

November 2010 e-Bulletin

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- 48th International PRAC Conference Kuala Lumpur
Hosted by Skrine October 16-19, 2010



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- 49th International PRAC Conference - Amsterdam - May 21-24, 2011
Registration Open www.prac.org/events.php

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BAKER BOTTS ANNOUNCES NEW PARTNERS

HOUSTON, October 18, 2010 -- -- On January 1, 2011, 13 lawyers will comprise the 78th group in Baker Botts' 170-year history to become new members of the partnership, Managing Partner Walt Smith announced today.

"These new partners are a diverse group of lawyers representing a broad spectrum of practice areas," Smith said. "They will strengthen our team of talent throughout the firm."

2011 new partners for Baker Botts include:

Darryl Adams -- Intellectual Property, Austin

Kevin Cadwell -- Litigation, Palo Alto

Alejandro Escobar -- Litigation, London

Jeremy Gott -- Global Projects, Dallas

Zachary Hughes -- Litigation, New York

Sandra Lee -- Intellectual Property, New York

Robert Maier -- Intellectual Property, New York

Hamish McArdle -- Global Projects, London

Luckey McDowell -- Corporate, Dallas

Bridget Moore -- Litigation, Washington

Aaron Streett -- Litigation, Houston

John Winter -- Corporate, New York

Eric Winwood -- Tax, Dallas

For biographical sketches of our new partners and more information, please visit www.bakerbotts.com

GIDE LOYRETTE NOUEL STRENGTHENS INTERNATIONAL ECONOMIC TEAM

26 October 2010 -

Gide Loyrette Nouel is adding to the strength of its legal expertise with the arrival of **Alexis Massot** as an associate. Alexis Massot is joining the international economic law team after eight years of advising the French Government on these issues.

Cited as one of the leading specialists in international economic law, Gide Loyrette Nouel has, since the 1990s, been developing a solid expertise in European and international law and regulations, particularly in the implementation of trade defence instruments. The Firm regularly acts for institutions and governments in trade dispute proceedings before the WTO. The Firm has also positioned itself on the cutting edge of all new aspects of international economic law, such as subsidy control, unfair and discriminatory practices, e.g. in connection with technical barriers to trade, public procurement, investment protection and export control.

The arrival of Alexis Massot, with his comprehensive understanding of international economic law, will be a valuable asset to the Firm and its clients. From 2002 to 2005, he worked as legal advisor to the international affairs service of the French Treasury, and from 2005 to 2010 as legal advisor to the French Permanent Delegation to the WTO in Geneva. He is an acknowledged expert in European Union trade policy and World Trade Organization dispute settlement.

Alexis is a graduate of the *Institut d'Etudes Politiques* in Strasbourg and the Graduate Institute of International Studies in Geneva. He also earned a Master's degree in Law "Litigation, Arbitration and Alternative Means of Dispute Resolution" from the Panthéon-Assas University (Paris). He has also been lecturing since 2008 for the "Health & Food Safety Law" Master's degree course at the University of Paris Panthéon-Sorbonne.

For additional information visit www.gide.com

FRASER MILNER CASGRAIN EXPANDS NATIONAL COMMERCIAL GROUP

November 1 2010

Fraser Milner Casgrain LLP (FMC), one of Canada's leading business and litigation law firms, is proud to welcome **Katherine Peacocke** and **Julie D. Gagnon** as partners in the firm's National Corporate | Commercial Group in Montreal.

With more than 25 years in practice, Ms. Peacocke specializes in the purchase and sale of businesses, financing, bankruptcy and insolvency and commercial real estate. Prior to joining FMC, Ms. Peacocke was Assistant General Counsel at one of Canada's largest public companies, before becoming a partner of a reputable specialized business law firm, where she primarily acted for businesses in the financial, manufacturing and services sectors.

Ms. Gagnon is known for her exceptional negotiation skills and has expertise in corporate law, purchasing, sales and business financing, and in the drafting and revision of commercial contracts. Her experience with the legal department of a chartered bank has enabled her to have a good grasp on client issues related to risk management and legal costs.

"We're very happy to welcome Katherine and Julie to our Commercial Group," said Claude Morency, FMC's Managing Partner in Montréal. "As one of the most active groups in the province, our team offers a wealth of experience to the industry, and their valuable skill sets will not only benefit and strengthen our already-accomplished team, but will also bring tremendous value to our clients and our firm as a whole."

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

KING & WOOD BOLSTERS DISPUTE RESOLUTION PRACTICE

New Anti-Fraud Specialist | October 11, 2010

October 11, 2010 - Jeff Lane, formerly of boutique law firm Gall & Lane, recently joined King & Wood as a partner specializing in corporate fraud and money laundering disputes. He is also the Hong Kong representative of FraudNet, the International Chamber of Commerce's network of fraud litigation specialists.

Jeff Lane has extensive experience in international dispute resolution and commercial litigation and has been admitted as solicitor in the UK, Hong Kong and Australia. He has conducted a number of complex multi-jurisdictional fraud and asset tracing investigations and has been recognized by a number of renowned international legal publishers, including Legal 500, ALB and Chambers.

King & Wood's managing partner Wang Ling commented, "Our firm's corporate fraud practice will benefit greatly from Jeff's expertise, and I look forward to seeing the continued growth of our international arbitration and dispute resolution groups."

For additional information visit www.kingandwood.com

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LUCE FORWARD FORMS NATIONAL FORECLOSURES PRACTICE

A New practice to advise lenders, servicers, and institutional investors facing civil litigation, proposed class actions, and federal and state investigations related to the national foreclosure crisis

Luce Forward today announced it has expedited the formation of a specialized team of attorneys to serve as the firm's National Foreclosure Litigation & Investigation practice. Luce Forward's objective in assembling these leading practitioners and specialists is to provide 'one-stop shopping' to institutions facing potential civil or criminal liability arising out of the national foreclosure crisis. The new practice will serve lenders, servicers and institutional investors facing civil litigation, proposed class actions, and federal and state investigations.

The National Foreclosure Litigation & Investigation practice will proactively work with clients to limit or eliminate potential civil or criminal liability prior to the commencement of civil litigation or a civil or criminal investigation. The team will also investigate and evaluate a client's potential civil and criminal liability exposure arising out of the foreclosure crisis and then provide practical recommendations to the client to reduce exposure.

"This emerging national foreclosure crisis embodies a 'perfect storm' of events that could lead to substantial liability for companies and institutions that fail to aggressively investigate their potential exposure," said Kurt L. Kicklighter, Luce Forward's Managing Partner. "We represent numerous institutional clients that will benefit from the comprehensive defense approach that Luce Forward has now assembled. I am pleased the size of our firm provides us the opportunity to put together a 'dream team' of attorneys with the necessary expertise to defend against any litigation arising out of this unprecedented crisis."

Led by Partners Pat Swan, Chris Healey and Steve Wall, the National Foreclosure Litigation & Investigation practice consists of nearly 20 civil and criminal specialists who are experienced in defending corporations facing civil and criminal investigations; defending corporations named as defendants in class actions; conducting internal investigations on behalf of audit committees or management; and creating compliance programs following deferred prosecution agreements.

Swan, Healey and Wall are three of the leading practitioners in the respective fields of corporate criminal defense, class action litigation, and California foreclosure law. Just this year, Healey represented plaintiffs in the class action suit against Skilled Healthcare Group which resulted in a \$677 million verdict - the nation's largest verdict this year. The firm also has a demonstrated track record of success at trial in foreclosure related litigation and class actions. In 2007, Wall led a team in successfully preventing a foreclosed-out property owner from expanding his case into a statewide class action that would have involved hundreds of foreclosure trustees. In 2008, Wall and the foreclosure team convinced the trial judge that a property owner had no basis for a class action against a title company acting as trustee in a foreclosure. The plaintiff also attempted to assert claims under California's unfair competition laws. The case was dismissed and the dismissal affirmed by the Court of Appeal.

"Combining the substantive expertise of the firm's foreclosure specialists with the experienced class action attorneys that work in our business litigation group provides our clients with a powerful tool to employ against any future class actions or Unfair Competition Law claims related to the national foreclosure crisis," said Wall.

Luce Forward formed its National Foreclosure Litigation & Investigation practice as some national lenders have announced temporary moratoria on foreclosures in selected states while others have stopped all of their foreclosure proceedings nationwide. At the same time, federal and state agencies are launching civil and criminal investigations into various foreclosure practices. In response, numerous lenders, servicers, and institutional investors are contemplating the need to conduct internal investigations to determine the scope of their potential civil and criminal liability.

A corporation or business entity must consider the benefits and risks of a potential deferred prosecution agreement against the impact such an agreement would have in related civil litigation. Internal investigations - with or without a prior agreement to cooperate with government agencies - must be conducted with an understanding of how the investigation will impact the related civil litigation or future class actions.

Pat Swan, head of Luce Forward's white collar defense group, said it is crucial for general counsel to have the advice of experienced outside counsel prior to making any decision about whether to cooperate with government investigators.

With multiple offices throughout California depending on the client's needs, Luce Forward can present and implement a comprehensive and multi-tiered defense strategy that recognizes and addresses the unique challenges corporations face when responding to simultaneous government investigations and related civil actions.

For additional information visit www.luce.com

WILSON SONSINI GOODRICH & ROSATI EXPANDS CORPORATE FINANCE PRACTICE

-- Charlotte Kim Joins Firm's New York Office --

PALO ALTO, CA (October 18, 2010) - Wilson Sonsini Goodrich & Rosati, the premier provider of legal services to technology, life sciences, and growth enterprises worldwide, today announced that Charlotte Kim has joined the firm as a partner in the corporate finance practice. She comes to the firm from Choate Hall & Stewart, where she was a partner in their finance and restructuring practice. Kim will be based in Wilson Sonsini Goodrich & Rosati's New York office.

"Charlotte is a gifted attorney with considerable experience representing both borrowers and lenders in a wide variety of complex corporate finance transactions," said CEO Steve Bochner. "Her legal skills, outstanding client service, and extensive representation of companies at all stages of development make her a perfect fit for the firm. She will lend additional expertise to our thriving corporate finance practice, and allow us to better serve companies and financial institutions on the East Coast."

With particular experience in the energy, healthcare, and technology sectors, Kim works with public and private companies and their investors on their debt capital structures and financing needs throughout the life cycle of the enterprise, from start-up through operations, acquisitions, investments, securities offerings, and restructuring. In addition, she works with financial institutions and investors on all aspects of cash-flow and asset-based financings. Her transactional experience encompasses senior, subordinated, and other junior lending; buyout and acquisition finance; private placements and debt securities offerings; venture debt; domestic and international corporate finance; project finance; securitizations; lease financings; related derivative transactions; and restructuring transactions, both in and out of bankruptcy. Her international experience includes numerous cross-border transactions and investments involving the U.S., Europe, Asia, and Latin America. Overall, she has structured, negotiated, and closed as lead attorney more than 140 corporate finance transactions totaling more than \$20 billion in value.

Prior to joining Choate, Kim had been an associate at Chadbourne & Parke and Milbank, Tweed, Hadley & McCloy in New York. She received her J.D. from Harvard Law School in 1995, was a Fulbright Scholar at the Centre for European Policy Studies in Belgium from 1991-1992, and graduated *magna cum laude* from Harvard University in 1991 with a degree in social studies.

For more information, please visit www.wsgr.com.

