SQUIRE SANDERS | LEGAL COUNSEL WORLDWIDE

走出中国 CHINA OUTBOUND

美国翰宇国际律师事务所
Squire, Sanders & Dempsey L.L.P.
December 2008

www.ssd.com

RUSSIA

Russian Court Upholds Prohibition on Limiting Pricing Policies and Sales Territories of Distributors

On July 29, 2008 a Russian appellate court upheld the decision of the Kurgansk Department of the Federal Antimonopoly Service of the Russian Federation ruling that the pricing and sales territory provisions in the distribution agreement of a Russia-based dairy company, Unimilk LLC, constituted an unlawful restraint on trade. Under Unimilk's distribution agreement, the distributor was required to agree with Unimilk on its prices for milk sold in a specific geographic territory and on the terms and conditions of its sales. As part of the ruling, the antimonopoly agency imposed a fine of RUB16.17 million (approximately US$700,000) on Unimilk.

The ruling is significant as it marks the first time a court has upheld the antimonopoly agency's position that provisions of distribution agreements limiting the prices and sales terms of distributed products and where they can be sold are unlawful. While the antimonopoly agency has previously ruled against these provisions (e.g., against Coca-Cola HBC Eurasia), its position was never tested in court before now. Moreover, the fine imposed by the antimonopoly agency is considerable and sets a benchmark of risk that companies with similar distribution arrangements may face.

It is fairly typical for distribution arrangements to include restrictions limiting the distributor's ability to determine pricing, sales terms and territory. In light of the ruling, we recommend that companies operating in Russia review their current distribution arrangements for compliance with antimonopoly law.

UNITED STATES

New Credit Facility Aims to Support Common Asset-Backed Securities – Student Loans, Auto Loans, Credit Cards and SBA Loans

On November 25, 2008 the US Federal Reserve Board announced the creation of the Term Asset-Backed Securities Loan Facility (TALF), which is aimed to support the issuance of asset-backed securities (ABS) collateralized by student loans, auto loans, credit card loans and loans guaranteed by the Small Business Administration (SBA). These commonplace consumer and small business credit vehicles have stalled in recent months or otherwise have experienced historically high costs. The board's facility is thus aimed to restart the ABS markets and to bring costs down to more normal levels.

Under the TALF, the Federal Reserve Bank of New York (FRBNY) will lend up to US$200 billion on a nonrecourse basis to holders of certain AAA-rated ABS that are backed by newly and recently originated consumer and small business loans in the eligible collateral classes. The FRBNY will

lend an amount equal to the market value of the ABS, less a "haircut" based on the price volatility of the ABS classes involved. The TALF loans will be secured at all times by the ABS. The US Treasury Department – under the Troubled Assets Relief Program (TARP) of the Emergency Economic Stabilization Act of 2008 – will provide US$20 billion of credit protection to the FRBNY in connection with the TALF. The TALF loans will not be subject to mark-to-market or remargining requirements. The eligible ABS collateral classes for the TALF might be expanded later to include commercial mortgage-backed securities, among others. The board's term sheet describes the basic terms and operational details of the facility.

The one-year loans will be offered to borrowers on a monthly basis based on a competitive, sealed bid auction process. Borrowers must access the TALF through a primary dealer. Originators of the credit exposures that underlie the eligible ABS must have agreed to comply with the executive compensation standards under the TARP's Capital Purchase Program. This program is a direct effort by the Board and the Treasury to resuscitate the consumer credit markets.

A Revolution in Bank M&A: New National Bank "Shelf Charters" Will Facilitate Private Equity Investment in Troubled and Healthy Financial Institutions

