PACIFIC RIM ADVISORY COUNCIL

August 2009 e-BULLETIN

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46th International PRAC Conference - Beijing
Hosted by King & Wood - Oct 17– 20 2009
Registration Now Open—Deadline August 24

PRAC Members Gathering at IBA Madrid - 2009
Details tba

47th International PRAC Conference - Mexico
Hosted by Santamarina y Steta
April 17—20, 2010

PRAC Members Gathering @ INTA Boston - 2010
May 23 - details tba

48th International PRAC Conference - Kula Lumpur
Hosted by SKRINE
October 16—19, 2010

For more information visit www.prac.org/events

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► GIDE LOYRETTE NOUEL London and Moscow Advise on Landmark Russian Restructuring

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► LUCE FORWARD Obtains Unanimous Jury Verdict on All Claims for Robinson & Robinson Inc in Business Dispute Case

► RODYK Acts for European Bank VTB PLC in S$71million Building Sale

► SANTAMARINA y STETA Acts for Corporación GEO, S.A.B. de C.V. in Joint Venture with PREI

► TOZZINI FREIRE Acts in Acquisition by Admenta France (French subsidiary of Celesio AG) for 50.1% of voting capital of Panpharma S.A

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- International Expert System (sample forms) ▌ Conferences & Events

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CLAYTON UTZ
PARTNER APPOINTED TO AUSTRALIAN RESEARCH COUNCIL

Melbourne, 30 June 2009: Clayton Utz partner Robyn Baker has been appointed to the Australian government's Australian Research Council (ARC) Advisory Council. A partner in the Corporate group in the Melbourne office of Clayton Utz, Ms Baker has many years' experience in legal practice with a focus on the health, aged care, pharmaceuticals, medical devices and biotechnology sectors.

Ms Baker currently sits on the Board of the BioMelbourne Network and has also served on the Salvation Army Aged Care Advisory Board (Southern Territory), the Inner South Community Health Service Board, and the Board of Metabolic Pharmaceuticals Limited. She is a former Ministerial Adviser to a State Health Minister.

Commenting on her appointment, Ms Baker said: "I am pleased to be able to make a contribution to Australia's research policy through the Advisory Council and look forward to working with my fellow Council members, who are each distinguished in their fields."

Announcing the appointment on Friday 26 June, Federal Minister for Innovation, Industry, Science and Research, Senator Kim Carr said Ms Baker's experience in life sciences and commercial law would make her a strong addition to the Council.

The ARC Advisory Council was established in January 2008 to advise the ARC's Chief Executive Officer on strategic planning and policy issues as well as matters concerning the evaluation of the quality and outcomes of research and research training in an international context. It has six members in addition to the CEO.

The ARC provides advice advice to the Government on research matters and manages the National Competitive Grants Program (NCGP), a significant component of Australia's investment in research.

Ms Baker replaces Dr Elizabeth Jazwinska, who has been appointed ARC Executive Director of Biological Sciences and Biotechnology.

For additional information visit www.claytonutz.com

HOGAN & HARTSON
NEW YORK ADDS LEADING IP PARTNER

NEW YORK, August 5, 2009 – Hogan & Hartson LLP announced today that intellectual property litigator Theodore (Ted) J. Mlynar has joined the firm's New York office as a partner. Mr. Mlynar's practice will focus on litigation matters involving complex technologies and international intellectual property issues.

Mr. Mlynar has been handling intellectual property matters for more than 15 years, including patent, trademark, copyright, trade secret, and unfair competition cases and related contractual disputes. He has successfully represented clients at trial, through appeals, in arbitrations, and in administrative proceedings. He has worked with a wide range of clients, from multinational conglomerates, to small start-up companies and individual inventors in connection with a diverse array of industries and technologies. In addition, Mr. Mlynar frequently advises on the acquisition, divestiture, exploitation, policing, and licensing of intellectual property.

“Ted brings impressive knowledge and experience spanning a broad spectrum of IP issues that will be valued by our team and our clients,” said Eric Lobenfeld, a New York partner and a Director of the firm's intellectual property practice. “He has significant experience in formulating global litigation strategies and developing innovative legal and technical theories. We are very pleased to have him with us at Hogan & Hartson.”

Commenting on his arrival, Mr. Mlynar said, “I cannot think of a more exciting time to join a firm with a truly global IP practice. I look forward to growing my practice at Hogan & Hartson and collaborating on complex IP matters with my new colleagues.”

Mr. Mlynar earned his law degree from University of Southern California Law Center and his bachelor’s degree in electrical engineering from California Institute of Technology.

About Hogan & Hartson

Hogan & Hartson is an international law firm founded in Washington, D.C., with more than 1,100 lawyers in 27 offices worldwide.

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

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

KING & WOOD
OPENS JI'NAN OFFICE

King & Wood opened its new office in Ji'nan in July 2009. Shandong is one of the fastest developing regions in China, while Ji'nan, as the capital city of Shandong Province, is its economic and political center. The establishment of our Ji'nan office complements our Qingdao office in enhancing our ability to serve our clients in Eastern China.

Our Ji'nan office currently has 2 partners and 3 legal professionals and provides comprehensive legal services with a focus on mergers and acquisitions, securities, and foreign investment in China.

King & Wood Ji'nan Office Details:
4th Floor, Int'l Business Center,
6 Liyang Ave., Jinan,
Shandong, 250002, PRC
Tel: 86 531 8901 9600
Fax: 86 531 8901 9611

For additional information visit www.kingandwood.com

MORGAN LEWIS & BOCKIUS
ENHANCES LONDON BUSINESS & FINANCE PRACTICE

LONDON, July 23, 2009: Enhancing its corporate and finance capacity in the UK and Europe, Morgan Lewis today announced the addition of Christopher S. Harrison as a partner in its Business and Finance Practice, resident in London. He brings nearly 20 years' experience as an English law banking lawyer at several prestigious international law firms in London. His arrival follows a recent expansion of the corporate practice across the firm's U.S. offices..

"Chris's arrival reflects our commitment to the strategic expansion of the firm, not only in the U.S. but internationally as well," noted Firm Chair Francis M. Milone. "At a time when clients increasingly need comprehensive advice on complex international transactions, Chris's experience further strengthens our finance capabilities."

Mr. Harrison acts for financial institutions, sponsors, and corporations on complex domestic and cross-border finance transactions under English law. He advises on a broad range of finance matters, including acquisition finance, debt restructurings, asset-based lending, and project financings. His clients include various Fortune 500 companies in industries ranging from financial services and manufacturing to life sciences, retail, communications, and transportation.

"Paired with our existing private equity, M&A, and tax capacity, Chris will help build and develop our Finance Practice and expand the range of services for Morgan Lewis clients in London and internationally," said David Pollak, leader of the firm's Business and Finance Practice.

Mr. Harrison joins a business and finance team that already spans the United States, Europe, and Asia, with nearly 400 transactional lawyers who focus on a wide variety of areas, including mergers and acquisitions, private equity, tax, finance, and capital markets.

"We are delighted that Chris has joined us," added Robert Goldspink, Managing Partner of the firm's London office. "He brings with him a market leading reputation and significant international experience in Europe, the Middle East, and Far East, which will help build our global finance capability."

For additional information visit www.morganlewis.com

CLAYTON UTZ

ADVISES WINNING BIDDER ON VICTORIAN DESALINATION PROJECT

Melbourne, 5 August 2009: Clayton Utz continues to consolidate its reputation as the legal adviser of choice on Australia's largest and strategically significant infrastructure projects, following the Victorian government's awarding to the AquaSure consortium of the contract to build the country's largest desalination plant at Wonthaggi in Victoria.

A Clayton Utz team worked alongside the AquaSure consortium – comprising Suez Environnement, Degremont, Thiess and Macquarie Capital Group – throughout the bidding process, providing strategic and commercial advice on both the bidding documentation and financing arrangements for the project.

The AquaSure consortium will finance, design, construct, operate and maintain the multibillion dollar desalination plant via a Public Private Partnership with the Victorian Government, including an 84-kilometre transfer pipeline to connect to Melbourne's existing network and undertaking various related renewable energy projects in order to fully offset the electricity used by the project. The project is the largest PPP being undertaken globally since the global financial crisis began.

In a multi-disciplinary and cross-office effort, Melbourne projects partners Dan Fitts, Marcus Davenport and Naomi Kelly led the Clayton Utz team that advised the AquaSure consortium on the necessary project documentation, including the finalising and signing of the Project Deed in late July as part of the bid process.

Meanwhile debt finance partner Simon Irvine and corporate partner Brendan Groves advised on the complex debt funding and equity arrangements for the project, which involved consideration and documentation of innovative structures to secure finance for the project in a challenging market.

The project contract is expected to reach financial close on or before 4 September this year, with the AquaSure consortium to begin construction of the plant and associated infrastructure soon after. Work has already commenced on the project.

Clayton Utz projects partner Dan Fitts said the team was pleased to have advised the AquaSure consortium on a project of such strategic significance to Victoria in meeting its future water needs. "We congratulate AquaSure on securing the contract for this important project and will continue to work alongside it as it enters the construction phase of the project," he said.

"Our experience in major infrastructure and PPP projects being built around the country including Peninsula Link, EastLink, and the Biosciences Research Centre projects in Victoria, the Clem7 Tunnel and Airport Link projects in Queensland, and the New Royal Adelaide Hospital project in South Australia, puts us in a unique position to understand the drivers of such a project and help our client AquaSure deliver on its commitment."

For additional information visit www.claytonutz.com

GIDE LOYRETTE NOUEL

LONDON AND MOSCOW ADVISE ON LANDMARK RUSSIAN RESTRUCTURING

27 July 2009:

The Moscow and London offices of Gide Loyrette Nouel have acted as Russian and English legal counsel to Mechel OAO ("Mechel") on its successful refinancing of USD 2.6 billion of credit facilities. This is the first successful public Russian corporate restructuring of credit facilities involving international syndicates of creditors since the global credit crisis began, and involved the refinancing of certain short term credit facilities with secured long term credit arrangements. Mechel is one of the leading Russian mining and metals companies, with its shares listed in Moscow (the Russian Trading System Stock Exchange) and on the New York Stock Exchange.

Mechel was advised by a cross office team comprising Moscow partner Grigory Marinichev and associates Konstantin Kochetkov, Mikhail Lisov and Dimitry Raev as to Russian law, and partner Michael Doran, senior associate Richard Pogrel and associates Nilang Desai and Manan Singh of the London office as to English law.

The refinancing was the result of negotiations with two syndicates of 27 international lenders in total, relating to acquisition debt incurred for the acquisition of Yakutugol Holding Company OAO and Elgaugol OAO in October 2007 and the purchase of the English company Oriel Resources Ltd. in April 2008.

London partner Michael Doran commented:

"*This is the first successful restructuring of internationally syndicated debt by a major Russian corporate since the global credit crisis began. Its completion will be looked upon favourably by market participants, in particular those other Russian companies currently in refinancing discussions with international banks. It is an important transaction in the Russian marketplace and we were delighted to represent Mechel*."

Moscow partner Grigory Marinichev added:

"*This refinancing is a landmark transaction and is a clear sign of increased confidence in the Russian market. No doubt its successful completion will facilitate ongoing negotiations on a number of pending restructuring projects*."

► continues next column

In a press release issued by Mechel[1], Mechel's CFO Stanislav Ploschenko commented:

"*Mechel has become the first Russian company which managed to refinance its significant credit facilities with foreign banks by means of long-term instruments and, moreover, it was done on acceptable and favorable terms in current market environment*."

