

## April 2010 e-BULLETIN

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Details Coming Soon*

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Hosted by Skrine - October 16 - 19, 2010*

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**ABNR PARTNER APPOINTED TO WTO DISPUTE SETTLEMENT PANEL**

**JAKARTA April 7, 2010** The World Trade Organization (WTO) has appointed Mr. Nugroho Wisnumurti, a partner in Ali Budiardjo, Nugroho, Reksodiputro (ABNR) Counsellors at Law, as member of the WTO Dispute Settlement Panel, as of March 30, 2010.

The WTO's panel of judges was established to examine and reach decision on the complaints submitted by the United States, the European Union and Mexico against China with respect to its exportation of various raw materials such as bauxite, magnesium, manganese, zinc silicon carbide and silicon metal. The appointment of Mr. Wisnumurti as member of the Panel is a significant event as he is the first Indonesian national to be entrusted as a judge of such an important international dispute settlement body.

Mr. Wisnumurti, who joined ABNR in April 2004, is also a member of the United Nations International Law Commission (2007-2011). Prior to joining ABNR, his latest government assignment was as the Indonesian Ambassador/Permanent Representative to the United Nations and other International Organizations, including the WTO, from 2000 to 2004. He served as the Director-General for Political Affairs, Department of Foreign Affairs (1997-2000), the Indonesian Ambassador/Permanent Representative to the UN (1992 – 1997) and concurrently as the Indonesian Ambassador to Jamaica, the Bahamas, Guatemala and Nicaragua.

Mr. Wisnumurti has an extensive experience in negotiating and concluding international agreements. His work in ABNR involves international trade law, including WTO related matters.

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

**BAKER BOTTS SMITH ELECTED TO THIRD TERM AS MANAGING PARTNER**

**HOUSTON, March 17, 2010** -- The partners of Baker Botts L.L.P. have elected Walter J. Smith to a third term as Managing Partner of the law firm. Smith joined Baker Botts in 1975 and practiced corporate and securities law throughout his career before being elected Managing Partner in March 2002.

"I am honored that my partners have elected me to another term as their Managing Partner," Smith said. "I am very grateful for the opportunity to continue to represent the firm and work with our clients around the world. Our commitment to client service continues to be of paramount importance, and I am especially pleased by our recent recognition as one of the top three firms in BTI's 2010 client service ranking of over 500 firms serving Fortune 1000 companies."

Smith's new term as Managing Partner will run through December 2012, when he will retire from the firm.

Smith earned an LL.M. from Harvard University and a J.D., summa cum laude, from Creighton University, where he was editor-in-chief of the Creighton Law Review. After law school, he served as a judicial clerk to the Honorable E. A. Tamm of the United States Court of Appeals for the District of Columbia Circuit.

For more information, please visit [www.bakerbotts.com](http://www.bakerbotts.com)

## ESTUDIO MUNIZ OPENS CUSCO OFFICE

Peru's largest law firm, Muñiz, Ramírez, Pérez-Taiman & Olaya has announced the opening of a new office in Cusco, in the south of the country.

The firm expects to benefit from the tourism and hydrocarbons sectors that have strongly boost the economy of the province in recent years. Cusco attracts thousands of tourists every year because of its archaeological remains. This fact has motivated to several luxury hotels and restaurants to open establishments in the city. On the other hand, the hydrocarbon activity is also increasing: the gas pipeline between Camisea and Lima is being expanded and there is a new project to bring gas from Cusco to the southern part of Peru.

This is the seventh office across the country. The firm has already offices in Lima, Trujillo, Arequipa, Chincha, Ica and Piura, as well as two in Ecuador (Quito and Guayaquil).

Principal Partner Jorge Pérez-Taiman said "Cusco has become a very active business center for the tourism and hydrocarbons sectors, and it was the logical next step in our efforts to provide our clients with first quality legal services across the country".

The office is headed by Frank Vizcarra, a lawyer with a wide experience counseling companies both in the public and the private sector.

For additional information visit us online at [www.munizlaw.com](http://www.munizlaw.com)

## DAVIS WRIGHT TREMAINE SEATTLE EXPANSION CONTINUES

Portia R. Moore, a top employment litigator, has joined Davis Wright Tremaine LLP as a partner. Moore has more than 20 years of experience representing clients such as 3M, Starbucks Coffee Company, Bose, State Farm Insurance Company and United Parcel Service. Her arrival builds on Davis Wright's recent attraction of over 30 attorneys to fill critical roles in the firm's service to major Northwest companies.

"Portia is a top notch litigator and a tremendous addition to our employment law team," said Henry Farber, chair of the firm's employment and labor law practice. "She understands how to work effectively with clients to vigorously defend their interests."

Moore has led a number of complex, high-profile litigation matters over her career. Most recently she defended Chevron in a discrimination case where she received a complete defense verdict after a three-week jury trial in King County Superior Court. Moore has also served as lead counsel in numerous employment discrimination cases including charges of sexual harassment and retaliation.

"Davis Wright's broad, national scope of work is what attracted me to the firm," Moore said. "I'm excited to be a part of a firm with deep employment resources and that offers diversity amongst its practices and clients."

Prior to joining Davis Wright, Moore spent two years with the local law offices of Lane Powell and prior to that, she spent 17 years with the San Francisco office of Morrison & Foerster. Moore is a member of the 2009 Direct Women Board Institute, a program (which is an initiative of the American Bar Association and Catalyst) designed to identify and promote qualified women lawyers to serve on corporate boards of public companies. She also serves as a regular faculty member for the National Institute for Trial Advocacy (Western Regional Program) and is a frequent guest lecturer on employment-related topics.

Moore received her J.D. from the University of Michigan Law School and her B.S from the University of Washington, magna cum laude. She is admitted to practice in Washington and California.

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

**HOGAN & HARTSON AND LOVELLS ESTABLISH MERGER IMPLEMENTATION PLANNING COMMITTEE**

WASHINGTON, D.C., March 11, 2010 – Hogan & Hartson LLP and Lovells LLP have established a joint Implementation Planning Committee (IC) for the combined firm, with the purpose of overseeing and planning for integration of the combined firm's practices. The IC will report directly to the members of the recently announced International Management Committee.

Members of the Implementation Planning Committee include:

- Jeanne Archibald: Director of the international trade group and Managing Partner for practice management (Hogan & Hartson)
- Oxana Balayan: Local Managing Partner and Head of the corporate practice in Moscow (Lovells)
- Thad Dameris: Managing Partner of the Houston office and Practice Group Director for litigation (Hogan & Hartson)
- Michael Davison: Head of the international arbitration practice (Lovells)
- Ben Hammond: Co-chair of the lending, bankruptcy & creditor's rights group (Hogan & Hartson)
- James Harris: Local Managing Partner in Singapore office and Head of the infrastructure practice in Asia (Lovells)
- David Hudd: Practice Stream Leader, Finance (Lovells)
- Steve Immelt: Managing Partner for international offices and Practice Group Director for litigation (Hogan & Hartson)
- Garry Pegg: Managing Partner of London office and Practice Group Director for the project and international finance group (Hogan & Hartson)
- Emily Reid: Head of the Commercial and Retail Banking Team in the financial services practice and Chair of the CR Panel (Lovells)
- Thomas Rouhette: Head of the dispute resolution practice in Paris (Lovells)
- Patrick Sherrington: Practice Stream Leader, Dispute Resolution (Lovells)
- Richard Silverman: Partner in the food, drug, medical device, and agriculture group (Hogan & Hartson)
- Andrew Skipper: Practice Stream Leader, Corporate (Lovells)
- Stuart Stein: Executive Committee member and Practice Group Director for the corporate, securities, and finance group (Hogan & Hartson)
- James Vaudoyer: Managing Partner of the Paris office (Hogan & Hartson)
- Andreas von Falck: Practice Stream Leader, Commerce & Real Estate (Lovells)
- Robert Waldman: Practice Group Director for the corporate, securities, and finance group (Hogan & Hartson)

Thad Dameris and Emily Reid will serve as Co-chairs of the committee.

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## HOGAN & HARTSON CONT'D

"We are thrilled to be working together to support the seamless combination of our two firms," said Thad Dameris and Emily Reid. "We are happy to have been chosen for this role, and we are committed to sharing and implementing the ideas and practices that will move us towards this exciting transition."

According to Hogan & Hartson and Lovells, "The Implementation Planning Committee's role will be critical in facilitating the successful integration of our firms' practices. This is another important step in maintaining the continuity of excellent legal services that our clients have come to know from both our firms."

The combination is subject to the firms obtaining the necessary regulatory clearances.

For more information about the two firms please visit:

[www.hhlaw.com](http://www.hhlaw.com)

[www.lovells.com](http://www.lovells.com)

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## SIMPSON GRIERSON ADDS TO AUCKLAND OFFICE

**Simpson Grierson welcomes solicitor Mark Colley to the Auckland information and communications technology group.**

Mark will be advising on, negotiating and drafting a diverse range of commercial contracts in the telecommunications, information technology, and infrastructure sectors, including major outsourcing and facilities management projects, joint ventures and mergers/acquisitions. Before joining the firm, Mark was a co-founder and director of several companies.

