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Pacific Rim Advisory Council
July 2014 e-Bulletin

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PRAC CHILE 2014

PRAC 56th International Conference
San Pedro de Atacama, Chile
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- ►TOZZINI FREIRE Advises Maquina de Vendas Group (Issuers) R$874,000,000 Debenture Issuance in first capital markets transaction in Brazil with Collateral Over Credit Cards from Different Issuers

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ARIAS & MUNOZ EXPANDS LITIGATION TEAM

June 2014 Arias & Muñoz continues its regional expansion and this time, strengthens its partnership with the addition of renowned litigation lawyer Jorge Molina Mendoza.

jorge.molina@ariaslaw.com

Molina Mendoza, who has joined the firm from June 2014 as Partner and Head of the Litigation and Arbitration practice, has over 20 years of experience in the field, having held important positions in public and private sectors, among which stands out his work as Legal Adviser to the Ministry of the Presidency of Panama, Magistrate of the Third Superior Court of the First Judicial District and Partner at recognized legal firms.

Attorney Molina Mendoza earned his degree in Law and Political Science at Universidad de Panamá in 1990, a Finance MBA from Universidad Latinoamericana de Ciencia y Tecnología in Costa Rica, a Master's Degree in Economic Law from the Pontificia Universidad Javeriana in Colombia, Specialization in Public Law at the Universidad Externado de Colombia and specialization courses in Law, Politics and Criminology, among other technical studies.

Attorney Molina Mendoza earned his degree in Law and Political Science at Universidad de Panamá in 1990, a Finance MBA from Universidad Latinoamericana de Ciencia y Tecnología in Costa Rica, a Master's Degree in Economic Law from the Pontificia Universidad Javeriana in Colombia, Specialization in Public Law at the Universidad Externado de Colombia and specialization courses in Law, Politics and Criminology, among other technical studies.

His leadership in the first two arbitration trials won in its country's history stands out as a major milestone in his impeccable career; Molina is also recognized for leading the most highly valued cases of bankruptcy and Antitrust.

"My incorporation as Partner at Arias & Muñoz is - for me - an opportunity to add value to the most important law firm in Central America and complete my career development in this firm", expressed Jorge Molina.

For additional information visit www.ariaslaw.com

CAREY APPOINTS NEW PARTNER TO ENERGY TEAM

Chile's Carey has boosted its energy practice through the promotion of an associate to the partnership.

José Miguel Bustamante, 43, joined two other partners, Juan Francisco Mackenna and Maria Fernanda Carvajal, in leading the energy department on 12 June. Bustamante, who has been with the firm since 2007, has experience in energy regulatory matters and in the development of various types of energy projects as well as litigation. Prior to joining the firm in 2007, he worked for eight years as part of the in-house team at Chilean energy company GasAtacama.

Carey managing partner Jaime Carey says that Bustamante's promotion is the result of a firm-wide drive to capitalise on expected future growth in Chile's energy sector. The newly inaugurated president, Michelle Bachelet, recently unveiled a new energy agenda aimed at prioritising renewables with a view to plugging the country's energy shortage. "The energy sector is one of the most dynamic and crucial industries in Chile today, both for its key role in the country's economic growth and competitiveness, and due to the increasing level of sophistication of the different stakeholders which is a direct consequence of Chile's long lasting economic development and improved living conditions of its population," he explains. Carey's practice is particularly strong in renewables, and Bustamante has been seen on a number of key recent deals. Last year, he worked alone to advise Spanish wind farm owner Acciona in selling renewable non-conventional energy (RNCE) credits to electricity company Colbún, as well as advising SunEdison on a contract to sell solar energy from a plant located in the Atacama desert to Chile's largest producer of iron ore, CAP.

For additional information visit www.carey.cl

ARIFA BVI OFFICE ON THE MOVE

Arias Fabrega & Fabrega Trust Co. BVI Limited is moving offices . Effective July 1, 2014 our new address is:

Level 1, Palm Grove House,
WichamsCay 1, Road Town,
Tortola, British Virgin Islands.
Tel: +284-494-4977
Fax: +284-4944980
www.arifacorporate.com

GOODSILL STRENGTHENS LITIGATION TEAM

Honolulu – July 1, 2014 – Managing Partner Peter T. Kashiwa announced that Gail Cosgrove has joined Goodsill Anderson Quinn & Stifel as of July 1, 2014.

Just prior to joining the firm, Gail was Officer and Director of Hisaka Yoshida & Cosgrove.

Also a Lecturer-in-Law at University of Hawaiʻi William S. Richardson School of Law, Gail has been practicing law for over 30 years. She centers her work in civil litigation, primarily medical liability, complex litigation, product liability and toxic tort litigation.

“We are fortunate and pleased to welcome Gail to the firm,” said Kashiwa. “She is a very energetic and capable attorney; we look forward to having her add another layer of experience to our litigation practice groups.”

For additional information visit www.goodsill.com

NAUTA BOARD CHANGES

01 July 2014 - As of today, there have been changes to the board of NautaDutilh. Erik Geerling will continue as a board member and has taken over the Chair of the Board from Michaëla Ulrici, who is returning to her practice. Gaike Dalenoord, corporate/private equity partner, has been appointed to the Board.

Chair Erik Geerling, who has sat on the board since 2010, primarily focuses on the firm’s strategy and policy. “The year in which we are celebrating our 290th anniversary is a great time to take over the chair,” says Erik. “During the last term of office, we set a clear course for the future, with a focus on added value for clients, entering into new partnerships and intensifying existing ones. Together with Gaike, I will continue to develop this strategy in more detail. Our commitment to a high level of client satisfaction and appreciation and to being a good employer will always remain central to this.”

After four years, Michaëla Ulrici is returning to her practice in Banking & Finance where, as one of the leading partners, she advises clients on securitsations, debt solutions and other structured finance transactions. In addition to this, she will lead the Financial Institutions team.

Private equity partner Gaike Dalenoord has been working at NautaDutilh since 1995 and has been a partner since 2003. He was also managing partner at NautaDutilh London for four years. At the moment, he leads the Amsterdam private equity team and the India & Japan Desk. He is also Chair of NautaDutilh's international strategy committee.

For additional information visit www.nautadutilh.com

SIMPSON GRIERSON APPOINTS NEW SENIOR ASSOCIATE

Wellington - 09 Jul 2014: Simpson Grierson has strengthened its Wellington commercial team with the appointment of Aimee Sandilands as Senior Associate.

Aimee is a business and solutions focused commercial lawyer. She has experience across a broad spectrum of commercial activities, with specific expertise in the mining and oil and gas sectors and electricity industry. Aimee brings to her role a winning combination of legal expertise, commercial acumen and a friendly client-focused approach.

For additional information visit www.simpsongrierson.com

UPCOMING PRAC EVENTS

- **PRAC @ IBA Tokyo** October 20, 2014
- **PRAC @ PDAC** Toronto Conference March 3, 2015
- **PRAC 57th International Conference**
  Brisbane, Australia
  Hosted by Clayton Utz
  April 18—21, 2015
- **PRAC @ INTA** San Diego May 3, 2015
- **PRAC @ IPBA** Hong Kong May 7, 2015
- **PRAC @ IBA** Vienna October 5, 2015
- **PRAC 58th International Conference**
  Vancouver
  Hosted by Richards Buell Sutton LLP
  September-October, 2015

PRAC CHILE 2014

- **PRAC 56th International Conference**
  San Pedro de Atacama, Chile
  November 8-11, 2014

Hosted by

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ARIFA

APPOINTED OFFICIAL LEGAL SERVICE PROVIDER FOR PANAMA DIAMOND EXCHANGE CLIENTS

PANAMA CITY, 26 May 2014 -- ARIAS FABREGA & FABREGA is proud to be appointed an official legal service provider for The Panama Diamond Exchange ("PDE"), the only diamond bourse in Latin America. PDE is the diamond industry's main trading hub and international gateway to and from Panama, one of the world jewelry industry's most exciting growth markets.

From diamond producers and retailers, to all international clients seeking to establish their business operations in one of the fastest growing markets in the world, ARIFA is ready to offer clients comprehensive and integrated legal services on all aspects of their operations in the PDE.

These include corporate matters, business and operating licenses, labor and immigration matters, intellectual property issues, real estate and commercial transactions and, since companies established in the PDE will operate as free zone companies with special tax and custom status, taxation.

Panama was accepted as a member of the Kimberley Process, the international system that defends against the infiltration of conflict diamonds into legitimate chain of distribution, in 2012. Membership is a prerequisite for participation in the international diamond trade.

About the Panama Diamond Exchange (PDE)
PDE has been created to serve as a trading platform and bi-directional gateway, where suppliers and buyers from North America, Europe, Asia and the Middlle East could access the fastest growing markets of Latin America, worth in excess of $8 billion, and where members of the industry and trade in Latin America could meet and do business in an easy to reach, and secure and stable environment, where the common languages are Spanish, Portuguese and English.
http://pde.com.pa

For more information visit www.arifa.com

BAKER BOTTS

REPRESENTS VECTREN CORPORATION IN $296 MILLION SALE OF COAL MINING SUBSIDIARY TO SUNRISE COAL

NEW YORK, July 8, 2014 -- On July 1, 2014, Vectren Corporation (Vectren) (NYSE: VVC) announced it has reached an agreement to sell its wholly owned coal mining subsidiary, Vectren Fuels, Inc., to Sunrise Coal, LLC (Sunrise Coal), an Indiana-based wholly owned subsidiary of Hallador Energy Company (NASDAQ: HNRG), which owns and operates coal mines in the Illinois Basin. The sales price is $296 million in cash, plus adjustment for working capital and other items. Closing is expected in the third quarter of 2014.

Baker Botts represented Vectren in the transaction.

Baker Botts Lawyers involved include Partners William S. Lamb, Michael Didriksen, Don Lonczak, Paul Cuomo, Special Council Michael Bodosky; and Associate Krisa Benskin.

For additional information visit www.bakerbotts.com

BRIGARD & URRUTIA

ADVISES OCENSA ON US$500 MILLION FIRST OFFERING

BOGOTA, 04 May 2014 - - Colombia’s Brigard & Urrutia Abogados acted as local counsel to assist Oleoducto Central (Ocensa), the operator of Colombia’s largest crude oil pipeline, with a US$500 million notes offering. Underwriters were Citi and HSBC. Ocensa made the offering, which is its first international capital markets issuance, to finance a US$685 million expansion of the pipeline, which is expected to come into operation in 2015 and will boost the oil transporter’s capacity by 20 per cent.

The pipeline operator manages the main pipeline between Colombia’s Llanos region and the port of Covenas on the Atlantic coast and handles around 70 per cent of all crude oil exports from the country.

US private equity firm Advent International bought a US$1.1 billion 22 per cent stake in Ocensa in a leveraged buyout deal that took place last year, involving Brigard & Urrutia.

The offering closed on 30 April. Brigard & Urrutia counsel team was led by Partner Manuel Quinche and associate Laura Villaveces in Bogotá.

For additional information visit www.bu.com.co

CAREY

ACTS FOR CASA SABA IN US$638 MILLION SALE TO ALLIANCE BOOTS; ALSO FOR ENDESA IN US$400 MILLION BOND REPLACEMENT

SANTIAGO, July 2014: Carey acted as local counsel to The Bank of Nova Scotia and Scotiabank Chile in the negotiation of a 15-year business alliance between Cencosud, Cencosud Retail and other Cencosud subsidiaries for the joint furthering of the consumer finance business in Chile. The deal entails the direct acquisition by Scotiabank Chile of 51% of Cencosud Administradora de Tarjetas, a credit card issuer, and the indirect acquisition of other related companies, such as Cencosud Administradora de Procesos, Cencosud Servicios Integrales and Cencosud Corredora de Seguros Limitada. Additionally, Scotiabank Chile granted a loan for up to USD3 billion to the companies mentioned above.

Carey advised The Bank of Nova Scotia and Scotiabank Chile through a team led by partners Diego Peralta, Felipe Moro, Francisco Ugarte and associates Elena Yubero, Manuel José Garcés, Paulina Silva, Alejandra Donoso, Agustín Fracchia, Loreto Ribera, Luciano Aguilera, Cristina Busquets and Andrés Salas.

For additional information visit www.carey.cl

DENTONS

CROSS-BORDER TEAM ADVISES BLACKSTONE ON MULTI-PORTFOLIO LOGISTICS ACQUISITION

July 8, 2014 -- Dentons real estate team has advised Blackstone, the global investment and advisory firm, on the acquisition of a portfolio of 6 logistics and distribution parks located throughout Poland and the Czech Republic from Pramerica Real Estate Investors.

Dentons real estate team has advised Blackstone, the global investment and advisory firm, on the acquisition of a portfolio of 6 logistics and distribution parks located throughout Poland and the Czech Republic from Pramerica Real Estate Investors. The acquisition was completed via Logicor, Blackstone's European logistics platform. These standout logistics parks totaling 200,000 sq.m. include Panattoni Parks in Czeladź, Kraków, Gliwice and Błonie in Poland and Prague Airport in the Czech Republic; and Stolica Business Centre Łazy in Poland.

Dentons cross-border team was led by Stewart Middleman, and included Warsaw-based Partner Tomasz Stasiak and senior associates Agnieszka Nagórska, Anna Garbula-Węgrzynowska and Martyna Markiewicz, as well as Prague-based Counsel Michal Hink, Daniel Hurych and associates Eleanor Johnson, Adela Horakova and Hana Hrbáčová.