[1] Full Mechel press release: http://www.mechel.com/news/article.wbp?article-id=A5A05E11-A472-4B42-9A52-10087ACFD55A

For additional information visit www.gide.com

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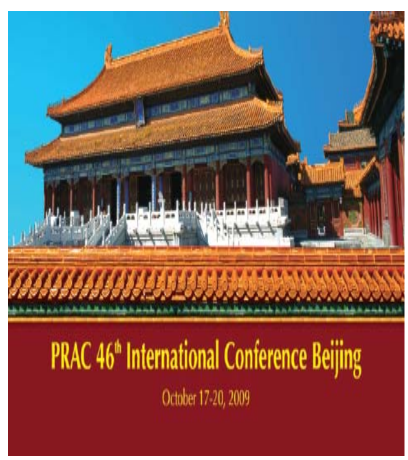

PACIFIC RIM ADVISORY COUNCIL

金杜律师事务所 KING & WOOD PRC LAWYERS

HOGAN &HARTSON

PRO BONO TEAM OBTAINS RELEASE FOR ONE OF WRONGLY CONVICTED NORFOLK FOUR

WASHINGTON, D.C., August 7, 2009 - After spending more than 11 years in prison for a crime he did not commit, Derek Tice has been released from prison following a conditional pardon by Virginia Governor Timothy M. Kaine on August 6. Mr. Tice is one of four Navy veterans, known as the Norfolk Four, who were wrongly charged in the 1997 rape and murder of the wife of another sailor.

Mr. Tice had been convicted of a 1997 rape and murder that all physical evidence, including DNA evidence, overwhelmingly shows he did not commit. He had been serving two life sentences in prison without the possibility of parole. The real killer, Omar A. Ballard, whose DNA was left at multiple locations at the crime scene, is currently serving a double-life sentence for this crime and has admitted that he committed this crime alone.

Over the past five years, dozens of Hogan & Hartson lawyers have worked thousands of hours to obtain clemency for Mr. Tice, as well as for Joseph Dick, Jr., and Danial J. Williams, who had also been wrongfully convicted of the same crime and were also serving life sentences without the possibility of parole. Hogan & Hartson has worked jointly with two other major law firms which represent Mr. Dick and Mr. Williams, and with the Mid-Atlantic Innocence Project. A fourth innocent Navy veteran, Eric Wilson, was released in 2005 after serving eight and a half years in prison.

"After nearly four years of review, Governor Kaine has finally allowed Derek Tice, Danial Williams, and Joseph Dick to return to their families. We are overjoyed that these families are reunited and have begun the process of rebuilding their lives together. But this grave miscarriage of justice will end only when the Commonwealth of Virginia finally and fully clears the records of these men," said Des Hogan, a Washington, D.C. office partner who led the team of Hogan & Hartson lawyers working to free Mr. Tice and the others.

Nearly 40 years ago, Hogan & Hartson was the first U.S. law firm to create a separate department to develop and foster pro bono work. Working on the Tice case and countless others, the firm provided more than 100,000 hours of free legal assistance in 2008.

For more information, visit www.hhlaw.com.

About Hogan & Hartson

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RODYK

ACTS FOR EUROPEAN BANK VTB PLC IN S$71MILLION DOLLAR BUILDING SALE

Rodyk acted for VTB PLC, a European Bank in the sale a freehold 16-storey office block at 70 Robinson Road for S$71 million. This is one of the largest investment building sales in 2009. The sale contract was entered into between the parties recently and completion is scheduled for the end of the year.

Partners Norman Ho and Low Boon Yean act for the sale of the building.

For additional information visit www.rodyk.com

SANTAMARINA Y STETA

ACTS FOR CORPORACION GEO, S.A.B. DE CV IN JOINT VENTURE WITH PREI

On July 10th 2009, Corporación GEO, S.A.B. de C.V. ("Corporación GEO") and PREI announced the creation of a new business implemented through a strategic joint venture destined for the development of real estate and large scale projects with urbanized lots, to be developed by Corporación GEO, as well as the development of land for housing, commercial, industrial and services purposes, to be sold to small, medium and large scale developers. The first part of the project is comprised by 360 hectares to be developed in Valle de las Palmas, Tijuana, Baja California, which would urbanize 18,000 residential homes, as well as commercial and industrial areas. It has been nearly 6 years from the first alliance between Corporación Geo and PREI, and PREI has invested approximately $5,800 million pesos in Corporación GEO's land reserve in 84 projects, from which 51 are concluded, 17 are in the development process and 16 are in reserve. The 51 concluded projects represent approximately 70,000 residences which have been delivered. Additionally, in May 2009 Corporación GEO and PREI agreed on a new investment phase, under the existing Corporación GEO land reserve program, for the next 7 years.

Santamarina y Steta, led by Partner Juan Pablo Rosas Pérez & Lorenzo Ruiz de Velasco Beam represented Corporación GEO in the drafting, negotiation and implementation of the documents related with the joint venture executed between Corporación GEO and PREI.

For additional information visit www.s-s.com.mx

WILMERHALE

AWARD RENDERED IN GROUND-BREAKING ABYEI INTERNATIONAL ARBITRATION

July 24, 2009

The Sudan People's Liberation Movement/Army (SPLM/A), represented by Wilmer Cutler Pickering Hale and Dorr's International Arbitration Group led by Partners Gary Born and Wendy Miles, together with the Public International Law & Policy Group, has received a very favorable award in its arbitration against the Government of Sudan (GoS) in a dispute over the definition and delimitation of the Abyei Area.

As a means of resolving a dispute with its roots in decades of civil conflict, the Abyei Arbitration is unique. In 2005, the GoS and the SPLM/A signed the Comprehensive Peace Agreement (CPA), ending four decades of civil war between the North and the South of Sudan, a war that has been described as the "world's most destructive civil conflict." At the heart of the CPA was the definition of the Abyei Area. The Abyei Area was subsequently defined by a Boundary Commission of Experts (ABC), set up with the full cooperation of the parties, in July 2005. While the SPLM/A was ready to implement the ABC's decision, the GoS rejected it as an excess of mandate. The parties' dispute over the ABC's definition finally resulted in the Abyei Arbitration.

The Tribunal in the Abyei Arbitration has now determined, in a near unanimous decision (Judge Al-Khasawneh dissenting) that the predominantly tribal interpretation by the ABC of its mandate to delimit the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905 (as argued for by the SPLM/A and contrary to the territorial interpretation argued for by the GoS) was reasonable and was not an excess of mandate. In doing so, the Tribunal adopted the meaning of "excess of mandate" argued for by the SPLM/A. Accordingly, the Tribunal upheld the ABC's finding that the Ngok Dinka people of the Abyei Area (and thus the SPLM/A) had a legitimate dominant claim to a northern boundary at 10º10'N, rejecting the GoS claim that the northern boundary of the Ngok Dinka lay along the Bahr el Arab River, significantly further south.

Further, the Tribunal adopted the narrow interpretation of the meaning of an "excess of mandate" argued for by the SPLM/A and rejected the GoS's much broader interpretation which sought to include numerous other grounds, including procedural violations, for finding the decision of the ABC a nullity. In this regard, the Tribunal adopted almost verbatim the SPLM/A's reasoning as to why procedural violations, if any, did not constitute an excess of mandate as defined by the parties' arbitration agreement. The Tribunal also adopted the general principle of law argued for by the SPLM/A that even if there were some excess of mandate in relation to some part or parts of the ABC's decision, then the principle of partial annulment should apply such that only those parts found to be an excess of mandate should be annulled. Accordingly, the Tribunal found that the decision of the ABC in respect of the eastern and western boundaries was (in part) not sufficiently motivated and was, therefore, in relation to those parts only, an excess of mandate. The Tribunal accordingly adjusted the eastern and western boundaries.

Despite the Tribunal determining anew some of the boundaries of the Abyei Area, their decision categorically affirms the right of the Ngok Dinka people to their historic homeland in the Abyei Area and represents a significant victory for the SPLM/A and the people of Southern Sudan (including the Ngok Dinka of the Abyei Area), who vote next year in a referendum to decide their future. The full text of the award can be found on the PCA website, or by visiting here http://www.pca-cpa.org/upload/files/Abyei%20Final%20Award.pdf

►continues next page

WILMERHALE

AWARD RENDERED IN GROUND-BREAKING ABYEI INTERNATIONAL ARBITRATION

Continued from previous page

The arbitration resolving the dispute over Abyei is unique in other ways as well. As previously reported, unprecedented in the history of international arbitration, the entire hearings were broadcast live via webcasts on the Permanent Court of Arbitration website. These recordings, which can be viewed here, http://www.pca-cpa.org/showpage.asp?pag_id=1318 provide an opportunity to view some of the world's most highly regarded advocates in action. To watch Gary Born, partner and chair of the firm's International Arbitration Group, visit here to view the 9-11 a.m. session on April 22, 2009 http://www.wx4all.net/pca/22-04-2009_6.1.html and here http://www.wx4all.net/pca/23-04-2009_7.2.html to view the closing session on April 23, 2009.

The Honourable Dr. Luka Biong Deng, minister of presidential affairs, Government of Southern Sudan and co-agent for the SPLM/A, described the firm's performance as "an historic milestone" and "truly extraordinary in every way."

Wilmer Cutler Pickering Hale and Dorr LLP has handled a number of important and groundbreaking public international law matters in recent years. Our representation of the SPLM/A in the historic Abyei Arbitration reflects the firm's reputation as one of the world's premier practices for challenging, complex and sensitive public international law matters.

For further information on the firm's Public International Law practice, please visit www.wilmerhale.com

TOZZINI FREIRE

ACTS IN ACQUISITION BY ADMENTA FRANCE (FRENCH SUBSIDIARY OF CELESIO AG) FOR 50.1% VOTING CAPITAL OFPANPHARMA S.A.

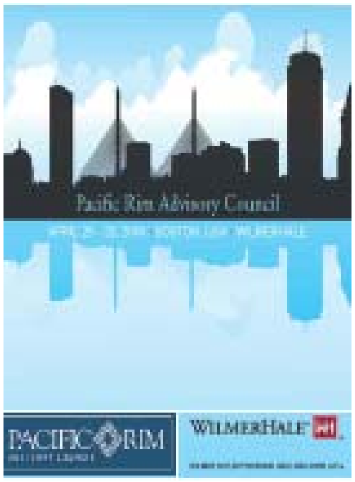
Acquisition, by Admenta France (French subsidiary of Celesio AG) of 50,1% of the voting capital of Panpharma S.A., holding of the Panarello group, the number one in Brazilian pharmaceutical wholesale.

Panpharma is the leading corporation in Brazilian pharmaceutical wholesale and holds a market share of about 17%. Its operating business is handled by the companies Panarello, American Farma and Sudeste Farma. These companies are supplying about 30,000 of the 52,000 Brazilian pharmacies on a daily basis. Revenues in the financial year 2008 amounted to about R$ 3 bn, corresponding to about EUR 1 bn. Panpharma was founded and established by the former sole owner of the company, the Brazilian Panarello family of entrepreneurs. The family will still play a central role in the management board and the supervisory board in the long term. The parties agreed not to disclose any details with regard to the transaction.

Closing of the transaction will occur upon the satisfaction of certain conditions agreed by the parties. Celesio has the option to purchase additional shares in Panpharma at a later date.

TozziniFreire Partner Marcela Waksman Ejnisman and Associate Ana Cristina Izu acting for Celisio.

For additional information visit www.tozzinifreire.com.br



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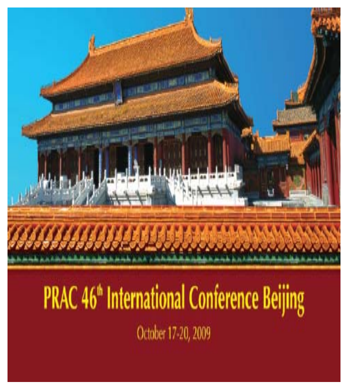
BRIGARD & URRUTIA



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Paris 2008

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& Craigie Blunt & Caroe
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Mumbai, India
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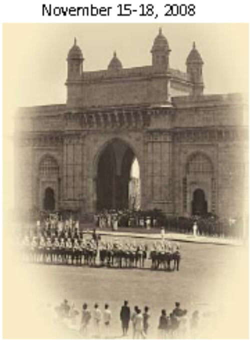

LUCE FORWARD
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KIM, CHANG & LEE

SEOUL 2007
October 20-24

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

ARGENTINA Native Forests Regulations

The Executive Power issued Decree 91/2009 regulating the Native Forests Law. The new regulation establishes, among others:

- The broadening of the concept of Native Forests including developing forestry ecosystems and palm trees.

