PACIFIC RIM ADVISORY COUNCIL

Pacific Rim Advisory Council

February 2019 e-Bulletin

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Costa Rica - Hosted by ARIAS
April 6 - 9, 2019

PRAC @ PDAC Toronto
March 4, 2019

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

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PRAC WELCOMES NEW JAPAN MEMBER LAW FIRM—CITY-YUWA PARTNERS

01 February 2019: The Pacific Rim Advisory Council ("PRAC") is pleased to welcome Japan law firm **CITY-YUWA PARTNERS** to its membership.

City-Yuwa Partners is a pre-eminent, full service Japanese law firm with over 140 lawyers providing a full range of diversified legal services. City-Yuwa has many lawyers with experience working in various fields including as former prosecutors, high-ranking governmental officials, in-house counsels for financial institutions, trading companies and other business corporations. Many of the lawyers at City-Yuwa have additional professional qualifications, including as patent lawyers and certified public accountants, with many lawyers licensed in both Japan and foreign jurisdictions. This broad professional background enables City-Yuwa to offer practical advice and to solve any legal issues confronting clients.

City-Yuwa Partners routinely counsels its clients in areas ranging from general corporate matters, mergers and acquisitions, international transactions, and financial transactions, including asset securitization and the formation and ongoing operations of investment funds, to intellectual property, civil and commercial litigation, and bankruptcy. City-Yuwa's attorneys are knowledgeable in a wide range of legal areas, with particular expertise in corporate law, international banking and finance, securities, mergers and acquisitions, investments, real estate, intellectual property, litigation and alternative dispute resolution, bankruptcy and virtually all aspects of international and domestic business transactions. City-Yuwa's attorneys and support staff are fluent in English, thereby enabling the firm to counsel its foreign clients and generate documentation for complex transactions in both Japanese and English.

We are both pleased and honored to have a firm of City-Yuwa Partners' distinction as a member of PRAC.

CITY-YUWA PARTNERS

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PACIFIC RIM ADVISORY COUNCIL

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

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

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

GOODSILL NAMES TWO NEW PARTNERS

HONOLULU, 02 January 2019: Goodsill has named Stacy Y. Ma and Alana Peacott-Ricardos as its newest partners effective January 1, 2019.

Stacy concentrates her practice in the areas of personal injury, premises liability, commercial litigation and medical malpractice defense. Stacy also has a background in securities class actions, and has represented clients in connection with investigations by the SEC and FINRA. She joined Goodsill in December 2016 after practicing at a large law firm in New York City. Stacy is a graduate of George Washington University Law School (J.D., 2009) and Boston University (B.A., cum laude, 2006). She is licensed in Hawaii and New York (inactive).

Alana focuses her practice in the area of medical malpractice defense and health law. She began her legal career in general commercial litigation, then led the public policy advocacy efforts and education program of a local nonprofit organization addressing sexual violence. Alana joined Goodsill in August 2014. She is a graduate of the William S. Richardson School of Law, University of Hawai'i (J.D., summa cum laude, 2010) and Boston University (B.A., cum laude, 2002). She is licensed in Hawaii and Washington (inactive).

For more information about the firm,please visit: www.goodsill.com

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HAN KUN PROMOTES FIVE PARTNERS AND 11 COUNSELS

BEIJING, 05 January 2019: Han Kun Law Offices is delighted to announce that, effective January 1, 2019, **Yi Ding, Shijia Li, Jiaxin Liu, Zaiguang Lu,** and **Kaiying Wu** (names listed in alphabetical order) have been promoted to partner.

Mr. Yi Ding's practice focuses on asset and structured finance matters where he regularly advises airlines, leasing companies, financial institutions and arrangers on a wide variety of asset financing and structured financing transactions. He has advised a number of banks, financial institutions, corporate and institutional borrowers on cross-border financing, syndicated and bilateral secured and unsecured lending. He also has acted for a number of banks and financial institutions in establishing their respective operations in China and their corporate governance, merger and acquisition and regulatory advisory matters.

Mr. Shijia Li mainly specializes in domestic and offshore listings, restructurings and reorganizations, mergers and acquisitions, venture capital and private equity. He has extensive experience in IPOs, private placements, material asset restructurings, mergers and acquisitions in the A-share market. Mr. Li also provides professional services for going-private transactions and the restructuring of red chip companies, domestic or outbound investments, and mergers and acquisitions for domestic and offshore-listed companies, large-scale state-owned enterprises and buyout funds.

Mr. Jiaxin Liu specializes in venture capital and private equity financing, public financing, mergers and acquisitions and foreign investment. He has represented a large number of venture capital funds, private equity funds, strategic investors and entrepreneurs in various industry sectors covering Internet, education, telecommunications, retail and pharmaceuticals, and has assisted in forming deal structures, conducting due diligence investigations, drafting legal documents and participating in negotiations. In the area of public finance, Mr. Liu has represented a large number of issuers and underwriters of Chinese companies in initial public offerings, debt offerings and alternative public financings on overseas stock exchanges.

Mr. Zaiguang Lu specializes in venture capital/private equity investment and financing, overseas IPOs, foreign direct investment in hi-tech industries, mergers and acquisitions, etc. Mr. Lu has represented a number of companies to complete IPOs in the United States and Hong Kong markets, has participated in a great number of complex equity and asset acquisition and merger deals, and has helped many companies to complete domestic and overseas investment and financing transactions. Mr. Lu assists clients in designing transaction structures, drafting transaction documents, participating in negotiations and handling Chinese law-related issues arising in the transactions, covering industries including financial services, education, retail, transportation, TMT, medical and entertainment.

Ms. Kaiying Wu specializes in domestic and overseas IPOs and refinancings, venture capital/private equity investment and financing, foreign direct investments, and mergers and acquisitions. Ms. Wu provides professional legal services to many private equity funds, venture capital funds, strategic investors and entrepreneurs. Ms. Wu's legal services include deal structuring, drafting transaction documents, assisting with negotiations and handling PRC law-related issues arising in transactions, covering a wide range of industries including advertising, telecommunications, internet, entertainment, healthcare and media.

Han Kun Law Offices is delighted to announce that, effective January 1, 2019, the following have been promoted to counsel.

Ms. Arong specializes in venture capital and private equity investment, mergers and acquisitions, securities offerings and foreign direct investment. Ms. Arong is knowledgeable of PRC industrial policies, corporate structures, investment and project management. She has represented numerous Chinese and international companies, as well as international and PRC funds in cross-border transactions. The clients Ms. Arong represents operate in a variety of industries, including Internet information technology, telecommunications, entertainment, education, fintech, healthcare and energy.

Mr. Kevin Cao's experience focuses on private equity and venture capital, mergers and acquisitions and corporate restructuring matters. Mr. Cao advises clients on transaction structures, private equity and venture capital closing procedures, and M&A and corporate restructuring transactions, and also conducts due diligence, and drafts and reviews transaction documents.

Continues next page .....

HAN KUN PROMOTES FIVE PARTNERS AND 11 COUNSELS

...continued from previous page.

Florine Gu's main practice areas cover venture capital and private equity, foreign investment, mergers and acquisitions, and offshore public offerings. Her legal services include designing deal structures, drafting, reviewing and revising legal documents, conducting legal due diligence, and general corporate matters. She has represented clients in industries including e-commerce, sharing economy, biotechnology and pharmaceuticals, and traditional manufacturing.

Ms. Reese Huang mainly focuses on venture capital and private equity investment, fund formation, insurance fund investment and mergers and acquisitions. Ms. Huang has represented many private equity funds, insurance companies and start-ups in a variety of transactions in different industries such as internet, consumer products, real estate, healthcare, banking and finance.

Ms. Yipu Li mainly focuses on capital markets transactions, mergers and acquisitions, venture capital and private equity investment and general corporate matters. In addition, she has represented issuers and leading investment banks in initial public offerings of China-based companies on HKSE, NYSE and NASDAQ. Ms. Li has project experience in industries including internet finance, consumer internet, healthcare, marketplace and enterprise services.

Ms. Lu Ran has advised local and overseas clients in a variety of private equity-related transactions, including formation, management and operation of various types of fund entities and fund management entities. Her comprehensive legal services include formation and operation of RMB and USD fund, QFLP, QDII, QDLP and QDIE, investment of insurance funds, etc.

Mr. Vincent Song specializes in venture capital and private equity financing, private equity fund formation, mergers and acquisitions, fund formation and overseas listings. Mr. Song has dealt with a large number of private equity investments, corporate mergers and acquisitions, and significantly involved in the formation of and fundraising for numerous onshore and offshore private equity funds, covering industries including internet information technology, life sciences and healthcare, culture and entertainment, internet finance, etc. Mr. Song has also represented the issuers or the underwriters in many Chinese companies' public offerings on overseas markets.

Ms. Wei Song specializes in mergers and acquisitions, foreign direct investment, private equity and venture capital investment, and general corporate matters. Ms. Song has represented a large number of multinational companies and funds in connection with their investment and financing projects. Ms. Song's legal services include due diligence investigations, drafting and negotiating transaction documents, assisting with deal closing, and advising companies on establishment, daily operations and their domestic and overseas investments.

Ms. Tracy Tang specializes in domestic and overseas IPOs and restructurings, mergers and acquisitions, venture capital/private equity investment and financing, foreign investments, general corporate and compliance matters, and has accumulated extensive and practical experience in relevant policies and structure designs. She has represented clients from different industries such as internet, technology, advertising, entertainment, real estate, and retail. Ms. Tang also acts as the general corporate counsel to many well-known Chinese and foreign companies.

Ms. Qimin Zhu has accumulated substantial experience in handling dispute resolution cases, especially commercial litigations. She has successfully handled many commercial litigations, including trade contract disputes, real estate joint venture disputes, shareholder investment disputes, share transfer disputes, corporate control disputes and private equity investment disputes.

Charles Wu specializes in cross-border venture capital and private equity, mergers and acquisitions and general corporate matters. Charles focuses his practice on China's TMT industry, primarily the Internet and mobile space. He has particular expertise with offshore business and legal terms, as well as China-specific issues. He also advises on general corporate matters.

For additional information visit www.hankunlaw.com

MUNIZ WELCOMES NEW PARTNER IN LIMA

LIMA, 29 January 2019: Muniz is pleased to welcome **Juliana Llosa Bustamante**, Partner to the firm. Juliana's extensive experience is in Capital Markets and Bank Regulation, Project Finance and Syndication and her expertise will add to the firm's strong capital markets and banking regulations team, led by senior partner Andrés Kuan- Veng Cabrejo.

For additional information visit www.munizlaw.com

RICHARDS BUELL SUTTON WELCOMES TWO NEW PARTNERS

VANCOUVER, 09 January 2019: Richards Buell Sutton is pleased to announce the addition of **Aneez N. Devji** and **Jonathan M.S. Woolley** to the partnership.

"Jonathan and Aneez are tremendous additions to the depth and strength of our Partnership", said Managing Partner, Jeff Lowe, Q.C.

Aneez is a member of the firm's Real Estate practice group, and has many years of experience in commercial leasing, commercial lending and real estate transactions.

Jonathan is a member of the firm's Intellectual Property and Advanced Education and Research practice groups, and maintains a broad litigation practice with particular emphasis on intellectual property and commercial litigation.

We congratulate them both on this milestone.

For additional information visit www.rbs.ca

SKRINE ANNOUNCES PARTNER PROMOTIONS

KUALA LUMPUR, 24 January 2019: Skrine is pleased to announce that three of our Senior Associates, **Shaleni Sangaran**, **Syafinaz Vani** and **Addy Herg**, have been admitted as Partners of the firm with effect from 1 January 2019.

The promotions are the result of their respective achievements in their career and moving forward, we look forward to them working together with us in strengthening our firm's capabilities in delivering par excellent legal services in response to our clients growing needs.

For further information, visit www.skrine.com

ARIAS AND BRIGARD URRUTIA

ASSIST COLOMBIAN PHARMA GROUP OBTAIN US$100 MILLION LOAN

03 January 2019: Brigard Urrutia in Bogotá and Arias (El Salvador) have helped a consortium of banks provide a US$100 million loan to pharmaceuticals maker Procaps for refinancing purposes.

Bancolombia and its Panamanian subsidiary along with Colombia's Davivienda, Peru's largest bank Banco de Crédito del Perú, and Spain's Banco de Sabadell provided the loan in the deal closed on 28 November.

The unsecured financing was backed by the Colombian and Salvadorean notes guaranteed by Procaps' subsidiaries.

Counsel to Bancolombia, Bancolombia Sucursal Panamá, Davivienda, Banco de Crédito del Perú and Banco de Sabadell Brigard Urrutia Partner Manuel Fernando Quinche and associates Natalia Arango and Alberto Vergara in Bogotá;

Arias (El Salvador) Associate Mariana Nochez in San Salvador.

For additional information visit www.bu.com.co and www.ariaslaw.com

ARIAS FABREGA & FABREGA

ASSISTS UNITED AIRLINES IN JOINT VENTURE WITH COLOMBIAN AIRLINES AVIANCA AND COPA

PANAMA 13 December 2018: Arias, Fábrega & Fábrega in Panama City assisted United Airlines enter a joint venture agreement with Colombian airline Avianca and its Panamanian counterpart Copa.

The joint venture, if approved by the US and various Latin American governments, will see United, Copa and Avianca (all three currently codeshare) provide more air routes between the US and 19 Latin America countries.

The revenue-sharing joint venture agreement closed the day before United granted Synergy Aerospace Corporation a US$456 million loan. Synergy will use some of the funds from the 30 November loan to repay its debts with US investment management firm Elliott Management Corporation. United retained Sidley Austin in Chicago and New York and ARIFA to provide the loan.

