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Member Firm Gide Loyrette Nouel hosted the 43rd International PRAC Conference in Paris, April 12-15. http://www.prac.org/event_archive.php



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**BAKER BOTTS
VETERAN TRIAL LAWYER JOINS FIRM**

Mark Glasser Brings Extensive Trial Experience to Baker Botts
Houston-based Litigator Handling Complex Commercial,
Securities and Energy Disputes

HOUSTON, May 7, 2008 -- Veteran trial lawyer Mark Glasser, who has spent more than 30 years prosecuting and defending complex commercial, securities, financial institution and energy litigation matters, joined Baker Botts L.L.P. today as a Senior Partner in the firm's Litigation Department. He will be based in Houston.

Glasser has represented plaintiffs and defendants in business disputes, including accounting, brokerage and other professional malpractice claims, trade secret litigation and non-compete litigation. He also has handled claims of fraud, tortious interference and breach of fiduciary duty in the financial services, securities and energy industries.

"Mark adds a wealth of experience to the firm's traditional strength in commercial and securities litigation and arbitration," said Baker Botts Managing Partner Walt Smith. "Mark's decades of experience in these areas will bolster our national litigation practice."

Prior to joining Baker Botts, Glasser was a senior trial partner at King & Spalding.

Throughout his career, Glasser has written extensively on litigation issues, currently serving as a member of the Editorial Advisory Board of the Texas Pretrial Practice Treatise. He is a member of the Houston Bar Association, the State Bar of Texas, the Securities Industry Association Compliance and Legal Division, and is a Sustaining Life Fellow of the Texas Bar Foundation. He is also a member of the State Bar of Texas Pattern Jury Charge Oversight Committee and of the Governing Council of the Antitrust and Business Litigation Section of the State Bar of Texas.

He serves on a number of professional and charitable boards, including the Chancellor's and the President's Councils of The University of Texas System and the Houston Zoo Advisory Council. He is also a member of the Executive Committee of the Alumni Association of The University of Texas School of Law and of the Advisory Council of The UT School of Law Center for Public Interest. He is a director of Texas Appleseed, one of the country's leading pro bono and public interest law organizations.

He is a faculty member of the American Arbitration Association/ Arbitration Training Institutes and an instructor in trial advocacy of the National Institute for Trial Advocacy summer seminars.

Glasser has been recognized by Chambers USA: America's Leading Lawyers for Business as a leading practitioner in general commercial litigation. He was named by Texas Monthly magazine as one of the Top 100 lawyers in the Houston region in 2007.

"What drew me to Baker Botts wasn't anything I learned in a handful of meetings over the last few weeks," Glasser said. "It was what I've seen in working with and opposite the lawyers and staff here in over 30 years of practice. This is a famously talented group whose efforts have resulted in a particularly distinguished clientele. Just as important, I know of no firm more serious about maintaining the standards of the law as a profession. It's a rare place, and I'm very pleased to be here."

Glasser earned a Bachelor of Arts degree from Columbia University (with honors). He earned his law degree from The University of Texas. He is also a graduate of the Harvard Negotiation Workshop. After graduating law school, Glasser served as a law clerk to the Honorable William Wayne Justice, Chief Judge for the U.S. District Court, Eastern District of Texas (1976 to 1978).

For additional information visit www.bakerbotts.com

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**DAVIS WRIGHT TREMAINE
TOP SEATTLE LITIGATOR JOINS FIRM**

SEATTLE, Apr. 21, 2008 – James C. (Jim) Grant, former Chief Litigation Counsel at AT&T Wireless Services and a top Seattle litigator, has joined the law firm of Davis Wright Tremaine LLP. Grant has more than 22 years experience serving clients in the communications and technology industries.

“Jim is a superb litigator who understands how to work effectively with clients,” said Greg Landis, General Counsel of Intellectual Ventures and former Executive Vice President and General Counsel of AT&T Wireless Services. “His technical skills, industry knowledge and experience as an in-house chief litigation counsel make him invaluable to his clients.”

At AT&T Wireless Services, where he spent six years, Grant managed a team of more than 20 people responsible for litigation, government investigations and regulatory proceedings. He also managed the company's outside legal counsel. In private practice, he has built an extensive record handling class action litigation and a broad range of other commercial disputes. His clients include Amazon.com, T-Mobile, and AT&T Mobility.

“Jim brings the unique perspective of someone who has litigated both from an in-house and an outside counsel perspective on major national cases, as well as being a terrific practitioner,” said Dan Waggoner, co-chair of the firm's Communications, Media & Information Technology practice. “Putting together his skill sets, leadership and distinctive vision with our strong industry focus will give us an even greater ability to serve and work with our technology and communications clients.”

“Davis Wright Tremaine offers a great platform for my practice,” said Grant. “They have a strong industry focus in communications and technology, a deep team of litigators and a philosophy of serving clients that fits well with my approach.”

For additional information visit www.dwt.com

**HOGAN & HARTSON
FORMER SENIOR WHITE HOUSE
OFFICIAL JOINS FIRM**

WASHINGTON, D.C., April 21, 2008 – Hogan & Hartson LLP announced today that Candida “Candi” Wolff, formerly Assistant to the President for Legislative Affairs, has joined the firm's Washington, D.C. office and legislative practice group as a partner. Wolff has had a nearly 20-year career in the district in both the government and the private sector.

In her most recent role, Wolff was responsible for implementing President George W. Bush's agenda in Congress and advising the President, senior White House staff, and other Administration officials on legislative strategy on a wide range of economic, domestic policy, international, and national security issues.

Prior to this position, Wolff was a partner at Washington Council Ernst & Young in Washington, D.C., where she provided corporate clients with legislative advice in the areas of tax, telecommunications, pensions, energy, and the environment.

In addition, Wolff was Assistant and Deputy Assistant to the Vice President for Legislative Affairs (2001-2004), where she advised the Vice President and senior White House staff on legislative strategy. She also served on the Bush-Cheney transition team (2000-2001) and spent eight years working in the U.S. Senate, serving as Deputy Staff Director to the Senate Republican Policy Committee, legislative counsel to the Senate Steering Committee, and tax counsel to former Sen. Malcolm Wallop (R, Wyoming).

“We expect that with the election of a new President in 2008, the next couple of years will be very active ones for our legislative practice,” said Mike House, Director of Hogan & Hartson's legislative practice group. “Candi is widely known on the Hill and in the corporate environment for her sound judgment and deep, substantive understanding of the legislative process. Her arrival at Hogan & Hartson further adds to our existing bench strength in the economic, domestic, international, and defense arenas.”

Commenting on her return to private practice, Wolff said, “I am joining one of the pre-eminent Washington law firm lobbying shops during an exciting period of growth for legislative activities. I look forward to joining the talented lawyers at Hogan & Hartson and building my practice at the firm.”

Wolff received her law degree from The George Washington University and her bachelor's degree from Mount Holyoke College.

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

**MORGAN LEWIS & BOCKIUS LLP
EMPLOYMENT PARTNER JOINS FIRM****Employment Partner Joins Morgan Lewis in Chicago**

CHICAGO, April 28, 2008: Morgan Lewis today announced that Thomas F. Hurka joins the firm as a partner in its Labor and Employment Practice, resident in the Chicago office. Tom, a former partner of Baker and McKenzie, rejoins six of his former colleagues who joined Morgan Lewis in Dallas late last year.

Tom's arrival will broaden further the firm's nationally recognized labor and employment capabilities—which have made Morgan Lewis a Winner or Finalist in every American Lawyer magazine "Litigation Department of the Year" competition since 2004. With a strong presence on both coasts and a solid team in the central United States, Morgan Lewis's Labor and Employment Practice counsels and represents Fortune 500 companies across a broad array of labor and employment matters, including complex employment litigation; race, sex, and disability discrimination; harassment; wrongful discharge; overtime lawsuits; Employee Retirement Income Security Act (ERISA); Family Medical Leave Act (FMLA); and non-compete agreements.

Tom's practice focuses on litigation involving federal, state, and local employment and labor laws, including the National Labor Relations Act, the Americans with Disabilities Act, FMLA, the Age Discrimination in Employment Act, ERISA, and the Fair Labor Standards Act, among others. Tom also counsels and represents employers regarding litigation involving restrictive covenants, unfair trade practices, breaches of fiduciary duty and duty of loyalty, fraud, and breaches of contract.

Tom has represented employers in state and federal trials, arbitrations, and administrative proceedings. He has also represented employers before the National Labor Relations Board.

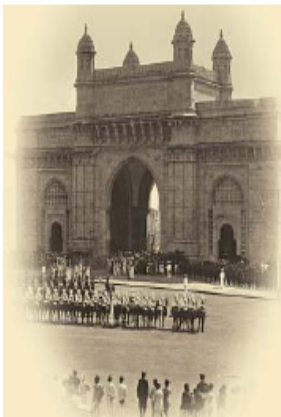
For more information about Morgan Lewis, please visit www.morganlewis.com.

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**NAUTADUTILH
APPOINTS NEW PARTNER TO HEAD DEDICATED INVESTMENT FUNDS
PRACTICE IN LUXEMBOURG**

Leading Benelux law firm NautaDutilh is pleased to announce the appointment of Pierre Reuter as a partner in the firm's Luxembourg office. Pierre will head and further develop the recently established investment funds practice in Luxembourg and joins NautaDutilh with nearly 10 years of experience in the Luxembourg fund industry, gained at the highly regarded law firms of Elvinger, Hoss & Prussen and Linklaters LLP.

He is the third new partner to be appointed this year at the firm's steadily growing Luxembourg office, following the appointment of Jean-Marc Groelly and Jean-Michel Schmit in January 2008 and March 2008, respectively.

Pierre's appointment is a boost to NautaDutilh's Benelux Investment Funds Industry Team and reaffirms the firm's commitment to meet clients' growing demand for assistance and advice in relation to investment fund products and services. Furthermore, it is a response to the continued popularity of Luxembourg as a key jurisdiction for the establishment of fund vehicles. The investment funds practice in Luxembourg works closely with the firm's corporate and tax practices to provide comprehensive legal advice to, in particular, private equity and real estate funds.

Pieter Elias, head of NautaDutilh's Luxembourg office said "We are delighted that Pierre has joined us to head up this practice group in the fast-moving funds sector. His significant experience and expertise in the Luxembourg funds market will enable us to provide clients with a broad range of funds products and services and to continue the growth of our office".

For additional information visit www.nautadutilh.com

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CLAYTON UTZ

ADVISES ON AWARD WINNING MOTORWAY PROJECT

Melbourne, 4 April 2008: Australia's newest tollway, Eastlink, continues to receive recognition for its innovation and enhancement of Melbourne's road network, adding to what has been an excellent experience for national law firm Clayton Utz as legal advisors to the project.

The 39 kilometre motorway, which on completion mid year will connect Victoria's Monash, Eastern and Frankston Freeways, was recently awarded the Project of the Year at the second Annual Infrastructure Oration and National Infrastructure Awards organised by Infrastructure Partnerships Australia.

The award, presented by the Premier of Victoria the Hon. John Brumby MP, recognised the project for its "focus on customers, stakeholders and the environment, and delivery ahead of time and on-budget".

Led by Melbourne partner Marko Misko, the Clayton Utz Major Projects team advised the Southern and Eastern Integrated Transport Authority (SEITA) on the \$3.8 billion development. This included the developmental and contracting stages, the tender process, the concession deed, project scope, construction and technical requirements.

Other members of the project team included Brad Vann, Steve Murray, Naomi Kelly, Sallyanne Everett, Joanne Daniels and a host of lawyers from across the firm.

The head of Clayton Utz' Major Projects team, Doug Jones, said he was proud the firm was able to bring its significant experience in advising on major infrastructure projects in Australia to such a well-regarded project as Eastlink.

"Eastlink is one of the largest PPPs ever carried out in Australia and it is fantastic to see that industry has given this project the recognition it deserves. The Eastlink motorway is going to make a significant difference to the daily lives of many Melbourne residents," he said.

EastLink is the largest urban road project ever constructed in the State of Victoria and will include a 40 kilometre link between Mitcham and Frankston, twin 1.5 kilometre tunnels, a link to the Ringwood Bypass, 16 interchanges and over 90 bridges.

For additional information visit www.claytonutz.com

Disclaimer

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.

