SEPTEMBER 2004 e-BULLETIN

MEMBERSHIP Events

- October 30 – November 5 New Delhi/Agra 2004 PRAC Conference
  All Delegate Members must be registered as of August 15. Details @ www.prac.org

- PRAC / IBA Calgary Canada Energy Conference - 19-21 September
  Conference Co-Chair Fraser Milner Casgrain LLP - Contact Nick.Kangles@fmc-law.com for details

- PRAC / IPBA New Zealand Conference Attendees – 25 October Reception
  Contact Denis.McNamara@simpsongrierson.com for details

Tools to Use

- PRAC Contacts Matrix & Email Listing – September Update (member version only)
- PDF version Directory 2003-2004 Member Firms **available** at PRAC web site
- Expert System 2003 available at PRAC web site Private Libraries

PRAC e-Bulletin is published monthly and emailed to all PRAC Primary, Practice Group & Marketing contacts
Send member contributions to susan.iannetta@fmc-law.com on or before the 15th of each month

Visit the PRAC web site www.prac.org to view this edition and other information on line

ASAHI KOMA LAW OFFFICES MOVE TO NEW BUILDING

Please note that our Tokyo office address, telephone & fax numbers are changed effective as of September 6, 2004.

New office contact details are:

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Rep. fax: 81-3-5219-0004

Our email addresses do not change.

For additional information visit our web site at www.alo.jp/english

NAUTADUTILH ADDS PATENT AND TRADEMARK PROSECUTION PRACTICE

This expansion of our firm's capabilities also meets our clients' needs for assistance in the context of due diligence studies and the creation of security rights on trademarks and registered designs.

The exchange of expertise furthermore adds substantial value to our legal practice. Our trademark attorney can involve our attorneys-at-law during the very early stages of oppositions and other trademark disputes, thereby creating additional value right from the start. Our attorneys-at-law enjoy the reciprocal advantage of being able to call upon the trademark attorney's specialized knowledge regarding both the inherent and technical aspects of trademark registration and the trademark register.

The new service is headed by Boudewijn van Vondelen, a highly experienced European trademark attorney who has been operating in the market for nearly ten years now. Boudewijn has built up an excellent reputation in the Benelux countries and beyond.

NautaDutilh is the first Benelux firm to fully integrate trademark prosecution in the firm's activities, which ensures that our clients, also in prosecution matters, receive the high quality assistance NautaDutilh stands for.

For further details, please contact Boudewijn van Vondelen (boudewijn.vanvondelen@nautadutilh.com) or visit us at www.nautadutilh.com

HOGAN & HARTSON LLP's Karen M. Hardwick Named Business Leader of the Year; International Trade Lawyer Chandri Navarro-Bowman Joins Firm's Washington D.C office

Karen M. Hardwick Names Business Leader of the Year
WASHINGTON, 2004 - The District of Columbia Chamber of Commerce has named Karen M. Hardwick Business Leader of the Year. She is a partner in the firm's Washington office and a member of the litigation group.

Hardwick chairs the board of the National Capital Revitalization Corporation, which manages and develops a $400 million real estate po rtfolio, creates jobs, stimulates real estate development and brings businesses to Washington, D.C. In addition, she is vice chair of the National Black Child Development Institute, which promotes the educational development and well-being of disadvantaged children

International Trade Lawyer Chandri Navarro-Bowman Joins Hogan & Hartson
WASHINGTON, August 12, 2004 – Hogan & Hartson L.L.P. announced today that Chandri Navarro-Bowman has joined the firm's Washington, D.C., office as a partner in the international trade practice.

Navarro-Bowman has more than 15 years of experience in international trade, customs, and legislative work. She focuses her practice on trade negotiations, security, import/export, and documentation issues related to global trade and customs. She has represented clients before the U.S. Congress, the World Customs Organization, the U.S. Department of Commerce, and the International Trade Commission.

"Chandri's extensive international trade experience, combined with her fluency in Englis h, French, and Spanish, will benefit our clients conducting business nationally and globally, including Latin America," said Jeanne Archibald, international trade practice group director. "We are pleased to have Chandri as part of our team."

Before joining Hogan & Hartson, Navarro-Bowman was a partner with two other Washington, D.C., trade-law firms. Earlier in her career, she was an assistant economist with the American Apparel Manufacturers Association. There she represented the interests of U.S. apparel manufacturers during bilateral textile negotiations around the world.

Active in bar association activities, Navarro-Bowman is a member of the Washington International Trade Association, Women in International Trade, Hispanic National Bar Association, and the Customs and International Trade Bar Association. She holds a law degree from American University's Washington College of Law and a bachelor's degree in international relations and international economics from the College of William and Mary. She also spent a year studying at the Institute d'Etudes Politiques in Paris, France.

About Hogan & Hartson
Hogan & Hartson is an international law firm headquartered in Washington, D.C., with close to 1,000 attorneys practicing in 20 offices around the globe. The firm's broad-based international practice cuts across virtually all legal disciplines and industries.

Hogan & Hartson has European offices in Berlin, Munich, Brussels, London, Paris, Budapest, Prague, Warsaw, and Moscow; Asian offices in Tokyo and Beijing; and U.S. offices in New York, Baltimore, Northern Virginia, Miami, Los Angeles, Denver, Boulder, Colorado Springs, and Washington, D.C.

For more information about the firm, visit www.hhlaw.com.
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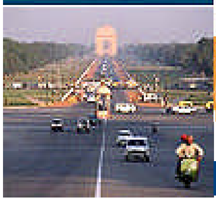
PACIFIC RIM ADVISORY COUNCIL



PRAC INDIA 2004 CONFERENCE

New Delhi / Agra October 30 - November 5, 2004
Hosted by Kochhar & Co.
New Delhi . INDIA

HOST FIRM MESSAGE

September 14 2004

Dear PRAC Members,

It gives us great pleasure to host the 36th Pacific Rim Advisory Council Conference in New Delhi from 30th October to 3rd November, 2004 and a follow-on in Agra from 3rd November to 5th November, 2004.

