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 2009

UNITED STATES – CHINA

What to Expect in US Courts

China Outbound interviews **Victor Genecin**[1]

What is it like for China-based businesses that file suit in US courts?

Genecin: The federal and state courts located in New York and Boston, the cities where I practice, are accustomed to seeing parties from all over the world. China-based businesses that bring suit here, or that must defend a suit here, can expect our courts to give their claims and defenses the same full and fair hearing that US-based companies receive. Our courts have a very sophisticated understanding of corporate law and a lot of experience dealing with issues of international and non-US law.

Take a simple breach of contract dispute, for example, and help us understand what the first steps would be.

Genecin: When the parties' business transactions are governed by a written contract, the first question to address is whether the contract has a valid arbitration clause. If so, then that clause will control the dispute resolution process. The arbitration clause should state where the arbitration will take place. Our courts will support your right to arbitration and enforce the arbitrators' award.

And if there is no arbitration clause?

Genecin: If there is no arbitration clause, then you must decide whether to bring suit in the US courts. This decision involves balancing the potential cost of a lawsuit against the value of your claim. It's important at the outset to investigate your adversary. Is the party on the other side solvent? Will it be able to pay any judgment that you obtain? It's also important to be aware of the risk that if you become a plaintiff in our courts, other US-based entities that want to sue you may be able to obtain jurisdiction by virtue of your presence for your lawsuit. Therefore, the very first thing that a China-based company that is contemplating becoming a plaintiff in the US courts should do with its US lawyers is analyze whether such risks are present and, if so, decide whether or not to proceed.

Can you estimate the cost of a lawsuit in a breach of contract case?

Genecin: Each case is different: some cases are settled very quickly, while other cases go through all possible procedural stages. To start to develop a clearer idea of what a specific breach of contract case would cost, you should provide your US trial lawyer with the contract itself, the documents that demonstrate your compliance, the evidence of breach and all of your correspondence with the other side. It's important to share with your lawyer your understanding of the other side's potential defenses.

A key variable that affects how much a case will cost is the stage of the lawsuit called "discovery,"

[1] Victor Genecin is a trial lawyer in the New York office of Squire, Sanders & Dempsey L.L.P.

in which each side explores the factual basis of the other side's claims or defenses. US civil procedure requires that each party make thorough searches of its files and produce not only all relevant documents but also all documents that might lead to the discovery of evidence in the case. A company may be required to produce the files maintained by or for each of its employees who participated in any way in the transactions at issue.

In addition, each party is required to produce all witnesses who are in its control. This means that even if you can prove your case with the testimony of just one or two of your employees, the other side can require you to produce all of your employees who may have knowledge about any aspect of the case. A more accurate estimate of litigation costs is possible only if you know the volume of documents that will be involved in the case, as well as who the witnesses for both sides will be.

Another cost factor is the need for expert testimony. A case against a buyer of goods who hasn't paid for them becomes more complex if the goods in question have technical specifications or are subject to US regulations. In such a case, you can anticipate the need for expert testimony concerning whether the products satisfy the relevant standards. If both sides have experts, there can be significant costs associated with their various fees. There also will be attorneys' fees for your counsel to depose the opposition's experts, and for defending the deposition of the experts that you expect to call at trial.

You also must bear in mind that, after you have started a lawsuit, you may not be able to put an end to its costs simply by discontinuing the case. Defendants can present counterclaims that, even if baseless, can force a plaintiff to continue with its case.

What impact does the language barrier have on proceedings?

Genecin: Certainly, the need for translation of documents and interpreters for witnesses can increase litigation costs in a cross-border case. Non-English documents that you intend to use to prove your case must be translated. A company that has high-quality translators in-house can save a lot on translation costs. A court-certified interpreter must be retained for witnesses who do not speak English. Giving testimony in a lawsuit is a stressful experience. I have worked with many witnesses whose first language is not English. I have found that a good interpreter can be very helpful even when a non-US witness speaks excellent English.

With so many variables to consider, how do you provide guidance to your clients concerning the potential cost of a lawsuit?

Genecin: When a client wants a very general estimate of potential legal fees, I make certain assumptions, such as that the case would be brought in New York state court (lawyers in other locations would consider a case with their own

states in mind). I also assume that the potential case will be assigned to the state court system's somewhat more time-efficient and commercially sophisticated Commercial Division. And I assume that documents and witnesses would be produced in New York, dispensing with the need for New York lawyers to travel to China. Also, in every case, when estimating potential costs it's wise to assume that your opposition will be aggressive.

Are there any globally applicable fees?

Genecin: Unfortunately, there aren't. It's simply not possible to speak of a global fee for any case. Some matters are resolved quickly; others can last months or years. I usually apply a mid-range scenario – not the best case, not the worst case – for what a case in the New York courts might cost at each stage, and how long each stage might take. I make no assumptions about which side would prevail at each stage, but I do assume that the losing party will pursue its right to appeal at each stage for which an appeal is available under New York law.

