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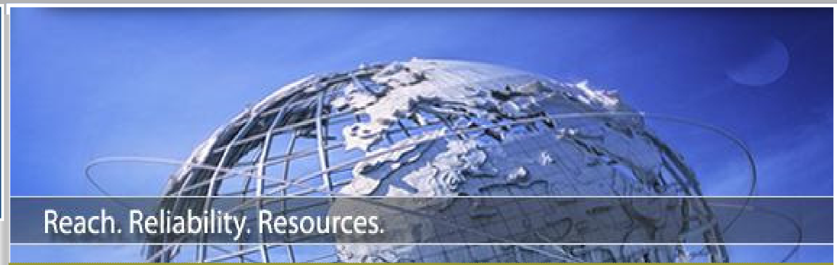

Pacific Rim Advisory Council
July 2018 e-Bulletin

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CONFERENCES & EVENTS

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

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

Visit www.prac.org for full details

MEMBER DEALS MAKING NEWS

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

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

►ARIFA Panama Counsel to McDermott in Multiple Transactions in Connection with its Merger Deal with Chicago Bridge & Iron Company

►BAKER BOTTS Represents EQT Corporation in Divestiture of Non-Core Upstream and Midstream Assets for $575 Million

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►CLAYTON UTZ plays role in Australia-Japan collaboration on world-first liquefied hydrogen pilot project in Victoria

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►GIDE Acts in the first Restricted Tier 1 issuance by CNP Assurances

►HOGAN LOVELLS Advises Greystar in its acquisition of leading college housing REIT

►NAUTADUTILH Advised J.P. Morgan in relation to the notes issue of the Radisson Hotel Group

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

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BAKER BOTTS DRAWS TOP CAPITAL MARKETS PARTNER IN HOUSTON

HOUSTON – 18 June, 2018: Baker Botts L.L.P., a leading international law firm, announced today that Capital Markets Partner, Justin Hoffman has joined the firm's Houston office. He was previously a partner with Kirkland & Ellis LLP.

"Justin's experience in the capital markets arena, and energy sector, will be a great addition to our already robust corporate team," said Andrew M. Baker, Managing Partner of Baker Botts. "His strategic focus and outstanding track record advising clients through initial public offerings, debt and public equity offerings will add significant value for our clients," Mr. Baker noted.

Mr. Hoffman's practice focuses on debt and equity capital markets transactions, corporate governance and compliance. He regularly represents both issuers and investment banks in Rule 144A high yield debt and public equity offerings, as well as liability management transactions. He has extensive experience in advising energy companies in securities offerings and acquisition financings, particularly in the upstream, midstream and oilfield services sectors, as well as coal mining and renewables.

"Justin is a highly regarded capital markets lawyer and is well known in the Texas business community," said Mike Bengtson, Chair of Baker Botts' Corporate Practice. "His decision to join Baker Botts boosts our team of lawyers in the capital markets area and adds to our industry leading group of M&A, corporate finance and private equity lawyers," Mr. Bengtson stated.

Mr. Hoffman obtained his B.A., magna cum laude in Political Science from Hunter College in 2001, and he received his J.D. from the New York University School of Law in 2004.

Since January of 2017, Baker Botts has added 13 new partners focused on M&A, capital markets, finance, restructuring and private equity.

For additional information visit www.bakerbotts.com

BENNETT JONES WELCOMES SENIOR COUNSEL

Bennett Jones is pleased to announce that Arthur B. Renaud Esq. has joined the firm as Senior Counsel in the Toronto office. He is one of Canada's leading intellectual property litigators and is certified by the Law Society of Ontario as a specialist in all areas of intellectual property law.

"Arthur is highly respected in the legal and business communities," says Hugh MacKinnon, Chairman and Chief Executive Officer of Bennett Jones. "He brings more than 30 years of court experience to the firm and will help us continue to deliver successful litigation outcomes for our clients."

Arthur was previously a partner at Bennett Jones between 2005 and 2010. He has appeared in all levels of court and has been lead or co-counsel in several precedent-setting decisions in the intellectual property field. As quoted in Chambers Global, clients say that Arthur is a "no-nonsense counsel with a pragmatic understanding of business issues".

Bennett Jones is thrilled to welcome Arthur back to the firm.

For additional information visit www.bennettjones.com

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

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

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

Bennett Jones

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

For more information visit www.bennettjones.com

PACIFIC RIM ADVISORY COUNCIL

The Pacific Rim Advisory Council ("PRAC") is an international law firm association with a unique strategic alliance within the global legal community providing for the exchange of professional information among its 30 top tier independent member law firms. Since 1984, Pacific Rim Advisory Council (PRAC) member firms have provided their respective clients with the resources of our organization and their individual unparalleled expertise on the legal and business issues facing not only Asia but the broader Pacific Rim region. Whether you are an institutional client or an emerging business our member firms are leaders in their fields and understand your business needs and the complexities of your industry.

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

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

CLAYTON UTZ WELCOMES LEADING REAL ESTATE PARTNER

SYDNEY—05 July 2018: Clayton Utz is delighted to announce that Andrew Steele has joined the firm as a partner in its national Real Estate practice group, based in Sydney.

Andrew is one of the country's leading property lawyers, acting for both private and public sector clients across a range of sectors. As part of his top tier practice, Andrew regularly advises fund managers, financial institutions, restructuring and insolvency practitioners, developers, and government departments on complex commercial and mixed-use property transactions. His clients include Goodman, Commonwealth Bank of Australia, AXA IM - Real Assets, and Celestino. Andrew was formerly the co-head partner of Norton Rose Fulbright in Sydney.

Clayton Utz's national Real Estate practice group leader, Nikki Robinson, said Andrew was a perfect fit for the team and the firm on every measure - from his focus on client service and professionalism, to his ability to lead and motivate a team. Andrew's expertise will support and enhance the Real Estate team's National Tier 1 ranking and demonstrate the ongoing strength of Clayton Utz in the commercial property sector.

"I've worked across from Andrew numerous times over the past decade and know him to be a strong negotiator, technically excellent, and a consummate professional. However, the thing that makes this move such an important one is that in Andrew we have found someone who values integrity, collegiality and collaboration as much as we do. This not only leads to the best outcomes for our clients, but also for our collective teams - we're all looking forward to working with Andrew and his team".

The firm has already had a hugely positive reaction from a large number of clients to the news that Andrew and his team are joining Clayton Utz.

For additional information visit www.claytonutz.com

SIMPSON GRIERSON WELCOMES CHRIS BROWN AS SPECIAL COUNSEL

WELLINGTON - 27 June 2018: We are pleased to announce that Chris Browne has been appointed as special counsel in our Wellington commercial team – commencing this week.

Browne joins our firm from Transpower where he was part of the in-house legal team for 14 years, most recently in the role of deputy general counsel.

Simpson Grierson Chair, Anne Callinan, says the firm is delighted to welcome Browne into its Wellington office, noting that he adds a depth of electricity regulatory experience to an already accomplished energy sector team.

"Chris is highly regarded in the electricity industry and the wider energy sector, and is one of a small number of legal practitioners with a thorough understanding of the New Zealand electricity regulatory regime," says Callinan.

"In addition to bolstering what was already a strength for our firm, he brings significant commercial, projects and IT experience."

Browne's expertise extends to end-to-end legal process management for major infrastructure projects. He also has a thorough understanding of the Commerce Commission's economic regulation of electricity lines businesses, the Electricity Industry Participation Code and the transmission pricing methodology.

Prior to joining Transpower Browne held commercial law roles in the UK and NZ. He holds a BA/LLB (econ) from Victoria University of Wellington.

For additional information visit www.simpsongrierson.com

HOGAN LOVELLS LAUNCHES GLOBAL TRANSPORTATION REGULATORY PRACTICE

WASHINGTON, D.C., 25 June 2018 – International law firm Hogan Lovells announced today that it has launched a new global Transportation practice, to be led by Washington, D.C.-based partner Latane Montague, one of the transportation industry's most seasoned regulatory lawyers.

Part of the firm's Regulatory Practice, the new practice combines the strengths of the firm's top-tier Aviation and Unmanned Aircraft Systems practices with its industry-leading surface transportation and automotive practices.

The new practice covers a wide array of regulatory matters involving all modes of transportation, including: automotive, aviation, autonomous vehicles, drones, rail, ships, and trucking. It focuses on:

>>The regulation of transportation manufacturers, including: environmental regulation of vehicles and engine makers; safety regulation of car and truck manufacturers; regulation of manned aircraft and drone manufacturers; and autonomous vehicle regulation.

>>Regulation related to transportation projects, including: environmental and historic preservation reviews and approvals; transportation agency participation in public-private partnership (P3) projects; grants; noise regulation; and licensing of port projects.

>>Economic and safety regulation of transportation operators, including: accident investigations; economic regulation of rail operations; regulation of rail car owners and shippers; regulation of airlines; and commercial drone operators.

Speaking about the formation of the new practice, Montague commented:

"This new practice combines the firm's unmatched experience in the industry's most complex and heavily regulated sectors, with a truly global platform. As the pace of technological innovation accelerates and outpaces the ability of historical regulation to keep-up, a new generation of regulatory issues is emerging that only increases the importance of experienced regulatory counsel that can help clients see around corners, reduce risk, and prepare for the future."

In addition to combining the strength of several existing practices, the new Transportation practice will work closely with the Environment and Natural Resources practice area, and align closely with the firm's Aerospace Defense and Government Services and Automotive and Mobility sector groups.

For additional information visit www.hoganlovells.com

ARIFA

M&A TEAM ACTED AS PANAMA COUNSEL TO MCDERMOTT IN MULTIPLE TRANSACTIONS NOTED BELOW IN CONNECTION WITH ITHS MERGER DEAL WITH CHICAGO BRIDGE & IRON COMPANY

PANAMA – June, 2018: ARIFA's M&A team acted as Panama counsel to McDermott in multiple transactions noted below in connection with its merger deal with Chicago bridge & iron company

TRANSACTION: *McDermott International completes a US$6 billion merger deal with Chicago Bridge & Iron Company (CB&I*) ARIFA advised the leading Houston based provider for upstream field developments worldwide, with extensive assessment of the Panamanian corporate and regulatory matters of the transaction. **Summary of Transaction:** ARIFA acted as Panama counsel to its Houston based client and global upstream and subsea engineering, procurement and construction company McDermott International (NYSE: MDR) in its US$ 6 billion strategic merger with the downstream provider of industry-leading petrochemical, refining, power, gasification and gas processing technologies and solutions Chicago Bridge & Iron Company (CB&I), to create a premier fully integrated provider of technology, engineering and construction solutions for the energy industry. In accordance with the terms of the business combination agreement, and as a result of the approval by McDermott stockholders of the 3-to-1 reverse stock split resolution, CB&I shareholders received 0.82407 shares of McDermott common stock for each share of CB&I common stock tendered in the exchange offer. Each remaining share of CB&I common stock held by CB&I shareholders not acquired by McDermott in the exchange offer was effectively converted into the right to receive the same 0.82407 shares of McDermott common stock that paid in the exchange offer, together with cash in lieu of any fractional shares of McDermott common stock, less any applicable withholding taxes. As a result of the combination, CB&I common stock will no longer be listed on the New York Stock Exchange and ceased trading prior to the open of the market on May 11, 2018. **Date of deal completion date:** May 10, 2018

TRANSACTION: *US$4.65 Billion Financing by Crédit Agricole Corporate and Investment Bank and Barclays Bank PLC in favor of McDermott Internatio*nal. **Summary of Transaction**: ARIFA acted as Panama counsel to its Houston based client McDermott International (NYSE: MDR) in a US$ 4.65 billion financing by Crédit Agricole and Barclays Bank PLC. ARIFA provided extensive assessment of the Panamanian corporate matters and tax implications of the transaction in addition to analysis regarding the perfection of collateral in the form of naval mortgages and other security interests under Panamanian law. McDermott and its affiliated companies entered into the Credit Agreement with a syndicate of lenders with Barclays Bank PLC as Administrative agent for the term facility under the Credit Agreement; and Crédit Agricole Corporate and Investment Bank as Administrative agent for the other facilities under the Credit Agreement. Proceeds of loans under the Credit Agreement were used, together with proceeds from the US$1.3 billion in aggregate principal amount of 10.625% Senior Notes due May 2024 issued by McDermott Technology (Americas), Inc. and McDermott Technology (US), Inc. and cash on hand, (1) to consummate the Exchange Offer and a series of transactions contemplated by, and in accordance with, the Business Combination Agreement dated as of December 18, 2017 to which McDermott, Chicago Bridge & Iron Company N.V. and certain of their respective subsidiaries are parties, including the repayment of certain existing indebtedness of CB&I and its subsidiaries; (2) to redeem McDermott's US$500 million aggregate principal amount of 8.000% second-lien notes due in April 2021; and (3) to prepay existing indebtedness under, and to terminate in full, McDermott's previously existing Amended and Restated Credit Agreement, dated as of June 30, 2017. Date **of deal completion date:** May 10, 2018

TRANSACTION: *US$1.5 Billion Senior Unsecured Note Offering by McDermott Technology (US) and McDermott Technology (Americas).* **Summary of Transaction**: ARIFA acted as Panama counsel to its Houston based client McDermott International (NYSE: MDR) in the joint offering by Post-Merger Co-Issuers McDermott Technology (US), Inc. and McDermott Technology (Americas), Inc. (each a wholly owned subsidiary of McDermott); of: US$950 million in aggregate principal amount of senior unsecured notes due 2024, and ; US$550 million in aggregate principal amount of senior unsecured notes due 2026. The net proceeds from the offering of the notes were used to pay a portion of the purchase price for certain transactions related to the merger with Chicago Bridge & Iron Company (CB&I). The notes will be offered only to qualified institutional buyers under Rule 144A under the Securities Act of 1933, as amended, and to certain non-U.S. persons in transactions outside the United States under Regulation S under the Securities Act. **Date of deal completion date:** May 10, 2018

Advising McDermott International: Baker Botts LLP (Texas) Ted Paris, Partner; James Mayor, Partner
ARIFA (Panama): Rodrigo Cardoze, Partner; Fernado Arias F., Associate

For additional information visit www.arifa.com

BAKER BOTTS

REPRESENTS EQT CORPORATE IN DIVESTITURE O NON-CORE UPSTREAM AND MIDSTREAM ASSETS FOR $575 MILLION

On June 28, 2018, two wholly owned subsidiaries of EQT Corporation – EQT Production Company ("EQT Production") and EQT Gathering, LLC ("EQT Gathering") – entered into a Membership Interest Purchase Agreement (the "Purchase Agreement") with Diversified Gas & Oil Corporation ("DGOC") pursuant to which EQT Production and EQT Gathering will divest of certain upstream and midstream oil, gas and NGL assets for a total of $575 million. DGOC is a subsidiary of Diversified Gas & Oil plc ("DGO"), which is listed on the London Stock Exchange's Alternative Investment Market ("AIM").

