

June 2011 e-Bulletin

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- PRAC Members Gathering @ IBA Dubai—October, 2011

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BRIGARD & URRUTIA ADDS FINANCE M&A PARTNER

Brigard & Urrutia is pleased to welcome Manuel Quinche, Partner, to the firm.

Mr. Quinche has participated in a significant number of Mergers & Acquisitions, Financing and Capital Markets transactions. In the Mergers & Acquisitions area, he has participated in transactions which aggregated value exceeds US\$20 billion and that include, among others, SABMiller's acquisition of Grupo Empresarial Bavaria, Cervecería Nacional Dominicana's acquisition of a group of breweries in the Caribbean, private equity investments in Latin American banks, sale of mining assets by Colombian companies and acquisitions of retail and insurance businesses.

In the Capital Markets area he has participated in a significant number of securities transactions, including bond offerings under Rule 144A/Reg S by Latin American issuers such as the City of Bogotá (US\$400M), Empresas Públicas de Medellín (US\$500 M), Cervecería Nacional Dominicana (US\$500M), Transmilenio S.A. Also, participated in securities offerings by structured vehicles and special investment vehicles, ADR's offerings and private placements (including affiliate block trades). In the area of financings, he has extensive experience as a result of participating in several local and international financing transactions involving ECAs, multilateral agencies, commercial banks, sovereign and sub-sovereigns. In the area of financings he has also focused his practice on Project Finance.

Mr. Quinche graduated from Colegio Mayor de Nuestra Señora del Rosario (J.D. 2001), Universidad de los Andes (Commercial Law Graduate Degree) and New York University School of Law (LL.M in Corporate Law). Admitted to the practice of law in Colombia and New York.

Named as an "Associate to Watch" in New York in the area of Latin American Capital Markets by Chambers & Partners. Prior to rejoining Brigard & Urrutia as Associate Director, Mr. Quinche practiced law in New York City as a senior associate in the Corporate Finance Practice Group at one of the largest and most prestigious law firms in the United States. He has focused his legal practice in the areas of finance and M&A. He currently teaches Corporate Finance at the University of Rosario.

Mr. Quinche has advised several Colombian companies, as well as international companies, in acquisitions throughout Latin America. Fluent in Spanish, English and Portuguese.

For additional information visit us at www.bu.com.co

CLAYTON UTZ SYDNEY OFFICE ON THE MOVE

Clayton Utz has a new Sydney home

Energy-efficient buildings can neatly combine several interests of a business - the financial, the human and the community.

From 14 June 2011, the Clayton Utz Sydney office will be located in a landmark building designed to achieve just that. 1 Bligh Street is the first high-rise in Sydney to achieve a 5 Star Energy Rating and a 6 Star Green Star Office Design v2 Certified Rating.

This state-of-the-art office building has groundbreaking design and superior sustainability features, including:

- a double glass façade (an Australian first) and a full height atrium that increases natural ventilation and sunlight;
- an innovative tri-generation electricity generation system, using grid, gas and solar power; and
- advanced water recycling technology.

Our new Sydney home will reduce our firm's carbon footprint, supporting our commitment to environmental sustainability and to social responsibility. It will also be a more pleasant place for our people and our clients.

We look forward to welcoming you to a place we are proud to call home.

Details to update: Level 15, 1 Bligh Street
Sydney

Details that remain the same: PO Box H3, Australia Square
Sydney 1215
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GIDE LOYRETTE NOUEL PROMOTES SIX LOCAL LAWYERS

2 May 2011 - Gide Loyrette Nouel ('Gide') is pleased to announce the appointment of six local partners, effective from 1 April 2011. These are internal appointments around the Firm's international network (including affiliate firms) and encompass a range of disciplines including M&A/Corporate, Banking & Finance, Dispute Resolution, Intellectual Property and Tax.

- David Klass (London - Tax) ▪ István Kővári (Budapest - M&A / Corporate)
- Adam Rooney (London - Dispute Resolution) ▪ Zheng Yu (M&A / Corporate - Dispute Resolution)

We are also pleased to announce the appointment of two partners in our local associate firm in Turkey.

- Haluk Bilgiç (Istanbul - Banking & Finance) ▪ Esra Dündar-Loiseau (Istanbul - IP-TMT)

Commenting on the appointments, Senior Partner Pierre Raoul-Duval said: *"I am delighted to announce the promotion of these six outstanding individuals to local partnerships. These appointments are testament to the firm's investment in its international network, and demonstrate our commitment to offering clients seamless cross-border advice for all their business and financial needs."*

For additional information visit www.gide.com

FRASER MILNER CASGRAIN ADDS AWARD WINNING CONSTITUTIONAL LAWYER TO FIRM

Nathan Whitling Joins FMC Edmonton

June 8 2011 Fraser Milner Casgrain LLP (FMC), one of Canada's leading business and litigation law firms, is pleased to welcome Nathan Whitling as counsel in the firm's Edmonton office. Mr. Whitling will join FMC's litigation team focusing on constitutional law.

Mr. Whitling's award-winning professional track record includes pro bono work with Omar Khadr, a Canadian detainee in Guantanamo Bay, and appearing as lead counsel before the Supreme Court of Canada in multiple cases addressing important and complex issues of constitutional law. His expertise spans commercial litigation, aboriginal law and constitutional law.

"We are delighted to have a lawyer of Nathan Whitling's calibre joining the FMC team," says Dennis Picco, Managing Partner, FMC Edmonton. "His broad experience, deep knowledge and a nuanced understanding of constitutional law will enhance the leadership of FMC's constitutional practice. In addition, Nathan's dedication to pro bono work is an excellent fit with FMC's core values of giving back to our communities."

With a primary focus on commercial litigation, Nate represents companies involved in commercial and contractual disputes, and disputes relating to business torts. He also acts on behalf of First Nations in relation to Aboriginal and Treaty Rights, and on other human rights matters.

Mr. Whitling was called to the Alberta Bar in 1999, after graduating from the University of Alberta in 1997. He was honoured with the Horace Harvey Gold Medal in his graduating class. Mr. Whitling received his LL.M. from Harvard Law School in 1998, following which he clerked for the Honourable Mr. Justice John Major of the Supreme Court of Canada.

Mr. Whitling is a member of the CBA Constitutional and Civil Liberties Sections and a member of the Criminal Trial Lawyers Association.

For additional information visit www.fmc-law.com

HOGAN LOVELLS HIRES FINANCE PARTNER IN MADRID

MADRID, 7 June 2011 - International legal practice Hogan Lovells has expanded its global Finance practice with the recruitment of José Luis Vázquez. José Luis joins Hogan Lovells International LLP in June 2011, based in the Madrid office.

José Luis joins Hogan Lovells from Uria Menéndez, where he specialised in project finance, infrastructure finance, acquisition finance, structured finance and debt restructuring. José Luis has advised on several high profile financings and restructurings.

Finance co-leader David Hudd said:

"The hire of José Luis is part of our ongoing strategy to strengthen our finance practice in the key financial centres around the world and comes shortly after the arrival of finance partners, Matthew Williams, John Deacon, Robert Fugard and Simon Gwynne in London."

José Luis Huerta, Hogan Lovells' Madrid Office Managing Partner, said:

"José Luis has great experience and client contacts. I am delighted he joins our Madrid office to develop our banking and finance practice. We are clearly committed to expand our presence in this area at all levels"

José Luis Vázquez commented:

"Hogan Lovells is a highly regarded global firm and I am looking forward to building on that platform as well as on the strengths of the Madrid office to grow the banking and finance practice there"

For additional information visit us at www.hoganlovells.com

SIMPSON GRIERSON ADDS TO EMPLOYMENT LAW GROUP

Simpson Grierson's Auckland employment law group welcomes associate Rebecca Rendle from a boutique law firm specialising in employment law and industrial relations.

Rebecca is experienced in advising employers and employees on all aspects of employment law including personal grievances, the Holidays Act, privacy, medical incapacity, restraints of trade, restructuring, and employment agreements and policies. She regularly attends mediation conferences and has contributed to external publications on employment law matters.

For additional information visit www.simpsongrierson.com

LUCE FORWARD ADDS TO FAMILY WEALTH & EXEMPT ORGANIZATIONS PRACTICE

James M.A. Murphy recently joined Luce Forward as a partner in the firm's Los Angeles office. Murphy will be a part of the firm's Family Wealth & Exempt Organizations practice group.

Luce Forward's Family Wealth & Exempt Organizations practice addresses four general areas of client concerns: estate and tax planning, the responsibilities of fiduciaries in the probate and trust process, dispute resolution in the estates and trusts context, and the start-up and operation of nonprofit organizations. Murphy will focus primarily on trusts and estates, taxation and employee benefits, working closely with Luce Forward Partners Mary F. Gillick and Carol K. Kao.

