PACIFIC RIM ADVISORY COUNCIL

Pacific Rim Advisory Council

June 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
Spring, 2019

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PRAC WELCOMES NEW MEMBER FIRM - HAN KUN LAW OFFICES

June 06, 2018: The Pacific Rim Advisory Council ("PRAC") is pleased to welcome HAN KUN Law Offices to membership.

Han Kun is a full-service law firm in China with over 300 lawyers in four offices across Beijing, Hong Kong, Shanghai, and Shenzhen. Han Kun has been consistently recognized as a leader in China in all the areas they practice. Han Kun's main practice areas include private equity, mergers and acquisitions, international and domestic capital markets, investment funds, assets management, competition law, banking and finance, aviation finance, foreign direct investment, compliance, intellectual property and dispute resolution. You can learn more about Han Kun by visiting www.hankunlaw.com

We are both pleased and honored to have a firm of Han Kun's distinction as a member of PRAC and look forward to a long and successful relationship.

Joyce C. Fan, PRAC Chair
Lee and Li

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

BAKER BOTTS LEADING OIL AND GAS LAWYER JOINS FIRM

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

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

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

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

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

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

For additional information visit www.bakerbotts.com

GIDE BOOSTS ITS EXPERTISE IN M&A

PARIS - 22 May 2018: Gide is pleased to welcome Charles de Reals as partner within its Mergers & Acquisitions / Corporate practice group in Paris. Admitted to the Paris Bar, Charles de Reals focuses on complex merger-acquisition transactions involving both listed and private companies. He is recognised as an expert on corporate governance issues and securities law, and regularly represents French and foreign companies on strategic disputes.

Prior to joining Gide, Charles practised within leading US and French law firms, in particular Skadden Arps Slate Meagher & Flom since 2015, and previously Sullivan & Cromwell, and Bompoint.

Stéphane Puel, Gide managing partner, indicates: "I am very pleased to see Charles join our teams. Widely acknowledged for his expertise in the field of mergers, acquisitions, and securities law, Charles is above all a professional whose human qualities make him an obvious choice. His arrival is perfectly in line with our firm's current development dynamic."

Charles de Reals adds: "I am delighted to be joining Gide's teams, whose skill is deemed as a reference in all key fields of business law. As a specialist in mergers and acquisitions, I consider the firm's unique cross-disciplinary service offer to be a precious asset for clients."

Gide's Mergers & Acquisitions / Corporate practice group numbers some sixty lawyers in Paris, now including nineteen partners. It handles the full spectrum of practices essential to mergers and acquisitions, from public tenders through to private equity, via disputes and restructurings, in a broad range of business sectors.

For additional information visit wwww.gide.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 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

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SIMPSON GRIERSON APPOINTS NEW CHAIR

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

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

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

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

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

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

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

For additional information visit www.simpsongrierson.com

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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 SI GROUP IN ACQUISITION BY SK CAPITAL PARTNERS

DALLAS - 01 June 2018: SK Capital Partners, a private investment firm focused on the specialty materials, chemicals and pharmaceuticals sectors, announced today an agreement to acquire SI Group, a leading global developer and manufacturer of performance additives and intermediates. Headquartered in Schenectady, New York, SI Group operates 20 manufacturing facilities on five continents with more than $1 billion in annual sales and over 2,800 employees worldwide.

SI Group is being acquired from the descendants of W. Howard Wright, who founded the company in 1906. At the close of the transaction, SK Capital will combine SI Group and Addivant, a leading global supplier of additives including antioxidants, antiozonants, inhibitors, polymer modifiers and UV stabilizers used by customers to improve the production and performance properties of polymers, plastics and rubbers. SK Capital has owned Addivant since 2013. The transaction is expected to close in the second half of 2018.

Baker Botts is representing SI Group in the transaction.

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

COUNSELS BOURSORAMA ON THE SALE OF ITS STAKE OF SELF TRADE BANK TO WARBURG PINCUS

PARIS - 07 June 2018: Societe Generale Group, through Boursorama, has agreed to sell the entire stake of Boursorama in Self Trade Bank S.A.U., its Spanish subsidiary, to private equity fund Warburg Pincus. This transaction is part of Societe Generale Group's continuous effort to simplify its setup to focus on its core businesses and create synergies within the Group. It will have a limited positive impact on Societe Generale Group's financial ratios.

The sale is expected to close before the end of year, following completion of the necessary regulatory authorisations.

Societe Generale Group remains strongly committed to the Spanish market, notably through its Global Banking & Investor Solutions activities, specialised financing, and leasing and fleet management, and will continue in France the development of Boursorama, its leading online banking subsidiary with over 1.4 million customers.

Societe Generale and Boursorama were advised by Gide (partner **Guillaume Rougier-Brierre** and associate **Natalia Li**), and Cuatrecasas (partners Gerard Correig and Fernando Minguez Hernandez).

For additional information visit www.gide.com

CLAYTON UTZ

ACTS FOR JAPAN'S NISSUI ON PRAWN FARM INVESTMENT

BRISBANE - 05 June 2018: Clayton Utz has advised Japanese marine products company Nippon Suisan Kaisha Ltd ("Nissui") on its acquisition of a stake in ASX listed prawn farming operation Seafarms Group Limited ("Seafarms"). Nissui announced the transaction on 22 May 2018.

A Clayton Utz team led by Brisbane partner and Japanese bengoshi Hiroyuki Kano advised Nissui on all aspects of the transaction, including due diligence, the negotiation of transaction documents in relation to the share subscription, and offtake arrangements.

Under the terms of the agreement, Nissui will acquire an approximately 14.99 per cent shareholding in Seafarms, valued at around A$25 million. Project Sea Dragon Pty Ltd, a 100% subsidiary of Seafarms ("PSD"), plans to begin construction of a black tiger prawn farming site in the Northern Territory in 2018 and bring the product to the market in 2021. Nissui will market the black tiger prawn products from PSD exclusively in Japan, Australia and New Zealand, as well as potential global distribution through Nissui's global network. Nissui Group will also distribute in Japan and the Oceania region approximately 2,000 tonnes per annum of black tiger and other prawns sourced from Seafarms' existing Queensland prawn farming operations.

Commenting on the transaction, Hiroyuki said: "This is a very exciting development not only for Nissui and Seafarms. It is a symbolic deal to illustrate the beginning of the new long-term business collaboration between Japan and Australia in the agribusiness sector. We expect to see more Japanese companies investing in the Australian agribusiness sector in the coming months and years."

For additional information visit www.claytonutz.com

ESTUDIO MUNIZ

COUNSEL ON US$1 BILLION NOTE ISSUANCE

LIMA May 2018: Our firm provided legal advice to Goldman Sachs & Co., J,P. Morgan Securities LLC, Citigroup and Morgan Stanley & Co. on a notes issuance worth US$ 1 billion by DirectTV. DirectTV is a leading provider of digital entertainment services in South America (May 2018)

For additional information visit www.munizlaw.com

DAVIS WRIGHT TREMAINE

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

LOS ANGELES - March, 2018: The Davis Wright Tremaine team of John LeCrone, Karen Henry, and Paul Rodriguez has won an important victory in Los Angeles Superior Court on behalf of a young woman who was sued for defamation by an international music star for allegedly accusing him of rape. William Bensussen, a producer and DJ who goes by the name The Gaslamp Killer, sued our client and a second woman, both of whom, he alleges, accused him of raping them after they met at a private party at the Standard Hotel in Los Angeles. Bensussen sued both women for defamation and the Davis Wright Tremaine team filed an anti-SLAPP motion on Ms. Medina's behalf.

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

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

For additional information visit www.dwt.com

HOGAN LOVELLS

REPRESENTS SESEN BIO IN PUBLIC OFFERING

PHILADELPHIA - 06 June 2018: Hogan Lovells advised Sesen Bio, Inc., a late-stage clinical company developing next-generation antibody-drug conjugate therapies for the treatment of cancer, in an approximate $46 million follow-on public offering led by Jefferies and Canaccord Genuity. Sesen Bio intends to use the net proceeds from this offering for, among other things, the clinical development of Vicinium™ for the treatment of high-grade non-muscle invasive bladder cancer and the development of commercial-scale manufacturing capabilities.

Philadelphia partner Steve Abrams led the Hogan Lovells team, which also included Steve Nicolai, John Siemann, John Sharrar, Susan Lee, Steve Kauffman, Mike Applebaum, and Henry Kahn.

For more information, see www.hoganlovells.com

NAUTADUTILH

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

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

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

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

For additional information visit www.nautadutilh.com

SIMPSON GRIERSON

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

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

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

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

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

For additional information visit www.simpsongrierson.com

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PRAC EVENTS


PRAC 59th
INTERNATIONAL
CONFERENCE
21 - 24 MAY 2016
PRAC2016
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DURAN S.L.P.
PACIFIC RIM
ADVISORY COUNCIL


PRAC @ Taipei 2014


PACIFIC RIM
ADVISORY COUNCIL


PRAC @ IPBA Vancouver 2015


PRAC @ Vancouver 2015


PRAC @ INTA San Diego


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PRAC @ Brisbane 2015


PRAC @ IPBA Hong Kong


PRAC @ PDAC Toronto 2014

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MUÑIZ OLAYA MELÉNDEZ CASTRO ONO & HERRERA Abogados

ALLENDE & BREA

DENTONS RODYK

Arias

GIDE
GIDE LOYRETTE NOUEL

NautaDutilh

ARIFA
ARIAS, FABREGA & FABREGA

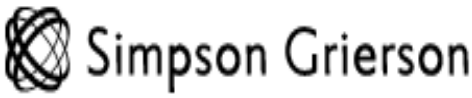
GOODSILL

r | b | s
richards buell sutton LLP

Santamarina + Steta

BAKER BOTTS LLP

Hogan Lovells



SKRINE

BRIGARD & URRUTIA

SyCip Salazar Hernandez & Gatmaitan

/Carey

CLAYTON UTZ

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

TOZZINI FREIRE
ADVOGADOS

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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CLAYTON UTZ

29 MAY 2018

Higher fines for competition law breaches, and more unlawful behaviour captured by Australia's cartel laws

BY MIHKEL WILDING, DAMIANO FRITZ

Following the record AU$46m penalty in the Yazaki cartel case, expect the ACCC to continue pursuing higher civil fines for cartel conduct and other competition law contraventions by domestic companies and their foreign parents.

Multinationals and corporate groups found to engage in cartel conduct face higher penalties in Australia following a landmark decision of the Full Federal Court increasing a penalty for anti-competitive cartel conduct in relation to automotive wire harnesses by 485%, from AU$9.5 million at first instance to AU$46 million on appeal. This is the highest fine imposed for any breach of Australia's competition laws (the previous record was AU$36 million).

The recent decision in Australian Competition and Consumer Commission v Yazaki Corporation [2018] FCAFC 73 held that foreign parent companies may incur civil penalties in Australia even if their local subsidiary had no knowledge that it was implementing a cartel arrangement at the direction of its foreign parent.

The case follows recent investigations by the European Commission into various cartels for the supply of automotive components to Japanese car manufacturers in the European Economic Area, including seatbelts, airbags, steering wheels, braking systems and spark plugs. In the last six months alone, the European Commission has imposed penalties of over €185 million (approx. AU$285 million) in relation to cartel conduct in the automotive components industry.

The decision also resolves two issues in relation to the calculation of maximum penalties for competition law contraventions.

Australian turnover: The first is that where 10% of turnover is used to calculate the penalty, the total Australian connected turnover of a corporate group is to be used, and not merely the Australian turnover of the specific business unit which engaged in the conduct for a contravention of the Competition and Consumer Act 2010 (Cth) (**CCA**).

Course of conduct principle: The second is that penalties may be separately imposed for both making, and then implementing, a cartel agreement. It is not generally appropriate to impose one overall penalty by the "course of conduct" or "one transaction" principle to facts which show that the contraventions were separate contraventions, rather than arising from the same conduct.

Yazaki Corporation made an overarching cartel agreement

The Court held that two Japanese corporations which supplied components to the automotive industry in Australia and elsewhere, Yazaki Corporation and another supplier, engaged in cartel conduct in contravention of the CCA, through their wholly owned Australian subsidiaries who implemented the cartel in Australia. The cartel concerned the supply of automotive wire harnesses and had been in place for a number of years. Automotive Wire harnesses are the wiring and circuits that distribute power and electrical signals to other components in a motor vehicle. Yazaki was among the main global manufacturers of wire harnesses.

