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November 2018 e-Bulletin

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CONFERENCES & EVENTS

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

66th International Conference
Seattle - Hosted by DAVIS WRIGHT TREMAINE
October 5 - 8, 2019

Visit www.prac.org for all events and details

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ARIAS CELEBRATES 76 YEARS—A LEGACYOF SERVICE

ARIAS, A SURNAME TRANSFORMED INTO A LEGACY OF SERVICE

October, 2018: A story that began in a small office, deeply rooted in the humanistic vision and values of our founder Dr. Armando Arias senior and his vision to transcend generations in the legal world, explains how our law firm became a family. On October 23rd, 2018 we celebrated 76 years of being one of the most recognized firms in the Central American region, with a team of exceptional attorneys, offering comprehensive business solutions and outstanding customer service.

We know that this trajectory, in which we have garnered innumerable recognitions such as Band 1 by Chambers & Partners, Best Central American Tax Firm by the International Tax Review and Best Central American Firm for Women in Business Law in the Americas Women in Business Law Awards, wouldn't have being possible without our team of highly specialized lawyers. Dr. Armando Arias junior reminds us that, "An attorney must be a reliable business partner for its clients and an integral part of their development within a secure, legal framework."

We are grateful to all the people who helped our firm reach its highest aspirations, especially our attorneys and their unwavering commitment to Arias. Above all, we are honored to have an extraordinary mentor in the legal and business world; Dr. Francisco Armando Arias junior, who remembers how his father started the firm and how everything he´s become is "thanks to him". Dr. Francisco Armando Arias junior became an integral part of the firm during his exceptional career, filled with great commitment to the law and an incomparable dedication to his clients.

In closing, we´d like to send a very special thank you to the entire Arias team; without your passion and perseverance, this wouldn´t have been possible.

Arias, going beyond borders since 1942, is now stronger than ever.









BAKER BOTTS EXPERIENCED FINANCE PARTNER JOINS FIRM

Robert Wann, Jr, Joins Baker Botts in New York

NEW YORK, 12 OCTOBER 2018: Baker Botts L.L.P., a leading international law firm, today announced that Robert Wann, Jr. has joined the Finance Section of the firm's Corporate Practice as a Partner. Mr. Wann will be based in New York.

“Over the last 12 months, we have seen significant growth in our Corporate Practice across the firm, and especially in New York. Robert is an outstanding lawyer with a vast depth of experience, with a particular focus on complex financing arrangements. He is another excellent addition to our Corporate team,” said Andrew M. Baker, Managing Partner of Baker Botts.

“Robert is a first-class corporate lawyer with considerable experience advising private equity sponsors and their portfolio companies, investment banks, commercial banks and public and private corporations in a variety of financing transactions including; high-yield and investment-grade bonds, syndicated loans, club loans, asset-based loans, tender offers and exchange offers,” said Mike Bengtson, Chair of the firm's Corporate Department and a New York based Partner.

Mr. Wann has broad experience representing borrowers, issuers and financing sources on both the bank and bond sides of financing transactions, and has represented clients with debt restructurings, equity offerings and exchange offers. Mr. Wann has handled transactions valued at over $100 billion and has experience in a variety of industries including financial services, media, chemicals, education, energy, hospitality, healthcare, retail and manufacturing. Mr. Wann also has significant experience working on cross-border transactions.

For additional information visit www.bakerbotts.com

CLAYTON UTZ PARTNER JOINS CONSTRUCTION AND MAJOR PROJECTS TEAM

SYDNEY, 12 NOVEMBER 2018: Clayton Utz has appointed Graham Read as a partner in its market-leading national Construction and Major Projects practice.

Graham is an experienced construction and infrastructure lawyer who works with both public and private sector clients, with a particularly strong track record advising NSW and Commonwealth government clients.

Graham began his career in private practice and has worked at large firms as well as in-house in general counsel roles with NSW State government.

Clayton Utz Construction and Major Projects national practice group head Sergio Capelli said Graham's experience and approach to client service made him an excellent fit for the team. "Graham has impressive experience in managing complex projects both domestically and internationally, including leading negotiations on behalf of government on major cross-border deals and major infrastructure projects nationally," Sergio said.

"As well as his legal and commercial experience, Graham is respected a strong mentor who builds strong, long-term client relationships and has a highly collaborative approach to his work. We are confident that Graham will make a valuable contribution and help us continue to provide our clients with an exceptional service."

For additional information visit www.claytonutz.com

DAVIS WRIGHT TREMAINE EXPANDS SEATTLE TRADEMARK/IP GROUP

SEATTLE, 08 NOVEMBER 2018: The Seattle office of Davis Wright Tremaine LLP has expanded its highly regarded trademark and intellectual property practice group with a team from Cairncross & Hempelmann led by partner Jeff Nelson.

Mr. Nelson's practice focuses on intellectual property protection and enforcement strategies for a wide array of clients, ranging from emerging companies to established industry leaders in the music, gaming, media, and food/beverage industries.

"We see Jeff's experience and his team as enabling us to further expand Davis Wright Tremaine's already strong reputation in the areas of intellectual property and entertainment," said Alexandra Nicholson, chair of the firm's Media, Entertainment, and Intellectual Property group.

"Davis Wright Tremaine's renowned national practices in media, entertainment, technology, and IP provide a powerful platform to support the full breadth of my practice and to expand the services I can offer my clients," said Mr. Nelson. "I'm very excited about the opportunities made possible by this move."

In addition to his private practice, Mr. Nelson is highly committed to community service and is currently board president of Art With Heart, a nonprofit that supports children experiencing trauma or adversity. He is also the former board chair of Washington Lawyers for the Arts.

Joining Mr. Nelson in moving to Davis Wright Tremaine are associate Lauren Schulz, trademark paralegal Mary Hadley, and legal assistant Chelsea Fox.

For more information, visit www.dwt.com.

DENTONS RODYK WELCOMES NEW PARTNER TO CORPORATE GROUP

SINGAPORE, 25 SEPTEMBER 2018: Dentons Rodyk is pleased to announce that Eunice Yao has joined the Firm as a Partner in its Corporate practice group. Eunice began her career Rodyk & Davidson. Subsequently, she served in the corporate finance teams of boutique law firms, and was most recently at Fortis Law Corporation. As a corporate lawyer, Eunice's main areas of practice include capital markets, mergers and acquisitions, and FinTech.

She has advised in initial public offerings of companies providing advice to issue managers and also advised many companies (including medical groups, companies providing education expertise, real estate companies, oil and gas supply chain entities and technology companies) listed on the Singapore Exchange Securities Trading Limited (SGX-ST) in their corporate actions (including equity and debt fund raising) and also was company secretary for companies listed on the SGX-ST.

Eunice also was legal counsel with the largest consumer bank in Singapore and her tenure as legal counsel gave her the opportunities to advise in FinTech matters. She remains involved in multiple strategic enterprise FinTech, sourcing, outsourcing and compliance related initiatives.

For additional information visit www.dentons.rodyk.com

GIDE ANNOUNCES CREATION OF GIDE 255 DIGITAL TRANSFORMATION TEAM

Gide 255, a new team dedicated to digital transformation, headed by Franck Guiader

PARIS, 19 SEPTEMBER 2018: In line with its pioneering spirit and ambition to be a reference law firm as regards innovation, Gide is pleased to announce the arrival of a new team dedicated to offering strategic, legal and regulatory advice on all matters related to its clients' digital transformation.

Headed by **Franck Guiader,** with **Jennifer D'hoir** and **Matthieu Lucchesi**, this team of experts in the fields of regulation, innovation and strategy aims to offer "augmented" advice on changing business models and new behaviours that are deeply affected by the development of advanced technologies. The team will also offer high-end support to help advance the changing legal and regulatory framework both in France and abroad, whether ongoing or to come.

Gide 255 covers in particular the growing stakes of blockchain, ICOs, artificial intelligence, automation and various aspects of data processing.

The recognised know-how of all Gide teams as regards business law, combined with the comprehensive experience of this new team on all challenges pertaining to digital transformation, together enable the firm to offer its clients a unique tool to help decision-making processes in a context that is disrupted by the advent of breakthrough technologies.

L-R Matthieu Lucchesi; Jennifer D'hoir; Franck Guider

For **Franck Guiader**, head of Gide 255: *"Transforming is no longer just an option. It is a reality for some, and a matter of urgency for others. The incredible rise of the digital economy offers fantastic development opportunities, both on a national and international level. With the wealth of opportunities opening up, we will work alongside public and private players, sharing with them our enthusiasm and vision of the digital world that drives us to rewrite the rules, co-build, and reinvent client relations".*

Franck Guiader, 41, is an expert in innovation regulation (marketplaces, blockchained services, ICOs, roboadvisors, crowdfunding platforms, AI). He is also a leading player in the development of the Paris financial market (creation for the French Financial Markets Authority (AMF) of the FROG initiatives, Agility and Unicorn programmes, and ICO management). Franck began his career as a financial analyst at Lazard in 2001. He then joined BNP Paribas in 2003, and Euronext in 2006. In 2011, he joined the AMF's Asset Management Regulation division of the Regulatory Policy and International Affairs Directorate, before becoming its head in 2015. In May 2016, Franck became head of the AMF's new FinTech division, Innovation and Competitiveness. He also co-led the AMF-ACPR FinTech forum with the supervisory authority. Franck holds a postgraduate degree (Magistère) in Banking and Finance (2001) and a Master's degree in financial techniques from Paris II Panthéon-Assas University. He is also a graduate of Neoma Business School (2006) and of Paris V René Descartes University in applied mathematics (1998). He lectures on European regulation at the Institut de Haute Finance and at Paris I Panthéon-Sorbonne University.

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GIDE CONTINUED..............

Matthieu Lucchesi, 32, specialises in legal and regulatory strategy in the field of innovation. Matthieu started his career in 2011 as a lawyer within the New York office of Sullivan & Cromwell LLP, before joining the French Financial Markets Authority (AMF) in 2012. In 2016, he became head of its Asset Management Regulation division. In early 2018, Matthieu became head of public affairs for BNP Paribas Asset Management. Matthieu holds a postgraduate degree (Magistère) in business law from Paris II Panthéon-Assas University (2009) and an LL.M. from Harvard Law School (2001). He is admitted to the New York Bar.

Jennifer D'hoir, 33, specialises in influence strategy, lobbying and international negotiations. She joined the European and International affairs division within the Regulatory Policy and International Affairs Directorate of the French Financial Markets Authority (AMF) in May 2013. From 2015 to 2018, she was the Head of the International Affairs Unit within the AMF. Her assignments included coordinating the AMF's actions within international financial regulation bodies (in particular the Financial Stability Board (FSB) and the International Organization of Securities Commissions (IOSCO)) and led cooperation actions with foreign regulation authorities. Prior to joining the AMF, Jennifer was Chief of Staff and EU Regulatory Affairs manager for Mazars. She began her career in 2009 as a parliamentary attaché at the French Senate. Jennifer is a graduate of Sciences Po Paris (2008). She lectures within the Sciences Po Paris Law School and teaches students at Master's level in law and market regulation at Paris Dauphine University.

For more information visit us at www.gide.com

HOGAN LOVELLS ENHANCES CROSS-BORDER LITIGATION CAPABILITY WITH NEW HONG KONG PARTNER HIRE

HONG KONG, 07 NOVEMBER, 2018: Hogan Lovells announced today that Antonia Croke will be joining the firm as a partner in the Global Litigation practice, and will ultimately be based in the Hong Kong office. Antonia will be joining the firm from the London office of Ashurst LLP and will initially join the Hogan Lovells litigation team in London before transitioning to Hong Kong later in 2019.

The Global Litigation practice at Hogan Lovells has advised 50 of the Fortune 100, 34 of the FTSE 100, and 17 of the DAX 30, often on bet-the-company litigation and Hong Kong is an important and growing center for commercial dispute resolution. With extensive experience in complex, cross-border litigation and investigations, including contractual, corporate, employment, insolvency, and fraud related disputes, Antonia will allow the Hong Kong team to meet the increasing demand from global clients for strategic, commercial minded litigation counsel in the Asia Pacific region.

Commenting on Antonia's arrival, Michael Davison, Global Head of the Hogan Lovells Litigation practice, said: "Antonia is a dynamic, driven, and impressive individual. Adding her to our existing team will boost our offering and enable us to respond to the growing demand for high-quality litigation counsel in Asia."

Antonia Croke added: "I am thrilled to be joining the world-renowned litigation practice at Hogan Lovells. The firm works on some of the most complex and high profile litigation matters, and has a truly global footprint. I look forward to working with an outstanding group of colleagues in Asia and across the world."

While at Ashurst, Antonia worked for a number of FTSE 100 companies on complex and high-profile commercial disputes and investigations in the financial services, automotive and TMT sectors. She was the Chair of the Ashurst Women's Network committee in London. Prior to joining Ashurst in 2010, Antonia was at Clayton Utz and Gilbert + Tobin in Sydney.

For additional information visit www.hoganlovells.com

NAUTADUTILH ADDS BRUSSELS CORPORATE M&A PARTNER

BRUSSELS, 06 NOVEMBER 2018: We are pleased to announce the arrival of Philippe Remels. Philippe, appointed as partner, joins the Corporate M&A practice in our Brussels office.

