

Pacific Rim Advisory Council
December 2017 e-Bulletin

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CONFERENCES & EVENTS

Upcoming Events

PRAC @ PDAC Toronto
March 6, 2018

PRAC 63rd International Conference
Honolulu - Hosted by Goodsill Anderson Quinn & Stifel LLP
April 21 - 24, 2018

PRAC 64th International Conference
Calgary - Hosted by Bennett Jones LLP
September 15 - 18, 2018

Visit www.prac.org for full details

MEMBER DEALS MAKING NEWS

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- ▶ BRIGARD & URRUTIA Acts in landmark Colombian offering
- ▶ CAREY Advises HP in Acquisition of Samsung Electronics' Printer Business for USD1.05 billion
- ▶ CLAYTON UTZ Acts for Denmark's CIP on investment in Australian-first A\$8 billion offshore windfarm project
- ▶ DAVIS WRIGHT TREMAINE Assists Ajinomoto North America With Ongoing Expansion
- ▶ GIDE Advises Agence des Participations de l'Etat on Sale of Renault's Shares by French State
- ▶ HOGAN LOVELLS Advises on US\$6 Billion Acquisition of Cavium, Inc. by Marvell Technology Group Ltd.
- ▶ MUNIZ Assists Sino-Portuguese joint venture Hydro Global Perú with US\$365 million loan from China Development Bank
- ▶ NAUTADUTILH Advises Lombard Odier (Europe) SA's sale to InsingerGilissen Bankiers N.V.

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BAKER BOTTS PROMOTES 11 TO PARTNER

HOUSTON, 20 NOVEMBER, 2017 - Baker Botts L.L.P., a leading international law firm, today announced the promotion of eleven lawyers to partner, effective January 1, 2018.

"This is an outstanding class of lawyers, who are key to our success, as they represent the future leadership of our firm. They showcase our diversity, represent the communities in which we work and live, and highlight our ongoing commitment to providing our clients with the highest level of service," said Andrew M. Baker, Managing Partner of Baker Botts.

The 2018 class of partners includes lawyers based in Houston, New York, San Francisco, Dallas, Austin and Moscow.

2018 New Partners for Baker Botts

Jonathan Bobinger - Corporate, Houston
Coleson Bruce - Global Projects, Austin
Brian Johnston - Intellectual Property, Dallas
Louie Layrisson - Litigation, Houston
Meghan McElvy - Litigation, Houston
Jennifer Nall - Intellectual Property, Austin
Jonathan Platt - Corporate, Dallas
Beverly Reyes - Corporate, New York
Elena Stepanenko - Corporate, Moscow
Jeremy Taylor - Intellectual Property, San Francisco
Travis Wofford - Corporate, Houston



For more information, please visit www.bakerbotts.com

CLAYTON UTZ ANNOUNCES 1 JANUARY 2018 PARTNER APPOINTMENTS

SYDNEY, 08 DECEMBER, 2017: Clayton Utz is pleased to announce the promotion of five senior lawyers to the partnership, effective 1 January 2018. They are:

Amber Agustin, Tax, Melbourne Amber joined Clayton Utz in 2005 and has built a reputation as a formidable tax disputes lawyer. Amber acts for major multinationals, ASX-listed companies and privately-held groups, providing strategic advice on the regulatory, investigative, administrative, litigation and commercial contexts of the tax system. Amber is also experienced in matters involving multi-agency investigations, ATO access visits (raids), statutory notices and challenging ATO decisions, as well as R&D tax matters, tax agent disciplinary matters and tax professional negligence claims.

Andrew Fry, Major Projects & Construction, Melbourne Andy is a specialist construction and projects lawyer who is passionate about driving innovation in the delivery of legal services. Andy is respected by clients for his commercial acumen and ability to deliver unique solutions to the complex issues that arise in procuring and delivering major infrastructure projects.

Alison Kennedy, Real Estate, Melbourne Alison joined the Clayton Utz Real Estate team in Melbourne in 2004 and is valued by clients for her ability to provide clear insight into complex commercial arrangements. Her practice spans a broad range of property-related matters, from project development and structuring, including property joint ventures and development agreements, through to property acquisitions and disposals, leasing and general property advisory work.

Jessica Morath, Pro Bono, Sydney Jessica joined Clayton Utz in 2001 and has coordinated the Pro Bono practice alongside David Hillard since 2009. She is a passionate advocate for access to justice and acts for low-income and disadvantaged clients who cannot obtain Legal Aid, specialising in victims' compensation, employment, discrimination and dispute resolution. As the firm's second pro bono partner, Jessica will continue to be a strong advocate for best practice pro bono at Clayton Utz and in the wider legal profession.

Elizabeth Richmond, Competition, Sydney Elizabeth is a specialist in competition and consumer protection law. Her practice includes advising clients from a broad range of industries on enforcement and competition litigation and investigations, merger clearances and ongoing strategic and operational advisory work. Elizabeth also has a keen interest in multijurisdictional matters and in particular, multijurisdictional investigations.

Clayton Utz Chief Executive Partner Rob Cutler congratulated Amber, Andy, Alison, Jess and Elizabeth on their appointments. "They are exceptional lawyers who are highly respected by our clients and who continue to make an outstanding contribution to Clayton Utz."

For additional information visit www.claytonutz.com

GOODSILL WELCOMES NEW ASSOCIATE

HONOLULU - 27 NOVEMBER, 2017: Elizabeth L. Sweeney has joined Goodsill as an associate in the firm's Real Estate practice group.

A graduate of UCLA School of Law, Elizabeth concentrates her practice in the areas of real estate development and finance. While in law school, she served as an extern for the Honorable Richard R. Clifton of the United States Court of Appeals for the Ninth Circuit and in the Legal Department of Hawaiian Electric Company.

For additional information visit www.goodsill.com

DENTONS RODYK SEMINAR GLOBAL TRANSPARENCY—THREATS AND OPPORTUNITIES FOR ASIAN FAMILIES

SINGAPORE, 24 NOVEMBER 2017 – For many years, high net worth Asian families have relied on banking secrecy, trustee confidentiality and the incorporation of companies in secretive offshore jurisdictions to ensure that their assets and profits would not be disclosed to tax authorities, regulators and others. But in the recent years, secrecy has been under attack by governments, not only in the United States and Organisation for Economic Co-operation and Development (OECD), but also in Asian jurisdictions.

The recent Paradise Papers scandal involving the leakage of 13.4 million files relating to offshore investments by well-known personalities has further captivated the attention of the media in Asia and globally. Banks and consultants have been prosecuted for assisting their clients to hide their wealth, and have been forced to implement complex procedures to promote transparency.

In light of a growing international push for transparency and exchange of information amongst jurisdictions for tax purposes, Dentons Rodyk conducted the Global Transparency: Threats and Opportunities for Asian families seminar on Thursday, 23 November 2017, with Senior Partner Edmund Leow, SC as the speaker of the event.

At the seminar, Edmund addressed how transparency is a global trend that will continue, and suggested possible structures for high net worth Asian families as they navigate their way through the complexities. An estimated 30 attendees turned up to hear and learn about adopting a legitimate tax planning approach, with Edmund delving into general principles and key takeaways of setting up trust and corporate structures.

For more information, visit www.dentons.rodyk.com

GIDE LAUNCHES GIDE VENTURE ONLINE PLATFORM DEDICATED TO START-UPS

PARIS, 07 DECEMBER, 2017: Drawing on its expertise in the fields of investment and venture capital, and against a particularly buoyant backdrop for French Techs, Gide is pleased to announce the launch of its Gide Venture website, wholly dedicated to entrepreneurs and start-ups.

A first on the French market, Gide Venture embodies the firm's capacity for legal and technological innovation, and its desire to support access to legal counsel for players whose projects' legal certainty is of paramount importance.

Entrepreneurs will thus be able to freely access essential and automatically customisable legal documents drafted by Gide lawyers, articles of association in particular, so that they may start their activity in the best possible circumstances. Operational advice from all the firm's practice areas and inspiring tips from entrepreneurs are also available on the website.

For Stéphane Puel, Managing Partner of Gide: "Gide Venture illustrates our ambition to set innovation and knowledge-sharing at the heart of our firm's strategy. Legal innovation has always been part of Gide's DNA, and new technologies are now also fully part of it."

Led by partners Pierre Karpik and David-James Sebag, the firm's Venture team is recognised as one of the most active on the market. Its portfolio of operations is without compare, with over 3 billion euros raised these past 10 years. « Le cabinet conseille des investisseurs et des sociétés en croissance, et intervient dans les opérations les plus emblématiques du marché » (The Legal500).

The website is accessible here: www.gide-venture.fr

RICHARDS BUELL SUTTON WELCOMES TWO NEW ASSOCIATES

VANCOUVER - 04 DECEMBER, 2017: We are pleased to announce that **Una Urosevic** and **Ola N. Stoklosa** have joined the firm. Una is a member of our Personal Injury Practice Group and has experience handling personal injury and insurance defence matters. Ola is a member of our Family Law Practice Group and focuses on asset division, business valuations, spousal & child support, division of parenting time, mobility and enforcement of orders.

For additional information visit www.rbs.ca

BAKER BOTTS

REPRESENTS TALLGRASS ENERGY PARTNERS IN \$250 MILLION OFFERING OF ADDITIONAL SENIOR NOTES

HOUSTON - 12 DECEMBER, 2017: Deal Description: Tallgrass Energy Partners, LP (NYSE: TEP) ("TEP") announced on December 7, 2017, that it, along with Tallgrass Energy Finance Corp., a subsidiary of TEP, priced a private offering of \$250 million aggregate principal amount of its 5.50% Senior Notes due 2028 (the "Additional Notes"). The offering closed December 11, 2017. The Additional Notes were issued at 101.5% of par, plus accrued interest from September 15, 2017.

TEP intends to use the net proceeds of the offering to repay outstanding borrowings under its existing senior secured revolving credit facility.

Baker Botts L.L.P. represented TEP in the offering.

Baker Botts Lawyers/Office Involved: Corporate/Finance: Mollie Duckworth (Partner, Austin); Dan Tristan (Partner, Houston); Courtney Fore (Senior Associate, Austin); Jennifer Wu (Associate, Austin); Allison Lancaster (Associate, Austin); Leah Davis (Associate, Austin). Tax: Mike Bresson (Partner, Houston); Jon Nelsen (Partner, Austin); Leah Patrick (Associate, Houston).

For more information, please visit www.bakerbotts.com

BRIGARD URRUTIA

ACTS IN LANDMARK COLOMBIA OFFERING

BOGOTA - DECEMBER, 2017: Colombia's largest utilities company, Empresas Públicas de Medellín has entered into an international notes offering worth 2.3 trillion pesos (US\$766 million) – the largest ever global debt tap in Colombian pesos.

The underwriters hired Milbank, Tweed, Hadley & McCloy LLP in New York and Brigard & Urrutia Abogados in Bogotá.

Investors bought 60% of the bonds on the international market, while the remaining 40% were sold to Colombian buyers. The funds raised will go towards the prepayment of a syndicated loan agreement entered into by EPM in 2015.

The deal closed on 8 November.

Counsel to the HSBC, Bank of America Merrill Lynch and BBVA Brigard & Urrutia Abogados Partners Manuel Fernando Quinche and Luis Gabriel Morcillo, and associates María Camila Ordoñez and Juan Camilo Arbeláez in Bogotá.

For additional information visit www.bu.com.co

CAREY

ADVISED HP IN ACQUISITION OF SAMSUNG ELECTRONICS' PRINTER BUSINESS FOR USD1.05 BILLION

SANTIAGO - 01 DECEMBER 2017: The transaction was structured as an asset purchase deal through the execution abroad of a Master Purchase Agreement. The Master Purchase Agreement provided for the execution of Local Conveyance Agreements in each of the jurisdictions involved in the transaction. Carey's advice extended to corporate, tax and labor matters for the transfer of assets, liabilities and employees related to the transferred business from the seller's local subsidiary to the buyer's local subsidiary.

Carey advised HP through a team led by partners Alfonso Silva, Jorge Ugarte and Francisca Corti, counsel Eduardo Martin and associates Manuel José Alcalde, Javier Undurraga, Carla Karzulovic and Cristóbal Silva.

For additional information visit us at www.carey.cl

CLAYTON UTZ

ACTS FOR DENMARK'S CIP ON INVESTMENT IN AUSTRALIAN-FIRST A\$8BILLION OFFSHORE WINDFARM PROJECT

SYDNEY, 07 DECEMBER 2017: Clayton Utz has acted as Australian legal counsel to Danish fund manager Copenhagen Infrastructure Partners (CIP) on its partnership with Australia's Offshore Energy Ltd (Offshore Energy) to develop the proposed A\$8 billion 2GW "Star of the South" project - Australia's first offshore windfarm, and the country's largest ever windfarm project. Watson Farley Williams acted as CIP's global counsel with Bruun & Hjejle acting as CIP's Danish counsel, both having worked with CIP on numerous offshore wind projects.

Through its infrastructure fund Copenhagen Infrastructure III K/S and with Copenhagen Offshore Partners leading the technical development, CIP will partner with Offshore Energy to develop the project, plans for which were announced in June this year. The project will be built in the Bass Strait, 10-25 kilometres off the south coast of Gippsland in Victoria, and connect to existing grid infrastructure in the Latrobe Valley.

The project utilises a unique structure that allows CIP to complement Offshore Energy's significant local expertise and experience by leveraging off CIP's international expertise in delivering large-scale offshore wind farms.

