

November 2007 e-BULLETIN

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Founding Member Firm Kim Chang & Lee hosted the 42nd International PRAC Conference in Seoul, October 20-24. For complete details including business meeting materials and handouts, visit us online at http://www.prac.org/event_archive.php



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CLAYTON UTZ RESPECTED TAX LAWYER JOINS CLAYTON UTZ

Melbourne, 9 November 2007: Clayton Utz has appointed well-known tax specialist Sue Williamson as a partner in its Melbourne office, strengthening its capacity to provide high-end taxation services to clients in the Melbourne market.

Ms Williamson joins Clayton Utz after 12 years as a tax partner with an Australian law firm. Her experience, which includes six years at Price Waterhouse (now PwC), spans income tax, capital gains tax, GST, stamp duty and tax disputes. She has represented a range of Australian and international clients including BHP Billiton, ANZ, Brown Brothers and the eBay group.

Ms Williamson is also a member of the National Tax Liaison Group, chaired by the Commissioner of Taxation, and will take up the position of President of the Taxation Institute of Australia in 2008.

Clayton Utz Melbourne managing partner Brad Vann said Ms Williamson's appointment reflected the firm's ability to attract first-class lawyers. "Sue's skills and experience will give our Taxation practice even greater ability to support our Corporate, Banking & Financial Services, Major Projects and Energy & Resources teams. We are pleased to welcome a lawyer of Sue's standing and talent to the firm," said Mr Vann.

The head of Clayton Utz' national tax practice, Sydney partner Allan Blaikie, said Ms Williamson joined a mature and substantial tax team. "Our Sydney practice is long-established and we are pleased to be able to build on that capability in Melbourne, with Sue joining the excellent Niv Tadmore," said Mr Blaikie.

Dr Tadmore, who heads the Melbourne tax practice, said he looked forward to working alongside Ms Williamson. "Sue's arrival will strengthen the team's ability to provide clients with outstanding advice in relation to their transactional, ongoing and contentious tax affairs."

ENDS

For additional information visit www.claytonutz.com

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DAVIS WRIGHT TREMAINE LLP GENERAL COUNSEL FOR MARTHA STEWART LIVING OMNIMEDIA INC JOINS DAVIS WRIGHT TREMAINE

NEW YORK, OCT. 30, 2007 – John R. Cuti, the former General Counsel of Martha Stewart Living Omnimedia, Inc. (MSLO), has joined the law firm of Davis Wright Tremaine LLP and will be based in its New York office.

At MSLO, Mr. Cuti was a member of the senior management team, responsible for all the company's legal matters, including securities law compliance, litigation management, and the negotiation of major agreements that created new relationships for MSLO with companies in a wide range of businesses, such as Macy's, Lowe's, 1-800-Flowers, KB Home, Mark Burnett Productions, GTCR, Singer Sewing Machines, and Kodak.

"John has been an integral adviser to a highly creative and vital New York City company," said Sharon Schneier, partner-in-charge of Davis Wright Tremaine's New York office. "We are delighted to have him join our strong team of lawyers here in New York."

Mr. Cuti has led a number of complex, high-profile litigation matters over his career. In 2004, Mr. Cuti played a major role in the successful defense of the government's securities fraud charge against Martha Stewart, and he earlier represented Joseph Jett, the former Kidder Peabody bond trader accused of securities fraud. Mr. Cuti also represented John McCain and Steve Forbes in their successful challenges to the New York State ballot access laws in 2000 and 1996.

"We are sorry to see John go but happy that he is returning to the litigation practice he loves and joining such a fine firm, which has provided great service to MSLO over a number of years," said Susan Lyne, CEO of MSLO.

Mr. Cuti says he is excited about working with his new colleagues: "Davis Wright Tremaine has great lawyers and great practice groups and I couldn't be happier to be part of their team."

Mr. Cuti received his J.D. from New York University School of Law and his B.A. from The University of Virginia. He is a member of the Board of Trustees of the Neighborhood Service of Harlem. He is also actively involved with the nonprofit organization, Legal Information for Families Today and is the recipient of its 2007 Champion of Children and Families Award.

ABOUT DAVIS WRIGHT TREMAINE

Davis Wright Tremaine LLP is a national business and litigation law firm with more than 480 attorneys in nine offices: Seattle and Bellevue (Wash.), Portland (Ore.), Anchorage (Alaska), Los Angeles, San Francisco, New York, Washington, D.C. and Shanghai, China. For more information, visit www.dwt.com

LUCE FORWARD EXPANDS TENANT-IN-COMMON PRACTICE GROUP

November 1, 2007



Mark T. Mauerman and Ariel R. Bedell

Two new attorneys have joined Luce, Forward, Hamilton & Scripps LLP in the firm's renowned Tenant-In-Common (TIC) specialization. Both Mark T. Mauerman, special counsel, and Ariel R. Bedell, an associate, will work from Luce Forward's downtown San Diego office.

The TIC group is part of Luce Forward's business practice group and is led by attorney Darryl Steinhouse, who pioneered the legal structure for the modern tenant-in-common syndication model more than ten years ago. Known for its ability to create solutions and structure complex deals across the country, Luce Forward's top tier TIC practice continues to expand.

Mauerman, who previously had a solo practice, has focused primarily on securities work including mergers and acquisitions, corporate finance and governance, taxation and other related business transactions for both private and public companies. Bedell's practice specializes in commercial real estate transactions including acquisition and disposition of apartment complexes, shopping centers, vacant land and office complexes.

"The knowledge and expertise acquired by Mark and Ariel through their previous work will benefit our distinguished TIC group, as well as help our current and future clients," said Robert J. Bell, Luce Forward's Managing Partner. "We have worked with Mark in the past and know him to be a dedicated and skilled attorney, and Ariel will be a strong support to our expanding group of attorneys who lead the nation in TIC syndications. We are excited they have chosen to become part of the practice."

Mauerman received a Master of Laws degree in taxation from New York University School of Law, a Juris Doctor degree from Willamette University College of Law, and a Bachelor of Science degree from the University of Redlands. Bedell received a Master of Laws degree in taxation and a Juris Doctor degree from the University of San Diego School of Law, and a Bachelor of Arts degree of San Diego State University.

For additional information visit www.luce.com

FRASER MILNER CASGRAIN STRENGTHENS NATIONAL FINANCIAL SERVICES PRACTICE

November 5, 2007 - Toronto

Fraser Milner Casgrain LLP (FMC), announced today that Vickie Wong has joined the firm's Financial Services Group as a partner. Based in the Toronto office, Vickie's practice will consist of a broad range of finance related matters, including bilateral and syndicated financings, cross-border transactions and asset-based lending. She has acted as counsel to Canadian, U.S. and international financial institutions and brings significant experience in multi-jurisdictional financing transactions.

"To serve the needs of our domestic and foreign clients, we have put together a Financial Services team capable of acting on the most complex international transactions," says Michel Brunet, FMC's Chair and Chief Executive Officer. "Vickie's outstanding skill set and experience, including her extensive cross-border experience, makes her a perfect fit for our Financial Services Group and our clients."

"Clients, and in particular U.S. clients, are looking for a firm that can provide sophisticated legal services on a seamless basis across the country. I am very excited to be joining a firm that has both deep roots in the financial services area as well as a truly national platform," says Vickie.

"With Vickie's experience in multi-jurisdictional transactions, we are strengthening one of the most talented financial services law groups in the country," says Ross Walker, Chair of FMC's National Financial Services Group.

Vickie joins FMC from a Toronto-based law firm where she played a leading role in the Corporate Financial Services, Asset-based Lending and Corporate Lending areas. Called to the Ontario bar in 1991, she obtained her Bachelor of Laws from the University of Western Ontario.

For additional information visit us at www.fmc-law.com

**MORGAN LEWIS & BOCKIUS LLP
LEAD ATTORNEY IN FORT DIX INVESTIGATION RETURNS TO MORGAN LEWIS**

After serving as a federal prosecutor, Stigall joins firm's national white collar practice

PHILADELPHIA, October 29, 2007: Morgan, Lewis & Bockius LLP is pleased to announce that R. Stephen Stigall has joined the firm as a partner in the Litigation Practice, resident in the firm's Philadelphia office. Mr. Stigall returns to the firm after more than seven years of distinguished service as an assistant U.S. attorney in the U.S. Attorney's Office for the District of New Jersey, where he served as the lead prosecutor in the investigation by the FBI and the Joint Terrorism Task Force into the Fort Dix terrorism case.

"The experience Steve gained as a federal prosecutor working on some of the most complex issues courts are grappling with today makes him a strong addition to an already sophisticated team," said James D. Pagliaro, head of Morgan Lewis's Litigation Practice. "During his tenure as an associate, Steve proved to possess the ideal combination of collegiality, talent and work ethic. We are thrilled to welcome him back."

Mr. Stigall has handled large securities fraud and money laundering investigations, as well as other major fraud cases involving a variety of federal agencies, including the Securities and Exchange Commission, the Food and Drug Administration, and the Department of Commerce. He has received various awards and commendations, including the Department of Justice Director's Award for Superior Performance.

"Steve's experience as a trial lawyer and his familiarity with Morgan Lewis will allow him to hit the ground running," said Jack C. Dodds, co-head of the Corporate Investigations and White Collar Practice at Morgan Lewis. "His skill set will be a great fit as the practice continues to attract significant white collar matters from our various Fortune 100 clients."

Morgan Lewis's Litigation Practice consists of a 700-litigator contingent across 18 offices. Its members' creativity, sophistication, and cross-practice capabilities have resulted in a mounting number of calls from Fortune 100 firms. Mr. Stigall will join a Corporate Investigations and White Collar team that already includes the former head of the Justice Department's Enron Task Force; 11 former assistant U.S. attorneys; former assistant district attorneys; and former high-ranking attorneys from the Securities and Exchange Commission, the Internal Revenue Service, and the Antitrust Division of the Department of Justice.

Mr. Stigall's practice will focus on corporate investigations and white collar litigation matters. Prior to becoming an assistant U.S. attorney, Mr. Stigall served as an associate in Morgan Lewis's Litigation Practice from 1996-2000.

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.



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Gide Loyrette Nouel



NAUTADUTILH LAUNCHES CLASS ACTION TEAM

Leading Benelux law firm NautaDutilh launches one of continental Europe's first Class action teams.

As an increasing number of EU member states move to develop collective action legislation, one of the team's goals is to work with European companies facing the possibility of a mass claim in multiple jurisdictions to find the best possible and most cost-effective solution.

The Dutch Collective Settlements Act of 2005 changed the legal landscape. The Act offers companies, whether as plaintiffs or defendants, a significant alternative and/or a complementary forum to US litigation, giving the Netherlands a leading position in Europe. The Act provides for the court approval of collective settlements on an opt-out basis. If a defendant and a non-profit organisation representing a group of plaintiffs agree to settle a dispute out of court, they can apply to the court to declare the settlement fair and binding even on non-parties to the agreement. As a result, NautaDutilh anticipates an increase in the number of collective settlement procedures in the Netherlands, with ramifications throughout Europe.

When asked about NautaDutilh's message to corporate Europe, team head Daan Lunsingh Scheurleer states "You operate in a globalised world, clients are numerous. If they have a problem with you, you want to deal with it in such a way that you get rid of the problem and, in that respect, collective actions or collective redress mechanisms may provide you with the opportunity to close the books on the issue. It's not all bad."

The Act has already produced two court-approved collective settlements, with a third settlement now before the court and with involvement of NautaDutilh in all three cases. The pending case is considered a potential groundbreaker as it seeks to achieve a worldwide settlement, excluding only US plaintiffs, under the Dutch Act. This new "global resolution option" can be applied if a Dutch court has jurisdiction, such as where one of the parties is Dutch.

