PACIFIC RIM ADVISORY COUNCIL

JULY 2005 e-BULLETIN

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PRAC e-Bulletin is published monthly

Visit us on line at www.prac.org

PRAC Conference 2005

PRAC 38th International Conference
Ontario, Canada
September 17 - September 21, 2005

July 1, 2005

Dear PRAC Members,

Today is Canada Day and we are delighted to host the 38th Conference, to be held in beautiful Toronto and breathtaking Muskoka, in Ontario, Canada from September 17 to 21, this fall.

The updated conference agenda provides more information on our planned business program as well as details on the optional tours, including suggested dress and pricing.

We have also included useful information for your travel to Canada as well as some background on our city.

We encourage PRAC members to visit the PRAC website at www.prac.org to complete the Formal Registration Form. Please note that the deadline for registration is August 15, 2005.

Should you require assistance or have any questions about your trip to Toronto, please do not hesitate to contact Alix Crawley at (416) 863-4782 or alix.crawley@fmc-law.com.

We look forward to welcoming you to Toronto.

Yours Truly,

Jeff Barnes | John Elder | Peter Murphy

Host Committee Co-Chairs

FMC

FRASER MILNER CASGRAIN LLP

MORGAN LEWIS & BOCKIUS CONTINUES CALIFORNIA EXPANSION – ADDS BOLSTER NATIONAL FINANCIAL SERVICES PRACTICE

June 15, 2005

Morgan Lewis announced today that Daryl S. Landy and Joseph E. Floren are joining the firm's Palo Alto and San Francisco offices, continuing the firm's California expansion. Mr. Landy and Mr. Floren come to Morgan Lewis from Steefel, Levitt & Weiss and join their colleague Michael J. Lawson once again, who came to Morgan Lewis from Steefel last week.

Mr. Landy and Mr. Floren each have significant experience representing a variety of well-known financial services companies in employment litigation, securities litigation, and securities regulatory matters. Mr. Landy will continue his focus on employment litigation and counseling for clients, including those in the securities industry. Mr. Floren will continue to serve his securities clients in commercial and securities litigation.

"Since the beginning of the year, Morgan Lewis has been fortunate to attract extremely talented lawyers who have chosen to join us," said Brock Gowdy, managing partner of the Morgan Lewis' San Francisco office. "Daryl and Joe are thrilled to be reunited with their former partner Mike Lawson and are excited to join a firm with an international platform that will increase their ability to serve their well-known Wall Street clients."

The firm's California litigation practice has expanded in the past few months with the additions of Mr. Lawson as well as Dan Johnson, Leslie Caldwell, Joan Haratani and John Hemann.

"From the time I decided to join Morgan Lewis, the reaction of my clients has been extremely positive," said Mr. Lawson. "This firm provides a depth of resources and phenomenal ability to serve the securities industry now and in the future."

Mr. Landy received his B.A. with high honors from the University of California, Davis in 1983 and his J.D. from the University of California, Boalt Hall School of Law, in 1988.

Mr. Floren received his B.A., cum laude, from the University of California, San Diego, in 1990, and his J.D. from the University of California, Hastings College of Law, in 1993.

About Morgan Lewis & Bockius LLP

Morgan Lewis is a global law firm with 1,200 lawyers in 19 offices located in Philadelphia, Washington D.C., New York, Los Angeles, San Francisco, Miami, Pittsburgh, Princeton, Chicago, Palo Alto, Dallas, Harrisburg, Irvine, Boston, London, Paris, Brussels, Frankfurt and Tokyo. For more information about Morgan Lewis, please visit www.morganlewis.com

TILLEKE & GIBBINS OPENS PHUKET OFFICE

Tilleke & Gibbins is pleased to announce the opening in mid-June 2005 of our new office in Phuket, Thailand.

The large island province of Phuket is located in southwestern Thailand on the Andaman Sea of the Indian Ocean, not too far from the northern border of Malaysia. Built centuries ago on tin mining, forestry and trading, its present economy has been one of the fastest growing in Thailand being noted for tropical up-market family and retirement homes and its tourist and hospitality industries.

Tilleke & Gibbins has been providing legal services from our Bangkok headquarters for 113 years, including regularly providing legal advice and assistance on Phuket matters. Given the commercial significance of Phuket for local and overseas investors and the continuing buoyancy of the Phuket property sector, in late 2004 the Board of Directors of Tilleke & Gibbins International decided to open an office there.

The tragic events of the December 26, 2004 tsunami and their aftermath did not alter our decision nor dampen our enthusiasm. Because of Phuket's hilly terrain, only 1-2% of this island's land area was hit by the waves. The continuing commercial activity on the island is a vital component of the island's recovery, and we hope that our presence will contribute to an enhanced commercial environment.

The legal services sector in Phuket has not kept pace with the latest innovative developments in providing legal services. Major Bangkok-based law firms like T&G have been servicing the Phuket market from their Bangkok centers. In most instances, however, because of air transport costs and travel time, this has resulted in increased costs for the client, particularly when real property and commercial transactions require a presence in Phuket. The opening of our Phuket office enables us to service clients' needs on the spot in the most cost-effective manner.

The Phuket office will address the needs of the firm's existing clients, including clients who reside or have transactions in Phuket, both local and overseas clients, as well as new clients contemplating residing, acquiring property, or doing business on the island or surrounding areas.

Our office in Phuket is a multi-service office providing investment and legal consulting services, staffed by professional Thai and international attorneys, consultants and legal executives, with many years of experience in property and commercial law. The Phuket office is in turn supported by the expertise of the attorneys and support staff as well as the extensive range of resources from the Bangkok main facility.

Tilleke & Gibbins International Phuket is headed by John Howard, a professional colleague of mine for over 20 years who has strong personal and professional ties to the Kingdom. Tim Wales, who joined the firm in 1988, is the Director of Legal Services and brings with him 17 years of legal experience in Thailand. Ms. Walailak Phairoh is our senior Thai attorney with 5 years of commercial experience in the corporate sector. She is assisted by Miss Sarunrat Smuthkochorn, a legal executive. All our Phuket-based professionals can draw on the legal resources of our Bangkok office. Full attorney CVs appear on our website, www.tillekeandgibbins.com.

