PACIFIC RIM ADVISORY COUNCIL

Pacific Rim Advisory Council
March 2018 e-Bulletin

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

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

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BAKER BOTTS APPOINTS 11 ASSOCIATES TO SPECIAL COUNSEL

HOUSTON, March 1, 2018 – Baker Botts L.L.P., a leading international law firm, today announced the promotion of 11 associates to the position of Special Counsel.

"This is an outstanding class, and their depth of experience and talent speaks to the strength of our firm and our commitment to deliver value-added services that exceed client expectations," said Andrew M. Baker, Managing Partner of Baker Botts.

Brendan Dignan – Mr. Dignan represents public and private companies, including private equity funds and their portfolio companies, in mergers and acquisitions and joint venture transactions. He also advises clients on corporate governance and securities law compliance. He has represented clients in a number of industries, including energy, defense, technology, media, and telecommunications, many of which included a cross-border element. Prior to law school, Mr. Dignan served as a combat arms officer in the U.S. Army, with tours in Iraq and Kosovo.

Dorine Farah – Ms. Farah's practice focuses on international arbitration. Her practice involves a mixture of commercial and investment-treaty arbitration. Ms. Farah has extensive experience with arbitral practice and procedure both in civil and common law systems. Her practice also includes representation in public international law arbitrations and pre-contentious advice on various international law and cross-border issues. She has acted as counsel in both institutional and ad hoc arbitrations (including under the ICSID, ICC, LCIA, UNCITRAL rules).

Jon Finelli – Mr. Finelli represents investment banks, private equity sponsors, hedge funds and public and private corporations in complex domestic and cross-border financings. Mr. Finelli has experience representing both borrowers and lenders in acquisition financings, leveraged buyouts, recapitalizations and refinancings, mezzanine investments and restructurings.

Justine Gozzi – Ms. Gozzi practices all aspects of intellectual property law and advises clients on consumer products, such as due diligence, freedom to operate, and patentability concerns. She assists clients in patenting, protecting and commercializing inventions, both utility and design, in the areas of mechanical arts, medical devices, biotechnology, electrical products, pharmaceuticals and business methods.

Ellen Lynch – Ms. Lynch's practice focuses on representing government contractors in federal court litigation arising from all stages of the procurement process. She represents large and small contractors in such disputes with the federal government. Ms. Lynch has significant trial and appellate experience in complex commercial litigation. Prior to joining the firm, Ms. Lynch served as a trial attorney and senior trial counsel with the Department of Justice's Commercial Litigation Branch.

Thomas Martin – Mr. Martin is a registered patent attorney whose practice focuses on patent litigation, prosecution and client counseling. His litigation experience includes all phases of pre-trial, trial, post-trial and appeal before the International Trade Commission (ITC), the Court of Appeals for the Federal Circuit, and federal district court. Mr. Martin's experience also includes preparing and prosecuting U.S. and foreign patent applications and advising clients with respect to patent infringement, invalidity, patentability and patent portfolio development.

Chris Ponder – Mr. Ponder is an intellectual property lawyer who focuses on complex patent and business litigation, that often involves competitors. Mr. Ponder's litigation experience includes conducting and managing fact and expert discovery, and developing claims and defenses. Mr. Ponder has extensive experience in motion advocacy, and routinely argues motions in federal court. He has taken depositions of high-level corporate executives (including a chief operating officer, a chief technology officer, and a general counsel), as well as expert witnesses. He has worked on several inter partes review proceedings related to active district court litigation.

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BAKER BOTTS CONT'D

Thomas Rooney – Mr. Rooney's practice focuses on intellectual property matters, including litigation, prosecution, and patent counseling. He has represented technologies include oilfield services, medical devices, pharmaceuticals, software, home appliances, and other mechanical or electronic devices. Mr. Rooney has worked on patent, trade secret, trademark, breach of contract, and related litigation in several District Courts and the International Trade Commission. He has also represented parties in inter partes reviews and reexaminations before the U.S. Patent and Trademark Office.

Richard Sobiecki – Mr. Sobiecki's practice focuses on civil litigation, white collar criminal defense, and appellate matters. He has significant first-hand experience handling complex cases from start to finish. From drafting complaints, to deposing expert witnesses, from arguing dispositive motions, to delivering jury addresses, Mr. Sobiecki has represented his clients in all phases of litigation. He has also represented clients in investigations brought by the Securities and Exchange Commission, and in prosecutions brought by the Department of Justice.

Charles Strecker – Mr. Strecker represents public corporations, private companies and individuals in state and federal courts throughout the country. His representation includes clients in a variety of industries, such as private equity, professional services, technology and energy. His diverse commercial litigation experience includes securities class actions, trade secret claims, professional liability matters, and disputes arising from acquisitions and divestitures. Mr. Strecker also represents clients in internal investigations and proceedings before state and national regulators.

Paulina Williams – Ms. Williams' practice involves environmental litigation, regulatory compliance and transactional support relating to air, water, waste and natural resources issues. Her experience includes air, wastewater and water rights permitting, and permit defense and defense of private citizen suits in federal court. Ms. Williams regularly advises clients on compliance matters and regulatory developments.

For additional information visit www.bakerbotts.com

RBS WELCOMES TWO MEMBERS TO THEIR ASIA PACIFIC PRACTICE GROUP

VANCOUVER: RBS welcomes two new members to their Asia Pacific Practice Group; **Christine D. Lowe** and **Su Ji Yim**. Christine has extensive knowledge and experience in the areas of wealth preservation and estate and trust administration, and advises clients with personal estate and incapacity planning matters, as well as business and estate administration and succession. Su Ji is a member of the firm's Business Law Group and is a registered Trademark Agent. She assists clients with corporate/commercial matters, civil litigation and trademarks.

Richards Buell Sutton's Asia Pacific Practice Group, led by Joe Chan, is comprised of lawyers who have a range of proficiencies including litigation, securities advice and transactions, wealth management, estate planning, real estate transactions, immigration, and other corporate-related matters. Members of this group serve regional and Asia Pacific clients including private individuals who have businesses across various industries, and provide support on small to large deals. RBS is the oldest law firm in the province of British Columbia, and is one of the oldest firms in Canada.

"We are thrilled to have both Christine and Su Ji join our team. Along with our Mandarin, Cantonese and Japanese language capabilities, we now also provide legal services in Korean. Our new associates have expanded our Asia Pacific practice to further enhance our team's capabilities, which we are delighted with." – Joe Chan, Chair of the Asia Pacific Practice Group.

Firm members are active within the local Asian community and are involved with the Association of Chinese-Canadian Entrepreneurs, the Hong Kong Canada Business Association, S.U.C.C.E.S.S., the Japanese Canadian Citizens Association, the Richmond Chamber of Commerce, and the Federation of Asian Canadian Lawyers.

For additional information visit www.rbs.ca

DENTONS RODYK TRANSFORMS CLIENT-LAWYER RELATIONSHIPWITH PARTICIPATION IN SAL'S FUTURE LAW INNOVATION PROGRAMME

SINGAPORE, 10 JANUARY 2018 – Dentons Rodyk is pleased to announce that it has joined the Singapore Academy of Law's Future Law Innovation Programme (FLIP) as the featured international law firm among the participating law firms.

The programme is a strategic initiative that aims to assist law firms in innovating new ways of delivering legal services and integrating technology within their processes. It also seeks to facilitate the cross-pollination of ideas between the technology and legal sectors, and to create a vibrant Legal Tech ecosystem for the future economy.

Dentons Rodyk sees FLIP as a partner on our journey to re-define our clients' experience – with a focus on collaborating seamlessly and delivering cost-effective and high-quality legal services for even the most complex matters. Dentons Rodyk believes that in order to improve the client's experience, we first need to deeply understand their needs and business objectives, which is a building-block of FLIP and one of the key reasons the Firm joined the programme.

FLIP is also helping Dentons Rodyk drive innovation firm-wide, and enable those with the best understanding of client needs to shape the solutions being implemented. The Dentons Rodyk FLIP Task Force, comprising talented lawyers representing a broad array of clients, will participate in the FLIP "Ideate!" stage that will allow them to learn new ways of identifying needs around legal service delivery, develop plans, and partner with technology companies in an effort to better serve their clients.

Our clients have faced significant market pressures head-on and have embraced innovation in order to do more with less. Dentons Rodyk is committed to embarking on this journey with our clients, not only as trusted legal advisors but also as innovation and business partners who are equipped to handle their future needs.

For additional information visit www.dentons.rodyk.com

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For more information visit www.prac.org

GIDE INVOLVED IN CREATION OF INTERNATIONAL CHAMBERS WITHIN THE COMMERCIAL COURT AND THE PARIS COURT OF APPEAL

PARIS - 27 February 2018: Gide is pleased to announce the creation of international chambers within the Commercial Court and the Paris Court of Appeal, which contribute to Paris' influence as a leading centre for international commercial litigation disputes.

The protocols governing the creation of international chambers within the Commercial Court and the Paris Court of Appeal were signed on 7 February 2018, in the presence in particular of the French Minister of Justice, Nicole Belloubet, upon recommendation of the Legal High Committee for Financial Markets of Paris (Haut Comité Juridique de la Place Financière de Paris), chaired by Guy Canivet, Honorary First President of the Cour de Cassation. The protocols were made public on 21 February 2018.

These protocols aim to clarify the manner in which the International Chamber of the Paris Commercial Court (created in 1995) and the newly created International Chamber of the Paris Court of Appeal (CICAP) will instruct and rule on the cases submitted to them.

Signing these protocols places France ahead of other European states, in particular Germany, Belgium and the Netherlands, which are also looking into the creation of specialised courts to handle international commercial disputes.

The creation of such international chambers presents opportunities, but also significant challenges for all those concerned, namely the commercial companies that will be the future parties to these procedures, the lawyers who will assist them, and the judges responsible for instructing the cases.

It is one of the consequences of Brexit. As a financial centre, London has so far had to deal with the vast majority of transnational business law disputes. Among the many repercussions of the United Kingdom's exit from the European Union, and subject to the upcoming negotiations, decisions rendered by the English courts will no longer benefit from recognition and automatic enforcement within the European Union. Post-Brexit, such decisions will have to submit to the longer and more expensive exequatur procedures in force in each of the Member States in order to be recognised and executed in those countries.

Several innovations reflect France's desire to facilitate access to French jurisdictions and to break down the reservations – justified or otherwise – of foreign companies, in particular by:

recognising the competence of international chambers to deal with economic and commercial disputes with an international element,

giving the parties the possibility of choosing the language of the proceedings,

providing for a more flexible procedure, similar to that of international arbitration.

The competence of international chambers to deal with economic and commercial disputes with an international element

These chambers are intended to hear disputes relating to international trade contracts, whether subject to French law or a foreign law, concluded between two companies of different nationalities. The protocols specify that the cases they will hear will include "disputes of an economic and commercial nature with an international element, and in particular those in which provisions of EU law or a foreign law apply or are likely to apply" (Article 1). CICAP will also be responsible for appeals against decisions handed down in international arbitration, as well as all decisions handed down at first instance by the International Chamber of the Paris Commercial Court.

These chambers can be used by the parties inserting a clause in their contracts designating them explicitly. In the absence of such clause, the allocation chamber (chambre de placement) of the Paris Commercial Court will also refer all international economic and commercial disputes to the international chamber.

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GIDE ..CONTINUED

The use of a foreign language

The main innovation lies in the possibility for the parties to choose the language of the procedure. The parties may produce exhibits in the chosen language, and any witnesses, experts, as well as the parties and their lawyers, may speak in that language. Nevertheless, since the Ordinance of Villers-Cotterêts imposes the use of French for all acts of justice, the judge, as a representative of the State, will only speak French, and all procedural acts (in particular, the final decision) will be in French.

English is given a prime position: the parties will be able to submit their exhibits directly in English, without translation (unless one of the parties raises an objection), and debates (pleadings, hearings of witnesses, etc.) can be carried out in English. As regards other foreign languages, all documents must be translated and oral exchanges must be translated simultaneously, the cost of which will be paid by the parties.

A more flexible procedure, similar to that of international arbitration

The procedure before these chambers is deliberately flexible and allows the parties to be involved in its organisation and conduct. The parties and the judges will meet several times (after the referral to the court, after the first submissions of the parties, and before opening the hearings) and together will determine the timetable of the procedure and the court administration measures concerning evidence, including the possible hearing of witnesses and experts.

These specialised courts also benefit from probative rules similar to those applicable to international arbitration (requests for the forced production of documents held by the opposing party, or a third party, using examination and cross-examination of experts, etc.), which are particularly popular with foreign companies, particularly for their flexibility.