We have endeavoured to prepare what we hope will be an interesting and exciting programme for all the delegates. Delhi, the capital of India, is a fascinating old and new city. For almost 3000 years, India has witnessed the rise and fall of various rulers - the Aryans, the Mauryas, the Guptas, the Turko-Afghan Slave Dynasty, the Mughals and the British - each of these rulers have left an indelible print on this historic city, the centre of power for much of this period. Delhi's culture, architecture and its cuisine reflects these various influences. We have attempted to prepare a programme that we hope would enable the delegates to experience some of these influences.

The business programme will cover multiple Practice Group meetings and include a Public Seminar on "International Finance", featuring guest and PRAC speakers and be attended by local industry leaders.

By now, all formal registrations have been received and confirmations are ongoing. For those of you requiring a visa letter, please request same from us at your earliest convenience (details below) .

This is the first time PRAC is coming to India and we are looking forward to welcoming you all to our country.

Host Committee:

Rohit Kochhar
Manjula Chawla

KOCHHAR&Co.
ADVOCATES & LEGAL CONSULTANTS

Please Send Visa Letter Request to rachna.advani@kochhar.com
Delegate Information available On Line @ PRAC Web Site www.prac.org

MORGAN LEWIS EXPANDS PRACTICE IN LOS ANGELES AND CHICAGO; OPENS NEW DALLAS OFFICE; US STATE DEPARTMENT ENRON TASK FORCE LEADER LESLIE R. CALDWELL JOINS FIRM

Chicago/Dallas, September 1, 2004 -- Morgan Lewis announced today an expansion of its already significant employee benefits and executive compensation practice with the addition of lawyers from Jenkens & Gilchrist who focus their practice in employee benefits, ERISA and employee stock ownership plan (ESOP) matters. The new attorneys are located in Chicago, Dallas and Los Angeles and bring even further experience to what is considered one of the top employee benefits practices in the country. The group includes David Ackerman and John Kober, former Co-Chairs of the ESOP team at Jenkens, and two of the most experienced ESOP attorneys in the country, and Riva Johnson, a well-known benefits and ESOP practitioner. Also included in the group are two corporate transactional partners who focus their practice on ESOPs, and Ted Becker, a highly regarded senior litigator who handles ESOP and benefits litigation matters in addition to a broad-based commercial litigation practice. This expansion also opens a new office for Morgan Lewis in Dallas, its 19th office and the seventh new office of the firm in the last two years.

Robert Lichtenstein, head of Morgan Lewis' Employee Benefits and Executive Compensation Practice, said, "Our new partners bring with them years of experience handling complex ESOP transactions and litigation for both publicly and privately held companies across industries and around the world." The new attorneys have extensive experience in ESOP matters, including representing banks and venture funds participating in ESOP loans and helping private equity entities to structure ESOP buyouts, as well as in more traditional ERISA matters.

"The addition of an ESOP practice and additional depth and experience in ERISA matters allows us to help our clients address virtually every aspect of employee benefits and executive compensation issues, an area of considerable importance to any client," said Francis M. Milone, Chair of Morgan Lewis. "With our new colleagues, we now have more than 60 professionals in the employee benefits and executive compensation practice group, in addition to a large group of practitioners in the labor and employment group who work on benefits-related matters -- a truly national practice in this area, both substantively and geographically."

For more information on Morgan Lewis' expanded capabilities, or on the firm in general, please contact Mona Zeiberg, Firm Director of Marketing at 202.739.5847 or mzeiberg@morganlewis.com.

U.S. JUSTICE DEPARTMENT'S ENRON TASK FORCE LEADER JOINS MORGAN LEWIS
Leslie R. Caldwell to Expand Corporate Investigations and Criminal Defense Practice Group
NEW YORK CITY – SEPTEMBER 8, 2004 -- Leslie R. Caldwell, who recently served as Director of the U.S. Department of Justice's special task force investigating the Enron corporate scandal, will join Morgan Lewis as a partner in its New York City office, the firm announced today.

Ms. Caldwell, one of the most respected and best-known federal prosecutors in the country, joins Morgan Lewis' Global Litigation Practice, where she will take a lead role in the firm's corporate investigations and criminal defense team. "I am extraordinarily pleased to be joining Morgan Lewis," Ms. Caldwell said. "Its commitment to building a top-notch, national white collar crime practice and its well learned reputation for integrity and excellence made it the natural choice as I rejoin the private practice of law." Caldwell said she was impressed with Morgan Lewis' unwavering dedication to meeting and satisfying the litigation needs of its global business clients.

In addition to leading Morgan Lewis' criminal defense team in New York City, Caldwell will spend considerable time in the firm's California offices, enhancing the litigation group's West Coast practice. This arrangement will provide Morgan Lewis clients on both coasts with ready access to her more than 20 years of legal experience and winning track record.

In 1987, Caldwell joined the U.S. Attorney's Office for the Eastern District of New York, where she worked, trying more than 30 cases, until 1998. From 1999 to 2002, Caldwell served as Chief of the Securities Fraud Section and Chief of the Criminal Division in the U.S. Attorney's Office for the Northern District of California, where she oversaw the prosecution of dozens of corporate and financial fraud cases.

In a June 14, 2004 article, *The Washington Post* reported Caldwell was one of the four attorneys most sought after by the nation's top law firms. She was named one of *Fortune* magazine's "People to Watch" in February 2003, and has been profiled in *The New York Times*, *BusinessWeek*, *The Washington Post*, the *Houston Chronicle*, and the *San Francisco Chronicle*, among others.

"Her achievements in government are beyond impressive. She was number one on just about every law firm's wish list," said Jim Pagliaro, leader of Morgan Lewis' Litigation Practice. "And for good reason. Her professionalism and skills as an attorney have earned her the respect of judges, prosecutors, law-enforcement officials, and defense attorneys alike. We are thrilled she has chosen to join our litigation team at Morgan Lewis, especially in this post-Enron era, when corporate clients are looking for sophisticated, real world counsel more than ever."

As an Assistant U.S. Attorney, Caldwell successfully prosecuted some of the most notorious criminals of the past 17 years. In 1989, as a prosecutor in New York's Eastern District, she put away a brutal drug kingpin who ordered the execution-style slaying of a 22-year-old rookie New York City police officer. She also exposed the influence of organized crime on Wall Street, obtaining numerous convictions in what some legal observers have called one of the most significant securities fraud cases ever filed.

