Pacific Rim Advisory Council

June 2013 e-Bulletin

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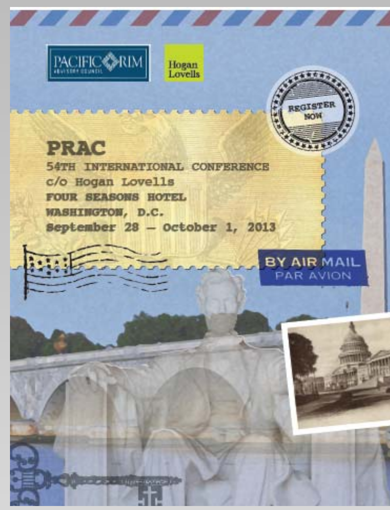

Washington, D.C.
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October 7, 2013
PRAC Members Gathering

PRAC @ PDAC Toronto
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April 26-29
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PRAC @ INTA Hong Kong
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Santiago, Chile 2014
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CLAYTON UTZ LAUNCHES NEW EDITION OF SUCCESSFUL DELIVERY OF RESOURCES PROJECTS

Sydney, 6 May 2013:Clayton Utz has released a revised edition of its popular legal text Successful Delivery of Mining Projects, a practical guide for project stakeholders on the diverse range of legal issues and risks they may encounter in projects and how to factor these into their decision-making.

Now titled Successful Delivery of Resources Projects, the publication is a collaborative, firm-wide effort that draws on the significant experience of Clayton Utz' partners and lawyers across a range of practice areas, including Major Projects and Construction, Energy and Resources, Government, Environment and Planning, Corporate / M&A, Native Title, Litigation and Dispute Resolution and Workplace Relations.

The revised edition of the text includes several new chapters, including on carbon capture and storage, carbon risks in projects, real property and intellectual property issues, bilateral investment treaties, and the restructuring of troubled projects.

Clayton Utz Construction and Major Projects partner Andrew Stephenson, a specialist in construction related disputes who generated the idea for Successful Delivery of Resources Projects, said it drew on the firm's broad experience in providing strategic, commercial and whole-of-project-cycle advice to mining, energy and resources industry participants. "We were overwhelmed by the response to the first edition of the publication, both in Australia and abroad. It confirmed our view that there was a need for a publication which provides a comprehensive overview of all the key legal issues that project participants are likely to encounter, including relevant legislative and regulatory frameworks."

The national head of Clayton Utz' Energy and Resources practice, Graeme Dennis, said the publication reflected the central role the resources sector will continue to have in the Australian economy. "We hope Successful Delivery of Resources Projects will contribute to a greater understanding of the legal environment in which projects have to be delivered — and ultimately, to their successful delivery."

Clayton Utz has one of the largest dedicated Energy and Resources and Construction and Major Projects practices in Australia and the largest Major Projects practice in South-East Asia, specialising in advice on the diverse legal issues arising from all types of significant energy and construction projects.

For additional information visit www.claytonutz.com

HOGAN LOVELLS EXPANDS LITIGATION AND INTERNATIONAL ARBITRATION CAPABILITIES WITH THREE PARTNERS

NEW YORK, 5 June 2013 – Hogan Lovells today announced the addition of three partners from Chadbourne & Parke to its Litigation and Arbitration practice. Oliver J. Armas, the co-head of Chadbourne & Parke's International Arbitration Group, and Phoebe A. Wilkinson, the co-head of Chadbourne's Product Liability Group, will join Hogan Lovells' New York office. Luis Enrique Graham, a prominent litigation and arbitration practitioner, will be resident in Mexico City, with a significant presence in New York.

"This team offers strategic experience in international arbitration and products liability for a diverse range of clients," said Warren Gorrell, Co-CEO of Hogan Lovells. "They are strong complements to our highly regarded global Litigation and Arbitration practice and expand upon the firm's already established strength resolving complex disputes across the globe."

Armas and Graham bring complementary experience in international arbitration and commercial litigation, while Wilkinson comes to the firm with a strong background in international products liability, particularly relating to life sciences issues.

"We are thrilled to welcome these incredibly talented, seasoned, and well-connected lawyers," said Daniel Gonzalez, co-head of Hogan Lovells' International Arbitration practice. "This group is a perfect fit for us and enhances our International Arbitration and Latin American practices while also providing a strengthened focus on life sciences and products liability in New York."

"Our team is very excited about joining Hogan Lovells. It has true global scale with deep practices; a unique package to offer our clients," added Armas. "To be presented with the opportunity to further build out the New York international arbitration and commercial litigation teams, and for Luis Enrique and me to join forces with Hogan Lovells' incredibly strong Latin America team in Miami was ultimately too good a situation to pass up."

As co-head of the International Arbitration Group at Chadbourne & Parke, Armas handled complex domestic and international disputes. He routinely represents foreign and domestic clients in arbitrations before the ICC, ICDR, LCIA and ICSID. Armas has also supervised litigation and conducted Foreign Corrupt Practices Act (FCPA) investigations in almost every country in Latin America. He holds a J.D. and B.A./M.P.A (with honors) from New York University.

Graham has extensive experience in international arbitration, complex civil and commercial litigation, and anticorruption regulations. He has regularly appeared before the ICC, ICDR, LCIA and NAFTA/ICSID. Graham holds a J.D., cum laude, from Panamerican University, an M.A., cum laude, from American University and a B.A., summa cum laude, from the Universidad Nacional Autónoma de México.

Wilkinson focuses on complex domestic and international disputes with an emphasis on products liability on behalf of pharmaceutical, medical device and consumer appliance manufacturing companies. She frequently counsels clients on anti-corruption compliance programs and has significant experience before international arbitration tribunals. Wilkinson holds a J.D. from Brooklyn Law School and an A.B. from Brown University.

For additional information visit www.hoganlovells.com

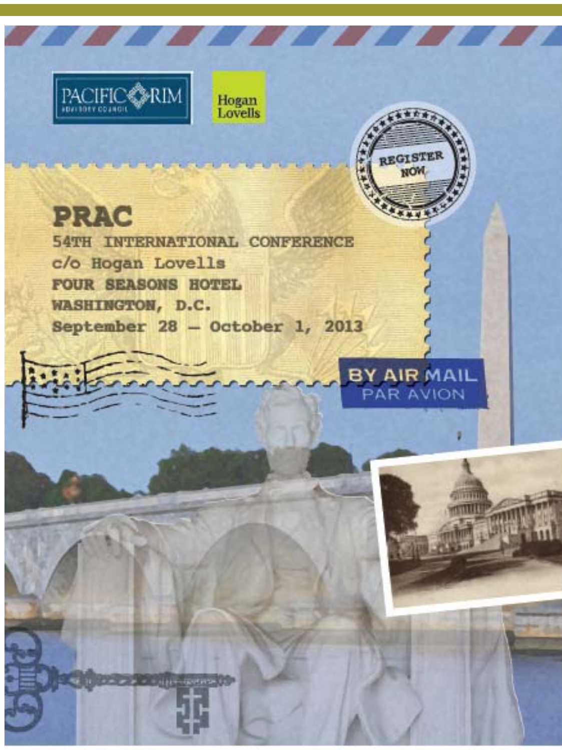
SYCIPLAW APPOINTS TWO TO PARTNERSHIP

May 24, 2013 - SyCip Salazar Hernandez & Gatmaitan (SyCipLaw) is pleased to announce the admission of Russel L. Rodriguez and Marietta A. Tibayan to the partnership.

Mr. Rodriguez specializes in civil and commercial litigation. He has handled and tried a broad range of cases involving contract disputes, corporate restructuring and rehabilitation, debt recovery, enforcement of foreign judgments and arbitral awards, family law and settlement of estates, infrastructure and engineering disputes, intra-corporate controversies, labor disputes, insurance claims, and disputes involving land, mining and natural resources. He also has extensive experience in immigration and deportation cases, insurance law, labor and employment law, and criminal litigation, both as a private prosecutor and as defense counsel. Mr. Rodriguez received his Bachelor of Arts (cum laude) and Bachelor of Laws from the University of the Philippines.

Ms. Tibayan specializes in foreign investments, joint ventures, mergers and acquisitions, real estate and property development, and corporate services. She has extensive experience in the acquisition and disposition of companies including those engaged in power and energy, food, electronics, pharmaceuticals, mining, manufacturing, real estate, and business process outsourcing . She has wide-ranging experience in contract preparation, review and negotiations, including those involving joint ventures and hotel operations. She has assisted in the setting up of multinational companies in the Philippines and in advising on legal issues arising in the course of their business operations. Ms. Tibayan received her undergraduate degree in Legal Management (magna cum laude) from Ateneo de Manila University and her Bachelor of Laws (salutatorian) from the University of the Philippines.

For additional information visit www.syciplaw.com



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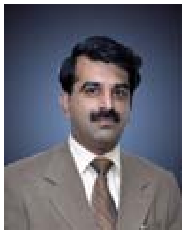
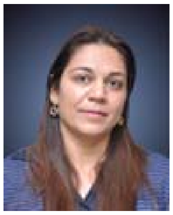
KOCHHAR & CO. CONTINUES EXPANSION WITH ADDITION OF FOUR NEW PARTNERS

We are pleased to inform you that the following new Partners have joined the Firm.



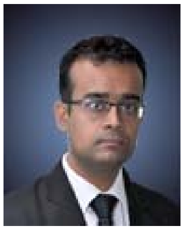
Neeraj Grover is a Partner & Head of the Intellectual Property (IP) Litigation practice at the Firm's New Delhi office. He enjoys the unique distinction of being one of the very few renowned IP practitioners in India who have handled litigation in diverse areas of law including criminal law (especially white collar crimes) commercial law, cyber law, general civil law, arbitration, banking law, consumer protection etc. In addition, Neeraj regularly represents client on all facets of IP law including prosecutions, criminal enforcement actions and complex litigations relating to trade mark, copyright, patent and design.

Neeraj has extensive experience in conducting trials and leading evidence both in civil & criminal proceedings pertaining to Intellectual Property Laws. He was independently practicing as an arguing counsel before merging his practice with Kochhar & Co.



Niti Paul is a Partner in the Corporate practice at the New Delhi office and is an integral part of the mergers and acquisitions team (M&A). She was previously associated with the law firm of Amarchand Mangaldas.

Niti has substantial experience and expertise of having advised clients across various industry sectors including retail, hospitality, healthcare, financial services, real estate, IT, media, entertainment, publishing, telecom. Her practice includes advising both Indian as well as MNC clients on all aspects pertaining to joint ventures, foreign investments-inbound and outbound, mergers and acquisitions, corporate restructuring, regulatory issues and employment laws.



Nishant Menon is as a Partner in the Litigation practice at the Firm's New Delhi office. He has over 14 years of experience in handling complex commercial disputes and civil litigation and has represented several large Indian and multinational companies in contentious matters. He also has expertise on arbitration matters.

Nishant specializes in representing clients before the Supreme Court, High Courts, District Courts, Company Law Board, Debt Recovery Tribunal and its Appellate Tribunal, Consumer Redressal Commissions amongst others. Nishant has also represented leading nationalized banks and public sector insurance companies before the Supreme Court and Delhi High Court.

Nilesh Parekh is a Partner in the Litigation practice of the Firm. He has substantial experience spanning over 18 years of handling complex litigation matters. Nilesh has to his credit having successfully handled more than 100 ship litigation matters relating to ship arrest & release, charter party disputes, ship building contracts & marine insurance claims.

Nilesh has also successfully handled over 50 inter - bank suits, having recovered in excess of Rs.800 crore for various prestigious banks/financial institutions/mutual funds. Nilesh specializes in handling commercial arbitrations including matters relating to shipping.

For more information, please visit: www.kochhar.com

MCKENNA LONG FURTHER EXPANDS NEW YORK OFFICE WITH PARTNER ADD

Johnathan A. Ballan Marks Fourth Strategic Addition to MLA's New York Office in 2013

NEW YORK (May 20, 2013) — McKenna Long & Aldridge LLP (MLA) is pleased to announce that Jonathan A. Ballan has joined the firm as partner in the New York office. Ballan will head the New York Public Finance Group and will co-chair the firm's Global Infrastructure and Public-Private Partnerships practice.

