PACIFIC RIM ADVISORY COUNCIL

Pacific Rim Advisory Council

January 2019 e-Bulletin

MEMBER NEWS

►ALLENDE & BREA Partner Promotions
►BAKER BOTTS Continues Growth Adding Two Leading Partners
►CLAYTON UTZ Announces Partner Promotions
►DAVIS WRIGHT TREMAINE Announces Six Partner Promotions
►DENTONS RODYK Announces Partner Promotions
►GOODSILL Names Two New Partners
►NAUTADUTILH Bosts its Public & Regulatory Practice

COUNTRY ALERTS

►AUSTRALIA Some PPSA Registrations Are About to Expire – Don't Get Caught Out CLAYTON UTZ

►BRAZIL Normative Instruction Postpones Deadline for Informing the Ultimate Beneficial Owner TOZZINIFREIRE

►CANADA Are You Ready? Bill IFRS 16 and Your Contractual Arrangements BENNETT JONES

►CANADA New Reporting Obligations for Assignment of Pre-Sale Contracts RICHARDS BUELL SUTTON

►CHILE Amends Rules on Criminal Liabilities Legal Entities CAREY

►CHINA New Supreme Peoples' Court IP Tribunal Launched HAN KUN

►COLOMBIA Minimum Monthly Statutory Salary and Transportation ALlowance for 2019 BRIGARD URRUTIA

►FRANCE Blockchain Rendered Suitable for Certain Fnancial Securities Confirming France's worldwide pioneering legal framework GIDE

►HONDURAS Increases in Minimum Wage ARIAS

►MEXICO Update: Competition Provisions of the USMCA SANTAMARINA

►NEW ZEALAND New Employment Laws Come Into Force May 2019 SIMPSON GRIERSON

►SINGAPORE Ministry of Health Publishes Fee Benchmarks for Surgical Procedures in Private Sector DENTONS RODYK

►TAIWAN Vital Currency Being Regulated by the Money Laundering Control Act LEE & LI

►UNITED STATES What did the Inventor "Actually Invent" Claim COnstruction under *Cave Consulting v. OptumInsight* BAKER BOTTS

►UNITED STATES Delete Cannabis Apps before Coming to the United States DAVIS WRIGHT TREMAINE

►UNITED STATES Medical Device Reporting Single Report Exemption and ASR's: Coming to an End for Most Reporters HOGAN LOVELLS

CONFERENCES & EVENTS

65th International Conference
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

MEMBER DEALS MAKING NEWS

►ALLENDE & BREA Assists Marfrig purchase of majority stake in Argentina's Quickfood

►BAKER BOTTS US Supreme Court Agrees to Hear Important FOIA Case Brought on behalf of Food Marketing Institute

►BENNETT JONES Assists S.i. Systems Ltd in Acquisition by Quad C Partners

►CAREY Assists Compañía Minera Teck Quebrada Blanca in sale of US$1.2 billion stake in Chilean copper project to Japanese Trading Group Sumitomo

►CLAYTON UTZ Advising Euroz and Sprott on $43.2m placement by West African Resources

►GIDE Counsel on Refinancing the Société Ivoirienne de Raffinage (SIR) debt of 577 million euros

►HAN KUN Advises Tencent Music Entertainment Group on its U.S. IPO

►HOGAN LOVELLS Warsaw office advised ISOC Group in acquisition of Silesia Business Park Class A office buildings

►KOCHHAR & CO Successfully Represents PSU OMCs Before the CCI against Allegations of Anti-competitiveness and Abuse of Dominant Position

►MUNIZ Assists Petroperu in Export Credit Line Facility

►NAUTADUTILH Advises ABN AMRO on the sale of a EUR 2 billion loan Portfolio to NWB Bank

►SANTAMARINA Advises Aerotech Peissenberg GmbH Co KG

►TOZZINIFREIRE Assists Santander in 1.4 Billion Reais for Full Control of Getnet

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ALLENDE BREA PARTNER APPOINTMENTS

BUENOS AIRES, January 2019: We are pleased to announce that Fernando Martínez Zuviría and Nicolás Procopio have been promoted to partnership. The promotions are effective as of January 1, 2019.

Learn more about them:

Fernando Martínez Zuviría
fmz@allendebrea.com.ar
+54 11 4318-9933
Practices: Corporate, Commercial, Life Sciences and Healthcare, Reorganizations and Restructurings

Mr. Martínez Zuviría joined Allende & Brea after graduating magna cum laude from Universidad Austral in 2005. He attended the Academy of American and International Law at the Center for American and International Law, Texas, U.S., in 2007. On May 2012 he obtained a Master of Laws degree (LL.M.) at the University of Illinois at Urbana-Champaign, U.S., and between 2012 and 2013 he worked at Holland & Knight LLP law firm in Miami.

He is a member of the City of Buenos Aires Bar Association and his practice includes general corporate law, commercial agreements, and restructurings, and specifically assistance to laboratories and medical devices manufacturers on their daily operations and in local and cross-border M&A transactions, including joint ventures, divestitures, reorganizations, and drafting and negotiating of manufacturing, license and distribution agreements.

Nicolás Procopio
nop@allendebrea.com.ar
+54 11 4318-9941
Practices: Tax, Private Clients

Mr. Procopio is an associate at Allende & Brea, specialized in Tax Law, who joined the firm in 2016. He received his law degree from the "Universidad de Buenos Aires" in 2006. Mr. Procopio obtained a master's degree in International Tax Law from the "University of Florida".

Mr. Procopio specializes on tax matters and planning for individuals as well as corporations with respect to their domestic and international transactions. Also, Mr. Procopio has vast experience representing clients in disputes and court litigation, including administrative and judicial procedures against the Argentine Government, and different Provinces, National Tax Court, local and federal courts, the Federal Administration of Public Revenues and other tax bureaus.

After graduating from the University of Florida, Mr. Procopio has worked in the United States as an International Tax Manager for Price Waterhouse Coopers and Ernst & Young, in the Detroit and Miami offices from 2011 until 2016, when he returned to Argentina. During those 7 years in the United States, Mr. Procopio has advised many multinational companies on their inbound and outbound investments.

For additional information visit www.allendebrea.com.ar

BAKER BOTTS CONTINUES GROWTH IN LONDON WITH ADDITION OF TWO LEADING PARTNERS

LONDON, 07 January 2019 – Baker Botts L.L.P., a leading international law firm, today announced that Richard Brown and Nick Collins have joined the firm's Corporate Practice and Global Projects Practice respectively, as partners. Richard Brown, recognized as a leading UK and international equity capital markets (ECM) lawyer, and Nick Collins, a prominent global project development and finance lawyer, will be based in the firm's London office.

"Our clients will benefit greatly from the addition of Richard and Nick. They each bring a high level of expertise and unique insights to their respective practices, which will ultimately provide significant value to the firm's clients," said Andrew M. Baker, Managing Partner of Baker Botts.

"We continue to focus on growing our Corporate Practice, and Richard's arrival is part of our strategy to build upon our already robust Corporate group, while increasing our scale in London and New York. Likewise, the addition of Nick Collins significantly advances our strategy of building a world class project finance team to complement our project development, LNG and M&A Practices," added Mr. Baker.

"Richard has a stellar ECM practice that will significantly benefit our corporate offering and clients. Nick's project development and finance practice will add further depth to the firm's project finance expertise in the energy sector, particularly in the power sector. We are delighted they have decided to join the firm. These hires are an extremely positive start to the year as we look to continue our growth in London," said Mark Rowley, Partner-in-Charge of the London office and Global Projects partner.

"Baker Botts has world-class clientele across the technology and energy sectors, and the firm is at a very exciting growth stage in London. This is a superb opportunity for me to help further enhance its Corporate Practice and presence in the city," said Richard Brown.

"With its tier-one ranked oil and gas and LNG capabilities, Baker Botts is a natural fit for my practice. I am excited to play a part in the firm's growth in London and to help deliver on its global objectives across project finance and energy," added Nick Collins.

Richard Brown advises issuers and underwriters on ECM transactions and has experience in public and private M&A transactions. He joins from Latham & Watkins, where he served as head of UK Equity Capital Markets in their London office. Over the course of the last four years, he has been engaged on approximately 20 ECM transactions, representing both issuers and underwriters/sponsors.

Nick Collins advises borrowers, sponsors, export credit agencies, banks, multilateral lending agencies, and Islamic finance institutions on complex, large-scale energy, natural resources, and telecommunications projects around the world. He joins from Jones Day and has extensive experience advising on project development and finance matters, debt capital markets, and banking and finance in Africa, the Middle East, the Russian Federation, and Asia. Prior to Jones Day, Nick was a partner at White & Case and Latham & Watkins.

Baker Botts has recently made a series of lateral partner hires in London including Energy partner Lewis Jones (March 2018) and Corporate and Technology partner David Ramm (September 2018). Other International hires include EU Antitrust partner Matthew Levitt (November 2018) in Brussels and Global Projects partner Euan Pinkerton (October 2018) in Riyadh.

For more information, please visit www.bakerbotts.com

CLAYTON UTZ ANNOUNCES PARTNER APPOINTMENTS EFFECTIVE 1 JANUARY 2019

SYDNEY, 13 December 2018: Clayton Utz is pleased to announce the appointment of five new partners, effective 1 January 2019:

Eleanor Dickens, Government Services, Brisbane
Eleanor specialises in Public and Administrative Law, with a key focus on complex government investigations including corruption and misconduct investigations, information law (FOI, privacy, data, public records and information policy), compliance and government decision-making processes. Eleanor is also focused on driving innovation and advising public sector clients on information and data use and practice issues.

Liz Humphry, Corporate, Perth
Liz is a corporate law specialist who is passionate about working with her clients to achieve their commercial outcomes. Liz acts for a wide range of leading Australian and international organisations on transactional and operational matters, including mergers and acquisitions, corporate finance and equity capital transactions, projects and Australian regulatory compliance matters. Liz has a particular focus on the energy and resources industry.

Samy Mansour, Corporate, Sydney
Samy has significant experience advising on investments, sales, joint ventures, projects, corporate governance and supply arrangements across a number of key industries including energy, resources, transport, infrastructure, health, insurance, manufacturing and retail. He is valued for his client-centric focus and solution-oriented approach, and is recognised by a number of legal publications. Samy also has an interest in driving best-practice in the legal industry and was appointed as the first Distinguished Fellow at the Centre for Legal Innovation at the College of Law.

Alexandra Rose, Litigation and Dispute Resolution, Sydney
Alex is a litigator with particular experience defending high-stakes class actions, product liability claims and multi-jurisdictional claims where clients rely on her ability to manage disputes a way that enables them to focus on their current business priorities. Alex draws on her extensive experience in dispute resolution to help clients identify and mitigate risks as early as possible, and provide practical, commercial solutions to problems. Alex's experience across several industries includes a focus on health, pharmaceuticals, medical devices and consumer goods as well as the automotive and financial services industries.

Joanne Teagle, Major Projects and Construction, Melbourne
Jo specialises in Social Housing, Facilities Management Contracting, Services Contracting, complex Government Procurement and Work Health and Safety. With 20 years' experience in the social housing sector, Jo acts for a wide range of government social housing providers and asset/facility owners on all aspects of their project outsourcing requirements. Her clients value her ability to provide innovative, value-for-money and practical solutions, particularly with respect to end to end procurement processes and collaborative contracting models.
Jo is also passionate about work health and safety, advising predominantly government clients on the harmonised WHS legislation since 2011.

Clayton Utz Chief Executive Partner Rob Cutler said the appointments were well deserved. "For more than a decade, Eleanor, Liz, Samy, Alex and Jo have worked exceptionally hard to build their reputations as specialists in their respective areas and have contributed significantly to the firm's culture on many levels. We're delighted to welcome them to the partnership and look forward to watching their careers continue to flourish as partners of Clayton Utz."