The cartel involved Yazaki and the other supplier coming to an overarching cartel agreement that they would:

- meet and discuss any tender requests for automotive wire harnesses;
- agree upon the allocation of their respective products to various vehicle manufacturers in various countries;
- agree upon the prices their respective local subsidiaries would submit in response to any tenders; and
- ensure, as far as possible, that tenders would award supply contracts in accordance with their agreed allocation.

The Australian Competition and Consumer Commission (**ACCC**) sought pecuniary penalties and other relief which fell within the six year limitation period under the CCA, being cartel conduct in giving effect to the overarching cartel agreement between 2008 to 2011.

A penalty can be imposed on a foreign parent where a local subsidiary unknowingly implements a cartel agreement made by its foreign parent

Yazaki directed its Australian subsidiary as to the manner, pricing and terms on which it submitted its responses to various tenders for automotive wire harnesses. The Full Court held that Yazaki was, through its Australian subsidiary, carrying on business in Australia in relation to the cartel activities (although it was not otherwise closely involved in its Australian subsidiary's business) and was therefore subject to Australia's competition laws. Yazaki's subsidiary was not shown to be aware of the existence of any of the unlawful agreements made by its parent Yazaki .

The foundation of the Full Court's reasoning was that in a global supply chain, "cartel provisions are to be interpreted in a way that makes their enforcement effective".

The Full Court held that:

- the local subsidiary could implement the cartel without being aware of its existence if it engaged in relevant conduct to implement the cartel activities- "the CCA focuses on the act of implementation of the cartel agreement and does not import any knowledge requirement ";
- the Court said "there is nothing inherently incongruent or anomalous with the proposition that an entity could play a role in giving effect to a cartel arrangement – for instance, at the direction of its controlling parent – without necessarily possessing subjective knowledge of that arrangement.Indeed, the very nature of cartel arrangements suggests that they will be surreptitious and their principal architects may be reluctant to disclose their existence and nature to the extent such disclosure to other parties (including related parties) can be avoided";
- a narrow interpretation would enable foreign parent companies to avoid penalties, even in the case where a subsidiary it controlled was directed to act by its foreign parent, although the subsidiary had no knowledge of the purpose of the section.

Where the penalty is determined by turnover, the maximum pecuniary penalty is to be calculated as 10% of the total Australian connected turnover of the contravening corporation and related bodies corporate (ie. the Australian corporate group)

The CCA prescribes that the pecuniary penalty payable is not to exceed the greatest of:

- AU$10 million per contravention;
- if the Court can determine the value of the benefit from the conduct, 3 times the value of the benefit; or
- if the Court cannot determine the value of the benefit, then 10% of the total Australian connected annual turnover of the body corporate in 12 months preceding the end of the conduct.

The Full Court held:

- The purpose of the provision is to fix a maximum penalty payable for a contravention by the contravening corporation;
- The three means of fixing the maximum penalty are alternative bases fixing the maximum penalty, and are not a proxy for one another; and
- The 10% of annual turnover metric only applies when the 3 times the value of the benefit metric cannot be applied.

In Flight Centre Limited v ACCC (No 2) [2018] FCAFC 53, the Court held that penalties can only be calculated by reference to the gains made from the contravening conduct, if the corporation is shown to have derived a benefit from the conduct. In such case, if the size of the benefit or gain cannot be determined, then 10% of turnover is used (instead of three times the gain) to determine the maximum penalty applicable.

As to how 10% of total Australian connected annual turnover is to be calculated, the Full Court held that it includes the turnover of all values of the supplies made by every company in the Australian corporate group, irrespective of their connection with the conduct of the contravening company (here, Yazaki).

Using this reasoning, the Full Court held that the maximum penalty was AU$87.4 million, and imposed a penalty of AU$46 million.

The AU$46 million penalty reflected five separate contraventions, not two "broad categories" or "courses of conduct"

The cartel behaviour spanned a 20-year period. To determine the penalty payable by Yazaki, the primary judge had found that Yazaki had engaged in two "broad categories" of cartel conduct by applying the "course of conduct" or "one transaction" principle, which groups individual acts or omissions as "steps along the way" to the commission of a broader, single offence.

The Full Court, however, reversed this finding: in determining the maximum penalty, each contravention must be assessed and treated in isolation. The "course of conduct" principle becomes relevant only in determining the actual penalty payable – and even then, the Court is not obliged to apply the principle "if the resulting penalty fails to reflect the seriousness of the contraventions".

The Full Court recognised:

- Where there is a contravention of two or more of the competition provisions of the CCA but the conduct is the same, the contravener is not liable to more than one pecuniary penalty "in respect of the same conduct";
- The "course of conduct" or "one transaction" principle, and the "totality principle", are not rules, but principles or tools to assist the Court in arriving at an appropriate penalty in circumstances where its task is to determine a penalty for a multitude of civil penalty contraventions. In this way the penalty which is imposed is a matter of fact and judicial discretion.
- In applying the "course of conduct" principle it is not appropriate for a Court to treat multiple contraventions as just one contravention for the purposes of determining the "maximum limit to consider as a yardstick in reaching the appropriate penalty". The issue is whether the contraventions arise out of the same course of conduct or the one transaction, such that it is appropriate that a "concurrent" or single penalty should be imposed for the contraventions.

The Full Court also held that the primary judge had erred in finding that the conduct amounted to two courses of conduct and, therefore, two maximum penalties. Here, the conduct in fact involved five separate and discrete acts, each with its own factual substrate, and which attracted its own maximum penalty. Broadly, these were:

- The making of an agreement in relation to a specific request for tenders in 2008;
- Giving effect to that arrangement and the overall cartel arrangement;
- Discussions in Japan between competitors about the agreed prices that were going to be submitted for that tender;
- The submission of prices to the customer in Japan in responding to the tender; and
- The subsequent submission of the same prices by the local subsidiary to the customer's local subsidiary in Australia.

Reflections and Implications

The decision in Yazaki has been welcomed by the ACCC at a time when the ACCC has been vocally campaigning that competition and consumer law penalties in Australia are too low and that penalties should not merely be a cost of doing business for multinationals and large domestic entities.

It also follows the "Pecuniary Penalties for Competition Law Infringements in Australia" report published by the OECD, which found that "the amount of pecuniary penalties imposed for competition law infringements in Australia is significantly lower, in both absolute and relative terms, than the amounts imposed in other OECD jurisdictions, particularly as regards large companies or conduct that lasted for a long period of time".

The significance of the decision is that it clarifies that it is no defence to civil liability if a local subsidiary implements a cartel at the direction of their foreign parent in circumstances where it has no knowledge that the cartel exists; it clearly outlines the limitations on the Court (and, by extension, parties seeking to settle civil claims) in applying the "course of conduct" or "one transaction" principle to justify a lower penalty. What the Full Court has clearly said is that applying this principle will not be appropriate where the contravention does not arise genuinely out of the "same conduct".

We expect that the Full Court's decision will further encourage the ACCC as it pushes for higher civil penalties, both in contested cases and settlements, and both in a competition and consumer law context.

Specifically in the context of cartels, the decision may influence the willingness of companies to come forward under the ACCC's immunity policy for cartel conduct.

And, in a consumer law context, if the Government's reforms to consumer law penalties to bring them into line with the penalties for competition law penalties are passed by the Parliament as expected later this year, then the principles concerning the calculation of maximum penalties will also be particularly relevant to foreign entities that carry on business in Australia and contravene the consumer law,

The offshore reach of Australian consumer law was also seen in the recent decision in Valve Corporation v ACCC [2017] FCAFC 224 where consumer law penalties of AU$3m were imposed for failure to provide refunds for breach of statutory consumer guarantees of "acceptable quality" for online sales by a US based gaming supplier into Australia.

It remains to be seen whether Yazaki will seek leave to appeal against the penalties from Australia's ultimate Court, the High Court of Australia.

Note: Clayton Utz acted for the immunity applicant in the Yazaki matter

GET IN TOUCH

Mihkel Wilding

SPECIAL COUNSEL, SYDNEY
+61 2 9353 5814
mwilding@claytonutz.com

Michael Corrigan

PARTNER, SYDNEY
+61 2 9353 4187
mcorrigan@claytonutz.com

CONTACT US

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

Bennett Jones

Canada Retaliates to U.S. Tariffs on Steel and Aluminum

June 05, 2018

Written by Darrel H. Pearson, Jessica B. Horwitz, Sabrina A. Bandali

As of midnight on May 31, the Trump administration revoked the exemptions to the U.S. ad valorem tariffs on imports of steel and aluminum previously granted to Canada, the EU, and Mexico. In a swift response following the U.S. announcement, Canada (as well as the EU and Mexico) declared its intention to impose retaliatory tariffs against U.S. exports.

President Trump imposed the tariffs through presidential proclamations under an obscure provision in U.S. domestic law, Section 232 of the *U.S. Trade Expansion Act of 1962*. The chosen legal mechanism is irregular and trade experts question its application given the requirement that true national security risks exist. WTO Agreements permit application of protective tariffs under other conditions, including dumping, subsidization, and import surges, but the U.S. government has chosen to take the Section 232 route which is not burdened by the rigor of as many procedural steps and satisfaction of legal conditions (other than security risk). "National security" in the U.S. usage includes the "general security and welfare of certain industries, beyond those necessary to satisfy national defense requirements, which are critical to minimum operations of the economy and government."

The move naturally seen by the Canadian government as an aggressive tactic by the United States to pressure its trading partners into making trade concessions, notably with respect to Canada and Mexico in the NAFTA renegotiations. Canada's Minister of Foreign Affairs Chrystia Freeland described the U.S. tariffs as a "specious and unprecedented use" of the Section 232 national security exemption.

The list of U.S. products proposed to be subject to Canadian retaliatory measures is available on the Department of Finance website. These are "dollar for dollar" countermeasures on similar categories of U.S. steel and aluminum products as the Canadian products targeted by the United States, as well as 71 categories of other industrial and consumer goods. The collective value of imports of the targeted products is C$16.6 billion (US$12.8 billion) per year, which is approximately the same value as Canadian steel and aluminum exports to the United States affected by the U.S. tariffs. Minister Freeland described it as the strongest trade action Canada has taken in the post-war era.

The Canadian government is currently seeking public input on or before June 15, following which the government may modify or expand the list. July 1 is the implementation date.

Canada also announced that it has filed requests for consultations at the WTO over the legality of the U.S. steel and aluminum tariffs, and has requested consultations with the United States under Chapter 20 of the NAFTA.

China and India have already filed requests for consultations through the WTO (DS544 and DS547), and other member states have asked to join these consultations. The EU, Japan, Russia, Turkey, India and China have also notified the WTO of their intent to impose countermeasures against the United States in response to the steel and aluminum tariffs.

This unequivocal response demonstrates that key U.S. trading partners will not easily capitulate to pressure from the U.S. administration. However, it also means that there will be significant economic disruption and additional costs in the short to medium term for Canadian businesses who trade in the targeted products.

In addition, on May 23, the U.S. Commerce Department initiated another national security investigation into automobiles and auto parts. Given the integration of the North American auto industry, auto tariffs would cause substantial economic disruption to manufacturing supply chains. The threat of Section 232 tariffs on auto parts could significantly increase the negotiating advantage of the United States against Canada and Mexico in the NAFTA negotiations. The default "Most Favoured Nation" U.S. tariff rate applicable to Canadian and Mexican originating auto parts in the absence of NAFTA is only 2.5 percent, which pales by comparison to a 25% Section 232 surtax.

And, if NAFTA leverage is the U.S. motivation for these Section 232 tariffs, there is no reason to believe that it will stop at steel, aluminum and autos; the U.S. could initiate investigations into other categories of goods. Looking ahead, these actions may be precursors to further protectionist trade measures undertaken by both sides.

Legal Framework—WTO Countermeasures

The WTO challenges brought to date against the U.S. actions are grounded in Article XIX of GATT 1994 and the Agreement on Safeguards. Safeguards are exceptional, emergency measures that member states are allowed to undertake for a limited period of time when imports of particular goods are causing or threaten to cause serious injury to the importing member's domestic industry (Agreement on Safeguards, Article 2). Generally, a member applying a safeguard measure must balance the effect of the safeguard by compensating trading partners through concessions or other obligations. If the trading partners cannot agree on the appropriate compensation within 30 days, then the exporting partner may retaliate by suspending “substantially equivalent” concessions or other obligations, i.e., imposing countermeasures.

Canada's Countermeasures

Canada's countermeasures will most likely take the form of a surtax under the *Customs Tariff* Act on listed products, but could also involve quantitative restrictions (i.e., import quotas or tariff-rate quotas under the Export and Import Permits Act), or some combination of tariff and non-tariff measures.