Philippe has 20 years' experience in corporate law. He specialises in various areas of corporate law, with a particular focus on mergers and acquisitions, reorganisations, shareholder agreements, joint ventures, private equity transactions and capital markets. He has extensive experience with and comprehensive knowledge of regulated sectors such as life sciences, healthcare, chemicals and energy. His expertise is the perfect fit with the sector focus of NautaDutilh Brussels.

Philippe received his law degree in 1998 from KU Leuven and obtained a Master of Laws (LLM) from the University of Cambridge in 2000. In 1998, he started his career at Linklaters where in 2009 he was appointed counsel and subsequently promoted to the partnership.

For additional information visit us at www.nautadutilh.com

SIMPSON GRIERSON WELCOMES SENIOR COMMERCIAL LAWYER

WELLINGTON, 16 OCTOBER 2018: Simpson Grierson is pleased to announce the appointment of senior lawyer Catherine Shirley-Brown in its Wellington office.

Shirley-Brown was based in London prior to joining Simpson Grierson, including the last six years as partner at leading international firm Bryan Cave Leighton Paisner.

Simpson Grierson Chair Anne Callinan says the firm is extremely pleased to have a lawyer of Shirley-Brown's calibre join the team.

"Cath is a fantastic addition to our Wellington office, and adds to the depth of expertise we have in acting for clients on M&A, private equity, and general corporate and commercial transactions."

Shirley-Brown joins the firm's Wellington commercial law team. She has a particular focus on cross border M&A and transactions involving financial sponsors, and brings considerable experience advising businesses across a range of industries, including real estate, infrastructure, retail, energy, IT and finance.

"It's exciting to be back in New Zealand and part of another leading firm," says Shirley-Brown. "The strength of Simpson Grierson's work in the commercial sector and their strong culture made joining an easy decision."

Shirley-Brown has an honours degree in Law and a BA from Canterbury University. She is dual-qualified as a solicitor in England and Wales and a barrister and solicitor in New Zealand.

She joined the firm as a special counsel last week and will become a partner following the successful completion of Law Society requirements.

For additional information visit www.simpsongrierson.com

ALLENDE BREA AND CAREY FIRMS

ACT FOR LENDER—BANK OF NOVA SCOTIA—IN 100 MILLION ENERGY LOAN IN ARGENTINA

24 OCTOBER 2018: Chilean energy company Empresa Nacional del Petróleo's (ENAP) Argentine subsidiary obtained a US$100 million loan from lender, Bank of Nova Scotia. The deal closed on 21 September. ENAP Sipetrol Argentina will use the money to pay off existing debt and for general corporate purposes. ENAP focuses on exploration and production as well as refining and commercialisation of oil and gas. It is present in Argentina, Chile and Ecuador.

Counsel to Lender - The Bank of Nova Scotia Mayer Brown LLP ; Allende & Brea Partner Jorge Mayora and associates Dolores Muñiz and Pedro Echavarría Coll in Buenos Aires; Carey Partner Diego Peralta and associates Elvira Vial, José Tomás Otero, Manuel José Garcés and Paluska Solar in Santiago.

For additional information visit www.carey.cl and www.allendebrea.com.ar and www.carey.cl

BOGOTA, 09 NOVEMBER 2018: Bancolombia, BBVA, Financiera de Desarrollo Nacional (FDN), BlackRock and UPI were lenders and enlisted Colombia's Brigard & Urrutia to advise on local law. The lenders each sought counsel from different

BRIGARD & URRUTIA

ASSISTS LENDERS IN 1.6 TRILLION PESO FINANCING FOR 4G TOLL ROAD PROJECT

firms on New York law. Skadden, Arps, Slate, Meagher & Flom LLP in New York and Philippi Prietocarrizosa Ferrero DU & Uría (Colombia) assited helped a concessionaire obtain 1.6 trillion pesos (US$590 million) in financing for a 4G toll road project. The financing closed on 27 October. The Ruta del Cacao concessionaire is made up of infrastructure company Cintra, which holds a 40% stake, while Scotiabank Colpatria and UK investment fund Ashmore both hold a 30% stake each. Local law Counsel to Bancolombia, BBVA, Financiera de Desarrollo Nacional, BlackRock and UPI - Brigard & Urrutia Partner Manuel Quinche and associates Juan Carlos Puentes, Ana Rodríguez, María José Assis, Mario Forero, Nicolás Alonso and Maya Alejandra Bhatia in Bogotá.

For additional information visit www.bu.com.co

CLAYTON UTZ

HELPS DRIVE AUSTRALIAN AUTOMOBILE CLUBS FURTHER INTO ELECTRIC VEHICLE FUTURE WITH CHARGEFOX INVESTMENT

MELBOURNE, 24 OCTOBER 2018: Clayton Utz has advised Australian Motoring Services Pty Ltd (AMS) on its investment in Australia's first ultra-fast charging network powered by renewable energy. AMS has invested, and is the major shareholder in, Australian start-up Chargefox, which this week announced it had successfully raised $15 million to build Australia's largest open, ultra-rapid network of charging stations for modern electric vehicles (EV).

AMS is the commercial vehicle for Australian Automobile Clubs (NRMA, RACV, RACQ, RAC, RAA and RACT). AMS CEO Michael Reed said Australian Automobile Clubs wanted to encourage greater take-up of EVs by providing its members with access to the new charging technology, and build on its current investment to improve infrastructure in Australia to help the transition from road transport to renewable energy.

Clayton Utz Corporate partner Michael Linehan and special counsel Quentin Reidy led the transaction for AMS. Michael commented that it was very exciting to be able to advise on this ground-breaking transaction. "The firm has had a long history of advising AMS and various of the Automobile Clubs, so to be involved in this next major transaction is particularly pleasing."

Chargefox will roll out 21 charging sites that are expected to be no more than 200 km apart on inter-state highways across the east coast, connecting major capital cities including Adelaide, Melbourne, Sydney, Canberra, Brisbane and separately, the north and south of Perth. The public sites will be open-access for all EV models currently sold in Australia. Motorists will be able to use the stations via an app.

In addition to AMS, Chargefox has received funding from Wilson Transformers, Carsales founder Greg Roebuck, and grants from Australian Renewable Energy Agency (ARENA) and the Victorian Government.

For additional information visit www.claytonutz.com

BAKER BOTTS

OCTOBER LEADS FOUR MAJOR ENERGY DEALS WORTH OVER $20 BILLION

HOUSTON, 05 NOVEMBER 2018: Baker Botts L.L.P., a leading international law firm, announced today that during the month of October, the firm led four major public energy M&A deals with a combined value of over $20 billion.

"These outstanding deal announcements demonstrate the depth and expertise of our M&A lawyers and further highlights the strength of our transactional practice," said Mike Bengtson, Partner and Corporate Chair at Baker Botts.

"Through these deals, our lawyers demonstrate their commitment to delivering value-added services that exceed client expectations," added Mr. Bengtson.

In October Baker Botts' energy lawyers led the following deals:

Baker Botts Acted for EnLink Midstream, LLC in its $13 Billion Acquisition of EnLink Midstream Partners, LP in a Simplification Transaction; led by Corporate partners, Preston Bernhisel and Joshua Davidson.

Baker Botts Represented Chesapeake Energy Corporation in $3.977 Billion Acquisition of WildHorse Resource Development Corporation; led by Corporate partners, Clint Rancher and Joshua Davidson.

Baker Botts Advised WorleyParsons Ltd. in $3.3 Billion Acquisition of Jacobs Engineering Group Inc.'s ECR Business; led by Corporate partner, Efren Acosta.

Baker Botts Represented Valero Energy Corporation in its $2.2 Billion Acquisition of Valero Energy Partners LP; led by Corporate partners, Jeremy Moore and Joshua Davidson.

Baker Botts lawyers handle a full range of corporate, securities and financing matters, including mergers and acquisitions (M&A), public and private securities offerings and institutional and other specialized financings.

The firm's corporate practice represents companies of all sizes, and have been especially active in the energy, energy services, energy transportation, telecommunications, media and computer (hardware and software) service industries in recent years.

For additional information visit www.bakerbotts.com

CAREY

LOCAL COUNSEL TO P&G ON GLOBAL ACQUISITION OF MERCK'S CONSUMER HEALTH DIVISION

SANTIAGO, 08 OCTOBER 2018: US consumer goods company Procter & Gamble (P&G) and German pharmaceutical company Merck have hired Carey to get antitrust approval in Chile for P&G's US$4.2 billion global acquisition of Merck's consumer health division. Chile's antitrust authority, the National Economic Prosecutor, gave the green light for the deal on 20 August.

Jones Day and Freshfields Bruckhaus Deringer LLP coordinated the deal globally. The transaction still awaits clearance in several jurisdictions and is expected to close June 2019.

Local Counsel to Procter & Gamble and Merck - Carey Partner Claudio Lizana and associates Daniela León and Natalia Acevedo.

For additional information visit www.carey.cl

DENTONS-RODYK

ACTS FOR RB CAPITAL GROUP AND CONFIDENTIAL CLIENT IN MATTERS RELATED TO FARRER SQUARE

SINGAPORE 24 OCTOBER 2018: Dentons Rodyk is acting for RB Capital group, a privately held real estate conglomerate headquartered in Singapore headed by the billionaire Kishin RK, in the sale of units with an aggregate area of 10,602 sq ft at Farrer Square (where StarMed's day-surgery and multi-disciplinary medical centre "StarMed Specialist Centre" is located), to StarMed@Farrer Square Pte. Ltd. ("StarMed"), a subsidiary of listed company Health Management International Ltd, at the price of S$36.7 million.

We also advised on a naming rights agreement for the building, a licence agreement for the use of certain parts of common property, and a right of first refusal agreement with StarMed in respect of an additional unit at Farrer Square.

We are also representing a confidential client in the put and call option agreement entered into with StarMed in respect of certain other units on different levels at Farrer Square with an aggregate area of 7,061 sq ft, for an aggregate purchase price of S$24.3 million.

The strata medical suites in Farrer Square are part of a S$450-million integrated development geared towards the medical tourism market. The building includes the 300-room five-star Park Hotel and a ground-floor retail podium.

Real Estate Senior Partner Melanie Lim led the matter, supported by Partner Jeannette Lim and Associate Jarren Loe.

For additional information visit www.dentons.rodyk.com

GIDE

COUNSEL ON INAUGURAL BOND ISSUANCE BY SOCIETE DUE GRAND PARIS

PARIS, 07 NOVEMBER 2018 - Gide has advised the banks syndicate composed of BNP Paribas, Barclays, Crédit Agricole CIB, HSBC, Natixis and Société Générale in connection with the issuance by Société du Grand Paris of green bonds in an amount of EUR 1.75 billion, bearing interest at 1.125 per cent. per annum due in 2028.

This operation marks the first bond issuance by the issuer under its green EMTN programme established in July 2018.

Gide's team was led by partner Hubert du Vignaux, assisted by Aude-Laurène Dourdain, Mariléna Gryparis and Stéphanie Trost.

Société du Grand Paris was advised by Clifford Chance.

For additional information visit www.gide.com

HAN KUN

ADVISES CNFINANCE HOLDINGS LIMITED ON ITS U.S. INITIAL PUBLIC OFFERING AND LISTING ON NYSE

BEIJING, 09 NOVEMBER 2018: han Kun advised and acted as the PRC counsel to CNFinance Holdings Limited (NYSE: CNF) on its U.S. initial public offering and listing on the New York Stock Exchange.

CNFinance is a leading home equity loan service provider in China.

For additional information visit www.hankunlaw.com

MUNIZ

ASSISTS BRAZILIAN AND CHILEAN COMPANIES IN $US 28 MILLION SALE OF CEMENT JOINT VENTURE IN PERU

LIMA, 26 OCTOBER 2018: Muñiz, Olaya, Meléndez, Castro, Ono & Herrera has helped Brazilian cement company Votorantim and Chile's Cementos Bío Bío sell Peruvian cement maker Cementos Portland to local counterpart Unacem in a US$28 million deal. Unacem relied on in-house counsel for the deal, which closed on 10 October.

Counsel to Votorantim Cimentos and Cementos Bío Bío Muñiz, Olaya, Meléndez, Castro, Ono & Herrera Partners Andres Kuan Veng, Guido Muñiz and Jorge Otoya, and associate Ronald Cross.

For additional information visit www.munizlaw.com

NAUTADUTILH

ASSISTED TA ASSOCIATES WITH ACQUISITION OF CXO GROUP

AMSTERDAM - 12 November, 2018: Last Thursday, Insightsoftware announced that they took over CXO Software based in Utrecht. Both companies provide software to give insight in business data. Insightsoftware hopes to offer broader services to its clients with this acquisition.

CXO Software was founded in 2007. The company's software provides an alternative dashboard to give companies a better view of their financial data and developments.

The NautaDutilh deal team consists of Harm Kerstholt, Wijnand Bossenbroek, Olaf Baks, Sjuul Jentjens, Aira Scheijvens and Daan Hagelstein. The due diligence to make this deal possible was performed by: Willem van der Vossen, Wouter Loijson (Corporate M&A), Jeroen Boelens (IP), Jorieke Strijen (Real Estate), Joyce Trebus (Employment), Sanne Schoone (Insurance), Astrid Sixma, Terrence Dom (Privacy), Daniel Kuiper, Pieter de Jong (Pensions), Barbara Nijs and Arnout Koeman (Competition).