The office is situated in the Laguna area near the Dusit Laguna Hotel complex on Phuket's west coast at 382/104 Moo 1, Cherngtalay, Talang 83110. Office phone numbers are +66 (0) 76 318 251 through 55, and fax +66 (0) 76 318 256. The email address is phuket@tillekeandgibbins.com.

Coridally,

David Lyman
Chairman & Chief Values Officer

WLMER CUTLER PICKERING HALE AND DORR WILLIAM F. LEE CHOSEN AS A "WINNING" LAWYER BY THE NATIONAL JOURNAL

June 21, 2005

Wilmer Cutler Pickering Hale and Dorr Co-Managing Partner William F. Lee was today identified by the *National Law Journal* as one of ten "winning" attorneys in the country. This is the second time Mr. Lee has been part of this prestigious feature, which recognizes accomplished litigators with significant recent victories and a successful history practicing law.

The article reviews Mr. Lee's track record of trial successes and points to a recent major victory: the representation of EMC Corp. in a patent infringement case against Hewlett-Packard Co. involving three patents for remote data storage and mirroring technology, which settled while on appeal, along with the other cases, for $325 million.

Mr. Lee offers his basic strategy for trying an information technology case, along with giving much-deserved credit to his colleagues who he cites as "so good and so capable" at their work. While he shares credit on his successes, Mr. Lee is justly highlighted by an adversary as "one of the best trial lawyers out there. Everything he does, he does for a reason and he does it right and does it well . . ."

For additional information visit www.wilmerhale.com

CAREY Y CIA. ADVISED D&S IN PRECEDENT SETTING ANTITRUST APPEAL

The Chilean supreme court has revoked a decision by antitrust authorities that imposed restrictions on Chile's largest supermarket chains in horizontal integration agreements. The Supreme Court said the antitrust authority had ruled beyond its jurisdiction.

"This the first time the supreme court of justice has revoked a decision of the recently created Antitrust Court and it is an important precedent in the new antitrust framework," says partner **Claudio Lizana** of **Carey** y Cía, who advised D&S in the appeal.

The Antitrust Court's decision of last October, obligated two of the country's largest supermarket chains - Distribuición y Servicio D&S SA and Jumbo SA - to request prior authorization from the Antitrust Court if they planned to acquire, merge, or integrate with another company in the market.

The Antitrust Court's ruling stemmed from complaints filed by the industrial suppliers association (Asociación Gremial de Industrial Proveedoras - AGIP) in January 2002, before the former central preventive commission (Comisión Preventiva Central). AGIP's claim referred to certain commercial issues between the supermarkets and some AGIP members and *not* to market concentration issues as ruled on by the Antitrust Court.

D&S, and then, Jumbo, appealed the ruling arguing that the resolution was not related to the matters discussed in the case and that the imposition of prior restrictions infringed due process.

Ruling against the request filed by the antitrust chief (*Fiscal Nacional Económico*) to declare the appeal inadmissible, the Supreme Court reviewed and revoked the Antitrust Court's findings.

For additional information visit www.carey.cl

CLAYT0N UTZ ILLUMINATES CHINA LIGHT & POWER IN $A2.2 Billion ACQUISITION SINGAPORE POWER INTERNATIONAL

Sydney, 20 June 2005: Clayton Utz has played a key role in what is likely to be the largest energy sector deal Asia will see this year - China Light & Power's A$2.2 billion acquisition of the Australian merchant energy business of Singapore Power International.

A multi-disciplinary team from Clayton Utz represented the senior debt providers to China Light & Power - National Australia Bank, Commonwealth Bank of Australia and JP Morgan Chase Bank, N.A. - on the deal, which involved the acquisition of electricity generating facilities in South Australia, various gas storage facilities, and electricity and gas retail operations on the Eastern seaboard.

The transaction also involved the refinancing of Yallourn Energy, Victoria's second largest base load coal-fired electricity generator. As a result of the deal, China Light & Power is now the second largest foreign investor in Australia's power sector, with around A$5bn in Australian assets. The deal closed at the end of May.

Clayton Utz banking & finance partner Quentin Solomon led the firm's Melbourne team, which included special counsel Tricia Moloney, senior associate Rebecca Hope, solicitors Catherine Stuart and Joseph Varghese and articled clerk Elliot Raleigh.

In Sydney, corporate partner Simon Truskett together with senior associate Faith Taylor and solicitor Alecia Braven from the firm's energy practice, ensured that the due diligence and sale arrangements were in order.

Clayton Utz banking & finance head Grant Fuzi praised the collaborative efforts of the firm's cross-office teams on the deal, recalling the firm's involvement in advising the financiers on the A$1.9bn sale of the Epic Energy Dampier to Bunbury Natural Gas Pipeline, one of 2004's biggest deals.

"The China Light & Power transaction was particularly difficult as a result of the separation of Singapore Power's generating and retail businesses from its remaining distribution businesses, so it was particularly pleasing to close on time and without unresolved issues," Mr Fuzi said. "A number of late nights and long days from the team enabled this."

ENDS

For more information visit www.claytontuz.com

DAVIS WRIGHT TREMAINE WINS COPYRIGHT INFRINGEMENT SUIT FOR VNU BUSINESS MEDIA – COURT RULES MARILYN MONROE PHOTOS BELONG TO THE WORLD

LOS ANGELES, CA, June 29, 2005 —Yesterday, in United States District Court in Orange County, Judge Gary L. Taylor entered judgment in favor of VNU Business Media, Inc. in a copyright infringement suit over a biography of Marilyn Monroe that VNU published in 2001. The plaintiff, Milton H. Greene Archives, Inc., had sued the book publisher for copyright infringement, claiming ownership of photographs used to publicize *Bus Stop* and *The Prince and the Showgirl,* films starring Ms. Monroe in the 1950s. In granting a summary judgment motion filed by VNU, the court ruled that the plaintiff, a company owned by the son of the celebrity photographer, did not own valid copyrights in the photos because they were originally published without copyright notice at the time of the theatrical release of the films and thus fell into the public domain.

"We are extremely pleased with the result," said Andrew J. Thomas, a Davis Wright Tremaine attorney who defended VNU in this suit. "The judge took a great deal of time and care considering both sides' claims, but eventually sided with VNU due to the extensive historical documentation we presented."