For additional information visit www.dentons.com

CLAYTON UTZ

ADVISES RIDLEY CORPORATION ON JV WITH SANCTUARY LIVING FOR PROPOSED MOOLAP SITE DEVELOPMENT

MELBOURNE, 8 July 2014: Clayton Utz has acted for ASX-listed Ridley Corporation (Ridley) on its entry into a joint venture (JV) agreement with Sanctuary Living for the potential development of Ridley's 465 hectare salt field site located at Moolap, near Geelong, into a world-class mixed residential and commercial project. The agreement was signed on 11 June.

The Moolap site is the first of Ridley's dormant salt field sites it has announced it proposes to develop. Sanctuary Living is an Australian developer of master planned communities, including the Sanctuary Lakes Resort and Sandhurst Club projects in Melbourne.

Clayton Utz corporate partner Michael Linehan, a long-time adviser to Ridley, led the firm's team, which included senior associates Quentin Reidy, Alison Kennedy, Caroline Van Grieken and Simon Bowden, and lawyer Angela Manolakos.

The transaction was negotiated and agreed over a nine-month timeframe. The Clayton Utz team provided strategic advice on the structuring, drafting and negotiation of a range of complex contractual documentation included a conditional land sale contract, a unit trust deed and unitholders agreement, a rezoning agreement, a development agreement and a development management agreement.

Led by Michael Linehan, Clayton Utz has advised Ridley on a series of strategically significant corporate transactions for the business. These include Ridley's sale of Cheetham Salt Limited to Hong Kong based CK Life Sciences Int'l, (Holdings) Inc., and its $77 million acquisition of BPL Melbourne, Victoria's leading renderer of poultry and mammalian waste products, in 2012.

Commenting on the transaction, Michael said: "Our multi-disciplinary team enjoyed the opportunity to work collaboratively and bring their specialist skills to support Ridley to conclude the JV agreement with Sanctuary Living for what will be a landmark project for Geelong and the greater Melbourne area."

Ridley is Australia's leading provider of high performance animal nutrition solutions and value-added solar salt.

For additional information visit www.claytonutz.com

GIDE

ADVISES INVENSENSE ON ACUISITION OF MOVEA

PARIS, 09 July 2014 - - Gide advised the US-based electronic components manufacturer InvenSense on the acquisition of Movea, a leading provider of signal processing and data fusion technology applied to consumer mobile (smartphones and tablets), TV interaction and wearable sports and fitness applications. InvenSense has also signed a definitive agreement to acquire Trusted Positioning, a Canadian company specialised in inertial sensor-assisted positioning.

The overall cost of both acquisitions is US$81 million.

France legal counsel to InvenSense: Gide - David-James Sebag (partner) and Bruno Laffont.

For additional information visit www.gide.com

HOGAN LOVELLS

ADVISES ON US$3.2 BILLION LOAN TO THE COFCO GROUP

HONG KONG, 8 July 2014 -- Hogan Lovells' Hong Kong banking team has advised a syndicate of 11 banks in relation to a US$3.2 billion loan to the COFCO Group ("COFCO") to finance COFCO's acquisitions of a 51% stake in Noble Group Limited's agri-business, and a 51% stake in Nidera, the Dutch commodity trader and agri-business company.

The loan comprised a US$1 billion 12 month bridge tranche and a US$2.2 billion 5 year tranche. This tightly priced deal represented a rare opportunity for banks to lend to a strategically important company, one of China's largest state-owned companies. COFCO is the largest supplier of diversified products and services in the agricultural products and food industry in China and is a Fortune 500 company.

The Hogan Lovells team advising the banks was led by Hong Kong banking partners Gary Hamp and Owen Chan and of counsel Salam Bassili and assisted by associate Alan Wong.

For more information visit www.hoganlovells.com

NAUTADUTILH

ACTS AS BINCKBANK'S COUNSEL IN ISSUANCE OF BINCK TURBOS

08 July 2014 - - BinckBank has started to issue turbos in the Netherlands. A turbo allows clients to invest with leverage in underlying assets such as the AEX-index, the DAX-index, many Dutch and international stock, and precious metals. By doing so, the bank meets the demand of experienced and active investors who like to invest in turbos.

BinckBank N.V. acts as the issuing institution and has appointed the Swiss bank UBS as market maker. Trading takes place through the Citigroup Automated Trading System (Cats).

This is the first time that BinckBank issues its own turbos. BinckBank considers this issuance as an important strategic milestone for its retail investors business.

Over the last year, NautaDutilh acted as counsel to BinckBank in connection with this project. The NautaDutilh team structured and drafted the relevant agreements between the parties involved and assisted BinckBank in the negotiations. In addition, NautaDutilh drafted the turbo Prospectus and successfully filed it with the AFM.

The core NautaDutilh team consisted of Pim Rank, Bart Bierman and Jasha Sprecher (Financial Law) and Jochem Polderman (Capital Markets). Others working on the Turbo project were Petra Zijp (Capital Markets), Leo Groothuis and Matthijs Noome (Corporate), Nico Blom and Frederike Manzoni (Tax), Barbara Nijs and Babs van der Heijden (Competition).

For additional information visit www.nautadutilh.com

MCKENNA LONG & ALDRIDGE

SCORES COMPLETE VICTORY FOR KBR IN $55M CASE

27 June, 2014 -- Last week, MLA achieved a complete victory for KBR in an important $55M case before the Armed Services Board of Contract Appeals (ASBCA). The case involved KBR's contract to provide logistical support services—including feeding the troops—during the Iraq War from 2003 to 2006. The Government asserted that KBR and its subcontractors improperly used private security contractors (PSCs) in support of their work in Iraq and that the Government was not responsible for the costs allegedly associated with that use.

In 2013, a team composed of Herb Fenster, Ray Biagini, Jason Workmaster, Dan Russell, Alex Sarria, and John Sorrenti tried the case before the ASBCA for 24 days. Among the numerous witnesses were four Army general officers—including General Ricardo Sanchez, the commanding general in Iraq from mid-2003 to mid-2004. The testimony at trial overwhelmingly supported KBR's contention that the use of PSCs was absolutely necessary in order to accomplish the mission of supporting the troops, due to the Government's failure to provide adequate force protection, and that the Army was aware of that use at the time. The evidence also demonstrated that the Government's claim against KBR was politically motivated and that, before asserting its claim, the Government had done nothing to determine whether it had met its force protection obligations under the contract.

In its decision in KBR's favor, the ASBCA agreed entirely with KBR that the Government's claim was devoid of merit. Specifically, the ASBCA found: (1) that the Government waited too long to properly assert its claim against KBR; (2) that KBR's contract did not prohibit the use of PSCs in general or require case-by-case permission to use PSCs; (3) that, because the Army in the field lacked the necessary resources to meet the Government's force protection obligations, KBR and its subcontractors reasonably chose to use PSCs; and (4) that the amount allegedly charged for that use was reasonable.

In reaching this decision, the ASBCA rejected the Army's argument that, when the Government failed to provide adequate force protection, KBR and its subcontractors should simply have waited to perform their mission. In this regard, the ASBCA stated: "Fortunately for the troops that depended on KBR and its subcontractors for their life-support and other logistical support services, KBR and its subcontractors did not adopt the attitude now suggested by the government as their only remedy for the government's failures to provide force protection."

The fact that MLA sought $55M and that our client was awarded every penny makes this a tremendous victory and vindication for KBR.

For additional information visit www.mckennalong.com

RODYK

ACTS FOR TEE INTERNATIONAL LIMITED IN ISSUANCE OF BONUS WARRANTS

SINAGAPORE, June 2014 - - Rodyk acted for Tee International Limited in its 2 for 5 bonus warrants issue at an exercise price of S$0.25. The warrants were offered pursuant to an offer information statement lodged with the Monetary Authority of Singapore on 26 May 2014, and listed and traded on the SGX-ST on 3 June 2014, raising S$49.3 million if all the warrants are exercised.

Corporate partner Valerie Ong led, supported by partner Au Yong Hung Mun and associate Tan Kai Yong.

For additional information visit www.rodyk.com

MUNIZ RAMIREZ PEREZ-TAIMAN & OLAYA

ASSISTS INTEROIL IN LANDMARK ENVIRONMENTAL PRECEDENT

LIMA May 2014: A recent resolution issued by the Appellate Court of the Peruvian Agency For Environmental Assessment and Audit (OEFA) declared that Interoil Peru, a subsidiary of a Norwegian petroleum company with operations in Peru, did not break the law when it decided to move the location of four wells located in Block III, an oilfield located in the Piura Region, in north west Peru.

The case dealt with four programmed oil wells that were originally approved to be drilled in four different locations. These four wells were in practice drilled from a single platform using directional drilling instead. This situation, not considered in the Environmental Impact Assessment submitted by Interoil, caused the Peruvian authority to impose a strong sanction on Interoil. The Court, in a second instance within OEFA, determined that the company actions created a lesser impact for the fauna and flora, less quantity of toxic emissions, among other good consequences.

Through this case, OEFA set the criteria to admit practical amendments to an EIA if they create an "environmental improvement".

"This is a landmark precedent that opens a new way of understanding the environmental engagements assumed by oil & gas companies. It can perfectly apply to other sectors linked to the exploitation of natural resources, such as mining and electricity", says Jenny Caldas, partner of Muñiz, Ramírez, Pérez-Taiman & Olaya, who led the legal team that represented Interoil before OEFA.

For additional information visit www.munizlaw.com

SANTAMARINA Y STETA

ASSISTS GEO WITH US$1.5 BILLION RESTRUCTURING PLAN

MEXICO CITY April, 2014: Santamarina y Steta is assisting Mexican homebuilder GEO restructure over US$1.5 billion worth of debt, after reaching a deal with creditors which provides an important template for other companies in Mexico's struggling homebuilding industry.

GEO and 15 of its subsidiaries announced on 20 March that they had filed for a pre-packaged bankruptcy proceeding, putting forward a restructuring plan for 50 per cent of the homebuilder's outstanding indebtedness.

GEO filed for bankruptcy in April last year and began negotiations with creditors in September after running into difficulty because of the challenging macro-economic environment in which financing has been scarce for Mexico's homebuilding industry in response to a change in government housing policy to prioritise vertical development over urban sprawl. Other developers such as Urbi and Homex have also filed for bankruptcy.

The deal also allows for a new equity injection, which is open to both third parties and existing shareholders. Backstop commitments were negotiated from bondholders to make the injection themselves in the event that a third party or shareholder is unable to be found over the course of the restructuring plan.

GEO waited to file its plan for the approval of amendments to Mexico's bankruptcy law, which were rolled out as part of wider financial reform at the beginning of 2014. The new legislation makes it easier for companies to receive third-party financing during restructuring proceedings, which will allow GEO to acquire Debtor In Possession (DIP) financing in order to continue running as the new funding is given priority over existing debt commitments. The law has also enabled GEO to make a filing for both the company and its subsidiaries as a group, rather than individually.

Local counsel for Corporacion GEO - Santamarina y Steta was led by Partners Fernando del Castillo and Alfonso Castro, and associates Adriana Padilla, Yoare Heredia, Ana Paula Buchanan and Camilo Vázquez in Mexico City.

For additional information visit www.s-s.mx

TOZZINIFREIRE

ADVISES MAQUINA DE VENDAS GROUP

June 27, 2014 - - TozziniFreire Advogados (Counsel of the Issuers) - Issuance of Debentures by Máquina de Vendas Brasil Participações S.A. ("MVB"), Lojas Insinuante S.A. ("Lojas Insinuante") and Dismobrás Importação, Exportação e Distribuição de Móveis e Eletrodomésticos S.A. ("Dismobrás" and, together with MVB and Lojas Insinuante, the "Issuers"), all companies members of the Máquina de Vendas group, one the most important retailer group of Brazil. Banco Bradeso BBI S.A. ("Bradesco BBI") acted as leading underwriter and Banco Itaú BBA S.A. ("Itaú BBA") and HSBC Corretora de Títulos e Valores Mobiliários S.A. ("HSBC" and, together with Bradesco BBI and Itaú BBA, the "Underwriters") acted as underwriters.

The total value of the deal for three issuances of debentures totaling R$874,000,000.00.

Structured issuances of debentures with collateral over credit cards receivables. It is the first capital markets transaction in Brazil with collateral over credit cards receivables from different brands.

TozziniFreire lawyers acting in the transaction included Partner, Alexei Bonamin, Partner, Rodrigo de Campos Vieira, and André Bocchi – associate, Caio Ramos Penitente – associate.

For additional information visit www.tozzinifreire.com.br

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LEGAL FLASH

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BVI Signs Model 1B IGA for FATCA

The British Virgin Islands signed the inter-governmental agreement (IGA), relating to the US Foreign Account Tax Compliance Act (FATCA), with the United States Government.

The IGA is based on the Model 1B agreement and the signing paves the way for formal implementation of FATCA in the BVI. This includes local enabling legislation adopting both the IGA and guidance notes in respect of the FATCA regime. The Government of the BVI is expected to shortly release draft guidance notes for industry input.

A Model 1 IGA requires reporting by BVI resident financial institutions on US accounts directly to the BVI Government followed by the exchange of this information with the United States on an automatic basis, the key benefit of such an arrangement being that there will be no direct reporting by BVI entities to the United States Government. The BVI's financial institutions have until the end of 2014 to obtain a Global Intermediary Identification Number (GIIN).

Arias, Fabrega & Fabrega Trust Co. BVI Limited has already obtained its Global Intermediary Identification Number (GIIN).

The BVI currently has 26 Tax Information Exchange Agreements in place with major countries, including the US.

We would be more than pleased to provide further information upon request.

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CLAYTON UTZ

11 July 2014

Australian carbon price repeal fails, for now

The Australian Senate yesterday rejected the bills repealing the Clean Energy Act 2011, the centrepiece of the Australian carbon price scheme that commenced on 1 July 2012.