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

**CLAYTON UTZ**

ASSISTS SOUTHERN CROSS MEDIA GROUP ON SUCCESSFUL INTERNALISATION AND REFINANCING

**Sydney, 12 March 2010:**

Clayton Utz congratulates Southern Cross Media Group (formerly Macquarie Media Group) on the successful completion of its internalisation initiative and the refinancing of Southern Cross Media's business level debt facility on 10 March 2010.

These transactions follow on from the innovative capital raising conducted by Southern Cross Media Group last year and the corporatisation of Southern Cross Media Group which is expected to complete next week.

The transactions represent a rare combination of events by virtue of Southern Cross Media Group seeking to restructure many facets of its business at the one time. The innovative capital raising structure, a single bookbuild accelerated pro-rata renounceable entitlement offer, represented the first time this new structure had been used by a stapled vehicle. The corporatisation involves a unique corporate restructure including the destapling of the Southern Cross Media Group entities and restructure of those entities under a single Australian company using a Bermudan scheme of arrangement and Australian trust scheme.

Clayton Utz Corporate / M&A partners Karen Evans-Cullen and Toby Ryston-Pratt have advised on the internalisation and corporatisation initiatives. Equity Capital Markets partner Stuart Byrne advised on the recapitalisation.

Banking and Financial Services partners Geoff Geha and Alex Schlosser have acted for Southern Cross Media on the refinancing arrangements.

Commenting on the transactions, Karen Evans-Cullen and Toby Ryston-Pratt said: "These are novel transactions which presented interesting challenges for our teams and continued Clayton Utz' longstanding relationship with Southern Cross Media Group dating back to 2006. We wish Southern Cross Media Group all the best as it embarks upon this next phase in its corporate history."

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

**FRASER MILNER CASGRAIN****CORUS ENTERTAINMENT INC CLOSES \$2 BILLION REFINANCING INCLUDING LARGEST CANADIAN HIGH-YIELD DEBT OFFERING TO DATE**

On February 11, 2010, Corus Entertainment Inc. ("Corus") completed a refinancing of its credit facilities comprised of an offering of \$500 million principal amount of 7.25% senior unsecured guaranteed notes due 2017 and a \$500 million secured revolving credit facility. The note offering is understood to be the largest public offering of non-investment grade debt completed in Canada to date.

The notes were publicly offered in Canada under Corus' shelf prospectus and supplement pursuant to an Underwriting Agreement with TD Securities Inc. and Scotia Capital Inc., as bookrunners, along with a syndicate that included RBC Dominion Securities Inc., CIBC World Markets Inc., National Bank Financial Inc. and BMO Capital Markets Inc.

Concurrent with the closing of the offering of the notes, Corus entered into a \$500 million amended and restated credit agreement with The Toronto-Dominion Bank, as administration agent, and the lenders from time to time party thereto, establishing a secured revolving credit facility with a maturity date of February 11, 2014. Corus used the net proceeds from the sale of the notes, as well as funds available under the new credit facility, to retire its prior credit facility.

Corus was represented by Fraser Milner Casgrain LLP with a team consisting of Bill Jenkins, John Reynolds, Irene Ludwig, Shannon Ward and Keith Inman (corporate/securities), Anne Calverley, Q.C. (tax) and Stephanie Campbell, Charles Rich, Neil Katz, Jennifer Dezell, Cynthia Hickey, Elizabeth Burton and Jean-Sebastien Dugas (banking).

For additional information visit [www.fmc-law.com](http://www.fmc-law.com)

**HOGAN & HARTSON****ADVISES DIGITAL CINEMA IMPLEMENTATION PARTNERS ON ROLLOUT OF DIGITAL CINEMA/3D NETWORK**

DENVER, March 15, 2010 – Hogan & Hartson LLP announced today that it has advised Digital Cinema Implementation Partners (DCIP) on the rollout of a digital cinema network (including 3D capability). The rollout consists of the deployment of digital technology and projection systems across more than 14,000 movie theater screens in the United States and Canada.

The acquisition of the digital equipment and technology infrastructure supporting the digital cinema rollout was contingent on DCIP's recent successful completion of a \$660 million financing from JP Morgan and Blackstone Advisory Partners L.P., among others. The deployment of digital cinema systems will begin later this year.

The matter was led by Hogan & Hartson's Denver office partner David London (intellectual property) and Boulder office associate David Toy. Additional support was provided by Denver partner Richard Mattera (corporate) and Washington, D.C. partner Joseph Krauss (antitrust).

Formed in 2007 to finance, procure, and develop digital projection systems, DCIP is a joint venture of the three largest theater circuits in the U.S.: Regal Entertainment Group, AMC Entertainment, Inc., and Cinemark Holdings, Inc. In support of the digital cinema initiative, DCIP has executed long-term deployment agreements with Twentieth Century Fox, Sony Pictures Entertainment, Walt Disney Studios Motion Pictures, Paramount Pictures, Universal Pictures, and Lionsgate Films.

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

**NAUTADUTILH**

ADVISES FORTIS BANK NEDERLAND ON EUR 3 BILLION DOLPHIN RMBS NOTES ISSUE

Fortis Bank Nederland announced Thursday 25 March 2010 that it has agreed to sell EUR 3 billion of residential mortgage backed securities (RMBS) to a third party.

The notes are issued under the Dolphin Master Issuer programme that consists of EUR 28 billion of standard prime Dutch residential mortgages.

The NautaDutilh team that advised Fortis Bank Nederland consisted of Willem Ruys, Luca van Veen, Marieke van Raay en Farihan Keramati.

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

**GIDE LOYRETTE NOUEL**

ACTS AS INTERNATIONAL LEGAL COUNSEL TO GOVERNMENT OF INDIA ON USD 2.2 BILLION SHARE SALE OF NMDC

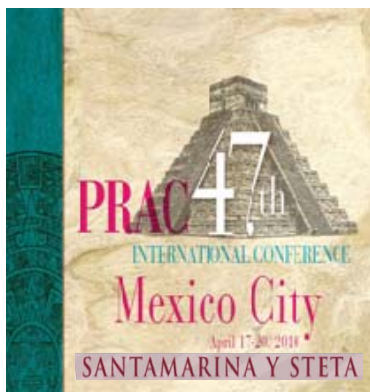
Gide Loyrette Nouel (GLN) has acted as international legal counsel to the Government of India in the further public offering of National Mineral Development Corporation Limited (NMDC). The Government of India divested approximately 8.38% of its 98.38% equity stake in NMDC via a traditional bookbuilding process raising approximately USD 2.2 billion.

NMDC was the largest iron ore producer by volume in India during the last three fiscal years and has access to significant reserves of high grade iron ore. It operates one of the largest diamond mines in Asia and owns a wind power facility in the State of Karnataka. NMDC has also engaged in the exploration and production of various mineral products primarily in India.

Underwriters to the deal were UBS, Citigroup, Morgan Stanley, RBS, Edelweiss Capital Limited and Kotak Investment.

The GLN team was led by partner Chris Mead in London with assistance from senior associates Sylvain Dhennin (London), Prashanth Kumar Kanukuntla (Dubai), Melinda Arsouze and Ali Ezzatyar (Paris), and Steffi Tam.

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



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**SANTAMARINA Y STETA**ADVISING MEXICO FEDERAL GOVT IN NEW AIRPORT  
PLANNED FOR MAYAN RIVIERA

On March 22, Mexico's President Felipe Calderón Hinojosa announced the construction of a new airport in Tulum, Quintana Roo, which will be the first Mexican commercial airport constructed from the beginning by the private sector and that will be one of the most important infrastructure projects of this six-year presidential period and certainly the most important project in aviation matters of this administration.

The airport will be constructed under the *green field* model (the private sector is in charge of its construction, development and operation) and will be located 120 km away from Cancún, in 1,500 hectares with a 3,500 and 45 meter-wide runway with capacity to operate Boeing 747 airliners. It will have capacity for more than 3 million passengers, competing from the start with the biggest Mexican airports.

Santamarina y Steta Partner Juan Carlos Machorro heads the firm's legal team advising Mexico Federal Government.

For additional information visit [www.s-s.mx](http://www.s-s.mx)

**KING & WOOD**CREDITOR RIGHTS ENFORCEMENT IN FIRST CHINESE  
AIRLINE BANKRUPTCY CASE

On March 10, 2009, GE Commercial Aviation Services (GECAS), a subsidiary of GE, filed a bankruptcy petition as a major creditor of East Star Airline Co., Ltd. at Wuhan Intermediate People's Court.

The claim followed non-payment of aircraft rental fees payable to GECAS by East Star Airline. This case is the first bankruptcy petition involving a Chinese airline to come to the PRC courts. The proceedings are ongoing.