CLAYTON UTZ

ADVISES ON NOBLE GROUP ACQUISITION \$58.8MILLION STAKE IN ASTON RESOURCES

Sydney, 20 October 2010: Clayton Utz is advising ASX-listed Kingsgate Consolidated Limited on its agreed merger with Dominion Mining Limited, announced today.

Under the proposed Scheme of Arrangement, Kingsgate will acquire all of the shares in Dominion in exchange for 0.31 Kingsgate shares per Dominion share. The transaction values Dominion at approximately A\$376 million.

Clayton Utz's national Mergers & Acquisitions practice head, John Elliott, is leading the Clayton Utz team advising Kingsgate.

Commenting on the transaction, Mr Elliott said: "This is a further example of the ongoing consolidation we are seeing in the gold mining sector. The transaction will strengthen Kingsgate's position as the premier mid-tier gold producer in Australia and provide Kingsgate with an enlarged operational and financial platform."

Clayton Utz is a leading adviser to participants in the gold mining sector in relation to M&A activity. Recently the firm advised long-standing client Barrick Gold Corporation on its takeover of Tusker Gold Limited, and is currently advising Anatolia Minerals Development Limited on its proposed merger with Avoca Resources Limited.

For additional information visit www.claytonutz.com

CAREY Y CIA

ADVISES GRUPO CASA SAA IN ACQUISITION OF FARMACIAS AHUMADA

Santiago: Carey y Cía. has advised the Mexican Grupo Casa Saba in the acquisition of 97.8% of Farmacias Ahumada S.A. through a tender offer process launched on August 31, 2010.

The transaction was funded through a loan agreement entered between Grupo Casa Saba, S.A.B. de C.V. (as borrower) and HSBC México, S.A., Institución de Banca Múltiple and Banco Mercantil del Norte, S.A., Institución de Banca Múltiple (as lenders).

The acquisition amounted to US\$504 MM, and the aggregate amount of the Loan Agreement amounted up to US\$834 MM.

Carey y Cía. acted as the Chilean counsel for the borrower, with a team led by partners Pablo Iacobelli and Guillermo Acuña, and the participation of associates Felipe Moro and Santiago Montt.

For additional information visit www.carey.cl

FRASER MILNER CASGRAIN

ANDEAN RESOURCES COMPLETES \$234.5 MILLION PUBLIC OFFERING

On August 11, 2010, Andean Resources Limited ("Andean") completed a public offering of 70,000,000 common shares at a price of \$3.35 per share, representing aggregate gross proceeds to Andean of \$234,500,000. The offering was underwritten by a syndicate co-led by BMO Capital Markets and RBC Capital Markets that included CIBC, Paradigm Capital, UBS Securities Canada, Dundee Securities, TD Securities, Euroz Securities and Haywood Securities.

Andean was represented in Canada by a team from Fraser Milner Casgrain LLP that included John Sabine, Sander Grieve, Linda Missetich, Brian Abraham and Eric Foster (securities) and Zahra Nurmohamed (tax).

For additional information visit www.fmc-law.com

GIDE LOYRETTE NOUEL

ADVISES PERNOD RICARDS IN SALE OF RENAULT COGNAC BRAND

Gide Loyrette Nouel advised Pernod Ricard on the sale of its Renault Cognac brand, together with stocks of finished products, to Altia. Completion of the transaction is subject to clearance from the Swedish and Norwegian competition authorities. Pernod Ricard Finland and Altia have also entered into a transitional distribution agreement.

Altia is a Finnish group producing, distributing, marketing and selling alcoholic beverages in the Nordic and Baltic countries. Altia owns a portfolio of brands, including Blossa, Grönstedts, Koskenkorva, Jaloviina, Maximus, O.P. Anderson, Explorer, Skåne Akvavit and Chill Out, all of which have a strong position in their respective markets and a long heritage. Altia also distributes international quality brands from all over the world.

Gide Loyrette Nouel also advised Pernod Ricard on the sale of the Bisquit Cognac brand to the Distell group in 2009.

Legal counsel to Pernod Ricard: Gide Loyrette Nouel A.A.R.P.I. (Nadège Nguyen, partner, and Edgard Nguyen, the intellectual property aspects were handled by Emmanuel Larere, partner, and Jean-Hyacinthe de Mitry).

For additional information visit www.gide.com

HOGAN LOVELLS

ADVISES AMERICAN COMMERCIAL LINES, INC. ON \$777 MILLION MERGER AGREEMENT

NEW YORK, 19 October 2010 – A group of Hogan Lovells lawyers is advising American Commercial Lines, Inc. (ACL), one of the largest and most diversified inland marine transportation and service companies in the U.S., in a definitive merger agreement in its acquisition by an affiliate of Platinum Equity.

Valued at approximately \$777 million and expected to close in the fourth quarter of 2010, the transaction is subject to customary closing conditions, including the expiration or earlier termination of the Hart-Scott Rodino waiting period and the approval of ACL's stockholders, but is not subject to any condition with regard to the financing of the transaction. ACL intends to keep its existing senior secured notes outstanding and will comply with the indenture governing the notes, including making any required offer to purchase the notes upon a change of control.

Under the terms of the merger agreement, ACL may solicit acquisition proposals from third parties for a period of 40 calendar days continuing through 27 November 2010.

The Hogan Lovells US LLP team advising on this transaction includes New York office partners Amy Freed, Alex Johnson, and Phil Altman; Baltimore partner Mike Silver; Washington, D.C. partners Bill Neff and Carin Carithers; Northern Virginia partner Michele Harrington; and New York associates Derek Meilman, Bob Zapata, Roxanne Tingir, Jennie Ingram, and Lillian Tsu.

For further information, please visit www.hoganlovells.com

NAUTADUTILH

ADVISES AERCAP IN \$380 MILLION TRANSACTION

October 25, 2010 – AerCap Holdings N.V. ('AerCap', NYSE: AER) announced that it has signed an agreement with Abu Dhabi-based investment holding company Waha Capital PJSC ('Waha', ADX: WAHA), under which Waha will acquire approximately 29.8 million shares in AerCap in exchange for \$105 million in cash, Waha's 50% interest in AerVenture and the transfer of a 40% interest in Waha's 16-aircraft portfolio.

The total consideration for the shares in AerCap is approximately \$380 million based on the New York Stock Exchange closing price of AerCap's shares on Friday, 22 October 2010. Waha Capital's main institutional shareholder is Mubadala Development Company. NautaDutilh advises AerCap in this transaction.

NautaDutilh's team: Jaap Jan Trommel, Wijnand Bossenbroek, Lieke van der Velden, Ruud Smits, Pieter van Drooge.

For additional information visit www.nautadutilh.com



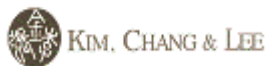
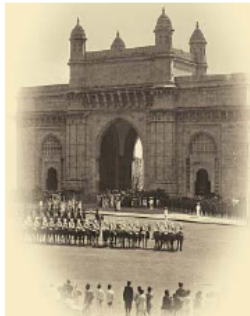
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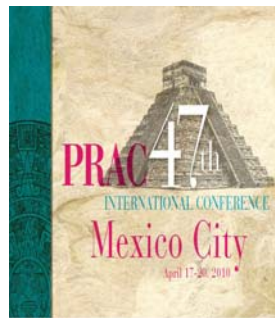
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November 15-18, 2008



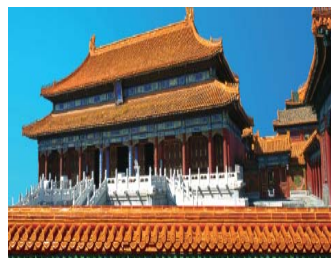
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SANTAMARINA Y STETA



PRAC 46th International Conference Beijing
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BRIGARD & URRUTIA



Gide Loyrette Nouel



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Member Firms are encouraged to contribute
articles for future consideration.
Send to editor@prac.org.
Deadline is 10th of each month.

National Secretariat of Energy Enacts Resolution Establishing New Mandatory Quality Specifications for Biodiesel.

The National Secretariat of Energy (the "Secretariat") enacted Resolution N° 6/2010 by which it set forth new quality specifications applicable to Biodiesel to be delivered by authorized Producing Plants. Such non-fossil fuel shall be blended with diesel oil in at least 5% in volume, measured over the total quantity of the resulting product, and shall be mandatorily used all over the country with the exception of ships, mining, first-load fuels, Antarctic diesel oil and other non-compatible uses to the discretion of the Secretariat.

The mentioned percentage is the minimum limit imposed by the Biofuels Law 26,093 (the "Law") for the blend that shall be sold in all gas stations operating in Argentina.

The new specifications replace those established by Resolution N° 1283/2006 issued by the Secretariat and apply to all Biodiesels other than pure non-blended (B100) that shall continue to be governed by the 2006 regulation.

Breach of compliance with quality specifications shall enable the imposition of sanctions contemplated in the Law, such as interdiction of producing plants, exclusion of the producers' registry, fines, and revocation of tax benefits granted to the defaulting company including loss of tax benefits.

For additional information visit www.allendebrea.com.ar



05 November 2010



Court values non-pecuniary aspects of workplace

The recent Federal Court decision in *Quinn v Overland* [2010] FCA 799 highlights the increasing recognition placed by courts on the importance of the non-pecuniary aspects of a workplace to employees.

In this case, Ms Quinn sought an injunction to prevent her employer from further suspending her from work, after already being suspended for seven months during an investigation into allegations of misconduct.

Justice Bromberg found that the employer had failed to act in accordance with statutory obligations under the Public Administration Act 2004 (Vic) and failed to afford Ms Quinn with procedural fairness in accordance with public sector employment principles.

The question was then whether the balance of convenience favoured the granting of the injunction.

Why non-pecuniary factors were relevant

Justice Bromberg identified two main issues to be considered in determining Ms Quinn's application for interlocutory relief:

whether there was a prima facie probability that at trial Ms Quinn would be entitled to relief; and
whether the injury or inconvenience likely to be suffered by Ms Quinn if the injunction were refused outweighed the injury the employer would suffer if the injunction were granted.

Against the injunction, there was an ongoing investigation into her actions at work, and if she were allowed back to work that investigation could be compromised by her talking to certain other staff members. Ms Quinn however gave undertakings she would not communicate with them about the investigation.

There was also the question of her relationship with other staff, but Justice Bromberg found that Ms Quinn would be able to perform her functions adequately.

In Ms Quinn's favour were the benefits she gained from working. Justice Bromberg was careful to highlight that the workplace is not simply a place of economic sustenance:

"[There is] a growing acceptance at common law of the right of an employee to perform work. That recognition has arisen out of changed social attitudes... Workplaces are a hub of important human exchanges which are vital to the wellbeing of individual workers. Work provides employees with purpose, dignity, pride, enjoyment, social acceptance and many social connections... These non pecuniary attributes of work are important and their denial can be devastating to the legitimate interests of any worker, either skilled or unskilled."

Justice Bromberg found that the denial of these non-pecuniary attributes of employment was having a personally detrimental effect on Ms Quinn. Any success at trial, or future award of damages, would not be adequate compensation. He granted her application for an injunction, with the effect of lifting her suspension and allowing her to return to work.

Implications

Considering the weight given to the non-pecuniary aspects of employment, employers should be careful when excluding employees from the workplace. If a court finds that the exclusion of the employee was on balance detrimental, it could, as in this instance, order the employee to be reinstated.

Disclaimer

Clayton Utz communications are intended to provide commentary and general information. They should not be relied upon as legal advice. Formal legal advice should be sought in particular transactions or on matters of interest arising from this bulletin. Persons listed may not be admitted in all states and territories.

