PACIFIC RIM ADVISORY COUNCIL

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September 2017 e-Bulletin

MEMBER NEWS

►ALLENDE & BREA Expands Mining Practice with Partner Hire
►DAVIS WRIGHT TREMAINE Gains Two Partners Experienced in Consumer Financial Services Supervision and Enforcement
►DENTONS RODYK Strengthens Energy Practice
►HOGAN LOVELLS Extends Steve Immelt's CEO Term to 2020
►SyCip Law Announces Senior Associate Appointment

COUNTRY ALERTS

►AUSTRALIA Proposed Amendments to Therapeutic Goods Regime CLAYTON UTZ
►BRAZIL Major Decision on Confirmation of Foreign Awards TOZZINIFREIRE
►CANADA Securities Administrators Provide Guidance on the Review of Material Conflict of Interest BENNETT JONES
►CHILE New Technical Standard on Nutritional Guidelines CAREY
►CHINA Prohibits Unverified Internet Users to Post Online Comments DAVIS WRIGHT TREMAINE
►COLOMBIA National Mining Agency Identified and Reserves New Mining Areas for Mining Activities BRIGARD URRUTIA
►COSTA RICA New Law for Corporate Tax Payments ARIAS
►INDONESIA Clear Identity for Technology Based Transportation Services ABNR
►MALAYSIA The Solvency Test Under the Companies Act SKRINE
►NETHERLANDS Scope of Term "Information on environmental emissions" broadened NAUTADUTILH
►PANAMA Imposes Visa Requirements for Venezuelans ARIFA
►RUSSIA Changes in Foreign Investments Regime and Shareholder Information Rights GIDE
►SINGAPORE New Legal Test to Determine Standard of Doctor's Duty to Advise Patient DENTONS RODYK
►TAIWAN Ministry of Finance Amends the Reviewing Rules for Information Exchange Request LEE & LI
►UNITED STATES Inequitable Conduct - But For Materiality and an Adverse Inference of Intent to Deceive BAKER BOTTS
►UNITED STATES Phase Out of DACA - What it Means For Employers DAVIS WRIGHT TREMAINE
►UNITED STATES SEC Issues New Guidance on Omission of Interim Financial Information From Draft Registration Statements HOGAN LOVELLS

CONFERENCES & EVENTS

Upcoming Conferences & Events

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

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

For more information visit www.prac.org

MEMBER DEALS MAKING NEWS

►ARIAS Guatemala counsel to Banco Latinoamericano de Comercio Exterior, S.A. (Bladex)

►BAKER BOTTS Represents The Carlyle Group in $2.6 Billion Joint Venture with Hilcorp Energy Co

►BENNETT JONES Shore Gold Inc. announces acquisition from Newmont Mining Corporation to consolidate Star-Orion Diamond Mine Project and Earn-in Agreement with Rio Tinto Exploration Canada Inc .

►CAREY Assists Minera Valle Central with USD$35 million loan from Export Development Canada and BBVA

►CLAYTON UTZ Advises senior lenders on debt financing agreement for Bauxite Hills Mine

►GIDE Advises on successful recapitalisation of KPS Capital Partners portfolio company, Chassis Brakes International

►HOGAN LOVELLS Advises Ventiga Capital Partners in relation to the £47 million offer for Thesis Asset Management PLC

►NAUTADUTILH Assisted Bain on its USD 3.2 billion acquisition and financing of Diversey Group

►RCD Advises ELIX in the creation of an investment vehicle for the residential sector

►SyCip Law Maynilad Wins Arbitration Against the Republic of the Philippines under the Undertaking Letter

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ALLENDE & BREA EXPANDS MINING PRACTICE WITH PARTNER HIRE

BUENOS AIRES - 07 September, 2017: Allende & Brea is pleased to announce that Florencia Heredia has joined the law firm's Natural Resources Group as Partner on August 1.

Florencia has more than 25 years of experience in the natural resources sector. Prior to joining Allende & Brea, she was founder and senior partner at HOLT Abogados and prior to that she was partner at Estudio Beccar Varela. She is an expert in mining law with extensive experience advising financing institutions and companies in complex mining transactions in Argentina, and has repeatedly represented lenders in all mining project finance taken place in the country.

For 25 years she has been very active assisting many mining companies that have established in Argentina and actively participated in the financings of the Bajo de la Alumbrera Project, the Cerro Vanguardia Project, and the Veladero Project. Through the course of her career, Mrs Heredia has worked with an impressive list of clients leaders in the mining industry.

She is an active member of the International Bar Association where she held the position of Chair of the Mining Committee and is currently council member of Seeril within the IBA. She is currently a trustee at large of the Rocky Mountain Mineral Law Foundation, and also held the position of Secretary of the Board (2014-2015).

Managing Partner Valeriano Guevara Lynch said "We very much look forward to working alongside Florencia and we trust she will become a natural leader to continue to provide and enhance our service of excellence to our clients in the mining industry".

Florencia Heredia said: *" I am very excited to join the Natural Resources practice of the firm, I have always had a great respect for the lawyers and the firm as an institution and look very much forward to contribute my experience in this practice area."*

Allende & Brea is a leading firm in Argentina representing a wide spectrum of clients in all kinds of transactions. Founded in 1957 the firm has 60 years of long standing tradition in the excellence of legal services.

For additional information visit www.allendebrea.com.ar

PRAC @ IBA SYDNEY 2017—MEMBER HOSTED EVENTS

The following PRAC Member firms will be hosting receptions and events at IBA Conference, Sydney. Invitations to these events are extended to PRAC member firms/delegates attending the conference.

Bennett Jones LLP
Monday, October 9, 2017
6pm—10pm The Glenmore Hotel Rooftop, 96 Cumberland Street, The Rocks, Sydney NSW 2000
For full details and to RSVP: Email: eventinfo@bennettjones.com

Clayton Utz
Tuesday, October 10, 2017
5:30pm—7:30pm Museum of Contemporary Art, Foundation Hall, 140 George Street, The Rocks, Sydney NSW 2000
For full details and to RSVP: Email: IBASydney2017@claytonutz.com

DAVIS WRIGHT TREMAINE GAINS TWO PARTNERS EXPERIENCED IN CONSUMER FINANCIAL SERVICES SUPERVISION AND ENFORCEMENT

16 August, 2017 – With state and federal regulators continuing to scrutinize financial institutions' consumer-facing operations, Davis Wright Tremaine has added two new partners who bring significant experience with investigations and supervisory, enforcement, and litigation matters, particularly those involving the Consumer Financial Protection Bureau (CFPB).

Jonathan B. Engel has more than a decade of experience with large, complex, precedent-setting supervisory, enforcement, and litigation proceedings involving consumer financial protection laws at both the federal and state level. He was most recently an enforcement attorney at the CFPB. He previously served as an Assistant Attorney General in the Consumer Protection Division of the Massachusetts Attorney General's office.

Robin Nunn brings to the firm five years of experience helping C-suite executives of major financial institutions navigate federal investigations and examinations as well as supervisory and enforcement actions brought by prudential regulators. She has extensive experience guiding clients through supervisory examinations, agency enforcement investigations, trial court litigation, and compliance with consumer protection laws. She was most recently vice president/senior associate general counsel at Capital One and earlier was counsel at American Express. Ms. Nunn spent six years in private practice at Sullivan & Cromwell LLP, where she represented financial institutions and non-financial institutions.

"The skills these two lawyers bring to our clients powerfully complement one another," said Claude Goetz, chair of the Financial Services practice at Davis Wright Tremaine. "Together, Jonathan and Robin provide 360-degree insight into how regulators supervise, investigate, and enforce and litigate against financial institutions, how major financial institutions address these matters, and how outside counsel can best assist in delivering a successful outcome."

Davis Wright Tremaine is known for its strong regulatory and transactional work in the consumer financial services space, as well as its leading position in emerging and mobile payments and FinTech. The team has seen significant growth in the investigations, supervisory, enforcement, and litigation area as well.

"Focusing on practice areas in which we excel, and that are critical to our clients, is key to our continued success," said Jeff Gray, managing partner of Davis Wright Tremaine. "The addition of excellent lawyers like Jonathan and Robin is consistent with our approach to build on our core strengths as a firm."

Mr. Engel played a central role in a number of CFPB supervisory and enforcement activities. These include a widely publicized, ongoing lawsuit against several major payment processors, who the agency alleged violated the law by assisting operators of an abusive robocall debt collection scheme. He also helped win a $530 million CFPB suit against Corinthian Colleges, a now-defunct, for-profit company that the Bureau alleged targeted students with a predatory lending campaign.

At the AG's office in Massachusetts—known as a consumer protection trendsetter, particularly in the area of data privacy—Mr. Engel was part of the False Claims Enforcement Unit. His work included investigation of a massive data security breach, as well as investigations, supervision, enforcement, and litigation of alleged predatory lending, unfair foreclosure, and illegal debt collection.

As a Capital One vice president, Ms. Nunn oversaw a team of attorneys on matters covering the gamut of consumer and financial products and services, including credit card, retail banking, commercial banking, broker/dealer, small business lending, mortgage, virtual currencies and online banking, payment networks, FinTech, and automobile. At American Express, she handled matters involving an array of issues under federal and state banking laws, as well as issues within the jurisdiction of the CFPB and other federal and state regulators. Ms. Nunn also provided executives with advice on federal and state consumer financial laws and regulations, and has worked with managers and staff at numerous federal and state agencies, including the CFPB, Federal Reserve Board, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, Federal Trade Commission, and Internal Revenue Service.

Her experience has included advising on investigations and enforcement actions involving the CFPB, DOJ, OCC, and FRB as well significant experience handling complex civil litigation brought by private plaintiffs.

For more information, visit www.dwt.com

DENTONS RODYK STRENGTHENS ENERGY PRACTICE GROUP

SINGAPORE—21 August, 2017: Dentons Rodyk is pleased to announce that Kunal Kapoor has joined the Firm as a partner in the energy, infrastructure and project finance group. Kunal joins from Ashurst and prior to this, Kunal was with Ince & Co. Kunal's expertise covers project development work, project finance, private M&A, commodity offtakes and trading, and structured finance in the Energy sector (with a focus on LNG), and he has extensive experience of advising blue chip
energy companies and banks on oil & gas, renewable energy and energy infrastructure matters across the Asia Pacific including Indonesia, India, Pakistan, Bangladesh, Thailand, Malaysia, Mongolia, Vietnam, Papua New Guinea and Australia.

Commenting on Kunal's arrival, Philip Jeyaretnam S.C., Global Vice Chair of Dentons, and CEO of Dentons Rodyk, said: "We are delighted to have Kunal join us, and are confident that with his wealth of experience, he will be able to help us provide in-depth legal advice to our global energy clients as we continue to expand in Southeast Asia."

Christopher McGee-Osborne, Co-chair of Dentons' Global Energy practice, said: "Kunal brings broad-based energy expertise to Dentons at an ideal time as we continue to see substantial opportunities for Dentons across all the energy and infrastructure markets in which we operate, in particular Southeast Asia. We maintain a top-tier global energy practice, and the addition of Kunal is a further step in our continuing strategy to grow our team and enhance our offering to clients globally."

Kunal is recognised by Legal 500 as a next generation lawyer in the Energy, and Projects & Infrastructure sections. Kunal's arrival brings the number of lawyers in Dentons Rodyk's Energy Practice Group to 17.

For more information, see www.dentons.rodyk.com

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HOGAN LOVELLS EXTENDS STEVE IMMELT'S CEO TERM TO 2020

LONDON / WASHINGTON, D.C. 7 September 2017: Global law firm Hogan Lovells' partnership has agreed to extend Steve Immelt's and David Hudd's terms of office as CEO and Deputy CEO respectively by another two years, taking them through to 30 June 2020. The two took up their posts on 1 July 2014.

Nicholas Cheffings, Chair of Hogan Lovells, says:

"This was not a difficult decision. Our clients face challenging regulatory, political, and business change and rely on our experience more than ever. The Board and partnership felt that Steve, with the support of David, would continue to provide the strength and consistency of leadership needed to help us deliver a world-class business through a confident strategy."

Steve Immelt, CEO of Hogan Lovells, says:

"Clients see significant value in the combination of our unrivalled trans-Atlantic strength, industry sector knowledge, and market-leading regulatory capabilities. We see them turning to us when faced with complex cross-border disputes, transactions, or commercial matters such as IP in highly-regulated sectors.

"The consistent feedback we get from our clients is that our most distinctive strengths are the quality of our people and collaborative culture. This is a superb platform from which to continue to build our firm.

"My role over the past three years has concentrated on making sure we achieved the benefits that were promised by the combination we carried out in 2010. That work continues but with a shift of emphasis. Over the next three years my goal is to ensure that we are fit for the future and the best we can be as a modern, client-centric, world-class firm which demonstrates leadership and innovation in a challenging and competitive market."

For additional information visit www.hoganlovells.com

SYCIP LAW ANNOUNCES SENIOR ASSOCIATE APPOINTMENT

SyCip Salazar Hernandez & Gatmaitan is pleased to announce the promotion of Jon Edmarc R. Castillo as Senior Associate effective on July 1, 2017.

Jon Edmarc R. Castillo is a member of the Firm's Litigation and Arbitration Department. His practice covers commercial arbitration, and general litigation before courts and quasi-judicial agencies. He has deep experience in providing solutions for clients in the mining industry in connection with mining-related dispute resolution and regulatory compliance.

For additional information visit www.syciplaw.com

ARIAS

GUATEMALA COUNSEL TO BANCO LATINOAMERICANO DE COMERCIO EXTERIOR, S.A. (BLADEX)

CIUDAD de GUATEMALA – July, 2017: Arias Guatemala provided legal counsel to Banco Latinoamericano de Comercio Exterior, S.A. (Bladex) in connection to a $50 million US dollar syndicated trade facility in favor of Banco de América Central, S.A. (Guatemala). The syndicated trade facility has a three year term, reserved to finance the foreign trade loan portfolio of BAC Guatemala.

The Bladex transaction captivated the interest of different financial institutions, from Central America and the Caribbean as well as from Europe and Asia. The operation represents for BAC Guatemala its first internationally syndicated loan.

Bladex is a well-known multinational bank originally founded by the central banks of the countries of Latin America and the Caribbean. It started its operations in 1979 and has different offices in Latin America, with the purpose of promoting foreign trade and economic integration throughout the Region.

Arias Guatemala provided assistance in negotiating, reviewing and drafting all the relevant corporate documents of the entities involved in the transaction.

Arias Guatemala team included Jorge Luis Arenales (Partner) and Juan José Del Pino (Associate).

For additional information visit www.ariaslaw.com

BAKER BOTTS

REPRESENTS THE CARLYLE GROUP IN $2.6 BILLION JOINT VENTURE WITH HILCORP ENERGY CO.

HOUSTON - 15 August 2017: Deal Description: On July 28, 2017, The Carlyle Group entered into a joint venture with Hilcorp Energy Co. to acquire upstream oil and gas assets in the San Juan Basin of northwestern New Mexico and southwestern Colorado from ConocoPhillips in a transaction valued at approximately $2.6 billion.