Caldwell also worked to rid New York's Chinatown of gang violence, leading a series of prosecutions that crippled Asian organized crime groups in the city. In 1998, then-U.S. Attorney for the Northern District of California Robert Mueller -- who is now Director of the F.B.I. -- personally recruited Caldwell to come to San Francisco and establish a securities fraud unit. Caldwell later became Chief of the Criminal Division in the Northern California office.

All of this was prelude to her appointment as Director of the Justice Department's elite Enron Task Force in 2002. As Director, Caldwell led a team of federal prosecutors, F.B.I. and I.R.S. agents in investigating the largest, most complex corporate fraud case in history. To date, the Task Force she assembled has indicted 32 individuals in connection with the scandal, including Enron's former chairman Ken Lay and former CEO Jeff Skilling, and obtained guilty pleas from 11 former Enron executives, including former CFO Andrew Fastow. In addition, the Task Force obtained the obstruction of justice conviction of former Enron auditor Arthur Andersen LLP, which was unanimously affirmed by the U.S. Court of Appeals for the Fifth Circuit in June 2004.

Fran Milone, Chair of Morgan Lewis, said of Caldwell's addition to the firm, "It is an exciting day not only for our firm, but for our clients. We have added one of the premier trial attorneys in the country to Morgan Lewis. Her unique blend of courtroom experience, knowledge, and legal skill will enrich our firm and bring untold benefits to our clients."
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CAREY Y CIA ADVISES LARGEST CHILEAN SUPERMARKET CHAIN IN PUBLIC OFFERING

On August 6, 2004, Distribución y Servicio D&S S.A. ("D&S"), Chile's leading holding in the supermarket business, successfully launched its third equity offering to the public. The issuance of 166 million shares of D&S achieved an unprecedented prorate distribution in the Chilean securities market of 13.5%, with purchase orders for close to US$1,900 million.

The value of the deal amounted to US$160 million. Pre-emptive rights are still outstanding for about US$80 million to be exercised by current shareholders until September 4th, 2004.

Carey advised D&S through partner **Diego Peralta** and associates **Gonzalo Smith** and **Maureen Ravilet**

HOGAN & HARTSON in Top 20 *MERGERMARKETS* M&A RANKINGS

Hogan & Hartson placed in the top 20 on several of *Mergermarket's* pan-European and North American mergers and acquisition rankings for the first six months of 2004. The semi-annual ranking is broken into valuation and industry-sector lists.

The firm was No. 16 on the European technology, media and telecommunications (by volume) list. The firm's six deals were worth more than €1 billion.

The firm was No. 14 on the North American technology deal (by value) list. The firm's four deals were worth nearly $900 million.

The firm was No. 16 on the North American mid-market list (by value). The firm's 13 deals were worth more than $1.3 billion.

The firm was No. 17 on the North American mid-market list (by volume). The firm's 13 deals were worth more than $1.3 billion.

Tables rank advisors on deals that include a North American bidder, target, or seller and cover all sectors. These rankings demonstrate the firm's adeptness and skill at international deal-making. To complete client mergers and acquisitions, Hogan & Hartson assembles teams that include lawyers with a variety of geographic, industry, and regulatory experience.

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TOZZINI ADVISES ALCOA IN SALE OF BRAZIL FLEXIBLE PACKAGING BUSINESS

Alcoa Aluminio SA, a unit of aluminium manufacturer Alcoa Inc, has sold its Brazilian flexible packaging business unit Itaipava to Latin American packaging company Dixie Toga SA. The deal closed on July 1.

Dixie Toga bought the unit through its subsidiary Itap Bemis Ltda for an undisclosed amount. Itaipava's 200 employees will be incorporated into Itap Bemis. The decision to sell Itaipava was in line with Alcoa's divestiture programme, announced at the beginning of 2003.

Alcoa will continue to operate its global flexible packaging business, which serves customers in the pharmaceutical, medical, food and beverage, confectionery, retail, tobacco and electronic industries, via its nine facilities. In 2003, Alcoa had revenues in the packaging market of US$5.4 billion.

Tozzini, Freire, Teixeira e Silva Advogados gave counsel to Alcoa, through partner **Marcela Ejnisman** and associate **Fernando Cinci Silva**.

AUSTRALIA - Clayton Utz – FOR GOVERNMENT LEGAL ADVICE TO BE PRIVILEGED, IN-HOUSE LAWYERS MUST BE "INDEPENDENT"

The issue of whether certain Government documents will be protected by legal professional privilege is again in the spotlight following a recent first instance ACT Supreme Court decision.

Although *Vance v McCormack* [2004] ACTSC 78 (2 September 2004) is primarily concerned with advice given by Australian Defence Force legal officers, Justice Crispin's decision affects advice given by Government lawyers (both Commonwealth and State) who do not have a current practising certificate or a statutory right to practise, or whose office culture and position do not give them sufficient independence.

What this case was about

Vance was a squadron leader in the Royal Australian Air Force whose employment was terminated. He challenged that termination and sought discovery of certain documents. The Air Force claimed those documents were protected by legal professional privilege.

Legal professional privilege permits a person to resist the giving of information or the production of documents which would reveal communications between the client and his lawyer made for the dominant purpose of giving or obtaining legal advice, or preparing for or prosecuting actual or anticipated legal proceedings.

Some of these documents had been prepared by legal officers in what was then called the Defence Legal Office. Some held military commissions as full-time Australian Defence Force officers, and others were civilian lawyers in the Defence Legal Office or reserve officers who were also in private practice. The legal officers were all legally qualified and admitted to practise, but the military officers were not required to hold current practising certificates (nor did they).

There were two issues for Justice Crispin:

- can a document be protected by legal professional privilege if the legal officer giving the advice does not hold a current practising certificate?
- did the legal officers have a professional relationship with the ADF that gave their advice an independent character notwithstanding their employment?

