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October 2010 e-Bulletin

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  October 16-19, 2010

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- *PRAC Gathering @ INTA -San Francisco - May 15, 2011*
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BAKER BOTTS LEADING RUSSIAN IP LAWYER JOINS MOSCOW OFFICE

New Special Counsel to Lead Firm's Intellectual Property Practice Efforts in Russia

MOSCOW, October 11, 2010 -- Ekaterina Tilling, one of the leading intellectual property lawyers in Russia, has joined Baker Botts L.L.P. as a special counsel in the firm's Moscow office. She will lead a growing team of Baker Botts IP lawyers based in Moscow as part of a continuing effort to support Russian and other international companies with interests in the region.

Tilling has extensive experience in the intellectual property area, covering both contentious and non-contentious matters for Russian clients. This includes handling complex investment projects involving a variety of IP assets, as well as in negotiating and advising on various IP/IT transactions involving software development, franchising, IP assignment and licensing.

"Ekaterina's experience, not just in the broad range of Russian IP commercial work, but also in solving IP disputes in contentious matters involving the Russian courts at all levels is a significant addition to our IP team in Moscow and firmwide," said Steven Wardlaw, Partner in Charge of the firm's Moscow office. "She is well-respected as an IP litigator, recognized in awards at the highest level, and has represented household name clients on many complex IP issues facing Russian businesses competing in today's technology and software industries."

Tilling's move to Baker Botts will bring to four the number of lawyers in the Moscow office that regularly work with clients on IP transactional and contentious matters."

"I believe that my joining Baker Botts, as well as the future hires that we have planned, will place the firm in the top tier of IP counsel within Russia." Tilling said. "I was attracted by their unrivalled technology, life sciences and general IP practice globally, and their strong commitment to grow this dramatically in Russia and the CIS."

In addition to her IP experience, Ekaterina is qualified as a Mediator of International and Community Conflicts by the Conflicts Resolution, Research and Resource Institute, Inc. (CRI). Also, she is deputy chairperson of the IP-Subcommittee of the Association of European Businesses (AEB) in Russia. She is also a qualified Moscow advocate. She is recognized by Chambers Europe and the Legal 500 EMEA as a leading IP practitioner in Russia.

Tilling earned her law degree from Moscow State University.

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About Baker Botts L.L.P.

Baker Botts L.L.P., dating from 1840, is a leading international law firm with offices in Abu Dhabi, Austin, Beijing, Dallas, Dubai, Hong Kong, Houston, London, Moscow, New York, Palo Alto, Riyadh and Washington. With approximately 750 lawyers, Baker Botts provides a full range of legal services to international, national and regional clients.

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

CAREY ON THE MOVE

CAREY Y CÍA. Moves to New Offices

Chile's largest law firm, Carey y Cía. has relocated its offices and moved to the Titanium Tower, the tallest building in South America located in the heart of Santiago's financial district. Carey y Cía.'s new offices occupy four floors of the building, a total of around 6.000 sq. meters, in the highest portion of the Titanium Tower. The construction has become a symbol of Chile's modernity, with top-end engineering, strict environmental standards (LEED certification) and direct access to a number of the city's new highways.

"This will allow us not only to be closer to our clients, but is key for us to be working all together", says Jaime Carey, managing partner, referring to the rapid growth of Carey's team. Carey y Cía. and its intellectual property subsidiary HarneckerCarey, will finally be located in the same place.

The Titanium Tower is equipped with twenty elevators; six of them have the fastest technology in the world; a heliport for two helicopters; top-end anti-seismic technology with energy dissipating devices to reduce the deformation during an earthquake; and seven underground floors. Carey's offices has 16 meeting rooms for clients, two internal stairs, and one big conference room with capacity for fifty persons, especially designed for the closing of important deals.

Our new offices contact info is:
CAREY Y CÍA.

Av. Isidora Goyenechea 2800, Floor 43
7550647 / Las Condes
Santiago, Chile
Tel: +56 2 928 2200
Fax: +56 2 928 2228
www.carey.cl

HARNECKERCAREY
Av. Isidora Goyenechea 2800, Floor 42
7550647 / Las Condes
Santiago, Chile
Tel: +56 2 928 2600
Fax: +56 2 928 2628
www.harneckercarey.cl

For additional information visit www.carey.cl

FMC WELCOMES NEW PARTNERS

Colleen Verville and Leanne Krawchuk Join FMC Edmonton

October 5, 2010 - Fraser Milner Casgrain LLP (FMC), one of Canada's leading business and litigation law firms, is proud to announce that two new partners – Colleen Verville and Leanne Krawchuk – have joined its Edmonton office.

"I am very pleased to have Colleen and Leanne join our FMC team," says Dennis Picco, Managing Partner at FMC's Edmonton office. "Their experience, enthusiasm and dedication to clients further enhance our already-strong law firm. Between their extensive professional and volunteer involvement in Edmonton, they are a great fit for our firm, and will continue to build on FMC's values of providing excellent service and value to our clients and to the community."

Colleen Verville joins FMC as a partner in the Employment/ Pensions/Research working group. Ms. Verville brings to the table her experience in labour and employment law, human rights and freedom of information and protection of privacy. Recognized in Alberta Venture as a "Whiz Kid of the New Millennium," Ms. Verville was also a former co-chair of the Labour Employment Law Section of the Canadian Bar Association.

Leanne Krawchuk joins FMC as a partner in the Commercial working group. Ms. Krawchuk practises corporate and securities law, and specializes in the areas of mergers and acquisitions, corporate transactions, reverse takeovers, private placements for entities primarily involved in mining, as well as oilfield service and manufacturing. Ms. Krawchuk is currently a member of the Securities Advisory Committee to the Alberta Securities Commission, and former chair of the Northern Alberta Securities Law subsection of the Canadian Bar Association.

FMC is the largest law firm in Edmonton. The firm's integrated practise teams service key industries in Alberta, including financial services, energy, engineering, forest products, technology, transportation, health and consumer products and services.

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

SIMPSON GRIERSON WELCOMES PARTNER ADDITIONS

The firm adds to its established depth of expertise across all aspects of New Zealand's business, trading and regulatory environment, by welcoming banking and finance specialist James Caird and local government & infrastructure specialist Gerald Lanning to the partnership today.

"James and Gerald have both established impressive track records in their respective specialities and offer an in-depth understanding of the issues affecting business today," said Kevin Jaffe, Simpson Grierson chairman. "As partners they will continue to add value to our clients' businesses and the firm's reputation for delivering expert, yet practical commercial advice".

James Caird is a partner in the firm's banking and finance department. He specialises in insolvency, restructuring, and banking and finance litigation. James acts for financial institutions, liquidators, receivers, directors and creditors.

Gerald Lanning is a partner in the local government & environment department. He advises on all aspects of resource management and local government law, with particular expertise in the transport and infrastructure sectors. Gerald primarily acts for local authorities and other public bodies.

For additional information visit www.simpsongrierson.com

NAUTADUTILH ANNOUNCES PARTNER APPOINTMENTS

NautaDutilh appoints three new partners and one associate partner

NautaDutilh has announced the appointment of three new partners at its annual Shareholder Partners' meeting on 17th September: Arjan Scheltema, Herman Speyart and Margaretha Wilkenhuysen. Herbert Reimers has been appointed associate partner.

For additional information visit www.nautadutilh.com

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Conference Session Materials available to Member Firms only

www.prac.org

TOZZINIFREIRE WELCOMES TAX EXPERT

We are pleased to announce that Carlos Adolfo Teixeira Duarte has joined TozziniFreire Advogados as a partner, responsible for the Tax practice group at the firm's Rio de Janeiro office. With 25 years of practice in Business Law, Carlos Adolfo is widely experienced in taxation, mergers and acquisitions and commercial contracts.

He worked for fifteen years for the Royal Dutch/Shell Group of companies, which included three years at Shell International Petroleum Company in London and The Hague, with responsibilities related to international taxation in a broad range of jurisdictions. He also acted as Shell Brazil's legal manager (Chemical Division) and Tax Director, and represented the downstream (Brazil's Fuel & Lubricants Distributors' Union - Sindicom) and the upstream oil businesses (Brazilian Petroleum, Natural Gas and Biofuels Institute - IBP) in discussions on the Constitutional Tax Reform with the Executive Branch and the Congress.

Carlos Adolfo graduated from the Law School of Rio de Janeiro State University, earned a Postgraduate degree in Business Law from Getulio Vargas Foundation and authored several books and articles. He is a member of the Advisory Board of Brazilian Association of Financial Law (Brazilian IFA Branch) and member of the International Fiscal Association and the International Bar Association.

TozziniFreire Advogados is a leading law firm in Brazil and consistently provides exceptional legal services to domestic and international companies in a wide variety of business sectors. With 6 fully-owned offices in Brazil (two in São Paulo and one each in Rio de Janeiro, Brasília, Porto Alegre and Campinas), TozziniFreire is engaged in all areas of business law and ensures its clients the same outstanding services and one-firm resources in all offices. In addition to these features, we offer the convenience of an office in New York.

For additional information visit www.tozzinifreire.com.br

WILSON SONSINI GOODRICH & ROSATI EXPANDS CORPORATE & SECURITIES PRACTICE

-- Barry Taylor Rejoins the Firm --

PALO ALTO, CA (October 4, 2010) - Wilson Sonsini Goodrich & Rosati, the premier provider of legal services to technology, life sciences, and growth enterprises worldwide, today announced that Barry Taylor has rejoined the firm as a partner in the corporate and securities practice. Taylor comes to the firm from Warburg Pincus, a leading global private equity firm, where he served as a managing director in the technology, media, and telecom group. Prior to joining Warburg Pincus, he had been a senior corporate partner at Wilson Sonsini Goodrich & Rosati. Taylor will be based in the firm's Palo Alto office.

"We are delighted to welcome Barry back to the firm," said CEO Steve Bochner. "Aside from his substantial proficiency as both a transactional attorney and an investment professional, he brings outstanding management skills and international experience, most notably in Asia, which is a key focus for the firm. While well versed in representing companies at all stages of development, Barry has particular expertise in providing senior judgment, technical guidance, and transactional management to public company boards of directors and senior executives, as well as to investment professionals at private equity and venture capital firms."

"Barry's return adds to our already substantial bench in finance, mergers and acquisitions, and public and private company representation," said Vice Chairman Jeff Saper. "One of the most experienced corporate and securities attorneys in Silicon Valley, Barry is an incredibly accomplished partner, a great friend, and an inspiring mentor. He will be an invaluable asset to the firm and our clients."

As a managing director in the technology, media, and telecom group at Warburg Pincus, Taylor participated in the investment process for new deals and supported existing portfolio companies in Silicon Valley. He also managed the Menlo Park office for eight years and worked with Warburg's professionals in India and China on cross-border investments and servicing India- and China-based portfolio companies active in the United States. In his prior 16-year tenure as a partner in Wilson Sonsini Goodrich & Rosati's corporate and securities practice, Taylor represented public and private companies in a wide range of matters, including private financings of preferred stock, convertible debt, and bridge loans with warrants, as well as both issuers and underwriters in public offerings. He also advised clients on public company governance and disclosure, reporting, and proxy matters, and negotiated and structured merger and acquisition transactions. His clients encompassed a broad array of sectors, including software, clean technology, healthcare, biotechnology, Internet, communications, and semiconductors. In addition, Taylor was a member of the senior management team and served on a number of the firm's key committees. Earlier in his career, he had been an associate, and then a partner, at Pillsbury Madison & Sutro (now Pillsbury Winthrop Shaw Pittman), serving as both a litigator and a corporate attorney.

Taylor was a member of the New York Stock Exchange's Legal Advisory Board for three years and the National Association of Securities Dealers' Legal Advisory Board for six years. He received his J.D. from the University of Virginia School of Law in 1975, and a B.A. in political science from Dickinson College in 1970.