The proposed repeal legislation included several "price exploitation provisions", inserting sections in the Competition and Consumer Act 2010 that prohibit corporations from engaging in "price exploitation in relation to the carbon tax repeal" during the period 1 July 2014 to 30 June 2015, in relation to the supply of natural gas, electricity and other specified goods ("regulated supplies"). These price exploitation provisions were to commence on the day after royal assent is given to the repeal bills, and would have related to conduct engaged in from and after that date in relation to the period from 1 July 2014.

On Wednesday the Palmer United Party proposed additional consumer protections, including amendments making it compulsory for suppliers of regulated supplies (such as electricity and natural gas) to report to the Australian Competition and Consumer Commission on how much of their savings from the carbon price repeal had been passed through.

On Thursday morning the Palmer United Party proposed yet further amendments, including provisions requiring suppliers of regulated supplies to pay to the Government 250% of any savings from the carbon price repeal that were not passed through to customers. The Senate declined leave to the Party to introduce these amendments during the debate, and the amendments were probably unconstitutional anyway.

The Palmer United Party then withdrew its earlier amendments without putting them to the vote, and the Senate then voted to reject the repeal bills completely.

It is likely that the Abbott Government will continue negotiations with the cross-bench members to come up with amended repeal bills to be re-introduced into the House of Representatives next week. For now, the fixed carbon price of $25.40 until 30 June 2015 (and a floating price trading scheme after that) remains in law.

Two other substantive reforms to Australia's carbon emissions and renewable energy schemes are also still being considered:

The legislation to implement the Australian Government's Direct Action policy, under which an Emissions Reduction Fund will be established to buy up to A$2.55 billion in carbon credits from emissions abatement activity under a revised Carbon Farming Initiative, is expected to be considered by the Parliament later in the month.

The review into the Renewable Energy Target, which was originally intended to mandate that 20% of on-grid electricity be sourced from renewable sources, is still continuing. Potential outcomes from that review include closure of the whole scheme, closure of the small technology (rooftop solar PV) section of the scheme, or revision of the scheme to a lower target, perhaps prescribed by percentage of power acquisitions rather than the present fixed 41,000 GWh per annum target.

INTELLECTUAL PROPERTY NEWS / JULY 2014

Brazil: São Paulo Court Issues Decision Regarding the Name “in box” of a Restaurant Chain

The São Paulo State Court of Appeals has determined that “China in Box”, a restaurant chain specializing in Chinese fast food delivery, has exclusivity over the expression “in box”. As a result, the Court ordered “Massa in Box”, an Italian fast food delivery service, to stop using the expression “in box”.

Although the words “China” and “in box”, registered by the Brazilian Patent and Trademark Office, are of common use, the decision was based on the fact that these terms are associated by consumers with the Chinese fast food delivery service of “China in Box”.

The decision, which is still subject to appeal, is consistent with previous similar cases. Both “Asia In Box”, a Chinese food restaurant, and “Uai In Box”, a regional food restaurant, have also been prevented from using the expression “in box”.

New limits imposed on foreign investors seeking to acquire farmland in Quebec

July 8, 2014

An Act respecting the acquisition of farmland by non-residents

Near the end of the 1970s, the Quebec National Assembly recognized the need for a law to regulate the specific problem of foreign ownership of farm land, which was becoming more and more common[1].

As a result, *An Act respecting the acquisition of farmland by non-residents*[2] (the "Act") was adopted on December 21, 1979. The purpose of the Act is to control the acquisition of any type of farmland by a person who is not resident in Quebec. The *Commission de protection du territoire agricole* (the "Commission") is responsible for overseeing the implementation of the Act. A person who is not resident in Quebec may not, directly or indirectly, make an acquisition of farmland without the authorization of the Commission[3].

The Act applies to farmland covering a minimum area of four hectares, south of the 50th parallel north[4]. Geographically, this delimitation draws a line passing north of Chibougamau, but south of Port-Cartier[5].

One of the purposes of the Act is to ensure that farmland remains in the hands of residents as much as possible, to encourage active farming, and to prevent a market imbalance caused by foreign price scales, which could potentially impact Quebec residents' financial capacity to acquire farmland.

The Act stipulates the conditions for a legal person[6] or a natural person[7] to be considered "resident in Quebec." The Act also provides for an application procedure through which the Commission exercises control over the acquisition of farmland by non-residents[8].

Bill 46

Concerned parties in the farming community deemed it necessary to amend the Act to ensure that the legislation better reflects today's economic reality and to counter farmland grabs by foreign investors, which had increased in recent years, and not only in Quebec, notably due to the 2007-2008 global food crisis[9].

On October 30, 2013, the date of royal assent and entry into force of Bill 46[10], it became more difficult for a non-resident to acquire agriculturally zoned land suitable for the cultivation of the soil and the raising of livestock. The additional restrictive measures added to the Act by Bill 46 are: (i) strengthening of the "resident in Quebec" status, (ii) imposition of an annual quota on the total area of farmland the Commission may allow to be acquired by persons who do not intend to settle in Quebec, and (iii) new evaluation criteria enabling the Commission to exercise greater control.

Strengthening of the "resident in Quebec" status as provided under the Act

Before Bill 46 came into force, a natural person was deemed to be resident in Quebec if the person had lived in the province for not less than 366 days (12 months and one day) in the 24 months immediately preceding the date of acquisition of farmland[11], or following the date of acquisition in the case of a non-resident who had the intention of settling in Quebec[12].

Since October 30, 2013, a natural person is deemed to be resident in Quebec if the person is a Canadian citizen or a permanent resident within the meaning of the *Immigration and Refugee Protection Act*[13] and has lived in Quebec for not less than 1,095 days (36 months) in the 48 months immediately preceding the date of acquisition of farm land[14], or following the date of acquisition in the case of a non-resident who has the intention of settling in Quebec[15].

Imposition of an annual Quota

Bill 46 added a completely new restrictive condition to the Act:

> "Except for areas of land in respect of which an authorization is granted to natural persons who intend to settle in Québec, no more than 1,000 ha of farmland suitable for the cultivation of the soil or the raising of livestock may be added in a year to the total of such areas that any other persons have already been authorized to acquire.[16]"

Once this cumulative annual area of 1,000 hectares[17] has been reached, the Commission can no longer authorize acquisitions by non-resident persons who do not intend to settle in Quebec.

This new measure of control imposed on the Commission is designed to somewhat reduce the risk of massive grabs of good farm land by non-residents.

New Evaluation Criteria

Regarding the third restrictive measure brought by Bill 46, when assessing an application by a non-resident for the acquisition of farmland suitable for the cultivation of the soil or the raising of livestock based on the

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biophysical conditions of the soil and the environment, the Commission must henceforth take the following factors into consideration:

- The intended use, in particular the applicant's intention to cultivate the soil or raise livestock on the farmland that is the subject of the application;
- The impact of the acquisition on the price of farmland in the region;
- The effects of the acquisition or projected use on the economic development of the region;
- The increase in value of agricultural products and the development of underutilized farmland; and
- The impact on land occupancy.

This decision-making framework imposed on the Commission is designed to ensure that the farmland acquired will in fact be used for agricultural activities, and to prevent farmland from being acquired for purely speculative purposes. For applications pending on October 30, 2013, the Commission will, however, apply the evaluation criteria provided in paragraph 3 of former Section 15 of the Act.

Sanction[18]

Any interested person, including the Attorney General, may apply to the Superior Court to declare the nullity of an acquisition made in contravention of the Act (i.e., an acquisition made by a non-resident who did not obtain the Commission's prior authorization), or an acquisition made following a conditional authorization given by the Commission, for which the conditions were not subsequently met (i.e., a non-resident who had intended to settle in Quebec as stipulated under section 15.2 of the Act). The Commission may also, by order, enjoin a person having acquired farmland in contravention of the Act to divest himself of that farmland within 6 months of the service of that order, and ultimately, may apply to a judge of the Superior Court to obtain authorization for the judicial sale of the farmland.

The group at Dentons Canada LLP's Montreal office is available to answer any questions regarding the Act, as amended by Bill 46, and, ultimately, to assist you with an application for authorization from the Commission.

References

1 Mario MASSE, "La Loi sur l'acquisition de terres agricoles par des non-résidents : conditions générales d'application," (2007) 1C.P. du N. 1, 7.

2 *An Act respecting the acquisition of farm land by non-residents*, C.Q.L.R. c. A-4.1 (hereinafter "A.R.A.F.L.N.R.")

3 A.R.A.F.L.N.R., s. 8.

4 A.R.A.F.L.N.R., s. 5.

5 This example is from Serge Cardinal, "*Loi sur la protection du territoire agricole du Québec et Loi sur l'acquisition des terres agricoles par des non-résidents – Présentation des textes de lois et jurisprudence*," Commission sur la protection du territoire agricole du Québec, 1989, internal document, p.160.

6 A.R.A.F.L.N.R., s. 2.

7 A.R.A.F.L.N.R., s. 4.

8 A.R.A.F.L.N.R., s. 12 to 20.

9 The 2007-2008 global food crisis was triggered by a steep increase in basic food prices, throwing some of the world's poorest countries into a state of crisis. Many affected areas experienced riots and political instability.

10 *An Act to amend the Act respecting the acquisition of farm land by non-residents*, S.Q. 2013, c. 24.

11 A.R.A.F.L.N.R., s. 2 and 3 as published on October 29, 2013.

12 A.R.A.F.L.N.R., s. 16 as published on October 29, 2013.

13 *Immigration and Refugee Protection Act*, S.C. 2001, c. 27

14 A.R.A.F.L.N.R., s. 2 and 3 as modified by *An Act to amend the Act respecting the acquisition of farm land by non-residents*, S.Q. 2013 c. 24.

15 A.R.A.F.L.N.R., s. 15.2, section added by *An Act to amend the Act respecting the acquisition of farm land by non-residents*, S.Q. 2013 c. 24.

16 A.R.A.F.L.N.R., s.15.3 para.1, section added by *An Act to amend the Act respecting the acquisition of farm land by non-residents*, S.Q. 2013 c. 24.

17 10,000,000 sq. m. or 107,639,104.2 sq. ft.

18 A.R.A.F.L.N.R., s. 27, 28.

/Carey

New Guidelines of the National Economic Prosecutor for Vertical Restraints

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Carey contact.

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1. Introduction

In June, 2014 the National Economic Prosecutor (Fiscalía Nacional Economica - FNE) issued its guidelines for the Analysis of Vertical Restraints.

This document is a new effort of the FNE to promote free competition, on the basis of the review of the best practices on the matter and the study of the problems associated with vertical restraints. These guidelines are intended to provide a framework concerning the concept of vertical restraint used by the FNE, the main features of these kinds of provisions, their type, anticompetitive risks and potential efficiencies. The guidelines are not mandatory to the Antitrust Court (Tribunal de Defensa de la Libre Competencia). Nonetheless, the FNE may file a claim before the Antitrust Court based on these guidelines and claim violations to competition law.

2. The guidelines

In their investigations, the FNE will consider a presumption of legality of a particular vertical restraint whenever none of the parties involved holds a market share over 35%.

In the event that a buyer or seller is subject to similar terms with other sellers and buyers, respectively, these restrictions will remain within the presumption of legitimacy to the extent the market share of all buyers and sellers that are subject to those provisions do not exceed 35%. However, this presumption of legality may be rebutted under certain circumstances.

The FNE will take into consideration the following aspects:

a) The market share of the economic agents subject to the restriction;
b) The anticompetitive effect (actual or potential) rising from the vertical restriction; and,
c) The efficiencies arising from the same that cannot be achieved through other measures less restrictive to competition.

2.1 **Positive and negative aspects of vertical restraints**

The guideline recognizes possible efficiencies of vertical restraints, such as avoiding:

/Carey

a) Double margin in the producer/distributor relationship;
b) Free riding[1], mainly in the provision of retail services;
c) *Hold-up*[2], that is, long term investments (such as sunk costs) in vertical relationships and the opportunistic behavior of taking advantage of them when made by the counterparty.

However, the guidelines also recognize some potential risks to competition, regarding the following aspects;

a) Promote or facilitate collusion or coordination of producers or distributors;
b) Block or delay the entrance or expansion of competitors.

2.2 **FNE analysis**

If the FNE considers that vertical restraints may produce some risks to competition, those risks shall be measured against the efficiencies claimed by the parties.

The analysis considers three consecutive stages:

- First: determination of the market shares of the economic agents subject to the vertical restriction.

---

[1]The FNE recognizes in its guidelines that the presence of these kinds of externalities could produce a disincentive to offer complementary services, producing a sub provision of the same. Depending on the type of product, this sub provision could negatively affect the intensity of the inter brand competition.

[2] The possibility of an opportunistic behavior ex-post (such as hold up) reduces the incentives to invest ex-ante by the entity that could be subject to the opportunistic behavior. The FNE considers that the risks of sub inversion will be significant and therefore there will be efficiencies associated to the vertical restraints if the following copulatives characteristics are met:

i) The investments are specific;
ii) A long term investment;
iii) The investment must be asymmetric, meaning that a party should invest significantly more than the other party.

- Second: actual or potential effects on competition.
- Third: efficiencies (which cannot be achieved by other alternatives which are less restrictive to competition).
- Once it is established that the efficiencies are truthful and justifiable, the FNE will perform a qualitative analysis to determine whether those efficiencies serve as effective counterweight to the risks generated by the restriction, that is, if the efficiencies compensate for the risks.
- If the analysis reveals that those efficiencies do not effectively counterbalance the identified risks, the FNE shall consider this vertical restriction contrary to free competition.