No practising certificate means no privilege

What if the legal adviser has neither a statutory right to practise nor a practising certificate, as was the case here? The underlying rationale for legal professional privilege, as explained by Justice Crispin, is rooted in the relationship of legal practitioner and client. It is justified by the public interest in facilitating the representation of the clients. This rationale appears to presuppose that the practitioners are entitled to practise. If the legal advisers have no actual right to represent them, then there is no public interest being served and legal professional privilege does not protect their advice. He added:

"This conclusion should not, of course, be seen as imposing any substantial constraints on the rights of government bodies to employ their own legal advisers. It means only that the lawyers in question will need to enjoy some statutory right to practise or hold current practising certificates if communications with them for the purpose of obtaining legal advice are to enjoy the protection of privilege. "

The independent employee

Even if an employed legal adviser holds a practising certificate, that is not the end of the matter. He or she must also act with sufficient independence to support a solicitor/client relationship to give rise to privilege. To determine this requires due consideration of all of the evidence, including evidence of factors such as the employment structure and chain of command insofar as those factors may impinge upon the independence of employed lawyers, directions in fact given by superior officers and attitudes and occurrences capable of casting light on the true nature of the relationships in question.

In this case, the military officers were found not to have sufficient independence to support a solicitor/client relationship and hence there was no privilege. The factors included:

- they are subject to the *Defence Force Discipline Act* 1982 (Cth), including the obligation to obey lawful commands

- they could be ordered to act in a manner that would be quite contrary to prevailing standards of professional ethics
- many military legal officers would be under the command of superior officers who were not legally qualified and could not be expected to have a full appreciation of the ethical and professional standards which practising lawyers are expected to maintain or of the need for their subordinates to maintain their own independent judgment
- unlike civilian lawyers, they are not obliged to keep abreast of developments of ethical rules and there is no peer review of their ethical standards.

Implications for Government

It might come as a surprise to many Government lawyers to discover that their lack of a current practising certificate could mean their advice is not protected, but that seems to be the result of this decision. Unless a Government lawyer has a current practising certificate or a relevant statutory protection, then any advice he or she gives can be ordered to be disclosed to parties suing Government.

Having said that, it's clear that the mere possession of a practising certificate will not in itself guarantee that the privilege attaches to advice. A lack of true independence will also defeat a claim of privilege. While this decision is of a single judge at first instance and therefore may be appealed, it is desirable for in-house government advisers to take steps to ensure that they hold a practising certificate and when providing advice do so with the requisite degree of independence.

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FRASER MILNER CASGRAIN LLP

Oh Canada

MONTREAL OTTAWA TORONTO EDMONTON CALGARY VANCOUVER NEW YORK

FMC's Overview of Significant Developments in the Canadian Energy Industry

August, 2004

Alberta Oilsands News

A new survey by the Canadian Association of Petroleum Producers finds that oilsands production is expected to account for three quarters of all western Canadian oil production by 2015. Current oilsands production accounts for about half of western Canadian oil production. The study forecasts that conventional western Canadian oil output will slip to 600,000 bpd by 2015, down from 1.12 million bpd in 2003. However, total oilsands and upgrader production is expected to supply 2.8 million bpd by 2015, increasing the supply to market of western Canadian crude oil to just under 3.4 million bpd. The Association also expects to see investment spending related to oil sands development exceed $30 billion over the next ten years.

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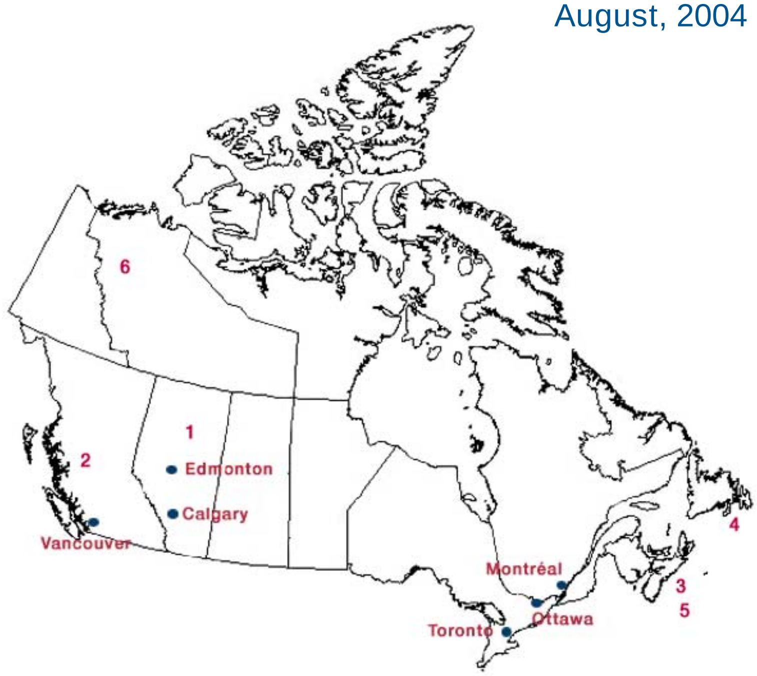

Husky has obtained regulatory approval for its $500 million Tucker oilsands project in northern Alberta. Construction on the project is expected to begin in 2005, and should be completed in 2006. Husky estimates that it will be able to recover about 350 mbbls of heavy oil over the 35 year project life, with peak production expected at a rate of 30-35,000 bpd. The project will use steam assisted gravity drainage technology.

Husky Energy and Trident Exploration have formed a joint venture to develop coal bed methane (CBM) in central Alberta. The new agreement adds to the existing 2002 joint venture between the two companies for exploration and development of CBM in the Fenn Rumsey area, and will see an additional 120 wells drilled over the next two years. The companies have successfully drilled over 50 CBM wells in the Fenn Rumsey area since their initial joint venture in 2002, and with 32 wells tied-in, current production of about 6 mmcfpd is split evenly between Husky and Trident.

Burlington Resources plans to increase Canadian capital spending by $80 million (U.S.) next year, in an attempt to boost its production after a relatively slow year. Burlington's Canadian production fell in the second quarter of this year as the company had initially cut capital spending for 2004 due to rising service costs and unfavourable exchange rate conditions. According to a company spokesperson, about 900 to 1,000 wells a year are required to boost production from Canadian operations, but 2004 will likely see the company drill between 700 and 800 wells. Burlington has also made no final decision on its coal bed methane pilots.