GIDE LOYRETTE NOUEL

ADVISES THE REPUBLIC OF MALI ON THE PRIVATIZATION OF THE BANQUE INTERNATIONALE POUR LE MALI

22 April 2008

The Republic of Mali announced on 18 April 2008 an invitation to tender within the framework of transferring a strategic participation in the share capital of the Banque Internationale pour le Mali (BIM SA).

The second largest commercial bank in Mali, BIM SA posts a net profit of more than 5.6 billion CFA Francs (€8.5 million) and benefits from a network covering the whole of Mali.

The invitation to tender is for 51% of the shares and the voting rights of BIM SA and aims to attract a strategic bank that is likely to further the development of BIM SA. This invitation to tender falls within the policy of disengagement from the financial sector that was implemented by the Government of Mali through the *Projet de Développement du Secteur Financier*.

In this operation, Gide Loyrette Nouel (François Krotoff, Leïla Hubeaut and Romain Régulaire) advises the Republic of Mali. François Krotoff leads a very active team on the African continent, intervening notably in matters of project finance and privatisations but equally in the fields of both mining and hydrocarbons.

For additional information visit www.gide.com

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FRASER MILNER CASGRAIN LLP

ACTS IN LANDMARK DECISION ON THE POWERS OF SEARCH AND SEIZURE

Montreal, May 6 2008: On April 23, 2008, Justice Suzanne Courteau of the Superior Court handed down an important decision on the powers of search and seizure set out in sections 40 and 40.1 of the *Act respecting the ministère du Revenu* (the "MRA"). In her judgment, Justice Courteau found the wording "until it has been produced in judicial proceedings" contained in sections 40 and 40.1 of the MRA, unconstitutional, invalid, null and void. Her reasoning was that this wording violates section 8 of the Canadian Charter of Rights and Freedoms (the "Charter") since it authorizes the unreasonable retention of things seized during a search.

Section 40 MRA is the provision that authorizes Ministère du Revenu officials who have obtained a warrant to search for any thing that may afford evidence of an offence against a fiscal law or a regulation made by the Government under a fiscal law, and seize, remove and keep it "until it has been produced in judicial proceedings".

As for section 40.1 MRA, it authorizes the person executing a warrant issued under section 40 MRA to seize and remove, in addition to that which is referred to in the warrant, any thing he believes, on reasonable grounds, to constitute evidence of the commission of an offence against a fiscal law or a regulation made by the Government under a fiscal law and, upon being authorized by a judge, to keep it for purposes of the investigation, "until it has been produced in judicial proceedings".

Therefore, as these sections currently read, the courts rule only once on the retention of the seized items—either when the search warrant is issued or when a judge orders that the things be retained pursuant to section 40.1 MRA.

BACKGROUND

In May 2006, the plaintiff companies were searched a number of times. During the searches, many things were seized, not only under the search warrants but also under section 40.1 MRA. As required by the latter section, a judge authorized the retention of the things seized until they were produced in judicial proceedings. To date, no judicial proceedings have been introduced in connection with the alleged offences for which the search warrants were issued and the things were seized, notwithstanding that it has been over 23 months since the searches.

CONSTITUTIONAL SHORTCOMINGS OF SECTIONS 40 AND 40.1 MRA

Justice Courteau agreed with the arguments of the plaintiff companies, and found that sections 40 and 40.1 MRA violate section 8 of the Charter for two reasons. First, as these sections now read, the judge who authorizes the search and retention of the things seized loses jurisdiction over them and, second, there are no mechanisms for such jurisdiction to be maintained, or to assure reasonable retention of the things seized during the entire time they are being held. According to Justice Courteau, the intent of section 8 of the Charter is to prevent unreasonable search and seizure. For this reason, Justice Courteau found that the unlimited retention of things seized in the absence of court jurisdiction and without judicial authority over the retention of the things seized makes it impossible to take preventive action and guarantee compliance with section 8 of the Charter. Such omissions in the wording of sections 40 and 40.1 MRA cannot be tolerated by the courts. Accordingly, the plaintiff companies' motion for a ruling of unconstitutionality had to be granted.

The plaintiffs in this case were represented by Fraser Milner Montreal Partner, Jean Groleau and Nicolas Courcy, Associate.

For additional information visit www.fmc-law.com

HOGAN & HARTSON LLP

ANNOUNCES CLOSING OF MAJOR DEAL FOR ARCELORMITTAL'S SPARROWS POINT STEEL MILL

Partner Serves as Divestiture Trustee in the \$810 Million Transaction

BALTIMORE, May 7, 2008 — Hogan & Hartson LLP announced today the completion of the sale of ArcelorMittal's Sparrows Point steel mill to OAO Severstal of Russia for \$810 million. Joseph G. Krauss, a partner with Hogan & Hartson's Washington, D.C. office, served as Divestiture Trustee for the sale of ArcelorMittal's Sparrows Point in this transaction.

Krauss was appointed by a District of Columbia federal judge to serve as Divestiture Trustee in August 2007. He led the sale process as required by the United States District Court for the District of Columbia.

The deal, which was approved by the United States Department of Justice in April, closed on May 7, 2008, with OAO Severstal acquiring Sparrows Point. The 119-year-old Baltimore steel mill is the only integrated producer of flat-rolled steel on the East Coast, producing approximately 3.9 million tons of steel products per year. Following the merger of Mittal Steel and Arcelor in 2006, the company, renamed ArcelorMittal, was required to seek the sale of the mill by a final judgment entered in the United States District Court for the District of Columbia to comply with antitrust law requirements related to the merger of the two companies.

Lawyers with Hogan & Hartson acted as counsel to the Divestiture Trustee, handling all aspects of the transaction including corporate, labor and employment, environmental, real estate, intellectual property, energy, international trade, litigation, transportation, and tax. Morgan Stanley acted as financial advisor to the Divestiture Trustee in connection with this transaction.

As Divestiture Trustee, Krauss was assisted by associate Jonathan Grossman, and the firm's transaction team was led by partner Lorraine Sostowski, both with the firm's Washington, D.C. office. In addition, partners Steve Kaufman, Stanley Brown, Jack Keeney, Lee Berner, Scott Reisch, Margaret de Lisser, and more than 20 other lawyers from Hogan & Hartson offices throughout the firm, worked on this matter. Joseph Suh, Sarah Reisert, Nneoma Nwogu, Steve Giordano, Jenny McClister, and Carin Carithers were some of the primary associates involved in this deal.

For additional information visit www.hhlaw.com

NAUTADUTILH

THE HEIRS OF MALEVICH AND THE CITY OF AMSTERDAM REACH AN AMICABLE SETTLEMENT

The Heirs of Malevich and the City of Amsterdam have reached an amicable settlement in the dispute regarding the artworks of the Russian artist Malevich that are currently in the Stedelijk Museum in Amsterdam.

At a press conference on Thursday 24 April, Mayor Job Cohen announced that five works by Malevich have been transferred to the Heirs. The City acknowledges that the Heirs have title to the five paintings being transferred to them, and the Heirs acknowledge that the City has title to the works in the collection remaining with the City.

This will end the longstanding dispute between the City and the Heirs that began in the 1990's after the fall of the Iron Curtain. The City has always held the view that it acquired the collection properly and honourably in 1958. The Heirs contest this; in their view the selling party, Dr. H. Häring, had no right and was not entitled to sell the artist's works.

NautaDutilh assisted the City of Amsterdam in this case and was partially responsible for the present settlement. The NautaDutilh team was led by Paul Loeb assisted by Huib van Everdingen, Nico Blom, Frederike Manzoni and Erik Minderhoud.

For additional information visit www.nautadutilh.com

TOZZINI FREIRE

ACTS IN SADIA SA AND KRAFT JOINT VENTURE

Sadia S.A. ("Sadia"), Kraft Foods Brasil S.A. and Kraft Foods Holdings Inc. (the last two jointly referred to as "Kraft") have celebrated an association agreement to determine the conditions of a joint venture project that will focus on the fabrication, commercialization and distribution of cheese and cheese related products, including those currently commercialized by Kraft under the brand Philadelphia and those currently commercialized under the brand Sadia. Additionally, Sadia and Kraft have celebrated a distribution agreement to commercialize and distribute, with exclusivity, the entire Kraft's cheese portfolio in Brazil and, after the joint venture activities start, the entire portfolio of the joint venture.

The joint venture will be performed by Kraft and Sadia through a company in which Kraft will hold 51% of the voting shares and Sadia will hold 49%. The joint venture is expected to start operating by the second quarter of August 2008. This transaction represents an important step for Sadia's business strategy in the cheese segment, adding value to the company as well as to its shareholders.

The value of the initial investment was R\$30million. The Stock Purchase Agreement was executed April 28, 2008.

TozziniFreire lawyers acting in the transaction were Partner, Syllas Tozzini and Partner, Mauro Guizeline.

For additional information visit www.tozzinifreire.com

RODYK & DAVIDSON

ACTS FOR SAVVIS IN ACQUISITION OF GEO-TELA DATA CENTRE

Rodyk acted for Savvis Singapore Company Pte Ltd (Savvis) in its acquisition of the entire data centre business and assets of Geo-Tele Pte Ltd (Geo-Tele), a subsidiary of Sim Lian Group Limited. The acquisition involved the acquisition of specific assets, a long term lease and special technical requirements for fitting out the leased premises. An aggregate consideration of S\$7.8 million was paid by Savvis as consideration for the acquisition to Geo-Tele. This amount does not include the rental for the long term lease.

Partner S. Sivanesan led this transaction supported by partner Tang Woon Ee, associates Sunil Rai and Lina Chua, and foreign lawyer Rajesh Venugopalan.

For additional information visit www.rodyk.com

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WILMERHALE

ACTS FOR INTERNATIONAL PAPER; DOJ APPROVES ACQUISITION OF WEYERHAEUSER

May 6, 2008

The Department of Justice last week granted early termination of the Hart-Scott-Rodino review waiting periods allowing WilmerHale client, International Paper, to complete its acquisition of the containerboard packaging and recycling business of Weyerhaeuser. The combined entity will be the largest producer of containerboard (used to make corrugated board) and the largest converter of corrugated boxes in the world. The clearance was received despite opposition from a number of independent box converters.

International Paper announced March 17 it had signed a definitive agreement with Weyerhaeuser to acquire its containerboard packaging and business. Weyerhaeuser's containerboard packaging and recycling business includes nine linerboard mills, 72 box plants in the U.S. and four in Mexico, and more than 30 specialty packaging, kraft bag and recycling operations. International Paper is a global paper and packaging company with manufacturing operations in North America, Europe, Latin America, Russia, Asia and North Africa.

The core IP team was Doug Melamed, Jim Lowe and Jeff Ayer with assistance from Kevin Stemp, Dan Matheson, Wendy Terry, Janet Ridge, Sven Voelcker, Gabriele Accardo and Lester Ross.

For additional information visit us at www.wilmerhale.com



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KIM, CHANG & LEE

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Securities lending contracts are not mortgages or charges

The purpose of this note is to summarise the decision of Justice Finkelstein in *Beconwood Securities Pty Ltd v Australia and New Zealand Banking Group Limited* [2008] FCA 594 (handed down on 2 May 2008).

Justice Finkelstein has ruled that the securities lending contract between Opes Prime and its clients did not have the effect of conferring any equity of redemption or other equitable estate or equitable interest, including a charge, in the securities or equivalent securities. Instead, the contract passed unencumbered title in the securities on delivery of the securities.

Background

Beconwood entered into a securities lending arrangement with Opes Prime. It used a contract based on the AMSLA (the Australian Masters Securities Lending Agreement).

Under the contract, Beconwood supplied a parcel of securities to Opes Prime, in return for a payment of money. In accordance with the AMSLA-type provision, Opes Prime undertook to supply Beconwood with equivalent securities when Beconwood repaid the "loan".

Opes Prime then supplied Beconwood's securities to ANZ, under a separate securities lending arrangement.

Opes Prime collapsed and a receiver and a voluntary administrator were appointed. Beconwood wanted to regain possession of its securities. However, title to the securities had by now passed to ANZ and to its internal ANZ custodian and nominee. Beconwood may have had a claim for damages against Opes Prime, but Opes Prime's apparent

insolvency meant that any amount that might be recovered would probably be less than the value of the securities. Beconwood began legal proceedings to recover the securities from ANZ.

As a preliminary issue, Justice Finkelstein decided to issue a ruling on the legal effect of the securities lending agreement.

Beconwood's argument

The securities lending agreement stated that "all right title and interest in" the securities passed from Beconwood to Opes Prime.

