PACIFIC RIM ADVISORY COUNCIL

Pacific Rim Advisory Council

JANUARY 2023 e-Bulletin

MEMBER NEWS

►ARIFA Appoints Transactional Partner
►CAREY Partner Appointments
►CITY-YUWA Announces Promotions and New Additions
►DENTONS RODYK Kicks off 2023 with Introduction NExGen Leaders
►DAVIS WRIGHT TREMAINE Former Lead Global Partnerships Counsel at Stripe Joins Firm's Nationally Ranked Financial Services Practice
►HAN KUN Partner Announcements
►HOGAN LOVELLS Former D.C. AG Joins Washington DC Office

COUNTRY ALERTS

►ARGENTINA Secretariat of Trade sanctions cartel exempting one party and imposing a divestiture obligation ALLENDE BREA
►CANADA Accounting for Oil and Gas Revenues Without an Operating Agreement BENNETT JONES
►CANADA Government Enacts Two-Year Ban on Residential Real Estate Purchases by non-Canadians RICHARDS BUELL SUTTON
►CHILE New Fintech Law and new reporting entities before the Financial Analysis Unit CAREY
►CHINA Highlights of Draft Revision to the Anti Unfair Competition Law HAN KUN
►COLOMBIA Fossil Fuel Oxygenation Policy BRIGARD URRUTIA
►COSTA RICA Recognition of Foreign Marketing Approvals Comes Into Effect for Pharmaceuticals ARIAS
►FRANCE Adoption of the CSRD : Sustainability - A New Pillar of Business Performance? GIDE
►GUATEMALA Amendment to VAT Regulation in Order to Issue Invoices as Final Consumer ARIAS
►HONG KONG The final frontier - Hong Kong Court of Final Appeal grants leave to appeal in arbitration escalation clauses dispute HOGAN LOVELLS
►INDIA CBDC Concept Note – India's move towards digitalizing currency KOCHHAR & CO.
►MEXICO Voluntary Programs for Wastewater Discharge Quality Compliance SANTAMARNA Y STETA
NETHERLANDS Final CSRD mandates more sustainability reporting NAUTA DUTILH
►PHILIPPINES PPP Update SyCIP
►SINGAPORE Discharging the burden of proof in a property tax appeal: lessons from two recent property tax cases DENTONS RODYK
►TAIWAN Adoption of FinTech Accelerated by Pandemic – Taiwan Regulator Further Lifted Restrictions on Remote Insurance Application LEE and LI
►UNITED STATES California Court of Appeal Reverses Summary Judgment in Time-Rounding Case Involving Electronic Timekeeping System DAVIS WRIGHT TREMAINE
►UNITED STATES FTC Proposed Ban of Employer Non-Competes: Are non-profits exempt? HOGAN LOVELLS

CONFERENCES & EVENTS

PRAC Let's Talk!

Virtual meeting - TBA

Conferences

Mexico City April 22 - 25, 2023
Hosted by Santamarina y Steta

New Delhi - October 7—10, 2023
Hosted by KOCHHAR & Co.

Paris TBA
Hosted by GIDE

PRAC 2023 Event Connect

Let us know your plans to attend upcoming industry events
Prior to event start we will put you in touch with other attending PRAC Delegates.
events@prac.org

IBA Singapore Feb 22-24	IBA Cartagena March 22-24
PDAC Toronto March 5-8	ABA Antitrust Wash DC March 29-31
IPBA Dubai March 7-10	INTA Singapore May 16-20

Full Details
www.prac.org/events

MEMBER DEALS MAKING NEWS

►ARIAS | FMO Dutch Entrepenurial Development Bank in Green Loan Agreement with BacCredomatic in Guatemala
►BENNETT JONES | SolGold & Cornerstone Announce Friendly Merger Transaction
► BRIGARD URRUTIA and CAREY | Cross Border OData Centre Transaction
►GIDE | Air France-KLM inaugural issuance of Sustainability-Linked Notes in two tranches for an aggregate principal amount of €1 bn
►HAN KUN | Biomerieux strategic cooperation with Accunome
►HOGAN LOVELLS | Assists Percepto to secure groundbreaking FAA waiver authorizing drone infrastructure deployment at sites nationwide
►NAUTADUTILH | Advises Ecovative acquisition of Lambert Spawn Europa

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COVID-19 SITE FOR ALL UPDATES

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CAREY STRENGTHENS LITIGATION AND ENVIRONMENTAL PRACTICES WITH PARTNER ANNOUNCEMENTS

SANTIAGO – 01 December, 2023: Mónica Pérez, Roberto Villaseca, Julio Recordon and Manuel José Barros officially joined Carey's partnership on 1 December, bringing the total number of partners at the firm to 44.

(L-R) Monica Perez, Roberto Villaseca, Julio Recordon, Manuel Jose Barros

Pérez specialises in civil and commercial litigation, as well as cross-border arbitration work and competition matters. She first joined Carey's litigation practice back in 2011 as a senior associate. During her time there, she also spent one year as a visiting associate in the Madrid office of Spanish firm Pérez-Llorca. Before joining Carey, Pérez was a lawyer at fellow Chilean Elite firm Claro & Cía. She is qualified to practise in the state of Alabama in the US.

Fellow disputes lawyer Villaseca is also proficient in civil and commercial litigation. He focuses his practice on insolvency and international trade disputes. He first joined Carey in 2011 and has worked on several relevant deals in the region. In June, he was part of the team that helped Chilean financial holding company CorpGroup obtain approval for its Chapter 11 plan. During his tenure at the firm, he spent one year as an international associate in the New York office of Simpson Thacher & Bartlett LLP.

In the environmental department, Recordon has been made a partner after five years as an associate at the firm. He offers counsel in waste management, environmental impact assessments and related administrative procedures. In a recent deal, he helped renewables multinational Sonnedix expand into Chile's wind power market. Recordon first joined Carey in 2014 and spent just under a year as an adviser to the country's comptroller general before returning to the firm in 2017.

Barros joins Recordon in the environmental law partnership, building on a near decade of work at the firm. Barros advises clients on developing mining and energy projects, which he complements with regulatory expertise. At the beginning of the year, he provided counsel to local energy group Aela, which divested its business and a portfolio of wind farms to a Canadian buyer for US$686 million. Between 2013 and 2014, the newly elected partner held several government advisory roles, providing legal advice to Chile's Ministry of the Environment. He began his legal career at Chilean Elite outfit – Philippi Prietocarrizosa Ferrero DU & Uría, where he spent two years as an associate.

For additional information visit www.carey.cl

ARIFA APPOINTS TRANSACTIONAL PARTNER

PANAMA CITY, 22 December 2022. Panamanian firm Arias, Fábrega & Fábrega announced the appointment of Javier Yap Endara to the partnership. Effective 1 January, the firm will have 17 partners. Yap advises on M&A and financing deals, including capital markets. He also helps clients set up new operations in Panama, particularly in the fintech industry.

For additional information visit www.arifa.com

CITY-YUWA ANNOUNCES NEW ADDITIONS AND PROMOTIONS

TOKYO, 01 January 2023: City-Yuwa is pleased to announce:

Takashi Soga, Shingo Morikawa, Takuro Awazu, Takayuki Sumida, Yusuke Tani, Ryoko Takeda, Yuko Toyoda, Hitomi Sakai, Naoyuki Kishimi, Yuka Sakai and Masatsugu Kobayashi have been made Partners of the Firm.

Yoshitada Ogiso, Izuru Goto, Ayaka Itoh and Fumi Kawashima have been promoted to Of Counsel of the Firm.

Ayaka Miyata, Yuki Mori, Xiaolong Li (registered foreign lawyer (China)), and Nga Tran Thu Le (attorney admitted in Vietnam) have joined the firm.

In addition, seven attorneys newly admitted - Arisa Mio, Kazuki Mochizuki, Ryota Nakatani, Miyu Park, Hiroaki Sekoguchi, Yuto Takeuchi, and Takahiro Tateno - have joined the Firm.

For more information visit us at www.city-yuwa.com

DAVIS WRIGHT TREMAINE FORMER LEAD GLOBAL PARTNERSHIPS COUNSEL AT STRIPE JOINS FIRM'S NATIONALLY RANKED FINANCIAL SERVICES PRACTICE

SEATTLE, 11 January, 2023: The financial services practice team at Davis Wright Tremaine LLP has deepened its market-leading expertise with the addition of Ryan Richardson as a partner in New York. He comes to the firm from Stripe, where he served as lead global partnerships counsel and was primary legal advisor to the company's chief business officer.

"Ryan truly brings one-of-a-kind expertise," said Bradford Hardin, co-chair of the financial services practice at Davis Wright. "He has seen the financial services industry from all sides and has helped drive success at the most valuable private fintech in the world. For clients looking to grow in this highly competitive space, Ryan's experience will provide extremely useful perspective."

At Stripe, Richardson led an international team responsible for business-critical enterprise agreements that governed hundreds of billions of dollars in money movement annually, including agreements with payment networks, financial iinstitutions, and key technology and infrastructure partners.

The deals he oversaw supported all major Stripe products and encompassed complex issues involving financial regulation, privacy, IP, consumer protection, data security, and risk allocation. Previously, Richardson served as product counsel for Stripe Payments, helping drive product and market launches across the globe for the company's most popular product.

"Ryan significantly expands our capacity to handle clients' most important strategic transactions," said practice group co-chair Elizabeth Davis. "Fintech deals demand sophisticated, seasoned counsel. Together with Don Meier, who joined us in September, and Chris Ford, who arrived in 2020, Ryan will help us deliver the critical expertise clients need."

Richardson began his legal career at the Federal Deposit Insurance Corporation, focusing on consumer compliance, payments, and enforcement. He later spent several years in private practice at Morrison & Foerster LLP, where he assisted major clients with co-branded and private label credit card agreements and advised on a wide range of compliance matters.

"Ryan has extensive experience with the complex, bespoke card deals that our firm has excelled at for decades and he'll help us further expand that practice," said James Mann, a senior financial services partner at Davis Wright. "He's also got the energy and personality to help mentor the next generation of lawyers, ensuring we are supporting excellence and diversity into the future."

"The Davis Wright team has tremendous momentum right now," said Richardson. "I'm delighted to join them in helping clients of all kinds successfully build lasting partner relationships and navigate the fast-changing financial services landscape."

Richardson added: "I've also been very impressed to see that DEI is absolutely top-of-mind at Davis Wright. The firm has been recognized for its DEI commitment by a long list of financial services clients—including Citi, Discover Financial, and U.S. Bank—and the impact of its efforts is clear. I'm looking forward to joining the firm's dynamic LGBTQ+ affinity group and further building on this culture of inclusion."

Richardson earned his B.A. from Birmingham-Southern College and his J.D. from Samford University's Cumberland School of Law.

About Davis Wright Tremaine: Davis Wright Tremaine LLP is an AmLaw 100 law firm with more than 600 lawyers representing clients based throughout the United States and around the world. The firm was recently ranked as a fintech industry leader for the second straight year in the Chambers FinTech Guide 2023.

For more information about the firm's financial services team, visit www.dwt.com/fs

DENTONS RODYK KICKS OFF 2023 WITH THE INTRODUCTION OF NEXT GENERATION LEADERS

SINGAPORE, 06 January, 2023: Singapore's Big Five law firm Dentons Rodyk unveiled its new Executive Committee and also announced the admission of two outstanding young individuals into the senior partnership of the firm, with effect from 1 January 2023.

Election of new Executive Committee for 2023 to 2025

Comprising both younger and more senior lawyers, this newly elected team is helmed by **Managing Partner Gerald Singham,** together with **Joint Deputy Managing Partners Lek Siang Pheng and Edric Pan**, and Senior Partners **Evelyn Ang**, **Gilbert Leong, Hsu Li Chuan, Lee Liat Yeang** and **Mark Seah. Evelyn Ang** and **Mark Seah** are the new members on the Executive Committee.

Admission of next generation leaders into senior partnership

Lawyers Ray Chiang and Ng Hui Min have both been admitted into the firm's senior partnership, joining the ranks of 44 other Senior Partners of the firm. Their admission is testament to their achievements in their respective practices and also showcases the firm's commitment to developing the next generation of market leaders within the legal industry.

From Dentons Rodyk's Corporate practice, Ray is Co-Head of both the Employment practice and the India desk. His main areas of practice include mergers and acquisitions, venture capital, venture technology, private equity and employment law.

Hui Min has been at the firm for over 15 years in the Litigation and Dispute Resolution department, and her main areas of practice encompass commercial litigation and arbitration, insolvency cases, landlord and tenant disputes, real-estate and property-related disputes, and employment disputes.

"Being the first and oldest law firm in Singapore, we have had many generations of partners passing through our ranks. Admission into the equity partnership of the firm carries great prestige and is a huge honour. The admission of Ray and Hui Min, both young and brilliant lawyers, shows our intention to develop and prepare the next generation of leaders. Likewise, the firm's Executive Committee, who steered and guided us through challenges in the recent past, has been refreshed to further inspire the Dentons Rodyk family and to keep building on the trust and confidence that our clients have in our legal expertise and service delivery," commented Managing Partner Gerald Singham.

For additional information visit www.dentons.rodyk.com

HAN KUN PARTNER ANNOUNCEMENTS

Han Kun promotes new partners

BEIJING, 03 January, 2023: As the new year begins, Han Kun Law Offices is pleased to announce the 2023 promotion of new partners. These new partners are based across Han Kun's offices, covering practice areas such as private equity, venture capital, mergers and acquisitions, domestic and overseas securities issuances and listings, banking finance, aviation and aviation finance, structured finance, asset securitization, fintech, asset management, project finance, foreign direct investment, corporate compliance, and dispute resolution.

Han Kun is committed to providing young lawyers with opportunities for further development, encouraging them to give full play to their abilities and helping them to quickly excel by providing more opportunities for responsibility and leadership. Han Kun values the vitality of these young lawyers and expects them to contribute to the firm's development by consistently upholding Han Kun's spirit of always aiming high and adhering to our philosophy of professionalism. Facing the new journey in 2023, let us join hands to tackle new challenges and fulfill new expectations!

Lei Chen Ms. Chen specializes in private equity and venture capital investment, mergers and acquisitions, onshore and offshore listings, foreign investment, etc. She is knowledgeable of and experienced in relevant corporate structures and project management. Ms. Chen has represented many Chinese and international investment funds and companies in a wide variety of cross-border transactions in different industries such as telecommunications, internet, information technology, entertainment, consumer goods, healthcare, biotechnology, and pharmaceuticals.

Xiaoming Deng Mr. Deng specializes in securities-related dispute resolution. He has in-depth knowledge of and extensive experience in handling statutory liability disputes involving financial institutions, such as those arising from securities misrepresentation, trustee fiduciary duties, and suitability obligations. Mr. Deng previously worked in the Legal and Compliance Department of a leading securities company. He has kept in close contact with the industry for over a decade, and has developed profound insights in securities business and law as well as regulatory risk response. Mr. Deng's clients mainly include listed companies and financial institutions in the securities and banking industries.

Chunyao Lin Mr. Lin focuses on handling dispute resolution cases arising from business investments and financings, red chip investments, control contests, private equity and financial management, mergers and acquisitions, cross-border investment and trade, real estate and construction projects, etc. Mr. Lin attaches great importance to combining dispute resolution with non-contentious legal services, and excels at resolving disputes by drawing on his transactional lawyer experience and through various ADR (alternative dispute resolution) measures.

Long Liu Mr. Liu specializes in dispute resolution, with a focus on complicated cross-border commercial and corporate control disputes, and has represented clients in handling a series of influential cases. Mr. Liu has an educational and practice background in both Chinese law and common law and is familiar with both legal systems. Mr. Liu has extensive experience in foreign-related/international arbitration, having represented or advised clients in arbitration proceedings under the rules of arbitration institutions in mainland China, Hong Kong, London, Singapore, etc. Also, Mr. Liu has been advising both domestic and overseas clients on commercial disputes relating to international trade and all types of maritime cases.

Kanxi Liao Mr. Liao specializes in general banking matters, fintech, asset management transactions, blockchain and cryptocurrency, real property finance, and financial institution set-up and investment. Mr. Liao represents various commercial banks in a variety of financing transactions, including structured finance, acquisition finance, and real property finance. Mr. Liao assists fintech enterprises in product design and compliance, investing in fintech enterprises, investing in and setting up financial institutions. Mr. Liao also represents trust companies in a variety of domestic and cross-border asset management transactions.

Yuan Meng Ms. Meng specializes in aviation finance, bank finance, financial institution establishment, and corporate compliance. She is knowledgeable of relevant PRC industry policies, corporate structures, and investment and project management and has extensive practical experience. Ms. Meng represents clients in leasing and financing projects involving various types of aeronautical facilities and other high-value equipment. She has advised on a wide range of financing transactions such as bilateral loans, syndicated loans, trade finance, as well as convertible bond transactions, leveraged finance, and non-performing asset disposals.