3. Conclusion

The guidelines are an effort of the FNE to make public its internal criteria that it will use in its investigations of vertical restraints for determining whether a vertical restraint is against free competition. Thus, by making public such criteria, economic agents will be informed of the possible reaction of the FNE and take into account the foregoing while making a decision on the matter.

Hogan Lovells

Third Party Payment Licences in China - Are They within The Grasp of Foreign Investors?

Contents

JUNE 2014

Online sales in China are booming. Gigantic figures are regularly trotted out by commentators to illustrate the size of the online market, such as the recent jaw-dropping figures for online sales for China's answer to St. Valentine's Day, Singles' Day (光棍节). That market is underpinned by payment services, and the number of payment services providers, and online payment services providers in particular, has grown exponentially along with the explosion in online sales. Online payment services, however, remains an area where foreign players are struggling to gain a foothold.

Rapidly developing industry

Third party payment service is a rapidly growing industry. So rapidly that regulatory authorities are struggling to keep up with changes. In March this year, the People's Bank of China ("**PBOC**"), China's central bank and the regulatory authority overseeing the third party payments industry, suspended the rollout by Tencent and Alibaba (two of China's largest and best known companies in this space) of online credit cards and code (QR) scanning payments, ostensibly due to concerns about data privacy with this new system, but perhaps also partly because the authority needed time to understand their impact (and, according to some commentators, because these payment methods do not go through China UnionPay, which has a *de facto* monopoly on credit card network services in China). A regulation issued that same month by the PBOC together with the banking industry regulator, the China Banking Regulatory Commission ("**CBRC**"), addressed data privacy issues, among other matters. Drafts of that regulation had proposed to set significant limits on spending via online payment services, which would have severely impacted the industry. However, the final version requires only that banks set payment limits that are appropriate to customers' risk tolerance levels.

Foreign participation in the industry

Foreign investors in this area are particularly limited by regulatory restrictions – some of which are explicit, while others seem to be a matter of unwritten policy. In this note, we briefly set out the regulatory "state of play", mainly from the standpoint of for would-be foreign invested providers of online payment services.

PAYMENT LICENCES

People's Bank of China's requirements

A provider of third party payment ("**TPP**") services in China must hold a payment services licence (a "**Payment Clearance Operator**" or "**PCO Licence**") issued by the PBOC, as well as an approved business licence on which the business scope section explicitly includes the particular service(s). The rules that impose this requirement [1] (the "**TPP Regulations**") do not expressly prohibit foreign-invested enterprises ("**FIEs**") from becoming Payment Clearance Operators, but they do state that separate provisions regulating FIEs in this space will be issued. The TPP Regulations were issued in 2010 and, as at time of writing in mid-2014, special rules regulating FIE providers of TPP services have yet to be issued.

Payment licences have been issued to two FIEs

Under Chinese law, unlike in jurisdictions such as the UK and the US, the absence of a legal prohibition on an action does not necessarily mean that that action is permitted and lawful. Accordingly, the provision in the TPP Regulations that separate rules would be provided for FIEs in the online payments space was generally understood by the market to mean that, until such regulations were issued, the absence of a positive legal basis allowing them to do so meant that FIEs would not be permitted to obtain PCO Licences in China.

However, in July 2013, the PBOC issued PCO Licences to two FIEs: the China subsidiaries of Sodexo and Edenred (both French companies). Each was issued a licence permitting it to provide prepaid card services in China. With no specific regulations expressly authorising provision of TPP services by FIEs, the Sodexho and Edenred PCO Licences seemed to have

[1] *Measures for the Administration of Payment Services of Non-financial Institutions*, effective 1 September 2010, and *Detailed Implementing Rules for the Administration of Payment Services of Non-financial Institutions*, effective 1 December 2010.

been issued in something of a legal vacuum and took the market rather by surprise.

Under the TPP Regulations, the issue and acceptance of prepaid cards, along with online payment services and bill collection via bank cards (as well as any other payment services that the PBOC may specify) are payment services that may be provided by non-financial institutions in China, provided that they hold a PCO Licence.

We contacted the PBOC to ask its view on issuing PCO Licences to FIEs. The response was positive. We were told that the PBOC encourages FIEs to apply for PCO Licences. In terms of how to do so, we were told that, in the absence of specific regulations aimed at FIEs, FIE applicants for PCO Licences should simply refer to the requirements set out in the TPP Regulations. Broadly, those require that the main investors are properly established companies that have been providing information processing support services to financial institutions, or for e-commerce activities, for at least two years, are profitable, and that the proposed TPP service provider entity in China satisfies a number of conditions, including in relation to minimum capital requirements (RMB100 million for providers of services nationwide), organisational structure, facilities and staffing.

At the time of writing, the Sodexo and Edenred FIEs' licences are the only two PCO Licences on the public record (of a total of 250 PCO Licences issued by PBOC[2]) that have been issued to FIEs in China, and those are very limited in scope – allowing prepaid card services and not, for example, online payment services. To our knowledge, no FIE is licensed to carry out online payment services in China. However, if it is possible for an FIE to obtain a PCO Licence to carry out prepaid card business in China, then it should also be possible for an FIE to obtain a PCO Licence allowing it to engage in online payment services. Nevertheless, in practice, online payment services thus far seem to remain out of bounds for FIEs.

New pilot Free Trade Zone in Shanghai

Following the launch of the Shanghai Pilot Free Trade Zone ("**FTZ**") in September 2013, the Shanghai Head Office of the PBOC issued opinions on the provision of cross-border RMB payment services in the FTZ[3]. That set of opinions allows entities with a presence in Shanghai (inside or outside the FTZ), who hold an Internet payment business licence and a PCO Licence, to provide cross-border RMB payment services via the Internet. This follows a programme implemented by the State Administration of Foreign Exchange in 2013, which authorised a number of Chinese companies to provide cross-border foreign exchange payment services on a pilot basis[4]. Permitting cross-border RMB online payment services will allow payment services providers to tap into the large volume of purchases made online by Chinese consumers from overseas sellers. This is potentially a huge market, as although cards bearing the UnionPay logo are increasingly accepted worldwide as China UnionPay expands its operations internationally, Chinese individuals tend to be very conscious of exchange rate risk and of restrictions on use of cards issued in China when buying direct on websites outside China. However, whether or not the FTZ will be a real additional opportunity for foreign players will still depend on the ability of FIEs to obtain the appropriate business scopes and PCO Licences and, possibly, telecommunications operating permits (see below).

TELECOMS LICENCES

We noted above that the PCO Licences obtained by the Sodexho and Edenred FIEs (the only FIEs to have obtained such licences to date according to public record), permit the holders to carry out prepaid card services and not online payment services.

Internet/telecoms industry regulator's requirements

Prepaid card services are subject to the PBOC licensing requirements discussed above. The provision of online payment services may, however, fall under both the payments and the telecommunications legal regimes in China, and therefore into the regulatory ambit of both the PBOC and the government department that oversees the Internet and telecommunications industries, the Ministry of Industry and Information Technology ("**MIIT**"). However, the position is not entirely clear.

China's telecommunications regime imposes licensing requirements on providers of telecommunications services. In particular, that requires providers of "transaction processing services" must hold a Value-

[2] According to [the PBOC's website at www.pbc.gov.cn] at the time of writing.

[3] *Implementing Opinions of the Shanghai Head Office of the People's Bank of China on the Provision of Cross-border RMB Payment Services by Payment Institutions in Shanghai Municipality*, effective 18 February 2014. Please click here to see our commentary on financial reforms in the FTZ.

[4] Under *Guiding Opinions on the Pilot Services of Cross-border E-commerce Foreign Exchange Payment by Payment Institutions*, effective 2 February 2013.

added Telecommunications Services Licence ("**VATS Permit**"), issued by MIIT.

The 2013 draft *Catalogue for Classification of Telecommunications Services* [5] defines "transaction processing services" as "*the use of transaction processing platforms linked to communications networks (including the Internet) to provide the public with public platform services in relation to various financial or securities transactions, or transactions of e-commerce-related commodities or services".* (Emphasis added)

Do online payments services providers need a VATS Permit?

Based on the wording underlined above, and the fact that the TPP Regulations do not require providers to obtain VATS Permits from MIIT as a precondition to being able to provide online payments services, it is arguable that the requirement for a VATS Permit does not apply to those carrying out online payments services via another party's platform or portal (through Taobao, for example). In such case, it is Taobao that provides the public platform through which customers access the payment processing service; the payment services provider serves only those individual persons/entities with whom/which it contracts to provide services – rather than to the public at large. The argument runs that VATS Permits for online payment processing are only required for parties who offer transaction processing services through their own portal or platform which is open to the public at large. In that scenario, it is the public transaction processing platform provider (ie Taobao) that would need the VATS Permit for transaction processing services. We asked the MIIT on a number of occasions and at several of its branches, whether a provider of online payments services must hold a VATS Permit. We got mixed answers: half of the officials we spoke to were of the view that a VATS Permit is required and half were of the view that it is not.

Difficult for foreign investors to obtain

Telecoms, and the Internet in particular, is a sensitive area in China and, under Chinese law[6], VATS Permits are generally available only to joint venture FIEs in which a Chinese investor (or investors) hold at least 50% of the equity interests. Even then, the MIIT has issued relatively few (less than 30 according to its website) VATS Permits to FIEs. As a result of MIIT's (whether real or perceived) unwillingness to issue these licences to FIEs, many foreign investors have opted to invest in China's telecoms sector through nominee or indirect structures, such as the variable interest entity ("**VIE**"). This structure has been used in a wide variety of industries, even beyond those, such as the media, telecoms and the Internet, where foreign investment restrictions are most commonly encountered, but it remains highly controversial in the eyes of many Chinese officials and is subject to a variety of regulatory and legal threats and challenges, which we do not discuss in this note. The 50% cap on foreign investment has been relaxed in the FTZ in relation to certain types of VATS, and in some cases it has been removed entirely. For transaction processing services in the FTZ, the cap on foreign investment has been raised only slightly – to 55%. (To see our commentary about FTZ–specific rules on VATS, please click here.) Outside the FTZ the 50% cap remains.

This means that, even in the FTZ, in order to obtain a VATS that permits transaction processing services, an FIE must be a Sino-foreign joint venture company. In turn, that means that a foreign investor must find, and agree terms with, a Chinese partner and deal with all the associated relationships and administration before it can even begin to apply for permission to provide these services. It is, at the time of writing, too early to know whether the MIIT will be more generous with granting VATS licences to joint venture FIEs in the FTZ than it has been to date to those elsewhere in China. Initial signs are, however, promising; we see the recent FTZ rules delegating authority for approving applications down to the local Shanghai Telecoms Administration Bureau (from central MIIT) as a first step in the direction of loosening central control on this highly regulated sector - even if the decision on which telecoms services are to be opened up to foreign investment within the FTZ ultimately remains firmly within the hands of central MIIT.

INTERNATIONAL REMITTANCES

Foreign non-financial institutions can provide cross-border payment services in cooperation with Chinese banks where the latter act as international remittance agents and the former as principals.

International remittances are overseen by yet another regulator, the CBRC.

[5] This is still a draft for comments and is not yet law, but provides an indication of what the final definition may look like going forward.

[6] Based on, and consistent with, China's World Trade Organisation ("**WTO**") commitments, although how MIIT has interpreted these is a more contentious issue.

The relevant regulation[7] in this area requires the foreign principal to establish a representative office in China, through which it must keep the CBRC informed of events that might impact its China business that occur in other countries where it does business.

Under this regime, the foreign party has no 'legal person" presence in China and does not require (and, indeed, cannot hold) a PCO Licence – because it is the agent bank in China that makes or receives payments.

This route is currently used by some foreign payments companies, giving them access to a portion of the China payments market. It is, however, relatively speaking, addressing a very small portion of the market, as the vast majority of payments made in China are, of course, in RMB and onshore (between Chinese parties).

COMMENTS

Our understanding then, is that it is currently feasible for an FIE (including a wholly foreign owned enterprise, a 100% subsidiary of a foreign company) to obtain a PCO Licence and, if that is the case, then it is, at least theoretically, equally possible for FIEs to obtain PCO Licences that allow them to carry out any of the services regulated by the TPP Regulations - including online payments. However, thus far the only two PCO Licences granted to FIEs allow only prepaid card services.

What is not entirely clear is whether, in order lawfully to provide online payment services, a VATS Permit is also required. It is, on the face of the rules, possible for a Sino-foreign joint venture FIE with at least 50% Chinese ownership (45% in the FTZ) to obtain a VATS Permit to allow it to carry out transaction processing services. However, to our knowledge, that has yet to be achieved by any FIE.

It is difficult to see any technical or other reason for limiting foreign investment in China's vast payment services market – beyond simple protectionism. Many of the world's leading payment companies have technologies and know-how derived from extensive experience in other markets, which would clearly be helpful to developing the nascent China payments industry. China is not, technically, in violation of the obligations in this area that it agreed to upon accession to the WTO in 2001. Those included opening up its financial transactions market, and providing "national treatment" to international financial institutions – but not to non-financial institutions – and allowing foreign investment in (among other VATS) transaction processing services, subject to a 50% cap. In terms of the latter, China is being consciously more open, voluntarily going beyond its WTO obligations for FIEs in Shanghai and the FTZ.

Attempts have already been made to force China to open up other areas of its payments sector. In a 2012 case brought by the United States against China UnionPay ("**CUP**"), the WTO ruled that China unfairly discriminated against foreign suppliers of electronic payment services by requiring all RMB-denominated payment cards issued in China to work with CUP. In the same case, however, the WTO rejected the Americans' claim that CUP enjoys monopoly status, ruling that China's laws do not preclude foreign service providers from entering the China market. In response to the WTO findings, China repealed a number of rules that collectively provided that CUP was the only entity permitted to carry out payment card transactions in China.