- The obligation for each jurisdiction to update the zoning of Native Forests every five years.

- A list of different activities that may be carried out on Category I Forests, including the maintenance and restoration of the environment, the recollection of natural resources without jeopardizing the ecosystem, and tourism. It also authorizes public works on Category I and II Forests, to the extent of the prior assessment of the corresponding environmental impact.

- A rule of interpretation in favor of the preservation of natural forests.

- Police powers for the Secretary of Environment and Sustainable Development with the possibility of establishing a system to verify the compliance of the authorized operating plans, and requiring local authorities to report annually whether those plans will have negative effects on the environment.

- Definitions of the infringements subject to penalties under the Native Forests Law.

Furthermore, the Secretary of Environment and Sustainable Development, by means of Resolution 256/2009, created an Experimental Program for Managing and Conserving Native Forests for the current year. This program is addressed to owners or legitimate possessors of pieces of land on which native forests are located, who are entitled to file a form informing a Management and Conservation Plan with each jurisdictional authority. Once approved, the plans will be forwarded to the Secretary of Environment and Sustainable Development that will make a final selection of the admissible plans, giving special attention to plans presented by small producers, indigenous communities and the creation of new jobs. The owners and possessors of approved plans will receive a compensation for a term of up to three years from the National Fund for the Enrichment and Conservation and Native Forests.

For additional information visit www.allendebrea.com

CLAYTON UTZ

24 June 2009

Termination payments: good news, bad news

The Federal Government has fast-tracked its crackdown on directors' and executives' termination payments.

Three weeks after receiving public comment on a draft version, the Government has today introduced the final Bill into Parliament.

As noted in our previous Alert, the Government's main aim is to require shareholder approval for termination payments that are more than one year's base salary.

The Bill introduced into Parliament today does not change that. However, some other key provisions have changed - and not necessarily for the better.

Timing of shareholder vote

Under the current law, shareholders vote on a director's termination payment while the director is still in office. Under the draft Bill, that vote would only take place after the director had left office (on the grounds that shareholders would then have a better idea of how the director had performed).

As we pointed out in our submission to Treasury, this was a proposal that was fraught with problems. Not the least of those was that shareholders might rationally decide that there's no point in approving a termination payment after a director has left office, regardless of how well the director has performed.

The Government has responded by dropping the idea. As a result, shareholders will continue to vote on a director's termination payment while the director is in office.

Existing contracts

The good news about shareholder votes is, however, somewhat offset by what the Government now proposes to do to contracts that are already in existence when the Bill is passed.

There has been considerable confusion about this issue, going right back to the Government's first announcement about its intentions.

The draft Bill proposed that the new 12 month base salary limitation would only apply to:

- new contracts entered into after the Bill became law; and
- pre-existing contracts that had been extended after the Bill became law.

Our previous Alert pointed out that this was a fairly woolly test. In legal terms, there are no hard and fast rules about how far you can amend an existing contract before it becomes a "new" contract.

Rather than just making it clear that the restrictions only apply to completely brand new contracts, the new Bill goes the other way, and sets out rules for determining when a pre-existing contract will be caught by the new restriction. According to the Explanatory Memorandum accompanying the Bill, the new restrictions will apply to:

"existing contracts for which a variation of a condition is made. Minor changes to an existing contract would not be considered a variation of a condition. However, changes that effect an essential term, including any term relating to remuneration would be considered a variation of a condition."

This suffers from all of the problems of the original proposal (only a court will be able to decide what constitutes a "minor change" or an "essential term"). More worryingly, it appears to mean than any change to the remuneration terms of a pre-existing contract would bring the director under the new 12 month base salary limitation rule.

Where to now?

The fact that the Bill has now been introduced into Parliament does not, of course, mean that it will be passed in its current form. We will be tracking its progress through Parliament and keeping you up to date with developments as they happen.

For additional information visit www.claytonutz.com

TOZZINIFREIRE
A D V O G A D O S

News

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LATEST ISSUES

Immigration

BRAZIL: REGULARIZATION OF IMMIGRATION STATUS

A Federal Law recently enacted in Brazil allows the concession of temporary residence to foreigners that entered the Brazilian territory until February 1, 2009, and are currently in an irregular situation.

The application for temporary residence must be submitted until December 30, 2009. Initially, foreigners who meet the legal requirements will be conceded a temporary registration that will allow a stay of 2 years in the country. After this period, they may require the transformation of the temporary registration into a permanent one, provided they meet certain legal requirements.

In addition to temporary residence, the law ensures all rights and duties contained in the Brazilian Federal Constitution to the benefited foreigner, including labor rights and the concession of identity and work cards.

The new law might benefit approximately 150,000 to 200,000 foreigners who are currently residing illegally in the country.

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Citizens of Mexico and the Czech Republic Now Require Visas to Visit Canada

By: Evelyn L. Ackah

Beginning July 14, 2009, citizens of the Czech Republic and Mexico now require a Temporary Residence Visa (TRV) to travel to Canada.

Czech citizens may apply for a TRV from the Canadian Visa Office in Vienna, Austria, which currently serves nationals from several other European countries. Mexican citizens may apply at the Canadian Embassy in Mexico City, and are encouraged to send their applications by courier or mail rather than in person, as short-term delays are expected while Citizenship and Immigration Canada (CIC) works to increase the processing capacity of the Embassy.

Applicants from both countries must satisfy the granting officer that they meet the visa requirements in place for all Canadian TRVs, namely that their visit is temporary, the approved time will not be overstayed, they have sufficient funds to cover their stay, are in good health, have no criminal record, and will not pose a security risk to Canada.

The stated purpose of introducing the visa requirements is to reduce the burden on the refugee system resulting from an influx of refugee claims from the Czech Republic and Mexico in recent years. Mexico is currently the top source country for refugee claims, with 9,400 claims in 2008. The Czech Republic is the second, with 3,000 claims since October 2007 when the previous visa requirement was removed. When announcing the new requirements, the Minister of Citizenship, Immigration and Multiculturalism emphasized that Canada has strong ties with both the Czech Republic and Mexico, and continues to welcome all genuine travellers from both countries.

For further information, please view the following news releases from Citizenship and Immigration Canada:

Canada imposes a visa on Mexico
http://www.cic.gc.ca/english/department/media/releases/2009/2009-07-13.asp

Canada imposes a visa on the Czech Republic
http://www.cic.gc.ca/english/department/media/releases/2009/2009-07-13a.asp

Contact Us

For further information, please contact a member of our National Business Immigration Group. http://www.fmc-law.com/AreaOfExpertise/Business_Immigration.aspx

August 2009

CBRC NEW RULES ON FIXED ASSETS LOAN & PROJECT FINANCE

Background

In order to regulate the fixed assets loans and project finance business of the commercial banks, China Banking Regulatory Commission ("CBRC") released the Guidelines for Project Finance Business (《项目融资业务指引》) (Yinjianfa [2009] No.71) on July 18, 2009, and the Provisional Measures on the Administration of Fixed Assets Loans (《固定资产贷款管理暂行办法》) (CBRC Order [2009] No.2) on July 23, 2009. Both of the regulations apply to all banking institutions and will come into force three months after the date of its promulgation.

Provisional Measures on Administration of Fixed Assets Loans ("Provisional Measures")

The "fixed assets loans" mentioned in the Provisional Measures refers to loans granted by the lender to an enterprise legal person (institutional person) or any other entity which is qualified as borrower under the PRC law to finance the borrower's fixed assets investment, in RMB or in foreign currency.

The Provisional Measures require the lender to carry out an independent and comprehensive risk appraisal of the loans, taking into consideration factors such as the borrower, the project sponsors, the compliance of the project with applicable laws and regulations, the technical and financial feasibility of the project, the market of the products to be produced under the project, the financing scheme of the project, reliability of repayment sources of the loans, security, insurance, etc.

For those lenders who violate the Provisional Measures, penalties will be imposed according to the Provisional Measures. At the same time, the Provisional Measures also require the lenders to prepare their own administrative rules and operation procedures for fixed assets loans based on the provisions of the Provisional Measures.

The Provisional Measures also set forth some new requirements, including:
(a)Out of concern over the risks that could be brought to loans by the deficiency in capital investments in project, the regulator now expressly requires the followings to be included as conditions for drawdown: (i) the capital of the project proportionate to such drawdown has been paid up and the actual progress of the project corresponds to the amount invested; and (ii) if the amount actually invested has exceeded the estimated investment amount and additional loans are required for the project, the sponsors shall increase their capital investment accordingly to maintain the proportion of its capital investment in the total investment of the project and shall provide relevant additional security.

(b)Despite the fact that account control mechanism is from time to time seen in project financing cases, it is the first time for the regulator to make it a mandatory requirement that, (i) control over the Borrower's accounts are provided for in the loan contract; and (ii) where the contract has specified a repayment reserve account, the lender shall request a certain proportion of the cash flow generated by the fixed assets investment project or from the borrower's income to be paid to such account, and maintain a specific average balance in such account.

c)The Provisional Measures have a separate chapter dedicated to administration of drawdown and payments of the loan proceeds, which expressly requires the proceeds of any drawdown in excess of 5% of the aggregate investment amount of the project or over RMB5,000,000 to be paid by the lender on trust for the borrower, that is, the lender will, based on the borrower's payment authorization and upon its drawdown request, directly pay the loan proceeds to the relevant counterparty of the borrower in accordance with the purpose stipulated in the loan contract. Where the loan proceeds is not paid by the lender on trust for the borrower, the lender shall require the borrower to submit regular reports to the lender in respect of the payment of the loan proceeds, and shall verify whether the proceeds are applied towards the agreed purpose by way of account analysis, examination of certificates and site inspection, etc..

The supervision on the utilization of loan proceeds is an old topic, and has also been an issue under close scrutiny of the regulators for a long time. In practice, a lot of borrowers misappropriate the loan proceeds and apply it for purposes other than those agreed, which brings great risks to the banks' rights and interests as creditors. Now the Provisional Measures once again tightened up supervision over the use of loan proceeds, this time with specific measures.

(d)The Provisional Measures require the lenders to have a particular department and specific positions in place responsible for due diligence investigation on the projects, and to incorporate the findings of such due diligence investigation into a written due diligence report. The person who carries out the due diligence investigation shall ensure such due diligence report being true, complete and valid.

Guidelines for Project Finance Business ("Guidelines")
The "project finance" referred to in the Guidelines means a loan with the following characteristics: (1) the purpose of the loan is to finance the construction of one or a set of large-scale manufacturing equipment(s), infrastructure, real estate development projects or other projects, including refinance of the projects in construction or any completed projects; (2) the borrower will usually be an enterprise established for the construction, operation or finance of such project; and (3) repayment relies on the incomes deriving from the sale of products, subsidies or other incomes of the project, and there will usually exist no other source of funds for repayment of loans.

The Guidelines expressly recognize the Provisional Measures as one of its basis of legislation, and the procedural management and payment management of the loans under project finance are required to be carried out in accordance with the provisions of the Provisional Measures. Based on the rules of the Provisional Measures, the Guidelines shed more light on the characteristics of the project finance, for which the Guidelines provide corresponding rules.

As a conclusion, the Provisional Measures and the Guidelines reflects the efforts by the regulator to enhance supervision of large amount loans. Banks thus need to make more detailed risk control internal policies in terms of loan documentation and disbursement procedures. At the same time, banks also need to consider how to implement some of the requirements in the Provisional Measures and the Guidelines, such as ensuring the truthfulness and completeness of due diligence reports and how to accommodate the "pay on trust of the borrower" rule with the various funding demands of borrowers.