"As Luce Forward continues to grow and strengthen its practices and offices throughout California, Mr. Murphy's vast experience will be a valuable asset to our already successful trust and estates group," said Kurt L. Kicklighter, Luce Forward's Managing Partner. "We know Mr. Murphy will provide Luce Forward clients with the same high-level counsel and confidential services that our firm has always been known for. He is a much welcomed addition to our firm; we are very pleased that he is joining us."

Prior to joining Luce Forward, Murphy was a partner at Cox, Castle & Nicholson LLP in Los Angeles where he also practiced trust and estates, taxation and employee benefits. Earlier in his career he worked with Rosenfeld, Meyer & Susman LLP in Beverly Hills. Murphy completed his undergraduate education at Harvard College (A.B., *magna cum laude*) and received his Juris Doctor from Harvard Law School.

Luce Forward's Family Wealth & Exempt Organizations practice works with high net-worth individuals and frequently handles complex estate plans and sophisticated tax challenges. The group has been ranked nationally by Chambers USA in the Wealth Management category for the past four years and has been cited as having "one of the finest reputations in the West."

For additional information visit us at www.luce.com

RICHARDS BUEL SUTTON ADDS WEALTH PRESERVATION COUNSEL

May 24, 2011 - John P.H. Nicolls recently joined Richards Buell Sutton's Wealth Preservation team, with a focus on Personal Estate Planning. John has an extensive background in private practice, as in-house counsel, and as a business executive. He provides his clients with comprehensive, timely and practical advice.

John was a former Treasurer of the Canadian Film and Television Production Association (BC Branch). He also spent a number of years writing and consulting in various media including a three-year stint in Los Angeles working in-house for Pacific Century Television. He also wrote for "Street Legal", the hit CBC legal drama, wrote and directed a short film "The Highway House", and created and wrote a monthly column, "Bollywood" for Vancouver Magazine.

Richards Buell Sutton is pleased to welcome John to the firm.

For additional information visit www.rbs.ca

WILSON SONSINI GOODRICH & ROSATI DELAWARE CHANCELLOR WILLIAM B. CHANDLER III JOINS FIRM

-- Expands the Firm's Corporate Governance, Litigation, and M&A Practices --

PALO ALTO, CA (May 19, 2011) - Wilson Sonsini Goodrich & Rosati, the premier provider of legal services to technology, life sciences, and other growth enterprises worldwide, is pleased to announce that William B. Chandler III, the current Chancellor of the Delaware Court of Chancery, will become a partner at the firm. Widely respected as one of the country's most influential judges on issues of corporate law and governance, Chancellor Chandler will join the firm on June 18, 2011.

"We are incredibly proud to have such an esteemed member of the judiciary join the firm," said Chairman Larry Sonsini. "During his tenure on the bench, Chancellor Chandler has authored many of the most significant decisions on critical questions of corporate governance and the role of directors in managing the corporation. His two decades of judicial experience enable him to offer a unique perspective to the boards of directors and management teams of leading public and private enterprises across the globe. His insight in the areas of corporate governance, special committee assignments, internal investigations, and mergers and acquisitions is unrivaled. In addition, as a jurist and as an individual, Chancellor Chandler has gained a well-deserved global reputation for his wisdom, character, and integrity. We are delighted to welcome him to the firm."

"It has been a privilege to serve on the Delaware Court of Chancery," said Chancellor Chandler. "I repeatedly have said that serving as Chancellor likely will be the greatest honor of my life, but I felt that the time was right to take on new challenges. After considerable thought, I believe Wilson Sonsini Goodrich & Rosati is the right place for me to begin my next chapter. WSGR has an outstanding legal practice, one of the most enviable client bases in the nation, and a roster of attorneys whom I long have considered among the best in the business. That made the firm extremely compelling to me, and I am excited to establish my practice on such a strong and promising platform."

Chancellor Chandler has served since 1989 on the Delaware Court of Chancery, the nation's leading court for corporate law cases, particularly those relating to change of control and other corporate law issues. Since his appointment, he has issued more than a thousand opinions and presided over some of the most contentious and high-profile corporate law disputes in the country, including those involving The Walt Disney Company, Yahoo, Microsoft, Hewlett-Packard, eBay, Citigroup, Dow Chemical, and, most recently, the Air Products/Airgas dispute. His opinions and analyses have made him one of the most influential corporate jurists in the world, and many of his rulings have become required reading for M&A and business law practitioners. He also has written and lectured widely on numerous critical corporate law issues, and during his tenure as Chancellor, he gained a national reputation for his successful administration of the Court of Chancery.

Prior to his appointment to the Court of Chancery, Chancellor Chandler served as resident judge of the Delaware Superior Court from 1985 to 1989. Earlier in his career, he was an associate with Morris, Nichols, Arsht & Tunnell and served as legal counsel to Pete duPont, the former governor of Delaware. Chancellor Chandler received law degrees from the University of South Carolina School of Law and Yale Law School, and an undergraduate degree from the University of Delaware. He is a member of the American Law Institute and a trustee of the Yale Center for Corporate Governance, the University of Delaware, and the Weinberg Center for Corporate Governance.

For more information, please visit www.wsgr.com

About Wilson Sonsini Goodrich & Rosati

Celebrating its 50th anniversary in 2011, Wilson Sonsini Goodrich & Rosati offers a broad range of services and legal disciplines 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 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, Hong Kong, New York, Palo Alto, San Diego, San Francisco, Seattle, Shanghai, and Washington, D.C.

BAKER BOTTS

BP AMERICA RECEIVES UNANIMOUS FAVORABLE RULING FROM TEXAS SUPREME COURT

HOUSTON, May 18, 2011 -- The Texas Supreme Court ruled unanimously late last week in favor of BP America Production Co. ("BP") in a closely-watched case involving two recurring issues: (1) the duty of royalty owners to bring actions in a timely fashion, and (2) the requisites of adverse possession when unleased co-tenants mistakenly believe their mineral interests are under lease.

The 8-0 decision in *BP America Production Co. v. Marshall*, written by Justice Debra H. Lehrmann, held that all claims brought against BP by royalty owners were barred by limitations. It therefore reversed the San Antonio Court of Appeals' judgment for the plaintiffs, members of the Marshall family, and rendered judgment for BP.

Baker Botts L.L.P. represented BP America in this case.

In a dispute no longer involving BP or its opponents in this case, the Court reversed the lower court's judgment that Wagner Oil Co. did not obtain a leasehold interest by adverse possession, assuming that the leasehold had expired before Wagner initially acquired it. It therefore also reversed the same lower court and rendered judgment for Wagner.

The Marshalls were owners of a South Texas royalty interest, having leased their mineral interests to BP's predecessor (ARCO) in the 1970s. In 2001, intervening in a lawsuit first brought by other parties, the Marshalls alleged that BP's lease had terminated in early 1981 and that BP had defrauded them by concealing the lease termination. The Marshalls contended that they could not receive co-tenancy payments from the current operators because those operators took title to the leasehold via adverse possession.

On the basis of a jury verdict in Zapata County, the district court awarded the Marshalls damages equal to the difference between the royalty interest they had actually received and the amount that they would have been due as unleased co-tenants from 1981 until trial. The court also ordered an accounting from which BP would have been required to pay the Marshalls' co-tenancy interest for the life of the future production, even though BP—its only well having been a dry hole—did not and never had produced any minerals on the property.

On appeal, BP argued that there was no evidence of fraud, and alternatively that the statute of limitations had run in any event, and that the future accounting award was unsupported under Texas law.

In reversing and rendering judgment, the Supreme Court based its decision for BP exclusively on the limitations argument. The Court agreed with BP that neither the discovery rule nor fraudulent concealment applied in this case, primarily because "reasonable diligence obliges owners of property interests to make themselves aware of pertinent information available in the public record" or to take other steps to safeguard property interests. In this case, the

Marshalls could have determined well before limitations ran that the lease had in fact terminated by examining public filings in two offices of the Railroad Commission.

Three amici curiae submitted multiple briefs to the Supreme Court in this case: The Texas Oil and Gas Association; Kelly Hart & Hallman LLP; and the Texas Land and Mineral Owners Association.

For additional information visit www.bakerbotts.com

ALLENDE & BREA

ACTS FOR DLJMB FUNDING II, INC. STOCK SALE

DLJMB Funding II, Inc., a private-equity fund managed by Credit Suisse and the controlling shareholder of International Health Services Argentina S.A. (IHS), and the other minority shareholders of IHS (the "Sellers") have sold 100% of the capital stock of IHS to Obra Social Unión Personal de la Unión del Personal Civil de la Nación and Unión Personal Civil de la Nación (the "Purchasers"). The Purchasers are a National Workers' Union and a Workers' Social Services Association (*Obra Social*), and IHS is a major provider of ambulance and medical services.