The protocols will come into effect on 1 March 2018, and the courts are expected to be operational within two to three months.

For additional information visit www.gide.com

HOGAN LOVELLS LAUNCHES ITS FIRST CLIENT-FACING ONLINE TRAINING COURSE

New digital academy a first for Hogan Lovells and legal sector - Hogan Lovells pushes into digital training realm for the first time

LONDON - 01 March 2018: Hogan Lovells is to launch its first client-facing online training course, taking the firm into realms traditionally associated with e-learning providers and adding to its growing suite of LawTech products.

The new Payment Services Academy, revealed today, is designed to help those in legal, compliance, risk management, product design and operational functions understand their obligations under the UK's new payment services regulations.

"To our knowledge we are the only law firm offering digital training in this area, marking the course out as an industry first" said financial institutions partner Roger Tym, one of the course co-creators in Hogan Lovells' industry-leading payments team, alongside partners Emily Reid and Jonathan Chertkow, and counsel Julie Patient.

Commenting, Emily Reid said the course reflected the firm's desire to embrace the rapidly changing nature of the legal industry and the ways in which technology is driving change in legal services delivery:

"We live in a world where clients want to access Hogan Lovells knowledge in new ways that suit them, at times that suit them. This is about taking our world-leading insights and making them accessible to everyone, from FinTech start-ups to major financial institutions."

The Payment Services Academy offers:

- Content that can be accessed repeatedly and at leisure, without the need for commissioning bespoke training
- engaging and dynamic modules that turn complex concepts into straightforward, actionable advice
- over two hours of video content that is regularly updated to cover the latest developments
- interactive note taking and quiz functions to help embed what users have learned
- the ability to earn certificates to demonstrate users' knowledge

It is part of Hogan Lovells' suite of LawTech products offered on www.HLEngage.com, which currently cover Payments, MiFID II, FinTech and blockchain, as well as a bespoke legal publishing tool, Business Brief. A one minute video overview of the Academy is available here https://www.youtube.com/watch?v=QZ7ba7qYi6w&feature=youtu.be

For additional information visit www.hoganlovells.com

BAKER BOTTS

COMMERCEHUB AGREES TO ACQUISITION BY AFFILIATES OF GTCR AND SYCAMORE PARTNERS

NEW YORK : Baker Botts announced that it has advised its client, CommerceHub (NASDAQ: CHUBA, CHUBK), on its sale to an affiliate of two private equity firms, GTCR and Sycamore Partners, in a cash transaction totaling approximately $1.1 billion.

Under the terms of the merger agreement, each holder of shares of CommerceHub common stock will receive $22.75 in cash per share. The transaction is subject to customary closing conditions, including the receipt of stockholder and regulatory approvals. Closing is expected to occur in the third quarter of 2018.

CommerceHub, which is headquartered in Albany, New York, is a SaaS+ distributed commerce network connecting supply, demand and delivery that helps retailers and brands increase sales by expanding product assortments, promoting products on the channels that perform, and enabling rapid, on-time customer delivery. With its robust platform and proven scalability, CommerceHub helped over 11,500 retailers, brands, and distributors achieve an estimated $16 billion in Gross Merchandise Value in 2017.

The firm has represented CommerceHub for a number of years, including in connection with its spin-off as a public company in July 2016.

The Baker Botts team:

Corporate: Renee Wilm (Partner), Jonathan Gordon (Partner), Adorys Velazquez (Partner), Beverly Reyes (Partner), Justin Blass (Associate), Bryan Henderson (Senior Associate, Dallas), Jennifer Ybarra (Associate, Dallas), Stephen DiMaria (Law Clerk)

Tax: Tamar Stanley (Partner), Jon Lobb (Partner), Peter Farrell (Associate)

Employee Benefits: Rob Fowler (Partner), Stephanie Jeane (Associate)

Antitrust: Stephen Weissman (Partner), Paul Cuomo (Partner), Tom Carter (Associate)

Finance: Dan Tristan (Partner)

For additional information visit www.bakerbotts.com

CAREY

HELPS PRIVATE EQUITY FIRM MESOAMERICA ACQUIRE MAJORITY STAKE IN HELADERIAS SAVORY ACQUISITION

SANTIAGO 18 January 2018: Carey has helped private equity firm Mesoamerica acquire a majority stake in Chilean ice-cream shop operator Heladerías Savory. Unifood, the food chain operator in which Mesoamerica holds a majority stake, becomes the largest operator of fast-food stores in Chile as a result of the transaction. Savory operates more than 100 ice-cream stores across Chile.

The deal, whose value remains confidential, closed on 14 December.

Counsel to Mesoamerica Carey team led by Partner Francisco Ugarte and associates Alejandra Daroch, Pamela Morales, Manuel José Barros, Tomás Varela, Felipe Astaburuaga and Bernardita Larraín.

For additional information visit www.carey.cl

CLAYTON UTZ

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

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

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

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

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

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

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

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

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

For additional information visit www.claytonutz.com

ARIAS

ADVISES UNITED STATES EMBASSY ON CONSTRUCTION OF NEW RESIDENTIAL COMPLEX

MINAGUA - February 2018: Arias Nicaragua recently advised the Embassy of the United States of America, in the analysis of the acquisition of real estate under its "embassy" status; at the same time, in the negotiations and drafting each contract to be signed with Grupo Coen, for the construction of a new residential complex, a project addressed to the diplomatic staff of the Embassy of the United States in Managua. The contract is valued at US $3.9 million and financed by the Government of the United States, offering the opportunity to generate new jobs in Nicaragua and strengthen their relations.

As a firm, we know the importance to support our clients in every step they take, it is our commitment to provide the best legal advice for their projects; this is why Arias Nicaragua was part of this project from the negotiation stage and continues to attend the embassy until the closing of the transaction. In this way Arias supports the embassy in signing the contract that reaffirms its bilateral relationship with Nicaragua and stimulates the country's economy.

Arias Team of advisors: Roger Pérez (Partner); Uriel Balladares (Associate)

For additional information visit www.ariaslaw.com

GIDE

ADVISES WENDEL ON THE SALE OF ITS INTEREST IN SAHAM GROUP

CASABLANCA - 09 March 2018: Gide's Casablanca office assisted Wendel on the sale of its equity interest in the holding company of the Saham group for USD 155 M (EUR 125 M).

This transaction took place alongside the sale by Saham group of its insurance division to South Africa-based Sanlam, the leading financial services provider in Africa, for more than USD 1bn. It is subject to the completion of the transaction between the Saham Group and Sanlam, which should occur in the second half of 2018.

Wendel will also get an earn-out, with a portion of the capital gains on any disposal of the remaining businesses of Saham Group (Customer relationship centers, Real estate, Healthcare and Education) that would take place in the next 24 months for a consideration exceeding certain pre-defined thresholds.

Wendel invested EUR 100M in the holding company in 2013 for 13.3% of its share capital, to finance Saham's African growth and diversification.

Gide Casablanca assisted Wendel with a team led by partner Simon Auquier, and Chloé Joachim de Larivière.

For additional information visit www.gide.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

ADVISES WELLING HOLDING LIMITED IN ITS PRIVATIZATION BY MIDEA INTERNATIONAL CORPORATION COMPANY LIMITED BY WAY OF A SCHEME OF ARRANGEMENT UNDER THE HONG KONG COMPANIES ORDINANCE

HONG KONG - 02 March 2018: Hogan Lovells has represented Welling Holding Limited ("Welling") (HKSE: 382) in its privatisation by Midea International Corporation Company Limited, a wholly-owned subsidiary of Midea Group Co., Ltd. ("Midea Group") (000333.SZ), by way of a scheme of arrangement under section 673 of the Hong Kong Companies Ordinance. This is the third successful privatisation in Hong Kong by way of a scheme of arrangement under the Hong Kong Companies Ordinance since it came into force in 2014.

Midea Group is principally engaged in the production of home appliances, motors and their parts, import and export of home appliances, home appliances raw materials and parts, installation, maintenance, and after-sales service of home appliances. Welling is principally engaged in the manufacturing, distribution, and selling of motors and electric components for household appliances in the PRC and overseas.

At a cancellation consideration of HK$2.60 per share, the cancelled shares are valued at HK$1.85 billion (US$237 million). Welling became a wholly-owned subsidiary of Midea Group and its parties acting in concert upon the scheme becoming effective. The transaction was announced on 10 November 2017 and Welling was delisted on 20 February 2018. Please click here for more information on the transaction.

The Hogan Lovells Hong Kong based team was led by partner Nelson Tang and supported by associates Jeffrey Lee and Jessica Shing, and trainee solicitor Christy Tsui. Hogan Lovells also advised on three other Hong Kong takeovers in 2017, including the mandatory general offer of the shares of China Modern Dairy Holdings Ltd. and voluntary general offer of the shares of Yingde Gases Group Company Limited and New World Department Store China Limited.

For additional information visit www.hoganlovells.com

NAUTADUTILH

ASSISTS ABN AMRO CLEARING BANK WITH THE LAUNCH OF A BLOCK CHAIN-BASED ALTERNATIVE FOR ESCROW ACCOUNTS

AMSTERDAM - 02 February, 2018: Most non-banking organisations entrusted with client funds are required to use escrow accounts to hold those funds. ABN AMRO Clearing Bank (AACB) has developed an alternative based on blockchain technology, in consultation with Nxchange (a Dutch trading venue and the first client that will make use of the alternative).

With this new service, every client of the non-banking organisation gets a bank account with AACB via the blockchain. As such, fund flows between the organisation and its clients are included in the payment processes under regular supervision. This blockchain method drastically reduces administrative costs for the organisation by eliminating escrow account management costs.

The team advising AACB consisted of Pim Rank, Sven Uiterwijk, Marjolein van Well, Jorik Reijmer and Anke van der Burgh.

For additional information visit www.nautadutilh.com

SANTAMARINA

ACTS FOR LENDER BANCO NACIONAL DE OBRAS Y SERVICIOS PUBLICOS IN MEXICAN HOSPITAL PPP LOAN

MEXICO CITY - 20 February 2018: Santamarina y Steta represented the lender Banco Nacional de Obras y Servicios Públicos (Banobras) in construction Company Prodomex loan for the first public-private partnership (PPP) project awarded by Mexico's public health body. The loan will be used for the construction and operation of a hospital in Tapachula, which is a city located in the southern state of Chiapas.

The deal closed on 16 January. The loan's value has not been disclosed.

Counsel to Banobras Santamarina y Steta team led Partner Juan Carlos Machorro, and associates Ricardo Orea and Arturo Rosette

For additional information visit www.s-s.com.mx

TOZZINIFRIERE

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

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

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

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

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

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ALLENDE & BREA

Argentine Foreign Affairs

Legal insight and thoughts

Newsletter No. 1 - March 2018

Argentina ratified the Trade Facilitation Agreement

It is estimated that the implementation of the TFA will reduce the costs of cross-border trade by 14.3%. African countries and least developed countries will have a significant reduction in transaction costs. Likewise, it is expected that the TFA will increase world export growth by 2.7% per year and increase by more than 0.5% per year to world GDP in relation to the 2015-30 horizon forecast.

Likewise, the TFA sets the GATT 1994 dispute settlement mechanism –elaborated and applied in accordance with the Understanding on Rules and Procedures Governing the Settlement of Disputes- however, it provides a grace period for its application depending on the specificities of each case.

The purpose of the TFA is to reduce the costs of cross-border trade. The TFA contains provisions to expedite the movement, release and dispatch of merchandise; establishes procedures for the requested country to issue advance rulings on the treatment it will give to the merchandise prior to its importation; foresees measures to improve impartiality, transparency and non-discriminatory treatment; measures for effective cooperation between customs authorities and other competent authorities in the area of trade facilitation; and establishes recommendations to standardize formalities and applicable standards.

On January 22, 2018 the Argentine Republic ratified the Trade Facilitation Treaty ("TFA"). The TFA was adopted by the member countries of the World Trade Organization ("WTO") at the Bali Ministerial Meeting in 2013 and entered into force on February 22, 2017.

Author:
Juan Martín Allende
Nahila A. Cortés

Progress in the negotiations of the Economic Complementary Agreement No. 6 (ACE 6) between Argentina and Mexico

On February 6 and 8, 2018, the IV Round of Negotiation for the Expansion and Deepening of Economic Complementation Agreement No. 6 (ACE 6) between Argentina and Mexico was held in Buenos Aires.

The parties made progress in the negotiation of the following areas: Goods, Services, Public Procurement, Investments, and Technical Barriers to Trade. However, consensus is still to be reached on issues related to key interests of the two countries, so major negotiation efforts will be required.

