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ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION
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IBA2016 18–23 SEPTEMBER WASHINGTON DC

The 2016 IBA Annual Conference will be held in Washington DC, home to the federal government of the USA and the three branches of US government – Congress, the President and the Supreme Court. Washington DC is also an important centre for international organisations and is home to the International Monetary Fund and the World Bank. As well as being the political centre of the USA, Washington DC is home to some spectacular museums and iconic monuments clustered around the National Mall.

Washington DC will give the 2016 IBA Annual Conference the perfect blend of opportunities for business, cultural exploration and to develop a unique set of new contacts. This mix makes Washington DC an ideal location for the world's leading conference for international lawyers.

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- Access to the world's best networking and business development event for lawyers – with over **6,000** lawyers and legal professionals attending from around the world
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- The opportunity to generate new business with the leading firms from around the globe
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IN THIS ISSUE

Contributions to this newsletter are always welcome and should be sent to the Publications Officer:

Lynda J Zadra-Symes
Knobbe Martens Olson & Bear, Irvine
Tel: +1 (949) 760 0404
Fax: +1 (949) 760 9502
lynda.zadrasymes@knobbe.com

International Bar Association

4th Floor, 10 St Bride Street
London EC4A 4AD, United Kingdom
Tel: +44 (0)20 7842 0090
Fax: +44 (0)20 7842 0091
www.ibanet.org

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This newsletter is intended to provide general information regarding recent developments in the region of North America. The views expressed in this publication are those of the contributors, and not necessarily those of the International Bar Association.

Welcome to Vienna

Luis Fernando González Nieves
Solcargo, Mexico City
luis.gonzalez@solcargo.com.mx

The North American Regional Forum brings together North American lawyers who share concerns, interests and a common perspective on many areas of law and global issues. I would like to extend a warm welcome to all new members of the Forum and I look forward to meeting you in person.

We are looking forward enthusiastically to the IBA Annual Conference in Vienna on 5–9 October 2015, where the Forum will be presenting the following sessions:

- *Protecting the innocents: time to bare the teeth of UN Resolutions 1325 (2000), 1888 (2009) and 1960 (2010) et al.*
  This session will assess the efficacy of UN Resolutions in bringing women more effectively into peace processes to prevent and resolve armed conflicts, and what can be done to make the Resolutions more effective, where appropriate.
- *Friends and faux – legal pitfalls in social media.*
  This interactive session will be led in a round table format by our expert speakers, using real life examples of legal problems that can befall the unwary user of social media platforms. Discussion will focus on advertising/marketing, defamation and privacy issues and employer best practices.
- *Genocide: national, ethical, racial, religious groups – is the 1948 definition in need of reform or would it be too dangerous to change?*
  In conflicts throughout the world, allegations of genocide are regularly made by the media and civil society group. This session will assess whether the 1948 definition should be expanded to reflect conflicts and situations being experienced in the 21st century.
- *Europe invests in the world, the world invests in Europe: forum and networking.*
  This session, organised by the European Regional Forum jointly with all IBA Regional Fora, will examine global FDI into Europe and Europe's FDI globally, including legal, practical and cultural challenges.
- *Advising Entrepreneurs – from start-up to scaling up.*
  This is an interactive session, presented by entrepreneurs, investors, advisors, in-house lawyers and legal practitioners and will discuss a roadmap for guiding entrepreneurs and start-up clients to position themselves for a successful scale-up.

Please remember to purchase your tickets from the IBA for our Forum lunch on Monday. Our keynote lunch speaker is Professor Schreuer, a leading expert on investor–state dispute settlement (ISDS), which is a source of heated debate in discussions on the proposed Transatlantic Trade and Investment Partnership (TTIP) between the United States and European Union. In addition, we will be coordinating our annual no-host bar event on Thursday evening at the Onyx Bar, DO & CO Hotel im Haas Haus Restaurantbetriebs, Stephansplatz 12, A-1010 Wien.

Our Forum also has several conferences in the planning stages for 2016, including a programme on energy reform on 27–29 January 2016 in Mexico City. This conference will be presented by the IBA North American Regional Forum, the IBA Energy, Environment, Natural Resources and Infrastructure Law Section, supported by the IBA Latin American Regional Forum. Panels bring together regulators of water and the environment, will discuss lessons learned from the first year of hydrocarbon energy reform and will include sessions on the electricity energy reform implementation and new investment vehicles established in Mexico that allow for investment in energy projects. We hope you will join us for this very timely and interesting conference. For more information, please see the IBA website at **www.ibanet.org** and select 'Conferences'. We would welcome your participation at this conference and other events!

We also encourage Forum members to participate and assist in planning and speaking at our programmes, preparing email alerts for Forum members, contributing to email newsletters and blogs, and participating in various topical roundtables and project working groups.

Please do not hesitate to contact me if you would like to get more involved with the Forum or if you feel there is an opportunity for the Forum to diversify its activities. Input and feedback from our members is essential to the success of the committee, and we look forward to hearing your thoughts, suggestions and/or comments.

Once again, a warm welcome to all new members, and thank you for everyone's contributions to this newsletter.

Forum Officers and Advisory Board members

Chair

Luis Fernando Gonzalez Nieves
Solcargo, Mexico City
Tel: +52 (55) 5062 0050
Fax: +52 (55) 5062 0051
luis.gonzalez@solcargo.com.mx

Senior Vice Chairs

Elizabeth Foster
Tel: +1 (619) 519 4662
e.foster@gmail.com

Pierre Legault
Department of Justice Canada, Ottawa
Tel: +1 (613) 941 4073
Fax: (613) 941 4074
pierre.legault@justice.gc.ca

Vice Chairs

Wade Coriell
King & Spalding, Houston
Tel: +1 (713) 751 3272
Fax: +1 (713) 751 3290
wcoriell@kslaw.com

Hansel Pham
White & Case, Washington, DC
Tel: +1 (202) 626 3611
Fax: +1 (202) 639 9355
hpham@whitecase.com

Vice Chair and Conference Quality Officer

Brenda L Pritchard
Gowling Lafleur Henderson, Toronto
Tel: +1 (416) 862 5716
Fax: +1 (416) 863 3416
brenda.pritchard@gowlings.com

Secretary

Luis Moreno
Haynes & Boone, Mexico City
Tel: +52 (55) 5249 1800
Fax: +52 (55) 5249 1801
luis.moreno@haynesboone.com

Treasurer

Bruce Thelen
Dickinson Wright, Detroit
Tel: +1 (313) 223 3624
Fax: +1 (313) 223 3598
bthelen@dickinson-wright.com

Publications Officer

Lynda J Zadra-Symes
Knobbe Martens Olson & Bear, Irvine
Tel: +1 (949) 760 0404
Fax: +1 (949) 760 9502
lynda.zadraSymes@knobbe.com

Membership Officer

Kelli Sager
Davis Wright Tremaine, Los Angeles
Tel: +1 (213) 633 6821
Fax: +1 (213) 633 6899
kellisager@dwt.com

Conference Quality Officer

Pierre Legault
Department of Justice Canada, Ottawa
Tel: +1 (613) 941 4073
Fax: +1 (613) 941 4074
pierre.legault@justice.gc.ca

Conference Coordinators

Ann-Marie McGaughey
Dentons, Atlanta
Tel: +1 (404) 527 8354
ann-marie.mcgaughey@dentons.com