Do the courts charge fees as well?

Genecin: Our court charges are very modest to start with – approximately US$300 to initiate an action in state court, or US$350 in federal court. After that, US courts impose small fees to obtain documents from the official records of the court, and, of course, there can be filing fees in connection with appeals.

Are there additional expenses to be expected?

Genecin: The fees of court reporters can be a major area of expense. The court reporter is a person certified by the court whose job it is to record proceedings stenographically and produce a verbatim transcript. Reporters are paid by the page. Discovery depositions are all recorded verbatim. A full day of deposition testimony might result in a transcript costing roughly US$2,000. In addition, when a conference or oral argument before the court is held on the record there is a court reporter in attendance who prepares a verbatim transcript. Such transcript charges tend not to be significant during the pretrial part of a case, as there are relatively few proceedings on the record, and these are usually not long. On the other hand, in a trial, you can spend US$3,000 to US$5,000 per day on transcripts.

Additional potential costs for court proceedings depend on the nature of the case. For example, a plaintiff seeking a preliminary injunction or other prejudgment remedy, or a defendant seeking to appeal a money judgment, will be required to post a bond.

Circling back to your first answer – can you tell us a bit about arbitration procedures in the United States?

Genecin: There is usually little or no discovery involved in arbitration, which makes an arbitrated case significantly less costly than a litigated one. And arbitration proceedings are typically not on the record, which eliminates transcript costs. The costs of adjudication, however, are higher in

arbitration. The arbitration providers generally charge a filing fee to start the case based on the size of the claim and then charge administrative fees and fees for the arbitrators as the case progresses. Even with these higher fees, though, arbitration is usually much less expensive than a lawsuit because there is generally very limited discovery.

Estimating Litigation Costs

A hypothetical estimate of legal fees to be paid by a plaintiff, and the time necessary for each part of the case, in a lawsuit in the courts of New York for breach of contract might look something like this:

Phase 1: Pleadings

0.5 months	US$5,000	Investigation
0.5 months	US$15,000 - US$20,000	Prepare, file and serve complaint
1 - 1.5 months		Receive defendants' answer

Phase 2: Motion to Dismiss Complaint

This phase occurs infrequently, but it can happen that a defendant is able to allege jurisdictional or other legal grounds for dismissal. Such a motion would be presented when the defendant is required to serve its answer. In such a case, a very general estimate of fees and timing would be:

1 month	US$20,000 - US$25,000	Prepare and file opposition to motion to dismiss
1 month		Receive defendants' reply papers
1 - 3 months	US$4,000 - US$6,000	Prepare for and attend oral argument of motion
2 - 6 months		Inactive time awaiting decision of first-level court

Phase 3: Appeal by Losing Party Following Motion to Dismiss

1 month	US$0 - US$1,500	Losing side files notice of appeal
3 - 4 months	US$40,000 - US$45,000	Prepare and file joint record and opening briefs
1 month	US$15,000 - US$25,000	Reply brief
2 - 4 months	US$6,000 - US$8,000	Prepare for and present oral argument on appeal
3 - 4 months		Await decision of the appellate court

If the Appellate Division upholds the dismissal, the litigation is ended. There would be no further right of appeal.

Phase 4: Discovery

Following opposition's answer, or after plaintiff prevails on motion to dismiss:

6 - 9 months	US$50,000 - US$250,000	Discovery on the merits

Phase 5: Motion for Summary Judgment

6 - 12 months	US$50,000 - US$75,000	Motion for summary judgment; await decision

Phase 6: Appeal by Losing Party Following Motion for Summary Judgment

9 - 12 months	US$75,000 - US$90,000	Appeal by losing side; await decision

If the case survives summary judgment and proceeds to trial:

Phase 7: Trial

6 - 12 months	US$100,000 - US$175,000	Prepare for and conduct trial

Phase 8: Appeal After Trial

12 months	US$70,000 - US$100,000	Appeal in connection with full trial record; await decision

US-China Trade Roundtable

Squire, Sanders & Dempsey L.L.P. and Boss & Young co-sponsored a United States-China trade roundtable that was held on November 12 at the Squire Sanders Shanghai office. **David M. Spooner** of Squire Sanders was the featured speaker, and David W. Wu, senior partner with Boss & Young, served as moderator.

Participants included representatives of China-based companies in the areas of textiles, automobiles and other industries that are interested in the impact of current trade negotiations between China and the United States on their business.

The session explored the implications of the recently concluded US-China Joint Commission on Commerce and Trade for various industries such as steel, textiles and apparel, as well as export controls in the IT and high-tech sectors.