The list of countermeasure products may seem random, but it is anything but. WTO countermeasures need not be imposed against the same products targeted by the measures of the offending state. Typically, a retaliating state will choose items that will exert the greatest political pressure on the offending member state and avoid those needed for use as inputs by domestic manufacturers. Canada's list appears carefully developed to target the home states of prominent members of Congress, and/or swing electoral districts in the upcoming U.S. congressional elections this fall. Some examples, with targeted, though not exclusive, States in parenthesis, include:

- household appliances, beer kegs and ketchup (e.g., Pennsylvania—American Keg Company and Heinz);
- roasted coffee (e.g., Washington state - Starbucks);
- whiskies(e.g., Kentucky—home state of Republican Senate majority leader Mitch McConnell);
- candles and soaps (e.g., Ohio);
- boats (e.g., South Carolina);
- maple syrup (e.g., Maine);
- orange juice (e.g., Florida); and
- fruit jams, soy sauce, facial tissues and felt-tipped pens (e.g., Wisconsin—home state of Republican House Speaker Paul Ryan).

The Canadian government also would have considered alternative availability of the products from domestic or non-U.S. suppliers in order to minimize the disruptive impact of the tariffs on Canadian importers.

The surtax will be assessed on an ad valorem basis, meaning calculated as a percentage of the declared value for duty of the imported goods. This reinforces the importance of accurate customs valuation accounting, and of designing commercial import transactions in a manner that minimizes the customs value.

With respect to enforcement of the countermeasures, only goods of U.S. origin will be subject to the countermeasures. Goods merely in transit through the United States, or goods that incur minor processing in the United States that does not affect the origin (such as marking, tagging or packing) and which are onward shipped to Canada will not be subject.

An important challenge will be the identification of whether goods are subject to countermeasures by

virtue of their origin, particularly with respect to fungible or difficult to mark products such as food. Origin for countermeasures purposes will be determined under the rules contained in Canada's *Determination of Country of Origin for the Purposes of Marking Goods (NAFTA Countries) Regulations*.

Finance Minister Bill Morneau released a statement on March 30, 2018 that Canada will also be expanding the scope of its country of origin marking regime for steel and aluminum products. The public consultation period for proposed amendments of the *Determination of Country of Origin for the Purposes of Marking Goods (NAFTA Countries) Regulations and the Determination of Country of Origin for the Purpose of Marking Goods (Non-NAFTA Countries) Regulations* closed on May 14. These changes are designed to improve the Canada Border Services Agency's access to information and ability to identify source countries, volumes and prices of subject goods, which could in turn lead to more self-initiated *Special Import Measures Act* (SIMA) investigations.

Note that the currently proposed Canadian countermeasures are to be proportional to the value of trade affected by the U.S. steel and aluminum tariffs. If the U.S. administration were to impose tariffs on additional categories of goods, Canada's countermeasures will expand to reflect an equivalent value of trade of the new category.

What Can Businesses Do to Protect Themselves?

It is critical that Canadian importers and exporters review their trade policies and examine their supply chains in light of the new trade law paradigm. Canadian importers and exporters exposed to risks of U.S. trade policy are advised to consult with experienced international trade counsel immediately to help gird themselves for the fight, and to explore strategies to defend themselves and minimize risk to business outcomes caused by these or future "trade war" measures.

The following are some thoughts to keep in mind when planning risk response strategy:

- Importers should immediately review the HS classifications and description of their imported goods to see whether they import goods covered by the proposed countermeasures list, and then further review to ascertain whether any covered imports are of “U.S. origin”.
- The Government of Canada has invited members of the public to comment in response to the proposed countermeasures consultation. The deadline to submit comments is June 15, 2018. Interested parties, including U.S. exporters, should seriously consider making submissions.
- The countermeasures will apply to goods that enter Canada on or after the July 1 effective date regardless of whether the goods were already purchased, pre-ordered or in transit prior to that date. Importers should therefore also review existing orders and goods in transit, assess risk that the shipments could be subject to the surtax, and consider options to accelerate shipment, delay the acquisition, or switch to a non-U.S. goods supplier to avoid additional costs. In this connection, diversification of input sources and export markets should be examined.
- Businesses should recall that the countermeasures, as well as typical current or future trade remedy

duties under the SIMA, will be implemented on an ad valorem (percentage of value) basis. Importers should account for the additional tariff when budgeting. The ad valorem nature of the tariffs also underscores the importance of taking steps to legitimately reduce value for duty through thoughtful planning of the commercial structure of the sale for export, to minimize tariffs.

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

700 - 401 W GEORGIA ST.
VANCOUVER, BC V6B 5A1
CANADA
TELEPHONE
604 682 3664
FAX
604 688 3830
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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.

700 - 401 W GEORGIA ST.
VANCOUVER, BC V6B 5A1
CANADA
TELEPHONE
604 682 3664
FAX
604 688 3830
RBS.CA

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*

700 - 401 W GEORGIA ST.
VANCOUVER, BC V6B 5A1
CANADA
TELEPHONE
604 682 3664
FAX
604 688 3830
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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.

700 - 401 W GEORGIA ST.
VANCOUVER, BC V6B 5A1
CANADA
TELEPHONE
604 682 3664
FAX
604 688 3830
RBS.CA

/Carey

June, 2018

NEW DUCT LAW'S REGULATION AND TECHNICAL RULE

On April 23, 2018, Supreme Decree 167 of the Ministry of Transportation and Telecommunications (dated September 15, 2016), which regulates the ways and conditions to guarantee the freedom of choice in the contracting and receiving of telecommunications services in private estates, buildings and co-owned real estate (the "Regulation"), was published. Also, on April 27, 2018, Exempt Resolution 766 of Subtel (the Undersecretary of Telecommunications), which establishes the technical rule of the Regulation (the "Technical Rule"), was published.

The publication of both regulations is intended to enforce and apply the provisions of Law No. 20,808, which protects the freedom of choice of cable, internet and telephone services, also known as "Duct Law", by establishing the minimal conditions of construction and design that allow for free access to telecommunications services by owners or lessees of units in private estates or building projects, formed by multiple alienable or of exclusive ownership units, whether or not subject to the real estate co-ownership regime (such as buildings and condominiums), and by units in existing buildings.

Both regulations combine established regulatory and technical standards so the units located in the abovementioned projects may support multiple services from multiple telecommunications operators, in optimal quality and continuity conditions, allowing users to freely choose between them and, in the case of existing buildings or condominiums, their owners or lessees may choose between two or more operators. Thus, the main regulated matters may be summarized as follows:

1. **Registry of Real Estate Projects:** The Regulation requires the creation of a new web-based real estate project registry that telecommunications service providers can access for detailed information that will allow them to expand their networks to new users. Compliance with this registration will be a requirement for the municipal final approval of projects.

2. **Telecommunications Project:** The regulations establish that real estate projects must include a telecommunications plan, that includes the design and construction of, "*the necessary capacity for multiple telecommunications operators to provide their services to the relevant units of the private estate or building, under equal conditions...*". The plan must be verified by an authorized telecommunications planner, who will issue a report regarding the installations once the works are completed satisfactorily.

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

Alfonso Silva
Partner
+56 2 2928 2232
asilva@carey.cl

Tomás Varela
Associate
+56 2 2928 2217
tvarela@carey.cl

Matías Osses
Associate
+56 2 2928 2232
mosses@carey.cl

Carey y Cía. Ltda.
Isidora Goyenechea 2800, 43rd Floor.
Las Condes, Santiago, Chile.
www.carey.cl

3. **Internal Telecommunications Network:** The Internal Telecommunications Network, which must be part of every telecommunications project and be dedicated exclusively to telecommunications services, is defined and regulated. Telecommunications service providers must make equitable use of such networks, without making alterations, interventions, hindering or obstructing other providers' installations. Likewise, technical specifications are established for the internal network's physical infrastructure and for telecommunications services with access to wired or wireless networks, in order to ensure appropriate services are available to users.

4. **Protocol for Access to Existing Buildings and Condominiums:** The regulations include a special regime for existing buildings and condominiums, due to the difficulties that requiring them to modify their internal telecommunications networks would have involved. Thus, use and access to shared installations, feasibility and procedures for installation or extension of internal and/or external telecommunications networks and dispute resolution were regulated.

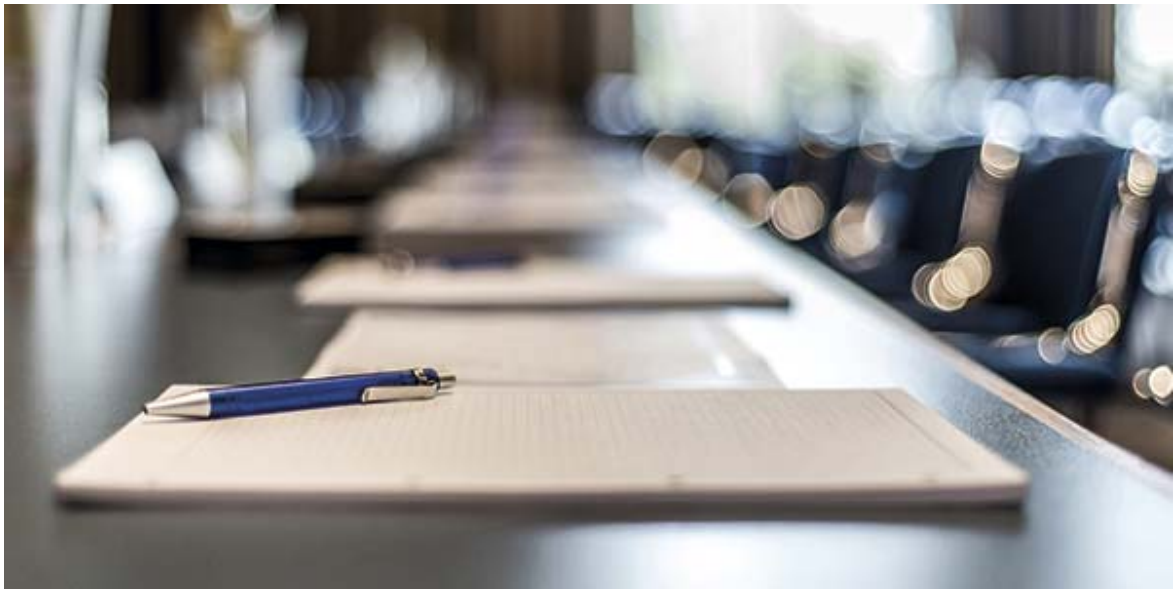
   For example, they establish the right for every owner or lessee of a unit to require the administrator or owner to execute the necessary works in order to guarantee their right to choose between at least two providers in the contracting and reception of telecommunications services. In order to ensure that multiple options are available to customers, exclusivity agreements executed with a particular telecommunications provider are unenforceable against unit owners or lessees. When the access requires the performance of works over shared property, that qualify as an extraordinary shared expense, approval by an extraordinary meeting of co-owners would be required.

   Likewise, new telecommunications services providers are guaranteed the right to use external installations of buildings and condominiums that allows their access regardless of the ownership and nature of the property over which such installations are located, to the extent that such use does not affect the provision of already existing services. In case of doubt regarding the feasibility of using such installations, the regulations require that potential new providers offer alternatives to solve or mitigate risks. If there is no agreement, whether for technical or economic reasons, the dispute must be submitted to ex aequo et bono arbitration.

The Regulation, as well as its Technical Rule, will enter into force on September 3, 2018, aiming to promote competition and participation of a larger number of telecommunications providers, in a market sector that was stagnant due to technical and contractual restrictions.

Resolution 2021 of May 9, 2018

Mon, 05/21/2018 - 10:48 *NewsFlash: 417* *Labor & Employment*



Resolution 2021 of May 9, 2018

On May 09, 2018, the Ministry of Labor issued the Resolution 2021 by means of which it establishes guidelines with respects to the Inspection, Surveillance and Control performed before the content of article 63 of Law 1429 of 2010 (the "Resolution). The referred provision prohibits the engagement of permanent missionary activities with Labor Cooperatives or under any other modality that affects the constitutional and legal rights of the employees.

By means of the Resolution, the Ministry of Labor defined the labor intermediation and established that the Regional Headquarters in charge of the Inspection, Surveillance and Control will impose the corresponding sanctions before the engagement with Labor Cooperatives or Pre-Cooperatives or under any other modality that affects the constitutional and legal rights of the employees, through the development of illegal intermediation activities.

