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BAKER BOTTS WELCOMES LEADING ANTITRUST LAWYER AND FORMER SENIOR DOJ OFFICIAL TO ITS SAN FRANCISCO OFFICE

SAN FRANCISCO, 15 November 2018: Baker Botts L.P.P., a leading international law firm, today announced that Peter Huston has joined the firm's Antitrust Practice as a Partner. Prior to entering private practice, Peter served as the Assistant Chief of the DOJ's Antitrust Division San Francisco office and led multiple high-profile trial victories for the Antitrust Division. He will be based in Baker Botts' San Francisco office and become the latest addition to an expanding West Coast presence of the firm's award-winning global antitrust team.

"Peter is an outstanding lawyer with over 25 years of experience in the antitrust, complex commercial, white collar and high stakes criminal and civil litigation arena. His government and private sector experience will add tremendous value for our clients and speaks to the expansion of our Antitrust Practice and the momentum and growth we are seeing in the Bay area," said Andrew M. Baker, Managing Partner of Baker Botts.

"Peter is one of the most highly regarded antitrust lawyers on the West Coast, with a strong track record for top-quality work in high-profile matters both at DOJ and in private practice. We are thrilled that he has decided to join our team," said Stephen Weissman, Co-Chair of the firm's Antitrust Practice.

During his tenure as a top DOJ enforcer, Peter led the Antitrust Division's trial teams in U.S. v. BazaarVoice, a merger challenge in the high-tech industry, and in the agency's historic criminal price-fixing trial victory against AU Optronics, a maker of consumer electronics.

"Peter is the second acclaimed antitrust partner to recently join our San Francisco office. Together with Stuart Plunkett, who joined Baker Botts in 2016, Peter's addition reaffirms that San Francisco is an integral part of our global antitrust solution," said John Taladay, Co-Chair of the firm's Antitrust Practice. "In addition, Matthew Levitt recently joined our Antitrust practice in Brussels, another sign of the momentum and growth in the department," added Mr. Taladay.

"We are thrilled that Peter is joining our San Francisco office. Baker Botts is one of the fastest growing law firms in San Francisco and, with the addition of Peter, we will continue our momentum in expanding the range and depth of services we offer our clients from our California offices," said Pat Stanton, Partner-In-Charge of the firm's San Francisco office.

Mr. Huston joins Baker Botts from Sidley Austin.

For more information, please visit www.bakerbotts.com

BENNETT JONES BOOSTS CROSS BORDER TEAM

05 December 2018: Gordon Cameron has joined Bennett Jones (US) LLP as Principal in New York City. He brings more than 15 years of experience working in New York in the areas of corporate finance, private equity and cross-border transactions where he has developed deep ties to New York's business and legal communities.

"We grow where our clients need us and have been expanding our presence in key U.S. markets and areas of business, practising exclusively Canadian law," says Hugh MacKinnon, Chairman and Chief Executive Officer of Bennett Jones. "Gordon is an outstanding corporate lawyer who is deeply integrated into New York's business community. He's a superb match for our clients."

Gordon is originally from Vancouver and has almost 20 years of experience in corporate and securities law. He focuses on private equity, corporate finance, cross-border mergers and acquisitions, and other cross-border matters.

"Investors and funds are looking for growth opportunities north of the border. I have a deep commitment to client success, fitting them with the right opportunity and providing practical and tailored Canadian legal advice. This is something I've been very passionate about as a Canadian lawyer in New York," says Gordon.

The Bennett Jones (US) team practises Canadian law and supports U.S. and international clients, and their legal and financial advisors, on commercial transactions and investments in Canada. The team includes:

Brian Rose, Senior Counsel: Brian leads a number of the firm's global business activities, including initiatives to support international clients operating and investing in Canada. He is also based in New York.

Melanie Aitken, Partner and Managing Principal of Bennett Jones (US) LLP: Melanie served as Canada's Competition Commissioner, in charge of the Canadian Competition Bureau from 2009 to 2012. She runs the firm's Washington presence and is co-chair of the firm's Global Antitrust and Competition Law Department. Her practice is also exclusively in Canadian law.

David Glassberg, Senior Business Advisor: David practised corporate law in New York and other U.S. markets, and was Irving Oil's Chief Legal Officer and Corporate Secretary from 2001 to 2016. He provides strategic advice to Bennett Jones clients on critical business issues including governance, public affairs and risk management.

Gordon is a member of the American Bar Association, the New York State Bar Association, the Association of the Bar of the City of New York, the American Foreign Law Association, and the Law Society of British Columbia.

For additional information visit www.bennettjones.com

GOODSILL WELCOMES LITIGATION ASSOCIATE

HONOLULU, 13 November, 2018: Goodsill has welcomed a new litigator to the firm, Christopher K. Hikida.

Chris joins the firm as an associate and is experienced in litigation and disputes, as well as class action matters. A graduate of University of California Davis School of Law, he previously practiced at a firm in San Francisco representing plaintiffs in class action and other complex litigation matters.

For additional information visit www.goodsill.com

DAVIS WRIGHT ADDS LEADING CONSUMER FINANCIAL SERVICES ATTORNEY

NEW YORK – 26 November 2018: Davis Wright Tremaine LLP (DWT) continues to expand its consumer financial services practice, today adding Peter N. Cubita, long a leader of the fair-lending and closed-end consumer-finance bars, as counsel in its New York office. Cubita joins the firm from Ballard Spahr, where he was of counsel.

"Peter is widely and rightly regarded as one of the 'deans' of the closed-end bar, and we're thrilled that he's chosen to join our team," said Claude Goetz, chair of DWT's consumer finance practice.

Three months ago, DWT added Bradford Hardin, also a leading practitioner in fair-lending and closed-end credit matters. Hardin joined the practice from WilmerHale in Washington, D.C.

"The additions of Peter and Bradford over the past few months have significantly broadened and deepened our capabilities in fair-lending and closed-end credit matters, both in counseling and advocacy contexts. These additions were driven largely by the expressed needs of our market-leading clients," noted Goetz.

Cubita's experience is wide-ranging, encompassing regulatory compliance, transactional, governmental enforcement, and class action matters, with extensive experience in the motor vehicle retail finance and leasing areas. His advocacy efforts have yielded seminal appellate decisions in cases presenting novel issues of consequence to the financial services industry. For example, he successfully briefed and argued the appeal in Perrone v. GMAC, which resulted in the first appellate decision to analyze whether detrimental reliance is required to recover actual damages for TILA disclosure violations. He also represented GMAC in connection with its interlocutory class certification appeal in Coleman v. GMAC, which resulted in a seminal holding that compensatory damages under the Equal Credit Opportunity Act are not recoverable by a Rule 23(b)(2) class. Previously, Cubita worked as an in-house attorney at Ally Financial Inc., and was at Weil, Gotshal & Manges.

For more information, visit www.dwt.com

HOGAN LOVELLS BOLSTERS INTERNATIONAL DEBT CAPITAL MARKETS TEAM

NEW YORK, 03 December 2018: International law firm Hogan Lovells announced today that Stuart Morrissy has joined the firm's New York office as a Finance partner in the International Debt Capital Markets (IDCM) practice. Morrissy joins from Milbank, Tweed, Hadley & McCloy LLP where he was a partner in the firm's New York office.

"Stuart has extensive experience in advising on leveraged finance and high yield transactions," said Emil Arca, head of the firm's International Debt Capital Markets practice group for the Americas. "His skill set compliments our strong cross-border finance capabilities in the debt and equity markets and bolsters our ability to help commercial and investment banks, corporate issuers and private equity sponsors finance complex mergers and acquisitions."

"We have been strategically expanding our Global Finance group to support growing client demand for investment grade and high yield debt issuance," said Matthew Cottis, Global Head of the Finance practice at Hogan Lovells. "His addition will also give us the ability to offer corporate, private equity and restructuring practice clients a wider array of financing options."

Morrissy's practice focuses on securities law with an emphasis on leveraged finance and high yield transactions. He regularly represents commercial and investment banks financing complex mergers and acquisitions for corporate issuers and private equity sponsors. He also has extensive experience representing both underwriters and major corporate issuers in a wide range of debt, equity and equity-linked offerings and liability management transactions involving complicated exchange and tender offers. Morrissy also has a growing practice advising investment banks, export credit agencies, multilateral agencies, development finance institutions and corporate and government clients on capital markets programs involving guarantees, buyer credit insurance policies, political risk insurance policies and other forms of credit enhancement. He has significant expertise in developing new funding sources for the purchase of high-cost manufactured goods such as aircraft, shipping vessels and satellites.

Morrissy earned his J.D. from the University of Michigan Law School in 2000 and his B.A. from the University of Arizona in 1994. He began his career in the Capital Markets practice at Weil, Gotshal & Manges LLP.

For more information, see www.hoganlovells.com

ALLENDE BREA AND CAREY FIRMS

ASSIST LENDER IN US$100 MILLION LOAN TO CHILEAN ENERGY COMPANY'S ARGENTINE SUBSIDIARY

Allende & Brea (Argentina) and Carey (Chile) assisted Bank of Nova Scotia in its US$100 million loan to Chilean energy company Empresa Nacional del Petróleo's (ENAP) Argentine subsidiary obtain a US$100 million loan. The deal closed on 21 September.

ENAP Sipetrol Argentina will use the money to pay off existing debt and for general corporate purposes. ENAP focuses on exploration and production as well as refining and commercialisation of oil and gas. It is present in Argentina, Chile and Ecuador.

Counsel to ENAP Sipetrol Argentina Shearman & Sterling LLP

Counsel to The Bank of Nova Scotia Mayer Brown LLP, **Allende & Brea** Partner Jorge Mayora and associates Dolores Muñiz and Pedro Echavarría Coll in Buenos Aires; **Carey** Partner Diego Peralta and associates Elvira Vial, José Tomás Otero, Manuel José Garcés and Paluska Solar in Santiago

For additional information visit www.allendebrea.com.ar or www.carey.cl

ARIAS, ARIAS FABREGA & FABREGA FIRMS

ASSIST IN PROMERICA'S FIRST US DEBT TAP

Arias (Honduras) and Arias, Fabrega & Fabrega (Panama City) acted for underwriters Credit Suisse Securities and Bank of America Merrill Lynch in Panamanian bank group Promerica's first ever US issuance, worth US$200 million.