Mr. Spooner indicated in his speech that, while the US government is working to mitigate restrictions on IT and high technology export from the United States, China-based apparel companies may face trade remedy and safeguard cases in the coming year. Other industries in China may also face restrictions on exports, as US companies use the latest recession year of profit data to allege dumping.

Mr. Wu moderated discussions among attendees on a variety of topics including the influence of politics in the United States on trade with China,

limitations imposed on the export of high technology to China and legal measures that China-based companies can adopt to avoid anti-dumping penalties. Mr. Wu explained that he believes there will be more trade disputes besides those in the tire industry between China and the United States in the next half year or even later, and China's government may carry out retaliation investigation against US enterprises.

David M. Spooner

Prior to joining Squire Sanders, Mr. Spooner served as the Assistant Secretary of Commerce for Import Administration, administering the US Foreign Trade Zone system, supervising the US Department of Commerce's import safety initiatives, overseeing apparel trade policy, managing trade remedy negotiations at the World Trade Organization and chairing US-China talks on macroeconomic reforms and the steel industry. Previously, he served as the Textile and Apparel Negotiator and Transition Coordinator in the Office of the US Trade Representative, where he negotiated a comprehensive apparel trade agreement with China. See further details of Mr. Spooner's qualifications.

David W. Wu

Before joining Boss & Young, Mr. Wu practiced law at the No. 1 Shanghai law firm for eight years. He was admitted to the China Bar in 1992. He is an arbitrator for the Shanghai Arbitration Commission for Technical Contracts.

Please refer questions or comments for the speakers to:

Squire, Sanders & Dempsey L.L.P.
Washington DC Office

David. M. Spooner
+1.202.626.6612

Squire, Sanders & Dempsey L.L.P.
Shanghai Office

Amy L. Sommers
+86.21.6103.6308

Daniel F. Roules
+86.21.6103.6309

Rainer Burkardt
+86.21.6103.6360

Boss & Young Attorneys at Law

David W. Wu
+0086 21-6886 9666

GLOBAL

The Global Maritime Industry Approaches a Financial Storm

The troubled economy has not only affected real estate, but now the shipping industry faces troubled waters. In recent months, shipping industries' profits have continued to diminish due in part to excess capacity triggered by a pre-slowdown building spree and lowered demand for goods. In this article, we consider issues in the news regarding the problems facing the shipping industry as well as possible approaches to navigate rough seas.

A *Wall Street Journal* article published November 13, 2009 reviewed A.P. Moller-Maersk AS' startling loss of US$778 million during the first nine months of 2009 with an expectation of losses of more than US$1 billion in 2009. According to the article, the Maersk's troubles are due to over-capacity in the container shipping business. Moving a 40-foot container in September 2009 averaged about US$2,000, down 17 percent from a year earlier. Shipping volume has not declined as substantially.[1]

The *New York Times* carried a November 12, 2009 article on how banks are fearing the collapse of carriers, especially Europe's banks, which hold shipping industry loans worth more than US$350 billion. According to the *New York Times*, banks have not taken write-downs for their portfolios, which, if predictions are to be believed, may cause trouble down the line. As the shipping industry was still in the midst of a shipbuilding frenzy two years ago, diminished shipping rates are beginning to affect companies' ability to repay the loans they took out to order new ships. Banks with large shipping portfolios may soon face another crisis when their borrowers can no longer repay their loans.[2]

Two articles in the *Financial Times* highlighted the effect the downturn has had on Germany's shipowners. Peter Döhle Schiffahrts, one of the world's largest container shipowners, requested money from Germany's fund established to assist companies suffering through the global economic crisis. With owners in Germany accounting for about a third of the world's container ships, many Germany-based companies may soon resort to asking Berlin for their own version of a bailout. In addition, Germany's KG funds allow ordinary investors to purchase shares in ships. As the industry continues to suffer, Germany's professionals who invested in the tax-efficient KG funds may be asked to cough up valuable assets to support their investments.[3]

A *Lloyd's List* article suggested shipowners use Chapter 11 to rework their loans as well as bargain with shipyards. The article suggested smart shipyards and banks will work with shipowners to resolve disputes before shipowners use Chapter 11 protection for stays against lenders and to break shipyard contracts.[4]

Squire Sanders has a team of experienced maritime, trial, finance and bankruptcy lawyers to assist clients with critical, time-sensitive concerns arising from the recent volatility in the shipping and financial markets. Drawing upon this collective experience, we are well prepared to assist clients in even the most challenging situations. We have been successful in using Chapter 15 and Chapter 11 of the Bankruptcy

[1] John W. Miller, Maersk Signals Slow Sailing Ahead, *The Wall Street Journal*, Nov. 13, 2009.
[2] Landon Thomas Jr., As Shipping Slows, Banks and Carriers Fear Loan Defaults, *The New York Times*, Nov. 12, 2009.
[3] Robert Wright, Funds Facing Shipping Crisis, *Financial Times*, Oct. 19, 2009 and Bail-out Request Highlights Shipping Crisis, *Financial Times*, Oct. 26, 2009.
[4] Rajesh Joshi, Warning of Wave of Bankruptcies to Come, *Lloyd's List*, October 16, 2009.