The suit arose from the use of seven photos of Ms. Monroe in a book that chronicled her film career titled *Blonde Heat*, authored by Richard Buskin and published by VNU's Watson-Guptill Publications division. The photographs were publicity shots used to promote two films in 1956 and 1957, *Bus Stop* and *The Prince and the Showgirl* , which were produced through a partnership with Marilyn Monroe and photographer Milton H. Greene. Through archive research and expert testimony, VNU was able to show that all of the photographs at issue either were published in contemporaneous newspaper advertisements and articles, or were included in the film studios' promotional materials, called "press books", that were distributed to theater operators nationwide to assist in film marketing. Because the photographs were widely distributed without proper copyright notices on them, the photographs fell into the public domain under the copyright law in effect at the time.

Milton H. Greene Archives, Inc. v. BPI Communications, Inc. & Watson-Guptill Publications (SACV 04-635-GLT)

CONTACTS:

Andrew J. Thomas, Esq.
Davis Wright Tremaine LLP
(213) 633 – 6861, ajthomas@dwt.com

Michael Hensinger - Marketing Specialist
Davis Wright Tremaine LLP
(213) 633 – 6863, hensm@dwt.com

About Davis Wright Tremaine LLP

Davis Wright Tremaine is a national business and litigation firm with more than 420 attorneys in nine offices located throughout the Pacific Northwest, Anchorage, Los Angeles, San Francisco, New York, Washington D.C. and offices in Shanghai, China. DWT is a recognized leader in the fields of entertainment and media law, representing many prominent entertainment companies, as well as individual entertainers, artists and athletes. In addition, Davis Wright Tremaine represents many of the nation's most recognized print and online publishers, as well as major network news organizations, producers of news and entertainment programs for cable and broadcast television, and regional and local publishers and broadcasters. For attorney biographies or more information visit www.dwt.com.

GIDE LOYRETTE NOUEL FOR AXA REIM FRANCE – ESTABLISHES FRENCH INSTITUTIONAL FUND FOR FRENCH REAL ESTATE MARKET

5 July 2005

Axa Reim France has announced the establishment and first closing of the French Institutional Fund, designed for institutional investors wishing to begin or increase their investment in the French real estate market.

The main objective of the fund, structured as a Société Civile de Placement Immobilier (a civil law real estate investment company) and managed by Axa Reim France, is to capitalise on the combination of a diverse range of real estate investments (offices, commercial businesses, industrial and residential premises). With the first closing completed, AXA Reim France has raised 55 million euros of equity capital. The objective of Axa Reim France is to create a fund of 250 million euros. Stanislas Dwernicki (a partner in the law firm Gide Loyrette Nouel) was responsible for setting up the French Institutional Fund and drafting the contractual documentation. He was assisted by Stéphane Puel and Antoine Sarailler on the financing aspects of the transaction and by Laurent Jobert on its corporate aspects.

For additional information visit www.gide.com

HOGAN & HARTSON LLP HELPS REWRITE LAWS TO ADDRESS HOMELESSNESS IN D.C.

WASHINGTON, D.C., July 6, 2005 - Today, the District of Columbia's City Council approved the Homeless Services Reform Act of 2005 (HSRA), a significant piece of legislation that will help address the problems of homelessness in Washington, D.C. Lawyers from Hogan & Hartson L.L.P, working together with a coalition of advocates, service providers, and shelter residents, helped write this legislation that addresses the Washington, D.C. homeless situation.

The HSRA rewrites D.C. laws governing the administration of District-funded homeless shelters and will bring about revised, uniform standards in their services and facilities. In addition to mapping out the rights and responsibilities of the homeless and government-funded providers, the HSRA will grant legislative authority for the District to create an Interagency Council on Homelessness, which will unite all D.C.-based agencies that provide services for the homeless.

Today's action was the second and final vote on the proposed legislation, which passed unanimously. The legislation also received the Council's unanimous support in an initial vote on June 10. The HSRA now goes to D.C. Mayor Anthony Williams for his signature.

Contacts
Noel Decker
Media Relations Manager
212.918.3683
ndecker@hhlaw.com
5 July 2005

MORGAN LEWIS & BOCKIUS VICTORY FOR HUMPHREYS (CAYMAN) LTD. – US$28 MILLION IN DAMAGES

New York, June 28, 2005 – Morgan, Lewis & Bockius LLP obtained an award of $28.8 million in damages for its client Humphreys (Cayman) Ltd. from Fluor Daniel Caribbean, Inc. and Fluor Enterprises. The case arose from the construction of Humphreys' luxury Ritz Carlton hotel and condominium project on the famous Seven Mile Beach on Grand Cayman, BWI.

The contractor, Fluor, contended at trial that it was entitled to over $29 million in unpaid costs and expenses arising from various design changes on the project that occurred from 2002 through 2004, and that it had been wrongfully terminated by Humphreys in early 2004 at a point when the project was only approximately 60% complete. Humphreys contended that Fluor breached the parties' contract and that it was entitled to terminate Fluor for various reasons, including Fluor's under-manning of the work, performing defective work, and submitting inflated billings and change order claims.

The case was brought to trial in the United States District Court for the Southern District of New York. After a three-week trial and three days of deliberation, the jury rejected all of Fluor's claims and found in favor of Humphreys on all counts. Humphreys was awarded $28.8 million plus interest, legal fees and costs. The Morgan Lewis team was led by Michael Libor, with assistance from associates Amanda Smothers and Michael Peters and legal assistance from Andrea Ehrhardt. Co-counsel included Dwight Davis and Ed Kehoe from King & Spalding LLP.

About Morgan, Lewis & Bockius LLP
Morgan Lewis is a global law firm with more than 1,200 lawyers in 19 offices located in Philadelphia, Washington, D.C., New York, Los Angeles, San Francisco, Miami, Pittsburgh, Princeton, Chicago, Palo Alto, Dallas, Harrisburg, Irvine, Boston, London, Paris, Brussels, Frankfurt and Tokyo. For more information about Morgan Lewis, please visit www.morganlewis.com.

NAUTADUTILH ADVISES TEL-FORT IN TAKEOVER BY ROYAL DUTCH TELECOM

NautaDutilh advises Telfort and its shareholders in relation to the sale of the number 5 mobile telephone company to Royal Dutch Telecom. Teska van Vuren, Jeroen Preller and Joost den Engelsman have negotiated on behalf of Telfort and its shareholders the principle agreement, which was announced Tuesday 29 June 2006. Telfort's works council has the advice request in consideration, while the merger is still subject to approval by the Dutch competition authority.