CIP is a market-leader in the offshore wind space, with interests in offshore wind projects in the United Kingdom, Germany, the US, Canada and Taiwan. The Star of the South project marks CIP's first foray into the Australian market.

Clayton Utz partners Peter Staciwa (Projects and Finance) and Rory Moriarty (Corporate) led the firm's deal team which also comprised partners Faith Taylor (Electricity) and Damien Gardiner (Environmental). This internationally experienced team brought together their specialist projects, corporate, environmental, energy regulatory and finance expertise to structure, negotiate and document CIP's partnership arrangements with Offshore Energy in an extremely tight timeframe.

Peter Staciwa said the Star of the South project was an exciting development for both Clayton Utz and Australia's renewable energy industry. In an increasingly competitive renewables marketplace, it is an example of a growing trend of financial sponsors such as CIP partnering at an early stage with project developers to ensure not only that the sponsor has greater investment certainty, but also that the project developers have access to the necessary resources to get the project off the ground.

The project also highlights that Clayton Utz's strategy to remain independent and partner with best-in-market firms such as Watson Farley Williams and Bruun & Hjejle is delivering results for both our domestic and international clients.

Looking ahead, while another significant offshore wind project in the short term is unlikely, Peter does expect a number of these early-stage project developer and sponsor arrangements (especially in the renewables sector) to continue into the New Year.

For additional information visit www.claytonutz.com

Upcoming Events

PRAC @ PDAC Toronto Reception—March 6, 2018

PRAC 63rd International Conference
Honolulu - Hosted by Goodsill Anderson Quinn & Stifel LLP
April 21—24, 2018

PRAC 64th International Conference
Calgary - Hosted by Bennett Jones LLP
September 15—18, 2018

For more information visit www.prac.org

DAVIS WRIGHT TREMAINE

ASSISTS AJINOMOTO NORTH AMERICA WITH ONGOING EXPANSION

PORTLAND - 21 NOVEMBER, 2017: Davis Wright Tremaine LLP is pleased to have advised Ajinomoto Co., Inc., a worldwide leader in amino acids, pharmaceuticals, high-quality seasonings, processed foods, beverages, and specialty chemicals, in its latest strategic acquisition.

Through its North American subsidiary, Ajinomoto closed this month on the acquisition of Cambrooke Therapeutics Inc., a global leader and innovator in therapeutic nutrition for inborn errors of metabolism and ketogenic diet therapy.

Portland-based Davis Wright Tremaine lawyers Michael Phillips and Ryan Maughn represented Ajinomoto North America in the deal, the latest in a series of transactions that have expanded the client's product line and presence in the U.S.

For additional information visit www.dwt.com

GIDE

ADVISES AGENCE DES PARTICIPATIONS DE L'ETAT ON SALE OF RENAULT'S SHARES BY THE FRENCH STATE

PARIS, 07 DECEMBER 2017: Gide advised Agence des Participations de l'État on the sale by the French State of 14 million Renault's shares, equivalent to 4.73% of Renault's share capital. This sale has been made through an institutional private placement by way of an accelerated bookbuilding.

This sale is subsequent to the French State's commitment made on April 2015 to return to a 15.01% shareholding level, after the confirmation that double voting rights established by the Florange law (law of 29 March 2014) have been set forth following the acquisition of 4.73% Renault's share capital on April 2015. Renault took part to this transaction through its buyback program by acquiring 1,400,000 shares that will be subsequently proposed to employees and former employees of the group in accordance with the ordinance of 20 August 2014 as modified by the law of 6 August 2015.

The placement has been conducted by Merrill Lynch International, as global coordinator, lead manager, joint bookrunner and guarantor, Goldman Sachs International as settlement agent, lead manager, joint bookrunner and guarantor and Deutsche Bank AG, London Branch, as lead manager, joint bookrunner and guarantor.

Gide's team was led by partner Arnaud Duhamel, assisted by counsel Théophile Strebelle, associates Aude-Laurène Dourdain and Laure Bellenger, on French law aspects, and by partner Melinda Arsouze, assisted by associate Scott Logan, on U.S. law aspects. Partner Thomas Courtel and his team also advised on public law aspects of the transaction.

For additional information visit www.gide.com

HOGAN LOVELLS

ADVISES ON US\$6 BILLION ACQUISITION OF CAVIUM, INC. BY MARVELL TECHNOLOGY GROUP LTD.

SILICON VALLEY, 20 NOVEMBER 2017 – International law firm Hogan Lovells has advised semiconductor solutions provider Marvell Technology Group Ltd. in its approximately US\$6 billion acquisition of Cavium, Inc., a chip maker headquartered in San Jose, California.

Under the terms of the definitive agreement, Marvell will pay Cavium shareholders US\$40.00 in cash and 2.1757 Marvell common shares for each share of Cavium common stock. Marvell intends to fund the cash consideration with a combination of cash on hand from the combined companies and US\$1.75 billion in debt financing. The transaction is not subject to any financing condition.

The transaction is expected to close in mid-calendar 2018, subject to regulatory approval as well as other customary closing conditions, including the adoption by Cavium shareholders of the merger agreement and the approval by Marvell shareholders of the issuance of Marvell common shares in the transaction.

For more information, see www.hoganlovells.com

MUNIZ

ASSISTS SINO-PORTUGUESE JOINT VENTURE HYDRO GLOBAL PERU WITH US \$365 MILLION LOAN FROM CHINA DEVELOPMENT BANK

LIMA - 29 NOVEMBER, 2017: Muñiz Ramírez Pérez-Taiman & Olaya in Lima has helped Sino-Portuguese joint venture Hydro Global Perú obtain a US\$365 million loan from China Development Bank to build a 209-megawatt hydropower plant in Peru. The deal closed on 17 November. BBVA Continental acted as structuring agent. The transaction is thought to be the largest project finance deal in Peru's private sector this year. The loan will finance the construction of the San Gaban III power plant project, located in the Puno region, south Peru.

The project involves the construction of two 104.6-megawatt impulse turbines and a 139-kilometre transmission line.

Counsel to Hydro Global Perú Muñiz Ramírez Pérez-Taiman & Olaya Partners Daniel Lovón, Jorge Otoya, Rolando Salvatierra and Gillian Paredes in Lima

For additional information visit www.munizlaw.com

NAUTADUTILH

ADVISES LOMBARD ODIER (EUROPE) SA'S SALE TO INSINGERGILISSEN BANKIERS N.V.

AMSTERDAM - 13 NOVEMBER, 2017: NautaDutilh advised Lombard Odier (Europe) S.A. - a Luxembourg entity - on the sale of the private banking business and wealth management service activities for the private banking clients in the Netherlands to InsingerGilissen Bankiers N.V.

It concerns a cross-border asset and liability transaction, whereby the individual contracts are transferred to the buyer (the recently merged bank InsingerGilissen). In a private banking and wealth management business, it goes without saying that it is a matter of personal relationships. This requires a close connection between the legal issues and the commercial and personal aspects. That complexity makes it more interesting. Completion of the transaction is expected medio 2018, which should allow parties plenty of time to prepare the transfer of both clients and Lombard Odier employees to InsingerGilissen, and to complete the integration and migration process. This is the third recent private banking deal that NautaDutilh was involved in over the past twelve months. In December 2016 we advised Staalbankiers/Achmea on its divestment of private banking and wealth management activities and in June this year we advised Van Lanschot Kempen on its acquisition of UBS's domestic wealth management activities in the Netherlands.

NautaDutilh Team: Lieke van der Velden, Edger Kleijer, Jacqueline Clement and Esmée Salomons (Corporate M&A), Jasha Sprecher and Larissa Silverentand (Regulatory), Frederike Manzoni, Pedro Paraguay and Tom Vincken (Taxation), Jad Nader (Regulatory Luxembourg) and Gijs van Nes (Employment).

For additional information visit www.nautadutilh.com

PRAC EVENTS



PRAC 59th INTERNATIONAL CONFERENCE 21 - 24 MAY 2016
RCD COSTAS DURAN S.P.A.
ROUSSAUD COSTAS
PACIFIC RIM ADVISORY COUNCIL



PRAC @ Taipei 2014



PRAC @ Vancouver 2015



PRAC @ INTRA San Diego

PACIFIC RIM ADVISORY COUNCIL
PRAC SPAULO.17
TOZZINI FREIRE ASSOCIADOS



PRAC @ Brisbane 2015



PRAC @ PBA Hong Kong



PRAC @ PDAC Toronto 2014





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

www.prac.org

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GOODSILL

Hogan Lovells

RCD ROUSAUD COSTAS DURAN SLP

BAKER BOTTS LLP

KIM, CHANG & LEE

Santamarina + Steta

Bennett Jones

KOCHHAR & CO.
ADVOCATES & LEGAL CONSULTANTS

Simpson Grierson

BRIGARD & URRUTIA

LEE AND LI
ATTORNEYS-AT-LAW

SKRINE

Carey

SYCIP SALAZAR & HERNANDEZ GATMAITAN

CLAYTON UTZ

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

TOZZINI FREIRE
ADVOCADOS



ARGENTINA ANTI-CORRUPTION LAW #27401 TO COME INTO EFFECT March 1, 2018

The enactment of Anti-corruption Law #27401 which establishes companies' criminal liability for corruption related will become effective on March 1st, 2018. A summary of the key provisions of the Anti-corruption Law is provided herein.

Under the Anticorruption Law, heavy fines and economic sanctions such as the suspension of activities or the inability to participate in public bids, may be imposed to companies doing business in Argentina if they engage in corruption related crimes.

Companies shall not be subject to any fine or economic sanctions if they have an adequate compliance program in place; conduct internal investigation and self-report to the authorities; and refund the monies illegally obtained.

Therefore, it is very important to review that the company's compliance program is in accordance with its specific corruption related risks, size and economic capacity and particularly with the requirements set forth by the Anticorruption Law. It is also relevant to increase the company's efforts related to the training and monitoring of employees and business partners in anticorruption practices and to conduct internal investigations if any potential wrongdoing surfaces.

Our Compliance Department has expertise implementing and reviewing compliance programs and the respective policies and procedures; training directives, employees and business partners in anticorruption practices; and also conducting internal investigations when needed. For more information please feel free to contact us directly.

Allende & Brea Compliance Department

Address: Maipú 1300 – Piso 10 - C1006ACT - Buenos Aires, Argentina

Contact: David Gurfinkel- dg@allendebrea.com.ar or Andrés Tarakdjian– aet@allendebrea.com.ar

Tel: 54-11 4318-9901 -

Web: www.allendebrea.com.ar

ARGENTINE ANTI-CORRUPTION LAW #27401

- Legal entities shall be held criminally liable if they engage in any of the following five offenses: (a) public officers' bribery or influence peddling (applicable to local and foreign public officers); (b) transactions prohibited for public officials; (c) illegal levies (d) illegal enrichment of public officials and employees; and (e) books and records related crimes.
- Legal entities shall be held criminally liable if the crimes described above are committed, directly or indirectly on their behalf, interest or benefit. To avoid being held liable, legal entities must show that the individual who committed the crime acted on his or her exclusive benefit and that the company did not benefit from such act.
- In case of mergers, acquisitions and corporate restructurings, the successor is liable for the corrupt acts committed by the legal entity.
- The statute of limitations is of six (6) years as from the date of the crime.
- The legal entity may be condemned even if the individual who committed the offense has not been identified or subject to process, if there is evidence that the crime could not have been committed without the allowance of the companies' authorities.
- The following sanctions may be imposed to the legal entities found guilty of these offenses: (a) fines between two (2) and five (5) times the amounts illegally obtained or that the company may have obtained as a consequence of the crime; (b) suspension of its activities for up to ten (10) years; (c) inability to participate in public bids or any other activity related to the government for up to ten (10) years; (d) cancelation of the legal entities' capacity, applicable only when the company was created with the only purpose of committing the above referred crimes or when the commission of those crimes was the company's main activity; (e) loss or suspension of state benefits; and (f) publication of the judgment at its cost.
- When applying the above referred sanctions, courts shall take into account: (a) the company's compliance with its internal rules and procedures; (b) the number and seniority of the executives, collaborators or employees involved in the wrongdoing; (c) the omission to duly control the wrongdoers' activities; (d) the damaged caused, the monies involved, the size, nature and economic capacity of the company; (e) self-reporting and collaboration with the official investigation; (f) the company's willingness to mitigate or to repair the damage caused and recidivism (the existence of recidivism is given by the commission of a second crime within three (3) years of a prior judgment). Payment of economic sanctions may be fractionated in as much as five (5) years if needed to allow the continuity of the company and the protection of the source of work.
- The legal entity shall not be subject to any sanction or administrative liability when all the following circumstances are present: (a) self-reporting as a consequence of an internal

investigation; (b) existence of an adequate compliance program in place prior to the occurrence of the offense; and (c) refunding of the monies illegally obtained.