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Argentina and Russia signed cooperation and market opening agreements

On February 8, 2018, the XIII Argentine-Russian Intergovernmental Commission for Economic-Commercial and Scientific-Technological Cooperation (COMIXTA) culminated in Moscow, where progress was made in the bilateral relationship between Argentina and Russia.

As a result of the meetings and negotiations, twenty eight (28) Argentine fishing companies were authorized to export to Russia; the phytosanitary requirements were established to export Argentine fruits to the Russian market and; the opening of the market for fertile eggs and fishmeal was negotiated.

Also, Argentina presented the strategic plan for railway modernization and the Argentine Railways State Society ("ADIF.SE") and Russian Railways ("RZD") entered into a "Memorandum of Understanding on Cooperation in Railway Transport Matters."

Progress was also made in other areas such as cooperation in science, technology and productive innovation and it was manifested the possibility of carrying out space cooperation.

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Approval of the Agreement on applicable law to international consumer contracts

In December 2017, the Common Market Council of MERCOSUR approved the Agreement on the applicable law to international consumer contracts, which will be applied within the MERCOSUR.

This Agreement does not need to be internalized into the legal system of each State Party because it regulates an aspect of the organization and operation of the regional bloc, and will enter into force thirty (30) days after the second State Party of the MERCOSUR deposits the instrument of ratification.

This Agreement defines international consumer contract as "the one in which the consumer has his domicile, at the moment of the conclusion of the contract, in a State Party different from the domicile or headquarters of the professional supplier that intervenes in the contract or in the transaction."
It is important to highlight that this agreement modifies certain aspects of the treatment of these contracts under the Argentine domestic regulations.

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CLAYTON UTZ

01 MAR 2018

NSW proposes major reforms to protection of Aboriginal cultural heritage

BY NICK THOMAS, MARK GERITZ, TOSIN ARO, AND AARON MOSS

By providing added clarity and introducing tailored dispute resolution and appeal processes, the new consensus-based model should increase certainty for proponents in developing their projects, and is more reflective of similar regimes in other jurisdictions.

Proponents of major projects will be required to engage earlier and more purposefully with respect to Aboriginal cultural heritage (**ACH**) under significant reforms proposed by NSW's draft Aboriginal Cultural Heritage Bill 2018.

The long road to reform

In NSW, matters of ACH are regulated under the provisions of the National Parks and Wildlife Act 1974 (NSW) (the **NPW Act**), the oldest ACH legislation in Australia. Since the drafting of these provisions in the 1970s, values and attitudes to the protection of ACH have developed significantly, leaving the NPW Act sorely in need of reform.

The Aboriginal Cultural Heritage Bill 2018 (the **Reform Bill**) represents the final stage of a seven-year process designed to deliver this reform. Building upon a series of public consultations and recommendations made by the Independent Aboriginal Cultural Heritage Reform Working Party, the Reform Bill presents a vision of "a transformative, contemporary and respectful vision for the management of Aboriginal cultural heritage in New South Wales".

Although this vision has been consistent throughout the reform process, the Reform Bill departs significantly from both the existing system of ACH management set out in the NPW Act, and from the previous model circulated in the NSW Government's 2013 draft reform framework.

What's changing?

In short, the Reform Bill proposes a more sophisticated and bespoke system of cultural heritage assessment for projects, with ACH values to be integrated into the development consent process. For many proponents, this will require deeper attention to ACH matters, much earlier in the timeline of their project.

New authorities

Central to the revisions proposed in the Reform Bill are two key bodies. Firstly, the Reform Bill proposes to establish a state-wide "ACH Authority" comprised exclusively of Indigenous Australians. Unlike the existing Aboriginal Cultural Heritage Advisory Committee, the Authority is to be vested with decision-making authority and will be the government agency responsible for implementing the ACH Act. The Authority will be advised and supported by Local ACH Consultation Panels made up of individuals appointed by the Authority in accordance with procedures to be publicly notified.

A new assessment framework

The Reform Bill proposes to replace the NSW Government's Due Diligence Code of Practice for the Protection of Aboriginal Objects in New South Wales with a "four-step" assessment pathway.

Supported by a revised ACH Information System database and a new suite of authorised ACH maps, the proposed assessment pathway will require proponents to review ACH maps and consult with the Local Panel to identify applicable ACH values prior to applying for development consent. Where potential ACH values are identified, proponents must work with the Local Panel to scope proposed impact and management activities, before providing an Assessment Report to the Authority. The level of detail and investigation required in this report will vary in response to the specific risk to ACH values posed by the project.

ACH Management Plans to replace Impact Permits

Under the Reform Bill, the current system of Aboriginal cultural heritage impact permits (**AHIP**s) will be abolished. In their place, proponents will be required to enter into, an obtain the Authority's approval of, "ACH Management Plans" for their projects. Management plans will specify ACH actions (which are then covered by the approval), and secure agreed obligations from the proponent, which may include conservation measures or actions (similar to Cultural Heritage Management Plans in other jurisdictions and ILUAs in the native title context).

ACH Management Plans must be negotiated by the proponent and the relevant Local Panel. Once the Local Panel has consented to an ACH Management Plan, the draft plan is submitted to the Authority for review and approval. Harm to ACH values caused by actions undertaken in compliance with an approved ACH Management Plan will not constitute an offence under the ACH Act.

The Reform Bill contemplates that ACH Management Plan negotiations, and determinations of the Authority, will be subject to mandatory timeframes fixed in response to the risk profile of the development.

If agreement on a draft ACH Management Plan cannot be reached within these timeframes, the Local Panel is deemed to have refused its consent, and proponents may directly request the Authority to approve the ACH Management Plan. Similarly, If the Authority refuses to approve a draft ACH Management Plan within the designated determination period, the Authority is deemed to have refused its approval, and this "deemed refusal" may be the subject of an appeal to the Land and Environment Court.

ACH Management Plans form part of development application

The Reform Bill also proposes to require project proponents to include either an approved ACH Management Plan, or evidence that a refused plan is being appealed or reviewed, alongside any application for development consent. This departs significantly from the existing process which does not require an AHIP to be obtained until after development consent is obtained. Under the Reform Bill, the ACH Management Plan will then form part of the development application, which will be exhibited to the public and will be considered by the consent authority when determining the development application.

What about State Significant Projects?

Under the existing regime, proponents of State Significant Infrastructure (SSI) or State Significant Development (SSD) projects are not required to seek AHIPs, and are exempt from the harm offences set out in the NPW Act. The Reform Bill proposes to retain these exemptions. Accordingly, proponents of SSI or SSD will not be required to negotiate ACH Management Plans or provide draft plans prior to receiving development consent.

Instead, ACH matters will be addressed via the Secretary of the Department of Planning and Environment's environmental assessment requirements (**SEAR**s) for those projects. The Proposal Paper issued in support of the Reform Bill indicates that the SEARs "will be updated to adopt the key features of the ACH Management Plan negotiation process and supporting guidelines".

We expect that the revised guidelines will require a greater focus on negotiation with indigenous peoples, and will provide for "tailored" assessments earlier in the planning process. Accordingly, we expect that SSI and SSD proponents will be required to comply with the essence of the revised pathway identified above.

What about enforcement?

The Reform Bill also proposes a comprehensive suite of compliance and enforcement measures which have developed significantly upon the existing model contained in the NPW Act. All offences currently set out in the NPW Act that relate to Aboriginal cultural heritage will be retained in the Reform Bill. As well as the approved ACH Management Plan defence, a person will have a defence in relation to these offences if, having taken all reasonable steps to determine the matter in accordance with the "ACH assessment pathway code of practice" developed by the Authority (and approved by the Minister), they reasonably conclude that no ACH would be harmed by their activity. However, this does not (as in the case in Queensland, for example) go as far as imposing a positive duty on proponents to take all reasonable and practicable measures to avoid harm to ACH.

Penalty amounts have been markedly increased, with the maximum penalty for "harming" Aboriginal cultural heritage increasing from $110,000 to $1,650,000 (in the case of corporations) under the new scheme. This will be supported by the grant of a wide range of investigative powers to the ACH Authority.

What next?

The Reform Bill promises to deliver "greater certainty", "tailored assessment pathways", and a simplified ACH consultation process to industry stakeholders. Many aspects of the reforms, including the shift to "project-based" rather than "site-based" approvals, and improved mapping and recording systems, are well overdue and worthy of encouragement.

By providing added clarity around who to deal with and the matters necessary to ensure appropriate conservation and management of ACH, and by introducing tailored dispute resolution and appeal processes, the new consensus-based model should increase certainty for proponents in developing their projects, and is more reflective of similar regimes in other jurisdictions. Ultimately, the ability of these reforms to create certainty for proponents with respect to ACH management will depend on the effectiveness and responsiveness of both the Authority and the relevant Local Panels – and remains to be seen.

The draft Bill, the Proposal Paper and an accompanying fact-sheet are available on the Office of Environment and Heritage's dedicated consultation page for review. Public consultation on the proposed reforms will continue until **6 April 2018**.

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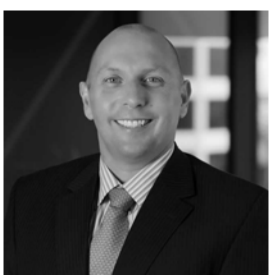

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Blog

Federal Court of Appeal Quells Concern over Transactional Common Interest Privilege

March 09, 2018

Written by Christiaan A. Jordaan

A December 2016 a decision of the Federal Court caused chills for corporate lawyers across Canada when it held that common interest privilege does not apply in the transactional context where otherwise privileged material is shared between parties to the transaction. That decision has now been reversed by the Federal Court of Appeal in *Iggillis Holdings Inc v Canada (National Revenue)*, 2018 FCA 51.

The reasoning in the now-overturned lower court decision was that the existence of transactional common interest privilege was still an open question at law. The lower court judge held its acceptance in the transactional context was an extension of principles recognized in other circumstances—either the joint defence of litigation, or where two clients retain the same lawyer to represent them (rather than two clients with their own lawyers collaborating)—but made without any meaningful analysis. As a result, the court felt free to consider the issue afresh. After a lengthy analysis of policy issues, it held that common interest privilege should not apply in the transactional context where the parties have separate representation.

By contrast, the decision of the Federal Court of Appeal side-stepped the thicket of policy issues by reliance on the wording of the statutory provision at issue. The case involved the production of documents compelled by the Minister of National Revenue under the *Income Tax Act*. The statutory power to compel production excluded documents over which solicitor-client privilege could be asserted "in a superior court in the province where the matter arises". And although the lower court decision had considered prior Federal Court case law, it had not considered whether the privilege issue was already decided in the provinces connected with the transaction.

The Federal Court of Appeal held that the issue had been decided, so that the lower court did not have a free hand. It concluded:

> Based on the decisions of the courts in Alberta and British Columbia, solicitor-client privilege is

> not waived when an opinion provided by a lawyer to one party is disclosed, on a confidential basis, to other parties with sufficient common interest in the same transactions. (Para. 41)

Although the Federal Court of Appeal's decision did not frontally engage with the policy issues raised below, which therefore could still be argued in the provincial superior courts, it does appear likely to quell anxiety on that front. The Court agreed that common-interest privilege "is strongly implanted in Canadian law and indeed around the common-law world", and it even offered up a policy reason that can be advanced in its favour: "when dealing with complex statutes such as the *Income Tax Act*, sharing opinions may well lead to efficiencies in completing the transactions and the clients may well be better served as the application of the *Income Tax Act* will be of interest to all of the parties to the series of transactions" (paras. 40 and 42). For the time being, therefore, it is back to business as usual.

Posted on: February 14, 2018

STATUTORY ENVIRONMENTAL LIABILITY AND THE CGL POLLUTION EXCLUSION

By: Ryan Shaw

A recent decision from the BC Supreme Court concerning the applicability of CGL pollution exclusions in the context of contaminated sites litigation should raise some concern for insurers. In *West Van Holdings Ltd. v. Economical Mutual Insurance Company*, 2017 BCSC 2397 the court found that liability for cost-recovery claims under the *Environmental Management Act* (the "*EMA*") was not ousted by the pollution exclusions contained in the CGL policies of two major insurers. The case should serve as a warning for underwriters and brokers to review the effect of policy wordings in the context of status rather than fault based liability such as that created by the *EMA*.

THE FACTS

The insured dry cleaning operator and its corporate parent holding company (the "Insureds") were sued by the owners of an adjacent property (the "Underlying Action"). The plaintiffs in the Underlying Action alleged that the Insureds' dry-cleaning business, in operation since 1987, and a previous automotive repair business which had operated on the Insureds' property (the "Property") since 1976, utilized chemicals and petroleum products in a manner that caused them to enter the groundwater and soil and migrate to the plaintiffs' lands causing them to become contaminated. The Underlying Action entailed causes of action in nuisance, negligence and a statutory cause of action under the *EMA* seeking recovery for costs of remediation.