During the negotiation of the transaction, the trading of DGO's shares was suspended and, following publication of the re-admission document for DGO, the shares were readmitted for trading on AIM. The completion of the transaction remains subject to the approval of DGO's shareholders.

The upstream assets to be acquired by DGOC are EQT Production's non-core shallow wells located in Kentucky, West Virginia and Virginia and include approximately 2.5 million acres and approximately 11,250 wells and. The midstream assets to be acquired by DGOC are located in Kentucky, Maryland, Virginia and West Virginia and include approximately 6,400 miles of low pressure gathering lines and 59 compressor stations. DGOC also agreed to hire all of the EQT employees in these areas. EQT retained all deep rights under the properties.

Baker Botts represented EQT Production and EQT Gathering in the transaction.

The Baker Botts team included: **Corporate**: Mike Bengtson (Partner, New York); John Kaercher (Senior Associate, Austin); Rachel Ratcliffe (Associate, Austin); Neil Foster (Partner, London); Sarah Melaney (Associate, London); **Global Projects**: Greg Wagner (Partner.); Scott Looper (Senior Associate, Houston); **Tax:** Jon Lobb (Partner, Houston); Matthew Larsen (Partner, Dallas); Katie McEvilly (Associate, Houston); **Employee Benefits:** Rob Fowler (Partner, Houston); Krisa Benskin (Senior Associate, Houston); **Antitrust:** Michael Bodosky (Partner)

For additional information visit www.bakerbotts.com

ALLENDE & BREA

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

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

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

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

For additional information visit www.allendebrea.com.ar

GIDE

ACTS IN FIRST RESTRICTED TIER 1 ISSUANCE BY CNP ASSURANCES

PARIS - 03 July 2018: Gide has advised CNP Assurances on the issuance of its EUR 500 million perpetual deeply subordinated "Restricted Tier 1" notes, admitted to trading on Euronext Paris.

This transaction is the largest euro-denominated Restricted Tier 1 subordinated notes issue by a European insurer so far.

Gide's team was led by Hubert du Vignaux (partner, Capital Markets), assisted by Bastien Raisse (senior associate) and Laure Bellenger (associate). Laurent Modave (partner, Tax), assisted by Foulques Delaporte (associate), provided assistance on tax issues.

The joint lead managers were advised by Allen & Overy Paris.

For additional information visit www.gide.com

BENNETT JONES

SFC LITIGATION TRUST GRANTED US$2.6 BILLION JUDGMENT

Bennett Jones: SFC Litigation Trust Granted US$2.6-billion Judgment

On March 14, 2018, the Honourable Justice Penny released a decision granting a US$2.6-billion judgment to the SFC Litigation Trust for fraud and breach of fiduciary duty in its action against Allen Chan, the former CEO of Sino-Forest Corporation.

The Sino-Forest Success Story. Sino-Forest was a publicly traded company listed on the Toronto Stock Exchange with a market capitalization of approximately $6 billion at its peak. Its principal businesses included the ownership and management of forest plantations, the buying and selling of standing timber, wood logs and wood products, and the complementary manufacturing of downstream wood products.

By all accounts, Sino-Forest seemed like a remarkable success story. Between the 2003 and 2010 financial year ends, Sino-Forest's revenue grew from $265.7 million to $1.9 billion (an approximately 625% increase) and its assets from grew from $418 million to $5.7 billion (an approximately 1,270% increase). Between August 2004 and October 2010, Sino-Forest used its apparent success to raise approximately $3 billion through debt and equity financing.

The Demise of Sino-Forest. On June 2, 2011 a short seller, Muddy Waters Research, published a report describing Sino-Forest as a "multi-billion dollar Ponzi scheme ... accompanied by substantial theft." Among other things, the report alleged that Sino-Forest did not hold the full amount of timber assets that it reported, that it overstated its revenue, and that it had engaged in undisclosed related-party transactions.

The same day that the Muddy Waters report was released, Sino-Forest's Board appointed an Independent Committee to investigate the allegations contained in the report. In turn, the Independent Committee retained professional firms to assist with the investigation. After eight months of investigation, the Independent Committee released its final report on January 31, 2012, disclosing that the issues it examined, including timber asset verification and related party transactions and relationships, "proved very difficult to definitively resolve."

Also following the Muddy Waters report, the Ontario Securities Commission (OSC) commenced an investigation into Sino-Forest. On August 26, 2011, the OSC issued an order containing allegations including that Chan, the CEO of the company, and other certain directors and officers "appear to be engaging or participating in acts, practices or a course of conduct related to its securities which it and/or they know or reasonably ought to know perpetuate a fraud". Among other things, the order cease-traded Sino-Forest's securities and required Chan and other members of management to resign. The OSC delivered a Statement of Allegations on May 22, 2012, alleging that Chan and other members of management "engaged in a complex fraudulent scheme to inflate the assets and revenue of Sino-Forest".

In March 2012, Sino-Forest filed for protection under the Companies' Creditors Arrangement Act, which led to the approval of a Plan of Arrangement by the Court. The Plan, among other things, transferred Sino-Forest's litigation rights to a Litigation Trust to pursue for the benefit of Sino-Forest's creditors.

On March 31, 2014, the SFC Litigation Trust commenced an action against Chan for perpetrating the fraud.

The Mareva Proceedings against Chan. On August 28, 2014, the SFC Litigation Trust obtained a worldwide Mareva order freezing all of Chan's assets. Chan appealed the Mareva order to the Divisional Court, arguing that the Litigation Trust failed to establish that Chan had assets in Ontario. In a split decision released on March 28, 2017, the Divisional Court dismissed Chan's appeal, holding that Mareva orders are justified by the Court's in personam jurisdiction over the defendant – not whether the defendant has assets in the jurisdiction.

Chan obtained leave to appeal the Divisional Court's decision to the Court of Appeal. However, Chan abandoned his Mareva appeal shortly after Justice Penny's trial decision was released.

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BENNETT JONES

SFC LITIGATION TRUST GRANTED US$2.6 BILLION JUDGMENT

...SFC Litigation Trust Granted US$2.6 Billion Judgment continued from previous page

The Decision of Justice Penny. The trial was held in March, April, and May 2017, with closing argument taking place over a week in July 2017. Three weeks of the trial were held in Hong Kong with Justice Penny sitting as commissioner to take the evidence of witnesses who resided in Hong Kong and mainland China.

Justice Penny released his decision finding in favour of the SFC Litigation Trust on March 14, 2018.

In the decision, Justice Penny found that Chan secretly controlled many of Sino-Forest's counterparties (i.e. its suppliers and customers) through a complex network of relationships with third parties. The third parties acted as Chan's "nominees", holding positions as directors, officers, and shareholders on his behalf.

Justice Penny found that Sino-Forest's primary business model under which it claimed to buy and sell forestry plantations within China was a fraud and that "Sino-Forest lacked the requisite documentation to find the standing timber assets, much less prove that it had any ownership interest in them." Justice Penny also found that Chan defrauded Sino-Forest by causing it to fund deposits and advance payments to entities that Chan secretly controlled.

In the result, Justice Penny held that Chan was liable for US$2.6 billion in damages for fraud and breach of fiduciary duty, as well as punitive damages of C$5 million.

Damages recovered from Chan will go to the beneficiaries of the SFC Litigation Trust, being the creditors of the now defunct Sino-Forest.

Bennett Jones LLP was counsel to Sino-Forest Corporation and the SFC Litigation Trust, with a team including Robert Staley, Alan Gardner, Jonathan Bell, Preet Bell, Jason Berall and William Bortolin.

Allen Chan was represented by Rueters LLP, with a team including Robert Rueter, Sara Erskine, Malik Martin and David Barbaree.

For additional information visit www.bennettjones.com

CAREY

ASSISTS CHILEAN TELECOMS PROVIDER VTR IN US$484 MILLION LOAN

SANTIAGO - June 2018: Carey assisted cable television and broadband provider VTR obtain a US$484 million loan. The transaction consisted of several facilities, including a US$185 million revolving credit line; a US$275 local long-term loan and another US$24 million revolving facility.

VTR is based in Chile and is owned by US television company Liberty Global.

Counsel to VTR: Carey Partners Pablo Iacobelli and Guillermo Acuña, counsel Patricia Silberman, and associates Fernando Noriega, Feliciano Tomarelli, Josefina Marshall and José Antonio Espinoza in Santiago.

For additional information visit www.carey.cl

CLAYTON UTZ

PLAYS ROLE IN AUSTRALIA –JAPAN COLLABORATION ON WORLD-FIRST LIQUEFIED HYDROGEN PILOT PROJECT IN VICTORIA

SYDNEY, 12 April 2018: Clayton Utz client Kawasaki Heavy Industries (KHI) is celebrating the launch today of a world-first pilot project in Victoria's LaTrobe Valley that has the potential to unlock a viable new energy source to support countries in transitioning to being low-carbon economies.

The Hydrogen Energy Supply Chain (HESC) project marks a major collaborative effort between Australia and Japan, which are both facing challenges in how they adapt to a new global energy future. KHI's wholly-owned subsidiary, Hydrogen Engineering Australia (HEA), is coordinating the HESC project. Clayton Utz has acted for KHI since 2013.

The HESC project will see the development of a pilot plant, where liquefied hydrogen will be created from brown coal. The aim is to develop a supply chain for low-emissions hydrogen, which has been identified as having enormous potential as a low-carbon energy source in the future global energy economy.

A Clayton Utz team led by partners Steve O'Reilly and Hiroyuki Kano has been assisting the industry participants through KHI and HEA on almost all the legal aspects of the project, including advising on regulatory approvals strategy, consortium structuring and documentation, contract documentation, amongst others. Clayton Utz will continue to act for KHI and HEA in relation to the implementation of the pilot project for the next few years.

Commenting on the project, Steve and Hiro said: "This is a landmark project for Japan and Australia. Japan has a national energy security issue, whereas for Australia, the concern is finding a better way to use high-emission brown coal. The HESC project is historic in that it brings together the two countries in finding a solution that will help both in addressing their respective energy issues. If successful, the pilot project has the potential to ease the way for low-emission hydrogen to become a viable new energy source not just in Australia and Japan, but globally, and help reduce carbon emissions. We're proud to be a part of it."

Steve and Hiro, together with Clayton Utz Chief Executive Partner Rob Cutler, attended the project's formal launch event to celebrate the funding milestone. Among other attendees were Prime Minister Malcolm Turnbull: the Federal Minister for Environment and Energy, The Hon Josh Frydenberg MP; Federal Minister for Jobs and Innovation, The Hon Michaelia Cash MP; Victoria's Minister for Regional Development, The Hon Jaala Pulford MLC; Japanese Parliamentary Vice-Minister of Economy, Trade and Industry, Mr Daisuke Hiraki, and; Japan's Ambassador to Australia, H.E. Sumio Kusaka.

For additional information visit www.claytonutz.com

DENTONS RODYK

ADVISES ON SINGAPORES LARGEST OFFICE REAL ESTATE DEAL IN 2018

SINGAPORE - 04 July, 2018: Dentons Rodyk is acting as lead transaction counsel for CapitaLand Commercial Trust Management Limited (Manager of the SGX-listed REIT, CapitaLand Commercial Trust), in the sale of Twenty Anson to an unrelated third party for a sale consideration of S$516 million.

Twenty Anson is a 20-storey office building located in Tanjong Pagar, a sub-market of Singapore’s Central Business District. This is reported to be Singapore’s largest office real estate deal in 2018 to date, with the sale consideration working out to S$2,503 per square foot based on the building’s net lettable area of approximately 206,000 square feet. The transaction is expected to be completed in 3Q 2018. Completed in 2009, Twenty Anson has a committed occupancy rate of 94.3% as at 31 March 2018, with its top three tenants being Toyota Motor Asia Pacific Pte Ltd, BlackRock Advisors Singapore Pte Ltd, and BCD Travel Asia Pacific Pte Ltd.