Code both to get claims against our clients heard in forums that may be more favorable to their interests and to use the power of the bankruptcy court to vacate Rule B attachments and enjoin prosecution of lawsuits. In addition, with our global footprint, we can assist our maritime clients with cross-border insolvencies by offering seamless representation from country to country. If you would like to learn more about our maritime or bankruptcy & restructuring practices, please contact your principal Squire Sanders lawyer or one of the following lawyers:

Sandra E. Mayerson
+1.212.872.9899
Brian D. Starer
+1.212.872.9844

UNITED STATES

What's the Use: A Look at *In re Bose Corp.* and Fraud

In the United States, trademark or service mark rights are derived from the use of a mark to identify and distinguish the mark owner's goods and/or services from those of another. An application for federal registration can be filed based on actual use of a mark or one's *bona fide* intention to use that mark. Subject to certain international considerations, a registration will not be issued and may not be maintained absent actual use of a mark. All the while, from filing an application, issuance of a registration and post-registration maintenance, a trademark owner is required to attest to its *bona fide* intention to use a mark or its actual use of a mark subject to the penalties of perjury under 18 USC §1001. Indeed, at the time an intent to use application has successfully passed the opposition stage, a Notice of Allowance provides the following guidance.

Ensure that statements made in filings to the United States Patent and Trademark Office (USPTO) are accurate, as inaccuracies may result in the cancellation of your trademark registration. The lack of a *bona fide* intention to use the mark will all goods and/or services included in an application or the lack of use on all goods and/or services for which you claimed use could jeopardize the validity of your registration, possibly resulting in its cancellation.

The declarations, affidavits and attestations as to the actual use of a mark have most often formed the basis for fraud claims. In 2003 the Trademark Trial and Appeal Board (TTAB) held in *Medinol v. Neuro Vasx, Inc.* that "[a] trademark applicant commits fraud in procuring a registration when it makes material representations of fact in its declaration which it knows or show know to be false or misleading."[1] Since the Medinol decision, we have seen many more challenges asserting fraud, and the TTAB has applied this "knew or should have known" standard to opposition and cancellation proceedings alleging fraud.

[1] *Medinol v. Neuro Vasx, Inc.,* 67 USPQ2d 1205, 1209 (TTAB 2003).

On August 31, 2009 the TTAB's reviewing court, the Court of Appeals for the Federal Circuit (CAFC), stated in *In re Bose Corp.* that the TTAB had erroneously lowered the fraud standard to a simple negligence standard by equating "should have known" of the falsity with a subjective intent and rejected the *Medinol* standard.[2] Reviewing its own prior decisions, and particularly those addressing inequitable conduct in patent cases, the CAFC explained that mere negligence is not enough to infer fraud or dishonesty.[3] Even "'gross negligence' does not of itself justify an inference of intent to deceive."[4] Rather, the CAFC confirmed that "[t]he principle that the standard for finding intent to deceive is stricter than the standard for negligence or gross negligence… applies with equal force to trademark fraud cases."[5] Reaffirming this principle, the CAFC limited the likelihood of success of a fraud claim and held that "a trademark is obtained fraudulently under the Lanham Act *only* if the applicant or registrant knowingly makes a false material representation with the intent to deceive the PTO."[6] The court cautioned that an allegation of fraud should not be taken lightly and the subjective intent to deceive is an indispensable element of the analysis. Clear and convincing evidence is required to prove such intent.

Applying this more limited standard to the particular facts of *Bose* and reversing the TTAB's decision, the CAFC determined that there was no willful intent to deceive although the court acknowledged that Bose had made a material misrepresentation to the USPTO. The court reasoned that Bose's false misrepresentation, which was made pursuant to an honest misunderstanding or inadvertence, did not constitute fraud because it lacked the requisite intent. In closing, the CAFC noted its agreement with the TTAB that Bose's mark was no longer in use on specific goods and, therefore, the registration would need to be restricted to reflect this commercial reality.[7]

In our view, in making this closing statement and recognizing that no public purpose would be served by cancelling a registration in its entirety, the CAFC hinted at the premise that registrations should not be cancelled in whole or deemed void *ab initio*, but specific goods or services in a registration may be removed if they are no longer in use or if fraud has been found in connection with a declaration of use of such goods and/or services.

Since the CAFC's decision in *In re Bose Corp.*, the TTAB has had several occasions to address this new standard. Most notably, in *Enbridge, Inc. v. Excelerate Energy Ltd. Partnership*, the TTAB denied a motion for summary judgment when it found that the opposer had failed to meet its burden of establishing that there was no genuine

[2] *In re Bose Corp.,* 91 USPQ2d 1938 (Fed. Cir. 2009).
[3] *Id.*
[4] *Id.* (internal citations omitted).
[5] *Id.*
[6] *Id.* (emphasis added).