The Insureds had CGL policies through the period 1998 – 2012 with two major insurers. The policies had similarly worded pollution exclusions for property damage "*arising out of the actual, alleged or threatened discharge, disposal, release or escape of pollutants … at or from premises owned, rented or occupied by an Insured.*"

The Insureds tendered their defence of the Underlying Action but the insurers declined on the basis of the pollution exclusions. The Insureds then commenced an action against the insurers seeking a declaration that the insurers owed a duty to defend them in the Underlying Action.

THE RULING

In ruling for the Insureds the court concluded that the plaintiffs' invocation of a cause of action under the

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EMA was determinative. The court noted that under the *EMA* current owners or operators of a site from which a contaminating substance migrated are "persons responsible for remediation", with absolute and retroactive liability. In this manner, the *EMA* necessarily reaches back and brings historical events into a current owner or operator's present-day risk of liability. The *EMA* thus creates a cause of action that is status based as opposed to fault based; a current owner may be liable by its status as such without any wrongdoing.

The court found the pollution exclusion clauses did not clearly oust coverage for this type of liability. In support of its conclusion the court found that the pollution exclusions do not "clearly and unambiguously" oust coverage for compensation arising from pollutants that may have been used *before* they owned the Property or operated their dry cleaning business. In other words, the pollution exclusions provided no clarity on whether they extend to concurrent, contributory or retroactive liability for property damage arising out of occurrences that may have been brought about by an independent third party such as the previous Property owner or the automotive repair company.

The court also considered the manner in which other exclusion clauses within the policies specific to contaminants (*e.g.* liability arising out of nuclear energy hazards, fungi, fungi derivatives and asbestos) showed that had they wanted to, the insurers could have easily worded the pollution exclusions in a way that made them clearly and unambiguously applicable to concurrent, contributory and retroactive liability of the type subject of the *EMA*.

Finally, the court distinguished the cases relied on by the insurers, in which similarly worded exclusions were found to apply, on the basis that the underlying claims by the plaintiffs in those actions were based only on alleged acts or omissions of the insureds and not statutorily deemed, retroactive liability based on a third party's actions and an insured's status as an owner or user of an allegedly contaminated property.

PRACTICAL CONSIDERATIONS

It is notable that the insurers have filed appeals so our Court of Appeal will likely have the final word as to whether the ruling in *West Van Holdings* will stand.

In the context of the appeal it may be argued that the court in *West Van Holdings* fell into the same error as the court in *Gill v. Ivanhoe Cambridge I Inc.,* reversed in *Economical Mutual Insurance Company v. Gill*, when it placed undue and unnecessary emphasis on the language used in other exclusion clauses contained in the policies and thereby moved away from the Continuity of Interpretation doctrine expressed by the Supreme Court of Canada in *Co-Operators Life v. Gibbens*. In this latter context we note cases such as *ING Insurance Company of Canada v. Miracle*, *Pier Mac Petroleum Installation v. Axa Pacific Insurance Co.* and *Corbould v.*

BCAA Insurance Corp. which have found that insureds engaged in activities that carry an obvious and well-known risk of pollution and environmental damage fit precisely within the purpose of the pollution exclusion and therefore are not entitled to coverage. A dry cleaning operation would seem to be such an activity.

Irrespective of the arguments insurers may have on appeal, *West Van Holdings* is the first case of its kind to specifically address the effect of status based liability legislation in the context of the specific wording of pollution exclusions. As such it is advisable that underwriters and brokers review their policy wordings in light of such statutory claims to determine their and their clients' risks in what is likely to be a burgeoning area of insurance coverage contention.

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News Alerts

Self-regulation and the Financial Self-Regulation Committee

March 8, 2018

As the Commission for the Financial Market (the "**Commission**") came into full force this January (read previous news alert here), the regulation of the Chilean financial market took a step forward in terms of institutionalism and modernization. In this context, one of the changes introduced by Law No. 21,000 (the "**Law**"), that created the Commission, is the self-regulation of entities in the financial market.

The Law provides that public offer intermediaries, stock exchanges, products exchanges, general fund administrators and single portfolio administrators supervised by the Commission must mandatorily self-regulate in order to ensure the implementation of good practices in terms of corporate governance, business ethics, transparency and fair competition. In this respect, the entities forced to self-regulate have two options: (i) issue their own regulations and conduct codes, which must be filed before the Commission by June 14, 2018; or (ii) take part in the Committee of Financial Self-Regulation (the "**Committee**"). Entities that choose to participate in the Committee must report their decision to the Commission by March 16, 2018, through the Online Information Remittance System (SEIL).

The Law provides that the Committee's objectives will be: (i) to issue the regulations necessary to reach the aforementioned goals and ensure compliance; (ii) to establish and certify the compliance of standards of technical and ethical adequacy of the securities market players; (iii) to resolve the differences or claims that are presented between its members or between members and their clients; and (iv) to promote the protection of investors. The Committee shall be managed by a board comprised of five independent directors chosen by the members of the Committee through a designated sub-committee and shall be financially independent. As to its members, the Committee shall be composed of not only the entities that are required to self-regulate and choose to be part of it, but also, by any entity of the financial market that voluntarily chooses to participate in the Committee. Voluntary participants will also have until March 16, 2018, to file a request before the Commission to join. Finally, entities such as trade associations, securities deposit and custody companies and administrators of compensation and liquidation systems of financial instruments and others, may also join, in compliance with the terms and conditions provided by the Committee.

The regulation of the Committee shall be established through an internal rule (the "**Internal Regulation**"), which, along with other matters, shall regulate the form, amount and proportion of the contributions that the members of the Committee must make annually. The Committee shall issue the regulations deemed necessary to achieve the objective of self-regulation, and once approved by the board of the Committee, these regulations will be mandatory for all of its members. The Committee will have the authority to supervise and review the transactions made through the exchanges, undertake periodical audits of its members, impose sanctions through fines or other measures, and report breaches that comprise a felony to the Commission. All of these functions will be monitored by the Internal Regulation. The Committee may also grant certifications of adequacy and sufficiency of knowledge to participants of the securities market that by legal or regulatory provisions are required to obtain them, and also to those that voluntarily chose to obtain the certifications.

Alternatively, the entities forced to self-regulate may issue their own regulations and codes of conduct, which ought to be approved by the Commission. In this respect, the Commission has issued an invitation for public comment on a project that regulates the minimum content and structure of codes of conduct, making them easier to compare. According to the regulatory project, the codes must be structured around the following areas: (i) relationships with clients, including norms of treatment, commercialization, If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Carey contact.

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BACK

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Immigration

Resolution 1128 of 2018

New developments on visa exempted nationals were release through Resolution 1128, issued on February 14, 2018

WHAT CHANGED?

National foreigners from Bosnia & Herzegovina, Qatar and Serbia may enter Colombia without a visa and obtain an entry and stay permit upon arrival.

WHAT NEEDS TO BE CONSIDERED?

- Nicaraguan citizens entering Colombia without a visa, will be required to pay an entry fee equivalent to USD$10.00.
- The payment shall be done during the Immigration control process in any of the authorized immigration checkpoints.
- Because this is a reciprocity measure, the fee amount would vary depending on the entry fee that the government of the Republic of Nicaragua charges to Colombian citizens.
- Resolution 1128 of 2018 will enter force on February 24th, 2018 and repeals Resolutions *439 of 2016, Resolution 5622 of 2017, and Resolution 6771 of 2017.*

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The model for Brexit - is it Norway, Switzerland, Ukraine, Turkey or Canada?

1 March 2018

Client Alert | EU | UK | Brexit

One of the most frustrating aspects of the Brexit process has been the lack of clarity as to what exactly the UK government wants the relationship with the EU post-Brexit to look like. It has fallen to others to extrapolate a position from what the UK has indicated it doesn't want.

The table below (which owes a great deal to Michel Barnier's "red lines" graphic from December last year) lists what the UK's objectives are thought to be, and the extent that these objectives can be achieved within the existing structures (membership of the EU, the European Economic Area (EEA) or European Free Trade Association (EFTA), an association agreement or a separate customs union).

	EU	EEA	EFTA	Association Agreement	Customs Union
UK Objectives					
No financial contribution	✗	✗	✗	✓	✓
Control of immigration	✗	✗	✗	✓	✓
Customs free trade	✓	✓	✓	✓	✓
No ECJ jurisdiction	✗	✗ *	✗ *	✗	✓
No EU regulation	✗	✗	✗	✗	✓ **
Bilateral free trade agreements	✗	✓	✓	✓	✗

* In theory ECJ does not have jurisdiction, replaced by EFTA Court, which follows ECJ precedents
** In practice goods must comply with EU regulations to enter the market

MEMBERSHIP OF THE EU

Of the UK's objectives, only one, customs free trade, is presently enjoyed by the UK as a member of the EU. All the others: freedom from the financial burden of contributing to the EU, control of immigration, submission to the European Court of Justice and EU regulation, and the ability to make independent trade deals with third party nations, are incompatible with membership.

Within the EU, goods can be moved freely across national borders without any customs duty being payable or any physical barriers (creating the "Single Market"), but goods from outside the EU have to clear customs and are subject to the Common External Tariff (CET). The CET applies to the import of goods across the external border of the EU, and applies to all EU members, but the rates of duty differ from one kind of import to another depending on what they are and where they come from. The UK Government insists that it wants the "most frictionless trade possible" with the remaining members of the EU, and cites advances in technology (as yet unidentified) as the means to achieve this. The EU has consistently contended that access to the Single Market is conditional upon acceptance of the four freedoms, and remains sceptical as to how frictionless trade can be achieved without membership of the Single Market.

MEMBERSHIP OF THE EEA

Often described as the "Norway option", the EEA actually comprises all the existing members of the EU plus Iceland and Lichtenstein as well as Norway. Its principal attraction is that membership confers equal rights and obligations within the Single Market on non-members, which would give the UK the "frictionless trade" it wishes. The quid pro quo, however, is that EEA countries must adopt EU legislation relating to the four freedoms - the free movement of goods, services, persons and capital, and the jurisdiction of the ECJ. As the former UK Foreign Secretary, Sir Malcolm Rifkind wrote recently "the requirement [to incorporate into UK law all future EU regulations without playing any role in the formulation of such laws] would be both humiliating and indefensible…and creates an impenetrable barrier to remaining in the Single Market."

MEMBERSHIP OF EFTA

EFTA is the intergovernmental organisation of Iceland, Liechtenstein, Norway and Switzerland. Switzerland is the only member of EFTA which is not in the EEA, so this option is known as the "Swiss Model". Switzerland's relations with the EU are governed by a patchwork of bilateral agreements which add up to access to (most of) the Single Market, but this was achieved only on condition of Switzerland's accepting free movement of people, which ironically was one of the reasons Switzerland rejected membership of the EEA. Switzerland also makes contributions into the EU budget, another UK "line in the sand". As a member of EFTA Switzerland is, however, free to negotiate free trade deals with other third party countries, one of the UK objectives.

AN EU/UK ASSOCIATION AGREEMENT

Association Agreements are entered into between the EU and a non-EU country to create a framework for cooperation between them. They typically provide for tariff-free access to some or all EU markets in exchange for political, economic, trade or human rights reform. The most recent Association Agreement was entered into with Ukraine, so this is often described as the "Ukraine model". Leaving aside the irony that Association Agreements are often entered into as a precursor to entry into the EU, rather than a means of exit from it, the main attraction for the UK of an Association Agreement with the EU is that it permits "deep and comprehensive" access to the Single Market without requiring freedom of movement. This is generally because the EU is not ready to grant freedom of movement to the citizens of the counterparty nation, rather than vice versa, but it does at least provide a model for frictionless trade with control of immigration. What it would not do, however, is remove the UK from the jurisdiction of the ECJ or the need to accept EU regulation.

A CUSTOMS UNION

There has been much semantic debate in the UK about whether the country could cease to be a member of "the Customs Union" and instead have "a" customs union with the Customs Union. The model here is Turkey, which has a customs agreement with the EU (the Ankara Agreement). Turkey doesn't have to make contributions the EU budget and is not to subject to free movement of people. It does enjoy customs free trade. It is not subject to the jurisdiction of the ECJ or EU laws and regulations. However in practice for Turkish goods to enter the Single Market they must comply with the relevant EU regulations, and the Ankara Agreement contemplates the eventual alignment of Turkish law with the acquis communautaire. More importantly, Turkey has little or no freedom to develop trade policy with other countries; it is bound to open its markets to any country the EU enters into a free trade agreement with, but takes no role in the negotiation of that agreement and does not have the same immediate duty-free access to that country's market that EU members do. For that reason the Turkey model is not an acceptable one for the UK.