Notwithstanding this, Beconwood claimed that the agreement was, in reality, a legal mortgage pursuant to which it borrowed money from Opes Prime and provided its shares as security. Under a legal mortgage, property in the security passes to the lender, but the borrower retains an equity of redemption (ie. the right to regain title to the security upon repayment of the loan). Beconwood argued that, even after transfer to Opes Prime and then to ANZ, the securities were subject to the equity of redemption. This would mean that Beconwood would be entitled to have the securities returned to it by ANZ.

Alternatively, Beconwood argued that the securities lending agreement had created a charge in its favour. In brief, the argument was that, as a result of an implied term in the agreement, the securities were charged in Beconwood's favour as soon as they were transferred to Opes Prime by Beconwood:

"The way the argument proceeds is as follows. Upon delivery to it of the lent securities, title passes to OPS. At that point the securities,

because they are identical in number and type to the lent securities (Securities), immediately fall within the definition (and thus assume the character) of Equivalent Securities which, in due course, must be delivered to Beconwood. The crux of the argument is that under the SLA OPS has an implied obligation to hold or retain an interest in any securities that meet the definition of Equivalent Securities as soon as it receives or obtains such securities. In those circumstances, Beconwood contends that it has a charge, or some kind of equitable interest, over the securities until it obtains legal title on the transfer back."

In the face of evidence by ASLA (the Australian Securities Lending Association) that the legal effect of an AMSLA-type agreement is to transfer unencumbered title to the securities borrower, Beconwood argued that the agreement should be given a different interpretation when it was used by retail investors.

A subsidiary issue was whether netting provisions in the securities lending agreement had been automatically triggered by the appointment of a receiver and a voluntary administrator to Opes Prime.

What the Court said

No mortgage

Justice Finkelstein held that the securities lending agreement was an outright transfer of property, rather than a mortgage, for a number of reasons:

- it expressly said that it transferred unencumbered title in lent securities;

- there was no provision requiring the securities borrower to return in specie the securities that were originally lent;
- there were netting and set off provisions that came into effect on default, which converted redelivery obligations into payment obligations (confirming that the parties to the agreement did not intend there to be any equitable property rights over lent securities).

No charge

Beconwood's claim that the securities were subject to a charge was also dismissed:

- Justice Finkelstein said that there were no obvious grounds for reading the suggested implied term into the securities lending agreement. He said that implying such a term into the agreement would convert it into a mortgage or a charge, which it was not;
- the agreement had no provision restricting Opes Prime from disposing of Beconwood's securities or requiring Opes Prime to keep equivalent securities on hand at all times. On the contrary, the agreement contemplated that the lender could meet its obligations to provide equivalent securities from its own holdings or in the open market.

No event of default

As a subsidiary point, Justice Finkelstein looked at whether the agreement's netting provisions had been automatically triggered by the appointment of receivers and voluntary administrators to Opes Prime. The agreement provided that the netting provisions were automatically triggered by "the appointment of a liquidator or analogous officer". The question for Justice Finkelstein was whether the appointment of receivers or voluntary administrators was analogous to the appointment of a liquidator.

He decided that the netting provisions had not been automatically triggered:

"In my view the role and function of, on the one hand, a party-appointed receiver or an administrator and, on the other hand, a liquidator, are not analogous. The role of

a liquidator is to get in the assets of the company that is being wound up, dispose of those assets and out of the proceeds discharge the debts due to creditors (pro rata if there is a deficiency) and pay the balance (if there be a balance) to the contributories. When this task is complete the company is finished. This is in marked contrast to the role of a party-appointed receiver or an administrator. A party-appointed receiver takes control of the company's assets (and sometimes manages its business), but for the single purpose of discharging the debt due to his appointer, the secured creditor. The receiver holds any surplus he has secured for the benefit of the company. On his retirement the company continues in existence. An administrator does little more than take over the running of the company, and then only for a relatively short period. This enables the creditors to decide the company's fate."

No different conclusion for retail investors

Justice Finkelstein also dismissed Beconwood's argument that the legal effect of the securities lending agreement should depend upon whether it was being used by institutions or by retail investors:

"First of all, I disagree with one fundamental premise of this argument, namely that the transactions which are given effect by the SLA and other securities lending agreements take place in different markets. The view I take is that as each agreement may be used for financing purposes they are made in the same market, namely the market for providing funding to intending share purchasers. In any event, even if they be different markets, that would not, in my view, be good reason for giving a different meaning to the same agreement. This is because I do not accept that a share lending agreement (indeed any agreement) can have a meaning that is dependent upon (and changes with) the subjective motivations for which it is entered into.

What Beconwood's argument comes down to is this. Being an unsophisticated investor, it did not know what it was getting into when it signed the SLA and its lack of sophistication

is a sufficient reason to give the SLA a construction it would not bear if entered into by skilled market players such as investment banks, hedge funds or arbitrageurs. I do not accept this argument either. Beconwood borrows for, and invests millions of dollars in, share trading. It does not qualify as an unsophisticated investor. It certainly is not a candidate for the special protection courts give to the weak and vulnerable. "

Where to from here?

Media reports indicate that Beconwood may be considering an appeal from Justice Finkelstein's decision. Regardless of whether there is an appeal, this decision is by no means the end of litigation surrounding Opes Prime's securities lending agreement.

The question of the effect of the agreement may arise in other cases in other courts (although it should be noted that, in a decision earlier this week, the NSW Court of Appeal appears to be of the same view as Justice Finkelstein).

In addition, Opes Prime clients have foreshadowed claims based upon their individual dealings with Opes Prime, focusing on representations allegedly made to them by Opes Prime. These claims would not affect Justice Finkelstein's findings on the inherent legal effect of the securities lending agreement, but might result in an award of monetary damages to a client.



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Corporate and Administrative Law

BRAZIL: THE USE OF FEDERAL WATERS FOR AQUICULTURE ACTIVITIES

A recent ruling issued jointly by the Brazilian Secretariat for Aquiculture and Fishery ("SEAP") and the Ministry of Planning, Budget and Management sets forth the proceedings to be applied before the use of Federal public waters is granted to private parties for aquiculture purposes.

Based on the new regulations, the SEAP launched, on January 15, 2008, the first public bidding for selection of private parties to commercially exploit said Federal waters. On March 17, the second public bidding was launched, through which the winner will receive permission to use federal waters in the Moxotó Reservoir, located in the São Francisco River, State of Pernambuco, to develop aquiculture activities.

This is the result of an initiative that began with the submission of technical projects by private parties interested in using certain public waters. The SEAP analyzed the convenience and adequacy of the enterprises and consulted with other public authorities, such as the Regional Office of Federal Assets – GRPU, and finally started launching the public biddings.

The criteria that the SEAP takes into account for deciding and ranking bidding proposals are: (i) the competitors' technical experience; (ii) the price offered by competitors; (iii) the viability and sustainability of the enterprise; (iv) an expected increase in the Brazilian fishing production; (v) social inclusion; (vi) creation of employment; (vii) food safety; and (viii) social actions aimed at increasing food offer.

These public biddings have opened the list of approximately 1,200 technical projects already submitted to the SEAP, which await the Secretariat's opinion on their convenience and adequacy. According to the SEAP's technicians, the next projects, from their initial presentation by the private party until the execution of an agreement authorizing the use of the applicable waters shall be concluded within a period of six months to one year.

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Perfection of Civil Retrial, Enforcement and Consistency Among Laws — Amendments to PRC’s Civil Procedure Law

By Li Yongmei*

The PRC Civil Procedure Law (“Old Law”), which was promulgated by the seventh National People’s Congress of People’s Republic of China (“NPC”) and became effective on April 9, 1991, was amended for the first time on October 28, 2007 on the 13th session of the Standing Committee of the 10th NPC. The amendments to the Old Law (“New Law”) came into effect on April 1, 2008. The New Law will reconcile the conflicts of the retrial system and civil enforcement system during the implementation of the Old Law. Also, the amendment have been coordinated with the PRC Enterprise Bankruptcy Law effective as of June 1, 2007, by deleting the chapter titled “Bankrupt Procedures of Enterprise Legal Person”.

I. Improving the Retrial System

Through a retrial, a competent people’s court may re-try a case if a lower court’s decision is incorrect. After retrial, the retrial court may revoke or revise the original decision according to law. Therefore, the retrial procedures are important to the parties as they are the last opportunity to justify their legal rights and interests. The New Law addresses potential logjams in the retrial process, such as problems with retrial petition acceptance, and improves the existing civil retrial system in substance and in procedure by integrating Chinese courts’ practical experiences in trials in recent years.

A. Retrial Petition and Trial Procedures Standardization

The New Law has standardized the retrial petition process and trial procedures by implementing a few changes.

First, the New Law empowers higher courts to accept retrial petitions for decisions rendered by lower courts. The New Law revised the relevant provisions in the Old Law and Opinions of the Supreme People’s Court on Regularizing the Acceptance of Retrial Petition by the People’s Courts and clarifies that the parties may directly submit the retrial petition to the people’s court at the next higher level.¹ This change solves problems related to previous procedures which did not clarify which court may accept retrial petitions. Such lack of clarity often led to courts of the same level performing retrials, or, in some instances, the original court retrying its own case by error! The New Law improves impartiality, public creditability, and authoritativeness of a retrial ruling.

Second, the New Law balances the rights of the claimant and respondent during the retrial. Article 180² of the New Law makes it clear that the respondent has the right to submit its opinion on the retrial application in writing. Such provision provides the respondent with an opportunity of defense, helps the retrial court gain a

¹ Article 178 of the New Law provides that if the parties believe that an effective court judgment is erroneous, then they may petition at a people’s court at the next higher level for retrial; however, the enforcement of the effective court decision shall not be suspended or terminated due to the initiation of such petition.

² Article 180 of the New Law provides that

A party that petitions for retrial shall submit a retrial petition and other required materials. The people’s court shall, within five days upon receiving the retrial application, deliver the copy of the retrial application to the counterparty. The counterparty shall submit its opinions in writing within 15 days upon receiving the copy of the retrial application; if the counterparty fails to submit its opinions in writing, it will not affect the review by the people’s court. The people’s court may require the claimant and the respondent to provide additional materials and inquire on relevant matters.

comprehensive understanding of both parties' arguments and evidences, and enhances the fairness and accuracy of retrial. This amendment is consistent with the impartial policy of the people's courts.

Third, the New Law extends the statute of limitations to file retrial petition, to make it consistent with the statute of limitation provided by the General Principles of Civil Law³. Article 184 of the New Law provides that

where a party wishes to petition for retrial, such petition shall be filed within two years from the date when the court decision became effective; such petition shall be filed within three months from the date such party is aware of or should be aware of the fact that the writ or order on which the original court decision had been revoked or modified or that the personnel involved in the original trial had committed embezzlement, accepted bribery, sought for personal interests or bent the law during the original trial after two years from the date when the court decision became effective.

Compared with the Old Law which merely provides the two year span of the statute of limitation, the New Law has added two special situations in which the statute limitation for retrial petition may be recalculated beyond the two-year limit.

Fourth, the New Law has added provisions to discipline the courts' practice during the retrial application review and trial procedures. For example, Article 181 of the New Law provides that

the people's court shall review and examine the case within three months from the date of receiving the retrial application and accept the retrial application where the application meet any of the circumstances specified in Article 179 of this Law; the court shall reject the retrial application where the application does not satisfy any of the circumstances specified in Article 179 of this Law. Where special circumstances in which the review period needs to be extended arise, such extension shall be subject to the approval of the president of the competent court. A case that a party petitions for retrial shall be retried by a people's court at a level higher than an intermediate people's court. A case that the Supreme People's Court or a high people's court rules for retrial shall be retried by the court that rules for retrial or another people's court, or the people's court that initially tried the case.

This provision sets the time limit for reviewing and examining the retrial application, which is helpful to protect the parties' rights and improves litigation efficiency; this provision also clarifies which court shall retry the case, which increases the authoritativeness of retrial.

B. Defining Substantive Conditions to Initiate Retrial

A case must satisfy the substantive conditions as provided in the New Law before it qualifies for a retrial. The New Law refines the three grounds for retrial under the Old Law and makes these grounds more operable. In general, the New Law has inserted 10 new grounds on which the parties may petition for retrial and the procuratorate may make defense.