Allende & Brea partner Germán A. Ferrarazzo and associate María Cecilia Victoria acted for the Seller in the transaction.

For additional information visit www.allendebrea.com.ar

CAREY Y CIA

ADVISES MASISA S.A. IN PRODEMAC ACQUISITION

Carey y Cía. advised Masisa S.A., a leading player in the production and commercialization of forest products with industrial operations in Chile, Argentina, Venezuela, Brazil and Mexico, in the acquisition of Prodemac, owner of several "Placacentros", a strategic distribution channel for MDF boards, particleboards, melamine boards and other complementary products with stores throughout the cities of Santiago and Concepción.

Carey y Cía. partners Francisco Ugarte and Guillermo Acuña led the team, formed also by associates Alejandra Donoso, Camila Saffirio and Camila Guarda.

For additional information visit www.carey.cl

GIDE LOYRETTE NOUEL

ADVISES INVESTMENT MANAGER UFG REM ON SETTING UP UFG EUROPEAN FUND OF FUNDS

21 April 2011 - Gide Loyrette Nouel (GLN) has advised UFG REM (UFG-LFP Group) on the setting-up and structuring of its UFG European Fund of Funds, structured as a real estate contractual corporate fund (*SICAV contractuelle*) governed by French law.

The UFG European Fund of Funds is the first real estate investment fund with a non-listed core/core+ profile and targets French institutional investors wishing to diversify their portfolio by gaining exposure to the wider European property market outside France. The closed-ended fund will have a life term of 7-10 years, with initial capital of EUR 23 million, and will comprise office and retail real estate assets in Northern Europe, in particular in Scandinavia, the United Kingdom, Germany and the Netherlands.

UFG European Fund of Funds promoters were advised by partner Stéphane Puel and senior associate Antoine Sarailier from the GLN's Investment Funds team, in addition to partner Laurent Modave and senior associate Bertrand Jouanneau from the GLN's Tax department.

For additional information visit www.gide.com

CLAYTON UTZ

ADVISES ON NOBLE TRANSACTION TO CREATE LEADING ASX-LISTED INDEPENDENT COAL MINER

Sydney, 18 May 2011: Clayton Utz has assisted long-time client Hong Kong based Noble Group Limited in relation to a suite of transactions involving Gloucester Coal Ltd that will underpin Gloucester's strategy of becoming a leading ASX-listed coal miner with an estimated market capitalisation of A\$2 billion.

Clayton Utz Corporate / Energy and Resources partner Rory Moriarty, with support from partner Simon Brady, advised Noble Group as controlling shareholder (with a 63.4 per cent interest) of Gloucester Coal Ltd on the complex set of transactions, which were announced to the market on 16 May.

They include the acquisition by Gloucester from Noble Group of Hunter-Valley based coal producer Donaldson Coal with an enterprise value of A\$580 million (comprising \$360 million in scrip and \$225 million in debt), as well as Gloucester's acquisition of Monash Group, for A\$180 million. The two transactions are inter-conditional and will be underwritten by a A\$230 million rights issue undertaken by Gloucester.

Noble has also entered into a series of long-term coal marketing and sale agreements with Gloucester Coal.

The transactions are subject to the necessary regulatory and shareholder approvals.

Commenting on Clayton Utz's advisory role, lead partner Rory Moriarty said: "It is very satisfying to have worked alongside our client Noble Group in bringing these complex transactions to market, and helping Noble position Gloucester as an ASX 150 coal miner."

Clayton Utz has had a long-standing association with Noble Group. In 2009, a Clayton Utz team led by national M&A practice head John Elliott, Corporate / M&A partner Karen Evans-Cullen and Corporate / Energy and Resources partner Rory Moriarty, successfully represented Noble Group in its acquisition of control of Gloucester Coal, which followed ground-breaking proceedings before the Takeovers Panel.

Clayton Utz subsequently advised Noble Group in August 2010 on two key transactions: the A\$437.5 million sale of Noble's interest in the Middlemount Joint Venture to Gloucester Coal Limited (key partners: Rory Moriarty, Energy and Resources partner Stuart MacGregor and Corporate Advisory / M&A partners Karen Evans-Cullen, Stuart Byrne and David Landy), and; Noble Group's acquisition of a A\$58.8 million stake in Aston Resources and the long-term coal off-take agreement from Aston's Maules Creek mine (key partners: Stuart MacGregor and Rory Moriarty, and Stuart Byrne).

For additional information visit www.claytonutz.com

FRASER MILNER CASGRAINACTS FOR CONSOLIDATED THOMPSON IRON MINES
IN CDN \$4.9 BILLION SALE TO CLIFF NATURAL

On May 12, 2011, Cliffs Natural Resources closed the purchase of Consolidated Thompson Iron Mines for CDN\$4.9 billion, a deal described as the most valuable deal of the first quarter in the global metals market in PwC's recent quarterly report *Forging Ahead*, and credited by the *Globe and Mail* in January 2011, with helping propel the Canadian dollar. It has been almost four years since first quarter deal-making in the metals sector has been this active.

Fraser Milner Casgrain LLP (FMC) played an instrumental role in this upswing, acting for Consolidated Thompson Iron Mines. The team was led by Sander Grieve (Toronto), and included FMC Toronto's John Sabine, Linda Misetich, Liz Fraser, Zahra Nurmohamed, Tim Banks, Susan Paul, Sandy Walker, Heidi Clark, Mark Dunsmuir, Robb Heintzman, Michael Melanson and Ralph Shay, and FMC Montréal's Guy Paul Allard, Charles Spector, Barbara Farina, Scott Rozansky, Richard Gauthier and Giancarlo Salvo.

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

HOGAN LOVELLSADVISES STEREO D ON SALE TO DELUXE
ENTERTAINMENT SERVICES GROUP, INC.

Hogan Lovells is pleased to announce that a team of lawyers led by corporate partner Stephen H. Kay advised StereoD, LLC in connection with the sale of substantially all of its assets to Deluxe Entertainment Services Group Inc. The transaction closed on 17 May 2011.

StereoD is a leader in providing 2D-to-3D image conversion services to major Hollywood studios. The Burbank-based company has established relationships with major film studios, and utilizes its proprietary processes to convert motion pictures that were originally shot in 2D into 3D releases.

"Hogan Lovells is a recognized leader for advising on M&A transactions in the media and entertainment sector, and we are pleased that StereoD turned to us as counsel for this transformative transaction," said Stephen H. Kay, Managing Partner of Hogan Lovells' Los Angeles office.

The Hogan Lovells team included corporate partners Stephen H. Kay and Timothy R. Aragon, and tax partner Mark J. Weinstein.

For additional information visit us at www.hoganlovells.com

KING & WOOD

ACTS FOR DELIGHTFUL HILL LTD IN PURCHASE OF RUSSIAN COAL DEPOSIT

Delightful Hill Ltd., an overseas entity of the Winsway Group, has purchased rights to a Russian coal deposit for \$90 million. Delightful Hill Ltd. will purchase 60% of Divalane Holdings Ltd., a Cyprus holding company with rights to the Apsatskoe coal deposit in the north of Chita Oblast, Eastern Siberia. The acquisition has been executed but yet pending on approval by Russia's antitrust authority. According to Moscow Times reports, this will be the first case of a Chinese private company successfully acquiring control holding of Russian coal assets.

The Apsatskoe coal project has proven reserves of 675 million tons, and is 30km away from major railway lines. The purchaser in this transaction, Delightful Hill Ltd., is part of the Winsway Group, a subsidiary of this group has been listed on the Hong Kong stock exchange (1733) in October 2010, and is one of China's largest coking coal merchants. The seller is Russia's largest privately owned energy company.

King & Wood served as a leading legal advisor to Delightful Hill Ltd. The transaction was led by partner Jing Gang, supported by associate Joseph Nan.

For additional information visit www.kingandwood.com

NAUTADUTILH

ADVISES RABOBBANK, ING, ABN AMRO, DEUTSCHE BANK AND BNP PARIBAS WITH FINANCING OF INTERNATIONAL SHIPBUILDER IHC MERWEDE.

8 June 2011 – A NautaDutilh team has been assisting Rabobank, ING, ABN AMRO, Deutsche Bank and BNP Paribas with the financing of international shipbuilder IHC Merwede. IHC has extended its credit facility to € 1.5 billion, of which € 900 million is committed.

IHC Merwede builds innovative ships and develops equipment for the dredging industry and the oil and gas industry. Last year it achieved record profits of € 99 million on a turnover of € 1.01 billion.

The NautaDutilh team consisted of Meta van der Zanden, Niels Hagelstein, Arief van Rhee and Nelien Ploegstra, under the responsibility of David Viëtor.