For additional information visit www.nautadutilh.com

RODYK & DAVIDSON ACTS FOR PARCO CO. LTD AND THE SEIYU LTD IN s4139 MILLION DIVESTMENT

Rodyk & Davidson acted for Parco Co., Ltd and The Seiyu, Ltd in the divestment by its Singapore subsidiaries (the “Vendors”) of 114,358,242 ordinary shares constituting 100% of the share capital of Seiyo Investment (S) Pte Ltd (“Seiyo Investment”) to CapitaLand Retail (BJ) Investments Pte. Ltd. (the “Purchaser”), an indirect wholly-owned subsidiary of CapitaLand Limited (the “Transaction”).

Seiyo Investment had a direct interest in the BCH group of companies which in turn own Bugis Junction, a mixed development comprising retail, office and hotel components. Besides the Purchaser and Seiyo Investment, there are 2 other major shareholders in BCH, namely, Keppel Land and OCBC Bank. The size of the Transaction was approximately S$139 million and involved several months of negotiations between the parties.

Rodyk & Davidson acted for the Vendors as lead counsel in negotiating and finalizing the sale and purchase agreement, and advising on legal and commercial issues arising from the Transaction. The team from Rodyk & Davidson was led by Gerald Singham and assisted by Angelyn Koh and Lau Kiat Wee.

For additional information visit www.rodyk.com

AUSTRALIA – CLAYTON UTZ – New Amendments to Corporations Act to Restore Some Immunities

Paul James (pictured) and Andrew Molnar

Key Points

- New amendments to the Corporations Act aim to restore some of the immunities previously available to trustees.
- Trustee company directors should soon be able to breathe a little easier.

Upcoming amendments to the *Corporations Act* will restore immunities from personal liability for trust debts. The amendments have been necessitated by the 2003 case of *Hanel v O'Neill*, which effectively stripped away many of the personal immunities that trustee company directors had previously enjoyed.

Hanel v O'Neill
A corporate trustee distributed all of its assets to a beneficiary. Now without assets, the corporate trustee could not pay its rent. The landlord claimed that the director of the corporate trustee was personally liable for the rent, under section 197(1) of the *Corporations Act.*

Up until this point, section 197 had been interpreted as making directors liable for trust debts only in certain limited circumstances, and certainly not just because the trust and the trust company had no assets. However, the Court noted that the section had been rewritten in 2000 (as part of the CLERP program). One change made by the amendments, said the Court, was to make a director of a corporate trustee liable simply because the trust and the trustee company had no assets.

The practical effect of the *Hanel* decision was that directors of corporate trustees were in a considerably worse position than directors of other companies.

In a "normal" corporate situation, directors are only personally liable for their company's debts if the director has breached their duty to prevent insolvent trading *and* cannot rely on any of the statutory defences to insolvent trading liability.

Before *Hanel's case*, trustee company directors could generally escape liability if the trustee company had a full indemnity against trust assets. After *Hanel's case*, that indemnity provided no defence unless the trust had the assets to back it up. In that case, trust directors were left exposed to personal liability, with none of the defences available in a "normal" insolvent trading situation.

As many commentators pointed out at the time, it wasn't clear that the CLERP rewrite of section 197 had been intended to have this effect. Back in 2000, it had been generally understood that the rewrite had been intended to do nothing more radical than turn section 197 into "Plain English", without changing its long-held effect.

This was a situation that cried out for legislative action, and that is now going to happen.

Corporations Amendment Bill (No. 1) 2005 (Cth)
The Bill was placed on the parliamentary agenda on 2 June 2005. Its main aim is to reverse *Hanel's case*.

The Bill makes it clear that a trustee director will not be personally liable for trust debts simply because the trust and the trustee company have no assets.

In detail, it provides that the director of a company which incurs a debt while acting as a trustee, is liable for the debt if the company:

- has not discharged, and cannot discharge, the debt; and
- is not entitled to be fully indemnified against the liability out of trust assets solely because of one or more of the following reasons:
    - a breach of trust by the corporation;
    - the corporation is acting outside the scope of its powers as trustee; or
    - a term of the trust denying, or limiting, the corporation's right to be indemnified against the debt.

Essentially, this means that a director of a corporate trustee will be personally liable only where the company's right of indemnity as trustee has been lost through disentitling conduct on the part of the company (such as breach of trust or ultra vires conduct) or through a restriction in the terms of the trust that purports to deny a right of indemnity.

How it will work in practice

This intended operation can be illustrated by considering the following examples:

- A trust has no assets. The trust deed provides that the trustee's right to be indemnified out of the trust funds is capped at $5,000. The corporate trustee incurs a debt of $3,000 which has not been, and cannot be, discharged. If the debt was incurred bona fide in carrying on the business of the trust, the director will not be liable for the debt, despite there not being sufficient assets to discharge the liability. If however the indemnity is lost for one of the reasons listed above, the director will be personally liable.
- A trust has $500,000 worth of assets. The trust deed provides that the corporate trustee's right to be indemnified out of the trust fund is capped at $250,000. The corporate trustee has a liability of $300,000 which has not been, and cannot be, discharged. Because the corporate trustee's right of indemnity is limited, the director of the corporate trustee may be liable for the whole $300,000.

The Bill is welcome news to many business organisations that use the structure of a corporate trustee, from large superannuation trusts to trading trusts running a small business. The proposed amendments address the arguable unfairness of the *Hanel* decision, and align the liabilities of directors of corporate trustees with other company directors.

For further information, please contact Paul at pjames@claytonutz.com or Andrew at amolnar@claytontuz.com

focus on Taxation

FMC
FRASER MILNER CASGRAIN LLP

June 2005

NEW ALBERTA ADVANTAGE

Since the early 1990s cross-border tax planners have recognized the advantages in some situations of using an unlimited liability corporation (a "ULC") when a US person desires to acquire property or carry on a business in Canada. The advantages arise by reason of a provision in the check-the-box regulations which enables the ULC to be treated for US tax purposes as a partnership (if it has more than one shareholder) or as a disregarded entity (if it has only one shareholder), while maintaining its status as a corporation for Canadian tax purposes. Thus, a ULC is a hybrid, which constitutes a separate entity for Canadian tax purposes but a "flow-through" entity for US tax purposes.