First, Article 179 of the New Law retains the three substantive conditions to initiate retrial provided in the Old Law. These conditions are:

- a. where sufficient new evidence is found to overturn the original court decision;
- b. where the application of law in the original court decision is erroneous;

³ Article 135 of the General Principles of Civil Law provides that the statute of limit for filing a petition at a people's court for protection of civil rights shall be two years, unless otherwise provided by other laws or regulations.

c. where breaches of statutory litigation procedures that affect the accuracy of the original court decision exist or the judiciary have committed embezzlement, accepted bribes, sought personal benefits or bent the law during the trial of the case.

Second, the New Law refines the existing substantive conditions in the Old Law and adds new conditions. One of the new substantive conditions provided in the New Law is “where the basic facts affirmed by the original court decision lack the support of substantial evidence”, which is an improved version of “the primary evidence on which the original court decision affirmed the facts were insufficient” as provided in the Old Law. Although this amendment abandons the obscure expression that the “primary evidence was insufficient” under the Old Law and explains that the “primary evidence” as the evidence used to prove the basic facts, the amendment is silent on what “basic facts” means and such silence could easily result in controversy in practice. Therefore, the amendment needs to be further improved.

Third, the New Law specifies another 11 situations under which a case shall be retried based on the past trial experience. These provisions covering procedural and substantive issues in retrial aim to ensure the legality of trial procedures and the accuracy of court decisions.

Under the New Law, a case shall be subject to retrial if the following procedural flaws are found:

- a. the court of original trial failed to cross-examine the primary evidences upon which the original court decision was based;
- b. the application of jurisdiction was wrong;
- c. the trial⁴ proceeded in a form that was illegal;
- d. a disabled person or one who is not *sui juris* participated in the trial without his next friend or any party who shall be present at the trial did not do so because of an incident not arising from the fault of such party or its next friend;
- e. the right of a party to argue was deprived during the original trial in breach of law; or
- f. the court rendered the original decision where either party had not been served with a summons and therefore had failed to be present at the court.

The said provisions regarding cross-examination, jurisdiction, judiciary and the parties’ participation ensure the legitimacy of trial procedures.

The New Law also provides that a case shall be retried if the following substantive defects are found:

- a. the primary evidence based on which the court affirmed the facts was forged;
- b. the facts which the original trial court affirmed lack the support of evidences;
- c. the parties, which were unable to collect evidences by themselves needed for the original trial because of an external cause, had applied to the people’s court for assistance in investigation and evidence collection in writing but the court failed to provide such assistance;
- d. some claims of the parties were overlooked in the original court decision or the original court decision went beyond the scope of the parties’ claims; or
- e. the writ or order on which the original court decision was made has been revoked or revised.

The said provisions regarding the authenticity of evidence, evidence collection, and legal basis for court ruling guarantee the accuracy of the “basic facts”.

C. Consolidating the Supervision by the People’s Procuratorates

⁴ In China, a civil case may be tried by a single judge or a collegiate bench consisting of three judges or more judges in an odd number larger than three.

The New Law further strengthens the supervision by the people's procuratorates and expressly specifies the 14 situations in which the people's procuratorates may file an objection to a retrial. The New Law also sets forth that the people's court must rule on retrial within 30 days upon receiving the protest of the people's procuratorate. Such amendments not only expand the conditions under which a procuratorate may file a protest, but also avoid the delay in the initiation of retrial due to the law's silence on the time limit for the court to rule on retrial upon receiving the procuratorate's protest.

II. Reinforcing Civil Enforcement

The New Law establishes a series of new systems based on practical experiences to strengthen civil enforcement in various aspects and clear the roadblocks of enforcement in practice. The New Law improves civil enforcement in the following aspects:

A. Reinforcing Civil Enforcement by Implementing Immediate Enforcement, Property Filing, Severe Penalty and A System to Deter Non-Enforcement

a. Immediate Enforcement

Under to the Old Law, the enforcement measures could only be taken if the notice of enforcement is delivered to the enforcee. This defective provision fails to stop some enforcees from transferring their property to another place or concealing their property immediately upon receiving the notice and is likely to impair the creditors' rights and invade the sanctity of law. To correct such deficiency in the Old Law, Article 216 of the New Law provides that if the enforcee fails to fulfill its obligations specified in a writ or order and is suspected of concealing its property or transferring its property to another place, the enforcement officers may take enforcement actions immediately.

b. Property Reporting System

In practice, although certain local courts send a Property Filing Notice to the enforcee, such practice lacks legal grounds and therefore often encounters practical obstacles. Article 217⁵ of the New Law establishes a property reporting system and the legal liabilities for failure of performing such obligations. This system is conducive to force the enforcee to cooperate in enforcement and makes it possible to conduct enforcement where the party applies for enforcement are unaware of the enforcee's property's status.

c. Deterring Non-enforcement

The New Law establishes a coordinated system to reduce non-enforcement. If the enforcee fails to fulfill the obligations specified in a writ or order, the people's court may notify relevant agencies to restrict the enforcee from leaving the country, instruct the enforcee's credit records to include non-enforcement records or provide public notice through the media of the non-enforcement. The said measures form a coordinated supervision force, which ensures that the enforcee performs its obligations. Such measures also help to maintain the equity and authority of law by preventing the

⁵ Article 217 of the New Law provides that

If the enforcee fails to fulfill the obligations specified in a writ or order as instructed in the enforcement notice, the enforcee shall provide a list of its existing property and its property within one year before receiving the enforcement notice. Where the enforcee refuses to provide the said property list or provides false information in the said list, the people's court may, based on the circumstances, impose a fine on or detain on the enforcee, its next friend or the person in charge in the related organization or the person bear primary liability in such organization.

enforcee who refuses to perform while maintaining a luxurious lifestyle or continuing its regular investment and borrowing activities.

d. Severe Penalties

Merciful penalties are likely to cause a delay or rejection of enforcement by the enforcee or the agency which is obliged to provide assistance during enforcement (the “Assisting Entity”). The highest fine for the Assisting Agency provided by the Old Law was only RMB30,000, which is too small to deter Assisting Entities with substantial financial strength. For various reasons, some Assisting Entities would rather pay the fine than assist in the enforcement. The New Law increases the fines for non-enforcement up to RMB10,000 for individuals and up to RMB300,000 for entities. The highest fine for non-enforcement under the New Law is 10 times as that under the Old Law.

Also, the New Law expanded the scope of parties subject to detention to the person in charge and the person bearing primary liability for non-enforcement in the Assisting Entities which refuses to assist during enforcement. Such amendment is a breakthrough, compared to the detention provision in the Old Law which only covers the person in charge and the person primarily liable for non-enforcement from the enforcee. The New Law, under which the enforcee and the Assisting Entities must consider the risks of being detained and the legal costs of non-performance, helps to deter the parties from refusing to perform their obligations during enforcement.

B. Empowering the Parties to Choose the Enforcing Court

Targeting local protectionism in civil enforcement, the New Law entitles the parties to apply to the court at a higher level for enforcement. Where the local protectionism is found after the court at the higher level investigates, the higher court may order the court conducting the original trial to enforce the case within a given time limit or order another court to enforce. To clear the roadblocks of a higher level enforcement, the New Law provides that

Effective court decisions on civil cases and the paragraphs relating to property in court decisions in criminal cases shall be enforced by the people’s court of first instance or the people’s court at the same level at the domicile of the property to be enforced. Other writs or orders that shall be enforced by a people’s court according to law shall be enforced by the people’s court at the domicile of the enforcee or at the domicile of the property to be enforced.

C. Extending the Time Limit to File an Enforcement Application

The Old Law sets forth different time limits, which are up to one year, for different subjects of enforcement. The New Law no longer differentiates the subjects of enforcement and provides a unified two-year time limit for the submission of an application for enforcement. The New Law also clarifies the provisions on the suspension and interruption of the statute of limitation in other laws will apply to the suspension and interruption of the statute of limitation for the submission of an enforcement application. The said clarification ensures the applicants can exercise their rights while applying for enforcement, and their rights of enforcement application are protected at the same time.

In addition, the New Law specifies the method of calculating the time limit for enforcement application:

- a. The time limit shall start from the last day of the enforcement period specified in the court order;
- b. Where the court order requires bifurcated enforcement, the time limit shall start from the last day of the specified period for each stage;

c. Where the court order is silent on the period of enforcement, the time limit shall commence from the day when the court order comes into effect. Such provision reduces the uncertainty arising from a different understanding of the calculation of such period.

D. An Enhanced Enforcement System

Certain practical barriers to enforcement are simply illegal behavior. For this reason, the New Law upgrades the system under which an enforcement can be challenged. Such change provides the parties and the interested parties with additional procedural remedies for illegal enforcement. This enhanced system -- which also empowers the parties and the interested parties to petition for reconsideration at a higher court against a court decision with which they disagree and specifies the time limit of reviewing the challenge/disagreement against the original court decision. It helps to discipline the courts' enforcement practice and guard the parties' legitimate rights and interests.

E. Redefining Enforcement Agencies

The enforcement agencies under the Old Law shall be the primary people's courts and the intermediate people's courts. But in practice, the high people's courts and the Supreme People's Court, which supervise the people's courts at lower levels, also share the enforcement responsibilities. As no law empowers the Supreme People's Court to participate in civil enforcement, the enforcement agency of the Supreme People's Court has engaged in civil enforcement through an expanded practical interpretation of the Old Law. The New Law clarifies that the people's court in any level may establish its own enforcement agency, as needed, which provides the legal ground for the Supreme People's Court and the high people's courts to establish their own enforcement agency. This revision is consistent with the current situation of and the practical needs for civil enforcement.

III. Removing Provisions on Bankruptcy Procedure of Enterprise Legal Person

The Enterprise Bankruptcy Law, which was promulgated in 2006, sets forth provisions regarding the bankruptcy procedure of legal person enterprise which apply to all types of enterprises in the PRC. Therefore, it is unnecessary to retain in the New Law the provisions on the bankruptcy procedure of enterprise legal person which were in the Old Law that overlap with the corresponding provisions in the Enterprise Bankruptcy Law. The foregoing provisions have been deleted in the New Law for purpose of the consistency of law.

Based on the existing provisions in the Law as well as past experiences and practical needs, the New Law improves the retrial system and the enforcement system. The New Law is far from perfect; however, its positive effect upon promulgation is undeniable. It is believed that China's civil procedure system will be further refined with the government's continuing legislative efforts.

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

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Reform of the Law of Arbitration in Hong Kong

On 31 December 2007, the Department of Justice of the HKSAR published a Consultation Paper on Reform of the Law of Arbitration in Hong Kong and draft Arbitration Bill (“Consultation Paper”). Views are sought on the Consultation Paper by 30 April 2008.

The key object of the draft Arbitration Bill (the “draft Bill”) is to seek to unify the domestic and international regimes of the arbitration law in Hong Kong. The origin of the law for domestic arbitration in Hong Kong was the English Arbitration Act 1950 (now repealed). In an attempt to align the arbitration law for international arbitration in Hong Kong with international standards, following the Law Reform Commission’s recommendations, the UNCITRAL Model Law on International Commercial Arbitration (the “Model Law”) adopted by the United Nations Commission on International Trade Law (“UNCITRAL”) with minor modifications were applied to international arbitration in Hong Kong in 1990. The arbitration law in Hong Kong has since been divided into two separate regimes for domestic and international arbitrations.

The purpose of the reform, as stated in the Consultation Paper, is twofold. One objective is to make the law on arbitration more user-friendly. The other objective is to take a further step forward in aligning the domestic arbitration law with widely accepted international arbitration practices and development. It is hoped that this will secure Hong Kong’s place as a Model Law jurisdiction, thereby attracting more business parties to choose Hong Kong as the place to conduct arbitral proceedings.

We shall in this article briefly look at the major changes to the domestic arbitration regime introduced by adopting the Model Law for domestic arbitration (as well as international arbitration) in Hong Kong.

Interim Measures and Preliminary Orders

Interim measures

Interim measures and preliminary orders are dealt with under Part 6 of the draft Bill. Clause 36(1) gives effect to Article 17 of the Model Law with revisions adopted by the UNCITRAL in 2006. Under Article 17, unless otherwise

agreed by the parties, an arbitral tribunal may grant interim measures at the request of a party unless the parties have agreed otherwise. An interim measure is defined under Article 17(2) as any temporary measure by which the arbitral tribunal orders a party to:

- “(a) *Maintain or restore the status quo pending determination of the dispute;*
- “(b) *Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral proceedings itself;*
- “(c) *Provide a means of preserving assets out of which a subsequent award may be satisfied; or*
- “(d) *Preserve evidence that may be relevant and material to the resolution of the dispute.*”

The draft Bill in Clause 36(2) extends such meaning to include an injunction and under Clause 36(3) empowers the arbitral tribunal to make an award to the same effect as the interim measure granted to facilitate the enforcement of the interim measure. These are provisions which apply locally in Hong Kong if the draft Bill is enacted. The inclusion of an injunction may be seen to be a clarification of what is probably covered by the original provisions of Article 17. The making of an award to the same effect as the interim measure will enhance its enforcement, particularly in countries which are parties to the New York Convention.

