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March 2017 e-Bulletin

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Upcoming Conferences

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

PRAC 62nd International Conference
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For more information visit www.prac.org

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BAKER BOTTS FOLLOWS UP RECENT EXPANSION OF NINE PARTNERS IN HOUSTON WITH ADDITIONS OF NOTED REGULATORY PARTNER IN AUSTIN AND CORPORATE OIL & GAS PARTNER IN DALLAS.

MARCH 2017 -Baker Botts L.L.P., a leading international law firm, announced that Andrea Stover, has joined the firm's Global Projects Practice based in the Austin office and Larry Hall has joined the firm's Dallas office as a Partner in the Corporate Department.

“Andrea is an outstanding lawyer with significant experience in representing clients before State and Federal regulatory bodies,” said Andrew M. Baker, Managing Partner of Baker Botts. “Her experience and background in the energy and construction industries will add significant value for our clients,” added Mr. Baker.

“Andrea is well-known and highly respected among Texas energy regulatory agencies and her arrival will complement our practice before the Public Utility Commission of Texas, the Electric Reliability Council of Texas (ERCOT) and in the Texas courts,” said Jason Bennett, Co-Chair of the firm's Global Projects Group and a partner in the Houston office.

Ms. Stover's clients have included utilities and other regulated institutions, who appear before the courts and regulatory authorities on issues such as complaint cases, rate proceedings and applications for Certificates of Convenience and Necessity (CCN). She has significant experience in the construction industry, representing both building and land owners, commercial developers, tenants, banks and contractors. Ms. Stover has worked with clients in fraud claims, contractual disputes, and statutory and constitution lien claims. Ms. Stover has a B.A. from the University of Texas and a J.D., graduating magna cum laude, from American University, Washington College of Law.

“Larry is a first class corporate lawyer with a tremendous amount of experience in the energy sector both in Texas, as well as in Oklahoma. He is a great addition to our outstanding group of Texas based corporate lawyers,” said Andrew M. Baker, Managing Partner of Baker Botts.

Mr. Hall's practice is focused on corporate and finance work for oil and gas companies. He has significant experience in private equity funding, exploration and development participation arrangements, mergers and acquisitions and non-traditional and traditional financing. Mr. Hall graduated from the University of Oklahoma with a B.B.A., with highest honors, and a J.D. from Harvard University.

“We are thrilled that Larry will be joining our Dallas office and Corporate team. He is well known as an outstanding oil and gas lawyer and his arrival boosts our already robust team of corporate lawyers in Dallas, across the United States and internationally,” said Tim Durst, Partner in Charge of the firm's Dallas office.

Baker Botts also recently announced the arrival of nine private equity, corporate, finance, tax and energy partners formerly with Norton Rose Fulbright. Included in this group of lawyers is the former head of Norton Rose Fulbright's U.S. Corporate and M&A Practice, the former head of their Houston Corporate and M&A Practice and the former head of Norton Rose Fulbright's U.S. Tax Practice. The partners moving to Baker Botts include - **Edward Rhyne, David Peterman,** former head of Norton Rose Fulbright's U.S. M&A and Securities Practices, **Robert Phillpott, former** head of Norton Rose Fulbright's U.S. Tax Practice, **Efren Acosta,** former head of Norton Rose Fulbright's Houston Corporate, M&A and Securities Practices, **Ned Crady, Daniel Mark, Natasha Khan, Ron Scharnberg and Dan Tristan.**

“This exceptional group of partners possess a depth of talent and volume of experience that will add to our already robust Corporate, Tax and Global Projects Practices. Their addition strengthens our position as the leading firm serving the energy industry,” said Andrew M. Baker, Managing Partner of Baker Botts.

“These new additions dramatically enhance our strength in the areas of private equity, mergers and acquisitions, tax, finance and projects in the upstream, midstream and downstream energy markets,” added Mr. Baker.

“This group of lawyers have been working together for many years and recognize the importance of collegiality, professional excellence, integrity and world class client service. We are very excited by their arrival,” said John Porter, Partner in Charge of the firm's Houston office.

For more information, please visit www.bakerbotts.com

ALLENDE & BREA ADDS SPECIAL COUNSEL TO ENERGY & NATURAL RESOURCES GROUP

BUENOS AIRES - 03 March 2017: Allende & Brea is pleased to announce that Soledad Ferreyra has joined the law firm's Energy and Natural Resources department as Special Counsel in the Oil & Gas practice group.

Soledad has more than 20 years of experience in the Oil & Gas sector. Prior to joining Allende & Brea, she played a key role in the department of legal affairs of Pan American Energy for 16 years.

Soledad is highly regarded for her understanding of the oil & gas industry, her vast knowledge of oil & gas regulations and her negotiation skills, both in the structuring of complex oil and gas transactions and dispute resolution.

Allende & Brea's Energy and Natural Resources department is co-headed by partners Juan Martin Allende and Marcos Patron Costas. "We very much look forward to working alongside Soledad and we trust she will become a natural leader of our Oil & Gas practice group, to continue to provide and enhance our service of excellence to our clients in the industry".

For additional information visit www.allendebrea.com.ar

CLAYTON UTZ LAUNCHES FORENSIC & TECHNOLOGY SERVICES PRACTICE WITH NEW PARTNER APPOINTMENT

SYDNEY - 21 February 2017: Clayton Utz has recruited Paul Fontanot from global accounting firm EY to head up a dedicated national Forensic & Technology Services practice. Paul will join the firm in Sydney on 1 March 2017 as a partner.

Paul was most recently a partner and Asia-Pacific Quality and Risk Leader of EY's Fraud Investigation & Dispute Services (FIDS) team, in which he spent 20 years. Paul has worked with many multinational clients in identifying and managing fraud and corruption risk, as well as cyber-risk. His experience includes conducting fraud and regulatory investigations, designing and implementing Anti-Fraud Programs and corporate compliance programs, managing IT forensic analysis, preservation and data review programmes, as well as forensic accounting.

Clayton Utz Chief Executive Partner Rob Cutler said the new practice, headed by Paul, would offer clients the complete package of forensic investigation, forensic accounting, forensic technology and front end transaction services and would be complementary to the firm's full service legal offering. Rob said the enhanced offering would also enable the firm to better respond to increasing demand from clients for services that help them identify and manage fraud and corruption risk at an early stage.

"Our existing Legal Technology Services (LTS) practice, led by Jonathan Prideaux, has worked alongside our practice groups for many years, particularly our Dispute Resolution practice, to provide our clients with tailored, innovative electronic data and evidence management and legal project management solutions.

"We're now building on that capability by expanding services in forensic investigations, forensic accounting including forensic data analytics, which reflects our clients' needs for these services and enables us to take a complete service to the market. Paul's experience, particularly advising multinationals on investigations and risk, will be hugely valuable to our clients."

Paul said he was pleased to bring his experience to a law firm that was providing a smart and complete solution to a specific client need. "Clayton Utz is one of the leading law firms in Australia and a leader in LTS and dispute resolution advice and services, and my experience will complement that. Clients are increasingly grappling with issues such as cyber-risk, the impact of global anti-bribery legislation, and contract risk in the supply chain. We can help them identify and manage that risk in a practical way, under one firm."

For additional information visit www.claytonutz.com

GOODSILL WELCOMES CORPORATE PARTNER AND CIVIL LITIGATION ASSOCIATE

HONOLULU— February 2017: Goodsill Anderson Quinn & Stifel has expanded its Corporate Group with the addition of Michael L. Korniczky as partner and Civil Litigation Associate Maegan A. Ruggles.

Michael concentrates his practice in the area of business and technology law including public and private company securities law, commercial business contracts, manufacturing law, international business transactions, mergers and acquisitions and intellectual property transactions. Prior to joining Goodsill he has held executive-level positions while serving internationally based, publically traded and privately held manufacturing companies.

Maegan concentrates her practice in the areas of civil litigation with an emphasis on medical liability and general healthcare law. Prior to joining the firm she worked at a boutique law firm in Beverly Hills centering on personal injury and entertainment law. Locally in Hawaii she worked as a legislative attorney in the Hawaii State Legislature and most recently practiced at a Honolulu firm with focus on medical malpractice defense, premise liability and privacy rights.

For additional information visit www.goodsill.com

GIDE PROMOTES TEN LAWYERS TO COUNSEL

PARIS - 02 March 2017: Gide is pleased to announce the promotion to Counsel of ten promising young lawyers across its offices in five practice areas. The appointments are effective as of 1 January 2017.

Banking & Finance - **Benjamin Delaunay, Delphine Guillotte, Théophile Strebelle, Laurent Vincent**
Competition & International Trade - **Anna Claudia Coelho Dias**
Dispute Resolution - Criminal & Commercial Litigation - **Caroline Sader**
Dispute Resolution - International Arbitration - **Hannah McIrvine**
Mergers & Acquisitions / Corporate - **Régis Henry**
Projects (Finance & Infrastructure) - **Victor Grandguillaume, Nicolas Jean**

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

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

For additional information visit www.gide.com

HOGAN LOVELLS EXPANDS PRIVATE EQUITY FUNDS PRACTICE

Hogan Lovells Expands Private Equity Funds Practice Adding Adam Tope in New York

NEW YORK— 09 March 2017: Hogan Lovells announced today that Adam Tope will join the firm's Corporate practice as a partner in the New York office.

"We are excited for Adam to join us," said David Winter, co-head of the firm's global Fund Formation Practice Group. "Adam's talent and excellent relationships with private equity firms and institutional investors makes him a good addition to our New York office where he will be able to provide our clients with advice on all aspects of fund formation."

Tope represents the sponsors of private equity, real estate, venture capital, and hedge funds across the full spectrum of fund formation matters, including co-investment vehicles, managed accounts, and funds of one. He also advises investors on fund investments, direct investments, and co-investments, including secondary transactions.

"The firm's global network and cross-practice capabilities will expand the services I can offer to private equity and venture capital firms and to investors in private funds," said Tope. "Hogan Lovells is also ideal for helping me expand what we can provide clients given the firm's extensive regulatory, tax, ERISA, and transactional work."

Tope also advises startup companies on a variety of corporate-related matters and is working to create innovative technology-based solutions to manage the fund formation process.

"Adam's skills are closely aligned with the needs of our clients both in the New York market and internationally," said David Gibbons, head of the firm's global Corporate Practice Group. "Due to client demand, we have been focused on strategically expanding our Investment Funds practice in New York."

Prior to joining Hogan Lovells, Tope was a shareholder at Greenberg Traurig, LLP. He earned his J.D., cum laude, from Georgetown University Law Center and his B.S. from Cornell University. He is admitted to practice in New York and the District of Columbia.

For more information, see www.hoganlovells.com

PRAC @ Hong Kong 2017 Conference
Island Shangri-La Hotel

April 22—25, 2017

Hosted by Hogan Lovells

Visit www.prac.org

SIMPSON GRIERSON ANNOUNCEMENTS

AUCKLAND - March 2017: Simpson Grierson announced several partner and senior associate appointments and across its New Zealand offices.

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

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

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

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

On March 3, Simpson Grierson announced five new senior associates, and a senior litigation advisor.

Dominic Toomey has been promoted to senior associate as a member of the Auckland transactional banking and finance group. Dominic's practice focuses on property financing and leveraged transactions. He also has specialist knowledge in complex receivables financing and development funding.

Kate Strevens joins Simpson Grierson as a senior associate in its Auckland corporate and commercial group. She has over 15 years' experience working in leading law firms and financial institutions in London, Hong Kong, Singapore and New Zealand. She's an expert in advising on private equity transactions, mergers, takeovers, acquisitions, funds management, Financial Advisers Act and Financial Markets Conduct Act issues, joint ventures, commercial contracts, and corporate governance.

Tom Heard joins Simpson Grierson as a senior associate in the Auckland corporate and commercial group. He has more than 10 years' experience working for leading firms in New Zealand, Ireland and the Middle East advising all aspects of corporate law. Tom specialises in mergers and acquisitions, joint ventures, capital markets, corporate structuring, infrastructure projects and commercial contracts.

Nina Blomfield returns to Simpson Grierson as a senior associate in the Auckland commercial litigation group. Nina has previously worked in litigation roles at Herbert Smith and Barlow Lyde & Gilbert in London, and has broad experience in resolving complex commercial disputes. She has particular expertise in matters involving commercial property, regulatory issues and the energy sector.

Meredith Webb has returned to Simpson Grierson as a senior litigation advisor in the Wellington commercial litigation group. Meredith spent seven years at the Government Legal Department in the UK where she was instructed by government clients in high profile and complex judicial reviews and statutory appeals. She is an experienced litigator with particular expertise in public and administrative law.

Finally, having previously worked at Simpson Grierson as a project consultant, **Genevieve Cox** rejoins the firm as a senior associate in the construction team. Having spent over six years at UK's leading construction law firm, Masons, on her return to New Zealand Genevieve undertook in-house legal roles at NIWA and Fisher & Paykel Healthcare. She brings expertise in PPP and infrastructure projects, consultancy services agreements, commercial contracts, and regulatory and governance issues relevant to government agencies.

For additional information visit www.simpsongrierson.com

ARIAS

ADVISES AERCAP AIRCRAFT LEASING AND AVIATION FINANCE

Arias successfully advised AerCap, a global leader in aircraft leasing and aviation finance, in the repossession of an aircraft that had been leased to “Vuelos Económicos Centroamericanos (VECA)” for the commercial transportation of passengers within Central America.

Our specialized team assisted AerCap with counsel and preparation of all local documents necessary, which were related to the lease of the aircraft and its operation, as well as, being part of the relocation process involving the transfer of the aircraft from El Salvador to the United States, representing the client during negotiations. The deal was specifically challenging since there had not been precedents of repossession in El Salvador and that it was successfully concluded within a very short period of time. The aircraft was recovered for AerCap on January 12, 2017 and the case is being followed up. Arias El Salvador relied on advice from Arias Guatemala and Costa Rica regarding these types of cases.