For more information visit www.claytonutz.com



LATEST ISSUES

■ Brazil: Republication of Presidential Decree n. 7.323/2010 - Tax on Foreign Exchange Transactions – Rate Increase

Tax

BRAZIL: PRESIDENTIAL DECREE N.º 7.330/2010 - TAX ON FOREIGN EXCHANGE TRANSACTIONS – NEW RATE INCREASE

By virtue of Decree n.º 7,330, published on October 19, 2010, the rate of the Tax on Foreign Exchange Transactions ("IOF/FX") applicable over remittances made by foreign residents for purposes of investing in the Brazilian financial and capital markets has been raised, as a general rule, to 6%.

Certain exceptions to this general rule were maintained, so a 2% rate remains applicable with respect to remittances: (i) made by foreign investors registered according to Resolution 2,689 of the National Monetary Council for investments in variable income in stock or commodities and futures exchanges, except for transactions involving derivatives with a predefined income; and (ii) made by any foreign investor to acquire shares in a public offering registered or not subject to registration before the Brazilian Securities Commission or to subscribe for shares, as long as, in both cases, the shares of the issuing company are listed for trading in a stock exchange.

The IOF/FX rate has also been raised, from 0.38% to 6%, in relation to remittances made by foreign investors to comply with margin requirements imposed by stock or commodities and futures exchanges.

It should be noted that the IOF/FX is a tax whose rate may be changed at any time through a presidential Decree, up to a limit of 25%. This is the third time that the government introduces changes to IOF/FX rates during this month of October. Any such changes are effective immediately. Therefore, the changes increase introduced by Decree n.º 7,330 apply over foreign exchange transactions effected as from October 19, 2010.

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NOVEMBER 2010

Canadian Industry Minister Rejects BHP
Billiton's Bid for Potash

Canadian Industry Minister Rejects BHP Billiton's Bid for Potash

By Sandy Walker

Federal Industry Minister Tony Clement has rejected BHP Billiton's bid for Potash Corporation of Saskatchewan on the basis that it does not meet the "net benefit to Canada" test under the *Investment Canada Act*. This decision is widely regarded as a political response to the intense public relations campaign led by the Premier of Saskatchewan (the province in which most of Potash Corporation's mines are located) that has galvanized popular opposition to the deal over the past two months. BHP Billiton has 30 days under the statute to make additional representations and submissions to the Industry Minister to prove net benefit.

This case is only the second rejection of a deal in the history of the *Investment Canada Act* (outside of the cultural sector). The first deal to be rejected was the 2008 proposed acquisition by an American company, Alliant Techsystems, of the geospatial business of MacDonald, Dettwiler and Associates Ltd. for (broadly speaking) "national interest" reasons (among other rationales reported in the media, the protection of Canadian sovereignty in the Arctic) under the "net benefit" test.

The calculus as to what constitutes a "net benefit to Canada" is an elastic one based generally on economic considerations (such as the impact of the proposed investment on employment, capital expenditures, head office location, participation of Canadians in senior management) but also including industrial and economic policy objectives of a province likely to be significantly affected by the investment. As a result, the Minister's decision under the *Investment Canada Act* can readily be made for political reasons.

While Industry Minister Clement's announcement of his decision offered almost no detail, it will be important to see how the Government characterizes this decision to the international investor community. The Government has been seen as a strong supporter of foreign investment in the past and will no doubt try to distinguish this acquisition from others, either on the basis that potash is of such strategic importance to Canada (given Potash Corporation's significant global share of this commodity) that it should be protected from any foreign takeover or that BHP Billiton's commitments to the Canadian Government are simply not sufficiently positive to meet the "net benefit" test.

The next 30 days will not only give BHP Billiton the opportunity to test the Government's rationale for rejection, but will also no doubt give the Government more time to monitor the political winds. Opposition to the deal has been unusually unified and vociferous with other Premiers, including the Premier of Alberta (which, along with Saskatchewan, is a stronghold for the governing federal Conservative Party), some members of the business community and federal opposition parties, condemning the deal.

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



The Chilean Supreme Court's new guidelines regarding the exequatur in commercial arbitration

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Recently, the Supreme Court rendered judgment in the exequatur request *Stemcor UK Limited vs Compañía Comercial Metalúrgica Limitada*, in which Carey y Cía. was involved counseling Stemcor UK Limited. In this case, Stemcor requested the Court to grant its approval in order to enforce a decision passed by the foreign London Court of International Arbitration which sentenced the Chilean company *Compañía Comercial Metalúrgica Limitada* to compensate damages arising from several contract breaches plus interests and, also, to pay the costs of the proceeding. During the exequatur proceeding, oral arguments were made by the head of our Litigation Group, Gonzalo Fernández.

In the ten reasonings of the judgement (*considerandos resolutivos*), the Court focused on analyzing and clearing all doubts regarding its jurisdiction and the manner to enforce a judgment passed by a foreign arbitration court, establishing clarity on which are the rules that govern the issue. After analyzing each potential applicable regulation, it established the preeminence of one over the other.

The Court's analysis begins by evidencing the positive progress that our legislation has had in matters of enforcing foreign judgments. As a matter of fact, going back in history, we can recall that the newly formed Republic at the beginning of the XIX century, refused any possibility of a foreign power exerting sovereignty in Chilean territory and consequently proscribing that a judgment passed by a foreign court could affect or be enforced in our territory. Under these harsh terms, article V of the Constitutional Regulations of October, 1812



provided that “no decree, ruling or order emanating from any authority or court out of the territory of Chile will have effect whatsoever and those who would try to give them validity will be punished as convicts of the state”.

It was not until the signing of the New York Convention and subsequent pronouncing of Law N° 19.971 on International Commercial Arbitration, in year 2004, that Chilean courts began a maintained tendency to enforce foreign and international decisions in our country. In this regard, through Law N° 19.971, Chile adopted the UNCITRAL Model Law in order to promote our country as an international arbitration center in Latin America and, also, to secure the application of certain principles by Chilean courts when deciding on exequatur requests. In fact, Law N° 19.971 specifically states that judgments passed by foreign courts are binding and enforceable in our country, providing that any country in which an arbitral award has been passed “will recognize it as binding and after a written petition has been filed, at the competent court, it shall be enforced”.

As stated in the Stemcor judgment, this evolution in our legislation is mostly due to the progress made in international relations during the past 200 years. This has lead to more flexibility of the territorial principles and therefore an increasing understanding of cooperation and reciprocal assistance, because “it’s necessary to consider this reality and how the different judicial systems integrate, recognizing validity and binding force of the decisions of the different states courts, and according to the legislative decisions that have been made in this matter”.



The Court continues with a necessary reflection intended to conclude, in general terms, which regulations must be applied to an exequatur request. For this purpose, it examines the different systems through which states grant enforcing power to judgments passed by foreign courts. As it is well known, Chilean legislation uses a cascade system, known as “de cascada”, which in summary is carried out by a process of dismissal. In this regard, the Supreme Court must begin by checking if there are existing international treaties or reciprocal conventions (reciprocidad convencional) between Chile and the state where the judgment was passed. If so, these must be applied. Otherwise, the Court will act according to the reciprocal legality, that is, it will verify whether the petitioning state has enforced judgments passed by Chilean courts in its territory. Finally, if none of the above criteria are applicable, the Court will have to study the foreign judgment being petitioned to be enforced in our territory in order to clarify if the requirements set forth in the article 245 of the Civil Procedural Code are fulfilled.

As to the Stemcor case, the Court points out that since the matter arises from an international commercial arbitration, such regulations must be applied over those of the Civil Procedural Code. Therefore, the Law governing the exequatur must necessarily be Law N° 19.971. The aforementioned is with no disregard to the New York Convention, ratified by Chile in 1975, since it is the regulatory framework by which the arbitration proceeding was held and agreed upon and specially considering both countries (Chile and the United Kingdom) are part of such treaty. In this regard, rules set forth in Law



N° 19.971 applicable to exequatur requests are identical to those of the New York Convention.

Considering the above and after checking if any of the grounds for dismissal were present in the Stemcor case, the Court decided favorable to the exequatur request. For this purpose, it analyzed whether the arbitral award complied with each and every condition required by Chilean Law and, also, if the parties had agreed to submit their disputes to the London Court of International Arbitration. In this regard, it considered that even though the defendant had not actively contributed in the proceeding, it was duly aware and informed of the claim, as well as of the exequatur request and “was not prevented of using its right to defense, but simply decided of free accord, to remain in default in regards to that procedure, notwithstanding having been duly summoned...” (Reasoning N° 9).

In our opinion, the Court established a correct legal precedent when applying the special regulations set forth in Law N° 19.971 and in the New York Convention, over those of the Civil Procedural Code, contributing further to improve Chile’s status as an international commercial arbitration center in the Region.

Author: José Tomás Bulnes L.



Energy Performance Contracting in China

By [Kalley Chen](#) and Xu Zifeng

Energy service company ("ESCO") uses Energy Performance Contracting ("EPC") to provide energy-saving services to the customers. Under an EPC, an ESCO and a customer establish energy-saving target. A customer repays the ESCO its costs and returns by using the energy cost savings from the reduced energy consumption. Compared to other conventional energy conservation methods, EPC has been the most effective in conserving energy in western countries since 1970s. First, EPC, by using ESCO's expertise to promote greater energy efficiency, reduces energy cost of the customers and even, the whole society. Second, EPC shifts much of the cost and risk associated with energy efficiency projects from customers to ESCOs. As a result, customers are more open to take the initiative in energy conservation, and consequently speed up the energy-saving process of the entire society.

I. EPC Practice in China

In March 1998, China and the World Bank and Global Environment Fund introduced the EPC model under the "China Energy Conservation Project". Phase I of the project supported the establishment and development of three pilot ESCOs in Beijing, Liaoning and Shangdong which have demonstrated significant achievement in energy conservation. Launched in November 2003, Phase II established the World Bank Project Department in the China National Investment & Guaranty Co., Ltd. to provide loan guarantee for small and medium-sized enterprises. Additionally, it established the Energy Conservation Service Industry Committee of China Energy Conservation Association ("EMCA").

By the end of 2009, there were 502 ESCOs operating in China. Among them, Haerbin Jiuzhou Electric Co., Ltd. (Ticker Symbol: 300040) was publically listed on ChiNext on January 8, 2010. Shenzhen Das Intellitech Co., Ltd. (Ticker Symbol: 002421) was publically listed on the Shenzhen Stock Exchange on June 3, 2010. Some well-established ESCOs in China EPC market, such as Beijing Shenwu Thermal Energy Technology Co., Ltd. and Sinowdyde Energy Technologies (Beijing) Co., Ltd., received venture capital investments.