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HAN KUN PARTNER ANNOUNCEMENTS

continued from previous page

Jinsong (Jason) Song Mr. Song specializes in private equity and venture capital, mergers and acquisitions, foreign investment, and capital markets, among other areas. He has represented institutional investors and corporate clients in over a hundred transactions in diverse industries such as internet, telecommunications, bio-medicine, consumer goods, automotive logistics, energy, education, gaming, real estate, and fintech, providing full-scope legal services spanning deal structure design, legal document drafting and negotiation, and project closing.

Dan Sun Ms. Sun specializes in public and private financing, mergers and acquisitions, incorporation and corporate restructuring, and foreign direct investment. She has represented Chinese and international companies in a wide variety of cross-border transactions in diverse industries such as telecommunications, internet, consumer goods, healthcare, biotechnology, and pharmaceuticals.

Lijuan Wang Ms. Wang's primary practice areas are mergers, acquisitions and reorganizations, private equity and venture capital, and foreign investment. She is knowledgeable of relevant industry policies, corporate structures, and project management and has extensive practical experience. Ms. Wang has developed a broad client base consisting of multinationals, foreign-invested companies, leading funds, as well as SOEs and start-ups. Ms. Wang also focuses on the areas of life sciences, bio-medicine and healthcare, advising clients on corporate, compliance and transaction issues such as those related to the biosecurity law and human genetic resources, clinical trials, product marketing authorization, GxP compliance, healthcare data compliance, exclusive product distribution, as well as cross-border drug and patent right license-in and commercialization projects.

For additional information visit www.hankunlaw.com

FORMER D.C. ATTORNEY GENERAL JOINS HOGAN LOVELLS' WASHINGTON, D.C. OFFICE

WASHINGTON, D.C., 17 January 2023 – Global law firm Hogan Lovells announced today that Karl A. Racine, the first elected and independent Attorney General for the District of Columbia, has joined the firm as a litigation partner in the Washington office.

"I am extremely pleased to welcome Karl to the firm," said Hogan Lovells CEO Miguel Zaldivar. "Karl is one of the most respected attorneys not only in Washington, but nationally. He brings so much to the table: the sheer breadth of cutting edge issues on which Karl has been a national leader—issues that matter to our clients—include privacy, social media, AI, antitrust, competition, financial services, ESG, civil rights, consumer protection, labor and employment, food and drug safety, child safety, false claims, environment, and government investigations."

Des Hogan, global head of Hogan Lovells' Disputes practice, added: "In a town chock-full of good lawyers, Karl stands apart—for his leadership, competitiveness, and team play, all in service of winning for clients. State AG offices are ascendant and are top of mind in the C-Suite and boardrooms. This is why, in addition to working shoulder-to-shoulder with our litigation and white collar teams around the world, Karl will launch our State AG practice. Karl's earned credibility among other AGs and before numerous federal and state regulatory, enforcement, and investigative agencies with which he has successfully partnered, will bolster our clients' abilities to navigate opportunities as well as threats to their business objectives."

Elected twice in landslide elections, Racine has over the last eight years built the District of Columbia's first independent office of Attorney General and elevated it to its current status as being among the best AG offices in the country. While Racine's national reputation for strategic and bold action is well known, he has also defended the D.C. government in court, saving taxpayers more than $3 billion.

"In his two terms as D.C. Attorney General, Karl built what is widely viewed as one of the strongest and most active AG offices in the United States," said Lillian S. Hardy, who heads Hogan Lovells' Crisis Leadership Team. "He's a leader in our community, and we're so happy to welcome him as a partner."

Racine will represent clients in a wide range of bet-the-company civil and white collar litigation and investigations. Racine has more than 30 years of experience building talented legal teams that deliver victories for clients. He has tried dozens of cases, argued numerous appeals, and has practiced at the highest level in civil, criminal, enforcement, and administrative matters. He will lead the firm's newly branded AG practice, bringing together cross-practice and cross-office resources and experience from across the firm.

"I am proud, humbled, and excited to join Hogan Lovells, where I began my legal career as a summer associate," Racine said. "I have long admired the firm and its truly exceptional team of lawyers. I've joined Hogan Lovells because of its distinguished history, well-earned status as an elite global law firm, and because of the direction in which Miguel is strategically guiding the firm. The best is yet to come, and I look forward to doing my part to get us there."

Racine's leadership and accomplishments have earned him national recognition and respect. In 2021, he was elected by his Attorney General colleagues to serve as the president of the bipartisan National Association of Attorneys General (NAAG), where he launched a ground-breaking initiative to combat hate, build unity, and stand up for humanity at a time of significant division in our country. In 2022, NAAG awarded Racine and his team the highest honor bestowed to a sitting Attorney General—the Kelley-Wyman Award. In addition, from 2017-2022, Racine served as the Co-Chair of the bipartisan Attorney General Alliance Association. Racine also was the Co-Chair of the Democratic Attorneys General Association from 2016-2020, a time at which the organization experienced electoral success, substantially improved its diversity, and achieved record-breaking fundraising results.

Before being elected to public office, Racine had a highly successful career in private practice and government service. He was the first Black managing partner of a top 100 U.S. law firm after building a preeminent white collar and civil litigation practice. He also served as Associate White House Counsel during the Clinton Administration and as a D.C. Public Defender early in his career. Long active in the D.C. community, Racine has served as a board member for multiple non-profit organizations, including the Legal Aid Society of Washington and the Network for Victim Recovery of D.C. (NVRDC). He was born in Haiti and immigrated to Washington, D.C. when he was three years old.

Racine earned his J.D. from the University of Virginia School of Law and a B.A. from the University of Pennsylvania, where he was captain of the men's basketball team.

For additional information visit www.hoganlovells.com

ARIAS

ADVISES FMO DUTCH ENTREPRENEURIAL DEVELOPMENT BANK IN A LOAN AGREEMENT WITH BAC CREDOMATIC IN GUATEMALA FOR THE PROMOTION OF GREEN LOANS

CIUDAD de GUATEMALA, December, 2022: Our firm advised the FMO, Dutch Entrepreneurial Development Bank, (https://www.fmo.nl/) as legal counsel in the structuring of a USD $200 million loan in favor of Banco de America Central (BAC) Credomatic in Guatemala.

The main purpose of this alliance is to increase inclusive and sustainable prosperity in Guatemala through financing for small and mid-sized entrepreneurs (SMEs) in order for them to generate employment, operate and grow with transparency and responsibility concerning all social and environmental matters. Through this loan, it is intended to apply improved social and environmental practices based on the standards established by the International Finance Corporation (IFC) of The World Bank.

As Arias, our participation in this transaction represents the uttermost importance. The attorneys involved in the transaction are experts in banking and finance, structuring and restructuring of loans, M&A and Capital and Stock markets. We are proud to congratulate to the team led by Jorge Luis Arenales, Partner: Cindy Arrivillaga, Senior Associate and Andrés Marroquín, Associate. We are thankful to our client, FMO for entrusting our firm with this important agreement.

For additional information, visit us at www.ariaslaw.com

BENNETT JONES

SOLGOLD & CORNERSTONE ANNOUNCE FRIENDLY MERGER TRANSACTION

TORONTO, 17 October 2022: SolGold plc and Cornerstone Capital Resources Inc. announced they have entered into a definitive agreement, where SolGold will acquire all of the issued and outstanding shares of Cornerstone, other than Cornerstone shares already held, directly or indirectly, by SolGold, pursuant to a court-approved plan of arrangement.

Bennett Jones is acting for SolGold on the deal.

The merger of the two companies will significantly strengthen their ability to create value for shareholders by consolidating 100% of the Cascabel copper-gold project, along with a robust portfolio of other projects, primarily across Ecuador.

The Bennett Jones team is led by James Clare, Christopher Doucet and Marshall Eidinger (Corporate/M&A) and includes Jessica Thrower, Bikaramjit Sandhu and Evan Stein (Corporate/M&A) and James Morand and Phil Ward (Tax).

More details on the transaction are available in SolGold's news release here: http://ir.q4europe.com/Tools/newsArticleHTML.aspx?solutionID=3676&customerKey=Solgold&storyID=15574581

For more informatoin visit us at www.bennettjones.com

BIGARD URRUTIA AND CAREY Y CIA

CROSS BORDER ODATA CENTRE TRANSACTION

Brigard and Carey among several firms in cross-border data centre transaction

BOGOTA and SANTIAGO - 04 January, 2023: Colombia's Brigard Urrutia and Chile's Carey y Cia are among several firms assisting in the acquisition by Alligned of Latin American-focused counterpart ODATA from Brazil's Patria Investimentos and US IT company CyrusOne.

Aligned, which is controlled by Australian investor Macquarie Asset Management, simultaneously acquired a minority structured investment in ODATA from SDC Capital Partners in the US. Skadden, Arps, Slate, Meagher & Flom LLP in New York advised SDC, while the joint lead arrangers of that investment vehicle enlisted Paul Hastings LLP in New York.

The deal was signed on 10 December and is expected to close in early 2023. No purchase value was disclosed. ODATA's market value is estimated to be around US$1.8 billion.

Texas-headquartered Aligned expands into Latin America for the first time through the deal. The purchase also makes the buyer one of the largest private data centre operators across both North and South America. The buyer now has a two-gigawatt capacity across its data centres in 30 locations worldwide – including ODATA's assets in Brazil, Chile, Colombia and Mexico.

Counsel to Patria Investimentos and ODATA included:

Brigard Urrutia Partner Tomás Holguín and associates Nicolás Alonso and Natalia Castiblanco in Bogotá

Carey Partners Pablo Iacobelli, Cristián Eyzaguirre, Manuel José Garcés, Manuel José Barros and José Pardo, director Alejandra Risso and associates Daniela Pfeffer, Ignacio Alfaro, Constanza Rivera and Javiera Álvarez in Santiago

For additional information visit www.bu.com.co and www.carey.cl

GIDE

ASSISTS AIR FRANCE—KLM WITH ITS INAUGURAL ISSUANCE OF SUSTAINABILITY—INKED NOTES IN TWO TRANCHES FOR AN AGGREGATE PRINCIPAL AMOUN TOF €1 BILLION

PARIS, 13 January 2023: Gide assisted Air France-KLM in connection with (i) the establishment of an EMTN programme including the option to issue Sustainability-Linked Notes and (ii) an inaugural issue of Sustainability-Linked Notes in two tranches for an aggregate principal amount of €1 billion.

The Sustainability Performance Target used for these notes is Air France-KLM group's objective to reduce its well-to-wake scope 1 and 3 jet fuel greenhouse gas (GHG) emissions by 10% per revenue tonne kilometer by 2025 compared to 2019. If this target is not achieved, a premium will be paid to the holders of the notes with a maturity of 3.3 years and the coupon of the notes with a maturity of 5.3 years will be increased by an interest step-up.

This issue constitutes Air France-KLM's first bond issue under its EMTN programme and the first public issue of Sustainability-Linked Notes in Europe in the airline sector.

The Gide team was composed of Laurent Vincent, partner, assisted by Aude-Laurène Dourdain, Louis Ravaud and Emilie Radisson, associates.

For additional information visit www.gide.com

HAN KUN

REPRESENTS BIOMERIEUX IN ESTABLISHING STRATEGIC COOPERATIONJ WITH ACCUNOME

BEIJING 28 December, 2022: In December 2022, Biomerieux and Jiaxing Accunome Biotechnology Co., Ltd. ("Accunome") entered into a strategic partnership upon concluding both a strategic investment agreement and an exclusive distribution agreement. The deal allows Biomerieux to embark on in-depth collaboration with Accunome to expedite the expansion of Biomerieux's molecular diagnostics business in China through DXcellence12, Accunome's fully automated molecular diagnostics platform and ancillary reagent tubes for the platform. In return, Accunome will expand the market presence for its products via Biomerieux's mature business channels in the Chinese market.

Han Kun represented Biomerieux in its execution of the strategic investment agreement and the exclusive distribution agreement with Accunome. Owing to the firm's extensive experience and profound understanding of the medical device industry, Han Kun not only provided legal services throughout all stages of the transaction process, such as deal structure design, contract negotiation, and project consummation, but was deeply involved in negotiating commercial terms for the strategic cooperation, which requires a high level of specialized expertise.

About Biomerieux:(https://www.biomerieux.com.cn/)

Biomerieux has been committed to providing advanced diagnostic solutions for better patient care in China, with special expertise in infectious diseases, which has been the focus of both healthcare providers and patients in recent years. Advanced bio-diagnostic products will safeguard public health by saving time and improving quality of diagnosis to enable sooner identification, control, and treatment of infectious diseases.

For additional information visit www.hankunlaw.com

HOGAN LOVELLS

ASSISTS PERCEPT TO SECURE GROUNDBREAKING FAA WAIVER AUTHORIZING DRONE INFRASTRUCTURE DEPLOYMENT AT SITES NATIONWIDE

WASHINGTON, D.C., 08 November 2022: Global law firm Hogan Lovells counseled autonomous drone technology developer Percepto in securing a nationwide waiver from the Federal Aviation Administration (FAA) for Beyond Visual Line of Sight (BVLOS) operations. In a broad approval, the FAA granted Percepto authorization to operate at qualifying sites across the country remotely for increased safety, efficiency, and ease of operation. Further details can be found here.

Percepto's "drone-in-a-box" technology, used by electric utilities, oil & gas, solar power stations, and mining operations, detects infrastructure problems, enabling faster response times and ensuring remedial action is taken where it is needed most. Percepto's waiver enables the expansion of automated drone inspection and monitoring without the lengthy wait that has traditionally been necessary for site-specific BVLOS approvals.

Hogan Lovells partner Lisa Ellman, who leads the firm's Uncrewed Aviation Systems practice, said: "Obtaining authorization from the FAA to conduct BVLOS operations nationwide is a significant win for Percepto, and we are proud to have helped our client bring this over the finish line. In addition to being an important step for the industry as a whole, we hope this is a sign the FAA will continue to encourage innovation by key critical infrastructure operators in the field of AI."

In addition to Ellman, Washington, D.C.-based counsel Patrick Rizzi and senior associate Matthew Clark also advised Percepto. Hogan Lovells' UAS team also includes Arjun Garg, Emily Kimball, and Allisa Newman.

For additional information visit www.hoganlovells.com

NAUTADUTILH

ASSISTS ECOVATIVE ON THE ACQUISITION OF LAMBERT SPAWN EUROPA

NEW YORK - 04 January, 2023: Ecovative, a New York-based company, is one of the largest producers of mycelium products. Lambert Spawn Europa is a state-of-the-art mushroom spawn production facility in the Netherlands. As a result of this acquisition, Ecovative will be able to achieve greater global vertical integration.

"We are pleased to have assisted Ecovative on this acquisition, as Ecovative makes a bigger push towards increasing its capacity to produce mushroom packaging, leather-like textiles and high-performance foams." says lead partner Rebecca Pinto.

The NautaDutilh team further consisted of Ruud Smits, Jos Somers, Thomas Castermans, Rob Heslenfeld, Yassir Zuidi (Corporate M&A), Wijnand Bossenbroek, Celine Houwen, Leanne Meurs (Corporate Notary), Jeroen Boelens, Fleur Folmer, Jesper Vrielink (IP), David Wumkes, Ramon Pop, Boris Andriessen, Youri Jansen (Real Estate), Martijn Vreuls (Finance), Peter Vogels, Daniel Kuiper, Inger van Dijkman (Employment), Nina Kielman, Pedro Paraguay, Alissia Sudibyo (Tax), Beike Baaijens, Rema Tewarie (Insurance), Jasmijn van Koetsveld (Competition), Arjen Praat, Esther Talal (Regulatory), Eva Reinders (IT), Mariska Kamta (Due Diligence Coordinator).

For additional information visit www.nautadutilh.com

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NEW DELHI - 2021: PRACites around the globe gathered online for PRAC @ New Delhi micro-conference hosted by member firm KOCHHAR & CO. Congratulations to the entire Kochhar Team for a successful e-hosting!