Young Lawyers Liaison Officer

Stewart Sutcliffe
Stikeman Elliott, Toronto
Tel: +1 (416) 869 5511
ssutcliffe@stikeman.com

Website Officer

Robert S Russell
Borden Ladner Gervais, Toronto
Tel: +1 (416) 367 6256
Fax: +1 (416) 361 7060
rrussell@blgcanada.com

Advisory Board members

José Ignacio Astigarraga
Astigarraga Davis, Miami
Tel: +1 (305) 372 8282
Fax: +1 (305) 372 8202
jia@astidavis.com

Laura K Christa
Christa & Jackson, Los Angeles
Tel: +1 (310) 282 8040
lchrista@christalaw.com

Vince Imerti
Stikeman Elliott, Toronto
Tel: +1 (416) 869 5555
vimerti@stikeman.com

James Klotz
Miller Thomson, Toronto
Tel: +1 (416) 597 4373
Fax: +1 (416) 595 8695
jmklotz@millerthomson.com

Paul Lalonde
Dentons, Toronto
Tel: +1 (416) 361 2372
Fax: +1 (416) 863 45952
paul.lalonde@dentons.com

Carolyn Lamm
White & Case, Washington, DC
Tel: +1 (202) 626 3605
clamm@whitecase.com

Peter Maynard
Peter D Maynard, Nassau
Tel: +242 325 5335
Fax: +242 325 5411
peter.maynard@maynardlaw.com

Turenna Ramirez Ortiz
Sanchez Devanny, Mexico City
Tel: +52 (55) 5029 8500
Fax: +52 (55) 5029 8501
tramirez@sanchezdevanny.com

Escuela de Gobierno y Transformación Pública
Tecnológico de Monterrey

The New Era of Taxation:

The keys to providing legal advice on tax law at the cutting edge of a rapidly changing world

3–4 December 2015 Escuela de Gobierno y Transformación Publica del Tecnológico de Monterrey, Mexico

A conference presented by the IBA Taxes Committee, supported by the IBA Latin American Regional Forum

Topics include:

- Base erosion and profit shifting (BEPS) developments
- Double tax treaties in Latin America
- M&A recent trends
- Tax controversy for multinationals and special problems of representing multinationals
- Alternative dispute resolution methods
- Transparency and assistance in tax matters

Who should attend?

International tax lawyers, economists, corporate, finance and banking lawyers, accountants and bankers

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Vienna 4–9 October 2015
ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

North American Regional Forum sessions

Monday 0930 – 1230

Protecting the innocents: time to bare the teeth of UN Resolutions 1325 (2000), 1820 (2008), 1888 (2009) and 1960 (2010) et al

Presented by the Human Rights Law Working Group, the War Crimes Committee, the African Regional Forum, the Asia Pacific Regional Forum, the Crimes Against Women Subcommittee, the Discrimination and Equality Law Committee, the Family Law Committee, the North American Regional Forum, the Poverty, Empowerment and the Rule of Law Working Group and the Women Lawyers' Interest Group

Session Moderator
Steven Kay QC *9 Bedford Row Chambers, London, England; Co-Chair, War Crimes Committee*

Recognising that civilians – and in particular women and children – were the most adversely affected by armed conflicts and increasingly targeted by combatants and armed elements, UNSC Resolutions 1325 (2000) 1820 (2008), 1888 (2009), 1960 (2010) and others were passed to bring women more effectively into peace processes to prevent and resolve armed conflicts.

This session is to assess whether the UN Resolutions have been effective and, if not, what it would take to make them effective. The session will consider:

- Are women and children any better protected now than before R1325?
- Have women been given effective roles in peace talks and conflict resolution?
- Has the demilitarisation agenda that underlines R1325 been implemented by states in any meaningful way?
- Are there new peacekeeping and mediation practices implementing R1325 and the related Resolutions?
- What is the role and contribution of women in conflict field-based operations?
- What is the willingness of UNSC missions to consult with (and listen to) local women's groups?
- Does the UN apply these Resolutions when carrying out its own responsibilities?

Speakers
Norman Clark *Walker Clark, Fort Myers, Florida, USA; Chair, Poverty, Empowerment and the Rule of Law Working Group*
Federica D'Alessandra *Public International Law & Policy Group, Harvard University, Cambridge, Massachusetts, USA; Vice Chair, War Crimes Committee*
Jens Dieckmann *Becher & Dieckmann – Rechtsanwälte, Bonn, Germany; Conference Coordinator, War Crimes Committee*
Gina Heathcote *Centre for Gender Studies, SOAS University of London, London, England*
His Honour Judge Howard Morrison CBE QC *International Criminal Court, The Hague, the Netherlands*

Monday 1430 – 1730

'Friends' and faux – legal pitfalls in social media

Presented by the North American Regional Forum, the Employment and Industrial Relations Law Committee, the Intellectual Property and Entertainment Law Committee and the Media Law Committee

Session Co-Chairs
Brenda Pritchard *Gowling Lafleur Henderson, Toronto, Ontario, Canada; Vice Chair, North American Regional Forum*
Kelli Sager *Davis Wright Tremaine, Los Angeles, California, USA; Membership Officer, North American Regional Forum*

This interactive session will be led in a round table format by our expert speakers, using real life examples of legal problems that can befall the unwary user of social media platforms. Discussion will focus on the following topics:

1) Advertising/marketing

More and more, businesses are using social media for advertising and marketing. But too often, the marketing department is out ahead of the legal group, with potentially disastrous consequences. We will discuss the legal traps for the unwary, including content clearance; rules of the road for social media promotions; disclosure requirements (and challenges of including disclosures in some mediums); and government enforcement of advertising rules in the digital space.

2) Defamation and privacy issues

Even 140 characters can be enough to defame someone, and Facebook postings may raise unanticipated privacy and defamation issues. What do individual lawyers need to consider in their own use of social media, and what should they be advising their clients about how to avoid legal liability?

Continued overleaf

3) Employer best practices

Can employers look at prospective employees' social media posts in making hiring decisions? What kinds of guidelines or rules should employers have for employees using social media? How can a company stop the inadvertent disclosure of information that could violate SEC rules? Every business is facing these issues – and this session will discuss about best practices for employers to follow.

Speakers
Darci Bailey *A&E Television Networks, New York, USA; Corporate Counsel Forum Liaison Officer, Media Law Committee*
Laura Christa *Christa & Jackson, Los Angeles, California, USA; LPD Council Member*
Benjamin Du Chaffaut *Google, Paris, France; Website Officer, Technology Law Committee*
Ron LeClair *Filion Wakely Thorup Angeletti, London, Ontario, Canada*
Alexandra Neri *Herbert Smith Freehills, Paris, France; Senior Vice Chair, Intellectual Property and Entertainment Law Committee*
Susanna Norelid *Advokatfirman NorelidHolm, Stockholm, Sweden*
Rebecca Sanhueza *WME/IMG, New York, USA*
Paul Schabas *Blake Cassels & Graydon, Toronto, Ontario, Canada; Treasurer, Media Law Committee*

Wednesday 0930 – 1230

Genocide: national, ethnical, racial, religious groups – is the 1948 definition in need of reform or would it be too dangerous to change?