Thus, the Ministry determined that the Regional Headquarters must identify the engagement scheme with third parties and, in the event of the execution of agreements with independent services contractors, it will analyze, among others, the following:

a) If the contractor's employee performs the same or substantially the same duties as the ones performed by the contracting party's employees and to which kind of duties they correspond within the contracting party's activities.

b) If the contractor's current employees have been employees of the contracting party or of any other contractor that the contracting party has had.

c) If the contractor has autonomy in the usage of the production means in the execution of the hired processes or sub-processes.

d) If the contractor executes over its employees the regulatory and disciplinary powers or, if on

the contrary, this is performed by the contracting party.

e) If the contractor and the contracting party incur in behaviors that violate the principles and rules in relation with the execution or development of the figure that bonds them.

Finally, the Resolution establishes the cases of illegal labor intermediation when engaging with Temporary Employment Agencies, Labor Cooperatives and Pre-Cooperatives, Independent Contractors, Union Agreements and when providing placement services.

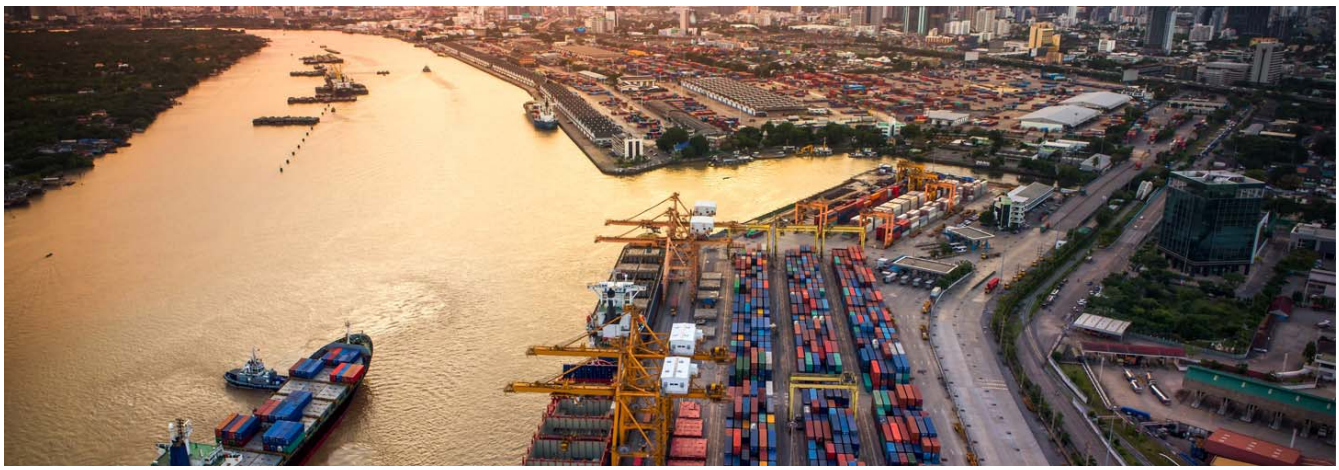
For more information please contact

- Catalina Santos Angarita
- Daniela Caicedo Callejas
- María Silvana García

www.bu.com.co

Arias

EL SALVADOR: REFORMS TO THE SPECIAL LAW ON CUSTOMS INFRACTIONS



On May 28, the Legislative Assembly approved a reform to the Special Law on Customs Infractions. Among the most important reforms are the following:

1. The administrative infractions will be sanctioned with a fine equivalent to 0.25% on the accounting equity; currently said fine is equivalent to 0.5% on the accounting equity.

2. An omission or inaccuracy in the declaration of goods that is due to an excess or missing merchandise, and does not cause a fiscal loss, will have a tolerance margin of 5% on parameters of quality, volume, weight or value of the goods.

3. For tax infractions, a maximum tolerance of 5% of the total weight of an item of merchandise introduced, when there is an inferior difference than the actual weight that has been declared. The same will apply to inaccuracies and omissions caused by missing re-export declarations that come from special customs regimes. If the surplus exceeds 5% but the tax that must be paid does not exceed $100, a sanction equivalent to 100% of the tax not paid will be applied.

4. The tax fines that were sanctioned with 300% of the evaded taxes will now be sanctioned with 100%.

5. An abbreviated voluntary procedure is regulated for those offenders who voluntarily submit themselves to the application of sanctioning procedures as long as the fines do not exceed 6 monthly minimum wages in the commerce and services sector.

6. The amount from which a tax loss is considered a crime of customs income fraud was increased. With the reform, they will be sanctioned with four to six years in prison if those damages exceed 333 minimum wages in the commerce and services sector ($101,288.61), and not $25,000, as it is now in force.

7. In the cases in which subjects are in judicial processes before the courts of the litigation, whenever a definitive sentence has not been issued, the recalculation of the sanctions imposed on the basis of the reform must be made upon request of the interested party.

GIDE

GIDE LOYRETTE NOUEL

Statute of limitations on patent invalidity and infringement actions in France: amendments made by Order No. 2018-341 of 9 May 2018

15 May 2018

Client Alert | France | IP-TMT

French Order No. 2018-341 of 9 May 2018 relating to the European Patent with unitary effect and the Unified Patent Court ("UPC") was published in the Official Journal on 10 May 2018.

This long-awaited text has a twofold objective: to ensure the compatibility of legislation, in particular the French Intellectual Property Code, with the two European Union regulations forming the "patent package" (Regulations (EU) No. 1257/2012 and No. 1260/2012) and to implement the agreement on a unified patent court, signed in Brussels on 19 February 2013 and ratified by France by **Law No. 2014-199 of 24 February 2014** ("the Agreement").

Among the substantial amendments made by this text are those relating to the statute of limitations on actions relating to a European or French patent: the limitation period for bringing invalidity actions on the one hand, and

the limitation period for bringing infringement actions on the other. They ensure equal treatment before the Paris District Court and the UPC and provide greater legal certainty.

Patent invalidity actions are not statute-barred

Article 13 of the Order, which appears in its Title II *"Provisions relating to legal proceedings relating to European patents and French patents"*, introduces a new Article L. 615-8-1 in the French Intellectual Property Code according to which : *"A patent invalidity action is not statute-barred."*

The purpose of this provision is to put an end to the application by the French Courts of the general five-year statute of limitations provided for in Article 2224 of the French Civil Code (resulting from Law No. 2008-561 of 17 June 2008 reforming civil limitation rules generally) and the delicate determination of the starting point for this 5-year period as regards patents. In recent years, this issue has been the subject of much legal debate.

This text is to be welcomed. It avoids a distortion between the French regime and that of the UPC as well as between the French regime and that of our European neighbors which have no statute of limitations applicable to patent invalidity actions.

Some nuances must however be identified:

- First, the entry into force of the provisions of the Order is subject to the entry into force of the Agreement (Article 23 I of the Order), which is itself dependent upon its ratification by Germany, which ultimately depends on the outcome of a constitutional complaint there;
- Secondly, according to Article 23 II of the Order, *"the provision provided for in Article 13* [the new Article L. 615-8-1] *has no effect on a limitation period that has already passed. It applies to actions for which, on the date of its entry into force, the limitation period has not yet expired"*. When it enters into force, the debate will therefore remain open as to whether the limitation period has already expired or not.
- Lastly, this text, which only deals with patents, leaves open the question of the statute of limitations which are applicable to invalidity actions of other industrial property rights, and, in particular, trade marks.

Modification of the starting point of the limitation period for patent infringement actions

The time limit for instituting patent infringement proceedings remains five years. However, Article 12 of the Order modifies the starting point of this time limit. Article L. 615-8 of the French Intellectual Property Code, as superseded, provides that infringement actions shall be statute barred after five years running, no longer *"from the facts giving rise to the cause of action"* (i.e. the date of the acts of infringement), but, *"from the date on which the holder of a right knew or should have known the last fact allowing him to bring action"*.

This amendment, which echoes Article 72 of the Agreement and Article 2224 of the Civil Code, is undeniably more favorable to right holders.

Its entry into force remains, however, also subject to the entry into force of the Agreement and the determination of the *"date on which the holder* [of the patent] *knew or should have known the last fact allowing him to bring action"* risks giving rise to some interesting debates.

One may also regret that such harmonisation did not extend to other intellectual property rights, but in ruling by Order, the Government could only act in the strict context of an enabling law which did not relate to these other rights (law no. 2016-1547 of November 18, 2016 of modernisation of justice of the XXIth century, Article 109 I 3° and 4°). It is therefore possible that the French legislator will again intervene on this point, perhaps on the occasion of the transposition into French law of the *"trade mark reform package"*.

Finally, this Order must be accompanied by a decree which will determine conditions of its implementation.

Click here https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000036887984&dateTexte=&categorieLien=id to read the French Order No. 2018-341 of 9 May 2018.

By counsel **Julie Pailhès**

This Client Alert is not intended to constitute legal advice and should not be taken as a recommendation to take action or withhold from taking action.

Lawyers

Raphaëlle Dequiré-Portier

Grégoire Triet

Arnaud Michel

Emmanuel Larere

Jean-Hyacinthe de Mitry

Julie Pailhès

www.gide.com

Private action for contempt of court?

May 2018

Hogan Lovells

Private action for contempt of court?

Introduction

In March, the UK Supreme Court handed down a landmark judgment[1], in which it held that:

(a) contempt of court constitutes unlawful means for the purposes of the tort of unlawful means conspiracy, *giving rise to a private cause of action*; and

(b) where a conspiracy is hatched in England, the English courts have jurisdiction under the Lugano Convention to hear a claim founded in that conspiracy (even if all other elements of the tort take place abroad).

Given the similarity of the law on the economic tort of conspiracy in Hong Kong and England, this decision may provide a new weapon for judgment creditors to bring a civil claim where a defendant fraudulently conspires with a third party to breach a court order in an attempt to avoid enforcement in the Hong Kong courts.

Moreover, the UK Supreme Court expressly left open the possibility that a plaintiff may be able to bring a claim for damages based on contempt alone, ie without having to rely on any other cause of action. It therefore remains to be seen whether this will be relied upon by future plaintiffs to found a damages claim for contempt of court.

The judgment also provides helpful guidance on how to determine the place where a conspiracy occurred for the purposes of establishing jurisdiction. The Lugano Convention rules on jurisdiction in tort claims are similar to the Hong Kong rules on granting permission to serve a tort claim out of the jurisdiction, though plaintiffs in Hong Kong will also need to show that Hong Kong is the *forum conveniens* and that their claim is also actionable under the laws of the foreign country where the tort was in substance committed.

Nevertheless, the decision could potentially encourage Hong Kong courts to assert jurisdiction over conspiracy claims where the conspiratorial agreement was made here.

Background

JSC BTA Bank's (**BTA**) claim in these proceedings arises in the context of the wide-ranging fraud perpetrated by certain members of its former management, in particular its former Chairman, Mr Mukhtar Ablyazov. By multiple sets of proceedings in the English High Court, BTA successfully obtained judgments against Mr Ablyazov and his associates for over US$5 billion, as well as an order to identify and disclose the whereabouts of his assets, a worldwide freezing order and orders appointing receivers over his assets (the **Ablyazov Orders**).

During the course of the proceedings, the courts held that Mr Ablyazov sought to keep his assets away from BTA through the use of nominee arrangements, complex corporate structures and dealings in breach of the Ablyazov Orders. His *modus operandi* has been to distance himself from his assets and instead to put trusted associates forward as their purported beneficial owners, often being family members including, more recently, his son-in-law, Mr Khrapunov.

In July 2015, BTA commenced proceedings against Mr Khrapunov for conspiracy to injure by unlawful means. In particular, BTA alleged that Mr Khrapunov conspired with Mr Ablyazov to breach the Ablyazov Orders in an attempt to prevent BTA from being able to enforce its judgments against Mr Ablyazov's assets. BTA's case is that the conspiracy was hatched in England, albeit that all steps to implement the conspiracy appear to have taken place overseas.

Mr Khrapunov sought to challenge both the validity of BTA's cause of action and the English courts' jurisdiction to hear the claim.

[1] JSC BTA BANK V (1) MUKHTAR ABLYAZOV (2) ILYAS KHRAPUNOV [2018] UKSC 19

Breach of court order constitutes 'unlawful means' for the tort of conspiracy

Mr Khrapunov argued that contempt of court could not constitute unlawful means for the purpose of the tort of conspiracy because, apart from any combination, such contempt would not be actionable at the suit of the plaintiff. He also argued that there is a positive rule of law (the alleged "preclusionary rule"), which precludes a party from relying upon a contempt of court in a private law action for damages.

In essence, he argued that it would be contrary to public policy to allow a private law right of action to be based on contempt, because the principles underlying the law of contempt require that the court has control over the consequences of breach of court orders – whereas a right of action would make damages for contempt a matter of right.