For additional information visit www.nautadutilh.com

SANTAMARINA

ADVISED AEROTECH PEISSENBERG GMBH CO KG IN THE IMPLEMENTATION OF A JOINT VENTURE WITH GRUPO PUNTO ALTO

MEXICO CITY, 15 OCTOBER 2018: Santamarina y Steta, through its partners Jorge Leon Orantes and Pablo Laresgoiti, and associate Gabriela Lomeli, first, advised Aerotech Peissenberg GmbH Co KG in the implementation of a Joint-Venture with Grupo Punto Alto, S.A.P.I. de C.V. which is now in the process of edifying, constructing and developing a plant that will, eventually, produce and manufacture blisks, compressors and turbine discs for aviation-engines in Hermosillo, Sonora, México. The investment for the edification, construction and development of the aforementioned plant will amount to, approximately, USD$267,000,000.00. The transaction was closed on October 10th, 2018.

Then, SyS, through Jorge, Pablo and Gabriela advised the Joint-Venture in the negotiation process of a credit agreement with Bancomext by virtue of which Bancomext extended a loan to the Joint-Venture (for an undisclosed amount) to be used, solely and exclusively, for the edification, construction and development of the plant.

The financing piece of the transaction included an innovative package of guarantees.

Other firms involved: Bancomext was represented by Norton Rose (Mexico City and NY offices). Aerotech Peissenberg GmbH Co KG was represented, in Germany, by TaylorWessing.

For additional information visit www.s-s.mx

TOZZINIFREIRE

INTRODUCES THINKFUTURE—THE FIRST STRUCTURED INNOVATION INITIATIVE BY A FULL SERVICE LAW FIRM IN BRAZIL

The project was developed according to the benchmark set by international trends and consolidates the firm's technology practice

Startups, artificial intelligence, cryptography, blockchain, coworking and fintechs are already commonly used words in global markets. Little by little, they've made their way into Brazil, becoming a growing trend in traditional fields such as Law.

With a track record punctuated by pioneering initiatives, which include providing legal services related to the technology and entrepreneurship environment through the cooperation with accelerators, capital funds, universities and others, TozziniFreire introduces ThinkFuture, the first structured innovation project implemented by a full-service law firm in Brazil.

According to Fernando Serec, TozziniFreire's partner and CEO, ThinkFuture was developed in consonance with the benchmark set by international trends and consolidates the firm's technology practice. "For TozziniFreire this represents a solid step towards the digital transformation of Law and the future of legal services," says Serec.

Through this project, the firm aims to strengthen its relationship with lawtechs in order to use cutting-edge technologies in the delivery of legal services, expand the engagement of employees in actions involving technology, and further develop initiatives for connecting to startups and open innovation programs.

TozziniFreire has been engaged for the past two years in the innovation market. Among the initiatives that gave rise to ThinkFuture are the use of open workstations and rooms at WeWork, the establishment of four design thinking rooms focused on finding creative solutions to the clients' needs, and the development of partnerships with the main players in the technology ecosystem.

"Our first move was to plunge in the innovation market and the whole landscape around it, quickly making it part of our daily routine. We have created Smart Lawyers, a program for our practitioners whose main activities are the Smart Talks, monthly casual panels addressing the latest legal topics related to technology," informs innovation specialist Victor Fonseca, the coordinator of ThinkFuture.

Besides ThinkFuture, TozziniFreire also presents its Technology & Innovation practice group, composed of a multidisciplinary team led by ten partners from different areas, such as Corporate, M&A, Litigation, Capital Markets, Cybersecurity & Data Privacy, Compliance, Intellectual Property, Labor, and Tax.

"We've been in the market for 42 years, the firm is a reference in many legal fields. We're now focusing on strengthening our position as a legal authority in areas involving innovation and entrepreneurship as well, and for that we will keep pursuing the goals established by this unprecedented project in the country," concludes Fernando Serec.

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08 NOV 2018

Want to value your copyright? ACCC releases draft Copyright Guidelines for public consultation

BY TIMOTHY WEBB, BRUCE LLOYD AND FRANCESCA TENG

The Australian Competition and Consumer Commission's draft Copyright Guidelines, if finalised, may be considered by the Copyright Tribunal of Australia when determining reasonable copyright remuneration.

The methodology for pricing copyright materials is under scrutiny, with the release on 23 October 2018 of the Australian Competition and Consumer Commission's draft Copyright Guidelines for public consultation. If finalised, the principles set out in the Copyright Guidelines are intended to provide a framework to assist the Copyright Tribunal of Australia in making decisions on the reasonable pricing and terms and conditions of voluntary copyright licences and licence schemes.

What has prompted the ACCC to release the Copyright Guidelines?

The Copyright Tribunal is an independent body governed by the Copyright Act 1968 (Cth) and the Copyright Regulations 2017 and was established to address cases where a monopoly or quasi-monopoly exists by reason of the licensing of copyright material by a collecting society.

Existing or proposed licence schemes can be referred to the Copyright Tribunal whose task is to determine the reasonableness of the terms and conditions of those licences. The Copyright Tribunal acts as a constraint on the exercise of market power by collecting societies through its ability to confirm or vary a proposed or existing licence scheme, or substitute a new scheme for the one referred to it.

However, the task of determining an appropriate methodology for pricing copyright materials is particularly challenging given the significant variance in type, volume and utility of copyright materials.

When considering an application in relation to a voluntary licence or licence scheme, the Copyright Tribunal must have regard to any relevant ACCC guidelines if requested to do so by a party to the proceeding. In this context the ACCC has released the draft Copyright Guidelines, which are intended to assist the Copyright Tribunal in determining the reasonable remuneration for copyright materials.

What types of licences do the Copyright Guidelines address?

While there are a variety of revenue sources available to copyright owners and content creators, the Copyright Guidelines relate specifically to copyright licensing arrangements administered by collecting societies.

In Australia, it is not uncommon for copyright owners to assign their rights to collecting societies that establish licence schemes for particular industries or classes of users under which they offer "blanket licences" containing standard fees and conditions. While these licensing arrangements can be an efficient way to overcome the high transaction costs of direct copyright licensing, there can be the potential for market distortion if there is a misuse by the collecting society of its market power.

What effect will the guidelines have?

The Copyright Guidelines are ultimately intended to assist the Copyright Tribunal in matters where it has been asked to consider the reasonableness of voluntary licences or licence schemes that are brought before it. While advisory in nature and not determinative, the principles contained in the guidelines will likely be an important factor for the Copyright Tribunal if it is asked to consider voluntary licences or licence schemes.

The Copyright Tribunal's finding will be binding not only on the parties to the proceeding, but orders made in relation to a licence scheme will generally bind all other users of the copyright material to which that scheme relates.

Additionally, the guidelines may also facilitate licence discussions between copyright users and collecting societies when negotiating reasonable copyright remuneration by providing insight into the economic framework that the ACCC considers could reasonably be adopted and the approaches that can be used in applying that framework. In turn, this could potentially reduce the number or scope of matters requiring determination by the Copyright Tribunal.

What key matters do the Copyright Guidelines address?

The Copyright Guidelines set out various economic principles that the ACCC considers relevant to determining an appropriate methodology for pricing copyright material and which focus on countering any market power held by collecting societies in the provision of blanket licences.

These include:

- an overview of the economics of copyright and copyright licensing;
- collective licensing and direct licensing; and
- pricing principles to constrain market power.

Ultimately, the ACCC recommends two methods as appropriate for pricing copyright materials if feasible in the circumstances of the case:

1. benchmarking: ie. using appropriate existing rates as a source of information for determining reasonable remuneration; and
2. constructing a hypothetical bargain between a licensor and licensee with equal bargaining power.

The Copyright Guidelines state that where possible both approaches should be used as a cross-check against one another. If there are substantial differences between prices determined using the two approaches, then further investigation may be required.

What next?

The ACCC is seeking public comment and submissions on the draft Copyright Guidelines before it moves towards issuing final guidelines.

Australian businesses, particularly those that are party to or may require licences from a collecting society, should consider making an online submission to the ACCC consultation hub by **5.00 pm** on **Tuesday 20 November 2018**.

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Bennett Jones

Blog

SCC Renders Judgment on Cooperative National Securities Regulator

November 12, 2018

Is the End in Sight?

Written by John E. Piasta, Kristopher R. Hanc, Michael D. Mysak, Justin R. Lambert, Hind Masri and Stefanie Cardarelli

On November 9, 2018, the Supreme Court of Canada (SCC) unanimously ruled that a proposed pan-Canadian securities regulator is constitutionally acceptable. The decision, *Reference re Pan-Canadian Securities Regulation,* was highly-anticipated and now paves the way for the Cooperative Capital Markets Regulatory System (CCMRS).

Background

Unique among major economies, Canada does not have a national securities regulator. While the provinces have established some forms of cooperation (through the use of national and multilateral instruments and, more recently, the "passport" system) since at least the 1970s, there have been recurring discussions and efforts to more formally and definitively address this issue. Most recently, in a 2011 ruling, the SCC determined that a proposed national regulatory system was unconstitutional, concluding that under the *Constitution Act, 1867* (the "Constitution"), the provinces and territories hold jurisdiction over most aspects related to the regulation of securities. Nonetheless, the SCC left the door open in that decision to the creation of a system involving a cooperative approach among the provinces and territories.

Following the SCC's 2011 decision, the CCMRS was developed under which the governments of Ontario, British Columbia, Saskatchewan, New Brunswick, Prince Edward Island, Yukon and the federal government announced in 2014 that they had signed a memorandum of agreement (the "MOA") pursuant to which the terms of the CCMRS were formalized. The main components of the CCMRS include: (i) a model provincial and territorial statute called the *Capital Markets Act* (the "Model Provincial Act") that primarily deals with the day-to-day aspects of the securities trade; (ii) a draft federal act called the *Capital Markets Stability Act* (the "Draft Federal Act") that is to regulate the prevention and management of systemic risks, and equally establishes criminal offences related to financial markets; (c) a council of ministers (the "Council") comprised of the federal minister of finance and the minister responsible for capital markets regulation from each participating jurisdiction, to provide oversight over the national securities regulator; and (d) a national securities regulator that is to operate under the purview of the Council and who is charged with administering the securities regime.

The constitutional validity of the CCMRS was referred to the Québec Court of Appeal in July 2015, with that Court finding that the CCMRS was unconstitutional. Specifically, the Québec Court of Appeal had to consider two questions, those being: (i) whether the Constitution authorizes the implementation of a pan-Canadian securities regulation under the authority of a single regulator, according to the model established by the MOA regarding the CCMRS; and (ii) whether the most recent version of the Draft

Federal Act exceeds the authority of the Parliament of Canada over the general branch of the trade and commerce power under subsection 91(2) of the Constitution. On the first question, the Québec Court of Appeal determined that, in essence, the Model Provincial Act fettered the sovereignty of the provinces' legislatures and found the process for making federal regulations inconsistent with the principles of federalism in Canada. On the second question, the Court ruled that the pith and substance of the Draft Federal Act fell within the federal government's jurisdiction over trade and commerce under the Constitution; however, the Court took issue with certain provisions of the Draft Federal Act, rendering it ultimately unconstitutional.

The Attorney General of Canada appealed both questions, with the Attorney General of British Columbia appealing on the first question and the Attorney General of Québec appealing on the second question, leading to the SCC's decision of November 9, 2018.

The Decision

In reaching its decision, the SCC revisited the same two questions that the Québec Court of Appeal had to consider upon referral from the Government of Québec.

In response to the first question, the SCC held that the implementation of pan-Canadian securities regulation under the authority of a single regulator in accordance with the terms set out in the MOA was constitutional. In reaching this ruling, the SCC determined that, in contrast with the Québec Court of Appeal's decision, the MOA did not entail an impermissible delegation of law-making authority and that the process for amending the Model Provincial Act by the Council did not have the effect of fettering the sovereignty of the participating provinces' and territories respective legislatures. The SCC held that the terms of the MOA did not imply that the legislatures of the participating provinces and territories would be required to implement the amendments made to the Model Provincial Act, nor would the participating provinces and territories be precluded from making any other amendments to their respective provincial or territorial securities law. The SCC ruled that even if the terms of the MOA fettered the sovereignty of the legislatures, it would be ineffective in view of the principle of parliamentary sovereignty, as the executive is incapable of interfering with the legislature's power to enact, amend and repeal legislation.

On the second question, the SCC ruled that the Draft Federal Act fell within Parliament's trade and commerce powers under section 91(2) of the Constitution. The pith and substance of the Draft Federal Act is to control systemic risk having the potential to create material adverse effects on the Canadian economy and therefore addresses a matter of genuine national importance. In contrast with the Québec Court of Appeal, the SCC did not find that certain provisions of the Draft Federal Act dealing with the Council rendered the legislation unconstitutional.

Next Steps

If, when and how the legislation implementing a new securities regulatory regime will be introduced is still unknown. The SCC indicated that its decision was an advisory one and that it is up to the individual provinces and/or territories to determine whether participation is in that province or territory's best interest. The SCC emphasized that the decision to relinquish a degree of autonomy over the regulation of securities is entirely a matter of political choice and it is unclear what actions those provinces that oppose a national securities regulator will take or are available to them in response to the SCC's decision.