Shell Canada has acquired two Athabasca oilsands leases from Encana. While the financial details surrounding the purchase of Leases 9 and 17 were not released, Shell estimates that Lease 9 contains approximately 1 bbbl of recoverable bitumen, and could support a mining operation extracting up to 100,000 bpd. Lease 17 requires further drilling before a determination can be made as to the feasibility of mining the site.

West Coast News

2

Enbridge's proposed Gateway project shipping oilsands production to Asian markets could face some stiff competition. The project, which entails transporting production by pipeline to West Coast terminals for shipment via tanker to Asia, faces a potential competing option from Terasen, which may offer a northern leg to Prince Rupert or Kitimat for its proposed TransMountain pipeline expansion.

East Coast News

Anadarko Petroleum paid an undisclosed sum for privately held Access Northeast Energy, the sole asset of which is a proposal to build a liquefied natural gas (LNG) receiving terminal in Nova Scotia to ship stranded world gas to North American markets. The proposed terminal is expected to process up to 1 bcfpd of natural gas. LNG currently accounts for only about 3% of North America's supply, but the flow of LNG is expected to increase fivefold over the next two years, as local supplies continue to decline while demand rises. 3

Husky Energy plans to spend $20 million on its Lewis Hill exploratory well, 220 miles south of St. John's. Husky has also made positive statements regarding the future development of its huge natural gas reserves associated with the White Rose oil project off the coast of Newfoundland. The project's oil reserves are estimated at 250 million barrels, and the $2.35 billion project to develop the reserves is expected to become operational by late 2005 or early 2006. White Rose also contains 2.3 tcf of gas. At a recent conference, a company spokesperson said the outlook for gas is so strong that the economics of producing it from White Rose might surpass those of oil. Production could start as early as 2010, using a specialized floating, production , storage and offloading vessel being built for the project. 4

Several companies have opted out of plans to spend up to $275 million on exploration off the coast of Nova Scotia, after allowing a dozen offshore exploration licences to expire. The permits were originally issued in the late 1990's as part of a record $592.5 million license sale. Since then, only Encana's Deep Panuke find has been promising. In addition to the exploration licenses, an exploratory well off Nova Scotia has also been abandoned by ExxonMobil and Shell. It was one of the few remaining planned wells in the region. 5

Canadian Arctic News

Calls are mounting for Alaska to join with Canadian premiers in a northern gas alliance that would push cooperation on the development and export of energy resources in the Arctic region. The Premiers of British Columbia, Alberta, Saskatchewan, Manitoba, the Yukon, Northwest Territories and Nunavut recently agreed at their annual conference to cooperate in marketing their jurisdictions as a "secure supplier of oil, gas and hydroelectricity" to North American, Asia/Pacific and other markets. The Premiers also emphasized that any energy alliance would involve working closely with Alaska. The theme was echoed this month by Alaskan Gov. Frank Murkowski, who urged northern Premiers to join Alaska in making the case for development of northern gas to the U.S. and Canadian governments. 6

ON THE HORIZON…

- Exploration off the coast of Nova Scotia
- Increase in oilsands production

For more information please contact any of the following individuals via phone at (403) 268 - 7000 or email at:

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In this newsletter, all dollar amounts are Canadian dollars. We have also used the following abbreviations: bpd - barrels per day; mmcfpd - million cubic feet per day; bcfpd - billion cubic feet per day; tcf - trillion cubic feet; bbl - barrel; mbbl - million barrels; bbbl - billion barrels.

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Watch our website at www.fmc-law.com

August 2004

Labor Law Issues and Suggestions in Foreign Mergers and Acquisitions of Chinese Enterprises

By: *Jiang Junlu and Bai Hongjuan*

Recently, mergers and acquisitions of Chinese enterprises are becoming a common vehicle for multinational companies seeking to invest in China. Typically, the interested foreign company engages lawyers specializing in company law to complete the merger or acquisition transaction, overlooking labor law issues. As a result, a very important aspect of the transaction is overlooked.

In the case of a company only acquiring the assets of the target company, there are very few potential problems, as the target company remains responsible for settling labor issues and placement of its pre-acquisition employees. In practice, however, matters are much more complicated as the scope of the merger or acquisition often includes the target company's personnel in addition to its assets. If the acquiring company fails to afford due regard to the relevant labor issues such as post-acquisition placement and compensation, it may face unexpected and difficult management problems, not to mention huge potential liabilities.

1. Labor Issues in Merger and Acquisition Transactions

1.1 Term of Labor Contracts

Chinese labor law recognizes three categories of labor contracts: fixed term contracts, non-fixed term contracts, and contracts expiring upon the completion of a specific assignment. Fixed term contracts expressly provide both the contract commencement and termination dates, whereas non-fixed term contracts only provide the commencement date. Contracts expiring upon the completion of a specific assignment terminate as the name suggests, upon the completion of a specific assignment. Chinese enterprises regularly utilize the first two types of labor contracts but rarely the latter type.

Chinese labor law places relatively more restrictions on the early termination of labor contracts, while placing fewer regulations on termination of labor contracts upon expiration. Thus, for flexibility purposes, most companies choose to utilize short-term labor contracts. An acquiring company should pay special attention to this issue, as absent any agreement to the contrary, it inherits the responsibility for continued performance under the target company's existing labor contracts. In addition, if the target company has employees who have been working for the target company for more than 10 consecutive years, and such employees have agreed with parties to acquisition transactions to extend the terms of their labor contracts, such employees have the right to request to enter into labor contracts with non-fixed term, and such request shall not be refused by the acquiring company.

In addition, if the target company has employees who have been working for target company for more than 10 consecutive years, provided that such employees have agreed with parties to acquisition transactions to extend term of their labor contracts, such employees have the right to request execution of labor contracts with non-fixed term, and such request shall not be refused by acquiring company.

1.2 Wage Payment

Chinese labor law requires employers to pay their employees monthly. However, if the company fails to pay its employees for an extended period of time, this accrued balance may be quite substantial. Thus, if the acquiring company neglects the issue of default salary payments, it may unknowingly inherit all such payment obligations. As a result, it is imperative that the acquiring company perform legal due diligence with regard to the target company's salary payment records including overtime payment.