- The legal entity and the Public Prosecutor are entitled to execute a Cooperation Agreement in which the company obliges itself to provide useful information, identify the wrongdoers, and allow the reimbursement of the monies illegally obtained. Cooperation Agreements may be executed until the date in which the summons to trial is issued. The negotiations between the legal entity and the Public Prosecutor shall be confidential and subject to court approval and supervision.
- Cooperation Agreements shall identify the information to be provided by the company as well as: (a) the payment of a fine equivalent to the amounts illegally obtained as a consequence of the illegal activity; (b) reimbursement of the amounts illegally obtained; and (c) delivery of the assets that would have presumably been confiscated if a judgment was issued. Cooperation Agreements may also include: (d) remediation actions; (e) community services; (f) disciplinary measures against individuals involved in the wrongdoing; and (g) implementation of an adequate compliance program.
- Legal entities must have an adequate compliance program in place, in accordance with the legal entity's specific corruptions risks, size and economic capacity. The compliance program shall be appropriate to prevent, detect, and correct any corruption offense.
- The compliance program shall have, at least, the following elements: (a) a code of conduct or policies and procedures applicable to directors, administrators and employees; (b) specific policies and procedures issued to prevent illegal acts related to public tender and bids, administrative contracts or any other relationship with the public sector; (c) periodic training programs addressed to directors, administrators, employees, third parties and business partners. Compliance programs may as well have the following elements: (d) periodic analysis of corruption risks to adapt the compliance program accordingly; (e) evidence of the senior management's support to the compliance program; (f) internal hot-lines to receive complaints available to third parties too; (g) a non-retaliation program to protect whistleblowers; (h) an adequate internal investigation system which imposes effective sanctions in cases of deviation from the code of conduct's policies; (i) due diligence procedures in place to confirm the integrity and reputation of third parties and business partners, both prior and also during the commercial relationship; (j) periodic monitoring and evaluation of the compliance program; and (k) the appointment of a compliance officer to develop, coordinate and review the compliance program.
- The existence of an adequate compliance program shall be mandatory for companies that execute certain agreements with the federal government.
- The law shall be in force on March 1st, 2018.

07 DEC 2017

Get ready for the new NSW Strata Defects Regime

BY LINA FISCHER, KHASH KAMALI

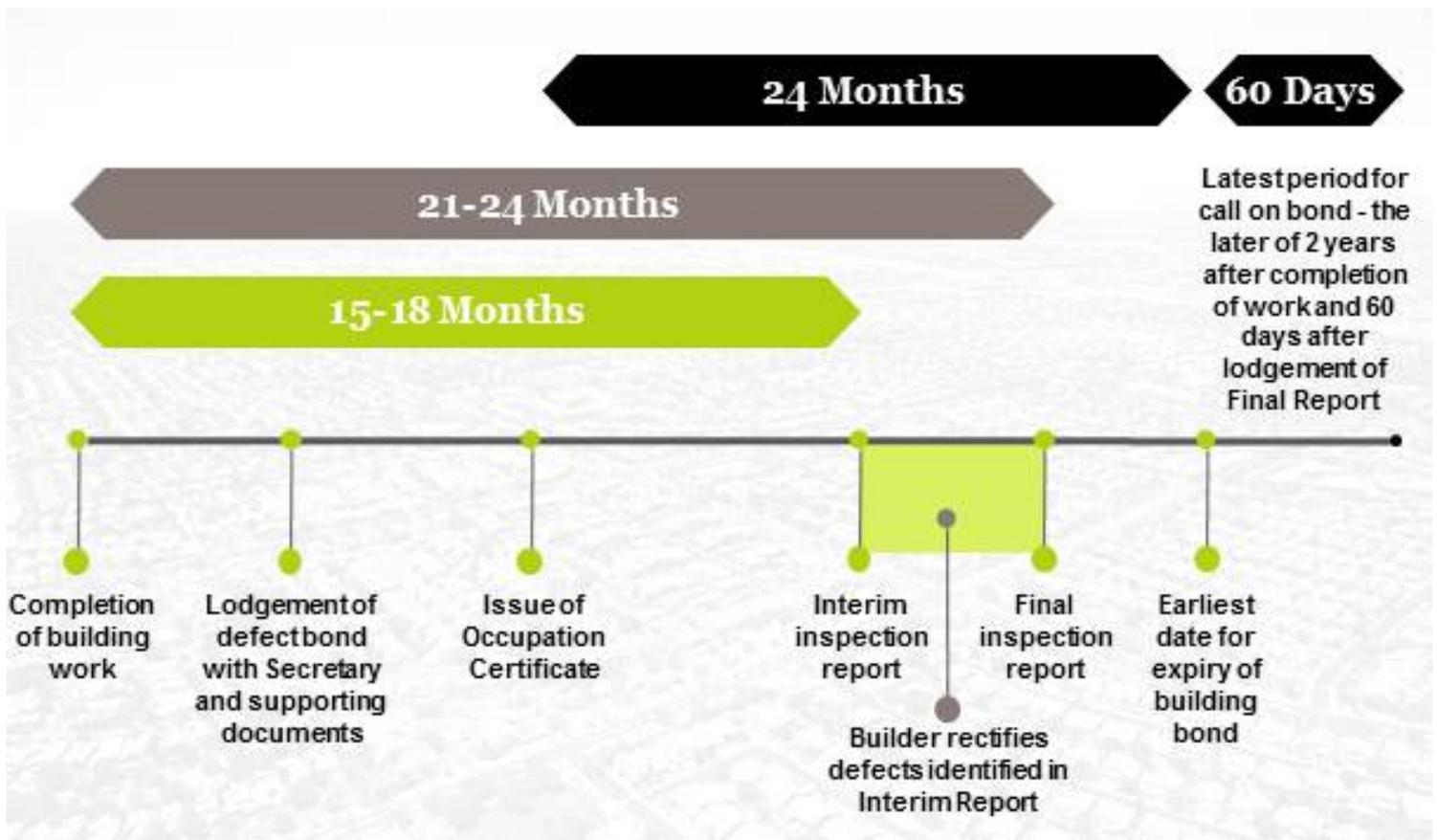
The new Strata Defects Regime will have short- and long-term effects on developers, and they should be getting ready now.

New South Wales' new Strata Defects Regime established under the Strata Schemes Management Act 2016 is about to commence on **1 January 2018**, and with the release of the Strata Schemes Management Regulations 2016 developers have more clarity about their various obligations under the scheme.

Developers and builders will need to familiarise themselves with their new obligations to avoid fines and the risk of delays in receiving an occupation certificate, and ensure that any contracts in negotiation but not signed before 1 January 2018 reflect them.

The new Strata Defects Regime at a glance

Developers of residential or partially-residential strata properties that do not require coverage under the Home Building Compensation Fund (ie. with three or more stories in height) will be required to lodge defect bonds with the Commissioner for Fair Trading, Department of Finance, Services and Innovation (**Secretary**) for construction contracts signed (or if there is no contract where building work commences) on or after 1 January 2018. We explored this in our previous article.



The new Regulations now provide details about:

- documents to be lodged with the building bond;
- persons qualified to be appointed as building inspectors;
- the "contract price" for determining how the 2% bond will be calculated;
- validity periods for building bonds;
- deadlines for the owners corporation to call on bonds;
- the process for payment of the building bonds; and
- the process for review of decisions by the Secretary.

We'll look at these in more depth below.

Documents to be lodged with the building bond

A developer must, when giving a building bond to the Secretary, also provide (amongst other things) the following documents and information:

- address for service of the developer and the owners corporation;

- a copy of any documents relevant to the determination of the contract price used to calculate the amount of the building bond;
- a copy of the contract or contracts for the building work between the developer and the builder;
- a copy of the specifications for the building work and any variations;
- a copy of any written warranties relating to the building work;
- a copy of any schedule of non-conforming works relating to the building work;
- a copy of all "issued for construction" and "as built" drawings and specifications relating to the building work,
- a copy of any development consent or other consents, approvals or certificates issued under the Environment Planning and Assessment Act 1979 relating to the building work,
- a copy of any alternative solutions and fire engineering reports, and the applicable assessment and approval by the principal certifying authority relating to the building work,
- a copy of any design certificates relating to the building work,
- a copy of the Building Code of Australia compliance certificates by each subcontractor for any part of the building work carried out by the subcontractor; and
- a copy of any inspection report obtained by the developer or building relating to the building work.

Developers will need to make sure they have these documents ready for submission so there is no delay in issue of the occupation certificate.

Qualified building inspectors

Developers will need to appoint inspectors to carry out interim and final inspections of the building works.

For the purposes of the Act a person is qualified to be appointed as a building inspector if that person is a member of a class of persons prescribed by the Regulations. The Regulations do not specify specific qualifications required by an inspector but rather require that the inspector be a person who is a member of a strata inspector panel established by one of a number of industry bodies listed in the Regulations (eg. the Housing Industry Association or the Master Builders Association of NSW).

Contract price for determining value of building bond

Under the scheme, developers will be required to provide a building bond to the Secretary for the value of 2% of the contract price. The Regulations have now clarified that the contract price is calculated as the total price paid under all applicable contracts for the building works as at the date of the issue of the occupation certificate. The Civil and Administrative Tribunal may also on application of the owners corporation, the developer or the Secretary make an order determining the contract price of the building work for the purposes of determining the amount of the building bond.

If there is no written contract for the building work or the parties to the building contract (i.e. the developer and the builder) are related or connected persons, the contract price for the building works must be identified in a cost report prepared by an independent quantity surveyor who is a member of the Australian Institute of Quantity

Surveyors or the Royal Institute of Chartered Surveyors.

The cost report prepared by the quantity surveyor must include costs of the following and be accompanied by a certificate by the quantity surveyor that he or she has inspected the premises, the as-built documents and the specifications for the strata plan:

- construction and fitout costs, not including appliance and PC items;
- demolition and site preparation;
- excavation;
- car parking;
- cost for the common property that is included in the property plan, including landscaping, pools, fencing and gates;
- professional fees; and
- taxes applied in the calculation of the as built construction.

Developers using in-house building capability will need to be aware of this additional requirement to value the works before submitting the defect bond (again potentially delaying the issue of the occupation certificate). This will be the case even where the contract sum has been negotiated on an arm's-length basis (as is often the case).

Validity periods for building bonds and deadlines for call by the owners corporation

The developer must ensure that the building bond, whether in the form of a bank guarantee, unconditional undertaking, security bond or another form of security as prescribed by the Regulations, is valid for at least two years (and no more than three years) after the date of issue of the relevant occupation certificate.

An owner's corporation can apply to the Secretary for payment of the building bond, to meet the costs of rectifying any defective building work, identified in the final report (which is to be completed within 21-24 months after the date of completion of the building work).

A building bond must be claimed or realised within two years after the date of completion, or within 60 days after the final report is given to the Secretary, whichever is the later (**Bond Claim Date**). An application by the owners corporation to claim a building bond must be made no later than 14 days before the last day of the Bond Claim Date.

The Secretary must not pay the whole or part of an amount secured by a building bond unless the Secretary has given at least 14 days written notice to the owners corporation, the developer and the builder of the proposed payment. This 14 day notice period allows the builder and developer the opportunity to make an application for review of the Secretary's decision. Where there has been an application for review a payment of the bond cannot be made until the review has been determined or withdrawn.

Review of decisions of the Secretary

Interested persons including the developer, the owners corporation, the owner of a lot or the builder may apply

for review of the following decisions of the Secretary:

- a decision to appoint a building inspector to carry out a final report;
- a decision under the Act to vary the period within which an interim or final report is to be provided or other action is to be done under the building defect regime;
- a determination that the developer is not required to arrange a final report;
- a decision that the whole or part of the building bond may be claimed or realised for payment to the owners corporation, developer or other person.

The application for review of a decision must be made no later than 14 days after the notice of the decision is given by the Secretary to the interested person and must:

- be in writing;
- specify the decision for which a review is sought and the grounds on which the review is sought; and
- specify any information not previously provided to the Secretary and indicate why the information was not previously provided.

In reviewing a decision, the reviewer (who will be independent of the initial decision maker) may affirm, vary, set aside the Secretary's initial decision and make a decision in substitution for the decision that is set aside.

Interested persons are not entitled to a review of any decision that has previously been reviewed. However the Act does not affect any action that may be taken, or remedy that may be sought by or in respect of the building works under any other law and any court, tribunal or other body may take into account any payment made, rectification work done or any other action taken in relation to the building work under the building defects scheme.

Getting ready for the new Strata Defects Regime

The new regime will have short- and long-term effects on developers.

In the short-term, any developer currently in negotiations but who is unlikely to sign a contract before the New Year should be taking the new laws into consideration now, and ensuring the terms and conditions reflect them. In particular, they should review their building contracts to ensure that, as far as possible, obligations are backed down to their builder, which might include:

- extended defects liability periods to align with the length of time available to the owners corporation to claim on the defects bond; or
- the provision of bonds direct from the builder to the Secretary or, at the least, back to back bonds to cover the developer's exposure.

In the long term, developers need to be prepared for the additional administrative burden imposed by the new regime, by:

- ensuring they have all paperwork and calculations of contract value ready to go upon completion of the

building work, so they can promptly lodge their defect bonds and supporting documents with the Secretary to avoid any delay in issue of the occupation certificate;

- when using in-house building capability, lining up a quantity surveyor to prepare a final cost report to calculate the contract price for the works; and
- ensuring they provide a detailed initial maintenance schedule to the owners corporation to mitigate the risk of defect claims.

Seeking bank guarantees from financial institutions may be difficult for smaller scale developers and they may be required to use more of their own equity to fulfil bond requirements. Developers should start engaging with banks to discuss their options for securing bonds.

Developers and builders also need to be prepared to ensure they are ready to respond quickly to claims against the bond. Given the tight 14 day time-frame to apply for review of the Secretary's decision, builders and developers will need to be aware of any potential claims by owner's corporations, in particular any defects identified in the final report, to ensure they are prepared for any claims against the bond.

If you have any questions or would like any assistance in navigating the new regime please contact us.

RELATED KNOWLEDGE

- Aim of the new Strata Defects Regime: quick and efficient repairs of defects!