The Dentons Rodyk team is led by Real Estate Senior Partner Pat Lynn Leong, Real Estate Senior Associate Lynette Khoo and Real Estate Associate Kehua Tan. They were also assisted by Real Estate Partner Claire Wu.

For additional information visit www.dentons.rodyk.com

ARIAS

ADVISED ONTARIO MUNICIPAL EMPLOYEES RETIREMENT (“OMERS”) IN SALE OF TWO AIRPORTS IN COSTA RICA

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

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

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

For additional information visit www.ariaslaw.com

HOGAN LOVELLS

ADVISES GREYSTAR IN ITS ACQUISITION OF LEADING COLLEGE HOUSING REIT

WASHINGTON, D.C., 25 June 2018: Hogan Lovells represented Greystar Real Estate Partners (Greystar) in its recently announced entry into a merger agreement for the acquisition of EdR, one of the nation's largest developers, owners and managers of high-quality collegiate housing communities, by a newly-formed, perpetual-life fund, Greystar Student Housing Growth and Income Fund, LP, which is an affiliate of Greystar. The all-cash deal is valued at US$4.6 billion and is expected to close in the second half of 2018.

In conjunction with the merger, a joint venture between an affiliate of Blackstone Real Estate Income Trust, Inc. and an affiliate of Greystar will acquire a portfolio of off-campus student housing assets located adjacent to top-tier university campuses. The newly combined Greystar/EdR team will manage the assets.

Greystar is a leading, fully integrated real estate company offering expertise in investment management, development, and property management of rental housing properties globally. It is the largest operator of apartments in the United States, managing more than 435,000 conventional units and student beds in over 150 markets globally.

The Hogan Lovells team representing Greystar was led by corporate partners Bruce Gilchrist, Elizabeth Donley and Paul Manca. Additional support was provided by partners Lee Berner, Cam Cosby, Gordon Wilson, and Margaret de Lisser, senior associates Peter Trentman, Andrew Zahn, Nathan Cooper, and Ben Clarke, and associates Liz Banks, Catalina Parkinson, Leslie Graham and Mitra Anoushiravani.

For additional information visit www.hoganlovells.com

NAUTADUTILH

ADVISED JP MORGAN IN RELATION TO THE NOTES ISSUE OF THE RADISSON HOTEL GROUP

09 JULY, 2018: NautaDutilh successfully advised J.P. Morgan in relation to the EUR 250,000,000 senior secured notes issue of the Radisson Hotel Group. The closing of the transaction took place on 6 July 2018. NautaDutilh worked on the transaction as co-counsel with Shearman & Sterling LLP.

The Radisson Hotel Group is one of the world's largest hotel groups with eight distinctive hotel brands and over 1,400 hotels. The Notes are expected to be listed on the Official List of the Luxembourg Stock Exchange (for trading on Euro MTF market). Radisson Hospitality intends to use the proceeds from the issuance of the Notes to repay outstanding borrowings under existing credit facilities and for general corporate purposes, including to fund its five-year operating plan, to carry out further investments and to create a liquidity buffer.

For additional information visit www.nautadutilh.com

SIMPSON GRIERSON

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

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

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

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

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

For additional information visit www.simpsongrierson.com

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PRAC 65th International Conference
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ALLENDE & BREA

New Argentine Antitrust Law is enacted

On May 15, 2018, the Executive Power enacted the antitrust law (the “Law”), which was previously approved by Congress. The Law will come into force on May 23, 2018.

The Law introduces the following changes to the previous antitrust regime in force in Argentina:

Presumption of illegality for hard-core cartels - The Law creates a presumption of illegality for hard-core cartels, thus creating an exception to the general rule of reason framework of analysis for anticompetitive conducts.

Reform of the institutional framework - The Law envisages the creation of the National Antitrust Authority, as a decentralized and independent competition agency within the sphere of the Executive branch. The National Antitrust Authority members will be the Tribunal for the Defense of Competition, the Secretariat for Investigation of Anticompetitive Conducts, as well as the Secretariat of Economic Concentrations. The individuals composing these bodies will have five-year terms which may be renewed only once, and can only be removed with proper justification.

Greater sanctions for anticompetitive conducts - Fines shall be established according to whichever is the higher of the following criteria: (i) up to 30% of turnover related to the affected products multiplied by number of years that illegal conduct lasted, sum which may not exceed 30% of the national turnover achieved by the economic groups involved in the unlawful conduct during the previous fiscal year; or (ii) twice the illicit profit obtained. If fines cannot be established by using the methods (i) or (ii) above, then fines for each offender cannot exceed the amount of approximately US$200 million. Recidivism will be subject to a duplication of the fine.

Introduction of a Leniency Program - The creation of a Leniency Program which will fully exempt from any sanction to the first party that applies for leniency and meets certain requirements, and would reduce the fines between 50% and 20% for subsequent applicants that provide useful information to prove a collusion. The Law also contemplates the introduction of a Leniency Plus mechanism whereby a leniency applicant shall be entitled to a fine reduction of up to 1/3 for participation in the first cartel, if it provides useful information about a different cartel.

Changes in merger control - The Law introduces various changes to the existing merger control system, notably, the implementation of a pre-merger control regime; an update and modification of the notification thresholds which were established in pesos in the 1999 reform (since then the Argentine peso was devaluated more than 25 times vis-à-vis the U.S. dollar) and the methods used for their calculation; and the introduction of a fast-track mechanism for transactions unlikely to affect competition. Furthermore, filing fees are established by the Law, which shall range between approximately US$5,000 and US$20,000.

Damages actions – The Law allows any injured party to bring either stand-alone or follow-on damages actions as a consequence of infringements to the antitrust law. Notably, the Law foresees the binding effect on courts of any prior infringement decision adopted by the National Antitrust Authority.

Judicial review - The Law provides for the creation of a specialized antitrust division within the Federal Court of Appeals in Civil and Commercial matters, which would act as the competent court in appeals to the National Antitrust Authority’s decisions.

For further information on this topic please contact Julián Peña and Federico Rossi

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05 JUL 2018

Stop, water thief! Major changes to NSW water management laws

BY NICK THOMAS, ALISON PACKHAM

Most of the changes to NSW water management laws have commenced, but some details are yet to be ironed out in the Regulations.

NSW has delivered a major legislative response to the recent water management controversy, with the amendment of the Water Management Act 2000. It provides more rigorous monitoring and enforcement measures – including tougher metering requirements and more significant penalties – but also more flexibility and control for Government in managing the State's water resources.

Catalyst for change

A wave of controversy struck the Murray-Darling Basin States and Territories in August 2017, when the ABC's Four Corners expose was broadcast. The program included allegations of illegal water take from the Murray-Darling Basin and raised issues about government transparency and accountability.

Since then, there have been parliamentary inquiries at Federal and State level, government audits, corruption commission, ombudsman and regulatory agency investigations, a Royal Commission in South Australia (which is currently in progress) and a number of other reviews.

Among the various responses:

- The Murray Darling Basin Authority, the agency managing the cross-border water management issues and the Murray Darling Basin Plan under the Commonwealth Water Act 2007, released the Murray Darling Basin Water Compliance Review;
- The NSW Government commissioned the Matthews Review (an independent review of water management and compliance by the former National Water Commission head), it pledged to implement the Matthews recommendations and issued a Water Reform Action Plan, and it has also commenced some criminal prosecutions; and
- At least one environmental group has commenced civil enforcement proceedings against an agricultural operator, claiming the operator has pumped water in contravention of its licence conditions.

The NSW Government has also reviewed aspects of its water management legislation, and has secured the passage of important legislative changes. Most recently, the Water Management Amendment Act 2018 (**Amending Act**) received assent on 27 June 2018 and most of it has now commenced.

The Amending Act is intended to deliver the legislative amendments required to implement the Government's Water Reform Action Plan.

Minister Niall Blair's second reading speech for the amendment Bill focused on restoring community confidence in water management, while acknowledging that the Bill "is just the start of a long process".

Here is a snapshot of some key features of the Amending Act.

Enforcement options

The Natural Resources Access Regulator (**NRAR**), recently established under the Natural Resources Access Regulator Act 2017 as another response to the water controversy, will take over the role of compliance and enforcement from Water NSW and the Department of Industry.

In addition to criminal prosecution, under the Amending Act the Minister and the NRAR will have the power to:

- carry out compliance audits;
- enter into enforceable undertakings; and
- share intelligence between agencies and jurisdictions.

The regulations can also prescribe a methodology for estimating the amount of water taken in a given situation. This should reduce the evidentiary burden for enforcement actions considerably.

The Amending Act also increases criminal penalties for taking water without a water access licence (**WAL**). Tier 1 penalties for corporations will be raised to $5 million and tier 2 penalties for corporations will be raised to $2 million and for individuals to $500,000.

Comprehensive metering (almost)

Monitoring of water meters can incentivise compliance and gather data which are essential for strategic planning and management as well as enforcement.

The Amending Act significantly expands requirements for metering of water take, but allows for exemptions for some types of extractions, such as floodplain harvesting and possibly others in yet to be released regulations. Consequently, some have argued that the "no meter, no pump" recommendations of the Matthews and MDBA reviews were not fully implemented in the Amending Act. It is expected that 5% of users, mainly small scale operators, will continue not to be metered under the changes.

Metering conditions can be imposed on WALs and licences under the Water Act 1912 (NSW) (which the Water Management Act is gradually replacing).

Unlike the current arrangements, where meters are publicly provided, water users will now own their meters, and they will be required to maintain them properly and report operating faults with 24 hours of becoming aware of them.

The amendments also insert a rebuttable presumption for basic landholder rights; where water is taken by the holder of a WAL and basic landholder rights (which do not need a WAL), it is presumed to be taken under that WAL and not under the basic landholder right. It is then up to the WAL holder to prove otherwise. This applies the extensive regulatory regime for WALs to a lot of water take which so far has been much less regulated.

New register for water availability and use

The Government has responded to calls for greater transparency by requiring the creation of a central public register, with information about WALs and other licences and approvals, as well as water balance and meter readings, and information about water availability for taking. Calls from some stakeholders for real time data will be moderated by the need to protect commercially sensitive information.

Better control of environmental water

Serious allegations have been made in the media about some larger scale operators extracting environmental water, which has been bought with Federal taxpayer money over the last decade of Government water buy-backs. This water is used to increase the flows and river health, especially during periods of low flow.

The amendments clarify that temporary water restriction orders can be issued to manage environmental flows, in addition to "coping with a water shortage" or managing a "threat to public health or safety".

The exclusion of Crown liability is extended to cover flooding effects from the release of environmental water in good faith.

Other changes affecting water use

The Minister is given some additional powers to manage extraction limits, such as to:

- amend the share or extraction components of WALs;
- introduce new mandatory WAL conditions (after publicly exhibiting them for at least 28 days);
- suspend Basin management plans during extreme events; and
- assign individual daily extraction components between users.

The Government has emphasised that there is no intention to reduce water allocations or compensation rights under the Amending Act.

GET IN TOUCH

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Red Sole Diary: how the story ends before the CJEU

Thursday 21 June 2018

The Court of Justice of the European Union ("CJEU") handed down an eagerly awaited decision in a dispute about Christian Louboutin's "red sole mark" which is pending before the District Court of The Hague (NL). With its judgment rendered on 12 June 2018 (to be found here), the CJEU clarified that if a sign is meant *only* to protect the application of a certain colour to *a specific part* of a product (so not the shape of the colour's outline or the product itself), such sign does not consist of a "shape" as meant in Article 3(1)(e)(iii) of the Trademark Directive (Directive 2008/95/EC). That Article provides that a trade mark is liable to be declared invalid if it "consists exclusively of the shape which gives substantial value to the goods". But it is now clear that a sign consisting of the colour red applied to the sole of a high-heeled shoe, as shown in Louboutin's trade mark, cannot be invalidated on that particular ground. The referring District Court of the Hague will have to take it from here.

The registration contains the following description: '*The mark consists of the colour red (Pantone 18 -1663TP) applied to the sole of a shoe as shown (the contour of the shoe is not part of the trade mark but is intended to show the positioning of the mark)' and the goods for which it is registered are limited to high-heeled shoes.*

The CJEU's preliminary ruling was requested in the course of infringement proceedings between, on the one hand, shoe designer Mr Christian Louboutin and Christian Louboutin SAS (together, "Louboutin") and, on the other, shoe retailer Van Haren Schoenen B.V. ("Van Haren") concerning the sale, by Van Haren, of shoes which allegedly infringe the red sole mark. In these proceedings, Van Haren claimed that Louboutin's mark is invalid on the basis of Article 2.1(2) of the Benelux Conventionon Intellectual Property, which implements Article 3(1)(e)(iii) of the Trademark Directive. The District Court of The Hague was unsure whether the concept of "shape", within the meaning of these provisions, also covers properties that are not three-dimensional (such as the colour) or whether it is limited only to three-dimensional properties of a product, such as its contours, measurements and volume. This is why it asked the CJEU for guidance on the issue.

