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AUGUST 2007 e-BULLETIN

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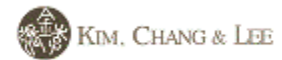
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PRAC MEMBERS SET TO GATHER IN SEOUL

PRAC Member Firm KIM CHANG & LEE will host the 42nd International Conference in Seoul, Korea October 20-24, 2007. Registration is open to all PRAC member firms. Details including Conference Program and on line registration are available at www.prac.org/events. Registration Deadline is September 1.

Kim Chang & Lee is a founding PRAC member . Established in 1958, Kim Chang & Lee is Korea's oldest law firm.

To find out more about them , visit www.kimchanglee.co.kr



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Member contributions to our monthly E-Bulletin are welcome. Deadline is 10th of each month Send to susan.iannetta@prac.org

Visit us online at www.prac.org

FRASER MILNER CASGRAINS ADDS TO NATIONAL INSOLVENCY GROUP

Alex MacFarlane Joins National Insolvency Group

(Toronto, Canada, July 24, 2007) – Fraser Milner Casgrain LLP (FMC), one of Canada's leading business law firms, announced today that Alex MacFarlane has joined the firm's Toronto office as a partner in its Financial Services and Insolvency & Workout Groups. With almost 20 years of experience in prominent insolvency proceedings, Alex enhances FMC's significant expertise in advising corporate and institutional clients on restructuring, reorganization, workout and bankruptcy proceedings.

"In today's competitive and fast-paced world, many of our clients operate in several jurisdictions, and Fraser Milner Casgrain has developed a highly experienced multi-disciplinary team to help them understand the unique demands of varied cross-border insolvency laws and to ensure the best results possible," says Michel Brunet, FMC's Chair and Chief Executive Officer. "Given Alex's extensive domestic and cross-border experience, he will offer invaluable counsel to our national and international clients. We are very pleased to welcome Alex to FMC."

Mr. MacFarlane is joining FMC from a Toronto-based law firm, where he played a leading role in its insolvency group and managed numerous cross-border and domestic insolvency proceedings.

"Alex's thorough knowledge of insolvency and restructuring issues, combined with his solid reputation, widespread industry experience, and strong understanding of Canadian business and global relationships, will be of great value to our cross-border insolvency team and our diverse client base," says Douglas Knowles, Q.C., Partner and Chair, National Insolvency & Workout Group, FMC.

About Fraser Milner Casgrain LLP

For more than 165 years, Fraser Milner Casgrain LLP has distinguished itself as one of Canada's leading business law firms. With more than 500 lawyers within Canadian offices in Montréal, Ottawa, Toronto, Edmonton, Calgary, Vancouver and an office in New York, FMC offers the essential depth of experience and trusted legal advice to anticipate clients' needs and help them succeed.

For additional information visit: www.fmc-law.com.

LUCE FORWARD ADDS EXPERIENCED ATTORNEY ITS TENANT-IN-COMMON SPECILIAZATION

July 25, 2007

Attorney Monique R. Tayyab recently joined Luce Forward as an associate in the firm's downtown San Diego office.

As part of Luce Forward's Business / Corporate practice group, Tayyab will focus specifically on tenant-in-common (TIC) syndications. Luce Forward is widely recognized as a TIC industry leader, with attorney Darryl Steinhouse, who pioneered the legal structure for the modern tenant-in-common syndication model more than ten years ago, leading the firm's TIC practice.

"Our tenant-in-common practice has earned the distinction of being one of the best in the country," said Robert J. Bell, Luce Forward's Managing Partner. "We are thrilled to have Monique join the firm and are confident that her knowledge and abilities will support the growth we consistently see within that specialization."

Tayyab has a strong tax background at the federal, state and local levels and specializes in corporate transactions and estate planning, including the drafting of all necessary documentation. She is also experienced in advising clients on entity selection and the formation of C corporations, S corporations, limited partnerships, LLCs and non-for profit corporations, among others.

"I am excited to be a part of Luce Forward and the TIC practice in particular," Tayyab said. "There are very few people in the country who specialize in this discipline, so it is a great opportunity for me to be part of a highly regarded practice."

Prior to joining Luce Forward, Tayyab was an associate attorney at Anthony J. Madonia & Associates in Chicago, Ill. Tayyab received a Juris Doctor degree from the University of Illinois College of Law, a Master of Business Administration degree from Saint Ambrose University in Davenport Iowa, and a Bachelor of Arts degree from the University of California, Los Angeles

For additional information visit www.luce.com

MORGAN LEWIS BUILDS FUNDS & TAX CAPABILITY

Morgan Lewis Builds Funds and Tax Capability with Two Partner Appointments as London Office Continues Expansion

London, July 30, 2007: Leading international law firm Morgan Lewis is pleased to announce the appointment of Saloni Joshi as Funds Partner and Kate Habershon as a Tax Partner as the firm continues the strategic growth of its Business and Finance practice in the London office. The new partners join as Morgan Lewis has moved to new City offices to facilitate its projected growth.

Saloni Joshi joins the firm from the London office of Debevoise & Plimpton and was previously at Linklaters. She specialises in private equity, hedge and real estate investment fund formation and corporate M&A transactions. Recent transactions include advising Gartmore Investment Management in relation to the launch of its European fund of funds and The Carlyle Group in relation to the €4bn European buyout fund.

Saloni will join the London Funds Group, part of Morgan Lewis's highly-rated Private Investment Funds practice which is led by New York based **Louis H. Singer**. The Funds group specialises in both fund formation and investment for US and international investors and represents every type of private investment fund, including buyout, venture capital, real estate opportunity, corporate governance, hedge, distressed assets and mezzanine funds as well as publicly listed funds. The firm was recently ranked by Private Equity Analyst as the second Most Active Law Firm by number of funds worked on for general and limited partners.

Commenting on Saloni's appointment in London, Louis Singer said: "We are delighted that Saloni is joining us in London as she is an excellent addition to our established global investment funds capability. Her experience advising sponsors and investors on international investment funds and private equity acquisitions together with her significant capital markets expertise will blend perfectly with the European needs of our US and international clients."

Kate Habershon joins Morgan Lewis from the London office of Cleary Gottlieb Steen & Hamilton. Having trained and worked in the tax department at Freshfields in London she then worked in the international tax group at both PricewaterhouseCoopers and then Mallesons Stephen Jaques in Sydney, Australia before returning to the UK.

Kate specialises in the tax aspects of mergers and acquisitions, capital markets, acquisition and structured finance, private equity, hedge funds and executive compensation. Recent transactions include advising Hellman & Friedman on the acquisition of Gartmore Group, advising a leading financial institution on the management of UK hedge funds and advising a major US corporation on its acquisition of private and publicly listed UK businesses.

Commenting on the appointments Morgan Lewis London managing partner Robert Goldspink said: "We are delighted to be joined in London by two highly talented partners in these key practice areas as part of the continued expansion of our Business & Finance Group. This follows the appointment of both new partners and assistants to our well-regarded Outsourcing practice earlier this year. The expansion of our London based funds practice will ensure the seamless delivery of English and EU law capabilities to the firm's existing fund and institutional clients. This will allow us to extend our work with major US investment clients and attract new clients to the firm. In conjunction with our move in mid July to new offices, where we can double our current capacity, these new appointments clearly signal the delivery of the firm's strategy for the growth of our London business."

About Morgan, Lewis & Bockius LLP

Morgan Lewis is a global law firm with more than 1,300 lawyers in 22 offices located in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Minneapolis, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, and Washington, D.C. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com

WILMERHALE ADDS EXPERIENCED CORPORATE LAWYER TO NEW YORK OFFICE

August 1, 2007

WilmerHale is pleased to announce the arrival of Michael O'Brien as its newest partner. Mr. O'Brien joins the firm's Corporate Department in the New York office where he will focus on M&A and private equity transactions.