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COLOMBIAN CONGRESS APPROVED LAW 1340 ON ANTITRUST.

On July 24, 2009 the Colombian Congress approved the bill "by virtue of which new regulations are issued for the protection of competition". Some of the relevant provisions incorporated in the bill are the following:

- Single Antitrust Authority.

  The Superintendence of Industry and Commerce ("SIC") is appointed as the only Antitrust Authority in Colombia. Nonetheless, the Superintendence of Finance and the Civil Aeronautics Administration retain jurisdiction to approve mergers or integrations were there is a company under their surveillance.

- Increase of fines to legal entities and individuals.

  Legal entities that infringe competition regulations could be fined for up to 100.000 minimum wages (COP$49.690.000.000, approximately USD$24,086,282) or up to 150% of the revenues derived from the conduct of the offender.

  Additionally, individuals who facilitate, authorize, perform or tolerate practices contrary to competition regulations could be also subject to fines of up to 2.000 (COP$ 993.800.000, approximately USD$ 481,725).

- Total or partial release of fines to legal entities or individuals that cooperate with the SIC.

  Offenders could be totally or partially released from paying fines if they cooperate with the SIC by providing evidence or information related to the relevant infringement under investigation.

- Time extension in proceedings to authorize mergers.

  Law sets forth an initial evaluation stage of 30 working days which term could be extended for up to 5 months if the SIC deems it necessary. Under the previous law, competition regulations provides for a term of 30 working days.

- Reversion of mergers.

  The SIC could reverse a merger when: i) it was not dully informed or it was performed prior to obtaining the clearance; and ii) the companies involved do not comply with the remedies imposed by the SIC.

- Automatic authorization of the merger if the relevant firms have less that 20% of the relevant market.

  Pursuant to new law, if the parties to a relevant market have together a market share of less than 20%, the integration will be deemed to be authorized by the SIC. However, the parties will nevertheless need to submit a report to the SIC with a description of the transaction and the SIC will have the authority to request additional information.

  Please be advised that as of today, the SIC has not indicated what kind of information it will require from the parties when their combined market share is less than 20% of the relevant share.

- Authorization of integrations were the relevant firms have more that 20% of the relevant market

  The following is a brief summary of procedure that will need to be followed if the parties to the transaction hold more than 20% of the relevant markets:

The parties to the transaction will need to submit to the SIC an application for pre-evaluation, accompanied by a brief report in which the parties express their intention to carry out the transaction, together with a description of the basic conditions of the transaction. For that purpose, the new law provides that the pre-evaluation filing will need to follow the guidelines to be issued by the SIC. Within 3 days following the above said report and unless the SIC has sufficient evidence to establish that there is no obligation to report the transaction, the SIC must order the publication in a newspaper of wide national circulation, so that within 10 days following the publication, interested third parties (such as competitors) will be able to provide to the SIC information concerning useful elements for the analysis of the proposed transaction. However, the SIC will not order the publication of the notice to the extent that it has sufficient evidence to establish that there is need to report the transaction to the SIC, or when the parties involved, for reasons of public policy, and in writing, request that the information remain confidential, and such request is accepted by the SIC.

Within 30 days following the filing of the pre-evaluation report, the SIC will determine whether to continue with the process or, if it finds that there are no substantial risks to competition that may arise from the transaction, to terminate the process and allow the transaction to proceed to completion.

If the process continues, the SIC must notify the proposed integration to other authorities in order to obtain their opinion. In addition, the SIC will request additional information from the parties to the transaction, that has to be submitted in a complete and reliable manner within 15 days of the request by the SIC. The SIC may require the parties to complement, clarify, or explain the information so collected. Also, the parties to the transaction may propose conditions, actions or conducts to neutralize any possible anticompetitive effects of the transaction in the market.

The interested parties will have the right to request that the SIC discloses any information provided by third parties, and may contest such information.

If the transaction has not been objected within 3 months from the moment in which the parties to the transaction have submitted the required information with the SIC, the transaction will be deemed authorized.

On an informal meeting held with the SIC, we were informed that the SIC estimates at this stage that the entire process will take more or less 5 months from the date in which the parties to the transaction file the information.

- Ministry of Agriculture is empowered to authorize agreements aiming to stabilize the agricultural sector.

Law 1340 considers the agricultural sector as a core sector of interest to the general economy in Colombia. As such, the Ministry of Agriculture and Rural Development shall issue a preliminary opinion, which will be binding and justified, in connection with the approval of agreements and covenants aimed at stabilizing that sector of the economy.

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24/07/2009

INDONESIA
New Regulations on Securities Rating Agencies

The Indonesian Capital Market and Financial Institution Supervisory Agency ("Bapepam-LK") issued, on 22 June 2009, the long delayed rules and regulations regarding securities rating agencies. The rules and regulations are embodied in a total of five regulations, as follows:

i. Regulation No. V.C.2 regarding the Licensing of Securities Rating Companies (issued under Decree No. Kep-151/BL/2009) ("Regulation No. V.C.2");

ii. Regulation No. V.H.4 regarding Guidance on Rating Agreements (issued under Decree No. Kep-152/BL/2009) ("Regulation No. V.H.4");

iii. Regulation No. V.F.4 regarding Reporting Requirements for Securities Rating Companies (issued under Decree No. Kep-153/BL/2009) ("Regulation No. V.F.4");

iv. Regulation No. V.F.5 regarding Document Maintenance and Care by Securities Rating Companies (issued under Decree No. Kep-154/BL/2009) ("Regulation No. V.F.5"); and

v. Regulation No. V.H.3 regarding Conducts of Securities Rating Companies (issued under Decree No. Kep-155/BL/2009) ("Regulation No. V.H.3");

As stated by Bapepam-LK's Chairman in the press release, the purpose of the issue of the Regulations is to provide the investors community with professional and high quality securities rating agencies that conduct their business with transparency and accountability. The first Regulation, for instance, requires a securities rating agency to have directors, commissioners and analysts who have good integrity, competence and expertise, whereas three of them, namely Regulation No. V.H.3, Regulation No. V.H.4 and Regulation No. V.F.4, provide a new perspective on how a rating company should behave and on how the public may question the compliance of a rating done by a rating company with the standards.

All the above Bapepam-LK regulations have been in force since the date of their issue on 22 June 2009 . [Hamud M. Balfas]

For additional information visit www.abnrlaw.com

LEGAL UPDATE

JUNE 17, 2009

REGULATIONS OF THE GENERAL LAW ON TOBACCO CONTROL

On May 31, 2009, the Regulations of the General Law on Tobacco Control (the "Regulations"), were published in the Official Gazette of the Federation, which abrogate the Regulations on Tobacco Consumption dated July 27, 2000 and specifically regulate the Law published on May 30, 2008. These Regulations will come into force thirty (30) calendar days following their publication, that is, from June 30, 2009, and they may affect, either directly or indirectly, the activities performed in your places of business.

In connection with the above, following are the most relevant items of said piece of legislation. The Regulations intend to regulate in further detail the provisions of the General Law for Tobacco Control (the "Law") concerning the manufacture, import, marketing, advertising and promotion of tobacco products.

Pursuant to the provisions of Articles 1 and 3 of the Regulations, the Secretariat of Health and the Governments of each State of the Mexican Republic, are responsible for the surveillance and verification of compliance with said piece of legislation. In relation to the correct application of the Law and the Regulations, the Secretariat of Health will have the following powers:

I. Receive and take care of the accusations or complaints to be filed on matters of noncompliance or breach with the Law and these Regulations;
II. Implement the surveillance and health control procedures;
III. Impose, in the field of its jurisdiction, the safety measures and the penalties to be determined for such purpose due to noncompliance or breach with the Law, the Regulations and other provisions applicable;
IV. Issue and revoke the corresponding authorizations referred to in the Law, the Regulations and other applicable legal provisions;
V. Publish the resolutions concerning the characteristics and contents that the health messages and the pictographs referred to by the Law will have and that will be used in the packaging and labeling of tobacco products;
VI. Set forth the characteristics that the 100% tobacco smoke free spaces will have, as well as the areas exclusively reserved to smoking only;
VII. The others attributed to it by other laws.

The Regulations, also provide for minimum requirements related to the information to be contained on the packaging and labeling of the tobacco products to be commercialized in Mexico, having to be expressed in clear, visible, indelible characters and contrasting colors, easy to be read by the consumer, in ordinary purchase and use circumstances, being such requirements the following:

I. In the tobacco products to be commercialized in Mexican territory, the statement "*For sale in Mexico only*", must appear;

II. The declaration of contents, emissions and risks, in accordance with the provisions applicable to be issued to that effect by the Secretariat of Health;
III. The identification and domicile of the manufacturer, importer, packaging, *maquila* company or domestic or foreign distributor, as the case may be;
IV. The identification of the lot that the product belongs to; and,
V. The health messages and pictographs to be established by the Secretariat of Health must be printed directly in the packaging of the product.

It should be noted that, in case that the tobacco products packaged and labeled abroad, bearing the captions and information related to the specific product, are described in the official language of the country of origin, they must also be described in Spanish and as provided for by the Law, the Regulations and other provisions applicable that the Secretariat of Health issues from time to time, if said products are to be commercialized in Mexican territory.

The aforementioned information must be visible and at the sight of the general public at all times, during the display period of the tobacco products and until they are acquired by the final consumer.

In addition to the above, the establishment vending cigars per unit, i.e., individually, must comply with the following requirements:

I. Keep the product in its original box until the moment of its sale;
II. The external packaging and labeling used in its commercialization must have the health messages and pictographs referred to above and be likewise visible and available at all times; and,
III. In the case of the packages usually kept open for the cigars display, the health messages and pictographs must appear on the packages containing them, both in the external and in the internal part of the upper lid, in order to guarantee that as they are placed, the health messages and the pictographs are seen.

The obligation of including the health messages and pictographs on the external packaging and labeling applies for any tobacco product whose consumption be performed or not by means of the combustion of same. It should be mentioned that the external packaging and labeling of any tobacco product must compulsorily bear at least one image or pictograph and two different warning labels in same, in accordance with the provisions to be issued for such purpose by the Secretariat of Health and these Regulations. The health messages and pictographs included on the tobacco products packages and on any external packaging and labeling of same and other requirements must adapt to the measurements and proportions required by the Law, regardless of the type, form, size and presentation of same.

The Regulations set forth the express provision of indicating, on the external packaging and labeling of the tobacco products, any form of promotion, that may lead to error in connection with their characteristics, health effects, risks or emissions; likewise, the use of descriptive terms, brand names or trademarks, figurative signs or phrases such as “with low tar content”, “light”, “ultra light”, “soft”, “extra”, “ultra”, “lights”, “mild”, “smooth” or anything else that in this or another language has the direct or indirect effect of creating the false impression that a certain tobacco product is less harmful than another, is forbidden.

As to the advertising of tobacco products, the Regulations provide for that tobacco products advertising may only be performed in adult magazines, personal communication by mail, as set forth by the Mexican Postal Service Law, or places that are exclusively for adult access. The advertising displayed inside establishments reserved exclusively for adults exclusive access will be performed in printed materials and must include the minimum requirements for information established by the Law, the Regulations and other provisions that the Secretariat of Health may issue from time to time.

Information on tobacco products, displayed inside the selling places, must be the same for all the equivalent products, and will only consist of the name and price of same, written in black print letter on a white background without including written or visual information enabling or leading consumer to think that any of the products or trademarks, represents a lower risk for consumers.

