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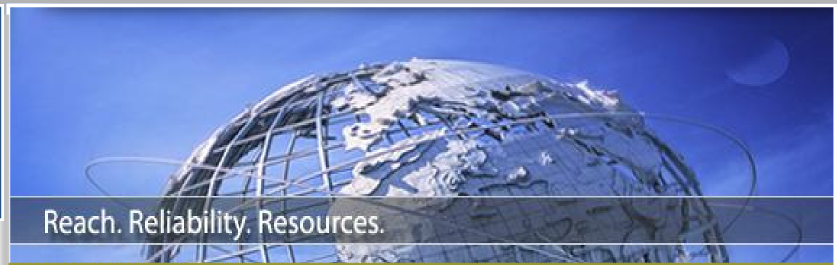

Pacific Rim Advisory Council
April, 2018 e-Bulletin

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CONFERENCES & EVENTS

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

Member Hosting @ INTA Seattle 2018
21 May @ Davis Wright Tremaine

64th International PRAC Conference
Calgary - Hosted by Bennett Jones LLP
September 15 - 18, 2018

Visit www.prac.org for full details

MEMBER DEALS MAKING NEWS

►ALLENDE & BREA Acts for Chinese State-owned agrochemicals company Syngenta in acquisition of Nidera Seeds from Chinese state-owned grains trader COFCO International

►ARIFA Advises INCHCAPE acquisition of privately held Grupo Rudelman

►BAKER BOTTS Represents Sunnova Energy Corporation in a $100,000,000 Equity Financing Investment with Quantum Strategic Partners

►CLAYTON UTZ Acts for Denmark's CIP on investment in Australian-first A$8 billion -offshore windfarm project

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►HOGAN LOVELLS Advises pSivida Corp. on its acquisition of Icon Bioscience as it rebrands as EyePoint Pharmaceuticals

►NAUTADUTILH Assists with the sale of Fysicon B.V. to Canon Medical Systems Corporation

►SIMPSON GRIERSON advises OMV on landmark transaction in USD$587m Acquisition of Shell’s upstream oil and gas business in New Zealand

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BAKER BOTTS LEADING OIL AND GAS LAWYER JOINS FIRM

HOUSTON, 05 April 2018: - Baker Botts L.L.P., a leading international law firm, announced today that Craig Vogelsang a leading oil and gas lawyer, who specializes in upstream and midstream oil and gas development, financing and acquisitions and dispositions, has joined the firm's Global Projects Group as a Partner in its Houston office.

"Craig has an excellent track record advising major oil and gas companies on the development and financing of the upstream and midstream assets and on the acquisition and disposition of those assets. Craig bolsters the firm's depth and evidences our commitment to the oil and gas sector by strengthening our senior-level expertise to meet the growing demands of our clients," said Andrew M. Baker, Managing Partner of Baker Botts.

"Craig's in-depth knowledge of US upstream and midstream deal structures and financing will be invaluable to our oil and gas clients. In addition, his international experience will be a great asset for our firm. Craig is a real oil and gas pro and was recommended to us by many of our clients, which makes this a great fit for the firm and for Craig," added Jason Bennett, Partner and Chair of the firm's Global Projects Group at Baker Botts.

Craig Vogelsang was previously a Partner with Winston & Strawn L.L.P. in their Energy, Oil and Gas Transactions Department in Houston for four years. Prior to this appointment, he spent over 12 years at Fulbright & Jaworski L.L.P.

"Baker Botts is a leading energy firm with an exceptional US and international oil and gas pedigree, and I am looking forward to developing my practice by working alongside some of the industry's top energy advisors to deliver the most innovative and fruitful energy and natural resources projects for our global clients," noted Mr. Vogelsang.

Mr. Vogelsang obtained his B.A., summa cum laude, in Political Science from the University of Minnesota in 1998 and he received his J.D. with distinction, from the University of Iowa, College of Law in 2001, where he served as a member of the Journal of Corporation Law.

For additional information visit www.bakerbotts.com

CLAYTON UTZ ADDS FINANCE SPECIALIST

Sydney, 05 March 2018: Clayton Utz has appointed experienced finance lawyer Graeme Tucker as a partner in the firm's national Banking and Financial Services practice, in Sydney.

Graeme's practice spans asset-based lending, trade and asset finance, corporate and acquisition finance, debt restructuring and debt and portfolio trading transactions. He has acted for many large financial services entities and companies and has particular expertise in the Personal Property Securities Act.

Graeme said he was attracted to Clayton Utz' reputation for a collaborative, team-based approach to working with clients, and its strong client service focus. "It is particularly attractive to be a part of the cross-practice collaboration between the national Clayton Utz Banking and Financial Services practice, Restructuring and Insolvency practice and Corporate / M&A practice."

Deputy CEP - Clients and Markets and Banking and Financial Services national practice group head, Bruce Cooper, said Graeme's appointment meant Clayton Utz' clients would have access to an even broader range of specialist finance law services.

For additional information visit www.claytonutz.com

GIDE WELCOMES RENOWNED M&A SPECIALIST PARTNER AND STRENGTHENS ITS TAX EXPERTISE WITH A NEW PARTNER

PARIS, 23 March 2018: Gide is very pleased to announce the upcoming arrival of **Olivier Diaz** as partner within its Mergers & Acquisitions / Corporate Law practice group in Paris.

Recognised unanimously as one of the most talented lawyers in the field of mergers and acquisitions, Olivier Diaz is regularly praised in the main international directories (Chambers and Legal 500) and by his peers (Best Lawyers) as a great strategist, in particular as regards listed and non-listed operations. His perfect command of the increasingly complex challenges and requirements that companies must face, make him a priority counsel on strategic decisions.

Gide's Mergers & Acquisitions practice group is the largest in Paris, now with over 60 lawyers including 18 partners. Gide senior partner Xavier de Kergommeaux and managing partner Stéphane Puel indicate: "We are very pleased to see Olivier Diaz join our teams again. He is a symbolic figure in the vast field of Mergers & Acquisitions. His arrival is a perfect example of our firm's dynamic development, and illustrates our ambition to further strengthen our position as leader on the market, in particular by bringing together the best practitioners in our clients' key fields."

Olivier Diaz adds: "I am very pleased to be joining Gide again, and a culture in which I will be able to give my best. I am enthusiastic at the idea of committing to, and working with, high-quality teams. The international standing of the firm, both through its own offices and its network of leading partner firms, represents an exceptional opportunity for development."

Olivier Diaz will be in charge of a commission that will explore growth possibilities with clients and Gide's major partner firms.

Admitted to the Paris Bar in 1990, Olivier Diaz has over 25 years' experience in complex mergers and acquisitions, private equity operations, securities law and corporate law. His practice covers a wide variety of transactions, in particular public and private acquisitions, leveraged buyouts, joint ventures and corporate restructurings. During his career, Olivier has worked with clients on the largest and most complex M&A transactions in France, particularly in industrial fields, such as telecoms, energy, financial institutions and the food industry. He also assists companies on complex governance issues and is regularly consulted by regulators on securities and corporate law issues.

Prior to joining Gide in which Olivier was previously partner from 1990 to 1998, he worked for two years at Linklaters (1998-2000), fourteen years at Darrois Villey Maillot Brochier (2000-2015) and three years at Skadden Arps Slate Meagher & Flom. A graduate of Paris' political sciences institute Sciences-Po (1985) and from HEC business school in Paris (1987), Olivier also holds a postgraduate degree (DESS) in international taxation from Paris XI University (1987).

Gide is a major player in the field of mergers & acquisitions and corporate law. The firm's skills cover the full spectrum of practices essential to mergers and acquisitions, ranging from public offers to private equity, via disputes and restructurings, in a wide range of business sectors.

PARIS, 19 March 2018: Gide is pleased to welcome **Magali Buchert** as partner to its tax practice group. In Paris, the practice group now numbers over twenty lawyers, including five partners. Admitted to the Paris Bar in 2005, Magali Buchert practises in the field of French and international tax law, more particularly in transaction tax (public and private mergers and acquisitions, complex restructurings, private equity). She also advises companies in connection with tax audits and litigations, as well as with management incentive plans.

Magali has also acquired specific expertise in the taxation of non-profit organisations (endowment funds, corporate foundation). Prior to joining Gide, Magali practised within Bredin Prat, where she had been promoted to Counsel in 2015. Magali is a member of the International Fiscal Association (IFA) and the French institute of tax lawyers (Institut des Avocats Conseils Fiscaux, IACF). She is a graduate of international business school ESSEC (2003), and holds a postgraduate degree (DESS) in business law and taxation from Paris I - Panthéon-Sorbonne University (2004), as well as an LL.M. from UCLA School of Law (2014).

Gide Managing Partner Stéphane Puel says: "I am delighted to see Magali join our teams, as her recognised expertise in terms of transactional taxation and structuring of complex operations constitutes a veritable asset for our clients and teams. Her arrival further boosts our firm's unique positioning as a specialist in multiple fields."

Magali Buchert adds: "I am very happy to join such a prestigious firm whose values I share, and to participate in the development of a team whose diligence and technical skill are recognised on the market."

For additional information visit www.gide.com

GOODSILL SET TO HOST 63RD INTERNATIONAL PRAC CONFERENCE

HONOLULU, 10 April, 2018: Pacific Rim Advisory Council ("PRAC") member firm GOODSILL ANDERSON QUINN & STIFEL will host the 63rd International PRAC Conference April 21 - 24, 2018 in Honolulu, Hawaii. Member firm delegates from around the globe will gather in Honolulu to attend the business conference featuring topical professional development programs and business development opportunities. Among the business sessions on tap:

● **Business Session #1** | Country Briefing presented by Goodsill
● **Business Session #2** | Special guest presentation, United States Navy Admiral, Pacific Command *"Security in the Pacific Region"*
● **Business Session #3** | PRACtice Management—*"Artificial Intelligence and Technology in the Courts"*
● **Business Session #4** | PRAC Business Development - *"Member Spotlight SIMPSON GRIERSON, New Zealand; Member Roundtables – Bring a Message"*
● **Business Session #5** | PRACtice Development *"Healthcare – Legal Issues and Opportunities"*
● **Business Session #6** | Special Guest Presentation, The Polynesian Voyaging Society *"The Story of the Hokule'a"*
● **Business Session #7** | PRACtice Development *"Trade in the Pacific" CPTPP Legal Work*
● **Business Session #8** | PRACtice Management—*"Law Firm Economics: Alternative Fee Arrangement and Non-Traditional Service Providers"*

The Pacific Rim Advisory Council is an international law firm association with a unique strategic alliance within the global legal community providing for the exchange of professional information among its 30 top tier independent member law firms. For more about our member firms and our organization visit us online www.prac.org

ABOUT GOODSILL
Goodsill Anderson Quinn & Stifel LLLP has served clients locally and globally for more than a century. From its origin in 1878 as a one-person law office, the firm is one of the largest in Hawaii, providing a wide range of legal services to a broad spectrum of clients.

With over 60 attorneys located in downtown Honolulu, Goodsill offers legal services to individuals and businesses in several areas of law, including business and securities transactions, banking and finance, real estate, tax, trusts and estates, public utilities, immigration, international transactions and civil litigation. Our attorneys have experience in mergers and acquisitions, environmental law matters, antitrust compliance, aviation and admiralty law, international trade, labor and employment, media, technology, entity formation and venture financing and health law. Goodsill and its attorneys regularly receive professional awards and recognition from national and international organizations.

Goodsill's role in the Hawaii community extends well beyond the courtroom and boardroom. The firm's attorneys have served over the years as Governor of the State, Chief Justice and Associate Justice of the Hawaii Supreme Court and Chairman of the Federal Deposit Insurance Corporation. In addition, Goodsill attorneys actively participate as volunteers and board members of local and national charitable and professional organizations and educational institutions, as well as governmental advisory boards.

The firm's international practice has a strong focus on the Asia-Pacific region, assisting clients in all aspects of their business including transactional and operational matters, and judicial, administrative and arbitration proceedings. Our membership in the Pacific Rim Advisory Council is enhanced by Goodsill attorneys and legal assistants who have capabilities in Japanese, in, French, Korean, Tagalog and Pampango/Kapampangan.

For more information about Goodsill visit www.goodsill.com

HOGAN LOVELLS LANDS FORMER TOP PENTAGON LAWYER

WASHINGTON, D.C., 02 April 2018: Hogan Lovells announced today that Robert Taylor, former Principal Deputy General Counsel (PDGC) and Acting General Counsel for the Department of Defense, has joined the firm as senior counsel in Washington, D.C. As a member of the firm's Government Contracts and Public Procurement practice, he will represent clients on matters related to national security, including in relation to cybersecurity, energy, and environmental law. Taylor will also join the firm's Aerospace, Defense and Government Services (ADG) Industry Sector Group, where his deep knowledge of the defense and intelligence industries will bolster the firm's global ADG practice.

"Bob is a seasoned lawyer with a history of excellence operating at the highest levels of government and in private practice," said Mike Vernick, head of the firm's Government Contracts and Public Procurement group. "Serving as one of the Pentagon's top lawyers across multiple administrations, he understands how to get things done creatively and effectively. He will be an excellent resource to clients looking to navigate an increasingly complex federal bureaucracy."

Serving as the Defense Department's PDGC for the past eight years, Taylor provided counsel to senior Pentagon officials including four Secretaries of the Department, Secretaries of the Military Departments, Chairmen of the Joint Chiefs, and Directors of Defense Agencies. During his career with the Defense Department, Taylor was also a six-time recipient of the Defense Medal for Distinguished Public Service, the department's highest civilian honor.

His career has included intra-departmental dispute resolution, advocating on the Defense Department's behalf with the White House and other federal agencies, and advising on a wide range of issues including acquisitions, international affairs, the environment, the Committee on Foreign Investment in the United States (CFIUS), security-related personnel and health issues, and sexual assault in the military. Earlier in his career, Taylor also served as the Pentagon's first Deputy General Counsel, Environment and Installations.

In addition to his work for the Defense Department, Taylor has nearly 25 years of private practice experience in which he represented large companies and associations on energy and environmental regulatory matters.

Commenting on his arrival at Hogan Lovells, Taylor said, "National security-related aspects of doing business with the federal government are becoming increasingly prevalent and complex. I'm looking forward to bringing my government and DoD experience to bear on behalf of the Government Contracts and Public Procurement practice at Hogan Lovells. With cyber vulnerabilities threatening our security and economy, companies involved in federal procurement face increased pressure to address these threats making the top-tier cybersecurity practice at Hogan Lovells a major draw. With its deep bench of regulatory experience, Hogan Lovells is an unparalleled leader in the field and I'm excited to join such a dynamic team."

Taylor earned his J.D. from Harvard Law School and his A.B. from Harvard University.

For more information, see www.hoganlovells.com

LEĜA ABOGADOS— NEW COPORATE IDENTITY FOR HOET PELAEZ CASTILLO & DUQUE

CARACAS, 08 March, 2018: We are pleased to announce that from 8 March 2018, we at Hoet Pelaez Castillo & Duque Abogados will continue our operations under the name of Leĝa Abogados, a leading Venezuelan law firm committed to providing a new and innovative approach to the local and global challenges of a changing market. Our intention is to invigorate our firm, with an important emphasis on institutionalization and the use of technology to be closer to our clients.