Unless a contrary agreement is reached between the parties to the acquisition, Chinese labor law requires the acquiring company to inherit the target company's obligations under any existing labor contracts, including salary payment. The post-acquisition salary shall not be lower than the pre-acquisition salary, nor shall it be lower than the local government prescribed minimum wage. At present, the minimum wage for Beijing stands at RMB2.96 per hour or RMB 495 per month, for Shanghai RMB5.5 per hour or RMB495 per month, for Guangzhou (excluding Panyu and Huadu districts, Zengcheng City and Conghua City) RMB24.38 per day or RMB510 per month.

1.3 Social Insurances and Housing Fund

Chinese labor law also requires employers to provide its employees the so-called "Five Insurances and One Fund," which includes retirement, medical, unemployment, work-related injury, and birth insurance as well as a housing fund. The employer is also responsible for paying the employees' social security premiums. Although the law mandates this obligation, not all employers adhere to it, presenting potential legal liabilities to the acquiring company.

Accordingly, the acquiring company should perform thorough due diligence to determine whether the target company has duly performed such obligations and whether it has accepted any supplemental insurance programs. Unless it is specifically provided in the acquisition agreements, the acquiring company shall assume all existing statutory and contractual obligations.

The relevant local authorities oversee the “Five Insurances and One Fund” and other supplemental insurance programs, and the payment shall be made on a monthly basis.

1.4 Severance Payment

Another aspect of Chinese labor law that the acquiring company should be aware of is the requirement of a severance payment upon the termination of a labor contract. In general, after contract termination, the employer is required to pay one month's salary as severance pay for every year of consecutive employment. The exact amount of the monthly payment will vary based on each specific situation.

Where acquiring company agrees to retain target company’s employees without an explicit agreement, or acquiring company in fact acquired all of the target company’s employees the acquiring company assumes the responsibility of making severance payments to all retained employees upon contract termination. The time basis for calculation of such severance payment includes the duration of both pre-acquisition and post-acquisition employment. This requirement places an unwelcome burden upon the acquiring company retaining the target company’s employees. Acquiring company shall negotiate on the program to retain the target company’s employees to reduce the unexpected obligation of severance payment.

1.5 Retirement Related Issues

In China, enterprises, especially state-owned enterprises, may be responsible to provide retirees a pension in addition to other benefits. Thus, it is vital that the acquiring company conduct a thorough due diligence on the existence of such obligations, including contractual obligations to retirees, and to carefully address all relevant retirement issues in the appropriate agreements.

1.6 Employees in Special Circumstances

The term “employees in special circumstances” refers to employees who maintain employment relationships with the employer, but for various reasons are not currently working. These reasons may include work-related injury, sick leave, maternity leave, or administrative suspension. The acquiring company should include in its due diligence an investigation of employees in special circumstances in order to avoid any unnecessary burdens after the close of the acquisition.

1.7 Labor Union and Employees Association

The acquiring company should investigate whether any employees of the target company have established a labor union and whether the labor union shall continue post-acquisition. If so, the acquiring company shall be responsible for paying 2% of the total salary of all employees to the union as its operating stipend and to provide the union with office space.

Further, the acquiring company should duly note whether the union and the target company have entered into a collective bargaining agreement. If so, the acquiring company should ensure that the individual labor contracts do not contravene such collective bargaining agreement, as collective bargaining agreements prevail over individual labor contracts.

In many state-owned enterprises, the employees may form an employees association. The employees association has the power to review and accept all proposals affecting the employees' rights and interests which may include many portions of a merger or acquisition agreement. The acquiring company should determine whether such an employees association exists and shall address the related issues during negotiations.

2. Suggestions on M&A Labor Issues

2.1 A relatively hassle-free approach to deal with the labor issues involved in a merger or acquisition is as follows: (1) Target company terminates the employment relationships with its employees and disburses the associated severance payments accordingly; (2) After the merger or acquisition is complete, the acquiring company negotiates new employment agreements with the employees it intends to hire. The new employees may then decide on whether to establish a labor union.

2.2 The acquiring company shall exercise due care to retain the employees from the target company, but as few as possible.

2.3 If the acquiring company decides to retain all or a portion of the employees of the target company, it should perform due diligence on all of the points discussed above. The acquiring company should then negotiate and enter into a special agreement on labor issues based on the due diligence report.

- END -

1. INTRODUCTION

The Republic of Indonesia (Indonesia) and the Kingdom of the Netherlands (the Netherlands) signed a favourable new Double Taxation Agreement (DTA) on 29 January 2002, which became effective on 1 January 2004. This article will discuss the interest provision and dividend provision in the new DTA as both were changed significantly from the corresponding provisions in the old DTA and create offer tax-efficient opportunities for finance and holding structures for Indonesian groups. Some general information about the Dutch tax regime for intermediary finance companies is also provided.

2. INTEREST PROVISION

The most important difference between the old and new DTAs is the introduction under the latter of an exemption from withholding tax for certain categories of interest. As a result of this exemption, which is unique for Indonesian DTAs, attractive opportunities have arisen for establishing efficient finance structures.

Pursuant to Art. 11 (4) of the new DTA, an exemption from interest withholding tax applies if (i) the recipient is the beneficial owner of the interest, (ii) this recipient is a resident of the other State and (iii) the interest is paid (a) on a loan made for a period of more than two years *or* (b) in connection with the sale on credit of any industrial, commercial or scientific equipment. If only the first two conditions are met, a reduced interest withholding tax rate of 10% is applicable. A 10% rate was also the general rule under the interest provision of the old DTA.

2.1. In Practice: Finance Structures

If an Indonesian group intends to attract debt capital from the international capital markets, it will normally structure the issued debt via a foreign special purpose company. The reasons for interposing a foreign finance company are generally the following:

- easier access to international capital markets;
- currency regulations;
- political factors; and
- reduction of the domestic Indonesian withholding tax.

The intermediary finance company is often located in the Netherlands. Until recently, Mauritian companies were also popular for this purpose. By using a Mauritian finance structure, for instance, the Indonesian withholding tax is reduced to 10% under the DTA between Mauritius and Indonesia, and very little or no Mauritian corporate income tax is due on the remuneration. However, in principle, this DTA will cease to apply to Indonesia as of 1 January 2005. Consequently, it would be prudent for Indonesian groups that are currently using a Mauritian finance structure to start reconsidering their position.