Agenda
Opening Remarks - Jaap Stoop, PRAC Chair; Marcio Baptista, PRAC Vice Chair; Jeff Lowe, PRAC Corp Secretary
Greetings & Welcome - Rohit Kochhar, Chairperson and Managing Partner
Country Update - India - Pradeep Ratnam
Visual Presentation - Essense of India!
Kochhar Practice Update - M&A - Chandrasekhar Tampi
Kochhar Practice Update - Banking & Finance - Pradeep Ratnam
Firm update - Rohit Kochhar
Panel Discussion on "Regulation of Content on Social Media" - Moderator, Stephen Mathias, Kochhar & Co (Bangalore); Mark Brennan, Hogan Lovells (Washington); Mauricette Schaufeli, NautaDutilh (Amsterdam)

PRAC EVENTS


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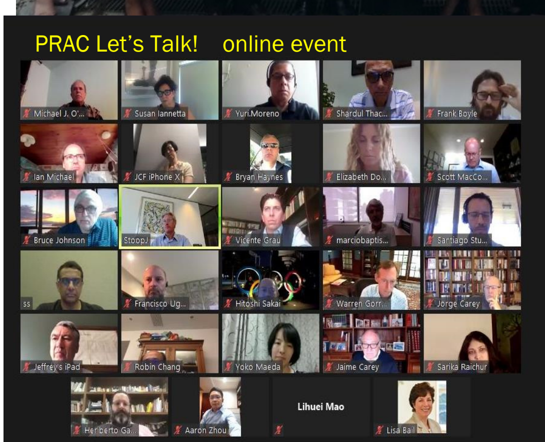
PRAC Let's Talk! online event
Michael J. O'...
Susan Iannetta
Yuri.Moreno
Shardul Thac...
Frank Boyle
Ian Michael
JCF iPhone X
Bryan Haynes
Elizabeth Do...
Scott MacCo...
Bruce Johnson
Vicente Grau
marciobaptis...
Santiago Stu...
Francisco Ug...
Hitoshi Sakai
Warren Gorr...
Jorge Carey
Jeffrey's iPad
Robin Chang
Yoko Maeda
Jaime Carey
Sarika Raichur
Heriberto Ga
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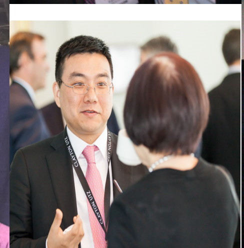
Lisa Bai


PRAC @ INTA


PRAC @ Vancouver

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The Secretariat of Trade sanctions a cartel, exempting one of the involved parties from sanction and imposing a divestiture obligation

Practice Areas:

Antitrust

Lawyers:

Julián Peña, Federico Rossi

On November 25, 2022, the Secretariat of Trade issued Resolution 115/2022 (the "Resolution"), by means of which it sanctioned certain nightclubs of the city of Bariloche (Province of Rio Negro, Argentina) with fines totaling AR$240 million (approximately USD$1.5 million) for engaging in a price-fixing and market allocation cartel. In addition, the Resolution ordered some of the sanctioned companies the divestment of certain assets and exempted one of the companies that was a party to the cartel from sanctions despite not having filed for leniency.

As a result of a complaint filed in 2018 by Powerlink S.R.L. ? a nightclub involved in the student parties? market in the city of Bariloche- the National Commission for the Defense of Competition (CNDC) initiated an investigation against Alliance S.A. and Grisú S.R.L. for a potential abuse of a dominant position and cartelization. Within the framework of the investigation, the CNDC verified the existence of a price-fixing and market allocation agreement between the defendants to establish a single price for the tickets offered to student tourism agencies. The agreement, which was in place between 2004 and 2017, was implemented through a "Memorandum of Understanding" entered into by Powerlink, Alliance and Grisú, aimed at allocating the market between the signing parties.

The Secretariat of Trade issued a cease-and-desist order and imposed a fine against the offenders. Furthermore, following the recommendation from the CNDC, the Secretariat of Traded exempted Powerlink from a fine. Despite the latter company signing the "Memorandum of Understanding" and not having filed an application under the leniency program provided for in the Antitrust Law, the CNDC acknowledged that having filed the complaint that triggered the investigation and "based on the cooperation provided during the proceedings and the evidence provided" to the authorities, added to "the coercion exercised by the dominant companies" that led Powerlink to sign the Memorandum, there was sufficient merit to exempt that company from a fine.

The Resolution also compelled the disassociation between the company CADEHSUR S.A. and Alliance, ordering the

latter to terminate the contracts through which it exercised control over CADEHSUR and prohibiting its shareholders and/or executives from any participation whatsoever in CADEHSUR. In that regard, the Resolution stated that "the removal of Alliance´s market power and allowing access to the market to other competitors is necessary to restore competition and neutralize the abuse of a dominant position exercised in violation to the Antitrust Law", thus constituting an unprecedented divestment obligation in the framework of an anticompetitive conduct investigation in Argentina.
This report should not be considered as legal or any other type of advice by Allende & Brea.

New Rules for Foreign Home Buyers in Canada Come Into Force January 1, 2023: Here's What You Need to Know

Written By Mark Lewis, Alixe Cameron, Jane Helmstadter, Kiera Stel and Kyle Laplante

On December 2, 2022, the Privy Council passed an Order in Council confirming regulations related to the *Prohibition on the Purchase of Residential Property by Non-Canadians Act* (the Act). The *Prohibition on the Purchase of Residential Property by Non-Canadians Regulations* (the Regulation) was published on December 21, 2022, in the *Canada Gazette*. The Regulation will come into force on January 1, 2023, along with the Act.

The Regulation addresses certain aspects of how the Act will operate once in force and clarifies several of the outstanding issues identified in our blog, *Canada's Ban on Foreign Home Buyers Soon In Effect: Update and What's Next*.

Broadly speaking, the Act prohibits "non-Canadians" from purchasing any residential property directly or indirectly from January 1, 2023, to December 31, 2024. The Regulation provides greater detail on five key elements of the Act.

1. Residential Properties Not in a Census Agglomeration or Census Metropolitan Area Are Exempt

In its 2022 Budget, the federal government signaled its commitment to exempt recreational properties from the prohibition in the Act. The government has followed through on that commitment by applying the Act only to residential properties in either a "census agglomeration" or a "census metropolitan area". Those terms bear the same meanings in the Act as set out in Statistics Canada's *Standard Geographical Classification (SGC) 2021*, being an area where one or more adjacent municipalities are centered on a population centre, otherwise known as a core.

As now defined, a census agglomeration area requires only a core population of at least 10,000 people based on data from the previous Census of Population Program. In comparison, to be defined as a census metropolitan area, an area must have a total population of at least 100,000 people based on data from the current Census of Population Program, of which at least 50,000 must live in the core based on adjusted data from the previous Census of Population Program. A link to a map of the impacted areas is here.

The effect of this definition is to include not only urban centres such as Vancouver, Calgary, Edmonton, Toronto and Ottawa but also many smaller centres (where many people will own recreational properties) such as Squamish, Chilliwack, Penticton, Ladysmith, Sylvan Lake, Medicine Hat, Canmore, Collingwood, Kawartha Lakes and Wasaga Beach.

The Regulation also includes as "residential property" land in either a census agglomeration or census metropolitan area that is zoned for residential use or mixed use, even though there is no habitable dwelling on that land. This inclusion will capture some land that is not generally considered to be "residential". We anticipate that this definition will include land on which commercial buildings (such as an office tower or shopping centre) are located if the land is zoned for "mixed use", even if the property does not contain residential units.

2. Exempt and Included Purchases

Definition of "Purchase"

The operative restriction in section 4(1) of the Act prohibits the "**purchase**, directly or indirectly, [of] any residential property" [*emphasis added*]. Section 4(1) of the Regulation adds that the "**acquisition**, with or without conditions, of a legal or equitable interest or a real right in a residential property constitutes a purchase" [*emphasis added*].

When the Act was introduced, there were questions about what would constitute a restricted purchase; in particular, would the ban apply to the entering into of an agreement of purchase and sale, to the completion of the conveyance contemplated by that agreement, or both? Section 4(1) of the Regulation does not provide precise clarity on this question but it suggests that both are captured by the prohibition.

A consultation paper issued by the Canada Mortgage and Housing Corporation (CMHC) earlier this year included a proposal to define "purchase" in the Regulation as "[a]cquire, or agree conditionally or unconditionally to acquire, a legal or equitable interest ... in a residential property ...". The same CMHC paper includes the following:

> Acquisition by a non-Canadian of control of a corporation or entity which has an interest ... in residential property constitutes a purchase for the purposes of the Act and these Regulations. ... For greater certainty, this definition would apply to conditional offers or arrangements to purchase residential property, leases structured to include purchase options, and purchases involving the use of nominee buyers.

While much of the proposed Regulation language contained in the CMHC paper was included in the final version of the Regulation, the language adopted with respect to what constitutes a purchase diverges by not expressly including the concept of agreeing to acquire land and by not including specific language with respect to the use of nominee buyers or the purchase of nominee entities. It is our view that both should be considered as being subject to the prohibition in the Act.

Where an assignment of a purchase agreement is being contemplated, based on the definition in the Regulations, we interpret the prohibition to capture the assignment of a purchase agreement to a non-Canadian assignee if the effective date of the assignment occurs after December 31, 2022, and before January 1, 2025. This means the assignment of an agreement is prohibited even if the original agreement was written and executed before January 1, 2023, and whether or not the assignor is or is not a non-Canadian.

Execution vs Completion

Given the intentions signaled in the consultation paper, and the definition language in the Regulation, signing a valid purchase and sale agreement is likely captured by this definition, as the execution of an agreement for property has been held to transfer the beneficial ownership of the property to the purchaser. *Lysaght v Edwards* (1876), 2 Ch. D. 499 (Eng. Ch. Div.) is a seminal English case on this issue, and it rules that beneficial ownership passes to the purchaser when the parties sign agreements for the sale of property. Courts have adopted this analysis in Canada over the past one hundred years. For example, it was adopted as law in 1922 in Alberta in *Re Church*, [1922] 3 WWR 1207, [1923] 1 DLR 203.

In 2018, the Ontario Court of Appeal stated that "[e]ven if the purchaser pays the sale price upon closing, the purchaser becomes the beneficial owner of the property as soon as the contract is formed" (See *Mercado Capital Corporation v. Qureshi*, 2018 ONCA 711 at paragraph 31).

This subject was considered in 2012 by the British Columbia Court of Appeal in *Terasen Gas Inc. v. Utzig Holdings*, 2012 BCCA 444. In this case, the issues were not decided on the question of whether the purchaser had a beneficial interest in the property, because, as stated in the dissent, "it was clear that beneficial title ... passed to the purchaser while the agreement for sale was pending" (paragraph 68). Similarly, in *Main Acquisitions Consultants Inc. v. Prior Properties Inc.*, 2021 BCSC 1449, the court found that "it could not be doubted that some form of an equitable interest in the Lands passed upon the signing of the [Agreement]" (paragraph 57).

As such, it is not necessary for a non-Canadian to complete a residential purchase or to defer the conveyance of the residential property until after 2024—the mere act of signing a contract is captured by the scope of the legislation based on common law principles.

Additional Exemptions

Section 4(2) of the Regulation provides for several specific exemptions from the prohibition:

1. the acquisition by an individual of an interest or a real right resulting from death, divorce, separation or a gift;
2. the rental of a dwelling unit to a tenant for the purpose of its occupation by the tenant;
3. the transfer under the terms of a trust that was created prior to the coming into force of the Act; and
4. the transfer resulting from the exercise of a security interest or secured right by a secured creditor.

3. What Constitutes Control by a Non-Canadian?

The Act deferred the definition of "control" to the Regulation, and also allowed for a category of "non-Canadian" to be added by the Regulation, in particular because the Act only addressed individuals and corporations. Section 2(c) of the Act provides that a corporation incorporated under the laws of Canada or a province that is controlled by an individual or a corporation that is a non-Canadian is itself deemed to be non-Canadian unless that corporation's shares are listed on a stock exchange in Canada for which a designation under section 262 of the *Income Tax Act* is in effect.

Section 2 of the Regulation adds to the category of those included as "non-Canadian" any entity formed or controlled by another entity that is formed other than under the laws of Canada or a province or otherwise controlled by a non-Canadian. The Regulation has therefore picked up partnerships, trusts and all other persons who are not individuals or corporations.

Under Section 1 of the Regulation, "control" means:

1. direct or indirect ownership of shares or ownership interests of a corporation or entity representing 3 percent or more of the value of the equity in it, or carrying 3 percent or more of its voting rights; or
2. control in fact of the corporation or entity, whether directly or indirectly, through ownership, agreement or otherwise.

The "control in fact" test will be familiar to those who have acquired property in British Columbia or Ontario in the time since those provinces introduced their respective "foreign buyers" taxes. While this test does not specifically reference section 256 of the federal *Income Tax Act*, as do the respective provincial foreign buyers tax statues, there is at least some familiarity in those jurisdictions with the analysis required to examine control.

What will come as a surprise to many is the very low threshold of a 3 percent direct or indirect ownership interest by any non-Canadian in an entity that has been formed under Canadian laws (and which is not publicly traded). This will capture many Canadian corporations, partnerships and trusts, especially so in conjunction with the expansive definition of residential property that includes lands with no habitable dwellings that are zoned for mixed use.

4. Issuing Orders for Contravening the Act

In our prior blog post, *Canada's Ban on Foreign Home Buyers Soon In Effect: Update and What's Next*, we identified several consequences for contravening the Act, which include fines of up to $10,000 per person or entity. Another additional consequence is set out in Section 7(1) of the Act, which permits a court to order that a residential property purchased by a non-Canadian in contravention of the Act be sold following an application from the minister, and the proceeds of that sale are not fully paid back to the non-Canadian individual or entity. The Regulation provides further guidance on orders under this provision.

For a court to order that a residential property be sold, the following conditions must be met as outlined under Section 7(1) of the Regulation:

1. the non-Canadian is the owner of the residential property at the time the order is made;
2. notice has been given to every person who may be entitled to receive proceeds from the sale; and
3. the superior court of the province is satisfied the impact of the order would not be disproportionate to the nature and gravity of the contravention, the circumstances surrounding the commission of the contravention and the resulting conviction.

Further, any order made under the Act must include the term that proceeds of the sale be distributed in a specific order as outlined under Section 7(2) of the Regulation, being:

1. the minister's costs are to be repaid, along with any outstanding fines to be paid by the non-Canadians;
2. the payment to those Canadians entitled to proceeds of the sale;
3. the repayment of the non-Canadian of amounts not greater than the purchase price for the sale; and
4. any remaining sums to be paid to the Receiver General of Canada.

5. Exempt Individuals

The Regulation exempts certain temporary residents (students or workers), foreign nationals and refugees who meet the specific criteria set out in the Regulation.

Section 8 of the Regulation provides that the Act does not apply if it is incompatible with the rights recognized and affirmed by section 35 of the *Constitution Act*, 1982. Section 35 recognizes and affirms the existing Aboriginal and treaty rights of Indigenous peoples of Canada.

Conclusion

This new federal legislation is rather unique, in particular given its limited application for only two years and noting that, as federal legislation, it covers an area that has typically (and constitutionally) been the domain of the provinces. Buyers who may have an upstream ownership structure that could offend the prohibition under the Act should proceed with caution and under the advice of counsel to determine whether they are subject to these new restrictions imposed. Similarly, professional advisors and others involved in the spectrum of services provided to buyers of real property will need to bear the prohibition in mind to ensure that they too are not exposed to the consequences imposed by the legislation.

If you have any questions about the *Prohibition on the Purchase of Residential Property by Non-Canadians Act*, please reach out to the authors of this blog or a member of our Commercial Real Estate group.

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Posted on: January 5, 2023

FOREIGN BUYER'S BEWARE: CANADIAN GOVERNMENT ENACTS A TWO-YEAR BAN ON PURCHASES OF RESIDENTIAL REAL ESTATE BY NON-CANADIANS

By: Jeevan V. Ahuja

As of January 1, 2023, the federal government's *Prohibition on the Purchase of Residential Property by Non-Canadians Act* (the "**Act**") has come into force. The Act prohibits "non-Canadians" from purchasing residential property directly or indirectly from January 1, 2023 to December 31, 2024.

According to the Act, a non-Canadian means:

> (a) an individual who is neither a Canadian citizen nor a person registered as an Indian under the *Indian Act* nor a permanent resident;
>
> (b) a corporation that is incorporated otherwise than under the laws of Canada or a province;
>
> (c) a corporation incorporated under the laws of Canada or a province whose shares are not listed on a stock exchange in Canada for which a designation under Section 262 of the *Income Tax Act* is in effect and that is controlled by a person referred to in paragraph (a) or (b) above; and
>
> (d) a prescribed person or entity (non-Canadien).

The Prohibition on the Purchase of Residential Property by Non-Canadians Regulations (the "**Regulations**") was published on December 21, 2022 in the Canada Gazette. The Regulations address certain aspects of how the Act will operate and clarifies provisions in the Act which previously raised uncertainty.

1. **What if I signed my contract before January 1, 2023, but have not completed?**

Vendors can rest easy knowing that the prohibition will not apply to purchase and sale agreements that were entered into prior to January 1, 2023. The mere act of signing the purchase and sale agreement is sufficient. As such, it was not necessary for a non-Canadian to complete a residential purchase prior to January 1, 2023 or to wait until 2025.

2 . What is considered control by a non-Canadian?

The Act had originally deferred the definition of “control” to the Regulation and allowed for the “non-Canadian” to be clarified as per paragraph (d) above.

With respect to a corporation or entity, “control” means a threshold of 3 percent direct or indirect ownership of shares or ownership interests by any non-Canadian in an entity that has been formed under Canadian law or a province (and which is not publicly traded).