The Arias team included Lilian Arias (Partner), Ana Mercedes López (Partner), Carolina Lazo (Associate), Vanessa Granados (Associate), Jaime Rodríguez (Associate).

For additional information visit www.ariaslaw.com

BAKER BOTTS

UNANIMOUSLY WINS STATUTORY CONSTRUCTION APPEAL IN TEXAS SUPREME COURT

AUSTIN – 02 March, 2017: Baker Botts L.L.P., a leading international law firm, announced the Texas Supreme Court issued a unanimous opinion February 24, 2017, in favor of firm client Texas Association for Marriage and Family Therapists (TAMFT) in a decade-long dispute with the Texas Medical Association (TMA) regarding the authority of marriage and family therapists (MFTs) to diagnose mental diseases.

“This is a great win for our client, and a greater win for therapists and patients,” said Baker Botts litigation partner Gavin R. Villareal, who argued the case in the Texas Supreme Court. “The decision addresses fundamental questions of statutory construction, and will be relevant to many other statutory construction cases for years to come.”

The Baker Botts team, along with the Texas Attorney General’s office, filed a petition for review in the Texas Supreme Court following a 2-1 loss in the Third Court of Appeals. TAMFT, an organization of about 1,700 Texas marriage and family therapists, had intervened at the trial court level to defend the challenged rule. TAMFT argued that the court of appeals decision, left uncorrected, threatened the ability of marriage and family therapists to provide mental-health care services in Texas. After requesting full briefing, the Texas Supreme Court initially denied the petition for review. TAMFT and the Attorney General’s office, who represented the MFT Board, jointly moved for reconsideration of that denial, with support from the California Association of Marriage and Family Therapists. The Court reversed its rejection and decided to hear the case on the merits.

“It’s rare for the Court to grant a motion for reconsideration of the denial of a petition,” said Villareal. “So it was remarkable that, after initially denying to hear the appeal, the Texas Supreme Court unanimously sided with our client TAMFT and the State and rendered judgment that the challenged rule is valid.”

“This is quite possibly one of the most important outcomes in AAMFT’s history and certainly for the profession of marriage and family therapy,” said Tracy Todd, CEO of the American Association for Marriage and Family Therapy, of which TAMFT is a member.

The Baker Botts team that represented TAMFT in the Texas Supreme Court included partners Gavin R. Villareal and Thomas R. Phillips, and special counsel David Arlington, all from Austin.

For additional information visit www.bakerbotts.com

BENNETT JONES

GIBSON ENERGY SALE OF PROPANE OPERATIONS TO SUPERIOR PLUS

Date Announced: February 13, 2017

Date Closed: April 03, 2017

Deal Value: $412,000,000

Client Name: Gibson Energy

Gibson Energy Inc. has entered into an agreement to sell its Industrial Propane Business for cash consideration of CAD 412m (USD 314.8m) to Superior Plus.

The sale will be completed through a series of transactions. Pursuant to an option purchase agreement, dated 13 February 2017, subject to the fulfilment of customary conditions, Gibsons and Superior are obligated to complete the initial transaction pursuant to which Superior pays non-refundable cash consideration of CAD 412m and Gibsons grants an irrevocable to Superior to acquire 100% of the partnership units and shares of the Canwest and Stittco businesses.

The cash payment of CAD 412m is expected to be received by Gibsons, concurrent with the granting of the Option, no later than 3 April 2017. Following granting of the Option by Gibsons, closing risk transfers to Superior. Upon exercise of the Option by Superior, and receipt of regulatory approvals, the Securities will be transferred to Superior for nominal consideration.

Gibsons will continue to operate the business under the direction of the current management team, with no disruption to its employee base and customer service levels, until the final closing of the divestiture, which is expected to occur no later than the fourth quarter of 2017.

As part of the sale, Superior has agreed to 5-year wholesale supply and truck transportation agreements that offer Gibsons an ability to continue procuring propane volumes for Canwest and Stittco and provide bulk delivery rights to the associated branch distribution locations.

For additional information visit www.bennettjones.com

CAREY

ACTS FOR AMSTED IN TAKE OVER OF RAILWAY JOINT VENTURE

SANTIAGO - 01 March, 2017: Chilean firm Carey has helped US equipment manufacturer Amsted Rail Company take full control of railway equipment company Amsted Rail Chile – formerly a joint venture it shared with fellow manufacturer MGYT.

MGYT held a 60% stake in the JV, which Amsted purchased for an undisclosed fee. The deal closed on 30 January.

Carey lawyers acting in the transaction included Partners Francisco Ugarte and Ricardo Reveco and associates Alejandra Daroch, Ricardo Padilla and Héctor Juan Hernández .

For additional information visit www.carey.cl

CLAYTON UTZ

ADVISES MMG LIMITED ON US$210 MILLION SALE OF GOLDEN GROVE MINE TO EMR CAPITAL

PERTH - 13 January 2017: Clayton Utz is advising Hong Kong Stock Exchange and ASX-listed global resources company MMG Limited on the sale of its Golden Grove mine located in Western Australia to EMR Capital.

On 30 December 2016, MMG entered into a conditional share sale agreement with EMR Golden Grove Holdings Pty Ltd, an entity owned and managed by EMR Capital, for the sale of MMG Golden Grove Pty Ltd for US$210 million.

Subject to MMG board and other approvals, the sale is expected to be completed in early 2017.

Clayton Utz corporate partner Brett Cohen is leading the team on the transaction, which includes senior associate Armin Fazely and lawyers Kaley Ohariw and Milana Sarenac. The core transaction team has been supported by specialist teams from Clayton Utz including tax, environment, native title and employment.

Commenting on the transaction, Brett said: "We are pleased to have been given the opportunity to provide strategic advice and support to this longstanding client of Clayton Utz, working alongside MMG and its financial adviser Goldman Sachs to execute the sale agreement for this transaction in a compressed timeframe over the 2016 Christmas holiday break."

For additional information visit www.claytonutz.com

DAVIS WRIGHT TREMAINE

LEADS USD$83 MILLION CMBS REFINANCING FOR WESTIN PALO ALTO HOTEL

JANUARY 12, 2017: Davis Wright Tremaine has advised Mr. Clement Chen, the principal owner of The Westin Palo Alto Hotel, in securing an $83 million CMBS loan from LStar Capital, the credit affiliate of global private equity firm Lone Star Funds.

The Westin Palo Alto is owned by an affiliate of Mr. Chen's Pacific Hotel Management LLC, which operates eight prestige properties in California, including the new concierge-style super-luxury hotel, The Clement Hotel, also in Palo Alto, and InterContinental The Clement Monterey, on historic Cannery Row in Monterey. The latter property was also refinanced by LStar in 2015 for $72.5 million, another loan in which DWT advised Mr. Chen.

"Our client's hotels are outstanding performers, and comprise a significant part of the LStar funds in which they are securitized," said Steve Ledoux, co-chair of the DWT's Hotels & Resorts practice group. "We are starting 2017 off with a bang, and look forward to a positive and dynamic year for CMBS borrowers and for all kinds of strategic hotel transactions."

The mortgage broker for The Westin Palo Alto loan and for the InterContinental The Clement Monterey loan was Highland Realty Capital.

For additional information visit www.dwt.com

HOGAN LOVELLS

ADVISES ISA IN INVESTMENT OF UP TO US$80 MILLION IN ANDEAN TOWER PARTNERS

New York, 7 March 2017: Hogan Lovells represented infrastructure development provider ISA, in an agreement to invest up to USD$80 million in Andean Tower Partners Holdings LLC (ATP), a private owner of wireless communication towers and equipment in Colombia and Peru. ATP is a subsidiary of Digital Bridge Andean Tower Holdings LLC, a North American company.

As part of the investment, ISA will hold up to a 48% stake in ATP and will partner with Digital Bridge to develop the business. The investment will be focused on the deployment of new telecommunications network infrastructure in Colombia and Peru.

"We are seeing an increase in infrastructure investment in Latin America," Jose Luis Vittor, a partner at Hogan Lovells. "There has been particular interest in deals in connection with the development of infrastructure assets in emerging markets which are embracing more private investment such as Colombia."

The Hogan Lovells team was led by Dave Locascio, Jose Luis Vittor, and Bruno Ciuffetelli in the Houston office. They were assisted by Luke Edney and Pedro Echavarria Coll in Houston, Jeff Tolin in New York, Peter Spivack and Brian Curran in Washington, D.C. and Amy Freed and J. Nicholas Hoover in Baltimore.

Local counsel for ISA was led by Carlos Umaña of Brigard & Urrutia. Digital Bridge was represented by Kleinbard LLC and ATP by Muñoz Tamayo & Asociados in Colombia.

"The Hogan Lovells team worked seamlessly together to ensure our investment was complementary to ISA Group's already existing infrastructure and aligned with our corporate strategy," said Sonia Abuchar ISA's Chief Legal Officer.

For more information, see www.hoganlovells.com

GIDE

ADVISES DTZ INVESTORS FRANCE ON THE SETUP UP A FRENCH AIFM

PARIS - 10 March 2017: DTZ Investors France, a real estate investment manager that is part of the Cushman & Wakefield group with EUR 3.3 billion of real estate assets under management, was advised by Gide on its successful application for an AIFM licence for its new subsidiary, DTZ Investors REIM.

The new portfolio management company, which obtained its licence as of 23 February 2017 from the French Financial Markets Authority, will mostly manage professional real estate investment funds (organismes professionnels de placements collectifs immobiliers) in France. DTZ Investors REIM targets to manage up to EUR 1 billion of assets by next year.

The Gide team comprised managing partner Stéphane Puel, counsel Guillaume Goffin and associate Clothilde Beau.

For additional information visit www.gide.com

RCD

ADVISES SIROCCO CAPITAL ON €2.7 MILLON ACQUISITION OF EL CONJURO WIND FARM (GRANADA)

BARCELONA - 21 January, 2017: RCD – Rousaud Costas Duran has advised venture capital fund Siroco Capital on the acquisition of the company operating the El Conjuro wind farm in Granada, Spain.

The €2.7 million investment will allow the venture capital fund to control 100% of the wind farm, which produces 2,000 full-load hours per year from its location between the municipal disricts Motril and Gualchos.

The transaction has been led by RCD's Energy Area, which has extensive experience advising on projects in the energy sector.

Rousaud Costas Duran is an independent, dynamic and innovative law firm, and a reference provider of integral legal advice. The firm's team is made up of over 300 professionals, led by 28 partners, and is positioned among the top law firms in Spain. It has been recognized for its innovation by the European ranking Financial Times FT – Innovative Lawyers 2016.

The firm has offices in Madrid and Barcelona, as well as a wide network of alliances and 'best friends' agreements with leading law firms abroad.

For additional information see www.rousaudcostasduran.com

NAUTADUTILH

ASSISTS PSA GROUP WITH ACQUISITION OF OPEL/ VAUXHALL OPERATIONS AND GM FINANCIAL'S EUROPEAN OPERATION FROM GENERAL MOTORS CO.

BRUSSELS - 06 March 2017: NautaDutilh assisted PSA Group (Paris:UG) with the acquisition of the Opel/Vauxhall operations and GM Financial's European operations from the General Motors Co. (NYSE:GM). Signing of the transaction was announced this morning and the operations are valued at EUR 1.3 Bn and EUR 0.9 Bn, respectively. The transaction is expected to close before the end of 2017.

With sales and revenue of EUR 54 billion in 2016, PSA Group designs unique automotive experiences and delivers mobility solutions that provide freedom and enjoyment to customers around the world. The Group has three car brands, Peugeot, Citroën and DS, as well as a wide array of mobility and smart services under its Free2Move brand, to meet the evolving needs and expectations of automobile users. Find out more at groupe-psa.com/en.

The official press releases are available:

PSA Media Center: Opel/Vauxhall to join PSA Group http://media.groupe-psa.com/en/press-releases/group/opelvauxhall-join-psa-group AND

General Motors Media Center: Opel/Vauxhall to join PSA Group https://www.gm.com/mol/m-2017-mar-0306-opel-vauxhall.html

For additional information visit www.nautadutilh.com

MUNIZ RAMIREZ PEREZ TAIMAN & OLAYA

ASSISTS CAMPAS GROUP SAFI IN US$47 MILLION PROPERTY SALE IN LIMA

LIMA – 01 March, 2017: Muñiz Ramírez Pérez-Taiman & Olaya assisted investment fund administrator Compas Group SAFI in US $47 million sale of Centro Corporativo Micracorp, a property located in Lima's business district, to German property investment fund GLL Real Estate Partners. The deal closed on 26 January. Compass Group SAFI made the sale through its real estate fund, Fondo de Inversión Inmobiliario I.

Counsel to Compass Group SAFI Muñiz Ramírez Pérez-Taiman & Olaya Partner Mauricio Olaya and associate Annalucia Fasson.

For additional information visit www.munizlaw.com

SANTAMARINA Y STETA

ASSISTS KRUGER BROWN IN PLASTIC ACQUISITION

MEXICO CITY - 27 January, 2017: Mexico's Santamarina y Steta have helped investment company Kruger Brown Holdings (KBH) close the Mexican leg of its acquisition of US based plastic producer, The PendaForm Company.

The acquisition closed on 22 December with no value disclosed.

Santamarina y Steta team was led by Partner Pablo Laresgoiti and associate Iván Szymanski in Mexico City.

For additional information visit www.s-s.com.mx

TOZZINIFREIRE

ASSISTS KIRIN IN US$704 MILLION SALE OF ITS BRAZILIAN BEVERAGE ASSETS TO HEINEKEN

SAO PAULO - 01 March 2017: TozziniFreire Advogados São Paulo assisted Japanese beverage maker Kirin to o sell its Brazilian beverage assets to Dutch beer maker Heineken in a deal worth US$704 million. Kirin blames high inflation and a stagnant drinks market for its exit. The company originally paid US$3.6 billion for 12 breweries in 2011. It already parted with one of its bottling plants in 2016, selling the business to Brahma beer maker Ambev. Kirin has retained TozziniFreire throughout its time in Brazil.

