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February 2018 e-Bulletin

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PRAC @ PDAC Toronto - March 6, 2018

Member Event @ IPBA Manila - March 13, 2018

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

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

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CAREY NAMES A NEW PARTNER

SANTIAGO - 04 January, 2018: Carey elected Matias Vergara as the Firm's newest partner. Mr. Vergara, who graduated from Universidad de Chile and holds an LLM from Cape Town University, is co-head of Carey's Insurance and International Trade areas. As a result, Carey, the largest firm in Chile, with 250 legal professionals, now has 31 partners and eight counsels.


Matias Vergara

Mr. Vergara is a professor of insurance law at Adolfo Ibanez University School of Law, and author of numerous national and foreign publications on insurance and reinsurance as well as international trade matters. He has been recognized by publications such as Chambers Latin America, Legal 500 and Leading Lawyers as one of the most outstanding insurance specialist lawyers in Chile.

In 2018 under the leaders of Mr. Vergara, Carey's Insurance and Reinsurance practice was recognized as Tier 1 by Legal 500, and the firm was elected Insurance Law Firm of the Year by the specialized publication Best Lawyers.

For additional information visit www.carey.cl

GIDE SETS UP IN CAIRO AND BOLSTERS ITS PRESENCE IN MIDDLE EAST AND NORTH AFRICA

PARIS - 05 February 2018: Gide is pleased to announce the opening of its office in Cairo. In line with its pioneering spirit, Gide thus becomes the first international law firm of French origin to set up in the Egyptian capital.

At the crossroads between Asia and Africa, Egypt is a significant regional and global economic hub and represents a strategic avenue for development for a number of private and public players. Indeed, in 2017 Egypt became the top destination for foreign investment in Africa. Gide wishes to be more actively involved in the development of French and international firms in this country, and to assist Egyptian companies in their international transactions, both in an advisory and litigation capacity.

Particularly active in the Middle East for nearly 30 years now, especially via its offices in Paris, London, Istanbul, Tehran and its north African hub (Algiers, Casablanca and Tunis offices), the firm has been working in Egypt for some time. It has extensive experience in investments, acquisitions, commercial contracts and international arbitration cases, projects (finance & infrastructure), compliance, as well as competition law.

Gide Cairo is headed by Baudouin de Moucheron, Gide partner since 1992, founder of the firm's Istanbul office and Senior Partner from 2012 to 2017. The team in Cairo comprises mainly lawyers of Egyptian origin, working in Arabic, English, French and German.

Stéphane Puel, Gide Managing Partner, indicates: "After opening our office in Iran in 2017, this new establishment in the MENA region is a strong sign of our presence in emerging countries. We are convinced that our long-standing integration in the region and the close relationships we have forged with local authorities represent solid assets for the development of our clients in Egypt".

Baudouin de Moucheron, partner in charge of Gide Cairo, adds: "I am very pleased that Gide has entrusted me with this task. The Egyptian market is very buoyant, and opening this office will enable us to fully support those companies looking to develop there. In order to assist them, we are setting up a local team of Egyptian lawyers, drawn from among the most talented of their generation".

For additional information visit www.gide.com

DENTONS RODYK STRENGTHENS PARTNERSHIP WITH PROMOTIONS

SINGAPORE - 01 January 2018: Dentons Rodyk has announced the promotion of our internal talents and strengthening of the partnership with Li Chuan Hsu, Melvin See, and Vanessa Lim promoted to senior partner with effect from 1 January 2018. We take pride in recognising all three accomplished professionals for their hard work and demonstrated commitment to our clients as they continue to develop and grow in their careers. Apart from continuing our focus on investing in our clients' success, the Firm also embraces and encourages innovation in the nurturing of our lawyers as we build the next generation of leaders in the legal marketplace.

Li Chuan Hsu (Corporate): His main areas of practice encompass corporate finance, mergers & acquisitions and general corporate commercial transactions, with an emphasis on equity capital markets transactions. He is fluent in both English and Chinese (spoken and written), and has advised various Chinese clients and companies. He is also a key member of the Blockchain and Distributed Ledger Technology team in Dentons Rodyk, and has advised on initial coin offerings (ICOs) and token generating events.

Melvin See (Litigation and Dispute Resolution and Arbitration): His main areas of practice encompass medical malpractice (defence) matters, building and construction disputes where he acts for developers, contractors and consultants to advance their interests, insolvency cases where he advises and supports liquidators and judicial managers in discharging their duties, and corporate and shareholder disputes. Melvin also acts as an independent mediator to facilitate an amicable resolution between disputing parties.

Vanessa Lim (Litigation and Dispute Resolution): Her primary practice is civil litigation. She has a particular interest in professional negligence, and focuses on medical malpractice. She has advised and acted for hospitals and doctors in medical negligence suits in both the High Court and State Courts. She also represents medical practitioners in professional disciplinary proceedings commenced by the Singapore Medical Council and advises them on regulatory investigations.

The Firm is also pleased to announce the promotion of three more lawyers to the position of partner, effective 1 January 2018:

Glenda Lee (Corporate): Her main areas of practice include mergers and acquisitions, corporate finance and general corporate commercial matters. She has advised on private and public transactions including acquisitions, divestments and joint ventures and has also acted in a range of private equity and venture capital fundraising exercises.

Mohamad Rizuan Bin Pathie (Corporate): His main areas of practice encompass corporate commercial law as well as competition and anti-trust law. As a Chartered Islamic Finance Professional (CIFP), Rizuan also advises on Islamic finance transactions. He deals in a wide scope of corporate commercial transactions including advising on mergers and acquisitions, contracts, employment matters and regulatory issues. He also advises on competition law and anti-trust matters including advising on cartel investigations, leniency applications as well as on obtaining regulatory clearance for mergers and acquisitions.

Valmiki Nair (Corporate): His primary areas of practice include mergers and acquisitions, private equity, venture capital, venture technology, corporate reorganisations and restructurings, employment and general corporate commercial matters. He has advised several venture capital funds, start-ups and companies on investment deals. He has also acted for multiple Singapore companies in relation to cross -border restructuring exercises.

For additional information visit www.dentons.rodyk.com

HOGAN LOVELLS EXPANDS ITS FAST GROWING AND SUCCESSFUL GLOBAL TAX PRACTICE WITH HEAD OF TRANSFER PRICING FOR EMEA

LONDON, 05 February 2018: Hogan Lovells has hired Tom McFarlane as Head of Transfer Pricing (EMEA) for the firm's growing Transfer Pricing practice led by Fabrizio Lolliri. He joins from Alvarez & Marsal (A&M) where he was a partner and led the Transfer Pricing and Tax Efficient Supply Chain Management practice in London. Prior to joining A&M, Tom spent six years with KPMG and was one of the founders of its Tax Efficient Supply Chain Management practice.

Tom brings 16 years of experience in implementing new and efficient operating models for multinationals around the globe. He has worked with clients across a range of industries, including consumer products, industrial products, retail, mining, pharmaceuticals, automotive and oil and gas. Tom supports clients that are expanding and adapting their current supply chain models to meet the demands of the new economy. This includes support with respect to expansion into new geographical markets, and new channels to market (such as online business).

Tom also works closely with his clients to ensure compliance with the anti-Base Erosion and Profit Shifting (BEPS) rules recently adopted by the OECD, as well as assisting clients with numerous Advance Pricing Agreements (APA) and Mutual Agreement Procedure (MAP) claims.

Commenting on Tom's arrival, Karen Hughes, Partner and Practice Area Co Leader – Tax, said: "We have an ambitious and truly international long-term vision for the TP practice. Over the past year, we have seen significant growth in the practice and client demand is expected to continue to grow. A further top-level appointment to the TP practice is the first step in growing the practice out from our London base. With Tom being present in London to develop the European business even further, it will enable us to concentrate on growing TP and supply chain work outside of Europe, especially in the Americas."

Fabrizio Lolliri, Global Head of Transfer Pricing, said: "There are few senior level experts with real supply-chain experience in the market and who have hands-on experience in supporting clients through change. Tom has the depth of supply-chain experience to compete with the big four accountancy firms for complex restructuring and reorganisation projects whilst maintaining his transfer pricing generalist role to operate successfully at the high end of TP work. Tom's arrival is very exciting and will help our practice move to the next level in terms of our TP and supply chain services, offering clients 360 hands-on expertise and support through change."

Tom's arrival comes off the back of the appointment of Elliot Weston who joined the London office as a tax partner from Gowling WLG and is a further addition to Hogan Lovells expanding TP and supply chain team with Graham Poole (previously HMRC's senior economist and TP expert) and Lisette Lach-Reichle (a TP and supply chain specialist) recently joining the firm too.

For additional information visit www.hoganlovells.com

RICHARDS BUELL SUTTON WELCOMES SIX NEW ASSOCIATES

VANCOUVER - 02 February, 2018: Our lawyers and staff warmly welcome our 6 new associates to our team. Joining our team are:

Elizabeth Vranjkovic – Business Law
Tommy M. Chan – Wealth Preservation, Insolvency
Christine D. Lowe – Wealth Preservation, Estate and Trust Administration
Casey L. Smith – Real Estate Development, Lending and Secured Transactions, Commercial Real Estate Acquisitions and Sales
Ola N. Stoklosa – Family Law
Una Urosevic – Personal Injury

L to R: Elizabeth Vranjkovic, Tommy M. Chan, Christine D. Lowe, Casey L. Smith, Ola N. Stoklosa, Una Urosevic

For additional information visit us at www.rbs.ca

BAKER BOTTS

REPRESENTS UNDERWRITERS IN CACTUS, INC.'S INITIAL PUBLIC OFFERING

HOUSTON - 08 February 2018 - Deal Description: On February 8, 2018, Cactus, Inc. ("Cactus") announced the pricing of an upsized initial public offering of 23,000,000 shares of its Class A common stock at $19.00 per share. The shares are expected to begin trading on the New York Stock Exchange under the ticker symbol "WHD" on February 8, 2018. In addition, Cactus granted the underwriters a 30-day option to purchase up to an additional 3,450,000 shares of Cactus' Class A common stock at the initial public offering price, less underwriting discounts and commissions. The offering is expected to close on February 12, 2018, subject to customary closing conditions.

Cactus expects to receive approximately $405.8 million of net proceeds from the offering, or $467.4 million if the underwriters exercise their option to purchase additional shares in full.

Citigroup Global Markets Inc. and Credit Suisse Securities (USA) LLC acted as joint book-running managers for the offering and as representatives of the underwriters. In addition, Simmons & Company International, Energy Specialists of Piper Jaffray, J.P. Morgan and BofA Merrill Lynch also acted as joint book-running managers for the offering, and Tudor, Pickering, Holt & Co., Barclays, RBC Capital Markets, Raymond James and Scotia Howard Weil acted as co-managers.

Baker Botts Lawyers/Offices Involved: Corporate: David J. Kirkland Jr. (Partner, Houston), A.J. Ericksen (Partner, Houston); Laura Katherine Mann (Senior Associate, Houston); Chelsea Gaw (Associate, Houston); Ieuan List (Associate, Houston) and Hayley Hervieux (Associate, Houston); Tax: Don J. Lonczak (Partner) and Peter Farrell (Associate, Washington); Employee Benefits & Executive Compensation: Chris Pratt (Special Counsel, Houston); Intellectual Property: Robinson Vu (Partner, Houston); Environmental: Scott Janoe (Partner, Houston) and Harrison Reback (Associate, Houston).

For additional information visit www.bakerbotts.com

CAREY

ACTS IN BCI ACQUISITION OF FINANCIAL AND CREDIT CARD BUSINESS FROM WALMART CHILE

SANTIAGO - 19 January, 2018: Carey has helped Banco de Crédito e Inversiones (BCI) acquire Walmart Chile's credit card businesses for US$148 million. The deal was signed on 19 December.

BCI's acquisition is expected to close in the second quarter of 2018, pending approval from Chile's superintendence of banks and financial institutions and the country's antitrust authority.

Counsel to Banco de Crédito e Inversiones - Carey Partners Diego Peralta and Francisco Corti, counsel Paulina Silva and Mariela Riquelme, and associates Vesna Camelio, Manuel José Garcés and Claudia Kraemer

For additional information visit www.carey.cl

CLAYTON UTZ

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

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

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

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

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

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

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

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

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

For additional information visit www.claytonutz.com

GIDE

COUNSEL TO ENGIE ON ACQUISITION OF TWO COMPANIES SPECIALIZING IN ENERGY SERVICES IN WEST AFRICA

PARIS - 25 January 2018: Gide has advised ENGIE on the acquisition of Afric Power and Tieri, two companies specialising in energy services in West Africa. Based in Côte d'Ivoire, Burkina Faso, Mali and Niger, Afric Power and Tieri employ over 140 people who specialise in the design, installation and maintenance of electrical systems and automated control mechanisms in West Africa. In acquiring Afric Power and Tieri, ENGIE gains a strong local foothold to boost its development in energy services in Central and West Africa.

Through this acquisition, ENGIE will implement a regional platform to offer energy services (installation and maintenance) to secondary and tertiary clients, from both the private and public sectors.