In addition to the above, the tobacco products display cabinets located in the establishments commercializing, selling, distributing, supplying or vending tobacco products must only include the following information:

I. The telephone number to be established for such purpose by the Secretariat, giving advice and guidance concerning treatment and aid centers to stop tobacco consumption, which must be at the sight of the public;
II. The caption “Forbidden sale of cigars per unit”;
III. The caption “The trade, sale, distribution or supply to minors is forbidden”;
IV. The text: “Report at” followed by the telephone number to file citizen’s complaint for breach; and,
V. The others to be issued for such purpose by the Secretariat in the laws applicable.

To guarantee the right for health protection of the people, it shall be the obligation of the owner, manager or person in charge of a place of business to make sure that a place is 100% tobacco smoke free, that when a person is smoking at said place, in the first place, the person in charge must ask him or her to stop smoking and to put out his or her cigarette or any other tobacco product lit by said person. In case the smoker ignores the petition, demand him or her that he or she leaves the 100% tobacco smoke free space and goes to the smoking area; if he or she puts up any resistance, the person in charge must deny him or her the service and, if applicable, seek the assistance of the corresponding authorities. The responsibility of the owners, occupants or managers referred to in this provision will conclude when he or she gives notice to the corresponding authorities, thus, he or she must have the report code that the authorities are obligated to issue for such purpose.

In all the accesses to 100% tobacco smoke free spaces, it will be necessary that the owners, occupants, administrators or persons in charge place a vertical astray with the sign: “Put out your cigarette or any other tobacco product before going in”. At the entrances and inside same, there must be signs and notices informing workers, users and visitors that it is a 100% tobacco smoke free space, as well as signs containing warning signs against noncompliance with same and the telephone number for filing complaints and accusations.

The tobacco smoke free space must be, as a minimum, double the size of the isolated interior space. As the case may be, it shall be taken into account in the measurement of the total space exclusively the surface destined to the rendering of the service, not being possible to include, under any circumstances, the areas destined to the kitchen, beverage preparation, sound equipment and its operators, restrooms, terraces or parking lots.

The smoking areas must be located outdoors or in isolated interior spaces and have the following characteristics:

I. Those located outdoors, must be physically separated and out of reach from the 100% smoke free spaces, not being an obligated path for people or located at the accesses or exits of the properties. No minors will be allowed in these spaces and pregnant women must be warned of the risks that she and the unborn child may suffer upon entering this area; and,
II. In case of isolated interior spaces, same must comply with the technical requirements provided for by the Law, these Regulations and other applicable legal provisions.

In the isolated interior spaces the following requirements must be met:

I. Be totally separated from floor to ceiling and from wall to wall from the 100% tobacco smoke free space by all sides;
II. Have a lateral movement mechanism, automatic opening and closing non-hinged door; that will remain permanently closed and will be open only during the access or exit from said areas;
III. Have the adequate signs prohibiting entrance to minors and warning from the health risks that might be suffered by entering these spaces, particularly by pregnant women, elderly people and those suffering cardiovascular or respiratory diseases, cancer, asthma and others in the respective resolution by the Secretariat; and,
IV. Not to be an obligated path for people.

The owners, managers, event organizers in a 100% tobacco smoke free space, with the support of their employees and workers, will be responsible for implementing, complying with and causing the compliance with the Law and these Regulations in the spaces occupied by same, as well as for requesting those infringing said provisions to leave the place, being warned that in case of failure to do so, notice will be given to the corresponding administrative authorities.

The isolated interior space must compulsorily have a ventilation and purification system guaranteeing the following:

I. Refill of clean air, both continuous and permanent, corresponding to the total of the interior volume per each 20 minutes. Air recirculation equipment may not be used; this minimum supply of air can transfer air from other non-smoking areas of the building or place of business, and must be continuously maintained during the premises operating hours. Besides, this minimum supply of air must be clearly contained in the occupation certificate;
II. Adequate filtering of the polluted air before expelling it outside the building where the place of business is located, at a height not affecting pedestrians passing by this output. The air coming from a smoking room must not have an output within a 6-meter perimeter around any entrance or exit door of the building, air intakes, tobacco smoke free patios or at street level. In the cases in which this 6-meter perimeter may not be complied with, a 3-meter separation will be allowed, provided that the expelled air be filtered both for particles and for gases. A maintenance and a filter changes record must be kept that will be presented in case of being required during an inspection;
III. Minimum contribution guaranteeing 30 liters of air per second per person within the space, on the basis of a seating capacity index of 1 person per each 1.5 square meters;
IV. Keep a negative pressure with the rest of the establishment no lower than 6 Pascals, which must be automatically recorded during all the day that the establishment remains open. Said records must be kept by the person in charge of the establishment during two years, in order to show them in case of inspection. In case of not having same, it will be inferred that they did not operate during those days and the corresponding penalties will be applied per each of the days that such records are missing;
V. A monitor for measuring pressure difference will be required which reading may be made from the exterior of the area located close to the entrance to same. The smoking designated area must have an alarm audible both inside and outside same. This alarm will be activated when the differential pressure between the smokers' area and the adjacent smoke free area be lower than 5 Pa. Likewise, there must be a sign outside informing that no one may enter the area while the alarm is activated and an interior sign informing all the persons inside the area that they must put out their cigarettes or any other tobacco product and leave the premises immediately;
VI. That the air coming for this space may not be recycled and be invariably expelled to the exterior of the property; and,
VII. Installation and maintenance in accordance with the rules in force.

At the places destined to accommodations, smoking is strictly forbidden and it is only allowed at smoking rooms, provided that they meet the provisions of the regulations.

Noncompliance with the provisions of both the Law and the Regulations will give rise to the application of safety measures and penalties in the following terms:

In accordance with the provisions of Article 79 of the Regulations, the safety measures will consist of:

I. Suspension of the advertising, works or services; this may be partial, total or permanent;
II. Seizure of tobacco advertising or products and of the equipment used for their manufacturing or distribution;
III. Destruction of tobacco advertising, products and of equipment used for their manufacturing;
IV. Withdrawal from the market; and,
V. The others to be determined by the Secretariat.

In accordance with the provisions of Article 80 of the Regulations, infringements to the principles or provisions of the Law, these Regulations and other provisions resulting therefrom, will be penalized with a monetary sanction from the COFEPRIS (the Federal Commission for the Protection against Health Risks), and the penalties may range from: i) the application of a fine of 100 (one hundred) to 10,000 (ten thousand) times the minimum salary in force in the economic zone in question, duplicating the sum of said fine in case of recidivism; ii) Temporary or definitive closing of the establishment where the infringement takes place; and iii) Arrest of up to 36 hours.

Update
Class Actions

Global settlement approved by Dutch court **17 July 2009**

This newsletter is sent from NautaDutilh

On 15 July 2009 the Amsterdam Court of Appeal approved and declared binding the global collective settlement in the Vedior case, resolving a threatened securities action in connection with Randstad's public takeover bid for Vedior. This update is of interest to anyone involved in strategic decisions on the resolution of cross-border mass claims against European companies.

Introduction

Globalisation and related factors are causing a continued increase in the incidence of mass damage, i.e. damage of a similar nature suffered by a large number of individuals. As a result, class action-type litigation has become a much debated topic across Europe, resulting in several legislative initiatives at the level of both the European Commission and individual EU member states. The enactment in 2005 of the Dutch Act on Collective Settlements of Mass Claims (*Wet collectieve afwikkeling massaschade*, the "WCAM") was a major milestone, making the Netherlands the first, and thus far the only, European country with legislation enabling a binding collective settlement of mass disputes. Recent case law shows that the WCAM is an effective instrument for settling mass disputes, even where the relevant mass dispute is a cross-border one.

Under the WCAM, parties that have agreed to settle a mass damage claim may request the Amsterdam Court of Appeal to declare the settlement binding on the group of similarly situated claimants described in the agreement, unless they opt out. To date, the WCAM has produced five court-approved collective settlements in a wide variety of disputes, ranging from product liability to securities fraud. NautaDutilh is, or has been, involved in four out of these five settlements. The following brief description of the settlements shows not only that thousands of ongoing or potential proceedings can be settled in one go, but also that the WCAM can serve as an effective tool for reaching a global settlement.

DES

The pioneering settlement under the WCAM ended the DES hormone dispute in the Netherlands. The settlement, which was approved and declared binding in June 2006, entitled around 34,000 claimants to a share in a € 35 million settlement fund. By April 2008, around 6,000 DES users had filed requests for payment. The settlement also aims to compensate future claimants. 22 interested parties objected to certification of the settlement, mainly because the settlement excluded some groups. The opt-out rates in this case are not publicly available, but it is estimated that only a handful of claimants opted out. NautaDutilh's lawyers represented manufacturers of DES.

Dexia

In January 2007, the Amsterdam Court of Appeal approved and declared binding a € 1 billion collective settlement in the Dexia investment products case. The case involved over 300,000 claimants, of whom less than 10% opted out. NautaDutilh represented Dexia Bank Nederland in the litigation, the negotiations leading up to the settlement and the approval process.

Vie d'Or

In April 2009, a € 45 million settlement was approved and declared binding following litigation in which around 11,000 former policy holders of the bankrupt life insurance company Vie d'Or brought a claim against the former insurance industry regulator for alleged failure to take adequate enforcement action, and against the actuarial advisor and the auditors for alleged professional malpractice.

Shell
In a landmark decision rendered in May 2009, the Amsterdam Court of Appeal approved and declared binding the US$ 352.6 million Shell settlement. The settlement compensates investors who suffered losses due to a sudden decrease in the value of Shell securities following disclosure and restatement of allegedly incorrect prior reporting by the company of its proven oil and gas reserves between April 1999 and March 2004. The settlement agreement was entered into on behalf of investors residing in 100 jurisdictions, except for those residing in the US and those who purchased their Shell stock on US stock exchanges. Court approval of the settlement was requested by Shell, the Shell Reserves Compensation Foundation (*stichting*), the Dutch Shareholders' Association and the Dutch pension funds ABP and Zorg en Welzijn. For the first time, the court explicitly took jurisdiction over shareholders residing outside the Netherlands and declared the settlement binding on such shareholders as well as on those residing in the Netherlands. The court also confirmed that a Dutch foundation can act on behalf of non-Dutch injured parties. NautaDutilh represented the two pension funds.

Vedior
The most recent approval is that of the € 4.25 million Vedior settlement on 15 July 2009. The settlement relates to damage allegedly suffered by investors who sold their Vedior stock, which was listed on Euronext Amsterdam, at a moment when rumours were spreading that Vedior was about to be acquired. As a result of those rumours, the share price suddenly rose. Later the same day, on 30 November 2007, Vedior and Randstad announced their merger talks. Like the Shell settlement, the Vedior settlement includes both Dutch and foreign investors. Unlike the Shell settlement, however, the Vedior settlement also includes US residents, giving it a truly global scope. NautaDutilh represented Randstad.

Collective settlements under Dutch law: a new strategic option for European companies?
In any litigation, and particularly in disputes regarding mass claims, there are times when various settlement options have to be considered. The Shell and Vedior cases have made clear that collective settlements under the WCAM can be used for claimants residing worldwide. Moreover, the availability of a forum in Europe dealing with mass dispute settlements may be a relevant factor for courts elsewhere in deciding whether to take jurisdiction over European claimants and whether to include them in a certified class. This means that European companies dealing with a global mass claim now have a new and viable strategic option that will enable them to achieve a worldwide resolution of the dispute and also to improve their position in class actions elsewhere.

NautaDutilh
Aside from the legal aspects, the "art" of dispute resolution and litigation involves devising a strategy together with the client that not only effectively deals with threats, but also opens up new opportunities. This philosophy guides NautaDutilh's Class Action team, which draws from expertise found across several practice groups and industry groups within the firm and is an expression of our firm's commitment to staying ahead of trends and developments that affect the business of our clients and friends.

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Copyright Commissioning – Back to Basics

As reported in our May 2009 edition of On Your Marks, the National government has dropped the Copyright (Commissioning Rule) Amendment Bill which proposed the abolition of the copyright commissioning rule. This means that, for now at least, the rule under section 21(3) of the Copyright Act 1994 will still apply.