The acquisition closed on August 1, 2017.

Baker Botts Lawyers/Office Involved: Corporate: Jeremy Moore (Partner, Houston); Ian Jelsma (Associate, Houston); Bill Pritchett (Associate, Houston); Finance: Andrew Thomison (Partner, Houston); Malory Weir (Associate, Houston); Tax: Ron Scharnberg (Partner, Houston); Leah Patrick (Associate, Houston); Katie McEvilly (Associate, Houston); Global Projects: Jeremy Kennedy (Partner, Houston); John Craven (Associate, Houston).

For additional information visit www.bakerbotts.com

BENNETT JONES

SHORE GOLD INC ANNOUNCES ACQUISITION FROM NEWMONT MINING CORPORATION TO CONSOLIDATE STAR-ORION DIAMOND MINE PROJECT AND EARN0IN AGREEMENT WITH RIO TINTO EXPLORATION CANADA, INC.

Shore Gold Inc. announces acquisition from Newmont Mining Corporation to consolidate Star-Orion Diamond Mine Project and Earn-in Agreement with Rio Tinto Exploration Canada Inc.

Date Announced: June 23, 2017
Date Closed: June 22, 2017
Deal Value: 91,300,000
Client Name: Shore Gold Inc.

On June 22, 2017, Shore Gold Inc. acquired all of the participating interest of Newmont Canada FN Holdings ULC n the Fort à la Corne joint venture, resulting in Shore owning 100% of the Star-Orion South Diamond Project. Shore issued approximately 53.8 million common shares and 1.1 million common share purchase warrants to Newmont, with each warrant entitling Newmont to acquire one additional common share in the capital of Shore at a price of $0.349 per common share for a period of 45 months from the closing date.

Concurrently, Shore entered into an Option to Joint Venture Agreement with Rio Tinto Exploration Canada Inc. (RTEC) pursuant to which Shore granted RTEC an option to earn up to a 60% interest in the Project. RTEC also subscribed for units of Shore for an aggregate subscription price of $1,000,000 at a price of $0.18 per unit, with each unit consisting of one common share in the capital of Shore and one common share purchase warrant, with each warrant entitling RTEC to acquire one additional common share at a price of $0.205 per common share for a period of 24 months following the closing date.

Shore was represented by Bennett Jones LLP with a team led by Brad Markel and including Ali Naushahi, Kwang Lim, John Lawless, Elyse van Spronsen and Chris Hall (Corporate) and Greg Johnson (Tax).

For additional information visit www.bennettjones.com

CAREY

ASSISTS MINERA VALLE CENTRAL WITH USD$35 MILLION LOAN FROM EXPORT DEVELOPMENT CANADA AND BBVA

SANTIAGO - 07 September, 2017: Carey has helped copper exploration and mining company Minera Valle Central obtain a loan from Export Development Canada and BBVA for US$35 million.

Larraín y Asociados advised the banks.

The funds will be used finance the expansion of Minera Valle Central's processing plant within the El Teniente copper mine, which is operated by state-owned mining company Codelco.

Both banks supplied Minera Valle Central with a US$64 million loan back in 2015. Carey helped the borrower amend security documents granted for that financing in line with the new finance package. The deal closed on 3 August.

Carey Counsel to Minera Valle Central acting in the transaction included: Partner Felipe Moro and associates Patricia Montt and Valentina Vizcay.

For additional information visit www.carey.cl

CAREY

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

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

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

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

For additional information visit www.carey.cl

CLAYTON UTZ

ADVISES SENIOR LENDERS ON DEBT FINANCING AGREEMENT FOR BAUXITE HILLS MINE

PERTH, 10 August 2017: Clayton Utz has advised Canadian based Sprott Private Resource Lending (Sprott) as senior lender on its debt financing agreement with Metro Mining Limited (MMI) which will fund the development of MMI's Bauxite Hills Mine in Queensland, Australia.

The transaction includes a A$40 million debt financing facility as well as warrants issued to Sprott by MMI.

Clayton Utz Banking partner Rohan Mishra led the team advising Sprott which included special counsel Kate Casellas, senior associate Stephen Neale, lawyer Gemma Robinson and graduate Nicholas Rawlinson.

For additional information visit www.claytonutz.com

GIDE

ADVISES ON SUCCESSFUL REACAPITALISATION OF KPS CAPITAL PARTNERS PORTFOLIO COMPANY, CHASSIS BRAKES INTERNATIONAL

24 July 2017: Chassis Brakes International Group, portfolio company of KPS Capital Partners, has completed its second successful recapitalisation. The proceeds of the recapitalisation will be used to fund a cash distribution to stockholders, refinance the company's capital structure, purchase Robert Bosch GmbH's financial interests in the company, and provide resources for investments in technology and growth.

Financing for the transaction was provided by KKR Credit and Gide advised Chassis Brakes International Group in connection with the financing and security agreements entered into with KKR.

The following jurisdictions were involved: Luxembourg, The Netherlands, France, Brazil, Mexico, Poland, the State of Delaware, Germany and Spain.

The Gide team was led by partners Nadège Nguyen and Dimitrios Logizidis with tax partner David Klass, counsel Will Oliver; and associates Sarah Whitley, Jeremie Bismuth and Hugo Nocerino.

For additional information visit www.gide.com

HOGAN LOVELLS

ADVISES VENTIGA CAPITAL PARTNERS IN RELATION TO THE £47 MILLION OFFER FOR THESIS ASSET MANAGEMENT PLC

LONDON, 22 August 2017: Hogan Lovells has advised Ventiga Capital Partners, a private equity investment group, as part of the Consortium acquiring Thesis Asset Management PLC (Thesis), a Lymington, Hampshire-based fund management group, for approximately £52.0527 per share in cash.

The acquisition of Thesis is the third deal Hogan Lovells has advised Ventiga on this year. In January the company purchased Swedish food service group Nordic Service Partners Holding AB, and in May it acquired Danish airfare analytics group Infare Solutions A/S.

The Hogan Lovells team was led by London-based Private Equity partner Ed Harris, with support from senior associate, Oliver Vallee, and associates Chris Perry and Adam Halewood.

The Thesis Group is a regional private client asset management business with approximately £12 billion of assets under management that provides investment management, financial advice or fund structuring for its clients.

For more information, see www.hoganlovells.com

NAUTADUTILH

ASSISTS BAIN ON ITS USD $3.2 BILLION ACQUISITION AND FINANCING OF DIVERSEY GROUP

AMSTERDAM – 07 September 2017: A team composed of NautaDutilh Amsterdam, Brussels, Luxembourg and New York assisted Bain Capital Private Equity, LP with the acquisition of the Diversey Group from Sealed Air Corporation. NautaDutilh co-counseled with Kirkland & Ellis International LLP and various local counsels. Next to the M&A deal we also worked on the bond issuance and leveraged financing of the transaction.

Diversey is a global leader in sustainable, high-performance hygiene and cleaning solutions operating in two distinct verticals (professional and food & beverage) with significant operations in Netherlands and Belgium and a Luxembourg holdings structure.

On 6 September, Bain Capital Acquired the Diversey Group from Sealed Air Corporation. In January 2017, Sealed Air began the sale process for Diversey, through an auction process. Signing took place on 25 March. To finance the acquisition, the acquisition vehicle (i) entered into a USD 1,967 million senior secured term loan facility and a USD 250 million senior secured revolving credit facility, (ii) made an equity contribution of USD 815 million, and (iii) issued senior notes for the aggregate principal amount of EUR 450 million due 2025 with an interest rate of 5.625% per annum.

The NautaDutilh team consisted of, inter alia, Ruud Smits, Peter Vogels, Wijnand Bossenbroek, Arief Roelse, Gijs van Nes, Joyce Trebus, Niels Hagelstein, Edward Rijnhout, Tom Vincken, Elke Janssen, Maxime Colle, Romain Sabatier, Antonia Netiv Michelle van Doren, Sabrina Legerstee en Mariëlle van Nimwegen.

For additional information visit www.nautadutilh.com

ROUSAUD COSTAS DURAN

ADVISES ELIX IN CREATION OF INVESTMENT VEHICLE FOR THE RESIDENTIAL SECTOR

US-based KKR, Spain-based Altamar Capital Partners and other domestic and international investors to join the investment vehicle, expected to manage over €200 milllion

RCD - Rousaud Costas Duran has advised ELIX on a transaction to create a company to manage an investment vehicle in the real estate sector. The new company, named ELIX Vintage Residential Socimi SA, is expected to manage over €200 million. The agreement will allow ELIX Vintage Residential Socimi SA to invest in Spanish residential real estate stock. To do so, in addition to the funds provided by the investors, the new company will benefit from ELIX's expertise and market knowledge of property renting, renovation and investment.

Investment funds such as KKR, Altamar Capital Partners and Deutsche Finance Group took part in the transaction, as well as other domestic and international investors. RCD's Corporate and Commercial department has advised ELIX on the formation of the new company, as well as on the investment agreement between the parties involved in the transaction.

For additional information visit www.rcdslp.com

SYCIP LAW

MAYNILAD WINS ARBITRATION AGAINST THE REPUBLIC OF THE PHILIPPINES UNDER THE UNDERTAKING LETTER

Maynilad Wins Arbitration Against the Republic of the Philippines under the Undertaking Letter

SyCip Salazar Hernandez & Gatmaitan, as lead counsel, represented Maynilad Water Services, Inc. (Maynilad) in an arbitration case against the Republic of the Philippines, which was represented by the Office of the Solicitor General and Rajah & Tann Singapore LLP. This arbitration case was an UNCITRAL-governed international arbitration held in Singapore.

The case against the Republic was an offshoot of an earlier rate rebasing arbitration case filed by Maynilad as Concessionaire against a Republic-owned water utility, Metropolitan Waterworks and Sewerage System (MWSS). There, a three-man appeals panel chaired by Professor Bernard Hanotiau issued a final award in 2015 upholding Maynilad's rate rebasing adjustment pursuant to its 1997 Concession Agreement with the utility.

As the MWSS refused to fully implement the rebasing award, Maynilad claimed compensation from the Republic of the Philippines (Republic) pursuant to the latter's 1997 Undertaking Letter for the losses occasioned by a delay or non-implementation caused by the Republic or any of its agencies in implementing any increase in standard rates.

The Republic refused to honor Maynilad's demand and Maynilad brought the matter to a second arbitration against the Republic before a tribunal, consisting of Mr. Kevin Kim as Chairman, with V. V. Veeder and retired Justice Roberto Abad, as members.

On July 24, 2017, the tribunal unanimously found in a final First Partial Award that the Republic had breached its Undertaking Letter and ordered it to indemnify Maynilad for the PhP3, 424,690,000 in actual losses it had suffered from 11 March 2015 to 31 August 2016, without prejudice to Maynilad seeking further recourse against (i) MWSS for losses from 1 January 2013 to 10 March 2015, and (ii) the Republic for losses from 1 September 2016 onwards. The Tribunal expressly stated that it would entertain an additional claim from Maynilad for losses from 1 September 2016 onwards in case the parties are unable to settle that matter between themselves.

The SyCipLaw team was composed of partners Emmanuel M. Lombos and Arlene M. Maneja, and associates Mark Xavier D. Oyales and Ricardo Jesus E. Gutierrez, who were assisted by Jericho R. Tiu and Nikko Emmanuel D. Silva.

For additional information visit www.syciplaw.com

PRAC EVENTS


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


PRAC @ Vancouver 2015


PRAC @ Brisbane 2015


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31 AUG 2017

Proposed amendments to the Therapeutic Goods Regime

The TGA has today announced that it is seeking comments from interested parties on the exposure draft Bills amending the Therapeutic Goods Act 1989 and the Therapeutic Goods (Charges) Act 1989.

The Therapeutic Goods Amendment (2017 Measures No. 1) Bill 2017 is part of the legislative response to the Expert Panel Review Medicines and Medical Devices Regulation. The TGA has stated that the Bill is intended to:

- "establish a scheme for the provisional approval of promising new medicines
- streamline and simplify the framework for advertising therapeutic goods to the public
- enhance the regulation of complementary medicines; and
- strengthen monitoring and compliance provisions."

The Therapeutic Goods (Charges) Amendment Bill 2017 is intended to "enable annual charges to be levied for Australian conformity assessment bodies and for provisionally registered goods."

The TGA has invited "concise submissions on "show stopper" issues with the clarity, readability and complexity of the draft Bills".

Submissions are requested by **9am on 5 September 2017**.

It is anticipated that the Bills will be introduced to Parliament on **13 September 2017**.

Consultation: Therapeutic Goods Advertising Code

The TGA has today also announced that it is seeking comments from interested parties on proposed changes to the Therapeutic Goods Advertising Code.

The stated purpose of this consultation is "to provide an opportunity for interested parties to provide their views on proposed changes to the Code to support the implementation of related Review recommendations and a possible framework for advertising of Schedule 3 medicines to the public."

Submissions are requested by COB **on 13 October 2017**.

GET IN TOUCH

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TOZZINIFREIRE
ADVOGADOS

BRAZIL PRODUCES MAJOR DECISION ON CONFIRMATION OF FOREIGN AWARDS

Arbitrator's failure to disclose potential conflict of interest prevents confirmation of foreign arbitral award in the country

June 27, 2017

By Fernando Eduardo Serec & Antonio Marzagão Barbuto Neto, arbitration partners in TozziniFreire Advogados

In a widely publicized decision rendered on April 19, 2017, the Superior Court of Justice (STJ) held that an arbitrator's failure to disclose material facts affecting his independence and impartiality precludes the confirmation of the respective arbitral award in Brazil, as it violates the national public policy.

The case stemmed from the sale of the Ometto sugar cane and ethanol business to the Spanish company Abengoa. The Spanish company commenced arbitration proceedings under the auspices of the ICC, in which it basically sought damages arising from seller's alleged misrepresentation concerning the crushing capacity for one of the mills.

A panel of three arbitrators seated in New York found in favor of Abengoa and awarded the Spanish company over US$ 110 million in damages.

Shortly after the arbitral award was rendered, it was discovered that the chairman of the arbitral tribunal failed to disclose that his law firm had received significant legal fees from Abengoa during the course of the arbitration. The chairman admitted to failing to conduct the proper conflicts check, but denied any knowledge of his firm's relationship with Abengoa at the time the award was rendered.

Ometto then filed an action to annul the award before the Southern District of New York. However, the federal court did not vacate the arbitral award holding that the petitioner failed to demonstrate the existence of evident partiality under a more stringent interpretation of the Federal Arbitration Act. The Second Circuit upheld this decision and the Supreme Court refused to hear the matter, even though the Ninth Circuit applies a different test of evident partiality to annul arbitral awards in similar situations.

Ometto's last stand would be before the Superior Court of Justice (STJ), the highest court on federal law issues and also responsible to weed out foreign decisions that violate fundamental tenets of Brazilian law.

The STJ has a clear pro-arbitration position on foreign arbitral awards, as it confirms most of the foreign decisions. The court appropriately exercises restraint in analyzing the merits of cases already decided by arbitral tribunals seated abroad.