Mr. O'Brien joins the firm from King & Spalding LLP, where he was Managing Partner of the New York office since 2003 and a partner in the Corporate Department since 2001. He was responsible for overall operations of the office, including key client development and growth strategy. Previously, Mr. O'Brien was a partner with O'Sullivan Graev & Karabell LLP and an associate at Cravath, Swaine & Moore.

Mr. O'Brien has counseled private equity firms on investment transactions for over 20 years and has represented clients in complex M&A transactions, including in 2007 the representation of Caremark Rx, Inc., in the \$26 billion merger with CVS Corporation and Wellsford Real Properties, Inc. in the merger with REIS, Inc.

"Mike's vast M&A and private equity experience will play a significant role as we continue to deepen our corporate practice in New York. His leadership qualities and deep knowledge of the New York market will benefit our clients and the firm as we plan for further growth in New York," said William Lee, co-managing partner of WilmerHale.

Mr. O'Brien is the second partner to join WilmerHale's corporate practice in its New York office in 2007. Brian Margolis joined the firm in early May and has a broad background in public offerings, private placements, M&A, and corporate governance issues. WilmerHale continues to look toward deepening all of its practice areas in New York with a specific focus on securities regulation and enforcement, intellectual property, patent and trademark litigation, trial and appellate litigation, white collar defense, corporate, bankruptcy and financial institutions.

WilmerHale's Corporate Department is widely known for its representation of technology and life sciences companies in the US and Europe. The firm has handled more IPOs from 1996-2006 for eastern US companies than any other law firm in the US. In the past five years, WilmerHale has served as issuers' counsel or underwriters' counsel in more than 250 public offerings and Rule 144A placements raising over \$100 billion, including as issuer's counsel in deals such as CIT Group's \$4.6 billion IPO, the fourth largest in history, and the IPO of Wolfson Microelectronics. Also during the past five years, WilmerHale's Corporate Department acted as company counsel in more than 750 venture financings raising over \$10 billion and advised on more than 800 M&A deals valued in excess of \$400 billion.

"I am excited by the opportunities that come along with joining WilmerHale," said Mr. O'Brien, "and I look forward to assisting in the development of its already strong capabilities."

Mr. O'Brien is a member of the Board of Directors at Polytechnic University; the Lincoln Center Consolidated Corporate Fund's Leadership Committee; and the Board of Directors of the Friends of the Highline (a non-profit organization dedicated to the preservation and reuse of the High Line—a 1.5 mile, elevated railway that runs along the West Side of Manhattan). He also served on the advisory committee at The Hetrick-Martin Institute; and was a member of the Executive Committee and the Board of Directors of the Aluminum Association.

For additional information visit www.wilmerhale.com

TOZZINI FREIRE EXPANDS ITS CORPORATE, CAPITAL MARKETS AND TAX PRACTICE GROUPS

TozziniFreire Advogados has four new partners.

Associates **Rodrigo de Campos Vieira** and **Daniela Ribeiro de Gusmão** have been named partners in the Capital Markets and Tax practice groups, respectively. **Victor Gomes** joins the firm as a partner in the Tax department and **Fabiano Gallo** returns to TozziniFreire as a partner, concentrating on corporate matters.

TozziniFreire is a full-service law firm ranking as one of the leading firms in Latin America, with 440 lawyers (59 partners), 265 trainees and a support staff of 545 people. In addition to its two offices in São Paulo, the firm has offices in Rio de Janeiro, Brasília, Porto Alegre, Fortaleza, Recife, Campinas and New York.

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For additional information visit www.tozzinifreire.com.br

HOGAN & HARTSON REPRESENTS PARTNERS TRUST FINANCIAL GROUP IN \$555 MILLION MERGER WITH M&T BANK CORPORATION

NEW YORK, July 23, 2007 - Hogan & Hartson LLP announced today that it is advising Partners Trust Financial Group, Inc. in a definitive merger agreement with M&T Bank Corporation. Under the terms of the merger agreement, Partners Trust will merge with M&T in a stock and cash transaction valued at approximately \$555 million, or \$12.50 per Partners Trust share.

M&T will acquire 33 branch locations in upstate New York and approximately \$2.3 billion in deposits and \$2.3 billion in loans from Partners Trust.

The transaction is subject to customary closing conditions, including stockholder and regulatory approvals.

The Hogan & Hartson team representing Partners Trust included Washington, D.C. partners Stuart G. Stein and Daniel Keating; Washington, D.C. associates Gregory F. Parisi, Daniel S. Meade, and Jason S. McCaffrey; and New York associate Andrea B. Sluchan. For tax and benefits, the team included Washington, D.C. partners Scott McClure and William Neff, and Washington, D.C. associate Brian Shiker.

For additional information visit www.hhlaw.com

LOVELLS ADVISES TAMASEK HOLDINGS IN STAKE IN BARCLAYS

Lovells has advised Temasek Holdings (Private) Limited, the investment house owned by the Singapore government, on the acquisition of a stake in Barclays of up to £2.5 billion. The agreement was announced on 23 July.

Temasek will become a major shareholder in Barclays through an initial subscription of £1 billion, representing 2.1% of Barclays current issued share capital. It has also agreed to subscribe a further £1.5 billion of shares on the successful completion of the ABN Amro takeover, and has subscribed warrants over a further £479 million of shares.

The agreement was announced alongside a deal between Barclays and China Development Bank, which has agreed to buy £1.5 billion of new ordinary shares or 3.1% of the bank's current issued share capital. The Chinese bank will also subscribe for a further £5.1 billion of shares and warrants if Barclays bid for ABN Amro is successful.

For additional information visit www.lovells.com

GIDE CASABLANCA ADVISES OFFICE CHERIFIEN DES PHOSPHATSTES

1 August 2007 - Gide Loyrette Nouel Casablanca advises the *Office Chérifien des Phosphates* (Moroccan Agency for Phosphates) in the context of one of the largest financial restructurings of Morocco (€ 3 billion):

The Casablanca office of the international law firm Gide Loyrette Nouel advised the *Office Chérifien des Phosphates* (Moroccan Agency for Phosphates - OCP) on the financing plan for the outsourcing of its pension fund for an amount of 33 billion dirhams (close to € 3 billion).

The restructuring reached a new level on the 19th of July with the signing of an agreement between the Moroccan State, the OCP, and the Caisse de dépôt et de gestion (Deposit and Management Fund - CDG) which sets out the main terms for the financing of the outsourcing.

This transaction is one of the largest institutional and financial restructurings that Morocco has ever known. It will increase the financial means of the OCP and, for the first time, it will give Moroccan public investors the opportunity to accompany the OCP in its industrial development on a long term basis, through the acquisition of financial holdings in the OCP.

The Gide Loyrette Nouel legal team advising the OCP on this transaction comprised Hicham Naciri, partner, and Thomas Urlacher, senior associate.

For additional information visit www.gide.com

FRASER MILNER CASGRAIN SUCCESSFULLY ARGUES CASE FOR THE CANADIAN WHEAT BOARD

August 2 2007

Fraser Milner Casgrain's J.L. McDougall, who, with the assistance of Brian Leonard and Matt Fleming, successfully argued the case of *The Canadian Wheat Board v. Attorney General of Canada*. The Federal Court announced yesterday that regulations made by the federal government, which removed barley from the marketing authority of the Canadian Wheat Board, were contrary to the provisions of the *Canadian Wheat Board Act* and were therefore unlawful.

FMC has represented the Board in achieving great success in this very high-profile case. The decision and the events leading up to it have received widespread media coverage, particularly in Western Canada.