The Office of the Comptroller of the Currency (OCC) of the US Treasury Department has announced a new procedure to facilitate private equity investments for the acquisition of deposit liabilities and other business from troubled US banks and thrifts. In connection with its conditional approval of a charter for the new Ford Group Bank, N.A. in Dallas, the OCC outlined a procedure by which nonbank investors could for the first time obtain conditional OCC approval of a new national bank charter (Shelf Charter) and could thus form the legal entity known as a "national bank in organization," thereby qualifying to receive invitations from the Federal Deposit Insurance Corporation (FDIC) to bid on the deposits and assets of institutions that the FDIC had or was about to close. Under this new Shelf Charter procedure an investor group submits a simplified application to charter a new national bank, outlining the names and qualifications of the management team, the amounts and sources of available capital, and an abbreviated strategic business plan. Similar to a home buyer's preliminary qualification for a mortgage loan, this Shelf Charter allows the group's representatives to review FDIC bid packages and to submit bids in the name of the new national bank in organization. If the bid is accepted by the FDIC the group then provides the OCC with a more detailed business plan reflecting the specifics of the institution or deposit and asset package to be purchased and obtains its final OCC national bank charter concurrently with the closing of its purchase from the FDIC. A Shelf Charter is valid for 18 months and may be renewed thereafter.

Monthly reports of any changes in the basic application information will be required.

Nontroubled Institutions

While the OCC announcement focuses on the acquisition of deposit liabilities and performing assets of troubled or failed institutions, the concept of a Shelf Charter could place nonbank investors (including non-US banks not yet approved by the Federal Reserve as bank holding companies) on a more level playing field with existing US banks and bank holding companies in negotiating acquisitions. This equality would arise from the fact that prospective sellers historically have not entertained offers from non-US banking organizations because such offers entail long and uncertain regulatory application-processing periods. The requirement that the directors and senior management of a buying group must undergo extensive and time-consuming background checks by US law enforcement and intelligence organizations has been a particular reason for sellers to avoid nonbank buyers, and the Shelf Charter procedure could in most cases eliminate this problem by having the background checks successfully completed as part of the Shelf Charter application.

New Investor Classes

In the past only existing banks could bid for the deposits of a troubled institution since a bank charter is a legal prerequisite to the acceptance of bank deposits. The OCC correctly notes that its new Shelf Charter procedure should greatly increase the availability of capital to resolve troubled bank situations because it allows nonbank investors to participate. In the past the deposits and performing loans of failing local banks were often assumed by larger banks from elsewhere; it is possible that this Shelf Charter concept will promote the retention of local control of community banks since a local investor group with a Shelf Charter could quickly step in to acquire the deposits and performing loans of a failing local bank.

Federal Reserve Bank Holding Company Aspects

In its release the OCC indicates that it would expect the Shelf Charter organizing group concurrently to apply for Federal Reserve approval of a shell one-bank holding company to serve as 100 percent parent shareholder of the new national bank. Depending on the number, size and nature of the involved investors, one or more of these investors might also have to apply to become bank or financial holding companies. While the Federal Reserve did not join in the OCC's announcement, it is expected that the Federal Reserve has or will reconsider its policy of accepting holding company applications only from applicants that had entered into an agreement to acquire a specific financial institution. Such a change would facilitate the OCC Shelf Charter initiative and would be consistent with recent Federal Reserve actions enlarging the size of noncontrolling private capital investments in US banking organizations (September 22, 2008) and granting certain blanket approvals to private equity firms to invest

in up to 15 percent of the voting equity of US banking organizations (December 7 and 21, 2007).

FDIC Deposit Insurance Aspects

In its release the OCC indicates that it would also expect the Shelf Charter organizing group concurrently to apply for FDIC insurance for the new national bank.

Given the "least cost resolution" advantages of the Shelf Charter concept, it is likely that the FDIC would process such applications expeditiously and, if not previously completed, that the FDIC would approve such an application in connection with its award of a purchase and assumption contract to a Shelf Charter bidder.

Squire Sanders Approach

Our law firm appreciates that the advantages of a Shelf Charter will make them attractive to a wide range of private capital investment firms and individuals. For that reason we are working to develop a relatively fixed price package for the legal and regulatory work needed to assist an organizing group in applying for an OCC Shelf Charter, FDIC deposit insurance and Federal Reserve approval of a shell one-bank holding company.

