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APAC News & Insights

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Welcome to the ninth edition of the Asia Pacific Economic Consulting (ECON) practice newsletter.

These newsletters recap some of the latest developments in the dispute, litigation and international arbitration communities, and will keep you up-to-date with our recent activities, including our latest engagements in the public domain, sponsored events, speaking arrangements and upcoming industry affairs.

If you have any queries, comments or feedback, please feel free to contact us using the details below.

Thank you,

Montek Mayal
Consultant, Economic Consulting

Cases and Decisions

APAC

Official Assignee v SUTL family | 13/11/2013

Minority oppression: The body that administers the affairs of bankrupts has lost a USD25 million lawsuit against the family behind the SUTL group of companies.

- The dispute in question arose from the sale of shares that a sibling, Mr William Tay, owned in two family firms. Mr William Tay also filed for bankruptcy in 2000.
- In October 2000, Mr William Tay's assets were vested in the Official Assignee (OA). The OA's responsibility included selling assets for distribution to creditors.
- The OA sought accounting data and information on any expressions of interest for Mr William Tay's shares from SUTL. A valuation of the shares was subsequently carried out by the Insolvency and Public Trustee's Office based on the accounts provided by SUTL. On the basis of that valuation, the shares were then sold to the seven defendants – Mr William Tay's siblings and half-siblings – for USD832,000 in 2004.
- The OA later alleged that it was misled by the defendants into selling the shares at a gross undervalue. It further alleged that the defendants had conspired to dilute Mr William Tay's stake in the aforementioned entities in a 2000 restructuring exercise.
- It alleged that by not disclosing the restructuring exercise and two other transactions in the assets, the defendants falsely represented that the value of the shares could be derived only from the accounts.
- However, the Judicial Commissioner Lionel Yee, in a written judgment, dismissed the claims stating that the accounts were disclosed as requested by the claimant and the defendants were not making any representation that the accounts were to be used as the sole basis for valuing the shares.
- The Judicial Commissioner further noted that the OA had not explicitly stated the purpose of requesting the accounts nor requested information on other transactions involving the companies' shares.
- He also rejected the OA's claim of a conspiracy to dilute Mr William Tay's stake on the basis that it was carried out for the purpose of succession and tax planning. *Source: Singapore Law Watch.*

Deutsche Telekom v India | 29/11/2013

Dispute over breach of contract: Deutsche Telekom, as the claimant, has filed a treaty claim governed by the International Centre for Settlement of Investment Disputes' (ICSID) additional facility rules against India over an aborted satellite venture between Devas Multimedia and Antrix.

- The claimant's Singaporean subsidiary, Deutsche Telekom Asia, has a 20% stake in Indian firm Devas Multimedia, which had entered into contracts with Antrix, the commercial arm of the Indian Space Research Organisation, for the launch and operation of two satellites. The project would have provided Devas with the bandwidth to offer broadband services to Indian consumers. But India cancelled the contracts in 2011, citing the need for the bandwidth to be reserved for "strategic requirements."
- The cancellation of the contract has already resulted in two other arbitrations – an International Chambers of Commerce (ICC) claim by Devas against Antrix and an investment treaty claim against India by three Mauritian entities that also own stakes in Devas.
- Counsel to Deutsche Telekom: Platinum Partners. Counsel to India: not yet appointed. *Source: Global Arbitration Review.*

Other

Starbucks v Kraft| 13/11/2013

Dispute over breach of contract: A JAMS arbitrator has ruled against Starbucks and ordered the coffee chain to pay USD2.8 billion for terminating a marketing deal between the two firms.

- The dispute related to a marketing contract signed between the parties in 1998 in which Kraft was given the exclusive right to market Starbucks coffee in supermarkets. The contract was subsequently terminated by Starbucks after they showed dissatisfaction with Kraft's performance.
- Starbucks alleged that Kraft had failed to cooperate with the company's sales and advertising process and also violated an exclusivity deal by promoting its own Yuban coffee blend. After failing to renegotiate the agreement, Kraft launched arbitration proceedings in November 2010, claiming compensation from Starbucks for unilaterally terminating the contract.
- Counsel to Starbucks: Kellogg Huber Hansen Todd Evans & Figel. Counsel to Kraft: Robins Kaplan Miller & Ciresi and Morgan Lewis & Bockius. *Source: Global Arbitration Review.*

CSP Equity Investment v Spain| 11/11/2013

Energy Charter Treaty claim: CSP Equity Investment, a subsidiary of Abengoa, has filed an Energy Treaty Claim against Spain over reforms in its solar power sector, under SCC rules at the Permanent Court of Arbitration.