Gide's team advising ENGIE on this transaction comprised partner Julien David, with associates Alexandre Heydel and Arthur Lemaitre.

For additional information visit www.gide.com

DENTONS RODYK

ACTS AS SINGAPORE LEGAL ADVISORS TO FINTECH COMPANY INCORPORATED IN SINGAPORE

Dentons Rodyk is acting as Singapore legal advisors to TenX Pte. Ltd. ("TenX"), a FinTech company incorporated in Singapore, on the legal structuring and the contractual, tax, intellectual property, corporate finance and regulatory aspects of the pre-initial token sale (the "Pre-ITS") and the initial token sale (the "ITS", and together with the Pre-ITS, the "Token Sale") of cryptographic tokens ("PAY Tokens") created and sold by a company affiliated to TenX (the "Token Vendor").

The Token Sale raised an aggregate of 245,832 Ethers (also widely referred to as ETH, being a cryptocurrency associated with the Ethereum blockchain), being equivalent to approximately US$80 million based on the USD/ETH exchange rate as at the close of the Token Sale. Proceeds from the Token Sale are earmarked for deployment by the Token Vendor for, amongst others, development of the TenX Card Payment System. Senior Partners Kenneth Oh and S. Sivanesan joint led the deal, supported by Senior Partners Edmund Leow SC, Gilbert Leong, Li Chuan Hsu as well as Partners Jia Xian Seow, Sunil Rai, Elaine Lew, and Associates Beverly Chong and Ann Louise Chia.

For additional information visit www.dentons.rodyk.com

HOGAN LOVELLS

REPRESENTS AXA IN $155 MILLION ACQUISITION OF MAESTRO HEALTH

DENVER 05 February 2018: International law firm Hogan Lovells is representing AXA, a worldwide leader in insurance and asset management, in the acquisition of employee health and benefits company Maestro Health for $155 million.

Completion of the transaction is subject to customary closing conditions, including the receipt of regulatory approvals, and is expected to take place before the end of first quarter of 2018.

Hogan Lovells Corporate partners Tim Aragon and Nicola Evans are leading the team representing AXA. The Corporate team also consists of senior associate Ryan Adrian, and associates Katy Raffensperger, Brittany Wolma, and Sam Posnick. Partner David London and associates Hao Wang and Mark Pereira are advising on IP. Employment matters are being handled by partner Robin Samuels and attorney Amy Kett. Employee benefits advice is being provided by partner Carin Carithers and associate Adrienne Jack. Partner Scott Loughlin, senior associates Mohammad Amer and Nathan Salminen and associate Joseph Vladeck are advising on privacy. Health Regulatory is being handled by partner Sheree Kanner, senior associate Matthew Piehl and associate Isaac Swaiman. Partner Scott McClure and associate Charles Stones are advising on tax. Partner Lea Ann Fowler, senior associate Sierra Russell and associates Katie Roddy and Jennifer Guzman are advising on real estate. Insurance Regulatory matters are being handled by partner Robert Fettman and senior associate Kerri Cutry. Partner Brian Curran and senior associate Stephenie Gosnell are working on international trade matters. Partner Michele Harrington and senior associate Robert Baldwin are advising on antitrust.

For more information, visit www.hoganlovells.com

NAUTADUTILH

ASSISTS GLOBAL BIOPHARMACEUTICAL COMPANY SANOFI WITH ITS PUBLIC TAKEOVER OF BELGIAN BIOTECH FIRM ABLYNX

BRUSSELS 29 January, 2018: NautaDutilh assisted global biopharmaceutical company Sanofi (listed on Euronext and NYSE) with its takeover of Belgian biotech company Ablynx (listed on Euronext Brussels and Nasdaq).

Sanofi will acquire all outstanding ordinary shares, including American depositary shares (ADS), warrants and convertible bonds of Ablynx at a cash price of €45 per share which represents an aggregate equity value of approximately €3.9 billion.

Sanofi has complied with the formalities set forth in the Belgian takeover legislation and filed the mandatory documents with the Belgian Financial Services and Markets Authority (FSMA). A notice was published by the FSMA on its website today. It is yet unclear when the acceptance period of the offer will start and when the transaction will close.

Ablynx's most advanced product in development is caplacizumab (anti-vWF Nanobody), for treatment of the life-threatening autoimmune blood disorder acquired thrombotic thrombocytopenic purpura (aTTP). This product will strengthen Sanofi's position in rare blood-disorder medications.

NautaDutilh's team was led by Elke Janssens and Dirk Van Gerven and was assisted by Michiel Nuitten, Louisa Vandepitte, Frederik Meuwissen, Christel Brion, Philippe François, Anneleen Abbeel, Ken Lioen, Nathalie Van Landuyt, Stefanie Hardy, Yolanda Hebbrecht, Roeland Van Cleemput, Lentle Nijs, and Aurelie Pollie.

For additional information visit www.nautadutilh.com

MUNIZ

ASSISTS SINO-PORTUGUESE JOINT VENTURE HYDRO GLOBAL PERU WITH US $365 MILLION LOAN FROM CHINA DEVELOPMENT BANK

LIMA - 29 NOVEMBER, 2017: Muñiz Ramírez Pérez-Taiman & Olaya in Lima has helped Sino-Portuguese joint venture Hydro Global Perú obtain a US$365 million loan from China Development Bank to build a 209-megawatt hydropower plant in Peru. The deal closed on 17 November. BBVA Continental acted as structuring agent. The transaction is thought to be the largest project finance deal in Peru's private sector this year. The loan will finance the construction of the San Gaban III power plant project, located in the Puno region, south Peru. The project involves the construction of two 104.6-megawatt impulse turbines and a 139-kilometre transmission line. Counsel to Hydro Global Perú Muñiz Ramírez Pérez-Taiman & Olaya Partners Daniel Lovón, Jorge Otoya,
Rolando Salvatierra and Gillian Paredes in Lima

For additional information visit www.munizlaw.com

SIMPSON GRIERSON

ADVISES ON BIGGEST NEW ZEALAND CBD PROPERTY DEAL SINCE 2010

AUCKLAND 19, January 2018: Simpson Grierson advised Roxy-CES (NZ) Limited (a JV company between Singapore listed property group Roxy-Pacific Holdings Ltd and Singapore listed property group, Chip Eng Seng Corporation) on its acquisition of 205 Queen St in Auckland for $174 million. This deal settled on 20 December 2017.

The two buildings, formerly known as the National Bank Towers, went on the market last year with close to $1.5 billion in bids from around the world. The sale is the biggest Auckland CBD property deal since 2010. It shows that New Zealand is a favoured location for international investment. A week prior, Simpson Grierson also completed Roxy-Pacific's $63 million purchase of 1 Fanshawe St (fully leased to New Zealand's largest insurer IAG New Zealand). Tara Wylie, who played a lead role in both transactions said "settling two such major property deals within a week was highly challenging but evidences the expertise and skill within the firm. It also highlights our broad range of experts which allows our clients to get all their advice at the same place."

The team included Greg Allen, Greg Towers, Richard Evans and Rachel Witney. Andrew Harkness and Zelda Gower advised on the financing by DBS Bank (Singapore) on both deals and Simon Vannini and Viktoriya Pashorina-Nichols assisted on commercial matters.

For additional information visit www.simpsongrierson.com

SKRINE

ACTING FOR MYCC IN SUCCESSFUL OPPOSITION TO MYEG'S APPEAL TO THE COMPETITION APPEAL TRIBUNAL

KUALA LUMPUR: On 28 December 2017, Skrine, acting for the Competition Commission ("MyCC"), was successful in opposing an appeal brought by My E.G. Services Berhad ("MyEG") and My E.G. Commerce Sdn Bhd ("MyEG Commerce") against MyCC's Decision dated 24 June 2016. This is the first appeal before the Competition Appeal Tribunal ("CAT") with regard to an infringement for abuse of dominant position under Section 10(2)(d)(iii) of the Competition Act 2010.

In MyCC's Decision dated 24 June 2016, MyEG was directed to cease and desist immediately from imposing different conditions to the equivalent transactions in the process of renewal applications of mandatory insurances for online foreign workers permit, to provide an efficient gateway for all its competitors in the market of the sale of the mandatory insurances within 60 days, and to pay a financial penalty of RM2,272,000.00.

This case stemmed from a high-profile privatisation of the government's foreign workers permit renewal to MyEG.

The CAT affirmed MyCC's Decision and found that MyEG had abused its dominant position in the downstream market in which MyEG is operating the sole platform for online foreign workers permit renewal applications, and had applied different conditions to equivalent transactions where MyEG Commerce is participating as an insurance agent for the mandatory insurances for the permit renewal. The CAT imposed a further financial penalty of RM4,140,000.00 (daily penalty of RM7,500.00 from 25 June 2016 to 28 December 2017) on MyEG.

MyEG has since made an announcement that it intends to seek for judicial review and apply for a stay against the CAT's Decision.

Dato' Lim Chee Wee, Sharon Chong and Manshan Singh acted on behalf of MyCC.

For additional information visit www.skrine.com

TOZZINIFRIERE

ASSISTS LENDERS IN MEXICO'S LARGEST DAIRY PRODUCER GRUPO LALA OBTAIN A BRIDGE LOAN TO PURCHASE BRAZILIAN COUNTERPART VIGOR ALIMENTOS FOR 25 BILLION PESOS (US$1.5 BILLION)

SAO PAULO – 01 December, 2017: Tozzini assisted the lenders in Mexico's largest dairy producer Grupo Lala obtain a bridge loan to purchase Brazilian counterpart Vigor Alimentos for 25 billion pesos (US$1.5 billion).

JP Morgan, BBVA Bancomer and Santander were the lenders and enlisted Davies Polk & Wardwell LLP's New York and Washington, DC, offices, Mexico's Ritch, Mueller, Heather y Nicolau, SC in Mexico City and Brazilian firm TozziniFreire Advogados.

The financing agreement was executed on 24 October, while the acquisition closed on 26 October.

Brazil Counsel JP Morgan, BBVA Bancomer and Santander - TozziniFreire Advogados Partners Alexei Bonamin, Shin Jae Kim and Renata Muzzi Gomes, and associates Jose Augusto Dias, Felipe Tulio de Paiva and Fernanda Vilela Viana in São Paulo

For additional information visit www.tozzinifreire.com.br

PRAC EVENTS


PRAC 59th
INTERNATIONAL
CONFERENCE
21 - 24 MAY 2016
PRAC2016
Barcelona
RCD
ROUSAUD
COSTAS
DURAN S.L.P
PACIFIC RIM


PRAC @ Taipei 2014


PACIFIC RIM
ADVISORY COUNCIL


PRAC @ IPBA Vancouver


PRAC @ Vancouver 2015


PRAC @ INTA San Diego


PACIFIC RIM
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PRAC
SP AULO.17
TozziniFreire
PACIFIC RIM
ADVISORY COUNCIL


PRAC @ Brisbane 2015


PRAC @ IPBA Hong Kong


PRAC @ PDAC Toronto 2014

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www.prac.org

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

The National Government Removed All Tariffs For the Import of Wind Turbines Exceeding 700 Kw of Power

Joint Resolution 4-E/2017

On January 2th 2018, the Resolution No. 4-E/2017 was published in the Official Gazette, that establishes the removal of all tariffs for the importation of wind turbines that exceed 700 Kw of power and that are part of Round 1 and 1.5 of the "RENOVAR" program. These projects shall be previously declared as "Critical Projects" by the Governmental Authority.

For further information on this topic please contact Juan Martín Allende, Marcos Patrón Costas and María Soledad Ferreyra

www.allendebrea.com.ar

CLAYTON UTZ

12 FEB 2018

Foreign investors in Australian resources projects receive important income tax guidance from Federal Court

Foreign investors in Australian resources projects receive important income tax guidance from Federal Court

All foreign investors into Australian companies, especially resources companies, will need to review their approach to Australian tax risks, following a successful appeal by partners of two private equity investment vehicles against income tax assessments of the proceeds of their disposal of investments in an Australian resources company (Resource Capital Fund IV and V LP v Commissioner of Taxation [2018] FCA 41; Clayton Utz acted for the successful applicants).

RCF's operations and disposal of shares in an Australian company

Resource Capital Fund IV LP and Resource Capital Fund V LP were US-based private equity operations established in the Cayman Islands. Investment decisions were made by an Investment Committee meeting in the US, while various management companies conducted the day-to-day operations.

In 2007, the Funds, together with other investors, invested in a WA-based mining company known as Talison Lithium and disposed of their interest in a 2013 scheme of arrangement. The ATO issued special assessments to the Funds for their gains on disposal of Talison shares.

Five issues in dispute

In coming to its finding for the applicants, the Court dealt with five key issues.

Who were the correct parties to the action?

The ATO argued that the Funds themselves were "taxable entities" with standing to the tax appeal.

Though the Funds were tax transparent in both the US and the Caymans, under Australian tax law the Funds had to be taxed **as if** they were companies. There was also expert evidence that the Funds were not separate legal entities under Caymans law and the proper parties to sue and be sued were the ultimate general partners.

