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Upcoming Conferences & Events

PRAC 62nd International Conference
Sao Paulo - Hosted by TozziniFreire - October 21 - 24, 2017
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Member Hosted Events @ IBA Sydney – October 2017

PRAC 63rd International Conference
Honolulu - Hosted by Goodsill Anderson Quinn & Stifel LLP
April 21—24, 2018

For more information visit www.prac.org

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BAKR BOTTS INTERNATIONAL REAL ESTATE LAWYER JOINS FIRM

LONDON, 1 August, 2017 - Baker Botts L.L.P., a leading international law firm, announced today that Melanie Sharpe, who specialises in commercial real estate matters and contract negotiations, has joined the firm's Real Estate and Construction Group as Special Counsel based in the London office.

"Melanie is an exciting addition to our Real Estate and Construction Group and brings a wealth of legal expertise handling a wide range of sophisticated property interests and transactions, including land developments, joint ventures and estates management in London and throughout the UK. Her appointment demonstrates our commitment to enhancing the global reach of our firm's market leading real estate practice," said Patricia Stanton, Firmwide Real Estate Chair of Baker Botts.

"I am delighted to welcome Melanie to our London office. Her appointment highlights our firm's dedication to hiring the best legal talent available in the City. Melanie has excellent knowledge of the real estate industry and we look forward to working with her on a wide range of projects," said Mark Rowley, Partner-in-Charge of the firm's London office.

Ms. Sharpe has over 20 years' legal experience in the real estate sector. She has a strong track record of working with leading UK retailers, shopping centres and telcos gained both in leading law firms and most recently in-house with Telefonica UK Limited (O2), where she was Senior Counsel for Property. Previously, she acted as a Partner at Berwin Leighton Paisner representing Tesco, British Land, The Mall Corporation and a US Steel company acquiring UK business.

Ms. Sharpe obtained a BA (Hons) in Politics from Durham University and then studied at the Guildhall University for her Law Conversion Course and Solicitors' final exam. She trained at Dentons.

For additional information visit www.bakerbotts.com

BRIGARD & URRUTIA WELCOMES TOP M&A PARTNER

Top Colombian M&A partner Jaime Robledo has joined Brigard & Urrutia Abogados.

Along with partners Sergio Michelsen, Álvaro Cala and Darío Laguado, Robledo will lead a team of 30 lawyers that are among the very best in the market in terms of corporate and M&A work.


Jaime Robledo Vásquez

"We believe that the merger and acquisition area is growing in the country and the market is again very active. Jaime's arrival strengthens the team's ability to continue facing the challenges in this market," says Brigard & Urrutia managing partner Carlos Umaña.

Robledo, who is licensed to practise in Colombia and New York, has almost two decades of experience and is regarded as a market-leading M&A and corporate law practitioner.

In a recent work highlight, he worked on the controversial privatisation of Colombian power company Isagen.

For additional information visit www.bu.com.co

CLAYTON UTZ CONTINUES TO GROW FORENSICS AND TECHONOLOGY SERVICES PRACTICE

Clayton Utz snaps up two new specialists for Forensic and Technology Services practice

Melbourne, 17 July 2017: Data analytics professional Deepak Pillai and forensic accounting specialist Daniel Heywood are the newest additions to Clayton Utz' Forensic and Technology Services (FTS) practice, launched earlier this year.

Deepak has joined the FTS practice as a Director, with a decade's experience in providing analytical services for major clients in Australia and North America, across the financial services, resources, government and other sectors. He specialises in technical analysis of large electronic data sets, particularly utilising advanced data capture and analytic modelling techniques.

Daniel joins as a Senior Manager, with nearly a decade's worth of experience in complex financial accounting and investigations both in Australia and internationally. A chartered accountant, Daniel has extensive experience in loss quantification including class actions, post-acquisition disputes, insurance claims, tax-related fraud investigations, business failures and financial products.

Commenting on the appointments, FTS practice head Paul Fontanot said: "Attracting two professionals as experienced as Deepak and Daniel is not only fantastic for our team, but also means we're able to offer our clients an even greater scope of specialist services in the areas of data analytics, forensic accounting and investigations."

The addition of Deepak and Daniel to the FTS team follows the appointments in May of Owen Bourke and Meg McKechnie.

For additional information visit www.claytonutz.com

DAVIS WRIGHT TREMAINE - PROMINENT MEDIA AND FIRST AMENDMENT LAWYERS JOIN FIRM'S RENOWNED TEAM

01 August, 2017: In a major expansion of the nationally renowned media and First Amendment practice at Davis Wright Tremaine, three exceptional lawyers have joined the firm as partners. They are:

Nathan Siegel, whose 25 years' experience includes representing clients in many of the nation's most high-profile media matters, including cutting-edge right of publicity cases and defamation suits brought by celebrities and political personalities.

Katherine Bolger, who brings 20 years of experience as a litigator and counselor, having successfully represented major newspaper and book publishers, broadcast networks, and motion picture studios in a broad range of content matters.

Rachel Strom, who has a decade of experience representing leading publishers and broadcasters in defamation, privacy, newsgathering, and copyright cases, as well as subpoena and access matters.

All three lawyers join the firm from the highly respected media law boutique Levine Sullivan Koch & Schulz LLP.

"These are extraordinary times for the media business and for all creators of content," said Alexandra Nicholson, chair of the communications, media, and intellectual property practice at Davis Wright Tremaine. "I am thrilled to further strengthen our support of the media and entertainment industry, and the cause of free speech, with these three gifted lawyers in the prime of their careers."

"Nathan, Kate, and Rachel have been well known to us over the years, as colleagues, co-counsel, and competitors," said Jim Rosenfeld, New York-based co-chair of the Davis Wright Tremaine media practice. "We've seen up close their tremendous dedication to the interests of their clients and highly skilled defense of those interests. They are a powerful addition to our team."

Joining Davis Wright Tremaine along with the three partners are two former Levine Sullivan associates: Amy Wolf and Adam Lazier.

For more information, visit www.dwt.com

HOGAN LOVELLS WELCOMES FORMER TERRESTAR NETWORKS GC AND SENIOR EXEC TO FIRM'S SPACE AND SATELLITE PRACTICE

Jeffrey Epstein, Former General Counsel and Senior Executive at TerreStar Networks, Joins Space and Satellite Practice at Hogan Lovells

McLean, VA, 01 August 2017 – Hogan Lovells announced today that Jeffrey Epstein has joined the firm's leading Space and Satellite practice as counsel in Northern Virginia. A seasoned satellite industry lawyer and business professional, Epstein was most recently President and Chief Executive Officer of publicly-traded satellite company, TerreStar Networks Inc.

"Jeff brings a real roll up your sleeves, entrepreneurial attitude to his practice. With a combination of business and private practice experience, he has deep and strategic experience with some of the most highly regulated industries and challenging bet-the-company transactions. As the space and satellite industry continues to grow in the private sector, Jeff will be a valuable asset to our practice and clients," said Randy Segal and Steve Kaufman, co-heads of the Space and Satellite practice.

Emily Yinger, Managing Partner of Hogan Lovells' Northern Virginia office, added, "We're thrilled to welcome someone with Jeff's experience and caliber to the firm. Northern Virginia has long been a hub for both startup and expanding space and satellite companies, and as a firm it's important that we grow and evolve in the new areas of space innovation. The Northern Virginia office has spent over 30 years advising many of the region's leading companies. Jeff's arrival continues our commitment to the region and provides clients with the resources they need for their own success."

Over the past decade, Epstein has acted as outside counsel, focused on the development and deployment of global satellite systems, and the complex strategic investments that come with those ventures. He has advised on the corporate and securities/capital markets needs of numerous companies from startup to publicly-traded, including distressed companies and complex restructuring situations.

In addition to his time with TerreStar Networks, Epstein served as Chief Operating Officer and Chief Legal Officer of wireless services engineering and deployment company, Connectivity Solutions, Inc. He began his career as a staff attorney in the Division of Corporation Finance at the Securities and Exchange Commission (SEC), then worked as an associate at an international law firm, followed by in-house positions as corporate and securities counsel at a Fortune 500 bank holding company.

"For nearly 15 years I've had the pleasure of working with Hogan Lovells on every side of the table and at every stage of development," said Epstein. "With their unique blend of legal, business, and technical experience, they've earned their reputation as problem solvers and deal closers. I'm excited to join the firm and look forward to the opportunity to support and grow a leading practice for satellite system operators, investors, and manufacturers."

Epstein earned his LL.M. from Georgetown University Law Center in 1997, a J.D. from St. Thomas University School of Law in 1995, and a B.A. from the University of Florida in 1991.

For more information, see www.hoganlovells.com .

ARIAS

ADVISED ASSICURAZIONI GENERALI SPA IN SALE OF SHAREHOLD IN ASEGURADORA GENERAL SA

Trieste - The Generali Group has entered into an agreement to sell its business in Colombia and has completed the sale of its business in Guatemala. The transactions are part of its strategy to optimize its geographical presence, increase operational efficiency and improve capital allocation.

Frédéric de Courtois, Group Ceo Global Business Lines & International commented: “These transactions are another step forward in the rebalancing of Generali Group geographical presence across the world. We are making good progress in the rationalization of our geographical footprint pursuing our strategy to make Generali a simpler and smarter company”.

Generali has agreed to the disposal of its participation in the Colombian companies, equivalent to 91.3% of Generali Seguros and to 93.3% of Generali Vida, to the Talanx Group. The transaction is subject to the approval of the relevant authorities.

In 2016, Generali Colombia recorded a total premium income of around €59 million and a shareholders’ equity of approximately €22 million. Generali Colombia share in the local insurance market is below 1%, ranking #22.

Generali also announces the completion of the sale of its stake in its Guatemala-based subsidiary to the Neutze family, its long-term trusted local partners. Aseguradora General S.A. is an insurance company mainly active in the P&C segment. The Generali Group will remain active in Guatemala with its international business lines, namely, Generali Employee Benefits, Generali Global Corporate & Commercial and Europ Assistance. Arias Guatemala was part of the legal counsel for Generali for the final sale of their shares in Guatemala.

Arias Team of advisors include: Jorge Luis Arenales (Partner), Ximena Tercero (Partner), Cynthia Soto (Associate), Ivón Hernandez (Associate).

For additional information visit www.ariaslaw.com

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BAKER BOTTS

REPREENTS INNOPHOS HOLINGS, INC. IN $125 MILLION ACQUISITION OF NOVEL INGREDIENTS

01 August 2017: Innophos Holdings, Inc. (NASDAQ: IPHS) announced today that it has entered into a definitive merger agreement to acquire Novel Ingredients, a New Jersey-based provider of dietary supplement ingredient solutions primarily owned by GenNx360 Capital Partners, a New York-based private equity firm.

Under the terms of the merger agreement, Innophos will acquire all of the outstanding shares of Novel Ingredients for a total purchase price of $125 million (enterprise value), payable in cash. Innophos will fund the acquisition with borrowings under its existing credit facility. The acquisition is expected to be accretive to Innophos' earnings per share in the first year following the close of the transaction. Closing of the transaction is subject to customary closing conditions, including review under the Hart Scott Rodino Antitrust Improvements Act, and is expected to be completed in the third quarter of 2017.

Baker Botts is representing Innophos Holdings, Inc. in the transaction.

For additional information visit www.bakerbotts.com

BENNETT JONES

ASSISTS PARKLAND FUEL CORPORATION COMPLETES BROUGHT DEAL PRIVATE PLACEMENT

Deal Value: $1,162,030,000
Client Name: Parkland Fuel Corporation

On May 9, 2017, Parkland Fuel Corporation ("Parkland") completed a bought deal private placement of $662,030,000 common shares (the "Common Share Offering") and, by way of offering memorandum, of $500,000,000 aggregate principal amount of 5.625% senior notes due 2025 (the "High Yield Offering").

The net proceeds of the Common Share Offering and High Yield Offering will be used by Parkland to fund a portion of the costs to be incurred by Parkland in connection with its acquisition of all of the shares of Chevron Canada R&M ULC which operates the Canadian integrated downstream fuel business of Chevron Canada Ltd. for $1,460 million plus an estimated $186 million in working capital.

The Common Share Offering was completed by a syndicate of underwriters led by TD Securities Inc. and National Bank Financial Inc., as joint bookrunners, RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., BMO Nesbitt Burns Inc., AltaCorp Capital Inc. and Canaccord Genuity Corp.

The High Yield Offering was completed by a syndicate of underwriters led by TD Securities Inc., National Bank Financial Inc. and Merrill Lynch Canada Inc. as joint bookrunners and joint lead managers, Scotia Capital Inc. as joint lead manager, and RBC Dominion Securities Inc., CIBC World Markets Inc., BMO Nesbitt Burns Inc. and Wells Fargo Securities Canada, Ltd. as co-managers.

Parkland was represented by Bennett Jones LLP with a team led by John Piasta (Capital Markets) and including Karen Dawson (Banking), Greg Johnson (Tax) and Elyse van Spronsen (Capital Markets).