[7] On October 30, 2009 further to the CAFC's directive, the TTAB issued an Order amending Bose's registration to delete "audio tape recorders and players, portable radio and cassette recorder combinations" which no longer were in use.

issue that the applicant had the intent to deceive the USPTO.[8] The TTAB stated that, "[a]t a minimum, whether applicant knowingly made either of… these representations of use with the intent to deceive the USPTO remains a genuine issue of fact to be determined at trial."[9] It also appears that the TTAB is undertaking a review of the pre-*Bose* filings that allege fraud. In some instances, as indicated in *Societe Cooperative Vignerrone Des Grandes Caves Richon-Le-Zion and Zicron-Jacod Ltd. v. Albrecht-Piazza, LLC*, the TTAB is requiring that a party amend its fraud claim if its original filing now fails to state a legally sufficient claim of fraud under *Bose.*[10] In this proceeding, the TTAB also advised that pleadings must contain explicit rather than implied expressions of circumstances that constitute fraud. "Pleadings of fraud made 'on information and belief' where there is no separate indication that the pleader had actual knowledge of the facts supporting a claim of fraud" are insufficient.[11]

Most recently, in *Asian & Western Classics B.V. v. Lynne Selkow*, the TTAB issued a precedential decision when it was called upon to consider a motion for summary judgment on a fraud claim.[12] The motion had been fully briefed. However, in view of its decision in *Bose,* the TTAB reviewed the operative pleadings in the case and determined that the claim of fraud had been insufficiently pleaded. In this case, the TTAB observed insufficiencies in the pleadings in which allegations based on "information and belief" were made without identifying specific facts on which the belief was reasonably based. Under Fed.R.Civ.P. 9(b), "any allegations based on 'information and belief' must be accompanied by a statement of facts upon which the belief is founded." Citing *Bose*, the TTAB also determined that a pleading before the USPTO must include an allegation of intent. "Intent" is a specific element of a fraud claim, and an allegation that a declarant "should have known" a material statement was false does not make out a proper pleading. In addition, the petitioner's allegations that "registrant knew or should have known" were found to be insufficient to infer respondent's intent to commit fraud on the USPTO. In closing, the TTAB cautioned that fraud "must be 'proven to the hilt' by clear and convincing evidence" and stated that a party asserting fraud is under a heavy burden. Considering the factual question of intent in a fraud claim, the TTAB also advises that such a claim was "particularly unsuited to disposition on summary judgment."

While we certainly do caution trademark applicants and registrants to continue to accurately identify those goods and services for which they have a *bona fide* intention to use a mark or for which they are making actual use of a mark, especially where a laundry list of goods

[8] *Enbridge, Inc. v. Excelerate Energy Ltd. Partnership* (Opposition No. 91170364, October 6, 2009).
[9] *Id.*
[10] See *Societe Cooperative Vignerrone Des Grandes Caves Richon-Le-Zion and Zicron-Jacod Ltd. v. Albrecht-Piazza, LLC,* (Opposition No. 91190040, September 20, 2009).
[11] *Id.*
[12] See *Asian & Western Classics B.V. v. Lynne Selkow,* (Cancellation No. 92048821, October 22, 2009).

and/or services is identified, it seems clear based on the CAFC's decision in *Bose* as well as the TTAB's post-*Bose* actions that a registration, or a portion thereof, will become vulnerable to cancellation based on fraud only if there has been a clear and convincing showing that the registrant had the intent to deceive. The same is true for applications. Gone are the days when the lesser "should have known" standard would suffice. The question remains unanswered with respect to the magnitude of evidence that will be required to demonstrate the requisite willful intent for fraud. The CAFC has recognized that subjective intent to deceive may be difficult to prove. Direct evidence of such deceptive intent is rarely available. Indirect and circumstantial evidence may be available to infer the necessary intent. It is unclear what form that evidence will take. However, what is clear is that pleadings of fraud must be specific. Moreover, based on the TTAB's recent decision in *Enbridge*, without the proverbial smoking gun, summary judgment motions asserting fraud likely will not succeed. Even then, based on the most recent decision in *Asian & Western Classics*, the TTAB hints that summary disposition may just not be appropriate.

Alisa C. Key
+1.703.720.7854

FDIC Adopts Interim Rule Amending Safe Harbor Protection for Securitization Transactions

The Federal Deposit Insurance Corporation (FDIC) adopted an Interim Rule, effective immediately, at its November 12, 2009 meeting, to provide a safe harbor in its conservatorship and receivership rules through March 31, 2010 for participations or securitizations that would be adversely affected by recent changes to generally accepted accounting principles (GAAP) that are effective for reporting periods beginning after November 15, 2009.

