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October 2007 e-BULLETIN

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PRAC MEMBERS SET TO GATHER IN SEOUL

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

Kim Chang & Lee is a founding PRAC member . Established in 1958, Kim Chang & Lee is Korea's oldest law firm. To find out more about them , visit www.kimchanglee.co.kr

KIM, CHANG & LEE

MEMBER DEALS MAKING NEWS

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►**Brigard & Urrutia Advises McDonald's Latin America in Sale to Arcos Dorados**

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- PRAC Member Directory
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- Conferences & Events

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

Visit us online at www.prac.org

BAKER BOTTS LLP ANNOUNCES NEW PARTNERS FOR 2008

HOUSTON, October 10, 2007 -- Baker Botts L.L.P.'s Managing Partner, Walter J. Smith, today announced the firm's 2008 new partners. Effective January 1, 2008, 18 lawyers will comprise the 75th group in the firm's history to become new members of the partnership on New Year's Day.

"This group of new partners carries on a tradition at Baker Botts of recognizing exemplary legal work," Smith said. "When our clients call on us, they want to be confident that their interests are being well-represented. These new partners add to our pool of leading lawyers who provide that high level of service."

The 2008 new partners for Baker Botts include:

Brooksany Barrowes/Global Projects, Washington
Jason Bennett/Global Projects, Dallas
Paige Ben-Yaacov/Tax, Houston
Mark Cook/Global Projects, Washington
Samantha Crispin/Corporate, Dallas
Aaron Davidson/Litigation, Dallas
Derek Green/Tax, Houston
Breen Haire/Corporate, Houston
Brian Henchey/Corporate, Dallas
Rebeca Huddle/Litigation, Houston
Kevin Jacobs/Litigation, Houston
Scott Janoe/Environmental, Houston
Kurt Pankratz/Intellectual Property, Dallas
Barton Seitz/Environmental, Washington
Chad Walters/Intellectual Property, Dallas
Russell Wilkinson/Global Projects, Hong Kong
Eliot Williams/Intellectual Property, New York
Renee Wilm/Corporate, New York

Additional information on our new partners can be found at www.bakerbotts.com
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About Baker Botts L.L.P.
Baker Botts L.L.P., founded in 1840, is a leading international law firm with offices in Austin, Beijing, Dallas, Dubai, Hong Kong, Houston, London, Moscow, New York, Riyadh and Washington. With approximately 750 lawyers, Baker Botts provides a full range of legal services to regional, national and international clients. For more information, please visit www.bakerbotts.com

NAUTADUTILH APPOINTS FIVE PARTNERS ACROSS BENELUX OFFICES

Leading Benelux law firm NautaDutilh has announced the appointment of five new partners at its annual Shareholder Partners' meeting on 21st September.

Christiaan de Brauw (37)
Corporate & Commercial, Amsterdam

Homme ten Have (33)
Employment, Amsterdam

Rutger Kalsbeek (34)
Corporate & Commercial Litigation, Rotterdam

Josée Weydert (38)
Banking, Luxemburg

Jan Werbrouck (42)
Tax, Brussels

For additional information visit www.nautadutilh.com

Tilleke & Gibbins Consultants Limited
announces the relocation of its Hanoi office to:

HAREC Building, 4th Floor
4A Lang Ha Street
Ba Dinh
Hanoi, Vietnam
Tel: (84-4) 772 6688
Fax: (84-4) 772 5568
E-mail: inquiry@tillekeandgibbins.com
with effect on September 29, 2007.

HOGAN & HARTSON LLP EXPANDS DOMESTIC AND INTERNATIONAL REAL ESTATE PRACTICE WITH ADDITIONAL OF MIAMI PARTNER

MIAMI, September 13, 2007 — Hogan & Hartson LLP announced today that Joseph M. Hernandez has joined the firm's Miami office and real estate practice as a partner. In his new role, Hernandez will significantly broaden the firm's domestic and international real estate capabilities.

Hernandez, who was previously a corporate and real estate banker, represents real estate developers in all phases of complex commercial real estate transactions, including the negotiation, documentation, and closing of the acquisition and sale, development, and financing of commercial real estate. He represents both financial institutions and borrowers obtaining acquisition and construction financing, and has handled the resolution of complex title issues. In addition, Hernandez has significant experience in documenting and negotiating real estate joint ventures and private placements to raise capital for real estate projects.

Hernandez has represented several U.S. and foreign institutional investors in the acquisition, development, and financing of commercial real estate projects throughout the Caribbean and Latin America. He has represented several major financial institutions extending financing for commercial real estate projects, as well as non-real estate related secured loan facilities.

"The breadth of Joe's experience in real estate transactional work will be a great asset to the firm and the Miami office. We are delighted to welcome him to Hogan & Hartson as we continue to expand our capabilities in that area," said Parker Thomson, Managing Partner of Hogan & Hartson's Miami office.

"I am very excited to join such a dynamic and skilled group of lawyers in the Miami office. I look forward to growing my domestic and international real estate practice at Hogan & Hartson," said Hernandez, commenting on his move.

Prior to joining Hogan & Hartson, Hernandez was a partner in the real estate practice at Greenberg Traurig.

Hernandez, who is fluent in Spanish, was formerly the Chairman of the board of directors of Junior Achievement of Greater Miami and now serves as a board member. He also is a member of the Greater Miami Chamber of Commerce and the United Way's Young Leaders Society. In addition, Hernandez teaches a real estate transaction workshop at the University of Miami Law School.

Hernandez received his law degree from the University of Miami School of Law, cum laude, and his bachelor's degree from the University of Florida.

About Hogan & Hartson

Hogan & Hartson opened its Miami office in 2000 and has grown to include nearly 40 lawyers practicing in the areas of health care, litigation, international finance, corporate and securities, and real estate law.

Hogan & Hartson is an international law firm founded in Washington, D.C. with more than 1,000 lawyers in 22 offices worldwide. The firm has a broad-based national and international practice that cuts across virtually all legal disciplines and industries.

Hogan & Hartson has offices in Baltimore, Beijing, Berlin, Boulder, Brussels, Caracas, Colorado Springs, Denver, Geneva, Hong Kong, London, Los Angeles, Miami, Moscow, Munich, New York, Northern Virginia, Paris, Shanghai, Tokyo, Warsaw, and Washington, D.C.

For more information about the firm, visit www.hhlaw.com.

LUCE FORWARD HAMILTON & SCRIPPS LLP

JEROME A. GROSSMAN APPOINTED CHAIR OF THE OPINIONS COMMITTEE

October 4, 2007

Jerome A. Grossman, a partner in Luce Forward's San Diego office, has been appointed Chair of the Opinions Committee of the Business Law Section of the State Bar of California.

The purpose of the Opinions Committee is to review, and to help formulate, the Business Law Section's public positions on third party legal opinions and to support and coordinate the work of the Section's standing committees on significant opinion issues. As Chair, Grossman's responsibility will be to interact with the Business Law Section's Executive Committee and other standing committees to ensure all opinions reports and other publications of the Section concerning third-party legal opinions are consistent. He will also preside over meetings, help coordinate the work of the committee and keep projects moving.

Grossman is part of Luce Forward's business/corporate practice group. He has been involved with the Opinions Committee since it was initially formed as a special task force, in 2000. During the past 25 years, Grossman has been heavily involved with delivering and negotiating legal opinions and has helped the firms he has worked for develop and refine their formal opinions for various transactions.

"It is a great honor for me to serve as Chair of the Opinions Committee," Grossman said. "This committee plays a valuable role in making the negotiation process flow more smoothly, especially as giving and receiving opinions are integral to so many transactions in which attorneys are involved."

In his practice, Grossman also specializes in Uniform Commercial Code secured transactions, real estate secured transactions and other financing transactions (including securitized financings).

For additional information visit www.luce.com

TOZZINI FREIRE ADVOGADOS

EXPANDS CHINA DESK

Our associate, Arquelau So, is currently participating in an exchange program for lawyers sponsored by King & Wood, one of the most prominent law firms in China.

As one of the first law firms in China, King & Wood was established in 1993 and is currently ranked #1 law firm in China, with over 600 lawyers.

King & Wood is a full service law firm, headquartered in Beijing, with offices in Shanghai, Shenzhen, Chengdu, Guangzhou, Chongqing, Xi'an, Hangzhou, Tianjin, Hong Kong, Tokyo and Silicon Valley (www.kingandwood.com).

Arquelau is fluent in Mandarin, and coordinates, together with our partner Shin Jae Kim, the China Desk of TozziniFreire since 2005.

While at King & Wood, Arquelau will work in the bank practice group, and will be in charge of the Brazilian Desk.

TozziniFreire's China Desk is growing. Associate Juliana Tsai, fluent in mandarin, joined TozziniFreire in September. Juliana is an excellent addition to our China Desk, which is now composed of 6 members.

For additional information visit www.tozzinifreire.com.br

WILMERHALE

HIRES FORMER REGIONAL SEC DIRECTOR, EXPANDING CALIFORNIA PRESENCE AND STRENGTHENING SECURITIES PRACTICE

September 20, 2007

WilmerHale is pleased to announce that Randall Lee, former Regional Director in Los Angeles for the U.S. Securities and Exchange Commission, has joined the firm as Partner in its securities practice. He will be opening WilmerHale's new office in Los Angeles, and bolstering the firm's preeminent securities practice, which includes in its ranks many other former SEC officials.

This expansion follows WilmerHale's entry into California in 2005 with its Palo Alto office. The L.A. practice will enable WilmerHale to extend its leading intellectual property, intellectual property litigation, corporate, securities litigation and enforcement, and white collar defense practices to the southern California area.

“We are thrilled to have Randall join our firm, and to open an office in Los Angeles,” said William F. Lee and William J. Perlstein, co-managing partners of WilmerHale. “Our expansion will enable us to better serve our clients who are based on the West Coast or whose legal work arises in that region.”

