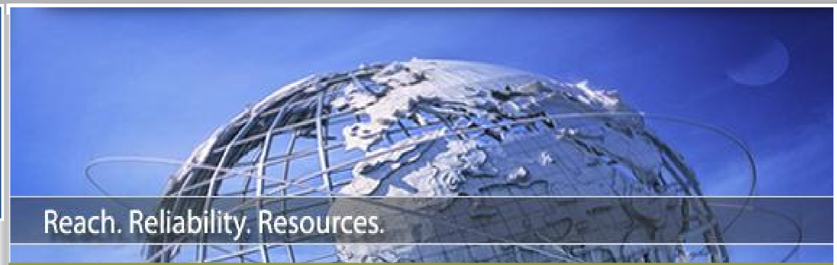
PACIFIC RIM ADVISORY COUNCIL



Pacific Rim Advisory Council
August 2018 e-Bulletin

MEMBER NEWS

►ARIAS Continues Expansion Abroad
►BAKER BOTTS Bolsters Renewables Energy and Environmental Practices
►BENNETT JONES Set to Host 64th International PRAC Conference
►DENTONS RODYK Builds on Corporate Practice Group
►GOODSILL Adds to Trust Group

COUNTRY ALERTS

►AUSTRALIA "Artificial Price" in Market Manipulation - Different Tests for Different Products? CLAYTON UTZ
►BENELUX - Debranding Before Import Not Allowed NAUTADUTILH
►BRAZIL Recent Changes in ANATEL's Rules Aim to Foster Competition in Telcom Market TOZZINIFREIRE
►CANADA What Can Canada Expect with Mandatory Breach Notification BENNETT JONES
►CANADA Are You Ever Off the Clock? Termination for Off-Duty Conduct RICHARDS BUELL SUTTON
►CHILE New Requirement for Producers of Priority Products in Framework of REP Law CAREY
►CHINA Financial Market Liberalization May Trigger Merger Filing HAN KUN
►COLOMBIA Law on the Integral Management of Moorlands BRIGARD URRUTIA
►COSTA RICA Paradigm Shift in Law of International Merchandise Contracts ARIAS
►FRANCE EU The Geo-Blocking Regulation GIDE
►INDONESIA Roll Back Expat Employment Liberalization ABNR
►MALAYSIA Competition Act - From Floriculturists and Barbers to Airlines and Insurers SKRINE
►NEW ZEALAND When is a Consent Application Complete? SIMPSON GRIERSON
►PANAMA International Standards on Transparency and Exchange of Information ARIFA
►SINGAPORE Embracing Assisted Living Model DENTONS RODYK
►TAIWAN Statements Made by the Party in Other Cases Can be Used as Exhibits for Identifying Ordinary Skill LEE & LI
►UNITED STATES IRS Proposes Regulations Interpreting TCJA Amendments to Bonus Depreciation Rules BAKER BOTTS
►UNITED STATES FCC Releases Final Text Expediting Wireline and Wireless Attachments to Utility Poles DAVIS WRIGHT TREMAINE
►UNITED STATES USSC False Statement Render Debt Non-dischargeable GOODSILL
►UNITED STATES Iran Sanctions: Snapback Becomes Reality HOGAN LOVELLS

CONFERENCES & EVENTS

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

Member Hosted Events @ IBA, Rome

65th International Conference
Costa Rica - Hosted by ARIAS
April 6 - 9, 2019

Visit www.prac.org for full details

MEMBER DEALS MAKING NEWS

►ARIAS Advised Ontario Municipal Employees Retirement ("OMERS") in sale of two airports in Costa Rica

►BAKER BOTTS Represents BHP Billiton in Sale of Onshore US Assets

►CAREY Assists Brookfield in financing for Chilean Solar Project

►CLAYTON UTZ Advises Fleetwood Corporation on its $60 million Equity Raising and Acquisition of Modular Building Systems

►GIDE Advises Legrand on the Contemplated Acquisition of a Majority stake in Debflex

►HAN KUN Advises Aurora Mobile Limited on its U.S. initial public offering and listing on NASDAQ

►HOGAN LOVELLS Advises Ironwood Capital in an over US$400 Million Capital Raise

►MUNIZ Assists Compartamos Financiera Issue Inaugural

►NAUTADUTILH Assists Cofinimmo with EUR 155 Million Capital Increase

►SIMPSON GRIERSON Acts for DLF Seeds in Acquisition of PGG Wrightson

►TOZZINIFREIRE Advises Chinese waste-to-energy investor

PRAC TOOLS TO USE

PRAC Contacts PRAC Member Directory Events
Visit us online at www.prac.org

ARIAS CONTINUES EXPANSION ABROAD

July, 2018: Since January 2018, The Firm laid out a clear strategy of innovation and growth, with its sights set on expansion by opening new markets and acquiring new business opportunities outside Central America.

This expansion project began in Canada, given its enormous potential to legally assist local companies looking to invest in the Central American region, as well as Central American investors interested in doing business in Canada. This task was assigned to Zygmunt Brett senior partner of The Firm, known for being a visionary, a leader, and a person of human values. Zygmunt is recognized as a top-tier practitioner by market onlookers, with considerable experience in handling complex multi-jurisdictional transactions. His experience and personal skills made him the right person to lead this project which aims to explore new regions in the future.

As a part of this assignment Zygmunt will attend the 64th international Conference of the Pacific Rim Advisory Council (PRAC) to be held in September in Calgary, as well as the seasonal conference of the New York State Bar Association (NYSBA) during October in Montreal.

For additional information visit www.ariaslaw.com

BAKER BOTTS BOLSTERS RENEWABLES, ENERGY & ENVIRONMENTAL PRACTICES IN SAN FRANCISCO AND NEW YORK

SAN FRANCISCO, 18 July 2018: Baker Botts, L.L.P., a leading international law firm, today announced that Jeffrey M. Kayes and Adam Griffin have joined the firm's Global Projects Department as Partners. Mr. Kayes will be based in San Francisco and Mr. Griffin in New York.

"Jeff and Adam are outstanding lawyers with strong backgrounds in sophisticated energy and renewables project financings, and tax equity transactions, having represented leading developers, private equity sponsors and strategic investors across the country," said Andrew M. Baker, Managing Partner of Baker Botts.

"Jeff and Adam add a wealth of finance and renewables experience to Baker Botts' already deep bench of energy project finance experience. Their presence will allow Baker Botts to expand those skills in an even larger way," said Jason Bennett, Co-Chair of the firm's Global Projects Department.

In joining Baker Botts, Jeff and Adam are once again teaming up with former environmental and energy colleagues Chris Carr and Navi Dhillon, both of whom are based in Baker Botts' San Francisco office. Chris joined the firm in July 2017 and Navi in June 2018.

"In addition to the industry leading expertise that Jeff and Adam bring to the firm, Navi brings extensive experience and a winning record, in complex environmental, energy and land-use litigation and counseling," said Pat Stanton, Partner-in-Charge of the firm's San Francisco office.

"The addition of these three outstanding lawyers really enhances the world class services we are providing clients in all facets of energy, renewables; and environmental matters," added Mr. Baker.

For additional information visit www.bakerbotts.com

BENNETT JONES LLP
CALGARY TO HOST PRAC 64TH INTERNATIONAL PRAC CONFERENCE

Pacific Rim Advisory Council ("PRAC") member firm **BENNETT JONES LLP** will host the 64th International PRAC Conference, September 15-18, 2018 in Calgary, Alberta. Member firm delegates from around the globe will gather in Calgary to participate in the various business sessions featuring topical professional development programs and business development opportunities. Included among the business sessions on tap:

- **Business Session #1** | Country Briefing presented by Bennett Jones LLP
- **Business Session #2** | Opening Keynote Presentation— *Peter Tertzakian, Executive Director of the Arc Energy Research Institute, Chief Energy Economist and Managing Director, ARC Financial Corporation* - *"Why a Playing to Win Mindset is Mandatory in the Energy Arena"*
- **Business Session #3** | PRACtice Development - *"Increasing Challenges Facing the Energy Industry in Alberta & Globally" - Part 1: Energy, Infrastructure, Project Development*
- **Business Session #4** | PRACtice Management - *"Risky Business: Managing Cybersecurity as a Threat and a Practice"*
- **Business Session #5** | PRACtice Management - *"Taking Care of Business: The Evolving Role of Law Firm General Counsel and the Increasing Demands of Outside Counsel Guidelines"*
- **Business Session #6** | Special Guest Presentation - *"Lessons Learned from Both Sides of the Bench" - Up close and personal with one of Canada's former Supreme Court Justices, the Honorable John C. (Jack) Major C.C., Q.C.*
- **Business Session #7** | PRACtice Development *"Recent Developments in International Trade"*
- **Business Session #8** | PRACtice Development - *"Increasing Challenges Facing the Energy Industry in Alberta & Globally" - Part 2: Power and Renewable Energy "The Changing Landscape"*
- **Business Session #9** | PRAC Business Development - *(a) Han Kun—Member Firm Spotlight; (b) Group Roundtables—"Bring a Message"*

Bennett Jones LLP is an internationally recognized Canadian law firm. The firm and the affiliated and associated entities that comprise Bennett Jones have more than 380 lawyers and business advisors and 500 staff in nine Canadian and international offices. We continue to broaden and deepen our representation of clients in key global business centres, and build our profile and relationships around the world. With exceptional experience in complex cross-border and international transactions, the firm is ideally suited to advise foreign businesses and investors with Canadian ventures, and connect Canadian businesses and investors with opportunities in the US, Asia, the Middle East, and around the world.

For more information visit www.bennettjones.com

The Pacific Rim Advisory Council ("PRAC") 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. Since 1984, Pacific Rim Advisory Council (PRAC) member firms have provided their respective clients with the resources of our organization and their individual unparalleled expertise on the legal and business issues facing not only Asia but the broader Pacific Rim region. Whether you are an institutional client or an emerging business our member firms are leaders in their fields and understand your business needs and the complexities of your industry.

With over 12,000 lawyers practicing in key business centers around the world, including Latin America, Middle East, Europe, Africa, Asia and North America, these prominent member firms provide independent legal representation and local market knowledge.

For more information about Pacific Rim Advisory Council or our member law firms, visit us online at www.prac.org

DENTONS RODYK BUILDS ON CORPORATE PRACTICE GROUP

DENTONS RODYK WELCOMES YI JING TEO TO THE FIRM'S CORPORATE PRACTICE GROUP

Dentons Rodyk is pleased to announce that Yi Jing Teo has joined the Firm as a Partner in the Corporate practice group.

Having spent around 15 years in practice, Yi Jing's experience is mainly in corporate finance and mergers and acquisitions. She has been involved with numerous IPOs and other equity capital market transactions such as rights issues and placements.

Yi Jing joins from investment firm Charles-Lim Capital Limited, and was previously with Shook Lin & Bok, and Rajah & Tann. She has worked actively in private equity transactions and also advised on a wide range of general corporate and commercial transactions. Her experience also includes advising on license and regulatory requirements related with the Monetary Authority of Singapore.

For additional information visit www.dentons.rodyk.com

GOODSILL ADDS ASSOCIATE TO TRUSTS, ESTATES AND FAMILY BUSINESS GROUP

HONOLULU, 07 August 2018: Goodsill has added Joelle B. Yamamoto to the Trusts, Estates and Family Business practice group.

Joelle joins the firm as an associate and will concentrate her practice in the areas related to estate planning, probate and trust administration, including will and trust disputes. She is a graduate of William S. Richardson School of Law and has clerked for the Honorable Derrick H. M. Chan during his term as Chief Judge of the First Circuit Court and his subsequent term as Associate Judge of the Intermediate Court of Appeals.

For additional information visit www.goodsill.com

ARIAS

SFC LITIGATION TRUST GRANTED US$2.6 BILLION JUDGMENT

COSTA RICA, April, 2018: Arias Costa Rica advised the Ontario Municipal Employees Retirement ("OMERS"), in their sale of an equity participation in Airports Worldwide, including the sale of two of its most important airports, Aeropuerto Internacional Juan Santamaría and Aeropuerto Internacional Daniel Oduber. Airports Worldwide is a privately-held, multinational company with a successful and proven track record of investments and operations in airports in America and Europe.

Arias participated in all of the stages of sale, including (i) the vendors' due diligence, (ii) documentation drafting and negotiation, (iii) transaction execution and closing,, and (iv) advice on the regulatory approvals, including merger control, where the company sold 48.75% of its participation in Aeropuerto Internacional Juan Santamaría and 45% of its participation in Aeropuerto Internacional Daniel Oduber, this transaction opens the way for the Vinci Airports Company to strengthen its position in Latin America.

Arias Team of advisors to Airports Worldwide (Seller): Andrey Dorado (Partner), Carlos Ubico (Partner), Carlos Camacho (Partner), Tracy Varela (Associate), Alonso Miranda (Associate), and Gloriana Fernández (Associate).

For additional information visit www.ariaslaw.com

BAKER BOTTS

REPRESENTS BHP BILLITON IN SALE OF ONSHORE US ASSETS

HOUSTON, July 26 2018: Baker Botts L.L.P., a leading international law firm, announced today that it has represented BHP Billiton ("BHP") in its binding agreements for the sale of its entire interests in the Eagle Ford, Haynesville, Permian and Fayetteville Onshore US oil and gas assets for a combined base consideration of US$10.8 billion, payable in cash. As noted in the BHP media release - BP America Production Company, a wholly owned subsidiary of BP Plc, has agreed to acquire 100% of the issued share capital of Petrohawk Energy Corporation, the BHP subsidiary which holds the Eagle Ford, Haynesville and Permian assets, for a consideration of US$10.5 billion (less customary completion adjustments). One-half of the consideration is payable at completion, with the balance (deferred consideration) being payable in six equal installments over a six-month period, the first installment to be paid one month after completion. Payment of the deferred consideration is not subject to any conditions.

MMGJ Hugoton III, LLC a company owned by Merit Energy Company, has agreed to acquire 100% of the issued share capital of BHP Billiton Petroleum (Arkansas) Inc and 100% of the membership interests in BHP Billiton Petroleum (Fayetteville) LLC, which hold the Fayetteville assets, for a total consideration of US$0.3 billion (less customary completion adjustments), payable in cash at completion.

Both sales are subject to the satisfaction of customary regulatory approvals and conditions precedent, and we expect completion to occur by the end of October 2018.