The Court held that the Funds were not separate taxable entities; the correct parties to assess were the partners, not the partnership. However, the Court found that such procedural irregularity could be remedied and determined that the assessments were valid. Nevertheless, the fact that the partners were the correct parties to the action was favourable to other parts of the applicants' case.

Were the funds protected by an ATO ruling on Australian-sourced business profits of foreign limited partnerships?

The Funds relied on an ATO public ruling TD 2011/25 as being apposite to their circumstances; they also led extensive evidence that they relied on the ruling.

The Court agreed that the Commissioner was bound by the ruling, and the extensive, unchallenged evidence that the Funds had relied upon it. Therefore, the Commissioner was bound by the ruling unless Article 7(6) and Article 13 applied and the gains were "wholly or principally attributable" to real property in Australia.

Were the funds protected by the Australia/US tax treaty?

The Funds argued that they were protected from Australian tax by the Treaty as the Talison gain was a "business profit" and Talison's assets were not principally real property situated in Australia. The ATO argued that the Treaty did not apply to the Funds and that, even if it did, Talison's assets were principally Australian real property.

The Court held that the partners of the Funds were entitled to Treaty protection; the relevant "residents" for Treaty purposes were the partners of the Fund and the Treaty did not transform the partnership Funds into "persons" for Treaty purposes.

Was the Talison gain ordinary income with an Australian source?

The Funds argued that the Talison gain was not ordinary income as there was no profit-making intention from the outset of the investment and the substance of the transaction and key transaction steps happened offshore.

The Court held on the characterisation of the gain that ordinary income, as profitable realisation of the investment was one of the Funds' objectives from the outset and that there were key transaction steps that happened offshore and also key steps that happened onshore and pointed to an Australian source.

However, this was not determinative, as the Funds were entitled to rely on the ruling and Treaty protection.

Was the Talison gain liable to Australian capital gains tax?

This question turned on whether or not Talison's assets were over 50% taxable Australian real property (**TARP**). Very broadly, TARP comprises all interests in land, mining and exploration interests and certain buildings and improvements.

This issue required very technical and specialised analysis by appropriately qualified valuation experts. A core aspect of the Funds' valuation evidence was the use of the "Netback method" which was a methodology for separating Talison's mining and processing activities. The Funds' experts found Talison's assets to be less than 50% TARP; the ATO's, more than 50%.

Accepting the Funds' evidence, the Court held that the Funds were not liable to an Australian capital gain:

- The "netback method" used by the Funds' experts, which is a method for separately valuing the mining and processing operations, was acceptable, reasonable and reliable;
- Certain leases and licences that allow processing, but not mining operations are not TARP and the value of those leases and licences, as well as processing plant and equipment, are non-TARP;
- Value attributable to the period after expiry of the current mining leases should be valued as a non-TARP asset; and
- Intercompany loans were to be valued on a gross, not net basis.

What foreign investors in Australian companies should do next

Foreign partnerships investing in Australia should consider where their ultimate partners are resident. If it is in a country with a tax treaty with Australia (most of our major trading partners) they may be entitled to treaty protection or protection under ruling TD 2011/25.

All foreign investors into Australian resource companies should consider how they value those companies for Australian capital gains tax purposes. These are often complex valuations that require careful consideration and selection of the right methodology.

GET IN TOUCH

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ADVOGADOS

January 24, 2018

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

Intellectual Property

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

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

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

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

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Bennett Jones

Getting In on Bitcoin: Canadian Income Tax Implications of Cryptocurrencies

February 12, 2018

Written by Matthew Peters and Martin A.U. Sorensen

Are you contemplating the acquisition of a cryptocurrency such as Bitcoin or Litecoin? The reasons for, and circumstances surrounding, such acquisitions vary widely, including "crypto-mining" activities, buying and selling for speculative investment purposes, and as a means of facilitating the purchase and sale of goods, services or other transactions.

The technology underlying digital currencies may offer the benefits of increased privacy and reduction of intermediaries (and associated transaction fees) normally associated with cash transactions. However, the acquisition, holding and disposition of a cryptocurrency (regardless of how anonymous it may seem) has Canadian tax implications. Any potential holder of a cryptocurrency must understand the applicable Canadian tax landscape, including the transactions that trigger a taxable event, and ensure that it is fully compliant with its tax reporting and paying obligations.

The use of the term "cryptocurrency" in this blog is restricted to virtual currencies (e.g., Bitcoin) that are created through a "mining" process over a decentralized network. These cryptocurrencies can generally be bought and sold on specialized exchanges and are increasingly being accepted as payment in lieu of fiat currency in a wide variety of commercial transactions.

Beyond the scope of this article are business-specific virtual "tokens" or "coins" that are created, issued and sold exclusively for use on a platform operated by the creator of the token/coin. While tokens/coins are rapidly proliferating in the marketplace, the unique nature of any particular token/coin (including the manner in which it is issued and the rights/entitlements that it affords its owner) does not easily accommodate broad legal generalizations and must be considered on a case-by-case basis.

Starting Point...Commodity, not Currency

The Canada Revenue Agency (CRA) currently takes the position that, despite its nomenclature, a cryptocurrency is not a "currency" for income tax purposes. Rather, cryptocurrency is akin to a commodity (albeit an intangible, "virtual" thing), the value of which will fluctuate based on external factors that are driven largely by investor sentiment and basic supply/demand. In other words, think of cryptocurrency for income tax purposes as being the virtual equivalent of a precious metal such as gold or silver.

By acquiring and transacting in cryptocurrencies you are, under current the CRA's most recent interpretation of Canadian tax law, transacting in commodities. This is a critical threshold concept that has significantly different income tax implications compared to "normal" cash (even foreign currency) transactions.

The CRA's administrative position has not been tested in a Canadian court and many in the Canadian tax community have suggested that alternative legal characterizations (e.g., currency, commodity, personal property) may be more practical and appropriate, at least in certain situations.

Acquisition of Cryptocurrency—A Taxable Event?

Typically, the first question asked regarding the taxation of cryptocurrencies is whether the acquisition of the cryptocurrency is a taxable event that potentially triggers a Canadian income tax liability to the person acquiring the cryptocurrency. The answer depends on the manner, purpose and circumstances in which the cryptocurrency is acquired.

If the cryptocurrency is acquired through "mining" activities that are of a commercial nature (i.e., mining carried out generally for business purposes or in connection with a business), the CRA's current published administrative position is that the acquirer will be required to report business income for the year determined with reference to the value of the mined cryptocurrency. For this purpose, the mined cryptocurrency will generally be treated as inventory of the business. Such a holder will have a myriad of tax issues that are distinct from the acquisition of cryptocurrency from non-mining activities, which are not addressed in this blog and must be reviewed on a case-by-case basis.

The acquisition of cryptocurrency as a pure speculative investment, similar to physical gold or a publicly-traded security, is generally not a taxable event to the person acquiring the cryptocurrency. However, the acquisition of the cryptocurrency establishes the holder's "cost" for tax purposes and sets the stage for the tax consequences that will be realized down the road when the cryptocurrency is eventually sold.

This is to be contrasted with the acquisition of a cryptocurrency as consideration for the provision of goods or services or as compensation for some other right of payment. In such cases, the acquisition of the cryptocurrency (or, more accurately, the sale of the underlying good/service or the right to receive payment) is a taxable event for Canadian income tax purposes, similar to any other sale of goods, services or right of payment that is satisfied in fiat currency. Moreover, the person acquiring the cryptocurrency will generally realize *another* taxable event when he/she subsequently disposes of the cryptocurrency.

What is My Cost in the Cryptocurrency?

Once a cryptocurrency has been acquired, it will be important to determine its cost for Canadian tax purposes, which is a fundamental concept for determining the future income tax consequences on an eventual disposition of the cryptocurrency.

Where a cryptocurrency is purchased in exchange for Canadian currency, the cost for income tax purposes of the cryptocurrency will be equal to the amount of such cash paid, plus any directly related acquisition expenses. If foreign currency is used, the holder will generally be required to convert the foreign currency into the Canadian-dollar equivalent at the applicable rate pursuant to normal tax rules.

Things become a bit trickier if a cryptocurrency is acquired as payment for goods or services or pursuant to other contractual rights/obligations. The CRA generally treats such exchanges as a barter transaction, resulting in the recipient of the cryptocurrency obtaining a tax cost in such cryptocurrency equal to the fair market value of the goods/services/rights that were given up in exchange for the cryptocurrency. This may not always line up exactly with the fair market value of the cryptocurrency at the time of the barter transaction.

Another type of transaction that is becoming increasingly prevalent is the acquisition by a person of one cryptocurrency ("crypto #1") in exchange for a different cryptocurrency ("crypto #2"). Based on the CRA's general administrative position, this will likely be regarded as a barter transaction involving the exchange of one commodity for another commodity. The person will be considered to have acquired crypto #1 with a tax cost equal to the fair market value of the crypto #2 given up in exchange, computed as of the time of the barter transaction. The additional wrinkle in this scenario is that the person acquiring crypto #1 will also be considered to have disposed of crypto #2 and will be required to report any income/gain in respect of crypto #2 for Canadian income tax purposes (the person will therefore need to know his/her tax cost in crypto #2, which is dependent on the manner in which crypto #2 was originally acquired by such person).

Tax on Disposition of Cryptocurrency

You will realize taxable income (or loss) on an eventual disposition of a cryptocurrency. This includes a sale of the cryptocurrency for cash as well as the use of the cryptocurrency to pay for goods or services or as consideration under other contractual rights/obligations.

If the cryptocurrency has a value at the time of its disposition that is in excess of its "cost" as described above, it will be critical to determine whether the holder should report such excess as being on capital account (i.e., a capital gain) or whether the proceeds should be reported as business income. This is a material distinction for tax purposes.

Generally, the buying and selling of a commodity can be regarded as being on capital account unless it is either carried out in the course of a business of buying and selling such commodities or such buying and selling amounts to an "adventure or concern in the nature of trade". This is a factual, case-by-case determination requiring a detailed review of the nature of your dealings with the commodities in question.

If a person acquires cryptocurrency as payment for goods or services in the normal course of the person's business (even if the person is not, *per se*, in the business of buying and selling cryptocurrencies as part of a speculative investment business), there is a risk that any appreciation realized at the time the person disposes of the cryptocurrency will be fully taxable as business income. Again, this issue is fact-dependent and should be reviewed on a case-by-case basis.

Can I Hold a Cryptocurrency in My RRSP?

Canadian tax law restricts the type of investments can be held in deferred investment plans (e.g., RRSPs and TFSAs). While "currency" and certain types of commodities are eligible investments for such purposes, cryptocurrencies appear to fall outside of these parameters, at least based on the CRA's current published administrative practice. Accordingly, unless such cryptocurrencies are held through a registered mutual fund corporation or trust (or through a publicly-listed company) the shares/units of which are already eligible investments for a deferred investment plan, it does not appear that a cryptocurrency can currently be directly held through a deferred investment plan.

This discussion focuses on the fundamental Canadian income tax issues relating to the acquisition, holding and disposition of cryptocurrency based on the CRA's current published administrative position that cryptocurrency is a commodity. Should the CRA's administrative position evolve to treat cryptocurrencies in any given situation as a "currency", a security, personal property, a "tax nothing" or otherwise, such characterization could have a domino effect on every aspect of the relevant tax analysis. Transacting in cryptocurrencies also gives rise to unique sales tax implications that must be considered based on the facts relating to any particular transaction. Holders and prospective holders of cryptocurrency will need to ensure that all potentially relevant Canadian tax issues are considered and to stay on top of evolving legal trends and administrative interpretations.

Special thanks to articling student Rehman Mir for his assistance with preparing this article.

February, 2018

NEW CALL FOR PUBLIC COMMENT REGARDING FOODSTUFF PRODUCTS

In the last few weeks, the Ministry of Health solicited public comments on three proposals which would amend relevant regulations in connection to foodstuff products, as detailed below:

1. **Proposal for the modification of Article 105 of the Food Health and Safety Regulation**

   The first public comment process will be open between January 12th and March 13th, 2018, and is available here.

   This initiative proposes the **amendment of Article 105 of the Food Health and Safety Regulation** (RSA) in order to, **"introduce into the regulation the obligation, criteria and conditions for recall of products from the market and their eventual alternative use"**. The proposed regulation sets forth that when a foodstuff product qualifies as corrupted, adulterated, falsified or contaminated in accordance to the provisions of the RSA (Article 98 and subsequent), and has been, "distributed in the market without the direct control of the manufacturer or the importer, either the manufacturer, the importer or the holder of the products shall notify the health authority".

   In this context, the importer, manufacturer, packer, distributor and seller, as applicable, **shall recall the product(s) as a preventive measure while the health authority analyzes the situation**. The health authority shall authorize the commercialization of products again if it deems that there is no public health threat. On the other hand, if the authority determines that the product qualifies as corrupted, adulterated, falsified or contaminated, such product may be destined to non-human food industrial use, insofar as: (i) it is subject to a prior denaturing process, (ii) such process is authorized by the health authority, and (iii) it does not entail reintroducing a hazard into the food chain from the primary product through consumption. If these conditions are not met, or if the owner of the products deems it necessary, the product must be destroyed. The disposal process also requires the authorization of the health authority.