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Opportunities in Infrastructure in Brazil: Provisional Measure No. 752

01 December, 2017: By [Antonio Felix de Araujo Cintra](#), [Claudia Elena Bonelli](#) e [Ana Cândida de Mello Carvalho](#),



After months of discussion, the Brazilian Federal Government published last Friday (November 25) a Provisional Measure (“PM 752”) establishing alternative solutions for ongoing concessions. These solutions are basically two: (i) contract term extension followed by a commitment of new investments by the concessionaire (applicable to toll-roads and railways), and (ii) the re-tendering of concession projects – including public private partnerships – PPP (applicable to toll road, railway and airports).

The main innovation brought by PM 752 is the possibility of the contracting public entity and the interested concessionaire agreeing upon the early termination of the concession agreement in force. As a consequence, the project can be re-tendered and granted to a new operator.

Only concession contracts currently under default or whose concessionaires do not have the capacity to comply with contractual obligations are eligible for early termination. Terms and conditions of the termination and of the re-tender process will be regulated on a case-by-case basis.

PM 752 also regulates the conditions under which a concession may have its term extended. The term extension can apply either at the original contractual term or during the life of the original agreement. In both cases, the concessionaire has to comply with certain conditions and request the extension at least 24 months prior to the original expiration date, unless otherwise regulated on a specific provision.

The extension on concession terms will be submitted to public consultation and to the analysis of the Federal Court of Audits prior to the Grantor’s approval.

Only concessions whose current terms ranges between 50% to 90% of their original term and whose concessionaires undertake the commitment to make new investments are eligible for the early term extension set forth in PM 752. Eligibility may also depend on additional conditions, such as the commitment to new KPI levels for railway concessions; and the performance of, at least, 80% of the works initially set forth in the contract for highway concessions.

Like any Provisional Measure, PM 752 produces effects immediately, but still needs to be approved by Congress to be converted into law. With the new rules, the Brazilian Government expects to generate a new wave of investments in infrastructure projects, either by allowing the re-tendering of some projects or by allowing new investments by current operators, in exchange of a longer concession period.

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Bennett Jones Fall 2017 Economic Outlook

Bennett Jones' **Government Affairs and Public Policy group** are pleased to present the Fall 2017 edition of the Bennett Jones Economic Outlook.

Prepared by **David Dodge**, former Governor of the Bank of Canada, **Richard Dion**, former Senior Economist with the Bank of Canada, **John Weekes**, Canada's Chief Negotiator for the North American Free Trade Agreement, **Michael Horgan**, former Canadian Deputy Minister of Finance, and **Daniel Cheng**, a former Managing Director of the Canada China Business Council, this report provides unique insights on the current and future state of the Canadian and global economies, with a focus on the following key themes:

1. **Global Growth to 2019:** The broad cyclical, structural and policy factors that are expected to shape growth to the end of the decade, particularly in the advanced economies, and four risks to the projection.
2. **Radical Uncertainty and Central Banks:** The conundrum facing central banks in their interest rate decisions, in an economy with both low unemployment, and low inflation and low wage growth at the same time.
3. **Trade Policy Developments and Risks:** The issues surrounding trade policy developments in the United States and elsewhere and the implications for Canadian governments and businesses.
4. **China's Growth Strategy from the 19th Congress:** What the focus on "quality instead of speed" might mean for Canada.

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Read the full update > <https://www.bennettjones.com/Fall2017EconomicOutlook>



Posted on: October 26, 2017

THE IMPORTANCE OF PROVIDING PROPER NOTICE

By: Ryan A. Shaw

A recent decision of the Supreme Court of British Columbia serves as a reminder to all landlords and tenants to carefully consider the nature and content of the notices being provided under a commercial lease. In *Rami and Nina Holdings Ltd. v. Xu*, 2017 BCSC 4, the landlord learned the hard way that the form and content of a notice can be critical, particularly when terminating a tenancy.

Background

In *Rami*, the subject lease had an initial term of 5 years commencing January 15, 2005, with an option to renew the lease for an additional five years. The tenant exercised the first renewal option, which renewed the lease for a new term commencing January 16, 2010 and ending January 15, 2015 (the "First Lease Renewal"). The First Lease Renewal agreement contained a right of renewal for an additional five years on the same terms and conditions in the lease, except the tenant had to provide six months' written notice to the landlord before exercising the right to renew. Also, rent for the additional renewal term would be mutually agreed or determined by arbitration.

In July 2014, the tenant gave written notice of her intention to renew the lease for an additional five years. It was unclear on the evidence whether that notice was provided pursuant to the First Lease Renewal agreement or if the tenant wished to have a new agreement altogether, independent of that right of renewal. However, it was clear that the tenant sought to have an additional five-year option to renew the lease in the form of the second lease renewal (the "Second Lease Renewal"). Between January and November 2015, the parties did not reach an agreement on the terms of a Second Lease Renewal. The parties did agree on a new rental rate, which the tenant paid from February to October 2015, but could not agree on the additional right to renew proposed by the tenant. In November 2015, the tenant stopped paying rent at the new agreed upon rate and reverted to paying rent at the old rate payable under the First Renewal Lease agreement, on the stated basis that she would do so until the Second Lease Renewal agreement was signed. The landlord continued to demand payment at the new rate and eventually sought to terminate the tenancy, but the tenant refused to deliver up possession.

The Landlord's Application to Court for Possession



The landlord brought an application for an order for possession under sections 18 – 21 of the *Commercial Tenancy Act*, R.S.B.C. 1996, c. 57 (the “Act”). However, at the first stage of what is usually a two stage process, the Court dismissed the application, finding a number of defects in the landlord’s materials prevented it from proceeding. The most significant flaws were with respect to the manner of purported termination, mainly the timing and content of various notices provided by the landlord through its property management agent.

In order to obtain an order for possession under ss.18 – 21 of the Act, a landlord must establish by way of affidavit evidence, amongst other things, the terms of the lease and that the lease has expired or been determined by a notice to quit or otherwise. In *Rami*, the landlord had declared the tenant a month-to-month tenant, so it was required to give the tenant one month’s notice to terminate the lease. The landlord’s agent provided notices of default to the tenant in January and February 2016. On January 13, 2016, the agent wrote to the tenant advising that the locks on the premises would be changed if all current and outstanding rent was not paid in full. The term of the tenancy was not clarified in that notice, nor was there any mention of termination. On February 3, 2016, the landlord notified the tenant of her continued failure to pay rent and that if she did not remedy her defaults by paying the amounts due, then the balance of the lease term would be “fortified [sic]” and the landlord would re-enter and take possession. In that notice, the landlord informed the tenant that the lease had been renewed on January 15, 2015, notwithstanding its repeated assertions that no renewal was granted and the tenancy had become month-to-month. That confusion was never clarified in the landlord’s supporting affidavit. Thus, the Court found the landlord had failed to establish the terms of the lease or right of occupation, as required in s.18(1)(a) of the Act.

Perhaps even more troubling for Court however, was the form of notice of termination and demand for possession which the landlord subsequently provided to the tenant. On March 1, 2016, the landlord’s agent delivered a “Notice to Quit” to the tenant, which provided in part:

You are hereby notified that the Lease is therefore terminated immediately and you are formally notified that you are required to vacate and quit the property no later than the 15th day of March, 2016 at 5:00 p.m. (emphasis added)

The landlord’s agent then delivered a demand for possession to the tenant on March 16, 2016, which demanded possession of the premises, but delayed the time for delivery of possession to March 25, 2016. The Court found that both of the above notices were fundamentally flawed, as they contemplated and permitted continued occupancy of the premises by the tenant. The jurisprudence clearly provides that



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notices which contemplate continued occupancy are not effective to end a tenancy. As a result, the landlord could not establish that the tenancy had been determined, as required under s.19 of the Act, and its application for an order for possession could not proceed.

Best Practice

This decision in *Rami* should serve as a warning to landlords to be very careful when issuing notices to tenants, especially when purporting to end a tenancy. Firstly, ensure that you are aware of your legal position (i.e. is it a fixed-term tenancy or month-to-month?) and that that position is expressed clearly in all notices provided to the tenant thereafter. Secondly, the notice to quit or notice of termination must clearly call for immediate termination of the tenancy; a termination notice which contemplates continued occupation by the tenant will not be effective. Similarly, to be effective, a demand for possession must not delay the time for delivery of possession. If you do not follow these guidelines in issuing notices, then you risk not being able to rely on those notices in subsequent legal proceedings brought against, or initiated by, a knowledgeable tenant.



NEWSALERT

/Carey

Chilean Tax Authority releases new version of Tax Schemes Catalogue and Law No. 21,047 that introduces several tax amendments is published

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1.- New version of Tax Scheme Catalogue

On November 23, 2017, the Chilean Tax Authority (hereinafter "SII") publicly released a new version of the Tax Schemes Catalogue. In this new version, the SII includes 15 new schemes of situations that could be declared abusive or simulated, adding to a total of 28 schemes published since November of 2016. In addition, through the catalogue the SII proposes an interpretation about how the general anti-avoidance rule should interact with specific anti-avoidance rules in conflict situations.

Among the new tax schemes included in this version that can be highlighted are the generation of tax losses through share sales between related parties, back-to-back loans, loans from an open stock corporation to its shareholders, corporate migrations and a new case of life insurance contracts used as wealth management tool, among others.

Read more in: http://www.sii.cl/destacados/catalogo_esquemas/catalogo_esquemas_2017.pdf

2.- Law No. 21,047

On the same date, Law No. 21,047 (hereinafter the "Law"), which amended several provisions of the Chilean Income Tax Law (hereinafter the "ITL") and the Chilean Tax Code, was published on the Official Gazette. Among the most relevant amendments are the following:

- The business-platform tax regime contained in Article 41 D of the ITL was abrogated, precluding any new companies from joining such regimen from the date the Law was published.
- For purposes of the ITL, the reference to the black list of tax haven jurisdictions elaborated by the Chilean Ministry of Economy was replaced with a reference to certain general criteria that determine the existence of preferential tax regimes, contained in Article 41 H of the ITL. These new criteria expressly excludes member countries of the Organization for Economic Cooperation and Development (OECD).
- It extends by additional years the application of the transitory rule that entitles non-resident owners of Chilean companies subject to the partially integrated tax regime (regime B) to use 100% of the corporate tax credit to pay the withholding tax on their profit withdrawals or dividend distributions, when their countries of residence have a signed DTT¹ with Chile that is not yet in force. Consequently, this benefit was extended to withdrawals and distributions that are executed until December 31, 2021. In addition, this benefit was extended to countries that sign a DTT with Chile before January 1, 2019.
- A new Article 62 ter was included in the Chilean Tax Code, which amended the rules regarding banking information secrecy with the purposes of enabling the SII to request local qualified institutions for certain financial information of non-resident entities and individuals, in order to comply with the automatic exchange of information obligations established in the Convention on Mutual Administrative Assistance on Tax Matters (MAAT) and the Common Reporting Standard (CRS).

¹ International treaty for the avoidance of double taxation.

China Prohibits Unverified Internet Users to Post Online Comments

09.07.17

By Ron Cai and Sherry Zhang

On August 25, 2017, the Cyberspace Administration of China (“CAC”) issued the *Administrative Provisions for Services concerning Internet Comment Posting* (the “Internet Comment Posting Provisions”) and the *Administrative Provisions for Services concerning Internet Forums and Communities* (the “Internet Forum and Community Services Provisions”), both of which will become effective on October 1, 2017.

On the same date of issuance, CAC’s head commented at a press conference that the purpose of these two provisions is to “thoroughly implement the spirit of China’s new Cybersecurity Law”, “to standardize China’s Internet comment posting services market” and to “promote healthy and orderly development of the market.” At the same time, however, the special requirements for Internet users and service providers under these new provisions also cause substantial concern in the market.

Application of the Provisions

The Internet Comment Posting Provisions state that they will regulate the provision of “Internet comment posting services” within the territory of China. “Internet comment posting services” are defined as the provision of publishing services of texts, symbols, expressions, pictures, audio, and video clips to the users by any Internet websites, applications, interactive communication platforms, and other communication platforms with the nature and function of providing news and public opinions, and social mobilization, through posts, replies, messages, “bullet screen” comments (*danmu*), and etc.

The Internet Forum and Community Service Provisions will regulate the provision of “Internet forum and community services” within the territory of China. “Internet forum and community services” are defined as the provision of services to the users of interactive information publishing communities and platforms in the form of forums, postings, communities, etc.

Definitions under these two provisions appear to be broad enough to cover all website, application and forum operators providing information publishing services through Internet in China (collectively, the “Service Providers”).

Substantive Responsibilities of the Service Providers

The provisions expressly address eight types of substantive responsibilities that the Service Providers are legally required to comply with in offering information publishing services, including:

- Verification of the real identity information of the registered users. Before a user is permitted to use the Service Provider’s service, he/she must disclose its real name and ID information to the Service Provision for verification. Service Providers are not permitted to provide information publishing services to any users without identity verification. However, after verification, the users do not have to display their real names when making comments within the platform.
- Establishment of user information protection mechanism. The Service Providers must not divulge, tamper, destroy, sell or disclose to others any of the users’ personal information. Before collecting and using such personal information, the Service Providers must obtain the users’ prior approval.
- If the users are intended to comment on any news, the Service Providers must review the comments for any improper discussion before releasing the comments to the Internet.
- For any “bullet screen” comments (*danmu*), a popular feature among young Chinese netizens where comments scroll across the screen while a video clip is playing, the Service Provider must post within the same webpage and same platform the text version of the “bullet screen” comments.
- Service Providers are required to provide prior review and real-time management of all the comments posted, and report to the supervisory authorities if any illegal information is discovered.
- Service Providers are required to develop a sound information security and protection system to avoid any safety defects and loopholes.