II. National Policies

A. Policies on Energy Conservation and Emission Reduction

China established a series of energy conservation policies and targets to encourage the development of the EPC industry in China. In 2006, China announced a plan to reduce energy consumption per unit of GDP by 20% and reduce major pollutants emissions by 10% by 2010. (1) In 2007, China officially established energy conservation as one of its fundamental national policies. (2) On November 25, 2009, China committed to lower its 2005 carbon dioxide emission level by 40%-45% in 2020. (3)

B. Policies on EPC

Chinese central government began to formulate the policies specialized on EPC in 2010. These policies include the *Opinions on the Acceleration of the Implementation of Energy Performance Contracting to Promote the Energy-saving Service Industries* (Guofaban [2010]No.25)(4) ("Opinions"), the *Interim Measures concerning the Administration of Financial Incentives to Fund the Energy Performance Contracting*(5) ("Interim Measures"), and the *General Technical Rules for Energy Performance Contracting* (6) ("General Technical Rules").

a. Development Target

The Opinions set forth two development goals. The Chinese government aims to support a few professional ESCOs and develop a few large scale ESCOs with full scope of energy-saving services and establish a regulated energy efficiency market by 2012. By 2015, China hopes to build an advanced energy efficiency service system and make the EPC model one of the main energy efficiency methods.

b. Financial Incentives

The Opinions entitle EPC projects to receive investment fund from the central finance budget and the central finance fund specializing for energy efficiency and emission reduction. Under the Interim Measures, qualified ESCOs and EPC projects will receive financial incentives. On the central finance level, the standard is RMB240 for 1 ton of standard coal equivalent. (7) On the provincial finance level, the standard is at least RMB60 for 1 ton of standard coal equivalent. The Opinions also encourage banks and other financial institutions to provide project financing and factoring services to meet ESCOs' financial needs.

c. Tax Preference

Pursuant to the Opinions, ESCOs are exempted from business tax for revenue generated from EPC projects and VAT on the free transfer of the EPC assets to customers. After the first revenue-generating year, ESCOs will also be exempted from income tax for the next three years. ESCOs will enjoy a 50% percent income tax reduction for three years beginning the fourth year. In addition, all reasonable fees paid by the customers to the ESCOs pursuant to the energy performance contracts shall be tax-deductible. After the energy performance contract expires, any EPC project assets transferred by the ESCO to the customers shall be treated as depreciable assets or the assets exempted from amortization period and not as the ESCO's revenue.

d. Accounting Method

Under the Opinions, EPC projects of governmental agencies, public institutions and enterprises are subject to specific provisions regarding accounting method. In addition, the EPC project assets transferred by the ESCO to the customers after the expiration of the contract shall be treated as donations.

e. General Technical Rules

The General Technical Rules set forth EPC's terminologies, conceptions, contract types, technical requirements and contract forms. In essence, these rules direct the Chinese government to promote the EPC mechanism and regulate China EPC market.

III. Local Policies

Before the Opinions were released, some provinces and cities, such as Beijing and Shanghai, had formulated their own local policies to support the development of EPC.

Beijing released the *Interim Measures on Supporting EPC Projects of Beijing* in 2009. Beijing government provides rewards to EPC projects initiated by public institutions, large-scale public buildings above 20,000 square meters, or other customers with energy consumption of 2,000 tons of standard coal equivalent per year.

In September 2002, Shanghai EPC Committee began to regulate the energy consumption market in Shanghai and provided preferential policies to those enterprises with energy innovation and ESCOs. In September 2008, Shanghai government set up a specialized fund to support and reward the qualified EPC projects under the *Implementing Measures Supporting EPC Projects in Shanghai*.

IV. EPC Operation Process

EPC model helps ESCOs and their customers in reaching amiable agreement regarding their rights and interests. In practice, an EPC contains two steps.

A. Contract Negotiation

First, the ESCO will visit the customer's premises or facility to assess the energy consumption of the customer and provide the customer with a preliminary project proposal. If the customer accepts the proposal, the ESCO will conduct a more detailed examination of the energy premises to verify the information in the preliminary proposal. After confirming the data, the two parties will sign a letter of intent of the EPC project and a final energy performance contract. In general, an energy performance contract explains the rights and obligations of the ESCO and the customer, energy-saving target, measurement and verification of energy savings, and the assumption of measurement and test cost.

B. Contract Implementation

Upon signing the final energy performance contract, the ESCO initiates the procurement and installation of the equipments, construction and maintenance of the facilities and staff training based on the energy-saving plan. After the EPC project begins, the ESCO and the customer will monitor the energy saved according to the provisions of the energy performance contract. In some situations, many ESCOs also provide project financing or invest in EPC projects using ESCOs' own capital, World Bank loan, commercial bank loan, or other government incentives.

V. Types of Energy Performance Contracts

An energy performance contracts can be an energy-saving benefits sharing contract, an energy-saving guarantee contract, or an energy expense entrusted contract. (8)

In an energy-saving benefits sharing contract, the ESCO will usually provide, at its own cost, construction service, materials, equipment and technology. The ESCO and the customer will share the utility savings generated under the contract. Once the contract expires, the customer will retain the energy efficiency equipments and be entitled to the future energy savings generated from the EPC project.

The customer in an energy savings guarantee contract will bear the costs (partially or wholly) for the EPC projects. Conversely, the ESCO is responsible for implementing the EPC projects and guarantees a minimum level of utility savings. Upon completion of the EPC projects, the

customer will subsidize the ESCO for the guaranteed utility savings. On the other hand, the ESCO will pay the customer the difference if the utility savings fall short of the guaranteed level.

An entrusted energy expense entrusted contract provides that the customer entrusts the ESCO to operate its energy system or implement the energy-saving innovation during the contract term at an agreed energy cost. If the energy expense, after the implementation of the contract, exceeds the agreed energy cost, the ESCO will repay the difference to the customer. If the energy expense is below the agreed energy cost, the ESCO will retain the difference.

In practice, many energy performance contracts are hybrids of the foregoing forms.

VI. Conclusion

Although EPC model has existed in China for more than ten years, the China EPC market remains in dormancy. While China has released a series of EPC legislation and policies to improve the development of its EPC market, the effects of these measures remain to be seen.

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

* Xu Zifeng is an associate of King & Wood's Venture Capital Financing Group in Beijing.

Notes:

(1) See the *Outline of the 11th Five-year Plan for National Economic & Social Development of the PRC* approved by the Fourth Session of the 10th National People's Congress on March 14, 2006; the *General Work Plan on Energy Conservation and Emission Reduction* issued by the State Council on November 22, 2007; and the *Eleventh Five-Year Plan of National Environmental Protection* released by the State Council on June 3, 2007.

(2) See the *PRC Energy Conservation Law* amended on October 28, 2007.

(3) China restated the target on the Climate Change Conference in Copenhagen held on December 7, 2009.

(4) Issued by the General Office of the State Council on April 2, 2010.

(5) Jointly issued by the National Development and Reform Committee and Department of Finance on June 3, 2010.

(6) Jointly issued by the General Administration of Quality Supervision, Inspection and Quarantine and the Standardization Administration on August 9, 2010.

(7) A unit representing energy generated by burning one ton of standard coal is 7,000 kilocalories in China.

(8) See the *General Technical Rules for Energy Performance Contracting*.

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Lawsuit challenging the constitutionality of Law 1382 of 2010

Wednesday, 03 November 2010 00:00

News Flash Number: 93

Equipo: Natural Resources and Environment

On september 8 of 2010, Guillermo León Henao Gómez, a colombian citizen, filed a lawsuit in the Colombian Constitutional Court challenging the constitutionality of Law 1382 of 2010. This law modified the Colombian Mining Code (Law 685 of 2001).

The plaintiff argues that Law 1382 of 2010 violates articles 1; 2; 3; 4; 7°; 90; 13; 40, second numeral; 93; 329, and 330 of the Colombian Constitution, as well as article 15 of the Convention 169 of 1989 adopted by the International Labour Organization. These articles require previous consultation process with the indigenous and tribal communities. This consultation process is a fundamental right and an obligation when the enactment of any law or statute affects the indigenous or tribal communities.

The plaintiff grounds his allegation on: (i) that Law 1382 of 2010 modifies Law 685 of 2001 (current Colombian Mining Code); (ii) that Law 1382 of 2010 contains legal provisions related to the exploration and exploitation of non renewable natural resources; (iii) that any modification to Law 685 of 2001 would directly affect the mining activities developed by the indigenous communities or by others inside the indigenous territories and (iv) that the consultation process was not observed.

It is important to mention that the Colombian Constitutional Court held that Law 1021 of 2006 (General Forest Law) and Law 1152 of 2007 (Rural Development Statute) were unconstitutional by means of the decisions C-030 of 2008 and C-175 of 2009, for not observing the previous consultation process with the indigenous and tribal communities during their enactment.

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INTRODUCTION OF A SPECIAL TAX ON FINANCIAL INSTITUTIONS

The recent international financial crisis and the cost of bank and financial institution bailouts by numerous countries to alleviate its effects has led those in government to question how financial institutions should be expected to contribute to the financial effort that came to their rescue to such a massive extent.

The idea of introducing a banking tax has been widely mooted at European level and there now appears to be a consensus on the principle of adopting such a tax. All that remains is to discuss how it should be implemented in practical terms. At the same time, some countries have also taken steps towards incorporating a domestic tax on financial institutions into their fiscal arsenal. Taking the lead, the German government settled on draft legislation at the end of August 2010, which is due to be submitted to Parliament sometime before the end of the year. Both France and Great Britain are proposing to do likewise. Having passed Law XC of 2010 (the "**Law**") on 22 July 2010, bringing in a special tax on financial institutions (the "**Tax**"), Hungary might almost be the discrete forerunner in the field compared to its European counterparts.

Bringing in the new Tax has not been achieved without arousing a degree of discontent, most loudly voiced by the European Banking Federation, International Monetary Fund and Hungarian Budgetary Committee. These organisations question whether it is the right time, economically speaking, to introduce a tax in the form made law by the Hungarian parliament, which they believe may weaken financial institutions to too great an extent and thus undermine the country's economic recovery because the tax rates are too high. In addition to this economic dissent, the question of the Law's constitutionality has also been added to the controversy. However, as the issue has not yet been referred to the Constitutional Court, the Law introducing the Tax came into force on 28 September 2010.

Scope of the Tax

Financial institutions to be taxed

According to the Law, the following financial institutions (including those carrying on business as branches) will be liable for the Tax:

- credit institutions ("*hitelintézet*");
- insurers ("*biztosító*");
- all other financial institutions, including:
 - finance companies ("*pénzügyi vállalkozás*");

- investment service providers ("*befektetési vállalkozás*");
- stock exchanges ("*tőzsde*");
- goods exchange investment service providers ("*árutőzsdei szolgáltató*");
- risk capital fund management companies ("*kockázati tőkealap-kezelő*");
- investment fund management companies ("*befektetési alapkezelő*").

Smaller insurance mutual societies ("*biztosítási egyesület*") are excluded from the scope of the Law. They are defined as insurance mutual societies not engaged in life assurance business but only insurance providing assistance or offering cover for fire, acts of God or other financial losses, provided the value of the premiums collected per financial year by the mutual society has not exceeded HUF 125 million (app. EUR 461,000) over the last three years. Although an exemption for insurance companies issued with an operating licence after 1 July 2007 was also discussed during parliamentary debate, the proposal was finally rejected.

Timescale for application of the law

The legislature intended the Tax to apply temporarily over enough time to help compensate for the budgetary deficit caused by the current crisis. It will therefore only be levied in 2010, 2011 and 2012. Focusing on liability for the Tax in 2010, only those financial institutions whose financial statements for the 2009 financial year have been closed prior to 1 July 2010 will be liable for the tax in 2010, the assessment base being determined with reference to that annual report (cf. *infra*).

It is this point that raises doubts as to the Law's constitutionality. In fact, the rule of non-retroactivity stemming from the entrenched principle of the rule of law, laid down in Article 2 (1) of the Constitution and Article 12 (2) of Law XI of 1987 *on the rules applicable to the adoption of legal instruments*, is construed for taxation purposes by the Hungarian Constitutional Court as prohibiting the legislature from requiring taxpayers to pay a tax for a period preceding the promulgation date of the law in question¹. In this case, by providing that the Tax payable in 2010 will be assessed according to the results of financial institutions in 2009, the Law is retroactively impacting on a legal situation existing prior to its promulgation (on 13 August 2010) and may therefore be held unconstitutional if referred to the Constitutional Court for a ruling.