Since 2002, the full-service law firm Hoet Pelaez Castillo & Duque Abogados has been operating independently from Hoet Pelaez Castillo & Duque, the intellectual property firm, which will still operate under that same name. At Hoet Pelaez Castillo & Duque Abogados, we are taking this opportunity to officially announce a change in our corporate identity and image to **Leĝa Abogados.** We are still the same team and will maintain our excellent quality legal services and our commitment to providing the best legal solutions for our clients.

After a comprehensive review of our vision, mission and values as a firm, we identified crucial reasons for changing our identity, convinced that it is the right path to a deeper institutionalization and aligned to who we are and what we represent, always inspired by our clients.

Leĝa Abogados will be led by the same partners who have been working together for many years. Our firm draws its strengths from the experience, expertise and reputation of our market-leading attorneys and their ability to adopt an innovative approach in a market that has been changing across multiple sectors, both from a national and international perspective.

Behind this crucial decision, there is a team committed to innovating our legal services, with a strong emphasis on technology, and to better understanding our clients, ensuring that we are the best version of lawyers they need in Venezuela and abroad.

Please do not hesitate to contact us should you require further information. We invite you to take a look at our new website www.lega.law, launched on 8 March 2018, as well as our corporate video https://vimeo.com/258026151/65a2b8fb08 and to follow our social network accounts.

For additional information visit us online at www.lega.law

SIMPSON GRIERSON APPOINTS NEW CHAIR

NEW ZEALAND, 28 March, 2018: We're pleased to announce Anne Callinan as our new Chair. ,

Anne works closely with many of our commercial clients. Her appointment caps off a long career at Simpson Grierson, including six years on the Board.

Acting Chair Michael Robinson says that the firm is delighted to have someone of Callinan's calibre lead the business.

"It's great to see such a strategic thinker step into this role. Anne is well respected by staff and clients alike for her acumen as much as her down to earth approach," says Michael.

Anne says it's a real privilege to be appointed as the Chair of Simpson Grierson.

"Our firm has benefitted from excellent stewardship to date and there is a huge amount of talent and energy across our organisation. I'm committed to ensuring we remain a great place to work and continue to adapt to our clients' changing needs."

Anne joined Simpson Grierson in 1992 and made partner in 1998. She has a LLB/BA from the University of Auckland and is a member of the Competition Law and Policy Institute of NZ, Arbitrators' and Mediators' Institute of New Zealand (AMINZ), and the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

For additional information visit www.simpsongrierson.com

ARIFA

ACTS FOR INCHCAPE IN ACQUISITION OF PRIVATELY HELD GRUP RUDELMAN AND GAINS ACCESS TO THE SUZUKI-LED DISTRIBUTION BUSINESS IN COSTA RICA AND PANAMA

ARIFA advised the leading independent multi-brand automotive distributor and retailer in its strategic distribution acquisition in Central America.

27 March 2018: Arias, Fábrega & Fábrega represented car dealership chain Inchcape Plc, in its sixth international takeover in 16 months as ir acquires family-run Grupo Rudelman, one of the leading and most successful Central American automotive distributors focused on Suzuki, for a total cash consideration of US$284 million (GBP £200.5 million), on a cash -free and debt-free basis deal. The deal closed 26 March, 2018.

The transaction involves the acquisition of the Grupo Rudelman group of companies from their shareholders including Holding de Las Americas S.A. and Fundación Rudco.

The cash consideration represents approximately 9.6x the target group's EBIT of US$29.4mln for the 12 months to 31 December 2017.

The acquisition of Grupo Rudelman, which sold 12,500 new Suzuki vehicles in 2017, would add to earnings in the first full year post-acquisition by mid-single digits in percentage terms.

With more than 45 years of experience, Grupo Rudelman is the exclusive retailer for Suzuki in both Costa Rica and Panama, where the brand is particularly well positioned with a top 5 market position.

Inchcape already has a long-term partnership with Suzuki, who the Group has represented as distributor in Singapore since 1977. Following acquisitions in South America in late 2016, Inchcape also represents Suzuki as Distributor in Argentina.

Almost 10 per cent of group sales are now generated in Latin America. It comes adjacent to recent South American expansion of dealerships in Chile, Peru, Argentina and Colombia.

ARIFA team representing Inchcape in this transaction Andrés N. Rubinoff, partner; Federico Alfaro, partner; Javier Yap Endara, associate; David Polo, associate. Other firms involved in the deal: Advising Inchcape**:** Costa Rica EY Law; EEUU Greenberg Taurig; UK Herbert Smith Freehills LLP; Spain Rene Descahmps Abogados.

ARIAS TEAM Advising Seller Grupo Rudelman: ARIAS team acting in the transaction led by Zygmunt Brett (Partner), Andrey Dorado (Partner), Tracy Varela (Associate), Alberto Carrillo (Paralegal); María Cristina Fábrega de Duque (Associate); María Elena Moreno (Associate); Mayrolis Parnther Rodríguez (Associate).

For additional information visit www.arifa.com

BAKER BOTTS

REPRESENTS SUNNOVA ENERGY CORPORATION IN A $100,000,000 EQUITY FINANCING INVESTMENT WITH QUANTUM STRATEGIC PARTNERS

HOUSTON, 03 April 2018: Sunnova Energy Corporation ("Sunnova"), the leading privately held U.S. residential solar + battery storage service provider, announced today that it has closed a $100 million equity financing investment with Quantum Strategic Partners Ltd., a private investment vehicle advised by Soros Fund Management LLC that focuses on long-duration investments globally.

Baker Botts L.L.P. represented Sunnova in the transaction. Baker Botts Lawyers/Offices Involved: Corporate: Travis Wofford (Partner, Houston); Josh Davidson (Partner, Houston); Sarah Dodson (Associate, Houston); Jennifer Gasser (Associate, Houston); Bill Pritchett (Associate, Houston); Mitch Athey (Associate, Houston); Finance: Martin Toulouse (Partner, New York); Jon Finelli (Special Counsel, New York); Peter Glenn (Senior Associate, New York); Tax: Mike Bresson (Partner, Houston); Jon Nelsen (Partner, Austin); David Morris (Senior Associate, Palo Alto); Employee Benefits: Rob Fowler (Partner, Houston); Stephanie Jeane Associate, Washington); Advisory: Danny David (Partner, Houston)

For more information, visit www.bakerbotts.com

ALLENDE & BREA

ACTS FOR CHINESE STATE-OWNED AGROCHEMICALS COMPANY SYNGENTA IN ACQUISITION OF NIDERA SEEDS FROM CHINESE STATE-OWNED TRADER COFCO

BUENOS AIRES, March 2018: The deal hands Syngenta assets in Argentina, Brazil, Paraguay and Uruguay. Nidera is an important player in the South American seeds market.

Syngenta was represented by In-house counsel Ingolf-Christian Quandt, Patricia Moreira, Rinaldo Zangirolami, Esteban Mazzuco and Gabriel Lozano. DLA Piper LLP acted as lead counsel.

Allende & Brea team acting in the transaction included Partners Raúl Fratantoni and Julian Peña, and associates Pedro Echavarria Coll, Nicolás Procopio and Martín Prieto in Buenos Aires.

For additional information visit www.allendebrea.com.ar

GIDE

ADVISES ACCORHOTELS ON THE SALE OF MAJORITY OF CAPITAL OF ACCORINVEST

PARIS, 02 March 2018: Darrois Villey Maillot Brochier and Gide advise AccorHotels on the project to sell the majority of the share capital of AccorInvest. AccorHotels would initially sell 55% of AccorInvest to Sovereign Funds, namely the Public Investment Fund (PIF) and GIC, Institutional Investors, namely Credit Agricole Assurances, Colony NorthStar and Amundi, and other investors.

The DVMB team includes Marcus Billam, Jean-Baptiste de Martigny, partners, Ioana Nicolas and Alexandre Durand for the M&A aspects, Vincent Agulhon, partner, and Zoé Attali for the tax aspects, Igor Simic, partner, and Elise Maillot for the antitrust aspects.

The Gide team includes Frédéric Nouel and Didier Martin, partners, and Pierre-Adrien Vibert, Romain d'Innocente and Cléopha Thomann.

Reed Smith is also involved on the tax aspects with Jean-Pierre Collet, partner, and Benoit Bernard, counsel.

For additional information visit www.gide.com

CLAYTON UTZ

ACTS FOR DENMARK'S COPENHAGEN INFRASTRUCTURE PARTNERS (CIP) ON INVESTMENT IN AUSTRALIAN-FIRST A$8 BILLION OFFSHORE WINDFARM PROJECT

SYDNEY, 07 December 2017: Clayton Utz has acted as Australian legal counsel to Danish fund manager Copenhagen Infrastructure Partners (CIP) on its partnership with Australia's Offshore Energy Ltd (Offshore Energy) to develop the proposed A$8 billion 2GW "Star of the South" project - Australia's first offshore windfarm, and the country's largest ever windfarm project. Watson Farley Williams acted as CIP's global counsel with Bruun & Hjejle acting as CIP's Danish counsel, both having worked with CIP on numerous offshore wind projects.

Through its infrastructure fund Copenhagen Infrastructure III K/S and with Copenhagen Offshore Partners leading the technical development, CIP will partner with Offshore Energy to develop the project, plans for which were announced in June this year. The project will be built in the Bass Strait, 10-25 kilometres off the south coast of Gippsland in Victoria, and connect to existing grid infrastructure in the Latrobe Valley.

The project utilises a unique structure that allows CIP to complement Offshore Energy's significant local expertise and experience by leveraging off CIP's international expertise in delivering large-scale offshore wind farms.

CIP is a market-leader in the offshore wind space, with interests in offshore wind projects in the United Kingdom, Germany, the US, Canada and Taiwan. The Star of the South project marks CIP's first foray into the Australian market.

Clayton Utz partners Peter Staciwa (Projects and Finance) and Rory Moriarty (Corporate) led the firm's deal team which also comprised partners Faith Taylor (Electricity) and Damien Gardiner (Environmental). This internationally experienced team brought together their specialist projects, corporate, environmental, energy regulatory and finance expertise to structure, negotiate and document CIP's partnership arrangements with Offshore Energy in an extremely tight timeframe.

Peter Staciwa said the Star of the South project was an exciting development for both Clayton Utz and Australia's renewable energy industry. In an increasingly competitive renewables marketplace, it is an example of a growing trend of financial sponsors such as CIP partnering at an early stage with project developers to ensure not only that the sponsor has greater investment certainty, but also that the project developers have access to the necessary resources to get the project off the ground.

The project also highlights that Clayton Utz's strategy to remain independent and partner with best-in-market firms such as Watson Farley Williams and Bruun & Hjejle is delivering results for both our domestic and international clients.

Looking ahead, while another significant offshore wind project in the short term is unlikely, Peter does expect a number of these early-stage project developer and sponsor arrangements (especially in the renewables sector) to continue into the New Year.

For additional information visit www.claytonutz.com

DAVIS WRIGHT TREMAINE

WINS IMPORTANT VICTORY IN LOS ANGELES SUPERIOR COURT-JUDGE DISMISSES DEFAMATION LAWSUIT FILED BY THE GASLAMP KILLER AGAINST RAEAN MEDINA, WHO ALLEGEDLY ACCUSED HIM OF RAPE

LOS ANGELES, March 2018: The Davis Wright Tremaine team of John LeCrone, Karen Henry, and Paul Rodriguez has won an important victory in Los Angeles Superior Court on behalf of a young woman who was sued for defamation by an international music star for allegedly accusing him of rape.

William Bensussen, a producer and DJ who goes by the name The Gaslamp Killer, sued our client and a second woman, both of whom, he alleges, accused him of raping them after they met at a private party at the Standard Hotel in Los Angeles. Bensussen sued both women for defamation and the Davis Wright Tremaine team filed an anti-SLAPP motion on Ms. Medina's behalf.

In a ruling issue issued March 7, 2018, Judge Joanne O'Donnell granted our client's anti-SLAPP motion, finding that "Medina's allegedly defamatory statement was made in connection with an issue of public interest, violence against women" and therefore fell squarely under the protections of the California anti-SLAPP statute. Judge O'Donnell also found that Mr. Bensussen could not establish a probability of prevailing on his claim against our client. Judge O'Donnell dismissed the claim against Ms. Medina with prejudice. The ruling gives Ms. Medina the right to recover her attorney fees.

"This is a very important victory," said Ms. Henry, who drafted and argued the anti-SLAPP motion. "Many men accused of rape or sexual assault/harassment leverage the judicial system to silence their victims. Filing defamation claims against victims who speak out about their experience threatens the victims with years of stressful and expensive litigation. In many cases, the victims are forced to relent because they simply cannot afford to defend themselves against their alleged rapists, who generally have more resources and influence. This dynamic forces victims into the shadows and effectively muzzles them. Our team is privileged to have played a role in making sure that at least one victim's voice is heard."

For additional information visit www.dwt.com

HOGAN LOVELLS

ADVISES PSIVIDA CORP ON ITS ACQUISITION OF ICON BIOSCIENCE AS IT REBRANDS AS EYEPOINT PHARMACEUTICALS

PHILADELPHIA, 04 April 2018: Hogan Lovells advised pSivida Corp. on its acquisition of Icon Bioscience, Inc. as part of its rebranding initiative into EyePoint Pharmaceuticals, Inc. pSivida, which officially became EyePoint on 29 March 2018, is a specialty biopharmaceutical company that develops and commercializes ophthalmic products. Icon is also a specialty biopharmaceutical company whose flagship drug, DEXYCU™, is administered at the end of ocular surgery to treat postoperative inflammation.

pSivida has entered into an agreement with EW Healthcare Partners and a third party investor, which will make equity investments in pSivida of up to approximately US$60.5 million. pSivida has also entered into a US$20 million senior secured, non-dilutive term loan agreement with SWK Funding LLC, a subsidiary of SWK Holdings. This transformative merger with new partnerships, combined with the rebranding initiative, strengthens pSivida's position as a fully integrated specialty biopharmaceutical company. This transaction involved a Hogan Lovells cross-border team consisting of lawyers from our Corporate, Finance, Government Regulatory, and IPMT practices in our Philadelphia, New York, Northern Virginia and Perth offices.

The Hogan Lovells team was led by Philadelphia-based Corporate partner Steve Abrams. Corporate partners Matthew Johnson, John Duke, Adam Bellack and Daniel Davidson advised on the transactions with senior associate Stephen Nicolai and associates John Siemann and Julian Wang. Finance partner Ned Purdon and Counsel Lindsey Owings advised on the debt transaction with senior associate Cheli Bleda Drew and associate Stephanie Lipscomb. The team was also supported by Employee Benefits and Executive Compensation partner Martha Steinman and counsel Michael Applebaum; IMPT Partner Cullen Taylor, counsels Joseph Eng and Teresa Lavenue, attorney Denise McNairn, and associates Rachel Eisen and Nadia Aksentijevich; Employment partner Michael DeLarco and Counsel Tao Leung; Antitrust, Competition and Economic Regulation partner Michele Harrington and senior associate Lauren Battaglia; Environmental counsel Seaton Thedinger and associate Marta Orpiszewska; Real Estate senior associate Katie Cooperman; and Government Regulatory partners Stuart Langbein and Susan Lee, senior associate Jason Conaty, and associate Katie Kelly.