For additional information visit www.nautadutilh.com

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TOZZINIFREIRE

ASSISTS SELLERS FUNDO DE PARTICIPACAO E CONSOLIDACAO IN MASTERSAF'S SALE TO THOMPSON REUTERS

TozziniFreire Advogados assisted the sellers, including Fundo de Participação e Consolidação (FIPAC - FMIEE), in Mastersaf's sale to Thomson Reuters. Mastersaf's LegisCenter information sets will be integrated into Revista dos Tribunais and Checkpoint, offering local and global customers more extensive information for Brazil compliance from one trusted source.

Mastersaf is a powerful complement to the Thomson Reuters global portfolio of legal, tax and accounting products. In Brazil, it offers a wide array of products and solutions including a tax and accounting compliance suite; E-invoicing software that facilitates digital registration and approval of invoices under Brazilian reporting regulations; and LegisCenter, an online information portal for tax rates and rules. According to Thomson Reuters, the addition of Mastersaf is a key step in fulfilling the company's strategy to expand its professional services across Latin America.

In the past year, Thomson Reuters has expanded in Latin America with the acquisition of the well-known Revista dos Tribunais in Brazil; launched the groundbreaking Revista dos Tribunais Online, Brazil's first online legal research tool; and has enhanced the respected La Ley business, the leading information provider for legal, tax and accounting professionals in Argentina. Additionally, the acquisition of Mastersaf follows the Brazil launch of Thomson Reuters Eikon, the company's next-generation desktop for financial market professionals.

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Mastersaf is a top provider of tax and accounting solutions for companies operating in Brazil. Brazil, one of the world's most complex tax environments, is currently undergoing country-wide adoption of a mandatory digital tax and accounting reporting system, Sistema Público de Escrituração Digital (SPED). SPED was enacted to reduce paperwork, enforce tax compliance and increase corporate oversight and transparency. Mastersaf helps thousands of customers comply with SPED by providing information and software that allows companies to electronically file tax and accounting records in accordance with Brazilian regulations.

It is important to highlight the parts' efforts to complete the deal in an extremely short period of time (less than two months).

Partner Maria Elisa Gualandi Verri and associates Luciana Xavier da Silveira Renouard and Alessandra Hidemi Takara acted in the transaction.

For additional information visit www.tozzinifreire.com.br

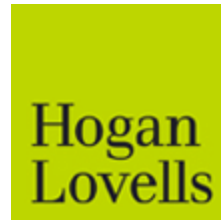


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CLAYTON UTZ

27 May 2011

Member-approved takeovers - ASIC acts

No, not schemes of arrangement, but approvals under item 7 of section 611 of the Corporations Act.

Item 7 allows a general meeting to approve an acquisition that would take the acquirer over the 20% ownership threshold.

It is not often used for full takeovers of companies, largely because that would require special relief from ASIC. However, following the Takeovers Panel 2002 decision in relation to Colonial Mutual Property Trust, it has provided a statutory alternative for certain takeovers of listed managed investment schemes (MISs – for which section 411 schemes of arrangement are unavailable).

ASIC has now released a draft new policy to reflect both the use of item 7 by MISs and changes in the regulatory environment since its original policy was published in 1994.

Managed investment schemes

A major hurdle for MIS takeovers by item 7 is that item 7 prevents target unitholders from voting in favour of the acquisition. This means that, without an ASIC modification, no-one could actually vote for a full takeover.

The new draft policy sets out the basis on which ASIC will grant such a modification. It also indicates what other relief the deal may require.

A major consideration is whether the deal complies with the Takeovers Panel policy on trust schemes. In brief, this requires MIS schemes to follow the principles and shareholder protections in Chapter 6 of the Corporations Act. In other words, ASIC is confirming that it does not want item 7 to be used just to avoid Chapter 6.

ASIC also notes that an MIS item 7 vote may require some modifications to other parts of the Corporations Act, including:

- if the MIS is illiquid and the acquirer makes withdrawal offers, it would require an exemption from Pt 5C.6 to allow it to offer consideration from its own resources, rather than from the MIS's own assets;
- if the acquirer is offering scrip and there are foreign unitholders, it would require an exemption from the s 601FC equal treatment obligation before it could offer cash to those foreign shareholders; and
- the acquirer may require relief from various requirements relating to Product Disclosure Statements, Financial Services Guides and financial services licences.

General voting restrictions

As noted above, item 7 prevents anyone voting in favour of an acquisition if they are the acquirer or a person from whom shares or units are to be acquired (or an associate of either).

Even where the deal is less than a complete takeover, this provision can cause problems if the acquirer holds shares on trust or as nominee for a person who would not be precluded from voting if they held the shares or units directly. Under the new draft policy, ASIC would allow those votes to be counted if:

- the beneficial holder is not an associate of the acquirer or otherwise prevented from voting; and
- the beneficial holder directs the legal holder to vote

Of course, full takeovers of companies by item 7 vote face the same problem as full takeovers of MISs: target members can't vote in favour of the takeover. As with MISs, ASIC is prepared to grant relief from this roadblock, but will require a lot more convincing (noting that a section 411 scheme could be an available alternative for a company):

"We will not give relief... unless we are satisfied that there is a commercial or legal reason why it is not practical to structure the offer as a takeover bid or scheme of arrangement."

Time limits and game-changers

Although ASIC's current policy is that information packs and notices of meeting should be shown to it in draft form, there is no written policy about the time for doing that; the proposed new policy "strongly encourages" entities to do so 14 days before they are printed (longer if ASIC relief is required).

If there is a material change between dispatch of the notice of meeting and the meeting itself, the target members should be given a supplementary information pack – and should have at least 10 days to digest it before being asked to vote (a shorter period may be acceptable if the supplementary information has already been flagged or is already out in the market).

If an event after the vote materially changes the nature of the deal (eg. by increasing the acquirer's stake in the company or MIS), a fresh vote should be held.

Information requirements

Item 7 requires that members be given all information that is material to their decision to vote. As with the current policy, ASIC provides an indicative list of information that should be provided. ASIC's longstanding policy is also that members should receive an analysis of the transaction. The draft policy says that this analysis should comply with Regulatory Guide 111 (rewritten in March this year).

That analysis can, in ASIC's view, be prepared by the target's directors, but only if it is of the same standard as an independent expert's report (which requires the directors to have the necessary expertise, experience and resources). The proposed new policy increases the pressure on directors to comply with what ASIC observes is standard market practice: ASIC says that, in its experience of item 7 documents, there is a "significant risk that a report prepared by directors will not provide all material information to members".

The draft policy also draws attention to the need for the notice of meeting to be "clear, concise and effective". In the Consultation Paper accompanying the draft policy, ASIC notes that it has provided extensive guidance on "clear, concise and effective" in last month's Consultation Paper 155.

Where to from here?

The draft policy is up for public comment until 1 August 2011.

ASIC then plans to publish a final policy by the end of this year.

Disclaimer

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



Arbitration

YET ANOTHER GOOD NEWS DAY FROM THE BRAZILIAN HIGH COURT

The Brazilian Superior Court of Justice (STJ) - the court of last resort in federal law issues and also responsible for confirming foreign arbitration awards – has recently rendered another decision in favor of arbitration.

In a case stemming from the 2001 accident of an oil drill platform commissioned by the Brazilian state-owned company Petrobras, the Justices of the STJ overturned a Rio de Janeiro Court of Appeals decision that had previously denied enforceability to an arbitral award rendered under the auspices of the ICC.

The issue concerned the definition of domestic award under the Brazilian Arbitration Act. According to the law, only domestic awards can be directly enforced before a first instance court (in the same way as a judgment rendered by a magistrate). On the other hand, foreign decisions must first go through confirmation proceedings at the STJ before enforcement measures are taken.

The STJ reversed the Rio de Janeiro Appellate Court that prevented the creditor from taking attachment measures directly before a court of first instance, even though the award was actually rendered in Rio de Janeiro. The Rio de Janeiro court, by a majority vote, set aside enforcement proceedings (“*execução*”) citing the need for confirmation proceedings, given that the arbitral award had been rendered by an international institution, headquartered in Paris (ICC).

Citing article 34 of the Arbitration Act, the Justices held that an arbitral award shall be deemed domestic as long it has been rendered within the Brazilian territory. In electing the so-called “territorial criterion”, the Brazilian law dispenses with inquires of whether the subject-matter is international in nature, the arbitrators’ nationality, or the location of the arbitral institution. Once the final arbitral award is rendered in Brazil, it can be enforced by the court that would have original jurisdiction to hear the case.

Although the Rio de Janeiro decision added at least another year to the creditor’s ability to secure assets held by the debtor in Brazil, the STJ swift answer in favor of arbitration constitutes yet another evidence of the growing importance of the Brazilian Judiciary in ensuring that Arbitration remains an effective means of dispute resolution in this country.

¹Portuguese version available here.

²Portuguese version of the decision rendered by the Reporting Justice of the STJ, which suspended the effects of the Rio de Janeiro ruling until the final resolution of the creditor’s appeal at the high court available here. The STJ finally decided the case on May 24, 2011, but the opinion has not yet been published.