Randall Lee served as the SEC’s Regional Director for the Pacific Region, based in Los Angeles, from 2001 until July of this year. As the first Asian American to head one of the SEC’s regional offices, he was responsible for overseeing the SEC’s enforcement and examination programs in nine Western states.

“Randall’s expertise in securities law and his proven leadership abilities make him a tremendous asset to WilmerHale and to our clients,” said William R. McLucas, chair of the Securities Department at WilmerHale. “He will help to make our securities law practice—one of the largest and most diverse of its kind—even stronger.”

WilmerHale’s securities practice consists of more than 225 lawyers, including many others who served at the SEC, such as McLucas, who was Director of Enforcement for eight years. The securities practice has successfully resolved some of the most significant and complex securities investigations and litigations over the last two decades. The practice offers sophisticated regulatory compliance advice and corporate governance counseling to companies and other financial market participants in the United States and Europe, and is highly regarded for its representation of investment management and broker-dealer businesses.

“WilmerHale has the nation’s premier securities practice, a roster of renowned attorneys across a broad range of practice areas and a deep commitment to public service,” said Randall Lee. “I am delighted to be joining such a distinguished firm, and I look forward to spearheading the new Los Angeles office and to representing and counseling the firm’s clients.”

Prior to joining the SEC, Lee was an Assistant United States Attorney in Los Angeles from 1994 to 2001. He served as a Deputy Chief in the Major Frauds Section of the Criminal Division. Before that, Lee practiced corporate and securities law at the firm of Munger, Tolles & Olson in Los Angeles. He began his legal career as a law clerk to the Honorable James L. Buckley on the United States Court of Appeals for the District of Columbia Circuit.

Lee received his B.A. from Yale University in 1983 and his J.D. from the Boalt Hall School of Law, University of California, Berkeley, in 1989, where he graduated Order of the Coif and was an Articles Editor on the *California Law Review*.

For additional information visit www.wilmerhale.com

BAKER BOTTS LLP

NAMED LEGAL ADVISER FOR SAUDI ELECTRICITY COMPANY ON POWER PLANTS TOTALING 3000MW

Landmark Appointment Emphasizes Firm's Recent Growth in Middle East Capabilities

RIYADH, October 8, 2007 -- The Saudi Electricity Company (SEC) has named Baker Botts L.L.P., in association with the law firm of Mohanned Bin Saud Al-Rasheed, as legal adviser on all aspects of the development of two independent power plants to be built in Saudi Arabia that will add more than 3000 megawatts to the country's power grids when completed.

The projects are planned for Rabigh and Riyadh with Rabigh scheduled for commercial operation in 2012 and Riyadh in 2013. The plants are to be built on a Build-Own-Operate (BOO) basis with the SEC as sole offtaker.

"SEC is responsible for meeting the rapidly increasing demands for power created by the explosion of growth in Saudi Arabia's industry, petrochemicals and infrastructure," said Nigel Thompson the Baker Botts partner based in Dubai who will lead the team on the projects. "With our experience and long standing presence in the Region and Riyadh in particular, headed by Special Counsel Babul Parikh, Baker Botts has the skills and expertise necessary to assist SEC to meet this challenge."

In addition to Baker Botts acting as legal adviser, Citi has been named financial adviser and the Fichtner Group technical adviser on the projects.

This landmark appointment serves to emphasize Baker Botts' recent growth in the region. Earlier this month, David Emmons was named partner in charge of the firm's Middle East offices in Dubai and Riyadh. His appointment followed the hiring earlier this year of Nigel Thompson and Sean Korney as partners in the firm's Dubai office, all three joining incumbent partner Stephen Matthews.

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About Baker Botts in the Middle East

Through its Dubai and Riyadh offices, Baker Botts offers great depth of experience and knowledge in the Middle East and broad-based expertise in energy-related project development and finance. The firm represents clients in the region not only in the energy industry but also in the telecommunications, manufacturing, transportation, construction, and banking industries, among others. The firm's practice also encompasses transactional work, including entity formation and structuring, contract negotiation, and banking and finance, as well as litigation and arbitration matters internationally. Baker Botts' energy-related project development and finance work is enhanced by the firm's experience with the complex issues faced in financing these projects under local law, which is largely founded on the *shari'a* or Islamic law.

For more information visit www.bakerbotts.com

BRIGARD & URRUTIA

ADVISES MCDONALD'S LATIN AMERICA IN SALE TO ARCOS DORADOS

McDonald's Latin America sold the franchising rights to operate 1,600 existing restaurants throughout Latin America and the Caribbean.

Brigard & Urrutia advised McDonald's Latin America in connection with the structure in Colombia concerning the sale of the franchising rights of 1,600 restaurants throughout Latin America and the Caribbean to Arcos Dorados for USD$700 million. The firm reviewed tax, corporate and commercial matters involved in the deal.

The deal closed in August, 2007.

The deal was lead by Brigard & Urrutia partners Carlos Umaña and Luis Gabriel Perez, assisted by associate Maria Juliana Perez.

For more information visit www.bu.com.co

GIDE LOYRETTE NOUEL

ADVISES LAGARDERE SERVICES ON SALE TO RAUTAKIRJA OF PRESS POINT INTERNATIONAL

Gide Loyrette Nouel advised Lagardère Services, formerly Hachette Distribution Services, world leader in travel retail and press distribution, on the sale to Rautakirja of Press Point International, one of the leading international press importers in Russia and the CIS, and HDS CIS, which operates Relay and Inmedio press publication and book stores in Russia. The completion of this transaction is subject to Russian competition authority approval.

Rautakirja, a Finish company specialising in press distribution, press publication stores, cinemas and book stores, is a member of the Finish media group, SanomaWSOY, listed on the Helsinki Stock Exchange. This transaction will enable Rautakirja, which already has a foothold in Russia, to increase the number of its R-kiosk sales outlets.

Legal counsel to Lagardère Services:
Gide Loyrette Nouel: Nadège Nguyen and Edgard Nguyen form the Paris Office, and Victor Topadze from the Moscow Office

For additional information visit www.gide.com

CLAYTON UTZ

CAPITALIZES ON CHINA RESOURCES INVESTMENT THROUGH MAJOR WESTERN AUSTRALIA INFRASTRUCTURE DEAL

Sydney, 24 September 2007

Clayton Utz has advised Perth-based company Yilgarn Infrastructure Limited[1] on a proposed major project that is set to deliver vital infrastructure to Western Australia's resources sector and also enhance Australia-China investment.

Yilgarn's estimated A$3 billion Oakajee Port and Rail Project will see the construction of an independently owned and operated common-user deepwater port north of Geraldton and a rail network to service multiple iron ore mines in the Mid West region – increasing the production flow of important minerals, particularly iron ore, to China and other countries.

The project will be partly funded by five major Chinese companies — Sinosteel, China Railway Engineering, China Communication Construction Company, China Railway Materials Commercial and Anshan Iron & Steel Group —through a A$750 million equity deal for the development, construction and operation of the infrastructure. China's EXIM Bank and China Development Bank will provide debt financing for the project.

The deal was finalised in a ceremony witnessed by senior members of the Chinese and West Australian governments in the week of the recent Asia Pacific Economic Co-operation meeting. It is the first time such a large group of Chinese state-owned enterprises has invested in an Australian company.

Sydney Corporate partner Susan O'Rourke led the Clayton Utz team advising on the deal, supported by partners Wally McDonald, Peter Wiese and Paul Humphreys.

"We are pleased to have advised Yilgarn on this important project, which will enable the Mid West's commercial mines to develop and expand their investments confident in the knowledge that they will have access to vital infrastructure that will help them to deliver to global markets. For us, this is a new milestone in Chinese investment into the Australian resources industry and the linkage to infrastructure."

Yilgarn Infrastructure Limited Executive Chairman Dr John Saunders described the project as a "long-term, sustainable regional plan with benefits that will flow to the whole State".

Subject to environmental and other approvals, the project is due for completion in 2011.

For additional information visit www.claytonutz.com

ENDS

[1] Yilgarn Infrastructure Limited is an unlisted public company based in Perth, established to supply the mining and resources industry in the Mid West region of Western Australia with efficient rail and port services on an open-access, multi-user basis.

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Clayton Utz Media Releases are intended to provide commentary and general information. They 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 Media Release. Persons listed may not be admitted in all states.

HOGAN & HARTSON LLP

ADVISES ON FIRST RUSSIAN AIRPORT ACQUISITION EVER MADE BY INTERNATIONAL INVESTOR

MOSCOW, October 4, 2007 – Hogan & Hartson announced that it is advising Meinl Airports International on its acquisition of a 100 percent stake in the international airport in the Siberian city of Ulan Ude. This is the first acquisition of a Russian airport ever made by an international investor. Meinl Airports International focuses on investments in airports and airport related business in Central and Eastern Europe. For Meinl Airports International, this strategically important project is its successful entry into this emerging market, which will be followed by further projects in Russia.

Meinl Airports International envisages significant investments in modernization of the existing airport and development of the commercial airport infrastructure of Ulan Ude.

Hogan & Hartson advised Meinl Airports International on both the legal and tax issues in connection with the transaction, including review of the target company, corporate and tax structuring of the transaction, advice on financing issues in connection with airport modernization, advice on real estate and land law issues, as well as advice on licensing and certification issues for airports and airport related businesses.

The Hogan & Hartson team on this matter was led by Moscow partner Ilya Rybalkin and Moscow associate Igor Eliseev, and includes Moscow associates Maxim Scherbakov, Tatiana Miteva, Alexey Khorokhordin, and Andrey Pavlov, tax adviser Vadim Kukushkin, as well as Geneva associate Oliver P. Ciric.