   Additionally, if the health authority determines that there is a risk to consumers' health, the proposal sets forth an obligation for the manufacturer or importer to inform, "consumers of the situation and the reasons for the recall in an effective and accurate manner".

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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2. Proposal for the amendment of paragraph II "labeling and advertisement" of the RSA for the regulation of healthy or functional messages in food

This period for public comment will be open between January 15th and March 15th, 2018, and is available here.

In general terms, this proposal aims to properly **determine the regulation applicable to "functional foods**". Therefore, the proposal includes the incorporation of a new definition into Article 106 of the RSA, which provides that, "foods with healthy or functional properties [are] those foods that comply with all of the requirements and conditions for declaring any of the healthy messages included in the approved associations set forth by the Ministry of Health which authorizes the Technical Rules on Nutritional Guidelines to declare healthy or functional messages in food [currently Resolution No. 860 of 2017]".

Moreover, the proposal adds a new final paragraph to Article 114 of the RSA, which sets forth a relevant prohibition in this regard. The new paragraph states that, "in the labeling and/or advertisement of any particular type of food, **it is forbidden** to use the expressions **'healthy food', 'functional food', 'nutraceutical food', 'super food' and other equivalent phrases or fantasy names**, declared in any language". Furthermore, the denomination, "food with healthy or functional properties", may only be used for those products that comply with the provisions of the Nutritional Guidelines for Declaring Healthy Properties approved by the Ministry of Health".

3. Update project for maximum limits of pesticide residues in foods

This public comment process will be open between January 23rd and March 23rd, 2018, and is available here.

In this case, the proposal does not correspond to a possible amendment to the RSA, but to a **modification of Resolution No. 33 of 2010 which, "sets the maximum tolerance for pesticide residues in foods"**.

This project proposes the **addition of 38 new pesticides to the list of those associated to maximum presence limits in foods** for human consumption, e.g. espinetoram, meptildinocap and piridabene. Moreover, some of the pesticides currently included on the list are eliminated, such as aldicarb y clorfentezine.

The proposal also expands the list of foods associated with these maximum pesticide residues limits (tolerance), adding 88 new foods, including peas, cherries, beans and turkey meat.

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PRESS ROOM

GUATEMALA: THE MONETARY BOARD AMENDS THE REGULATION FOR CORPORATE GOVERNANCE

January, 2018

The Monetary Board amends the Regulation for Corporate Governance

of insurance and reinsurance companies

On January 19th, 2018, the resolution JM-2-2018 of the Monetary Board was published in the Official Gazette, amending the resolution JM-62-2016, "Regulation for Corporate Governance of Insurance and Reinsurance Companies". The provisions became effective as of the day of its publication.

The main purpose of this amendment is the incorporation of certain guidelines to reinforce the corporate governance practices in insurance and reinsurance companies, based on international standards.

Among the most relevant provisions is the implementation of specific policies to assess the capacity of the members of the board of directors, general manager or whoever acts as such, and the officials reporting

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1. The Audit Committee will be responsible to ensure compliance with the corporate governance and internal control system policies and procedures.
2. The Compliance Administrative Unit will rely upon the Committee designated by the Board and not exclusively upon the Audit Committee.

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HKMA reboots virtual banking

February 2018

Hogan Lovells

HKMA reboots virtual banking

On 6 February, 2018, the Hong Kong Monetary Authority (the "**HKMA**") published draft revisions to its "Guideline on Authorization of Virtual Banks" (the "**Draft Guideline**").

The framework will support the authorization in Hong Kong of 'virtual banks', defined as banks which deliver retail banking services primarily, if not entirely, through the internet or other electronic channels rather than through physical branches.

Consultation on the Draft Guideline is open to the public through 15 March, 2018.

The existing framework and the vision going forward

Once finalized, the Draft Guideline will replace the HKMA's existing Guideline on Authorization of Virtual Banks issued on 5 May, 2000. The original guidelines, which were largely unused, were introduced to support Hong Kong market entry by offshore licensed financial institutions through Hong Kong-based internet banking operations, which were growing in popularity at the time.

HKMA Chief Executive Officer Norman Chan signaled his intention to overhaul the virtual banking framework in his September, 2017 speech calling for a "New Era of Smart Banking" in Hong Kong. A new virtual banking framework was put forward together with a number of other proposals, including the recently launched "Open API" consultation.

The HKMA's intention for the virtual banking consultation is to repurpose the existing framework to further support the growth of fintech and digital banking in Hong Kong. Critically, the revised framework will support the introduction of retail banking services by non-bank organizations rather than simply provide a digital route into the Hong Kong market for banks licensed elsewhere. The Draft Guideline explicitly refers to the aspiration that the authorization of virtual banks will support financial inclusion in Hong Kong, including with respect to small and medium-sized enterprises, and this aspect of HKMA policy impacts the nature of permitted business, as explained in more detail below.

The Hong Kong financial services market is very different from how matters stood in May, 2000. 2016 saw the launch of Hong Kong's stored value facility licensing regime and recent years have seen a noticeable surge in fintech investment. There are now a number of substantial non-bank payments services providers active in Hong Kong. These organizations will see the reboot of the virtual banking framework as an opportunity to expand into deposit-taking and monetization of their platforms through a wider universe of financial services.

On the basis of press accounts of comments attributed to HKMA Deputy Chief Executive Arthur Yuen, the scope of banking services available to virtual banks will be very broad, ranging from payments and deposits, through to loans and wealth management.

Some critical points for the consultation include the following:

What will the criteria be for authorization as a virtual bank?

The Draft Guideline makes reference to the HKMA's "Guideline on Minimum Criteria for Authorization" (the "**Guideline on Authorization Criteria**"), and in doing so it is clear that the same criteria applicable to institutions currently licensed under the Banking Ordinance will generally apply to virtual banks as well.

Hong Kong's current regulatory structure supports a three tier system, under which the HKMA regulates licensed banks, restricted licence banks ("**RLBs**") and deposit-taking companies ("**DTCs**") within their respective permitted scope of banking and deposit-taking business. All three tiers are subject, in broad terms, to the same authorization criteria.

Chief amongst the criteria applicable to all categories of licensees is the "fit and proper" assessment that applies to the applicants' directors, controllers, chief executives and executive officers. The HKMA is required to approve an institution's chief executive and directors (and their alternates) and assess whether or not candidates have sufficient skills, knowledge, experience, and soundness of judgment to undertake and fulfill his or her particular duties and responsibilities. The precise "fit and proper" criteria vary depending on the role and specific responsibilities involved, but in general the HKMA will also assess probity (general reputation, any past disqualifications and instances of non-compliance with law and codes of conduct) and financial soundness and strength (with a view to ensuring that the individual's personal financial affairs do not have an adverse impact on the position of the institution).

The Guideline on Authorization Criteria sets an expectation that one third of an institution's directors will be independent non-executive directors ("**INEDs**"). RLBs and DTCs are expected to have at least three INEDs, but the HKMA recognizes that the specific number of INEDs will depend on the size of the institution, the total number of directors and the institution's ownership structure.

Those considering virtual bank authorization will be very interested to understand how the authorization criteria will be adapted to the virtual context. Uniquely for the virtual banking context, the HKMA indicates that boards of directors for virtual banks will need to possess requisite knowledge and experience with due regard to the technology-driven business model being undertaken.

Capital requirements and ownership structure?

There will be much focus in the consultation on who may participate in virtual banking, and in practical terms much will turn on expected capital requirements and the nature of regulatory commitments that must be made by holding companies.

It is clear that given the retail banking focus envisaged by the HKMA, virtual banks are expected to be incorporated locally. However, it is no longer the case that virtual banks must be controlled by a regulated financial institution or a financial holding company, removing a critical impediment to development under the existing framework.

A key passage in the Draft Guideline states that the HKMA is open to applicants controlled by Hong Kong incorporated holding companies in non-financial sectors (including technology), provided that the holding company or intermediate holding company, as the case may be, accepts supervisory conditions relating to matters such as capital adequacy, risk management and financial reporting to the HKMA (Chapter 4 of the HKMA's Guide to Authorization provides more detail on the nature of conditions that are likely to be expected). If the HKMA's existing guidance is followed, it should be the case that a special purpose holding company that has no business other than holding shares in the licensee would be permissible, but the precise capital structure expected by the HKMA in each case will need to be considered in detail.

The Draft Guidance does not specify any minimum capital requirements (i.e., paid-up share capital and/or balance of share premium account) but we can expect that requirements will be reconciled with the existing three tiers of minimum capital requirements for licensed banks (HK$300 million), RLBs (HK$100 million) and DTCs (HK$25 million).

Constraints on the virtual business model?

Virtual banks will be required to maintain a physical presence and a principal place of business in Hong Kong. A branch network will not be required, but the HKMA expects that a virtual bank will need to have adequate points of contact available to both the HKMA and customers, and will need a physical presence in order to administer customer due diligence requirements, which remain largely paper-driven and based on a face-to-face meeting as part of the account opening process. The approach to customer due diligence is under review, and it may well be the case that the introduction of virtual banking models as accepted banking practice will put further pressure on efforts to modernize practices.

Virtual banks will be expected to adhere to the HKMA's "Treat Customers Fairly" Charter and the HKMA-endorsed Code of Banking Practice. In keeping the financial inclusion objective, there will be no minimum account balances at virtual banks and low balance fees will not be permitted.

Key risk management requirements?

The Draft Guideline indicate that the HKMA's general risk-based supervisory framework will apply to virtual banks, referencing the modules for credit, interest rate, market, liquidity, operational, reputational, legal and strategic risks. Participation in Hong Kong's depositor protection scheme will also be required.

Technology risk management ("**TRM**") is highlighted as a critical area of risk management, stating that applicants will be required to submit an independent assessment report on their computer hardware, systems, security, procedures and controls from a qualified and independent expert.

The specific requirement of an independent expert assessment of technology is consistent with the HKMA's existing TM-E-1 Supervisory Policy Manual for "Risk Management of e-banking", which calls for such an assessment when a licensed bank launches a new digital service delivery channel or makes a major enhancement to an existing e-banking service.

The Draft Guideline also specifically refers to the HKMA's SA-2 Supervisory Policy Manual for "Outsourcing", the HKMA noting here that it does not object in principle to outsourcing of virtual banking operations provided that plans are discussed with the HKMA in advance and the SA-2 requirements are met, which include controls in areas such as TRM and data protection. Flexibility to outsource will no doubt benefit applicants seeking to rely on group technology and infrastructure in connection or leverage the middle and back office operations of financial institutions as part of their operating strategies.

Conclusions

The HKMA's relaunch of its virtual banking regulatory framework is a promising sign for the continued development of Hong Kong's fintech and digital banking ecosystem. The success of the stored value facility regime (which now has thirteen licensees) is noteworthy as a first step towards broader based technology-driven financial services regulation. Virtual banking promises a much larger potential scale of financial services to non-bank businesses. A balanced and proportionate application of regulatory oversight in this area would mark a further step forward for Hong Kong in its step to be a regional fintech leader.

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NEWS DETAIL

26/01/2018

MoF Regulation 95/PMK.08/2017: Updated Rules on Granting Government Guarantees in Infrastructure Sector

Ministry of Finance (“MoF”) Regulation No. 95/PMK.08/2017 was issued on 19 July 2017 as an implementation regulation for Government Regulation (“GR”) No. 50/2016 on the amendment of GR No. 35/2009, which envisages the setting up of state-owned Badan Usaha Penjaminan Infrastruktur (Infrastructure Guarantee Corporations / “BUPI”). The only BUPI established to date is the Indonesia Infrastructure Guarantee Fund (“IIGF”).

As mandated by Article 2 of GR No. 50/2016, MoF No. No. 95/PMK.08/2017 sets out more detailed provisions on government guarantees for infrastructure projects, as well as the nature and scope of, and procedures governing, such guarantees.
In this regard, the following aspects are of particular note:

- A guarantee provided by a BUPI may cover the following aspects:

  a. Infrastructure risks;
  b. Political risks;
  c. Default risks; and/or
  d. Other relevant risks.

  In addition to the above risks, under the earlier MoF Regulation No. 260/PMK.011/2010, as amended by MoF Regulation No. 8/PMK.08/2016, the following risks may also be covered:
  a. Infrastructure risks arising from actions taken or not taken by the Government or Project Owner (Penanggung Jawab Proyek Kerjasama / “PJPK”). A Project Owner is defined as a minister or head of a government institution, or the head of a local government, or a state- or local-government enterprise;
  b. Infrastructure risks arising from a policy of the Government or Project Owner;
  c. Infrastructure risks arising from a unilateral decision of the Government or Project Owner; and
  d. Breach of contract by the Government or Project Owner.

- The extending of a BUPI guarantee may be proposed by a minister or head of a government institution, or the head of a local government, or a state- or local-government enterprise to the MoF and/or the BUPI. The proposal must state the partnership scheme that will be employed for the purpose of the infrastructure project and the anticipated risks. The following documents must be provided:

a. the project's financial scheme;
b. the final draft of the infrastructure project contract;
c. the risk-mitigation plan; and
d. such other documents as may be required.