For more information, see www.hoganlovells.com

NAUTADUTILH

ASSISTS WITH THE SALE OF FYSICON BV TO CANON MEDIAL SYSTEMS CORPORATION

AMSTERDAM, 06 March 2018: NautaDutilh assisted the sole shareholder with the sale of Fysicon B.V., a leader in healthcare information systems and equipment for obtaining physiological information, to Canon Medical Systems Corporation.

With unique advanced technologies and clinical evidence in the field of hospital IT systems and workflow as the backbone of its business, Fysicon is well-known for developing and manufacturing product families such as cardiovascular monitoring systems and selling them globally. In particular, equipment for reading cardiac waveforms and analyzing cardiac function has been highly evaluated by customers as an advanced product with compact design and intuitive operability.

The team of NautaDutilh that assisted on this deal consisted of Ruud Smits, Rebecca Pinto, Marieke Pols, Pamela Buhrman (Corporate M&A), Sjuul Jentjens en Saskia Bijl de Vroe (Taxation), Jeroen Boelens (Regulatory and IP) and Gijs van Nes en Elias Ram (Employment).

For additional information visit www.nautadutilh.com

SIMPSON GRIERSON

ADVISES OMV ON LANDMARK TRANSACTION IN USD$587M ACQUISITION OF SHELL'S UPSTREAM OIL AND GAS BUSINESS IN NEW ZEALAND

AUCKLAND, 23 March 2018: We're delighted to have advised our long-standing client OMV on its US $578m acquisition of Shell's upstream oil and gas business in New Zealand.

OMV, which operates both upstream and downstream oil and gas businesses around the world, has agreed to buy Shell's upstream business in New Zealand including a 48% interest in Pohokura, the largest gas-producing field in the country, and an 83.75% interest in the Maui gas field.

Partner Dave Trueman led a wide team from across the firm to advise on all aspects of the landmark transaction, including corporate, commercial, tax, competition/regulatory, environmental, superannuation and employment issues.

Key team members included Barney Cumberland (Tax), James Hawes (Corporate), James Craig (Competition), Aimee Sandilands (Corporate), Bronwyn Heenan (Employment) and Joanna Lim (Superannuation).

For additional information visit www.simpsongrierson.com

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Carey

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

TOZZINIFREIRE ADVOGADOS

ALLENDE & BREA

Entry into force of the European General Data Protection Regulation

On May 25, 2018 the "General Regulation of European Data Protection" also known as "GDPR," enacted by the Parliament of the European Union on April 14, 2016, will come into force.

One of the major modifications with respect to the current regulation (Data Protection Directive 95/46 / EC) is that it will be applied extraterritorially. The obligated subjects will be all those companies that process personal data of residents of the European Union, whether the companies are inside or outside the European Union.

Among its provision, the most important ones are: (i) the obligation to obtain the consent of data subjects through intelligible and simple to understand forms; (ii) the obligation to notify any data leaks; and (iii) the right of data subjects to: (a) know if and for what purpose they are processing their respective data; (b) the deletion of your personal data when it so requests; and (c) the possibility of downloading all the personal data that it refers to.

The maximum penalty for non-compliance is the payment of 4% of the total annual business volume or 20 million euros, whichever is greater.

For further information on this topic please contact Juan Martín Allende

back

CLAYTON UTZ

04 APR 2018

NSW closer to ban of unsafe building products and rectification orders, with call for submissions

NSW building owners might soon be issued with rectification orders to redress the risks posed by combustible cladding and other external finishes, with the NSW Government considering a ban on them. If you are the owner of a potentially affected property you should consider making a submission by **23 April 2018**.

New powers to regulate unsafe building products

The Building Products (Safety) Act 2017 (NSW) came into effect on 18 December 2017 and has, as its aim, the elimination of unsafe building products in the construction industry. It authorises the NSW Commissioner of Fair Trading to issue bans in respect of certain products (a "building products use ban") if the Commissioner is satisfied "on reasonable grounds" that the use of that product is "unsafe".

Enforcement authorities are given extensive powers to investigate, assess and order the rectification of buildings in which banned products are present. In addition, heavy penalties of up to $1.1m apply to any person or corporation who uses banned products in a building or represents that such products are suitable for use.

The building products and uses which might now be banned

Before issuing a "building products use ban" the Commissioner may call for public submissions as to whether a particular product ought to be the subject of a ban. This has now occurred, with the Commissioner seeking submissions by **23 April 2018** as to whether a "building product use ban" is warranted on the use of:

- aluminium composite panels (in particular panels containing a polyethylene core);
- polystyrene products; and/or
- other similar substances,

in "any external cladding, external wall, external insulation, façade or rendered finish on a building of 2 or more storeys" and, if warranted, what the "terms" of the ban should be.

In particular, submissions are sought as to whether a ban should:

- apply to all uses of aluminium composite panels containing a polyethylene core, and/or polystyrene products, and/or other similar substances in a building or only to specific uses (and, if so, what uses);
- apply to all buildings or only to specified classes of buildings (and, if so, what classes);
- apply to use by all people or permit use by specified persons or classes of persons (and, if so, what persons or classes);
- apply subject to specified exceptions (and, if so, what exceptions – for example, an exception that permits use of the building product only after a specified test or tests have been conducted and a test report or reports provided to the Commissioner); or
- be subject to conditions (and, if so, what conditions).

How this will affect building owners in NSW

If you are the owner of a building of two or more storeys in NSW and a product the subject of a "building product use ban" is present in that building, you will be at risk of being issued with a "building product rectification order", which would require you to do such things as are necessary to:

- Eliminate or minimise the safety risk posed by the banned product; and/or
- Remediate or restore the building after eliminating or minimising the safety risk.

Importantly, the bans will have retrospective effect; the Building Products (Safety) Act stipulates that it is irrelevant whether a proscribed building product was used in a building **before** the relevant ban came into force.

The financial and legal implications to owners of buildings the subject of a building products use ban cannot be overstated. In addition to potentially material rectification and remediation costs, the presence of a banned product would invariably be problematic in an insurance context, in particular in respect of strata insurance. Undisclosed banned products could lead to the cancellation of policies or coverage being denied, while disclosure could result in the imposition of higher premiums, excesses and more onerous policy exclusions.

What should you do?

Submissions must be made by **23 April 2018** to NCBP@finance.nsw.gov.au. If you are the owner of a potentially affected property you could consider tendering appropriate submissions.

You should otherwise be preparing for the possibility of a product ban, including by referring to the recommendations to owners and strata managers on the NSW Fair Trading website.

RELATED KNOWLEDGE

- Major projects and construction: 5 Minute Fix 01
- Major projects and construction: 5 Minute Fix 06

GET IN TOUCH

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TOZZINIFREIRE
ADVOGADOS

January 24, 2018

Brazil: BPTO launches a pilot project for pre-examination of patent applications without cost

Intellectual Property

A free pilot project of the Brazilian Patent and Trademark Office (BPTO) regarding the pre-examination of certain patent applications began on January 23, 2018. The BPTO's goal is to evaluate the simplification and expediting of technical procedures for the examination of patent applications, aiming to reduce the amount of patent applications (backlog) of the institute, identifying applications that are still of interest to the applicant. Currently, the BPTO has more than 200,000 pending patent applications for examination.

According to the rules of the project, the Brazilian patent applications in which there are corresponding foreign applications, the owner may voluntarily submit to the BPTO, if eligible, adjustments that have already been indicated by other industrial property offices around the world. From this material, the BPTO will publish a pre-examination opinion pointing out previous issues that will be considered in the technical examination of the Brazilian patent application. The publication of the pre-examination opinion does not replace the technical examination opinion, which constitute a later stage, in which there may still be new searches and inclusions of documents considered relevant.

Certain applications excluded from the pilot project are, for example, applications with any other publication of official requirement and proceedings in which, after the request for examination, a new set of claims was submitted voluntarily. Initially 80 patent applications will be analyzed, provided they do not exceed 40 applications per technical division of the BPTO's patent office. The pilot project will run until March 2018.

One of the most sensitive aspects of the pilot project and one that may have its legality questioned is the possibility of shelving the patent application in case a requirement raised in the pre-examination opinion is not fulfilled, since this is a requirement currently not contemplated by the industrial property law (Law No. 9.279/1996).

For more information contact TozziniFreire Partners
Marcela Waksman Ejnisman
Andreia de Andrade Gomes

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Belgium | Luxembourg | Netherlands

Reform of Corporate and Commercial Law in the Benelux

Thursday, 5 April 2018

In recent years, a number of European countries have embarked on sweeping reforms of company law. Indeed, increasing harmonisation of company law at the European level has allowed many Member States to adopt more dynamic policies for the purpose of attracting business.

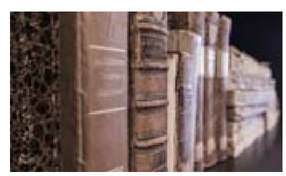
Luxembourg reformed its company law in 2016. The Netherlands and Belgium are in the process of doing likewise.

Much will undoubtedly be written about these reforms in the coming months. Our BeNeLux team is pleased to have this opportunity to explain to you the most important points and guiding principles. We will closely follow further developments and will be sure to keep you informed.

Reform of Belgian Commercial Law: New Rules Applicable as of 1 November 2018

On 29 March 2018, the House of Representatives adopted the previously announced reform of Belgian commercial law. By means of this reform, Belgium bids adieu to the Napoleonic Code. > Read more

The Netherlands: The Modernisation of Company Law Remains a Hot Topic



In October 2012, the Flex BV Act significantly changed the rules applicable to private limited-liability companies (*besloten vennootschap or BV*). Amongst other things, the incorporation procedure was simplified and certain impediments removed, more freedom given to shape the company, and the minimum capital requirement of €18,000 abolished. > Read more

Luxembourg: Major Reform of the Commercial Companies Act in 2016

On 23 August 2016, Bill 5730 amending and modernising the Luxembourg Companies Act of 10 August 1915 entered into force. Companies existing on that date have a period of 24 months to amend their articles in order to comply, to the extent required, with the new provisions. > Read more

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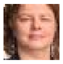

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Reform of Belgian Commercial Law: New Rules Applicable as of 1 November 2018

Thursday, 5 April 2018

On 29 March 2018, the House of Representatives adopted the previously announced reform of Belgian commercial law. By means of this reform, Belgium bids adieu to the Napoleonic Code.

The 19th century notion of merchant or trader (*handelaar/commerçant*) is replaced with the more modern and pragmatic concept of a business (*entreprise*), which will be the guiding tenet of Belgian commercial law, covering the entire spectrum of economic activity.

From a procedural perspective, the commercial courts (*rechtbank van koophandel/tribunal de commerce*) will be known as business courts and will have jurisdiction over all matters of commercial and business law.

The new rules will apply as of 1 November 2018.

Further reforms in the areas of company and civil law will follow.

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Luxembourg

Luxembourg: Major Reform of the Commercial Companies Act in 2016

Thursday, 5 April 2018

On 23 August 2016, Bill 5730 amending and modernising the Luxembourg Companies Act of 10 August 1915 entered into force. Companies existing on that date have a period of 24 months to amend their articles in order to comply, to the extent required, with the new provisions.

Key points of the reform include:

- formalization of a number of mechanisms which were already used in practice, such as voting agreements, the issuance of so-called tracking shares, the suspension of voting rights, lock-up provisions, and the possibility to wind up a company without liquidation under certain conditions;
- creation of the simplified joint-stock company (*société par actions simplifiée*);
- introduction of the possibility for all commercial companies to issue public bonds and convertible instruments; and
- changes to the rules applicable to the private limited-liability company (*société à responsabilité limitée*) and the public limited company (*société anonyme*).

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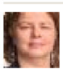

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Netherlands

The Netherlands: The Modernisation of Company Law Remains a Hot Topic

Thursday, 5 April 2018

In October 2012, the Flex BV Act significantly changed the rules applicable to private limited-liability companies (*besloten vennootschap or BV*). Amongst other things, the incorporation procedure was simplified and certain impediments removed, more freedom given to shape the company, and the minimum capital requirement of €18,000 abolished. In addition, the Management and Supervision Act entered into force on 1 January 2013. This act *inter alia* provided an express statutory basis for a one-tier board system within an NV or BV, modified the conflict-of-interest rules, and (for a large NV or BV) limited the number of board positions and set a target of 30% participation by women on the management and supervisory boards.

Modernisation of the rules governing public limited-liability companies (*naamloze venootschap or NV*) is still planned but thus far no bill has been presented. An online consultation was held in 2017 on a bill providing for the mandatory online registration (i.e. dematerialisation) of bearer shares to prevent anonymous transfers.

The statutory rules on partnerships will also be overhauled. According to the 2018 Dutch legislative programme, the new rules will enter into effect on 1 January 2019, but it is doubtful that this deadline will be met given that, to date, no bill has been tabled.

A bill on the management and supervision of legal entities is still pending before the lower house of Parliament. In brief, the purpose of the bill is to harmonise a number of rules applicable to different types of legal entities so that they are in line with those currently applicable to private and public limited-liability companies (the BV and NV).

Finally, the 2017 Dutch coalition agreement states that legislation will be updated to help businesses respond better to social and technological developments through their products and services. In addition, steps will be taken to limit the regulatory and administrative burden on businesses, for example by expanding the current business impact test (used by the Ministry of Economic Affairs to assess proposed new legislation) to include an SME test.

More information on these subjects can be found in our previous newsletters:
- Corporate law-related plans for 2018 in the coalition agreement and state budget
- Corporate law 2.0

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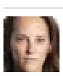

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Upcoming Policy Projects Announced by the Canadian Securities Administrators

April 09, 2018

Written by Will Osler and Kathryn Shaw

The Canadian Securities Administrators (CSA) announced on March 27, 2018, the initiation of six policy projects aimed at reducing regulatory burdens for non-investment fund reporting issuers. The announcement comes after stakeholders had the opportunity to respond and comment on a CSA Consultation Paper released in April 2017.

The new policy projects include:

a. exploring potential alternative prospectus models;

b. facilitating at-the-market offerings;

c. revisiting the primary business requirements;

d. removing or modifying the criteria to file a business acquisition report;

e. revisiting certain continuous disclosure requirements; and

f. enhancing electronic delivery of documents.

The projects are briefly summarized as follows:

Alternative Prospectus Models

The CSA noted in the Consultation Paper that it was considering an alternative prospectus offering model for reporting issuers with disclosure more concise and focused than under the current short form prospectus regime. Stakeholders provided positive feedback and potential alternative offering models will be researched.