However, the STJ does not rubber-stamp all decisions submitted for confirmation. Consistent with Article V(2)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Brazilian Arbitration Act specifically authorizes the STJ to refuse confirmation of awards that violate the national public policy. In other words, awards that violate fundamental principles of Brazilian law will not be recognized in this country.

The STJ rejects most public policy defenses as an undue attempt to re-litigate the matter. It is only in those rare circumstances, in which fundamental principles of Brazilian law are threatened, that the STJ interferes. That was exactly the case in the Abengoa v. Ometto dispute, according to the STJ.

By an 8 to 1 decision, the STJ held that “the chairman’s failure to disclose to the parties objective elements that compromise his impartiality and independence under Brazilian law prevents the confirmation of the respective awards in this country”.

The court further stated that “given the contractual nature of arbitration, which underscores the trust relationship between the parties and the arbitrator, the breach of an arbitrator’s duty to disclose any circumstances that are reasonably capable of casting a doubt over his impartiality and independence prevents the confirmation of the arbitral award in this country.”

Independence and impartiality of arbitrators represent an absolute requirement of all arbitral proceedings; they are essential to arbitrators’ judicial role and, as such, represent a fundamental principle of both Brazilian and international arbitration. For this reason, arbitrators have a duty to disclose facts that affect their independence and impartiality and failure to do so is likely to be sanctioned by the Brazilian courts, as indicated by the STJ’s recent decision.

The recent decision in the Abengoa v. Ometto saga appears to set the tone for the STJ’s role during confirmation proceedings. The court will (as it should) continue to exercise restraint when analyzing public policy defenses. However, the justices sitting on the nation’s capital are poised to safeguard the integrity of the arbitration process by “repealing only those actions and legal effects that are absolutely incompatible with the Brazilian legal system”.

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Canadian Securities Administrators Provide Guidance on the Review of Material Conflict of Interest Transactions

August 18, 2017 | Jon C. Truswell, Nicholas P. Fader, Jeffrey Kerbel and Michael A. Barrett

Transactions between related parties may create material conflicts of interest between an issuer and its directors, officers and related parties. In particular, material conflicts of interest may arise in the context of insider bids, issuer bids, business combinations and related party transactions. *Multilateral Instrument 61-101 Protection of Minority Security Holders in Special Transactions* (MI 61-101) was adopted in Alberta, Manitoba and New Brunswick on July 31, 2017, and prescribes procedural safeguards intended to mitigate the risks to minority security holders in material conflict of interest transactions. MI 61-101 has been in effect in Ontario and Québec since February 1, 2008, when it superseded Rule 61-501 in Ontario and Regulation Q-27 in Quebec.

On July 27, 2017, staff of the securities regulatory authorities in each of Ontario, Québec, Alberta, Manitoba and New Brunswick (the Staff) issued CSA Staff Notice 61-302 (the Notice) to provide guidance on transactions that fall within MI 61-101. Although the Notice is non-binding, it sets out Staff's views on compliance with MI 61-101. The Notice is also the first major pronouncement on MI 61-101 since the instrument was introduced in 2008.

The Notice follows various high-profile cases, such as *InterOil Corporation v Mulacek* [*InterOil*] and *Re Magna International Inc* [*Magna*], where material conflict of interest transactions were scrutinized and concerns about processes and disclosure were raised. Staff also conducted their own review of material conflict of interest transactions. The Notice provides important information for any participant in a proposed material conflict of interest transaction, suggesting that such transactions will be subject to greater regulatory scrutiny.

Interpretive Approach

Staff expect market participants to take a broad and purposive interpretation to the requirements of MI 61-101 and adopt practices designed to effectively mitigate conflicts in material conflict of interest transactions with a view to ensuring that all shareholders are treated in a manner that is fair and perceived to be fair.

Transaction Review in "Real-Time"

A regulatory review will generally be triggered by the filing of a disclosure document relating to a material conflict of interest transaction. Once the review process is initiated, transactions will be assessed for public interest concerns and compliance with MI 61-101 "in real time"; the intention is to identify and resolve issues prior to security-holder approval or the transaction closing. We note that "real time" review represents a departure from past practice where Staff typically conducted reviews only after complaints were made. It also deviates from U.S. practice, as the SEC often reviews proxy circulars before they are sent to shareholders.

In conducting a review, Staff will focus on: (i) compliance with disclosure requirements; (ii) compliance with the conditions of any exemptions (in MI 61-101) from valuation and minority approval requirements relied upon by the issuer; and (iii) the substance and disclosure of the process conducted by the board of directors or a special committee (or both) in considering the transaction. Any complaints received by Staff will be considered as part of the review. Staff will generally consider the following factors when reviewing disclosure documents:

- compliance with disclosure requirements intended to enable security holders to make informed decisions, including the enhanced disclosure required by MI 61-101;
- if the formal valuation requirements of MI 61-101 are engaged, whether the issuer obtained a valuation that complies with MI 61-101 and included either a summary or the entire valuation in its disclosure document;
- if minority security holder approval is required, whether the issuer excluded all parties that are not properly part of the minority;
- if the issuer is relying on an exemption from the formal valuation or minority approval requirement (or both), whether the disclosure document provides a reasonable basis to conclude that the exemption relied upon is, in fact, available; and
- whether the process employed by the issuer's board of directors in negotiating and reviewing the proposed transaction (including the existence or non-existence of a special committee of independent directors) raises concerns that the interests of minority security holders have not been adequately protected and whether that process is adequately disclosed.

Issuers should be aware that they or their counsel may be contacted by Staff and asked to answer questions or provide supporting information (such as board or committee minutes and mandates). If Staff identifies instances of non-compliance with MI 61-101 or public interest concerns, Staff may seek corrective disclosure, a temporary cease trade or other order under securities legislation, or even pursue enforcement action.

Special Committees

A recognized method of managing conflicts of interest involves the formation of a special committee of independent directors. Although MI 61-101 mandates a special committee only in the case of insider bids, the Notice states that a special committee comprised of independent members (as defined in MI 61-101) is advisable for all material conflict of interest transactions.

To be effective, a special committee should possess a broad mandate, robust powers and be actively engaged. Staff therefore recommend that a special committee be empowered to negotiate or supervise the negotiation process, consider alternatives, make recommendations and hire its own independent financial and legal advisors. Individuals who are not independent should not be present at, or participate in, decision-making deliberations; the special committee's records should evidence that the process was free from coercive conduct on the part of interested parties.

In the Notice, Staff identified situations in which a special committee will be considered ineffective in protecting the interests of minority security holders:

- the committee is formed after a proposed transaction has been substantially negotiated; or
- the committee is passive and fails to conduct a robust review of the circumstances leading to the transaction, viable alternatives and the transaction itself.

Staff's emphasis on the importance of a robust and independent special committee process reflects the OSC's findings in *Magna*, as well as court and regulatory reactions to other Canadian and U.S. transactions where special committees were found to be ineffective or passive. In *Magna*, the OSC was concerned that the special committee's process was tainted by the participation of executive management, and that the committee was forced into a "take it or leave it" position in respect of the proposed transaction. The Notice affirms the OSC's finding in *Magna* that special committees must be afforded latitude to independently assess a proposed transaction, negotiate its terms and consider alternatives.

Enhanced Disclosure

Enhanced disclosure constitutes a fundamental aspect of the minority security holder protections included in MI 61-101 and is intended to promote informed decision-making by security holders vis-à-vis proposed material conflict of interest transactions. Tactical or self-serving disclosure intended primarily to further the interests of a related party in the transaction is considered inappropriate by Staff.

Enhanced disclosure generally requires a thorough discussion of:

- the review and approval process;
- the reasoning and analysis of the board of directors and/or special committee;
- the board of directors' and/or special committee's views on the desirability or fairness of the transaction;
- reasonably available alternatives to the transaction, including the status quo; and
- pros and cons of the transaction.

Conversely, disclosure may be considered wanting if it:

- inadequately discloses the context and background of the proposed transaction;
- does not meaningfully discuss the board of directors' or special committee's process and rationale for supporting the transaction;
- fails to disclose the dissenting views of directors in respect of the transaction; and
- provides overly one-sided disclosure regarding a recommended transaction that does not identify potential concerns or alternatives.

Staff also noted that disclosure should contain a meaningful discussion of the analysis provided by advisors and how that advice was considered. In addition, when discussing the desirability or fairness of a transaction, the interests of minority security holders should be addressed; the board should not simply state that the transaction is in the best interests of the issuer. We note that corporate law requires directors to act in the best interests of the corporation and, in that context, to consider all stakeholders, while MI 61-101 focuses particularly on the interests of minority security holders. Although Staff believe that the best interests of an issuer and its minority security holders will generally not be in conflict when considering transactions regulated under MI 61-101, issuers should be aware of the potential for such a conflict to arise. If the board believes that a conflict exists, Staff expect that the disclosure document will explain the conflict and how it was addressed by the board in reaching its decision to propose the transaction for approval by minority security holders.

Staff also note that corporate and securities legislation do not require a board of directors or a special committee to make a recommendation regarding how minority security holders should vote on a proposed material conflict of interest transaction. While a board of directors generally makes a recommendation to security holders, there may be exceptional circumstances where the board or special committee determines that a transaction should be put to security holders for their consideration without a voting (or tender) recommendation. In such a case, Staff recommend that minority security holders be provided with enhanced disclosure, such that they receive substantially the same information and analysis that the board or special committee received in considering and addressing the legal and business issues raised by the proposed transaction. Staff expect the board to disclose its review and approval process and explain why the transaction is being proposed without a recommendation, including the reasons for not making a recommendation and the basis upon which minority security holders are expected to vote in the absence of a recommendation.

Fairness Opinions

Staff are of the view that it is the responsibility of the board of directors or a special committee to determine whether a fairness opinion is necessary to make a recommendation to security holders. Similarly, the board or the committee should determine the terms and financial arrangements for the fairness opinion engagement. We note that although fairness opinions are non-compulsory, nearly all significant transactions will involve a fairness opinion.

If a fairness opinion is obtained, the Notice emphasizes that it should serve only a subsidiary role in the review process. The board or special committee cannot substitute a fairness opinion for its own assessment of the transaction's desirability and fairness, as a transaction must be considered from more than a financial perspective. A board or special committee is also expected to actively review the fairness opinion, assessing its methodology and assumptions.

Staff has found that fairness opinion disclosure is often limited and fails to provide security holders with a meaningful understanding of the fairness opinion and how it was used by the board or special committee. Where a fairness opinion is obtained, the disclosure document should:

- discuss the compensation arrangement with the financial advisor and how it affected the board of directors' or special committee's consideration of the advice provided;
- discuss any relationship or arrangement between the financial advisor and the issuer or an interested party that would create the perception of a lack of independence;
- include a clear summary of the methodology, information and analysis (including financial metrics) underlying the opinion, conveyed in a manner that allows the reader to understand the basis for the opinion; and
- note the opinion's relevance to the board of directors or special committee in coming to a determination to recommend a transaction.

Staff also refer market participants to the rules regarding fairness opinions prepared by the Investment Industry Regulatory Organization of Canada and The Canadian Institute of Chartered Business Valuators.

Staff's approach to fairness opinions reflects the judicial treatment of fairness opinions in *InterOil* and a number of Ontario court decisions. By mandating greater transparency in respect of advisor fees and requiring disclosure of the financial analysis underlying a fairness opinion, the Notice addresses two of the main issues raised by the Court in *InterOil*. However, we note that the Notice neither mandated nor recommended the use of fixed fee opinions, a significant element of *InterOil*. In addition, Staff do not require disclosure of the quantum of fees received by the advisor.

It appears that Staff is advocating a movement towards U.S.-style disclosure in respect of fairness opinions, which is significantly more detailed than the current practice in Canada. Such an approach will create additional burdens for financial advisors, as their opinions will potentially become subject to heightened scrutiny. This may create a perception of increased risk among financial advisors, likely translating into higher fees for issuers and more stringent limitation of liability provisions in financial advisory engagements.

Conclusion

The Notice is of significance to M&A lawyers, investment bankers, market participants and directors of reporting issuers who are involved in material conflict of interest transactions. The "real time" review of transactions, Staff's comments confirming the meaningful role to be played by special committees, guidance on the appropriate level of disclosure, voting recommendations and the use and disclosure of fairness opinions will likely require even more exacting processes and disclosure in the context of material conflict of interest transactions, which, among other things, will increase transaction costs and subject transactions to longer timelines.

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NEWSALERT

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New Technical Standard on Nutritional Guidelines for Healthy Claims on Food Products

On July 26th, 2017, Exempt Resolution No. 860 which "Approves Technical Standard No. 191 on Nutritional Guidelines for Healthy Claims on Foodstuff Products" (hereinafter, "Resolution 860") was published on the Official Gazette. Resolution 860 replaces Exempt Resolution No. 764, which currently regulates this matter.

Resolution 860 will enter into force six months after its publication; this is, on **January 27th, 2018**.

As pointed out in the recitals of Resolution 860, the purpose of this regulation is to introduce "*changes in the existing regulation that aims to explicitly exclude healthy claims or messages in foodstuff products intended for infants or young children, and those with pharmaceutical presentations and food supplements, given that the latter are not a part of healthy diet, that is intended to be promoted* (...)".

In this context, the most relevant aspects introduced by Resolution 860, are the following:

- A new table with the mandatory requirements that each product must fulfill in order to be able to legitimately use a healthy claim (or health message) is established. Please **read here.**
- In order for a foodstuff product to be able to be associated with one or more healthy messages, such must be part of the common diet of the population.
- With regards to the prohibition of the use of healthy messages on food addressed to children under four years of age contained in Resolution 764, this prohibition is extended to:
  - - Food supplements;
  - - Food with a presentation commonly associated with medicines (powders, liquids, granules, capsules, tablets, capsules or others);
  - - Products that due to their nutritional composition qualify as "High in" (i.e., those that have added sodium, saturated fats or sugars and exceed the maximum concentration limits of calories, saturated fats, total sugars and sodium set forth in Table No. 1 of Article 120 bis of the Sanitary Foods Regulation), except for associations No. 12 (polyols and dental cavities) and No. 17 (lactose free food and lactose intolerance) in Table N ° 1 of the Guidelines, and only for chewing gum;
  - - Those products that per 100 g of ready-to-eat product contain amounts over 26 g of total fat or 13 g of total fat per serving; and
  - - Those products that per 100 g of ready-to-eat product contain amounts in excess of 120 mg of cholesterol or 60 mg of cholesterol per serving, with the exception of egg and fish.
- For using healthy messages in products with serving of less than or equal to 30 grams, the product must comply with the conditions and requirements established for 50 grams and per serving, in all cases, except for the "free" descriptor in general, and for the specific descriptor "low in saturated fat", where the requirement must be fulfilled only per serving.