"The sale of BHP's subsidiary, Petrohawk Energy Corporation, is one of the most significant transactions in the oil & gas upstream market in a number of years and we are thrilled to be a part of it. Our teams at Baker Botts worked in tandem with BHP's worldwide legal team to prepare for and carry-out the Petrohawk and Fayetteville transactions in order to maximize the value of those deals for BHP and its shareholders. Erin Hopkins, a partner in our Houston office, led the sale of Petrohawk, and Craig Vogelsang, a partner in our Houston office, led the sale of the Fayetteville assets." said Jason Bennett, firmwide chair of Baker Botts' Global Projects Practice and a partner in the Houston office.

BHP will continue to operate the assets until completion and will work closely with the purchaser to ensure a smooth transition of ownership.

For additional information visit www.bakerbotts.com

CAREY

ASSISTS BROOKFIELD IN FINANCING FOR CHILEAN SOLAR PROJECT

Carey in Santiago has helped lender Brookfield Asset Management in mezzanine finance transaction to private equity firm EIG Global Energy Partners and a Chilean subsidiary for the construction and operation of two solar energy plants. The deal closed 03 July.

Brookfield's mezzanine financing means it has the right to convert some of its debt into an equity interest in EIG's Chilean subsidiary, Cerro Dominador, if the borrower is unable to pay the loan back.

The funds will be used by Cerro Dominador for the construction and operation of its two solar energy plants located near the northern port city of Antofagasta. The plants, which have a combined 210-megawatt installed capacity, already have 15-year power purchase agreements.

Counsel to Brookfield Asset Management Carey Partners Juan Francsico Mackenna and Salvador Valdés; counsel Patricia Silberman; and associates Feliciano Tomarelli, Manuel José Barros, Montserrat Godoy and Thomas Sutherland

For additional information visit www.carey.cl

CLAYTON UTZ

ADVISES FLEETWOOD CORPORATION ON ITS $60 MILLION EQUITY RAISING AND ACQUISITION OF MODULAR BUILDING SYSTEMS

Perth, 25 July 2018: Clayton Utz has advised ASX-listed Fleetwood Corporation Limited (Fleetwood) on its $60 million raising via a $22 million placement to sophisticated and institutional investors and a $38 million (1 for 2.9) accelerated non-renounceable entitlement offer, announced to the market today. The raising is fully underwritten by Euroz Securities Limited.

Perth corporate advisory/M&A partner Mark Paganin and special counsel Liz Humphry led the Clayton Utz team, which included lawyer Ben Depiazzi.

The funds raised will be used to fund the acquisitions of Sydney-based modular building manufacturer, Modular Buildings Systems (on which Clayton Utz also advised) and Melbourne-based caravan plumbing and electrical services and parts supplier, Northern RV, as well as working capital requirements.

For additional information visit www.claytonutz.com

GIDE

ADVISES LEGRAND ON CONTEMPLATED ACQUISITION OF A MAJORITY STAKE IN DEBFLEX

PARIS, 24 July 2018: Gide advises Legrand, global specialist in electrical and digital building infrastructures, on the contemplated acquisition of a majority stake in the share capital of Debflex, a French frontrunner in electrical equipment for DIY activities.

Gide's team is led by partner Antoine Tézenas du Montcel, with associate Arthur Debourdeaux, on M&A and stock exchange law aspects, partner Hugues Moreau and associate Sibylle Chomel de Varagnes on real estate aspects, partner Emmanuel Reille and associate Wenceslas Chelini on economic law aspects, partner Caroline Texier and associate François Lépany on restructuring aspects, partner Foulques de Rostolan on labour law aspects and partner Magali Buchert on tax aspects.

For additional information visit www.gide.com

HAN KUN

ADVISES AURORA MOBILE LIMITED ON ITS US INITIAL PUBLIC OFFERING AND LISTING ON NASDAQ

JULY 26, 2018: Han Kun advised and acted as the PRC counsel to Aurora Mobile Limited in its U.S. initial public offering and listing on the NASDAQ Global Market under the stock symbol "JG".

Aurora Mobile Limited is a leading mobile big data solutions provider in China.

For additional information visit www.hankunlaw.com

HOGAN LOVELLS

ADVISES IRONWOOD CAPITAL IN AN OVER US $400 MILLION CAPITAL RAISE

WASHINGTON, D.C., 18 July 2018: International law firm Hogan Lovells advised private equity firm Ironwood Capital in raising over US$400 million for Ironwood Mezzanine Fund IV LP and its affiliated funds (Fund IV), its largest fund raised to date. Fund IV was raised with commitments from over 40 domestic insurance companies, banks, pension funds and other investors.

Fund IV will enable Ironwood to continue investing both subordinated debt and equity in buyouts, growth investments, full and partial recapitalizations, generational transitions and other transactions in support of business owners and sponsors.

Ironwood Capital has worked with Hogan Lovells for over 15 years, and Fund IV is the fifth Ironwood investment fund Hogan Lovells has advised on.

The Hogan Lovells team was led by Investment Funds partner David Winter, senior associate Dele Butler, associate Jyoti Kuvelker, and law clerk Myles Depass. Partner Kurt Lawson and senior associate Laura Szarmach advised on ERISA, partner Aleksandar Dukic advised on International Trade, Securities partner Henry Kahn, and Tax partners Shawna Tunnell and Babak Nikravesh also advised on the transaction. Finance partner Chalyse Robinson and senior associate Nathan Moore advised Ironwood Capital on the capital call facilities for Fund IV.

For more information, see www.hoganlovells.com

MUNIZ

HELPS COMPARTAMOS FINANCIER ISSUE INAUGURAL BONDS

LIMA, 14 June 2018: Muñiz, Olaya, Meléndez, Castro, Ono & Herrera has advised microfinance provider Compartamos Financiera and its arranger BBVA Banco Continental on the bank's first-ever corporate bond issuance.

Compartamos made its first issuance worth 70 million soles (US$21 million) through a public Dutch auction offering on 7 June. This kind of offering means the price is set after all bids are made. The issuance has a fixed rate of 4.8% and matures in two years.

The deal closed on 8 June. The proceeds will be used to diversify the bank's funding sources, decrease costs, and expand services.

Muñiz Partner Andrés Kuan-Veng and associate Rocío Izquierdo acted in the transaction.

For additional information visit www.munizlaw.com

NAUTADUTILH

ASSISTS COFINIMMO WITH EUR 255 MILLION CAPITAL INCREASE

BRUSSELS, 07 July 2018: NautaDutilh assisted its longtime client Cofinimmo (REIT - Euronext Brussels) on its successful EUR 155 mio capital increase with suppression of the preferential rights of the existing shareholders and introduction of priority allocation rights. BNP Paribas Fortis and ING Belgium acted as Joint Global Coordinators.

The transaction has been announced in June 2018 and closed in July 2018.

NautaDutilh's core team consisted of Nicolas de Crombrugghe, Lorraine Vercauteren, Louise-Anne Bertin and Vanessa Uwamahoro.

For additional information visit www.nautadutilh.com

SIMPSON GRIERSON

ACTS FOR DLF SEEDS IN ACQUISITION OF PGG WRIGHTSON'S SEED AND GRAIN BUSINESS

AUCKLAND, 07 August 2018: New Zealand's Simpson Grierson acted for Danish cooperative DLF Seeds in its recently announced purchase of PGG Wrightson's seed and grain business for $421 million.

This sale allows DLF, as the world's leading cool season clover and grass seed company, to strengthen their global customer offering via access to the leading temperate forage seed operation in the Southern Hemisphere.

The deal also includes a long-term distribution agreement and the right for the seed and grain business to continue using the PGG Wrightson name and brands.

Simpson Grierson partner Simon Vannini led the law firm's team on this work, which involved a number of specialists from multiple areas of the firm.

"The complexity of this deal stemmed from the need to deliver ongoing value through the acquisition and resulting partnership of these two companies, that meets both shareholder and regulatory approval," says Vannini.

The law firm advised DLF Seeds on the full range of legal aspects of the transaction, including the Overseas Investment Act and Commerce Act, and negotiations of the transaction documents.

Simpson Grierson also coordinated legal counsel in Australia (Clayton Utz) and Uruguay (Guyer & Regules) and worked closely with DLF's financial and tax advisors (EY).

The sale is subject to the approval of PGG Wrightson shareholders, as well as regulatory approvals.

Simpson Grierson Team acting in the transaction: Partners Simon Vannini, Andrew Matthews, Andrew Harkness, James Hawes, Earl Gray, Greg Towers, John Rooney, Senior Associates Tara Wylie, Rebecca Rendle, Warren Bangma.

For additional information visit www.simpsongrierson.com

TOZZINIFREIRE

ADVISES CHINESE WASTE TO ENERGY INVESTOR

SAO PALO, 22 June 2018: TozziniFreire Advogados has helped Chinese investors Jingjiang buy a majority stake in a project to build Brazil's first waste-to-energy thermoelectric plant.

Seller, Foxx Innova Ambiental, which will continue to hold the remaining 49% of shares. The thermoelectric plant, which will be located in the city of Barueri in São Paulo state, will produce electricity from urban waste material in a process known as waste-to-energy. Thought to be the first of its kind in Brazil, the project is set to receive financing from the IFC and Caixa Economica Federal. Once built, all solid waste produced by the city of Barueri will be delivered to the facility. It will have capacity to receive 825 tons of waste per day and a power generation capacity of 17 megawatts. Awarded to Foxx Innova in 2011 as a 30-year private public partnership concession, the project was delayed due to lack of investment during Brazil's economic crisis.

The Jingjiang deal was signed on 20 April and is expected to close in the third quarter of 2018.

TozziniFreire partner Reinaldo Ma says the project is attracting interest from other municipalities in the region. "The legislation for waste management has become a burden to city administrations because the old landfills need to be closed, so this pioneering project brings a solution which is environmentally attractive for them," he says.

Ma, who co-leads the China desk at TozziniFreire, believes the deal demonstrates Chinese investors' continued appetite for assets in Latin America. "We are seeing new Chinese players in the market – Jinjiang is an example – so we are likely to continue seeing an expansion of Chinese investments," he says.

Counsel to Jinjiang Environment TozziniFreire Advogados Partners Leonardo Miranda and Reinaldo Ma, and associate Vitor Yeung Casais.

For additional information visit www.tozzinifreire.com.br

PACIFIC RIM ADVISORY COUNCIL

UPCOMING EVENTS

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

PRAC 65th International Conference
Cost Rica
Hosted by ARIAS
April 6 - 9, 2019

Open to Member Firms only

www.prac.org

PRAC EVENTS


PRAC 59th
INTERNATIONAL
CONFERENCE
21 - 24 MAY 2016
PRAC2016
Barcelona
RCD
ROUSAUD
COSTAS
DURAN S.LP


PRAC @ Taipei 2014


PACIFIC RIM
ADVISORY COUNCIL


PRAC @ IPBA Vancouver


PRAC @ Vancouver 2015


PRAC @ INTA San Diego


PACIFIC RIM
ADVISORY COUNCIL
PRAC
SPAULO.17
TOZZINIFREIRE


PRAC @ Brisbane 2015


PRAC @ IPBA Hong Kong


PRAC @ PDAC Toronto 2014

PACIFIC RIM ADVISORY COUNCIL

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 28 top tier independent member law firms.

Since 1984, Pacific Rim Advisory Council (PRAC) member firms have provided their respective clients with the resources of our organization and their individual unparalleled expertise on the legal and business issues facing not only Asia but the broader Pacific Rim region.

With over 12,000 lawyers practicing in key business centers around the world, including Latin America, Middle East, Europe, Asia, Africa and North America, these prominent member firms provide independent legal representation and local market knowledge.

www.prac.org

ABNR COUNSELLORS AT LAW

Davis Wright Tremaine LLP DEFINING SUCCESS TOGETHER

ESTUDIO MUÑIZ MUÑIZ OLAYA MELÉNDEZ CASTRO ONO & HERRERA Abogados

ALLENDE & BREA

DENTONS RODYK

NautaDutilh

GIDE GIDE LOYRETTE NOUEL

Arias

GOODSILL

RICHARDS BUELL SUTTON Established in 1871

ARIFA ARIAS, FABREGA & FABREGA

漢坤律師事務所 HAN KUN LAW OFFICES

Santamarina + Steta

BAKER BOTTS LLP

Hogan Lovells

LEGA ABOGADOS

SKRINE

Bennett Jones

理律法律事務所 LEE AND LI ATTORNEYS-AT-LAW

SyCip Salazar Hernandez & Gatmaitan

Brigard Urrutia

KOCHHAR & CO. ADVOCATES & LEGAL CONSULTANTS

Carey

KIM, CHANG & LEE

Simpson Grierson

CLAYTON UTZ

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

TOZZINIFREIRE ADVOGADOS

CLAYTON UTZ

03 AUG 2018

"Artificial price" in market manipulation – different tests for different products?

BY VINCE ANNETTA AND BRENDAN GROVES*

Following several market manipulation cases under section 1041A of the Corporations Act, its application to different types of financial products is evolving, so caution is needed.

Section 1041A of the Corporations Act 2001 (Cth) prohibits conduct which has, or is likely to have, the effect of creating or maintaining an artificial price for trading in various financial products, including shares and futures. Some considered the relevant test was settled for all financial products following the High Court decision in DPP (Cth) v JM (2013) 298 ALR 615, a case involving ASX-listed shares.

However, a recent Federal Court case demonstrates that the position is more nuanced and evolving, and that the section might apply differently to different financial products (Australian Securities and Investments Commission v Westpac Banking Corporation (No 2) [2018] FCA 751).

To understand the chameleon-like nature of section 1041A requires an appreciation of its evolution.

Section 1041A: an historical analysis

Historically, market manipulation of shares and futures was regulated separately, and the relevant prohibition framed differently for each.

The early futures legislation was similar to the current section 1041A. It prohibited conduct which had, or was intended or likely to have, the effect of creating or maintaining an "artificial price" for dealing in futures contracts on a futures market. The explanatory memorandum and commentary at the time supported the notion that the prohibition was concerned with attempts to manipulate futures prices by manipulating supply and demand for the physical commodities deliverable under futures contracts. This required economic analysis in two separate markets.

In contrast, the early prohibition in respect of shares involved less complex concepts: it forbade persons from increasing, decreasing, maintaining or stabilising the price of shares for the purpose, or with the intention, of inducing others to buy, sell or subscribe for shares.

Section 1041A brought together the regulation of shares and futures, adopting the language of the former futures legislation.

The High Court test for section 1041A

In JM, the prosecution alleged that the defendant purchased shares in a listed company to maintain the share price in order to avert a margin call. The case raised for determination whether the term "artificial price" in section 1041A was an economic concept, as was considered to be the case in respect of futures.