For additional information visit www.claytonutz.com

DAVIS WRIGHT TREMAINE PROMOTES SIX TO PARTNER

SEATTLE, 07 JANUARY 2019 – Six lawyers at Davis Wright Tremaine have been promoted to partnership as of January 1, 2019.

The new partners, along with their areas of practice and office, are:

Zana Bugaighis – Litigation, Seattle
Ryan Hess – Employment, Seattle
Amy Hwang – Employment/Benefits, Seattle
Ryan Maughn – Business & Tax, Portland
James Parker – Litigation, Portland
Christie Totten – Employment, Portland

For more information, visit www.dwt.com

DENTONS RODYK ANNOUNCES PARTNER PROMOTIONS

SINGAPORE 14 January, 2019: Dentons Rodyk is pleased to announce that Kia Meng Loh has been admitted to equity partnership. Kia Meng will continue to be the firm's Chief Operating Officer.

The firm has also announced eight promotions to Partner. Vyasa Arunachalam, Amogh Chakravarti, Sarah Chan, Jean Nie Ho, Karen Hsu, Lynette Khoo, Alexander Lee, and Huiyi Wong (listed in alphabetical order by surname), have taken on the new role as of 1 January 2019.

The new partners represent a range of practices and sectors and these promotions are not only a result of how well they have done in their careers but also a response to our clients' growing needs in ASEAN and beyond.

For further information visit www.dentons.com

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

NAUTADUTILH BRUSSELS BOOSTS ITS PUBLIC & REGULATORY PRACTICE

BRUSSELS, 14 January 2019: NautaDutilh strengthens its Public & Regulatory practice in Brussels with the arrival of Jens Mosselmans and his team from a boutique firm specialising in public law.

Jens Mosselmans returns to NautaDutilh as a local partner. Jens is well known at NautaDutilh as he was a member of the firm's Public & Regulatory practice from 2005 until 2014. He advises both companies and public authorities on administrative law issues, particularly with regard to public procurement (with a focus on the healthcare sector), energy and environmental law as well as urban planning. Jens has extensive experience in transactional work, arbitration and litigation before the Council of State, the Constitutional Court and other courts and tribunals.

Dirk Van Gerven, managing partner of NautaDutilh Brussels: "Our firm has witnessed substantial growth in the past six months, as evidenced by hires in the fields of privacy and data protection, corporate M&A and now public and regulatory law. I am convinced that the Public & Regulatory practice will thrive under the leadership of Jens Mosselmans and Patrick Peeters, who has headed the practice group since 2005. The arrival of the new team members will undoubtedly enhance our public and regulatory service offering."

For additional information visit www.nautadutilh.com z

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Davis Wright Tremaine LLP
DEFINING SUCCESS TOGETHER

Event details at www.prac.org

ALLENDE BREA

ASSIST MARFRIG PURCHASE OF MAJORITY STAKE IN ARGENTINA'S QUICKFOOD

Allende Brea Assists Marfrig purchase of majority stake in Argentina's Quickfood

Allende & Brea assisted Brazilian food-processing company Marfrig to buy a majority stake in Quickfood from Brazilian counterpart BRF for 300 million reais (US$77 million). The parties closed the deal on 2 January.

The transaction gives Marfrig, which is Brazil's largest food-processing company after JBS, a 92% stake in Quickfood. The target company owns three meat production plants in the province of Buenos Aires and the adjacent province of Santa Fe and gives Marfrig one production plant in the Brazilian state of Mato Grosso.

Acting in the transaction as local Counsel to Marfrig Global Foods Allende & Brea Partners Carlos María Melhem, Marcos Patrón Costas, Nicolás Procopio and Julián Peña, and associates Federico Rossi, Paula Cerizola, Federico Alem and Camila Peters in Buenos Aires.

For additional information visit www.allendebrea.com.ar

BAKER BOTTS

U.S. SUPREME COURT AGREES TO HEAR IMPORTANT FOIA CASE BROUGHT ON BEHALF OF THE FOOD MARKETING INSTITUTE

11 January 2019 - Baker Botts is delighted to announce that the U.S. Supreme Court today granted a petition for a writ of certiorari filed by the Food Marketing Institute, the firm's client. The case involves Exemption 4 of the Freedom of Information Act, which protects from disclosure confidential commercial information, and presents the Court its first opportunity to address what data qualifies as "confidential." The firm is honored to represent FMI and looks forward to presenting its position on the merits: that Exemption 4's plain text prevents the disclosure of commercially sensitive data that companies keep confidential.

The Baker Botts team representing FMI includes Gavin Villareal, Thomas R. Phillips, Evan Young, and Scott Keller (Austin partners) and Stephanie Cagniart, Ellen Springer, and Grayson McDaniel (Austin associates).

For additional information visit www.bakerbotts.com

BENNETT JONES

ASSISTS S.I SYSTEMS LETD IN ITS ACQUISITION BY QUAD C PARTNERS

Date Announced:	December 20, 2018
Date Closed:	December 19, 2018
Client Name:	S.i. Systems Ltd.

Acting for S.i. Systems who have agreed to be acquired by Quad C Partners. Cross-border with continuing equity participation from the founder. Complex in that it requires additional planning to achieve that type of arrangement on a tax efficiency basis while maintaining proper governance arrangements. S.i. systems is in the business of placing IT professionals and places a number of its IT professionals into positions that require security clearances and controlled goods registrations which adds an element of regulatory sensitivity.

For additional information visit www.bennettjones.com

CAREY

ASSISTS COMPAÑÍA MINERA TECK QUEBRADA BLANCA (CMTQB) IN SALE OF US$1.2 BILLION STAKE IN CHILEAN COPPER PROJECT TO JAPANESE TRADING GROUP SUMITOMO

SANTIAGO, January 2019: Philippi Prietocarrizosa Ferrero DU & Uría (Chile) has helped Japanese trading group Sumitomo acquire a 30% stake in Chile's Quebrada Blanca Phase 2 copper project for US$1.2 billion from Canadian miner Teck.

Japanese trading group Sumitomo acquired the 30% stake indirectly through Compañía Minera Teck Quebrada Blanca (CMTQB), a purpose-built company created by Teck to manage the project. The deal was signed on 4 December. Teck relied on its internal legal team for the deal.

Counsel to Compañía Minera Teck Quebrada Blanca Carey Partners Rafael Vergara and Cristián Eyzaguirre, counsel Francisco Corona and associates Maximiliano Urrutia, Giannina Veniú and Ignacio Alfaro.

For additional information visit www.carey.cl

CLAYTON UTZ

ADVISING EUROZ AND SPROTT ON $43.2M PLACEMENT BY WEST AFRICAN RESOURCES

PERTH, 05 December 2018: Clayton Utz is acting for Euroz Securities Limited and Sprott Capital Partners, a division ofSprott Private Wealth LP, as joint lead managers, underwriters and bookrunners to West African Resources Limited's $43.2 million placement, which forms part of the company's $326 million debt and equity funding package announced to the ASX today.

Clayton Utz corporate partner Mark Paganin is leading the firm's team, with key support from special counsel Stephen Neale and lawyers Benjamin Depiazzi and Matt Johns.

The placement will be undertaken as a single tranche of approximately 173 million shares at $0.25 per share and the shares will be issued to eligible sophisticated, professional and other institutional investors. Upon completion of the fundraising, West African Resources will be fully funded through to gold production at the company's Sanbrado Gold Project in Burkina Faso.

For additional information visit www.claytonutz.com

GIDE

COUNSEL ON REFINANCING THE SOCIÉTÉ IVOIRIENNE DE RAFFINAGE (SIR) DEBT OF 577 MILLION EUROS

PARIS, 14 January 2019: Gide, counsel to Société Ivoirienne de Raffinage (SIR) and the Republic of Côte d'Ivoire on refinancing the SIR debt of 577 million euros. Gide has acted, alongside Ivorian firm KSK, on the implementation of a FCFA 378 billion (EUR 577 million) syndicated loan for SIR. This loan enables SIR, the region's most high-performing refinery of the West African sub-region, to refinance its commercial debt so that it may boost its activities to face the growing demand for refined products in Côte d'Ivoire and the entire sub-region. Gide and KSK advised Société Ivoirienne de Raffinage and the Republic of Côte d'Ivoire.

M. Thomas Camara, Director-General of SIR, indicated: "I would like to thank our legal counsels, law firms Gide and KSK, for having efficiently advised SIR and the Republic of Côte d'Ivoire and made it possible, through their long-standing experience in the field, to uphold the interests of the Ivorian party".

The Gide team, coordinated by partner Nicolas Jean, comprised partner Hubert Merveilleux du Vignaux with associates Aurélien de Casteja, Perrine Delandre and Célia Alao in Paris, and Sarah Whitley in London, on financial aspects, and counsel Laurent Vincent with associate Louis Ravaud on the hedging aspects.

The Africa Finance Corporation, arranger and lender alongside Deutsche Bank, ICBC Standard Bank, United Bank for Africa, NSIA Banque and Bridge Bank, was advised by Norton Rose Fulbright and Bilé-Aka, Brizoua-Bi & Associés.

For additional information visit www.gide.com

HOGAN LOVELLS

WARSAW OFFICE ADVISED ISOC GROUP IN ACQUISITION OF SILESIA BUSINESS PARK CLASS A OFFICE BUILDINGS

WARSAW, 27 December 2018: Hogan Lovells Warsaw Office advised the ISOC Group in the transaction consisting of the acquisition of C and D buildings of "Silesia Business Park" from Skanska. The transaction involved two new class A office buildings with leasable area of over 24,000 sq.m. Silesia Business Park is located in the most dynamic business district in Katowice. ISOC and Skanska signed the final sale agreement on December 21, 2018.

The ISOC Group is a real estate and industrial infrastructure investment company based in the Philippines with a registered office in Manila. The acquisition of buildings C and D of Silesia Business Park is one of its first real estate transactions in the Polish market. "We are excited by this investment in the Silesia Business Park, and intend to continue investing in Poland," said Michael Cosiquien, Chairman of the ISOC Group.

From the Purchaser's side, this transaction was conducted by counsel Bartosz Clemenz. The head of Hogan Lovells real estate legal practice, Partner Marek Grodek supervised the transaction and coordinated works of multidisciplinary legal team. The real estate transaction team included Adam Nowosielski, Michał Zajączkowski, Ewa Kraszewska, Marta Popis, Damian Gadomski and Paweł Gnaś. Tax advice was led by Andrzej Dębiec, Partner heading tax practice of Hogan Lovells Warsaw Office and counsel Zbigniew Marczyk, financing legal advice was led by Piotr Zawiślak, Partner leading banking law practice, Mateusz Dereszyński and Jakub Matusielański, and in the area of IP law by Ewa Kacprek, counsel heading intellectual property, media and new technologies department, Jakub Baczuk and Weronika Wołosiuk. From the Seller's side, the transaction was led by Dentons.

This is one of four large real estate transactions in 2018 consisting of Asian investment in commercial real property in Poland, in which Hogan Lovells Warsaw office is involved.

For additional information visit www.hoganlovells.com

HAN KUN

ADVISES TENCENT MUSIC ENTERTAINMENT GROUP ON ITS U.S. INITIAL PUBLIC OFFERING

BEIJING, 12 December, 2018: Han Kun advised and acted as the PRC counsel to Tencent Music Entertainment Group on its U.S. initial public offering and listing on the New York Stock Exchange under the symbol "TME."

Tencent Music Entertainment Group is the largest online music entertainment platform in China, and currently operates several well-known brands, including QQ Music, Kugou Music, Kuwo Music and WeSing.

For additional information visit www.hankunlaw.com

MUNIZ

ASSISTS PETROPERU IN EXPORT CREDIT LINE FACILITY

LIMA December 2018: Muniz acted as counsel to Petroperú in a export credit line facility provided by 18 financial institutions in a aggregate amount up to US$ 1,300,000,000.

The purpose of the credit line facility is to provide funds for the financing of elements of the Talara refinery project supplied under an engineering and procuring contract entered with Cobra-SCL UA&TC Consortium and eligible for support pursuant to the terms of the Cesce policy, Spanish Credit Export Agency (December 2018).