About Wilson Sonsini Goodrich & Rosati
Wilson Sonsini Goodrich & Rosati's broad range of services and legal disciplines is focused on serving the principal challenges faced by the management and boards of directors of business enterprises. The firm is nationally recognized as a leader in the fields of corporate governance and finance, mergers and acquisitions, private equity, securities class action litigation, employment law, intellectual property, and antitrust, among many other areas of law. With long-standing roots in Silicon Valley, Wilson Sonsini Goodrich & Rosati has offices in Austin, New York, Palo Alto, San Diego, San Francisco, Seattle, Shanghai, and Washington, D.C. In addition, the firm has applied for a license to open an office in Hong Kong.

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

CLAYTON UTZ

ADVISES ON RBS SOCIAL INFRASTRUCTURE (AUSTRALIA) TRUST SALE

Sydney, 17 September 2010: Clayton Utz has acted for RBS Funds Management (RFM) and RBS Group Australia (RBS) on the divestment of the RBS Social Infrastructure (Australia) Trust (the Fund) to AMP Capital Investors Limited (AMPCI) which was effected by replacing the responsible entity of the Fund.

The Fund which has been renamed the AMP Capital Community Infrastructure Fund, consists of four PPP assets: Southbank Institute in Queensland, Schools II in New South Wales, Emergency Alerting System in Victoria and the Darwin Convention Centre in the Northern Territory.

Clayton Utz Corporate and Infrastructure partner Nikki Robinson led the firm's team advising RFM and RBS in structuring and negotiating all aspects of the divestment of its Australian infrastructure funds management business.

The divestment included:

- the retirement of RFM as the responsible entity of the stapled trusts, collectively named the RBS Social Infrastructure (Australia) Trust , and the appointment of AMPCI;
- the transfer of the asset management rights and obligations of RBS in respect of the Fund to AMPCI; and
- the sale of RFM's interest in Reliance Rail to a related RBS party prior to the appointment of AMPCI as responsible entity.

Commenting on recent activity in the M&A market Nikki Robinson said: "Despite an uncertain M&A market, Clayton Utz continues to advise major international players on strategic acquisitions and divestments. The transactions noted above in relation to the Fund are typical of 2010, which so far has been dominated by friendly deals driven by our clients focussing on core business strategies."

Nikki was assisted by Klay Brown, a Senior Associate in all aspects of the matter.

For additional information visit www.claytonutz.com

FMC

TEMBEC COMPLETES US$255 MILLION PRIVATE OFFERING

On August 17, 2010, Tembec Inc. completed the offering of 11.25% notes of its wholly owned subsidiary, Tembec Industries Inc., for total gross proceeds of US$255 million. The notes were sold in a private offering to qualified institutional buyers. BofA Merrill Lynch and Credit Suisse Securities (USA) LLC were joint book running managers for the offering. The notes are senior obligations of Tembec Industries Inc. secured by a first priority lien on certain of the property and assets of the issuer and the guarantors. The proceeds from the offering, together with cash on hand, were used to permanently repay all outstanding indebtedness under Tembec's existing US$300 million term loan facility, to pay prepayment premiums in connection therewith and to pay fees and expenses relating to the offering.

Tembec is a large, diversified and integrated forest products company which stands as the global leader in the sustainable force management practices.

Tembec was represented by Patrick LeBel, General Counsel and Corporate Secretary and was represented in Canada by a team from FMC that included Charles Spector, Stephen Lloyd, Guy Paul Allard and Scott Rozansky (corporate and securities), Richard Gauthier (tax) and Paul Shantz, Glenda Mallon, Colin McIver and Damian Koo (real estate). White & Case LLP acted as Tembec's United States counsel.

For additional information visit www.fmc-law.com

KING & WOOD

CHINESE BANKS EXTEND USD$1.23 BILLION LOAN TO BRAZILIAN FIRM VALE

September, 2010, Vale announced the news of its USD 1.23 billion loan agreement with the Export-Import Bank of China and the Bank of China. The South American shipping magnate will use the credit to order the manufacture of 12 Chinese mining ships capable of carrying 400,000 deadweight tons of iron ore each.

King & Wood advised the Export-Import Bank of China and the Bank of China on PRC law. Our legal team was led by Li Jinnan, a partner in the King & Wood financing group.

For additional information visit www.kingandwood.com

GIDE LOYRETTE NOUEL

ADVISES ENNAKL AUTOMOBILES ON ITS IPO ON THE TUNIS AND CASABLANCA STOCK EXCHANGES

September 10, 2010

The Tunis and Casablanca offices of Gide Loyrette Nouel have advised Ennakl Automobiles, a company governed by Tunisian law and the official distributor in Tunisia of the Volkswagen, Volkswagen Utility, Seat, Audi and Porsche brands, on its dual listing on the Tunis and Casablanca stock exchanges. The offering, which notably aims at reshaping the company's share capital structure, was open to Tunisian, Moroccan and other institutional investors as well as to the public.

This IPO took place on 13 July and involved the sale of 40% of Ennakl Automobiles share capital, with 30% on the Tunis stock exchange and 10% on the Casablanca bourse.

This simultaneous offering on two stock exchanges in the region is the first one in the Maghreb region and is in keeping with the market development policies pursued by both countries.

The Gide Loyrette Nouel team comprised Kamel Ben Salah, partner, with Anis Jabnoun, associate (Tunis office) and Julien David, partner, and Younes Maleh, associate (Casablanca office).

For additional information visit www.gide.com

HOGAN LOVELLS

ADVISES LABCORP ON $925 MILLION PURCHASE OF GENZYME GENETICS

WASHINGTON, D.C., 24 September 2010 – Hogan Lovells US LLP is advising long-standing client Laboratory Corporation of America Holdings (LabCorp) on a $925 million purchase of Genzyme Genetics, a business unit of Genzyme Corp. Genzyme Genetics is a leading provider of complex reproductive and oncology testing services and the preferred provider of such services to maternal fetal medicine specialists and obstetrician/gynecologists in the U.S.

Genzyme Genetics offers an expansive menu of complex tests including technologies that span the continuum of care, ranging from maternal serum screening and prenatal diagnostics to carrier screening and postnatal testing services. The acquisition will expand LabCorp's capabilities in reproductive, genetic, hematology-oncology, and clinical trials central laboratory testing.

The transaction is subject to the satisfaction of customary closing conditions set forth in the agreement, including the expiration or early termination of the waiting period under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, with the goal of closing before the end of the year.

Baltimore office partner Michael Silver led the Hogan Lovells team, with assistance from Baltimore partners John Booher and William Intner, and Washington, D.C. partner Joseph Krauss. Other Hogan Lovells lawyers working on the transaction include Washington, D.C. partners Helen Trilling, William Neff, Lee Berner, and Scott McClure; Denver partner Scott Reisch; Northern Virginia counsel Valerie Brennan; Baltimore associates Julian Seiguer and Mark Paul Lehman; Washington, D.C. associates G. Allen Hicks, Leigh Oliver, Vi Nguyen, and Danielle Drissel; and Denver associates Seaton Thedinger and Jenny McClister.

About LabCorp®

Laboratory Corporation of America® Holdings, an S&P 500 company, is a pioneer in commercializing new diagnostic technologies and the first in its industry to embrace genomic testing. With annual revenues of $4.7 billion in 2009, over 28,000 employees worldwide, and more than 220,000 clients, LabCorp offers clinical assays ranging from routine blood analyses to HIV and genomic testing. LabCorp combines its expertise in innovative clinical testing technology with its Centers of Excellence: The Center for Molecular Biology and Pathology, National Genetics Institute, ViroMed Laboratories, Inc., The Center for Esoteric Testing, Litholink Corporation, DIANON Systems, Inc., US LABS, Monogram Biosciences, Inc. and Esoterix, Inc. and its Colorado Coagulation, Endocrine Sciences, and Cytometry Associates laboratories. LabCorp conducts clinical trials testing through its Esoterix Clinical Trials Services division. LabCorp clients include physicians, government agencies, managed care organizations, hospitals, clinical labs, and pharmaceutical companies.

For more information, please visit www.hoganlovells.com

NAUTADUTILH

ASSISTS JOHNSON & JOHNSON WITH ITS INTENDED PUBLIC OFFER FOR ALL ORDINARY SHARES OF CRUCELL N.V.

NautaDutilh assists Johnson & Johnson (J&J), a leading worldwide pharmaceutical company, with its intended public offer for all ordinary shares of Crucell N.V.

Crucell is a global biopharmaceutical company focussed on the research & development, production and marketing of vaccines and antibodies against infectious disease worldwide.

On 6 October 2010 Johnson & Johnson and Crucell reached an agreement pursuant to which J&J would acquire all outstanding equity of Crucell that it does not already own for approximately EUR 1.75 billion in a recommended cash tender offer, which represents a purchase price of EUR 24.75 per share. Johnson & Johnson currently owns 17.9% of Crucell's outstanding shares acquired in September 2009 as part of a strategic collaboration between Johnson & Johnson and Crucell. NautaDutilh advised J&J on that transaction as well.

NautaDutilh's team headed by corporate partner Christiaan de Brauw consist of Jochem Prinsen, Hein Hooghoudt, Philippine van Leeuwen and Bas van Hunnik. The core team was assisted by Herman Speyart and Charles Sasse van Ysselt (worldwide competition law aspects, other than the US), Aimée Bosman and Nico Blom (tax matters), Homme ten Have and Gijs van Nes (employment issues) and Paul Olden (corporate litigation aspects).

For additional information visit www.nautadutilh.com

TOZZINIFREIRE

ASSISTS SCOTIABANK IN AGREEMENT TO ACQUIRE BRAZILIAN BANK

Scotiabank Expands Presence in Thriving Brazilian Marketplace - Announces Agreement to Acquire Brazilian Bank

TORONTO, SAO PAULO, September 16th, 2010 – Scotiabank, Canada's most international bank, today announced it has reached an agreement with Commerzbank AG to acquire Dresdner Bank Brasil S.A. - Banco Múltiplo (DBB). Terms of the transaction, which is subject to regulatory approval, are not financially material to Scotiabank and were not disclosed.

DBB is headquartered in Sao Paulo, Brazil and operates as a wholesale bank. It holds a multiple banking license, which enables the holder to offer a range of banking services. On completion of the transaction, Scotiabank expects to be the only Canadian bank in Brazil with a multiple banking license. This new business will report through Scotiabank's wholesale banking division, Scotia Capital.

"Scotia Capital is pleased to broaden our footprint in Latin America through the purchase of Dresdner Bank Brasil S.A. - Banco Múltiplo," said Steve McDonald, Group Head, Global Corporate and Investment Banking, and Co-CEO, Scotia Capital. "This transaction will provide us with an existing wholesale operating platform to accelerate our organic growth strategy in the Brazilian market. Based on our success in the region, we know that our offering in key sectoral areas – including oil and gas, power and mining – will play a dominant role in our growth plans in Latin America's largest economy." At the end of 2009 DBB had total assets of approximately US$400 million and approximately 50 employees.

The largest and most populous country in South America, the Federative Republic of Brazil is South America's leading economic power. With 190 million people – including about 67 per cent between the ages of 15 and 64 years – Brazil has the fifth-largest population in the world. The Gross Domestic Product (GDP) is an estimated US$1.6 trillion – by International Monetary Fund standards the 10th largest GDP in the world – and the nation has large and well-developed energy, agriculture, mining, manufacturing,

and service sectors, which serve as the foundation for the country's economy. "Scotia Capital has been actively expanding our wholesale business in key Latin American markets where we see tremendous potential for growth and we are very optimistic about the opportunity in Brazil," said Mike Durland, Group Head, Global Capital Markets, and Co-CEO, Scotia Capital. "Across the region, we have been able to leverage Scotiabank's history in these countries and deep market knowledge to provide corporate and institutional clients with unique expertise in order to meet their needs." "We have had a presence in Brazil for almost forty years through our representative office and the addition of a bank with a multiple banking license would give us an opportunity to broaden our future services in a very attractive market," added Rob Pitfield, Group Head, International Banking. "Latin America is an increasingly important part of Scotiabank's international strategy and we continue to build on our already strong franchise by delivering superior service."