Tax imposition rules

The Tax imposition rules vary according to the category of the taxpayer.

Credit Institutions: the assessment base for the Tax due in 2010 is the total balance sheet value, as stated in the 2009 annual report prepared in accordance with Government Decree No. 250/2000 (XII. 24) *on*

¹ Decision No. 903/B/1990 of the Constitutional Court of 13 November 1990



accounting obligations and the preparation of the annual reports of credit institutions less:

- claims pursuant to domestic interbank loans;
- debt instruments issued by Hungarian credit institutions, finance companies and investment service providers;
- claims pursuant to subordinated loans, additional subordinated loans or loans granted to Hungarian finance companies or investment service providers.

The tax rate applicable on the first HUF 50 billion (app. EUR 184,442,000) of the taxable assessment base is 0.15%. A rate of 0.5% applies over and above this threshold.

Insurance Companies: the assessment base for the Tax due in 2010 is the total premiums received, as stated in the 2009 annual report, prepared in accordance with Government Decree No; 192/2000 (XI. 24) *on accounting obligations and the preparation of the annual reports of insurers*. To be more precise, the assessment base for the Tax is the amount of premiums received from insurance (excluding reinsurance) other than life assurance, plus gross premiums written from the life assurance branch, less:

- 90% of premiums received under single-premium policies;
- 90% of premiums received from temporary insurance;
- all premiums written in respect of deferred-starting pension supplement insurances ("*halasztott kezdetű nyugdíjkiegészítő biztosítás*").

The tax rate payable by insurers is 6.2% of the assessment base, as defined above.

POLAND

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ADAPTATION OF DIRECTIVES 2007/44/EC AND 2005/56/EC TO POLISH LAW

The Act amending the Banking Law, the Insurance Activity Act, the Investment Funds Act, the Trading in Financial Instruments Act and the Financial Market Supervision Act, dated 25 June 2010 (hereinafter referred to as the "**Act**"), came into force on 14 August 2010.

The aim of the Act is to implement Directive 2007/44/EC into national law in scope of the procedural rules and evaluation criteria for the prudential assessment of

acquisitions of shares in financial sector entities (banks, insurance or re-insurance undertakings, investment funds companies and brokerage houses), and to adapt the Banking Law to the requirements of Directive 2005/56/EC on cross-border mergers of companies to allow the merger of a bank and a credit institution.

The intention is to improve the acquisition of shares in entities of the financial market. These improvements will come from two main areas. Firstly, improvements are expected from the introduction of uniform procedures among the various sectors, in line with solutions operating in other European Union countries. Secondly, the greater transparency of procedures, through the introduction of more detailed regulations, instead of solutions created on the basis of the practice of law, founded partly on the basis of appropriate measures for other types of proceedings, will make it easier to carry out restructuring and ownership changes in international capital groups.

In the Banking Law, the hitherto institution of permission to execute voting rights from acquired shares has been replaced by the institution of an objection to a proposed acquisition which may be reported by the Financial Supervisory Commission (**KNF**).

With regard to the solutions adopted on the basis of the current Insurance Activities Act, the Investment Funds Act and the Trading in Financial Instruments Act, more detailed procedural rules were introduced for cases falling under the obligation to notify the KNF, the assessment process, the prudential criteria used, the duration of the assessment, as well as the objection itself.

An individual or company intending to acquire shares or rights arising from shares in a domestic bank, domestic insurance or re-insurance undertaking, investment fund company and brokerage house is required to notify the KNF (amended Article 25.1 of the Banking Law, Article 35.1 of The Insurance Activity Act, Article 54.1 of the Investment Funds Act, Article 106.1 of the Trading in Financial Instruments Act). The obligation to notify applies when crossing one of the defined thresholds: 10%, 20%, one third and 50% of the total number of votes at a general meeting or of the share capital.

Anyone intending to be the parent undertaking of any of the above is also obliged to notify the KNF. The provisions of the Act require the KNF to issue immediate, written confirmation of receipt of the notification, along with an indication of settlement date (the expiry date of the notification of the decision on the opposition).

If no objection is expressed within 60 working days from receiving the notification, together with all the statutorily required information and documents, then the intended transaction can be carried out.

An objection may only be raised under certain conditions. It may arise in connection with the notifying entity having a potential negative impact on the stable



management of a financial sector company. An objection may also be reported if any incompliance with formal requirements has not been removed within the period defined, or if additional information requested by the KNF has not been delivered.

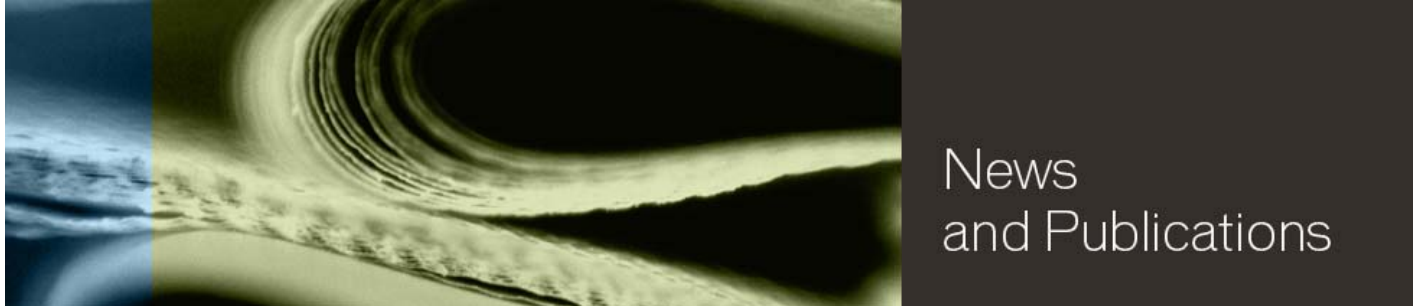
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The proceedings may be ended before the deadline of 60 days if KNF issues a decision on finding no grounds to object (Article 25h.4 of the Banking Law, Article 35h.4 of the Insurance Activity Act, Article 54h.4 of the Investment Funds Act and Article 106h.4 of the Trading in Financial Instruments Act).

In addition, the KNF may summon the entity who filed the notification to submit additional information or documents within 50 days of submitting the notification. Until the required information or documents have been submitted, the deadline for the decision on the objection is suspended, though subsequent summons do not result in a suspension.

The amended acts: the Banking Law, the Insurance Activity Act, the Investment Funds Act, trading in Financial Instruments Act regulate both direct or indirect acquisitions of shares or rights to shares, or the process of becoming the parent entity of a financial entity. They also state which of the entities is obliged to provide the KNF with information required in the cases mentioned above. The acts do not set out a requirement to inform the KNF about the acquisition of shares made by a domestic bank, credit institution, brokerage house or investment firm in a European Member State in execution of a contract of investment underwriting.

Breaching the conditions specified in the amended acts when acquiring the shares leads to a ban on exercising voting rights. If the parent undertaking exercises such rights, then the bank's board members appointed by the parent, as well as by members of the Board, proxies or persons performing the managerial functions, are banned from participating in activities of representation. In addition, the KNF can order the sale of the shares in the bank, and if this fails then it may impose monetary penalties, establish a bank receivership, or even repeal the authorisation to establish a bank and decide on its liquidation. The upper limit of the fine for not obeying a KNF decision on ordering the sale of shares acquired in breach of the law was unified among all the amended acts and now stands at PLN 10 million.



News and Publications

NEWS DETAIL

27/10/2010

NEW REGULATION ON DEBT SECURITIES TRUSTEESHIP

The Capital Market and Financial Market Supervisory Agency ("Bapepam-LK") issued, on 6 September 2010, a new regulation No. VI.C.4 regarding General Provisions and Contracts on Trusteeship of Debt Securities (the "Regulation"). The Regulation was issued in the form of Decree of the Chairman of Bapepam-LK No. 412/BL/2010.

The Regulation contains extensive provisions on trustee related matters such as the tasks and obligations of a trustee as well as prohibited trustees' acts and circumstances. The main bulk of the Regulation, however, deals with the trusteeship contract. This includes provisions with respect to the identity of the parties in a debt issuance agreement, the details of the debt itself such as the principal amount, interest as well as the securities and type of instruments issued under the trusteeship agreement, the tasks and obligations of the paying agent, debt securities other than Indonesian Rupiah, and mechanism for the buyback as well as the general meeting of the holders of debt securities. The term "trusteeship contract" is defined in the Regulation as "agreement between an issuer and the trustee in the framework of the issuance of debt securities". The Regulation does not define the term "trustee" as it is already defined in Law No. 8/1995 on Capital Market.

The Regulation will become effective sixty days as from its issue date of 6 September 2010. (by: Hamud M. Balfas).

Update

Banking & Finance

Expertise requirement for financial enterprises to be extended and clarified / Aanscherping deskundigheidstoetsing door DNB en AFM

12 October 2010

This update is sent from NautaDutilh

- Expertise requirement for financial enterprises to be extended and clarified
-

Expertise requirement for financial enterprises to be extended and clarified

This newsflash discusses the following two important developments regarding the expertise requirement for members of the management board and supervisory board of financial enterprises:

- *a bill is now before the Dutch parliament pursuant to which the expertise of supervisory board members of a financial enterprise must, as from 1 January 2011, be tested by the Dutch Central Bank ("DCB") and the Authority for the Financial Markets ("AFM");*
- *the DCB and AFM have published a draft policy rule setting out the criteria they will use to test whether management and supervisory board members have met the statutory expertise test.*

Expertise test for supervisory board members

On 22 September 2010, a bill was submitted to the lower house of the Dutch parliament under which supervisory board members (which, for the purpose of this newsflash, includes any other supervisory body) of the financial enterprises listed below will have to be tested by the DCB or the AFM before they can be appointed. The financial enterprises in question are:

- (the managers and custodians of) investment institutions;
- investment firms;
- payment institutions;
- financial service providers;
- credit institutions; and
- insurance companies.

Supervisory board members are currently subject to a trustworthiness requirement but not to an expertise requirement. The expertise requirement applies only to management board members and other persons who determine the financial enterprise's day-to-day management.

The target date for the entry into force of the new legislation is 1 January 2011. Transitional rules will apply to persons who are already supervisory board members on that date. Under those rules, such persons will be presumed to meet the expertise requirement until the end of their term of appointment or 1 January 2015, if earlier. This presumption will cease to apply if there is a change in the relevant facts or circumstances which gives reasonable cause for an evaluation of the relevant person's expertise. In the event of reappointment after 1 January 2011, an expertise test must be conducted.

DCB and AFM policy rule on expertise

On 1 September 2010 the DCB and AFM published a consultation document for a joint policy rule clarifying and specifying the expertise requirement. The policy rule is intended to take effect on 1 January 2011. Interested parties have until 31 October 2010 to submit their comments.

The policy rule will apply not only to management and supervisory board members of the financial enterprises listed above (under "Expertise test for supervisory board members"), but also to those who determine or co-determine the policy of pension funds and to management board members, supervisory board members and those who determine or co-determine the policy of trust offices.

The policy rule sets out the criteria and information to be used by the DCB and AFM when testing whether the statutory expertise requirement has been met. The rule divides financial enterprises into three different groups and sets out different conditions for each group. For example, the expertise requirement for management and supervisory board members of a bank differs from the requirement applicable to management and supervisory board members of an investment institution.