Mr. Zhang Shouzhi of King & Wood's Dispute Resolution Group leads the Beijing-based team on behalf of GECAS.

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

**TOZZINIFREIRE**ASSISTS BANCO SOFISA IN SALE OF ITS RETAIL  
BUSINESS SOFCRED TO GVI

TozziniFreire assisted Banco Sofisa in the sale of its retail business - SofCred - to GVI, a company controlled by Banco Fibra. The transaction also contemplated the assignment of credits related to leasing and personal loans.

The effectiveness of the transaction depends on the implementation of some ordinary conditions in this sort of transaction, and will be communicated to the relevant authorities in the terms of the applicable law.

The transaction represents the transference of the vehicle responsible for financing consumers through consigned credit, credit cards and other personal financing, including also the assignment of credits related to leasing and personal loans, which were valued at R\$ 400 million. As a result of such transaction, Sofisa will focus in the development of its main sector, the financing companies middle-market segment.

TozziniFreire team advising Banco Sofiso include Mauro E. Guizeline – Partner; Francisco Eumene Machado de Oliveira Neto - Associate and Thiago José da Silva – Associate

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



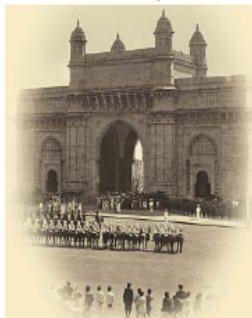
SANTAMARINA Y STETA

Mulla & Mulla

& Craigie Blunt & Caroe

Advocates, Solicitors and Notaries

Mumbai, India  
November 15-18, 2008



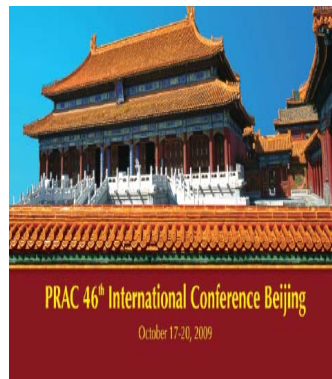
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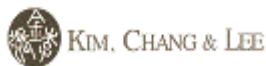
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future consideration. Send to [editor@prac.org](mailto:editor@prac.org).  
Deadline is 10th of each month.



# CLAYTON UTZ

12 April 2010

## Gordian Runoff v Westport important for the insurance industry and arbitration users in all sectors

The recent case of Gordian Runoff Limited v Westport Insurance Corporation [2010] NSWCA 57 gives arbitration users more confidence as to the finality of arbitral awards by confirming that the grounds for challenging an award are very limited. It also recognises the importance of upholding arbitration's key attributes of providing a commercial resolution in an efficient and timely manner, by not imposing on arbitrators the same procedural formalities and technicalities applied to judges (such as the requirement for detailed judgments). Lastly, the decision has also given valuable guidance with respect to the scope of application of section 18B of the Insurance Act 1902 (NSW).

### The facts

In this case, an insurer and reinsurer disagreed over whether the reinsurance contracts responded to a certain claim and in particular the operation of section 18B of the Insurance Act 1902 (NSW). Their dispute was referred to arbitration before a panel of experienced insurance arbitrators, which found in favour of the insurer. The implications of this case from an insurance perspective are discussed further below.

### Challenging the arbitral award

The reinsurer sought leave to appeal to the New South Wales Supreme Court from the award, which was granted and the appeal was successful; the insurer then appealed from that decision to the Court of Appeal.

Under section 38 of the Commercial Arbitration Act 1984 (NSW) (which has counterparts in each state) the grounds upon which a party can appeal from an arbitral award are limited to questions of law arising out of an award. However, unless both parties agree to the appeal, it can only be heard with the leave of the court, which can only be granted in the following circumstances:

- the determination of the question of law concerned could substantially affect the rights of one or more parties (section 38(5)(a)); **and**
- there is a manifest error of law on the face of the award **or** strong evidence that the arbitrator or umpire made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law (section 38(5)(b)).

Courts in the past have had a tendency to give an expansive interpretation to these limited grounds and thereby grant leave to appeal, which is why this decision is so significant.

In this case, the Court of Appeal in overturning the primary judge's decision (which granted leave to appeal and found in favour of the appellant) has given clear guidance as to the strict criteria that must be satisfied when considering whether or not to grant leave to appeal. It held that:

- "**manifest error of law**" must be "more than arguable; it must be evident or obvious". The Court found that the primary judge had erred in finding that there was a manifest error of law;
- "**strong evidence of an error of law**" required a strong prima facie case that the arbitrators were wrong in law. The Court found that only if this was satisfied could it move onto the next consideration in section 38(5)

(b), that is, whether the determination may be likely to add substantially to the certainty of commercial law. In this case it found that there was no such strong evidence.

### **No requirement for arbitrators to give detailed reasons**

The reinsurer argued that another reason that the primary judge was justified in granting leave to appeal from the arbitral award was because the arbitral tribunal failed to give adequate reasons in its award and that this also constituted a manifest error of law or strong evidence of an error of law.

In support of its argument the reinsurer relied on the decision of the Victorian Court of Appeal in *Oil Basins Ltd v BHP Billiton Ltd* [2007] VSCA 255. In that case the court interpreted the requirement to "include in the award a statement of the reasons for making the award" (section 29(1) of the Commercial Arbitration Act (identical in Victoria)) as requiring reasons equivalent to those that a judge would be obliged to give in Australia.

After reviewing relevant arbitration instruments such as the Model Law, the history of the development of the Commercial Arbitration Act which drew inspiration from those instruments and contemporary writings, the Court in this case concluded that the decision in *Oil Basins* was wrong in requiring arbitrators to be held to the standard of reasons of judges and should not be followed.

In reaching this conclusion, the Court emphasised that the underlying difference between arbitration and court litigation should be kept in mind at all times. It observed that whereas a court judgment is an act of state authority as the court is an arm of the state, the arbitration award is the outcome of a private consensual process that is meant to be "shorn of the costs, complexities and technicalities often cited ... as the indicia and disadvantages of curial decision making".

The recognition by the Court of the important underlying differences between arbitration and litigation and its consequent decision not to follow the *Oil Basins* decision is laudable, and gives renewed confidence in the Australian judiciary's support of arbitration as a straightforward, fast and cost effective alternative to litigation.

### **Section 18B of the Insurance Act 1902 (NSW).**

A key issue in the arbitration was the effect of section 18B of the Insurance Act 1902 (NSW). Section 18B provides a limitation on the application of exclusion clauses in a contract of insurance. In an Alert last year, we reported the Supreme Court's decision on the arbitrator's construction of section 18B ([What's covered, and what's excluded? Contracts of reinsurance and section 18B](#)). The Court of Appeal has now found that the primary judge was wrong to conclude that there was strong evidence that the arbitrator's misunderstood or misconstrued section 18B.

The Court of Appeal commented on the proper construction of section 18B. The context in which to interpret section 18B is "the existence of a mischief in the operation of exclusion clauses in insurance policies in a way that was unjust: the denial of cover when ... an exclusion clause operated by reference to a factor unrelated to the cause of the loss." With this in mind, the Court of Appeal found that the section should not depend on a distinction between an insurance contract's scope of cover or exclusion clauses.

The Court of Appeal chose not to comment on whether section 18B applies to reinsurance. On 1 September 2009, the Insurance Regulations 2009 (NSW) came into effect and exempted reinsurance contracts from section 18B and certain other sections of the Insurance Act. It remains to be seen whether the regulations apply to reinsurance contracts entered into before that date.

**More to come**

A more detailed analysis of this case and the implications it could have for your organisation will be published in upcoming editions of IA Insights and Project Insights.

For further information, please contact Doug Jones or Peter Mann.

[www.claytonutz.com](http://www.claytonutz.com)

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## Capital Markets and Publicly Held Companies

### BRAZIL: NEW REGULATIONS FOR PUBLIC OFFERINGS OF SECURITIES

The Brazilian Securities Commission (CVM) has recently issued new regulations on the procedures for registration of public offerings of securities in Brazil (CVM Instruction 482). The main objective was to harmonize these procedures with another recent regulation by the CVM dealing with the registration of issuers of securities (CVM Instruction 480).

One of the most relevant changes is in the form and content of the prospectus that must be prepared in connection with public offerings of securities. The prospectus must now contain the Reference Form (RF) created by CVM Instruction 480, while the section entitled "Summary of the Issuer", in which information about the issuer disclosed in the RF is summarized, became optional. Additionally, the presentation of the risk factors of the offering shall be made in accordance with their order of relevance.

The new rule also creates an initial term for the "quiet period" applicable to the intermediary institutions taking part of the offering. This term begins 60 days before the filing of the offering, or 60 days prior to the date when the offering was planned or decided, ending with the closing of the offering. Moreover, the new rule also specifies the liabilities that may attach to the issuer's, offeror's and underwriter's managers.