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China Prohibits Unverified Internet Users to Post Online Comments

09.07.17

By Ron Cai and Sherry Zhang

On August 25, 2017, the Cyberspace Administration of China ("CAC") issued the *Administrative Provisions for Services concerning Internet Comment Posting* (the "Internet Comment Posting Provisions") and the *Administrative Provisions for Services concerning Internet Forums and Communities* (the "Internet Forum and Community Services Provisions"), both of which will become effective on October 1, 2017.

On the same date of issuance, CAC's head commented at a press conference that the purpose of these two provisions is to "thoroughly implement the spirit of China's new Cybersecurity Law", "to standardize China's Internet comment posting services market" and to "promote healthy and orderly development of the market." At the same time, however, the special requirements for Internet users and service providers under these new provisions also cause substantial concern in the market.

Application of the Provisions

The Internet Comment Posting Provisions state that they will regulate the provision of "Internet comment posting services" within the territory of China. "Internet comment posting services" are defined as the provision of publishing services of texts, symbols, expressions, pictures, audio, and video clips to the users by any Internet websites, applications, interactive communication platforms, and other communication platforms with the nature and function of providing news and public opinions, and social mobilization, through posts, replies, messages, "bullet screen" comments (*danmu*), and etc.

The Internet Forum and Community Service Provisions will regulate the provision of "Internet forum and community services" within the territory of China. "Internet forum and community services" are defined as the provision of services to the users of interactive information publishing communities and platforms in the form of forums, postings, communities, etc.

Definitions under these two provisions appear to be broad enough to cover all website, application and forum operators providing information publishing services through Internet in China (collectively, the "Service Providers").

Substantive Responsibilities of the Service Providers

The provisions expressly address eight types of substantive responsibilities that the Service Providers are legally required to comply with in offering information publishing services, including:

- Verification of the real identity information of the registered users. Before a user is permitted to use the Service Provider's service, he/she must disclose its real name and ID information to the Service Provision for verification. Service Providers are not permitted to provide information publishing services to any users without identity verification. However, after verification, the users do not have to display their real names when making comments within the platform.

- Establishment of user information protection mechanism. The Service Providers must not divulge, tamper, destroy, sell or disclose to others any of the users' personal information. Before collecting and using such personal information, the Service Providers must obtain the users' prior approval.

- If the users are intended to comment on any news, the Service Providers must review the comments for any improper discussion before releasing the comments to the Internet.

- For any "bullet screen" comments (*danmu*), a popular feature among young Chinese netizens where comments scroll across the screen while a video clip is playing, the Service Provider must post within the same webpage and same platform the text version of the "bullet screen" comments.

- Service Providers are required to provide prior review and real-time management of all the comments posted, and report to the supervisory authorities if any illegal information is discovered.

- Service Providers are required to develop a sound information security and protection system to avoid any safety defects and loopholes.

- Service Providers shall maintain a professional team of editors.
- Service Providers are required to provide necessary technical, materials and data support for the supervisory authorities' supervision and inspection.

Protection of Legitimate Personal Rights

In formulating these two provisions, CAC also had the goal of protecting legitimate personal rights. In addition to requiring protection of the users' personal information and information safety discussed in the section above, the new provisions expressly prohibit a Service Provider or any of its employees from intentionally deleting or recommending any posts for the purpose of seeking improper benefits or based on erroneous values. Service Providers and users are not permitted to use software, hire business organizations, or personnel to disseminate information that misleads public opinion.
Finally, the provisions require that Service Providers are also required to establish a "credit evaluation grading system" for all their users under which the Service Providers should evaluate the users' performance, and decide the scope of services provided to the user based on the evaluation results. If any user is given a low credit score under the grading system, Service Providers shall stop providing services to the user and add the user to a black list, and prohibit the user from any further use of its service (for example, through registering a new account).

Supervisory Authorities

CAC and its local agencies at different levels are the law enforcement agencies and supervisory authorities of the Service Providers under the provisions. They are empowered to hold any Service Providers accountable who fails to perform their responsibilities by law. Also, the provisions stipulate that if a Service Provider intends to offer new products, applications, and features for comment posting services, it must file an application with the CAC or its local agencies for a security evaluation. Finally, CAC or its local agencies shall also establish a "credit evaluation grading system" for the Service Providers to supervise the credibility and compliance of all the Service Providers.

Observation

The issuance of these two provisions show the Chinese government is taking active regulatory approaches toward the information publishing industry. However, at the same time, the industry also worries that these new provisions may impose excessively harsh responsibilities on the Service Providers, which may increase operating costs, reduce operation efficiency, and even affect business innovation. The healthy development of the industry needs the joint efforts and in-depth communications among legislation, law enforcement agencies, and Internet companies.

Disclaimer

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New model of the mining concession agreement

The ANM identified and reserved new areas with potential for mining activities in Colombia

On July 14, the National Mining Agency ("**ANM**") issued Resolution No. 394 of 2017 "*which establishes and adopts the new model of the Standard Mining Concession Agreement (Contra Único de Concesión Minera) and takes other determinations*" (the "**Model**").

The Model aims to adjust new mining concession agreements to the rules currently in force concerning mining matters, the rulings of the high courts related with the powers of territorial entities, the new labour and environmental requirements for mining activities and the requirements regarding public hearings and participation of interested parties.

In that sense, in accordance with the judgments of the Constitutional Court, the new of the Model sets forth the precedent steps that must be fulfilled prior to executing the concession agreement. The most salient are of them are: (i) a meeting between the mayor of the municipality and the ANM to agree upon "concertation terms" (*acta de concertación*) that must identify the areas susceptible of having mining potential, whereby the mayor must undertake incorporate the mining component into the territorial plans of the municipality; (ii) a public hearing with the participation of third parties interested in the development of the mining project; and (iii) confirmation that the new labor and environmental requirements are comply with for the mining activities established by means of Resolution 143 of 2017, through the filing of the Minimum Exploratory Program.

On the other hand, the Model expressly includes the procedure set forth in article 82 of the Mining Code that provides that at the end of the exploration period, the concessionaire must return the areas that will not be occupied by mining operations during the production period. The resulting area will be registered before the National Mining Registry. In addition, the Model incorporates Resolution 831 of 2015, which requires that evidence be provided concerning th economic capacity to comply with the agreement´s obligations of an assignee in order to complete an assignment process.

Finally, in the past, any changes to the work program for construction of mining facilities and the development of mining activities could be implemented by simply giving notice of the relevant change to the mining and environmental authorities. The new Model now provides that the concessionaire must obtain the prior approval of the mining and environmental authoritie to implement any changes to the work program.

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COSTA RICA: PAYMENT OF CORPORATE TAX

Law 9428 of the "Corporate Tax" will come into effect on September 1st, and payments for this tax should be done by September 30th at the latest.

The Corporate tax must be paid annually by any company, branch of a foreign company, or its representative, as well as any individual limited liability company, currently registered at the Public Registry, or register hereafter in the Public Registry.

For the fiscal year 2017, the corporate tax should be paid in proportional amount for the months of September to December 2017 as described below:

Entity (annual income): 2017 Base salary[1] : ₡426,200 ($745 approx.)	Amount to be paid Period 2017 (Colones and USD est.)
Inactive legal entities or without business activities	₡21,210 ($37)
Legal entities with business activities and gross income under 120 base salaries (₡51.2 millions)	₡35,520 ($61)
Legal entities with business activities and gross income between 120 base salaries (₡51.2 millions) and 280 base salaries (₡119.4 millions)	₡42,620 ($74)
Legal entities with business activities and gross income over 280 base salaries (₡119.4 millions)	₡71,040 ($123)

In January 2018, the Corporate Tax will be fully charged, according to the following rates:

Entity (Annual Income) *Base salary to be determined annually	Tax Fee
Legal entities without business activities (with no reported income).	15% of a Base Salary
Legal entities with gross income under 120 base salaries.	25% of a Base Salary
Legal entities with gross income between 120 base salaries, and 280 base salaries.	30% of a Base Salary
Legal entities with gross income over 280 base salaries.	50% of a Base Salary

To issue the collection of the Corporate Tax, inactive companies, branches, or limited liability companies will be automatically registered as taxpayer of the Corporate Tax in the Taxpayer Registry (RUT, for its acronym in Spanish), without any notification.

[1]The base salary is updated annually.

From now on, the new entities incorporated in the Public Registry will have to submit within one month, starting count from their registration date at the Public National Registry, the Form D-140 to update the Information of the Taxpayer at the RUT providing the basic information as taxpayer.

Inactive entities constituted before the entry of the abovementioned law comes into force, will be registered automatically in the RUC, therefore, these entities will also have the obligation to file Form D-140 to update their basic information as a taxpayer, according to the following schedule:

a) **Corporate ID ending in 1 and 2:** During the month of October 2017.
b) **Corporate ID ending in 3 and 4:** During the month of November 2017.
c) **Corporate ID ending in 5 and 6:** During the month of December 2017.
d) **Corporate ID ending in 7 and 8:** During the month of January 2018.
e) **Corporate ID ending in 9 and 0:** During the month of February 2018.

Failure to submit form D-140 within the established deadlines will lead to a penalty, established in article 78 of the Tax Code, which ranges from half base salary up to a maximum of three base salaries, determined by the delay in filling the form.

If you will like more information on the matter, do not hesitate to contact us.

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ABNR
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04/08/2017

MOT REGULATION 26/2017: A CLEAR IDENTITY FOR TECHNOLOGY-BASED TRANSPORTATION SERVICES

Indonesia's ride-hailing transportation services enjoy greater legal certainty following regulatory changes in 2016 and 2017. Operators and customer of these businesses will welcome the government's endorsement over their legitimacy. The new regulations introduce clear definitions, sanctions, minimum tariffs, and procedures for cooperation with conventional operators.

New Ministry of Transportation ("MOT") regulations respond to the rise of technology-based transportation (ride-hailing) services in Indonesia. The latest is MOT Regulation Number 26 of 2017 regarding Operation of Non-Designated Route Passenger Transportation Services Using Public Motor Vehicle (Penyelenggaraan Angkutan Orang Dengan Kendaraan Bermotor Umum Tidak Dalam Trayek) ("MOT Regulation 26/2017"). Issued on 31 March 2017, MOT Regulation 26/2017 revokes the previous MOT Regulation Number 32 of 2016 ("MOT Regulation 32/2016").

MOT Regulation 26/2017 responds to developing public demand for alternative transportation and the popularity of ride-hailing services. The regulation aims to create legal certainty over safety, security, comfort, fairness, and affordability requirements. Through MOT Regulation 26/2017, the Government is willing to ensure equal opportunity for the growth of both conventional taxis and information technology-based transportation businesses.

Since ride-hailing services first appeared in Indonesia, conventional passenger transportation competitors have questioned their legality. Opponents argue that the information technology-based transportation services violate Law Number 22 of 2009 regarding Traffic and Road Transportation ("Law 22/2009") and Government Regulation Number 74 of 2014 regarding Road Transportation ("GR 74/2014"). The rise of ride-hailing in Indonesia has significantly impacted conventional taxi drivers, who launched a powerful protest by blocking Jakarta's main roads in March 2016.

The Government's enactment of MOT Regulation 32/2016 and now MOT Regulation 26/2017 responds to these concerns, recognizing that the previous framework created insufficient legal basis for the operation of the information technology-based transportation services.

The most-highlighted substance of MOT Regulation 26/2017 is the introduction of "Special Rented-Transport," (*Angkutan Sewa Khusus*) the term used for technology-based transportation service vehicles. The regulation explains the Special Rented-Transport to be door-to-door transportation services with a driver, which covers the city region, and uses an information-technology based application reservation system.

MOT Regulation 26/2017 sets out services qualification that must be fulfilled by the Special Rented-Transport, which are as follows:

a. Operation covers city region;
b. Unscheduled;
c. Door-to-door;
d. Destination set by customer/services user;
e. Tariff appears in the application;
f. Tariff determination is based on the base and ceiling tariff as proposed by the Governor/Chairman of Agency which is then approved by Director General of Land Transportation on behalf the Minister of Transportation based on analysis;
g. The use of the vehicle must be done through reservation or appointment, it is not allowed to directly pick up the passenger from the street;
h. The services reservation must be done through information technology-based application;
i. Must meet the services minimum standard to be applied.

The previous, now obsolete regulations did not explicitly recognize the technology-based transportation services with a specific term. Although MOT Regulation 23/2016 clearly states that the scope of the issues being regulated included the operation of the public transportation with information technology based application, MOT Regulation 32/2016 only stipulates the possibility for public transportation services using information technology-based application which can be done independently or in cooperation with an information technology-based application provider that has Indonesian legal entity form. The same stipulation is replicated in MOT Regulation 26/2017 with further additional detail requirements for the technology-based application provider.

Related to the arrangement of base and ceiling tariff, based on press release and socialization material by MOT, the tariff is divided into two regions i.e. Region I covers Sumatera, Jawa and Bali and Region II covers Kalimantan, Sulawesi, Nusa Tenggara Barat, Maluku and Papua. The following tariff rates will apply:

Tariff	Region I	Region II
Base Tariff	Rp. 3,500/km	Rp. 3,700/km
Ceiling Tariff	Rp. 6,000/km	Rp. 6,500/km

The above tariff arrangement is effectively enforced on 1 July 2017. MOT Regulation 26/2017 is silent with regards to legal implication on reduction of cost which shall be paid by the customer through subsidy by either the public transportation company or information technology-based application provider.

MOT Regulation 26/2017 obliges the technology-based application provider to meet the following requirements:

a. In the form of legal entity established under Indonesian Law;
b. Conducting contract, selling, and/or delivery of services, and billing;
c. Having bank account in Indonesian bank serving as instrument to receive the proceeds from the service sale or delivery activities;

d. Having/Controlling server or data center domiciled in Indonesia;
e. Conducting marketing, promotion, and other supporting activities;
f. Providing customer services and complaint center.

As also firmly stated in the previous regulation, MOT Regulation 26/2017 prohibits technology-based application providers from operating business as a public transportation provider. In the event the technology-based application provider facilitates the providing of the passenger transportation services, it must cooperate with public transportation company that already holds the Transportation Services Operation License (Izin Penyelenggaraan Angkutan).

Furthermore, a technology-based application provider which has entered into cooperation agreement with public transportation company is required to give access of their Digital Dashboard to the authorized government institution which at least includes:

a. The details of the information technology-based application service provider (e.g.: name of the company, the responsible persons, the address);
b. The data of all public transportation companies that made cooperation with;
c. The data of all vehicles and drivers;
d. The monitoring access on the services operation in the form of the vehicle spatial movements and tariff; and
e. The consumer complaint services in the form of telephone and email of the information technology-based application service provider.