Commenting on the launch of the class action team, NautaDutilh chairman Marc Blom says: "As more and more EU countries develop their own multi-party or collective action approach, there is a growing risk of multinationals having to battle on multiple fronts - in the US and in various European jurisdictions. At a certain point, defendants want finality and financial certainty and may therefore prefer to settle. In the past their global settlement options were limited but this situation is changing."

The team draws upon the expertise of litigators and other professional advisors from across the firm's most recognised specialisations. The launch is supported by a dedicated website providing information and guidance at www.classactions.nautadutilh.com.

The team members and their areas of specialisation are as follows:

Daan Lunsingh Scheurleer Head of Class Actions Team -(Financial Institutions, Amsterdam)

John Allen (Intellectual Property, Amsterdam)

Stan Brijs (Litigation, Brussels) Lead of Class Action Team -Belgium

Stijn Franken (Product Liability and Insurance, Amsterdam)

Bart Gerretsen (Dispute Resolution, Rotterdam)

Jan Joling (Damage Assessment and Auditing, Amsterdam/Rotterdam)

Rutger Kalsbeek (Dispute Resolution, Rotterdam)

Gizzy Klink (Product Liability and Insurance, Amsterdam)

John Lisman, (Life Sciences/Pharmaceutical Liability, Amsterdam)

Frank van der Leeuw (Financial Institutions, Amsterdam)

Gerard Meijer (Arbitration, Rotterdam/Amsterdam)

Paul Olden (Securities and Shareholders, Amsterdam)

Carla Schoonderbeek (Life Sciences/Pharmaceutical Liability, Amsterdam)

Daniella Strik (Dispute Resolution, Rotterdam)

Charles van Sasse van IJsselt (Antitrust, Brussels/Amsterdam)

Ianika Tzankova (Financial Institutions, Amsterdam and extraordinary professor of Comparative Mass Litigation at Tilburg University)

Flip Wijers (Securities and Shareholders, Amsterdam)

For more information please visit the dedicated site at www.classactions.nautadutilh.com

About NautaDutilh NautaDutilh is one of the leading independent law firms in the Benelux and one of Europe's pre-eminent law firms. It is the largest law firm in the Benelux market with 400 lawyers, civil law notaries and tax advisers in offices in Amsterdam, Brussels, London, Luxembourg, New York and Rotterdam. NautaDutilh works in close cooperation with leading law firms worldwide on a non-exclusive basis. The firm provides a broad range of high-level legal services and advises a wide variety of clients on complex transactions and legal issues.

NautaDutilh is recognized by the major international legal directories, The European Legal 500 and Chambers' Global Directory, both of which recommend NautaDutilh as a leading firm in the Benelux markets. Website: www.nautadutilh.com

MUNIZ RAMIREZ PEREZ-TAIMAN & LUNA-VICTORIA LAUNCHES INTERNATIONAL ARBITRATION PRACTICE

Lima, October 2007.- In view of the outstanding growth of arbitration as an alternative mechanism for the efficient solution of conflicts derived from investment protection agreements and free trade agreements, particularly the one signed with the United States, which include arbitration clauses to resolve conflicts between investors and the Peruvian State, our Law Office has decided to implement and make available to its clients the International Arbitration Practice Group to resolve conflicts related to the interpretation, fulfillment and implementation of trade and investment agreements.

This new practice group will be managed by our senior partners Nelson Ramírez Jiménez and Fernando Meléndez Fernández, and will be headed by associate Carlos Alberto Soto Coaguila, a national and international arbitrator, University professor at Universidad de Lima and Universidad San Ignacio de Loyola, a member of the Spanish Arbitration Club, Secretary to the Civil Code Reform Commission, and Executive Director of the Peruvian Arbitration Magazine.

This new practice group will be supported by partners and associates specializing in investment, finance, hydrocarbons, mining, electricity, foreign trade, intellectual property, competition, etc. These expert lawyers are in a capacity to provide advice on the conduct of arbitration procedures under the regulations of the main arbitration centers and associations, including the International Centre for Settlement of Investment Disputes (ICSID), the International Court of Arbitration (ICC), the United Nations Commission on International Trade Law (UNCITRAL), the American Arbitration Association (AAA), among others.

For additional information visit www.munizlaw.com

RICHARDS BUELL SUTTON PARTNER APPOINTED TO BOARD OF PARTNERSHIP BC

SHARON E. WHITE APPOINTED TO THE BOARD OF DIRECTORS OF PARTNERSHIPS BRITISH COLUMBIA



Sharon E. White, a partner with Richards Buell Sutton LLP, has been appointed by the provincial government to the Board of Directors of Partnerships British Columbia. Partnerships British Columbia ("Partnerships BC") was established by the Government of British Columbia in May 2002 to promote and support partnership projects and to identify opportunities for maximizing the value of public capital assets. It is a BC company owned by the Minister of Finance as the sole shareholder.

Partnerships BC provides project management to the Province of British Columbia. It is also responsible for developing projects for public private partnerships (P3). The Board is responsible for the oversight and governance of Partnerships BC.

Among the projects in which Partnerships BC is currently involved include: Canada Line (\$1.9b), Golden Ears Bridge (\$808m), Sea to Sky Highway (\$600m), Abbotsford Hospital (\$355m), Pitt River Bridge (\$198m), Kelowna Bridge (\$144m), Kicking Horse Canyon (\$130m) and a number of others such as Port Mann Bridge and Royal Jubilee, Kelowna and Surrey Hospitals projects are in procurement.

In December, 2006, Ms. White was appointed by the federal government to the Board of Directors of Farm Credit Canada. Farm Credit Canada is the leading provider of financing and business and financial services to the agricultural industry in Canada. Agriculture represents over 8% of Canada's GDP and employs one in every 8 Canadians. Farm Credit Canada has assets of approximately \$15b, offices in over 100 locations across Canada and over 1100 employees.

Sharon White is a partner of Richards Buell Sutton LLP, one of BC's oldest law firms. She has been practicing in the areas of corporate/commercial law since 1981. She has served as a Director and Officer on a number of corporate boards as well as community and professional organizations. Ms. White is a member of the Law Society of BC, the Canadian Bar Association, and a former member of the Bermuda Bar Association and the Council of Canadian Administrative Tribunals.

For more information visit www.rbs.ca

ALI BUDIARDJO NUGROHO REKSODIUPUTRO

NAMED INDONESIAN GOVERNMENT GLOBAL BOND COUNSEL

ABNR has been selected, for the 5th time, by the Government of the Republic of Indonesia as the local legal counsel for its global bond issue in the international market that is planned for early 2008. Ferry P. Madian, partner, has been the lead lawyer of the ABNR's team of lawyers.

The first appointment was back in 1996, when the Government was testing the waters in contemplation of taking its first plunge into the international capital market. The Government re-entered the international capital market in 2004 and ABNR has always been the legal counsel since 2005. The objectives of the bond issue are, among others, to raise funds for a portion of the respective year's budget, to set benchmarks in international capital market, to diversify funding sources and investor base, and at the same time to promote Indonesia's potentials and recent achievements in international capital market. The Government's previous bond issues are as follows:

- In 2007, the US\$ 1,5 Billion Global Bond offering of the Government of the Republic of Indonesia, listed on the Singapore Stock Exchange;
- In 2006, the US\$ 2 Billion Global Bond offering of the Government of the Republic of Indonesia, listed on the Singapore Stock Exchange;
- In 2005, the US\$ 1 Billion Global Bond offering of the Government of the Republic of Indonesia, listed on the Luxemburg Stock Exchange;
- In 1996, the US\$ 400 Million Yankee Bond offering of the Republic of Indonesia, registered in the United States with the SEC.

For additional information visit www.abnrlaw.com

FRASER MILNER CASGRAIN LLP

ADVISES SPECIAL COMMITTEE OF ARIZONA STAR IN \$773M ACQUISITION BY BARRICK GOLD

The Fraser Milner Casgrain team of John Sabine, Sander Grieve, Linda Misetich and Eric Foster, is currently acting as legal advisor to the special committee of Arizona Star Resource Corp. with respect to Barrick Gold Corporation's friendly takeover bid of Arizona Star valued at approximately \$773 million, announced October 29, 2007.

Barrick's offer has been unanimously approved by the board of directors of Arizona Star, with all directors and officers having entered into an agreement to tender their shares to the offer. The board is also unanimously recommending the offer to shareholders.

Arizona Star owns a 51% interest in the Cerro Casale deposit in the Maricunga Project in Chile, one of the world's largest undeveloped gold and copper deposits. Barrick's existing assets in the area include the Zaldivar copper mine (Chile), the Pascua-Lama gold-silver project (Chile/Argentina), the Veladero gold mine (Argentina), and the Lagunas Norte and Pierina gold mines (Peru).

For additional information visit us at www.fmc-law.com

GIDE LOYRETTE NOUEL

ADVISES DEXI CREDIT LOCAL ON LAUNCH OF FCC SURF

22 October 2007 - On 14 August 2007, Dexia Crédit Local launched FCC SURF, a French mutual debt fund (fonds commun de créances) acting by and through Eurotitrisation as management company and Bred Banque Populaire as custodian.

FCC SURF was set up for the acquisition of loans receivables originated by Dexia Crédit Local pursuant to a French law governed loans facility agreement dated 24 July 2007, pursuant to which Dexia Crédit Local and BNP Paribas grant loans to SANEF and SAPN in an aggregate principal amount of €1,500,000,000. Such loans receivables are guaranteed by FSA and MBIA.

In order to fund the transfer of the loans receivables, FCC SURF has issued four series of floating rate partly paid notes for an aggregate amount of €750,000,000. The notes issued by FCC SURF are governed by English law. Besides its innovative refinancing structure, another particularity of FCC SURF is that it is one of the first transactions for the securitisation of fully wrapped infrastructure financing in France.

The Gide Loyrette Nouel team which advised Dexia Crédit Local, in its capacity as arranger, on the French and English law aspects of the transaction was coordinated by **Grégory Benteux** (senior associate), led by **Colin Mercer** (partner) and **Patrice Doat** (partner), with William Oliver, Karine Imbrosciano, Zolika Bouabdallah and Phung Pham (associates).

For additional information visit www.gide.com

DAVIS WRIGHT TREMAINE LLP

WINS CASE BEFORE WASHINGTON STATE SUPREME COURT JUSTICES STRIKE DOWN CITY COUNCIL ORDINANCE FREEZING SHORELINE DEVELOPMENT

October 16, 2007

Bainbridge Island Couple Wins Case Before Washington State Supreme Court Justices Strike Down City Council Ordinance Freezing Shoreline Development

OLYMPIA, Wash., October 16, 2007—A Bainbridge Island couple and other shoreline property owners and developers have received a favorable decision from the Washington State Supreme Court invalidating a city moratorium that stalled them from enhancing their shoreline property. Ray and Julie Biggers sought a bulkhead to protect their residential property, but were prohibited by the Bainbridge Island City Council, which enacted a series of moratoriums on development while it revised its shoreline management plan.

“This is not only a victory for the Biggers but for owners of shoreline property throughout the state,” said Dennis Reynolds, a partner with Davis Wright Tremaine LLP representing the plaintiffs. “Basically the Court is telling local governments that they do not have unlimited power to manage the shorelines. Municipalities must act within standards set out in state law and the Washington State Constitution.”

In *Biggers vs. City of Bainbridge Island*, Justice James Johnson held that under the Shoreline Management Act of 1971 the state has the primary authority to manage shoreline development.

“We are very pleased with the Court’s decision,” said Andrew Cook, legal counsel for the Building Industry Association of Washington, which filed a friend of the court brief in opposition to the city moratorium. “The Court was absolutely correct in ruling that neither the laws of Washington nor the constitution grant local governments the authority to impose blanket building moratoria on shorelines.”

The City of Bainbridge enacted a one-year moratorium on shoreline development in 2001 to allegedly assess possible environmental effects on salmon habitat. It prohibited filing for new applications for shoreline development permits and exemptions that applied to over-water structures like docks and piers, and new shoreline armoring such as bulkheads. The city extended the moratorium and the Biggers filed a complaint saying it was illegal. Ultimately, Bainbridge Island kept its moratorium in place for more than three years, but made only one small change during that time to its shoreline use regulations.