In a cautious judgment the High Court stressed the need to assess each case on a fact-specific basis, given the wide range of financial products governed by section 1041A. Subject to that qualification, and in respect of listed shares, the High Court rejected the notion that section 1041A concerned only economic misconduct, noting that to read section 1041A as being concerned solely with transactions effected from a position of monopoly or dominant power would give the provision little work to do in respect of shares listed on the ASX, particularly in light of the takeover provisions in the Corporations Act which proceed from the premise that monopoly of, or dominance over, the market on the ASX for shares in a particular listed company can be achieved only by making a successful takeover for that company (or under an applicable exception).

The High Court held that in respect of listed shares, the price resulting from a transaction undertaken for the sole or dominant purpose of setting or maintaining price at a particular level is an "artificial price" for the purposes of the section.

The High Court emphasised that it was not necessary nor appropriate for it to comment on whether the test might apply differently in respect of other financial products such as futures, noting that unlike shares, futures have a secondary market: the market for the underlying physical commodity.

Which market?

In the recent Federal Court case, ASIC alleged the defendant contravened section 1041A by undertaking certain transactions in the bank bill market, which affected other financial products, namely bank bill futures, interest rate swaps and cross-currency swaps. However, there was no evidence of any conduct or effect in the other markets, so ASIC failed in its contention.

This highlights the need to carefully consider the particular financial product in question, as alluded to by the High Court in the JM case, and shows that section 1041A cannot be applied on a global basis.

The need for caution

No doubt the law will become clearer with the passage of time as cases involving different facts and different financial products fall to be decided.

One area requiring clarification is market stabilisation activity following an initial public offering – so-called "greenshoe" support. Such conduct would likely be caught by section 1041A and would need to be undertaken with great caution, having regard to the particular financial products and markets impacted by the activity. Any ASIC "no-action" letter in respect of such conduct would need to be carefully sought on terms which afford maximum protection, noting of course the limitations of such letters.

The need for caution cannot be over-emphasised given that contravention of section 1041A is punishable by civil penalties and imprisonment.

Thanks to Christine Demiris for her help in preparing this article.

GET IN TOUCH

Vince Annetta

PARTNER, MELBOURNE
+61 3 9286 6160
vannetta@claytonutz.com

Brendan Groves

PARTNER, MELBOURNE
+61 3 9286 6934
bgroves@claytonutz.com

CONTACT US

Sydney +61 2 9353 4000
Brisbane +61 7 3292 7000
Canberra +61 2 6279 4000
Melbourne +61 3 9286 6000
Perth +61 8 9426 8000
Darwin +61 8 8943 2555

NautaDutilh

Intellectual Property

Belgium | Luxembourg | Netherlands

Debranding Before Import Not Allowed

Thursday, 02 August 2018

In a recent decision, Mitsubishi v Duma Forklifts and G.S. International (C-129/17), the Court of Justice of the European Union (CJEU) confirmed that 'debranding' products before importing them into the EEA, without the trade mark proprietor's consent, is not allowed.

Facts

The facts of the case can be summarized as follows.

Two Belgian companies, Duma and GSI, purchase MITSUBISHI forklifts outside the European Economic Area (EEA), which they import into the EEA under a customs warehousing procedure. Before doing so, however, they remove from the goods all MITSUBISHI trade marks ('debranding'), make the necessary modifications to render the goods compliant with EU standards, and replace the identification plates and serial numbers with their own signs. Afterwards, the modified goods are imported into and marketed in the EEA.

According to Duma and GSI, Mitsubishi cannot rely on its trade mark rights in relation to the debranded products, as the MITSUBISHI trade mark is no longer affixed to them. Mitsubishi, however, which did not consent to the modification and import of its goods into the EEA, argued that its trade mark rights are adversely affected and started proceedings in Brussels against the two companies. The Brussels Court of Appeal requested a preliminary ruling from the Court of Justice of the European Union (CJEU).

Judgment

The CJEU sided with Mitsubishi and ruled that a trade mark proprietor has the right to oppose the removal by third parties of its trade marks and their replacement with other marks, even if the products formed the object of a customs warehousing procedure, before being imported into and marketed in the EEA.

Trade mark proprietors indeed have the right to control the initial marketing in the EEA of goods bearing their trade marks. If the goods are debranded without their consent, they are unable to control the initial marketing, which adversely affects the trade mark's functions.

The fact that the trade mark proprietor's goods are placed on the market before the proprietor is able to do so while using his trade mark, with the result that consumers become familiar with the goods before associating them with the trade mark, is likely to substantially impede use of the trade mark by the proprietor to acquire a reputation likely to attract and retain consumers or promote sales or as an instrument of commercial strategy.

The CJEU held that Duma and GSI's aim was to circumvent the proprietor's right to prohibit the import of its branded products without its consent, which is contrary to the objective of ensuring undistorted competition.

According to the CJEU, it does not matter that debranding took place when the goods were still under the customs warehousing procedure, since the operation was carried out for the purpose of importing the goods into and placing them on the market in the EEA.

Contact us


Hannes Abraham | Brussels | +32 2 566 8442


Tanguy de Haan | Brussels | +32 2 566 8430


Anne Marie Verschuur | Amsterdam | +31 20 71 71 821


Vincent Wellens | Luxembourg | +352 26 12 29 34

NautaDutilh | Challenge the obvious

International Law Firm | Amsterdam · Brussels · London · Luxembourg · New York · Rotterdam

July 24, 2018

Digital Law

The National Agency for Telecommunications (ANATEL) approved on July 12th, 2018, a new version of the general plan for competition targets. These new rules will be in force for the next four years. The text was under discussion and negotiation since 2016.

The main innovation introduced by these new rules is the creation of four large categories of Brazilian cities according to the level of competition in the telecommunications industry, ranging from highly competitive cities (category 1) to non-competitive cities (category 4). For each category, ANATEL may adopt different regulatory measures to correct the competitive asymmetries, or to encourage competition in the categories in which the provision of services is unfeasible without public policies.

Another innovation brought by the new general competition plan is the legal definition of Small Enterprise Provider (PPP, in Portuguese) as a company that holds a market share of less than 5% of the national retail market of telecommunications, and does not have a relationship with large providers, such as Oi, TIM, NET, Vivo, Claro, among others. Even though no rules with immediate effect have been enacted for the PPPs, the purpose of this definition is to make the regulatory obligations of the PPPs more flexible in the upcoming reviews of ANATEL's rules, in order to foster competition through the deregulation of new and small companies.

Bennett Jones

Blog

What Can Canada Expect with Mandatory Breach Notification?

August 08, 2018

Written by Martin P.J. Kratz QC

November 1, 2018, brings mandatory breach notification to Canada's federal private sector privacy law, the *Personal Information Protection and Electronic Documents Act* (PIPEDA), following Alberta's *Personal Information Protection Act* (PIPA) which has had such a law since 2010.

What can Canada expect to see when the reporting of breaches becomes mandated as opposed to voluntary?

Australia recently implemented a Notifiable Data Breaches (NDB) scheme under Part IIIC of the *Privacy Act* 1988 (Australia) setting out requirements for entities in responding to data breaches. Entities have data breach notification obligations when a data breach is likely to result in serious harm to any individuals whose personal information is involved in the breach. The scope of the Australian system includes Australian Government agencies, larger businesses and not-for-profit organizations, credit reporting bodies, health service providers, and others.

The Office of the Australian Information Commissioner (OAIC) releases quarterly reports which provide a guide to the breaches reported and may be an interesting data point for Canadians to consider as we move towards national mandatory breach reporting. See "Notifiable Data Breaches Quarterly Statistics Report", July 2018, Office of the Australian Information Commissioner.

A preliminary observation is that the number of reported breaches went up in a mandatory system versus the voluntary system. Canada can certainly expect that as well.

The OAIC found for the second quarterly report 242 notifications of data breaches of which 59% were due to malicious or criminal attacks, 36% due to human error and 5% due to system faults. The OAIC noted that attacks included "cyber incidents such as phishing, malware, ransomware, brute-force attack, compromised or stolen credentials and hacking by other means, as well as social engineering or impersonation and actions taken by a rogue employee or insider threat. Theft of paperwork or storage devices was a significant source of malicious or criminal attacks."

The human error incidents were cases such as personal information sent to the wrong recipient by email or mail, unauthorized disclosures and loss of a storage device.

The kinds of personal information involved in the data breaches were:

- 89% contact information, such as an individual's home address, phone number or email address;
- 42% financial details;
- 39% identity information such as information that is used to confirm an individual's identity, such as passport number, driver's licence number, etc.;
- 25% health information;
- 19% tax file numbers (another form of identifier); and
- 8% other sensitive information.

The top industry sectors by notifications in the OAIC report were:

- 49 notifications by health service providers of which 59% were due to human error and 41% due to a malicious or criminal attack;
- 36 notifications in the finance sector of which 50% were due to human error and 47% due to a malicious or criminal attack;
- 20 notifications in the legal, accounting and management services sector of which 30% were due to human error and 60% due to a malicious or criminal attack;
- 19 notifications in the education sector of which 47% were due to human error and 47% due to a malicious or criminal attack;
- 15 notifications in the business and professional association sector of which 20% were due to human error and 73% due to a malicious or criminal attack.

An early lesson is the substantial number of breaches due to human error. These suggest organizations maintain and expand training, policies and procedures to heighten awareness of this preventable risk.

The Australian experience suggests Canadian organizations should review their privacy policies, practices and procedures to firstly minimize the breaches due to human error. Secondly, Canadian organizations should maintain an ongoing awareness of the substantial number of malicious or criminal attacks and implement policies and practices to defend against such attacks, detect them when they occur and minimize the damage caused by such an incident.

It would be helpful to the educational effort in support of preparedness to minimize and mitigate the impact of breaches in Canada if the Canadian Privacy Commissioner's Office considered a similar form of reporting on the breach notifications it receives after November 1, 2018.

RICHARDS BUELL SUTTON
Established in 1871

Are You Ever Off the Clock? Termination for Off-Duty Conduct

By Michelle Quinn 07 August

THE FACTS

In the recent case of *Klonteig v. West Kelowna (District) 2018 BCSC 124*, the BC Supreme Court considered whether the defendant employer had cause to dismiss the plaintiff for conduct which occurred while he was off-duty.

The plaintiff, Mr. Kerry Klonteig ("Mr. Klonteig") was a trained firefighter. In 1995, he became a career firefighter with the City of Kelowna. On June 16, 2008, Mr. Klonteig began working for the City of West Kelowna, then known as the District of Westside (the "District"), as an Assistant Fire Chief. Mr. Klonteig had an unblemished employment record and, according to the District, he was a valued and exemplary employee.

On October 7, 2013, while Mr. Klonteig was returning to his home he was pulled over by the RCMP for suspected impaired driving. He was off-duty at the time. The vehicle which he was driving belonged to the Fire Chief. It had a fleet number on its tailgate, however, it was not decaled and bore no indication that it belonged to the District. After failing two roadside breathalyzer tests, Mr. Klonteig received a 90-day administrative driving prohibition. On the same day, Mr. Klonteig reported the incident to the Fire Chief and human resources.

On October 9, 2013, the District terminated Mr. Klonteig's employment for cause. At the time of his dismissal, Mr. Klonteig had been a firefighter for approximately 23 years.

THE DECISION

In assessing whether the District had just cause to dismiss Mr. Klonteig, the Court outlined (at para. 60) that:

While there is no single test which defines the degree of misconduct that will justify summary dismissal, it is clear that the misconduct must be considered in the context of the circumstances surrounding the misconduct and the nature of the employment relationship. Misconduct arising in one employment context might justify summary dismissal while it will not in a different employment context.

The Court also considered the "principle of proportionality" in which an effective balance is struck between the severity of the employee's misconduct and the sanction imposed.

The Court concluded that the District did not have just cause to dismiss Mr. Klonteig. Mr. Klonteig was not representing the District when he engaged in the conduct that led to the suspension of his licence. There was no criminal conviction. The vehicle he was driving, although belonging to the District, was unmarked and there was no public knowledge of Mr. Klonteig's administrative suspension. There was no evidence before the Court that the public at large would have been offended by Mr. Klonteig's lack of judgment being sanctioned by a lengthy suspension without pay. Further, Mr. Klonteig was not the "public face" of the fire department rather his role was more administrative in nature.

Overall, Mr. Klonteig's off-duty conduct was not prejudicial to the interests or reputation of the District.

Mr. Klonteig was awarded with five months' salary in accordance with his employment contract.

If you have any questions about off-duty conduct please contact any member of the Employment and Human Rights Group.

www.rbs.ca

New information requirement for producers of priority products in the framework of the REP law

July 12, 2018

By Exempt Resolution No. 409/2018 (E.R. 409), the Ministry of the Environment (MMA) has instituted a new information requirement for producers of priority products, in accordance with Law No. 20,920 on Waste Management, the Extended Producer Liability and Recycling Promotion ("Las 20,920").

I. Purpose

The information requirement is part of the drafting process for the corresponding supreme decrees that, in the near future, will establish the goals and obligations associated with each category and subcategory of priority product subject to Law 20,920. According to transitory article 2 of Law 20,920, the MMA may require producers of priority products to provide information regarding priority products present in the national market and the implementation and execution of collection, recovery and disposal activities for priority product waste.

II. Recipients

The information requirement established by E.R. 409 is for producers of the following priority products:

- Lubricant oils
- Electrical and electronic devices
- Medium and large batteries
- Containers and packaging
- Tires
- Small batteries
- Newspapers and magazines

III. Obligation to report

Under this requirement, producers must provide the following information through the Registry of Emissions and Transfer of Pollutants (in Spanish *Registro de Emisiones y Transferencia de Contaminantes* “RETC”):

- Number of priority products present in the national market in 2017
- Collection, recovery and disposal activities executed at their own cost in 2017
- Number of collected, recovered and disposed wastes from priority products in 2017
- Specification as to whether collection and recovery activities are carried out individually or jointly with other producers

IV. Deadlines

The required information must be provided upon registration in the RETC prior to or on August 31, 2018.

V. Practical importance

The specific goals and obligations for each category and subcategory of priority products will be established through the supreme decrees for each category and subcategory of priority products, which are still being drafted by the MMA. In this regard, within the interim period, the MMA is entitled to request the relevant information in order to establish such goals and obligations.