CANADA

The Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada came into force in September last year. It removes duties on 98% of products traded between the EU and Canada, and permits both parties to enter into trade deals with other countries. Under CETA Canada is not subject to the jurisdiction of the ECJ and EU law is not directly enforceable but it does have to meet EU regulatory standards in relation to the goods it exports to the EU. It covers access to each side's public procurement processes, mutual recognition of professional qualifications and to a limited extent mobility of company employees. In these respects, CETA is a useful precedent for the UK's new relationship with the EU. But there are major issues on which CETA has no bearing, issues that have so far proved intractable in the negotiations, such as the border between Northern Ireland and the Republic, and the status of EU citizens in the UK and of UK citizens in the EU. Moreover it took seven years to negotiate and was twenty two years in the making. One can only wonder how long a so-called "Canada Plus Plus Plus" deal will take to conclude. The current twenty two month schedule seems ambitious.

New listing regime proposals for emerging and innovative companies

March 2018

Hogan Lovells

New listing regime proposals for emerging and innovative companies

On 23 February 2018, the Stock Exchange of Hong Kong Limited (the "**HKEx**") published a consultation paper seeking public comments on Listing Rules amendments aimed at expanding the listing regime to help list companies from emerging and innovative sectors, which the HKEx identified as gaps in Hong Kong's current listing regime affecting its overall competitiveness versus other major global listing venues. This consultation paper gives effect to the New Board Concept Paper Conclusions published in December 2017.

Key proposals include seeking amendments to the Listing Rules, under three new chapters, to allow the following three new types of companies to list on the Main Board:

1. biotech companies that do not meet any of the financial eligibility tests, including companies without any prior record of profit or revenue;
2. high growth and innovative companies with weighted voting right ("**WVR**") structures; and
3. qualifying issuers seeking a secondary listing on the HKEx.

Summarized below are the key proposed amendments under each of these chapters.

Biotech Companies – these are companies engaged in the R&D, application and commercialization of biotech products, processes or technology.	
Proposal	Biotech Companies that fulfill the eligibility and suitability requirement can seek to list on the Main Board without satisfying the financial eligibility tests under LR8.05.
Eligibility for listing	– Minimum expected market capitalization of HK$1.5 billion at the time of listing; – Maintain a track record period of 2 financial years, where there is no material change of business and is under substantially same management; and – Enhanced working capital requirements to cover 125% of the group's costs (which must substantially consist of the general, administrative and operating costs and R&D costs) for at least 12 months from the date of publication of the prospectus, after taking into account the IPO proceeds.
Suitability for listing	– Have a regulated biotech product which is required by applicable laws, rules or regulation to be evaluated and approved by a competent authority i.e. US Food and Drug Administration, China Food and Drug Administration or European Medicines Agency, based on data derived from clinical trials before it could be marketed and sold (a "**Core Product**"); – At least one Core Product must have proceeded beyond the concept stage (guidance on developmental milestones for different types of biotech companies is provided in the consultation paper - generally speaking, the applicant must have completed the first phase or at least one clinical trial together with endorsement or no objection from one of the

	competent authorities listed above); – Primarily engaged in R&D for its Core Product for a minimum of 12 months before listing; – Primary reason for listing must be the raising of finance for R&D to bring its Core Product to commercialization; – Have durable patent(s), registered patent(s), patent applications(s), and intellectual property in relation to its Core Product; – Have received meaningful third party investment from at least one investor considered by the HKEx to be sophisticated for at least 6 months before the IPO (which must remain at IPO), except for the spin-off from a parent company in which case the HKEx may dispense with this requirement if a reasonable degree of market acceptance can be demonstrated; and – For applicants engaged in the R&D of pharmaceuticals or biologic products, it must demonstrate a pipeline of those potential products.
Investor protection	– Prominent warning statements and enhanced risk disclosures including the phases of development of its Core Product(s), material communications with competent authorities, material safety data relating to its Core Product, intellectual properties, and R&D experience of management; – Cornerstone investment shares will not count towards the minimum initial public float requirement at the time of listing or during the 6 month lock-up period; and – Existing shareholders may participate in the IPO as a cornerstone investor and the new shares subscribed will not count towards the minimum initial public float requirement, although the existing shareholding prior to the IPO will be counted towards the public float provided that the existing shareholder is not a core connected person or otherwise not recognized by HKEx as a member of the public.
Risk management measures	– Fundamental change of principal business will require prior consent from the HKEx, although consent will normally be given for a legitimate business expansion or diversification that forms part of its business strategies; – Accelerated de-listing process (i.e. 12-month period) if it fails to maintain sufficient operations or assets; and – Identification through a stock marker "B" at the end of its stock name. A Biotech Company which has developed its business and is able

	to demonstrate that it is able to satisfy one of the financial eligibility tests will no longer be subject to these measures.

Companies with WVR structure	
Proposal	Eligible companies that are innovative with a high business growth track record may be allowed to list with a WVR structure. A new Chapter 8A is proposed.
Eligibility of WVR issuers	– New listing applicants only; – Minimum expected market capitalization of HK$10 billion at the time of listing (and if the market capitalization is below HK$40 billion, then it must meet a higher revenue test of HK$1 billion); – Must be an innovative company to be determined by the HKEx on a case-by-case basis and is expected to demonstrate one or more of the following characteristics: • Its success is attributable to the application of (1) new technologies, (2) innovations, and/or (3) a new business model; • R&D is a significant contributor of its expected value and constitutes a major activity and expense; • Its success is attributable to its unique features or intellectual property; and • It has an outsized market capitalization / intangible asset value relative to its tangible asset value. – Demonstrate a track record of high business growth that can be objectively measured; and – The applicant must have received meaningful third party investment from at least one sophisticated investor (which must remain at IPO and subject to some lock-up restrictions), except for a spin-off from a parent company.
Responsibility and contribution of WVR beneficiaries	Each WVR beneficiary: – Must have been materially responsible for the growth of the business by way of his skills, knowledge and/or strategic direction in circumstances where the value of the company is largely attributable to intangible human capital; – Must be an individual with an active executive role within the business; and – Be a director of the issuer at the time of listing and remain as a director afterwards.
Investor protection provisions	**(a) Restrictions on the WVRs** – All WVR beneficiaries are required to collectively beneficially

	own a minimum of at least 10% and a maximum of not more than 50% of the underlying economic interest in the applicant's total issued share capital at the time of listing; – WVR structure is required to be attached to a specific class of shares which must be unlisted, and the rights attached to WVR shares must be the same in all other respects to those attached to ordinary shares except for the voting rights; – No increase in proportion of shares with WVRs in issue or to issue any further WVR shares. This includes situations where the number of non-WVR shares is reduced following a share buyback; – Voting powers will be limited to not more than 10 times voting power of ordinary shares. – Non-WVRs holders must be entitled to cast at least 10% of the votes on a resolution proposed at a general meeting; and – Certain key matters must be decided on a one-share one-vote basis and WVR beneficiaries will not be able to exercise WVRs on these matters (e.g. changes to the constitutional documents, variation of class rights and, importantly, the appointment and removal of independent non-executive directors and auditors). **(b) Major enhanced corporate governance measures** – Engagement of a compliance adviser on permanent basis; – Constitutional backing for the WVR safeguards to allow private legal action by shareholders and an undertaking by WVR beneficiaries in favour of the issuer and all existing and future shareholders; and – Corporate governance committee comprising a majority of INEDs to review, monitor and report on the company's compliance with the Listing Rules, and to ensure the issuer is operated and managed for the benefit of all shareholders.
Safeguards and other provisions to note	– WVRs attached to a WVR beneficiary's shares will lapse permanently if a WVR beneficiary (1) dies, (2) ceases to be a director, (3) is deemed by the HKEx to be incapacitated, (4) is deemed by the HKEx to no longer meet the requirements of a director set out in the Listing Rules, or (5) transfer his beneficial or economic interest or voting rights to another person; – In the event of failure to comply with the HKEx rules and the safeguards, the HKEx may impose or issue sanctions against the relevant WVR beneficiary, make decision for a WVR beneficiary to give up the WVRs and, if the breach is material,

	may result in suspension or cancellation of listing; and – Identification through a stock marker "W" at the end of its stock name and other prominent warning statements in listing documents, announcements, financial reports and documents of title.

Secondary listing of qualifying issuers	
Proposal	New concessionary secondary listing route for emerging and innovative companies already listed on other major international exchanges
Qualifications for listing	A "Qualifying Issuer" is defined as an issuer primarily listed on New York Stock Exchange LLC, Nasdaq Stock Market, or the Main Market of London Stock Exchange plc (each, a "**Qualifying Exchange**"). A Qualifying Issuer must: – be an innovative company as described above; – have a good record of compliance for at least 2 full financial years; – have a minimum expected market capitalization at the time secondary listing in Hong Kong of at least HK$10 billion; and – a secondary listing applicant with a WVR structure and/or a centre of gravity in the Greater China region must also meet a revenue test of HK$1 billion in the most recent financial year if it has an expected market capitalization of less than HK$40 billion at the time of listing.
Listing Rules applicability and shareholder protection standard	– Automatic waivers apply (for example, requirements regarding connected transactions, notifiable transactions and the Corporate Governance Code); – Must fulfill minimum key shareholder protection standards, including: • Holding an annual general meeting at least every 15 months, giving reasonable notice of meetings and members to have the right to speak and vote at the shareholders' meeting; • Minority shareholders holding not less than 10% must be allowed to convene an extraordinary general meeting; • Minority shareholders holding not less than 10% must be allowed to convene an extraordinary general meeting; • No alteration to the constitutional documents to increase an existing member's liability unless approved by such member; • Super-majority vote of members is required to approve fundamental matters (e.g. changes to rights attached to any

	class of shares, changes to the constitutional documents or a voluntary winding-up); and • The appointment, removal and remuneration of auditors to be approved by a majority of the members or another body independent of the company's board of directors. – For applicants with WVR structure and without a "centre of gravity" in Greater China or ones with a "centre of gravity" in Greater China but were primarily listed on a Qualifying Exchange on or before 15 December 2017, they are not required to meet WVR safeguards (except on disclosure) nor change its WVR structure to meet primary listing requirements. – For applicants with a "centre of gravity" in Greater China that are listed on a Qualifying Exchange after 15 December 2017, the above concessions will not be granted and they are required to change constitutional documents in accordance with the existing rules and must meet WVR safeguards and WVR structure must conform with primary listing requirements.

Initial thoughts and expected timetable

The public comment period ends on 23 March 2018. Interested groups should submit their comments before that. If there are no major adjustments to the proposals following the consultation, the HKEx will publish the consultation conclusions in late April at the earliest.

While the proposals will bring significant changes to the existing listing regime, they are largely expected as they were drawn from the responses received from the New Board Concept Paper.

Companies may submit a formal listing application under the new regime after the new rules come into effect. From a practical perspective, any prospective listing applicants should start considering whether they are able to meet the new rules and criteria as the HKEx will permit formal pre-IPO enquiries regarding interpretation of the published final rules and their application to the applicant's circumstances. Before then, the HKEx will also respond to enquiries on an informal basis.

Given it is a new regime and the HKEx retains absolute discretion to find a listing applicant not suitable for listing even if it satisfies all the features set out in the Listing Rules, potential applicants are encouraged to consult with the HKEx prior to submitting a listing application. In this regard, we are happy and well-placed to assist any potential applicant in making such consultation.

ABNR

COUNSELLORS AT LAW

12/03/2018

Government Caps Prices of Coal for Power Generation

A. Introduction

With state power utility Perusahaan Listrik Negara (“PLN”) coming under increasing financial pressure as energy prices soar and the political temperature heating up ahead of local elections this year and a presidential election next year, the Government has opted to impose caps on the prices payable for coal to be used for power generation in the public interest. This new policy is incorporated in three newly issued regulations, namely, Government Regulation No. 8 of 2018 (GR 8/2018), Minister of Energy & Mineral Resources Regulation No. 19 of 2018, and Minister of Energy & Mineral Resources Decree No. 1395 K/30/MEN/2018 (“**Decree No. 1395**”).

Government Regulation No. 8 of 2018 and Minister of Energy & Mineral Resources Regulation No. 19 of 2018 provide the overarching legal basis for the setting of maximum prices for coal to be used for power generation in the public interest, while Decree No. 1395 sets out the technical details of the new pricing policy. Decree No. 1395, which was promulgated on 9 March 2018, is of retroactive effect to 1 January 2018.