In Latin America, Scotiabank has operations in Brazil, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Mexico, Panama, Peru, Puerto Rico and Venezuela. The Bank has more than 32,000 employees, 2,605 automated banking machines (ABMs) and 1,889 branches, kiosks and other offices in the region, including affiliates. Scotiabank has been in El Salvador since 1997, where it is the fourth-largest bank; in Peru since 1997, where it is the third-largest bank; Mexico since 1967, where it is the sixth-largest commercial bank; and Chile since 1990, where it is the seventh largest bank.

TozziniFreire partners assisting The Bank of Nova Scotia were led by Antonio Felix de Araujo Cintra and Luciana Maria Agoston Burr.

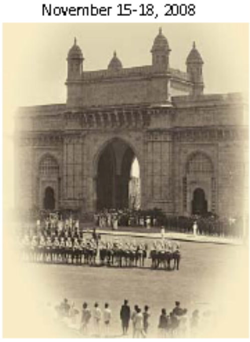
For additional information visit www.tozzinifreire.com.br

PRAC 48th International Conference
Kuala Lumpur Oct 16—19, 2010

SKRINE

Mulla & Mulla
& Craigie Blunt & Caroe
Advocates, Solicitors and Notaries

Mumbai, India
November 15-18, 2008



KIM, CHANG & LEE

SEOUL 2007
October 20-24

SANTAMARINA Y STETA

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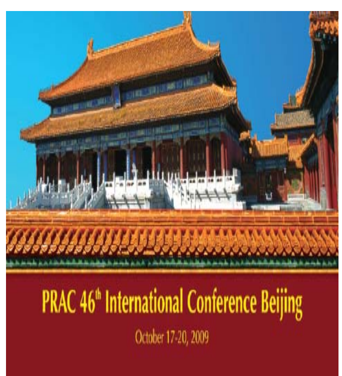
PRAC 2011
AMSTERDAM CONFERENCE

NautaDutilh



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Send to editor@prac.org.
Deadline is 10th of each month.

PRAC CONFERENCE 2007
Bogotá - Cartagena, Colombia

BRIGARD & URRUTIA

Gide Loyrette Nouel

PRAC
Paris 2008

PRAC 40TH MEETING
SAN DIEGO, USA

LUCE FORWARD
ATTORNEYS AT LAW • FOUNDED 1873

Employers' Liability for Accidents under Argentine Law

Introduction

In 1995 the Occupational Risks Law 24.557 ("LRT") was passed—and it has been recently amended by Decree No. 1694/2009. The LRT created the system of Occupational Risks with the purpose to prevent risks and compensating damages resulting from working practices.

In this sense, and in accordance with the regime regulated by the LRT, employers must choose either to be affiliated compulsorily to the Occupational Risk Insurers ("ART") that they freely choose, or self-insure themselves.

ARTs are entities governed by private law, authorized by the National Insurance Superintendence ("SSN"). Employers which opt to be affiliated to an ART must register the entering and exiting of the workforce of the company and ARTs may not reject affiliation by any employer. In this sense, if an employer not included in the self-insurance regime fails to join an ART, it shall be directly liable before any beneficiaries for the benefits stipulated in the LRT. Likewise, if the employer fails to declare its obligation to pay or the hiring of an employee, the ART will award the benefits and may then make a claim against the employer for the cost thereof.

Mandatory insurance and self-insurance

Employers may protect themselves against the risk of occupational accidents and illness by hiring a mandatory insurance regulated by the LRT or by self-insuring themselves. Employers may self-insure when they can prove their economic-financial solvency and guarantee the services to award the benefits established in the LRT.

Prevention of occupational risks

The LRT establishes the obligation to adopt measures aimed to effectively prevent occupational risks. If an occupational illness occurs as a result of the employer's failure to comply with the health and safety in the workplace regulations, the LRT establishes the possible application of penalties which will be determined by the Occupational Risks superintendence ("SRT") in its role as supervisory body.

Situations covered

Situations covered by the LRT are:

Listed occupational illnesses
Unlisted occupational illnesses due to or during work, determined by a special procedure established in this respect
Accidents on the way to and from work
Accidents that occur due to or during work
Disability, partial or total, and permanent, provisional or definitive incapacity
Death.

Benefits

The LRT establishes the benefits that the ARTs will award to an employee who is a victim of any of the occupational eventualities covered. The LRT's benefits are divided into those paid in cash and those given in kind or in services. Benefits in kind are those that the employee requires for psychological and physical recovery. Cash benefits are those paid to make up for the total or partial loss of income, or the sums paid as compensation to make up financially for the damages sustained by the victim.

Employers' legal liability

The LRT benefits exempt employers from any additional civil liabilities before their employees, except for cases falling under section 1072 of the Civil Code, that is, willful misconduct by the employer. In such event, the victim or his or her successors may claim compensation for the damages and losses in accordance with the provisions of the Civil Code, without prejudice to the victim retaining the entitlement to LRT benefits due by ARTs or self-insured employers.

Nevertheless, it should be noted that in several precedents the Supreme Court has declared unconstitutional the section of the LRT limiting the liability of the employer as set out above, and effectively exposing employers and ARTs to higher compensations.

Conclusion

The system established by the LRT has been questioned by the Supreme Court, which has almost led the system to crisis, generating additional costs for employers and ARTs.

In general, the arguments have concerns on the quality and scope of services and the insufficient cash benefits. The industry is carefully watching the judicial response to the last reform implemented in 2009, which was aimed to solve some of the issues formerly raised.

For additional information visit www.allendebrea.com.ar

CLAYTON UTZ

06 October 2010

Doors edge open for challenges to SOP Act adjudication determinations in NSW

Since the NSW Court of Appeal's decision in Brodyn, owners and principals have often found the court room door firmly shut when seeking to challenge an adjudication determination for non-compliance with the Building and Construction Industry Security of Payment Act1999 (NSW) (the **SOP Act**). Now, following a new decision from the Court of Appeal, the door may be slowly edging open - but it is not yet fully ajar.

While some are already suggesting that the NSW Court of Appeal's decision in Chase Oyster Bar v Hamo Industries [2010] NSWCA 190 heralds a new era of greater court review of adjudication determinations under the SOP Act, it is not clear that this will in fact be the result.

An adjudicator's failure to comply strictly with one of the many procedural rules and timeframes prescribed in the SOP Act **will not necessarily mean that a court can quash the resulting determination**.

Only failure to comply with any of those requirements that are **a condition of an adjudicator's exercise of the statutory power to determine the amount of a progress claim** - in other words, committing a jurisdictional error - will lead to certiorari being available to quash the determination.

Key points

The key points arising from the decision are:

- A purported adjudication determination of an application **which does not comply with section 17(2)(a)**, which deals with a claimant's duty to notify the respondent of its intention to apply for an adjudication within 20 days after the due date for payment (and not previously identified as a "basic and essential requirement" in the Brodyn sense) of the SOP Act will not be a valid determination and may be quashed by a court.
- The ability of the courts to review and quash adjudication determinations (by means of a remedy called **certiorari**) will ultimately depend on the identification of "jurisdictional error" on the part of the adjudicator (in other words, an error by the adjudicator as to existence of his or her statutory authority to determine the amount of a progress payment).
- Chase Oyster Bar suggests that the scope to challenge adjudication determinations successfully **is greater than previously thought** based on Brodyn. This will become clearer as future decisions identify those requirements which constitute "jurisdictional facts" and consequently give rise to "jurisdictional error" where they have not been complied with.

The ability to challenge an adjudication determination prior to *Chase Oyster Bar*

Until now, the decision of the NSW Court of Appeal in Brodyn Pty Ltd v Davenport(2004) 61 NSWLR 421 was the leading authority applicable to an owner/principal seeking redress from an adjudication determination which did not comply with all the requirements of the SOP Act.

In Brodyn, Justice Hodgson held that a purported adjudication determination that did not comply with any of what were described as **"basic and essential requirements"** would be void.

Justice Hodgson set out the following list as examples of "basic and essential requirements":

- The **existence of a construction contract** between the claimant and the respondent, to which the SOP Act applies.
- The service by the claimant on the respondent of **a payment claim**.
- The making of **an adjudication application** by the claimant to an authorised nominating authority.
- The **reference** of the application to an eligible adjudicator, who accepts the application.
- The **determination by the adjudicator of this application**, by determining the amount of the progress payment, the date on which it becomes or became due, and the rate of interest payable and the issue of a determination in writing.

While this list was non-exhaustive, leaving open the possibility that further "basic and essential requirements" might subsequently be identified, Justice Hodgson found that compliance with other "more detailed requirements" of the SOP Act was not essential to the existence of a valid determination.

Importantly, in the case of an adjudication that was not void, Justice Hodgson found that the remedy of **certiorari was not available to quash the determination** (a declaration by the court and an injunction restraining enforcement was available in respect of an adjudication that was void).

This meant in effect that owners/principals **could basically only challenge determinations** in cases where the determination was void for failure to comply with a "basic and essential requirement".

The decision of the Court of Appeal in Chase Oyster Bar

Chase Oyster Bar clarifies the position following Brodyn in relation to court review of adjudication determinations.

The NSW Court of Appeal emphasised that the remedy of **certiorari will still be available to quash a determination** that fails to comply with other requirements of the SOP Act that do not constitute "basic and essential requirements", **provided that the adjudicator has committed a "jurisdictional error".**

The concept of "jurisdictional error" is where a decision-maker makes an error that is in relation to a fact that gives rise to its ability to make the decision in question. Such facts are sometimes referred to as "jurisdictional facts".

For example, in Chase Oyster Bar, the requirement of notice of the applicant's intention to apply for adjudication within the 20 day period specified in section 17(2)(a) is an example of a jurisdictional fact - without this fact being established, the adjudicator has no statutory authority to make a determination.

Implications for owners/principals and contractors

The key question in the immediate aftermath of Chase Oyster Bar is therefore how to identify which requirements of the SOP Act will give rise to jurisdictional error, and thus make certiorari available, if they are not complied with. Chase Oyster Bar makes it clear that there will be jurisdictional error in the case of:

- failure to comply with any of the "basic and essential requirements" identified in Brodyn; or
- failure by an applicant to comply with section 17(2)(a).

Future decisions will assist principals and owners to identify other requirements which may give rise to jurisdictional error if they are not complied with.

TozziniFreire Advogados News

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Energy

ENERGY - RECENT NEWS

Relevant News:

• ICGs Auction

The state-owned company CHESF, controlled by the Eletrobras group, was the winner of the auction conducted by ANEEL to contract public service of power transmission. The company will be granted with a concession of Transmission Facilities of Generation Plants' Exclusive Interest for Shared Connection (ICG) to enable the connection to the Basic Grid of wind projects located in the States of Rio Grande do Norte, Bahia and Ceará. The company was the winner in three tranches, comprising five transmission lines, with extension of 501 kilometers, and four substations. The auction had an average discount of 50.9%.

• Alternative Sources Auctions Commercialized 89 Plants

The Alternative Sources Auction (A-3 and Reserve), held on August 25 and 26, resulted in the commercialization of 2,892.2 MW of installed capacity. 70 wind plants, 12 biomass thermoelectric and 7 small hydroelectric power plants (PCHs) sold their power. These 89 projects will receive investments of approximately R$9.7 billion. It is estimated that the amount involved in the auctions will reach R$26.9 billion at the end of the contracts term, which varies among 15 years (biomass), 20 years (wind) and 30 years (PCH).