VI. Current status of supreme decrees that establish the goals and obligations associated with the categories and subcategories of priority products

Currently, there are two supreme decrees being drafted that refer to the following priority products: (i) tires and (ii) containers and packaging. Once the preliminary drafts of both supreme decrees have been issued, a public consultation phase will be initiated, during which any natural person or legal entity will be able to present observations on the content of the preliminary drafts and submit the corresponding background information and documentation to justify the observations.

www.carey.cl

HAN KUN LAW OFFICES

Legal Commentary

CHINA PRACTICE • GLOBAL VISION

July 2, 2018

Capital Markets Law

Financial Market Liberalization May Trigger Merger Filing

Ma Chen | Yang TieCheng | Ge Yin | Zheng Ting | Shi Da

On 28 June 2018, the National Development and Reform Commission ("**NDRC**") and the Ministry of Commerce ("**MOFCOM**") jointly issued the *Special Administrative Measures for Foreign Investment Access (Negative List for Foreign Investment Access)* (the "**2018 Negative List**")[1]. The newly published 2018 Negative List officially allows foreign control of securities firms, fund management companies ("**FMCs**"), futures companies and life insurance companies in China, which is widely considered a significant move to further open up China's financial services sector.

China's recent relaxation of foreign investment restrictions in the financial services sector will no doubt increase the number and size of acquisition transactions by foreign financial institutions of Chinese counterparts. Thus far, there have been notably few merger filings in relation to foreign acquisitions of Chinese financial institutions. Will that change? This article will analyze the relevant legal issues relating to merger filings in anticipation of the expected wave of increased foreign investment in China's financial services sector.

a. Merger filing requirements generally

Determination of notifiablity requires a two-step analysis: whether a transaction is a "concentration", and whether it meets certain turnover thresholds. Under the Anti-monopoly Law of the People's Republic of China ("**AML**"), concentrations refer to mergers of undertakings,

[1] 《外商投资准入特别管理措施(负面清单)(2018 年版)》[Special Administrative Measures for Foreign Investment Access (Negative List for Foreign Investment Access) (2018 Version)] (28 June 2018), *available at*: http://www.mofcom.gov.cn/article/b/f/201806/20180602760432.shtml (Chinese)

or the acquisition of control or the ability to exert decisive influence over other business undertakings. The turnover thresholds for merger filings include prior fiscal year aggregate business turnover (RMB 10 billion turnover worldwide or RMB 2 billion turnover in China) and individual business turnover (RMB 400 million turnover in China for at least two undertakings to the concentration). Special rules for turnover calculation are provided for financial institutions (10 times the standard threshold amounts). The time needed to complete a merger control filing varies significantly. Simplified procedure filings may take fewer than two months to clear. Normal procedure filings typically take four to six months, and could take as long as one to two years if there are serious competition concerns. In general, the State Administration for Market Regulation ("**SAMR**") clears most transactions without imposing any conditions. In 10 years of AML enforcement, the merger filing authorities have only issued 38 conditional clearances and only two cases were prohibited (one of them being Coca Cola's acquisition of Huiyuan Juice Company). Failure to report a notifiable transaction leads to fines (22 such cases to date). Theoretically, SAMR can order the unwinding of a transaction that has been closed to restore competition to the status quo ante, but this severe punishment has never before been imposed.

b. Relationship between AML enforcement authorities and industry regulators

SAMR, which is authorized by the AML to review merger filings, is now the only antitrust enforcement agency in China following the recent PRC State Council's institutional reforms. The financial services sector is heavily regulated by the relevant industry regulators, and traditionally these industry regulators have been heavy-handed when reviewing and approving acquisitions by foreign financial institutions of Chinese financial institutions. Traditionally, however, MOFCOM, the predecessor to SAMR, gave great deference to industry regulators with respect to merger filings, especially in regulated industries. There are few precedents in the financial services sector that are instructive about the regulatory boundaries between SAMR and industry regulators. The primary reason is that foreign financial service providers were not previously permitted to take controlling interests in Chinese financial institutions by way of acquisition.

c. The regulatory environment may now change

2018 marks the tenth year since the AML took effect, yet there have been few merger filings concerning foreign investment in the financial services sector. Over the past ten years, there have been only several merger filings that have involved foreign financial institutions acquiring shares of, or setting up a joint venture with, Chinese financial institutions. Examples include Warburg Pincus's acquisition of Fortune SGAM Fund Management Co., Ltd. (美国华平投资有限公司收购华宝兴业基金管理有限公司股权案), as well as the establishment of a joint venture among WL Ross and Co. LLC, Huabao Investment Co., Ltd. and other business operators (WL 罗斯有限责任公司与华宝投资有限公司等经营者新设合营企业案), etc.

This is partly due to the foreign ownership restrictions in respect of financial institutions.

However, it is clear that restrictions on foreign investment in the financial services sector are being relaxed, and it is anticipated that more merger filings will be made by foreign acquiring entities when they take control of Chinese financial institutions as a result of these new regulatory developments.

At the 2018 Boao Forum for Asia on 11 April 2018 (the "**2018 Boao Forum**"), China announced a series of opening-up commitments which offer broader development opportunities to foreign market players in the financial services sector, specifically:

- In the banking industry, China committed to (1) removing the limit on foreign ownership in commercial banks and offering equal treatment for foreign banks and domestic banks; (2) allowing foreign banks to open both subsidiaries and branches in China in parallel; and (3) substantially expanding the business scope of foreign-invested banks.
- In the securities industry, China committed to raising the limit on foreign ownership in securities firms up to 51%, and to removing this limit after three years. The permitted scope of business of foreign controlled securities firms will also be expanded in incremental steps.
- In the funds industry, China committed to raising the limit on foreign ownership in FMCs up to 51%, and to removing this limit after three years.
- In the futures industry, China committed to raising the limit on foreign ownership in futures companies up to 51%, and to removing this limit after three years.
- In the insurance industry, China committed to raising the limit on foreign ownership in life insurance companies up to 51%, and to removing this limit after three years.

Following the official announcement of these commitments at the 2018 Boao Forum, we have observed that some commitments have already been fulfilled by way of regulatory changes. For example, we have discussed the raising of foreign shareholding limit in securities firms to 51% in one of Han Kun' s previous articles, "*China to Allow Foreign Control of Securities Firms: CSRC Officially Promulgates Measures for Administration of Foreign Investment in Securities Firms*"; in addition, on 28 April 2018, the Chinese regulator also confirmed that it now permits foreign investors to hold 51% stakes in FMCs in China, and the shareholding cap of 51% will eventually be removed in 2021[2]. Other opening-up measures in the financial services sector have also entered the planning or consultation stage, such as in the futures and insurance industries.

Further, according to the 2018 Negative List jointly issued by NDRC and MOFCOM as we have

[2]《证监会新闻发言人就〈外商投资证券公司管理办法〉答记者问》 [News Briefing by CSRC on the Release of Measures for Administration of Foreign Investment in Securities Companies] (28 Apr. 2018), *available at:* http://www.csrc.gov.cn/pub/newsite/zjhxwfb/xwdd/201804/t20180428_337508.html (Chinese).

mentioned above in the *Executive Summary*, the previous requirements have been removed on the holding of a relative majority of shares by Chinese parties in securities firms, FMCs, futures companies and life insurance companies, which means that, effective 28 July 2018, foreign investors will officially be allowed to take controlling stakes of up to 51% in the these four types of financial institutions, and the 51% limit will be further removed by 2021.

As reported by the media, some international financial institutions have kicked off their initial communications with the regulators or have even submitted applications to take majority control of domestic financial institutions either by way of acquisition or by capital increase.

d. Possible strategies for foreign acquirers in relation to merger filings in China

Some acquirers prefer not to submit merger filings for business reasons. To achieve this objective, an acquirer must structure the transaction in a way so that it is not legally required to submit a merger filing. In minority acquisition transactions, this typically means veto rights are significantly watered down so that the acquirer only obtains veto rights associated with the protection of its minority interest, which does not result in the acquirer gaining control and thus the acquisition does not constitute a concentration transaction. If a foreign investor now takes a controlling interest in a domestic financial institution, this "dancing around the veto rights" approach may not work for outright acquisition of control transactions because it is clear that the acquirer will have obtained control of the target company by its 51% shareholding in the target financial institution. However, with respect to existing foreign minority joint venture financial institutions where the minority shareholder has significant veto rights, there may be room to argue that the quality of control by the foreign investor has not improved in a substantive way, because the shareholding increase from a minority to 51% does not in fact give the foreign investor increased control over the target company. Please contact us for specific legal advice on structuring transactions to suit your business needs or those of your clients.

e. Consequences for failure to file

SAMR may impose administrative penalties in cases of failure to submit merger filings or closing the transaction before obtaining clearance. The most frequent penalty is a fine, which is currently capped at RMB 500,000, with account taken of the nature, extent, and duration of the violation. For serious violations, SAMR also has the authority to order firms to dispose of shares, assets, and businesses to restore competition to the status quo ante, although none of these measures have been taken against an undertaking to date. During a SAMR failure to file investigation, refusal or obstruction of the investigation can lead to fines or even criminal charges. Refusal and obstruction typically include refusal to provide materials and information, the provision of false materials and information, or the concealment, destruction or transfer of evidence.

Concluding Remarks

The financial services sector in China is dominated by Chinese financial institutions. Foreign-invested companies have played only a minor role to date and have taken relatively little market share, even in specialized industry sub-segments. With the upcoming relaxation of foreign investment restrictions, it is possible that a foreign acquisition in this area could cause serious competition concerns in terms of substantial market share. In addition, antitrust regulators may also consider other factors that may affect competition, such as entry barriers based on technology and knowhow, conglomerate effects (capital availability and customer bases), etc. So far, MOFCOM/SAMR have not indicated how they will review merger filings for acquisition transactions by foreign financial institutions, and it is not clear how much deference SAMR will give to the relevant financial industry regulators. We will certainly see more merger filings as a result of the further opening-up of the financial services sector, and most of these filings may be cleared without conditions under the simplified filing procedure. Until now, foreign investors in the financial services sector have not been accustomed to submitting merger filings for their investments, and it is therefore necessary to be mindful that competition law will come to play a more important role in acquisition transactions as foreign investment restrictions are gradually withdrawn.

Important Notice

This Legal Commentary has been prepared for clients and professional associates of Han Kun Law Offices. Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused. The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases.

If you have any questions regarding this publication, please contact **Mr. YANG TieCheng (8610-85164286; tiecheng.yang@hankunlaw.com)** or **Mr. MA Chen (8610-85255552; chen.ma@hankunlaw.com)** or **Ms. GE Yin** (**8621-60800966; yin.ge@hankunlaw.com**).

Law on the integral management of moorlands in Colombia enacted

09 August 2018

On July 27, 2018, the Colombian Congress issued Law 1930, *"By means of which the general provisions for the integral management of moorlands in Colombia were established"* (the "Law").

The purposes of the Law are the following: (i) define moorlands as strategic ecosystems in Colombia; and (ii) establish the guidelines applicable to their protection. Please find below some of the most relevant matters of the new Law:

1. The Law establishes the principles that are applicable to the management of moorlands in Colombia.
2. The Law defines the following concepts: moorland, traditional habitants of the moorlands and differential approach.
3. The Law establishes that the Ministry of Environment and Sustainable Development (the "MADS") will delimit the moorlands based on: (i) the area of reference of "Instituto de Investigación de Recursos Biológicos Alexander Von Humboldt" at scale 1:25.000 or any other available; and (ii) the studies of the environmental regional authority.
4. The Law prohibits the development of several activities in moorlands, including mining and hydrocarbon´s exploration and exploitation.

5. The Law establishes that the regional environmental authorities will have a maximum term of four years, since the delimitation of moorlands, to issue the applicable management plan . Said management plans will require a future projection of at least 10 years, with updates every five years. The MADS will issue the terms of reference for said plans in a maximum term of one year since the issuance of the Law.

6. The Law establishes that the relevant environmental authorities should conduct all necessary steps to re-organize the private property that is currently located within the areas of moorlands in a term of five years as of the date of the Law.

7. The Law establishes that the relevant environmental authorities must carry out programs to replace and restructure agricultural activities that cause significant impacts and traditional mining that is being developed in moorland areas before 16 June 2011.

8. The Law establishes strategies to manage the moorlands with a demographic approach, considering the traditional inhabitants of the moorlands.

9. The Law establishes several provisions to channel financial resources to ensure moorlands' protection. Among said provisions it is important to outline the modification of previous provisions related to: (i) the distribution of contributions made for the generation of owned energy by the companies that generate hydroelectric energy (above 10.000 KV); (ii) the new allocation of the resources that come from the fees that are established for the use of water and the national carbon tax.

10. The Law recognizes ecotourism as a social and finance strategy for the protection of moorlands.

Finally, the national government should issue the regulation applicable to the Law within a maximum term of 12 months.

The Law will be in force from the date of its promulgation.

For more information visit us at www.bu.com.co

PARADIGM SHIFT IN THE APPLICABLE LAW OF INTERNATIONAL MERCHANDISE CONTRACTS

Costa Rica will become the 89th State to enforce the United Nations Convention on Contracts for the International Sale of Goods. Law No. 9421 will come into effect this coming August, this law will change the country's legal landscape that governs the international sales of goods.

The Convention brings together a series of accepted international standards regarding the main obligations of the seller and the buyer in an international sale. The purpose of this convention is to reduce uncertainty and provide assurance to companies when signing contracts with parties from other countries, through a uniform system of rules.

The CISG can be applied directly or indirectly; directly and automatically in all contracts for the sale of merchandise, between parties that have their establishments in at least two countries that are part of the Convention. Its indirect application occurs when the regulation is explicitly stated as the governing rule.

If you would like more information on this new regulation, please do not hesitate to contact us.

DIEGO GALLEGOS
Senior Counsel
diego.gallegos@ariaslaw.com

FELIPE VOLIO
Paralegal
felipe.volio@ariaslaw.com

THE GEO-BLOCKING REGULATION

With a view to help implement the Digital Single Market, regulation no. 2018/302 was published in the Official Journal on 2 March 2018. This Regulation, also termed "Geo-blocking Regulation", aims to address unjustified geographical blocking.

As a reminder, this Regulation follows on from an initiative of the European Commission, which had observed during its investigations into e-commerce that the level of cross-border transactions was relatively low within the EU in comparison with other economic areas, such as the United States.

The purpose of this Regulation is to limit, as far as possible, the artificial partitioning of the internal market based on national borders, and thus offer customers the possibility of enjoying a wider range of products in the best conditions of sale, all the while preventing discrimination based on nationality, place of residence, or any other information indicating the physical location of customers such as IP address, delivery address, language or Member State in which the payment instrument was issued.

The practice of geo-blocking, or geographical blocking, refers to economic operators using online websites (or applications) to:

- block or limit access to their online interface by customers from other Member States of the European Economic Area who wish to make a purchase on such interface;
- offer different general conditions of access to customers from other Member States of the EEA, without objective justification.