According to the policy rule, expertise consists of:

- knowledge;
- skills; and
- professional conduct.

Expertise can be shown by means of:

- education;
- work experience; and
- evidence of relevant personal characteristics/abilities (such as decisiveness, communicative skills, leadership ability and vision).

For financial enterprises in each group, the policy rule indicates, among other things, the number of years over which the relevant skills and other expertise must have been acquired.

The requisite expertise must relate to the field of business in which the relevant enterprise operates. For example, for the group including banks and insurers, the policy rule states that expertise is required on the following topics:

- management, organisation and communication;
- the enterprise's products and services and the markets in which the enterprise is active;
- controls and integrity in the conduct of business; and
- balanced and consistent decision-making.

Different areas of expertise apply in the case of pension funds. The policy rule specifies the following topics:

- organisational management;
- the relevant laws and regulations;
- pension schemes and types of pensions;
- financial and actuarial issues, including financing, investments, actuarial principles and reinsurance;
- administrative organisation and internal controls; and
- communication.

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Registered Trademarks Remain Valid Until Revocation

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The Trademark Act provides legal processes for the revocation, opposition, and invalidation of trademarks. When the Intellectual Property Office mistakenly accepts a trademark registration when it should have denied it, its decision is subject to cancellation through either an opposition or invalidation action. The effect of such cancellations is retrospective.

A revocation, on the other hand, seeks to cancel a properly registered trademark because of subsequent illegal use or public interest concerns. While the Trademark Act does not explicitly specify whether the effect of a revocation is retrospective or prospective only, Article 125 of the Administrative Procedure Act provides that such administrative decisions should take effect prospectively. Therefore, pursuant to the Trademark Act, a right holder of a registered trademark may seek damages or injunctive relief against infringing actions that took place while his trademark is still in effect, even if the trademark in question is later revoked. The Intellectual Property Court agreed with this interpretation in its recent decision in civil case (98-Ming-Shang-Su-No. 41). Registered trademarks remain valid until revocation.

Lee and Li Bulletin

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INTELLECTUAL PROPERTY REPORT

Articles

Trade Dress Fundamentals Revisited: Protection Of Color Schemes In College Sports Uniforms

[Jeffrey Sullivan](#) and Michael Knierem¹

I. Introduction

Trademark protection for color schemes is once again in the news. On November 2, 2009, the United States District Court for the Northern District of Alabama issued a memorandum opinion in *University of Alabama Board of Trustees v. New Life Art*,² a case addressing the issue of whether the University of Alabama ("UA") had trademark rights in its football team colors. The UA Board of Trustees sued painter Daniel A. Moore, an artist who has gained recognition for his oil paint renditions of famous moments in American football history. Moore had previously signed a licensing agreement with UA in 1991, but in 2000, he decided that his paintings did not require a license. UA disagreed, insisting that its uniform colors of crimson and white are protectable trade dress.

The district court, in deciding cross motions for summary judgment, noted that the colors of UA's uniforms in Moore's paintings may be a weak trade dress mark and that those paintings may create a likelihood of confusion, and thus summary judgment would not be appropriate on those issues alone. However, the court concluded that Moore was entitled to prevail on summary judgment on his defenses of the right to artistic expression, the First Amendment and fair use, noting that even if there were some likelihood of confusion, the balancing of such likelihood and the public interest entitled Moore to prevail. The court was careful to note the distinction between trade dress protection of uniform colors and UA's registered marks, including symbols and logos — the latter category clearly being protectable. The case is now on appeal to the Court of Appeals for the Eleventh Circuit. Twenty-seven other universities have submitted an *amicus curiae* brief arguing for the protection of uniform colors.

II. Background

A. Trade Dress Basics

Section 43(a) of the Lanham Act provides the statutory foundation for trademark and trade dress causes of action, prohibiting the sale of goods by use of:

any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of [the seller] with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . .³

Case law has made clear that Section 43(a) provides a cause of action for trade dress infringement, and is not limited to registered marks.⁴

Trade dress has been defined by courts as "the total image or overall design or appearance of a product or its packaging."⁵ Thus, trade dress "involves the total image of a product and may include features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques."⁶

The United States Supreme Court clarified in *Two Pesos v. Taco Cabana* (a dispute involving respective vivid tropical-themed paint and décor schemes in rival Mexican restaurant chains) that to make out a prima facie case for trade dress infringement, a plaintiff must establish three elements. First, the design must be nonfunctional, as functional elements of a product's trade dress are not protectable.⁷ Second, the design must either be inherently distinctive or distinctive by virtue of having acquired secondary meaning.⁸ Third, there must be a likelihood of confusion.⁹

The test for whether trade dress is inherently distinctive has been adopted from the trademark context. In *Abercrombie & Fitch v. Hunting World*, the Second Circuit classified marks as either generic, descriptive, suggestive, arbitrary or fanciful.¹⁰ Suggestive, arbitrary, or fanciful marks are almost always inherently distinctive

because they “serve[] to identify a particular source of a product” whether or not they have acquired secondary meaning.¹¹ Descriptive marks must be shown to have acquired secondary meaning before they are eligible for protection.¹² Generic marks never merit protection.¹³

If a plaintiff cannot show inherent distinctiveness, he must demonstrate that the trade dress has acquired secondary meaning.¹⁴ Secondary meaning exists when “in the minds of the public, the primary significance of [the product design] is to identify the source of the product rather than the product itself.”¹⁵ Put another way, “[a] plaintiff’s trade dress acquires secondary meaning when the purchasing public associates the dress with a particular source.”¹⁶

Finally, the last element in a cause of action for trade dress infringement is likelihood of confusion. Courts apply a traditional trademark analysis to the issue of likelihood of confusion in trade dress cases. Factors relevant to this inquiry differ slightly in language from circuit to circuit, but generally include (1) similarity of the conflicting designations, (2) proximity of the competing parties’ products or services, (3) strength of the mark, (4) marketing channels used, (5) degree of care likely to be used by customers purchasing the goods or services, (6) a party’s intent in selecting the mark, (7) evidence of actual confusion and (8) likelihood of expansion in product lines.¹⁷

B. Trade Dress Protection for Colors

As the Supreme Court held in *Two Pesos*, colors may give rise to trade dress protection.¹⁸ Indeed, the Supreme Court has held that green-gold used on dry cleaning press pads was a protectable trademark because the color had acquired secondary meaning in *Qualitex v. Jacobson Products*.¹⁹ Other courts have likewise held that color may give rise to a protectable mark. For example, the pink color applied to fiberglass insulation produced by Owens-Corning Fiberglas Corporation was held a valid mark by the Federal Circuit because it had acquired secondary meaning.²⁰

A plaintiff attempting to enforce a color mark must meet the three elements discussed in *Two Pesos*. First, the color must not be functional.²¹ In *Saint-Gobain v. 3M*, The Trademark Trial and Appeal Board held that a deep purple shade for coated abrasives was functional, noting that “[i]n the field of coated abrasives, color serves a myriad of functions, including color coding, and the need to color code lends support for the basic finding that color, including purple, is functional in the field of coated abrasives having paper or cloth backing.”²²

Although color marks may acquire secondary meaning, the Supreme Court in *Wal-Mart v. Samara Brothers* stated that they can never be inherently distinctive.²³ Thus, in order for a color mark to be protectable as trade dress, it must acquire distinctiveness. Finally, just as in all other trade dress infringement actions, a plaintiff must show that there is a likelihood of confusion because of the color mark.

C. Trade Dress in Sports Uniforms

In 2004, four universities sued a t-shirt manufacturer, Smack Apparel, in *LSU v. Smack Apparel*,²⁴ after Smack Apparel allegedly sold six t-shirts containing colors, images and slogans related, among other things, to Oklahoma and LSU’s match-up in the 2004 Sugar Bowl. For example, one of the shirts, while not containing any of LSU’s registered trademarks, was colored in the school’s customary purple and gold team colors. Another shirt was scarlet and gray — evoking Ohio State — along with a map of Ohio and the phrase “Got Seven? We do! 7 Time National Champs.”

In 2006, the United States District Court for the Eastern District of Louisiana found for the universities on their trade dress infringement claim regarding the color schemes of the universities’ football uniforms, finding all three elements required by *Two Pesos* — nonfunctionality, distinctiveness by acquired secondary meaning (via the *Abercrombie* classification scheme) and likelihood of confusion.²⁵ The court held “that plaintiffs have established secondary meaning in their particular color schemes, logos, and designs.”²⁶ In addition to the fact that the universities had used their respective color schemes for a long period of time, the court noted that “[t]he universities advertise items with their school colors in almost every conceivable manner, and . . . the universities’ school colors have been referenced numerous times in magazines and newspapers. The universities have even used the colors to refer to themselves, *i.e.*, LSU sometimes refers to itself as the ‘Purple and Gold.’”²⁷

In its likelihood of confusion analysis, the court concluded that “the universities’ color schemes, logos, and designs are extremely strong marks,”²⁸ and that “[t]he stronger the mark, the greater the protection it receives because the greater the likelihood that consumers will confuse the junior user’s use with that to the senior user.”²⁹ After a thorough discussion of the other factors relevant to likelihood of confusion, the court concluded that plaintiffs had established a likelihood of confusion.³⁰ The court also briefly discussed the nonfunctionality element in the infringement analysis, concluding that the universities had demonstrated that their color schemes, logos and designs are not functional.³¹

Smack Apparel appealed to the Fifth Circuit, which affirmed the trial court's decision.³² In regard to the secondary meaning analysis, the court noted that the trial court's finding of distinctiveness by acquired secondary meaning was "consistent with the importance generally placed on sports team logos and colors by the public,"³³ and further noted that the "desire by consumers to associate with a particular university supports the conclusion that team colors and logos are, in the minds of the fans and other consumers, source indicators of team-related apparel."³⁴ In regard to the likelihood of confusion analysis, the Fifth Circuit affirmed the district court's analysis of the relevant factors, "particularly the overwhelming similarity of the marks and the defendant's intent to profit from the [u]niversities' reputation."³⁵ Moreover, the court stated that "[t]his creation of a link in the consumer's mind between the t-shirts and the [u]niversities and the intent to directly profit therefrom results in 'an unmistakable aura of deception' and likelihood of confusion."³⁶

III. *University of Alabama Board of Trustees v. New Life Art*

The U.S. District Court for the Northern District of Alabama has come to a somewhat different outcome from that of the Fifth Circuit in *University of Alabama Board of Trustees v. New Life Art*. Although the district court's ruling on the parties' motions for summary judgment did not reach the merits of whether UA had made out a prima facie case of trade dress infringement —stating only that there *may* be acquired secondary meaning and likelihood of confusion— the court did hold that the artist Daniel Moore's defenses on the theories of freedom of artistic expression, the First Amendment and fair use superseded any potential trade dress rights in the University's uniform color schemes.³⁷

However, the court made a number of telling comments when discussing the issues of likelihood of confusion, secondary meaning and functionality. For instance, the court noted that UA's uniforms and color schemes are "descriptive at best," and that a number of other Division 1-A football teams have crimson as part of their colors.³⁸ This suggests a significantly different approach from the way color schemes were characterized by the Fifth Circuit in *LSU v. Smack Apparel*. Additionally, in discussing functionality, the court noted that "[f]ootball uniform colors clearly perform a function. They help avoid confusion as to team members for the benefit of officials, opposing team members, and spectators."³⁹