For additional information visit www.bennettjones.com

CAREY

ASSISTS UNDERWRITERS BANK OF AMERICA, MERRILL LYNCH AND JP MORGAN WITH CHILEAN RETAILER CENCOSUD USD $1BILLION NOTE ISSUANCE

Santiago, July, 2017: Bank of America Merrill Lynch and JP Morgan were bookrunners and turned to Shearman & Sterling LLP and Chilean firm Carey. Milbank, Tweed Hadley & McCloy LLP in New York and Chile's Morales & Besa assisted Chilean retailer Cencosud issue notes worth US$1 billion. The offering closed on 17 July.

Cencosud will use the funds for two tender offers which it launched on 27 June.

Carey Partner Diego Peralta and associates Fernando Noriega, Manuel José Garcés, Elvira Vial and José Tomás Otero in Santiago assisted in the transaction.

For additional information visit www.carey.cl

CLAYTON UTZ

ADVISING EUROZ, PARADIGM AND NUMIS IN CONNECTION WITH HERON RESOURCES' A$240 MILLION FUNDING PACKAGE

Perth, 30 June 2017: Clayton Utz is advising Euroz Securities Limited, Paradigm Capital Inc. and Numis Securities Limited as lead managers in connection with a A$32m institutional placement by ASX-listed Heron Resources Ltd as part of a A$240 million funding package, announced today.

Clayton Utz corporate partner Mark Paganin and senior associate Stephen Neale are leading the firm's team with support from lawyer Benjamin Depiazzi.

The institutional placement is to sophisticated and professional investors, undertaken via an institutional bookbuild. Euroz Securities Limited is the global co-ordinator and bookrunner to the institutional placement.

Heron's funding package also comprises a loan, equity and stream funding package from subsidiaries of Orion Mine Finance Group for a total of A$129 million, an equity subscription agreement with a subsidiary of Greenstone Resources LP and co-investment parties for A$42 million, an equity subscription agreement with Castlelake LP for A$33 million, and a share purchase plan to existing shareholders to raise up to A$5 million.

For additional information visit www.claytonutz.com

GIDE

COUNSELS THE IFC ON ITS INVESTMENT IN THE SHARE CAPITAL OF SIGFOX

Paris, 18 July 2017: Gide advised the IFC (International Finance Corporation, World Bank group) on its investment in the share capital of Sigfox, a global communications services provider for the Internet of Things (IoT) for an aggregate amount of EUR 15 million (of which EUR 5 million has been contributed to date).

The Gide team comprised partner Jean-Gabriel Flandrois, and associate Hugo Nocerino.

For additional information visit www.gide.com

DAVIS WRIGHT TREMAINE

REPRESENTS BLUE MAN GROUP IN SALE TO CIRQUE DU SOLEIL

07 July 2017: A multidisciplinary, cross-office Davis Wright Tremaine team has represented the owners of entertainment phenomenon Blue Man Group in the sale of the company to Montreal-based Cirque du Soleil.

First launched in New York in 1991, Blue Man Group's dynamic combination of art, music, comedy, and technology has been performed in over 20 countries and been seen by more than 35 million people worldwide. The company has ongoing shows in five major U.S. cities, a permanent show in Berlin, and a world tour.

Gray Coleman, chair of the firm's Entertainment Transactions practice group, has served for several years as outside entertainment counsel to Blue Man co-founders Phil Stanton and Chris Wink.

"There are only a handful of lawyers in the country with expertise in live theater entertainment," says Coleman. "Most of them don't reside in firms where they can say, 'Yes, of course I have sophisticated corporate deal runners, and international tax counsel, and employment and benefits experts, and yes, I can assemble a team in 24 hours to handle this. Happily I do."

The deal was led on the corporate side by Claude Goetz and Jisoo Kim in New York, with support from Drew Patterson and Nicole Giuntoli in San Francisco. Because Cirque is based in Canada, tax implications proved to be among the most complicated aspects of the deal and Pamela Charles in Seattle provided essential advice. Amy Hwang in Seattle handled benefits and Michael Goettig in New York acted as employment counsel for Stanton and Wink, who are both staying on in executive roles at the new combined company.

As the New York Times reported: "After the acquisition, Blue Man will be able to tap into Cirque's worldwide access to theaters and marketers. In particular, both organizations have their eye on China, home to one of the most powerful and quickly growing entertainment industries in the world."

Blue Man Group was owned by Wink and Stanton and the GF Capital Private Equity Fund. Goldman Sachs & Co. LLC acted as exclusive financial advisor to Blue Man Group.

For additional information visit www.dwt.com

MUÑIZ RAMÍREZ PÉREZ-TAIMAN & OLAYA

ADVISES PERUANA DE INVERSIONS EN ENERGIAS REMOVABLES

Muñiz, Ramírez, Pérez-Taiman & Olaya helped recently to Peruana de Inversiones en Energías Renovables (PIER) in the sale of the 20 megawatt Manta hydroelectric plant to the Spanish investment companies Bow Power and Stowe Invest. The Manta power plant is located in the region of Ancash, in western Peru. The concession was originally granted in 2011 to PIER.

Bow Power and Stowe get a US$51 million loan from Natixis to fund the project.

Bow Power is the result of the strategic relation between Global Infrastructure Partners (GIP) and the ACS Group (ACS), being these the shareholders of the company. Bow Power has an agreement with Grupo COBRA, a world reference EPC contractor, to design and build the projects that Bow Power develops.

The amount of the transaction is undisclosed.

Partners Andrés Kuan-Veng and Jorge Otoya acted as legal advisers of PIER.

For additional information visit www.munizlaw.com

HOGAN LOVELLS

REPRESENTS LABCORP IN $1.2 BILLION ACQUISITION OF CHILTERN

New York, 31 July 2017 – Hogan Lovells represented LabCorp, a leading health care diagnostics company, in the acquisition of Chiltern, a specialty contract research organization (CRO) focusing on clinical research services for the pharmaceutical and medical device industries.

The all-cash transaction is expected to close in the fourth quarter of 2017, subject to regulatory approvals and customary closing conditions. Once the transaction is complete, Chiltern will become part of LabCorp's Covance segment.

Corporate partners Michael Silver and Allen Hicks led the transaction team, which also included Rob Church, Gabi Witt, Natalie Kone and Philip Corser. Other key members of the Hogan Lovells team included Leigh Oliver, Lauren Battaglia, and Alice Wallace-Wright on antitrust matters; Scott McClure, on tax matters; and Michael Applebaum on executive compensation.

Hogan Lovells has advised LabCorp for more than a decade on many of its most significant strategic acquisitions including: Covance, Genzyme Genetics, Pathology Associates Medical Laboratories (PAML), Mount Sinai Health System Clinical Outreach Laboratories, Monogram Biosciences, Medtox, Liposcience and Sequenom.

For more information, see www.hoganlovells.com .

NAUTADUTILH

ASSISTS CENTRICA WITH E&P JOINT VENUTRE

AMSTERDAM, 18 July 2017: NautaDutilh assisted Centrica plc (Centrica) with the creation of a joint venture with Bayerngas Norge AS (Bayerngas Norge). Centrica plc and Stadtwerke München GmbH (SWM) reached an agreement to combine Centrica's European oil and gas exploration and production (E&P) business with Bayerngas Norge to form a newly incorporated joint venture and create a leading independent European E&P company.

The joint venture will create a strong and sustainable European E&P business by combining Centrica's production profile with Bayerngas Norge's portfolio. The joint venture will comprise Centrica's assets in the UK, Netherlands and Norway and Bayerngas Norge's assets in the UK, Norway and Denmark. Centrica will contribute the whole of its European E&P to the joint venture, in exchange for a 69% share in the joint venture.

The existing shareholders of Bayerngas Norge, led by SWM and Bayerngas GmbH, will contribute 100% of the shares in Bayerngas Norge in exchange for a 31% share of the joint venture, held through Bayerngas HoldCo.

The NautaDutilh team consists of Jaap Jan Trommel, Hilleke Terpstra, Lisa Schoenmakers (Corporate Energy/M&A), Albert van der Kolk, Joyce Trebus (Employment), Edward Rijnhout (Tax) and Stephanie Schoonhoven (Notarial). The NautaDutilh team worked together with Slaughter and May (London).

For additional information visit www.nautadutilh.com

ROUSAUD COSTAS DURAN

ADVISES CORNERJOB ON A EUR23MILLION RAISING

25 July 2016: RCD's innovation team has advised CornerJob, a classified advertising start-up belonging to the company builder Antai Venture Builder, on its recent funding round. The increase in capital will help the firm consolidate its presence in Spain and other foreign markets.

Venture capital firms Northzone (shareholder in Wallapop), and e.ventures participated in fund-raising, as well as earlier investors who have reinvested in the firm. With the addition of this round, CornerJob has managed to raise over 30 million euros since its creation in 2015.

CornerJob is a job search app that has up to 40,000 monthly job offers in industries such as hotel and leisure, retail, security, services, and industry, among others. The company operates in Spain, Italy, France, and Mexico, where it will invest the newly acquired capital. Furthermore, the start-up is planning on entering new markets before the end of the year.

RCD has been committed to innovative and entrepreneurial projects since its creation. For this reason, it has become a pioneer and a reference for legal advice in this area. Our clients include technology and biotech companies to whom we offer comprehensive, expert advice.

For additional information visit www.rcdslp.com

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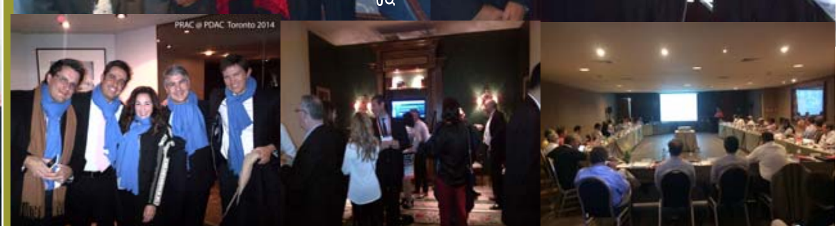
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TOZZINIFREIRE ADVOGADOS

CLAYTON UTZ

03 AUG 2017

Environmental due diligence loose ends: buyers ... and sellers ... beware

BY NICK THOMAS, ALISON PACKHAM

The recent conviction in NSW of both the new operator and the previous operator of an abattoir for water pollution shows how broad NSW environmental offences are, and how important it is to ensure that the right person holds the EPA licence after the licensed business is sold.

The NSW Land and Environment Court has fined both the new operator and the previous operator of an abattoir for water pollution, and the previous operator for contravening the conditions of the abattoir's Environment Protection Licence (**EPL**), in relation to a single pollution incident.

The Court's decision in EPA v P&M Quality Smallgoods Pty Ltd; EPA v JBS Australia Pty Ltd [2017] NSWLEC 89 (21 July 2017) highlights the risk that both the operator of licensed premises and the licensee can be prosecuted for the same offence if the operator doesn't hold the EPL.

The sale of the abattoir and the pollution incident

P&M Quality Smallgoods Pty Ltd operated the Scone Abattoir. P&M was sold in March 2015 to the JBS Group, which includes JBS Australia Pty Limited. JBS began operating the abattoir in June 2015, but P&M remained the EPL holder.

The abattoir disposed of treated effluent by using it to irrigate specified cropping areas on a farm which was part of the abattoir operation, via a system of pipes. In August 2015 – just a few months after JBS assumed control of operations – the farm manager directed that between 70,000 and 140,000 litres of effluent be pumped via a discharge pipe to an unauthorised area, from where some of it then flowed into the nearby Two Mile Gully Creek. The discharge was contrary to the abattoir's environmental management plan.

During the P&M sale process, JBS carried out a desktop and on site review of the abattoir's environmental management systems and controls. According to the Court, the discharge pipe leading to the unauthorised area was partially obscured by earth and grass for much of its length, and neither the discharge pipe nor the unauthorised discharge location was identified or referred to in any company documents.

The EPA prosecution

The NSW Environment Protection Authority charged JBS for polluting waters, as the current operator of the abattoir and the person who physically caused the water pollution. It also charged P&M as the holder of the EPL, because, although P&M did not have any physical involvement in the incident, it was taken to be the occupier pursuant to section 258(2) of the Protection of the Environment Operations Act 1997 (**POEO Act**) since it was the EPL holder at the time of the incident.[1]

In addition, the EPA charged P&M with contravention of its EPL condition which required that all plant and equipment installed at the premises or used in connection with the licensed activity must be operated in a proper and efficient manner. This is a standard EPL condition, but its use here is to prosecute P&M was unusual, since, although P&M installed the unauthorised pipe, the Court found that P&M had not operational role on site at the time of the incident and that JBS should have removed or isolated the pipe once it took on the abattoir operations.

P&M was liable for contravention of its EPL condition because section 64 of the POEO Act states that, if any person contravenes an EPL condition, the EPL holder is guilty of an offence.

Given the strict liability nature of the offences, both P&M and JBS pleaded guilty.

Sentencing P&M and JBS

The Court noted the EPA's submission that strict compliance with EPL conditions is required.

The Court also took the view that the fact that P&M is only deemed to be the site occupier and had no physical involvement in the incident, that was not a significant mitigating factor, and P&M still had a duty, as EPL holder, to take steps to prevent the incident.