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BC Workplace Blog

Authored By Michelle Quinn & Colleagues

31
October

Sexual Harassment in the Workplace is NOT Locker Room Talk – It's Illegal

By Michelle Quinn

This post will take less than 10 minutes to read.

What is Sexual Harassment?

The case of *Janzen v. Platy Enterprises Ltd.* [1989] 1 S.C.R. 1252 is a leading Supreme Court of Canada decision on discrimination. The case defines sexual harassment as a form of discrimination:

> *Sexual harassment in the workplace is unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of harassment. It is…an abuse of power. When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it… (para. 56).*

Examples of Sexual Harassment

The Court also provided descriptions of sexual harassment:

> *…Sexual harassment is any sexually-oriented practice that endangers an individual's continued employment, negatively affects his/her work performance, or undermines his/her sense of personal dignity…*
>
> *…Harassment behaviour may manifest itself blatantly in forms such as leering, grabbing, and even sexual assault. More subtle forms of sexual harassment may include innuendos, and propositions for dates or sexual favours… (para.49).*

What is the Law on Sexual Harassment in BC?

Section 13 of the BC *Human Rights Code* prohibits discrimination in employment on the basis of sex. The time limit for filing a complaint with BC Human Rights Tribunal (the "Tribunal") is 6 months. The Tribunal is a specialized court.

Additionally, Section 5.1 of the *Workers' Compensation Act* deals with harassment, which includes sexual harassment. WorksafeBC can provide compensation for a mental disorder caused by significant workplace stressors such as bullying or harassment.

Cases from the Tribunal

Below are summaries of two cases where the Tribunal found that the employees were sexually harassed while at work:

1. *Ratzlaff v. Marpaul Construction and another,* 2010 BCHRT 13.

Ms. Ratzlaff filed a complaint alleging that she was sexually harassed in her employment with Marpaul Construction Limited ("Marpaul"), by its owner Albert Rondeau. Ms. Ratzlaff was employed by Marpaul as a heavy equipment operator. She had undertaken a three-year training course to operate heavy equipment, and Marpaul was her first employer following the completion of her training.

During her employment, Mr. Rondeau made a number of sexual comments directed at Ms. Ratzlaff. He told her how she made him feel and that he knew what she could do for him. He also grabbed her hand. On another occasion, he grabbed her buttocks and tried to hug her. He told her that he enjoyed sex with younger women. During a business trip away, Mr. Rondeau forced his way into her hotel room. He grabbed her throat and kissed her aggressively, forcing his tongue into her mouth.

The Tribunal found that Ms. Ratzlaff experienced unwelcome conduct of a sexual nature which detrimentally affected her work environment and led to her resignation from Marpaul.

The Tribunal awarded her $25,000 in damages for injury to dignity, feelings and self-respect. She was also awarded compensation for wage loss.

2. *PN v. FR and another (No.2)*, 2015 BCHRT 60

PN was a mother from the Philippines, she was hired through an agency to work for FR and MR as a housekeeper and caregiver. She worked for FR and MR in Hong Kong for about one year. Her employers moved to Canada and she accompanied them. For much of her employment, PN was the victim of ongoing sexual assault by FR and harassment, including assault by MR. She was only allowed to eat food with the permission of MR. She was not allowed to eat food in the fridge without permission. When MR was away, FR sexually assaulted PN. The assaults occurred about twice a week. She fled from her employers and found refuge in an institution for victims of human trafficking.

At the time of the events, PN was 28 years of age. The Tribunal found that PN was exploited and she was repeatedly harassed by PN.

The Tribunal awarded her $50,000 in damages for injury to dignity, feelings and self-respect. She was also awarded compensation for wage loss.

If you need advice about sexual harassment or harassment generally, and assistance with filing a complaint with the Tribunal please contact either myself or my colleague Nicole Mangan.

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October, 2018

NEW PROJECT THAT MODIFIES THE INDUSTRIAL PROPERTY LEGISLATION IN CHILE IS SENT TO CONGRESS

With the aim of improving the industrial property system in our country, the Government, on recent days, has entered a bill amending Law No. 19,039 on Industrial Property; Law No. 20,524 that establishes the Industrial Property Institute; and the Criminal Procedure Code (hereinafter the "Project").

The main modifications introduced by the Project have the purpose of granting a stronger protection of industrial property rights and enabling a more efficient enforcement, along with establishing more efficient and expeditious registration procedures, reducing their processing times.

Among the modifications that this Project seeks to introduce, the following are worth highlighting:

I. *Trademarks*

a) Recognition of new types of signs that can be registered as trademarks

By modifying the trademark concept of current article 19 of Law No. 19.039, the Project seeks to include "non-traditional brands" or "new types of brands" in our legislation, such as movement marks, holograms, position marks, olfactory marks and tactile marks, among others.
Up until now, the concept of a trademark has been limited to those signs that can be graphically represented, namely, word marks, figurative trademarks, word & label trademarks and sound trademarks.

b) Cancellation of trademark registration due to lack of effective use in the market or loss of distinctive character

The Project introduces the possibility of cancelling a trademark based on its lack of use within at least five years as from the date of its registration.
Likewise, the Project contemplates the possibility of requesting the cancellation of a trademark registration when the brand has lost its distinctive character, i.e. when the trademark has been transformed into the generic denomination of a product or service.

c) Elimination of Commercial and Industrial Establishments as special trademark categories

Following the international trend in this matter, the Project proposes the elimination of the trademark categories of commercial establishment (which protects the trademark that identifies a physical location in which goods are commercialized) and industrial establishment (which extends its protection to the trademark that identifies facilities in which goods are manufactured). It is contemplated that the trademarks that are already registered in these categories could be renewed as service marks to preserve acquired rights.

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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d) The crime of trademark counterfeiting is introduced

The specific offense of trademark counterfeiting is contemplated, establishing a penalty of imprisonment for a period that ranges between 541 days to three years and one day, together with fines.

e) Predetermined reparations in case of a trademark infringement

Once the offense has been judicially evidenced, the Project gives the owner of the infringed trademark the possibility to request a replacement of the compensation for damages for a single compensatory sum of up to 2,000 Monthly Tax Units per infringement (equivalent to approximately USD 140,000).

II. *Patents of Invention*

a) Provisional patent grant

The Project includes the possibility of applying to a provisional patent in those cases in which the applicant cannot yet meet all the requirements for submitting a definitive patent application. The provisional patent provides the applicant with a term of 12 months to proceed with the filing of a definitive application.

b) Exceptions to the rights granted by a patent

The Project introduces a series of limitations to the rights granted by a patent to its owner. In this sense, a new final clause is added to current article 49 of Law No. 19,039, stating that the rights conferred by patents will not be extended to acts performed privately and without commercial reasons; exclusively experimental acts; and preparation of medicines under medical prescription for individual cases, among others.

c) Collection of fees for excess sheets in patent applications

The Project proposes that any patent application that exceeds fifty pages must pay an additional fee of 1 Monthly Tax Unit (equivalent to approximately USD 70) for every twenty additional pages or fraction of page, together with the application filing fee.

d) Patent usurpation action

The Project introduces the figure of “patent usurpation”, which regulates the right of the legitimate owner of a patent to request the transfer of the registration (and the corresponding indemnification of damages), when said patent has been registered by a person who does not have the right to do so.
To this date, this hypothesis is not contemplated in Law No. 19,039, so it can only be remedied through nullity actions.

e) Limitation of supplementary protection

The period to request supplementary protection is reduced from six months to sixty days counted as from the granting of the registration, and the Project limits the extension of the protection that can be granted up to a maximum term of five years, regardless of the processing period affected by unjustified delays that may be evidenced.

III. *Industrial Designs and Drawings*

a) Abbreviated procedure and extension of protection term

The Project establishes the possibility of applying to a new “abbreviated procedure”, in which the applicant will be granted a “certificate of deposit” for an industrial design or drawing, without a substantive examination of the application taking place. This examination can be requested at a later stage by both the owner of the certificate or by a third party.
The Project extends the period of protection of industrial designs and drawings from ten to 15 years.

IV. *Modifications to Law 20.254*

In relation to the legal powers of the Industrial Property Institute, the Project proposes to grant it the possibility of appearing as a party before the ordinary courts of justice in the appeals filed against the definitive resolutions of proceedings held before the Institute.

V. *Modifications to the Criminal Procedure Code*

The Project sets forth a public criminal action for the criminal offenses established by Law No. 19,039, under which such offenses may be denounced by any person, and not only by the right holder as has happened to date.

10th Edition of 2018

Legal Update

1. New Regulations for Panda Bonds in China's Interbank Market (Author: Financial and Investment Management Department)

In recent years, with the development of China's economy and the internationalization of the renminbi, more and more overseas financial institutions and non-financial institutions have issued renminbi-denominated bonds in China[1] ("**Panda Bonds**"). The number and size of the Panda Bonds issued in 2018 have increased significantly. For the half year ended 30 June 2018, 23 Panda Bond issuances were offered in the China Interbank Bond Market ("**CIBM**") with a total amount of RMB 41.26 billion, accounting for 80.13% of total Panda Bond issuances by value[2]. Eight Panda Bonds were issued in the Exchange Bond Market with a total amount of RMB 10.23 billion, accounting for 19.87% of the total Panda Bond issuances by value[3].

Despite the relatively large size of Panda Bond issuances in China's markets, the relevant regulators had not issued specialized regulations for Panda Bonds, except for regulations on issuances of Panda Bonds by international development institutions. In practice, other overseas institutions that have issued Panda Bonds in the CIBM, such as foreign government agencies, overseas financial institutions and non-financial enterprises, have had to refer to relevant regulations and rules for domestic institutional bond issuances, which has led to some uncertainty. On 25 September 2018, the People's Bank of China ("**PBOC**") and the Ministry of Finance ("**MOF**") officially issued the *Interim Measures for Administration of the Issuance of Bonds by Overseas Institutions in the National Interbank Bond Market* (《全国银行间债券市场境外机构债券发行管理暂行办法》) (the "**Interim Measures**") which officially abolished the *Interim Measures for Administration of Issuing Renminbi Bonds by International Development Institutions* (《国际开发机构人民币债券发行管理暂行办法》) (the "**IDI Measures**")[4].

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[1] "China" and "Domestic" (for the purposes of this article only) refer to the territory of the People's Republic of China, excluding the Hong Kong Special Administrative Region, the Macao Special Administrative Region and Taiwan; "overseas" (for the purposes of this article only) refers to countries and regions outside of China.

[2] Please see http://finance.sina.com.cn/money/bond/market/2018-08-10/doc-ihhnunsq9352799.shtml, sourced from 联合资信.

[3] Please see http://finance.sina.com.cn/money/bond/market/2018-08-10/doc-ihhnunsq9352799.shtml, sourced from 联合资信.

[4] Please see http://english.gov.cn/archive/state_council_gazette/2015/06/08/content_281475123345680.htm.

The Interim Measures aim to provide more systematic and specific guidelines for overseas institutions to issue Panda Bonds in the CIBM. The Shenzhen Stock Exchange also published a consultation draft of the rules for Panda Bonds in the corporate bond market this May[5] and may issue the formal rules in the near future.

We intend to introduce the main contents of the Interim Measures in this article and analyze the changes to the regulatory rules for Panda Bonds in China.

I. The Issuers Regulated by the Interim Measures

Before the issuance of the Interim Measures, the IDI Measures were the only specialized regulation for CIBM Panda Bond issuances, which only applied to international development institutions. In practice, foreign government institutions, overseas financial institutions and non-financial enterprises largely had to refer to regulations and industry rules applicable to domestic institutions when issuing Panda Bonds. The Interim Measures expand the regulated issuers to foreign government agencies, overseas financial institutions and non-financial enterprises, and provide clearer guidelines for overseas institutions to issue Panda Bonds in the CIBM, which will thus further facilitate the development of the Panda Bond market in China.

II. Further Clarifying the Scope of Approved and Registered Issuances

Generally speaking, the Interim Measures simplify the administration of bonds issued by foreign institutions in China. According to the Interim Measures, the issuance of Panda Bonds by overseas financial institutions in the CIBM is subject to PBOC approval, and Panda Bond issuances by foreign government agencies, overseas non-financial institutions and international development institutions, etc. in the CIBM are registered with the National Association of Financial Market Institutional Investors ("**NAFMII**").

In addition, overseas financial institutions will submit to PBOC for recordkeeping a current prospectus, credit rating reports (if any), underwriting agreement and underwriting syndicate agreement, legal opinions and other final relevant documents.

[5] Please see http://www.szse.cn/lawrules/publicadvice/t20180525_536657.html.

III. Substantive Requirements for Overseas Financial Institutions to Issue Panda Bonds in the CIBM

The Interim Measures specify the specific requirements for overseas financial institutions to issue Panda Bonds in the CIBM. These requirements are generally consistent with those requirements for domestic financial institutions (including PRC banking financial institutions and other non-banking financial institutions) to issue financial bonds in CIBM.