The Court’s ruling in the Biggers’ favor is expected to have broad impact. “Cities and counties are required to revise their shoreline management plans in the next few years,” added Reynolds. “This ruling will stop them from placing all-encompassing moratoriums of long duration on shoreline development and use while undertaking this task, which is beneficial to property owners throughout the state.”

Reynolds added that the full implications of the Court’s decision on future shoreline development needs to be sorted out. “As stated in the concurring opinion, ‘passing annual, rolling moratoria,’ such as Bainbridge Island did, ‘reflects a disregard for those within its geographical limits who wish to fully enjoy the use and benefits of the property they own and the need of individuals to engage in their own critical planning,’” concluded Reynolds.

About Davis Wright Tremaine LLP

Davis Wright Tremaine LLP is a national business and litigation law firm with more than 480 attorneys in nine offices: Seattle and Bellevue (Wash.), Portland (Ore.), Los Angeles, San Francisco, New York, Washington, D.C., Anchorage (Alaska) and Shanghai, China.

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For additional information [visit www.dwt.com](http://www.dwt.com)

HOGAN & HARTSON LLP

ADVISES IES HOLDING ON EBRD MINORITY STAKE IN RUSSIAN POWER GENERATING COMPANY

MOSCOW, November 6, 2007

Hogan & Hartson is advising Integrated Energy Systems (IES), one of the largest strategic investors in the Russian power sector, in a series of transactions for the sale of a minority equity stake in TGK-9, a regional generating company, to EBRD. The transaction is subject to IES becoming a controlling shareholder in TGK-9, where IES currently holds approximately 30 percent. A €140 million EBRD investment is allocated for support of privatization in the final phase of Russian power sector reform. This transaction will enhance the investment appeal of TGK-9, enabling it to finance its investment program.

Hogan & Hartson is advising IES on all corporate and finance issues of the transaction.

The Hogan & Hartson team on this matter is being led by Moscow partners Sergey Komolov and Ilya Rybalkin and also includes counsel Kimberly Reed and associate Dmitry Zhdanov from the Moscow office, and partner Sean Harrison and associate Leon Sosnowski from the London office.

For additional information visit www.hhlaw.com

LOVELLS

ADVISES TUBE LINES ON DEAL TO IMPROVE NORTHERN LINE TRAIN PERFORMANCE

26 October 2007

Lovells has advised Tube Lines, the contractor responsible under the London Underground Public-Private Partnership (PPP) for infrastructure maintenance and upgrades on the Jubilee, Northern and Piccadilly Lines, in securing a deal with Alstom Transport to improve performance of the train fleet used on the Northern Line. The deal, amongst other things, creates a new performance regime that is more closely aligned with the PPP arrangements between Tube Lines and London Underground thereby incentivising Alstom Transport to improve train reliability.

When Tube Lines entered into the PPP in 2002, it inherited from the public sector a Private Finance Initiative (PFI) contract under which Alstom Transport is responsible for providing and maintaining the train fleet used on the Northern Line. Since the PFI contract had remained materially unchanged since coming into effect in 1995, much of the machinery regulating Alstom's performance was not suitable for enabling Tube Lines to perform the obligations it had undertaken under the more recent PPP arrangements. Overall, the package of amendments is intended to enable both parties to work together to reduce the impact of fleet-related faults on Northern Line passengers.

The Lovells team was led by Andrew Briggs, a London based partner in the Project Finance Unit, along with projects assistants James Pitman, Chris Cross and Dominic Richardson.

Lovells continues to assist and advise Tube Lines in the management of its responsibilities under the PPP. This is an important change to one of its most important supply chain arrangements that should deliver significant service improvements to customers on the Northern Line. The transaction underlines the close working relationship that Lovells continues to have with the contractor tasked with delivering one of the largest and most complex PPP arrangements in recent times.

For additional information visit www.lovells.com

TOZZINI FREIRE

REPRESENTS BANCO INDUSTRIAL E COMMERCIAL S.A. IN IPO

Initial Public Offering by Banco Industrial e Comercial S.A. in the total amount of R\$821,526,075.00

A Public offering of 71,437,050 (seventy one million, four hundred thirty seven thousand and fifty) preferred shares (the "Shares") of Banco Industrial e Comercial S.A. (the "Issuer" or "BicBanco") for an aggregate amount of R\$821,526,075.00 (eight hundred twenty one million, five hundred twenty six thousand and five hundred seventy five reais). The offering was comprised of a primary offering of 42,862,230 Shares by BicBanco and a secondary offering of 19,256,948 Shares and 9,317,872 Additional Shares sold for the purpose of covering over-allotments by certain shareholders of BicBanco (the "Selling Shareholders"). The initial offering price for the Shares was R\$11.50 per Share.

In view of the Brazilian law, the capital increase related to the primary offering was subject to ratification by the Central Bank of Brazil, which was obtained on October 24, 2007. For this reason, the offering was initially settled by the delivery of units to the investors. Each unit consisted of two preferred shares and three subscription receipts. Each subscription receipt entitled its holders to one preferred share. On October 29, 2007, BicBanco delivered to holders of units five preferred shares per unit.

BicBanco's preferred shares have been approved for listing and trading on the Level 1 segment of the São Paulo Stock Exchange (*Bolsa de Valores de São Paulo S.A. - BVSP*), or the BOVESPA, under the symbol "BICB4"; BicBanco's units have been approved for listing and trading on the Level 1 segment of the BOVESPA, under the symbol "BICB11".

Date of registration of the offering with the CVM: October 11, 2007.

Comments

BicBanco has acquired experience and know how in over 69 years of operating in the middle market segment, maintaining a solid base of active and loyal customers and occupying a privileged position to take advantage of business opportunities in an effective and rapid manner. During BicBanco's years in the middle market segment, it has improved its analysis process through quick decision-making and disbursements, as a result of a well-organized and differentiated platform, when compared to competitors. BicBanco has also created a diversified and profitable tailor-made products portfolio to meet its customer's needs and has created efficient and powerful tools to identify opportunities and to control the guarantees in its secured transactions.

The net proceeds obtained with the primary offering will be used by BicBanco to finance its credit portfolio in reais, increase the level of its available cash and finance the development and expansion of its sales infrastructure. BicBanco also intends to use the proceeds to increase its credit portfolio in the segments in which BicBanco operates. BicBanco will not receive any proceeds from the sale of preferred shares by the Selling Shareholders.

Banks Involved

Banco UBS Pactual S.A. acted as the underwriter and bookrunner of the offering in Brazil, and Banco Bradesco BBI S.A., Banco Fator S.A. and HSBC Corretora de Títulos e Valores Mobiliários S.A. acted as arrangers. UBS Securities LLC acted as sole global coordinator and sole bookrunner and Bradesco BBI, Banco Fator and Investment HSBC acted as co-managers of the offering outside Brazil pursuant to Regulation S and Rule 144A under the Securities Act of 1933, as amended

TozziniFreire acted as legal adviser of the Issuer with respect to Brazilian law—Ana Carolina de Salles Freire Rutigliano; Antonio Felix de Araujo Cintra; Mauro Guizeline; Rosinei Silvestre Libano Silva; Janaina Maluf Pichinin; João Rodrigo Maier

For additional information visit www.tozzinifreire.com.br

WILMERHALE

ADVISES EQUALLOGIC IN 1.4B ACQUISITION BY DELL

Largest Cash Purchase Price in History for Private VC-Backed Company

A team of WilmerHale lawyers advised EqualLogic in connection with its proposed acquisition by Dell (Nasdaq: DELL) for approximately \$1.4 billion in cash. According to data from Dow Jones VentureOne, this represents the largest cash purchase price ever paid for a private venture capital-backed company.

The acquisition came in the midst of EqualLogic's pending IPO, which had been led by David Westenberg and included Jason Kropp, Libby Black, Karen Abrams and Chris DelGiorno. For the M&A transaction, the IPO team was joined by M&A partners Jay Bothwick and Mike LaCascia with assistance from corporate lawyers Graham Robinson, Stacy Krause, Mike Penney and Robb D'Ambruoso; antitrust lawyers Jim Burling and Janet Ridge; tax lawyer Bill Caporizzo; and Jeff Johnson on licensing matters.

EqualLogic was formed in 2001 and initially was a client of the WilmerHale Venture Group—headquartered in Waltham, Massachusetts—which devotes its entire practice to advising emerging companies.

EqualLogic, based in Nashua, New Hampshire, is a leading provider of high-performance iSCSI storage area network (SAN) solutions uniquely optimized for virtualization. In announcing the deal, Dell said the acquisition will strengthen Dell's product and channel leadership in simplifying and virtualizing IT for customers globally. Michael Dell, Chairman and CEO, said "Our customers will be dealing with the largest increase in data we have seen in our history over the next few years. Leading the iSCSI revolution will help Dell accelerate IT simplification and virtualization and will drive the Dell value proposition into more areas of the enterprise storage business."

The acquisition is subject to regulatory approvals and customary closing conditions and is expected to close late in the fourth quarter of Dell's fiscal year 2008 or early in the first quarter of fiscal 2009.

For additional information visit us at www.wilmerhale.com



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Gide Loyrette Nouel



SEOUL 2007
October 20-24

PRAC e-Bulletin is published monthly.
Member Firms are encouraged to contribute articles for future consideration. Send to susan.iannetta@prac.org.
Deadline is 10th of each month.

Amendments to the Franchising Code: what do they mean for you?



On 6 February 2007, Fran Bailey (Federal Minister for Tourism and Small Business) announced the Federal Government's response to a review conducted last year in relation to the disclosure provisions of the Franchising Code of Conduct. After a series of consultations with interested parties (including Clayton Utz and the Franchise Council of Australia), amendments have now been made to the Code. These amendments take effect from **1 March 2008**.

The amendments to the Code – the first changes since 2001 – will increase the disclosure burden on franchisors in their dealings with franchisees and potential franchisees. Outlined below are some of the key changes and a brief summary of their implications.

Content of Disclosure Document

A number of changes have been made to the Code in relation to the required content of a Disclosure Document. Franchisors will need to ensure that Disclosure Documents which are distributed on or after 1 March 2008 comply with the Code as amended.

One of the more significant changes is that franchisors will now need to state in their Disclosure Documents where rebates or other financial benefits are given in connection with the supply of goods or services to the franchisor, and also the names of all parties who provide them. It is not necessary to quantify the value of rebates received or to provide the method by which such rebates are calculated.

This change means that franchisors have an increased level of transparency and accountability to franchisees, although it may also impose a significant administrative burden on franchisors as these arrangements will vary from time to time.

More detail must now be disclosed about a franchisor's officers, past franchisees and financial information where the franchisor is part of a consolidated entity.

Foreign franchisors with single franchise

Current law: At present, foreign franchisors that grant only one franchise or master franchise to be operated in Australia are exempt from compliance with the Code.

New law: The amendments to the Code will remove this exemption. This is a major change which affects not only new entrants to the market, but also existing foreign franchisors. All franchisors (domestic and foreign) will need to comply with the Code's requirements, including the onerous ongoing disclosure obligations and the mandated dispute resolution process.

Faster disclosure of materially relevant facts

Current law: Disclosure of prescribed matters under clause 18 of the Code (including matters such as a change in the majority ownership or control of the franchisor, the commencement of certain civil proceedings, and the appointment of an external administrator) must be disclosed to franchisees and prospective franchisees within a reasonable time, being not more than 60 days.

New law: Disclosure of these matters is now required within a reasonable time, being not more than 14 days. In cases where a franchisor has many franchisees, this reduced timeframe could impose a serious administrative burden and may require a franchisor to employ additional dedicated staff to ensure the

information is disseminated to franchisees within 14 days.