- To maintain the credibility of its guarantees, a BUPI is required to:

  a. invest its assets;
  b. maintain adequate liquidity;
  c. maintain adequate capital; and
  d. conduct proper risk management.

  A BUPI is also obliged to periodically submit reports on its operations to the MoF.

MoF Regulation No. No. 95/PMK.08/2017 entered into effect on its date of issuance, that is, 19 July 2017. *(By: Ammalia Prama Putri & Zefanya Samantha Sahusilawane)*

A SEA CHANGE?

Siva Kumar Kanagasabai and Corrinne Chin highlight the key amendments to the Merchant Shipping Ordinance 1952

INTRODUCTION

The Merchant Shipping (Amendment) Act 2017 ("MSAA 2017") was passed by Dewan Rakyat and Dewan Negara on 9 and 16 August 2017 respectively to amend the Merchant Shipping Ordinance 1952 ("MSO 1952"). Although the MSAA 2017 was gazetted and became law on 1 December 2017, it will only come into force on a date appointed by the Minister.

This article will provide an overview of the key amendments made in MSAA 2017, specifically the registration of ships under the Malaysia Ship (International) Register, bareboat chartered-out ships, the Registrar's new powers, the rights of mortgagees, licensing of ships, increment of penalties, and the Malaysia Shipping Development Fund.

In this article, a "Malaysian ship" refers to a ship that is registered or licensed under Part II of MSO 1952, as amended by MSAA 2017.

REGISTRATION OF SHIPS

Under MSAA 2017, no ship shall be within Malaysian waters or the exclusive economic zone unless it is registered in Malaysia as a Malaysian ship or registered in any other country, subject to MSO 1952 and any other written law. A ship may be registered as a Malaysian ship under the Malaysia Ship Register ("MSR") or Malaysia International Ship Register ("MISR") (collectively "Ship Registers").

MSAA 2017 increases the number of categories of registration of ships as Malaysian ships under the Ship Registers and amends the requirements imposed on some of the categories when registering a ship. In addition, it also removes the requirement that property in a ship be divided into 64 shares and provides that a ship may be divided into any number of shares.

Registration under MSR

Under MSAA 2017, a Malaysian citizen or a body corporate incorporated in Malaysia may register their ships as a Malaysian ship under MSR.

The present law specifically requires a Malaysian corporation registering its ship under MSR to have, amongst others, a majority of Malaysian shareholders and directors. However, under MSAA 2017, the extent to which it may register its ship under MSR will be determined by the Minister (normally by regulations which will be issued in due course). As the regulations have not been issued at this juncture, it is unclear whether MSAA 2017 would result in less stringent requirements being introduced.

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Registration under MISR

Presently, only a corporation incorporated in Malaysia may register its ship as a Malaysian ship under MISR. With the inception of MSAA 2017, any person or entity, regardless of citizenship or place of incorporation, may register a ship as a Malaysian ship with MISR.

Unlike the more stringent MSO 1952, MSAA 2017 does not subject a Malaysian company to foreign shareholding and paid-up capital requirements, nor the requirement to appoint a ship manager.

However, a non-Malaysian citizen or a body corporate incorporated outside Malaysia applying to register a ship as a Malaysian ship under MISR, is required to appoint a representative person so long as the said ship remains registered. The representative person must be a Malaysian citizen who has his permanent residence in Malaysia or a body corporate incorporated in Malaysia which has its principal place of business in Malaysia.

Unlike a ship manager whose responsibilities include maintaining and operating a ship, the role of a representative person, as stated in MSAA 2017, is to file documents or furnish information required under the MSO 1952 and accept service of any document to be served on the owner relating to offences.

The current law does not allow a ship to be registered under MISR unless it is fitted with mechanical means of propulsion, is not more than 15 years or 20 years in age (depending on the type of ship) and is of not less than 1,600 gross tonnage, unless exempted by the Minister. Under MSAA 2017, the age and tonnage criteria for registration under MISR may be prescribed in regulations to be issued by the Minister. Hence it remains to be seen whether the criteria for registration under MISR will be stricter or more lenient in this regard.

Ships under Bareboat Charter Terms

MSO 1952 currently does not provide for the registration of ships under bareboat charters. In a revolutionary move, MSAA 2017 will allow charterers of a ship under bareboat charter terms to register a ship as a Malaysian ship with the Ship Registers. The establishment of a bareboat charter registry operating under the Ship Registers is in line with regimes in other countries such as the United Kingdom and Singapore.

MSAA 2017 defines “bareboat charter terms” as the hiring of a ship for a stipulated period on the terms which give the charterer possession and control of the ship, including the right to appoint the master and crew of the ship.

The registration of a ship under bareboat charter terms with the Ship Registers is subject to (i) the Minister’s approval; and (ii) evidence that the ship’s registration at its primary registry has been suspended or that the authority of primary registry has consented to the suspension of the ship’s registration at its primary registry.

BAREBOAT CHARTERED-OUT SHIPS

The current law also does not stipulate the rights of Malaysian shipowners to register their ships as a bareboat charter in another country. Following the amendments made in MSAA 2017, Malaysian shipowners may do so subject to conditions imposed by the Director of Marine and the consent of the Registrar. However, the Minister may disallow any Malaysian ship to be bareboat chartered-out for any reason and duration as he thinks fit. While a

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Malaysian ship is bareboat chartered-out and re-registered in another country, the registration of that ship in Malaysia will be suspended.

REGISTRAR'S NEW POWERS

The Registrar is responsible to maintain the Ship Registers. MSAA 2017 accords the Registrar with the power to, amongst others, suspend and terminate registrations of Malaysian ships (including ships on bareboat charter terms) under the Ship Registers, which the law does not presently expressly provide for. For example, the Registrar may terminate the registration of a Malaysian ship if the ship is broken up, or is an actual or constructive total loss such that it is no longer capable of being used in navigation.

The Registrar may also terminate the registration of a ship under bareboat charter terms if (i) the ship ceases to be operated under a bareboat charter; or (ii) the rights and obligations of the bareboat charterer under the bareboat charter terms are assigned; or (iii) the ship's primary registry is closed or annulled; or (iv) the primary registry authority has revoked or withdrawn the suspension of the ship's registration at its primary registry.

RIGHTS OF MORTGAGEES

Registered mortgagees are empowered to sell the ship when the mortgage money is due and to give effectual receipts for the purchase money. Nevertheless, in practical terms, unless there is a debenture providing for the appointment of a receiver with the right to sell the ship, any sale of a ship pursuant to a mortgage would require a Court order.

MSAA 2017 also expressly recognises contractual or equitable interests, and allows for such interests to be enforced by or against the owners and mortgagees of ships.

However, it should be noted that under MSAA 2017, a bareboat chartered-in ship may not be mortgaged. In fact, the laws of primary registry of these ships will apply to issues such as the priority of registered mortgages.

LICENSING OF SHIPS BELOW 15 NET TONNAGE

Unless specifically exempted, MSAA 2017 will require ships below 15 net tonnage in any part of Malaysian waters for purposes of trade or business; transportation of any person other than for trade or business; or sports, leisure or recreational activity, to be licensed. The present law requires the licensing of vessels below 500 gross tonnage for any of the aforesaid purposes.

PENALTIES

MSAA 2017 increases the penalties across the board in the event MSO 1952 is contravened. For example, the penalty for a person who uses a ship or causes or permits a ship to be used without a licence or for a purpose other than the purpose for which it is licensed or contrary to the conditions of its licence will attract a fine not exceeding RM100,000 and/or imprisonment for a term not exceeding two years, as opposed to a mere fine not exceeding RM10,000 under the present law.

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MALAYSIA SHIPPING DEVELOPMENT FUND

MSAA 2017 also introduces the Malaysia Shipping Development Fund ("Fund") from monies collected through the payments of annual tonnage fee. The Malaysia Shipping Development Fund Committee ("Committee") controls and administers the Fund which is aimed at improving the shipping industry.

Specifically, the Fund is to be expended to improve the shipping industry; provide awards, fellowships, scholarships and research grants; sponsor research projects; organize seminars, expositions and other similar activities; and pay any other expenses incurred by the Committee in the execution of its functions.

COMMENTS

MSAA 2017 is intended to arrest the steady decline of Malaysian shipping tonnage by encouraging shipowners and bareboat charterers to flag their ships in Malaysia by introducing more categories of registration and imposing less stringent registration requirements under the Ship Registers. It also increases the powers of the Registrar and introduces stricter penalties. MSAA 2017 also seeks to address the need to improve maritime human resources by introducing the Fund to train and educate our maritime manpower.

The amendments under MSAA 2017 will no doubt complement the Ministry of Transport's 5-year Malaysia Shipping Master Plan to revitalize shipping (including facilitating access to capital and financing and promoting employment of Malaysian ships). Time will tell whether the amendments will bring about a sea change to the Malaysian shipping industry.

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Update: UBO register | developments in the Netherlands and Europe

Friday February 9, 2018

There are important developments in the Netherlands and in Europe regarding the register in which personal details of ultimate beneficial owners ("**UBOs**") of companies and other entities will be recorded ("**UBO register**"). This update provides a high-level summary of the major developments.

On 31 January 2018 the Dutch government published a draft decree, designating the categories of natural persons who will be classified as UBOs in any event for the purpose of customer due diligence procedures carried out by banks, insurance companies, lawyers, civil law notaries, tax advisers and other service providers. Although the draft decree does not directly relate to the UBO register, which is yet to be introduced in the Netherlands, we expect that the definition of UBOs for customer due diligence purposes as set out in the draft decree will also be the starting point for the Dutch UBO register. The draft bill for the introduction of the UBO register, which is expected to be submitted to the lower house of the Dutch parliament (*Tweede Kamer*) during the first half of this year, has not yet been published and hence it is still unclear exactly what the criteria will be for classifying individuals as UBOs for the purposes of the register. Nevertheless, the draft decree gives further insight into the lines along which the Dutch government is likely to proceed.

Definition of UBOs in the Netherlands

The definition of UBOs in the draft decree is based on the definition of "beneficial owner" in the fourth European Anti-Money Laundering Directive ("**AMLD4**"). The draft decree contains a non-exhaustive list of categories of natural persons who in any event constitute UBOs of companies and other entities. The following categories are particularly noteworthy.

BVs, NVs, private partnerships, limited partnerships, general partnerships, cooperatives and similar entities

• The UBOs of a Dutch *BV* (private limited liability company), *NV* (public limited liability company) or other similar entity, other than - in brief - a listed company that is subject to sufficient disclosure requirements, are in any event the natural persons who ultimately own or control the entity, (i) through direct or indirect ownership of more than 25% of the shares, voting rights or ownership interest in that entity, or (ii) by other means, such as the right to appoint or dismiss the majority of the members of the entity's administrative, management or supervisory body of the entity.

• The criteria for determining the UBOs of a Dutch *maatschap* (private partnership), *CV* (limited partnership), VOF (general partnership), *coöperatie* (cooperative), or a similar organisational form, resemble the criteria for BVs and NVs, tailored to the specific organisational form in question. The threshold of more than 25% is also generally applicable.

• If no "real" UBO can be identified on the basis of ownership or control, or if there is any doubt that the person(s) identified are the UBO(s), the natural person(s) who hold the position of senior managing official(s) are deemed to be the UBO(s).

Foundations and Mutual Funds

• The UBOs of a Dutch *stichting* (foundation) are in any event: (i) the incorporator(s), (ii) the board member(s), (iii) if applicable, the beneficiaries or, where the individuals benefiting from the foundation cannot be determined, the class of persons in whose interest the foundation was mainly set up or mainly operates, and (iv) any other natural person exercising ultimate control over the foundation by other means.

It is unclear whether all holders of *certificaten van aandelen* (depositary receipts for shares) issued by a Dutch foundation that is a *stichting administratiekantoor* ("**STAK**") are deemed to be beneficiaries - and hence UBOs - of the STAK. If this proves to be the case, this will have a major impact on companies in which, for example, family members and/or managers invest through depositary receipts for shares: a natural person typically qualifies as a UBO of a BV or NV if he/she holds a direct or indirect interest of more than 25%, but for holders of depositary receipts for shares issued by a STAK there might be no minimum threshold when determining the STAK's UBOs. This has major practical implications and is undesirable from a privacy perspective.
• In anticipation of the draft bill for the introduction of the UBO register, the Dutch government is currently researching whether or not a Dutch *fonds voor gemene rekening* (mutual fund) should also be obliged to record information about its UBO(s) in the register.

Developments in Europe

Fifth European anti-money laundering directive
In mid-December 2017 political agreement was reached at European level on a proposal to amend AMLD4, the directive that requires member states to establish a UBO register. This proposal is also known as the fifth European anti-money laundering directive ("**AMLD5**") and entails important changes to AMLD4, including the following: (i) in all member states the public will have access to information in the registers on UBOs of companies and other legal entities, (ii) the UBO registers of all member states will be directly interconnected, and (iii) information on UBOs of trusts and similar legal arrangements will be more widely accessible (parties that can demonstrate a "legitimate interest" will have access, for instance investigative journalists). On 29 January 2018 the members of two committees of the European Parliament (Economic & Monetary Affairs and Civil Liberties, Justice & Home Affairs) supported AMLD5 by a large majority. The next step is approval by the plenary meeting of the European Parliament.