• MME Protocols Studies for Conduction of A-5 Auction

The Ministry of Mines and Energy - MME sent on August 10 to the Union Audit Court the process for the Auction for Energy Purchase from New Generation Projects (A-5). The studies were developed by the Energy Research Company - EPE and enable the construction of the Teles Pires, São Manoel and Sinop hydroelectric plants, located in the Teles Pires River. MME also filed optimization studies of the Riacho Seco hydroelectric plant, located in the São Francisco River. The A-5 Auction is planned for the second half of 2010, as per MME Ordinance No. 54/2010.

Legislation and Regulation:

• Limits for Reimbursement of ICMS

The National Electricity Agency – ANEEL published Resolution No. 410/2010, establishing limits of reimbursement to the States that had losses from the collection of ICMS (state sales tax) on fossil fuels used to generate power. The reimbursement is established in Federal Law No. 12,111/2009 and will be equal to the difference, if positive, between the value resulting from the reference rate of ICMS on the cost of fossil fuel used to generate energy in the isolated systems of the relevant State (i) in the 24-month period prior to the interconnection and (ii) in the 24-month period following the interconnection. The deadline for reimbursement is up to December 31, 2013 and will have as exclusive source of payment the additional amount of 0.30% on the operational net revenues of the power distribution concessionaires and permissionaries.

• New Regulation for Energy Supply

ANEEL published Resolution No. 414/2010, which establishes updated and consolidated general conditions of electric energy supply. This new resolution replaces Resolution No. 456/2000, which will be revoked after one year from date of publication of the new Resolution No. 414/2010, which is September 15, 2011. The Resolution is the result of numerous suggestions from agents to ANEEL and the changes that were made in the power sector legislation over the past 10 years.

• 2014 World Cup Action Plan

MME Ordinance No. 760/2010 created a Working Group to draft the Action Plan of the 2014 World

Cup. The Working Group will have the following responsibilities related to the cities that will host the 2014 World Cup: (i) description of the current topology of the power system supply, covering the transmission system and distribution grids, (ii) description of the works whose operation start-up is scheduled for 2014, (iii) evaluation of the power supply system performance, (iv) definition of extensions and reinforcements to be implemented to ensure adequate performance of the system in 2014, and (v) preparation of a specific Action Plan for the control, evaluation and monitoring of the planned activities.

• **New Law on Dam**

Federal Law No. 12,334/2010, which establishes the National Policy on Safety of Dams (PNSB) and creates the National Information System on Safety of Dams (SNISB). The Law applies to dams used to accumulate water for all purposes, to temporary or final disposal of waste and to the accumulation of industrial waste. The dam that does not meet the safety requirements provided in the applicable law shall be recovered or disabled.

Public Hearings and Consultations:

• **Change of the Inventory Study**

ANEEL published the documentation regarding Public Hearing No. 42/2010 to obtain subsidies and additional information for the improvement of Resolutions No. 393/1998 and No. 398/2001, which deal with the procedures for registry, analysis, selection and approval of inventory studies. The deadline for contributions is November 16, 2010.

• **Power Contracting in case of Delay in the Commercial Operation**

ANEEL published the documentation regarding Public Hearing No. 41/2010 to obtain subsides and additional information for the improvement of Resolution No. 165/2005, which establishes the conditions for power commercialization in case of delay in the commercial operation start-up of generation plants or power import projects. The deadline for contributions is October 11, 2010.

• **Third Cycle of Tariff Review**

ANEEL published the documentation regarding Public Hearing No. 40/2010 to obtain subsides and additional information to establish methodologies and general criteria for the third cycle of periodic tariff reviews of the power distribution concessionaires. The deadline for contributions is December 10, 2010.

• **Incentive for Small Distributed Generation**

ANEEL published Public Consultation No. 15/2010 with the aim of presenting the main regulatory instruments used in Brazil and in other countries to encourage small distributed generation projects from renewable energy sources connected to the distribution grid, and receiving contributions from the interested agents and society on the questions that the regulator must face to reduce the existing barriers. The deadline for contributions is November 9, 2010.

Pedro G. Seraphim
Partner - São Paulo
pseraphim@tozzinifreire.com.br

Heloisa Ferreira Andrade Scaramucci
Partner - São Paulo
handrade@tozzinifreire.com.br

Focus On

Intellectual Property

SEPTEMBER 2010

The *Copyright Modernization Act* – How will the New Exceptions Impact You?

By Margot Patterson

Bill C-32, the *Copyright Modernization Act*, has been the subject of a great deal of attention and debate since it was introduced in June, over issues such as “digital locks”, “users’ rights”, and whether and how Canada is keeping up with other countries in protecting copyright. Reforming the *Copyright Act* is a government priority, and with Parliament now back in session, the bill will soon be before the Committee for review.

Rapid advances in the use of digital media to access, use, share and copy works have had led to increased pressure to overhaul Canada’s copyright legislation, which has not been significantly revised since the last general amendments in 1997. Over the years, the government has conducted stakeholder consultations and put forward bills intended to better align our legislation with the digital environment, and with international standards as set out in two 1996 World Intellectual Property Organization treaties. Two bills died on the Order Paper in 2005 and 2008. Bill C-32 is the most recent proposal to balance out the policy concerns of increasing innovation and competition against creators’ needs to protect their works. How best to achieve this balance has always been one of copyright’s most fundamental issues.

This article focuses on the access to, and use of, works in the digital environment through copyright exceptions. Much of the tension in the *Copyright Act* which characterizes its balance is found in those significant words: “it is **not** an infringement of copyright to…” engage in those defined activities the government has identified as being exempt from liability.

The Bill C-32 proposed exceptions are listed in the second part of this article. Before arriving there, however, it is worth noting that while copyright in Canada is statutory law, the courts and the Copyright Board of Canada have increasingly found themselves defining the reach and limits of rights and exceptions – in the absence of "modernized" legislation.

Defining the rights of owners and users in Copyright decisions

For example, in the 2002 decision *Théberge v. Galerie d'Art du Petit Champlain inc.*, the Supreme Court of Canada said that the proper balance lies not only in recognizing creators' rights but also "in giving due weight to their limited nature". Two years later, in *CCH Canadian Ltd. v. Law Society of Upper Canada,* the Court observed that the *Copyright Act* sets out the rights and obligations of both copyright owners and users, and said that exceptions to copyright infringement can be understood as "users' rights".

In July, the Federal Court of Appeal upheld a Copyright Board decision that the fair dealing exception in the *Copyright Act*, which applies to "research", covered the 30-second previews of songs available online for purchase and download. The Society of Composers, Authors and Music Publishers of Canada (SOCAN) had wanted its tariff for online uses of music to reflect the distinct value of previews and is now seeking an appeal to the Supreme Court. SOCAN wants the Court to rectify a "very significant and unwarranted expansion in the scope of" fair dealing, noting that the case "raises important questions about the scope and application of the *Copyright Act*, particularly the fair dealing defence", in the "new world of copyright", characterized by mass use of digital media.

Defining the rights of users and owners in legislation: the Bill C-32 exceptions

For those who wish to avoid copyright liability in their business operations or private uses, and for those who are closely watching how their rights will be limited under the *Copyright Act*, here is a list of the expanded or new exceptions to copyright protection proposed in Bill C-32. Eventually, some aspects of these can be expected to be tested before copyright decision makers, such as the courts and the Copyright Board. As legislative proposals, however, all efforts are now focused on making sure the provisions are fair, workable, and meet the government's stated policy objectives.

Fair Dealing

Fair dealing has long been part of Canadian copyright law to allow certain uses that have significant social benefits. The existing fair dealing exceptions cover research and private study (s. 29), and with certain requirements, criticism or review (s. 29.1).

The bill adds education, parody and satire as non-infringing activities (s. 29). New exceptions are also provided for non-commercial, user-generated content (e.g. for mash-ups of video clips (s. 29.21)), making copies for private purposes (e.g. "format shifting" songs to an MP3 player (s. 29.22)), time-shifting programs on PVRs and other devices (s. 29.23), and for making back-up copies to protect against loss or damage (s. 29.24).

Educational Institutions

The government has expanded the ability of teachers and students to use digital technology and copyright materials without liability. The bill adds exceptions for instructors to send lessons by telecommunication (e.g. for distance education (s. 30.01(3)), and for their students to copy the lesson in order to access it at a more convenient time (s. 30.01(5)). Exceptions are introduced where the educational institution has a reprographic reproduction (photocopy) licence to make digital copies of works (s. 30.02(1)), and for the instructor to print one copy of the work (s. 30.02(2)). Educational institutions and instructors are also granted exceptions to use works and other materials available through the Internet, subject to certain limitations (s. 30.04(1)).

Computer Programs and Technological Processes

As the government has pointed out, the last round of updates to the *Copyright Act* took place at a time when many of the digital media and technologies widely available today were not yet developed (or even imagined). The government states that it wants to permit greater flexibility in using computers, systems and programs in ways that do not create unanticipated or incidental copyright liability. It also has the policy goal of supporting innovative, competitive businesses and markets, such as the Canadian third-party software market.

New exceptions are granted to copy a computer program to make it interoperable with another (s. 30.61), and to copy a work or other subject-matter for the purposes of encryption research (s. 30.62), or for computer system or network security purposes (s. 30.63). A broad new exception is introduced for making temporary reproductions for "technological processes" (s. 30.71), which are not defined in the bill.

Broadcasting

The existing *Copyright Act* provides exceptions to programming undertakings – broadcasters or broadcast distributors that originate their own programming – to make certain reproductions without liability. The exceptions are limited in certain ways, however, and are not applicable where a copyright-collective society seeks payment for the reproductions through a licence. To advance the government's policy to limit liability for making temporary, incidental digital copies, the bill considerably expands the scope of the exception and its availability to broadcasters.

Network services

The government wants to clarify that ISPs and search engines are not liable when they deal with content only as intermediaries. The bill grants exceptions for "providing services related to the operation of the Internet or another digital network" (s. 31.1(1)), for caching and other similar incidental acts (s. 31.1(3)), and for hosting (s. 31.1(5)).

Perceptual disabilities

The *Copyright Act* provides for exceptions for persons with disabilities. A new exception is granted for non-profit organizations for the visually impaired, such as the CNIB, to make and send copies of works that are accessible to persons with a print disability to similar organizations outside Canada (s. 32.01(1)).

Private uses and non-commercial infringement

Greater flexibility is given to use personal photos that are professionally taken: the bill provides new exceptions for private or non-commercial use of photographs commissioned for personal purposes (s. 32.2(1)(f)).

Technological protection measure (TPM) circumvention

The debate over access versus protection has made TPMs the focus of some of the most significant and contentious issues surrounding the bill. TPMs are sometimes called "digital locks", which may be used by rightsholders to control access to their work (e.g. by password or access code) or to prevent copying (e.g. by encrypting the work). Bill C-32 supports these measures with legal protection, making it illegal to: bypass or circumvent the TPM; to manufacture, sell or distribute devices designed to hack TPMs; or to offer services to do so.

In the interest of fair access, innovation and competition, the government has limited the protection for TPMs by providing exceptions for circumventing them:

- for purposes of law enforcement and national security (s. 41.11);
- for the interoperability of computer programs (s. 41.12);
- for encryption research (s. 41.13);
- to prevent the collection or use of personal information (s. 41.14);
- for computer system or network security purposes (s. 41.15);
- for making works, performances or recordings accessible to persons with perceptual disabilities (s. 41.16);
- for broadcasting undertakings, to benefit from the temporary recordings exception in s. 30.9, (s. 41.17); and
- for unlocking a wireless device (s. 41.18).

The government may enact regulations adding to the above list of exceptions, if for example it considers it necessary to lift restrictions on competition in the applicable sector.

Bill C-32 has the potential to change Canada's copyright landscape significantly. If history repeats itself, further broad copyright reform may not occur again for a number of years. This presents a unique opportunity to ensure that this bill – should it survive – delivers positive change for stakeholders which will stand the test of time.

Contact Us

For further information, please contact a member of our National Intellectual Property Group.