For additional information visit www.hhlaw.com

LOVELLS

ADVISES SABMILLER ON LAUNCH OF LANDMARK JOINT VENTURE

10 October 2007

SABMiller plc (SABMiller) and Molson Coors Brewing Company have agreed to combine the U.S. and Puerto Rican operations of their respective subsidiaries, Miller and Coors, in a joint venture, to be called MillerCoors, to create a stronger, brand-led U.S. brewer. MillerCoors will have annual pro forma net revenues of approximately $6.6 billion. SABMiller and Molson Coors will each have a 50% voting interest in the joint venture and SABMiller will have a 58% economic interest.

SABMiller was advised by Lovells' London office and Cleary Gottlieb Steen & Hamilton LLC in New York as co-counsel on corporate aspects of the transaction and by Jones Day (Washington D.C.) on U.S. anti-trust matters.

The joint venture will be effected through the contribution by both parties of their U.S. and Puerto Rico operations into a limited liability company to be formed under Delaware law. Each of the parties has agreed that all its U.S. business will be conducted exclusively through the joint venture. The transaction is subject to finalisation of definitive agreements, which is expected by the end of 2007. Closing of the transaction is also subject to obtaining clearances from U.S. competition authorities and certain other regulatory clearances and third-party consents as required.

The transaction will require the approval of a majority of Molson Coors' Class A common and exchangeable shareholders, which is expected to be given at the time of signing the definitive agreements by the Molson and Coors families, which own a majority of that class of shares. The transaction does not otherwise require approval by the shareholders of either party.

The Lovells team was led by London-based client relationship partner Andrew Pearson, working closely with SABMiller General Counsel and Group Secretary, John Davidson and Deputy General Counsel, Stephen Jones.

Andrew Pearson, speaking for the Lovells team, said:

“We are delighted to announce our involvement in this challenging and complex transaction which is of great strategic importance to SABMiller in the execution of its U.S. strategy. It has been a pleasure to work with the SABMiller team on yet another landmark deal."

For additional information visit www.lovells.com

Notes for editor—

SABMiller plc and Lovells .

Lovells has acted for SABMiller since 1998 on a series of international corporate and capital markets transactions commencing with SABMiller's £3.4 billion listing on the London Stock Exchange in March 1999; a US$612 million synthetic treasury stock structure implemented in September 1999; a US$600 million convertible bond issue in August 2001; a $420 million equity placing in December 2001; and the US$5.62 billion acquisition of Miller Brewing Company from Altria Group (formerly Philip Morris Companies, Inc), which completed in July 2002, and a subsequent US$1 billion equity placing, which was pulled because of adverse global securities market conditions.

In 2003, Lovells' London, Milan and Rome offices advised on SABMiller's acquisition of Birra Peroni S.p.A., with an enterprise value of some US$683 million. That year, Lovells also advised on SABMiller's US$2 billion debut issue of London listed, investment grade, corporate bonds. In 2005, Lovells advised on SABMiller's US$7.8 billion transaction with Bavaria S.A. in Colombia. In June 2006, the firm advised SABMiller on three deals announced within the space of a week, including a $1.75bn Rule 144A bond issue, the $55.3m disposal of Bavaria S.A.'s fruit juice business in Colombia, and the $215m acquisition of the Sparks and Steel Reserve brands and related trademarks in the United States.

WILMERHALE

VICTORIOUS IN INSURANCE BROKERAGE ANTITRUST MULTIDISTRICT LITIGATION

WilmerHale, representing The Hartford, won a major victory on Friday, September 28, in the Insurance Brokerage Antitrust Multidistrict Litigation. Chief Judge Garrett Brown of the U.S. District Court for the District of New Jersey dismissed all RICO claims in both the commercial and employee benefits complaints in this massive class action, with prejudice. Judge Brown had previously dismissed all antitrust claims. In his order on Friday, Judge Brown also dismissed the state law claims in the commercial complaint. He deferred ruling on the state law claims in the employee benefits complaint until he rules on the defendants' pending motion for summary judgment as to the only remaining federal claims in the case, under ERISA.

The WilmerHale team who represented The Hartford in this matter was led by partners Paul Engelmayer, Bill Kolasky, Andrea Robinson and Bob Trenchard.

For additional information visit www.wilmerhale.com

RODYK & DAVIDSON

MCDONALD'S LATIN AMERICA IN SALE TO ARCOS DORADOS

Rodyk acted for Innogest and Upstream in their Series A investment in Singular ID Pte Ltd, the provider of the integrated high technology enterprise brand security system called *enxure*. Innogest, a start-up fund of the Torino Wireless group, has strong connections in the IT and electronics industries and the manufacturing sector in northern Italy. It raised a fund of Euro 80 million.

Partner S.Sivanesan led this transaction.

For additional information visit www.rodyk.com

Member INFO

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SEOUL 2007
October 20-24

BRIGARD& URRUTIA

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insights
Projects Insights
04 September 2007

NSW Government's "Working With Government: Risk Allocation and Commercial Principles"

The NSW Commercial Principles are substantially similar to their Victorian equivalent. There are, however, some differences to note between the NSW and Victorian regimes in relation to applying the Relief Event, Force Majeure Event, and Compensation Event terms.

NSW Risk Allocation and Commercial Principles: Purpose and philosophy

In May 2007, the NSW Government released its *"Working with Government: Risk Allocation and Commercial Principles"* (*"NSW Commercial Principles"*). The final form did not contain any material variations from the draft version issued in December 2006.

The NSW Commercial Principles set out the NSW Government's preferred risk allocation for privately financed infrastructure projects. The document focuses on social infrastructure projects such as schools, hospitals and prisons, rather than economic infrastructure projects such as toll roads. The key hallmark of a social infrastructure project is that the private party's revenues are service charges paid by the Government for developing the facility, making it available and providing support services such as facilities maintenance, cleaning and security.

The risk allocation outlined by the NSW Commercial Principles exhibits a high degree of commonality with its Victorian counterpart.[1]

This article will examine three aspects of the risk allocation under the NSW Commercial Principles - the "Relief Event"; "Force Majeure Event"; and "Compensation Event" regimes - and outline some of the differences between the regimes of the two States.

The "Relief Event" regime in NSW: An introduction

"Relief Events" are a class of events for which the Government bears the performance risk by relieving the private sector of its obligations to undertake those services, or perform those obligations, when it is prevented from doing so as a result of that event. The private sector bears the financial risk in the form of decreased revenues and increased costs, as no compensation is paid if delays occur as a result of the occurrence of such events.

The rationale is that the private sector is in a better position than the Government to manage the risk, for example, via insurance or insurance in combination with risk management and proper planning.

In NSW, what constitutes a Relief Event is to be decided on a project-by-project basis. The NSW Commercial Principles provide a number of examples of what will generally constitute a Relief Event, including:

- a failure by an authority (including utility provider) to carry out works or provide services which it is obliged to carry out or provide
- fire or other damage
- any blockade or an embargo
- industrial action affecting the construction or facilities management sectors or a significant segment of it.

In each case, an event will not constitute a Relief Event if it was caused by the action or inaction of the private party.[2]

In Victoria, the corresponding concepts are Extension (of time) Events and Intervening Events.[3]

Relief Event: Differences between the Victorian and NSW regimes

There are some differences between Victoria and NSW on exactly what events could constitute a Relief Event. For example:

A statutory authority not acting pursuant to its power

In Victoria, a Relief Event/Intervening Event occurs where a statutory authority fails to carry out works or provide services, unless the statutory authority, in failing to do so, is acting in accordance with or pursuant to its statutory powers and discretions or obligations.

This exception has not been adopted in the NSW Commercial Principles.

In NSW, an event will not be a Relief Event if it is caused by the action or inaction of the private party. This excludes circumstances where the works or services are withheld because of a failure by the private party to comply with the requirements of the relevant statutory authority, and accordingly, it is not seen as necessary to include the additional caveat present in the Victorian regime.

Site-specific blockades or embargos

In Victoria, site-specific blockades or embargos which affect specialised project equipment (to be determined on a project-by-project basis) will be an Intervening Event.

In NSW, a Relief Event will not be limited to blockades or embargos affecting specialised project equipment. So long as the blockade or embargo is not caused by the act or omission of the private sector, then the Government will grant performance relief.

Even though the private sector is granted relief from its obligations and extensions of time, the term of the agreement is never extended, so that the private sector bears full decreased revenue/increased cost risk. In the Government's view, this provides strong incentive to the private sector to mitigate and manage this event as quickly and efficiently as possible.

Industrial action

In Victoria, industrial action is a Relief Event/Intervening Event, but only to the extent that it directly affects the project and project-related industries and the private party can demonstrate that it results directly from an act or omission of the contracting Government party or any of its employees at the facility/site.

In NSW, relief is generally granted where industrial action affects the facilities management or the construction industry or a significant sector of it. Other than showing that the industrial action was not caused by the act or omission of the private party, it is not necessary to prove that the industrial action arose from an act or omission of the contracting Government party or its employees before being granted relief.

To what extent can deductions from the service fee be applied when failure to provide services is due to a Relief Event?

In social infrastructure projects, the private sector is paid a regular service fee upon completion of construction and commencement of services. The service fee (over the length of the term) pays for the capital cost of construction, equity and debt financing costs and the costs of providing the services. The service fee is subject to abatement where the private sector fails to satisfy key performance indicators.

In NSW, because the private sector takes financial risk of Relief Events (even though the private sector is given relief from the performance of obligations), abatements still continue if the failure to perform results from a Relief Event.

While the Victorian Commercial Principles are not entirely clear, it appears that Victoria will also continue abatement, but will cap the abatements at an amount which guarantees the payment of the debt financing cost component of the service fee.

Force Majeure Events

- Traditionally, *force majeure* events are catastrophic events outside the control of either the Government or the private sector, which prevent a party from performing all or a material part of its obligations under the project agreement.[4] Under the NSW Commercial Principles, the occurrence of a "Force Majeure Event" will result in the private sector being granted relief from the performance of obligations affected by the Force Majeure Event. During the period of *force majeure*, the Government will only be liable to pay the private sector for services actually received.
- If after its occurrence the Force Majeure Event continues for a specified period (usually six to 12 months) and the parties cannot agree on the best way to continue the project, either party can terminate the project. The Government, however, will have the right to continue the project, despite the private sector electing to terminate, by paying the full service fee less costs not incurred.