3. **What is considered a purchase?**

Under the Act and Regulations, “residential property” means any real property or immovable (other than real property that is located in an area of Canada that is not within either a census agglomeration or census metropolitan area) that is situated in Canada and:

(a) is a detached house or similar building, containing three or less dwelling units;

(b) is a part of a building that is a semi-detached house, rowhouse unit, residential condominium unit or other similar premises that is, or is intended to be, a separate parcel or other division of real property or immovable owned, or intended to be owned, apart from any other unit in the building; or

(c) does not contain any habitable dwelling (e.g. bare land), is zoned for residential use or mixed use, and is located within a census agglomeration or census metropolitan area.

However, there are exceptions to the prohibition as Section 4(2) of the Regulations provide the following circumstances that do not constitute a “purchase” under the Act:

(a) the acquisition by an individual of an interest or a real right resulting from death, divorce, separation or a gift;

(b) the rental of a dwelling unit to a tenant for the purpose of its occupation by the tenant;

(c) the transfer under the terms of a trust that was created prior to the coming into force of the Act; or

(d) the transfer resulting from the exercise of a security interest or secured right by a secured creditor.

Additionally, the Act will not apply to the following classes of persons:

(a) Temporary residents, within the meaning of the *Immigration and Refugee Protection Act* are exempted if one of the following conditions are met:

(i) if they are enrolled in a program of authorized study at a designated learning institution, and they have fulfilled the following conditions:

(A) they filed all required income tax returns under the *Income Tax Act* for each of the five taxation years preceding the year in which the purchase was made;

(B) they were physically present in Canada for a minimum of 244 days in each of the five calendar years preceding the year in which the purchase was made;

(C) the purchase price of the residential property does not exceed $500,000; and

(D) they have not purchased more than one residential property; or

(ii) if they hold a work permit or are authorized to work in Canada, and

(A) have worked in Canada for a minimum period of three years within the four years preceding the year in which the purchase was made, if the work is full-time work;

(B) filed all required income tax returns under the *Income Tax Act* for a minimum of three of the four taxation years preceding the year in which the purchase was made, and

(C) have not purchased more than one residential property.

(b) foreign states purchasing residential property for diplomatic or consular purposes;

(c) foreign nationals who hold a passport that contains a valid diplomatic, consular, official or special representative acceptance issued by the Chief of Protocol for the Department of Foreign Affairs, Trade and Development;

(d) foreign nationals, with valid temporary resident status, whose temporary resident visa was issued, or temporary resident status was granted, if the Minister is of the opinion that the exemption was justified based on public policy considerations to provide safe haven to those fleeing conflict; and

(e) persons that have made a claim for refugee protection, if that claim has been found eligible and referred to the Refugee Protection Division under the *Immigration and Refugee Protection Act.*

4. **What are the offences and penalties?**

Those who contravene the Act may be guilty of an offence and may be subject to fines up to $10,000 per person or entity.

Contravening the Act does not invalidate the sale necessarily, however, the superior court of the province may order that the residential property be sold if the following conditions are met:

(a) the non-Canadian is the owner of the residential property at the time the order is made;

(b) notice has been given to every person who may be entitled to receive proceeds from the sale; and

(c) the superior court of the province is satisfied that the impact of the order would not be disproportionate to the nature and gravity of the contravention, the circumstances surrounding the commission of the contravention and the resulting conviction.

Any order under the Act must provide that the proceeds of the sale be distributed as follows:

(a) the payment of the costs of the sale, including the costs incurred by the Minister in bringing the application for the order and any unpaid fines by the non-Canadian under the Act;

(b) the payment of those, other than the non-Canadian, who are entitled to receive the proceeds of the sale in amounts and according to priorities that the superior court may determine;

(c) the repayment of the non-Canadian of an amount that is not greater than the purchase price they paid for the residential property; and

(d) the payment of any amount remaining to the Receiver General for Canada.

5. **Who is responsible?**

This penalty not only applies to non-Canadians, but also may include every person or entity that attempts to counsel, aid or abet a non-Canadian to purchase, directly or indirectly, any residential property under the Act.

Anyone involved in a real estate transaction (e.g. developers, builders, vendors, realtors, brokers, lawyers, and other advisors) should be cautious on advising on potential transactions.

Developers, in particular, should train sales staff regarding the requirements of the Act and should ensure that sales staff undertake reasonable inquiries as to whether purchasers are non-Canadians. This will protect developers from being found to have entered into contracts with non-Canadians knowingly or with willful blindness.

If you are a developer, vendor, or any professional advisors that may be involved in a real estate transaction, it is important to ensure that there is no exposure to the consequences imposed by this legislation.

Should you have any questions about this article, please contact the author of this article Jeevan V. Ahuja at jahuja@rbs.ca, or any member of our real estate group found here.

/Carey

News Alerts

Fintech Law and new reporting entities before the Financial Analysis Unit

On January 4, 2023, Law No. 21,521 was published, which promotes competition and financial inclusion through innovation and technology in the provision of financial services ("Fintech Law").

The Fintech Law introduces a series of legal amendments to various regulatory bodies, including Law No. 19,913, which creates the Financial Analysis Unit ("UAF") and amends various provisions on money laundering ("Anti-Money Laundering Act").

The Fintech Law expands the list of reporting entities before the UAF. Thus, with the enactment of the Fintech Law, Article 3 of the Anti-Money Laundering Act includes two main groups of subjects as reporting entities under the supervision of the UAF:

1. Those who are registered in the Registry of Financial Service Providers and in the Registry of Providers of Payment Initiation Services maintained by the Financial Market Commission ("CMF") and provide the services of crowdfunding platforms, alternative transaction systems, custody of financial

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instruments, intermediation of those instruments, and payment initiation.The Fintech Law defines “crowdfunding platform services” as the *physical or virtual place through which those who have investment projects or financing needs spread, communicate, offer or promote those projects or needs, or the characteristics thereof, and contact or obtain contact information of those who have available resources or the intention to participate in or satisfy those projects or needs; in order to facilitate the materialization of the financing operation*.

In turn, the Fintech Law considers “alternative transaction systems” as the *physical or virtual place that allows its participants to quote, offer or trade financial instruments or publicly offered securities, and that is not authorized to act as a stock exchange or as a commodities exchange*.

It states that “financial instrument” is *any security, contract, document or intangible asset, designed, used or structured for the purpose of generating monetary income, or representing an outstanding debt or a virtual financial asset*.

In addition, “virtual financial asset or crypto-asset” means a *digital representation of units of value, goods or services, other than money, whether in local currency or foreign currency, that can be transferred, stored or exchanged digitally*.

2 Individuals or legal entities that by virtue of any of their transactions are subject to CMF supervision and that have voluntarily requested their registration in the Registry of Reporting Entities maintained by the UAF. The aforementioned voluntary registration may not be canceled as long as the individual or legal entity has not lost the status of being supervised by the CMF.

The Fintech Law adds that the UAF will be empowered to issue differentiated and proportional instructions (e.g., general instructions –“circulares”-) for different types of reporting entities, based on the nature of the transactions they carry out and in consideration of the actual risks to which these entities are exposed of being used for the commission of money laundering and terrorist financing offenses.

The Fintech Law will enter into force 30 days after its publication in the Official Gazette, with the exception, among others, of Title II regarding the services of crowdfunding platforms, alternative transaction systems, credit and investment advisory, custody of financial instruments, order routing and intermediation of financial instruments, which will be in force as of the date of entry into force of the respective regulations issued by the CMF.

Finally, the persons and entities that provide the services of Title II referred to above, must comply with the obligation to request their registration and authorization to operate before the CMF in the terms established in the general rule issued for such purpose, within a term not exceeding 12 months from the entry into force of the aforementioned rule.

The Fintech Law is available at:

https://www.diariooficial.interior.gob.cl/
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Legal Commentary

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Highlights of the Draft Revision to the Anti-Unfair Competition Law

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On November 22, 2022, the State Administration for Market Regulation ("**SAMR**") issued for public comments a draft revision to the *Anti-Unfair Competition Law of the People's Republic of China* (the "**Draft Revision**", the "**AUCL**"), which reflects the government's ongoing efforts against unregulated unfair competition activities emerging in tandem with fast-evolving market forces that continue to give rise to new business forms and models.

The AUCL, first coming into force in 1993, has been revised and amended in 2017 and 2019, respectively, which focused on following aspects: The 2017 revision pinpointed the scope of parties taking bribes in business activities as individuals or entities that work for or entrusted by the transaction counterparty or can influence the transaction, excluding the counterparty itself; it also added rules to regulate unfair competition using the Internet and increased the amount of fines. The 2019 amendment focused on enhancing provisions for trade secrets protection. Likewise, the Draft Revision, representing what would be the third revision or amendment to the AUCL, with 48 articles as opposed to the current 33 articles, demonstrates a number of highlights: It refines rules to address unfair competition in the digital economy; it improves rules against existing types of unfair competition, including enhanced provisions against misleading commercial acts and false promotions, explicitly prohibits taking bribes in transaction activities, and strengthens systems for trade secrets protection; it adds new types of unfair competition, such as acts that harm fair trade and malicious transactions; it improves the legal liability section by introducing penalties on some unfair competition acts while reasonably adjusting the degree of punishment for certain violations. This commentary provides a summary and analysis of the focuses and highlights of the Draft Revision.

Refined rules to address unfair competition in the digital economy

Most significantly, the Draft Revision further specifies unfair competition acts existing in the digital economy, refining rules to regulate the acquisition and use of data and online unfair competition through the use of algorithms and technologies. These changes involve nearly ten articles in the Draft Revision, reflecting the great importance Chinese lawmakers attach to maintaining fair competition and data protection in the digital economy. Article 4 of the Draft Revision directly provides the overarching principle that the State intends to establish and improve the rules for fair competition in the digital economy, and that business operators may not use data and algorithms, technologies, capital advantages, or platform rules to engage in unfair competition. With respect to specific practices, in addition to traffic hijacking, improper interference, and malicious incompatibility that are already prohibited under the current AUCL, the Draft Revision would establish new types of illegal practices such as malicious transactions, influencing user choices, misleading users by using keyword association, by setting false operation options or by other means, intercepting or blocking other operators' pages without justified reasons, hindering the normal provision of online services or products, improper acquisition or use of commercial data, and big data-enabled price discrimination.

Meanwhile, given the complexity of determining unfair competition in the digital economy and the need for greater institutional foreseeability and greater consistency in law enforcement, Article 21 of the Draft Revision sets out several considerations when determining whether an act constitutes unfair competition, which include: (1) the impact on the lawful rights and interests of consumers and other business operators and on public interests; (2) whether such means as force, coercion and fraud are used; (3) whether the act contravenes industry practices or business ethics; (4) whether the act contradicts the principles of fairness, reasonableness and non-discrimination; and (5) the impact on technological innovation, industry development, and the Internet ecosystem.

As indicated above, the Draft Revision uses multiple provisions to regulate new types of unfair competition in the digital economy. Both platform providers and business operators using the platforms should pay close attention to these provisions and accordingly reassess their compliance in regard to relevant issues in their contract execution, performance, and daily operations.

More stringent enforcement of commercial bribery

The Draft Revision tightens rules against commercial bribery in the following four aspects:

- Counterparty returns as a potential bribed party. Article 8 of the Draft Revision provides that a business operator may not, by itself or instigate others to, bribe the counterparty in a transaction or any of its employees by offering money or valuables or by any other means. This means that the counterparty itself would again be included as a potential bribed party. The 1993 AUCL provides that, where a business operator secretly pays kickbacks to the transaction counterparty, be it an entity or individual, off the books, the operator will be punished for offering bribes; where the counterparty, be it an entity or individual, secretly accepts kickbacks or other benefits off the books, the counterparty will be punished for accepting bribes. By comparison, the 2017 AUCL sets forth the potential bribed parties, which include employees of the transaction counterparty but exclude the counterparty itself. Whether to include the "counterparty" as a bribed party has been a difficult issue in unfair competition law enforcement. On the one hand, business to business payments are normally a market practice resulting from equal, voluntary negotiations between the transaction parties. Commercial arrangements not involving a "power-for-money deal", namely the essence of bribery, should not be deemed as commercial bribery. For example, "secret" payments that are made "off the books" caused by accounting errors should not be considered commercial bribery. On the other hand, however, business to business arrangements with special market entities, such as hospitals, may still cause problems. For example, providing equipment for free with bundled consumables sales as a condition may cause a hospital to skip procurement through open tenders or even lead to collusive bidding or internal corruption within the hospital. Given that, the AUCL is still a useful tool to resolve such systematic problems concerning these special entities. The Draft Revision restores the "transaction counterparty" as a potential bribed party, but still needs to strike a balance given the above two considerations, with the elements to establish illegality to be further clarified in subsequent rules for implementation.

- Provisions are added to prohibit and punish the act of accepting bribes in transactions, which is explicitly specified as an unfair competition practice. A prohibitive provision is introduced in Article 8 of the Draft Revision that "no entity or individual may accept bribes in transaction activities". The legal liability for accepting bribes is prescribed in Article 29.2 that, where a business operator or any of its employee accepts bribes in transaction activities, if laws and administrative regulations have laid down relevant provisions to punish the act of accepting bribes in certain types of transactions, such provisions shall prevail; if laws and administrative regulations are silent, the bribed party will be punished in accordance with provisions to penalize the bribing party. Article 29.2 provides an alternative means to punish a bribed party that falls short of the standard of criminal prosecution, which would facilitate smooth transition between administrative and criminal penalties against a bribed party, as well as the two-way transfer of cases between judicial organs and administrative organs.

- Article 8 of the Draft Revision stresses that "instigating others" to engage in bribery also constitutes commercial bribery, which lays a more solid basis for punishing business operators who offer bribes through distributors or other third parties.

- The maximum fine for commercial bribery is raised from RMB 3 million to RMB 5 million.

The above changes reflect stronger efforts of market regulators to crack down on commercial bribery, which, after coming into force, would pave the way for a new level in law enforcement against commercial bribery.

Aiding unfair competition underlined as a regulatory focus

Another highlight of the Draft Revision lies in stricter constraints on the provision of aid to unfair competition. In the *Provisions on Prohibition of Unfair Competition Acts on the Internet (Draft for Comment)* released by the SAMR in August 2021, business operators are prohibited from aiding others in committing unfair competition acts over the Internet. The Draft Revision underlines the prohibition against aiders who in fact indirectly engage in unfair competition.

Article 2 of the Draft Revision provides a general principle that business operators must not aid other persons in committing any act of unfair competition, with specific requirements set forth in the following provisions: (1) Misleading commercial acts: A business operator may not sell goods that are misleading or facilitate misleading acts by providing storage, transportation, delivery, printing, concealment, premises, etc. (Article 7.2); (2) False commercial promotion: A business operator may not help another business operator in conducting any false or misleading commercial promotions by way of organizing false transactions, fictitious evaluations or otherwise, or provide planning, production, release or other services for false promotion (Article 9.3); (3) **Trade secrets**: A business operator may not help others to violate confidentiality obligations or the right owners' requirements for keeping confidential trade secrets by obtaining, disclosing, using, or allowing any other party to use such trade secrets (Article 10). The legal liability of aiders of unfair competition is the same with that of those who directly commit unfair competition acts, meaning that they may be ordered to cease the illegal acts, have their illegal gains and articles used for illegal activities confiscated, be fined, have their business license revoked, etc.

The above provisions would impose greater obligations on platform providers to supervise and examine unfair competition on their platforms. The provisions would also raise the bar for other companies and service providers to examine compliance of their services in a more prudent manner. Also, the protection of trade secrets is further consolidated in the Draft Revision.

Enhanced legal liability and increased cost of violations

With respect to legal liability, the Draft Revision introduces penalties for some unfair competition acts while reasonably adjusting the degree of punishment for certain violations.

I. Expand the scope of application of punitive damages and statutory damages

Under the current AUCL, punitive damages only apply to "trade secrets infringement committed by a business operator in bad faith", where, if the circumstance is grave, the amount of compensation may be determined as between one time and five times the actual losses suffered by the right holder as a result of the infringement or the benefits gained by the infringer from the infringement (Article 17.3). The Draft Revision would expand the scope of application of punitive damages to all types of unfair competition that are "in violation of the provisions of this Law". In addition, as opposed to the current AUCL where the statutory damages of up to RMB 5 million only applies to misleading commercial acts and trade secrets infringement (Article 17.4), such punitive damages would apply to all types of unfair competition under the Draft Revision.

II. Introduce legal liability for certain illegal acts

The Draft Revision introduces penalties for newly added types of unfair competition such as practices that impair fair trade, malicious transactions, and new types of online unfair competition practices. It also sets out legal liabilities for aiding the misleading acts and false promotions. On the basis of the current AUCL, Article 29 of the Draft Revision pursues liability against parties who take bribes in commercial transactions by imposing penalties on accepting bribes in transactions.