Powers to order interim measures are provided under Section 2GB of the current Arbitration Ordinance. The scope of Section 2GB is considerably wider than Article 17. In particular, Section 2GB confers express powers (which are not provided under Article 17) on the tribunal to order security for costs and discovery of documents and to direct evidence to be given by affidavit. These additional powers provided under Section 2GB are retained, unless otherwise agreed by the parties, under Section 57 of the draft Bill. This seems to be a sensible approach because experience shows these powers are generally useful for the conduct of arbitral proceedings.

One other significant feature of the draft Bill in respect of the conduct of arbitral proceedings is the provision of the power, unless otherwise agreed by the parties, for the tribunal to make a peremptory order. Whilst Article 25 of the Model Law, which is adopted under Clause 54 of the draft Bill, provides for certain powers that can be exercised by the tribunal in the event of a procedural default, it only applies to certain specified defaults in respect of statements of claim and defence, non-appearance or non-production of evidence. The draft Bill goes further and gives the tribunal the power to make a peremptory order. Under Clauses 54(3) and (4) of the draft Bill, where a party fails to comply with a peremptory order made by an arbitral tribunal, the tribunal may direct that the party in default shall not be entitled to rely on any allegation or material which is the subject matter of the order, may draw adverse inferences from the non-compliance or may make an award on the basis of the materials provided. The tribunal may also make an order as to the payment of costs. Where the party fails to comply with an order for the provision of security of costs, the tribunal may under Clause 57(4) of the draft Bill make an award dismissing a claim or stay a claim. These are in our view useful and powerful tools which may be relied upon to ensure effective conduct of arbitral proceedings.

It is interesting to note that all the powers for making interlocutory orders as discussed above are subject to agreement otherwise by the parties. These are effectively powers which can be opted out by the parties. This gives weight to party autonomy whilst keeping, failing agreement by the parties, the useful powers.

Preliminary orders

The specific regime for preliminary orders under Clauses 38 and 39 of the draft Bill, adopting Articles 17B and 17C of the Model Law, allows any party to make ex-parte applications to the tribunal, without notice to any other party, to request an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested. This mechanism bears some similarity to an application for an injunction to the Court in Hong Kong. The party requesting a preliminary order would need to satisfy the tribunal that prior disclosure of the request for the interim measure to

the party against whom it is directed risks frustrating the purpose of the measure. The tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practical time and shall decide promptly on any objection to the preliminary order. The tribunal may require the party requesting an interim measure or applying for a preliminary order to provide security and such party shall be liable for any costs and damages caused by the measure or the order to any party if the tribunal later determines that the measure or the order should not have been granted.

A preliminary order will only be valid for a period of 20 days and a tribunal may issue an interim measure adopting or modifying the preliminary order. Whilst a preliminary order is binding on the parties, it is not subject to enforcement by the Court. A preliminary order also does not constitute an award. In those circumstances, it seems that a preliminary order alone has limited effect in preserving the status between the parties. Where there is a breach of the order, remedies may be sought from the tribunal. However, by that time, the purpose of the preliminary order may have been frustrated by the action of the party against whom the order is directed. We consider that provisions should be made in the new legislation for the preliminary order to be enforceable by the Court, perhaps even with some expedited procedure due to the short validity period of the preliminary order.

Awards

Part 8 prescribes procedures for deciding on the choice of substantive law in arbitral proceedings and sets out the requirements for the form and contents of an arbitral award. It also provides for the correction and interpretation of an award and the making of an additional award. It deals with the award on costs of the arbitral proceedings and empowers an arbitral tribunal under Clause 80 to order payment of interest on costs awarded in arbitral proceedings. This extends the relevant powers of the tribunal under Sections 2GJ and 2GH of the current Arbitration Ordinance which do not give an arbitral tribunal an express power to award interest on costs.

Court Assistance or “Intervention”

Power to grant interim measures

Under Clause 46 of the draft Bill, the Court in Hong Kong is given a concurrent power to grant interim measures. For arbitral proceedings conducted outside Hong Kong, an interim measure may be granted by the Court only if those proceedings are capable of giving rise to an arbitral award which may be enforced in Hong Kong under the new arbitration legislation or any other legislation in Hong Kong and that the interim measure sought belongs to a type or description of interim measures that may be granted in Hong Kong in relation to arbitration proceedings conducted in Hong Kong. There is an alternative proposal that reciprocity should be considered in granting an order in aid of arbitration proceedings conducted outside Hong Kong. This proposal is not recommended by the working party and is probably not conducive to promoting Hong Kong as an international arbitration centre.

Leave for enforcement

Clause 62 of the draft Bill preserves the present statutory position in respect of the enforcement of orders or directions, including interim measures, made by an arbitral tribunal in relation to arbitral proceedings conducted in or outside Hong Kong. For orders or directions made outside Hong Kong, there is a new requirement that leave for enforcement of such orders or directions shall not be granted by the Court in Hong Kong unless such orders or directions belong to a type or description of orders or directions that may be made in Hong Kong in relation to arbitral proceedings conducted in Hong Kong. An alternative proposal based on reciprocity is similarly not recommended by the working party.

Recourse against award

Under Section 25 of the Arbitration Ordinance, an arbitrator may be removed by the Court or an award set aside if there is misconduct by the arbitrator. Misconduct covers both personal misconduct of the arbitrator and misconduct which affects the proceedings. If the arbitrator has breached the principles of nature justice or fairness leading to substantial miscarriage of justice, it may be considered misconduct. Under Articles 12 and 13 of the Model Law incorporated

by Clauses 25 and 26 of the draft Bill, potential challenges will have to be characterised as giving rise to justifiable doubts as to impartiality or independence. Whilst some of the grounds for misconduct may also lead to justifiable doubts as to the arbitrator’s impartiality and independence, the concept of misconduct is probably wider than failing to demonstrate independence and impartiality.

The familiar provisions in domestic arbitration for appealing against an award on a question of law will not be available under the new regime (subject to opt-in provisions discussed below). An award may only be set aside on limited grounds specified in Article 34 of the Model Law such as the incapacity of a party to the arbitration agreement, the invalidity of the agreement under the chosen law, proper notice not being given of the appointment of the arbitrator, etc. The Court may not set aside an award on the ground of error of fact or law on the face of award.

Other court powers

Article 27 of the Model Law is adopted under Clause 56 of the draft Bill which allows an arbitral tribunal to request the Court’s assistance in taking evidence. Clause 56 further provides that the Court may order a person to attend proceedings before the arbitral tribunal to give evidence or to produce documents or other evidence. The special powers for the Court under Section 2GC of the current Arbitration Ordinance to make an order, in relation to any arbitral proceedings, directing the inspection, photographing, preservation, etc. of any relevant property or directing samples to be taken from, observations to be made of, or experiments to be conducted on any relevant property are retained by Section 61 of the draft Bill.

Other available powers under the current Arbitration Ordinance such as the power to consolidate arbitration proceedings under Section 6B and the power to determine a preliminary point of law under Section 23A are not available under new regime. The consolidation provision in particular is something commonly used by parties to domestic arbitration in Hong Kong and is a powerful tool to facilitate the conduct of related arbitration proceedings. Its removal may require careful drafting of related contracts and sub-contracts to make sure all the necessary parties give their consent in the agreements for consolidation of

related arbitration proceedings. This may not be practicable as not all the contracts are prepared at the same time and it is difficult for sub-contractors down the line to have provisions which contemplate consolidation of sub-contract arbitrations with arbitrations under the main or upstream contracts. It is worth considering keeping the consolidation provision in the Hong Kong legislation.

Opt-in Provisions

As may be seen from the above, the draft Bill once enacted will introduce significant changes to the current domestic regime of the arbitration law in Hong Kong. Many of the provisions which are available under the domestic regime and which will not be provided for in the unified regime are to a certain extent retained as opt-in provisions under Schedule 3 to the draft Bill. It is provided under Part 11 that parties to an arbitration agreement may include in the agreement any of the provisions in Schedule 3.

The opt-in provisions include the reference to a sole arbitrator, the power for the Court to consolidate arbitrations, grounds to challenge an award for "serious irregularity" (rather than misconduct), the power of the Court, upon application of any party to the arbitral proceedings, to determine a question of law arising in the course of the proceedings and the right (subject to certain conditions) to appeal against an arbitral award on a question of law.

One main difference between the old and the new regime (under Schedule 3) on the procedure of appeal against an arbitral award on a question of law is that the Court under the new provisions shall determine an application for leave to appeal without a hearing unless it appears to the Court that a hearing is required. Leave may be granted if the decision of the arbitral tribunal on the question is obviously wrong or the question is one of general importance and the decision of the arbitral tribunal is at least open to serious doubt. Whilst the criteria for granting leave may be said to bear some similarity to the common law criteria, the criterion of "serious doubt" now applies to a question of general

importance which arguably also includes the interpretation of provisions in a "standard form" rather than a "one-off" contract. The absence of the requirement of a hearing may present some difficulty for the Court to deal with potentially complicated matters on paper.

It is provided under Part 11 of the draft Bill that, where an arbitration agreement entered into before, or at any time within a period of six years after, the commencement of the new legislation stipulates that an arbitration under that arbitration agreement shall be a "domestic arbitration", all the opt-in provisions under Schedule 3 shall automatically apply to that arbitration agreement subject to any express agreement to the contrary between the parties. This will reduce the impact of the new legislation on the current domestic arbitration provisions which the industry and the practitioners are used to and it is open to them to adopt the provisions in Schedule 3 even after the expiry of the six-year period. There is also a deeming provision included under Part 11 to ensure that, subject to some exceptions, all the opt-in provisions in Schedule 3 would automatically apply to an arbitration agreement contained in every contract down the line of the sub-contracting process.

Conclusion

The introduction of new arbitration legislation in Hong Kong along the lines proposed in the Consultation Paper and the draft Bill should be seen as a positive step forward in enhancing the international status of Hong Kong as an arbitration centre. A balance however needs to be struck between the practical conduct and convenience of domestic arbitration proceedings in Hong Kong and the adoption of a law that is more familiar to the international community. It can be seen from the draft Bill significant efforts have been made to strike the balance. It remains to be seen after the consultation period as to what further changes will be made to the draft Bill. We encourage you to provide your comments to the Department of Justice by 30 April 2008 so that they are taken into account in any revision to the draft Bill. Lovells

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Memorandum

April 28, 2008

Re: The Proposed Amendment of the Japanese Merger Filing Regulation

To whom it may concern:

On March 11, 2008, the Japan Fair Trade Commission (the “JFTC”) submitted a new bill on amendment of the Antimonopoly Law of Japan (the “AML”) to the Japanese Diet. The proposed amendment to the AML includes major changes in various areas; among other things, significant changes in the merger filing regulation. Given the chaotic situation of Japanese politics, it is very difficult to predict when the new bill will pass the diet; however, the proposed amendment is expected to enter into force as of April 1, 2009 or later, if there are no unexpected delays in the lawmaking process.

Although the draft regulations or ordinances of the JFTC relating to the proposed amendment of the AML, which provide the details of the new regulation, are not yet available, we hereby outline the proposed amendment to the Japanese merger filing regulation, to the extent we can know based on information currently available, as follows.

I. Pre-Transaction Filing of Stock Acquisition

(1) Pre-transaction filing for share acquisitions

The most significant change in the proposed amendment of the AML is that share acquisitions will be subject to pre-transaction filing, just as mergers, corporate divestitures, and transfers of business unit already are. Under the current AML, unlike in other jurisdictions, share acquisitions are subject to post-transaction filing only. Thus, after the proposed amendment of the AML enters into force, it is necessary to file a notification of the proposed share acquisition with the JFTC by no later than 30 days before the closing date, if the transaction meets the filing thresholds.

(2) Changes in the filing thresholds

(i) *Total Sales in Japan*

There are also some important changes in the filing thresholds in the proposed amendment to the AML. Under the current AML, a filing is required if: (i) the sum of the total assets of the acquiring company, its parent company and its subsidiaries in Japan exceeds 10 billion Yen, and (ii) the total assets of the target company exceed 1 billion Yen (if the target company is a Japanese company) or the sum of the total sales of the business offices in Japan of the target company and its subsidiaries exceeds 1 billion Yen (if the target company is a non-Japanese company).