MOT 26/2017 does not specifically regulates the mechanism or procedure if a technology-based application service provider would like to engage in the operation of non-designated route passenger transportation services using public motor vehicle. From a conservative perspective, the possible mechanism is to either establish a joint venture company or expand its business license to cover non-designated route passenger transportation services using public motor vehicle which subject to the following requirements the requirements:

a. Such company must be established in the form of legal entity under Indonesian Law (For foreigners that intend to do this type of business, the negative list restrictions would be applied);
b. Obtaining the Non-Fixed-Route Public Transportation Service Operation License (*Izin Penyelenggaraan Angkutan Orang Tidak Dalam Trayek*) which requires the following conditions:
    - Having at least 5 (five) vehicles which evidenced by the Vehicle Registration Certificate (*Surat Tanda Nomor Kendaraan or STNK*) registered in the name of such company and certificate evidencing that such vehicles have passed the Motor Vehicle Periodical Test (*Uji berkala kendaraan bermotor*);
    - Having/possessing vehicles storage with sufficient space/capacity for the number of vehicles being owned;
    - Providing vehicle maintenance facility (workshop) which is evidenced by an ownership document or cooperation agreement document with other party.

Another important change introduced by MOT Regulation 26/2017 is a more detailed regime for sanctions. MOT Regulation 26/2017 introduces categories of violations (light – middle – heavy) which would trigger different type of sanctions. MOT Regulation 26/2017 also mentions the involvement of Minister of Communication and Information Technology to impose sanction on violation conducted by the information technology-based application provider.

MOT Regulation 26/2017 became effective on 31 March 2017. However, the implementation of MOT Regulation 26/2017 will be conducted gradually for adjustment process. (by: *Rendi Prahara Septiawedi*)

THE SOLVENCY TEST UNDER THE COMPANIES ACT 2016

The Companies Act 2016 ("CA 2016") which came into operation on 31 January 2017 introduces the requirement for a solvency test and a solvency statement for certain transactions, namely redemption of preference shares out of capital, reduction of capital by way of special resolution (except for the sole purpose of cancelling share capital which is lost or no longer represented by assets), provision of financial assistance and share buyback.

ELEMENTS OF THE SOLVENCY TEST

The solvency test applicable to the redemption of preference shares, reduction of capital and provision of financial assistance differs from the test applicable to a share buyback. Both tests comprise two components, namely "*cash flow solvency*" and "*balance sheet solvency*".

The solvency test for the redemption of preference shares, reduction of capital and provision of financial assistance is set out in section 112(1) of the CA 2016 and is as follows –

(1) *Cash flow solvency* – this test is satisfied if (i) immediately after the transaction, there is no ground on which the company is unable to pay its debts; and (ii) either (a) the company will be able to pay its debts as and when they become due during a period of 12 months from the date of the transaction; or (b) if the company is to be wound up within 12 months after the date of the transaction, it will be able to pay its debts within 12 months after the commencement of the winding up; and

(2) *Balance sheet solvency* – this test is satisfied if the company's asset exceeds its liability at the date of the transaction.

The solvency test for the share buyback is found in section 112(2) and 122(3) of the CA 2016 and is as follows –

(1) *Cash flow solvency* – this test is satisfied if the company remains solvent after each buyback during the period of six months after the date of the declaration made under section 113(5) of the CA 2016, in that the company will be able to continue to meet its debts as and when they fall due without any substantial disposition of its assets outside the ordinary course of its business, restructuring its debts, externally forced revisions of its operations or other similar actions; and

(2) *Balance sheet solvency* – this test is satisfied if the share buyback would not result in the company being insolvent and its capital being impaired (that is, when the value of its net assets is less than the aggregate amount of all the shares of the company after the share buyback) at the date of the solvency statement.

The solvency test in relation to redemption of preference shares, capital reduction by special resolution and provision of financial assistance in the CA 2016 is substantially similar to the test in the United Kingdom Companies Act 2006, the Singapore Companies Act (Cap. 50) and the New Zealand Companies Act 1993. The aforesaid companies' legislation do not contain provisions that correspond with the solvency test for share buyback in the CA 2016.

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Considerations in applying the solvency test

In applying the solvency test and forming an opinion for the purpose of making a solvency statement, section 113(4) of the CA 2016 provides that a director shall (i) inquire into the company's state of affairs and prospects; and (ii) take into account all liabilities, including contingent liabilities, of the company.

THE SOLVENCY STATEMENT

The solvency statement shall (i) be made in a manner as may be determined by the Registrar; (ii) state the date on which it is made; (iii) state the name and bear the signature of each director making the statement; and (iv) be supported by a declaration that the directors have made an inquiry into the affairs of the company.

Number of directors making the statement

The CA 2016 requires a solvency statement relating to a reduction of share capital or redemption of preference shares to be made by all directors of the company. Where the transaction relates to the provision of financial assistance or a share buyback, the statement is to be made by the majority of the directors of the company.

Offences regarding solvency statement

A director who makes a solvency statement without having reasonable grounds for the opinion expressed in the statement will be liable on conviction to imprisonment for a term not exceeding five years or to a fine not exceeding RM500,000 or to both.

PARTICULAR ISSUES

Redemption of preference shares

A redemption of preference shares out of capital can only be effected after (i) all the directors have made a solvency statement in relation to that redemption; and (ii) a copy of the solvency statement has been lodged with the Registrar.

Reduction of capital

In the case of a reduction of capital by way of a special resolution, a company meets the solvency requirements if (i) all the directors of the company have made a solvency statement in relation to the capital reduction; (ii) the statement is made in the case of a private company, within the time frames specified in sections 117(3)(b)(i) and 117(5) of the CA 2016 and in the case of a public company, within the time frames specified in sections 117(3)(b)(ii) and 117(6) of the CA 2016; and (iii) a copy of the solvency statement has been lodged with the Registrar together with the notice under section 117(1)(a) of the CA 2016 that a special resolution to reduce the share capital has been passed.

For a private company, section 117(3)(b)(i) requires the solvency statement to be made within a period of 14 days ending on the date of the special resolution, and section 117(5) requires (i) where the resolution is to be passed as a members' written resolution, a copy of the solvency statement to be served together with the special resolution, or where the special resolution is to be passed at a general

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meeting, the solvency statement or a copy thereof to be made available for inspection by members throughout the meeting; and (ii) the solvency statement or a copy thereof is to be made available at the registered office for inspection by any creditor for a period of six weeks from the date of the resolution.

In the case of a public company, section 117(3)(b)(ii) requires the solvency statement to be made within a period of 21 days ending on the date of the special resolution, and section 117(6) requires the solvency statement or a copy thereof to be made available for inspection (i) by members throughout the meeting; and (ii) by any creditor of the company at the registered office for a period of six weeks from the date of the resolution.

Financial assistance

Section 126 of the CA 2016 permits a company, other than a listed company, to provide financial assistance for the purposes of purchasing or acquiring shares in the company or in its holding company or reducing or discharging a liability for such an acquisition if the conditions set out in section 126(2) are satisfied. These conditions include (i) an obligation on the directors who vote in favour of the resolution (being not less than the majority of the directors) to make a solvency statement in relation to the giving of the financial assistance on the same day as that on which the aforesaid resolution is passed; and (ii) a requirement that the assistance is to be given not more than 12 months after the date on which the solvency statement is made.

The company is also required to provide a copy of the solvency statement and other information prescribed in section 126(5) to each member of the company within 14 days from the giving of the financial assistance.

Share buyback

A solvency statement for a share buyback is required under section 113(5) of the CA 2016 to include a declaration by the directors that the share buyback is necessary and is made in good faith in the interest of the company. The Companies Commission of Malaysia has confirmed in an FAQ that based on section 112(2)(b) of the CA 2016, a solvency statement issued in relation to a share buyback is valid for six months.

SOLVENCY TEST IN OTHER JURISDICTIONS

New Zealand

In New Zealand, the solvency test is set out in Section 4(1) of the Companies Act 1993. As in the case of the CA 2016, it embodies cash flow solvency and balance sheet solvency. In assessing whether the test had been satisfied, the New Zealand Court of Appeal in *Petterson v Browne* [2016] NZCA 189 focused on the balance sheet solvency. In arriving at its decision, the court referred to the company's financial statements and found that the company's current liabilities exceeded its current assets. Further, at the time the payments were made, the company was unable to meet its contingent liabilities i.e. an adjudication claim made pursuant to an indemnity given in favour of a subcontractor. Accordingly, the court held that the solvency test was not satisfied.

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United Kingdom

As in the case of the CA 2016, the United Kingdom Companies Act 2006 permits private and public companies to reduce their share capital by way of a special resolution supported by a solvency statement. The case of *BAT Industries plc v Sequana and another* [2016] EWHC 1686 concerned a challenge to dividends paid by a company to its parent after the directors had resolved that the company would first reduce its share capital for the dividend distribution. The company in question was exposed to long-term environmental liabilities. The court formed the opinion that where a company had on its balance sheet an estimated provision in respect of a long-term liability, there was no justification for holding that the duty to protect creditors' interests applied for the whole period of the long-term liability. To do so would suggest that the directors are to take account of the creditors' rather than the shareholders' interests when running a business over an extended period. Accordingly, the court found that the directors had validly formed the necessary views when they made the solvency statement.

CONCLUSION

The introduction of the solvency test and solvency statement under the CA 2016 is welcomed as they impose a duty on directors to act in the interest of not only the shareholders of the company but also of its creditors. The requirement for a solvency statement offers a safeguard to creditors against the risk that directors may improperly distribute or otherwise pay company funds to shareholders at the cost of creditors and provides some assurance that the company will be able to pay its debts as and when they fall due within a foreseeable period of time.

Moving forward, it will be interesting to see how the Malaysian courts will interpret the application of the solvency test – will a restrictive approach be adopted to further secure the interests of the creditors or will the courts follow the approach taken by the English court in *BAT Industries plc v Sequana and another*?

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NautaDutilh

Scope of term "information on environmental emissions" broadened: consequences for access to government documents

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8/24/2017

From now on, the legal terms "environmental emissions" and "information on environmental emissions" must be interpreted more broadly than in the past. On 16 August 2017 the Administrative Jurisdiction Division of the Council of State ruled in favour of Greenpeace in its protracted dispute with the province of Groningen. The dispute concerns Greenpeace's efforts to obtain certain documents under the Government Information (Public Access) Act (Wet openbaarheid van bestuur). The Administrative Jurisdiction Division had postponed its decision in this case until the EU Court of Justice (ECJ) handed down its judgments in Bayer CropScience / Stichting De Bijenstichting and Commission / ACC. Based on those judgments, the Administrative Jurisdiction Division has now held that the term "information on environmental emissions" is not limited to information on actual emissions but can also include information on the effects of emissions on the environment and "information that will enable the public to check whether the assessment of actual or foreseeable emissions […] is correct". This interpretation substantially expands the scope of these terms.

Information on emissions

Information on environmental emissions has a special position in EU legislation and must, if possible, be accessible to the public. This requirement derives from the Aarhus Convention (i.e. the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters). Invoking the Government Information (Public Access) Act, Greenpeace has since 2011 been seeking access to more than 1,700 documents relating to the permit granted in that year for the construction of two coal-fired power stations in Eemshaven. Greenpeace aims to prove that the provincial authorities were not neutral when assessing the permit applications but favoured the energy companies.

Based on the ECJ's judgments in the cases referred to above, the Administrative Jurisdiction Division concluded that the provincial authorities had interpreted the concept of "information on emissions" too narrowly, even though their interpretation was in line with the Division's earlier case law. In that sense, the Administrative Jurisdiction Division has changed course, following the ECJ's lead. This means that eight or so of the documents withheld by the the province of Groningen indeed contain information on emissions.

Battle not yet over

Nevertheless, the Administrative Jurisdiction Division's judgment does not automatically mean that the eight documents must be turned over. Another ground for denying access - the interest in maintaining the secrecy of "personal viewpoints with regard to policy" - can weigh more heavily than the public interest in accessibility in this specific case. Because the provincial authorities have not yet balanced these two interests (as there was no need for this), they must now do so for the eight documents. Greenpeace can, if necessary, then lodge an appeal against the Administrative Jurisdiction Division's decision.

We will follow future developments in this matter with interest.

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LEGAL FLASH

Panama will impose visa requirements for Venezuelans

We would like you to know that...

By way of Decree N° 473, published August 23rd, 2017, the Ministry of Foreign Affairs of the Republic of Panama will no longer grant visa-exempt status to nationals of Venezuela.

Beginning Oct. 1st, 2017, all Venezuelan nationals traveling into the country will be required to obtain business/tourist visa at a Panamanian consulate.

Application process may take several days to several weeks depending on the location, therefore employers and Venezuelan employees are urged to plan ahead and allow for extra time to obtain a visa.

Qualified nationals from this country may apply for a tourist or business visa that will be valid for 30 days initially and extendable for up to an additional 60 days.

Special Visa Exemption Status

Venezuelan nationals who hold a multiple-entry visa for the United States, Canada, the United Kingdom or Australia that is valid for at least one year from the date of travel to Panama will be visa-exempt.

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Arias, Fábrega & Fábrega provides a full range of immigration services to clients, with emphasis on solving the needs of multinational companies and their expatriate personnel in Panama.

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CHANGES IN FOREIGN INVESTMENTS REGIME AND SHAREHOLDER INFORMATION RIGHTS

STRICTER REGIME OF FOREIGN INVESTMENTS IN RUSSIAN ENTITIES

Important changes to the Russian regulation of foreign investments came into effect in July 2017.[1]

The changes tighten the regime of foreign investments involving the acquisition of Russian companies by foreign investors and consist in the following:

(a) significant extension of list of transactions which may potentially be subject to governmental approval as having meaning for security of the state security and defence;

(b) recognition of Russian citizens holding a second (foreign) citizenship as ‘foreign investors’ for the purposes of governmental control over investment transactions;

(c) establishment of the liability for a foreign investor who failed, in breach of its statutory obligations, to notify state authorities of its acquisition of a shareholding in a strategic[2] entity;

(d) banning foreign companies registered in jurisdictions or territories recognised as ‘tax havens’ and (or) not providing information on financial operations and entities under their control from acquiring control over strategic entities and the privatisation of state property; and

(e) granting full discretion to the Governmental Commission for the Control of Foreign Investments (the “**Commission**”) in measures to be taken by the foreign investor as a condition for the Commission’s approval of the investment transaction.

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[1] The legal basis for the described changes includes Federal Law No. 155-FZ dated 1 July 2017 “*On Amendments to Article 5 of the Federal Law "On Privatization of State and Municipal Property" and Federal Law "On Procedure of Foreign Investments in Business Entities Having Strategic Importance for National Security and State Defence"*” (came into force on 1 July 2017) and the Federal Law No. 165-FZ dated 18 July 2017 “*On Amendments to Article 6 of the Federal Law "On Foreign Investments in the Russian Federation" and Federal Law "On Procedure of Foreign Investments in Business Entities Having Strategic Importance for National Security and State Defence"*” (came into force on 30 July 2017).

[2] A Russian entity is recognised as ‘strategic’, i.e. having strategic meaning for national security and state defence, if it conducts any of the ‘strategic’ activities listed in the Federal Law “On Procedure of Foreign Investments in Business Entities Having Strategic Importance for National Security and State Defence”.

Extension of list of transactions being subject to governmental approval

The Chair of the Commission (who is in fact the Chairman of the Russian Government) has been granted the authority to consider **any** transaction of a foreign investor in respect of **almost any** Russian entity (and not only a strategic one)[3] as a transaction being subject to preliminary approval by the Commission as potentially significant for national security and state defence.