Under the commissioning rule, those who commission and agree to pay for the creation of computer programs, designs and other artistic works, photographs, films and sound recordings, are the first owners of any copyright in the works created. The rule applies subject to any agreement to the contrary.

If the commissioning rule had been abolished, the default position would be that the author would be the first owner of copyright in a work in all cases except:

1.1 where the work is created in the course of employment; or

1.2 where an applicable contract says something else about ownership.

Now that the abolition of the rule is no longer on the horizon, it is timely to remind ourselves of the findings of a recent case in the High Court which looked at the application of the commissioning rule (Oraka Technologies Ltd v Geostel Vision Ltd (High Court, Hamilton, CIV 2005-419-809, 18 February 2009)).

In Oraka Technologies one of the defendants regularly offered a free design service in a bid to attract new customers. In accordance with this practice, it accepted a request from one of the plaintiffs to prepare some concept and design drawings. At the time the plaintiff requested the defendant's services there was no discussion of payment, no subsequent request for payment by the defendant, and no offer by the plaintiff to pay for the services.

Although the material copyright works in this case (namely, design drawings) were created in 1993 and 1994 and therefore ownership questions should be determined under the Copyright Act 1962, the High Court held that for the purposes of this case, there was no distinction between the commissioning provisions in the 1962 Act and those under section 21(3) of the current Act, the Copyright Act 1994.

The Court restated a number of well known principles including the finding of the Court of Appeal in Pacific Software Technology Ltd v Perry Group Ltd ([2004] 1 NZLR 164) that for section 21(3) to apply there must be an agreement to pay. The Court also held that for the commissioning party to be the first owner of any copyright in the work, the payment or the agreement to pay must pre-date the creation of the copyright work in question, and relate to that creation. Applying the findings in Plix Products Ltd v Frank M Winstone (Merchants) Ltd ([1986] FSR 63, 87, per Prichard J) the Court also held that payment must relate to the article in which the copyright resides, irrespective of whether any of the finished products are purchased. The payment cannot be made for the product manufactured using the copyright works.

The commissioning does not have to be the subject of a written agreement; it may be inferred in all the circumstances of the case. However, the commissioning, whether express or implied, must include an agreement to pay.

The Court also confirmed the finding in Apple Corps Ltd v Cooper [1993] FSR 286 that the agreement to pay must be a true consensus and not a mere unexpressed intention to pay, or a unilateral expectation that there will be a payment. In the absence of such agreement, there could be no suggestion of a commissioning.

The Court held that in this case no commissioning had occurred. Although the plaintiff subsequently sought and accepted a quote from the defendant for tooling and production of the final article, this was a distinctly separate instruction, payment for which could not convert the earlier instruction into a commission.

The Court also rejected the plaintiffs' arguments that a commissioning could be implied on the basis of the ordinary business efficacy test, or on the basis of trade custom. There was no persuasive evidence of a trade custom to that effect. Further, the express requirements of the Act require payment or an agreement to pay, and to accept that a commissioning had occurred by which the plaintiff would own copyright in the absence of payment or an agreement to pay would be to subvert this statutory requirement and run counter to the default ownership rules in the Act.

It seems then that for the time being at least, the commissioning rule is here to stay. These reminders on the well known requirements for a valid commissioning should therefore remind us all what steps can be taken to try and avoid arguments over copyright ownership when engaging a third party to create copyright works for us.

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

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Limited Partnerships - A New Business Entity In Singapore

June 2009 | Corporate | Business Bulletin

S SIVANESAN

Sunil RAI

Introduction

Singapore recently welcomed a new business vehicle – the limited partnership – when the Limited Partnerships Act 2008 ("LPA") commenced operation on 4 May 2009. The Accounting and Corporate Regulatory Authority ("ACRA") is the administering authority of the LPA.

This new business vehicle provides a structure which, in summary, comprises at least one general partner with unlimited liability and limited partners with limited liability, and separates ownership from management. A limited partnership ("LP") is essentially a general partnership but with passive investors in the form of limited partners. This structure is common in the UK and US, and has been often used in Europe for private funds. The LP is a vehicle which is well suited to limited life, self-liquidating funds. For example, funds that intend to have a charter life of eight years may consider adopting this vehicle for the fund's activities. The LP is therefore expected to appeal to niche markets like private equity and fund investment businesses. It is also attractive to investors who do not wish to take an active management role and who prefer to entrust management to someone willing to bear unlimited liability.

This article highlights key features of the LP which should be considered when it is used as a vehicle for business activities or for raising capital.

Setting up a limited partnership

(1) Registration and renewal

Registration is relatively quick and convenient and costs only S$50. After registration, the name of the LP has to contain the words “limited partnership” or the abbreviation "LP" in all its invoices and official correspondences.

Unlike an incorporated company, an LP has less onerous reporting requirements and administrative duties but, as the LP has a limited life span of just one year, its registration has to be renewed on an annual basis. Also, the LP exists as long as there is one general partner and one limited partner. If there is no limited partner, the partnership will be suspended and the LP will be converted to a firm registered under the Business Registration Act. However, once a limited partner is appointed, the registration of the LP will be restored to a 'live' status.

In this regard, it is important to note that the failure to renew registration could result in the loss of LP status and the LP may instead be treated as a general partnership. In short, limited partners may lose their limited liability status due to a failure to file a renewal of the LP.

(2) Parties in the limited partnership

There are generally three parties in an LP – a limited partner, a general partner and a local manager. An individual (above 18 years of age) or a corporation may become a general partner or a limited partner of an LP. Each partner need not be ordinarily resident in Singapore which makes the LP attractive to foreign investors. However, a local manager has to be appointed if every general partner is ordinarily resident outside Singapore.

(3) Records

The LPA does not require an LP to lodge share capital information or the respective contributions of partners with ACRA. The LPA also does not prescribe the requirements for financial reporting or for accounting standards to be adopted. Therefore, information regarding contributions and the financial performance of an LP do not become readily available to the general public. However, every general partner is required to ensure the proper keeping of accounting and other records that will sufficiently explain the transactions and financial position of an LP. These records must be retained for at least five years as the Registrar may require such records to be produced for inspection.

Liability of the parties

(1) No separate legal personality

An LP is not a separate legal entity from its partners, that is, an LP cannot sue or be sued or own property in its own name. An LP, like a general partnership, does not have a legal personality and thus cannot enter into contracts. An LP cannot become a partner in another partnership, LP or limited liability partnership, or a shareholder in a company.

(2) The partners

A partner's ownership and share in the profits and assets of an LP is purely the subject of agreement between the partners. Subject to the partnership agreement, an LP's property can be held in the name of the general partner.

The general partner bears responsibility for the actions of an LP. The general partner has management control and bears liability for all debts and obligations of the limited partnership incurred while being a general partner in the limited partnership.

Like shareholders in a company, a limited partner is not liable for the debts and obligations of an LP beyond that partner's agreed contribution or investment (whether in the form of cash, property, services or otherwise). The general partners pay the limited partners a return on their investment (akin to a dividend), the nature and extent of which is usually defined in the partnership agreement.

In this regard, a limited partnership agreement is necessary to spell out the rights and obligations of the general partners and the limited partners.

While limited partners enjoy limited liability, they are prohibited from participating in the management of the LP. Limited partners will lose the protection of their limited liability if they participate in the management of the partnership. The limited partner will be personally liable for all debts and obligations of the LP incurred during the period that the limited partner participates in the LP's management, as though he were, for that period, a general partner.

The First Schedule of the LPA prescribes a list of activities that, for the purposes of the LPA, are not regarded as taking part in the management of the partnership. These include contracting with the partnership, acting as an employee of the partnership, providing advice in relation to the business affairs or transactions of the partnership, and calling, attending or participating in a meeting of the partners or limited partners. Therefore, partners can separately enter consultancy agreements with the LP to provide advice on proposed investments by the LP.

In this regard, limited partners have to refrain from active participation in the business or engaging in management activity if they wish to avoid unlimited liability status but they can enter independent contracts with the general partner.

(3) The manager

The local manager is personally responsible for the discharge of all obligations attaching to the LP under several provisions of the LPA. In the case of any default in respect of any such obligation, the local manager will be subject to the same responsibilities, liabilities and penalties as a general partner in the LP.

Other requirements

(1) Securities and Futures Act

The Securities and Futures Act provides that the definition of securities includes 'interests in a limited partnership... formed in Singapore'. In that regard, a person can make offers to the public in Singapore to buy or subscribe for interests in limited partnerships in accordance with Division 1, Part XIII of the Securities and Futures Act (that is, issuing a prospectus). In that regard, an LP can be a vehicle for raising capital in Singapore.

(2) Income Tax Act

The Income Tax Act does not subject limited partnerships to corporate income taxation. Profits are instead taxed at the partner's personal income tax rates.

Dissolving the limited partnership

Subject to the partnership agreement, the general partner may dissolve the LP. Alternatively, if registration has expired and has not been renewed, ACRA can dissolve the LP.

Conclusion

The requirements indicate that the LP is a hybrid between a company (where limited partners have limited liability similar to shareholders) and a sole proprietorship (where the general partner has unlimited liability, enters contracts and can hold property). The LP provides a structure for passive investors who prefer to contribute money or resources rather than operate or manage the partnership and wish to allow an experienced party (such as a fund manager) to manage the partnership (albeit with unlimited liability). Furthermore, due to the limited liability of limited partners, the LP can be used as a vehicle for raising capital. However, it is crucial to note the requirements that the LP is renewed annually and that limited partners refrain from taking control (or being seen to be taking control) of the business of the LP if unlimited liability is to be avoided.

TAIWAN IS READY TO GRANT ACCESS TO CHINESE MAINLAND CAPITALS

◎Lihuei Mao/Martin Chiu

According to the Act Governing Relations Between Peoples of the Taiwan Area and the Mainland Area (the "Act"), PRC investors may make any investment in Taiwan unless approved by the competent authorities. In the absence of relevant regulations to guide approval procedure, the access has long been denied.

The Executive Yuan approved the Regulation Regarding the Taiwan Investments Made by Persons of Mainland Area (the "Investment Regulation") and the Regulation Regarding the Establishment of Branch Offices or Agencies in Taiwan by Profit Seeking Enterprises of Mainland Area (the "Establishing Regulation") both on 25 May 2009. Since the promulgation of the Regulations on 30 June 2009, access can now be granted to inbound PRC capitals for local investments.

- Mainland Capitals for Local Investments

As a general rule, an individual, juristic person, organization, or other institution of Mainland China Area (a "Mainland Person"), or any company a Mainland Person invests in any third area must obtain an approval pursuant to the Investment Regulation before making any investment in Taiwan.

Permitted investment are: (i) the acquisition of shares of equity interest of Taiwanese companies or other entities, (ii) the establishment of branch offices, private or partnership, and (iii) the provision of loans for one year or above to the above-mentioned investment target entities.

Regarding the investment through a third-area company, such third-area company, according to the Investment Regulation, refers to any company established pursuant to the law of a jurisdiction other than Mainland and Taiwan areas with the investment from a Mainland Person, and that (i) the Mainland Person directly or indirectly holds more than 30% of the equity interests of such third-area invested company, or that (ii) the Mainland Person has control over the such company. This "indirect investment" should be made pursuant to the Investment Regulation instead of the Statute for Investments for Foreign Nationals.

Along with the promulgation of the Regulations, the Investment Committee published a list of 192 industries of manufacturing, service and public construction sectors opened for Mainland capitals. Nevertheless, the authorities concerned will have the right to further restrict or deny applications for policy reasons.

- Domestic Appearances

Under the Establishment Regulation, Mainland companies may apply to establish its branch offices or agencies in Taiwan, subject to different documentation and approval requirements. It is also required that applicants set aside the operating funds specifically for their Taiwan branches to meet the minimum requirements stipulated by the authorities governing the industries of investments.