Brazil produced 139 million hectolitres of beer in 2015, making it the third biggest beer maker in the world, with only China and the US producing more.

Acting in the transaction for TozziniFreire Advogados were Partners Jun Oyafuso Makuta, Daniel Oliveira Andreoli and Fernando Eduardo Serec, and associates Eduardo Barreto Alfonso, Jacques Abi Ghosn and Mario Glauco Pati Neto in São Paulo.

For additional information visit www.tozzinifreire.com.br

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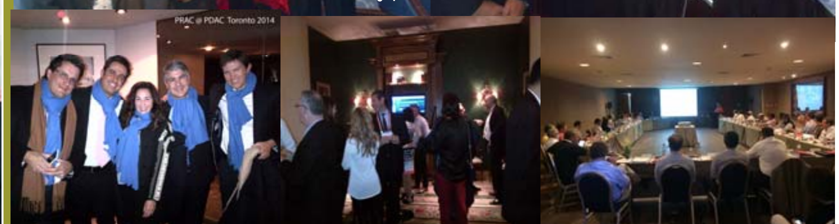
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CLAYTON UTZ

02 MAR 2017

Clipsal turns off the lights for Clipso in trade mark dispute

BY CAMERON GASCOYNE, ZOE GIFFARD

Registering a trade mark provides a limited defence if the trade mark is similar to an existing well-known brand in the same market.

If you thought that registering a trade mark gave you the right to use it, you'd be wrong. While a trade mark registration is good for bringing infringement claims and will provide a defence to trade mark infringement claims, it does not provide a defence to actions for misleading or deceptive conduct or passing off.

A recent Federal Court decision has highlighted the limitations of relying on trade mark registration as a defence to these types of claims.

CLIPSAL and CLIPSO

CLIPSAL is a well-known brand in Australia and is registered as a trade mark for various electrical goods.

In 2009, Mr Abdul Kader founded Clipso Electrical Pty Ltd and caused it to register and use CLIPSO as a trade mark for various electrical goods, similar to those sold under the CLIPSAL brand. Clipsal Australia objected to Clipso Electrical's use of the CLIPSO trade mark, and eventually sued it for infringing the CLIPSAL trade mark. Clipsal Australia also claimed that Clipso Electrical's use of the CLIPSO trade mark meant it had engaged in misleading and deceptive conduct and passing off.

Trade mark infringement

Clipsal Australia had no success in its trade mark infringement claim, because Clipso Electrical's registration of the CLIPSO trade mark gave it a complete defence. However, Clipsal Australia was successful in arguing that the CLIPSO trade mark registration should be cancelled on various grounds, including that Clipso Electrical had registered CLIPSO in bad faith. The result is that the CLIPSO trade mark will be cancelled. Once that occurs, Clipso Electrical will no longer be able to rely on it as a defence to any future infringement of the CLIPSAL trade mark.

Misleading and deceptive conduct - who's buying Clipsal and Clipso?

Clipsal Australia argued that Clipso Electrical's conduct in using the CLIPSO trade mark was misleading or deceptive due the similarity between CLIPSO and the well-known CLIPSAL brand.

The Court analysed in detail the relevant market and drew a distinction between electrical contractors (who would not be misled due to their expertise) and others in the market such as consumers, retailers and builders (who could be misled due to their lack of expertise).

As a result, the Court found that Clipso Electrical's use of the CLIPSO trade mark was misleading or deceptive.

Passing off Clipso as Clipsal?

Once the Court found that Clipso Electrical had engaged in misleading or deceptive conduct, it was a short step for it to find that Clipso Electrical had also engaged in passing off.

Passing off involves a misrepresentation that one person's goods are those of another person who has a reputation in the relevant goods.

Clipsal Australia has a significant reputation in Australia for the CLIPSAL brand, and Clipso Electrical had engaged in passing off by adopting a similar brand which was likely to result in members of the public mistaking CLIPSO for CLIPSAL.

Personal liability for Clipso's director

Mr Abdul Kader was the director of Clipso Electrical. Of itself, this does not make him liable for its conduct. However, the Court found Mr Abdul Kader was personally liable for the conduct of Clipso Electrical because of his close personal involvement in its dishonest conduct. This means Clipsal Australia will have recourse to the personal assets of Mr Abdul Kader, if Clipso Electrical does not have sufficient assets to meet the claim. The amount of liability was not decided by the Court in this decision. The amount will either be agreed by the parties or determined by the Court on another day. No doubt Clipsal Australia will also be looking to recover its legal costs.

Key points for trade mark owners

Registering a trade mark can be an effective strategy for stopping others from using similar trade marks. However, it provides a limited defence if the trade mark is similar to an existing well-known brand in the same market. It is important to investigate whether use of a trade mark could amount to misleading or deceptive conduct or passing off.

A comprehensive search should identify unregistered similar trade marks for consideration. However, as the CLIPSAL/CLIPSO decision highlights, existing registered trade marks with a significant reputation should also be considered.

The Trade Marks Office does not consider the reputation of existing registered trade marks when examining new trade mark applications. So, the fact that a new trade mark is allowed to be registered does mean it can be used without the risk of a misleading or deceptive conduct or passing off claim.

GET IN TOUCH

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March 07, 2017

NEWSLETTER - OIL & GAS - BRAZIL´S FEDERAL GOVERNMENT SEEKS TO REDUCE BY 50% THE MINIMUM PERCENTAGES OF LOCAL CONTENT

On February 22, 2017, the Minister of Mines and Energy, Fernando Coelho Filho, announced the new proposal of the Federal Government for the local content policy related to the bidding rounds promoted by the Brazilian Agency of Petroleum, Natural Gas and Biofuels ("ANP"), in order to reduce, on average, by 50% the minimum percentage of local content.

After a dialogue with representatives of the Ministry of Finance, the Office of the Chief of Staff, the Ministry of Industry, Foreign Trade and Services, Minister Fernando Coelho Filho declared that the Federal Government aims to establish realistic numbers for the minimum percentages of local content and to decrease the number of waiver requests made by oil companies that fail to meet local content requirements.

According to the Government's proposal, the new percentages of local content in onshore areas will be 50% for exploration and production activities. In offshore areas, the new percentages will consist of 18% for exploration, 25% for well constructions, 40% for collection and disposal systems, and 25% for stationary production units ("SPUs").

It is worth noting that the new percentages will still be submitted to the management committee of PEDEFOR (Incentive Programme for Supply Chain Competitiveness and the Development and Improvement of Suppliers to the Oil and Gas Sector) and shall be analyzed by the Brazilian National Board of Energetic Policy ("CNPE") in a possible extraordinary meeting to be held during the month of March.

If approved, this measure may allow a bigger participation of strategic players in the auctions expected to occur during 2017, since it represents a solution built after a long debate among various sectors of the Brazilian oil industry.

Bennett Jones

Federal Court Cracks Down on Intentional Infringement with $1 Million Punitive Damages Awards

March 08, 2017 | L.E. Trent Horne

It's been a costly week for intentional infringers of intellectual property (IP) rights. In two separate decisions, the Federal Court of Canada has awarded $1 million in punitive damages. These are among the highest punitive damages awards ever made in Canadian IP cases, and send a signal to both counterfeiters and sophisticated businesses that deliberate infringement can have significant monetary consequences.

Digital Locks and Video Games

Nintendo sells popular video game consoles including the Nintendo DS, 3Ds and Wii. The games and consoles include technological protection measures (TPMs) that, among other things, prevent the consoles from playing unauthorized copies of Nintendo's games.

Nintendo sued Go Cyber Shopping (2005) Ltd. for circumventing its TPMs. Through a retail and online store, Go Cyber sold "game copiers" that would allow a person to play an illegally downloaded game on a Nintendo DS or 3DS console. It also sold "mod chips" that would disable security features on a Wii console to permit the use of pirated video games. In the first decision since the prohibition on circumventing TPMs was added to Canada's *Copyright Act* in 2012, the sale of the game copiers and mod chips was found to breach Nintendo's rights.[1]

For its compensatory damage claim, Nintendo elected statutory damages. It asked for, and the court awarded, the maximum amount ($20,000) on a per-work basis. The court cited the need for deterrence as one of the factors in awarding the maximum amount. Since Go Cyber's game copiers and mod chips provided unauthorized access to each of Nintendo's 585 video games, the statutory damage award came to $11.7 million ($20,000 x 585).

Turning to punitive damages, the court considered the objectives of retribution, deterrence and denunciation. Go Cyber had shown callous disregard for Nintendo's rights; its activities had gone on for years, and continued after the litigation had commenced. Deterrence was also a factor in the punitive damages analysis. Nintendo asked for, and received, punitive damages of $1 million, one of the highest punitive damage awards ever made by the Federal Court.

Helicopter Parts and Patent Claims

For at least a decade, punitive damages were almost unavailable in patent cases.

In 2005 the Federal Court heard a patent case involving electric fireplaces.[2] The plaintiff was successful–its patent was held to be valid and infringed. Even though the trial judge found that the defendant's appropriation of intellectual property was deliberate, its conduct was not so high handed, callous or oppressive to offend the court's sense of decency. Malice was not established, and there was no evidence that the defendant regarded the risk of damages for patent infringement as a mere cost of doing business. The court also noted that there appeared to be no patent cases where punitive damages were awarded simply because the defendant knowingly or intentionally infringed a patent without more. Punitive damages had been awarded in connection with litigation misconduct or abuse of process, but not solely for intentional infringement. Ultimately, the court concluded that the infringing behaviour would be sufficiently deterred by a general award of damages.

After this decision was released, and upheld by the Court of Appeal, it was well-established that a claim for punitive damages in a patent case could not be sustained solely on an allegation of intentional infringement. In at least one case, such an allegation was struck on a preliminary motion for failing to disclose a reasonable cause of action.[3]

In 2012, the doorway to punitive damages for patent plaintiffs was opened in *Monsanto v. Bar V Farms*.[4] This was an infringement action for saving and re-planting genetically modified canola seed without a license. The court awarded damages of about $340,000, plus $150,000 in costs. $50,000 in punitive damages were also awarded, largely because of the defendant's intentional infringement. While the amount was somewhat modest compared to the compensatory awards, it was the first time in recent memory that punitive damages had been awarded and quantified in a patent case.

Eurocopter v. Bell Helicopter Textron Canada Limitée was a patent infringement case involving landing gear for helicopters. The action was bifurcated; at the initial trial, the patent was held valid and infringed. The trial judge also determined that Eurocopter was entitled to punitive damages in an amount to be determined, a finding that was upheld by the Court of Appeal.[5] (EditorPage.aspx?da=core&id=%7B0602307F-3489-40AC-ADD5-3FB7318BB058%7D&ed=FIELD2247134361&vs&la=en&fld=%7BE37D3C16-46BE-4493-97F8-70E1A9997D84%7D&so&di=0&hdl=H2247134388&mo&pe=0&fbd=1#_ftn2)

The court's decision on remedies was released this week.[6] Even though Bell Helicopter did not sell any of the 21 infringing landing gear it had manufactured, compensatory damages were assessed at $500,000, representing what the parties would have negotiated as a royalty immediately before the infringing activity.

As for punitive damages, the court found that the defendant's landing gear was a "slavish copy" of the plaintiff's, and that the defendant marketed the design as its own. Notwithstanding its own policy manuals and guidelines that included measures to avoid infringing IP rights, the court concluded that Bell Helicopter must have known about the plaintiff's patent and acted in a foolhardy manner. After considering the blameworthiness of the defendant's conduct, the plaintiff's vulnerability, the potential harm to the plaintiff, the need for deterrence and the advantages wrongfully gained by the defendant, punitive damages were assessed $1 million. Not only is this at the very high end of punitive damage awards in Canadian intellectual property cases, it is one of the few instances where such damages have been awarded in a case between sophisticated litigants.

Looking Ahead

While Canada's *Patent Act* does not have a “treble damages” provision for intentional infringement, that remedy may now be practically available in other cases where the infringement can be shown to be deliberate.

Notes

[1] *Nintendo of America Inc. v. Go Cyber Shopping (2005) Ltd.*, 2017 FC 246

[2] *Dimplex North America Ltd. v. CFM Corporation* (http://www.canlii.org/en/ca/fct/doc/2006/2006fc586/2006fc586.html?autocompleteStr=Dimplex%20North%20America%20Ltd.%20v.%20CFM%20Corporation%2C%202006%20FC%20586&autocompletePos=1), 2006 FC 586

[3] *Wi-Lan Technologies Corp. v. D-Link Systems Inc.* (http://decisions.fct-cf.gc.ca/en/2006/2006fc1484/2006fc1484.html), 2006 FC 1484

[4] Federal Court File No. T-1710-12, unreported decision dated July 24, 2013

[5] *Eurocopter v. Bell Helicopter Textron Canada Limitée* (http://www.canlii.org/en/ca/fct/doc/2012/2012fc113/2012fc113.html?autocompleteStr=Eurocopter%20v.%20Bell%20Helicopter%20Textron%20Canada%20Limit%C3%A9e&autocompletePos=2), 2012 FC 113; aff'd 2013 FCA 219

[6] *Airbus Helicopters S.A.S. v. Bell Helicopter Texteron Canada Limitée* (http://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/223697/index.do), 2017 FC 170

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NEWSALERT

Law N°21,000 establishes the National Financial Market Commission of Chile

On February 23, 2017, Law N°21,000 (the "**Law**") was published in the Official Gazette of Chile, creating the Commission for the Financial Market (the "**Commission**"), a professional body and technical entity that will replace the current Superintendency of Securities and Insurance ("**SVS**"). The Law will enter into force in August 2018, or at an earlier date if the Commission becomes operational sooner.

The SVS and the local capital markets have long sought the implementation of this Law, due to the need for a regulatory body with an improved corporate government, equivalent to regulators in developed markets, with greater and more effective control and specific administrative sanctioning regimes.