The evidence indicated that JBS had taken steps to improve effluent treatment and irrigation systems at a cost of about $2.2 million, had made other improvements to the plan, its operations and safety at a cost of about $5.2 million, and was proposing further works at the abattoir with an estimated cost of about $430,000.

The Court fined JBS $60,000 for water pollution. It fined P&M $42,000 for water pollution and $48,000 for contravention of the EPL condition (the maximum penalty for each offence is $1 million). Relevant factors which helped reduce the fines included the likely limited environmental harm, JBS' post transaction investment in relevant aspects of the abattoir, both defendants' early guilty pleas and co-operation with the EPA.

In addition, JBS and P&M were ordered to pay the EPA' legal costs and some EPA investigation costs, and to publicise the convictions.

What this means for you

This case highlights the importance of careful environmental due diligence in a transaction, to get a good understanding of a business' systems, capabilities and operational risks.

It also highlights the importance of adopting a legal structure in the operation of a business which is based on an understanding of the legal risks and benefits.

In particular, the consequences of holding – or not holding – the EPL for an operation should be considered carefully.

[1] Section 257 of the POEO Act deems the occupier of premises to have caused pollution from the premises, unless the occupier can establish a very limited defence. Presumably, this is what enabled the EPA to charge P&M for polluting waters on the basis of it being the EPL holder.

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NautaDutilh

Taxation

Belgium

Alert on Tax Reform

Tuesday, 1 August 2017

On 26 July 2017 the Belgian government announced an important social and economic reform, which should make Belgium more attractive for investors.

Below we have summarized the main corporate income tax highlights of what has come to be known in the press as the "summer agreement".

It is important to note that at present no legal texts are available and that the "summer agreement" still needs to pass various legislative processes before it can be transposed into Belgian law. Hence, the below is to be considered as preliminary and is still subject to change.

Corporate income tax reform

Progressive decrease of the corporate income tax rates

The corporate income tax rates will decrease progressively over the next years as follows :

	Current	**As of 2018**	**As of 2020**
Corporate income tax rate	33%	29%	25%
A separate reduced rate will apply on small and medium-sized enterprises ("SME"). The reduced rate is only applicable on the taxable basis ≤ 100.000 EUR and subject to certain conditions.	Progressive reduced rates	20%	20%
Crisis surcharge (calculated on the corporate income tax rate)	3%	2%	0%

Some measures that would apply as of 2018

- abolishment of the 0,412% taxation on capital gains on shares (for large companies), resulting in a full exemption. The conditions for the exemption for capital gains on shares would however be aligned with the conditions of the dividends-received deduction (i.e. the exemption will be subject to (i) a one year holding period and (ii) a participation of 10% or 2.5mio EUR);

- the investment deduction would be (temporarily) increased from 8% to 20% both for SMEs and for one-man businesses;

- the current (partial) payroll tax exemption for researchers will progressively be extended to certain bachelors;

- the tax rules applicable on one-man businesses will be further aligned with the corporate income tax regime to avoid the use of companies for tax reasons;

- the notional interest deduction will be calculated on the incremental adjusted equity (over a 5-year period);

- the use of certain tax assets (tax losses carried forward, dividends-received carried forward, innovation deduction carried forward, notional interests deduction carried forward and notional interests deduction) will be limited to 1mio EUR + 70%, hence resulting in a minimum taxable base. An exception would be made for certain investments;

- apart from the dividends-received deduction, no tax assets will be allowed against an increase of the taxable basis following a tax audit;

- in order to encourage prepayments, the base interest rate will increase from 1% to 3%;

- in case a company that has taxed reserves decreases its capital, it will be deemed to have distributed a pro rata part of its reserves (hence potentially triggering withholding tax);

- certain other measures are also envisaged, for instance in relation to the matching principle and the tax deductibility of provisions.

Some measures that would apply as of 2020

- apart from the above further reduction of the income tax rate, a tax consolidation regime (based on the Swedish model) will be progressively introduced;

- further to the Anti-Tax Avoidance Directive 2016/1164 of 12 July 2016, additional limitations on the deductibility of interests will be introduced together with controlled foreign company ("CFC") legislation, exit taxation and provisions on hybrid mismatches;

- the concept of "permanent establishments" will be given a more economic interpretation (taking into account BEPS action points 1 and 7);

- the tax deductibility of losses of foreign permanent establishments will only be allowed in Belgium to the extent that the tax payer has depleted all its possibilities to deduct the losses in the country of the permanent establishment;

Other

Apart from the above, the summer agreement contains various other measures, such as :

- an annual subscription tax of 0,15% will be due on securities accounts valued at 500.000 EUR or more (per tax payer);

- a new tax regime would be introduced for employees sharing in the profits of their employer (without an obligation for the employer and without the employees having a participation in the capital of the company);

- extension of the tax shelter for starters to "growth companies" (subject to conditions) ;

- an optional VAT regime for (certain) real estate leases will be introduced.

- etc.

* * *

We will inform you as soon as the above becomes more concrete. In the meantime, don't hesitate to reach out to your NautaDutilh contact person.

Today, we are pleased to welcome Ken Lioen, Local Partner in our Tax practice group.

We are delighted with his move to our firm and look forward to strengthening our tax practice together with him.

We wish him lots of success in his new assignment.

Contact me

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July 26, 2017

Newsletter - Changes in Brazilian Mining Sector

On July 25th, 2017 Brazilian President Michel Temer, the Minister of Mines and Energy Fernando Coelho Filho, the Chief of Staff Eliseu Padilha and Rodrigo Maia, the Speaker of the House of Representatives hosted an event to announce the Brazilian Mining Industry Revitalization Program, aiming to recover the mining sector credibility, attract new investments, ensure legal and regulatory certainty, reduce bureaucracy of the sector and increase geological reconnaissance of the Brazilian territory.

Some changes introduced through the issuance of Executive Orders ("Medidas Provisórias" - MP) No. 789, No. 790 and No. 791 from 2017 to Brazilian legislation include the creation of a Brazilian Mining Agency (ANM), changes on the calculation of the mining royalty (CFEM) and changes in the Mining Code (decree-law No. 227/1967), as detailed below:

MP No. 789/2017: modifies the calculation method regarding CFEM, the mining royalty:

- Assignor and assignee of mining rights are jointly liable for CFEM existing debts;
- The new tax basis will consider the gross revenue of the mineral sale, not including taxes. Currently, the tax basis considers the net sales. <u>The new rules will be enforceable on August 1st</u>;
- Tax rates set forth by law, on a maximum of 4%:
    - 0,2%: gold and diamond, when extracted through small scale mining permission regime, and other gemstones;
    - 1,5%: rocks, sand, gravel, clay and other minerals used in civil construction;
    - 2%: gold and other minerals, except for iron ore; and
    - 3%: bauxite, manganese, diamond, niobium, potassium and halite;
- For mining ore: progressive tax rates, according to the international price:

    - 2%: below US$ 60;
    - 2,5%: from US$ 60 and below US$ 70;
    - 3%: from US$ 70 and below US$ 80;
    - 3,5%: from US$ 80 and below US$ 100; and
    - 4%: from US$ 100 on.

- Changes in the tax rates will be enforceable on November 1st, 2017;
- In cases where the miner consumes the mineral, the tax basis will be its price in the local, regional, national or global market, according to the case, or previously established by the mining authority. Nowadays, there is legal uncertainty because DNPM considers the price on the moment of the mineral transformation.

MP No. 790/2017: changes some sections of the current Mining Code, maintaining the current legal regime (first-come, first-served principle). For example:

- Allows additional mining exploration after the issuance of a final exploration report;
- Changes the exploration deadlines (that may vary from 2 to 4 years), at ANM's sole discretion. The deadline is renewable once, for the same amount of time;
- Extraordinary deadline extension if the miner, despite its best efforts, cannot access the area or obtain environmental licenses;
- New procedures for available areas (in which there was already someone holding mining rights over the area, but the mining rights were voided, relinquished or forfeited, for instance): electronic tender through higher bid criteria;
- If miners have debts with ANM, negotiating mining rights will not be possible;
- Readjusts fines and fees, which will be enforceable on January 1st, 2018:
    - The Annual Fee per Hectare will have a progressive value, according to regulation of the Ministry of Mines and Energy;
    - Simple fines that may vary from BRL 2,000 to BRL 30 million;
    - Daily fines that may vary from BRL 100 to BLR 50,000.
    - Mine closure plan and the National Policy for Waste Dams are now part of the mining activities.

MP No. 791/2017: creates the ANM, responsible for regulating and inspecting mining activities, and also new charges:

- Transformation of the National Department of Mining Production (DNPM) in ANM, a regulation agency connected to the Ministry of Mines and Energy, with headquarters in the Federal District, authorized to have regional branches (currently, DNPM has one branch in each Brazilian state);
- Creation of terms for a collegiate directorship: currently, DNPM is directed by one director-general that can be removed from office at any time. The new ANM model contributes to regulatory certainty and less political interference, once the office of the 5 directors should have a 5 year term;
- ANM Directors should have professional requirements before taking office, and there are also prohibitions related to conflicts of interest;
- Creation of Mining Activities Inspection Fee (TFAM) that will vary from BRL 500 to BRL 5,000 on a yearly basis for each mining right, depending on the current phase.

According to the procedure set forth on Section 62 of the Constitution, the Executive Orders have full force of law and can be used by the president on urgent and relevant matters, and depend on Congress approval to be signed into law.

When received by the Congress, a Commission with both Senate and House of Representatives members should issue a report on the matter. Then, the executive orders should be voted in the floors of the House of Representatives and the Senate, separately.

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Now You See It, Now You Don't: SCC Upholds Worldwide Injunction That Alters Google Search Results

July 12, 2017 | Andrew D. Little and L.E. Trent Horne

The Supreme Court of Canada has upheld a novel injunction order against Google, requiring it to remove certain websites from worldwide search results. For litigants in Canadian courts, *Google v. Equustek*[1] enlarges both the available pre-trial remedies, and the choice of who may be sued, to protect intellectual property rights—and perhaps other interests as well.

The decision expands current law by recognizing that an intellectual property (IP) rights holder may obtain an injunction against an innocent third party, if that party is unwittingly "facilitating" a defendant's breach of a court order designed to prevent irreparable harm to IP rights.

The question now is, what are the limits for future injunctions? The Supreme Court provides hints, but not extensive guidance. There is considerable scope for development in coming cases, in part based on what is *not* expressly mentioned in the Supreme Court majority's reasons.

The decision warrants attention from both IP rights holders and potential "facilitators" such as social media platforms, some commercial website operators and internet service providers.

Injunction Granted

Equustek is a technology company in British Columbia. It manufactures networking devices that allow electronic communications between complex industrial equipment. Equustek filed a lawsuit against a former distributor, Datalink, alleging that it re-labeled Equustek's products as its own, and also misused confidential information and trade secrets belonging to Equustek.

Initially, Datalink participated in the litigation and filed a defence disputing Equustek's claims. This participation was short-lived. Datalink left the jurisdiction, and disregarded court orders mandating that it return materials to Equustek and stop referring to Equustek on its websites. Through its websites, Datalink continued to sell and offer for sale products that Equustek claimed infringed its intellectual property rights.

Confronted with a recalcitrant defendant and ongoing infringement, Equustek turned to Google for help. Since Google controls between 70 to 75 percent of the global searches on the Internet, Equustek reasoned that de-listing Datalink's websites and web pages from search results would prevent potential customers from locating and purchasing Datalink's products.

After Equustek obtained an order requiring Datalink to cease doing business through any website, Google voluntarily provided some assistance. It de-indexed 345 specific web pages associated with Datalink for searches conducted on google.ca. It did not, however, de-index all of the Datalink websites or alter search results for searches conducted on google.com. The de-indexing proved to be ineffective; Datalink just started up new web pages.

While it was never alleged that Google had done anything wrong, Equustek then asked the court to grant a novel form of injunction against Google that would block the display of search results that would otherwise lead customers to any part of Datalink's websites. Worldwide. Only that, Equustek argued, would protect its business from the irreparable harm being caused by Datalink's ongoing breaches of intellectual property rights and would ensure that the court's previous orders against the defendant were effective.

The B.C. courts agreed with Equustek. The motions judge, Fenlon J., granted an order requiring Google to remove Datalink's websites from search results displayed anywhere in the world. The order was upheld by the British Columbia Court of Appeal.

The injunction order against Google was without precedent. No other Canadian court has issued an injunction requiring a foreign non-party to modify search results for Internet users both inside and outside of Canada.

Injunction Upheld

By a majority, the Supreme Court upheld the injunction. It was unanimous in its determination that this form of injunction with extraterritorial effect *could* be granted. Google carried on business in British Columbia through advertising and search operations; this was sufficient to establish the court's jurisdiction over it. The Court was divided (7-2) on whether such an order *should* have been granted in this case.

i. The Legal Requirements to Grant a "Google Order"

In compelling cases, civil courts have created limited and specific pre-hearing remedies to assist private litigants to preserve and protect their legal rights, particularly against those who show disregard for the rule of law. These remedies include *Norwich* orders requiring non-parties to produce information and *Mareva* orders freezing assets. (These orders are discussed in more detail in our February 2016 article, seen here.)