In contrast, under the proposed amendment to the AML, a filing is required if: (i) the sum of the total sales in Japan of the Corporate Group, to which the acquiring company belongs, exceeds 20 billion Yen, and (ii) the sum of the total sales in Japan of the target company and its subsidiaries exceeds 2 billion Yen, regardless of whether the target company is a Japanese company or not.

As such, under the new filing thresholds, the total sales in Japan will be used instead of the total assets of the company, and the same threshold will apply to both Japanese companies and non-Japanese companies. In this regard, in calculating “total sales in Japan,” the JFTC currently targets the turnover generated in the business offices in Japan of the target company or its subsidiaries; however, under the proposed amendment, it will also include exports to Japan in addition to the turnover generated by the business offices in Japan. Although the details of the calculation method will be provided in the regulations ordinances to be announced, it is expected that the coverage of “total sales in Japan” will be significantly expanded, and accordingly, more transactions will meet the filing threshold.

(ii) *Corporate Group*

In addition, more importantly, the new filing thresholds introduce the concept of the “Corporate Group”, which means the group of corporations, including all the Subsidiaries, of the ultimate Parent Company of the acquiring company. In defining the “Subsidiary” or “Parent company” in the Corporate Group, the proposed amendment to the AML introduces the standard of substantial control, while the JFTC relies only on the standard of capital control under the current AML. The details of the standard of substantial control are not clear at this stage; they will be provided in the regulations or ordinances to be announced. In any event, due to the introduction of the “Corporate Group” and the standard of substantial control, under the new AML, a filing may be required for the transaction, in which the foreign acquiring company has indirect subsidiaries which have substantial sales in Japan but does not have a direct subsidiary in Japan, while such transaction is exempted from the filing requirement under the current AML.

(iii) *Funds and partnerships*

Moreover, while the current AML targets “corporations” only, the new merger filing regulation will cover funds and partnerships. Funds and partnerships will be treated similarly to corporations in defining the “Corporate Group,” and if a fund acquires the stock of another company, the acquisition will be subject to the filing requirement by way of considering that it is a share acquisition by the direct parent company of the fund.

(iv) *Percentage of share acquisition*

Lastly, the threshold for filing of the share acquisition will be simplified under the proposed amendment to the AML. Under the current AML, a filing is required whenever the acquiring company acquires more than 10 percent, 25 percent, or 50 percent of the stock of the target company on a non-consolidated basis. In contrast, under the new AML, a filing will be required whenever the acquiring company acquires more than 20 percent or 50 percent of the stock of the target company on a consolidated basis.

II. Amendment of the Filing Thresholds for Merger, Corporate Divestiture, and Business Transfer

(1) Changes in the Filing Thresholds for Pre-Transaction Filing

There are also some changes in the thresholds for the pre-transaction filing of mergers, corporate divestitures, and transfers of business units. Just as in share acquisitions, (i) the concept of the “Corporate Group” and the standard of substantial control will be introduced in the pre-transaction filing of mergers, etc., (ii) “total sales in Japan” will be uniformly used in the filing threshold for the pre-transaction filing of mergers, etc, instead of “total assets”, and (iii) the amount of the filing threshold will be raised.

Specifically speaking, under the current AML, a filing is required if the transaction parties include the two companies, the sum of the total assets of the company, its parent company and its subsidiaries in Japan respectively exceeds 10 billion and 1 billion Yen (in case of a Japanese company), or the sum of the total sales of the business offices in Japan of the company and its subsidiaries respectively exceeds 10 billion Yen and 1 billion Yen (in case of a non-Japanese company).

In contrast, under the new AML, a filing will be required if the transaction parties include the two companies, the sum of the total sales in Japan of its Corporate Group respectively exceeds 20 billion Yen and 2 billion Yen. Non-Japanese companies will be subject to the same filing thresholds as Japanese companies.

(2) Exemption of filing on corporate restructuring within one corporate group

Under the proposed amendment to the AML, any mergers, corporate divestitures, or transfers of business units of the companies included in one Corporate Group will not require a filing with the JFTC. Under the current AML, a filing is exempted only for a merger, etc. between a company and its direct subsidiary (parent-child companies), or between companies which have the same direct parent company (sister companies). Under the new AML, in addition to the categories that were already exempted, for example, transactions between companies having an “uncle-nephew” relationship or “grandfather-grandson” relationship will also be exempted from the filing requirement. It is a reasonable change in view of accelerating corporate restructuring within a corporate group.

(3) Joint share transfer

With the amendment of the filing regarding share acquisitions, joint share transfers will also be subject to the pre-transaction filing requirement. The filing threshold for joint share transfers will be the same as that for mergers, etc.

III. Influences on Practice

The proposed amendment to the AML will have significant influence over the practice of merger filing. First, share acquisitions will be subject to the pre-transaction filing requirement, as in many other jurisdictions. In the past practice of merger filings on a worldwide basis, filings of share acquisition with the JFTC tended to be relatively postponed, but such practice should be changed.

Furthermore, the changes in the filing thresholds will significantly expand the coverage of the transactions which need filing. In the past, the JFTC only considered the group consisting of the acquiring company, its direct parent company, and its direct subsidiaries, but it will consider all the companies in the Corporate Group, which will be determined based on the standard of substantial control. In addition, the change in the calculating method of “total sales in Japan” will substantially broaden the coverage of the filing requirement. Given that, it is sure that the number of transactions which need to be filed with the JFTC will significantly increase.

On the other hand, the proposed amendment to the AML will make it more convenient for corporations to prepare for merger filings on a worldwide basis, because the new Japanese merger filing regulation intends to be more in line with the merger filing regulations in other jurisdictions.

* * * * *

Any questions regarding the amendment to the AML discussed above may be discussed with Kozo Kawai (k_kawai@jurists.co.jp) or Madoka Shimada (m_shimada@jurists.co.jp).

NISHIMURA & ASAHI

SINGAPORE Catalist Rules Announced On 26 November 2007, the Singapore Exchange (“SGX”) announced the creation of a new listing platform, Catalist, to replace the SGX second board, SESDAQ¹. The new rules for this platform came into effect on 17 December 2007, the same day the SESDAQ was renamed Catalist.

Companies in the bioscience and resource exploration industries that are seeking to list on Catalist will have to comply with a more stringent set of rules, which will be revealed by the second half of 2008. However, REITs and business trusts which rely on dividend yields to attract investors will not be eligible for listing on Catalist.

Current SESDAQ companies will continue to be governed by the existing rules. These companies will have at least two years from the announcement of the first batch of sponsors in February 2008 to appoint a sponsor and comply with the new rules.

Sponsors

Sponsors play a critical role in this new regime. There are two types of sponsors:- (i) a Full Sponsor who is responsible for mentoring a company through the listing process and who must remain as its adviser after the listing to ensure good corporate governance; and (ii) a Continuing Sponsor who is responsible for advising a company on good corporate governance subsequent to its listing on Catalist.

To maintain the quality of sponsors and build market confidence in a sponsor-regulated regime, it is not surprising that when SGX announced its pioneer batch of sponsors on 4 February 2008, six out of the 10 Full Sponsors were local and foreign investment banks, namely DBS Bank, OCBC Bank, UOB Asia, HL Bank, Merrill Lynch and Morgan Stanley. Banks and large financial institutions are generally more conservative and stricter in selecting the companies they sponsor, as their reputation would be at stake should their sponsored companies run foul of the Catalist rules.

Besides the 10 Full Sponsors, SGX also named six Continuing Sponsors which consist mainly of finance and corporate services companies.

Conclusion

Catalist was set up with the hope of competing with London’s Alternative Investment Market (“AIM”) by offering fast-growing firms in Asia a viable alternative listing destination. It is hoped that Asian firms will find the new board attractive, as the initial costs of listing and ongoing costs of listing will be significantly cheaper than in London. Further, for many Asian companies whose interest primarily hails from Asian investors, the new board enjoys an advantage over AIM which is ‘London-centric’.

The future, however, may not be entirely bright for Catalist. In the face of a looming recession in the United States, a possible slowdown in China’s economic growth and the increasing restrictions imposed by the Chinese government on companies seeking listing outside China, it remains to be seen if Catalist will be able to emulate the success of AIM and establish itself as a leading listing platform in Asia.

For additional information visit www.rodyk.com

¹For a discussion of the changes to the rules as proposed in the consultation papers issued by SGX on 23 May 2007, please refer to SGX Proposes Changes To Listing Rules, in the September 2007 issue of the Rodyk Reporter.



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TAIWAN - NEW RULES FOR THE FINANCIAL INDUSTRY

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· FTC Policy Statement on the Business Practices of the Financial Industry

On 27 December 2007 the Fair Trade Commission (FTC) amended its Policy Statement on the Business Practices of the Financial Industry (the "Policy Statement").

In determining whether an act is deceptive or obviously unfair and will affect the market order, the FTC will look at whether the party involved has knowingly deceived the other party or has concealed any material trading information from the other party or has engaged in competition or transactions in an obviously unfair manner. The amended Policy Statement sets out 14 scenarios which the FTC considers to be deceptive or obviously unfair.

One of the newly added scenarios is the failure to clearly define the liability of a joint and several guarantor. The FTC requires that when a financial institution demands a guarantor in providing personal credit, (1) the contract should clearly state that the liability of the guarantor arises from a specific legal relationship between the debtor and the financial institution, or should expressly state the guarantor's maximum liability; (2) an indefinite guarantee for successive debts should expressly stipulate that the guarantor may cancel his guarantee at any time in accordance with Article 754 of the Civil Code; and (3) in standard guarantee contracts, material information on the transaction (such as the extent of guarantee and the definition of the maximum-amount guarantee) should be displayed in bold letters or a different color. The guarantee contract must be read and signed by the guarantor, and the financial institution must provide the guarantor with the original copies of the loan contract and the guarantee contract, or their certified photocopies.

Because of the amendments, financial institutions should pay special attention to the wording of loan guarantees, and should no longer use vague wording like "guarantees all present and future debts" and should comply with relevant requirements.

· Required Content of Standard Contracts for Personal Motor Vehicle and Housing Loans

The Legislative Yuan (LY) enacted the Consumer Insolvency Act (CIA) on 8 June 2007. After cross-party consultation, the legislators deleted Article 55 of the original bill, which protected the residence occupied by a debtor. However, the LY decided that in order to protect debtors' related rights during an individual debt adjustment period, a standard housing loan contract should contain a provision affording protection similar to the deleted Article 55; that all mortgage contracts for personal residence concluded before the amendment should be changed accordingly; and that during negotiation and individual debt adjustment period, financial institutions should not enforce acceleration clauses without legitimate reasons.

Based on the above decision, the Financial Supervisory Commission proposed an amendment to Article 5-1 of the Required Content of Standard Contracts for Personal Motor Vehicle and Housing Loans so that if a borrower (1) has already requested negotiation with the financial institutions under Article 151 of the CIA, (2) has not paid two install-ments or less, and (3) agrees to continue to repay the loan as scheduled in the original loan contract, then the outstanding principal and interest, penalties, and related charges should be evenly apportioned over the remaining repayment period, with the interest calculated at the rate agreed in the original loan contract. Even if the original loan contract allows the financial institution to demand repayment of the loan in a lump sum, the financial institution should not enforce such acceleration clause or its rights over the collateral without legitimate reasons.

However, if the borrower misstates his debts, conceals his assets, or gives preferential treatments to one or more creditors, the financial institution may, after giving a notice to the borrower, enforce the acceleration clause and its rights over the collateral, that is, the personal residence of the borrower.

For additional information visit www.leeandli.com



Employer Services Advisory Bulletin

H Visa Cap Exemption Would Boost Guam Military Buildup

By [David B. Cohen](#)
[April 2008]

The author, as Deputy Assistant Secretary of the Interior from 2002 until 2008, headed the office that administers the U.S. relationship with its territories. He was also the founding Co-Chair of the Federal Interagency Task Force on the Guam Military Buildup.

The U.S. Senate recently passed legislation that would exempt Guam and the Commonwealth of the Northern Mariana Islands from immigration law caps on temporary workers through 2014. The legislation, which is expected to be signed by the president after receiving the concurrence of the U.S. House of Representatives, would help ensure that sufficient skilled and unskilled labor is available for Guam's planned military buildup and could open up numerous business opportunities in both Guam and the Northern Marianas.

