PACIFIC RIM ADVISORY COUNCIL

Pacific Rim Advisory Council

September 2013 e-Bulletin

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PRAC @ IBA Boston
October 7, 2013
PRAC Members Gathering

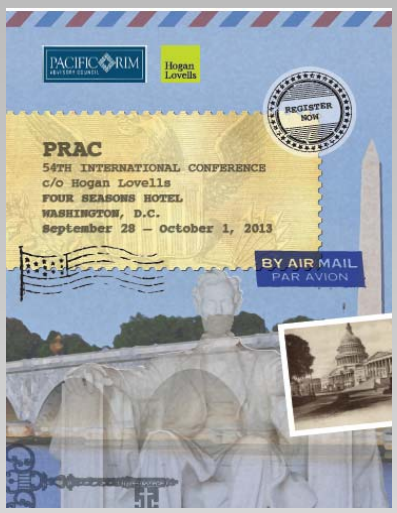
PRAC @ PDAC Toronto
March 4, 2014

Taipei , Taiwan 2014
PRAC 55th International Conference
April 26-29
Hosted by Lee and Li

PRAC @ INTA Hong Kong
May 10, 2014

Santiago, Chile 2014
PRAC 56th International Conference
November 8 - 11
Hosted by Carey/

Register @ www.prac.org



PRAC 54th International Conference
Washington, D.C. 2013
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Details online www.prac.org

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►CAREY Acts for Codelco in USD$750 Million Bond Placement
►CLAYTON UTZ Supports Barrick Gold on US$300 Million Divestment of Yilgarn South Assets
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CLAYTON UTZ MAKES SUPER HIRE FOR FINANCIAL SERVICES CLIENTS

Sydney, 14 August 2013: Clayton Utz continues to make strategic investments that will enhance its offering to financial services industry clients, recruiting **David Ephraums** to join the Firm's Superannuation practice, as a partner.

David began his career in private practice and has over 25 years' experience in the financial services sector, including senior in-house legal roles with BT Financial Group, UBS Global Asset Management and AMP.

His legal and industry experience spans financial services, funds management, superannuation, life insurance, portfolio services, financial advice and distribution, and retail banking, including advice on governance and compliance issues.

David will join the Firm's Banking and Financial Services practice as a member of the Superannuation team, which includes respected practitioners Jane Paskin, a former ASFA board member, director Sonia Lopes, and senior associates, Phillip Turner and Sophie Dalton.

The department head of the Clayton Utz Banking and Financial Services practice, Steve O'Reilly, said clients would benefit from David's unique industry background and experience.

"With continued consolidation and regulatory change in the superannuation and funds management sectors, our clients with core services in these areas need legal advisers who understand the industry and regulatory environment within which they operate, as well as the commercial drivers of their businesses. David offers our clients a unique combination of deep legal and industry knowledge, relationships, and experience, with the ability to help them achieve successful commercial outcomes while at the same time meeting their regulatory obligations."

For additional information visit www.claytonutz.com

ABNR PARTNER PROMOTION

ABNR is pleased to announce the promotion of Senior Associate, Yanny Meuthia Suryaretina, to Partner level with effect from 1 August 2013.

Yanny joined ABNR as an Associate in March 1994, soon after she graduated from the Faculty of Law, University of Indonesia, majoring in International Law. In 2005, she completed English academic writing and drafting course at University College London, United Kingdom. She has actively participated in the investment, corporate, mergers and acquisitions, financing and banking projects in ABNR, and has gained extensive experience as well as regulatory knowledge in these areas. She has also taken part in restructuring transactions in which the ABNR team works on behalf of the consortium of lenders as well as for the individual lenders.

Of the many work-outs undertaken by ABNR she has been involved in, a project of note is the government gas industry legal reformation project carried out under the Indonesian Banking Restructuring Agency (IBRA).

For additional information visit us at www.abnrlaw.com

DAVIS WRIGHT TREMAINE ADDS TO HEALTH CARE PRACTICE

David W. Gee Joins the Health Care Practice at Davis Wright Tremaine

AUGUST 19, 2013 – David W. Gee, a lawyer with over two decades of experience advising clinical and molecular diagnostic laboratories across the nation, has joined the health care practice at Davis Wright Tremaine LLP as a partner in the Seattle office.

Gee comes to the firm from Garvey Schubert Barer, where, in addition to clinical laboratories, he represented other health care providers, hospitals, long-term care facilities, and physician practices, as well as health care management companies, private equity firms, and other investors.

Gee brings both a legal and business perspective to his practice, having served as an in-house attorney and executive officer of Unilab Corporation, a publicly traded company that was acquired by Quest Diagnostics in 2003 for over $1 billion. Unilab was the largest independent provider of clinical laboratory testing services in California.

"We are thrilled to have David join our team," said Rick Ellingsen, chair of the health law practice at DWT. "Few industries are evolving as fast as health care, and David's combination of in-depth legal knowledge and practical business skills will help our clients stay ahead in this changing world."

"DWT's leadership and depth in the health care field is something I've long admired," said Gee. "I look forward to having the support of DWT's national health law platform to enhance and expand my practice, and the benefits of DWT's wide-ranging health law experience and capability to assist my clients in successfully delivering new and exciting diagnostic tests, and adapting to rapidly changing health care delivery and payment models."

Gee provides legal guidance on a broad spectrum of subjects, including regulatory compliance, business operations and transactions, corporate governance, data privacy and security, Medicare/Medicaid reimbursement, managed care, employment, quality assurance, and the development and management of hospital laboratory outreach programs.

He received a B.A. in economics, and a J.D. magna cum laude, from Brigham Young University. Gee is admitted to practice in both California and Washington, where he is president-elect of the board of directors of the Washington State Society of Healthcare Attorneys.

For more information, visit www.dwt.com

HOGAN LOVELLS SET TO HOST PRAC 54TH INTERNATIONAL CONFERENCE IN WASHINGTON, D.C.

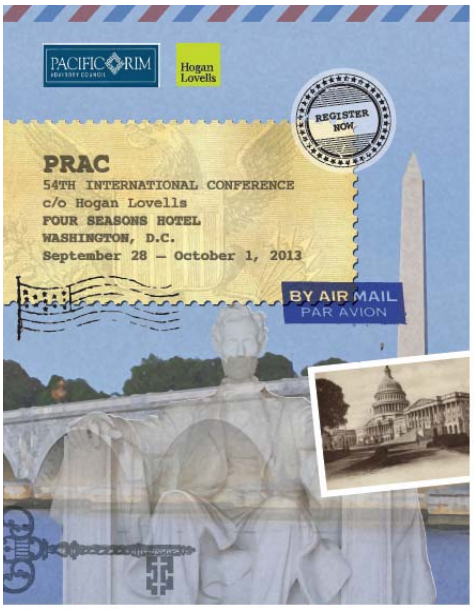
September 10, 2013 -- PRAC member firms from around the globe will be gathering in Washington D.C. later this month to attend the 54th International Conference of The Pacific Rim Advisory Council, hosted by member firm Hogan Lovells.

Included among the many business sessions planned for Washington, D.C. are:

- Keynote Speaker Address - Samuel ("Sandy") R. Berger, Chair, Albright Stonebridge Group
- PRACtice Management Panel Discussions on Lawyer Retention
- United States Supreme Court visit and off-the-record conversation with Chief Justice John G. Roberts, Jr.
- Round Table Discussion of regional and country specific issues featuring members of the Albright Stonebridge Group
- General Counsel Forum on new and existing markets featuring GC's from leading international companies

The Pacific Rim Advisory Council ("PRAC") is a unique strategic alliance within the global legal community providing for the exchange of professional information among its 32 top tier independent member law firms handling substantial business dealings in the Pacific Rim region. Admission is by invitation only. PRAC events are exclusive to Members Firms.

For more information visit us at www.prac.org



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www.prac.org/events

TOZZINI FREIRE ADDS NEW PARTNER TO TAX LITIGATION PRACTICE

TozziniFreire welcomed Vinicius Jucá, as Partner to its Tax Litigation practice. With 11 years of experience as a tax lawyer, Vinicius has expertise in value-added taxes, such as ICMS (state tax), IPI and PIS/COFINS (federal taxes); and ISS (tax on services - charged by the municipalities). His experience includes assistance to companies in sectors such as infrastructure, energy, automotive, beverages, cosmetics and defense.

Vinicius graduated from the Law School of Pontifícia Universidade Católica de São Paulo (PUC-SP), earned an LL.M. degree in Tax Law with honors (dean's list and distinction) from Georgetown University, where he was granted the Graduated Tax Scholarship, and is specialized in Economic and Business Law from Fundação Getulio Vargas, teaching as a visiting professor at the same institution. He is also president of the Georgetown Alumni Club of Brazil.

For additional information visit www.tozzinifreire.com.br

MCKENNA LONG & ALDRIDGE CONTINUES CORPORATE GROWTH IN SOUTHERN CALIFORNIA

Elizabeth Bawden Expands Private Client Services Focus

LOS ANGELES (September 3, 2013) — McKenna Long & Aldridge LLP (MLA) announces the addition of Elizabeth Bawden to the firm's Corporate practice in California. Based in Los Angeles, Bawden's experience includes implementing complex estate plans for high net worth clients, counseling clients with respect to intra-family wealth transfers, advising and assisting trustees and estate executors concerning all phases of probate and trust administration, and establishing and representing private foundations, public charities and other types of tax-exempt organizations. Joining the Private Client Services team as a partner, she is the tenth addition to MLA's Corporate practice this year.

"Elizabeth is an excellent addition to the firm," said Wayne Bradley, Corporate Department Chairman. "Her practice and skillset align well with the client growth we are experiencing in Private Client Services in Southern California."

"MLA's Private Client Services team is a recognized leader in this area of law, particularly in Southern California," said Bawden. "With a depth and breadth of experience that varies from business succession planning to estate and tax planning to fiduciary litigation, I look forward to complementing our client service offering with my practice."

Bawden is certified by the California Board of Legal Specialization as a legal specialist in Estate Planning, Trust and Probate Law and is currently adjunct faculty at the UCLA School of Law teaching Estate and Gift Tax. She is frequently featured as a speaker at continuing education programs. She has been named multiple times as a "Southern California Rising Star" by *Super Lawyers* magazine. In addition, she has been selected by *Southern California's Outstanding Young Lawyers* as among the "Top Women Attorneys" in 2012 and 2013.

For additional information visit www.mckennalong.com

SIMPSON GRIERSON ADDS 3 NEW SENIOR ASSOCIATES

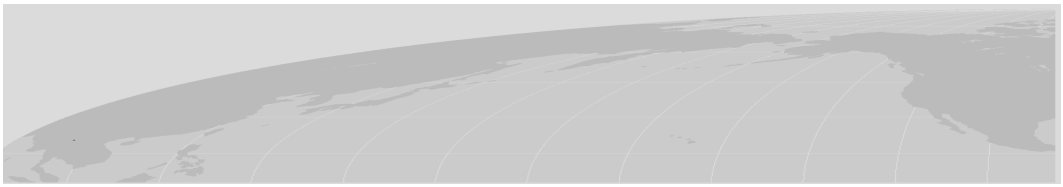
Simpson Grierson is delighted to announce three new senior associate appointments.

Ashton Welsh joins the firm's Sales & Marketing Law team bringing with him experience in the staging of major international events, bid processes/procurement, the exploitation of commercial rights (including sponsorship/media rights), licensing and venues. Ashton advises a range of clients in relation to the sports/media industries.

Marc Cropper re-joins Simpson Grierson after five years with London-based law firm, Addleshaw Goddard. A member of the corporate and commercial group, his expertise includes commercial transactions, structuring and regulatory compliance issues. He specialises in technology, telecommunications, outsourcing, payments (including mobile/digital payments), insurance distribution, loyalty programmes and commercialisation of data.

Rebecca Rendle has been promoted to senior associate in Simpson Grierson's employment law group. Experienced in all aspects of employment law, she advises clients in a range of sectors including health, banking and finance, engineering, retail and forestry. She regularly acts for clients in respect of personal grievance claims, corporate restructures, disciplinary and performance management processes.

For additional information visit www.simpsongrierson.com



Attending the IBA Annual Meeting in Boston?