At a conceptual level, the mechanisms for the treatment of Force Majeure Events are similar in both Victoria and NSW, although there are some material differences to note.

Force Majeure Events as an extension of the Relief Event regime

In NSW, the Force Majeure Event regime operates as an extension of the Relief Event regime. A Force Majeure Event is defined as a Relief Event which exists or is likely to exist for more than six months.

In contrast, Victoria has a separate and distinct Force Majeure Event regimes, they being "events of exceptional severity" (for example, lightning, cyclones, earthquakes etc.).

Servicing debt obligations during the occurrence of a Force Majeure Event

In Victoria, where a period of suspension arises as a result of a Force Majeure Event, for which insurance is not available, the Government will service senior debt commitments forecast in the base case financial model as being due and payable during the period of suspension.

The NSW Commercial Principles do not provide for the automatic servicing of senior debt obligations during a force majeure event. The rationale behind this is that:

- The Government should not automatically be obliged to pay the private sector any amount simply to service the private sector's debt obligations.
- If termination occurs, the Government will, in any event, compensate the private sector for outstanding senior debt.
- If termination does not occur, then the parties will be discussing continuation of the project against a back drop of such a compensation payment.

In NSW, a right to terminate following a Force Majeure Event will only arise after the parties have used reasonable endeavors to attempt to find a way to continue the project. Accordingly it is assumed that any solution could well involve agreement by the Government to cover senior debt obligations; otherwise, if the private party is unhappy with the position, it will elect to terminate.

Compensation Event Regime and the calculation of compensation

Compensation Events are events for which the Government takes both performance risk and increased cost/decreased revenue risk, by providing the private sector with both relief from the performance of obligations affected by the Compensation Event, and compensation for increased costs or decreased revenue.

The Compensation Event regimes in the NSW and Victorian Commercial Principles are largely similar. There are however slight differences. For example:

- Unlike Victoria, NSW will provide compensation where it exercises its step-in rights and such exercise is unrelated to any breach by the private party.
- The NSW Commercial Principles provide for when certain emergencies, unrelated to the conduct of the private party, may warrant the Government stepping in and providing the services itself for a short period of time. In such cases, the private party will be compensated for the effects of such step-in, including any damage caused by the Government in stepping in. This compensation will go beyond the Victorian approach of simply the paying the service fee less costs not incurred.
- In NSW, to the extent that the Government engages a third party (other than the private party) to undertake additional capital works on the site, then it will compensate the private party for any disruption this may cause.
- Generally, project agreements in NSW contain an undertaking by the private party to comply with all Environmental Notices served by a statutory authority. The Government will compensate the private party in these circumstances except to the extent that the Environmental Notice relates to an area for which the private party is taking the contamination risk or the private party is in breach of the project agreement.

Calculation of compensation

The NSW and Victorian Commercial Principles also differ in the method for calculating compensation payable as a result of a Compensation Event.

The Victorian Principles calculate compensation on the basis of the reasonable additional costs incurred by the private party as a direct result of the Compensation Event less insurance proceeds. The NSW Commercial Principles go into considerably more detail, specifying compensation as the lower of the sum of the following costs which would be incurred by the private party, or which would have been incurred by an efficient and competent provider of services:

- incremental design and construction costs (including incremental preliminaries)
- incremental costs to deliver the services (including incremental lifecycle costs)
- reasonable external third party advisory costs
- debt financing costs
- lost service fee or lost commercial opportunities (limited to the revenue projected in the base case financial model)
- changes in the cost of insurances

less

- insurance proceeds or damages or other compensation or amounts (other than those received under the project agreement) received by the private party as a direct result of the Compensation Event
- any costs avoided (including tax, financing and/or other benefits associated with deferred expenditure) accruing to the private party as a direct result of the Compensation Event
- any other amounts received or receivable by the private party as a direct result of the occurrence of events which gave rise to or constituted the Compensation Event.

The next issue of *Project Insights* will feature Part 2: The termination regime under the NSW Commercial Principles.

Thanks to Julian Gratiaen for his help in writing this article.

[1] Partnerships Victoria: Standard Commercial Principles, Department of Treasury and Finance, Victoria (2005).

[2] Section 12.1(b), Working with Government: Risk Allocation and Commercial Principles, New South Wales Treasury (2007).

[3] Sections 12.2 and 17.1, Partnerships Victoria: Standard Commercial, Department of Treasury and Finance, Victoria (2005).

[4] Section 13.1, Working with Government: Risk Allocation and Commercial Principles, New South Wales Treasury (2007).

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September 2007

Fair Use—A Defense to Trademark Infringement (Part I of II)

By Liao Fei*

Trademark, an exclusive right like patent and copyright, has a limited scope. Although PRC's Patent Law and Copyright Law explicitly set forth some defenses to the fair use of a third party's patent or copyright, PRC's Trademark Law does not include any fair use defenses. However, Article 49 of *the Rules for the Implementation of Trademark Law* ("Implementation Rules"), an administrative regulation, provides that registered trademarks consisting of generic names, design, or model of a product, or direct descriptions of the quality, main raw materials, functions, or other characteristics of the product shall not be cause for the holder of a registered trademark to prohibit fair use by another party. This provision provides a very limited defense scope for fair use.

Does it mean that the use of a third party's registered trademark without such party's consent on the same or similar products in other situations than those provided in Article 49 of the Implementation Rules constitutes registered trademark infringement as prescribed by Article 52[1] of the Trademark Law? Usually, it is easy to determine that a registered trademark has not been infringed when being used on a similar or identical product for non-commercial[2] purpose or for commercial[3] purposes at the exhaustion of trademark rights.[4] However, determining whether commercial use in a situation other than at the exhaustion of trademark rights constitutes an infringement merely based on the existing Trademark Law is much more difficult, since the law is silent on such standards. And in many cases, such commercial usage is likely to be held trademark infringement. As China's legislature plans to overhaul the existing Trademark Law, it is important to explore the feasibility and necessity of legalizing fair use as a defense to trademark infringement. Legalizing fair use in China can be compared with typical trademark cases from Europe and the U.S.

I. Defending Fair Use in Comparative Advertising

Comparative advertising is a widely used form of commercial advertising in many countries. This type of advertising intends to influence consumer behavior by comparing the features of the advertiser's product with that of the competitor's product. Many jurisdictions in Europe and U.S.A. allow comparative advertising, since comparative advertising provides consumers with information about both parties' products through a quick comparison, effectively results in lower prices, encourages competition, and helps prevent monopolies. In addition, in the U.S., comparative advertising enjoys the additional protection of freedom of speech laws. For example, in

[1] Article 52 of the Trademark Law sets forth that a party shall be deemed infringing a registered trademark by engaging in any of the following activities:
1) using a trademark that is identical or similar to a registered trademark on a identical or similar product;
2) selling products infringing upon a registered trademark;
3) forging or manufacturing registered trademark without the authorization of the trademark owner or selling a registered trademark forged or manufactured without the authorization of the trademark owner;
4) replacing a registered trademark without the consent of the trademark owner with another trademark and marketing the products with the replaced trademark.

[2] For example, the registered trademark is cited in news, reviews and literatures, or used by consumers on personal products.

[3] For example, the promotion of genuine products by the distributors.

[4] The exhaustion of rights, or the doctrine of exhaustion, is an important concept in intellectual property law. According to this concept, an intellectual property owner will lose or "exhaust" the rights or ability of further controlling the product manufactured by a party with the owner's authorization after the first sale of the product. In other words, all parties that legally obtain the proprietary intellectual property right may freely use, sell, or dispose of the product created with the intellectual property, provided that such parties do not infringe the exclusive rights of the IP owner. Source: "Trademark: Exhaustion of Rights or Restriction of Rights?" State Intellectual Property Office Website, http://www.sipo.gov.cn/sipo/xwdt/mtjj/2007/200707/t20070712_177713.htm, last visited July 24, 2007.

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***Tommy Hilfiger Licensing Inc. vs. Nature Labs LLC* [2002][5],** Nature Labs, a shop selling pet perfumery, used "Timmy Holedigger" as its trademark as well as the slogan "If you like Tommy Hilfiger, your pet will love Timmy Holedigger". Tommy Hilfiger, one of the best recognized U.S. fashion labels, brought a lawsuit against Natural Labs for, among other things, trademark infringement, unfair competition, trademark dilution and commercial fraud. The court held that the use of a trademark similar to Tommy Hilfiger by the defendant is a fair parody, a type of "freedom of speech" protected under the First Amendment of the United States Constitution. Consumers were more likely to laugh at the humor in the parody than be confused about the origin of the products. Moreover, the comparison used by the respondent did not depreciate the claimant's products in any means. Therefore, the court dismissed all of the plaintiff's claims.

The preceding paragraph exemplifies how European and American jurisdictions' believe that use of a registered trademark on similar products in comparative advertising, even if such use is for commercial purpose, shall be legal, provided that such use is bona fide and does not unduly take advantage of the market recognition and distinctiveness of the trademark, or attempt to mislead the consumers or derogate the original product on which the trademark is used.

However, China's trademark and advertising legislation has had a gap in comparative advertising for a long time. In fact, Articles 7 and 12 of the PRC Advertising Law effectively disallow comparative advertising by stipulating that advertising shall not use "such wording as *State level*, *highest level* or *the best*" (emphasis added) and "shall not have any content that denigrates the commodities or services of other manufacturers or business operators." Since the ultimate purpose of comparative advertising is to prove that the advertiser's products are better, cheaper or more unique than its competitor's, such comparison, in many cases, has the actual effect of "denigrating" other commodities or services. Moreover, according to *The Criteria for Advertising Examination* issued by the State Administration for Industry and Commerce ("SAIC") in 1994, comparative advertising should not involve any direct comparison of specific products or services. Since these provisions tend to be either too vague or too strict, Chinese enterprises hesitate to engage in comparative advertising.