Presented by the Family Law Committee, the War Crimes Committee, the African Regional Forum, the Asia Pacific Regional Forum, the Crimes Against Women Subcommittee and the North American Regional Forum

Session Moderator
Federica D'Alessandra *Public International Law & Policy Group/ Harvard University, Cambridge, Massachusetts, USA; Vice Chair, War Crimes Committee*

In conflicts throughout the world, allegations of genocide are regularly made by the media and civil society groups. These allegations often do not reflect the definition of 1948. Should that definition be extended to reflect the conflicts and situations being experienced in the 21st century (Islamic State, North Korea)? Would the extension to include political groups be justified? Or would that be a dangerous and potentially unsafe extension if the conflicts before the ICC were considered (Kenya, Cote D'Ivoire, Democratic Republic of the Congo) and would lead to injustice? Are crimes against humanity in fact as serious as genocide so as to make the 'crime of crimes' description an exaggeration?

Speakers
Gregory Kehoe *Greenberg Traurig, Tampa, Florida, USA; Co-Vice Chair, War Crimes Committee*
Andrea Margelletti *CESI Centro Studi Internazionali, Rome, Italy*
Professor William Schabas *Middlesex University, London, England*

Wednesday 1430 – 1730

Europe invests in the world, the world invests in Europe: forum and networking

Presented by the Regional Fora

Session Co-Chairs
Claudio Doria *J&A Garrigues, Barcelona, Spain; Vice Chair, European Regional Forum*
Patricia Gannon *Karanovic & Nikolic, Belgrade, Serbia; Senior Vice Chair, European Regional Forum*

European countries play an important business role in the world having made significant investments in emerging markets. Europe also counts on foreign direct investment (FDI) to drive its economies forward. In this sense all countries rely on each other through global trade and investment.

This session, organised by the European Regional Forum jointly with all IBA Regional Fora, will reveal our insight into global FDI into Europe and Europe's FDI globally. We will examine the key sectors invested into, with a special focus on the related European legal and practical issues which affect inbound and outbound FDI, such as immigration visas and permits, employment flexibility, research, development and innovation benefits, anti-money laundering, etc, and other cultural challenges faced by advisers to these globally active businesses.

Speakers
Carlos Dominguez *Hoet Pelaez Castillo & Duque, Caracas, Venezuela; Senior Vice Chair, Latin American Regional Forum*
Luis Fernando González Nieves *SOLCARGO, Mexico City, Mexico; Chair, North American Regional Forum*
Akil Hirani *Majmudar & Partners, Mumbai, India; Vice Chair, Asia Pacific Regional Forum*
Sadiq Jafar *Hadef & Partners, Dubai, United Arab Emirates; Co-Chair, Arab Regional Forum*
Nasser Ali Khasawneh *Eversheds, Dubai, United Arab Emirates; Co-Chair, Arab Regional Forum*
Kwon-Hoe Kim *Yoon & Yang, Seoul, South Korea; Newsletter Editor, Asia Pacific Regional Forum*
Ann-Marie McGaughey *Dentons US, Atlanta, Georgia, USA; Conference Coordinator, North American Regional Forum*
Olufunmi Oluyede *TRLPLAW, Lagos, Nigeria; LPD Council Member*
Graham Wladimiroff *Akzo Nobel (China) Investment Co, Shanghai, China; Corporate Counsel Forum Liaison Officer, Asia Pacific Regional Forum*

Thursday 1430 – 1730

Advising entrepreneurs: from start-up to scaling up

Presented by the Closely Held and Growing Business Enterprises Committee, the European Regional Forum and the North American Regional Forum

Session Co-Moderators
Marco A Rizzi *Froriep, Zurich, Switzerland; Conference Coordinator, Closely Held and Growing Business Enterprises Committee*
Noreen Weiss *MacDonald Weiss, New York, USA*

Scaling up is one of the most challenging stages in the life-cycle of a company, and the number one cause of death of start-ups and growing businesses that survive the first five critical years.

Scaling up involves the use of more resources (money, people, structure and systems), a substantial acceleration of cash-burn and the need to efficiently manage such resources as well as navigate the legal and regulatory hurdles that present themselves. In a global economy where scaling up often goes hand-in-hand with international expansion, successfully scaling up is becoming an increasingly complex process. Unlike Uber and AirBnB, many businesses do not survive the legal aftershock of an 'act first, think later' model.

This interactive session, held by entrepreneurs, investors, advisors, in-house lawyers and legal practitioners, will be divided into two parts:

1. Scale-up: what is it – and what are the challenges?
2. Setting up a roadmap for guiding entrepreneurs and start-up clients to position themselves for a successful scale-up.

Speakers
Gil Arie *Foley Hoag, Boston, Massachusetts, USA*
Massimo Calderan *ALTENBURGER legal + tax, Küsnacht/Zurich, Switzerland*
Elizabeth Foster *State Bar of California International Law Section, San Francisco, California, USA; Senior Vice Chair, North American Regional Forum*
Cristina Fussi *De Berti Jacchia Franchini Forlani, Milan, Italy; Vice Chair, Insolvent Financial Institutions Subcommittee*
Katia Gauzès *Arendt & Medernach, Luxembourg City, Luxembourg; Website and Newsletter Officer, European Regional Forum*
Luis Fernando González Nieves *SOLCARGO, Mexico City, Mexico; Chair, North American Regional Forum*
Anthony Helbling *3 Komma Services, Attendorf, Switzerland*
Bernd Litzka *Austrian Business Angels Network, Vienna, Austria*
Jonathan Scott *Corum Group Interanational, Amsterdam, the Netherlands*
Franck Sekri *Sekri Valentin Zerrouk, Paris, France*

Thursday 1430 – 1730

The new normal? Media censorship and access to government information in the age of terrorism

Presented by the Media Law Committee and the Regional Fora

Session Co-Moderators
Jean-Frederic Gaultier *Olswang Paris, Paris, France; Chair, Media Law Committee*
Paul Schabas *Blake Cassels & Graydon, Toronto, Ontario, Canada; Treasurer, Media Law Committee*

In this age of terrorism, many nations increasingly invoke national security as justification for laws that hamper and censor news reporting on important matters of public interest. This panel will explore how different countries and regional courts balance security concerns with free expression rights. Among other topics, we'll discuss:

- government restrictions on news reporting and reporters;
- protection of journalists' sources; and
- restrictions on ability to get access to government information.

Speakers
Steve Crown *Microsoft Corporation, Redmond, Washington, USA*
Helen Darbishire *Access Info, Madrid, Spain*
Eric Frey *Der Standard, Vienna, Austria*
Nani Jansen *Media Legal Defence Initiative, London, England*
Lucie Morillon *Reporters Without Borders, Paris, France*
Gillian Phillips *Guardian News & Media, London, England*
Kelli Sager *Davis Wright Tremaine, Los Angeles, California, USA; Membership Officer, North American Regional Forum*

New Integrity Framework: changes to Canada's Integrity Rules for Procurement

Paul M Lalonde
Dentons, Toronto
paul.lalonde@dentons.com

On 3 July 2015, the Government of Canada introduced a new Integrity Regime (the 'Regime') for procurement and real property transactions to overhaul the former Integrity Framework (the 'Framework').[1] The Regime consists of the Public Works and Government Services Canada (PWGSC) Ineligibility and Suspension Policy[2] (the 'Policy') and associated Integrity Provisions. It will be administered by PWGSC, a body that serves as the government's main buyer of goods and services.