Counsel to United Airlines (joint venture agreement and financing) Arias, Fábrega & Fábrega Partners Andrés Rubinoff, Eduardo de Alba, Ricardo M Arango and Claudio De Castro, and associates David Polo, Donald Canavaggio and Javier Yap Endara in Panama City.

For additional information visit www.arifa.com

BRIGARD URRUTIA

ASSISTS HBC, BANK OF TOKYO-MITSUBISHI UFJ, CITIBANK AND DEUTSCHE BANK IN MULTI-BILLION DOLLAR LOAN TO GLENCORE

BOGOTA 05 February 2019: Brigard Urrutia helped HSBC, Bank of Tokyo-Mitsubishi UFJ, Citibank and Deutsche Bank provide a multibillion-dollar loan to Anglo-Swiss commodities trader Glencore. The deal closed on 12 December. Purpose and exact value of the loan have not been disclosed.

Glencore has been busy in Latin America over the last couple of years. It acquired a 78% stake in fuel distributor AleSat Combustíveis, which owns Brazil's Ale petrol station chain, last June. The year previous, it sold zinc-related assets in Peru and Africa to Tevali Mining.

Counsel to HSBC, Bank of Tokyo-Mitsubishi UFJ, Citibank and Deutsche Bank Brigard Urrutia Partner Manuel Fernando Quinche along with associates María Fernanda Sánchez, Esteban Gutiérrez Soto and Cristina Gamboa in Bogotá assisted in the transaction.

For additional information visit www.bu.com.co

BAKER BOTTS

REPRESENTS KIMBELL ROYALTY PARTNERS IN US$151.3 MILLION DROP DOWN OF OIL AND GAS ROYALTY ASSETS

HOUSTON 07 February 2019: On February 7, 2019, Kimbell Royalty Partners, LP ("Kimbell"), a leading owner of oil and gas mineral and royalty interests across 28 states, announced that it has agreed to acquire oil and gas mineral and royalty assets from EnCap Investments L.P. ("EnCap") in a transaction valued at approximately $151.3 million. The purchase price for the acquisition is composed of 9.4 million newly issued units in Kimbell Royalty Operating, LLC, valued at approximately $151.3 million based on a closing price of $16.10 per common unit for Kimbell's common units as of February 6, 2019. The transaction is expected to close in late March 2019.

Target: Oil and gas mineral and royalty assets controlled by EnCap through Phillips Energy Partners, LLC, Phillips Energy Partners II, LLC and Phillips Energy Partners III, LLC.

Counsel to Kimbell: Baker Botts L.L.P.; Financial Advisor to EnCap: RBC Richardson Barr; Outside Counsel to EnCap: Vinson & Elkins L.L.P.

Value: $151.3 million

Baker Botts Lawyers/Office Involved: Corporate: Jason Rocha (Partner, Houston); Joshua Davidson (Partner, Houston); Eileen Boyce (Senior Associate, Houston); Jennifer Gasser (Associate, Houston); Steven Lackey (Associate, Houston); Global Projects: Erin Hopkins (Partner, Houston); Rachel Briley (Associate, Houston); Tax: Michael Bresson (Partner, Houston); Chuck Campbell (Special Counsel, Houston); Katie McEvilly (Associate, Houston).

For additional information visit www.bakerbotts.com

BENNETT JONES

ASSISTS ZCL COMPOSITES INC IN DEFINITIVE AGREEMENT WITH GLOBAL ENERGY SERVICES COMPANY SHAWCOR LTD.

Date Announced:	January 20, 2019
Deal Value:	$312 Million
Client Name:	ZCL Composites Inc.

CL Composites Inc. entered into a definitive agreement with Shawcor Ltd, a global energy services company, under which Shawcor will acquire all of the issued and outstanding common shares of ZCL by way of a court-approved plan of arrangement, for a purchase price of $10.00 per share, payable entirely in cash.

The proposed cash consideration represents an approximately 46% premium to the 20-day volume weighted average trading price of the ZCL's common shares on the TSX as of January 18, 2019. The aggregate proposed consideration on a fully diluted basis implies a total enterprise value for ZCL of approximately $312 million, or 12.5 times ZCL's Adjusted EBITDA reported for the 12-month period ending September 30, 2018. The transaction will be implemented by way of a statutory plan of arrangement under the Canada Business Corporations Act and is subject to the approval of ZCL's securityholders, relevant regulatory approvals and other customary closing conditions.

For additional information visit www.bennettjones.com

CAREY

ASSISTS BANCO SANTANDER CHILE RENEW LATAM PARTNERSHIP

SANTIAGO, 11 February 2019: Carey has helped Banco Santander Chile renew a customer loyalty scheme with LATAM Airlines for another seven years. The deal closed on 26 December.

The new agreement updates the programme's compliance structure, aligning it with Chile's latest banking and aviation industry standards.

Carey Partner Francisco Ugarte, and associates Alejandra Daroch, Javiera Sepúlveda and Pablo Albertz acted in the transaction.

For additional information visit www.carey.cl

CLAYTON UTZ

ADVISED ALCOA ON NEW GAS SUPPLY AGREEMENTS WITH BHP, CHEVRON AND WOODSIDE

18 December 2018: Clayton Utz is pleased to have advised Alcoa on its gas supply contracts with BHP, Chevron and Woodside which will feed its three alumina refineries in south west Western Australia.

Energy & Resources Partner Brett Cohen and Senior Associate Armin Fazely led the firm's team advising Alcoa on this major and complex set of agreements.

Alcoa is WA's largest consumer of gas and the new supply arrangements will deliver about 25% of Alcoa's gas needs from 2020. The signing of these contracts represent a significant commitment by Alcoa to the State and its ongoing contribution to the Western Australia economy.

For additional information visit www.claytonutz.com

DAVIS WRIGHT TREMAINE

REPREENTS SAMUEL FRENCH IN SALE TO CONCORD MUSIC

30 January, 2019: A multidisciplinary, cross-office Davis Wright Tremaine team has represented Samuel French Inc., in the sale by its owners of the renowned script publisher and licensor to Concord Music. Family-owned prior to the sale, Samuel French has a history stretching back nearly 200 years and holds rights to 10,000 titles—including venerated works by playwrights such as Edward Albee, Lorraine Hansberry, Arthur Miller, and August Wilson.

Nate Collins, the president of Samuel French and a great-grandson of one of the company's early-20th-century presidents, is continuing at Concord as general manager of the Samuel French imprint and told the New York Times he expects most of the company's employees to stay on as well.

"It's gratifying to assure the viability of Samuel French for many generations to come," said Gray Coleman, chair of the Entertainment Transactions practice group at Davis Wright Tremaine, who co-led the deal with DWT's Claude Goetz.

DWT's combination of deep expertise with the performing arts and multi-disciplinary skills helped make the high-profile transaction possible. The deal drew on DWT practitioners in corporate, tax, benefits, and real estate law across five offices. "Not many firms can provide this kind of top-flight service across so many disciplines at reasonable rates," said Coleman.

Coleman and Goetz, both partners in Davis Wright Tremaine's New York office, have collaborated on performing arts-related transactions for more than two decades.

As reported in the New York Times, Mr. Collins said the merger will benefit playwrights because it will allow for more technological innovation and stronger relationships with producers. Mr. Collins told Playbill the merger "will enable us to continue to provide our clients with the most innovative products, dynamic marketing, and transparent reporting."

For additional information visit www.dwt.com

GIDE

COUNSEL TO CASINO GROUP ON SALE OF 26 HYPERMARKET AND SUPERMARKET PROPERTIES WORTH EUR 50 MILLION

PARIS, 22 January 2019: The Casino Group has announced the signing of an agreement with funds managed by Fortress Investment Group with a view to the sale of 26 hypermarket and supermarket properties worth EUR 501 million. Under the agreement, the Casino Group will sell a portfolio of 13 Géant Casino hypermarkets, 3 Casino hypermarkets and 10 Casino supermarkets properties in the first half of 2019 to an entity in which the Casino Group will receive an interest, enabling it to benefit from the value created by the transaction.

Gide's team advising the Casino Group on this new transaction is headed by partner Stanislas Dwernicki, with associates Romain d'Innocente, Louis Delestrée, Rémi Avon, and Lucas Gintz on corporate and real estate aspects, and partner Bertrand Jouanneau and counsel Alexandre Bochu on tax aspects.

For additional information visit www.gide.com

HAN KUN

ADVISES ON WEIDAI LTD'S U.S. INITIAL PUBLIC OFFERING AND LISTING ON NYSE: WEI

January, 2019: Han Kun advised and acted as the PRC counsel to the joint bookrunners on Weidai Ltd.'s U.S. initial public offering and listing on the New York Stock Exchange (NYSE: WEI).

Weidai Ltd. is a leading auto-backed loan and internet finance information service provider in China.

For additional information visit www.hankunlaw.com

MUNIZ

ASSISTS PERU'S TALARA OBTAIN US$1.3 BILLION SYNDICATED LOAN

LIMA, 29 January 2019: Muñiz, Olaya, Meléndez, Castro, Ono & Herrera helped state-owned petrol company Petroperú obtain funding to modernise the Talara refinery in northern Peru.

The 10-year loan will fund modernisation works that will increase the refinery's capacity from 62,000 barrels per stream day (BPSD) to around 95,000 BPSD.

Muñiz, Olaya, Meléndez, Castro, Ono & Herrera Partners Andrés Kuan-Veng and Guillermo Flores, and associate Alesandra Azcarate in Lima acted in the transaction.

For additional information visit www.munizlaw.com

HOGAN LOVELLS

REPRESENTS PAPA JOHN'S IN US$200 MILLION STRATEGIC INVESTMENT FROM STARBOARD

WASHINGTON D.C., 04 February 2019: Hogan Lovells is representing the world's third-largest pizza delivery company Papa John's International, Inc. (NASDAQ: PZZA) in a US$200 million strategic investment with Starboard Value LP. The transaction also includes an option to make an additional US$50 million investment through March 29, 2019. More about the deal can be found in the company press release.

The Hogan Lovells team was led by John Beckman and

included corporate and securities attorneys Joe Connolly, Alan Dye, Alex Bahn, Tiffany Posil, Peter Trentman, Weston Gaines, Brendan Oldham and Nick Eckstein.

For more information, visit www.hoganlovells.com

NAUTA DUTILH

ASSISTS JAMF IN ACQUIRING ZULUDESK

AMSTERDAM 07 February 2019: NautaDutilh assisted JAMF Software Atlantic B.V., headquartered in Amsterdam and backed by Vista Equity Partners since 2017, with its acquisition of ZuluDesk. ZuluDesk is a company specialized in the field of education and in particular providing management of Apple devices (mobile device management, i.e. MDM services).

ZuluDesk, which is being used in over 50 countries, works together with Apple to provide innovative solutions to schools, parents, and IT professionals.

The NautaDutilh team consisted of Joost den Engelsman, Jeanine Evertse, Michael Oldenburger and Nadine Platenburg (Corporate M&A); Celine Houwen (Corporate Notarial); Fleur Folmer (IP); Astrid Sixma and Naomi Asscheman (IT and Data Privacy); Arjan Koorevaar and Daniel Kuiper (Employment); Edward Rijnhout and Sjuul Jentjens (Tax).

For additional information visit www.nautadutilh.com

SANTAMARINA

ASSISTS BIOFILM OBTAIN CLEARANCE FROM MEXICAN ANTITRUST AUTHORITY

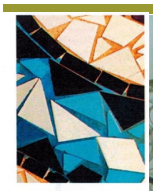
MEXICO CITY, 04 February 2019: Santamarina y Steta has advised Biofilm, one of LatAm's leading producers of BOPP film for flexible packaging, labels and industrial applications, and Lisa Holdings and Valorem S.A., shareholders in Biofilm, in relation with the M&A process and to obtain the authorization from the Federal Economic Competition Commission to sell Biofilm to Taghleef, one of the largest global manufacturers of BOPP film.

With the addition, Taghleef will expand its offering and capacity in LatAm and will also consolidate its position as one of the leading global producers of BOPP film for the production of flexible packaging, labels and other industrial applications.

Santamarina y Steta team was led by Ernesto Duhne and Jorge Leon Orantes, assisted by Paola Morales, Ivan Szymanski and Fernando Ruiz.

For additional information visit www.s-s.mx

PRAC EVENTS

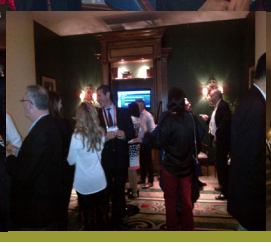


PRAC2016 Barcelona

PRAC 59th INTERNATIONAL CONFERENCE 21 - 24 MAY 2016

PACIFIC RIM ADVISORY COUNCIL

RCD ROUSAUD COSTAS DURAN S.L.P.



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ALLENDE & BREA

Global Affairs Newsletter No. 1

1) The effect of the G20 in the Argentinean economy and legal implications

During the G20 held in Argentina between November 30th and December1st, 2018, Argentina entered into international agreements to foster economic integration and commercial relations. The following is a summary of the main agreements:

UNITED STATES:

1) OVERSEAS PRIVATE INVESTMENT CORPORATION (OPIC)

OPIC signed six letters of intent to advance with several projects in support of Argentina's economic growth and they represent US$813 million in U.S.