Important Decision Affecting Risk Allocation in M&A Agreements

Mergers and acquisitions agreements almost always include a provision stating that the representations and warranties in the agreement survive the closing of the transaction for a set time period. These provisions are often heavily negotiated and are critical to the allocation of risk between the parties. A recent decision by a three-judge panel of the Ninth Circuit Court of Appeals has an important impact on the interpretation of those survival clauses and serves as a reminder to M&A parties in all jurisdictions to draft with specificity when crafting survival clauses in M&A agreements.

***Western Filter Corp. v. Argan, Inc.* (9th Cir. 8/25/2008)**

Western Filter Corp. competed with Pureflow, Inc. in the industrial aerospace and automotive filter business. Western Filter decided to acquire Pureflow from its parent company, Argan, Inc. As is typical, Argan made representations and warranties about Pureflow in the Stock Purchase Agreement (SPA) that governed the transaction. The SPA contained a survival clause that provided that certain of the representations and warranties "shall survive the Closing for a period of one year . . . "

After acquiring Pureflow, Western Filter discovered that Pureflow's inventory was allegedly worth significantly less than Argan represented in the SPA. Eleven months after the closing, Western Filter sent Argan a written notice claiming that Argan had "grossly misrepresented" the financial condition of Pureflow, and that Western Filter was "fully prepared to assert its claims in court, if necessary." Six months later, after the one-year survival period had expired, Western Filter filed suit against Argan, alleging breach of representations and warranties in the

SPA. On summary judgment, the district court concluded that Western Filter's claims were barred by the one-year survival limitation in the SPA.

Ninth Circuit Decision

On appeal, the Ninth Circuit considered whether the one-year survival clause in the SPA served as a contract to shorten the longer statute of limitation period otherwise applicable under California law. Reversing the district court's decision, the Ninth Circuit held that the SPA's survival clause, as drafted, did not shorten the limitation period to one year.

The court reasoned that although contracts to shorten a statute of limitation period are generally valid, the survival clause in this case did not do so because it did not unambiguously state that it was meant to shorten the statute. According to the court, the most reasonable interpretation of the survival clause is that it "serves only to specify when a breach of the representations and warranties may occur, but not when an action must be filed." It noted that California law, like that of many states, disfavors contracts to shorten a statute of limitation period, requiring them to be "construed with strictness against the party invoking them."

Suggestions

Some commentators have criticized the Ninth Circuit's decision because its conclusion differs from the common understanding of survival clauses held by most M&A lawyers. Future court cases might clarify or overturn the Ninth Circuit's holding, but in the meantime, parties involved in drafting M&A agreements should carefully craft the survival provisions. In most cases, that means an M&A agreement should provide:

- That representations and warranties of the seller speak only as of the time of execution of the agreement and as of the closing;
- That the survival clause is intended to shorten the period otherwise provided by law during which claims for breach of representations and warranties can be made, and that such claims must be asserted within the applicable survival period or be forever barred;
- A procedure describing how such a claim for breach of representations and warranties should be made, for example, by written notice to the other party or by filing a complaint in court; and
- That indemnity is the sole remedy available for breach of representations and warranties.

GERMANY

Revisions to the German Foreign Trade Act Unnerve Global Investors

On July 11, 2008 the German Federal Ministry of Economics and Technology (*Bundesministerium für Wirtschaft und Technologie* – BMWi) published a revised draft act to amend the German Foreign Trade Act (*Außenwirtschaftsgesetz* – AWG) and the corresponding German Foreign Trade Regulation

(*Außenwirtschaftsverordnung* – AWV). The draft act passed the cabinet on August 20, 2008.

Pursuant to the draft act, a new review and clearance procedure shall be established that entitles the BMWi to prohibit or restrict investments in 25 percent or more of the voting rights in German companies by non-German private and public investors. In contrast to the current law, the scope of the draft act is no longer restricted to investments in companies active in the fields of arms or encryption technology, but shall apply to a variety of industries.

Besides the investment threshold of 25 percent, the only further requirement for a prohibition or restriction of a transaction by the BMWi is if the public order or safety of the Federal Republic of Germany is endangered *(Gefährdung der öffentlichen Sicherheit oder Ordnung)* by the investment and if the investor is regarded as (i) a non-EU entity or (ii) an EU-resident entity with a minimum of 25 percent of the voting rights in such EU-resident entity held by a non-EU entity.