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MAY 2011

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Supreme Court of Canada Issues Landmark Labour Relations Decision

By Andy Pushalik

In a landmark decision that narrows the constitutional right of workers to collectively bargain with their employer, the Supreme Court of Canada has ruled that there is no “one-size fits all” approach when it comes to implementing a system of labour relations.

In *Ontario (Attorney General) v. Fraser* (“*Fraser*”)¹, the Court considered the constitutionality of the labour relations regime that applies to Ontario’s farm workers. The legislation in question provided farm workers with various labour relations rights including the right to join an employees’ association and the right to make representations to their employer concerning the terms and conditions of their employment. That said, the legislation did not include many of the other protections that have come to be associated with the traditional labour relations model in Canada.

Despite these deficiencies a majority of the Court agreed that the law should be upheld. In the reasons that followed, the Court spent a considerable amount of time rehashing its decision from *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia* (“*B.C. Health Services*”).² In that case, the Court had taken the bold step of extending constitutional protection to the collective bargaining process.

¹ 2011 SCC 20.

² 2007 SCC 27, [2007] 2 S.C.R. 391.

Setting aside calls to overturn *B.C. Health Services*, Chief Justice McLachlin and Justice LeBel, on behalf of the majority, held that the decision remained good law insofar as it merely ensured that workers have a constitutional right to make collective representations to their employer and to have their collective representations considered in good faith. They went on to stress that the Court's decision in that case was not to be seen as an endorsement for a particular model of collective bargaining - "[w]hat is protected is associational activity, not a particular process or result."³

While the decision in *Fraser* represents somewhat of a retreat from the Court's original position regarding the constitutional status of collective bargaining rights, the splintered nature of the accompanying reasons indicates that the scope of the right to associate is very much an open question. Accordingly, employers should continue to monitor this area of the law as the Court works to find a balance between these competing viewpoints.

Contact Us

For further information, please contact a member of our [National Employment | Labour Group](#).

³ Supra note 1, paragraph 47.



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Latin American countries start developing a project to expedite patent procedures

Between April 25 and 28, 2011, the First Seminar of Cooperation on Project Reviews PROSUR 2011 funded by the World Organization of Industrial Property (OMPI) was held in Santiago, Chile.

This seminar was part of the project “Regional Cooperation System on Industrial Property” better known as PROSUR, a joint initiative of Argentina, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Uruguay and Surinam. This project aims to confront the widespread problem that patent offices in the region face: the increase in the number of patent applications filed and in their technical complexity.

Indeed, with the continuous development of technology, there has been a proliferation of patent applications, which must be processed in a timely and prudent manner by patent offices, so as not to slow down the interests of applicants.

The Regional Projects Coordinator of OMPI, Paulo Agostinho said: “PROSUR was basically born with the aim of sharing work among Latin American offices in order to meet an increasing number of applications at a reasonable cost while maintaining the quality of the analysis”.

For this purpose, the patent offices of the participating countries will seek to draw on the experiences of their peers, sharing search reports and patentability reports in a non-binding manner. This aspect has been emphasized by Maximiliano Santa Cruz, National Director of the National Institute of Industrial Property (INAPI), who said that “for this pilot plan to work, it must be developed in compliance with the laws and sovereignty of each country.



The exchange of reports will not be binding and will only be made in order to utilize the work done by other offices, to thus considerably reduce their processing times”.

One of the PROSUR Project development goals is the training of those working in patent offices in the participating countries. The Seminar of Regional Cooperation in Industrial Property held in Chile was a first example. In this instance, the mechanical and biotechnological field examiners of patent offices will be able to share experiences relative to expediting patent procedures and can become familiar with technological tools developed by the OMPI and will have a central applicability in the development of this project: the WIPO Case platform, which will allow the exchange of information and integration between the participating offices.

The conclusions and recommendations stemming from the seminar will be soon made available to the directors of the participating offices.



China's First Policy to Support Overseas Graduates to Come back to Set up Businesses

The Organization Department of the Chinese Communist Party (CPC) Central Committee and the Ministry of Human Resources and Social Security of China jointly issued *The Opinions on Supporting Overseas Graduates to Come back to Set up Businesses* (hereinafter the "Opinions") on February 23rd, 2011. The Opinions is the first state policy to stipulate the overall provisions on supporting overseas graduates to come back and set up businesses through various favorable policies, including tax preference, rent reduction, land-use preference, household registration and professional title assessment, etc.

The Opinions stipulates that "overseas graduates coming back to set up businesses" refers to the coming-back overseas graduates establishing enterprises with their own intellectual properties, scientific research achievements, proprietary techniques, etc. and serving as the said enterprise's legal representatives, or those overseas graduates whose self-owned funds (including technology stocks) together with both domestic and international following-up venture capital account for 30% or more of the total investment in the enterprise.

The Opinions stipulates explicitly that the aforesaid coming-back overseas graduates may not only participate in social insurance scheme in China in accordance with relevant laws and regulations, but also set up their individual housing fund accounts in local areas by presenting valid employment agreements and certificates issued by the local departments of human resources and social security. Further, the aforesaid overseas graduates who have no local household registration may make contributions to and use the housing funds in the local area, and when leaving the area may withdraw or transfer their housing funds. In addition, the aforesaid overseas graduates who have already obtained foreign citizenship are entitled to the same rights and obligations of social insurance and housing fund benefits as Chinese citizens.

King & Wood: In recent years, coming back to China to set up businesses have gradually become an important way for overseas graduates to serve the country. Overseas graduates constitute an important part of China's talent resource. The Opinions is the first state policy to provide comprehensive provisions on supporting businesses set up by coming-back overseas graduates. Therefore the enterprises which meet the standards may pay attention to and fully utilize the preferential policies provided in the Opinions.



Integrated Latin American Market (Mila)

Tuesday, 07 June 2011 00:00



Capital Markets and Securities
News Flash Número: 121

Integrated Latin American Market (Mila)

This past Monday, May 30, the Colombian Stock Exchange (BVC), the Peruvian Stock Exchange (BVL) and the Chilean Commerce Exchange (BCS) initiated trading operations through the Integrated Latin American Market (MILA). The MILA is first in the region by number of issuers, second by market capitalization and third by trading volume. The MILA aims to promote the integration of the three national economies with investment grade status, increase investment options for investors, decrease financing costs for issuers and facilitates financing opportunities through the capital markets, stimulate the creation of new investment vehicles and boost the number of broker spots for capital market intermediaries.

Only equity securities (including stock indices, participations in mutual funds that invest in equity and similar instruments) listed on any of the three stock exchanges may be traded on the MILA. The rights of the securities holders are governed by the rules of the country of original issuance.

The purchase of foreign securities through MILA must be conducted through a local broker that has signed an intermediary routing agreement with a broker located in the country where the securities were originally issued.

The MILA was designed with a second phase to be implemented in the future, in which brokers from any of the three member countries would be allowed to directly initiate trades of securities issued outside their home country.

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This Newsletter is meant to keep our clients and friends informed of the recent regulations in Indonesia, which we feel may be interesting to them. You will, therefore, not find all recent legislations in this Newsletter and the selected items are also not dealt with in length. You will find that the articles contain only the general information about such recent regulations. If further information or a deeper analysis of the topics published in the Newsletter is needed, please contact us at the address or telephone and e-mail address indicated.

GUIDELINES FOR THE ISSUE OF LOCATION PERMITS, AND APPROVALS OF LAND USE CHANGE

The Indonesian National Land Agency has issued a regulation that stipulates the technical considerations for the issue of Location Permits, Location Stipulations and Approvals of Land Use Change ("Permits"). The regulation is Regulation of the Head of National Agency No. 2 of 2011.

As stipulated in Article 3 of the regulation, in considering the issue of a Permit the government agency in charge should make sure that the issue of the Permit:

- a. does not compromise public interest;
- b. does not interfere with the utilization of the surrounding land;
- c. complies with the sustainability principle;
- d. is done with due regard to the principle of justice; and
- e. is in compliance with the prevailing laws and regulations.

The above technical considerations are further elaborated in the regulation's Annex I concerning Technical Guidance for Land Utilization. Annex II sets forth the procedures for the issue of the Technical Guidance.

The regulation also assigns the different levels of the Land Office to supervise and monitor the implementation of the Permits' provisions. In regard to the Location permit in particular, the results of the aforementioned monitoring may be a material consideration for the cancellation of a Location Permit.