Join us for a visit with fellow PRAC members

PRAC members will be gathering

Monday, October 7, 2013
4:00pm – 6:30pm

For full details and to register visit www.prac.org

Invitation is exclusive to PRAC Member Firms

BAKER BOTTS

REPRESENTS HALIBURTON IN JOINT VENTURE WITH TRINIDAD DRILLING

HOUSTON, September 4, 2013 -- On September 3, 2013, Halliburton and Trinidad Drilling entered into a joint venture to provide and operate drilling rigs for Halliburton's international integrated projects. Halliburton will own a 40% stake in the joint venture, which will conduct business under the name Trinidad Drilling International.

Trinidad Drilling, a Canadian drilling rig operator, will hold a 60% stake in the venture, but Halliburton and Trinidad Drilling will share equal voting rights and representation on the board of directors. The joint venture will have a right of first look to provide drilling rigs for all of Halliburton's managed onshore projects outside of Canada and the United States, and a right of first look at Trinidad Drilling's onshore contract drilling opportunities outside of Canada and the United States.

Initially, the joint venture is expected to concentrate on the Kingdom of Saudi Arabia and Mexico. Affiliates of Trinidad Drilling and Halliburton have signed an agreement, which will be assigned to the joint venture, to provide four rigs for work in the Kingdom of Saudi Arabia for an initial term of three years, with an optional extension of one year.

For additional information visit www.bakerbotts.com

CAREY

ACTS FOR CODELCO IN USD$750 MILLION BOND ISSUANCE

Carey acted as local counsel to Codelco in the issuance and placement of a USD750 million bond under Rule 144A and Regulation S, at a 4.50% cupon rate with a 4.517 yield, due in 10 years.

Carey advised Codelco through a team led by partners Juan Guillermo Levine and María Fernanda Carvajal, and associates Fernando Noriega and Felipe Artigas.

For additional information visit www.carey.cl

SYCIP LAW

COUNSELS VESTAS IN CONNECTION WITH EDC BURGOS WIND POWER AGREEMENTS

August 08, 2013 --SyCipLaw acted as Philippine counsel to Vestas - Australian Wind Technology Pty Ltd., Vestas Services Philippines Inc., and Vestas Wind Systems A/S in connection with the agreements for the engineering, procurement and construction of a wind energy generation facility of EDC Burgos Wind Power Corporation executed on or about March 1, 2013.

The wind farm is located at Burgos, Ilocos Norte, Philippines, and it is expected to be able to generate approximately 86 MW of electricity.

Angel M. Salita Jr., partner, led the SyCipLaw team which included special counsel Cecile Margaret E. Caro and senior associates Marie Corinne T. Balbido and Hiyasmin H. Lapitan.

For additional information visit www.syciplaw.com

CLAYTON UTZ

SUPPORTS BARRACK GOLD ON US$300 MILLION DIVESTMENT OF YILGARN SOUTH ASSETS

Sydney, 22 August 2013 - - Clayton Utz has provided strategic legal advice and support to global gold miner Barrick Gold Corporation ("Barrick") in connection with the divestment of its Yilgarn South assets in Western Australia to Gold Fields Limited, for a total consideration of US$300 million.

Clayton Utz's national M&A practice head John Elliott is leading the firm's team, which includes Sydney-based senior associate Peter Debney and lawyer Angela Wen, with support from Perth-based partner Brett Cohen and lawyer Mark Joss. UBS Securities Canada Inc. and Bank of America Merrill Lynch are acting as financial advisors to Barrick.

The Yilgarn South assets are comprised principally of the Granny Smith, Lawlers and Darlot mines. The agreement is subject to FIRB approval.

Clayton Utz has been a lead adviser to Canadian-based Barrick on all of its Australian corporate transactions in recent years.

For additional information visit us at www.claytonutz.com

GIDE LOYRETTE NOUEL

ADVISES REPUBLIC OF GUINEA GOVERNMENT ON IMPLEMENTATION OF A PUBLIC PRIVATE PARTNERSHIP AIMED AT OPERATING THE INTERNATIONAL CAPACITY FROM THE ACE SUBMARINE CABLE

Gide Loyrette Nouel advised the Government of the Republic of Guinea on the implementation of a public-private partnership aimed at operating the international capacity from the ACE submarine cable.

Gide Loyrette Nouel advised the Government of the Republic of Guinea on its negotiations with all the Guinean telecommunications operators for the implementation of a public-private partnership in the form of a limited company aimed at operating the capacity from the fibre optic international submarine cable "Africa Coast to Europe" (ACE) in Guinea.

GUILAB SA, the incorporated company created, was granted its "carriers' carrier" telecom licence on 19 March 2013 and is now in charge of providing all Guinean operators with international broadband capacity from the ACE cable, in compliance with non-discrimination and open access principles.

GUILAB SA is a member of the international ACE consortium alongside over fifteen other operators including Orange France and Portugal Telecom Comunicações.

Gide Loyrette Nouel Paris partner Rémy Fekete acted in the transaction.

For additional information visit www.gide.com

NAUTADUTILH

ASSISTS INTERTRUST WITH ITS TAKEOVER OF ATC

September 3, 2013 - - Intertrust trust agency has taken over its sector peer ATC from the investor HgCapital at 303 million euros. Consolidation in the trust sector has been seen for quite some time now. For example, only in 2012 the purchaser Intertrust was taken over by the American investor Blackstone.

The NautaDutilh team consisted of Gaike Dalenoord, Matthijs Noome, Bart van Kempen, Laura Brummelhuis, Ernst van der Touw, Frans Overkleeft, Bart Bierman, David Viëtor, Janneke de Goeij-Prins, Nico Blom, Nina Kielman, Herman Speyart, Greet Wilkenhuysen, José Weydert, Isabelle Lux, Elke Janssens, and Virginie Ciers.

For additional information visit www.nautadutilh.com

KING & WOOD MALLESONS

ADVISES MESNAC CO. LTD SUCCESSFULLY ACQUIRED MAJORITY STAKE IN TEST MEASUREMENT SYSTEMS, INC.

August 21, 2013 -- On August 12, 2013, Mesnac Co., Ltd. (MESNAC) successfully acquired majority stake in Test Measurement Systems, Inc. (TMSI), a developer and maker of testing equipment for the tire and automotive industries in Ohio, USA.

MESNAC, headquartered in Qingdao city, Shandong province, was listed on the Shenzhen Stock Exchange in 2006 and is a global enterprise that supplies a wide range of tire manufacturing equipment ranging from raw material mixing to final product testing. It has research institutes in China, US, UK and Europe and has sales and service operations in North/Latin America, Europe, Asia Pacific, India and Greater China.

TMSI, incorporated in 1991 and located in Akron, Ohio, produces endurance testing equipment, tire force and moment testing equipment and other testing and measurement equipment for the tire and automotive industries.

This project was led by King & Wood Mallesons' partner Xu Ping and partner George Zhao, together with the core team member Wei Kao. Acting as the lead legal counsel, King & Wood Mallesons fully participated in all aspects of the project, including due diligence, negotiation, restructuring, tax advisory, executions of transaction agreements, and completing the transaction. Partner Jiang Xinglu also provided great support to this project.

For additional information visit www.kingandwood.com

TOZZINI FREIRE

ASSISTED COCA-COLA FEMSA IN ACQUISITION OF 100% OF COMPANHIA FLUMINENSE DEREFRIGERANTE

TozziniFreire Advogados assisted Coca-Cola FEMSA in the closing of the acquisition of 100% of Companhia Fluminense de Refrigerantes, Brazil-based drinks producer and distributor of soft drink.

Companhia Fluminense represents a geographic link between Coca-Cola FEMSA's São Paulo and Minas Gerais footprint and expands its presence in Brazil to parts of the state of Rio de Janeiro.

Maria Elisa Gualandi Verri, partner in the Mergers and Acquisitions practice group at TozziniFreire, Ana Cláudia Utumi, partner in the Tax practice group, and Daniel Oliveira Andreoli, partner in the Antitrust practice group, were in charge of the transaction with the assistance of associate Edgard Pascarelli de Assumpção.

For additional information visit www.tozzinifreire.com

MCKENNA LONG & ALDRIDGE

ADVISING AMERICAN CYBERSYSTEMS, INC. IN ACQUISITION OF ANALYSTS INTERNATIONAL CORPORATION

ATLANTA, September 5, 2013 — McKenna Long & Aldridge LLP (MLA) announced that it is advising global information technology services provider American CyberSystems, Inc. (ACS) in its acquisition of Analysts International Corporation (AIC) (Nasdaq: ANLY). The transaction, which is expected to close in the fourth quarter this year, is valued at approximately $35 million. Under the terms of the agreement and following the closing, AIC will become a privately-held company wholly owned by ACS. ACS plans to continue operating the company under the AIC brand.

The transaction is being led by Partner Michael Cochran and the deal team includes Partner Shannon Baxter, Counsel Emily Crosby and Associates Jay Shah, Derek Swanson and Rachel Fox Weitz.

For additional information visit www.mckennalong.com

HOGAN LOVELLS

ADVISES ON TWO SIGNIFICANT BLOCK TRADE TRANSACTIONS

HONG KONG, September 6, 2013 – Hogan Lovells has successfully closed two block trade transactions today for a combined value of over HK$2.4 billion.

On the first transaction Hogan Lovells advised UBS AG as the sole placing agent in respect of a placement of 52,392,000 new H-shares in Tong Ren Tang Technologies Co. Ltd. ("**Tong Ren Tang**"), raising approximately HK$1.205 billion (US$154 million). Tong Ren Tang is a leading Chinese pharmaceutical company engaged in the production and distribution of Chinese medicines.

In addition, the team advised CLSA Limited and CITIC Securities Corporate Finance (HK) Limited as the joint placing agents in respect of a placement of 180,000,000 existing shares in Xinyi Glass Holdings Limited ("**Xinyi Glass**") by the controlling shareholders, raising approximately HK$1.206 billion (US$155 million), and the issue of 120,000,000 new shares in Xinyi Glass to one of the selling controlling shareholders. Xinyi Glass is a leading Chinese glass company engaged in the production of float glass, automobile glass and construction glass products.

Both Tong Ren Tang and Xinyi Glass are listed companies on the Hong Kong Stock Exchange.

The Hogan Lovells team advising on both transactions was led by Hong Kong partners Terence Lau and Thomas Tarala, supported by consultant Nelson Tang, senior associate Donald Fung and associate Priscilla Lee.

For more information, see www.hoganlovells.com

UPCOMING PRAC EVENTS

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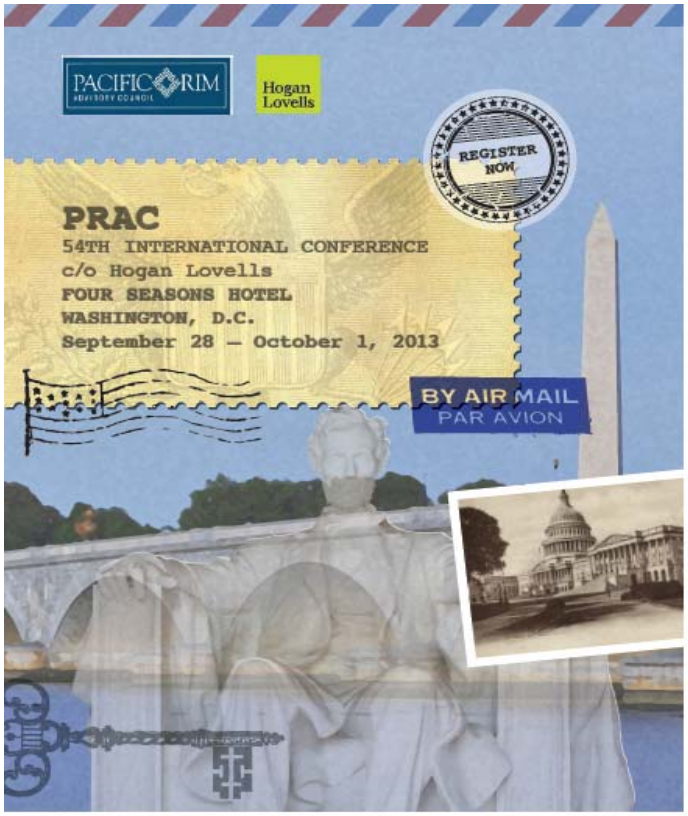
HOGAN LOVELLS TO HOST PRAC 54TH INTERNATIONAL CONFERENCE



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Send to editor@prac.org.

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Since 1984, Pacific Rim Advisory Council (PRAC) member firms have provided their respective clients with the resources of our organization and their individual unparalleled expertise on the legal and business issues facing not only Asia but the broader Pacific Rim region.

www.prac.org

With over 12,000 lawyers practicing in key business centers around the world, including Latin America, Middle East, Europe, Asia and North America, these prominent member firms provide independent legal representation and local market knowledge.