1. SCOPE OF THE REGULATION

The Geo-blocking Regulation applies to the sale of cross-border goods or services within the EEA. It does not apply to:

- audio-visual content (including sports broadcasts which are provided on the basis of exclusive territorial licences),
- retail financial services, including payment services.

This Regulation applies to the relations between sellers and end-users, be they companies or customers, unless such companies or customers purchase the good with a view to subsequent resale, transformation or rental.

Recital 16 of the Regulation states that brands will be allowed to continue to organise their distribution network via a selective or exclusive distribution system. Economic players will thus be able to further limit the number of products purchased to ensure that their clients purchase these goods for their own private use, rather than for resale.

Equally, the Regulation should not affect agreements restricting active sales within the meaning of Commission Regulation (EU) no 330/2010 (Recital 34), which mostly concerns exclusive distribution agreements.

However, Article 6 of the Regulation provides that agreements restricting passive sales are forbidden, in such a way that provisions preventing a professional from responding to unsolicited requests from customers located outside of its (exclusive) territory are automatically void.

2. FREEDOM OF ACCESS TO ONLINE INTERFACES

The Regulation lays down the two following principles:

- a trader shall neither block, nor limit, by any means whatsoever, access by a customer to an online interface for reasons linked to nationality, place of residence, or place of establishment;
- a trader shall not, for reasons related to a customer's nationality, place of residence or language selection, redirect a customer to a version of such trader's online interface that is different from the online interface to which the customer initially sought access, unless the customer has explicitly consented to such redirection.

And one exception:

- these prohibitions shall not apply where the blocking or limitation of access, or the redirection is necessary to ensure compliance with a legal requirement to which the trader's activities are subject. In such instances, the trader shall provide a clear and specific explanation to customers.

The final version of the Regulation therefore allows freedom of access to an operator's various online interfaces (including all software, websites, applications - including mobile apps - through which it is possible to conduct a purchase).

Nonetheless, the seller is not required to deliver the good to a customer established in another EEA Member State that is not already served by the website. This approach thus takes into account the logistical realities and limitations of economic operators and the difficulties they may encounter when delivering goods to other EEA Member States.

In other words, a consumer residing in Germany could freely browse from a ".de" interface to an ".fr" interface, freely purchase a product on the ".fr" interface, and have the product delivered to Germany either directly by the seller (if the seller already ensures product deliveries in that country), or by a third party. In this latter case, the seller shall bear no extra transport costs for such delivery.

3. NON-DISCRIMINATORY GENERAL CONDITIONS

Article 4 of the Regulation provides that a professional shall not apply different general conditions (price[1], payment conditions, delivery conditions) to a customer for reasons related to a customer's nationality, place of residence or place of establishment:

- when goods are delivered to a location or are collected at a location agreed upon between the trader and the customer in a Member State in which the trader offers such an option in the general conditions of access;
- when the services can be provided electronically;
- when the services, other than electronically supplied services, are requested by a customer for completion in a physical location where the trader operates (e.g. hotel accommodation, car rental, festival tickets etc.).

---

[1] As regards the prohibition on practising different prices, please go to section 4 below.

4. POSSIBILITY OF APPLYING PARTICULAR PRICING CONDITIONS

As regards pricing conditions, the Regulation indicates that rules to access the online interface and the non-discriminatory nature of the general conditions do not preclude traders from offering general conditions of access, in particular net sales prices that are different from one Member State to another, so long as such prices are offered in a non-discriminatory fashion to customers located in a specific country or to certain groups of clients.

The text of the Regulation is not abundantly clear in this regard, but one understands that the legislator wished to leave a certain amount of leeway to online retail sites, enabling them to provide for different general conditions, so long as such differences are justified by objective criteria.

As regards payment means, the Regulation prohibits the application of different conditions to payments made by credit transfer, direct debit or card-based payment instruments within the same payment brand and category, when the requirements in terms of authentication are fulfilled and the payment is completed in a currency accepted by the trader.

5. MONITORING AND ENTRY INTO FORCE

The Member States shall designate one or more bodies in charge of taking effective, dissuasive and proportionate measures with a view to ensuring the Regulation is applied. For France, this role is attributed to the Directorate-General for Competition, Consumer Affairs and Prevention of Fraud (or DGCCRF).

The Regulation with enter into force on **3 December 2018**. In the meantime, we remain at your disposal should you have any queries on this matter.

CONTACTS

ANTOINE CHOFFEL
Partner
choffel@gide.com

THIERRY DOR
Partner
dor@gide.com

FRANCK AUDRAN
Counsel
audran@gide.com

HÉLÈNE VEY-MORIT
Associate
helene.vey-morit@gide.com

ABNR
COUNSELLORS AT LAW

NEWS DETAIL

07/08/2018

Devil's in the Detail: New Regulation Rolls Back Expat Employment Liberalization

A. Introduction

Pursuant to the changes in the expatriate employment rules brought about by Presidential Regulation No. 20 of 2018 ("**PR 20/2018**"), the Ministry of Manpower ("**MOM**") has issued a new implementing regulation (Regulation No. 10 of 2018 / "**MOMR 10/2018**") governing the procedures for the employment of expatriates. The new regulation, which entered into force on 11 July 2018, revokes the previous regulations on the same topic, namely, MOM Regulation No. 16 of 2015 and MOM Regulation 35 of 2015.

While MOMR 10/2018 has clarified some aspects of PR 20/2018, it also gives rise to a number of significant issues that could undermine legal certainty for both expatriates and employers. Accordingly, we focus on these legal-certainty issues in Part B below, while other salient issues are addressed in Part C.

B. Legal Certainty Issues:

1. Divergence between PR 20/2018 and MOMR 10/2018

It is an axiom of the civil law system to which Indonesia adheres that a subordinate or implementing regulation should not substantively diverge from the purport of its superior (or mandating) regulation, and in particular should not impose additional obligations that are not contained in the superior regulation. Nevertheless, despite MOMR 10/2018 being issued as an implementing regulation for PR 20/2018, it imposes significant new obligations that are not mentioned in PR 20/2018. These additional obligations are as follows:

a. New Assessment Process for RPTKA Approval

The first significant divergence between MOMR 10/2018 and PR 20/2018 sees the introduction of a new layer of bureaucracy that is not mentioned in PR 20/2018, namely, the requirement that a "Suitability Assessment" (*penilaian kelayakan*) be conducted before an RPTKA is approved. Such assessment is to be conducted based on the “list of positions” (*daftar jabatan*) maintained by the MOM, presumably meaning that if the position in which the expatriate is to be employed is not listed, then the RPTKA will not be approved. Besides giving rise to additional uncertainty for employers, the Suitability Assessment also has significant implications for the length of time required for approval of the RPTKA. According to PR 20/2018, the RPTKA must be approved by the MOM within a maximum of two days after all of the required documents have been deemed completed. However, MOMR 10/2018 stipulates that the RPTKA must be approved within a maximum of two days after the Suitability Assessment has been successfully completed. As there is no mandatory time limit set for the completion of the Suitability Assessment, this could result in unforeseen delays

b. New Notification Process

One of the major changes that appeared to result from PR 20/2018 was the abolition of the requirement for an employer to obtain an IMTA (Expatriate Employment License / *Izin Mempekerjakan Tenaga Kerja Asing*) from the MOM in order to employ an individual expatriate. This IMTA could only be applied for after the MOM had approved the employer’s RPTKA. While MOMR 10/2018 also no longer requires an employer to obtain an IMTA, it imposes a new obligation on the employer, namely, the requirement to submit an application for what is termed a “notification” (*notifikasi*) after its RPTKA has been approved. Article 1 point 15 of MOMR 10/2018 defines this “notification” as an “approval for the employment of an expatriate that is issued by the Director General of Manpower Supervision and Expansion of Employment Opportunities as the basis for the issuance of a temporary residency permit (*Itas*).” It should be pointed out here that the RPTKA application only contains general information on the employer, while the notification application must set out the full particulars of the expatriate. In reality, this is very similar to what happened under the previous regime: the RPTKA contained the required background information on the employer, while the IMTA application set out the particulars of the expatriate, the position to be filled, and the expatriate’s qualifications.

Essentially, the new notification process seems to be broadly similar to the IMTA requirement. While different names may be employed, the end result is basically the same – an employer has to secure an additional approval in order to employ an expatriate. As is often the case with legislation, it is what is inside the bottle rather than the label that really counts.

2. Real and Present Dangers

The discrepancies between PR 20/2018 and MOMR 10/2018, as highlighted in Section 1 above, clearly give rise to a lack of legal certainty for both expatriates and employers. Among the most obvious problems are the following:

a. Article 9 of PR 20/2019 expressly provides that an approved RPTKA constitutes the employer’s permit or license to employ the expatriate in question. However, MOMR 10/2018 introduces the additional requirement of applying for and obtaining a notification. Thus, is the expatriate permitted to work or not based on the approved RPTKA? All that can be said with certainty here is that the answer will depend entirely on the discretion of the MOM.

b. Potential liability to pay outstanding obligations under an executed employment contract if MOM refuses to issue a notification: Under Indonesian employment law, should either party to a fixed-term employment contract breach the terms of such contract, they remain liable to perform all outstanding obligations under the contract up until the agreed end of the contract. This would appear to also apply should an employer be forced to unilaterally terminate an expatriate’s employment contract as a result of its inability to obtain a notification from the MOM following the MOM’s earlier approval of the employer’s RPTKA. Such a scenario could leave the employer liable to pay the employee’s salary from the time of the termination of the contract up until the agreed ending date of the contract.

c. The schedule to MOMR 10/2018 incorporates a standard-form draft employment contract that must be submitted with the application for RPTKA approval. Obviously such a one-size-fits-all contract will not be suitable for every type of fixed-term employment relationship. Consequently, the requirement to use this standard form would appear to be an undue restriction on the freedom of contract, and could pose significant problems for both employers and expatriates.

3. Uncertainty as to Precisely Which Entities May Employ Expatriates

As discussed in some depth in our earlier ABNR legal update (see *ABNR News: Bureaucratic Reform Gains Traction in Indonesia as Government Streamlines Expat Employment Rules*, published on 06/04/2018), PR 20/2018 appears to expand the categories of undertaking that are permitted to employ expatriates by:

(a) deleting the specific prohibitions on certain types of undertaking from employing expatriates. These undertakings included civil partnerships, unlimited liability partnerships, limited liability partnerships, associations, sole proprietorships, and cooperatives.

(b) adding a new, catch-all category of undertaking that is permitted to employ expatriates, namely, “business entity” (*badan usaha*);

However, as no definition of “business entity” is provided in PR 20/2018, the use of this term has the potential to give rise to some uncertainty as it is open to multiple or conflicting interpretations by individual officials or MOM offices around the country. This could result in particular business entities being allowed to employ expatriates in one area, while other entities of the same type in another area are not allowed to do so, thus potentially leading to challenges and delays in the licensing process. Consequently, it had been widely hoped that this issue would be resolved by the inclusion of a comprehensive definition of business entity in MOMR 10/2018, but this has not happened.

C. Other Salient Issues

1. New Obligations for Employers

In line with PR 20/2018, MOMR 10/2018 imposes a number of new obligations on the employer of an expatriate that were formerly the responsibility of the expatriate under the previous regulations (MOM Regulation No. 16 of 2015 and MOM Regulation 35 of 2015). These new obligations include the following:

- To insure the expatriate with an Indonesian insurance company (for an expatriate employee who will be employed for less than 6 months) or a state social security provider (for an expatriate who will be employed for 6 months or more);
- To provide education and training to a local employee that is assigned as the expatriate’s assistant; and
- To facilitate the provision of Indonesian language training to the expatriate.

2. Centralization of Authority in MOM

PR 20/2018 appears, in general, to envisage a situation where the MOM plays the leading role in regulating the employment of expatriates. Whereas previously, expatriates could only be employed in certain prescribed sectors (such as oil and gas) after the securing of a “technical recommendation” from the relevant governmental authority in that sector, it appears that such recommendations are no longer required as they are not mentioned as requirements for the approval of an RPTKA or for obtaining a notification. Rather, it would seem that the MOM now has the power to determine the requirements for the employment of expatriates across all sectors, although MOMR 10/2018 expressly states that this is subject to input from the sectoral governmental authorities. Obviously, the successful implementation of this new arrangement will require close alignment between the policies of the MOM and those of other relevant authorities.

3. Concurrent Employment

Expatriates were already permitted to concurrently serve as directors or commissioners with more than one company under the old regime. This is reiterated by PR 20/2018 and MOMR 10/2018, subject to the additional requirement that such directors/commissioners are not shareholders.

In addition, an expatriate may now also work for more than one employer in the vocational education and training sector and the digital economy sector, and in the oil and gas sector for production sharing contractors.

4. RPTKA Exemption for Prescribed Positions

PR 20/2018 and MOMR 10/2018 provide exemptions from the requirement for the employer of an expatriate to obtain an RPTKA in the following circumstances (Articles 10 of PR 20/2018 and MOMR 10/2018)

- an expatriate who is to be employed as a director or commissioner is also a shareholder of the company;
- an expatriate who is a diplomatic or consular officer at the representative office of a foreign country; or
- an expatriate who is to be employed for certain types of work that are required by the government, such as in the case of technical assistance work, cooperation between Indonesian ministries/agencies and international entities, national priority programs, or the response to a natural disaster or extraordinary event.

5. Assignment of Local Employee as Expatriate's Assistant

MOMR 10/2018 continues to require the assignment of at least one local employee as an expatriate employee's assistant for the purpose of facilitating the transfer of technology and expertise. In addition, employers are required to optimize the knowledge-transfer process through the provision of relevant training to expatriates' assistants.

As regards the precise number of local employees that must be assigned to each expatriate, this is not specified in either MOMR 10/2018 or its antecedent regulations. However, the policy of the MOM to date has been to apply a ratio of 1:1, meaning that at least one local employee must be assigned to each expatriate. However, there is also a Ministry of Trade regulation on the books that requires a 3:1 ratio in the case of a representative office. Thus, in general it may be assumed that a minimum of one local employee must be assigned to assist each expatriate employee, save in the case of a representative office, where three local employees should be assigned to each expatriate.

6. Sanctions

Article 34(1) of PR 20/2018 stipulates that an employer which violates the rules on the utilization of expatriate manpower, education and training for expatriates' assistants and reporting shall be subject to administrative sanctions. These are spelled out in Article 39 of MOMR 10/2018, which provides for sanctions in the form of a suspension of services, temporary suspension of expatriate licensing process, revocation of notifications, and/or such other sanctions as may be prescribed by the provisions of the laws and regulations in effect. In this regard, it should be noted that the Investment Law provides for the revocation of business licenses and investment facilities in the case a violation of Indonesian law by a company established under Indonesia's foreign direct investment regime.