The Interim Rule is intended to forestall ratings downgrades as market participants take into account the risk that the FDIC as conservator or receiver of a failed depository institution might reclaim or recharacterize securitized financial assets or participations. The Interim Rule thus benefits both holders of existing securitized assets and loan participations and FDIC-insured depository institutions that sell loans to the securitization markets or participations in loans.

Under the Federal Deposit Insurance Act, the FDIC has the power as the conservator or receiver of a failed depository institution, similar to that of a bankruptcy trustee, to disaffirm or repudiate any contract or lease to which a failed institution is a party if the FDIC determines that the performance of such contract or lease will be burdensome and its disaffirmance or repudiation

will promote the orderly administration of the failed institution's affairs.

The FDIC adopted its Securitization Rule (12 C.F.R. § 360.6) in 2000 to provide a safe harbor for the transfer of financial assets by an insured depository institution in connection with a securitization or participation, provided that the transfer meets all conditions for sale accounting treatment under generally accepted accounting principles, other than the "legal isolation" condition. The Securitization Rule also required that the insured depository institution receive adequate consideration at the time of the transfer and that the documentation reflect the intent of the parties to treat the transaction as a sale, and not as a secured borrowing, for accounting purposes.

The Financial Accounting Standards Board finalized changes to GAAP in June 2009 effective for reporting periods that begin after November 15, 2009 (the GAAP Modification) that affect whether banks and other financial institutions must consolidate an issuing entity to which financial assets have been transferred for securitization on their balance sheets for financial reporting purposes even when the transferee entity is legally isolated. The GAAP Modification may also require institutions to treat loan participation transactions as secured borrowings rather than as sales. In either such case, the transfers will not qualify for the safe harbor provision of the existing Securitization Rule.

The FDIC's November 12 action adds another temporary safe harbor to the Securitization Rule through March 31, 2010 for asset transfers made as part of a securitization or participation transaction, notwithstanding that such transfers do not satisfy all conditions for sale accounting treatment under the new GAAP Modification rules for reporting periods after November 15, 2009 so long as such transfer satisfied the conditions (except for the legal isolation requirement addressed elsewhere in the Securitization Rule) for sale accounting treatment under GAAP in effect for reporting periods before November 15, 2009.

The Interim Rule applies both to existing transactions and to transactions that close on or before March 31, 2010. Thus it creates a window to close transactions in the pipeline that close after the GAAP Modification effective date. It also applies to revolving securitization trusts, for which beneficial interests were issued on or before March 31, 2010, thus permitting these trusts to continue operating in the normal course during this window. The FDIC has requested public comment on the Interim Rule during the 45 days following publication so it can consider and address additional changes in any final rule. The FDIC stated that it intends to publish in December 2009 further rulemaking to amend the Securitization Rule for transactions occurring after March 31, 2010.

Banks and other participants in the securitization and loan participation markets should review their documentation to ensure that transactions that no longer qualify for non-consolidated treatment under the GAAP Modification rules reflect an intent to satisfy the FDIC's Interim Rule.

For more information about the FDIC's Interim Rule or assistance in reviewing documentation, contact your principal Squire Sanders lawyer or one of the following individuals:

James J. Barresi
+1.513.361.1260

David C. Kenny
+1.415.954.0252

David L. Lapides
+1.813.202.1319

K. David Lindner
+1.602.528.4050

Aaron A. Seamon
+1.614.365.2759

Fred A. Summer
+1.614.365.2743

Alan N. Waxman
+1.212.872.9831

UKRAINE

Toxic Rains of Ukraine's State Guarantees – Acid-Proof Umbrella Is Needed

In 2009 Ukraine's government announced a storm of state guarantees for various projects. In all, the government adopted 19 resolutions (the Investment Resolutions) regarding implementation of investment projects to be financed by non-Ukraine-based lenders with state guarantees. The largest investment projects include road construction (8 billion UAH); development of EURO 2012 infrastructure (2.4 billion UAH); purchase of medical equipment and transport from companies in Austria (€500 million), the United States (US$1.3 billion) and China (US$500 million); and purchase of agricultural and energy-saving equipment from suppliers from Ukraine (1.3 billion UAH) and other countries (US$1 billion). Among the financial institutions that Ukraine's government has named as potential lenders are the Export-Import Banks of China, the United States and Korea; Private Export Funding Corporation (USA); UniCredit; Canada-based export agency EDC; the Japan Bank for International Cooperation; and others.

Why the Guarantees May Be Toxic

With the flood of Investment Resolutions, Ukraine's government has announced a willingness to issue state guarantees up to 53.8 billion UAH (approximately US$6.56 billion) (not including the state guarantee of approximately 16.4 billion UAH [approximately US$2 billion] for the debt restructuring of the state oil and gas company Naftogaz). At the same time, the 2009 State Budget Law limits the government to issuing a maximum of 37 billion UAH (approximately US$4.62 billion) in state guarantees. It is not clear exactly how much the government has guaranteed to date, as the Investment Resolutions speak to a maximum issuance for

certain projects and are not guarantees in themselves.