CJEU preliminary ruling

As regards the meaning of the concept of "shape" the CJEU stated that, lacking a definition in the Trademark Directive, this must be determined by considering its usual meaning in everyday language, taking into account the context in which it occurs. Now in the context of trade mark law, the concept of "shape" is usually understood as a set of lines or contours that outline the product concerned. Thus, a colour per se, without an outline, does not constitute a "shape". But also in the case of a particular colour, applied to a specific part of a product (and thus creating an outline for the colour), it cannot be held that the sign in question consists of that shape when the trade mark owner did not seek to protect that shape when registering the sign but sought solely to protect the application of a colour to a specific part of that product. With this answer, the CJEU departed from the Opinion of the Advocate General (to be found here).

It is clear that the description included in the registration, which explicitly states that the contour of the shoe does not form part of the mark, played an important role in the CJEU's decision. According to the CJEU, this description shows that the contour of the shoe is intended purely to show the positioning of the red colour covered by the registration. Therefore, Louboutin's red sole mark, the main element of which is a specific colour designated by an internationally recognised identification code according to the CJEU, cannot be regarded as consisting (exclusively) of a shape.

Comments

A lot depended on the CJEU's answer, because the District Court of The Hague already found that the red sole does in fact give substantial value to the shoes marketed by Louboutin since ‘that colour forms part of the appearance of those shoes and plays an important role in a consumer’s decision to purchase them’. Had the CJEU's answer been any different, the red sole mark may well have been liable to be declared invalid.

If anything, the findings of the CJEU underline the importance of including an explicit description of what it is you want to protect when applying for a trade mark of the same type as the red sole mark. It does help if the scope of protection of the mark one seeks to register is clearly delimited.

However, it should also be noted that Trademark Directive 2008/95 has in the meantime been replaced by Trademark Directive 2015/2436. Under the new law, a trade mark is liable to be declared invalid if it consists exclusively of ‘the shape, *or another characteristic*, which gives substantial value to the goods’. This new wording could potentially also apply to colours, which means that when filing a new application for such type of mark (i.e. after the transposition of the new Trademark Directive repealing the old), including a proper description is still no guarantee that the mark will be accepted.

Seeing that Louboutin's mark predates the coming into force of the amended Trademark Directive (which is yet to be implemented into Benelux law ultimately on 14 January 2019), we expect that the District Court of The Hague will not have the opportunity to assess the new wording in relation to the red sole mark. We have strong reasons to assume that the new grounds in question cannot be applied retroactively to already existing marks, for instance because this would seem contrary to the principles of legal certainty and the protection of legitimate expectations of trade mark owners, such as Louboutin. It is to be hoped though, that we will not have to wait too long before the first ruling on this interesting topic is issued.

(Note: NautaDutilh acted for Van Haren in the first round of interim proceedings in 2013.)

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ANVISA PUBLISHES FOUR NEW MAJOR RESOLUTIONS ON JUNE 25, 2018

June 26, 2018 **Life Sciences & Healthcare**

Linear barcode will be mandatory in traceability labels of certain implantable medical devices

On June 25, 2018, the Brazilian Health Regulatory Agency (ANVISA) published a new resolution (RDC ANVISA No. 232/2018) making mandatory the use of linear or two-dimensional (2D) barcodes in traceability labels of conventional and pharmacological stents for coronary arteries, as well as of hip and knee arthroplasty implants.

The linear or two-dimensional barcodes must be in compliance with the standards issued by the International Medical Device Regulators Forum, but the new Resolution also provides for the possibility of recognizing codification standards issued by other international agencies.

The RDC ANVISA No. 232/2018 will come into force in two (2) years after its publication.

New rules on the outsourcing of drugs and biological products

RDC ANVISA No. 234/2018 updates regulation concerning outsourcing of drugs and biological products manufacturing stages, quality control, transportation and warehousing.

Such new regulation opens new possibilities for outsourcing structures, as some relevant restrictions previously provided for in the revoked RDC ANVISA No. 25/2007 are no longer in place, such as: (a) prohibition against the outsourcing of all manufacturing stages; (b) prohibition against the outsourcing of all drugs registered by one company; (c) obligation on MA (marketing authorization) holders to have their own warehousing, among others.

Other aspects of RDC ANVISA No. 234/2018 should also be highlighted, such as:

(i) Mandatory provisions for outsourcing agreements;

(ii) Subcontracting by the outsourced company is now allowed; and

(iii) Lifting of the requirement to notify ANVISA before the beginning of the outsourcing activities.

In order to adapt the health regulation to the new outsourcing rules, ANVISA also published RDC No. 235/2018 to amend RDCs No. 38/2014, No. 76/2016 and No. 49/2011. These changes present specific rules on the updating of MAs whose products are to be outsourced.

Changes to the MA transfer rules

ANVISA also changed RDC No. 102/2016, which establishes the procedures for MA transfer, global transfer of responsibility for clinical trials and updating of ANVISA's databases as a result of corporate transactions or commercial transactions.

RDC ANVISA No. 233/2018 amended the item VII of Article 4 of the RDC No. 102/2016, in order to give a broader concept to the definition of commercial transactions, now defined as: "a transaction between companies resulting in the transfer of assets or a group of assets, without the occurrence of any corporate transaction between them." Such definition was previously limited to transactions involving the purchase and sale of assets.

Update on the regulation for substances and medicines subject to special control

Ordinance SVS/MS No. 344/1998, which provides for the technical regulation for substances and medicines subject to special control, was also updated through RDC ANVISA No. 231/2018. According to the new wording of Art. 4-A, facilities duly licensed before ANVISA may build stocks of special controlled chemical substances used as a standard in analytical tests, for later distribution to establishments carrying out laboratory analyses and research and educational activities.

Posted on: June 5, 2018

DISSOLVED COMPANIES AND THEIR FORMER DIRECTORS AND OFFICERS EXPOSED TO LIABILITY FOR COSTS TO REMEDIATE CONTAMINATED SITES UNDER THE B.C. ENVIRONMENTAL MANAGEMENT ACT

By: Ryan Shaw

Introduction

A recent decision by the BC Supreme Court in *Foster v. Tundra Turbos Inc.*, 2018 BCSC 563 ("***Foster***") has closed a loophole created by prior jurisprudence which allowed dissolved companies and their former directors to claim they were immune from liability for costs to remediate a contaminated site under the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "***EMA***"). In *Foster*, the Court granted an order that retroactively and prospectively restored a dissolved company and its sole director for the purpose of allowing the applicant to seek recovery from those parties as persons responsible for costs of remediation he incurred to remediate a contaminated site under the *EMA*.

Before the *Foster* case, the decision in *Gehring v. Chevron Canada Ltd.,* 2006 BCSC 1639 ("***Gehring***"), had protected dissolved companies, and their former directors and officers, from liability for costs of remediation under the *EMA*. Based on *Gehring*, it was a widely held view in the legal profession that a person who incurred costs to remediate a contaminated site could not pursue an action to recover those costs against a company that caused the pollution, or the company's directing minds, if the company had been dissolved. *Foster* has changed the legal landscape in British Columbia to allow plaintiffs in a cost-recovery action to cast a wider net in seeking recovery from persons responsible for contamination, consistent with the "polluter-pays" philosophy of the legislation.

The decision in *Foster* is a significant development which will be of interest to those in the real estate, corporate, environmental and insurance industries in British Columbia.

Background

In December 2016, Mr. Foster commenced a cost-recovery action under the *EMA* (the "**Action**") against a numbered company, that was a former owner of a contaminated site (the "**Property**"), as well as its two directors. In the Action, Mr. Foster sought a declaration that each of the named defendants were

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"*responsible persons*" under the *EMA* and jointly and separately liable for the remediation costs incurred by him in respect of the contamination of the Property. Under the *EMA*, directors and officers of a company can be "*responsible persons*" to the extend they authorized, permitted or acquiesced in the activity which gave rise to the costs of remediation.

One of the directors of the defendant numbered company, had previously incorporated and been a director of Tundra Turbos Inc. ("**Tundra**"). Tundra owned the Property from 1987 until February 2000, when it was transferred to the defendant numbered company, which in turn sold the Property to Mr. Foster in October 2005.

Tundra was admittedly an historic polluter of the Property. From 1987 to 1993, Tundra sold gasoline and natural gas on the Property from facilities it had installed. In approximately 1996, Tundra began the process of decommissioning the Property. Tundra removed two underground storage tanks ("**USTs**"), that it had used to store gasoline, and arranged for a limited contaminated soil investigation to be conducted by an environmental consultant.

In 1999, Tundra began the process of being wound up and dissolved. In about 2008, the former director of Tundra destroyed Tundra's business records after receiving advice from the Canada Revenue Agency that they no longer had to be kept.

After purchasing the Property in 2005, Mr. Foster entered into a contract to sell the Property in 2014 to a third party. Before selling the Property, Mr. Foster retained his own environmental consultant to conduct an investigation to determine whether there was any contaminated material on the Property. That environmental investigation determined the presence of contamination on the Property which Mr. Foster subsequently remediated. Mr. Foster then commenced his Action against responsible persons to recover the costs of remediation he incurred to deal with the contamination.

The defendants in the Action asserted that all of the contamination occurred during the period when Tundra owned the Property; Tundra would be solely responsible for the costs of remediation had it not been dissolved; and, based on *Gehring,* the former director of a dissolved company could not be found to be a "*responsible person*".

Mr. Foster brought a petition under the BC *Business Corporations Act,* R.S.B.C. 2002, c. 57 (the "***BCA***") seeking orders for the retroactive and prospective restoration of Tundra for a period of two years, the reconstitution of the directorship of its former director, and the retroactive restoration of that person as a director of Tundra.

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The Decision

In her analysis, Madam Justice Warren confirmed that applications to the court for restoration of a dissolved company under s. 360 of the *BCA* are discretionary and a restoration order will only be granted if the court is satisfied that the order is "*appropriate*" in the circumstances. After reviewing the limited case authorities dealing with the circumstances in which it was appropriate to grant a restoration order, Justice Warren granted Mr. Foster the relief he sought in order to facilitate the imposition of liability on Tundra and its former director for remediation costs pursuant to the *EMA*.

The Court considered whether any factors weighed against the restoration of Tundra and the directorship of its former sole director, focussing on Tundra's submissions that it would be "*unfair*" in the circumstances to expose Tundra and/or its former director to potential liability for Tundra's historic conduct. Tundra submitted that s. 360 (7) of the *BCA* amounted to a statutory presumption that existing rights may not be prejudiced by the restoration of a company. That section provided in material part that "*unless the court orders otherwise, an order [restoring a company] is without prejudice to the rights acquired by persons before the restoration*". Tundra argued that if the company was restored and the directorship of its former sole director was reconstituted, they would be unable to rely on the defence recognized in *Gehring*, which would amount to the loss of a substantive right and constitute prejudice to the former director contrary to s. 360 (7). Justice Warren rejected this argument, holding that the purpose of s.360 (7) of the *BCA* was to preserve "*legitimate claims of third parties*" that may have arisen during the period when the company was struck. The Court found that Tundra and its former director were attempting to rely on a tactical advantage from the dissolution, rather than a legitimate claim. At paragraph 66 of her decision, she states:

[66] Similarly, it is my view that the right of a company and it [sic] directors to avoid liabilities for which they would have been exposed but for the dissolution of the company is not the kind of right protected by s. 360 (7). As explained, it is apparent that a legitimate purpose of restoring a company is to facilitate the imposition of such liabilities. Gehring holds that the statutory liability imposed by the E.M.A. does not extend to corporations that have been dissolved; simply put, as in Aujla, Blackwater, and Husky Oil Ltd., a restoration application is required. The fact that a restoration application is required to impose liability is not a reason for dismissing the application. As in Doig, I find that the respondents are relying on a tactical advantage arising from Tundra's dissolution rather than a legitimate claim that is protected by s. 360 (7).

The Court further held that the passage of time, and the destruction of Tundra's business records, did not result in any real prejudice to Tundra and its former director. Rather, the Court found the lack of documentary evidence would likely be more prejudicial to Mr. Foster since he had the burden of establishing in the Action that Tundra's former director had "*authorized, permitted or acquiesced in the activity which*

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gave rise to the cost of remediation", under s. 35 (4) of the *Contaminated Sites Regulation,* B.C. Reg 375/96. Finally, the Court accepted Mr. Foster's submission that the potential use of dissolution as a means of escaping liability for remediation costs ran contrary to the polluter-pays principle behind the environmental legislation and weighed in favour of restoring Tundra and reconstituting the directorship of its former director.

Practical Considerations

Prior to the decision in *Foster*, it was common for legal counsel to advise corporate clients that dissolution of a company could protect the company and its directors and officers from exposure to liability in a cost-recovery action under the *EMA.* Lawyers advised clients that it made sense to use a single purpose company to own, operate a business on, or lease a property that may be or may become contaminated. Upon sale of the property or termination of a lease, simply wind-up the company, and according to *Gehring*, no liability could flow to the company or its directors, officers or senior employees. *Foster* has changed the legal landscape and will serve as an important precedent for those involved in a cost-recovery action or contemplating bringing one. A company and its directors can no longer hide behind the shield of protection previously afforded by dissolution of the company.

The decision is also potentially significant for liability insurers who may become exposed to third party claims involving property damage which occurred many years ago, at a time when Commercial General Liability insurance policies did not contain the comprehensive pollution liability exclusion clauses which we see in liability policies today.