Invaluable research assistance was provided by Tim Banks, Brianna Davies and summer student, Adrienne Silk.

For additional information visit www.fmc-law.com

RODYK ACTS FOR ONEX CORP

Rodyk acted for Onex Corp., as Singapore counsel, in its acquisition of Eastman Kodak Co's health-care imaging unit for US\$2.35 billion. The team comprised partner Valerie Ong and associate Caris Tay, with competition law support from partner Yew Woon Chooi.

For additional information visit www.rodyk.com

WILMERHALE WINS VICTORY IN ANTI-TRUST SUIT, AN IMPORTANT TEST OF THE SUPREME COURT'S RECENT TWOMBLY DECISION

August 9, 2007

In an early test of the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*, WilmerHale won an important victory for its client Philips Electronics and all patent-holding members of standard-setting organizations.

The District Court for the Central District of California dismissed an antitrust challenge to the DVD standard holding that the plaintiff, International Norcent Technology, had failed to allege adequately the existence of an anticompetitive conspiracy between the members of the standard-setting group that developed the DVD standard.

The victory represents an important application of the pleading standards the Supreme Court announced in their May 21, 2007 *Twombly* decision. WilmerHale obtained dismissal of the plaintiff's original complaint in April, then used the intervening *Twombly* decision to rebut the new allegations in the plaintiff's amended complaint.

Doug Melamed argued the motion to dismiss, assisted on the briefs by Philips' in-house attorneys and a WilmerHale team that included Steve Hut, Danielle Conley, Daniel Matheson and Ryan Phair.

For additional information visit www.wilmerhale.com

NAUTADUTILH ADVISED ON IPO FOR PAN-EUROPEAN HOTEL ACQUISITION

NautaDutilh has advised Pan-European Hotel Acquisition Company N.V. on the listing and trading of its shares and warrants on Eurolist by Euronext, the regulated market of NYSE Euronext. Trading started on 19 July 2007. EUR 100 mio was raised in the successful offering, and the greenshoe was exercised in full at listing.

This is the first special purpose acquisition company (spac or also blank cheque company) to be listed in Amsterdam and in mainland Europe. It is currently expected that several other spacs may follow the same route in the near future.

The deal team was lead by NautaDutilh Banking and Finance partners Jan Paul Franx and Petra Zijp; they were assisted by Monique Dorenbos, Teun Struycken, Anne Hakvoort and Matthieu van Straaten. Tax advice was given by tax partner Chris Warner and Timo Balster and notarial assistance was given by corporate partner Frits Oldenburg and Martine Schmidt.

For additional information visit www.nautadutilh.com

Member INFO

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PRAC CONFERENCE 2007
Bogotá - Cartagena, Colombia

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MUNIZ RAMIREZ PEREZ-TAIMAN & LUNA VICTORIA ADVISED IN PERUVIAN US1.5 BILLION SOVERIGN BOND ISSUE

PERUVIAN SOVEREIGN BOND ISSUANCE FOR PARIS CLUB DEBT PREPAYMENT

Lima, Peru, August 2007.-The Republic of Peru ("Peru") has successfully completed a landmark deal in sovereign debt restructuring. Citibank del Perú S.A. ("Citibank Peru") structured for Peru a simultaneous sovereign bond ("Sovereign Bonds") offering ("Offering") in the international and domestic markets amounting to S/. 4,750,000,000 Nuevos Soles ("PEN") (equivalent to US\$ 1,508,000,000 Dollars –"Dollars"). The Sovereign Bonds accrue a 6.90% annual interest rate and have a 30 year maturity (payment due on 2037). The Sovereign Bonds are denominated in PEN and governed by the laws of Peru.

The Offering was structured as a two stage process. Citibank Peru acquired the entire Offering in order to immediately sell the Sovereign Bonds both in the international and domestic markets by means of simultaneous securities offerings. In the domestic market, the negotiation of the Sovereign Bonds was part of a public offering. In the international market, the negotiation of the Sovereign Bonds was limited to Qualified Institutional Buyers ("QIBs") under Regulation S and Rule 144-A.

The Offering was a landmark deal for Citi. Said financial institution included for the first time *Global Depositary Receipts* ("GDNs") in a securities offering. Through the GDNs all payments of principal and interest to the respective beneficial owners (QIBs) will be made in Dollars, although the underlying assets of the GDNs (the Sovereign Bonds) are denominated in PEN and paid in the domestic market. Two different categories of GDNs were present in the international Offering: (i) *Restricted GDNs*, distributed among QIBs in the US; and, (ii) *International GDNs*, distributed among QIBs outside the US under Regulation S.

Peru used the proceeds of the Offering to prepay part of its external debt owed to the Paris Club.

Parties:

Issuer:	Republic of Peru
Financial Advisor to the Issuer:	Citibank del Perú S.A.
Initial Purchaser:	Citibank del Perú S.A.
Depositary:	Citibank, N.A.
Custodian:	Citibank del Perú S.A.
Global Coordinator and Depositor: .	Citigroup Global Markets Inc.
Domestic Placement Agents:	Banco de Crédito del Perú Corporación Financiera de Desarrollo – COFIDE Interbank
Closing Date:	July 26, 2007

Importance of the Transaction: The success of the Offering was attributed to the complexity yet functionality of the structure. The diverse contractual arrangements and financial instruments presented to the market enabled Peru to access a considerable broader base of investors than those that usually acquire PEN denominated bonds in the domestic market.

In terms of interest rate and maturity, this Offering is the most successful sovereign bond issuance launched by any other Latin American country during the past decade. In addition, as a result of this successful placement, Peru was able to increase the amount of its PEN denominated external debt from 23.8% to 29.2%, thus lowering the adverse impact of a sudden devaluation of the PEN *vis-à-vis* other foreign currencies (specially, the Dollar).

Financial Advisor to Peru: CITIBANK PERU, through EMCB Product Head Alberto Carrera, EMCB Banker Nelson Dávalos and Resident Vicepresident Luis Bas.

MUÑIZ, RAMÍREZ, PÉREZ-TAIMAN & LUNA-VICTORIA, through partner Sergio Oquendo Heraud and senior associate Andrés Kuan-Veng, with the participation of partner Fernando Castro and associate Jorge Luis Otoy regarding tax matters, and partner Ricardo Herrera regarding constitutional and administrative matters, acted as counsel to Citibank Peru.

For additional information visit www.munizlaw.com

More options for insureds in suing for damages



An insurer declines to indemnify the insured under a contract. What are the insured's options? A recent case has confirmed that insureds have a few options and can pursue them simultaneously without having to pick only one route - and recover more for all their losses.

Brescia Furniture is an importer and retailer of furniture in Sydney using a three-storey building as its flagship premises. There, it stored, showed and sold furniture, until a fire broke out and burnt all three storeys down to the concrete slab.

Brescia had an Industrial Special Risk Industry Policy providing cover against property damage and consequential loss of profits, but the insurer refused indemnity, so Brescia went to court for a declaration that it was entitled to indemnity under the contract of insurance. For good measure, it asked for damages for the consequential losses caused by the insurer's refusal to indemnify.

This meant in effect that Brescia was claiming that the insurer had breached the contract by refusing to indemnify it and so was liable for the damages the refusal caused Brescia, and at the same time was trying to get the insurer to do what it had promised to under the contract.

For many years there's been some doubt about whether insureds such as Brescia can do this. There's been a school of thought - and a number of cases - saying that the insured had to choose between suing for performance of the contract and suing for breach of the contract.

It was suggested that if the former course was chosen, the insured could only recover the benefits available under the insurance contract (and statutory interest) and could not recover consequential damages, such as loss of profits caused by being held out of the insurance proceeds. On the other hand, if the insured accepted the insurer's repudiation of the contract, the insured could then recover damages at large, including consequential loss.