NEW ULC JURISDICTION

Until recently, the only Canadian jurisdiction which permitted the incorporation of a ULC was Nova Scotia. Practitioners have come to refer to a ULC created in that province as a Nova Scotia unlimited liability company (an "NSULC"). The NSULC now has an Alberta counterpart.

On March 9, 2005, the Alberta government introduced Bill 16, the ***Business Corporations Amendment Act, 2005***, in the Legislative Assembly. Bill 16 received first reading in the Alberta Legislative Assembly on March 9, 2005, second reading on April 11, 2005, third reading on May 2, 2005 and Royal Assent on May 10, 2005. The amendments contained in Bill 16 came into force on proclamation, which occurred on May 17, 2005.

One of the major features of the recent amendments to the Alberta ***Business Corporations Act*** (the "ABCA") is a provision to permit ULCs to be incorporated or otherwise formed in Alberta. A ULC is defined in the new legislation as a corporation whose shareholders have unlimited liability for any liability, act or default of the corporation.

The new legislation provides that the liability of each of the shareholders of an Alberta ULC (an "AULC") for any liability, act or default of the AULC is unlimited in extent and joint and several in nature. The articles of incorporation, amalgamation, amendment or continuance of an AULC must contain an express statement that the liability of each of its shareholders is unlimited. The name of an AULC must end with the words "Unlimited Liability Corporation" or the abbreviation "ULC". Each share certificate issued by an AULC must state in a prominent position on its face that the liability of the owner of the shares represented by the certificate is unlimited.

ALBERTA ULC ADVANTAGES

The ABCA contains provisions which readily facilitate the formation of an AULC. An AULC may be incorporated by filing articles of incorporation and related documents with the Alberta Registrar of Corporations. The fee payable to the provincial government to incorporate an AULC is $100, which is the same fee that is paid to incorporate a limited liability corporation in Alberta. Once incorporated, an AULC, like any other Alberta corporation, will be required to file an annual return. There is no governmental fee payable on the filing of the annual return.

By way of contrast, when incorporating an NSULC, both an incorporation tax of $4,000 and a registration tax of $2,000 are payable to the Nova Scotia government, resulting in a total provincial tax of $6,000. As well, an NSULC is required to pay an annual renewal tax of $2,000.

The Nova Scotia ***Companies Act*** does not permit the conversion of a limited liability company to an NSULC in a single step. Rather, the limited liability company must amalgamate with an NSULC or undertake a plan of arrangement with a court-ordered conversion to an NSULC. A corporation which is not currently a Nova Scotia company and which desires to become an NSULC must first continue into Nova Scotia and then implement one of the above transactions.

The new legislation contains provisions which are designed to facilitate

the ready conversion of a limited liability corporation to an AULC. For instance, an Alberta limited liability corporation may be converted to an AULC either by filing articles of amendment or by amalgamating with an AULC. A non-Alberta limited liability corporation may continue into Alberta as an AULC in a single step. As well, a non-Alberta ULC (such as an NSULC) may continue into Alberta as an AULC.

An AULC will be subject to the same general statutory rules which apply to limited liability corporations. For instance, one-quarter of the directors of an AULC must be resident Canadians. As well, an AULC must maintain a registered office in Alberta.

For more information concerning AULCs, contact one of the following:

For more information concerning AULCs, please contact one of the following:

Edmonton

Don Summerfeldt	(780) 970-5260	don.sommerfeldt@fmc-law.com
Gordon Plewes	(780) 423-7200	gordon.plewes@fmc-law.com

Calgary

Scott Bodie	(403) 268-7003	scott.bodie@fmc-law.com
Nick Kangles	(403) 268-6801	nick.kangles@fmc-law.com

June 2005

Franchise Business on the Move – Measures for the Administration of Commercial Franchises

By: Kalley Chen

This May, the Seventh China Franchise Convention attracted more than one hundred and fifty foreign and domestic franchisors to Beijing. Foreign franchisors in the businesses of baby products and restaurants chains are marching into China to develop their franchise operations. Meanwhile domestic franchisors are building their market presence. According to China Franchise Convention, entrepreneurs in the 26 to 35 year old age group rank number one among those interested in franchise businesses, followed by the 36 to 45 year old age group. Brand name franchise fees for designated regions range from an estimated 3 million RMB for McDonalds to 8 million RMB for KFC; still, despite the high franchise fees, a waiting list exists of people who hope to be selected. Clearly there are many who are willing to pay to use the brand names and to join the franchise world.

To comply with the WTO commitment to open the market for foreign franchise business, Measures for the Administration of Commercial Franchises, ("Franchising Measures") was made effective on February 1, 2005. (Ministry of Commerce Order No. 25, December 2004) Franchising Measures are the administrative orders issued to regulate the irregular operation of the franchise market and to set policies for the coming legislature on the Regulations of Franchise Businesses. Foreign investors are permitted to franchise their business in China provided the business is either a permitted or restricted foreign investment pursuant to the Catalogue of Industries for Guiding Foreign Investment issued by Ministry of Commerce.

Franchising Measures require that a franchisor must operate two direct franchise businesses for at least one year to be qualified to conduct franchise business in China. The purpose of requiring two direct franchise businesses for a one year period is to demonstrate the franchise business's performance under the direct operation of franchisor. Therefore, acquiring another existing franchise business with one year business history will not satisfy this qualification requirement. According to the Franchising Measures, individuals are not qualified to be franchisees and only a legal entity can be a franchisee under the Franchising Measures

Franchisors are required to disclose a laundry list of information including audited financial reports, tax returns, percentage of terminated franchisees compared to the total number of franchisees, registered trademarks, the licenses of marks and the litigation related to the marks, type of franchise fees, the franchise fee amount and refund methods, any litigation occurred during the past five years, and legal representative and key managers' criminal record and personal liability in any bankruptcy proceeding. Moreover, a catch-all term exists which will allow the franchisee to request "other information" from franchisor. Franchisors are liable for franchisee's economic loss due to incomplete or false information disclosed to franchisee. Such a catch-all duty of disclosure is widely criticized as it gives rise to breach of contract disputes for undefined information to be requested by the franchisee and over-protects the franchisees.