Below, we summarize the substantial requirements for different kinds of overseas issuers under the Interim Measures:

	Overseas Financial Institutions	**Foreign Government Agencies and International Development Institutions**	**Overseas Non-financial Enterprises**
Approval/ Registration	PBOC approval	NAFMII registration	NAFMII registration
Substantive Requirements	Paid-in capital of no less than RMB10 billion or its equivalent;	Foreign government agencies and international development institutions shall have bond issuance experience and are in good credit standing.	The Interim Measures are silent on substantive requirements for overseas non-financial enterprises.
	the issuer has good corporate governance mechanisms and a sound risk management system;		
	the issuer has stable financial conditions, good credit, and has been continuously profitable for the last three years;		
	the issuer has bond issuance experience and is able to pay any of its debts;		
	the issuer is under effective supervision by the financial regulatory authorities of the country or region in which it is located, and the main risk monitoring indicators are in compliance with the regulations of such financial regulatory authorities.		

IV. Issuance Methods and Applicable Conditions for Installment Issuances

The Interim Measures stipulate that Panda Bonds may be issued in the CIBM either in full or in installments up to an approved or registered amount.

Foreign government agencies, international development institutions, and overseas financial institutions may apply to issue Panda Bonds in the CIBM in installments up to the approved or registered amount if they are experienced in issuing bonds abroad or have issued bonds within China and have maintained continuous information disclosures for more than one year.

Overseas non-financial enterprises may apply to issue Panda Bonds in the CIBM in installments in accordance with the relevant NAFMII rules. Under the Rules for the Registration and Issuance of Debt Financing Instruments *of Non-financial Enterprises in the Interbank Bond Market* (《银行间债券市场非金融企业债务融资工具发行注册规则》)[6], non-financial enterprises are to complete issuances within two months of registration. In the case of installment issuances, each subsequent issuance is filed with NAFMII two business days in advance.

V. Registration and Custody

The Interim Measures only prescribe principled provisions for the registration and custody of CIBM Panda Bonds. The Interim Measures stipulate that CIBM Panda Bonds are to be placed under the custody of certain PBOC-approved depositories. Upon completion of an issuance, issuers will timely confirm the debtor-creditor relationship with the depository, which will promptly handle the bond registration.

The China Government Securities Depository Trust & Clearing Co., Ltd. and the Shanghai Clearing House are the current depositories designated by the PBOC. In practice, most Panda Bonds are under the custody of the Shanghai Clearing House. As of 30 September 2018, there were about 70 Panda Bonds registered with the Shanghai Clearing House, including the Panda Bonds issued by foreign government agencies, overseas financial institutions and overseas non-financial enterprises[7]; there were only five Panda Bonds issued by the international development institutions registered with the China Government Securities Depository Trust & Clearing Co., Ltd[8].

[6] Please see http://www.nafmii.org.cn/english/lawsandregulations/selfregulatory_e/201706/t20170623_61901.html.

[7] Based on our public search on the website of Shanghai Clearing House (http://www.shclearing.com).

[8] Based on our public search on the website of China Government Securities Depository Trust & Clearing Co., Ltd. (http://www.chinabond.com.cn).

VI. Foreign Exchange Administration

According to the Interim Measures, overseas institutions that have been approved or registered to issue bonds in China go through foreign exchange registration formalities. Account opening, fund remittance, cross-border transfer, information reporting and other matters regarding fundraising must comply with the relevant regulations of PBOC and the State Administration of Foreign Exchange.

We understand that matters relating to Panda Bond issuance fundraising accounts and cross-border transfers of renminbi capital proceeds will continue to be subject to the relevant provisions in the *Notice on Issues Concerning the Cross-border RMB Settlement of RMB Bonds Issued by Overseas Institutions within China* (《关于境外机构境内发行人民币债券跨境人民币结算业务有关事宜的通知》) issued by PBOC in 2016.

In addition, according to the *Notice on Issues Concerning Full-coverage Macro-prudent Management of Cross-Border Financing* (《关于全口径跨境融资宏观审慎管理有关事宜的通知》) issued by PBOC in 2017, Panda Bonds for self-use, i.e. renminbi bonds issued within China by the offshore parent company of a domestic non-financial enterprise (other than government financial platforms and the real estate enterprises) and lent back to a domestic subsidiary, are not subject to foreign debt limits.

VII. Bond Ratings

Bond ratings are not mandatory for the issuance of Panda Bonds in the CIBM. The Interim Measures stipulate that if an overseas institution chooses to publicly disclose credit rating reports, such reports shall be issued by an accredited national interbank market credit rating agency.

The *Announcement on the Operation of Credit Rating Business in the Interbank Bond Market by Credit Rating Agencies* (《关于信用评级机构在银行间债券市场开展信用评级业务有关事宜的公告》) issued by PBOC in 2017 and the *Rules on Evaluation and Registration of Credit Rating Agencies in the Interbank Bond Market* (《银行间债券市场信用评级机构注册评价规则》) issued by NAFMII in 2018, specify the CIBM qualification requirements for credit rating agencies (including both the domestic and international credit rating agencies). The large international credit rating agencies (e.g. Standard & Poor's, Moody's and Fitch Group) will be able to provide credit rating services for CIBM Panda Bonds upon passing the registration assessment according to the regulations and rules above.

VIII. Information Disclosures

The Interim Measures provide detailed regulations on the information disclosures for Panda Bonds issued in the CIBM, especially on the relevant accounting standards. The main points include:

i. **The principle of authentic, complete and equivalent disclosure:** The information disclosed by the issuer is to be authentic, accurate, complete and timely, and must not contain false records, misleading representations or major omissions. Based on the principle of equivalent disclosure, the important information disclosed by the issuer in other markets must also be disclosed to the CIBM concurrently or within the shortest reasonable time.

ii. **Disclosure requirements for private issuances:** For CIBM Panda Bonds which are only issued to specific investors, the receivers of information disclosures are limited to the investors of such Panda Bonds, and the issuance documents such as prospectuses or financial reports must not be disclosed to the public.

iii. **Accounting standards**: Before the issuance of the Interim Measures, the financial reports of Panda Bond issuers were required to be prepared in accordance with China Accounting Standards ("**CAS**") or such equivalent accounting standards, which was costly and time consuming for prospective overseas issuers. However, the Interim Measures to some extent ease the financial report requirements for private issuances of CIBM Panda Bonds and also set different disclosure requirements for different kinds of issuers in the case of public issuances.

    1) For CIBM Panda Bonds publicly issued by international development institutions, the Interim Measures require the issuer to declare the accounting standards used in its financial reports in a prominent position in the prospectus and financial reports. In addition, if the disclosed financial reports are not prepared in accordance with CAS or other accounting standards that are recognized by MOF to be equivalent to CAS according to principles of reciprocity, the issuer is required to disclose the material differences between the accounting standards adopted and CAS.

    2) For the CIBM Panda Bonds publicly issued by overseas financial institutions and non-financial enterprises, the Interim Measures require the issuer to declare the accounting standards used in the financial reports in a prominent position in the prospectus and financial reports. If the disclosed financial reports are not prepared in accordance with CAS or equivalent accounting standards, the issuer will also be required to provide the following supplementary information:

(1) material differences between the accounting standards adopted and CAS; and

(2) a reconciliation of differences based on CAS, and an explanation of the financial impact of the accounting standard differences on all important items in the financial reports.

If the issuer only discloses its financial reports to the qualified institutional investors with whom the issuer has entered into a written private subscription agreement, the issuer may negotiate with the qualified institutional investors to determine the accounting standards to be adopted in the financial reports, but the issuer is required to fully disclose relevant risks in a written private subscription agreement and have the investors confirm their undertaking of such risks.

iv. **Audit Requirements (expanding the scope of approved auditors)**: The Interim Measures stipulate that if an issuer adopts CAS to prepare its financial reports, it is required to engage a PRC accounting firm with qualifications for securities and futures business to audit the financial reports. Where other accounting standards are adopted, a PRC accounting firm with qualifications for securities and futures business or a foreign accounting firm may be engaged for the audit provided that it meets the following conditions:

1) it is legally registered and established in the country or region where it is located, and has obtained the practice qualification for auditing business and is in normal practice;

2) it has a good international reputation and market recognition;

3) it has engaged in publicly issued securities-related audits in the country or region where it is located, and has more than five years of experience in auditing publicly securities issuances; and

4) other conditions or regulatory requirements set by MOF.

The reconciliation information adjusted in accordance with CAS provided by overseas institutions is required to be certified by a PRC accounting firm with qualifications for securities and futures business.

If the issuer engages a foreign accounting firm to audit the financial reports related to the CIBM Panda Bonds, the foreign accounting firm is required to file with MOF within 20 business days before submission of the Panda Bond issuance application, and such report filings will be annually updated with MOF during the term of the bond issue.

IX. Language Requirement

Under the Interim Measures, if the issuer publicly discloses the issuance documents, such documents are required to be in simplified Chinese or otherwise provided with a simplified Chinese translation.

X. Applicable Law

Prior to the issuance of the Interim Measures, the IDI Measures explicitly stipulated that any breach of contract or other disputes arising out of or in connection with the issuance of renminbi-denominated bonds within China by an international development institution was to be governed by PRC law. In practice, CIBM Panda Bonds issued by foreign government agencies, overseas financial institutions and overseas non-financial enterprises were also subject to PRC law by reference to this regulation. The Interim Measures do not set any compulsory requirement as to the application of law, and provide some flexibility for CIBM Panda Bond issuances by overseas institutions. This trend is in consistent with the general principle of choice of laws for cross-border bond issuances in other countries.

The Interim Measures respond to the calls of investors in the CIBM as well as of foreign institutions to issue specialized regulations relating to CIBM Panda Bonds. Most provisions of the Interim Measures agree and are consistent with the currently applicable rules and practices relating to Panda Bonds. On the other hand, the Interim Measures provide more detailed and flexible operating rules (such as the rules on accounting standards and financial reports) for overseas institutions to issue Panda Bonds in the CIBM. However, some of the provisions are still too general for specific transactions. NAFMII may issue specific guidelines soon and we will continue to pay attention to relevant rules and guidelines and keep you updated.

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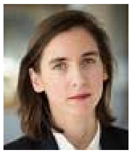
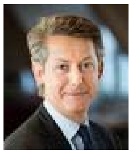


Raphaëlle Dequiré-Portier

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Unwired Planet v Huawei UK Court of Appeal

25 October 2018

On 23 October 2018, the Court of Appeal in the UK handed down the decision in the Unwired Planet v Huawei telecoms litigation.

It was an appeal against a decision of Mr Justice Birss in the Patents Court (High Court) in which he had to decide if the terms for licensing patents essential to telecoms standards offered by each side were fair, reasonable and non-discriminatory ("FRAND") and, if not, to decide the terms that would be FRAND and further to decide if Huawei had a competition law defence.

Mr Justice Birss' findings which were appealed were: i) that the only licence basis that would be FRAND between the parties was a global licence and not a UK licence (such as offered by Huawei), ii) that Unwired Planet ("UP") was not discriminating against Huawei by failing to offer it the lower licence fees that were charged to Samsung, and iii) that, although UP was in a dominant position in the relevant market, it had not abused its position by proceeding as it did in the litigation and so Huawei had no defence to an injunction.

Jurisdiction to find a global licence to be FRAND

The Court of Appeal considered that Huawei had confused and elided two separate but related matters. Namely, the scope of patent infringement proceedings and the undertaking given by UP to the European telecoms standards setting organisation (ETSI) to offer to license its standards essential patents on FRAND terms.

The Court had not made any ruling on validity or essentiality of patents which were not in the relevant jurisdiction. The Court's jurisdiction to determine a global licence arose because of the nature of the undertaking given to ETSI which concerned patents with no restriction as to their territories (determined by reference to French law).

The only question was whether the offer of a global licence by UP was capable of meeting UP's obligations to ETSI under its undertaking; that is, whether it was FRAND or not. The Court of Appeal held it was within the Court's jurisdiction to decide this and agreed with Mr Justice Birss that a global licence would, in the circumstances, be FRAND.

Not only one FRAND rate

However, interestingly, the Court of Appeal held that Mr Justice Birss was wrong (and it was "unreal") to conclude that there could only be <u>one</u> set of FRAND rates for a given set of circumstances. It would be possible for there to be, for example, a national and a global licence which were both FRAND and the standards essential patent owner would comply with its obligations by offering either one.

Non-discrimination

The Court of Appeal also agreed with the trial judge that there had been no discrimination by UP and that licensors were free to grant lower-priced licences without it 'levelling-down' the royalty to the point where it no longer represented a fair return for the portfolio.

No abuse of a dominant position, but notification necessary

It further recalled the CJEU position (in Huawei v ZTE) that a refusal to grant licences on FRAND terms may, in principle, amount to an abuse of a dominant position, but found that Mr Justice Birss had interpreted the CJEU judgment correctly in finding that the CJEU was not laying down a number of mandatory conditions for pre-litigation procedures such that non-compliance would be a breach of competition law. Nevertheless, the Court of Appeal agreed that there is one such mandatory requirement which is to notify the alleged infringer before commencing proceedings for an injunction, although the nature and content of the notice will depend on the circumstances.

Development of the approach

The Court of Appeal recognised that it might be the case that the approaches of courts around the world used to assess global licence royalties are not at present wholly aligned, but added that this was not surprising given that this was a jurisdiction which was in the process of developing. Huawei envisaged that there would be a race between the patentee and the implementer to choose the most favourable jurisdiction with associated anti-suit injunctions, but the Court of Appeal did not think that this would cause any problems with which commercial courts around the world were not already familiar.