Legislation would facilitate major military buildup on Guam, other projects

For those who were wondering how the Department of Defense would be able to find the 12,000 to 20,000 workers estimated to be required for the planned military buildup in Guam, a large part of the answer is being provided through the unlikely vehicle of the Consolidated Natural Resources Act of 2008. Tucked away in Title VII of that Act, which was passed by the U.S. Senate on April 10, 2008, is a provision that would exempt the U.S. territory of Guam and the U.S. Commonwealth of the Northern Mariana Islands (CNMI) from caps on all H visas through the end of 2014. That would open the door for military contractors to pull both skilled and unskilled labor from the Philippines and other nations to help implement what has been called the largest U.S. military project of its kind since the end of the Cold War. It would also open up unique opportunities for companies that are not participating in the buildup.

Last year, when I was still heading the federal office that administers the U.S. relationship with Guam and the other territories and co-chairing the federal Interagency Task Force on the Guam Military Buildup, my staff and I drafted the original version of the Act's immigration provisions. The Act, which is an amalgamation of bills that have already passed the U.S. House of Representatives, will now return to the House for concurrence before being forwarded to President Bush for signature.

The military buildup will completely transform Guam, a U.S. territory in the Western Pacific with a current population of approximately 170,000. That population is projected to jump to 225,000 in a few short years, thanks to the relocation of 8,000 U.S. Marines and 9,000 of their dependents from Okinawa, the arrival of thousands of workers, and a sharp increase in the level of economic activity on the island.

The centerpiece of the military buildup will be the US\$10.3 billion relocation of the Marines from Okinawa, which will require the construction of a new military base, military housing and utilities. This massive project is scheduled to occur during a very compressed time frame from 2010 through 2014. An additional US\$4 billion or more is expected to be spent on Navy, Air Force and Army facilities on Guam.

In addition to the billions of dollars of military expenditures planned for Guam, a great deal of capital will likely be attracted to the civilian economy. In order to cope with a large, rapid spike in its population, Guam's civilian infrastructure will have to be significantly upgraded and expanded. This should create opportunities for companies involved in the development, construction and operation of critical infrastructure such as ports, power, water, wastewater and solid waste. The 55,000 additional people who are expected to arrive on Guam's shores in a few years, mostly civilians, will all need, in addition to utilities, places to live, places to shop, places to dine, products to buy, services to consume, etc. This is likely to have a significant impact on Guam's economy.

What the Act would do

The Act would exempt both Guam and its neighbor, the CNMI, from national caps on all H visas through Dec. 31, 2014. Most of the construction workers required for the buildup are expected to be brought in on H-2B visas for temporary nonagricultural workers. Importing large numbers of workers will be necessary because of the very limited number of qualified workers on Guam, and because of the practical difficulties of attracting large numbers of U.S. workers cost-effectively to a territory that is over 6,000 miles away from the closest point on the U.S. mainland. Guam, which bills itself as "America in Asia," is approximately three hours from Manila by plane, and is expected to draw most of the workers needed for the buildup from the Philippines because of its large, well trained, English-speaking work force.

The nationwide annual cap on H-2B visas is currently set at 66,000, and demand for these visas far outstrips supply. Without the cap exemption, it would be impossible for a small territory such as Guam to utilize such a large share of the entire nation's allocation of temporary nonagricultural workers. It should be noted that H-2B visas should be issued for jobs that are temporary and for which the need is either a one-time, seasonal, peak or intermittent one. It may require further analysis to determine whether most of the construction jobs that will be generated by the buildup will fit comfortably within these requirements.

While the cap exemption for H-2B visas has been the principal focus of Department of Defense planners, the exemption would also apply to H-1B visas for professional or specialty workers. That would enable engineers, architects, computer professionals, health care professionals, professors and teachers, scientists, accountants, financial analysts and many other types of professionals to enter Guam or the CNMI without regard to the current nationwide cap of 65,000 for H-1B visas, which is supplemented with an additional 20,000 visas for applicants with a U.S. master's degree or higher.

Unique business opportunities

By allowing both skilled and unskilled workers to enter the CNMI and Guam without regard to the stringent limits applicable to the rest of the country, the Act would create opportunities that go well beyond the military buildup. For one thing, the Act could help ensure a sufficient supply of labor for all of the civilian infrastructure improvements and commercial development expected for Guam. Also, companies frustrated by their inability to secure needed skilled or unskilled employees might consider establishing operations in the CNMI or Guam as an alternative to assuming the risks associated with operating outside of the U.S. As one example, software companies might bring foreign software engineers to work in the CNMI as a way to get them "in the door" while they await the adjudication of their visa applications for work on the mainland.

While the H cap exemption would almost certainly result in an influx of workers from the Philippines, it would also likely attract talent from other countries. Japan, for example, will provide about 60 percent of the funding for the relocation of the Marines to Guam, and Japanese companies are expected to get a significant amount of business from this project. The exemption would enable these Japanese companies to bring in more of their own professionals and other workers than would otherwise have been possible. The exemption would also enable professionals and other employees from Korea, Taiwan, Australia, New Zealand and many other countries to participate in the buildup and other activities in Guam and the CNMI.

Duration of exemption

The H cap exemption would likely have generated even more opportunities in Guam and the CNMI had it been permanent rather than temporary. Under the Act, the exemption is scheduled to apply to H visa applications submitted during a period of approximately six and a half years, and perhaps less. The exemption would go into effect on the first day of the first month beginning one full year after the date of enactment, although the effective date can be delayed by up to 180 days at the discretion of the Secretary of Homeland Security. For example, if President Bush signs the Act into law on May 15, 2008, the H cap exemption would go into effect on June 1, 2009, unless the Secretary of Homeland Security decided to delay it for up to 180 days. The exemption would initially be scheduled to expire on Dec. 31, 2014. However, the statute indicates that the exemption would be in effect during a transition program designed to incorporate the CNMI's existing guest worker program into the federal system. That transition program would originally be scheduled to terminate on Dec.31, 2014, but could be extended indefinitely as necessary by the Secretary of Labor in increments of up to five years.¹

Assuming, as is likely, that the Act will be enacted, questions about the potential duration of the H cap

exemption will be clarified in due course. Whether the exemption is in effect for six and half years or longer, it is likely to have a very significant impact on Guam and the CNMI and on companies searching for opportunities there.

Footnotes

¹ The Government Accountability Office, in a recent review of the immigration provisions of the Act, interpreted the H visa cap exemption as not being extendable beyond Dec. 31, 2014. When we drafted the Act, however, it was our intention and the intention of the Congressional staff that we were working with that the H visa cap exemption could be extended. We believe that the plain language of the Act supports the conclusion that the H visa cap exemption can indeed be extended.

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EDUCATION INVESTORS UPDATE

HOGAN &
HARTSON

Congress Passes Law to Facilitate Student Loan Availability

Acting swiftly to address concerns that the current credit crunch is disrupting student lending markets, Congress has passed the Ensuring Continued Access to Student Loans Act of 2008 (H.R. 5715). President Bush signed the bill into law on May 7, 2008. The Act is designed to facilitate the availability of student loans and to increase students' access to federal student aid. The Act's key provisions address the "lender-of-last-resort" program, the role of the U.S. Department of Education as a secondary market for student loans, and PLUS loan repayment.

Lender-of-Last-Resort Program

Even prior to the Act, the Higher Education Act (HEA) provided for a lender-of-last-resort program, under which a state guaranty agency makes or arranges for an eligible lender in the state to make Federal Family Education Loan Program (FFELP) loans to eligible students who are otherwise unable to obtain them. The HEA also authorizes the Education Department to advance funds to guaranty agencies to make loans under the lender-of-last-resort program. 20 U.S.C. 1078(j).¹

As of the date of enactment, the Act expands the lender-of-last-resort program in several ways:

- The Act includes parent-borrowers in the lender-of-last-resort program.
- The Act allows the Secretary of Education to designate institutions to participate in the lender-of-last-resort program on a school-wide basis, rather than on a student-by-student basis. Institutions must meet a "minimum threshold" (to be set by the Secretary) of students who are unable to obtain conventional FFELP loans before the school may qualify for institution-wide lender-of-last-resort participation. Any such institution-wide eligibility will expire on June 30, 2009.
- The Act precludes lenders under the lender-of-last-resort program from offering reduced interest rates, origination fees, or default fees or other borrower benefits.
- Lenders operating under the lender-of-last-resort program will be subject to the same ethics rules as other lenders, including being barred from using prohibited inducements to expand their loan volume.

¹ On May 5, 2008, the Education Department sent a letter to guaranty agencies to implement the lender-of-last-resort program. U.S. Department of Education, Dear Partner/Colleague Letter GEN-08-05, FP-08-05 (May 5, 2008), available at <http://www.ifap.ed.gov/dpccletters/050508GEN0805.html>. The department will update this guidance in light of the Act.



The Education Department as a Secondary Market

As of the date of enactment, the Act permits the department to function as a temporary secondary market for FFELP loans.

- If the department determines that there is an inadequate availability of loan capital for FFELP loans, it may purchase or enter into advance commitments to purchase FFELP loans first disbursed on or after October 1, 2003, and before July 1, 2009.²
- The department may purchase such loans on such terms as the department, the Secretary of the Treasury, and the Director of the Office of Management and Budget jointly determine are in the best interest of the United States, as long as any such purchase does not result in a net cost to the federal government.
- A lender selling FFELP loans to the department must use the proceeds to continue its participation in the FFELP program and to originate new FFELP loans.
- The department may contract with the selling lender to continue servicing the purchased loans.

Additionally, the Act authorizes funding through the Federal Direct Loan Program general funding authority to carry out the secondary market provisions.

PLUS Loan Repayment

The Act allows parents who take out PLUS loans after July 1, 2008, to defer loan principal repayment for up to six months after their student is no longer enrolled in school at least half-time.

The Act creates an exception to the general rule that parents with an adverse credit history are ineligible for PLUS loans. During the period from January 1, 2007, through December 31, 2009, parents who are or were no more than 180 days delinquent on mortgage payments on their primary residence or on any medical bills, or no more than 89 days delinquent on the repayment of "any other debt," may still qualify for PLUS loans.

Other Provisions

The Act increases the maximum annual and aggregate limits for certain FFELP loans and requires the Comptroller General to conduct a study of the effect of the increased loan limits on tuition, fees, and room and board charges and the level of private loans. In addition, the Act makes certain changes in the Academic Competitiveness Grant program. Except for that program, the Act exempts all amendments from negotiated rulemaking.

* * * * *

² In addition, on May 2, 2008, the Federal Reserve announced that it will now accept triple-A-rated asset-backed securities (ABS), including those backed by student loans, as collateral for its liquidity auction of U.S. Treasury securities. <http://www.federalreserve.gov/newsevents/press/monetary/20080502a.htm>. This change in policy should also help to alleviate the liquidity crunch in the student loan secondary market. The auctions allow financial institutions, such as banks and primary dealers, to borrow treasury securities from the Federal Reserve for a month, using securities backed by student loans as collateral. The borrower can usually use the Treasury securities as collateral for short-term cash flow much more easily than the ABS the borrower has now pledged to the Federal Reserve. In turn, secondary market demand for student loans will likely increase as financial institutions become more willing to buy or hold student-loan-backed securities now that they can be pledged as collateral for the Federal Reserve's liquidity facilities.

About the Education Investors Update

Hogan & Hartson publishes the *Education Investors Update* to track recent developments in education law, such as the Higher Education Act, the No Child Left Behind Act, and the Individuals with Disabilities Education Act. To have this publication sent to additional colleagues or for more information on any of the topics discussed, please contact the attorney with whom you work or the author as listed below.

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*A special thanks to **Ruby Shellaway** for her contributions to this Client Update.*

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DON'T LET THE DOOR HIT YOU ON YOUR WAY OUT: FEDERAL COURT DOOR CLOSED TO INVERSE CONDEMNATION ACTIONS AGAINST THE STATE

By Emily L. Madueno

"Knock, knock."

"Go away!" That's the response property owners can expect to hear from federal courts when owners seek just compensation from the State for inverse condemnation in federal court. On Monday, the Ninth Circuit Court of Appeals issued its opinion in *Seven Up Pete Venture v. Schweitzer* (April 21, 2008, 06-35384, ___ F.3d ___).