"Jon's addition demonstrates the firm's commitment to expanding our public finance group, as well as the New York office," said New York Executive Partner, Ambassador Gordon Giffin. "His deep experience in varied areas of public finance is an exceptional complement to our firm's focus on the intersection of government and business."

Prior to joining MLA, Ballan was a partner at the New York office of an international law firm where he led and developed the New York Public Finance group. His experience includes municipal and infrastructure finance, public authority finance, stadium finance, economic development, housing finance, project finance, government relations, and privatization and securitization of public assets. Ballan serves on the Board of the Metropolitan Transportation Authority of New York and is a member of the Audit, Finance, Commuter Rails, and Bridge and Tunnel Committees. Joining him as Counsel in the New York office is Rob Senzer.

The addition of Ballan and Senzer aligns with MLA's plan for increasing and diversifying services for our clients on the local and state level in New York, as well as throughout the Northeast. Earlier this year, Public Finance Partner Dick Sigal, Corporate and Private Client Services Partner Tony Williams and former New York State Senator Craig Johnson joined the firm and are based in the New York office.

"Our firm is committed to identifying strategic areas of growth and bringing in the right people to help grow those areas," said MLA Chairman Jeff Haidet. "The recent additions of these attorneys reflect our dedication to providing added value to our clients in all aspects of their business."

For additional information visit www.mckennalong.com

ARIAS & MUNOZ

EL SALVADOR ADVISES IDB IN US$25 MILLION LOAN TO LA HIPOTECARIA

April 24, 2013 Arias & Munoz acted as local advisors of Banco La Hipotecaria, SA (Panama) in connection with the issuance of certain notes by the Issuer Trust constituted by La Hipotecaria (Holding), Inc., as settlor, and Banco La Hipotecaria, S.A. as trustee, and the establishment of a Collateral Trust to hold and administer the collateral trust assets, such collateral trust was constituted between Banco La Hipotecaria in its capacity of Issuer Trustee, and BG Trust, Inc., as collateral trustee.

The amount of the issuance was of up to US$ 45 million, which was placed through the Panama Stock Exchange. This issue was guaranteed by the mortgage loans granted by La Hipotecaria, SA de CV (a Salvadoran company) which was transferred by La Hipotecaria, SA de CV for the Collateral Trust.

Our role was to participate as Escrow Agents of the mortgage loans that would be transferred to the Guarantee Trust and preparing documents under Salvadoran law formalizing the transfer of the loan portfolio.

Arias & Muñoz lawyers working on the deal include Armando Arias, Partner, Ana Mercedes López, Partner, Mario Lozano, Associate and Rafael Burgos, Paralegal.

For additional information visit www.ariaslaw.com

CAREY

ACTS FOR BIC IN 882.8 MILLION SHARE PURCHASE AGREEMENT FOR CITY NATIONAL BANK OF FLORIDA

Carey acted as local counsel to Banco de Crédito e Inversiones (BCI) in the Share Purchase Agreement for the 100% acquisition of City National Bank of Florida, the second largest bank in Miami, for USD882.8 million.

Carey advised BCI through a team led by partner Francisco Ugarte and associate Eugenio González.

For additional information visit www.carey.cl

GIDE LOYRETTE NOUEL

ADVISES KWEICHOW MOUTAI ON ACQUISITION OF CHATEAU LOUDENNE

Gide Loyrette Nouel has advised Kweichow Moutai, China's leading distillery, traded on the Shanghai stock exchange, on the acquisition of Château Loudenne, a winery in Saint-Yzans-de-Médoc owned since 2000 by the Lafragette family.

The 132-hectare (326-acre) estate, 62 hectares (153 acres) of which benefit from the AOC Médoc appellation, is situated on the banks of the Gironde estuary and produces, in particular, the Château Loudenne red, the Médoc Cru Bourgeois Supérieur and the Hippocampus Cuvée Spéciale. It employs a staff of around 20 and produces 300,000 bottles per year.

Gide Loyrette Nouel Paris team included David Boitout (partner), Alexis Pailleret and Githa Bourquouquou and from Gide Loyrette Nouel Shanghai, Fan Jiannian (partner)

For additional information visit www.gide.com

CLAYTON UTZ

ADVISES BANK OF AMERICA MERRILL LYNCH AND RBS MORGANS ON $250 MILLION CROMWELL EQUITY RAISING

Sydney, 27 May 2013: Clayton Utz has advised Bank of America Merrill Lynch and RBS Morgans as joint lead managers (JLMs) and underwriters on the $250 million equity raising by Cromwell Property Group, announced to the market on 23 May.

The raising is being conducted by way of a $128 million placement to institutional shareholders and a $122 million non-renounceable pro-rata entitlement offer.

Stuart Byrne, the head of the national Equity Capital Markets practice at Clayton Utz, together with Director - Equity Capital Markets, Natasha Davidson, advised the JLMs and underwriters on the raising.

Stuart said the raising reaffirmed that equity funding is available in the current environment for quality property stocks.

For additional information visit www.claytonutz.com

HOGAN LOVELLS

ADVISES TOP SPRING INTERNATIONAL HOLDINGS ON US$88.3 MILLION DISPOSAL

HONG KONG, 08 May 2013 - Hogan Lovells has advised Top Spring International Holdings Limited ("Top Spring") on its disposal of interests in Top Spring Taihu Bay to Jian Hong Holdings Limited ("Jian Hong") for US$88.3 million.

The disposal includes Top Spring Taihu Bay's entire equity interest in Changzhou Taihu Bay, a limited liability company established in the PRC.

Changzhou Taihu Bay's principal business is the development, operation, sales, lease and management of the ordinary commercial real estate on the land situated at the Changzhou, Jiangsu Province, China.

The proceeds from the disposal will enable Top Spring to improve its cash position through repayment of borrowings and allow the general working capital for other growth initiatives.

Top Spring is a PRC real estate developer listed on the Hong Kong Stock Exchange. It specialises in the development and operation of urban mixed-use communities, and the development and sale of middle to high-end residential properties in the Yangtze River Delta, Pearl River Delta, Beijing-Tianjin and Chengdu-Chongqing regions.

Jian Hong is a limited liability company incorporated in the BVI. The principal business of Jian Hong is investment holding.

The Hogan Lovells Corporate team in Hong Kong has developed a strong relationship with Top Spring, having now advised them on a second major transaction in the last eight months.

The Hogan Lovells team was led by Hong Kong-based partner Terence Lau, supported by associate Sheryl Cheung.

For more information, see www.hoganlovells.com

SYCIPLAW

ADVISES EAGLE CEMENT IN PHP 4.5 BILLION SECURED FIXED RATE NOTES FACILITY

Manila – May 24, 2013 - SyCipLaw teams acted as counsels to Eagle Cement as issuer and Standard Chartered Bank, China Banking Corporation, Development Bank of the Philippines, PNB Capital and Investment Corporation, Union Bank of the Philippines, Metropolitan Bank and Trust Company, Security Bank Corporation, and United Coconut Planters Bank as noteholders in Eagle Cement's Php4.5 billion secured fixed rate notes facility.

Eagle Cement is a 100% Filipino company engaged in the manufacture and distribution of cement. Its production facility is one of the most modern in the country with a capacity of 1.5 million metric tons of cement per year (approximately 40 million bags of cement).

The Php4.5 Billion Secured Fixed Rate Notes Facility is Eagle Cement's first corporate notes issuance. The proceeds from this corporate notes facility was intended to be used by Eagle Cement to fully pay an existing loan facility. The securities used to secure the payment and other obligations under the notes facility were substantially the same as the securities used to secure the payment of the existing loan facility. Given that the securities would only be released at the time of full payment, the timing and procedure for the release of securities from the loan facility and the delivery of the same to the new security agent to secure the corporate notes facility was crucial to the transaction.

The SyCipLaw team acting for the noteholders was composed of partner Mia G. Gentugaya and associate Diana Grace L. Uy. The SyCipLaw team acting for Eagle Cement was composed of partner Vicente D. Gerochi IV and senior associate Jose Florante M. Pamfilo.

For additional information visit www.syciplaw.com

KING & WOOD MALLESONS

ADVISES NISSAN MOTOR TO SUCCESSFULLY SIGN AGREEMENT WITH DONGFENT MOTOR FOR ITS CV BUSINESS

26 January 2013—King & Wood Mallesons represented Nissan Motor Co., Ltd. ("Nissan") and Nissan (China) Investment Co., Ltd. to successfully sign the Framework Agreement with Dongfeng Motor Group Co., Ltd. ("DFG") and Dongfeng Motor Co., Ltd. ("DFL"), for DFL's medium-duty commercial vehicle business and the heavy-duty commercial vehicle business. The total investment is RMB 11.71 billion which includes the restructure and transfer of equity interest, assets, contracts, debt and personnel. The relevant Equity Transfer Agreements and Assets Transfer Agreement were also signed on the same day.

DFL is a joint venture established by Nissan and DFG in 2003 with each holding 50% equity interest. It is the largest sino-foreign joint venture in the auto industry in China. It has approximately 70,000 employees and has comprehensive products covering commercial vehicles, light-duty commercial vehicles, passenger vehicles, parts and components to motor tools with registered capital of RMB 16.7 billion. DFL achieved sales of 1.36 million vehicles in 2012. Through this transaction, DFL will focus on its business development of the light-duty vehicles and passenger vehicles.

DFG is a leading auto manufacturer of medium and heavy trucks in both of the world's and the Chinese market and is the largest listing motor company in China. The majority of the business and assets which bought by DFG, is expected to inject into the commercial vehicle joint venture company between DFG and AB Volvo and its strategic alliance agreement was also signed on the same day in Beijing.

As a legal counsel of Nissan, this one and a half year project was led by Xu Ping and Liu Cheng. King & Wood Mallesons was fully engaged in all aspects of this transaction including transaction structure design, negotiation and execution of transaction documents. According to Ms. Xu Ping, the lead partner in the Beijing office, "The transaction involves complex assets and business restructuring. The deal structure is complicated which requires transfer of equity interest, assets, contracts and personnel. The King & Wood Mallesons team is honored to be a part of this deal and to urge the restructuring completion the." This successfully signed agreement is an important milestone for the project. Since then, the King & Wood Mallesons team will continue to participate in the transaction to procure a speedy and successful closing.

King & Wood Mallesons, with the wealth of experience in the auto industry and a thorough understanding of the auto supervision policy in China, has represented many prestigious auto companies both foreign and domestic in various of merger and acquisition or joint venture transactions.

For additional information visit www.kingandwood.com

RODYK

ADVISES IN ACQUISITION OF REMAINING 50% OF ISSUED AND PAID-UP SHARE CAPITAL OF SINGAPORE CARBON DIOXIDE COMPANY PTE LTD

Rodyk acted for Singapore Oxygen Air Liquide Private Limited (the Purchaser) in acquiring the remaining 50% of the issued and paid-up share capital in Singapore Carbon Dioxide Company Private Limited (the Company), which it does not already own.

Corporate partner Gerald Singham led, supported by partner Terence Yeo.

For additional information visit www.rodyk.com

MCKENNA LONG & ALDRIDGE

TEAM SECURED VICTORY FOR FLOORING MANUFACTURER ECORE

Federal Circuit Affirms District Court Decision in U.S. Rubber Recycling, Inc. v. ECORE International Inc.

May 17, 2013 – McKenna Long & Aldridge LLP attorneys Robert C. Nissen and Jeffrey D. Wexler secured a major victory for client ECORE International Inc. in a long-running patent lawsuit, *U.S. Rubber Recycling, Inc. v. ECORE International Inc.*, Case No. CV 09-9516 SJO (OPx) (C.D. Cal.). The United States Court of Appeals for the Federal Circuit ruled on Wednesday in favor of ECORE, affirming the district court judgment in favor of ECORE without opinion.