Facilitating At-the-Market Offerings

Reporting issuers wishing to conduct an at-the-market offering must obtain exemptive relief from certain securities legislation requirements. This regulatory burden may account for why there are a limited number of these offerings. Stakeholders suggested that codifying the exemptive relief on at-the-market offerings would not compromise investor protection nor the integrity of capital markets.

Revisiting the Primary Business Requirements

The CSA did not identify revisiting the primary business requirements in its Consultation Paper. These requirements relate to the historical financial statement to be included in an IPO prospectus. However, based on feedback from stakeholders, CSA staff will consider ways in which to provide greater clarity for issuers preparing an IPO prospectus.

Removing or Modifying the Criteria to File a Business Acquisition Report

Preparing a business acquisition report requires significant time and cost, and at times the required information may be difficult to obtain. The CSA will explore ways to reduce this regulatory burden, given reporting issuers frequently apply for and are granted certain relief.

Revisiting Certain Continuous Disclosure Requirements

Recurring themes among commenters regarding existing continuous disclosure requirements included eliminating duplicative disclosure, consolidating financial statements, management's discussion and analysis and the annual information form, and examining if the volume of information in annual and interim filings can be reduced.

Addressing these concerns would enhance the usefulness and comprehensibility of information for investors, while also reducing the burden of disclosure on issuers.

Enhancing Electronic Delivery of Documents

The Consultation Paper noted market participants incur significant costs associated with printing and delivering various documents required under securities legislation. Stakeholders were generally supportive of facilitating electronic delivery and switching the default to electronic delivery.

Conclusion

The six projects will be initiated by the CSA in the near term. Projects have different timelines for completion, but at this time, the CSA has not elaborated on such timelines.

The policy projects are in no way a guarantee that the current regulatory regime will undergo any changes. However, the positive response from stakeholders to the Consultation Paper and the initiation of projects signal the CSA's willingness to adapt to changing market conditions, investor demographics, technological innovation and globalization in an effort to reduce regulatory burden for reporting issuers.

Posted on: March 23, 2018

B.C. CANNABIS RETAIL – THE LANDSCAPE FOR LANDLORDS

By: Casey L. Smith

In what was expected to be a close vote, the Senate recently voted to move the proposed federal legislation relating to the legalization of cannabis to committee. What does legalization mean for commercial landlords in B.C.? Leasing to a dispensary, as the B.C. courts recently identified, currently raises a number of legal issues pending the introduction of the federal legislation. Even after federal legislation is introduced, each province will regulate certain aspects of cannabis sales.

In February 2018 the government of BC released the B.C. Cannabis Private Retail Licensing Guide (the “Cannabis Guide”). The Cannabis Guide sets out a framework for the regulation of private retail stores selling cannabis. While the Cannabis Guide sets out the framework for the BC Government’s intentions for the retail cannabis framework, it is subject to legislation to be passed at both the federal and provincial level.

The wholesale distribution of non-medical cannabis will be controlled and managed solely by the Liquor Distribution Branch (“LDB”). In addition to wholesale distribution, the LDB will also operate government-run retail cannabis stores. Cannabis stores will not be permitted to sell any other products, including, perhaps most significantly, any liquor products. The Liquor Control and Licensing Branch (“LCLB”) will be responsible for licensing and monitoring the retail cannabis sector using a mixed public/private model.

Of key importance for commercial landlords in BC that may already be leasing to retail cannabis operations, is the requirement that all retailers will have to apply through the yet to be released government portal for a retail cannabis license. Current retailers of cannabis products will have to apply using the same process as new applicants. Having run an illegal cannabis retail operation will not preclude an applicant from obtaining a legal license.

Similar to applications for liquor licenses through the LCLB, applicants will have to submit to a background check and provide information about the individual(s), corporation(s), society or other legal entity that will run the cannabis retail operation. Details about the proposed location of the retail operation will also have to be provided. In the case of a leased premise, the applicant will have to provide a fully signed lease that does not expire for at least 12 months from the date of license approval.

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After legalization of retail cannabis operations it will be incumbent upon a landlord to ensure that tenants have obtained the required retail license if the landlord wants to have the ability to enforce lease provisions regarding compliance with all applicable laws and obtaining all required permits and licenses. There is a recent decision from the British Columbia Supreme Court, *1028840 B.C. Ltd. v. The Heritage Dispensary Clinic Society*, 2018 BCSC 82 ("Heritage Dispensary") dealing with this specific issue. In Heritage Dispensary, the landlord was successful in terminating the lease with the tenant on the basis of the tenant failing to comply with lease terms regarding compliance with applicable laws and obtaining all required business permits and licenses.

The landlord in Heritage Dispensary had collected rent on a regular basis from the tenant in full knowledge that the tenant was carrying on an illegal marijuana dispensary business. The main issue to be determined was whether the landlord was estopped from terminating the lease due to knowledge that the tenant was operating an unlicensed marijuana dispensary. The court found that the landlord had in the past waived breaches of the lease provisions regarding compliance with laws and obtaining all necessary permits and licenses when it accepted rent payments from the tenant. However, the court also found that such waivers on the part of the landlord are not irrevocable for the duration of the lease. The landlord had in fact continued to accept payment from the tenant after serving notice that the tenant was in breach of the terms of the lease and that the lease was terminated. The landlord had, however, noted on the cheques provided by the tenant that the payment was for "use and occupation." Such notation, in the decision of Justice Kent, was sufficient for the landlord to deny that it continued to accept "rent" payments.

If a commercial lease does not expressly permit the tenant to carry on an illegal retail cannabis operation then it is open to a landlord, even after having accepted payment for rent, to insist that the tenant comply with the lease terms regarding compliance with all applicable laws and obtaining all necessary licenses and permits. As retail cannabis operations are legalized, there will be an extensive process for applicants to obtain the required license from the LCLB. Should a landlord wish to ensure that all laws are complied with and all permits and licenses are obtained by the tenant they should include lease terms that require the tenant to provide copies of all permits and licenses prior to the commencement of the lease term. According to Heritage Dispensary acceptance of rent prior to alleging a breach, in full knowledge of non-permitted or illegal operations, is not an irrevocable waiver, however, it would be prudent to ensure that all permits are in place at the outset of the lease.

While the Cannabis Guide offers a great deal of useful information for potential retail cannabis licensees and their potential landlords, there remain many details to be determined as legislation is introduced and passed at both the federal and provincial level. Landlords with existing or potential retail cannabis tenants are encouraged to read the Cannabis Guide and to stay tuned for further details as the date for cannabis

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legalization nears.

If you have any questions about this particular topic or another Commercial Leasing matter, please contact the Practice Group Leader, C. Nicole Mangan at nmangan@rbs.ca, or the author of this article, Casey L. Smith at csmith@rbs.ca.

/Carey

March, 2018

NEW CHILEAN STATE CORPORATION NAMED INFRASTRUCTURE FUND INC. IS CREATED

On March 24, 2018, a law for the creation of a corporation named “Infrastructure Fund Inc.”, hereinafter the “Fund” was enacted.

Social purpose. The Fund´s purpose is to invest, develop and finance infrastructure projects through non-related third parties as well as the development of its ancillary services.

Contracting schemes. The Fund can only develop infrastructure projects through non-related third parties. The projects can be developed through different mechanisms, being the preferred one, the concession scheme. The projects to be tendered will be governed by the rules of the Public Works Concessions Act.

The concessionaries must be incorporated in Chile as special purpose vehicles and such will be governed under the rules of listed corporations for information disclosure purposes.

Concessions granted by the Fund cannot have a term longer than fifty years.

Equity. The Chilean State will have 99% of the corporation’s equity and the Production Development Corporation (Corfo) will have 1% of the equity.

Administration. The Fund’s administration will be subject, where applicable, to the rules of Title IV of Act 18.046, regarding the administration of publicly held corporations, and the rules of Act 21.082 that will prevail over the others.

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

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PBOC opens the door for foreign payment institutions

23 March 2018

On March 21, 2018, the Chinese central bank and regulator of payment services operators ("PSOs"), the People's Bank of China (the "PBOC") circulated PBOC Announcement No.7 of 2018 (the "Announcement") lifting the de facto but unwritten ban on foreign institutions' accessing the Chinese online payments and settlement market. The move will allow qualifying foreign institutions to provide electronic payments services in respect of both domestic transactions and cross-border transactions, subject to PSO licensing. However, foreign-invested PSOs will be required to localize their data in China. Cross-border transactions initiated by Chinese citizens will now be regulated and will require a license from PBOC, whilst in the past this was an unregulated area.

Analysis

Based on PBOC press release, the Announcement aims to achieve unified market entry standards and regulatory requirements for both domestic payment institutions and foreign payment institutions, extending "national treatment" to foreign players.

Foreign payment institutions intending to provide payment services in China will be required to obtain a Payment Service Operator License ("**PSO License**") from the PBOC. A foreign payment institution will need to establish a foreign-invested enterprise in China to act as the applicant in order to obtain such PSO License, which requires minimum registered capital of RMB 100 million for a national license or RMB30 million for a provincial license. In addition, applicant foreign payment institutions will be required to demonstrate to the PBOC that they have secure operations meeting requisite standards and a disaster recovery system that can independently process payment transactions. It appears that applications for PSO Licenses can be submitted with effect from the date of the Announcement.

In an echo of the preoccupation of various Chinese regulators with data protection, perhaps best exemplified by the implementation of the PRC **Cyber Security Law** in June, 2017, the PBOC requires that personal information and financial data generated or collected in China by PSOs must be stored, processed and analysed within China. Where international transfers of such data are necessary in order to process cross-border transactions, the consent of the data subject will be required, and PSOs transferring data offshore will be required to ensure that parties receiving the data keep it confidential. These echo provisions in the **daft data review measures** (see our client note here) but which proved to be highly controversial and were still not law at time of writing.

In addition to the specific requirements noted above, the operations of foreign-invested PSOs in China will need to meet the same requirements as are currently imposed on domestic capital PSOs, including with respect to corporate governance, operational risk management, safe-keeping of funds and reserve deposits.

Conclusion

The opening of the Chinese payment market has come at a time when domestic champions have already established very strong positions across many sectors of the market (think virtual red packets for example). That said, the lure of a market worth something in the order of RMB 169 trillion in a country where cash payments appear to be losing out to online payments and where it is possible to go for days without spending cash will no doubt be irresistible to many international players; particularly for those with international networks that wish to harness the huge purchasing power of the Chinese middle class both domestically and on trips abroad and which can support a robust cross-border business model.

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BRIGARD& URRUTIA

Latest news regarding the structuration of the first metro line project in Bogota D.C.

Thu, 04/05/2018 - 15:21
NewsFlash: 409

Infraestructura y Servicios Públicos

The Metro Company of Bogotá released an invitation to present an expression of interest for the implementation of the first metro line in Bogota D.C.

On April 3, 2018, the Metro Company of Bogotá S.A. ("EMB" for its Spanish acronym) released an invitation to all the individuals and companies interested in participating in the bidding process (the "Bidding Process") to select the contractor that will be in charge of completing the studies, final designs, financing, construction, supply, tests, operation and maintenance of Section 1 of the first metro line for Bogotá ("PLMB" for its Spanish acronym), so that they express their interest to participate in the Bidding Process.

It is important to underscore that this invitation to present an expression of interest it is not the formal opening of the Bidding Process. Accordingly, the purpose of this invitation is to indicate to the EMB, the Financiera de Desarrollo Nacional (a state development bank) and the structuring experts of the project, which could be the individuals or companies, national or foreign, that would be interested in participating in the Bidding Process.

Additionally, the EMB presented a term sheet (the "Term Sheet") that, for informative purposes only, contains a preliminary description of the enabling conditions that potential bidders must meet, the disaggregation of costs by execution units of the project, the description of the PLMB and the transaction structure for the performance of the PLMB. Among other aspects, it can be underscored from such documents the following:

- The transaction structure consists of a concession contract to be executed between the EMB and a special purpose vehicle (SPV) (the "Concessionaire").

- The Concessionaire will be responsible, at its own risk, for performing the works and other activities necessary for the financing, studies, designs, construction, operation and maintenance of the PLMB, including the supply, operation and maintenance of the rolling stock and the provision of the public transport service in Bogotá.
- The Bidding Process will be ruled by the contracting policies of the Inter-American Development Bank (IDB), in accordance with Art. 20 of Law 1150 of 2007.
- The funds that will be used by EMB to pay the remuneration of the respective Concessionaire will include: (i) direct disbursements provided for in the co-financing agreement executed between the Nation and the District (the "Co-financing Agreement"); (ii) payments with credit resources obtained by the EMB with multilateral, bilateral, ECAs, financial entities and / or with the issuance of securities of the EMB, debt that will be repaid with funds from the Co-financing Agreement, credit operations that will be guaranteed by the Nation; (iii) securities issued by the EMB; (iv) resources derived from the provision of the public transportation service through the PLMB; (v) commercial exploitation resources; (vi) other incomes of the EMB.
- The estimated value of the Concession Contract is equivalent to COP $ 15.5 trillion (approximately USD 5.5 billion).
- In accordance with the preliminary enabling conditions released by the EMB, future bidders must accredit their financial capacity through: (i) a minimum net worth equivalent to COP $ 5.2 trillion (approximately USD $ 1.7 billion); (ii) a net worth of the leader of COP $ 2.5 trillion (approximately USD $ 830 million); (iii) indebtedness capacity for COP $ 4.4 trillion (approximately USD $1.5 billion); (iv) experience in financing projects in private public partnership or concession contracts, having obtained financing for an amount greater than or equal to COP $ 3.28 trillion (approximately USD $ 1.17 billion).
- In relation to the experience that shall be accredited as an enabling condition, potential bidders must certify that they comply with: (i) experience in integration of metro components or systems; (ii) experience in detail engineering; (iii) experience in the performance of civil works; (iv) experience in the manufacture and commissioning of rolling stock; (v) experience in the development and implementation of a signalling system and automatic train control (CBTC - Communication Based Train Control); and (vi) experience in operation.

The individuals and companies interested in the Bidding Process shall submit their expressions of interest no later than May 17, 2018. Once this stage of disclosing information of the project and receiving comments has been completed, the EMB will release a formal invitation to participate in a Prequalification Process (the “PQ Process”). At this stage, the Bidding Process will be formally initiated. Once the evaluation of the bidders responding to the invitation has been made, the "Prequalified List" resulting from the PQ Process will be published and the respective terms of reference of the definitive Bidding Process will be submitted, along with the contract minutes, the annexes, the designs and other appendices, so that all prequalified bidders can prepare and present their corresponding proposal.

The District Administration plans to open the Bidding Process in the third quarter of 2018, a process that will be undertaken throughout the year, foreseeing the start of the construction of the project during the second half of 2019.

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Arias

CR: New tax regulation - Country by country report

Costa Rica is in the process of becoming part of the Organization for Economic Co-operation and Development (OECD); one of the most important aspects of the process is adapting local regulations to comply with the OECD commitments.

Recently, the Ministry of Finance published resolution DGT-R-001-2018, which addresses the disclosure of tax information by companies in Costa Rica, for purposes of the Country-by-Country report (CbC report). The resolution was published in the official newspaper in February 2018.