The UBO register in other European countries
Our research report dated 31 August 2017 showed that only a few member states met the 26 June 2017 deadline for the implementation of AMLD4. Several countries, such as the Czech Republic, Denmark, France, Germany, Latvia, Slovenia and Sweden, have now established an operational UBO register. In other countries, including Belgium, Croatia and Italy, AMLD4 has been implemented in national law, but secondary legislation containing details on the registration of UBO information has not yet been published. In Belgium, a Royal Decree will be issued after the Commission for the Protection of Privacy register has given its advice regarding the functioning modalities of the UBO register. To date, neither the advice of the Commission, nor the Royal Decree are available and no expected publication date has been publicly announced. On 6 February 2018 the Luxembourg Parliament held a first voting round with respect to the bill implementing some of the provisions of AMLD4, including with regard to the application of "a holistic, risk-based approach" by all professionals who are subject to anti-money laundering rules. This bill does not implement the UBO register in Luxembourg. That will likely occur later this year by means of separate bills. More news on this will follow shortly.

Now that several countries have an operational UBO register, we can unfortunately conclude that the requirements for registering UBOs vary widely between member states. There are important differences when it comes to providing information to UBO registers in different countries and, much to our surprise, the result of identifying UBOs in one country can differ from the result in another country. This is cumbersome for companies with subsidiaries or branches in multiple European countries, and their owners. We will closely monitor the implementation of the UBO register in the Netherlands and the rest of Europe and will keep you informed. If you have any questions or require assistance, do not hesitate to contact us.


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Government announces first round of changes to employment laws

January 25, 2018

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The Government has today announced the first round of its employment law reforms. While changes to employment laws were expected, the Government has moved on its pre-election 100-day manifesto in relation to trial periods.

In the run-up to the 2017 election, Labour campaigned that it would retain trial periods, but in a different form. Today the Government has confirmed that instead all employers with more than 20 employees will not have access to trial periods. This will be of concern to many larger employers.

The Government intends to introduce a new Bill to largely repeal the National Party's amendments to the ER Act over its nine years in Government. The changes announced today target collective bargaining and wages as well as minimum standards and protection of employees: the Government says the aim is to restore fairness in the workplace.

Rights for employees

The main changes the Bill will introduce are:

- reinstating the right to prescribed rest and meal breaks (subject to exceptions for workplaces where it is not possible for workers to take breaks at the same time ie air traffic controllers);
- restricting 90-day trial periods to only employers of less than 20 employees;
- extending rights for employees in "vulnerable industries";
- requiring employers to notify employees of their right to review and ask for corrections of personal information; and
- restoring reinstatement as the primary remedy available to the Employment Relations Authority.

Changes for unions

In relation to strengthening collective bargaining and union rights in the workplace, the Bill proposes to:

- reinstate union representatives' rights to access the workplace to conduct union activities, where employees are members, without prior consent of the employer;
- require employers to provide union contact details, information about the role of unions and the option to join a union to new employees;
- reinstate the 30-day rule where for the first 30 days' new employees must be employed under terms consistent with the collective agreement;
- reinstate a union's opportunity to initiate collective bargaining first;
- reinstate the principle that the duty of good faith requires parties to conclude a collective agreement;
- remove the ability for employers to opt out of multi-employer collective once bargaining has been initiated;
- require that collective agreements must set pay rates and that rates of pay be agreed during collective bargaining;
- extend the grounds for discrimination against union members;
- require employers to allow union representatives reasonable time to perform their duties within working hours; and
- remove an employer's ability to deduct pay as a response to partial strikes.

90-day trial periods

For large businesses, use of 90-day trial periods will be unlawful and only businesses that employ less than 20 employees will be able to use them. Based on MBIE figures, 29% of all workers work for a business with fewer than 20 employees. The number of employees may be calculated using an 'associated person' test which means that employees of subsidiaries or holding companies (for example) will be treated as being employed by one employer.

Going forward

It is expected that the Government will introduce the Bill to Parliament by 3 February 2018 before the 100-day deadline.

The transitional arrangements in the Bill will require close attention by all employers who are going into bargaining in 2018 or have not concluded bargaining prior to the introduction of the changes. A key change for many employers will be the requirement to include rates of wages and salaries in collective agreements.

We will update you once the Bill is released. In the meantime, if you would like more information, please contact one of our experts listed above.

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BULLETIN

MODIFICATION OF MINIMUM WAGE
Executive Decree No. 75 became effective in January 1, 2018

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January, 2018. According to Executive Decree No. 75 of December 26, 2017, published in the Official Gazette of December 27, 2017, new minimum wage rates applicable to all workers were set in the Republic of Panama.

The two regions previously established, remain the same for determining the new minimum wage rate applicable. Namely:

> **Region 1:**
> It involves the districts of Panamá, Colón, San Miguelito, David, Santiago, Chitré, Aguadulce, Penonomé, Bocas del Toro, La Chorrera, Arraiján, Capira, Chame, Antón, Natá, Las Tablas, Bugaba, Boquete, Taboga, San Carlos, Chepo, Guararé, Los Santos, Pedasí, Dolega, San Félix, Barú, Boquerón, Portobelo, Donoso, Santa Isabel, Santa María, Parita, Pesé, Atalaya, Changuinola y Chiriquí Grande.
>
> **Region 2:** It involves the remaining districts.

We proceed to list the new minimum wage rates for those economic activities that might be of interest to our distinguished clients.

We remain at your disposal for any further inquiries you might have, or for information on other activities not listed in this release.

About ARIFA

ARIFA's labor and employment team is one of the leading providers of legal services in this field in Panama.

Lawyers in the labor and employment area frequently work with our lawyers in the M&A and Corporations Practice Group to provide guidance in connection with complex acquisitions and mergers.

Our lawyers in this area also team up with lawyers in our Litigation and Arbitration Practice Group to litigate and settle labor disputes and claims.

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Economic activity	Region 1	Region 2
Manufacturing industries		
Small businesses	2.20	1.85
Large businesses (16 or more employees)	2.85	2.35
Distilling, rectifying and blending of spirits	2.85	2.40
Manufacture of concrete and / or cement	3.14	2.99
Processing of sugar cane (National)	2.85	2.85
Electricity, gas, steam and air conditioning supply (National)	3.14	3.14
Ice production	2.72	2.24
Water supply, sewerage, waste management and sanitation activities (National)	3.14	3.14
Sewage system	2.85	2.35
Collection, treatment and waste disposal	2.85	2.35
Processing and recovery of waste materials	2.72	2.24
Wholesale and commissions	2.72	2.23
Sale of products and by-products derived from Sugar Cane (National)	2.72	2.72
Fuel tanks	2.72	2.23
Retailing		
Small businesses	2.20	1.84
Large businesses (11 or more employees)	2.72	2.23
Fuel stations	2.72	2.23
Hotels		
Small businesses	2.26	1.87
Large businesses (11 or more employees)	2.72	2.23
Franchised hotels and resorts	2.85	2.34
Hotels with more than 200 rooms	2.85	2.34
Hourly hotels, motels, inns and residential	2.85	2.34
Information and communication (National)	2.85	2.85
Editing activities	2.85	2.35
Production of radio and television	2.85	2.34
Radio and television broadcasting (National)	3.14	3.14
Activities of employment agencies (National)	2.85	2.85
Activities of travel agencies, tour operators and reservation services	2.85	2.24
Social services and relating to human health	2.85	2.32
Clinics and hospitals	3.14	2.34
Health technicians (National)	3.14	3.14
Arts, entertainment and creativity (National)	2.85	2.85
Gambling and betting activity, casinos (National)	3.34	3.34
Other service activities		
Residential Condos (totaling more than 10 floors) and tenant associations of individual houses (National)	3.14	3.14

Setting aside an SOP Act adjudication determination: The right of all parties to be heard

DENTONS RODYK

The Building and Construction Industry Security of Payment Act (Cap 30B) (SOP Act) gives parties in Singapore a way to quickly resolve construction payment disputes on a "temporary finality" basis with the right to fully and finally resolve all disputes in Court or in arbitration (where the parties had agreed to arbitration).

If a party is aggrieved by the outcome in the adjudication proceedings, it may apply to set aside the adjudication determination where there are grounds to do so, including if they were not properly heard by the adjudicator.

In the recent case of *Bintai Kindenko Pte Ltd v Samsung C&T Corp [2017] SGHC 321*, the Singapore High Court further clarified what would amount to a breach of natural justice on the part of the adjudicator, such that the Court would exercise its power to set aside the adjudication determination.

In particular, this case highlights the importance of an adjudicator having to apply his/ her mind to all of the essential arguments raised by parties in the adjudication. Otherwise, there is a risk that the adjudication determination may be set aside by the Court for being in breach of natural justice.

Facts

The plaintiff sub-contractor, Bintai Kindenko Pte Ltd (Bintai Kindenko) applied for adjudication against the defendant main-contractor, Samsung C&T Corp (Samsung). The claims by Bintai Kindenko and Samsung are summarised as follows:

Issue	**Bintai Kindenko's Claim (Sub-Contractor)**	**Samsung's Claim (Main-contractor)**
Retention Monies	S$2,146,250.00	-
Variation Works (certified and paid in earlier payment responses, but now reversed in the disputed payment response)	-	S$1,605,711.42
Backcharges	-	S$585,252.20
Total	**S$2,146,250.00**	**S$2,190,963.62**

The adjudicator ruled in favour of Bintai Kindenko. Specifically, the adjudicator excluded the two issues raised by Samsung, and stated expressly in its adjudication determination that the dispute "centred solely on the release of the first retention monies, and not the variations or backcharges". However, in the adjudication conference, neither party had sought to limit the scope of the adjudication to the issue of retention monies only.

When Bintai Kindenko sought to enforce the adjudication determination in Court, Samsung then applied to set aside the adjudication determination on the basis that the adjudicator had breached the rules of natural justice by failing to consider the two issues which it had raised in the adjudication.

Below, we discuss the important legal principles in relation to the breach of natural justice.

Key Takeaways

There will be a breach of natural justice if (1) the adjudicator fails to deal with all the essential issues in dispute, and (2) the breach was material and caused real and serious prejudice to the aggrieved party.

A. The adjudicator must deal with all essential issues in the adjudication application

An issue would be essential if it was of such major consequence and so much to the forefront of the parties' submission that no adjudicator could, in good faith, have regarded the issue as requiring no specific examination in the reasons for determination.

In this case, the Court found that the two issues of backcharges and variation works were repeatedly flagged out in both Bintai Kindenko's and Samsung's submissions to the adjudicator as important issues in dispute. Thus, this would support the point that the two issues were essential. By failing to consider the two essential issues in dispute, the Court found that the adjudicator had acted in breach of natural justice.

B. The breach of natural justice must be material, and must cause real and serious prejudice to the aggrieved party

Even if the aggrieved party can show that the adjudicator was in breach of natural justice, the Court has to be convinced that such **breach was material and caused real and serious prejudice** to the aggrieved party. In this regard, the test of materiality was whether the breach could reasonably have made a difference, and not whether it would necessarily have done so. The crux is whether the omission to consider the issues in question might have had some prospect of changing the adjudicator's mind in respect of his decision.

Ultimately, the Singapore High Court concluded that the adjudicator had not dealt with the two issues raised by Samsung. Further, the two issues which the adjudicator had excluded could certainly have changed the adjudicator's mind as to the final outcome, since the sum disputed in relation to these two issues was greater than Bintai Kindenko's claim for the first half of the retention monies. Thus, the Court decided that there was real and serious prejudice occasioned to Samsung, and allowed Samsung's application to set aside the adjudication determination.

Conclusion

When the adjudicator renders his/ her adjudication determination, one should always scrutinize the decision to see if the adjudicator had considered all the essential issues raised by the parties, which is likely to have a bearing on the eventual outcome of the case.

If the adjudicator did not rule in your favour, and you feel that the adjudicator had failed to consider some of the essential issues at hand which should have been properly considered, this may very well constitute a ground for setting aside the adjudication determination. In which case, it would be advisable to seek legal advice to assess whether you have a good case for setting aside the adjudication determination.

Dentons Rodyk acknowledges and thanks associate Tan Ting Wei for her contribution to the article.

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Potential Legal Challenges of Smart Healthcare

01/31/2018

Hsiu-Ru Chien/Shih-I Wu

In the past, the advancement of medical devices was largely centered on researching and developing new products or improving the quality of existing products. In recent years, however, the growth of digital technology and network communication technology has not only facilitated the research and development of novel medical devices but also encouraged a transition of the industry from traditional hardware manufacturing to a new service model of meta-analysis based on a combination of software and hardware equipment. Medical services have also expanded beyond limited service locations (such as hospitals and clinics) into user-oriented smart healthcare services with the help of technologies such as long-distance healthcare system, homecare devices, cloud technologies, data computing and artificial intelligence.