Given the size and growth prospects of China's online payments services market, foreign investors will continue to seek a way into this potentially lucrative market. Based on PBOC's apparent enthusiasm for foreign investment, the door is not entirely closed to establishing FIEs in China to tap into this highly promising area. The key questions at this stage are whether PBOC will issue PCO Licences to FIEs that permit them to carry out online payments and whether (and in which circumstances) MIIT will require such FIEs to hold VATS Permits for transaction processing services. If they do, the next question will be whether the FTZ will provide the key for foreign investors to unlock the undeniably huge opportunities in this area.

June 2014

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[7] *CBRC Regulating International Remittance Agency Business of Financial Institutions Circular*, effective 27 February 2006.

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Agreement Colombia and Japan

Thu, 07/03/2014 - 14:26
NewsFlash: 251

Customs and International Trade

Congress ratifies Bilateral Investment Agreement between Colombia and Japan

Last June 25, the Colombian Congress enacted Law 1720 in order to ratify the Bilateral Investment Treaty between Colombia and Japan. The purpose of this agreement is to provide guarantees and legal certainty to Japanese investors in Colombia, and concurrently, promote and protect Colombian investments in Japan.

Among the included obligations, the principle of National Treatment is one of the most relevant. According to this principle, Japanese investors shall be treated as nationals in Colombia, and Colombian investors shall receive this same treatment in Japan. In any event, it must be recalled that this agreement does not include trade barriers elimination.

The treaty will bring great benefits to Japanese investors that have identified business opportunities in Colombia in areas such as, petroleum, gas, thermic carbon, ferronickel, coltan, food, technology, among others, and likewise, to Colombian investors in Japan in areas such as oils and fats, tuna, poultry farming, cocoa, ornamental fishes, waxes, handcrafts, organic chemical products, jewelry, and footwear and leather.

However, so that the agreement enters into force, the law must be validated by Colombian Constitutional Court, which will be the last step to complete the internal procedure of ratification.

ニュース速報: 251

税関と国際貿易

コロンビア国会、日本・コロンビア二カ国間投資協定を承認する。

去る6月25日、コロンビア国会は、日本・コロンビア二カ国間投資協定を批准すべく、法律1720号を制定しました。この協定の目的は、コロンビアで事業を行おうと投資する日本人投資家に保証と法的安定性を提供すること、及びコロンビア人投資家による日本への投資を促進し、これを保護することにあります。

この協定に基づく義務の中で、最も重要なものの一つは内国民待遇原則です。この原則により、日本人投資家はコロンビアにおいてコロンビア国民と同等の待遇を与えられ、またコロンビア人投資家も日本において同様の待遇を受けることになります。ただし、これは関税撤廃までを意味するものではないことには留意する必要があります。

この協定は、コロンビアの、原油、ガス、石炭、ニッケル鉄、コルタン、食料、技術機器その他の分野でビジネス機会を見出す日本人投資家にとっても、また、日本において食用油、養鶏、ココア、観賞用熱帯魚、ろう、工芸品、有機化学製品、宝石、皮製品といったような分野に投資を行うコロンビア人投資家にとっても、大きな恩恵をもたらすものであります。

但し、この協定がコロンビアにおいて批准され、発効されるためには、最終ステップとして、当該法律がコロンビア憲法裁判所において承認される必要があります.

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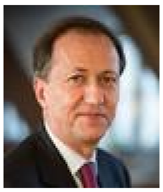

Olivier Cousi

“Right to oblivion”: a new concept in Europe?

23 June 2014

Publication | France - Data Protection

By partner **Olivier Cousi**

The historical decision rendered by the European Court of Justice in its decree of 13 May on the right to oblivion gives substance, twenty years later, to a principle included in the 95/46/EC directive of 1995 indicating that, in the name of the protection of privacy, European country citizens have rights as regards those managing the handling of their private data. The European Court of Justice highlighted this point at the beginning of its decree, thereby clearly placing the safeguard of fundamental rights as the basis of its decision.

The concept of asserting a “right to oblivion” appeared with the generalisation of Internet usage that placed citizens at the mercy of a more or less faithful image of themselves circulating online, and which constitutes their e-reputation.

In 2013, the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament adopted a “Package” on personal data, aiming to replace the 1995 Directive and including the right to request the deletion of data.

The ECJ has decided that the search engine operator must, when requested, delete links to web pages if the web user's request is justified. The decree does not, however, put in place a right to the removal of the website from the index: the links remain accessible, in particular from the US search engine Google.com, to a European web user.

The solution put in place by the Court is therefore not as strict as the draft regulation that will replace the 1995 directive, which recommends the complete deletion of data and which must be adopted "at the latest in 2015" by France and Germany. The entry into force of the Regulation should also render the Court's decision null and void.

The scope of the 13 May decree must however be put into perspective, since the right to removal of websites from the index is already in place in several European Union countries, including in France.

The real significance of the decision of 13 May 2014 lies rather in the territorial application of the 1995 directive, which provides that the domestic law in which the decree is transposed applies in particular when "the processing of personal data is carried out as part of a body's activities" on the territory of an EU member state (art. 4). Google Inc. is thus responsible for the handling of such data, even in those European countries in which its subsidiaries operate.

You will find a detailed presentation of this topic in French journal *Option Finance* No. 1275 dated Monday 23 June 2014, as well as an article written by Olivier Cousi on the specialised ***Journal du Net*** website.

LAW FOR THE PROTECTION OF NEW VARIETIES OF PLANTS IN GUATEMALA

On June 26, 2014 the Law for the Protection of New Varieties of Plants, Decree Number 19-2014 of Congress, was published in the Official Gazette (Diario de Centro America). This Law was enacted so that Guatemala may accede to the Convention that creates the International Union for the Protection of New Varieties of Plants (UPOV). The Law regulates the means by which breeders of new varieties of plants may obtain plant variety protection as intellectual property rights. It comes into force on September 26, 2014, except for provisions regarding the extension of necessary funds out of the State's general budget of revenue and expenses, which are in force since June 27, 2014.

ABNR

COUNSELLORS AT LAW

NEWS DETAIL

07/07/2014

REGULATION OF INDONESIA DEPOSIT INSURANCE CORPORATION ("LPS") ON PROCEDURES TO SELL SHARES OF FAILING BANKS

The LPS (Lembaga Penjamin Simpanan) has issued a new regulation, Number 1/PLPS/2014 of 2014, on Procedures to Sell Shares of Failing Banks (“Regulation 1/2014”), which replaces the older Regulation Number 2/PLPS/2011. The new regulation is set to provide clearer and more thorough information regarding procedures to sell shares of failing banks.

Regulation 1/2014 among others provides the following:

- LPS must sell the entire shares of a Saved Bank. The sale of the shares may be conducted by way of (i) strategic sale; and/or (ii) other methods which are not in contradiction with the prevailing laws and regulations. The sale of the shares through the capital market as previously regulated under Regulation Number 2/PLPS/2011 is no longer permitted.
- The sale of the shares must be conducted within the following time frame:
  1. For Failing Banks With No Systemic Impacts: 2 (two) years as of the commencement of the settlement by LPS;
  2. For Failing Banks With Systemic Impacts: 3 (three) years as of the date of the submission of their management by the Coordinating Committee to LPS.

It is interesting to note that the following former requirements are no longer in place:

- The requirements for the prospective investors to (i) have experience in the banking industry and/or show capability to contribute to the progress of Indonesian banking industry; and (ii) not be listed in the banking industry negative list.
- In the event the equity of a Failing Bank is positive, the former requirement for an agreement between LPS and the previous shareholders of the Bank regarding the use of the proceeds from the sale of the Bank’s shares. (by: Hafez Aditya Komar)

NautaDutilh

Information & Communication Technology

Privacy & Data Protection Luxembourg | EU

Data breaches in Luxembourg after eBay - What to do?

Wednesday 9 July 2014

In May 2014, eBay announced that it had fallen victim to a cyber-attack. It stated that a large database of passwords and non-financial personal data had been compromised and advised users to change their passwords.

On 27 May 2014, the Luxembourg data protection authority, the Commission Nationale pour la Protection des Données ("CNPD"), which is competent given eBay is established in Luxembourg, subsequently announced that it was looking into the circumstances of the data breach as well as the consequences for the integrity and confidentiality of the personal data of eBay users in the EU.

The revelation of the data breach is hardly shocking, as eBay is yet another name on the long list of e-commerce businesses and other online platforms having suffered data breaches. eBay, however, has subsequently been blamed for mishandling the data breach and failing to adequately notify its clients, with the President of the CNPD labelling the incident a global disaster. The question therefore arises whether there is a better way to deal with a data breach in Luxembourg, and if so, how. This is not an easy question as Luxembourg data protection law so far does not provide for any legal framework regarding the notification of data breaches, a situation that may change in the near future.

1. Luxembourg legal framework

a) Before the breach

The Law of 2 August 2002 on the Protection of Persons with regard to the Processing of Personal Data ("Data Protection Law") (as amended) imposes a number of obligations on a "data controller". The latter is defined as the natural or legal person, which solely or jointly with others determines the purposes and methods of processing personal data. By Article 22, the controller must implement appropriate security measures to prevent unauthorised access to the data or accidental or unlawful destruction or loss. Furthermore, the controller must remain in control of the security measures and must therefore, if choosing to sub-contract processing activities, choose a sub-contractor that provides sufficient guarantees of security.

Article 23 specifies that the necessary measures to use will depend on the risk of a data breach as well as the state of the art and the cost of their implementation. As such, the controller must first assess the risk that the processing activities entail and should thus in principle proceed to a privacy impact assessment. It must subsequently decide on the various security measures to put in place. In practical terms this means, of course, that low-level data processing of publically available information will not need to be subject to measures as stringent those required for personal information such as financial data. On the other hand, choosing to sub-contract will necessarily entail a high risk element and all agreements with the sub-contracts must therefore be rigorously reviewed to ensure that the sub-contractor offers a sufficient level of security measures.

In order to verify that each controller complies with this requirement, the CNPD may request a description of the measures in place as well as any subsequent major changes. These must be sent to them within fifteen days. Controllers must therefore ensure that they have clear documentation detailing the measures in order to expediently comply with the CNPD's request.

Furthermore, most personal data processing activities are subject to a general notification to the CNPD, in which the security measures must be described in a general fashion. Some critical processing activities, however, require a prior authorisation from the CNPD (*e.g.*, the processing of the results of the monitoring of the use of IT tools), in which case a more detailed description of security measures need to be provided and the CNPD will assess the sufficient character of the security measures in the course of the authorisation procedure.

b) After the breach

In Luxembourg, data breach notification requirements exist only in sector specific legislation:

- Legislation applicable to telecom providers requires the latter to notify a breach to the CNPD within 24 hours. Where the breach is likely to negatively affect the personal data or the privacy of an individual, the telecom provider must inform this person without undue delay. If the service provider has not informed the persons concerned of the breach, the CNPD may, after having examined the circumstances of the case, demand that the service provider do so. On the other hand, if the service provider proves to the CNPD that appropriate security measures had been put in place and that they had been used in relation to the data that had been compromised in such a way as to render them illegible to anyone not authorised to access them, the service provider will not need to notify the person affected by the data breach. Therefore, service providers who use encryption may not need to notify persons concerned by a security breach.
- According to Circular 11/504 of the CSSF, the Luxembourg financial sector surveillance authority, financial establishments have the duty to report IT attacks and most certainly when an IT attack gives rise to an actual data breach.

The Data Protection Law, however, contains no provisions obliging controllers to notify neither the CNPD nor the affected data subjects of any security breach. However, it can be more than useful to notify the breach to the CNPD (albeit informally) or to the data subjects:

- Firstly, the CNPD will be more inclined to work with the controller where the controller has demonstrated a willingness to counteract any damage that the data breach might have caused.
- Secondly, according to general principles of Luxembourg (contractual or tort) liability law, a party causing damage to another party has the obligation to adopt damage mitigating measures. This means that where the controller has suffered a data breach, it has the obligation to notify the breach to the data subject, if such a notification is likely to diminish the damage caused.

Once aware of the breach or suspecting of a breach, the CNPD may conduct investigations into the processing activities of the controller. By Article 32 of the Data Protection Law, the CNPD is entitled to carry out the necessary checks to ensure that the controller complies with data protection requirements. This includes direct access to the premises of the controller. In the eBay case, for instance, the CNPD will look into the security measures that the business had in place and assess their effectiveness. Thus, for data breaches, clear documentation from the CNPD will prove useful in complying with requests from the CNPD.

Unlike several other national authorities in the EU, the CNPD has no powers of financial sanctioning. Article 33 of the Data Protection Law, however, grant it administrative sanctioning powers, such as a temporary or definitive ban on processing or ordering the publication of the decision. A ban - be it temporary or definitive - would certainly prevent the controller from effectively carrying out its business. The publication of the CNPD decision would result in affected data subjects becoming aware of the breach, which increases the risk of the latter seeking remedies against the controller.

Additionally, the CNPD or the data subjects concerned can defer the case to the criminal authorities. Per Article 25 of the Data Protection Law, the controller can be liable to a prison sentence of between eight days and six months and/or a fine of between 251 and 125,000 EUR if found not to have implemented sufficient security measures. Thus, while the CNPD may have no powers of direct financial sanctioning, controllers may nevertheless have a fine imposed on them.