The resolution states that the parent company of a multinational group resident in Costa Rica or a resident entity of the group, specifically appointed by the multinational group with consolidated group revenue of the equivalent of EUR750m in the Costa Rican currency - presently CRC529.3m (USD924.7m) - must comply with the obligation to file a country-by-country report in line with the rules set out in the resolution. An initial report must be filed by December 31st, 2018.

Additionally, companies that are part of a group or multinational group must notify before the last business day of the current month, to the Tax Authorities, whether the CbC report will be submitted in Costa Rica or in another jurisdiction.

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News

NEWS DETAIL

12/04/2018

Supreme Court Stresses Expats May Only Work on Temporary Contracts, but Surprises Still Possible

A. Introduction

Following our recent legal update on Presidential Regulation No. 20 of 2018, which significantly streamlines the requirements for the hiring of expatriates [click here to view], we have received a number of queries as to the rights and protections afforded to expatriate employees under Indonesian manpower law. In particular, we have been asked whether there is any possibility for an expatriate to be employed on a permanent basis in Indonesia.

B. Fixed-Term versus Permanent Employment Contracts

In response, the first thing to be said is that the relevant legislation (the "**Manpower Law**"[i]) draws a very clear distinction between a permanent employment contract and a fixed-term employment contract ("**FTEC**", also known as a temporary or specific-job contract).

Generally, the Manpower Law expressly discourages temporary employment on the basis of a fixed-term contract by setting strict limits on the amount of time and the types of work for which an employee may be hired on a temporary basis. Conversely, the Manpower Law also makes it impossible for an expatriate to enjoy permanent employee status by expressly providing that an expatriate may only be employed to perform a specific job and that his/her employment may only be on the basis of an FTEC (see Article 42(4) Manpower Law).

Thus, local employees and expatriate employees are treated very differently under the Manpower Law.
Nevertheless, confusion has arisen as to whether an expat can in certain circumstances become a permanent employee. This is because of the Manpower Law's failure to clearly identify:

(1) those of its provisions that apply only to Indonesian employees, those that apply only to expatriate employees, and those that apply to both; and

(2) those of its provisions that apply only to permanent employment contracts, those that apply only to FTECs, and those that apply to both.

In other words, the way in which the Manpower Law is structured and framed has the potential to often leave the hapless reader scratching his/her head in bewilderment.

C. Restrictions on Use of Fixed-Term Contracts

This question of whether or not a provision of the Manpower Law is applicable to both local employees and expatriate employees is particularly important in the case of Article 59, which sets out strict limitations on the use of FTECs.

Essentially, Article 59 provides that a fixed-term contract may only be entered into in respect of work that is intrinsically of a one-off, seasonal or temporary nature, work which it is estimated will be completed within not more than three years, or work that is related to product or process development. A fixed-term contract may not be entered into for work that is intrinsically permanent or recurring in nature.

Further, Article 59 provides that a fixed-term employment contract may be entered into for up to a maximum of two years, which period may be extended once by up to a maximum of one year, or renewed once for a maximum of two years, with a 30-day grace period between the expiry of the first contract and the commencement of the renewed contract. Accordingly, an employee may work for the same employer on a temporary basis for a maximum period of either three or four years depending on the nature of the second contract.

Thus, Article 59 sets restrictions on (1) the type of work that may be performed under a FTEC, and (2) the length of time that a person may be employed in the same job and by the same employer on the basis of a FTEC.

Crucially, Article 59 (7) provides that an FTEC that falls foul of the above restrictions will automatically convert into a permanent employment contract. This conversion occurs by operation of law, meaning that no action needs to be taken by the employee for it to happen.

D. Do Restrictions on Fixed-Term Contracts Also Apply to Expatriates?

So, the big question is whether the restrictions on the use of FTECs and the mandatory conversion provision contained in Article 59 also apply to expatriates? At first sight, they appear to be universally applicable as the article provides for no exemptions. Indeed, the Industrial Relations Court has handed down a number of decisions that held this to be the case. These decisions appear to have aroused hopes that expatriates who have worked for more than three or four years, as the case may be, with the same employer can have their FTECs automatically converted into permanent contracts, and thus be entitled to enjoy all the benefits and protections afforded under the Manpower Law, such as its tight restrictions on termination, paid sick leave for at least 12 months (on a sliding scale from 100% to 50%), severance and service pay entitlements, etc.

Unfortunately (from the expat's perspective), the Industrial Relations Court's decisions referred to above are in a clear minority, and the vast preponderance of the court's rulings have been to the contrary, i.e., that Article 59 Manpower Law does not apply in the case of an FTEC entered into by an expatriate.

E. Supreme Court's Stance

This issue would now appear to have finally been put to bed with the issuance of Supreme Court Circular No. 1 of 2017 (the "**Circular**") on 19 September 2017. A Supreme Court Circular (or *Surat Edaran Mahkamah Agung*) is an instrument that can be used by the Supreme Court to impose a common understanding across the judicial system as regards the interpretation or application of particular aspects of the law.

Section B.2.b.1 of the Circular stipulates, among other things, that:

(a) An expatriate may only be employed in Indonesia on the basis of a specific job and a FTEC.
(b) Only an expatriate employee in respect of whom an Expatriate Employment License ("**IMTA**") has been issued is entitled to enjoy protection.
(c) Upon the expiry of an expatriate employee's IMTA, he/she will no longer enjoy legal protection.

Paragraph (a) simply reiterates what is stated in Article 42(4) Manpower Law. However, paragraphs (b) and (c) are somewhat problematic, even without taking into consideration the changes brought about by Presidential Regulation No. 20 of 2018. For example, what precise type of protection / legal protection is being referred to in paragraphs (2) and (3)? If it is protection under the Manpower law and/or the immigration legislation, then why not simply state this? If we were to interpret these two paragraphs literally, then all forms of legal protection will be withdrawn from an expatriate employee whose IMTA has expired, such as the legal right to protection of property. While this confusion may simply be put down to poor drafting, such negligence can have consequences in Indonesia given the unpredictability of the country's courts.

This unpredictability may also affect the extent to which the Circular is heeded by the courts. Given the long-running and widely acknowledged problem of indiscipline in judicial decision-making in Indonesia, there is no guarantee that it will be faithfully adhered to in all cases. So, it should come as no surprise if decisions emerge in the future that run contrary to its purport.

With regard to the references to an IMTA in paragraphs (b) and (c) above, It should also be borne in mind that, with the issuance of Presidential Regulation No. 20 of 2018, the requirement to obtain a stand-alone IMTA from the Ministry of Manpower in order to employ an expatriate has essentially been replaced by a notification process under which all the prospective employer needs to do is to submit its Expatriate Manpower Employment Proposal (RPTKA) for approval by the Minister of Manpower. Such approved RPTKA then doubles up as an IMTA.

F. ABNR Commentary

As in many other jurisdictions, the rights of expatriate workers in Indonesia are tightly circumscribed. The rules set out in the Manpower Law not only have regard to labor market conditions and the needs of employers, but also take into account socio-cultural realities in Indonesia, where there has long been a fear among sections of the public that the country is on the cusp of being flooded by foreign labor. Given this background, what is surprising is not so much the substance of Circular No. 1/2017 (in so far as it pertains to expatriate manpower), but rather that it took the Supreme Court so long to reiterate that under no circumstances can an expat be employed on the basis of a permanent contract. By Indra Setiawan isetiawan@abnrlaw.com and Teuku Ridzky tamin@abnrlaw.com

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[i] Law No. 13 of 2013 on Manpower / *Undang-undang Nomor 13 Tahun 2013 Tentang Ketenagakerjaan.*

MALAYSIAN COURT ADOPTS THE DOCTRINE OF PRIME NECESSITY

In the recent case of *Labuan Ferry Corporation Sdn Bhd v Chin Mui Kien & Ors & Another Appeal* [2017] 1 LNS 497, the Court of Appeal unanimously applied the common law doctrine of prime necessity, subject to the qualification that the doctrine applies only where no statutes exist to exclude the applicability of the doctrine.

In short, the doctrine of prime necessity means that in the absence of good cause to the contrary, where a business is a monopoly providing an essential service, that business must make the service available to all and at a reasonable price.

BRIEF FACTS

The Plaintiffs were owners or operators of lorries or trailers whose business was to transport goods. The Defendant was the sole operator of ferry services between Menumbok and Labuan under a contract with the State Government of Sabah which prevented the Defendant from unilaterally increasing fares without the prior written consent of the State Government. Although the Defendant's contract with the State Government expired on 20 June 2010, it remained the sole operator of ferry services between the two points until the middle of 2012. The Plaintiffs in both suits complained of the following:

(a) That in January 2011, the Defendant unilaterally and unlawfully increased the charges for its ferry services for a 9-ton laden lorry from RM270.00 to RM1,080.00 for the Menumbok-Labuan route and RM1,120.00 for the Labuan-Menumbok route; and

(b) Due to the Plaintiffs' complaints regarding the increased charges, some Plaintiffs were denied use of the ferry's services leading to the loss of use of vehicles stranded in Labuan.

The Plaintiffs' main argument was that the Defendant, being the sole provider of an essential service, had a duty to ensure the availability of the service to all and charge a reasonable price for that service pursuant to the doctrine of prime necessity. The Plaintiffs' basis for the application of the doctrine as part of Malaysia's common law was its application in the common law jurisdiction of England supported by persuasive decisions from New Zealand and Canada. The doctrine was to be imported by way of section 3(1) of the Civil Law Act 1956 ("Civil Law Act") which states as follows:

"*Section 3. Application of U.K. common law, rules of equity and certain statutes.*

(1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall—

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> (a) *in Peninsular Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956;*
>
> (b) *in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 1 December 1951;*
>
> (c) *in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 12 December 1949, subject however to subparagraph (3)(ii):*

Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary."

The Defendant's position was that the doctrine had no place in Malaysian law as there are in existence written laws that govern the Plaintiffs' claims, namely the Contracts Act 1950 ("Contracts Act"), the Competition Act 2010 ("Competition Act") and the Merchant Shipping Ordinance 1952 ("Merchant Shipping Ordinance").

THE DECISION OF THE HIGH COURT

The High Court held that there was no reason for the non-application of the doctrine in Malaysia and such application was not precluded by any existing legislation. The Defendant appealed.

THE DECISION OF THE COURT OF APPEAL

The Court of Appeal charted the following framework to reach their conclusion. Firstly, the service being considered must be an essential service. Secondly, if there is no statute which deals with or encapsulates the doctrine, it must follow that the doctrine "*shall*" be applied in Malaysia pursuant to section 3(1) of the Civil Law Act, subject to any "*qualifications as local circumstances render necessary*".

In satisfaction of the first limb, the Court of Appeal accepted that the ferry service was indeed an essential service. Unfortunately, the Court of Appeal did not elaborate on the basis upon which the ferry service was found to be essential. Guidance may be sought from the High Court decision (reported in [2016] 1 CLJ 866) where Stephen Chung J was convinced by the following factors:

(1) the Defendant was, at all material times the sole operator and had a monopoly over the ferry services between Menumbok and Labuan;

(2) there is no bridge or land connection or link between the two points; and

(3) such ferry services are essential to trade, commerce and transportation between Labuan and Sabah.

The Court of Appeal then moved on to consider the origin of the doctrine from the 18th century English case, *Allnut v Inglis* (1810) 12 East 527. The doctrine had been laid down as follows:

"*Every man may fix what price he pleases upon his own property or the use of it but if for a particular purpose, the public have a right to resort to his premises and make use of them,* ***and he has a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms …***"

The Court of Appeal then went on to consider section 3(1) of the Civil Law Act and said:

"*It is thus mandatory to apply the common law of England as administered or in force in England on the dates specified in section 3(1)(a)(b)(c) of the Civil Law Act where no provision "has been made … by any written law in force in Malaysia.""*

The Court of Appeal clarified that the "common law" referred to in section 3(1) of the Civil Law Act is the common law of England. Any development in Malaysian common law after the dates specified in the Civil Law Act is entirely in the hands of the Malaysian courts (*Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd* [1990] 1 MLJ 356).

In the opinion of their Lordships, "*the mere existence of the Competition Act, Contracts Act and the Merchant Shipping Ordinance is not key to determining whether the common law doctrine of prime necessity applies to Malaysia. The key to determining the issue is whether the three statutes encapsulate the common law doctrine of prime necessity*."

As none of the three statutes cited by the Defendant contained provisions that regulate the monopoly of essential services, these statutes are not "*other provision … made under any written law in Malaysia*" within the meaning of section 3(1) of the Civil Law Act which have the effect of excluding the application of the common law doctrine of prime necessity.

The Court of Appeal took the view that the object of the Competition Act is to protect the interests of consumers by prohibiting anti-competitive conduct among competitors and not to regulate monopolies of essential products and services. Thus, the Competition Act has nothing to do with the doctrine of prime necessity, which is concerned with the obligation imposed on monopoly suppliers of essential products and services to supply their products and services in consideration for fair and reasonable payments.

Based on the facts and circumstances of the case, the Court of Appeal agreed with the High Court that the doctrine of prime necessity could and did apply. The Court of Appeal also found that the increased fares imposed by the Defendant were excessive and unreasonable in the circumstances.

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CONCLUSION

Although this was not the first time the doctrine has been argued and considered in Malaysia, it marks the very first positive application and acceptance of the doctrine as part of Malaysian common law. The only other reported decision that has considered the doctrine is *Tsen Heng That v Sabah Fish Marketing Sdn Bhd & Ors* [2015] 1 LNS 585, which incidentally was also presided over by Stephen Chung J.

In *Tsen Heng That*, one of the issues raised during an application for an interim injunction was whether the fisheries complex owned by the 1st Defendant was a business invested with the "monopoly of a public privilege". The High Court declined to consider the issue as there was insufficient evidence at that interlocutory stage of proceedings to determine the issue and took the view that it was a matter to be decided at trial. Unfortunately, there is no further reported decision on the outcome of the trial and whether a case for the doctrine was made out or not.

It must be noted that in coming to its decision, the Court of Appeal in *Labuan Ferry* was careful to clarify that there is no statute that they were aware of that deals with the cause of action of the nature brought by the Plaintiffs. Hence, a party who seeks to invoke the doctrine of prime necessity must canvass all available legislation before pursuing an action on this ground lest the cause of action be stymied by an applicable statutory provision.

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Santamarina + Steta

LEGAL UPDATE

March 2018

Amendment to the Mexican Industrial Property Law

On March 13, 2018, an amendment to the Industrial Property Law (the Law) concerning Industrial Designs, Denominations of Origin, and Geographic Indications, was published in the Official Gazette of the Federation.

The amendment will take effect in 30 business days after its publication date, and fundamentally, it comprises the following aspects:

Industrial Designs.

1.- The validity of industrial design registrations was modified, establishing a new validity of five years, which are renewable for successive periods of the same duration, with a maximum limit of twenty-five years, subject to the payment of the respective official fees. The validity of industrial design registrations was formerly of fifteen years, without a possibility to renew.