In *Brescia Furniture Pty Limited v QBE* [2007] NSWSC 598, the judge said that Brescia did *not* have to choose between the two.

The implications of this for insureds are:

- if a dispute over indemnity goes to litigation, insureds don't have to limit themselves to one strategy only
- by seeking enforcement and damages for breach, insureds can get both the cover under the policy and damages for losses caused by the insurer's refusal to indemnify them.

The implications for insurers are that

- insurers need to reserve for more than just the contractual benefits, interest and costs and must take into account the potential for consequential losses
- additionally, insurers will need to consider whether such consequential damages are covered by reinsurance treaties, which may exclude such "extra-contractual" losses.

The case concerns a substantial claim, and there's a good possibility it will go on appeal, so we will watch it with interest.

One other matter that arose in the case, although not material to the final decision, is the court's view of

section 56 of the Act. It said that it thought that section 56 applies to an insurance claim made outside court as opposed to a claim within court proceedings. This means it would not necessarily operate to preclude a recovery for damages for breach of contract even if part of the claim made within court proceedings proved to be exaggerated. Of course, if this view is accepted in another case, the insured would still have to prove its damages, and a judgment procured by fraud can be set aside.

Disclaimer

Clayton Utz News Alert is intended to provide commentary and general information. It should not be relied upon as legal advice. Formal legal advice should be sought in particular transactions or on matters of interest arising from this bulletin. Persons listed may not be admitted in all states.

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focus

on

Insolvency Law

July, 2007

The logo for Fraser Milner Casgrain LLP, featuring the letters "FMC" in white on a dark blue square background.

FRASER MILNER CASGRAIN LLP

STAY OF PROCEEDINGS LIFTED IN CROSS-BORDER REORGANIZATION TO ALLOW PURSUIT OF INSURED CLAIM

In *Re: Carrey Canada Inc.* (2006) CarswellOnt. 7748, the Ontario Superior Court considered an application for the lifting of the stay to allow certain creditors of the debtor to pursue a claim which may have been insured under the debtor's liability policy.

The debtor obtained a stay of proceedings pursuant to an Order under section 18.6(4) of the *Companies' Creditors Arrangement Act* ("CCAA") which recognized and enforced a General Claims Bar Order and Confirmation Order issued by the US Bankruptcy Court in connection with a Joint Plan of Reorganization of the debtor's parent company and the debtor in the United States.

Certain claimants applied to the Court for an Order lifting the stay of proceedings and permitting them to continue with certain actions against the debtor for the limited purpose of allowing the claimants to obtain judgments against the debtor which were to be enforceable only against the liability insurer of the debtor.

Ultimately, the Court allowed the application, relying heavily on the decision of the Ontario Court of Appeal in *Algoma Steel Corp. v. Royal Bank* (1992), 8 O.R. (3d) 449, which held that the protection afforded by the CCAA was meant for the debtor seeking such protection, was not to insulate insurers from providing appropriate indemnification, and that the insurer's rights and options would be the same whether the debtor was or was not the subject of CCAA proceedings.

The debtor attempted to distinguish *Algoma Steel*, on the basis that the Canadian Court was (in this case) being asked to lift the stay of proceedings created by the US Bankruptcy Court in the context of US bankruptcy proceedings. Therefore, the debtor submitted, it was inconsistent with the principles of comity for the Canadian Court to pick and choose which provisions of the US Order should be enforced and which should not, especially in light of the fact that the Canadian Court had previously ordered the recognition of the US Order.

The Court rejected this argument on the basis that (1) it was the debtor itself that initiated the motion before the Canadian Court expressly seeking a stay of proceedings and recognition of the US Order, (2) Ontario was the "natural forum" for the claims, as all the parties were located in Ontario, as were the sites of the environmental claims at issue, and (3) application of Ontario law (section 132(1) of the *Insurance Act* (Ontario)) was at issue, and was best dealt with by the Canadian Courts.

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COLOMBIA – Brigard & Urrutia Abogados – Central Bank of Colombia issues regulations which impose an obligation on Colombian residents to make a deposit in respect of foreign indebtedness

On May 6, 2007, among other regulations, the Central Bank of Colombia (CBC) issued Regulation 2 which sets forth the obligation of Colombian residents to make a deposit in respect of foreign indebtedness. Regulation 2 was issued with the purpose of controlling inflation and discouraging short term foreign capital inflows.

The following are the most salient issues relating to Regulation 2:

1.- Types of Deposits: Regulation 2 refers to the following four types of Deposits: i) Foreign loans (Loans Deposit); ii) Financing of imports' payments in advance; iii) Non-completed foreign investments and iv) Exports' payments in advance and the financing of exports.

2.- Entry into Force: Regulation 2 applies to disbursement of funds after May 6, 2007, in respect of the abovementioned transactions independently of whether or not such transactions were informed to the CBC.

3.- General Features:

3.1 Currency and Denomination: Deposits must be made in COPs and denominated in USD.

3.2 Interest: No interest bearing.

3.3 Negotiability/Divisibility: Non-negotiable. Deposits may be divided up at the Deposit-holder's request.

4. Specific issues relating to Loans Deposits (LD):

4.1 Scope of Transactions: LD apply in respect of international loans and debt securities issued by Colombian residents. LD do not apply in respect of, among others, the following transactions:

- (i) Loans obtained by Colombian residents with the purpose of financing Colombian investments abroad.
- (ii) International credit card financings for individuals.
- (iii) Soft loans granted by foreign governments.
- (iv) Margin loans in respect of derivatives.

4.2 Amount: The amount of the LD is equal to forty percent (40%) of the disbursement amount calculated by reference to the Representative Forex Rate (RFR) in force as of the making of the LD.

4.3 Term: LD are to be made for a six month period.

4.4. Early redemption: LD may be redeemed prior to maturity subject to a discount ranging from 9.4% (if early redemption is made six months prior to maturity) to 1.63% (if early redemption is made one month prior to maturity).

5.- Specific issues relating to Deposits for Imports' Payments in Advance (DIPIA):

Please note that the same regulation established in connection with LD applies for DIPIA.

6.- Specific issues relating to Exports Deposits (ED):

6.1 Scope of Transactions: ED apply in respect of exports' payments in advance or export financings. ED do not apply in respect of exports' payments in advance whether exports are made within the four (4) months immediately following the disbursement date, or capital assets as defined by the CBC.

6.2 Amount: The amount of the ED is equal to eleven percent (11%) of the financing calculated by reference to the Representative Forex Rate (RFR) in force as of the making of the ED.

6.3 Term: ED are to be made for a twelve month period.

6.4. Early redemption: ED may be redeemed prior to maturity subject to a discount ranging from 0% to 5.72% (in a non lineal scale) depending upon the early redemption date

7.- Specific issues relating to Non-Completed Foreign Investment Deposits (NCFID):

7.1 Scope of transactions: NCFID apply in respect of the transfer abroad of non-completed foreign investment made in Colombia if said transfers are not made within the six (6) months immediately following the disbursement date. Additionally, NCFID applies in connection with the return of foreign investment that exceeds 5% of the local foreign investment beneficiary's equity.

Please note that Amount, Term and Early Redemption are the same described above regarding LD.

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The purpose of this newsflash is to present a summary of the recent developments in connection to the topic at hand. Formal legal advice should be sought in specific transactions or on matters of interest arising from this newsflash.

The Employment Contract Law: A New Era in China's Labor Market

By Jiang Junlu*

On June 29, 2007, the PRC Employment Contract Law (the "Law"), a milestone legislation driving the job market in China, was passed on the 28th session of the 10th National People's Congress after four deliberations. Effective on January 1, 2008, the Law is a momentous first for China's labor and social security system as an ancillary legislation to the PRC Labor Law promulgated in 1994.