III. Impose heavier punishment for certain illegal acts

On the whole, the Draft Revision raises the upper limit of fines for unfair competition practices, with the maximum limit reaching RMB 5 million for violations such as trade secrets infringement, commercial defamation, abuse of a comparative dominant position, malicious transactions, and online unfair competition practices. Where the circumstances are particularly serious and of an extremely grave nature, thereby severely impairing the fair competition order or public interests, the business operator who carried out the corresponding unfair competition act may also have its illegal gains confiscated, be fined in the amount between 1% and 5% of its sales of the preceding year, be ordered to suspend business operations, or have its relevant business permits or business licenses revoked. The business operator's legal representative, principal in charge, and directly responsible person may also be personally subject to fines of between RMB 100,000 and RMB 1 million.

IV. Reduce punishment for certain illegal acts

Under the Draft Revision, the minimum fine for false promotion is reduced from RMB 200,000 to RMB 100,000 to better serve law enforcement realities and ensure congruence between punishment and wrongdoing. Also, Article 41 sets out special circumstances where exemption from punishment is available: if the business operators concerned have reached a settlement on the assumption of civil liability for the unfair competition act in question or if a people's court has adjudicated on civil liability and the act in question causes no harm to the fair competition order or public interests. In these instances, an investigation that has been initiated may be terminated; or, if an investigation has been concluded, an exemption from penalty will be granted.

In addition to the above highlights, the Draft Revision also delineates the features of commercial promotion and distinguishes it from advertising (Article 9); puts forward the concept of "comparative dominant position" to better protect the rights and interests of small and mid-sized operators in the market (Articles 13 and 47); and enhances protection of personal privacy and personal information (Article 25). The Draft Revision represents a significant revision to the current AUCL in that new types of unfair competition are brought under its umbrella for regulation, while a higher and broader perspective is adopted to re-examine the impact on public interests and business ethics in addition to protecting the rights and interests of business operators and consumers. The AUCL has served as a fundamental basis for market regulation over many years. It is our hope and belief that, after thorough consultation, discussion, and deliberation of the Draft Revision, a newly revised AUCL will be adopted to further optimize the regulatory scope spanning all links of the industrial and commercial chain, so as to safeguard an operable business environment and promote a better social order for fair competition.

Important Announcement

This Legal Commentary has been prepared for clients and professional associates of Han Kun Law Offices. Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused. The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases.

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Brigard Urrutia

27 December

Fossil Fuel Oxygenation Policy in Colombia

One of the main goals of climate change worldwide is to reduce CO2 emissions produced by the use of fossil fuels, therefore, this article seeks to analyze how the fuel policy in Colombia is directed towards the same goal.

Fossil fuels, ordinary or extra gasoline and diesel, in words of Decree 1073 of 2015 "are mixtures of hydrocarbons derived from petroleum that have been designed as fuels for internal combustion engines", that generate emissions of gases such as carbon dioxide and monoxide, which cause and/or enhance the greenhouse effect, air, soil and water pollution, among other negative environmental effects, which explains why their disincentive is one of the main goals of climate change, as well as of the environmental policies of current governments around the world.

Since 2001, the Ministry of Mines and Energy of Colombia has promoted a fuel oxygenation policy, ordering that fossil fuels used in the country must contain oxygenated components such as fuel alcohols or biodiesel, as an adjuvant factor for environmental sanitation, considering that biofuels are obtained from resources of animal or vegetable origin, that they will not be exhausted in the near future and that their use reduces gas emissions by large percentages. These orders are mainly found in Article 1 of Law 693 of 2001, Article 7 of Law 939 of 2004 and paragraph 2 of Article 35 of Law 1955 of 2019.

In development of the above, currently applies the Resolution 40447 of October 31, 2022 of the Ministry of Mines and Energy, which order retail distributors, as fuel service stations, and wholesale or large distributors of fuels, to only commercialize fuels blended with the following percentage of biofuel or fuel alcohol per gallon:

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COSTA RICA

NEW SALARY TAX BRACKETS WILL BE EFFECIVE AS OF JANUARY 1, 2023

Dec/2022

As of January 1st, 2023, new brackets of income tax will be applicable to salary, retirement payments and pensions.

The updated brackets and rates were published in Executive Decree No. 43852-H, in the national newspaper La Gaceta on December 23rd, 2022.

The monthly withholding tax rates and brackets that will apply as of January 1st, 2023 are the following:

Bracket	Rate
Up to ¢941.000,00 (approximately US$1.600)	Exempt
Over ¢941.000,00 (approximately US$1.600) and up to ¢1.381.000,00 (approximately US$2.350)	10%
Over ¢1.381.000,00 (approximately US$2.350) and up to ¢2.423.000,00 (approximately US$4.100)	15%
Over ¢2.423.000,00 (approximately US$4.100) and up to ¢4.845.000,00 (approximately US$8.200)	20%
Over ¢4.845.000,00 (approximately US$8.200)	25%

If you have any questions or concerns regarding this update or advice on tax matters, please contact our experts or call (+506) 4036 - 2800.

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For the case of regular or extra motor gasoline:

Effective date of the regulatory blending level	**Fuel alcohol content, expressed in percentage, per gallon or liter**
November 1, 2022	4%
December 1, 2022	5%
January 1, 2023	5%
February 1, 2023	5%
March 1, 2023	5%
April 1, 2023	4%
May 1, 2023	2%
June 1, 2023	2%
July 1, 2023	4%
August 1, 2023	4%
September 1, 2023	4%
October 1, 2023	4%
November 1, 2023	4%
December 1, 2023	6%
January 1, 2024	8%
February 1, 2024 and thereafer	10%

In the case of fossil diesel: each gallon must contain 10% biofuel or biodiesel.

It is important to highlight that some departments of the country are exempted from the mandatory blend or have a different blend percentage due to technical or logistical reasons or due to their border zone status.

According to the above, it is evident that the regulation of hydrocarbons in Colombia is advancing in order to promote the production and commercialization of cleaner and more sustainable fuels and contribute to the energy transition promoted by the National Government since years ago.

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Adoption of the CSRD: sustainability, a new pillar of businesses’ performance?

20 July 2022

The topic of non-financial information as such is not new; the so-called "Non-financial Reporting Directive" (Directive 2014/95/EU) already requires a number of companies to disclose and include in their management reports a non-financial statement containing information relating to at least environmental matters, social and employee-related matters, respect for human rights, anti-corruption and bribery matters.

Transposed into French law in 2017,[1] the companies[2] in scope are required to publish a "*declaration of extra-financial performance*" (the "**DPEF**"), integrated into their management report, which presents information regarding how they take into account the social and environmental consequences of their activities.

However, the implementation of these requirements has highlighted significant shortcomings: many companies do not provide reliable, comparable and relevant information on sustainability risks, opportunities and impacts.

These shortcomings prove all the more problematic in light of the European Green Deal and the European Commission's objectives of promoting sustainable finance and investment, and ensuring a just transition.

This is the context in which the European Commission published its legislative proposal (April 2021) which aimed to thoroughly revise applicable rules on non-financial reporting (renamed "corporate sustainability reporting") in view of improving the flow of information on sustainability matters. On 21 June, after several months of negotiations, the Council and the European Parliament reached a political agreement on this new directive - the *Corporate Sustainability Reporting Directive*) (the "**CSRD Directive**").

The CSRD, which broadens the scope of non-financial reporting, will oblige more companies to disclose precise information, on the basis on harmonised standards and subject to reinforced control. Thus, the CSRD will require companies to communicate with respect to both sustainability risks to which they are exposed as well as and about their own impact on people, the environment and society at large. In that respect, sustainability can be of relevance for the measure of companies' performance.

1. **Extending the scope of non-financial reporting**

The CSRD will require the following entities to disclose information on sustainability matters :

- all companies listed in EU regulated markets (with the exception of micro-companies[3]), including those not established in the Union but whose securities are listed on a European regulated market;

- non-listed companies with more than 250 employees and either a balance sheet total or a turnover of more than EUR 20 million or EUR 40 million, respectively.

European subsidiaries and sub-groups whose parent company is not established in an EU Member State will also be required to disclose sustainability information. Small and medium-sized companies[4] are also encouraged to publish sustainability information according to simplified standards. Finally, all parent companies of large groups will have to publish sustainability information.

As a result, it is estimated that an additional two thousand French companies will have to publish sustainability information.

2. **Towards more granularity and greater comparability of sustainability information**

The CSRD strengthens significantly the list of sustainability indicators that companies will be required to report on.

From now on, companies will notably have to provide information about i) their business strategy and the resilience of the undertaking's business model and strategy to risks related to sustainability matters; ii) any plans they have developed to ensure that their business strategy and model are compatible with the transition to a sustainable and climate-neutral economy; iii) their targets related to sustainability matters and the progress made towards achieving those targets; as well as iv) the role of the administrative, management and supervisory bodies with regard to sustainability matters.

This information will have to be clearly identifiable in a specific section of the management report and will have to include precise descriptions, including for example the plans defined by the company to ensure that its business model and strategy are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement and climate-neutrality.

Although certain derogations may apply in exceptional cases (impending developments, matters under negotiation, information seriously prejudicial to the commercial position of the company) and transitional periods are provided for, the spirit of the reform is undeniably to move towards greater transparency and comparability of the information provided by companies in scope of the CSRD.

In this respect, sustainability reporting standards[5] will be prepared on the basis of technical advice and contributions from the working group set up by the European Financial Reporting Advisory Group (EFRAG). They will be adopted by the European Commission by means of delegated acts and will aim to ensure that the information disclosed is understandable, relevant, verifiable, comparable and is represented in a faithful manner.

The adoption of these standards will face both opportunities and challenges: the standards could pave the way to the emergence of a sustainability data ecosystem, and contribute to the coherence of the legal and regulatory framework relating to the European Taxonomy and the so-called SFDR[6], all while striving to find the right balance by taking into account to the greatest extent possible the work of global standard-setting initiatives for sustainability reporting, as well as existing standards and frameworks.[7]

The CSRD will therefore result in a double upheaval: an amendment of the current non-financial reporting provisions under French law, in particular the Commercial Code, and the emergence of a new body of harmonised standards at EU level. The new legal framework is bound to have strategic implications and be demanding for companies, under the guise of the concept of "sustainability", and will require all activities of companies in scope to factor in the objective of sustainable development. It is therefore a real revolution which companies face, which they will have to adapt to and prepare for by 2024.[8]

3. **Strengthening the audit and assurance of sustainability reporting**

The absence of an assurance requirement on sustainability reporting would undermine their credibility and fail to meet the needs of the investors and other users of sustainability information for whom they are intended. It is therefore appropriate to consider a gradual increase in the level of assurance required for sustainability disclosures, starting with a requirement for the statutory auditor or audit firm to give an opinion on the compliance of sustainability disclosures with EU requirements, based on a limited assurance engagement.

The co-legislators also wanted to offer undertakings a broader choice of independent assurance services providers for the assurance of sustainably reporting. Member States should, therefore, be allowed to accredit independent assurance providers to provide an opinion on published sustainability information.

It should be noted that French law already provided such an assurance mechanism for a certain number of companies.

Conclusion

The European Commission's ambition, with the proposed CSRD, was to ensure a consistent flow of sustainability information within the financial system, in order to achieve the transition objectives and prevent greenwashing.

The broader scope of CSRD, the principle of greater comparability through common benchmarks for sustainability reporting, and the assurance mechanism agreed by the co-legislators should all be welcomed and will contribute to deliver on the Commission's objectives. Companies may now start preparing and assessing the operational impacts resulting from the CSRD.

That said, the reform is not complete yet: the Union is still to adopt the European sustainability standards which will have to further transcribe the principle of double materiality and provide a common framework for the latest waves of sustainability-linked rules and regulations. This will be the true test that will determine whether the EU can become a front-runner in setting global sustainability reporting standards, and whether sustainability can become a new pillar of businesses' performance.

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[1] Article L.225-102-1 of the French Commercial Code.

[2] These are companies which employ, on average, more than 500 employees and whose turnover or balance sheet total exceeds (i) for companies listed on a regulated market, their turnover or balance sheet total must exceed 40 million euros or 20 million euros respectively and (ii) for other companies, their turnover or balance sheet total must exceed 100 million euros.

[3] Namely, companies that employ less than 10 people and whose annual turnover or annual balance sheet total does not exceed 2 million euros.

[4] These are companies that employ less than 250 people and whose annual turnover does not exceed 50 million euros or whose balance sheet total does not exceed 43 million euros.

[5] Simplified standards will apply to SMEs.

[6] Cf. Regulation (EU) 2019/2088.

[7] Including existing standards and frameworks for natural capital accounting and for greenhouse gas accounting, responsible business conduct, corporate social responsibility, and sustainable development.

[8] From 1st of January 2024 for companies already subject to the non-financial reporting directive; from 1st of January 2025 for large companies that are not presently subject to the non-financial reporting directive; and from 1st of January 2026 for listed SMEs, small and non-complex credit institutions and captive insurance undertakings.

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GUATEMALA

AMENDMENT TO VAT REGULATION IN ORDER TO ISSUE INVOICES AS "FINAL CONSUMER"

Jan/2023

Government Agreement No. 12-2023, published January 9th, 2023, on the Official Gazette, amends Article 30 of VAT Regulation, Government Agreement No. 5-2013, which establishes de following:

- Invoices issued to foreign persons that do not have Tax ID, the invoice must be issued with their identification number.
- Is eliminated the provision to issued invoice as Final Consumer" (C.F) in documents that prove the provision of basic services such as consumption of drinking water, electricity and telephony of less than Q. 500.00 quetzals.
- In cases of force majeure and duly justified, SAT may authorize the application of issuance of invoices as "C.F". progressively, under corresponding mechanisms and deadlines.

The amendments will enter into force on January 14th, 2023.

If you have any questions regarding the agreement, its implications and how it may affect your particular case, do not hesitate to contact us.

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The final frontier - Hong Kong Court of Final Appeal grants leave to appeal in arbitration escalation clauses dispute

4 January 2023

The Hong Kong Court of Final Appeal has granted leave to appeal in the case of *C v D* [2022] HKCFA 25, against last year's finding by the Court of Appeal that the validity of "escalation clauses" – multi-tiered dispute resolution provisions which require negotiation or mediation before formal proceedings can be commenced – should be determined by the arbitrators themselves, not the courts. The Court of Appeal had previously refused leave to appeal their decision. The appeal is set to be heard in April 2023.

Space to negotiate?

In *C v D* [2021] HKCFI 1474, disputes arose from a cooperation agreement entered into between Company C, a Hong Kong company and Company D, a Thai company, for the development and building of a satellite. The agreement provided that the parties were to attempt in good faith promptly to resolve any disputes arising by negotiation between the parties' respective chief executive officers (CEOs) and that if that a dispute could not be resolved amicably within 60 business days, it was to be referred to arbitration in Hong Kong.

On 24 December 2018, the CEO of Company D issued a letter to the chairman of the board of directors of Company C, copied to other directors of Company C, alleging that Company C was in repudiatory breach of the agreement and with the letter meaning to serve as a "written request" for negotiation under the agreement. On 18 April 2019, Company D issued a notice referring the dispute to arbitration. In response, Company C claimed that the arbitral tribunal did not have jurisdiction because the letter had been addressed to Company D's directors but not the CEO, thus not fulfilling the condition in the agreement.

The tribunal dismissed Company C's objection and held that the relevant clause only made it mandatory that the parties should attempt in good faith to resolve any disputes by negotiation, but the reference of disputes to the respective CEOs was optional. The tribunal issued an award in favour of Company D, ruling that the letter constituted a request for negotiation under the agreement (the partial award).

Company C sought to set aside the partial award under section 81 of the Arbitration Ordinance (Cap. 609) (Ordinance)[1] on the ground that the partial award concerned a dispute "not contemplated by or not falling within the terms of the submission to arbitration" under Article 34(2)(a)(iii) of the Model Law.

The Court of First Instance dismissed Company C's application and held that compliance with an "escalation clause" was an issue of admissibility and did not go to the jurisdiction of the tribunal (see Hogan Lovells alert *C v D – Hong Kong court rules on compliance with pre-arbitration procedural requirements*).

Court of Appeal

Company C was granted leave to appeal. The issues upon appeal were:

- Whether the award should be set aside under Article 34(2)(a)(iii) of the Model Law (as implemented by section 81(1) of the Ordinance) since the failure to comply with preconditions meant that the dispute was "not contemplated by or not falling within the terms of the submission to arbitration under Article 34(2)(a)(iii)".
- The arbitral award was not in accordance with the agreement of the parties.
- The true construction of the relevant contractual provisions in particular, whether Company D was obliged to refer the disputes for determination by the companies' respective CEOs.

The Court of Appeal in *C v D* [2022] 3 HKLRD 116 (Cheung, Yuen and Chow JJA) dismissed all three grounds of appeal, citing recent English authority that it is arbitrators who are in the best position to decide issues relating to whether preconditions in the parties' agreement have been satisfied.

Whether an objection went to the jurisdiction of the tribunal rather than the admissibility of the claim ultimately depended on the agreement of the parties. It was not Company C's argument that Company D's claim could never be referred to arbitration, only that the reference to arbitration was premature in that some pre-arbitration procedural requirements had to be observed first. The issue therefore went to the admissibility of the claim rather than the jurisdiction of the tribunal.