For additional information visit www.munizlaw.com

KOCHHAR & CO.

SUCCESSFULY REPRESENTS PSU OMCS BEFORE CCI

Kochhar & Co. successfully represents PSU OMCs before the CCI against allegations of anti-competitiveness and abuse of dominant position; CCI imposes penalty of USD 5.2 million on the leading sugar manufacturers in India and their industry associations.

NEW DELHI, September 2018: Kochhar & Co. successfully represented the three leading public sector units (PSUs) namely Bharat Petroleum Corporation Limited – BPCL; Hindustan Petroleum Corporation Limited – HPCL; and Indian Oil Corporation Limited – IOCL; together referred to as the Oil Marketing Companies (OMCs) before the Competition Commission of India (CCI) against allegations of anti-competitiveness and abuse of dominant position.

Kochhar & Co's competition team comprising of Reeta Mishra and Abhishek Verma, led by the Anti-trust & Competition practice head - Piyush Gupta, represented the OMCs before the CCI.

In a common order dated 18 September 2018 relating to six complaints wherein 26 parties were arrayed as opposite parties, the CCI imposed a penalty of USD 5.2 million (approx. INR 38.05 Crore) on 20 parties (18 sugar mills and 2 trade associations) while rejecting the allegations against the OMCs.

The CCI, while exonerating the three OMCs of charges of violating the provisions of the Competition Act, 2002 by floating a joint tender, has held that "since the terms of the tender are same for all the OMCs, floating a joint tender is not only a more efficient option, but is also more cost-effective, as it eliminates cost, time and effort in floating multiple tenders with the same terms and conditions", while going on to say that "floating of joint tender by OMCs for procurement of ethanol per se cannot be construed as anti-competitive particularly when such process has evident efficiency benefits".

Below is the link to the CCI order . https://www.cci.gov.in/sites/default/files/C.%20Nos.%2021%2C29%2C36%2C47%2C48%20%26%2049%20of%202013.pdf

This is a landmark decision wherein the CCI has undertaken an in-depth study of the benefits of joint purchasing and distinguished the same from cartelization because of the pro-competitive effects accorded by the former as against the adverse impact that the latter has.

For additional information visit www.kochhar.com

NAUTADUTILH

ADVISES ABN AMRO ON SALE OF EUR2BILLION LOAN PORTFOLIO TO TO NWB BANK

AMSTERDAM, 11 January 2019: NautaDutilh advises ABN AMRO on the agreement with NWB Bank regarding the sale of a portfolio of loans to Dutch public sector companies.

The total portfolio in scope amounts to approximately EUR 2 billion and consists of long-term loans to housing corporations, municipalities, academic hospitals and drinking water companies. The phased acquisition of the portfolio has already been initiated and will be finished over the coming weeks in consultation with all relevant parties.

For additional information visit www.nautadutilh.com

SANTAMARINA

ADVISES AEROTECH PEISSENBERG GMBH CO KG $267 MILLION JOINT-VENTURE

MEXICO CITY: Aerotech Peissenberg Corporation executed a joint venture with Mexican company Grupo Punto Alto, to build US$ 267 million plant to manufacture turbine components in Hermosillo, Sonora.

The plant is already under construction over a three-hectare surface at the Hermosillo Norte industrial park, where it will manufacture parts for General Electric and Rolls Royce engines under the name of AT Engine Mexico.

Grupo Punto Alto is a Chihuahua-based company founded in 1959 with investments in several sectors such as construction, real estate, aerospace, metal-mechanics and services.

In Germany TaylorWessing advised Aerotech Peissenberg on the transaction. In Mexico the company relied on Santamarina y Steta, with a team including Jorge Leon Orantes, Pablo Laresgoiti and Gabriela Lomeli.

For additional information visit www.s-s.mx

TOZZINIFREIRE

ASSISTS SANTANDER IN 1.4 BILLION REAIS FOR FULL CONTROL OF GETNET

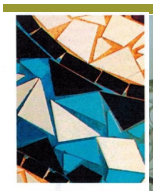
SAO PAULO, December 2019: Santander purchased the remaining stake in Brazilian card processor Getnet for 1.4 billion reais (US$370 million) in shares from the minority shareholders, investor Manzat and businessman Guilherme Alberto Berthier Stumpf.

The two sellers exercised a put option to sell their 11.5% stake in the company. A put option allows shareholders to sell assets at an agreed price and date. The deal closed on 19 December.

Counsel to Banco Santander TozziniFreire Advogados Partners Mauro Guizeline and Francisco Neto and associate Alexis Borowik Rosa

For additional information visit www.tozzinifreire.com.br

PRAC EVENTS



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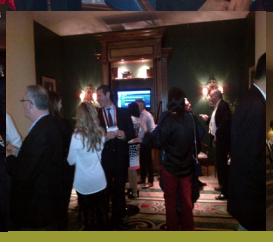
RCD ROUSAUD COSTAS DURAN S.L.P.



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08 JAN 2019

Some PPSA registrations are about to expire – don't get caught out

30 January 2019 marks the seventh anniversary of when the Personal Property Securities Act 2009 (Cth) started to apply and, as registrations against serial numbers and/or consumer property can only have a duration of 7 years, that means those types of registrations (if made in 2012) will expire automatically this year unless they are renewed.

If you have made registrations on the PPS register that are for a period of 7 years (or less):

- you should start monitoring when those registrations expire. You can request a report (for free) from the PPS register that identifies all registrations in favour of your secured party group that are due to expire; and
- when doing so, you may wish to take the opportunity to check whether the details used in those registrations continue to be correct.

If you do not renew your registration before it expires and have to make a new registration:

- you may lose your priority position; and/or
- your security interest could vest in the grantor if the grantor goes into administration or liquidation within 6 months of that new registration.

To avoid these consequences, you should renew your registrations in advance of their expiry if they continue to perfect security interests in your favour.

If you need any assistance or have any queries, please contact us.

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Normative Instruction RFB No. 1,863/2018 postpones the deadline for informing the Ultimate Beneficial Owner (UBO)

Earlier today (December 28, 2018) the Brazilian Federal Tax Authorities issued Normative Instruction RFB No. 1,863/2018, revoking the Normative Instruction No. 1,634/2016 and altering specific provisions regarding the National Registry of Legal Entities (CNPJ).

Among the changes, we highlight the provisions related to the filing of information on Ultimate Beneficial Owners (UBO), as follows:

- Specification on the entities subject to an exception on the provision of information of the individual that ultimately has direct or indirect control or significant influence;

- Exclusion of investors in Private Equity Investment Funds (FIP) from the list of exceptions on the filing of UBO information;

- Creation of a new form (Ficha de Beneficiários Finais) to be filled by the companies' legally constituted representatives;

- Postponement of the deadline to file the UBO information for an extra 180 (one hundred and eighty) days as of today.

Even though the postponement was announced on the last business day of the year, it is worth noting that the Brazilian Federal Tax Authorities were reasonable to acknowledge the need for a larger timeframe in order to obtain and organize the requested information.

We remain available to assist in the fulfillment of these obligations.

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Bennett Jones

Are You Ready? IFRS 16 and Your Contractual Arrangements

January 14, 2019

Written by Denise D. Bright

IFRS 16 Leases becomes effective for annual reporting periods beginning on, or after, January 1, 2019. Consequently, entities with a December 31 year end, who did not adopt the new standards early, will report financial results utilizing IFRS 16 for the first time in their March 2019 quarterly financial statements. While entities have already been evaluating the impact of IFRS 16 on their financial statements, many have yet to fully consider its impact under various agreements, including, in particular, their financing agreements. It is important to note that the Financial Accounting Standards Board is also implementing similar rules (ASC 842) resulting in entities who report utilizing US GAAP needing to consider many of the same issues.

This article focuses on the impact of IFRS 16 on a lessee since lessor accounting remains similar to current practices. Under IFRS 16, the definition of lease is very broad, being "a contract or part of a contract, that conveys the right of use an asset (the underlying asset) for a period of time in exchange for consideration." Consequently, agreements that are not typical leases may include an embedded lease. Under IFRS 16, the "embedded lease" part of an agreement will be subject to the same analysis and accounting treatment as a typical lease. Any lease modifications or changes to the term will generally require the lessee to consider the lease as a new lease to which the applicability of IFRS 16 will need to be assessed.

To determine if a lease is present, a lessee will consider: whether there is a specified asset; who has the right to use and direct the use of such asset (i.e., control); any substitution rights; the period of use or term (which may be time or based on another identifiable factor (i.e., production)); and, whether it obtains substantially all of the economic benefits. It should be noted that the value of the lease payments as compared to the value of the asset, and the term of the lease as compared to the assets' useful life are not relevant considerations to the IFRS 16 lease determinations except to the extent the lease would fall in the exceptions stated below. Consequently, it is likely that IFRS 16 will effectively eliminate the off balance sheet treatment of many leases that were historically classified as operating leases. As a result of IFRS 16, many operating leases of big ticket items such as real estate, aircraft, trains, ships, large equipment, cars and cell towers will now be on the balance sheet. Readers are reminded that IFRS 16 does not include the term or concept of 'capital lease', but in most cases those leases formerly known as capital or finance leases are likely leases under IFRS 16.

The application of IFRS 16 excludes a number of specific types of leases, including leases to explore for or use minerals, oil, natural gas and similar non-regenerative resources, and certain licenses for

intellectual property and intangibles. In addition, there are two other significant exclusions from lease accounting: short-term leases (generally those with a term of less than a year without a purchase option) and low-value leases, both as defined in the standard.

Historically, lessees recorded finance leases (often still referred to as capital leases) on their balance sheet as if the assets were owned and financed. Alternatively, operating leases were not recorded on the balance sheet but were disclosed in aggregate amounts in the notes to the financial statements. Lessees under IFRS 16 will recognize a right-of-use asset and a lease liability associated with leases.

Entities which have significantly utilized operating leases in the past will likely, as a result of IFRS 16, now have a higher balance for assets and increased liabilities on their balance sheet. In addition, the expenses related to the former operating leases, which are now leases under IFRS 16, will be accounted for as operating expenses, depreciation and interest expense, as opposed to operating expenses. Consequently, many ratios and financial calculations for an entity where operating leases are reclassified as leases under IFRS 16 are likely to be impacted. Ratios impacted include, but are not limited to debt to equity ratios, asset turnover ratios, interest coverage, current ratios and any ratios which utilize EBITDA or EBIT.

If IFRS 16 has an impact on an entity's financial statements, then it should evaluate it's financing agreements and other agreements to determine:

1. **Is GAAP Fixed or Floating?**
   If GAAP or the applicable definitions (i.e., operating lease or finance/capital lease) are fixed at a point in time (usually on or prior to December 31, 2017) then reporting and compliance under the agreement will not change post-implementation of IFRS 16; however, the amounts attributable to leases reported or utilized for the purposes of such agreement may be different from those reported in the financial statements which will require the maintenance of two sets of data to assess future compliance and provide the required reporting under the agreement.

2. **How Are Leases Defined and Treated If the Definitions Are Not Fixed?**
   The definitions of finance or operating leases in the applicable agreement is important in assessing the implications of IFRS 16. As an example, the definition of debt or indebtedness often includes any amounts that would be included on the borrower's consolidated balance sheet as a liability. As a result of the application of IFRS 16 debt, as defined, may increase liabilities due to the recognition of leases due to the reclassification of operating leases to leases under IFRS 16. An alternate definition of debt or indebtedness includes indebtedness for borrowed money as stated on the balance sheet and adjusts for certain items which often include the amounts attributed to finance (capital) leases. Since it is likely that many leases previously included as operating leases will now be leases under IFRS 16, the debt amount will increase under such a definition. Entities should also assess whether the current definitions continue to be applicable due to the finance lease, capital lease and operating lease distinctions not being utilized under IFRS 16. Balance Sheet related definitions which may be impacted include "Attributed Debt", "Capital Leases", "Debt", "Indebtedness", "Operating Leases", "Permitted Indebtedness", "Permitted Liens", "Total Assets" and any baskets associated with or including capital/finance and operating leases.