The new regulations do not specify what type of investment transactions relating to a Russian entity may trigger the Chair's decision: so far, any acquisition of a minority equity stake or, for example, establishing a new Russian entity may be made subject to clearance by the Commission. Equally, no grounds or criteria for the Commission's Chair to make the respective decision (e.g. transaction amount, thresholds for total assets of a Russian entity, etc.) have been given due statutory regulation: as a purpose of such a decision, though, it is only stated that the decision can be made '*for the purposes of ensuring national security and state defence*'. An explanatory note to the draft amendment law does not provide any clarifications in this regard, as the respective amendments were not contained therein from the very beginning, at submission to the Russian parliament, but were added to the draft law only during the second reading in parliament.

In any case, the procedural aspect of obtaining clearance from the Commission in this case is vague: it is stated that the Russian Federal Antimonopoly Service (the "**FAS**"), acting as an intermediary body between a foreign investor and the Commission, shall immediately notify the foreign investor of the decision of the Commission Chair and the need to obtain the Commission's preliminary approval for a planned transaction. There is no rule as to how the Chair could become aware of the intended transaction of the foreign investor and, therefore, in which cases the Chair could make the respective decision. Presumably, questionable transactions could be disclosed to the Commission by the FAS in the course of standard merger control procedures upon the foreign investor's filing, though some foreign investment transactions are not subject to the FAS merger control approval – it is, therefore, not clear what may trigger the Commission's intervention if there is no merger control filing.

Irrespective of the vagueness of the regulation, liability for its breach remains strict. Once the foreign investor is notified of the Commission Chair's decision, it cannot close the intended transaction before obtaining the Commission's approval therefor. Otherwise, the transaction is invalid and, if the restitution of shares is impossible for some reason, the foreign investor may be deprived of its voting rights on the acquired shares in the Russian company until its approval by the Commission.

In view of the above, a new legal issue for foreign investors intending to acquire Russian entities should be borne in mind. Detailed procedures of application of new rules and their construction by state authorities are expected from the Russian Government, the FAS and the courts.

[3] The only exception is financial organisations – banks, other credit institutions and insurance companies, acquisition of which by a foreign investor is subject to special approval of the Bank of Russia.

Russian citizens with a second (foreign) citizenship are recognised as 'foreign investors'

The regime established by the Federal Law "On Procedure of Foreign Investments in Business Entities Having Strategic Importance for National Security and State Defence" (the "**Strategic Law**") now extends to Russian citizens holding a foreign passport – such individuals are now treated as foreign investors in terms of the Strategic Law, and certain of their transactions with respect to Russian strategic entities may be subject to the Commission's approval.

Given the provisions described above, transactions involving such Russian citizens in respect of a Russian *non-strategic* entity may also be subject to the Commission's approval, if the Chair of the Commission so decides.

Liability for a foreign investor failing to notify State authorities of the acquisition of shares in a strategic entity

The Strategic Law contains an obligation for the foreign investor to notify the FAS of the acquisition of 5% or more shares in a Russian strategic entity.

This obligation is now furnished with a sanction for its breach: the court, further to a claim from the FAS, may deprive the foreign investor of its voting rights at the general meeting of shareholders of a strategic entity until the day the investor properly notifies the FAS of the respective acquisition of shares. In this case, the foreign investor's shares do not count towards the quorum and do not cast votes at the general meeting of shareholders.

Banning 'tax haven' companies and companies under their control from acquiring control over strategic entities and privatisation transactions

Companies registered in jurisdictions or territories recognised by the Russian Ministry of Finance as 'tax havens' and (or) not providing information on financial operations, as well as entities under their control (the "**Offshore Companies**") have been subjected to restrictions.[4]

The Offshore Companies are not allowed to:

(a) acquire control[5] over strategic entities;

(b) acquire, lease or otherwise use a strategic entity's fixed assets with a value exceeding 25% of the total balance sheet value of that entity's assets as of the latest reporting date; and

(c) participate in the privatisation of state or municipal property.

The acquisition of more than 25% of votes in a Russian strategic entity, or more than 5% of votes in a Russian strategic entity being a federal subsoil user, by an Offshore Company is subject to the Commission's preliminary approval.

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[4] The Russian Ministry of Finance maintains a list of the respective jurisdictions and territories (approved by the order No. 108n of 13 November 2007 (as amended)): it covers, among others, such in-demand jurisdictions as the BVI, the Isle of Man, the Channel Islands, the Seychelles and the UAE.

[5] 'Control' is generally understood as holding more than 50% of votes, the ability to appoint the CEO or over 50% of the board of directors and (or) legal authority to determine decisions of the Russian strategic entity. However, this list of criteria is not exhaustive, and control over a strategic entity may be established in other ways. Each transaction should, therefore, be analysed on a case by case basis.

Granting full discretion to the Commission in determination of pre-condition measures to be taken by a foreign investor

Under the Strategic Law, the Commission is allowed to issue a conditioned approval of a transaction and oblige a foreign investor to perform certain duties set out by the Commission. If the duties are not performed, the investor may be deprived of its voting rights within the strategic entity. For that purpose, there was an exhaustive list of duties in the Strategic Law, including, for example, continuing supplies for state defence procurement by a Russian strategic company, completion of a business plan declared by the foreign investor when filing for the Commission's approval of the transaction, keeping an average headcount in the Russian strategic entity for a set term, etc.

The Commission is no longer limited to that list of duties and may impose on the foreign investor *any obligations* the Commission considers reasonably appropriate to '*ensure national security and state defence*'.

STRICTER RULES ON SHAREHOLDERS' ACCESS TO COMPANY RECORDS

Considerable limitations for minority shareholders of Russian joint-stock companies (JSC) regarding shareholder access to company records were enacted in July 2017. Some changes also concern shareholders of Russian limited liability companies (LLC)[6].

Information access in JSCs

In JSCs, shareholders enjoy three levels of access to corporate documents, depending on the percentage of their shareholdings. Within those levels, various groups of documents are available for the shareholder's attention:

(a) the **first access level** includes the documents which should be provided to **any shareholder of a JSC** (upon request). Mostly those are:

  (i) foundation documents (charter, incorporation agreement, etc.);

  (ii) documents which are often available publically (securities prospect, lists of affiliated persons, etc.);

  (iii) documents available during the general meeting of shareholders or related thereto (annual financial statements, audit report thereto, etc.);

  (iv) documents accompanying notifications sent to the JSC pursuant to mandatory rules (receipt of the VTOs/MTOs, conclusion of an SHA, etc.).

  The regulation has changed in this regard, and the following documents are no longer available to such shareholders:

  (i) documents confirming a JSC's title to its property;

  (ii) appraiser's reports (except for the appraiser's reports regarding major transactions / related-party transactions and mentioned in the paragraph below – they are only available to the at least 1%-shareholders);

[6] The legal basis for the changes is the Federal Law No. 233-FZ dated 29 July 2017 "On Amendments to the Federal Law "On Joint-Stock Companies" and Article 50 of the Federal Law "On Limited Liability Companies"" (came into force on 30 July 2017).

(iii) information on major transactions and related-party transactions (except for the information mentioned in the paragraph below – they are only available to the at least 1%-shareholders);

(b) the **second access level** is a new rule intended to release JSCs from the obligation to present company records to shareholders holding a negligible percentage of shares.

This level covers documents (information) available by request to **shareholders holding at least 1% of voting shares** in a JSC: certain information on major transactions and related-party transactions and appraiser's reports on the value of property being the object of those transactions, and minutes of the JSC's board of directors.

Within this level, a non-public JSC shall also provide shareholders with access (upon request) to other documents that the JSC is obliged to keep as a matter of law, except for minutes of the management board and financial accounts. This obligation of a non-public JSC may be excluded in its charter or in the shareholder agreement to which all the shareholders of the JSC are parties.

Shareholders of both public JSCs and non-public JSCs inside this second level shall indicate their reasonable commercial purpose for requesting the listed documents from the JSC. However, a commercial purpose may be regarded as not being reasonable, if:

(i) the JSC is aware of that shareholder's bad faith;

(ii) the shareholder's interest in accessing the requested information is inappropriate;

(iii) the shareholder is a competitor of the JSC, or a competitor's affiliate, and the requested document is confidential, relates to competition and the disclosure of information therein may do harm to the commercial interests of the JSC;

(c) the **third access level** includes the documents available by request only to **shareholders holding at least 25% of voting shares** in a JSC: minutes of the management board and financial accounts of the JSC. However, the charter of a JSC may now lower the shareholding threshold that grants a shareholder the third level of access to its corporate records.

Irrespective of all the above, in non-public JSCs the shareholders may establish their own regime of access to corporate records and data that would be different from the regulations set out above, including the establishment of thresholds for various levels of access and the procedures for providing the data to shareholders. Such regulations may be introduced in the JSC's charter based on a unanimous decision of the shareholders.

The JSC is entitled to deny access to the requested documents to any shareholder irrespective of its shareholding percentage on specific grounds aimed at preventing any misuse of the shareholder's rights to access to company's documents – e.g. a JSC may deny access if, in particular:

(a) an electronic version of the document is available on the JSC's website or properly disclosed pursuant to the Russian legislation;

(b) a document is requested twice in two years (provided that the first request was properly satisfied);

(c) a document relates to a period that ended more than three years prior to the request date (excluding information on transactions which are still being performed at the moment of making the request);

(d) a document relates to a period when the shareholder was not a shareholder of the JSC.

Information access in LLCs

The shareholders of LLCs are not separated into access groups, as in JSCs. Nevertheless, the list of documents which any shareholder can access is almost identical to the list for JSCs (please see the paragraph describing the *first access level* above). It is notable, however, that the list is not closed, like the one for JSCs, and refers to other documents the shareholder may be able to access is prescribed in the LLC's charter, by-laws, decisions of the general meeting of shareholders, resolutions of the board of directors and other managing bodies of the LLC.

In addition, the list of grounds for the LLC's to refuse the shareholder access to the requested documents is considerably shorter than that in JSCs:

(a) an electronic version of the document is available on the LLC's website or properly disclosed pursuant to the Russian legislation;

(b) a document is requested twice in two years (provided that the first request was properly satisfied);

(c) a document relates to a period that ended three years before the request – this ground for refusal is not applicable, however, to most of the documents that any shareholder shall be given access to (documents of the *first access level*).

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Medical Negligence - The new legal test in Singapore to determine the standard of a doctor’s duty in advising his patient

A case study of *Hii Chii Kok v Ooi Peng Jin London Lucien and another* [2017] SGCA 38

DENTONS RODYK

31 May 2017

Introduction

The Singapore Court of Appeal has in its recent judgment in the case of *Hii Chii Kok v Ooi Peng Jin London Lucien and another* [2017] SGCA 38 (*Hii Chii Kok v London Lucien Ooi*) delivered on 12 May 2017, decided that the Bolam test (as supplemented by the *Bolitho* addendum) (referred to herein simply as “the Bolam test”) is no longer the applicable legal test to adjudicate on the appropriate standard of care of a medical practitioner in the provision of medical advice to his patient. The Court of Appeal has ruled that a new 3-stage, patient-centric legal test ought to be applied.

In the area of medical negligence, the contentious aspects of medical care can be broadly categorised into three aspects, namely, (a) diagnosis – establishing what the patient’s medical condition is; (b) advice – presenting information regarding what should be done (treatment options), reasonable alternatives, and the risks attendant on the various options; and (c) treatment.

Previously, the Singapore Court had applied the Bolam test to adjudicate the standard of care required in all three aspects of medical care, in order to determine whether there was medical negligence on the part of the doctor. Under the Bolam test, a doctor is not liable in negligence if he can demonstrate that there is a respectable and responsible body of medical opinion, logically arrived, that accepts the doctor’s practice as proper.

The decision of the Court of Appeal in *Hii Chii Kok v London Lucien Ooi* is that:

a. Diagnosis and Treatment: The Bolam test should continue to apply; and

b. Advice: There is a new 3-stage test.

The Court of Appeal’s explanation for not applying the Bolam test to the issue of standard of care for a doctor’s advice to his patient

The Court of Appeal considered that the material difference between the three aspects of medical care lies in the degree of passivity on the part of the patient. With regard to diagnosis and treatment, the patient is a passive participant. In contrast, when advice is being furnished to the patient, it is the patient who is in charge and must make the choices and decisions, that is, the patient assumes an active role. The doctor’s function is to empower and enable the patient to make that decision by giving him the relevant and material information.

At the time the Bolam test was articulated (in 1957), much less emphasis was placed on the principle of autonomy than the principle of beneficence. Doctors were thought to know best and thus, it was considered acceptable to keep a patient in the dark as to the risks and alternative treatment relating to his illness if this would make him more likely to undergo the treatment that was, in the doctor’s opinion, best for the patient’s health.

There has since been a “*seismic shift*” in “*medical ethics*” and “*societal attitudes towards the practice of medicine*”, that warrants a new legal test to adjudicate the advice aspect of a doctor-patient relationship. In arriving at this view, the Court of Appeal observed, among others, the emphasis placed by the Singapore Medical Council’s Ethical Code and Ethical Guidelines (2016 Edition) (2016 ECEG), which came into force on 1 January 2017, on the need to respect patient autonomy and the doctors’ obligation to uphold their patient’s “*desire to be adequately informed and (where relevant) their desire for self-determination*”. The Court of Appeal noted that the 2016 ECEG reflected the fact that the “*nature of the doctor-patient relationship has evolved together with the level of education and access to knowledge of the ordinary Singaporean*”. The discussion on which treatment to pursue is “*now best seen as a collaborative process involving the doctor and the patient*”.

Accordingly, the Court of Appeal declared that the Bolam test should no longer be applied to the aspect of a doctor’s advice to his patient given that it “*does not allow any room for the patient’s perspective*”.

The new 3-stage test applicable to determine the standard of care in respect of a doctor’s advice to his patient

Stage 1

The first stage assesses the sufficiency of information given to the patient from the patient’s perspective. At this first stage, the patient is required to identify the exact nature of the information that he alleges was not given to him and establish why it would be regarded as relevant and material. Information which should be disclosed is (a) information that would be relevant and material to a reasonable patient situated in the particular patient’s position, or (b) information that a doctor knows is important to the particular patient in question.

Information which should be disclosed is not limited to risk-related information. Information that should be disclosed includes (a) the doctor’s diagnosis of the patient’s condition; (b) the prognosis of that condition with and without medical treatment; (c) the nature of the proposed medical treatment; (d) the risks associated with the proposed medical treatment; and (e) the alternatives to the proposed medical treatment, and the advantages and risks of those alternatives.

The inquiry at this first stage is “*largely a matter of common sense*.” Remote risks with minor consequences or very severe consequences with very low chances of occurring will generally be deemed immaterial, and do not have to be disclosed.