The Court of Appeal found that disputes which went to the admissibility of the claim should be viewed as disputes "falling within the terms of the submissions to arbitration" under Article 34(2)(a)(iii) of the Model Law. Such an interpretation would in all likelihood give effect to the parties' agreement that all disputes should be resolved by the same tribunal and further the objective under section 3 of the Ordinance to facilitate the fair and speedy resolution of disputes.

It would also tie in with practice in other major international arbitration centres (see Hogan Lovells alert *Rising to the top – Hong Kong Court of Appeal rules that escalation clauses compliance queries are best left to arbitrators*).

Leave to appeal

In their decision of 12 December 2022, the Court of Final Appeal (Ribeiro, Fok and Lam PJJ) have now given leave to appeal on the question: "Is an arbitral tribunal's determination on whether a pre-arbitration condition precedent in an arbitration agreement that the parties thereto should first attempt to resolve their dispute by a specified mechanism has been fulfilled subject to recourse to the Court under Articles 34(2)(a)(iii) of the UNCITRAL Model Law (as incorporated into Hong Kong law under sections 81(1)(2)(a)(iii) of the Arbitration Ordinance (Cap. 609)."

The CFA said it was satisfied that this was a question of general importance and since this was the first case in which the issue had fallen to be considered by a Hong Kong court, granted leave to appeal.

The appeal is listed for hearing on 27 April 2023.

Taking it to the top

The CFA's ruling will be of great significance as it will be the highest court in a Model Law jurisdiction to consider the position. Until the position is clarified, one way of making sure that recourse to such clauses cannot be used by a party dissatisfied at the findings of a tribunal, is to place a time limit on when negotiations should take place. If they do not take place within the time limit, the precondition can be shown to have been complied with.

1. which gives effect to Article 34 of the UNCITRAL Model Law

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CBDC Concept Note – India's move towards digitalizing currency

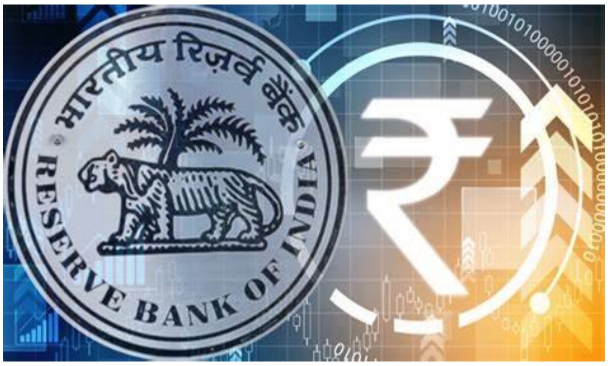
The Reserve Bank of India ("**RBI**") has released a concept note on Central Bank Digital Currency ("**CBDC**") on October 7, 2022 ("**Concept Note**"). The Concept Note sets out the objectives, motivations, benefits, risks, designs, and other features of the digital rupee and highlights considerations such as technology and design choices, security and anonymity, impact on monetary policy, banking systems, financial market systems, etc. The Concept Note takes India a step forward towards digitizing its currency and is released with an aim of creating awareness of e-rupee ("**e-₹**"). A brief snapshot of the Concept Note is set out below:

Motivations for e-₹: In India, there has been a shift in adaptation of the present payment systems such as NEFT, RTGS, UPI, etc. that are affordable, accessible, convenient, efficient, and secure. RBI has maintained that private virtual currency is at odds with the historical concept of money. It has consistently noted that cryptocurrency is not a commodity and has no intrinsic value and de-centralized finance will disrupt the traditional financial system and destabilize the fiat economy. e-₹ is intended to leverage on the benefits of digital currency *viz.* innovations in payments, financial inclusion, reduction in costs associated with physical cash management, cross-border payment efficacy, etc. without the associated risks of private currencies such as price volatility and proliferation of crypto assets.

What is e-₹: The digital rupee will be legal tender issued by the RBI in a digital form. It will be a sovereign currency exchangeable at par with existing fiat currency. Similar to the paper currency, e-₹ will be acceptable as a medium of payment, store of value and legal tender. The difference between CBDC and commercial bank money will be that CBDC will be issued by RBI and will be a liability in the books of RBI. This would ensure that RBI can meet its obligations using its own non-redeemable money. e-₹ promises to offer the public access to digital money free from credit and liquidity risk.

Design and architecture: RBI proposes the following design considerations for a resilient, secure, and scalable infrastructure for the digital currency:

- *Type*: RBI is considering launching two broad types of e-₹: retail CBDC ("**CBDC-R**") and wholesale CBDC ("**CBDC-W**"). CBDC- R could be made available to all users in the private sector, non-financial consumers



and business. The primary use of CBDC-R would be akin to paper currency. CBDC-W could be used for wholesale payments such as interbank payments or securities settlement. Case-in-point is Project Jasper in Canada and Project Ubin in Singapore. Adoption of CBDC-W will depend on integration with and upgrade of the existing exchanges and trading infrastructure and whether the cost of CBDC-W is less than the cost of existing settlements.

- *Model*: RBI has considered multiple models for CBDC, including a Direct Model, Two Tier Model and Hybrid Model. A Direct Model which makes RBI responsible for managing all aspects of CBDC has been currently ruled out due to the burden on RBI for onboarding customers, KYC, etc. The Intermediate/ Two Tier Model has been considered to be the most relevant in India wherein the issuer of CBDC would be RBI, but the distributors would be intermediaries such as commercial banks. The customer onboarding, KYC, ledger maintenance etc. would be done by intermediaries and RBI would only track the wholesale CBDC balances of the intermediaries.

- *Remunerated vs. Non-remunerated CBDC*: RBI is considering whether CBDC should be interest bearing. While this would certainly incentivize the shift from paper currency to digital currency, designing CBDC like a 'deposit (bearing interest)' is likely to disrupt the financial system resulting in loss of deposits with banks, impeding their credit creation capacity and increasing lending rates. Contrastingly, while non-remunerated CBDC is likely to hinder the switch from bank deposits to CBDC, it could still be an attractive medium of payment. RBI is currently considering non-remunerated CBDC as it would be least disruptive.

- *Account vs. token based*: A token based CBDC system would involve a type of digital token issued by and representing a claim on RBI. A token CBDC is a 'bearer-instrument' like banknotes, meaning that whoever holds the tokens at a given point in time would be presumed to own them. In contrast, an account-based system would require the keeping of a record of balances and transactions of all holders of the CBDC and indicate the ownership of the monetary balances. The verification of both systems would also differ, i.e. a person receiving a token will verify that his ownership of the token is genuine, whereas an intermediary verifies the identity of an account holder. RBI is considering token-based CBDC for CBDC-R and account-based system for CBDC-W.

- *Technology*: Technology considerations will be the focal point for developing a scalable, stable, tamper-proof financial system that offers cross-platform support and is able to integrate with other IT platforms, has configurable workflows and uses highly evolved fraud monitoring framework. The basic requirements of the technology architecture include zero downtime, zero frauds, able to handle high volume of transactions and zero loss due to cyberattacks. The options include conventional centrally controlled database or distributed leger technologies.

Recoverability: In account-based models, recoverability is not an issue as the identity of user is available. In a token-based system, the model can support two types of wallets, a custodian based where the wallet is held with a token service provider and is recoverable with the wallet pin, address etc. and user held model where the responsibility of the key is with the user and its device.

Offline Functionality: As financial inclusion is one of the key drivers of e-₹, offline functionality will be a key design consideration. The use of offline transactions would be beneficial in remote locations and offer availability and resilience benefits when electrical power or mobile network is not available. For offline transactions, the wallets must be able to independently verify the authenticity of any CBDC transaction without communicating with the server during the transactions.

Interoperability: RBI's aim is that e-₹ should be able to utilise the current payments infrastructure like UPI, digital wallets like Paytm, Gpay etc. Integrating CBDC into the broader payments landscape of India would possibly help drive end user adoption (both for the public and merchants) and will obviate the need for the creation of a parallel infrastructure. Collaborating with central banks of other countries would also be required to test the cross-border efficacy of CBDC. Case-in-point is Project Dunbar which brings together the central banks of Australia, Malaysia, Singapore and South Africa with the BIS Innovation Hub to test the use of CBDCs for international settlements.

Resource Intensiveness: The resource intensiveness also needs to be factored in while designing CBDC. For centralised systems, the resource consumption is comparable with that of existing payment systems. For distributed systems, it depends on whether there is any consensus protocol. CBDCs would not be 'mined' unlike private cryptocurrencies; CBDC will be issued by RBI and for account-based systems, users can simply opt for conversion of the bank's existing balances to CBDC balances. However, in the case of token-based systems, unique tokens based on agreed techniques would need to be created, which may be slightly resource intensive.

Privacy and data protection: CBDC ecosystems may be at similar risk for cyber-attacks that the current payment systems are exposed to. The token creation process should ensure the highest levels of the cryptography and the transaction of tokens also needs to be secured to ensure trusted environment.

Consumer Protection: CBDT will generally come with the risks of other digital currency including digital fraud, data breaches, lack of privacy, etc. The development of a secure system, countering of accountability risk and the establishment of an efficient grievance redressal system is likely to combat the risks associated with e-₹.

Anonymity v. AML/CFT: Degree of anonymity would be a key design decision for any CBDC. While digital currency should promise to maintain certain anonymity, recent trends have demonstrated the use of digital assets for money laundering and financing terrorism. The balance between Anti-Money Laundering and Combating Finance of Terrorism and anonymity is the principle of 'managed anonymity' i.e. anonymity for small value and traceable for high value, akin to anonymity associated with physical cash.

Launch and next steps: RBI is currently engaged in working towards a phased implementation strategy, going step by step through various stages of pilots followed by final launch. RBI will build a prototype, test the idea in a controlled environment, perform test cases with positive and negative scenarios to evaluate the durability and resilience of e-₹ and finally conduct pilot projects with a diverse user based.

With the advent of cutting-edge technologies, digital currency will be the next milestone in monetary history. RBI notes that a sovereign digital currency issued by the central bank stands to offer the benefits of virtual currency without the potential risks associated with private virtual currencies.

For further information, contact Mr. Rajarshi Chakrabarti (rajarshi@mumbai.kochhar.com) and Ms. Dhvani Shah (dhvani@mumbai.kochhar.com).

VOLUNTARY PROGRAMS FOR WASTEWATER DISCHARGE QUALITY COMPLIANCE

DECEMBER 2022

EXECUTIVE SUMMARY

- In March 2023, new parameters requiring improved wastewater quality will come into effect.
- The guidelines establish the possibility for those who discharge wastewater to propose to CONAGUA no later than April 3, 2023, a compliance program with concrete actions to improve wastewater quality.
- Those who do not submit this program must ensure that their discharges comply with the new parameters as of April 3, 2023.

In March 2022, the Official Mexican Standard NOM-001-SEMARNAT-2021 ("the NOM") was published, establishing the permissible limits of pollutants in wastewater discharges in receiving bodies owned by the nation. In addition, it enacts new limits and stricter conditions that must be met by wastewater discharges into rivers, lakes, and the subsoil, granting one year for those who carry out said discharges (the "Regulated Entities") to adapt their processes to ensure compliance with the NOM.

To facilitate Obliged Subjects to comply with the norm, on December 5th, 2022, the Guidelines establishing the general administrative provisions for the presentation of the compliance programs established in the fourth transitory article of the NOM (the "Guidelines") were published.

GUIDELINES FOR COMPLIANCE WITH THE NOM

The Guidelines establish that the Regulated Entities in need of modifying their facilities or changing their production processes may submit to the National Water Commission (CONAGUA, for its acronym in Spanish) a compliance program establishing actions, conditions, and goals for their discharge waters to comply with the NOM, giving a maximum deadline of March 11, 2027.

The submission of compliance programs is voluntary and may be submitted from March 11 through April 3, 2023.

Those who choose not to present a program must ensure that their wastewater discharges comply with the NOM guidelines as of April 3, 2023.

If CONAGUA verifies that the Regulated Entities do not comply with the commitments established in the program, said Commission will proceed to cancel the program. In such cases, the Regulated Entities must immediately comply with the NOM.

Failure to comply with the parameters established in the NOM would be equivalent to discharging contaminated water, which would give rise to administrative, environmental, civil, and criminal responsibilities.

OUR RECOMMENDATIONS

First, verify the obligations derived from the discharge permit, ensure that the treatment plant is in optimal conditions and that discharge analysis and declarations are periodically made to CONAGUA, ensuring that the current discharge conditions are met.

Subsequently, verify with the current wastewater analysis and experts' technical opinion whether the current discharge complies with the parameters established in the NOM. If the current discharges does not comply with the requirements, it is advisable to submit the compliance program to CONAGUA within the corresponding period.

Finally, we recommend legal and technical advice to ensure adequate compliance with the NOM and the National Waters Law.

Read the original publication in the Official Gazette of the Federation by visiting: https://www.dof.gob.mx/nota_detalle.php?codigo=5673265&fecha=05/12/2022#gsc.tab=0

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Final CSRD mandates more sustainability reporting

22-12-2022

On 16 December 2022, the Corporate Sustainability Reporting Directive (CSRD) was published (url: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32022L2464) in the Official Journal of the EU. The CSRD replaces the Non-Financial Reporting Directive (NFRD) and extends reporting requirements with regard to people and the environment, responsible corporate governance and supply chain responsibility. This article briefly outlines the main changes to the CSRD and the steps needed to ensure you are prepared in good time. The CSRD is more than 'just' a reporting guideline and demands action in 2023.

CSRD background

Globally, the focus on ESG (Environmental, Social, Governance) continues to expand. In this context, the EU has expressed its commitment to climate neutrality by 2050 in the European Green Deal. At the same time, the EU wants to promote future-proof economic growth that ensures stability, employment and sustainable investment. The above ambitions have led the EU to issue several directives and regulations. One example is the EU Taxonomy Regulation, which provides a classification system to indicate whether a financial product or investment is sustainable. The Sustainable Finance Disclosure Regulation (SFDR) also brings sustainability-related obligations, such as the requirement for asset managers to be transparent about their ESG policy or risk policy, as well as performance. The CSRD is also an important part of sustainability ambitions, by requiring companies to report on sustainability and having this reporting reviewed (to a greater or lesser extent) by an auditor. Above all, what the EU Taxonomy Regulation, the SFDR and the CSRD have in common is that they all promote behavioural change among undertakings, investors and other stakeholders and encourage undertakings to achieve higher scores for the extent to which activities or products are green or contribute to achieving sustainability ambitions. In many cases, undertakings have to indicate when a particular disclosure requirement can be met, if it cannot be met at the time when the CSRD comes into force.

Main changes

1. Formulating long-term ESG goals and policies

The CSRD requires companies to set clear ESG targets and disclose progress annually based on European Sustainability Reporting Standards (ESRS). The ESRS are being prepared by the

European Financial Reporting Advisory Group (EFRAG) and are being issued in two stages. In November 2022, the first set of ESRS was proposed (url: https://efrag.org/lab6?AspxAutoDetectCookieSupport=1), which must be adopted by the European Commission by 30 June 2023. The second set of ESRS has to be adopted by 30 June 2024, setting out additional information that companies must disclose on specific sustainability issues and reporting areas, and information that companies must disclose that is specific to the sector in which they operate. The first set of draft ESRS includes 12 standards covering the following topics:

General	Theme: Environment	Theme: Social	Theme: Governance
General requirements that undertakings shall comply with when preparing and presenting sustainability-related information	Climate change	Own workforce	Business conduct
General disclosure requirements that apply to all undertakings regardless of their sector of activity and apply across sustainability topics	Pollution	Workers in the value chain	
	Water and marine resources	Affected communities	
	Biodiversity and ecosystems	Consumers and end-users	
	Resource use and circular economy		

2. Extending the scope

The CSRD will cover about five times more companies than the current NFRD. The scope will be extended from large public-interest undertakings, i.e. listed companies, banks and insurance companies with >500 employees, to include the following categories:

- **large undertakings**, listed or unlisted (or undertakings exceeding at least two of the following values: a balance sheet total of €20 million, net turnover of €40 million, and an average number of 250 employees during the financial year);
- **large non-EU undertakings** with substantial activities in the EU market (a net annual turnover of €150 million in the EU) and which have at least one subsidiary or branch in the EU exceeding certain thresholds; and
- **small and medium-sized undertakings** with securities admitted to trading on an EU regulated market, excluding micro enterprises, small and non-complex credit institutions and captive insurance entities.

3. Clarifying the double materiality principle

The double materiality approach requires companies to report on the impact the company has on people and the environment on the one hand, and the impact of sustainability issues on their company, both positive (e.g. striving for a diverse and inclusive work environment) and negative (resource scarcity) on the other.

