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ADVISORY COUNCIL

Pacific Rim Advisory Council

May, 2018 e-Bulletin

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64th International PRAC Conference
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September 15 - 18, 2018

65th International Conference
Costa Rica - Hosted by ARIAS
Spring, 2019

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BAKER BOTTS LEADING OIL AND GAS LAWYER JOINS FIRM

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

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

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

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

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

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

For additional information visit www.bakerbotts.com

CLAYTON UTZ ADDS FINANCE SPECIALIST

Sydney, 5 March 2018: Clayton Utz has appointed experienced finance lawyer Graeme Tucker as a partner in the firm's national Banking and Financial Services practice, in Sydney.

Graeme's practice spans asset-based lending, trade and asset finance, corporate and acquisition finance, debt restructuring and debt and portfolio trading transactions. He has acted for many large financial services entities and companies and has particular expertise in the Personal Property Securities Act.

Graeme said he was attracted to Clayton Utz' reputation for a collaborative, team-based approach to working with clients, and its strong client service focus. "It is particularly attractive to be a part of the cross-practice collaboration between the national Clayton Utz Banking and Financial Services practice, Restructuring and Insolvency practice and Corporate / M&A practice."

Deputy CEP - Clients and Markets and Banking and Financial Services national practice group head, Bruce Cooper, said Graeme's appointment meant Clayton Utz' clients would have access to an even broader range of specialist finance law services.

For additional information visit www.claytonutz.com

GIDE INAUGURATES ITS OFFICE IN CAIRO IN THE RESIDENCE OF THE FRENCH EMBASSY IN EGYPT

12 April 2018: Gide announced the opening of its office in Cairo in early 2018. In line with its pioneering spirit, Gide becomes the first international law firm of French origin to set up in the Egyptian capital.

The inauguration of this new office will take place on Thursday 12 April from 7 p.m. onwards at the Residence of the French Ambassador to Egypt and in the presence of his Excellency **Stéphane Romatet**, French Ambassador to the Republic of Egypt, **Hubert Védrine**, former French foreign affairs minister, **Baudouin de Moucheron**, partner in charge of Gide Cairo, as well as **Xavier de Kergommeaux** and **Stéphane Puel**, Senior Partner and Managing Partner of Gide. The ceremony will gather clients and representatives of the Egyptian and international community, and Gide's team in Cairo.

At the crossroads between Asia and Africa, Egypt has exceptional assets that now make it the top destination for foreign investment in Africa, with the European Union as a major investor and France as 5th investor worldwide.

Egypt is the second most populated country in Africa. Its demographic growth, as well as its remarkable geographic situation (over 2,540 km of coastline and access to two seas), make it a major economic platform in the world and a strategic destination for development for a number of private and public players. Some 130 French companies are already present in Egypt. Buoyed by strong economic development in particular in the fields of agri-food, transport, energy and infrastructure, the country should reach a 5% growth rate in 2018.

Gide wishes to be more actively involved in the development of French and international firms in this country, and to assist Egyptian companies in their international transactions, both in an advisory and litigation capacity.

Particularly active in the Middle East for nearly 30 years now, our firm has been working in Egypt for some time through its various offices in the region. It has extensive experience in investments, acquisitions, commercial contracts and international arbitration cases, projects (finance & infrastructure), compliance, as well as competition law.

Gide Cairo is headed by **Baudouin de Moucheron**, Gide partner since 1992, founder of the firm's Istanbul office and Senior Partner from 2012 to 2017. The team in Cairo comprises mainly lawyers of Egyptian origin, working in Arabic, English, French and German. It will work closely with lawyers specialising in all fields of business law and other Gide offices worldwide.

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

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

For additional information visit www.gide.com

GOODSILL SET TO HOST 63RD INTERNATIONAL PRAC CONFERENCE

HONOLULU, 10 April, 2018: Pacific Rim Advisory Council ("PRAC") member firm GOODSILL ANDERSON QUINN & STIFEL will host the 63rd International PRAC Conference April 21 - 24, 2018 in Honolulu, Hawaii. Member firm delegates from around the globe will gather in Honolulu to attend the business conference featuring topical professional development programs and business development opportunities. Among the business sessions on tap:

● **Business Session #1** | Country Briefing presented by Goodsill
● **Business Session #2** | Special guest presentation, United States Navy Admiral, Pacific Command *"Security in the Pacific Region"*
● **Business Session #3** | PRACtice Management—*"Artificial Intelligence and Technology in the Courts"*
● **Business Session #4** | PRAC Business Development - *"Member Spotlight SIMPSON GRIERSON, New Zealand; Member Roundtables – Bring a Message"*
● **Business Session #5** | PRACtice Development *"Healthcare – Legal Issues and Opportunities"*
● **Business Session #6** | Special Guest Presentation, The Polynesian Voyaging Society *"The Story of the Hokule'a"*
● **Business Session #7** | PRACtice Development *"Trade in the Pacific" CPTPP Legal Work*
● **Business Session #8** | PRACtice Management—*"Law Firm Economics: Alternative Fee Arrangement and Non-Traditional Service Providers"*

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

ABOUT GOODSILL
Goodsill Anderson Quinn & Stifel LLLP has served clients locally and globally for more than a century. From its origin in 1878 as a one-person law office, the firm is one of the largest in Hawaii, providing a wide range of legal services to a broad spectrum of clients.

With over 60 attorneys located in downtown Honolulu, Goodsill offers legal services to individuals and businesses in several areas of law, including business and securities transactions, banking and finance, real estate, tax, trusts and estates, public utilities, immigration, international transactions and civil litigation. Our attorneys have experience in mergers and acquisitions, environmental law matters, antitrust compliance, aviation and admiralty law, international trade, labor and employment, media, technology, entity formation and venture financing and health law. Goodsill and its attorneys regularly receive professional awards and recognition from national and international organizations.

Goodsill's role in the Hawaii community extends well beyond the courtroom and boardroom. The firm's attorneys have served over the years as Governor of the State, Chief Justice and Associate Justice of the Hawaii Supreme Court and Chairman of the Federal Deposit Insurance Corporation. In addition, Goodsill attorneys actively participate as volunteers and board members of local and national charitable and professional organizations and educational institutions, as well as governmental advisory boards.

The firm's international practice has a strong focus on the Asia-Pacific region, assisting clients in all aspects of their business including transactional and operational matters, and judicial, administrative and arbitration proceedings. Our membership in the Pacific Rim Advisory Council is enhanced by Goodsill attorneys and legal assistants who have capabilities in Japanese, in, French, Korean, Tagalog and Pampango/Kapampangan.

For more information about Goodsill visit www.goodsill.com

HOGAN LOVELLS APPOINTS NEW BOARD MEMBERS

LONDON and WASHINGTON, D.C., 2 May 2018 – Hogan Lovells has elected five partners to its Board - Joaquín Ruiz Echauri, Clay James, Richard Lorenzo, Cate Stetson and Adrian Walker.

Joaquín Ruiz Echauri has been elected to the Continental Europe seat.
Clay James has been elected to the At Large seat.
Richard Lorenzo has been elected to the U.S. (other than D.C. area) seat.
Cate Stetson has been re-elected to the D.C. area seat.
Adrian Walker has been elected to the London seat.

Joaquín, Clay, Cate and Adrian begin or continue their roles as of 1 May. Richard will begin his role as of 1 July.

The Hogan Lovells Board comprises 12 members in total and has supervisory responsibility for overseeing the affairs of the firm, but without executive responsibility for strategy, management, and operating decisions. It provides input to the CEO and Hogan Lovells' International Management Committee. Members of the Board make up the Compensation Committee and are part of the Advancement Committee which they chair. Membership of the Board is designed to reflect the broad scope of the business, with members representing a combination of geographic and other backgrounds.

The Board will now comprise:

Chair (and "At Large"): Leo von Gerlach
CEO: Steve Immelt
Asia Pacific Middle East: Andrew McGinty
Continental Europe: Joaquín Ruiz Echauri
Washington, D.C. area: Cate Stetson
London: Adrian Walker
The Americas: Bruce Oakley
U.S. (except D.C. area): Richard Lorenzo
45 and under: Ben Higson

Three "At Large" representatives:
- Marie-Aimée de Dampierre
- Clay James
- Phoebe Wilkinson

New Chair Leo von Gerlach said: "I am delighted to welcome our new members to the Board and look forward to working with them in my new responsibility as Chair. The Board plays an important role in the governance of Hogan Lovells, in its relationship with our management team, and in listening to, and representing, the views of partners. The high level of participation in this election process is testament to that."

For more information, see www.hoganlovells.com

LEGÂ ABOGADOS— NEW COPORATE IDENTITY FOR HOET PELAEZ CASTILLO & DUQUE

CARACAS - 08 March, 2018: We are pleased to announce that from 8 March 2018, we at Hoet Pelaez Castillo & Duque Abogados will continue our operations under the name of Legâ Abogados, a leading Venezuelan law firm committed to providing a new and innovative approach to the local and global challenges of a changing market. Our intention is to invigorate our firm, with an important emphasis on institutionalization and the use of technology to be closer to our clients.

Since 2002, the full-service law firm Hoet Pelaez Castillo & Duque Abogados has been operating independently from Hoet Pelaez Castillo & Duque, the intellectual property firm, which will still operate under that same name. At Hoet Pelaez Castillo & Duque Abogados, we are taking this opportunity to officially announce a change in our corporate identity and image to **Legâ Abogados.** We are still the same team and will maintain our excellent quality legal services and our commitment to providing the best legal solutions for our clients.

After a comprehensive review of our vision, mission and values as a firm, we identified crucial reasons for changing our identity, convinced that it is the right path to a deeper institutionalization and aligned to who we are and what we represent, always inspired by our clients.

Legâ Abogados will be led by the same partners who have been working together for many years. Our firm draws its strengths from the experience, expertise and reputation of our market-leading attorneys and their ability to adopt an innovative approach in a market that has been changing across multiple sectors, both from a national and international perspective.

Behind this crucial decision, there is a team committed to innovating our legal services, with a strong emphasis on technology, and to better understanding our clients, ensuring that we are the best version of lawyers they need in Venezuela and abroad.

Please do not hesitate to contact us should you require further information. We invite you to take a look at our new website www.lega.law, launched on 8 March 2018, as well as our corporate video https://vimeo.com/258026151/65a2b8fb08 and to follow our social network accounts.

For additional information visit us online at www.lega.law

SIMPSON GRIERSON APPOINTS NEW CHAIR

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

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

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

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

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

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

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

For additional information visit www.simpsongrierson.com

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Calgary
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PRAC 65th International Conference
Cost Rica
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Spring, 2019

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ARIFA

ACTS FOR INCHCAPE IN ACQUISITION OF PRIVATELY HELD GRUP RUDELMAN AND GAINS ACCESS TO THE SUZUKI-LED DISTRIBUTION BUSINESS IN COSTA RICA AND PANAMA

ARIFA advised the leading independent multi-brand automotive distributor and retailer in its strategic distribution acquisition in Central America.

27 March 2018: Arias, Fábrega & Fábrega represented car dealership chain Inchcape Plc, in its sixth international takeover in 16 months as ir acquires family-run Grupo Rudelman, one of the leading and most successful Central American automotive distributors focused on Suzuki, for a total cash consideration of US$284 million (GBP £200.5 million), on a cash -free and debt-free basis deal. The deal closed 26 March, 2018.

The transaction involves the acquisition of the Grupo Rudelman group of companies from their shareholders including Holding de Las Americas S.A. and Fundación Rudco.

The cash consideration represents approximately 9.6x the target group's EBIT of US$29.4mln for the 12 months to 31 December 2017.

The acquisition of Grupo Rudelman, which sold 12,500 new Suzuki vehicles in 2017, would add to earnings in the first full year post-acquisition by mid-single digits in percentage terms.

With more than 45 years of experience, Grupo Rudelman is the exclusive retailer for Suzuki in both Costa Rica and Panama, where the brand is particularly well positioned with a top 5 market position.

Inchcape already has a long-term partnership with Suzuki, who the Group has represented as distributor in Singapore since 1977. Following acquisitions in South America in late 2016, Inchcape also represents Suzuki as Distributor in Argentina.

Almost 10 per cent of group sales are now generated in Latin America. It comes adjacent to recent South American expansion of dealerships in Chile, Peru, Argentina and Colombia.

ARIFA team representing Inchcape in this transaction Andrés N. Rubinoff, partner; Federico Alfaro, partner; Javier Yap Endara, associate; David Polo, associate. Other firms involved in the deal: Advising Inchcape**:** Costa Rica EY Law; EEUU Greenberg Taurig; UK Herbert Smith Freehills LLP; Spain Rene Descahmps Abogados.

ARIAS TEAM Advising Seller Grupo Rudelman: ARIAS team acting in the transaction led by Zygmunt Brett (Partner), Andrey Dorado (Partner), Tracy Varela (Associate), Alberto Carrillo (Paralegal); María Cristina Fábrega de Duque (Associate); María Elena Moreno (Associate); Mayrolis Parnther Rodríguez (Associate).

For additional information visit www.arifa.com

BAKER BOTTS

REPRESENTS CONFLICTS COMMITTEE OF WILLIAMS PARTNERS L.P. IN $10.L5 BILLION ACQUISITION BY THE WILLIAMS COMPANIES, INC.