The *Opinions on Issues Regarding Administrative Enforcement of Trademark* ("Opinions") issued in December 1999 by SAIC for the first time recognizes the legality of fair use of trademark. Article 9, Paragraph 2 of the Opinions provides that "the bona fide description of the features or attributes of products or services, especially those regarding the quality, purpose, geographic origin, type, value and date of manufacture" shall not constitute trademark infringement. However, as a normative document issued by a government authority at a ministerial level, the Opinions has a limited legal effect and does not clarify whether such provision is applicable to comparative advertising.

Comparative advertising practice is addressed for the first time in *The Interpretation of the Supreme People's Court on Issues Concerning the Application of Law in the Trial of Civil Cases Involving Unfair Competition* ("Interpretation"), promulgated on February 1, 2007. Although the Interpretation does not expressly define comparative advertising, the three types of misleading and fraudulent promotional actions by business operators stipulated in Article 8[6] of the Interpretation actually target comparative advertising. According to the Interpretation, a comparative advertisement shall not constitute unfair competition if it is not biased and is based on ideas or

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5 221 F. Supp. 2d 410, 424 (S.D.N.Y. 2002)

6 Article 8 of the Interpretation provides that a business operator shall be deemed as conducting a misleading promotion specified in Article 9 Paragraph 1 of the Anti-unfair Competition Law if the promotion causes confusion amongst the target audience by engaging in any of the following activities:

1) conduction biased promotion or comparison of a product;
2) using scientifically unproven ideas or phenomena in the promotion of a product; or
3) using ambiguous language or other ways that may mislead the target audience in the promotion of product.

The promotion of a product in an obviously exaggerated manner that would not cause misunderstanding among the target audience shall not be deemed as misleading or false promotion.

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arguments that have been proved scientifically correct and does not include any ambiguous or misleading language. This provision in the Interpretation, similar to the provisions on comparative advertising in the EU Directive 97/55/EC[7], sets a good example for future legislation on comparative advertising in China. Nonetheless, although the Interpretation pardons comparative advertisers who have no intention of engaging in unfair competition and gives a green light to fair comparison in advertising, it has no authority over trademarks, which are frequently used in comparative advertising. Apparently, trademark use is the easiest way, and, in many circumstances, the only way, for consumers to quickly identify both products.

The use of a competitor's trademark may not necessarily constitute unfair competition, but does it constitute trademark infringement? Trademark Law's silence on this matter has become the sword of Damocles over many enterprises in China.

If Article 52 of the Trademark law applies, Coco-Cola's use in their advertisements of such wording as "the price of this product is 20% lower than that of Pepsi Cola" —even though such description is true and unbiased or does not lead to a misunderstanding of association between the two companies—would infringe Pepsi's trademark. This assumed example implies that though the ban on comparative advertising is lifted by the Advertising Law or the Anti-Unfair Competition Law, without sound legal ground in the Trademark Law, comparative advertising will continue to encounter practical barriers.

II. The Fair Use Defense for Scale Models

When making toy models, third parties will use the original product's registered trademark on the scale models (especially on car models). But does that constitute trademark infringement? At first glance, reproduction of the trademark in Class 28 appears to fall under trademark infringement qualifications as stated in Article 52 of the Trademark Law.

However, it seems that the European Court of Justice ("ECJ") does not agree that unauthorized use of registered trademark on scale models constitutes trademark infringement. In ***Adam Opel AG vs. Autec AG [2007]***[6], a recent case of substantial public interest, the defendant, Autec AG, produced and sold in Germany 1:24 remote-controlled scale models of Opel Astra V8 Coupéon with the "Opel" logo reproduced on the scale models. The defendant also used their own Cartronic® and AUTEC® marks in the specification and on the remote-control

[7] Directive 97/55/EC, Article 3a, Paragraph 1, of the European Parliament and of the Council of 6 October 1997, states:
comparative advertising shall, as far as the comparison is concerned, be permitted when the following conditions are met:
(a) it is not misleading according to Articles 2 (2), 3 and 7 (1);
(b) it compares goods or services meeting the same needs or intended for the same purpose;
(c) it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;
(d) it does not create confusion in the market place between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor;
(e) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor;
(f) for products with designation of origin, it relates in each case to products with the same designation;
(g) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;
(h) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name.
Source: EUR-Lex website. See
http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31997L0055&model=guichett, last visited on July 27, 2007.

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of the scale models. The claimant claimed that the defendant's action infringed upon Opel's registered trademark. The ECJ's decision suggested that a trademark proprietor is not entitled to prevent affixing by a third party without authorization of a sign identical to that trademark on scale models of vehicles bearing that mark, in order to faithfully reproduce those vehicles, if that use does not affect or is not liable to affect the functions of the mark as a trademark registered for toys and if the use does not take unfair advantage of, or is not detrimental to, the distinctive character or the repute of the mark.

Under the present trademark legal framework and practice in China, judges and local authorities of administrative enforcement tend to rule that the use of registered trademark on scale models constitutes trademark infringement, since the fair use of trademark is yet to be recognized as a statutory defense. Obviously, the judges and local officials attach more weight to the protection of the registered trademark, an interest that they believe more important than the right of fair use, although the registered trademark is used to describe a certain fact (in this case, to make scale model) and such use does not cause any confusion among the consumers.

At the 2001 Guangzhou Fair[8], there was a typical case related to trademark infringement and scale model toy cars , In that instance, the administrative enforcement authority banned the unauthorized use of the "Mercedes-Benz" mark on toy and scale model cars produced by three enterprises. It was not clear whether in those cases the affixing of the "Mercedes-Benz" on model vehicles was strictly in accordance with the location and type of the original vehicles and whether the consumer could be confused thereby. Even if it was a faithful replication and no confusion or misconception was caused among the consumers regarding the origin of the scale model, such use would still, most likely, be considered infringement in China. If scale model manufacturers are prohibited from using a mark identical to the registered trademark of the original car, their scale models (not toys for children) will completely lose their attraction to car model collectors, who are the majority of car model buyers. That is to say, scale model manufacturers will lose their business and give away the market to automobile manufacturers regardless of whether automobile manufacturers have registered their trademark under Class 28 or not[9]. This is unfair to scale model manufacturers.

A balance can be achieved between the rights associated with a registered trademark and public interests only if the use of registered trademark on scale models shall be deemed fair use. Because scale models are substantially different from real cars in their function, price, target consumers, and sales channel—so consumers are unlikely to mistake the scale models with the real cars—and an accurate description as such does not have a negative impact on the distinctive features and reputation of the registered trademark, this use of registered trademarks should fall under trademark's fair use defense.

On this issue, Taiwanese courts and authorities previously held a viewpoint similar to that of the Chinese courts and authorities. The owner of Taipei 101, the world highest completed skyscraper, registered a three-dimension trademark for the configuration of the building for goods and services in such Classes as 16, 28, 35 and 37. The Taiwan Intellectual Property Office ("TIPO") provided a controversial opinion that unauthorized manufacturing of scale models of the building constitutes trademark infringement[10]. However, in the recently released "*Guideline on Amendments to the Trademark Act*"[11], ("Guidelines") a document to help Taiwan better fulfill its obligations under the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("TRIPs"), TIPO clearly sets forth that the nominative use of a third party's trademark to describe the contents or characteristics of one's own goods or services is a fair use of trademark and can be used as a defense for trademark infringement. According to the Guidelines, the manufacturing of scale models of Taipei 101 shall be deemed a "nominative use" of the registered

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[8] See "The Nanfang Daily" on October 22, 2001.

[9] Because cross-category protection of well-known trademark is available to many multi-national automobile manufacturers.

[10] See "World Trademark Report" (by Globe Business Publishing Ltd) on April 11, 2006.

[11] See "World Trademark Report" on July 5, 2007.

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three-dimension trademark, since the purpose of manufacturing is to faithfully reproduce the configuration of the building, and thus should be regarded as fair use of trademark.

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

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Editor's Note: Analysis of Fair Use as a Defense for Trademark Infringement shall continue in Part II of this article, to be published in the October issue of King &Wood IP Bulletin.

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Amendments to the Dutch Competition Act introduce wider investigatory powers for NMa and imposition of personal fines

On 1 October 2007 a number of amendments to the Dutch Competition Act entered into effect. Due to these amendments the Netherlands Competition Authority (NMa) will have wider powers to carry out its enforcement tasks; the most striking change being that the NMa has obtained the power to impose personal fines on directors and other decision-makers within an undertaking. Below is a summary of the most important developments.

Individuals to face personal fines, but not imprisonment

For some time now there have been plans in the Netherlands to increase the deterrent effect of the competition rules by introducing sanctions that can be imposed on the individuals behind a cartel. For the time being, the government has decided not to introduce prison sentences or professional disqualification, but has instead opted for the imposition of personal fines on individuals who have "ordered the commission of" an infringement of the Competition Act or "exercised de facto leadership" with regard to such an infringement.

These fines will be of an administrative nature, which means they will be imposed by the NMa rather than the criminal courts. Persons who are fined will have the right to appeal to the administrative courts. The maximum personal fine is EUR 450,000.

The concepts of "ordering the commission of" and "exercising de facto leadership" are interpreted in the same way as the equivalent concepts in the Dutch Penal Code. The threshold for a finding that a person has "exercised de facto leadership" with regard to an infringement is relatively low. The test is met if a person fails to take steps to prevent an infringement despite being entitled to do so, or if he/she knowingly accepts the risk that an infringement will occur. The test for whether an individual has "ordered the commission of" an infringement is slightly more onerous since it requires the order to be unequivocal. Although board members are the most likely category of persons to meet either of these tests, it is also possible for middle managers to be held personally responsible for an infringement and hence become subject to a fine. An individual who is no longer with an undertaking can be fined for actions taken while he/she was still with the undertaking.