China Promulgates New Regulation on Third Party Payment Service

By Huang Xuhua* and Wang Shijie**

China Bulletin September 2010

The regulation of payment and settlement service provided by non-financial institutions has always been of a concern to China's legislator over the years. After more than five years of study and deliberation, the People's Bank of China ("**PBOC**") officially promulgated the *Administrative Rules for the Payment Services by Non-financial Institutions* ("**Payment Service Rules**") on June 14, 2010. The Payment Service Rules, effective September 1, 2010, established detailed provisions on the scope of the third party payment service, the qualifications and requirements for paid-in capital that the service provider should satisfy, as well as client protection in regard with the customer deposit funds. Undoubtedly, the Payment Service Rules will have a significant impact on the integration of the existing third party payment service market in China and the non-financial institutions engaging in third party payment business.

I. Legislation on Third Party Payment Service before the Promulgation of the Payment Service Rules

For a long time, payment and settlement services have been considered the traditional services of commercial banking. The *Rules for Payment and Settlement*[1] *promulgated in 1997* clearly provides that unless otherwise stipulated by relevant laws and administrative regulations, non-bank financial institutions and other organizations shall not engage in payment and settlement business as a payment intermediary without the approval of the PBOC. [2] Upon the promulgation of the *Rules for Payment and Settlement* in 1997, relevant rules and regulations[3] started to permit credit unions and financial institutions other than banks to access the payment and settlement market. However, due to risk control and other concerns, relevant authorities did not give the green light to enterprises and legal persons which are not financial institutions to access the payment and settlement service market until the implementation of the Payment Service Rules.

In addition, China's phenomenal economic growth and its rapid development of information technology and Internet media also require a functional payment service. However, the broad and comprehensive service model of traditional financial institutions was not sufficiently refined to meet the needs of new and small businesses. For this reason, the payment service provided by non-financial institutions (also known as the "third-party payment service") emerged and quickly flourished to fill this gap in the market. Due to legal restrictions, third party payment service providers were unable to include "payment and settlement services" in their respective scopes of business. Therefore, third party payment service providers had to operate payment services in the gray area. Moreover, the regulation of third-party payment services, including the eligibility and anti-money laundry obligations of service providers, also became void due to the lack of legal basis.

To speed up the lagged legislation on third party payment service, the PBOC formulated the *Administrative Rules for Payment and Settlement Organizations (Draft)* (" **Draft Payment Service Rules**") in early 2005 and solicited public comments. The Draft Payment Service Rules proposed to permit qualified financial institutions other than banks to provide payment and settlement services. The Draft Payment Service Rules were amended for several times as relevant authorities were unable to agree on a number of issues, including whether foreign investment in this industry is permitted, restriction on the proportion of equity that foreign investors hold in non-financial institutions providing third party payment service, information security and deposit risks. To provide a transitional measure and reference for the formulation of policy, the PBOC published the *PBOC Announcement No.7 [2009]* ("**No. 7 Announcement**") on April 16, 2009. The announcement required non-financial institutions engaging in the payment and settlement service to perform registration formalities with PBOC. The announcement also clarified that such registration is not an administrative license of payment and settlement services issued by the PBOC. By the end of the first quarter of 2010, more than 260 non-financial institutions submitted registration materials to the branches of PBOC. Most of these institutions provide online payment, mobile payment, telephone payment and prepaid card issuance services.[4]

II. Integration of Third-party Payment Market After the Promulgation of the *Payment Service Rules*

According to the *Payment Service Rules*, starting from September 1, 2010, non-financial institutions must obtain the License of Payment Services ("**License**") from the PBOC[5] before engaging in payment and settlement services within the territory of China. The non-financial institutions that have started to provide payment services prior to the implementation of the *Payment Service Rules* must obtain the License by August 31, 2011.[6] To obtain the License, the non-financial institution applying for the License ("**Applicant**") shall meet the strict requirements that the PBOC establishes according to the principle of prudence, including 1) the registered capital of the Applicant that applies for operating nationwide payment services shall not be less than RMB100 million[7]; 2) the Applicant shall operate its business for more than three years; and 3) the main investor of the Applicant shall have provided information processing support services to financial institutions or e-commerce businesses for more than two consecutive years, have generated profits for more than two consecutive years, and have not been subject to any penalty for engaging illegal or criminal activities by utilizing payment services or for providing payment services for illegal or criminal activities in the past three years.[8]

The above requirements imply that the Applicant will be unable to establish a new enterprise to engage in third party payment business. In practice, few of the existing enterprises that are providing third party payment services are able to meet these eligibility requirements. According to China e-Business Research Center[9], only a smaller number of enterprises that are eligible to apply for the License to provide payment services across the country, including Alipay.com, YeePay.com and Ten Pay.com. It is foreseeable that some of the 260 enterprises that have performed registration formalities with the PBOC will have to exit from the payment and settlement market, unless they can meet the threshold for market entry set by the PBOC via increase of registered capital or other necessary measures by August 31, 2011.

In addition, the *Payment Service Rules* provide that the ratio of the paid-in capital of a third party payment service provider to the daily average of balance of its customer deposit funds shall not be less than 10%[10]. This means that large privately-owned payment service providers, such as Alipay.com, will need to maintain their paid-in capital in large amounts at any time. In light of the fact that the state-owned payment service providers are mainly banks and other types of financial institutions not subject to these restrictions, the requirement of 10% may result in the continuous reduction in the number of qualified privately-owned third-party payment service providers and thus place these third party payment service providers in a disadvantaged position when competing with state-owned payment service providers.

III. Further Improvements of the Payment Service Rules

To accord with the enforcement of the *Payment Service Rules*, the PBOC is formulating relevant implementation rules, and has announced on its website the *Detailed Provisions for the Implementation of the Administrative Rules for the Payment Services by Non-financial Institutions (Draft for Comments)* ("**Detailed Provisions for the Payment Service Rules (Draft for Comments)**") on September 21, 2010 in an attempt to set definitive requirements and supplements to the administrative examination and approval of the third party payment market entry, and the operation and supervision of payment services. Unfortunately, the two important issues that are of particular concern to the legislaton process in the past five year are not specified in either the *Payment Service Rules* or the *Detailed Provisions for the Payment Service Rules (Draft for Comments)*.

A. Legitimacy of Non-Financial Institutions to Provide Interbank Settlement Services

Unlike the *Draft Payment Rules* and the *No.7 Announcement*, the *Payment Service Rules* only specify that third-party payment services include on line payment, prepaid card issuance and acquiring service, and bank card acquiring services, but do not clarify whether financial institutions other than banks may provide interbank settlement service. Therefore, unless the PBOC grants special approval or provides otherwise in the future, non-financial institutions cannot legally provide such service in China.

B. Third party Payment Services Providers with Foreign Investment

The *Draft Payment Rules* proposed that foreign investors may jointly establish payment and settlement organizations with Chinese investors, subject to a maximum foreign shareholding of 50%. Relevant authorities also discussed the possibility of reducing the maximum foreign investment ratio to 25% or 30%. Eventually, the *Payment Service Rules* are silent on whether or not foreign investment in payment and settlement organizations are permitted and the permitted percentage of foreign investment. Instead, the Payment Service Rules only generally provide that the business scope of foreign-invested payment service providers, the qualifications of the foreign investors, and the restriction on foreign shareholdings in such businesses shall be subject to rules to be established by the PBOC and the approval of the State Council.[11]

International companies, which have planned for years to operate payment service business in China, have to wait a longer time for entry into the market and will, at the same time, face the growing competiveness of Chinese companies in the third party payment service sector. It is also expected that, before the promulgation of related foreign investment policies, Alipay.com, PayPal.com and other companies that have virtually provided payment services through the Variable Interest Entity ("**VIE**") structure are very likely to continue to provide their services with the VIE structure.

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

* Huang Xuhua is a partner of King & Wood .
** Wang Shijie is a partner of King & Wood .

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[1] The *Rules for Payment and Settlement* was promulgated by PBC on September 19, 1997, and took effect as of December 1, 1997.

[2] See Article 6 of the *Rules for Payment and Settlement*.

[3] For example, the *Guidelines of the People's Bank of China on the Payment and Settlement Service in Rural Areas ([2006] No.272)*.

[4] Source of data: the explanation of the PBC officers on "the background and significance of the *Administrative Rules for the Payment Services by Non-financial Institutions*" on the press conference on June 24, 2010, accessible http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=lfbj&gid=1090522211（last visited on July 14, 2010）

[5] See Article 3 of the Payment Service Rules.

[6] See Article 48 of the Payment Service Rules.

[7] See Article 9 of the Payment Service Rules.

[8] See Article 10 of the Payment Service Rules.

[9] Source: "China e-Business Research Center: China's Third Party Payment Service Sector to Reshuffle", assessable via http://b2b.toocle.com/detail--5254800.html（last visited on July 14, 2010）

[10] See Article 30 of the Payment Service Rules.

[11] See Article 9 of the Payment Service Rules.

COLOMBIA - Insurance With Foreign Companies

The Colombian Superintendence of Finance makes reference to the articles of Finance Statute related to the insurance engagement with foreign insurance companies and especially to article 39 that prohibits as a general rule, to contract insurances with foreign entities that have not been authorized to operate in Colombia. Law 1328 of 2009 modifies that disposition by allowing foreign insurance companies offering their services in Colombian territory, but can only offer the insurances mentioned in that Law: insurance associated with maritime international shipping, international commercial aviation and space launching and space transportation (including satellites), that covers the risks associated with goods being transported, the vehicle transporting the goods and any liability that could arise, as well as insurance to covers the merchandise in international traffic.

Nevertheless, the following insurances cannot be underwritten with foreign insurance companies: insurances related to the social security system; compulsory insurances; insurances in which the policyholder, insured or beneficiary must demonstrate prior to the acquisition of the respective insurance that has a compulsory insurance or that is current on his obligations to social security and insurance where the policyholder, insured or beneficiary is a State entity.

These modifications related will not be in force until four (4) years after its promulgation, it means July 15th, 2013.

For additional information visit www.bu.com.co

The Brief

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Abu Dhabi
Tel. +971 (0)2 667 6972
gln.abudhabi@gide.com

Algiers
Tel. +213 (0)21 23 94 94
gln.algiers@gide.com

Beijing
Tel. +86 10 6597 4511
gln.beijing@gide.com

Belgrade
Tel. +381 (0)11 30 24 900
gln.belgrade@gide.com

Brussels
Tel. +32 2 231 11 40
gln.brussels@gide.com

Bucharest
Tel. +40 21 223 03 10
gln.bucharest@gide.com

Budapest
Tel. +36 1 411 74 00
gln.budapest@gide.com

Casablanca
Tel. +212 5 22 27 46 28
gln.casablanca@gide.com

Dubai
Tel. +971 (0)4 445 6500
gln.dubai@gide.com

Hanoi
Tel. +84 4 3946 2350
gln.hanoi@gide.com

Ho Chi Minh City
Tel. +84 8 3823 8599
gln.hcmc@gide.com

Hong Kong
Tel. +852 2536 9110
gln.hongkong@gide.com

Istanbul
Tel. +90 212 385 04 00
gln.istanbul@gide.com

Kyiv
Tel. +380 44 206 0980
gln.kyiv@gide.com

London
Tel. +44 (0)20 7382 5500
gln.london@gide.com

Moscow
Tel. +7 495 258 3100
gln.moscow@gide.com

New York
Tel. +1 212 403 6700
gln.newyork@gide.com

Paris
Tel. +33 (0)1 40 75 60 00
info@gide.com

Prague
Tel. +420 222 871 111
gln.prague@gide.com

Riyadh
Tel. +966 1 217 77 54
gln.riyadh@gide.com

Saint Petersburg
Tel. +7 812 303 6900
gln.saintpetersburg@gide.com

Shanghai
Tel. +86 21 5306 8899
gln.shanghai@gide.com

Tunis
Tel. +216 71 891 993
gln.tunis@gide.com

Warsaw
Tel. +48 22 344 00 00
gln.warsaw@gide.com

NEWSFLASH

Hungary
2010 Interim Tax Law Changes

In June 2010, the Hungarian government announced a 29-point economic action plan, including steps that are meant to implement lower taxes and simplify the tax system.