- Service Providers shall maintain a professional team of editors.
- Service Providers are required to provide necessary technical, materials and data support for the supervisory authorities' supervision and inspection.

Protection of Legitimate Personal Rights

In formulating these two provisions, CAC also had the goal of protecting legitimate personal rights. In addition to requiring protection of the users' personal information and information safety discussed in the section above, the new provisions expressly prohibit a Service Provider or any of its employees from intentionally deleting or recommending any posts for the purpose of seeking improper benefits or based on erroneous values. Service Providers and users are not permitted to use software, hire business organizations, or personnel to disseminate information that misleads public opinion.

Finally, the provisions require that Service Providers are also required to establish a "credit evaluation grading system" for all their users under which the Service Providers should evaluate the users' performance, and decide the scope of services provided to the user based on the evaluation results. If any user is given a low credit score under the grading system, Service Providers shall stop providing services to the user and add the user to a black list, and prohibit the user from any further use of its service (for example, through registering a new account).

Supervisory Authorities

CAC and its local agencies at different levels are the law enforcement agencies and supervisory authorities of the Service Providers under the provisions. They are empowered to hold any Service Providers accountable who fails to perform their responsibilities by law. Also, the provisions stipulate that if a Service Provider intends to offer new products, applications, and features for comment posting services, it must file an application with the CAC or its local agencies for a security evaluation. Finally, CAC or its local agencies shall also establish a "credit evaluation grading system" for the Service Providers to supervise the credibility and compliance of all the Service Providers.

Observation

The issuance of these two provisions show the Chinese government is taking active regulatory approaches toward the information publishing industry. However, at the same time, the industry also worries that these new provisions may impose excessively harsh responsibilities on the Service Providers, which may increase operating costs, reduce operation efficiency, and even affect business innovation. The healthy development of the industry needs the joint efforts and in-depth communications among legislation, law enforcement agencies, and Internet companies.

Disclaimer

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WELL-KNOWN TRADEMARKS AS LEGAL BASIS IN THE OPPOSITION PROCEEDING

In a recent case, Arias represented Mr. Leonardo Sergio Raimondo, known in the media and celebrities as Leonardo Rocco, founder and owner of ROCCO DONNA HOLDING, LLC, as opponent to the application for registration of the tradename "ROCCO DONNA PROFESSIONAL" in the name of a third party.

Having no registration in El Salvador for ROCCO DONNA as trademark or tradename, the basis of the opposition was the notoriety of the trademark in El Salvador and other countries. In this case, the Intellectual Property Office of El Salvador determined based on the proofs provided – consisting, among others, videos programs broadcasted in El Salvador by cable television and Internet sites - that the tradename incurred in the prohibitions of Law, since granting its registration could "dilute the notoriety acquired by the trademark ROCCO DONNA, besides indicating a false business origin, which would affect the consumers". The resolution confirmed that the evidence provided was sufficient to prove that stylist "Leonardo Rocco" and his trademarks "ROCCO DONNA" were well known in the beauty salons sector.

The legal basis of the aforementioned opposition was article 9, letter d) in relation to Article 58 of the Law of Trademarks and Other Distinctive Signs of El Salvador, which provides that a trademark cannot be registered or used if it affects third parties rights, providing that the trademark applied is a reproduction, imitation or transcription, total or partial, of a well-known trademark. This prohibition is also applicable to tradenames under Art. 58 mentioned above.

Among the most relevant aspects, it can be mentioned that the criteria applied by the IP Office in order to resolve the opposition, took into account the importance and advances that communication and technological means have reached to this day, since the proofs filed were sufficient to prove the notoriety of trademarks in which the opposition was based, as established in Art. 2 of the aforementioned Trademark Law, which provides that a well-known distinctive sign is a "*distinctive mark which is known to a particular commercial sector or sector of the public and has acquired this degree of recognition as a result of its use or promotion in El Salvador.*"

For more information, do not hesitate to contact us.



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News

NEWS DETAIL

13/10/2017

BILL ON OIL PALM: INCENTIVE PACKAGE FOR BUSINESS ACTORS

The Indonesian Government and the House of Representatives have agreed to put the Bill on Palm Oil (the "Bill") as a priority to be enacted in 2017. The Bill has been criticized particularly by environmental activists who argue that there is no urgency for its enactment as most of the provisions are already contained in Law No. 39 of 2004 regarding Plantation (the "Plantation Law").

Regardless the controversy surrounding its enactment, here are the Bill's provisions of note:

Licensing

- Oil Palm licenses will be issued in accordance with the business activities, as follows:
 1. Oil Palm Plantation Business License for oil palm plantation cultivation;
 2. Oil Palm Industrial Business License for oil palm product processing; and
 3. Oil Palm Trading Business License for oil palm trading.
- The Oil Palm product processing business may be carried out alone or together with with the oil palm cultivation business.
- To engage in the oil palm business and in the oil palm trading activities, the following are required:
 1. Location Permit;
 2. Environmental Permit;
 3. Conformity with the respective region's spatial plan; and
 4. Conformity with the palm oil master plan and strategic plan.

The Bill is more detailed regarding the above requirements than the Plantation Law. However, it is unclear why the Location Permit is required for the trading activities.

- The Bill obligates medium and large scale oil palm companies which have obtained their license to (i) cooperate with small scale oil palm companies and with employees, and the surrounding community, and (ii) facilitate the development of an oil palm plasma plantation.

Land for Palm Oil Cultivation

The Bill stipulates the use of mineral land and/or peat land for oil palm cultivation. It adopts the stipulation of the Plantation Law regarding the maximum area, which is 25 hectares for small scale businesses and 100,000 hectare for large scale businesses.

- The Bill sets the following oil palm cultivation targets for oil palm plantation companies which have obtained their plantation business license and the land for its activities:
 1. Three (3) years as of the issuance of the license: at least 30% of the land must have been cultivated;
 2. Five (5) years as of the issuance of the license: at least 50% of the land must have been cultivated; and
 3. Eight (8) years as of the issuance: the entire land must have been cultivated.

Foreign Ownership

- The Bill requires foreign investors in the oil palm business to cooperate with domestic investor(s) by establishing an Indonesian limited liability company. It states that the foreign shareholding ownership will be further regulated in a

specific government regulation. Whether a new foreign shareholding ownership limit will be set remains to be seen. At the moment, a 95% limit is set under the so-called Negative Investment List;

- Under the Bill, the foreign shareholders of oil palm companies which have become public companies are required to divest their shares in compliance with the maximum foreign ownership restriction, within three years (presumably as of the enactment of the Bill into a law). There are no provisions regarding the procedure for the divestment and the percentage.

Palm Oil Processing Industry

- The Bill divides oil palm processing industry into (1) cooking oil industry, (2) organic basic chemical industry, and (3) derivatives industry.
- The Bill adopts the provision of the current plantation regulation that 20% of oil palm processing companies' raw material must come from their own palm oil plantation. This means that an oil palm processing company cannot be an independent company and must integrate with an oil palm plantation.
- To guarantee the quality of the oil palm and the products of its processing, the Bill stipulates provisions regarding the standardization of oil palm cultivation and processing in accordance with Indonesian national standards.

Palm Oil Trading

- All products of oil palm processing must be registered with the Ministry of Industry. It is not clear as to why the registration is with the Ministry of Industry instead of with the Ministry of Agriculture.
- Export duties will be imposed for exportation of oil palm, crude palm oil, and derivative products of amounts which are competitive with the requirements of the palm oil exporting countries. The proceeds from the export duties will be used *inter alia* for oil palm research and development and for promoting and marketing the country's oil palm commodity.
- Exportation or importation of oil palm oil seeds requires a permit from the Minister of Agriculture. All imported palm oil seeds must meet the minimum technical and requirements and quality standards. The oil palm seeds certification must be done by the Ministry of Agriculture in accordance with national and international standards.

Incentives for Oil Palm Investors

- Oil palm investors will be provided with facilities/incentives. To be eligible for the incentives, an investor must meet the conditions, such as providing a good size of employment and technology transfer, and preserving the environmental sustainability.
- The facilities/ incentives which are available to qualified investors are, among others:
 1. Income tax reduction;
 2. Import duty exemption or relief for capital goods and machinery;
 3. Import duty exemption or relief for raw or supporting materials for production purposes within a certain period of time and upon fulfillment of certain requirements;
 4. VAT exemption for a certain period of time;
 5. Accelerated amortization;
 6. Land and building tax relief; and/or
 7. Product marketing support.

NEW CAPITAL REDUCTION PROCEDURE AND WHITEWASH EXEMPTION FOR FINANCIAL ASSISTANCE

The Companies Act 2016 (“CA 2016”) which came into operation on 31 January 2017 (with the exception of certain provisions which are not relevant to this article) introduces various new concepts into Malaysian company law. These new concepts include an alternative procedure for the reduction of share capital and a whitewash exemption for the provision of financial assistance for the purchase of shares.

THE SOLVENCY TEST

Both of the newly-introduced concepts mentioned above require a solvency statement to be made in the prescribed form, whereby each director making the statement has to declare that he has formed the opinion that the company satisfies the solvency test laid out in section 112(1) of the CA 2016, namely that:

- (a) immediately after the transaction there will be no ground on which the company could be found unable to pay its debts;
- (b) the company will be able to pay its debts as the debts become due during the period of 12 months immediately following the date of the transaction **or** it is intended to commence winding up of the company within 12 months after the date of the transaction and the company will be able to pay its debts in full within 12 months after the commencement of the winding up; and
- (c) the assets of the company exceed the liabilities of the company at the date of the transaction.

The solvency test has been discussed in greater detail in Legal Insights – A Skrine Newsletter - Issue No. 2/17 (June 2017).

ALTERNATIVE PROCEDURE FOR CAPITAL REDUCTION

The previous regime under the Companies Act 1965 (“CA 1965”) provided that a company may only reduce its share capital by a special resolution subject to confirmation of the reduction by the Court. The CA 2016 retains this concept but also introduces an alternative procedure whereby a company may reduce its share capital by passing a special resolution which is supported by a solvency statement (“Section 117 Capital Reduction”).

Procedural requirements

The procedure for carrying out a Section 117 Capital Reduction may be summarised as follows:

- (1) All directors of the company make a solvency statement in relation to the reduction of share capital;
- (2) The company passes a special resolution to reduce its share capital in accordance with its constitution within 14 days (in the case of a private company) **or** 21 days (in the case of a public company) from the date of the solvency statement;
- (3) The company sends a notice to the Director General of the Inland Revenue Board and the Registrar of Companies (“Registrar”) within 7 days of the date of the resolution. The notice must state that the resolution has been passed and contain the text and the date of the resolution. A copy of the solvency statement is to be lodged with the Registrar together with the notice;
- (4) The company makes the solvency statement or a copy thereof available for inspection without charge by its creditors at its registered office for six weeks from the date of the resolution; and

- (5) The company advertises a notice of the reduction of share capital within seven days from the date of the resolution in two widely circulated newspapers in Malaysia – one in Bahasa Malaysia and the other in the English language.

The CA 2016 exempts a company whose reduction of share capital is solely by way of cancellation of any paid-up share capital which is lost or unrepresented by available assets from the requirement for a solvency statement.

Objection by creditor

Any creditor of the company may, within six weeks from the date of the resolution, apply to the Court for the resolution passed under the Section 117 Capital Reduction to be cancelled. The creditor is required to serve the application on the company as soon as possible. The company must, in turn, give notice of the application to the Registrar as soon as possible.

If the resolution has not been cancelled at the time when the application is to be heard, the Court may make an order cancelling the resolution (“Section 120 Order”) if any debt or claim on which the application was based is outstanding, and the Court is satisfied that:

- (a) the debt or claim has not been secured and the applicant does not have other adequate safeguards for the debt or claim; and
- (b) it is not the case that security or other safeguards are unnecessary in view of the assets that the company would have after the reduction.

The Court is required to dismiss the creditor’s application if it is not satisfied that there are sufficient grounds to make a Section 120 Order.

Effective Date of Section 117 Capital Reduction

If no application for cancellation of the resolution is made by any creditor, the company is required to lodge the documents specified in Section 119(1) of the CA 2016 with the Registrar within 6 to 8 weeks from the date of the resolution (i.e. within 2 weeks from the end of the period within which creditors may apply to Court for a cancellation of the resolution).

If one or more applications for cancellation of the resolution have been made, the proceedings for all such applications are to be brought to an end due to their being dismissed, withdrawn or for any reason as the Registrar may allow. The company is then required to lodge the documents specified in Section 119(2) with the Registrar within 14 days from the date on which the last of such applications was dismissed, withdrawn or brought to an end.

The reduction of the share capital will take effect when the Registrar has recorded the information lodged with him in the appropriate register. The Registrar will then issue a notice to confirm the reduction of share capital, which is conclusive evidence that all the requirements of the CA 2016 with respect to the reduction of share capital have been complied with.

THE WHITEWASH EXEMPTION FOR FINANCIAL ASSISTANCE

General prohibition

Under the CA 1965, a company was prohibited from providing financial assistance for the purpose of, or in connection with, a purchase or subscription of shares in the company or in its holding company. This general prohibition is retained in Section 123(1) of the CA 2016.

In addition to the general prohibition, a further restriction is introduced in Section 123(2) of the CA 2016 which prohibits the provision of financial assistance for the purpose of reducing or discharging any liability that has been incurred by a person in the acquisition of shares in the company or in its holding company.