Disclosure to prospective franchisees

Current law: Currently, a franchisor is required to give prospective franchisees a copy of the Code and a Disclosure Document at least 14 days prior to entering into or renewing or extending a franchise agreement or the payment of a non-refundable fee to the franchisor.

New law: The changes mean that a franchisor will additionally need to provide the franchisee or prospective franchisee with a copy of the franchise agreement "in the form in which it is to be executed". This requirement will pose practical difficulties for franchisors. Initially, the Government had proposed to use the words "...in the form in which it is **intended** to be executed".

The new wording would appear to require franchisors to provide prospective franchisees with the franchise agreement in its final form. In order to ensure compliance, the franchise agreement will need to be negotiated and the execution version sent to the franchisee and there will then be a 14 day waiting period before the franchisee can execute the franchise agreement. Combined with the existing seven day cooling off period, this 14 day delay may cause delays in the recruitment of franchisees.

Reporting requirements of marketing funds

The changes to the Code will increase the regulations around marketing funds:

- Franchisors will have four months to prepare the financial statement detailing the marketing fund's receipts and expenses and to finalise any audits. (Currently such statements need to be prepared and audited within three months.)
- Franchisors will be required to provide a copy of the marketing fund statement, along with a copy of any auditor's report, to every franchisee within 30 days of preparing the report. (Currently such statements only need to be provided on written request.)
- It will be possible to opt out of the audit requirements if 75% of franchisees contributing to the marketing fund agree and the agreement is reached by a vote taken either within five months of the end of the financial year or within two years of a previous vote. (This means that franchisors will need to have regular votes of franchisees in order to continue an opt out of the requirement for auditing of the marketing fund statement.)

These more prescriptive guidelines will again increase the administrative burden on franchisors, especially in terms of ensuring that statements (and, where applicable, audit reports) are provided to all franchisees within the assigned time period.

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 Securities Law



FRASER MILNER CASGRAIN LLP

November, 2007

Amendments to Oil and Gas Disclosure Rules

The Canadian Securities Administrators (“CSA”) are implementing amendments to National Instrument 51-101 - *Standards of Disclosure for Oil and Gas Activities* and its related forms and companion policy (“NI 51-101”). NI 51-101 was originally adopted in September 2003, and sets out the general disclosure standards and annual filing requirements for issuers which are involved in oil and gas activities. It is expected that the amendments will come into effect on December 28, 2007.

The amendments are being made in response to problems identified and proposals made during public consultation with representatives from various organizations representing petroleum producers, reserves evaluators and financial analysts, and are also based on CSA staff’s own experience with NI 51-101. Many of the amendments are intended to clarify or streamline the requirements of NI 51-101. Some of the more significant amendments are described below.

CONSTANT PRICES AND COSTS

Reserves and the related future net revenue will no longer have to be reported using constant prices and costs. This information may still be voluntarily provided by issuers as supplemental disclosure.

RECONCILIATIONS

Under the amended NI 51-101, the reconciliation of reserves will be done using gross reserves rather than net

reserves. An issuer will not be precluded from providing the reconciliation based on net reserves as additional information. This supplemental disclosure may be useful for issuers with significant royalty interests (such as royalty trusts), which may have net reserves which exceed their gross reserves.

A reconciliation of future net revenue will no longer be required.

RESOURCES NOT CLASSIFIED AS RESERVES

The amended NI 51-101 will provide guidance for those issuers providing voluntary disclosure of “anticipated results” from resources which cannot currently be classified as reserves, including certain specified disclosure regarding risks and the level of uncertainty associated with recovery of the resources. The concept of “anticipated results” is now defined as information that may, in the opinion of a reasonable person, indicate the potential value or quantities of resources in respect of an issuer’s resources or a portion of its resources, and includes areal extent, pay thickness, flow rates, hydrocarbon content or estimates of volume or value.

If an issuer includes an estimate of a quantity of resources in which the issuer has an interest or intends to acquire an interest, or an estimated value attributable to an estimated quantity, the estimate will have to have been prepared or audited by a qualified reserves evaluator or auditor (although that evaluator or auditor need not be independent). In addition, the resources will have to be classified in the most specific category of

resources that is applicable under the COGE Handbook (for example, contingent resources, discovered unrecoverable resources, etc.), and the issuer will have to identify what portion of the estimate is attributable to each category.

ANALOGOUS INFORMATION AND EXTRAPOLATIONS

Under the amended NI 51-101, an issuer will be permitted to disclose comparative analogous information for an area outside of the area in which the issuer has an interest or intends to acquire an interest, even if that analogous information does not meet all of the general requirements of NI 51-101. In order to include the analogous information, the issuer must disclose the source and date of the analogous information, whether the source of the analogous information was independent, and the relevance of the analogous information to the issuer's oil and gas activities. Analogous information may include:

- historical information concerning reserves or resources;
- estimates of the volume or value of reserves or resources;
- historical production amounts;
- production estimates; or
- information concerning a field, well, basin or reservoir.

However, where an issuer discloses information that is an “anticipated result”, an estimate of a quantity of reserves or resources, or an estimate of value attributable to an estimated quantity of reserves or resources for an area in which it has an interest or intends to acquire an interest that is based on an extrapolation from analogous information, all of the general disclosure requirements of NI 51-101 must be satisfied, including the requirements of proper categorization of resources and reserves, and proper disclosure relating to value, risks and uncertainties.

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New Toy and Food Recall Legislations: China Addressing Global Product Safety Concerns

By Zhang Shouzhi*, Gui Hongxia ** and Li Xiang***

In 2007, several categories of products made in China have been recalled, ranging from toothpaste, animal feed, tires to children's clothes¹. The back-to-back lead paint violation and magnet hazard recalls of Chinese-made Mattel toys in August 2007 have caused the biggest ever product safety turmoil for China's original equipment manufacturers (OEMs). The Chinese government is under substantial pressure to promptly respond to the recall via political and diplomatic channels. However, the government's emergency solutions are not the long-term cure for China's persistent product quality syndrome. The continued survival and growth of the Made-in-China industry relies on the enactment and enforcement of product liability legislations. China has promulgated new toy and food recall legislations to respond to the recent recall challenges.

I. Loopholes Resulting in Recurring Recalls

A. Weakness in Testing and Inspection

China's primary financial magazine, Cai Jing (《财经》), investigated Mattel's voluntary recall of 967,000 units of OEM toys on August 2, 2007. These toys were manufactured by Foshan Lida Toy Co. Ltd in China and tainted with surface paint containing excessive levels of lead. The magazine found varying degrees of negligence and omissions attributed by the paint raw material supplier, the paint supplier, the toy manufacturer, Mattel and PRC's import and export inspection authority responsible for paint inspection procedures².

According to the Administrative Regulations for Mandatory Product Certification, China "requires mandatory certification for the products involving human and animal health and safety, environmental protection and public security." All toys included in the mandatory product certification catalog shall obtain product certification. Toys without product certification shall not be distributed, sold in or imported to China. And according to relevant rules of PRC Certification and Accreditation Administration ("CAA"), the products manufactured exclusively for export may be exempted from mandatory certification administration³ and such products are subject to the manufacturer's own quality control system.

Due to the limited capacity and technical strength constraints, toy manufacturers in China usually rely on administrative authorities⁴ to perform product safety inspection. However, it is difficult for the administrative inspectors, who are overloaded with inspection assignments, to identify all defects and safety risks of a product

¹ On March 24, 2007, Canada recalled 60 million packages/cans of dry and wet pet food manufactured in the US with tainted wheat gluten imported from Xuzhou Anying Biologic Technology Development Co. in Wangdian, China and Binzhou Futian Biologic Technology Co. Ltd. The recalled pet food contains melamine, a hazardous chemical, and caused the death of 14 dogs and cats in Canada. On June 25, the US National Highway Traffic Safety Administration recalled an estimated 450,000 light truck tires manufactured by Hangzhou Zhongce Rubber Company because the tires lacked a critical component. On August 14, US Toiletry supplier Gilchrist & Soames posted a statement on the US Food and Drug Administration website to recall Chinese toothpaste that may contain diethylene glycola, a chemical used in antifreeze and harmful to humans. The recalled toothpaste was distributed to hotels worldwide. On August 20, Toy "R" Us, a US toy company, recalled about 1 million Chinese-made baby bibs containing excessive levels of lead.

² See the report titled "The Accidental Death of A Toy Manufacturer"(《一名玩具商的意外死亡》), Cai Jing Vol.17 published on August 20, 2007.

³ See CAA Announcement of 2002 No. 8.

⁴ "Administrative authorities" include General Administration of Quality Supervision, Inspection, Quarantine, local import and export inspection and quarantine authorities, local quality and technology supervision authorities as well as industry and commerce administration at all levels.

from a relatively small number of tests⁵ run on a random basis. Also, PRC law is silent on the standard procedure to release the inspection results⁶, and the inspection results that have been released are not managed systematically. This undoubtedly increases the difficulty for quality control authorities to continuously monitor product quality and safety over a long term. These problems explain why Chinese-made products are still not defect-free after inspection by domestic administrative authorities.

B. Lack of a Punitive Indemnification Mechanism

Most of the recent recalls were caused by the use of hazardous raw materials in the manufacturing of the product. The economic explanation of this recall phenomenon is that many Chinese OEMs are forced to use inferior quality raw materials with lower costs to match importers' low-price expectations. The legal explanation is that lacking a punitive indemnification mechanism, OEMs are not motivated to ensure product safety.

Currently, China does not have a product liability law regulating liability in association with product safety. The PRC Product Quality Law⁷ is the primary legislation governing product liability. Basic civil laws, including General Principles of the PRC Civil Law ("General Principles"), also prescribe a number of product liability provisions. Also, though the Consumer Protection Law includes related penalties, they are not strict enough to serve as deterrents. These legislations provide protection to the consumers in terms of the establishment of product liability and legal procedure but are not comprehensive enough to address all aspects of product safety liability.

Article 41 of Product Quality Law provides that

"where the defect(s) of a product has caused personal injury or loss of property to the consumer ("Consumer's Property"), the manufacturer shall be liable for such injury or loss, unless the manufacturer can prove the existence of any of the following three situations:

- 1) the products have not been distributed or circulated by the manufacturer;
- 2) the defect(s) causing injury or loss does not exist when the products are distributed or circulated; or
- 3) the defect(s) was unable to be identified with the technology available at the time when the products are distributed or circulated.

According to the above provision, except under certain statutory situations discharging product liability, manufacturers shall be liable for losses suffered by the consumers if such losses are caused by the defect(s) in a product⁸.

Furthermore, the Supreme Court's judicial interpretation of civil procedures shifted the burden of proof on the manufacturer to prove the existence of a statutory exemption to be discharged of product liability⁹. However, the

⁵ Heavy metal tests are seldom performed during toy inspection. That's why recently recalled Chinese products have contained excessive levels of lead.

⁶ Article 19 of Import and Export Product Inspection Law only provides that the product inspection authority may release the inspection results or report the results to related authorities.

⁷ The PRC Product Quality Law was promulgated in 1993 and amended in 2000.

⁸ The establishment of product liability is intricate in court trial. According to our observation, even if none of the three statutory situations exist, the manufacturer may also be discharged from such liability in certain circumstances, e.g., the consumer uses the products in a manner that does not comply with the product instructions. .

⁹ Article 4 Paragraph 1 Item 6 of the Supreme Court's Rules for Evidence for Civil Procedure sets forth that "the burden of proving the existence of statutory situations discharging product liability is on the manufacturer in civil procedures involving losses or injury arising from defective products." This is contrary to the situation in most civil cases, where the plaintiff, who is the injured party, shall bear the burden of proof for causation that the injury or loss is caused by defendant's conduct or negligence.

nature of indemnification for product liability provided in the applicable laws is merely to compensate for the injury or property loss.