The Court of Appeal also recognised that it was desirable that an internationally accepted approach to determining discrimination should ultimately emerge. However, given the few other cases that exist elsewhere, it would be wrong for the Court of Appeal to look to harmonise on a first-to-decide basis.

Given that the matter of the ETSI undertaking is governed by French law, it will be particularly interesting for the French Courts to rule on this issue as this may have wider effects.

ADDING SPICE AND SEASONING TO THE MALAYSIAN BOND AND SUKUK MARKET

An overview of the recent measures to boost retail investment in bonds and sukuk in Malaysia

On 11 October 2018, several measures announced by the Securities Commission Malaysia ("SC") to liberalise the framework for retail investment in the domestic bond and sukuk market came into effect. These measures involve amendments to the Guidelines on Issuance of Corporate Bonds and Sukuk to Retail Investors ("Retail Issuance Guidelines"), Guidelines on Sales Practices of Unlisted Capital Market Products ("Sales Practices Guidelines") and the Prospectus Guidelines and the introduction of the new Guidelines on Seasoned Corporate Bonds and Sukuk ("Seasoning Guidelines"). This article will explain these new measures.

ISSUANCE OF BONDS OR SUKUK BY QUALIFIED ISSUER

The revised framework introduces a new Chapter 22 to the Retail Issuance Guidelines that liberalises the requirements for the issuance of corporate bonds and sukuk by a qualified issuer ("Qualified Issuer").

To be a Qualified Issuer, an issuer must satisfy the three conditions set out in paragraph 4.01 of the Retail Issuance Guidelines. First, it must be any of the following: (a) a licensed bank, licensed investment bank or licensed Islamic bank; (b) a company whose shares are listed on a stock exchange; (c) Cagamas Bhd; (d) Danajamin Nasional Berhad; (e) Khazanah Nasional Berhad; or (f) an unlisted public company if (i) the bonds or sukuk are irrevocably and unconditionally guaranteed by any of the entities referred to in sub-paragraphs (a) to (e) or the Credit Guarantee and Investment Facility, or (ii) established by one of the entities referred to in sub-paragraphs (a) to (e) and there is full recourse to the establishing entity in its capacity as obligor (severally an "Eligible Issuer").

Second, an Eligible Issuer must have issued or guaranteed corporate bonds or sukuk with an aggregate amount of at least RM500 million in the past five years. Third, the corporate bonds or sukuk to be offered must have a minimum credit rating of AA- (or its equivalent).

A Qualified Issuer is permitted to issue corporate bonds or sukuk to retail investors without a prospectus, provided that it prepares a Product Highlights Sheet in accordance with the Sales Practices Guidelines. Where applicable, a Qualified Issuer may issue an information memorandum in connection with its issue of corporate bonds or sukuk to retail investors.

SEASONED BONDS OR SUKUK

Existing corporate bonds or sukuk (currently tradeable on an over-the-counter basis only by sophisticated investors) may be distributed to retail investors if the relevant conditions set out in the Seasoning Guidelines are satisfied.

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General requirements

The criteria that must be satisfied in order for corporate bonds or sukuk to be distributed to retail investors are as follows. First, the issuer of the relevant bonds or sukuk must be an Eligible Issuer (as described earlier in this article).

In addition, the corporate bonds or sukuk must: (a) be denominated in Ringgit Malaysia; (b) have a tenure of more than one year; (c) have a minimum rating of A (or its equivalent) by a credit rating agency registered with the SC; (d) have completed the full seasoning period, i.e. in the case of a one-off issue, 12 months from the date of issue to sophisticated investors or in the case of a tranche under a debt or sukuk programme, 12 months from the date of issue of the tranche to sophisticated investors; (e) have a fixed term with principal and accrued interest or profit payable at maturity; (f) have a fixed or variable rate of return or profit rate; (g) have interest or profit paid periodically or at specified intervals (except for zero coupon bonds or sukuk without periodic distribution); (h) rank at least equally with unsecured and unsubordinated obligations of the issuer; and (i) have no embedded swaps, options or other derivatives except the option, exercisable at the discretion the investor, to convert or exchange to shares which are listed on a stock exchange.

Capital adequacy bonds or sukuk

Less stringent criteria apply to corporate bonds or sukuk that meet the requirements for regulatory capital set out in the relevant guidelines on capital adequacy issued by Bank Negara Malaysia ("Capital Adequacy Guidelines").

Among others, the Seasoning Guidelines require the aforesaid bonds or sukuk to (a) be issued by (i) a licensed bank, licensed investment bank or licensed Islamic bank, or (ii) the holding company of the entities mentioned in sub-paragraph (i), or (iii) a public company established by any of the entities referred to in sub-paragraphs (i) or (ii) for the purpose of issuing corporate bonds or sukuk to meet capital adequacy requirements; (b) be denominated in Ringgit Malaysia; (c) have a tenure of more than one year; (d) have a minimum rating of A (or its equivalent) by a credit rating agency registered with the SC; (e) have completed the full seasoning period; and (f) if so provided in the terms of issue, be written off or converted into equity only to meet the requirements set out in the Capital Adequacy Guidelines.

Multi-currency bond programme

The Frequently Asked Questions on the Seasoning Framework issued by the SC ("FAQs") state that a tranche of Ringgit-denominated bond in a multi-currency bond programme may be distributed to retail investors if that tranche meets the relevant eligibility criteria set out in the Seasoning Guidelines.

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Distribution of Seasoned Bonds and Sukuk

The Seasoning Guidelines also regulate the manner in which the eligible corporate bonds or sukuk ("Seasoned Bonds or Sukuk") are to be distributed to retail investors.

To be eligible to distribute Seasoned Bonds or Sukuk, an entity must be a licensed bank, a licensed investment bank, a licensed Islamic bank, a holder of a licence for dealing in securities or for dealing in securities for over-the-counter bonds under the Capital Markets and Services Act 2007 (severally an "Eligible Distributor").

An Eligible Distributor must ensure that its employees or agents who are involved in the distribution of Seasoned Bonds or Sukuk hold one of the qualifications, and are fit and proper persons, as prescribed in paragraphs 4.01 and 4.02 respectively of the Seasoning Guidelines.

An Eligible Distributor is also required to make available on its website the information set out in paragraph 5.01 of the Seasoning Guidelines. Such information includes an explanation of the key characteristics and the essential terms of, and risks associated with, the Seasoned Bonds or Sukuk.

An Eligible Distributor who intends to distribute Seasoned Bonds or Sukuk must submit an initial notification ("Initial Notification") to the SC at least two business days prior to its intended distribution date. In addition, it must register its interest with the SC at least seven business days prior to the submission of the Initial Notification. The requirements for the registration of interest and the Initial Notification are set out in paragraph 6.01 and Appendix 1 of the Seasoning Guidelines.

An Eligible Distributor must provide the SC with the information and documents set out in Appendix 2 of the Seasoning Guidelines in respect of any additional Seasoned Bonds or Sukuk that it has distributed within seven business days after the end of each quarter by way of a Post-Distribution Notification.

In addition, an Eligible Distributor is required to submit to the SC a post-distribution quarterly report within seven business days after the end of each quarter in accordance with Appendix 3 of the Seasoning Guidelines.

An Eligible Distributor must immediately notify the SC once it becomes aware that the Seasoned Bonds or Sukuk no longer satisfies the criteria to be Seasoned Bonds or Sukuk under the Seasoning Guidelines.

Further, an Eligible Distributor must notify the SC within seven business days prior to its intention to cease distribution of Seasoned Bonds or Sukuk. The FAQs provide that, notwithstanding the termination of the distribution, an Eligible Distributor may continue dealing with the investor on matters relating to the Seasoned Bonds or Sukuk purchased through the Eligible Distributor, including assisting with the subsequent transfer or sale of the bonds or sukuk concerned.

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The FAQs also provide that Seasoned Bonds or Sukuk may be re-denominated into smaller lot sizes for distribution to retail investors. This would make those bonds or sukuk more marketable to this segment of investors.

COMMENTS

The liberalisation of the framework for the offering to retail investors of corporate bonds and sukuk that meet the criteria set out in the relevant guidelines is an interesting initiative by the SC.

The dispensation of the requirement for a prospectus for the offering of corporate bonds or sukuk by a Qualified Issuer to retail investors will reduce the time frame, and possibly, the cost of such offerings. However, it raises the question as to whether this dispensation will compromise the level of information and legal safeguards available to a retail investor.

The implementation of the Seasoning Guidelines opens avenues for retail investors to invest in Seasoned Bonds or Sukuk that have hitherto been inaccessible to them. It will also be welcomed by entities that qualify to be Eligible Distributors as it will provide them with an additional income stream. As the approval or consent of the issuer is not required in order for Seasoned Bonds or Sukuk to be distributed under the Seasoning Guidelines, it is interesting to see how palatable this is to issuers who may prefer to deal with sophisticated investors (i.e. high-net-worth entities, high-net-worth individuals or accredited investors) rather than a gaggle of retail investors.

These initiatives to increase retail participation in the local corporate bond and sukuk market are timely in light of the capital flight from emerging markets, like Malaysia, to countries that have raised their interest rates, such as the United States. At first blush, these new measures have the potential to spice up the domestic capital market. However, as Malaysians have traditionally placed their savings in time deposit accounts with financial institutions or invested them in landed property and shares, it remains to be seen whether investing in corporate bonds and sukuk will be a new flavour that will be irresistible to retail investors.

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Kok Chee Kheong is a Partner in the Corporate Division of SKRINE

This is an updated version of an article that was published in Legal Insights 3/18 (September 2018).

October, 2018

United States-Mexico-Canada Agreement

On September 30, 2018, the Governments of the United States of America and Canada finally reached an understanding regarding their negotiations to modernize or update the North American Free Trade Agreement ("NAFTA") and thereby allowed them, together with Mexico, to announce the conclusion of the basic negotiation of a new "United States-Mexico-Canada Agreement ("USMCA")", which will replace NAFTA. The USMCA has, among other objectives, to preserve and expand the regional trade and production of the three States parties, as well as to improve and promote the competitiveness of regional organizations and exports within a framework of fair competition within our North American region and in the context of world markets.

In accordance with the initial text that the parties have published, this new trilateral agreement will formally enter into force on the first day of the third month following the written notification from the last one of the participating countries, whereby they advise that it has completed its internal procedures required for the entry into force of the USMCA.

Following the line of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP"), the USMCA is a last generation free trade agreement which contemplates, among other legal provisions, chapters relating to: Digital Trade, Telecommunications, Competition Policy, State Owned Enterprise, Financial Services, Small and Medium-Sized Enterprises, Dispute Settlement, Macroeconomic Policies and Exchange Rate Matters, in addition to those chapters on trade in goods and services, as well as those on investment that were already covered by NAFTA.

With the announcement of the successful conclusion of negotiations achieving the USMCA will lead to an additional negotiations to achieve the elimination or exemption of the tariffs recently imposed by the United States on aluminum and steel originating and coming from Mexico and Canada; and, consequently, the eventual elimination of the retaliatory measures imposed by these two countries on U.S. products.

The complete text of the USMCA, in the its so-called "Subject to Legal Review for Accuracy, Clarity, and Consistency Subject to Language Authentication" version can be found in the following links:

https://www.gob.mx/tlcan/acciones-y-programas/resultados-de-la-modernizacion-del-acuerdo-comercial-entre-mexico-estados-unidos-y-canada?state=published

https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-states-mexico

In the near future we will be providing more detailed information on each of the chapters contemplated in the USMCA, by our specialized practice areas on each one of those matters and as a result of the analysis of the final text of the treaty that the Parties make known after the process of formalization and ratification, in accordance with the constitutional ordinances of each one of them.

If you require additional information, please contact the partner responsible for your affairs or one of the attorneys listed below:

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Shareholders' Rights Directive implementation bill now before Parliament

Thursday 8 November 2018

On 16 October 2018, the bill for the implementation in Dutch law of the revised Shareholders' Rights Directive (EU 2017/828) was submitted to the lower house of the Dutch parliament (*Tweede Kamer*). In this newsletter, we will describe the changes in the bill compared to the earlier consultation version published on 27 February 2018, which was the subject of our newsletter dated 9 March 2018.

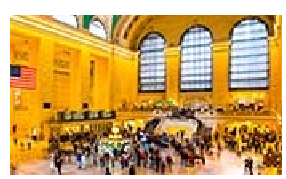
Remuneration policy

The consultation version of the bill contained a new provision on the remuneration policy of listed companies. This gave rise to confusion, because the Dutch Civil Code ("DCC") already contains a provision on the subject. Under the bill as submitted to Parliament, it has now been clarified that listed companies will be subject only to the new provision, which will become section 2:135a(5) DCC. This sets out the information that must be given in the company's remuneration policy, some of which is already required. New items of information that will be required include:

- an explanation of the way in which the policy contributes to the company's business strategy, long-term interests and sustainability;
- an explanation of the decision-making process followed for the policy's determination, review and implementation; and
- in the event that the policy is revised, a description and explanation of how it takes into account the votes and views of shareholders on the policy and remuneration reports since the most recent vote on the policy by the general meeting of shareholders.