- The current dispute arose out of a series of reforms initiated by Spain to its renewable energy sector in 2012. Such reforms include a 7% tax on the revenue of power generation companies and a reduction in the subsidies that previous governments had granted to renewable energy providers.
- The reforms are aimed to reduce the EUR26 billion tariff deficit in Spain's energy market.
- However, the industry body representing the interests of the thermosolar power sector, Protermosolar, contends that reforms will results in producers' revenues dropping by one-third, amounting EUR15 billion.
- Counsel to CSP Equity Investment: Understood to be Cuatrecasas Gonçalves Pereira. Counsel to Spain: Government Legal Service. *Source: Global Arbitration Review.*

Stans Energy v Kurgyzstan | 4/11/2013

Dispute over expropriation of investment: Stans Energy, a Canadian mining company, has filed a USD118 million claim against Kyrgyzstan before MKAS.

- The claimant, Stans Energy, has accused the Kyrgyz government of expropriating its investment in a rare earth project (Kutessay II).
- The claimant acquired a 20-year mining licence for the mine through an open auction in 2009. Following this, Stans Energy alleges that actions by the government make it impossible for the company and its subsidiaries to carry out their work.
- According to Stans Energy, the government inappropriately questioned the legitimacy of the licence agreement in 2012 and falsely alleged that Stans Energy had failed to comply with its requirements. Stans Energy claims that the actions of the government prevented it from fulfilling its responsibilities under the license and have resulted in the company halting its operations.
- Counsel to Stans Energy: Partner Law Firm and Interlex. Counsel to Kyrgyzstan: Unknown. *Source: Global Arbitration Review.*

Industry Insight

Mining Industry – Falling Commodity Prices?

Driven by rapid development in India and China, mining company shares have generally outperformed broader equity markets over the last decade. Between January 2003 and January 2011 the Dow Jones and FTSE 100 increased by 36% and 50% respectively. Over the same period the HSBC Global Mining Index increased by 313%. Although this masks a sharp fall and rapid recovery between 2008 and 2010, it is apparent that mining stocks enjoyed considerable success compared to the wider market in the first decade of the 21st century.

Recent years have been less favorable and since January 2011, the index has declined by 45%. During the first three quarters of 2013 alone, the HSBC Global Mining Index fell by 23%. In August 2013, Glencore and Xstrata wrote-down USD7.7 billion on their merger, citing weaker outlook for the industry.[1] Mr Glasenberg, CEO of GlencoreXstrata, attributes the softer commodity prices to both slowing demand from the emerging markets and excess supply in the market.[2]

China's economic growth has fallen below the double-digit rates it enjoyed during the first decade of the 21st century. Although 7% (say) of China's 2013 GDP is much more than 10% (say) of its 2003 GDP, expectations about China's future growth are perhaps less optimistic today than in the recent past.

[1] http://www.ft.com/intl/cms/s/0/df8aa238-0963-11e3-8b32-00144feabdc0.html#axzz2h7UW0fDr

[2] http://www.miningweekly.com/article/excessive-capex-to-blame-for-low-prices-glencorexstrata-2013-09-10

Many emerging markets are experiencing falling exchange rates and high domestic inflation. In developed markets, uncertainties surrounding the U.S. fiscal policy and Europe's on-going financial crisis have contributed to the volatility in demand for commodities. Meanwhile, certain major emerging markets, such as India, are struggling with domestic policies and implementation of a cohesive investment framework.

The industry is also experiencing significant supply side pressures. Over the last decade, encouraged by strong demand fundamentals and cheap access to credit, mining companies have invested heavily in new projects. In 2012, the 40 largest mining companies, measured by market capitalization, invested a total of USD140 billion in capital projects and added USD108 billion of debt to their balance sheets.[3] This has resulted in excess capacity in some commodities at a time when demand has become more volatile.