Should you have any questions about this article or the cases presented, please contact me at rshaw@rbs.ca, or on my direct line at 604-909-9312.

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June, 2018

NEW SYSTEM OF PROCESSING CUSTOMS DESTINATION CERTIFICATES FOR MEDICAL DEVICES WITHOUT A SANITARY REGISTRATION

As of July 2, a Customs Destination Certificate (CDA, in its Spanish acronym) will be required for medical devices[1] that do not have a sanitary registration to be imported into Chile.

The CDA must be requested and obtained by the importer through the Institute of Public Health's (ISP, id.) GICONA 2.0 electronic platform, and will require the payment of an official fee corresponding to the service code 4111027, "Customs Destination Certificate, law 18,164".

Importers of medical devices who are currently registered in the GICONA 2.0 platform may access the CDA-request process by entering the module "Foreign Trade/ Imports" (Comercio Exterior/Importación), and selecting the option "Medical Devices without Sanitary Registration" (Dispositivos Médicos sin Registro Obligatorio).

Importers that are not current users of the system will be required to register in the GICONA 2.0 system. This entails identifying as a company or as a natural person, registering a warehouse where the imported medical devices will be stored, and obtaining a password[2].

Pursuant to Circular 225 of April 6, 2018, issued by the National Customs Service (SNA, id)[3], medical devices without a sanitary registration are associated with specific customs codes, which are – in turn – linked to internal ISP codes (currently codes DM-00001 to DM-10072), which are grouped as follows[4]:

[1] Further information about this new procedure available here.
[2] For further information, see guidelines available here.
[3] Available here.
[4] Information available at here.

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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Grouped products (customs code)	
30.06	Pharmaceutical goods
34.07	Modelling pastes, waxes or compounds for dental impression; plaster-based preparations for odontology
33.06	Preparations for oral and dental hygiene, including denture fixative pastes and powders; dental floss
38.22	Diagnostic or laboratory reagents; certified reference materials
40.14	Hygienic or pharmaceutical articles (including bottle nipples), of vulcanized rubber other than hard rubber
87.13	Wheelchairs and other vehicles for disabled persons, whether or not motorized or otherwise mechanically propelled
87.14	Spare parts and accessories for vehicles classified in 87.11 to 87.13
90.01	Optical fibers; sheets and plates of polarizing material; lenses (including contact lenses), optical elements
90.11	Optical microscopes, including for photomicrograph, cinephotomicrograph, or microprojection
90.18	Medicine, surgery, dental or veterinary instruments and devices, including electromedical equipment
90.19	Apparatuses for massages, psychological aptitude-testing, ozone therapy, oxygen therapy or aerosol therapy, for respiratory therapy and reanimation
90.21	Orthopedics items and devices for fractures, binders, medical-surgical bandages, splints; prostheses; earphones
90.22	X-ray apparatuses using alpha, beta or gamma radiation, control consoles, furniture for examination or treatment
94.02	Furniture for medicine, surgery, odontology or veterinary (for example: operating tables)
96.19	Sanitary napkins and tampons, diapers for babies and similar articles, of any material

HAN KUN LAW OFFICES

Legal Commentary

CHINA PRACTICE • GLOBAL VISION

July 2, 2018

Capital Markets Law

Financial Market Liberalization May Trigger Merger Filing

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

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

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

a. Merger filing requirements generally

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

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

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

b. Relationship between AML enforcement authorities and industry regulators

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

c. The regulatory environment may now change

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

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

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

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

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

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

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

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

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

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

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

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

e. Consequences for failure to file

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

Concluding Remarks

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

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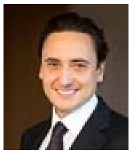

Stéphane Puel

4 July 2018

Crypto & Anti-Money Laundering (AML)

Certain actors in the crypto-assets investment market will be subject to obligations to prevent the use of financial systems for purposes of money-laundering or terrorist financing.

The EU directive 2018/843 of 30 May 2018, published in the Official Journal of the European Union on 19 June 2018, modifies the European directive 2015/849 pertaining to preventing the use of the financial system for purposes of money-laundering or terrorist financing. One of the main changes is to subject to obligations certain intermediaries in crypto-assets investment. Its provisions will come into force only once they have been transposed into national law, which each Member State must carry out at the latest by 10 January 2020.

The directive of 30 May 2018 extends the scope of EU obligations pertaining to combating money-laundering and the financing of terrorism to (i) providers of exchange services between virtual currencies and fiat currencies, and to (ii) custodian wallet providers.

- With a view to combating money-laundering and the financing of terrorism, the reform aims to enable the competent authorities to monitor, via these actors, use of these virtual currencies.
- The reform aims to strengthen measures in this regard, considering that "anonymity of virtual currencies allows their potential misuse for criminal purposes". However, it wishes to define "a balanced and proportional approach, safeguarding technical advances and the high degree of transparency attained in the field of alternative finance and social entrepreneurship".

The concept of virtual currency is broad. It covers all digital representations of a value that are not issued or guaranteed by a central bank or a public authority, that are not necessarily attached to a legally established fiat currency, and that do not possess a legal status of currency or money, but that are accepted by natural or legal persons as a means of exchange that can be transferred, stored and traded electronically.

- Providers engaged in exchange services between virtual currencies and fiat currencies (that is to say coins and banknotes that are designated as legal tender and electronic money, of a country, accepted as a medium of exchange in the issuing country).
- Custodian wallet providers are entities that provide services to safeguard private cryptographic keys on behalf of its customers, to hold, store and transfer virtual currencies.

The directive also provides that all national financial intelligence units (in France, TRACFIN) should be able to obtain information enabling them to associate virtual currency addresses to the identity of the owner of such virtual currency to combat the anonymity of virtual currency transactions and their potential misuse to finance criminal activities.

It also indicates that providers engaged in exchange services between virtual currencies and fiat currencies, as well as custodian wallet providers, should be registered.

The European Commission shall draft a report, to be published at the latest on 11 January 2022, on the implementation of this Directive. Where necessary, it shall contain appropriate legislative proposals, including, where appropriate, with respect to virtual currencies, empowerments to set up and maintain a central database registering users' identities and wallet addresses accessible to financial intelligence units, as well as self-declaration forms for the use of virtual currency users.

This reform contributes to the definition, on a European level, of a regulatory framework for actors that are part of the crypto-assets investment sector.

HONDURAS AND MEXICO NEGOTIATING A SINGLE FREE TRADE AGREEMENT

According to press release No.32/2018 issued by the Central Bank of Honduras (BCH), the gross domestic product grew by 0.9% in the first quarter of 2018; furthermore, it states that the main industries that reflect growth are the ones relating to manufacturing of clothing, textiles, food, beverages and tobacco.

The BCH has indicated that the monthly index of economic activity (IMAE) for June shows a cumulative variation to April of 3.4% with particular growth in electricity and water services; mining and quarries; construction; hotels and restaurants and trade.

In order to achieve commercial growth, on June 19th, Honduras began negotiating with Mexico to establish a single Free Trade Agreement (single FTA) that can allow greater integration between countries.

While the terms of negotiation are still under discussion, it is expected that this single FTA generates an important, positive impact on the economy.

Do not hesitate to contact us if you wish to find out more on this subject and its updates.

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ABNR

COUNSELLORS AT LAW

NEWS DETAIL

05/07/2018

BKPM Suspends Operation Pending Launch of New Online Single Submission System

At end of June 2018, the government enacted Government Regulation 24/2018 concerning Electronically Integrated Business Licensing Service (**GR**), which introduces the so-called Online Single Submission (**OSS**) system for the issuance of licenses and permits by the government.

The objective of this GR is to have a harmonized, unified, and simplified licensing process nationwide. Based on GR 24/2018, the OSS system will be undertaken by an 'OSS Institution', which is a non-Ministerial government agency engaged in investment coordination.

The Indonesian Investment Board (the **BKPM**) has issued a press release informing of its suspension of all license processing as per Friday, 29 June 2018, pending the launch of the OSS system.

The OSS system will be a "one-roof" online licensing system for the handling of licenses previously managed by different ministries and government agencies, including the BKPM. The system will for the time being be administered by the Coordinating Ministry of Economic Affairs (the **Ministry**), until such time the OSS Institution is officially established or designated. Although not stated in the GR, one reliable source at the Ministry has indicated that the BKPM will be designated as the OSS Institution.

Based on the GR, pending applications submitted prior to enactment of the GR will be processed under the OSS system. According to the press release, all applications received by the BKPM before and after Friday, 29 June 2018, will be forwarded to the Ministry to be further processed through the OSS system, with the exception of some licenses that may be further processed and issued by the BKPM. The BKPM officers could not confirm at this stage which licenses the BKPM will still process during the transition period or in the future when the OSS system is online.

Although the BKPM's own online system (so called **SPIPISE**) remains accessible and can receive applications after Friday, 29 June 2018, ABNR has received verbal confirmation from BKPM Officers that the BKPM is no longer authorized to process these applications, including any applications for foreign direct investment (**FDI**) related licenses, at this time.

Until the OSS system is in place, there will be a moratorium on the issuance of licenses related to investment, either for new investments or existing foreign direct investment companies in Indonesia. It is unclear whether the Ministry, as temporary caretaker of the OSS system until the OSS Institution has been designated, will process and issue approvals for pending applications.

Indeed, there is still very limited information available on the OSS system and its further impact on current authorities and procedures. ABNR is trying to get further information on the above questions, and intends to issue another legal update with further details shortly.

It is most unfortunate that the BKPM has suspended all licensing processes pending the launching of the OSS system. It would have been better if applications were still able to be processed during the transition to the OSS system. The aim of the OSS system is to make it easier for foreign investors to do business in Indonesia, but at least during this transition period, the result is the opposite.

On a positive note, the OSS system should cut down red tape and reduce processing time when applying for licenses and permits in general. Nevertheless, we anticipate that the government will need to amend and align several regulations related to the GR before the OSS system can be fully operational.

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WHERE DIFFERENCES MATTER

Aaron Yong provides a primer on the Guidelines on Contracts for Difference

In a move to promote and develop the Malaysian derivatives market, the Securities Commission of Malaysia ("SC") introduced the contracts for difference ("CFD") framework with the issue of the Guidelines on CFD ("Guidelines") together with a list of Frequently Asked Questions for the Guidelines ("FAQ") on 6 April 2018. At the same time, the SC revised its Licensing Handbook ("Handbook") to set out the requirements for the licensing of CFD providers.

Although the Guidelines are only effective on 1 July 2018, it has been released early to enable the industry to familiarise itself with the requirements for offering CFDs.

WHAT IS A CFD?

CFD is defined in the Guidelines as a contract made between a buyer and a seller to gain exposure in the allowable underlying instrument whereby differences in settlement are made through cash payments. The FAQ further clarifies that CFD is a leveraged derivatives product that tracks the price movement of an underlying instrument.

In effect, CFDs are financial derivatives which allow investors to capitalise on price movements of the underlying instruments without having any interest in such instruments.

The Guidelines set out some of the key features of a CFD and the requirements which are applicable to a CFD provider in Malaysia.

PRODUCT REQUIREMENTS

Allowable underlying instruments

The Guidelines provide that CFDs are only allowed to be offered based on shares or indices.

If the CFD is based on shares, the shares must either be listed on the Main Board of Bursa Malaysia Securities Berhad or a securities exchange outside Malaysia.

Shares listed in Malaysia

If the shares are listed on the Main Board of Bursa Securities, the underlying company must have an average daily market capitalisation (excluding treasury shares) of at least:

(a) RM1 billion in the past three months ending on the last market day of the calendar month immediately preceding the date of issue; or

(b) in the case of a newly listed company that does not meet the three-month market capitalisation track record, RM3 billion.

The underlying company must also meet the public shareholding spread requirement.

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Shares listed outside Malaysia

If the shares are listed on a securities exchange outside Malaysia, the underlying company must be listed on an exchange in a jurisdiction where the capital market regulator is a signatory of the International Organization of Securities Commissions multilateral memorandum of understanding concerning consultation and co-operation and the exchange of information among securities regulators.

The underlying company must also have an average daily market capitalisation of at least:

(a) RM3 billion in the past three months ending on the last market day of the calendar month immediately preceding the date of issue; or

(b) In the case of a newly listed company that does not meet the 3-month market capitalisation track record, RM5 billion.

However, the Guidelines do not specify whether treasury shares are to be taken into account when computing the average daily market capitalisation of the underlying company whose shares are listed outside Malaysia.

Index

Where the underlying instrument of a CFD is an index, the constituents of the index must be listed on a securities exchange in or outside Malaysia. The index must (a) be broadly based; (b) have a transparent composition; and (c) be a recognised benchmark. Further, information on composition and performance of the index must be conveniently accessible by investors.

Margin requirements

As CFDs are leveraged trading instruments, they are traded on margin. Instead of paying the full value for the underlying instrument, an investor pays an initial margin to open the position and is required to maintain the minimum margin requirement for open positions at all times.

For a CFD based on shares, a minimum of 10% and 20% margin is required for index shares and non-index shares respectively. If the CFD is based on an index, a 5% margin is required. A CFD provider may require a higher margin than the prescribed minimum requirements.

A CFD provider must make additional calls for margin when necessary and if an investor fails to comply with the demand for margin within reasonable time, the CFD may be terminated.