4. Due diligence on own operations and supply chain too

Undertakings must report not only on their own performance regarding ESG themes, but also on that of their clients and suppliers. The exact requirements will be detailed by EFRAG on a theme-by-theme basis. An exception may be invoked in the first three years for not being able to retrieve all value chain information.

5. Mandatory assurance for sustainability reporting

Sustainability information should be included in the management report and audited by an independent auditor. Initially, the CSRD provides for ‘limited’ assurance of the sustainability report by an auditor, which is more than was required under the NFRD. The requirement for ‘limited’ assurance is expected to gradually shift to a requirement for ‘reasonable’ assurance.

Phased entry into force

The requirements will take effect in phases, depending on the type of company:

- 1 January 2024 for companies already covered by the NFRD (reporting in 2025 annual report for financial year 2024);
- 1 January 2025 for non-NFRD undertakings (reporting in 2026 annual report for financial year 2025);
- 1 January 2026 for listed SMEs, small and non-complex credit institutions and captive insurance companies (reporting in 2027 annual report for financial year 2026, with SMEs being granted an extension until 2028);
- 1 January 2028 for the large non-EU undertakings mentioned earlier (reporting in 2029 annual report for financial year 2028).

Preparation: what steps to take now?

For many undertakings, reporting on sustainability information is new, especially to this extent. The management report will be considerably more voluminous. To actually be able to report in line with CSRD standards from FY2024 or 2025, first requires an understanding of issues such as the undertaking's own information processes, KPIs and data applications. But it also requires an understanding of closely related legislation such as the above EU Taxonomy Regulation, as well as knowledge of other guidance such as that of the Task Force on Climate Related Financial Disclosures (TCFD) and initiatives such as the Corporate Sustainability Due Diligence Directive (CSDDD). In addition, other future legislation on sustainability is also relevant, such as the proposal for the Dutch private member’s bill Responsible and Sustainable International Business Conduct Act (Wet VDIO) and the updated Corporate Governance Code (see our newsletter (url: https://www.nautadutilh.com/en/information-centre/news/update-of-the-dutch-corporate-governance-code-finalised) of

20 December 2022). Similarly, any undertaking preparing for the CSRD should consider how its governance can be properly structured to meet the broad disclosure requirements. For many undertakings, next year will therefore be dominated by further preparation for the CSRD.

We will be happy to engage with you to discuss your preparedness for the CSRD and related legislation.

Written by

The Netherlands

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The
SyCipLaw PPP Update
OCTOBER 2022

2022 Revised Implementing Rules for the Build-Operate-Transfer Law

On 1 September 2022, the Build-Operate-Transfer Law Implementing Rules and Regulations (IRR) Committee approved the Revised 2022 IRR of Republic Act No. 6957, as amended by Republic Act No. 7718, otherwise known as the Build-Operate-Transfer (BOT) Law (the Revised 2022 IRR).

The Revised 2022 IRR seeks to address the concerns raised by the private sector with the amendments introduced by the 2022 BOT IRR approved on 31 March 2022. The Revised 2022 IRR was published on 27 September 2022 and will take effect on 12 October 2022.

EXPANDED SCOPE OF ELIGIBLE PROJECTS

The Revised 2022 IRR includes the construction, rehabilitation, improvement, betterment, expansion, modernization, operation, financing and maintenance of the following types of projects: (i) land transportation systems, including railways, road-based transportation systems, bus rapid transit, high priority public utility vehicle systems, active transportation, transit-oriented developments, public utility vehicle stations, transport plazas, intermodal terminals, park & ride, and related facilities; (ii) transport and traffic management projects, including transportation databases, automated fare & toll collection systems, traffic signaling, traffic monitoring systems, traffic enforcement systems, congestion and management systems; (iii) energy efficiency and conservation, renewable energy, and electric vehicle charging stations with related infrastructure; (iv) flood control projects; (v) urban redevelopment, townships, and housing projects; and (vi) heritage preservation and adaptive reuse projects.

FLEXIBILITY IN ESTABLISHING BIDDER QUALIFICATION

The Revised 2022 IRR permits a bidder to establish the required track record through (i) its own experience; (ii) the experience of the member firms, in case of a consortium; or (iii) through contractors, nominated affiliates, proposed facility operators and/or entities bound by a technical services agreement (collectively, Nominated Entities). Certain required key personnel may also come from these Nominated Entities.

In relation to financial capability, the Revised 2022 IRR permits for the ability of the bidder to provide equity to be measured in terms of the latest net worth of the bidder and, in case of a consortium, of the lead member or the combined net worth of member firms. Thus, in computing net worth, it is no longer required (i) to deduct from the net worth of an entity its equity commitments to other projects; and (ii) to pro-rate the net worth of member firms based on the proposed ownership structure.

The Revised 2022 IRR seeks to address the concerns raised by the private sector with the amendments introduced by the 2022 BOT IRR approved on 31 March 2022

UNSOLICITED PROPOSALS

The Revised 2022 IRR clarifies that it is the grant of a Direct Government Guarantee, Direct Government Subsidy or Direct Government Equity (as these terms are defined therein) that is not permitted in unsolicited proposals. Previously, the scope was ambiguous since what was prohibited was a “Direct Government Guarantee, subsidy or equity,” which did not use the defined terms.

It also relaxes the requirements for New Concept or Technology, which is required to support an unsolicited proposal. It is described as a concept or technology that is new or pioneering where the project is intended to be implemented” and no longer requires that it be “untried in the Philippines.” Further, the track record showing successful implementation may now be established not only by the bidder but also by any consortium member or Nominated Entity, which shall be subject to a lock-in period pursuant to the contract.

The Revised 2022 IRR further provides that the 80-day negotiation period for unsolicited proposals may be subject to extension pursuant to rules and procedures to be issued by the PPP Governing Board.

DIRECT GOVERNMENT SUBSIDY

The Revised 2022 IRR has recognized the concept of Availability Payments, which refer to predetermined payments by the agency or local government unit to the project proponent in exchange of delivering an asset or service in accordance with the contract. It is expressly states that Availability Payments shall not be construed as Direct Government Subsidy.

The Revised 2022 IRR also provides that, if the final approval of the franchise by the regulator shall result in a decrease in the amount of tolls, fares, fees, rentals, and/or charges stipulated under the contract, the government shall ensure that the project proponent recovers the difference between the amount stipulated under the contract and the amount approved by the regulator (or appropriate regulatory body) through measures consistent with the Constitution and other applicable laws. The payment of such difference between the amounts shall also not be considered as Direct Government Subsidy.

MATERIAL ADVERSE GOVERNMENT ACTION (MAGA)

The Revised 2022 IRR widens the scope of MAGA to refer to any act of the government (and not just the executive branch) and has deleted the carve-out for (i) acts of the agency or local government unit and approving body; (ii) acts of the executive branch, made in the exercise of regulatory powers; and (iii) acts of the legislative and judicial branches of government. The deletion of the carve-outs is a very welcome development as it gives project proponents real and meaningful recourse against acts of the government. However, the requirement that “the project proponent had no, or could not reasonably be expected to have had, knowledge of the MAGA prior to the effectivity of the contract” has been retained.

Further, for a MAGA to occur, the act of the government must specifically discriminate against the “sector, industry or project,” which is broader in scope compared to the previous requirement that the act must specifically discriminate against the project proponent. The Revised 2022 IRR, however, requires that the contract provide for rules, including materiality or amount threshold, nature and manner of recourse, and a cap in case of monetary compensation.

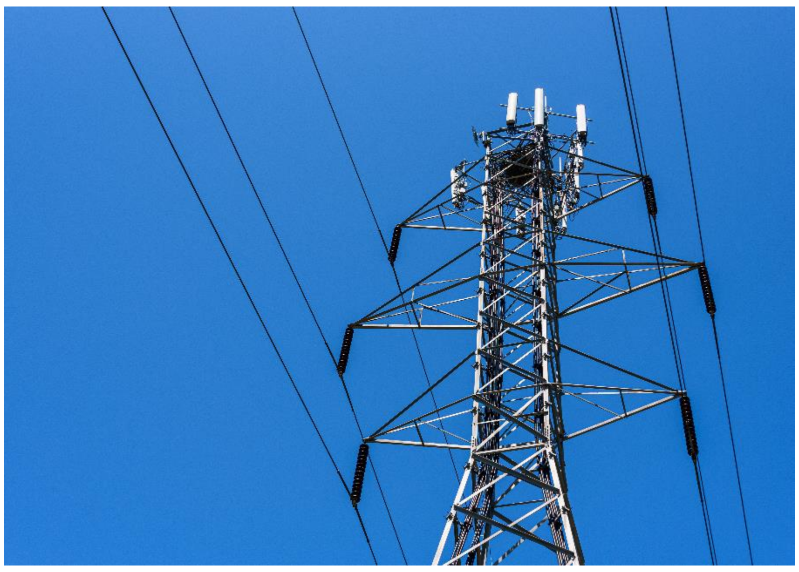
ALLOWABLE CONCESSIONAIRE ACTIVITIES

The Revised 2022 IRR has deleted the prohibition against the concessionaire (which is a special purpose company) from engaging in other concessions, businesses, or undertakings not approved by the relevant regulator, which may conflict with the approved project or otherwise lead to anti-competitive behavior or abuse of dominant position.

The Revised 2022 IRR widens the scope of Material Adverse Government Action (MAGA) to refer to any act of the government (and not just the executive branch) and has deleted the carve-out for (i) acts of the agency or local government unit and approving body; (ii) acts of the executive branch, made in the exercise of regulatory powers; and (iii) acts of the legislative and judicial branches of government.

RELAXATION OF NATIONALITY REQUIREMENT

For Public Utilities



The Revised 2022 IRR retains the requirement that, for projects requiring a public utility franchise for its operation, the operator must be (i) a Filipino, or (ii) if a corporation, must be duly registered with the Securities and Exchange Commission and owned up to at least 60% by Filipinos; or (iii) if a consortium of local and foreign firms, Filipinos must have at least 60% interest in said consortium.

Given the passage of Republic Act No. 11659, which amended Commonwealth Act No. 146, otherwise known as the Public Service Act, the term "public utility" now has a narrower definition and refers only to a public service that operates, manages or controls for public use any of the following: (i) distribution of electricity; (ii) transmission of electricity; (iii) petroleum and petroleum products pipeline transmission systems; (iv) water pipeline distribution systems and wastewater pipeline systems, including sewerage pipeline systems; (v) seaports; and (vi) public utility vehicles. Thus, other activities that previously required a franchise, including the operation of railways and airports, are no longer considered public utilities and do not require any minimum Filipino ownership.

For Solar, Wind and Hydro Power Projects

The Philippine Department of Energy (DOE) has announced that it is preparing the necessary amendments to Rule 6, Section 19 of the implementing rules and regulations (IRR) of the Renewable Act of 2008 to lift the 40% cap on foreign ownership of renewable energy project proponents.

This development came after the Philippine Department of Justice (DOJ) issued on 29 September 0222 DOJ Opinion No. 21 opining that the exploration, development, and utilization of inexhaustible renewable energy sources are not subject to the 40% foreign equity limitation provided under Section 2, Article XII of the 1987 Constitution of the Philippines. Said provision reads that "[a]ll lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least 60% of whose capital is owned by such citizens."

In said opinion, the DOJ said that the enumeration accompanying the term "natural resources" are properties that are within the State's power of dominium pursuant to the Regalian Doctrine (such as lands, fisheries, forests, and wildlife), which are all susceptible to appropriation and, thus, excludes the sun, the wind, and the ocean. The DOJ also said that constitutional debates centered on the strong concern and fear against fully opening to foreign exploitation the natural resources in Section 2, Article XII as it may lead to the possibility of running out of these limited and exhaustible resources. Thus, this compelling reason behind the imposition of the foreign ownership cap finds no application to inexhaustible renewable energy sources.

The DOJ further noted that limiting participation in these renewable energy projects will work only to the detriment of the country as there is no clear evil to be remedied and the adoption of these inexhaustible renewable energy source technologies would not only help in the attainment of a healthful and balanced ecology but also provide clean energy that would not be subject to price fluctuations and market forces similar to fossil fuels. Finally, the DOJ noted that the technical knowledge and experience, as well as the immense capital required to set up these inexhaustible renewable energy power stations to utilize solar, wind, hydro and ocean or tidal energies is akin to large-scale exploration, development and utilization of minerals, petroleum, and other mineral oils, which necessitates the aid of foreign capital, technology and/or expertise.

SyCipLaw is one of the largest law and oldest firms in the Philippines. It offers a broad and integrated range of legal services, covering the following fields: Banking, Finance and Securities; Special Projects; Corporate Services; General Business Law; Tax; Intellectual Property; Employment and Immigration; Litigation; and Dispute Resolution. This bulletin has been prepared pursuant to the Firm's Sustainability Policy. Under the latter, the Firm seeks to, among others, assist in the task of social and economic development by practicing law in the best traditions of the profession, and to assist the Firm's clients in their own quest for sustainability.

The links to our earlier bulletins and briefings can be found at the SyCipLaw information hub, www.syciplawresources.com. For more information about the regulations covered by other bulletins and briefings, please contact your account partner or email info@syciplaw.com

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Discharging the burden of proof in a property tax appeal: lessons from two recent property tax cases

DENTONS RODYK

January 10, 2023

Introduction

1. There were two recent property tax appeals against the Chief Assessor's revised annual values which bore different results: one was successful, the other was not. Given the difference in results, a review of these two cases may help shed some light on how a potential appellant can better prepare for its property tax appeal to maximise its chances of success.
2. The experience from the two cases suggests that an appellant stands the highest chance of success if it does not limit its case to pure legal arguments, but also provide comprehensive and compelling expert evidence to show why its proposed annual value should be preferred over that of the Chief Assessor's.

The cases

3. The first case is *Bollywood Veggies Pte Ltd v. Chief Assessor* [2021] SGVRB 1. The facts of the *Bollywood Veggies* case are as follows:

   a. The appellant leased a plot of land at Neo Tiew Road from the Singapore Land Authority (SLA) for a period of 20 years from 2001. The property comprised of a vegetable farm and some buildings that the appellant later constructed on site to house among other things, a bistro, a food museum, and an event space.
   b. In 2018, the Chief Assessor increased the annual value of the property from S$87,000 to S$107,100. The Chief Assessor calculated that annual value by adding 5% of the costs the appellant had purportedly incurred in 2009 to construct one of the buildings (which was S$29,650) to the annual land rent the appellant paid to the SLA that year (which was S$77,400).
   c. The appellant objected to the Chief Assessor's assessment, contending that the annual value of the property should be the same as the annual land rent that the appellant paid to the SLA. The appellant's main ground of appeal was the buildings it had constructed were temporary (apparently because they had to be removed at the end of the lease period) and in any case, the lease prevented the appellant from subletting the buildings out.
   d. In respect of the appellant's case, the Valuation Review Board noted that the only supporting evidence produced by the appellant was a valuation report prepared by its valuer Jones Lang LaSalle (for an earlier rent review exercise between the appellant and SLA). The appellant did not lead any other evidence to prove that the buildings in question were only temporary, and/or that this temporal nature had affected their value. On JLL's report, the VRB found that it had little probative value for the purposes of the appeal because the report was only meant to determine the land rent, and not the annual value of the property under the Property Tax Act. Indeed, JLL did not even consider the key issues in dispute there namely whether the buildings on the property were assessable to property tax, and if so, at what value.
   e. In contrast, in respect of the Chief Assessor's case, the VRB noted that the Chief Assessor's choice of valuing the building at 5% of the construction costs was amply justified under the then section 2(3)(a) (now section

2(6)(a)) of the Property Tax Act.

f. Ultimately, the VRB held that the appellant did not discharge its burden of proving that the Chief Assessor's assessment was excessive and proceeded to dismiss the appeal.