Dismissing those arguments, the Court found that the *correct test in an action for conspiracy is whether there is a just cause or excuse for defendants to combine to use unlawful means*.

This would depend on the nature of the unlawfulness and its relationship with the resultant damage to the plaintiff. For example, a criminal offence which was objectively directed against the plaintiff could constitute unlawful means for the purpose of the tort of conspiracy, even if the conduct in question is not otherwise actionable as an independent tort and the predominant purpose was not to injure the plaintiff.

In dealing with frozen assets, Messrs Ablyazov and Khrapunov acted in contempt of court (a criminal offence) and, whilst their predominant intention may have been to further Mr Ablyazov's financial interests, the court found that the damage caused to BTA was clearly not just incidental, as the object of the conspiracy was to prevent BTA from enforcing its judgment debts. As such, BTA's allegations of contempt were, if proven, sufficient to constitute the unlawful means for the purposes of the tort of conspiracy to injure by unlawful means.

The Court also rejected Mr Khrapunov's public policy argument, on the basis that the same act can give rise to both criminal and civil liability and, in such cases, the sentence for the crime will be discretionary but the civil consequences will not. For example, a person may be given immunity in a criminal trial for burglary for testifying against others involved, but that will not protect him against civil liability to the owner of the stolen goods.

Compensation for contempt alone

The Court declined to decide the question of whether damages should be available to a party based on contempt alone. However, the Judges did appear to see some force in the argument that breach of a court order can ground a cause of action for damages, and remarked that "*we do not think that the last word has necessarily been said on this subject in this court*".

Jurisdiction where the conspiracy was hatched or where implementation took place?

The Lugano Convention[2] provides that "*A person… may… be sued… in matters relating to tort… in the courts for the place where the harmful event occurred*", which the Court of Justice of the EU (**CJEU**) has interpreted as giving a plaintiff the option of suing either (a) in the courts for the place where the damage occurred, or (b) in the courts for the place of the event giving rise to the damage[3].

This is similar to the Hong Kong test for obtaining leave to serve a writ out of the jurisdiction[4]; leave to serve out of the jurisdiction can be granted if "*the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction*".

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2 Article 5(3)
3 *Bier v Mines de Potasse*(Case C-21/76) [1978] QB 708
4 Hong Kong RHC O. 11 r. 1(1)(f),

Mr Khrapunov argued that the hatching of the conspiracy was not in itself harmful or the proximate cause of any loss. Instead, the steps taken in furtherance of the conspiracy (ie the alleged dealings) were the relevant "events giving rise to the damage" and, given those took place overseas, he argued that the English court did not have jurisdiction.

The Court observed that the authorities focused on the "*originating event*" of the damage and the "*event which sets the tort in motion*". One such example was the *Akzo Nobel*[5] competition law case in which the CJEU identified the formation of a cartel, rather than its implementation, as the event giving rise to the damage.

In this case, Mr Khrapunov's alleged dealings with frozen assets were undertaken as part of the implementation of his agreement with Mr Ablyazov. It was therefore the hatching of the conspiracy in England which constituted the originating event / the event which set the tort in motion. As such, it was held that the English courts have jurisdiction to hear BTA's claim against Mr Khrapunov.

Comment

The UK Supreme Court's decision is a significant development both in the instant case and in the state of the law more generally: it gives judgment creditors an important weapon to recover losses from third parties who conspire with a defendant to breach court orders in an attempt to avoid enforcement. Under English law (and likely Hong Kong law), victims may now bring a claim for conspiracy based on breach of a court order – and they may even be able to bring a claim for damages based on contempt alone.

As regards the jurisdiction point, this decision emphasises that when looking for the place of the event giving rise to damage, the court should focus on the events which set the tort in motion. This could influence the approach taken by Hong Kong courts when determining whether to grant leave to serve out of the jurisdiction in the context of tort claims. However, in the absence of any treaty analogous to the Lugano Convention, plaintiffs in Hong Kong will still have to grapple with *forum conveniens* principles and the double actionability rule.

Hogan Lovells acts for JSC BTA Bank worldwide in these proceedings.

Contacts

Chris Dobby
Partner, Hong Kong
chris.dobby@hoganlovells.com

Allan Leung
Partner, Hong Kong
allan.leung@hoganlovells.com

Mark Lin
Partner, Hong Kong
mark.lin@hoganlovells.com

5 *CDC Hydrogen Peroxide v Akzo Nobel* (Case C-352/13) [2015] QB 906

ABNR

COUNSELLORS AT LAW

NEWS DETAIL

20/04/2018

OJK Issues New Rules for Assessing Financial Soundness of Venture Capital Companies in Indonesia

1. Background

The Financial Services Authority ("**OJK**") has issued new rules (the "**Rules**") to give effect to the provisions of Chapter V of OJK Regulation No. 35/POJK.05/2015 (the "**Regulation**"), which governs the management of venture capital ("**VC**") providers. The Rules are set out in OJK Circular No. 7/SEOJK.05/2018 on the Financial Soundness of Venture Capital Companies (the "**Circular**"), which entered into effect on 7 March 2018.

The provisions of Chapter IV of the Regulation essentially require all venture capital companies ("**VCC**") to have a minimum financial soundness rating of "healthy." However, the Regulation does not define "healthy," or set out a mechanism for assessing it, instead leaving this to be subsequently provided for by way of an OJK Circular.

As the Rules are highly technical in nature, for purposes of brevity we have confined the scope of this legal update to a general description of their key features.

The term "VCC," as used herein, includes conventional VCCs, shariah-compliant units of conventional VCCs and dedicated shariah-compliant VCCs, save where otherwise expressly stated.

Further, the term "investee" should be construed as also meaning "borrower," should this be required by the context.

2. Key Criteria for Assessment of Financial Soundness

In line with the Regulation, the Rules set out two key criteria that are to be used for the assessment of a VCC's financial soundness: (a) the quality of its productive assets; and (b) its level of profitability.

(a) Productive Asset Quality

A "productive asset" is defined by the Rules as any asset that is held by a VCC for the purpose of generating income. A VCC's productive assets may consist of:

1. Equity Investments (i.e., shares);

2. Quasi-equity investments (i.e., convertible bonds);
3. Bonds (including shariah-compliant bonds) issued by an investee company during its start-up and/or growth stages; and/or
4. Business financings, including shariah-compliant financings.

A VCC is required to assess, monitor, and take all necessary measures to ensure the quality of its investments and financing receivables.

In order to facilitate this process, the Rules set out a list of indicators for assessing the quality of each class of productive asset. These indicators are as follows:

Productive Asset	Indicator
1. Equity Investment	a. Investee's prospects b. Investee's financial performance
2. Quasi-equity / bond investment	a. Repayment capacity of investee b. Financial performance of investee c. Investee's business prospects
3. Business Financing	A. For financings amounting to less than Rp 1 billion at the time the agreement was signed: ○ Timeliness of principal and/or interest payments in the case of a conventional VCC, or timeliness of payment of principal, profit shares and/or margins in the case of a shariah-compliant unit of a conventional VCC or a shariah-compliant VCC. In addition, the following criteria may be had regard to: a. Investee's capacity to repay; b. Investee's financial performance; and c. Investee's business prospects. B. For financings amounting to Rp 1 billion or more at the time the agreement was signed: a. Investee's repayment capacity b. Investee's financial performance; and c. Investee's business prospects.

Each of the above indicators is accompanied by a list of components that are to be employed in their application. However, it is beyond the scope of this ABNR Legal Update to describe these components in detail.

With the exception of financings amounting to less than Rp 1 billion at the time the agreement was signed, the assessment of productive-asset quality should have regard in all cases to the following considerations:

1. the significance or materiality of each indicator and its accompanying components;
2. the relevance of each indicator and its accompanying components to the investee's business.

Provisioning

Under Part E of the Rules, a VCC is required to set aside provisions for productive asset write-downs in the case of quasi-equity investments, bond purchases at the start-up or growth stages, and business financings, while a shariah-compliant unit of a conventional VCC or a shariah-compliant VCC is required to set aside provisions for write-downs of investments in convertible sukuk or other shariah-compliant bonds, sukuk issued by an investee at the start-up and/or growth stages; and/or profit sharing-based financings. Such provisions are set as a percentage of the outstanding value of each asset, less the value of security/collateral.

Lower levels of provisioning are permitted in the case of a number of priority economic sectors, including the creative economy, food, low-cost housing, new and renewable energy, eco-friendly tourism, water treatment, power, transportation infrastructure, and the marine sector.

The Rules contain detailed provisions for the treatment of security. Due to their technical nature, however, a full discussion of these is beyond the scope of this update.

(b) Profitability

Profitability is defined in the Rules as a benchmark that is used to identify the capacity of a VCC to generate profit over the course of a defined period and to assess the effectiveness of management in running the business.

In assessing the profitability of a VCC, the following ratios are used:

1. Return on Assets (ROA)
2. Return on Equity (ROE)
3. Operating Profit Margin (OPM)

As described in the Rules, these ratios are as generally applied in business and by the accounting profession.

3. Procedures for Assessment of Financial Soundness

The Rules describe detailed, step-by-step procedures for the assessment of a VCC's financial health. These procedures may be summarized as follows:

a. Calculating the value of each productive asset quality and profitability ratio;
b. Assigning a weighting to each asset quality and profitability ratio;
c. Determining composite scores for (i) productive-asset quality, and (ii) profitability; and
d. Determining a composite financial soundness ranking.

4. Verification and Validation by OJK

The OJK is authorized to conduct verification and validation as regards the accuracy and reasonableness of the asset-quality and profitability conclusions arrived at by a VCC. Should the conclusions reached by the OJK based on such verification and validation differ from those drawn by the VCC, the OJK's conclusions shall prevail.

5. ABNR Commentary

After a slow start, the venture capital industry is now playing an increasingly important role in Indonesia, where a particularly conservative banking system makes it even more difficult than usual for start-ups and early-stage businesses to access financing. For investors, the Indonesian market remains attractive given the country's relatively high economic growth, rapidly expanding middle class, and burgeoning population of tech-smart young people. However, the VC industry also has the potential to cause losses if not properly regulated, as happened during the internet bubble crash at the end of the last century. In addition, many VC providers raise funds from the public to finance their investments. Consequently, it is essential that a comprehensive legal framework be put in place to ensure that the industry is properly regulated and all involved receive adequate legal protection. The Rules are therefore to be welcomed as they provide the OJK with clear parameters by which the overall financial health of the VC industry and its individual players can be assessed.

By Elsie F. Hakim ehakim@abnrlaw.com

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.

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

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.

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

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.

AARON YONG (aaron.yong@skrine.com)

Aaron is an Associate in the Corporate Division of SKRINE. He graduated from Aberystwyth University in 2011 and joined Skrine in 2017.

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

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LEGAL UPDATE

June, 2018

Amendment to the Mexican Industrial Property Law

On May 18, 2018, a new decree was published in the Official Gazette of the Federation, through which various articles of the Industrial Property Law were added, modified and deleted, especially in the field of trademarks.

The legislative modifications contained in the decree are probably the most profound and relevant since 1994, when the Law acquired its current name.

The decree will take effect 60 business days after its publication date, i.e. on August 10, 2018, and fundamentally, it comprises the following aspects:

I. Non-traditional marks, trade dress, and certification marks.

1.- The following will be subject to trademark protection:

a).- Holographic signs, which consist of tridimensional images with different perceptions depending on the angle from which they are seen.

b).- Sounds.

c).- Smells.

It is worth mentioning that the current text of the Law expressly excludes them from trademark protection; accordingly, it is expected that there will be a strong interest in these types of registrations, once the decree takes effect.

2.- Trademark protection will be available for "the plurality of operative elements; image elements, including, among others, the size, design, color, form disposition, label, packaging, decoration or any other elements distinguishing goods or services in the market, when combined".

This is very important, as it constitutes the first registration protection for trade dress figure in Mexico. Until the date in which the decree takes effect, the only alternative for defending trade dress is through infringement actions for unfair competition, which may only be initiated after the rights have been invaded by a third party.

3.- Certification marks are also included and defined as "a sign distinguishing goods and services which qualities and other characteristics have been certified by its owner".

Based on their importance around the world and the great usefulness they may bring to the merchants, industrials, and to the consumer, certification marks will be widely used after the new legislation takes effect.

II. Strengthening of the trademark opposition system.

1.- Only parties with interest may oppose applications for registration or publication of distinctive signs, and thus, it will no longer be possible to file oppositions in a personal capacity if there are no faculties to represent the owner of the rights uses as the basis of the opposition.