The six letters of intent were signed with:
• Tecpetrol and Transportadora de Gas del Sur for $350 million to finance the construction of a natural gas pipeline across Argentina and support the development of the country's energy resources.
• Astris Infrastructure for $250 million to finance the repair and expansion of a major highway stretching from Buenos Aires to Mendoza to improve regional connectivity and facilitate trade.
• YPF Luz for a $50 million loan to install 122 MW in wind power projects in Santa Cruz and add reliable sources of energy to the national grid.
• Genneia, two agreements to lend $118 million to support the construction of both a wind and a solar power plant, that will together generate 222 MW in the Ullum and Chubut regions of Argentina.
• Plaza Logística to provide a loan of $45 million to expand the company's warehouses in the greater Buenos Aires region and enhance Argentina's logistics network.

2) AGREEMENT FOR ENERGETIC COOPERATION

In the context of the G20 summit, Argentina and the USA subscribed an agreement to strengthen investment in infrastructure and energy cooperation.

This agreement is destined to promote capital investments of the private sector in the value chain of energy, which includes generation, transmission, and distribution and both countries will cooperate on the following objectives:

• Incorporate cleaner energy sources such as natural gas and renewable energies.
• Develop midstream and downstream infrastructure for refined products.
• Expand the generation of electricity using natural gas and adapt the existing power plants for them to work with the combined cycle technology of natural gas.

• Accelerate Argentina's adoption of innovative technologies, including renewable energies, micro and mini grids and batteries' storage.
• Invest in infrastructure of high voltage electrical transmission and its national and international connection.
• Improve energy efficiency and the use of smart grids.
• Develop deep and liquid energy commodities markets and debt securities supported by infrastructure.
• Support the investment in infrastructure and development of energy industry consistently with each country's objectives.

JAPAN:

Bilateral Investment Protection and Promotion Agreement

On December 1st, 2018, Argentina and Japan subscribed an agreement of reciprocal Promotion and Protection of Investment (the "BIT"). The BIT is a "third generation agreement" that balance the interest of the investors and the State by reaffirming the State's right to regulate and maintaining a high standard of protection towards the investors.

In relation to the standards of treatment, the BIT contains the following provisions and standards:

• National treatment: Article 2 of the BIT specifies that "in like circumstances" depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investments or investors on the basis of legitimate public welfare objectives.
• Most-favored-nation clause ("MFN"): Article 3 excludes from the scope of this standard the international dispute settlement procedure or mechanisms under any international agreement.
• Fair and equitable treatment ("FET"): Article 4 regulates the standard to avoid a broad interpretation. The FET shall be interpreted under the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to investments of investors of the other Contracting Party; failure to comply with the BIT does not establish that there has been a breach of the FET; and breach of investor's expectations does not constitute breach of the FET.
• Non conforming measures: The BIT contemplates a chapter on non conforming measures that constitutes an exception to the application of the national treatment and MFN articles.
• Expropriation: The BIT contemplates direct and indirect expropriation. In the last one, the BIT states that to determine whether indirect expropriation occurred, it requires a case-by-case analysis and the following factors, among others, shall be considered: (i) the economic impact (however, standing alone, does not establish indirect expropriation), (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) character of the government action.
• Health, Safety and Environmental Measures and Labor Standards: Article 22 states that each Contracting Party recognizes that it is inappropriate to encourage investment by investors of the other Contracting Party and of a non-Contracting Party by relaxing its health, safety or environmental measures, or by lowering its labor standards
• Denial of benefits: the BIT shall not apply in specific circumstances such as when an enterprise of the other Contracting Party and its investments is owned or controlled by an investor of a non-Contracting Party and (a) the denying Contracting Party: (i) does not maintain diplomatic relations with the non-Contracting Party; and (ii) adopts or maintains measures with respect to the non-Contracting Party that prohibit transactions with

the enterprise or that would be violated or circumvented if the benefits of this Agreement were accorded to the enterprise or to its investments; and (b) the enterprise has no substantial business activities in the Area of the other Contracting Party.
• Settlement of investment disputes: the settlement and dispute chapter is regulated in detail and it provides that in the event of an investment dispute, the parties should initially seek to resolve the dispute through consultations and negotiations, and if it cannot be settled they may submit it to arbitration. In those cases, the claimant may submit the case to arbitration by itself or on behalf of a Respondent's enterprise that the claimant owns or controls directly or indirectly.

RUSSIA:

Russia and Argentina agree co-operation on fisheries and aquaculture

On December 1, 2018, Russia and the Argentina entered into a five-year term agreement on co-operation on fisheries and aquaculture. The agreement would be automatically renewed for five years unless any Party notifies the other one its intention not to renew.

The objective of the agreement is the mutual and equitable cooperation in fisheries and aquiculture and it does not modify the fisheries permits for the extraction of biologic marine resources.

The main areas of cooperation are: (i) conservation and responsible exploitation of marine resources, (ii) combating illegal, unreported, and unregulated fishing, (iii) elaboration and development of joint projects related to the marine fisheries, commercialization and processing of fisheries products, (iv) development of technology for extraction and processing of biologic aquatic resources, (v) professional training, and (vi) scientific and technical cooperation. As part of implementing the provisions of the agreement, a Russian-Argentine Commission on Fisheries was established.

In addition, to this agreement, both countries analyzed progress in bilateral trade, particularly related to fisheries with the export certification for another 19 Argentine fish processing plants.

Russia and Argentina enter into a Framework Agreement on nuclear cooperation

On November 23, 2018, the framework agreement entered into force in the preparation to the G20. Both parties agree to cooperate in the development of nuclear energy with pacific purposes in consistency with the necessities and priorities of their respective national nuclear programs.

The cooperation will be executed in accordance to the framework agreement and the local regulations of each State and will be implemented by means of the signature of agreements that determine the scope of the cooperation, rights and obligations of each party, financial and other cooperation terms that includes the transfer of nuclear material, equipment, components, technology; work groups; assistance in the training of scientific and technical personnel; exchange of scientific and technical information etc.

The appointed authorities are:

Russia: National Corporation of Atomic Energy (ROSATOM) and the Federal Sservice for the Ecologic, Technologic and Atomic inspection)
Argentina: Comision Nacional de Energía Atómica (CNEA), Autoridad Regulatoria Nuclear (ARN) and Nucleoelectrica Argentina SA (NASA) (Argentina)

CHINA:

The Government of China and Argentina entered into the following agreements:

• Joint Action Plan 2019-2023: Both government agree on a new action plan which includes a roadmap with steps to be taken in areas such as politics, economic, commerce, investments, infrastructure, agriculture, mining, energy, finances, transport, tourism, culture, education, science and technology, health, special issues, sports, South-South cooperation, defense, etc.

• Agreement on the Extension of the Validity of the Memorandum of Understanding for the Establishment of a Strategic Dialogue Mechanism for Economic Cooperation and Coordination (DECCE): The agreement extends the MOU for 5 years. The MOU was signed on September 13, 2013 and sets the mechanism for the strategic dialogue for economic cooperation and coordination in order to strengthen the economic bilateral relations and cooperation, foster the exchange of information and experts in relation to the development and macroeconomic policies, and foster the economic and social development.

• Convention on the Elimination of Double Taxation in respect of Income and Wealth Taxes as well as the Prevention of Tax Evasion and Avoidance.

• Memorandum of Understanding to strengthen Fiscal and Financial Cooperation between the Ministry of Finance of the People's Republic of China and the Ministry of Finance of the Argentine Republic: The MOU seeks to amplify the tax and financial cooperation under bilateral and multilateral frames, as well as fostering new cooperation opportunities.

• Memorandum of Understanding between the Ministry of Production and Labor of the Argentine Republic and the Ministry of Commerce of the People's Republic of China on the Promotion of Trade and Investment Cooperation: The MOU establishes the “Dialogue of Commerce and Investment among China-Argentina”, aimed at increasing, promoting, and developing commerce and investments in both countries.

• Memorandum of Understanding between the Ministry of Commerce of the People's Republic of China and the Ministry of Transport of the Argentine Republic on Strengthening Cooperation in the Infrastructure Sectors: The MOU seeks to reinforce the investment and cooperation in the transport and infrastructure sectors, aiming to increase commerce and bilateral cooperation, as well as the expansion of these sectors and its level of cooperation.

• Protocol of Phytosanitary requirements for the Export of Argentine fresh cherries to China between the General Customs Administration of the People's Republic of China and the Government’s Secretary of agro-industry of the Ministry of Production and Labor of Argentina.

• Memorandum of Understanding between the Ministry of Production and Labor of the Argentine Republic and the Ministry of Commerce of the People's Republic of China on E-Commerce: The MOU establishes an electronic commerce cooperation mechanism in order to facilitate and foster commerce and investment, especially in regards of medium and small companies.

• Memorandum of Understanding between the Ministry of Production and Labor of the Argentine Republic and the Ministry of Commerce of the People's Republic of China on Cooperation in the Trade of Services: The

MOU sets forth the cooperation in the services sector and promoting a dialogue in regards of exchange of information policies as well as creating a favorable environment for commerce and investment in this sector.

• Protocol for the Export of Sheep meat and Goat meat to China between the General Customs Administration of the People's Republic of China and the Secretary of the Government of Agroindustry of the Ministry of Production and Labor of the Argentine Republic.

• Adequacy of the Protocol for the Export of horses to China between the General Customs Administration of the People's Republic of China and Agro-Industry's Secretary of Government of the Ministry of Production and Labor of the Argentine Republic.

• Memorandum of Understanding on Cooperation between the National Supervisory Commission of China and the Ministry of Justice and Human Rights of Argentina: The MOU is aimed at intensifying cooperation in the prevention and fight against corruption, asset recovery and transnational bribes, in accordance with United Nation's Convention against corruption.

• Term Sheet between the Ministry of Finance of the Argentine Republic and the Development Bank of China (CDB) for the creation of a Fund for an estimated amount up to 1,000 million dollars, in order to finance "Working Capital": The purpose of this agreement is to promote bilateral commerce and cooperation in Argentina's infrastructure sector.

• Framework Agreement for the Promotion of Trade in Oilseeds Products between the Agro-Industry's Secretary of Government of the Ministry of Production and Labor of the Argentine Republic and China's Grain Reserves Group Ltd. Company (SINOGRAIN): By means of this agreement, SINOGRAIN expressed its interest in buying between two and three millions of tons of soybeans and between three and four hundred of soy-oil in the 2018/2019 campaign. This amounts to duplicate SINOGRAIN's purchases of Argentine products in comparison with 2017 and it could reach an estimated of 1,100 and 1,500 millions of dollars.

• Commercial contract between the Ministry of Transport and the Chinese company CRCC for the recovery of the "San Martín Cargas Railway Line" Stage I: The agreement sets forth the renovation and improvement of more than one thousand kilometers of railways across Argentina with an estimated investment of 1,100 millions of dollars.

• Memorandum of Understanding between the Ministry of Environment of China and the Environment and Sustainable Development's Secretary of Argentina on Environmental Protection and Sustainable Development: The MOU develops and implements concrete actions to protect the environment, coordinate efforts to fight climate change, mitigate its consequences, and promote clean energy.

• Framework Cooperation Agreement between China Export & Credit Insurance Corporation (Sinosure) and Argentine's Federal Bank: The framework agreement's purpose is to provide advantages and mutual benefits to facilitate the financing of investments, in order to increase economic and commercial relations between Argentine and Chinese companies.

• Addendum to the Financing Contract for the Rehabilitation of the "Belgrano Cargas" Railway: The addendum extends the contract until June 2020.

• Financing Agreement between the Ministry of Finance of the Argentine Republic and the China Development Bank (CDB) for the Acquisition of Train Rolling Stock for the "Roca" Railway Line: It provides for a long-term loan for up to 236 millions of dollars for the purchase of 200 trains in accordance with a previous commercial agreement entered into by the parties.

2) The CPTPP entered into force. Impact for Latam.

On December 30, 2018 the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP") entered into force. This multilateral free trade agreement is a revised version of the Trans-Pacific Partnership ("TPP") and has been executed by 11 Asia Pacific Countries, after the USA withdrew from the TPP in January 2017.The CPTPP represents nearly 13.5 percent of global gross domestic product (GDP) and creates a free trade area among its signatories States: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.The CPTPP contains most of the original clauses of the TPP, however, 22 provisions contemplated in the original agreement that were prioritized by the USA were suspended or eliminated such as IP chapter.

3) The Congress of Argentina and Chile ratified the Free Trade Agreement

On November 2, 2017, the Presidents of Argentina and Chile entered into a Free Trade Agreement. The Argentine Congress ratified the agreement in December 2018 and the Chilean Congress in January 2019. The agreement complements the Economic Complementation Agreement No. 35 (Mercosur-Chile).
The agreement contemplates major facility and agility in the exchange of products, the desburocratization of the custom office and the increase of the commercial relations. Due to the terms, it is expected there will be more willingness to foster the bi-oceanic corridor that joins Brazil, Argentina, and Chile to potentiate the commercial traffic to Asia.

4) Paris Agreement? Where are we now?

Argentina, as well as many Latin American countries, has international commitments to reduce greenhouse gas emissions. As a party of the UNFCC and the Paris Agreement, the outcome of COP 24 impacts in Argentina's commitments. To make a brief recap, on March 21, 1994, the United Nations Framework Convention on Climate Change ("UNFCCC") Convention entered into force. This international environmental agreement establishes the objective to stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system, however, it does not set binding obligations for the signatories States and they agreed to specify the further actions to be take through the execution of specific treaties and protocols.

In 2015, the Paris Agreement was adopted within the framework of the UNFCCC, and its long-term objective is to keep the increase in global average temperature to well below 2 °C above pre-industrial levels; and to limit the increase to 1.5 C.