Mining companies are adopting various strategies to manage this risk. An immediate response has been to cut operating costs and increase the productivity of existing assets. To facilitate this, shareholders have replaced an unprecedented number of CEOs in the last year. Since April 2012 five of the CEOs at the top 10 mining companies have been replaced. Compared to their predecessors, these new CEOs are more likely to have an emphasis on operational experience.[4] This is one indication that shareholders expect value to be created through increasing the productivity of existing assets rather than through the acquisition of new ones.

Apart from changes to the way mining companies manage existing assets, we might expect to see a change in the way they evaluate and invest in new projects. When deciding to invest in new mining projects, executives need to consider both the long-term outlook for the project, and the short-term uncertainty around demand and supply.

One response to increased uncertainty is to increase the threshold rate of return a new project is required to deliver before it can secure funding. However, the use of so called "hurdle rates" can lead to binary, yes/no decision making and is insufficiently flexible to adjust to rapidly changing market conditions.

A more appropriate way to value new early-stage mining projects within the current uncertain environment might be to view them as multi-stage investment options. Companies could break down new mining projects into various stages, with multiple projected paths. Depending on the market scenario, the mining executives could then choose to develop along a certain path. Each stage of a project is viewed as an investment option and valued independently. At any point in time, the executives have the option to invest along the path that is most lucrative. If no development path proves to be profitable, the companies can delay or suspend a particular project path until market conditions are more favourable.

The use of such options, generally termed as real options, is not new. However, in an uncertain economic environment it has an increased appeal, for the valuation of capital intensive projects with long development lead-times. As long as global uncertainties continue to weigh on the commodity markets, we expect to see such a valuation method becoming more prominent in the mining sector.

Thought of the Month: The UK Economy – Expected to Grow?

Almost five years since the 2008 financial crisis, the world at large has still been struggling with economic growth and policy.

In 2013, however, the UK has emerged as a surprising leader of developed country growth rates, especially in Europe. In the last ten months, the UK has been one of the strongest performers of the developed countries, despite a lacklustre recovery between 2009 and 2012.

The UK's GDP fell by 5% in 2009 and grew by only 1% in 2011.[5] Forecasts for the UK appear increasingly optimistic with many economists raising their expectation in the last few months. In the second and third quarters of this year, the UK economy grew at above-trend rates and at the fastest pace in the last three years.[6] It is expected to be Europe's fastest growing major economy for the next couple of years.

The recent growth is mostly a result of increased consumer spending and is led by retail sales, housing transactions and the hospitality sector.[7] Growth in consumer spending might lead to lower savings and therefore dwindling disposable incomes, given that salary growth has failed to grow in line with inflation since the crisis.[8]

An interesting question is whether the recent growth and projected performance will be supported by the private sector and business investments and growth in the manufacturing sector. These are essential for a balanced, sustainable long term growth. If investment were to pick up to sustain the recovery, the UK could become less dependent on consumer debt for economic growth. At the same time, increasing the productivity potential of the economy should support future earnings growth for firms and consumers alike.

Recent announcements communicating the possible continuation of austerity measures (until at least 2015) may result in a slimmed-down public sector and lower public sector investment and expenditure. While this may help UK to control its debt, it will act as a brake on the UK's growth rate.

3 PwC, Mine: A Confidence Crisis, p 6 and 14.
4 PwC, Mine: A Confidence Crisis, p 6 and 24.

5 IMF.
6 Deloitte Monday Briefing, dated 11 November 2013.
7 Deloitte Monday Briefing, dated 11 November 2013.
8 http://www.theguardian.com/business/2013/nov/05/uk-growth-2014-niesr.

FTI Consulting News

Recent and Upcoming Events

- James Searby will be travelling to Australia in early December to attend the GAR Live Sydney event.
- James Searby and Montek Mayal continue the development of our dispute resolution practice in India with an upcoming four-day visit to Delhi in December.
- Richard Hayler recently travelled to Kuala Lumpur to further develop and grow our reach of Economic Consulting services in the Asia Pacific region. Should you be interested in hearing more about our work in Malaysia, please contact Richard at richard.hayler@fticonsulting.com or +65 6831 7816.

Should you have any feedback or questions on anything you've read, please feel free to contact Montek by phone at +65 6831 7813 or by email: montek.mayal@fticonsulting.com