The Regulation has been in force since 4 February 2011. *(by: Indah Rahmayuni)*

Banking & Finance

Newsflash

New Exemption to Netherlands Market Manipulation Rules: The Liquidity Agreement

16 May 2011



On 12 May 2011 the Regulation on Accepted Market Practices [\[1\]](#) (the "**Regulation**") was published and came into force the next day. The Regulation provides closed-end funds and other issuers with a further exemption to two of the most difficultly judged Netherlands market manipulation rules. This update gives a brief overview of the contents of the Regulation which applies to transactions executed on the basis of a liquidity agreement, in particular of the conditions which should be met in order to make use of this new exemption.

Market manipulation

Netherlands market abuse legislation prohibits, amongst others, the performance of transactions in financial instruments:

- a) that send or may send an incorrect or misleading signal with regard to the supply, demand or price of the financial instruments, or
- b) in order to maintain the price of the financial instruments at an artificial level.

Pursuant to the Regulation these two prohibitions do not apply to transactions that are performed in the context of a liquidity agreement (within the meaning of the Regulation), subject to compliance with certain conditions set out in the Regulation.

Liquidity Agreement

In order for transactions to be exempt from the above mentioned prohibitions under the Regulation they should be performed in the context of a liquidity agreement between an issuer and an investment firm for the purpose of enhancing regular trading through purchase and sale of shares or participation rights in the capital of the issuer. The liquidity agreement should provide for both purchases and sales of the issuer's shares or participation rights in order to qualify as a liquidity agreement under the Regulation. Transactions performed under the liquidity agreement must be for the risk and at the expense of the issuer and the liquidity agreement must specify a maximum amount of securities (expressed in absolute numbers or in currency) which may be bought or sold by the investment firm.

The Regulation only applies to liquidity agreements concluded for the purposes of enhancing regular trading in shares or participation rights listed on a regulated market or multilateral trading facility regulated by Netherlands law. The Regulation does not apply to transactions conducted in participation rights in the capital of open-end funds.

Further Conditions

Besides being performed under a liquidity agreement within the meaning of the Regulation, the issuer, the investment firm and the transactions executed on the basis of the liquidity agreement must comply with specific conditions in order to successfully rely on the exemption.

For instance, the issuer must publish a press release on the undertaking of the liquidity agreement and any changes made to the liquidity agreement. This press release should include specific information such as the name of the investment firm which has been engaged. Also, quarterly press releases should be published by the issuer on the transactions performed (number of sale and purchase transactions carried out and average volumes). The termination of the liquidity agreement will also require the publication of a press release in which specific information on transactions is disclosed.

The investment firm engaged under the liquidity agreement must ensure an adequate separation of assets and therefore perform all transactions pursuant to the liquidity agreement via a specific account designated especially for that purpose. Furthermore, the investment firm must independently take decisions on the execution of its obligations under the liquidity agreement and ensure that its employees involved in the execution remain independent vis-à-vis the issuer.

The investment firm must ensure that the difference between bid and sale prices quoted by it do not exceed a bandwidth of five per cent (or less if so provided by the rules of the market on which the transactions are performed). Further rules apply to maximum bid and sale prices quoted with respect to participation rights in closed-end funds and certain articles of the Buy-back and Stabilisation Regulation [2] must be complied with. In particular, shares or participation rights may not be purchased at a price higher than the higher of the price of the last independent trade and the highest current independent bid on the trading venue where the purchase is carried out.

What is new?

If all conditions under the Regulation are met the issuer may rely on an exemption to two of the most difficultly judged Netherlands market manipulation rules.

One might argue that this is the first codification of a specific exemption for liquidity enhancement mechanisms under the Netherlands market manipulation rules. Although the conditions for reliance on the exemption under the Regulation are similar to the conditions set out under the Buy-Back and Stabilisation Regulation, there are important differences. Firstly, the Regulation provides that the provision of liquidity is sufficient purpose to rely on the exemption it provides. The Buy-Back and Stabilisation Regulation requires other purposes (such as reduction of the issuer's share capital) to be met in order for parties to be able to rely on the exemptions provided by it. Secondly, the Regulation, in contrast to the Buy-Back and Stabilisation Regulation, does not set out any volume restrictions for purchases of the issuer's shares. Such volume restrictions have in the past proved difficult for smaller and illiquid funds to meet when trying to enhance their liquidity. Thirdly, although the issuer should ensure that it complies with other Netherlands market abuse legislation, the Regulation, unlike the Buy-Back and Stabilisation Regulation, does not indicate any specific behaviour in which the issuer may not engage during the life of the liquidity agreement, such as sale or issuance of further shares.

[1] Regulation of the Minister of Finance of May 4, 2011, No. FM/2011/8728M, designating categories, transactions or trade orders to which the prohibitions referred to in article 5:58, first paragraph, heading and sub a and b, of the Netherlands Financial Supervision Act do not apply (Regeling gebruikelijke marktpraktijken Wft).

[2] Regulation (EC) No 2273/2003 of the European Commission of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and the Council as exemptions for buy-back programs and stabilization of financial instruments (PbEU L 336).

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REGULATIONS OF ECFA'S PROVISIONAL RULES OF ORIGIN

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The early harvest plan of the Cross-Straits Economic Cooperation Framework Agreement (the "ECFA") took effect on January 1 this year. In order to determine the origin of a product and whether the early harvest plan is applicable, Annex II of the ECFA sets forth the Provisional Rules of Origin Applicable to Products under the Early Harvest Plan for Trade in Goods (the "Provisional Rules of Origin"). According to Article 2 of the Provisional Rules of Origin, the basic rules of determining the origin of a product are:

- the good is wholly obtained in one Party in accordance with Article 3 of the Provisional Rules of Origin;
- the good is produced entirely in one or both Parties, exclusively from originating materials; or
- the good is produced in one or both Parties, using non-originating materials, and conforms to the product specific rules provided in Article 4 of the Provisional Rules of Origin.

Pursuant to the Provisional Rules of Origin, the governments of both sides of the Taiwan Strait may issue origin certificates to products complying with the Provisional Rules of Origin and promulgate administrative rules. Consequently, the Ministry of Finance issued Ruling Tai-Cai-Guan-09905911570 on 27 December 2010, which contains the "Administrative Procedure for the Provisional Rules of Origin Applicable to Products under the Early Harvest Plan for Trade in Goods" and "Product-Specific Rules of Origin Applicable to Products under the Early Harvest Plan for Trade in Goods." Both rules became effective on 1 January 2011.

Paragraph 1, Article 2 of the Administrative Procedure for the Provisional Rules of Origin Applicable to Products under the Early Harvest Plan for Trade in Goods (the "Administrative Procedure") reads: "In order for the products originating from one party to enjoy preferential tariff treatment, the exporting party shall issue origin certificates." The Administrative Procedure also contain detailed rules on the format of the ECFA origin certificates, the application procedure, the conditions of their issuance and the verification methods.

Generally speaking, an exporter or manufacturer shall obtain an origin certificate before reporting to customs. However, in the exceptional situations set forth in Paragraph 4,

Article 2 of the Administrative Procedure, it may apply for an origin certificate ninety days after reporting to customs. The exceptional situations are:

- force majeure events or justifiable reasons acceptable to the exporting party in accordance with rules;
- the certifying party has issued an origin certificate but due to technical errors in the making of the certificate, the exporter has to apply for certificate cancelation and reissue of certificate;
- the origin certificate is lost or destroyed.

It is noteworthy that although a product not included in the early harvest plan or does not comply with the Provisional Rules of Origin may not enjoy the early harvest benefits of the ECFA, a general origin certificate may still be issued for it.

The Product-Specific Rules of Origin Applicable to Products under the Early Harvest Plan for Trade in Goods specifies the origin rules applicable to each product in the early harvest plan on the Taiwan side, including changes in tariff classification or regional value content. The requirements vary from product to product. For example, the tariff classification of bicycles processed in Taiwan has to be changed from another heading to 87120010 and the regional value content shall not be less than 40%; the tariff classification of cutting machines for paper processed in Taiwan has to be changed from another heading to 84411000 and the regional value content shall be no less than 50%.

INTERNATIONAL TRADE UPDATE - JUNE 2, 2011

United States Imposes New Round of Sanctions on Syria

As part of its escalating pressure on Syria to cease its crackdown on recent demonstrations, the United States government has imposed a new round of sanctions targeting the Syrian President, Bashar al-Assad, and some of his top aides. These sanctions follow those issued in April under Executive Order 13572, which targeted Syria's intelligence agency and two relatives of President Assad for alleged human rights abuses.

The new Executive Order, "Blocking Property of Senior Officials of the Government of Syria" (the "EO"), blocks the property and interests in property of President Assad and the country's vice president, prime minister, interior minister, defense minister, head of military intelligence, and director of political security forces. As such, the EO prohibits U.S. persons from engaging in any transaction or dealing which involves the property or interests in property of these officials, including the making or receiving of "any contribution of funds, goods, or services by, to, or for the benefit of any [designated party]." In conjunction with the EO, the Treasury Department's Office of Foreign Assets Control has added President Assad and these other top officials to its Specially Designated Nationals and Blocked Persons List.