Each country must make effort and take action to reduce national emissions and adapt to the impacts of climate changes ("nationally determined contributions"). Article 3 of the Agreement states that all parties are to undertake and communicate ambitious efforts to achieve the purpose of the Agreement and the efforts of all Parties will represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of this Agreement. Article 4 states that each party shall communicate and maintain successive nationally determined contributions that it intends to achieve.

On December 15, 2018, in the COP24 held in Poland, the parties agreed on universal, transparent rules that will govern efforts to cut emissions and curb global warming and this will enable the countries to put into action the principles of the Paris Agreement. The rules related to the voluntary carbon market were postponed to COP25 which will be held in Chile.

5) Venezuelan elections: Impact in the region

On January 10th, Nicolas Maduro claimed to be the President of Venezuela, however, he did not have the support of most Latin American countries. The Lima Group, composed by Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Guyana, Honduras, Panamá, Paraguay, Peru and Santa Lucía, stated that they will not recognize Venezuelan President Nicolás Maduro as the legitimate leader of his nation when he takes office on January10th, 2019 for a new six-year term.

The Group also ratified their support to the National Assembly, urged Nicolas Maduro not to assume the presidency and that he respects the attributions of the National Assembly and transfer their power until new democratic presidential elections are made, highlighted the importance of the respect to the integrity, autonomy, and independency of the Supreme Court.

Among other things, the Group agreed to: (i) reevaluate their diplomatic relations with Venezuela; (ii) to the extent their domestic regulation allows them, to bar Venezuelan officials from traveling to the nations of the Lima Group, elaborate a list of entities and natural persons that will not be able to operate with banks or financial institutions, evaluate with a restrictive criteria the granting of loans to Nicolas Maduro regimen in international and regional financial organism that they belong to; and (iii) suspend military cooperation with Venezuela.

The same path was followed by the Permanent Council of the Organization of American States (“OAS”). The Council agreed "to not recognize the legitimacy of Nicolas Maduro’s new term as of the 10th of January of 2019" as well as to call for new Presidential elections with all necessary guarantees of a free, fair, transparent and legitimate process to be held at an early date attended by international observers. The resolution was approved with 19 votes in favor, 6 against, 8 abstentions and 1 absent.

Up to the moment of this report, the following countries had recognized the President of the National Assembly, Juan Guaido, as the President of Venezuela: Argentina, USA, Brazil, Colombia, Paraguay, Ecuador, Chile, Peru, Guatemala, Canada, Costa Rica, Panama, Honduras, Puerto Rico, European Union, France, UK, Italy, Denmark, Albany, Japan, and Georgia.

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New decision rejects long-standing arguments concerning greenhouse gas emissions

New greenfield mining projects that will create greenhouse gas emissions (and significant modifications to existing mining operations) may now face a higher bar for approval in NSW, and will require much more robust evidence about the impact of their Scope 3 emissions.

The decision by Chief Justice Preston of the New South Wales Land and Environment Court in Gloucester Resources Limited v Minister for Planning [2019] NSWLEC 7 **has rejected long-standing arguments concerning the relevance and impact of greenhouse gas emissions from coal mine developments** in determining whether or not to approve new projects. Although the Court's decision to reject the mine was primarily based on social and economic considerations, the Court held that the greenhouse gas emissions produced as a result of the mine (which would be a small fraction of global emissions) still have an effect on cumulative global warming, and therefore must be considered by the consent authority.

Given the potential for flow-on ramifications from the decision for other coal mine developments in Australia, there's an even stronger case now for legislative and policy changes to create a consistent approach to the assessment of coal mining developments nationwide.

Gloucester Resources' proposed mine

Notably, Gloucester Resources Limited's (**GRL**) development application was for a new open cut coal mine to produce coking coal for steel making (previous cases have been concerned with thermal coal mines to produce coal for power generation). The mine would have been located close to the town of Gloucester, and would have produced approximately 21 million tonnes of coal over 16 years.

Applying the relevant New South Wales statutory and policy framework, the Chief Justice stated:

> "the Project will yield public benefits, including economic benefits, but it will also have significant negative impacts, including visual amenity, social and climate change impacts and impacts on the existing, approved and likely preferred uses of the land in the vicinity of the Project, all of which are costs of the Project"

The Chief Justice noted that the relevant balancing exercise was a "qualitative" and not "quantitative" exercise and found:

> "As I have found elsewhere in the judgment, **the Project will have significant and unacceptable planning, visual and social impacts, which cannot be satisfactorily mitigated. The Project should be refused for these reasons alone.** [emphasis added] The greenhouse gas emissions of the Project and their likely contribution to the adverse impacts on the climate system, environment and people adds a further reason for refusal".

The standard arguments raised by Gloucester – and rejected by the Court

GRL argued that the mine's effects on climate change were acceptable for a number of reasons, four of which have been long-standing arguments before the courts:

- that Scope 3 emissions ("downstream" emissions produced when the coal is transported and burnt overseas) should not be considered in determining the application;
- the emissions only presented a small fraction of global emissions;
- the emissions would be offset by sinks or other reduction mechanisms; and
- if the mine was not allowed to go ahead, coal would be sourced from other jurisdictions with lower quality coal and regulatory standards (and therefore even higher emissions).

After reviewing a range of Australian and US decisions, and the *Urgenda Foundation* decision in the Netherlands, the Chief Justice found against the company on each of these arguments.

Scope 3 emissions must be considered

The Chief Justice found that the terms of the Department Secretary's environmental assessment requirements for the project, and the requirement of the consent authority to take into consideration the likely impacts of the development on the environment under the Environmental Planning and Assessment Act 1979 as well as the Mining State Environmental Planning Policy and other applicable environmental planning instruments, created an environmental assessment framework that required the consent authority to consider the impacts of greenhouse gas emissions – including downstream emissions along with direct and indirect emissions. These policies, along with the requirement to consider the "public interest" which incorporates the principles of ESD, meant that Scope 3 emissions were to be included in the consideration of the mine's impacts.

Local emissions contribute to global warming

Although the Chief Justice acknowledged that the total amount of emissions from the mine would be a small fraction of global emissions, he pointed out that the global problem of climate needs to be addressed by multiple local actions. According to the Chief Justice, there is a causal link for the Project's cumulative greenhouse gas emissions, as they will become part of the global total of greenhouse gas emissions which will affect the climate system and cause climate change impacts. The Chief Justice indicated that all emissions are important, and that climate change will only be averted by the abatement of greenhouse gas emissions which come from myriad individual sources.

Are the Scope 3 emissions offset?

GRL argued that the emissions would be offset by various sinks and reduction mechanisms. The Chief Justice found the offset argument to be **speculative and hypothetical**, and was not persuaded that there was any evidence before the Court of any specific and certain actions.

If we don't do it, someone else will

Finally, the Chief Justice found that the "market substitution argument" was fraught. He found no certainty that there would be market substitution by new coal mines in any other country supplying coal; all countries around the world are increasingly taking action to reduce greenhouse gas emissions, and there is no inevitability that developing countries will instead approve a new coal mine instead of the project. He found that **the potential for hypothetical but uncertain alternative development** to the same but certain unacceptable development is **not a reason** to approve that development.

Coking coal vs thermal coal

GRL also raised an argument that coking coal should be treated differently to thermal coal mines as it was necessary for steel production which was critical to society and there were currently limited substitutes. The Chief Justice rejected this argument on the basis that the current and future demand for coking coal for use in steel production can be met by other coking coal mines, both existing and approved in Australia.

This position, and the Court's position outlined above on the market substitution argument, is **inconsistent** with Queensland cases relating to thermal coal mines – for example, Hancock Coal Pty Ltd v Kelly and Department of Environment and Heritage Protection (No 4) [2014] QLC 12 (the evidence and findings were not disturbed in subsequent reviews and appeals). The Queensland Courts have accepted arguments that the thermal coal market was demand-driven and that if the new mine was not developed, the same amount of coal would need to be sourced from other mines, potentially in other jurisdictions where the quality of coal was poorer, leading to greater global greenhouse gas emissions.

What this will mean for your coal project

Whether you're seeking approval for new greenfield sites or significant modifications to your existing mining operations in NSW, you will need to be careful to ensure that you have assessed in detail the climate change impacts of your project as well as the other environmental, social and economic impacts, and present the most robust evidence to the consent authority.

It will be interesting to see whether the NSW Government will take steps through legislative or policy changes regarding how Scope 3 emissions are to be assessed for mining projects. This seems prudent given that these issues are more a matter of public policy for Parliament rather than the Courts.

GET IN TOUCH

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LEGAL MILESTONE: ENDOWMENT ACT IS ENACTED

Capital Markets

Law No. 13,800 was published in January 4, 2019, allowing the formation of endowments funds. It results from the conversion of Provisional Measure No. 851/2018, which was created after the destruction of the National Museum at Rio de Janeiro. The law regulates endowment funds that are constituted to support, with long term resources, institutions and projects focused on topics of public interest, such as education, science, public security, technology, culture, health and environment.

Popular in other countries, endowment funds are an alternative to fund and manage resources for entities dedicated to purposes of public interest.

The endowment funds can receive from individuals or legal entities donations that are invested by the organization that manages the endowment fund. The goal is to preserve the donated amount and solely use the output from the investments as a regular and stable source of resources.

The organization that manages the endowment fund shall fundraise and manage the endowment fund formed from the resources donated, as well as execute partnership instruments. It will be established in those instruments matters such as as which topic of public interest will be object of the partnership. If the supported institution has public nature, then the organization that manages the endowment shall also sign an execution term with the supported institution and, if necessary, with the organization that will execute the project or program of public interest. The execution term will determine details such as how the resources will be used and the responsibility of each party.

Additionally, the law establishes governance and transparency basis for the funds, which structure is composed by a Board of Directors, an Investments Committee and a Fiscal Board.

Note that it is prohibited the transfer of resources to the endowment funds from direct governmental bodies, autarchies, governmental funds, some public companies and the supported institution. The endowment funds shall not count on guarantees from the direct or indirect public administration and the organization that manages the fund shall be responsible for its obligations up to the limit of the assets and rights that integrate the endowment fund.

It is also worth mentioning there are three types of donations that can be admitted by the formation act of the endowment funds:

1. Non-restricted permanent donation: it is a resource which is incorporated as asset of the endowment fund. It cannot be redeemed as it can only be used in programs, projects and other purposes of public interest.

2. Restricted permanent donation with specific purpose: it is a resource which is incorporated as asset of the endowment fund. The output can be used in projects related to the purpose previously determined in the donation instrument.

3. Donation with specific purpose: it is a resource linked to a project previously determined in the donation instrument. It cannot be used immediately and shall be incorporated as asset of the endowment fund. The organization that manages the fund can redeem the original amount invested under the terms set forth in the donation instrument.

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Curtailment Rules Come Into Force for Production of Crude Oil and Crude Bitumen in Alberta

February 06, 2019

Written by Donald E. Greenfield Q.C. and Emerson Frostad

The government of Alberta has ordered and approved rules for curtailment of the production of crude oil and crude bitumen in Alberta. These rules took effect in January 2019. Following an announcement by Premier Rachel Notley on December 2, 2018, Order in Council 375/2018 was issued on December 3. Amendments were made on December 12 and 18, and January 30, 2019, by Orders in Council 434/18, 438/18 and 34/19 and are consolidated as Alberta Regulation 214/2018 (the "Curtailment Rules").

The Curtailment Rules currently provide that they are repealed effective December 31, 2019. The Curtailment Rules were the provincial government's response to a historically high differential between the price of the West Texas Intermediate and Western Canada Select grades of oil, which is regarded as being caused by constraints on access of Alberta oil to export markets, and among other things had resulted in high volumes of crude in storage. The initial stated intention was to reduce production by 325,000 barrels of crude oil and crude bitumen per day, or about 8.7 percent of provincial production. The provincial government announced on January 30, that aggregate provincial production for March would be set at 3.63 million barrels per day, an increase of 75,000 barrels per day from February 2019, due to storage volumes being drawn down.

The Curtailment Rules

The stated intent of the Curtailment Rules is to: (a) effect conservation and prevent wasteful operations; (b) prevent improvident disposition; and (c) ensure the prudent and economic development in the public interest of the crude bitumen and crude oil resources of Alberta. The Curtailment Rules supersede any approvals, directives or orders issued by the Alberta Energy Regulator (AER), and any agreements or approvals under the *Mines and Minerals Act,* RSA 2000, c M-17, that allow crude oil or crude bitumen production at a greater rate than is permitted under a curtailment order.

Effective in January 2019, the Curtailment Rules grant the Minster of Energy the authority to fix the combined provincial production of crude oil and crude bitumen in Alberta for a calendar month, which as mentioned above will be 3.56 million barrels per day in February and 3.63 million barrels per day in March. The Minister may also, by monthly order, allocate that combined provincial allocation to individual operators, in accordance with the formulae in the Schedule to the Curtailment Rules. These formulae are discussed below. Operators are not permitted to produce more than their allotment under a curtailment order. Infractions are subject to administrative penalties under the *Responsible Energy Development Act*, SA 2012, c R-17.3, as well as additional penalties under the *Oil Sands Conservation Act*, RSA 2000, c O-7, and the *Oil and Gas Conservation Act*, RSA 2000, c O-6.

The Curtailment Rules import the definition of "operator" from the *Oil Sands Conservation Act* in respect of crude bitumen, and define the operator as the "licensee" or "approval holder" as those terms are defined from the *Oil and Gas Conservation Act* in respect of crude oil. All operators and their production are therefore caught by the definition, regardless of whether the rights to extract from the underlying mineral estate are derived from Crown or freehold mineral leases. The volume restrictions are implemented at the operator level, meaning that it is in effect assumed for these purposes that the operator produces and controls 100 percent of the production from the well or oil sands project.