While the 2014 Framework applied only to PWGSC-managed contracts, the new Regime applies government-wide to a comprehensive list of departments and agencies listed in Schedule I, I.1 and II of the Financial Administration Act.[3] As there is no dollar threshold, construction contracts, goods and services contracts and real property transactions of any value are subject to the Regime.

The Regime is effective immediately for PWGSC-managed contracts. The Policy will be adopted by other departments and agencies over the coming months through memoranda of understanding with PWGSC. It is unclear when full government-wide coverage will be achieved. A more specific timeline for implementation has not been released.

In summary, the Policy provides a mechanism for barring and suspending suppliers who are convicted or discharged (absolutely or conditionally) of enumerated offences pursuant to the Financial Administration Act, the Criminal Code, the Competition Act, the Corruption of Foreign Public Official Acts, Income Tax Act, Excise Tax Act and the Controlled Drugs and Substance Act. Offences that will render a supplier ineligible for a contract award include fraud, bribery, bid-rigging, drug-trafficking and money-laundering.

The new Regime significantly modifies the integrity provisions of the procurement process. Notably, it eliminates the automatic debarment of suppliers due to the conduct of affiliates. Under the Regime, a supplier will not be debarred unless it directed, influenced, authorised, assented to, acquiesced in or participated in the affiliate's commission of a listed offence. In addition, 'affiliates' is defined more narrowly than before. According to the Policy, it encompasses a supplier's directors, parent companies and subsidiaries, provided that they control each other or are under the common control of a third party. The determination of a supplier's involvement and degree of control will be based on an independent third-party assessment.

Another major change is the ability to reduce the length of debarment. A supplier convicted or discharged (absolutely or conditionally) is ineligible to do business with the Government for a period of ten years from the date of determination. This period may now be reduced by five years if the supplier cooperates with law enforcement authorities or has undertaken remedial action(s) to address the wrongdoing. On the other hand, the rules in respect of suppliers convicted of frauds under the Financial Administration Act and the Criminal Code remain strict. Such convictions result in permanent ineligibility unless a record suspension is obtained.

The time period used to assess ineligibility has also been reduced. Under the Regime, a supplier is ineligible for a contract award if it has been convicted in the past three years of a listed offence or foreign equivalent. This is a substantial reduction from the ten-year period previously used in the Framework.

While most of the provisions may be well-received, the suspension provisions may be disconcerting for some industry players. Under the new system, the government has the ability to suspend a supplier for up to 18 months if it has been charged for a listed offence. This provision raises various issues. First, it is not clear whether this provision applies to subcontractors who have been

charged for a listed offence. Second, the provision does not provide any mechanisms for compensation in circumstances where the charge is lifted. And last, critics see it as fundamentally contrary to the presumption of innocence.

The Policy's stated purpose is to enable PWGSC to make prospective declarations of ineligibility. In other words, the government intends to proactively identify ineligible suppliers, be it those who have had previous contracts with the government or those who may reasonably be expected to bid for a contract. This will be accomplished through regular monitoring of the convictions record both in Canada and in foreign jurisdictions. Furthermore, the Regime encourages existing and potential suppliers to proactively disclose misconduct by allowing their ineligibility period to start immediately.

Overall, the Regime appears more flexible and more carefully developed than its predecessor. Moving forward, PWGSC will be contacting ineligible suppliers and reassessing their eligibility. It is important to note that the Policy will not impact pre-existing contracts.

On balance, the new Regime significantly improves Canada's supplier debarment and suspension system. Critics have already accused the government of yielding to pressure from the business community and of watering down its integrity rules. However, while some issues remain problematic, most in the government procurement community will welcome the new rules.

This article was co-authored by Kailin Che, a summer student in Dentons' Toronto office.

Notes

1 See http://news.gc.ca/web/article-en.do?nid=995629.
2 See http://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html.
3 See http://laws-lois.justice.gc.ca/PDF/F-11.pdf.

Finley Harckham
Anderson Kill,
New York
fharckham@
andersonkill.com

Are your company's insurance policies governed by New York law – and should you care?

Many companies from the US and around the world have one very odd thing in common: they have insurance policies that are governed by New York law. This is not a coincidence. Many insurance companies have decided that risks with little or no connection with New York should be decided under its law.

The reasons for doing so appear to be twofold: first, applying the law of a single jurisdiction helps to achieve some degree of uniformity and predictability in the interpretation of standard-form insurance policies; second, the selection of New York law, instead of the law of some other jurisdiction, often coupled with requirements that it be applied in a manner that is detrimental to policyholders, can give the insurance company a significant advantage in the resolution of a dispute.

Insureds, like insurers, can benefit from the uniform interpretation of standard-form insurance policies. Unfortunately, standard provisions are frequently given different interpretations by courts in different jurisdictions, causing confusion and providing an incentive for an insurer and its insured to engage in forum shopping to find a court or arbitration venue whose law will be most beneficial. Contractual choice-of-laws provisions can at least partially eliminate these problems by ensuring that disputes arising from standard-form policies will be resolved under the same legal standards wherever they are addressed. In theory, this will give policyholders and insurers alike a clear picture of the coverage afforded by the policy and reduce the number of contested claims.

However, the uniform interpretation of insurance policies does not benefit insureds when the applicable law favours the insurance company, which is often the case with New York law. For example, unlike other jurisdictions in the US and other

countries, as a general rule New York law does not recognise a cause of action for insurer bad faith in the handling of claims by corporate insureds. That means there may be no negative consequence for an insurer that unreasonably denies coverage or delays payment of a claim. Further, New York law can be harsh in its application to insurance contract conditions, resulting in the forfeiture of coverage for technical breaches. For example, most liability policies require prompt notice of claims. As a general rule, courts will excuse untimely notice as long as there is no resulting prejudice to the insurer. New York law follows that rule, but only for policies issued or delivered in that state.[1] Insureds who are located elsewhere, but whose policies are governed by New York law, may face a forfeiture of coverage for late notice, even if there has been no prejudice to the insurers.

Worse still, many policies contain arbitration clauses that require the tribunal to modify the application of New York law to the detriment of policyholders. One commonly used form provides:

> This Policy shall be governed by and construed in accordance with the internal laws of the State of New York, except insofar as such laws may prohibit payment in respect of punitive damages hereunder; provided, however, that the provisions, stipulations, exclusions and conditions of this Policy are to be construed in an evenhanded fashion as between the insured and the Company; without limitation, where the language of this Policy is deemed to be ambiguous or otherwise unclear, the issue shall be resolved in the manner most consistent with the relevant provisions, stipulations, exclusions and conditions (without regard to authorship of the language, without any presumption or arbitrary interpretation or construction in favor of either the Insured or the Company and without reference to parol evidence).

Note that the clause not only requires the application of New York law, but also modifies it by requiring construction of the policy on an 'evenhanded' basis. While such a construction can make sense in the context of a carefully negotiated commercial agreement between parties of equal bargaining power, New York law recognises that insurance companies draft insurance policies with little input from the policyholder – and, therefore, courts applying such law typically construe ambiguities against the drafter.[2] Thus, the requirement of 'evenhandedness' ignores the settled rules of contract interpretation, which are based on logic and fairness. In sum, the clause requires arbitrators to ignore the fact that standard-form insurance policies are contracts of adhesion, offered on a 'take it or leave it' basis with no negotiation or actual agreement between the parties on what is covered and what is not.