Another innovation is the automatic registration of offerings for "well known seasoned issuers – WKS1", which will be granted in 5 days from the filing of the registration, in accordance with the classification already established by CVM Instruction 480.

CVM Instruction 482 also improved the rules on automatic exemptions of registration for offerings of single and indivisible lots of securities, as well as of securities issued by micro and small enterprises.

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FRASER MILNER CASGRAIN LLP

# FRASER MILNER CASGRAIN OH CANADA!

## SIGNIFICANT DEVELOPMENTS IN CANADIAN ENERGY



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### OIL SANDS NEWS

1 Imperial Oil announced that the company is expecting regulatory approval for a 20% increase in output at its Cold Lake oil sands facility by the end of June. This increase will add 250 mmbbl of reserves to the field. Imperial also announced the use of a sulfur-filtering plant to cut emissions, and new drilling techniques that will reduce the number of gravel pads needed to hold pump jacks.

1 Canadian Oil Sands Trust, a 37% stake-holder in Syncrude's oil sands project, reported it is planning to boost production at the project to 425,000 bpd of synthetic crude by 2020. This is 25,000 bpd more than

previously expected from the project. Canadian Oil Sands stated that these expansion plans will bring on “production growth with less project execution risk and better economics than constructing Greenfield upgrading facilities.”

**1** Connacher Oil and Gas announced that commissioning of the Algar steam assisted gravity drainage (“SAGD”) project is expected to begin in April. The project is currently on budget and on schedule, with steam injection expected to start in May. Connacher also reported that bitumen production at its Pod One oil sands project has recently exceeded 8,000 bpd of bitumen, a slight increase over the average of 7,924 bpd of bitumen in December 2009.

**1** Athabasca Oil Sands and PetroChina International Investment Company Limited, a wholly-owned subsidiary of PetroChina Company Limited, announced they have received all required approvals from the governments of Canada and the People’s Republic of China with regard to PetroChina’s investment in the MacKay River and Dover oil sands projects. As a result of the transaction, PetroChina will acquire a 60% working interest in the projects for \$1.9 billion. The companies intend for the projects to utilize in situ development methodologies. The Canada-China Business Council stated that “the stress-free approval of this deal went a long way to ease fears that there would be political barriers to China’s investment in Canada.” The Council further stated that “China’s investment in the oil sands and energy sector and mining sector in Canada is about to take off even more significantly than it has in the last number of years.”

**1** Cenovus Energy reported that output at its oil sands projects increased in 2009 due to a 48% increase in the start-up of new phases in the fourth quarter of 2009. Cenovus also announced plans to move up construction of Phase D at Christina Lake by six months so that construction will begin in mid-2010 with first production expected in mid-2013. Christina Lake is currently producing roughly 7,500 bpd (net), before royalties. Foster Creek, another Cenovus oil sands project, is producing approximately 52,000 bpd (net), before royalties, and is expected to hit payout this year.

## EAST COAST NEWS

**2** The Newfoundland and Labrador government has officially inked a deal with industry partners, formalizing the memorandum of understanding entered into in June 2009, for the development of the Hibernia South

extension. Industry partners include: Nalcor Energy, ExxonMobil, Chevron Canada, Suncor, Statoil, Canada Hibernia Holding Corporation, and Murphy Oil Corporation. First production is expected in 2012.

**3** Corridor Resources’ 2010 budget includes plans for drilling and completing two natural gas wells in the upper part of the Hiram Brook formation in the McCully field in southern New Brunswick. The forecast is for one new McCully horizontal development well (L-37) to be drilled, completed and tied in by the end of May 2010, with a second to be drilled, completed and tied in by the end of the fourth quarter.

## WEST COAST NEWS

**4** Terra Energy announced that it has signed a commitment letter to acquire roughly 91 gross sections of land in northeast British Columbia. The arrangement has Terra acquiring a 100% working interest in approximately 14 net sections of land in the Altares and Farrell Creek area. The company has plans for drilling and testing, with the use of micro-seismic technology, to allow the company to assess the potential for a multi-well horizontal development program. Terra stated that this “deal will add considerably to Terra Energy’s growing land presence in the Montney fairway trend in northeastern British Columbia with material acreage additions in key areas of high activity, including Altares/Farrell Creek, Wilder and Groundbirch.”

**4** EnCana announced that it expects its production from the Horn River to rise to 100 mmcfpd by the end of 2010, and to 200 mmcfpd by the end of 2011. Currently, EnCana’s Horn River production is less than 20 mmcfpd. EnCana is preparing for a surge in production this year, reporting that the company will be drilling another 20 net wells in 2010, and performing between two and two and a half fracs each day.

**4** Apache Canada announced plans to substantially increase its capital spending in Canada in 2010. The four wells that were completed by the company in the Horn River last summer are producing over 4 mmcfpd each, confirming reserves in excess of 10 bcf for each well. Apache stated that it intends to drill further development wells in the Horn River Basin with its 50% partner, EnCana. Apache expects that it will have an additional 42 to 44 wells on production by the end of this year at Horn River.

## CANADIAN ARCTIC NEWS

The National Energy Board (NEB) will hold a hearing to review its policy on same season relief well capability - the ability to drill a relief well in the same season in which the original well was drilled - for oil and gas drilling operations in the Beaufort Sea. Drilling activities in the Canadian Beaufort are regulated by the NEB under the *Canada Oil and Gas Operations Act*.

**5** The University of Calgary's Department of Geoscience has announced a new research project which could help realize the resource potential of one of the High Arctic's most promising frontier basins. The program, Studies to Unlock Northern Basins Energy along Arctic Margins (SUNBEAM), received funding from the Natural Sciences and Engineering Research Council of Canada (NSERC), National Resources Canada (NRCan), and French energy giant Total.

## ALTERNATIVE ENERGY NEWS

**6** General Electric and Plutonic Power are determining the feasibility of doubling the capacity of the 144 MW Dokie Ridge Wind Project in British Columbia. This expansion would make it the largest wind farm in Western Canada. The two companies are also building a \$660 million, 196 MW run-of-river hydroelectric project on glacier fed streams approximately 190 km northwest of Vancouver, which is expected to be completed this year.

The University of British Columbia announced plans to install and demonstrate a biomass-fuelled combined heat and power system. This system will combine Nexterra Systems' gasification and synthetic gas conditioning technologies with a high-efficiency Jenbacher gas engine from General Electric Power and Water. GE stated that it believes that "this new combined heat and power solution represents a potential breakthrough for biomass power generation."

## ON THE HORIZON

The Canadian government announced that it will keep supporting the development of Alberta's oil sands, which

are the largest source of oil outside of the Middle East, while also committing to cut 2005 emission levels by 17% by 2020. This cut is identical to the U.S. target.

**7** Cenovus Energy announced plans for investment in new acreage in the Bakken and Lower Shaunavon unconventional light oil plays in southern Saskatchewan, now that it is no longer under the Encana umbrella. In recent years, several companies have capitalized on new technology to maximize production from the Bakken play, which straddles the Canada-U.S. border.

## ABBREVIATIONS

In this newsletter, all dollar amounts are Canadian dollars unless otherwise stated. We have also used the following abbreviations: **bpd** - barrels per day; **mmcfpd** - million cubic feet per day; **bcfcpd** - billion cubic feet per day; **tcf** - trillion cubic feet; **bbl** - barrel; **mbbl** - thousand barrels; **mmbbl** - million barrels; **bbbl** - billion barrels; **boe** - barrels of oil equivalent; **MW** - megawatts; **kV** - kilovolt; **km** - kilometre.

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FRASER MILNER CASGRAIN LLP  
 YOUR FUTURE IS OUR BUSINESS

## Banks Are Called Upon to Eye the Loan Purpose - Opportunities or Mud? | April 2010

The promulgation of the *Provisional Measures on the Administration of Working Capital Loans (WCL Rules)* in February 2010 signaled the preliminary completion of the regulatory framework of the China Banking Regulatory Commission (CBRC) to curb the utilization of loan proceeds in terms of corporate lending. The WCL Rules along with the *Measures on the Administration of Fixed Assets Loans* (published in July 2009) have captured all the corporate lending other than loans used for equity investment/acquisition.

The approach CBRC took under the WCL Rules (focusing more on the tracking of movements of loan proceeds) differs from that adopted by banks to review credit story (focusing more on the repayment risk) which may impact the following traditional products of foreign-funded banks in China:

- working capital loans extended to the global clients' subsidiaries;
- financial accommodation granted to SME suppliers but rely on credit profile of off-takers; and
- asset based financings.

While in none of the above loan transactions, foreign-funded banks do need to care much about how the loan proceeds are actually used as the borrowers are not intended to be the reliable repayment source, now banks need to worry about how to satisfy the monitoring requirements under the WCL Rules. Also impacted are cash pooling products where working capital loans borrowed by group members should be excluded from being pooled going forward.