CLAYTON UTZ

07 September 2013

Employers need to plan for new Government's evolution in workplace relations law

Although the Coalition Government elected today promises workplace reform that is more evolution than revolution, employers will need to carefully consider its effect on their operations in the next 12-18 months.

Its policy retains the framework of the existing Fair Work Act, which it said has "many positive aspects", and amends it rather than starting again from scratch. In the vast majority of cases, employers need not take any immediate action. Any change will not be passed until much later this year at the earliest.

No restrictions on individual flexibility arrangements

The Coalition Government will not permit individual flexibility arrangements to be restricted in an enterprise agreement.

The "Better Off Overall Test" will be retained for such arrangements.

There is no plan to reintroduce Australian Workplace Agreements.

Workplace bullying laws to be retained, but slightly amended

The Coalition supports and will retain the amendments made by the previous Government to the Fair Work Act to include workplace bullying.

They have, however, foreshadowed two amendments:

- workers making an application to the Fair Work Commission in respect of workplace bullying will need to show they have first sought help from an independent regulatory agency such as a state work health and safety body; and
- the scope of the workplace bullying provisions will be expanded to include the conduct of union officials towards workers and employers.

Greenfield agreements – new good faith bargaining requirements

The Coalition Government will introduce good faith bargaining requirements for the negotiation of greenfield agreements. These negotiations and the greenfield agreement will need to be completed within three months; if not, the Fair Work Commission will have the power to make and approve the agreement as long as it provides fair working conditions that are consistent with prevailing industry standards.

Australian Building and Construction Commission to be revived

The Coalition Government will re-establish the Australian Building and Construction Commission, replacing Fair Work Building and Construction. It will administer a national code and guidelines governing industrial relations arrangements for government projects.

A new threshold for protected action

The Coalition's policy is that before "protected action" can occur the Fair Work Commission will need to be satisfied that there has been genuine and meaningful talks between the employer and employees and that the claims made by both parties are "sensible and realistic".

Fair Work Review Panel

The Coalition promises to implement some of the recommendations of the Fair Work Review Panel that were not implemented by the previous Labor Government, including:

- clarifying the circumstances when annual leave loading is payable on termination;
- amending the "Better Offer Overall Test" to include consideration of non-monetary benefits; and
- requiring an employer and employee to hold a meeting to discuss a request for extended unpaid parental leave, unless the employer has already agreed to the request.

Paid Parental Leave Scheme

While the Coalition has promised to introduce its own Paid Parental Leave Scheme, the full implications of this, and how it will interact with pre-existing employee entitlements, are not yet clear.

Right of entry

The Coalition will reverse the right of entry amendments passed in June this year, and seek to limit union entry for discussion purposes to:

- a union covered by an enterprise agreement at that workplace; or
- a union as a bargaining representative seeking to make an agreement in that workplace where there is evidence members have requested their presence.

For award-covered workplaces or non-union covered enterprise agreements, entry will be permitted only where a union can demonstrate it has, or had a representative role in that workplace and it has members who have requested their presence.

The coalition will give the Fair Work Commission powers to resolve disputes about the frequency of unions' workplace visits.

The proposed changes will not affect union rights to enter to investigate OHS breaches or represent a member in a dispute over an award or agreement.

As always, the Clayton Utz Workplace Relations, Employment and Safety team will keep you informed of developments as the Coalition's policies are implemented in this vital area.

BRAZIL: INTERPRETATION OF TAX TREATIES

On August 8, 2013, the Brazilian Federal Revenue Secretariat, through a division named General Coordination of Taxation ("COSIT"), issued an important interpretation that a specific legal provision in Brazil does not violate international tax treaties executed by the country to avoid double taxation.

Based on such specific legal provision (Section 74 of Provisional Measure 2,158-35 of 2001), Brazilian tax authorities consider that the profits derived from the participation in a foreign company become available to the Brazilian entity immediately upon being recorded in the balance sheet of the foreign company at the end of each fiscal year. As a result, these profits become subject to Brazilian corporate income taxes regardless of being actually distributed to the Brazilian entity.

In summary, COSIT used the following arguments to support its interpretation:

- When the participation of a Brazilian entity in a foreign company is valued based on the equity pick-up method, the net worth of the Brazilian entity increases every December 31 whenever the foreign entity has registered profits, even though they have not been distributed to the Brazilian entity yet;
- Since these profits are already recorded and can be distributed to shareholders of the foreign company, they are legally available to the Brazilian entity that holds participation in the relevant foreign company;
- Therefore, the increase in net worth that is subject to Brazilian corporate income taxes belongs to the Brazilian entity, and not to the foreign company;
- The tax treaties to avoid double taxation prevent the income accrued by the foreign company from being taxed in Brazil, and not the gains that belong to the Brazilian entity; and
- The taxes paid abroad can be deducted for purposes of Brazilian corporate income taxes, which avoids double taxation of the same income.

COSIT also clarified that Brazilian taxes will not apply only if the relevant tax treaty expressly creates an exception. The tax treaties that Brazil has executed with Denmark, the Czech Republic, and the Slovak Republic were given as examples, since they expressly provide that: "*Non-distributed profits of a corporation of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be taxable in the last-mentioned State.*"

Canada Strengthens its Laws Against Bribery of Foreign Public Officials

June 20, 2013

Amendments to the *Corruption of Foreign Public Officials Act* (CFPOA) that were proposed in Bill S 14 earlier this year were passed into law on June 19, 2013.

The amendments are aimed at addressing international criticism of Canada's efforts to implement the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (the Convention). Specifically, the amendments address certain criticisms from the Organisation for Economic Co-operation and Development (OECD), an international organization of 34 countries of which Canada is a member. The OECD's Working Group on Bribery had criticized the CFPOA as deficient in certain respects in a report issued in March 2011, but endorsed Bill S 14 in its follow-up report issued in May 2013 on Canada's progress in implementing its obligations under the Convention.

The CFPOA makes it a crime to bribe a foreign public official in order to obtain or retain an advantage in the course of business. To date, three companies have pleaded guilty and been convicted of offences under the CFPOA, the latter two resulting in fines of approximately $10 million each. There are approximately 35 active investigations currently underway by the Royal Canadian Mounted Police (RCMP).

As a result of the passage of Bill S 14 into law, the CFPOA has been amended as follows:

- the offence of bribing a foreign public official has been expanded beyond business carried on "for a profit" to include activities not carried on for profit. As a result, the CFPOA will apply to charities and other not-for-profit organizations in addition to for-profit corporations;
- the maximum period of imprisonment for bribing a foreign public official has been increased from 5 years to 14 years;
- instead of requiring a "real and substantial connection" between Canada and the location where acts of bribery occur as was previously the case, the CFPOA now applies to acts of bribery anywhere in the world where such acts are conducted by Canadian citizens, permanent residents present in Canada, Canadian corporations or other entities created under the laws of Canada or a province;
- "facilitation payments" (generally, payments to a public official to expedite a routine governmental act that is part of the official's duties, and not to obtain or retain business or any other undue advantage) will be eliminated as an exception to the offence of bribing a foreign public official and will therefore become illegal at a future date to be set by the Governor in Council;
- a new offence of manipulation or falsification of accounting records to conceal bribery has been created, which attracts a maximum sentence of 14 years in prison; and
- the RCMP have been given exclusive jurisdiction to charge persons for offences under the CFPOA.

It is important for companies operating internationally, especially in developing nations, to have appropriate policies and procedures in place to ensure compliance with the CFPOA and other applicable anti-bribery legislation throughout the world. When entering into transactions with companies that also operate internationally, it is important to ensure appropriate due diligence is conducted and appropriate language is contained in contracts relating to the transaction to minimize the possibility that your corporation will attract liability under the CFPOA and other applicable anti bribery legislation through its association with proposed business partners or other counterparties.

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CHINA LAW INSIGHT

China Tax: Unveiling the International Secondment Arrangement

by Tony Dong, Daisy Duan and Jiang Junlu

Over the years, it has been common practice for a multinational company **("Home Entity")** to dispatch expatriate employees ("Secondees") to its affiliated enterprise in China **("Host Entity")** to hold senior management or other technical positions. Usually, the Home Entity and the Secondee will retain the employment relationship. The Home Entity will pay the salary and social security contribution for the Secondee in the home country, and will be reimbursed by the Host Entity. A Chinese tax clearance certificate is usually required when the Host Entity makes the reimbursement payment, so the Chinese tax authority needs to determine whether the Home Entity constitutes an establishment/place of business **("taxable presence")** or a permanent establishment **("PE")** under the relevant tax treaty and thus be liable to Enterprise Income Tax **("EIT")** consequence in China. The tax authorities and the Host Entity may have different views due to the ambiguity of tax regulations in the assessment of taxable presence or PE for cross-border secondment arrangements. As a result, the Host Entity often has difficulty in obtaining the tax clearance certificate and cannot remit the payment to its overseas Home Entity.The situation is likely to change from June 1, 2013.

On April 19, 2013, the State Administration of Taxation**(SAT)** issued the Announcement on Issues Concerning Enterprise Income Tax on Services Provided by Non-resident Enterprises through Seconding Personnel to China **("Announcement 19")**, Which provides clearer guidance over the criteria for determining whether the Home Entity under a secondment arrangement will constitute a taxable presence or a PE in China. Announcement 19 is based on tax circular Guoshuifa [2010] No.75 (Circular 75) and is a further development in respect of the PE assessment for international secondment in China. Where the Home Entity constitutes a taxable presence or a PE in China, (apart from Individual Income Tax (IIT) which usually apply to the Secondees) EIT will be imposed on the Home Entity. This new policy will significantly impact the tax cost of Home Entities and the pattern of structuring international assignments.

Based on the salient points of Circular 75 and the latest Announcement 19, we summarize below the issues concerning the assessment of taxable presence or PE under secondment arrangements.

Criteria determining the constitution of taxable presence or PE in China

According to Circular 75, if at the request of its PRC subsidiary, the overseas parent company dispatches personnel to work for the subsidiary, and such personnel enter into formal employment with the PRC subsidiary which has command over their work, and the work responsibilities and risks are entirely assumed by the subsidiary, instead of the parent company, then the activities of such personnel shall not trigger a taxable presence or a PE of the parent company in China. In this case, the fees paid, directly by the PRC subsidiary or indirectly through the parent company to such personnel, shall be deemed payroll expenses paid to the PRC subsidiary's employees.

Moreover, Announcement 19 clearly states that, where the Home Entity dispatches personnel to render service in China, if the Home Entity bears all or part of the responsibilities and risks in relation to the work of the Secondees, and normally reviews and evaluates the job performance of the Secondees, the Home Entity shall be deemed as having a taxable presence in China. If the Home Entity is a tax resident of a country/region that has entered into tax treaty with China, such establishment and place of business may create a PE in China if the criteria of PE have been met under the applicable treaty provisions, for instance, the Secondees' stay in China has exceeded 183 days or 6 months in any consecutive 12 month period.

When doing the above assessment, the following factors shall be taken into consideration:

- The Host Entity makes payments to the Home Entity in the nature of management fees or service fees;
- Payments from the Host Entity to the Home Entity exceed the Secondee's salaries, bonus, social security contributions, and other expenses as advanced by the Home Entity;
- Not all related expenses reimbursed by the Host Entity are paid to the Secondees, instead, the Home Entity retains a portion of such payments;
- IT has not been reported and paid based on the full amount of the Secondee's salaries; and
- The Home Entity is the decision maker in terms of the number, the qualification, the remuneration and the working locations of the Secondees in China.

Generally speaking, if one of the above factors is met and the work of Secondees has substantial connection with the Home Entity, the Home Entity is likely to be assessed as having a taxable presence or a PE in China.

In addition, Announcement 19 stipulates that, if the Home Entity constitutes a taxable presence or a PE in China, the Host Entity and the Home Entity shall perform tax registration or record-filing with the tax authorities, and file EIT based on the actual income generated in China, if it is not feasible to accurately calculate the taxable income, the tax authority is empowered to deem the taxable income in accordance with relevant regulations.

KWM Observation

1. With the release of Announcement 19, it is expected that the tax authorities will strengthen their oversight of secondments between multinationals and their subsidiaries in China. It is suggested that enterprises review their existing secondment arrangements and assess the underlying tax risks. The bright side of Announcement 19 is that it provides greater certainty about the tax treatment of secondments, and will facilitate smoother tax clearance when Host Entities make reimbursement payments overseas.