Insureds can and should take steps to address the potential problems raised by such clauses and level the playing field when resolving disputes with insurance companies. First, they should be proactive in attempting to keep one-sided provisions out of their policies. While the purchase of insurance in many companies is assigned to a risk manager, and not the legal department, counsel's input can be valuable to review choice-of-laws and arbitration provisions in policies before coverage is bound, and consider seeking to have them modified or eliminated.

Second, it might be possible to convince a court or arbitration tribunal that such a clause should not be enforced. In the US, there is a strong presumption in favour of enforcing agreements to arbitrate, and choice-of-laws provisions will generally be upheld as long as there is a rational basis for the selected law. Nonetheless, even in the US a choice-of-laws provision may not be enforced if there is no connection between the insurance contract or risks insured and the law in question. Also, arbitration tribunals outside the US, or those governed by international rules, might not feel constrained to enforce such clauses.

Third, if faced with an arbitration in which one of those clauses is enforced, insureds should develop arguments which use the 'evenhanded' standard to their benefit. For example, if untimely notice of a claim is an issue, the insured can argue that New York law is one-sided, and unduly punitive, so the tribunal should apply the more lenient standard followed in most jurisdictions which forgives late notice as long there has been no prejudice to the insurer. Also, when construing coverage grants or exclusions, insureds can argue that even if the rule of *contra proferentem* is not to be applied, the tribunal should follow the New York rule that insurance policies should be interpreted in accordance with the objectively reasonable expectations of the insured.[3] Under that rule, the policy is to be interpreted in the manner that a reasonable insured in the position of the actual policyholder would understand the coverage. It certainly can be argued that the

reasonable expectations doctrine is consistent with a mandate to construe the policy in an evenhanded manner.

Depending upon the issues raised in connection with a particular claim, there may be other arguments available for avoiding the negative consequences of a New York law provision.

Conclusion

A choice-of-law provision in an insurance policy must be carefully considered, and not treated as a secondary consideration to the scope of coverage provided and the rates charged. When faced with a claim governed by the law of New York or any other jurisdiction, policyholders should secure the advice of an expert in that law to assist in developing the best arguments to avoid the impact of negative precedent.

Notes

1 New York Insurance Law, Section 3420.

2 See Westchester Resco Co. v New England Reinsurance Corp. 818 F.2d 2, 3 (2d Cir. 1987). '[W]here an ambiguity exists in a standard-form contract supplied by one of the parties, the well-established contra proferentem principle requires that the ambiguity be construed against that party. In particular, New York law, which the parties agree governs here, recognizes a general rule that ambiguities in an insurance policy are to be construed strictly against the insurer.'

3 See Cragg v Allstate Indem. Corp. 17 N.Y.3d 118, 926 N.Y.S.2d 861 (NY Court App 2011).

Jason Champion
Knobbe, Martens, Olson & Bear, Irvine
jason.champion@knobbe.com

Alexander Kappner
Knobbe, Martens, Olson & Bear

The 2015 US Supreme Court term in IP

The US Supreme Court's 2015 term just ended. Yet again, the Court has been highly active in the intellectual property field, reviewing five patent and trademark decisions from the Federal Circuit. This article provides a brief overview of those decisions.

Kimble v Marvel Entertainment

Kimble affirmed that patent licence payments are not enforceable after the patent term has ended.

An inventor licensed his patent for a Spider-Man toy glove to Marvel in exchange for a percentage royalty on sales. The licence failed to specify an end date for the royalty payments, and Marvel stopped paying Kimble when the patent expired. In arguing that its actions were justified, Marvel relied on *Brulotte v Thys Co*, a 1964 Supreme Court decision holding that licence agreements requiring payments after the expiration of the patent term constitute 'patent misuse' and are unenforceable. The trial and appellate level courts agreed with Marvel and ruled that Kimble was not entitled to post-expiration payments.

On *certiorari*, petitioner Kimble explicitly asked the Supreme Court to overrule Brulotte, arguing it prevented pro-competitive and economically beneficial risk-spreading in licensing deals. Analogising to antitrust law, Kimble proposed replacing the outright prohibition of post-patent-term royalties with a case-by-case, 'rule of reason' inquiry. This would require a court to decide the case based on what effect a proposed licensing scheme would have on competition in the relevant market.

While acknowledging that Brulotte may be economically unsound, the Court voted six to three to affirm on the ground of *stare decisis*. The Court explained that parties to licensing negotiations have continuously relied on Brulotte, and consequently any deviation from its holding could only be made by Congress. It also acknowledged ways to draft a licence contract such as to avoid unenforceability under Brulotte while still extracting payments after the patent term from a licensee, such as by setting up the contract as an installment sale or licensing a trade secret together with a patent. The Court further clarified that the patent laws, unlike the antitrust laws, do not aim to maximise competition, and therefore

applying an antitrust-style 'rule of reason' test would be improper.

The dissent opined that the Brulotte holding has no textual basis in the patent act and is thus solely based on an economic concept that has been shown to be flawed.

While the Kimble decision merely affirmed decades-old precedent and thus is not likely to have fundamental practice implications, it reinforces the importance of having the contract drafter be aware of the prohibition against licence payments post patent expiration.

B&B Hardware v Hargis Industries

B&B established that decisions by the Trademark Trial and Appeal Board (TTAB) can be grounds for issue preclusion in later litigation.

B&B sold fasteners to the aerospace industry under its registered Sealtight trademark, while Hargis made Sealtite-branded building fasteners. When Hargis attempted to get its own mark registered, B&B filed an opposition. The TTAB eventually ruled against Hargis in the issue, denying the registration based on the presence of 'likelihood of confusion' with B&B's senior mark.

The issue of 'likelihood of confusion' arose yet again in federal court when B&B sued Hargis for trademark infringement. In the district court action, B&B asserted issue preclusion, arguing that since Hargis had already lost before the TTAB and not appealed, it was precluded from re-litigating the issue before the district court. Hargis claimed that since the TTAB was not an Article III court, the allowable evidence before the TTAB was limited and the legal standards were different, issue preclusion did not apply.

In a seven-to-two decision, the Supreme Court decided that, in general, TTAB decisions may give rise to issue preclusion if the 'ordinary elements' of issue preclusion were met. In this particular case, the issues raised were 'materially the same' and, consequently, preclusion should attach.

In practice, this may lead to an increase of applicants appealing from the TTAB to the district court, knowing that an unfavourable decision may cause them to lose far more than their registration rights if the TTAB decision is not overturned.

Hana Financial v Hana Bank

Hana Financial resolved a circuit split, holding that 'trademark tacking' is a jury question.

Hana Financial sued Hana Bank claiming infringement of its Hana Financial trademark. Hana Bank defended on the basis that its senior use of the trademark Hana Overseas Korean Club (which predated Hana Financial) is sufficiently similar to its Hana Bank mark to allow it to claim the benefit of the priority of the older trademark – a doctrine known as 'tacking'. Tacking is available when two trademarks constitute 'legal equivalents' by creating 'the same, continuing commercial impression'.