1. Establishment Procedures for an Employer's Internal Rules

The Law clarifies that the employer shall negotiate with employees or the employee representatives' congress and shall bring forward schemes and opinions to stipulate internal rules on an equal basis involving the following issues: remuneration, working hours, leave and holidays, labor security and sanitation, insurance and benefits, vocational training, labor discipline, and others.

2. Conclusion of Labor Contract in Written Form

The Law prescribes that where the employer has not signed a labor contract in written form with employees, the labor contract in written form must be concluded within one month of establishing the labor relationship. Where the employer fails to sign a labor contract in written form with an employee within one year from the day the employee starts to work for the employer, the employer shall be deemed to have entered into a non-fixed term contract with the employee.

3. Non-fixed-term Contract

The Law requires the employer to enter into a non-fixed-term labor contract with the employee after the employer executes two consecutive fixed-term labor contracts with such an employee, provided that there are no grounds for the legal termination of the employee's contract.

4. Retrenchment

The Law stipulates that the employer may lay off redundant employees, subject to mandatory procedures, under the following circumstances: (1) where the employer is restructuring in accordance with laws and regulations due to the bankruptcy of the enterprise; (2) where serious difficulties occur affecting the production and management of the employer; (3) where the employer engages in a change of product line, major technical renovation, or

change of business model, and the employer still needs to layoff redundant employees after amendments to the original employment contract.

5. Severance

The Law clarifies that severance shall equal the employee's monthly remuneration multiplied by the employee's period of service and any period of time more than six months but less than one year will be counted as one year. The severance shall equal the employee's semi-monthly remuneration for employees whose service year is shorter than six months. Further, it stipulates the maximum amount shall be three times the average city salary with a 12-month cap. Severance payment is required when the employer does not renew the fixed term labor contract with the employee upon the expiration date, unless the employer maintains or improves the benefits under the contract or the employee is not willing to renew the contract.

6. Labor Dispatch

The Law clarifies that the obligations for labor dispatching enterprises are: (1) entering into a labor dispatching agreement with the ultimate employer; and (2) notifying the dispatched employee of the content of the labor dispatching agreement. In addition, the dispatched employee shall have the right to organize or join a trade union in the dispatching enterprise or in the ultimate employment enterprise.

7. Non-competition

The non-competition clause shall apply to senior management, senior technical staff and other staff subject to confidentiality liabilities. The non-competition period shall be limited to the maximum of two years.

8. Trade Unions

The Law has reinforced the role of labor unions in safeguarding the legitimate rights and interests of employees in the following areas: (1) formulating corporate rules and bylaws; (2) bargaining on collective contracts; (3) providing opinions on mass layoffs; and (4) providing opinions on the termination of labor contracts.

Conclusion

The Law extensively changes labor relations. Corporate human resources management must adapt to this new era of labor employment relationship. The current letters of appointment, labor contracts, internal labor rules, and various other documents should be amended to comply with the legal requirements of the Law.

(The article was originally written in Chinese, the English version is a translation.)

*Jiang Junlu is a partner at King & Wood's Beijing office.

The Brief

July - August 2007

Employment Law Practice Group

Recent news:

1. Elimination of termination penalty for employees aged 50 and over
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4. When is a settlement agreement valid?
5. Employee surveillance
6. Measures against psychological harassment strengthened
7. Imposed retirement and discrimination



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1. Elimination of termination penalty for employees aged 50 and over

Article 50 paragraph 2 of the law n° 2006-1770 of December 30, 2006 on the development of employee profit sharing and shareholding provides for the elimination, with effect from January 1, 2008, of the Delalande Contribution, which the employer pays in the event of the termination of the employment contract of an employee aged 50 or over, and which, in certain cases, can amount to up to 12 months of salary.

According to the Unedic (the French unemployment insurance fund) circular of February 14, 2007, which sets out the terms and conditions of application of this law, the date to be taken into account when determining if the Delalande Contribution is due shall be the date that corresponds to the effective termination of the employment contract and not the notification thereof.

For instance, the dismissal of an employee aged 50 and over, notified on December 15, 2007, with a two-month notice period, will entail the termination of the employment contract on February 2008, and shall not trigger the application of the Delalande Contribution.

2. No smoking in the office

Since February 1, 2007, smoking in collective workplaces and individual offices has been banned. The employee now has an absolute safety obligation with regard to the protection against nicotine addiction.

The employee can however decide to set up smoking areas. To do so, it must submit its project to fit out such areas to the Health, Safety and Working Conditions Committee (*Comité d'Hygiène de Sécurité et des Conditions de Travail - CHSCT*) and to the occupational doctor. These consultations are to be renewed every two years.

Moreover, the employee must put up visible posters of this non-smoking ban as well as a health warning at the entrance of the smoking areas. In addition, indication of this non-smoking ban, together with the health prevention message, must also be posted at the entrance of and inside the buildings, in visible and apparent places.

The signs regarding the reserved smoking areas and the health warning must be posted at the entrance of these areas.

3. New prerequisite for collective redundancy

The law of January 18, 2005 added provisions on forward-looking labor force and skills management (*gestion prévisionnelle des emplois et des compétences - GPEC*) to the French Labor Code. Article L.320-2 of same states that “in companies and groups of companies [...] with at least 300 employees [...], the employer is required to initiate every three years negotiations [...] regarding company strategy and its foreseeable effects on employment and salaries. The negotiations must also cover the implementation of a forward-looking labor force and skills management system, [...] and the relevant accompanying measures [...]”.

This new article has given rise to many divergent interpretations among jurisdictions regarding its articulation with the rules relative to the implementation of redundancy on economic grounds. Certain courts, such as the District Courts of Meaux and Annecy and the Court of Appeal of Versailles, consider that GPEC and a collective redundancy plan constitute autonomous systems. While acknowledging that the GPEC aims to avoid restructurings, the Court of Appeal of Versailles considers however that GPEC is not a condition precedent to the implementation of a collective redundancy plan.

On March 7, 2007, the Court of Appeal of Paris introduced a more precise ruling and stated that the negotiation procedure of Article L.320-2 of the Labor Code, of a preventive nature, is imposed as a general rule, all the more so when an employer contemplates a decision liable to impact employment. GPEC negotiations take on their full meaning when they occur before the implementation of this project.

Hence, according to the Court of Appeal of Paris, before contemplating collective redundancy, the employer must have respected its annual works council information/consultation obligation regarding GPEC and its obligation of negotiating a GPEC agreement with social partners. A decision from the French Supreme Court (*Cour de cassation*) would make it possible to put an end to the debate.

4. When is a settlement agreement valid?

In the past, the French Supreme Court (*Cour de cassation*) had already defined the timing and formalities for terminating an employment contract performed in France under the laws of France, and for entering into a valid settlement agreement.



Recently, the French Supreme Court reiterated the fact that a settlement agreement was null and void if entered into after hand-delivery of the dismissal letter to the employee instead of being sent by registered mail with return receipt requested (January 24, 2007). It is also ruled null and void if, even if it was sent by registered mail with return receipt requested, the employee can evidence that he/she did not collect the dismissal letter at the post office and was therefore not aware of the dismissal grounds contained in this letter at the time he/she signed the settlement agreement (June 14, 2006). Moreover, the French Supreme Court ruled that, in the event where the dismissal letter fails to comply with French law requirements (i.e., sufficient motivation for the dismissal grounds), the settlement agreement entered into is null and void (February 7, 2007).