2. Where PRC IIT is paid on the full amount of the Secondee's salaries, then even if the Home Entity bears part or all of the expenses, it is not likely to create a taxable presence or a PE for the Home Entity because it does not bear the Secondee's salary and does not derive a profit through the secondment arrangement.

3. This Announcement clarifies that where the Home Entity assigns its expatriate employees to China solely to exercise its shareholders' rights and safeguard the shareholders' interest, the Home Entity will not be deemed to have a taxable presence or a PE in China.

4. Enterprises should establish the factual background to substantiate the connection between the work of Secondees and the Host Entity. It is of vital importance to put in place proper documentation about the work reporting requirements and evaluation mechanism of job performance, The documentation should include: (1) relevant contracts of employment and/or secondment; (2) Secondee's job description for the Home Entity or the Host Entity, including responsibilities, role, performance indicators and assumption of risk of the Secondees; (3) the terms governing payments to be made by the Host Entity to the Home Entity and accounting treatment, and the IIT filing and payment records of the Secondees in China; and (4) information about whether the Host Entity treats a Secondees' expenses by way of offsetting inter-company accounts, waiver of creditor's rights, related party transactions or other means, in lieu of reimbursement,

Announcement 19 becomes effective from June 1, 2013, and also applies to existing secondments where the tax treatment has not been confirmed or the reimbursement has not been made. It is suggested that enterprises shall assess the tax implications of Announcement 19 on their current secondments and, where needed consider restructuring the international assignment arrangement and put in place proper documentation to safeguard the parent company's tax

position and mitigate PRC tax risks.

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

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Raw materials and capital goods 0% tariff

Tue, 07/30/2013 - 16:30
NewsFlash: 202

Customs and International Trade

Certain raw materials and capital goods will enter with 0% tariff

The Ministry of Trade, Industry and Tourism published the draft decree "Which partially amends the Customs Tariff".

This decree would establish a tariff duty of zero percent (0%) for imports of products classified under tariff subheadings listed in it (raw materials and capital goods that currently do not have registered domestic production record to July 1, 2013, excluding subheadings belonging to the Andean Automotive Agreement). The tariff reduction will apply for the term of two years beginning on August 16, 2013.

The Committee on Customs, Tariffs and Trade will receive feedback, comments and suggestions on the draft decree until July 31, 2013, via e-mail: comitetriplea@mincit.gov.co

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USE OF DIGITAL CORPORATE NOTARY SERVICES PORTAL

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NEWS DETAIL

25/07/2013

BI UPDATED ITS REGULATION ON SINGLE PRESENCE POLICY

Bank Indonesia ("BI") on 26 December 2013 issued Regulation No. 14/24/PBI/2012 regarding Single Ownership in Indonesian Banks (the "Regulation").

The Regulation was issued as an effort of BI to improve the competitiveness of Indonesia's banking industry in light of the economic development in regional and global levels, by reducing the number of Indonesian banks via consolidation. This policy is commonly known as the "single presence policy" or the "SPP", and was first introduced by BI in 2006.

Under the updated SPP, basically a party may only become a controlling shareholder in one bank. However, a party may become a controlling shareholder in two banks if (i) the two banks operate under different business principles (such as the conventional principle and the sharia principle); or (ii) one of the banks is a joint venture bank, namely a bank established jointly by a foreign and a local shareholder. "Controlling party" is defined as a party which controls 25% or more shares in the bank or, if it holds less than that percentage threshold it has direct or indirect control over the bank.

Article 3 of the Regulation stipulates that controlling shareholders of more than one bank are obliged to restructure their ownership by conducting a merger or consolidation, establishing a holding company, or establishing a holding function. For the first two restructuring options, i.e. merger and establishment of a holding company, the act must be implemented within one year after the Regulation enters into force. For the establishment of a holding function, the act must be carried out within six months after the Regulation enters into force.

The restructuring option in the form of merger and consolidation comes with the following incentives: (i) time extension for compliance with the compulsory minimum reserves (Giro Wajib Minimum); (ii) time extension for the settlement of the legal lending limit; (iii) facilitation for the opening of the branch offices, and/or (iv) temporary facilitation for the implementation of the Good Corporate Governance.

Controlling shareholders that opt for the transfer all of their shares into a bank holding company should note that the Regulation requires that the holding company must be formed as an Indonesian limited liability company that is established in accordance with the Indonesian law. The holding company is a separate company which does not carry out the banking activities – it merely controls the activities of the financial institutions under it.

The Regulation repeals and replaces BI Regulation No. 8/16/PBI/2006 regarding Single Ownership of Indonesian Banks and its implementing regulation as well as certain articles in BI Regulation No. 8/17/PBI/2006 regarding Incentives in Banking Consolidations (as amended).

The Regulation has been in force since the day of its issue of 26 December 2012. (by: Hamud M. Balfas).

NautaDutilh

Banking & Finance Update

Use of derivatives by housing associations: model agreements published / Minister publiceert modelovereenkomsten voor gebruik derivaten door woningcorporaties **29 August 2013**

This newsletter is sent by NautaDutilh

Use of derivatives by housing associations: model agreements published

Since 1 October 2012 policy rules have applied to the entry into derivative transactions by housing associations. The model documentation envisaged in those rules has recently been published by the Minister for Housing and the Central Government Sector and the use of such documentation for derivative transactions entered into with housing associations will become mandatory on 1 September 2013. On that same date, certain changes in the policy rules will also enter into effect. Both subjects will be discussed in this newsletter.

Contents

Introduction

On 1 October 2012, new "Policy rules on the use of derivatives by approved public housing institutions" issued by the Minister for Housing and the Central Government Sector (the "Minister") entered into effect; these policy rules are discussed in our newsletter dated 10 September 2012. The policy rules aim to ensure that housing associations use derivatives properly and responsibly. The rules limit the types of derivative transactions into which housing associations may enter and require that the counterparty be a financial institution with at least a single-A or equivalent rating. The rules also contain requirements as to the documentation to be used and require the use of certain standard documentation.

When the rules were issued, the standard documentation had not yet been published and the effective date of this requirement was therefore postponed. On 12 July 2013, the Minister published the envisaged standard documentation. Consequently, as from 1 September 2013 financial institutions are only permitted to enter into derivative transactions with housing associations with which they have first concluded two standard agreements: the Framework Agreement Interest Rate Swaps (the "Framework Agreement") and a 2002 ISDA Master Agreement with a Schedule drawn up as prescribed in the policy rules. Both documents are attached as exhibits to the policy rules.

Simultaneously with the publication of the standard documents, the Minister published a number of amendments to the policy rules. These relate in particular to what are called "base rate loans".

Both the obligation to use the standard documents and the other amendments will enter into force on 1 September 2013.

Framework Agreement

The purpose of the Framework Agreement is to lay down certain mandatory terms of the relationship between the housing association and the financial institution. The explanatory notes to the policy rule amendments do not explicitly state that the Framework Agreement may not be supplemented or otherwise amended. We assume, however, that the intention is to prohibit any such change.

Relationship financial institution - housing association

As prescribed by the policy rules, the Framework Agreement explicitly classifies the housing association as a non-professional investor.

The Framework Agreement also provides that the relationship between the financial institution and the housing association constitutes a "*contract for services (dienstverlening) as referred to in section 7:400 of the Dutch Civil Code*". In the absence of any further explanation on this point, we assume that this refers to a contract of mandate (*opdracht*) as provided for in section 7:400 and not, or not also, to a contract with a service provider (*dienstverrichter*) as provided for in section 6:230a et seq. of the Dutch Civil Code. This distinction is of significance with respect to the financial institution's obligations to inform.

The financial institution declares in the Framework Agreement that it has a "*written and unwritten duty of care*" towards the housing association. In this connection, the agreement refers to the General Banking Conditions used by all Dutch banks that are a member of the Dutch Bankers Association. It is unclear what this reference means if the General Banking Conditions do not apply to the relationship between the relevant housing association and financial institution, for example where the latter is not a bank.

Finally, the Framework Agreement requires the financial institution to ensure that the housing association complies with the policy rules. Financial institutions that enter into derivative transactions with housing associations are therefore subject to a very far-reaching duty of care. This means that they must, among other things, gain an understanding of the housing association's financial policy and organisation and must, in advance of each proposed derivative transaction, determine whether it is permitted under the policy rules.

Neutralisation

The Framework Agreement provides that if a transaction is entered into in violation of the policy rules, "*all debts and claims*" of the housing association based on that transaction will be "*neutralised by opposite debts and claims for the same amounts*". These "*opposite debts and claims*" are deemed to have arisen at the same time as their counterpart debts and claims and "will be set off against them". The explanatory notes to the policy rules refer to this provision as the "mutual indemnification provisions". The explanatory notes do not make clear why this construction was chosen.

Dutch law?

The Framework Agreement provides that the legal relationship between the financial institution and the housing association will be governed by and construed in accordance with Dutch law and that the Dutch courts have exclusive jurisdiction over disputes arising from or in connection with the Framework Agreement. It is unclear how this is to be reconciled with the possibility under the ISDA documentation discussed below to choose English law as the governing law.

ISDA documentation

The ISDA documentation published by the Minister consists of three parts: the 2002 Master Agreement (including a template Schedule) drawn up by the International Swaps and Derivatives Association, Inc. ("**ISDA**"), a Schedule specifically tailored to housing associations and, in case the parties also wish to provide each other with collateral, a Credit Support Annex ("**CSA**").

It follows from the explanatory notes to the policy rules that these documents may not be supplemented or otherwise amended unless the policy rules expressly indicate that this is permitted. With respect to both the Schedule and the CSA (if any), this means that there is room for a choice to be made on a few points and that no provisions may be added.

The Schedule provides, among other things, that when entering into transactions the financial institution acts as an adviser to the housing association. The Schedule also adds as an Additional Termination Event the withdrawal of recognition of the housing association as an institution within the meaning of section 70 of the Dutch Housing Act. On the other hand, the Schedule provides that an act or decision based upon the Housing Act does not constitute an Event of Default or Termination Event. It is unclear how these provisions relate to each other.

The Schedule and CSA lay down rules on many subjects that in normal contractual relationships are left to the parties' discretion. Examples are the Termination Provisions in the Schedule and the provisions in the CSA with respect to the valuation percentages to be used for the different categories of collateral.

The provision in the Framework Agreement with respect to the neutralisation of rights and obligations in the event of a violation of the policy rules does not appear in the ISDA documentation.

Base rate loans

A "base rate loan" (*basisrentelening*) is defined as a "*loan with a fixed interest rate*" and a "*surcharge that is adjusted periodically*". It follows from the amended policy rules that such loans are permitted under certain circumstances and do not constitute derivatives for the purposes of the rules. One of the circumstances is that such a loan be documented in accordance with the standard documents drawn up by the Social Housing Guarantee Fund (*Waarborgfonds Sociale Woningbouw*, "**WSW**"). Base rate loans need not be documented in accordance with the Framework Agreement and/or the ISDA model documentation published by the Minister.

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Minister publiceert modelovereenkomsten voor gebruik derivaten door woningcorporaties

Sinds 1 oktober 2012 golden al beleidsregels voor het aangaan van derivatentransacties door woningcorporaties. De in die beleidsregels voorziene modeldocumentatie is inmiddels door de Minister van Wonen en Rijksdienst gepubliceerd en dient per 1 september 2013

verplicht gebruikt te worden bij derivatentransacties waarbij woningcorporaties partij zijn. Daarnaast worden per 1 september 2013 enkele wijzigingen doorgevoerd in de beleidsregels. Beide onderwerpen zullen in deze nieuwsbrief worden besproken.

Inhoud

Introductie

Zoals beschreven in onze nieuwsbrief van 10 september 2012 gelden sinds 1 oktober 2012 de "Beleidsregels gebruik derivaten door toegelaten instellingen volkshuisvesting". Met deze beleidsregels is bedoeld te bewerkstelligen dat woningcorporaties derivaten uitsluitend op juiste wijze en in verantwoorde mate inzetten. Als gevolg van de beleidsregels mogen woningcorporaties uitsluitend nog derivaten aangaan met bepaalde kenmerken, met als wederpartij financiële instellingen met minimaal een single-A of gelijkwaardige rating en moet de daarbij gebruikte documentatie aan bepaalde kenmerken voldoen.