The Court of Appeal made clear that the doctor’s duty to advise is not satisfied by conducting an “*information dump*”, which tends to cause the patient to be more confused and less able to make a proper decision. The doctor must ensure that the “*information given is presented ‘in terms and at a pace’ that allows the patient to assimilate it, thereby enabling him to make informed decisions*”.

A contextualised approach is also adopted at this stage of inquiry to determine the personal circumstances of the patient. While a doctor has “*no open-ended duty to proactively elicit information from the patient and will not be at risk of being found liable owing to idiosyncratic concerns of the patient unless this was made known to the doctor or the doctor has reason to believe it to be so”*, it should be borne in mind that information may be rendered relevant and material pursuant to the particular questions asked or particular concerns expressed by the patient.

Stage 2

The Court determines at this second stage of the inquiry whether the doctor was in possession of the information (which pursuant to the first stage of the inquiry is relevant and material).

The inquiry stops at this stage if the doctor is shown to not have the information at the material time. A separate inquiry may arise in respect of any negligence in diagnosis or treatment (but not advice) if the doctor does not have the information "*because he did not conduct the procedure which would have discovered that information or because he lacked the factual or technical knowledge to realise that a particular risk or alternative treatment existed".*

Stage 3

If the Court is satisfied that the doctor possessed the information which the patient has demonstrated is relevant and material, at this third stage of the inquiry, the doctor has the burden to justify why he chose to withhold the information.

The assessment at this stage is from the doctor's perspective. The Court will decide if the doctor was justified to withhold the information having regard to "*the doctor's reasons for withholding the information and then considering whether this was a sound judgment having regard to the standards of a reasonable and competent doctor*". Expert evidence may be helpful but not necessarily determinative in the consideration of whether the doctor's withholding of information was a sound judgment (otherwise, it will effectively be the application of the Bolam test).

Three instances whereby the withholding of information may be justified:

a. Waiver situation – Where the patient expressly indicated that he does not want to receive further information about the proposed treatment or alternatives;

b. Emergency situation – Where life-saving treatment is required and the patient temporarily lacks decision-making capacity and no appropriate substitute decision-maker can be found. The Bolam test will continue to apply in this context; and

c. Therapeutic privilege – Where although the patient has mental capacity, his decision-making capabilities are impaired to an appreciable degree such that the doctor reasonably believes that the very act of giving particular information would cause the patient serious physical or mental harm. For example, patients with anxiety disorders.

Implications and takeaways

As there is now a need to determine the sufficiency of information based on a reasonable patient situated in the particular patient's position, doctors may have to apply their minds to whether any questions posed or concerns expressed by the patient during the consultations are out of the ordinary. Such information obtained from the patient will assist in the determination of how much more the doctor has to discuss with the patient, in order to empower the patient to make his or her decision. The doctor has to carefully consider whether there are additional risks, possible complications or any other information which may be material to this particular patient, and for which the doctor should raise for discussion with the patient.

Simply going through the list of risks and possible complications in patient information sheets and consent addendum forms may not be sufficient. Doctors have to constantly apply their minds to the issue of whether there is anything on top of what is contained in the consent documents which needs to be raised with the patient.

Lastly, the importance of careful documentation by doctors of discussions with their patients was specifically underscored by the Court of Appeal in *Hii Chii Kok v London Lucien Ooi* in response to the argument raised that there could be situations whereby even properly informed patients may pursue negligence advice claims, for instance whereby perhaps under the fog of illness, the patient denies ever being apprised of a risk.

Dentons Rodyk acknowledges and thanks Senior Associate Yvonne Ong for her contribution to the article.

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MOF Amended the "Reviewing Rules for Information Exchange Request

08/28/2017

Josephine Peng/Alvin Chen

In its ruling dated July 24, 2017 (Ref. No.: Tai-Cai-Ji-Zi-10624512120), the Ministry of Finance (the "MOF") amended the "Reviewing Rules for Information Exchange Request Made or Received Pursuant to Income Tax Treaties" (the "Reviewing Rules"), which was promulgated on April 21, 2016, in order to better coordinate with the upcoming practices in international tax information exchange.

Nearly a hundred countries have officially signed to participate in the Common Reporting Standards (CRS) proposed by the OECD, and two rounds of international tax information exchange will occur in September 2017 and September 2018, respectively, among those signatories. While ROC is not officially a signatory to the CRS, it could not be ignorant of the trend of international tax information exchange. Therefore, the ROC government intends to conduct tax information exchanges similar to that under the CRS with other countries via the existing income tax treaty framework of the ROC.

In this regard, the Tax Collection Act (the "TCA") had been amended on June 14, 2017, to introduce the newly added Articles 5-1 and 46-1, which authorize the MOF to conduct tax information exchanges with other countries legally, without being restricted by the confidentiality provisions under the TCA or the other laws or regulations. Articles 5-1 and 46-1 apply to the income tax treaties which had contained tax information exchange provisions or other tax assistance provisions before the June 14, 2017 amendment as well.

Pursuant to Item 4 of the amended Reviewing Rules, the subject person and the kind of tax the information of which would be exchanged under income tax treaties are as follows:

(I) The subject person is limited to the person who is a resident of the ROC, a resident of the other signatory to the treaty, or a resident of both, unless the applicable income tax treaty stipulates otherwise.

(II) The kind of tax is limited to the income tax levied by the ROC, or by the other signatory to the treaty, unless the applicable income tax treaty stipulates otherwise.

Furthermore, if the one of the following conditions regarding the other signatory to the treaty is found to be existent after further examination, then no information exchanges could be conducted:

(I) The other signatory to the treaty is unable to provide the equivalent information to the ROC.

(II) The other signatory to the treaty has obvious difficulties in keeping confidential the information it obtained.

(III) The information requested by the other signatory to the treaty is not for tax purposes.

(IV) The provision of the information requested would cause damages to the public interests of the ROC.

(V) The other signatory to the treaty files the information request without first exhausting its investigation procedures available.

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Inequitable Conduct: But-For Materiality and an Adverse Inference of Intent to Deceive

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Firm Thought Leadership

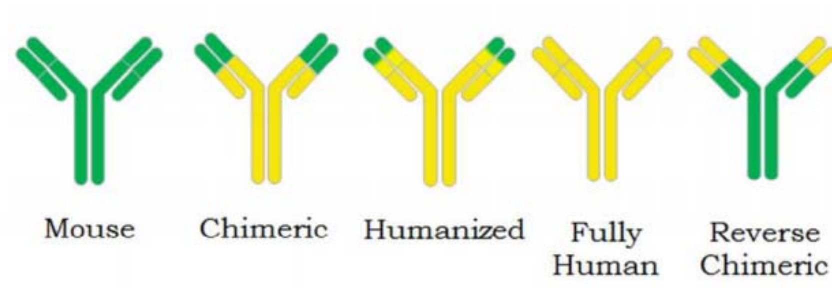
In 2011, the Federal Circuit provided a two prong framework for determining when inequitable conduct during prosecution renders a patent unenforceable.[1] The Circuit characterized a finding of inequitable conduct as "the 'atomic bomb' of patent law" because the finding renders all claims of the patent unenforceable, the conduct cannot be cured by reexamination or reissue, and the finding may render other related patents unenforceable as well.[2] Given the severity of the remedy, the Federal Circuit "tighten[ed] the standards for finding both intent and materiality" — the two elements of inequitable conduct.[3]

The Federal Circuit analyzed each of these elements in *Regeneron Pharms., Inc. v. Merus N.V.*, based on an appeal by Regeneron Pharmaceuticals, Inc. ("Regeneron") from a district court finding that U.S. Patent No. 8,502,018 ("'018 patent") was unenforceable.[4] The Circuit reviewed and ultimately affirmed the lower court's application of the *Therasense* two-prong inequitable conduct analysis.[5]

Regarding the first prong, but-for materiality, the Circuit agreed with the lower court that "had the reference(s) been before the examiner at the time," the claims of the '018 patent would not have been allowed to issue.[6] The Federal Circuit analyzed the disclosed references and held that the lower court did not clearly err in finding the references but-for material and not cumulative.[7] Regarding the second prong, specific intent to deceive the PTO, the Circuit held that the lower court did not abuse its discretion in sanctioning Regeneron for litigation misconduct by drawing an adverse inference of specific intent to deceive the PTO.[8] The Circuit held that sanctioning Regeneron in this manner was appropriate given that the litigation misconduct was closely related to the prosecution misconduct.[9]

Background

The '018 patent issued on August 6, 2013 from a continuation application claiming priority from an application filed in December 2000.[10] The '018 patent relates to targeting and modifying endogenous genes and chromosomal loci in eukaryotic cells.[11] Only claim 1 of the '018 patent was at issue and recited "[a] genetically modified mouse, comprising in its germline human rearranged variable region gene segments inserted at an endogenous mouse immunoglobulin locus."[12] A mouse as described in claim 1 may have DNA coding for antibodies that is modified using human DNA.[13] The figure below shows the various types of antibody configurations that can be achieved by modifying the mouse DNA.[14] The different configurations have human DNA, shown in yellow, mouse DNA, shown in green, or a combination of the two.[15] The amino acid chains that make up the antibodies include the variable region, shown at the upper portion of the "Y," and the constant region, shown at the lower portion of the "Y."[16]



In 2014, Regeneron filed the underlying infringement suit based on the '018 patent against Merus B.V. ("Merus") in the Southern District of New York, and Merus asserted a counterclaim of unenforceability due to Regeneron's inequitable conduct.[17] The alleged inequitable conduct involved four references (the "Withheld References") that Regeneron undisputedly knew of and failed to disclose during prosecution.[18] Regeneron argued that the Withheld References "were not but-for material, that they were cumulative of references the PTO actually relied on during prosecution, and that Regeneron did not have any specific intent to deceive the PTO."[19]

After a bench trial, the lower court "issued a lengthy opinion detailing the materiality of the Withheld References."[20] In this opinion, the lower court also drew an adverse inference against Regeneron regarding specific intent to deceive the PTO based on "Regeneron's repeated violations of the district court's discovery orders and improper secreting of relevant and non-privileged documents."[21] Based on these findings, the lower court found that Regeneron had committed inequitable conduct and held the '018 patent unenforceable.[22]

Materiality: Claim Construction, But-For Materiality, and Cumulativeness

On appeal, Regeneron argued that none of the Withheld references were but-for material to the prosecution of the '018 patent. The Federal Circuit defined the materiality required to establish inequitable conduct as but-for materiality in *Therasense*.[23] An alleged infringer can show but-for materiality "if the PTO would not have allowed a claim had it been aware of the undisclosed prior art."[24] To determine materiality, a court must "place itself in the shoes of a patent examiner" and therefore "applies the preponderance of the evidence standard and gives the claims their broadest reasonable construction."[25]

As a threshold matter, the Federal Circuit determined the broadest reasonable construction of the claim that the PTO would have applied during prosecution.[26] Although Regeneron argued that the claim language and the specification limited the scope of claim 1 to only cover a "reverse-chimeric mouse," the Federal Circuit found that the language was written such that the broadest reasonable construction would cover a "reverse chimeric mouse" as well as a fully human or humanized mouse.[27]

This claim construction proved determinative as to the materiality of the first of the Withheld References considered.[28] Regeneron argued that the first reference was not but-for material because it did "not disclose a reverse-chimeric mouse."[29] However, since the Circuit did not adopt Regeneron's narrow construction and because the reference did disclose fully human and humanized mice, the Federal Circuit found that the district court did not clearly err in finding the first reference but-for material.

As to the other Withheld References, the Federal Circuit reviewed the references, the testimony of Merus' expert witnesses, and the finding of the lower court before ultimately holding that "the references both individually and in combination teach one of skill in the art to genetically modify mice by inserting exogenous, including human, variable region gene segments endogenously into a mouse immunoglobulin locus."[30] The Circuit also found two of the Withheld References but-for material at least partially because they provided "the motivation to combine these references to develop the genetically modified mouse."[31]

Regeneron argued that, even if the Withheld References were material, the references were cumulative of the other references considered by the Examiner — specifically U.S. Application No. 11/009,873 to Nils Lonberg et al. ("Lonberg") and U.S. Patent No. 6,114,598 to Raju Kucherlapati

(“Kucherlapati”).[32] If a reference is merely cumulative, the reference cannot be but-for material.[33] A patent owner can show that a reference is cumulative if the reference “teaches no more than what a reasonable examiner would consider to be taught by the prior art already before the PTO.”[34] The Federal Circuit relied upon Regeneron’s own representations during prosecution and litigation and the testimony of Regeneron’s expert witness regarding the disclosures of Lonberg and Kucherlapati to find that the Withheld References were not cumulative.[35]

Intent: Specific Intent to Deceive, Litigation Misconduct, and Adverse Inference

On appeal, Regeneron also argued that the district court abused its discretion by sanctioning Regeneron for litigation misconduct by drawing an adverse inference of specific intent.[36] Regeneron did not however dispute the lengthy and detailed recitation of litigation misconduct included in the lower court’s opinion and adopted by the Federal Circuit.[37] This litigation misconduct was noted early in the case and included “gamesmanship” by Regeneron in filing inadequate infringement contentions, providing limited and incomplete evidence of conception and reduction to practice, and refusing to provide initial claim construction proposals.[38]

The lower court found that the more egregious misconduct involved Regeneron’s repeated “sword/shield use of the attorney client privilege.”[39] The lower court identified three categories of documents that involved discovery misconduct: non-privileged documents that were included on a privilege log; documents to which Regeneron had waived privilege by disclosing an outside counsel’s memorandum prior to a deposition;[40] and documents to which Regeneron had waived privilege by filing trial declarations relying upon privileged documents.[41] Based on these activities, the lower court chose to sanction Regeneron.[42] The lower court considered alternative options for sanctioning Regeneron and determined that “reopening discovery, striking the problematic affidavits, and/or shifting costs would not ensure fairness.”[43] Ultimately, the lower court drew “an adverse inference against Regeneron from the undisclosed documents . . . [, i.e., an inference that] Regeneron failed to disclose the Withheld References to the PTO during prosecution of the ’018 patent with the specific intent to deceive the PTO.”[44]

While the majority at the Federal Circuit found that the lower court did not abuse its discretion in drawing this adverse inference, Judge Newman dissented.[45] Judge Newman emphasized the requirement that intent to deceive be proven by clear and convincing evidence and would have drawn a bright line between litigation misconduct and misconduct during prosecution.[46] However, the majority emphasized that direct evidence of intent is not required and intent may be inferred “where the applicant engages in a ‘a pattern of lack of candor,’ including where the applicant repeatedly makes factual representations ‘contrary to the true information he had in his possession.’”[47]

The majority also emphasized that the “widespread litigation misconduct” was tied directly to evidence relevant to the intent inquiry.[48] The majority noted that the litigation misconduct directly affected the ability of the court and Merus to discover whether the patent prosecutors had the requisite intent to deceive.[49] The majority also clarified that the sanction imposed only established the element of intent, and “[o]nly after Merus proved the remaining elements of inequitable conduct did the district court hold the patent unenforceable.”[50]

Conclusion

The Federal Circuit provides useful insights into both elements of inequitable conduct in *Regeneron*. The Federal Circuit’s approval of the lower court’s adverse inference also demonstrates that litigation misconduct may be relevant to the intent analysis, at least when the misconduct is relevant to the work of patent prosecutors. The decision demonstrates the importance of claim construction in the but-for materiality analysis and also highlights the importance of carefully reviewing references during prosecution and erring on the side of disclosure whenever deciding whether a reference is material or cumulative.