It is worth noting banks are offered flexibilities under the WCL Rules to either structure their documentation or deal components to meet the regulatory requirements compared to the draft WCL Rules (**Draft Rules**) circulated for public comments in 2009. In summary, the WCL Rules removed (i) the conditions upon which a revolving facility can be granted; and (ii) the thresholds where the working capital loan must be disbursed via "entrusted payment", i.e., the loan proceeds should direct go to the counterparty of the borrowers, which were contained in the Draft Rules.

We set out below some examples as to how the major regulatory requirements can be met:

Requirements under WCL Rules	Possible Solutions
General narratives of loan purposes is not allowed	<ul style="list-style-type: none"> <li>• loan agreement to specify the permitted scope</li> <li>• borrower to deliver a drawdown notice with details of the loan purpose along with supporting documents</li> </ul>
Banks are required to assess the working capital needs of borrowers; a forecast model is attached to the WCL Rules	<ul style="list-style-type: none"> <li>• to have credit line/commitment capped within the working capital needs of the borrower as assessed by banks</li> <li>• to treat RMB loans and foreign currency loans differently</li> <li>• borrowers to make representations and warranties</li> </ul>
Banks are required to work out internal policies to embed "entrusted payment" in the daily operation	<ul style="list-style-type: none"> <li>• tailor the criteria/thresholds according to the types of products and clients</li> </ul>
Banks are required to monitor the actual sale proceeds collection of borrowers	<ul style="list-style-type: none"> <li>• to specify at least one collection account for monitoring purpose (no need to be maintained with the lending office)</li> <li>• borrower to undertake to provide a periodical report regarding and access to the collection account</li> </ul>

Further, the WCL Rules do not exclude the related parties or affiliates from the scope of the counterparties of the borrowers. This also brings possibilities of structuring the working capital loan transactions.

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# **MALAYSIA – SKRINE**

## **SPLIT PERSONALITY?**

*Samuel Loh explains the concept of a Labuan protected cell company*

## **BACKGROUND**

The island of Labuan was designated as Malaysia's offshore financial hub in 1990. Recently, a re-branding exercise was undertaken by the Malaysian Government to reflect the financial centre's new focus and broader role in the offshore financial services industry and to reinforce Labuan's position as a premier business and financial centre in the Asia Pacific region.

As part of this exercise, extensive amendments have been introduced to the existing offshore legislation. The Offshore Companies (Amendment) Act 2010 which amends the Offshore Companies Act 1990 ("Act") came into force on 11 February 2010, introducing among other major changes, the concept of "protected cell companies" ("PCC") into Malaysian law.

## **BRIEF INTRODUCTION TO PCC**

A PCC, sometimes referred to as a "segregated portfolio company" in some offshore jurisdictions, is a company which segregates the assets and liabilities of a particular cell from each other and from the general assets of the PCC. PCCs first originated in Guernsey in 1997 but a number of other offshore jurisdictions have adopted the concept, including Bermuda, Cayman Islands, the Isle of Man and the British Virgin Islands.

## **LABUAN PROTECTED CELL COMPANY**

A Labuan company may be incorporated as a Labuan PCC or be converted into a Labuan PCC, if authorised by its articles and by special resolution. A Labuan company shall not be incorporated as, or operate as, or be converted into a Labuan PCC except in accordance with the terms and conditions of the written approval of the Labuan Financial Services Authority ("Authority").

Although PCCs in other jurisdictions have been used for various purposes (including formation of collective investment schemes as umbrella funds and asset holding vehicles), a Labuan PCC shall only be formed and operated for the following purposes:

- (a) to conduct Labuan insurance business or Labuan captive insurance business and Labuan general takaful business or Labuan captive takaful business; or
- (b) to conduct the business of a mutual fund and Islamic mutual fund.

## **UNIQUENESS OF A LABUAN PCC**

A Labuan PCC differs from a conventional company in that a Labuan PCC may establish one or more cells for the purpose of segregating and protecting cell assets. Notwithstanding this, the Labuan PCC is a single legal person and the creation by the Labuan PCC of a cell does not create, in respect of that cell, a legal person separate from the Labuan PCC.

## **CELL AND GENERAL ASSETS**

A Labuan PCC may have two types of assets, namely, cell assets which comprise the assets of the Labuan PCC held within or on behalf of the protected cells of the company, or general assets which comprise the assets of the Labuan PCC which are not cell assets.

Assets of a cell comprise assets representing the consideration paid or payable for the issue of the cell shares and reserves attributable to the cell shares and all other assets attributable to or held within the cell.

To ensure proper protection of cell assets, a Labuan PCC is required to maintain separate records for cell assets and keep the cell assets held for each cell separate from cell assets of other cells and from general assets. There must be clear segregation and identification.

## **CELL SHARES AND CELL SHARE CAPITAL**

A Labuan PCC may create and issue cell shares, the cell capital of which shall be comprised in the cell assets attributable to the cell in respect of which the shares were issued. The proceeds of the issue of shares other than cell shares created and issued by a Labuan PCC shall be comprised in the general assets of the Labuan PCC.

Further, a Labuan PCC may declare cell dividend in respect of cell shares by reference only to the cell assets and liabilities attributable to the cell in respect of which the cell shares were issued.

## **LIABILITY**

Only the assets attributable to a cell are available to satisfy the claims of creditors of that particular cell. Hence, where a liability arises which is attributable to a particular cell of a Labuan PCC, the cell assets attributable to that cell shall be used to satisfy the liability and a creditor in respect of that cell shall not be entitled to have recourse against the cell assets of any other cell or the general assets of the Labuan PCC.

Conversely, where liability arises which is not attributable to a particular cell of a Labuan PCC the liability shall be satisfied solely from the Labuan PCC's general assets and a creditor in respect of that liability shall not have recourse to the cell assets of any cell of the Labuan PCC.

## **IMPLIED TERMS**

The Act sets out terms which are implied in every transaction entered into by a Labuan PCC, namely:

- (a) that no party shall, whether in any proceedings or by any other means, use any cell assets attributable to any cell of the Labuan PCC to satisfy a liability not attributable to that cell;
- (b) that if any party uses any cell assets attributable to any cell to satisfy a liability which is not attributable to that cell, that party shall be liable to pay to the Labuan PCC a sum equal to the value of the benefit obtained by him; and
- (c) that if any party succeeds in levying execution against any cell assets attributable to any cell of the Labuan PCC to satisfy a liability not attributable to that cell, that party shall hold those assets or their proceeds in a fiduciary capacity for the Labuan PCC and shall keep those assets separate and identifiable for that purpose.

## **DISCLOSURE**

A Labuan PCC is required to inform any person with whom it transacts that it is a Labuan PCC. If a transaction involves a particular cell, a Labuan PCC must identify the cell with which that person is transacting and inform him that only the cell assets of that cell are available to pay the obligations and liabilities of that cell.

## **TRANSFER OF CELL ASSETS AND AMALGAMATION OF CELLS**

A Labuan PCC may transfer cell assets attributable to any of its cells to another cell of that Labuan PCC or to another person and may amalgamate and consolidate cells within a Labuan PCC.

Various conditions have to be satisfied, including approvals being obtained from the Authority and the shareholders of the PCC by special resolution as well as the consent being obtained from the creditors of the Labuan PCC who are entitled to have recourse to the relevant cell assets.

## **RECEIVERSHIP AND WINDING-UP**

In a receivership and winding-up of a Labuan PCC or any cell of a Labuan PCC, the approved liquidator is required to observe the provisions in the Act for segregating assets and can only apply assets of a particular cell to those entitled to have recourse to that particular cell.

## **CONCLUSIONS**

The concept of PCC is very similar to the segregated portfolio companies in other offshore jurisdictions. However, there are still some issues which require clarification. For example, it is unclear whether, and the extent to which, holders of cell shares have voting rights in matters pertaining to the Labuan PCC or are entitled to participate in the general assets of the Labuan PCC.

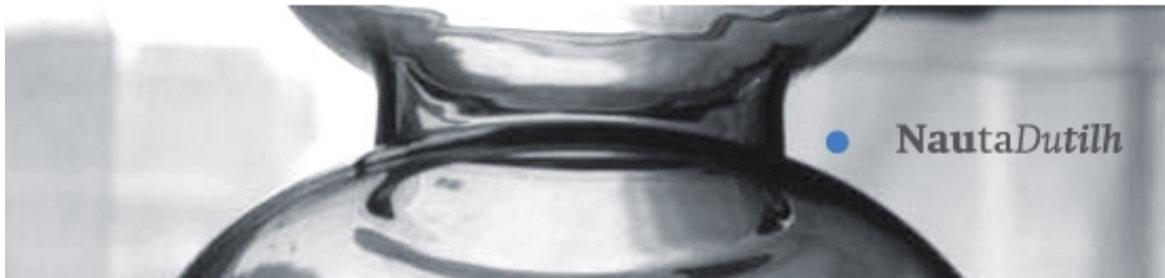
From the legal perspective, it is clear that protected cells of a Labuan PCC are not separate legal entities but constitute part of one legal entity comprised in the Labuan PCC. However, from certain operational aspects, in particular, the segregation of assets, the limitation on the rights of cell creditors and the right to declare cell dividend, the protected cells operate like split personalities.