Part of the tax related steps has been already passed by the Hungarian Parliament. The new bill amending the tax laws was published on 13 August 2010.

The codification of other parts of the action plan is still under way, additional draft bills are expected to be submitted to the Parliament in the near future.

Please note that this Newsflash is aimed at giving a flavour of the major changes. As such, the summary below is by no means exhaustive and complete, and should not be relied upon as legal or tax advice. For individualised tax and legal consulting, please contact our advisors at the contact details displayed on the back page of this newsletter.

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Contents

GLN
Gide Loyrette Nouel

More Preferential Corporate Income Taxation

As of 1 July 2010, the preferential 10% corporate income tax ("CIT") rate will be applicable up to a positive tax base of HUF 500 million, instead of the former HUF 50 million limit. In addition, as opposed to the former rules, the preferential 10% CIT rate may be applied without preconditions.

As the changes are introduced during the tax year, taxpayers should apply both the former and the newly introduced tax rate regimes in 2010. Technically, this means that the 2010 CIT base should be split up in proportion to the calendar days in the first and second half of 2010.

The table below illustrates the calculation of CIT for 2010 and 2011:

	2010		2011
Tax base	The part of the 2010 CIT base attributable to the first half of 2010	The part of the 2010 CIT base attributable to the second half of 2010	2011 tax base
Tax rate	10% up to a tax base of HUF 50 million if certain conditions are met	10% up to a tax base of HUF 250 million (i.e. half of 500 million due to the half year) without further preconditions	10% up to a tax base of HUF 500 million without further preconditions
	19% for tax base above HUF 50 million if certain conditions are met, otherwise 19% for the whole tax base	19% for tax base above HUF 250 million	19% for tax base above HUF 500 million

However, in general, foreign entities holding shares in 'real estate companies' will be still subject to 19% CIT in 2010. In addition, the 19% CIT rate remains in effect with respect to the definition of controlled foreign companies.

Extraordinary Tax on the Financial Sector

Extraordinary tax is levied on most entities in the financial sector that closed their financial statements prior to 1 July 2010.

The extraordinary tax for 2010 should be paid in two equal instalments. The first instalment is due by 30 September 2010, while the second instalment needs to be paid by 10 December 2010.

The tax bases and the tax rates for 2010 in relation to the different financial institutions subject to this tax are summarised below:

Financial institution	2010 Tax base	2010 Tax rate
Credit institutions	2009 adjusted balance sheet total (= balance sheet total – receivables from domestic inter-bank loans – the value of the debt securities and shares issued by domestic credit institutions, financial enterprises and investment companies – receivables from loans, subordinated loan capital and additional subordinated loan capital provided to domestic financial enterprises and investment companies including also receivables from reverse placement transactions, repurchase agreements and delivery repurchase agreements)	0.15% rising to 0.5% for tax base above HUF 50 billion
Insurance companies	2009 corrected premiums (= earned premiums net of reinsurance for non-life insurance + gross premiums for life-insurance – 90% of the ad-hoc premiums and 90% of the premiums from single-premium contracts – certain premiums from deferred-starting pension supplement insurances)	6.2%
Financial enterprises	2009 profit from interest, fees and commissions	6.5%
Investment companies, Stock exchanges, Commodity exchange companies, Venture capital fund managers	2009 corrected net revenue (with a different definition for the different financial institutions)	5.6%
Investment fund managers	net asset value of funds managed and the value of other portfolio assets managed on 31 December 2009	0.028%

The extraordinary tax would be in place for 2011 and 2012 as well. For these years, the tax base and the tax rates will be governed by separate tax bills.

Communal Tax on Entrepreneurs

The communal tax on entrepreneurs will be abolished as of 1 January 2011.

Personal Income Tax

Household work

As of 15 August 2010, household work (cleaning houses, cooking, washing, ironing, baby-sitting, home teaching, home and nursing care, housekeeping and gardening) performed by an individual for another individual do not trigger tax and social security contribution liability. The employer is only obliged to report the employment to the tax authority prior to the start of the activity each month, and to pay a monthly registration fee of HUF 1,000 per employee.

Household work carried out by businesses (including individual entrepreneurs and individuals who perform the activity as employee or shareholder of a company) and household work carried out to the benefit of the employing individual's business are not exempted from tax and social security contributions.

Real property let by individuals

The modifications make it clear that individuals do not have to become individual entrepreneurs and to obtain tax number to let real property if they do not opt for the taxation of the lease for value added tax purposes.

Real Estate Transfer Tax

As of 1 January 2010, transfer tax is levied on the acquisition of a quota in a 'real estate company', if the quota obtained reaches 75% either by the acquirer alone or, for example, with close relatives or its related companies. Based on the recent tax law changes, if a transaction is between related parties, the acquisition is exempt from transfer tax in all cases where the tax authority has not made a binding decision before 1 July 2010.

Inheritance and Gift Tax

Inheritance and donations between linear relatives by blood or adoption are exempted from inheritance and gift tax as of 16 August 2010. The favourable changes also apply to cases where no binding decision was made before 1 July 2010.

Property Tax on Vehicles

The property tax on high value vehicles, including certain water vehicles, aircraft and passenger cars, will be cancelled as of 16 August 2010. The second instalment of the 2010 tax liability should not be paid.

Expected Further Tax Law Changes

In the 29-point economic action plan, the government has also announced plans to implement the following measures:

- 16% flat-rate personal-income tax instead of the current progressive taxation at 17% and 32%, and family taxation (planned to be introduced within the next two years);
- cancellation of tax credits in personal income tax;
- cancellation of several less relevant taxes currently imposed on small and medium-sized businesses.

The related draft tax bills have not been submitted to the Parliament yet.

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Gide Loyrette Nouel
Rákóczi út 42
1072 Budapest - Hungary
Tel. +36 1 411 74 00
Fax +36 1 411 74 40
E-mail: gln.budapest@gide.com

Contacts

François d'Ornano, resident partner
ornano@gide.com

Lilla Pusztai
lilla.pusztai@gide.com

For more information:
www.gide.com

GLN
Gide Loyrette Nouel

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INDONESIA REGULATION AGAINST UNFAIR COMPETITION AND MONOPOLY PRACTICES IN MERGERS AND ACQUISITIONS

The regulation for the implementation of Articles 28 (3) and 29 (2) of Law No. 5 of 1999 regarding Anti-Monopoly was finally issued on 20 July 2010, more than eleven years after the enactment of that law. The regulation is Government Regulation No. 57/2010 regarding Mergers and Acquisitions Which May Cause Monopolistic Practices ("Regulation No. 57/2010" or "Regulation").

The Regulation stipulates a total asset value threshold as well as a sale value threshold for mergers and acquisitions, and the requirement to file a written notification to Anti Competition Commission (the "Commission") if a merger or an acquisition will have a total asset value or a sale value that exceeds the threshold. The total asset value threshold is 2.5 trillion Rupiah, whereas the sale value threshold is 5 trillion Rupiah. For mergers and acquisitions in the banking sector, a total asset value of greater than IDR 20 trillion will trigger the notification requirement. Parties intending to do a merger or acquisition which value will exceed the respective threshold may consult the Commission.

The Regulation also regulates exemptions from the notification requirement, the procedure for the notification, the Commission's assessment of the notification, and sanctions for the notification requirement violation.

The Regulation has been in force since 20 July 2010. (by: Hamud M. Balfas)

For additional information visit www.abnrlaw.com

NautaDutilh

Update
Banking & Finance

Expertise requirement for financial enterprises to be extended and clarified / Aanscherping deskundigheidstoetsing door DNB en AFM — **12 October 2010**

update NautaDutilh

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.

Contact

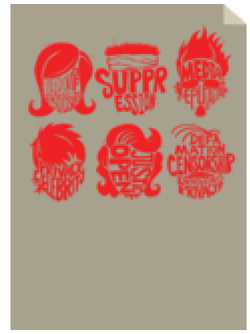
Larissa Silverentand (T +31 20 71 71 716)
larissa.silverentand@nautadutilh.com

Geert Raaijmakers (T +31 20 71 71 992)
geert.raaijmakers@nautadutilh.com

Simpson Grierson

New Rules for Name Suppression Proposed

13 Oct 2010



What does a rugby player, a hip hop artist and an Act politician have in common?

All have had name suppression in our criminal courts at one time or another. The Government says a proposed overhaul of suppression rules will make that less likely in future.

In 1994 Simpson Grierson partners William Akel and Tracey Walker won the right for news media to be represented in Court on the question of suppression in a criminal case.[1] The rationale was that the news media are the eyes and ears of the general public; open justice is a fundamental part of the fabric of our society and suppression impedes the media's ability to report and the public to be informed about the way justice is served in our criminal courts.

Sixteen years later, the Government has announced it will introduce a new Bill to overhaul suppression laws which goes one step further - granting "legitimate media" a conditional right to appeal suppression decisions.[2]

This is one proposal in a bundle which the Government says will make suppression harder to get. The perceived problems with the current framework for suppression under the Criminal Justice Act 1985 are inconsistency, uncertainty and clarity of application. No guidance is provided in the Act which merely provides a broad discretion. This has left the Courts to develop the approach on a case by case basis. More likely, the public perception that name suppression appears too easy for celebrities and other prominent people has galvanised Government action. Justice Minister Simon Power's press release expressly stated "Being famous is not a good enough reason to be granted name suppression". [3]

As the Law Commission concluded in its October 2009 report "Even the existence of this perception [that the principle of open justice is departed from too readily…without clearly articulated reasons] undermines the principle of open justice and risks jeopardising public confidence in the courts".[4]

The Government's proposals endorse, in whole or in part, 33 of the recommendations made by the Law Commission. These are largely consistent with the approach to suppression mandated by the Court of Appeal (although the Court has avoided laying down any "fettering code"[5]). Once they receive the imprimatur of statute, it is expected the approach will be applied more consistently, particularly at the District Court level where long Court lists and insufficient time to consider broader issues present practical challenges.

Summary of the main proposals

The Criminal Procedure Bill (**the Bill**) will provide that suppression of name, address or occupation of a person charged with an offence may be made on the following grounds:

- Where there is a real risk of prejudice to a fair trial
- To prevent undue hardship to victims
- To prevent extreme hardship to the accused and/or persons connected with the accused
- Where publication would endanger the safety of any other person
- Where publication would identify another person whose name is suppressed by order or by the law
- Where publication would be likely to prejudice the interests of the maintenance of the law, including the retention, investigation and detection of offences
- Where publication would cast suspicion on other people that may result in undue hardship

Automatic name suppression will apply in cases of incest or sexual conduct with a dependent family member but the victim will be able to apply to the Court for publication of the defendant's name and the Court has to make such an order if the victim is over 18 and understands the nature and effect of the decision.

Importantly, the proposed legislation will reaffirm the principle that there is no presumption of extreme hardship solely on the ground that the accused is well known.[6]

Victims and witnesses are also entitled to have their identity suppressed where publication would endanger the safety of any person or would result in undue hardship to the victim or witness. Automatic name suppression for victims of specified sexual offences would continue. In addition, child victims and witnesses would receive automatic name suppression with a mechanism for name suppression to be lifted in respect of a child victim who has died.

The Bill will also provide that the Court has power to make an order preventing publication of the identity of persons (including corporations) connected with the accused or the proceedings where publication would otherwise result in undue hardship to that person, whether or not the name of the accused is suppressed. This would change the law to the benefit of employers and others who have some connection with an accused facing a criminal charge. The current position is that an employer's connection is not regarded as a connection with the proceedings but is merely collateral.[7] This means there is no ability for the employer to seek suppression of its identity even if hardship results. In a recent case, an orchestra relying on sponsorship for funding was unable to seek suppression when one of its musicians faced serious arms charges. The publicity associated with the charges jeopardised funding but the Court of Appeal said it had no ability to entertain a request for name suppression.