Purpose and scope

The Commission shall aim to ensure the proper functioning, development and stability of the financial market, facilitating the participation of market agents and promoting duly standards. Furthermore, it shall also ensure that regulated persons or entities comply with laws, regulations, statutes and other provisions governing them.

Any institution, person or activity expressly subject to the supervision of the Superintendency of Banks and Financial Institutions is outside the Commission's jurisdiction. Notwithstanding the aforementioned, a one-year deadline has been established for the presentation before the National Congress of a law expanding the Commission's jurisdiction. Likewise, pension fund administrators are not subject to the supervision of the Commission.

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In order to fulfill its objective, the Commission will maintain the powers already vested in the SVS (*e.g*. to issue rules, to interpret applicable law on administrative grounds, to investigate complaints or claims, to examine all operations, assets, books, accounts, archives and documents of persons, entities or activities under its supervision, among other faculties).

However, important new attributions are added to the Commission, such as requiring information on banking operations of specific persons, even those subject to secrecy or confidentiality; gaining access to private properties and, if necessary, entering by force with the help of law enforcement officers; registering and seizing all kinds of objects and documents; intercepting all kinds of communications (and obtaining from telecommunication companies copies and records of communications transmitted or received by them), and ordering other public agencies to provide background information, even when the information is confidential or classified. These measures will be subject to control and prior authorization by the courts.

Leadership and Operation of the Commission

The directors of the Commission will lead a council (the "**Council**"), composed of five members (known as "commissioners") who have been recognized for their professional or academic prestige in matters related to the financial system. The President of the Council will be appointed by the President of the Republic, shall have the legal, judicial and extrajudicial representation of the Commission, serving until the end of its appointer's term. The rest of the commissioners will be appointed by the President of the Republic after ratification by 4/7 of the Senate members in office. The commissioners will serve six year terms, being able to be reelected only for a consecutive period. Commissioners must be exclusively dedicated to their role on the Council and may not engage in any other service or activity in the public or private sector, except for academia. Commissioners must also abide by specific rules regarding the prevention of conflicts of interest both while serving their term on Council and after leaving the Council.

Investigation by the Commission

Within the Commission, the Council will appoint a prosecutor who will establish an investigative unit responsible for detecting, investigating, determining and prosecuting infringements of the rules governing the markets regulated by the Commission. The prosecutor will also be responsible for oversight of the sanctioning process established by the Law. In addition, the Commission will

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maintain the right to impose sanctions for violations of the law, such as censorship, fines for tax benefits, and revocation of authorizations.

The Law establishes two types of sanctioning procedures, a general procedure and a simplified procedure. The general procedure aims to resolve the majority of the cases brought to the attention of the Council. The cases that can be sanctioned under the simplified procedure will be determined by a general rule that to this date has not yet been issued. However, the simplified procedure will not apply to conducts classified as crimes.

The Law establishes an appeals mechanism for the reconsideration of resolutions of the Prosecutor or the Council, and also establishes a claim of illegality, which must be presented to the Court of Appeals of Santiago prior to determining admissibility. The judgment that rejects the claim of illegality shall be subject to appeal, which will be known by the Supreme Court. In any of the two cases previously mentioned, the application of the requested decision may be suspended, which is especially relevant in view of the fact that the old system only authorized the claim of the application of the fine or its amount before a civil procedure judge after consignment of 25% of the total amount.

In order to achieve greater collaboration and effectiveness in the application of the Law, mechanisms of self-report and leniency are established. By self-reporting, an offender can obtain a reduction of up to 100% of the applicable pecuniary penalty if the illegal conduct involves two or more responsible parties and the self-reporting party is the first one to report and provide background information. The remaining responsible parties can only access up to a 30% reduction in penalty. In cases that involve only one offender, reductions of up to 80% can be obtained by self-reporting. In addition, the Law benefits both cases with significant reductions in criminal matters, including the elimination of criminal responsibility in certain cases.

Self-regulation of market players

Finally, in order to improve good practices in corporate governance, business ethics, transparency and fair competition, the Law obliges market players to self-regulate in order to comply with the aforementioned objectives.

To this end, market players that are obliged to regulate themselves (*e.g.* securities brokers, stock exchanges, product exchanges, general fund managers) may issue their own rules and codes of conduct (which must be submitted for approval by the Commission), or join the Committee of Financial Self-Regulation (the "**Committee**"), whose creation is established by the Law. The mission

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of the Committee (that will be administered by a board of five independent directors elected by the members of the Committee) will be to ensure compliance with good practices, to establish and accredit compliance with standards of suitability, to promote the protection of investors, as well as to resolve differences and claims between the different members or between members and their clients.

SUMMARY TABLE

CHARACTERISTICS	SVS	COMMISSION
Members	One Superintendent	Five commissioners
Designation	Appointed by the President of the Republic, being of its exclusive trust	President of the Commission appointed by the President of the Republic. Other commissioners, presidential designation with prior approval of the Senate by 4/7 of its members in office
Internal Organizations	Determined by the Superintendent	Determined by Law
Sanctioning Attributions	Superintendent investigates and sanctions	Separation of duties: Prosecutor investigates and Commission sanctions
Sanctioning Procedure	One procedure	Two procedures: one of general application and one simplified
Resources against fines	Allows suspension of the resolution by recording 25% of the fine's value	It allows suspension of resolution without any provision

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DEFINING SUCCESS TOGETHER

How to Protect Your Online Games in China

Chapter 1: Overview of the Options
03.09.17
By Tracey Tang and Vincent Wang

Online gaming in China represents one of the largest and fastest growing internet business sectors in the world. In 2016, the online gaming industry in China saw an unprecedented total market value of RMB 165 billion (or approximately $24 billion USD). Unfortunately, many in the global online gaming world suggest that revenue from game infringement contributed to this figure. With the largest consumer base in the world, China presents a huge opportunity for online game developers, but the risk of infringement of successful games, brands, and images has become a continuing headache for right holders. So, what actions can be taken to ensure statutory protection of online games in China?

Similar to the U.S., Japan, and other western countries, China does not enact laws or regulations specially designed for statutory protection of online games. Online games are protected by specific intellectual property laws, anti-unfair competition laws, and criminal laws when their elements and aspects are determined as qualified subjects of legal protection under those laws. Copyright holders of online games may be able to seek protection and remedy based on trademark, copyright or patent infringement, unfair competition, or criminal offense (respectively or on a combined basis), depending on the particular circumstances of the infringement.

This article is the first in a series introducing the available protection options and proper strategies to fight against online game infringement. This article will provide an overview of the various protection alternatives based on applicable laws and recent court rulings in China.

Copyright

Essentially, online games are software and game content running on a network platform. Given that both the source code and the expressive elements, such as the characters, art works, literary works and music of a game are entitled to copyright protection, copyright law is the most frequently used option to protect intellectual property from being stolen, replicated, or used without permission. According to 2016 statistics released by Beijing Haidian District Court and Beijing Shijingshan District Court1, around 85 to 90 percent of online gaming infringement cases are based on copyright infringement.

As infringement culprits become more and more sophisticated, pursuing civil claims on copying game source code is less commonly asserted by the plaintiffs. In practice, if a plaintiff claims that person A has copied its game source code, normally the plaintiff would expect an expert witness, mutually agreed on by both parties in the dispute or designated by the court, to make a comprehensive and detailed line-by-line comparison of the source code of the copyrighted game and the game allegedly committing copyright infringement. This method has a prolonged time period for trial and a costly professional fee, initially born by the plaintiff, making the civil claims less efficient and effective compared to the potential reward from the final judgment on the source code infringement dispute. Because (1) private servers or illegal plug-ins usually involve hacking or unauthorized modification of game source code, (2) the operators of private servers and illegal plug-ins, usually make substantial illegal gain, as an alternative to the civil claims, copyright holders in most cases could also choose criminal charges against the illegal operators. As a result, solely filing civil lawsuits on source code infringement has become less popular. In contrast, copying characters, storylines, plots, scenes, settings, literary works, art works and music in a well-known prior work (including, but not limited to, online games, novels, TV plays, movies, animations, comic books, etc.) is more commonly seen in online games offered to Chinese fans. Some Chinese developers would rather take the chance for a free ride on the popularity of an existing game by emulating the look and feel or the features of the prior work than create innovative expressions of their own or seek authorization from the original copyright holders for the use of these copyrighted works in their own games. In accordance with the PRC Copyright Law, as well as our research of recent court cases relating to copyright infringement disputes regarding online games, the game elements listed below may be categorized into the following statutory types of copyrightable works and may be granted copyright protection by China courts if they are the original works of authorship, met with the proper level of creativity.

Literary Works	Art Works	Musical Works	Works analogous to cinematography (Audiovisual Works)
• Introduction of game characters, their personalities, skills, abilities, weapons and etc.; • Game rule instructions or introduction of play patterns; • Introduction of game backgrounds or environments; …...	• Images of game characters, weapons and virtual items; • Graphic designs of user interface; • Maps; • Game scenes; • Logos of game, virtual items, character abilities; • Graphic designs of NPC; ……	• Theme song; • Interlude song; • Sound effect; ……	• Consecutive game pictures; • In-game animation; ……

Generally speaking, if a plaintiff can demonstrate the substantial similarities between the above-mentioned elements in an allegedly infringing game and those in a copyrighted game based on side-by-side comparison, a copyright infringement claim can be successfully established. It seems pretty simple to classify various elements of an online game into the categories listed in the chart above and decide whether copyright infringement can be constituted. However, this practice has never been straightforward, especially when the defendant may argue certain components are not copyrightable or protectable even though similarities exist. You will get a sense about this complexity from the following brief summary of a few recent and influential online game infringement cases where China courts upheld or denied copyright protection over certain game elements:

“My Name Is MT” vs. “Super MT”

In this lawsuit, the mobile game “Super MT” was alleged to have copied the mobile game “My Name Is MT”. The Beijing IP Court found the names of the plaintiff’s game and its characters are not copyrightable for lack of creativity and personalized expression. Further, because the plaintiff’s game was originated and adapted from a comic book, the court decided that, as far as the character images are concerned, only new elements created by the plaintiff that are different and separate from the pre-existing expressions in the comic book are protectable.

“MU Online” vs. “Miracle Legend”

In this lawsuit, the web game “Miracle Legend” was accused of cloning the game “MU Online.” The Shanghai Pudong New Area Court held that the combination of names and introductions of game characters (including non-player characters), maps, characters’ skills, weapons and equipment can be deemed as part of the storyline of the game, and therefore are protectable literary works, even though such names or introductions, if standing alone, may not meet the level of creativity.

In addition, this court judgment for the first time in China’s judicial practice recognizes that consecutive game pictures are copyrightable as works analogous to cinematography because the visual expressions of the plaintiff’s game are very similar to those of cinematographic works, despite the fact that users may interface differently with the game pictures within the developer’s pre-established game designs and settings.

Given the substantial similarity of the overall look and feel of the two games, the court concluded that the defendant infringed upon the plaintiff’s copyright by cloning the maps, scenes, game level designs, characters and their skills, weapons, equipment and more of the plaintiff’s game. The court rejected the defendant’s defense that the plaintiff’s three-dimension client game cannot be similar to the defendant’s two-dimension web game.

“Hearthstone: Heroes of Warcraft” vs. “Crouching Dragon Legends”

In this lawsuit, You Ease’s “Crouching Dragon Legends” was alleged to infringe Blizzard’s “Hearthstone: Heroes of Warcraft.” The Shanghai No.1 Intermediate Court held that game rules and gameplay, as well as the layout of game interface, are in fact ideas rather than expressions of ideas and thus, are not protectable under PRC Copyright Law.

In addition, when commenting whether the defendant copied the plaintiff’s game instructions, the court held that the allegation was not supportable due to the limited number of expressions of same gameplay or game rules, which, in essence, applies the theory that prevents a monopoly over “an idea where there are only a limited number of ways of expressing the idea.”2

It is worth noting that, although Blizzard lost the two copyright claims on game rules and instructions in the above lawsuit, it eventually won this lawsuit based upon its successful claim under the anti-unfair competition law, as discussed later in this article.

As such, the judicial determination of copyright infringement in the online gaming environment is not very different from that in other creative industries. Under normal circumstances, the China courts would affirm copyright infringement and support the plaintiff’s case if (i) the expressive elements in plaintiff’s game copied or used by the defendant fall within the statutorily defined subjects that are entitled to copyright protection under the PRC Copyright Law; (ii) there exist substantial similarities between the two games’ expressive elements; and (iii) no substantive copyright defense, such as the merger doctrine or fair use, is applicable to the specific situation.

Trademark

Generally speaking, only a very small portion of game elements, such as game name, icon, and images of key characters are registerable as trademarks under Chinese law. Therefore, only unauthorized use of the plaintiff's registered trademarks that confuse the public will be recognized as trademark infringement by China courts. Given the long process for trademark registration in China and the short life span of most online games, trademark protection may not be a viable option for many online games. However, because trademark protection is comparatively straightforward and efficient in law enforcement, it is still very important for game developers to register their game-related trademarks in China in order to build their own proprietary brands and fight against copycats and free-riders.

Patent

Patent might be the most overlooked option for protecting innovation in online games. Only as recently as two to three years ago did international and Chinese game developers begin building up their patent portfolios in China. Today, more than 35,000 patent applications relating to online games have been filed in China. Most are for game balancing mechanics, user control methods, anti-cheating systems game user interfaces, and game-related hardware, such as a console. However, patent infringement claims relating to online gaming are still rare in China. Given the lengthy period of the patent application process and the general vulnerability of a patent title ownership, there may not be a significant amount of forthcoming patent disputes in the online gaming industry in the near future. It should be expected that game developers will put forth a greater effort to develop their patent portfolio and make full use of the "defensive" value of patents.