Settlement of CFD

A CFD must only be settled in cash and not by delivery of the underlying instruments. This is to prevent an investor from circumventing disclosure requirements and stealthily building a stake in the issuer of the underlying instrument.

The Guidelines further provide that a CFD in respect of shares must not carry any voting rights or any options for conversion into the underlying shares.

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Stop loss measures

To mitigate some of the risks involved in trading CFDs, the Guidelines require a CFD provider to make available stop loss measures to its clients. A stop loss measure allows an investor to set a stop-loss price at which an open trade will automatically be closed out.

When underlying shares are suspended, halted or delisted

A CFD provider is prohibited from creating new positions when the trading in the underlying instrument has been halted or suspended.

Although the Guidelines do not specify how an open position on a CFD is to be dealt with in the event that the underlying instrument is suspended, halted or delisted, a CFD provider is required to provide its clients with clear information on its procedure to address these situations.

Sophisticated investors

In Malaysia, CFDs can only be offered to sophisticated investors, i.e. any person who falls within any of the categories of investors set out in Part 1 of Schedules 6 and 7 of the Capital Markets and Services Act 2007.

PROVIDER REQUIREMENTS

Among the requirements that a CFD provider has to satisfy are the following -

Licensing requirements

Only a holder of a capital market services licence for (a) dealing in derivatives; or (b) dealing in derivatives restricted to CFD, may carry out the offering of CFDs. The financial requirements that an applicant or a licensee is required to comply with are set out in the Handbook.

Suitability assessments

Notwithstanding that CFDs may only be offered to sophisticated investors, a CFD provider is required to conduct a suitability assessment on an investor who wishes to invest in CFD. If a CFD trading account may be opened online, an online questionnaire may be used for this purpose.

Disclosure requirements

Before a CFD is offered, the CFD provider must register a product highlight sheet and a disclosure document with the SC. Similarly, the product highlight sheet and disclosure document must be provided to an investor before opening a CFD account for the investor.

Information required to be disclosed in the product highlight sheet and disclosure documents include (a) background information of the CFD provider; (b) product description of the CFD; (c) key features of the CFD; and (d) key risks in CFD trading.

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Risk management and managing conflicts

A CFD provider is required to have adequate risk management practices in place. These include (a) adequate infrastructure and processes; (b) comprehensive internal control and audit procedures; and (c) documented policies and procedures for managing risks.

Further, a CFD provider must also have in place supervisory and internal control procedures and systems to address potential conflicts of interest and establish effective Chinese walls between the various divisions of its business.

Segregation of assets

If a CFD provider also offers other derivative contracts, it must segregate the client's assets for CFD trades from the client's other assets. Rehypothecation of clients' assets is prohibited.

Maintenance of records

A CFD provider must maintain certain records, including (a) instructions by a client; (b) the date and time of receipt, sending and carrying out of those instructions; and (c) the person by whom those instructions are received, the person by whom they are sent and the person by whom they are carried out.

Reporting requirements

A CFD provider must submit to the SC a monthly report of (a) transactional information to the SC in the format prescribed in the Guidelines; and (b) specified financial information, such as its financial condition and adjusted net capital.

COMMENTS

The Guidelines do not contain requirements to deal with changes in the capital structure (e.g. a bonus issue or a capital reduction) of an underlying company that is announced and completed during the tenure of a CFD for shares. It would appear desirable that provision, similar to those applicable to company warrants, be made to deal with these contingencies.

The introduction of CFD would be eagerly anticipated by Malaysian investors and would most certainly bring the Malaysian derivative markets closer to the likes of Singapore and Australia where CFD offerings are already available. It remains to be seen whether Malaysian investors are equipped for CFD trading.

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Supreme Court dismisses appeal challenging legality of fluoridation of drinking water supply by local authorities

June 28, 2018

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New Health New Zealand Incorporated v South Taranaki District Council [2018] NZSC 59, [2018] NZSC 60

On 27 June 2018 the Supreme Court issued two judgments of importance for local authorities across New Zealand.

The judgments addressed several matters arising from a decision by the South Taranaki District Council (Council) to fluoridate the drinking water supply for Patea and Waverley. The Council's decision was made on the basis of evidence of high levels of dental decay among the resident populations of those towns, consistent with the general approach to fluoridation across much of New Zealand.

Simpson Grierson were involved throughout the proceedings, with Duncan Laing and Hamish Harwood successfully representing the Council.

The Supreme Court's first judgment (the "Council appeal", [2018] NZSC 59) considered:

- The power of local authorities to fluoridate drinking water supply:
- Whether the decision to fluoridate engages s 11 of the New Zealand Bill of Rights Act 1990 (BORA), which establishes the "right to refuse to undergo any medical treatment"; and
- If the s 11 right is engaged, whether fluoridation is a limitation on that right that is a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society in terms of s 5 of the BORA.

The second judgment (the "Regulations and Medicines Act appeals", [2018] NZSC 60) also dismissed the appeal by New Health New Zealand Inc, addressing matters associated with the validity of the Medicines Amendment Regulations 2015 and the Medicines Act 1981. We do not consider those matters further in this update.

Of importance to local authorities, in the "Council appeal", the following can be considered to have been established:

- Local authorities have the power to fluoridate drinking water under the Local Government Act 2002 (LGA 2002) and the Health Act 1956, with the power primarily arising from the duties of local authorities relating to public health.
- The LGA 2002 was enacted against a background that fluoridation was, and had been for decades, lawful. The Council's general competence power in section 12(2), read against that background and alongside the express continuation power in s 130, includes the power to fluoridate.
- The fluoridation of drinking water is medical treatment for the purposes of s 11 of the BORA.

- Despite fluoridation of water supply engaging s 11 of the BORA, the legislative provisions allowing such fluoridation limit that right to an extent that is demonstrably justified in a free and democratic society, for the purposes of s 5 of the BORA.
- The "demonstrable justification" aspect of s 5 was established on the basis of the evidence before the High Court, and two other reports that were considered by the Court of Appeal, which indicated that dental decay in New Zealand is a significant problem and that the situation in Patea and Waverly worse than in other parts of the county. The Court held that the "objective of preventing and reducing dental decay is sufficiently important to justify a limitation on the s 11 right, assuming that this can be done in a manner that is otherwise justified. Given the minor limitation of the s 11 right inherent in fluoridation, we do not consider that this conclusion gives inadequate recognition to the values of bodily integrity inherent in the s 11 right".

While the appeal was dismissed by a majority of the Supreme Court, the reasoning given varied. The joint judgment issued by O'Regan and Ellen France JJ is summarised above, with separate judgments by Glazebrook J and William Young J which depart from the O'Regan and Ellen France JJ on certain matters (including Glazebrook J, who considered that whether s 5 is satisfied depends on local conditions). The dissenting judgment was issued by Elias CJ, who held that local authorities do not have the authority to add fluoride to water.

Can cryptographic tokens be used to secure your next loan?

DENTONS RODYK

Introduction

The secured loan market in Singapore was worth roughly US$420 billion in 2017 – with loans primarily backed by traditional assets such as property, inventory, or gold. In 2018, however, the global cryptographic token market peaked at a total market capitalization of US$832 billion on 7 January 2018, and is presently hovering at around US$236 billion. Meanwhile, JP Morgan published a 70-page “Bitcoin bible” asserting that “cryptocurrencies are here to stay” on 8 February 2018. Even the Monetary Authority of Singapore (the MAS) is exploring the implications of “tokenizing” the SGD using distributed ledger technology.

As a result, both lenders and cryptographic token holders may want to explore ways to make better use of such coins or tokens (generally referred to as “tokens” in this article) to achieve their business objectives. Given that security can be taken over almost anything that is deemed sufficiently valuable – where then, does Bitcoin (or any one of the 1597 other tokens presently available) stand?

Are these tokens a form of up-and-coming asset class, ripe to be used as security? What are the possible challenges? Should secured parties consider accepting tokens as security for loans?

The idea of using tokens as an asset for security is still in its infancy, and there is a dearth of precedent or legislation surrounding such use. This article primarily examines the nature of tokens and explores the issues to be addressed when evaluating cryptographic tokens as an asset for security.

The applicable law depends on where the asset is situated

Available forms of security interests vary by jurisdiction. Thus, the first hurdle to determining whether security can be taken over coins is to understand where the asset is “located” - given that the location of the asset will determine the applicable law and the type of security interest which can be taken over the asset.

While this may be a non-issue when dealing with immovable assets such as land, the answer is not as clear when it comes to tokens, which are electronic in nature and would be considered intangibles. Even though the tokens may be seemingly “stored” in a physical location, such as a hardware wallet (a storage device for certain types of tokens), they are actually encoded (stored) in the blockchain. This means that every transaction is recorded in a public ledger that is held and independently validated (corroborated) by each participating node (a connected computer) in the blockchain network. This makes it difficult to site the asset since it is both “here” **and** “everywhere”.

Where a token can be easily traced to a particular tangible object, it may be easier to argue that the location of that object is where the currency is located. For example, in the case where tokens are stored in a literal token, such as a Casascius Coin (a physical coin that can be used to store bitcoin), or a hardware wallet like the Nano Ledger S or Trezor wallet, it is easier to argue that the asset should be deemed as being located with that physical object in which it is stored. In India, for example, it has been suggested that for taxation purposes the location of an intangible asset can be linked with such tangible property with which it is most closely connected, such as an operating server.

In the absence of a literal token or a physical hardware wallet, one could argue that the location of the asset should be the physical location of the server where the wallet data file is stored.

The above being said, in the absence of case law, legal precedent or legislation, a definitive pronouncement cannot be made.

Form of security

Security is commonly given under financing or other transactions to protect the secured party's interests in the event of a default or other specified trigger. Generally, the nature of the asset and the law of the jurisdiction where the asset is situated would determine the type of security which can be taken over an asset. In a case where Singapore law may apply, traditional common law forms of security interests such as the assignment, mortgage, charge, and pledge may be considered. Each of these security interests functions differently, involves different legal formalities and creates different legal rights and obligations. A brief overview of the types of security is as follows:

Assignment	Mortgage
An assignment involves a transfer of a one's rights and obligations to another party through a written agreement. Assignments can be granted of over choses in action, and consequently, the right of enforce payment of a debt.	A mortgage is a transfer of one's ownership interest in an asset by way of security upon the express or implied condition that ownership will be re-transferred to the debtor on discharge of his obligation. Since it does not require delivery of possession, both tangible and intangible assets may be mortgaged.
Charge	**Pledge**
A charge is an encumbrance on an asset that gives the chargee a right of appropriation. A charge may be fixed or floating, depending on the degree of control the debtor has over the asset and charges can typically be created over any form of asset.	A pledge is the actual or constructive delivery of possession of the asset to the creditor by way of security. Since pledges depend on possession, only assets reducible to possession may be pledged, such as goods.

There is currently no case law, legal precedent or legislation in Singapore specific to the use of tokens as security. A logical starting point to explore how security can be taken would be to look at the nature and characteristics of tokens, and use this to find a nexus to an appropriate governing law and to the form of security which should apply.

Characteristics of tokens

Apart from determining the location of a token (and thus the applicable governing law), we would also have to look at what kind of an asset a token is in order to place it into an asset class.

There are no homogenous rules which set out what characteristics tokens are supposed to have, and in fact, tokens serve a wide variety of functions. Currently, there are various common types of tokens, which include, but are not limited to:

Type of Token	Brief Description

Type of Token	Brief Description
Equity Tokens	These grant token holders a share in the company, such as the tZERO Preferred Equity Token.
Investment Tokens	These do not grant their holders equity, but offer dividend-like rights with payouts based on a percentage of the company's profits, such as KuCoin Shares (KCS), which equally distributes 50% of all daily trading fees paid to the KuCoin exchange amongst all KCS tokens.
Utility Tokens	These confer rights to use or consume certain products developed by the issuing company and deposited on the blockchain, like tokens from Filecoin (the largest ICO in history, raising US$257 million), which give holders the right to use empty computer storage space distributed and managed via the blockchain.
Currency Tokens	These act as currencies that can be used as a means of payment and can be held as a store of value, such as Bitcoin.
Hybrid Tokens	These share two or more different characteristics above to different degrees.

Below we discuss a few ways to look at tokens as an asset class, in order to decide the form of security which should be applicable to it.

a. Tokens as securities

In July 2017, the US Securities and Exchange Commission (the US SEC) released a report which highlighted that tokens can be subject to the full scope of US securities regulation. It has also been suggested that pure investment tokens be considered securities under EU securities regulation. On 11 December 2017, the chairman of the US SEC released a statement stating that whether a token is considered securities depends on the facts. In particular, he highlighted that where the promoters of a token offering (i) emphasize the secondary market trading potential of these tokens or the potential for increase in value or otherwise (ii) profit from the tokens based on the efforts of others, these would be considered hallmarks of securities, and presumably, that token would be considered securities.