The deal closed on 12 November. This is Promerica's first ever issuance under US law. Promerica listed the notes on the Luxembourg Stock Exchange.

It will use the proceeds to refinance existing debt and fund further growth of its subsidiaries in Cost Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua and Panama.

Counsel to Credit Suisse Securities and Bank of America Merrill Lynch Cleary Gottlieb Steen & Hamilton LLP; Arias (Honduras) Partner Evangelina Lardizabal in Tegucigalpa; Arias, Fábrega & Fábrega Partners Ricardo Arango and Estif Aparicio, and associate Ana Isabel Quijano in Panama City.

For additional information visit www.ariaslaw.com and www.arifa.com

BAKER BOTTS

REPRESENTS SOUTHERN POWER IN SALE OF MANKATO ENERGY CENTER TO EXCEL ENERGY FOR $650 MILLION

HOUSTON, 07 November 2018: Southern Power, a leading U.S. wholesale energy provider and subsidiary of Southern Company, announced late Tuesday that it has entered an agreement to sell the Mankato Energy Center to Xcel Energy for $650 million.

Mankato, a natural gas combined-cycle generation facility, will have a maximum capacity of approximately 760 megawatts upon completion of an ongoing expansion project. The sale is subject to regulatory approval and other closing conditions and is expected to close mid-2019.

Baker Botts was Southern Power's primary outside counsel in this transaction.

Baker Botts Lawyers/Office Involved: Corporate: Bill Lamb (Partner, New York); Jonathan Bobinger (Partner, Houston); Courtney Fore (Senior Associate, Austin); Susan Toumanian (Associate, Washington, D.C.); Allison Lancaster (Associate, Austin); Employee Benefits: Mark Bodron (Partner, Houston); Chris Pratt (Special Counsel, Houston); Tax: Don Lonczak (Partner, Washington D.C.); Peter Farrell (Associate, Washington D.C.); Real Estate: Joel Overton (Special Counsel, Dallas); Environmental: Aileen Hooks (Partner, Austin); Paulina Williams (Special Counsel, Austin); Global Projects: Stuart Solsky (Partner, New York).

For additional information visit www.bakerbotts.com

BENNETT JONES

ACTS FOR LONGVIEW AVIATION CAPITAL CORP IN PURCHASE DASH 8 PROGRAM FROM BOMBARDIER INC

Date Announced: November 08, 2018

Deal Value: US$300,000,000

Client Name: Longview Aviation Capital Corp.

Bennett Jones is representing Longview Aviation Capital Corp., parent company to Viking Air Limited and a leading Canadian aircraft manufacturer, in its acquisition of the entire Dash 8 program including the 100, 200 and 300 series and the in-production Q400 program from Bombardier Inc. Also included as part of the transaction are rights to the de Havilland name and trademark in an all-Canadian transaction.

As part of the agreement, Longview will receive all assets and intellectual property and Type Certificates associated with the Dash 8 program. Upon the closing of the transaction, Longview will also assume responsibility for the worldwide product support business – covering more than 1,000 aircrafts either currently in service or slated for production.

Once completed, Longview will become North America’s largest commercial turbo-prop aircraft manufacturer.

This transaction builds on Longview’s established track record of acquiring and successfully operating significant aircraft manufacturing, parts and serving programs including the Twin Otter program and the Canadair CL 215 and 415 waterbomber series.

The transaction is subject to typical closing conditions and the receipt of regulatory approvals. The sale and transaction are expected to close by the second half of 2019.

For additional information visit www.bennettjones.com

BRIGARD & URRUTIA

ASSISTS IN COLOMBIA’S US$2BILLION IN HISTORIC DEBT TAP

Brigard & Urrutia in Bogota assisted the joint book runners Citigroup, Credit Suisse and JP Morgan with the Republic of Colombia raising of USS$2 billion in a public offering, following unprecedented institutional demand. The government launched the issuance on 4 October and it will close on 12 October.

Colombia made the issuances in two tranches. The first, US$1.5 billion, has an interest rate of 4.5% and will mature in 2029, while the second, US$500 million, has an interest rate of 5% and will mature in 2045.

Counsel to Republic of Colombia: Arnold & Porter

Counsel to Citigroup, Credit Suisse and JP Morgan: Sullivan & Cromwell LLP; Brigard Urrutia Partners Carlos Urrutia and Luis Gabriel Morcillo, and associate Hernán Vidal in Bogotá

For additional information visit www.bu.com.co

CAREY

ASSISTS EXPORT DEVELOPMENT CANADA IN AMENDMENT TO EXISTING CODELCO US$300 MILLION LOAN AGREEMENT

SANTIAGO Export Development Canada (EDC) looked to Carey in Chile to amend an existing loan to Chilean state-owned copper mining company Codelco worth US$300 million. The transaction closed on 25 October. The amendment means Codelco will complete its repayment in October 2028. The previous maturity date was June 2019.

Counsel to Export Development Canada **Carey** Partner Diego Peralta and associates José Tomás Otero, Manuel José Garcés and Paluska Solar in Santiago.

Counsel to Codelco Cleary Gottlieb Steen & Hamilton LLP.

For additional information visit www.carey.cl

CLAYTON UTZ

ADVISES SPOOKFISH ON SUCCESSFUL $137 MILLION SCHEME OF ARRANGEMENT WITH EAGLEVIEW

PERTH - 11 December 2018: Clayton Utz congratulates its client Spookfish Limited (ASX: SFI) on the successful implementation of its scheme of arrangement with Eagle View Technologies, Inc.

Corporate partner Mark Paganin and special counsel Stephen Neale led the firm's team, with key support from lawyers Benjamin Depiazzi and Matthew Johns. Partner Cameron Belyea and lawyers Rebecca Hing and Natasha Graham led the court aspects of the scheme process.

The total consideration valued Spookfish's fully diluted equity at approximately at approximately $137 million. Spookfish shareholders (other than EagleView) received $0.09 cash per Spookfish share.

Spookfish is a leading geospatial imagery company that offers its customers subscription-based access to high-quality geospatial imagery and textured three dimensional models.

For additional information visit www.claytonutz.com

GIDE

COUNSEL ON IPO OF CIRA ON EGYPTIAN STOCK EXCHANGE AND SIMULTANEOUS US INTERNATIONAL PLACEMENT

PARIS - 27 November 2018: Gide has advised EFG Hermes Promoting and Underwriting on the Initial Public Offering and listing of Cairo for Investment and Real Estate Development S.A.E. ("CIRA") on the Egyptian Stock Exchange in October 2018, for an amount of EGP 1.2 billion.

EFG Hermes Promoting and Underwriting acted as sole global coordinator and bookrunner to the transaction. The IPO saw over 200 million shares issued in Egypt via a public offering and via private placement to institutional investors in several jurisdictions, including to qualified institutional buyers in the United States.

CIRA is the largest private education group in Egypt, catering predominantly for the primary, secondary and higher education markets. It is the market leader on the middle-income segment, offering affordable, premium education to Egypt's middle-class population.

Gide's team was led by Paris-based U.S. securities law partner Melinda Stege Arsouze, assisted by senior associate Scott Logan and associate Amine Assouad, in cooperation with Gide's Cairo office, in particular resident partner Baudouin de Moucheron and senior counsel Karim Wissa, as well as associate Omar Adel.

For additional information vist www.gide.com

HAN KUN

ADVISES TUANCHE LIMITED ON ITS U.S. IPO

BEIJING - 21 November, 2018: Han Kun advised and acted as the PRC counsel to the joint bookrunners on TuanChe Limited's U.S. initial public offering and listing on the Nasdaq Capital Market under the symbol "TC."

TuanChe Limited is a leading omni-channel automotive marketplace in China.

For additional information visit www.hankunlaw.com

DENTONS-RODYK

ACTS FOR DBS BANK ON CAPITALAND'S SECURING FIRST AND LARGEST S$300 MILLION SUSTAINABILITY-LINKED LOAN IN ASIA'S REAL ESTATE SECTOR

SINGAPORE - 12 October, 2018: Dentons Rodyk is acting for DBS Bank (DBS) in its grant of a S$300 million multi-currency sustainability-linked loan to CapitaLand. The five-year term loan and revolving credit facility is the first and largest sustainability-linked loan in Asia's real estate sector. It is also Singapore's largest sustainability-linked financing provided by a sole lender.

The multi-currency loan is linked to the developer's listing on the Dow Jones Sustainability World Index (DJSI World), which tracks established firms in areas such as environmental, social and governance (ESG) efforts. Unlike green loans, where the funds are used for certain types of projects, CapitaLand is able to use the loan for general corporate purposes.

Senior Partner Doreen Sim and Partner Kee Min Lee worked on the matter.

For additional information visit www.dentons.rodyk.com

MUNIZ

ASSISTS INDUSTRIAL AND COMMERCIAL BANK OF CHINA LOAN TO CHINESE MINER IN PERU

Muñiz, Olaya, Meléndez, Castro, Ono & Herrera has helped Industrial and Commercial Bank of China lend US$50 million to iron miner Shougang Hierro Perú.

Shougang Hierro relied on its in-house team for counsel. The money was disbursed on 4 December.

The iron miner obtained US$10 million from ICBC Peru, while the Dubai branch of ICBC lent US$40 million.

Shougang Hierro, which is owned by Chinese state-owned steelmaker Shougang Group, will use the debt to fund its daily operations in Peru. It operates an iron mine in the southwestern province of Nazca.