D. ABNR Commentary

Given the Government's oft professed commitment to improving Indonesia's ease-of-doing-business ranking, it is to be regretted that MOMR 10/2018 appears to have significantly backtracked on what seemed to be a major liberalization of Indonesia's expatriate employment rules under PR 20/2018. The exact extent of that backtracking will only become apparent going ahead, having regard to the manner in which the provisions of MOMR 10/2018 are interpreted and implemented by the MOM. Accordingly, we will continue to closely monitor and report on the relevant issues in future issues of *ABNR News*.

By Indra Setiawan (isetiawan@abnrlaw.com) and Tara Riandikia (triandika@abnrlaw.com).

FROM FLORICULTURISTS AND BARBERS TO AIRLINES AND INSURERS

Tan Shi Wen and Karyn Khor examine the developments since the inception of the Competition Act 2010

This year marks the 6th anniversary of the Malaysian Competition Act 2010 ("Act"), which came into force on 1 January 2012. The past few years have shown a growing trend of enforcement by the Malaysia Competition Commission ("MyCC"), particularly those relating to cartels.

We observed that the MyCC has, based mainly on third party complaints and even *ex-officio*, conducted investigations into various industries, associations and companies both international and local. In tandem with those investigations, the MyCC has been active in developing guidelines and carrying out studies of several market sectors.

This update provides an overview of the MyCC's investigative trends, policy and enforcement positions, as well as the developments which have occurred in the application of the Act itself.

THE FIRST STEP

When the Act was passed in 2010, companies were given one and a half years to bring their business and internal processes into compliance with the Act. The rationale at the time was that businesses and associations would need time to learn about the Act and adjust their practices accordingly, since there had never been any similar law in Malaysia to address competition issues (apart from the Communications and Multimedia Act 1998). The MyCC went on roadshows and focused on giving talks in an attempt to educate companies – as well as the general public – about the Act and how it was meant to protect consumers in Malaysia. It also issued various guidelines on the application of the Act and the basic concepts of market share.

After the Act came into force, public reaction to the Act and talk of its enforcement remained rather relaxed, and for a brief time it remained to be seen whether and how the MyCC would tackle potential non-compliance.

However, the lull was short-lived; on 23 July 2012, *The Star* newspaper reported that the MyCC was investigating the Cameron Highlands Floriculturist Association ("CHFA") for allegedly fixing prices of flowers sold to distributors and wholesalers. The initial reaction of the CHFA was one of denial, insisting that the rules of the free market meant that the CHFA and its members were entitled to raise flower prices by 10% across the board. However, the tune quickly changed when the MyCC issued its proposed decision in October that same year. On 6 December 2012, the MyCC published on its website that it had issued a decision finding that the members of the CHFA had infringed Section 4(2) of the Act by fixing the purchase price of their products.

This being the first case in which the MyCC issued a decision on infringement, there was no financial penalty imposed. The CHFA was instead instructed to cease and desist the act of fixing prices and to give an undertaking to the MyCC that its members would refrain from any anti-competitive practices in the relevant market. The CHFA was also required to issue a public statement in local newspapers that it had implemented the above. The president of the CHFA publicly apologised on behalf of the association and admitted that neither the CHFA nor any of its members had been aware that their association's decision to fix prices contravened the Act.

GAINING TRACTION

The CHFA's price-fixing behaviour was brought to the attention of the MyCC by the CHFA's own newspaper announcement regarding the decision to raise prices of flowers. One might say it was a case of low-hanging fruit, but it certainly paid off; the media attention which the CHFA case garnered sent a clear signal that the MyCC was ready and willing to investigate and prosecute any party – even small, local associations – who violated the provisions of the Act.

In late 2013, the MyCC investigated the Malaysia India Hairdressing Saloon Owners Association ("MIHSOA") for a similar offence, on nearly the same facts. The association had published in local newspapers that its members were going to raise prices of haircuts by RM2.00. No formal decision was issued, but MIHSOA was required to give the MyCC an undertaking that its members would cease such price-fixing behaviour.

TAKING OFF

CHFA and MIHSOA were far from the only associations to be investigated by the MyCC, which was, by 2014, conducting various investigations parallel to one another. In March 2014, the MyCC issued its first ever decision requiring the offending parties to pay a financial penalty. Malaysia Airline System Berhad ("MAS") and AirAsia Berhad ("AirAsia") were found to be in contravention of Section 4(2) of the Act, by agreeing that MAS, AirAsia and AirAsiaX would each focus on their individual market areas and not enter into or continue to compete in their competitor's allocated market. MAS and AirAsia were fined RM10,000,000 each, bringing the enforcement of competition law in Malaysia to its next major milestone – the imposition of financial penalties.

A string of investigations and decisions quickly followed the MAS/AirAsia finding of infringement. In October 2014, Giga Shipping Sdn Bhd gave an undertaking to the MyCC to cease the imposition of certain exclusivity clauses which would have raised competition issues under Section 4 of the Act. Interestingly, the undertaking was given before the MyCC issued its final decision, and in exchange for the undertaking, the MyCC agreed to "*refrain from instituting or taking proceedings against the relevant enterprises involved*".

Shortly thereafter, in January 2015, the MyCC issued a decision finding 24 manufacturers of ice to have infringed the Act by fixing the prices of tube ice and block ice in Kuala Lumpur, Selangor and Putrajaya. The ice manufacturers were collectively fined RM251,950, with individual fines ranging from RM1,080 to RM106,000. Two weeks later, the MyCC issued a decision against 15 members of the Sibu Confectionary and Bakery Association for price-fixing, fining them a total of RM247,730 with individual fines ranging from RM480 to RM102,600.

Other cases investigated during this time included the Pan-Malaysia Lorry Owners Association, and the Malaysia Heavy Construction Equipment Owners' Association. In both cases the MyCC was satisfied with undertakings and did not impose a financial penalty.

In June 2016, the MyCC issued its first decision relating to a Section 10 offence (abuse of dominance). The investigation involved My E.G. Services Berhad ("MyEG"), which was allegedly abusing its dominant position by imposing different conditions on equivalent transactions in the processing of mandatory insurance for online foreign worker permit renewal applications. The MyCC found MyEG guilty of abusing its dominant position and imposed a financial penalty of RM2.27 million.

Unit No. 50-8-1, 8th Floor, Wisma UOA Damansara, 50 Jalan Dungun, Damansara Heights, 50490 Kuala Lumpur, Malaysia.
T: +(603) 2081 3999 F: +(603) 2094 3211 E: skrine@skrine.com W: www.skrine.com

Around the same time, another decision was issued against four container depot operator companies and an information technology service provider, Containerchain (Malaysia) Sdn Bhd, for operating a cartel in the shipping and logistics industry in Penang – a total fine of RM645,774 was imposed on all enterprises.

RECENT DEVELOPMENTS

MyCC continues to conduct investigations consistently to this day. At the time of writing, there are six (6) findings of an infringement and two (2) proposed decisions issued by the MyCC which have yet to be finalised – one against Persatuan Insurans Am Malaysia ("PIAM") (the General Insurance Association of Malaysia) and its members in late 2017, and another against seven tuition and day care centres operating in the SS19 area in Subang Jaya in February this year.

Of all the cases which the MyCC has investigated to date, three have been challenged: the Competition Appeal Tribunal ("CAT") overturned the MyCC's decision in the MAS/AirAsia case in February 2016, and the case is currently pending judicial review. Both Prompt Dynamics Sdn Bhd (one of the container depot operators) and MyEG appealed their respective cases to the CAT, but were unsuccessful. MyEG has announced that it intended to apply for judicial review as well, but as at the time of writing there have been no developments on that front.

DISCERNING THE TRENDS

Investigations

The MyCC's first few investigations appeared to have arose from publications and news articles by the offending parties themselves, who were not aware that their behaviour was illegal. Since then, the MyCC has had plenty on its plate without relying on enterprises to 'self-report'. Competitors, consumers and even enterprises in the upstream or downstream industries have complained to the MyCC of potentially anti-competitive conduct. In fact, based on statistics published by the MyCC in late 2017, the MyCC had received a total number of 339 third party complaints of which 311 of those complaints were closed. There were only 45 cases initiated by the MyCC of which 41 were closed. There is also the possibility that an enterprise may inform the MyCC of its own anti-competitive behaviour by making an application under the "*leniency regime*". However, based on the cases reported to date, this has yet to occur.

Target Enterprises

From 2014 onwards, the MyCC's investigations appeared to have moved away from small businesses and associations involving everyday goods and services, such as flowers, haircuts and ice, to 'bigger fish', like MAS, AirAsia, MyEG and PIAM. The MyCC's latest proposed decision against the seven tuition and day care centres in Subang Jaya however came as a surprise. It is speculated to be initiated based on a third party complaint and if true, will reaffirm the MyCC's enforcement practice that it will continue to focus and investigate into third party complaints.

From Undertakings to Penalties

When the Act first came into force, the MyCC's decisions imposed relatively little or no financial penalties. This was likely due to a combination of the fact that the infringers were small businesses with relatively small turnover, and also that the Act was in its infancy at the time and these businesses would not have had the resources to ensure

Unit No. 50-8-1, 8th Floor, Wisma UOA Damansara, 50 Jalan Dungun, Damansara Heights, 50490 Kuala Lumpur, Malaysia.
T: +(603) 2081 3999 F: +(603) 2094 3211 E: skrine@skrine.com W: www.skrine.com

that their company and staff underwent competition compliance training. This changed with the MyCC's imposition of a collective fine of RM 20 million in the MAS/AirAsia case, which sent a clear signal to the Malaysian market that the MyCC would enforce the Act strictly and that ignorance should no longer be pleaded as a mitigation point or in defence of a contravention.

The PIAM proposed decision, if finalised and issued as presently proposed, would result in the largest financial penalty ever imposed by the MyCC in the history of the Act's enforcement, at roughly RM213.5 million. The penalties generally appear to be on an upward trend, and where MyCC accepted undertakings in the past, the more recent decisions see these replaced with orders or instructions attached to the fines.

INTO THE FUTURE

Since the Act came into force, one of the more notable changes is the disapplication of the same to certain industries – new laws have been drawn up and old ones amended so as to bring competition issues in certain industries out of the scope of the Act and within the powers of the regulatory authority under the relevant legislation (for example, the Petroleum Development Act 1974 and the Malaysian Aviation Commission Act 2015).

The MyCC had also conducted market studies on particular industries to examine how potentially anti-competitive behaviour should be analysed given the particular market characteristics – these include, among others, the two recent studies on the pharmaceutical and building construction industries.

The MyCC's political will is clear and unambiguous – despite having been active for less than a decade, the investigative and enforcement arm of the MyCC has been hard at work, as can be seen from the increasing complexity of the cases being tried and the thought being given to the decisions issued.

During a public consultation relating to its latest proposed Guidelines on Intellectual Property Rights and Competition Law ("IPR Guidelines"), the MyCC reiterated that it would take a strong stance against anti-competitive behaviour, particularly where there was an object to prevent, restrict or distort competition.

Considering the latest draft IPR Guidelines, and with at least one case up for judicial review and two proposed decisions in the pipeline, it is definitely an exciting time for competition in Malaysia. If the MyCC's track record is indicative of any sort of trend or movement, that movement is forwards and upwards, and the enforcement of competition legislation is definitely growing in Malaysia. Against this backdrop, companies operating, or considering to carry out business, in Malaysia, should ensure that they are familiar and comply with the competition legislation to avoid the risk of falling foul of the legislation and consequently bearing the brunt of enforcement action by the MyCC.

TAN SHI WEN (tan.shi.wen@skrine.com)
KARYN KHOR (karyn.khor@skrine.com)

Shi Wen is a Partner and Karyn is an Associate in the Competition Law Practice Group of SKRINE.

This article was first published in Issue 2/18 of LEGAL INSIGHTS – a SKRINE Newsletter

PANAMA AND THE INTERNATIONAL STANDARDS ON TRANSPARENCY AND EXCHANGE OF INFORMATION

July, 2018
Arias, Fábrega & Fábrega
Gian Castillero

Although the OECD initiatives in tax matters have been clearly defined since 1998, it was not until 10 years later, as a result of the global financial crisis, that the international community finally reached the consensus that it was in the best interest of most of the countries to move away from tax competition to embrace the concept of cross-border cooperation in tax matters.

It is this conceptual shift in thinking that served as the cornerstone for the development of the principles of transparency and information exchange that have prevailed in the last decade. Panama has not escaped to implementing legislation in compliance therewith.

By way of Executive Decree 122 of 11th June 2018, published in the Official Gazette of June 13, 2018, the Republic of Panama made public the list of reportable jurisdictions for the purpose of the automatic financial information exchange between tax authorities that shall take place for the first time in July / September 2018, with regards to financial information as of 31 December 2017.

> ... Panama has tried to achieve an adequate balance between adopting new legislation and ensuring ... certain safeguards to protect the fundamental rights of the owners of the information ...

While complying with the expectations of the international community Panama has tried to achieve an adequate balance between adopting new legislation and ensuring that the countries for which it opens a channel for the exchange of automatic financial information, provide certain safeguards to protect the fundamental rights of the owners of the information, such as: (i) an adequate legal framework to guarantee the protection of the data; (ii) a technological platform that minimizes the risks of undue access to information; and (iii) low levels of corruption and crime and high levels of political stability

Contrary to the negative publicity that had been generated in recent years, the reality is that there are legitimate reasons to protect the privacy of financial information. Owners of the information could be exposed to substantial risk if their personal information falls into the hands of criminal organizations. Hopefully, time will correct the distortions and abuses of the system that can occur at both ends of the pendulum that oscillates between total transparency and certain guarantees of privacy of financial information.

About the author

Gian Castillero is a senior advisor to the Panamanian government in matters related to the international services platform of the Republic of Panama.
Between 2015 and 2017, he joined the high level committee organized by the Government of the Republic of Panama for the protection of its international services and the National Council of Foreign Affairs of the Republic of Panama.
He is President of the Panamanian Association of International Lawyers and Director of the National Bank of Panama (BNP).

Embracing the Assisted Living Model for Singapore

3 July 2018

The real estate industry is a natural beacon of innovation – where architects, designers, engineers, developers and planners come together to define how we live, work, and connect with each other. As the industry faces a wave of disruptive technology, automation and digitisation, there is no time like the present to find innovative ways to serve the segments of our population with distinct and pressing needs.

