Summary of California AB 32

Statewide GHG Emissions Limit

By January 1, 2008, CARB must determine what the statewide greenhouse gas emissions level was in 1990. This 1990 emissions level will serve as the statewide emissions limit that must be reached by 2020. CARB must hold at least one public workshop, with public notice and an opportunity for public comment prior to making this baseline determination.

How this 1990 GHG emissions level will ultimately be calculated is an unresolved and complicated question. For example, it is not yet known whether or how individual companies will be expected to generate and/or estimate actual 1990 emission levels, or whether CARB will evaluate each business sector independently.

Industry has a vital interest in becoming actively involved in determining this all important baseline as it has extensive implications for the ultimate cost of GHG emissions reduction. Given the inevitable lack of conclusive data on emissions levels dating back to 1990, this figure is obviously prone to subjective interpretation and could vary significantly depending on CARB’s approach. Business interests cannot afford to ignore the process – already underway – by which this baseline will be determined.

Mandatory GHG Emissions Reporting

On or before January 1, 2008, CARB must adopt regulations requiring the reporting and verification of statewide GHG emissions. In doing so, CARB must review existing and proposed international, federal and state GHG reporting programs and make reasonable efforts to promote consistency among programs and to streamline reporting requirements. CARB reporting regulations must:

- Require monitoring and annual reporting of GHG emissions, beginning with the sources or categories of sources that contribute most to statewide emissions;
- Account for total annual emissions of GHG in the state, including all emissions of GHG from the generation of electricity delivered to and consumed in California, whether the electricity is generated in state or imported;
- Ensure rigorous and consistent GHG emission accounting, and provide reporting tools and formats to ensure collection of necessary data.

Compliance with this reporting and verification scheme will require significant technical expertise. As many companies in Europe and the UK can attest, precise measuring of GHG emissions is very difficult, and yet slight errors can result in very large cost increases. Expert technical assistance will be vital to compliance with these rules. Moreover, companies – in particular those that have not yet evaluated their GHG emissions – must be careful with the information they generate, and should consider ways in which to protect early evaluations of their carbon footprints that later may prove to be inaccurate or incomplete.

Early Action Measures

On or before June 30, 2007, CARB must publish a list of early action GHG emission reduction
measures. Regulations implementing early action measures must be promulgated on or before January 1, 2010 and shall be enforceable no later than that date.

**Scoping Plan**

On or before January 1, 2009, CARB must prepare and approve a scoping plan for achieving the statewide GHG emission limit by 2020. The plan must be updated at least every 5 years. In developing the plan, CARB must:

- Consult state agencies with authority over sources of GHG – like the Public Utilities Commission – on aspects of the plan pertaining to energy related matters;
- Identify and make recommendations on direct emissions reduction measures, alternative compliance mechanisms, market-based compliance mechanisms, and potential incentives for sources;
- Evaluate potential costs and benefits of the plan, including potential adverse effects on small businesses;
- Recommend a de-minimis threshold below which GHG emissions reduction requirements will not apply; and
- Identify opportunities for GHG emissions reduction from voluntary measures, including carbon sequestration projects and best management practices.

**Emissions Reduction Measures**

On or before January 1, 2011, CARB must adopt GHG emission limits and reduction measures sufficient to achieve the “maximum technologically feasible and cost-effective” reductions in GHG emissions, to become operative on January 1, 2012. In adopting these measures CARB must:

- Consider several enumerated factors, including the impact on low-income communities, credit for early voluntary reductions, cost effectiveness and overall societal benefits;
- Consult with other states, the federal government and others nations to identify the most effective strategies and methods to reduce GHGs, manage GHG control programs and facilitate the development of regional national and international GHG emissions reduction programs;
- Ensure that the regulations direct investment toward disadvantaged communities and provide opportunities for small businesses, schools, and other community institutions to benefit from GHG emissions reduction efforts.

**Market-Based Compliance Mechanisms**

In furtherance of achieving the statewide GHG emissions limit, CARB may adopt regulations that employ market-based compliance mechanisms, such as:

- A system of market-based declining annual aggregate emissions limitations for sources or categories of sources that emit GHGs;
- GHG emissions exchanges, banking, credits and other transactions that result in the same greenhouse gas emissions reduction, over the same time period, as direct compliance with a GHG emissions limit or reduction measure imposed by CARB.

Adoption of these market based mechanisms is not mandatory under AB 32 (though Governor Schwarzenegger recently signed an executive order requiring CARB to implement a trading program). Industry has a very strong interest in ensuring that CARB adopts an economically sound compliance and benefits scheme. All business sectors, as well as individual companies affected by AB 32, should become actively involved in shaping this regulatory environment.
Fiona Trust v. Privalov: The English Court of Appeal strikes a blow in favour of the arbitration process

On 24 January 2007, the English Court of Appeal delivered an important judgment enforcing an arbitration clause, compelling arbitration where one party to the contract containing that arbitration clause had purported to rescind the contract as a whole following allegations of bribery. The Court of Appeal ruled that if a contract is said to be invalid for reasons such as bribery, unless that bribery relates specifically to the arbitration clause, the clause survives and the validity of the contract as a whole is to be determined by the arbitrators, not the court. It also took the opportunity to set aside a longstanding debate in the English authorities on the distinction between disputes arising "under" a contract and disputes arising "out of" a contract, concluding that arbitration clauses in international commercial contracts should be given a liberal interpretation.