The Netherlands has traditionally been, and still is, a favourite finance company jurisdiction and could, therefore, provide an acceptable alternative. Although the old tax regime for Dutch intermediary finance companies can no longer be used, the current tax regime for Dutch finance companies (as set out below) is good or even better in meeting today's international taxation standards as advocated by the Organisation for Economic Co-operation and Development (OECD).

As tax authorities become more sophisticated and advanced in their thinking, they are more likely to question whether an intermediary finance company qualifies as a "beneficial owner" within the meaning of Art. 11 (4) for Indonesian tax purposes. Generally, such a finance company does not have much substance, runs no economic risks, and pays little or no corporate income tax on the remuneration received from its finance activities. These characteristics could endanger a finance company's ability to meet the "beneficial owner" test.

The Netherlands radically changed its domestic tax rules for intermediary finance companies in 2001 to make them OECD-proof (in line with the OECD international taxation standards), and to dispel the criticism of other European Union (EU) member states. There is good reason for concluding that the "beneficial owner" test will be met by a Dutch finance company qualifying under the current tax regime for such companies. Under this regime, a Dutch finance company is basically required to have substance in the Netherlands (to ensure that its place of effective management is located in the Netherlands), to run economic risks and to report an arm's length remuneration on its finance activities in conformity with the OECD transfer pricing guidelines (see further below). This conclusion has been reinforced by the new decrees relating to intermediary finance activities issued on 11, 16 and 21 August 2004, as the effect of these decrees is to ensure that the Netherlands' tax regime continues to comply in full with all applicable EU and OECD standards. Finally, as meeting the "beneficial ownership" test was also a condition for the reduction of the Indonesian interest withholding tax rate to 10% under the old DTA (and the Mauritian DTA), and as such finance structures were established successfully under the old DTA, there is no reason for this to be different with respect to the exemption under the new DTA.

The Indonesian interest withholding tax exemption, in combination with the fact that the Netherlands generally does not levy interest withholding tax pursuant to Dutch domestic law, enables Dutch companies, such as Dutch banks, financial institutions and special purpose vehicles, to finance Indonesian companies without interest withholding tax. In our practice, we already see Indonesian groups establishing or planning the continued use of Dutch finance companies for their future funding.

The only (modest) tax burdens that arise in the Dutch finance structure would be (1) the Dutch corporate income tax at the rate of 34.5% (29% on the first EUR 22,689) on the net remuneration received by the Dutch finance company for its finance activities, (2) Dutch dividend withholding tax at a reduced rate of 10% upon the distribution of such remuneration to the Dutch finance company's Indonesian parent-company, and (3) Dutch capital tax at the effective rate of 0.36% on any equity contribution to the Dutch finance company.

In order for a Dutch finance company to have advance certainty on the treatment of its remuneration for Dutch corporate income tax purposes, it can conclude an Advance Pricing Agreement (APA) with the Dutch tax authority. An APA confirms that the gross taxable remuneration to be reported by the Dutch finance company in respect of its finance activities will be considered to be at arm's length by the Dutch tax authority.

Under the current APA rules, the Dutch finance company is required to meet two conditions:

- it must have sufficient substance in the Netherlands; and
- it must be exposed to economic risks in respect of its finance activities.

If the Dutch finance company meets the above conditions, suitable arm's -length remuneration for its activities must subsequently be determined. In practice, the conceptual model that the Dutch tax authorities want companies to apply is based on a functional analysis, using third-party comparables.

Based on our experience to date, the Dutch finance company must probably report a total gross remuneration, i.e. before expenses, ranging from 4 to 15 basis points of the outstanding loan or the notes issued by the Dutch finance company to qualify as an arm's length remuneration.

2.2. In Practice: Sale On Credit

The sale on credit of any industrial, commercial or scientific equipment by a Dutch company to an Indonesian company will not result in any Indonesian withholding tax on interest payments made by the Indonesian company. Therefore, tax-efficient structures can be created by interposing a Dutch company in a sale on credit transaction with Indonesia.

2.3. In Practice: 10% Indonesian Interest Withholding Tax

Even if the reduced 10% Indonesian interest withholding tax rate applies, it can still be attractive to interpose a Dutch finance company. As the Dutch finance company can obtain a full credit for the Indonesian withholding tax, the Dutch corporate income tax liability can be reduced to nil.

3. DIVIDEND PROVISION

The dividend article in the new DTA also contains an important change from its predecessor. Under the old DTA, the dividend withholding tax rate was reduced to 10% if the beneficial owner was a company holding directly at least 25% of the capital of the company paying the dividends. Under the new DTA, the dividend withholding tax rate is 10% regardless of the percentage of shares held by the recipient. This is, of course, very attractive for minority shareholders. In addition, individuals (not only companies) who beneficially own shares in the company paying the dividend can also take advantage of the 10% rate under the new DTA.

As a result of the favourable new dividend article, in combination with the capital gains article, the use of a Dutch holding company can be very attractive for Indonesian groups. The capital gains article still stipulates that capital gains realised on the alienation of shares will, in principle, be taxed in the State of which the alienator is a resident.

The Netherlands has always been and remains one of the most popular holding company jurisdictions. The main reasons for this are the Dutch participation exemption and the extensive Dutch DTA network with low withholding tax rates on both incoming and outgoing dividends.

Under the Dutch participation exemption, any dividend income received by the Dutch holding company from its qualifying shareholdings, and any capital gains realised by the Dutch holding company on the sale of these shareholdings, will be exempt from Dutch corporate income tax at the level of the Dutch holding company, provided certain conditions are met.

The distribution or redistribution of dividends and gains by the Dutch company to its Indonesian parent-company is subject to the above-mentioned reduced 10% Dutch dividend withholding tax, regardless of the percentage of ownership. Further structuring could reduce this to nil.

Capital gains on the sale of shares in a Dutch company realised by an Indonesian resident company or individual are normally exempt from Dutch tax. Consequently, such capital gains will only be taxed in Indonesia, if at all.

If a Dutch holding company is used to hold shares in Indonesian companies, dividends received from such Indonesian companies will be subject to Indonesian dividend withholding tax at the reduced rate of 10%. At the level of the Dutch holding company, the Dutch participation exemption can be applied to the dividend income. Capital gains realised upon the alienation of the shares in the Indonesian company are, pursuant to the DTA, only taxable in the Netherlands; as a result of the application of the Dutch participation exemption, these gains would not be taxed at all.