In the case of the remuneration report it has likewise been clarified that listed companies will be subject only to the new section 2:135b DCC, which sets out a number of new requirements in addition to existing ones. It should be noted, however, that pursuant to section 2:135b the current requirements in sections 2:383c-e DCC will continue to apply. One of the new items of information that will be required is an explanation of how the total remuneration complies with the remuneration policy and how it contributes to the company's long-term performance. All information must be given in respect of each individual management board member.

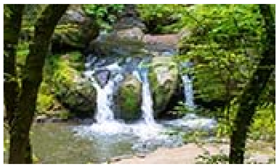
Transactions with related parties



The bill introduces the term "material transactions" (unlike the consultation version, which referred to "significant transactions") and sets out a definition in which price sensitivity is taken as the point of departure. A transaction will be material if it meets both of the following two criteria:

1. the information about the transaction constitutes inside information under the Market Abuse Regulation (Regulation (EU) 596/2014); and
2. the transaction is concluded between the company and a related party (as defined under the International Accounting Standards). Related parties in any event include:
   - one or more shareholders who individually or collectively represent at least 10% of the company's issued share capital ("stichting administratiekantoor" foundations and foundations holding preference shares can fall within this category);
   - members of the company's management board; and
   - members of the company's supervisory board.

A provision has been added prohibiting a management board member or supervisory board member from participating in the decision making on a related party transaction in which that board member is involved. Lastly, the period over which non-material transactions with the same related party must be aggregated, potentially resulting in an obligation to disclose those transactions, has been changed from 12 months to "the same financial year".



Transparency regarding long-term shareholder engagement

The definition of "asset manager" has been amended to clarify that it refers to those providing asset management services to institutional investors. The term "proxy advisor" has been replaced with "voting advisor" (*stemadviseur*), as this is more in line with the terminology commonly used in the Netherlands, including in the Dutch Corporate Governance Code. In addition the obligation on the part of institutional investors and asset managers to disclose and explain "the most significant votes", and the possibility of excluding "insignificant votes" in this regard, have been elaborated upon.

The proposed reporting requirements overlap with those imposed under other EU directives and regulations, such as the AIFM, UCITS and MiFID II directives. The explanatory memorandum to the bill clarifies that it will be sufficient if asset managers include the relevant information in their other reports or include references to such information (for example using hyperlinks), provided it is made clear to the relevant institutional investors where the information can be found.

Next steps

The deadline for the implementation of the Directive in national law is 10 June 2019. It is possible that the bill will be amended as it makes its way through Parliament. We will of course keep you updated on any significant amendments and on the entry into effect of the new legislation. It is also worth mentioning that both the government and the Corporate Governance Code Monitoring Committee are of the opinion that, in connection with the implementation of the Directive, the section of the Code relating to shareholders should be re-examined; we will likewise inform you of any developments on that front.

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Court of Appeal confirms ratepayers cannot refuse to pay rates because of alleged issues with rates assessments and invoices

November 09, 2018

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The Court of Appeal's latest decision (delivered on 6 November 2018) in a string of proceedings concerning rates in the Kaipara District is that:

a. a challenge to the validity of rates assessments and invoices is not a challenge to the validity of the rates themselves; but
b. any issues a ratepayer has with the rates assessments and invoices is not a valid basis for refusing to pay the rates when they are due.

This is a welcome outcome for all local authorities in New Zealand as it should ensure that rate recovery in the District Court continues to remain relatively straightforward and expeditious. It also means that in most circumstances rate recovery proceedings do not need to be put on hold if the ratepayer is also bringing proceedings challenging the validity of the rates, rates assessments or invoices.

Background

Kaipara District Council and Northland Regional Council sued some ratepayers for unpaid rates in 2014. The ratepayers defended the proceedings on the basis that the Councils had not issued valid rates assessments and invoices for the rates. In Northland, the territorial authorities deliver combined rates assessments and invoices for their own, and the regional council's rates, hence the allegation that the defects were with the documents for both councils.

The District Court did not accept the defence broadly on the grounds that the ratepayer's challenge was to the validity of the rates and section 60 of the Local Government (Rating) Act 2002 (Rating Act) prevented such issues being raised as a defence in the District Court. The District Court awarded judgment for unpaid rates to the councils.[1] The ratepayers appealed the decision to the High Court, and were also unsuccessful before that Court for similar reasons as expressed by the District Court. [2]

After the ratepayers obtained leave to appeal, the appeal was heard before the Court of Appeal in September this year. The Court of Appeal has now dismissed the ratepayers' further appeal.[3]

Based on the way the issue was dealt with by the Courts (whether defects could be raised as a defence) they were not actually required to consider whether there were in fact defects with the documents.

What the Court of Appeal said

The Court said there is only a limited ground for ratepayers to refuse to pay rates in section 60 of the Rating Act, and that is that the local authority is not empowered to set or assess the rates on the particular rating unit. The example the Court gives of where section 60 might be engaged is that a local authority has assessed rates on a rating unit that is outside the local authority's boundary.[4]

In the Court's view, a challenge to the validity of rates assessments and invoices was not a challenge to the rates themselves, and therefore it was not caught by section 60.[5]

This means ratepayers can challenge the validity of rates assessments and invoices but it does not suspend the obligation to pay the rates, meaning issues with rates assessments and invoices cannot be raised as a defence in rate recovery proceedings.

The Court reached this conclusion after examining the sections in the Rating Act concerning the assessment and invoicing of rates, and found that the scheme of the Rating Act does not entitle ratepayers to refuse to pay rates if there is any error or omission in the documents. Rather, the information requirements for rates assessments and invoices support one of the purposes of the Rating Act, which is to provide information to enable ratepayers to understand their liability for rates.[6]

The Court noted that the interpretation contended for the ratepayers would enable ratepayers to seize on any alleged defect to justify their stance not to pay the rates, and this would be contrary to another of the purposes of the Rating Act which is to provide local authorities with flexible powers to set, assess and collect rates to fund their activities.[7]

Wider context

Through this and the related judicial review cases[8], rating practices in this country have been intensely scrutinised and upheld. The ratepayers have ultimately failed to secure any tangible success. These cases demonstrate that the higher Courts in particular look to the intent of the legislation, and will apply a purposive approach to interpreting it.

Local Government can take significant comfort from these decisions. The Courts have shown an unwillingness to grant relief on points that they regard as overly technical or which cause no prejudice to ratepayers.

For more information about this case or any rating matter, please contact any one of our experts above.

[1] *Kaipara District Council v Rogan* [2015] NZDC 21698.

[2] *Rogan and Anor v Kaipara District Council and Anor* [2017] NZHC 2329.

[3] *Rogan and Anor v Kaipara District Council and Anor* [2018] NZCA 478.

[4] At paragraph 26.

[5] At paragraph [27].

[6] At paragraphs [29] to [33].

[7] At paragraph [31].

[8] Simpson Grierson acted for the Councils in related judicial review proceedings challenging the validity of the rates they sought to recover. The judicial review proceedings were commenced by the ratepayers after the hearing of the recovery proceedings in the District Court and before the decision was received. These proceedings were resolved in the Council's favour in August this year when the Supreme Court declined the ratepayers leave to appeal the Court of Appeal's decision in the Councils' favour. *Northland Regional Council v Rogan* [2018] NZCA 63; [2018] NZSC 69.

Impact of the EU-Singapore Free Trade Agreement

DENTONS RODYK

The EU-Singapore Free Trade Agreement (EUSFTA) was signed on Friday, 19 Oct 2018. When the EUSFTA enters into force in early 2019, businesses on both sides of the pact can expect to enjoy greater market accessibility and significant boosts in trade within the next few years.

EU – an important economic partner for Singapore and ASEAN

Amidst a time of trade tensions among the world's giants, the EUSFTA is a welcome development in the economic ties between Singapore and the EU. As an economic body, the EU has established itself as Singapore's largest foreign investor, the largest market for the nation's services exports, and our third largest trading partner (just after China and Malaysia). On the EU side, Singapore is the biggest trading partner in goods and services among the ASEAN countries, accounting for one-third of EU-ASEAN trade in goods and services in 2016 and 2017.

The EUSFTA joins Singapore's extensive network of over 20 existing free trade agreements (FTAs), but is significantly the first FTA signed between the EU and an ASEAN country. In fact, the EUSFTA is the second FTA concluded between the EU and any Asian nation, after South Korea. The signing of this pact potentially opens more trade and investment opportunities between the EU, Singapore and the larger ASEAN region.

Tariff concessions

Key benefits for Singapore and EU-based businesses include tariff elimination, reduced non-tariff barriers and improved trade in the services sectors.

Upon ratification, Singapore will remove tariffs on all EU products entering Singapore, and the EU will remove tariffs on 84% of all Singapore products entering the EU, with the remaining 16% to be removed over a period of 3 to 5 years.

The EUSFTA will also provide for liberal and flexible rules of origin (ROO) for the EU's and Singapore's key exports to each other's markets. Of significance to Singapore manufacturers, materials sourced from ASEAN member states would be deemed as originating from Singapore when determining whether such exports can qualify for tariff concessions.

Removal of technical barriers to trade (TBT)

Unnecessary TBT for Singapore and EU exporters will be removed, making it easier for companies to sell their products in different markets, and in the service sector, there will be enhanced market access for service providers, professionals and investors.

Further benefits to businesses

Other benefits to local businesses include increased opportunities in government procurement, enhanced protection of intellectual property rights, and renewed commitment to sustainable development.

Ratification of the EUSFTA

The EUSFTA is forecasted to enter into force in early 2019, subject to the domestic administrative procedures for ratification on both sides. Once ratified, tangible results from the EUSFTA are expected to be reaped very quickly. Markets will be opened, opportunities will beckon – a clear step towards economic growth amidst the uncertain international trade climate in the world today.

FTA with UK post-Brexit?

As a post-script, it is noteworthy that PM Lee Hsien Loong had told British PM Theresa May that Singapore can extend the terms of the EUSFTA in a separate FTA with UK post-Brexit. Keep your eyes peeled for imminent developments in this direction.

How we can help

Our team of experienced lawyers in our Dentons Rodyk office, supported by our lawyers across the globe, is here to assist if you have questions relating to the EUSFTA and how it may affect your business. Please do not hesitate to reach out to the key contact or email to sg.academy@dentons.com.

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The Enforcement of the Rental Housing Market Development and Rental Housing Act

08/29/2018

Yi-Jiun Su/ Lily Kuo

With the aim of balancing the rights of tenants and landlords, and of establishing standards for rental housing services, the Rental Housing Market Development and Regulation Act ("Act") took effect on June 27 this year. The key provisions of the Act are summarized as follow:

I. **<u>Scope of Application</u>**: The Act is applicable to all "rental housing", i.e., buildings leased or to be leased for housing purposes, except for those used in any of the following scenarios, as they are different from regular rental housing:

1. Where the rental housing is used for purposes in connection with leisure or travel;

2. Where the rental housing is operated and managed by the government or a designated organization or agency established by the government;

3. Where the rental housing is operated and managed by a cooperative; or

4. Where the term of the lease is less than thirty days.

II. **Control over Contractual Terms**: The Act sets out restrictions on the terms of lease contracts to balance the rights of tenants and landlords. Major restrictions are summarized as follows:

1. <u>Mandatory and Prohibitory Provisions</u>: The Act authorizes the competent authorities to set out mandatory and prohibitory provisions for lease contracts. Any terms that contradict such mandatory and prohibitory provisions will be invalid. All such mandatory provisions will automatically become an integral part of all lease contracts, regardless of whether they are set forth in the contract or are verbally agreed upon between the parties (Article 5 of the Act).

2. <u>Exclusion of the Cap on Rent</u>: Pursuant to Paragraph 1, Article 97 of the Taiwan Land Act, in cities and municipalities, house rentals shall not exceed an amount equivalent to an annual interest of 10 per cent on the total declared value of the land and the buildings thereon. If the rent exceeds such amount, the competent authorities may order the landlord to reduce it to within the limit prescribed above. In consideration of the gap between the market value and the assessed and published land value or the assessed building value, and of the fact that such assessed values might not properly reflect certain housing property's earning-capacity value, the Act

has excluded the above-mentioned cap on rent so as to allow market mechanism to set the rent (Article 6 of the Act).

3. Amount of Security Deposit: Article 7 of the Act stipulates that the amount of security deposit for a lease may not exceed the equivalent of two months' rent, which is consistent with Article 99 of the Taiwan Land Act.

4. Landlords' Obligation to Provide Explanations: As prescribed by Article 429 of the Taiwan Civil Code, unless otherwise agreed upon between the parties or except for certain customary obligations, landlords shall be responsible for the repair of the leased premises. The Act further requires landlords to explain to their tenants, before the execution of the lease contract, the items and scope that the landlords are responsible for repairing, and to provide the tenants with his/her contact information to be used if the need for repair ever arises.

5. Obligation to Formalize a Sublease: As landlords in Taiwan customarily allow tenants to sublet the leased building, the second half of Paragraph 1, Article 443 of the Taiwan Civil Code provides that unless otherwise agreed upon by the parties not to sublet, the tenant may sublet a part of the leased building to others. However, the Act stipulates that the tenant cannot sublease the rental housing in whole or in part without prior written consent of the landlord, thus constituting an exception to the foregoing rule.