While it is possible that pure equity tokens qualify as securities under Section 2 of the Securities and Futures Act of Singapore (Chapter 289, 2006 Rev Ed) (the SFA), where securities is defined as, among others:

> debentures, stocks or shares issued or proposed to be issued by a corporation or body unincorporate; [or]
>
> any right, option or derivative in respect of any such debentures, stocks or shares",

as it currently stands, such tokens would not be considered "book-entry securities" to which the regime for taking security over book-entry securities under the SFA would apply.

b. Tokens as Currency

The biggest cryptocurrency, Bitcoin, broadly regarded as the gold standard of the cryptocurrency market, was initially sought to be used as an alternative to fiat currency so as to decentralise currency from within the control of traditional banks. In fact, Singapore's first cashless café recently opened up its doors several months ago, accepting among other forms of cashless payment, Bitcoin or its own cryptocurrency token, the Ducatus coin. However, unlike traditional fiat currency, cryptocurrency tokens may only be stored in hardware wallets or online coin wallets.

c. Tokens as goods

In the case where tokens are embodied in physical form, such as a Casascius Coin, that physical embodiment can be seen as a valuable object capable of being delivered as security to the creditor. However, unlike traditional valuables, the value of such a physical embodiment is rarely intrinsic. Its value as an asset only exists insofar as it functions as a store of value. Value (in the form of Bitcoins) stored in these physical coins can be accessed using private keys, but once the Bitcoins are redeemed, the physical coin loses its digital worth.

In the case of a hardware wallet such as the Nano Ledger S, the physical possession of the wallet is required in order to realize the value in it. The value in the wallet can be accessed by using private keys and various other mechanisms which are in-built into a particular type of wallet, but again however, the physical hardware wallet is only as valuable as the value of the tokens stored in it.

Possible forms of security over tokens

To the extent that Singapore law applies, from a conceptual point of view (and this may be oversimplifying the issue), it would appear that an assignment, mortgage or charge could all be applicable to tokens categorised as securities or currency (when stored in online wallets). To the extent that physical cryptographic token wallets can be considered goods or personal chattels, it would be possible for these to be pledged as security.

In reality, however, the answer may be more complicated.

Namely – what are the steps needed to create the security and the appropriate level of control to be given to the secured party? Very much of this depends on how each token works and how its value can be accessed.

How can we retain some protection for the asset owner against misappropriation by the secured party since, in certain instances where the token is stored online, anyone with the requisite password(s) or private key(s) can access and deal with the tokens, and essentially “own” the tokens? Furthermore, unlike bank accounts or securities accounts where transfer restrictions may be set in place, most, if not all of the storage mediums for tokens do not contemplate such controls by third party intermediaries. This is perhaps where parties can consider having more than 1 private key (perhaps 2 or 3 which are required to be used together), held by escrow agents, to potentially reduce the risk posed by rogue intermediaries with private keys.

Also, how can one prevent a security provider from restoring the contents of a pledged hardware wallet to a new device, thereby siphoning off assets which are supposed to be secured?

Given their plethora of functions, it would be necessary to delve into the exact features of any particular token before one is able to determine what kind of asset it is, whether the traditional forms of security are suitable or applicable to it, and whether other mechanisms (such as escrows, which do not ring-fence the asset in insolvency) would be more appropriate for a beneficiary to access the value of a token when a trigger event occurs.

Other challenges & Risks

One of the central risk factors for tokens is price volatility, which would be a key concern to the extent that security is given to a beneficiary primarily for the latter to realize the value of the secured asset upon occurrence of a trigger event.

Since cryptocurrencies are not backed by any country’s central bank, the value of tokens which purport to be currency tokens are derived purely from the market forces of demand and supply, and with that, cryptocurrency values are susceptible to large fluctuations (many have likened cryptocurrencies to Dutch Tulips). This is readily apparent from looking at the fluctuations in market capitalization. In March 2017, the entire market capitalization of cryptographic tokens worldwide was just shy of US$24 billion. By January 2018, it had peaked at US$832 billion, before presently hovering at US$236 billion, just 6 months removed from its peak. The value of other forms of tokens such as utility tokens would be even more difficult to ascertain unless traded on a cryptographic token exchange or unless they have otherwise evolved into widespread acceptance. The same argument for the value of such tokens being derived purely from market forces of demand and supply would apply even more so.

Furthermore, wallet security and the potential for market manipulation and scams also pose concerns. In June 2017, the price of Ethereum crashed from US$319 to 10 cents within seconds following a multi-million sell order on the GDAX cryptographic token exchange. While prices eventually recovered, the vulnerability of cryptographic tokens to such market manipulation is definitely a factor for consideration.

Moreover, market manipulation is not the only external factor that potential token-based security holders need to watch out for. Given how "young" (and volatile) cryptographic tokens are, any news regarding its regulation has the tendency to alarm pundits, which often results in significant drops in prices, especially when stop-loss mechanisms result in a cascading effect. In early January 2018, the South Korean Justice Minister's announcement regarding the government's plans to ban cryptocurrency trading resulted in a steep sell off, causing both Bitcoin and Ethereum to fall by 14%. Likewise, news of potential cryptocurrency bans in India and China have elicited similarly large fluctuations.

Other potential issues include:

1. hacking incidents, such as the hacking attack on the DAO (Decentralized Autonomous Organization; an investor-directed venture capital fund based on the Ethereum blockchain), where US$50 million was stolen; and
2. liquidity concerns (at its peak in December 2017, the average time to make a bitcoin transaction was 1,188 minutes, which is an eternity given the price volatility).

The above being said, cryptographic tokens do possess a tremendous potential for growth; the 154,300% surge in the value of Ethereum between Dec 2015 and Jan 2018 (US$ 0.90 to US$ 1389) is testament to that.

Conclusion

With cryptographic tokens and blockchain surging in popularity and with an increasing number of new products and tokens being created for different uses, it is likely to only get harder to dismiss cryptographic tokens as pure speculation.

However, even as cryptographic tokens become less and less foreign to the business community, and token holders look to further unlock the potential of the cryptographic tokens they hold, there are still challenges which need to be overcome to use tokens as security assets. The individual nature of each token and the underlying technology behind it could be key to its suitability and the measures required to utilise it as security assets, and lawyers would have to work hand in hand with technology experts in order to realise their potential.

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Slogans Containing Well-Known Marks Do Not Necessarily Have Inherent Distinctiveness or Acquired Distinctiveness

05/24/2018
Ruey-Sen Tsai/Celia Tao

According to *the Examination Guidelines on Distinctiveness of Trademarks* issued by the Intellectual Property Office, consumers will not usually perceive a slogan as an identifier of goods or services until consistent advertising practices or other effort on the part of the brand user. Therefore, slogans generally are not inherently distinctive in the current trademark examining practice in Taiwan. An applicant of a slogan will need to prove that the slogan has acquired secondary meaning for it to be registrable.

At the same time, the *Guideline* also states that, a slogan that is highly creative or containing highly distinctive trademark may be considered as inherently distinctive as an exception. However, if the slogan as a whole is still a mere description of goods or services, it will not be deemed as distinctive. In this case, whether a slogan containing a well-known mark will be considered as distinctive as a trademark is a question left to be answered.

In a recent administrative litigation case regarding the registrability of a slogan in 2018, the Intellectual Property Court of Taiwan stated that slogans containing well-known marks do not necessarily have inherent distinctiveness or acquired distinctiveness.

In the case above, for the issue of inherent distinctiveness, the trademark applicant claimed that its house mark is extremely well-known worldwide; the IPO should not disregard the existence of its famous house mark and treat the trademark to be filed as a regular slogan. The Intellectual Property Court, however, stated that the assessment of inherent distinctiveness should be determined on the overall look and feel of the trademark. In this case, the trademark to be filed is just a slogan, which is a mere description of the maker or the designer of the goods, the relevant consumers cannot treat it as an identifier of the goods.

As for the issue of acquired distinctiveness, the trademark applicant claimed that it started to use such a slogan as a trademark as early as in February 2005, and the consumers are already familiar with such a slogan as a trademark. The trademark applicant also pointed out that the slogan has acquired trademark registrations in multiple countries worldwide. The Intellectual Property Court, on the other hand, stated that acquired distinctiveness should be determined by whether the consumers in Taiwan have perceived the slogan as an identifier of the goods. In the case, however, the evidence showed that the consumers still need to use the trademark applicant's other main trademarks in combination with the slogan to distinguish the source of goods. Therefore, the main marks are the actual identifiers in this case, not the slogan. If the main trademarks are removed from the slogan, the relevant consumers will not be able to identify the source of goods from the rest of the slogan.

BAKER BOTTS

Ideas

IP Pitfalls in Virtual Worlds: Issues to Consider During Development

02 July 2018
Firm Thought Leadership

The market for Virtual Reality (VR) and Augmented Reality (AR) technologies has been projected at $150 billion in 2020[1] and $209.2 billion in 2022.[2] As VR/AR technologies are developed, there are important intellectual property (IP) issues that should be considered to avoid or mitigate legal risk that could derail the profitability of VR/AR systems. This article provides a brief overview of IP issues relevant to VR/AR, including real-world IP rights in VR/AR, virtual IP rights in the real world, patent rights, copyrights, and the right of publicity. Given how new VR/AR technologies are, these issues largely involve open questions as to how IP law written for the "real" world might be shaped to fit the virtual world.

Defining VR/AR. Terminology can be confusing for these new technologies, so a brief definition of VR and AR is useful in any discussion relating to them. For purposes of this article, VR consists of a three-dimensional, virtual world that allows users to immerse in, interact with, and navigate through different environments. This immersion into an environment is a perception of being physically present in the virtual world while being generally unaware of the outside world. VR systems typically use headsets and tracking sensors to provide the immersive environment. These environments often provide a 180-degree or 360-degree field of view, are self-contained, and do not allow users to interact with the real world around them. Examples of existing VR systems include the Oculus Rift and the HTC Vive systems. In contrast, AR, also known as Mixed Reality, contains a live view of the real world and superimposes virtual, computer-generated elements on top of the live view. The superimposed elements can include text, sound, graphics, or video. Examples of existing AR systems include Pokémon Go and photo filter apps like Snow, Masquerade, BOO!, Camera360, and Face Swap Live.

Real-World IP Rights in VR/AR. Who owns the IP rights to a virtual phone created by a user that includes a trademark (e.g., a famous logo)? Or who owns the IP rights to a virtual bottle of soda with a famous logo on it? The logo owners likely think that they own the copyright and trademark rights in the virtual phone logo or soda logo. Yet a hurdle the IP owner may face is whether the scope of its trademark covers only real goods or could be extended to cover those intangible, virtual goods. For example, Marvel Enterprises sued NCSoft (the maker of the *City of Heroes* virtual world) for providing development tools to its players to design superhero costumes for their avatars that allegedly infringed trademarks and copyrights in well-known superheroes like Spiderman, the Incredible Hulk, Wolverine, and Captain America.[3] The court rejected Marvel's trademark claims on the bases that the players did not use the marks in commerce and the use of Marvel superhero names by players within the game was not an infringing use.[4] Another hurdle the IP owner may face is proving damages from the use of their IP in a virtual platform. If sales of the tangible, trademarked goods are not impacted by the virtual goods, how can the IP owner then show damages? Brand owners seeking to avoid this problem may consider entering into contracts with the manufacturer of a VR/AR system to license and clearly establish IP rights in any logos or trademarks used in the systems. For example, brand owners could work with a VR platform to provide a license for virtual products that use their IP and allow users to virtually incorporate those trademarked or copyrighted products into their virtual experiences.

Virtual IP Rights in the Real World. Does a user of a VR system who creates virtual content using that VR system own the IP rights in her creation? Generally, the author or inventor of a work owns the intellectual property in it, unless that author or inventor expressly assigns her intellectual property rights in a written agreement. VR systems allow for the creation of virtual worlds and virtual products (e.g., houses, cars, phones, etc.) that conceivably could have associated protectable IP rights. Consequently, a clear agreement on who owns the IP is very important for both the creators and users of any VR platform. The company owning the VR platform could require terms of use where users assign their IP rights to the VR platform. Alternatively, the terms of use could let users keep the IP rights in their creations but require in return a license to use any IP created in the VR platform. A good starting point for developers in creating these terms of use may be current best practices adopted by other game and app ecosystems, such as Steam, Google Play, and iOS. VR platform providers should also keep in mind that users of VR platforms may come from many different countries, each of which may have laws governing the ownership and use of IP. On a separate but related note from an AR perspective, can an owner of a famous building stop a user or platform owner from identifying its building in a negative manner? In other words, who owns the rights to superimpose information on real world locations? Although this is currently unclear, an AR platform may benefit from terms of use allowing the removal or alteration of superimposed information.

Patent Rights. VR/AR technologies are rapidly maturing, and the patent landscape in this field is becoming increasingly crowded. In 2017 alone, there were 11,307 VR/AR patent filings globally, which represents more than a 400% increase from 2012 (2,650 VR/AR patent filings).[5] Because the VR/AR patent landscape is becoming increasingly crowded, stakeholders need to carefully consider how to mitigate the risk of patent infringement while still protecting their contributions. Options for risk mitigation and protection with regard to this growing landscape include performing patent clearance studies, whitespace studies, and patentability searches.