2.- The opposition may be filed along with any type of evidence, except for confessional and testimonial evidence, unless they are included in documents.

3.- Once the terms foreseen in the Law have elapsed, and the evidence has been processed, a two-day term will be granted for the filing of final allegations, after which the Authority will proceed directly to the substantial examination of the opposed application.

4.- Oppositions may only be filed against distinctive signs incurring in one of the non-registrability causes foreseen in the Law. However, the decree has added some new causes, among which the bad faith may be highlighted.

5.- According to the added text, "we may understand as bad faith, among other cases, when an application is filed against the good customs, habits and practices in the industrial property system, the commerce, or the industry; or when the applicant intends to obtain an improper benefit or advantage in detriment of its legitimate owner."

III. Mandatory declarations of use.

1.- The owner of a trademark registration will be compelled to declare its real and effective use, during a three-month period counted as of the third anniversary of the granting of the trademark registration.

2.- If the declaration of use is not timely filed, the trademark will be automatically cancelled for non-use.

3.- The aforementioned will also apply when renewing a trademark registration.

IV. Changes to the nullity causes for trademarks.

1.- The bad faith nullity cause was divided into two different causes. The first one (section V) indicates that a trademark registration will be invalid when "the agent, representative, user or distributor of the owner, or any other person who had a relationship with the direct or indirect owner of a trademark registration abroad, applies for and obtains registration of such mark or of a confusingly similar mark, without the express consent of the owner of the foreign mark"; while the second one (section VI) remains as a generic bad faith cause, without further explanation.

The aforementioned modifications will be very useful for those entities and individuals attempting to recover ownership of a trademark which has been

improperly registered by a third party with whom they have had any type of contact.

2.- The term for exercising any of the nullity causes foreseen in the Law is unified to five years, except for the aforementioned causes (sections V and VI), and the generic cause referring to trademarks obtained against the Law (section I).

This decree has an important impact for all the owners of trademark applications and registrations, and in general, for anyone who intends to obtain trademark rights within the Mexican territory.

We invite you to contact us. We will be very glad to provide further information and detailed advice regarding this matter.

If you need any additional information, please contact the partner in charge of your matters or any of the foregoing lawyers:

Mexico Office: **Lic. José Pablo Pérez Zea., jperez@s-s.mx (Partner)**
Lic. Daniel Legaspi Jaime., dlegaspi@s-s.mx (Associate)
Lic. José Alfredo Vaca y González., avaca@s-s.mx (Associate)
Tel: (+52 55) 5279-5400

Monterrey Office: **Lic. Jorge Barrero S., jbarrero@s-s.mx (Socio)**
Tel: (+52 81) 8133-6000

Querétaro Office: **Lic. José Ramón Ayala A., jayala@s-s.mx (Socio)**
Tel: (+52 442) 290-0290

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European proposal for cross-border transactions and online company establishment

Tuesday, 8 May 2018

On 25 April 2018, the European Commission published two proposals for directives: a proposal to make it easier for companies to merge, divide and transfer their registered office within the EU and a proposal to render it possible throughout the EU to establish a company online.

To which corporate forms do the proposals apply?

In the Netherlands, the new harmonised European procedure for cross-border mergers, divisions and conversions and the complete online establishment of a company will apply in principle to private limited-liability companies (*besloten vennootschappen*) and public limited companies (*naamloze vennootschappen*). It should be noted that the Member States may opt not to allow public limited companies, such as the NV, to be fully established online.

For Belgium, the proposals indicate that the new rules apply to the public limited company (*naamloze vennootschap/société anonyme*), the limited partnership with shares (*commanditaire vennootschap op aandelen/société en commandite par actions*) and the private limited-liability company (*besloten vennootschap met beperkte aansprakelijkheid/société privée à responsabilité limitée*). As in the Netherlands, the NV/SA may be excluded from the scope of full online establishment. Furthermore, Belgium will take the necessary steps to ensure that the proposal on cross-border mergers, divisions and conversions applies to all corporate forms, as such rules already exist under national law.

For Luxembourg, the rules will apply to the public limited-liability company (*société anonyme*), the partnership limited by shares *(société en commandite par actions*) and the private limited-liability company (*société à responsabilité limitée*), with the possibility to exclude the SA and, potentially, the SCA from full online establishment. At present, the Luxembourg rules on cross-border mergers are flexible and allow a cross-border merger with any Luxembourg company or limited partnership with legal personality. In addition, the cross-border merger of a Luxembourg company with a foreign (i.e. non-EU) company is allowed to the extent it is not prohibited under the applicable foreign law and the non-EU company complies with the provisions and formalities of its national law.

What is the procedure for a cross-border merger, division or conversion?

The procedure for cross-border mergers remains largely the same as provided for by the current Merger Directive (Directive 2005/56/EC, codified in Directive 2017/1132) with the addition of new rules for simple mergers and new protective measures for shareholders and creditors. The new procedure for a cross-border division or conversion will be, for the most part, the same as the cross-border merger procedure. The new protective measures include, amongst other things, the possibility for the Member State to require the company to declare that it sees no reason why it should no longer be able to fulfill its obligations after the transaction and that creditors who are dissatisfied with the protection provided may request appropriate safeguards with the competent administrative or judicial body. Minority shareholders that voted against the cross-border transaction may be eligible for cash compensation.

What is the procedure for online establishment?

All required documents must be uploaded online using e-IDs and electronic signatures (in keeping with Regulation (EU) 910/2014). To prevent abuse, national authorities can use each other's information about banned directors. The public authorities may also require that certain professionals (such as notaries) be involved in the establishment of the company, provided the founders can fully complete the procedure online. Personal appearance by the founders may be required only if there are suspicions of fraud.

What are the next steps?

The proposals for the directives will now be discussed by the European Council and the European Parliament, which will have to agree on them. Afterwards, the Member States will have a so-called transposition period, within which the directives must be implemented in national law. The 2009 proposal for a directive on single-member private limited liability companies (*Societas Unius Personae or SUP*), which could be set up online in every Member State, will be withdrawn.

Contact us

Dirk Van Gerven | Brussels | +32 2 566 8114

Geert Raaijmakers | Amsterdam | +31 20 71 71 992

Suzanne Rutten | Amsterdam | +31 20 71 71 954

Greet Wilkenhuysen | Luxembourg | +352 26 12 29 32

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Update on Commerce Commission activity - pharmacies and steel mesh suppliers

May 08, 2018

Contacts

Partners Anne Callinan (https://www.simpsongrierson.com/people/anne-callinan),
James Craig https://www.simpsongrierson.com/people/james-craig

The Commerce Commission (Commission**) has been busy lately, filing proceedings against a Nelson pharmacy for price fixing and obtaining Judgment and penalties of more than $400,000 against a steel import and distribution business for false and misleading representations.**

Price fixing in Nelson

The Commission has investigated 10 companies based in and around Nelson (operating 12 pharmacies in total) who attended a Nelson region pharmacy owners meeting in April 2016. The Commission found that at the meetir the pharmacies agreed to a price fixing arrangement which, in most cases, resulted in consumers paying an extra $1 for the 'dispensing charge' for fully funded prescription items in May 2016. Price fixing arrangements of this nature are prohibited under section 30 of the Commerce Act 1986. The conduct ceased a month later when the pharmacy owners were given increased taxpayer funding from the Nelson Marlborough District Health Board.

Despite the Commission's finding that nine of the 10 companies were "*likely to have breached the price fixing prohibitions,*"[1] it has only taken legal action against the company that facilitated the price-fixing agreement, Prices Pharmacy 2011 Ltd, and its two directors, Stuart Hebberd and Jason Wright. The remaining nine companie have been issued with a warning letter, copies of those letters can be found here (http://www.comcom.govt.nz /business-competition/enforcement-response-register-commerce/filter/Any/1/178/Warning/2018/).

The Commission's decision to take action against Prices Pharmacy 2011 Ltd and its directors, despite the fact tha the conduct only occurred for one month (May 2016) demonstrates how seriously the Commission treats price fixing. If the Commission's claims are established, the Court has the power to impose fines against the company c up to $10m and against the directors of up to $500,000 each, as well as prohibiting the directors from being company directors or managers.

Steel mesh investigation - first sentence

On 24 April 2018, the District Court released its sentencing Judgment, issuing fines of $400,950 against two related companies, Timber King Limited (TKL) and NZ Steel Distributor Limited (NZSD), for making false and misleading representations in relation to their steel mesh products in breach of the Fair Trading Act.

The Commission conducted a wide-reaching investigation into false and misleading representations made by a number of New Zealand companies relating to 500E steel mesh (used for strengthening buildings) since 2015. To be sold with the grade of 500E, the steel mesh is required to be manufactured and tested to very high standards, and requires high strength and elasticity. The Ministry of Business, Innovation and Employment is the building regulator and it sets and enforces the specific standards with which 500E steel mesh must comply.

TKL and NZSD were found to have made false and misleading representations, falsely claiming compliance with the relevant standards, on batch tags, invoices, and receipts, as well as forging a test certificate claiming that the steel had been independently tested and was suitable for reinforcing buildings in an earthquake zone.

Due to New Zealand's history of earthquakes, and the corresponding importance of consumers being able to rely on representations as to compliance with building standards, the Court took the offending very seriously and decided that "*very strong specific and general deterrence is required in these circumstances.*"[2] (Full judgment available here (http://www.comcom.govt.nz/dmsdocument/16236))

As a result of its investigations, the Commission found a number of parties had varying levels of culpability with respect to the same conduct, and has taken steps against a number of other suppliers, ranging from warning letters to claims being brought in the Courts.

For more information about compliance with competition law and the Fair Trading Act, please get in touch with ou team.

[1] Warning letter to Mapua Pharmacy Limited T/A Mapua Pharmacy, 26 April 2018, http://www.comcom.govt.nz/dmsdocument/16228 (http://www.comcom.govt.nz/dmsdocument/16228).

[2] *Commerce Commission v Timber King Ltd & Anor.* [2018] NZDC 510 at [117].

Contributors edward.warren@simpsongrierson.com (mailto:edward.warren@simpsongrierson.com)

Corporate and individual bankruptcy under one roof

What to expect in the upcoming Insolvency Bill

DENTONS RODYK

31 May 2018

A new Insolvency Bill in the works is expected to further transform Singapore's bankruptcy landscape, perhaps most notably by consolidating the existing individual and corporate bankruptcy legislation. At present, the rules relating to corporate and personal insolvency are generally housed separately- within the Companies Act (Cap 50, 2006 Rev Ed) and the Bankruptcy Act (Cap 20, Rev Ed 2009) respectively. This Bill would impact virtually every type of company as many will find themselves concerned with insolvency laws during their lifecycle.

In this article we explore the business rationale behind the changes and the nature of the expected amendments.

Phases of transformation

Singapore has made great strides to become an international debt restructuring hub. The Singapore Parliament last year made extensive changes to Singapore's insolvency laws via the Companies (Amendment) Act 2017 (the Act), drawing on the experience of other jurisdictions.

Indeed, Singapore became the first common law jurisdiction in recent years to introduce a hybrid scheme mixing the best elements of the UK regime with those of the US, seeking to create the optimum environment for businesses and investors involved in debt restructuring.

However, as Minister for Law K Shanmugam pointed out in his keynote address at the Singapore Insolvency Conference 2017, there is still work to be done. Separate regimes for corporate and personal bankruptcy carry the potential for each to develop independently of the other, despite the obvious commonalities between them. Certain provisions also straggle behind in subsidiary legislation, such as the Companies (Application Of Bankruptcy Act Provisions) Regulations (Cap 50, Rg 3, 1996 Rev Ed). This creates uncertainty as to how the interplay between both Acts is to be balanced.

In that same keynote address, the Minster for Law announced that we may soon expect a new Insolvency Bill that will bring, under an omnibus legislation, laws governing both personal and corporate restructuring and insolvency. This feature is just one amongst other new features that serve to further develop laws that aid businesses in distress. We discuss some of the key changes we can expect to be made via the new Insolvency Bill below.

Expected changes

(i) Consolidation

One primary expected change is the consolidation of the personal and corporate insolvency regimes which could iron out the kinks in each Regime and to bring each into alignment.

For instance, the current rules concerning the avoidance of transactions will likely be streamlined to apply to companies and individuals equally. Under the corporate insolvency regime, in the time leading up to the filing of the winding up petition, certain debtor companies may be tempted to dispose of their assets by transferring to other entities within the group so as to place these assets out of the reach of creditors.