Deal Description: On May 17, 2018, The Williams Companies, Inc. (NYSE: WMB) and Williams Partners L.P. (NYSE: WPZ) announced an agreement under which Williams will acquire all of the outstanding public common units of its master limited partnership, Williams Partners. The transaction, valued at $10.5 billion, is structured as an all stock-for-unit transaction, with Williams Partners public unitholders receiving 1.494 Williams common shares for each Williams Partners common unit (or 1.513 Williams common shares for each Williams Partners common unit if the closing does not occur before the record date for Williams' dividend to be paid in the third quarter of 2018). Following consummation of the merger, Williams Partners will become a wholly owned subsidiary of Williams.

Baker Botts represented the Conflicts Committee of Williams Partners L.P.

Baker Botts Lawyers/Office Involved: Corporate: Joshua Davidson (Partner, Houston); Travis Wofford (Partner, Houston); Jennifer Wu (Associate, Austin); Hayley Hervieux (Associate, Houston); Ty'Meka Reeves-Sobers (Associate, Austin); Tax: Michael Bresson (Partner, Houston); Chuck Campbell (Special Counsel, Houston); Regulatory: Gregory Wagner (Partner, Washington D.C.)

For more information visit www.bakerbotts.com

ALLENDE & BREA

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

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

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

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

For additional information visit www.allendebrea.com.ar

GIDE

ADVISES SEMIR ON ACQUISITION OF PRELIMUM CHILDREN'S FASHION LEADER KIDILIZ

09 May, 2018: Gide is acting as lead counsel to Zhejiang Semir Garment Co., Ltd. (Semir Garment), the leader in kidswear fashion in China, on its acquisition of the Kidiliz Group, the European leader in premium children's fashion with brands such as Catimini, Absorba, Z, Paul Smith Junior, and Kenzo Kids, for EUR 110 million.

The two groups, with about EUR 2 billion in combined sales, announced they signed a put option agreement on 3 May and are set to enter an equity transfer agreement following customary consultation procedures under French law. Upon completion of the transaction, Semir Garment will acquire the entire Kidiliz Group with the support of its management to form the world's second-largest pure player in children's fashion.

Gide's advice covered all aspects of the transaction, including deal structuring, legal due diligence, drafting and negotiation of the equity transfer agreement, as well as corporate and labour matters.

The Gide team is led by partners Thomas Urlacher in Paris and Fan Jiannian in Shanghai, with the assistance of senior associate Xavier Lecomte and associates Bai Yiran and Bao Ningying on corporate aspects, partner Jean-Hyacinthe de Mitry, associates Adelaïde de Laguiche and Nicolas Le Pays du Teilleul on IP law aspects, counsel Franck Audran and associate Wenceslas Chelini on antitrust aspects, partner Stanislas Dwernicki and associate Louis Delestrée on real estate aspects, and associate Eva Kopelman on employment law aspects.

For additional information visit www.gide.com

CLAYTON UTZ

ADVISES CANADA'S COPPER MOUNTAIN MINING CORPORATION ON ALTONA MINING ACQUISITION AND ASX LISTING

Perth, 24 April 2018: Clayton Utz has advised Toronto Stock Exchange (TSX) listed Canadian copper producer Copper Mountain Mining Corporation (CMMC) on its scrip for scrip acquisition of ASX-listed Altona Mining by scheme of arrangement, and its subsequent secondary listing on the Australian Securities Exchange. As part of the acquisition, CMMC issued to Altona shareholders common shares trading as CHESS Depositary Interests on ASX.

Under the Altona acquisition, CMMC has acquired a development project, a large mineral land tenure position in Queensland and A$30 million in cash, creating a leading dual TSX and ASX listed copper producer.

Perth-based partner Brett Cohen and special counsel Liz Humphry led the firm's advisory team, which included lawyer Milana Drca. Brisbane-based partner Stuart MacGregor and senior associate Patrick Cranley led the due diligence of Altona's Queensland assets, and partner Cameron Belyea and lawyer Alex Snell led the court aspects of the scheme process.

Commenting on the transaction, Brett said: "This is the second TSX-listed company we have assisted to gain a secondary listing on the ASX in the last six months. This increase in ASX-TSX activity by resources companies has coincided with the sustained increases in commodity prices in recent times."

For additional information visit www.claytonutz.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

ADVISING LABCORP IN US$670 MILLION SALE OF COVANCE FOOD SOLUTIONS TO EUROFINS SCIENTIFIC

New York, 30 April 2018 – Hogan Lovells is advising LabCorp, a leading global life sciences company, in an agreement to sell its Covance Food Solutions business to Eurofins Scientific, a global group of laboratories active in food, environment and pharma product testing. The all-cash purchase price of the transaction is US$670 million. The transaction is expected to close in the third quarter of 2018, subject to customary closing conditions and regulatory approvals.

The Hogan Lovells team was led by New York-based partner Michael Silver and Baltimore-based partner William Intner and senior associate Jessica Bisignano.

The global team also consisted of co-head of our Americas Life Sciences practice and partner Adam Bellack, Antitrust partner Leigh Oliver, Corporate partners Carin Carithers, Stephanie Keen and Tom Brassington, Tax partners Scott McClure and Philip Harle, Employment partners Ed Bowyer and Michael DeLarco, Pensions partner Edward Brown, Regulatory partners Martin Hahn, T. Clark Weymouth and Ajay Kuntamukkala, and Privacy and Cybersecurity partner Scott Loughlin. They were assisted by counsels Michael Applebaum, Seaton Thedinger, Judith Crate, and Roy Liu; senior associates Lauren Battaglia, Charles Stones, Matthew Bousfield, Natalie Psaila, Nathan Cooper, Nathan Salminen, Alex Hohl and Andrew Felton; and associate Nathasha Newey, Oliver Spratt, Dianne Milner, Caitlin Piper, Joe Vladeck, Paul Maynard, Patrick de Lapérouse, Sean Carlesimo, Julia Diaz, and Peter Dixon.

Hogan Lovells has advised LabCorp for more than a decade on many of its most significant transactions including: Chiltern, Covance, Genzyme Genetics, Pathology Associates Medical Laboratories (PAML), Mount Sinai Health System Clinical Outreach Laboratories, Monogram Biosciences, Medtox, Liposcience and Sequenom.

For more information, see www.hoganlovells.com

NAUTADUTILH

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

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

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

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

For additional information visit www.nautadutilh.com

SIMPSON GRIERSON

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

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

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

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

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

For additional information visit www.simpsongrierson.com

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Entry into force of the European General Data Protection Regulation

On May 25, 2018 the "General Regulation of European Data Protection" also known as "GDPR," enacted by the Parliament of the European Union on April 14, 2016, will come into force.

One of the major modifications with respect to the current regulation (Data Protection Directive 95/46 / EC) is that it will be applied extraterritorially. The obligated subjects will be all those companies that process personal data of residents of the European Union, whether the companies are inside or outside the European Union.

Among its provision, the most important ones are: (i) the obligation to obtain the consent of data subjects through intelligible and simple to understand forms; (ii) the obligation to notify any data leaks; and (iii) the right of data subjects to: (a) know if and for what purpose they are processing their respective data; (b) the deletion of your personal data when it so requests; and (c) the possibility of downloading all the personal data that it refers to.

The maximum penalty for non-compliance is the payment of 4% of the total annual business volume or 20 million euros, whichever is greater.

For further information on this topic please contact Juan Martín Allende

CLAYTON UTZ

Shareholder activism: How can companies protect themselves? - Knowledge

By Stephen Neale and Benjamin Depiazzi

10 May 2018

Glaucus' recent attack on Blue Sky Alternative Investments demonstrates the devastating effect an activist short seller can have on a company's share price – so what should you be doing to protect your company against activist short sellers and shareholder activists?

Unless you have been living under a rock, you would have seen media coverage of shareholder activists (many of whom are large US hedge funds) flexing their muscles in the United States and, increasingly over the last few years, in corporate Australia.

Shareholder activism is not new. There have always been shareholder activists seeking to privately influence a company's operational and strategic direction, capital management or corporate governance. What is new to Australian shores (and will be new to many Australian boards) is the US-style of shareholder activism – aggressive, sophisticated, media-savvy and very public.

That's because activists relying on such tactics have raised significant pools of money over the last few years, but it's become harder for them to find viable targets in jurisdictions where activism is a common strategy (such as the US and Europe). Activists are now looking globally for opportunities, and that's where Australia comes in.

Australia has relatively few domestic activist funds, shareholder friendly laws, a continuous disclosure regime giving access to real-time information on companies and a securities exchange with a large number of institutional relative to retail investors (so fewer shareholders need to be convinced of an activist’s thesis for change). All of these characteristics make Australia an attractive environment for activists, which means boards need to be prepared for the tactics they employ.

What drives activists to attack a company – and how do they do it?

Shareholder activists often claim to be working to add value to a company and improve returns for shareholders. While critics argue that activists force companies to make decisions resulting in short-term gains at the expense of greater long-term benefits, large institutional investors and funds have come around to the view that activists may deliver benefits, and for that reason are more willing to support them and will do so over time.

While every activist attack differs in its details, there is a common play-book for this new style of shareholder activism:

- The activist identifies a target considered to be undervalued or underperforming and then acquires an initial stake in that company.

- After it acquires a stake, the activist meets privately or corresponds with the company's board to put forward its proposed changes to the company, its board or management.
- The stake in the company is increased via equity and/or derivatives, while the activist informally engages with what it hopes are like-minded shareholders sharing the same desire to change the company.
- If the company doesn't engage or accede to the activist's demands, the activist cranks up the blowtorch by launching a public campaign attacking the company. A key weapon in the activist arsenal is to release a white paper aggressively criticising the company, its board and its management and putting forward an alternative strategy or desired changes to the company.
- This white paper is often supported by a sophisticated media campaign, which together seek to make the company's existing policies, strategies or board composition seem untenable.
- Recent examples in Australia include Elliott Management paying for billboards and wrapping entire Melbourne trams with advertisements critiquing BHP; Ariadne creating a professional website to host its claims and build awareness for its campaign against Ardent Leisure; and Halom Investments (an aggrieved shareholder as opposed to a dedicated activist) creating a slick website containing video graphics and presentations to push its plan to replace directors of MMA Offshore.
- If the activist is dissatisfied with the response from the company, it may then seek to escalate its campaign by exercising rights enjoyed by shareholders under Australian securities laws – convening or requisitioning a general meeting, requesting the share register and corresponding directly with shareholders, moving spill motions, using the two strikes rule or otherwise moving to appoint or remove directors.

A special sub-set: activist short sellers

Activist short sellers such as Glaucus take a more ruthless approach – they skip the pleasantries and instead launch a surprise attack by releasing a white paper and disseminating it as widely as possible (such as for free via the internet).

The reason is simple: activist short sellers are not interested in constructive engagement. Their strategy is to inflict maximum damage to their target's share price in order to capitalise on a short position built up prior to the public release of their white paper. The effect can be devastating. On the day of release, Glaucus' white paper on Quintis led to a 9% drop in its share price, while Glaucus' attack on Blue Sky caused its share price to drop 9.2%, with falls continuing in subsequent days.

So, what can your company do to protect itself from activists?

- **Take a look in the mirror:** critically identify and address any potential weaknesses and risks which may attract activists, including corporate governance issues (board composition, executive compensation or otherwise), financial performance and large differences between the internal and market valuations of your company.
- **Monitor the landscape:** keep up-to-date on current activist tactics in Australia and overseas and monitor investor sentiment and coverage of your company in the media or otherwise.

- **Know your shareholders:** regularly keep a close eye on your company's share register and shareholder base for any known activists or suspicious movements and monitor ASIC’s short position reports, investigate any suspicious shareholder activity by issuing beneficial ownership notices, and work to understand shareholders' and activists' thoughts, motivations and sentiments.
- **Communicate proactively:** regularly communicate with shareholders and other third parties (such as analysts and customers) to effectively convey a strong strategic and financial vision. Proactively address concerns which may be raised by shareholders, and engage with activists where the opportunity arises, particularly activists who have the support of institutional shareholders or otherwise where there is a real or perceived benefit in addressing what may, in fact, be legitimate claims.
- **Prepare as you would for a hostile takeover:** with the benefit of advisers (corporate, public relations, proxy and legal), prepare for action as you would a hostile takeover defence. This includes establishing a response team and communication strategy, role playing potential scenarios, undertaking a value assessment of your company, being ready to quickly respond to any assertions made by activists, and engaging with shareholders, other stakeholders and the market promptly after an attack.
- **Legal defence strategies:** with input from appropriate advisers, consider mounting a challenge to any associations between shareholders, the purpose of requisitioned meetings or resolutions proposed by activists, and oppose proposed board appointments where there are inadequate skill-sets or conflicts of interest. Naturally, these defences could be used in response to a shareholder activist but would be much less effective in mitigating against an activist short seller’s surprise attack.
- **Don't be complacent:** it goes without saying that Australian companies and their advisers should anticipate and be responsive to the changing role and methods of shareholder activism and take active steps to protect against the possibility of an activist attack, including revisiting the condition of your current response / defence manuals to ensure they are up-to-date and effective in the context of modern market trends.