Users can now receive reminders, take physiological measurements or obtain health data with the help of homecare, wearable or portable devices, thereby monitoring their own health or that of a family member. Healthcare providers can also help users manage their health by collecting, transmitting, processing and computing the data. This integration of new technologies with healthcare resources improves healthcare efficiency, and thus provides the public with an access to more appropriate treatments and preventive healthcare services. Moreover, such integration is an essential development for both an aging social structure and the promotion of healthcare services in remote areas where healthcare personnel are insufficient and medical resources are unevenly distributed.

The application of smart healthcare, however, greatly depends on the investment from and the integration of various industries including healthcare providers, medical device manufacturers and the IT industry, as well as individual users' behaviors. Under current laws and regulations in Taiwan, is there any risk that relevant services and products may violate applicable laws or cause any damage to users' life, body or health? Among existing laws and regulations, which ones should relevant suppliers pay attention to? All these are legal issues that have to be taken into consideration during the development of smart healthcare.

For instance, the most important function of long-distance healthcare is that doctors are allowed to provide patients with inspection, diagnosis and even medication services via long-distance devices. However, Article 11 of the Physicians Act sets forth that a physician may not treat, issue prescription or certificate of diagnosis to patients not diagnosed by the physician himself or herself. Physicians who violate the aforesaid requirement by providing long-distance healthcare may be imposed with administrative fines. However, as the Act places strict restrictions on the development of long-distance healthcare, the Ministry of Health and Welfare ("MOHW") has announced the draft version of "Regulations of Treatment on Telemedicine" on January. 10, 2018, which is aimed at loosening the restrictions on long-distance diagnosis and treatment projects. The impact of aforesaid Regulations on long-distance healthcare is yet to be seen.

Moreover, smart healthcare relies on the collection, storage and transmission of data to help healthcare providers quickly obtain a patient's information so as to provide timely medical services. However, Article 6-1 of the Personal Information Protection Act states that personal information of medical records, medical treatment, genetic information and health examination should not be collected, processed or used. One should be mindful of the regulations governing personal information protection when collecting, transmitting, using or storing patients' personal information while providing long-distance healthcare services. Besides, long-distance healthcare providers should also comply with the Guidelines for the Protection of Personal Information of Long-distance Healthcare Patients approved by the MOHW on November 5, 2014, to avoid their services in violation of the guidelines.

In addition, smart healthcare services may involve the usage of various equipment, instruments, software or apparatus. Are these tools categorized as medical devices? If so, do the suppliers have to obtain licenses of manufacture and sale from competent authorities? Do they also need to apply for inspections and registration? Regarding these issues, Article 13 of the Pharmaceutical Affairs Act provides that a "medical device" refers to any instruments, machines, apparatus, materials, software, reagent for in vitro use and other similar or related articles, which is used in diagnosing, curing, alleviating or directly preventing human diseases, regulating fertility or which may affect the body structure or functions of human beings, and do not achieve its primary intended function by pharmacological, immunological or metabolic means in or on the human body. These devices, therefore, are subject to strict control of application laws and regulations, such as Regulations for Governing the Management of Medical Device and Regulation for Registration of Medical Devices, so as to avoid potential damages caused by inappropriate or faulty medical devices to users' life, body or health.

However, smart healthcare relates to a great variety of products. Whether they all fall within the scope of medical devices is probably still a question for various suppliers developing, manufacturing and importing such products. One thing suppliers can do is to search for similar products in the Medical Device Classification Database and use them as references. Additionally, in accordance with Article 6 of Regulations for Governing the Management of Medical Device, suppliers may also approach the Food and Drug Administration of the MOHW for inquiry of the classification of a medical device and its regulatory control so as to avoid legal disputes after the products are launched on the market.

Regardless of whether such products are deemed as medical devices, liability issues subject to the Civil Code and the Consumer Protection Act would arise if the design or manufacture thereof is found defective, such as incorrect transmission of medical information, inaccurate healthcare instructions or advice, loss of user information or errors in displaying said information, unpunctual reminders for medication or physiological measurements and mistakes in information calculation or analysis due to design errors or malfunction, which may even cause significant physical or financial damages to users. A smart healthcare system may comprise software and hardware equipment designed and supplied by respective individuals or companies, whereas the medical or healthcare services are provided by professional institutions such as hospitals and data storage and computing by professional cloud equipment and service vendors, not to mention that timely and accurate data transmission relies on the quality of network communications. Consequently, when defective products result in damages, the determination of responsible persons, cause-and-effects and liability allocation would be of great importance in resolving arising disputes.

Apart from all the above issues, smart healthcare pertains to patient-oriented medical services, requiring high levels of cooperation and execution on the part of patients or users. If any risk to life or health arises from users' own inappropriate behaviors, such as not taking medication or physiological measurements according to reminders from the equipment or software, not following instructions given by medical providers and thus resulting in worse health conditions or delaying treatments, or entering inaccurate information that causes misdiagnosis by the healthcare provider, which parties should be responsible and bear the burden of proof? How could service vendors prevent similar situations via product design? Or should they enter into prior agreements with users to protect their own rights? These issues are also worthy of discussion in the field of smart healthcare.

Smart healthcare is aimed at providing high-quality healthcare. Moreover, suppliers thereof are committed to getting closer to the needs of users, so as to maximize the efficiency of limited medical resources. Various manufacturers from traditionally non-medical industries, such as electronics, electrical engineering, IT and materials, can also enter the smart healthcare market by researching and developing novel products and technology integration, thereby increasing competitiveness within this industry. However, apart from the various risks mentioned above, there are still many foreseeable legal problems that require the attention of the industry, the academia and even legislators. Alternatively, a consensus of opinions may be established based on an accumulation of judicial judgments on litigation cases filed. When an industry, technologies and service diversification advance faster than legislative changes, each and every participant should not only pay close attention to the requirements and restrictions set forth in existing applicable laws and regulations, but also keep an eye on and participate in the establishment of new regulations and technical standards. It is important for suppliers to appropriately control legal risks when taking advantage of the opportunities arising from the market of smart healthcare.

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client alert

BANKING & FINANCE | TURKEY | FEBRUARY 2018

NEW PROTECTIONIST MEASURES IN TURKISH FOREIGN EXCHANGE REGULATIONS

In November 2017, the Central Bank of the Republic of Turkey announced that restraining measures were being considered in order to curb USD 200 billion of f/x debt owed by Turkish companies. After having collected and analysed details of the f/x debt of 110 Turkish companies which represents roughly 23% of the total Turkish private sector f/x debts, Decree No. 32 on the Protection of the Value of Turkish Currency ("**Decree No. 32**") was amended in order to ease the credit burden on Turkish banks and Turkish companies and to stem the weakening of Turkish lira against f/x currencies. The amendments were announced in Official Gazette No. 30312 from 25 January 2018, and will enter into force on 2 May 2018. In this context, the most significant principles of the new amendments may be outlined as follows:

- Turkish individuals (real persons) cannot engage in borrowings in foreign currency, whether from Turkish financial institutions or from foreign financial institutions.
- F/x-indexed loans will cease to exist as of 2 May 2018.
- F/x loans may not be extended to Turkish entities that do not have any f/x income.
- F/x loans to be extended to Turkish entities must comply with the "USD 15,000,000 threshold" rule at the relevant utilisation date.
- Exceptions to the main principle are strictly limited to a number of cases concerning financial institutions, contractors of PPP projects and the defence industry, and exporters.

This client alert aims to briefly summarise the requirements set out under the recent changes brought to Decree No. 32, and to provide some insight about the new currency regime regarding foreign currency denominated loans:

- Two new definitions are included in the Decree No. 32:

  (i) "f/x income" means "receivables obtained from exports, transit trade, sales and deliveries that which are deemed to be exports, as determined by the relevant legislation and foreign exchange earning services and activities"; and

  (ii) "Credit balance" means the "total amount of unpaid cash f/x loan debts obtained domestically (within the country) and from abroad."

- In principle, Turkish residents may freely obtain Turkish Lira denominated loans from abroad, provided that such loans are transferred through banks operating in Turkey. Having said that, recent changes introduced in Decree No. 32 provide a restriction on f/x loans whether extended from abroad or from Turkish financial institutions. Turkish residents who do not have any f/x income are not allowed to obtain f/x loans from abroad or Turkish financial institutions.

- In the event that the borrower's total credit balance is lower than USD 15 million as of the utilisation date, the sum of the current credit balance and the amount of the loan planned to be used by the borrower cannot exceed the total amount of its f/x income in the past three financial years. Furthermore, the borrower is obliged to prove its f/x income from the last three financial years in a report drawn up by a certified accountant. Banks, leasing companies, factoring companies, financing companies that extend f/x loans and banks that are intermediaries to the utilisation of foreign f/x loans are obliged to monitor this restriction.
- If it is determined that the Borrower's credit balance exceeds the total amount of the f/x income of the past three financial years, the excess part of the loans extended by banks (including their free trade zone branches), leasing companies, factoring companies and financing companies, will be called and converted into TRY-denominated loans.
- Turkish banks, leasing companies, factoring companies, and financing companies are free to extend each other, directly or by way of syndication, f/x loans without any limitation regarding maturity, subject to the provisions of their respective legislation.
- Decree No. 32 does not allow Turkish residents to use f/x indexed loans from foreign or Turkish financial institutions.
- In addition, Turkish individuals (real persons) are not allowed to use f/x loans from foreign or Turkish financial institutions.
- Starting from 2 May 2018, existing f/x loans of Turkish residents with a credit balance less than USD 15 million will not be renewed as f/x loans or f/x indexed loans. In this respect, it is worth mentioning that f/x loans or f/x indexed loans that are extended prior to 2 May 2018 will be counted in the calculation of the credit balance.
- These restrictions does not apply in the following cases:

  (i) Loans to be used by public institutions, Turkish banks, leasing companies, factoring companies and financing companies.

  (ii) Turkish residents with a credit balance of more than USD 15 million on the utilisation date.

  (iii) F/x loans to be used by Turkish residents within the framework of an investment incentive certificate.

  (iv) F/x loans to be used in order to finance machinery and equipment whose HS Codes are indicated by reference in Annex (I) of Decree No. 2007/13033 determining the Value Added Tax Rate Applicable to the Goods and Services. This exception also applies to domestic financial lease operations performed in a foreign currency.

  (v) F/x loans to be used by Turkish residents who win domestic public tenders announced on an international scale, or Turkish residents undertaking defence industry projects approved by the Undersecretariat of the Defence Industry.

  (vi) F/x loans to be used by Turkish resident-contractors of PPP projects.

  (vii) Turkish residents who do not have any f/x income in the past three years are also allowed to use f/x loans up to the amount of their potential f/x income, provided that they demonstrate their relationship/link with exports, transit trade, sales and deliveries that are deemed to be exports, as well as foreign exchange earning services and activities and their potential f/x income.

(viii) F/x loans to be obtained by Turkish residents in accordance with the principles to be determined by the Prime Ministry (to which the Undersecretariat of Treasury is attached).

(ix) F/x loans obtained domestically, to be used by Turkish residents up to the amount of foreign exchange deposited as collateral in the domestic branches of banks, or up to the amount of f/x securities issued by central governments and central banks of OECD member countries.

Long-awaited changes are provided as a main tool for the limitation of f/x debts of Turkish companies. However, there is some secondary legislation introducing the details of the legal process and implementing these changes that is still expected by the Turkish banking sector.

In compliance with Turkish bar regulations, opinions relating to Turkish law matters that are included in this client alert have been issued by Özdirekcan Dündar Şenocak Avukatlık Ortaklığı, a Turkish law firm acting as the correspondent firm of Gide Loyrette Nouel in Turkey.

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Ideas

2017 Roundup - Consolidation Continues Apace

06 February 2018

Firm Thought Leadership

Each year around this time we take the opportunity to review the transactions and other significant industry developments over the past year and offer our views on what they may mean for the coming year.

Mergers and acquisitions activity in the energy industry during 2017 was higher than at any time in the last decade. Deal volume for transactions in the United States was over $213 billion, well above the $141 billion recorded in 2016 and above the previous high-water mark of $201 billion set in 2015. Initial uncertainty about the potential for tax reform was overcome by optimism about the economy generally, which kept stock valuations high and interest rates lower than at least some had thought they might be at this point in the business cycle. Utility stock valuations did decline somewhat toward year end, but it remains to be seen what effect lower valuations may have on the level of transaction activity in 2018.