[1] *Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276, 1287 (Fed. Cir. 2011) (en banc).

[2] *Id.* at 1288-89 (also discussing the effect of inequitable conduct on antitrust and unfair competition claims, attorneys' fees, and attorney-client privilege).
[3] *Id.* at 1290.
[4] *Regeneron Pharms., Inc. v. Merus N.V.*, No. 2016-1346 (Fed. Cir. July 27, 2017).
[5] *Id.*, slip op. at 2.
[6] *Id.* at 12, 14, and 21.
[7] *Id.* at 14.
[8] *Regeneron*, slip op. at 21-22
[9] *Id.* at 37 ("Here, Regeneron is accused not only of post-prosecution misconduct but also of engaging in inequitable conduct *during* prosecution. . . . Regeneron's litigation misconduct, however, obfuscated its prosecution misconduct.").
[10] *Id.* at 4.
[11] *Id.* at 4-5 (citing '018 patent col. 1 ll. 17-33).
[12] '018 patent col. 29 ll. 24-26.
[13] *Regeneron*, slip op. at 5-6.
[14] *Id.* at 6 (showing figure from Appellant's Br. at 10).
[15] *Id.* at 5-6.
[16] *Id.*
[17] *Regeneron*, slip op. at 2-3.
[18] *Id.* at 3.
[19] *Id.*
[20] *Id.* at 3 (citing *Regeneron Pharm., Inc. v. Merus B.V.*, 144 F. Supp. 3d 530 (S.D.N.Y. 2015)).
[21] *Id.* at 3-4.
[22] *Id.* at 4.
[23] *Therasense*, 649 F.3d at 1291.
[24] *Id.*
[25] *Regeneron*, slip op. at 10, 12 (citing *Therasense*, 649 F.3d at 1291-92).
[26] *Id.* at 12.
[27] *Id.* at 12-14 (discussing the use of the open-ended "comprising" transition and the non-limiting disclosure in the specification).
[28] *Id.* at 15.
[29] *Id.*
[30] *Regeneron*, slip op. at 15-18.
[31] *Id.* at 18.
[32] *Id.* at 18-20.
[33] *Dig. Control Inc. v. Charles Mach. Works*, 437 F.3d 1309, 1319 (Fed. Cir. 2006).
[34] *Regents of the Univ. of Calif. v. Eli Lilly & Co.*, 119 F.3d 1559, 1575 (Fed. Cir. 1997).
[35] *Regeneron*, slip op. at 20-21.
[36] *Regeneron*, slip op. at 21-22.
[37] *Id.* at 22.
[38] *Id.* at 22-23.
[39] *Id.* at 28.
[40] *Id.* at 23-28.
[41] *Id.* at 28-33.
[42] *Id.* at 34.
[43] *Id.* at 34-35.
[44] *Id.* at 35.
[45] *Regeneron*, slip op. at 1 (Newman, J., dissenting).
[46] *Id.* at 2-6 (Newman, J., dissenting).
[47] *Id.* at 11 (citing *Apotex Inc. v. UCB, Inc.*, 763 F.3d 1354, 1362 (Fed. Cir. 2014)).
[48] *Id.* at 37-38.
[49] *Id.* at 37.
[50] *Id.* at 38.

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Trump Administration Phase-Out of DACA: What It Means for Employers

09.06.17
By Diane Butler

The Trump Administration announced on September 5, 2017, that it is terminating DACA. The program, Deferred Action for Childhood Arrivals, administered by the Department of Homeland Security (DHS), has permitted people who came to the United States as children to remain here and be eligible for employment though they lack legal status. Bipartisan legislation has been introduced in the Senate that could replace DACA. A measure to replace DACA also has been introduced in the House of Representatives.

DACA has been available for persons who have met the following requirements:

- Came to the United States before reaching their 16th birthday;
- Were under the age of 31 as of June 15, 2012;
- Have continuously resided in the United States since June 15, 2007, up to the present time and did not depart the United States on or after August 15, 2012 without DHS authorization;
- Are currently in school, have graduated, or obtained a certificate of completion from high school, have obtained a General Educational Development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
- Have not been convicted of a felony, a significant misdemeanor, or three or more misdemeanors, and do not pose a threat to national security or public safety.

As a “deferred action” program, DACA did not grant legal status to anyone, but it enabled beneficiaries to live, work, and pursue education in the U.S., and apply for driver licenses or a state identification card, without the fear of deportation. Applications for employment authorization documents (EAD cards) are submitted to U.S. Citizenship & Immigration Services (USCIS).

Now, DACA is ending. Effective September 5, 2017, no applications for new DACA benefits, including EAD cards, will be accepted. However, there is a one-month period to apply for a two-year renewal, with a deadline of Thursday, October 5, 2017. This grace period applies only to those whose DACA benefits and protections expire within six months, up to March 5, 2018.

What does the rescission of DACA means for employers? The options depend to some extent on whether a person is seeking DACA benefits for the first time, or renewing:

- Current DACA recipients, as well as those eligible to apply by October 5, 2017, will be permitted to retain both the period of deferred action and, for DACA extensions, their EAD cards until they expire, unless terminated or revoked.
- DACA beneficiaries must possess valid EAD cards to work.
- USCIS will process new DACA EAD applications received before September 5, 2017.
- USCIS will not process new DACA EAD applications received September 5, 2017 or thereafter.
- DACA and EAD renewal applications that were properly filed prior to September 5, 2017 will continue to be processed.
- USCIS will process two-year DACA EAD renewal applications received by October 5, 2017 for individuals whose current DACA EAD expires between September 5, 2017 and March 5, 2018. Individuals who meet these criteria should file their renewal applications as soon as possible to preserve their work authorization.
- DACA beneficiaries with EAD applications pending renewal for at least 75 days should contact USCIS to request that the

agency act to approve the application.

- DACA employees should not be terminated on the basis of a future expiration of an EAD card.
- DACA beneficiaries should not depart the United States, even with DHS authority to do so, without contacting immigration counsel to assess implications.
- DACA beneficiaries may have other options available, through political asylum claims, marriage to a U.S. citizen, employment sponsored immigration, or other legal immigration avenues.

To read the full text of the DHS memorandum on rescission of the DACA program, click here.

For the FAQs on the phase-out process, click here.

Please contact us if you have any questions or desire further information regarding the DACA phase-out.

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SEC Update
August 31, 2017

SEC issues new guidance on omission of interim financial information from draft registration statements

On August 17, the SEC's Division of Corporation Finance issued new guidance indicating that emerging growth companies (EGCs) and non-EGCs may omit from their nonpublic draft registration statements interim financial information they reasonably believe will not be required to be presented separately at (1) the time of the first public filing (for non-EGCs) or (2) the time of commencement of the offering (for EGCs). The staff's position will relieve issuers in these circumstances of the expense required to prepare separate financial statements and related financial information covering applicable interim periods, including disclosure for the interim periods in management's discussion and analysis. The new guidance reflects the SEC's ongoing efforts to facilitate capital-raising by reducing the costs associated with the registration process.

The two new **Compliance and Disclosure Interpretations (C&DIs)** have been posted on the SEC's website under the C&DI category "Securities Act Forms" and are identified by their issue date of August 17, 2017. The SEC staff also published a revised **FAQ** under the Fixing America's Surface Transportation Act (FAST Act), identified by its revision date of August 17, 2017, which changes the prior guidance and mirrors the first Securities Act C&DI. On the same date, the SEC published an update to its **announcement** of June 29, 2017 describing the procedures the staff will follow in processing draft registration statements. Each addition to the original announcement has been individually identified with a date of August 17, 2017.

Background

Nonpublic draft registration statements. As described in the ***SEC Update*** we issued on July 7, the SEC announced in June that the Division of Corporation Finance will allow all companies to submit for nonpublic review draft registration statements relating to initial public offerings and other specified registrations. Under the new process, nonpublic review procedures

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will be available to any company that submits a registration statement to the SEC covering the (1) registration of an IPO under the Securities Act, (2) initial registration of a class of securities pursuant to Section 12(b) of the Exchange Act or (3) registration of an offering under the Securities Act during the first twelve months after a company's IPO or Section 12(b) registration. EGCs (generally, companies having total annual gross revenues of less than $1.07 billion) as well as non-EGCs benefit from the new procedures.

Financial information requirements for publicly-filed registration statements. The new guidance provides relief from the requirements under the SEC's Regulation S-X governing the inclusion of annual and interim financial statements and related financial information in a publicly-filed registration statement and amendments to the registration statement.

Interim financial statements are unaudited financial statements generally covering the first three months, six months and nine months of the issuer's fiscal year. Financial statements in a registration statement are evaluated for compliance with the "staleness" rules under Regulation S-X by the number of days between the date of the financial statements included in the filing and the effective date of the registration statement. As a general matter, and subject to certain exceptions and adjustments (including for third-quarter financial information), a registration statement filed for an IPO is required to include unaudited interim financial statements as of a date and for the most recent interim period ended no more than 134 days before the effective date, and, with respect to the income and cash flow statements, the corresponding period in the prior fiscal year. As indicated in the Division of Corporation Finance's Financial Reporting Manual, the SEC staff historically has reserved the right not to commence a review of a filing unless the issuer's financial statements "comply with the rules for age of financial statements and audit at the date of filing." Each filing would be expected to include, in addition to the interim financial statements, selected financial data for the interim periods, as well as disclosure in management's discussion and analysis comparing the financial results for the current interim period with those for the prior corresponding period.

Prior guidance for financial information in nonpublic draft registration statements. The SEC announced on June 29, 2017 that the staff will not delay processing a draft registration statement if a company omits financial information that it "reasonably believes" will not be required under Regulation S-X *at the time the registration statement is first publicly filed*.

This promised accommodation differed from the relief previously granted solely to EGCs in amendments to the Jumpstart Our Business Startups Act (JOBS Act) made in 2015 by Section 71003 of the FAST Act and discussed in the ***SEC Update*** we issued on December 23, 2015. Under the FAST Act relief, an EGC has been permitted to omit from either draft or publicly-filed registration statements *annual* financial statements the company reasonably believes will not be required to be included *at the time the contemplated offering commences*. In 2015 (in the FAST Act FAQ now superseded by the revised guidance discussed below), the staff declined to extend this relief to the presentation of *interim* financial statements. The staff said in the 2015 guidance that it would not permit an EGC to omit from either draft or publicly-filed registration statements interim financial statements for a period that would be included, at the time the offering commences, within required financial statements for a longer interim period or for the completed fiscal year, even if Regulation S-X would not require financial statements for the shorter interim period to be presented separately at that time.

New guidance on omission of interim financial information

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The August 17 guidance changes the staff's 2015 position with respect to the omission of interim financial information from nonpublic submissions by EGCs and clarifies the implications of the June 2017 announcement for nonpublic draft submissions by both EGCs and non-EGCs.

Under the new guidance, issuers may omit from their *nonpublic draft registration statements* interim financial information that they reasonably believe will not be required to be presented separately at (1) the time of the first public filing (for non-EGCs) or (2) the time of commencement of the offering (for EGCs).

The effect of the guidance may be illustrated by reference to the examples provided by the SEC staff in the two newly published C&DIs, the first of which pertains to EGCs, and the second of which pertains to non-EGCs. These examples have been modified slightly for purposes of this discussion.

Nonpublic submission by EGC. The first example contemplates a calendar year-end EGC that makes a nonpublic draft submission in December 2017 and plans to publicly file its registration statement and launch its offering in April 2018. The following relief would be available under the revised guidance:

- *Annual financial statements:* Consistent with the 2015 guidance, the EGC's draft registration statement would have to include audited annual financial statements for 2016, but may omit audited annual financial statements for 2015 if the company reasonably believes that those financial statements would not be required at the time of the April 2018 offering. (An EGC is required to include only two years of audited annual financial statements, which at the time of the April 2018 offering would be the company's audited annual financial statements for 2017 and 2016.)

- *Interim financial statements:* If the EGC reasonably believes that that it will launch its offering in April 2018, the draft registration statement would not be required to include unaudited interim financial statements or related financial information for the nine months ended September 30, 2017, because at the time the offering commences the registration statement would include, as its most recent financial statements, only audited annual financial statements for 2017 and no financial statements for any interim period. In a change from the guidance under the superseded 2015 FAQ, the fact that the nine-month financial statements are part of the longer historical period – full year 2017 – no longer would require the separate presentation of those interim financial statements and related financial information in the December draft submission.

Nonpublic submission by non-EGC. The results under the new guidance are similar for a calendar year-end non-EGC that makes a nonpublic draft submission in December 2017 and plans to first publicly file its registration statement in April 2018.

- *Annual financial statements*: The non-EGC's draft registration statement would have to include audited annual financial statements for both 2016 and 2015. The company may omit audited annual financial statements for 2014 if it reasonably believes that those financial statements would not be required at the time of the first public filing in April 2018. (A non-EGC is required to include three years of audited annual financial statements, which at the time of the April 2018 filing would consist of the company's annual financial statements for 2017, 2016 and 2015.)

- *Interim financial statements:* The new guidance clarifies that if the company reasonably believes that that it will first publicly file its registration statement in April 2018 (regardless of when the offering will commence), the December draft submission would not be required to include unaudited interim financial statements or related financial information for the nine months ended September 30, 2017, because the publicly-filed registration statement in April 2018 would include, as its most recent financial statements, only audited annual financial statements for 2017 and no financial statements for any interim period.

Public filing by EGC or non-EGC. In the new guidance, the staff did not relax its prior position with respect to the inclusion of interim financial statements in *publicly-filed registration statements*. In accordance with the prior staff guidance, publicly-filed registration statements may not omit any interim financial information that will be part of financial information for a longer historical period which the issuer will include at (1) the time it first files publicly (for a non-EGC) or (2) the time it commences its public offering (for an EGC).

To illustrate this point, if the EGC in the staff's example were to plan to publicly file its registration statement for the first time in January 2018 and commence its offering in April 2018, the registration statement filed in January 2018 would have to include interim financial statements and related financial information for the nine months ended September 30, 2017. This result would be mandated by the fact that the financial information for the nine months ended September 30, 2017 would be included within the audited annual financial statements for 2017 to be presented in the EGC's prospectus filed in April 2018.

Switching from public to nonpublic review process

As updated on August 17, the SEC's June 2017 announcement states that an issuer that has publicly filed a registration statement which is being reviewed by the SEC staff and is not yet effective may switch to the nonpublic review process for future pre-effective amendments to the registration statement. To take advantage of this accommodation, the issuer must (1) be eligible to participate in the nonpublic review process and (2) agree to publicly file its amended registration statement and all draft amendments in accordance with the timing required for public filings under the nonpublic review guidelines.