One of the amendments, which was in effect only for January 2019, meant that no operator would have its January production curtailed to a volume less than 84 percent of its October 2018 production. This curtailment floor provided operators with some certainty as to what their minimum production allotment will be in 2019. A second change, which is in effect for the months of January through March 2019, allows the Minister to amend an operator's curtailment order to increase the operator's allocation to an amount sufficient for the safe operation of an oil sands project if that project is the only such project operated by the operator and the project cannot be operated safely on the volume allocated under the original ministerial order applicable to that operator.

The Formulae

The Schedule contains the formulae for determining an operator's baseline production and adjusted baseline production, and for calculating the percentage that the combined provincial production allocation is of the aggregate of all operators' adjusted baseline production for the month in question.

Each operator's baseline production will be equal to the highest combined crude oil and crude bitumen production volume it achieved during any calendar month in the 12-month period starting with November 2017. Its adjusted baseline production will be equal to that volume minus 310,000 barrels.

The Minister may make "curtailment orders" only in respect of operators who have "adjusted baseline production" in excess of zero barrels, meaning, in other words, operators whose "baseline production" is in excess of 310,000 barrels. It is thought that because of this 310,000 barrel per month benchmark, only about 25 Alberta operators (the "Curtailed Operators") will be directly subject to curtailment orders. The Curtailment Rules also allow the Minister to curtail an operator who did not meet the 10,000 barrel per day threshold before November 2018, if the operator achieves that daily level over the course of a calendar month after October 2018.

The aggregate provincial production allocation is then distributed to the Curtailed Operators *pro rata* according to a formula that adds the 310,000 barrel benchmark volume back to their adjusted baseline production for the purpose of the allocation, and multiplies that volume by the percentage referred to above. This of course has the effect of allocating the province-wide curtailment percentage across only the Curtailed Operators.

Consequences, Intended and Otherwise

A Curtailed Operator could have a production allocation after curtailment that is higher than the volume of crude that it is capable of producing if, for example, it sold producing assets at some time after November 2017 and did not replace that production in Alberta or at all. The Curtailment Rules permit two or more operators to consolidate their respective allocations month by month and redistribute the

allocations among themselves as they see fit. This has reputedly created a market for unutilized monthly allocations.

Since the Curtailment Rules apply to production from both Crown leases and freehold leases, issues may arise under freehold leases that could expire in the absence of continuous production. The province changed the Curtailment Rules on January 30, 2019, to allow the Minister to amend a Curtailed Operator's curtailment order for subsequent months to increase the production allocation of that operator to a volume sufficient to retain its mineral rights if the Curtailed Operator can demonstrate to the Minister's satisfaction that at least 80 percent of its production is freehold production and that its production allocation would otherwise be insufficient to allow it to produce the volume contractually required to retain its freehold mineral rights. Curtailed Operators will have to manage their curtailments carefully if they produce a large proportion of their crude oil from freehold leases. The provisions of freehold leases vary, such that shutting in freehold wells because of curtailment orders may not result in lease expiries, for example, because of force majeure clauses. Of course, the result in each case is dependent on the terms of the particular lease.

The Curtailment Rules were also amended on January 30, 2019, to allow the Minister to increase a Curtailed Operator's allocation to mitigate a long-term loss of crude bitumen production if the Curtailed Operator can demonstrate to the Minister's satisfaction that it operates an *in situ* oil sands project using steam injection that accounts for at least 80 percent of its forecast 2019 production, that the 2019 volume forecast is at least 125 percent of its 2018 forecast for that project, that steam injection at the project had started in 2018 prior to December 3, and that compliance with the existing curtailment order would result in the long-term loss of crude bitumen production.

Most of the wells and projects operated by Curtailed Operators are owned jointly with other working interest partners, so those co-owners will see their production curtailed as well in some fashion, which may give rise to disputes between working interest owners regarding how an operator has allocated its curtailment across the operator's portfolio. How these disputes should be resolved will largely on the terms of the relevant contract(s), such as the force majeure provision and, if there is one, a provision that deals with legally mandated production cuts. The CAPL operating procedures in use in Alberta do not contain the latter type of provision. Operators of assets governed by CAPL operating procedures do not, for the most part, owe fiduciary duties to their working interest partners.

The Curtailment Rules contain a provision that applies to allow an operator who is comprised of two or more persons carrying on business as joint venture or partnership to agree as to how the production from the joint venture or partnership will be allocated to each participating party for the purposes of complying with a curtailment order. However, since well licences can be held only by corporations and individuals, and are typically held by one of the working interest owners, e.g., the operator named in the operating agreement, it is not clear what this rule was intended to accomplish nor what its effect will be.

Curtailment may have an impact on the liability management ratings of Curtailed Operators under the AER's rules relating to well licence transfers (e.g., where assets are being sold), since the formula for calculating the rating is based in part on trailing historical production revenue, although the effect will be mitigated because the calculation takes into account a rolling average of 36 trailing months, whereas the Curtailment Rules are currently intended to be in effect for only 12 months.

The Curtailment Rules could also affect producers who have contracts that require them to deliver minimum volumes of oil to purchasers or that contain take-or-pay or similar obligations to service providers. Again, the consequences will depend on the provisions of the applicable contracts.

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Posted on: February 5, 2019

DUE DILIGENCE WHEN BUYING A BUSINESS

Co-authored by Silvana M. Facchin and Su Ji Yim

Buying a business is a complex and risky undertaking. A thorough due diligence plan, however, will uncover potential weaknesses of a target business giving a prospective buyer the information it needs to make a fully-informed investment decision. That same information will also be used by the buyer's advisory team to negotiate deal terms which then allocate the business and legal risks among the parties.

How is Due Diligence Conducted?

Due diligence is the process whereby a buyer, together with its financial and legal advisors, investigates the legal, financial, and operational affairs of a target company in order to evaluate a purchase opportunity. A seller often responds to the inquiries directly or through a "virtual" data room that gives buyers electronic access to the seller's important information such as business plans, financial statements, material contracts, and lists of employees and assets to name a few.

Why is Due Diligence Important?

Due diligence is particularly important for the buyer who will inherit certain risks and liabilities associated with the target business, such as its material contracts and employee severance obligations. The buyer has one goal: to learn as much about the target company as possible before committing funds to purchase.

What Types of Inquiries are Made?

The scope of the inquiries depends on the target's industry, the parties' circumstances, the size of the transaction, and the deal structure itself. Due diligence is often divided into two general categories:

(a) *Financial:* A buyer's accountants and financial advisors will lead the investigations into the financial health of the target company. Past performance and future prospects are analyzed to understand the company's revenues, expenses, financing, accounts receivable, and other financial metrics. Financial statements are reviewed, human resources are evaluated, and corporate policies, such as business interruption and cybersecurity plans, are scrutinized.

(b) *Legal:* The buyer's lawyers will review the legal status of the target company and its contractual

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relationships with customers, suppliers, lenders, and employees. Legal counsel will typically suggest searching applicable governmental or third party agencies (such as Canada Revenue Agency, provincial taxation authorities, WorkSafe, Employment Standards, and the Courts) to determine whether there are any claims or proceedings against the target business.

When Should Due Diligence Begin?

It is advisable to begin the due diligence process as early as possible in the negotiations. This will allow the buyer more time to determine whether any government or third party consents and approvals are required and to address with the seller any issues which have been discovered. Also, certain government agencies may take several weeks or longer to respond to search inquiries.

What are Benefits of Due Diligence?

Due diligence allows the buyer to discover potential issues early in the acquisition process before significant time, money, and energy are expended on negotiating the purchase agreement and devising a transition plan.

The process will provide information about the organizational and capital structure of the company, determine if any consents or approvals from government, shareholders, or a financier are required, and uncover whether the company is subject to any real, potential or threatened claims and lawsuits. This vital information establishes the basis for the deal fundamentals including the purchase price, structure, representations and warranties, indemnifications and additional covenants to protect the buyer.

What are Potential Consequences of Inadequate Due Diligence?

By failing to conduct thorough due diligence prior to committing to an acquisition, the buyer risks making a poor decision based on an incomplete picture of the financial health and legal status of the target company. It may also limit the ability of the buyer's legal counsel to address such issues and protect the buyer, to the extent possible, through appropriate provisions in the purchase agreement.

The Business Lawyers at Richards Buell Sutton LLP have authored "Make Your Move" which is a tool to support entrepreneurs who are considering buying or selling a business in British Columbia. If you are interested in obtaining a copy, please contact us at rbs@rbs.ca.

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News Alerts

Law No. 21,132: New Predicate Offenses on Law No. 20,393 on Criminal Liability of Legal Entities

February 6, 2019

On January 31, 2019, **Law No. 21,132** came into force, **which strengthens the authorities of the National Fisheries Service** ("SERNAPESCA") and adds **new predicate offenses to Law No. 20,393 regarding criminal liability of legal entities.**

The law adds the following criminal offenses to the list of conducts that may result in criminal liability of legal entities:

Water Pollution
This criminal offense penalizes all who without authorization, or contravening their respective obligations or infringing applicable regulations, insert or cause the insertion into a sea, river, lake or other body of water, of chemical, biological or physical pollutants that cause damage to hydro-biological resources (e.g. fish, mollusks, crustaceans, among other species).

Violation of Fishing Bans
This criminal offense penalizes the processing, transformation, transportation, commercialization or storage of banned hydro-biological resources, and the processing, commercialization and storage of products derived from them.

Illegal Fishing of Seabed Resources
This criminal offense penalizes unauthorized extractive activities in restricted areas of management and exploitation of seabed resources.

Illegal Processing or Storage of Scarce (collapsed or overexploited) Products
This criminal offense penalizes anyone who processes or stores collapsed or overexploited hydro-biological resources, or products derived from them, without evidencing the legal procurement of such resources.

Companies —particularly but not exclusively those in the fishing industry— **should update their compliance programs to incorporate policies and procedures** to mitigate these new risks.

You can download Law No. 21,132 at: https://www.leychile.cl/Navegar?idNorma=1128370

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

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CSRC to Make QFII and RQFII Attractive Again

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On 31 January 2019, China Securities Regulatory Commission ("**CSRC**") issued consultation drafts of the *Measures for the Administration of Domestic Securities and Futures investment by Qualified Foreign Institutional Investors and RMB Qualified Foreign Institutional Investors* and the *Provisions on Issues Concerning the Implementation of the Measures for the Administration of Domestic Securities and Futures Investment by Qualified Foreign Institutional Investors and RMB Qualified Foreign Institutional Investors* (collectively the "**Consultation Drafts**")[1] to amend and consolidate rules related to qualified foreign institutional investors (**QFII**) and RMB Qualified Foreign Institutional Investors (**RQFII**) programs.

As one of the earliest financial market liberalization initiatives, QFII program used to attract many foreign institutional investors to the Chinese securities market and RQFII program has been an important supplement for such efforts. However, in recent years, with more alternative access channels becoming available (such as the Stock Connect and Bond Connect schemes), QFII and RQFII programs have gradually lost their attraction due to the relatively complicated application process, on-going compliance requirements and, more importantly, the limited investment scope which is largely overlapped with that of other schemes. The Consultation Drafts are intended to make the QFII and RQFII programs attractive again by further relaxing relevant restrictions and requirements. The key proposed changes under the Consultation Drafts include:

1. Merging QFII and RQFII regimes

Currently, QFII and RQFII programs are subject to separate rules and application procedures. The Consultation Drafts aim to consolidate all QFII and RQFII regulations into one set of unified rules to further synchronize the qualification requirements applicable to QFIIs and RQFIIs and mitigate regulatory arbitrage by investors. As a result, the only key difference between QFII and RQFII will be that RQFIIs will use offshore RMB for making investments while QFIIs will remit foreign currency into China, which will be converted into RMB for investments.

[1] The full versions of the Consultation Drafts are available at http://www.csrc.gov.cn/pub/zjhpublic/zjh/201901/t20190131_350601.htm (in Chinese) and http://www.csrc.gov.cn/pub/csrc_en/newsfacts/PressConference/201901/t20190131_350613.html?from=timeline&isappinstalled=0 (in English).

2. Expanding investment scope

The Consultation Drafts will significantly expand the investment scope for QFIIs/RQFIIs. In addition to the currently permissible asset classes which mainly include A-shares, bonds, public securities investment funds and stock index futures, QFIIs/RQFIIs will be able to invest in (i) shares traded on the National Equities Exchange and Quotations (NEEQ); (ii) bond repo; (iii) private investment funds; (iv) financial futures listed and traded on the China Financial Futures Exchange (CFFEX); (v) commodity futures traded on futures exchanges approved by CSRC; and (vi) options traded on futures exchanges approved by the State Council or CSRC. QFIIs/RQFIIs will also be allowed to participate in margin trading and securities lending on domestic stock exchanges.

It is worth noting that the investment scope of the permissible private investment funds shall be within the permissible investment scope of QFIIs/RQFIIs.

3. Facilitating engagement of investment advisors

The Consultation Drafts explicitly permit a QFII/RQFII to engage its affiliated domestic private securities investment fund manager for investment advisory services.

4. Clarifying beneficial ownership of assets

The Consultation Drafts stipulate that the assets under a "Qualified Investor + Client Name/Client Assets" account belong to the clients and are separate and independent from those of the QFII/RQFII and its custodian.