For example, Article 117 Paragraph 2 of General Principles of Civil Law provides that “a party that caused damages on the property of the state, a collective or individual shall restore the property to its original condition or compensate the losses of such damages.” Article 119 of General Principles of Civil Law provides that “a party causing injury to a citizen shall compensate the citizen for his/her medical expenses, loss of income, and living expenses where such injury causes physical disability; where the injury causes the death of the citizen, the party causing such injury shall pay for the citizen’s expenses, including funeral expenses and living expenses of the citizen’s dependent(s).”

Similarly, Article 44¹⁰ of Product Quality Law also provides compensations to the injured party, but none of them is of the penalty nature. The only quasi-penalty indemnification available to the injured party is provided by the Consumers Protection Law. Article 49 of the Consumers Protection Law sets forth that

where a business operator engages in fraudulent activities when providing a product or service, the operator shall increase its compensation to the consumer. The increased amount of compensation shall equal the amount the consumer paid for the product or service.

This provision exemplifies the type of administrative measures that are the current primary means to deter illegal activities related to product quality. However, these administrative penalties are far from strict enough to intimidate law breakers. According to Article 49 of Product Quality Law, a party manufacturing or selling products not conforming to national or industrial standards is only fined between one to three times of the value of the products¹¹. China’s existing three regulations regarding defective product recalls¹² also include administrative penalties for non-performance of recall duties, but a breaching party is subject to a maximum fine in the amount of RMB30,000. Such penalty is negligible compared with the profit a manufacturer would earn from the sale of defective products.

II. China’s Remedies for Recurring Recall Incidents

A. New Recall Regulations

On August 27, the General Administration of Quality Supervision, Inspection, Quarantine (“GAQSIQ”) promulgated Administrative Regulation on Food Recall (“Food Recall Regulation”) and Administrative Regulation on Toy Recall (“Toy Recall Regulation”) (collectively “New Recall Regulations”). Before that, Administrative Regulation on Defective Automobile Recall (“Automobile Recall Regulation”) jointly promulgated by GAQSIQ and the Ministry of

¹⁰ Article 44 of Product Quality Law provides that

where the defect(s) of a product causes physical injury to a party, the party responsible for such defect(s) shall compensate the injured party for medical expenses, nursing expenses, loss of income; where the injury causes physical disability, the responsible party shall also pay for the injured parties claims, including the expenses for necessary appliances to support the injured party’s normal life, basic living expenses, disability claim and dependency claim; where the injury causes the death of the injured party, the responsible party shall pay for the injured party’s claims including funeral claim, death claim and dependency claim. Where the defect(s) causes loss to a party’s property, the responsible party shall restore the property of the damaged party to its previous condition or compensate such loss. Where the damaged party suffers material loss, the responsible party shall be liable for the loss.

¹¹ Article 49 of Product Quality Law sets forth that a party manufacturing or selling products that don’t comply with national or industry standards on human health and personal and property safety shall be ordered to stop manufacturing or selling such products. In addition to the confiscation of the non-compliance products, the party shall receive a fine between one time and three times of the value of products manufactured or sold (including those that have been and have not been sold). Where the party has received illegal income from such products, such income shall be confiscated. Where the breach is serious, the business license of the party shall be cancelled and the party shall be charged criminal liabilities where a crime is established.

¹² They are Administrative Regulation on Food Recall, Administrative Regulation on Toy Recall and Administrative Regulation on Defective Automobile Recall.

Commerce on March 12, 2004 was the first and only legislation on defective product recall. The two New Recall Regulations have improved many aspects of defective product recalls compared with Automobile Recall Regulation.

First, the new recall regulations have refined the definition of defect. Automobile Recall Regulation adopted the criteria of “undue risks” or “nonconformity to national standards” to define “defects”, which is consistent with the criteria provided by the Product Quality Law¹³. Article 3 Paragraph 2 of Toy Recall Regulation sets forth that “defect under this regulation refers to the undue risks that imperil children’s health and personal safety that exist in a certain batch, model or category of a toy which arise from the design, manufacture or user’s manual of the product.” Therefore, “nonconformity to national standards” has been replaced by a more detailed criteria for product recall determined based on the existence of “undue risks” of a defective product. Also, the “defect” criterion for recalls has been clarified to include all products containing undue risks. However, Food Recall Regulation has discarded the concept of “defect”; instead, the regulation defines food that shall be recalled as “unsafe food”, which means “the food proven to have caused or might cause harm to human health” regardless whether the food product is unreasonably dangerous¹⁴.

Secondly, the New Recall Regulations have strengthened the power of GAQSIQ in deciding whether to initiate a recall. Automobile Recall Regulation requires the competent authority to establish a panel of experts to “investigate and assess” the defects of automobiles. When the experts’ panel believes defect(s) exist in the product, the authority shall recall such product after confirming the defect(s) exist¹⁵. Toy Recall Regulation provides more flexibility to product inspection authorities at and above provincial level to decide whether to establish an experts’ panel. Establishing the experts’ panel is at the authority’s discretion and the experts’ panel’s function has been expanded from “investigating and assessing” defect(s) to “providing technical support”¹⁶.

Third, the New Recall Regulations have reinforced administrative powers of product inspection authorities at and above provincial level. According to Automobile Recall Regulation, a manufacturer which disagrees with a mandatory recall decision made by the said authority may apply for administrative reconsideration or initiate an administrative litigation. The recall may be suspended during the said reconsideration or litigation process¹⁷.

¹³ Article 46 of Product Quality Law provides that “defects under this law means that undue risks that imperil the personal and property safety of consumers exist in a product or the situation in which the product does not meet the national or industry standards on protecting the personal and property safety of consumers where such standards apply.” Article 5 Paragraph 2 sets forth that “the defect under this regulation refers to the undue risks that imperil the personal and property safety that exist in a certain batch, model or category of automobiles due to design and manufacturing deficiency or the situation in which a product does not comply with the national or industry standards regarding automobile safety.”

¹⁴ The impact of food on human health and personal safety is the reason that Food Recall Regulation made such changes. The regulation also ranks food recall according to three levels of harm caused or might be caused by the unsafe food and imposes different levels of recall duties.

¹⁵ Article 11 of Automobile Recall Regulation provides that “the competent authority shall establish a panel of experts to investigate and assess the defects and authorize a qualified automobile quality inspection institution to perform technical tests upon the panel’s recommendation. The panel shall report and submit the investigation report to the authority.” Article 24 Paragraph 3 of the regulation sets forth that “the competent authority shall notify the manufacturer in writing to initiate voluntary recall once the authority confirms the defect(s) upon reviewing the expert panel’s assessment and testing results. The costs of defect assessment and testing shall be borne by the manufacturer. Where the manufacturer refuses to initiate voluntary recall, the authority shall initiate mandatory recall and order the manufacturer to cooperate according to Chapter 6 of this regulation.”

¹⁶ Article 20 of Toy Recall Regulation provides that the quality and technology supervision authority at or above provincial level may establish a panel of experts or authorize a product quality inspection institution or laboratory with appropriate qualifications to provide technical support to the investigation of defects and assessment of risks.”

¹⁷ Article 31 of Automobile Recall Regulation provides that

a manufacturer shall notify its distributors to stop selling the defective automobile within 5 working days from receiving the recall notice of the competent authority and send notice regarding the defects to its distributors and the consumers who have bought the product within 10 working days from receiving the recall notice. A manufacturer outside China shall notify the importers to stop importing the product within 5 working days from receiving the recall notice. A manufacturer who disagrees with the mandatory recall decision by the competent administrative authority may apply for administrative reconsideration or initiate an administrative

Unlike powers granted to manufacturers in Automobile Recall Regulation, Toy Recall Regulation only empowers the manufacturer to challenge the results of product defect investigation before the authority initiates a recall¹⁸. This means that the manufacturer cannot initiate administrative reconsideration or litigation against a mandatory recall for a toy recall decision.

However, the recall of imported and exported products is not subject to Toy Recall Regulation and Food Recall Regulation. It is subject to the administration of the import and export inspection and quarantine authority in accordance with relevant rules of GAQSIQ. Although China has not yet recalled any OEM products according to the existing three recall regulations, the recent OEM product safety incidents have demonstrated the necessity of applying recall to imported and exported products. It is expected that the legislations on OEM product recall, which carry the spirit of China's existing recall legal framework, will be stricter to better serve the international trade practices.

B. Strengthen Inspection for Exported Products

According to Article 4 Paragraph 4 of Toy Recall Regulation, China's OEMs are primarily liable to recall defective toys¹⁹. However, because the said provision does not apply to exported products, the Chinese government has neither initiated enforcement against an OEM that failed to recall a defective product nor coordinated with any recall of OEM products initiated by the authority of another country.

To respond to the recent recall incidents, the Chinese government has imposed higher standards for export inspection. In mid-August 2007, a special product quality and food safety taskforce was formed. The taskforce lead by Vice Premier Wu Yi started a 4-month program to improve product quality and food safety nationwide. From September 1, 2007, only food affixed with tags indicating that the food has passed PRC inspection and quarantine authority's export inspection shall be exported. Also, Minister of Commerce, Bo Xilai, communicated the government's confidence in the quality of China-made products to the public. According to Minister Bo Xilai, 99% of Chinese products imported by the US, EU and Japan are of satisfactory quality. Bo also pointed out that some of the product defects provoking recalls were not due to problems in the manufacturing, but rather, the design of the product²⁰.

These remedies are and can only be temporary solutions. For a major international exporter like China, the administrative costs of thorough and strict export inspection on a long-term basis are extremely high. Therefore, a more practical long-term solution would be to improve the inspection capability and self-discipline of domestic manufacturers.

III. Additional Measures to Impose Product Liability

A. Industry Associations To be Established

litigation. The recall may be suspended during the said reconsideration or litigation. However, the manufacturer must perform the said duties of sending notices to related parties.

¹⁸ Article 18 of Toy Recall Regulation sets forth that

“the manufacturer may explain the situation to or disagree with the authority, where the result of investigation on product defect by the manufacturer is inconsistent with that of the investigation by a quality and technology supervision authority at or above provincial level.

The authority may confirm the investigation result upon reviewing the disagreement via hearing or other means.”

¹⁹ Article 3 Paragraph 4 of Toy Recall Regulation provides that “the recall under this regulation refers to the actions initiated by the manufacturer or its distributors to prevent or eliminate potential risks or damaged caused by defective toys via means including adding information to or amending consumer's instructions, refunding, replacing or repairing the defective toys.”

²⁰ The Sixth Consultations between the ASEAN Economic Ministers (AEM) and the Ministry of Commerce (MOFCOM) of the People's Republic of China was held on August 25, 2007. The Tenth AEM Plus 3 (China, Japan and Korea) Consultations was held on August 26, 2007. During the meetings, Minister Bo Xilai made speeches regarding China's attitude towards product quality and food safety.

Mattel's largest recall yet, recalling about 18.2 million China-made toys on August 14, 2007²¹, arose from a defective design of a product rather than problems in manufacturing procedures. For this reason, the recall invoked a strong response among China's public. Many law-abiding Chinese OEMs complained about the negative impact such incident had brought to the credibility of products made in China. Some academics recommended that OEMs shall limit their liabilities to a more reasonable extent via contractual terms so that they will not become scapegoats of the negligence and omission of other parties²².

Nevertheless, the fact is that Chinese OEMs are usually small enterprises with limited financial strength. Furthermore, authoritative and binding OEM industry organization standards are yet to be established in China. So, when the importers raise their requirements on products, the manufacturers often have no choice but to compromise product quality. Manufacturers lack the bargaining power to pass on any increase in production costs to importers who require an increase in quantity or decrease in cost. Also, importers have recently begun to require the exporter or manufacturer to bear full liability for all losses caused by defective products, in addition to raising the bar for import inspection.