Stephen Neale

Senior Associate, Perth

Disclaimer

January 24, 2018

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

Intellectual Property

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

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

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

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

For more information contact TozziniFreire Partners
Marcela Waksman Ejnisman
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Reform of Corporate and Commercial Law in the Benelux

Thursday, 5 April 2018

In recent years, a number of European countries have embarked on sweeping reforms of company law. Indeed, increasing harmonisation of company law at the European level has allowed many Member States to adopt more dynamic policies for the purpose of attracting business.

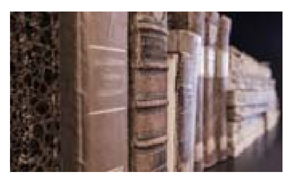
Luxembourg reformed its company law in 2016. The Netherlands and Belgium are in the process of doing likewise.

Much will undoubtedly be written about these reforms in the coming months. Our BeNeLux team is pleased to have this opportunity to explain to you the most important points and guiding principles. We will closely follow further developments and will be sure to keep you informed.

Reform of Belgian Commercial Law: New Rules Applicable as of 1 November 2018

On 29 March 2018, the House of Representatives adopted the previously announced reform of Belgian commercial law. By means of this reform, Belgium bids adieu to the Napoleonic Code. > Read more

The Netherlands: The Modernisation of Company Law Remains a Hot Topic



In October 2012, the Flex BV Act significantly changed the rules applicable to private limited-liability companies (*besloten vennootschap or BV*). Amongst other things, the incorporation procedure was simplified and certain impediments removed, more freedom given to shape the company, and the minimum capital requirement of €18,000 abolished. > Read more

Luxembourg: Major Reform of the Commercial Companies Act in 2016

On 23 August 2016, Bill 5730 amending and modernising the Luxembourg Companies Act of 10 August 1915 entered into force. Companies existing on that date have a period of 24 months to amend their articles in order to comply, to the extent required, with the new provisions. > Read more

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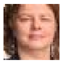

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Reform of Belgian Commercial Law: New Rules Applicable as of 1 November 2018

Thursday, 5 April 2018

On 29 March 2018, the House of Representatives adopted the previously announced reform of Belgian commercial law. By means of this reform, Belgium bids adieu to the Napoleonic Code.

The 19th century notion of merchant or trader (*handelaar/commerçant*) is replaced with the more modern and pragmatic concept of a business (*entreprise*), which will be the guiding tenet of Belgian commercial law, covering the entire spectrum of economic activity.

From a procedural perspective, the commercial courts (*rechtbank van koophandel/tribunal de commerce*) will be known as business courts and will have jurisdiction over all matters of commercial and business law.

The new rules will apply as of 1 November 2018.

Further reforms in the areas of company and civil law will follow.

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Luxembourg: Major Reform of the Commercial Companies Act in 2016

Thursday, 5 April 2018

On 23 August 2016, Bill 5730 amending and modernising the Luxembourg Companies Act of 10 August 1915 entered into force. Companies existing on that date have a period of 24 months to amend their articles in order to comply, to the extent required, with the new provisions.

Key points of the reform include:

- formalization of a number of mechanisms which were already used in practice, such as voting agreements, the issuance of so-called tracking shares, the suspension of voting rights, lock-up provisions, and the possibility to wind up a company without liquidation under certain conditions;
- creation of the simplified joint-stock company (*société par actions simplifiée*);
- introduction of the possibility for all commercial companies to issue public bonds and convertible instruments; and
- changes to the rules applicable to the private limited-liability company (*société à responsabilité limitée*) and the public limited company (*société anonyme*).

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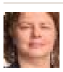

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The Netherlands: The Modernisation of Company Law Remains a Hot Topic

Thursday, 5 April 2018

In October 2012, the Flex BV Act significantly changed the rules applicable to private limited-liability companies (*besloten vennootschap or BV*). Amongst other things, the incorporation procedure was simplified and certain impediments removed, more freedom given to shape the company, and the minimum capital requirement of €18,000 abolished. In addition, the Management and Supervision Act entered into force on 1 January 2013. This act *inter alia* provided an express statutory basis for a one-tier board system within an NV or BV, modified the conflict-of-interest rules, and (for a large NV or BV) limited the number of board positions and set a target of 30% participation by women on the management and supervisory boards.

Modernisation of the rules governing public limited-liability companies (*naamloze venootschap or NV*) is still planned but thus far no bill has been presented. An online consultation was held in 2017 on a bill providing for the mandatory online registration (i.e. dematerialisation) of bearer shares to prevent anonymous transfers.

The statutory rules on partnerships will also be overhauled. According to the 2018 Dutch legislative programme, the new rules will enter into effect on 1 January 2019, but it is doubtful that this deadline will be met given that, to date, no bill has been tabled.

A bill on the management and supervision of legal entities is still pending before the lower house of Parliament. In brief, the purpose of the bill is to harmonise a number of rules applicable to different types of legal entities so that they are in line with those currently applicable to private and public limited-liability companies (the BV and NV).

Finally, the 2017 Dutch coalition agreement states that legislation will be updated to help businesses respond better to social and technological developments through their products and services. In addition, steps will be taken to limit the regulatory and administrative burden on businesses, for example by expanding the current business impact test (used by the Ministry of Economic Affairs to assess proposed new legislation) to include an SME test.

More information on these subjects can be found in our previous newsletters:
- Corporate law-related plans for 2018 in the coalition agreement and state budget
- Corporate law 2.0

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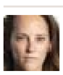

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Bennett Jones

Upcoming Policy Projects Announced by the Canadian Securities Administrators

April 09, 2018

Written by Will Osler and Kathryn Shaw

The Canadian Securities Administrators (CSA) announced on March 27, 2018, the initiation of six policy projects aimed at reducing regulatory burdens for non-investment fund reporting issuers. The announcement comes after stakeholders had the opportunity to respond and comment on a CSA Consultation Paper released in April 2017.

The new policy projects include:

a. exploring potential alternative prospectus models;

b. facilitating at-the-market offerings;

c. revisiting the primary business requirements;

d. removing or modifying the criteria to file a business acquisition report;

e. revisiting certain continuous disclosure requirements; and

f. enhancing electronic delivery of documents.

The projects are briefly summarized as follows:

Alternative Prospectus Models

The CSA noted in the Consultation Paper that it was considering an alternative prospectus offering model for reporting issuers with disclosure more concise and focused than under the current short form prospectus regime. Stakeholders provided positive feedback and potential alternative offering models will be researched.

Facilitating At-the-Market Offerings

Reporting issuers wishing to conduct an at-the-market offering must obtain exemptive relief from certain securities legislation requirements. This regulatory burden may account for why there are a limited number of these offerings. Stakeholders suggested that codifying the exemptive relief on at-the-market offerings would not compromise investor protection nor the integrity of capital markets.

Revisiting the Primary Business Requirements

The CSA did not identify revisiting the primary business requirements in its Consultation Paper. These requirements relate to the historical financial statement to be included in an IPO prospectus. However, based on feedback from stakeholders, CSA staff will consider ways in which to provide greater clarity for issuers preparing an IPO prospectus.

Removing or Modifying the Criteria to File a Business Acquisition Report

Preparing a business acquisition report requires significant time and cost, and at times the required information may be difficult to obtain. The CSA will explore ways to reduce this regulatory burden, given reporting issuers frequently apply for and are granted certain relief.

Revisiting Certain Continuous Disclosure Requirements

Recurring themes among commenters regarding existing continuous disclosure requirements included eliminating duplicative disclosure, consolidating financial statements, management's discussion and analysis and the annual information form, and examining if the volume of information in annual and interim filings can be reduced.

Addressing these concerns would enhance the usefulness and comprehensibility of information for investors, while also reducing the burden of disclosure on issuers.

Enhancing Electronic Delivery of Documents

The Consultation Paper noted market participants incur significant costs associated with printing and delivering various documents required under securities legislation. Stakeholders were generally supportive of facilitating electronic delivery and switching the default to electronic delivery.

Conclusion

The six projects will be initiated by the CSA in the near term. Projects have different timelines for completion, but at this time, the CSA has not elaborated on such timelines.

The policy projects are in no way a guarantee that the current regulatory regime will undergo any changes. However, the positive response from stakeholders to the Consultation Paper and the initiation of projects signal the CSA's willingness to adapt to changing market conditions, investor demographics, technological innovation and globalization in an effort to reduce regulatory burden for reporting issuers.

Posted on: April 24, 2018

WHO IS RESPONSIBLE FOR PAYING THE STRATA'S DEDUCTIBLE?

By: Aneka Jiwaji

When the source of damage to strata common property emanates from a specific strata unit, the question of who is responsible for paying the strata's insurance deductible can lead to tension between the strata and the owner of the source unit. In recent years, it has been common practice for stratas to successfully charge their insurance deductibles to the source unit owner, relying on the *Strata Property Act* and case law precedent. However, rulings of the Civil Resolutions Tribunal ("CRT") have questioned the practice of charging back deductibles to unit owners. The granting of leave to appeal in, *The Owners, Strata Plan BCS 1589 v. Nacht et al, 2018 BCSC 455* of a recent CRT ruling in *The Owners, Strata Plan BCS 1589 v. Nacht et al,* 2017 BCCRT 88, will give the BC Supreme Court an opportunity to clarify this common area of dispute.

THE FACTS

The CRT is an online tribunal which has the jurisdiction to resolve small claims disputes under $5,000 and strata property disputes of any amount. Since 2016, it has issued 171 decisions relating to a broad range of strata property disputes, including payment of strata fees or fines, enforcement of strata bylaws such as noise, pets, parking and rental restrictions, and financial responsibility for repairs of strata units and strata common property.

In *Nacht*, a water leak occurred in a strata lot which caused $87,000 in damage to other strata units and strata common property. The cost of the damage was covered by the strata's insurer, but the strata was responsible for the $25,000 deductible. The strata paid the deductible and then attempted to charge back the deductible to the unit owner, relying on s.158(2) of the *Strata Property Act*. The unit owner refused to pay the deductible and the strata brought the claim to the CRT. The CRT ruled in favour of the unit owner, finding that as a result of the strata bylaws, *"proof of negligence on the part of the owners is required for the strata to recover its insurance deductible from the owners".* The Strata has been granted leave to appeal by the BC Supreme Court.

THE CRT RULING

Section 158(2) of the *Strata Property Act* provides that a strata corporation can sue an owner in order to

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recover the deductible portion of an insurance claim if the owner is "responsible" for the loss or damage that gave rise to the claim. Past case law such as *Wawanesa Mutual Ins. Co. v. Keiran,* 2007 BCSC 727 and *Mari v. Strata Plan LMS 2835,* 2007 BCSC 740, have long stood for the proposition that negligence does not have to be established and responsibility falls to the unit owner when the unit is identified as the source.

In this particular case, the strata bylaw 4.4 (a) read: "*An owner must indemnify and save harmless the strata corporation from the expense of any maintenance, repair or replacement rendered necessary to the common property, limited common property, common assets or to any strata lot* ***by the owner's act, omission, negligence or carelessness****.*"

The CRT found that, despite the existence of bylaw 4.4 (b) – which stated that bylaw 4.4(a) "*does not limit, in any way, the ability of the strata corporation to sue an owner pursuant to section 158(2) of the Act* – bylaw 4.4 (a) had in fact narrowed the application of s.158(2) of the *Strata Property Act*, with the result that the strata would have to establish that the unit owner was negligent in order to charge back the deductible portion of the insurance claim. In reaching its decision the CRT relied on *Strata Plan LMS 2446 v Morrison,* 2011 BCPC 519, which had a bylaw with similar wording to bylaw 4.4(a), and found that the standard to be applied in determining the owner's responsibility for loss or damage was one of negligence, rather than "responsible for". As there was no evidence of negligence, the CRT ruled in favour of the unit owner and the strata sought leave to appeal the ruling to the BC Supreme Court.

LEAVE TO APPEAL

In order to be granted leave to appeal of a CRT decision the appellant must establish that there are questions of law arising from the CRT decision and that it is in the interests of justice and fairness for the BC Supreme Court to hear the appeal.

The BC Supreme Court considered these criteria and decided that the CRT decision had raised important questions of strata law including the interpretation of the *Strata Property* Act, strata bylaws and past strata case law. The BC Supreme Court also noted that it was satisfied that it was in the interest of justice and fairness for the Court to hear the appeal due to the fact that "[e]*ach question is of such importance that it would benefit from being resolved by this Court to establish a precedent."*

The appeal can be expected to be heard in approximately six to twelve months.

PRACTICAL CONSIDERATIONS

The *Nacht* case emphasizes the CRT's role in influencing and establishing strata law. The pending ruling of the BC Supreme Court will provide guidance and clarity on the law of strata deductibles, including the

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interpretation and application of s.158 of the *Strata Property Act*, the interaction of the *Strata Property Act* with the strata's bylaws, and the precedential value of past case law such *Strata Plan LMS 2446 v Morrison,* 2011 BCPC 519. It is advisable that strata management companies, underwriters and brokers keep apprised of the future BC Supreme Court decision and continue to keep in mind the impact and importance of the CRT in resolving strata disputes.

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April, 2018

CLOSE-OUT NETTING IN DERIVATIVES TRANSACTIONS: CENTRAL BANK OF CHILE ENACTS NEW REGULATIONS.