The proposed "undue hardship" test for victims and witnesses is less onerous to satisfy than the "extreme hardship" test for an accused. "Undue hardship" means serious hardship or excessive or greater hardship than the circumstances warrant. [8]This reaffirms that name suppression for a person charged is supposed to be exceptional.

The Bill would however make it clear that, at an early stage, a person charged can seek an interim suppression order if there is an arguable case for suppression. Such interim order is designed to be very temporary; it would expire at the next appearance (usually within two or three weeks) and can not be renewed unless supporting evidence is produced. This is principally designed for the first appearance in Court which often takes place before there is sufficient opportunity for legal advice and before information is available for the proper consideration of suppression issues.

On the vexed subject of ISPs and content hosts on the internet, the Bill will provide that where an on-shore ISP or content host becomes aware that they are carrying or hosting information that they know is in breach of a suppression order, it will be an offence for them to fail to remove it or to block access to it as soon as reasonably practical.

Penalties for breaching suppression orders will increase substantially from $1,000 to $100,000 in the case of a body corporate and from a maximum of three months to six month's imprisonment in the case of an individual. A breach of name suppression will occur if the name or any particulars likely (either alone or in conjunction with other information already in the public domain) to lead to the person's identification are published. This is commonly known as "jigsaw identification".

The Bill is intended to be introduced later this year.

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[1] *R v L* [1994] 3 NZLR 568

[2] "Legitimate media" is likely to be defined as members of the media who are subject to a code of ethics and the complaints procedure of the Broadcasting Standards Authority or the Press Council

[3] 5 October 2010; beehive.govt.nz

[4] Law Commission Report 109, Suppressing Names and Evidence, para 1.5

[5] *Lewis v Wilson & Horton* [2000] 3 NZLR 546

[6] *Sooalo v NZ Police,* High Court, Christchurch, CRI2006-409-151, 14 September 2006.

[7] *R v Shapiro* [2008] NZCA 151

[8] *R v Wallace* (2001) 18 CRNZ 577 (CA); *Dalton v Auckland City* [1971] NZLR 548

AUTHOR

Tracey Walker
Partner - Dispute Resolution
DDI: +64 9 977 5088
Mobile: +64 21 273 6241
Email: tracey.walker@simpsongrierson.com

理律法律事務所
LEE AND LI
ATTORNEYS-AT-LAW

TFTC Imposed Fines on Three Paper Companies for Price Fixing

◎Yvonne Hsieh

In a decision dated April 14, 2010, the Fair Trade Commission (FTC) found that Cheng Loong Corp. ("Cheng Loong"), Long Chen Paper Company ("Loong Cheng") and Yuen Foong Yu Paper Company ("Yuen Foong Yu"), three paper companies, had violated the Fair Trade Act ("FTA") for increasing their prices at the same time and by the same amount to avoid competing with each other. Consequently, the FTC imposed a NT$5 million fine on Cheng Loong, a NT$3 million fine on Loong Chen and a NT $2 million fine on Yuen Foong Yu.

With respect to the recent industrial paper price-fixing, the FTC found that Cheng Loong, Loong Chen, and Yuen Foong Yu, which together controlled over 90 percent of the industrial paper market, set the industrial paper prices jointly during the period from November 2009 to March 2010, which violated the provisions forbidding concerted action under the FTA. Though industrial paper prices were indeed adjusted market-wide owing to the rising cost of waste paper, the three paper companies increased their listed prices simultaneously by a proportion that does not reflect the increase in the waste paper cost and also not consistent with the price raise among competitors. Also, the increase in price made by the three companies from November 2009 to March 2010 was different from that in 2007 and thus was inconsistent with the commercial practice in the paper industry. Moreover, purchasing costs of waste paper, the percentage of the revenues arising from industrial paper compared with the other business of the company, the cost cap, the amount of industrial paper exported, etc. varied among the three companies. However, despite the differences, the three companies still increased their prices simultaneously and at the same rate without any reasonable grounds. Therefore, it was clear that the three companies intended to eliminate price competition to gain illegal profits arising from their conspiracy.

In addition, the three companies also operated downstream paper processing companies as well as corrugated container businesses, and thus can be deemed to have a vertical integration advantage in the paper industry. In fact, approximately 20 percent of the corrugated cardboards used for the manufacturing of corrugated containers on the market were provided by Cheng Loong and Loong Chen. Since Cheng Loong and Loong Chen have integrated the markets vertically, they should benefit from the low manufacturing cost and thus be able to provide their products at low prices. Nevertheless, those paper processing companied owned by Cheng Loong and Loong Chen quoted their prices almost at the same time monthly without any differences in their respective prices. Moreover, their prices were higher than those of other paper processing companies. Therefore, it was obvious that Cheng Loong and Loong Chen capitalized on their vertical integration advantage to jointly control the paper prices at the paper processing stage to stifle competition in the market.

Given the above, the FTC imposed a NT$5 million fine on Cheng Loong, a NT$3 million fine on Loong Chen, and a NT$2 million fine on Yuen Foong Yu. Additionally, the FTC stated that damage to the market resulting from concerted action is more easily proved than any other violations under the FTA and thus reminded the industrial paper industry to respect the market mechanism and maintain fair competition.

Lee and Li Bulletin

BAKER BOTTS LLP

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INTELLECTUAL PROPERTY REPORT

Articles

The Federal Circuit Expands The Scope Of Section 102(e) Prior Art

Osman Siddiq

The United States Court of Appeals for the Federal Circuit recently expanded the scope of prior art that will be considered subject to 35 U.S.C. Section 102(e), referred to by some as "secret prior art." The Federal Circuit addressed the issue of whether it is appropriate to use the filing date of a provisional patent application as the effective date for a later-filed reference that is cited as prior art. In *In re Giacomini*,[1] the Federal Circuit held that an issued patent had a patent-defeating effect as of the filing date of its provisional application.

A. Background

Applicants Peter Joseph Giacomini, Walter Michael Pitio, Hector Francisco Rodriguez and Donald David Shugard (collectively referred to as "Giacomini") filed a patent application for selectively storing electronic data in a cache on November 29, 2000.[2] Following rejection of the application by the primary Examiner, the Board of Patent Appeals and Interferences (the "Board") rejected certain claims of U.S. Patent Application No. 09/725,737 (the "Giacomini application") as anticipated under 35 U.S.C. § 102(e).[3] The Board cited U.S. Patent No. 7,039,683, in the name of Tran (the "Tran patent") as disclosing the elements of Giacomini's claims.[4]

The filing date of the Tran patent was December 29, 2000, one month *after* the filing date of the Giacomini application. However, the Tran patent claimed priority to a provisional patent application (the "Tran provisional") that was filed on September 25, 2000, two months prior to the Giacomini application.[5] Using the filing date of the Tran provisional, the Board held that the Tran patent anticipated the claims of the Giacomini application.[6]

Giacomini subsequently appealed the Board's decision.[7] Giacomini did not dispute that the Tran provisional disclosed all of the features claimed by the Giacomini application.[8] Giacomini also did not dispute that the Tran provisional was the first U.S. application to disclose the invention.[9] Furthermore, Giacomini never disputed that the Tran provisional provided written description support for all of the features.[10] Therefore, the issue in front of the Federal Circuit was whether the Tran patent should have the benefit of the Tran provisional's filing date, making it prior art to the Giacomini application.

B. Statutes

Two relevant statutes that are important for understanding this issue are 35 U.S.C. § 102(e) and 35 U.S.C. § 119(e). The relevant portion of § 102 states that an invention is not patentable if "the invention was described in . . . a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent . . . ."[11] The relevant portion of § 119 states: "An application for patent . . . for an invention disclosed . . . in a provisional application . . . shall have the same effect, as to such invention, as though filed on the date of the provisional application . . . ."[12]

C. The Federal Circuit's opinion

Giacomini primarily argued that § 119(e) allows a patent to share the date of its provisional application for priority but not for its effective reference date as prior art.[13] To support this position, Giacomini cited *In re Hilmer*.[14] In *Hilmer*, the predecessor court to the Federal Circuit had to determine whether a U.S. patent cited as a § 102 (e) reference shared an effective reference date with its foreign priority date.[15] The court in *Hilmer* decided that § 119 is silent as to effective reference dates and only covers "right of priority."[16] Thus, § 119 "does not provide for the use of a U.S. patent as an anticipatory reference as of its foreign filing date."[17] Using *Hilmer*, Giacomini argued that a U.S. provisional patent application should be treated similarly to a foreign application and, therefore, that a U.S. patent's effective reference date should not be the priority date of its provisional application.[18] Specifically, the Tran patent's effective reference date, according to Giacomini, should not be equivalent to the Tran provisional's filing date.[19]

Unpersuaded by Giacomini's argument, the Federal Circuit explained that at the time of *Hilmer*, § 119 was limited to priority dates arising from a foreign application's filing date.[20] Because the authorization of provisional applications and § 119(e) post-date *Hilmer*, the court noted that the earlier holding regarding § 119 is not applicable to provisional applications.[21] The Federal Circuit further distinguished *Hilmer* as creating a dichotomy between domestic and foreign filing dates.[22] The Federal Circuit explained that the "history of treating the disclosure of a *U.S. patent as prior art as of the filing date of the earliest U.S. application* to which the patent is entitled, provided the disclosure was contained in substance in the said earliest application."[23] The *Hilmer* court reasoned that the effective reference date of a U.S. patent does not become the filing date of an earlier filed foreign application because § 102(e) is expressly limited to the United States.[24]

Because activities in the United States are treated differently than activities overseas in several sections of the Patent Code, the Federal Circuit rejected Giacomini's reading of *Hilmer* and thus held that there is no tension between § 102(e) and § 119 as applied to provisional applications filed in the U.S.[25] Citing the principle that "one really must be the first inventor in order to be entitled to a patent,"[26] the Federal Circuit affirmed that the "Tran patent had a patent-defeating effect as of the filing date of the Tran provisional."[27]

D. Conclusion

The implication of *Giacomini* is that the universe of potentially invalidating prior art for any particular application is now larger. Because the effective reference date of a published application or patent is shared with the provisional application to which it claims priority, the published application or patent is potentially prior art to an earlier-filed application. The *Giacomini* decision provides examiners and patent litigants alike another avenue to finding potential prior art references for a particular patent application and, likewise, poses an additional issue of which patent applicants and their counsel should be aware.

1 *In re Giacomini*, 612 F.3d 1380 (Fed. Cir. 2010).
2 *Id.* at 1381-82.
3 *Id.* at 1381.
4 *Id.* at 1381-82.
5 *Id.* at 1382.
6 *Id.*
7 *Id.*
8 *Id.* at 1383.
9 *Id.*
10 *Id.*
11 35 U.S.C. § 102(e).
12 *Id.* § 119(e).
13 *Id.* at 1384.
14 *In re Hilmer*, 359 F.2d 859 (C.C.P.A. 1966).
15 *Giacomini*, 612 F.3d at 1384 (citing *Hilmer*, 359 F.2d at 862).
16 *Id.*
17 *Id.* (quoting *Hilmer*, 359 F.2d at 862).
18 *Id.*
19 *Id.*
20 *Id.*
21 *Id.*
22 *Id.* at 1385 (citing *In re Klesper*, 397 F.2d 882, 885 (C.C.P.A. 1968)).
23 *Id.* (quoting *Klesper*, 397 F.2d at 885).
24 *Id.* (citing *Hilmer*, 359 F.2d at 862).
25 *Id.*
26 *Id.* at 1384 (quoting *Alexander Milburn Co. v. Davis-Bournonville Co.*, 270 U.S. 390, 400 (1926)).
27 *Id.* at 1385.