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An earlier version of this article was first published in Issue 4/2009 of LEGAL INSIGHTS – A SKRINE Newsletter.

# Newsflash

## Intellectual Property



**Google and its AdWords**

**23 March 2010**

*This newsletter is sent from NautaDutilh*

There has been a lot to do about the use of keywords in search engines on the Internet. By a decision rendered on 23 March 2010, the European Court of Justice (ECJ) sheds some light on some of the many questions which have arisen since the use of keywords started.

Uncertainty exists as to who is actually using the keywords, and how the various uses are to be qualified from a trade mark law point of view. In case of Google's AdWords, should Google be considered to be the user, as the supplier of the AdWords? Or is it the advertiser, either as the purchaser of the AdWord or as the originator of the linked ad in which it is used? Or could it be the internet consumer who types in the AdWord for his search? And also, is offering advertisers the possibility of selecting AdWords which correspond to a trade mark infringing use? Google's position in the keyword story is the main subject of three French cases which the Cour de Cassation referred to the ECJ.

### **The facts of the cases (C-236/08, C-237/08 and C-238/08)**

The three French cases are between Google and (i) Louis Vuitton, (ii) Viaticum/Luteciel and (iii) CNRRH e.a. In the first case it has been established that entering Louis Vuitton's trade marks into Google's search engine triggered the display of ads for sites offering *counterfeit versions of its products*. In the second as well as the third case, it has been established that entering the relevant trade marks into the Google search engine triggered the display of ads for sites offering *identical or similar products from competitors*.

### **Questions**

Although the questions from the Cour de Cassation are formulated somewhat differently, they mainly concern the interpretation of Article 5(1) of the (Trade Mark) Directive 89/104.

The two most important questions are:

- a. does the use by Google, in its AdWords advertising system, of keywords corresponding to trade marks, constitute an infringement of those trade marks?
- b. does the use by advertisers, in AdWords, of keywords which correspond to trade marks, constitute trade mark infringement?

### **Opinion of Advocate General Poiares Maduro (A-G Maduro)**

In his opinion, issued on 22 September 2009, A-G Maduro stated, in summary, that neither Google nor the advertisers infringe any trade mark rights by the **selection** of AdWords. The subsequent **display** of the ads is, however, different, but not the subject of the present cases. A-G Maduro's main concern was that the advertisers' selection of AdWords can take place for many legitimate reasons (e.g. purely descriptive uses, comparative advertising, product reviews), which would be precluded if the selection of an AdWord would constitute, in itself, trade mark infringement.

## Decision of the ECJ

The ECJ did not follow its A-G on all points. The ECJ does share the opinion that Google does not actually *use* the signs in the course of trade. The advertisers, however, do use the signs they selected as an AdWord in the course of trade because the AdWord has the object and effect of displaying an advertising link to their site on which they offer goods or services for sale. Moreover, the advertisers also use the sign in relation to their own goods and services (even if they do not mention the sign in the linked ad) in the situation where they have selected the AdWord with the aim of offering internet users an **alternative** to the goods or services of that proprietor of the mark.

According to the ECJ, Article 5(1)(a) means that the proprietor is entitled to prohibit an advertiser from using (without its consent) its mark as AdWord for advertising identical goods or services in the case where that ad does not enable an average internet user, or enables that user only with difficulty, to ascertain whether the goods/services originate from the proprietor of the mark or an undertaking economically connected to it or, on the contrary, originate from a third party. It is for the national court to assess on a case-by-case basis whether this is the case. In that regard it is also important to note that the ECJ is of the opinion that the situations listed as exceptions in Article 6 and 7 Directive 89/104 (such as exhaustion of the proprietor's rights in case of second-hand goods) can still prevent the proprietor to prohibit the use of its mark.

## Conclusion

Several courts in EU countries (amongst which The Netherlands (case C-558/08), see our Newsflash of 29 December 2008) have submitted prejudicial questions to the ECJ regarding this type of advertising, all with different factual backgrounds. These questions mainly relate to the use of the keywords by the advertisers, rather than Google. Although it appears that Google is off the hook, we will have to wait for the ECJ's decisions in the other reference proceedings, to see if and how the various types of advertisers can use a trade mark in their ads or on their websites, through making use of them as a keyword. The first of these decisions is expected this Thursday 25 March 2010 in the Austrian case Bergspechte Outdoor Reisen/trekking.at Reisen c.s. (C-278/08).

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## NEW PRC PATENT LAW – SECRECY EXAMINATION PRACTICE

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The 3<sup>rd</sup> amendment to the PRC Patent Law was passed in December 2009 and took effect on 1 October 2009. Among all the changes in this 3<sup>rd</sup> amendment, the "secrecy examination needed for applying for patent abroad for inventions completed in China" has gained extensive concerns by industries (New Secrecy Examination). To comply with the implementation of the new Patent Law, the PRC government is now amending the Implementation Rules of the Patent Law as well as the Patent Examination Guidelines. Since the amendment of each of the implementation Rules and the Patent Examination Guidelines have not been concluded and announced, how the New Secrecy Examination is implemented has become concerned by patent applicants/industries.

Prior to 30 September 2009, for companies having R&D operation in China, they had to first file Chinese patent applications for inventions and utility models (design not included) completed in China (i.e., First Filing Requirement for Local Inventions), and later apply for patent abroad for the said inventions. Through the 3<sup>rd</sup> amendment of the Chinese Patent Law, "First Filing Requirement for Local Inventions" has been abolished; according to Article 20 of the new Patent Law, for inventions and utility models completed in China, patent applicants may choose first filing patent applications therefor either in China or abroad; however, prior to applying for patent abroad, the patent applicants must voluntarily apply for New Secrecy Examination for these inventions with the State Intellectual Property Office (SIPO). If the New Secrecy Examination requirement is not met, the Chinese patent applications will not be allowed; if such Chinese patent applications are allowed by negligence, they will be subject to invalidation.

In fact, secretary examination practice has been in existence in Chinese patent practice before the 3<sup>rd</sup> amendment of the Patent Law. According to Article 4 of the Patent Law (which has not been changed in the 3<sup>rd</sup> amendment), where an invention or creation under patent protection involves state security or significant interest of the state, therefore causing it necessary to keep the invention or creation confidential, the state shall deal with the confidentiality need according to laws. The secrecy examination of patent applications under Article 4 of the Patent Law is initiated by the SIPO, and no applications from patent applicants are needed.

Among the inventions from the world, a substantial portion of them are originated from and completed in China, and it has been very commonly seen that companies from Taiwan and other foreign countries have set up their R&D operations in China.

It has become important and critical for industries to decide how to apply for patent globally for inventions and creations completed in China. To comply with implementation of the new Chinese Patent Law, the SIPO is now working on amendment of the Implementation Rules of the Patent Law as well as the Patent Examination Guidelines. According to the draft amendment of the Implementation Rules of the Patent Law, as of 1 October 2009 and for inventions and creations completed in China (not including Taiwan, Hong Kong and Macao), implementation details regarding the New Secrecy Examination are as follows:

- Prior to applying for patent abroad (via either a national filing or a PCT international filing), a patent applicant must apply for and comply with the New Secrecy Examination beforehand by submitting a written document illustrating the invention or creation.
- If a patent applicant decides to first file a patent application in China and later apply for patent abroad, he/she must apply for and comply with the New Secrecy Examination before applying for patent abroad. A qualified applicant may choose first filing a PCT international patent application with the SIPO as receiving office; at the time of filing the PCT application, it shall be presumed that a request for New Secrecy Examination has been simultaneously filed (i.e., no specific request for New Secrecy Examination is needed).
- If a patent applicant decides to first file a foreign patent application, he/she must submit a request for New Secrecy Examination as well as a written document illustrating the invention or creation, which must be prepared in Chinese language.

The key points for preparing the above-mentioned document illustrating the invention or creation are as follows:

- (1) The document must sufficiently disclose the invention or creation;
  - (2) The disclosure in the document must be consistent with the content of the invention or creation. If the above-mentioned document does not meet the formality requirements, it shall be deemed that a request for New Secrecy Examination is not filed, and the applicant may re-file a request for New Secrecy Examination.
- If it is deemed not necessary to keep an invention or creation confidential, the SIPO shall issue a Notice of Secrecy Examination notifying the applicant to go ahead with foreign patent filing. If no Notice of Secrecy Examination is received within 4 months from the date of filing a request for New Secrecy Examination, the applicant can proceed with foreign patent filing accordingly. If it is deemed necessary to keep an invention or creation confidential, the SIPO shall issue a Notice of Secrecy Examination notifying the applicant to suspend the foreign patent filing, and will issue a "Notice of Decision for Secrecy Examination" through further verification. If a "Notice of Decision for Secrecy Examination" is not received within 6 months from the date of filing a request for New Secrecy Examination, the applicant can proceed with foreign patent filing accordingly.