2. Data breaches in the rest of the Benelux

Luxembourg is not alone in needing to find an efficient way to deal with data breaches. Across the European Union, legislators and data protection authorities are increasingly looking to impose notification obligations on controllers. This is particularly true for the two other Benelux countries:

- The Dutch legislator is currently debating a bill which introduces a duty to notify the Dutch Data Protection Authority ("CBP") and the relevant data subjects in the event of a breach. The controller must immediately notify the CBP of a breach, if it can reasonably be assumed that there is a significant risk of negative consequences for the protection of personal data. If the breach will probably have unfavourable consequences for the data subject, the latter must equally be notified immediately.
- The Belgian Data Protection Authority, the Privacy Commission, has issued a recommendation which provides for a stricter duty to notify data breaches. In the event of a breach, the Privacy Commission must be notified of the cause of the breach and the resulting harm within 48 hours. The controller must thereafter launch a public information campaign within 24 to 48 hours of the former notification. While the guidelines are merely recommendations, the Commission states that controllers are expected to strictly follow the procedures set out therein.

3. European Union Initiatives

a) Proposed General Data Protection Regulation

European Union legislation currently in the pipeline also provides for obligatory data breach notifications. The proposed General Data Protection Regulation (COM (2012) 11) as approved by the European Parliament ("EP") requires all controllers to notify the national data protection authorities without undue delay in the event of any data breach. Afterwards, the controller must communicate the data breach to the data subjects without undue delay, if the data breach is likely to adversely affect the protection of the personal data, the privacy, the rights or the legitimate interests of the data subject. The draft Regulation foresees certain exceptions to the data subject notification requirement, notably where the national data protection authority is satisfied with the controller's implementation of appropriate technological measures for the data in question.

Moreover, the draft Regulation provides that a controller who conducts processing activities which present specific risks, must carry out a data protection impact assessment. Examples of processing activities presenting specific risks are the processing of the personal data of more than 5,000 data subjects over a 12 month period or the processing of employee data in large scale filing systems.

The impact assessment shall take into account the entire lifecycle of the processing, thus also potential data breaches. It shall be documented and shall contain, amongst others, an assessment of the risks to the rights and freedoms of data subjects as well as a list of safeguards, security measures and mechanisms to ensure the protection of personal data. Controllers shall, furthermore, conduct periodic compliance reviews to ensure that their processing activities comply with the assurances made in the impact assessment.

If the impact assessment indicates that the processing activities involve a high degree of specific risks to the rights and freedoms of data subjects, such as by the use of specific new technologies, the controller's data protection officer, with the involvement of the national data protection authority charged with supervising the controller, should be consulted before the start of the processing activities.

The draft Regulation equally foresees granting all national data protection authorities the power to impose fines. Failure to comply with the data breach notification requirements could entail a fine up to 100,000,000 EUR or up to 5% of the annual worldwide turnover.

The Council of the European Union ("Council") has not yet taken a final position on the full text. However, in December 2013, a text was made public which retained an amended version of the data breach notification requirements.

b) The Network and Information Security Directive

The much less discussed proposal for a Network and Information Security Directive (COM (2013) 48) also provides for data breach notification requirements. Following its approval by the EP, it sets out that all market operators of critical infrastructures (such as energy, transport, banking, stock exchange and healthcare) must notify the relevant national authority of any incident having an impact on the continuity of the service. Such an impact could consist of a data breach and theft of data, for example. The Council has, as of yet, not adopted a position vis-à-vis this proposal but is expected to do so soon.

Conclusion

The sanctions that the CNPD could impose, both now and possibly in the future, make it clear that controllers of personal data should know how to deal efficiently with data breaches. Furthermore, considering the moves across the entire EU to make data breach notifications obligatory, controllers are advised to:

1. Proceed to a privacy impact/risk assessment: even when such assessment is not formally required (yet) it is the only manner to assess whether the security measures to put in place are sufficient.
2. Maintain documentation related to security measures and keep security measures up-to-date.
3. Plan in advance how to deal with a data breach.
4. Inform the CNPD of the data breach: even though there is no obligation to notify data breaches (yet), notifying the CNPD (albeit informally) would help the controller determine the potential effects of the data breach including the need to notify concerned persons.

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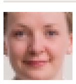

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TAX ALERT

July, 2014

INVOICES

On April 25, 2014, a jurisdictional precedent issued by the Supreme Court of Justice pertaining to invoices was published in the Judicial Gazette of the Federation. This precedent was also published in the webpage of the Tax Administration Service on June 30, 2014.

The precedent provides that, although the Federal Fiscal Code provides for the obligation of those who use invoices to deduct or credit certain concepts, to ensure that the invoice meets the requirements of the Federal Fiscal Code, the foregoing does not imply that such obligation constrains the recipient of the invoice to verify compliance with tax obligations of the issuer.

The resolution that led this Supreme Court's precedent states that for an expenditure or disbursement to be considered creditable or deductible for tax purposes, the taxpayer must demonstrate:

1. That the relevant transaction has an economic purpose.
2. That an actual and valid support of the transaction exists.

In conclusion, if a taxpayer intends to deduct or credit an amount supported with an invoice, in addition to requesting a document that meets the tax requirements, it will be necessary to hold documentation that supports the relevant transaction.

In case you require additional information, please contact the partner responsible of your account or any of the following attorneys:

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Simpson Grierson

Recent Competition Law Developments

27 Jun 2014

There may be change on the horizon for New Zealand's competition law.

First, there has finally been some movement on the Commerce (Cartels and Other Matters) Amendment Bill. The Bill's second reading started on Tuesday this week. So, there is at least a chance that it will be passed before Parliament dissolves for the election. We will keep you updated if it looks to be progressing further.

The Productivity Commission recently released its final report on "Boosting Productivity in the Services Sector" (available here (http://www.productivity.govt.nz/sites/default/files/services-inquiry-final-report.pdf)). As part of its report, the Commission made some recommendations as to how competition law could be improved, including:

- a detailed review of section 36 of the Commerce Act (although the Productivity Commission moved away from its specific recommendation for an effects test (which Mark Berry, the Chair of the Commerce Commission, has publically stated he favours), which was made in its initial report, although it still recommends that it be considered);
- a review of the Cartels Bill several years after it is passed, to ensure criminal sanctions are not having an undue "chilling" effect on pro-competitive collaborations; and
- the inclusion of a general "market inquiry" power for the Commerce Commission (ie an ability to carry out detailed reviews of how markets operate so as that any competition concerns can be addressed).

Following the Productivity Commission's report, the Government released its "Business Growth Agenda" (available here (http://www.productivity.govt.nz/sites/default/files/services-inquiry-final-report.pdf)). In the report, the Government confirms that it will undertake a review of section 36, and also goes on to note that it will undertake a deeper review of competition law provisions, in particular the resale price maintenance and cease and desist regime. It will be interesting to see whether this results in a full "root and branch" review of the Commerce Act, like the Australian review that is currently underway.

If you would like any further information on any of the above, then please feel free to contact us.

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A BONUS FOR COMPLIANT BIDDERS

By Lize Louw, Director, Patrick Mayer, Senior Associate and Charlotte Mankgela, Associate

LEGAL BRIEF
JULY 2014

In recognition of the effort that prospective independent power producers have put into their renewable energy projects in Windows 1, 2 and 3 of the South African Department of Energy (DoE)'s Renewable Energy Independent Power Producers (REIPP) Procurement Programme, the DoE has exempted those bidding into Windows 4 and 5, and who already have "compliant" projects, from having to resubmit voluminous sections of qualification criteria relating to the land on which the project will be developed and the environmental consents required for the project, as set out in part B of the Request for Qualification and Proposals issued by the DoE on 26 May 2014 under Tender No: DOE/003/13/14 (RFP).

INTRODUCTION

Although some stakeholders may be disappointed that additional preferred bidders were not announced for Window 3, this exemption may nonetheless go some way towards reducing the time spent and the costs incurred by bidders in Window 4.

To qualify for the exemption, the bid response for which an exemption is sought must:

> rely on the same project site, project layout and technology as those contained in the bid response submitted for the project in Windows 1, 2 and/or 3

> have been judged by the DoE to be "compliant" in any earlier bid submission phase, but ultimately not successful because of other considerations such as pricing.

For structuring purposes, it is not necessary to use the same bidding entity for a compliant project (which may be useful, for example, for consortium bids). However, a bidder claiming the exemption must provide sufficient information to the DoE to enable the DoE to confirm the fact that the project site, project layout and technology are identical to the project site, project layout and technology used in a previous bid response.

Regarding "compliant" projects, we have seen letters from the DoE addressed to bidders in Window 3 confirming that the bid response met all of the threshold requirements of Part B of the RFP, but was ranked behind other bid responses when evaluated on considerations such as price and economic development contributions in accordance with Part C of the RFP.

We have not however seen the DoE issue any such confirmatory letters prior to Window 3 and there may be bidders in Window 3 who are unclear about the judgment passed by the DoE on their projects. In these circumstances, a returning bidder should ask the DoE for such a letter in time for bid submission into Window 4. The DoE has undertaken in this regard to notify all unsuccessful bidders whether their bid response passed the Part B evaluation (and so was a compliant bid) but was unsuccessful on the Part C competitive evaluation only; or whether the bid response failed any part of the Part B evaluation and so was not considered to be a compliant bid. Only in instances where the bidder was previously notified that the project passed all aspects of the Part B evaluation (and so was a Compliant Bid), can the exemption be claimed.

EXEMPTION QUALIFICATION

If a project qualifies for the exemption, the bidder will return Appendix AA as part of its bid submission, which is a new "Returning Compliant Bidder Declaration". This is a simple two-page letter in which the bidder confirms that it wishes to take advantage of the exemption and qualifies to do so because:

- it submitted a bid response in Window 1, 2 and/or 3
- the DoE notified it that while its bid response was unsuccessful, the bid response passed the Part B evaluation (a copy of this letter must be attached to Appendix AA)
- the bid response was in respect of a project site, project layout and technology which is identical to the site, layout and technology included in the current bid response to be submitted by the bidder in Window 4 or 5. A full property description is required. The descriptions of the project and the facility bid in an earlier window must also be identical to those included in the bid response submitted for Window 4 or 5.

If a bidder qualifies for the exemption, then it does not have to include the returnable schedules required in response to the land acquisition and land use criteria and evaluation sections of the RFP, or the environmental consent criteria and evaluation sections of the RFP; i.e., no other information is required to be submitted by a returning bidder in respect of a compliant project with its bid response, for the purpose of demonstrating compliance with the Land Acquisition and Land Use Criteria and Evaluation (clause 2.3 of Part B [Qualification Criteria]), and the Environmental Consent Criteria and Evaluation (clause 2.4 of Part B [Qualification Criteria]).

DOING AWAY WITH THE UNNECESSARY

The volumes containing these returnable schedules have not yet been published for Window 4, but if one goes on the returnable schedules contained in Volume 2A of the RFP published for the third bid submission phase, then not having to resubmit these sets of information should make a material difference to the amount of time and energy which returning bidders with compliant projects need to spend on their Window 4 bids. For example, it should not be necessary for a returning bidder with a compliant project to provide copies of the title deed, notarial lease or other document evidencing real rights in and to the project site. Nor should it be necessary to include authorisations relating to compliance with environmental laws, water use, land use, subdivision, removal of restrictive conditions, rezoning and the like for that project as envisaged in clauses 2.3 and 2.4 of Part B (Qualification Criteria) of the RFP.

CONCLUSION

Of course these authorisations and consents still need to be in place for the lawful operation of a power generation facility and will remain a key component of the bankability of the project to the extent applicable. Accordingly, having been obtained in a previous window, they need to remain valid and of full force and effect on the relevant bid submission date.

Even if a returning bidder has projects which qualify for the exemption, it need not claim those exemptions, but is free to bid qualifying projects as if for the first time and need not explain why it has chosen to do so.

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ABOUT WERKSMANS ATTORNEYS

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Business entities need not issue withholding and non-withholding tax statements and dividend vouchers under certain circumstances starting from year 2014

06/23/2014

Josephine Peng / Alvin Chen

According to the latest amendments to Articles 94-1 and 102-1 of the Income Tax Act, which were promulgated on 8 January 2014, a statutory tax withholder need not issue withholding and non-withholding tax statements, dividend vouchers and other relevant documents ("Tax Documents") to an income recipient if the information that would have been stated thereon ("Relevant Information") has been duly reported to the tax authorities, and the following conditions are met:

(i) the income recipient is an individual residing within the territory of the Republic of China (**ROC**) or a profit-seeking enterprise, an organization, an institution, a practitioner, or a trustee of a trust, which has a fixed place of business within the territory of the ROC;

(ii) the Relevant Information has been entered into the Income Information Inquiry System by the tax authorities during the income tax return filing period; and

(iii) other conditions set forth by the Ministry of Finance (MOF).

The MOF's Income Information Inquiry System contains, among others, Relevant Information on ROC individual tax residents. In this regard, the MOF issued a tax ruling on 10 January 2014 (Ref. No.: Tai-Cai-Shui-Zi- 10304506650) which states that, if a statutory tax withholder reports Relevant Information on income recipients or before 5 February 2014, the statutory tax withholder need not issue Tax Documents to those income recipients who are ROC individual tax residents unless they request for them. As to other income recipients, statutory tax withholders are still required to issue Tax Documents to them.

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TAX UPDATE - JULY 11, 2014

US Supreme Court to Review Federal Jurisdiction over State Tax Cases

A recent Supreme Court action may impact taxpayers who have or are contemplating filing a lawsuit challenging a state tax law, or retailers analyzing compliance requirements under state Amazon laws. On July 1, 2014 the Supreme Court granted certiorari in *Direct Marketing Association v. Brohl*. At issue is the scope of the Tax Injunction Act ("TIA"), a law that limits a federal court's jurisdiction over state tax cases. Federal appellate courts are currently split on when the TIA precludes federal jurisdiction over state tax claims.