Further, the EO also authorizes the Secretary of the Treasury, in consultation with the Secretary of State, to block the property and interests in property of agencies or instrumentalities "of the Government of Syria" or "owned or controlled, directly or indirectly, by the Government of Syria or by an official or officials of the Government of Syria." The designation of such entities would prevent their property interests from being "transferred, paid, exported, withdrawn, or otherwise dealt in" by U.S. persons. This could have profound ramifications on trade-related transactions with Syria, as many of the country's industries are state-controlled, particularly in the energy sector. However, the EO stops short of imposing the level of sanctions as those currently imposed on Libya under Executive Order 13566, which by its terms automatically blocks all property and interests in property of the Government of Libya (see "[International Trade Update: Imposition of Broad New U.S. Sanctions Targeting the Government of Libya.](#)" March 4, 2011).

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U.S. Court of Appeals Rejects Antitrust Challenge to Tiered Bundling of Cable Networks

06.07.11

By Burt Braverman

It has long been the subject of fierce debate whether cable television and DBS distributors should be forced to unbundle their program tiers and sell channels to subscribers on an "*a la carte*" basis, and in turn whether major programmers should be forbidden from conditioning the licensing of their most popular, "must-have" networks on cable and DBS operators' carriage of their less popular ones. While most often fought on a policy basis before the Federal Communications Commission, the issue also has played out in the courts.

On June 3, 2011, in *Brantley et al. v. NBC Universal, Inc. et al.*, a three judge panel of the United States Court of Appeals for the Ninth Circuit, in San Francisco, issued a unanimous opinion holding that consumer plaintiffs who brought a class action to force the unbundling of cable and DBS operators' program tiers had failed to adequately plead an antitrust claim against either the operators or programmers named as defendants in the suit. The plaintiffs have vowed to seek rehearing of the panel's decision by the full Court of Appeals, *en banc*, and if necessary to seek *certiorari* review by the U.S. Supreme Court.

The plaintiffs' complaint

The Plaintiffs, ten cable and DBS subscribers, brought a class action suit against major cable network owners, including Disney, Fox Entertainment Group, NBC Universal, Time Warner, Turner Entertainment Group and Viacom (Programmers) and multi-channel distributors, including Cablevision Systems, Comcast, Cox, DirecTV, EchoStar and Time Warner Cable (Distributors). Plaintiffs alleged that Programmers' practice of forcing distributors to carry unwanted, less desirable networks in order to be allowed to distribute "must-have" channels, and Distributors' practice of requiring consumers to subscribe to large, bundled tiers of networks, violated Section 1 of the Sherman Act. Programmers' control over the must-have networks, Plaintiffs asserted, gave them market power to force Distributors to sell content in large bundles that include unwanted channels, thereby precluding Distributors from purchasing, and then distributing to subscribers, only the must-have programming. Plaintiffs contended that, in the absence of Programmers' bundling practice, Distributors would offer individual channels on an *a la carte* basis, which would allow subscribers to order only those channels that they wished to watch, instead of limiting Distributors' method of doing business, reducing customer choice, and raising prices to subscribers. Plaintiffs sought not only treble damages, but an injunction ordering Programmers to make their channels available on an individual, unbundled basis.

Injury to consumers not enough

Paying homage to the well established principle that the antitrust laws protect competition, not competitors, the Court outlined Plaintiffs' burden in the face of the Defendants' motion to dismiss: to show that the complaint (which had been amended three times) pleaded facts that, if proved, would establish not only that the challenged practices injured competitors and/or consumers (antitrust injury), but also that they caused "injury to competition", an essential element to a Section 1 antitrust claim. Indeed, as the Court noted, competitors may be hurt by practices that are the consequence of vigorous competition, and consumers may benefit even when a competitor is injured. While showing such antitrust injury is a necessary element of an antitrust plaintiff's case (to establish the litigant's standing to assert an antitrust claim), an antitrust plaintiff must also assert, and ultimately prove, that *competition* has been injured by the challenged practices. Reviewing Plaintiffs' allegations, the Court found that they came up short of the mark.

Plaintiffs' allegations fall short of the mark

Although Plaintiffs attempted, early in the litigation, to satisfy the injury to competition element by asserting that Programmers' practice of selling bundled cable channels foreclosed independent programmers from entering and competing in the market for programming channels, they abandoned that position after preliminary discovery. Thereafter, they contended instead that the sale of multi-channel packages harms consumers by (1) limiting the manner in which Distributors compete with one another because they are unable to offer *a la carte* programming, (2) thereby reducing customer choice, and (3) consequently increasing prices.

But the Court held that these allegations addressed only the issue of antitrust injury and not injury to competition, and therefore did not make out a Section 1 claim. First, the Court said that limitations on the way Distributors compete with one another do not alone necessarily constitute injury to competition; more must be alleged. "Although plaintiffs may be required to purchase bundles that include unwanted channels in lieu of purchasing individual cable channels, antitrust law recognizes the ability of businesses to choose the manner in which they do business absent an injury to competition."

Second, in a statement that already has some consumer bloggers fuming, the Court stated that allegations regarding harm to consumers, either in the form of reduced choice or increased prices, do not suffice absent some further showing because increased prices and lessened consumer choice may be fully consistent with competition. "...[T]he plaintiffs here have not explained how competition (rather than consumers) was injured by the widespread bundling practice." The Court distinguished Plaintiffs' allegations from the facts in *United States v. Loew's, Inc.*, 371 U.S. 38 (1962), where the Supreme Court held that "block-booking" and "tying" practices of major movie studios, which not only forced theater chains to buy unwanted movies to get hit movies but also *forced them to forego purchasing movies from other distributors*, resulted in harm not just to consumers but *to competition*, the element that the Court of Appeals found wanting in the *Brantley* plaintiffs' claims.

Finally, the Court addressed Plaintiffs' assertion that most or all of Programmers and Distributors engage in bundling, which the Court referred to as "current market practice". Noting that Plaintiffs' third amended complaint contained no allegation that Programmers' sale of channels in bundles has any effect on other programmers' efforts to produce competitive programming channels, or on Distributors' competition on cost and quality of service, the Court concluded that Plaintiffs' allegations, while alleging harm to consumers, failed to show how such practice injured competition, a *sine qua non* for Plaintiffs' Section 1 claim. Absent that allegation, wrote Judge Ikuta, the case was nothing more than "a consumer protection class action masquerading as an antitrust suit."

The future of bundling

Plaintiffs have vowed to continue their fight, although the case seems an unlikely candidate for *en banc* reversal or Supreme Court review. While others may seek to challenge bundled tiers in different judicial circuits, and on new legal theories, the opinion comes at a time when the marketplace and technology may do more than legal challenges to promote new forms of choice in video programming.

For more information on this important decision, or its potential impact on your business, please contact your DWT attorney.

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Health Alert

10 June 2011



Print

Senate asks OIG to probe physician-owned distributors

Yesterday, [five U.S. Senators sent a letter](#) to the Department of Health and Human Services Office of Inspector General (OIG) requesting that the OIG investigate the legality of physician-owned implant distributors (PODs), entities that allow physicians to profit from the sale of surgical implants used on their patients. A [companion letter](#) to CMS asked that the agency be certain not to inadvertently provide protection for PODs when drafting the ownership disclosure requirements under the Physician Payments Sunshine Act. The letter was accompanied by a [report from the Senate Finance Committee](#) describing the recent proliferation of PODs. Both documents were described in a [Wall Street Journal article](#) published yesterday.

The OIG letter and the report express serious concerns about the abuse associated with PODs and question their legality under the anti-kickback law. They also provide substantial support to a position that Hogan Lovells has advocated with respect to legal analysis of PODs: that the potential for abuse is so significant that the traditional joint venture analysis that the OIG has applied to physician-owned service providers (like labs and imaging centers) does not appear to apply to PODs.

The anti-kickback law has long been interpreted to be violated if one purpose of a financial arrangement is to reward doctors for their referrals. Through its safe harbors to the law, the OIG has identified certain safety zones. For joint ventures outside a safety zone, the OIG has shared its views of which abuses will cause a provider joint venture to be worthy of prosecution. Its Special Fraud Alert on physician joint ventures, issued in 1989, identifies questionable features of those ventures,¹ and its 2003 Special Advisory Bulletin on contractual joint venture similarly identifies "indicia of a suspect joint venture."²

The Senate report fairly clearly advises the OIG not only that it believes PODs possess many of these questionable features, but also that the traditional leniency towards certain physician-owned providers of ancillary services that



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OIG has allowed through the Special Fraud Alert and Special Advisory Bulletin should not be shown in the case of PODs. The letter and the report state that PODs are importantly different from ancillary service providers, which at least are regulated entities furnishing an actual health care service. In contrast, the Senators indicate that PODs, as middlemen that exist only to assure that physicians get paid a piece of the implants they order, do not deserve the leniency under the anti-kickback law that the OIG has shown to physician-owned providers that meet certain standards. ("[W]e are worried that OIG's existing guidance, which is largely focused on physician-owned providers of ancillary healthcare services, and its expressions of concern, is not adequate to protect against the risk of PODs abuse." Letter to OIG, page 2.)