Responding to the new steps taken by the importers, some members of online communities in China called for establishing an industry association that may unite China's OEMs on the internet. With such an organization, the disadvantaged position of individual OEMs in trade transactions can be substantially improved with consolidated bargaining power. In addition, an industry association is helpful to build a new unified image for China's OEMs. The discipline of industry associations is complementary to the supervision of administrative authorities with limited resources. It would be difficult for manufacturers who break the law to survive pressure from their peers, even if they are not effectively regulated and punished through legal and administrative measures. This type of collective social awareness and action may reduce incidents of defective products manufacturing, thereby reducing the number of product recalls.

B. Introduction of a Penalty Mechanism

As stated above, the existing PRC legislations lack provisions on punitive indemnification. Although the PRC Criminal Law provides a section on the crime of manufacturing and selling of products that are fake and in poor quality²³, the parties engaging in such activities are seldom held criminally liable due the high thresholds of establishing such crimes. For this reason, China's legislature has been calling for introduction of a penalty system that has already been widely adopted in other jurisdictions. A penalty system will significantly increase the manufacturers' cost for violating the law beyond the existing compliance costs. Such penalty would effectively deter non-compliance with product safety requirements on the manufacturers, and reduce the liability attributed by unsafe products.

The promulgation of Toy Recall Regulation and Food Recall Regulation and the launch of ancillary programs demonstrated the PRC government's actions to regulate product liability and its determination to improve product quality and safety. The formulation of China's recall legislations will standardize the business practice of manufacturers and protect the rights and interests of consumers. However, recall legislations will not eliminate high product liability risks in international trade transactions. Product liability insurance will be an effective tool for manufacturers to manage potential legal risks.

²¹ See Mattel's website, <http://service.mattel.com/us/recall.asp>, last visited on September 29, 2007.

²² Several academics, including Dr. Gao Fei, Deputy Director of China Academy of Arbitration Law, made similar statement on a seminar regarding trade risk management and dispute resolution during the 102nd Guangzhou Fair held in October 2007. See Nanfang Daily published on October 20, 2007.

²³ Criminal Law Chapter 3 Section 1.

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

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THE CAPITAL MARKETS AND SERVICES ACT 2007

INTRODUCTION

The Capital Markets and Services Act 2007 ("CMSA") came into force on 28 September 2007 with the exception of Part VI Division 2. A massive legislation, comprising 394 sections and 11 schedules, it is the result of the implementation of Recommendations 92, 118 and 123 of the Capital Markets Masterplan which advocate the consolidation of the securities and futures legislation and the creation of a single licensing regime.

The Capital Markets and Services Regulations 2007, the Licensing Handbook and the Guidelines on Regulation of Markets came into effect together with the CMSA.

Part VI Division 2 relating to takeovers and mergers will be enforced in 2008 together with a new code to regulate takeovers and mergers.

The CMSA consolidates the provisions of Securities Industry Act 1983 ("SIA") and the Futures Industry Act 1993 ("FIA") and repeals those legislation. Certain provisions of the Securities Commission Act 1993 ("SCA") that have been incorporated into the CMSA have been repealed.

SECURITIES AND FUTURES MARKET

The establishment and regulation of stock exchanges, futures markets, exchange holding companies, and clearing houses for the securities market and the futures market were regulated separately under the SIA and the FIA. These provisions are now consolidated under Part II of the CMSA. The Guidelines on Regulation of Markets seek to provide a better understanding as to how the Securities Commission ("SC") will administer Part II of the CMSA.

Part II of the CMSA introduces new provisions to regulate electronic facilities (such as order routing facilities, market making facilities and electronic trading facilities) used to operate or maintain a stock market or futures market. The facilities operated by Bank Negara Malaysia for trading of unlisted debt securities are exempted from the CMSA.

CAPITAL MARKETS SERVICES

Part III of the CMSA sets out the licensing requirements in respect of capital markets services and provides for the regulation of such services.

Any person who carries on a business in any "*regulated activity*" is required to hold a Capital Markets Services Licence ("Licence") or be a registered person. The regulated activities specified in Schedule 2 Part 1 of the CMSA are dealing in securities, trading in futures contracts, fund management, advising on corporate finance, investment advice and financial planning. These are essentially an amalgamation of the activities that were hitherto licensed separately under the SIA and the FIA.

Each Licence will specify the regulated activity which its holder may carry out. The activities that fall within the purview of each regulated activity are set out in Schedule 2 Part 2.

The various classes of registered persons, such as licensed commercial banks, licensed merchant banks, Islamic banks and other market intermediaries, and the activities which they may undertake are listed in Schedule 4.

COMPENSATION FUND AND FIDELITY FUND

Part IV of the CMSA incorporates, with some modifications, the provisions of the SIA and the FIA that relate to the compensation fund and fidelity fund respectively.

MARKET MISCONDUCT AND OTHER PROHIBITED CONDUCT

Part IX of the SIA relating to prohibited conduct, market manipulation, insider trading and liability for unlawful activity are reproduced in Part V of the CMSA. Similarly, conduct which is prohibited in relation to futures contracts, such as bucketing and false trading, under Part VII of the FIA is now incorporated into this Part of the CMSA.

OFFERING AND ISSUE OF SECURITIES

Part IV and Schedules 1 to 5 of the SCA which regulate the offering and issue of securities are reproduced, with modifications, as Part VI and Schedules 5 to 9 respectively of the CMSA.

Several significant changes are introduced in Part VI. First, the SC is authorised to publish a registrable prospectus submitted to the SC for public information before it is registered.

Second, new provisions have been introduced which empower the Minister and the SC to make changes to conventional securities laws and the roles of market participants to give effect to *Shariah* principles in transactions relating to Islamic securities. These provisions are introduced to further Malaysia's aim of becoming an international centre for the origination and trading of Islamic instruments.

Schedule 5 of the CMSA introduces the following additional categories of transactions that do not require SC's approval under Section 212(4):

- the issue of securities by a Labuan incorporated or registered offshore company exclusively to persons outside Malaysia;
- the offer of securities of a foreign corporation which is listed on a recognised foreign stock exchange to existing members or debenture holders by means of a rights issue;
- the subdivision or consolidation of shares;
- the issue, without consideration, of additional securities in respect of a warrant, option or right approved by the SC; and
- the issue of non-transferable debentures by a corporation to its related corporation.

The categories of excluded offers or invitations or excluded issues have been expanded to include the issue of securities by a foreign corporation that is listed on a recognised foreign stock exchange to its existing members or debenture holders by means of a rights issue where such issue is accompanied by a prospectus or disclosure document approved by the foreign supervisory authority of such foreign corporation.

PROVISIONS APPLICABLE TO LISTED CORPORATIONS

The provisions of Sections 99B to 99F of the SIA which apply to listed corporations, such as disclosure of interests by the chief executive and directors, disqualification of a chief executive or director, submission of audited accounts and periodic financial reports, changes in chief executive or directors or registered address, duties of

auditors and the protection of whistle-blowers, have been incorporated, with modifications, into Part VII of the CMSA.

SELF-REGULATORY ORGANISATIONS

One of the objectives of the Capital Markets Masterplan is the self-regulation of the capital markets and services industry. The platform to achieve this objective is contained in Part VIII which introduces new provisions for the establishment, recognition, withdrawal and protection of self-regulatory organisations and the duties and rules of such organisations.

CAPITAL MARKET DEVELOPMENT FUND, DISCLOSURE OF INFORMATION, ADMINISTRATIVE AND CIVIL ACTIONS AND GENERAL PROVISIONS

The provisions relating to the Capital Market Development Fund, Disclosure of Information and General Matters contained in Parts IX, X and XII respectively of the CMSA incorporate, with modifications, certain provisions of Parts VIIIA, X and XI of the SIA and Parts VII and IX of the FIA.

Part XI of the CMSA sets out the powers conferred on the SC to take administrative actions against market participants for breach of the CMSA and securities laws and the right of aggrieved parties to take civil actions (and the right of the SC to do so on their behalf) against another person who has contravened Part VI of the CMSA. These provisions are derived from the corresponding provisions of the SCA, SIA and FIA.

REPEAL, SAVINGS AND TRANSITIONAL PROVISIONS

The subsidiary legislation contained in Schedule 11 have been repealed upon the coming into force of the CMSA. These include the Securities Industry Regulations 1987 and the Futures Industry Regulations 1995 which have been replaced by the Capital Markets and Services Regulations 2007.

Save as provided in Part XIII and Schedule 11, all subsidiary legislation, orders, directions, approvals, decisions notifications, exemptions and other executive actions made under the SIA and the FIA remain in force and effect until they are amended, repealed, rescinded, revoked or replaced under the CMSA.

Similarly, all actions, rules, regulations, orders, directions, notifications, approvals and decisions and other executive acts made under Section 2B and Part IV of the SCA are deemed to have been made under the CMSA.

Licences issued under the SIA and the FIA are deemed to have been issued under the CMSA in respect of the regulated activity which each licensee was carrying on under the original licences.

CONCLUSION

The CMSA is a significant milestone in the development of the capital markets in Malaysia. The introduction of the single licensing regime for the securities industry and the futures industry may spur the growth of capital market products.

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New rules for public offers in the Netherlands

29 October 2007

This newsletter is sent from our Amsterdam office

On 28 October 2007 the new rules for public offers came into force in the Netherlands, thereby implementing the European Takeover Directive of 21 April 2004 in Dutch law. The new rules have securities law aspects (in particular, the procedure for making a public offer), as well as corporate law aspects (e.g. the permissibility of protective measures). In general, the AFM is responsible for monitoring compliance with the securities law rules, while the authority to decide on the application of the corporate law rules is vested in the Enterprise Chamber of the Amsterdam Court of Appeal. The main exception to this are mandatory takeover bids, to be discussed below: the authority to decide whether such an obligation exists has been explicitly vested in the Enterprise Chamber.

The most important of the new rules will be described below.

Highlights of new rules

The securities law rules on public offers are based on a number of key provisions in the Financial Supervision Act (*Wet op het financieel toezicht*, "Wft"), which are elaborated upon in the Public Offers Decree (*Besluit openbare biedingen*, the "Decree").

- The Decree lays down the general rule that a public offer must be announced, by means of a public statement, no later than when an agreement, whether or not conditional, between the bidder and the target company has been reached. Such an announcement must include the intended price and the other agreed conditions under the offer. Where no agreement has been reached, the prospective bidder will nevertheless be deemed to have announced a public offer if it makes public concrete information about the intended offer, for example the intended price.
- To ensure clarity regarding the offering procedure, the Decree lays down strict *time limits*. Accordingly, no later than four weeks after the offer is announced, the bidder must make public whether it will issue an offer document. If the bidder intends to pursue the offer, it must, no later than 12 weeks after the offer is announced, submit the offer document to the AFM for its approval. In principle, the AFM will decide within 10 working days whether or not to grant its approval. The bidder then has six working days in which to actually make the offer by publishing the offer document.
- The rule requiring the bidder to refrain from announcing the offer until seven days after it has informed the target company's management board of the offer has been abandoned. Under the new rules, a *hostile offer* may be announced without prior notice.
- The initial *acceptance period* for shareholders may not be shorter than four weeks or longer than ten weeks. This period may be extended once by a minimum of two weeks and a maximum of ten weeks. In the event of a competing bid, the period may, however, be extended again until the end of the acceptance period for the other offer. After the offer has been declared unconditional, the so-called post-acceptance period may be set at a maximum of two weeks. Based on the above, the entire offering procedure will, in the absence of special circumstances, take a minimum of seven weeks and a maximum of 37 weeks.
- At least six working days before the end of the acceptance period, the target company must hold a *general meeting of shareholders* to discuss the offer. No later than four days before that meeting, the target company must provide a reasoned opinion in relation to the

- offer. If a competing offer is issued, the target company must make known its reasoned opinion in relation to that offer, but is not required to hold another shareholders' meeting.
- During the acceptance period (including any extension thereof), the bidder may *increase the offer* once.
 - The bidder is subject to the so-called "certain funds" rule: no later than at the time it requests the AFM to approve the offer document, the bidder must be able to produce any cash consideration necessary to give effect to the offer, or must have taken all reasonable measures to be able to produce any other type of consideration.
 - The Decree contains detailed requirements regarding the contents of the *offer document*. It must in any event contain all information a shareholder needs to make a well-informed choice.
 - A new requirement is that the offer document must state the compensation that will be paid to management and supervisory board members relating to the offer being declared unconditional.
 - The Decree also contains rules implementing the European passport for offer documents. On the basis of such a passport, the approval of other European supervisory authorities is no longer necessary once the AFM has approved the offer document.