"ECORE is gratified that the Court upheld the judgment as ECORE has always maintained that all the claims in the lawsuit lacked merit," said Nissen, counsel for ECORE.

Art Dodge, CEO of ECORE, expressed his appreciation for the “outstanding work [the McKenna team] performed on ECORE’s behalf for the past four years, as this case wound its way through the court system.”

Prior to the appeal, the Honorable S. James Otero of the United States District Court for the Central District of California had granted ECORE’s motions for judgment on the pleadings and for summary judgment against all of U.S. Rubber’s claims. Notably, the district court's grant of summary judgment on U.S. Rubber’s false marking claim was one of the first nationwide to have ruled on the merits on the issue of whether a plaintiff had suffered a competitive injury for purposes of the false marking statute, as amended by the America Invents Act. The court held that U.S. Rubber had failed to raise a fact issue as to whether it had suffered a competitive injury due to ECORE's alleged false marking.

The suit was filed in 2009 with U.S. Rubber alleging ECORE had improperly procured a patent for acoustical underlayment by failing to disclose prior art to the United States Patent & Trademark Office (PTO).

In April 2011 Judge Otero granted ECORE's motion for judgment on the pleadings on U.S. Rubber's antitrust claim. Then, in August 2011, the court granted summary judgment on U.S. Rubber's claim for a declaration of unenforceability, holding that the Federal Circuit's recent *en banc* decision in *Therasense* and the PTO’s issuance of the reissue patent prevented U.S. Rubber from showing that the PTO would not have issued the original patent if it had been provided with the prior art during the prosecution of that patent. At the same time, the court also granted summary judgment to ECORE on U.S. Rubber’s other claims under the Lanham Act and for intentional and negligent interference with prospective economic advantage, leaving only the false marking claim remaining for trial.

In December 2011, Judge Otero granted ECORE's motion for summary judgment based upon lack of competitive injury and dismissed the case.

About ECORE International

ECORE International traces its history back to the mid-nineteenth century, a time when individuals transformed big ideas into extraordinary results. With equal measures of hard work and ingenuity, the company evolved a promising concept into a full line of the smartest, highest-performing and most eco-logically responsible recycled rubber products made in the United States. Today, ECORE leads the commercial rubber flooring category and continues to blaze trails and set new standards in recycled rubber technology, responding with intelligent solutions that improve people's lives every day.

For additional information visit www.mckennalong.com

TOZZINIFREIRE

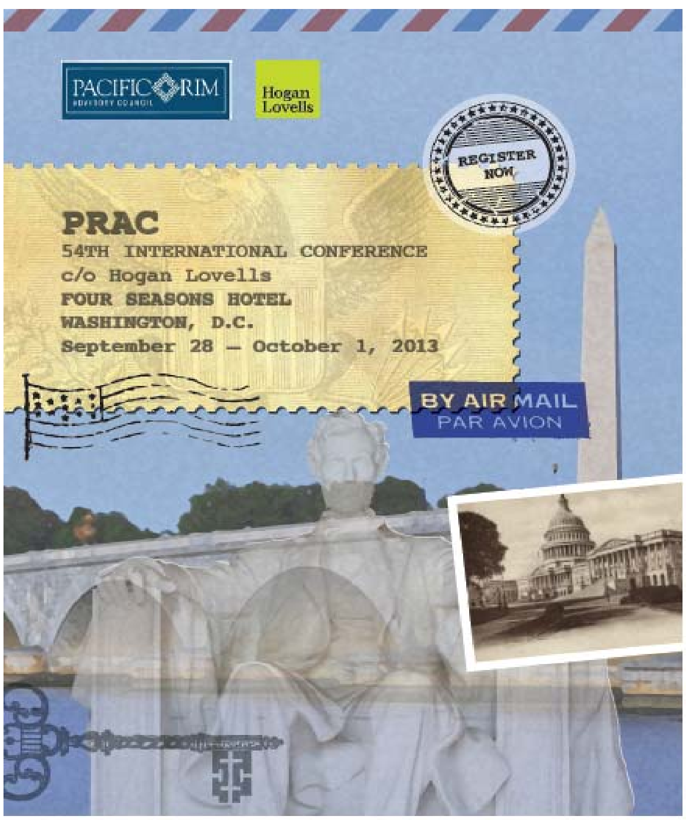
ACTS FOR BNY MELLON IN RR1.192 BILLION BRIDGE LOAN TO AEROPORTAS BRAZIL - VIRACOPOS

Sao Paolo - June 01, 2013 TozziniFreire Acts for BNY Mellon in RR1.192 Billion Bridge Loan to Aeroportas Brazil – Viracopos. In the context of the R$ 1,192 billion bridge loan granted by Banco Nacional de Desenvolvimento Econômico e Social (BNDES) to Aeroportos Brasil - Viracopos S.A., the private concessionaire in charge of the operation, development, modernization and expansion of Campinas' International Airport Viracopos, sponsored by private players UTC Participações S.A. and Triunfo Participações e Investimentos S.A., alongsideFrench operator EGIS Airport Operation and Brazil's state operator Infraero, the commercial banks Banco do Brasil S.A., Banco Bradesco S.A., Banco Itaú BBA S.A., Banco Pine S.A., Banco Santander (Brasil) S.A. and ING Bank NV, São Paulo branch ("Banks") entered into a First Demand Guarantee Agreement with Viracopos by means of which such financial institutions shall issue bank guarantees to ensure the concessionaire's obligations before BNDES under such bridge loan. BNY Mellon Serviços Financeiros Distribuidora de Títulos e Valores Mobiliário S.A. acted as the administrative nd collateral agent ("BNYM").

Alexei Bonamin, partner at Capital Markets and Banking & Finance TozziniFreire's practice groups, was in charge of the assistance for BNY Mellon with the firm's associate Mariana Amaral Guenka.

For additional information visit us at www.tozzinifreire.com.br

HOGAN LOVELLS TO HOST PRAC 54TH INTERNATIONAL CONFERENCE IN WASHINGTON,



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06 June 2013

Is fair use coming to Australian copyright law?

Australia's copyright laws could be in for a major shake-up, including the adoption of a US-style fair use exemption, if the proposals in the ALRC's long-awaited discussion paper, "Copyright and the Digital Economy", are adopted.

Another key ALRC proposal tackles the retransmission of free-to-air broadcasting, a particularly high-profile issue since the Optus TV-Now case.

The introduction of a US-style fair use exception

The ALRC proposes repealing all the current exceptions in the Copyright Act and replacing them with a broad and flexible fair use exception, a concept derived from US law.

The Copyright Act would contain:

- an express statement that a fair use of copyright material does not infringe copyright;
- a non-exhaustive list of the factors to be considered in determining whether the use is a fair use ("the fairness factors"); and
- a non-exhaustive list of illustrative uses or purposes that may qualify as fair uses ("the illustrative purposes").

The non-exhaustive list of fairness factors are listed as:

- the purpose and character of the use;
- the nature of the copyright material used;
- in a case where part only of the copyright material is used—the amount and substantiality of the part used, considered in relation to the whole of the copyright material; and
- the effect of the use upon the potential market for, or value of, the copyright material.

The non-exhaustive list of illustrative purposes listed includes:

- research or study;
- criticism or review;
- parody or satire;
- reporting news;
- non-consumptive uses, such as caching, indexing or data or text mining;
- private and domestic use, such as time-shifting or format-shifting, data backup;
- quotation;
- education; and
- public administration.

These changes are probably the most contentious in the Discussion Paper. Rights holders have identified uncertainty leading to higher transaction costs, including more litigation, as a likely result of a fair use regime. The ALRC however argues that the current regime is already uncertain, and that the benefits of a fair use regime, including acting as a spur to innovation, will outweigh any costs.

Statutory licences

The ALRC has recommended that certain statutory licence schemes provided for in the Copyright Act should be repealed and that licences for the use of copyright material by governments. educational institutions and institutions assisting persons with a print disability should be negotiated separately.

Copyright, broadcasting and the internet

The ALRC proposes that the broadcast exceptions in the Copyright Act should be extended to apply to other forms of communication to the public, including internet transmissions.

This is one of the most complex proposals in the Discussion paper, as the ALRC acknowledges, and it is not in final form. The ALRC is seeking views on how this would work in practice, such as:

- should the scope of the broadcast exceptions be extended only to the internet equivalent of television and radio programs?
- should on demand programs still be excluded from the scope of the broadcast exceptions, or only in the case of some exceptions?
- should the scope of some broadcast exceptions be extended only to content made available by free-to-air broadcasters using the internet?

Copyright and broadcasting: retransmission of free-to-air broadcasts, including over the internet

Pay-TV and other content providers currently have some rights to retransmit free-to-air broadcasts without infringing copyright.

In considering this issue, the ALRC was slightly constrained because it crosses over into territory outside its terms of reference. It therefore has put forward two reform options:

Option 1: Repeal both the free-use exception applying to broadcast copyright and the remunerated exception in relation to underlying rights. Retransmission would then only occur to the extent there was negotiated agreement between broadcasters, retransmitters and the underlying copyright holders.

Option 2: Replace the free-use exception for broadcast copyright with a remunerated exception, similar to that which would continue to apply to the underlying rights. It says this would continue the existing retransmission scheme while providing some recognition for broadcast copyright.

The ALRC determined that if Option 2 is chosen, or the existing retransmission scheme is retained, retransmission "over the internet" should no longer be excluded from the scheme, and the existing scheme should apply to retransmission by any technique, subject to geographical limits on reception. Alternatively, if the "over the internet" exclusion is retained, its scope should be clarified, in particular in relation to internet protocol television.

Libraries: e-works and the preservation of copyright material

The ALRC has proposed that libraries would only be able to supply copyright material in an electronic format to users for research or study if it has taken measures to:

- prevent the user from further communicating the work;
- ensure that the work cannot be altered; and
- limit the time during which the copy of the work can be accessed.

The ALRC also recommends amending the Copyright Act to create a new exception that permits libraries and archives to make copies of copyright material for the purpose of preservation. This will not apply to copyright material that can be commercially obtained within a reasonable time at an ordinary commercial price.

What next?

The due date for submissions on the Discussion Paper is 31 July 2013.

Rights holders will need to consider the impact of these changes very carefully, particularly the fair use exemption, not only when it comes to protecting their intellectual property but also in connection with using copyright material.

The proposed reforms will, if implemented, have significant implications for a host of other sectors, including commercial free-to-air and subscription broadcasters, educational institutions, the public sector and people with disabilities.

BRAZIL: NEW REGULATORY FRAMEWORK FOR THE PORT SECTOR

On June 5, 2013, the President sanctioned the new Brazilian Ports Law (Federal Law 12,815/2013).

As a result of the new regulatory framework, the port sector has now two key players which will compete in the rendering of port services: the already established public port terminals, located inside the public maritime port ("organized port area") and the private port terminals, located outside the organized port area.

Previously, private port terminals located outside the organized port area were divided into two types: exclusive use private terminals, allowed to handle cargo owned / produced by the holder of the terminal's authorization, and mixed use private terminals, allowed to handle its own cargo and third party cargo in a subsidiary manner. The new regulatory framework has eliminated such concepts, enabling private terminals to handle general cargo. In order to operate a private terminal, the applicant must previously submit an authorization request to the Brazilian Agency for Waterway Transportation ("ANTAQ") which, once granted, will be formalized by means of an adhesion contract.

The public port terminals, which handle general cargo, will remain operated by the private sector by means of lease agreements resulting from public procurement proceedings. The new regulations have defined that the criteria to be used in public procurement proceedings to select the best proposal are the highest capacity for cargo handling, the lowest tariff and shortest cargo turnaround time, isolated or combined, eliminating the criteria of highest grant value to be paid to the port authority.