2.- The concepts of "independent creation" and "signifcant degree" which are extremely important for determining the novelty of an industrial design, are now defined.

3.- The creator of an industrial design is now the "designer", instead of "inventor".

Denominations of Origin and Geografic Indications.

1.- The geographic indications figure was introduced, alluding to the "name of a geographic area, or containing such name, or other indication known for refering to the mentioned area, which identifies a product as originary of the same, when certain quality, reputation or other characteristic of the product is fundamentally attributable to its geographic origin".

2.- The definition of denomination of origin was amended to the "name of a geographic area, or containing such name, or another denomination known for refering to the mentioned area, which serves to designate a product as originary from the same, when the quality or characteristics of the product are due exclusively or essentially to the geographic environment, including natural and human factors, which give reputation to the product".

3.- Common procedures for denominations of origin and geographic indications are established, specifically for the application for protection, the authorization for their use, and the cessation of effects of protection and of authorizations of use.

4.- Denominations of origin and geographic indications protected abroad, are now recognized in Mexican territory.

5.- New administrative infringements and felonies for the invasion and violation of denominations of origin and geographic indications were incorporated.

Other relevant aspects.

1.- Applications for utility models and industrial designs will now be published in the Industrial Property Gazette (the Gazette) as well, once their formal examination has been satisfactorily completed.

2.- Divisional applications for patents, utility models, and industrial designs will also be published in the Gazette.

3.- The right of inventors and designers, to be mentioned as such in the publication of the respective appilactions, as well as in the eventual title, is now recognized as an unwaivable right.

4.- For patent applications, the term for any interested person to file information on whether or not the application meets the patentability requirements provided by the Law, was reduced to two months.

This amendment have a significant impact for all those who own industrial design registrations or applications, since it will be necessary to take certain actions for preserving their rights, and for benefiting from the new legal provisions recently published.

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

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Eight public law trends to watch in 2018

2018 set to be a big year for public law and regulation.

The Labour-led government is creating momentum, with new legislation, significant regulatory and social sector reviews and some key policy changes.

Elsewhere in public law, technology is creating new pressures for government and highlighting the need for some (overdue) changes. Closely related to this, there is also an increased focus on accountability and transparency.

Looking across these changes, here are our top eight public law and regulatory trends for businesses to watch in 2018.

1. An ambitious legislative agenda – with some teething problems

The Government has introduced, in very short timeframes, a raft of new Bills covering areas with complex social and economic implications. The list includes legislation focusing on:

- child poverty reduction, with the Child Poverty Reduction Bill proposing to require governments to set three and 10-year targets on child poverty reduction, and provide updates in each Budget;
- upholding the proportionality of political party representation in Parliament, under the Electoral (integrity) Amendment Bill (aka the 'Waka Jumping Bill');
- decriminalising medicinal use of cannabis;
- reforming employment law by regulating pay and conditions across industries (for more information, see our employment team's FYI here);
- amending the Overseas Investment Act 2005 to restrict overseas investment in residential land, and to bring forestry rights into the scope of the regime;
- amending the State Sectors Act and Crown Entities Act to provide for greater integrity and accountability in the management of the State services (including chief executive pay levels);
- amending the Education Act 1989 to remove the provisions relating to National Standards and the partnership school model (among other things).

The Bills are now before select committees for further consideration, and many are still open for public submissions. Given National's high proportion of membership (with more seats on committees than any other single party), it will be interesting to see if Opposition MPs can exert their influence on some of the more divisive Bills.

The busy agenda and short timeframes promised for enacting new legislation has created some problems for the system charged with bringing the law into force.

- Recently, for example, the Primary Production Committee took the unusual step of notifying interested parties that it is seeking an extension of a report back on the Racing Amendment Bill, because it is awaiting a reply from Racing Minister Winston Peters.
- In the education sector, the Parliamentary Counsel Office recently advised Cabinet that the tight turnaround time for drafting the proposed Education Amendment Bill meant that the Bill would likely require corrective amendments during the select committee consideration.

Given these challenges, we encourage organisations affected by any of these Bills to keep a close eye on developments and be ready to engage with the law reform process as and when necessary. We can assist with submissions or advise on the impact of the proposed changes.

2. A year of review and inquisition

In addition to new legislation, a vast number of inquiries and reviews have been announced – 39 in all in the Government's first five months in office.

Foremost amongst these (and promised as part of the Government's 100-Day Plan) is the Royal Commission of Inquiry into child abuse in State care. Headed by former Governor General Sir Anand Satyanand, the Royal Commission will have a wide scope to cover abuses committed in the 50 years from 1950 to the end of 1999. Consultation on draft Terms of Reference is currently underway and is expected to take around three months to complete. The Inquiry itself is expected to begin considering evidence in mid-to-late 2018.

Other inquiries and reviews in the works include:

- a Ministerial inquiry into mental health, led by former Health and Disability Commissioner Ron Paterson;
- a review of New Zealand's insurance contract law (for more details, see our recent FYI here),
- a public inquiry into the drivers of local government costs and its revenue base;
- a Government inquiry into the fuel pipe outage at Marsden Point; and
- a review of the procedures and organisational culture at the New Zealand Human Rights Commission.

Scale is likely to be a serious issue for the Government if these pending inquiries and reviews are as ambitious as the recent inquiry into water contamination in the Hawke's Bay. If future inquiries make similarly wide-ranging recommendations, a battle of priorities will loom.

3. Going for Zero – Policy change for Carbon and Climate Change

Climate Change Minister James Shaw has indicated that public consultation on a future Zero Carbon Bill will likely begin at the end of May, and has set up an online registration process for individuals and organisations who are interested in being part of the Government's consultation on what the Bill should look like.

It is expected that the Bill will be introduced into parliament by October, and that an independent Climate Change Commission will be formally established to oversee the legislation.

While the idea of a Zero Carbon Act and independent Commission should attract broad support, a number of difficult questions will need to be resolved. This includes how the regime should operate and where the respective responsibilities of government and Commission should lie.

To this end, a report published by Parliamentary Commissioner for the Environment Simon Upton is a timely and useful indicator of what businesses should expect to be included in any proposed legislation. It includes nine recommendations on what the Commissioner sees as some of the more critical elements for the legislation and ensuring a credible Commission is established, including setting effective carbon budgets and a process for climate change adaptation. New Zealand is one of only a small number of OECD countries not to have developed a national adaptation strategy.

4. Privacy – overdue reform but does it go far enough?

This year, privacy should be at the top of every boardroom agenda. Overseas, the controversial use of personal information is firmly in the headlines.

At home, the long-awaited Bill to reform New Zealand's 25-year-old Privacy Act has finally been introduced into Parliament. The Bill replaces the Privacy Act 1993, as recommended by the Law Commission's 2011 review of that Act, and is intended to promote people's confidence that their personal information is secure and will be treated properly in an increasingly digitalised economy.

Among the changes introduced are:

- strengthened cross-border data flow protections;
- stronger investigation powers (the Privacy Commissioner will be able to make binding decisions on complaints about access to information and issue compliance notices);
- a new mandatory reporting regime for data breaches; and
- new criminal offences.

We are keenly tracking the progress of the reforms, and over the coming months we will be discussing important areas of focus in regular updates (the first of which can be read here).

Elsewhere in the privacy sphere, we have been seeing upwards trends in damages awards for privacy breaches, not only in the Human Rights Review Tribunal but also earlier on in the complaints process (with the Office of the Privacy Commissioner recently reporting that nearly half of its cases are being closed through settlements).

With increasing delays and backlogs in the Human Rights Review Tribunal, indications are that aggrieved persons and organisations alike will increasingly look to early resolution through the Privacy Commissioner's office – so much so that the Privacy Commissioner has recently released guidance as to the "value" of a complaint, monetary or otherwise (including anonymised examples of recent settlement figures). The guidance will be a very useful resource for organisations responding to privacy complaints.

5. 'Big data' and cloud computing to be a focal point

The rise in use of 'big data' technologies will continue to present both opportunities and challenges for business and in government in 2018.

In anticipation of this, the Government has recently outlined its priorities across digital technology, media and open government. In addition to modernising the Privacy Act to reflect the way new technologies have changed how personal information is used, the Government has signalled that the establishment of a Chief Technology Officer and Ministerial advisory group is at the top of its list. It has also pledged to review and update a range of other legislation to include the wider effects of digitisation, and introduce a Digital Bill of Rights that will integrate with existing cornerstone legislation such as the Bill of Rights Act, the Crimes Act, the Privacy Act and surveillance legislation.

In terms of developments abroad, the United States Supreme Court recently heard oral arguments in a key cloud computing case (*United States v Microsoft*), concerning the execution of a US search warrant to access personal information held by Microsoft in an Irish data centre.

- This case will examine the cross-border reach of law enforcement agencies and how data protection laws are interpreted, applied and developed.
- It could potentially have significant implications, including for individuals and companies in New Zealand.
- Read the New Zealand's Privacy Commissioner's warning here.

We await the United States Supreme Court's decision with interest.

6. Stronger protections for whistleblowers may be in the works

The Government has recently announced that it is reviewing the protections offered by the Protected Disclosures Act 2000 – the so-called "whistleblower" legislation, designed to encourage people to report serious wrongdoing in their workplaces by providing protection to them when they "blow the whistle". The current legislation is often not fit for purpose and accordingly, not often used.

As part of its review, we expect the Government will be looking at introducing penalties for retaliation against whistleblowing, rewards and compensation for whistleblowing, whether people who blow the whistle on wrongdoing to the media should be protected, and what body could oversee whistleblowing complaints.

An initial discussion document is expected to be put out for public consultation in the coming months.

The review follows a number of high-profile misconduct cases within New Zealand public sector organisations that have led to some suggesting that the law may not be working as effectively as it could, and lags behind international practice in a number of key areas. This prompted the States Services Commissioner, Peter Hughes, to release model standards last year for state sector agencies to follow when employees raise issues of suspected wrong-doing.

7. Proposed changes to NZBORA inconsistency declaration powers

If the government has its way, senior courts will soon have an express statutory right to declare inconsistencies between legislation and the New Zealand Bill of Rights Act 1990 (NZBORA), to better hold Parliament to account.

Cabinet has recently agreed in principle to amend NZBORA to specify that senior courts can make declarations of inconsistency.

So far, this is no more than some recent judicial decisions have permitted. A recent example is the litigation involving serial litigant Arthur Taylor, where the High Court made a declaration that a provision in the Electoral Act 1993 preventing all prisoners from voting was inconsistent with the right to vote protected by NZBORA. In 2017, the Court of Appeal upheld that decision on appeal, commenting that in some situations a declaration of inconsistency may be necessary "... to emphasise that the legislation needs reconsidering or to vindicate the right." Leave to appeal has been granted by the Supreme Court.

What is new, however, is that, in the event of a declaration of inconsistency, Parliament will be required to reconsider the relevant legislation. Parliament would then have the option to either amend or repeal the law, or to retain the status quo.

This further step may be of more practical significance than statutory confirmation that the declaratory power exists. However, whether Parliament will be responsive to declarations of inconsistency remains to be seen.

8. Increased accountability and transparency for public sector organisations

The Government is also considering law changes to control top public sector pay, in response to concerns about the upwards trajectory of chief executive remuneration levels, and the growing gap between staff wages and chief executive pay.

The State Sectors Act and Crown Entities Bill, introduced in February this year, will amend the State Sector Act 1988 and the Crown Entities Act 2004 to provide for greater integrity and accountability in the management of the State services. The proposed changes will include:

- a requirement for boards of statutory entities to obtain written consent from the State Services Commissioner before finalising the employment conditions and remuneration of chief executives (or any subsequent amendments to them);
- expressly enabling the Commissioner to apply a code of conduct to an statutory entity's board and board members; and
- amendments to promote greater consistency in the manner in which inquiries and investigations are conducted by the State Services Commissioner across government.

The Bill is currently before the Select Committee for further consideration.

The move comes after State Services Commissioner recently began identifying crown entity boards who chose not to follow State Services Commission advice with respect to the chief executive's remuneration, warning them that this information could inform Ministers' decisions about the tenure of board members.

Keep in touch

If you are interested in finding our more about any of these developments, please contact us.

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Stricter compliance measures for listed companies

Deadline approaching to submit comments – let us help to get your views heard!

DENTONS RODYK

9 March 2018

The Corporate Governance Council (the CG Council), through its recently issued consultation paper, has proposed amendments to the Singapore Code of Corporate Governance (the CG Code 2012) and the Listing Rules of the Mainboard of the Singapore Exchange Securities Trading Limited (SGX Listing Rules). Accordingly, companies listed on the Mainboard of the Singapore Exchange Securities Trading Limited (Listed Companies) have until 15 March 2018 to submit comments on the proposed amendments.

The proposed amendments would result in stricter compliance measures for Listed Companies, and concern:

1. Director independence & training
2. Remuneration
3. Internal controls & risk management systems
4. Stakeholder engagement

The proposed amended compliance framework for Listed Companies is as follows:

	SGX Listing Rules	*Revised CG Code 2012 (Revised Code)*	*Practice Guidance*
Purpose	**Mandatory Compliance:** Sets out key requirements and baseline market practices	**Comply or Explain:** Provides overarching principles of good corporate governance and actionable steps to guide compliance with such principles	**Voluntary Compliance:** Provides guidance for compliance with the Revised Code as well as setting out best practices
Key Changes	Guidelines in the CG Code 2012 which are considered important requirements or baseline market practices are proposed to be shifted to the SGX Listing Rules for mandatory compliance Key changes are further discussed below	The definition of "comply or explain" should be clarified to strengthen the emphasis on thoughtful and meaningful communication between Listed Companies and their stakeholders Key changes are further discussed below	The introduction of the Practice Guidance is recommended to complement the Revised Code, but is non-binding and will apply on a voluntary basis. 24 prescriptive or less essential details, which are currently contained in the CG Code 2012, are recommended to be incorporated in the Practice Guidance instead

Below, we discuss the key changes that would affect current operations of Listed Companies. If you or your company would like to assess your company's current position or submit comments to the proposed amendments, please reach out to us.