Copyrights. VR/AR environments provide countless options to display creative text, images, music, and videos with the potential risk of infringing a copyright, such as the infringement of the exclusive rights of reproduction and alteration.[6] By including copies of artwork, music, videos, or other copyrighted material in an AR/VR environment, the exclusive right of reproduction is straightforwardly implicated. Even further, AR/VR software and environments allow a user to modify or change those works, such that there is a potential for creating derivative works by simply taking pictures or videos of surroundings and overlaying virtual elements on those surroundings. The fair use doctrine may protect some of these uses. Fair use is meant to ensure that some uses of copyrighted material do not require permission or payment, such as teaching, scholarship, research, news reporting, comment, and criticism. When faced with claims of copyright infringement, an alleged infringer may claim the statutory defense of fair use that requires weighing four factors:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.[7]

Courts have clarified the first factor and found that a “transformative” use, where the source work is used in completely new or unexpected ways, is a fair use.[8] Examples of transformative fair uses include parody [9] and new technologies.[10] If faced with a claim of copyright infringement, VR/AR platform providers and users may analogize to the *Kelly v. Arriba-Soft* case [11] and claim a transformative fair use because the use is not merely retransmitted in a different medium but serves a different function by improving access to information. However, the outcome of a fair use defense is unpredictable because the defense requires a flexible, case-by-base analysis where no single factor is decisive. It remains to be seen how copyright protection and enforcement will play out in virtual worlds.

Right of Publicity. Individuals generally can control how their likeness, image, and persona are used commercially under right of publicity claims. Many states recognize right of publicity tort claims based on common law, state statute, or both. The elements of a right of publicity claim vary, but common elements include: (1) use of someone's name, identity, likeness, or persona; (2) through which use the defendant received a commercial advantage; (3) the use was made without the person's consent; and (4) injury to the plaintiff.[12] This right of publicity can include recognizable attributes or mannerisms, such as voice, signature, gestures, biographical information, and many others.[13] Just like marketers must obtain permission for real people to appear in their advertising, virtual marketers should obtain permission for any commercial use of an individual's publicity rights in the virtual world.

Conclusion. Because of the rapidly changing VR/AR technology and legal landscape (including a lack of substantive case law in some areas), intellectual property rights in your virtual world should be carefully considered and protected on an ongoing basis.

[1] Tim Merel, *Augmented and Virtual Reality to Hit $150 Billion, Disrupting Mobile by 2020*, TechCrunch (Apr. 6, 2015), https://techcrunch.com/2015/04/06/augmented-and-virtual-reality-to-hit-150-billion-by-2020/.

[2] *Forecast augmented (AR) and virtual reality (VR) market size worldwide from 2016 to 2022*, Statista, https://www.statista.com/statistics/591181/global-augmented-virtual-reality-market-size/ (last visited Jun. 29, 2018).

[3] *Marvel Enterprises, Inc. v. NCSoft Corp.*, No. CV 04-9253, 2005 WL 878090, at *4 (C.D. Cal. Mar. 9, 2005).

[4] *Id.*

[5] Garrett Padilla, *Transformational technology: A look at the virtual reality patent landscape*, Derwent Innovation, (Feb. 6, 2018).

[6] 17 U.S.C. § 106.

[7] 17 U.S.C. § 107.

[8] *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994).

[9] *Id.* (holding that 2 Live Crew's use of the opening tag and the words (but not the melody) from the first line of the song "Pretty Woman" ("Oh, pretty woman, walking down the street") was transformative where the rest of the lyrics and the music were different); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998) (holding that a movie company's use of a photo of a naked pregnant woman onto which it superimposed the head of actor Leslie Nielsen, which was a parody of a famous photo taken by Annie Leibovitz of the actress Demi Moore for the cover of Vanity Fair magazine, was a transformative fair use because it imitated the photographer's style for comic effect or ridicule).

[10] *Kelly v. Arriba-Soft*, 336 F.3d 811 (9th Cir. 2003) (holding that search engine's use of thumbnails of copyrighted images was transformative fair use because the search engine's use created a different purpose for the images, i.e., the search engine used smaller, lower-resolution images to improve access to information and not for artistic expression).

[11] *Id.*

[12] *See, e.g.*, *Eastwood v. Superior Court for Los Angeles Co.*, 149 Cal. App. 3d 409 (1983); *see also* Cal. Civ. Code § 3344(a); N.Y. Civ. Rights Law § 51.

[13] Ind. Code § 32-36-1-7 ("As used in this chapter, 'right of publicity' means a personality's property interest in the personality's: (1) name; (2) voice; (3) signature; (4) photograph; (5) image; (6) likeness; (7) distinctive appearance; (8) gestures; or (9) mannerisms."); Hart v. Electronic Arts, Inc., 717 F.3d 141 (3d Cir. 2013) (holding that the college football player's likeness (including his biographical information) in a video game was not a transformative use that would escape his right of publicity claim).

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California Supreme Court Affirms Broad Section 230 Immunity

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By Thomas R. Burke, Rochelle Wilcox, and Ambika Doran

In a closely watched case, the California Supreme Court on Monday confirmed it will continue to broadly interpret the immunity provided by Section 230 of the Communications Decency Act, 47 U.S.C. § 230. *Hassell v. Bird*, S235968 (Cal. July 2, 2018). The court reversed an order requiring the online review website Yelp to take down an allegedly defamatory review that had been posted by a third party.

Factual Background

In *Hassell*, attorney Dawn Hassell and her law firm sued Ava Bird, a former client, after Bird allegedly posted negative reviews on Yelp, a website that publishes reviews and ratings of businesses and other entities. The lawsuit sought damages as well as injunctive relief that would have required Bird to remove the reviews. It did not name Yelp, nor seek any relief (injunctive or otherwise) from Yelp. At Hassell's request, the court entered a default judgment, which ordered Bird and Yelp to remove the allegedly defamatory reviews.

After Hassell pressured Yelp to comply with the order, Yelp filed a motion to set aside and vacate the judgment, arguing that it violated Yelp's due process rights and was barred by Section 230. The superior court denied the motion, reasoning that Yelp had been aiding and abetting Bird's violation of the injunction through its continued publication of the reviews.

Section 230 Ruling

Section 230(c)(1) states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Section 230(e)(3) states that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." Courts have afforded websites broad immunity under this provision, barring claims that seek to hold websites responsible for content provided by their users.

The Court of Appeal affirmed the trial court's decision, holding that the trial court's removal order was permissible because it did not "impose any liability on Yelp." The court refused to follow cases holding that Section 230 applies to injunctive relief because in those cases, it said, there had not been a "judicial determination that defamatory statements had, in fact, been made…"

The California Supreme Court reversed. In an opinion by the court's chief justice, the court concluded that "[w]here, as here, an Internet intermediary's relevant conduct in a defamation case goes no further than the mere act of publication—including a refusal to depublish upon demand, after a subsequent finding that the published content is libelous—section 230 prohibits this kind of directive." (Citations omitted.) In other words, "[t]he duty that plaintiffs would impose on Yelp … wholly owes to and coincides with the company's continuing role as a publisher of third party online content."

The court underscored the need to interpret Section 230 to accomplish its intent to promote the flow of information on the Internet. In particular, the court noted that had Yelp been named as a defendant, it would have been entitled to immunity, and held that Section 230 barred this effort to "accomplish indirectly what Congress has clearly forbidden … directly." The court also emphasized the fact that plaintiffs' "maneuver, if accepted, could subvert a statutory scheme intended to promote online discourse and industry self-regulation," as other plaintiffs would file similar lawsuits to effectuate an "end-run" around Section 230 immunity.

The court "conclude[d] that in light of Congress's designs with respect to section 230, the capacious language Congress adopted to effectuate its intent, and the consequences that could result if immunity were denied here, Yelp is entitled to immunity…."

Two justices joined the chief justice's opinion, and a fourth justice wrote a concurring opinion, stating she would have decided for Yelp on due process grounds, but that she agreed Section 230 also barred the removal order—creating a majority on the Section 230 holding. Three justices dissented. The plurality opinion took direct aim at the dissents, stating that "[t]he narrow, grudging view of section 230's immunity provisions advanced in both dissents is at odds with this court's analysis in *Barrett*, and for that matter with the views of virtually all courts that have construed section 230."

Davis Wright Tremaine LLP attorney Thomas R. Burke represented Yelp in the Court of Appeal, along with former DWT attorney Deborah Adler. Mr. Burke and DWT attorney Rochelle L. Wilcox represented Yelp in the California Supreme Court. Yelp was also represented by its in-house counsel, Aaron Schur.

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International online programs: Know the pitfalls

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Thanks to the rapid development and widespread acceptance of online programs over the last decade, American universities and their respective business partners now offer degree or non-degree programs entirely online around the world. The international market is appealing to U.S. institutions for many reasons. These include

- decreasing domestic U.S. enrollments;
- funding pressures, particularly on public institutions;
- a desire to leverage domestic brands;
- newly developed technologies and pedagogies; and
- concerns that international student enrollment in the United States has stalled, in part due to immigration policies of the current administration.

While many international students still come to the United States to study, and many traditional-age American students study abroad, the delivery of online education linked to world-class brands is fast becoming a "hot" growth area.

When considering online programs abroad, several important U.S. and non-U.S. legal and compliance issues arise. A few of the most common issues are discussed below. This alert concerns online-only programs; the compliance challenges are very different and more complex if a university also establishes a physical presence abroad.

Key U.S. legal issues to consider

Offering online programs internationally implicates certain U.S. legal requirements. First, the U.S. bars trade with certain sanctioned countries. U.S. export control laws and regulations prohibit most transactions with Iran, Cuba, North Korea, Syria, and the Crimea region of Ukraine, which may include restrictions on enrolling online students from those countries. In order to comply with these complex trade regulations, institutions often need policies and procedures to identify, verify, and limit student enrollment on the basis of geographic location or require third-party vendors who are handling enrollment to do so.

U.S. student aid regulations under the Higher Education Act, or HEA, sometimes also apply to international ventures. Any additional locations in a country outside the United States must generally be approved by the institution’s accreditor, home state, and the U.S. Department of Education. If considering a partnership with a school in another country (many of which participate in federal student financial aid programs under Title IV of the HEA), U.S. institutions should be aware that Title IV regulations contain strict limitations on offering Title IV aid for programs in which a partner in another country utilizes telecommunications technologies (e.g., online instruction).

U.S. higher education institutions must adhere to the Foreign Corrupt Practices Act, or the FCPA, whenever engaged in international activities. The FCPA prohibits directly or indirectly offering or giving payments or anything of value to foreign government officials in order to gain an improper business advantage. Under the FCPA, the term "government official" is broadly defined and could include employees of public universities in other countries. "Anything of value" is also defined broadly, for example, giving favorable treatment in admissions to foreign government officials or their relatives could also violate the FCPA even though there is no payment exchanged for admission. Many U.S. companies have found themselves in trouble with the FCPA not because of the actions of their own employees, but because of the actions of their consultants, vendors, or partners who interface with foreign government officials. Universities operating internationally increasingly take a sophisticated approach to address FCPA compliance, including diligence on business partners, training for staff, and robust policies and procedures.

Certain non-U.S. legal issues to consider

Non-U.S. laws and regulations pertaining to online programs vary considerably by country and are evolving. A few notable trends and issues are already clear.

An initial issue is proper authorization to offer the program. The good news here is that, so far, many jurisdictions currently do not require prior approval to offer a 100 percent online program; however, establishing a physical presence (such as on-site faculty or instruction) usually triggers the need for host country approval and potentially other local business registrations as well as tax considerations.

Many countries, including China and India, do not fully recognize credentials earned online, especially from a foreign university. This disadvantage creates an important disclosure issue for students who may, for example, wish to apply for work in their home country’s government or industry only to find they do not meet the job's credential requirements.

Another important consideration is data security and privacy. Many countries have stronger privacy laws than the United States, which could affect the collection and use of personal data from students participating in online programs. A well-known international example is the European Union’s new General Data Protection Regulation (GDPR), part of a wave of EU privacy legislation intended to change the use and flow of personal data worldwide.

It is also important to consider trademark protection in target countries, especially where marketing and recruitment campaigns accompany an online program. Invalidating bad-faith trademark registrations of trademark squatters can take years to resolve.

U.S. universities must also consider other countries' tax requirements. In addition to applicable U.S. requirements, many countries seek to tax students and institutions directly. Even U.S. institutions that are nonprofits may have to pay sales tax or value added tax (VAT) when collecting tuition or fees from international students in online programs.

Another and arguably more significant tax concern is whether providing online education to students in another country inadvertently creates a taxable physical presence or "permanent establishment" (PE) of the U.S. university in that country. A PE would expose the institution to corporate income tax on certain revenues attributable to that country. The test of whether or not online activity creates a PE in a particular country depends on local law and whether a tax treaty with the United States is in effect.

U.S. institutions frequently enter into collaborative degree programs aimed at international students (who are not Title IV eligible) with an online delivery component where the non-U.S. institution collects tuition and then shares some tuition revenue with the U.S. school. Foreign tax withholding requirements often apply to such payments coming from the non-U.S. institution, which other countries often view as taxable service payments.

Finally, there may be restrictions on individuals who are in-country making payments to an entity outside the country, and such restrictions may pose hurdles for online students in certain countries. In some countries, like China, making payments over a certain value to foreign companies requires prior government approval. If students must go through such approval processes, there is risk not only of long payment delays and lost enrollments, but also of additional governmental scrutiny.

Conclusion

Given the above considerations, a U.S. institution contemplating the launch of an online initiative abroad must do its business and legal due diligence and design an ongoing compliance program. The laws and regulations concerning online programs internationally have been slow to develop, but are expected to evolve rapidly in response to the changing global marketplace.

We are available to respond to questions.

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