The term for the operation of public terminals is not defined in the new Brazilian Ports Law, which only sets forth the term for the operation of private terminals. ANTAQ may authorize the operation of private terminals for a period of up to 25 years extendable for successive periods, without a maximum total period, provided that the port activity is maintained and the port operator promotes investment in the expansion and modernization of the port facilities.

Another relevant difference between public and private terminals relates to tariff and assets applicable regimes. Operators of public terminals are subject to the tariff structure and tariff review and readjustment criteria previously set forth in the lease agreement, as well as to restrictions resulting from the public assets regime applicable to this case, especially the reversion of assets to the public authority by the end of the lease period. On the other hand, prices and assets related to port activities in private terminals should be exclusively subject to a private law regime.

The new regulatory framework has also innovated regarding the possibility of term extension of lease agreements executed during the period in which Federal Law 8,630/1993 (the now old Ports Law) was in force. Upon the enactment of the new law, if the term extension is expressly set forth in the lease agreement and has not yet been accomplished, the term of such agreement may be extended upon a commitment of new investments in the terminal.

Another relevant innovation is the centralization of powers at the federal level, especially those related to the public procurement proceedings aiming at granting the operation of public terminals. Previously carried out by the local port authorities, from now on such proceedings will be carried out by ANTAQ, in accordance with guidelines set forth by SEP – Special Ports Secretariat.

The enactment of a new regulatory framework for the port sector is part of a set of actions undertaken by the Federal Government to foster investments in the modernization of the Brazilian infrastructure.

Canada Introduces Extensive New Sanctions on Iran

June 5, 2013

On May 29, 2013, in response to a stated concern over Iran's nuclear program, the Government of Canada significantly expanded its unilateral sanctions against Iran under the *Special Economic Measures Act* ("SEMA") by amending the existing *Special Economic Measures (Iran) Regulations* (the "Regulations"). Subject to certain narrow exemptions, Canada effectively implemented a general ban on all **exports to and imports from Iran**. This is a significant departure from Canada's existing sector specific sanctions regime, which primarily targeted Iran's energy industry, financial sector, and its military and nuclear activities.

This alert provides a brief overview of the new measures, which are set out in detail by the Department of Foreign Affairs and International Trade **here**. These new sanctions should be carefully reviewed and incorporated into the export and import compliance and screening procedures of Canadian companies doing business not just in and around Iran, but also in international trade more generally. Particular care must be taken by financial services businesses for whom the expectation of due diligence is high. Parties contemplating any form of business transaction or undertaking which even indirectly involves Iran would be well advised to seek legal advice prior to proceeding.

Overview of New Sanctions

The *Regulations Amending the Special Economic Measures (Iran) Regulations* (Amended Regulations), fortify Canada's existing sanctions against Iran in four principal ways by:

a. **Near-total ban on exports**: it is prohibited for any person in Canada and any Canadian outside Canada to export, sell, supply or ship goods, wherever situated, to Iran, to a person in Iran, or to a person for the purposes of a business carried on in or operated from Iran;

b. **Total ban on imports**: It is prohibited for any person in Canada and any Canadian outside Canada to import, purchase, acquire, ship or transship any goods that are exported, supplied or shipped from Iran after May 29, 2013, whether the goods originated in Iran or elsewhere;

c. **Expanded investment restrictions**: It is prohibited for any person in Canada and any Canadian outside Canada to make an investment in an entity in Iran; and

d. **New designated persons**: The addition of 30 individuals and 82 entities to Canada's list of designated persons under the Regulations brings the total number of such designated parties to 530 entities and 83 individuals. It is prohibited for any person in Canada and any Canadian outside Canada to enter into certain dealings with and/or provide various financial services to a designated person.

Exemptions

To soften the economic impact of the Amended Regulations on Canadians doing previously-legal business with Iran, goods required to be supplied to Iran or acquired from Iran under a contract entered into before May 29, 2013 are not captured by the new prohibitions, provided that such goods were not already listed as prohibited under the Regulations. Note, however, that different exemption timelines apply to certain goods used in the petrochemical, shipping, and mining industries that are supplied to Iran under pre-existing contracts.

In addition to the existing exemptions for food, medicine, medical equipment, and humanitarian goods, the Amended Regulations extend exemptions to goods used to purify water for civilian and public health purposes, informational materials, including books and other publications, and personal or settlers' effects.

Interestingly, the list of exemptions also includes the provision of equipment, services, and software that facilitate secure and widespread communications via information technologies, subject to the issuance of an export permit. The purpose of the exemption is to help the Iranian people avoid government control of

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communication services and to facilitate open access to internet services and social media, particularly during the upcoming presidential elections in June. Social media played a pivotal role in the Green Movement's opposition to Iranian President Mahmoud Ahmadinejad's disputed re-election in 2009. This policy coincides with the announcement by the U.S. on May 30, 2013, that it was relaxing sanctions on Iran to permit American companies to sell consumer communication equipment and software to Iran, including mobile phones, satellite phones, broadband hardware, modems, routers, WiFi access points, data storage devices, voice-over-IP telephony technology, and anti-virus and anti-tracking software.

Compliance Measures

Trade controls and economic sanctions have an impact not only on international business activities, but also on transactional due diligence, contractual representations and warranties and, increasingly, the reputation of a business. Ensuring compliance with these and other trade controls requires the implementation of awareness training, customer screening, regular organizational risk assessments, and other due diligence procedures complete with appropriate record-keeping.

It is important to note that trade controls imposed under the SEMA, including the Iran sanctions, contain anti-circumvention provisions that forbid persons in Canada or Canadians outside Canada from indirectly engaging in prohibited activities by "causing, assisting or promoting" such activities. To this extent the sanctions may have extraterritorial reach.

Along with the further sanctions imposed by the U.S. and E.U. in recent months, Canada's hardened stance is likely to inspire renewed efforts by some persons inside and outside Iran to find ways to circumvent the prohibitions through creative shipping or payment schemes. Guidance from the Export Controls Division of the Department of Foreign Affairs recommends that Canadian companies consider the following questions in performing their due diligence with respect to international transactions. While this screening tool was developed to foster compliance in the export of controlled goods, it is also a good starting point for evaluating foreign clients against the prohibitions imposed by economic sanctions regimes.

- How well do you know the foreign customer? Is it difficult to obtain information about that company or entity?
- Is the customer reluctant to provide an end-user assurance document or is information not forthcoming in comparison to past experiences with other customers?
- Is the customer or the end-user tied to the military or the defence industry, or to any military or governmental research body?
- If you have done business with the customer before, is this a usual request for him/her to make?
- Does the customer seem familiar with the product type and its performance characteristics or is there an obvious lack of technical knowledge? Does the proposed purchase fit the customer's business profile?
- Does the customer reject the customary installation, training, or maintenance services provided?
- Is unusual packaging and labelling required?
- Is the shipping route unusual?
- Is the customer offering unusually profitable payment terms, such as a much higher price than normal? Is the customer offering to pay in cash?
- Is the customer proposing unusual means of payment, such as routing payment through seemingly unrelated financial institutions?

Canadian exporters are also reminded that Canada imposes trade controls on Canadian activities involving a number of other countries: Belarus, Burma (Myanmar), Cote d'Ivoire, Democratic Republic of Congo, Egypt, Eritrea, Guinea, Iraq, Lebanon, Liberia, Libya, North Korea, Syria, Pakistan, Sierra Leone, Somalia, Sudan, Syria, Tunisia, and Zimbabwe. Furthermore, controls imposed by the U.S. and E.U. may apply to exports by Canadian firms. In this complicated compliance environment, where trade barriers change at a moment's notice, screening tools like the above cannot substitute for a thorough compliance program.

For more information please contact Dentons' **Trade, WTO, and Customs Group**. Our in-house leading global expertise in trade, customs, and investment matters, our exceptional team of government relations and arbitration lawyers in the US, Canada and Europe, as well as our reliable local connections in numerous jurisdictions can assist you in pursuing opportunities worldwide while successfully managing regulatory compliance in multiple jurisdictions.

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News Alert Law N° 20,659: Simplifies The Statute for Incorporating, Amending and Dissolving Commercial Companies

Last May 2nd, the new law N° 20,659 entered into force, also known as the "Express Companies Act", which permits the incorporation of a company and its registration for a tax ID number in just one day. This new simplified system for the incorporation and modification of commercial companies is part of an important effort of the State of Chile to facilitate and make more cost-efficient the legal process necessary for the incorporation or modification of a commercial company, thus incentivizing the creation and development of new enterprises.

The objective of this new law is to establish a simplified system for the incorporation, amendment, transformation, merger, split, termination and liquidation of companies, applicable to the most commonly used types of legal entities (Individual Limited Liability Companies, Limited Liability Companies, Closed Stock Corporations, Reciprocal Guarantee Corporations, General Commercial Partnerships, Stock Companies, Silent Companies and Silent Corporations).

For such purposes, law N° 20,659 and its regulation create a system that stands as a quicker and more economic alternative to the current registration system. For example, the requirements of registration in the Commerce Registry and/or the publication in the Official Gazette are both replaced with the completion of a digital form and its addition to the Registry Companies and Corporations (the "Registry"), an act which shall be completely free, notwithstanding the costs of obtaining a digital signature, or of soliciting the services from a Notary to sign digitally on behalf of the user.

The Registry shall be administrated by the Ministry of Economy, Development and Tourism, and shall be on-line, public and free. In the Registry, any registered user may incorporate a company and carry out all other acts permitted by law N° 20,659, in accordance to the conditions set forth therein and in its regulation, through the completion of electronic forms with an advanced digital signature, whether the user's or a Notary's in the event the former does not have said type of signature. Furthermore, the Registry allows the incorporation of annexes or supplementary documents to said acts, such as powers of attorney, certificates and, in general, all types of public or official instruments.

For the time being, the new system shall only be available for limited liability companies, and a differed entry into force shall apply for the other types of legal entities. The last type of company to be included in the new system shall be closed stock corporations, as of July 1st, 2016. Publicly-traded corporations shall be excluded from this new system, and shall remain under the registration system of the Commerce Registry.

As is the case with every new system, the simplified statute must undergo improvements after the entry into force of law N° 20,659 and its regulation by the practices and experiences acquired by the administrator of the Registry, the courts, and the other organisms called upon to apply the new system. The foregoing will probably imply a future amendment to law N° 20,659 and its regulation, which shall in no case, however, tarnish the important modernization efforts achieved through the implementation of said system. A similar implementation, adaptation and perfecting process shall be required among the principal participants of the market (entrepreneurs, investors, lawyers, banks and public entities).

KING&WOOD MALLESONS
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Five Issues You should be Aware of the Latest Draft of Revision of PRC Trademark Law

by Cecilia Lou, Ding Xianjie and Yao Di

The current PRC Trademark Law ("**Law**") was implemented in 1983, and revised in 1993 and 2001, and it has played a significant role in supporting the development of the PRC social economy since its implementation. However, the current Law is complained a lot in practice mainly because the registration procedure is fairly complex and time-consuming, bad faith registration is common and difficult to stop and it provides insufficient protection against trademark infringement. Thus, the latest draft of revision of PRC Trademark Law Draft (the "**Draft**") has been released and was open for any public comments until January 31, 2013. Generally speaking, the Draft addresses to the above mentioned issues. A detailed explanation of some key interesting proposed changes for multinational companies ("**MNCs**") is as follows:

I. Expansion of Non-traditional Trademark Registration

The Draft proposes to accept non-traditional trademark registration to cover sound and also to cover single color (if the single color has obtained the acquired distinctiveness through use).

II. Procedure Facilitation

The Chinese Trademark Office ("CTMO") has already allowed electronic filings for several years on a trial pilot program. Such practice is now officially proposed to be explicitly written into the Law in this Draft.

Furthermore, the Draft also proposes that the applicant can submit one registration application for a trademark covering multiple classes. The current practice only allows the filing of one trademark in one class and additional trademark applications were required for different classes.

Moreover, the practice of office action is proposed to offer trademark applicants an opportunity to present addition argument and evidence for their registration during the CTMO procedure.