1. Director Independence & Training

Topic	Current Guideline under the CG Code 2012	Will it be mandatory?
"Independent" director ratio on board of directors of the Listed Company (Board)	Guideline 2.1: There should be a strong and independent element on the Board, with independent directors making up at least one-third of the Board.	**Mandatory compliance**: It is proposed that this become a mandatory rule under the SGX Listing Rules, such that independent directors would have to form at least one-third of the Board.
"Independent" director ratio on the Board, where the chairman of the Board (Chairman) is not independent	Guideline 2.2: The independent directors should make up at least half of the Board where: (a) the Chairman and the chief executive officer (or equivalent) (the CEO) is the same person; (b) the Chairman and the CEO are immediate family members; (c) the Chairman is part of the management team; or (d) the Chairman is not an independent director.	**Comply or explain**: It is proposed that this Guideline be revised to provide that independent directors are to comprise a majority of the Board where the Chairman is not independent.
"Independent" director tests	Guideline 2.3: The Board should determine, taking into account the views of the nominating committee, whether the director is independent in character and judgement. The Board should state its reasons if it determines that a director is independent notwithstanding the existence of relationships or circumstances which may appear relevant to its determination. Examples of relationships or circumstances which would deem a director to be not independent are set out in this Guideline. If the Board wishes, in spite of the existence of one or more of these relationships or circumstances, to consider a director as independent, it should disclose in full, the nature of that director's relationship or circumstance and bear responsibility for explaining why that director should be considered independent.	**Mandatory compliance**: The proposed tests for director independence provide that a director will not be considered independent where: (i) he is employed by the Listed Company or its related corporations for the current or was employed in any of the past three (3) financial years; or (ii) his immediate family member is employed by the Listed Company or its related corporations for the current financial year or was employed in any of the past three (3) financial years, and such family member's remuneration was determined by the Listed Company's remuneration committee; or (iii) he is, or has an immediate family member who is, a substantial shareholder of the Listed Company; or *Option (i) – to incorporate the "nine (9) year rule" as a hard limit* (iv) he has served on the Board for more than nine (9) years since the date of the director's first appointment (before or after listing). ***OR*** Option (ii) – *to subject independent directors who would like to serve more than nine (9) years to a two-tier vote*

Topic	Current Guideline under the CG Code 2012	Will it be mandatory?
		(iv) such director has been a member of the Board for an aggregate period of more than nine (9) years before or after listing and his continued appointment as an independent director has not been sought and approved in separate resolutions from: (A) all shareholders; and (B) shareholders excluding any controlling shareholder and associate of the controlling shareholder. The 9-year rule is not a term limit, as it does not prevent an independent director who has served on the Board for nine (9) years, to continue as a non-independent director. Additionally, a transition period of three (3) years is recommended, regardless of which option is adopted, to give companies sufficient time to adjust their Board composition and/or search for new independent directors. The remaining tests of director independence from the CG Code 2012 are proposed to be shifted to the non-binding Practice Guidance.
Shareholding threshold for "independent" directors	Guideline 2.3: An "independent" director is one who has no relationship with the company, its related corporations, *its 10% shareholders* or its officers that could interfere, or be reasonably perceived to interfere, with the exercise of the director's independent business judgement with a view to the best interests of the company.	**Mandatory compliance**: It is proposed that the shareholding threshold in relation to determining director independence be lowered from 10% to 5%, and that this become a mandatory rule under the SGX Listing Rules.
First-time director training	Guideline 1.6: Incoming directors should receive comprehensive and tailored induction on joining the Board, and companies should provide training for first-time director in areas such as accounting, legal and industry-specific knowledge as appropriate, as well as regular training on relevant new laws, regulations and changing commercial risks.	**Mandatory compliance**: It is proposed that this become a mandatory rule under the SGX Listing Rules, requiring any first-time directors to undergo training in the roles and responsibilities of a director.

2. Remuneration

Topic	Current Guideline under the CG Code 2012	Will it be mandatory?
Disclosure on relationship between remuneration and performance	Guideline 9: Every company should provide clear disclosure of its remuneration policies, level and mix of remuneration, and the procedure for setting remuneration, in the company's Annual Report.	**Comply or explain**: It is proposed that this Guideline be revised to provide for Listed Companies to disclose the relationship between remuneration and value creation. In particular, the proposed revised Principle provides that the company be transparent with its remuneration policies, and, among other things, its procedures for setting remuneration, and the relationships between remuneration, performance and value creation.
Remuneration of employees who are, or directly related to, substantial shareholders	Guideline 9.4: For transparency, the annual remuneration report should disclose the details of the remuneration of employees who are immediate family members of a director or the CEO, and whose remuneration exceeds S$50,000 during the year. This will be done on a named basis with clear indication of the employee's relationship with the relevant director or the CEO. Disclosure of remuneration should be in incremental bands of S$50,000. The company need only show the applicable bands.	**Comply or explain**: It is proposed that this Guideline be revised to provide for Listed Companies to disclose the names and remuneration of employees who are substantial shareholders or immediate family of substantial shareholders (in addition to employees who are immediate family members of a director or the CEO, as in the CG Code 2012), where such remuneration exceeds S$100,000 during the year (revised from S$50,000 currently), in bands no wider than S$100,000 (revised from S$50,000 currently).

3. Internal Controls & Risk Management Systems

Topic	Current Guideline under the CG Code 2012	Will it be mandatory?
Disclosure on internal controls and risk management systems	Guideline 11.3: The Board should comment on the adequacy and effectiveness of the internal controls, including financial, operational, compliance and information technology controls, and risk management systems, in the company's Annual Report. The Board's commentary should include information needed by stakeholders to make an informed assessment of the company's internal control and risk management systems.	**Mandatory compliance**: While the SGX Listing Rules currently require Listed Companies to comment on their internal controls, it is proposed that these rules be amended to enhance disclosures on the adequacy and effectiveness of Listed Companies' internal controls and risk management systems. In particular, there is an additional requirement for disclosure of the Listed Company's weaknesses, and steps to address them.

4. Stakeholder Engagement

It is proposed that a provision be introduced in the Revised Code to provide for Listed Companies to consider and balance the needs and interests of material stakeholders, as well as accompanying provisions setting out expectations for Listed Companies to:

(a) have arrangements to identify and manage relationships with material stakeholder groups;

(b) disclose key focus areas in relation to their management of stakeholder relationships; and

(c) maintain a current corporate website for all stakeholders to stay informed of material updates in a timely manner.

5. Conclusion

Ultimately, the proposed measures would impose stricter compliance requirements for Listed Companies. If you or your company would like to submit comments to the proposed amendments, please reach out to us prior to 15 March 2018. We are also available to help you assess your company's current position and determine the next steps under the proposed amendments.

Dentons Rodyk acknowledges and thanks Sean Gallagher, Julian Foo and Randall Lee for their contributions to the article.

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Intellectual Property Office Amends the Examination Standards for "Patent Term Extension"

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Kate Shu-Yin Chu

The Intellectual Property Office (IPO) announced on December 14, 2017 amendments of Chapter 11, Part II of the Patent Examination Guidelines, entitled "Examination Guidelines for Patent Term Extension." The amendments mainly include the following changes:

1. In the event the name of the market approve holder is inconsistent with that of the patentee, the applicant shall provide documentation that the two are the same legal entity or have an exclusive or non-exclusive authorization relationship. In addition, recordation of the license with the IPO is necessary.

2. The active ingredients in the first market approval shall be determined based on the active ingredient per se rather than the moiety having pharmacological effect (free base). The term "first market approval" means that obtained for the same active ingredient and the same use. In principle, different licenses obtained for different salts, esters or different hydrates of the same chemical moiety shall each be identified as a first market approval.

3. For determination of correlation between the patent scope and the first market approval, the "correspondence" relation originally specified in the Guidelines is redefined as "coverage." The relevant descriptions and examples in the Guidelines are amended accordingly. For the examination of an application for extension, the IPO requires that the active ingredients and use stated in the first license should be covered by the scope of the patent application. In the case of an invention patent for a product, the active ingredient contained in the first market approval should be covered by the scope of the product claims; in the case of a use invention patent, the active ingredients and use stated in the first market approval should be covered by the use claims. In the case of a manufacturing process for a product, the active ingredients contained in the first market approval should be covered by the process claims.

4. It is clarified that the commencement and conclusion dates of the foreign clinical trials are respectively the study initiation and study completion dates defined in the clinical trial report in line with ICH (International Conference on Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use). In the case of applying for extension based on foreign clinical trial periods, the focus of the foreign clinical trial

protocol should be stated, and the study initiation and completion dates as stated in the clinical trial report that conform to the ICH should be recorded as the commencement and conclusion dates of foreign clinical trial.

5. The conclusion of regulatory review of an application for agricultural chemical is redefined as the issue date recorded on the market approval for the agricultural chemical. Moreover, delay during regulatory review attributable to the applicant includes period from the issue date of approval of the "use methods and scopes" of agricultural chemical to completion of documents for regulatory review...

6. The requirement of submitting document(s) regarding allowance of patent term extension in foreign country(ies) is lifted.

7. The following stipulations are added: the period during regulatory review in which an interruption or delay in obtaining a market approval occurs due to "data inconsistent with the criteria for approving a market approval" is attributable to the applicant. In respect of applications for market approval of a drug or agricultural chemical, the documents and regulatory fees required for filing market approval are defined. Any delay during regulatory review in obtaining a market approval due to incomplete data, non-payment of fees, or data not in conformity with the requirements for obtaining a market approval during examination by the Department of Health and Welfare is in principle attributable to the applicant.

8. For an academic clinical trial converted into a clinical trial, the initiation date of the academic clinical trial is taken as the commencement date of the domestic clinical trial.

The IPO plans to announce implementation of the amended guidelines on 1 April 2018. Although the changes to the definition of the first market approval referred to in the preceding paragraph 2 relax the criteria on determination of first market approval, it also imposes a limitation on the scope of extension to the specific ingredients stated in the market approval according to the provisions of Article 56 of the Patent Act. In addition, the update of paragraph 7 may adversely impacts patentees by expanding the explanation of the "periods of delay attributable to the applicant."

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In Re Silver: The Lone Star State Gives Patent Agents a Badge of Privilege

01 April 2018

Firm Thought Leadership

On February 23, 2018 the Supreme Court of Texas concluded [1] that the definition of a "lawyer" – for purposes of the lawyer-client privilege under the Texas Rules of Evidence [2] – is sufficiently broad to encompass some communications between a patent agent and their client. The impact of this decision may reach beyond the Lone Star State, particularly since Texas's Rule 503 is modeled after a version of proposed Federal Rule of Evidence 503.[3] While most other states' courts have not addressed whether such communications are privileged, many states [4] have adopted rules similar to Texas's Rule 503 and thus may also reach a similar conclusion. Because many patent agents do not work under the supervision of an attorney, this development may significantly impact the privilege protection available when using such agents for patent prosecution.[5]

This decision was a reversal of both of the lower courts' rulings [6] that Texas did not recognize a common law patent agent privilege other than where a patent agent acts under the supervision of an attorney. Unlike the lower courts, the Supreme Court of Texas framed the issue not as the creation of a new patent agent privilege, but instead as the determination that the existing lawyer-client privilege extends to patent agents.[7] Because the Supreme Court of Texas agreed that patent agents "are independently providing professional legal services to a client" rather than "just working in the legal field," they must be recognized as "authorized" to "practice law" within the definition of a "lawyer" as set out in the Rules of Evidence.[8] The Court suggested that to hold otherwise could be found to be an unconstitutional violation of the Supremacy Clause.[9] Ultimately, the highest court of Texas returned the case to the trial court with directions to conduct an *in camera* review of the underlying communications.[10]

In re Silver arose from a contract dispute related to two patents directed to a tablet device marketed as the "Ziosk." This stand-alone device allows restaurant-goers to order meals, play games, and pay their checks at their table without interacting with a server. The inventor, Andrew Silver, sold the rights to the invention under a patent purchase agreement ("PPA") to Tabletop Media, LLC for the purpose of commercializing the Ziosk. The PPA contained a provision for the payment of royalties within a period of time after the patents had been granted. Tabletop successfully commercialized the Ziosk – placing the units in many popular restaurants including Chili's, TGI Fridays, Red Robin, and Outback Steakhouse; however, they allegedly failed to make the first royalty payment under the PPA.

Silver had worked with a U.S. patent agent since March of 2010, and together they had successfully obtained more than 30 patents from the United States Patent and Trademark Office ("USPTO"). As related to the Ziosk, Silver consulted with his patent agent while prosecuting the patents, and after realizing litigation with Tabletop was imminent, further sought his patent agent's legal opinion regarding the strengths of his case. Notably, Silver's patent agent did not work under the supervision of a licensed attorney. For this reason, the trial court concluded that the three hundred e-mails between Silver and his patent agent were not protected from discovery by the lawyer-client privilege and ordered their production. Silver then filed a petition for mandamus relief.

The decision by the Texas Supreme Court to find a limited lawyer-client privilege extending to non-attorney practitioners continues a recent trend from other jurisdictions that have found a privilege to exist between clients and patent agents.[11] In the past, lower courts have not been consistent when deciding the issue: some outright rejecting the privilege,[12] some finding privilege only when the agent is working under the supervision of an attorney,[13] and still others simply recognizing the privilege.[14] The USPTO conducted a round table event in early 2015 where a number of organizations strongly favored a clear recognition of a privilege for communications with a patent agent.[15] In 2016 the Federal Circuit held in *In re Queen's University at Kingston* that confidential communications with patent agents are afforded a privilege commensurate with the scope of a patent agent's ability to practice before the USPTO.[16] The Federal Circuit attempted to distinguish the scope of this privilege as applicable only to communications related to those activities of patent agents authorized by Congress.[17] To this end, the Federal Circuit considered the regulations promulgated by the USPTO for guidance.[18] Specifically, the Federal Circuit found that privileged communications should include those that are "in furtherance of the performance of these tasks . . . 'which are reasonably necessary and incident to the preparation and prosecution of patent applications or other proceedings before'" the USPTO.[19]

But what exactly does this now-recognized privilege include? There is still quite a bit of uncertainty left in the wake of these decisions. The Supreme Court of Texas did not provide a clear determination of what falls within the purview of patent agents' authorized activities, electing to avoid any bright line rule.[20] The Federal Circuit in *Queen's* attempted to center the scope of the patent agent privilege around the nonexclusive list of USPTO matters in which a patent agent may participate.[21] The Federal Circuit made an effort to further elucidate the privilege by listing a couple of examples that may fall outside the scope.[22] In his dissent in *In re Silver,* Justice Evans of the Court of Appeals of Texas favored an approach similar to that of the Federal Circuit, offering his opinion that the privilege should be found where a patent agent is "authorized to practice law to the extent of applications and prosecutions of patents."[23] Under this analysis, Justice Evans would apply the lawyer-client privilege to the category of documents falling under "patent prosecution documents" but deny the privilege as to "litigation consultation documents."[24]

These approaches may be helpful with facts that fit neatly within *prosecution* or *litigation* but appear less precise as the permissible activities of a patent agent border on or overlap with those of litigation. For instance, the regulations of the USPTO that the Federal Circuit employed when delineating the scope of a patent agent's scope of privilege include advising a client on "alternative forms of protection which may be available under state law."[25] Likewise, even a patent agent's authority to prepare assignments and other contracts related to patents may not be totally outside the scope of a patent agent's authority as viewed by the USPTO.[26] In the context of reexamination or *inter partes* review – activities where a patent agent may certainly participate and represent a client – a patent agent is authorized to issue a validity opinion to a client.[27] Curiously, advising a client on the scope of privilege afforded to communications with a patent agent may be one of the few activities impermissible for patent agents according to these guidelines.[28]

The Supreme Court of Texas's opinion in *In re Silver* merely posits that "matters outside the agent's authorized practice area *might* not be protected" and does little to clear up any of these outstanding questions.[29] The mechanics of this privilege will likely be left to the lower courts to craft, and a bright line rule may be difficult to construct. If such a patent agent privilege is to exist, patent agents – and more importantly their clients – need certainty in the understanding of this privilege. Certainty will ensure that sensitive communications are made with the full knowledge of potential discovery repercussions. For now, those who consult patent agents without attorney supervision should do so cautiously in the presence of this uncertainty.