The Supreme Court unanimously held that the question of whether such tacking defence should be available in a given case is a fact-intensive inquiry 'from the perspective of the ordinary consumer'. It thus constitutes a mixed question of law and fact that should go to the jury.

By resolving the circuit split, this decision eliminates the need for parties to forum shop over the issue of tacking. The decision may also have broader implications if its reasoning is successfully expanded to the issue of likelihood of confusion. While the circuit courts remain split on whether likelihood of confusion is a question of law or fact, the decision in this case is likely to be used to argue that, like tacking, the issue is ultimately one for the jury.

Commil v Cisco

Commil established that notwithstanding the scienter requirement expressed in the *Global-Tech* Supreme Court precedent, a belief that a patent is invalid is not a defence to induced infringement.

Non-practising entity Commil sued networking giant Cisco over a wireless networking patent, alleging both direct and induced infringement. Cisco defended against induced infringement based on the recent *Global-Tech Appliances v SEB* case, which established that knowledge that the induced acts constitute patent infringement is necessary for liability. Cisco argued that since one cannot infringe an invalid patent, its good-faith belief that Commil's patent was invalid precluded any required mental state for induced infringement liability.

A six-to-two majority rejected Cisco's argument, holding that because validity and infringement constitute distinct legal questions under the Patent Act, invalidity is not a defence to infringement, but rather a defence to liability. The Supreme Court pointed out that the statutory presumption of patent

validity would be undermined if an accused infringer could assert such belief as a defence.

This case significantly improves a patentee's position because an accused infringer cannot simply shield itself with an opinion of counsel after being put on notice of the patent.

Teva Pharmaceuticals v Sandoz

Teva Pharmaceuticals held that the Federal Circuit is to review factual determinations by a district court during claim construction under a clear error standard.

Sandoz manufactured a generic version of Teva's patented multiple sclerosis drug. In a subsequent infringement suit by Teva, Sandoz alleged invalidity based on the patent claiming a specific 'molecular weight' without disclosing which of several possible methods the figure was based on. The district court found the phrase sufficiently definite after hearing expert evidence, whereas on appeal, the Federal Circuit applied *de novo* review and reversed.

The Supreme Court held the *de novo* review standard inapplicable here; rather, the factual determinations during claim construction are findings of fact and, as such, can be reviewed only under a clear error standard by the Federal Circuit.

By requiring this more deferential standard on appeal, the Supreme Court decision should reduce the number of claim construction decisions overturned by the Federal Circuit. This will hopefully provide more predictability in patent cases. Further, because of the increased stakes at the district court level, parties may seek to introduce more extrinsic evidence during claim construction, in the form of expert testimony.

Zarish Baig
Flicker, Kerin, Kruger & Bissada, San Francisco
zarishb@gmail.com

Max Blitt QC
Spier Harben, Calgary
mblitt@spierharben.com

The interplay of refugee status and the grave risk of harm defence

Article 13(b), also known as the 'grave risk of harm exception', is one of the three main defences to refuse return to the child's habitual residence pursuant to the Hague Convention on International Child Abduction (the Hague Convention). Under the Article, 'the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation'.

The Hague Convention defences require clear and convincing proof, and the Explanatory Report of the Convention (the Report)[1] explains why. The Report, which is afforded substantial deference in Hague Convention cases, asserts that a restrictive interpretation of the defences is necessary to avoid a collapse of the entire structure of the Hague Convention. Paragraph 34 of the Report goes on to say: '[T]he three types of exception to the rule concerning the return of the child must be applied only so far as they go and no further... a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Hague Convention by depriving it of the spirit of mutual confidence which is its inspiration.'[2]

In *A.M.R.I. v K.E.R.*, a case heard in Ontario, Canada, it was stated that a 'child's refugee status gave rise to a rebuttable presumption that her return to Mexico [the habitual residence] would expose her to a risk of persecution and, hence, to risk of harm within the meaning of Article 13(b) of the Hague Convention'.[3] The case discussed the interplay between Canada's international obligations under the Hague Convention on the one hand, and the protective provisions of the Refugee Convention on the other. While

acknowledging that neither Convention refugee status, nor a claim for such status, displaces Canada's obligations under the Hague Convention, the court also held that 'none holds that Canada's non-refoulement obligations are irreconcilable with its obligations under the Hague Convention'.[4]

After analysing the former interplay with Canada's obligations, and ruling that a rebuttable presumption arose in the case where the child has been granted refugee status, the court went on to say: 'on an application for the return of a refugee child under the Hague Convention, the child's [Canadian] Charter rights mandate that a risk assessment be performed regarding the existence and extent of any persisting risk of persecution to be faced by the child on return from Canada to another country'.[5] The risk assessment would aid in the ultimate decision of the court. The court thus made its findings not on the mere grant of the refugee status, but on the evidence that was submitted and considered in the granting of the status.

In a more recent case in the US, *Sanchez v R. G. L.*, the Court of Appeal discussed 'whether the children's asylum grant should be considered by the district court'[6] in determining whether the children should be returned to their habitual residence. In its amicus brief, the government advanced the position that a grant of asylum is not dispositive of, but is relevant, to whether either the Article 13(b) or 20 exception applies.[7] The Court of Appeal ruled that 'the asylum grant does not supersede the enforceability of a district court's order that the children should be returned to their mother, as that order does not affect the responsibilities of either the Attorney General or Secretary of Homeland Security'.[8] Since the asylum finding had not been made until after the district court's hearing, the Court of Appeal remanded the case back to the district court for reconsideration of whether the Article 13(b) or 20 exception applied.

Reconsideration was ordered in light of the grant of asylum, which was new evidence not considered by the district court in its initial hearing. Since the children had now been granted asylum, all available evidence from that proceeding was to be considered by the district court before determining whether to enforce the return order. The mother, who had filed the initial petition for return, eventually withdraw her request for the return of the children, and the question of return became moot at the rehearing.[9]

In a similar case where the authors of this article represented the fleeing parent from Mexico, the mother and her three daughters were granted refugee status before the Hague Convention petition was filed by the left-behind father. The father was highly influential in Mexico, and had physically abused the mother on several occasions. The mother submitted to the court that on one occasion the father had placed a loaded gun in her mouth, threatening to kill her, and had his brother chase her with a gun in the streets of Mexico. The mother fled to Canada with their three daughters, but the Canadian court allowed the father's petition and ordered that the children be returned to Mexico. The court ruled that while the mother's return would pose a grave risk of harm to her, there was 'no' grave risk of harm to the children, and despite the fact that the children were Convention refugees, that was not in itself sufficient to meet the burden under article 13(b) and refuse the children's return to Mexico. Of further note in the case is that the mother was convinced that the children did not want to return to Mexico. As a result, a 'voice of the child' report was sought on two occasions. In both reports a psychologist confirmed that they wanted to return to Mexico.

Recent cases involving children who are granted refugee status in the abducted country have set a precedent that while the granting of asylum is important for the Hague Convention hearing, it is not dispositive of the case. Courts have frequently stated that the evidentiary burdens in the asylum proceedings are different, and often lower than the evidentiary burden under the Hague Convention. The prior consideration of a risk of harm in a different forum is relevant; however, it does not abdicate the trial court's duty to make controlling findings on the potential 'grave risk of harm' to the child.