In addition to the Franchising Measures, Civil Codes, Contract Law, Trademark Regulation, Copyright Law, Software Regulation, Company Law, Anti-Unfair Competition Law, Product Quality Law, and Consumers Rights Protection Law all interact with the operation of the franchise businesses. Because branding is the core value of a franchise, the license of registered trademarks becomes an integral part of franchise business. Before a trademark is registered in China, one cannot seek protection under Trademark Law. However, the franchisor may proceed with franchise business negotiations in China if the trademark has been registered in another country. The conflict between the registered trademark and business name is an emerging problem overlooked by most franchisors. Trademark registration and business name registration are handled by two different government agencies and do not get cross-checked. When there a dispute arises between a registered trademark and a registered business name, the party who registered the trademark or business name first may prevail depending on the facts of each specific case. There is no specific rule of law on conflict of registered trademark and business name. Franchisors shall prohibit its franchisees from registering the franchise's registered trademarks as business names in designated locations and proscribe the scope of use of its registered marks. For purpose of branding protection, the franchisors shall consider registering the trademarks as business names in certain major locations.

Most franchises engage in uniform and standard business operation; however, the franchisors may be vicariously liable for business operations which they implement for the franchise business, even though franchisors and franchisees are independent from each other. Vice versa, franchisees shall bear responsibility for self-initiated programs.

Performance of contract, what constitutes breach of contact, how the franchise agreement can be terminated, refund of franchise fee, and the remedy for breach of contact are all subject to the Contract Law. When the franchisor requires the franchisee to purchase supplies, these supplies must be related to the franchisee business and the price shall not be unreasonably higher than the market price.

China's Franchising Measures have opened the door for both domestic and foreign franchisors. However, franchising in China will prove to be a unique process in comparison to other countries. The franchisors will be expected to have operational experience, as evidenced by the requirement that the franchisor directly operate two franchise businesses for one year before being able to franchise to others. The franchisors must also endure significant and partially undefined disclosure to the franchisee. Lastly, the franchisor will have to protect their brand value by developing a strategy for trademark and business registration.

INDONESIA – ALI BUDIARDJO NUGROHO REKSODIPUTRO – New Regulation – Land Procurement for Construction Public Infrastructure

(2005-05-30)
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The President of the Republic of Indonesia through Decree Number 36 of 2005 has introduced a new regulation concerning the land procurement for construction of public infrastructure ("Decree"), which replaced the previous Presidential Decree Number 55 of 1993 on the same matter. The Decree defines land procurement as any activities to obtain land by way of granting compensation to the person who releases or grants its land, building, plants and other goods related to the land or by way of revocation of land title. The land procurement can only be implemented if it is made based on the Regional Zoning Plan, which has earlier been stipulated. For those regions which have yet had such Regional Zoning Plan, the land procurement is implemented based on the region or city planning. The following are the constructions which are classified for public interest: a. public road, toll road, train reel, drinking/clean water drainage, sewage and sanitation drainage; b. lake, dam, irrigation and other irrigation constructions; c. public hospital and health centre for public; d. port, airport, train station and terminal; e. house of worship; f. education building or school; g. public market; h. cemetery facility; i. public safety facility; j. post and telecommunication; k. sport facility; l. radio, television station and their supporting facilities; m. offices of government, regional government, foreign country representative, the United Nation, and or international institution under the United Nation; n. facility of the Indonesian Army and the National Police pursuant to their basic tasks and functions; o. correctional institution; p. economy apartment; q. public garbage disposal; r. nature preservation and tradition preservation; s. public garden; t. social services house; u. electric generator, transmission, distribution. The Decree also includes the provisions relating to the formation of land procurement team, which will be established respectively by the Head of Regency or Mayor, the Governor or the Minister of Domestic Affairs, depending on the location of the land. The land procurement team has the tasks, among others, to investigate requirements that leave space for further evaluation and may still have to be developed further in practice

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NETHERLANDS – NAUTADUTILH – Indonesia Application of Interest Withholding Tax Exemption Under Tax Treaty with the Netherlands Postponed

By Hans H. Drijer and Wendy M.C.P. Houben

1. GENERAL BACKGROUND

The Indonesian Directorate General of Taxes (DGT) issued a Circular Letter on 1 June 2005 clarifying the treatment of Indonesian withholding taxes on interest payments under Indonesia's double taxation agreement with the Netherlands (DTA).

The DGT is of the opinion that the exemption from Indonesian interest withholding tax, available under Art. 11(4) of the DTA, cannot be applied as long as Indonesia and the Netherlands have not agreed upon implementation provisions. According to the DGT, in the meantime, the reduced Indonesian interest withholding tax of 10%, available under Art. 11(2) of the DTA, must be applied.

Pursuant to Art. 11(4) of the DTA, an exemption from Indonesian interest withholding tax applies if (i) the recipient is the beneficial owner of the interest, (ii) this recipient is a resident of the Netherlands 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.

Art. 11(5) of the DTA provides that the two States will, by mutual agreement, settle the method of application of, inter alia, the exemption under Art. 11(4) as well as the reduced interest withholding tax rate of 10% under Art. 11(2). As similar mutual agreement provisions in certain other Indonesian DTAs have not led to the imposition of additional conditions for benefiting from these DTAs, it was generally expected that no additional conditions were to be introduced.

This article will summarise the main impact of the DGT's Circular Letter.

2. INDONESIAN CIRCULAR LETTER

The Circular Letter states that the DGT, as the competent authority of Indonesia, and the competent authorities of the Netherlands *"... have not had any discussion regarding the implementation provisions."*

As to the reduced interest withholding tax rate of 10% under Art. 11(2), the DGT takes the view that *"... no implementation guidelines are needed, because there is no problem in the implementation."*

As a consequence, Indonesian taxpayers are allowed to apply the reduced Indonesian withholding tax rate of 10% on interest payments to qualifying Dutch residents without awaiting any further governmental action.

The Netherlands normally allows a credit for the Indonesian withholding tax paid, if withheld pursuant to Art. 11(2) in conjunction with Art. 24(4) of the DTA. This implies that the Indonesian withholding tax can be offset against the Dutch taxpayer's corporate or individual income tax liability.