[1] In re Silver, 2018 WL 1022470 (Tex. Feb. 23, 2018).

[2] TEX. R. EVID. 503(a)(3) ("A 'lawyer' is a person authorized, or who the client reasonably believes is authorized, to practice law in any state or nation").

[3] Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 236 (1972) (including the definition: "A *'lawyer' is a person authorized*, or reasonably believed by the client to be authorized, *to practice law in any state or nation*.") (emphasis added).

[4] Thirty-eight states, including Texas, have adopted a version of the Uniform Rules of Evidence.

[5] Brief for Houston Intellectual Property Law Association as Amicus Curiae Supporting Relator at 12-13, In re Silver, 2018 WL 1022470 (Tex. Feb. 23, 2018).

[6] In re Silver, 500 S.W.3d 644 (Tex. App. 2016); Tabletop Media, LLC v. Andrew Silver, No. DC-15-02268 (N.D. Tex. filed Oct. 7, 2015) (order ruling that there is no patent agent privilege for discovery purposes in Texas).

[7] In re Silver, 2018 WL 1022470, at *3 (Tex. Feb. 23, 2018).

[8] In re Silver, 2018 WL 1022470, at *9; *See also* In re Queen's Univ. at Kingston, 820 F.3d 1287, 1296 (Fed. Cir. 2016) (interpreting *Sperry v. State of Florida ex rel. Florida Bar,* 373 U.S. 379 (1963) as establishing that "patent agents are not simply engaging in law-like activity, they are engaging in the practice of law itself.").

[9] In re Silver, 500 S.W.3d 644, 649 (Tex. App. 2016) (Evans, J., dissenting).

[10] In re Silver, 2018 WL 1022470, at *14-15 (Tex. Feb. 23, 2018).

[11] In re Queen's Univ. at Kingston, 820 F.3d 1287 (Fed. Cir. 2016); Rule on Attorney-Client Privilege for Trials Before the PTAB, 82 Fed. Reg. 51,570, 51,575 (Nov. 7, 2017) (to be codified at 37 C.F.R. pt. 42).

[12] Joh. A. Benckiser G. m. b. H., Chemische Fabrik v. Hygrade Food Prods. Corp., 253 F. Supp. 999 (D.N.J. 1966); Detection Sys., Inc. v. Pittway Corp., 96 F.R.D. 152, 155 (W.D.N.Y. 1982) ("As a general rule, 'no communications from patent agents, whether American or foreign, are subject to an attorney-client privilege in the United States.'").

[13] *See, e.g.*, Cuno, Inc. v. Pall Corp., 121 F.R.D. 198, 204 (E.D.N.Y.1988); Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 146 (D. Del. 1977).

[14] In re Amplicillin Antitrust Litigation, 81 F.R.D. 377 (D.D.C. 1978); Foseco Int'l. Ltd. v. Fireline, Inc., 546 F. Supp. 22 (N.D. Ohio 1982).

[15] U.S. PATENT AND TRADEMARK OFFICE, SUMMARY OF ROUNDTABLE AND WRITTEN COMMENTS: DOMESTIC AND INTERNATIONAL ISSUES RELATED TO PRIVILEGED COMMUNICATIONS BETWEEN PATENT PRACTITIONERS AND THEIR CLIENTS (2015), https://www.uspto.gov/sites/default/files/documents /Summary%20of%20Privileged%20Communication%20Roundtable.pdf

[16] In re Queen's Univ. at Kingston, 820 F.3d at 1301.

[17] *Id.*

[18] 37 C.F.R. § 11.5(b)(1).

[19] In re Queen's Univ. at Kingston, 820 F.3d at 1301 (citing 37 C.F.R. § 11.5(b)(1)).

[20] In re Silver, 2018 WL 1022470, at *14 ("The client's communications with a registered patent agent regarding matters outside the agent's authorized practice area might not be protected because these communications are not necessarily made to facilitate the rendition of professional legal services.").
[21] In re Queen's Univ. at Kingston, 820 F.3d at 1301-02 (citing 37 C.F.R. § 11.5(b)(1) ("Practice before the Office in patent matters includes, *but is not limited to* . . .") (emphasis added)).
[22] *Id.* (listing "communications with a patent agent who is offering an opinion on the validity of another party's patent in contemplation of litigation or for the sale or purchase of a patent, or on infringement" as not within the scope of privilege.).
[23] In re Silver, 500 S.W.3d 644, 651 (Tex. App. 2016) (Evans, J., dissenting).
[24] *Id.*
[25] 37 C.F.R. § 11.5(b)(1)(i).
[26] In re Queen's Univ. at Kingston, 820 F.3d at 1306-07 (Reyna, J., dissenting) (pointing out that there was more uncertainty in the proposed privilege than the majority admits.); Changes to Representation of Others Before the United States Patent and Trademark Office, 73 Fed. Reg. 47,650, 47,668 (Aug. 14, 2008) ("The Office's long-standing position has been that '[p]atent agents * * * cannot * * * perform various services which the local jurisdiction considers as practicing law. For example, a patent agent could not draw up a contract relating to a patent, such as an assignment or a license, if the state in which he/she resides considers drafting contracts as practicing law.'").
[27] Changes to Representation of Others Before the United States Patent and Trademark Office, 73 Fed. Reg. at 47,670 ("Due to registration to practice before the Office in patent cases, a practitioner may issue a validity opinion in contemplation of filing a request for reexamination."). By extension, this should also apply to *inter partes* review proceedings that replaced *inter partes* reexamination.
[28] In re Queen's Univ. at Kingston, 820 F.3d at 1307 (Reyna, J., dissenting).
[29] In re Silver, 2018 WL 1022470 at *14 (Tex. Feb. 23, 2018) (emphasis added).

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Is OCR Moving the Goal Posts on Vendor Management?

04.04.18
By Adam H. Greene and Rebecca L. Williams

Recent statements at the 27th National HIPAA Summit suggest that the U.S. Department of Health and Human Services (HHS) Office for Civil Rights (OCR) may be changing its position and expecting a greater level of vendor due diligence under HIPAA. Although surprising to many, the HIPAA regulations do not specifically require vendor due diligence or monitoring. Rather, HIPAA requires a business associate agreement (BAA) and that the covered entity take action upon learning of a business associate's pattern of activity or practice in breach of the BAA. The same is true with respect to the relation between business associates and their subcontractors.

Where We Have Been. The Privacy Rule that initially was proposed in 1999 included a requirement that covered entities implement policies and procedures to monitor their business partners and take reasonable steps to ensure their compliance. In the final rule that was issued in 2000, however, HHS changed its position, providing that a covered entity does not need to monitor its business associates or ensure their compliance, but rather needs to take action only upon learning of a violation of a BAA:

> In the final rule, we reduce the extent to which a covered entity must monitor the actions of its business associate and we make it easier for covered entities to identify the circumstances that will require them to take actions to correct a business associate's material violation of the contract, in the following ways. We delete the proposed language requiring covered entities to "take reasonable steps to ensure" that each business associate complies with the rule's requirements. Additionally, we now require covered entities to take reasonable steps to cure a breach or terminate the contract for business associate behaviors only if they know of a material violation by a business associate. In implementing this standard, we will view a covered entity that has substantial and credible evidence of a violation as knowing of such violation. While this standard relieves the covered entity of the need to actively monitor its business associates, a covered entity nonetheless is expected to investigate when they receive complaints or other information that contain substantial and credible evidence of violations by a business associate, and it must act upon any knowledge of such violation that it possesses.

The Privacy Rule includes a requirement to implement reasonable safeguards to protect the privacy of protected health information. Arguably, this could be interpreted to require some level of vendor due diligence and monitoring, but we have not seen evidence that OCR historically has expected more than merely obtaining compliant BAAs and taking action upon learning of business associate non-compliance. OCR has indicated in guidance on cloud computing that the Security Rule requires that a covered
entity include in its risk analysis risks related to business associates, but that is significantly different from a due diligence or monitoring requirement.

Other Agencies' Approaches. OCR's past approach to HIPAA contrasts with other statutory and regulatory approaches. For example, in the Matter of GMR Transcription, the Federal Trade Commission brought a complaint against the company for not taking "adequate measures to monitor and assess whether [a subcontractor] employed measures to appropriately protect personal information." The Massachusetts law governing the security of personal information requires "[t]aking reasonable steps to select and retain third-party service providers that are capable of maintaining appropriate security measures to protect such personal information consistent with these regulations and any applicable federal regulations."

A Changing Position? In a keynote speech at the 27th National HIPAA Summit in March 2017, Serena Mosley-Day, OCR's Acting Senior Advisor for HIPAA Compliance and Enforcement, suggested in her remarks that HIPAA does require a certain level of vendor due diligence. She indicated that a covered entity may not need to perform thorough due diligence, such as reviewing evidence of a compliance program, for a well-known and established cloud services provider. In contrast, she indicated that a covered entity may need to perform due diligence of a lesser known entity, such as a newly established company, to determine that it has appropriate safeguards in place. Mosley-Day highlighted a particular enforcement case, when a covered entity provided protected health information to a person claiming to provide free digital conversion services for radiology images (in exchange for the right to recover the images' silver content) without first obtaining a BAA or doing any due diligence. HIPAA clearly requires a covered entity to enter into a BAA; however, the due diligence obligation is less clear.

Reasonable due diligence and monitoring of business associates always has been a good idea, especially since the Breach Notification Rule, which can lead to a covered entity suffering significant financial and reputational harm due to a business associate's actions. But, historically, due diligence has not seemed to be a requirement under HIPAA. Mosley-Day's informal remarks suggest that this may be changing.

Granted, an agency official's statements at a presentation should not be treated as formal agency guidance. At a future OCR presentation, the agency could take a view more in line with its past policy. But, in the meantime, OCR's recent statements suggest that it may be expecting a greater level of vendor due diligence under HIPAA, where merely obtaining a BAA may not be sufficient.

Next Steps. Where does this leave covered entities and business associates? If they are not already doing so, they should evaluate the existence and effectiveness of their vendor management process. What checks are in place to reduce the risk of providing protected health information to a vendor that does not have adequate privacy and security safeguards? Organizations may wish to take a risk-based approach, determining risk based on factors such as independent assessments, reputation and resources, amount and type of protected health information that will be accessible, and security questionnaires. Organizations then can focus their due diligence efforts on business associates that appear to be higher risk.

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Hogan Lovells

U.S. imposes sanctions on Russian individuals, their companies, and Russian government officials

6 April 2018

Today, the Trump Administration designated multiple Russian targets, including several wealthy individuals and their companies, as Specially Designated Nationals (SDNs). These designations of major companies represent the strongest action to date by the Trump Administration against Russia and will have both symbolic and economic impact. Considering that these newly-designated individuals and entities have extensive business holdings, companies, universities, and other organizations should review the nature and extent of their dealings with them. While certain general licenses for wind down activities were issued, they are limited and have a number of conditions and restrictions.

As of today, the designated individuals and entities have been added to the SDN and Blocked Persons List, administered by the Office of Foreign Asset Control (OFAC) at the Department of the Treasury. Under primary U.S. sanctions, U.S. persons (including U.S. entities) are prohibited from transacting with these individuals and entities, as well as any entity of which they own 50 percent or more, directly or indirectly, even if such entity is not identified on OFAC's SDN list (the same is true if that non-listed entity is owned 50 percent or more in the aggregate by two or more SDNs). All property of any such designated individuals or entities (or non-listed entities who are owned by SDNs as noted above) that is located within the United States or within the possession or control of U.S. persons is blocked and such blocking has to be reported to OFAC within 10 business days.

While the primary prohibitions apply to U.S. persons or activities that have a U.S. nexus (such as USD payments clearing through the U.S. financial system), non-U.S. persons could also face exposure under so-called "secondary" U.S. sanctions if they engage in transactions with these SDNs. Specifically, non-U.S. persons can be targeted for sanctions under relevant executive orders if they are determined by OFAC to have provided "material assistance" to a newly-designated SDN. Non-U.S. persons could also face sanctions exposure, pursuant to Section 228 of the Countering America's Adversaries Through Sanctions Act, (PL 115-44), for facilitating a "significant transaction" with any of these individuals or entities. However, per OFAC FAQ 574 (and as described in FAQs 542 and 545), a transaction would not be considered "significant" and therefore not meet the statutory requirements for the imposition of sanctions, if a U.S. person would not need a specific license from OFAC to engage in it – e.g., if a U.S. person could engage in the activity pursuant to either of the two general licenses issued today by OFAC for certain limited activities, as described below.

OFAC has issued two time-limited General Licenses ("GL 12" and "GL 13") in conjunction with the announced designations to permit certain divestment and wind-down activities in relation to limited subsets of the newly-designated entities. OFAC also issued Frequently Asked Questions (the FAQs) providing guidance on the new sanctions and General Licenses.

Any transactions with the newly-designated entities, or entities of which they control 50 percent or more, which involve U.S. persons, should be reviewed immediately and stopped unless authorized pursuant to GL 12 and 13. U.S. persons also should consider whether they are in possession of any property interests of these SDNs that require blocking and associated filing of blocked property reports to OFAC. Non-U.S. persons should similarly consider whether transactions with the new SDNs create risk of exposure under secondary U.S. sanctions noted above.

Under GL 12, OFAC has authorized most transactions and activities ordinarily incident and necessary to the maintenance of wind down operations, contracts, or other agreements by **5 June 2018 with:**

- AgroHolding Kuban
- Basic Element Limited
- B-Finance Ltd.
- EN+ Group PLC
- JSC EuroSibEnergo
- GAZ Group
- Gazprom Burenie, 000
- Ladoga Menedzhment, 000
- NPV Engineering Open Joint Stock Company
- Renova Group
- Russian Machines
- United Company RUSAL PLC
- Any other entity in which one or more of the above persons own, directly or indirectly, a 50 percent or greater interest

GL 12 does **not** authorize the export of goods from the United States or divestment of debt, equity, or other holdings for an SDN, nor does it authorize payments, directly or indirectly, to these SDNs. Instead, any payments owed to these SDNs can be made under GL 12 by depositing funds in a blocked account at a U.S. financial institution.

Under GL 13, OFAC has licensed all transactions and activities ordinarily incident and necessary to divesting or transferring debt, equity, or other holdings of the following blocked persons to a non-U.S. person by **7 May 2018:**

- EN+ Group PLC
- GAZ Group
- United Company RUSAL PLC

U.S. businesses or individuals that participate in transactions authorized under either GL 12 or 13 are required to file a detailed report with OFAC within 10 business days of the expiration of each license (please note that this reporting obligation is separate from the requirement to file a blocked property report with OFAC, as noted above). These reports under GL 12 or 13 must contain the names and addresses of parties involved in transactions authorized under the GLs, the type and scope of activities conducted, and the dates of each transaction.

Please contact any member of our global sanctions team if you have any questions about these new U.S. sanctions.