The Whitewash Exemption

Notwithstanding the general prohibition on financial assistance, Section 126 of the CA 2016 introduces a “whitewash” exemption which allows a company whose shares are not quoted on Bursa Malaysia to provide financial assistance for the acquisition of its own shares or shares in its holding company, or for the reduction or discharge of any liability incurred for the purpose of such acquisition of shares.

The granting of financial assistance under the whitewash exemption however is subject to the following requirements:

- (1) The company must pass a resolution authorising the giving of financial assistance;
- (2) Before the assistance is given, the company must pass a directors’ resolution, setting out the full grounds of the conclusions of the directors, that (a) permits the company to give the assistance; (b) states that the giving of the assistance is in the best interest of the company; and (c) the terms and conditions under which the assistance is to be given are just and reasonable to the company;
- (3) On the same day that the resolution for financial assistance is passed, the directors who voted in favour of that resolution must make a solvency statement that complies with provisions in relation to the giving of the assistance;
- (4) The aggregate amount of the assistance and any other financial assistance given under Section 126 that has not been repaid must not exceed 10% of the aggregate amount received by the company in respect of the issue of shares and the reserves of the company, based on the most recent audited financial statements of the company;
- (5) The company must receive fair value in connection with the giving of the assistance; and
- (6) The assistance must be given not later than 12 months after the day on which the solvency statement was made.

Notification to members

Within 14 days from giving financial assistance under Section 126 of the CA 2016, the company must send to each member a copy of the solvency statement made in connection with provision of the assistance together with a notice that contains the following information:

- (a) the class and number of shares in respect of which the assistance was given;
- (b) the consideration paid or payable for those shares;
- (c) the name of the person receiving the assistance and, if a different person, the name of the beneficial owner of those shares; and
- (d) the nature, the terms and, if quantifiable, the amount of the assistance.

It is to be noted that the CA 2016 does not restrict the types of persons who are allowed to be given financial assistance under the whitewash exemption.

Penalties for contravention

The penalty that may be imposed on an officer of the company who contravenes the general prohibition against financial assistance in Section 123 is a term of imprisonment not exceeding five years, or a fine not exceeding RM3,000,000, or both. Although the maximum term of imprisonment remains unchanged from the CA 1965, the maximum fine has been increased substantially from RM100,000 to RM3,000,000 under the new CA 2016. As in the case of the CA 1965, a person who is convicted of the offence may also be ordered to pay compensation to the company or the person who has suffered loss or damage as a result of the contravention.

Further, the company and every officer who contravenes the whitewash exemption provisions in Section 126 may be liable to a fine not exceeding RM3,000,000 or imprisonment for a term not exceeding 5 years or to both. In the case of a continuing offence, a further fine not exceeding RM1,000 per day may be imposed for each day that the offence continues after conviction.

Continued validity notwithstanding contravention

A newly introduced Section 124 provides that the validity of the financial assistance and any contract or transaction connected with the financial assistance is not affected only by reason of the contravention of the provisions in the CA 2016 on financial assistance.

CONCLUSION

The procedure for effecting a Section 117 Capital Reduction is a welcomed alternative to a court sanctioned capital reduction as it expedites the time frame and reduces the cost of implementation of a capital reduction exercise, in particular if no objections are made by the company's creditors.

The whitewash exemption for the provision of financial assistance in connection with a purchase of shares in the company or its holding company is a slight liberalisation of the absolute prohibition under the CA 1965. The legislators have put in place various safeguards against the abuse of this procedure. Firstly, the total amount of the assistance that can be provided is limited to 10% of the company's share capital and reserves. Secondly, the provision of assistance must be approved by a special resolution of members and a board resolution supported by a solvency statement. Thirdly, the giving of assistance must be in the best interest of the company and be on terms which are fair and reasonable to it. Fourthly, the severe penalties which may be imposed for contravention of the provisions against financial assistance may mitigate the risk of abuse. To prevent the company from being short-changed, the 2016 Act also makes it mandatory that the company receives fair value in connection with the giving of the financial assistance.

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LEGAL UPDATE

December 2017

**Ministry of Finance and Public Credit
Third Resolution Modifying the Foreign Trade Rules for 2017 and its Annexes 1,
1-A, 10, 12, 14, 17, 21, 22, 27, 28 and 30.**

On December 8th, 2017 the Third Resolution Modifying the Foreign Trade Rules for 2017 and its Annexes 1, 1-A, 10, 12, 14, 17, 21, 22, 27, 28 and 30, was published in the Mexican Official Gazette of the Federation and it enter into force on the next day.

Modifications:

Registry and revocation of the conferred mandate. (Rule 1.2.4)

Once the resolution enters into force, the registration and revocation of the conferred mandate granted to the customs agents have to be submitted before the "*Administración Central de Investigación Aduanera*" ("ACIA", for its acronym in Spanish).

Causes of suspension in the registries. (Rule 1.3.3)

Due to the publication of the mentioned Resolution, if by resolution contained in official communication, it is determined that the value declared in the import manifest is lower by 50% or more of the average price of other identical or similar goods imported within the period of the preceding 90 days before or after the date of the operation or transaction, this will be a cause of suspension in the Import Registries.

In addition, section XXXI of such rule, was amended, now establishing, as a condition of suspension, that taxpayers introduce into the tax deposit regime in authorized general warehouses, any of the goods referred to in the rule 4.5.9 (as further specified below).

Registration, exemption and leaving without effect the suspension of the Specialized Sectorial Export Registry. (Rule 1.3.7)

The modification states that the exporters that have been suspended in the Specialized Sectorial Exporters Register may request that such suspension be left without effect, by complying with the provisions of Section B of the "*Instructivo de trámite para la inscripción en el padrón de exportadores sectorial (Regla 1.3.7.)*", of the "*Autorización de inscripción para el padrón de exportadores sectorial (Regla 1.3.7.)*".

Indirect Exportation of Sugar. (Rule 4.3.7.)

By means of this modification to the rules, the goods classified in the tariff codes 1701.12.01, 1701.12.04, 1701.13.01, 1701.14.01, 1701.14.04, 1701.91.02, 1701.91.03, 1701.99.01, 1701.99.02, 1701.99.99, 1702.20.01, 1702.90.01, 1806.10.01 y 2106.90.05 of the Harmonized Tariff Schedule of Mexico (hereinafter HTS), will now be considered as exported when the operation is supported by the official export documentation and such exportations have been duly and previously authorized under the respective export promotion program.

Goods not subject to fiscal deposit. (Rule 4.5.9)

Due to the modification, weapons, ammunition, explosives, radioactive, nuclear and polluting goods; chemical precursors and essentials; diamonds, rubies, sapphires, emeralds and natural or cultured pearls or articles of jewelery made with precious metals or with the aforementioned stones or pearls; watches; articles of jade, coral, ivory and amber; as well as the goods indicated in Annex 10, Section A, sector 9 "Cigars", vehicles, except the vehicles classified in tariff codes 8703.21.01 and 8704.31.02, and in heading 87.11 of the HTS and the goods classified in the tariff codes 2710.12.03, 2710.12.08, 2710.12.09, 2710.12.10, 2710.12.91, 2710.19.05, 2710.19.08, 2710.19.09, 2710.19.10, 2710.19.91 or in the Chapters 50 to 64 of the HTS cannot now be made subject to the fiscal deposit customs regime.

Benefits for the automotive industry. (Rule 4.5.31)

Once the modification enters into force, the automotive industry shall now be able to introduce to Mexico the goods classified under the tariff codes 2710.12.08, 2710.12.09, 2710.12.10, 2710.12.91, 2710.19.09, 2710.19.10, y 2710.19.91, in as much as such fuel is destined to be used so as to fill up the tanks of the manufactured or assembled vehicles to be export abroad, or for their use in prototype vehicles or for market research.

Rules 4.5.9 and 4.5.31 enter into force on December 3th, 2017.

Requirements that must be accredited by those interested in obtaining the modality of Value Added Tax and Business Flat Tax, headings AA and AAA. (Rule 7.1.3)

By the modification, the entities that have tax assessments liabilities and wish to obtain their Value Added Tax and Excise Tax certification, under the headings AA or AAA, such certifications can now, in fact, be requested if such liabilities have been previously and duly guaranteed or if a means of defense has been interposed in which it is not obligatory to guarantee the respective tax assesment liability.

Annexes Modifications:

Annexes 10, 12, 14, 17, 21, 22, 27, 28, 30 of the Resolution were also amended by mean of the referred modification.

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CJEU Upholds Prohibition on the Sale of Luxury Goods via Branded Third-party Internet Platforms

Thursday, 7 December 2017

The Court of Justice of the EU (CJEU) has just ruled, in the context of a selective distribution system for luxury goods, that contractual clauses prohibiting authorised distributors from selling those goods on branded third-party Internet platforms can be compatible with the EU competition rules.

Such a prohibition must meet three conditions:

- its objective is to preserve the luxury image of the goods;
- it is applied objectively and in a non-discriminatory manner; and
- the restriction is proportionate and does not go beyond what is necessary.

This judgment will be welcomed by the luxury goods industry, which, in the wake of the European Commission Vertical Guidelines, has been concerned about the negative impact on the image of luxury goods of sales through branded third-party platforms such as eBay or Amazon and an overly rigid application of the EU competition rules in that respect.

Background

Coty Germany sells luxury cosmetics in Germany. In order to preserve the brand's image, the products are made available to consumers solely through a selective distribution network, *i.e.* authorised distributors. The sales outlets of those authorised distributors must meet certain requirements in terms of their environment, décor and furnishing. Coty's authorised distributors are allowed to sell online, but only in their own web shops and provided the luxury nature of the products is maintained. They are expressly prohibited from selling online via third-party platforms.

Parfümerie Akzente, one of the Coty's authorised German distributors, sold Coty products on Amazon in Germany, in violation of the distribution agreement. Coty Germany brought proceedings before a German court against Parfümerie Akzente, with a view to prohibiting it from distributing Coty products on Amazon. The Frankfurt court of appeal referred the case to the CJEU.

Judgment

Referring to *Dior v Copad* (C 59/08), the CJEU recalled that luxury goods may benefit from a selective distribution system designed primarily to preserve their image. This does not breach EU law, to the extent retailers are selected on the basis of objective qualitative criteria, uniformly applicable to all potential retailers in a non-discriminatory fashion and which do not go beyond what is necessary (paras. 24 and 29).

The Court noted that the quality of luxury goods results not only from their material (or tangible) characteristics but also

from their overall allure and prestigious image. An "aura of luxury" is an essential aspect of the goods as it enables consumers to distinguish them from similar goods. Impairment of this aura of luxury is likely to affect the actual quality of the goods (para. 25).

As the clause in question does not prohibit Internet sales in general, only the use of third-party platforms, the Court concluded that the prohibition is an appropriate measure to preserve the prestigious image of luxury cosmetics. The Court added that while the clause restricts a certain type of Internet sale, it does not amount to a general restriction on customers or on passive sales to end users within the meaning of Article 4(b) and (c) of Commission Regulation (EU) No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (para. 68).

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Overseas Investment Act - Post Election Update

November 29, 2017

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[International investment \(/resources/international-investment\)](/resources/international-investment)

[Public Policy \(inc Election 2017\) \(/resources/public-policy-inc-election-2017\)](/resources/public-policy-inc-election-2017)

[Public law \(/resources/public-law\)](/resources/public-law)

An NZVCA update prepared with input from Simpson Grierson.

The recent change of government will see an overhaul of New Zealand's foreign investment regime.

Legislative reform?

Amongst other developments, the new Labour-led coalition has announced:

- restrictions on purchases of residential housing by non-citizens and non-residents (excluding Australians);
and
- the creation of a comprehensive register documenting foreign ownership of New Zealand land.

Restrictions relating to residential housing are expected to come into effect in the early part of 2018 (in order to fulfil the Government's "100 day" pledge and to avoid additional complications resulting from the potential ratification of the new "Comprehensive and Progressive Trans-Pacific Partnership").

Given the coalition commitment between Labour and New Zealand First to "strengthen the Overseas Investment Act", it is expected that reforms will ultimately address more than residential housing. Market rumour suggests that the Government may be contemplating changes:

- to add a “national interest” test when assessing applications;
- to amend the volume and nature of the different criteria against which investments in sensitive land can be tested. The Government regards these criteria as being too numerous and too difficult to apply in a consistent manner; and
- to set a higher bar in terms of the character and business acumen of persons seeking to make investments in New Zealand.

While most of these changes are likely to require legislative change, it is possible that the Government might look to fast track certain aspects of its reforms using a Ministerial Directive Letter.

Administrative upheaval

Aside from any possible changes to the legislation, the change of Government has, understandably, disrupted the operation of the OIO. Processing times for significant business asset applications have been lengthened and those applications relating to sensitive land which require ministerial approval cannot be signed off until the necessary delegations are in place empowering ministers to do so.

A watching brief

We are in regular contact with the Overseas Investment Office and other relevant departments within Government. We will, of course, seek to update you as and when further information arises.

In the meantime, if you have questions or would like to discuss these matters further please do not hesitate to contact one of our experts.

UPDATE:

Simpson Grierson notes the publication of the new Government’s Ministerial Directive Letter to the OIO

Importantly, the letter instructs the OIO to take a stricter line on acquisitions of “rural land”, greater than 5 hectares (excluding forests). In the context of these applications, the OIO is to apply particular weight to certain economic factors including the introduction of new jobs and technologies.