The existing insolvency laws allow the liquidator to take steps to avoid such transactions if certain requirements are met. In the case where the recipient company is related (i.e. an "associate"), these requirements are easier to meet. However, when it comes to companies in a similar position – matters become more complicated since provisions defining an "associate" and governing avoidance are located within the Bankruptcy Act.

The Court of Appeal encountered such a problem in *Show Theatres Pte Ltd (in liquidation) v Shaw Theatres Pte Ltd and another* [2002] 2 SLR(R) 1143: it was then not clear whether an associate of the insolvent Show Theatres would include two companies which exercised certain control over it. The Court rightly pointed out at [17] that "*much of the difficulty arose because provisions meant to be applicable to the bankruptcy of an individual are made to apply to the winding up or judicial management of companies.*"

Although the specific issue concerning whether a company exercising control constitutes an associate has been clarified, the current misalignment between the Bankruptcy Act and Companies Act persists in other areas. Thus, an omnibus piece of legislation that dovetails the respective provisions certainly holds promise.

(ii) Outstanding Recommendations of the Insolvency Law Review Committee

In his speech, the Minister for Law also announced that the proposed Insolvency Bill would cover areas that were recommended by the Insolvency Law Review Committee (the Committee) that have not yet been enacted in the 2017 changes. In particular, the Minister made reference to a framework within which insolvency practitioners would be governed, increasing accountability and the general quality of services.

It seems that we can also expect other recommendations that the Committee made, but have yet to be covered by the existing regulations. Some of the substantive recommendations include:

1. Standardisation on the rules of proof of debts across all insolvency proceedings. Presently, section 327(1) which makes "*all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages*" provable in winding up, contains a carve-out for the winding up of insolvent companies. The carve-out would instead be governed by the separate set of rules embodied in section 87(3) of the Bankruptcy Act. As a result, currently, some debts which are not provable in an insolvent liquidation are provable in the liquidation of a solvent company. These rules are important to businesses as they dictate what debts may be recovered in the event of insolvency.

2. Imposition of a bar on the realisation of security after 12 months from the winding up order. This would extend the existing equivalent rule under the Bankruptcy Act into the corporate sphere. At present, it is not clear on the face of the provisions, whether this bar in section 76(4) of the Bankruptcy Act, applies to corporate insolvency pursuant to section 327(2) of the Companies Act. If this recommendation is adopted, businesses who intend to look to security must therefore remain vigilant in the enforcement of security; delay could cost them dearly.

3. A noteworthy proposal relating to matters other than harmonisation of the regimes is the introduction of summary liquidation. If adopted, the Official Receiver or private liquidator will be able to seek an early dissolution where the following conditions are met:

    a. The realisable assets of the company are insufficient to cover the winding-up expenses;

    b. The affairs of the company do not require any further investigation;

    c. The creditors and contributories are given reasonable notice; and

    d. In the case of a private liquidator, the Official Receiver's consent is obtained.

This would improve efficiency in clear-cut cases, and enable creditors to more quickly recover as much of their debts as possible. In the context of liquidation, any lost time may exacerbate the already depreciating value of some of an insolvent company's assets.

Conclusion

The Minister suggested that the Insolvency Bill was likely to be presented in the latter half of 2018. Ultimately, this Bill would impact virtually every type of company as many will find themselves concerned with insolvency laws during their lifecycle – whether as creditor, shareholder, supplier, potential claimant or lender to an insolvent company, or indeed as the beneficiary of an insolvency regime. It would therefore serve businesses to keep an eye on developments as Singapore's dynamic bankruptcy legislation continues to progress.

Dentons Rodyk acknowledges and thanks Zoe Pittas for her contribution to this article.

Key contacts

Ajinderpal Singh
Senior Partner
Litigation, Dispute Resolution and Arbitration

D +65 6885 3619
E ajinderpal.singh@dentons.com

Mark Jerome Seah
Partner
Litigation, Dispute Resolution and Arbitration

D +65 6885 3652
E mark.seah@dentons.com

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Sale of Altered Parallel Imported Goods Constitute Trademark Infringement

05/24/2018

Ruey-Sen Tsai

Parallel imports of trademarked goods, also known as grey market goods, basically will be deemed legitimate and will not constitute trademark or violate the Trademark Act according to prevailing court opinions.

The reason why the courts take the view that parallel imports of the trademarked goods is not per se unlawful is due to the "first-sale doctrine", which provides that once a trademark owner releases its goods into commerce, it cannot prevent the subsequent re-sale of those goods by others. However, parallel imports can be unlawful when "material differences" exist between such imports and the authorized goods based on the core principle in trademark protection of preventing consumer confusion according to the majority of the courts.

The Taipei District Court, when reviewing a case in 2018 that the parallel importer altered the trademarked goods without any consent or license from the trademark owner, and then sold these altered goods, held that since the quality of the altered goods have materially differed from the goods previously authorized for sale, sale of such altered goods should constitute trademark infringement in violation of the Trademark Act though imports of the trademarked goods are deemed legitimate.

Unlike the Trademark Act, the Copyright Act that the sale and distribution in Taiwan of goods manufactured and first sold abroad that feature copyrightable subject matter can constitute copyright infringement without consents or license from the copyright holder or its exclusive licensees in Taiwan. The courts also held in specific copyright infringement cases that the first sale doctrine does not extinguish a copyright owner's ability to prevent the importation of gray market goods first manufactured and sold abroad.

BAKER BOTTS

Ideas

Texas Supreme Court Recognizes Realities of Horizontal Drilling in Key Lease Clause Ruling

04 June 2018

Firm Thought Leadership

On Friday, June, 1, the Texas Supreme Court issued an opinion holding that as a matter of law, Murphy Exploration & Production—USA complied with an express offset lease clause by drilling the offset well in the optimal location on the lease tract. The 5-4 opinion recognized important differences between horizontal drilling in tight shale formations where there is little to no drainage, and vertical drilling in more traditional reservoirs where migrating hydrocarbons lead to drainage.

Under the provision at issue, if a well was drilled within 467 feet of Murphy's lease line (a "triggering well"), Murphy was required, within 180 days, to drill a well adequate to test the same formation, pay compensatory royalties as if an equivalent amount of production was obtained from an offset well on the lease, or release sufficient acreage to constitute a spacing unit as if the triggering well had been drilled on the leased premise. After a neighboring operator drilled a triggering well, Murphy drilled a horizontal well on the lease ("Herbst well") to counter production. The Herbsts sued Murphy for breach of the offset provision, alleging that the Herbst well, which was located approximately 1800 feet from the lease line, was too far away from the triggering well to be an offset well. Murphy, however, contended that the plain language of the provision contained no distance requirement for the offset well. Murphy argued that the provision was drafted with horizontal drilling in mind, and therefore it only required Murphy to counterbalance production from the triggering well. Murphy further contended that there was little to no drainage in the Eagle Ford formation where Murphy completed the well, and therefore no reason to locate the well an arbitrary distance from the lease line.

The trial court agreed with Murphy's interpretation of the provision. On appeal, however, the San Antonio Court of Appeals implied drainage requirements into the provision, despite its lack of any reference to drainage, and reversed the trial court's ruling because Murphy had not met its summary judgment burden "to conclusively prove the Herbst well was protecting the [leased] tracts from drainage by the [triggering] well." At the Texas Supreme Court, Murphy contended that the plain language of the provision did not include any distance requirement or limitation on the location of the offset well, and that the well Murphy drilled, which was undisputedly adequate to test the same formation where the triggering well was completed, was, by definition, "such off-set well" as used in the lease. The Herbsts did not defend the court of appeals' implied drainage requirement, but instead continued to urge that the well must be located closer to the lease line.

In siding with Murphy, the Texas Supreme Court began by discussing the context in which the lease was negotiated – horizontal drilling in the Eagle Ford shale. Citing prior precedent, the Texas Supreme Court recognized that the term "offset well" could describe a vertical well drilled to prevent drainage, but also noted that this provision was drafted in a different context, one where production from tight shale presented little risk of drainage.

The court then examined the three interpretations proffered by Murphy, the Herbsts, and the San Antonio Court of Appeals, and determined that Murphy's interpretation was the only reasonable one. The Herbsts interpretation was unreasonable, the court explained, because the arbitrary distance requirement they advocated for was not supported by either the lease provision or the lack of drainage in the shale formation where both wells were completed. The court found that the court of appeals' holding that Murphy could prevail only by demonstrating that the Herbst well was protecting against drainage, despite the absence of a significant possibility that drainage was in fact occurring, was simply not logical. The court further noted that if the triggering well's surface location was within the triggering distance, but the triggering well ran perpendicular to the lease line, protecting against drainage would be a logical impossibility. After rejecting these two interpretations as unreasonable, the court adopted Murphy's interpretation that the term "offset well" is internally defined within the lease provision as a well drilled "to a depth adequate to test the same formation from which the well or wells are producing from on the

adjacent acreage."

The court's decision is important for several reasons. First, it represents a recognition by the court that common law built on vertical wells drilled in non-shale formations does not always apply to horizontal drilling, and a willingness by the court to recognize important differences between the two, such as the lack of drainage in tight shale formations. Second, it recognizes the need to focus on the productive portions of a horizontal wellbore for purposes of analyzing lease provisions such as offset well clauses. The court recognized that "the points along the horizontal wellbore that are 'perforated and fractured' are the points at which oil and gas is drained from the surrounding rock," and that "the locations of both the vertical portion of a horizontal well and the perforated portions of the horizontal wellbore are essentially irrelevant for production purposes." The court's focus in this regard may prove useful in future disputes involving the proper allocation of production from horizontal wells drilled across two or more lease tracts without pooling.

Related Professionals

Jason Newman

Partner

Macey Reasoner Stokes

Partner

J. Mark Little

Senior Associate

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U.S. Supreme Court Upholds Class Action Waivers in Arbitration Agreements: What Now?

06.06.18

By Elizabeth Hodes and Giancarlo Urey

You already know that on May 21, 2018, the U.S. Supreme Court issued a 5-4 decision in *Epic Systems*. The Court's long-awaited decision finally and conclusively establishes that class waivers in arbitration agreements between employers and employees are, in fact, enforceable under the Federal Arbitration Act (FAA). Now you must decide whether, when, and how to introduce and use arbitration and class action waiver agreements. And, you may be wondering, is this really an end-game? (Spoiler alert: state law and agency action still matter, and who knows what to expect from Congress.)

This decision will have far-reaching implications, perhaps most significantly (and immediately), it ***offers employers a tool to limit costly and protracted class action litigation***, especially litigation related to alleged wage and hour violations and discrimination or harassment claims. But employers still need to be sure their agreement is well-written and covers the bases. The only way an employer can be assured that a class waiver will be enforceable is to have a bi-lateral arbitration agreement that satisfies the FAA (which is easy to do). Employers in many states must look to the FAA to achieve federal preemption of state law restrictions on class action waivers. Employers who have not recently reviewed their arbitration agreements, or who otherwise have not considered whether they should include class waivers in their arbitration agreements, should do so in light of the *Epic Systems* decision.

1. Weigh your options.

Arbitration agreements are not a one-size-fits-all solution for all employers. It may be that the pros and cons balance differently for different employee groups with different compensation schemes, job duties, or roles within the company. Public relations and publicity factors may drive some employers to evaluate the benefits of arbitration differently than other employers. In some industries, arbitration may be better suited to address disputes with highly paid executive employees than it would be for disputes with front-line hourly employees, due to cost factors, the company's litigation trends, or publicity considerations. In other businesses, the opposite may be true.

With respect to class actions, an employer may decide it does not want to face a series of identical arbitrations where there a number of similarly situated aggrieved employees. Some arbitration agreements allow claims to proceed in a collective or class action arbitration proceeding.

In some industries, employees may be more likely to pursue individual claims in arbitration than they would be to participate in a class action or individual court proceeding. Keep in mind, employees benefit too (in some cases more) when it comes to confidentiality and the costs of arbitration.

As you revisit your company's perspective on arbitration and/or its current arbitration agreement in the aftermath of *Epic Systems*, consider the following advantages and disadvantages to arbitration:

<u>Potential advantages</u>:

- Ability to avoid class actions (most of the time, with a properly written agreement).
- Informality of the proceeding compared to a courtroom setting.
- May be quicker depending upon court backlogs.
- Less expensive (theoretically) – due to informality, speed, and fewer procedural landmarks.
- Practical obscurity and less publicity concerning the dispute. Confidentiality is not guaranteed,

however.

- Experienced legal professional (maybe even a specialist in the field) as fact-finder versus jury of laypersons.
- Eliminates risk of runaway jury verdicts on emotional distress damages.
- Lower chance of high emotional distress award, thereby decreasing value of “high dollar” cases in eyes of plaintiffs’ counsel.