In light of these changes, the NMa intends to review its leniency policy. According to a draft document prepared by the NMa, the threat of a personal fine should encourage individuals responsible for an infringement to provide information about the cartel, independently of their undertaking, in exchange for immunity from or a reduction of the personal fine. If the NMa proceeds with its plans, this could lead to conflicts of interest between undertakings on the one hand and their directors and managers on the other. Since former directors and employees can also be fined, they too will be able to apply for leniency, which will give them an incentive to provide incriminating information about their former employer.

This will have consequences for the relationship between undertakings and their directors and middle management. Both sides would be well advised to check their existing directors and officers' liability insurance policies and supplement them if necessary. In addition this issue is likely to become a regular feature in the employment or service contracts of directors and middle managers. It will also need to be carefully considered when those individuals leave the undertaking.

House searches

Another important consequence of the amendments is that officials of the NMa will now have wider powers to enter and search private residences (in addition to their existing authority with respect to business premises). With a warrant from a magistrate they will be able to exercise this power against the will of the resident, if necessary with police assistance. In other words, attempting to conceal information on a cartel at home may be futile since it will be possible for the authorities to find the information there.

Merger control
A number of amendments aim at bringing Dutch merger control into line with the EC rules on merger control.

First, the substantive test applied by the NMa to decide whether a concentration is permissible has been aligned with the EC test. The criterion is no longer solely whether the concentration will create or enhance a dominant position, but rather whether the concentration will substantially restrict effective competition. The NMa has announced guidelines explaining how it will implement this test, which is of a more economic nature than the old test.

Secondly, the filing thresholds for financial institutions have been adjusted to the EC thresholds in that the NMa will no longer look at the tangible fixed assets of financial institutions, but at specific items in their profit and loss accounts. The levels of the thresholds have not been changed.

A third change affects what are known as cooperative joint ventures (i.e. joint ventures which enable the parent companies to coordinate their competitive behaviour). These joint ventures fell outside the scope of Dutch merger control, but will now have to be notified. This constitutes an extension of the duty to notify; the advantage is that it will enable undertakings to obtain certainty about the validity of these types of cooperation.

Higher fines for undertakings
In an earlier amendment, the fine on undertakings for refusing to cooperate with an investigation by the NMa of a cartel or an abuse of dominance was raised to a maximum of EUR 450,000 or 1% of an undertaking's worldwide turnover, whichever the higher. Certain fines that the NMa can impose in the area of merger control have now also been raised. The fines apply amongst others if undertakings supply incorrect or incomplete information in a notification (maximum: EUR 450,000 or 1% of turnover), or if they implement a merger that must be notified to the NMa without having notified or prior to clearance (maximum: EUR 450,000 or 10% of turnover).

Conclusion
The power to search homes and impose personal fines significantly widens the enforcement powers available to the NMa. The effect is reinforced by the NMa's plans to adopt a new leniency policy, which could drive a wedge between undertakings and their management. For undertakings and directors this means that compliance programmes will become increasingly important. The changes are likely to have an effect on directors and officers' liability insurance and employment and service contracts.

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When eggs don't belong in the same basket

Organic food is becoming increasingly popular. However, as a number of Australian and New Zealand examples illustrate, before you jump on the organic bandwagon and market your product as such, care must be taken to ensure it is actually organic.

Organic eggs: a recent Australian example

In August of this year an Australian egg packer and supplier was penalised by the Australian Federal Court in Victoria for selling non-organically produced eggs as organic.

The usual practice of the egg packer was to source eggs from a certified organic egg producer and to label the cartons as containing certified organic eggs. However, when shortfalls in the supply of organic eggs occurred, the packer simply filled the cartons with non-organic eggs instead. This practice was deliberate, and continued for more than two years. It was estimated that the packer had made nearly AUS $70,000 in profits from the sale of eggs that were not organic at organic prices.

When concerns were raised by an organic egg supplier, the packer effectively turned itself in to the Australian Competition and Consumer Commission. It also began to recall the eggs and to issue credit notes to those who returned them.

Despite this remorse, it was impossible to fully rectify the situation. Because eggs are perishable, it was practically impossible to determine who had purchased eggs labelled as organic, the quantity purchased by each such person, and the number of non-organic eggs involved. Even more difficult, how do you assess the damage caused to someone who has consumed a non-organic egg believing it to be organic? And it was not just the consumers of the eggs who had been affected. Retailers had suffered loss by not receiving what they had paid for, and the organic food industry and its certifying bodies had potentially suffered a loss of consumer confidence.

Proceedings were brought against the packing company and its manager under the Trade Practices Act 1974 (**Australian Act**), the Australian equivalent of New Zealand's Fair Trading Act. The company was found to have breached the Australian Act by engaging in conduct that was misleading and deceptive, and by representing that the eggs they had supplied were of a particular standard or composition and had approval as being organically produced when they were not. In addition, the manager of the company was held to have been knowingly involved in this conduct.

When considering the penalty the Court took into account the company's remorse, its attempts to make amends, and the fact that it had since sold its egg business and so would not be repeating this conduct. The Court restrained both the company and the manager for three years from supplying eggs in packaging which claimed: (1) that the eggs were certified organic; or (2) produced by an organic certified producer.

And a financial penalty? Significantly, the Australian Act makes no provision for a financial penalty for breaches of the sections involved in the case. All the Court could do was award AUS$25,000 costs in favour of the Australian Competition and Consumer Commission, who had brought the case against the packer.

New Zealand's approach

Similarly, in 2001, the Commerce Commission brought proceedings against a company for labelling egg cartons as containing free range eggs when they did not. The mislabelling was a deliberate scam, aimed at reaping the benefits of the higher purchase price fetched by free range eggs and boosting turnover as a result.

The company was charged under section 10 of the Fair Trading Act 1986, which prohibits conduct that is likely to

mislead the public as to the nature, manufacturing process or characteristics of goods.

Unlike the Australian egg decision however, financial penalties were available. Under the Fair Trading Act, the maximum penalty that could be awarded against the company was NZ$100,000. The final figure reached by the District Court was a fine of NZ$35,000. This figure was settled on after the Judge weighed up the deliberateness of the conduct and the need to ensure that the company did not profit from its actions against the company's guilty plea and its full cooperation with the investigation. We note that the maximum penalty has since increased to NZ$200,000.

Some more meaty examples

Members of the meat industry have also been convicted under the Fair Trading Act for making false representations about their products.

In 2006, a butchery was fined NZ$10,000 for falsely representing on both its website and its product labelling that various meat products were organic, or certified organic, when they were not. The butchery claimed that the misrepresentations were mistakes and that it had not deliberately set out to mislead its customers. The District Court accepted that while the company had not embarked on a deliberate scam, it could not be said that it had made a one-off mistake. Furthermore, the Judge held that even honest mistakes must be dealt with using a firm hand. This strict approach was important to protect consumers and to maintain the integrity of the organic industry.

In 2004, a soy food supplier was fined for falsely claiming its vegetarian sausages did not contain genetically modified material. Again, this was a case of mistake rather than a deliberate scam, and the quantities of genetically modified material were minute. The Judge recognised the lesser degree of fault involved and imposed a fine of NZ$10,000.

Lessons to be learnt

These decisions have a number of common threads. In particular, the Courts are determined to protect consumers who have to trust the labelling on their food products. They have no way of telling for themselves whether something is free range, organic or GM free. Often the decision to purchase these products has close links to the consumer's ethical beliefs. Consumers must be able to rely on producers portraying honestly and accurately the way that their food is produced.

Another point that is raised by these decisions is that the Courts are keen to deter other suppliers from engaging in this type of conduct. They will endeavour to give penalties that will prevent the company from profiting from its deception and give a clear indication that this sort of behaviour, particularly when it is deliberate, will not be tolerated.

Finally, the effect of these actions on other honest traders and the reputation of the organic food industry will be a relevant factor. Traders are expected to maintain high standards in respect of certification, advertising, labelling and processing of organic foods and when they fail to meet these standards, they undermine the efforts of those who do.

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Registered Trade Mark – Use It Or Lose It!

Unlike jurisdictions like the United States, the Singapore trade marks regime does not require evidence of use to be filed before a trade mark registration is granted. However, owners of Singapore trade mark registrations must be conscious of the requirement that a registered trade mark must be put to genuine use within five years from the date that the registration procedure is completed. Failure to establish use within this period of time, or suspension of the use of the registered trade mark for an uninterrupted period of five years, would render the registered trade mark vulnerable to revocation proceedings based on nonuse.

Burden of proof

A revocation action based on non-use can be filed by any person and the burden would be on the trade mark proprietor to prove that he has in fact used the trade mark. In the recent case of *Nike International Ltd v Campomar SL [2006] 1 SLR 919*, it was held that the essential standard of proof required to defeat a revocation action was to show genuine use of the trade mark during the relevant five year period. A single instance of use would satisfy the test, provided that overwhelmingly convincing proof of the act was adduced.

Genuine use

Although substantial use of a trade mark is not required, it is established law that token use of a trade mark which is engineered merely to preserve the validity of the trade mark or use which is internal to the trade mark proprietor would not constitute "genuine use". A one-time advertisement by a trade mark proprietor which is done with the sole intention of trying to meet the use requirement would therefore not suffice. Where the use of a trade mark is limited, doubts may arise as to whether the use of the trade mark is genuine or whether it is merely token.

It is clear from the case of *Weir Warman Ltd v Research & Development Pty Ltd [2007] SGHC 59* ("Weir Warman's case") that the Singapore courts are inclined to follow the English position that genuine use of a trade mark can be established even without evidence of actual sales of goods branded with the trade mark. The use of the trade mark also does not need to be directed at the ultimate consumers of the goods. If the trade mark is used to promote the goods to a wholesaler seeking to supply the goods in Singapore, such use would suffice.