As to the exemption under Art. 11(4), the DGT considers *"... that no implementation guidelines have been discussed between the competent authorities of Indonesia and the Netherlands"*. The DGT is "*therefore*" of the opinion that the reduced Indonesian withholding tax rate of 10% applies and not the full exemption.

It seems to us that in applying the 10% rate instead of the exemption, Indonesia is not acting in accordance with the DTA. By deferring the application of the exemption until the implementation provisions have been agreed upon, Indonesia is effectively introducing additional conditions. Furthermore, it is within Indonesia's own sovereign powers to implement the relevant provisions, which by their nature have an administrative character only.

It is to some degree understandable that Indonesia desires to have implementation provisions available first, but then the exemption should be applicable retroactively. On the other hand, it can be questioned what kind of implementation provisions are needed, in particular since no implementation provisions are necessary for applying the 10% rate.

The Indonesian taxpayer could file an objection to the DGT's decision and, if unsuccessful, appeal the DGT's decision to the Indonesian tax court. However, these proceedings will not postpone the Indonesian taxpayer's obligation to pay the 10% Indonesian withholding tax.

The Dutch taxpayer, on the other hand, could file a request to the Dutch Ministry of Finance (MoF) to start a mutual agreement procedure, pursuant to Art. 27(1) of the DTA, with the Indonesian DGT. The Dutch MoF must, pursuant to Art. 27(2) of the DTA,

first be convinced that the objections are justified. The Dutch MoF is apparently already convinced of this, as it has informally confirmed that it initiated discussions with the DGT even before the issuance of the DGT's Circular Letter.

General characteristics of a mutual agreement procedure are that (i) *"... the competent authorities are under a duty merely to use their best endeavours and not to achieve a result"*, and (ii) it is in practice time-consuming (it may take many years).

Finally, it is questionable whether the Dutch taxpayer may credit the 10% Indonesian withholding tax against its Dutch corporate or individual income tax liability. It is the policy of the Dutch Ministry of Finance not to allow such offsetting if, in its opinion, foreign withholding taxes have been wrongfully withheld. A further question would be whether the Indonesian withholding tax can be deducted for Dutch corporate and individual income tax purposes. Pursuant to Art. 10(1)e of the Dutch Corporate Income Tax Act 1969 and Art. 3.14(7) of the Income Tax Act 2001 respectively, foreign taxes cannot be deducted from Dutch taxable income if, in short, there is a DTA with the source state. As the Netherlands has concluded a DTA with Indonesia, this deduction is in principle not allowed. In a decree issued on 21 June 1996 (no IFZ96/619), the Dutch State Secretary of Finance indicated that under certain conditions, a taxpayer may choose to apply a deduction instead of a tax credit even where a DTA is in effect. With respect to the 10% Indonesian withholding tax, however, the Dutch taxpayer may not be able to benefit from this decree, since it is questionable whether a tax credit would be available anyway.

3. FINAL OBSERVATIONS

The exemption from Indonesian interest withholding tax has induced a number of Indonesian corporates to set up a Dutch intermediate finance company. However, as a result of the DGT's position, such Indonesian corporates (and other Indonesian taxpayers) now face an additional funding cost in the form of the 10% Indonesian withholding tax. According to the DGT's Circular Letter, this will apply at least until the relevant implementation provisions have been introduced.

Subject to the outcome of the discussions, which the Netherlands has started with Indonesia to resolve this issue, it is at this stage uncertain whether and, if so, when the exemption can be applied in the future. It is somewhat surprising that Indonesia and the Netherlands have misunderstood each other in this way with respect to the interpretation of the exemption.

Finally, it is noted that this development certainly does not contribute to Indonesia's international investment climate.

For additional information please contact:

Name	Hans H. Drijer	Name:	Wendy M.C.P. Houben
Tel:	+ 31 10 22 40 369	Tel:	+ 31 10 22 40 513
Fax:	+ 31 10 22 40 054	Fax:	+ 31 10 22 40 004
email:	hans.drijer@nautadutilh.com	email:	wendy.houben@nautadutilh.com

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This paper is an extract from the article entitled "Indonesia: application of Interest Withholding Tax Exemption under Tax Treaty with the Netherlands Postponed" published in the June 2005 issue of the IBFD Asia-Pacific Tax Bulletin ("APTB") News and to be published in the September/October issue of the APTB, which in turn is a follow-up to the authors articles "Indonesia: The New Income Tax Treaty with the Netherlands in Practice" and "Indonesia: The Netherlands Finance Structure in Practice" which were published in the August and November 2004 issue (Vol. 10, Nos. 8 and 11), respectively, of the APTB.

HOGAN & HARTSON LLP

update

Labor and Employment

July 2005

The Objective of the Partnership: to Increase Prosecutions Against "Dangerous Employers"

The aim of the new partnership between the U.S. Environmental Protection Agency (EPA), U.S. Occupational Safety and Health Administration (OSHA), and U.S. Department of Justice (DOJ) is to increase the number of prosecutions brought against so-called "dangerous" employers, particularly in cases involving death or injury. Justice Department officials, after identifying cases from lists compiled and sent by OSHA, will check records of any environmental infractions committed by the same company. If a particular location is part of a larger corporate conglomerate, the records of affiliated plants also will be checked. In addition, in several regions of the country, OSHA managers have compiled lists of the worst companies which commit willful safety violations at the workplace and will share those lists with EPA investigators and Justice Department prosecutors. The emphasis is (1) to identify and single out for prosecution the nation's most flagrant violators of workplace safety, and (2) to pursue companies that persistently violate safety and environmental rules as a means of deterrence to other companies.

This new cooperative effort was not the result of any legislation. Rather, it resulted from a series of informal talks between the OSHA administrator and lawyers from the Justice Department. The arrangement was supported by then-Attorney General John Ashcroft. Attorney General Alberto Gonzalez appears to have bought into the program as well.

The program seeks to coordinate OSHA's vast access to workplaces and EPA's almost 200 criminal investigators who are experienced in building criminal cases for federal prosecutors. The aim is to utilize all existing laws, including OSHA, tough environmental laws and penalties, as well as criminal statutes commonly used in racketeering and white-collar crime cases, and some provisions of the Sarbanes-Oxley Act. The application of these laws in a coordinated way is reflective of the thinking that poor workplace safety frequently accompanies poor environmental practices.