Potential disadvantages:

- Inexpensive and easy for plaintiffs – not as important to have an attorney to navigate through the process.
- Arbitrators are not necessarily less likely to find employers liable or to award significantly less damages.
- Virtually no right to appeal an adverse decision. An arbitrator’s ruling, no matter how outrageous, is more binding than a decision by a judge or jury.
- Arbitrator fees and arbitration administrative fees have grown exponentially as arbitrators and arbitration services have become more professional (like paying for a private judge).
- Arbitrators often allow many of the cumbersome and expensive judicial procedures, like discovery and motion practice, into arbitrations.
- The less formal hearing procedures combined with the arbitrator’s almost unfettered discretion in how to conduct the arbitration process may excuse employees and their counsel from following “the rules.”
- Employers may be less likely to obtain summary judgment or dispositive rulings in arbitration than if the case were heard in federal court.

2. Make the tough decisions and draft a thorough agreement.

Once you have weighed your options and know what you want, you still have work to do. Some employers face the decision of whether to modify existing arbitration agreements with current employees or impose agreements with current employees who currently do not have one at all. The enforceability of an agreement entered into mid-stream with a current employee may depend on the circumstances and relevant state law. An exchange of promises may be sufficient consideration to enforce an agreement, but consider how you will present a new agreement to current employees in a positive light.

After deciding whether to require arbitration, and for whom, be sure the arbitration agreement is properly drafted to address various important decision points. For example, do you allow opt outs? Do you want to proceed under a specific set of rules or with a specific administrator (AAA, JAMS), or a more fluid private arbitration context? Who will pay which fees? Do you want to build in a limited appeal mechanism, so a particularly bad decision may be revisited by a second arbitrator? Arbitration appeal procedures can be useful in high-stakes cases, such as a collective or class action arbitration. Think through the details, and consult with colleagues and other resources who know where disagreements are likely to arise and which provisions are susceptible to unconscionability claims.

3. Know the extent of enforceability.

Employers must consider the state or local laws that affect the rights of their employees. For example, on April 12, 2018, Governor Andrew Cuomo of New York signed the “New York State Budget Bill for Fiscal Year 2019.” Included in New York’s Budget Bill is language that prohibits any contractual provision that requires employees to submit their sexual harassment claims to mandatory arbitration, except where inconsistent with federal law or part of a collective bargaining agreement. Similarly, the California legislature currently is debating Assembly Bill 3080, which would amend the California Fair Employment and Housing Act to prohibit mandatory arbitration of sexual harassment claims. It remains unclear whether state or federal courts will uphold these state provisions, or whether they will conclude that the FAA preempts the state laws.

Federal and state administrative agencies may still pursue collective/class action proceedings in their own right, even if individual employees are bound by arbitration agreements. In some instances, state agencies already have deputized employees to pursue collective actions on behalf of the state. California has the Private Attorneys General Act (PAGA) that allows employees to serve as private attorneys general and file collective actions relating to certain violations of the Labor Code. The California Supreme Court already has held, and the *Epic Systems* holding does not change, that PAGA claims are not subject to mandatory arbitration provisions, since an employer cannot bind the State of California.

4. Be ready for changes down the road.

States may follow the examples of New York and California to carve out pathways to court for certain types of claims. The Federal Arbitration Act is also not immune to amendment. Congress may still weigh in on federal law, particularly in light of the *Epic Systems* decision. As the political climate continues to heat up around the subject of sexual harassment and related issues, there appears to already be some legislative discussion about exemptions or additional requirements to be imposed on employers who seek to arbitrate employment-related claims. *See* S.2203 - Ending Forced Arbitration of Sexual Harassment Act of 2017.

Conclusion

The *Epic Systems* holding confirms that an arbitration and class action waiver agreement is, at a minimum, a strong risk management tool that all employers should consider. But, employers must consider several factors when considering how to draft and implement them.

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Creditors' Rights and Bankruptcy Practice Group

GOODSILL ALERT

June 5, 2018

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

♦♦♦♦

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

BACKGROUND FACTS

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

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

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

Lamar informed Appling that if he did not pay the outstanding amount, the firm would withdraw from representation and place a lien on its work product until the bill was paid. Id. Appling told his attorneys that he was expecting a tax refund of

"approximately $100,000," which was enough to cover his owed and future legal fees. Id. Lamar relied on Appling's statement and continued to represent him without initiating collection of the overdue amount. Id. When Appling and his wife filed their tax return, however, the refund they requested was of just $60,718, and they ultimately received $59,851 in October 2005. Id.

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

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

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

The U.S. District Court affirmed the Bankruptcy Court's decision. Id. However, the Court of Appeals for the Eleventh Circuit reversed, holding that "'statement[s] respecting the debtor's . . . financial condition' may include a statement about a single asset." Id. Because Appling's statements about his expected tax refund were not in

writing, the Court of Appeals held that §523(a)(2)(B) did not bar Appling from discharging his debt to Lamar. Id.

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

THE SUPREME COURT'S DECISION

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

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

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

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

Id. (emphasis added).

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

CONCLUSION

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

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

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

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

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

June 2018

False Claims Act – Taking a bite of the customs duties apple?

In a decision that highlights the overlap of international trade obligations and False Claims Act (FCA) jurisprudence, a federal judge recently dismissed an FCA suit because the whistleblower's claims, against an importer of steel pipe manufactured in China, were already the subject of a U.S. Customs and Border Protection (CBP) administrative proceeding to recover penalties for the same conduct. This is the first time a federal court has directly addressed the question of whether a penalty proceeding under the Tariff Act of 1930, 19 U.S.C. § 1592, qualifies as an "administrative civil monetary penalty proceeding" for purposes of the so-called government action bar in the FCA, 31 U.S.C. § 3730(e)(3).

The decision, *Schagrin v. LDR Industries, LLC*, No. 1:14-cv-09125 (N.D. Ill., May 23, 2018), arises from an unusual strategy for collecting duties under the Tariff Act: invoking the whistleblower provisions of the FCA. Traditional forms of enforcement for violations of U.S. trade laws, such as investigations coordinated between CBP, the Department of Justice (DOJ), and U.S. Immigration and Customs Enforcement (ICE), or sanctions imposed by the Bureau of Industry and Security (BIS), are more common and familiar. But violations of the Tariff Act can also serve as a basis for liability under the reverse false claims provision of the FCA, 31 U.S.C. § 3730(a)(1)(G), and actions for violations of that section of the Act can be brought by private citizens.

Reverse False Claims Provision Applies to Customs Duties

In 2009, Congress expanded the scope of the reverse false claim provision of the FCA in two ways:

- Imposing on anyone who "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government;" and
- Defining "obligation" to include "an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based relationship or similar relationship, from statute or regulation, or from the retention of any overpayment."

Authors

Michael C. Theis
Partner, Denver
michael.theis@hoganlovells.com

Chandri Navarro
Partner, Washington D.C.
chandri.navarro@hoganlovells.com

Karla J. Aghedo
Sr. Associate, Houston
karla.aghedo@hoganlovells.com

See 31 U.S.C. §§ 3729(a)(1)(G), 3730(b)(3).

For purposes of international trade, the reverse false claims provision of the FCA may be implicated when an importer knowingly avoids paying duties by making false statements about tariff classification, entered valuation, country of origin, Free Trade Agreement or trade preference program eligibility, or the applicability of antidumping or countervailing duties.

Schagrin v. LDR Industries

In *Schagrin*, the plaintiff alleged that the defendant companies imported steel pipe from China without paying the associated antidumping and countervailing duties. The complaint asserted that the federal government imposed duties of between 30 and 620 percent on circular welded steel pipe imported from China beginning November 2007. The defendants allegedly imported steel pipes into the U.S. to be sold to retailers without paying the corresponding duties. While shopping at a Home Depot store in 2010, the plaintiff, an attorney with experience in international trade, noticed that the defendants' steel pipe was being sold at a very low price. Plaintiff believed that anyone in the industry who was familiar with the applicable regulations would know the low price signaled the importer had not paid the required duties. He reported the issue to CBP in 2012.

Following the plaintiff's report, CBP opened an investigation and determined defendants' conduct resulted in over $14.3 million in lost revenue to the United States. The CBP assessed penalties of more than $38.8 million pursuant to 19 U.S.C. § 1592. However, CBP ultimately billed defendants only $6.7 million, later reduced to $4.85 million, for unpaid duties on steel pipe shipments in 2011 and 2012. Due in large part to the CBP penalties, the defendants filed for bankruptcy in September 2014. The plaintiff filed his FCA suit in November 2014, and CBP filed a proof of claim in the bankruptcy proceeding in February 2015, detailing its findings and assessment of penalties pursuant to its authority under 19 U.S.C. § 1592. When the bankruptcy court entered its October 2016 order approving defendants' Chapter 11 plan, it noted the plan incorporated terms of a settlement between defendants and CBP as "full and complete satisfaction" of disputed CBP claims for over $58.7 million.

Given that history, defendants moved to dismiss Schagrin's FCA case, arguing that the court lacked jurisdiction under the government action bar.

The Government Action Bar

The government action bar applies where the "allegations or transactions" are the subject of a "civil suit or an administrative civil money penalty proceeding in which the Government is already a party." 31 U.S.C. § 3730(e)(3). To succeed on a motion to dismiss under this provision, the defendants must show that substantially the same allegations or transactions are, or were, the subject of a previous civil money penalty proceeding involving the U.S. Government.

The plaintiff argued the government action bar did not apply because CBP did not pursue an "administrative civil money penalty proceeding" under 19 U.S.C. § 1592(b), but instead merely sent the defendants "a bill for duties," followed by a claim in bankruptcy. *Schagrin*, Slip. Op. at 5.

Rejecting this argument, the court recognized that the key to determining whether 31 U.S.C. § 3730(e)(3) bars a subsequent FCA suit is whether the government has already imposed a "penalty" against the defendants. *Id*. The court noted the proof of claim filed with the bankruptcy court said CBP's findings supporting the claim "are the result of the penalty pursuant to 19 U.S.C. § 1592." *Id*. The court also observed that CBP initially pursued a penalty amount greater than the amount ultimately billed to the defendants.

The court also rejected the plaintiff's argument that his suit was not based on "allegations or transactions" that CBP had alleged in a pleading or other document. Relying on the Seventh Circuit's reasoning in *United States ex. rel. Absher v. Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699 (7th Cir. 2014), the court held that an FCA suit is barred when either the allegation of fraud, or the critical elements of the fraudulent transaction themselves, are the subject of a governmental civil action or penalty proceeding. Slip Op. at 7 (citing *Absher*, 764 F.3d at 707). Recognizing that the critical elements of a transaction include the misrepresentation underlying the alleged fraud, the *Schagrin* court pointed to misclassification of the imported pipe to avoid customs duties as the misrepresentation "at the heart of both" the CBP penalty assessment and the pending FCA suit. *Id*.

Rejection of "Original Source" Argument

Finally, the court rejected the plaintiff's assertion that he should be permitted to proceed because his complaint was not a parasitic attempt to copy the earlier CBP proceeding, inasmuch as the plaintiff himself had tipped off the CBP to the allegations before that proceeding began. While the court acknowledged that the plaintiff might well qualify as an "original source" of the allegations for purposes of the public disclosure bar of the FCA, original source status would not help the plaintiff overcome the government action bar, which incorporates elements different from the public disclosure provisions in the FCA. Where the elements of the government action bar apply, the second suit must be dismissed regardless of the plaintiff's ability to claim "original source" status.

A Lesson for Importers

FCA claims in the customs arena pose a real risk. The FCA plaintiffs' bar is highly motivated, sophisticated, and well-organized, and the failure to pay appropriate tariff obligations can give rise to FCA liability. While the plaintiff in *Schagrin* could have reported the conduct to CBP under 19 U.S.C. § 1619, CBP's trade-specific whistleblower statute, he could have received only 25 percent of the government's recovery up to a maximum of $250,000. For most plaintiffs, the prospect of an uncapped 15 to 30 percent recovery of treble damages and penalties due under the FCA is more enticing.

Schagrin illustrates one way FCA *qui tam* suits can be defeated on a motion to dismiss where the government has already taken its bite of the apple. The lesson for importers may be to consider prior disclosure to CBP upon discovery of underpaid tariffs or customs duties. While the risk of *qui tam* complaints cannot be eliminated altogether with such a strategy, an early prior disclosure reduces that risk, and could form the basis for an argument that enforcement under the FCA is unnecessary.