Anti-Unfair Competition

In China, the Anti-Unfair Competition Law typically serves as a useful supplement or substitute where the specific intellectual property law is neither applicable nor sufficiently effective in a particular intellectual property infringement dispute. More and more plaintiffs in online game infringement lawsuits are seeking remedies under both the relevant intellectual property laws and the Anti-Unfair Competition Law where applicable. The China courts often rule that the defendants are responsible for their unfair competition activities or in violation of good faith principle if the game elements being copied are not protected or cannot be sufficiently protected under the relevant intellectual property laws. Anti-Unfair Competition Law is particularly useful where the defendant is found to make false or misleading publicity about its game or tries to take a free ride on the fame of plaintiff's games, brands, and images, or confuse the public. The following are examples of recent court cases where anti-unfair competition protection has been granted.

"Hearthstone: Heroes of Warcraft" vs. "Crouching Dragon Legends"

As stated above, the Shanghai No.1 Intermediate Court denied copyright protection for gameplay and game rules in the plaintiff's game because those elements are ideas rather than expressions. Nevertheless the decision made it clear that the plaintiff's game is an intellectual and creative product with considerable commercial value, and the gameplay and game rules created and designed by the plaintiff should be protected under the PRC Anti-Unfair Competition Law. Therefore, the defendant was held liable under Anti-Unfair Competition Law for its unreasonable and unfair copying and imitation of the plaintiff's game.

“World of Warcraft” vs.“Everyone Warcraft”

In this lawsuit, Chengdu Qiyou’s “Everyone Warcraft” was claimed to infringe Blizzard’s “World of Warcraft.” The Guangzhou IP Court first concluded that Blizzard’s World of Warcraft series was a well-known online gaming service, then decided that the game name, in addition to certain user interfaces, were uniquely associated with the plaintiff’s online game series and, thus, formed a unique name and trade dress of a well-known service, which should be protected. As a result, the defendant’s unauthorized use of the plaintiff game’s unique name and decoration in its “Everyone Warcraft” game had caused public confusion and was in violation of PRC Anti-Unfair Competition Law.

HuoMao TV vs. Douyu TV for live streaming of Dota 2 Asia Championships

In this lawsuit, Douyu TV was claimed to have infringed the exclusive live streaming rights of Yaoyu (the operator of HuaMao TV) for the Dota2 Asia Championship by providing a live stream of the same. The Shanghai Pudong New Area Court determined that the defendant’s unauthorized broadcasting and live streaming of the Dota 2 tournament directly damaged the plaintiff’s competitive advantage obtained from its exclusive broadcasting right of the same tournament authorized by the game operator and, therefore, violated good faith principles and generally accepted commercial ethics. The court found that the defendant should be liable for its unauthorized live streaming of the Dota 2 Asian Championships, although it did not infringe the plaintiff’s copyright.

With online game infringement growing more and more complex and sophisticated, sometimes specific intellectual property law may be inapplicable or insufficient to enforce the rights of a copyright holder. As a result, the Anti-Unfair Competition Law is becoming more and more important as a tool for game developers to attack clones, especially when the visual similarity of the two games is not obvious, but the core value of the game owner’s innovation, such as game play or game rules, is unfairly used. The good faith principle, as a catch-all provision under the PRC Anti-Unfair Competition Law, offers a more flexible legal basis to protect the game owner’s competitive advantage, originated from the novelty and creativity in its online game. Therefore, in fighting against copycats in online games in China, plaintiffs should evaluate the facts carefully and craft sensible strategies that will balance claims under both the intellectual property laws and the anti-unfair competition law.

Tracey Tang is a partner of the Chinese law firm, Broad & Bright, focusing on IP litigation matters.

FOOTNOTES

1 These two courts are the top two courts in Beijing in terms of the number of the first instance trials of online game disputes.
2 Timothy B. McCormack, COPYRIGHT PRIMER: Merger Doctrine, MCCORMACK INT’L PROP. & BUS. L. (Dec. 28, 2010), http://www.mccormacklegal.com/blog/copyright-law- Seattle/copyright-primer-merger-doctrine

ISO 37001: 2016 – New Anti-Bribery Standard for Companies

The International Standardization Organization (ISO), which brings together 163 States and has developed nearly 20,000 self-regulatory standards worldwide, recently issued its anti-bribery standard, which is still pending translation into Spanish. This new standard is contained in ISO 37001: 2016 ("ISO 37001") which, like any other ISO standard, confirms quality for the organization certified under that standard. ISO 37001 has been created to evaluate anti-bribery management systems in an organization, including instructions on the design and implementation of such systems. Its ultimate goal is to prevent, detect and manage the risk of bribery within an organization.

This is a new standard in the already long list of anti-bribery guidelines and instructions for organizations in the private sector. This list includes Law 1778/2016, recently issued by the Congress of Colombia, which establishes the administrative liability of legal persons in cases of transnational bribery and local bribery, as well as External Circular Letter 100-000003 issued on July 26, 2016 by the Superintendence of Corporations, which contains the guide to implement business ethics programs referred to in Law 1778/2016. To that extent, it is important to highlight the recent increase in the production of standards aimed at the fight against corruption, a phenomenon that is not only evident in Colombia but also worldwide.

ISO 37001:2016 deals with the risk of bribery in organizations in both public and private sectors, addressing risks such as acts of bribery with respect to third parties committed by employees of organizations acting on behalf of or for their benefit, bribery committed by employees with respect to the organization itself, bribery committed by business associates of the organization, and payments or bribes offered or accepted through third parties (indirect bribery). The standards established in these regulations are applicable to any type of company or organization, whether or not for profit, and regardless of its size, corporate purpose, or structure.

One of the many examples of matters regulated by this standard is legal auditing or due diligence with respect to third parties, which is a key component of any compliance system, and in the case of ISO 37001, it includes potential business partners or counterparts, which undoubtedly implies a very high standard compared to other international regulations. Some of the key aspects of ISO 37001 in terms of due diligence are:

1. Each due diligence process must be conducted according to the risk of a particular counterpart. In this case it is not true that the same standard can be applied to all industries or to all company sizes. There must be a particular process, case by case. In this situation, the knowledge of each industry or sector is fundamental.

2. Reviewing the so-called “blacklists” (such as the list known as “Clinton List”) regarding potential counterparts is necessary but not sufficient. ISO 37001 states that it is no longer sufficient to simply review these lists; it is necessary to require exhaustive due diligence questionnaires and a first-hand review of the counterpart’s documents.

3. Senior management and direct and indirect shareholders of a counterpart are important elements. In due diligence processes, special attention must be given to the qualifications of the people who make up the organization with which the deal or agreement is being performed. The above in order not to make mistakes that can be easily avoided with a good due diligence procedure.

   In general terms, it can be said that ISO 37001 increases the standard of compliance in organizations that wish to be certified, stating quality before counterparts and governments that may be potential contractors. The adoption of this standard introduces new management controls against bribery and private corruption, or helps to improve existing controls. In turn, it protects managers and partners from possible liability for the commission of related crimes and seeks to protect the company against reputational risk derived therefrom.

Efforts such as that of the ISO, other international organizations and legislators or regulators in different jurisdictions aimed at promoting the adoption of anti-bribery programs and in general for the prevention and management of corruption risks within organizations, make it clear that while despite a compliance or business ethics program will not always be able to avoid all situations of bribery or corruption, it is increasingly evident that the existence of a robust system, based on important standards, give an organization the tools to reduce the risk of liability for these events.

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COSTA RICA

CHANGING REGULATIONS TO BE CONSIDERED IN HUMAN RESOURCES POLICIES

During 2017, we expect the approval of new regulations related to Human Resources matters. We would like to remind you of two recent changes:

1. On January 12, the Costa Rican Social Security System approved an increase in the contribution of employees to the Disability, Old-age and Death (IVM for its acronym in Spanish) pension fund.
   It is expected that as of June 1st, the amount that will be deducted to the employees will increase in 1% to a total of 3.84%. According to the Costa Rican Social Security System, it is necessary to make changes to the IVM Regulation. Once the changes are ready, the new regulation will be published in the official newspaper "*La Gaceta*".

Recommendation: While this measure does not directly affect employers, it is important that you are clear about the situation in the event that an employee asks about the increase in the deduction. Also, financial departments must be ready to adjust the deduction once enforced in June.

2. On December 23rd, the Constitutional Chamber ruled in favor of the constitutional right of the inviolability of private documents. In the analysis, the main conclusion was:
   - There is a right for all citizens to respect the secrecy of communications and the inviolability of employees' documents, despite the fact that the technological equipment used by the worker is property of the employer.
   - The Second Chamber of the Supreme Court of Justice has stated on several occasions that although the employer can monitor the equipment - under specific conditions- the employees should always be allowed to extract their personal information at the end of the employment relationship.

Recommendation: It is advisable to have an internal policy that regulates this type of situation, and to ensure that employees fully understand its content.

If you would like more information, our practice area of Constitutional and Labor Law can gladly assist you.

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21/10/2016

DRAFT LAW ON DRUG AND FOOD SUPERVISION

The Government has submitted a draft law on Drug and Food Supervision (“Bill“) to the House of Representatives, just in time following the recent uncovering of the counterfeit vaccine and drugs scandal. The Bill has been included in the 2015-2019 National Legislative Program, even though it is not placed in the priority category for the year 2016.

Serving as an umbrella for regulations on supervision of foods and drugs, the Bill covers a wide range of aspects of the supervision, among others:

a. Production;
b. Distribution;
c. Export and Import;
d. Promotion and Advertising;
e. Laboratory Testing, Recalls and Disposal;
f. Liabilities; and
g. Criminal Sanction.

The following is noteworthy:

a. Pursuant to its definition, “Drugs and Foods” includes: (i) Drugs, (ii) Drug Raw Materials, (iii) Herbal Drugs, (iv) Herbal Extracts, (v) Cosmetics, (vi) Health Supplements, and (vi) Processed Foods (including packaged foods and ready-to-serve foods).
b. The Bill shows the government’s intention to expand and strengthen the role and authority of the National Agency of Drug and Food Control (Badan Pengawas Obat dan Makanan or “BPOM”). Under the Bill, BPOM replaces the role of the Ministry of Health in granting Pharmaceutical Manufacturing Licenses (Izin Industri Farmasi), Pharmaceutical Wholesaler Licenses (Izin Pedagang Besar Farmasi), and Cosmetic Manufacturing Licenses (Izin Industri Kosmetik). Processed foods manufacturing licenses are still granted by referring to the Industrial Business License issued by the Ministry of Industry.
c. The BPOM will maintain its current role as issuer of Drugs and Foods marketing authorization (izin edar).
d. The Bill emphasizes the previous BPOM requirement that the information stated on drug and food product labels be objective, comprehensive, correct and not misleading.
e. The Bill stipulates the following drug distribution channeling:

Pharmaceutical industries		a. Pharmaceutical wholesalers; and b. Governmental pharmaceutical stock storage facilities.
Pharmaceutical wholesalers		a. Other pharmaceutical wholesalers; b. Pharmacies; c. Governmental pharmaceutical stock storage

	→	facilities; d. Hospital pharmaceutical facilities; e. Clinic pharmaceutical facilities; f. Drugstore, except for prescribed drugs; and g. Scientific institutes
Governmental pharmaceutical stock storage facilities	→	a. Other governmental pharmaceutical stock storage facilities; b. Government-hospital pharmaceutical facilities; c. Public Health Centers (Puskesmas); and d. Clinic pharmaceutical facilities.

f. The Bill allows online distribution of Drugs and Foods, provided that the licensing, manufacturing and labeling standards and requirements are complied with. However, it is still unclear as to whether there are restrictions on the online distribution, given the restrictive nature of prescribed drugs.

g. In addition to the usual import licenses (API), Drugs and Foods exporters and importers are required to obtain an export/import certificate (Surat Keterangan Impor) from the BPOM.

h. The promotion and advertising of Drugs and Foods products require the approval of BPOM. The scope of BPOM's authority in this is still unclear.

i. Marketing authorization holders are obliged to recall Drugs and Foods products (i) which do not meet the standards and/or (ii) which marketing authorization is revoked. The Head of BPOM has the authority to announce Drugs and Foods products which are being recalled from circulation.

j. Drugs and Foods manufacturers must ensure the safety, quality and efficacy of their products. Failing to do so may cause the manufacturer to face a tort claim.

k. The sanctions imposed on corporations for violations of certain responsibilities, obligations or requirements under this draft law are 3 (three) times heavier than the sanctions for the same violations imposed on individuals.

The Bill is currently being deliberated between the Government and the House of Representatives. When it has become a law, its implementing regulations will still need to be issued by the BPOM. (*By: Adri Yudistira Dharma*)

NautaDutilh

Corporate

Luxembourg

Modernisation of Luxembourg Company Law: Profit Shares ("parts bénéficiaires")

Tuesday 7 March 2017

*The Companies Act of 10 August 1915, as amended inter alia by the Act of 10 August 2016 (the "**Act**"), now provides a legal basis for the issuance of profit shares by a limited-liability company (société à responsabilité limitée or "**SARL**") which complements the rules applicable to the issuance of such shares by a limited company (société anonyme or "**SA**").*

Profit shares do not form part of a company's share capital, as expressed in its articles of association. The rights associated with such shares should be laid down in the articles, however.

The issuance of profit shares by an SARL

The Act now provides a legal basis for the issuance of profit shares by an SARL.

In accordance with the general rules, an SARL may not issue profit shares by way of a public offering. Likewise, profit shares may not be represented by negotiable instruments, only by certificates issued to the benefit of a determined person. The voting and economic rights associated with such shares must be stipulated in the articles of association. It should be noted that the holders of profit shares enjoy the same legal rights as the company's shareholders in relation to the provision of documents concerning the annual accounts.

The rules on the transfer of profit shares vary, depending on whether the shares have voting rights.

Profit shares without voting rights may be freely transferred, unless the articles of association provide otherwise.

Profit shares with voting rights may be transferred in the same way as regular shares of an SARL, i.e. with the consent of shareholders representing 3/4 of the share capital (although this majority can be lowered in the articles to half the shares). Profit shares with voting rights are counted as regular shares for the purpose of determining this majority. Such consent is not required when the profit shares are to be acquired by (i) other shareholders or holders of profit shares with voting rights, (ii) a third party approved by them, or (iii) the company itself, within the period provided by the Act.