The question whether use on the internet would be sufficient use for the purposes of showing genuine use in Singapore was also considered in Weir Warman's case. Again, it was opined that Singapore ought to follow the position of the English courts. This means that for use to be established in Singapore, for the purposes of defeating a revocation action, there must be some additional active step by the trade mark proprietor in Singapore that goes beyond simply placing the goods branded by the trade mark on

its website and waiting in the hope that someone from Singapore will enquire about the goods.

Proper reasons for non-use

Once non-use of a registered trade mark for the requisite period is established, the court would have to grant the application for the revocation of the trade mark. The only exception would be where the registered proprietor is able to prove that he has "proper reasons for non-use" of the trade mark. What would constitute a "proper reason"? The Singapore court, in the case of *Nation Fittings (M) Sdn Bhd v Oystertec Plc & Another Suit [2006] 1 SLR 712*, held that "obstacles to the use of the mark which had arisen independently" of the proprietor's will or from "abnormal situations in the market or industry" would be required.

Conclusion

While a trade mark registration could potentially afford a proprietor a monopoly of a trade mark for an unlimited period of time, such statutory protection is not intended to enable a proprietor to simply "squat" on the register or "hijack" the mark of a competitor. Along with such monopoly comes the obligation to put the trade mark to genuine use, failing which the owner of a registered trade mark would run the risk of losing the trade mark registration which he or she would have spent considerable time, cost and effort securing.

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CONSUMER INSOLVENCY ACT PROMULGATED

◎James C. C. Huang

The Consumer Insolvency Act was promulgated on 11 July 2007, and will take effect nine months after that date. The Act provides that an indi-vidual who has not been engaged in business activities during the last five years, or whose average monthly business turnover over the last five years has not exceeded NT$200,000, and whose total debts other than secured and senior debts do not exceed NT$12 million, may petition the court for rehabilitation.

During a rehabilitation procedure, secured and senior creditors can still pursue the debt through litigation and compulsory enforcement on the collateral, but ordinary creditors may not file for or continue litigation or compulsory enforcement procedures. However, ordinary creditors may still offset their own debts toward the debtor that existed before commencement of the rehabilita-tion procedure.

If the debtor proposes a rehabilitation plan for repayment of a proportion of his debts over a period of up to six to eight years which is ac-cepted by the meeting of creditors and approved by the court, and the debtor does fully perform the plan, then the outstanding debts after the performance of the rehabilitation plan will be deemed to be discharged. The Act does not af-fect creditors' rights toward other joint debtors, guarantors, and collateral providers. The court may limit the debtor's living expenses prior to completion of the rehabilitation procedure.

The Act also provides a procedure for liquidation of the debtor's assets. During a liquidation pro-cedure, the rights of secured creditors are not affected or restricted and the secured creditor may foreclose the collateral out of the liquidation procedure. Ordinary creditors may still offset their own debts existed prior to commencement of the liquidation procedure toward the debtor. The debtor's assets should be managed and dis-posed of by an administrator acting according to the resolution of the meeting of the creditors or in an appropriate manner.

The liquidation procedure terminates upon the completion of the proceeds distribution. Once the liquidation procedure is completed, the debtor is discharged from the debt that has not been repaid, unless the debtor conducted im-proper behavior as defined in the Act before or during the liquidation procedure. However, this will not affect the creditors' rights toward other joint debtors, guarantors, or collateral providers. After a debtor has petitioned the court for a liq-uidation procedure, his living expenses may not exceed those of an ordinary person, and the court may impose further restrictions on his living expenses. The debtor may not leave his place of residence without the court's permission, and the court may restrict him from leaving the country.

If a debtor has any liabilities toward a financial institution for consumer loans, self-use mortgage loans, or credit card or cash card debts, then be-fore petitioning the court for a rehabilitation or liquidation procedure, he should first request the financial institution which is his largest creditor to negotiate a debt repayment plan. If such ne-gotiations should fail, the debtor may directly petition the court for a rehabilitation or liquida-tion procedure.

The Act provides heavily indebted consumers with an opportunity to emerge from their finan-cial difficulties. However, it is also certain to impact the interests of financial institutions and other creditors, and is thus likely to influence financial institutions' future risk assessment and lending policies.

Davis Wright Tremaine LLP

Real Estate & Land Use Advisory Bulletin

Measure 49 Bulldozes Awareness of Other Building Legislation

New construction excise taxes and growth management laws pass below the radar

By Eugene L. Grant
As appeared in "Legal Ease," our monthly column in the *Daily Journal of Commerce*

With Measure 49's potential to roll back Measure 37 commanding Oregonians' attention, other pieces of legislation that affect growth management are getting lost in the shuffle. Anyone involved in real estate development should understand these changes.

The 2007 Legislature enacted House Bill 2051 at Metro's request, delaying until 2009 the next urban growth boundary expansion. Given the greatly reduced demand for new land to develop, this delay may not hurt developers much.

The delay gives Metro time to adopt urban and rural reserves in its potential expansion area pursuant to Senate Bill 1011. The goal is to avoid the many difficulties experienced when Metro last expanded the UGB. The last expansion generated heated support and opposition to many of the proposed expansion areas, and several parties fought Metro's expansion plans with extensive and expensive litigation.

These twin bills attempt to minimize the contention and uncertainty in the UGB expansion process by means of Metro and the affected counties entering into agreements to determine which land is suitable for inclusion. The rural reserves will be lands better suited for long-term forest or farm use. The urban reserves will be lands better suited to accommodate up to 50 years of urban growth in metro Portland.

The UGB must contain enough land for 20 years of urban growth as well as another 20 to 30 years' worth of land in urban reserves for a total 40- to 50-year land supply at the time reserves are established. Metro and Washington, Multnomah and Clackamas counties together will establish the reserves.

Although these urban and rural reserves may improve the UGB expansion process, all the contention and uncertainty will now simply advance to this new reserve designation process.

The extremely high stakes make dispute inevitable. Owners of lands designated as urban reserves will see market values increase dramatically; the opposite holds true for those with rural reserves.

With so much money at stake and so many environmental impacts, the Metro reserve designation will be just as intense as the last UGB expansion. The real benefit of the expansion postponement, however, may be that it provides enough time to get through this inevitable battle before the land is actually needed inside the UGB.

Schools gain right to tax

Another twin set of bills are SB 336 and SB 1036, which affect school development. For years, school districts and home builders battled in the Legislature over control of school district growth management and whether developers of new subdivisions should pay charges to finance new schools that accompany growth. Repeated efforts by the school districts and their supporters to impose school system development charges on new housing were opposed and defeated by the home builders in large part due to the Republican control of either or both of the legislative branches.

In 2007's Democrat-held Legislature, the school districts didn't get a system development charge. But they did win the right under SB 1036 to impose a construction excise tax of up to $1 per $1,000 of

housing. That means a $400,000 house will pay $4,000 to the school district, regardless of whether a student occupies the new home. The rate is 50 cents per $1,000 up to a maximum of $25,000 per nonresidential building. Some exemptions apply, including ones for low-income housing.

The financial result of the construction excise tax is in many respects the same as a school system development charge. The main difference is the maximum dollar amount of the excise tax as opposed to the very complicated, expensive and often-contested fiscal impact analysis required to determine the maximum amount of a system development charge.

Of potentially greater impact on developers is SB 336, which gives school districts the power to effectively block development in addition to taxing it. The district can block development when it believes there is inadequate capacity to service the students expected from the new development.

Whenever a developer applies for local government approval of a proposed residential project, schools are asked whether they have any comments on the application. In the past, a school district statement of inadequate school capacity was not a legal criterion on which a city or county could deny a development application, unless the application would change the property's zoning.

SB 336 makes school capacity relevant to all development applications, dramatically increasing the uncertainty as to whether land may be developed consistent with its present zoning. This legislation also requires school districts to coordinate their school growth planning with cities' zoning and planning for new residential development.

Although cities and counties theoretically can approve developments over the objections of the school district, it would be rare for a city or county decision-maker to do so and face the wrath of soccer moms and other school supporters. The upshot is that school districts can now effectively block new residential development perceived to exceed school capacity.

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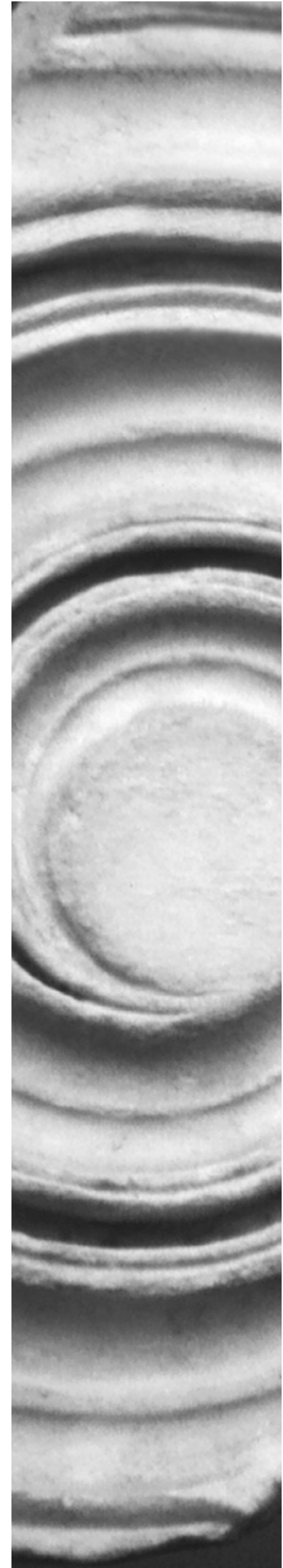

ANTITRUST UPDATE

Court of First Instance Upholds Commission's Decision in Microsoft Case

On September 17, 2007, the European Court of First Instance largely dismissed Microsoft's appeal and upheld the main pillars of the European Commission's decision that Microsoft had abused its dominant position. The court did not reduce or otherwise vary the fine imposed by the Commission of just over €497 million.