Details regarding implementation of the New Secrecy Examination need to be supplemented by the amendment of the Implementation Rules of the Patent Law and the Patent Examination Guidelines. In addition, the following topics regarding the New Secrecy Examination are note-worthy:

- Due to the international economic and technical activities, R&D activities are of variety and joint R&D projects have been commonly seen. Co-inventors may stay in different countries and R&D activities may involve activities from multiple countries. Under such situation, how to determine whether the inventions concerned are completed in China?
- Except for China, other specific countries may also require secrecy examination and implement technology export control for inventions completed in their countries. If the places involved in the R&D of an invention involves China and any of the above-mentioned foreign countries, how the patent applicant take care of requirement respect to the secrecy examination, which is prescribe in laws from both China and the other foreign country.
- Filing a patent application in Taiwan is deemed as a "foreign filing" as far as the New Secrecy Examination is concerned. In other words, for inventions and creations completed in China, prior to applying for patent in Taiwan, the New Secrecy Examination requirement must be complied. If the applicant decides to first file a Chinese patent application, he/she must apply for New Secrecy Examination as early as possible so as to file the patent application in Taiwan earlier (because priority claim cannot be made for the Taiwanese patent application based on the Chinese patent application).
- For inventions and creations completed in China, proper filing requests for New Secrecy Examination is critical to ensure the grant of the Chinese patent applications and the validity of such patents. If the requirement of New Secrecy Examination is not complied, the party concerned may be subject to liability under State Secrecy Law. It is critical and important for industries/patent applicants to come out with a plan for global patent filing with consideration of the requirements upheld in all the concerned countries.
- If the cooperation between a multi-national company and its Chinese subsidiary or its business partner in China, and if such cooperation involves R&D innovations completed in China, in addition to the New Secrecy Examination requirement set forth in the Patent Law, attention shall be paid to other laws especially governing the control of technology export.

As stated above, secrecy examination is not a new practice in China. To implement Article 4 of the Patent Law, the SIPO has had examination mechanism to verify whether inventions or creations under patent application involved state security or significant interest of the state. According to SIPO's experience in the past, the chance for identifying inventions or creations involving state security and significant interest of the state is very limited. According to the SIPO's statistics, for all the patent cases under secrecy examination in Year 2008, only 175 cases are confirmed to involve state security or significant interest of the state, which must be kept confidential. As compared with the total 600,000 cases filed in Year 2008 (not including patent cases originated from foreign countries), the percentage of cases which must be kept confidential is very small. Therefore, it is expected that majority of the patent cases for which New Secrecy Examination is needed should not involve confidentiality issue.

According to the SIPO's statistics, there are around 230 requests filed for New Secrecy Examination in October 2009. The SIPO completed the review of such requests and issued

decisions quickly (normally within several days). The SIPO advised that they understood the importance for issuing decisions on such requests and they will conduct such examination as soon as possible so that patent applicants may have more flexibility for handling their foreign patent filing.

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## INTELLECTUAL PROPERTY REPORT

### Articles

#### **En Banc Federal Circuit Decision Affirming Existence Of Separate And Distinct Written Description Requirement In 35 U.S.C. § 112**

[Jennifer Tempesta](#)

In a highly anticipated decision, the United States Court of Appeals for the Federal Circuit sitting *en banc* considered: (1) whether enablement and written description are two separate requirements under 35 USC § 112, ¶ 1; and (2) if so, what should be the scope and purpose of the written description requirement. See *Ariad Pharms., Inc. v. Eli Lilly & Co.*, No. 2008-1248 (Fed. Cir. Mar. 22, 2010) (*en banc*). In a 9-2 decision, the Federal Circuit affirmed that there are indeed separate written description and enablement requirements. The decision is significant at least because it clarifies certain aspects of the Federal Circuit's jurisprudence respecting § 112, and provides general guidance for what must be disclosed in a patent application to meet the written description requirement.

##### A. Applicable Principles

The dispute considered by the Federal Circuit is based on the interpretation of 35 U.S.C. § 112 ¶ 1, which provides in relevant part:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same . . .

Over time, certain three judge panels of the Federal Circuit and its predecessor court have interpreted this section to contain both an enablement requirement and a separate and distinct written description requirement. See, e.g., *Carnegie Mellon University v. Hoffmann-La Roche Inc.*, 541 F.3d 1115, 1121 (Fed. Cir. 2008) ("paragraph 1 of § 112 requires a written description of the invention—a requirement separate and distinct from the enablement requirement."); *In re Ruschig*, 379 F.2d 990, 995-96 (C.C.P.A. 1967) (finding enablement requirement of § 112 ¶ 1 to be distinct from written description requirement).

##### B. Procedural Posture

In an appeal to the Federal Circuit, Eli Lilly challenged a district court finding that Ariad's patent claims directed to certain transcription factors, which are molecules found in cells that regulate gene expression, were not invalid based on, *inter alia*, lack of written description. *Ariad Pharms., Inc. v. Eli Lilly & Co.*, 560 F.3d 1366, 1369 (Fed. Cir. 2009). The Federal Circuit reversed the district court determination of no invalidity by finding the claims invalid for failure to meet the written description requirement. *Id.* at 1380. Ariad filed a petition for the Federal Circuit to rehear the case *en banc*. The petition was granted. 332 Fed. Appx. 636 (Fed. Cir. Aug. 21, 2009).

##### C. The Federal Circuit Opinion

The Federal Circuit looked to the words of 35 U.S.C. § 112 ¶ 1, Supreme Court precedent and *stare decisis* in holding "that § 112, first paragraph, contains two separate description requirements: a "written description [i] of the invention, and [ii] of the manner and process of making and using [the invention]." *Ariad Pharms., Inc. v. Eli Lilly & Co.*, No. 2008-1248, slip op. at 10 (Fed. Cir. Mar. 22, 2010) (*en banc*) (emphasis in original) (quoting 35 U.S.C. § 112, ¶ 1).

##### 1. Application Of Written Description Requirement To Original Claims

In considering the patent claims at issue, the court rejected the patentee's argument that "the requirement to describe what the invention is does not apply to original claims because original claims, as part of the original disclosure, constitute their own written description of the invention." *Id.* at 19. In finding that "[n]either the statute nor legal precedent limits the written description requirement to cases of priority or distinguishes between original and amended

claims," *Id.* at 23, the court reasoned:

Although many original claims will satisfy the written description requirement, certain claims may not. For example, a generic claim may define the boundaries of a vast genus of chemical compounds, and yet the question may still remain whether the specification, including original claim language, demonstrates that the applicant has invented species sufficient to support a claim to a genus.

*Id.* at 20.

#### 2. Applicable Standard For The Written Description Requirement

In providing guidance regarding the appropriate standard to be applied in determining whether the written description requirement is met, the court reaffirmed that the "test for sufficiency is whether the disclosure of the application relied upon reasonably conveys to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date." *Id.* at 23. The court further clarified that the term "possession of the invention" that has been used in prior opinions "has never been very enlightening" because "the hallmark of written description is disclosure." *Id.* at 24. Therefore, the court determined that "possession as shown in the disclosure" is a more complete formulation of the appropriate test to be applied "from the perspective of a person of ordinary skill in the art." *Id.* Applying that factual inquiry, "the specification must describe an invention understandable to that skilled artisan and show that the inventor actually invented the invention claimed." *Id.*

#### 3. General Guidance

The court enunciated "a few broad principles that hold true across all cases" as follows: (1) "the written description requirement does not demand either examples or an actual reduction to practice; a constructive reduction to practice that in a definite way identifies the claimed invention can satisfy the written description requirement"; (2) "actual "possession" or reduction to practice outside of the specification is not enough . . . it is the specification itself that must demonstrate possession"; and (3) "a description that merely renders the invention obvious does not satisfy the requirement." (*Id.* at 25) (citations omitted).

Further, the court responded to the patentee's complaint that the written description requirement "disadvantages universities to the extent that basic research cannot be patented" by cautioning that "[p]atents are not awarded for academic theories, no matter how groundbreaking or necessary to the later patentable inventions of others." *Id.* at 28.

#### 4. The Patent-in-Suit

Applying the foregoing principles the court went on to find Ariad's patent claims directed to methods comprising the step of reducing NF- $\kappa$ B activity invalid for failure to meet the written description requirement because the specification merely hypothesized certain classes of molecules that were potentially capable of reducing NF- $\kappa$ B activity as claimed. *See Id.* at 32-38.

Baker Botts will continue to monitor this important area of the law, and will provide future reports as that law continues to develop. Please feel free to contact us with any questions you may have on this topic.