The issuance of profit shares by an SA

Profit shares issued by an SA may be in registered, bearer or dematerialised form. The voting and economic rights of such shares should be stipulated in the articles of association. If profit shares are issued in return for a contribution in kind, the Act now clarifies that a report by an independent auditor *(réviseur d'entreprises*) is not required. The holders of profit shares have a right of recourse against the SA's management. New Article 63*bis* of the Act provides that one or more shareholders and/or the holders of profit shares representing 10% or more of the company's voting rights (determined in accordance with the provisions of the Act) have a right to take action against the directors and members of the management and supervisory boards.

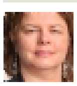
Profit shares issued by an SA, with or without voting rights, are in principle freely transferable. However, the Act's provisions on valid share transfer restrictions (such as a lock-up period and pre-emptive rights) also apply to profit shares.

If an SA buys back its profit shares with voting rights, it cannot exercise the voting rights itself. If it buys back profit shares with dividend rights, the Act allows the board to suspend these rights.

The corporate partnership limited by shares (*société en commandite par actions* or "**SCA**") remains subject to the same statutory rules as the SA when it comes to profit shares. The same holds true for the simplified joint stock company (*société par actions simplifiée* or "**SAS**") and the limited cooperative company (*société cooperative organisée comme une société anonyme* or "**Coop SA**").

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

Contact us



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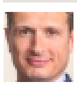

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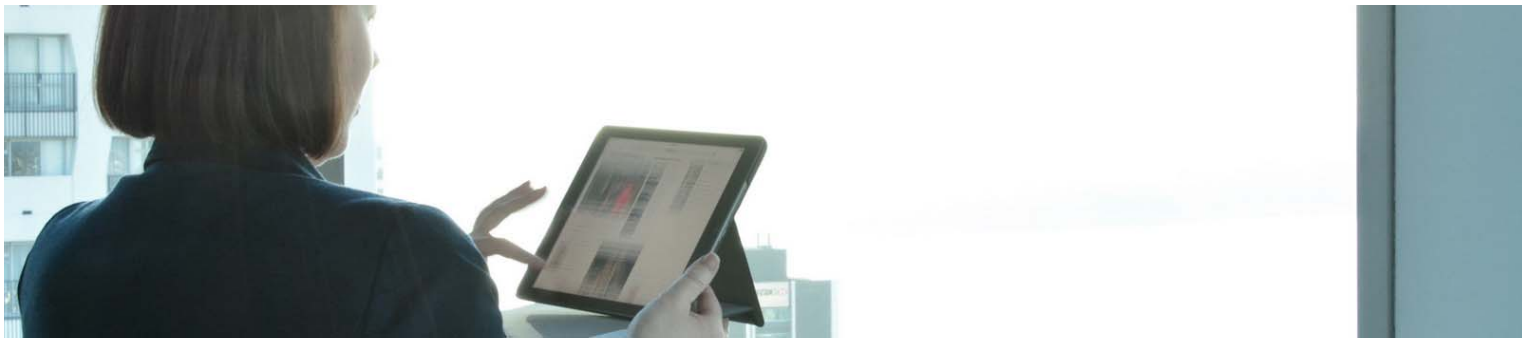

March 07, 2017

Select Committee reports back on Resource Legislation Amendment Bill

On Monday, the Local Government and Environment Committee announced its recommended changes (by majority) to the Resource Legislation Amendment Bill with several key amendments to the original proposed changes to the Resource Management Act 1991 and related legislation.

The changes largely reflect the recommendations of Ministry for the Environment staff as set out in the departmental reports released in November 2016.

Below we summarise and comment on some of the main changes the Committee has recommended be made to the Bill. Our comments are focused on the RMA. Click **here (http://www.simpsongrierson.com/articles/2015/the-second-phase-of-rma-reforms)** for more information about what the Bill originally proposed.

Improved Māori participation arrangements

- Significant changes are proposed in relation to the earlier proposed "Iwi participation arrangement", which is recommended to be replaced with "Mana Whakahono a Rohe".
- Mana Whakahono a Rohe is an alternative iwi and local authority relationship arrangement, as proposed in the Next Steps for Fresh Water discussion document.

- Mana Whakahono a Rohe will record how participating local authorities and iwi authorities will undertake consultation, how they will work together to develop monitoring methods, how they will manage conflicts of interest, and how they will resolve disputes.
- The requirement in the Bill as introduced, for local authorities to initiate a Mana Whakahono a Rohe, is removed, although local authorities may still choose to do so.
- Iwi authorities can initiate a relationship at any time other than 90 days before a local body election.

National planning standards to reduce complexity and cost

- The Committee recommends the renaming of the 'national planning template' as 'national planning standards' (**standards**), and there have been significant changes to what they are.
- The standards are to set the parameters for regional policy statements and plans, and to support the implementation of NES, NPS, NZCPS and regulations made under the RMA. We consider there is still room for debate about whether this is sufficient justification on its own, given the RMA already sets statutory requirements in relation to the relationships between these documents.
- The Bill still allows (and in fact intends) the standards to cut across local decision making, in that the standards may direct local authorities to amend statements/plans by including specified provisions, and/or choosing from a number of specific provisions in their policy statements and plans. Those described as mandatory must be made without using the Schedule 1 process. The Bill is not entirely clear as to how discretionary directions will go through the Schedule 1 process, and what will in fact be up for submission/change through that process.
- The Minister has 2 years to get the first standard approved.[1] That standard must give effect to NPSs, and be consistent with NESs, regulations made under the RMA, and water conservation orders. The Bill stipulates three new matters that the Minister must have regard to, which include whether it should allow for local circumstances and if so, to what extent, and whether it is appropriate for the standard to apply to a specified district, region, or other parts of New Zealand, rather than nationally.

Streamlined planning process to improve responsiveness

- The procedural principles in new section 18A have been relaxed, in that anyone exercising powers and performing functions under the RMA must now only ensure that they "take all practicable steps" to fulfil the listed procedural principles.
- The Select Committee has recommended the narrowing of new regulation-making powers, but retains the ability for the Minister to make regulations removing plan provisions that duplicate other regimes. The examples cited are hazardous substances and genetically modified organisms.
- In relation to plan making:
  - The narrow rights of appeal from plan decisions arising from a collaborative process, remain unchanged
  - The Bill continues to allow a plan change or variation to be notified only on a limited basis, rather than allowing the current level of public participation in all planning processes
  - Minor amendments only are recommended to the new streamlined planning process

- The Committee recommends requiring local authorities to consider whether a requirement, designation or heritage order could be considered within a collaborative planning process.
- The unqualified discretion of the Minister to approve early use of the collaborative planning process has been amended

Changes to consent requirements and processing regime

- The concepts of "deemed permitted activities" and "boundary activities" remain in the Bill largely unchanged (the latter, renamed "infringed boundary").
- The Committee has largely retained the Bill's approach to public notification of consent applications, but has recommended abandoning the changes to the limited notification tests in the face of submitter opposition.
- The Committee agrees with the Bill's removal of rights of appeal on boundary activities, subdivision applications and residential activities (in residential zones) other than in respect of non-complying activities. We anticipate that debate will

continue about whether this strikes the right balance in achieving access to justice for iwi, land owners, developers, neighbours and affected parties.
- The new 10-day consent category for minor activities remains, but the truncated process is narrowed so that it only applies to a controlled activity that requires a land use consent under a district plan, and the Committee recommends allowing an applicant to 'opt out' of the fast-track process. This amendment has avoided the reality that controlled activities are not always "simple" in nature.

Strengthening of requirements to manage natural hazard risks

- The Committee has agreed with making the management of significant risks from natural hazard a matter of national importance, and no further amendments have been proposed to the Bill.

New requirements for council to free up land for housing

- The definition of "development capacity" has been amended to align it with the proposed functions and definitions in the National Policy Statement on Urban Development Capacity.
- This change clarifies that the term only applies to urban areas, and that sufficient development capacity must be provided to meet short-term and medium-term demand, in addition to long-term demand.

New provisions to enable stock exclusion from waterways

- Higher fines for offences against the stock exclusion regime are recommended, with an increase from $750 for an infringement under the Bill as first introduced, to $100 per animal observed at the waterbody up to a maximum of $2,000 per infringement.
- Amongst other recommendations, the Committee has recommended that regulations may specify that any rules that are inconsistent with new regulations on stock exclusion from waterways must be withdrawn or amended.

In summary

The Select Committee has made a number of changes that improve the clarity and workability of the Bill. The recommendations about iwi participation would broaden the scope of those arrangements to include consenting and monitoring, and generally have more of a partnership flavour. But the overarching themes of the Bill remain.

Increased top-down direction, in the form of national planning standards and additional regulation-making powers, is still a key feature of the Bill. The Committee's recommendations do not significantly alter the general move away from local decision-making, and towards more streamlined planning processes.

What happens next?

The detail of the Bill and indeed its fate overall will depend on the Government's ongoing negotiations with support parties and in particular the Māori Party.

The Bill will come back to the House for its second reading this week.

[1] The first standard must include a structure and form for policy statements and plans, definitions, and requirements for the electronic functionality and accessibility of policy statements and plans.

DENTONS RODYK

Avoiding the perils of joint investments in real property

A case study of *Cheong Woon Weng v Cheong Kok Leong* [2016] SGHC 263

March 6, 2017

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Introduction

Often, joint investments in real property present potential pitfalls, especially if the parties are closely related to each other and dispense with the formalities of proper records, which may often be the case. In this article, we examine the recent High Court decision of *Cheong Woon Weng v Cheong Kok Leong* [2016] SGHC 263, on the issue of establishing a beneficial interest in a joint investment of a real property. The case is currently pending appeal.

Essentially, the case raises the importance of ensuring properly drafted trust instruments are in place to record trust arrangements. This is crucial to avoid disputes over the ownership of jointly held property.

Facts

Cheong Woon Weng (CWW) and Cheong Kok Leong (CKL) are brothers. CWW is the elder of the two. A condominium property in the western part of Singapore was purchased in July 2000 at S$880,000. It was registered solely in CKL's name.

A dispute arose as to the ownership of the property. CWW averred that his younger brother CKL proposed a joint investment in the property, to which he agreed. Both brothers visited the show flat of the property development, chose the unit, selected the building materials and also discussed the financing of the property. CWW claimed that there was an oral agreement, and pursuant to the Memorandum of Loan and a Collateral Agreement, he had half the beneficial ownership of the property. CWW claimed that as part of the agreement with this younger brother, he had contributed S$200,000 towards the purchase price of the property.

CKL did not deny that he received a sum of S$200,000 from his elder brother. However, CKL disputed the nature of the payment; he alleged that the sum was extended as a loan to him to buy the property, and it had since been fully repaid. CKL also counterclaimed for a sum of S$120,000, which he claimed were given to CWW as loans.

Issues

The issues to be decided at trial were, among others:

a. whether the two brothers made an agreement to co-own the property;

b. if the agreement to co-own the property was made, whether a trust was created, whereby the younger brother, who had sole legal ownership of the property, held half-share of the beneficial ownership on trust for his elder brother;

c. whether CWW had advanced the sum of S$200,000 as a loan to CKL or as a contribution for a joint investment in the property; and

d. whether CKL had made payments of a total of S$320,000 to CWW (including the further loan of S$120,000), and whether this discharged his obligation under the agreement for co-ownership of the property with CWW.

The decision

The court accepted that an oral agreement had been entered into prior to the purchase of the property, pursuant to which the Plaintiff would bear the S$200,000 down payment, and that parties would be equal beneficial owners of the property even though the property was to be registered in CKL's sole name.

The Collateral Agreement signed between the parties indicated that the Plaintiff would obtain a share in the property which was proportionate to his contribution to the purchase price.

The trial judge found that both parties had not intended for the Memorandum of Loan and Collateral Agreement to embody their entire agreement to the exclusion of the Oral Agreement. The parol evidence rule was not applicable, and extrinsic evidence is admissible to vary the written agreements.

The oral agreement had evinced the parties' intention for the Defendant to be the registered owner of the property which was to be held on trust for both parties as tenants-in-common of equal shares, consistent with the parties' conduct from the time of purchase to many years thereafter. The Collateral Agreement then conferred on the Plaintiff an interest in the property in return for his contribution of S$200,000.

Both the Collateral Agreement and the Memorandum of Loan made reference to CWW's contribution to the purchase of the property. If it was merely a loan, as alleged by CKL, there would be no need for a term in the Collateral Agreement requiring CWW's consent before the property was sold.

If the Memorandum of Loan was to be interpreted as a loan, it would be one encompassing the possibility that CWW would never get his money back if the property was not sold, and this made no commercial sense.

Although CWW had only contributed S$200,000 (out of the purchase price of S$880,000), he was entitled to half of the property because this was what the parties had agreed to.

The trial judge further found that the cheques totalling S$87,000 received by CWW from CKL were payments for his share of the income from rental of the property, and does not amount to repayment of the alleged loan.

CKL's counter-claim was dismissed as he had failed to adduce sufficient evidence to prove that he had made any other payments to CWW besides the S$87,000 received by his elder brother.

CKL was ordered to furnish all documents relating to the property in order to ascertain the income and expenses. CKL was also ordered to sell the property and distribute half the proceeds of sale to CWW, after deducting expenses and tax.

Takeaway

It is possible to assert beneficial ownership of a property if one can prove a trust was created by the legal owner for the benefit of the beneficial owner. In this case, the court found that a common intention constructive trust was created based on the contemporaneous documents and upon the conduct of the parties.

However, it is difficult to prove the intention of parties as to the agreement to jointly hold a property, if such agreement is not properly reduced in writing. Where family relations are involved, and oral agreements are the norm, matters can be especially complicated, which is shown in the subject case. Hence, the key takeaway would be for parties (even and especially for family members) to expressly and clearly set out their intention in a properly drafted document to reflect the true terms of their agreement.