B. Decree No. 1395: Key Provisions

Under Decree 1395, the price of coal supplied for power generation in the public interest is set at USD 70 per metric ton Free on Board Vessel ("**Coal Price I**"), where the coal satisfies the following specifications:

1. Calorific value: 6,322 kcal/kg GAR:
2. Total Moisture: 8%;
3. Total Sulphur: 0.8%; and
4. Ash: 15%.

Should the coal’s specifications differ from the above, and the benchmark price for such coal be equal to or exceed Coal Price I, then the price payable will be calculated based on the formulae set out in Annex I to MEMR Decree 1395 ("**Coal Price II**"), while if the benchmark price is lower than the Fixed Coal Price, the price is to be calculated based on formulae set out in Annex II to Decree 1395 ("**Coal Price III**").

The price caps described above are only applicable to coal sales in 2018 and 2019, up to a maximum of 100 million metric tons per year.

The MEMR may also authorize an increase in production volume of up to a maximum of 10% over the approved total production volume for miners holding a Production Operation Coal Mining License ("**IUP OP**"), Production Operation Specific Coal Mining License ("**IUPK OP**"), or a Coal Mining Contract of Work – Production Operation Stage ("**CCOW OP**"), provided that the miner has abided by its obligations under the applicable regulations on minimum percentage coal sales to the domestic market, and fully complies with the price caps under Decree 1395.

Decree 1395 also sets out rules governing the calculation of production fees or royalties by the holders of IUP OP, IUPK OP and CCOW OP. In the case of Coal Price I and Coal Price II, the amount payable is calculated by multiplying the applicable tariff formula for the calculation of production fees or royalties by the total sales volume and the selling price, while in the case of Coal Price III, the amount payable in production fees or royalties is calculated by multiplying the applicable tariff formula by the total sales volume and the applicable Indonesian Benchmark Price ("**HBA**").

C. ABNR Commentary

The maximum price payable under Decree 1395 is 30% below the HBA for equivalent coal sold for export in February 2018, meaning that the country's coal producers will suffer a substantial cut to their profitability by selling coal for domestic power generation. Not surprisingly, this shock was reflected on the Indonesia Stock Exchange, where the Mining Index slumped by 3.56% on Wednesday, 7 March 2018, shortly after the new pricing policy was announced by the Government. As the coal industry is dominated by locally owned companies or companies listed on the Indonesia Stock Exchange, it is likely that there will be furious lobbying by the coal industry to reduce or limit the impact of Decree 1395. *(By: Giffy Pardede: gpardede@abnrlaw.com & Rendi Prahara Septiawedi: rseptiawedi@abnrlaw.com)*

NautaDutilh

Corporate

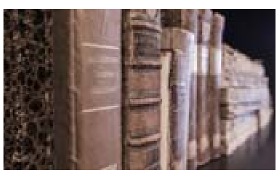
Netherlands | EU

How will the revised Shareholders' Rights Directive be implemented in the Netherlands?

Friday 9 March 2018

On 27 February 2018 a draft bill for the implementation in Dutch law of the revised Shareholders' Rights Directive ((EU) 2017/828) was published for the purposes of a public online consultation. The aim of the Directive is to further promote shareholder engagement in listed companies. According to the Dutch minister of finance, the aim is to implement as minimalistic as possible, in line with current practice where possible and to choose the options intended to reduce additional burdens when available.

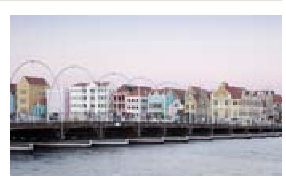
In this newsletter, we will give an overview of the most important new rules in the draft bill. Earlier we gave a description in our newsletter of May 2017 of the changes based on the Directive.



For whom is the Directive relevant?

- Listed companies (NVs and BVs) having their corporate seat in an EU member state and whose shares are admitted to trading on a regulated market in the EU. Intermediaries to the extent that they provide services to shareholders of listed companies, or to other intermediaries in respect of shares in such companies. The term "intermediaries" (tussenpersonen) comes from the Directive and refers to any of the parties that make up a "custody chain" (bewaarketen), a new term that will be included in the Securities Book-Entry Transfers Act. These parties are referred to in section 49b(1)(b) of that Act and consist of the central institution, an intermediary as referred to in the Act (intermediair) and the custodian of an investment institution, both inside and outside the Netherlands.
- Institutional investors having their registered office in the Netherlands, to the extent that they invest, whether directly or via an asset manager, in shares admitted to trading on a regulated market in the EU. For the purposes of the new rules (regarding transparency) that are to be incorporated in the Financial Supervision Act, the definition of "institutional investors" encompasses life insurers and pension funds.
- Asset managers having their registered office in the Netherlands, to the extent that they invest, on behalf of investors, in shares admitted to trading on a regulated market in the EU. For the purposes of the new rules (regarding transparency) that are to be incorporated in the Financial Supervision Act, the definition of "asset managers" encompasses investment firms, UCITS management companies, alternative investment fund manager and investment companies.
- Proxy advisors having their registered office or a branch office in the Netherlands, to the extent that they provide services to shareholders in respect of shares admitted to trading on a regulated market in the EU in the capital of companies having their corporate seat in an EU member state.

Identification of shareholders



With regard to the identification of shareholders, the current rule under section 49b of the Securities Book-Entry Transfers Act will be amended.

- There will be a change in scope: (a) issuing institutions having their registered office outside the EU and whose securities are listed in the Netherlands and (b) issuing institutions whose securities are listed on a multilateral trading facility will no longer fall under the shareholder identification rules laid down in the Securities

Book-Entry Transfers Act.

- Parties in the custody chain will be required to ensure that information which is of relevance for the exercise of shareholder rights reaches shareholders via the custody chain and that shareholders are able to communicate information to the issuing institution through the same route.
- Article 49b of the Securities Book-Entry Transfers Act otherwise remains unchanged, for exam-ple regarding the threshold below which shareholders need not be identified (shareholdings of 0.5% or less), the method for transmission of relevant information, the period during which the request for information must be submitted and the possibility for a shareholder to request the communication of information to the other shareholders.

Electronic voting

Shareholders who vote electronically during a general meeting will be entitled to subsequently obtain confirmation that their vote has been validly recorded and counted by the company, unless this information is already available to them. The draft bill sets a three-month deadline for this request.

Significant transactions with related parties

- The supervisory board, or the management board in the case of a company with a one-tier board system, has been chosen as the corporate body whose approval will be required for material transactions with related parties. Shareholders will not have the right to vote on such transactions – referred to in Dutch law as "significant transactions" (transacties van betekenis) – following approval.
- Under the draft bill, a definition of the term "significant transactions" (transacties van be-tekenis) will be added to the Dutch Civil Code for the purposes of the implementation of the Directive. This does not necessarily have the same meaning as "significant transactions" under the rules on companies' annual accounts (section 2:381(3) Dutch Civil Code). The draft bill states that a transaction will in any event constitute a significant transaction if it meets both of the following criteria:
  - if the transaction is with one or more shareholders who individually or collectively represent at least 10% of the company's issued share capital; and
  - if the transaction causes a decrease in the company's equity without a corresponding decrease in its debts, or causes an increase in the company's debts without a corresponding increase in its equity.

- A transaction with a related party that, by itself, does not constitute a significant transaction can nevertheless be classified as such when taken together with previous transactions with the same related party over the course of the same year.
- The following must be taken into account when determining whether a transaction is a significant one: (a) the influence that the information about the transaction may have on the economic decisions of shareholders of the company and (b) the risk that the transaction creates for the company and its shareholders who are not a related party, including minority shareholders.
- For transactions entered into in the ordinary course of business and concluded on normal market terms the supervisory board, or the management board in the case of a company with a one-tier board system, must establish an internal procedure to periodically assess whether these conditions are fulfilled. However this does not apply to transactions that have already received prior board approval.
- Listed companies will be required to publicly announce significant related-party transactions by no later than at the time they are concluded. Transactions entered into in the ordinary course of business and concluded on normal market terms will not be subject to the above requirement or to the approval requirement described earlier.

Remuneration policy

- In exceptional circumstances, companies are allowed to temporarily derogate from the remuneration policy where derogation is necessary to serve the long-term interests and sustainability of the company as a whole or to assure its viability. The draft bill also provides that a derogation from the remuneration policy must cease when a new policy is adopted.
- Shareholders will be entitled to vote on the remuneration policy as regards management board members and supervisory board members every four years, instead of only in the event of changes to the policy. Under the Directive EU member states have the option of providing for the shareholders' vote on the remuneration policy to be only advisory in nature, but the draft bill provides for a

binding vote.

- Each year shareholders will be entitled to hold an advisory vote on the remuneration report, which must be drawn up separately. The company must then explain in the subsequent report how the outcome of that vote has been taken into account. A negative vote will not affect the validity of the report. Small and medium-sized companies will only be required to submit the remuneration report for discussion in the annual general meeting as a separate agenda item.

Increased transparency for institutional investors, asset managers and proxy advisors

- Institutional investors and asset managers will be required to develop and publicly disclose on their website a policy on shareholder engagement, or explain why they have chosen not to do so. They must also provide insight into their investment strategy, for example how it contributes to the medium to long-term performance of the relevant assets. This is also a "comply or explain" principle. Lastly, the draft bill contains a provision requiring asset managers to also provide the relevant information to other investors of the same fund at least upon request.
- Each year proxy advisors will have to publicly disclose whether and, if so, to what extent they comply with a code of conduct. Here too, a "comply or explain" rule applies. In addition they will have to publicly disclose, also on an annual basis, certain information relating to the preparation of their research, advice and voting recommendations. Actual or potential conflicts of interest or business relationships that may influence the preparation of their voting recommendations will likewise have to be disclosed.

Next steps

The consultation on the draft bill will remain open until 27 March 2018, after which a definitive bill (possibly containing amendments) will be drawn up and submitted to the lower house of the Dutch parliament (Tweede Kamer). Further amendments may be made as the bill makes its way through Parliament. The deadline for the Netherlands (and other EU member states) to implement the Directive in national law is 10 June 2019. We will of course keep you updated on the implementation process and, in particular, any significant amendments to the bill.

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Government signals greater focus on waste minimisation

February 16, 2018

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Following reports that New Zealand is ranked 10th in the world for the amount of urban waste created per capita, the Associate Environment Minister Eugenie Sage has announced that there will be a review of the implementation of the Waste Minimisation Act 2008.

Scope of the review

The review will be focussed on the implementation of the Act, with the Minister commenting that she thinks the Act itself is a, "good law, with effective provisions, but they haven't been used to the extent they should have". She has signalled the review will likely cover the landfill waste levy, container deposit and product stewardship schemes, and the collection of data about waste.

Changes to the landfill levy

There is currently a $10 per tonne levy on waste which is disposed of at class 1 (municipal solid waste disposal) facilities that receive household waste. By exercising the powers currently available to her under the Act, the Minister could expand the scope of the levy so that it applies to more landfills; increase the levy for all types of waste; or increase the levy for more harmful types of waste. Each of these measures would seem a logical intervention if the Government's primary goal is to reduce volume of waste to landfill, and incentivise reuse and the diversion of recyclables and organic material. Expanding the scope of the levy, or the rate of the existing levy, is likely to be of particular interest to local authorities since 50% of the gross revenue collected through the levy is allocated to local authorities to fund waste minimisation activities.

More priority products

The Act allows the Minister to declare that some products, or classes of products, are 'priority products'. An accredited product stewardship scheme must be developed for any product that is declared to be a priority product, and participation in a product stewardship scheme can then be required by regulation.
Product stewardship schemes require producers, importers, retailers and consumers to accept responsibility for reducing a products environmental impacts. They typically control the disposal of products, materials or waste; or require take-back services, deposit fees or the labelling of products. The 14 voluntarily accredited product stewardship schemes are examples of what might be involved. Previous reviews have identified electrical and electronic equipment, tyres, agrichemicals and farm plastics, and refrigerants and other synthetic greenhouse gases as priorities for product stewardship schemes.

More information about waste disposal and diversion

Ms Sage has stated that the Government needs "good data and information to support decision making" about waste minimisation. A possible outcome of the review could be to require local authorities, or the operators of waste disposal facilities, to provide information about waste disposal and diversion. The Act already gives the Minister extensive powers to make regulations compel local authorities, or the operators of waste disposal facilities, to collect information about waste, and to provide that information to the Government.

The Minister might require local authorities to provide information about waste disposal and diversion as a part of setting performance standards regarding the implementation of territorial authorities' own waste management and minimisation plans.