In *Schweitzer*, the Ninth Circuit held that the Eleventh Amendment bars inverse condemnation actions brought under the Fifth Amendment in federal court against state officials in their official capacities. From this it appears that the only forum that may be left open to a property owner seeking just compensation from the State is the State's own courts.

Background: Fool's Gold

Seven Up Pete Venture ("Venture") struck gold in 1991 when it acquired leases to mine approximately 9 million ounces of gold and 20 million ounces of silver. Venture never obtained the required permit from the State to begin mining. Hence, Venture has not mined any of the metal.

Montana voters decided to keep it that way. They enacted Initiative 137, which bans the only mining procedure that Venture can use successfully to extract approximately half of the metal. Venture claims that no other economically viable mining process allows it to extract that metal and that, therefore, the State has taken Venture's property interest.

Venture brought two inverse condemnation actions against Montana's governor, one in federal court and the other in Montana state court. Venture claimed that the Initiative effected a regulatory taking of its property and required the State to pay just compensation under the Fifth Amendment.

After the state court granted a motion for summary judgment against Venture, the federal court also dismissed Venture's case. The federal district court ruled that the Eleventh Amendment barred Venture's claims.

Legal Background: The Eleventh Amendment and State Sovereign Immunity

The Eleventh Amendment reads:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Continued...

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The United States Supreme Court has construed the Eleventh Amendment:

- To bar suit by private parties against non-consenting States - not including counties, municipalities, or other local governmental entities - in federal court (whether those parties are citizens of the State, another State, or a foreign country);
- To bar suit by private parties against State officials sued in their official capacity in federal court; and
- To allow suit by private parties against State officials sued in their official capacity in federal court if the plaintiff seeks prospective injunctive relief rather than monetary relief.

Likewise, the doctrine of sovereign immunity protects States from suit in state courts.

Federal Courts Turn Property Owners Away

Venture argued that the Fifth Amendment's self-executing nature defeats Eleventh Amendment immunity so the federal district court should not have dismissed Venture's case. The Ninth Circuit disagreed.

The Ninth Circuit relied on *Reich v. Collins* (1994) 513 U.S. 106, where the United States Supreme Court:

- Held that a State could not invoke sovereign immunity in state court to avoid refunding an unconstitutional tax under a self-executing constitutional provision; and
- Noted parenthetically that while sovereign immunity did not bar this type of action in state court, States could invoke the Eleventh Amendment in federal court to bar such actions.

The Ninth Circuit reasoned:

- If state courts are available to plaintiffs seeking relief from an unconstitutional tax under *Reich* - and sovereign immunity is powerless to bar it - state courts must also be available to adjudicate just compensation claims under the Fifth Amendment, despite sovereign immunity;
- Providing a forum for just compensation actions in state court "can comfortably co-exist" with Eleventh Amendment immunity denying a forum for these actions in federal court; and
- The relief sought through an inverse condemnation action is monetary relief, not prospective injunctive relief.

The Ninth Circuit then concluded that the Eleventh Amendment bars just compensation claims against States - and State officials sued in their official capacities - in federal court. The Court noted that every circuit to address the issue has reasoned and held similarly.

Parting Thoughts

Will the United States Supreme Court jump into the fray? The Ninth Circuit Court of Appeals, which issued the *Schweitzer* opinion, is the most reviewed and reversed of the federal circuits. But given that every other circuit to address the issue agrees, *Schweitzer* does not stick out like a sore thumb.

On the other hand, only one other circuit has addressed the issue since the Supreme Court decided *Alden v. Maine* (1999) 527 U.S. 706. In *Alden*, the Supreme Court held:

- State immunity from suit is a fundamental aspect of State sovereignty, which States enjoyed before and retained after the Constitution's adoption, to the extent the Constitution did not alter it; and
- The Eleventh Amendment was merely a recognition of State immunity, it did not create that immunity.

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National commentators argue:

- The Fifth Amendment Takings Clause's self-executing nature is one way that the Constitution did alter State immunity as it existed before the Constitution's adoption;
- This would mean that States no longer enjoy immunity from suit in federal court for claims under the Fifth Amendment Takings Clause; and
- Though the Eleventh Amendment post-dated the Fifth Amendment, and could potentially have altered it, the Supreme Court held in *Alden* that the Eleventh Amendment did not do so - - the Eleventh Amendment merely recognized the status quo existing when the Constitution and Fifth Amendment were adopted.

Stay tuned.

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New Jersey to Provide Payments to Workers Taking Leave to Care for Dependent Family Members

April 17, 2008

On April 7, after several years of intensive lobbying and legislative negotiations, the New Jersey Senate passed an Assembly bill that, once signed by the governor, will make New Jersey the third state to provide state payments for workers on leave to care for dependent family members. Governor Corzine has announced that he intends to sign the bill. The bill amends New Jersey's Temporary Disability Benefits Law (TDBL) such that, commencing July 1, 2009, employees taking "family temporary disability leave" shall be eligible to apply to the state for up to six weeks of disability benefit payments. Although the amendment does not grant any new entitlement to take family leave, the amendment now grants employees up to six weeks of payments during a qualifying leave—which inevitably will encourage more employees to take leave. The amendment also imposes additional administrative requirements of which all New Jersey employers should be aware—even those employers otherwise exempt from other federal or state laws governing family leave.

The Mechanics of New Jersey Family Temporary Disability Benefits

Under the amended TDBL, covered employees are eligible to receive benefit payments for up to six weeks of continuous family temporary disability leave (or up to 42 days of such leave taken on an intermittent basis) during any 12-month period. The TDBL defines "12-month period" as beginning on the first day of the employee's first period of family temporary disability leave. Weekly benefit payments shall equal two-thirds of the employee's average weekly wage from the preceding eight weeks, up to a maximum of \$524.

The first week of family temporary disability leave is considered an unpaid "waiting period." Benefit payments commence with the second week of leave. Benefits for the waiting period may be paid retroactively, but only if the leave period extends beyond three weeks. There is no waiting period if the employee commences family temporary disability leave immediately after a disability period based on the employee's own disability.

The TDBL defines "family temporary disability leave" as leave taken to (1) provide care for a family member's "serious health condition," as defined in New Jersey's Family Leave Act (FLA), or (2) "be with a child" during the first 12 months after the child's birth or placement for adoption. Family temporary disability leave is not available for medical leave based on the employee's own disability, although existing temporary disability benefits may be available to an employee while on leave for his or her own health condition.

Employees must notify the employer of the need for family medical leave in a “reasonable and practicable manner,” with at least 15 days’ advance notice before commencing leave taken on an intermittent basis, “unless an emergency or other unforeseen circumstance precludes prior notice.” Employees also must “make a reasonable effort to schedule the leave so as not to unduly disrupt the operations of the employer,” including, “if possible,” a regular weekly schedule for the taking of intermittent leave. In contrast with the unpaid intermittent leave scheduling provisions of the FLA and the federal Family and Medical Leave Act of 1993 (FMLA), benefit payments for paid intermittent leave under the TDBL are paid only for leave taken in increments of not less than one day.

In the case of family medical leave (not childcare leave), the employee must, upon the employer’s request, provide certification by a healthcare provider. In accordance with the requirements of the FLA and its implementing regulations, such certification should set forth the date of onset and probable duration of the condition; the “medical facts within the knowledge of the provider” regarding the condition; a statement that the condition warrants the employer’s participation in providing healthcare, and the estimated time thereof; and the need, if any, for such leave to be taken intermittently, including the dates of any planned medical treatment.

Employees must provide at least 30 days’ notice to the employer of leave to be taken to care for a child. Failure to do so will reduce the amount of benefits available by two weeks, unless the time of the leave is unforeseeable or changes for unforeseeable reasons.

Benefits provided under the TDBL are paid concurrently with any period of family leave taken under the FLA or the FMLA. Employees may not receive family temporary disability benefits simultaneously with unemployment benefits or other state-provided disability benefits.

Interplay with Other Federal and State Family Leave Requirements

By itself, the TDBL does not *entitle* New Jersey employees to take any period of family temporary disability leave. The TDBL explains:

Nothing in [the revised law] shall be construed to grant an employee any entitlement to be restored by the employer to employment held by the employee prior to taking family temporary disability leave or any right to take action against an employer who refuses to restore the employee to employment after the leave.

Rather, the TDBL incorporates the leave requirements of the FLA and the FMLA, stating specifically that it does not “increase, reduce or otherwise modify any entitlement of an employee to return to employment or right of the employee to take action under the provisions of” those statutes.

Although the TDBL does not expand employees’ *entitlement* to family leave, it does expand employees’ eligibility for *temporary disability benefits* while taking leave under the FLA or the FMLA. The TDBL covers all New Jersey employers that are subject to the New Jersey Unemployment Compensation Law, including employers that are exempt from the FLA or the FMLA (e.g., businesses that employ fewer than 50 employees). Furthermore, unlike the FLA or the FMLA, the TDBL does not require employees to have worked a minimum number of hours in the preceding 12 months to become eligible to receive benefits; rather, employees need only to have worked for at least 20 base weeks and earned at least 1,000 times the minimum wage during that time. Accordingly, an employee who is ineligible for leave under the FLA or the FMLA (such as a part-time employee or an employee of a small business) may

still receive TDBL benefits for time spent caring for a family member, whether or not the employer grants leave.

The TDBL does not require FLA-exempt employers to provide additional leave to employees who seek to take family temporary disability leave under the TDBL. The amended TDBL expressly provides that if “an employer who is not an employer as defined in the [FLA] . . . fails or refuses to restore [an] employee to employment after the period of family temporary disability leave, that failure or refusal shall not be a wrongful discharge in violation of a clear mandate of public policy, and the employee shall not have a cause of action against that employer, in tort, or for breach of an implied provision of the employment agreement, or under common law, for that failure or refusal.” This amendment is intended to protect FLA-exempt employers from common-law claims, or “public policy” claims—commonly known as “*Pierce claims*” (after *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58 (1980))—for having terminated the employment of employees taking family temporary disability leave when they were not otherwise entitled to such leave. Companies should be careful, however, to consider whether such employees would be entitled to leave under any other company policies or laws, such as federal or state laws requiring reasonable accommodation of disabilities.

Necessary Actions by Employers

When an eligible employee takes family temporary disability leave, the TDBL requires the employer to furnish to both the employee and the Division of Temporary Disability Insurance of New Jersey’s Department of Labor and Workforce Development (the Division) “such wage information as the division may require to determine the individual’s eligibility for benefits,” including any sick pay, vacation, or other fully paid time off provided by the employer during the leave period. The employer must provide such information by no later than the ninth day of the employee’s leave. The employee is then responsible for applying for benefits within 30 days of the commencement of the leave period. However, failure to do so will not invalidate the employee’s claim if he or she applies “as soon as reasonably possible” and can demonstrate to the Division that it was not reasonably possible to file within the 30-day timeframe.

An employer may permit or require an employee on family temporary disability leave to use up to two weeks of sick leave, vacation time, or other employer-provided paid leave before the employee becomes eligible for benefits under the TDBL. The employee’s six-week benefits eligibility period may then be reduced by the amount of time spent on employer-provided paid leave. If the employer requires use of such paid leave, the employee may exercise that leave during any one-week unpaid “waiting period” at the outset of the family temporary disability leave period.

Employers must “conspicuously post,” and provide employees with written copies of, notices of the employees’ rights in a form issued by forthcoming regulation.

Employee contributions will fund family temporary disability benefits. Beginning January 1, 2009, employees will contribute 0.09% of their wages to a Division account earmarked to pay for such benefits; these contributions will increase to 0.12% of wages beginning in 2010.

An employer may also seek state approval for a private family temporary disability benefit plan. As with private employee disability benefit plans under the TDBL, such a plan must provide benefits at least equal to those required by the state plan. An employer providing a private plan for payment of family temporary disability benefits may require employees to pay the above-described employee contributions directly to the plan, rather than to the Division.

Conclusion

Although New Jersey's new paid leave law grants no new right to take leave, employers can expect more workers to exercise their preexisting entitlement now that they will receive pay for at least part of the leave. Accordingly, all employers should review their existing leave policies and benefits, consider how those will interact with the new TDBL, and consider modifications to address the new law before it goes into effect in July 2009.

Morgan Lewis's Labor and Employment Practice regularly advises employers with respect to all aspects of federal and state leave, including the development and implementation of policies, day-to-day guidance under such policies, and litigation of claims under the various leave laws. If you would like further information regarding the issues raised in this Morgan Lewis LawFlash, please contact any of the following Morgan Lewis attorneys:

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