Dentons Rodyk acknowledges and thanks associate Quek Ling Yi for her contribution to the article.

06 February 2017

Financial Supervisory Commission Proposed to Relax the Threshold for Commercial Banks to Invest In Non-Self-Use Real Estate

02/06/2017

Yi-Jiun Su/Christina Chiang

Commercial banks were reluctant to join the urban renewal projects with self-owned real estates in accordance with the Urban Renewal Act in the past because the rebuilt real estate often does not comply with the following condition:

(i) "a substantial portion of rebuilt real estate is for self-use" as referred to in Subparagraph 3, Paragraph 2, Article 75 of the Banking Act ("Act") and Paragraph 1, Article 3 of the Regulations Governing Investment in Real Estate by Commercial Banks ("Regulations") which means that at least 50% of the usable floor area of the rebuilt real estate shall be for the banks' self-use; or

(ii) "for self-use in the near future" as referred to in Subparagraph 2, Paragraph 2, Article 75 of the Act and Paragraph 3, Article 3 of the Regulations which means for a term of up to two years.

In order to increase the banks' motivation to participate in urban renewal and to meet the banks' needs to invest in real estate, the Financial Supervisory Commission (FSC) initiated the amendment to the Regulations and announced the draft amendment to the Regulations on 29 December 2016 ("Draft Amendment").

According to the Draft Amendment, the FSC proposed to enact Article 4-1 of the Regulations, according to which the banks' self-use ratio of the real estate rebuilt in an urban renewal project in accordance with the Urban Renewal Act should be at least 20% provided that such ratio should not be less than the self-use ratio before the reconstruction, which lowers the aforementioned 50% self-use ratio.

Furthermore, the FSC proposed to add a proviso to Paragraph 4, Article 3 of the Regulations, according to which the maximum term of the condition "for self-use in the near future" prescribed in Subparagraph 2, Paragraph 2, Article 75 of the Act will be extended to up to seven years for banks that acquire land and construct the building itself.

It is generally anticipated that since the Draft Amendment relaxes the threshold for commercial banks to invest in non-self-use real estate, it will stimulate the banks' willingness to contemplate on participating in urban renewal projects, thereby achieving the goal of expediting urban renewal.

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Ideas

Patients in the Limelight - The Federal Circuit Applies *Akamai v. Limelight* to Divided Infringement in Healthcare

March 2017

Article

In the past few months, the Federal Circuit decided two cases addressing the issue of divided patent infringement in the healthcare field. In both *Medgraph, Inc. v. Medtronic, Inc.* and *Eli Lilly & Co. v. Teva Parenteral Medicines, Inc.*, the Federal Circuit applied the *Akamai* standard for divided infringement to determine whether patient conduct may be attributed to a physician or third party when determining liability.[1] Although the outcomes differ, these cases taken together provide some additional guidance for evaluating divided infringement under the *Akamai* standard.

Divided Infringement

Infringement of a patented method claim requires performance of all of the steps of the claimed method.[2] Typically, an actor may be liable for direct infringement when the actor performs every claimed step of the method.[3] However, when the steps of a method are divided between two or more actors, one actor may be liable for the conduct of others under the doctrine of divided infringement.[4] The Federal Circuit and Supreme Court established a new standard for divided infringement in the *Akamai v. Limelight* series of decisions spanning from 2010 to 2015.[5]

Under divided infringement, an alleged infringer may be held responsible for another's conduct when that conduct is "attributable" to the infringer, i.e. when the infringer "directs or controls" the other party's conduct.[6] Because attribution is a question of fact, courts historically reviewed the evidence for indications of an agency or legal relationship between the parties.[7] In *Akamai V*, the Federal Circuit unanimously expanded the circumstances in which the controlling party may be liable for infringement.[8] The decision added an additional two-step analysis, where liability is appropriate if the alleged infringer "[1] conditions participation in an activity or receipt of a benefit upon performance of a step or steps of a patented method and [2] establishes the manner and timing of that performance."[9]

The Federal Circuit also held that members of a joint enterprise may similarly be liable for direct infringement when all of the claimed method steps are performed by the members of the joint enterprise.[10] A joint enterprise requires four elements: "(1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control."[11]

Medgraph, Inc. v. Medtronic, Inc.

Medtronic manufactures and markets diabetes management solutions, including insulin pumps and software for both patients and healthcare professionals under its CareLink® Therapy Management System for Diabetes. Using Medtronic's devices and software, patients may collect blood sugar data and provide that data to their healthcare providers. Medgraph filed suit against Medtronic, alleging infringement of Medgraph's method patent because every step of its patent was performed by or attributable to Medtronic.[12]

Without evidence to suggest an agency or contractual relationship, the Federal Circuit evaluated the facts under the *Akamai* two-prong standard.[13] First, Medgraph failed to prove that Medtronic required the performance of certain method steps by patients and healthcare professionals.[14] Patients were not denied the use of Medtronic's system if they failed to perform steps of the claimed method and Medtronic did not offer incentives to encourage patient performance. Second, Medtronic gave patients latitude regarding when and how to provide their blood glucose data. For example, patients could print or email health data reports for their healthcare professional, or even bring their medical device to a provider to have the blood sugar data extracted. Accordingly, Medtronic did not exercise control of the timing or manner of their patients' performance.[15] With neither *Akamai* prong satisfied, the Federal Circuit affirmed summary judgment of non-infringement.[16]

Eli Lilly & Co. v. Teva Parenteral Medicines, Inc.

Eli Lilly & Co. owns a patent directed to a method of administering chemotherapy treatment along with certain vitamins to reduce the toxicity of treatment.[17] Eli Lilly filed suit against multiple defendants who sought to market a generic version of the chemotherapy treatment with instructions to combine treatment with the vitamins claimed in Eli Lilly's patent.[18] While neither the patients nor the physicians individually performed every step of the method, Eli Lilly filed suit, arguing the patients' conduct was attributable to the physicians and, therefore, the physicians directly infringed its patented method.[19]

Like *Medgraph*, the Federal Circuit reviewed the evidence under *Akamai's* two-prong standard because the patients were not bound by an agency relationship or legal obligation to the physicians.[20] First, patients were required to take the prescribed vitamins as a precursor to receiving chemotherapy treatment.[21] In fact, physicians could, and did, withhold chemotherapy treatment from patients if the patients did not take the specified vitamins.[22] Second, the physicians controlled the timing and manner of the patients' performance by instructing patients when to take the vitamins and specifying the vitamin dosage.[23] Because both *Akamai* prongs were satisfied, the Federal Circuit held that the patients' conduct was attributable to the physicians and affirmed the district court's finding of direct infringement.[24]

Conclusion

The *Medgraph* and *Eli Lilly* cases provide an expanded look into how the Federal Circuit evaluates divided infringement under the *Akamai* standard. Both address specific factual circumstances in which physicians or healthcare entities may be liable for patient-physician interactions. However, because divided infringement is heavily dependent upon the facts at issue, these cases do not provide the full picture for the new standard. In *Eli Lilly*, the Federal Circuit acknowledged there are still open issues left unresolved: "Our holding today does not assume that patient action is attributable to a prescribing physician solely because they have a physician-patient relationship. We leave to another day what other scenarios also satisfy the 'direction or control' requirement."[25] Thus, we are likely to see more to come, with future cases refining the doctrine of divided infringement under *Akamai*.

[1] *Medgraph, Inc. v. Medtronic, Inc.*, 843 F.3d 942 (Fed. Cir. 2016); *Eli Lilly & Co. v. Teva Parenteral Medicines, Inc.*, 2015-2067, 2017 WL 117164 (Fed. Cir. Jan. 12, 2017).
[2] *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 797 F.3d 1020, 1022 (Fed. Cir. 2015) ("*Akamai V*") (citing *BMC Res., Inc. v. Paymentech, L.P.*, 498 F.3d 1373, 1379–81 (Fed.Cir.2007)). *See also Muniauction, Inc. v. Thomson Corp.*, 532 F.3d 1318, 1329 (Fed. Cir. 2008) ("*Muniauction*") ("where the actions of multiple parties combine to perform every step of a claimed method, the claim is directly infringed only if one party exercises 'control or direction' over the entire process such that every step is attributable to the controlling party, i.e., the 'mastermind.'") (quoting *BMC Res.*, 498 F.3d at 1380-81).
[3] *Akamai V*, 797 F.3d at 1022.
[4] *Akamai Techs., Inc v. Limelight Networks, Inc.*, 786 F.3d 899, 908-09 (Fed. Cir. 2015) ("*Akamai IV*"). As noted above, the Federal Circuit in *Muniauction* held that liability for direct infringement is predicated on performance by or attribution to a single entity. The Supreme Court expressly refused to review the *Muniauction* standard in *Limelight Networks, Inc. v. Akamai Techs., Inc.* ("*Akamai III*"), instead assuming that the standard was correct. *Limelight Networks, Inc. v. Akamai Techs., Inc.*, 134 S. Ct. 2111, 2114, 2119-2120 (2014) ("*Akamai III*"). *Muniauction* may be a candidate for Supreme Court review based on critics' attacks, including Judge Moore's argument that the *Muniauction* standard is "inconsistent with statute, common law, and common sense." *Akamai Techs., Inc v. Limelight Networks, Inc.*, 786 F.3d 899, 916 (Fed. Cir. 2015) (Moore, J., dissenting).
[5] *See Akamai Techs., Inc v. Limelight Networks, Inc.*, 629 F.3d 1311 (Fed. Cir. 2010) ("*Akamai I*"); *Akamai Techs., Inc v. Limelight Networks, Inc.*, 692 F.3d 1301 (Fed. Cir. 2012) ("*Akamai II*"); *Limelight Networks, Inc. v. Akamai Techs., Inc.*, 134 S. Ct. 2111 (2014) ("*Akamai III*"); *Akamai Techs., Inc v. Limelight Networks, Inc.*, 786 F.3d 899 (Fed. Cir. 2015) ("*Akamai IV*"); *Akamai Techs., Inc v. Limelight Networks, Inc.*, 797 F.3d 1020 (Fed. Cir. 2015) ("*Akamai V*").
[6] *Akamai V*, 797 F.3d at 1022.
[7] *Id.* at 1022-23. For example, the court might evaluate if the third party acted as an agent of the alleged infringer or if the infringer had contracted with the third party to perform the remaining steps of the method claim. *Id.*
[8] Note that Circuit Judges Taranto, Chen, and Stoll did not participate.
[9] *Akamai V*, 797 F.3d at 1022-23.
[10] *Id.* at 1023, n.1 (partially overruling *Golden Hour Data Sys., Inc. v. emsCharts, Inc.*, 614 F.3d 1367, 1380 (Fed. Cir. 2010)).
[11] *Id.* at 1023.
[12] *Medgraph, Inc. v. Medtronic, Inc.*, 843 F.3d 942 (Fed. Cir. 2016) (arguing infringement of the method claimed in U.S. Patent No. 5,974,124). Medgraph argued all of the steps of Medgraph's method claim were performed by Medtronic, patients, or healthcare professionals using its CareLink® systems. *See* Reply Brief for Plaintiff-Appellant, 2016 WL 3215437. Medgraph further argued the third party conduct was attributable to Medtronic because it instructed performance of the claimed steps. *Id.*
[13] *Id.* at 947-49.
[14] *Id.* at 948.
[15] *Id.*
[16] *Id.* at 948-49.
[17] U.S. Patent No. 7,772,209.
[18] *Eli Lilly & Co. v. Teva Parenteral Medicines, Inc.*, 2015-2067, 2017 WL 117164, at *1 (Fed. Cir. Jan. 12, 2017).
[19] *Id.* at *4.
[20] *Id.* at *4-7.
[21] *Id.* at *5.
[22] *Id.* at *5.
[23] *Id.* at *6.

[24] *Id.* at *7.
[25] *Id.* at *7. *See also id.* at *4.

Related Professionals

Steve Maule

Associate

BAP Holds That Rejection of a Trademark License Does Not Automatically Terminate Licensee's Rights

In the case of *Mission Product Holdings, Inc. v. Tempnology LLC* (*In re Tempnology LLC*), 559 B.R. 809 (B.A.P. 1st Cir. 2016), the United States Bankruptcy Appellate Panel for the First Circuit held that, although trademarks and trade names are not included within the Bankruptcy Code's definition of "intellectual property," the licensee's rights to use a debtor/licensor's trademarks were not automatically terminated by the debtor's rejection of the agreement in bankruptcy.

BACKGROUND FACTS

Tempnology LLC ("Tempnology" or the "Debtor") was a company that developed chemical-free cooling fabrics for use in consumer products under the brand name "Coolcore." *Id.* at 1-2. Mission Products Holdings, Inc. ("Mission") is a company in the business of marketing and distributing innovative sports technologies. *Id.* at 811.

Tempnology and Mission were parties to a co-marketing and distribution agreement (the "Agreement") granting Mission, among other things, exclusive distribution rights within the United States for an array of Tempnology products, a non-exclusive license to use certain intellectual property ("IP") (but not the trademarks or logo), and a limited license to use trademarks and the logo during the term of the Agreement. *Id.* at 811-13.

In June 2014, Mission exercised its rights to terminate the Agreement without cause, triggering the two-year wind-down period. *Id.* at 813. In July 2014, Tempnology issued a notice of termination for cause, asserting that Mission had breached the Agreement. *Id.* The dispute resulted in a two-phase arbitration process. *Id.* In June 2015, the arbitrator rendered a decision in the first phase of arbitration that the Agreement remained "in full force and effect." *Id.* The second phase of the arbitration—as to whether either party had breached the Agreement—was not decided because Tempnology filed a chapter 11 bankruptcy case in September 2015. *Id.*

The first day following its bankruptcy filing, Tempnology filed a motion to reject certain executory contracts,[1] including the Agreement with Mission, and a motion to allow Tempnology to sell substantially all of its assets free and clear of liens, claims, encumbrances and other interests. *Id.*

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[1] Under 11 U.S.C. § 365(a), subject to court approval, a debtor may reject its executory contracts.