Nevertheless, if state guarantees in excess of the US$4.62 billion are issued in 2009, the next government (if it is formed by a political party adverse to the current prime minister) may refuse to satisfy the claim of a lender based on such state guarantees. In addition, if there is a change in the next government, a Ukraine court may find reason to refuse enforcement in Ukraine of a guarantee-based arbitration award granted in favor of a lender.

The president may suspend an Investment Resolution (as any other government resolution) if he believes that such resolution is "unconstitutional." Using this right, as of November 2009 the president already has suspended seven Investment Resolutions equal to approximately 17.3 billion UAH (US$2.11 billion); the last two were suspended on November 10, 2009. The suspensions are disputable from a legal point of view, and the ultimate authority for resolving the issue, the Constitutional Court of Ukraine, may disagree with the president's actions and uphold the legality of the Investment Resolutions. Nevertheless, with presidential election campaigns underway, the president has been willing to veto or suspend much legislation proposed by the current prime minister, which means that suspension of other Investment Resolutions is possible. The question of whether such acts by the president are legitimate will not likely be resolved before 2010.

Acid-Proof Umbrella

In such an environment, the main questions for potential lenders and suppliers relying on guarantees are (i) whether they should devote time and money to negotiate investment projects with the government and (ii) if so, how they can protect themselves from the risk that a respective Investment Resolution will be suspended, cancelled or invalidated.

Timing is the key for answering the first question. All Investment Resolutions provide that loan agreements must be signed and state guarantees issued by the end of 2009. This is despite the fact that a majority of the Investment Resolutions were adopted only in the second half of 2009 (four resolutions in July, two in August, two in September and four in October). Therefore, if lenders or suppliers need the state guarantee component for their project to succeed, they should strive to ensure that a loan agreement is signed and a state guarantee is issued by year-end.

Understanding that suspension, cancellation or invalidation of an Investment Resolution may suspend or terminate the whole investment project is the key to answering the second question. To mitigate such risks, they should be shifted to the state. In the case of traditional project finance schemes, the lender may achieve

such protection by including in the loan agreements such events of default as suspension, cancellation and invalidation of a respective Investment Resolution. For the supplier of goods the same events should be included in the supply agreements as the basis for suspension or termination of the supply of goods. In addition, the text of a state guarantee should provide a warranty that such state guarantee will be issued within the limits provided by the 2009 State Budget Law (37 billion UAH).

Because almost all Investment Resolutions provide for prepayments for goods, proper attention also should be paid to how such prepayment should be applied in case of early termination of a supply agreement. The parties should keep in mind the "180 days rule," which provides that goods must be delivered and imported into Ukraine within 180 days of prepayment. Otherwise, if the prepayment is not returned, a Ukraine-based buyer would be subject to penalties of 0.3 percent of the prepayment amount each day following the 180-day period.

Basics of Ukraine State Guarantees

In pursuing a state guarantee, along with the advice listed above, the lender should keep in mind the following basic rules and principles to ensure protection:

- A state guarantee is a guarantee issued by the government to secure fulfillment of debt obligations of Ukraine-based entities.
- For the purposes of issuance of a state guarantee, the government is represented by the Ministry of Finance.
- A state guarantee may be issued only within the limits set by the State Budget Law for a particular calendar year.
- A state guarantee is not free. A borrower whose obligations are secured by a state guarantee must pay an interest to the state for issuance and maintenance of such guarantee.
- A state guarantee is always a term guarantee. It may not be issued for an indefinite period of time.
- A borrower whose obligations are secured by a state guarantee must provide to the state a counter-guarantee of banks. Such guarantee is irrevocable and unconditional, and an issuing bank must comply with the economic norms established by the National Bank of Ukraine for the period of 2007 to 2009. Alternatively, such borrower may provide some other appropriate security (mortgage, shares pledge, etc.).

If you have questions about the Investment Resolutions, Ukraine state guarantees or related issues, please contact your principal Squire Sanders lawyer or one of the following lawyers:

Peter Z. Teluk
+380.44.220.1414

Dmytro Sakharuk
+380.44.220.1407

ARGENTINA

Argentina Adopts a New Law Regulating Radio and Broadcast and Cable Television

Argentina recently adopted a new law regulating broadcast and cable television, radio and other media services (Law No 26,522 on Audiovisual Communication Services or in Spanish, *Ley N° 26.522 de Servicios de Comunicación Audiovisual*). The law establishes a new regulatory authority for broadcasting in Argentina, the Federal Authority of Audiovisual Communication Services (AFSCA), to replace the existing broadcast regulator, *Comité Federal de Radiodifusión* or COMFER. The first four members of the body, including its president, were designated by President Fernandez de Kirchner on December 10, but an additional three members remain to be appointed. Affected companies will have one year to comply with the new regulations by, for example, the compulsory selling of broadcast television and/or radio licenses in excess of the new limits authorized by the law.