3. **Does Any Income Measure or Ratio Adequately Adjust for Changes as a Result of IFRS 16?**

Under IFRS 16, the calculation of EBITDA and EBIT will increase as expenses attributable to former operating leases which are now being reported as leases under IFRS 16 will now be recorded as operating expenses, interest expense and depreciation rather than operating expenses. Therefore calculations, covenants, or earnouts based on EBITDA or EBIT should be re-evaluated.

4. **Does IFRS 16 Impact the Calculation of Other Financial Ratios?**
   Under IFRS 16, amounts attributable to assets may increase as the right of use assets are recognized. Short-term liabilities and long-term liabilities will also increase as the lease liabilities attributable to leases are recorded. Any calculation of current ratio will be affected as short-term assets will not increase but short-term liabilities will. The increase in liabilities may result in an increase in indebtedness or debt (as discussed above), and any debt or indebtedness based calculation may be impacted. Often lenders utilize lease baskets to limit the ability of a borrower to finance assets by way of a lease and the impact of the right of use assets and lease liabilities attributable to IFRS 16 should be assessed in conjunction with such baskets. In addition, under IFRS 16, as operating leases are reclassified as leases under IFRS 16, there will be an increase in both depreciation and interest expense and any ratios, such as interest coverage, calculated utilizing such expenses should be reassessed. Expenses relating to leases under IFRS 16 tend to be front-end loaded such that total lease expense (depreciation and interest) will be greater in the early years notwithstanding cash rentals are consistent through the term which may further impact calculations. Few calculations are based on cash flow but it should be noted that IFRS 16 will also impact cash flow moving some expenses from operating to financing cash flows. Finally, the characterization of a lease as on balance sheet may have an impact on the cross default provisions.

Currently entities are utilizing one of the following approaches to address the implications of IFRS 16:

1. **Frozen GAAP.** Many entities are amending their agreements to include static or "frozen" GAAP definition for operating and capital leases which in effect carves out the application of IFRS 16, this effectively freezes GAAP until the full impact of IFRS 16 can be quantified or where the impact is not material. While freezing GAAP may be a quick and easy solution, consideration should be given as to the impact of keeping adequate records to produce accounting records in compliance with IFRS 16 and also providing covenant calculations and disclosure excluding the impact of IFRS 16.
2. **Triggering Amendment Provisions.** Many credit agreements (but few bond/note indentures and agreements) provide for a mechanism where the borrower can provide notice to the lenders to trigger an amendment process with specific parameters which is often the intention to put the parties in the same position that they would have been absent the change.
3. **Amendment to Agreements Utilizing IFRS 16 Treatment.** It is likely that once the full impact of IFRS 16 on the entity's financial statements is calculated, companies will renegotiate the definitions, covenants, baskets and ratios to reflect the new IFRS 16 financial realities.

The foregoing is a general summary of some of the likely significant impacts of IFRS 16 on lessees. However, the actual impact of IFRS 16 on any entity will be dependent on both the entity's utilization of leases, the categorization of leases under the new rules and the actual provisions of any agreement which is impacted by the changes.

The members of the Bennett Jones Financial Services team are familiar with the various implications of

IFRS 16 on various aspects of our clients' business and operations. Please contact us if you would like to discuss the specific implications to your business and agreements.

Posted on: December 14, 2018

NEW REPORTING OBLIGATIONS FOR ASSIGNMENT OF PRE-SALE CONTRACTS

In February 2018, the BC government announced its intention to track pre-sale assignments. The stated purpose of this change in policy is to ensure everyone pays their "fair share of taxes" and to help inform future housing and tax policies.

LEGISLATIVE AND POLICY STATEMENT CLAIMS

On May 31, 2018, the government passed Bill 25, *Real Estate Development Marketing Amendment Act,* 2018 ("REDMA Amendment") to amend the *Real Estate Development Marketing Act* ("REDMA").

On November 5, 2018, by Order in Council, the government brought the balance of the REDMA Amendment into force and amended the Real Estate Development Marketing Regulation ("REDMR"). These changes are effective on January 1, 2019.

A new registry is also created – the Condo and Strata Assignment Integrity Registry (the "CSAIR"). The CSAIR will be administrated by the Property Transfer Tax Branch and operated by the Land Title and Survey Authority.

A. CHANGE TO REDMA

A new Part 2.1 of REDMA creates assignment reporting requirements for "strata lots" in development properties located in BC.

Bare land strata lots and disclosure statements for projects located outside BC are not affected.

B. CHANGE TO REDMR

A new Part 3.1 of REDMR outlines the assignment reporting requirements. The requirement to report is triggered when a developer enters into the first purchase contact for a project subject to Part 2.1 of REDMA.

Prior to the date the strata plan is filed, the developer is required to track assignments and file a report with CSAIR within 30 days of the end of each quarter. Once the strata plan is filed, the reporting periods are reduced and eventually become annual periods by calendar year (section 10.6 of REDMR).

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Importantly, all developers must have a myLTSA Enterprise account by March 31, 2019.

DEVELOPERS MUST CHOOSE

Developers must now decide whether to forbid or allow assignment of contracts. If assignments are allowed they must comply with the terms and conditions imposed by Part 2.1

A. IF ASSIGNMENTS WILL BE ALLOWED

If a developer permits assignments then it must amend its purchase contract(s) to include new prescribed language and a new prescribed notice to purchasers. In addition, all contracts must be amended and attached to disclosure statements.

As a result, section 7.2 of the corresponding disclosure statements must be amended to describe the new restrictions on assignments.

REDMR sets out the specific language that a developer must include as a term of, and as a notice in, the developer's contract.

The new terms state that without the developer's prior consent any assignment of the purchase contract is prohibited, and that each proposed party to an assignment must provide the developer with the information and records required under REDMA.

The new notice advises purchasers that before the developer can consent to an assignment the developer must collect personal information about the assignment parties' identity, contact and business information and the terms of the assignment. The notice also confirms the information can be shared with the Canada Revenue Agency

B. INFORMATION MUST BE COLLECTED

Developers will be statutorily prohibited from consenting to the assignment of a contract entered into on or after January 1, 2019, unless the developer first collects information for all parties to the assignment. For individuals, information that must be collected and provided includes:

- full legal name;
- date of birth;
- citizenship;
- social insurance number (if available);
- jurisdiction of tax residency; and

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- post address, principal residence address, phone number and email address.

For corporations, information to be collected and provided includes:

- full legal name;
- business number for federal income tax purposes;
- head office address; and
- name, postal address, phone number and email address of an individual who may be contacted to answer questions about the assignment agreement, prescribed information and records.

Regardless of the nature of the entity, there is certain information that must be collected for all assignments.

Developers must also collect and provide the following information:

- the date of the purchase agreement, the purchase price, and the address or legal description of the strata lot;
- the date that consent was given;
- the assignment fee that is payable to the developer; and
- the assignment fee payable to the assignor plus the amount of any deposit reimbursement.

For contracts entered into prior to January 1, 2019 that are being assigned after that date the developer must make "a reasonable effort to collect, from each proposed party to the assignment agreement, assignment information and records." If no assignment information or records are collected, then the developer must file a statement with CSAIR confirming the same.

The developer must retain the information collected for six calendar years after the strata plan has been filed.

CHANGES TO FEES PAYABLE UNDER REDMA

Also effective as of January 1, 2019 all fees payable under REDMA will triple for the stated purpose of covering increased regulatory and enforcement costs, including those associated with the CSAIR. The new fees are set out below.

For filing an application for an exemption, or filing a disclosure statement for:

- 9 or fewer units: $900
- 10 to 49 units: $1,800

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- 50 to 99 units: $3,600
- 100 or more units: $5,400

Fee to file an amendment to a disclosure statement: $600

Fee to request a retrieval of a filing: $38

Fee for a copy of a public filing: $1 per page

If you have any questions please feel free to contact Benjamin Hagen (604-661-9264, bhagen@rbs.ca) or Casey Smith (604-661-9287, csmith@rbs.ca).

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LAW NR. 21,121 AMENDS RULES RELATING TO CORRUPTION AND OTHER CRIMES, INCORPORATES NEW CRIMINAL CONDUCTS, AND EXPANDS CRIMINAL LIABILITY OF LEGAL ENTITIES

Law No. 21,121 (the "Law"), which came into force on November 20, 2018, amends the Criminal Code, Law No. 20,393 on Criminal Liability of Legal Entities, and Law No. 19,913 on Money Laundering, in connection with various criminal conducts relating to corruption and conflicts of interest.

The following is a summary of the main aspects of the Law:

1. Domestic Passive and Active Bribery. The Law incorporates the following amendments to the regulation of domestic passive and active bribery:

1.1. What Constitutes a Bribe: Prior to the Law, criminal liability for domestic bribery required that the actual bribe (i.e., the benefit or advantage requested, accepted, offered or delivered) be of an economic or financial nature. The Law has expanded this to include bribes consisting of *any kind* of advantage or benefit, not only financial or economic.

1.2. Bribery without corrupt intent or quid pro quo: Prior to the Law, the only case where a crime of domestic bribery could be established without proving corrupt intent or quid pro quo was *where the bribe requested, accepted, offered or delivered was a greater fee than the one applicable to the position of the relevant public official.* This made the occurrence of this crime very unlikely because most public officials—particularly those of higher ranks, such as a ministers, undersecretaries, members of Congress, etc.—are not entitled to receive payments or fees from private parties by reason of their official position. The Law amends this and provides that this criminal offense will be committed by requesting, accepting, offering or delivering *any kind of benefit to which the public official is not entitled.* Thus, any unlawful advantage or benefit offered to or accepted by a public official may constitute bribery, without the need to prove a corrupt intent or *quid pro quo.*

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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2. Bribery of Foreign Public Officials. The Law includes the following amendments to the regulation of bribery of foreign public officials:

2.1 Prior to the Law, this offense only could occur if the relevant unlawful business or advantage sought by the bribe was within the scope of "any international transactions". The Law extends this scope to *any type of economic activity carried out abroad.*

2.2 The Law provides that this criminal offense is also perpetrated when the bribe is intended to achieve that the foreign public official performs a function or duty that properly belongs to his/her office—e.g., facilitating payments—an element that was not expressly provided prior to the Law.

3. Unlawful Negotiation. Prior to the Law, this offense penalized public officials, judicial experts, arbitrators, liquidators, guardians and curators who acquired a personal or family interest, whether directly or indirectly, in any matters or business in which he/she intervened due to his/her position. The Law substantially amends the regulation of this conduct by: (i) listing certain specific actions that were previously not expressly considered; (ii) incorporating new types of perpetrators, such as insolvency trustees, company liquidators, asset managers or curators of legally unable persons, company board members and managers; (iii) increasing prison time penalties, which are now up to five years (up from three years and one day); and (iv) increasing disgorgement penalties, which currently range from 50 to 100 percent of the value of the undue interest taken in the business (up from ten to fifty percent).

4. New Criminal Offense: Commercial Bribery. This new criminal offense penalizes (i) employees or agents requesting or receiving an economic or other advantage in order to favor or for having favored a certain party over another party for the execution of a contract; and (ii) anyone offering or agreeing to provide such advantage to the relevant employee or agent, with that same intent.

5. New Criminal Offense: Disloyal Management: This new criminal offense penalizes any person's mismanagement of third party assets, resulting in a loss, when performed through or with an abuse of his/her authorities or other actions or omissions that are manifestly contrary to the asset owner's interests. Aggravated penalties for this new crime are provided for managers of assets owned by (i) legally unable persons (e.g., curator of a minor or mentally disabled person), and (ii) listed companies and certain regulated corporations.