Some territorial authorities, who do not already have provisions to this effect, may need to amend their solid waste bylaws to require those who hold licences for the collection and transportation or disposal licenses to provide data about the quantity, composition, and destination of waste collected and transported by the licensee (such as household waste to a disposal facility). Notably, Auckland Council's solid waste bylaw already requires the provision of such data as a condition of licences granted for collection and transportation of waste.

Changes to the New Zealand Waste Strategy?

Another potential outcome of the review could be revisions of the New Zealand Waste Strategy so that it is more aspirational, for example by setting a zero-waste goal. The Strategy could also be more prescriptive as to how Councils should implement the Act.

At present, the Act merely requires local authorities to have regard to the New Zealand Waste Strategy when developing their waste management and minimisation plans. More directive language (such as a requirement to "give effect to" the Strategy) is something the Minister may have in mind if her concern is with the implementation of the Act, and local authorities making insufficient tools of the measures available to them under the Act, such as waste management and minimisation plans and bylaws. However, that would require changes to the Act itself, which does not seem to be the Minister's primary focus at this stage.

Where to from here?

There is not yet any information publicly available about when the review will occur, or its precise scope. It will be "competing for space" within an extremely busy policy agenda for the new Government. The wider question is whether Ms Sage's appetite for change, as a Green Party Minister outside Cabinet, is shared by the wider Government, and in particular Cabinet which would be required to sign off on key changes such as increases to the landfill levy or regulations in relation to data provision. Local authorities and others with an interest in solid waste should continue to watch this space.

Arias

PRESS ROOM

NICARAGUA - MINIMUM WAGE INCREASE

March, 2018

The Ministry of Labor approved a 10.4% increase in minimum wages for the different economic sectors of the country, with the exception of the free trade zones, which increase will be of 8.25%. 50% of the increase will be applied from March 1 and the remaining 50% will be applicable from September 1st, 2018. For free trade zones the total increase applies as of March 1st, 2018.

With this new adjustment, Nicaraguan average minimum wage is approximately one hundred and sixty dollars (US $160.00). These minimum wage adjustments will also be applicable to the retirement pensions contemplated by the Social Security Law. In accordance with current legislation, minimum wage is reviewed every six months, and new negotiations must take place at the beginning of 2019.

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ARIFA

LEGAL BULLETIN

Does your company comply with the law by adopting an Internal Working Regulation approved by the Ministry of Labor and Labor Development?

Remember that it is mandatory compliance in any company or enterprise of 10 and more employees.

The Internal Work Regulation is essential to set the rules for your employees and for your company to meet with occupational health, labor, and safety laws and regulations. In addition, the formalization of this regulation allows you to impose effective disciplinary actions.

Labor and Immigration Group
ARIFA

Our deep knowledge of the Panamanian labor legislation and its regulatory framework, as well as the actions and demands carried out by the public competent employment authority, make us your strongest ally with our timely, efficient and effective advice to ensure proper compliance with the obligations and duties of your company.

We are up-to-date with the local authorities' labor requirements and in the identification of those breaches of the established norms that are subject to greater and more frequent sanctions by the authority.

One of them is the frequent failure to comply with an Internal Work Regulation.

On-site verifications to enforce the requirement for an Internal Work Regulation are being carried out by local authorities on a regular basis.

Sanctions

Violations of the provisions contained in Chapter IV of the Labor Code will be punished with a fine of B / .50.00 to B / .250.00, imposed by the General or Regional Labor Directorates.
Article 192

What should your Internal Labor Regulation include?

"The purpose of the internal labor regulations shall be to specify the mandatory conditions to which the employer and its workers must submit in connection with the execution or provision of service."
Labor Code, Chapter IV, Article 181

- Employers' obligations.
- Workers' rights and duties.
- Salary: form of remuneration; date, time, and place established for payment.
- Working schedule: time to report to and leave work, lunch breaks, overtime and night work. Vacations, holidays, and paid leaves-of-absence.
- Occupational health and safety policy: The time
- and established procedure for workers to undergo previous or periodic medical examinations, as well as prophylactic measures dictated by the authorities.
- Disciplinary sanctions and how to apply them.

Among others.

We are where our customers need us to be:

- In the drafting and submission of your Internal Labor Regulations before the Ministry of Labor and Labor Development (MITRADEL).
- In obtaining, through the Ministry of Labor and Labor Development, the favourable opinion issued by the corresponding workers' union, or otherwise, of the company labor force, in regards to the legal, social and economic aspects of said Regulations.

  The internal work regulations may not violate the rights set forth in the contracts and labor conventions that the workers have at the time of the approval of said regulation.

- Obtaining the Ministry of Labor and Labor Development's final approval, upon delivery of the report issued by the General Directorates of Labor on technical services.
- In the correct compliance with existing regulation requiring presenting the workers of the company with the new framework regulation, in a period not less than 15 days prior to the entry into force of the same.

Count on ARIFA to assist you in this and other legal issues.

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Opportunities for Venture Capital Investments in Singapore in 2018

DENTONS RODYK

Introduction

Heading into 2018, we look back on several key developments in the legal landscape in the past year that we expect will provide new opportunities for venture capital funds in Singapore. We also share our thoughts on promising trends in venture technology and emerging growth companies in the year ahead.

A more favourable legal landscape

Simplified rules for managers of venture capital (VC) funds

The Monetary Authority of Singapore (MAS) had on 20 October 2017 announced a simplified regulatory regime for VC fund managers. Previously, the qualifying criteria demanded, inter alia, VC fund managers to have at least five years of management experience, high capital capabilities and imposed onerous terms in relation to business conduct – with the new regime, such minimum qualifying criteria have been removed. This will attract a new set of VC managers and contribute to Singapore's vibrant start-up and growth stage market. For further details on such changes, please see our earlier article (Venture Capital fund managers may begin operations in record time in Singapore).

Redomiciliation

On 11 October 2017, Singapore formally adopted a re-domiciliation regime that allows certain foreign companies to be registered as a Singapore company limited by shares. With the enactment of new "Transfer of Registration" provisions under Part XA of the Companies Act (Chapter 50 of Singapore), foreign start-ups may find it compelling to re-domicile in Singapore to capitalise on its unique position as a reliable and efficient international business hub with access to various Asian markets, as well as its favourable tax regime.

In addition to increasing the pool of potential investee companies, the re-domiciliation regime will be a boon for investors who may be reluctant to invest directly into a foreign jurisdiction whose laws may be comparatively complicated or uncertain. Instead of requiring the founders of the foreign start-up to incorporate a new Singapore holding company and to effect various transfers of assets and shares to the Singapore entity, start-ups can make use of the re-domiciliation regime to transfer the registration of their existing entity to a Singapore company to facilitate the investor's equity investment, without the hassle of operational disruptions. This also dovetails the general preference for Singapore as a forum for dispute resolution in the region.

Enhanced Debt Restructuring Regime / Super-priority for Rescue Financing

A suite of debt restructuring reforms consolidated in the Companies Act came into force on 23 May 2017. The enhanced debt restructuring regime is a hybrid that builds upon existing legislation and combines key features of Chapter 11 US Bankruptcy Code provisions. With at least six workout cases filed in the Singapore courts to-date and a new Insolvency Bill to be enacted in 2018 that will further streamline and update its insolvency laws, Singapore will continue its push to establish itself as a debt restructuring hub in Asia and beyond.

Of particular interest to funds and corporates would be the super-priority for rescue financing enhancements to the scheme of arrangement and judicial management regimes (under Sections 211E and 227HA of the Companies Act respectively). Singapore courts can now order that the debt arising from rescue financing be accorded super-priority over existing debt, which should encourage the injection of critical funds to salvage distressed companies and envigorate the debt recovery market. Investors looking to capitalise on such opportunities to bridge the lending gap will do well to follow this space and related nascent jurisprudence closely.

MAS Regulations

Against the backdrop of continuous technology disruptions in the financial industry (and beyond), MAS has created a conducive ecosystem for financial technology (FinTech) experimentation in Singapore. MAS' aim is for innovations to be tested and developed in a safe and well-defined regulatory sandbox before wider adoption locally and abroad.

It was announced at the Singapore FinTech Festival organised by MAS in November 2017 (where over US$2 billion of capital was available for investment in start-ups) that MAS will expedite sandbox application assessments and further loosen the regulatory boundaries for solutions where the risks do not outweigh the potential benefits to consumers. Its recent venture with the Association of Banks in Singapore (ABS) in developing blockchain prototypes for more efficient inter-bank payments would also benefit all stakeholders looking to ride on the FinTech wave, including in the spheres of cybersecurity, payment gateways and digital currencies. With MAS continuing the drive to establish a thriving FinTech ecosystem, investment in this sector should remain relatively steady in 2018.

Promising Technology Trends

Legal Technology (LegalTech)

Consider a reality where legal contracts are enforced by machines; or a world where 'intelligent legal assistants' provide real-time updates on case law and legislation from jurisdictions worldwide. From America to Asia, start-ups and law firms have jumped on the bandwagon, transforming access to legal developments and services.

Dentons recently launched Nextlaw Labs and its investment arm Nextlaw Ventures, LegalTech ventures jointly focused on incubating, investing in, developing and deploying new technologies to transform the business and practice of law. Nextlaw Ventures' portfolio of legal technology innovators include *ROSS Intelligence*, a leading artificial intelligence company that leverages IBM Watson-powered cognitive computing to refine expert legal research and which had secured US$8.7 million in Series A funding in October 2017.

In Singapore, *Singapore Academy of Law* (SAL) has swung to the rhythm of LegalTech, with the official launch of the Future Law Innovation Programme (FLIP) in January 2018. Not only does FLIP aim to encourage innovation in Singapore's legal practice, the launch of its FLIP Accelerator (touted as South East Asia's first LegalTech accelerator program) will boost the growth and development of LegalTech start-ups in the region. Dentons Rodyk is a featured international law firm participant - in line with our strategy of redefining the client experience and leveraging technology to promote seamless collaboration.

Property Technology (PropTech)

Reports show that investment in PropTech has been steadily rising on a global scale, and that in recent years PropTech start-ups in Asia-Pacific have secured more investments that their American and European counterparts (close to US$5 billion in funding since 2013). In addition to PropTech that is developed primarily for consumers (such as property portals with virtual-reality tours, data analytics and market research), blockchain technology has already been adopted by some countries for their land registriesDedicated funds that have been set up by various property and construction groups in Singapore to invest exclusively in start-ups in the PropTech vertical are also indicative of PropTech's growing prospects.

Deep Technology (DeepTech)

DeepTech start-ups focus on developing technology based on unique scientific and/or engineering innovation and are built around intellectual property that is proprietary or hard to replicate, compared to the ubiquitous consumer technology companies that rely mainly on existing technology. While consumer technology companies continue to expand, the potential for unabated growth is theoretically limited by technology that is only available today as well as the risk of market saturation.

Investors are looking to DeepTech start-ups as an alternative. Amongst various other initiatives, SGInnovate, a Singapore government-owned innovation platform, unveiled late last year its "Deep Tech Nexus" Strategy for 2018 to develop the DeepTech ecosystem in Singapore, with a focus on three technology areas: (i) artificial intelligence; (ii) blockchain; and (iii) medical technology (discussed below).

Medical Technology (MedTech)

The interplay of technological advances, aging populations and vast areas of unmet medical needs in many Asian countries herald a new era of MedTech start-ups, and Singapore has been identified as being well-positioned to act as a gateway to tap into the MedTech industry in the region. A recent boost for MedTech start-ups and emerging growth companies was provided in June 2017 when the Singapore Exchange Limited (SGX) and ETPL, the commercialisation arm of the Agency for Science, Technology and Research (A*STAR), signed a two-year memorandum of understanding, making it more accessible for MedTech companies to tap on innovative technologies and access growth capital from private and public capital markets to grow their businesses.

Conclusion

VC and private equity investment in South East Asia have been on a upward trend in recent years as funding in Asian companies continue to increase globally, according to public reports. In light of the developments and technology trends discussed above, we believe there will be ample opportunities in Singapore as well as the region.

Dentons Rodyk acknowledges and thanks Xuan Rong Liow for her contribution to the article.

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Amendments to the Income Tax Act

02/26/2018

Josephine Peng

On January 18, 2018, the Legislative Yuan approved the Amendments to the Income Tax Act ("Amendments") submitted by the Ministry of Finance. After the Amendments are announced by the president, they will be effective starting from January 1, 2018 and are a step forward for Taiwan's tax system to be more in line with global tax developments and to be more competitive, equitable and reasonable. The major changes to the tax system are as follows:

A. Individual Income Tax

1. The Amendments will increase the standard deduction (from NT$90,000 to NT$120,000), the special deductions for salary/wages and the disability allowance (each from NT$128,000 to NT$200,000), and the special deduction for pre-school children (from NT$25,000 per child to NT$120,000 per child), in an effort to reduce the income tax liability of wage earners, mid/low-income earners, and parents with young children.