As usual, more than half the activity involved pipelines, midstream companies and MLPs, with $118 billion of announced transactions, up from about $76 billion the year before. Transactions among regulated electric utilities also increased, to $36.5 billion from $19.8 billion in 2016. The two largest transactions involving regulated electric companies were the acquisition of Oncor Electric Delivery Company by Sempra Energy and Dominion Energy's acquisition of SCANA Corporation, both of which likely would not have taken place but for the financial distress associated with the company or its parent company. Canadian acquirers remained active with Hydro One Limited agreeing to acquire Avista Corporation in another major transaction. Among LDCs, volume nearly doubled to $8.6 billion from $4.8 billion, although this was still well short of the $18 billion in 2015, when transactions involving AGL Resources and Piedmont Natural Gas Company set a new high-water mark. Most of the 2017 volume in the LDC sector was AltaGas Ltd.'s acquisition of WGL Holdings and the sale of Elizabethtown Gas to South Jersey Industries by Southern Company Gas. As in 2016, the volume of transactions involving electric generation assets was well above average, although at $32.5 billion, 2017 volume was slightly below the $33.5 billion of 2016. Two major transactions announced by IPP companies were Calpine's going private transaction and the merger of Dynegy and Vistra Energy. Transaction volume for renewable generation assets also jumped in 2017, to $13.1 billion from $6.6 billion in 2016 and $8.5 billion in 2015. Key transactions and trends that we see in each of these subsectors are discussed in more detail in the report.

Although not deal specific, other key developments during the year included the evolving legislative and regulatory reform under the Trump Administration. The Administration's efforts to significantly change regulations pertaining to the environment and related energy regulatory matters have only begun, but it is clear that they are likely to be significant. The potential implications of regulatory reform are discussed in more detail in the full version of this report.

The other area of major reform is of course federal income tax. The recently enacted tax reform act (the “Tax Reform Act”), informally known as the Tax Cuts and Jobs Act, was signed into law by President Trump on December 22, 2017. The Tax Reform Act made sweeping changes to the Internal Revenue Code of 1986, as amended (the “Code”), most of which took effect on January 1, 2018. We have included discussion of the effects of the Tax Reform Act in the report (see Regulated Utilities, Renewables, Master Limited Partnerships and YieldCos, Project Finance, and Bankruptcy Developments in the Energy Sector). We also have included a separate section discussing the overall impact of the Tax Reform Act on the energy sector.

The report covers the following areas:

- Regulated Utilities
- Independent Power Producers and Generation Assets
- Renewables
- Master Limited Partnerships and YieldCos
- Project Finance
- Bankruptcy Developments in the Energy Sector
- Environmental Regulation
- FERC
- Small Scale LNG
- CFTC
- ERCOT
- Tax Reform Act
- Mexico

To read the full report, click here.

http://www.bakerbotts.com/~/media/files/ideas/publications/2018/2017-energy-group-year-end-memo.pdf?la=en&hash=F29A456D5B1F424143F7B2A97AE6E63A738AE674

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DEFINING SUCCESS TOGETHER

Tax Bill Impacts Tax Treatment of Relocation, Transportation, Other Fringe Benefits

01.25.18

By Christine Hawkins

On Friday, December 22, 2017, President Trump signed the 1,100-page tax bill into law. Although not as drastic as the original House proposal, the bill promises to bring about the most impactful tax reform that plan sponsors and their advisors have seen in decades. This advisory highlights the key tax changes to benefits that every employer should be aware of.

Although certain fringe benefits – including qualified educational assistance program, adoption assistance, and dependent care assistance – were untouched by the tax bill, the bill both affects the employer deduction for certain fringe benefits and changes the tax treatment of others. As a result, employers are likely to revisit some of their benefit offerings.

How did the tax treatment of fringe benefits change?

Employer Deductions

Effective January 1, 2018, (and through at least January 1, 2026) the bill changes or eliminates employer deductions for the following employee benefits:

- *Qualified transportation fringe benefits* (e.g., parking, mass transit passes, van pooling), including benefits provided through direct payment, reimbursement, or salary reduction arrangements, are no longer deductible unless required for employee safety.
- *Qualified moving expense reimbursements are no longer deductible* (unless paid to members of the U.S. Armed Forces).
- *Business-related entertainment expenses*, including membership dues with respect to any club organized for business, pleasure, recreation or other social purposes, are no longer deductible.
- *Food or beverage expenses* that are related to the employer's business are subject to a 50 percent cap on deductions.
- Onsite gyms are no longer deducible.
- New Code Section 162(f) prohibits employers from deducting *settlement payments to the government*, subject to exceptions for payments that are attributable to restitution or compliance.
- New Code Section 162(q) prohibits employers from deducting *settlement payments in a sexual harassment or sexual abuse settlement* if the settlement or payment is subject to a nondisclosure agreement.

Employee Exclusions

The tax bill also changes the individual tax treatment of certain fringe benefits:

- *Bicycle commuting reimbursements* are no longer tax free.

- *Qualified moving expense reimbursements* are no longer tax free.
- *Unreimbursed employee business expenses* may no longer be itemized and deducted.

What does this mean?

Although the tax bill is clear with respect to what benefits it impacts, the bill also creates a number of questions about the practical consequences of these changes. While we wait for additional guidance, employers and their legal counsel must address questions such as how to coordinate their transportation fringe benefits with Code Section 132(f) salary deferral plans, how to determine the fair market value of a transit pass, and how to tax moving expenses incurred in 2017, but reimbursed in 2018. In addition, because the bill treats nondeductible fringe benefits offered to employees as unrelated business taxable income (UBTI), tax-exempt organizations are encouraged to review their budget, UBTI planning, and compensation decisions.

Is it all bad news for employer-offered benefits?

The tax bill eliminated or decreased preferential tax treatment for a number of employee benefits. But it's not all bad news. In addition to lowering the corporate tax rates, the tax bill also provided employers with the following reprieves.

Paid Leave Credit for Employers

Beginning in 2018, the bill puts in place a federal tax credit for employers that provide at least two weeks of paid leave at a rate of at least 50 percent of regular wages to qualifying employees on leave under the Family and Medical Leave Act. The credit applies toward workers who earn below $72,000 per year and will range from 12.5 percent to 25 percent of the cost of each hour of paid leave. Employers should, therefore, work with legal counsel to structure their paid leave policy to both comply with state or local laws and qualify for the FMLA credit.

401(k) Loan Extension

The news related to 401(k) plans is largely that they remain unchanged. However, the tax bill also provides for additional flexibility to employees by extending the period for rollovers on 401(k) plan loans. In the past, if an employee left his job, he had only 60 days to repay the loan or face income taxes and a 10 percent early withdrawal penalty. Under the new bill, employees will generally have until October of the following year to repay the loan or roll over into an IRA or the 401(k) at a new employer.

In short, the tax bill has sweeping impacts on employee benefits, including common perks generally offered to incentivize and retain employees. Employers should, therefore, revisit the desirability and effectiveness of their benefits and ensure that existing policies and operations are updated to reflect the tax changes.

For more information or to request review of your benefit offerings, please contact your DWT attorney.

Disclaimer

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

Creditors' Rights and Bankruptcy Practice Group

GOODSILL ALERT

February 8, 2018

NINTH CIRCUIT HOLDS THAT CRAMDOWN APPLIES ON A "PER PLAN" RATHER THAN A "PER DEBTOR" BASIS

♦♦♦♦

In the case of *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Properties Incorporated (In re Transwest Resort Properties, Inc.), 16-16221 (9th Cir. January 25, 2018)*, the U.S. Court of Appeals for the Ninth Circuit held that section 1129(a)(1) of the Bankruptcy Code, which requires that at least one impaired class of creditors accept a "cramdown" plan, applies on a "per plan" basis, rather than a "per debtor" basis.

BACKGROUND FACTS

In 2007, five separate companies (collectively, the "Debtors"), Transwest Hilton Head Property, LLC, Transwest Tucson Property, LLC (the "Operating Debtors"), Transwest Hilton Head II, LLC, Transwest Tucson II, LLC (the "Mezzanine Debtors"), and Transwest Resort Properties, Inc. (the "Holding Company Debtor") acquired the Westin Hilton Head Resort and Spa and the Westin La Paloma Resort and Country Club (collectively, the "Resorts"). Id. at 4-5.

The acquisition of the Resorts was financed by (1) a $209 million mortgage loan to the Operating Debtors from JPMCC 2007-C1 Grasslawn Lodging, LLC ("Lender"), secured by the Resorts (the "Operating Loan"); and (2) a $21.5 million loan from Ashford Hospitality Finance, LP (the "Mezzanine Lender"), secured by the Mezzanine Debtors' interests in the Operating Debtors (the "Mezzanine Loan"). Id. at 5.

In 2010, the Debtors filed a petition for chapter 11 bankruptcy relief. Id. The five cases were jointly-administered, but were not substantively consolidated. Id.

The Lender filed a claim in the bankruptcy proceeding for $298 million, based on the Operating Loan. Id. The Mezzanine Lender filed a $39 million claim based on the

Mezzanine Loan. Id. The Lender subsequently acquired the Mezzanine Lender's claim. Id.

The Debtors filed a joint chapter 11 reorganization plan (the "Plan"), wherein a third-party investor, Southwest Value Partners (the "Investor") would acquire the Operating Debtors for $30 million, thereby extinguishing the Mezzanine Debtors' ownership interest in the Operating Debtors. Id.

The Plan restructured the Lender's loan to a term of 21 years, and required monthly interest payments, and a balloon principal payment at the end of the term. Id. at 5-6. The Plan included a due-on-sale clause requiring the Debtors to pay the Lender the outstanding balance of the restructured loan in the event the Resorts were sold, although the due on-sale clause would not apply if the Debtors were to sell the Resorts between Plan years five and fifteen. Id. The Lender voted against the Plan but several other impaired classes of creditors voted to approve the Plan. Id.

The Lender, whose claim was undersecured, elected to have its entire claim treated as secured pursuant to 11 U.S.C. § 1111(b)(2). Id. at 5

Among other things, the Lender argued that section 1129(a)(10) of the Bankruptcy Code, which requires that at least one impaired class accept the Plan, applies on a "per debtor," not a "per plan," basis. Id. at 6. Because the Lender was the only class member for the Mezzanine Debtors and did not vote to approve the Plan, the Lender argued that the Plan did not satisfy the requirements of section 1129(a)(10). Id. Despite the Lender's objections, the Bankruptcy Court confirmed the Plan. Id. On appeal, the District Court ruled that section 1129(a)(10) applies on a "per plan" basis. Id. at 6-7.

PROCEEDINGS BEFORE THE NINTH CIRCUIT

Before the Ninth Circuit, the Lender argued that, when there is a jointly administered plan consisting of multiple debtors, "a 'per debtor' approach that requires plan approval from at least one impaired creditor for each debtor involved in the plan. . ." Id. at 11. In contrast, the Debtors argued that "the plain language of the statute contemplates a 'per plan' approach in which a plan only requires approval from one impaired creditor for any debtor involved." Id. As a matter of first impression among the circuit courts, The Ninth Circuit held that section 1129(a)(10) applies on a "per plan" basis. Id.

The Lender also argued that, while the Plan states it is "a jointly administered" plan, it was, in effect, a substantive consolidation. Id. at 13. The Ninth Circuit found that the

Lender's argument failed for two reasons: (1) the Lender never objected to the Plan on that basis, therefore it was not properly before the court on appeal; and (2) to the extent the Lender argues that the "per plan" approach would result in a "parade of horribles" for mezzanine lenders, such hypothetical concerns are policy considerations best left for Congress to resolve. Id. at 13-14.

In reaching its decision to affirm confirmation of the Plan, the Ninth Circuit explained:

> The plain language of the statute supports the "per plan" approach. Section 1129(a)(10) requires that one impaired class "under the plan" approve "the plan." It makes no distinction concerning or reference to the creditors of different debtors under "the plan," nor does it distinguish between single-debtor and multi-debtor plans. Under its plain language, once a single impaired class accepts a plan, section 1129(a)(10) is satisfied as to the entire plan.

Id. at 12. The Ninth Circuit explained that, "[b]ecause the plain language of section 1129(a)(10) indicates that Congress intended a "per plan" approach, we need not to look to the statute's legislative history or address the Lender's remaining policy concerns. Id. at 14.

Judge Friedland filed a concurring opinion in which he explained, "if a creditor believes that a reorganization improperly intermingles different estates, the creditor can and should object that the plan—rather than the requirements for confirming the plan. Id. at 20.

CONCLUSION

The *Grasslawn Lodging* should be extremely concerning to lenders who make loans to multiple debtors because of the serious risk that debtors will gerrymander an impaired accepting class in a cramdown situation. *Grasslawn Lodging* is also an important reminder for creditors' lawyers to assert proper objections to chapter 11 bankruptcy plans in the bankruptcy court, including objections to any disguised "substantive consolidation," or they risk waiving such objections on appeal.

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

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

U.S. Department of Education Issues Guidance on Providing FAPE After Supreme Court Decision in Endrew

08 February 2018
Education Alert

In *Endrew*, the U.S. Supreme Court ruled in favor of a higher standard of education for children with disabilities, which then raised many fundamental questions about special education across the nation. What is required for a school district to provide a free and appropriate public education (FAPE) to a student with a disability? What does the U.S. Department of Education expect to be included in an individualized education program (IEP) for the student? What should an IEP Team do in light of the Supreme Court's decision?

This client alert summarizes the decision and the implications it will have for your students, parents, and teachers.

Read More: U.S. Department of Education issues guidance on providing FAPE after U.S. Supreme Court decision in *Endrew*

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