Counsel to ICBC Peru and Industrial and Commercial Bank of China (Dubai branch) In-house counsel to ICBC Peru – Luciana Tataje; Muñiz, Olaya, Meléndez, Castro, Ono & Herrera Partner Guillermo Flores Borda

For additional information visit www.munizlaw.com

HOGAN LOVELLS

ADVISES AUTODESK IN US$876 MILLION PLANGRID DEAL

MENLO PARK, 21 November 2018: A team led by Hogan Lovells' Silicon Valley office has advised Autodesk in the US$875 million acquisition of privately-held construction software group PlanGrid, a deal announced by both companies yesterday.

PlanGrid has become a major innovator in the digitization of construction blueprints and projects. Formed in 2011, PlanGrid's initial goal was to move blueprints from paper to the iPad, but has accelerated its growth and is now a leading software developer in the effort to digitize workflow across the entire construction process. Its software allows general contractors, subcontractors, and owners in commercial, heavy civil and other industries work together in real time throughout the construction project lifecycle.

Autodesk is one of the world's largest suppliers of software and solutions to the design, engineering, and construction industries. The move to acquire PlanGrid will complement Autodesk's offering in construction and the cloud software space.

The deal is the second major transaction for the Hogan Lovells Silicon Valley office in a week, coming swiftly on the heels of Sabre's US$360 million acquisition of Farelogix.

The transaction is expected to close in the First Quarter of 2019. Silicon Valley-based partner Keith Flaum led the Hogan Lovells team, with key support from associates Annie Kang and Samantha Kingman. Partners John Brockland, Scott Loughlin, Mike Frank, Jeffrey Tolin and T Clark Weymouth also provided support, alongside senior associates Mohammad Amer and Nathan Salminen, and associates Max Scott, Whei Hsueh, Ryan O'Carroll, Patrick de Lapérouse and Mike Cook.

For additional information visit www.hoganlovells.com

NAUTADUTILH

ASSISTED LOGISTICS SERVICE PROVIDER NEELE-VAT ON ACQUISITION OF FAMILY BUSINESS OOSTVOGELS

ROTTERDAM, 06 December 2018: NautaDutilh succesfully advised logistics service provider Neele-Vat on the acquisition of family business Oostvogels in Breda (NL) and Meer (B). With this acquisition, Neele-Vat strengthens its position in distribution, storage and packaging in the food, feed and chemical industry. In addition, there will be an extra storage capacity of 70,000 m2, including silo storage for dry and liquid bulk. Oostvogels, with 165 employees, continues to operate within the Neele-Vat group under its own name. Its management remains active and the takeover will have no consequences for the employees.

NautaDutilh's deal team was led by Jeroen Preller and Jeanine Evertse (Corporate M&A) and furthermore included Celine Houwen, Sophie van Lanschot (Corporate M&A Notarial) and Jorieke van Strijen (Real Estate).

The Dutch and Belgian due diligence team was led by Sascha Allertz (Corporate M&A) and included Celine Houwen, Willem Renting (Corporate M&A Notarial), Niels Haasnoot (Administrative Law NL), Roeland van Cleemput (Administrative Law BE), Daniel Kuiper, Naomi Asscheman (Employment NL), Albert van der Kolk (Pensions NL), Philip Francois and Anneleen Abbeel (Employment BE). Further thanks goes to Edward Rijnhout (Tax NL), Ken Lioen (Tax BE) and Yolanda Hebbrecht (Corporate M&A BE).

For additional information visit www.nautadutilh.com

SANTAMARINA

ACTS FOR ATLANTICA YIELD IN PURCHASE OF SPAIN'S ACS PEMEX ENERGY PROVIDER

Atlantica Yield turned to Santamarina y Steta for acquisition of the Mexican arm of Spanish civil engineering group ASC natural gas concession for US $150 million. The deal was signed on 6 November. The transaction is subject to authorisation from Mexico's antitrust authorities and from state-owned energy company Pemex, which recently chose the target company as a services provider.

Counsel to Atlántica Yield Santamarina y Steta Partner Juan Carlos Machorro Guerrero and associates Alexandra Sibaja and Ricardo Orea.

For additional information visit www.s-s.mx

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CLAYTON UTZ

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

TOZZINIFREIRE ADVOGADOS

CLAYTON UTZ

06 DEC 2018

New rehabilitation framework for mining projects in Qld

BY KATHRYN PACEY, KAREN TRAINOR AND OLIVIA BACK

Progressive Rehabilitation and Closure Plans and a new public interest consideration for mines have been introduced into Queensland.

Significant rehabilitation reforms are currently underway in Queensland. For those undertaking or considering undertaking mining activities, it is important to understand the new rehabilitation regime, brought about by the passing of the Mineral and Energy Resources (Financial Provisioning) Act 2018. The Act makes significant rehabilitation reforms to the Environmental Protection Act 1994 (**EP Act**), including the introduction of Progressive Rehabilitation and Closure Plans (**PRCPs**) for mines.

Progressive Rehabilitation and Closure Plans: an overview

PRCPs – the new Progressive Rehabilitation and Closure Plans – will replace the previous Plan of Operations and apply for all mining leases for the life of the mine.

The PRCP will be separate to the environment authority (**EA**) and has its own processes for approval (including conditions), amendment, amalgamation/de-amalgamation and surrender.

A PRCP consists of two parts:

1. the rehabilitation planning part of the PRCP; and
2. a PRCP Schedule, which is the enforceable part of the PRCP. The Schedule outlines the milestones and rehabilitation outcomes for both land that can be progressively rehabilitated to a stable condition for surrender and land that cannot. Land is considered in a stable condition if it is safe and structurally stable, there is no environmental harm being caused on or in the land, and the land can sustain a post-mining land use.

If land cannot sustain a post-mining land use then it is classified as a non-use management area (**NUMA**). Land is deemed a NUMA if rehabilitation would cause a greater risk of harm than not carrying out rehabilitation or both the risk of environmental harm is confined to the area of the tenure and failing to rehabilitate the land to a stable condition is justified, having regard to cost of rehabilitation and public interest.

Unlike the rehabilitation planning part of the PRCP, the Schedule must be approved – with or without conditions – by the chief executive of the Department of Environment and Science (**DES**). The Schedule requires approval separately to the EA, however the EA overrides the Schedule in the event of inconsistency. Non-compliance with the Schedule or its enforceable conditions is an offence. The Schedule must be audited every three years and a report provided to DES.

The impact of PRCPs on existing mines

The requirement for a PRCP will be phased in for existing mines. Once the amendments to the EP Act have commenced, DES will have three years to give each EA holder a notice requiring it transition from a Plan of Operations to a PRCP. The PRCP start date is scheduled for 1 November 2019. For a mining lease, the Plan of Operations will remain in force until the Plan of Operations expires or the day the Schedule is approved, whichever occurs earlier. DES will need to consider the conditions of the current EA when approving the PRCP, but will not be bound to approve the PRCP in a way that is consistent with the current EA

For existing mines, exemptions to certain rehabilitation requirements for PRCPs have been allowed. An exemption applies if an outcome for the land has been identified under a land outcome document (such as an EA or EIS assessment report), and the outcome is the same as, or substantially similar to, the outcome if it were a NUMA under the Schedule. For example, if an EA condition authorises a void, then the PRCP cannot retrospectively impose a different rehabilitation outcome. Further, no public notice of the PRCP is required if the land use is stated in the current EA.

A new public interest consideration for mines

Under the new regime, the EP Act will now include a requirement that a proposed Schedule must not be approved unless, if a public interest evaluation is required, the public interest evaluation report (**PIER**) recommends that it is in the public interest to approve the areas as a NUMA. Amongst other things, the PIER must consider the benefit to the community resulting from the mining activity or resource project, any impacts on the environment and community and whether there are alternative options to approving the area as a NUMA.

Where a project has been through an EIS process under the State Development and Public Works Organisation Act 1971, recommendations of the PIER will prevail over conditions stated by the Coordinator-General. The PIER and any documents relied upon to exempt a holder from justifying a NUMA will be accessible on the public register.

Managing residual risks: have your say

A discussion paper on managing residual risks at rehabilitated resource sites has also been released by the Queensland Government. The paper provides an opportunity for you to have your say on the management of residual risks, as well as the financial assurance framework more broadly, with submissions open until Friday, 1 February 2019.

GET IN TOUCH

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Foreign investor in real estate in Brazil may obtain residency permit

November 30, 2018

The National Immigration Council issued on November 22, 2018, its Normative Resolution No. 36, approved on October 09, 2018, which regulates the granting of residency permit to foreigners that purchase urban real estate in Brazil.

Following similar initiatives of other nations, Brazil will allow citizens of any country to become resident through the purchase of real estate in urban areas, built or under construction, in the amount equal to or greater than one million Brazilian reais (BRL 1,000,000.00). Such minimum investment must be made with the use of own funds transferred from abroad. The amount of the investment may be of seven hundred thousand Brazilian reais (BRL 700,000.00) when the real estate is purchased in the North or Northeast regions of the country.

The foreigner may meet the requirement of the investment through the purchase of more than one property, provided that total investment is equal to or greater than BRL 1 million, or through co-ownership, provided that each co-owner invests the minimum amount. In such cases will also be applied the reduction for investments in the North and Northeast regions.

The residency will initially be granted for up to two (2) years and may be renewed or converted for an indefinite period of time, provided that the ownership of real estate is maintained and subject to conditions of the specific regulation. The foreigner will be required to stay in the Brazilian territory after the residency permit is granted for at least thirty (30) days, counted from his/her registration before the Brazilian Federal Police.

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Blog

Bill 66—More Changes to the Ontario Employment Standards Act, 2000

December 10, 2018

Written by Carl Cunningham

On December 6, 2018, the Ontario Government introduced Bill 66, titled *Restoring Ontario's Competitiveness Act*, 2018 (Bill 66). Bill 66 would amend several provincial statutes, including the Ontario *Employment Standards Act*, 2000 (ESA). The changes to be effected by Bill 66 are intended to make it easier for businesses to operate in Ontario and are in addition to the changes in Bill 47, *Making Ontario Open for Business Act*, 2018 (Bill 47), which we reviewed in our recent blog post.