Last but not least, the extension of time limit for appeal is also proposed: instead of 15 days in the current practice, the draft proposes 30 days. In summary, these new proposed procedures generally follow the international trend and the hope is that they will also work in China.

III. Material Change in Opposition Procedure

It is worthy of special mention that the CTMO's opposition procedure was materially changed in the Draft. Firstly, it strictly limits the opposition party and the grounds for their opposition. In the past, any party could oppose any trademark on any grounds (i.e., absolute ground or relative ground), but the Draft only allows the owner of prior right or the interested party to lodge opposition on relative ground before the trademark is registered. This change will reduce the number of opposition cases and help alleviate the unfaithful opposition problem.

Moreover, if the opposition is denied by the CTMO, the CTMO will allow the registration immediately and no longer have the application pending until it is resolved in the following appeal procedure. The opposing party's only recourse in invalidating trademarks is through a new procedure – "invalidation". As MNCs are generally the party who files these oppositions, this change will greatly affect the trademark strategy of MNCs in China. If an MNC loses their opposition filing, they can only attempt to invalidate the trademark and will face the disadvantageous situation of the unfaithful applicant receiving the registration. Therefore, in the past, the unfaithful applicant would be unable to register the trademark until the situation was resolved, but under the Draft, the unfaithful applicant will be allowed to use the trademark until it has been invalidated. In this regard, it is highly recommended for MNCs to focus on opposition first, instead of the previous practice of initiating other causes of action in court as a priority.

IV. The Conflict of Trademark and Trade Name

The Draft makes it clear that the Anti-Unfair Competition Law will be applied if any company uses a well-known trademark or other registered trademark as a trade name and causes public confusion.

V. A More Trademark Owner Friendly Burden of Proof System

The Draft proposes the punitive damages, this is the first time for punitive damages to be introduced in the trademark system to punish severe trademark infringement activities and the damages will be 1 to 3 times the profits earned/the loss suffered (License fee can be a reference) due to the infringement.

Furthermore, the Draft proposes to increase the cap of default compensation from RMB 500,000 to RMB 1 million.

Additionally, the disputed infringer will be required to provide its financial books as evidence to show profits, which was difficult for trademark owners to obtain previously, failing to do so means that the only evidence the court will use to calculate such damages will be based solely on the evidence provided by the trademark owner.

Moreover, it is also worthy of mention that the Draft proposes no compensation to the trademark owner if trademark owner cannot prove its use of the mark in the past three years and cannot prove any other loss suffered.

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

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Immigration

News Flash Númber: 189

New Colombian Immigration Statute

The Colombian Government, through its Ministry of Foreign Affairs has issued a new immigration statute. The new instrument is intended to modernize the Colombian immigration system and existing regulations in order to adapt them to today´s global mobility requirements and demands. The instrument, “DECRETO 0834” will enter into force definitely on June 24th 2013.

Though the Government has kept the principle of discretion as central in its visa-awarding functions, it has reduced the categories of visas from six to three and has created new sub types to expand them accordingly to the various activities foreigners may eventually perform in Colombia.

The statue still requires further development and each type of visa and entry permits will be regulated through and Executive Resolution. Having said this, the details for the requirements of documents, place of issuance etc. has not yet been defined by the authorities.
The instrument is extensive and covers many aspects of Colombian immigration. Bearing this in mind, in this newsflash, we will discuss and inform on the changes and novelties introduced to those visas most pertinent to our corporate practice.

In its essence not many changes are made. It does however represent an advance in immigration norms. It provides more detail and specifications on the type of activities a foreigner is allowed to perform in Colombia under the different type of visas.

As this is a frame instrument, the specific requirements for each visa as well as its practical implications will have to be verified along the way and once visas are requested under the new rules.

The first and most important aspect of the new instrument is the new visa classification. The Colombian Government as well as its consular offices will be granting three different types of visas:

- NEGOCIOS (BUSINESS) “NE”
- TEMPORAL (TEMPORARY) “TP”
- RESIDENTE (RESIDENT) “RE”

Please note the previous “Temporary Worker Visa” (Visa Temporal Trabajador) falls under TP category and is now named TP-4 Visa. As the new instrument defines it, it will be granted to the foreign employee to be hired, transferred or seconded by company in Colombia. Requirements as those regarding the exercise of regulated professions remain in effect and to be complied with.

Entry permits are still granted to foreigners from those nationalities that do not require a visa to enter Colombia. Two new categories are established: Entry and Stay Permit (PIP) and Temporary Permanence Permit (PTP) applicable for extensions when a foreigner has been granted a PIP permit previously.

Under entry permits foreigners from non-restricted nationalities are allowed to engage temporarily in a wide range of activities: from business to medical treatment, tourism, academic gatherings etc., Colombia will still allow permanence in Colombia for 90 and up to 180 days in a single year without a visa (work not included).

An important aspect to mention is the fact Technical Entry Permit is still available to foreigners for up to 30 days. A Technical visa may be obtained if the activities are to be extender. Further development however is still required.

Immigration novelties include the responsibilities and attributions granted to the Colombian Immigration authority “Migracion Colombia”. Such entity will be in charge of registration, compliance, police functions and identification services for foreigners. All visas granted for more than three months are still subject to registration. Also underage foreigner over the age of seven will be granted Colombian IDs (“cedulas”).

The most important aspect of the new instrument to highlight is the fact it makes a compilation under a single instrument of all immigration requirements, scenarios, activities allowed and obligations to be complied with by companies and foreign nationals.

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PROPOSAL OF 12% INCREASE TO THE MINIMUM WAGE IN EL SALVADOR

On May 9, 2013 an agreement was reached within the National Council of the Minimum Wage (CNSM) to increase by 12% the current minimum wage. This increase will be proposed by the CNSM to the President of El Salvador, Mauricio Funes. If the proposal is approved by the President, an executive decree will be issued and such decree shall then be published in the official gazette in order to become effective.

The proposal of such increase of the minimum wage is as follows:

- 4% would be applied immediately.
- Then, another 4% would be applied from January 1, 2014.
- Finally, the remaining 4% would be applied from January 1, 2015.

The proposal that had been made by the Salvadoran Government was for a 10% increase.

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NEWS DETAIL

16/05/2013

BKPM REGULATION NO. 5 OF 2013

The Investment Coordination Board (BKPM) has issued a new BKPM Regulation No. 5 of 2013 concerning Guidelines and Procedures for Licenses and Non-Licenses for Capital Investment (“Reg 5 2013”), dated April 8, 2013. This new regulation presents new items that may impact new investment for establishing a foreign investment company as well as existing foreign investment companies (“PMA Company”). The following are some of the key points of Reg 5 2013 based on our review of this regulation.

Effectiveness
Reg 5 2013, replaces BKPM Regulation 12 of 2009, and is effective 30 business days as of enactment date (on May 27, 2013).

Minimum Investment
Unlike the previous regulation, Reg 5 2013 explicitly sets out the minimum investment.
- The minimum total investment (excluding land and buildings): more than Rp. 10 billion (or its equivalent in US Dollars, or approx USD 1,030,927 using today’s exchange rate);
- The minimum issued and paid-up capital: Rp. 2.5 billion (or its equivalent in USD, approx USD 257,740);
- The minimum equity of a shareholder: Rp 10 million (approx USD1,030), and the percentage of share ownership is based on nominal value of shares.

Forms/Procedures
Reg 5 2013 deals with procedures on investment licensing and procedures, and introduces new forms to be used. Unlike the previous regulation, Reg 5 2013 eliminates the requirement to have an investment registration, thus cutting down the process.

Establishment, Implementation and Commercial Operations
Commencement of business comprises the activities of establishment of a new entity, acquisition of an existing entity or commencement of a new business in a new location as a result of relocation of project. Commencement of the business requires a Principle License.
For a new application which covers more than 1 business sector in which one of them includes manufacturing, separate Principle Licenses will be issued.
The timeline for implementing the investment plan set out in the Principle License is 3 years, except for a particular business that requires a longer period. Extensions may be given if the period lapses, subject to procedures set out in Reg 5 2013.
Once a PMA Company is ready to commence commercial operations, it must apply for a Business License from BKPM or from the relevant competent authority.
In terms of Business License, Reg 5 2013 also introduces new terms for certain fields of business, such as Business License for Direct Sale (Surat Izin Usaha Penjualan Langsung or SIUPL), Business License for Survey Business (Surat Izin Usaha Jasa Survei or SIUJS), Business License for Property Brokers (Surat Izin Usaha Perusahaan Perantara Perdagangan Properti or SIUP4), Business License for Construction Business (Surat Izin Usaha Jasa Konstruksi or SIUJK).

Change in Shareholders

For PMDN Companies: For partial or entire acquisition of shares in local companies/PMDN Companies, the company must obtain a Principle License as a foreign investment company.

One important provision in applying the Principle License is to include a list of all the PMDN Company's subsidiary companies. One year post issuance of the Principle License, the

subsidiary companies must apply for PMA status. Reg 5 2013 further on provides that if any of the subsidiary companies engages a business which is restricted for foreign direct investment, the parent PMA company must divest its shares in the subsidiary companies

to Indonesians. Due to the broad definition of 'PMDN companies', these subsidiary companies would include locally-owned companies that have not obtained investment facilities from BKPM.

For PMA Companies: For entire acquisition of shares in a PMA Company by Indonesian individuals or PMDN Companies, the PMA Company must obtain a Principle License as a domestic investment company.

For Publicly Listed Companies: For acquisition of shares in a publicly listed company ("Listed Company"), Reg 5 2013 reiterates the definition of 'controlling shareholders', which is stated as anyone who owns more than 50% of the total paid-up shares or has the ability to determine, directly or indirectly, and by any means, the management and/or policy of a Listed Company. A Listed Company will be categorized as a PMA Company if the entire or one of its controlling shareholders is a foreigner, a foreign legal entity or a PMA Company. A Listed Company categorized as a PMA Company must obtain a Principle License if there is a change in controlling shareholder. Article 50 Reg 5 2013 further provides that the application must be accompanied by a copy of a letter submitted by the controlling shareholder to the Financial Services Authority. Based on this provision, we observe that BKPM is attempting to assert the requirement that a shareholding in a Publicly Listed Company by a foreigner or foreigners which is categorized a controlling shareholder shall be excluded from the term 'indirect or portfolio investment', which, under the Negative List (Article 4 of Presidential Regulation No. 36 of 2010 concerning Fields of Business Closed or Open to Foreign Direct Investment). Thus, in a controlling shareholding situation, a Publicly Listed Company would be subject to the provisions under the Negative List. However, the foregoing is not explicitly stated in Reg 5 2013 but was addressed by BKPM during the socialization of Reg 5 2015. Thus, it is not clear as to how or whether BKPM will enforce this.

Restrictions for Venture Capital Companies

Reg 5 2013 introduces a restriction where Indonesian venture capital companies cannot be shareholders in a large-scale local company (so called PMDN Companies) or a PMA Company. Existing shareholdings by venture capital companies must be divested within a period of 10 years.

Divestment

Concerning divestment obligations, Reg 5 2013 addresses that the divestment obligation of a PMA Company to Indonesian individuals/entities would still apply if the obligation is stated in the investment approvals/licenses issued before the enactment of Reg 5 2013. Extensions can be applied to BKPM (a maximum 2 years can be obtained) to the extent that it has not successfully found a proper Indonesian shareholder.

Sanction Provisions

The sanction provisions of Reg 5 2013 provides that any applicants submitting false information or data in the application may be prohibited to processing further applications for one year and be imposed by criminal sanctions under the prevailing laws. The specific legislations on criminal sanctions are not stated under Reg 5 2013. The information in this alert is in summary form only and is not a legal advice. If you would like any further information on the Investment Law or any legal aspects of doing business in Indonesia please contact our team.