6. Increased Penalties, Fines and Statute of Limitations.

6.1. *Increased Prison Time and Statute of Limitations.* The Law increases prison time for a number of criminal offenses, including bribery and certain fraud crimes. Conducts that were previously assigned simple crime penalties—e.g., bribery of foreign public officials—now are subject to felony prison times, starting at *five years and one day*. As a consequence of this new minimum prison term, the statute of limitations for these conducts has increased from five to ten years, and convicted persons must serve actual prison time as opposed to solely alternative penalties.

6.2. *Increased Fines.* The Law increases fines that may be applicable to certain crimes, including bribery and other crimes committed by public officials—e.g., increased disgorgement penalty for unlawful negotiation, as described in section 3(iv) above.

7. New Penalties. The Law incorporates to the Criminal Code: (i) for conducts constituting felonies, the penalties of absolute perpetual and absolute temporary disqualification; and (ii) for conducts constituting simple crimes, the penalty of absolute temporary disqualification. In both cases, this penalty entails the inability to hold positions or jobs, or practice trades or professions, in companies that contract with governmental entities, in State-owned companies, in companies or associations where the State has majority ownership or participation, and in companies that participate in government concessions or are otherwise public utilities.

8. New Common Rules for Offences Committed by Public Officials: The Law incorporates certain new common regulations for crimes committed by public officials, such as: (i) a penalty aggravation for crimes committed by certain high-ranking officials; (ii) the count interruption of the statute of limitations applicable to a crime for as long as the relevant public official holds the relevant office, to avoid impunity due to the passing of time; (iii) special aggravating circumstance if the public official is a member of a group or organization for the commission of the relevant crime; (iv) a two-degree penalty reduction that the court may grant for effective cooperation.

9. Certain Gifts not Constituting Bribes. The Law provides that cases where gifts or donations of an official nature or motivated by protocol, or of minor economic value and customarily accepted as expressions of courtesy and good manners, shall not rise up to active or passive bribery.

10. Criminal Liability of Legal Entities. The Law provides the following main amendments to the regulation of criminal liability of legal entities:

10.1. *New Predicate Offenses.* The Law adds the following criminal offenses to the list of conducts that may result in criminal liability of legal entities: (i) Unlawful Negotiation (see section 3 above); (ii) Commercial Bribery (see section 4 above); (iii) Disloyal Management (see section 5 above), and (iv) Embezzlement (Art. 470 No. 1 of the Criminal Code).

10.2. *Increased Penalties.* The Law: (i) provides that the penalty of dissolution of the legal entity may be applied to all crimes potentially resulting in a legal entity's criminal liability, if the relevant legal entity has previously committed an offense of the same kind; (ii) increases applicable fines, including a raise of maximum fines from approximately USD 1.4 million (20,000 UTMs) to approximately USD 21.4 million (300,000 UTMs); and (iii) incorporates the penalties of (x) confiscation of funds that are equivalent to the assets that participated in the criminal conduct, and (y) disgorgement.

11. Increased Money Laundering Liability. The Law expands the predicate offenses that may result in a crime of money laundering, by incorporating disloyal management (see section 5 above) and embezzlement.

You can download Law 21.121 at
https://www.Leychile.cl/Navegar?idNorma=1125600&buscar=21121

HAN KUN LAW OFFICES

Legal Commentary

CHINA PRACTICE • GLOBAL VISION

January 11, 2019

Intellectual Property Law

China's New Supreme People's Court IP Tribunal Launched as of January 1, 2019

Tao ZHANG | Lili WU

On January 1, 2019, a new IP-focused tribunal within the Supreme People's Court (SPC) ("**IP tribunal**") was established in Beijing to hear second-instance cases involving patent and other complex technical IP matters. The IP tribunal will hear cases that are appealed from across China, from both the civil decisions of first-instance courts and administrative decisions of the Patent Re-examination Board (PRB) of the Chinese National IP Administration (CNIPA, patent office of China) and others. The IP tribunal is intended to unify IP judicial standards and improve the quality and efficiency of trials in IP cases. This development is regarded as a major step toward a national IP appellate court and is expected to greatly change China's IP protections in the coming years.

I. Background

In recent years, China has viewed centralizing its IP judicial system to be an essential component of its policy of strengthening and unifying IP protections. In November 2014, three specialized IP courts were established in Beijing, Shanghai and Guangzhou, and, from 2017, 18 new specialized IP tribunals have been established in the intermediate courts of major cities.

In early 2018, the central government issued the *Opinions on Several Issues Concerning Strengthening the Reform and Innovation in IPR Case Trials*, which identifies as an important reform task the establishment of a national level IP case appellate system. On October 26, 2018, the Standing Committee of the Thirteenth National People's Congress promulgated the *Decision on Several Issues Concerning Litigation Procedures of IPR Cases Including Patent Cases*, creating the IP tribunal to serve as a national IP appellate court and to hear civil and administrative appeals in patent and other technical IP cases, which were previously appealed to the respective provincial high courts.

The decision stipulates that the SPC will report to the Standing Committee three years after establishment of the IP tribunal. This indicates that the IP tribunal may be a transition towards a specialized IP appellate court.

II. IP Tribunal Procedural Rules

In December 2018, SPC issued *Provisions on Several Issues Concerning the IP Tribunal* ("**Provisions**"), which came into force on January 1, 2019 and set forth some basic procedural rules for the IP tribunal.

1. Jurisdiction

Article 2 of the Provisions specifies that the IP tribunal has jurisdiction over:

a. *Appeals of unsatisfactory first-instance decisions and rulings issued by High Courts, IP Courts, or Intermediate Courts in civil cases in relation to invention patents, utility models, new varieties of plant, layout designs of integrated circuits, technical secrets, computer software and monopoly;*
b. *Appeals of unsatisfactory first-instance decisions and rulings issued by the Beijing IP Court in administrative cases in relation to the granting and validation of invention patents, utility models, design patents, new varieties of plant and layout designs of integrated circuits;*
c. *Appeals of unsatisfactory first-instance decisions and rulings made by High Courts, IP Courts or Intermediate Courts in administrative cases in relation to invention patents, utility models, new varieties of plant, layout designs of integrated circuits, technical secrets, computer software and monopoly administrative penalties;*
d. *Major and complex nationwide first-instance civil and administrative cases mentioned in items (1), (2) and (3) of this Article;*
e. *Applications for retrial, protests, retrials and other cases suitable for judicial supervision where a legally effective decision, ruling, or mediation agreement has been issued in a first-instance case mentioned in items (1), (2) and (3) of this Article;*
f. *Jurisdictional disputes in first-instance cases mentioned in items (1), (2) and (3) of this Article, applications for reconsideration of fines and detention decisions, applications for trial period extensions, etc.;*
g. *Other cases that SPC considers should be tried by the IP tribunal.*

In addition to some special first-instance and retrial cases, the IP tribunal is generally designed to hear technology-related second-instance cases, including civil and administrative cases in relation to invention and utility model patents, plants, layouts, trade

secrets, antitrust, software copyrights, and administrative cases involving design patents. PRB design patent invalidation or re-examination decisions will now be appealed to the IP tribunal, while design patent infringement decisions issued by local courts will be appealed to the competent local high court.

Those IP cases not involving technology, such as trademark and non-software copyright cases, are not included in the jurisdiction at this stage but may be in the future. In addition, the IP tribunal will only hear cases appealed from first-instance decisions issued after January 1, 2019.

IP case retrials after the second instance will continue to be heard by the existing SPC IP Trial Tribunal, which is a separate tribunal under SPC.

2. Other procedural rules

The Provisions and SPC interpretations provide that the IP Tribunal will be flexible and transparent in how it handles cases. For example, if both parties agree, the IP tribunal can serve litigation documents, evidence and decisions by electronic means. The IP tribunal can also hold pre-trial meetings remotely through an online platform or hold hearings in cities other than Beijing in the form of a circuit court.

The Chief Justice of the IP tribunal, Mr. Dongchuan Luo, has promised to take advantage of artificial intelligence and big data technologies to alleviate pressure from administrative work, and take some new measures in trials such as employing different procedures in complex and simple cases, intelligent assigning processes, assigning similar patent cases to the same panels, etc. More provisions and interpretations on procedural and substantive issues will be formulated soon.

III. Structure and Personnel

The IP tribunal now has six trial groups, a technical investigation department for investigating technical matters, a litigation service center for procedural management, and an administrative office.

The IP tribunal includes a total of 27 experienced judges from SPC, lower courts, and PRB. Specifically, (a) ten judges are from SPC, including the head and three deputies; (b) three judges are from the Beijing High Court, one judge is from each of the Shanghai, Jiangsu, Zhejiang, Shandong, Hubei, Hunan and Fujian High Courts; (c) two judges are from the Beijing IP Court, one judge is from each of the Shanghai IP Court and the Guangdong IP Court; and (d) three judges are from PRB. Half of the judges have a doctoral degree and one-third have a technical background. The judges average over twelve years of IP trial experience and 42 years of age.

Mr. Luo has estimated that the IP tribunal may hear about 2,000 cases per year and will recruit

more judges. In addition to recruiting judges with trial experience, SPC has issued recruiting advertisements to the public welcoming scholars and lawyers who are experienced in IP law to join the IP tribunal.

IV. Outlook

SPC has repeatedly stated that the IP Tribunal has been established to ensure uniformity of legal decisions in the area of intellectual property, to protect IP rights and encourage innovation, and to create a sound business environment.

1. Unify judicial standards

A common appellate tribunal across China will greatly reduce conflicting decisions, whether between courts from different provinces or between courts handling infringement and validity cases of the same IP rights. Previously, over 30 local high courts could hear civil appeal cases and did sometimes issue conflicting decisions. For example, courts have disagreed whether jurisdiction can be established based on online purchases, and discrepancies have arisen under parallel validity and infringement proceedings. Though estoppel of prosecution history was a principle widely accepted, its successful application in practice remained an issue for a long time. The IP tribunal may resolve these issues, since the IP tribunal will presumably hear related appeal cases from the same panels or even the same judges.

The IP tribunal is also expected to take particular measures to unify judicial standards. For example, the IP tribunal will establish professional judge meetings to discuss difficult cases or essential legal issues, select typical cases to provide guidance for lower courts and PRB, rely on IT technology to help judges easily search for similar case precedents, and rely on the trial committee of SPC for important cases.

An additional advantage of a centralized appellate tribunal is that choice of forum issues will generally be less important, since differences at the lower court level may no longer weigh heavily on case outcomes.

2. Provide better protections for IP rights

A common IP tribunal at the appellate level is expected to provide greater protections for both domestic and foreign IP owners.

IP owners can expect the IP tribunal to issue larger damage awards. A draft amendment to the Patent Law, issued on January 4, 2019, proposes to quintuple damages in the case of willful infringement and raise the upper limit of statutory damages by five times to RMB 5 million. The amendment is expected to be passed soon. At the opening ceremony of the IP Tribunal, the Chief Justice of SPC, Mr. Qiang Zhou, emphasized that it is an important

task for the IP tribunal to "explore and improve the compensation system for IP infringement damages, correctly apply punitive damages, and to increase punishment for violations of IP rights."

Moreover, under unified judicial standards, the outcomes of infringement cases may be more reliable and predictable for IP owners, which will act to improve IP owners' confidence in IP protections in China.

3. Simplify procedures and shorten trial periods

Directly appealing to the IP tribunal removes a layer of appeals, which will reduce the cost and duration of litigation for IP owners. Efficiency, together with an increase in damage awards, will help attract more IP owners to initiate litigation in China.

V. Summary

The establishment of the IP tribunal within SPC is the most significant change in the China's IP judicial system since the establishment of specialized IP courts in 2014. This is good news for IP owners who wish to enforce their rights in China since the IP tribunal is expected to adjudicate complex civil and administrative patent cases under unified validity and infringement standards, more efficient procedures and improved IP rights protections. We look forward to seeing a more reliable, efficient, and unified IP system with the establishment of the IP Tribunal.

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Brigard Urrutia

Minimum monthly statutory salary and transportation allowance for 2019

The National Government set the minimum monthly statutory salary in the amount of COP $828,116 and the transportation allowance in the sum of COP $97,032.