Proposed Changes to the ESA Under Bill 66

The following are highlights of the proposed changes to the ESA to be effected by Bill 66:

1. ESA Poster: Elimination of the duty of employers to post a copy of the ESA poster in the workplace, but employers would still have a duty to provide a copy to each employee.

2. Approval for Excess Hours of Work: Elimination of the obligation of employers to obtain approval of Director of Employment Standards for employees to work more than 48 hours per week.

3. Approval for Averaging Hours of Work for Overtime: Elimination of the obligation of employers to obtain approval of Director of Employment Standards to average hours of work for the purpose of determining an employee's entitlement, if any, to overtime pay.

Bill 66 passed first reading in the legislature, but is not yet law. However, given how quickly the government passed Bill 47, it is reasonable to expect that Bill 66 will also proceed quickly through the legislature. We will update you further as Bill 66 progresses.

For further information please contact Carl Cunningham or Sara Parchello in our Employment Services group.

Posted on: August 23, 2018

ACCIDENTAL UNDERWRITING: INSURERS BOUND BY BROAD COVERAGE PROVISION INCLUDED IN ERROR

By: Nicholas M. Safarik

In the recent Supreme Court of British Columbia decision in *Surespan Structures Ltd. v. Lloyd's Underwriters*, 2018 BCSC 1058, the Court found that a design-build contractor and an architectural and engineering firm were both entitled to coverage under a policy that included a broad provision to insure "any firm(s)" providing "professional services" to a construction project. The decision was made despite the insurer's argument that the broad coverage provision "was included in error and does not reflect the intent of the parties with respect to the scope of coverage provided by the Policy".

The Facts

In 2014, the Vancouver Island Health Authority entered into an agreement with THP Partnership (**"Project Co."**) to design and build two hospitals and parkades in Campbell River and Comox on Vancouver Island (**"the Project"**). Project Co. subcontracted the design-build portion of the Project to Graham Design Builders LP (**"Graham"**).

Graham subcontracted the design-build work for the parkades to Surespan Structures Ltd. (**"Surespan"**), and Surespan, in turn, subcontracted much of the design work for the parkades to HGS Limited (**"HGS"**), an architectural and engineering firm.

In late 2016, cracks said to present an imminent risk were discovered in both parkades. Graham alleged the parkade defects were the result of errors or omissions in the design by Surespan and HGS, and demanded that Surespan repair the alleged defects immediately. In response to correspondence from Surespan and HGS notifying it of the potential loss regarding the parkades and requesting coverage, the insurer denied coverage on the basis that Surespan and HGS were not named in the Policy.

The Dispute

Surespan and HGS filed Petitions seeking declarations that they are "insureds" under the Policy. The Petitions were solely concerned with the issue of whether Surespan and HGS are insureds under the insurance policy; the Court was not asked to determine the issue of coverage generally, or fault for the

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alleged defects in the parkade.

The insurer issued a project professional liability insurance policy for the Project. Under the heading "INSURED(S)", the Policy included a broad provision to insure "any other firm(s) which have or will provide PROFESSIONAL SERVICES in regard to the Project" (**"Clause 3"**). Also included as insureds under the Policy were "any other firm(s) which have or will provide professional services in regard to the Project provided that such additional firms are reported and accepted by the Insurer…" (**"Clause 5"**).

The insurer argued that Clause 3 of the Policy "was included in error and does not reflect the intent of the parties with respect to the scope of coverage provided by the Policy". Interestingly, it did not seek rectification of the Policy to correct the "error", but rather submitted that the Court should simply ignore Clause 3. To explain this "error", the insurer relied on the Affidavit of an insurance broker regarding his negotiations with the representatives of the Project, and asserted that the parties intended Clause 5 to govern the scope of the term "insureds". Since neither Surespan nor HGS had been reported to and accepted by the insurer (as required by Clause 5), it argued they were not insureds and should be excluded from coverage on that basis.

Surespan and HGS primarily argued that they fit under the clear and unambiguous definition of insured set out in Clause 3 and Clause 3 could only reasonably be interpreted in their favor when the Policy was read as a whole.

The Ruling

The Court began its analysis by reviewing the purpose of a project liability insurance policy, which is intended to cover all project participants to ensure that there are funds available to the parties performing the insured services in order to rebuild in case of loss by professional negligence and to avoid litigating amongst themselves, followed by a review of the governing principles of insurance policy interpretation.

In response to the insurer's invitation to review the circumstances surrounding the issuance of the Policy, the Court acknowledged the authorities allow the Court to consider evidence of the commercial purpose of the contract and its aims and objectives, the nature of the industry in which the contract was executed and the parties' objective intentions. However, the Court agreed with the Petitioners' objection to the admissibility of extrinsic evidence regarding negotiations prior to the Policy being issued (in the form of the insurance broker's Affidavit), stating "this evidence does not affect the interpretation of the language of the Policy".

In interpreting the Policy language, the Court determined that:

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- Clause 3 provides coverage for firms that provide professional services, including the design and construction of the parkades;
- The professional services provided by the Petitioners were a component of the services contemplated in the insurance application;
- The language of the Policy generally and Clause 3 specifically was unambiguous, and the Petitioners fell within the definition of insured which did not require that the Petitioners be specifically named in the Policy;
- Clause 3 and Clause 5 could be read "harmoniously"; and
- When read as a whole, the meaning of insured is clear and unambiguous in the circumstances.

In reaching its decision, the Court rejected the insurer's invitation to simply ignore Clause 3 in the interpretive exercise, which would, in the Court's view, be tantamount to using the surrounding circumstances to "deviate from the text such that the Court effectively creates a new agreement" and "creating an ambiguity where none exists".

Practical Considerations for Insurers

The Court's decision in *Surespan Structures Ltd.* serves as an example of the principle that insurers are bound by clear and unambiguous policy language, despite such language being included in a policy in error. Evidence of an underwriting error will not prevail or even affect the Court's interpretation of the clear language of the policy.

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NEW PROCEDURE – INTERNATIONAL POLICE APPOINTMENTS

November, 2018

As of this date, an on-line appointment will be required in order to carry out the following procedures:

1. Travel Certificates
2. Permanent Residence Certificate of Validity
3. Visa Registration
4. Permanent Residence Registration
5. Duplicate of Visa/Permanent Residence Registration Certificate

To this effect, each assignee must provide his/her e-mail address in order to generate an account in the Immigration Department's platform.

It is important to mention that these appointments must be requested two to three weeks in advance and according to the authority's availability.

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

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December 10, 2018

AMAC Clarifies Personnel Requirements for Private Fund Managers

TieCheng Yang | Yin Ge | Ting Zheng | Olivia Shen

On 7 December, AMAC issued an amended version of its *Private Fund Manager Registration Instructions* (《私募基金管理人登记须知》). The amendments cover a series of matters relating to the registration and post-registration compliance of private fund managers, including requirements for personnel, business premises, business scope, capital sufficiency and affiliates, among others. In general, the amendments are intended to supplement and clarify existing requirements and supersede inconsistent AMAC rules or other guidance that have previously been issued.

From an international asset manager's perspective, the most noteworthy aspect of the amendments is the clarification of and changes to certain personnel requirements. We have summarized the highlights as follows:

I.General non-compete restriction added. The business personnel and investors of a private fund manager are required to comply with the principle of non-competition and to refrain from engaging in any activity which may present conflicts of interest with the private fund management business.

II. "Dual hatting" of senior management personnel further clarified:

1. Except for legal representatives, senior management personnel may not in principle hold any concurrent positions; otherwise, AMAC will require evidencing materials to justify the relevant dual-hatting arrangement.

2. In addition, dual-hatted senior management personnel may not exceed 50% of all senior management personnel at a private fund manager. AMAC will focus particular attention on senior management personnel who hold concurrent positions at multiple institutions and such personnel should reasonably allocate their work time.

3. As a general principle, senior management personnel of a private fund manager may not take concurrent positions at (i) any unaffiliated private asset management institutions or (ii) any institution whose business may conflict with the private fund manager.

The definition of "senior management personnel" remains unchanged and expressly includes, but is not limited to, legal representatives/executive partners, general managers, deputy general managers and chief risk/compliance officers.

III. Minimum staffing requirement expressly provided. It is now clarified that private fund managers are required to have no fewer than five employees and non-senior management employees may not take concurrent positions at other institutions.

IV. Personnel eligibility requirements. While the general requirement remains unchanged that personnel involved in private fund management shall have professional capabilities matching their respective positions, the amended Instructions have added that senior management personnel in charge of investments shall also have corresponding investment capabilities.

V. Continuity of senior management. If any senior management personnel leaves a private fund manager, his or her replacement is required to be appointed within three months.

The requirements above make no distinction on their application to domestic and foreign-invested private fund managers, so it is presumable that they will generally apply to all AMAC-registered private fund managers. The new personnel requirements may be challenging for some international asset managers who intend to engage in QDLP and/or WFOE PFM business, especially at the initial stage. However, to the extent a holding structure is adopted where a WFOE PFM will establish a subsidiary as a QDLP fund manager, a proper dual-hatting arrangement will still be achievable to effectively manage human resources. Given the amendments are very new, further interpretation from AMAC may be required for implementation of these requirements in practice. We will continue to closely monitor for any developments.

We have prepared an English translation of the amended AMAC Private Fund Manager Registration Instructions. Please let us know should you wish to receive a copy.

● Important Announcement

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.

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December, 2018

Comprehensive and Progressive Agreement for Trans-Pacific Partnership

On November 29, 2018, the "*Decree promulgating the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, made in Santiago of Chile on March eight two thousand and eight"*, was published in the Mexican Official Gazette of the Federation.

Through the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, (or as it is named the CPTPP or TPP 11), its members Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, New Zealand, Peru, Singapore, Vietnam and Mexico, establish a platform for potential economic integration of the Asia-Pacific region.