While the pre-trial remedy in this case was exceptional, the majority of the Supreme Court did not establish a unique test or specific requirements for what is expected to become known as a "Google order". The majority's reasons, written by Justice Abella, considered the traditional test for an injunction from the *RJR—MacDonald* case: a serious issue to be tried; irreparable harm suffered by the plaintiff; and, whether the balance of convenience favours granting the injunction.[2] In future cases, a party moving for a Google order will not be expressly required to establish that there are no reasonable alternative means of relief or that the order will be fully effective in preventing the ongoing breach of court orders or infringement intellectual property rights.

The two-member minority preferred a more difficult legal test to obtain such an injunction. Justices Côté and Rowe urged restraint and caution in the use of the court's injunction powers and would not have granted the injunction in the circumstances, particularly since the order had not been shown to be effective and alternative remedies were available. Indeed, judicial restraint is a major theme throughout the minority's reasons.

ii. When is a Non-Party Exposed?

The Supreme Court provided some guidance on the critical questions of what kind of conduct a non-party would have to engage in for a Google order to be granted, and how much a non-party will have to be involved in the unlawful activity of the defendant. But the majority did not establish express limits that will bind the lower courts.

Like Justice Fenlon in British Columbia, the Supreme Court majority concluded Google was an unwitting and inadvertent "facilitator" of the harm to Equustek caused by the defendant's ongoing breach of the court's orders. Justice Abella observed that the pre-trial injunction flowed from the "necessity of Google's assistance in order to prevent the facilitation of [the defendant's] ability to defy court orders and do irreparable harm to Equustek".

What conduct makes a non-party to litigation a "facilitator" of misconduct was not discussed in the majority reasons; however, the plain meaning of the word suggests that it could include a wide range of activities. The minority judges viewed "facilitation" as too broad. It could, for example, include companies supplying Datalink with the material to produce the derivative products, the companies delivering the products, or as Google argued in its written argument, it might also include the local power company that delivers power to Datalink's physical address.

iii. A Pre-Trial or Final Remedy?

The initial Google order was granted in 2014. By the time the case reached the Supreme Court in 2017, Equustek had still not moved for default judgment or otherwise taken steps to obtain a final order as against Datalink. The minority noted that what was intended to be an interim or pre-trial order had effectively become a final order, and one that gave Equustek little incentive to move the case to a conclusion.

The majority did not view the potential duration of such an order as a bar to granting it, noting that where an interlocutory injunction has been in place for an inordinate amount of time, it is always open to a party like Google to apply to have it varied or vacated. The practical consequence is that a non-party who has been compelled to take steps to give effect to a court order may decide to take additional action to bring the proceeding to a final conclusion, in order to terminate its own obligations under the Google order.

What's Next?

It is expected that rights holders will be quick to avail themselves of this remedy. Effectively deputizing non-party search engines or websites to enforce interlocutory court orders may be more effective than pursuing a final judgment or contempt proceedings against an elusive infringer. For a plaintiff, the costs of a Google order will likely be modest compared to the expense of pursuing litigation in multiple jurisdictions.

Other kinds of legal rights or interests could be protected with a Google order, beyond intellectual property rights. The majority's reasons also noticeably expand the range of targets for the remedy to those who may only "facilitate" harm or a breach of an existing court order, but provide no guidance as to what the limits of facilitation should be.

Plaintiff's counsel may therefore ask a court to protect consumers from online fraud or misrepresentation, or to protect an individual's reputation sullied by libel or other harmful attacks. The targets of such motions could include social media platforms (e.g., Twitter and Facebook), websites with classified ads (e.g., Kijiji and Craigslist) or internet service providers. In each of these instances, the target may not have aided or abetted the misconduct in the sense of having active involvement, but may be seen as being a determinative player in allowing the harm to occur, making it the proper subject of a Google order.

It is also possible that regulatory or law enforcement agencies such as the Competition Bureau will look to use this ruling to support their mandate to protect markets and consumers from fraudulent activity emanating outside Canada.

Non-parties who wish to resist or limit requests for Google orders may find themselves in the unenviable position of picking up the cudgels of the absentee defendant and arguing that there is insufficient evidence of infringement to warrant an order. Even if the non-party takes no position on the defendant's conduct, targets of Google orders will be well served to introduce evidence as to the practical burdens that compliance would require and whether the requested order will be effective. Further, in cases such as *Equustek* where the plaintiff has not pursued a final judgment with alacrity, non-parties should stand ready to request time limits on the Google order, even if that means effectively taking steps to move the proceeding to a final resolution.

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[1] *Google Inc. v Equustek Solutions Inc.*, 2017 SCC 34 (June 28, 2017).

[2] *RJR—MacDonald Inc. v. Canada (Attorney General),* [1994] 1 SCR 311.

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/Carey

Public Bid for the Bicentennial Cable Car Concession

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

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Today, July 11th, 2017, it was published in the Official Gazette the International Public Bid for the project called **"Bicentennial Cable Car Concession"**. Bidding documents may be obtained with the Ministry of Public Works.

Project Description
The project involves the execution, repair, maintenance and exploitation through the Concession System of an urban single-cable car with an approximate length of 3,382 meters, connecting the boroughs of Providencia, Las Condes, Vitacura and Huechuraba. The goal is to improve the vehicular and pedestrian traffic of one of the most crowded areas of the capital, offering an efficient and sustainable transport system and contributing to the reduction of current levels of congestion in Eastern Santiago.

The official estimated budget of the project is UF 1,948,603 (approximately USD78 million).

Prequalification
Individuals or legal entities, national or foreign, may participate in the tender, either individually or in a Consortium, provided they meet the requirements of the Concessions Law, the Regulation of the Concessions Law and the Bidding Rules.

Reception and Bids Opening
Bids will be received by the Opening Commission on **November 23, 2017**, at 12:00 hrs. The opening of financial bids will take place on December 21, 2017, at 12:00.

BRIGARD& URRUTIA

Resolutions 5797 & 1272 July, 2017

Tue, 08/01/2017 - 12:05
NewsFlash: 387

Immigration

Resolutions 5797 & 1272 July, 2017

Resolutions 5797 and 1272 were issued on July, 2017 creating a Special Stay Permit (herein and after "PEP") for Venezuelan citizens and establishing the procedure for its granting. A PEP holder will be authorized to exercise any legal activity or occupation in the country including those that are conducted under an employment contract.

WHAT CHANGED?

• The Special Stay Permit may be granted only to Venezuelan citizens who meet the following conditions:

- Being in Colombian territory on July 28, 2017.

- Having entered the national territory with a regular immigration status and through an authorized immigration border checkpoint.

- Not having national or international criminal records.

- Not having a current deportation or expulsion order.

• The PEP will not be granted to Venezuelans who entered with a border mobility card (Tarjeta de Movilidad Fronteriza).

• The PEP holder will be authorized to conduct any legal activity or occupation in the country, including those that are developed under an employment relationship.

• The PEP will be granted for a period of ninety (90) calendar days and it may be renewed automatically without filing a request, for equal periods, without exceeding a term of two (2) years. After this period, PEP holders must obtain a visa; otherwise, they will be in an irregular status.

• The PEP may not be extended to the discretion of the immigration authority when there is an improper use of the permit, when there have been an infraction of the legal system, when the foreigner exist Colombia and stays abroad for a term longer than ninety (90) calendar days, and at the discretion of the authority when deemed appropriate.

WHAT IS THE EFFECT OF THIS CHANGE?

• The PEP holder will be authorized to conduct any legal activity or occupation in the country, including those that are developed under an employment relationship.

WHAT NEEDS TO BE CONSIDERED?

• The immigration authorities will issue the PEP from August 3, 2017 until October 31, 2017.

• The PEP does not replace the passport as a travel document. It must be presented (if required) to the Colombian authorities along with the passport or the national identity document and it will be used as an identification of Venezuelan citizens in the national territory.

• Individuals or companies that hire or receive a PEP holder are required to file reports about the foreigner's activities in Colombia to the immigration authority through the SIRE system.

** This newsflash has been provided by Brigard & Urrutia. For more information please contact our immigration Team.*

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An expensive omission?

July 2017

On 25 July 2017, a travel agency in Hong Kong and its deputy operations manager were convicted of the offence of "misleading omissions" under the Trade Descriptions Ordinance ("**TDO**"). They were found to have omitted telling several customers of their tour package the reduction in the airline's fuel surcharge. According to Hong Kong Customs (the authority responsible for enforcing the TDO), this is the first criminal conviction of a travel agency under the TDO since it was amended in July 2013 to introduce the unfair trading practice offences.

The defendants were each fined HK$9,000 and were ordered to compensate HK$14,000 to all affected customers. While the amounts involved are relatively modest, this conviction highlights a number of risk areas which businesses must be aware of. We have set out our **recommendations** at the end of this article on ways to address these risks.

Background of the case

According to news reports (no written judgment is available yet), the customers involved signed up for a packaged tour operated by the travel agency. At the time of the purchase, the travel agency did not tell the customers that the fuel surcharge for their flight was reduced by the airline by about HK$1,800 per person. Instead, the travel agency offered a HK$800 discount to its all-inclusive package. The invoices however highlighted the fuel surcharge (at the original amount, not the reduced amount) as a separate payable item.

At the trial, the travel agency argued that since it was selling at an all-inclusive price, once the customers had agreed with that price, the fuel surcharge should not be regarded as "material information" which would impact the customers' decisions.

However, the Magistrate rejected this argument. The Magistrate found that the travel agency did not clearly explain what the all-inclusive price covered, whereas the invoices highlighted the outdated fuel surcharge as a separate payable item. Furthermore, the Magistrate found that the reduction of the fuel surcharge would lead to a reduction of the "all-inclusive package" price, and if the customers were informed of the actual reduction, they would not have had to pay for the extra amount. Hence, the Magistrate considered that this piece of information amounted to "material information" which should have been revealed to the customers.

The deputy operations manager in charge of the sales of the packaged tour was also held personally liable on the ground that he consented or connived to the offence committed by the travel agency.

It is reported that the travel agency would appeal the decision.

"Misleading Omissions" under the TDO

By way of reference, under Section 13E of the TDO, a trader commits the offence of misleading omissions if the trader omits or hides material information (or provides such information in an unclear or untimely manner) which causes or is likely to cause the average consumer to make a transactional decision that he or she would not have made otherwise.

This offence imposes strict liability, i.e. the trader can be liable even though it did not deliberately omit the information.

In addition, directors and management personnel of a trader may be personally liable if the offence has been committed with their consent or connivance, or is attributable to their negligence.

Recommendations

The offence of misleading omissions has a wide and uncertain scope. By definition, any information not disclosed to a consumer could fall within the ambit of omitted information. Whether such omitted information is "material" or not to an "average consumer" is something that can be very difficult to interpret with certainty.

This case reminds us of a few lessons:

- Price information (including details on surcharges, discounts, rebates, etc.) is a key focus of enforcement under the TDO. It is critical to put in place measures that the whole business from top down (e.g. by adopting suitable contract terms/invoice templates; providing regular training to front-line staff) uses accurate price descriptions (written and verbal) and not omits important price information.
- Risks under the TDO are applicable to both small traders and big, well-established businesses (as in this case where the travel agency is part of a listed group in Hong Kong).
- Management personnel can be personally liable for an offence under the TDO. A top-down approach is critical.

- TDO complaints and proceedings very often make newspaper headlines. The potential reputation impact cannot be ignored.
- Based on our experience, handling TDO complaints and proceedings often involve significant costs and resources. Prevention is better than cure.

Article by Eugene Low, a partner, and Grace Zhu, a trainee from Hong Kong office.

Contacts

Eugene Low

Partner
Hong Kong

NEWS DETAIL

04/08/2017

NEW MINERAL EXPORT RULES AND IMPLICATIONS FOR MINING COMPANIES

Indonesian Government Regulation No.1 2017 triggers major shifts in the country's mineral and coal mining industries. Mineral mining companies who depend heavily on mineral exports will be particularly affected by the new policies. Primary changes require all companies operating under a Contract of Work to transfer to a single licensing regime, and introduce stringent mineral export processing standards. Indonesian Government Regulation No. 1 of 2017, issued in January, is the fourth amendment to Government Regulation No. 23 of 2010 on the Implementation of Mineral and Coal Mining Business Activities ("GR 1/2017").

GR 1/2017 has prompted the Minister of Energy and Mineral Resources ("MEMR") to issue a suite of 3 (three) implementing regulations so far, as follows:

1. MEMR Regulation No. 5 of 2017 regarding Minerals' Increased Added Value through Domestic Mineral Processing and Refinery, dated 11 January 2017 ("MEMR Reg 5/2017");
2. MEMR Regulation No. 15 of 2017 regarding Procedure for the Granting of Production Operation Specific Mining Business License (*Izin Usaha Pertambangan Khusus Operasi Produksi*/IUPK OP) as Continuation of Contract of Work (CoW) Operation or Coal Mining Contract of Work (CCoW) dated 10 February 2017 ("MEMR Reg 15/2017");
3. MEMR Regulation No. 28 of 2017 regarding Amendment to MEMR Reg 5/2017 dated 30 March 2017 ("MEMR Reg 28/2017").