Ali Budiardjo, Nugroho, Reksodiputro
May 2013

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ENERGY LITIGATION UPDATE - JUNE 7, 2013

Drugs, Alcohol, and Guns in the Shale Plays

Due to the extensive drilling and production activity in the Eagle Ford, Marcellus, Bakken, and other shale plays, E&P companies are reviewing their policies regarding the possession and use of alcohol, drugs, and guns and other weapons by employees and contractors. Here are five factors to consider in creating or updating your own policies:

1. **Institute "No Expectation of Privacy" Policies**: By making it clear in your policies that employees and contractors have no reasonable expectation of privacy in areas such as their vehicles, offices, desks, file cabinets, computers, or lockers, you may protect yourself from potential liability. *See O'Connor v. Ortega*, 480 U.S. 709, 717 (1987). Even if the search invokes the Fourth Amendment (discussed below), a search is not in violation of the Fourth Amendment unless the employee had a reasonable expectation of privacy. Furthermore, other potential tort claims, such as invasion of privacy, must similarly involve some expectation of privacy.

2. **Consider posting a "No Concealed Handgun" sign:** In Texas, a land owner or lessee can preemptively prevent a concealed weapons license holder from carrying a "handgun" on an owner's premises by posting a sign that is compliant with § 30.06 of the Texas Penal Code. Section 30.06 prohibits concealed weapons license holders from "carry[ing] a handgun on [the] property of another without effective consent." TEX. PENAL CODE ANN. § 30.06(a)(1) (West 2011). A person carrying a concealed handgun who fails to heed signage that complies with § 30.06 commits a Class A misdemeanor. By the letter of the law, compliant signage must be a single sign in contrasting colors with text 1" or greater in height. It must contain exactly the text specified by law and be in both English and Spanish. The sign must be posted in a conspicuous manner that is "clearly visible to the public." *Id.* Concealed handgun license holders are generally instructed that signage that does not comply exactly with § 30.06 is not binding. Other states may have similar signage requirements.

   Note that in Texas, an employer generally cannot prohibit an employee who lawfully possesses a firearm or ammunition from "transporting or storing a firearm or ammunition . . . in a locked, privately owned motor vehicle in a parking lot, parking garage, or other parking area the employer provides for employees." TEX. LAB. CODE ANN. § 52.061 (West 2012). However, there are several exceptions to this limitation, such as if the employer leases the property under a valid oil, gas, or other mineral lease, and the lease prohibits possession of firearms on the property.

3. **Include prohibitions in your leases and contracts:** Consider including language in your master service agreements and other contracts preventing employees of contractors and subcontractors from carrying handguns or other weapons onto the premises. Clearly establishing these limitations at the outset of the relationship will not only set expectations, but also provide remedies if an incident does occur. Examining your current leases and contracts will also instruct as to whether you may prohibit employees from storing firearms in their locked, privately owned motor vehicles, as discussed above.

4. **Exercise caution in using private security or police to conduct searches:** Drilling operators are private employers and are not generally subject to the search and seizure provisions of the Fourth Amendment. However, by involving public police officers in conducting searches for contraband, you run the risk of involving a "state actor," thereby invoking the requirements of the Fourth Amendment, which require voluntary and knowing consent by the employee before a search is conducted. Even using a private security officer may invoke the requirements of the Fourth Amendment if that officer retains certain police powers or acts under color of state authority, such as carrying a deadly weapon or maintaining the power of arrest greater than that of a normal citizen. It is important to ensure that, if you use a private security guard, the security guard acts separate and apart from law enforcement. Note that there is no reason why law enforcement may not become involved *after* a search is completed.

5. **Get your employees' written consent to search:** Regardless of the legality and propriety of an employee search, it is a wise practice to obtain an employee's prior written consent to search his person or property. Such consent may be obtained in a general consent form that the employee signs at the beginning of, or any time during, the employment relationship. Consent to search is a defense against Fourth Amendment claims of unlawful search and seizure and other private tort claims and it is not generally unconstitutional for a private employer to require consent as a condition of employment. *See U.S. v. Sihler*, 562 F.2d 349 (5th Cir. 1977).

NautaDutilh

Energy & Utilities Update

Investments in Dutch power and gas transmission system operators 30 May 2013
This newsletter is sent by NautaDutilh

The legal framework – recent developments

*This summer, the Dutch Minister of Finance is expected to decide on the partial privatisation of the national power and gas transmission system operators (**TSOs**), Tennet and Gas Transport Services. Initially, the plans for those privatisations met with skepticism due to complications resulting from the ownership unbundling requirements introduced by the 2009 Third EU Energy Package (**Third Package**).*

The EU Commission recently released a document summarizing its views on ownership unbundling. This newsletter briefly explains the main issues of ownership unbundling and discusses the Commission's view and its impact on the envisaged privatisation of the Dutch TSOs.

Ownership unbundling
To reduce the perceived negative effects of vertically integrated energy companies on the completion of the EU internal energy market for natural gas and electricity, the Third Package specifies the rules for the activities of energy companies which are simultaneously involved in generation, production, supply or trading activities (**GPST**) on the one hand and the transport over the transmission and distribution networks on the other hand. These rules are intended to prevent conflicts of interests relating to these activities. For example, a shareholder in a TSO may not have an interest in investing in a network if that would be detrimental to GPST activities of other companies in which he has invested. These rules equally apply to the positions of financial investors, such as pension funds, insurance companies and infrastructure funds. Such financial investors often have diversified portfolios, including investments in energy transmission, generation, production and/or supply, located in different places. The ownership unbundling provisions of the Third Package apply across the gas and electricity markets.

Applied to the Dutch TSOs, the Third Package prohibits a person from controlling GPST activities on the one hand and on the other exercising "any right" in a Dutch TSO, vice versa. In other words:

- an investor that exercises any right in a Dutch TSO must not to acquire a controlling interest in a GPST business, for example, a wind farm or an LNG vessel; and
- an investor that exercises any right in a GPST business must not exercise control over a TSO.

The term "*any right*" is not defined, but includes the exercise of voting rights. The term "*control*" must be interpreted in line with the EC Merger Regulation and can result from the powers that an investor may have. These powers may include voting rights, board appointment rights and veto rights, i.e. rights that financial investors normally claim. The holding of purely passive financial rights related to a minority shareholding (e.g. the right to receive dividends) is not explicitly excluded from this concept.

EU Commission's views
The national regulators of the EU member states must certify their national TSOs from time to time. Compliance with the unbundling rules is one of the tests for the TSO certification. Proposals for certification must be submitted for prior approval to the Commission.

According to the Commission, the objective of unbundling rules in EU legislation is the prevention of conflicts of interest as explained above. This objective is not served if certification is being refused in cases where there is no incentive for an investor in a TSO to influence the TSO's decision making to favor GPST activities to the detriment of other network users.

According to the Commission this can be the case where an investor, for example:

- participates in a transmission network in the EU as well as in generation activities in the United States or in Australia, because there is no connection or interface between the energy activities concerned;
- simultaneously controls a waste disposal company generating electricity in Denmark and controls a gas TSO in Sweden, if only limited quantities of electricity are being generated that are sold for pre-established prices; in that case it is not possible to use the gas transmission activities in a manner so as to favor the electricity generating interests in a neighboring country;
- is the ultimate owner of the Italian gas TSO, and also participates in solar energy companies in Spain, if the interface between the Spanish electricity market and the Italian gas market is limited;
- is the ultimate owner of the Italian gas TSO, and also participates in a waste management company in the U.K. which generates electricity from waste and bio gas through small sized production units, as the geographical distance between the two countries excludes the possibility for this investor to discriminate between network users in favor of its waste management activities in the U.K.

Impact on investments in the Dutch TSOs

The Commission confirms that it will continue its pragmatic case-by-case approach. Factors that, we believe, will play a role in the national regulator/Commission’s assessment include: the difference between gas and electricity, the difference between the various generation facilities for electricity (waste management, windmills), the geographic distance between the two activities, the supervisory mechanisms in the member states, the difference between pre-determined sales prices and the prices which can be negotiated with customers at any moment, and the size of the GPST activities. Investors that are looking at investing in the Dutch TSOs should consider whether a real impact on the TSO's decision making could arise from other energy related activities in their portfolio.

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June 2013

LITIGATION

VOIDABLE TRANSACTIONS - BACK ON TRACK

A creditor wanting to keep the benefit of a potentially voidable transaction must be able to prove that value was given to the debtor company *at the time payment was received*, the Court of Appeal has held in *Farrell v Fences & Kerbs Limited* [2013] NZCA 91.

Section 296(3) of the Companies Act 1993 provides a defence to creditors who are a party to a voidable transaction that a liquidator is attempting to upset. To keep whatever they received from the company, a creditor must satisfy the three criteria set out in section 296(3). At the time they received the payment or other property, the creditor must be able to prove they:

a) had acted in good faith;

b) had no reasonable grounds for suspecting that the company was, or would become, insolvent; and

c) gave value to the company.

It is the third element, concerning the giving of value, which has received the most recent attention from the Courts.

In *Farrel v Fences & Kerbs Limited* [2012] NZHC 2865, *Farrell v ACME Engineering Limited* [2012] NZHC 2874 and *Meltzer v Hiway Stabilizers New Zealand Limited* [2012] NZHC 3281, the High Court temporarily derailed the accepted thinking as to what was meant by "giving value" by holding that value given by the creditor at any time - not just at the time of the challenged transaction - was sufficient. The High Court looked to the Australian equivalent of section 296(3) and held that there was no intention that New Zealand would depart from the well-settled position in Australia that, by receiving a payment made to discharge an earlier debt, the creditor has given value at the time of the transaction.

The Court of Appeal's reversal of the High Court's position was met with a warm welcome from the insolvency industry. The Court of Appeal recognised the importance of the rights of all creditors under the *pari passu* rule, noting that "it is important to keep in mind the rationale for the avoidance provisions... The object is to swell the pool of funds available to the company to be shared rateably amongst all creditors of the same class... this objective would be substantially undermined if the mere receipt of funds to discharge an antecedent debt were sufficient to meet s 296(3)(c)".

The Court of Appeal emphasised that the wording of section 296(3) meant that creditors had to prove value was given at the time payment was made, and that if Parliament had intended "value" to include earlier debt, then it would have noted this in the Act. It also considered that the High Court's reliance on the Australian approach was "misplaced", principally due to the difference between the New Zealand and Australian provisions, stating that "the best guide to statutory intention is the language used. In that respect, New Zealand has deliberately adopted different language".

Summary:

- Any transaction that has the effect of settling earlier debt between a creditor and an insolvent company has the potential to be attacked, and the payment to the creditor clawed back, by liquidators under section 292 of the Act
- A defence may be available to creditors under section 296(3) if they can show that some form of value was provided by the creditor to the insolvent company *at the time of receiving payment*, and that the creditor was also acting in good faith and without knowledge of a current or impending insolvency
- If payment is received two years before the liquidation, the payment cannot be recovered as a voidable preference (unless the creditor falls into one of the categories of related persons)
- Even if a creditor has entered into a voidable transaction, it is not always the case that a liquidator will pursue the money owed
- Creditors can minimise the risk of a voidable transaction through credit management, and monitoring changes to payment times of any companies that they are trading with

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Further exchange control relaxation for listed companies

By Ernest Mazansky, director

LEGAL BRIEF | JUNE 2013

It was announced in the publications issued together with the Minister of Finance's Budget Speech on 27 February 2013 that companies listed on the JSE would be entitled to designate one South Africa-resident company in their group to be a treasury company, and which company would be outside of the exchange control net, so as to facilitate treasury operations within South Africa for the foreign subsidiaries; without having to resort to having an offshore treasury company.

Effect was given to this announcement in a new circular issued on the same day. The preamble to the circular indicates that this is issued "in support of the ongoing strategy to promote South Africa as a hub for regional investment" and that this designated subsidiary may be established "to hold African and offshore operations, which will not be subject to foreign exchange restrictions. This will incentivise companies to manage their African and offshore operations from South Africa, maximising the benefits to the South African economy".