For example, as Singapore's population ages, the real estate industry needs to forge transformative collaborations between the Government, entrepreneurs, developers, healthcare providers and non-profit groups to provide effective solutions for senior living – even if this requires broad-based reforms.

These challenges are not unique to Singapore and we have the opportunity to leverage on both traditional and novel industry resources to come up with solutions such as the assisted living model, commonly followed in the west. This model provides appropriate levels of support and care environments to suit the needs of the seniors at different levels of physical and mental capacities, allowing them to age in place. The emphasis is on preventative and rehabilitative environments that provide long term care and which will reduce the burden on the public health cost and on the younger generation.

This may challenge all industry players to consider:

- new types of property ownership schemes;
- architectural designs which foster community and make services, such as groceries and healthcare more accessible; and
- how to integrate into the building design smart home technologies suited to senior living.

When more senior housing options such as the assisted living model are presented and find acceptance, the key players in the industry must be ready to step up to the task to help bring the issue to a socially responsible and economically rewarding resolution. Even as society is faced with a disruptive and changing landscape, it is imperative that we embrace innovation and transformation as we face up to these new challenges.

This article first appeared in REDAS 58th Anniversary Dinner Book: "Transforming the Real Estate Industry" on 14 November 2017, as a message from Melanie Lim, Honorary Legal Adviser of REDAS.

Key contact

Melanie Lim
Senior Partner
Real Estate

D +65 6885 3651
melanie.lim@dentons.com

About Dentons Rodyk

Situated at the southern most tip of Southeast Asia, Singapore is a massive regional hub for global commerce, finance, transportation and legal services. This important island city-state is a vital focal point for doing business throughout the Asia Pacific region.

As one of Singapore's oldest legal practices, trusted since 1861 by clients near and far, rely on our full service capabilities to help you achieve your business goals in Singapore and throughout Asia. Consistently ranked in leading publications, our legal teams regularly represent a diverse clientele in a broad spectrum of industries and businesses.

Our team of around 200 lawyers can help you complete a deal, resolve a dispute or solve your business challenge. Key service areas include:

- **Arbitration**
- **Banking and Finance**
- **Capital Markets**
- **Competition and Antitrust**
- **Corporate**
- **Intellectual Property and Technology**
- **Life Sciences**
- **Litigation and Dispute Resolution**
- **Mergers and Acquisitions**
- **Real Estate**
- **Restructuring, Insolvency and Bankruptcy**
- **Tax**
- **Trade, WTO and Customs**
- **Trusts, Estates and Wealth Preservation**

Providing high quality legal and business counsel by connecting clients to top tier talent, our focus is on your business, your needs and your business goals, providing specific advice that gets a deal done or a dispute resolved anywhere you need us. Rely on our team in Singapore to help you wherever your business takes you.

About Dentons Rodyk Academy

Dentons Rodyk Academy is the professional development, corporate training and publishing arm of Dentons Rodyk & Davidson LLP. This article is published by the academy. For more information, please contact us at sg.academy@dentons.com.

Statements Made by the Party in Other Cases Can Be Used as Exhibits for Identifying Ordinary Skill

08/01/2018
Hsiu-Ru Chien

In patent disputes, claim construction and PHOSITA determination often become the main focus of the parties' argumentation. In addition to interpreting the patent specifications and the cited prior art references, the court, which is not an expert in the art, must rely on exhibits provided by the parties to assist with the judgment. Based on the "principle of good faith" and the "doctrine of estoppel," it is common for one party to quote statements made by the other party outside the litigation proceedings as a basis for interpreting the claims or determining the ordinary skill of PHOSITA. However, legally speaking, statements made outside the litigation proceedings cannot be used as an admission of fact in litigation, and there is doubt as to whether or not such statements may be used as evidence. The Supreme Administrative Court 2018 Pan 163 Administrative Judgment rendered on 31 March 2018 seems to have reached an affirmative conclusion.

The Supreme Administrative Court states in said judgment that the appellant's original Exhibit 1, original Exhibit 4, and original Exhibit 5 produced at the litigation proceedings are all unfavorable statements made by the other party (i.e. the patentee) in other cases. While they are not to be considered an admission of fact in litigation, they are still statements made by the party itself, and as long as they are formally authentic, their content may serve as evidence in the present case. As to the degree of proof of such evidence in relation to the facts to be proved, the court must investigate facts on its own initiative, exercise its elucidative power to ensure that the parties conduct appropriate and sufficient debate of factual and legal issues, take into consideration the entire argument and evidence on file, determine the facts according to rule of logic and rule of thumb, and specify in the written judgment the reasons on which the determination is based. Otherwise, the judgment would violate the law by failing to provide reasons.

The Supreme Administrative Court further states that as the patentee or his litigation assistants are very familiar with the patented technology, it is reasonable to take their statements about the technical content of the disputed patent as evidence for the court to determine the "ordinary skill" at the time of patent filing. At the lower instance of the trial, the appellant (the invalidation petitioner) asserted that the patentee's presentation material submitted in other litigation involving the disputed patent can prove the ordinary skill of a PHOSITA, but the patentee argued that such statements in the concerned presentation were only made by its litigation assistant to explain the general mechanical design principles on which the development of the patent was based, and hence the said statement should not be employed as evidence of ordinary skill. The Supreme Administrative Court then concluded that the lower court's judgment did not specify the reasons for its determination on the above issue, and thus the judgment has violated the law by failing to provide reasons.

www.leeandli.com

BAKER BOTTS

Ideas

IRS Proposes Regulations Interpreting TCJA Amendments to Bonus Depreciation Rules

08 August 2018

Firm Thought Leadership

On August 3, 2018, the Treasury Department and Internal Revenue Service (the "IRS") released proposed regulations (the "Proposed Regulations" available here) that provide guidance regarding the additional first year depreciation deduction (the "bonus depreciation deduction") under Section 168(k) of the Internal Revenue Code (the "Code"), as recently amended by the Tax Cuts and Jobs Act (the "TCJA"). These Proposed Regulations affect taxpayers who deduct depreciation for qualified property acquired and placed in service after September 27, 2017.

The TCJA made several amendments to the bonus depreciation deduction. Most importantly, the TCJA (i) increased the bonus depreciation deduction percentage from 50% to 100% (subject to phase-downs for property placed in service generally between 2023 and 2026); (ii) expanded the property eligible for the bonus depreciation deduction to include certain used depreciable property; and (iii) generally extended the placed-in-service date from before January 1, 2020, to before January 1, 2027. Under the TCJA, used depreciable property is generally eligible for the bonus depreciation deduction if the taxpayer never used the property prior to acquiring it, is unrelated to the transferor, and did not take a carry-over basis (in whole or in part) from the transferor.

The Proposed Regulations provide additional guidance regarding these amendments. Noteworthy guidance includes the following:

- Bonus depreciation deductions are unavailable for "forward" and "reverse" remedial allocations under Code Section 704(c).
- Bonus depreciation deductions are unavailable for basis adjustments under Code Section 732 (adjusting the basis of property distributed by a partnership) and Code Section 734(b) (adjusting the basis of partnership property).
- Bonus depreciation deductions are generally available to the extent a taxpayer increases its interest in depreciable property.
    - If the taxpayer or a predecessor owns, or has ever previously owned, an interest in the property, the taxpayer can claim bonus depreciation deductions only as to its increased ownership above that prior level.
    - The IRS is requesting comments on whether a safe harbor should be provided to limit the backward-looking period of time during which prior ownership must be taken into account.
    - In making the determination whether a member of a consolidated group previously used property prior to acquiring it, such member is generally treated as previously having an interest in all property in which the consolidated group is treated as previously having an interest.
- Bonus depreciation deductions are generally available for Code Section 743(b) basis adjustments of partnership property arising from transfers of partnership interests when

an election is in effect under Code Section 754.

    - The rules described above limiting bonus depreciation deductions to the taxpayer's (indirect) increased interest in depreciable property apply.
    - For purposes of the restrictions on bonus depreciation deductions for used depreciable property, relatedness is tested at the partner level.
- Where used property eligible for bonus depreciation deductions is contributed to a partnership in the same year it is purchased by the contributing partner,
    - The bonus depreciation deduction is generally allocated between the contributing partner and the partnership based upon the relative number of months during the year they each own the property, but
    - If, apart from the contributing partner, any partner or predecessor of a partner owns or previously owned an interest in the property, the bonus depreciation deduction is allocated entirely to the contributing partner.
- In making the determination whether the transferor of used property is related to the transferee, related transactions are generally stepped together.

The Proposed Regulations are proposed to apply to qualified property placed in service by the taxpayer during or after the taxable year that includes the date of publication of final regulations. Prior to the publication of final regulations, taxpayers may apply the Proposed Regulations to qualified property acquired and placed in service after September 27, 2017, by the taxpayer during taxable years ending after that date.

Written or electronic comments and requests for a public hearing must be received by October 9, 2018.

Should you have any questions or concerns about the impact the Proposed Regulations may have on your business, please contact any of the authors of this update.

# # #

About Baker Botts LLP

Baker Botts is an international law firm of approximately 725 lawyers practicing throughout a network of 14 offices around the globe. Based on our experience and knowledge of our clients' industries, we are recognized as a leading firm in the energy and technology sectors. Throughout our 177-year history, we have provided creative and effective legal solutions for our clients while demonstrating an unrelenting commitment to excellence. For more information, please visit BakerBotts.com.

Practices

Tax

Related Professionals

Michael P. Bresson

Partner

Derek S. Green

Partner

Richard A. Husseini

Partner

Don J. Lonczak

Partner

Katie McEvilly

Associate

Jared Meier

Senior Associate

Jon Nelsen

Partner

Ron J. Scharnberg

Partner

LOCATIONS:

AUSTIN | BEIJING | BRUSSELS | DALLAS | DUBAI | HONG KONG | HOUSTON | KUWAIT ALLIANCE | LONDON | MOSCOW | NEW YORK | PALO ALTO | RIYADH | SAN FRANCISCO | WASHINGTON, D.C.

Davis Wright Tremaine LLP
DEFINING SUCCESS TOGETHER

FCC Releases Final Text of Rules and Order Expediting Wireline and Wireless Attachments to Utility Poles

08.09.18

By Maria Browne and John Seiver

> **Some Notable Changes Made to the "One Touch Make-Ready" Rules and Declaratory Ruling Prohibiting State and Local Moratoria on Wireline and Wireless Deployment**

Late Friday the FCC released the text of its Third Report and Order and Declaratory Ruling ("Final Order") in the wireline and wireless infrastructure dockets. While the Final Order retained much of the substance of the Draft Order, including one touch make-ready ("OTMR"), accelerated schedules and self-help remedies for other make-ready work, codification of overlashing processes, and prohibitions on state and local telecommunications deployment moratoria, it also made substantive changes, largely in response to vigorous advocacy on the part of all stakeholders in ex partes responding to the draft order.

Our advisory analyzing the Draft Order is available here. Notable changes in both the OTMR Rules and Declaratory Ruling include:

OTMR Process:

- Extended to ILEC pole owners the right to object to the simple/complex determination on poles that the utility owns – previously only "electric utilities" could object
- Clarified that as soon as the utility or the new attacher determines that simple make-ready is complex, the work must proceed under the non-OTMR rules
- Clarified that where jobs are bifurcated between OTMR and regular/complex make-ready, separate applications must be filed
- Clarified that the term "wireless activities" which are excluded from definition of simple maker-ready would allow a wireless attacher's work on its wireline backhaul facilities to be done as OTMR unless "reasonably likely to cause a service outage or facility damage."
- Denied request to exclude wireless activity in the communications space from definition of complex make-ready.

Self-Help:

- Extended the time period for pole owners and existing attachers to perform post-makeready inspections to 90 days (from 30).
- Clarified that new attachers are liable (in addition to being responsible) to existing attachers for damage to facilities and non-compliance.

Pre-Existing Non-Compliance:

- Clarified/added to Rule 1.1411(c)(2): A utility may not deny the new attacher pole access based on a preexisting violation not caused by any prior attachments of the new attacher.
- Codified in the Rules the statement from the Final Order that a utility may not charge a new attacher to correct pre-existing non-compliance.

General Make-Ready:

- Shortened utility response time on applications where the utility relies on new attacher's pre-construction survey to 15 days (was 45 days).

- Returned timeframe for make-ready in power supply space to 2011 standard – 90 days from notification, 135 for larger orders (i.e., more than 300 or .5 percent but no greater than 3000 or 5 percent).
- Imposed obligation on new attacher to immediately report damage to pole owners/existing attachers equipment/outages and immediately repair upon instruction to do so by impacted entities - but also added an obligation on pole owners/existing attachers to document such damage/outages.
- Clarified that self-help is not available for pole replacements.
- Denied pole owner requests to open a further rulemaking to examine self-help make-ready in the power supply space.
- Clarified that utilities must compile but are not expected to prepare third-party make-ready estimates and must provide new attachers contact information for third-party attachers.
- Clarified in the Rules that post-construction inspection is for purpose of identifying code violations as well as damage to facilities.
- Clarified at ACA's request that utilities must provide documentation in final make-ready invoice that is sufficient to determine the basis of all final make-ready charges, including material, labor and other related costs.
- Extended contractor insurance/bond requirement to cover liability for work performed on third party attachers' facilities.
- Clarified in response to ACA request that a utility must have a reasonable basis for vetoing a contractor.
- Added that existing attachers and utilities may file a petition (not a complaint) which would be considered on an expedited, adjudicatory case-by-case basis, requesting the suspension of a new attacher's OTMR privileges due to a pattern or practice of substandard, careless, or bad faith conduct when performing attachment work. Existing attachers and utilities may also file informal complaints regarding any alleged OTMR rules violations.

Overlashing:

- Clarified in response to requests from wireless entities that prior approval of utility pole owners is not required for third-party overlashing.
- Extended prohibitions on a utility's refusal of access relating to pre-existing non-compliance to overlashing – pole owner may not prohibit overlashing because of pre-existing violations or require overlasher to fix violations it did not cause.
- Clarified that pole owner may not charge overlashers for inspections/loading studies of facilities intended to be overlashed, may not require attachers to include equipment specifications in overlashing notice, and requires any pole owner action to stop overlashing to be within the 15 day advance notice period and documented. Overlashers may modify or explain why a modification is not necessary. Pole owner may not charge a fee to review a proposed overlash.
- Added a post overlashing notice within 15 days of completion giving the pole owner 90 days to inspect and 14 additional days to notify of any problems. Provided that the violation is documented in writing, the pole owner has option of curing the violation and billing the attacher or requiring the attacher to correct in 14 days.
- Rejected pole owner request to allow imposition of a "reasonable penalty" (e.g. unauthorized attachment penalties) for overlashing without providing advance notice, and indicated informal complaint process provides adequate remedy for violations.