In this regard, the CPTPP will allow Mexico to have greater integration with the countries of such region and, at the same time, reaffirm its commitment with the diversification of commercial ties with and in that region. Indeed, through such Treaty, Mexican products will have access to 6 new markets (Australia, Brunei Darussalam New Zealand, Peru, Singapore and Vietnam) that together represent 155 million potential consumers, as well as continued preferential access to 4 other markets with which Mexico already had other trade agreements in place.

On the other hand, the CPTPP contains innovative chapters in various topics such as those of electronic commerce, completion policy, small and medium-sized enterprises, transparency and anti-corruption, competitiveness and business facilitation, among others.

In addition, the TPP 11 contains a modernization, extension or betterment in topics such as intellectual property, telecommunications, labor and environment, that makes this treaty a last generation instrument and which has even served as a basis for other similar trade negotiations of the same nature such as those carried out on the United States-Mexico-Canada Agreement.

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership will enter into force on December 30th, 2018 and its complete text is available in the following link (here).

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

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Corporate

Netherlands

Dutch cooling-off period in face of shareholder activism or hostile take-over

Tuesday 11 December 2018

On December 7, 2018, the Dutch government published draft legislation aimed at promoting a careful decision-making process in case of shareholder activism or a hostile takeover. If enacted in its current form, the proposal would introduce a statutory cooling-off period of up to 250 days during which the shareholders meeting would not be able to dismiss, suspend or appoint board members of a listed Dutch company under attack.

Scope

The legislation would apply to companies organized under Dutch law whose shares (or depository receipts for shares) are listed on a regulated market or multilateral trading facility operating in the European Economic Area, or on any similar stock exchange operating outside the European Economic Area, including Nasdaq and NYSE.

Conditions to invoke the cooling-off period

The board of a listed Dutch company under attack may invoke a cooling-off period of up to 250 days in case:

1. shareholders, using either their shareholder proposal right or their right to request an extraordinary shareholders meeting, propose an agenda item for the shareholders meeting relating to the dismissal, suspension or appointment of a board member (or an amendment of any provision in the company's articles dealing with those matters); or
2. a public offer for the company is made or announced without the company's support, provided, in each case, that such proposal or offer materially conflicts with the interests of the company and its business, as determined by the board.

If a supervisory board has been established, the decision to invoke the cooling-off period shall be subject to its approval. If no supervisory board has been established, the decision of the board (or one tier board) will suffice. This also applies to the decision of the board to terminate the cooling-off period.

Effects of the cooling-off period

During the cooling-off period, the shareholders meeting cannot validly resolve on the dismissal, suspension or appointment of a board member (or an amendment of any provision in the company's articles dealing with those matters), unless proposed by

the board itself.

Judiciary review

Shareholders representing 3% or more of the issued share capital may request the Enterprise Chamber of the Amsterdam Court of Appeal for early termination of the cooling-off period. The Enterprise Chamber must deny the request if the board, in view of the circumstances at hand when the cooling-off period was invoked, could reasonably have come to the conclusion that the relevant shareholder proposal or hostile offer constituted a material conflict with the interests of the company and its business.

Consultation and transparency

During the cooling-off period, the board must gather all relevant information necessary for a careful decision-making process. In this context, the board must also consult with relevant stakeholders, including shareholders representing 3% or more of the issued share capital, the supervisory board (if one has been established) and the Dutch works counsil (if any). Formal statement expressed by these stakeholders during such consultations must be shared with other stakeholders who are consulted by the board. Ultimately at the end of the cooling-off period, the board must publish a report in respect of its policy and conduct of affairs during the cooling-off period. This report must be tabled for discussion at the next shareholders meeting.

End of cooling off period

The cooling-off period ends at occurrence of the earliest of the following events:

1. the expiration of 250 days following the date of the relevant shareholder proposal or hostile offer;
2. the hostile offer being declared unconditional (after the expiration of the initial acceptance period); or
3. the board (voluntarily) terminating the cooling-off period.

Combination with protective measures and/or existing response period

In an explanatory note, the legislature indicates that it is opposed to the accumulation of the cooling-off period with protective measures and/or the existing response period under the Dutch Corporate Governance Code. However, the draft legislation itself does not provide any specific restrictions in this respect. The rules in respect of potential combination or successive application of the various measures available to companies organized under Dutch law should be developed in market practice and case law.

There are a number of interesting differences between the existing response period under the Dutch Corporate Governance Code and the proposed statutory cooling-off period, which are summarized in the table below.

Existing response period	**Proposed cooling-off period**
Follows from the Dutch Corporate Governance Code and is considered part of the general principles of reasonableness and fairness which should be observed by all stakeholders (including shareholders)	**Mandatory Dutch law (once enacted), binding upon all shareholders**
Up to 180 days	**Up to 250 days**
Can be invoked if shareholders propose an agenda item which could result in a change to the company's strategy, including (but not necessarily limited to) the dismissal of board members.	**Can be invoked if shareholders propose the dismissal, suspension or appointment of a board member (or an amendment of any provision in the company's articles dealing with those matters), or in case of a hostile offer**
Allows the board to postpone a shareholder proposal during the response period (both as a discussion and as a voting item)	**Allows the discussion of a shareholder proposal during a shareholders meeting, but prevents a valid resolution in respect of the dismissal, suspension or appointment of a board member (or an amendment of any provision in the company's articles dealing with those matters) during the cooling-off period**

Although the legal effect of the existing response period under the Dutch Corporate Governance Code (postponement of the proposal) is slightly different from the legal effect of the proposed statutory cooling-off period (suspension of decision-making powers of the shareholders meeting), the common denominator of both measures, is that they each effectively prevent an activist or hostile bidder from changing the board composition of the target company during a standstill period invoked by the board. This also distinguishes these measures from more traditional protective measures under Dutch law, such as the issuance of preferred shares to an independent foundation, where (i) the decision whether to activate the protective measure typically vests in an independent third party and (ii) the protective measure is more focussed on neutralizing a vote at the shareholders meeting rather than avoiding a vote altogether.

Compliance with European rules

Based on advice from the Dutch Council of State (which has also been published), the Dutch legislature believes that the proposed legislation does not violate European rules. Relevant rules include in this respect:

1. the European Takeover Directive: the proposed legislation does not interfere with the course of any public take-over itself (merely with the adoption of certain shareholders resolutions during the offer period);
2. the European Shareholders Rights Directive: a distinction is made between the convocation of shareholders meeting and the inclusion of items on the agenda of such meeting on the one hand and, on the other hand, the suspension of the shareholders' powers to validly adopt certain resolutions (only the former, and not the latter, being subject to such European Directive); and
3. the European freedoms: although it is acknowledged that the proposed legislation could have a restrictive effect on European freedoms, the legislature believes that this is justified by the public interest of a careful decision making process and proportionality.

Next steps

The general public is invited to submit comments on the draft legislative proposal before February 7, 2019. Following review of the comments and potential revision of the proposal, the legislative proposal may be submitted to Dutch parliament. We will of course inform you of any new developments as soon as they are known.

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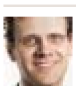

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New Employment Laws will come into force in May 2019

December 06, 2018

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Employment (inc Employment Relations Amendment Bill) (/resources/employment-inc-employment-relations-amendment-bill)

The Government last night succeeded in passing one of the most important pieces of their legislative agenda, the Employment Relations Amendment Bill. The Bill strengthens the legal rights of employees, enhances the workplace power of unions, and bans larger employers from using 90-day trial periods.

The Bill has been the subject of considerable media attention as it has progressed through Parliament this year, and the Government has overcome trenchant opposition from the National Party and business advocacy groups.

However, opponents of the Bill won a few victories in the late stages before the Bill was passed. The New Zealand First Party, whose votes were required for the Government to pass the Bill, indicated last week that they thought the Bill went too far in favour of unions. NZ First leader Winston Peters described the Bill then as "a work in progress". The final Bill reflects two key concessions:

Union officials will not be able to freely access a workplace without obtaining consent from the employer (unless there is a collective covering their work, or where bargaining is underway); and

Employers will now be able to object to Multi-Employer Collective Agreements (MECAs), if they have 'reasonable grounds' to do so.
Most of the Bill's provisions come into force 6 May 2019. We recommend that employers consider whether their employment agreements, practices and policies are compliant ahead of the changes coming into force. We are happy to provide advice on what effect the Bill will have on your business.

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Fundraising basics for start-ups: a legal perspective

November 19, 2018

Introduction

Singapore is one of the most diverse start-up ecosystems globally and in the region. Private equity and venture capital investments in Southeast Asia reached US$23.5 billion in 2017, as reported in the Singapore Venture Capital & Private Equity Association Report on Southeast Asia PE & VC: Investment Activity (May 2018). With a conducive ecosystem for start-ups to grow and flourish, this article seeks to highlight certain legal pointers as a broad guide and framework for start-ups and founders to be aware of when approaching fundraising exercises.

Manner of investments

Generally, the various rounds of fundraising in a start-up may include the following:

- Initial angel round, which may include investments from family, friends, or high net worth individuals.
- Seed financing involving a limited number of investors, typically to support initial working capital needs.
- Various subsequent rounds of financing (Series A, Series B, etc.), which are typically led by venture capital or institutional investors with a view to scaling the business of the start-up.
- Pre-IPO financing prior to the start-up's imminent initial public offering (IPO).

Some common forms of investment instruments are as follows:

Equity

- Ordinary shares.
- Preference shares: Shares with separate terms and conditions, some of which are preferential to those of the ordinary shares, allowing parties to vary the voting rights, dividends, and liquidation preference of the shares, amongst others, as well as determine whether such shares may be redeemable or convertible at the investors' option, or upon the occurrence of certain prescribed events, such as an IPO or the sale of the start-up.

Debt

- Simple debt: Simple debt with interest.
- Convertible debt: Debt that may be convertible into equity in the start-up (ordinary or preference shares) upon the occurrence of certain specified events.