The ultimate decision to allow or refuse a return of a child under the Hague Convention requires a separate analysis pursuant to the Convention itself and, based on the obligations under the treaty, this job cannot be delegated to the asylum-granting bodies. While there is interplay between the granting of refugee status and the grave risk of harm defence under the Hague Convention, each requires a separate analysis; however, the finding of refugee status is relevant but not conclusive to a finding of grave risk of harm.

Notes

1 Elisa Pez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, Acts and Documents of the Fourteenth Session (1980), tome III, Child abduction.
2 *Ibid.*
3 *A.M.R.I. v. K.E.R.* 2011 ONCA 417 at para 94.
4 *Ibid* at para 79.
5 *Ibid* at para 99.
6 *Sanchez v R. G. L.* 761 F.3d 495 (2014) at 12.
7 *Ibid.*
8 *Ibid.*
9 *Sanchez v Sanchez* 2015 U.S. Dist. LEXIS 68682.

George Waggott
McMillan, Toronto
george.waggott@mcmillan.ca

Stefanie Di Francesco
McMillan, Toronto
stefanie.difrancesco@mcmillan.ca

Corporate social responsibility: creating and implementing supplier codes of conduct

Economic globalisation and the increased scrutiny of transnational and multinational corporations over the past few decades have given rise to the present climate of opinion, with its widespread aversion to the 'soulless corporation'. Today, the responsibility of business is arguably not simply to increase profits but to achieve profit maximisation through corporate social responsibility and the advantages that come with being regarded as an 'ethical' brand.

Now, more than ever, corporations are looking at how they can modify, control, report, police and sanction behaviour that may jeopardise their status as an ethical brand with customers and shareholders. Accordingly, many corporations have taken to the practice of developing and implementing supplier codes of conduct that set minimum performance standards for their suppliers both at home and abroad. This article summarises the key components of supplier codes of conduct and analyses the legal risks associated with the creation and implementation of such codes.

Key components of supplier codes of conduct

Like other private-sector initiatives, supplier codes of conduct are not created in a vacuum, but are developed and negotiated against a backdrop of national and international laws and regulations. Therefore, determining the appropriate scope, content, implementation and enforcement mechanisms are pivotal considerations for transnational and multinational corporations drafting and implementing supplier codes of conduct.

Scope

The selection of issues covered (and avoided) is a key element of any supplier code of conduct. When defining the scope, corporations must first determine whether they will adopt universal standards for all suppliers or whether they will develop separate jurisdiction-specific supplier codes of conduct that accord with local laws and customs. While some businesspeople have the belief that the only way to build a global corporation is with a single global standard of business conduct, the practical reality is that some employment laws and human rights issues – such as those related to gender identity and sexual orientation, equal pay, equal treatment, attitude towards gifts, and discrimination – manifest themselves differently throughout the world in different legal systems. For instance, if a corporation does business in certain countries in which the governments have imposed legislation outlawing same-sex relationships, enforcing a supplier code of conduct prohibiting discrimination on the basis of sexual orientation may be problematic and untenable.

At a minimum, however, supplier codes of conduct should consider referring to the core labour standards identified in the conventions of the International Labour Organization (ILO), a United Nations agency, which include:

- freedom of association;
- right to collective bargaining;
- no forced labour;
- minimum age;
- no discrimination; and
- equal remuneration.

The most comprehensive supplier codes of conduct will also refer to a number of other aspects of employment and workplace conditions, such as provisions for health and safety, maximum hours of work and rest periods, wages and security of employment.

Coverage

Once a corporation has determined the scope of its supplier code of conduct, a further matter for consideration is to whom the code should apply. While the answer to this question may appear self-evident – the supplier code of conduct will apply to the corporation's suppliers – in many industries, multiple subcontracting relationships are common. In practice, a large amount of 'supplier' work is in fact carried out by subcontractors and sub-subcontractors. Accordingly, corporations must decide how far down the supply chain the obligations set out in the code of conduct apply.

Will the supplier code of conduct apply only to the corporation's direct suppliers, or will the corporation insist that its direct suppliers only do business with subcontractors who agree to be bound by the code? Moreover, there is also the issue of whether the supplier code of conduct will apply only to enterprises, or whether it also includes 'homeworkers', who provide services to suppliers as sub-subcontractors.

Implementation and enforcement

For a supplier code of conduct to be meaningful, it must have clear methods of implementation and enforcement to ensure that suppliers are conducting business in accordance with its terms. In one study, the ILO estimated that 80 per cent of supplier codes of conduct were actually just statements about general business ethics with no implementation provisions to back them up. In order to ensure that the adoption of a supplier code of conduct is more than a public relations ploy, corporations must include reasonable and realistic implementation and enforcement mechanisms. Therefore, a corporation's decisions with respect to the scope and coverage of its supplier code of conduct are inextricably connected to and impacted by the implementation and enforcement mechanisms it is prepared to undertake.

The most comprehensive supplier codes of conduct will include both auditing mechanisms and grievance and complaint procedures.

Auditing compliance with supplier codes of conduct

Since suppliers are in the business of profit maximisation and, generally speaking, operate in highly competitive markets far removed from the Western 'ethical' brand cachet, they should not be permitted to self-report compliance with a code of conduct. In order to ensure compliance, corporations, or third parties engaged on their behalf, must: negotiate audit rights into contracts with suppliers; regularly conduct on-site visits of supplier facilities; and require and review supplier records.

If and when the corporation's audit uncovers a violation of the supplier code of conduct, the corporation must be prepared to penalise the offending supplier. To ensure a culture of non-compliance does not develop, corporations should adopt an approach that penalises non-compliant suppliers in a meaningful way, commensurate with the degree of their aberration. Penal provisions in a supplier code may include, providing the supplier with a rectification period, the public reporting of non-compliance, the imposition of fines, and a reduction in business from the corporation to the supplier up to and including cancellation of the contract.

However, as it is ultimately not in the corporation's interest to uncover or publicise its business relationships with non-compliant suppliers, in practice the implementation and enforcement of supplier codes can be guaranteed only where there is an element of independent monitoring. This independent monitoring of compliance often proves to be a contentious issue as corporations are reluctant to accept such arrangements and, even where there is a commitment in principle to independent monitoring, stakeholders may differ as to what they consider 'independent' in this context. Nonetheless, the most comprehensive supplier codes of conduct will provide for auditing to be conducted by the corporation or an independent third party.

Grievances, complaints and whistleblowing

A complicated and contentious issue in respect of supplier codes of conduct is whether or not corporations should oversee grievances and complaint procedures when an employee of the supplier files a complaint related to an alleged breach of obligation set out in the code.

Corporations that do oversee such grievances and complaint procedures should carefully manage the legal risks that may arise from their involvement, including the risk of being deemed a co-employer of the supplier's employees. Although the law differs by jurisdiction, even the most comprehensive supplier code of conduct should not eliminate the supplier as the intermediary between the corporation and the supplier's employees, thereby preventing the supplier from abnegating its responsibilities under the code.

At a minimum, however, codes should contain provisions that trigger reporting obligations from the supplier to the corporation upon the filing of a complaint or grievance by an employee of the supplier related to its obligations under the code. Such reporting obligations keep the corporation abreast of the employee relations in the supplier's organisation and alert it to potential red-flag conduct by the supplier without the corporation assuming liability for any misdeeds.