5. Enhancing ongoing supervision

The Consultation Drafts reflect PRC regulator's intention to enhance ongoing supervision on QFIIs/RQFIIs, including account and trading monitoring by brokers, information sharing by exchanges and depositaries, additional information disclosure on offshore hedging positions related to onshore investment, and the "look-through" approach for underlying investors' compliance with holding limits and disclosure of interest requirements. The corresponding penalties for violations are also specified.

The issuance of the Consultation Drafts is seen as a very positive development and has shown CSRC's intent to address foreign investors' common concerns and promote inbound investments. In particular, allowing the QFIIs/RQFIIs to invest in onshore private investment funds and engage affiliated domestic private securities investment fund managers for investment consulting services will also benefit foreign asset managers' onshore private securities investment fund management (known as "WFOE PFM") business.

However, there may still be a few points worth further clarifying with CSRC such as the aggregation requirements on applying disclosure of interest/short swing profit rule to foreign managers and potential waiver grant.

The consultation period will end on 2 March 2019 and we will continue to closely monitor for any developments.

Important Announcement

This Legal Commentary has been prepared for clients and professional associates of Han Kun Law Offices. Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused. The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases.

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Brigard Urrutia

COLOMBIA: Renewable Energy Projects exempted from the DAA

Decree 2462 of 2018 exempted solar, wind, geothermal and tidal projects from conducting the DAA. Biomass projects will remain subject to said study.

On December 28, 2018, the Ministry of Environment and Sustainable Development (MADS for its acronym in Spanish) issued Decree 2462, according to which projects for the exploration and use of renewable energy sources (solar, wind, geothermal and tidal) with a capacity equal or greater than 10MW, are exempted from filing the Environmental Diagnosis of Alternatives Study (DAA by its acronym in Spanish).

On December 28, 2018, the Ministry of Environment and Sustainable Development - MADS issued Decree 2462 by which a transitory paragraph was added to paragraph 7 of article 2.2.2.3.4.2 of Decree 1076 of 2015.

This new paragraph rules that projects aiming at exploring or making use of renewable energy sources (particularly solar, wind, geothermal and tidal) with a capacity equal or greater than 10MW, are exempted from filing the Environmental Diagnosis of Alternatives Study (DAA by its acronym in Spanish). According to this modification, the obligation to file a DAA remains in force for biomass energy projects only.

In addition, the new paragraph clarifies that the ongoing proceedings to file or to analyze DAA´s already submitted shall be terminated upon the request of the beneficiary of the project.

This new regulation is intended to foster renewable energy projects in Colombia by means of facilitating the environmental proceedings applicable. The latter, in accordance with the rules and instructions set by the Colombian Green Growth Policy adopted by the CONPES 3934 of 2018.

The decree entered in full force upon its publication in the Official Gazzete.

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THE ESMA PREPARES FOR A POTENTIAL HARD BREXIT

While the outcome of political negotiations between the European Union and the United Kingdom still remain unclear, pragmatic solutions are being implemented in the sphere of financial regulation to limit the market disruptions in the event the UK leaves the EU without an agreement on 29 March 2019.

With this in mind, the ESMA (European Securities and Markets Authority) recently released several decisions and public statements, the result of several months' worth of negotiations between the 27 competent national authorities and with the British Financial Conduct Authority (FCA). These announcements are vital to ensure the proper operation of the single market in the event of a hard Brexit, and also look to reassure the market on the level of preparation of European supervisory authorities.

GUARANTEEING THE EFFICIENT OPERATION OF THE SINGLE MARKET AND THE STABILITY OF THE EURO ZONE: GRANTING ACCESS TO CENTRAL COUNTERPARTIES LOCATED IN THE UK

The key matter in the negotiations between the EU and the UK in terms of financial regulation is the access to central counterparties (or CCPs) located in London. It was unilaterally solved by the European Commission through the publication of an implementing decision in December 2018[1]. This decision determines, for a temporary 12-month period, that the **regulatory framework applicable to central counterparties in the UK is equivalent to the EU framework.**

To render this political decision operational, it was however necessary, in application of article 25(2)(c) of the EMIR[2] regulation, that the ESMA enter into a Memorandum of Understanding (MoU) with the British supervisory authority (in this case, the Bank of England) to enable the coordinated supervision of cross-border activities carried out by British players. An MoU to this end was agreed on 4 February 2019. Without going so far as to reveal the terms of this agreement, which will only come into force in the event of a hard Brexit, the ESMA announced that it had drawn up a cooperation agreement with the Bank of England (read the press release here). The ESMA also indicated that the decisions pertaining to the recognition[3] of British players would be taken before the cut-off date of 29 March 2019, but that they would only take effect if a no Brexit deal was reached between the EU and the UK.

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[1] Commission Implementing Decision (EU) determining, for a limited period of time, that the regulatory framework applicable to central counterparties in the United Kingdom of Great Britain and Northern Ireland is equivalent, in accordance with Regulation (EU) No 648/2012 of the European Parliament and of the Council(C(2018)9139).

[2] EU regulation no. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories. Text with EEA relevance.

[3] In application of article 25(2) of the EMIR, the ESMA is competent to recognise the central counterparties of third countries, subject in particular to the publication by the European Commission of an equivalency decision (article 25(2)(a)) and the conclusion of a cooperation agreement between the ESMA and the competent authority of such third country (article 25(2)(c)).

ORGANISING COOPERATION WITH THE FCA AND GUARANTEEING THE CONVERGENCE OF SUPERVISORY PRACTICES WITHIN EU-27

On 1 February 2019, the ESMA had announced the conclusion of a Multilateral Memorandum of Understanding (MMoU) between the FCA on the one hand, and the 27 competent national authorities on the other (read the press release here). To avoid having a plethora of bilateral cooperation agreements in place between the FCA and each of the 27 competent national authorities, and thereby limit any potential discrepancies and regulatory arbitrage, the ESMA lobbied for the implementation of a single multilateral MOU. This agreement aims to enable parties to exchange information, in particular as regards market supervision. It will also be instrumental in the asset management sector to uphold existing delegation and outsourcing structures put in place between European entities and British entities[4].

AFFORD CLARITY TO STAKEHOLDERS ON IMPLEMENTING CERTAIN PROVISIONS OF EU LAW IN THE EVENT OF A HARD BREXIT

On 5 February 2019, the ESMA published a public statement on the impact of a hard Brexit on ESMA databases and transparency calculations provided for in MiFID II/MiFIR[5]. In the event of a no-deal Brexit, from 30 March 2019 the ESMA will stop receiving any data from British entities, in particular from negotiation platforms and systematic internalisers. The ESMA uses such data to calculate thresholds applicable depending on observed market activity (reference data). To enable market stakeholders to anticipate demands that will be applicable to them in the event of a no-deal Brexit, the ESMA details in its statement the conditions and frequency of calculation of these various thresholds. Considering the uncertainty surrounding the quality of data that will be collected post-Brexit, the ESMA will defer the publication of certain calculations, in particular: the quarterly calculations for the SI-determination for equity instruments and bonds, the quarterly determination of the liquidity status of bonds and the monthly DVC (double volume cap) publications.

The pre-Brexit calculations that integrate British data will therefore continue to apply for several months in the event of a no-deal Brexit.

For the same sake of clarity, on 1 February 2019 the ESMA published another public statement regarding reporting requirements applicable under the EMIR. Lastly, the ESMA clarified in a set of Q&As[6] the way in which certain provisions of EU law would apply in the event of a hard Brexit, in particular the requirements applicable under the transparency and prospectus directives (respectively directives no. 2004/109/EC and 2003/71/EC).

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[4] As a reminder, article 13(1)(d) of EU directive no. 2009/65/EC ("UCITS Directive") and article 20(1)(d) of directive no. 2011/61/EU ("AIFM Directive") require cooperation between the competent authority of the delegating management company located within the EU and the competent authority of the delegatee located outside the EU.

[5] Directive 2014/65/EU of 15 May 2014 (MiFID II) and regulation 600/2014 of 15 May 2014 (MiFIR).

[6] ESMA, "Questions and Answers, Prospectuses, 29th updated version - January 2019" and "Questions and answers, Transparency Directive (2004/109/EC)".

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Malaysian Government Launches National Anti-Corruption Plan 2019-2023

The Prime Minister of Malaysia launched the National Anti-Corruption Plan 2019-2023 ('NACP') on 29 January 2019.

The NACP aims to make Malaysia corruption-free by 2023. It focuses on six priority areas, namely political governance, public sector administration, public procurement, legal and judicial, law enforcement and corporate governance upon which six key strategies have been formulated, namely-

- Strategy 1: Strengthen political integrity and accountability;
- Strategy 2: Strengthen effectiveness of public service delivery;
- Strategy 3: Increase efficiency and transparency in public procurement;
- Strategy 4: Enhance the credibility of the legal and judicial system;
- Strategy 5: Institutionalise credibility of law enforcement agencies; and
- Strategy 6: Inculcate good governance in corporate entity.

The aforesaid strategies have led to 17 strategic objectives which produced 115 initiatives to be initiated from 2019 to 2023, of which 22 have been identified as priority initiatives based on the urgency to deal with the intensity of the causes.

The 22 priority initiatives include the following –

Strategy 1

- Introduce new legislation to govern political funding and to make lobbying an offence (by December 2020)
- Introduce a proper asset declaration system for Members of the Administration and Members of Parliament (by December 2019 and December 2023 respectively)
- Prohibit issue of letters of support by Members of the Administration or Highly Influential Persons (by December 2019)
- Introduce policy on appointing politicians as chairperson or directors of Statutory Bodies, State-Owned Enterprises and Government Established Companies Limited by Guarantee based strictly on their academic and/or professional qualifications (by December 2019)

Strategy 2

- Manage the involvement and appointment of Senior Government Officials as members of Board of Directors and CEO in all State Owned Enterprises and Statutory Bodies (by December 2019)
- Introduce a transparent guideline on the appointment of Special Officers, Political Secretaries, Private Secretaries and Media Secretaries for all Ministers and Deputy Ministers including a limit on the number of appointments, salaries and entitlements (by December 2019)

Strategy 3

- Ensure that departments and regulators carry out projects based on the advice and recommendation by Technical Departments such as the Public Works Department and related technical agencies (by December 2019)
- Create accountability and transparency in defining the exercise of power of the Minister as stipulated in legal provisions especially in procurement and financial system (by December 2023)

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- Introduce standard clauses in project procurements to protect the Government's interest in all projects/contracts involving Government, Statutory Bodies and State-Owned Enterprises, including the right at any given time to terminate the contract in event of breach by the other party (by December 2019)

Strategy 4

- Promote clear separation of powers and impartiality, i.e. the separation of the powers of the Attorney General and of the Public Prosecutor (by December 2023)
- Prioritise corruption cases to be handled by judges and public prosecutors who are trained and/or experienced in corruption cases (by December 2020)

Strategy 5

- Transform and convert the Enforcement Agency Integrity Commission (EAIC) into an Independent Police Complaints and Misconduct Commission (IPCMC) to address integrity issues and curb misconduct by the police force (by December 2023)
- Introduce a new provision in the Malaysian Anti-Corruption Commission Act 2009 to make it an offence for any party to sell a Government project/tender to another for monetary gains without undertaking the project/tender; and to require any person who benefits from the sale of the project/tender to reveal the beneficial ownership (by December 2023)

Strategy 6

- Introduce an integrity vetting requirement as a selection criteria of top management positions in Statutory Bodies, State-Owned Enterprises and Government Established Companies Limited by Guarantee (by December 2019)
- Impose a conditional approach on the purpose and utilisation of funds provided by the Government to all Statutory Bodies, State-Owned Enterprises and Government Established Companies Limited by Guarantee (by December 2020)

Other key initiatives set out in the NACP include the following –

Strategy 1

- Strengthen the independence and widen the autonomy of the National Audit Department by placing it under Parliament (by December 2019)
- Transform the Public Complaints Bureau into Malaysian Ombudsman (by December 2020)
- Amend the Federal and States' Constitutions to limit the term of office of the Prime Minister. Chief Minister and Menteri Besar (by December 2023)
- Introduce new legislation on Freedom of Information (by December 2023)
- Require the elected Speaker of the Dewan Rakyat to resign from any post held by him in any political party and to appoint a Deputy Speaker of the Dewan Rakyat from the members of the Opposition (by December 2020)
- Introduce a written guideline on the role of the caretaker government (by December 2020)
- Establish separate Parliamentary Select Committees to oversee the Malaysian Anti-Corruption Commission, Ombudsman Malaysia and Election Commission Malaysia (by December 2023)

Strategy 2

- Establish a strong and effective mechanism in the issuance of permits and licensing (by December 2023)

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- Introduce a policy on managing the appointment of consultants in terms of their roles and responsibilities as well as to minimise their involvement in financial matters and organisational policies (by December 2019)
- Introduce a policy or guideline for the "cooling-off" period for public officials and senior civil servants moving to executive posts in corporate entities (by December 2019)
- Govern the power of Politicians and Highly Influential Persons including the limitations, inter alia, influences, interferences and subjections of control in Local Authority performance and decision-making (by December 2020)

Strategy 3

- Introduce a comprehensive procurement policy on disclosure of conflict of interest during the procurement process (by December 2019)
- Introduce legislation on public procurement to regulate procurement activities, improve efficient resource utilisation and safeguard public and national interest (by December 2023)
- Introduce a more transparent mechanism in preventing information leakages in the procurement process (by December 2019)
- Introduce a checks and balances mechanism in procurement dealings with the involvement of the Integrity Unit and Internal Audit Officers (by December 2020)

Strategy 4

- Review and revise the Judges' Code of Ethics to prohibit judges from accepting appointments to positions in any commercial entity for three years following their retirement (by December 2020)

Strategy 5

- Establish a National Anti-Financial Crime Centre as a centre to manage the seizure and forfeiture of assets through integrated enforcement (by December 2019)
- Insert a new provision in the existing laws that criminalises misconduct in public office which imposes punitive measures against public officials who deliberately cause leakage or wastage of Government funds (by December 2023)
- Amend the Immigration Act 1959/63 to provide an express power to blacklist persons from leaving the country under limited circumstances defined by law (by December 2023)
- To propose a minimum imprisonment penalty for corruption offences under the Malaysian Anti-Corruption Commission Act 2009 (by December 2023)

Strategy 6

- Impose full disclosure of Statutory Bodies, State-Owned Enterprises and Government Established Companies Limited by Guarantee on direct and indirect shareholding of senior management, individual director's and key management personnel's directorship positions in other public companies (listed or otherwise), remuneration of individual directors on a detailed basis and senior management on a bands basis (by December 2020)
- Issue a Prime Minister's Directive to govern disclosure of conflict of interest, as well as efficiency and transparency in Statutory Bodies, State-Owned Enterprises and Government Established Companies Limited by Guarantee (by December 2020)
- Establish a full disclosure mechanism on information regarding subsidiaries and non-consolidated companies of Statutory Bodies, State-Owned Enterprises and Government Established Companies Limited by Guarantee (by December 2020)
- Introduce a legal provision that prohibits Statutory Bodies, State-Owned Enterprises and Government Established Companies Limited by Guarantee from making contributions to politicians and political parties (by December 2023)

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The successful implementation of the initiatives set out above will go a long way in reducing corruption and improving public administration in Malaysia.

