional land transport committees and programmes.

Over the course of the nineties, various amendments were made to the Transit New Zealand Act 1989 including a requirement for regional councils to consult on and prepare 5-year regional land transport strategies.

When it was enacted, the LTMA reflected a shift in purpose away from a previous perceived focus on 'roads' to a broader 'land transport system'. The Act altered the way transport funding was prioritised and allocated by establishing a more comprehensive framework to guide decision making.

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Draft Amendments to "Regulations Governing Tender Offers for Securities of Public Companies" & "Regulations Governing Information to be published in Tender Offer Prospectuses"

In light of the recent incident under which the tender offeror failed to close its purchase of shares in XPEC Entertainment Inc. case ("XPEC case"), and in an attempt to better protect rights of tendering investors who intend to sell securities held in a public company being acquired through a tender offer, the Financial Supervisory Commission (hereinafter "FSC") announced the following Draft Amendments to "Regulations Governing Tender Offers for Securities of Public Companies," and "Regulations Governing Information to be Published in Tender Offer Prospectuses" (collectively, "Draft Amendments") on September 28, 2016. Highlights of the draft Amendments are as follows:

I Draft Amendment to "Regulations Governing Tender Offers for Securities of Public Companies"

1. To verify that a tender offeror has sufficient funding to complete the subject tender offer, the tender offeror who proposes to settle the tender offer consideration in cash shall provide the following supporting documents (Article 9):

(1) a letter confirming such tender offeror's ability to settle the tender offer consideration, to be issued by a financial consultant qualified as a securities underwriter, or by a certified public account responsible for auditing and attestation of the financial reports of public companies, in either case the tender offeror's source of funding is reviewed and the letter is issued in due process; or

(2) a letter of performance guarantee to be issued by a financial institution.

2. To increase the accountability of the board of directors and review committee of the subject public company being acquired, with respect to their verification on importation information of the tender offer (Articles 14 and 14-1):

(1) It is specified that, the board of directors shall verify the important information concerning the tender offer, including the identity and financial status of the tender offeror, fairness of the tender offer conditions, and reasonableness of the source of the consideration for the tender offer, and shall provide shareholders with its recommendation based on the results of its verification; in the case of a

review committee, the committee shall submit to the board of directors the result of its verification on the same information together with results of its review. If an expert is engaged, such expert's opinion shall be included concurrently in the public announcement.

(2) The minutes of the board meeting shall include the directors' specific concurring or dissenting opinions and reasons thereof so as to clarify each person's accountability;

(3) For the benefits of the verification operations of the subject company and review committee, the length of period for submitting responses is amended to 15 days; there are new provisions concerning the requirements on the attendance and meeting procedures of the review committee members.

3. Except Acts of God, wars, or riots, the settlement date of the tender offer consideration shall not be changed (Article 7-1).

4. To strengthen the disclosure of tender offer information, a tender offeror shall, within two days following the circumstances below, file a report to the FSC and copy the same to the mandated institution (Article 19):

(1) Obtaining the approval or disapproval document from another competent authority prior to the satisfaction of the tender offer conditions;

(2) The tender offer conditions become satisfied;

(3) The tender consideration has been settled in full in an exclusive tender account under the name of the mandated institution; and

(4) After the satisfaction of the tender offer conditions, the number of shares tendered reaches the maximum projected purchase volume.

5. It is specified that where a tender offeror fails to settle in full the tender offer consideration in the exclusive tender offer account under the name of the mandated institution, an investor who participates in the tender is entitle to revoke its tender (Article 19).

6. There are new provisions requiring the mandated institution to set up an exclusive account to receive and deduct payments for securities only, and provisions concerning negative qualifications preventing an institution to be mandated (Article 15-1).

7. The maximum length of extension period is amended to not exceed 40 days. There are new provisions stating that, the legitimate reasons for a tender offeror applying to FSC for exemption of the one-year restriction on the re-tender offer action may include: a previous tender offer is not completed due to the absence of a domestic competent authority's reviewing conclusion, and such tender offer has obtained the approval from another competent authority afterwards (Articles 18 and 24).

II Draft Amendment to "Regulations Governing Information to be Published in Tender Offer Prospectuses":

1. There are new provisions requiring the tender offer prospectus to include the specific information below for investors' reference, and requiring the signature or seal of an outside expert with respect to the content of the prospectus for which he/she is accountable (Articles 4 and 13-1)

(1) An attorney's legal opinion.