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## **DOL Reverses Course: Mortgage Loan Officers Not Typically Administrative Exempt Employees**

04.07.10

By Judith Droz Keyes and Mark W. Berry

Reversing its position and withdrawing a 2006 Wage/Hour Opinion Letter, the U.S. Department of Labor (DOL) has issued an "Administrator's Interpretation" stating that mortgage loan officers generally do not qualify for the administrative exemption under the federal Fair Labor Standards Act (FLSA).

Given the limited availability of the other white-collar exemptions for financial services employees, ***the new Interpretation poses a significant hurdle to banks, credit unions, mortgage brokers and other financial institutions*** seeking to maintain mortgage loan and other financial service officer positions as exempt from overtime.

### **Overview of the DOL's analysis**

The DOL's Interpretation is based on its conclusion that the primary duty of loan officers is sales, and on the determination that this activity is *not* related to the "management or general business operations" of either the employer or the employer's customers, as the administrative exemption requires.

There are four bases for the DOL's characterization of mortgage loan officers as essentially "sales" personnel. According to the DOL, mortgage loan officers in general (1) are primarily paid by commissions; (2) often receive training in sales techniques; (3) generally are evaluated by the number of loans generated; and (4) are often characterized by their employers as outside salespersons when trying to qualify them for the outside sales exemption (an argument that does not prevail unless the loan officers are out of the office selling most of the time).

Recognizing that heavy emphasis on the sales function can make establishing exempt status problematic, many financial institutions—relying on previous DOL interpretations—had concluded in the past that mortgage loan officers are administrative exempt employees because their primary duty relates to "the management or general business operations" of the employer's *customers*. The new DOL Interpretation severely undercuts their ability to prevail on this argument because the DOL now takes the position that the customer aspect of the regulation pertains only to customers that are businesses, not to customers who are individuals. Thus, commercial mortgage loan officers might meet the test for exemption, but residential mortgage loan officers would not.

### **Two important enforcement considerations**

First, the DOL Interpretation affects only federal law. Some states, such as California, already have equally or more restrictive interpretations of the administrative exemption under state law, so the change in the DOL's position is of little consequence in some states. Second, the Interpretation reflects only the DOL's enforcement view and may yet be tested in the courts. Nonetheless, financial industry employers (and other employers having "sales" employees) can expect the Interpretation to make it harder to argue successfully that employees with "sales" responsibility qualify for the administrative exemption.

### **Employer strategies**

Employers with questions concerning the application of the criteria for exempt status for specific positions or employees are encouraged to contact legal counsel for assistance.

Financial institutions and other businesses that currently classify mortgage loan officers or similar employees with significant "sales" duties as exempt from overtime should reassess their situation promptly and carefully. Here are some considerations:

1. Perform the assessment for the purpose of legal advice under the guidance of legal counsel, making it subject to the attorney-client privilege.
2. Consider reallocating supervisory responsibility. Loan officers who supervise two or more full-time equivalents may meet the requirements of the executive exemption.
3. Consider adjusting employees' responsibilities so they can qualify for the outside sales exemption if they "customarily and regularly" perform their sales duties outside the office.
4. Consider distinguishing between residential loan officers and commercial loan officers, because employees whose duties involve advising businesses about their finances and credit needs might meet the administrative exemption test.
5. If the loan officers or similar employees have duties that put them in a gray zone, but continued exempt status is preferable, carefully limit the hours these employees work, and make sure there is a clear understanding that the compensation paid covers all hours worked so as to minimize potential overtime liability if it is later determined that they were misclassified.

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# TAX UPDATE:

## PHARMACEUTICAL, BIOTECHNOLOGY, AND MEDICAL DEVICE COMPANIES

### New Health Care Reform Law Includes Tax Credit/Grant Program for Companies Developing Therapeutic and Diagnostic Products

**Buried in the recently-enacted Patient Protection and Affordable Care Act is a new tax credit and cash grant program that may provide smaller life sciences companies a significant opportunity to recover the cost of certain spending and investment even if they generally would not be able to benefit from tax credits. Some highlights of the program:**

- The credit/grant is available to businesses with 250 employees or less. While larger companies may not be eligible for the credit/grant, companies in which they have an interest may be eligible for the credit/grant provided that the larger company has a minority interest and the entities are not otherwise treated as a “common employer.”
- The credit/grant is equal to 50% of eligible expenses incurred in 2009 or 2010.
- The total tax credits/grants, available under this program are \$1 billion, so the process will be competitive.
- The credit/grant applies to certain expenses incurred for a “qualified therapeutic discovery project” (QTDP). A QTDP is a project that is designed to:
  - Treat or prevent diseases or conditions by conducting pre-clinical activities, clinical trials, and clinical studies, or carrying out research protocols, for the purpose of securing approval of an NDA or BLA;
  - Diagnose diseases or conditions to determine molecular factors related to diseases or conditions by developing molecular diagnostics to guide therapeutic decisions; or
  - Develop a product, process, or technology to further the administration of therapeutics.
- Companies will be required to submit an application that must be certified by the Treasury Department as involving a project that shows reasonable potential to (i) result in a new therapy to treat an unmet medical need, or to prevent, detect, or treat chronic or acute diseases and conditions, (ii) reduce long-term health care costs in the United States, or (iii) significantly advance the goal of curing cancer within a 30-year period.

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- The certification process will take into consideration which projects have the greatest potential to (i) create and sustain high quality, high-paying jobs in the United States, and (ii) to advance United States competitiveness in the fields of life, biological, and medical sciences.
- The Treasury Department is directed to establish details of the application process and the standard for certification by May 22, 2010.
- Companies will be able to apply for a grant, rather than a tax credit. Grant awards will be excluded from income for federal income tax purposes but may be subject to recapture if the investment no longer qualifies for the grant after the grant has been made.
- The availability of other tax benefits is reduced to the extent a taxpayer receives the credit/grant. For example, a taxpayer's basis in its assets and its ability to deduct expenses may be reduced to the extent that it receives a credit/grant.

Any company interested in this program should monitor developments, especially as information on the application process and certification standards becomes available, and prepare to submit a competitive application quickly once the process is established. We have a team of tax and FDA regulatory attorneys available to assist clients with evaluating the credit/grant program, monitoring the latest developments and preparing applications for the credit or grant.

If you have any questions or would like to learn more about this program, please contact one of the individuals below or another Hogan & Hartson attorney with whom you work.

*For further details on the guidance discussed above and how the Proposed Regulations could affect you or your organization, or if you are interested in submitting comments to Treasury, please contact any of the Hogan & Hartson attorneys listed below who contributed to this Update.*

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**UPDATED - New \$10,000 California Homebuyer Tax Credit Signed by Governor With  
Guidance by the Franchise Tax Board**

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On March 25, 2010, Governor Arnold Schwarzenegger signed California Assembly Bill 183, which provides a new tax credit for homebuyers. This program is distinct from the 2009 program. Below are some highlights of the new program:

- AB 183 provides an additional \$200 million in tax credits (\$100 million for newly constructed homes and \$100 million for first-time homebuyers of either newly constructed or existing homes).
- There are no buyer income restrictions in the new program.
- The tax credit is available to eligible buyers who close escrow for the purchase of the home on or after May 1, 2010 and before August 1, 2011 under a contract signed on or before December 31, 2010.
- Qualified buyers are eligible to receive a tax credit in the amount of 5% of the home's purchase price, up to \$10,000, spread equally over three successive tax years if they live in the home as their principal residence for at least two years immediately following the purchase.
- On and after May 1, 2010, buyers of new homes may, but are not required to, reserve the tax credit before the close of escrow. To reserve the credit, the buyer and seller must jointly sign and submit to the California Franchise Tax Board ("FTB") a certification that they signed a sales contract on or after May 1, 2010 and on or before December 31, 2010. The FTB has stated that it will require a copy of the signed contract to be included with the reservation request.
- To claim the tax credit, whether or not it has been reserved, within two weeks after the close of escrow the buyer must provide to the FTB a copy of the signed settlement statement and either of the following: (1) for new homes, a certification by the seller that the residence has never been occupied, or (2) for first-time homebuyers, a certification from the buyer that he or she is a first-time homebuyer.

Any information provided by sellers to homebuyers about this new program must be carefully drafted to comply with the law and to provide the seller with the appropriate protections.

The FTB has posted additional information on reserving and claiming a tax credit under the new program on its website: [http://www.ftb.ca.gov/individuals/New\\_Home\\_Credit.shtml](http://www.ftb.ca.gov/individuals/New_Home_Credit.shtml).

The text of Assembly Bill 183 can be viewed at:  
[http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab\\_0151-0200/ab\\_183\\_bill\\_20100325\\_chaptered.html](http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0151-0200/ab_183_bill_20100325_chaptered.html).

If you have any questions or would like to know more about this new law, please contact any member of the Luce Forward's Common Interest Development Group.