5. Employee surveillance

In answer to a question asked by a member of Parliament, the Minister of Employment recently reminded that the French Labor Code and the 1978 Data Protection and Civil Liberties Act (*Loi Informatique et Libertés*) tightly regulate the practice of employee surveillance:

- any and all employees must be informed of the existence and purpose of a surveillance system prior to its implementation, as well as their rights regarding recordings, visual or other, that concern them;
- the works council must be consulted prior to the implementation of any surveillance system and more specifically of its contemplated functionalities;
- a surveillance system may not be used to put a specific employee or a particular group of employees under surveillance.

The Minister also reminded that non-compliance with the implementation rules of a surveillance system as well as misuse of the system's purpose (i) is subject to civil and criminal sanctions, (ii) entails the nullity of the evidence thus obtained and (iii) justifies a procedure of cancellation of the sanctions that would have been issued. Lastly, it was also reminded that the agents of the French Data Protection Authority (*Commission Nationale de l'Informatique et des Libertés - CNIL*) have the power to conduct on-location controls and give out substantial administrative and financial sanctions.

6. Measures against psychological harassment strengthened

A French Supreme Court (*Cour de Cassation*) decision of February 22, 2007 has increased the employer's potential liability with regard to bullying in the workplace. Under French law, if the employee can prove that an accident is related to work, he or she can obtain set partial compensation from social security.

Moreover, if he or she can establish that the work-related accident is a result of the employer's gross negligence (*faute inexcusable*), the employee is entitled to additional compensation by the employer for the damages suffered.

In the case that led to the aforementioned French Supreme Court decision, it was established that the employee's psychological balance had been seriously shaken due to the continuous deterioration of his work relations and his employer's behavior. As a result, for reasons of depression, he had to go on sick leave, during which he made a suicide attempt that failed and left him injured. Although the employee was no longer in a superior-subordinate relationship at the time of the so-called "accident" since his sick leave suspended his employment contract, he nevertheless sought to have (i) his suicide attempt construed as a work-related accident and (ii) his employer declared liable for damages on the basis of gross negligence.

Concerning the first issue, the French Supreme Court held that an accident, which occurs at a time when the employee is no longer in a superior-subordinate relationship, can still be deemed to be work-related if the employee can establish the connection with his/her work (which was implicitly the case).

Regarding the second issue, the French Supreme Court ruled that since it was established that the employee's psychological balance had been seriously shaken due to the continuous deterioration of his work relations and his employer's behavior, the employer committed a gross negligence.

This case follows another decision of the French Supreme Court of June 21, 2006, in a case where an employee had been bullying his fellow employees but no work-related accident or illness had been established. As soon as the employer became aware of this situation, he dismissed the concerned bullying employee. The French Supreme Court nevertheless considered that where an employee is liable for bullying his fellow employees, this does not exclude liability on the part of the employer, even in the absence of fault.

Given the employer's strict liability, it is highly recommended to check on a regular basis that no employee is being bullied in the workplace.

7. Imposed retirement and discrimination

The employment division of the French Supreme Court (*Cour de cassation*) recently emitted a ruling on the consequences of an imposed retirement when it fails to comply with the conditions laid down by Article L.122-14-13 of the French Labor Code.

If until now imposed retirement considered unlawful for failure to meet the aforesaid conditions was ruled to be a dismissal without real and serious cause, the French Supreme Court now chooses to sanction such unlawful imposed retirement as being a null and void dismissal (*Supreme Court, December 21, 2006, n° 05-12816*).

The French Supreme Court ruled that an unlawful imposed retirement must be viewed as a discriminatory dismissal when based solely on the employee's age, and must therefore be rescinded. It based its decision on the provisions of Article L.122-45 of the French Labor Code, as modified by the law of November 16, 2001 on the fight against discrimination, which included the "employee age" factor to the list of prohibited discriminatory elements.

The Court thus considered that no employee can be dismissed due to his/her age and that any provision or action against the employee is consequently null and void.

It ensues that the employee has a right to be reinstated within the company, together with continued length of service and resumption of his/her functions. On a financial level, the employee is entitled to compensation while waiting for his/her effective reinstatement. However, the employee is not obliged to accept said reinstatement, for which he/she may rightfully prefer compensation instead.

In any case, nullity and reinstatement can only be contemplated if the unlawful imposed retirement is in fact just a dismissal based solely on age.

You can also consult this brief on our website, in the News/Publications section.

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INDIA – FOREIGN INVESTMENTS IN PREFERENCE SHARES

With a view to mobilizing foreign investment through issue of preference shares, the Government of India (GOI) had earlier permitted issuance of equity shares, preference shares, convertible preference shares by Indian companies to persons resident outside India in respect of financial projects / industries.

The Reserve Bank of India has on 8th June 2007 amended the guidelines applicable to foreign investment in preference shares. Pursuant to the revised guidelines, foreign investment from the issue of fully convertible preference shares would be treated as part of the share capital, which would be included in computing the sectoral caps on foreign equity.

Foreign investment inflow from the issue of non-convertible, optionally convertible or partially convertible preference shares, would be treated as debt and be required to conform to the guidelines/caps pertaining to External Commercial Borrowings (ECB).

Foreign investment in non-convertible, optionally convertible, partially convertible preference shares as on and upto 30th April 2007 would continue to fall outside the sectoral cap till their current maturity.

Only preference shares, fully and mandatorily convertible into equity, would be treated as part of the share capital and be eligible to be issued to persons resident outside India under the Foreign Direct Investment scheme.

Foreign investments from the issue of non-convertible, optionally convertible or partially convertible preference shares, for which funds have been received on or after 1st May 2007, would be considered as debt and be required to conform with ECB guidelines / caps. Accordingly, all norms applicable to ECBs would apply to such preference shares.

In accordance with the above revision, investments in optionally convertible/ partially convertible or redeemable preference shares, issued by Indian companies on or upto April 30, 2007, would continue till their current maturity.

Further, in lieu of representations received by GOI that the above revised guidelines had adversely affected business plans of entities that were at an advanced stage of issuing preference shares, it has been decided that where verifiable and effective steps had been taken prior to April 30, 2007 in relation to issuance of such shares, exemption could be granted from the purview of the revised guidelines.

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INDONESIA - REGULATION ON FOREIGN WORKERS IN THE BANKING INDUSTRY (2007-08-01)

With the opening further of the banking sector to foreign investment, Bank Indonesia (BI) saw the need to regulate the use of expatriate workers in this sector by issuing on 13 June 2007, Regulation No. 9 of 2007 (the "Regulation") regarding Foreign Manpower Use and Transfer of Knowledge in the Banking Sector.

With the opening further of the banking sector to foreign investment, Bank Indonesia (BI) saw the need to regulate the use of expatriate workers in this sector by issuing on 13 June 2007, Regulation No. 9 of 2007 (the "Regulation") regarding Foreign Manpower Use and Transfer of Knowledge in the Banking Sector. The Regulation highlights the prospect of the increase in the number of foreign manpower in the Indonesian banking industry, and the question of how to best exploit the foreign experts' technical know-how to the advantage of the banks themselves and of the Indonesian workers working in the industry. Under the Regulation, foreign workers in this industry are allowed to hold only the position of commissioner, director, executive officer, and expert/consultant, and they may only work in certain task fields to be specified in a BI Circular. Their period of employment is limited to three years at the maximum, with an extension possibility of not more than one year. In line with BI's policy that holders of certain banking positions are required to undergo the BI fit and proper test, the Regulation reiterates that the employment of commissioners, directors and executive officers requires BI's approval. Positions other than the foregoing to be held by an expatriate will require BI'S express pre-approval, but the Regulation is explicit in stating that foreign employees may not work in the human resources (personalia) and compliance (kepatuhan) task fields. The Regulation also requires banks to submit their manpower plan as part of their business plan, to Bank Indonesia. As the title of the Regulation suggests, banks are obliged to ensure the occurrence of the transfer of the foreign workers' knowledge to Indonesians, by arranging educational and training programs for banks' staff, students, and the community in general. The Regulation imposes monetary as well administrative sanctions on banks which fail to comply with the provisions of the Regulation. The Regulation has been in force since the day of its issue on 13 June 2007.