De inwerkingtreding van het verplichte gebruik van standaarddocumentatie is bij de invoering van de beleidsregels uitgesteld. Op 12 juli 2013 heeft de Minister voor Wonen en Rijksdienst de te gebruiken standaarddocumentatie gepubliceerd. Als gevolg hiervan is het financiële instellingen vanaf 1 september 2013 alleen nog toegestaan derivatentransacties met woningcorporaties aan te gaan als eerst twee standaardovereenkomsten zijn aangegaan: de Raamovereenkomst Interest Rate Swaps (de "Raamovereenkomst") en een 2002 ISDA Master Agreement met een op basis van de beleidsregels voorgeschreven Schedule. Beide stukken zijn als bijlage bij de beleidsregels opgenomen.

Tegelijkertijd met de publicatie van de standaarddocumentatie heeft de Minister een aantal wijzigingen in de beleidsregels gepubliceerd. Deze zien met name op zogeheten "basisrenteleningen".

Zowel het verplichte gebruik van de standaarddocumentatie als de overige wijzigingen aan de beleidsregels treden per 1 september 2013 in werking.

Raamovereenkomst

Met de raamovereenkomst is bedoeld dwingend in een aantal aspecten van de relatie tussen de woningcorporatie en de financiële instelling te voorzien. Uit de toelichting bij deze wijziging van de beleidsregels volgt niet expliciet dat de model raamovereenkomst niet mag worden aangevuld of gewijzigd. Wij nemen aan dat evenwel bedoeld is dat de tekst van de raamovereenkomst niet gewijzigd of aangevuld kan worden.

Relatie financiële instelling - woningcorporatie

In de raamovereenkomst wordt nog eens expliciet de op grond van de beleidsregels verplicht voorgeschreven kwalificatie van de woningcorporatie als niet-professionele belegger vastgelegd.

De raamovereenkomst bepaalt daarnaast dat de relatie tussen de financiële instelling en de woningcorporatie kwalificeert als een "*overeenkomst van dienstverlening als bedoeld in artikel 7:400 BW*". Bij gebreke van een verdere toelichting op dit punt nemen wij aan dat bedoeld is te verwijzen naar de overeenkomst van opdracht als bedoeld in 7:400 BW en niet (ook) naar een overeenkomst met een dienstverrichter als bedoeld in artikel 6:230a e.v. BW. Voor de informatieverplichtingen van de financiële instelling is dit niet zonder belang.

De financiële instelling verklaart in de raamovereenkomst dat op haar een "*geschreven en ongeschreven zorgplicht rust*", jegens de woningcorporatie. Daartoe wordt onder andere verwezen naar de Algemene Bankvoorwaarden. Onduidelijk is wat het gevolg is van deze verwijzing indien in de relatie tussen de woningcorporatie en de financiële instelling de Algemene Bankvoorwaarden niet van toepassing zijn, bijvoorbeeld omdat de financiële instelling geen bank is.

De financiële instelling dient er tot slot zorg voor te dragen dat de woningcorporatie overeenkomstig de beleidsregels handelt. Op financiële instellingen die derivatentransacties met woningcorporaties wensen aan te gaan rust daardoor een zeer vergaande zorgplicht. Financiële instellingen dienen daardoor onder andere inzicht in het financiële beleid en beheer en de organisatie van de woningcorporatie te hebben en zullen per transactie moeten nagaan of die past binnen de beleidsregels alvorens zij met de betreffende woningcorporatie transacties aan kunnen gaan.

Neutralisatie

De raamovereenkomst bepaalt dat indien toch transacties worden aangegaan die zich niet verdragen met de beleidsregels "*alle schulden of vorderingsrechten*" van de woningcorporatie op basis van een dergelijke transactie worden "*geneutraliseerd door tegengestelde schulden en vorderingsrechten met eenzelfde omvang*". Deze "*tegengestelde schulden en vorderingen*" worden geacht te ontstaan op hetzelfde moment als de schulden en vorderingsrechten waaraan zij tegengesteld zijn en "*zullen met elkaar verrekend worden*". De toelichting op de beleidsregels refereert aan deze bepaling als "onderlinge vrijwaringbepalingen". De toelichting maakt niet duidelijk waarom voor deze constructie is gekozen.

Nederlands recht?

De raamovereenkomst bepaalt dat de rechtsverhouding tussen de financiële instelling en de woningcorporatie wordt beheerst door en uitgelegd in overeenstemming met Nederlands recht en dat de Nederlandse rechter exclusief bevoegd is ten aanzien van geschillen die voortvloeien uit en verband houden met de raamovereenkomst. Onduidelijk is hoe dit zich verhoudt tot de expliciet in de hierna te bespreken ISDA documentatie opgenomen mogelijkheid om te kiezen voor Engels recht.

ISDA documentatie

De door de Minister gepubliceerde ISDA documentatie bestaat uit drie delen: de 2002 Master Agreement, met inbegrip van een template Schedule, zoals opgesteld door de International Swaps and Derivatives Association, Inc. ("**ISDA**"), een specifiek op woningcorporaties toegesneden Schedule en, voor het geval partijen ook onderpand wensen uit te wisselen, een Credit Support Annex ("**CSA**").

Uit de toelichting bij de beleidsregels volgt dat deze stukken niet mogen worden aangevuld of gewijzigd, tenzij die mogelijkheid expliciet is opengelaten. Ten aanzien van zowel de Schedule als de eventueel te gebruiken CSA betekent dit dat slechts op een enkel punt een keuze kan worden gemaakt en geen verdere ruimte bestaat voor aanvulling.

In de Schedule is onder andere bepaald dat de financiële instelling bij het aangaan van transacties optreedt als adviseur van de woningcorporatie. Daarnaast bevat de Schedule een, aan de erkenning van de woningcorporatie als instelling in de zin van artikel 70 van de Woningwet gerelateerde, Additional Termination Event. In de Schedule wordt verder bepaald dat enige handeling of beslissing op basis van de Woningwet niet kwalificeert als Event of Default of Termination Event. Onduidelijk is hoe deze twee bepalingen zich tot elkaar verhouden.

De Schedule en CSA regelen veel onderwerpen die in normale verhoudingen ter vrije discretie van partijen zijn, zoals in de Schedule ten aanzien van de Termination Provisions en in de CSA ten aanzien van (de te gebruiken waarderingspercentages bij) verschillende categorieën onderpand.

De bepaling uit de raamovereenkomst ten aanzien van neutralisatie van rechten en verplichtingen bij strijdigheid met de beleidsregels wordt niet herhaald in de ISDA documentatie.

Basisrenteleningen

Een "basisrentelening" is volgens de definitie een "*lening met een vaste marktrente*" plus een "*periodiek te herziene opslag*". Uit de gewijzigde beleidsregels volgt dat dergelijke leningen onder omstandigheden zijn toegestaan en dan bovendien niet als derivaten in de zin van de beleidsregels kwalificeren. Een van de voorwaarden is dat een dergelijke lening gedocumenteerd wordt door middel van de standaarddocumentatie van het Waarborgfonds Sociale Woningbouw ("**WSW**"). Basisrenteleningen hoeven niet gedocumenteerd te worden door middel van de raamovereenkomst en / of de door de Minister gepubliceerde ISDA-modeldocumentatie.

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Simpson Grierson

Intellectual Property

03 Sep 2013

The new Patents Act: New Zealand's patent regime dragged into the 21st century … mostly

FYI

The Quick Read

What are some of the key changes under the new Patents Act?

- Novelty: a shift from an assessment of local novelty to absolute (worldwide) novelty;
- Obviousness: patent examiners will be required to examine for an inventive step;
- Computer programs: computer programs "as such" will be excluded from patentability;
- Patentability: patentability will be assessed on the "balance of probabilities" rather than on a presumption of patentability;
- Pharmaceuticals: the new Act does not include patent term extension for pharmaceuticals; and
- Opposition and Re-examination: potential opponents will have longer to oppose a patent application and will also have the option of requesting re-examination of accepted/granted patents.

When will the majority of the key provisions be in force? In approximately 12 months' time.

Practical Advice - What you need to know:

- Computer programs: After decades of debate, computer programs "as such" are not patentable in New Zealand. New Zealand has adopted a stance similar to Europe, allowing only patents where a computer program has an extrinsic (physical) effect.

- No Patent Term Extensions: New Zealand has failed to follow its major trade partners, refusing to allow patent term extensions beyond the 20 year life of a patent. This will be unpopular with innovators, particularly in the pharmaceutical sector. However, this is a key term of the Trans-Pacific Partnership negotiations, so there may still be a possibility to change this.
-

The Detail

After decades of waiting, the new Patents Act is almost here.

The new Act will raise the bar for patents in New Zealand in a number of respects. These include shifting from an assessment of local novelty to absolute (worldwide) novelty, enabling patent examiners to examine for an inventive step, excluding computer programs "as such" from patentability, and an assessment of patentability on the "balance of probabilities" rather than a presumption of patentability.

The new legislation is currently expected to come into force in 12 months' time. This delay will provide businesses with the opportunity to review their patent portfolios and possibly beat the changes to higher patentability thresholds. Filing a New Zealand patent application, or entering into national phase in New Zealand in the next 12 months may provide an opportunity to ensure that your patent application is subject to the current lower patentability thresholds. If in the software industry, there may be an opportunity to achieve protection for software inventions during this time.

We discuss some of the more important changes below.

Increasing Patentability Threshold

Under the 1953 Act, the threshold for patentability over the past few decades, relative to most of New Zealand's trading partners, has been comparatively low. The new Act makes significant changes that increase the threshold of what will be patentable in New Zealand.

These include:

- **Novelty:** Under the 1953 Act, patent applications are only required to be examined against "local novelty", meaning that an invention need only be novel (eg not previously known) in New Zealand to be registered. Under the new Act, patentability is to be examined in accordance with "absolute novelty", meaning novelty will be assessed against all matter that has been made available to the public anywhere in the world before the priority date. This brings New Zealand into line with most other key trading partners.

- **Obviousness:** Under the 1953 Act, while "obviousness" (or lack of inventiveness) is a ground of opposition, examiners cannot examine for it. Under the new Act, they will. This more thorough examination is likely to result in a less cluttered patents register (although possibly a slower examination process). It is also likely to remove some of the burden on third parties to oppose or apply to remove obvious patents from the register.

- **Utility:** In addition to examining for obviousness, examiners under the new Act will also examine for whether an invention has "specific, credible and substantial utility".

- **Opposition and Re-examination:** Under the 1953 Act, any "interested party" may oppose accepted patent applications during the three months following publication of the complete specification. Under the new Act, an opposition is able to be filed by "any person" at any stage pre-grant (although, practically, before publication of the complete specification, there may be limited information on which to base an opposition). A potential opponent also now has the ability to request a patent be re-examined, both before and after registration. These changes may result in more potential opponents and give them more options to consider when objecting to a patent application. A potential opponent will also have more time in which to object.
  Currently, only a small number of oppositions are successful. With the additional examination criteria, coupled with examiners using a balance of probabilities test for patentability (see below), we predict that more oppositions will succeed under the new Act.

- **Balance of Probabilities:** The new Act shifts from allowing patent applicants the benefit of the doubt that their invention is patentable to requiring that a patent is inventive "on the balance of probabilities". This change should stop many "bad" patents proceeding to grant, and is also likely to result in more successful oppositions.

- **Maori Advisory Committee:** Paralleling the Trade Marks Act 2002, the new Act has created a Maori Advisory Committee. The Committee will advise, on request by an examiner, whether an invention seeking to be patented is derived from Maori traditional knowledge from indigenous plants or animals. The Committee will also advise on whether commercialisation would be contrary to Maori values. This is designed to ensure that patents do not unduly offend against Maori cultural heritage and support Maori custody of their heritage.

- **Specific Exclusions:** The new Act specifically states subject matter that is excluded from patentability. These include methods of medical treatment for human beings, human beings and biological processes for their generation, plant varieties, and inventions

whose commercial exploitation would be contrary to public order or morality. As noted, another notable "exclusion" is computer programs which is worthy of a separate mention below.

While these changes are of key concern to future inventors generally, there are also a couple of industries that are likely to be interested in specific aspects of the new Act.

Computer Programs

Since the introduction of the Patents Bill, lobbying and commercial influences in relation to the patentability of computer programs led to three amendments being made to the computer programs provision before the third reading of the Patents Bill. The final outcome is that computer programs "as such" are not patentable.

A computer program is not patentable if the actual contribution made by the alleged invention lies solely in it being a computer program. However, it can be patentable if the invention's contribution lies outside of the computer or if the contribution affects the computer itself but is not dependent on the type of data being processed or the particular application being used. The example given in the new Act is of a claim in an application that provides for a better method of washing clothes when using an existing washing machine. That method is implemented through a computer program on a computer chip that is inserted into the washing machine. The washing machine is not materially altered to perform the invention. While the only thing that is different about the washing machine is the computer program, the actual contribution lies in the way the washing machine works (rather than in the computer program "as such").