The case arose as a constitutional challenge to Colorado's "Amazon law," which forces some out-of-state online retailers to either collect sales tax from Colorado residents or comply with burdensome reporting requirements. Currently, more than 20 states have passed similar laws in an attempt to collect tax on online sales made by out-of-state retailers.

The United States District Court for the District of Colorado held that Colorado's Amazon law violated the Commerce Clause because it discriminates against out-of-state retailers by placing undue burdens on interstate commerce. On appeal, however, the Tenth Circuit reversed and remanded the case on the grounds that the TIA prevented the district court from having jurisdiction. As a result, Direct Marketing filed a constitutional challenge in Colorado state court and petitioned the United States Supreme Court for review of the Tenth Circuit's decision.

While the Supreme Court's ruling will likely be limited to the issue of whether the TIA precludes federal court jurisdiction, the implications will be far reaching. In the context of Amazon laws, a ruling that the laws can be challenged in federal court could ultimately result in binding nationwide (or at least circuit-wide) precedent concerning constitutionality. It could also open the door to federal lawsuits challenging other state tax statutes, especially in the context of whether such statutes pass constitutional muster. On the other hand, a ruling affirming the Tenth Circuit's decision would require the constitutionality of Amazon laws to be determined on a state-by-state basis.

The uncertainty surrounding the scope of the TIA has made it more difficult to determine the proper and most advantageous forum to file a lawsuit challenging a state tax law.

The Dark Side of Health Care Reform: The First “60-Day Rule” False Claims Act Case

07.10.14

By Adam D. Romney and Robert G. Homchick

Although the “60-day rule” has been the law for more than four years, no state or federal agency has sought to enforce it publicly until now.

The U.S. Department of Justice and New York State Attorney General’s Office recently intervened in a federal False Claims Act case in federal District Court based on allegations that a provider failed to report and refund an identified overpayment within 60 days, as required by the federal False Claims Act and the parallel New York state statute. The case at issue, State of New York, *ex rel.* Robert P. Kane v. Healthfirst, Inc. *et al.*, involves several affiliated hospitals (Mount Sinai Beth Israel, Mount Sinai St Luke’s, Mount Sinai Roosevelt, and Long Island College Hospital) operated by Continuum Health Partners (the “hospitals”). The hospitals erroneously billed New York Medicaid as a secondary payor after they had already been paid in full by Healthfirst, the patients’ Medicaid managed care plan. The billing errors were allegedly caused by a coding error in the remittances produced by Healthfirst. Although the hospitals allegedly learned of the computer coding error in February 2011, they did not make the final refund payments to New York Medicaid until March 2013.

The *Healthfirst* case is one of the first to test the bounds of the 60-day rule. The case may provide insights into the enforcement priorities of federal and state agencies, the interpretation of the 60-day rule by a federal court, and the willingness of courts to impose the massive civil penalty provisions potentially available for violations of the 60-day rule.

60-day rule refresher

Commonly referred to as the “60-day rule,” the law is based on a change in the definition of overpayments made by the Patient Protection and Affordable Care Act. More specifically, Section 6402(a) of the act requires a person who has received an overpayment to return the funds to the government and report the reason for the overpayment. The overpayment must be reported and returned by the later of: (1) the date which is 60 days after the date on which the overpayment was identified; or (2) the date any corresponding cost report is due, if applicable. The term “overpayment” is defined as any funds that a person receives or retains under the Medicare or Medicaid programs to which the person is not entitled.

The Affordable Care Act also created False Claims Act liability for persons who retained identified overpayments beyond the 60-day window. Because the retention of an

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identified overpayment is now an “obligation” under the False Claims Act, the government (or *qui tam* relators on behalf of the government) can pursue civil penalties against those who retain Medicare or Medicaid overpayments as “reverse false claims.” For each overpaid claim, the government can seek recovery of three times the claim’s value and a civil penalty between $5,500 and $11,000. The government can also exclude the person from participation in federal health care programs.

On Feb. 16, 2012, CMS issued proposed regulations for the 60-day rule. These regulations, however, have not been finalized.

Background on *Healthfirst*

Healthfirst involves the hospitals’ billing New York Medicaid as a secondary payor for Medicaid managed care patients enrolled with Healthfirst. The hospitals provided covered services to these enrollees, and were obligated to accept Healthfirst’s reimbursement as payment in full. State law prohibits the hospitals from billing New York Medicaid as a secondary insurer.

The erroneous claims submitted to New York Medicaid were caused by a computer coding issue that incorrectly indicated New York Medicaid as a secondary payment source. As a result, the hospitals balance billed New York for these services, and the state Medicaid program paid many of the claims.

The New York Office of the State Comptroller first raised the issue in September 2010. The Comptroller identified a small number of claims where New York Medicaid had been billed as a secondary insurer for services furnished to Healthfirst enrollees. The hospitals conducted an internal investigation and discovered in February 2011 that the coding error on the remittances may have affected many more claims. Robert Kane, an employee working in the revenue cycle department, was asked to investigate the error and determine the scope of potential liability. According to the pleadings on file, Mr. Kane determined that potentially 900 claims representing payments exceeding $1 million may have been wrongly submitted to and paid by New York Medicaid. He sent an email to the hospitals’ administrators describing the potential liability and, for reasons not apparent from the available court pleadings, was subsequently terminated by the hospitals. The hospitals began to make repayments to the New York Medicaid program, but did not ultimately complete the repayment process until March 2013.

On April 5, 2011, Mr. Kane filed a complaint under seal in federal district court in the Southern District of New York as a *qui tam* relator. Over a year later in June 2012, the United States issued a Civil Investigative Demand concerning the overpayments. On April 24, 2014, approximately three years from the date the *qui tam* complaint was filed, the United States filed its notice of partial intervention. On May 15, 2014, Mr. Kane filed an amended complaint on behalf of himself, the United States, and the State of New York alleging violations of the Federal and New York State False Claims Acts. Approximately one week later, the State of New York filed a Notice of Intention to Intervene. On June 27, 2014, the State of New York filed its complaint-in-intervention and, on the same day, the

United States also formally intervened.

What to watch for in the *Healthfirst* case

As one of the first cases on point, *Healthfirst* will play a role in defining the contours of the 60-day rule. Some of the specific issues that the industry will be monitoring include:

- *When did the hospitals "identify" the overpayments?*

  The 60-day rule does not define when an overpayment has been "identified," and the proposed regulatory definition of "identified" has not been finalized. Therefore, the Court may be tasked with defining when the various overpayments were "identified" by the hospitals, perhaps by focusing on when the hospitals had actual knowledge or acted in reckless disregard of the existence or amount of overpayments caused by the computing error. The Motions to Intervene include the April 5, 2011, email from Robert Kane to the hospitals' administrators that confirms at least the scope of the billing problem. The email, however, does not discuss the issue in terms of dollars. Therefore, the court could have some difficult work ahead in determining when the hospitals' had actually identified the overpayments, or in other words, when the 60-day clock began to tick. For example, the court may have to determine whether the hospitals are deemed to have "identified" the overpayments when a single employee concludes in an email that there has been an overpayment, or whether it is reasonable for the provider to conduct an investigation to verify the scope of the problem and the amount of overpayments at issue. In this context, the law should allow a provider at least the opportunity to conduct an investigation before the 60-day clock starts running.
- *Did the hospitals act with deliberate speed to report and refund the overpayments?*

  The available pleadings do not discuss the extent or scope of the internal investigation pursued by the hospitals to calculate the overpayment amount. The hospitals may have grounds for arguing that the internal processes followed in the wake of the Kane email constituted a reasonable inquiry into the matter. Anyone with on-the-ground experience in the industry knows that internal billing investigations take time and that accurate financial information that isolates claims based on the correct variables can be very difficult to generate. The hospitals in *Healthfirst* may well be able to explain the steps taken in the investigation and why the ultimate repayment of funds was a time consuming process. This aspect of the case may give the court an opportunity to assess the reasonableness of a provider's attempts to investigate and "identify" overpayments, and what effect that investigation has on the 60-day clock. Providers should keep in mind that the timeliness of any internal investigation, the credibility of the reviewers and their conclusions, and the contemporaneous documentation of the processes could be important factors in defending against an alleged violation of the 60-day rule.
- *What damages will be assessed?*

  The arsenal of damages available under the 60-day rule is daunting. If liability is established, how aggressively will the court assess damages? Will the court assess the full damages available under the 60-day rule and the FCA—treble damages + $11,000 per claim + civil money penalty for each day that the overpayment was retained? Or might the court exercise a degree of leniency based on mitigating factors, such as that the fact that the overpayment was caused by Healthfirst's computing error, and that the hospitals had already repaid the money by the time the state and federal governments moved to intervene.

- *Does your state's false claim act contain a reverse false claim provision?*

  In *Healthfirst*, the New York State False Claims Act is sufficiently broad for the state's attorney general to attempt recovery of damages and penalties resulting from the hospitals' alleged retention of an identified overpayment. Like its federal counterpart, the New York law establishes civil penalties and treble damages liability for the retention of any overpayment. Therefore, the hospitals in *Healthfirst* may face treble damages and civil penalties under two separate statutes. Providers need to be aware of their own state's false claim laws and whether such laws create liability for the retention of known overpayments. False claim statutes vary widely from state to state, and many do not include a "reverse false claim" provision.

Conclusion

The *Healthfirst* case could be extremely influential on the interpretation of the 60-day rule and the application of the reverse false claims provision. Regardless of the outcome of *Healthfirst*, however, this case is likely a harbinger of things to come. The 60-day rule provides the government with a new weapon in its war on so-called health care "fraud," enabling it not only to recover identified Medicare and Medicaid overpayments, but also to collect hefty civil penalties.

Disclaimer

Investigations, White Collar and Fraud Alert
July 9, 2014

See note below about Hogan Lovells

What are the implications of *In Re Kellogg Brown & Root, Inc.*[1] on privilege concerns in an internal investigation?

While companies can breathe a sigh of relief following the D.C. Circuit Court's recent unanimous ruling in *In Re Kellogg Brown & Root, Inc.*, overturning the District Court's decision in *U.S., ex rel. Barko v. Halliburton Co.*, there are precautions companies should take to reduce the risk of disclosure of privileged materials generated during internal investigations. While the D.C. Circuit Court's ruling reinforced the strength of the attorney-client privilege and work product doctrine in the District of Columbia, the lower court's narrow construction of these protections nevertheless demonstrates the importance of simple precautions companies should consider when undertaking internal investigations in order to reduce the risk of privilege disputes.

Trial court rejects privilege

In its March 2014 decision,[2] the United States District Court for the District of Columbia found that no attorney-client privilege or work product immunity attached to Kellogg Brown & Root's (KBR) investigation of a qui tam plaintiff's allegations of corruption related to government subcontracts. KBR's compliance office conducted an internal investigation, as required both by law under the Federal Acquisition Regulation (FAR) and by its own internal policy. The plaintiff, Barko, sought production of documents related to the company's internal audits and investigations of his allegations, over which KBR asserted claims of attorney-client privilege and work product immunity. Following an *in camera* review of these internal records, the court noted that the reports were "eye-openers" in showing that KBR employees had steered business and otherwise provided preferential treatment to a particular third party, who continued to receive contracts despite poor performance and repeated attempts to double bill.

In rejecting KBR's assertion of the attorney-client privilege, the District Court applied a "but for" test, requiring that KBR show that "the communication would not have been made 'but for' the fact that legal advice was sought."[3] The court found that the attorney-client privilege did not apply here. Because the investigation was undertaken primarily as a result of regulatory requirements and corporate policies, KBR would have conducted the internal investigation regardless of whether they were seeking legal advice. The district court noted in support of its decision

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that the employees who were interviewed had not been informed that the purpose of the interview was to obtain legal advice, nor would they have been able to infer the legal nature of the interview, given that the interviews were not conducted by attorneys.

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The District Court similarly rejected KBR's argument that the work product doctrine applied. While the District Court acknowledged that documents created by non-attorneys could be protected by the work product doctrine, that protection only applied when the investigation documents were prepared or obtained in anticipation of litigation. The court stressed that the party asserting the work product doctrine bears a heavy burden and must show that the documents were not prepared in the course of ordinary, non-litigation business. In *Barko*, the District Court determined that because "any responsible business organization would investigate allegations of fraud, waste, or abuse," this internal investigation was not conducted for litigation purposes and, thus, the documents created during that investigation were not protected by the work product doctrine.[4]

Circuit Court vacates District Court's production order

On appeal, the U.S. Court of Appeals for the D.C. Circuit held that the District Court's decision was "irreconcilable" with the protections afforded to companies under *Upjohn*, noting that the facts of the instant case were "materially indistinguishable" from those of *Upjohn*. The Circuit Court rejected several of the distinguishing characteristics relied upon by the District Court. For instance, whereas the District Court stressed that KBR's investigation was conducted by non-attorneys, the Circuit Court instead highlighted that these interviews were conducted at the direction of lawyers and that such communications are routinely protected by the attorney-client privilege. Similarly, the court noted that *Upjohn* did not require any "magic words" notifying employees that the purpose of the investigation was to obtain legal advice, but KBR had, nevertheless, informed employees that the legal department was conducting a confidential investigation.[5]

The Circuit Court also rejected the lower court's use of the "but for" test when analyzing attorney-client privilege, rejecting the lower court's distinction that KBR's investigation was carried out pursuant to regulatory obligations, rather than to obtain legal advice.[6] Instead, the Circuit Court applied the "primary purpose" test, determining that there need not be only one investigatory purpose for the attorney-client privilege to apply. Providing or obtaining legal advice must be one of the significant purposes of the investigation, not the only purpose; the attorney-client privilege protects the materials, regardless of whether the investigation was required by statute, regulation, or company policy.