Mandatory takeover bids

If a party, directly or indirectly, acquires control of a Dutch company all or part of whose shares, or depositary receipts for shares, are admitted to trading on a regulated market, that party is required to make a public offer for the remaining shares of the company (mandatory takeover bid).

"Control" is defined as the ability to exercise, whether or not in concert with others, at least 30% of the voting rights at a general meeting of shareholders. The purpose of this requirement is to protect the interests of minority shareholders.

The obligation to make a takeover bid does not apply, inter alia:

- to a party that acquires control of an open-end investment company (i.e. an investment company that is required to repurchase shares if the relevant shareholder so requests);
- to the trust office (*administratiekantoor*) holding the relevant shares in the target company where depositary receipts have been issued for those shares;
- to a legal entity whose object is to protect the continuity of the target company (e.g. a foundation holding protective preference shares in that company), provided that the entity is independent from the target company, the relevant shares are repurchased or redeemed by the company within two years of their having been issued and a public offer has been announced;
- to a party that already had control on 28 October 2007. In addition, the obligation to make a takeover bid does not apply to any subsequent expansion by such a party of his/its control.

If a party involuntarily acquires control, e.g. as a result of the repurchase by the relevant company of its shares, this party has the option of reducing the size of its holding within a period of thirty days, provided that no voting rights are exercised in the meantime.

Defensive measures

From a corporate law point of view, the most significant rules regarding defensive measures are the following:

- As indicated above, the introduction of the mandatory takeover bid limits the scope for issuing *preference or other protective shares* in the event of a threatened hostile offer. Before the announcement of such an offer, shares may not be issued to one or more parties together representing more than 30% of the voting rights without triggering the obligation to make a takeover bid for the remaining shares. After the announcement, protective preference shares may be issued, without triggering the mandatory bid obligation, to a legal entity whose object is to protect the company's continuity, provided that the other conditions set out above in this respect have been met.
- Listed companies may voluntarily provide in their articles of association that defensive measures may only be adopted with the *approval of the general meeting of shareholders*. The articles of association may also provide that restrictions on the transfer of securities or on voting rights, whether provided for contractually or in the articles, will not apply after the announcement of a public offer. In addition, the articles may provide that at the shareholders' meeting held to decide on whether to adopt the defensive measure, each share will be entitled to cast one vote.

- Companies may also apply a rule whereby any defensive measures in place will cease to apply if a bidder acquires at least 75% of the issued capital of the relevant company following a public offer (the "*breakthrough rule*"). Specifically, such a rule takes the form of provisions in the company's articles of association which (a) authorise a bidder that has acquired the above percentage to convene a general meeting of shareholders on short notice after the close of the acceptance period in order to amend the company's articles or remove or appoint management or supervisory board members, and (b) stipulate that voting at such a meeting shall take place on a one share/one vote basis.

Squeeze-out and sell-out rights vis-à-vis minority shareholders

Where after having made an offer, a bidder has acquired and holds, as shareholder for its own account, shares representing at least 95% of the target company's issued share capital and at least 95% of the voting rights, the bidder may initiate squeeze-out proceedings against all the remaining shareholders. If the offer was a mandatory takeover bid, the consideration offered in that bid will be deemed to be a fair price for the purposes of the squeeze-out. If the offer was a voluntary one, the consideration offered in that offer will be deemed a fair price if shares representing at least 90% of the company's capital were acquired through the offer.

If after having made a bid and acquired shares representing at least 95% of the target company's issued share capital and at least 95% of the voting rights, the bidder does not buy out a remaining shareholder, the latter may initiate sell-out proceedings in respect of his/its shares against the bidder.

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DVD piracy – the pendulum begins to swing in New Zealand

Two years on, the New Zealand film *Sione's Wedding* has now become almost as well known for copyright infringement as for its story. Recent estimates have suggested that around 20% of its profits were lost as a result of a plague of pirated copies of the movie that surfaced shortly before its release. The results were telling – the box office takings in Auckland, and particularly South Auckland, where the majority of the pirated copies were distributed, were poor compared to predictions, whereas throughout the rest of New Zealand the box office takings exceeded expectations.

Sione's Wedding - sentencing

The matter has recently come to glib conclusion – Frederick Junior Higgins, a man who had been employed for 11 years by the film's production house Digital Post Ltd, was eventually convicted as the man who made the initial copy of the movie.

Higgins subsequently faced two charges of theft under the Crimes Act, and one charge under section 131 of the Copyright Act for distribution of a submaster copy (an incomplete version of the film). Higgins argued that he had made a copy of the film for personal viewing and subsequently destroyed it. However, it was clear that the pirated copies must have originated from him. The fact that Higgins was in possession of the copy without the consent of the owner, and enabled it to be copied by others was held to amount to distribution. Higgins was found guilty and sentenced to a total of 300 hours of community service.

The sentence seems very lenient in light of the nature of the offence, the damage to South Pacific Pictures, and the potential penalties available under both the Copyright Act and the Crimes Act. Under the Copyright Act, DVD pirates can face penalties of up to five years imprisonment or fines of up to \$10,000 for every infringing copy to which the offence relates, but not exceeding \$150,000 in respect of the same transaction. Under the Crimes Act, offenders can face maximum imprisonment of up to 7 years depending on the value of the property stolen.

The leniency shown to the *Sione's Wedding* thief was in part because Higgins did not profit from his actions. The New Zealand courts have however shown signs of cracking down on "career" pirates. In August 2006, John Houston was sentenced to two years imprisonment - the toughest sentence yet for copyright offences in this country. Houston had used special software to unlock copy-protected DVDs and burned thousands of copies of top films to sell at Auckland street markets, making up to \$150,000 a year. In August 2007, two persons in Wanganui (one of whom was employed at a local video store) were also charged with making and selling pirated movies.

Self-Help

It is estimated that, in 2005, movie piracy cost the New Zealand film industry a total of \$70 million. This represents nearly half of the national box office takings in that year and an estimated 25% of the legitimate market overall.

Given the size of the problems and the leniency of the Courts, it is unsurprising that in New Zealand we are now seeing a greater move towards self-help by those in the vulnerable industries of movies, music and video games. This is occurring both at a rights-owner and industry level.

For frustrated rights owners (at least, those facing counterfeits originating abroad), the silver lining is Customs. New Zealand is blessed with an extremely efficient and effective Customs Services – and we are now seeing more and more entities taking advantage of this fact by filing copyright and trade mark notices to empower Customs to detain counterfeit products as they enter New Zealand. Given their low cost, the notices are delivering real value. We expect to see this trend increasing further in the future.

The other positive move has been at an industry level. The New Zealand Federation Against Copyright Theft, supported by the Ministry of Education, have commenced a more aggressive anti-piracy awareness campaign. This includes hiring New Zealand icon Temuera Morrison of the legendary *Jake the Muss*, to front a "Buy Original/See Original" campaign.

It remains to be seen how effective the prevention and education policies are in countering piracy in New Zealand. Hopefully they will make a positive impact, as clearly the threat of a few hours community service is unlikely to send waves of fear through the local and international criminal DVD pirates.

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Note: *The information provided in this article is intended to provide general information only. This information is not intended to constitute expert or professional advice and should not be relied upon as such. Specialist legal advice should always be sought for your particular circumstances.*

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DRAFT LAW ON FOREIGN INVESTMENT

The Duma is about to adopt a legislation restricting foreign investment in strategic sectors of Russian economy.

Last month, the Duma, the Russian lower house of Parliament, has passed the first reading of a draft law limiting foreign investment in strategic sectors introduced by the government after more than two years of fight between different state authorities. The text of the Law was not released and should be modified by the Duma in the preparations for the second reading.

Under the proposed law, foreign investment would be restricted if the targeted Russian company is operating in one of the 39 listed industries (including arms, aviation, space, and nuclear energy). Oil and gas would be the subject of a specific law.

A foreign investor wishing to purchase shares or enter into transactions that would lead to the control of a strategic company would need to obtain the agreement of a commission headed by the Prime minister. Shares bought without permission would not have voting rights at shareholders meetings.

COMPETITION LAW

The Federal Antimonopoly Service of the Russian Federation (the "**FAS**") has issued new orders concerning its cooperation with economic undertakings.

These orders relate to the implementation of practical cooperation following the legal modifications brought by Federal Law No. 135-FZ "On the protection of the competition" (the "**Competition Law**") adopted on 26 July 2006:

- order No.168 of 18 June 2007 "On approval of the list of documents and information to be provided to the FAS along with application by economic undertakings intending to conclude an agreement" which came into force on 10 August 2007; note that the FAS must respond to the applicant within 30 days of reception of said application;
- order No.184 of 25 June 2007 setting forth the form requirements of applications submitted by financial institutions pursuant to Article 35 para. 9 of the Competition Law relating to transactions with other financial institutions or any other state or private organisations, which came into force on 19 August 2007.

TAX LEGISLATION

Federal Law No.76-FZ dated 16 May 2007 "On changes to Articles 224, 275 and 284 of Part II of the Tax Code of the Russian Federation"

This law introduced the following significant changes relating to the taxation of dividends:

- Russian personal income tax on dividends paid by a Russian legal entity to non-resident individuals will be set at 15% (currently 30%);
- profit tax rate on dividends paid by foreign legal entities to Russian legal entities will be set at 9% (currently 15%);
- a 0% profit tax rate applies to the payment of dividends by a Russian legal entity to another Russian legal entity, provided that certain conditions are met: (i) the beneficiary has owned not less than 50% of the shares of the company distributing the dividends for not less than 365 days; and (ii) the beneficiary has invested not less than 500 mln RUB (around EUR 14 million) in the share capital of the distributing

company;

- dividends received by a Russian legal entity from a foreign legal entity are subject to 0% profit tax rate, provided that in addition to the conditions applicable to a payment of dividends by a Russian legal entity to another Russian legal entity, the State of residence of that foreign legal entity- beneficiary must not be included in the list of countries and territories (established by the Ministry of Finance of the Russian Federation) that benefit from a preferential tax regime and (or) which do not require the disclosure and provision of information relating to financial transactions.

This law will come into force from 1 January 2008.

Federal Law No. 75-FZ dated 16 May 2007 "On changes to chapter 22 of part II of the Tax Code of the Russian Federation"

This law introduces new excise tax rates for certain excisable goods for 2008, 2009, and 2010. Excise on certain goods has been increased, e.g. on some tobacco and alcoholic products. This law will come into force from 1 January 2008.

Federal Law No. 216-FZ dated 24 July 2007 and Federal Law No. 195-FZ dated 19 July 2007

These federal laws have introduced some amendments to Part II of the Russian Tax Code, most of which will come into force from 1 January 2008, with certain exceptions. The most significant amendments have been introduced to the following chapters of the Russian Tax Code:

- the profit tax chapter (in particular, property should be treated as depreciable property if its value exceeds RUB 20,000 - currently RUB 10,000);
- the value added tax ("**VAT**") chapter. The list of VAT exemptions has been expanded, in particular, the exemption will apply to:
 - development of certain new technologies and certain types of equipment;
 - implementation of certain types of scientific-research works;
 - transfer of rights relating to inventions, models, industrial samples, software, databases, know-how and provision of the right to use such results of intellectual property under licence agreements;
 - assignment of lenders' rights under loan and credit agreements;
- personal income tax chapter (in particular, voluntary pension insurance contributions will not be subject to personal income tax);
- the unified social tax chapter. In particular: (i) remuneration payable by an employer to foreign individuals under labour agreements signed with Russian company through its subdivisions outside of Russia, and (ii) remuneration payable to foreign individuals who provide works or services outside of Russia under civil agreements will not be subject to unified social tax. This provision is applicable to legal relations occurring as from 1 January 2007.