The National Government issued Executive Decrees 2451 and 2452 of 2018 by means of which it established the new minimum monthly statutory salary and the transportation allowance applicable for year 2019.

On December 27, 2018, the National Government issued Executive Decrees 2451 and 2452 of 2018 by means of which it established the new minimum monthly statutory salary and the transportation allowance applicable for year 2019.

In this sense, as of January 1st, 2019, the minimum monthly statutory salary will be of COP $828,116, and the new transportation allowance, applicable for employees earning 2 or less minimum monthly legal salary will be of COP $97,032.

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France renders applicable the use of blockchain for certain financial securities and confirms its worldwide pioneering legal framework

7 January 2019

Decree no. 2018-1226 dated 24 December 2018 provides the implementing provisions for order no. 2017-1674 dated 8 December 2017 on the use of a blockchain protocol for the representation and disposal of financial securities, and for article L. 223-12 of the French Monetary and Financial Code pertaining to mini-bonds. In force since 1 July 2018, this order had nevertheless its application hinged on the publication of this decree.

Over 30 years after the dematerialisation of transferable-securities, French securities law has taken another step forward by enabling their registration using distributed ledger technology (DLT, also known as *Dispositif d'Enregistrement Electronique Partagé*, or *DEEP*, in French). DLT refers in particular to blockchain technology, hailed as being particularly promising in post-trade activities, but remains voluntarily "broad and neutral as regards the various processes in order to not exclude future technological developments"[1].

This technology had already been recognised in French law under order no. 2016-520 dated 28 April 2016 pertaining to short-term notes (in French, *"bons de caisse"*) and which introduced the possibility for mini-bonds[2] to be issued and disposed of using DLT.

Next came order no. 2017-1674 dated 8 December 2017, which followed two industry-wide consultations with stakeholders. In applying this reform, French law now provides that DLT registration of certain financial securities equates registration in a securities account[3]. This DLT registration goes for both establishing the property of said securities[4] and their disposal[5]. The choice of using DLT rather than account registration falls to the issuer.

This innovative approach concerns securities that are not admitted to transactions by a central securities depository. The report submitted to the French President as part of this order usefully indicates that this category includes equity securities and debt securities that are not traded on a trading venue, as well as negotiable debt securities and units or shares of collective investment undertakings, i.e. precisely areas in which the market had high expectations.

This decree changes certain provisions of the French Commercial Code and the French Monetary and Financial Code. In particular, it provides:

- that the DLT on which the securities are registered must be designed and implemented "in such a way as to guarantee the registration and integrity of registrations and enable, whether directly or indirectly, the identification of the security owners, the nature and the number of securities held";
- that DLT registrations must be subject to "an updated activity continuity plan, which includes in particular an external

mechanism for the periodic safeguarding of data"; and

- the conditions according to which these securities could be pledged.

Although certain uncertainties regarding the application of the new mechanism must still be clarified, France maintains its status as a pioneer in matters of blockchain legislation and stays ahead of its European neighbours, for instance Luxembourg whose government has recently published a draft law[6] with a similar purpose.

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[1] Report to the French President of the Republic on order no. 2017-1674 dated 8 December 2017 pertaining to the use of distributed ledger technology for the representation and disposal of financial securities.
[2] Mini-bonds are a sub-category of short-term notes that can be offered via an investment services provider (ISP) or an adviser in equity investments.
[3] CMF, art. L.211-3.
[4] CMF, art. L.211-7.
[5] CMF, art. L.211-17.
[6] Draft law amending law amended on 1 August 2001 on the circulation of securities, initiated by the Finance Ministry of the Grand Duchy of Luxembourg and filed with the Deputy Chamber on 27 September 2018.

Gide 255 supports its clients in their regulatory review and strategic initiatives in the digital field. Drawing on its multidisciplinary experience, the Gide 255 team works with its clients on the legal structuring of their activities and the changing rules that will apply to this booming economic sector.

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

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

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

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PRESS ROOM

HN: INCREASE IN MINIMUM WAGE

January, 2019

By means of EXECUTIVE AGREEMENT No. STSS-00-2019, the increase to the Minimum Wage in Honduras was approved, effective as of January 1st of the current year (2019).

The percentages of increase to the minimum wage for the industries in the country were established in the following Agreements and according to the percentages that are detailed below:

- Tripartite Agreement in the framework of the negotiation of the minimum wage for the years 2019 and 2020; and,
- Agreement for the Promotion of Investment, Generation, Protection and Development of Decent Employment, Health, Access to Credit, Debt Consolidation and Access to Housing for Workers of the Honduran Maquiladora Textile Sector and other Free Zone Companies, effective as of January 1st of the years 2019, 2020, 2021, 2022 and 2023.

Categories	2019	2020
From 1 to 10	4.77%	5%
From 11 to 50	4.77%	5%
From 51 to 150	6.40%	6.75%
From 151 onwards	7.00%	7%

And for the Maquiladora Textile Industry and other companies that operate in free zones:

2019	8%
2020	7.5%
2021	7.5%
2022	7.5%
2023	8%

Santamarina + Steta

LEGAL UPDATE

January 2019

COMPETITION PROVISIONS IN THE USMCA
UNITED STATES-MEXICO-CANADA AGREEMENT

On November 30, 2018, during the G20 summit in Buenos Aires, Argentina, the U.S. president Donald Trump, Canada's Prime Minister Justin Trudeau and Mexico's former President Enrique Peña Nieto signed the United States-Mexico-Canada Agreement ("USMCA"), which will replace the 24 years old North America Fee Trade Agreement, once it has been ratified by each of the member states.

PROVISIONS ON COMPETITION POLICY

UMSAC is made by 34 Chapters, 4 Annexes and 10 side letters; the legal provisions that address economic competition can be found in Chapter 21 titled "Competition Policy". This legal update will exclusively cover the legal provisions contained therein.

As per information of Mexican Ministry of Economy, the objective of including a chapter exclusively dealing with competition policy was to:

"*Establish a stronger and better framework to secure that due process rules will be followed when applying competition laws and to strengthen the coordination and cooperation among the competition authorities in the North American region…*"[1]

Territorial and extraterritorial application of competition laws

According to the text of the USMCA each party shall apply its own competition laws to all commercial activities within its territory.

Notwithstanding, and in our opinion one the most outstanding contribution to competition law in the Americas, was the inclusion of extraterritorial application of competition laws provisions, same that dictate that a **Party to the agreement is**

[1] Política de Competencia, available at: http://comunicacion.senado.gob.mx/pdf/2018/USMCA/resumen/9.%20Competencia.pdf. Translation by the author.

entitled to apply its national competition laws to conducts carried out outside its territory whenever appropriate nexus to its jurisdiction exists, which will resolve some sensitive jurisdictional issues in the region.

Exceptions to the application of competition laws

Each Party may determine if certain economic activities or sectors will be exempted from the application of competition laws in its territory, provided that those exceptions are transparent, established in its law and based on the public interest or public policy grounds.

Enforcement Policies

All Parties shall (i) **give MFN treatment to persons of another Party**; (ii) take into consideration the effects of its enforcement actions on other Parties' competition authorities; and, (iii) limit the remedies relating to conducts and assets outside its territory when an **appropriate nexus** to harm or threatened harm to commerce exist.

Procedural Fairness

National competition authorities shall: (i) provide transparency regarding the applicable legal framework under which investigations and enforcement procedures will take place; (ii) conduct investigations either subject to definitive deadlines or within a reasonable time; (iii) afford the opportunity to be represented by legal counsel, including at all meetings and procedures before national competition authorities; (iv) **recognize legal privilege**; and, (v) in mergers, permit early consultations.

Additionally, each Party will have to afford the person under investigation reasonable opportunity to (i) obtain information regarding the national competition authority's concerns; (ii) discuss with the authority key legal, factual and procedural issues; (iii) have access to information to prepare an adequate defense; (iv) be heard and present evidence; (v) cross-examine any witness; and, (vi) contest any allegation before an impartial judicial or administrative authority.

Finally, each party shall provide the person that has been sanctioned the opportunity to **seek judicial review by a court or independent tribunal, including substantive or procedural errors**.

Fines

The criteria used by the competition authority of a Party to calculate a fine shall be transparent and shall be based on the revenue or profit obtained in its territory.

Cooperation

The USMCA sets the basis for an enhancement of cooperation among competition authorities, which includes the basis for information sharing and for coordinating consumer protection enforcement in transnational issues.

Regarding every legal provision under this chapter there is no recourse to dispute the agreement; however, there is a resource of consultation under this chapter.

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

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Simpson Grierson

New Employment Laws will come into force in May 2019

December 06, 2018

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Employment (inc Employment Relations Amendment Bill) (/resources/employment-inc-employment-relations-amendment-bill)

The Government last night succeeded in passing one of the most important pieces of their legislative agenda, the Employment Relations Amendment Bill. The Bill strengthens the legal rights of employees, enhances the workplace power of unions, and bans larger employers from using 90-day trial periods.

The Bill has been the subject of considerable media attention as it has progressed through Parliament this year, and the Government has overcome trenchant opposition from the National Party and business advocacy groups.

However, opponents of the Bill won a few victories in the late stages before the Bill was passed. The New Zealand First Party, whose votes were required for the Government to pass the Bill, indicated last week that they thought the Bill went too far in favour of unions. NZ First leader Winston Peters described the Bill then as “a work in progress”. The final Bill reflects two key concessions:

Union officials will not be able to freely access a workplace without obtaining consent from the employer (unless there is a collective covering their work, or where bargaining is underway); and

Employers will now be able to object to Multi-Employer Collective Agreements (MECAs), if they have ‘reasonable grounds’ to do so.
Most of the Bill's provisions come into force 6 May 2019. We recommend that employers consider whether their employment agreements, practices and policies are compliant ahead of the changes coming into force. We are happy to provide advice on what effect the Bill will have on your business.

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Singapore Ministry of Health publishes fee benchmarks for surgical procedures in the private sector

DENTONS RODYK

January 10, 2019

As part of efforts to keep healthcare costs sustainable, the Singapore Ministry of Health (MOH) has on 13 November 2018 introduced fee benchmarks for surgeon fees at private hospitals and clinics. As at the date of writing, the document released by MOH is titled 'Fee Benchmarks for Private Sector Surgeon Fees.'

The 2018 fee benchmarks, developed by a Fee Benchmarks Advisory Committee comprising of various stakeholders including medical practitioners and representatives from the healthcare and insurance industries, cover 222 common surgical procedures. Data was obtained from private healthcare providers, with the aim of ensuring sufficient empirical basis for the intended benchmarks.

This is not the first guideline of its kind in Singapore. Since 2003, MOH has already publicised historical hospital bill sizes (including operation fees) for public sector hospitals, which subsequently extended to private hospitals. The Singapore Medical Association (SMA) – an association representing the majority of medical practitioners in Singapore – published a Guideline on Fees (GOF) in 1987 for the private sector. The 4th edition of the GOF in 2006 had expanded to cover almost 1,500 surgical procedures, but was withdrawn by the SMA in 2007 due to anti-competition concerns. In recent years, amid calls for fee guidelines for the private sector, the MOH proceeded to develop fee benchmarks for private medical practitioners.

The 2018 fee benchmarks were designed to serve as guidelines for private medical practitioners in setting fair and reasonable fees for surgical procedures. By pushing toward greater transparency, the MOH also hopes to facilitate and empower patients to make informed decisions.

Other stakeholders such as insurers could also take the fee benchmarks into consideration in insurance policy claims and assessment processes.

The fee benchmarks, developed by reference to actual transacted data, cover only surgeon fees. Other fees, such as facility fees and anaesthetist fees, are not included.

Please also note that while it is not specifically addressed in the MOH's 2018 fee benchmarks, the Committee intended for the fee benchmarks to be periodically updated. The Committee recognised that over the years, there should be an allowance for some increase in the fees.