Historically, the MEMR regulations originated from Law No. 4 of 2009 on Mineral and Coal Mining (the "Mining Law 2009"). Article 170 of the Mining Law 2009 requires holders of a Contract of Work ("CoW") or Coal Contract of Work to commence their mining product processing and purifying activities domestically within 5 years from the enactment of Mining Law 2009 and no later than 12 January 2014.

<u>Requirements for Mineral Exports</u>

MEMR Reg 5/2017 and its amendment set out the requirements that holders of a CoW, Mining Business Operating Production License (*Izin Usaha Pertambangan* "IUP OP") or Special Mining Business Operating Production License (*Izin Usaha Pertambangan Khusus* "IUPK OP") must meet to continue exporting processed minerals (concentrates) and resume exports of unprocessed nickel and bauxite. In the first instance, mineral mining companies operating under a CoW must convert to an IUPK OP.
Further, both IUP OP and IUPK OP holders (including IUPK OP holders who have converted from a CoW) may only continue mineral exports for five years - up to 11 January 2022, and only if they satisfy the following conditions:

i. that they have obtained the required export recommendation from the Directorate General of Mineral and Coal and the required export permit from the Ministry of Trade;

ii. that they have fully paid the export duty; and
iii. that they have complied with the minimum processing limit set forth in Attachment I of MEMR Reg 5/2017.

Conversion from a CoW to IUPK OP

The following are the provisions of the MEMR regulations regarding the conversion of the CoW into IUPK OP:

- The application for the conversion must be submitted to the MEMR before the expiry of the CoW's validity period. The application must be accompanied by the required territorial map, proof of the payment of the fees, and the work and budget plans.
- The MEMR must issue its approval or rejection of the application at the latest 14 (fourteen) business days as of the submission of the complete application.
- The issuance of the IUPK OP does not automatically terminate the CoW.
- There are two types of IUPK OP:
  1) IUPK OP with validity period until the expiration of the CoW (type 1); and
  2) IUPK OP with validity period which covers the adjustment time for the operation's continuity (type 2).
- If a type-2 IUPK OP is granted, the CoW and its related consent documents will still prevail.
  - Upon the expiration of the type-2 IUPK OP, if a settlement with respect to the adjustment of IUPK OP is reached, the CoW and related documents between the Government and CoW holders become invalid simultaneously with the issuance of the new extended IUPK OP pursuant to the laws. MEMR REG 28/2017 provides neither further explanation nor reference to the laws regarding the above IUPK OK. That said, Article 112 paragraph 2 of Government Regulation No. 1 of 2017 regarding Implementation of Mineral and Coal Mining Business interprets the situation by stating that "Contacts of Work and Coal Contracts of Work which have not obtained an extension approval may, upon their expiration, be extended into an extended IUPK OP for operation continuation purposes without going through a tender".
  - Upon the expiration of the type-2 IUPK OP, if a settlement with respect to the adjustment of IUPK OP is not reached, the IUPK OP becomes invalid and the mining business is to be conducted under the CoW.

Conclusion

As mentioned above, the MEMR regulations are the follow-up regulations of Law No. 4 of 2009 regarding Mineral and Coal Mining, which initially introduced the regime shift from CoW to IUPK OP. The mechanism for conversion from a CoW to IUPK OP under the new regulations is not yet entirely clear. In particular, uncertainty remains over what the new terms and conditions under an IUPK OP will be in comparison to the existing CoW. There is also question over whether the requirements for contract conversion under MEMR Reg 5/2017 are legitimate under the existing mining law, and some speculation that the provisions will be challenged. Nevertheless, at present the regulations offer mining companies which depend on mineral exports little alternative but to convert to an IUPK OP in order to continue these activities. (*by: Zensy Pratiwi, Wahyuni Hanindriyowati & Mahatma Hadhi*)

FEDERAL COURT REASSERTS INDEPENDENCE OF THE JUDICIARY

SECTION 40D – STRUCK DOWN

The Federal Court has, in its recent decision in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526, unanimously struck down section 40D of the Land Acquisition Act 1960 ("Act") for being *ultra vires* the Federal Constitution.

Both appeals concerned a challenge to the constitutionality of certain provisions of the Act, including section 40D. One was an appeal by the landowner against a decision of the Court of Appeal and the other, a reference by the Court of Appeal of constitutional questions that arose in the course of an appeal for determination by the Federal Court.

In one of the appeals, the appellant also challenged the Court of Appeal's decision not to recognise its claim for loss of profit as a result of the extinguishment of the business carried out by the appellant on the land that was acquired.

Section 40D, which was introduced by way of an amendment to the Act in 1998, empowered the two valuers (commonly referred to as assessors) who assist a High Court Judge in a Land Reference, to determine the amount of compensation that ought to be awarded in respect of a land acquisition. It reads as follows:

"(1) In a case before the Court as to the amount of compensation or as to the amount of any of its items the amount of compensation to be awarded shall be the amount decided upon by the two assessors.

(2) Where the assessors have each arrived at a decision which differs from each other then the Judge, having regard to the opinion of each assessor, shall elect to concur with the decision of one of the assessors and the amount of compensation to be awarded shall be the amount decided upon by that assessor.

(3) Any decision made under this section is final and there shall be no further appeal to a higher Court on the matter."

The Federal Court held that, by virtue of section 40D, a High Court Judge in a Land Reference could not award compensation which differed from the amount decided by the assessors, and if the assessors themselves differed on the amount, the High Court Judge could only concur with one of them. Tan Sri Datuk Zainun Ali, FCJ, who delivered the judgment of the Federal Court commented:

"Wherefore now stands the Judge? It would appear that he sits by the sideline and dutifully anoints the assessors' decision."

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JUDICIAL POWER OF THE FEDERATION

In striking down the provision, the Federal Court held that it is not possible for Parliament to pass laws that have the effect of diluting the exercise of judicial power by the Judiciary because the Federal Constitution vests that power in the Judiciary. The Federal Court described the concept of judicial power as follows:

"Judicial power is the power every sovereign State must of necessity have, to decide controversies between its subjects or between itself and its subjects, whether the rights related to life, liberty or property ..."

Prior to the introduction of section 40D in 1998, there had been a period of time, that is until 1984, when it was not objectionable for judges in Land References to sit with assessors to determine compensation for compulsory acquisitions of land. Those sittings were however held pursuant to older provisions of the Act that were repealed in 1984, and although the assessors played a vital role thereunder in giving advice regarding the amount of compensation which ought to be awarded, the decision on the amount of compensation would ultimately be arrived at by the judges.

CHECK AND BALANCE

The Federal Court took the view that the placement of judicial power in the Judiciary represents an important feature of our democratic system of government because it is the judicial branch of government which is tasked with the duty of checking and balancing the powers vested in the other two branches of government, namely the legislative branch represented by Parliament, and the executive branch represented by the Prime Minister and his Cabinet.

It should go without saying that the judicial branch of government can only be effective as a check and balance if it is independent of legislative and executive influences. Law students learn very early on that the need for an independent judiciary and an effective system of checks and balances is of utmost importance and that that need, forms an integral part of the doctrine of separation of powers which modern democracies aspire to implement.

Although the doctrine and its requirements may seem obvious, the matter however had not been clear-cut in the context of our Judiciary due to an amendment to the Federal Constitution in 1988. The amendment in question was carried out by Act A704 which deleted the reference to the vesting of the judicial power of the Federation in the courts from Article 121(1) of the Constitution. However, according to the Federal Court, the words "judicial power" continued to remain in the marginal note to the said Article, and they currently appear in the shoulder note thereof as reflected in the current, reprinted, version of the Federal Constitution. The Federal Court then stated:

"Thus it is clear to us that the 1988 amendment had the effect of undermining the judicial power of the Judiciary and impinges on the following features of the Federal Constitution:

(i) The doctrine of separation of powers; and

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(ii) The independence of the Judiciary.

With the removal of judicial power from the inherent jurisdiction of the Judiciary, that institution was effectively suborned to Parliament, with the implication that Parliament became sovereign. This result was manifestly inconsistent with the supremacy of the Federal Constitution …"

BASIC FABRIC CANNOT BE ALTERED

The matters stated above formed the setting for what is perhaps the most important aspect of the Federal Court's judgment – which is their Lordships' view that it is not permissible for Parliament to amend the basic structure of the Federal Constitution even if the proposed amendment is passed by both Houses of Parliament with a two-thirds majority.

Specifically, the Federal Court said that Parliament does not have power to make amendments to the Federal Constitution that had the effect of undermining the independence of the Judiciary and the doctrine of separation of powers, both of which are basic features of our Constitution. According to Tan Sri Datuk Zainun Ali, FCJ:

"*It is worthwhile reiterating that Parliament does not have power to amend the Federal Constitution to the effect of undermining the features as stated in (i) and (ii) above for the following reasons:*

The effect of sub-s. 8(a) of the Amending Act A704 appeared to establish Parliamentary supremacy; this consequentially suborned the Judiciary to Parliament, where by virtue of the amendment, Parliament has the power to circumscribe the jurisdiction of the High Court.

Consequentially this has the unfortunate effect of allowing the executive a fair amount of influence over the matter of the jurisdiction of the High Court."

Her Ladyship referred to various decisions where the apex court had rejected the notion of Parliamentary supremacy and in particular to *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333, 342 where Gopal Sri Ram FCJ said:

"… Further it is clear from the way in which the Federal Constitution is constructed there are certain features that constitute its basic fabric. Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution) that offends the basic structure may be struck down as unconstitutional."

PROSPECTIVE EFFECT OF DECISION

The Federal Court however clarified that their declaration of the unconstitutionality of section 40D will carry only a prospective effect. In other words, it will not be possible for completed Land Reference cases to be reopened by former landowners, although an exception was made for cases pending at the appellate stage to be revisited if the application of section 40D may have caused prejudice to the appellants therein.

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BUSINESS LOSS

Turning their attention thereafter to the facts of the appeal before them, the Federal Court held that the Land Administrator and the High Court failed to award compensation for the extinguishment of the business that had been undertaken on the land by the Appellant at the time of acquisition and consequently, the case was remitted to the High Court for a determination of the appropriate amount of compensation that ought to be awarded on that ground.

Ordering compensation to be paid for the extinguishment of business due to an acquisition of land is itself significant because the First Schedule of the Act, which lays down the principles relating to the determination of compensation in land acquisitions, does not expressly provide for such compensation. However, the Federal Court held that that head of compensation is permissible as it ought to be considered part of the "market value" of the land which had been acquired.

CONCLUSION

The importance of *Semenyih Jaya* lies not in the mere fact that the apex court struck down section 40D of the Act. It is a landmark case in Malaysian constitutional law as it makes it clear that the Federal Constitution contains certain entrenched provisions that even Parliament cannot amend with a two-thirds majority, including for example, those that have the effect of undermining the doctrine of separation of powers and the independence of the Judiciary.

This decision has received widespread praise from members of the legal fraternity and the academia as it affirms the importance of an independent judiciary and the doctrine of separation of powers in forming the bedrock of a truly democratic system of government.

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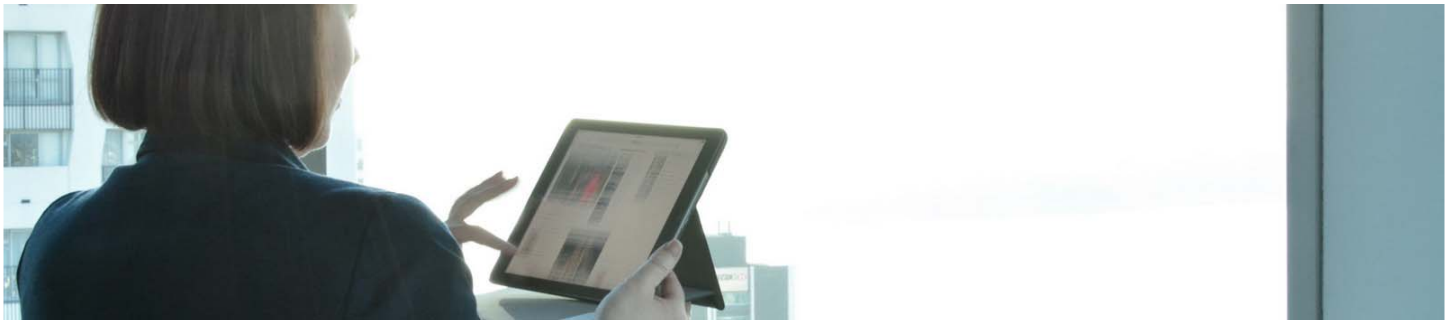

Putting your money where your mouth is

August 02, 2017

Contacts Partners **Earl Gray** , **Richard Watts**

Intellectual property rights owners often use threats of legal action as a tool for deterring infringers. However, threats of legal action can also potentially be open to abuse, such as by businesses making dubious claims to deter competitors or to extort settlements (acting as "trolls"). Many countries, including New Zealand, therefore provide defendants with remedies against unjustified threats and groundless infringement proceedings.