In respect of Overseas Investments in forestry assets, the letter reiterates the Government’s desire to encourage foreign investment in the value added processing of raw products and the advancement of its forestry-related strategies. The letter instructs the OIO to apply particular weight to factors including the “increased processing of primary products” when assessing overseas investments in forestry assets. This may well provide an advantage to an overseas person willing to invest in New Zealand forestry assets and prepared to supply logs to New Zealand processors of timber products.

Simpson Grierson will communicate directly with any clients affected by these instructions and will provide further general updates when the implications of these changes becomes clear and as/when further proposals are announced by Government.

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Establishing a chain of title: Leveraging blockchain for the real estate industry

22 November 2017

Establishing a good title and guaranteeing speedy acquisition of real estate is of paramount importance to investors, funds, and real estate developers. For example, if salient information on prior encumbrances, easements and restrictive covenants is not easily obtainable, land ownership disputes may increase transaction risks significantly.

Uncertainty in property ownership globally may be responsible for the loss of up to US\$9.3 trillion in value. This uncertainty hampers a party's ability to lend or borrow against the property. Most of this "dead capital", a term coined by Peruvian economist Hernando de Soto Polar, is primarily located in emerging economies. Land registries powered by blockchain technology may possibly bring this lost value into the mainstream economy, provided the information that is fed into the system is first verified and free from disputes.

Furthermore, in economies with reliable land registries, such as Singapore, the application of "smart contract" technology on a blockchain platform to automatically transfer land ownership upon certain conditions being met, could substantially enhance its real estate sector. Transactions could be carried out much more quickly with fewer intermediaries, and potentially result in more secure ownership records.

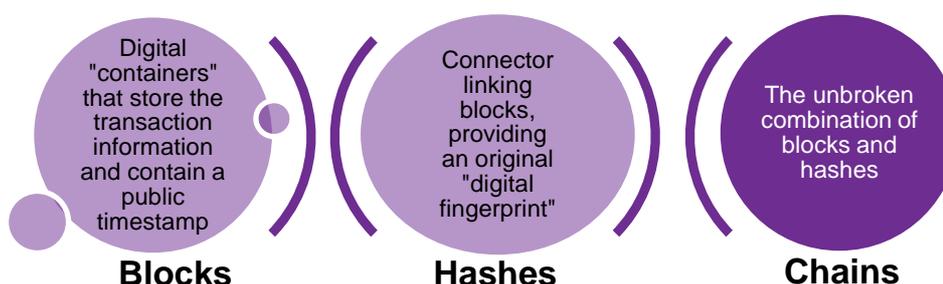
While some cities are moving quickly to adopt blockchain technology, such as Dubai (UAE) and Andhra Pradesh (India), others have adopted a wait-and-see approach. In Singapore, the financial services sector has been quick to begin testing the applications of blockchain technology – and the real estate sector may not be far behind.

Below, we (A) briefly explain what makes blockchain technology particularly useful for land registries, (B) discuss some ways in which this technology is being implemented in various jurisdictions, and (C) explain expected benefits and challenges when implementing this technology.

A. What is blockchain and how is it relevant to land registries?

A blockchain is a ledger (i.e., record book) in which a string of transactions are recorded in "blocks" and "hashes". Any changes to property ownership in the land registry would be recorded in a "block" which contains a public timestamp. It would be impossible to modify an existing entry without modifying every subsequent entry that was made in that ledger, due to the connecting "hashes".

This would ensure an increased security of title, which would be highly valuable, especially in developing jurisdictions. This in turn will make property investment in such jurisdictions even more attractive to investors.



The following features of blockchain technology are especially helpful in preventing fraud in a land registry:

1. **Sequential:** To perform a fraudulent transaction, all the subsequent blocks in the chain must be re-written, not just the block denoting the target transaction. Any attempted modification would be easy to detect.
2. **Unalterable:** The information stored in each block exists in a permanent and unalterable state. A block cannot be added to a chain of blocks without validation through complex algorithms and peer-to-peer consensus.
3. **Decentralized:** The blockchain exists as a distributed ledger that constitutes a publicly-accessible database where all users possess an identical copy. In theory, no one single or central database exists. Consequently, a single user (i.e. the database controller) is prevented from fraudulently and unilaterally manipulating the data.

Furthermore, when combined with “smart contract” technologies, blockchain-based land registries may significantly reduce the cost and time required to buy and sell real estate. “Smart contracts” are essentially electronic contracts embedded in the blockchain that would cause certain actions to automatically occur (e.g. the release of funds) when certain obligations in a contract are met. The use of smart contracts in real estate is a significant topic that merits discussion in a separate article.

B. How are various jurisdictions using blockchain for their land registries?

1. India

In October 2017, the government of Andhra Pradesh in India teamed up with a Swedish start-up, ChromaWay, to create a land registry based on a blockchain system for its new city of Amaravati. This platform will incorporate blockchain technology with next-generation database infrastructure, while allowing users to search through property records using a conventional search engine.

2. Dubai

In October 2017, Dubai announced that it would migrate its entire land registry on a blockchain system which would record all real estate transactions as well as lease registrations.

An additional feature of Dubai’s blockchain system is that it also aims to connect these transactions and lease registrations with the Dubai Electricity and Water Authority and the telecommunications system and various property related bills. For instance, this system will maintain a tenant database which contains information such as Emirates Identity Cards and residency visas. This system would allow tenants to make payments electronically without having to write cheques.

3. Georgia

In January 2017, Georgia announced that it would be migrating its land registry onto a blockchain system. The land registry interface would remain the same as most of the changes are intended to be made on the back end; the key difference being an increased confidence in Georgia’s land registry.

4. Sweden

Since June 2016, the Lantmäteriet (Sweden’s land registry authority) has been experimenting ways to record property transactions on a blockchain, with the intention of saving Swedish taxpayers over €100 million a year by eliminating paperwork, minimising fraud, and accelerating transactions.

C. What are some challenges to implementing blockchain?

Developing countries with high growth potential would especially benefit from widespread use of blockchain technology in their land registries. However, governments face some common hurdles in attempting to implement these technologies.

1. Digitisation and accuracy

Before blockchain technology can be applied to land registries, land titles must first exist on digital platforms and not in manual records. For some jurisdictions, the process of digitisation may take time.

Further, in certain complex cases, historical records for a certain property may date back over many years (e.g. historical easements which could be recorded under the deeds system), and it may take a long time before such information is digitised.

Separately, given that blockchain technology merely ensures authenticity, not accuracy, bona fide errors while digitising the records (e.g., human error) may still occur even though the title itself is genuine.

2. Property ownership disputes

Ownership of titles registered onto the system must first be verified and free from disputes. This is something which may not be immediately feasible in certain developing jurisdictions where the courts may have backlogs in resolving ownership disputes.

3. Awareness and regulation

Given the pace of technological development, the difficulty may not be implementation but, rather, awareness. Legislators will have to consider how to ensure the accuracy of a database hosted on multiple servers, as well as how to regulate individuals charged with managing the database. In order for such change to gain support, the community will also have to be educated.

Conclusion

Notwithstanding the challenges facing its implementation, blockchain has potential to make property investment in both developed and developing jurisdictions even more attractive.

Will Singapore soon leverage blockchain technology to transform its land registry?

The Singapore Land Authority's (SLA) Torrens system, which guarantees an indefeasible title for properties which are included in the register, is known worldwide to be extremely reliable and accessible.

Given the SLA's constant pursuit of advancement, it is not inconceivable that Singapore may harness blockchain technology for its land registry in the near future, to even further enhance what is already a very reliable system. If so, coupled with the potential of smart contracts hosted on a blockchain system, the Singapore real estate sector may well look forward to yet another revolution.

Dentons Rodyk acknowledges and thanks David Lui for his contribution to the article.

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Privacy and
Data Protection

COUNTDOWN FOR THE APPLICATION OF THE EU GENERAL DATA PROTECTION REGULATION

ABSTRACT

The General Data Protection Regulation (GDPR) shall apply within six months, from 25 May 2018. The GDPR expands the obligations and responsibility of the companies and entities when processing personal data, and the privacy rights of the citizens as well. The GDPR also applies to entities not established in the Union when they process personal data of citizens who are in the Union. It foresees important fines for infringements of the basic principles for personal data processing, and underlines the obligations of prevention and accountability. The GDPR must not be seen as a threat, but as an opportunity, though companies and entities must seek proper assessment in order to put in place the necessary measures, within their respective organizations, to comply and to be able to demonstrate compliance with the GDPR by 25 May 2018.

The General Data Protection Regulation (GDPR), Regulation EU 679/2016, of 27 April 2016, shall apply from 25 May 2018, date from which it shall be binding in its entirety and directly applicable in all Member States.

The GDPR shall apply to any company or entity established in the EU, and to those not established in the EU if they process personal data of citizens who are in the Union, either for offering goods or services, or monitoring their behavior within the Union (art. 3 GDPR), in which cases they shall designate in writing a representative in the Union to be addressed by authorities and data subjects (art. 27 GDPR).

The GDPR is based upon prevention and the principle of 'accountability' of companies and entities, so that every organization shall be responsible for, and be able to demonstrate compliance with the GDPR (arts. 5.2 y 24.1 GDPR).

It is therefore necessary that companies and entities seek proper assessment and evaluate their current data processing policies, in order to determine the appropriate measures, consistent with their business models, and taking into account the costs of implementation and the risks for the data subjects, in order to make sure they will comply with GDPR.

The GDPR grants new rights for data subjects, additional to those already known rights of access, rectification, erasure or blocking, or the right to object, like for instance the expanded right to erasure or 'right to be forgotten' (art. 17 GDPR), the right to restriction of processing (art. 18 GDPR), the right to data portability including the right to having the data transmitted directly between companies (art. 20 GDPR) or the right not to be subject to decisions based solely on automated processing, like profiling (art. 22 GDPR).

The aforementioned extension of the rights of the data subjects entails, in turn, a wide range of complementary obligations for companies and other operators such as:

- the data protection by design (for example, when a new mobile application is being developed) and by default, in order to ensure that personal data are not made accessible without the individual's intervention to an indefinite number of natural persons (art. 25 GDPR);
- to maintain (organizations employing more than 250 persons or processing sensitive data, like data concerning health, sex life, etc.) a record of data processing activities (art. 30 GDPR), which by the way will replace in Spain the traditional obligation to register the personal data files with the Data Protection Agency;
- to notify and to communicate to the authorities and to the data subjects in case of personal data breaches (hacking, virus, etc.) resulting in risks (arts. 33 y 34 GDPR);
- to evaluate appropriate security measures consistent with risks, like encryption and pseudonymisation (art. 32.1 GDPR) and to implement them;
- in certain cases, to designate a Data Protection Officer to monitor compliance with the GDPR and to act as contact point for the supervisory authority (arts. 37-39 GDPR); or
- also in certain cases, to carry out an assessment of the risk on the protection of personal data prior to the processing, in particular when using new technologies (art. 35 GDPR).

On the other hand, it is advisable, as a hallmark in the management of data protection, that companies and entities consider adherence to codes of conduct (Article 40 GDPR) in which the specific practices of a sector are detailed, including regarding data protection, for example in relation to issues such as pseudonymization or information provided to children and their protection, since this can be taken into account positively in the evaluation of possible fines.

And we cannot fail to make a reference, precisely, to the system of fines (Article 83 GDPR) foreseen by the GDPR, which basically establishes two lists of obligations whose infringement would be subject to administrative fines up to 10 or 20 million euros, or up to 2% or 4% of the total worldwide annual turnover of a company (whichever is higher), respectively, the infringement of the basic principles for processing the data subject's rights being among the causes of application of the highest fines.

In short, the GDPR aims to create a European space of trust that precisely promotes the development of the economy in the digital era, dominated by online activity and cross-border flows of personal data, every second, on an unprecedented scale until now, and in all sectors of activity.

For that reason, the GDPR should not be considered by companies as a threat, or a bureaucratic and limiting burden of doing business (as indicated by the GDPR (Recital # 4), "the right to the protection of personal data is not an absolute right"), but as an argument for positioning and as a business opportunity, totally compatible with the necessary and legitimate development of the economy.

The priority given by each organization to this question and the transparency with which it manages the privacy issues will undoubtedly be a competitive and differentiating factors of each entity, which explains why the GDPR itself obliges the Member States to encourage the establishment of data protection certification mechanisms, seals and marks allowing entities to demonstrate to their stakeholders compliance with the GDPR (Article 42.1 GDPR).

DO YOU HAVE ANY QUESTIONS?

We in the Privacy and Data Protection Department work to clarify any doubts or questions regarding the new regulation and how it could affect the activity of various businesses and organizations. If you have any questions, please do not hesitate to contact us.

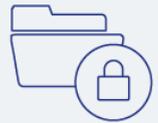
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Is It Legitimate for a Licensee to Exercise a Licensed Patent Right If Not Recorded with the TIPO?

11/30/2017

Hsiu-Ru Chien/Esther Lin

According to Paragraph 1, Article 62 of the Patent Act, the assignment or licensing of a patent right by the patentee shall have no locus standi against any third party unless it is recorded with the Specific Patent Agency. In practice, if an assignee or licensee of a patent right exercises such right and brings infringement claims against a third party before the assignment or licensing is recorded with the Specific Patent Agency, the Fair Trade Commission would deem such action as constituting unfair competition and thereby impose a penalty on the assignee or licensee, as can be seen in Gong-Chu-Zi No. 098056 and Gong-Chu-Zi No. 097096 disposition letters issued by the Fair Trade Commission. However, the Supreme Court rendered the 2017-Tai-Shang-Zi No. 1906 civil judgment on August 10th, 2017, holding that the aforesaid action shall be deemed as a legitimate exercise of right provided that the licensee has been legally licensed.