In discussing Moore's defenses, the court relied on *Boston Professional Hockey Association v. Dallas Cap & Emblem Manufacturing*⁴⁰ for the proposition that there is a distinction between fine art and product sales involving "cards, T-shirts, cups, mugs, posters, mini prints, calendars, etc."⁴¹ Because Moore created works of fine art, a point that plaintiff did not dispute, the court concluded that the "depiction of the uniforms in the paintings [was] incidental to the purpose and expression of the paintings."⁴² Following the so-called "*Rogers* test," which states generally that the Lanham Act should apply to artistic works only if "the public interest in avoiding consumer confusion outweighs the public interest in free expression,"⁴³ the court concluded that the public interest outweighed the likelihood of confusion.⁴⁴

Finally, the court suggested that Moore's paintings were a fair use. The court, citing *International Stamp Art v. U.S. Postal Service*,⁴⁵ stated that "[a] fair-use defense is established if a defendant proves that its use is (1) other than as a mark, (2) in a descriptive sense, and (3) in good faith."⁴⁶ The court concluded "[t]here is no substantial evidence here, as to the artistic paintings and prints, that the defendants implicated the source-identification function that is the purpose of the trademark. The defendants used their own marks to identify the source. This is evidence of good faith."⁴⁷

IV. Conclusion

Depending on one's viewpoint, the *UA Board of Trustees v. Moore* case either marks a new trend in trade dress protection for color schemes or is completely reconcilable with *LSU v. Smack Apparel*. In support of the latter viewpoint, one can point to clear distinctions in the facts — *Smack Apparel* involved T-shirts, typically a very commercial souvenir item that may be profitably sold by the rights owners, while Moore was painting fine art. Along these lines, the court specifically stated in the *UA* case that the holding would *not* cover mugs or T-shirts replicated with the same fine art prints. On the other hand, the *UA* court also arguably suggested, albeit subtly and in dicta, that UA may not have much assertable trade dress protection for its uniform color schemes. It characterized UA's color scheme as "descriptive at best," and stated that uniform colors have functionality. Whether this more skeptical view of the protectability of university athletic color schemes rises to the level of a circuit split with the Fifth Circuit will become clearer when the Eleventh Circuit issues an opinion on the appeal.

¹ Michael Knierem was a former Baker Botts summer associate.

² *Univ. of Ala. Bd. of Trustees v. New Life Art Inc.*, 677 F. Supp. 2d 1238 (N.D. Ala. 2009).

- ³ 15 U.S.C. § 1125(a).
- ⁴ See, e.g., *Pebble Beach Co. v. Tour 18 I Ltd.*, 155 F.3d 526, 536 (5th Cir. 1998) (“The same tests apply to both trademarks and trade dress to determine whether they are protectable [sic] and whether they have been infringed, regardless of whether they are registered or unregistered.”).
- ⁵ *Rose Art Indus., Inc. v. Raymond Geddes & Co.*, 31 F. Supp. 2d 367 (D.N.J. 1998); see also *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 765 n.1 (1992).
- ⁶ *Two Pesos*, 505 U.S. at 765 n.1.
- ⁷ *Two Pesos*, 505 U.S. at 769.
- ⁸ *Id.*
- ⁹ *Id.*
- ¹⁰ *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976).
- ¹¹ See *Two Pesos*, 505 U.S. 768.
- ¹² *Id.* at 769.
- ¹³ *Id.* at 768.
- ¹⁴ *Id.* at 769.
- ¹⁵ *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 211 (2000) (quoting *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 851 n.11 (1982)).
- ¹⁶ *Vision Sports, Inc. v. Melville Corp.*, 888 F.2d 609, 615 (9th Cir. 1989).
- ¹⁷ See *Brookfield Commc'ns v. West Coast Entm't Corp.*, 174 F.3d 1036, 1053-54 (9th Cir. 1999).
- ¹⁸ *Two Pesos*, 505 U.S. at 765 n.1.
- ¹⁹ *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159 (1995).
- ²⁰ *In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116 (Fed. Cir. 1985).
- ²¹ See *Brunswick Corp. v. British Seagull Ltd.*, 35 F.3d 1527 (Fed. Cir. 1994) (holding the color black functional for outboard motors because while the color did not provide utilitarian advantages in terms of making the engines work better, it nevertheless provided recognizable competitive advantages in terms of being compatible with a wide variety of boat colors and making the engines appear smaller).
- ²² *Saint-Gobain Corp. v. 3M Co.*, 90 U.S.P.Q.2d (BNA) 1425, 1447 (T.T.A.B. 2007).
- ²³ *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 211-12 (2000).
- ²⁴ *Bd. of Supervisors for La. State Univ. v. Smack Apparel Co.*, 438 F. Supp.2d 653 (E.D. La. 2006).
- ²⁵ *Id.*
- ²⁶ *Id.* at 658.
- ²⁷ *Id.*
- ²⁸ *Id.* at 659.
- ²⁹ *Id.* at 658.
- ³⁰ *Id.* at 660-61.
- ³¹ *Id.* at 662.
- ³² *Bd. of Supervisors for La. State Univ. v. Smack Apparel Co.*, 550 F.3d 465, 475 (5th Cir. 2008).
- ³³ *Id.* at 477.
- ³⁴ *Id.* at 478.
- ³⁵ *Id.* at 483.
- ³⁶ *Id.* at 484 (quoting *Boston Athletic Ass'n v. Sullivan*, 867 F.2d 22, 35 (1st Cir. 1989)).
- ³⁷ *Univ. of Ala. Bd. of Trustees v. New Life Art*, 677 F. Supp.2d 1238 (N.D. Ala. 2009).
- ³⁸ *Id.* at 1249.
- ³⁹ *Id.*
- ⁴⁰ *Boston Prof'l Hockey Ass'n v. Dallas Cap & Emblem Mfg.*, 510 F.2d 1004 (5th Cir. 1975).
- ⁴¹ *Univ. of Ala. Bd. of Trustees*, 677 F. Supp.2d at 1250.
- ⁴² *Id.*
- ⁴³ *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1980).
- ⁴⁴ *Univ. of Ala. Bd. of Trustees*, 677 F. Supp.2d at 1259.
- ⁴⁵ *Int'l Stamp Art, Inc. v. U.S. Postal Serv.*, 456 F.3d 1270 (11th Cir. 2006).
- ⁴⁶ *Univ. of Ala. Bd. of Trustees*, 677 F. Supp.2d at 1252 (internal quotation marks and emphasis omitted).
- ⁴⁷ *Id.* (internal quotation marks omitted).

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The Perils of the Physician Supervision Rules: Another Year, Another Cliffhanger

11.05.10

By Kent B. Thurber and Edwin D. Rauzi

Centers for Medicare & Medicaid Services (CMS) will publish the 2011 Final Rule for the Hospital Outpatient Prospective Payment System on Nov. 24. For the third year in a row, CMS has devoted a substantial portion of the preamble to defending the rationale that prompted it to require direct physician supervision as a condition of payment for most hospital outpatient therapeutic services. Also for the third year in a row, CMS concedes points at the margin, but insists its view of how to achieve quality is correct.

To restate the earlier chapters in the story, one of the benefit categories in Medicare is “hospital services provided incident to a physician’s service.” In conjunction with the implementation of the hospital outpatient prospective payment rule in 2000, CMS imposed special rules on provider-based departments of a hospital to have physicians provide direct supervision of therapies that the department provides. Direct supervision, in CMS’s view, includes the ability to respond “immediately” and to take over or change the therapy that the hospital is providing.

In late 2008, CMS extended the rule to on-campus departments and imposed a requirement that the supervising physician be credentialed under the hospital’s Medical Staff Bylaws to perform the therapy being supervised. Over the course of the last three years, CMS has stated that the physician must not be doing anything that cannot be interrupted when he or she is supervising. Taken to its limits, the rule anticipates physicians that literally do nothing but “supervise.” Given the wide range of therapies that some hospitals offer, it may take several physicians to supervise.

The 2011 Final Rule contains both good news and bad news for the hospital industry.

The good news

The most important positive development in the regulations is that CMS will continue “nonenforcement” of the rules against Critical Access Hospitals (CAHs) and will also extend this reprieve to include rural hospitals with less than 100 beds. While insisting that CAHs and rural hospitals ultimately must find a way to supervise, they are off the hook for another year. Nonetheless, such hospitals now have another year to lobby CMS and seek practical solutions to avoid the possibility of closing down chemotherapy programs and similar services that lack the level of supervision that CMS demands.

Another action that suggests the prospect of future reform is CMS’s decision to create a committee that will look at outpatient therapies to determine whether a lower (or higher) level of supervision is appropriate. CMS had earlier followed that route to define the levels of supervision for diagnostic tests, which are included in the Physician Fee Schedule that is updated quarterly. CMS leans toward assigning the task to an existing commission that works with the Ambulatory Payment Classification (APC) payment system. The process for the committee to make its way through all the outpatient therapies, however, is expected to take years.

CMS also changed the conditions required to achieve direct supervision. Gone is the definition of “in the hospital,” replaced by a single requirement of “immediate availability.” CMS described its motive for the change as

We wish to give CAHs and other hospitals more flexibility to meet the direct supervision requirement by allowing physicians or other practitioners in locations that are close to the hospital but not in actual hospital space to directly supervise services that are within their State scope of practice and hospital granted privileges, so long as these individuals remain immediately available.

One sentence later, however, CMS added

[W]e are not relaxing the requirement that, for direct supervision, the supervisory physician or nonphysician practitioner must be immediately available, meaning that the supervisory practitioner must be physically present and interruptible. We wish to emphasize that once we remove reference to “in the hospital” or “in the provider based department,” we continue to expect the supervisory practitioner to be physically present for the services he or she is supervising. As in the past, we are not defining immediate availability in terms of time or distance. We believe that removing specific boundaries provides reasonable flexibility but also holds the practitioner accountable for determining, in individual circumstances, how to be physically and immediately available when supervising services provided “incident to” a physician’s service in the outpatient setting.

The bad news

This set of regulations is troubling for a variety of reasons. If forced to prioritize the top three would include:

First. CMS continues to reject the industry’s best arguments. For example

Many commenters asserted that there is no evidence of compromised quality of care or patient safety that justifies the new and burdensome change in supervision rules, and that commenters know of no adverse events that have necessitated a change in CMS’ supervision policies from general supervision to direct supervision.

Simply stated, that is the strongest argument that hospitals and physicians can make. There is no evidence that substandard care was delivered prior to the new policy CMS imposed in November of 2008. The physician supervision rules in the hospital outpatient therapy context are the solution to a problem that never existed.

Second. CMS continues to hold fast to its view of the role that a hospital’s medical staff bylaws should play in physician supervision. In order to supervise, a physician must have both a state license and “hospital privileges to perform [the] procedure” being supervised. CMS is confident that hospitals can “adjust their bylaws and privileging standards sufficiently to cover practitioners whom they wish to act in a supervisory capacity.”

Third. CMS is taking an unnecessarily rigid stance with respect to the use of Advance Beneficiary Notices (ABNs). A hospital is instructed to provide a patient with an ABN if the hospital suspects that Medicare may not cover or pay for the procedure. The patient is asked to confirm that he or she will pay for the treatment if Medicare does not. It would seem that the conditions for obtaining an ABN would be met in the case of a service being provided without the level of supervision that CMS now requires.

CMS disagreed strongly with that approach, saying that a denial of payment would occur because the therapy was transformed into a type of “custodial care.” CMS stated that issuing an ABN was not appropriate, and “hospitals are not permitted to do so.”