Today, the Central Bank of Chile (the "**Central Bank**") incorporated a new Chapter III.D.2 to its Financial Regulations Compendium, which contains provisions applicable to the acknowledgement and regulation of master agreements for bilateral derivatives, where one of the parties is a bank established in Chile or an institutional investor (the "**Derivative Agreements**").

This new regulation includes general terms and conditions that the Derivative Agreements shall meet to qualify for close out netting purposes, ruling that the parties of the Derivative Agreement who accept the new regime set by the Central Bank through this regulation, will be empowered to agree that the close out netting provisions of their respective agreements may become effective as a consequence of the occurrence of specific critical situations. All of this, previous to the bankruptcy of the bank or the institutional investor, and to the extent that such close out netting does not become effective immediately, but prior request of the compliant party and once two banking days have elapsed as from the event.

Furthermore, it is ruled that in these cases, the payment of the net balance resulting from the netting shall only be requested once the critical situation is regularized, or, if it is the case, when a bankruptcy or insolvency procedure has started, whichever occurs first.

Previous to the issuance of these new regulations, the Central Bank submitted a **public consultation** in this regard. Some of the comments received during this process become part of the current provisions of this new Chapter III.D.2.

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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CR: New tax regulation - Country by country report

Costa Rica is in the process of becoming part of the Organization for Economic Co-operation and Development (OECD); one of the most important aspects of the process is adapting local regulations to comply with the OECD commitments.

Recently, the Ministry of Finance published resolution DGT-R-001-2018, which addresses the disclosure of tax information by companies in Costa Rica, for purposes of the Country-by-Country report (CbC report). The resolution was published in the official newspaper in February 2018.

The resolution states that the parent company of a multinational group resident in Costa Rica or a resident entity of the group, specifically appointed by the multinational group with consolidated group revenue of the equivalent of EUR750m in the Costa Rican currency - presently CRC529.3m (USD924.7m) - must comply with the obligation to file a country-by-country report in line with the rules set out in the resolution. An initial report must be filed by December 31st, 2018.

Additionally, companies that are part of a group or multinational group must notify before the last business day of the current month, to the Tax Authorities, whether the CbC report will be submitted in Costa Rica or in another jurisdiction.

Consumers' free choice: Consumer Council published report on mandatory cooling-off period in Hong Kong

14 May 2018

Background

In April 2018, the Consumer Council (**Council**) published *A Report to Advocate Mandatory Cooling-off Period in Hong Kong* (**Report**). The Report signifies the Council's renewed effort in advocating for a mandatory cooling-off regime in Hong Kong after the issue was last considered in around 2010 to 2011 when amendments of the Trade Descriptions Ordinance (**TDO**) were being discussed.

This note discusses the key observations and proposals in the Report.

Observations made by the Council

- Common high pressure sales tactics identified by the Council include keeping consumers in enclosed premises without access to outside communication, prolonged sales pitches and making physical or mental threats.
- Despite the lack of a mandatory regime in Hong Kong, some industries have voluntarily instituted their own cooling-off periods for certain products, such as the Industry Code of Practice for Telecommunications Service Contracts promulgated by the Communications Association of Hong Kong which prescribes a 7-day cooling-off period for unsolicited contracts. However, the lack of common standards may result in customer confusion.
- Beauty services, fitness clubs, timeshare, telecom services and wedding services frequently involve or require pre-payment. Complaints about sale practices form a major portion of the annual complaints for the beauty, fitness and timeshare industries. The monetary value involved can be high. In 2016, the average amount involved per case for complaints relating to timeshare products was as high as HK$70,000 per case, while that for beauty services and fitness clubs was around HK$30,000 on average.

Proposals made by the Council

The Council stressed that an "across the board" mandatory cooling-off regime is neither practicable nor advisable. In the Report, the Council considered the mandatory cooling-off regimes currently in force in other jurisdictions, including the European Union, the United Kingdom and Singapore, and made the following key recommendations:

- A mandatory cooling-off period is recommended for 5 types of consumer contracts:

1. unsolicited off-premises contracts
2. distance contracts (other than online purchases)
3. fitness services contracts with a duration of not less than 6 months or involving prepayment
4. beauty services contracts with a duration of not less than 6 months or involving prepayment
5. timeshare contracts, which are a tourism product giving the purchaser a right to stay at designated accommodation on a time-interval basis, e.g. paying HK$500 a month for the right to occupy a resort during Christmas every year.

The Council suggested that certain subject matters should be exempted from the regime as separate regulatory regimes are already in place, including financial services, property transactions, professional services such as legal services and accounting services, etc.

Apart from the above, the Council further suggested that certain categories of contracts should be exempted since imposition of mandatory cooling-off will likely result in disproportionate costs of compliance or is simply impracticable, such as purchases involving low monetary values, e.g. lower than HK$500, custom-made goods and urgent household repairs, etc.

The Council has proposed the following operational arrangements:

- *Length of cooling-off period*: The proposed length of the cooling-off period is 7 days.
- *Information to be provided*: Traders should be required to provide certain information to consumers before he/she enters into the contract if mandatory cooling-off period is applicable, including any applicable administrative fees in case of cancellation and details of the cancellation right contained in a standard cancellation form, etc. If traders fail to provide such information, the cooling-off period should not commence until the information is received by the consumer, subject to a maximum of three months.
- *Refund arrangement*: The time limit for refund should be no more than 14 days. Refunds should be done using the same means of payment which the consumer used to pay for the transaction.
- *Deduction from refund*: Traders should be allow to deduct from the refund sum:

1. up to 3% of the credit card transaction amount if payment and refund is done by credit card payment
2. express delivery charge
3. deduction in value of goods due to improper handling by the consumer during the cooling-off period
4. value of services supplied within the cooling-off period.

Traders should notify the consumer prior to completion of transaction that these charges might be deducted from refund. Otherwise, traders may not make such deductions.

- *Return of goods*: Where a sales contract is involved, the consumer should be required to return the goods to the trader within 14 days after cancellation by any method of return. The costs of returning the good should be borne by consumers.
- *Ancillary contracts*: If the consumer cancels a contract within the cooling-off period, any ancillary contracts, e.g. credit card instalment payment plan, should also be terminated automatically.
- *Mandatory cancellation right*: Traders and consumers should not be allowed to agree to waive or restrict the cancellation right.
- *Enforcement regime*: The mandatory cooling-off regime should be backed by civil but not criminal sanctions. A public body should be formed or appointed to oversee enforcement of the regime.

What does it mean for businesses in Hong Kong?

The Report is a significant step in renewing discussion on whether a mandatory cooling-off regime should be imposed in Hong Kong. Some believe that a mandatory cooling-off regime will enhance consumer protection in Hong Kong and bring about overall economic benefits to the market. In fact, some traders have already voluntarily offered a cooling-off period for as long as 30 days for consumers to return goods without requirement to state reasons.

A mandatory cooling-off regime will however likely bring about more compliance requirements for businesses. Although the initiative in implementing a mandatory cooling-off regime is still under discussion, it is another testament to the fact that consumer rights are on the rise so it is crucial for traders to review their trade practices to enhance transparency and fairness to consumers.

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NEWS DETAIL

12/04/2018

Supreme Court Stresses Expats May Only Work on Temporary Contracts, but Surprises Still Possible

A. Introduction

Following our recent legal update on Presidential Regulation No. 20 of 2018, which significantly streamlines the requirements for the hiring of expatriates [click here to view], we have received a number of queries as to the rights and protections afforded to expatriate employees under Indonesian manpower law. In particular, we have been asked whether there is any possibility for an expatriate to be employed on a permanent basis in Indonesia.

B. Fixed-Term versus Permanent Employment Contracts

In response, the first thing to be said is that the relevant legislation (the "**Manpower Law**"[i]) draws a very clear distinction between a permanent employment contract and a fixed-term employment contract ("**FTEC**", also known as a temporary or specific-job contract).

Generally, the Manpower Law expressly discourages temporary employment on the basis of a fixed-term contract by setting strict limits on the amount of time and the types of work for which an employee may be hired on a temporary basis. Conversely, the Manpower Law also makes it impossible for an expatriate to enjoy permanent employee status by expressly providing that an expatriate may only be employed to perform a specific job and that his/her employment may only be on the basis of an FTEC (see Article 42(4) Manpower Law).

Thus, local employees and expatriate employees are treated very differently under the Manpower Law.

Nevertheless, confusion has arisen as to whether an expat can in certain circumstances become a permanent employee. This is because of the Manpower Law's failure to clearly identify:

(1) those of its provisions that apply only to Indonesian employees, those that apply only to expatriate employees, and those that apply to both; and

(2) those of its provisions that apply only to permanent employment contracts, those that apply only to FTECs, and those that apply to both.

In other words, the way in which the Manpower Law is structured and framed has the potential to often leave the hapless reader scratching his/her head in bewilderment.

C. Restrictions on Use of Fixed-Term Contracts

This question of whether or not a provision of the Manpower Law is applicable to both local employees and expatriate employees is particularly important in the case of Article 59, which sets out strict limitations on the use of FTECs.

Essentially, Article 59 provides that a fixed-term contract may only be entered into in respect of work that is intrinsically of a one-off, seasonal or temporary nature, work which it is estimated will be completed within not more than three years, or work that is related to product or process development. A fixed-term contract may not be entered into for work that is intrinsically permanent or recurring in nature.

Further, Article 59 provides that a fixed-term employment contract may be entered into for up to a maximum of two years, which period may be extended once by up to a maximum of one year, or renewed once for a maximum of two years, with a 30-day grace period between the expiry of the first contract and the commencement of the renewed contract. Accordingly, an employee may work for the same employer on a temporary basis for a maximum period of either three or four years depending on the nature of the second contract.

Thus, Article 59 sets restrictions on (1) the type of work that may be performed under a FTEC, and (2) the length of time that a person may be employed in the same job and by the same employer on the basis of a FTEC.

Crucially, Article 59 (7) provides that an FTEC that falls foul of the above restrictions will automatically convert into a permanent employment contract. This conversion occurs by operation of law, meaning that no action needs to be taken by the employee for it to happen.

D. Do Restrictions on Fixed-Term Contracts Also Apply to Expatriates?

So, the big question is whether the restrictions on the use of FTECs and the mandatory conversion provision contained in Article 59 also apply to expatriates? At first sight, they appear to be universally applicable as the article provides for no exemptions. Indeed, the Industrial Relations Court has handed down a number of decisions that held this to be the case. These decisions appear to have aroused hopes that expatriates who have worked for more than three or four years, as the case may be, with the same employer can have their FTECs automatically converted into permanent contracts, and thus be entitled to enjoy all the benefits and protections afforded under the Manpower Law, such as its tight restrictions on termination, paid sick leave for at least 12 months (on a sliding scale from 100% to 50%), severance and service pay entitlements, etc.

Unfortunately (from the expat's perspective), the Industrial Relations Court's decisions referred to above are in a clear minority, and the vast preponderance of the court's rulings have been to the contrary, i.e., that Article 59 Manpower Law does not apply in the case of an FTEC entered into by an expatriate.

E. Supreme Court's Stance

This issue would now appear to have finally been put to bed with the issuance of Supreme Court Circular No. 1 of 2017 (the "**Circular**") on 19 September 2017. A Supreme Court Circular (or *Surat Edaran Mahkamah Agung*) is an instrument that can be used by the Supreme Court to impose a common understanding across the judicial system as regards the interpretation or application of particular aspects of the law.

Section B.2.b.1 of the Circular stipulates, among other things, that:

(a) An expatriate may only be employed in Indonesia on the basis of a specific job and a FTEC.
(b) Only an expatriate employee in respect of whom an Expatriate Employment License ("**IMTA**") has been issued is entitled to enjoy protection.
(c) Upon the expiry of an expatriate employee's IMTA, he/she will no longer enjoy legal protection.

Paragraph (a) simply reiterates what is stated in Article 42(4) Manpower Law. However, paragraphs (b) and (c) are somewhat problematic, even without taking into consideration the changes brought about by Presidential Regulation No. 20 of 2018. For example, what precise type of protection / legal protection is being referred to in paragraphs (2) and (3)? If it is protection under the Manpower law and/or the immigration legislation, then why not simply state this? If we were to interpret these two paragraphs literally, then all forms of legal protection will be withdrawn from an expatriate employee whose IMTA has expired, such as the legal right to protection of property. While this confusion may simply be put down to poor drafting, such negligence can have consequences in Indonesia given the unpredictability of the country's courts.

This unpredictability may also affect the extent to which the Circular is heeded by the courts. Given the long-running and widely acknowledged problem of indiscipline in judicial decision-making in Indonesia, there is no guarantee that it will be faithfully adhered to in all cases. So, it should come as no surprise if decisions emerge in the future that run contrary to its purport.

With regard to the references to an IMTA in paragraphs (b) and (c) above, It should also be borne in mind that, with the issuance of Presidential Regulation No. 20 of 2018, the requirement to obtain a stand-alone IMTA from the Ministry of Manpower in order to employ an expatriate has essentially been replaced by a notification process under which all the prospective employer needs to do is to submit its Expatriate Manpower Employment Proposal (RPTKA) for approval by the Minister of Manpower. Such approved RPTKA then doubles up as an IMTA.