Prior to the judgment being read out, most commentators were of the view that the Court of First Instance (CFI) would hedge its bets with a judgment which gave some wins to the European Commission and some to Microsoft. Instead, the judgment is a comprehensive win for the Commission on the substantive Article 82 issues with Microsoft winning on the ancillary and altogether less important issue of the Commission's powers in respect of the appointment of a monitoring trustee.

The judgment's categoric endorsement of the Commission's approach is likely to empower the Commission to take further action on the issue of interoperability and bundling. Companies with strong market positions in other technology markets are also likely to be scrutinizing the judgment.

The Commission Decision

On March 24, 2004, the Commission adopted a decision stating that Microsoft had abused its dominant position in the PC operating system market by:

- Refusing to supply interoperability information and allow its use for the purpose of developing and distributing work group server operating systems (refusal to supply and authorize abuse);

- Making the availability of the Windows Client PC Operating System conditional on the simultaneous acquisition of Windows Media Player (WMP) (tying abuse).

The decision imposed a fine of €497,196,304 and ordered Microsoft to bring the abuse to an end by licensing interoperability information and offering an unbundled version of Windows.

The decision also gave the Commission the power to appoint a monitoring trustee to monitor Microsoft's compliance with the decision and to provide the Commission with impartial advice. Microsoft was required to bear all costs incurred by the monitoring trustee.

On June 8, 2004, Microsoft lodged an appeal with the CFI challenging all aspects of the Commission's decision.

Extent of the Review by the CFI

At the beginning of the judgment, the CFI clarified the principles against which it would examine Microsoft's application for the annulment of the Commission's decision. The CFI made it clear that its review of complex economic appraisals made by the Commission was limited to: checking whether the relevant rules on procedure and on stating reasons had been complied with; whether facts had been accurately stated; and whether there had been any manifest error of assessment or misuse of powers.

Refusal to Supply and Authorize abuse

The CFI rejected all the arguments that Microsoft raised in defense of the alleged refusal to supply and authorize abuse.

It found that the Commission had been correct in its technical and factual findings in relation to the interoperability issue. It upheld the Commission's decision on the necessary degree of interoperability and held that there was no inconsistency between that degree of interoperability and the remedy imposed by the Commission. It rejected Microsoft's proposition that the Commission's decision effectively ordered Microsoft to disclose its source code to its competitors so that they could clone Microsoft's products.

The CFI held that there was no need to decide the issue of the validity and scope of Microsoft's IP rights in relation to the refusal to supply and authorize abuse because the Commission had at all times proceeded on the basis that Microsoft could rely on such rights.

The CFI reiterated two fundamental principles: that undertakings were, as a rule, free to choose their business partners; and that the Community judicature considered that the fact that a holder of an IP right can exploit that right solely for his own benefit constituted the very substance of that exclusive right. However, the CFI made clear that in certain exceptional circumstances a refusal to supply and authorize an IP right by a dominant undertaking may constitute an abuse of a dominant position unless it was objectively justified (Magill and IMS Health).

Relying on earlier case-law, the CFI argued that three conditions have to be satisfied before a refusal by the holder of an intellectual property right to license a third party to use a product can be characterized as an abuse of a dominant position**:**

- The refusal must relate to a product or service indispensable to the exercise of an activity on a neighboring market.
- The refusal must be of such a kind as to exclude any effective competition on that market.
- The refusal must prevent the appearance of a new product for which there is potential consumer demand. The CFI acknowledged that the appearance of a new product was not an issue here. It argued, however, that the scope of this condition should be interpreted more broadly to also include limitations to technical development to the detriment of consumers. The CFI has therefore expanded the test applied in the Magill and IMS Health, and has potentially facilitated regulatory interventions against refusals to license intellectual property rights.

The CFI held that the Commission did not commit any manifest error in considering that the three conditions were met in this case. Indeed the judgment cited numerous factors indicating the correctness of the Commission's approach.

The CFI rejected Microsoft's argument that the refusal was objectively justified because it was covered by IP rights. It held that if Microsoft were correct then a refusal to license an IP right could never be considered to constitute an infringement of Article 82 even though in Magill and IMS Health the Court of Justice had explicitly stated the contrary. The CFI held that Microsoft's assertion that the Commission had applied a new evaluation test when rejecting the objective justification was based on a "misreading of the decision".

The CFI therefore concluded that the exceptional circumstances necessary for finding that a refusal to supply IP protected information amounted to a breach of Article 82 applied in this case and dismissed Microsoft's appeal on this point as "unfounded in its entirety."

Tying Abuse

Microsoft appealed this part of the decision on two grounds: no breach of Article 82 and breach of the principle of proportionality. The CFI confirmed that the Commission had adopted the correct approach when concluding that there had been abusive tying. The approach was consistent with Article 82(d) EC and case law. The CFI confirmed that four factors were required: (i) the undertaking must have a dominant position on the market for the tying product, (ii) the tying product and the tied product must be two separate products, (iii) consumers must not have a choice to obtain the tying product without the tied product, (iv) the practice must foreclose competition.

Microsoft argued that factors (ii) – (iv) were not made out in this case. The CFI held that the Commission's decision that all four factors were established was well founded. In particular, the CFI concluded that Microsoft's objections on the issue of the foreclosure of competition were unfounded and were based on a "selective and inaccurate" reading of the decision.

The CFI found that Microsoft had not demonstrated the existence of objective justification for the tying. Microsoft had sought to show that the bundling produced efficiency gains that outweighed the anti-competitive effects.

Microsoft's plea that the remedy imposed was disproportionate was also dismissed. The CFI observed that the plea was based on the same arguments that were presented to show objective justification. The CFI emphasized that Microsoft was still able to offer the tied version of Windows. The remedy proposed by the Commission was an appropriate means of ending the abuse and resolving the competition issue while causing the least possible inconvenience to Microsoft and its business model.

The CFI rejected the entirety of Microsoft's appeal against the finding of breach of Article 82 in relation to the tying abuse and the Commission's remedy.

Monitoring Trustee

The CFI was critical of the Commission's actions in relation to the appointment of a monitoring trustee. It held that the appointment of the monitoring trustee had to be assessed by reference to the law in force at that time, i.e. Regulation 17/62 rather than Regulation 1/2003.

The CFI held that the Decision purported to confer on the monitoring trustee wide ranging powers. It found that the Commission had no authority to compel Microsoft to grant to a monitoring trustee powers which the Commission was not authorized to confer on a third party.

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It also held that the Commission had exceeded its powers by making Microsoft responsible for all costs associated with the monitoring trustee: there was no provision of Community law that authorized the Commission to require an undertaking to bear the costs which the Commission incurs as a result of monitoring the implementation of remedies.

The CFI therefore annulled that part of the Decision which ordered Microsoft to submit a proposal including the appointment of an independent monitoring trustee.

Fine

The CFI dismissed Microsoft's claims that the fine was excessive and disproportionate and upheld the fine imposed by the Commission. The Commission was entitled to impose a single fine for two abuses, which it considered to amount to a single infringement: leveraging a dominant position on the client PC operating systems market.

Appeal

At the time of writing, Microsoft has not indicated whether it intends to appeal the CFI's decision to the European Court of Justice. Any appeal must be on a point of law and made within two months. In a judgment of this length and complexity it would be foolhardy to suggest that there were no potential points of appeal. Nonetheless, the judgment is strongly focused on facts, which will make it more difficult for Microsoft to tease out points of law for appeal.

About the Antitrust Update

Hogan & Hartson publishes the Antitrust Update regularly. To have this publication sent to additional colleagues, please contact the author.

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Federal Judge Extends Temporary Injunction on Social Security No-Match Regulation

October 11, 2007

On October 10, 2007, the District Court for the Northern District of California granted a preliminary injunction blocking the implementation of the Department of Homeland Security (DHS) rule on Social Security no-match letters. Under the rule, DHS and the Social Security Administration (SSA) would immediately send no-match letters to 140,000 employers, notifying them of social security number discrepancies for up to 8 million employees. For further information on the rule, please click here to see our August 13, 2007 Immigration Alert.

The plaintiffs' motion requesting injunctive relief argued that the DHS rule contravenes the governing statute, is arbitrary and capricious under the Administrative Procedure Act, is an exercise of *ulta vires* authority by DHS and the SSA, and was promulgated in violation of the Regulatory Flexibility Act.

In his decision, United States District Judge Charles R. Breyer said that “the effects of the rule’s implementation will be severe,” and the expense to employers and the economy would be significant. He said the government did not follow proper procedures for issuing the new rule, and did so without conducting any survey examining the impact on businesses. Judge Breyer also noted that the DHS/SSA no-match letters would include lawfully employed individuals, and “would result in irreparable harm to innocent workers and employees.”

The injunction will remain in effect until the court makes a final decision on the rule. The government is almost certain to appeal the decision, but any final decision is unlikely to be made before the end of the year.

How This Affects You

The practical effect of the federal court injunction is to stop SSA from issuing the initial batch of 140,000 no-match letters. However, Morgan, Lewis and Bockius does not believe that the injunction should change how an employer responds to Social Security no-match letters or notification. The injunction does not mean that employers are free to ignore such letters pending the outcome of the litigation. In publishing the final regulation, the government has clearly announced its policy on Social Security no-match letters. The only question is whether that policy will have the force of law, as a regulation, or be implemented as a matter of executive branch and prosecutorial policy and discretion. Accordingly, the regulation reflects the government’s view on what steps taken by an employer will be viewed as a “reasonable” response to the notification of a Social Security number discrepancy. Employers that take steps that the government views as reasonable are less likely to face a charge of knowingly employing an unauthorized worker. Conversely, employers whose reactions to notification of a Social Security number discrepancy are not seen as reasonable by the government will presumably be at greater exposure to investigation and potential charges.

We will continue to monitor the process and will update you with any new information. If you have any questions about any of the issues raised in this Morgan Lewis Immigration Alert, please contact:

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