Recommendations moving forward

While the D.C. Circuit rejected the lower court's ruling regarding attorney-client privilege in *In Re Kellogg Brown & Root, Inc.*,[7] there are precautions that we would recommend in order to ensure that documents created during an internal investigation are protected by the attorney-client privilege and work product doctrine.

There are real risks to companies that find their privilege claims challenged in court. Challenges to the attorney-client privilege can lead to public disclosure of information. Although KBR ultimately succeeded in defending its privilege claims, the litigation itself caused the disclosure of the general content of certain privileged documents, including the fact that KBR employees had steered business and provided preferential treatment to a particular third party despite poor performance and attempts at double billing. Moreover, these cases are very fact specific. The District Court's ruling in *Barko* demonstrates the unpredictability of the case-by-case determinations necessarily required to resolve privilege disputes. Lastly, there are costs associated with litigating these issues. These risks, therefore, justify taking precautionary measures — measures that can help companies avoid later challenges in court.

As an initial matter, companies should not forego internal investigations for fear of disclosure of investigatory documents. While some internal investigations are required by regulation, even where not required, there may be strong benefits and advantages to conducting an internal investigation. For example, in the criminal antitrust context, a company may elect to undertake an internal investigation of possible collusive conduct prior to receipt of a grand jury subpoena or search warrant. Early detection, investigation, and risk assessment might allow a company — and its employees — to receive complete amnesty for the criminal conduct. Thus, rather than forgoing the benefits of an internal investigation altogether, we recommend companies take several steps to ensure that privileged materials are properly protected and reduce — as one can never entirely eliminate — the risk of disclosure.

- At companies where the compliance department is not part of the legal department, companies should consider appointing lawyers as key members of the compliance department, with titles that reflect such positions and responsibilities. Likewise, where non-lawyers report to lawyers, their titles and responsibilities should clearly reflect such a role. Lawyers should explicitly and clearly communicate and document their roles throughout the investigation and on all important investigative materials.
- The company should adopt clear policies to provide guidance to the compliance department about when to involve the legal department, including any investigations presenting the risk of significant legal exposure to the company. The compliance department should communicate directly with the legal department and clearly document any legal advice obtained. These policies should include formal procedures for involving lawyers in the earliest stages of an investigation and should include formal coordination with the legal department.
- Any non-attorneys carrying out the investigation should regularly report to and consult with a lawyer. It is always best for lawyers to handle substantive portions of the investigations, including interviewing witnesses. Where this is not possible or practical, the non-attorneys should document the role of the lawyers on all memoranda or other records.
- All documents created in the course of the investigation, including emails, should be clearly labeled as being part of the investigation and as having been prepared by, at the direction of, or for the purpose of seeking advice from legal counsel. This is especially true for documents that do not reflect involvement of an attorney on their face.
- At the beginning of the investigation, the compliance department should document the purpose of the investigation, noting that the investigation will assist the company in preparing for any potential litigation arising from the allegations. The department should clearly establish that they are seeking and/or providing legal advice rather than conducting the investigation for an ordinary business purpose.
- All interview subjects should receive *Upjohn* warnings and should be explicitly told that the interviewers are acting at the direction of legal counsel and that information learned at the interview will be shared with counsel and used to formulate a legal strategy to defend against possible litigation. These warnings should be clearly documented in any notes or memoranda summarizing the interview.

Given the risks, constantly evolving standards, and factual-dependent nature of privilege determinations, companies should consider implementing the aforementioned policies and procedures to ensure that their privileged materials are and remain protected. By clearly establishing the role of counsel and communicating counsel's role in investigations, companies can avoid privilege disputes and, if necessary, strengthen their position in litigation on these issues.

We will keep you informed of further developments in this area as they take place. If you have any questions, please feel free to contact any of the authors listed.

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1 *In re Kellogg Brown & Root, Inc.*, 2014 WL 2895939, No. 1:05-cv-1276 (D.C. Cir. June 27, 2014).

2 *U.S., ex rel. Barko v. Halliburton Co.*, No. 05-cv-1276, 2014 WL 1016784 (D.D.C. Mar. 6, 2014).

3 *Id.* at *5 (citations omitted).

4 *Id.*

5 *Id.* at 7.

6 *Id.* at 8.

7 Interestingly, the D.C. Circuit was silent on the lower court's interpretation of the work product doctrine. The only mention of this issue by the Circuit Court is in the decision's final sentence: "To the extent that Barko has timely asserted other arguments for why these documents are not covered by either the attorney-client privilege or the work-product protection, the District Court may consider such arguments." *Id.* at 18.

McKenna Long & Aldridge LLP

High Court Blocks Aereo: Internet Retransmission of Over-Air TV Runs Afoul of Copyright Act

July 10, 2014

Ending a dispute that has gripped the entertainment industry, a 6-3 majority of the U.S. Supreme Court has ruled that Aereo violated U.S. copyright law by the Internet retransmission of over-the-air TV broadcasts. *American Broadcasting Companies, Inc., et al. v. Aereo, Inc.* (No. 13-461). The decision is a victory for the traditional TV broadcasters, which had argued that Aereo's airwave-to-internet retransmission system was equivalent to cable television and, consequently, should be subject to the same copyright restrictions.

Aereo, a New York-based technology company, captured over-the-air broadcast signals using small, individual antennas, each no more than the size of a dime. When a subscriber wanted to watch a program, Aereo assigned a single antenna to the subscriber, captured the data on an Aereo hard drive, and shortly thereafter fed the broadcast through the Internet to that subscriber. The subscriber can then watch the program on any device with Internet access.

ABC sued Aereo in the Southern District of New York for copyright infringement. ABC alleged that Aereo was violating ABC's exclusive right "to perform the copyrighted work publicly," a right guaranteed by the Copyright Act. Aereo argued in its defense that its system did not constitute a "public" performance, as there was a single conduit of content for each subscriber, from the dime-sized antenna, through temporary storage on a hard drive, and then streaming over the Internet to an individual subscriber's (and only that subscriber's) media system. Aereo further noted that the subscriber alone selected and triggered the streaming of the programming over its dedicated equipment – Aereo itself is not directly involved in those decisions.

The U.S. District Court for the Southern District of New York (the first district court to address the issue) ruled in favor of Aereo because each of Aereo's dime-sized antennae operated as an independent, stand-alone antenna. Why is that important? Because in this respect Aereo's system closely resembled the facts in the Second Circuit's *Cablevision* decision, in which a cable television provider supplied remote-storage DVR devices that enabled customers to record and play TV programs remotely, as well as store them on the cable provider's servers. 874 F. Supp. 2d 373 (S.D. N.Y. 2012). When TV and movie copyright holders sued Cablevision for infringing their public performance right, the Second Circuit held that the transmissions had not been made "to the public" but to individuals.

Id. at 391 (citing *Cartoon Network LP, LLLP, et al. v. CSC Holdings, Inc.* 536 F.3d 121, 139 (2nd Cir. 2008) (*Cablevision*), *cert. denied*, 557 U.S. 946 (2009)). The district court found the *Cablevision* decision controlling and denied ABC's motion for preliminary injunction.[1] A divided Second Circuit affirmed. 712 F. 3d 676 (2nd Cir. 2013).

ABC petitioned to the Supreme Court, arguing that the Second Circuit had improperly conflated "performance" with "transmission," thereby avoiding proper consideration of the role of the Transfer Clause. The Copyright Act, ABC argued, considers whether the public is capable of receiving the performance of a copyrighted work, so it should not matter whether the public receives the performance "in the same place or in separate places" or "at the same time or at different times" (quoting from the definition of public performance, found at Section 101 of the Copyright Act). The fact that a program is transmitted to a subscriber through an individual transmission does not make it any less "public." Aereo, relying on the lower court's rationale and the *Cablevision* decision, responded that its service is similar to a traditional, in-home antenna and DVR, which should not be deemed a "public performance."

On June 25, 2014, the Supreme Court issued its 6-3 decision against Aereo. Relying heavily on the purpose behind the Copyright Act, the Court concluded that Aereo is publicly performing the broadcast by retransmitting the over-the-air broadcasts, even if the programming is transmitted to individual customers from a dedicated antenna.

The Court found this decision was decided before its time, by legislative action in 1976. In *Fortnightly v. Unite Artists TV*, 392 U.S. 390 (1968) and *Teleprompter v. CBS*, 415 U.S. 394 (1974), the Supreme Court addressed the legality of community antenna television (CATV) systems. CATV systems were adopted in areas where over-the-air reception was limited, and they used a shared community antenna, from which cable was run to individual homes. The Supreme Court's 1968 and 1974 decisions concluded that CATV systems ("rechanneling" a broadcast television signal) *did not c*onstitute unlawful public performance of the original broadcast feed, because their function was to extend the viewing function, rather than rebroadcast. Congress, however, overturned the *Fortnightly* and *Teleprompter* decisions when it adopted the Copyright Act of 1976, which expanded the definition of "performance" and adopted the "Transmit Clause." Slip Op. at 7.

Relying on the policy underlying the Copyright Act of 1976, and its express rejection of *Fortnightly* and *Teleprompter*, the Supreme Court made two high-level rulings regarding Aereo. First, Aereo's system (a dedicated antenna, hard drive, and Internet retransmission to a single end-viewer) constituted a "transmission" of the broadcast *by Aereo*, which is sufficient to fall under the Copyright Act. The differences between Aereo and cable TV were not sufficient to "transform a system that is for all practical purposes a traditional cable system." Slip Op. at 10. Aereo, in other words, "looks like cable TV," so Congress would want it to be regulated in the same way. *But see* Dissent Op. at 7 (taking issue with the majority's logic).

Second, the Court found that the term "public" applies to both groups and individuals, even when individuals are receiving media from a dedicated antenna (as Aereo's customers). Slip Op. at 16. Although Aereo argued that its system streams content to a single subscriber "and no one else," and that "[o]ne and only one subscriber has the ability to hear and see each Aereo transmission," the Court responded that "[i]n terms of the Act's purposes, these differences do not distinguish Aereo's systems from cable systems, which do perform publicly." *Id.* at 12. Again, as Congress took steps to regulate cable TV, the same rules should apply to Aereo, which practically resembles a television retransmission system.

Now that Aereo is unplugged, one lingering question is whether and how this decision may apply to other Internet-enabled and cloud-hosted services. On the one hand, Aereo's system architecture bears a functional resemblance to many cloud-based music and media locker systems, cloud based storage, and remote storage DVR systems. On the other hand, recognizing the concerns raised by this case (which prompted more than 25 *amicus* briefs), the Supreme Court was careful to say its decision is aimed primarily at "cable companies and their equivalents," so it should not "discourage . . . the emergence or use of different kinds of technologies." Slip Op. at 16. Will this decision present an obstacle to new innovation and technologies? Only time will tell.[2]

1 In fact, the district court noted that "in light of this Court's factual determination that each antenna functions independently, in at least one respect the Aereo system is a stronger case than Cablevision for attaching significance to such copies because, unlike Cablevision in which multiple copies were all created from a single stream of data, each copy made by Aereo's system is created from a separate stream of data. Taken in conjunction with the substantial factual parallels between Aereo's service and that in Cablevision, that Plaintiffs raise arguments profoundly similar to those already considered and rejected by the Second Circuit demonstrates, in part, why Cablevision controls this case." 874 F. Supp. 2d at 387 (citations and parenthetical discussions omitted).

2 Of interest, Aereo wrote to Judge Alison Nathan of the Southern District of New York on July 9, arguing that Aereo should be classified as a cable company. Why? Because if Aereo is equivalent to a cable company, as explained by the Supreme Court's majority ruling, then it should entitled to the compulsory license rights afforded cable television under the Copyright Act. http://blog.aereo.com/2014/07/3784/. As life, new technologies will strive to find ways to survive.

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IP NEWS

Changing or Modifying the Applicant

The most recent Official Bulletin No. 546 dated April 08, 2014 contains an Official Notice allowing the recordal of Changes on IP pending applications.

This Official Notice is of highly importance, given the fact that the PTO become very reluctant in accepting the recordal of changes against pending applications since Venezuela officially withdrew from the Andean Community.

Now, the PTO has issued the Official Notice after considering:

1) That the dynamics of worldwide trade generates changes affecting the Ownership of Intellectual Property Rights.

2) That the assignment of rights is a consensual contract governed by the national legal framework.

3) That Industrial Property Rights are goods of a private nature, against which the general property regime is applied to, thus characterized by the availability of the owner's rights.

4) The names of legal entities may change and be affected by duly recorded legal amendments.

5) That the identity of an applicant may change during the Registration procedure of a trademark and/or patent.

6) That any change that takes place against a granted trademark and/or patent, must be recorded in the official Records of the Trademark Office.

7) That at the time of filing the application the only right of the applicant is a Priority Right.

In light of the above, in order to proceed with the recordal of mergers and assignments as well as with any change of domicile or name, the following requirements must considered:

1) In the Assignment document or contract, the parties shall leave for granted the assignor is transferring its Priority Rights.

2) Also, the deed of conversion (document evidencing any change) must identify each application (e.g. trademark name and application number).

3) A request for a "Change of Applicant" (assignment, change of name or merger against a pending application), must be submitted prior to the publication of the granting of a trademark or patent.

As usual, the contract or deed must be duly Certified by Apostille and translated by Sworn Public Interpreter for filing before the Trademark Office.

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