(2) Documents supporting the tender offeror's sufficient funding to complete the tender offer, as set forth in Article 9 of Regulations Governing Tender Offers for Securities of Public Companies.

(3) An appraisal report or opinion issued by other experts.

2. Where the tender offer consideration is proposed to be paid in cash, in a case of multi-level acquisition, the identity of the ultimate funding supplier and information related to the arrangement of the funding shall be disclosed (Paragraph 1, Article 7).

3. Where a tender offeror is a company and the source of its funding comes from its own capital, it shall, based on its financial reports of the last two years, provide a detailed analysis and explanation on the reasonableness of the funding source for the subject tender offer. The tender offeror's public announcement of its tender offer prospectus shall also include an undertaking to honor its obligation to settle the tender offer consideration, and all the agreements or documents related to its capital arrangement. (Paragraph 2, Article 7).

4. The tender offeror shall disclose the material details of its plans to acquire material assets after the take-over of the subject public company is completed. (Article 12).

5. The tender offer conditions concerning the disclosure of the information and risks associated with the tendering are amended to include, such as, once the publicly announced tender offer conditions have been satisfied and the tender offer consideration has been paid in full to the exclusive tender offer account under the name of the mandated institution, a tenderer shall not be allowed to revoke its tender unless the law provides otherwise. (Articles 6 and 8).

The Draft Amendments above are currently at a preliminary notification stage. They are intended to aggravate a tender offeror's responsibility related to fund-raising, and to increase the accountability of the subject company's board of directors. Those who are planning to conduct a tender offer are advised to attend closely to the status of the Draft Amendments.

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Ideas

RINse and Repeat: Continued Fraud in the Renewable Fuel Credit Market

11 October 2016

Updates

Fraudulent transactions involving renewable fuel credits, known as "RINs"[1] continue to be a concern and a focus of federal regulators. On October 4, 2016, the U.S. Environmental Protection Agency (EPA) and the U.S. Department of Justice (DOJ) announced a $6 million settlement with Western Dubuque Biodiesel, LLC, the owner and operator of a biodiesel plant, in a RIN fraud case. Pursuant to the terms of the settlement released by EPA and DOJ, Western Dubuque agreed to pay a civil penalty of $6 million dollars for alleged violations of Section 211(o) of the Clean Air Act and the regulations promulgated thereunder. The enforcement case stems from a series of transactions in 2011 that resulted in the generation of more than 36 million allegedly invalid RINs.

Participants in the RIN market can expect to see more RIN fraud investigations and prosecutions in the future. In March, 2016, EPA and the Commodity Futures Trading Commission (CFTC) entered into a Memorandum of Understanding whereby the CFTC will advise EPA on conducting investigations into RIN fraud and market abuse. Based on observations by Doug Parker, the former head of EPA's Criminal Investigation Division, the Western Dubuque settlement may be the tip of an iceberg. "Anyone in the law enforcement or prosecutorial world will tell you that what's public is not the full picture of what's going on," Parker told E&E TV's "OnPoint." "There will be more prosecutions to come."

Further, Parker suggested that coming changes in the market--specifically, increasing requirements for ethanol--may create a shortage of ethanol RINs, increasing the incentive for fraudulent production of the biodiesel RINs that can act as a substitute. The RIN market can be treacherous, Parker said, calling it "tremendously opaque." "It is unlike any other commodity market out there in terms of people being able to understand where and how these RINs are generated," he said. Parker also observed that in the early days of the RIN market, RIN fraud perpetrators were committing "mom and pop fraud" but have grown more sophisticated in response to EPA's increased third-party verification and oversight of RIN generation and RIN transactions. He noted that "[y]ou'd see schemes where multiple entities across the country were organized to ship fuel that didn't have RINs but claimed it had RINs, massive bookkeeping scams all to the tune of making hundreds of millions of dollars illegally."

The complaint filed by EPA and DOJ concurrently with the proposed consent decree with Western Dubuque accused Western Dubuque of involvement in a similar scheme. EPA and DOJ alleged that, with the help of NGL Crude Logistics, LLC, formerly known as Gavilon LLC, Western Dubuque attempted to double--or even triple--dip, using the same biodiesel to generate several times its value in RINs. According to the complaint, NGL first purchased biodiesel that came with RINs on the open market. It then separated the RINs from the biodiesel, sold the RINs to third parties, and sold the biodiesel product to Western Dubuque. The two companies classified the biodiesel as a methyl ester "feedstock," a class of chemicals that includes biodiesel among many other chemicals. Western Dubuque then reprocessed this "feedstock" and designated it biodiesel, thereby generating a second set of RINs. Finally, Western Dubuque sold the now reprocessed biodiesel, along with its corresponding RINs, back to NGL, at which point the process could be repeated.