For additional information visit www.abnrlaw.com

TAIWAN – Lee and Li MINIMUM WAGE INCREASED FROM JULY 2007

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The Executive Yuan Council has approved a plan to increase the monthly minimum wage from NT\$15,840 to NT\$17,280, and the hourly minimum wage from NT\$66 to NT\$95, both with effect from 1 July 2007. This adjustment not only reflects an increase in the minimum wage per se, but the calculation of the new minimum hourly rate also takes into consideration for factor of the effect of weekends and holidays. Following this adjustment, workers who work the same number of statutory working hours will not be treated unequally based on whether their wages are calculated by the month or by the hour.

To reduce the impact on enterprises, protect workers' right to employment, and enhance the positive effect of the minimum wage increase, the Council of Labor Affairs (CLA) will apply a range of measures intended to stabilize and promote employment, which are to be introduced at the same time as the adjustment in the minimum wage:

- . Employment stabilization subsidy for hourly paid workers

For small and medium-sized enterprises ("SMEs") in specific industries that employ up to 50 persons, a subsidy of NT\$10 per employee per hour will be payable to the employer in respect of existing employees who work less than 32 hours per week, for a trial period of one year. The purpose of this measure is to protect employment by reducing the cost impact on SMEs, allowing SMEs with limited cash flow capabilities to more smoothly transition to the new wage rate, and maintaining enterprise owners' willingness to employ.

- . Incentives for employing disadvantaged groups

An employer that employs persons from disadvantaged groups full time or part time continuously for at least three months can receive a subsidy of NT\$5000 per person per month or NT\$10 per person per hour for a period of up to 12 months. The purpose of this measure is to encourage enterprise owners to employ workers from disadvantaged groups, thus promoting their employment.

- . Employment services for unemployed workers

The CLA will use data on persons leaving the Labor Insurance scheme to identify marginal workers who become unemployed, and will actively provide them with employment services, unemployment benefits, and vocational training, in order to create an all-round social safety net for unemployed workers and increase their rate of re-employment.

- . Adjusted food and lodging payments for foreign workers

Food and lodging payments that may be docked from the wages of foreign blue-collar workers are currently capped at NT\$4000 per month, and in practice are generally set at around NT\$2300 to 2500. Following the increase in the minimum wage, this figure can be appropriately adjusted by negotiation between labor and management, with a guide maximum level of NT\$5000 per month. The current maximum of NT\$4000 has not been adjusted for more than five years. This measure should increase the scope for negotiation between employees and employers, as well as reasonably reflecting increases in the cost of living.

- . Subsidies for in-service training

To further improve the work skills of persons employed by enterprises, the CLA will increase the subsidy for training fees up to a maximum of 80%.

The CLA also revises the salary bands in its contributions table for Labor Insurance, and in future will adjust the salary bands for pension contributions and National Health Insurance premiums.

For additional information visit www.leeandli.com



International Trade update

- For more information visit www.bakerbotts.com

Export of Dual-Use Items to China Addressed by the Department of Commerce

Commerce Amends the Export Administration Regulations

The Department of Commerce has amended the Export Administration Regulations ("EAR") so as to impose new licensing obligations on exports and reexports of over 20 different types of products, software and technology to certain parties in the People's Republic of China ("PRC"). On June 15, 2007, the Commerce Department's Bureau of Industry Security ("BIS") amended its licensing policy of dual-use exports to China by (i) imposing new restrictions on dual-use technologies destined for a military end-use in China, (ii) creating the Validated End-User ("VEU") program to facilitate certain exports to approved customers in China and (iii) revising the circumstances under which End-User Statements, issued by the PRC Ministry of Commerce, must be obtained. **1**

Military End-Use Restrictions

The final regulations implement a new control on exports and reexports to China of certain items that BIS considers to have the potential to advance the military capabilities of the PRC. **2** This rule imposes a new license requirement for certain items that the exporter knows (as defined under section 772 of the EAR), or has been informed by BIS, will be destined for military end-use in China.

The list of items subject to this restriction covers 20 products and related software and technologies as described under the newly added Supplement No. 2 to Part 774 of the EAR. This list includes specific items in the following categories:

- Materials, chemicals, microorganisms, and toxins (ECCNs: 1A290, 1C990, 1D993, 1D999, 1E994 and 1C996);
- Materials processing (ECCNs: 2A991, 2B991, 2B992 and 2B996);
- Electronics design, development, and production (ECCNs: 3A292, 3E292 and 3A999);
- Computers (ECCNs: 4A994, 4D994 and 4D993);
- Telecommunications (ECCNs: 5A991, 5D991 and 5D992);
- Sensors and lasers (ECCNs: 6A995 and 6C992);
- Navigation and avionics (ECCNs: 7A994, 7D994, 7E994 and 7B994);
- Marine (ECCNs: 8A992, 8D992 and 8E992); and
- Certain aircraft, propulsion systems, space vehicles, and related equipment (ECCNs: 9A991, 9D991 and 9E991).

For purposes of the military end-use restriction rule, the term "military end-use" means: (i) for incorporation into a military item described on the U.S. Munitions List (USML); (ii) for incorporation into a military item described on the International Munitions List (IML); (iii) for incorporation into items listed under ECCNs ending in "A018" on the Commerce Control List (CCL) in Supplement No. 1 to Part 774 of the EAR; or (iv) for the "use," "development" or "production" of military items described on the USML or the IML, or items listed under ECCNs

ending in A018 on the CCL. Additionally, the term “military end-use” means deployment of items classified under ECCN 9A991 as set forth in Supplement No. 2 to Part 744.

The text of the regulations do not explain how the military end-use restriction will be implemented. Foremost, the regulations do not clarify how much information exporters will need to know, or will be deemed to know, about end-users. Accordingly, exporters will need to tread cautiously when dealing with Chinese business partners and customers. Exporters should also be attentive to customers and end-users that will have the exported items incorporated into larger systems, especially where the larger system may have possible military applications. Foreign parties who reexport U.S. commodities, technology and software to China should also be cautious given that the military end-use restriction applies to reexports to China. ³

Validated End-User Program

The VEU program is designed to provide Chinese companies easier access to certain specific controlled technology. The VEU program establishes a mechanism by which Chinese companies that have been reviewed and “validated” by the U.S. Government will be authorized to receive only certain specific U.S.-controlled items as indicated in the VEU application, without having to obtain an individual export license. To be classified as a validated Chinese company, an entity must meet a number of criteria to be reviewed by the U.S. government, including, among others, (i) a demonstrated record of engaging in the use of U.S. controlled items for civil end-use activities, (ii) a demonstrated history of compliance with U.S. export controls (iii) and the willingness to agree to on-site reviews by representatives of the U.S. Government to ensure compliance with the conditions imposed by the VEU authorization. Any end-user in China, as well as subsidiaries of U.S. or foreign companies in the PRC, may apply to receive products from the U.S. under the VEU program.

Certain restrictions apply to the use of the VEU authorization program. For example, items controlled under the EAR for missile technology and crime control are not eligible to be exported or reexported under the VEU program. Additionally, items under the VEU program must be applied to civil end-uses and must be installed in, or consumed/transformed during use at, the validated end-user’s facility.

The qualification of an entity to be designated as a validated end-user will be determined by an End-User Committee composed of representatives of the Departments of State, Defense, Energy and Commerce, and other agencies. This committee will be responsible for adding, removing and amending the list of VEUs published by BIS. At this time it is not clear whether the VEU mechanism will be a viable efficient means for exporters to engage in export trade with Chinese parties.