Conclusion

The latest chapter in the physician supervision saga will keep hospital administrators turning the pages of the Federal Register, hoping for a plot twist to avoid what looks for now to be a tragic ending.

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California Supreme Court Accepts Case to Decide Whether Developers Can Enforce Arbitration Provisions in CC&Rs Against Homeowners Associations

By **Kathleen F. Carpenter**

On November 11, 2010, the California Supreme Court granted review in *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US) LLC*. We reported on the *Pinnacle* Court of Appeal decision last August. The Court of Appeal, Fourth Appellate District, held that CC&Rs are not a binding agreement between the homeowners association and the developer. As a result of the grant of review, the Court of Appeal opinion cannot be cited as precedent in California courts.

The California Supreme Court will probably issue its decision in *Pinnacle* between 12 and 24 months from now. The parties and *amici curiae* will file a new round of briefs on the merits. The first sign that the case is ready for decision will be the court's notice setting argument.

Meanwhile, the Fourth Appellate District still has the same issue before it in another case. As we reported in June, that was the first case in which the court held that developers cannot enforce arbitration agreements in CC&Rs against associations. But the court granted our petition for rehearing. A new decision in that case is due by late January.

If other courts issue decisions on the enforceability of CC&Rs between developers and associations, the California Supreme Court is likely to grant review and stay proceedings in those cases until it decides *Pinnacle*.

Resources.

Courts Continue to Struggle With Enforcing Arbitration Provisions in CC&Rs Against Homeowners Associations

August 3, 2010 > The complete article follows this e-Update.

Court of Appeal Withdraws Ruling That Arbitration Provisions in CC&Rs Are Not Enforceable Against a Homeowners Association

June 28, 2010 > The complete article follows this e-Update.

Court of Appeal Rules That Arbitration Provisions in CC&Rs Are Not Enforceable Against a Homeowners Association

June 2, 2010 > The complete article follows this e-Update.

Contact Us.

Please contact a member of Luce Forward's Common Interest Development group if you would like to discuss the impact of this decision on current arbitration provisions utilized in CC&Rs or to discuss strategies for the continued use of arbitration provisions new project documents.

Courts Continue to Struggle With Enforcing Arbitration Provisions in CC&Rs Against Homeowners Associations

By **Kathleen F. Carpenter**

In a published opinion dated July 30, 2010, the California Fourth District Court of Appeal summarily invalidated an arbitration agreement between a developer and a homeowners association. In the case of *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US) LLC* (July 30, 2010, D055422) ___ Cal.App.4th ___ [2010 DJDAR 11868], the Court of Appeal found that an arbitration provision in the CC&Rs did **not** constitute an “agreement” with the association and was therefore insufficient to waive the constitutional right to jury trial for construction defect claims brought by the homeowners association. The Court also found the jury waiver provision in the purchase and sale agreements was not enforceable because it was found to be “unconscionable.”

In our e-Update of July 28, 2010 (see next page), we reported that on June 25, 2010, the Court of Appeal granted rehearing in the case of *Villa Vicenza Homeowners Association v. Nobel Court Development, LLC* (“*Villa Vicenza*”) and directed further briefing. We also noted that a somewhat different panel of the same court had under submission another case (Pinnacle) which also had before it the issue of whether an arbitration provision contained in CC&Rs binds a homeowners association.

The Court in Pinnacle gave little credence to the long-standing approval of arbitration provisions by The California Department of Real Estate. It also misinterpreted and summarily dismissed the legislative intent behind SB800, known as California’s “Right to Repair Law.” The express legislative intent of SB800 was to create sweeping reform to promote the fair and prompt resolution of construction defect claims, which, prior to SB800, generally meandered through the complex litigation departments of superior courts for years before being resolved through settlement. In his concise dissent in Pinnacle, Justice O’Rourke stated he did not find the arbitration provision at issue to be unconscionable, and stated that he would have followed the conflicting opinion of *Villa Milano Homeowners Assn. v. Il Davorge* (2000) 84 Cal.App.4th 819, 824-825.

To be continued...

Resources.

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Please contact a member of Luce Forward’s Common Interest Development group if you would like to discuss the impact of this decision on current arbitration provisions utilized in CC&Rs or to discuss strategies for the continued use of arbitration provisions new project documents.

Court of Appeal *Withdraws Ruling* That Arbitration Provisions in CC&Rs Are Not Enforceable Against a Homeowners Association

In an e-Update of June 2, 2010 (see next page), we reported a decision of the Court of Appeal, Fourth Appellate District, that an arbitration provision contained in CC&Rs did not bind a homeowners association in a construction defect case against the developer. The case is *Villa Vicenza Homeowners Association v. Nobel Court Development, LLC* (“*Villa Vicenza*”).

On June 25, 2010, the same panel of the Court of Appeal granted our petition for rehearing in *Villa Vicenza*. The effect of the order is to withdraw the opinion of May 27, 2010. That opinion is no longer binding between the parties or as precedent. The appellate panel directed the parties to submit supplemental briefs by July 26, 2010. After that, the panel will take the case under submission again. The court is free to decide the case in any way it chooses, on any ground it chooses, and in either a published or non-published opinion. A somewhat different panel of the same court has under submission another case that concerns whether an arbitration provision contained in CC&Rs binds a homeowners association: *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US) LLC*, No. D055422. That case may be decided by August 2, 2010. The outcome of future appellate decisions evaluating the enforceability of arbitration provisions in CC&Rs is not predictable.

For now, the only authoritative precedent concerning arbitration provisions in CC&Rs is *Villa Milano Homeowners Assn. v. Il Davorge*, which holds a provision enforceable, at least when the association is acting as a representative for owners.

Resource.**Court of Appeal Rules That Arbitration Provisions in CC&Rs Are Not Enforceable Against a Homeowners Association**

June 2, 2010 > The complete article follows this e-Update.

Contact Us.

Please contact a member of Luce Forward’s Common Interest Development group if you would like to discuss the impact of this decision on arbitration provisions in CC&Rs.

Court of Appeal Rules That Arbitration Provisions in CC&Rs Are Not Enforceable Against a Homeowners Association

An arbitration provision contained in CC&Rs did not bind a homeowners association in a construction defect case against the developer, according to a recent California appellate court decision. In *Villa Vicenza Homeowners Association v. Nobel Court Development, LLC*, issued May 27, 2010, the Fourth District Court of Appeal concluded that because CC&Rs are not a contract between the developer and the homeowners association, the arbitration provision contained in the CC&Rs was not enforceable against the association. The CC&Rs in question were created in typical fashion, that is, the developer drafted and put them in place before the association was formed, and then formed the association and sold homes subject to the already existing CC&Rs. The court referred to CC&Rs as being adhesive in nature, unilaterally written by developers, and not subject to modification by the association. The court noted that an arbitration provision necessarily involves the waiver of the right to trial by jury, which the court determined was too important a right to waive, absent an express, voluntary agreement.

The Court acknowledged that another California appellate court, in *Villa Milano Homeowners Assn. v. Il Davorge*, previously reached a contrary conclusion, deciding that CC&Rs could be used to obtain an agreement to arbitrate. For now, there is an apparent conflict between the conclusions reached in the *Villa Vicenza* and *Villa Milano* decisions.

Should the Fourth District's decision remain in force, arbitration provisions included in developer-drafted CC&Rs may be unenforceable against homeowners associations. Once this decision becomes final in the Court of Appeal (on June 26, 2010) and if the time for petition for review in the Supreme Court elapses (July 6, 2010), arbitration provisions in CC&Rs should be reviewed in light of this decision.

Please contact a member of Luce Forward's Common Interest Development group if you would like to discuss the impact of this decision on arbitration provisions in CC&Rs.

WSGR ALERT

NOVEMBER 2010

CALIFORNIA REGULATORY AUTHORITY ANNOUNCES COMPENSATION RATE OF EXEMPT COMPUTER PROFESSIONALS TO REMAIN UNCHANGED FOR 2011

The California Department of Industrial Relations (DIR) has announced that the minimum compensation required to qualify for the state's computer-professional exemption in 2011 will remain unchanged from that of 2010. Therefore, in 2011, an employee must be paid a salary of at least \$79,050 annually (\$6,587.50 monthly) to qualify for the computer-professional exemption in California.¹ The minimum hourly rate and salary requirements for the computer-professional exemption under Labor Code Section 515.5 are adjusted annually for inflation according to the Consumer Price Index (CPI).²

This year, the CPI increased by 1.1 percent, in contrast to a decrease of 1.4 percent from 2008 to 2009. Despite this increase, the DIR did not increase the minimum statutory rates that an exempt computer professional must be paid because the CPI remains below 2008 levels; thus, there has been no net "percentage increase."³

In addition to meeting the compensation requirements described above, the computer-

professional exemption continues to have duties-based requirements as set forth in Labor Code Section 515.5. To qualify for the exemption, the employee must spend 50 percent or more of his or her time engaging in one or more of the following duties: a) applying systems-analysis techniques and procedures, including consulting with users, to determine hardware, software, or system-functional specifications; b) designing, developing, documenting, analyzing, creating, testing, or modifying computer systems or programs, including prototypes, based on and related to user or system-design specifications; or c) documenting, testing, creating, or modifying computer programs related to the design of software or hardware for computer operating systems. In addition, an employee's job duties must be intellectual or creative and require the exercise of discretion and independent judgment. Lastly, the employee must be highly skilled and proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering.

Please note that there are certain specific exclusions that employers should review before relying on the California computer-professional exemption. For instance, technical writers and certain employees making use of computer-aided design (CAD) software who are not engaged in computer systems analysis or programming occupations are excluded from the exemption.

Wilson Sonsini Goodrich & Rosati is able to assist employers in undertaking audits to address classification of their employees as exempt or non-exempt for overtime purposes in order to comply with federal and applicable state law.⁴ For more information on the computer-professional exemption or other related matters, please contact Fred Alvarez, Rico Rosales, Kristen Garcia Dumont, Alicia Farquhar, Elizabeth Tippet, Lauren Phillips, or any other member of Wilson Sonsini Goodrich & Rosati's employment law practice.

¹ If the computer-professional employee is paid on an hourly basis, the minimum hourly rate required to qualify for the computer-professional exemption also will remain unchanged at \$37.94. Please note that computer professionals compensated on an hourly basis must be paid for each hour worked even though no overtime premium applies. For example, if a computer professional is compensated at an hourly rate of \$60.00 per hour and he or she works 45 hours in a week, the employee would need to be paid \$2,700 for that week (\$60.00 per hour x 45 hours).

² Employers can check the following website each year to determine the applicable rate: <http://www.dir.ca.gov/dlsr/ComputerSoftware.pdf>.

³ For additional information on how the CPI affects the computer-professional salary requirement and other issues regarding the computer-professional exemption, please see the following WSGR Alerts: Poor Economy Results in Maintenance of Status Quo for Compensation Rate of Exempt Computer Professionals, Update on California's Computer-Professional Exemption; New CPI Announced, California Legislature Amends Computer-Professional Exemption to Ease Compensation and Timekeeping Burden on Technology Employers, and Class Action Settlements and Passage of AB 1093 Focus Attention on Classification of Computer Professionals.

⁴ Wilson Sonsini Goodrich & Rosati also can assist employers in undertaking wage-compliance audits related to pay equity issues, which have become the focus of many wage and hour class actions and is of particular concern for positions traditionally occupied by a specific gender.

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