- Venture debt: Equity-linked debt instruments, such as a loan with an attached warrant or option, granting the investor a right to further subscribe for shares in the start-up.

The type of investment instruments adopted would depend on various factors, including:

- Commercial considerations and the bargaining power of the start-up vis-à-vis the investors.
- Specific requirements of investors, e.g. the scope of the investors' investment mandate, their ability to divest of the investment, the level of investor protection required, etc.
- The financial position of the start-up and the accounting / financial impact of the investment or type of investment instrument on the start-up's financial statements.
- Tax considerations.

Key transaction documents

A typical round of fundraising would involve a suite of legal documents, the key ones being:

- Term sheet.
- Subscription / investment agreement.
- Shareholders' agreement.
- Service contracts for the start-up's founders.

Where new classes of shares are being created, the constitution of the start-up will also need to be amended. The amendments would typically also include certain terms of the shareholders' agreement to be entrenched in the constitution.

Due diligence

Investors would usually carry out a business, legal and financial due diligence before proceeding with an investment. This would enable investors to understand the financial, legal and business position of the start-up and the investment risk profile, and also flush out any legal irregularities that it may wish for the start-up to resolve pending or post investment. Depending on the complexity of the start-up's business and operations, this may take the form of a cursory desktop due diligence or an extensive review of the start-up's records.

Founders' assurances

As an assurance, investors would typically require the start-up's founders to stand behind the start-up by providing personal guarantees and/or contractual warranties as to the condition and operations of the start-up. The warranties may be generic, and may also address specific issues noted from the due diligence.

Investor protection

As investors usually hold a minority stake in the start-up, they would typically expect certain minority protection rights. Some examples are:

- Undertakings to be given by the founders of the start-up to achieve certain performance milestones;
- Board representation.
- Reserved matters at the board or shareholders' level that may require certain approval thresholds to be met or approved by the investors.
- Rights to certain information such as the start-up's financial statements or business plans, or observer rights to sit in on board meetings.
- Pre-emption rights over the issue and allotment of new shares or the transfers of shares, drag-along, and tag-along rights.
- Put option for the investors to sell their stake back to the founders.

Exit strategies

In structuring the investment, both the founders and investors would usually consider what happens upon the occurrence of an exit event, usually an IPO or a trade sale. The investment documents would commonly include provisions to address and regulate such exit events.

Other considerations

As a final point, some other factors that start-ups and founders should bear in mind when considering fundraising options are:

- Terms of the fundraising: These are commercially driven and depends on the bargaining power of the start-up vis-à-vis the investors, as elaborated above.
- Valuation: This would determine the amount investors are willing to pay for a share in the start-up, which would affect the amount raised per equity issued.
- Dilution: Founders should consider how much of their shareholding in the start-up is being diluted at each round of funding where equity is issued.
- Investor profile: This includes the investors' reputations, track records, and what they may be able to offer to the start-up apart from financing, including board guidance and business connections.
- Investment timeline: Certain investors may be investment funds with a limited fund life; in such case, their investment may require the start-up to meet certain milestones (such as an IPO or trade sale) within a limited time period, or a put option for the fund to exit prior to the expiration of the fund life.
- Other fundraising options: In addition to the fundraising options mentioned in this article, start-ups should also consider other avenues for funds, such as government grants and bank borrowings; each option would entail its own set of advantages and disadvantages that need to be considered and weighed, and would also depend on the start-up's need for the funds and its cash flow situation.

Dentons Rodyk acknowledges and thanks senior associate Kevin Chua for his contribution to this article.

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The Taiwan Food and Drug Administration is Moving Forward to Implement the Patent Linkage Laws in Taiwan

11/30/2018
Roger Chang

On September 11, 2018 the Taiwan Food and Drug Administration (TFDA) published a draft version of the new regulations on patent linkage titled "The Enforcement Rules for Patent Linkage" for public comment. The provisions relating to Taiwan's new patent linkage system were set out in the Pharmaceutical Affairs Act, passed on 27 December 2017 and promulgated by the president on 31 January 2018.

Two hearings were held by the TFDA in November. Analysis of the new Regulations and the TFDA’s announcements made in the hearings, which reveals several aspects that will have a significant impact on patent linkage operations.

Biological patents and biosimilar products

The first and arguably most important aspect relates to biological patents and biosimilar products. Biological patents will be classified as “new drugs” and therefore eligible for listing in the new system as long as they are not process patents. However, according to the TFDA’s latest announcement on November 27, even after biological new drug application (NDA) holders have listed their patents, applicants seeking biosimilar marketing approval would not need to make a declaration under Paragraph IV and the marketing approval applications will not be stayed for one year, because the patent linkage legislation does not define biosimilar products as “generics.”

Patent listing eligibility

It was an issue whether patents which claim different polymorphs of a medicinal ingredient are eligible for listing. One side of the industry supports that different crystalline, amorphous, hydrated and solvated forms of approved medicinal ingredients should be eligible for listing. The other side proposes that patents covering non-commercialized polymorphs should not be eligible. The TFDA made it clear on November 27 that patents covering non-commercialized polymorphs are basically eligible for listing.

Patent listing methodology

The new regulations confirm that patent listings will need to be made via the TFDA's online database. Listing will be performed entirely electronically. The TFDA has formally informed local NDA holders and ask them to submit lists of products to the TFDA by late December identifying products eligible for listing. As the master manager of the patent listing online system, the TFDA would crate “accounts” in the system in accordance with the products on the lists submitted by NDA holders, so that NDA holders would be able to list patents when entering into the system in the future.

Implementation

Though the TFDA yet to formally announce the date of implementation, the new patent linkage laws and regulations are expected to be implemented in January 2019. It seems that the TFDA does try to expedite the preparation for the implementation.

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Ideas

Can Bankruptcy Terminate Intellectual Property Licenses?

29 November 2018
Firm Thought Leadership

After filing for Chapter 11 bankruptcy, a company may request court approval to "reject" any outstanding executory contracts. 11 U.S.C. §§ 365(a), 1107(a). If the bankruptcy court approves the rejection, the other party to the contract may pursue a claim for damages because of the "breach" of the contract but cannot compel future performance. 11 U.S.C. § 365(g). The Supreme Court has held "the authority to reject an executory contract is vital to the basic purpose to a Chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede a successful reorganization." *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). In many situations, monetary damages provide adequate compensation for the rejection. However, in situations involving contracts for specialized services or goods, monetary compensation—and likely reduced monetary compensation due to the insolvency of the rejecting party—may leave the other party in an undesirable position. When the contract in question is a license to intellectual property rights, the rejection of said contract by a bankrupt intellectual property owner may have devastating impacts on the licensee's business if it relies heavily on the licensed intellectual property rights, and on income from the license that may assist in the reorganization of the bankrupt intellectual property licensor.

Accordingly, many have argued that the licensee of intellectual property rights should be able to retain its rights to the intellectual property even if the licensor rejects the contract. As discussed in greater detail below, Congress addressed this very issue with regard to certain intellectual property rights, but others remain open to further debate and treatment by the courts. In *In re Tempnology, LLC*, 879 F.3d 389 (1st Cir. 2018), the First Circuit affirmed the bankruptcy court's finding that licensee Mission Products Holdings, Inc. ("Mission") did not have the right to the continued use of Tempnology, LLC's ("Tempnology") trademark rights, nor did it retain the exclusive distribution rights to certain products covered by Tempnology's patents. *Id.* at 405. On October 26, the Supreme Court granted Mission's petition for *certiorari* to address the circuit split on these issues. *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, No. 17-1657, 2018 WL 2939184 (U.S. Oct. 26, 2018). Specifically, the Supreme Court certified the following question for review: "[w]hether, under § 365 of the Bankruptcy Code, a debtor-licensor's 'rejection' of a license agreement—which 'constitutes a breach of such contract,' 11 U.S.C. § 365(g)—terminates rights of the licensee that would survive the licensor's breach under applicable non-bankruptcy law." *Id.*; Petition at (i). Trademark licenses were explicitly excluded by Congress when it amended the statute because such agreements raise unique issues not present with respect to other intellectual property licenses, such as the trademark owner/licensor's obligation to control the quality of any licensed products and services; Congress thought it best to leave it to the equitable determination of the bankruptcy courts to resolve these types of issues. *See* S. Rep. No. 100-505, at 5 (1988).

I. Lubrizol and Congressional Amendment

The issue presently before the Supreme Court is largely one of statutory interpretation. However, § 365 of the Bankruptcy Code—the statutory framework in question—underwent substantial amendments in response to a 1985 decision by the Fourth Circuit. In *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985), the Fourth Circuit addressed whether the licensee to patented technology may continue to practice the patent under the terms of a license agreement even after the licensor rejects the contract. *Id.* at 1045. The Fourth Circuit held that the phrase "executory contract"—as found in § 365(a)—encompassed intellectual property licenses. *Id.* at 1045; see also 11 U.S.C. § 365(a) ("the trustee, subject to the court's approval, may assume or reject any executory contract"). Therefore, the court held "the statutory 'breach' contemplated by § 365(g) controls and provides only a money damages remedy for the non-bankrupt party." *Id.* at 1048. The court reasoned that allowing the licensee to retain its contract rights in the intellectual property "would obviously undercut the core purpose of rejection under § 365(a)." *Id.* Applying the *Lubrizol* holding allows debtors to completely terminate a licensee's rights to continue use of the debtor's intellectual property with court approval.

The Fourth Circuit's decision faced instant criticism, prompting Congress to amend the bankruptcy code in 1988 to include § 365(n) "to make clear that the rights of an intellectual property licensee to use the licensed property cannot be unilaterally cut off as a result of the rejection of the license pursuant to [§] 365." S. Rep. No. 100-505, at 3200. Congress explained they "never anticipated that … the licensee would lose not only any future affirmative performance required of the licensor under the license, but also any right of the licensee to continue to use the intellectual property as originally agreed in the license agreement." *Id.* at 3201-3202. Section 365(n) provides that when a debtor rejects a contract "under which the debtor is a licensor of a right to intellectual property," the licensee may elect either to treat the contract as terminated or to "retain its rights (including a right to enforce any exclusivity provision of such contract …) under such contract … to such intellectual property." 11 U.S.C. § 365(n). At the same time, Congress amended the bankruptcy code definitions to include the term "intellectual property" that covers, among other things, patents, copyrights, and trade secrets. 11 U.S.C. § 101(35A). The definition of "intellectual property" did not, however, include trademarks.