In addition to the charges stemming from the alleged fraud scheme, EPA and DOJ also alleged that Western Dubuque engaged in a number of other violations under the Renewable Fuel Standards program because the RINs were not generated using a qualifying feedstock or qualifying process. NGL was also named as a defendant in the EPA and DOJ complaint. In the suit against NGL, EPA and DOJ seek to require NGL to retire 36 million RINs to offset the alleged violations, and to pay a substantial penalty.

The Renewable Fuel Standard program was originally enacted under the Energy Policy Act of 2005 and expanded under the Energy Independence and Security Act of 2007. The program mandated that a set level of biofuels be blended into gasoline. Originally set at 7.5 billion gallons of renewable fuel, the number was modified when the program was expanded in order to meet specific greenhouse gas emissions goals. The program is a market-based system. Renewable fuel producers generate RINs when they produce biofuel. Refiners and importers are then required to retire a specific number of RINs each year based on the amount of petroleum they produce and import. Such "obligated parties" may purchase additional RINs from producers in order to meet their reduction quotas.

Parker estimated that as recently as 2011, fraud in the RINs market "probably contributed an additional two coal-fired power plants to emissions that weren't being reduced." EPA estimates that Western Dubuque and NGL's illegal generation of RINs resulted in about 151,319 metric tons of excess CO_2-equivalent greenhouse gas emissions. EPA also contends that Western Dubuque and NGL distorted the market price of RINs, thereby harming market integrity and the program's overall reputation. EPA alleges that the market distortion was greater than the $6 million dollar civil penalty Western Dubuque has agreed to pay, but indicates that the penalty was reduced to account for the relatively small company's inability to pay more.

The continued threat of purchasing invalid RINs faced by participants in the RIN market coupled with the program's "buyer beware" approach to liability underscores the importance of RIN buyers taking measures to protect against the risk of acquiring invalid RINs. These mitigation measures include robust contractual protections and the use of audits, including EPA's quality assurance program (QAP). Under EPA's QAP rules, RIN buyers and owners have an affirmative defense to civil liability for the transfer and use of invalid RINs that were verified as properly generated and valid for compliance purposes by an independent auditor under a QAP that meets the minimum requirements set forth in EPA's regulations; provided the defense does not apply if the party knew or had reason to know the RIN was invalid at the time of such transfer or use.

Read E&E TV's Interview with Parker here. http://www.eenews.net/tv/videos/2170/transcript
The Western Dubuque consent decree is available here.http://www.bakerbotts.com/~/media/files/ideas/publications/2016/western-dubuque-consent-decree.pdf?la=en

[1] “RINs” stands for Renewable Identification Numbers, which are serial numbers assigned to batches of biofuel.

Related Professionals

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Second Circuit Denies Section 230 Immunity for Acts of Affiliate Marketers

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By Ambika Kumar Doran and Jim Rosenfeld

The Second Circuit became the third federal appellate court ever to deny immunity under Section 230 of the Communications Act, 47 U.S.C. § 230, which provides broad protection for content supplied to websites by their users. *Federal Trade Commission v. LeadClick Media, LLC*, --- F.3d ---- (2d Cir. Sept. 27, 2016). The court held that the operator of an affiliate marketing network, LeadClick Media, LLC, unlawfully participated in the use of deceptive websites to market weight loss products, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

Fact Background

LeadClick, now out of business, operated an affiliate marketing network that connected its customers with third-party publishers ("affiliates") that advertised the customers' products, such as by email marketing, banner ads, search-engine placement, and creating advertising websites.

LeadClick solicited LeanSpa, an online retailer that sold purported weight-loss products, to use its services. Under the parties' agreement, LeanSpa paid LeadClick every time a consumer clicked on an affiliate ad and signed up for LeanSpa's "free trial." LeadClick paid a percentage of this payment to the affiliate.

Some LeadClick affiliates operated fake news websites, which looked like genuine news sites and falsely suggested that "reporters" had tested LeanSpa's products, offering comments by "customers" who had used products. LeadClick knew such sites were common in the industry and some of affiliates were using them, approved the use of the sites, and provided affiliates content to use on the sites. Affiliates were required to submit proposed marketing pages to LeadClick for approval, and were told by LeadClick that fake news sites are "totally fine." LeadClick also purchased ad space from well-known websites, which it resold, sometimes to affiliates.