Further, some supplier codes also include a mechanism for employees of the supplier to anonymously report violations of the code to the corporation. These 'whistleblower' provisions may then trigger the corporation's right to audit the supplier for compliance.

Risks and recommendations

When a corporation is contemplating the scope, content, implementation and enforcement mechanisms for its supplier code of conduct, it must be careful to strike a balance between two extremes.

First, if a corporation adopts a supplier code of conduct that is very limited in scope and content, it risks being criticised by customers, shareholders and other stakeholders for taking a non-committal approach to the potentially unethical business conduct of its suppliers, which may in turn detract from its status as an 'ethical brand'. While codes that are limited in scope and content may be easier to implement and enforce, they may also be viewed by stakeholders as a public relations ploy that changes very little 'on the ground'.

Second, if a corporation adopts a comprehensive supplier code of conduct but fails to adequately implement and enforce it, the corporation also risks the reputational and financial harm associated with its diminished public image in the event that breaches of the code are publicised. In such cases, corporations risk being accused of hypocrisy when egregious breaches of a code are made public. There are also potential legal considerations, which may include: negligence; breach of fiduciary duty; securities law class actions; and damage to reputation.

To minimise the reputational as well as the financial risks, corporations that draft such codes should: carry out a pre-screening verification during approval processes with suppliers; conduct initial on-site audits at some supplier facilities; apply the 'eyes always open' approach when visiting suppliers for any reason; conduct periodic follow-ups to monitor supplier performance; and enforce the penal provisions of the code if a supplier's performance creates an unreasonable reputational or financial risk to the corporation.

Moreover, a corporation's best public relations insurance against reputational and financial harm is to have clear enforcement mechanisms that both deter suppliers from breaching the terms of a code and enable the corporation to take swift and meaningful action in the event of a breach. Accordingly, corporations should not only include stringent penal provisions in their supplier codes of conduct but should also integrate those enforcement mechanisms into the commercial agreements they enter into with their suppliers.

Corporations should therefore: explicitly state in their commercial agreements with suppliers that non-compliance with the supplier code of conduct is a material breach of the commercial agreement; reserve the right to terminate the commercial agreement in the event of supplier non-compliance with the code; and be prepared to terminate the commercial agreement in the event that a significant breach of the supplier code of conduct is publicised, thereby creating an unreasonable reputational or financial risk to the corporation.

Master limited partnerships: a new way to invest in Mexico

Luis Burgueño
Von Wobeser y Sierra, Mexico City
lburgueno@vwys.com.mx

Andrés Nieto
Von Wobeser y Sierra, Mexico City
anieto@vwys.com.mx

Introduction

Mexico is demonstrating the best financial performance in 2015 in Latin America, and because of this, the Aztec stock market is the centre of attention for investors in the region.[1] Without doubt, Mexico has become highly attractive for investors, so much so that during the first quarter of 2015, Mexico registered foreign direct investment (FDI) of US$7.5bn, which is the highest preliminary figure for a first quarter in the history of this indicator in this country.[2]

One of the most attractive sectors for investors is energy. This industry was stagnant for more than 77 years because of the monopoly exercised by the Mexican government. Finally, in December 2013, the legislative branch amended Articles 25, 27 and 28 of the Mexican Constitution, collapsing the pillars of this monopoly. As a result, many pieces of legislation and regulations have been enacted and others have been amended. These new rules permit private participation in the energy sector. In light of this, domestic and foreign investors have begun to take an interest in a market that is expected to generate more than US$20bn per year in investments.[3] One of the most frequent questions that investors have is: what legal structures or vehicles can be used to invest in the sector? In this regard, Mexican authorities have undertaken the task of studying the legal structure of the master limited partnership (MLP) in the US in order to 'Mexicanise' this instrument and include it as an investment vehicle in the coming months.[4]

Concept of MLPs in the US

Perhaps in 1981, the public investor would not have imagined the success that MLPs have had in the US, starting when the Apache Petroleum Company carried out its initial public offering (IPO) in 1981, through the reforms passed by the US Congress in 1987, which, among other things, permitted the use of MLPs in the energy sector. No doubt, this investment vehicle detonated the energy industry in the US.[5] In the last 25 years, more than 100 MLPs related to the energy industry have been created; the majority of them have focused on midstream activities. The MLPs market has shown strong growth, reaching almost US$880bn, which represents approximately 75 per cent of the financing of the energy infrastructure in that country.[6]

In practice, MLPs are partnerships listed on stock exchanges and securities markets. For tax efficiency, they are structured as pass-through partnerships instead of public corporations.[7] They trade in the form of 'units'. These partnerships do not pay taxes at a corporate level because only unit holders pay, which they do individually.[8]

Generally, the legal structure of MLPs consists of a general partner (GP), who is the decision-maker, and the limited partners (LPs), who are the public holders of the 'units'; and on certain occasions, there is a 'sponsor'.[9] The GP holds a minor equity stake (approximately two per cent), but has full management responsibility for the company and is the owner of the incentive distribution rights (IDRs).[10] LPs generally possess the remaining interest in the partnership, have no role in the daily operations of the company, provide all the capital, receive cash distributions and do not have voting rights.[11]

To qualify as a MLP, the partnership must generate at least 90 per cent of its income from certain sources that the Internal Revenue Service qualifies as admissible.[12] These sources include every type of activity related to the production, transformation and transportation of oil, natural gas and coal, among others.[13]

MLPs in Mexico

It is expected that Mexican MLPs will be a mix of capital development certificates (*certificados de capital de desarrollo* – CKDs) and real estate investment trusts (*fideicomisos de inversión en bienes raíces* – FIBRAs) because both are long-term instruments and regulated under Mexican legislation. In contrast to

the US, where the primary investors are individuals, in Mexico, the idea is for the instrument to be attractive for institutional investors, mainly authorised pension fund managing entities, called investment companies specialised in retirement funds (*sociedades de inversión especializada en fondos para el retiro* – SIEFORES), as is done with the CKDs, encouraging investment in the energy sector without excluding the participation of other types of investors.[14]

The Mexican energy industry will probably collect at least US$10bn a year through the sale of energy trusts or Mexican MLPs, once they have been approved by the regulators.[15] In this regard, these trusts would make it possible to create a very interesting value chain, which would consist of such companies delivering their assets to the holders and the latter in turn injecting cash flow into the companies so that they can develop new operations.

It is clear that Mexico today, more than ever, needs an investment mechanism that is focused on the energy industry. The country has been asleep in terms of infrastructure development. For example, the existing transport network of Petróleos Mexicanos that connects production centres with national refineries and export terminals, only consists of around 4,830km of pipelines.[16] On the other hand, in the US, the pipeline network extends to around 92,000km. In the natural gas industry, Mexico has around 8,900km of pipelines, while in Texas alone there are more than 93,000km of natural gas pipelines.[17]

Conclusion

It is clear that Mexico needs these types of legal vehicles to detonate and modernise infrastructure in the energy sector to take full advantage of the new legal structure of this industry. Although there are still details to work out for the inclusion of MLPs in Mexico, among the most important being the elimination of double taxation, which would make the instrument more attractive for investment, members of the Mexican Stock Exchange are confident that Mexican MLPs will become a reality in 2015 or the beginning of 2016.

Notes

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