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LEGAL UPDATE

January, 2019

Merger Review Notification Thresholds Update

On January 9, 2019 the National Institute of Statistics and Geography published the update of the Unit of Measure and Adjustment, "UMA" ("*Unidad de Medida y Actualización*"), that is used to determine the amount of the governmental duties to be paid to the Mexican governmental agencies.

After the update, the UMA's daily value for 2019 will be MX$84.49.

As a result of the update, the thresholds for determining if a concentration will require prior authorization from the Federal Economic Competition Commission ("COFECE") or the Federal Institute of Telecommunications ("IFT") beginning February 1, 2019, will be the following:

	Threshold in UMAs	Threshold in Mexican Pesos	Threshold in US Dollars[1]
I. When the act or succession of acts originating the transaction, regardless of the place of execution, amount, directly or indirectly, in the Mexican Republic, to more than eighteen million times the value of the unit of measure and adjustment;	18,000,000	$1,520,820,000.00	$79,044,698
II. When the act or succession of acts originating the transaction, imply the accumulation of thirty five percent or more of the assets or equity of an economic agent, whose assets are located in the Mexican Republic or sales originated in the Mexican Republic (measured on an annual basis), are valued at over eighteen million times the value of the unit of measure and adjustment; or	18,000,000	$1,520,820,000.00	$79,044,698

[1] Exchange rate of January 10, 2019 (MX19.24 por US$1.00).

III. When the act or succession of acts originating the transaction, imply an accumulation in the Mexican Republic of assets or equity valued at over 8.4 million times the value of the unit of measure and adjustment, and where two or more economic agents participate, whose assets in Mexico or annual sales in Mexico, either jointly or individually, are more than forty eight million times the value of the unit of measure and adjustment.	8,400,000	$709,716,000.00	$36,887,525
	48,000,000	$4,055,520,000.00	$210,785,862

Additionally, as established by article 77 of the Federal Law on Governmental Duties and Annex 19 of the Annual or periodic adjustments to Mexican tax laws ("*Resolución Miscelánea Fiscal 2019*"), those who notify a concentration to the COFECE or the IFT must pay the amount of MX$184,539 in governmental duties.

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

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Netherlands

Lower House of Dutch Parliament adopts bill introducing a collective damages action

Wednesday, 6 February 2019

On January 29th, 2019, a bill introducing a collective damages action on an opt-out basis for persons domiciled in the Netherlands was adopted by the lower house of Dutch Parliament. The bill will now be submitted to the upper house for approval. If approved, the bill may come in to force and effect on July 1st, 2019 at the earliest. However, this would require a rather swift approval process and January 1st, 2020, seems to be the more likely effective date.

Under the current collective litigation regime, no monetary damages can be sought on a collective basis. The essence of the bill is that this restriction will be removed, so that a group action for monetary damages is possible. At the same time, the bar is raised for collective claims in order to achieve a fair and balanced system, which provides a higher level of finality for defendants. Under the new regime, finality is also increased by making a court ruling awarding or denying the collective relief sought binding on the individual members of the group, whereas under the current regime, there is no such binding effect.

The general outlines of the bill are as follows:

1. The aim of the bill is to increase the likelihood of reaching a settlement by (i) improving the quality of collective action organizations, (ii) co-ordination of collective proceedings and (iii) achieving more finality.

2. There will be one single statutory regime for collective actions, regardless of whether these are used to seek monetary damages or other relief. This new regime will apply to collective actions filed after the date on which the Bill will come into force and effect and must relate to an event or events which occurred on or after 15 November 2016.

3. The bill tightens the threshold requirements to be met by collective action organizations in order to have their collective claims admitted as far as governance, funding and representation are concerned.

4. In addition, there must be a sufficiently strong connection between the collective claim and the jurisdiction of The Netherlands in order to be admitted as a collective action. This is the case if (i) the majority of the persons in whose interest the action is brought reside in The Netherlands, or (ii) the defendant is domiciled in The Netherlands and there are additional circumstances which are indicative of a sufficient link with the jurisdiction of this country or (iii) the event or events to which the action relates took place in The Netherlands. This criterion is separate from the criteria applicable to the determination of the international jurisdiction of the Dutch court.

5. All collective claims must be entered into a central register for collective actions.

6. If there are more collective action organizations wishing to bring an action for the same event(s) on similar points of law and of fact, the court will select the most suitable organization as Exclusive Representative for all injured parties domiciled in the Netherlands and for non residents who have opted in.

7. The non-selected representatives remain parties in the proceedings.

8. After the appointme of the Exclusive Representative individual members of the group for whose benefit the action has been brought can withdraw from this group by opting out. The action will then go forward on the merits. Those who opt out must pursue their claim individually and will not be able to benefit from the collective action. This should

increase finality and should decrease the risk of free riding.

9. The court judgment is binding on all injured parties domiciled in the Netherlands who have not opted out and on all non Dutch residents who opted in.

With this bill, the Dutch legislator seeks to strike a proper balance between the parties for whose benefit the collective action is brought on the one hand and the defendants on the other. The stricter requirements for admissibility that are to be applied by the court at the start of the proceedings have also been introduced with the aim of protecting the parties whose interests are to be represented. This will probably lead to a further professionalization of foundations and associations that wish to bring collective actions.

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Regulatory developments for electricity distributors on their way in 2019

February 04, 2019

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2019 is set to be a busy year for electricity distributors. As well as the Commerce Commission resetting the default price-quality path for electricity distributors, there are other significant regulatory developments in the pipeline. We summarise those in this FYI.

Distribution and transmission pricing

The first report of the Electricity Price Review described current distribution pricing as "outdated". Most consumers pay a flat amount per kWh for distribution services regardless of when the electricity is used. This does not take into account peak usage across the network which is a significant driver of network investment. This misalignment will get worse with the predicted uptake of electric vehicles and electrification of the economy generally.

The Electricity Authority is now consulting on changing the Distribution Pricing Principles. These are principles for how distributors set their prices which were first published by the Electricity Commission in 2010. The Distribution Pricing Principles are not binding or prescriptive, so distributors will retain flexibility to design their own pricing plans. However, the Authority signals in the consultation paper that it expects distributors to transition to pricing plans that use static or dynamic peak charges for network use and fixed charges for network access. The Authority intends to assess annually how well distributor pricing plans align with the new principles and publish star-ratings. Submissions on the Authority's consultation paper close on 19 February.

Transmission pricing is also on the agenda in 2019. The Authority intends to restart the process of setting new transmission pricing methodology guidelines, on the basis of which Transpower will be required to draft a new transmission pricing methodology. Consistent with its proposals in 2017, which did not progress due to problems with the cost-benefit analysis supporting them, the Authority says it intends to replace the current interconnection and HVDC charges with new benefit-based and residual charges. This will result in wealth transfers amongst distributors and between distributors and other industry participants, although we expect those transfers to be less pronounced given the industry and political reaction last time. The Authority intends to start consultation on the new guidelines in June 2019.

Default distribution agreement

The Electricity Industry Participation Code (Code) does not contain a default agreement for electricity retailers' use of distribution networks (default distribution agreement or DDA). The Authority has published model distribution agreements but they have not been widely adopted. The Authority intends to introduce a DDA in order to simplify and standardise contractual arrangements between distributors and retailers.

The Authority's first foray into this area ended up in court. Vector (and Entrust, Vector's principal shareholder)

challenged the Authority's proposal to prescribe standard contract terms for distribution agreements and prohibit individually negotiated terms. The Authority prevailed in the High Court, but in November 2018 the Court of Appeal allowed Vector's appeal in part. In a preliminary decision[1] the Court of Appeal decided that, while the Authority can impose standard terms for distribution agreements via the Code, it cannot impose a blanket prohibition on the parties negotiating other terms that are not inconsistent with the prescribed ones (as the Authority had proposed to do).

The Authority says it will continue to develop its DDA proposal.

Review of tree trimming regulations

The Minister of Energy and Resources has announced a full review of the Electricity (Hazards from Trees) Regulations 2003 to take place during 2019. MBIE is expected to release a consultation paper in the second half of the year.

Outages caused by trees contacting lines are common, and vegetation-related maintenance is a very significant cost for electricity distributors. The Regulations are not effectively mitigating these issues. A review of the Regulations is overdue.

Some changes that should be considered are:

- increasing the growth limit zone around conductors;
- extending the Regulations to d eal with fall-distance trees; and
- providing clear rights for network operators to come onto private property to carry out tree trimming or felling to protect their lines, including when the tree owner cannot easily be contacted or does not respond to notices.

If you would like to discuss any of these matters and how they may directly affect your organisation, please contact our Corporate/Commercial and Regulatory experts.

[1] There remains an issue about the effect of section 32(2) of the Electricity Industry Act 2010, which is about the demarcation between the Authority's and the Commerce Commission's regulatory responsibilities. The Court requested further submissions on this point.

NICARAGUA: New Changes to Social Security

January, 2019

Today´s resolution from the Directive Council of the Nicaraguan Social Security Institute (INSS, in Spanish) approved the following changes to the social security system:

1. Increase to employer and worker´s contributions to the Integral Regime.
    - *Contributions of employers with more than 50 employees, increase from 19% to 22.5%.*
    - *Contributions of employers with less than 50 employees, increase from 19% to 21.5%.*
    - *Employee contributions increase (under both scenarios) from 6.25% to 7%.*
    - *State contributions (under both scenarios) increases from 0.25% to 1.75%.*
2. Increase to employer and worker´s contributions to the Disability, Old Age, Death and Professional Risks Regime.
    - *Contributions of employers with more than 50 employees, increase from 13% to 16.5%.*
    - *Contributions of the employer with less than 50 employees, increase from 13% to 15.5%.*
    - *Employee contributions increase (under both scenarios) from 4.25% to 5%.*
3. There are no limits to the maximum amount subject to affiliates' contributions.
4. Increase to contributions to the Optional Integral Regime from 18.25% to 22.25%
5. Increase to contributions to the Optional Disability, Old Age, Death and Professional Risks Regime from 10% to 14%
6. Changes to calculations of pensions, increasing the number of weeks contributed to the social system from 250 to 375.
7. Changes to the calculation of pensions, reducing amounts payable to retirees as well as reductions of pensions payable to disabled spouses, minor children and elderly dependents.
8. Pension amounts will be reviewed on November 30th of each year. The maximum pension granted by INSS remains at US $ 1,500.00 dollars.

The above changes are effective as of February 1, 2019.

Starboard News: Salvage reward and treasure

January 28, 2019

The Singapore government is proposing to implement the International Convention on Salvage, 1989 (the 1989 Salvage Convention).

In November 2018, the government presented a bill in Parliament which proposes among other things to implement the 1989 Salvage Convention in virtually every respect, except where salvage takes place in inland waters involving inland water vessels or where the salvage operation concerns seabed maritime cultural property of prehistoric, archeological or historic importance.

Readers familiar with the law on salvage would no doubt know that the 1989 Salvage Convention replaced the Brussels Convention on Assistance and Salvage at Sea as the principal multilateral document governing marine salvage and that the 1989 Salvage Convention's main innovation is to reward 'environmental salvage', such that a tribunal should fix the salvage reward by taking into account factors that include the skill and efforts of the salvors in preventing or minimizing damage to the environment. Also, if the salvor has carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment the salvor is entitled to special compensation from the owner of that vessel 'equivalent to his expenses'. In The Nagasaki Spirit [1997] 1 A.C. 455, the House of Lords held that 'expenses' in its ordinary meaning denoted amounts either disbursed or borne and not earned as profits and that the computation of special compensation did not concern remuneration and pointed to a quantification which contained no profit element. As the provision of the 1989 Salvage Convention may be displaced by contract, this decision led to the marine insurance industry developing the SCOPIC Clause in LOF forms to provide for environmental salvage remuneration.