The district court granted the FTC summary judgment. The Court of Appeals affirmed.

Section 230 Ruling

Section 230 states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). As the Second Circuit acknowledged, courts have generally afforded websites broad immunity under this provision, barring claims that seek to hold websites responsible for content provided by their users. Courts have held that Section 230 shields conduct from liability if (1) defendant is the provider or user of an interactive computer service; (2) the claim is based on information provided by another information content provider; and (3) the claim treats the defendant as the publisher or speaker of that information. The court raised issues as to all three elements.

First, in *dicta*, the court cast doubt on whether LeadClick is an "interactive service provider," defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2). Although the definition was "indeed broad," the court held, it was "not convinced" LeadClick "provides computer access in the sense of an internet service provider, website exchange system, online message board, or search engine." It raised novel issues, the court held, as to whether the definition fit LeadClick because LeadClick's provision of services was "wholly unrelated to its potential liability," and whether LeadClick's service is "the type of service that Congress intended to protect" under Section 230. Ultimately, however, the court found it need not reach this element of immunity since it went on to find the other elements lacking.

Second, the court held LeadClick was an "information content provider" because it recruited affiliates for the LeanSpa account that used fake news sites, paid them to advertise LeanSpa products, knowing such sites were common, suggested edits to content on the sites, and bought advertising space from real news sites to resell it to affiliates for use on fake sites. The court concluded "LeadClick's role in managing the affiliate network far exceeded that of neutral assistance. Instead, it participated in the development of its affiliates' deceptive websites, materially contributing to [the content's] alleged unlawfulness." The Second Circuit joined other courts in endorsing the "material contribution" standard to evaluate the second element of Section 230 immunity, *i.e.*, an interactive service provider must materially contribute to the content at issue — or "assist[] in the development of what made the content unlawful" — to be an information content provider *itself*.

Third, the court held the FTC sought to hold LeadClick liable not as the publisher or speaker of another's content but "for its own deceptive acts or practices—for directly participating in the deceptive scheme by providing edits to affiliate webpages, for purchasing media space on real news sites with the intent to resell that space to its affiliates using fake news sites, and because it had the authority to control those affiliates and allowed them to publish deceptive statements." This holding rested on the court's finding that LeadClick was "being held accountable for its *own* deceptive acts or practices…not…from its status as a publisher or speaker" of third-party content.

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Deductibility of the Tax on Significant Financial Transactions for the Purposes of Income Tax Determination

Ritza Quintero Mendoza [1]

The Decree that establishes the Tax on Significant Financial Transactions (LGTF, after its Spanish acronym) provides that such tax is not deductible for income tax purposes. Beyond the collision of rules that this scenario entails, which will be commented hereinafter, not allowing the deduction of the Tax on Significant Financial Transactions (IGTF, after its Spanish acronym) to determine the net income subject to income tax entails a flagrant violation of the taxable capacity, which is even more magnified in the case of an indirect tax that, per se, ignores the taxable capacity of the taxpayer and is, therefore, regressive.

Article 18 of the LGTF provides that "The tax provided in this Decree with Status, Validity and Force of Law cannot be deducted from the income tax." In spite of this regulation, we believe that there is no doubt that the IGTF is a regular and necessary expense made in the country for the production of income in the terms provided in Article 27 of the Law on Income Tax (LISLR, after its Spanish acronym). Indeed, it is the payment of a tax, which is an ordinary expenditure that derives from the regular remittance of the operations of any taxpayer and which has to be strictly fulfilled because of legal duty; therefore, there is no doubt that it is a tax paid according to the terms provided in numeral 3 of Article 27 of the referred law and, in consequence, it is a deductible expense to determine the net income subject to income tax, in accordance with the rules of determination of the tax provided by the LISLR.

[1] Lawyer graduated at Universidad Católica Andrés Bello. Master Executive Degree in Tax Consultancy awarded by Centro de Estudios Garrigues. Numerary member of the Venezuelan Association of Tax Law.

[2] Decree published in the Special Official Gazette N° 6.210 dated December 30th 2015.

Obtaining annual, net and available profits is subject to the ISLR, which is why the regular costs and expenses necessary to produce income must be deducted from the gross income so as to determine the net profits.