II. Seventh Circuit: Sunbeam Prod. v. Chicago Am. Mfg. LLC

The Seventh Circuit was the first circuit court to address the issue of rejected trademark licenses after *Lubrizol* and the subsequent amendments to § 365. *See Sunbeam Prod., Inc. v. Chicago Am. Mfg.*, LLC, 686 F.3d 372 (7th Cir. 2012). The court found that rejection of a trademark license does not terminate the licensee's right to use the debtor's trademarks, thereby refusing to adopt the reasoning presented by the Fourth Circuit in *Lubrizol* that the goals of Chapter 11 bankruptcy would be best served by termination of a licensee's intellectual property rights. *Id.* at 376–78. Specifically, the court asserted that the decision was "mistaken" and did not "correctly underst[an]d §365(g)." *Id.* at 376. In the Seventh Circuit's view, *Lubrizol* incorrectly equated a trustee's or debtor-in-possession's rejection of the license to an "avoiding power" rather than merely a breach as governed by § 365(g). *Id.* at 376–77. The court explained "[o]utside of bankruptcy, a licensor's breach does not terminate a licensee's right to use intellectual property." *Id.* at 376. "What § 365(g) does by classifying rejection as breach is establish that in bankruptcy, as outside of it, the other party's rights remain in place." *Id.* at 377. In other words, according to the Seventh Circuit, whether trademarks are covered by § 365(n) has no effect on the licensee's ability to continue using the trademarks post-rejection.

III. First Circuit: Mission Products Holdings Inc., v. Tempnology, LLC

In *In re Tempnology, LLC*, the First Circuit reached a different conclusion from the Seventh Circuit and created the circuit split now facing the Supreme Court. 879 F.3d 389. On November 21, 2012, Mission and Tempnology executed a Co-Marketing and Distribution Agreement, which serves as the focal point of the dispute. *Id.* at 394. The agreement granted Mission several rights, including patent licenses, trademark licenses, and exclusive distribution rights to certain patented products. *Id.* On September 1, 2015, Tempnology filed for Chapter 11 bankruptcy and, the following day, moved to reject its agreement with Mission. *Id.* Mission invoked § 365(n) in an attempt to retain the intellectual property rights granted by the agreement, but the bankruptcy court found that this exemption only applied to the patent rights, not the exclusive distribution or trademark rights. *Id.* "With respect to trademarks, the court reasoned that Congress's decision to leave trademarks off the definitional list of intellectual properties in 11 U.S.C. § 101(35A) left the trademark license unprotected from rejection." *Id.* Mission appealed to the Bankruptcy Appellate Panel for the First Circuit who affirmed the court's order with respect to the exclusive distribution rights, but instead applied the *Sunbeam* holding to trademark rights. *Id.* at 395.

Specifically, the First Circuit agreed with the original bankruptcy court, reversing the Bankruptcy Appellate Panel's decision on the trademark issue. *Id.* In doing so, the court applied the reasoning from *Lubrizol* that "[e]ven though § 365(g) treats rejection as breach, the legislative history of § 365(g) makes clear that the purpose of the provision is to provide only a damages remedy for the non-bankrupt party." *Id.* at 396 (quoting *Lubrizol*, 756 F.2d at 1048). The court argued that Congress recognized this to be the case by choosing to add § 365(n) rather than amending § 365(a) or (g) to clarify that the "breach" was no different than those occurring outside of bankruptcy. *Id.* at 397–98. Moreover, the First Circuit reasoned that this was consistent with the goal of bankruptcy—to reduce burden on a debtor—because, unlike other forms of intellectual property, trademarks require the owner "monitor and exercise control over the quality of the goods sold to the public under cover of the trademark. *Id.* at 402. Requiring this monitoring and control of the trademarks, the court asserted, would "diminish[] their value to Debtor, whether realized directly or through an asset sale." *Id.* at 403.

In its petition for certiorari, Mission asks the Supreme Court to overturn the decision below from the First Circuit and, instead, adopt the *Sunbeam* rule that "rejection does not 'impl[y] that any rights of the other contracting party have been vaporized.'" Petition at 22 (quoting *Sunbeam*, 686 F.3d at 377). Mission explains "[t]he trustee or debtor-in-possession in bankruptcy does have an 'avoiding' power that enables it to undo certain pre-bankruptcy transactions, but it is a limited power found elsewhere in the Bankruptcy Code." *Id.* at 23. Mission further argues "[t]he omission of trademarks from the Code's definition of 'intellectual property' does not create any inference that trademark rights do not survive rejection." *Id.* at 27. Specifically, Mission argues that "rather than endorsing *Lubrizol's* result for trademarks, the Senate Report emphasized that, while 'it was determined to postpone congressional action' on trademarks, 'rejection [of trademark licenses] [was] of concern because of the interpretation of [§] 365 by the *Lubrizol* court.'" *Id.* (quoting S. Rep. No. 100-505, at 3204). Several *amicus curiae* briefs were filed supporting Mission's arguments, including one from The International Trademark Association. That brief refutes the First Circuit's findings of the diminished value of a trademark by explaining "[t]rademark licensors also would benefit from this regime where licensees, knowing their rights will be more valuable in any eventual bankruptcy proceeding, are incentivized to pay more for those rights in pre-bankruptcy negotiations." INTA Brief at 23.

The opposition focuses its substantive arguments on the assertion that "[t]rademarks are deeply different from other forms of intellectual property subject to the application of section 365(n), because the value inheres in conveying a message of continued monitoring and quality control by the originator (and not just the licensees)." Opposition at 6. Tempnology reasons "[t]he unique characteristics of trademarks support a holding that licensees cannot continue to use trademarks after a debtor rejects a trademark license under section 365 because continued use necessarily imposes costs and burdens on the debtor licensor." *Id.* at 13–14. The opposition argues that Congress recognized this fundamental difference associated with trademarks by expressly considering their inclusion in, but subsequently leaving them out of, its bankruptcy definitions and § 365(n). *Id.* at 7. Tempnology argues Congress should handle "through legislative action what this Court cannot" if it feels that change is necessary. *Id.* at 9.

IV. Conclusion

The International Trademark Association noted that "[i]n 2014, trademarks accounted for $6.1 trillion in value added to the U.S. gross domestic product." INTA Brief at 24 (citing Economics and Statistics Administration & United States Patent and Trademark Office, INTELLECTUAL PROPERTY AND THE U.S. ECONOMY: 2016 UPDATE 22 (2016)). Moreover, trademark licensing "provides a significant stream of revenue for trademark licensors, not to mention extensive commercial opportunities." *Id.* at 25 (citing Irene Calboli, *The Sunset of "Quality Control" in Modern Trademark Licensing*, 57 AM. U. L. REV. 341, 343 (2007)). Thus, the commercial significance of the Supreme Court's forthcoming decision is clear. The Supreme Court's decision in this case should, regardless of the outcome, provide some clarity for parties considering trademark licenses in the face of potential bankruptcy. Improved clarity will allow negotiating parties to assign proper value to the trademarks, and potentially other intellectual property rights, in question. For example, § 365(n)'s protections only apply explicitly to license agreements. If the Supreme Court agrees adopts the *Sunbeam* standard, the decision could have broader impact on other types of contracts involving intellectual property rights, such as covenants not to sue and exclusive distribution/sales agreements.

# # #

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FTC Hearings Exploring Algorithms, Artificial Intelligence, and Predictive Analytics Focus on Notions of Fairness, Transparency and Ethical Uses

12.04.18

By Chris Cook, Katherine Bravo, KC Halm and Amy Mushahwar

The FTC continued its series of public hearings on Competition and Consumer Protection in the 21st Century with two days of hearings on November 13-14 focused on "Algorithms, Artificial Intelligence, and Predictive Analytics." During two days of discussions and testimony panelists generally agreed that new regulations in this area would be premature, and that finding the appropriate framework for transparency, fairness and ethics may require society to consider tradeoffs between competing value sets.

The hearings, at Howard University School of Law in Washington, DC, brought together FTC staff, industry, academia and consumer interest organizations to discuss key issues arising from the increasing adoption of algorithms, artificial intelligence, and predictive analytics in society, including:

- Current and potential uses;
- Ethics and consumer protection; and
- Policy, innovation, and associated market considerations.

Panelists discussed the fundamental aspects of algorithms, artificial intelligence, and predictive analytics (hereafter "AI"), how these technologies could impact and influence consumer protection, and emerging regulatory and legal issues associated with the use of these technologies in real-world applications.

Bias and Algorithmic Fairness Concerns Require Tradeoffs

During a panel on ethics, participants from industry and academia attempted to tackle some of the ethical considerations in the use of AI. Participants discussed the many ways in which AI contributes to improving society, including by detecting diabetic retinopathy in adults with diabetes; assisting lenders in extending credit to individuals that have not had access to credit before; and uncovering financial transactions that may be fraudulent.

At the same time, panelists acknowledged that the use of AI is not without risk. For example, panelists agreed that the use of AI may lead to bias in decision-making, including the use of biased data sets (to initially train AI tools or as ongoing data feeds). In addition, bias in AI may also be tethered to other imperfect sources, such as:

- Data encoding social prejudices from social media and other inputs;
- Less input data for minorities and other historically disadvantaged segments of society;
- Intentional prejudice (known as "data masking"), such as the bias against hiring pregnant women who may then leave the position; and
- Proxy variables, such as zip codes correlated with race/income levels.