Implications on private medical practitioners

The fee benchmark for each procedure is expressed as a range of fees. The MOH recognises that there would be variation in skill and complexity within each surgical procedure, and has made it clear that the upper bound of the benchmarks do not constitute a fee cap. Private practitioners are thus not bound to peg their fees to stay within the benchmark ranges. However, it is recommended that private practitioners should use the benchmark ranges when setting their fee rates and make reference to the benchmarks when providing financial counselling to patients or their

caregivers.

The fee benchmarks also place a greater imperative on practitioners to explain matters to patients should the fees exceed the upper bound. This explanation should be done before the operation. As a matter of good practice, medical practitioners should document clearly their explanations on the available treatment options and fees for the procedures, with the appropriate level of detail.

MOH has also stressed that fees exceeding the upper bound do not necessarily amount to overcharging. Nevertheless, medical practitioners may wish to note that the fee benchmarks may serve as a reference for regulators such as the Singapore Medical Council (SMC) and the MOH when investigating complaints relating to overcharging. Private medical practitioners should take care to ensure that departures from the fee benchmarks are justified and that appropriate explanations are provided to patients or their caregivers.

Conclusion

The publishing of the fee benchmarks is a welcome development. Greater information symmetry may also help to reduce complaints of overcharging against private practitioners.

Please do not hesitate to reach out to any of our contacts if you have any questions relating to the fee benchmarks and how the benchmarks will affect your business or practice.

Dentons Rodyk acknowledges and thanks Associate Lee Qiu Li for her contributions to this article.

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Vital Currency Being Regulated by the Money Laundering Control Act

12/27/2018

Lihuei Mao/ David Tien

The Asia Pacific Group on Money Laundering (APG) visited Taiwan on November 5, 2018 to commence the third-round assessment over the country's anti-money laundering practices. In order to avoid an underperforming assessment result, which would lead to the limitation of the overseas business operations of financial institutions, stringent scrutiny over the overseas investment by Taiwan citizens, and an adverse impact on the international reputation of Taiwan, the Legislative Yuan amended the "Money Laundering Control Act" on November 2, 2018. The amended Money Laundering Control Act not only strengthens the legal compliance requirements of the internal audit and control of financial institutions and includes virtual currency platform and trading business within the regulatory scope but also expands the extraterritorial jurisdiction of the Money Laundering Control Act.

The major content of the amendments of the "Money Laundering Control Act" is as follows:

1. Virtual currency platform and trading business shall be included in the scope of the Money Laundering Control Act, which shall be subject to the provisions relating to financial institutions (Article 5);

2. Financial institutions and designated non-financial enterprises or personnel shall establish their own anti-money laundering policies and procedures based on their money laundering and terrorism financing risks and business scale, including preparing and updating the assessment reports of AML/CFT and audit procedures periodically. Financial institutions may be subject to a fine between NT$500,000 and NT$10,000,000, while designated non-financial enterprises or personnel between NT$50,000 and NT$1,000,000 if breaching the relevant rules (Article 6); and

3. The extraterritorial effect of Money Laundering Control Act is expanded, which means a money laundering offense can be committed regardless whether the conduct or the result of such an offense takes place within the territory of Taiwan (Article 16).

Given that the Financial Action Task Force on Money Laundering (FATF) had issued an alert in 2015 emphasizing the risk of money laundering of virtual currency and also a recommendation in October this year providing that virtual currency shall be subject to anti-money laundering regulations, the "Money Laundering Control Act" was amended to cover virtual currency platforms and trading business to perfect Taiwan's anti-money laundering system. In the meantime, the Executive Yuan determined that the Financial Supervisory Commission (FSC) shall be the competent authority to govern all matters regarding anti-money laundering of virtual currency under the "Money Laundering Control Act", and thus the FSC will promulgate the relevant rules in due course.

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What Did the Inventor "Actually Invent": Claim Construction under *Cave Consulting v. OptumInsight*

07 January 2019

Firm Thought Leadership

In the seminal *en banc* decision *Phillips v. AWH*,[1] the Federal Circuit heralded the "bedrock principle of patent law that the claims of a patent define the invention to which the patentee is entitled the right to exclude."[2] However, when interpreting the meaning of particular claim terms, the Federal Circuit in *Phillips* explained that "the specification necessarily informs the proper construction of the claims."[3] For example, the Federal Circuit has cautioned that "the specification may reveal an intentional disclaimer, or disavowal, of claim scope by the inventor."[4]

The Federal Circuit's recent decision in *Cave Consulting Group v. OptumInsight*[5] highlights a situation in which certain descriptions of prior art methods in the specification may be deemed during claim construction to have excluded subject matter that might otherwise read on the claims. As illustrated in *Cave Consulting*, the Federal Circuit distinguishes between merely "discuss[ing] certain disadvantages of prior art methods," which may not be significant enough to disclaim claim scope, and "particularly pointing out what the invention does not use," which may limit the claim scope without regard to whether there is explicit disavowal.[6] This article discusses the *Cave Consulting* opinion and other relevant cases and the impact on both claim construction by the courts and on patent drafting.

The Claims at Issue

In *Cave Consulting,* a jury rendered a verdict at the district court in favor of Cave Consulting, finding that U.S. Patent 7,739,126 ("the '126 patent") was not invalid and was infringed by Optum, and awarding Cave Consulting over $12 million in damages.[7] The '126 patent is directed to a method for measuring physician efficiency that includes, *inter alia*, a step of calculating "weighted episode of care statistics" based on comparing a physician with a peer group to determine the physician's efficiency score.[8] Regarding the "weighted statistics," the '126 Patent explains that the "system of the present invention uses an indirect standardization technique for weighting together the episodes within [a] core group of medical conditions."[9] As background, the '126 patent discusses the prior art methods of direct standardization that "use a physician's actual episode composition."[10] The '126 patent further clarifies that the indirect standardization technique "does not use the peer group's actual episode composition to calculate the weighted average."[11] In other words, in calculating the "weighted statistics," the '126 patent uses an "indirect standardization" weighting method, while the prior art used a "direct standardization" weighting method.

The independent claims of the '126 patent broadly claim the "weighted statistics," with dependent claims 23 and 26 reciting the "indirect standardization" weighting method (i.e., the patented method) and the "direct standardization" weighting method (i.e., the prior art method), respectively. The district court adopted Cave Consulting's claim construction that included direct standardization within the scope of the claims and the jury determined infringement based on this claim construction.[12]

On appeal, the Federal Circuit reversed the district court's claim construction and held that the independent claims, when read in light of the specification, implicitly excluded the direct standardization weighting method.[13] The Federal Circuit disagreed with the district court's presumption of a broad and nonlimiting reading of the independent claims in view dependent claims 23 and 26.[14] Relying on *Retractable Techs. v. Becton, Dickinson*[15], the Federal Circuit indicated that claim elements

should be construed to "tether the claims to what the specifications indicate the inventor actually invented."[16] The Federal Circuit noted that there is no indication in the '126 patent's description, other than the dependent claims, that its invention uses the "direct standardization" weighting method.[17] In fact, the only mention of the "direct standardization" weighting method comes from the description of the prior art methods in the background section, which describes in detail the shortcomings of the error-prone prior art methods.[18]

Although Cave Consulting argued that the description of the prior art methods did not amount to clear and unmistakable disavowal, the Federal Circuit did not find that argument persuasive. The Federal Circuit acknowledged that "statements about the difficulties and failure in the prior art, *without more*, do not act to disclaim claim scope."[19] However, the Federal Circuit distinguished situations in which "*the description itself* is affirmatively limiting" such that "explicit redefinition or disavowal" is not required.[20] As such, since the '126 patent's description "particularly point[s] out what the invention does not use," the Federal Circuit concluded that clear and unmistakable disavowal was not required.[21]

Explicit Disclaimer in a Different But Similar Context

Cave Consulting harkens back to at least one pre-*Phillips* case, *SciMed Life v. Advanced Cardiovascular*,[22] which involved a slight twist on *Cave Consulting*. Instead of specification language that explicitly excludes a particular method, the specification language in *SciMed Life* was found to explicitly limit all embodiments to a particular structure.

In *SciMed Life*, SciMed owned three patents directed to balloon dilation catheters used in coronary angioplasty procedures. The patents' specifications all stated that a coaxial lumen structure was the "basic … structure for all embodiments of the present invention contemplated and disclosed herein."[23] The structure of the allegedly infringing product made by Advanced Cardiovascular differed from the structure disclosed in the specification of the SciMed patent in that it had a dual side-by-side lumen configuration.[24]

The district court concluded that the specification language "leaves no doubt that a person skilled in the art would conclude that the inventor envisioned only one design for the catheters taught in SciMed's patents – an intermediate sleeve section containing two … lumens arranged coaxially."[25] The Federal Circuit agreed, noting that the portion that the district court focused on was the most compelling portion of the specification, and interpreted the specification "to disclaim the dual lumen configuration and to limit the scope of the asserted claims to catheters with coaxial lumen structures."[26] As such, even though the claim language of SciMed's patents did not explicitly require a catheter with a coaxial lumen, the Federal Circuit held that the language in the specification defined the claim terms to exclude a dual side-by-side lumen configuration.

Takeaways

A petition for a writ of certiorari was filed in the *Cave Consulting* case on November 2, 2018.[27] But unless that writ is granted, we must look to the Federal Circuit's guidance and emphasis on construing claim elements to "tether the claims to what the specifications indicate the inventor actually invented."[28]

Both before and after *Phillips*, the Federal Circuit has indicated a willingness in certain circumstances to limit claim scope when it determines that the patentee has unambiguously stated that the invention does or does not include certain features even if those features are not recited in the claims. In *Cave Consulting*, the Federal Circuit determined that the specification description of the limitations of prior art methods was sufficient to explicitly point out what the claimed invention did not do, and thus limited the claim scope to exclude the prior art methods. In *SciMed Life*, the Federal Circuit determined that the specification description describing the structure of all embodiments of the device as being a particular structure limited the claimed invention to that particular structure to the exclusion of another mutually exclusive structure.

Accordingly, as seen from both *Cave Consulting* and *SciMed Life*, the manner in which the claims are ultimately construed may be highly dependent on specification statements or characterizations of the invention. Practitioners should exercise caution in the level of detail used to describe the prior art, especially in the situation in which claim limitations are drafted based on features of the prior art, and in some cases may want to limit or eliminate the background section altogether. Practitioners should also consider whether any specification statements or characterizations of the invention may be deemed to have disclaimed claim scope which is valuable to the inventor. Overall, practitioners should take care in drafting the specification and claims to avoid unintentional limitations in claim scope.

[1] *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005).

[2] *Phillips*, 415 F.3d at 1312 (citing *Innova/Pure Water, Inc. v. Safari Water Filtration Systems, Inc.*, 381 F.3d 1111, 1115 (Fed. Cir. 2004)) (citations omitted).

[3] *Id.* at 1316 (citing 35 U.S.C. § 112, para. 1)(citations omitted).

[4] *Id.*

[5] *Cave Consulting Group, LLC v. OptumInsight, Inc.*, No. 17-2081 (Fed. Cir. March 21, 2018).

[6] *Cave Consulting*, slip op. at 14.

[7] *Id.* at 2.

[8] *Id.* at 3-4.

[9] *Id.* at 4-5.

[10] *Id.* at 5.

[11] *Id.*

[12] *Id.* at 5-6.

[13] *Id.* at 13-15.

[14] *Id.* at 12-13.

[15] *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 653 F.3d 1296 (Fed. Cir. 2011).

[16] *Cave Consulting*, slip op. at 13-14 (citing *Retractable Techs.*, 653 F.3d at 1305).

[17] *Id.* at 13.

[18] *Id.* at 13-14.

[19] *Id.* at 14 (citing *Retractable Techs.*, 653 F.3d at 1306) (emphasis in original).

[20] *Id.* (citing *Trs. of Columbia Univ. in City of N.Y. v. Symantec Corp.*, 811 F.3d 1359, 1363 (Fed. Cir. 2016))(emphasis in original).