Unpacking the finer points

In essence, the following is the dispensation:

- The subsidiary will be established to hold African and other foreign operations, and will not be subject to exchange control restrictions.
- The subsidiary will, however, be subject to the following conditions:
    - It must register with the Financial Surveillance Department of the South African Reserve Bank (note that this is merely a registration – it is not necessary to apply for approval).
    - It must be a tax resident of South Africa, i.e. it must be incorporated and have its place of effective management here.
    - It will be allowed freely to raise and deploy capital abroad, i.e. without Reserve Bank approval - provided that these funds are without recourse to South Africa.
    - It will be allowed to operate as a cash management centre for South African entities. Cash pooling will be allowed without any restrictions and local income generated from cash management will be freely remittable abroad.
    - It may choose its functional currency and operate a foreign currency account and a rand-denominated account for operational expenses.
- Crucially, the group may transfer to this treasury company up to R750 million per calendar year, which may be invested abroad to establish and fund the foreign operations. This may be done without any formal approvals, i.e. the authorised dealers are empowered to effect this transfer simply by reason of that subsidiary having been so designated and registered.

What are the investment implications?

It will be recalled that currently any company wishing to invest up to R500 million per annum abroad need not make an application to the Reserve Bank, but the authorised dealers are empowered to grant the necessary approval, subject to a suitable application having been made. This designated subsidiary still has that entitlement. It will thus be seen that the group, through that subsidiary, would only have to apply to the Reserve Bank to invest abroad if the total amount to be invested abroad for the year exceeds R1.25 billion.

It will also be noted that only if the investments to be made abroad exceed R750 million will the additional R500 million facility need to be accessed, so that the first time an application needs to be made is when the foreign investments for the year have already amounted to R750 million. Put differently, such subsidiary may freely invest up to R750 million abroad in its foreign operations without any prior approval being required.

Considerations for establishing headquarter companies

In line with the tax dispensation to establish a headquarter company under the Income Tax Act, the exchange control dispensations allow for a similar designation, so that, in addition to having a headquarter company for tax purposes, one can have a headquarter company for exchange control purposes which, upon registration, is also outside of the South African exchange control net.

It is possible for any person, and not only a JSE-listed company, to establish a headquarter company. But the requirements to establish a headquarter company for exchange control purposes are more onerous than for this treasury company. Moreover, because it is treated as non-resident for exchange control purposes, any investment into the headquarter company itself requires an approval by the authorised dealer (if for not more than R500 million) or by the Reserve Bank (if in excess of R500 million).

Clearly, therefore, for a listed group, the dispensation of designating the single subsidiary under the new dispensation is far more advantageous and flexible than establishing a headquarter company. But this subsidiary can still qualify as a headquarter company under the Income Tax Act; even though it is not a headquarter company for exchange control purposes but, rather, qualifies for exchange control purposes under this new dispensation.

Conclusion

In summary, apart from being able to operate a treasury company free of exchange control restrictions, the biggest single relaxation is that a group is now free to invest up to R750 million abroad without having to obtain any permission. There will, however, still be reporting obligations.

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Ernest is a past chairman of the Taxation Committee of the South African Institute of Chartered Accountants and is a member of the Institute's Exchange Control Committee.

He is named as a leading specialist in international, tax and trusts & estates by Best Lawyers International; in tax by *Chambers Global: The World's Leading Lawyers for Business* and in corporate tax by *Who's Who Legal*. He is also a recommended tax specialist by the *Legal500* and *PLC Which Lawyer*.

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Ernest completed BCom and BAcc degrees and a Higher Diploma in Tax Law at the University of the Witwatersrand. He is also a registered CA (SA).

Regulations Eased on Collateral Acceptable to Domestic Banks for Foreign Currency Credit Extension

◎Frances Hsieh/ Wei-Ni Wang

To help the banking industry develop foreign currency credit extension business, the Financial Supervisory Commission (FSC) issued a letter (Ref. No.: Chin-Kuan-Yin-Wai-10250000340) on 19 February 2013 to broaden the range of eligible collateral acceptable to OBUs and overseas branches of domestic banks for foreign currency credit extension and revoked the FSC letter (Ref. No.: Chin-Kuan-Yin-5-09650003710) previously issued on 9 October 2007. Details are described as following:

According to the FSC letter (Ref. No.: Chin-Kuan-Yin-5-09650003710), when OBUs and overseas branches of domestic banks conduct foreign currency credit extension, the collateral provided by the borrower should not include certificates of foreign currency deposits issued by a domestic banking unit (DBU) to its non-affiliated entity. However, after the amendment to the previous FSC letter (Ref. No.: Chin-Kuan-Yin-5-09650003710) this time, with regard to using certificates of foreign currency deposits issued by a DBU as collateral, collateral acceptable to overseas branches of domestic banks for foreign currency credit extension is not limited to certificates of foreign currency deposits issued by a DBU held by the borrower or its affiliated entity, but extended to those held by any third party. Given the above, overseas branches of domestic banks can accept any certificates of foreign currency deposits issued by DBUs, OBUs and overseas branches provided by the borrower or others, as collateral, similar to what an OBU does.

Advisories

BSEE and Coast Guard Sign Memorandum of Agreement for Regulating Mobile Offshore Drilling Units

06.10.13

By Glenn S. Benson and Barbara S. Jost

On June 4, 2013, the U.S. Department of the Interior's Bureau of Safety and Environmental Enforcement ("BSEE") and the U.S. Coast Guard signed a Memorandum of Agreement regarding division of lead agency respons bilities between the two agencies for regulation, inspection, and oversight of systems and sub-systems on mobile offshore drilling units ("MODUs") used for oil, gas, or sulphur drilling, production, or related activities. The lead agency will be responsible for coordinating with the other agency as appropriate.

MODUs fall under Coast Guard authority for regulation of vessels, are inspected and certificated by the Coast Guard, and are subject to USCG regulatory authority under the Outer Continental Shelf Lands Act for matters relating to the protection of life and property, as well as for unregulated hazardous working conditions on the Outer Continental Shelf. During periods when a MODU is temporarily attached to the seabed, BSEE regulates well operations, including drilling, completions, workover, production, and decommissioning.

The Memorandum of Agreement sets forth the basis on which BSEE and the Coast Guard intend to work together to identify and coordinate responsibilities for the inspection and oversight of MODUs. Implementation is to be in accordance with a prior Memorandum of Understanding executed between the two agencies on Nov. 27, 2012, which generally addressed coordination of shared agency responsibility for management of the Outer Continental Shelf. As illustrated in the chart below, this new Memorandum of Agreement presents a detailed breakdown of lead responsibility by system and sub-system, thereby allowing operators of MODUs to more quickly identify the principal agency with regulatory oversight over any specific area.

Under the Memorandum of Agreement, the Coast Guard will have lead agency responsibilities over the following systems and sub-systems:

System	Sub-System
Structural Integrity	Structural integrity, modifications for construction and repair requirements Design environmental conditions
Floating Stability	
Station Keeping	Foundations, supporting mat, spud cans or footings Mooring and anchoring equipment Dynamic positioning
Lightering Equipment & Procedures	
Marine Engineering Systems	
Lifts, Elevators and Personnel Transfer	

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Fire Protection	Structural fire protection for accommodations Fire suppression systems Firefighting, water pumps, piping, hose reels and monitor equipment Fixed fire extinguishing equipment Portable and semi-portable extinguishers Fire and smoke detection Gas detection systems approval
Electrical Design & Equipment (other than electrical equipment on the drill floor)	
Hazardous Areas	Hazardous area classification & equipment approval
Aids to Navigation	
Communications	
Pollution Prevention	Prevention of unauthorized discharges to marine environment Petroleum and other product transfers to and from a vessel (including transfer of produced hydrocarbons)
Marine Cranes and Material Handling Equipment (other than cranes and lifting systems associated with drilling)	
Ventilation in Non-Hazardous Locations	
Life Saving Equipment	
Workplace Safety and Health	
Living Quarters and Accommodation Spaces	
General Arrangements (including means of escape)	
Operational Requirements	Structural inspection requirements Manning/credentialing of Coast Guard credentialed personnel Training of Coast Guard credentialed personnel Emergency evacuation plans Drills – fire, abandon, and lifeboat Inspection and testing of marine and lifesaving equipment Riveting, welding and burning Diving operations & equipment Safety Management System (SMS) per 33 CFR Part 96

BSSE’s lead agency responsibilities will extend to the following areas:

System	Sub-System

Structural Integrity	Risers (drilling and pipeline)
Station Keeping	Mooring analysis & anchoring plan
Drilling, Completion, Well Servicing & Workover Systems	Drilling systems Blowout prevention equipment and control systems Riser and guideline tensioning systems Motion compensating systems Atmospheric vessels and piping Lifting and hoisting systems Cementing systems Circulating systems Bulk drilling, material storage and handling systems Drilling Floor Electrical Equipment
Pipeline Operations and Components	
Fire Protection	Gas detection in drilling fluid handling areas
Hazardous Areas	Hazardous area equipment in the drilling fluid handling areas
Pollution Prevention	Pollution associated with exploration, development, production, and transportation of oil and gas and sulphur
Operational Requirements	Training of drilling personnel For floating drilling units, a Contingency Plan for moving off location in an emergency situation Well control drills Testing of Emergency Disconnect Systems and disconnect functions of blowout preventer Inspection and testing of all drilling equipment H2S contingency plan (including equipment, control, and detection systems) Production test flow-back system (if installed)

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U.S. Supreme Court and Appellate Alert

10 June 2013

See note below about Hogan Lovells

Supreme Court decision in *Oxford Health Plans LLC v. Sutter*

Today, the Supreme Court held that a court may not overturn an arbitrator's construction of an agreement to permit class arbitration—even if it is erroneous. In *Oxford Health Plans LLC v. Sutter*, a unanimous Supreme Court held that an arbitrator's decision to allow class arbitration cannot be overturned if it was based on the construction of the agreement between the parties. In so holding, the Supreme Court noted that even an arbitrator's interpretation that incorrectly assesses whether the parties intended to consent to class arbitration is not subject to judicial review. As Justice Kagan bluntly put it, "[t]he arbitrator's construction holds, however good, bad, or ugly."

The Court's ruling also clarified the application of its 2010 opinion in *Stolt-Nielsen v. AnimalFeeds International.* In that case, the Supreme Court determined that a party may not be compelled to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. In today's opinion, the Court explained that the parties in *Stolt-Nielsen* had stipulated that they had not to come to an agreement on class arbitration. Thus, in finding that the agreement permitted arbitration, the arbitration panel in *Stolt-Nielsen* could not have been construing an agreement that concededly did not decide the issue. The parties in *Oxford Health*, in contrast, disagreed about whether their agreement permitted arbitration and asked the arbitrator to resolve that disagreement. The Court held that this is an arbitrator's function and not an abuse of power.

Background

In April 2002, Sutter filed a breach of contract claim against Oxford Health Plans related to reimbursement rates paid by Oxford Health to physicians and other healthcare providers for primary services. After a New Jersey state court compelled arbitration, an arbitrator interpreted the agreement to permit class arbitration, relying on a broad arbitration clause:

"[n]o civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration. . . ."

The arbitrator ruled that although the arbitration clause did not expressly mention class arbitration, it was broad enough to support the conclusion that the parties agreed to have class arbitration. The arbitrator reached the same conclusion once more after the Supreme Court decided *Stolt-Nielsen*.

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Oxford Health attempted to vacate the arbitrator's decisions in federal district court by claiming that he had "exceeded [his] powers" under Section 10(a)(4) of the Federal Arbitration Act (FAA), 9 U. S. C. §1 et seq. The district court denied Oxford Health's motion, and the Third Circuit affirmed because the arbitrator's interpretation of the agreement was not "totally irrational."

The opinion

The Supreme Court unanimously affirmed. The Court held that the arbitrator was not acting outside the scope of his contractually delegated authority. Instead, the arbitrator was simply performing his bargained-for obligation: resolving the parties' disagreement about the interpretation of their agreement.