Although panelists agreed that bias in AI exists, several argued that critical to whether the use of AI leads to "biased" results is how we, as society, define fairness. Microsoft's Jennifer Wortman Vaughn argued that because bias may arise from incomplete or inaccurate data sets, policymakers must carefully choose metrics providing preferential treatment of some individuals recognizing the fact that tradeoffs between fairness amongst affected parties and accuracy of the algorithmic output may be necessary. Similarly, Professor Michael Kearns from the University of Pennsylvania argued that algorithmic fairness requires tradeoffs between fairness and accuracy (and possibly also within competing notions of fairness). Regardless, panelists agreed that because humans are inherently error-prone, algorithms developed by humans to perform tasks that in the past required human intelligence (including decision making and recognition of audio and video) may be subject to the same errors and biases that humans make.

The panelists acknowledged that once fairness is defined, application of that definition in a machine learning environment may come with tradeoffs. Optimizing for fairness, for example, could come at the cost of accuracy and vice-versa. Therefore, panelists agreed that the reduction of bias and optimization of metrics must be carefully weighed at every stage in the machine learning process – from the initial input of training data (larger more diverse data sets will help eliminate biases) to the models in which the data is applied and outputted.

Existing Consumer Protection Authority over New Technology Negates the Need for New Regulations

Panelists acknowledged that the use of AI may lead to new consumer protection concerns. However, in light of existing consumer protection laws, panelists generally agreed that any new regulation targeted at AI and machine learning is unnecessary at this time. In fact, the majority of panelists agreed that current authority under the FTC Act and Section 5 is broad enough to address consumer protection matters in which the FTC has jurisdiction. Furthermore, sector-specific laws, like the Fair Credit Reporting Act, add an additional layer of consumer protection.

Panelists explained that over-reaching regulation could have a detrimental impact on the development and proliferation of AI. For example, University of Washington Professor Ryan Calo argued that a recently enacted California law, which requires bots to disclose that they are bots when communicating with humans, may be premature. Other panelists characterized the law as unnecessary and harmful to the development of AI. Panelists argued that defining consumer protection in the context of AI is difficult when human behaviors are often contradictory. For example, many individuals treat certain situations differently and have value sets different from society at large. This presents the question of whether AI developers should calibrate outcomes based upon the expectations and norms of a specific individual, a subset of individuals, or society at large. Given these inherent contradictions, the panel agreed that it is not appropriate to adopt AI-specific laws and regulations at this time. Instead, panelists suggested that the most useful step the FTC can take with regard to AI is to issue best practices or guidelines that companies can apply to AI, which will influence how AI conforms to existing societal standards and rules.

Transparency in Algorithms, Artificial Intelligence, and Predictive Analytics Present Difficult Questions

During questions regarding the efficacy of the EU's approach on investing in AI and advancing consumer protection under the GDPR, Justin Brookman of Consumer's Union argued that the EU has stated a desire to advance in AI but that "they have shot themselves in the foot" in two ways with: (1) the right to explanation of significant decisions and (2) the right to erasure. "If an algorithm is used to make a significant decision about a person, you have the right to an explanation [under the GDPR]." However, Brookman noted that companies may ultimately use humans to make those decisions "which doesn't end up protecting consumers anymore" given that a decision accounting would not be required in that context. He further argued that "the law should say 'an explanation should be required regardless if a human makes it.'" Under the GDPR, individuals have the right to not be subject to a decision "based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her" without any human intervention. But according to Brookman, "the GDPR will struggle with determining where consumers [or companies] can jump in to correct the effects."

Some panelists argued that transparency obligations should apply to AI. The concept of transparency, in this context, includes "explainability," where companies should be able to explain "what they are doing and for what purpose," according to Brookman. "The FTC could be doing more to . . . say you have to have some basis for making these very precise claims, other than 'I don't know, the machine said it,'" added Brookman. Panelists also called for regular audits and to put in place feedback mechanisms to ensure that algorithms are continuing to learn and train in the manner programmed.

For example, one panelist proposed two questions that regulators should be asking when evaluating an algorithm's harm to consumers: (1) whether or not an AI system had mechanisms in place – either technological or procedural – to verify the system was acting as designed and (2) whether the system had mechanisms in place so that the operator could identify and prevent harmful outcomes. Mechanisms could include [ethical] impact assessments and error analysis. If a company can answer "yes" to both questions, they should be considered to be acting in good faith. If a company answers "no" to at least one question, they should be sanctioned moderately; if a company answers "no" to both questions, they should be sanctioned heavily.

Panelists' responses varied when asked what the FTC should be focusing on. One panelist advocated for the FTC to focus on the impact of historically disadvantaged populations caused by AI. Joshua New of the Center for Data Innovation responded with the need for policymakers to identify areas where market forces do not exist, particularly in the public sector (e.g., criminal justice systems where courts discriminate in sentencing) where there is little competition to encourage good output. Another panelist voiced concern over bad actors weaponizing algorithms. Lastly, Nicole Turner-Lee of the Center for Technology Innovation Brookings Institution voiced concern over, and urged the FTC to focus on, creating rules for the de-identification of data.

It is clear from this discussion that the FTC and industry are still wrapping their minds around these issues and working to develop appropriate legal frameworks. We are closely following these issues and working with clients on the day-to-day application of AI-based technologies. We will continue to watch both regulatory and self-regulatory efforts in this space and provide updates and thoughtful leadership for our clients.

Disclaimer

A look at the regulators that could and should regulate cryptocurrencies in the United States

31 October 2018

Bitcoin and other digital assets were conceived as radical, decentralized currencies that would operate independently, outside of traditional banking systems and unencumbered by regulations. But that is starting to change. In the United States, more organizations are accepting cryptocurrencies as legal tender, and as their popularity continues to grow, so does the rate at which their "outsider" status moderates.

New York, California, Illinois, and Wyoming are some of the states that have already moved forward with legislation governing the use of cryptocurrencies in financial transactions, and federal agencies are exploring whether to regulate them. First, however, they must not only establish the legal status of virtual currencies, but also definitively characterize them: are they securities, money, commodities, or swaps/futures?

In this hoganlovells.com interview, Evan Koster, a partner in the Hogan Lovells New York office, discusses the immediate challenges and complexities involved in regulating cryptocurrencies, and what it could mean when the factors that drive those regulations change over time.

With virtual currencies starting to gain wider acceptance in the U.S., what trends should our clients be aware of now?

Evan Koster: It depends on the client, but I think they need to be most concerned about the regulatory treatment of cryptocurrencies, because until there's clarity, even the most well-intentioned clients will, unfortunately, be in an area where they're not sure what the regulations are.

The federal agencies that would be most active in regulating cryptocurrencies are the U.S. Securities and Exchange Commission (SEC), Commodity Futures Trading Commission (CFTC), and Office of Foreign Assets Control (OFAC) at the Department of Treasury. And obviously, regulations depend upon the state in which a company's domicile is or where they're operating their business. In the digital world, certain states and agencies, such as the New York State Department of Financial Services (NYSDFS), have taken a more prominent role in formulating regulations.

You recently co-moderated a panel about trends in regulations,

derivatives, and cryptocurrencies. What topics attracted the most attention?

Koster: We discussed commodities and swaps. First, though, we should be clear on the terminology, and whether cryptocurrencies themselves are commodities. If they are commodities, then the anti-fraud and manipulation provisions of principal law dealing with commodities come into play, and that depends on the jurisdiction. Some courts have in some way acknowledged that they are commodities, which enables the commodity regulators to assert jurisdictions.

Derivatives, however, are not the actual cryptocurrencies themselves; they are the products that are tied to the change in valuation of the cryptocurrencies, such as, for example, some of the futures contracts on the Chicago Mercantile Exchange. You can buy a product on the Chicago Mercantile Exchange where you're not buying cryptocurrencies, but you are buying a contract where your payout is tied to a valuation of a cryptocurrency. That's what a derivative on a cryptocurrency is.

And if you are putting together those products, or if you are buying those products, under certain circumstances you may have regulatory responsibilities in addition to not engaging in fraudulent or manipulative conduct. There are reporting, filings, and other potential transactional requirements.

How do you and your Hogan Lovells team help clients stay compliant with the regulatory reporting requirements for cryptocurrencies?

Koster: If the client company is a "manufacturer" or "distributor," they will have to know the proper characterization of the production to determine who their regulator is and what regulation there is, and we help them answer those questions. If they are a corporate entity, there may be some additional registration requirements.

Then they may have to file as a dealer with the self-regulatory authority. So, for securities, they'd have to file with the Financial Industry Regulatory Authority (FINRA); if it's commodities, with the National Futures Association (NFA). So it's a threshold question really for them as to how they operate their business. And then not only are there registration requirements, but there may be implications from their business conduct, their contracts, and their hiring of employees.

If they are a purchaser or an end user and they're not selling cryptocurrencies for resale, but maybe they're a fund, then that may trigger some type of commodity pool operator registration requirements. So, similar to a mutual fund, hedge fund, or private fund in the securities industry, there is comparable regulation in the commodities industry.

If they are, we also advise them as to whether they're trading in this as a commodity or whether they are commodity pool operators, and whether there are exceptions. If not, we advise them as to what are the disclosure requirements and what are the registration requirements. So that's how it comes up.

Are there other regulations emerging that apply to cryptocurrencies where we help clients stay in legal compliance while things are in flux?

Koster: Well, since everything is digital, there's privacy and cybersecurity regulations. Obviously those are very important. Also, given there are anti-money laundering concerns, Department of the Treasury regulations and money transmitter laws needs to be considered. Clients or potential clients who need legal guidance on those topics should get in touch with Hogan Lovells. We have many experienced lawyers who will work with them.

About Evan Koster

If an explanation of complex financial products has ever left you feeling more confused that you were before, contact Evan Koster. As Global Coordinator for Derivatives and Commodities at Hogan Lovells, he demystifies the products and their legal implications — in both English and Spanish — and represents clients in a broad spectrum of derivatives, commodities, and structured products in the United States and Latin America.

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