As experienced in Europe, this provision is likely to cause many a headache for patent examiners.

Pharmaceutical Term Extension

The new Act does not introduce patent term extension for pharmaceuticals, meaning New Zealand remains out of step with most of its major trading partners. This may not be the end of the story, however. With the Trans-Pacific Partnership negotiations far from complete, this is one area that will continue to receive focus, possibly leading to the new Act's amendment to provide for patent term extensions.

Transitional Periods

The Act is likely to come into force in approximately 12 months. Transitional provisions will apply to some patents and not others.

In relation to patent applications:

- So long as a complete specification is submitted before the relevant provisions of the new Act come into force, the application will be dealt with by reference to the requirements of the 1953 Act.

- Patent Cooperation Treaty applications will continue to be dealt with under the 1953 Act if the applicant has entered national phase in New Zealand before the relevant provisions of the new Act come into force. Those entering into national phase in New Zealand after the relevant provisions of the new Act come into force will be examined under the new Act, even though their priority dates may be up to 2 ½ years earlier.

- If a new application is made in respect of another patent application under the 1953 Act (eg a divisional application), so long as the new application is given a date before the relevant provisions of the new Act come into force, the new application will be dealt with by reference to the requirements of the 1953 Act.

Obtaining granted patent protection is about to get tougher for patent applicants. However, the new Act will be seen as a positive from an overall innovation perspective and it is likely to result in a higher quality of patents proceeding to grant. While the end is in sight for New Zealand's low standard of patentability, it is not yet upon us. With this in mind, perhaps now is a good time to check whether your New Zealand patent portfolio could be bolstered before the relevant provisions of the new Act come into force.

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2013/2014 Draft Tax Amendments – international highlights

By Werksmans Tax Practice

LEGAL BRIEF | SEPTEMBER 2013

The 2013 draft Taxation Laws Amendment Bill ("the Bill") was published on 4 July 2013 for public comment and contains a wide range of proposed amendments. This brief seeks to highlight some of the proposed amendments affecting cross-border transactions.

Transfer pricing relief for equity loans

A proposed amendment to be welcomed by taxpayers is the extension of transfer pricing relief to outward investments of loans that have strong characteristics of equity.

Under SARS' current application of the current transfer pricing rules, these shareholder loans are treated as debt on which an arm's length interest rate is imputed. After years of strong criticism of the SARS treatment, it is proposed that these "quasi equity loans" as they are referred to, be treated as share capital and thus not subject to the transfer pricing rules.

The proposed relief is, however, limited to outward loans and is restricted in that it only applies if, amongst others, the South African company holds at least 10% of the equity shares and voting rights in the foreign borrower and if the loan is perpetual (at least non-redeemable for a period of 30 years).

The principle of treating certain shareholder loans in accordance with their substance (equity) is a positive development. It is however hoped that the same principle would be applied to inward investments. With the advent of the interest withholding tax (with effect from 1 January 2015), transfer pricing rules will be more relevant than before to inward investments structured as loans. In addition, thin capitalisation rules apply to require an arm's length portion of inward investments to be in the form of equity. It would only be equitable to extend the laudable principle of treating these types of shareholder loans as equity, to loans advanced by non-residents to South African borrowers – so as to exclude these loans from the South African transfer pricing and thin capitalisation rules.

New withholding tax on certain services

National Treasury proposes to introduce yet another withholding tax, intended to cover consultancy, management and technical fees rendered by non-residents, from a South African source that does not otherwise fall into the South African normal tax net. The withholding tax is proposed to be levied at the rate of 15%, subject to double tax treaty relief, if applicable. The principle of the withholding tax is similar to that of interest (yet to commence), royalties and dividends in the sense that South Africa (being the source state) would have a limited ability

to tax these fees. The Bill does not provide any guidance as to what type of services would fall into the ambit of the provisions and taxpayers would thus initially and until guidelines are issued by SARS, have to turn to international tax standards for interpretation.

In the double tax treaty context, the concept of technical fees has been defined to mean payments to a person, other than an employee of the person making the payments, in consideration for any services; such as technical and economic studies and technical assistance and other services of a technical or consultancy nature. A service fee charged by a lawyer or accountant that constitutes a fee of a consultancy nature may thus fall within this ambit.

The absence of any guidelines would unquestionably give rise to practical difficulties, as persons paying these fees would foreseeably be uncertain as to whether or not the service is of a consultancy, management and technical nature. The practicalities are further perplexed by the fact that the current legislation does not provide clear source rules for independent services rendered in South Africa.

The draft proposals contain three exclusions, namely, if the service fee is paid:

- to a natural person who was physically present in South Africa for more than 183 days during the twelve-month period preceding the date of payment;
- for services rendered to a permanent establishment of a foreign person in South Africa who is registered taxpayer here; or
- as remuneration for services rendered in an employer-employee context.

The new withholding tax is proposed to apply to service fees paid on or after 1 January 2015.

Value-added tax registration requirements for e-commerce suppliers

The VAT treatment of cross-border supplies has recently been on SARS' radar. In terms of the draft proposals, certain foreign suppliers would be required to register as vendors, and account for VAT in South Africa.

Foreign suppliers of e-commerce having no physical presence in South Africa are not obliged to register as VAT vendors in terms of the current VAT legislation. Instead, reliance is placed on local consumers to account for VAT on imported e-commerce services via the reverse charge mechanism. The enforcement of this mechanism is a practical challenge, effectively allowing foreign suppliers of e commerce to establish a near 14% competitive advantage over local e-commerce suppliers.

Current VAT legislation does not provide any place of supply rules, which are generally central in determining whether a foreign supplier must charge VAT on a supply. The absence of place of supply rules creates uncertainty in South Africa as regards the allocation of the taxing rights in cross border e-commerce transactions.

In an attempt to create certainty and to curtail foreign suppliers of e-commerce from escaping the VAT net in South Africa, it is proposed that all foreign suppliers be obliged to register as VAT vendors and account for output tax in respect of e-commerce supplies made to South African customers. The draft amendments seek to impose VAT on these transactions at the place of consumption, which is in line with the international guidelines on the VAT treatment of global transactions.

> "The new withholding tax is proposed to apply to service fees paid on or after 1 January 2015."

As the nature of e-commerce is such that the location of the customer is often unknown, it is proposed that these transactions be monitored by means of a proxy for customer location, being either payment from a South African bank or customer residency in South Africa. This administrative burden would most likely be less onerous than complying with the reverse charge mechanism.

The new definition of "e-commerce" means any supply of services where the placing of the order and delivery of the service is made electronically. It is presently unclear whether the definition is intended to apply only to goods ordered and delivered online - such as music, books and clothes - or whether the legislator has a wider application in mind to include, for example, the provision of virtual professional services.

It is proposed that the amendments would apply to qualifying supplies made on or after 1 January 2014.

About Werksmans tax practices

Our Tax practice is able to respond swiftly and efficiently on local and international tax matters. Team members have extensive experience in consulting to the commercial sector and are able to provide integrated advice and assistance on a wide range of tax issues.

Services range from consulting on the tax aspects of clients' commercial dealings to interacting on their behalf with the tax authorities and, where necessary, dealing with objections and disputes.

Special areas of expertise include the tax aspects of commercial activities such as mergers and acquisitions, private equity and black economic empowerment transactions, and corporate re-organisations.
Team members are also skilled in handling settlement negotiations, appeals in the Tax Court and High Court, and alternative dispute resolution processes.

In terms of international tax services, the team has a well-established track record in inward and outward investment matters and offshore structuring, taking into account the exchange control implications thereof.

Services include dealing with:

- Domestic tax: income tax, withholding tax, capital gains tax, employees' tax, value-added tax and securities transfer tax

International tax:

- Inward and outward investment
- Exchange control advice
- Estate planning

Tax rules relating to financial services and products:

- Encompassing insurance, private equity, securitisations, hedge funds, structured and project finance, debt and derivative instruments

Tax structuring of transactions:

- Including black economic empowerment transactions, mergers and acquisitions, unbundlings, reconstructions, management buyouts, distributions, funding, securities issues and buy-backs Tax litigation and dispute resolution: from liaison with tax authorities and regulators on settlement negotiations, alternative dispute resolution, objections and Tax Court appeals.

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Established in the early 1900s, Werksmans Attorneys is a leading South African corporate and commercial law firm serving multinationals, listed companies, financial institutions, entrepreneurs and government.

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IP Court Denies Trademark Owner's Infringement Assessment as Evidence

◎Ruey-Sen Tsai

In determining whether trademarked products are counterfeits or constitute a trademark infringement, policemen, court's public prosecutors, judges or other judicial authorities and the Customs, in principle, must first confirm whether those products are manufactured by the trademark owner itself or by a licensee. According to current practice, the trademark owner or its exclusive licensee or any party they designate may provide an assessment report, which states the difference between the genuine products and the suspected counterfeits and draws a conclusion on whether these products are counterfeits. The assessment report may serve as a reference by policemen, court's public prosecutors, judges or any other judicial authorities or the Customs. If the infringer does not argue the probative value of an assessment report, the report will normally be accepted as evidence. However, if the infringer raises any objections, whether or not such a report can be used as evidence might remain in doubt.

The Intellectual Property Court (IP Court) states in its Judgment in 2011 on a trademark infringement criminal case that according to Article 198 of the Code of Criminal Procedure, a presiding judge, commissioned judge or prosecutor may select one or more appraisers from the following: 1. a person who has special knowledge and experience concerning the matter which requires expert assessment; or 2. a person who is appointed by a public authority to perform the assessment. Article 208-I of the same Code provides that a court or prosecutor may request a hospital, school or other equivalent authority or group to make an assessment or to examine another's assessment.

The IP Court states that in this case, as the appraiser was appointed by the trademark owner, the assessment report provided and the statement made provided during the interrogation by the police were not made by a party who was selected or requested by a presiding judge, commissioned judged or prosecutor, nor by any prosecution authority. Therefore, such reports or statements cannot be admitted as evidence.

By citation of the IP Court's points of view and by referring to another Supreme Court's Criminal Judgment in 2007, Kaohsiung District Court decided in its Judgment in 2013 that the assessment report could not be accepted as evidence in support of this case because the defendant and the defense attorney had already denied the probative value of the assessment reported provided by the appraiser appointed by the trademark owner itself.

It may be justified for the IP Court to conclude that the assessment report independently provided by the trademark owner has no probative value. However, as such decisions may severally affect current assessment practice in respect of trademark infringement.

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Electronic Data Linkage Between Thai FDA and Customs

With the ASEAN Economic Community (AEC) due to come into effect in 2015, Thailand has prioritized modernizing its customs procedures to better facilitate trade across international borders. The country is taking a step-by-step approach, with the first prototypical reforms taking root in the cosmetics industry. It is hoped that implementing a single-window system with online capabilities will improve efficiency by hastening trade processes and reducing associated costs.

AEC and National Single Window

To comply with Thailand's AEC commitments, the country's Food and Drug Administration (FDA) has implemented both procedures to harmonize technical regulations and mutual recognition agreements to certify and test healthcare products. The aim of this harmonization scheme is to ensure the quality, safety, and efficacy of healthcare products for people in ASEAN.

In addition to the improvements made to technical regulations, Thailand has also made progress in developing its logistics infrastructure. As a signatory to the Agreement to Establish and Implement the ASEAN Single Window, Thailand has worked toward establishing the National Single Window (NSW) to reduce logistics costs, increase competitiveness, and support international trade for ASEAN integration. By providing a single-window system that allows international traders to submit trade-related documents at one clearly designated location, efficiency is greatly enhanced. The entire trade process becomes funneled through a single point of entry that fulfills all import, export, and transit regulatory requirements, and traders are no longer held back by lengthy dealings with government authorities. Not only does this save time and costs, but it facilitates the processing of data and information, which allows for easier decision making and faster response times when deliberating Customs release and cargo clearance.

E-Logistics and License per Invoice

In implementing the NSW, the FDA and Customs Department have made two significant developments; they have prepared a product-information database and set up a platform of communications and data exchange between both agencies. Within the healthcare industry, the e-logistics system has been fully implemented for cosmetics, and it has proved to be a successful prototype.

Before registering a cosmetic product, a company must first register as an importer (or manufacturer) with the FDA and request an electronic activation code. After that, cosmetics can be registered online with the e-activation code specific to each company. After submission, the FDA will evaluate and approve the registration request with the same electronic system.