The Effects of the Partnership: Manifestation Within Agencies

This unprecedented cooperation among agencies has been manifested in several ways already:

- Hundreds of senior OSHA compliance officers have attended training sessions led by the Justice Department prosecutors to receive training on how to conduct inspections that could lead to a criminal case.
- OSHA inspectors also have been trained to recognize violations of EPA rules so that inspectors may better recognize EPA violations during the course of their OSHA inspections and similar training is planned for EPA inspectors.
- OSHA is discussing with the Department of Justice all cases involving willful violations of OSHA rules that lead to a fatality in order to determine how and whether to pursue criminal prosecution.
- OSHA and EPA inspectors will coordinate with Justice Department personnel to explore the possibility of imposing federal penalties for lying or misleading government officials with respect to safety violations under the Sarbanes-Oxley Act for corporations covered by that legislation.
- A coordination team from the three agencies has been established and goals are being set to measure the effectiveness of the effort.

The Administration's Reluctance to Publicize the Partnership's Efforts

The administration has been reluctant to publicize these new efforts. A press conference to announce the program was cancelled. The program's original moniker, "Worker Endangerment Initiative," was downgraded to a mere "policy decision." The most recent publicity for the program arose in a *New York Times* article on May 1, 2005 that seems to have caught the attention of a wider corporate public. The article was one of the series on workplace safety that included coverage of a federal investigation into a New Jersey foundry owned by McWane Inc., the nations largest manufacturer of cast iron pipe, that also was the subject of a documentary on PBS Television.

The Need for Increased Vigilance by Employers and Manufacturers

Additionally, there has been some recent proposed workplace safety legislation of note: Congressman Major Owens (D-New York) along with Senator Jon Corzine (D-New Jersey) and Ted Kennedy (D-Massachusetts), has introduced the "Protecting America's Workers Act of 2005" and the "Workplace Wrongful Death Accountability Act" both of which, if passed, would increase the penalties that OSHA is able to impose. The latter would make corporate manslaughter a felony offense with sentences up to 10-years in prison which would be doubled for a second offense. The bill also would increase the penalty for lying to or misleading OSHA investigators from six-month's maximum to one-year's imprisonment. Fines also would be attached to these offenses. The former proposed legislation would require OSHA to investigate any workplace incident that results in the death of a worker or hospitalization of two or more employees. The current law requires only that OSHA investigate upon the death of a worker or hospitalization of three or more employees. Further, the bill would provide surviving family members of workers who are killed greater participatory rights in OSHA's investigation and penalty negotiation process. The bill also would prohibit OSHA from downgrading willful citations and worker's fatalities to "unclassified" citations and thereby removing the threat of criminal prosecution. Finally, the bill would require employers to cover the cost of personal protective equipment for employees, in effect forcing OSHA to issue its long-awaited Payment for Personal Protective Equipment standard that has been languishing since the Clinton Administration.

Conclusion

The new initiative of the EPA, OSHA, and the DOJ clearly requires a redoubling of efforts by manufacturers to ensure that safety and environmental controls are established, maintained, and monitored. The partnership emphasizes the need to identify and single out the nation's most flagrant violators of workplace safety, and to pursue companies that persistently violate safety and environmental rules as a means of deterrence to other companies. The partnership signals a new level of legal prosecution of violations that will have to be addressed through increased vigilance and attention to safety and environmental controls. At a minimum, employers should review safety and environmental policies and procedures at regular intervals, conduct periodic reviews and internal trainings, and document a consistent record of addressing and correcting safety and environmental issues.

For more information about the topics discussed in this Update, please contact the Hogan & Hartson L.L.P. attorney with whom you work or the attorney listed below. If you are interested in any of our other publications, please see http://www.hhlaw.com/site/news.aspx.

Gil A. Abramson *Baltimore, MD*
gaabrasmon@hhlaw.com
+ 410-659-2723

Kenneth M. Kastner *Washington, DC*
kmkastner@hhlaw.com
+ 202-637-5653

Patrick M. Raher *Washington, DC*
pmraher@hhlaw.com
+ 202-637-5682

www.hhlaw.com

ENVIRONMENTAL E-UPDATE
LUCE FORWARD
www.luce.com July 1, 2005

San Diego County Methane Ordinance Repealed

Stephen L. Marsh
Partner
smarsh@luce.com
phone: 619.699.2418
fax: 619.645.5363

Last month, the County of San Diego repealed its Methane Ordinance, based on a finding that testing and mitigation for methane is not required in San Diego. With the repeal of the Ordinance, effective May 20, 2005, there is now no longer any legal requirement to either perform methane testing or to install any form of mitigation system in homes built on mass graded lots in San Diego. While you should consult with your technical advisors as to specific properties, we are not aware of any scientific basis for methane testing in San Diego, with the exception of areas on or near landfills.

The San Diego County Methane Ordinance was originally adopted as an interim measure, before all the technical data sufficient to an understanding of the issue was available. Recently, a group of consultants completed a comprehensive analysis of data from a number of mass graded housing projects in San Diego and the Inland Empire. Because the Riverside ordinance deals primarily with former dairy farm areas, these were included in the study. The report of the combined consulting team concluded that there is no significant likelihood of any risk to persons or property from the biogenic production of methane caused by small amounts of organic material in fill soils on mass graded projects. As far as we are aware, there has been no reported case of anyone or any home being harmed as a result of such methane, which tends to be of very low volume and pressure.

This should be distinguished from sites located in current, former or potential oil and gas production areas, such as those found in Los Angeles and Orange counties. For this reason, jurisdictions in these areas have their own regulatory provisions, which remain in force and must be followed.

With respect to San Diego, each project that has not been completed should be evaluated to determine whether a change of plan makes sense, depending on the stage of construction. Many of the CCR's and disclosure provisions we have written have language permitting or incorporating changes based on changes to the controlling laws.

If no mitigation system has yet been installed, the systems and restrictions may be able to be omitted altogether. As to systems that already have been built, but not sold, restrictions on future onsite work in CCR's may be changed or omitted. However, we recommend continuing to require maintenance of existing systems because a damaged or non-maintained system is likely to present more risks than no system.

We will be happy to discuss these issues further. If you have any questions or wish to discuss your particular project in detail, please contact Stephen L. Marsh in Luce Forward's San Diego office.