Defendant A, who had been granted by the Taiwan Intellectual Property Office (hereinafter the "TIPO") a utility model patent ("Patent"), then, assigned the Patent to Defendant B, who, in turn, licensed the Patent exclusively to Defendant A. The plaintiff claimed that Defendant A, though knowing clearly that there was a reason for revoking the Patent, still sent warning letters to the plaintiff's downstream distributors, alleging that the plaintiff's products infringed the Patent. The Fair Trade Commission considered the defendant's act of sending warning letters sufficient to affect trading order and thereby deemed such act as a violation of the Fair Trade Act. Further, the Patent was revoked by the TIPO and ruled invalid by a civil court. Therefore, the plaintiff filed a lawsuit against the defendants, claiming that the aforementioned act of sending warning letters was an abuse of rights and that the defendants should be liable for damages. Both in the first- and second- instance decisions, the Intellectual Property Court dismissed the plaintiff's complaint as it held that Defendant A is entitled to exercise the patent right as an exclusive licensee since Defendant A obtained an exclusive license of the Patent. According to the Intellectual Property Court, Defendant A did not subjectively intend to jeopardize particular enterprises through sending the warning letter, and the disposition letter issued by the Fair Trade Commission was not sufficient to prove that Defendant A's act should be deemed as having negligence for infringement. The Supreme Court agreed with the Intellectual Property Court's opinions and rejected the plaintiff's appeal.

The purpose of recording patent licensing or assignment should be for protecting trade security rather than protecting the patent infringer. The Supreme Court reiterates this purpose in 2010-Tai-Shang-Zi-No. 921 judgment, 2014-Tai-Shang-Zi No. 395 judgment and 2015-Tai-Shang-Zi No. 671 judgment. Therefore, as long as the patent right is legally obtained and an exercise of the right does not breach trading order or involve an abuse of rights, such exercise of the legally obtained right shall not be considered a violation of the Fair Trade Act merely because the licensing or assignment has not yet been recorded with the TIPO.

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Ideas

Supreme Court Hears Arguments in Oil States Energy Services LLC v. Greene's Energy Group LLC

07 December 2017

Firm Thought Leadership

On November 27, 2017, the United States Supreme Court heard oral arguments in the much-anticipated case *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, U.S., 16-712. In this case, the Petitioner Oil States challenges the constitutionality of *inter partes* review, arguing that "IPR violates Article III by permitting the Executive to exercise the Judicial power over matters which, from their nature, were the subject of a suit at the common law." The issue at the Court is:

Whether *inter partes* review, an adversarial process used by the Patent and Trademark Office (PTO) to analyze the validity of existing patents, violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury.

Petitioner's Argument

Appearing for Petitioner Oil States, Allyson Ho of Morgan Lewis conceded, at the start, that reexaminations, which are fundamentally examinational and not adjudicational, are consistent with the Constitution. When asked by Chief Justice Robert what she meant by examinational, Ho replied that it meant that the proceeding is between the government and a private party. Justice Sotomayor pointed out that there are involvements of third parties in both reexaminations and IPR, and asked Ho to specify what procedures in IPR make IPR essentially adjudicatory and not examinational. Ho replied that the existence of procedures, such as discovery and hearing, showed that IPR is trial-like. Justice Kagan asked how many of those procedures the government had to take away before having a constitutional system. Instead of answering the question directly, Ho simply repeated that IPR is fundamentally adjudicational and thus unconstitutional, because a category of cases is taken out of the Article III courts and put into a non-Article III court. Justice Breyer pointed out that it is in fact very common for agencies to decide matters through adjudicatory-type procedure involving private parties.

Justice Kennedy pointed out that the patent owner had limited expectations as to the scope and validity of the property right that he holds, because Congress could shorten the terms of all patents under the limited time clause provided by Article I,

Section 8 of the Constitution. Ho argued that the limited time clause did not allow Congress to take out the disputes that have been adjudicated in courts for centuries and put them in a non-Article III tribunal.

Justice Ginsburg pointed out, a few times during the oral argument, that IPR is geared to be an error correction mechanism, and not a substitute for litigation. However, Justice Gorsuch opined that precedents, including *McCormick* and *American Bell*, indicated that any correction to a patent had to go to a court, and anytime a private right, such as a patent, is taken by anyone, it must be through an Article III court.

Respondent's Argument

Appearing for Respondent Greene's Energy, Christopher Kise of Foley & Lardner pointed out that IPR does not extinguish private property rights because a canceled patent simply should not have been issued. Justice Breyer pointed out that a patent owner might have vested interest or right in the issued patent after enough time went by and the patent owner has relied on it.

Chief Justice Roberts pointed out that the Respondent's position was that if you want the "sweet" of a patent, you have to take the "bitter" that the government might reevaluate it at some subsequent point.

Justice Kennedy and Justice Sotomayor pointed out that without judicial review, the PTO has unfettered discretion to take away a patent, which is worrisome. Justice Gorsuch observed that unless somebody appeals, there is no judicial review in IPR, and thus IPR is really an Article III adjudication. Justice Gorsuch further made an analogy to a land patent and pointed out that once a patent is granted, it is private right and could not be taken away in a non-Article III court. Kise contended that there was fundamental difference between a land patent and an invention patent, because the invention patent right derives solely from a federal statute, and it is granted to advance the progress of science, not for the benefit of the inventor.

Justice Ginsburg pointed out that the issue was not whether a patent is a private right because the Petitioner had conceded that reexaminations are constitutional. The real problem here was IPR looked too much like a court proceeding.

Government's Argument

Deputy Solicitor General Malcolm Stewart contended that it had always been part of the scheme that a patent could be reexamined at least by a court at any time when the patent remained in force, so the patentee never had any expectation that the patent would be immune from invalidation. Chief Justice Roberts pointed out that the patent-at-issue was granted before there was IPR, and asked how the expectation would work in this case. Stewart contended that there were still other proceedings that could reexamine and invalidate the patent. Stewart pointed out that the "bitter" part of the deal still required the procedures to be fair and must comply with the Due Process Clause.

Justice Breyer pointed out that when there had been huge investment in a patent, invalidating the patent through IPR would raise issues under either a taking clause or a due process clause. Justice Sotomayor asked whether Congress could permit the PTO to adjudicate infringement actions. Stewart answered that that would be more problematic under the constitution, because it was not part of the PTO's traditional work.

Opinion of this case will be handed down by the end of the Supreme Court's 2017-2018 term, which is late June or early July of 2018. Although it is often difficult to predict

the outcome of Supreme Court cases based on oral arguments, it appears that most of the justices do not have a strong position in abolishing the *inter partes* review process.

¹ Reply Brief for Petitioner at 5, *Oil States Energy Services, LLC v. Green's Energy Group, LLC* (U.S. 2017), 2017 WL 5591730.

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Does net neutrality have a future?

1 December 2017

By Hogan Lovells partners [Michele Farquhar](#), [Alexi Maltas](#), and [Winston Maxwell](#)

The Federal Communications Commission's (FCC) draft order on the open internet¹ would roll back the FCC's 2015 Open Internet Order, and order that internet access services no longer be considered as telecommunications services regulated under Title II of the U.S. Communications Act. This comes as no surprise because the FCC is now chaired by an appointee of the Republican party, Ajit Pai, who publicly opposed the FCC's Open Internet Order when it was adopted in 2015.

The issues concerning internet neutrality are highly politicized in the United States. Generally speaking, the Republican party defends a light-touch approach to regulation and the Democratic party supports a more proactive approach. Much of the U.S. debate revolves around the FCC's statutory powers to regulate internet service providers. The U.S. Communications Act, last updated in 1996, does not say a word about net neutrality. The FCC therefore had to search for a statutory basis to regulate. In 2005, under the Bush administration, the FCC restricted itself to a non-binding statement of open internet principles. Under the Obama administration, the FCC attempted to adopt binding regulations based on Title I of the Communications Act, but its first attempt was struck down by the federal courts.

On its second attempt in 2015, the FCC changed its legal approach by declaring that the internet access services were common carrier services subject to regulation under Title II of the Communications Act. By declaring internet access services to be telecommunications services regulated under Title II, the FCC could easily impose non-discrimination obligations on internet service providers. However, the FCC had previously said that internet service providers should not be considered as regulated telecommunications operators but instead as providers of information services subject to lighter-touch regulation under Title I of the Act. The FCC's 2015 decision to reclassify internet access services as regulated telecommunications services constituted a break with the position historically taken by the FCC. For Ajit Pai and most members of the Republican party, this change in position constitutes a threat to internet innovation, opening the door to over-regulation. In addition, most members of the Republican party believe that binding net neutrality regulation should have a clear statutory basis, via a law adopted by Congress. The FCC should not create regulatory powers that were not expressly given to it by the legislator.

These domestic law issues play an important role in the net neutrality debate in the U.S. Outside the United States, the more interesting question arising from the FCC's rulemaking proceeding is whether binding net neutrality regulations are necessary and useful. The utility of a regulation is generally assessed by comparing the direct and indirect social costs of the regulation with the regulation's direct and indirect benefits. The FCC's new chairman believes that the 2015 Open Internet Order does not bring a net positive benefit to society, and for this reason, should be repealed. To support his argument, Chairman Pai conducted a cost-benefit analysis.

To support its theory that the 2015 order does not create net benefits, the draft order points out that there have been few disputes concerning internet neutrality. According to the FCC, this is a sign that market forces are functioning properly, and that there is no market failure requiring regulatory intervention. ISP behavior would have been the same with or without a binding regulation. Consequently, according to the FCC, the regulation created no social benefit compared to a situation with no binding regulation. In addition to not creating benefits, the FCC believes that the regulation creates costs for society, notably a decrease in investments made by the operators. The FCC cites an annual decrease of approximately 5.6 percent, but produces no evidence to show a causal link between this

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http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db1122/DOC-347927A1.pdf

decrease in investment and the FCC's 2015 regulation. In any event, it is probably too soon to draw reliable conclusions on investment levels resulting from the 2015 regulation. The FCC also states that the 2015 regulation limits the development of innovative commercial offers, including those based on commercial partnerships between content distributors and internet service providers. According to the FCC, the public could benefit from innovative internet offers based on the characteristics of two-sided markets. Even though some commercial partnerships could lead to anti-competitive practices, the FCC considers that competition and consumer protection law would be sufficient to address these abuses. To conclude, the FCC considers that the 2015 Open Internet Order creates no benefit to society and generates significant costs.

One might legitimately ask why there have not been more disputes related to internet neutrality, both in the United States and in Europe. Is it because the 2015 European Regulation and the FCC's 2015 Open Internet Order have dissuaded operators from discriminating, or is it because market forces, combined with competition law, would have achieved the same result? In other words, have the FCC's and Europe's net neutrality regulations changed anything?

If we look at net neutrality from a purely economic standpoint, one can reasonably conclude that many kinds of discrimination targeted by the European and U.S. net neutrality rules would be covered by existing competition law. A commercial arrangement pursuant to which an internet service provider favors its own content would in some cases constitute an illegal vertical restriction on competition. Competition law analysis may depend on the level of competition on the retail market, as well as how the relevant markets are defined. A report dated February 2017 prepared for the European Commission² confirms that many kinds of abuses relating to "zero rating" would be covered by existing competition law.

But net neutrality is not just about competition law. In a speech dated July 17, 2017³, BEREC and ARCEP Chairman Sébastien Soriano presented the internet's open architecture as an "infrastructure of freedom." Soriano framed net neutrality as a guarantor of fundamental rights, including protection of personal data, freedom of expression and information, and freedom to engage in business and innovate. In Europe at least, net neutrality has taken on a symbolic value, tied to fundamental rights. Soriano quoted Lawrence Lessig, who said that net neutrality "codes a First Amendment into the architecture of cyberspace, because it makes it relatively hard for governments, or powerful institutions, to control who says what when." Connecting net neutrality with fundamental rights raises other thorny issues that European regulators have not yet considered: When an ISP takes voluntary action to block content it considers harmful, does that constitute a net neutrality violation, a potential violation of the user's fundamental rights, or both? Violations of fundamental rights generally require a form of action by the state, which would be absent in the case of voluntary ISP filtering. And who is to judge questions that lie at the interface of net neutrality and fundamental rights? Telecom regulators are not generally empowered to judge fundamental rights.

The draft order removes some of the more prescriptive aspects of the Open Internet Order, while keeping transparency obligations so that ISPs are required to disclose their traffic management practices to the public. Transparency facilitates choice and the proper functioning of the market, and does not carry the same costs as more prescriptive regulatory measures.

²

<https://www.dotecon.com/news/european-commission-publishes-report-on-zero-rating/>

³

http://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/7180-berec-chair-speech-at-the-speech-at-the-0.pdf

Cost-benefit analysis is an essential tool for a good regulation. In the United States and in Europe, several texts require a cost-benefit analysis before any new regulation is adopted, in order to predict as far as possible the positive and negative effects of the regulation, and give preference to regulatory options that maximize social welfare. A cost-benefit analysis will give policymakers a clearer vision of the hidden costs of regulation, in particular potential negative effects on innovation and on the open character of the internet. Winston Maxwell recently published a [roadmap](#) to help policymakers identify and measure the positive and negative impacts of regulations affecting the internet intermediaries. *Smart(er) Internet Regulation Through Cost-Benefit Analysis – Measuring harms to privacy, freedom of expression, and the internet ecosystem*, (Presses des Mines, 2017).

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