Mission filed an objection to the sale motion and the rejection motion, including a notice of election pursuant to 11 U.S.C. § 365(n)(1)(B), [2] arguing that notwithstanding the Debtor's rejection of the Agreement, by making an election under § 365(n), Mission retained its exclusive product distribution rights as well as its rights under the IP license and the trademark license and that it could continue to exercise without interference from Tempnology or the purchaser of its assets. *Id.*

The Bankruptcy Court ruled that: (1) Mission's election pursuant to 11 U.S.C. § 365(n) protected Mission's rights as a non-exclusive licensee only as to any patents, trade secrets, and copyrights; [3] (2) Mission's election pursuant to 11 U.S.C. § 365(n) provided no protectable interest in the Debtor's trademarks or trade names; and (3) Mission's election pursuant to 11 U.S.C. § 365(n) provided no protectable interest in the Debtor's "Exclusive Products" and the "Exclusive Territory" as those terms were defined in the Agreement. *Id.* at 814. [4]

THE BANKRUPTCY APPELLATE PANEL'S DECISION

On appeal, Mission argued that the Bankruptcy Court committed error by, among other things: (1) ruling that Mission's § 365(n) election applied only to the IP license and not to the product distribution rights granted in the Agreement; and (2) ruling that Mission did not retain any rights to use Tempnology's trademark and logo because those items are not included in the Bankruptcy Code's definition of "intellectual property." *Id.* at 817.

First, the United States Bankruptcy Appellate Panel for the First Circuit (the "BAP") explained that, "[u]pon rejection of an executory contract, the licensee's § 365(n) election applies only to its rights to intellectual property and not to any other rights that it might have received under the executory contract." *Id.* (emphasis added). Therefore, the BAP concluded that the Bankruptcy Court did not err in ruling that the exclusive product distribution rights granted to Mission in the Agreement were unprotected by its § 365(n) election. *Id.* at 818.

Second, the BAP held that although Mission's rights to use the trademarks were not protected by its § 365(n) election, Tempnology's rejection of the Agreement did not automatically "vaporize Mission's trademark rights under the Agreement[,]" and that "[w]hatever post-rejection rights Mission retained in the Debtor's trademark and logo are governed by the terms of the Agreement

[2] 11 U.S.C. § 365(n) protects licensees of "intellectual property" by permitting them to elect to retain certain rights granted to them under the contract, despite the debtor's rejection thereof.
[3] With respect to the Debtor's trademarks, the Bankruptcy Court concluded that, to the extent the Agreement granted Mission a non-exclusive right to use certain of the Debtor's trademarks and trade names, 11 U.S.C. § 365(n) did not protect Mission's trademark license or use of logos post-rejection.
[4] The Bankruptcy Court determined that the distribution rights granted to Mission under the Agreement were unrelated to the IP license and, although the IP license itself was protected under 11 U.S.C. § 365(n), the distribution rights were not.

and applicable non-bankruptcy law." *Id.* at 822-23 (emphasis added).

CONCLUSION

The *Tempnology* decision is significant because it is the first decision to adopt the United States Court of Appeals for the Seventh Circuit's holding in *Sunbeam Products, Inc. v. Chicago American Manufacturing, LLC*, 686 F.3d 372 (7th Cir. 2012), which held that a debtor's rejection of a trademark license, which was part of a larger supply agreement, did not automatically extinguish the licensee's right to use the debtor's trademarks under that agreement.

This ruling is different from courts which have determined that a debtor's rejection of a license *is* an automatic termination of a licensee's right to use the debtor's trademarks post-rejection, *see, e.g., In re Old Carco LLC*, 406 B.R. 180 (Bankr. S.D.N.Y. 2009), or courts which have allowed licensees to retain their § 365(n) rights in trademarks based on equitable considerations, *see In re Crumbs Baker Shop, Inc.*, 522 B.R. 766 (Bankr. D.N.J. 2014).

Mission filed an appeal in the United States Court of Appeals for the First Circuit and its Opening Brief is currently due to be filed on or before February 21, 2017.

# # #

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.

Creditors' Rights and Bankruptcy. Goodsill's attorneys practicing in the area of creditors' rights and bankruptcy concentrate on the representation of creditors, trustees, committees and other interestholders in complex bankruptcy, foreclosure and receivership matters, commercial landlord-tenant matters and major collections matters. Goodsill attorneys are adept at helping creditors avoid protracted litigation through creative workouts and settlements. Goodsill attorneys in this practice area frequently contribute to publications and lecture at bankruptcy and collection law seminars.

Yahoo incident reinforces vital role of counsel in cybersecurity

8 March 2017

Because cybersecurity is now a board-level issue across a range of industries, Hogan Lovells wants to alert you to a recent development involving the resignation of the general counsel of Yahoo! Inc that our cybersecurity team is tracking.

It has widely been reported that Yahoo has experienced significant legal and business impacts as a result of several cybersecurity breaches. On 1 March, Yahoo disclosed the findings of an independent board committee and subsequent actions taken by the board with respect to how Yahoo responded to the cybersecurity breaches experienced by this company.

Notably, as you can read in the highlighted text from Yahoo's Form 10-K filing, the board found that, among other things, the in-house legal team at Yahoo did not sufficiently pursue the investigation of a security incident in 2014. In connection with that lack of action Yahoo has accepted the resignation of its general counsel. The CEO will forfeit her 2016 cash payout as well as her 2017 equity award and Yahoo will undertake corrective actions in how the company investigates such incidents going forward—the very last paragraph under "Excerpt from Yahoo! Inc Form 10-K Report Filed March 1, 2017:" is very useful to read in that respect.

What happened at Yahoo reinforces the vital role played by a company's lawyers to understand the organisation's cybersecurity posture and to seek the technical and other facts needed to appropriately advise and guide the company.

Hogan Lovells' top-ranked cybersecurity team is deeply experienced in helping clients structure and implement incident response plans, and offers an online resource for incident response planning at www.hoganlovells.com/readysetrespond. We would be pleased to arrange a discussion with them.

Excerpt from Yahoo! Inc Form 10-K Report Filed March 1, 2017:

Security Incidents

Description of Events

On September 22, 2016, we disclosed that a copy of certain user account information for approximately 500 million user accounts was stolen from Yahoo's network in late 2014 (the "2014 Security Incident"). The Company believes the user account information was stolen by a state-sponsored actor. The user account information taken included names, email addresses, telephone numbers, dates of birth, hashed passwords (the vast majority with the "bcrypt" hashing algorithm) and, in some cases, encrypted or unencrypted security questions and answers. Our forensic investigation indicates that the stolen information did not include unprotected passwords, payment card data, or bank account information. Payment card data and bank account information are not stored in the system that the investigation found to be affected. We have no evidence that the state-sponsored actor is currently in or accessing the Company's network.

On December 14, 2016, we disclosed that, based on our outside forensic expert's analysis of data files provided to the Company in November 2016 by law enforcement, we believe an unauthorized third party stole data associated with more than one billion user accounts in August 2013 (the "2013 Security Incident"). We have not been able to identify the intrusion associated with this theft, and we believe this incident is likely distinct from the 2014 Security Incident. For potentially affected accounts, the user account information stolen included names, email addresses, telephone numbers, dates of birth, hashed passwords (using the MD5 algorithm) and, in some cases, encrypted or unencrypted security questions and answers. The stolen information did not include passwords in clear text, payment card data, or bank account information.

In November and December 2016, we disclosed that our outside forensic experts were investigating the creation of forged cookies that could allow an intruder to access users' accounts without a password. Based on the investigation, we believe an unauthorized third party accessed the Company's proprietary code to learn how to forge certain cookies. The outside forensic experts have identified approximately 32 million user accounts for which they believe forged cookies were used or taken in 2015 and 2016 (the "Cookie Forging Activity"). We believe that some of this activity is connected to the same state-sponsored actor believed to be responsible for the 2014 Security Incident. The forged cookies have been invalidated by the Company so they cannot be used to access user accounts.

The 2013 Security Incident, the 2014 Security Incident, and the Cookie Forging Activity are collectively referred to herein as the
"Security Incidents." With respect to each of the Security Incidents, the impacted users and appropriate regulatory and law enforcement agencies have been notified.

The Company, with the assistance of outside forensic experts, has concluded its investigation of the Security Incidents. The Company continues to work with U.S. law enforcement authorities on these matters.

Current and Future Expenses and Losses

We recorded expenses of $16 million related to the Security Incidents in the year ended December 31, 2016, of which $5 million was associated with the ongoing forensic investigation and remediation activities and $11 million was associated with nonrecurring legal costs. The Security Incidents did not have a material adverse impact on our business, cash flows, financial condition, or results of operations for the year ended December 31, 2016. However, we have subsequently incurred additional expenses related to the Security Incidents to investigate and take remedial actions to notify and protect our users and systems, and expect to continue to

incur investigation, remediation, legal, and other expenses associated with the Security Incidents in the foreseeable future. We will recognize and include these expenses as part of our operating expenses as they are incurred. The Company does not have cybersecurity liability insurance.

Litigation, Claims, and Governmental Investigations

To date, approximately 43 putative consumer class action lawsuits have been filed against the Company in U.S. federal and state courts, and in foreign courts, relating to the Security Incidents. The plaintiffs, who purport to represent various classes of users, generally claim to have been harmed by the Company's alleged actions and/or omissions in connection with the Security Incidents and assert a variety of common law and statutory claims seeking monetary damages or other related relief. In addition, a putative stockholder class action has been filed against the Company, and certain current officers of the Company, asserting claims under Sections 10(b) and 20 (a) of the Securities Exchange Act of 1934 and seeking class certification, unspecified damages, interest, and an award of attorney's fees and costs. Four stockholder derivative actions have also been filed purportedly on behalf of the Company against current and former directors and officers. See Note 12—"Commitments and Contingencies" in the Notes to our consolidated financial statements for additional information. Additional lawsuits and claims related to the Security Incidents may be asserted by or on behalf of users, partners, shareholders, or others seeking damages or other related relief.

In addition, the Company is cooperating with federal, state, and foreign governmental officials and agencies seeking information and/or documents about the Security Incidents and related matters, including the U.S. Securities and Exchange Commission ("SEC"), the U.S. Federal Trade Commission, the U.S. Attorney's Office for the Southern District of New York, and two State Attorneys General.

Independent Committee Investigation

As previously disclosed, an independent committee (the "Independent Committee") of the Board of Directors (the "Board") has investigated the Security Incidents and related matters, including the scope of knowledge within the Company in 2014 of access to Yahoo's network by the state-sponsored actor responsible for the theft and related incidents, the Company's internal and external reporting processes and remediation efforts related to the 2014 Security Incident and related incidents. The Independent Committee has concluded its investigation, although it will continue to review developments regarding the Security Incidents and report to the Board on these issues, and cooperate with various government entities. The Independent Committee was assisted by independent counsel, Sidley Austin LLP, and a forensic expert. The Board has separately been advised by other outside counsel regarding the Security Incidents and recommendations regarding remedial actions.

Based on its investigation, the Independent Committee concluded that the Company's information security team had contemporaneous knowledge of the 2014 compromise of user accounts, as well as incidents by the same attacker involving cookie forging in 2015 and 2016. In late 2014, senior executives and relevant legal staff were aware that a state-sponsored actor had accessed certain user accounts by exploiting the Company's account management tool. The Company took certain remedial actions, notifying 26 specifically targeted users and consulting with law enforcement. While significant additional security measures were implemented in response to those incidents, it appears certain senior executives did not properly comprehend or investigate, and therefore failed to act sufficiently upon, the full extent of knowledge known internally by the Company's information security team. Specifically, as of December 2014, the information security team understood that the attacker had exfiltrated copies of user database backup files containing the personal data of Yahoo users but it is unclear whether and to what extent such evidence of exfiltration was effectively communicated and understood outside the information security team. However, the Independent Committee did not conclude that there was an intentional suppression of relevant information.

Nonetheless, the Committee found that the relevant legal team had sufficient information to warrant substantial further inquiry in 2014, and they did not sufficiently pursue it. As a result, the 2014 Security Incident was not properly investigated and analyzed at the time, and the Company was not adequately advised with respect to the legal and business risks associated with the 2014 Security Incident. The Independent Committee found that failures in communication, management, inquiry and internal reporting contributed to the lack of proper comprehension and handling of the 2014 Security Incident. The Independent Committee also found that the Audit and Finance Committee and the full Board were not adequately informed of the full severity, risks, and potential impacts of the 2014 Security Incident and related matters.

Actions the Company is Taking in Response to the Independent Committee's Findings

Based on the Independent Committee's findings, the Board has taken the management related actions described below, adopted certain process and structure changes to address the Company's issues with respect to the Security Incidents, and taken certain other disciplinary actions.

Management Changes

In response to the Independent Committee's findings related to the 2014 Security Incident, the Board determined not to award to the Chief Executive Officer a cash bonus for 2016 that was otherwise expected to be paid to her. In addition, in discussions with the Board, the Chief Executive Officer offered to forgo any 2017 annual equity award given that the 2014 Security Incident occurred during her tenure and the Board accepted her offer.

On March 1, 2017, Ronald S. Bell resigned as the Company's General Counsel and Secretary and from all other positions with the Company. No payments are being made to Mr. Bell in connection with his resignation.

Other Remedial Actions

Additionally, in response to the Independent Committee's findings and recommendations, the Board has directed the Company to implement or enhance a number of corrective actions, including revision of its technical and legal information security incident response protocols to help ensure: escalation of cybersecurity incidents to senior executives and the Board of Directors; rigorous investigation of cybersecurity incidents and engagement of forensic experts as appropriate; rigorous assessment of and documenting any legal reporting obligations and engagement of outside counsel as appropriate; comprehensive risk assessments with respect to cybersecurity events; effective cross-functional communication regarding cybersecurity events; appropriate and timely disclosure of material cybersecurity incidents; and enhanced training and oversight to help ensure processes are followed.

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