By its terms, the 1989 Salvage Convention applies to 'acts or activities undertaken to assist a vessel or any other property in danger in navigable waters'. If it is enacted as law in Singapore, the terms of such an enactment make clear that salvage of seabed maritime cultural property of prehistoric, archaeological or historic importance (hereafter known as 'treasure salvage') is excluded, probably in recognition of the fact that treasure salvage involves a different set of urgencies, risks and rewards and the fact that the region is a prime area for treasure salvage. Cases on treasure salvage in which Starboard has had the privilege of being involved contain references to the recovery of treasures in regional waters, for example, the Geldermalsen/Nanking cargo, the Tek Sing shipwreck and the Tang Cargo.

Starboard will monitor the progress of the bill and update readers.

Sources:

Merchant Shipping (Miscellaneous Amendments) Bill, no.49/2018

Treasure Valley Group Ltd v Saputra Teddy and another (Ultramarine Holdings Ltd, intervener) [2006] 1 SLR(R) 358

Rickshaw Investments Ltd and another v Nicolai Baron von Uexkull [2006] 2 SLR(R) 850

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Acquisition of Trademark Registration for 3-Stripes Logo by Adidas

31 January, 2019
Cathy C. W. Ting/ Selina S. Y. Lin

Article 29-1(3) of the Taiwan Trademark Act provides that a trademark may not be registered if it consists merely of other non-distinctive signs. Article 29-2 of the Act provides that Article 29-1(3) shall not apply if the proposed trademark has been used by the applicant and has become an identifier of the applicant's goods or services in the course of trade. According to the examination criteria of the Taiwan Intellectual Property Office ("TIPO"), in general, consumers will not consider simple lines or decorative patterns as signs denoting and distinguishing the source of goods or services. In principle, simple lines or decorative patterns are not distinctive.

Judgments No. 106-Xing-Shang-Su-Zi-50 issued on 1 August 2018 and No. 106-Xing-Shang-Su-Zi-57 issued on 6 September 2018 by the Taiwan Intellectual Property Court ("IP Court") rule that as adidas has used TM "3-Stripes Logo" on specific positions of the external sides of jackets or trousers, i.e.

"  " and "  ",

these logos have acquired distinctiveness and shall be registered as position trademarks. The judgments also manifest the important judgment principles.

The IP Court considers that the 3-Stripes trademarks, sought to be registered by adidas, may be deemed decorative lines, but they are applied on a specific position of the external sides of jackets or trousers. As noted, the specific positon becomes an important feature of the proposed trademarks, and adidas has submitted adequate evidence certifying that the "3-Stripes" trademarks have been extensively used in connection with jackets or trousers in market for a long time. In consequence, it can be ascertained that before filing, the "3-Stripes" trademarks had made relevant consumers recognize them as source indicators of adidas' goods and had acquired distinctiveness.

The IP Court further states in the judgments that, as adidas' 3-Stripes trademarks have acquired distinctiveness and thus, enable relevant consumers to recognize them as signs denoting the source of adidas' goods, they shall be granted registration to protect adidas' rights and relevant consumers against any confusion. By doing so, it can maintain trade order and fair competition in the market. Thus, the decisions made by the TIPO and the Taiwan Ministry of Economic Affairs have been cancelled. Subsequently, the TIPO has rendered new decisions to approve the registrations of adidas' above 3-Stripes trademarks.

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Employee Issues Arising In Investigations

See the full Investigations Toolkit at *bakerbotts.com*.

1. WHAT INFORMATION SHOULD YOU GIVE EMPLOYEES?

Carefully balance when and what to tell employees about the investigation.

- Existence of investigation:
  - Employees generally learn of an investigation when they receive a document retention notice or when they are asked to provide access to their files.
  - Consider responding individually to employee questions about the investigation *process* (e.g., who is leading; will the employee be interviewed).

- Findings:
  - While U.S. law protects certain communications with employees under the company's *attorney-client privilege* (*Upjohn*), sharing the findings of an investigation increases the chance of public disclosure.
  - Employees may ignore confidentiality warnings and discuss findings with third parties, endangering the company's privilege.
  - Other countries may not share the U.S. view on privilege; outside the U.S. internal disclosures may constitute a privilege waiver.

Key Reminders

- Keep employees on a "need to know" basis to protect confidentiality, avoid confusing memories, and limit the risk of coordinating recollections.
- Company counsel may decide to limit its legal representation to the company only to ensure no future risk of disqualification based on a later-identified conflict of interest.
- Consider sharing "lessons learned" from an investigation through training sessions or by announcing revised policies. These lessons will necessarily be drawn from the disclosed facts and legal analysis, but rarely need to disclose either to be effective.

2. WHEN SHOULD YOU HIRE INDEPENDENT COUNSEL?

Explore whether it is in the company's best interest for employees to be represented by separate counsel and how to interact with such counsel.

- When to hire independent counsel:
  - Do you expect that the state or federal government may question that employee as a witness, subject, or target and has company counsel advises against a joint representation?
  - Has the company learned of conduct that may lead to separate criminal or regulatory exposure for that employee (e.g., debarment; suspension; indictment)?

- Whether to pay independent counsel:
  - Does the employee have a right to indemnification (e.g., employment agreement; collective bargaining)?
  - Will company's interests be better served with employees being ably represented during any questioning?
  - What precedent will this set for other employees requesting similar treatment?
  - What is the company's status with the investigating authorities? While the U.S. Department of Justice no longer formally views company-funded legal counsel for an employee to be inconsistent with cooperation, the company may still receive queries from individual prosecutors about this decision.

- What to share or accept with independent counsel:
  - *Give nothing* – Is it in the company's interest to have a prepared witness or counsel? Could the company face additional scrutiny or expense due to uninformed witness responses? Are there strategic or tactical benefits for this witness?
  - *Give something* – How much information does the witness or counsel need to prepare for their issues? Can you limit the risk of a third party gaining access to that information later using a common interest agreement?
  - *Receive something other than company records* – Are there conditions on accepting this information (e.g., returning it upon cooperation) that might limit the company's options in deciding whether to later cooperate with a regulator or prosecuting authority?

3. SHOULD YOU DISCIPLINE THE EMPLOYEE?

Competing pressures in deciding whether and when to discipline employees come from many sources—other employees, management, directors, cultural norms, the public, and regulators or prosecuting authorities.

- Whether to discipline:
  - *For prior conduct* – consider the company's code of conduct, applicable laws and, if a regulator or prosecutor is involved, whether that authority will expect discipline as part of any company remediation.
  - *For non-cooperation during the investigation* – consider whether company policies or employment agreements create a duty to cooperate and ask why the employee is not being cooperative.

- When to discipline:
  - Normally reserved until after the fact-finding exercise is complete.
  - Act too soon and later-discovered facts may alter the company's assessment of the proper outcome or the company may lose access to crucial information needed to analyze the company's exposure.
  - Wait too long and other employees may conclude that the company does not punish certain behavior.
  - If an employee may pose a current risk to business or an impediment to the ongoing investigation, consider whether it is permissible to place that employee on paid leave pending the outcome of the investigation.
  - Some regulators ask cooperating companies to wait to terminate culpable employees until their own investigation is complete, presumably to enhance the likelihood of cooperation from those witnesses.

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Ninth Circuit Significantly Restricts Permissible Contents of FCRA Disclosure Forms – Gilberg v. California Check Cashing Stores LLC

02.12.19

By Joseph P. Hoag

Employers who use third party vendors to perform background checks regarding job applicants and current employees know that they must comply with the federal Fair Credit Reporting Act's technical disclosure and authorization requirements. Failure to do so subjects employers to potential liability of up to $1000 per discrete violation, plus punitive damages and attorneys' fees. Typically the greatest source of FCRA exposure, and the source of numerous multi-million dollar payouts to plaintiff classes, arises from the FCRA's provisions governing initial disclosures to applicants and employees that a background check will be performed. On January 29, 2019, the Ninth Circuit significantly increased employers' potential liability by finding conduct common amongst many employers is, in fact, a violation of the FCRA.

Employers' Preliminary Disclosure Obligation under the FCRA

Before an employer may obtain a background check (called a "consumer report" under the FCRA) for employment purposes from a third-party vendor (called a "consumer reporting agency" under the FCRA), the FCRA requires the employer to disclose to the applicant or employee that the employer will seek and obtain a background check for employment purposes. This disclosure must be "**clear and conspicuous**" so that the applicant or employee can understand what is being disclosed. The disclosure must also be provided in writing and in a form "**that consists solely of the disclosure**." Thus, employers cannot include anything extraneous to the FCRA-mandated disclosure in the disclosure form, such as liability waivers, employment agreements, or acknowledgements of "at-will" status. The FCRA makes one express exception to its "consists solely of the disclosure" obligation – employers may include language authorizing the employer to obtain a consumer report, and a place for the applicant or employee to execute such authorization.

Gilberg v. California Check Cashing Stores LLC

Multiple states, such as California, New York, and Washington, have similar state laws that require similar, state-specific employment background check disclosures and authorizations. Many employers have included language to address these similar state obligations in their FCRA disclosure forms, often at the suggestion of, or based on sample forms provided by, the employer's consumer reporting agency vendor. A January 29, 2019, Ninth Circuit decision – *Gilberg v. California Check Cashing Stores LLC* – has cast significant doubt on whether this practice of including state disclosure or authorizations is lawful, or in fact violates the FCRA.

In Gilberg, the employer used an FCRA Disclosure and Authorization form that included disclosures and authorizations from several states. The form declared that these state-specific disclosures and authorizations applied to applicants and employees of those states only. For example, the California disclosure and authorization form in *Gilberg* expressly applied to "California applicants or employees only." The Court found that the employer's inclusion of state-disclosures and authorizations violated the FCRA's "consists solely of the disclosure" requirement. The Court further held that, because the language regarding the scope of the background check was not clear (due to typos and poor grammar), the employer's FCRA disclosure form further violated the "clear and conspicuous" requirement. The *Gilberg* Court rejected the employer's "invitation to create an implied exception" to the FCRA's "consists solely of the [federal] disclosure" language in cases where a disclosure form includes language required by state or local law. Rather, the Court found that the FCRA's "standalone requirement forecloses implicit exceptions," including apparently legal obligations imposed by state law and arising from the same activity covered by the FCRA.

Action Items for Employers

Employers in the Ninth Circuit – Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington – should take the following steps (and employers in other circuits should consider taking the following steps so as not to become test cases in courts outside the Ninth Circuit):

- Review FCRA disclosure forms to determine whether they include any language other than the FCRA-required disclosure

and authorization language;

- Determine whether any state or local laws impose additional disclosure, authorization, or acknowledgement obligations; and

- Review their FCRA disclosure forms to ensure that the language is clear and easily understood by an average layperson

Employers are advised to consult experienced counsel regarding how to properly comply with federal, state, and local obligations regarding employment background checks.

Disclaimer

Hogan Lovells FOCUS ON REGULATION

Posted on February 8th, 2019 By Philip Katz, Randy Prebula, Heidi Gertner, Yarmela Pavlovic and Lina Kontos

Would you like an extra application with that? FDA mulls requiring dual applications for combination products

On Tuesday, FDA announced the availability of a draft guidance, "Principles of Premarket Pathways for Combination Products," with high-level information on ways to bring combination products to market. Although the draft guidance doesn't break new ground, it provides some useful clarity; for example, it includes detailed illustrations of five circumstances when those pathways apply.

Citing existing FDA manuals and guidance documents, the 22-page draft guidance addresses the:

- definition of combination products under 21 CFR 3.2(e)
- jurisdictional assignment of combination products to agency Centers
- approval pathways available for device-led, drug-led, and biologic-led combination products, as well as considerations for making such pathway determinations
- safety and effectiveness data and information sponsors must offer, depending upon the pathway

Other key issues:

- The draft guidance says "a single application is generally appropriate for a combination product," but "may not be appropriate in limited cases." With that in mind, FDA is seeking comments about when two applications – one to the lead jurisdictional agency Center and one to the non-lead Center – should be submitted.
- FDA's Office of Combination Products (OCP) directs the Centers to coordinate on combination product approval requests, "including by ensuring that Agency components and staff coordinate appropriately on premarket review of these products, and that Agency thinking is aligned in conducting these reviews." This may suggest an internal FDA view that the Centers have not been fully aligned in reviewing submissions, and perhaps it signals greater OCP involvement, both to encourage robust involvement across the agency and to mediate any resulting conflicts.
- FDA expressly addresses an issue that may have been imperfectly understood and inconsistently applied, stating that "the data and information needed to address safety and effectiveness questions related to the non-lead constituent part of a combination product may differ from the data and information needed to obtain marketing authorization for that article as a stand-alone product that is not part of a combination product."

Generally, the draft guidance is consistent with the existing practice regarding Center jurisdiction and pathway processes for combination products, and doesn't add much in the way of substance. In the examples annex, for instance, FDA reiterates the existing approach to when a 510(k) is not an available pathway to market, but the agency does not suggest a mechanism for determining the appropriate pathway in those circumstances, leaving significant leeway for FDA discretion.

In a press release announcing the guidance, Commissioner Gottlieb touted the potential benefits of combination

products, saying the draft guidance aims to "enhance clarity, predictability, efficiency and consistency of premarket review for combination products." The draft guidance is intended to comply with the 21st Century Cures Act's mandate of greater transparency in combination product designations. Earlier efforts toward this end include the September 2017 final guidance on the agency's classification process for distinguishing between a drug, device, biologic, and combination product, which we analyzed here. FDA also issued a proposed rule in May 2018 related to streamlining combination product regulations, but it was generally limited in scope.

FDA will accept comments on the new draft guidance until May 29. If you have questions about this guidance or may be interested in submitting a comment, please contact any of the authors of this blog or the Hogan Lovells lawyer with whom you regularly work.

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