Prepaid Registration: Will U.S. Consumers Be Required to Show Photo ID When Buying a Cell Phone?

10.13.10

By Bob Stankey, Danielle Frappier, and Bradley W. Guyton

The use of a prepaid mobile telephone by the Times Square bomber has again raised the question of whether the identity of prepaid phone buyers should be verified and kept on file. Currently, there is no requirement in the United States, either at the federal or state level, to register end users of prepaid mobile wireless devices or subscriber identification module (SIM) cards.

Recently, however, Senators Charles Schumer and John Cornyn introduced a bill that would require retailers of prepaid mobile wireless communications devices or SIM cards to verify consumers' identities and forward certain identification information to the underlying wireless carrier. The bill comes as foreign governments are considering the introduction of similar requirements.

Senate bill 3427 requirements

Senate bill 3427 proposes to require sellers of prepaid wireless mobile devices and SIM cards to verify a purchaser's full name, home address, and date of birth. Acceptable identification documents for in-person sales would include a government-issued photo ID or two forms of alternate identification, such as recent W-2 forms or Social Security statements (Form 1099). For online or phone purchases, sellers could verify a customer's identification information via credit/debit card numbers, Social Security number, or driver's license number.

The seller would then be required to create a record of the sale and forward it to the wireless carrier, which would retain the information for 18 months. The information to be retained includes the identification information, date of the sale, manufacturer name, wireless carrier, telephone/account number, and other technical information to identify the mobile device or SIM card, such as the international mobile subscriber identifier (IMSI).

Anyone selling mobile devices or SIM cards who is not an "authorized reseller" for a wireless carrier would face a fine and up to a year in jail.

In prior years, bills have been introduced in several U.S. states but none have been passed into law. In fact, as of today, only a South Carolina bill covering devices used to originate voice calls appears to remain pending.

Practical problems

The registration system envisioned by the Schumer-Cornyn bill raises four practical problems:

1. Registration requirements would result in increased costs to retailers and providers, which would ultimately be borne by consumers. This is troubling when one considers the fact that prepaid wireless telephone services provide crucial communications ability to the poor and the homeless. Low-income consumers are particularly vulnerable to these potential cost increases, given that this segment of the population is much more dependent on prepaid wireless services. According to a recent study by the Centers for Disease Control and Prevention, adults living in poverty are nearly twice as likely to live in households with only wireless telephones. Moreover, they more often choose prepaid arrangements, thus avoiding credit-check requirements and establishing a simple means of cost control.
2. A requirement to register technical information on each mobile device or SIM card could prove disruptive if it results in the turning off (intentionally or otherwise) of previously sold, unregistered devices and SIM cards already in use.

3. Minority populations adopt prepaid wireless services in higher numbers than other segments of the population, thus the increased costs and any service disruptions could potentially widen the digital divide.
4. How would registration stop the use of anonymous prepaid SIM cards purchased outside the U.S. or the use of old prepaid phones by someone other than the original buyer? The registration system depends on record-keeping by U.S. resellers at the point of sale.

Identification requirements overseas

Beyond the United States, several countries have implemented identification requirements of some sort. For example, registration requirements of varying complexity have been mandated in China, Japan, France, Germany, and Spain.

- In China, consumers must show their national identity cards or passports in order to purchase prepaid SIM cards.
- In Japan, user registration requirements do not apply to data-only services.
- Under French law, carriers must collect identifying information of users and subscribers of prepaid communications services.
- In Germany, retailers must collect the name, address, date of birth, and other information from purchasers and forward it to the carrier.
- Spanish law requires carriers to collect the name and nationality of prepaid SIM card purchases, and to verify a customer's information by reviewing documentation such as a passport or voter registration card.

As part of its review of the EU Data Retention Directive, the European Commission is considering requiring all European Union countries to implement prepaid phone registration requirements. Key EU countries such as the UK have declined to put such measures in place due to the large number of pay-as-you-go SIM cards already in use.

For the moment, it is unclear whether the United States will follow suit. Senate bill 3427 has been referred to the Senate Committee on Commerce, Science, and Transportation but has yet to be reported out of committee. Click here to view a copy of the bill. http://thomas.loc.gov/cgi.

Disclaimer

Hogan Lovells US LLP Litigation Alert: The Ninth Circuit holds that courts may not impose limits on FACTA class certification based on disproportionality or the potential for huge statutory damages

1 October 2010

See note below about Hogan Lovells.

Bateman v. American Multi-Cinema, Inc.

Executive Summary

The Ninth Circuit Court of Appeals in a class action seeking a substantial award of statutory damages under the Fair and Accurate Credit Transactions Act (FACTA) reversed the denial of class certification, holding that the lower court had abused its discretion in finding that a class action was not a superior method for adjudicating claims.

Background

The plaintiff alleged that the defendant had violated FACTA by printing more than the last five digits of consumers' credit or debit card numbers on electronically printed receipts, and the plaintiff sought to recover on behalf of himself and other putative class members statutory damages ranging from $100 to $1,000 for each willful (knowing or reckless) violation of FACTA. The district court in Los Angeles denied class certification, finding that a class action was not the superior method of litigating the case on three grounds: (1) the disproportionality between the potential liability and the actual harm suffered, (2) the enormity of the potential damages (ranging from $29,000,000 to $290,000,000), and (3) the defendant's good faith compliance with FACTA requirements within a few weeks following the filing of the lawsuit.

Ninth Circuit's Decision

In determining that the district court had abused its discretion in denying class certification, the Ninth Circuit noted that since at least 1972 many courts had denied class certification for "proportionality" reasons, on the basis that a class action was not a superior method of

Contacts

Neil R. O'Hanlon
Partner
neil.ohanlon@hoganlovells.com
+1 310 785 4600

Robert B. Hawk
Partner
robert.hawk@hoganlovells.com
+1 650 463 4008

Visit us at
www.hoganlovells.com

adjudicating claims when the defendant's potential liability would be completely out of proportion to any harm suffered by the plaintiff. The opinion noted that this reasoning has prevailed in the vast majority of district courts within the Ninth Circuit in cases where plaintiffs sought to certify classes in FACTA lawsuits.

The Ninth Circuit distinguished contrary authority by examining congressional intent in enacting the statutory damages provision in FACTA. In particular, it determined that the statute clearly provided for an award of statutory damages upon proof of a willful violation, without any cap on such damages in the case of class actions. The Ninth Circuit presumed that statutory damages serve a compensatory function, noting that FACTA also authorized an award of punitive damages in addition to any actual or statutory damages. Apart from compensating victims, statutory damages were also found to serve as a deterrent. Most importantly, the Court found that Congress had determined that the range of $100 to $1,000 per violation was appropriate compensation, and that a district court had no discretion to depart from the specified range. In tying the hands of the district court, the Ninth Circuit noted that although Congress had amended FACTA in other respects, it did nothing to limit the availability of class relief or the amount of aggregate damages. Furthermore, the Court noted that if district courts were permitted in their discretion to decide whether a potential award would be so disproportionate to the actual harm that a class action would not be the superior method of adjudication, such "unguided discretion" would result in non-uniform decisions about class certification.

Having disposed of the disproportionality argument, the Ninth Circuit made quick work of the district court's other two grounds for denying class certification. It concluded that although certification might result in an enormous potential liability for defendant, with the consequent pressure to settle and avoid the risk of potentially ruinous liability, this factor could not be properly considered in determining whether to certify a class in a FACTA action, in the absence of any supporting congressional intent. Furthermore, the Ninth Circuit dismissed the argument against certification that the defendant had quickly complied with the requirements of FACTA after being sued, since Congress did not include any safe harbor or otherwise limit damages on account of belated compliance.

Conclusion

District courts in the Ninth Circuit will no longer be able to deny class certification in FACTA suits on the basis of disproportionality between potential liability and actual harm, or because of the enormity of potential damages. Instead of having the flexibility to consider factors which many courts have determined to be appropriate when deciding whether a class action was a superior method of litigating the case, they will instead have to be guided by what the Ninth Circuit found to be clear congressional intent that the specified statutory damages are what they are and that class actions seeking their recovery are permitted. Since Congress did not impose any limits on class certification based on disproportionality or the potential for huge damages, neither should the courts, according to the opinion. While the Ninth Circuit noted that other factors need to be considered in connection with class certification, including whether a showing of "ruinous liability" would warrant denial of class certification in a FACTA or similar action, defendants have lost a powerful weapon, based on principles of fairness, that they previously could employ (and often did, with success) in resisting class certification. Furthermore, defendants in non-FACTA class actions involving statutory damages prescribed by Congress (without any cap and without any indication of judicial discretion) may be hampered in their ability to argue that a class action is not a superior method for adjudicating such claims.

WSGR ALERT

OCTOBER 2010

CALIFORNIA TO DEVELOP UTILITY ENERGY STORAGE REQUIREMENTS

On September 29, 2010, Governor Schwarzenegger signed into law California AB 2514, which initiates a regulatory proceeding that may require utility companies within California to meet a portion of their total load through energy storage.

AB 2514 requires the California Public Utilities Commission (CPUC) to initiate a proceeding no later than March 1, 2012, in order to determine if procurement targets for energy storage systems are appropriate for the utilities subject to its jurisdiction. If such targets are found to be appropriate, the CPUC is to adopt procurement targets for December 31, 2015, and December 31, 2020. These targets are to be announced by October 1, 2013. The bill imposes similar obligations on the boards of publicly owned electric utilities.

For purposes of AB 2514, "energy storage systems" are defined as "commercially available technology" employing "mechanical, chemical, or thermal processes" to store energy for a period of time for subsequent dispatch. These systems may be centralized or distributed, and may be owned by a load-serving entity, an electricity customer, or a third party.

AB 2514 contains no guidance or requirements regarding procurement targets, leaving the determination of the appropriate targets to the discretion of the CPUC. However, in determining the appropriate targets, the CPUC is directed to consider, among other factors:

(1) the integration of intermittent renewable energy resources into the transmission and distribution grid for operation at or near full capacity;
(2) reducing the need for new fossil-fuel peaking facilities to meet peak demand;
(3) reducing energy purchases from sources with high greenhouse gas emissions; and
(4) using energy storage systems to provide ancillary services otherwise provided by fossil-fuel facilities.

Although AB 2514 represents the first legislative action on energy storage systems in California, energy storage is not a new topic of discussion within the state. In a recent white paper on energy storage, the CPUC noted that energy storage "offers California multiple economic and environmental benefits" and that "these technologies are poised to become commercially viable." The white paper highlighted the following currently available and developing technologies:

- Pumped hydro
- Compressed air
- Batteries
- Thermal energy storage
- Flywheels
- Ultracapacitors
- Superconducting magnetic energy storage

Despite the promise of energy storage technologies, however, the CPUC acknowledged that the limited amount of data available regarding the costs and benefits of energy storage may be insufficient to form a rational basis for policy action. The CPUC also noted that the costs and benefits of energy storage are likely to be highly application-specific, and therefore difficult to assess. Nevertheless, the CPUC recommended further consideration of incentives for energy storage systems, including the adoption of a procurement standard.

Energy storage is also becoming a hot topic on the federal level. For example, the U.S. Department of Energy recently awarded loan guarantees of $17 million and $43 million to energy storage projects building storage facilities using lithium-ion batteries and flywheels, respectively. In addition, while the Federal Energy Regulatory Commission currently determines whether storage systems should be classified as generation facilities or as transmission facilities on a case-by-case basis, lobbying efforts are underway to clarify this point, as this distinction impacts how developers may seek a return on their investment in such systems.

For more information regarding AB 2514, energy storage regulation, or other energy regulatory issues, please contact Peter Mostow, Matt Sieving, or Sheridan Pauker in Wilson Sonsini Goodrich & Rosati's energy and clean technology practice.

650 Page Mill Road
Palo Alto, CA 94304-1050
Tel: (650) 493-9300 Fax: (650) 493-6811
email: wsgr_resource@wsgr.com

www.wsgr.com