Order of the Ministry of Foreign Affairs and Ministry of Finance of the Russian Federation No. 6498/40n dated 8 May 2007 "On confirmation of the list of foreign States of which citizens and companies accredited in the RF, can apply for VAT exemption on the rent of premises in the territory of the RF"

This order establishes a new list of countries whose citizens and whose accredited representative offices of legal entities registered in such countries are entitled to VAT exemption in respect of rent of premises in the Russian Federation. Certain restrictions relating to the application of such an exemption are established in respect of several countries (for example, as far as France is concerned, the exemption applies only for rent of unfurnished premises). This order came into force as of 6 July 2007.

LABOUR LAW

The Labour Code of the Russian Federation was modified by Federal Law No. 54-FZ dated 20 April 2007 "On amendments to the Federal Law 'On the minimum monthly wage' and other laws".

Pursuant to these modifications, the minimum monthly wage ("**MMW**") has increased up to RUB 2,300 (approximately EUR 65). Moreover, a provision has been introduced according to which as of 1 September 2007, the MMW may be set up by a regional agreement signed by a regional social-employment relations commission within the relevant administrative territory of the Russian Federation provided that it is at least

as high as the one fixed by the Federal Law.

All employees from the relevant territory shall benefit from the regional MMW apart from employees of State financed organisations. However, employers may decline to join the regional agreement by filing a motivated refusal to the authorised executive body within 30 days of the date of publishing of the regional agreement.

PRESUMPTION OF RECIPROCITY IN PATENT INFRINGEMENT SUITS

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The proviso to Article 91 of the Patent Act stipulates that for a foreign corporate entity to bring a civil suit for patent infringement in Taiwan under the provisions of the Act, the entity's own country must provide reciprocal treatment to Taiwanese citizens and entities. There has been much disagreement in practice as to whether, when a foreign entity files such litigation, it must first produce evidence showing that its own country accords reciprocal treatment to Taiwanese entities.

In a 2007 ruling, the Supreme Court held that although international reciprocity in terms of ability to file patent applications is different in nature from reciprocity in terms of ability to litigate, if a country permits a foreign entity to apply for patent rights in that country, it can be assumed that it will also permit such an entity to protect such rights through litigation, for only thus would it comply with the legal doctrine that "where there is a right, there is a remedy" (*ubi jus, ibi remedium*). Therefore, although the proviso to Article 91 of the Patent Act imposes the condition of reciprocity, if a foreign entity has acquired patent rights in Taiwan, then based on the above doctrine, in principle the entity should be allowed to assert such rights by bringing civil litigation against patent infringement, without the need to produce evidence that its own country does indeed comply with the requirement for reciprocity. Therefore, if an infringer states in its defense that Taiwanese corporations that have acquired patent rights in the country concerned are unable to invoke remedies to protect such rights, the onus is on the infringer to present evidence of such exceptional circumstances.

For additional information visit www.leeandli.com



UPDATE

This update is intended only as a summary of the requirements under Revenue Procedure 2007-65.

If you would like to discuss how Revenue Procedure 2007-65 affects your operations, please contact a member of our Renewable Energy Tax Group, including:

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Revenue Procedure Establishes a Safe Harbor for "Partnership Flip" Structures in Wind Projects

On October 19, 2007, the IRS issued Revenue Procedure 2007-65 (the "Rev Proc"), which announced a safe harbor for partnership structures used to finance wind farms. Specifically, the safe harbor sets forth the economic terms which, if present, will ensure that the IRS will not challenge the validity of the partnership for federal income tax purposes or the allocation of production tax credits ("PTCs") among the partners in the partnership.

Section 45 of the Internal Revenue Code provides a 2 cents per kilowatt hour tax credit for electricity generated and sold by qualifying wind projects that are placed in service before 2009. The credit is available for such wind projects for a 10 year period, beginning when the project is placed in service. Congress is expected to extend the credit beyond 2008, but the exact timing of Congressional action is uncertain.

A common technique to finance the construction of wind projects is the "partnership flip" structure, which involves the formation of a tax partnership between a developer and one or more tax equity investors. Under this structure, the tax equity investor is allocated the vast majority of the PTCs for the ten year period during which the PTCs are available for the project. The Rev Proc sets forth minimum requirements which, if met, will ensure that the IRS will respect the partnership as a partnership and will not challenge the allocations of PTCs.

This safe harbor is available for any partnership between a wind developer and one or more tax equity investors. To qualify for the safe harbor, each of the following requirements will have to be met:

- at all times, the wind developer must have at least a 1% interest in all material items of partnership income, gain, deduction, loss, and credit, including PTCs;
- at all times, each tax equity investor must have an interest in all material items of partnership income and gain equal to at least 5% of its largest such interest;
- at the time the wind farm is placed in service and at all times thereafter, the tax equity investor must have at least a 20% unconditional investment in the partnership;
- at least 75% of the tax equity investor's capital contributions must be fixed and determinable;
- the tax equity investor may not hold an option that allows it to "put" its partnership interest, but the wind developer may hold a "call" option that allows the developer to repurchase at fair market value the tax equity investor's interest after at least five years have elapsed since the wind facility had been placed in service;
- the tax equity investor's allocation of PTCs may not be guaranteed;

- the partnership must bear the risk of wind availability, and the wind developer, the turbine supplier, a power purchaser, or another project participant may not guarantee the availability of wind; and
- the wind developer may not lend to or guarantee the investment of the tax equity investor in the project.

The Rev Proc provides that a transaction that does not meet each requirement of the safe harbor will generally receive close scrutiny from the IRS. The Rev Proc states that the IRS will not issue private letter rulings on any partnership tax issues relating to PTCs. Further, the Rev Proc applies only to partners and partnerships in wind power projects and does not apply to other types of projects. While IRS guidance in the form of a safe harbor is always welcome, this particular guidance is not novel. We believe that a partnership flip structure that meets the requirements of the Rev Proc would clearly have passed scrutiny under the partnership tax rules.

This Update is intended only to provide a general summary of Revenue Procedure 2007-65. It does not discuss all aspects of the Revenue Procedure and should not be interpreted as providing legal advice regarding these provisions. Under applicable Treasury regulations, this advice is not intended or written to be used, and cannot be used, for the purpose of avoiding any penalties.

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CUSTOMS UPDATE

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U.S. Trade Representative Announcement Regarding Loss of GSP Eligibility for Certain Imports

The office of the United States Trade Representative (USTR) recently issued a notice identifying imported goods from certain beneficiary countries that may be removed from GSP eligibility for duty free treatment because their import levels exceed "competitive need limits" (CNLs).

Companies wishing to file petitions for the waiver of the CNL for any of these products must do so by November 16, 2007. This update provides additional background information on the GSP program, as well as information regarding the products subject to GSP removal and the waiver process.

The Generalized System of Preferences is a trade preference program designed to promote economic growth in developing countries by providing duty-free treatment to more than 3,000 products from more than 130 designated beneficiary countries and territories, and currently covers more than \$25 billion worth of imports.

Imports from a particular developing country that are currently eligible for GSP treatment may be removed from such eligibility if imports meet specified CNLs. Eligible goods meet the CNL when the dollar value of imports into the United States exceeds either: (1) the statutory amount for that year (\$130 million for 2007), or (2) 50 percent of the total value of U.S. imports of the same product (the "50 percent CNL"). Once either of these thresholds is reached, the specific import from that country does not qualify for GSP treatment effective July 1 of the following year.

The President may grant a waiver of the CNL for articles imported from specific countries in two situations. First, interested parties may petition the president to waive the CNLs with respect to certain articles; the deadline for submission of such a petition is November 16, 2007. Second, the President may also waive the 50 percent CNL with respect to an eligible product if the value of total imports of that article from all countries during the calendar year did not exceed the de minimis amount for that year (\$18.5 million in 2007). Comments on de minimis waivers will not be requested until February 2008.

The USTR released a list of goods that have either already surpassed the CNL for 2007, or are on pace to do so by the end of the year. These products will no longer receive duty-free treatment under the GSP unless the CNL is waived after a successful petition. The majority of the products



on the list qualify for a de minimis waiver as they do not exceed the minimum import limit. However, some listed products that have exceeded the CNLs may no longer receive duty-free treatment unless an importer successfully petitions for a waiver. The Harmonized Tariff Schedule subheadings and specific country of origin of these goods are as follows:

- 2001.10.00 – India – cucumbers prepared by vinegar
- 2918.99.30 – India – Aromatic drugs derived from carboxylic acids
- 4107.19.50 – Brazil – Whole upholstery leather of bovines
- 4107.91.80 – Argentina – Full grain unsplit bovine & equine leather
- 4415.10.90 – Brazil – Wood cases, boxes, crates, and drums
- 7413.00.50 – Turkey – Copper, cables, plaited bands, and similar goods
- 7901.12.50 – Kazakhstan – Certain types of unwrought zinc
- 7907.00.20 – India – Zinc tubes or pipes and related zinc fittings
- 8103.90.00 – Kazakhstan – Tantalum
- 8528.72.16 – Thailand – Certain non-high definition television reception appliances
- 9602.00.50 – Colombia – Vegetable, mineral, or gum materials

Companies whose imports are currently duty-free under the GSP program should review the full list to determine if they will be affected by any proposed changes.

By Lewis Leibowitz, Craig Lewis, and Teresa Polino

Hogan & Hartson frequently publishes the Customs Update to track regulatory and legal changes that will have an impact on companies worldwide. Should you be interested in learning more about this or other customs issues, please contact the attorney with whom you work or one of the attorneys below who specializes in customs matters.

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Increase to California's Minimum Wage to Take Effect January 1, 2008

November 7, 2007

In accordance with a 2006 legislative enactment, effective January 1, 2008, the California minimum wage will increase by \$0.50, from \$7.50 per hour to \$8.00 per hour.¹ This increase will have broad-ranging effects on companies with employees in California.

Employees Classified as Nonexempt

Companies that employ minimum-wage workers in California will need to plan for the increased wage costs, including the resulting increase in overtime wage rates. Unlike the Fair Labor Standards Act (FLSA), California's definition of "overtime" includes time worked in excess of eight (8) hours in one workday, as well as time worked in excess of forty (40) hours in one workweek. In general, California requires payment of overtime at no less than one and one-half times the minimum wage. In certain circumstances, however, overtime must be paid at no less than two times the minimum wage.

Exempt Classifications

The minimum wage increase also will have an impact on the compensation to be paid to California employees who are classified as exempt.

Just as under the FLSA, California law generally requires that a position meet the following two tests in order to be exempt from the minimum wage and overtime requirements of the California Labor Code and corresponding Wage Orders: (1) a compensation test, and (2) a duties test. The compensation test for the California "white collar" exemptions requires that the position pay a salary—a regular, recurring amount not subject to reduction or offset based on the quantity or quality of work performed—that is at least two times the California minimum wage. This means that, effective January 1, 2008, positions intended to be exempt under California's executive, administrative, or professional exemption must pay a salary of at least \$640 per week, which is equivalent to \$2,773.33 per month or \$33,280 per year.

Positions intended to be exempt under California's "inside commissioned sales" exemption must satisfy a different compensation test. Those positions need to generate total compensation for the incumbent

¹ Under the authority reserved to local governments by the California Constitution and California Labor Code section 1205(b), San Francisco adopted its own minimum wage effective February 2004. As of January 1, 2008, the San Francisco minimum wage payable to nonexempt employees who work at least two (2) hours in a given workweek within the geographic boundaries of San Francisco will be \$9.36 per hour.

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