Upon execution of the underlying share purchase agreement or the publication of a tender offer relating to a minimum of 25 percent of the voting rights in a German company, a review period of three months commences. If the BMWi decides to initiate a formal review within such period, it informs the investor accordingly and requests a detailed set of transaction documents. Upon receipt of the documents, the BMWi has another two months to decide whether the transaction shall be restricted or prohibited. Since a prohibition by the BMWi would void the entire transaction with retroactive effect, the draft act provides that an investor may apply for a binding clearance of the transaction in advance – i.e., prior to the commencement of the three-month review period. If the BMWi decides to initiate a formal review, the review period of two months commences upon receipt of the transaction documents.

The draft law creates significant legal uncertainty for global investors. Although the BMWi has estimated that the amendment of the AWG and the AWV would affect only approximately 10 transactions per year, one must consider that the draft law has been issued as a reaction to widespread fears that foreign state funds may take over Germany's key industries. Therefore, an amended AWG with its vague legal terminology "danger to the public order and safety of the Federal Republic of Germany" could serve as a political means to prevent non-German investors from acquiring Germany's key industry companies if such an acquisition is unwanted for political reasons.

Against this background, controversy has arisen in Germany regarding whether the draft act is in line with the principle of the free movement of capital under EU law. Compliance with EU law is disputed by German trade associations – e.g., by the Chambers of Industry and Commerce *(Industrie-und Handelskammern)*. However, irrespective of such ongoing discussions, the draft

law has already passed the cabinet, so the next step in the legislative procedure would be for the German parliament (*Bundestag* – BT) to decide on the draft. If the BT approves it, the draft act could yet come into force in 2008.

As a result, any non-German investor would have to review whether the contemplated investment in a minimum of 25 percent of the voting rights in a German company could be subject to a prohibition or restriction by the BMWi. If a corresponding risk exists, the investor has to apply for the clearance of the transaction in advance to avoid legal uncertainty.

SQUIRE SANDERS | LEGAL COUNSEL WORLDWIDE

走出中国 CHINA OUTBOUND

Contacts：

北京办公室

Sungbo Shim (沈成辅)
James M. Zimmerman (吉莫曼)

Squire, Sanders & Dempsey L.L.P.
25th Floor, North Tower, Suite 2501
Beijing Kerry Centre
1 Guanghua Road, Chaoyang District
Beijing 100020
People's Republic of China

+86.10.8529.6998

上海办公室

Daniel F. Roules (陆大安)
Amy L. Sommers （李雅美）
Charles R. McElwee II (李康熙)

Squire, Sanders & Dempsey L.L.P.
Suite 1207, 12th Floor
Shanghai Kerry Centre
1515 Nanjing Road West
Shanghai 200040
People's Republic of China

+86.21.6103.6300

香港办公室

James S. Tsang （曾世昌）
Nicholas Chan (陳曉峰)
Francis Li (李澤恩)

Squire, Sanders & Dempsey
24th Floor, Central Tower
28 Queen's Road Central
Central, Hong Kong
Hong Kong SAR, China

+852.2509.9977

东京办公室

Ken Kurosu （黑须 贤）

Squire Sanders
Ebisu Prime Square Tower, 16F
1-1-39 Hiroo
Shibuya-ku, Tokyo 150-0012
Japan

+81.3.5774.1800

NORTH AMERICA
Cincinnati
Cleveland
Columbus
Houston
Los Angeles
Miami
New York
Palo Alto
Phoenix
San Francisco
Tallahassee
Tampa
Tysons Corner
Washington DC
West Palm Beach

LATIN AMERICA
Bogotá+
Buenos Aires+
Caracas
La Paz+
Lima+
Panamá+
Rio de Janeiro
Santiago+
Santo Domingo
São Paulo

EUROPE
Bratislava
Brussels
Bucharest+
Budapest
Dublin+
Frankfurt
Kyiv
London
Moscow
Prague
Warsaw

ASIA
Beijing
Hong Kong
Shanghai
Tokyo

+Independent network firm

www.ssd.com