F. ABNR Commentary

As in many other jurisdictions, the rights of expatriate workers in Indonesia are tightly circumscribed. The rules set out in the Manpower Law not only have regard to labor market conditions and the needs of employers, but also take into account socio-cultural realities in Indonesia, where there has long been a fear among sections of the public that the country is on the cusp of being flooded by foreign labor. Given this background, what is surprising is not so much the substance of Circular No. 1/2017 (in so far as it pertains to expatriate manpower), but rather that it took the Supreme Court so long to reiterate that under no circumstances can an expat be employed on the basis of a permanent contract. By Indra Setiawan isetiawan@abnrlaw.com and Teuku Ridzky tamin@abnrlaw.com

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[i] Law No. 13 of 2013 on Manpower / *Undang-undang Nomor 13 Tahun 2013 Tentang Ketenagakerjaan.*

MALAYSIA INTRODUCES CORPORATE LIABILITY FOR CORRUPTION

It has been at least four years since the idea of introducing corporate liability in Malaysia for bribery and corruption was mooted. This may soon be a reality with the proposed amendments to the Malaysian Anti-Corruption Commission Act 2009 ("Principal Act").

The Malaysian Anti-Corruption Commission (Amendment) Bill 2018 ("Bill") was passed by the Dewan Rakyat and the Dewan Negara on 4 and 5 April 2018 respectively. The Bill will come into operation on a date to be appointed by the Minister after it has received Royal Assent and been gazetted.

The Bill, *inter alia*, introduces a new section 17A ("section 17A") which provides for corporate liability *vis-à-vis* bribery and corruption under the Principal Act. This article explains the salient features of section 17A.

WHAT CONSTITUTES THE OFFENCE?

Section 17A states that a commercial organisation commits an offence if a person associated with the organisation corruptly gives, agrees to give, promises or offers to any person any gratification, whether for the benefit of that person or another person, with intent to obtain or retain business for the commercial organisation, or to obtain or retain an advantage in the conduct of business for the commercial organisation.

From the foregoing, it can be seen that an essential element of the offence is that the gratification must be for the benefit of the commercial organisation. Gratification for the benefit of the associated person or other person will not come within the ambit of section 17A.

COMMERCIAL ORGANISATION

A "commercial organisation" refers to any of the following bodies so long as it carries on business, or part of its business, in Malaysia – (a) a company incorporated under the Companies Act 2016; (b) a company wherever incorporated; (c) a partnership under the Partnership Act 1961 or the Limited Liability Partnerships Act 2012; or (d) a partnership wherever formed.

By adopting a purposive interpretation, a company incorporated under the repealed Companies Act 1965 would come within the ambit of item (a) of the preceding paragraph, notwithstanding that the Companies Act 2016 stipulates that a company incorporated under the repealed Act is deemed registered, rather than incorporated, under the latter Act.

Companies incorporated under the Labuan Companies Act 1990, and limited partnerships and limited liability partnerships registered under the Labuan Limited Partnerships and Limited Liability Partnerships Act 2010, would come within the ambit of items (b) and (d) respectively above.

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PERSON ASSOCIATED

To constitute an offence, the gratification must be carried out by a "*person associated*" with the commercial organisation, namely, a director, partner or an employee of the commercial organisation or a person who performs services for and on behalf of the commercial organisation.

Thus, a commercial organisation will not only be liable for gratification by its director or partner, but also its employee (regardless of his status or functions within the organisation). It could also be liable for gratification by its agents or distributors and possibly, joint-venture partners.

SANCTIONS

A commercial organisation which commits an offence is liable to a fine of not less than 10 times the sum or value of the gratification which is the subject matter of the offence, where the gratification is capable of being valued or is of a pecuniary nature, or RM1.0 million, whichever is the higher, or to a term of imprisonment not exceeding 20 years, or to both.

WHO ELSE IS LIABLE?

When a commercial organisation is convicted of an offence under section 17A, a director, controller, officer, partner or member of the management of the organisation is also deemed to have committed the offence ***unless*** he proves that the offence had been committed without his consent or connivance, and that he had exercised due diligence to prevent the commission of the offence, having regard to the nature of his function and to the circumstances.

In *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12, the constitutionality of a similar type of deeming provision in section 122 ("section 122") of the Securities Industry Act 1983 was challenged on grounds that it presumes guilt and abrogates from the prosecution's duty to prove beyond reasonable doubt that an offence had been committed.

The Federal Court upheld the constitutionality of section 122 and ruled that there was no displacement of the burden or standard of proof. According to the Court, it was first necessary for the prosecution to prove beyond reasonable doubt that the offence had been committed by the body corporate before the presumption could be triggered to deem the offence to be committed by the directors and officers of the body corporate.

The Court further explained that the "*unless proviso*" in section 122 (i.e. that the offence had been committed without consent or connivance of the person and that he had exercised due diligence) was a statutory defence that provided the opportunity for the accused to rebut the deeming provision. According to the Court, it is only fair that the absence of consent and connivance should be proved by the accused as these are matters within his knowledge.

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It is likely that the deeming provision in section 17A will be interpreted by the courts in the same manner as in *Gan Boon Aun*.

ANTI-CORRUPTION PROCEDURES

A commercial organisation that is charged for an offence under section 17A may successfully defend the charge if it is able to satisfy the court that it has in place adequate procedures to prevent persons associated with the organisation from committing bribery or corruption. The Minister will be issuing guidelines to assist commercial organisations in establishing these procedures.

COMMENTS

Section 17A will no doubt be a game-changer when the Bill becomes law and comes into force.

Directors, controllers, officers, partners and management personnel of commercial organisations will no longer be shielded from bribery and corruption carried out through their organisations. Neither can they turn a blind eye to such practices by their colleagues.

To mitigate the risk of criminal liability to a commercial organisation and its directors, controllers, officers, partners and management, it is imperative for an organisation that carries on business in Malaysia to adopt adequate procedures to prevent persons associated with the organisation from giving gratification for its benefit.

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This commentary was first published in Issue 1/18 of LEGAL INSIGHTS – a SKRINE Newsletter

March 2018

Amendment to the Mexican Industrial Property Law

On March 13, 2018, an amendment to the Industrial Property Law (the Law) concerning Industrial Designs, Denominations of Origin, and Geographic Indications, was published in the Official Gazette of the Federation.

The amendment will take effect in 30 business days after its publication date, and fundamentally, it comprises the following aspects:

Industrial Designs.

1.- The validity of industrial design registrations was modified, establishing a new validity of five years, which are renewable for successive periods of the same duration, with a maximum limit of twenty-five years, subject to the payment of the respective official fees. The validity of industrial design registrations was formerly of fifteen years, without a possibility to renew.

2.- The concepts of "independent creation" and "signifcant degree" which are extremely important for determining the novelty of an industrial design, are now defined.

3.- The creator of an industrial design is now the "designer", instead of "inventor".

Denominations of Origin and Geografic Indications.

1.- The geographic indications figure was introduced, alluding to the "name of a geographic area, or containing such name, or other indication known for refering to the mentioned area, which identifies a product as originary of the same, when certain quality, reputation or other characteristic of the product is fundamentally attributable to its geographic origin".

2.- The definition of denomination of origin was amended to the "name of a geographic area, or containing such name, or another denomination known for refering to the mentioned area, which serves to designate a product as originary from the same, when the quality or characteristics of the product are due exclusively or essentially to the geographic environment, including natural and human factors, which give reputation to the product".

3.- Common procedures for denominations of origin and geographic indications are established, specifically for the application for protection, the authorization for their use, and the cessation of effects of protection and of authorizations of use.

4.- Denominations of origin and geographic indications protected abroad, are now recognized in Mexican territory.

5.- New administrative infringements and felonies for the invasion and violation of denominations of origin and geographic indications were incorporated.

Other relevant aspects.

1.- Applications for utility models and industrial designs will now be published in the Industrial Property Gazette (the Gazette) as well, once their formal examination has been satisfactorily completed.

2.- Divisional applications for patents, utility models, and industrial designs will also be published in the Gazette.

3.- The right of inventors and designers, to be mentioned as such in the publication of the respective appilactions, as well as in the eventual title, is now recognized as an unwaivable right.

4.- For patent applications, the term for any interested person to file information on whether or not the application meets the patentability requirements provided by the Law, was reduced to two months.

This amendment have a significant impact for all those who own industrial design registrations or applications, since it will be necessary to take certain actions for preserving their rights, and for benefiting from the new legal provisions recently published.

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

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Simpson Grierson

FYI

April 2018

Eight public law trends to watch in 2018

2018 set to be a big year for public law and regulation.

The Labour-led government is creating momentum, with new legislation, significant regulatory and social sector reviews and some key policy changes.

Elsewhere in public law, technology is creating new pressures for government and highlighting the need for some (overdue) changes. Closely related to this, there is also an increased focus on accountability and transparency.

Looking across these changes, here are our top eight public law and regulatory trends for businesses to watch in 2018.

1. An ambitious legislative agenda – with some teething problems

The Government has introduced, in very short timeframes, a raft of new Bills covering areas with complex social and economic implications. The list includes legislation focusing on:

- child poverty reduction, with the Child Poverty Reduction Bill proposing to require governments to set three and 10-year targets on child poverty reduction, and provide updates in each Budget;
- upholding the proportionality of political party representation in Parliament, under the Electoral (integrity) Amendment Bill (aka the 'Waka Jumping Bill');
- decriminalising medicinal use of cannabis;
- reforming employment law by regulating pay and conditions across industries (for more information, see our employment team's FYI here);
- amending the Overseas Investment Act 2005 to restrict overseas investment in residential land, and to bring forestry rights into the scope of the regime;
- amending the State Sectors Act and Crown Entities Act to provide for greater integrity and accountability in the management of the State services (including chief executive pay levels);
- amending the Education Act 1989 to remove the provisions relating to National Standards and the partnership school model (among other things).

The Bills are now before select committees for further consideration, and many are still open for public submissions. Given National's high proportion of membership (with more seats on committees than any other single party), it will be interesting to see if Opposition MPs can exert their influence on some of the more divisive Bills.

The busy agenda and short timeframes promised for enacting new legislation has created some problems for the system charged with bringing the law into force.

- Recently, for example, the Primary Production Committee took the unusual step of notifying interested parties that it is seeking an extension of a report back on the Racing Amendment Bill, because it is awaiting a reply from Racing Minister Winston Peters.
- In the education sector, the Parliamentary Counsel Office recently advised Cabinet that the tight turnaround time for drafting the proposed Education Amendment Bill meant that the Bill would likely require corrective amendments during the select committee consideration.

Given these challenges, we encourage organisations affected by any of these Bills to keep a close eye on developments and be ready to engage with the law reform process as and when necessary. We can assist with submissions or advise on the impact of the proposed changes.

2. A year of review and inquisition

In addition to new legislation, a vast number of inquiries and reviews have been announced – 39 in all in the Government's first five months in office.

Foremost amongst these (and promised as part of the Government's 100-Day Plan) is the Royal Commission of Inquiry into child abuse in State care. Headed by former Governor General Sir Anand Satyanand, the Royal Commission will have a wide scope to cover abuses committed in the 50 years from 1950 to the end of 1999. Consultation on draft Terms of Reference is currently underway and is expected to take around three months to complete. The Inquiry itself is expected to begin considering evidence in mid-to-late 2018.

Other inquiries and reviews in the works include:

- a Ministerial inquiry into mental health, led by former Health and Disability Commissioner Ron Paterson;
- a review of New Zealand's insurance contract law (for more details, see our recent FYI here),
- a public inquiry into the drivers of local government costs and its revenue base;
- a Government inquiry into the fuel pipe outage at Marsden Point; and
- a review of the procedures and organisational culture at the New Zealand Human Rights Commission.

Scale is likely to be a serious issue for the Government if these pending inquiries and reviews are as ambitious as the recent inquiry into water contamination in the Hawke's Bay. If future inquiries make similarly wide-ranging recommendations, a battle of priorities will loom.

3. Going for Zero – Policy change for Carbon and Climate Change

Climate Change Minister James Shaw has indicated that public consultation on a future Zero Carbon Bill will likely begin at the end of May, and has set up an online registration process for individuals and organisations who are interested in being part of the Government's consultation on what the Bill should look like.

It is expected that the Bill will be introduced into parliament by October, and that an independent Climate Change Commission will be formally established to oversee the legislation.

While the idea of a Zero Carbon Act and independent Commission should attract broad support, a number of difficult questions will need to be resolved. This includes how the regime should operate and where the respective responsibilities of government and Commission should lie.

To this end, a report published by Parliamentary Commissioner for the Environment Simon Upton is a timely and useful indicator of what businesses should expect to be included in any proposed legislation. It includes nine recommendations on what the Commissioner sees as some of the more critical elements for the legislation and ensuring a credible Commission is established, including setting effective carbon budgets and a process for climate change adaptation. New Zealand is one of only a small number of OECD countries not to have developed a national adaptation strategy.

4. Privacy – overdue reform but does it go far enough?

This year, privacy should be at the top of every boardroom agenda. Overseas, the controversial use of personal information is firmly in the headlines.