In reaching today's holding, the Supreme Court relied on the limited scope of review prescribed by Section 10(a)(4). Under that section, the Court explained, the "sole question" for a reviewing court "is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." As a result, the Supreme Court was not required to and did not endorse the arbitrator's interpretation of the parties' agreement to permit class arbitration. This limited judicial inquiry, the Court held, is justified because it gives the parties what they bargained for: the arbitrator's construction of their agreement. Narrow judicial review also maintains arbitration's ability to resolve disputes quickly.

The Supreme Court also noted in a footnote that Oxford Health had not argued that the availability of class arbitration is a "question of arbitrability." Questions of arbitrability, including, for example, whether a valid agreement to arbitrate exists in the first place or whether an arbitration agreement applies to a certain type of controversy, are "presumptively for courts to decide." When that presumption attaches, judicial review of an arbitrator's determination of a question of arbitrability is de novo. But the Court had no occasion in this case to decide whether the availability of class arbitration is a "question of arbitrability" because Oxford Health had twice agreed to submit the question as a matter of contract interpretation to the arbitrator.

The concurrence

Justice Alito, writing for himself and Justice Thomas, concurred in the judgment. He emphasized that the majority's result rests on Oxford Health's concession that the arbitrator should decide the availability of class arbitration in this case and the narrow review of arbitrators' decisions prescribed by 10(a)(4). Justice Alito cautioned, however, that there is no reason to assume that absent class members would also agree that the arbitrator should decide the availability of class arbitration. As a result, according to Justice Alito, it is unlikely that absent class members could be bound by a decision that in turn depends on the arbitrator's erroneous interpretation of the agreement to permit class arbitration. Because arbitration is simply a matter of contract, the arbitrator had no power to modify the contract's terms without each and every offeree, or putative class member, consenting. Going forward, Justice Alito admonished courts to keep in mind this fundamental problem before entrusting arbitrators with questions on the availability of class arbitration.

Practical implications of the decision

Today's decision potentially increases the risks of class arbitration for defendants. As long as arbitrators' decisions to permit class arbitration are even arguably based on the interpretation of an agreement, those decisions are not subject to searching judicial review. As a result, despite recent defense-side victories in *Stolt-Nielsen* and other recent Supreme Court cases, defendants face an increased likelihood of finding themselves in class arbitration with commercial stakes comparable to those of class-action litigation, yet without the protection of traditional judicial review. Yet the concerns expressed in the majority's footnote and in the concurrence suggest that there will continue to be litigation about the availability of class arbitration. Going forward, defendants in cases presenting potential class-arbitration issues may do well to question whether they should concede that an arbitrator may pass on the question, or whether they might object on the ground that the availability of class arbitration poses a question of arbitrability warranting de novo review by a court.

Court OKs shaving latent defect limitations period when parties are sophisticated

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Most people understand they have 10 years from completion of a project to bring claims for unknown or latent construction defects. CCP Section 337.15. Once the defect is discovered, the owner has four years to bring his or her claim. CCP Section 337.1. However, a recent California decision (*Brisbane Lodging, L.P. v. Webcor Builders, Inc.*, 2013 DJDA 7127 (June 3, 2013)) upheld an agreement negotiated between sophisticated parties which provided that all claims arising out of the work would accrue from the date of completion of the project, not from discovery of the defect. In finding that the parties waived the "discovery rule," the court upheld the allocation of risk which effectively allowed the contractor to shave six years off the limitations period in which the owner must otherwise bring its claims.

In that case, a developer ("owner") entered into an agreement with a contractor to design and build a 210-unit, eight story Radisson hotel. After extensive negotiations between the parties, the contract included an American Institute of Architects (AIA) standard clause providing that any statute of limitations shall accrue not later than substantial completion. The hotel was completed on July 31, 2000.

Over four years later, in early 2005, the owner discovered a sewer line break and notified the contractor, who undertook temporary repairs. The contractor determined that the problem was a latent defect caused by its plumbing subcontractor.

Two years later, additional problems arose. Again, the owner notified the contractor and subcontractor. The subcontractor then undertook exploratory work to identify the cause of the problems, which included running a camera through the sewer pipeline. However, the camera fell out of the pipe, indicating a disconnection. The subcontractor did not provide this information to the owner. Instead, the contractor and subcontractor notified the owner that they considered the matter closed. Ultimately, the owner discovered that the subcontractor had used the wrong type of sewer pipe in violation of the Uniform Building Code.

In 2008, eight years after completion, but within four years of discovery of the problem, the owner filed a complaint against the contractor alleging various construction defect theories. The contractor moved for summary judgment, arguing that the action was time barred by reason of the AIA clause, which purported to bar all claims within four years of completion.

The trial court ruled as a matter of law that the AIA clause abrogated the discovery rule and granted judgment for the contractor. The 1st District Court of Appeal affirmed.

Generally, the statute of limitations begins to run upon the occurrence of the last element essential to establish the cause of action. Thus, a cause of action ordinarily accrues when the wrongful act is committed. Nevertheless, to ameliorate the harsh effects of that rule, a number of judicial exceptions evolved, including the delayed discovery rule. Under that exception, a cause of action does not accrue until the plaintiff actually discovers his injury, or should have discovered the injury through the exercise of reasonable diligence. The rule protects a plaintiff who is blamelessly ignorant of his cause of action.

By contrast in the present case, the parties negotiated and agreed to AIA Article 13.7.1.1, which seeks to alter the rules governing the accrual of causes of action, including the discovery rule. The court surveyed a number of different jurisdictions, all which upheld the AIA provision as waiving the discovery rule. While noting that the purpose of the discovery rule was to protect the ignorant, there was no precedent which prohibited sophisticated business actors from waiving the rule in advance.

The court noted extensive litigation over when an owner discovered or should have discovered a defect. However, the court concluded there was no reason why sophisticated parties should not be allowed to strike their own bargains and knowingly and voluntarily contract for certainty in risk taking, including litigation. Moreover, there was no public policy involved which precluded the parties from allocating those risks, especially given precedent which allowed parties to waive unknown claims provided in Civil Code Section 1542. Instead, the court believed "that where the parties are on equal footing and where there was considerable sophisticated give and take over the terms of the contract, those parties should be given the ability to enjoy the freedom of contract and to structure risk-shifting as they see fit without judicial intervention."

Nevertheless, the owner argued the case should fall within the rule announced in *Moreno v. Sanchez*, 106 Cal. App. 4th 1415 (2003). In that case, unsophisticated homeowners relied upon a professionally licensed inspector to inspect their home, which was later found to have caused injury by exposure to asbestos. The inspector's preprinted form contract included a provision which was not negotiated and which limited the time in which to bring injury claims to one year. Hence, the court held that public policy required application of the discovery rule for home inspection contracts.

Brisbane was certified for partial publication and the unpublished portion addressed a number of other arguments, none of which were upheld. The decision also did not address any rights the owner might have had against the subcontractor, who was not a party to the contract with the owner, and who failed to inform the owner that its plumbing was disconnected. Hence, the owner may well have had rights against the subcontractor, but those questions were never before the court.

Importantly, *Brisbane* stands for the proposition that sophisticated contracting parties may allocate commercial risks, including when the statute of limitations clock may start to run. For owners, such a clause will undoubtedly cause them to assume greater risk. By contrast, every contractor stands to benefit from ensuring that their risk is cut off at the earliest possible time, perhaps shaving off as much as six years of claim exposure. Hence, all contractors should seek to negotiate such a provision in their contracts, while owners should avoid them.

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Invention Secrecy in Vietnam

Patent law hinges on the disclosure of secrets. To be granted a patent, an inventor is required to publicly disclose his or her invention—often in great detail—in exchange for the exclusive rights to the patented invention for a limited period of time. In theory, this disclosure of secrets benefits society by fostering a wider sharing of knowledge and know-how, accelerating the overall pace of scientific and industrial development. The awarding of patents, meanwhile, provides a continued incentive to innovate.

However, some inventions contain sensitive information whose publication or disclosure could be detrimental to national security and defense. Governments therefore have a vested interest in keeping those inventions secret, regardless of the inventors' intentions.

Invention Secrecy

In Vietnam, Ordinance No. 30/2000/PL-UBTVQH10, effective from April 1, 2001 (the Ordinance) requires that inventions related to the contents of state secrets must be registered with a competent state authority. Subsequent guidelines on implementation issued in Decree No. 33/2002/ND-CP of March 28, 2002 (Decree 33) designated the state science and technology management agency as that competent state authority, and assigned it the responsibility of "keeping and preserving" such inventions placed under secrecy orders. However, the Ordinance and Decree 33 provided no further details on the examination and classification of these inventions, or the rights conferred from them.

Consequently, further guidelines were issued in Decree No. 122/2010/ND-CP of December 31, 2010 (Decree 122), which amended and supplemented Decree No. 103/2006/ND-CP of September 22, 2006, guiding the implementation of the 2005 Law on Intellectual Property. Decree 122 defines a "secret invention" as an invention classified by the competent state authority as a state secret in the field of national defense and security under the laws on protection of state secrets (mainly the rules in the Ordinance and Decree 33).

Decree 122 also notably introduced the concept of patent secrecy for classified inventions. Inventions that are subject to secrecy restrictions, and any patents granted on such inventions, are not published and must be kept confidential under the law. The rights to use, license, and assign these secretive patents must be approved by the competent state authority. Compensation for an owner whose patents are withheld is not specified.

If the information about an invention subject to a secrecy order is disclosed or is determined to no longer be sensitive to national security and defense, details of the invention can then be published in the same manner as a normal invention application, and patented as usual. The identification and disclosure of secrecy orders is conducted by the Ministry of Public Security in coordination with the Ministry of Defense and the Ministry of Science and Technology.

Applicants may wonder specifically what kinds of inventions will be subject to secrecy restrictions in Vietnam. Unfortunately, the criteria for assessment have not been revealed.

According to an official at the National Office of Intellectual Property, the Ministry of Public Security, in coordination with the Ministry of Defense and the Ministry of Science and Technology, is planning to issue a Circular with operational guidelines for the implementation of Decree 122. It is expected that the practice of invention secrecy will be outlined in detail in this Circular.

Foreign Filing License

Article 23(b) of Decree 122 raised for the first time the issue of foreign filing licenses. Under this provision, inventions of Vietnamese organizations and individuals and inventions created in Vietnam must first be filed in Vietnam if the owners wish to seek patent protection in Vietnam. This is to ensure that all Vietnamese inventions will be examined to determine whether they should be subject to secrecy restrictions.

If an invention is not deemed a threat to national security or defense, it can be filed outside Vietnam after six months from the Vietnam filing date. Otherwise, if the invention must be kept secret, the applicant must obtain a license to file abroad, in addition to first filing in Vietnam. Registration is only permitted in countries which also recognize the protection of invention secrecy.

If an owner does not plan to seek patent protection in Vietnam, it is not necessary to initially file the patent application in Vietnam. But because it is difficult to determine whether an invention must be kept secret and the Ordinance requires all secret inventions to be registered, it is a best practice for owners of Vietnam-origin inventions to register in Vietnam first in all cases.

Unanswered Questions

Foreign investors are understandably concerned about Decree 122, as it leaves a number of unanswered questions. For example, if a Vietnamese inventor assigns an invention to a foreign investor, will it be deemed an "invention of Vietnamese organizations and individuals" under the Decree? And more fundamentally, what are the specific criteria for assessing whether an invention may be subject to secrecy? With greater clarity on these criteria, foreign investors can avoid planning projects that will be deemed "secret inventions."

Decree 122, on its own, is not adequate to put these contents into practice. Recently, some experts have proposed that the rules governing invention secrecy should be introduced to the Law on Intellectual Property. This would increase the perceived importance of invention secrecy and foreign filing licenses and would likely result in expanded regulations following the amended law, so as to clarify the requirements. If not, it is hoped that detailed clarifications will be provided through upcoming regulations in additional decrees and circulars, so that some of these uncertainties can be put to rest.