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INTELLECTUAL PROPERTY REPORT

The Controversy Over Gene Patenting: Can The United States Patent Office Be Sued For Issuing A Patent That A Member Of The Public Doesn't Like?

Jennifer Cozeolino

The recent filing of an action encaptioned *Association for Molecular Pathology v. United States Patent and Trademark Office*[1] (hereinafter "*Myriad*"),[2] in the United States District Court for the Southern District of New York on May 12, 2009 has garnered much attention on patent blogs and in other media outlets.[3] Most of the discussion of this case has understandably been about the main substantive issue raised by the complaint, namely whether human genes are patent-eligible subject matter. One issue that has not received much attention, however, is whether it was appropriate for the plaintiffs to name the United States Patent and Trademark Office ("PTO") as one of the defendants in this case (doing so on the grounds that the PTO had improperly granted patents that the plaintiffs believed were drawn to statutorily unpatentable gene-related subject matter). The PTO issues tens of thousands of patents every year.[4] To subject it to suit each time an individual or organization disagrees with the decision to issue a particular patent would, the PTO's lawyers from its Office of the Solicitor will almost surely argue, not only be contrary to fundamental principles of procedural and administrative law, but would also impose an unnecessarily heavy burden on the PTO.

The *Myriad* complaint alleges that the PTO's long-standing policy of allowing patents for isolated and purified human genes "violates long established legal principles that prohibit the patenting of laws of nature, products of nature, and abstract ideas," as well as "the First Amendment and [the Patent Clause] of the United States Constitution."[5] Statutory law defines patent-eligible subject matter as "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof."[6] This language has been interpreted to "include anything under the sun that is made by man."[7] Patent-ineligible subject matter,[8] on the other hand, includes abstract ideas, laws of nature and natural phenomena.[9]

Naturally occurring human genes contained in human cells are obviously natural phenomena, and the mere discovery of such a gene, therefore, would not be entitled to a patent.[10] However, the PTO does consider "isolated and purified" genes to be patent-eligible.[11] According to the plaintiffs, however, "[a]n 'isolated and purified' gene performs the exact same function as a non-isolated and purified human gene in a person's body. . . . Removing a product of nature from its natural location does not make it any less a product of nature."12 13

It is not the purpose of this article to opine on the merits of the plaintiffs' claims in *Myriad*.14 The patenting of isolated forms of human genes has been going on for decades now. Even assuming that the claims made in the complaint have merit, and the patenting of isolated and purified human genes does violate patent eligibility requirements, the plaintiffs' claims, particularly as against the PTO, certainly face a challenging future based at least upon the PTO's recent filing of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).15 16

I. The PTO May Be Immune From The *Myriad* Suit

As a federal agency, the PTO enjoys the benefits of sovereign immunity.17 The federal government cannot be sued unless it has waived immunity or consented to suit.18 One such waiver can be found in § 702 of the Administrative Procedure Act ("APA"), which provides that "[a] person suffering legal wrong because of agency action . . . is entitled to judicial review thereof," and a claim for such review shall not be dismissed "on the ground that it is against the United States."19 This provision acts as a waiver of sovereign immunity for suits against federal agencies for "agency actions." Although the *Myriad* complaint does note cite the APA or even discuss sovereign immunity, "[i]t is not necessary that [a] suit be brought under the APA for § 702's waiver to apply."20 However, at least one district court has dismissed a suit against the PTO seeking to invalidate a particular patent for, among other reasons, failure to cite a specific waiver of sovereign immunity.21 Because the *Myriad* plaintiffs have similarly failed to identify a waiver of sovereign immunity, the case may be dismissed as against the PTO on the ground of sovereign immunity.

II. The District Court Likely Does Not Have Subject Matter Jurisdiction To Hear The *Myriad* Suit As Against The PTO

Even if a plaintiff does show that the government has waived sovereign immunity, the APA does not create subject matter jurisdiction for suits against federal agencies.22 For this, plaintiffs must demonstrate that the court has an independent basis for subject matter jurisdiction.23 Because they do not rely on the APA for subject matter jurisdiction, plaintiffs have turned to the jurisdictional provisions of Title 28 relating to challenging PTO decisions.24 However, courts have rejected jurisdiction in patent-related cases brought by "third-party protesters"25 on the ground that "the comprehensive scheme Congress [has] established to govern patent grants reveals Congress's intent to preclude judicial review of PTO examination decisions at the behest of third parties protesting the issue . . . of a patent."26 In other words, because "Title 35 contains no provision expressly authorizing administrative or judicial review of a PTO decision at the behest of a third-party protester," courts lack subject matter jurisdiction to hear such cases.27

Another reason the courts likely lack subject matter jurisdiction as to the PTO in this case has to do with the nature of the plaintiffs' prayer for relief. Although some of the legal theories in the complaint are novel,28 and the subject matter is controversial, the relief the plaintiffs have sought is typical to that readily available and routinely sought in district court declaratory judgment actions to declare a patent invalid; they have asked for a declaration that the patents-in-suit are invalid and/or unenforceable.29 To obtain a declaratory judgment, a plaintiff must, under the Constitution, demonstrate that there is a justiciable "case of actual controversy."30 Here, there is clearly a controversy between *some* of the plaintiffs and the patent-holders. Several of the plaintiffs are engaged in genetic research and have been threatened with infringement suits by the patent-holders. A declaratory judgment suit seeking a declaration of invalidity, if brought by these researchers against the patent-holders, would not be unusual, and would almost certainly pass procedural muster.

The PTO, on the other hand, has no interest in the validity of the *Myriad* patents once issued (and putting aside the provisions of the Patent Statute and rules permitting reexamination and reissue); it does not enforce patents either on its own or in coordination with patent-holders. Although the *Myriad* complaint appears drawn with an eye toward suggesting a controversy over the PTO's gene patenting policy, the relief sought is directed only to the specific patents themselves, and the granting of such relief would not affect the PTO on a going-forward basis in any way. Consequently, there is likely no actual controversy between the plaintiffs and the PTO that would warrant a declaratory judgment in *Myriad*, and the plaintiffs' including of the PTO as a defendant is therefore highly likely to be attacked by the PTO as unnecessary and improper.

III. Even If The District Court Had Subject Matter Jurisdiction, Administrative Law Likely Prohibits Suit Against The PTO Because Plaintiffs Have Other Adequate Remedies

There is a general rule in administrative law that courts should not intervene until plaintiffs have exhausted their administrative remedies.31 This exhaustion principle has long been applied to patent cases implicating the PTO.32 In an unpublished decision in a case in which the PTO had been sued for issuing an allegedly-invalid patent, the United States Court of Appeals for the Federal Circuit upheld the district court's dismissal for plaintiff's "failure to exhaust administrative remed[ies]," noting that "Congress has established an administrative procedure whereby the public can challenge a patent at the PTO by requesting reexamination."33

A similar rule is contained within the text of the APA itself. Excluded from APA judicial review of agency actions are those "for which there [are] . . . other adequate remed[ies] in a court."34 In *Hitachi Metals v. Quigg*, a competitor of a reissue patent-holder filed suit against the Commissioner of Patents and Trademarks seeking judicial review of the PTO decision regarding the reissue patent. The District Court noted that "[i]nstead of providing third-party protesters with the right to judicial review of examination proceedings, Congress authorized them to raise allegations of patent invalidity as a defense to an infringement action."35 Consequently, such third-party protester suits are "not . . . subject to review under the APA because 'adequate' remedies otherwise are available in court."36

IV. The PTO Is Almost Certainly Not An Appropriate Defendant

In The *Myriad* Suit

The question of whether the PTO may be sued in a patent invalidity suit has been addressed and answered by the federal courts. In each case the answer has been found to be "no." Rather than allow such suits, Congress has expressly authorized third parties to challenge the grant of a patent "by raising the defenses of patent invalidity or unenforceability to a patent infringement suit or by initiating a declaratory judgment action *against the party threatening an infringement suit*."37 In other words, "a potential infringer may not sue the PTO seeking retraction of a patent issued to another by reason of its improper allowance by the PTO. *A remedy must await confrontation with the patent owner*."38 The *Myriad* complaint does not allege that any of the plaintiffs have previously sought administrative relief (reexamination) or judicial relief (declaratory judgment of invalidity against patent-holders); nor does it discuss sovereign immunity or the APA. As a result, the *Myriad* complaint in its current form will not likely survive a motion to dismiss by the PTO, because it appears not to state a claim for which relief may be granted even if all of the allegations of the complaint are taken as true.

1 *Ass'n for Molecular Pathology v. U.S. Patent & Trademark Office*, No. 09-4515 (S.D.N.Y. filed May 12, 2009).

2 Myriad Genetics is one of the named defendants, and, according to the complaint, is the exclusive license holder of the challenged patents.

3 *See*, *e.g.*, Caitlin Hagan & Stephanie Smith, *ACLU Sues Over Patents on Breast Cancer Genes*, CNN.COM, May 12, 2009, http://www.cnn.com/2009/HEALTH/05/12/us.genes.lawsuit/; ACLU Mob Attacks Breast Cancer Test Patent, http://www.patentbaristas.com/archives/2009/05/13/aclu-mob-attacks-breast-cancer-test-patent/ (May 13, 2009); *People (Lots of) vs. The Breast Cancer Gene Patents*, http://www.patentlyo.com/patent/2009/05/people-vs-the-brca-patents.html (May 13, 2009).

4 U.S. Patent Statistics Summary Table, Calendar Years 1963 to 2008, http://www.uspto.gov/go/taf/us_stat.htm (last visited June 29, 2009).

5 Complaint at 3, *Myriad*, No. 09-4515.

6 35 U.S.C.A. § 101 (West 2007).

7 *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980).

8 There is a distinction between "patent eligibility," which refers to the statutory categories for which patents may be issued (i.e., "anything under the sun that is made by man"), and "patentability," which refers to the statutory requirements of novelty, utility and nonobviousness. Although the term "patentable subject matter" is commonly used elsewhere, the term "patent eligibility" is used exclusively in this article to avoid confusion.

9 *See* Manual of Patent Examining Procedure § 2106.

10 *See* Utility Examination Guidelines, 66 Fed. Reg. 1092, 1093 (Jan. 5, 2001) ("A patent . . . does not cover the gene as it occurs in nature."); *cf*. *Chakrabarty*, 447 U.S. at 309 (holding that a human-made microorganism was patent-eligible subject matter because it was not "a

hitherto unknown natural phenomenon").

11 Utility Examination Guidelines, 66 Fed. Reg. at 1093 ("A patent on a gene covers the isolated and purified gene . . . ."). Notably, the numerous Myriad claims challenged by plaintiffs go beyond just those to isolated or purified genes; the patents also claim diagnostic and therapeutic applications or uses of such genes.

12 Complaint, *supra* note 5, at 19. For a brief discussion supporting the distinction between a naturally occurring compound and its isolated and purified form, see Utility Examination Guidelines, 66 Fed. Reg. at 1093.

13 There is a recent blog that addresses this fallacy: most claimed nucleic acids are cDNA, which does not exist in nature. *See* http://www.patentdocs.org/2009/06/falsehoods-distortions-and-outright-lies-in-the-gene-patenting-debate.html (last visited July 10, 2009).

14 Because the *Myriad* complaint challenges the PTO's own interpretation of patent law, a brief note regarding *Chevron* deference is appropriate. The PTO's interpretation of statutory patent law would almost certainly be given deference because Title 35 is administered by the PTO. The Supreme Court has been less deferential to agencies' interpretations of constitutional law than to interpretation of statutes, so the PTO's interpretation of the Patent Clause of the Constitution would likely receive less deference. As discussed below, however, the *Myriad* plaintiffs' prayer for relief likely renders these arguments moot. The requested relief is aimed only at the validity of the particular patents-in-suit, not to the PTO's interpretation generally, so the court need not address these arguments to decide the case.