At home, the long-awaited Bill to reform New Zealand's 25-year-old Privacy Act has finally been introduced into Parliament. The Bill replaces the Privacy Act 1993, as recommended by the Law Commission's 2011 review of that Act, and is intended to promote people's confidence that their personal information is secure and will be treated properly in an increasingly digitalised economy.

Among the changes introduced are:

- strengthened cross-border data flow protections;
- stronger investigation powers (the Privacy Commissioner will be able to make binding decisions on complaints about access to information and issue compliance notices);
- a new mandatory reporting regime for data breaches; and
- new criminal offences.

We are keenly tracking the progress of the reforms, and over the coming months we will be discussing important areas of focus in regular updates (the first of which can be read here).

Elsewhere in the privacy sphere, we have been seeing upwards trends in damages awards for privacy breaches, not only in the Human Rights Review Tribunal but also earlier on in the complaints process (with the Office of the Privacy Commissioner recently reporting that nearly half of its cases are being closed through settlements).

With increasing delays and backlogs in the Human Rights Review Tribunal, indications are that aggrieved persons and organisations alike will increasingly look to early resolution through the Privacy Commissioner's office – so much so that the Privacy Commissioner has recently released guidance as to the "value" of a complaint, monetary or otherwise (including anonymised examples of recent settlement figures). The guidance will be a very useful resource for organisations responding to privacy complaints.

5. 'Big data' and cloud computing to be a focal point

The rise in use of 'big data' technologies will continue to present both opportunities and challenges for business and in government in 2018.

In anticipation of this, the Government has recently outlined its priorities across digital technology, media and open government. In addition to modernising the Privacy Act to reflect the way new technologies have changed how personal information is used, the Government has signalled that the establishment of a Chief Technology Officer and Ministerial advisory group is at the top of its list. It has also pledged to review and update a range of other legislation to include the wider effects of digitisation, and introduce a Digital Bill of Rights that will integrate with existing cornerstone legislation such as the Bill of Rights Act, the Crimes Act, the Privacy Act and surveillance legislation.

In terms of developments abroad, the United States Supreme Court recently heard oral arguments in a key cloud computing case (*United States v Microsoft*), concerning the execution of a US search warrant to access personal information held by Microsoft in an Irish data centre.

- This case will examine the cross-border reach of law enforcement agencies and how data protection laws are interpreted, applied and developed.
- It could potentially have significant implications, including for individuals and companies in New Zealand.
- Read the New Zealand's Privacy Commissioner's warning here.

We await the United States Supreme Court's decision with interest.

6. Stronger protections for whistleblowers may be in the works

The Government has recently announced that it is reviewing the protections offered by the Protected Disclosures Act 2000 – the so-called "whistleblower" legislation, designed to encourage people to report serious wrongdoing in their workplaces by providing protection to them when they "blow the whistle". The current legislation is often not fit for purpose and accordingly, not often used.

As part of its review, we expect the Government will be looking at introducing penalties for retaliation against whistleblowing, rewards and compensation for whistleblowing, whether people who blow the whistle on wrongdoing to the media should be protected, and what body could oversee whistleblowing complaints.

An initial discussion document is expected to be put out for public consultation in the coming months.

The review follows a number of high-profile misconduct cases within New Zealand public sector organisations that have led to some suggesting that the law may not be working as effectively as it could, and lags behind international practice in a number of key areas. This prompted the States Services Commissioner, Peter Hughes, to release model standards last year for state sector agencies to follow when employees raise issues of suspected wrong-doing.

7. Proposed changes to NZBORA inconsistency declaration powers

If the government has its way, senior courts will soon have an express statutory right to declare inconsistencies between legislation and the New Zealand Bill of Rights Act 1990 (NZBORA), to better hold Parliament to account.

Cabinet has recently agreed in principle to amend NZBORA to specify that senior courts can make declarations of inconsistency.

So far, this is no more than some recent judicial decisions have permitted. A recent example is the litigation involving serial litigant Arthur Taylor, where the High Court made a declaration that a provision in the Electoral Act 1993 preventing all prisoners from voting was inconsistent with the right to vote protected by NZBORA. In 2017, the Court of Appeal upheld that decision on appeal, commenting that in some situations a declaration of inconsistency may be necessary "… to emphasise that the legislation needs reconsidering or to vindicate the right." Leave to appeal has been granted by the Supreme Court.

What is new, however, is that, in the event of a declaration of inconsistency, Parliament will be required to reconsider the relevant legislation. Parliament would then have the option to either amend or repeal the law, or to retain the status quo.

This further step may be of more practical significance than statutory confirmation that the declaratory power exists. However, whether Parliament will be responsive to declarations of inconsistency remains to be seen.

8. Increased accountability and transparency for public sector organisations

The Government is also considering law changes to control top public sector pay, in response to concerns about the upwards trajectory of chief executive remuneration levels, and the growing gap between staff wages and chief executive pay.

The State Sectors Act and Crown Entities Bill, introduced in February this year, will amend the State Sector Act 1988 and the Crown Entities Act 2004 to provide for greater integrity and accountability in the management of the State services. The proposed changes will include:

- a requirement for boards of statutory entities to obtain written consent from the State Services Commissioner before finalising the employment conditions and remuneration of chief executives (or any subsequent amendments to them);
- expressly enabling the Commissioner to apply a code of conduct to an statutory entity's board and board members; and
- amendments to promote greater consistency in the manner in which inquiries and investigations are conducted by the State Services Commissioner across government.

The Bill is currently before the Select Committee for further consideration.

The move comes after State Services Commissioner recently began identifying crown entity boards who chose not to follow State Services Commission advice with respect to the chief executive's remuneration, warning them that this information could inform Ministers' decisions about the tenure of board members.

Keep in touch

If you are interested in finding our more about any of these developments, please contact us.

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SyCipLaw Tax Bulletin:

Revenue Regulations No. 6-2018: Once Again, Payment of Withholding Tax at the Time of Audit Considered Compliant with Withholding Tax Requirements for Deductibility of Expenses

On January 19, 2018, Department of Finance ("***DOF***") Secretary Carlos G. Dominguez issued RR No. 6-2018 which revoked RR No. 12-2013 and reinstated Section 2.58.5 of RR No. 2-1998, as amended by RR Nos. 14-2002 and 17-2003. Section 2.58.5 of RR No. 2-1998 implements the requirement of withholding of income tax for deductibility of expenses.[1] RR No. 6-2018 was published in the Manila Bulletin on January 23, 2018 and took effect on February 7, 2018.

Prior to its amendment by RR No. 12-2013, Section 2.58.5 of RR No. 2-1998[2], as amended by RR Nos. 14-2002 and 17-2003, allowed a taxpayer or withholding agent to deduct income payments against gross income despite failure to withhold income tax thereon at the time of the payment provided that the withholding agent or taxpayer pays the withholding tax, including the interest incident to the failure to withhold the tax, and surcharges, if applicable, at the time of audit or investigation or reinvestigation or reconsideration.[3]

On July 12, 2013,[4] then DOF Secretary Cesar V. Purisima issued RR No. 12-2013 and amended Section 2.58.8 to provide a stricter policy on withholding of taxes. RR No. 12-2013 provides that no deduction against gross income will be allowed in cases where no withholding of tax was made even if the taxpayer or withholding agent pays the withholding tax at the time of the audit investigation or reinvestigation or reconsideration.

With the issuance of RR No. 6-2018, the DOF relaxed the policy on withholding tax and reinstated the rule prior to RR No. 12-2013. Thus, taxpayers are, again, allowed to claim income payments against gross income despite failure to withhold taxes therefrom provided that they pay the withholding tax, including the interest incident to the failure to withhold the tax, and surcharges, if applicable, at the time of audit or investigation or reinvestigation or reconsideration.

[1] The 1997 Tax Code provides the following in relation to withholding of income tax on income payments:

> SECTION 34. Deductions from Gross Income.
> (K) Additional Requirements for Deductibility of Certain Payments.
> Any amount paid or payable which is otherwise deductible from, or taken into account in computing gross income or for which depreciation or amortization may be allowed under this Section, shall be allowed as a deduction only if it is shown that the tax required to be deducted and withheld therefrom has been paid to the Bureau of Internal Revenue in accordance with this Section, Sections 58 and 81 of this Code.

Prior to the 1997 Tax Code, the 1977 Tax Code provided as follows:

> SECTION 29. Deductions from gross income.

(Continued on page 2)

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(Continued from page 1)

> (j) Additional requirement for deductibility of certain payments. — Any amount paid or payable which is otherwise deductible from, or taken into account in computing gross income or for which depreciation or amortization may be allowed under this section, shall be allowed as a deduction only if it is shown that the tax required to be deducted and withheld therefrom has been paid to the Bureau of Internal Revenue in accordance with this section, Sections 51 and 74 of this Code.

[2] Before being repealed by RR No. 2-1998, RR No. 6-1985, as amended by RR No. 8-1990, provided for the following rule on requirement for deductibility:

> Sec. 9. (a) Requirement for deductibility. Any income payment, which is otherwise deductible under Sections 29 and 54 of the Tax Code, as amended, shall be allowed as a deduction from the payor's gross income only if it is shown that the tax required to be withheld has been paid to the Bureau of Internal Revenue in accordance with Sections 50, 51, 72, and 74 also of the Tax Code.
>
> (b) Requirement for registration of motor vehicle. In order to ensure the withholding and remittance of the creditable tax imposed in these regulations, no motor vehicle shall be registered by the Land Transportation Office without the Certificate Authorizing Registration (CAR), indicating the Payment Order/Confirmation Receipt or Official Receipt numbers, date of payment, and amount of creditable withholding tax, issued by the appropriate Revenue District Officer.

[3] Before being amended by RR No. 12-2013, Section 2.58.5 of RR No. 2-1998, as amended by RR Nos. 14-2002 and 17-2003, reads:

> Sec. 2.58.5. Requirements for Deductibility. - Any income payment which is otherwise deductible under the Code shall be allowed as a deduction from the payor's gross income only if it is shown that the income tax required to be withheld has been paid to the Bureau in accordance with Secs. 57 and 58 of the Code.
>
> A deduction will also be allowed in the following cases where no withholding of tax was made:
>
> (A) The payee reported the income and pays the tax due thereon and <u>the withholding agent pays the tax including the interest incident to the failure to withhold the tax, and surcharges, if applicable, at the time of the audit/investigation or reinvestigation/reconsideration</u>.
>
> (B) The recipient/payee failed to report the income on the due date thereof, but the <u>withholding agent/taxpayer pays the tax, including the interest incident to the failure to withhold the tax, and surcharges, if applicable, at the time of audit/investigation or reinvestigation/reconsideration</u>.
>
> (C) The withholding agent erroneously underwithheld the tax but <u>pays the difference between the correct amount and the amount of tax withheld including the interest, incident to such error, and surcharges, if applicable, at the time of the audit/ investigation or reinvestigation/reconsideration</u>.
>
> Items of deduction representing return of capital such as those pertaining to purchases of raw materials forming part of finished product or purchases of goods for resale, shall be allowed as deductions <u>upon withholding agent's payment of the basic withholding tax and penalties incident to non-withholding or underwithholding</u>. [Emphasis supplied]

[4] RR No. 12-2013 was published in the Manila Bulletin on July 13, 2013 and took effect on July 28, 2013.

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Stricter compliance measures for listed companies

Deadline approaching to submit comments – let us help to get your views heard!

DENTONS RODYK

9 March 2018

The Corporate Governance Council (the CG Council), through its recently issued consultation paper, has proposed amendments to the Singapore Code of Corporate Governance (the CG Code 2012) and the Listing Rules of the Mainboard of the Singapore Exchange Securities Trading Limited (SGX Listing Rules). Accordingly, companies listed on the Mainboard of the Singapore Exchange Securities Trading Limited (Listed Companies) have until 15 March 2018 to submit comments on the proposed amendments.

The proposed amendments would result in stricter compliance measures for Listed Companies, and concern:

1. Director independence & training
2. Remuneration
3. Internal controls & risk management systems
4. Stakeholder engagement

The proposed amended compliance framework for Listed Companies is as follows:

	SGX Listing Rules	*Revised CG Code 2012 (Revised Code)*	*Practice Guidance*
Purpose	**Mandatory Compliance:** Sets out key requirements and baseline market practices	**Comply or Explain:** Provides overarching principles of good corporate governance and actionable steps to guide compliance with such principles	**Voluntary Compliance:** Provides guidance for compliance with the Revised Code as well as setting out best practices
Key Changes	Guidelines in the CG Code 2012 which are considered important requirements or baseline market practices are proposed to be shifted to the SGX Listing Rules for mandatory compliance Key changes are further discussed below	The definition of "comply or explain" should be clarified to strengthen the emphasis on thoughtful and meaningful communication between Listed Companies and their stakeholders Key changes are further discussed below	The introduction of the Practice Guidance is recommended to complement the Revised Code, but is non-binding and will apply on a voluntary basis. 24 prescriptive or less essential details, which are currently contained in the CG Code 2012, are recommended to be incorporated in the Practice Guidance instead

Below, we discuss the key changes that would affect current operations of Listed Companies. If you or your company would like to assess your company's current position or submit comments to the proposed amendments, please reach out to us.