The Facts and First Instance Decision

The case, Fiona Trust & Holding Corporation & ors v. Yuri Privalov & ors, is part of a wider dispute between the Russian Sovcomflot group of companies and Mr Nikitin, who is alleged to have successfully bribed one or more of their directors or employees. The dispute before the English Court of Appeal concerned eight charterparty contracts entered into between Sovcomflot companies (as ship owners) and three separate chartering companies. It is alleged that these (and numerous other contracts) were procured by bribery and contained terms highly favourable to the charterers. Each of the eight contracts at issue contained a clause permitting either party to elect to have disputes referred to arbitration in London.

The charterers commenced arbitration in London, and the owners responded by commencing court action pursuant to Section 72 of the Arbitration Act 1996 ("1996 Act") seeking to restrain the arbitral proceedings on the basis that they had rescinded the contracts, and therefore the arbitration agreements contained within them, on grounds of bribery, and there could be no arbitration. The charterers responded by seeking a stay of the court action in favour of the arbitration pursuant to Section 9 of the 1996 Act. At first instance, Morison J. declined the stay and granted interlocutory injunctions restraining the arbitration proceedings pending trial of the court action. The Court of Appeal reversed this decision. It dealt with the arguments of the parties under three headings:

(i) Construction

The owners argued that the arbitration clause did not in any event cover a claim that the charters had been rescinded for bribery. The lengthy dispute resolution clause referred first to disputes "arising under" the contract, and later to disputes...
which have "arisen out of" the contract. The Court of Appeal considered argument on whether "out of" should have a wider meaning than "under", and if so, given that the clause contained both formulations, which should prevail. In its judgment, the Court of Appeal discussed previous decisions that had debated this point before concluding:

"Not all these authorities are readily reconcilable … For our part we consider that the time has now come for a line of some sort to be drawn and a fresh start made at any rate for cases arising in an international commercial context. Ordinary business men would be surprised at the nice distinctions drawn in the cases and the time taken up by argument in debating whether a particular case falls within one set of words or another very similar set of words. If business men go to the trouble of agreeing that their disputes be heard in the courts of a particular country or by a tribunal of their choice they do not expect … that time and expense will be taken in lengthy argument about the nature of particular causes of action and whether any particular cause of action comes within the meaning of the particular phrase they have chosen … [I]t seems to us any jurisdiction or arbitration clause in an international commercial contract should be liberally construed."

The Court of Appeal therefore concluded that a dispute about whether a contract could be set aside or rescinded for alleged bribery did fall within the meaning of the arbitration clause.

(ii) Separability

It is a well established principle of English law that an arbitration clause is a separate contract which survives the destruction (or termination) of the main contract, as confirmed by Section 7 of the 1996 Act. English case law has also confirmed that this applies even if the whole contract is alleged to be invalid, the invalidity of the contract being determined by an arbitral tribunal pursuant to the (separate) arbitration agreement.

The owners alleged that they would not have made any contract at all had they been aware of the bribery, and that it was enough for them to say that whatever impeached the main agreement also impeached the arbitration clause. The Court of Appeal disagreed:

"It is not enough to say that the bribery impeaches the whole contract unless there is some special reason for saying that the bribery impeaches the arbitration clause in particular. There is no such reason here."

(iii) Relationship between Sections 9 and 72 of the 1996 Act

This section of the Court of Appeal's judgment considered an apparent clash between two different provisions of the 1996 Act.

Section 9 provides that, on the application of a party to an arbitration agreement against whom court proceedings are brought, the court shall grant a stay of those proceedings unless the arbitration agreement "is null and void, inoperative, or incapable of being performed…". Section 72(1)(a) of the 1996 Act provides that an alleged party to arbitration proceedings who takes no part in those proceedings may question by way of court proceedings whether there is a valid arbitration agreement.

As the Court of Appeal had already concluded that the arbitration clause, being a separable agreement, was not impeached by an alleged bribery relating to the contract as a whole, and that there was therefore no ground to question its validity in this case, it considered that Section 72 had no application. Although it could have stopped here, the Court of Appeal went further and made two further comments of note.
Firstly, from an analysis of these (and other provisions) of the 1996 Act, the Court of Appeal considered that "it is contemplated in the Act that it will, in general, be for the arbitrators to be the first tribunal to consider whether they have jurisdiction to determine the dispute".

Secondly, where the court has conflicting applications before it to stay court proceedings under Section 9 in favour of arbitration and for a declaration under Section 72 that there is no valid arbitration agreement, the application under Section 9 is the primary (i.e. the first) matter which it should decide. The Court of Appeal considered this would be more in keeping with the U.K.’s obligations under the New York Convention on enforcement of arbitral awards, reflected in Section 9 of the 1996 Act.

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