The United Kingdom recently reformed its regime relating to unjustified threats. The developments in the United Kingdom serve as a reminder for businesses in New Zealand that:

- defendants, and other aggrieved parties, may have remedies against threatened or commenced infringement proceedings that are unjustified;
- the position regarding unjustified threats and proceedings varies between territories. In New Zealand, it depends on the particular IP rights in issue. This can make it complicated for rights owners where several types of IP rights are infringed, or where an infringing activity spans across more than one territory; and
- IP rights owners should obtain appropriate advice before threatening or commencing infringement proceedings.

Recent Developments in the United Kingdom

The United Kingdom recently enacted the Intellectual Property (Unjustified Threats) Act 2017 (the Act), which is expected to come into force later this year. The Act unifies the approach to remedies for unjustified threats of proceedings for certain types of IP. Highlights include:

- remedies can be sought by a "person aggrieved" by an unjustified threat of infringement proceedings. This means parties other than the recipients of threats could seek remedies. Remedies can include a declaration of non-infringement, damages, and/or an injunction against the party making the threat;
- the Act introduces a new test for what constitutes a threat of infringement proceedings. The test now relies on what a reasonable person would understand, and whether the threat is understood to relate to acts done in the United Kingdom;
- there are exceptions for "permitted communications" by rights owners. This is intended to allow rights owners

to give notice of their rights and make genuine enquiries without facing potential liability of being sued as a result; and
- the Act excludes liability for professional advisers of the parties making the threats, subject to certain conditions.

The Act applies to patents, registered trade marks, and registered and unregistered designs. The Act does not affect the position regarding other IP such as copyright and unregistered trade marks.

The Position in New Zealand

Unlike the United Kingdom, in New Zealand there is no unified approach to groundless threats or unjustified infringement proceedings. Instead, the approach differs depending on the particular IP right. Notably, New Zealand's Patents Act 2013 does not provide a remedy for defendants who are subject to unjustified threats and proceedings.

The table below summarises provisions in New Zealand for particular types of IP regarding groundless threats and unjustified proceedings.

IP Right	Comments
Registered trade marks	Section 105 of the Trade Marks Act 2002 provides a remedy for defendants where proceedings brought against them are unjustified. But relief will not be granted to the defendant if the claimant proves that the relevant act constitutes an infringement.
Copyright	Section 130 of the Copyright Act 1994 provides a remedy for defendants where proceedings brought against them are unjustified. But relief will not be granted to the defendant if the claimant proves that the relevant act constitutes an infringement.
Patents	The Patents Act 2013 does not contain any provisions addressing groundless threats or proceedings. However, defendants can counter-claim to revoke a patent (s 147), and any person wanting to exploit an invention can apply to the court for a declaration of non-infringement (s 159).
Registered designs	Section 34 of the Designs Act 1953 provides a remedy for a "person aggrieved" where proceedings are threatened against them. Relief will not be available if the plaintiff proves that the relevant acts constitute an infringement and the registered design is not shown by the defendant to be invalid.

Circuit layouts	Section 40 of the Layout Designs Act 1994 provides a remedy for defendants where proceedings brought against them are unjustified. Relief will not be granted to the defendant if the plaintiff proves that relevant acts constitute an infringement.
Plant variety rights	The Plant Variety Rights Act 1987 does not have provisions dealing with threats of unjustified proceedings or the bringing of groundless proceedings.

Making threats that are not capable of being substantiated or that are misleading or deceptive could also breach the Fair Trading Act 1986. Furthermore, threats that are malicious and false could give rise to an action in tort for slander of title or goods, trade libel, defamation, injurious falsehood, or interference with contractual relationships, and potentially malicious civil proceedings if proceedings are commenced.

Additionally, lawyers are subject to professional obligations that deter groundless threats and proceedings. For example, lawyers must not mislead the court, must ensure that there are reasonable grounds for proceedings relating to fraud and other reprehensible conduct, and must ensure that they are satisfied with certain matters in interlocutory applications without notice.

Time for New Zealand to unify its regime?

The policy reasons underlying remedies for unjustified threats and proceedings are sensible. However, the varied position under New Zealand's IP statutes does not encourage efficiency or certainty for rights owners or defendants. The regime in New Zealand relating to unjustified threats and proceedings could therefore benefit from a review and a possible unification of the approach across all types of IP.

Of the New Zealand statutes discussed above, the Patents Act 2013 is the most recent. In around 2009, when considering the possibility of including an unjustified threats or proceedings provision in the Patents Bill, the Ministry of Economic Development (now called the Ministry of Business, Innovation and Employment) was of the view that such a provision was unnecessary and could be used to intimidate patent owners into withdrawing or not threatening proceedings. The Ministry also noted that such provisions are not generally available in areas of law other than IP.

The Ministry recently launched a review of New Zealand's Copyright Act 1994. It will be interesting to see whether the Ministry's view on unjustified threats and proceedings in patent infringement still holds and, if it does, whether the same approach is applied to copyright infringement.

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SyCipLaw Tax Bulletin:

BIR Guidelines on Credit/Debit/Prepaid Card Payment of Internal Revenue Taxes

On January 12, 2016, Former Secretary of Finance Cesar Purisima issued Revenue Regulation ("**RR**") No. 3-2016 prescribing the policies and guidelines on the adoption of credit, debit, and prepaid cards as an additional mode of payment for internal revenue taxes. Credit, debit, and prepaid cards were made available as an additional mode of payment in order to ease the burden to taxpayers in the payment of their taxes[1]. However, payment through this mode is limited to Philippine-issued cards by authorized agent banks ("**AAB**") under the name of the taxpayer[2]. Prior to this RR, internal revenue taxes may be paid through **(1)** the electronic payment system, **(2)** over-the-counter cash payments, **(3)** bank debit system, or **(4)** check payment[3].

The taxpayer must bear the convenience fees, merchant discount rates, and other fees for the use of these payment facilities and such fees shall not be deducted from any tax due to the Bureau of Internal Revenue ("**BIR**")[4]. The BIR shall not be liable for issues arising between the taxpayer and the card issuer such as "charge back", erroneous posting, or non-payment[5]. In case erroneous payments were made through this mode, the taxpayer must apply for refund or tax credit and there shall not be any automatic "charge back" of the taxpayer's account[6].

Payments through credit, debit, or prepaid card are deemed made upon the approval of the transaction by the card issuer as evidenced by a duly issued payment confirmation receipt[7]. RR No. 3-2016 originally provided that the taxpayer shall have a continuing liability for the taxes until the BIR actually receives payment[8]. This was later amended by RR No. 2-2017, issued by Finance Secretary Carlos Dominguez on January 13, 2017, to provide that the authorized agent bank shall bear the liability, as trustee of the government, to pay the taxes due to late or non-remittance of the same to the BIR despite a timely issuance of a valid confirmation receipt. The amendment was made because "the taxpayer has no control over the actual remittance of the payment to the BIR other than securing a valid confirmation receipt and ensuring that his/her tax payment is paid through a legitimate AAB of the BIR."[9]

[1] Payment of taxes through a credit facility with a bank, a credit company, or similar institution was made available under RR No. 04-97, as amended by RR No. 06-98, but was later omitted under RR No. 16-02.
[2] Sec. 3(3), Sec. 3(6), RR No. 3-16
[3] Sec. 3, RR No. 16-02

(Continued on page 2)

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(Continued from page 1)

[4] Sec. 3(1), *id*
[5] Sec. 3(4), *id*
[6] Sec. 3(5), *id*
[7] Sec. 2(4) & Sec. 4(a), *id*
[8] Sec. 4(b), *id*
[9] http://www.dof.gov.ph/index.php/dof-bir-improve-process-for-tax-payments-via-credit-cards/ (last visited on 05/09/2017)

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Marking Documents with "Confidential" Indicate "Reasonable Confidentiality Measures" Have Been Taken?

07/31/2017

Hsiu-Ru Chien/Yu-June Tseng

In accordance with Article 2 of the Trade Secrets Act, the term "Trade Secret" shall meet the following three indispensable requirements: (1) it is not known to persons generally involved in the information of this type ("secret nature"); (2) it has actual or potential economic value because of to its secret nature ("economic value"); and (3) its owner has taken reasonable measures to maintain its secrecy ("reasonable confidentiality measures"). In the event of misappropriation of a trade secret, the owner must prove that the claimed information has met the three aforementioned requirements for protection by the Trade Secrets Act.

Among these three requirements, it has always been an issue of great importance to figure out to what extent confidentiality measures can be deemed as reasonable. A common practice is to mark documents containing confidential information with words like "Confidential," but courts in Taiwan hold different opinions as to whether such practice meets the requirement of "reasonable confidentiality measures."

In judgment No. 102-Min-Ying-Shang-4, a second-instance judgment rendered on February 5th, 2016, the Intellectual Property Court of Taiwan took a strict stance on this issue. According to the Court, even though the plaintiff claimed its documents containing trade secrets had been marked with red, handwritten characters "Business Secrets," since trade secrets may vary in type and content, they shall be categorized and classified based on business needs with appropriate control measures taken in accordance with different levels of role-based authorization to manage technical or business information in a confidential manner. The Court further pointed out that the plaintiff neither signed any confidentiality agreement with the recipient of the claimed information, specified any legal obligation of confidentiality on the part of the recipient, nor took any control measures including categorizing and classifying the information, designating particular staff to keep the information, setting limited access to users, or informing the responsible staff of the confidential content or the confidentiality measures. It is difficult to conclude that "reasonable confidentiality measures" have been taken merely on the basis of the words “Business Secrets” and/or “Confidential” claimed by the plaintiff. Therefore, the Court held that requirements for trade secrets were not satisfied on the part of the plaintiff.

However, the Supreme Court of Taiwan seems to have a different position on this case. In its judgment No. 106-Tai-Shang-350 rendered on June 3rd, 2017, the Supreme Court ruled that the fact that the owner of the trade secrets had already, during the delivery of the claimed documents, marked the documents with the warning "Business Secrets" can be interpreted as demonstrating the plaintiff's subjective intension to manage these trade secrets. Moreover, the documents stating that the information at issue shall not be publicized on any product packaging could prove that the owner of the trade secrets did not want anyone other than the designated recipient of the information to know the content. Therefore, it can be concluded that "reasonable confidentiality measures" had been taken on the part of the plaintiff.

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INSURANCE | TURKEY | JULY 2017

HIGH-RISK INSURANCE POOL FOR MTPL IN TURKEY

On 11 July 2017, the following amendments to the Turkish insurance legislation were published in the Official Gazette upon adoption by the Undersecretariat of the Treasury (the "**Treasury**"):

- Regulation amending the Regulation on the Implementation Principles of the Motor Third Party Liability Insurance ("**MTPL**") Tariffs ("**MTPL Amendment Regulation**"); and
- Regulation amending the Regulation on the Capital Adequacy Calculation and Assessment of the Insurance, Reinsurance and Private Pension Companies ("**Capital Adequacy Amendment Regulation**").

Pursuant to this legislation, a long-discussed High-Risk Insurance Pool has been established for MTPL, as mentioned in our Client Alert regarding recent changes on MTPL, which was published in August 2016.

Accordingly, the relevant changes have also been reflected in the Capital Adequacy Amendment Regulation, together with a few changes on equity capital adequacy provisions. Please find below a brief explanation of the notable changes brought by these amendments.

AMENDMENTS TO THE REGULATION ON THE IMPLEMENTATION PRINCIPLES OF THE MOTOR THIRD PARTY LIABILITY INSURANCE TARIFFS

The MTPL Amendment Regulation sets out a number of new provision on the MTPL principles implementation regarding motor vehicle operators and persons carrying out professional activities in relation to motor vehicles:

- Pursuant to the amendments made to Article 4/6 on the principles for determining insurance premiums, the determination of MTPL premium amounts for motor vehicle operators will no longer be subject to the proposal of the Insurance Association of Turkey, and will be directly set by the Treasury.
- Under Article 4/6 on motor vehicle operators, a High-Risk Insurance Pool has been established for motor vehicles subject to a high frequency risk or at a high risk level (*i.e. all vehicles in 1st, 2nd and 3rd grades, and taxis, minibuses, buses, trucks and tow trucks in all grades*). The principles set out for this High-Risk Insurance Pool will be applied starting from **12 April 2017**.

- When calculating the minimum premium amounts, the Treasury will, among other things, take into account the upper premium limits determined by the Treasury under Annex 1 of the MTPL Amendment Regulation of May 2017. The calculation will be made in accordance with Annex 4 (i.e. for vehicles subject to the High-Risk Insurance Pool) whereby discounts of 10%, 20% and 30% will be applied in grades 5, 6 and 7 respectively.

- All accounts in relation to the High-Risk Insurance Pool must be managed by the Turkish Motor Insurers' Bureau, under the Insurance Association of Turkey.

- The commission payable to insurance intermediaries is 8% of the amount of the premium (excluding taxes and contribution amounts but including social security contribution amount) and covers operating costs. For insurance companies the commission amounts to 5%.