Once registration is approved, the company must log in to the e-logistics system and input the Customs tariff (Harmonized System or HS code) of the corresponding products before importing cosmetics for sale. The company must also record the invoice number and keep a detailed description of the invoice and expected date of product shipment into Thailand. The importer must ensure that each item in the invoice has a corresponding product license number. This is the step where the invoice and product license are connected with each other.

Later, when the FDA officers at Customs or the embarking port log in to the e-logistics system, they can verify whether the products to be imported have valid licenses and check whether the product details and packing size are correct. This verification step is normally called "license per invoice." Provided there are no issues regarding the verification of license and invoice, the company can fast-forward the traditional cargo clearance with the Customs Department.

Because the company information, product information, registration license, Customs tariff, and detailed information provided in the invoice are already in the e-logistics system, product release and Customs clearance is better facilitated. Nevertheless, to safeguard the e-logistics system's benefits of importing healthcare products, importers should ensure:

- Their products are already registered with the FDA (with product license number);
- The product brand name and packing sizes shown on the invoice are in line with the information previously submitted to the FDA; and
- The invoice from the country of origin should be provided at least a couple of days before any shipment. This ensures the company has sufficient time to input the information into the system and the officer can verify the license per invoice before the goods arrive.

If certain items in the invoice do not have product license numbers, all products in that invoice can be detained or deported out of Thailand.

Currently, the e-logistics system is only operational for cosmetic products. For other healthcare products, manual registration of the product at the FDA is still required; for example, a medical device registration dossier must still be submitted to the FDA. The company must request an ID number, similar to an e-activation code for cosmetics. Once the product license is granted, the company will send a CD to the FDA containing an Excel template of their license per invoice. An FDA officer will verify the license per invoice and upload it to the NSW system, where there is linkage of information between the FDA and Customs Department.

Benefits of Linkage

Data integration between FDA and Customs is an important step forward in enhancing Thailand's logistics management system. Companies can overcome bureaucratic hurdles and easily record information via the e-system, while the authorities use the system as a safeguard to ensure that imported products have already been approved and confirm that the Customs tariff declared by the company is in line with product classification. This results in a smoother process and quicker release of regulated products from Customs ports.

With the system now functioning well for cosmetics, companies can look forward to full implementation of their healthcare products in other sectors as well. The fully implemented system will greatly improve logistics efficiency in Thailand. To move ahead, the government will need to earmark sufficient funding to improve its IT infrastructure so it can handle a wider range of products.

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ENERGY REGULATORY UPDATE - SEPTEMBER 9, 2013

Texas Supreme Court Passes Up Chance to Clarify *Denbury* Decision

On Friday, September 6th, the Texas Supreme Court denied a petition for writ of mandamus filed by TransCanada Keystone Pipeline, L.P. ("Keystone") on July 3, 2013. In doing so, the Court passed up an opportunity to provide much-needed clarification of its wide-reaching eminent domain decision in *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 363 S.W.3d 192 (Tex. 2012)*.

As we reported in an earlier Update, Keystone had sought an immediate writ of possession, pursuant to Property Code Section 21.021, following a successful condemnation proceeding. The land owner objected to the writ of possession and filed a petition for mandamus in the Beaumont Court of Appeals, arguing that Keystone's common carrier status had not been finally resolved.

In a May 23, 2013 opinion, the Court of Appeals acknowledged that Property Code Section 21.021 specifically allows possession while challenges to a condemnation are still pending. However, the court also wrote that it was error for the trial court to have issued the writ of possession without making at least a preliminary finding that Keystone possessed "eminent domain authority." Because the only evidence in the record supported common carrier status, the court held that the error was harmless and let stand the writ of possession.

Having won, Keystone did not appeal the decision, but did ask the Texas Supreme Court to order the appellate court to strike from its opinion the language suggesting the need for any "preliminary finding" under Property Code Section 21.021. Keystone (and numerous others who filed *amicus curiae* letters) warned that the "preliminary finding" language was contrary to Property Code Section 21.021 and would make it costlier and more difficult for common carriers to exercise eminent domain.

As we advised in our prior Update, all evidence of common carrier status is likely to receive increasing levels of scrutiny in eminent domain proceedings. Companies wishing to exercise eminent domain should ensure that sufficient common carrier evidence exists in the record and should seek written findings of fact at every stage of the process.

The *Denbury* opinion may be found here.

The more recent Keystone case is *In re Transcanada Keystone Pipeline, L.P.*, 402 SW3d 334 (Tex. App.—Beaumont 2013, pet.

denied), and may be found here.

Keystone's petition for writ of mandamus may be found here.

Davis Wright Tremaine LLP
DEFINING SUCCESS TOGETHER

Advisories

CA Legislation Will Require Commercial Websites to Disclose "Do Not Track" Practices

09.05.13

By Paul Glist and Christin S. McMeley

Last week, the California State Senate and Assembly passed AB 370, a bill to amend the California Online Privacy Protection Act (CalOPPA) that would require operators of commercial websites or "online services" to disclose how the site responds to "do not track" signals sent by web browsers, which in turn will trigger enforceability by federal and state authorities. The amendment is expected to be signed by Governor Jerry Brown. Currently, there is no agreed upon definition of tracking, sharing, or permitted uses when a DNT preference is expressed. Nor is there agreement on the propriety of devices or user agents (rather than informed consumers) setting DNT signals by default. Any publisher of a web site accessible to California residents should be cautious in how they respond to the California bill when it becomes effective, as discussed in this alert.

Background on W3C

Since its endorsement in the 2009 FTC Staff Report, "Self-Regulatory Principles for Online Behavioral Advertising" and subsequent legislative proposals, the Do Not Track (DNT) concept gained momentum with the formation of the Tracking Protection Group within the Worldwide Web Consortium (W3C). The W3C group made good progress in creating a proposal for a standard Do Not Track (DNT) protocol for a browser or similar user agent to signal a consumer's preference not to be tracked across web sites. But industry, academic, and consumer advocacy participants have foundered over the last two years in reaching agreement on what that signal should mean. Although there is general consensus that DNT is intended to restrict the data practices of third-parties (such as advertising networks) rather than first-party web site publishers with whom consumers know they are interacting, there is not yet clear consensus on the business rules for those receiving a DNT signal. Likewise, there is recognition that even without behaviorally targeted advertising, the web relies on collected data for a wide range of permissible activity (such as detecting security risks and fraudulent activity) that must occur even when a user expresses a DNT preference; but the range of permitted activities remains unsettled at W3C. And while DNT emerged as a proposed tool for expressing individual preferences, some user agents and devices in the field have been setting DNT signals by default, even without presenting the clear choice to the consumer. With the recent departure of the group's co-chair, Peter Swire, to serve as part of a high-level group reviewing US intelligence and communications technologies, quick adoption of a uniform

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DNT standard seems more challenging than ever.

Background on CalOPPA

Currently, CalOPPA requires a person or business that owns a commercial website or "online service" and collects "personally identifiable information" about California residents to post a conspicuous privacy policy on the website or service that covers the usual fair information practices territory: the categories of personally identifiable info collected; the third parties with whom operator may share the information; any process by which consumers can review and change the collected personally identifiable information; and the process for change.

The Amendment and Possible Responses

AB 370 would add two additional requirements for operators of such websites and online services under California law:

- Disclose how the website or online service "responds to 'do not track' signals or other mechanisms that provide consumers a choice regarding the collection of personally identifiable information about an individual consumer's online activities over time and across different Web sites or online services;"
- Disclose whether other parties may collect personally identifiable information about an individual consumer's online activities when a consumer uses the operator's Web site or service.

Consumer privacy advocates often cast doubt on self-regulation and call for legislative DNT solutions. California's amendment does not require honoring a DNT standard, but merely the disclosure of how a website or online service will respond to such a signal. It also would follow the enforcement model for California mobile policies, by which a party will receive 30 days' advance notice and an opportunity to cure before any enforcement action is taken. But the California approach is nonetheless problematic.

First, the DNT signal generated under the proposed W3C protocol is supposed to be directed primarily to third parties, not to publishers of the web sites that consumers are browsing. The CalOPPA amendments, by definition, are directed to first parties.

Second, the DNT signal as envisioned by W3C is directed at data gathering practices that go beyond PII. CalOPPA is limited to PII in the narrower sense of data collected online and stored in an "accessible" form that permits the physical or online contacting of a specific individual and other information collected and maintained in combination with such. While the breadth of that definition may be debatable, it may not be as extensive as the de-identified segmenting data that DNT advocates are trying to encompass in DNT.

Third, there is as yet no agreed upon definition of tracking, sharing, and permitted uses when a DNT preference is expressed. Nor is there agreement on the propriety of devices or user agents (rather than informed consumers) setting DNT signals by default. California legislators may see this as a way to "shame" operators into compliance, but this is an odd climate in which to "shame" parties into compliance with an unfinished spec.

Under these circumstances, any publisher of a web site accessible to California residents should be cautious in how they respond to the California bill when it becomes effective. A website that represents it honors DNT signals by not tracking consumers' online activities will be held to that vague representation not only in California, but in other states and by the Federal Trade Commission, as well.

Given that the amendment still permits disclosure by hyperlink to a privacy policy, web site publishers might consider simply explaining that because the DNT protocol is not yet finalized or directed to first party web sites, the site's information collection and disclosure practices, and the choices that it provides to consumers, will continue to operate as described in its policy, whether or not a DNT signal is received.

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False Claims Act Alert

27 August 2013

See note below about Hogan Lovells

New opinion endorses FIRREA case against Bank of America and Countrywide

Introduction

Federal judges in the U.S. District Court, Southern District of New York are making the Financial Institutions Reform Enforcement and Recovery Act of 1989 (FIRREA)[1] required re-reading for banking attorneys. In an opinion released this week, Judge Rakoff joined his colleague, Judge Lewis Kaplan, in endorsing the claims the United States Department of Justice (DOJ) is pursuing with provisions of the 1989 reform law in the aftermath of the late 2007 and 2008 meltdown in the housing and secondary mortgage market and other financial markets.

In this case, the court denied motions to dismiss FIRREA claims against Bank of America and Countrywide and adopted the novel principle Judge Kaplan accepted in April that FIRREA's required proof of fraud "affecting a federally insured financial institution" can be met even when the alleged perpetrator of the fraud was the same financial institution that was affected by the fraud.[2] Judge Rakoff also confirmed longstanding precedent that allows a breach of contract to serve as a basis for federal statutory fraud claims even though such claims of false promises cannot meet the test for common law fraud.[3] The loan underwriting, oversight, and quality review risk equations have thus tilted further in the government's favor.

Background

DOJ is using the federal courts in the Southern District of New York as a testing ground for its rarely seen application of FIRREA's civil enforcement tools. Congress created this civil penalty after the 1980s savings and loan debacle to supplement criminal bank fraud tools. It augments the civil False Claims Act (FCA) where there is no federal insurance or loan guarantee, as required for a government claim under that statute. U.S. Attorney Preet Bharara is leading FIRREA's application in the aftermath of the most recent financial crisis. His office is using the statute's authority to issue civil subpoenas in investigations, its civil penalty of up to US$1 million per violation, and its 10-year statute of limitations. Earlier this year, Judge Lewis Kaplan also refused to dismiss a FIRREA case against BNY Mellon alleging fraud in its foreign currency charges.[4] Another case is pending against Wells Fargo alleging fraud in underwriting and quality monitoring of HUD-insured loans.[5]

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Dealing direct blows to several defense arguments, the Judge Rakoff held that: (1) even though the primary impact of the alleged fraud was on Fannie Mae and Freddie Mac, which are not federally insured financial institutions, FIRREA can reach fraud affecting a federally insured financial institution that itself allegedly committed the fraud; (2) federal mail and wire fraud statutes reach not only false factual statements, but also reach false promises, or breach of contract; (3) fraudulent intent was adequately pleaded against an executive defendant.