6. The causes of termination, methods of termination and notice period applicable to landlords and tenants under lease contracts (Articles 10 and 11 of the Act):

(1)Tenants' Right to Early Termination: The Act is a "special law" under the umbrella of the Taiwan Civil Code. The tenants' early termination rights under the Act are generally similar to those prescribed under the Civil Code, except that the Act has a special provision to allow a tenant to terminate a lease contract early if he or she "needs long-term treatment and care to recover from any diseases or accidents".

(2) Landlord's Right to Early Termination: Pursuant to Article 100 of the Taiwan Land Act, an indefinite-term lease of housing in "cities and municipalities", whether used as residence or place of business, may only be terminated early due to an occurrence of the specified terminating events, of which the scope is narrower than that prescribed under the Taiwan Civil Code.

The Act is a special law specifically set forth for the leasing of houses; its application therefore shall take precedence over the Taiwan Land Act and the Taiwan Civil Code in respect of matters related to the leasing of houses. Hence, landlords may terminate the lease early under any of the following circumstances, provided that the relevant documentary proof and a termination notice shall be delivered to the tenants within the timeframe required by the law:

(a) Where the tenant has damaged the premises or the ancillary equipment therefore, and failed to repair such damages or provide compensation therefor;

(b) Where the tenant has failed to pay the rent or any fees, to the extent that the accumulated amount thereof has exceeded the amount of two months' rent, and has also refused to settle such delinquent payment upon the request of the landlord;

(c) Where the tenant has sublet the premises to others without the landlord's written consent;

(d) Where the landlord needs to take back the premises for the rebuilding of the premises; or

(e) Where the lease may be terminated early in accordance with the law.

III. Establishing a Regulatory Scheme for Rental Housing Services

The Act sets out provisions governing the management and activities of the rental housing service industry and requiring rental housing service practitioners to obtain professional certifications. The Act also introduces regulations governing the "rental housing management business" (the "Management Business") and the "rental housing subleasing business" (the "Subleasing Business") and requires service providers of these businesses to incorporate a company and to obtain a special license, in order to assist landlords and tenants in handling the complex tasks of managing rental housing properties and clarifying the rights and obligations between the parties.

According to a Q&A list made available by the competent authority in respect of the "industry aspect" of the Act, the Management Business and the Subleasing Business differs in their nature of business, scope of activities, and source of revenues. The key differences between them are as follows:

1. Nature of Business: Operators of the Management Business are engaged by the landlords to manage all affairs related to the landlords' rental housing properties. On the other hand, operators of the Subleasing Business sublease the premises, which they have leased from their landlords, to others for housing purposes and manage the leasing of such premises. By comparison, operators of the Management Business "manage the premises on behalf of the landlords" while operators of the Subleasing Business "manage the premises in the capacity of a sub-lessor" instead of on behalf of, or being engaged by, the landlords.

2. Scope of Activities: "Rental housing management activities" operated by the Management Business include inspecting the condition of the premises and equipment therein, handling the hand-over procedure, collecting and managing the security deposit and the rent, carrying out daily maintenance and repair, dealing with disputes, etc. On the other hand, operators of the Subleasing Business, in addition to the "rental housing management activities" described above, also carry out "leasing and subleasing" of rental housing properties; that is, operators of the Subleasing Business shall execute lease contract separately with their landlords and their sub-tenants, and therefore have the additional responsibility of performing the lease contracts, as compared to operators of the Management Business.

3. Source of Revenues: Operators of the Management Business generate revenues from charging an agreed upon management fees, which is usually a certain percentage of the monthly rent of the rental housing property and specified in the management service agreement between the landlords and the service operators. Meanwhile, operators of the Subleasing Business generate revenues from the difference between the rent they pay the landlords and the rent they charge the sub-tenants, but have to assume the risks of not being able to find sub-tenants to sublease the premises the operators rented from their landlords.

Real estate brokerages have now been allowed to conduct rental housing services without having to incorporate another company to do so. If a real estate brokerage intends to provide rental housing services, it only needs to, following the enforcement of the Act, file an application to include "rental housing management business" and "rental housing subleasing business" into its registered business scope, put up the operating bond, designate the management personnel for the rental housing services, enroll in the industry association and obtain the relevant registration before it can start conducting the rental housing management business and rental housing subleasing business.

Proposed Regulations Under Section 956 Could Expand Guarantor Group and Collateral Base for Financing Transactions Involving Domestic Corporations

02 November 2018
Firm Thought Leadership

On October 31, 2018, the Treasury Department and Internal Revenue Service released proposed regulations under Section 956 to reduce inclusions by domestic corporations under Section 956. These proposed regulations provide consistency between the deemed repatriation rules under Section 956 and the new participation exemption for domestic corporations contained in Section 245A, which was enacted as part of the Tax Cuts and Jobs Act (P.L. 115-97).

Section 956, in conjunction with Section 951(a)(1)(B), generally requires a deemed repatriation of the earnings and profits of a "controlled foreign corporation" ("CFC") to a "United States shareholder" if such CFC holds "United States property," which includes, among other property, stock of a domestic corporation or a debt obligation of a U.S. person. If certain holding period and other requirements are satisfied, new Section 245A allows a domestic corporation that is a "United States shareholder" of a CFC to claim a 100% dividends received deduction on dividends received from such CFC.

Importantly, a deemed repatriation under Section 956 is not technically considered a dividend for U.S. federal income tax purposes, so any such deemed repatriation is not eligible for the 100% dividends received deduction under Section 245A. As a result, a domestic corporation could be subject to additional U.S. federal income tax on a deemed repatriation from a CFC under Section 956 even though an actual dividend distribution received from such CFC would be exempt from U.S. federal income tax because of Section 245A. These proposed regulations fix this disparate treatment by reducing the Section 956 inclusion amount for a domestic corporation with respect to a CFC by the amount that would have been exempted from U.S. federal income because of Section 245A if such domestic corporation had instead received an actual dividend distribution from such CFC.

Financing transactions involving domestic corporations are directly impacted by these proposed regulations. Because a guarantee of a domestic corporation's debt by a CFC or the pledge of all of the stock of a CFC with respect to debt of a domestic corporation could cause a CFC to be considered to hold "United States property" for purposes of Section 956, credit and loan agreements for loans to domestic corporations often exclude CFCs from serving as guarantors and limit the pledge of stock of CFCs to less than 66 2/3% of the voting stock of first-tier CFCs. Although each specific situation should still be analyzed by tax counsel to ensure there is not a Section 956 or other tax issue, this change to Section 956 should allow more flexibility on these points and, therefore, could result in the expansion of the guarantor group to include CFCs and the collateral base to include additional stock and assets of CFCs when loans are made to domestic corporations.

Taxpayers generally are allowed to rely on these proposed regulations prior to the issuance of final regulations.

Should you have any questions about the impact these proposed regulations may have on your financing transactions or other areas of your business, please contact any of the authors of this update.

# # #

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Lights, Camera, Action!: HIPAA Enforcement for Camera Crews on Hospital Premises

11.01.18

By Terri Keville, Becky Williams, and Caitlin Forsyth

HIPAA and 15-minutes-of-fame are not compatible. In September 2018, the federal Department of Health and Human Services, Office for Civil Rights ("OCR") announced that it had reached settlements with Boston Medical Center ("BMC"), Brigham and Women's Hospital ("BWH"), and Massachusetts General Hospital ("MGH") totaling $999,000, to resolve allegations that the hospitals had violated the Health Insurance Portability and Accountability Act of 1996 ("HIPAA")—by inviting film crews on premises to film a television network documentary series, without first obtaining authorization from patients whose protected health information ("PHI") was disclosed.

OCR initiated its compliance reviews of BMC and BWH based on a Boston Globe article, which indicated BMC and BWH had permitted ABC News to film a medical documentary program at BMC and BWH.

OCR's investigation of BMC concluded that BMC impermissibly disclosed the PHI of patients to ABC employees during the production and filming of the television program.

Although OCR recognized that BWH had implemented some patient privacy protections, OCR determined based on the times when BWH obtained written patient authorizations that BWH had impermissibly disclosed patients' PHI to ABC employees during the production and filming of the television program, and also that BWH had failed to safeguard patients' PHI appropriately and reasonably.

As with the BMC and BWH, a news story—this one posted on MGH's own website—triggered OCR's compliance review of MGH. The story indicated ABC News would be filming a medical documentary program at MGH. Like BWH, MGH reviewed and assessed patient privacy issues related to the filming and implemented various protections regarding patient privacy. Despite MGH's efforts, however, OCR concluded that, like BWH, MGH had impermissibly disclosed the PHI of patients to ABC employees during the production and filming of the television program, and failed to take appropriate and reasonable steps to safeguard patients' PHI from disclosure.

It is unclear exactly what PHI was disclosed, but OCR guidance suggests that allowing film crews into patient treatment areas is itself a disclosure of PHI, even if electronic or hard copy records are not provided or made visible to the film crew.

While not admitting liability, BMC, BWH and MGH entered into settlement agreements with OCR to resolve the alleged HIPAA violations. BMC paid $100,000; BWH paid $384,000; and MGH paid $515,000. Each entity also agreed to enter into and comply with the terms of a Corrective Action Plan ("CAP"). Among other things, the CAP requires the hospitals to provide workforce training that will incorporate OCR's guidance on disclosures to film crews and media. This guidance is available online here. It is interesting that the two hospitals that had implemented some privacy protections paid the larger settlements. The size of the settlements may correspond to the sizes of the hospitals or their revenues.

This is the second round of HIPAA enforcement and settlement resulting from filming on hospital premises. In April 2016, OCR settled with New York Presbyterian Hospital for $2.2 million to resolve allegations the hospital violated HIPAA by permitting television crews to film patients without their consent for the show "NY Med."

As a general rule, HIPAA requires covered entities to obtain written authorizations from all affected patients before filming—or even pre-production activity—begins. A disclosure would be deemed made at the time of the filming, or at the time when the production crew can observe patients within a treatment area of the facility. In addition to HIPAA, state medical confidentiality laws also may expose both healthcare providers and media entities to liability for privacy violations.

Davis Wright has developed two guidance publications on the subject of health care, media, and privacy law—one about how medical privacy law applies to journalists; and another about how medical privacy law applies to television producers of shows with medical content. These publications can be found here and here.

Disclaimer

GOODSILL

Copyright Protection for Fashion Designs in the Wake of Star Athletica

Sep 18, 2018

In an article published in the Hawaiʻi Bar Journal, Brett Tobin discusses the March 2017 US Supreme Court decision in *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017), affirming that certain aspects of designs on cheerleading uniforms were eligible for copyright protection. He also highlights how the decision impacts the Hawaiʻi market and in particular aloha attire and similar clothing created by designers in Hawaiʻi.

First published in the Hawaiʻi Bar Journal (the official publication of the Hawaiʻi State Bar Association), September 2018 Edition.

Download supporting document here: http://goodsill.com/images/uploads/files/Article-copyrightprotectionbyBrettTobin_Sep_2018_HawaiiBarJournal.pdf

Hogan Lovells

New pharmaceutical technologies usher in significant changes to liability laws

01 October 2018
Life Sciences and Health Care Videos

As more pharmaceutical manufacturers introduce digital components to their products, the industry is beginning to consider long-term implications around liability issues.

As the line between products and services in health care continues to blur, traditional notions of product liability are coming into focus. Gina Rodriguez, trial lawyer in Hogan Lovells' Denver office, and Lauren Colton, Hogan Lovells' Head of Global Products practice, say that as pharmaceutical manufacturers continue to develop new and novel health care technologies, with an eye on providing further benefit to patients, they should also closely consider potential future risks as laws around liability continue to move into unchartered territory.

"We're entering an era where delivery modes for pharmaceutical products are rapidly increasing the amount of direct interaction between drug manufacturers and patients," says Colton. "Product liability law has not yet caught up with the advent of new and novel technologies like health monitoring devices and internet-connected drug delivery systems."

With these direct-to-consumer technologies often providing the type of health care oversight traditionally within the realm of providers, Rodriguez says companies may be at increased risk for future types of liability. "What were once viewed as health care products are becoming more and more like consumer products," says Rodriguez. "[These products] signal a major change in responsibility for manufacturers." She sites drug adherence as an example of a potential liability issue. "Let's say a manufacturer provides a medical mobile application that reminds patients to take their drugs. If the app stops working, does the company face liability for the failure to provide a prescription notification? These are the big-picture questions we're tackling."

The potential for civil liabilities is also a concern. "Patient support programs have received attention recently because they are a new model of patient-pharmaceutical company interaction," says Colton. "Companies have to be careful not to engage in activities that could be viewed as the corporate practice of medicine, which is illegal in a number of jurisdictions. There's a real concern that these patient interaction programs could be opening companies to new types of civil liabilities, such as professional malpractice."

Rodriguez and Colton both urge pharmaceutical companies to think about how additions to their product line can put them at risk, and to lean on their legal teams to help navigate what will continue to be uncertain legal waters. “These are really exciting times,” says Colton. “The pace of innovation is like nothing that I've ever seen in my lifetime. But for medical companies, it is also a time when they need to be vigilant about protecting themselves. The instinct is to consider product liability litigators only if you need to, but we really hope that clients understand... early consultation is becoming more and more critical to protect them from litigation down the road.”

Looking for additional insights on digital health tools and the changing liability landscape? Watch the video above.

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> Read the full article online