- Annual calculations of the premium and paid damage sharing in the High-Risk Insurance Pool will be made in two stages:

  - 50% of the premiums and paid damages will be shared equally between all the insurance companies; and

  - 50% will be shared in accordance with the MTPL premium shares of the insurance companies over last three years.

- Any disputes between the High-Risk Insurance Pool and the insurance companies will be resolved by the Turkish Motor Insurers' Bureau, with the Treasury's assent.

- The Treasury is entitled to apply administrative measures against insurance companies that have previously been warned about a refusal to issue insurance policies within the scope of the High-Risk Insurance Pool.

- In addition to these amendments, a maximum limit has been set for the payment of loss of value, corresponding to 15% of the coverage limit regarding motor vehicle operators and persons carrying out professional activities in relation with motor vehicles for the years 2017 and 2018. This provision will only apply to policies issued after the date when the MTPL Amendment Regulation was published (11 July 2017).

AMENDMENTS TO THE REGULATION ON THE CAPITAL ADEQUACY CALCULATION AND ASSESSMENT OF THE INSURANCE, REINSURANCE AND PRIVATE PENSION COMPANIES

The main amendments to the Regulation on the Capital Adequacy Calculation and Assessment of the Insurance, Reinsurance and Private Pension Companies are as follows:

- Risk calculation on an excessive premium increase has been removed from the risk items taken into account for the equity capital adequacy calculation;

- Premiums transferred to the High-Risk Insurance Pool must not be taken into account when calculating the underwriting risk; and

At the request of an insurance company, the Treasury is entitled to extend certain time limits applicable to protective measures to be taken by the insurance company in the event of a decrease in the equity capital / required equity capital ratio below 100%.

The provisions of the Capital Adequacy Amendment Regulation are valid starting from 11 July 2017.

In compliance with Turkish bar regulations, opinions relating to Turkish law matters included in this client alert have been issued by Özdirekcan Dündar Şenocak Avukatlık Ortaklığı, a Turkish law firm acting as correspondent firm of Gide Loyrette Nouel in Turkey.

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Making Patents STRONGER: The STRONGER Patents Act of 2017

August 2017
IP Reports

Patent reform has been a popular topic of discussion and public interest over the past few years, although little reform has followed the America Invents Act of 2011. Reform efforts have attempted to target the increased number of patent assertions by non-practicing entities but have yet to pass any significant legislation on the federal level. Some commentators have pointed to recent Supreme Court cases as alleviating some of these unresolved tensions by changing the scope of patentable subject matter[1] and lowering the bar to obtain attorney's fees.[2] On the other hand, pro-patentee advocates have seen this evolving law and increased use of post-grant proceedings to invalidate patents as a threat to the security of their patent rights. The Support Technology & Research for Our Nation's Growth and Economic Resilience (STRONGER) Patents Act of 2017[3] introduced by Senator Coon and co-sponsored by Senators Cotton, Durbin and Hirono attempts to provide stronger protections for patentees.[4]

Motivations of the STRONGER Patents Act of 2017

The motivations for introducing the STRONGER Patents Act of 2017 fall into four basic categories: stronger infringement enforcement, fairness in Patent Office administrative challenges, reducing abusive patent demand letters, and fully funding the USPTO to ensure timely, high-quality patents.[5] The senators sponsoring this legislation have stated their concern that a weakened patent system may reduce the United States' historic edge in innovation and the patent system's impact on the economy. To address these issues, the STRONGER Patents Act would amend a wide range of statutory provisions under Title 35 of the United States Code governing the bulk of the United States' patent system. This article will briefly discuss several of the proposed changes that are newly introduced in the 2017 version of the proposed Act.

Presumptive Injunction

Under 35 U.S.C. § 283, a court may grant injunctions using equitable considerations "to prevent the violation of any right secured by patent, on such terms as the court deems reasonable."[6] Courts have not, as a matter of course, issued injunctions upon a finding of infringement of a valid patent.[7] Even if injunctive relief is the most likely outcome, courts typically weigh the equities of issuing an injunction before its grant.[8] The STRONGER Patents Act would amend Section 283 to create a statutory presumption that "further infringement of the patent would cause irreparable injury" and "remedies at law are inadequate to compensate for that injury" upon a finding of infringement of a patent not proven invalid or unenforceable.[9] While not necessitating an injunction in every case, such statutory language would support injunctions as the default remedy, requiring the accused infringer to overcome the presumptions of irreparable harm and inadequacy of other remedies.

Reshaping Infringement

Section 271 of Title 35 of the United States Code provides the statutory basis for asserting an infringement action under three theories: direct infringement, inducement of infringement, and contributory infringement.[10] The contours of inducement and contributory infringement have been reshaped over the last decade by a Supreme Court ready and willing to take up patent cases and overturn established precedent in the Federal Circuit.[11] In response to these changes, the STRONGER Patents Act attempts to roll-back or mitigate the changes to support a wider range of infringement theories.

For example, Section 108 of the Act would amend subsection (b) to expand inducement liability to accused infringers beyond the current law, most recently espoused by the Supreme Court in *Commil Usa, LLC v. Cisco Systems, Inc.*[12] and *Global-Tech Appliances, Inc v. SEB S.A.*[13] In particular, this section would allow a finding of inducement infringement "upon a showing that the accused infringer intended to cause the acts that constitute infringement, *without regard to whether the accused infringer know of the patent*."[14] This would mark a sharp deviation from the current law established in the Supreme Court, which requires both knowledge of the patent and knowledge that the "induced acts constitute patent infringement."[15] The removal of the requirement of knowledge of the patent, as well as an implied abrogation of the knowledge that the acts would be infringing, would greatly expand the possible scenarios of inducement infringement.

Further, Section 108 of the Act would also add a new subsection (j) to Section 271 that purports to clarify the issue of divided infringement. The Supreme Court in *Limelight Networks, Inc. v. Akamai Techs., Inc.* held that for contributory infringement, one entity must practice all the steps of the patented process to find direct infringement to support a claim of contributory infringement.[16] Subsequently, the Federal Circuit, *en banc*, found that performance of a step may be attributed to the accused infringer, if the accused infringer directed another to perform the step.[17] The new subsection would clarify that "it shall not be a requirement that the steps of the patented process be practiced by a single entity," for purposes of inducing infringement or for contributory infringement of a process patent.[18] One reading of this provision is simply a codification of the law developed in the *Akamai* cases that does not require a strict single-entity performance rule. On the other hand, a broad reading of this provision could support separating inducement infringement and contributory infringement from the single-entity default rule and allowing a broader range of divided infringement cases to move forward than the current law allows.

Mitigating Risks to the Patent Owner in Post Grant Procedures

The proliferation of the use of post-grant proceedings to challenge the validity of patents has garnered varied reactions from the patent bar. Pro-patentee groups see the myriad of ways that patent rights may be lost in these administrative proceedings as concerning at best. The STRONGER Patents Act of 2017 includes several provisions targeted towards moving the balance back towards the patentee during these proceedings, including several new provisions added in the 2017 update to the proposed Act.

Among these new provisions are several proposed amendments that limit the type and frequency of challenges to a patent holder's patented claims. For example, subsections (d) in Sections 102 and 103 of the Act would prohibit institution of inter partes review or post-grant review for claims for which such a proceeding had previously been instituted.[19] Thus, a claim in a patent would only be subject to challenge in one post-grant proceeding, even if the claim is asserted against multiple parties in different infringement actions. Another protective provision is subsection (f) which would estop a party from challenging a claim as invalid based on Section 102 or 103 of title 35 of the United States Code if the party has already petitioned for inter partes review or post-grant review of the claim that resulted in an institution decision.[20] This would greatly expand the current estoppel provision that is limited to preventing challenges of validity on the grounds that were raised or reasonably could have been raised during an inter partes review.[21] Additionally, subsection (g) would further expand the estoppel provision to apply to those making any financial contribution to the post-grant challenge.[22] Thus, many of the new provisions would enhance protection for the patent holder by further limiting challenges to the patented claims.

In further strengthening the patent holder's position in post-grant proceedings, amendments proposed in subsection (h) of Sections 102 and 103 of the Act would stay or prohibit the institution of post-grant proceedings after a district court has found the challenged patent valid.[23] This would place determinations of validity at the district court level at a higher priority. As a result, district courts may be less willing to issue stays pending a post-grant review or inter partes review.

<u>Conclusion</u>

The new provisions of the updated STRONGER Patents Act of 2017 would further shift the balance between patent holders and accused infringers in several areas of the law. In particular, the Act would drastically change the operation of post-grant proceedings. Additionally, the Act would open up inducement and contributory infringement to a larger range of infringement scenarios. While passage is no guarantee, passage of even some of the provisions in the proposed Act could have lasting effects on the evolving patent law in the United States.

[1] *See Alice Corp. v. CLS Bank Int'l*, 573 U.S. ____, 134 S. Ct. 2347 (2014) and *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012).
[2] *See Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014) and *Highmark Inc. v. Allcare Health Management System, Inc.*, 134 S.Ct. 1744 (2014).
[3] Support Technology & Research for Our Nation's Growth and Economic Resilience Patents Act, S. 1390, 115th Cong. (2017).
[4] The STRONGER Patents Act of 2017 is an updated version of the Stronger Patents Act of 2015.
[5] Senator Coons has made available a one-page outline of the policy rationales underlying the introduction of the proposed act, which is currently made available through Senator Coon's website: https://www.coons.senate.gov/imo/media /doc/STRONGER Patents Act of 2017 One Pager.pdf.
[6] 35 U.S.C. § 283 (2012).
[7] *See eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006)(determining that an injunction should not be automatically issued based on a finding of patent infringement, but instead courts must still weigh the four-factor test traditionally

used to determine if an injunction should issue).
[8] *See id.*
[9] STRONGER Patents Act of 2017, § 106.
[10] 35 U.S.C. § 271(a)-(c).
[11] *See e.g., TC Hearland LLC v. Kraft Foods Grp. Brands, LLC*, 581 U.S. _____, 137 S. Ct. 1514 (2017); *Alice Corp. v. CLS Bank Int'l*, 573 U.S. _____, 134 S. Ct. 2347 (2014); *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012); *Commil Usa, Llc v. Cisco Systems, Inc.*, 135 S. Ct. 1920 (2015); and *Limelight Networks, Inc. v. Akamai Techs., Inc.*, 134 S. Ct. 2111 (2014).
[12] 135 S. Ct. 1920 (2015).
[13] 563 U.S. 754 (2011).
[14] STRONGER Patents Act of 2017, § 109.
[15] *Commil Usa*, 135 S. Ct. at 1928 (citing *Global-Tech*, 131 S. Ct. at 2070-71).
[16] 134 S. Ct. 2111 (2014).
[17] *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 797 F.3d 1020, 1022-23 (Fed. Cir. 2015)(*en banc*).
[18] STRONGER Patents Act of 2017, § 108.
[19] STRONGER Patents Act of 2017, § 102(d) § 103(d).
[20] STRONGER Patents Act of 2017, § 102(f) and § 103(f).
[21] 35 U.S.C. § 315 (e); *see also Shaw Indus. Grp., Inc. v. Automated Creel Sys., Inc.*, 817 F.3d 1293 (Fed. Cir. 2016)(reading the estoppel provision narrowly to only apply to invalidity references on which the IPR was actually instituted, and did not extend to grounds that were presented to the PTAB but not part of the grounds for institution).
[22] STRONGER Patents Act of 2017, § 102(g) and § 103(g).
[23] STRONGER Patents Act of 2017, § 102(h) and § 103(h).

Draft Cybersecurity Legislation Would Impose Substantial New Obligations on Vendors Selling Interconnected Devices to the U.S. Government

08.02.17

By Chris Savage and Lisa Marchese

On Tuesday, August 1, 2017, a bipartisan group of four Senators from the Senate Cybersecurity Caucus introduced legislation designed to improve the cybersecurity of devices purchased by the U.S. government and – albeit indirectly – sold anywhere in the U.S. or the world.

The legislation – the “Internet of Things (IoT) Cybersecurity Improvement Act of 2017” – would require government contracts for the purchase of Internet-connected devices to include clauses that impose significant new cybersecurity obligations on suppliers. Among other provisions, suppliers would be required to certify that their devices: (a) do not contain any known security vulnerabilities or defects; (b) can be patched; (c) use industry-standard protocols for communications and encryption; and (d) do not include any hard-coded credentials for receiving updates. Suppliers would be obliged to notify the government of any later-discovered security vulnerabilities, and to either update/patch or replace devices that are found to have such vulnerabilities. Waivers on a case-by-case basis would be permitted for “devices with severely limited functionality” if it is uneconomical to require compliance with the requirements of the bill.

In addition, the bill would require the National Protection and Programs Directorate within the Department of Homeland Security to issue guidelines for each executive branch agency for “coordinated disclosure” by contractors of security vulnerabilities.

The bill would also require each covered agency to develop a database of that agency’s internet-connected devices.

Finally, the bill would create explicit exemptions from liability under the Computer Fraud and Abuse Act (18 U.S.C. § 1030) and the Digital Millennium Copyright Act (17 U.S.C. §§ 1201 *et seq*.) for “good faith” research into cybersecurity vulnerabilities of devices of the types sold to the United States government.