The court recited particular facts that led to its conclusions. Countrywide originated mortgage loans that Bank of America sold to Fannie Mae and Freddie Mac. Each loan sold was required to conform to guides, master contracts, and purchase contracts that set forth underwriting, documentation, quality control, and self-reporting requirements allegedly not met. The complaint alleged that when selling the loans, defendants represented they knew nothing about the mortgage, the property, the mortgagor or his/her credit standing that could cause a lender reasonably to regard the mortgage as an unacceptable investment, cause the mortgage to become delinquent, or adversely affect the mortgages' value or marketability. They further represented that all loan data was true and complete, underwriting conditions were met for loans processed through automated systems, and no fraud or material misrepresentation had been committed. The High Speed Swim Lane (HSSL) loan origination program was designed to reduce processing from a high of 60 days to 10-15 days by eliminating certain stages of review, which in turn affected loan quality. The program added "turn time" bonuses to speed loan approval, removed loan quality as a criterion for compensation, and then offered bonuses for rebutting earlier findings that loans were defective. The one individual defendant is alleged to have moved sub-prime loans into the HSSL despite their higher risk. Internal reports showed material defect rates in one quarter were just under 40%, while the industry standard defect rate was 4-5%.

The court took time to summarize allegations about the impact this program had on Fannie Mae, Freddie Mac, and the banks who invested in them. The Countrywide and Bank of America loans allegedly caused more than a billion dollars in losses, which led to their insolvency. The consequent conservatorship eliminated all preferred shareholders in Fannie Mae and Freddie Mac, a group that included federally insured banks who had concentrated their investments in this preferred stock on the perception that these shares were safe. Many of those banks then failed, leading to an alleged loss of US$2.3 billion to the FDIC insurance fund.

1. Affecting a federally insured financial institution — "Self-affecting theory"

The court accepted the government's theory that alleged wrongful conduct by the bank itself "affected" a federally insured financial institution ("the self-affecting" theory). Judge Rakoff swept away "unconvincing," but "clever" legislative history and policy arguments to turn to a simple Webster's dictionary definition of "affect" and the unambiguous language of FIRREA which he said he could not ignore. The court said the alleged fraud "had a huge effect" on Bank of America and its shareholders because the bank paid billions to settle repurchase claims made by Fannie and Freddie.[6]

2. Affecting a federally insured financial institution — "Derivative theory"

The court expressly did not decide whether derivative fraud — that did not directly or immediately affect a federally insured financial institution — supports a FIRREA claim. It commented that the derivative theory is akin to classic proximate cause principles — that the defendants' actions prompted a substantial and foreseeable chain of events — when so many loans failed, this forced Fannie Mae and Freddie Mac into receivership, which in turn eliminated the preferred securities that were the core reserves of other federally insured banks. But the judge noted with approval the defense argument that Congress may not have intended such an attenuated impact because it did not add to the state the "direct or indirect" terminology it "typically employs to reach derivative effects."[7]

3. Pleading predicate offenses of mail and wire fraud

The court rejected the defense that the complaint failed to allege the elements of mail and wire fraud: specific statements, a speaker, a time and place where statements were made, and an explanation of why the

statements were fraudulent.[8] The court also rejected a second defense argument that the allegedly fraudulent statements to Fannie Mae and Freddie Mac were breaches of contract, not separate evidence of fraud. Judge Rakoff reached back to an 1896 case and a 1909 amendment to the mail fraud statute to instruct that Title 18 mail and wire fraud are not to be judged by the limitations on common law fraud. Even though, in New York, a false promise is not actionable under common law fraud in the same way that a false statement of fact is, this is not the rule under the federal mail and wire fraud statutes. The court cited his own 1980 law review article and said the mail fraud statute is "untrammeled by such common law limitations."[9] He went on to find that even if New York common law of fraud applied to the federal statutes upon which the FIRREA claims are predicated, the claims still survive as exceptions to the common law false promise rule. Citing two state court cases, claims based on false representations of the quality of mortgages made in connection with the sale of those loans are not impermissible as fraud because they were not "duplicative" breach of contract claims.

4. FIRREA scienter

Judge Rakoff rejected individual defendant's argument that the complaint failed sufficiently to allege her intent to defraud under FIRREA, citing allegations specific to that defendant, beyond conduct of other executives and beyond internal concealment of loan problems.

5. False Claims Act

The United States conceded that none of its allegations encompassed loans sold to Fannie Mae and Freddie Mac after the effective date of the Fraud Enforcement Recovery Act, which extended the government's reach in the civil False Claims Act. The court dismissed claims under that statute with prejudice, noting that extensive discovery occurred and no further justification exists for allowing a third complaint to be filed by the government.

Conclusion

Judge Rakoff's opinion does not change the compliance or regulatory risks attendant to lending and secondary marketing of loans. It underscores their importance in loan underwriting review, due diligence, and loan quality and risk assessments. But it squarely supports the government's efforts to use civil penalties where even a bank's own financial losses provide an element of the cause of action against it. It will remain for future challengers of this statute to bring arguments under different facts that this reach extends too far.

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1. 12 U.S.C. §1833(a)
2. *U.S. v. Bank of America, Countrywide, Financial, and Countrywide Home Loans*, 2013 WL 4437232 (entered August 19, 2013 S.D.N.Y.), at 6-7.
3. Id. at 8-9.
4. *U.S. v. The Bank of New York Mellon and David Nichols*, No. CV01:11-06969 (April 24, 2013 S.D.N.Y.)
5. *U.S. v. Wells Fa*rgo, No. CV01:12-07527 (S.D.N.Y.)
6. *U.S. v. Bank of America, Countrywide, Financial, and Countrywide Home Loans, supra*, 2013 WL 4437232, at 6.
7. Id. at 6-7.
8. Id. at 7, n. 3.
9. Id. at 8.

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PERSPECTIVE

Causation hurdles in legal malpractice suits

By J. Randolph Evans, Shari Klevens and Suzanne Y. Badawi

Sometimes attorneys make mistakes. Sometimes clients are upset because they believe their attorneys mishandled their cases. When these two factors converge, a legal malpractice lawsuit may be looming. If the client takes the next step and decides to file a legal malpractice lawsuit against his or her attorney, the client will generally blame the attorney for the client's perceived detriment. Nevertheless, filing a legal malpractice claim — even one rife with attorney mistakes and client dissatisfaction — does not necessarily mean the claim is tenable.

One reason why a legal malpractice claim against an attorney does not always prove to be viable is because of the nature of the elements that have to be established. In California, a legal malpractice claim is comprised of four elements: (i) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise, (ii) breach of that duty, (iii) causation, and (iv) damages. This article focuses on the last two elements of causation and damages and the challenges a plaintiff faces in establishing them in the legal malpractice context.

The causation standard: the case within a case

To establish causation, a plaintiff must show that *but for the attorney's negligence*, the client would have obtained a more favorable result in the underlying action. This more favorable result can come in many different forms, such as a better judgment, a better settlement, a better appellate ruling, or better terms in a transactional agreement. Whatever the nature of the underlying case may be, the burden of proof nonetheless rests with the plaintiff to show both that (i) the loss of a valid claim was proximately caused by defendant attorney's negligence, and (ii) such a loss was measurable in damages. Although causation does not have to be established with absolute certainty, according to the court in *Viner v. Sweet,* 30 Cal. 4th 1232, 1243 (2003), a plaintiff is still required to introduce "evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result."

In evaluating causation, California courts consistently apply and discuss the plaintiff's burden as the trial-within-a-trial, suit-within-a-suit or case-within-a-case.

In evaluating causation, California courts consistently apply and discuss the plaintiff's burden as the trial-within-a-trial, suit-within-a-suit or case-within-a-case. This is because, to win the malpractice case, the plaintiff has to theoretically win the underlying case. And in deciding what the result of the underlying proceeding should have been, courts apply an objective standard. The rationale in support of an admittedly burdensome and complicated approach is that it avoids speculative values as a measure of recovery.

The damages challenge: proving actual and appreciable harm

While establishing causation requires the client to prove that he or she would have obtained a better result in the underlying action, establishing damages requires the plaintiff to show that his or her loss was actual and appreciable, not speculative and nominal. This is where the causation and damages elements intersect: because of the attorney's negligence in the underlying case, the client must suffer actual and appreciable damages, as articulated in cases such as *Shopoff & Cavallo LLP v. Hyon,* 167 Cal. App. 4th 1489 (2008). Accordingly, the elements of causation and damages are closely linked.

Not only must damages be actual and appreciable, but a plaintiff must plead such damages at the onset of litigation. Should the plaintiff fail to do so, the attorney can seek to have the claim dismissed. In California, this can be done by way of a demurrer to the complaint. A demurrer attacks the pleadings where all elements of a claim have not been properly pled. Consequently, in a legal malpractice case, where a plaintiff pleads immaterialized or speculative damages, the claim can be subject to a demurrer challenge.

Even in cases where a client can prove that *but for the attorney's negligence*, the client would have obtained a more favorable result in the underlying case, and that damages would have been actual and appreciable, that still may not be enough to state a viable claim. This is because a malpractice plaintiff generally must also prove the collectability of a judgment from the defendant in the underlying case. The court in *Hecht, Solberg, Robinson, Goldberg & Bagley v. Superior Court*, 137 Cal. App. 4th 579 (2006), held that the burden of proving collectability, like causation and damages, lies with the plaintiff. A plaintiff must present proof that he or she could have recovered all or part of the amount that would have been due in the underlying action had the plaintiff prevailed. Because collectability is a fact-intensive inquiry, courts tend to allow plaintiffs to obtain insurance and financial information subject to a protective order.

Summary of the causation hurdles

In summary, there are a number of hurdles that a plaintiff must clear when filing a legal malpractice lawsuit. First, they must prove that the attorney's negligence caused them to receive a less favorable judgment or settlement than could otherwise have been obtained. Under the "trial within a trial" standard, the burden of proof for establishing causation lies with the plaintiff.

Having satisfied the requirements for proving causation, the plaintiff then must prove that he or she has suffered damages as a result of the attorneys negligence and that these damages are not speculative or nominal. In other words, the plaintiff must show that he or she suffered an actual and appreciable loss as a result of the attorneys' negligence in the underlying action. If the plaintiff fails to establish actual and appreciable damages, the claim is subject to dismissal. And if the plaintiff fails to properly plead the damages element in the complaint, the court can dismiss the lawsuit at the onset of proceedings by way of a demurrer.

The final hurdle the plaintiff has to clear is proving that the damages would have been collectible. That is to say, that if the client had been able to obtain a more favorable judgment or settlement in the underlying action, the defendant in that underlying case would have had the means to pay the claim. To establish collectability, the plaintiff in the legal malpractice case can conduct discovery to ascertain financial information about the defendant from the underlying lawsuit, such as that defendant's assets, net worth, investment proceeds, as well as the availability of insurance.

These hurdles are by no means insurmountable, however safeguards such as the trial within a trial standard operate to safeguard attorneys against "speculative and conjectural claims in this era of ever expanding litigation."

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THE VENEZUELAN PARLIAMENT APPROVES COOPERATION AGREEMENT IN ENERGY AND MINING ENTERED INTO BETWEEN THE GOVERNMENTS OF CHINA AND VENEZUELA

On July 30th 2013, the Venezuelan National Assembly published the Law approving the Cooperation Agreement in the fields of Hydrocarbons, Petrochemical and Mining between the governments of China and Venezuela. Following is a summary of the Cooperation Agreement.

Terms of the cooperation

The Cooperation Agreement is aimed to provide a general framework for the parties to start a process of cooperation and integration in the exploration and exploitation of hydrocarbons in Venezuelan territory, encompassing all elements of the value chain of hydrocarbons.

To accomplish the objectives of this agreement, the parties will focus on the following areas:

1. Joint projects in the Orinoco Oil Belt and in the petrochemical sector, covering all elements of the value of the hydrocarbons´ chain;
2. Exploration and exploitation of other minerals;
3. Expansion and upgrading of the processing power, refining and manufacturing of mineral resources;
4. Construction and maintenance of infrastructure for exploitation, storage, processing, beneficiation, refining, manufacturing and transport of mineral resources;
5. Exchange of information and knowledge in technological area as well as experiences related to the development of hydrocarbons, petrochemicals and mining of both countries on compliance with national legislation and international customs.

It is also foreseen to expand trade of oil and natural gas between the two countries, and to ensure full compliance of the existing long-term contracts, as well as the cooperation in the fields of natural gas and detailed cooperation in petrochemical and mining.

In addition, joint projects in the electricity field will be developed, as well as the cooperation in territorial planning in the context of development of hydrocarbons, petrochemicals and mining projects. The agreement also involves technical assistance from China to Venezuela.

Duration

This Agreement shall enter into force from the date of receipt of the last of all diplomatic communications and will last ten (10) years, renewable for equal periods, unless either party notifies the other through diplomatic channels, with a minimum of six (6) months prior to the expiry date.

Legal Report
The Venezuelan Parliament approves Cooperation Agreement in Energy and Mining entered into between the Governments of China and Venezuela
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