2. Hoping to help companies attract and retain high-level talent, the Amendments will abolish the highest tax rate bracket, thus decreasing the highest tax rate bracket from 45% to 40% and reducing the income tax liability of individuals with more than NT$10 million of net taxable income.

3. Under the new tax system, the income earned by sole proprietorships and partnerships will be passed through to the sole proprietor or each partner and subject to individual income tax. As corporate income tax will no longer be levied on such income, the Amendments will reduce the corporate income tax liability of sole proprietorships and partnerships.

B. Corporate Income Tax

The corporate income tax rate will increase from 17% to 20% and the surtax on undistributed earnings will decrease from 10% to 5% under the Amendments. However, the corporate income tax rate for corporations with less than NT$500,000 of taxable income will increase gradually over a three year period (the tax rate will be 18% in 2018, 19% in 2019, and 20% in 2020).

C. Taxation of Dividends Income

1. The Amendments will abolish the imputation tax system and imputed credit account with the aim of simplifying income taxation in respect of dividends.

2. The Amendments will increase the dividends withholding tax rate from 20% to 21% for foreign investors. Furthermore, foreign investors will no longer be allowed to apply 50% of the surtax paid by the company as a tax credit against his/her dividends withholding tax. However, if the investor's home country and Taiwan have entered into a tax treaty with a preferential dividends withholding tax rate, the investor may continue to apply such preferential tax rate (Taiwan has entered into tax treaties with 32 countries).

3. To promote a fairer tax system and to reduce the difference in tax liability that exists between resident individual investors and foreign investors, the Amendments will launch a new tax regime in respect of resident individual investors' dividends income. Under the new regime, there are two options for taxing dividends income that a resident individual investor may choose from:

(1)Under Option 1, an investor's dividends income is combined into his/her gross income and the investor can apply 8.5% of the dividends income as a tax credit against his/her income tax liability. However, such dividends tax credit is limited to NT$80,000 for each household. An investor is entitled to a tax refund if the amount of the dividends tax credit is greater than his/her income tax liability. Option 1 would likely be preferential for investors with individual income tax rates that are lower than 20%.

(2)Option 2 applies a flat 28% tax rate on dividends income and would likely be preferential for investors with individual income tax rates that are higher than 30%.

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BAKER BOTTS

Ideas

New Texas Comptroller Ruling - Oil and Gas Joint Venture Subject to Texas Franchise Tax

02 March 2018

Firm Thought Leadership

The Texas Comptroller's Tax Policy Division recently issued a private letter ruling (PLR No. 201712002L) taking the position that an oil and gas joint venture, treated as a partnership for federal tax purposes only, created a separate taxable entity for Texas franchise tax purposes.

Company A ("Operator") and Company B ("Non-Operator") entered into a Joint Operating Agreement ("JOA") for the development of oil and gas leasehold interests. Operator paid all expenses and then charged Non-Operator for its respective share. The JOA provided for each participant to take its proportional share of oil and gas production in-kind and market it separately, although it provided that the Operator could sell on the Non-Operator's behalf any production that the Non-Operator failed to take in kind.

For federal income tax purposes, the JOA created a tax partnership under Internal Revenue Code Section 761. For Texas franchise tax purposes, the PLR ruled that the JOA created a joint venture subject to Texas franchise tax because (i) it met Rule 3.581(b)(10)'s definition of a taxable "joint venture"—that is, a "partnership engaged in the joint prosecution of a particular transaction for mutual profit"—and (ii) the joint venture did not elect out of partnership treatment for federal income tax purposes, thereby failing to qualify for the exclusion under Texas Tax Code Section 171.0002(a) for ventures electing out of federal income tax partnership treatment.

The PLR fails to address important arguments that might be made against treating the joint venture as a taxable entity for Texas franchise tax purposes. Most critically, the PLR relies on Rule 3.581(b)(10) without analyzing whether the venture is a "partnership" within the meaning of that provision. Rule 3.581(b)(15) defines "partnership" by cross-reference to the Texas Business Organizations Code ("BOC") § 152.051, which contains factors relevant to determining whether a partnership exists and explicitly provides that "ownership of mineral property under a joint operating agreement" does not, by itself, create a partnership. The PLR does not analyze any of these BOC provisions.

Please contact us if you would like to discuss the implications of this PLR on the structuring and franchise tax reporting of Texas oil and gas ventures.

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Budget Act Includes Retirement Plan Changes Dropped From Tax Act

03.01.18
By Jeff Belfiglio

Our previous Advisory on the Tax Cuts and Jobs Act reported that it made few changes that affected retirement plans. However Congress got another chance in the recent Bipartisan Budget Act of 2018, and included changes to hardship withdrawals, relief for California Wildfires, and more. Some of those provisions were dropped from the Tax Act but revived a month later. Some are effective immediately, while others do not take effect until 2019.

Hardship Withdrawals

The Budget Act expands the availability of hardship withdrawals by including additional sources besides a participant's own salary deferrals. Qualified matching contributions, qualified nonelective contributions, and earnings will be available for withdrawal. The Budget Act also eliminates the requirement that plan loans be taken before hardship distributions can be made. These changes are all effective for plan years after 2018. In addition, it directs the IRS to revise its safe harbor hardship rules within one year, so that a 6-month suspension of deferrals will not be required.

The Tax Act did make one, possibly unintentional, change to hardship provisions. It narrowed the use of the "casualty loss" deduction so that it only applies in federal disaster areas. The safe harbor hardship rule references this section. So apparently a participant who suffered an isolated loss, like a home fire, could not take a hardship withdrawal from a plan using the safe harbor rules. It is possible the IRS will fix this problem by future guidance. Plans may also consider using a non-safe harbor definition of a casualty loss without the statutory reference.

California Wildfires

The Budget Act provides relief for victims of California wildfires similar to that previously provided for the 2016-17 hurricanes. Participants who withdraw funds up to $100,000 from October 8, 2017 through December 31, 2018 can spread the tax over three years. They can also roll the funds back into their plans within three years. Participants who took withdrawals between March 2017 and January 15, 2018 to purchase a home but couldn't use it can also repay the money to their plan. Plan loans that would come due through the end of 2018 can take a one-year extension. To be eligible, a participant must have resided in the federally declared wildfire disaster zone during October – December 2017 and suffered an economic loss. Plans offering this relief must be amended by the end of 2019.

IRS Levy

Qualified plan accounts are exempt from most creditors, but not the IRS. The IRS can force the plan to distribute a participant's savings to it, if the participant was otherwise eligible to take a distribution. Under the Budget Act, effective after 2017, if the IRS levies on a plan account but the levy turns out to be wrongful, the taxpayer can now re-contribute the funds to the plan by the due date of the individual's tax return for the year in which the IRS returns the funds.

GOODSILL

Creditors' Rights and Bankruptcy Practice Group

GOODSILL ALERT

March 9, 2018

SUPREME COURT NARROWS SECTION 546(E) SAFE HARBOR REGARDING TRANSFERS INVOLVING FINANCIAL INSTITUTIONS

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In the case of *Merit Management Group, LP v. FTI Consulting, Inc., 16-784 (February 27, 2018)*, the U.S. Supreme Court held that the safe harbor contained in section 546(e) of the Bankruptcy Code is not triggered when a financial institution is acting as an intermediary in a securities transaction.

BACKGROUND FACTS

The Bankruptcy Code allows trustees to set aside and recover transfers "of an interest of the debtor in property" for the benefit of the bankruptcy estate, including certain transfers that are either intentionally or constructively fraudulent. 11 U. S. C. §548(a). The Bankruptcy Code also contains a number of exceptions to this avoiding power, which limit a trustee's ability to recover certain types of transfers made to certain types of entities.

Section 546(e) of the Bankruptcy Code is one of those exceptions and provides that a trustee may not avoid a "settlement payment" or transfer that is "made by or to (or for the benefit of) a … financial institution" in connection with a "securities contract," unless the transfer was made with actual intent to hinder, delay, or defraud creditors under 548(a)(1)(A). 11 U. S. C. §548(e).

This case concerned an agreement between Valley View Downs, LP ("Valley View") and Bedford Downs Management Corporation ("Bedford Downs") to resolve a dispute over a harness-racing license wherein, among other things, Valley View was to purchase all of Bedford Downs' stock for the sum of $55 million. Id. at 7.

Valley View arranged for the Cayman Islands branch of Credit Suisse to finance the $55 million purchase price by wiring the money to Citizens Bank of Pennsylvania, which had agreed to serve as the third-party escrow agent for the transaction. Id.

As part of the transaction, each of Bedford Downs' shareholders, including Merit Management Group, LP ("Merit"), deposited their stock certificates into escrow. Id. When the transaction was completed, Merit received approximately $16.5 million from the sale of its Bedford Downs stock to Valley View. Id. at 8.

Valley View and its parent company, Centaur, LLC, later filed for Chapter 11 bankruptcy protection. Id. In that proceeding, the Bankruptcy Court confirmed a chapter 11 plan and appointed FTI Consulting, Inc. ("FTI"), to serve as trustee of the Centaur litigation trust. Id.

FTI filed a lawsuit against Merit seeking to avoid the $16.5 million transfer from Valley View to Merit for the sale of Bedford Downs' stock as constructively fraudulent under §548(a)(1)(B) of the Bankruptcy Code, alleging that Valley View was insolvent when it purchased Bedford Downs and "significantly overpaid" for the Bedford Downs stock. Id.

In the lawsuit, Merit moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), contending that the Section 546(e) safe harbor barred FTI from avoiding the Valley View-to-Merit transfer. Id. Specifically, Merit argued that the safe harbor applied because the transfer was a "settlement payment . . . made by or to (or for the benefit of)" a covered "financial institution"—here, Credit Suisse and Citizens Bank. Id. at 8-9.

The District Court granted Merit's Rule 12(c) motion, reasoning that the §546(e) safe harbor applied because the financial institutions transferred or received funds in connection with a "settlement payment" or "securities contract." Id. at 9. The Court of Appeals for the Seventh Circuit reversed, holding that the Section 546(e) safe harbor did not protect transfers in which financial institutions served as mere conduits. Id.

The U.S. Supreme Court granted certiorari to resolve a conflict among the circuits as to the proper application of the §546(e) safe harbor. Id.

THE SUPREME COURT'S DECISION

Before the Supreme Court, Merit argued that the Court should look not only to the Valley View-to-Merit end-to-end transfer, but also to all of its component parts, including the $16.5 million transfer by Credit Suisse to Citizens Bank and two transactions by Citizens Bank to Merit (i.e., the transmission of $16.5 million over two installments by Citizens Bank as escrow agent to Merit). Id. at 10. Because the component parts included transactions by and to "financial institutions," Merit contended that Section 546(e) barred avoidance of the transfer. Id.

On the other hand, FTI argued that the only relevant transfer for purposes of the §546(e) safe harbor inquiry was the overarching transfer between Valley View and Merit of $16.5 million for purchase of the stock, which is the transfer that the trustee sought to avoid under §548(a)(1)(B). Id. FTI argued that because that transfer from Valley View to Merit was not made by, to, or for the benefit of a financial institution, the safe harbor has no application. Id.

The Supreme Court agreed with FTI. Id. The Court explained that "to qualify for protection under the securities safe harbor, §546(e) provides that the otherwise avoidable transfer itself be a transfer that meets the safe-harbor criteria." Id. at 13. The Court explained:

> The safe harbor saves from avoidance certain securities transactions 'made by or to (or for the benefit of)' covered entities. Transfers 'through' a covered entity, conversely, appear nowhere in the statute.

Id. at 18.

The Court explained that the relevant transfer for purposes of the §546(e) safe harbor analysis is the transfer that the trustee seeks to avoid pursuant to its substantive avoiding powers, i.e. the end-to-end transfer of $55 million from Valley View to Merit. Id.

The Court concluded that "[b]ecause the parties do not contend that either Valley View or Merit is a "financial institution" or other covered entity, the transfer falls outside of the §546(e) safe harbor. " Id. at 19.

CONCLUSION

The U.S. Supreme Court's unanimous ruling in *Merit Management Group LP v. FTI Consulting Inc.*, resolves a long-standing circuit split over the scope of section 546(e)'s "safe harbor" provision exempting certain securities transaction payments from avoidance as fraudulent transfers. It is now clear that the Bankruptcy Code does not protect transfers simply because they are made through a financial institution because the relevant inquiry is whether the transferor or transferee are financial institutions themselves.

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

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