The title of the legislation suggests that it might apply only to “IoT” devices – networked cameras, appliances, etc. But the definition of “Internet-connected devices” under the bill includes any “physical object” that (a) is regularly connected to the internet and (b) has computer processing capabilities. So, the new requirements would apply to all PCs, laptops, tablets, smartphones, routers, servers, mainframes, and more – that is, to essentially any modern computing device.

On the surface, this legislation would not directly impose any cybersecurity obligations on any company. However, given the range of entities that supply computing/network gear to the government, wide swaths of the technology industry would be required to conduct detailed cybersecurity reviews of their products (and agree to the new provisions outlined above), on pain of losing the government's business. In practical terms, if passed, this legislation could significantly restructure industry's approach to cybersecurity. Moreover, by expressly exempting good-faith research into vulnerabilities from liability under either the CFAA or the DMCA, the bill would strongly encourage efforts by outsiders to identify and report vulnerabilities – which would then have to be reported to the government.

In short, if adopted, this bill would amount to form of "soft" regulation of cybersecurity, leveraging the government's purchasing power to require industry to substantially modify its approach. Long-time industry players will see a parallel between this effort and the effort in the late 1980s/early 1990s by the Department of Defense to require email systems used by its contractors and subcontractors to be interoperable. While not "regulation" in any formal legal sense, in practical terms leveraging the government's purchasing power drove the interoperability of email systems. This bill attempts to adopt the same approach for cybersecurity.

In summary, this legislation only underscores the Government's growing and heightened focus on cybersecurity and the expanding compliance requirements for federal contractors. For example, the newly enacted FAR and DFAR Cybersecurity clauses impose a myriad of compliance obligations aimed at safeguarding information and data in contractor information systems. Cybersecurity requirements will soon be included in virtually all federal procurement contracts. The government's approach has been to place the burden of cybersecurity upon contractors. Thus, contractors should make cybersecurity compliance a priority to ensure they stay ahead of the proverbial power curve in this ever evolving legislative and regulatory landscape.

By avoiding directly imposing security obligations on device manufacturers, and instead leveraging the government's purchasing power to "nudge" the market, this bill takes a different approach from the currently pending California IoT bill (SB 327). In its current form, that bill would require interconnected devices sold to consumers in California to have "reasonable security features appropriate to the nature of the device and the information it may collect, contain, or transmit [and] that protect the device and any information contained therein from unauthorized access, destruction, use, modification, or disclosure." *See* here.

We will monitor the progress of this proposed legislation and provide additional updates as warranted.

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Creditors' Rights and Bankruptcy Practice Group

GOODSILL ALERT

July 19, 2017

NINTH CIRCUIT BANKRUPTCY OPINION ALLOWS PROPERTY SALE FREE AND CLEAR OF LEASES

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In the case of *Pinnacle Restaurant at Big Sky LLC v. CH SP Acquisitions LLC (In re Spanish Peaks Holdings II LLC), 15-35572 (9th Cir. July 13, 2017)*, the U.S. Court of Appeals for the Ninth Circuit held that section 363 of the Bankruptcy Code allows a trustee to sell real property free and clear of unexpired leases.

BACKGROUND FACTS

Spanish Peaks was a 5,700-acre resort in Big Sky, Montana. Id. at 4. The project was financed by a $130 million loan, secured by a mortgage and assignment of rents, from Citigroup Global Markets Realty Corp. ("Citigroup"). Id. Citigroup later assigned the note and mortgage to Spanish Peaks Acquisition Partners, LLC ("SPAP"). Id.

In 2006, Spanish Peaks Holdings, LLC ("SPH"), leased restaurant space to Spanish Peaks Development, LLC ("SPD"), for $1,000 per month. Id. A year later, SPH and SPD replaced the 2006 lease with a lease under which SPD received a 99-year leasehold in the restaurant property in exchange for $1,000 per year in rent. In 2008, SPD assigned its interest to The Pinnacle Restaurant at Big Sky, LLC ("Pinnacle"), a company specially created for that purpose. Id. In 2009, SPH leased a separate parcel of commercial real estate at the resort to Montana Opticom, LLC ("Opticom"). Id. That lease had a term of sixty years and an annual rent of $1,285. Id.

Facing a shrinking real-estate market and mounting operational losses, SPH began to default on its loan payments. Id. at 5. On October 14, 2011, SPH and two related entities—The Club at Spanish Peaks, LLC, which managed the resort's ski and golf facilities, and Spanish Peaks Lodge, LLC, which managed its real-estate sales—filed for chapter 7 bankruptcy protection. Id.[1]

SPH's largest creditor was SPAP, which had a claim of more than $122 million secured by the mortgage on the property. Id. SPAP subsequently assigned its interest to CH SP Acquisitions, LLC ("CH SP"). Id. The trustee and SPAP agreed to a plan for liquidating "substantially" all of the debtors' real and personal property. Id. Their stipulation contemplated an auction with a minimum bid of $20 million. Id. It further stated that the sale would be "free and clear of all liens." Id.

The trustee then moved the Bankruptcy Court for an order authorizing and approving the sale "free and clear of any and all liens, claims, encumbrances and interests," except for certain specified encumbrances, and that other specified liens would be paid out of the proceeds of the sale or otherwise protected. Id. at 6. The Pinnacle and Opticom leases were not mentioned in either the list of encumbrances that would survive the sale or the list of liens for which protection would be provided. Id.

Pinnacle and Opticom both objected to "any effort to sell the Debtors['] assets free and clear of [their] leasehold interests," arguing that Section 365 of the Bankruptcy Code gave them the right to retain possession of the property notwithstanding the sale. Id. at 6. After a hearing, the Bankruptcy Court authorized the sale and did not rule on Pinnacle's and Opticom's objections. Id. Instead, the Bankruptcy Court deferred the decision on claimed right to possession to the hearing on the motion to approve the sale. Id.

On June 3, 2013, the auction and the sale approval hearing took place. Id. CH SP won the auction with a credit bid of $26.1 million. Id. At the approval hearing, Pinnacle and Opticom renewed their objections that they were entitled to retain possession pursuant to their leases, and argued that language in the proposed approval order providing that the sale would be free and clear of those interests was inconsistent with their claimed rights. Id. In response, CH SP's principal testified that its bid was contingent on the property being free and clear of the leases. Id. at 6-7.

On June 13, 2013, the Bankruptcy Court entered an order approving the sale free and clear of any "Interests," a term defined to include any leases "(except any right a lessee

[1] The petitions were filed in Delaware, but the proceedings were transferred to the Bankruptcy Court for the District of Montana, where they were consolidated for joint administration. Id.

may have under 11 U.S.C. § 365(h), with respect to a valid and enforceable lease, all as determined through a motion brought before the Court by proper procedure).” Id. at 7.

Both sides moved for clarification of the approval order. Id. Pinnacle and Opticom sought clarification that the order preserved their rights under the leases, while CH SP sought clarification that the order approved a sale free and clear of those interests. Id. The Bankruptcy Court denied having ruled one way or the other, explaining that it would not consider the issue until the parties had “file[d] an appropriate motion, notice[d] the matter for hearing, and present[ed] their evidence.” Id. The trustee then filed a motion to reject the Pinnacle and Opticom leases on the ground that the subject property was no longer property of the estate. Id. CH SP moved for a determination that the property was free and clear of the leases. Id. Pinnacle and Opticom did not object to the trustee’s motion, which was granted. Id. They did, however, renew their previous arguments as objections to CH SP’s motion. Id. After a two-day evidentiary hearing on that motion, the Bankruptcy Court made the following findings of fact:

- Pinnacle had not operated a restaurant on the property since 2011;
- Pinnacle’s rent was far below the property’s fair market rental value of $40,000 to $100,000 per year;
- Opticom’s lease was not recorded;
- The leases were executed “at a time when all parties involved were controlled by James J. Dolan”;
- The leases were the subject of bona fide disputes;
- Citigroup’s mortgage was senior to the leases; and
- The leases were not protected from foreclosure of the underlying mortgage by subordination or nondisturbance agreements.

Id. at 7-8. Based on those findings, the Bankruptcy Court—applying what it called a “case-by-case, fact-intensive, totality of the circumstances, approach”—held that the sale was free and clear of the Pinnacle and Opticom leases. Id. at 8.

Pinnacle and Opticom appealed to the U.S. District Court, which affirmed. Id. The District Court held that the sale extinguished the leases because the foreclosure of a mortgage would, under Montana law, terminate any leasehold interests junior to the mortgage. Id. at 9.

THE NINTH CIRCUIT'S DECISION

The Ninth Circuit explained that two sections of the Bankruptcy Code were in apparent conflict: (1) Section 363, which authorizes the trustee to sell property of the estate, both within the ordinary course of business (see 11 U.S.C. § 363(c)), and outside of it (see 11 U.S.C. § 363(b)) sometimes authorized to be "free and clear of any interest in such property of an entity other than the estate," and (2) Section 365, which authorizes the trustee, "subject to the court's approval," to "assume or reject any executory contract or unexpired lease of the debtor." Id. at 10-11.[2]

The Ninth Circuit noted that Section 365(h) of the Bankruptcy Code makes a special provision for rejected leases, which essentially provides that the rejection of an unexpired lease leaves a lessee in possession with two options: treat the lease as terminated (and make a claim against the estate for any breach), or retain any rights—including a right of continued possession—to the extent those rights are enforceable outside of bankruptcy. Id.

The Ninth Circuit explained that a majority of courts to have addressed this issue have held that section 365 trumps section 363 and that the property cannot be sold "free and clear" of the leasehold. Id. at 12. However, the Ninth Circuit rejected this majority approach and explained that, "we agree with the Seventh Circuit that sections 363 and 365 do not conflict." Id. at 14.[3] The Ninth Circuit explained that "Where there is a sale, but no rejection (or a rejection, but no sale), there is no conflict." Id.[4]

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[2] The Bankruptcy Court had explained that, "Section 363, confers a right to sell property free and clear of 'any interest,' without excepting from that authority leases entitled to the protections of section 365." Id. at 12. Focusing on the statutory text, the Bankruptcy Court noted that lessees are entitled to seek "adequate protection" under section 363(e), so "Lessees . . . are therefore not without recourse in the event of a sale free and clear of their interests. Id. They have the right to seek protection under section 363(e), and upon request, the bankruptcy court is obligated to ensure that their interests are adequately protected." Id.

[3] In Precision Industries, Inc. v. Qualitech Steel SBQ, LLC (In re Qualitech Steel Corp. & Qualitech Steel Holdings Corp.), 327 F.3d 537, 547 (7th Cir. 2003), the Seventh Circuit observed that "the statutory provisions themselves do not suggest that one supersedes or limits the other."

[4] The Ninth Circuit explained that Section 365 has a "limited scope":

> Section 365(h) . . . focuses on a specific type of event—the rejection of an executory contract by the trustee or debtor-in-possession—and spells out the rights of parties affected by that event. It says nothing at all about sales of estate property, which are the province of section 363.

Id. at 13.

The Ninth Circuit explained that "[t]he Pinnacle and Opticom leases were not "rejected" prior to the sale . . . Under our interpretation, then, section 365 was not triggered." Id. at 15. The Court also found that "Pinnacle and Opticom did not ask for adequate protection until *after* the sale had taken place." Id. at 16.

Additionally, the Ninth Circuit explained, "Under Montana law, a foreclosure sale to satisfy a mortgage terminates a subsequent lease on the mortgaged property." Id. at 16. The Court further explained:

> SPH's bankruptcy proceeded, practically speaking, like a foreclosure sale—hardly surprising since its largest creditor was the holder of the note and mortgage on the property. Indeed, had SPH not declared bankruptcy, we can confidently say that there would have been an actual foreclosure sale. Such a sale would have terminated the Pinnacle and Opticom leases.

Id. at 17. The Court explained that Section 363(f)(1) allows a "free and clear" sale if "applicable nonbankruptcy law permits sale of such property free and clear of such interest," Id. at 16, and that, "[w]e see no reason to exclude the law governing foreclosure sales from the . . . language in section 363(f)(1)." Id. at 17. The Ninth Circuit explained:

> We agree that section 365 embodies a congressional intent to protect lessees. But that intent is not absolute; it exists alongside other purposes and sometimes conflicts with them. To some extent, protecting lessees reduces the value of the estate—property presumably fetches a lower price if it is subject to a lease—and is therefore contrary to the goal of "maximizing creditor recovery," another core purpose of the Code. The statutory text is the best assurance we have that we are balancing competing purposes in the way Congress intended.

Id. at 17-18.

CONCLUSION

Owners of leases, as well as lenders with security interests in such leases, should be aware of the implications of Ninth Circuit's recent decision in *Pinnacle Restaurant*.

Although the Ninth Circuit attempts to limit its decision based upon "on the facts of this case," the implications of this decision could be far-reaching and could affect substantial property interests of creditors unless appropriate objections, requests for adequate protection, and other necessary actions are timely taken.

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This **Goodsill Alert** was prepared by Johnathan C. Bolton (jbolton@goodsill.com or (808) 547-5854) of Goodsill's Creditors' Rights and Bankruptcy Practice Group.

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