Argentina's president, Cristina Fernández de Kirchner, pushed for the new media law, saying that the existing law, promulgated during the military dictatorship of the late 1970s, was out-of-date. Ostensibly, the new media law seeks to "decentralize and democratize" the media by encouraging more local providers and supporting the protection and dissemination of Argentina's culture. However, the new law is also seen as political retribution because it limits the reach of the largest media group in Argentina, Grupo Clarín, which President Kirchner views as having turned against her administration in recent months. The new regulations also allow certain companies that are close to the current administration to acquire broadcasting licenses.

Key provisions include:

- Dividing the radio spectrum for broadcast services into thirds: one-third for government services, one-third for nongovernment services and one-third for commercial services. This change is a drastic reduction in the amount of available radio spectrum for commercial providers of radio and television.
- Limiting the number of licenses a single entity or network can have to operate radio and television stations. The effect will be that large commercial media groups, such as Grupo Clarín, will have to sell radio and broadcast television licenses to comply with this limitation.
- Requiring 70 percent of radio content and 60 percent of broadcast television content to be produced in Argentina. Cable television networks must have a channel of programming produced by them but can not have more than one.
- Requiring cable television networks to include the channels of the universities,

municipalities and provinces within their coverage area of services. This is designed to promote local artists, musicians, etc., as well as support Argentina's national and local culture.

- Creating a registry for foreign channels; in certain cases, such channels shall acquire rights over the production of Argentina's films.
- Limiting the percentage of foreign ownership in local radio and television broadcasting to 30 percent as long as non-Argentina-based ownership does not result in direct or indirect control of the company.
- Allowing only the two existing telephone companies to offer the so-called "triple play" of phone, cable television and Internet services.
- Grupo Clarín and other media groups are expected to challenge the new media law in court.

For more information on the new media law, please contact:

Squire, Sanders & Dempsey L.L.P.

Shanker A. Singham
+1.202.626.6860

Mark D. Johnson
+1.202.626.6265

Estudio Bunge – Bunge, Smith & Luchía Puig – Abogados – Squire Sanders Legal Counsel Worldwide Network

Diego César Bunge

Cristian Pablo Lacoste
+54.11.5281.6000

In the News

James M. Zimmerman was quoted on LATimes.com Dec. 7 regarding the "made in China" publicity campaign launched by China's Ministry of Commerce and a group of China-based trade associations.

WSJ.com quoted **Charles R. McElwee II** Dec. 7 on environmental litigation in two of China's provincial environmental courts brought by a China-based environmental group. The matters are significant because until these cases only individual citizens could sue polluters. Mr. McElwee was also quoted Nov. 25 on WSJ.com regarding growing government support for China's clean energy exports and interviewed by National Public Radio's "On Point" program and the BBC regarding China-based entrepreneurs who see opportunity in green tech projects in China.

Tyre Asia quoted **David M. Spooner** in November regarding the impact of the US government's decision to impose tariffs on low-cost tires imported from China.

Squire Sanders published the following *China Alert* in December: *China Releases Rules Allowing Foreign-Invested Partnerships*.

Daniel F. Roules published an article in *21st Century Business Herald* regarding China-based business investments in the United States.

David M. Spooner was quoted Sept. 26 by *The Washington Post* regarding recent trade cases brought against China by US-based unions. Media such as *The New York Times*, *Financial Times Deutschland*, Bloomberg.com, *The Washington Post*, BusinessWeek.com, Reuters and *Inside US-China Trade* have also quoted Mr. Spooner recently regarding the controversial tire tariff imposed by the US government on tires made in China. In related coverage, **James M. Zimmerman** was quoted on LATimes.com regarding the decision's impact on US automobile and chicken product exports.

Song Zhu was quoted Sept. 17 on *Law360: Intellectual Property* regarding President Obama's decision to impose tariffs on tires imported from China.

WELT ONLINE cited results of a Squire Sanders survey in a Sept. 7 article on China-based investment.

Daniel F. Roules published the following white paper on the Squire Sanders website in October: *China's Outbound Investment: Lessons From the Past*.

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）

Rainer Burkardt (博凯德)

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
Gaikokuho Kyodo Jigyo Horitsu Jimusho
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 & MIDDLE EAST
Bratislava
Brussels
Bucharest+
Budapest
Dublin+
Frankfurt
Kyiv
London
Moscow
Prague
Riyadh+
Warsaw

ASIA
Beijing
Hong Kong
Shanghai
Tokyo

+Independent network firm

www.ssd.com