End-User Statements From the PRC Ministry of Commerce

The final regulations also revise the circumstances under which an exporter must obtain an End-User Statement from the PRC Ministry of Commerce. The End-User Statement regime facilitates the BIS’ ability to conduct end-use checks on exports or reexports of controlled articles and technologies to China. Prior to the final regulations, BIS imposed the End-User Statement requirement to certain specific controlled items with a dollar threshold value of \$5,000. These items generally required a license from BIS to be exported to the PRC. The final regulations, however, impose a higher dollar threshold value of \$50,000 to all exports of items to China that require a license under the EAR (including all items within the new Part 744.21).

¹ 72 Fed. Reg. 33,646 (2007) (to be codified at 15 C.F.R. Parts 742, 743, 744,

748, 750 and 758).

2 The items identified by BIS under these regulations as having the potential to enhance the military capabilities of China were not previously regarded by BIS as such. Accordingly, they did not require an export license to China.

3 Note that the military end-use restriction is applicable to all foreign reexporters, whether they are related or unrelated to U.S. entities.

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Communications Advisory Bulletin

FCC Adopts Final Rules for 700 MHz Auction

By [Theresa Cavanaugh](#)
[August 2007]

In a proceeding that generated an unusual amount of press coverage and widespread industry interest, the Federal Communications Commission (FCC) on July 31 adopted revised band plan and services rules for its upcoming auction of 700 MHz band spectrum. The FCC will auction a total of 62 MHz of spectrum during the 700 MHz auction, which according to federal law must begin by Jan. 28, 2008. This spectrum is coveted by companies both within and outside of the wireless industry because it is ideal for carrying wireless signals.

The text of the FCC's Order has not yet been released, so the specific details of the new auction rules are not yet known. We have summarized the key elements of the FCC's News Release below, and will issue further advice when the FCC's final 700 MHz Auction order is released.

Revised 700 MHz Band Plan

The FCC adopted a revised band plan for the "Lower" and "Upper" 700 MHz bands. In general, the 700 MHz band encompasses spectrum from 698 MHz to 806 MHz. Some of the spectrum within this band previously was auctioned and licensed by the FCC. In the upcoming 700 MHz auction, the FCC will auction a total of 62 MHz of spectrum, divided among five spectrum blocks. Some of the specifics for each of these spectrum blocks are:

Block	Bandwidth/Pairing	Frequencies	Market Type/Size
Lower A Block	12 MHz/2 x 6 MHz	698-704 MHz/ 728-734 MHz	EA -Economic Area (larger than CMAs)
Lower B Block	12 MHz/2 x 6 MHz	704-710 MHz/ 734-740 MHz	CMA - Cellular Market Areas (smallest market size)
Lower E Block	6 MHz/Unpaired	722-728 MHz	Economic Area
Upper C Block (Open Access)	22 MHz/2 x 11 MHz	746-757 MHz/ 776-787 MHz	REAG – Large multi-state regions of US
Upper D Block (Public/Private)	10 MHz/2 x 5 MHz	758-763 MHz/ 788-793 MHz	Nationwide License

The FCC also adopted several significant revisions to the public safety spectrum allocations within the 700 MHz band.

Performance Requirements

The FCC adopted new, more stringent build-out and performance requirements for the new 700 MHz licensees. The performance requirements described below were strongly opposed by the wireless industry.

- For smaller geographic market-area licenses (such as Economic Area licenses and Cellular Market Area licenses), licensees will be required to provide service to cover at least 35 percent of the *geographic area* of the licensed market within four years of license issuance; and 70 percent of the geographic area by the end of the license term.
- For the larger, REAG market licenses, licensees will be required to provide service to cover at least 40 percent of the population of the licensed market within four years of license issuance; and 75 percent of the population by the end of the license term.
- The FCC did not identify specific build-out requirements for the nationwide Upper D block license. This licensee will be required to partner with an adjacent Public Safety Broadband Licensee, and to negotiate a Network Sharing Agreement to be approved by the FCC, which will govern construction deadlines, among other issues.
- If a licensee does not meet the four-year performance benchmarks, the FCC will reduce its license term from ten to eight years, thereby imposing an accelerated construction schedule.
- If a licensee fails to meet the end-of-term construction requirements, the FCC will automatically reclaim any unserved areas of its license area and re-license those areas.

Open Access

One of the more controversial aspects of the FCC's new rules is its decision to impose "open platform" requirements on the winning bidder of the 22 MHz Upper C Block license. Specifically, the Upper C Block licensee will be required to provide a platform that will allow customers, device manufacturers, third-party application developers and others to use the device and applications of their choice on this spectrum block, subject to the condition that these devices and applications do not harm the network.

Public Safety/Private Partnership

As mentioned above, the FCC will require that the winner of the 10 MHz Upper D Block nationwide license form a Public Safety/Private Partnership with an adjacent nationwide public safety licensee, to develop a shared, interoperable broadband network for both public safety and commercial use. Under the new rules, public safety will have priority access to the Upper D Block commercial spectrum in times of emergency, and the commercial licensee will have preemptible, secondary access to the adjacent public safety broadband spectrum.

Auction Procedures

The FCC adopted three noteworthy changes to its auction procedures for the 700 MHz auction. First, the FCC will use anonymous bidding for the auction, regardless of any pre-auction assessment of how competitive the auction will be. Second, the FCC will use "package bidding" procedures to auction the 12 Upper C Block REAG licenses, to assist bidders that are seeking to create a nationwide footprint. Finally, the FCC directed its staff to establish "reserve prices" for this auction. These prices will allow the FCC to decline to auction the 22

MHz Upper C Block license if the newly imposed open access requirements on this spectrum depress bidding to an unacceptably low level.

For more information, please visit us at www.dwt.com

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PRIVACY UPDATE

HOGAN &
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FTC Begins to Explore Mobile Marketing Regulation; Some States Already Have Enacted Proscriptions

Earlier this month, the Federal Trade Commission (FTC) hosted a “Spam Summit” to address consumer protection and privacy issues associated with SPAM and malware, particularly in connection with new and emerging mobile technologies. One of the prevailing messages of the Spam Summit was that as wireless phone and mobile Internet access use continue to rise, an increasing number of both legitimate and illicit marketing tactics are being – and increasingly will be – directed toward consumers.

Although the SPAM Summit was largely informational in nature (and thus is not expected to result in new FTC regulations in the near term), some states already have begun to enact their own mobile marketing regulations to address this concern. It appears that most states thus far have relied on their existing telemarketing statutes to provide a framework for regulating text messages and other forms of mobile communication. Two recent examples are:

- In **Texas**, HB 143, which is expected to become effective on September 1, 2007, modifies the definition of “telephone call” for purposes of the state’s Do Not Call list to include a “call or other transmission, including a . . . text or graphic message or of an image.” Thus, beginning on September 1, 2007, the Texas Do Not Call law will apply to text- and graphic-based messages such as those sent to and from mobile phones.
- In **North Dakota**, SB 2195, which went into effect April 5, 2007, modifies the definition of “message” under the telephone solicitations chapter of the state code to include any telephone call, including “text or other electronic communication” (in addition to voice communication). Thus, text- and graphic-based mobile phone messages are now clearly subject to North Dakota’s telemarketing laws.

Although the FCC’s telemarketing regulations already are deemed to apply to text messages, these developments at the state level demonstrate that the regulation of text messages under the telemarketing framework is becoming more widespread. Entities that market to mobile phones via text messaging therefore should consider focusing increased attention on state law to ensure compliance and minimize exposure.



About the Privacy Update

Hogan & Hartson frequently publishes the Privacy Update to track privacy developments at the FTC, FCC, and U.S. Congress. 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 the developments discussed in this document.

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