Among the deductions that are allowed by the LISLR to determine the net profit, we can find that number 3 of Article 27 provides as follows:

> Article 27: In order to determine the net profit, the following deductions shall be made to the gross income, which, except for any other provision to the contrary, shall correspond to regular and necessary expenses non-attributable to costs, generated in the country for the purposes of producing the profits:
>
> (…)
>
> 3. Taxes paid because of economic activities or because of goods that generate income, except for taxes authorized by this law. Regarding consumer taxes, and when, under the corresponding law, the taxpayer cannot transfer it as a tax nor obtain the reimbursement thereof, it will be attributable by the taxpayer as an element of the cost of the good or the service.

The prohibition to deduct the IGTF to determine the income tax set out in Article 18 of the LIGTF entails a collision of rules between such precept and the abovementioned provisions of Article 27 number 3 of the LISLR, that is, a clash between two legal proposals that affect the same factual circumstances with incompatible consequences and that constitutes a "constant opposition to principles;" which is why the legislative antinomy must be resolved taking into consideration not only the hierarchy or compliance with the formalities provided to apply the sanction, but also the application of the constitutional principles that the tax system embodies.

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[3] Joaquín Sánchez Covisa, *La vigencia temporal de la ley en el ordenamiento jurídico venezolana* [Temporary validity of the law in the Venezuelan legal system], in Obra Jurídica de Joaquín Sánchez Covisa, Ediciones de la Contraloría General de la República, Caracas, 1976, p. 210.

[4] Republic of Venezuela, Federal Court, Decision dated May 15th 1942, Official Gazette N° 20.827.

Indeed, the collision between the LIGTF and the LISLR cannot just resort to the application of the principle through which a subsequent law repeals a previous law, since both decrees were published in the same official gazette, and on the same date.

Furthermore, the principle of the identity of the matter does not apply because, although it concerns tax laws, the nature, economic justification and technical grounds corresponding to each tax are completely different.

On the other hand, the principle of prevalence of the organic laws or hierarchy does not apply either, because these are laws with the same hierarchy.

Also, regarding the specialty of the law, a part of the national doctrine has considered, with respect to other laws that prohibit the deduction of their tax from the income tax, that it might be interpreted that, while the special law about the deduction will be the LISLR, the special law in respect of the matter subject to deduction will be the other law that contains the tax .

In connection with the foregoing and in accordance with the criteria of the author Sánchez Covisa, Professor Emilio Roche pointed out that for the purposes of determining the specialty of the law in the case of conflict of rules, the factual circumstances provided in each law must be compared, so that the general law will be the one that includes as a specific case within its scenarios the factual circumstance of the other law.

In this regard, for the persons that support this position, the LISLR will be the general law that establishes the rules for income determination, while the LIGTF will be the special rule that regulates the matter subject to deduction; which would mean that the LIGTF prevails due to its specialty.

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[5] Emilio J. Roche, "Relatoría General, Subject I, General Part of the Income Tax", in 70 years of the Income Tax, Volume I, AVDT, Caracas, 2013, p. 112.

Now then, despite the above, we believe that the special law that regulates the rules to determine the net income subject to income tax is the LISLR, which clearly provides (in Article 27 number 3) the deductibility of taxes paid because of economic activities or goods that generate income, so the LIGTF cannot restrict or delimit the rules to determine a different and autonomous tax such as the income tax, because that would clearly exceed the limits of its specialty.

The LISLR is the law specialized in all aspects concerning determination of the tax base of the income tax and the regime of deduction of regular and necessary expenses related to activities or goods that produce income. It is the law that governs this tax and the one that shall set it pursuant to the principle of reserve of law on tax matters.

There is a harmonization mechanism for the tax system underlying in number 3 of Article 27 of the LISLR, which interrelates with the other laws of our legal system, in the light of the constitutional principles that limit the imposition power of the State and that are necessary to guarantee rationality and properness of a tax.

Ultimately, only the LISLR should establish the requirements for the deduction of expenses related to the production of income; therefore, vis-à-vis this collusion of laws, another law with the same hierarchy, that is, the LIGTF, cannot prohibit the deduction of an expense affecting the basis of calculation of the income tax because it would increase the taxable net income due to the non-application of deductions provided in the LISLR, which can lead to the taxation of gross income that is not subject to income tax, and, in this situation, the economic reality of the taxpayer would be ignored and the principle of taxation of net profit will be violated, which is why it could be understood as a confiscatory tax that taxes an artificial measure.