Section 253 Prohibition on State and Local Moratoria:

- Clarified broad interpretation of the services that a state or local government must not prohibit or effectively prohibit under Section 253 to include new services or significant improvements to existing services by an incumbent provider. Notably, the Commission holds that Section 253 protects "any covered service a provider wishes to provide, incorporating the abilities and performance characteristics it wishes to employ, including to provide existing services more robustly, or at a higher level of quality. . . ."

***

The Final Order also corrected the numbering of impacted rules and included an implementation schedule for the revised rules pursuant to which the pole attachment-related portions of the Third Report and Order and the rule amendments adopted therein become effective, which is on the latter of (1) six months after the release of this item, or (2) 30 days after the Commission publishes a notice in the Federal Register announcing approval by the Office of Management and Budget of the rules containing modified information collection requirements. The remainder of the Third Report and Order (primarily the provisions related to storm restoration and ILEC pole attachment rate parity) will be effective 30 days after publication in the Federal Register, and the Declaratory Ruling preempting state and local moratoria under Section 253 is immediately effective.

Disclaimer

This advisory is a publication of Davis Wright Tremaine LLP. Our purpose in publishing this advisory is to inform our clients and friends of recent legal developments. It is not intended, nor should it be used, as a substitute for specific legal advice as legal counsel may only be given in response to inquiries regarding particular situations.

Creditors' Rights and Bankruptcy Practice Group

GOODSILL ALERT

June 5, 2018

SUPREME COURT ADVISES THAT A FALSE STATEMENT ABOUT A SINGLE ASSET CAN RENDER A DEBT NONDISCHARGEABLE

♦♦♦♦

In the case of *Lamar, Archer & Cofrin, LLP, v. Appling, 16-1215 (June 4, 2018)*, the U.S. Supreme Court held that a materially false statement about a single asset can be a "statement respecting the debtor's financial condition," but must be in writing in order for the debt related to the asset to be nondischargeable under 11 U.S.C. §523(a)(2)(B).

BACKGROUND FACTS

The Bankruptcy Code prohibits debtors from discharging debts for money, property, services, or credit obtained by "false pretenses, a false representation, or actual fraud," under 11 U. S. C. §523(a)(2)(A), or, if made in writing, by a materially false "statement . . . respecting the debtor's . . . financial condition," 11 U.S.C. §523(a)(2)(B). Id. at 1.

The question presented to the Supreme Court was whether debtor's false statement about a single asset constitutes a "statement respecting the debtor's financial condition" under Section 523(a)(2)(B) or whether the statement must be about the debtor's overall financial status. Id. The Court explained that "the statutory language makes plain that a statement about a single asset *can* be a "statement respecting the debtor's financial condition," however, if that false statement is not in writing, the associated debt may be discharged. Id.

R. Scott Appling ("Appling") hired Lamar, Archer & Cofrin, LLP ("Lamar"), a law firm, to represent him in a business litigation. Id. at 2. Appling fell behind on his legal bills, and by March 2005, he owed Lamar more than $60,000. Id. at 2.

Lamar informed Appling that if he did not pay the outstanding amount, the firm would withdraw from representation and place a lien on its work product until the bill was paid. Id. Appling told his attorneys that he was expecting a tax refund of "approximately $100,000," which was enough to cover his owed and future legal fees. Id. Lamar relied on Appling's statement and continued to represent him without initiating collection of the overdue amount. Id. When Appling and his wife filed their tax return, however, the refund they requested was of just $60,718, and they ultimately received $59,851 in October 2005. Id.

Rather than paying Lamar, the Applings spent the money on their business. Id. Appling and his attorneys met again in November 2005, and **Appling falsely told them that he had not yet received the refund**. Id. **Lamar relied on that false statement** and agreed to complete the pending litigation and delay collection of the outstanding fees. Id. In March 2006, Lamar sent Appling its final invoice. Id. Five years later, Appling still had not paid, so Lamar filed suit in Georgia state court and obtained a judgment for $104,179.60. Id. at 2-3. Shortly thereafter, Appling and his wife filed for Chapter 7 bankruptcy. Id. at 3.

Lamar filed an adversary proceeding against Appling arguing that, because Appling made fraudulent statements about his tax refund at the March and November 2005 meetings, his debt to Lamar was nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). Appling moved to dismiss the adversary complaint, contending that his alleged misrepresentations were "statement[s] . . . respecting [his] financial condition" and were therefore governed by §523(a)(2)(B), such that Lamar could not block discharge of the debt because the statements were not "in writing" as required for nondischargeability under that provision. Id.

The Bankruptcy Court held that a statement regarding a single asset is not a "statement respecting the debtor's financial condition" and denied Appling's motion to dismiss. Id. After a trial, the Bankruptcy Court found that Appling knowingly made two false representations on which Lamar justifiably relied and that Lamar incurred damages as a result and concluded that Appling's debt to Lamar was nondischargeable under §523(a)(2)(A).

The U.S. District Court affirmed the Bankruptcy Court's decision. Id. However, the Court of Appeals for the Eleventh Circuit reversed, holding that "'statement[s] respecting the debtor's . . . financial condition' may include a statement about a single asset." Id. Because Appling's statements about his expected tax refund were not in writing, the Court of Appeals held that §523(a)(2)(B) did not bar Appling from discharging his debt to Lamar. Id.

The U.S. Supreme Court granted certiorari to resolve a conflict among the circuits as to whether a statement about a single asset constitutes a "statement respecting the debtor's financial condition." Id. at 4.

THE SUPREME COURT'S DECISION

The Supreme Court started its analysis by explaining that, under 11 U.S.C. §523(a)(2), a discharge under Chapter 7, 11, 12, or 13 of the Bankruptcy Code "does not discharge an individual debtor from any debt . . . for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by" fraud. Id.

In particular, the Court explained, subparagraph (A) bars discharge of debts arising from "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's . . . financial condition" and subparagraph (B), in turn, bars discharge of debts arising from a materially false "statement . . . respecting the debtor's . . . financial condition" if that statement is "in writing." Id. at 4-5.

The Supreme Court explained that "a statement is 'respecting' a debtor's financial condition if it has a direct relation to or impact on the debtor's overall financial status." Id. at 9. Therefore, it continued:

> A single asset has a direct relation to and impact on aggregate financial condition, so a statement about a single asset bears on a debtor's overall financial condition and can help indicate whether a debtor is solvent or insolvent, able to repay a given debt or not. Naturally, then, **a statement about a single asset can be a "statement respecting the debtor's financial condition.**"

Id. (emphasis added).

The Court therefore affirmed the judgment of the Court of Appeals for the Eleventh Circuit allowing the debt to be discharged.

CONCLUSION

In *Lamar, Archer & Cofrin, LLP, v. Appling*, the U.S. Supreme Court explained that a statement about a single asset can constitute a "statement respecting the debtor's financial condition." The consequence of this ruling is that a debtor's false statements to a creditor regarding assets (or perhaps also liabilities) must be in writing in order to be found to be nondischargeable under 11 U.S.C. § 523(a)(2)(B).

The Supreme Court explained that creditors can protect themselves and benefit from the protections of §523(a)(2)(B) "so long as they insist that the representations respecting the debtor's financial condition on which they rely in extending money, property, services, or credit are made **in writing**." The Court explained, "[d]oing so will likely redound to their benefit, as such writings can foster accuracy at the outset of a transaction, reduce the incidence of fraud, and facilitate the more predictable, fair, and efficient resolution of any subsequent dispute."

This opinion re-emphasizes the importance of lenders and creditors to get financial statements and information from a debtor (including information about assets and liabilities) **in writing** so there is no question that any false information provided will give the lender or creditor the ability to seek a determination that the debts owed to it are nondischargeable under 11 U.S.C. § 523(a)(2)(B).

♦♦♦♦

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

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

Hogan Lovells

Iran sanctions: Snapback becomes reality

10 August 2018

The United States has begun re-imposing nuclear-related sanctions with respect to Iran in connection with the expiration of the 90-day wind-down period announced alongside the United States' 8 May 2018 withdrawal from the Iran nuclear deal (see our prior alerts for more details about that announcement). On 6 August the president issued a new Iran-related executive order (the New Iran EO), which re-imposes relevant provisions of four previous executive orders (EOs) and revokes two EOs, but the same restrictions set forth in those revoked EOs have been incorporated into the New Iran EO so there has been no easing of sanctions as a result of such revocation.[1] In connection with the New Iran EO, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) issued new Frequently Asked Questions (FAQs), amended FAQs related to the Iran Freedom and Counter-Proliferation Act of 2012, and revised FAQs released on 8 May 2018 in connection with the United States' withdrawal from the Iran nuclear deal.

General impact of the New Iran EO as of 7 August 2018

After completion of the 90-day wind-down period, as of 7 August 2018, the New Iran EO makes sanctionable

- the purchase or acquisition of U.S. bank notes by the Government of Iran (GOI);
- Iran's trade in gold and other precious metals;
- direct or indirect sale, supply, or transfer to or from Iran of graphite; raw or semi-finished metals, such as aluminum and steel; coal; and software used for integrating industrial processes;
- significant transactions related to the purchase or sale of Iranian currency, the rial, or the maintenance of significant funds or accounts outside the territory of Iran denominated in rials;
- activities relating to Iran's issuance of sovereign debt; and
- significant transactions involving Iran's "automotive sector" as that term is defined in the New Iran EO.

Additionally, 7 August 2018 marked the expiration of certain wind-down General Licenses (GLs) issued by OFAC. These GLs permitted wind-down activities related to the importation into the United States of Iranian-origin carpets and foodstuffs, activities undertaken pursuant to specific

1 Specifically, the New Iran EO re-imposed relevant provisions of EOs 13574, 13590, 13622, and 13645. For the sake of clarity and consolidation, the New Iran EO also revoked EOs 13716 and 13628, although it continued the sanctions provided for in those EOs.

licenses issued in connection with the *Statement of Licensing Policy for Activities Related to the Export or Re-export to Iran of Commercial Passenger Aircraft and Related Parts and Services* (JCPOA SLP), and activities undertaken pursuant to GL I related to contingent contracts for activities authorized under the JCPOA SLP. The wind-down activities permitted in relation to activities previously undertaken pursuant to authorizations in GL H will expire on 5 November 2018.

General impact on 5 November 2018

Certain sanctions set out in the New Iran EO apply only to activities that take place on or after 5 November 2018. These sanctions will be re-imposed after the expiration of the 180-day wind-down period announced on 8 May 2018 and will target activities related to

- sanctions on Iran's port operators, and shipping and shipbuilding sectors, including on the Islamic Republic of Iran Shipping Lines (IRISL), South Shipping Line Iran, or their affiliates;
- sanctions on petroleum-related transactions with, among others, National Iranian Oil Company (NIOC), Naftiran Intertrade Company Ltd. (NICO), and the National Iranian Tanker Company (NITC), including the purchase of petroleum, petroleum products, or petrochemical products from Iran;
- sanctions on transactions by foreign financial institutions with the Central Bank of Iran (CBI) and designated Iranian financial institutions under section 1245 of the National Defense Authorization Act for FY 2012 (NDAA 2012);
- sanctions on the provision of specialized financial messaging services to the CBI and Iranian financial institutions described in subsection 104(c)(2)(E)(ii) of the Comprehensive Iran Sanctions, Accountability, and Divestment Act (CISADA);
- sanctions on the provision of underwriting services, insurance, or reinsurance; and
- sanctions on Iran's energy sector.

Notable New Iran FAQs Issued by OFAC

OFAC issued a number of FAQs in connection with the issuance of the New Iran EO. FAQ 615 reminds non-U.S. parties who purchase Iranian crude oil that, on or after 5 November 2018, the New Iran EO provides authority to sanction the purchase of petroleum or petroleum products, and significant dealings with NIOC and NICO by persons in jurisdictions that do not have a significant reduction exception under relevant provisions of the National Defense Authorization Act for Fiscal Year 2012. As a result, if a particular country does not receive such exemptions, purchases of Iranian crude oil will create exposure under secondary U.S. sanctions.

Additionally, FAQ 624 indicates that the New Iran EO provides authority to block the property and interests in property of persons determined, on or after 5 November 2018, to have materially assisted, sponsored, or provided financial, material, or technological support for, goods or services to, or in support of any Iranian persons on the Specially Designated Nationals and Blocked Persons List (SDN List) or any other persons included on the SDN List whose property and interests in property are blocked pursuant to EO 13599 or subsection 1(a) of the New Iran EO (in both cases excluding Iranian depository institutions whose property and interests in property are blocked solely pursuant to EO 13599).

Lastly, in a revision to the FAQs released on May 8, 2018, OFAC affirmed the GL permitting the exportation or reexportation of agricultural commodities, food, medicine, and medical products to Iran unless they involve certain sanctioned persons or conduct (see FAQ 2.7).

These actions were previewed in OFAC's 8 May 2018 public guidance, in which OFAC announced the re-imposition of primary and secondary sanctions, which took effect on 7 August 2018 and will take effect on 5 November 2018. For more information, please refer to our publications on OFAC's 8 May 2018 guidance and OFAC's amendment to the Iranian Transactions and Sanctions Regulations (ITSR) and revocation of GLs H and I on 27 June 2018.

We will continue to closely monitor this space for new developments.

Contacts

Anthony Capobianco
Partner, Washington, D.C.
T +1 202 637 2568
anthony.capobianco@hoganlovells.com

Brian Curran
Partner, Washington, D.C.
T +1 202 637 4886
brian.curran@hoganlovells.com

Aleksandar Dukic
Partner, Washington, D.C.
T +1 202 637 5466
aleksandar.dukic@hoganlovells.com

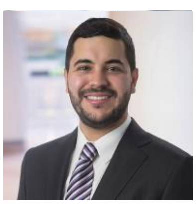
Ajay Kuntamukkala
Partner, Washington, D.C.
T +1 202 637 5552
ajay.kuntamukkala@hoganlovells.com

Robert Kyle
Partner, Washington, D.C.
T +1 202 637 5494
robert.kyle@hoganlovells.com

Beth Peters
Partner, Washington, D.C.
T +1 202 637 5837
beth.peters@hoganlovells.com

Stephen Propst
Partner, Washington, D.C.
T +1 202 637 5894
stephen.propst@hoganlovells.com

Roy Liu
Counsel, Washington, D.C.
T +1 202 637 4837
roy.liu@hoganlovells.com



Zachary Alvarez
Associate, Washington, D.C.
T +1 202 637 6559
zachary.alvarez@hoganlovells.com