Further evidence that the Senate views PODs as outside the zone of leniency normally accorded to physician-owned service providers is that its example of what might be a legal and appropriate POD is one that does no business with its physician owners or the hospitals where they practice. ("For example, if a POD was not permitted to do business with its own investors, their partners, or affiliated hospitals, presumably they would be acting as a traditional distributor and not be able to profit from their usage or the usage of other physician investors." Senate report, page 4.)

The *Wall Street Journal* article about the Senators' letter and report quotes Tom Scully, former director of the Medicare program, who also expresses serious skepticism about the legality of PODs. "You can't possibly think this is OK," he said. (*Wall Street Journal* article, page 2.)

The Senate's concern with PODs, and its strongly-worded report and letters, would seem to portend a dramatic increase in the risk the physicians, hospitals, and implant suppliers run when they agree to share implant profits with referring physicians through a POD. Further information on the legal problems with PODs can be found on Hogan Lovells' webpage devoted to [physician-owned companies \(POCs\)](#).

We will be watching developments closely. If you have any questions, please do not hesitate to contact one of the authors listed below, or any Hogan Lovells lawyer with whom you regularly work.

¹ The 1989 Special Fraud Alert is available on the OIG's website at oig.hhs.gov/fraud/docs/alertsandbulletins/121994.html.

² The 2003 Special Advisory Bulletin is available on the OIG's website at oig.hhs.gov/fraud/docs/alertsandbulletins/042303SABJointVentures.pdf.

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WSGR ALERT

JUNE 2011

U.S. SUPREME COURT HOLDS THAT BAYH-DOLE ACT DOES NOT AUTOMATICALLY VEST TITLE IN PATENTS TO GOVERNMENT CONTRACTORS FROM INVENTORS WORKING FOR THE CONTRACTORS

On Monday, June 6, 2011, the United States Supreme Court issued its decision in *Board of Trustees of the Leland Stanford Junior Univ. v. Roche Molecular Systems, Inc.* (*Stanford v. Roche*). In a majority decision¹ authored by Chief Justice John Roberts, the Supreme Court upheld the Federal Circuit's decision that the Bayh-Dole Act does not automatically vest title to federally funded inventions in federal contractors, such as universities conducting NIH-funded research. Although this decision prevents the Bayh-Dole Act from acting as a safety net for universities without appropriate employment agreements, careful attention to the language of invention assignment contracts will serve to preserve rights to university inventions. As a consequence, the decision will not normally impact the ability of universities to translate the results of research to a commercial setting.

Bayh-Dole Act Overview

Passed in 1980, the Bayh-Dole Act² seeks to "ensure that the Government obtains sufficient rights in federally supported inventions." To achieve this, the act provides that rights to federally funded "subject invention[s]" are allocated between the federal government and federal contractors (defined as "any person, small business firm, or nonprofit organization that is a party to a funding agreement"³). Under the act, a

"subject invention" is "any invention of the contractor conceived or first actually reduced to practice in the performance of work under a funding agreement."⁴ Contractors can "elect to retain title to any subject invention," but to do so they must fulfill several statutory obligations. In many cases, the contractor is a university that performs grant-funded research. In the case under discussion, the Bayh-Dole Act was important because a lower court had held that Stanford's employment agreement had not transferred title in a patent to the university.

Background

The technology involved in the patents at issue is a polymerase chain reaction (PCR) test for human immunodeficiency virus (HIV). In the late 1980s, Cetus and Stanford began to collaborate to test new drug efficacy. A research scientist at Stanford (Mark Holodniy) joined Stanford's Department of Infectious Diseases. Upon joining the department, Holodniy signed a contract with Stanford stating that he would "agree to assign" his "right, title and interest in" inventions resulting from his employment. Holodniy, who was unfamiliar with PCR at that time, went to Cetus to learn PCR techniques and research PCR quantification of patient HIV levels from blood samples. Cetus, a pioneer in the development of PCR, employed scientists who won the Nobel Prize for their discovery and

was a cutting-edge expert in the field at the time. As a condition of utilizing Cetus' expertise, Holodniy signed a confidentiality agreement that stated that he "will and do[es] hereby assign" his "right, title and interest in each of the ideas, inventions and improvements" made "as a consequence of access" to Cetus.

During his nine months at Cetus, Holodniy, working with Cetus employees, developed a PCR-based procedure for measuring blood HIV levels. Holodniy then returned to Stanford, where he and other Stanford employees tested the techniques he developed at Cetus. Stanford filed several patent applications on the technology and then obtained assignments—which Stanford believed to be merely confirmatory of earlier assignments—from the employees, including Holodniy. Some of this research was funded by the National Institutes of Health (NIH) and Stanford met its statutory obligations under the Bayh-Dole Act to retain title to the patents. In 1991, Roche Molecular Systems acquired Cetus' PCR assets, including the contract signed by Holodniy. Roche commercialized the technology as HIV test kits, which are currently in worldwide use.

In 2005, Stanford filed a patent infringement suit against Roche. Roche responded by asserting that Stanford lacked standing to sue because Roche was a co-owner of the

¹ Justice Sonia Sotomayor filed a concurring opinion. Justice Stephen Breyer filed a dissenting opinion, in which Justice Ruth Bader Ginsburg joined.

² 35 U.S.C. §200.

³ §§201(e), (c), 202(a).

⁴ §201(e).

Continued on page 2...

U.S. Supreme Court Holds that Bayh-Dole Act . . .

Continued from page 1...

patents covering the HIV test kits due to Holodniy's assignment to Cetus. Stanford argued that Holodniy had no rights to assign because part of the research conducted by the university was federally funded, and that their rights to the invention were assured by the Bayh-Dole Act.

The Supreme Court Decision

Stanford argued that the Bayh-Dole Act should automatically transfer title to the university, but the Supreme Court held in favor of Roche. In denying the validity of Stanford's position, the Court focused on the preclusive effect of the Bayh-Dole Act on the inventor's interests in the invention. The Court first noted the primacy of the inventor's ownership of his inventions, and recited several provisions of the Patent Act requiring that the inventor has initial ownership of a patent. Additionally, the Court noted precedents that confirmed the general rule that rights in inventions belong to the inventor, who may assign those rights to others. The Court also noted that "mere employment" is insufficient to convey title to an invention from an employee to an employer without "an agreement to the contrary." At the district court and Federal Circuit levels, Stanford argued that the "agree to assign" language was appropriate because the inventions had not been invented at the time the original contract with Holodniy was signed. However, both lower courts found that, because the Stanford employment agreement was written only in "future tense" (i.e., "I agree to assign...") as opposed to present tense (i.e., "I do hereby assign..."), Cetus obtained the first assignment of the patent rights. Thus, the Supreme Court decision effectively affirmed these findings.

The Court declined to adopt Stanford's interpretation of the Bayh-Dole Act to usurp these previous rulings. As the Court noted, the act does not expressly divest inventors of their rights, nor does it expressly vest those rights in contractors. The Court held that the Bayh-Dole Act's definition of a "subject invention" as "any invention of the contractor conceived or first actually reduced to practice

in the performance of work under a funding agreement" should not be interpreted to mean that any inventions made by an employee of a contractor were property of the contractor. Instead, the Court held that this language only applied to inventions owned by the contractor, such as via a valid assignment contract.

Observations on the Holding

The Supreme Court's interpretation of the Bayh-Dole Act prevents organizations receiving government research funding from using the act as a safe harbor to guard their rights to employees' inventions. The decision in *Stanford v. Roche* is also instructive for employers seeking to secure rights in their employees' inventions. Employers should refrain from using mere "promise" language, such as "agrees to assign," in invention assignment or employee contracts. Instead, definite language such as "hereby does assign" in addition to the "promise" language in such contracts is advisable. In most cases, employment agreements are drafted with the "hereby does assign" language.

In most cases, this decision will be of little impact. It would apply only when (a) a university or other employer has only the "future" assignment language in an employment agreement, and (b) the researcher signs a contrary agreement *before* assigning the patent rights to the university. In light of this case, it is worthwhile for investors and companies to perform diligence on this issue when an important technology is in-licensed, and to review the assignment language in their employee and consultant agreements.

Further Guidance

For further guidance on how to evaluate your patent portfolio, assignment contracts, and employee contracts in light of this decision and its potential implications, please contact Vern Norviel, Suzanne Bell, or another attorney in the intellectual property or technology transactions practices at Wilson Sonsini Goodrich & Rosati.



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