4. FINAL REMARKS

The new DTA offers fresh tax efficient opportunities for international capital market transactions by Indonesian companies. The newly introduced interest withholding tax exemption is of particular importance. Although a recent case in which the Indonesian District Court ruled against foreign investors and in favour of an Indonesian debtor company may temporarily deter foreign investors from investing in Indonesia, we expect the investment climate to improve after the presidential runoff election on 20 September 2004. When that occurs, foreign investors should keep in mind that the Netherlands is an attractive host country for Indonesian structures in today's international tax environment. This is a result of the new DTA as well as the Netherlands' OECD-proof tax regime, both as such and in combination with non-tax factors (such as an easy access to the international capital markets, currency regulations and a stable political situation).

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* This paper is an extract from the article entitled "Indonesia: the New Income Tax Treaty With The Netherlands In Practice" published in the August 2004 (Vol. 10, No. 8) issue of the IBFD Asia-Pacific Tax Bulletin ("APTB") http://nautalive.ddg1.tamtam.nl/upload/Indon-DTA.pdf which in turn is an updated version of a presentation Hans Drijer and Wendy Houben made at the "Debt Restructuring and Finance Structures" seminar held together with ABN AMRO Bank and Ali Budiardjo, Nugroho, Reksodiputro in Jakarta on 28 May 2003. For an extensive discussion of the changes to the old DTA and a summary of several unchanged but relevant provisions, the reader is invited to consult this publication. In the November 2004 issue of the IBFD APTB, we will publish an article entitled "Indonesia: The Netherlands Finance Structure in Practice" which will summarise the main impact of the above-mentioned new decrees of 11, 16 and 21 August 2004 on the use of a Dutch finance company by an Indonesian group. An extract from that publication will be published in a future PRAC-e-bulletin issue.

FOCUS

SECURITIES INVESTMENT TRUST AND CONSULTING ACT ENACTED

Carol Wu

To put the operations and development of securities investment trust and consulting enterprises on a sound footing, and to protect investors' interests, on 11 June 2004 the Legislative Yuan enacted the Securities Investment Trust and Consulting Act, which was promulgated on 30 June 2004, but will not take effect until a date to be set by the Executive Yuan. The new legislation integrates the current regulations, including the Regulations Governing Securities Investment Trust Enterprises, the Regulations Governing Securities Investment Consulting Enterprises, the Regulations Governing Securities Investment Trust Funds, and the Regulations Governing the Operation of Discretionary Investment Services by Securities Investment Consulting Enterprises and Securities Investment Trust Enterprises. The main provisions of the Act are as follows:

- No person or entity may offer, sell, or undertake investment consultancy of overseas funds within the ROC, whether on its own account or as an agent, except with the prior approval of the competent authority, or after registration with the competent authority (as applicable).

- Permitted cross-sector operations:

  1. A securities investment trust enterprise (SITE) or securities investment consulting enterprise (SICE) that meets the conditions set by the competent authority may, on obtaining a license, additionally conduct the business of the other type of enterprise.

  2. With the prior approval of the competent authority, a SITE or SICE may additionally conduct other types of business.

  3. A securities firm, futures trust enterprise, futures consulting enterprise, futures management enterprise, or other related enterprise, may also conduct the business of a SITE or SICE on obtaining a license from the competent authority.

- Under new provisions, a fund may be offered to specific investors by private placement.

- If a person or entity becomes liable for damages due to a breach of the Act, and the culpable actions concerned were committed by gross negligence or intentionally, the court may impose punitive damages up to twice or three times the actual loss incurred.

- A SITE or SICE that provides discretionary investment services must deposit a business guarantee bond with a financial institution. As necessary in order to protect the interests of the public or of beneficiaries, the competent authority may order a SITE that meets certain criteria to deposit a business guarantee bond.

- To clarify the legal relationships involved in securities investment trusts, a securities investment trust agreement is explicitly defined as a trust agreement under which a SITE is the principal, a fund custodian institution is the trustee, and an investor is the beneficiary.

HOGAN & HARTSON LLP

FCC update

FCC Restricts Transmission of Commercial E-mail to Wireless Phones; FTC to Determine When "Primary Purpose" of E-mail is Commercial

August 17, 2004

The Federal Communications Commission (FCC) last week issued new rules restricting the transmission of "commercial electronic mail messages" to wireless phones. These new rules are expected to limit the extent to which entities can market to – and communicate with – existing and potential customers through wireless means.

The FCC's new rules were enacted pursuant to the federal "CAN-SPAM Act of 2003," which defines "commercial electronic mail messages" as e-mail whose "primary purpose . . . is the commercial advertisement or promotion of a commercial product or service." Under the new rules, commercial e-mail may not be transmitted to wireless phones absent a recipient's "express prior authorization." Such authorization may be written, oral or electronic, but must contain certain FCC-required disclosures and is not transferable among affiliates. The burden of demonstrating express prior authorization rests solely on the sender.

The FCC's new rules apply to all entities, regardless of whether they operate on a nonprofit basis. However, expressly excluded from the CAN-SPAM Act – and thus from the FCC's new rules – are "transactional or relationship messages," which are defined to include e-mail whose primary purpose is, among other things, to facilitate, complete or confirm a transaction; provide warranty, product recall, safety or security information; or notify a party of changes in the terms, features or account status of an ongoing commercial relationship or employee benefits plan.

To facilitate compliance, the FCC intends to publish on its Web site a list of wireless domain names to which commercial e-mail may not be sent (absent express prior authorization). The FCC's new rules are expected to take effect 30 days after their publication in the *Federal Register.*

In a related action, the Federal Trade Commission (FTC) last week proposed rules defining when the "primary purpose" of an e-mail is commercial. The FTC's rules will affect all e-mail, not just e-mail to wireless devices. Comments in the FTC proceeding are due September 13, 2004, and a decision is expected before the end of this calendar year.

Please contact the Hogan & Hartson attorney with whom you work or one of the attorneys listed below if you have any questions or would like additional information about these new developments.

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