1. Director Independence & Training

Topic	Current Guideline under the CG Code 2012	Will it be mandatory?
"Independent" director ratio on board of directors of the Listed Company (Board)	Guideline 2.1: There should be a strong and independent element on the Board, with independent directors making up at least one-third of the Board.	**Mandatory compliance**: It is proposed that this become a mandatory rule under the SGX Listing Rules, such that independent directors would have to form at least one-third of the Board.
"Independent" director ratio on the Board, where the chairman of the Board (Chairman) is not independent	Guideline 2.2: The independent directors should make up at least half of the Board where: (a) the Chairman and the chief executive officer (or equivalent) (the CEO) is the same person; (b) the Chairman and the CEO are immediate family members; (c) the Chairman is part of the management team; or (d) the Chairman is not an independent director.	**Comply or explain**: It is proposed that this Guideline be revised to provide that independent directors are to comprise a majority of the Board where the Chairman is not independent.
"Independent" director tests	Guideline 2.3: The Board should determine, taking into account the views of the nominating committee, whether the director is independent in character and judgement. The Board should state its reasons if it determines that a director is independent notwithstanding the existence of relationships or circumstances which may appear relevant to its determination. Examples of relationships or circumstances which would deem a director to be not independent are set out in this Guideline. If the Board wishes, in spite of the existence of one or more of these relationships or circumstances, to consider a director as independent, it should disclose in full, the nature of that director's relationship or circumstance and bear responsibility for explaining why that director should be considered independent.	**Mandatory compliance**: The proposed tests for director independence provide that a director will not be considered independent where: (i) he is employed by the Listed Company or its related corporations for the current or was employed in any of the past three (3) financial years; or (ii) his immediate family member is employed by the Listed Company or its related corporations for the current financial year or was employed in any of the past three (3) financial years, and such family member's remuneration was determined by the Listed Company's remuneration committee; or (iii) he is, or has an immediate family member who is, a substantial shareholder of the Listed Company; or *Option (i) – to incorporate the "nine (9) year rule" as a hard limit* (iv) he has served on the Board for more than nine (9) years since the date of the director's first appointment (before or after listing). ***OR*** Option (ii) – *to subject independent directors who would like to serve more than nine (9) years to a two-tier vote*

Topic	Current Guideline under the CG Code 2012	Will it be mandatory?
		(iv) such director has been a member of the Board for an aggregate period of more than nine (9) years before or after listing and his continued appointment as an independent director has not been sought and approved in separate resolutions from: (A) all shareholders; and (B) shareholders excluding any controlling shareholder and associate of the controlling shareholder. The 9-year rule is not a term limit, as it does not prevent an independent director who has served on the Board for nine (9) years, to continue as a non-independent director. Additionally, a transition period of three (3) years is recommended, regardless of which option is adopted, to give companies sufficient time to adjust their Board composition and/or search for new independent directors. The remaining tests of director independence from the CG Code 2012 are proposed to be shifted to the non-binding Practice Guidance.
Shareholding threshold for "independent" directors	Guideline 2.3: An "independent" director is one who has no relationship with the company, its related corporations, *its 10% shareholders* or its officers that could interfere, or be reasonably perceived to interfere, with the exercise of the director's independent business judgement with a view to the best interests of the company.	**Mandatory compliance**: It is proposed that the shareholding threshold in relation to determining director independence be lowered from 10% to 5%, and that this become a mandatory rule under the SGX Listing Rules.
First-time director training	Guideline 1.6: Incoming directors should receive comprehensive and tailored induction on joining the Board, and companies should provide training for first-time director in areas such as accounting, legal and industry-specific knowledge as appropriate, as well as regular training on relevant new laws, regulations and changing commercial risks.	**Mandatory compliance**: It is proposed that this become a mandatory rule under the SGX Listing Rules, requiring any first-time directors to undergo training in the roles and responsibilities of a director.

2. Remuneration

Topic	Current Guideline under the CG Code 2012	Will it be mandatory?
Disclosure on relationship between remuneration and performance	Guideline 9: Every company should provide clear disclosure of its remuneration policies, level and mix of remuneration, and the procedure for setting remuneration, in the company's Annual Report.	**Comply or explain**: It is proposed that this Guideline be revised to provide for Listed Companies to disclose the relationship between remuneration and value creation. In particular, the proposed revised Principle provides that the company be transparent with its remuneration policies, and, among other things, its procedures for setting remuneration, and the relationships between remuneration, performance and value creation.
Remuneration of employees who are, or directly related to, substantial shareholders	Guideline 9.4: For transparency, the annual remuneration report should disclose the details of the remuneration of employees who are immediate family members of a director or the CEO, and whose remuneration exceeds S$50,000 during the year. This will be done on a named basis with clear indication of the employee's relationship with the relevant director or the CEO. Disclosure of remuneration should be in incremental bands of S$50,000. The company need only show the applicable bands.	**Comply or explain**: It is proposed that this Guideline be revised to provide for Listed Companies to disclose the names and remuneration of employees who are substantial shareholders or immediate family of substantial shareholders (in addition to employees who are immediate family members of a director or the CEO, as in the CG Code 2012), where such remuneration exceeds S$100,000 during the year (revised from S$50,000 currently), in bands no wider than S$100,000 (revised from S$50,000 currently).

3. Internal Controls & Risk Management Systems

Topic	Current Guideline under the CG Code 2012	Will it be mandatory?
Disclosure on internal controls and risk management systems	Guideline 11.3: The Board should comment on the adequacy and effectiveness of the internal controls, including financial, operational, compliance and information technology controls, and risk management systems, in the company's Annual Report. The Board's commentary should include information needed by stakeholders to make an informed assessment of the company's internal control and risk management systems.	**Mandatory compliance**: While the SGX Listing Rules currently require Listed Companies to comment on their internal controls, it is proposed that these rules be amended to enhance disclosures on the adequacy and effectiveness of Listed Companies' internal controls and risk management systems. In particular, there is an additional requirement for disclosure of the Listed Company's weaknesses, and steps to address them.

4. Stakeholder Engagement

It is proposed that a provision be introduced in the Revised Code to provide for Listed Companies to consider and balance the needs and interests of material stakeholders, as well as accompanying provisions setting out expectations for Listed Companies to:

(a) have arrangements to identify and manage relationships with material stakeholder groups;

(b) disclose key focus areas in relation to their management of stakeholder relationships; and

(c) maintain a current corporate website for all stakeholders to stay informed of material updates in a timely manner.

5. Conclusion

Ultimately, the proposed measures would impose stricter compliance requirements for Listed Companies. If you or your company would like to submit comments to the proposed amendments, please reach out to us prior to 15 March 2018. We are also available to help you assess your company's current position and determine the next steps under the proposed amendments.

Dentons Rodyk acknowledges and thanks Sean Gallagher, Julian Foo and Randall Lee for their contributions to the article.

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Intellectual Property Office Amends the Examination Standards for "Patent Term Extension"

03/31/2018
Kate Shu-Yin Chu

The Intellectual Property Office (IPO) announced on December 14, 2017 amendments of Chapter 11, Part II of the Patent Examination Guidelines, entitled "Examination Guidelines for Patent Term Extension." The amendments mainly include the following changes:

1. In the event the name of the market approve holder is inconsistent with that of the patentee, the applicant shall provide documentation that the two are the same legal entity or have an exclusive or non-exclusive authorization relationship. In addition, recordation of the license with the IPO is necessary.

2. The active ingredients in the first market approval shall be determined based on the active ingredient per se rather than the moiety having pharmacological effect (free base). The term "first market approval" means that obtained for the same active ingredient and the same use. In principle, different licenses obtained for different salts, esters or different hydrates of the same chemical moiety shall each be identified as a first market approval.

3. For determination of correlation between the patent scope and the first market approval, the "correspondence" relation originally specified in the Guidelines is redefined as "coverage." The relevant descriptions and examples in the Guidelines are amended accordingly. For the examination of an application for extension, the IPO requires that the active ingredients and use stated in the first license should be covered by the scope of the patent application. In the case of an invention patent for a product, the active ingredient contained in the first market approval should be covered by the scope of the product claims; in the case of a use invention patent, the active ingredients and use stated in the first market approval should be covered by the use claims. In the case of a manufacturing process for a product, the active ingredients contained in the first market approval should be covered by the process claims.

4. It is clarified that the commencement and conclusion dates of the foreign clinical trials are respectively the study initiation and study completion dates defined in the clinical trial report in line with ICH (International Conference on Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use). In the case of applying for extension based on foreign clinical trial periods, the focus of the foreign clinical trial

protocol should be stated, and the study initiation and completion dates as stated in the clinical trial report that conform to the ICH should be recorded as the commencement and conclusion dates of foreign clinical trial.

5. The conclusion of regulatory review of an application for agricultural chemical is redefined as the issue date recorded on the market approval for the agricultural chemical. Moreover, delay during regulatory review attributable to the applicant includes period from the issue date of approval of the "use methods and scopes" of agricultural chemical to completion of documents for regulatory review...

6. The requirement of submitting document(s) regarding allowance of patent term extension in foreign country(ies) is lifted.

7. The following stipulations are added: the period during regulatory review in which an interruption or delay in obtaining a market approval occurs due to "data inconsistent with the criteria for approving a market approval" is attributable to the applicant. In respect of applications for market approval of a drug or agricultural chemical, the documents and regulatory fees required for filing market approval are defined. Any delay during regulatory review in obtaining a market approval due to incomplete data, non-payment of fees, or data not in conformity with the requirements for obtaining a market approval during examination by the Department of Health and Welfare is in principle attributable to the applicant.

8. For an academic clinical trial converted into a clinical trial, the initiation date of the academic clinical trial is taken as the commencement date of the domestic clinical trial.

The IPO plans to announce implementation of the amended guidelines on 1 April 2018. Although the changes to the definition of the first market approval referred to in the preceding paragraph 2 relax the criteria on determination of first market approval, it also imposes a limitation on the scope of extension to the specific ingredients stated in the market approval according to the provisions of Article 56 of the Patent Act. In addition, the update of paragraph 7 may adversely impacts patentees by expanding the explanation of the "periods of delay attributable to the applicant."

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In Re Silver: The Lone Star State Gives Patent Agents a Badge of Privilege

01 April 2018
Firm Thought Leadership

On February 23, 2018 the Supreme Court of Texas concluded [1] that the definition of a "lawyer" – for purposes of the lawyer-client privilege under the Texas Rules of Evidence [2] – is sufficiently broad to encompass some communications between a patent agent and their client. The impact of this decision may reach beyond the Lone Star State, particularly since Texas's Rule 503 is modeled after a version of proposed Federal Rule of Evidence 503.[3] While most other states' courts have not addressed whether such communications are privileged, many states [4] have adopted rules similar to Texas's Rule 503 and thus may also reach a similar conclusion. Because many patent agents do not work under the supervision of an attorney, this development may significantly impact the privilege protection available when using such agents for patent prosecution.[5]

This decision was a reversal of both of the lower courts' rulings [6] that Texas did not recognize a common law patent agent privilege other than where a patent agent acts under the supervision of an attorney. Unlike the lower courts, the Supreme Court of Texas framed the issue not as the creation of a new patent agent privilege, but instead as the determination that the existing lawyer-client privilege extends to patent agents.[7] Because the Supreme Court of Texas agreed that patent agents "are independently providing professional legal services to a client" rather than "just working in the legal field," they must be recognized as "authorized" to "practice law" within the definition of a "lawyer" as set out in the Rules of Evidence.[8] The Court suggested that to hold otherwise could be found to be an unconstitutional violation of the Supremacy Clause.[9] Ultimately, the highest court of Texas returned the case to the trial court with directions to conduct an *in camera* review of the underlying communications.[10]

In re Silver arose from a contract dispute related to two patents directed to a tablet device marketed as the "Ziosk." This stand-alone device allows restaurant-goers to order meals, play games, and pay their checks at their table without interacting with a server. The inventor, Andrew Silver, sold the rights to the invention under a patent purchase agreement ("PPA") to Tabletop Media, LLC for the purpose of commercializing the Ziosk. The PPA contained a provision for the payment of royalties within a period of time after the patents had been granted. Tabletop successfully commercialized the Ziosk – placing the units in many popular restaurants including Chili's, TGI Fridays, Red Robin, and Outback Steakhouse; however, they allegedly failed to make the first royalty payment under the PPA.

Silver had worked with a U.S. patent agent since March of 2010, and together they had successfully obtained more than 30 patents from the United States Patent and Trademark Office ("USPTO"). As related to the Ziosk, Silver consulted with his patent agent while prosecuting the patents, and after realizing litigation with Tabletop was imminent, further sought his patent agent's legal opinion regarding the strengths of his case. Notably, Silver's patent agent did not work under the supervision of a licensed attorney. For this reason, the trial court concluded that the three hundred e-mails between Silver and his patent agent were not protected from discovery by the lawyer-client privilege and ordered their production. Silver then filed a petition for mandamus relief.