15 The PTO filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) on July 13, 2009. *See Myriad*, No. 09-4515 (Docket Nos. 25, 26). In its memorandum, the PTO argues that Plaintiffs lack standing to sue the PTO, there is no subject matter jurisdiction for Plaintiffs' claim against the PTO and sovereign immunity bars Plaintiffs' action. *See id.* A hearing on the motion to dismiss is set for August 26, 2009. *See Myriad*, No. 09-4515 (Docket No. 30).

16 Perhaps the most puzzling contention is the plaintiffs' assertion that the lawsuit is "authorized by 42 U.S.C. § 1983." Complaint, *supra* note 5, at 3. Section 1983 was passed as part of the Civil Rights Act of 1871 to provide relief for violations of federally protected rights at the hands of officials acting under color of *state* law. It does not apply to federal officials or agencies applying *federal* law. *See* 13D CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD D. FREER, FEDERAL PRACTICE AND PROCEDURE § 3573.2 (3d ed. 2008).

17 *FDIC v. Meyer*, 510 U.S. 471, 475 (1994).

18 *Id.*

19 5 U.S.C.A. § 702 (West 2007).

20 *Swan v. Clinton*, 100 F.3d 973, 981 n.4 (D.C. Cir. 1996).

21 *Rozenblat v. Sandia Corp.*, No. 04 C 3289, 2005 WL 1126879, at *2 (N.D. Ill. May 2, 2005).

22 *Hallmark Cards, Inc. v. Lehman*, 959 F. Supp. 539, 544 (D.D.C. 1997).

23 *Id.*

24 *See*, *e.g.*, *id.* at 542 (§ 1338(a) patent jurisdiction); *Hitachi Metals, Ltd. v. Quigg*, 776 F. Supp. 3, 7 (D.D.C. 1991) (§ 1331 federal question jurisdiction).

25 The *Myriad* plaintiffs are "third-party protesters" because they are challenging PTO actions not as applicants themselves, but as third parties to the process.

26 *Hitachi Metals*, 776 F. Supp. at 7; *see also Hallmark Cards*, 959 F. Supp. at 544 (applying *Hitachi Metals* to a third-party protest of a Certificate of Correction).

27 *Hitachi Metals*, 776 F. Supp. at 8.

28 For example, the complaint alleges that gene patenting restricts "basic human knowledge and thought" in violation of the First Amendment. Complaint, *supra* note 5, at 3, 19.

29 *See* Complaint, *supra* note 5, at 30.

30 28 U.S.C.A. § 2201 (West 2007).

31 *See McKart v. United States*, 395 U.S. 185, 193 (1969).

32 *See*, *e.g.*, *Singer Co. v. P.R. Mallory & Co.*, Inc., 671 F.2d 232, 236-37 (7th Cir. 1981) (reversing the District Court's injunction of the PTO).

33 *Rozenblat v. Sandia Corp.*, No. 05-1556, 2006 WL 678923, at *4 (Fed. Cir. Mar. 17, 2006).

34 5 U.S.C.A. § 704.

35 *Hitachi Metals*, 776 F. Supp. at 10.

36 *Id.*

37 *Id.* at 12-13 (emphasis supplied).

38 *Syntex (U.S.A.) Inc. v. U.S. Patent & Trademark Office*, 882 F.2d 1570 (Fed. Cir. 1989) (emphasis supplied).

***KCH Services, Inc. v. Vanaire, Inc.:* Duty to Preserve Triggered by a Phone Call**

August 10, 2009

On July 21, the U.S. District Court for the Western District of Kentucky in *KCH Services, Inc. v. Vanaire, Inc.*, 2009 WL 2216601 (W.D. Ky. July 21, 2009) granted the request of plaintiff KCH Services, Inc. (KCH) for an adverse-inference jury instruction against the defendant, Vanaire, Inc. (Vanaire). The court held that a duty to preserve evidence had been triggered by a phone call received by Vanaire's owner. As a result, the court found an adverse-inference instruction (an instruction to the jury permitting it to infer that the lost evidence would have been unfavorable to the spoliating party) to be an appropriate sanction.

KCH's president had called Vanaire's owner in October 2005 and notified him that Vanaire was using KCH's software without permission. Vanaire's owner then instructed his employees to delete from all company computers all software that he did not own or had not purchased. On November 23, 2005, KCH filed a complaint and sent a preservation letter to Vanaire.

The court, quoting *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423 (2d Cir. 2001), explained that the duty to preserve does not attach when the opposing party has actual knowledge of litigation, but rather when it "*should have known* that the evidence may be relevant to future litigation." (emphasis added) *Id.* at 426. The court held that the 2005 telephone call should have put Vanaire on notice that the software could be relevant to future litigation. In addition, Vanaire should have known that KCH would file suit as Vanaire's owner was involved with the company when KCH filed a separate suit in 1995. Nevertheless, even after the latest suit had been filed and the preservation letter received, Vanaire failed to distribute a "meaningful litigation hold," and continued to delete and overwrite the electronically stored evidence.

After determining that Vanaire had engaged in spoliation of evidence, the court determined an appropriate sanction. Typically, when determining sanctions, a court considers, among other things, "whether the spoliation was prejudicial, whether it can be cured, the importance of the missing evidence, whether the spoliating party was acting in good faith or bad faith, and the deterrent effect of the remedy compared with a lesser sanction." See *Ware v. Seabring Marine Indus.*, 2006 WL 980735 at *3 (E.D. Ky. March 6, 2006). Even though this spoliation was prejudicial and could not be cured, the court held that default judgment was too harsh a penalty. Therefore, the court selected an adverse-inference instruction as the most appropriate penalty given the circumstances.

This case demonstrates the importance of appropriately identifying the point at which the obligation to preserve data is triggered, then instituting appropriate safeguards to preserve potentially relevant information, whether it is available in hard copy or stored electronically.

As noted in this case, the preservation obligation can also be triggered *prior* to actual notice, especially if there is a reasonable anticipation of litigation, investigation, claim, or external audit.

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Washington Appeals Court: Cost-Shifting Provisions in Employment Arbitration Agreement Invalid

08.10.09

By Michael J. Killeen and Sheehan Sullivan Weiss

In a long-running battle involving the enforceability of an employment arbitration agreement between a Colorado company and its Washington state manager (*Walters v. A.A.A. Waterproofing, Inc.*), the Washington state Court of Appeals struck two provisions as invalid, but enforced the rest of the agreement.

Washington employers should consider these rulings before entering into arbitration. In many cases, arbitration may not be the best course of action. This advisory provides a brief analysis of the *Walters* case and offers some tips for employers who are considering going forward with an arbitration agreement.

First, the court held that a “loser pays all” provision, under which costs and attorney fees are paid by the prevailing party, was unconscionable because the statute under which the employee was asserting claims—the Washington Minimum Wage Act—specifically required the employer to pay the employee’s attorney fees and costs if the employee prevailed, but did not require the employee to pay the employer’s attorney fees and costs if the employer prevailed.

Second, the court held that a venue provision requiring that the arbitration be held in Denver, the location of the employer’s headquarters, was unconscionable because the employee, who lived and worked in Washington, provided proof that the costs to him of arbitrating out-of-state were prohibitively expensive.

The court severed the venue and fee-shifting terms, consistent with the severability provision of the arbitration agreement, and left the remaining terms of the arbitration agreement intact, ordering the parties to proceed to arbitration. The court underscored that ordinary contract rules otherwise apply in determining the enforceability and interpretation of employment arbitration agreements.

While the *Walters* case makes clear that Washington employers may use employment arbitration agreements, Washington courts are not enforcing provisions in arbitration agreements that give employers procedural or cost-shifting advantages that they do not already have in the judicial process.

Attorney fees provisions in employment arbitration agreements in Washington after Walters

Washington follows the so-called American rule regarding attorney fees, which says that each party is responsible for its own attorney fees and costs absent a statute, contract or other equitable basis. Unfortunately for Washington employers, there are a number of statutes that create exceptions to the rule and allow an employee to recover attorney fees and costs if he or she is a prevailing party as to claims such as wage loss or discrimination. These statutes do not create a reciprocal right for the employer.

As the *Walters* decision illustrates, Washington courts view such one-way statutory provisions as a public policy created by the Legislature to encourage employee claims. Consequently, the courts will not enforce an employment arbitration agreement that creates a reciprocal or “loser pays” provision that would expose the employee to attorney fees and costs where a statute expressly provides for recovery of attorney fees by the employee with no reciprocal provision for the employer. In the court’s view, the public policy embodied in the statute trumps a contractual prevailing party provision.

> ***Drafting tip:*** There are situations where no statute prevents an employer from requesting attorney fees and costs if the employer prevails. Thus, the Washington Supreme Court has said that employers can include an attorney fee provision giving the arbitrator discretion to award attorney fees to the prevailing party (as opposed to making it mandatory). (*Zuver v. Airtouch Communications Inc.* (2004)). Permissive language is not substantively unconscionable because it would be speculative to assume that the arbitrator would ignore controlling substantive law regarding the exercise of discretion as to whether or not to award attorney fees to the prevailing party.

Venue provisions in employment arbitration agreements in Washington after *Walters*

Although it struck the venue provision in *Walters*, the court held that out-of-state venue provisions are not invalid per se. As with other fee-shifting provisions, such as responsibility for administrative fees, the arbitrator's fee, and other costs not typically incurred by the employee if the case were brought in court rather than before an arbitrator, Washington courts will evaluate a venue provision to determine whether it will likely render the arbitral forum inaccessible due to prohibitively expensive costs to the employee. The issue must be resolved on a case-by-case basis after examining specific factual information.

The party opposing arbitration has the burden to show that the cost of arbitration is prohibitive by documenting their financial resources, the extra costs of arbitration, and any offer by the other party to defray the cost of arbitration. In *Walters*, the court found that the travel costs, including the travel expenses of witnesses, for holding the proceedings in Denver rather than Seattle were significant, and that AAA Waterproofing failed to produce specific information demonstrating that Mr. Walters could afford the higher travel expenses of attending arbitration in Denver.

> ***Negotiating tip:*** If an employee is claiming that the cost of arbitration is prohibitive, the employer should request the employee identify the extra costs of arbitration (beyond those typically incurred in court litigation) and provide documentation as to the employee's financial resources. If the employee has presented justification that he is likely to incur excessive costs, the employer should offer to defray some or all of the costs of arbitration if it wants to preserve the arbitral forum. If properly handled, Washington courts will deny an employee's motion to invalidate the arbitration agreement where the employer has agreed to defray costs. (*Zuver v. Airtouch Communications Inc.* (2004)).
>
> ***Drafting tip:*** Washington courts are disposed to strike invalid provisions in an arbitration agreement and allow the rest of the agreement to be enforced rather than to invalidate the entire agreement. Severability is particularly likely when the arbitration agreement includes a severability clause. If the employer wants to go to arbitration even if some provisions are struck from the agreement, the employer should include a severability provision. On the other hand, if the employer is only willing to go to arbitration if all the provisions are enforceable, then the agreement should contain a non-severability clause.

Washington employers often find that employment arbitration agreements are not better, faster or cheaper

Many employers have been led to believe that arbitration agreements are inherently beneficial because they allow employers to contract around disadvantages of the judicial process. However, as the *Walters* case illustrates, the employer may not be able to enforce key provisions of the agreement if courts feel that the provisions are overreaching in favor of the employer. Thus, employers should carefully consider what they can expect to get out of an arbitration agreement before signing it.

Increasingly, employers are finding that arbitrations are not necessarily better, faster or cheaper than administrative or judicial proceedings. Moreover, employers are almost never able to seek judicial review of an adverse arbitration result on appeal.

The employment law defense attorneys at Davis Wright Tremaine can assist employers not only in drafting employment arbitration agreements but also in analyzing whether such agreements make sense legally and strategically. Please contact us if you would like more information or require assistance.

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