[21] *Id.*

[22] *SciMed Life Systems, Inc. v. Advanced Cardiovascular Systems, Inc.*, 242 F.3d 1337 (Fed. Cir. 2001)

[23] *SciMed Life*, 242 F.3d at 1339.

[24] *Id.* at 1339.

[25] *Id.* at 1339-40.

[26] *Id.* at 1340, 1343.

[27] *Cave Consulting Group, LLC v. OptumInsight, Inc.*, Petition for Writ of Certiorari (filed November 2, 2018).

[28] *Cave Consulting*, slip op. at 13-14 (citing *Retractable Techs.*, 653 F.3d at 1305).

# # #

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DEFINING SUCCESS TOGETHER

Delete Cannabis Apps Before Coming to the U.S.

01.08.19
By Diane Butler

Cannabis became legal throughout Canada on October 1, 2018. In the U.S., 10 states and the District of Columbia have legalized recreational and medical cannabis use and production, and 33 states have legalized medical cannabis. Mexico's Supreme Court ruled that marijuana prohibition is unconstitutional, paving the way to follow Canada to nationwide legalization.

But beware: Cannabis is an illegal controlled substance under U.S. federal law. The U.S. Department of Homeland Security agency Customs and Border Protection ("CBP") is the enforcement agency at the U.S. border and airports, and their job is to keep out those who have violated or might violate federal law or cause harm in the U.S. CBP is taking the position that it may bar from entering the U.S. foreign citizens who have used cannabis previously, or who work for or invest in cannabis businesses in the U.S. and elsewhere.

Grounds for Banning Entry: CBP officers are law enforcement officers. They don't make the laws but enforce the laws and should be treated with all due respect. But the role of CBP will become more complicated, as hemp and non-psychoactive CBD compounds are set to become legal for production and use in the United States under the Farm Bill that Congress passed and the President signed on December 20, 2018. Please see our other detailed advisory here.

CBP still may bar entry for certain activities:

- Persons convicted of controlled substance laws anywhere in the world can be banned.
- Admitting to prior illegal use anywhere can result in a ban, even if there was no conviction.
- Drug addicts and drug abusers will be banned.
- Involvement in business activities with cannabis when it was illegal can result in a ban.
- Planning activities that CBP has "reason to believe" would be aiding and abetting trafficking or controlled substance law violations can lead to a ban, including planning to promote cannabis business or planning to buy, use, sell, produce, etc., cannabis in the U.S. (even in states where it is legal).

A theory for imposing bans is that breaking the law outside the U.S. indicates the propensity to violate the law or cause harm inside the U.S. CBP officers assert that to do their job, they may ask virtually any question to anyone entering the U.S., and look at information on phones and mobile devices.

Acceptable Activities: CBP would have *no legal reason for barring someone solely on the basis of legal actions*:

- Using cannabis in Canada when it is legal;
- Being involved in legal cannabis business in Canada;
- Using cannabis (even before October 17, 2018) with a medical use authorization;
- Involvement in U.S. business in hemp or CBD that is legal federally.

Do's and don'ts: Canadian and other foreign recreational users or business persons trying to navigate the rules of coming to the U.S., while violating no law and causing no harm in U.S., should be aware of these principles:

- Do not bring any cannabis product or paraphernalia into the U.S. Even residue can be detected.

- Questions from CBP must be answered truthfully.
- Do not answer “yes” to questions or statements you do not agree to or fully understand.
- Admitting to use of cannabis in Canada after it was legal on October 17, 2018, does not justify being barred from the U.S. (unless there is a concern about illegal activity in the U.S.).
- Admitting to recreational cannabis use in Canada before October 17, 2018, may result in being barred from the U.S.
- Working for a legal cannabis business in Canada does not justify a ban from the U.S. (unless CBP has a reason to believe there would be illegal activity in the U.S. or some other ground of inadmissibility).
- A person who does not want to answer CBP questions may “withdraw” the application for admission, and decide to return to Canada and not enter the U.S. at that time.
- Declining not to answer CBP questions may result in not being allowed to enter the U.S. at that time. It should not result in being barred from the U.S.
- A person who does not want to hand over a mobile device, is not required to do so, but CBP might deny entry. A mobile device with marijuana apps is likely to draw scrutiny from CBP.

Waiver after Denied Entry: Controlled substance violation bans are “permanent.” However, a person may apply for a waiver of inadmissibility. Waivers may take around a year to process and, if approved, are valid for one year or five years. Attorney assistance may improve the likelihood of success.

CBP Lightening Up?: Involvement in legitimate cannabis activities or legal use being decriminalized in the U.S. and elsewhere. Without a viable ground of inadmissibility, CBP should ease up the inclination to bar foreign nationals on controlled substances grounds.

Efforts are being made to urge CBP to clarify admission policies and procedures at ports of entry and avoid unnecessarily thwarting legitimate travel to the U.S. Until issues are weeded out, to minimize scrutiny, travelers should consider deleting marijuana apps from mobile phone devices before travel to the States.

Disclaimer

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MDR single report exemption and ASRs: Coming to an end for most reporters

January 14, 2019

The Medical Device Reporting (MDR) regulation provides a mechanism for the U.S. Food and Drug Administration (FDA or the Agency), as well as medical device manufacturers, to identify and monitor adverse events (deaths, serious injuries, and certain malfunctions) involving a manufacturer's medical device. Ultimately, the goal behind MDR reporting is transparency to facilitate timely postmarket surveillance of medical device performance to drive necessary corrective action.

Under the current MDR regulation (21 CFR Part 803), reporting entities (manufacturers, importers, and device user facilities – this alert deals only with manufacturers and importers) have specific reporting requirements. For example, if a device malfunctions in such a way that, if the malfunction were to recur, it would likely cause or contribute to a death or serious injury, then, upon learning of the malfunction, the importer must report the information to the manufacturer which must determine if the malfunction is reportable to FDA. If a device actually caused or contributed to a death or serious injury, then the importer has an independent obligation to report the event to FDA and notify the manufacturer, who also has an independent obligation to report the event to the Agency.

Simplifying the reporting process

FDA has broad authority to grant exemptions from, variances from or alternative forms of MDR reporting. Historically, the Agency has used two separate programs to help simplify certain reporting requirements: (1) an exemption that allows for only one of either the foreign manufacturer or importer to report the same MDR event to FDA on behalf of both entities; and (2) allowing certain events to be aggregated into a single periodic report, known as "Alternative Summary Reporting" (ASR). Per 21 C.F.R. § 803.19, a reporting entity wishing to utilize these programs must apply for, and be granted, a request to modify its reporting obligation. In recent years, and consistent with FDA guidance, the Agency has granted a number of these exemptions to reduce reporting of the same event by multiple entities (in the case of MDR single report exemptions); and to reduce the burden of submitting individual event reports for well-understood types of events and failure modes (in the case of ASR), while at the same time ensuring that the requirements of the MDR regulations are enforced. With the implementation of FDA's Voluntary Malfunction Summary Reporting Program (discussed below), the Agency is making changes to both the MDR single report exemption and the ASR programs.

Foreign manufacturer/importer exemption

In the FDA's November 2016 guidance, *Medical Device Reporting for Manufacturers*, the Agency explains that, pursuant to 21 CFR § 803.19(b) and (c), FDA will review requests for MDR single report exemptions from some or all of the requirements of the MDR regulation. For instance, the 2016 guidance notes that a foreign manufacturer and importer may decide they want the importer to submit reports for adverse events related to products for which both entities have an MDR obligation, and the guidance details the associated exemption request process.

Such exemptions create efficiencies for industry and the Agency. Granting authority for either the manufacturer or importer to report the same MDR to FDA avoids the submission of essentially duplicate reports and limits occasions when completion of an individual form 3500A is required.

We understand from recent FDA actions and discussions with Agency representatives that FDA has sent letters rescinding, or is in the process of rescinding, all MDR single report exemptions and will no longer be granting such exemptions under current policy. We also understand from discussions with FDA representatives that this shift, like the change discussed below to ASRs, is an industry wide policy shift that was not targeted at a specific company, sector or group of companies. This shift follows the implementation of FDA's Voluntary Malfunction Summary Reporting Program last year, which is designed to reduce the burden on entities that are subject to malfunction reporting under the MDR regulations. However, this shift could have significant consequences to both importers and foreign manufacturers that should be carefully addressed by entities that have been operating under an MDR single report exemption.

For instance

- there will be a need for increased coordination between manufacturers and importers in completing and cross-referencing reports in an attempt to make clear that certain reports that they submit are, in fact, for the same event; the increased volume of reports could give the outward looking impression that the safety profile of their devices has somehow diminished;
- along those lines, due to the difficulty in cross-referencing MDR reports in the current FDA dataset, it is uncertain how reporting of the same event by both the manufacturer and importer will allow for an accurate representation of how devices are performing postmarket, if only a tabulation of reported events is done, especially if the date on which reporting by both entities began for the given device is unclear; and
- companies who have relied on these exemptions to manage workloads and limit reporting by both entities must now renegotiate the arrangements with their partners as each will now own full individual responsibility for their reporting obligations.

Moreover

- for foreign manufacturers in non-English speaking countries who have relied on their U.S. importer partners to satisfy these requirements, they will need to hire and train individuals to evaluate, prepare, and submit individual reports, which must be submitted in English; and
- for industry analysts responsible for identifying and modeling accurate event counts, the challenge will become even greater because reports of the same event may present with slightly different information when prepared by the different reporting entities, which may be difficult, if not impossible, to deduplicate and use to reach accurate conclusions.

Alternative summary reporting

FDA has, in the past, encouraged the submission of ASR requests and published guidance instructing industry as to what sorts of ASRs would be appropriate and how to make a request for an ASR, (See, *Medical Device Reporting – Alternative Summary Reporting (ASR)* (October 19, 2000)). The November 2016 guidance, *Medical Device Reporting for Manufacturers*, further referenced the October 2000 guidance as the appropriate source for instruction on requesting an ASR and, as with MDR single report exemptions, the Agency explained that FDA will review requests for alternative reporting forms for some or all of the requirements of the MDR regulation.

Voluntary Malfunction Summary Reporting Program

Allows manufacturers to report certain device malfunctions for low-risk products on a quarterly basis:

- Applies only to reporting malfunction events by manufacturers; not to deaths or serious injuries
- Applies only to devices with listed product codes in existence for at least two years
- Does not eliminate five-day reporting requirements, where applicable
- Does not include MDRs for Class I or Class II recalls
- Does not include malfunction types not previously reported to FDA for the device
- Reports batched by each unique combination of device brand name, model and problem code(s)
- Requires similar level of detail as provided in an individual report
- Supplemental reports submitted as part of the summary report cycle (unless the supplemental information would require an individual MDR report)

We understand from recent FDA actions and discussions with Agency representatives that some companies have received letters rescinding previously granted ASRs and that certain recent ASR requests have been declined. For malfunction ASRs that are rescinded, we understand that the Agency is encouraging companies to instead make use of the *Voluntary Malfunction Summary Reporting Program* which became effective August 17, 2018, for eligible manufacturers who wish to participate. It should be noted that there are some limitations for participation in the program (see the *Voluntary Malfunction Summary Reporting Program* box above for a summary).

The Agency also commented that, though the ASR program will no longer exist by that name, future revised guidance on some form of summary reporting is forthcoming. Further, for the time being, FDA will continue to consider applications for alternative forms of reporting and we understand that some ASR exemptions have not been and may not be revoked as part of this new initiative.

Similar to the revocation of MDR single report exemptions discussed above, rescinding ASRs will likely result in some unintended consequences that should be addressed by entities that have been operating under an ASR that has been or may be rescinded. For instance, companies may require a dramatic increase in resources to prepare and submit individual 3500A forms for each adverse event, and, accordingly, companies may need to modify their processes. Further, as mentioned earlier, the Agency itself will be impacted as it strives to proactively monitor the safety of specific medical devices through a reporting system that may now expand substantially.

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