The decision by the Texas Supreme Court to find a limited lawyer-client privilege extending to non-attorney practitioners continues a recent trend from other jurisdictions that have found a privilege to exist between clients and patent agents.[11] In the past, lower courts have not been consistent when deciding the issue: some outright rejecting the privilege,[12] some finding privilege only when the agent is working under the supervision of an attorney,[13] and still others simply recognizing the privilege.[14] The USPTO conducted a round table event in early 2015 where a number of organizations strongly favored a clear recognition of a privilege for communications with a patent agent.[15] In 2016 the Federal Circuit held in *In re Queen's University at Kingston* that confidential communications with patent agents are afforded a privilege commensurate with the scope of a patent agent's ability to practice before the USPTO.[16] The Federal Circuit attempted to distinguish the scope of this privilege as applicable only to communications related to those activities of patent agents authorized by Congress.[17] To this end, the Federal Circuit considered the regulations promulgated by the USPTO for guidance.[18] Specifically, the Federal Circuit found that privileged communications should include those that are "in furtherance of the performance of these tasks . . . 'which are reasonably necessary and incident to the preparation and prosecution of patent applications or other proceedings before'" the USPTO.[19]

But what exactly does this now-recognized privilege include? There is still quite a bit of uncertainty left in the wake of these decisions. The Supreme Court of Texas did not provide a clear determination of what falls within the purview of patent agents' authorized activities, electing to avoid any bright line rule.[20] The Federal Circuit in *Queen's* attempted to center the scope of the patent agent privilege around the nonexclusive list of USPTO matters in which a patent agent may participate.[21] The Federal Circuit made an effort to further elucidate the privilege by listing a couple of examples that may fall outside the scope.[22] In his dissent in *In re Silver,* Justice Evans of the Court of Appeals of Texas favored an approach similar to that of the Federal Circuit, offering his opinion that the privilege should be found where a patent agent is "authorized to practice law to the extent of applications and prosecutions of patents."[23] Under this analysis, Justice Evans would apply the lawyer-client privilege to the category of documents falling under "patent prosecution documents" but deny the privilege as to "litigation consultation documents."[24]

These approaches may be helpful with facts that fit neatly within *prosecution* or *litigation* but appear less precise as the permissible activities of a patent agent border on or overlap with those of litigation. For instance, the regulations of the USPTO that the Federal Circuit employed when delineating the scope of a patent agent's scope of privilege include advising a client on "alternative forms of protection which may be available under state law."[25] Likewise, even a patent agent's authority to prepare assignments and other contracts related to patents may not be totally outside the scope of a patent agent's authority as viewed by the USPTO.[26] In the context of reexamination or *inter partes* review – activities where a patent agent may certainly participate and represent a client – a patent agent is authorized to issue a validity opinion to a client.[27] Curiously, advising a client on the scope of privilege afforded to communications with a patent agent may be one of the few activities impermissible for patent agents according to these guidelines.[28]

The Supreme Court of Texas's opinion in *In re Silver* merely posits that "matters outside the agent's authorized practice area *might* not be protected" and does little to clear up any of these outstanding questions.[29] The mechanics of this privilege will likely be left to the lower courts to craft, and a bright line rule may be difficult to construct. If such a patent agent privilege is to exist, patent agents – and more importantly their clients – need certainty in the understanding of this privilege. Certainty will ensure that sensitive communications are made with the full knowledge of potential discovery repercussions. For now, those who consult patent agents without attorney supervision should do so cautiously in the presence of this uncertainty.

[1] In re Silver, 2018 WL 1022470 (Tex. Feb. 23, 2018).

[2] TEX. R. EVID. 503(a)(3) ("A 'lawyer' is a person authorized, or who the client reasonably believes is authorized, to practice law in any state or nation").

[3] Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 236 (1972) (including the definition: "A *'lawyer' is a person authorized*, or reasonably believed by the client to be authorized, *to practice law in any state or nation.*") (emphasis added).

[4] Thirty-eight states, including Texas, have adopted a version of the Uniform Rules of Evidence.

[5] Brief for Houston Intellectual Property Law Association as Amicus Curiae Supporting Relator at 12-13, In re Silver, 2018 WL 1022470 (Tex. Feb. 23, 2018).

[6] In re Silver, 500 S.W.3d 644 (Tex. App. 2016); Tabletop Media, LLC v. Andrew Silver, No. DC-15-02268 (N.D. Tex. filed Oct. 7, 2015) (order ruling that there is no patent agent privilege for discovery purposes in Texas).

[7] In re Silver, 2018 WL 1022470, at *3 (Tex. Feb. 23, 2018).

[8] In re Silver, 2018 WL 1022470, at *9; *See also* In re Queen's Univ. at Kingston, 820 F.3d 1287, 1296 (Fed. Cir. 2016) (interpreting *Sperry v. State of Florida ex rel. Florida Bar,* 373 U.S. 379 (1963) as establishing that "patent agents are not simply engaging in law-like activity, they are engaging in the practice of law itself.").

[9] In re Silver, 500 S.W.3d 644, 649 (Tex. App. 2016) (Evans, J., dissenting).

[10] In re Silver, 2018 WL 1022470, at *14-15 (Tex. Feb. 23, 2018).

[11] In re Queen's Univ. at Kingston, 820 F.3d 1287 (Fed. Cir. 2016); Rule on Attorney-Client Privilege for Trials Before the PTAB, 82 Fed. Reg. 51,570, 51,575 (Nov. 7, 2017) (to be codified at 37 C.F.R. pt. 42).

[12] Joh. A. Benckiser G. m. b. H., Chemische Fabrik v. Hygrade Food Prods. Corp., 253 F. Supp. 999 (D.N.J. 1966); Detection Sys., Inc. v. Pittway Corp., 96 F.R.D. 152, 155 (W.D.N.Y. 1982) ("As a general rule, 'no communications from patent agents, whether American or foreign, are subject to an attorney-client privilege in the United States.'").

[13] *See, e.g.*, Cuno, Inc. v. Pall Corp., 121 F.R.D. 198, 204 (E.D.N.Y.1988); Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 146 (D. Del. 1977).

[14] In re Amplicillin Antitrust Litigation, 81 F.R.D. 377 (D.D.C. 1978); Foseco Int'l. Ltd. v. Fireline, Inc., 546 F. Supp. 22 (N.D. Ohio 1982).

[15] U.S. PATENT AND TRADEMARK OFFICE, SUMMARY OF ROUNDTABLE AND WRITTEN COMMENTS: DOMESTIC AND INTERNATIONAL ISSUES RELATED TO PRIVILEGED COMMUNICATIONS BETWEEN PATENT PRACTITIONERS AND THEIR CLIENTS (2015), https://www.uspto.gov/sites/default/files/documents /Summary%20of%20Privileged%20Communication%20Roundtable.pdf

[16] In re Queen's Univ. at Kingston, 820 F.3d at 1301.

[17] *Id.*

[18] 37 C.F.R. § 11.5(b)(1).

[19] In re Queen's Univ. at Kingston, 820 F.3d at 1301 (citing 37 C.F.R. § 11.5(b)(1)).

[20] In re Silver, 2018 WL 1022470, at *14 ("The client's communications with a registered patent agent regarding matters outside the agent's authorized practice area might not be protected because these communications are not necessarily made to facilitate the rendition of professional legal services.").
[21] In re Queen's Univ. at Kingston, 820 F.3d at 1301-02 (citing 37 C.F.R. § 11.5(b)(1) ("Practice before the Office in patent matters includes, *but is not limited to* . . .") (emphasis added)).
[22] *Id.* (listing "communications with a patent agent who is offering an opinion on the validity of another party's patent in contemplation of litigation or for the sale or purchase of a patent, or on infringement" as not within the scope of privilege.).
[23] In re Silver, 500 S.W.3d 644, 651 (Tex. App. 2016) (Evans, J., dissenting).
[24] *Id.*
[25] 37 C.F.R. § 11.5(b)(1)(i).
[26] In re Queen's Univ. at Kingston, 820 F.3d at 1306-07 (Reyna, J., dissenting) (pointing out that there was more uncertainty in the proposed privilege than the majority admits.); Changes to Representation of Others Before the United States Patent and Trademark Office, 73 Fed. Reg. 47,650, 47,668 (Aug. 14, 2008) ("The Office's long-standing position has been that '[p]atent agents * * * cannot * * * perform various services which the local jurisdiction considers as practicing law. For example, a patent agent could not draw up a contract relating to a patent, such as an assignment or a license, if the state in which he/she resides considers drafting contracts as practicing law.'").
[27] Changes to Representation of Others Before the United States Patent and Trademark Office, 73 Fed. Reg. at 47,670 ("Due to registration to practice before the Office in patent cases, a practitioner may issue a validity opinion in contemplation of filing a request for reexamination."). By extension, this should also apply to *inter partes* review proceedings that replaced *inter partes* reexamination.
[28] In re Queen's Univ. at Kingston, 820 F.3d at 1307 (Reyna, J., dissenting).
[29] In re Silver, 2018 WL 1022470 at *14 (Tex. Feb. 23, 2018) (emphasis added).

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Is OCR Moving the Goal Posts on Vendor Management?

04.04.18
By Adam H. Greene and Rebecca L. Williams

Recent statements at the 27th National HIPAA Summit suggest that the U.S. Department of Health and Human Services (HHS) Office for Civil Rights (OCR) may be changing its position and expecting a greater level of vendor due diligence under HIPAA. Although surprising to many, the HIPAA regulations do not specifically require vendor due diligence or monitoring. Rather, HIPAA requires a business associate agreement (BAA) and that the covered entity take action upon learning of a business associate's pattern of activity or practice in breach of the BAA. The same is true with respect to the relation between business associates and their subcontractors.

Where We Have Been. The Privacy Rule that initially was proposed in 1999 included a requirement that covered entities implement policies and procedures to monitor their business partners and take reasonable steps to ensure their compliance. In the final rule that was issued in 2000, however, HHS changed its position, providing that a covered entity does not need to monitor its business associates or ensure their compliance, but rather needs to take action only upon learning of a violation of a BAA:

> In the final rule, we reduce the extent to which a covered entity must monitor the actions of its business associate and we make it easier for covered entities to identify the circumstances that will require them to take actions to correct a business associate's material violation of the contract, in the following ways. We delete the proposed language requiring covered entities to "take reasonable steps to ensure" that each business associate complies with the rule's requirements. Additionally, we now require covered entities to take reasonable steps to cure a breach or terminate the contract for business associate behaviors only if they know of a material violation by a business associate. In implementing this standard, we will view a covered entity that has substantial and credible evidence of a violation as knowing of such violation. While this standard relieves the covered entity of the need to actively monitor its business associates, a covered entity nonetheless is expected to investigate when they receive complaints or other information that contain substantial and credible evidence of violations by a business associate, and it must act upon any knowledge of such violation that it possesses.

The Privacy Rule includes a requirement to implement reasonable safeguards to protect the privacy of protected health information. Arguably, this could be interpreted to require some level of vendor due diligence and monitoring, but we have not seen evidence that OCR historically has expected more than merely obtaining compliant BAAs and taking action upon learning of business associate non-compliance. OCR has indicated in guidance on cloud computing that the Security Rule requires that a covered
entity include in its risk analysis risks related to business associates, but that is significantly different from a due diligence or monitoring requirement.

Other Agencies' Approaches. OCR's past approach to HIPAA contrasts with other statutory and regulatory approaches. For example, in the Matter of GMR Transcription, the Federal Trade Commission brought a complaint against the company for not taking "adequate measures to monitor and assess whether [a subcontractor] employed measures to appropriately protect personal information." The Massachusetts law governing the security of personal information requires "[t]aking reasonable steps to select and retain third-party service providers that are capable of maintaining appropriate security measures to protect such personal information consistent with these regulations and any applicable federal regulations."

A Changing Position? In a keynote speech at the 27th National HIPAA Summit in March 2017, Serena Mosley-Day, OCR's Acting Senior Advisor for HIPAA Compliance and Enforcement, suggested in her remarks that HIPAA does require a certain level of vendor due diligence. She indicated that a covered entity may not need to perform thorough due diligence, such as reviewing evidence of a compliance program, for a well-known and established cloud services provider. In contrast, she indicated that a covered entity may need to perform due diligence of a lesser known entity, such as a newly established company, to determine that it has appropriate safeguards in place. Mosley-Day highlighted a particular enforcement case, when a covered entity provided protected health information to a person claiming to provide free digital conversion services for radiology images (in exchange for the right to recover the images' silver content) without first obtaining a BAA or doing any due diligence. HIPAA clearly requires a covered entity to enter into a BAA; however, the due diligence obligation is less clear.

Reasonable due diligence and monitoring of business associates always has been a good idea, especially since the Breach Notification Rule, which can lead to a covered entity suffering significant financial and reputational harm due to a business associate's actions. But, historically, due diligence has not seemed to be a requirement under HIPAA. Mosley-Day's informal remarks suggest that this may be changing.

Granted, an agency official's statements at a presentation should not be treated as formal agency guidance. At a future OCR presentation, the agency could take a view more in line with its past policy. But, in the meantime, OCR's recent statements suggest that it may be expecting a greater level of vendor due diligence under HIPAA, where merely obtaining a BAA may not be sufficient.

Next Steps. Where does this leave covered entities and business associates? If they are not already doing so, they should evaluate the existence and effectiveness of their vendor management process. What checks are in place to reduce the risk of providing protected health information to a vendor that does not have adequate privacy and security safeguards? Organizations may wish to take a risk-based approach, determining risk based on factors such as independent assessments, reputation and resources, amount and type of protected health information that will be accessible, and security questionnaires. Organizations then can focus their due diligence efforts on business associates that appear to be higher risk.

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