4. The appellant was dissatisfied with the VRB's decision and appealed to the High Court (see *Bollywood Veggies Pte Ltd v Chief Assessor* [2022] 3 SLR 1028).

   a. On appeal, the appellant appointed legal counsel and mounted three arguments, of which the last two were new, to try to reverse the VRB's decision.
   b. First, the appellant reiterated on appeal that since there was a prohibition in the lease against subletting, the appellant could not have reasonably leased out the buildings and correspondingly, the buildings should be excluded from the computation of the annual value of the property.
   c. Second, the appellant argued that the construction costs that was incurred by the appellant in 2009 was historical and could not represent the value of the buildings in 2018. The appellant's case was that since there was "no nexus between the building costs and the estimated value of the buildings", those costs should be excluded.
   d. Third, the appellant argued that even if the value of the buildings should be included, the construction costs that the Chief Assessor had relied on was based on an email by the appellant's architect which was not only hearsay but unreliable because it was recanted by the said architect immediately after the email was sent.
   e. The appeal was heard before Justice Aedit Abdullah.
   f. On the appellant's first argument, Justice Abdullah held it was well-settled that the hypothetical tenancy enquiry (i.e., the statutory test of annual value under the Property Tax Act) applied even if the actual tenant was the only possible hypothetical tenant in question. Hence, the appellant's proposition (that the buildings should be excluded from valuation because it could not reasonably sublet the buildings) was unsustainable since that proposition would contradict the prevailing position at law.
   g. Justice Abdullah held that in any case, the Chief Assessor was relying on section 2(3)(a) of the Property Tax to assess the annual value of the property in question and the application of that section did not depend on whether the buildings were tenanted or indeed, tenantable. Justice Abdullah further held that there was nothing wrong in the Chief Assessor choosing to apply section 2(3)(a) in the *Bollywood Veggies* case particularly when there were no useful comparable on the rental value of buildings in agricultural properties.
   h. On the appellant's second argument, Justice Abdullah reasoned that save for exceptional circumstances (such as the presence of an unusually high cost of maintenance), buildings would generally be expected to add *some* value to the property. Accordingly, there *must* – contrary to the appellant's submissions – be a causal connection between the costs of constructing the building and the value of the property in which the building was situated.
   i. On the appellant's third argument, Justice Abdullah held that the evidential rule on hearsay was not offended because the Chief Assessor did not adduce the architect's email as evidence of the costs of the building at the hearing; instead, the Chief Assessor referred to the email merely as proof that he had used the appellant's own figures in his determination of the annual value of the property.
   j. Justice Abdullah also found that the last two arguments were improperly raised on appeal (under the rule established in the case of *Browne v. Dunn* of obliging a party to put its case at trial to the other party) because they were not put to Chief Assessor's witness at the VRB hearing, with the effect that the Chief Assessor's witness was unfairly deprived of the chance to respond.
   k. In the final analysis, Justice Abdullah found that the appellant did not adduce any credible evidence that can substantiate an annual value different from the Chief Assessor's. Indeed, the appellant did not even challenge the costs of construction even though this information was well within its knowledge. Justice Abdullah thus held that the Chief Assessor's assessment was reasonable and dismissed the appeal.

5. The second case is *Harmony Convention Holding Pte Ltd and Chief Assessor* [2022] SGVRB 1. The facts of the *Harmony Convention* case are as follows.

a. The appellant – a joint venture between Suntec REIT and City Harvest Church – owned the Suntec Singapore Convention & Exhibition Centre which comprised a retail component and a meeting, incentives, convention, and exhibition facilities (MICE) component of approximately 60,282 sqm.
b. The appellant appointed an asset manager and a convention and exhibition services (CES) operator to manage and run the day-to-day operations of its MICE business. It paid the CES operator a fee of 3% of the gross revenue of the business per annum.
c. The Chief Assessor assessed the annual value of the MICE component using the profits method: which involved deducting expenses from the gross receipts of the business and applying a profit margin based on the tenant's enterprise, business risk and interest on capital to determine the tenant's and landlord's respective shares of the profits. The landlord's share would then form the expected annual rent.
d. The main issue in dispute resolves around the deductibility of the CES operator's fee as an operating expense under the profits method: the appellant contended that the deduction of the CES operator's fees must be allowed because it was after all a working expense that was incurred by the appellant in its MICE business; whereas the Chief Assessor argued that the scope of the CES operator's business replicated the business of a typical MICE business operator with the effect that the CES operator's fees was an unnecessary and not deductible expense.
e. The VRB (like the VRB in the *Bollywood Veggies* case) referred to the hypothetical tenancy enquiry (which as mentioned above is the statutory test of annual value under the Property Tax Act) and held that the hypothetical tenant should include the appellant. In turn, the expenses actually incurred by the appellant must be considered to properly measure the appellant's expected profitability under the profits method.
f. The VRB then carefully reviewed the scope of the CES operator's contractual duties and agreed with the appellant that the CES operator was indeed a third-party service operator, and its fees cannot reasonably be accounted for under the hypothetical tenant's share; instead, it should be deducted as an expense because it was a fee paid by the appellant to earn the income of its MICE business.
g. The VRB thus held that the appellant had proven that the CES operator's fees had not been appropriately accounted for under the Chief Assessor's application of the profits method, and the appellant had proven that the Chief Assessor's proposed annual value was excessive. The VRB thus allowed the appeal.

Analysis

6. It is apparent the appellant in the *Bollywood Veggies* case failed in its appeal before the VRB and later the High Court because it ran a purely legal argument that unfortunately contradicted not only established principles of valuation but also the fundamental hypothetical tenant enquiry.
7. The appellant in the *Bollywood Veggies* case did not otherwise explain – with reference to the necessary supporting expert evidence – how the Chief Assessor's assessment of the annual value of the buildings was factually excessive. This omission meant that once the VRB rejected the appellant's legal argument, the VRB would have no choice but to dismiss the appeal.
8. In comparison, the appellant in the *Harmony Convention* case not only made valid legal submissions as to how Chief Assessor had proceeded on a wrong legal premise when it failed to take the CES operator's fees into account, the appellant also provided compelling evidence as to why the CES operator's fees were reasonably incurred and in turn, why its proposed annual value was justifiable under the agreed profits method.
9. Indeed, in the *Harmony Convention* case, it was the Chief Assessor who did not produce any credible evidence to rebut the appellant's case and/or to show that the Chief Assessor's assessment of the annual value was fair and reasonable even if the Chief Assessor could be said to have misapplied the profits method.
10. While it is true that the main reason why property tax cases end up in litigation is due to the lack of an agreed methodology, or if the methodology is agreed, due to the lack of useful comparables (with the effect that the most relevant form of evidence required in a property tax appeal is often illusory), it does not invariably mean that there will also be a dearth of other forms of credible evidence.
11. It is incumbent on an appellant who intends to prosecute a property tax appeal to gather as much relevant,

credible, and useful objective evidence as possible, and to refer to this evidence as the foundation to discredit the Chief Assessor's assessment.

12. For instance, the appellant in the *Bollywood Veggies* case could have greatly strengthened its case by producing an expert report on how the costs of constructing the building in 2009 no longer represented the estimated value of the building in 2018 for the purposes of section 2(3)(a) of the Property Tax Act due to factors such as depreciation.
13. In addition, even if the appellant intends to run its highest case (i.e., to argue that the fixture in question such as the building in the *Bollywood Veggies* case should have zero value), it may still be worthwhile to put forward a more moderate but alternative case to have the platform to present all possible evidence before the VRB and maximise its chances of success.
14. Given the following observations of the High Court in the *Bollywood Veggies* case and the VRB in the *Harmony Convention* case, the approach suggested at paragraph 13 has become even more important:

    a. Justice Abdullah in the *Bollywood Veggies* case opined at paragraph 30 of his judgment that even though the standard to be adopted in an appeal against a VRB's decision should be to enquire into whether the Chief Assessor's assessment was fair and reasonable, there should still be some deference to the VRB's findings of facts.

    b. The VRB in the *Harmony Convention case* opined - possibly for the first time ever - at paragraph 16 of its judgment that there is no statutory basis under the Valuation Review Board (Appeals Procedure) Regulations for an amendment to be made to a notice of appeal.

Conclusion

15. In closing, we would say that a potential appellant to a property tax appeal would be well-advised to carefully consider its primary and/or alternative case(s) and properly formulate all its possible arguments before it prosecutes an appeal. If the potential appellant decides to push ahead, the appellant must make the extra effort to adduce all necessary evidence in support of its case including in inter alia the selection of its witnesses and the crafting of the relevant witnesses' affidavit evidence.
16. If the appellant decides to eschew the approach suggested above and take its chances, we suggest that the likelihood of a favourable outcome would be very much reduced. The appellant may end up not only having to bear the additional property tax imposed, it may also be out of pocket for the legal costs in an unsuccessful litigation.

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Adoption of FinTech Accelerated by Pandemic – Taiwan Regulator Further Lifted Restrictions on Remote Insurance Application

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Maggie P. Chang/Chih-han Wang

In the pandemic era, there are more and more scenarios where digital services replace physical interactions, and the pandemic has boosted the use of "Contactless Financial Services" in the insurance industry in recent years.

1. Meet-and-sign in person - Regulations Governing the Supervision of Insurance Solicitors

According to Article 15 of the Regulations Governing the Supervision of Insurance Solicitors, insurance solicitors soliciting life insurance products shall meet the applicant and the insured in person and obtain the wet-ink signatures of the applicant and the insured on the application-related documents. Although soliciting property insurance products is exempted from the meet-in-person requirement, wet ink signature is still required. Because of this requirement, visiting customers has always been the norm in the solicitation of insurance business.

2. Meet-and-sign via video call - Temporary Principles in Response to the Coronavirus Outbreak

The principle of meet-and-sign-in-person is being challenged in the pandemic era. In May 2021, rising infections prompted the government to expand the scope of Level 3 alert to the whole country. As the pandemic got more intense, the meet-and-sign requirement could no longer be accommodated promptly. To ensure the services and operations of insurance companies were not interrupted at Level 3 alert, the Financial Supervisory Commission (the "FSC") announced the "Temporary Principles in Response to the Coronavirus Outbreak When Providing Services Involving In-person Signatures and Paperwork" applicable to both life and non-life insurance companies on May 25 and 26, 2021 (collectively the "Temporary Principles"), allowing the insurance application process to be completed via video call where the insurance solicitors shall be able to identify and communicate with the applicant/insured and witness the signing of relevant documents. However, since the Temporary Principles are only an expedient measure applicable at Level 3 alert, the applicants/insureds are still required to submit the signed paper documents to the insurance companies once the pandemic alert is downgraded to Level 2. Following the issuance of the Temporary Principles, several insurance companies applied for trial operations for remote insurance applications since June 15, 2021.

3. The new normal of remote insurance application submission – Directions for Insurance Companies to Provide Remote Insurance Services

While the pandemic is subsiding, the number of new contracts signed via remote insurance application submission continues to rise. The FSC, based on the positive experience of insurers' trial operations for remote insurance applications, promulgated the "Directions for Insurance Companies Conducting Remote Insurance Application" (the "Directives") on November 18, 2021, setting standards for life and non-life insurers to conduct remote insurance application process, as summarized below:

(1) The remote insurance application process cannot be officially launched until the trial operation has achieved the expected performance.

(2) The entire process of insurance application submission done via video call should be recorded.

(3) The customer identity verification process is enhanced.

(4) The insurance company shall adopt internal procedures to ensure that the recorded video and audio files are complete.

(5) The insurance company shall ensure that relevant files such as personal information of the clients, audio and video recordings, and insurance documents are properly kept.

(6) The Directives may apply to after-sales services, claim services, and premium payment automatic debit authorization services.

(7) In the event of a dispute, the applicant or the insured may request the insurer to provide copies of the video or audio records, and the insurer cannot refuse such a request. In the event of any dispute arising from poor communication, poor equipment, or network connectivity issues during the remote application process, any steps taken to resolve the dispute shall be taken in favor of the applicant or the insured.

4. Restrictions further lifted - "Directions for Insurance Agent Companies and Insurance Broker Companies to Engage in Remote Insurance Services"

As of February 2022, the total number of remote insurance applications to life insurance companies exceeded 120,000, accounting for more than 30% of the total number of insured cases. This indicates that in the post-pandemic era, the public is in favor of "contactless" remote insurance services. Therefore, the FSC decided to expand the scope of "remote insurance business" to include insurance agencies/brokers and banks.

The FSC promulgated the "Directions for Insurance Agent Companies and Insurance Broker Companies to Provide Remote Insurance Services" on September 15, 2022. The main points include:

(1) Scope of application: Insurance agent companies, broker companies and bancassurance channels may now handle remote insurance applications and provide certain insurance services remotely. They are required to use the video recording software provided by the insurance companies and should establish internal control system and ensure its effective implementation.

(2) Customer identity authentication: Insurance agent companies, broker companies and bancassurance channels shall use the identity authentication method adopted by the insurance companies to verify customer identity and confirm the customer's intent to apply for insurance.

(3) Information Security and Personal Information Protection: Insurance agent companies, broker companies and bancassurance channels shall obtain certification of their information security and personal information management system when handling remote insurance applications and providing remote insurance services. The audio and video recording files must be encrypted and uploaded directly to the internal server of the insurance company or the server of the video software provider used by the insurance company.

(4) Dispute Resolution: In the event of a dispute, the applicant or the insured may request the insurance agent companies, broker companies and bancassurance channels to provide copies of the video or audio records, and the insurance agent companies, broker companies and bancassurance channels cannot refuse such a request. In the event of any dispute arising from poor communication, poor equipment, or network connectivity issues during the remote application process, any relevant steps taken to solve the dispute shall be taken in favor of the applicant or the insured.

(5) Remote signing: The remote signing shall be conducted on the platform/system established by the insurance company.

5. Restrictions and challenges

When InsurTech becomes a solution to traditional insurance challenges, we can see that the regulator emphasizes more on how to protect the rights and interests of policyholders, which would be the main compliance focus of digital insurance providers.

The pandemic has changed lifestyles and thus accelerated the development of financial technology. The new regime of remote insurance application business set an example. The insurance industry and the regulator worked together to realize the new regime swiftly in response to the pandemic, allowing technology to serve financial consumers.

We look forward to a more innovative organizational mindset of the regulator when dealing with the development of financial technology and insurance technology. The policy maker must provide room for financial innovations through sandboxes or new business trials and, in the meantime, provide the industry with appropriate guidance to ensure financial stability and information security.

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BLOG POST / EMPLOYMENT ADVISOR

Employment Counseling

California Court of Appeal Reverses Summary Judgment in Time-Rounding Case Involving Electronic Timekeeping System

By Patricia Kinaga and Evelyn Wang

11.03.22

In *Camp v. Home Depot*, a Sixth Appellate District panel recently found against an employer that—although its electronic system recorded employee work-time to the minute—rounded daily totals to the nearest quarter-hour for determining wages. The Court of Appeals panel emphasized that its decision was limited to the specific facts before it. It invited the California Supreme Court to weigh in on the debate involving time-rounding practices in view of recent technological advances that allow employers to track employee time worked more precisely.

Background

Plaintiffs Delmer Camp and Andriana Correa filed a putative class action against their employer, Home Depot, for unpaid minimum and overtime wages. Home Depot used the electronic timekeeping system "Kronos" which captured actual worktime by the minute. Despite this fact, Home Depot rounded its hourly employees' total daily worktime to the nearest quarter hour. The timekeeping records revealed that Mr. Camp had lost a total of 470 minutes over approximately four and a half years as a result of Home Depot's rounding policy. Ms. Correa conceded the records showed she was actually overpaid as a result of the employer's rounding policy, and her appeal was ultimately dismissed.

Home Depot moved for summary judgment, contending its time-rounding practice was neutral on its face and neutral as applied, and therefore lawful under the standard articulated in *See's Candy Shops, Inc. v. Superior Court*, a 2012 California Court of Appeals (4th Appellate District) decision. The trial court agreed and granted Home Depot's motion based on *See's Candy*.

Court of Appeal Decision

Mr. Camp appealed. On October 24, 2022, a panel for the Sixth Appellate District reversed the trial court's summary judgment order.

Noting that the California Supreme Court has never rendered a decision on the validity of the rounding standard articulated in *See's Candy*, the Sixth Appellate District chose to take guidance and direction from two more recent California Supreme Court opinions, *Troester v. Starbucks Corp.* (2018) and *Donohue v. AMN Services, LLC* (2021). In *Troester*, the Supreme Court found that the California Labor Code and wage order provisions clearly emphasize that employees must be paid for all work performed and all hours worked. In *Donohue*, the Supreme Court acknowledged that technological advances in timekeeping have helped employers track time more precisely and diminished the practical advantages previously associated with time-rounding.

The Sixth Appellate panel concluded Home Depot did not meet its burden on summary judgment to show that there was no triable issue of material fact regarding Mr. Camp's claims for unpaid wages, because Home Depot did track—to the minute—the exact time an employee worked, and those records did show that Mr. Camp was not paid for all the time he worked. Emphasizing that its decision is limited to the particular facts of this case, the panel specifically acknowledged that its analysis did not reach other circumstances, such as "when an employer uses a neutral rounding policy due to the inability to capture the actual minutes worked by an employee" or "whether an employer who has the actual ability to capture an employee's minutes worked is required to do so." However, the Sixth Appellate panel invited the Supreme Court to decide the validity of the rounding standard articulated in *See's Candy* with regard to both the limited circumstances in *Camp* as well as generally, given the technological advances in timekeeping.

Next Steps for Employers

It appears likely that the California Supreme Court will weigh in on the validity of the state's time-rounding standard, given that there are now arguably conflicting decisions at the court of appeal level between *See's Candy* and *Camp*. In the meantime, California employers who use time-rounding policies would be wise to consult with legal counsel and, if they also use electronic timekeeping systems that capture actual time worked, discontinue use of any time-rounding policies until a final decision is rendered.

Employers can refer to the following advisories previously published by DWT:

- California Supreme Court Rules Against Rounding Meal Periods
- "Rounding" Employees' Hours Worked Remains Risky in California

DWT will continue to monitor this case to see if the California Supreme Court accepts review and will provide updates on all developments as they arise. In the meantime, if you have any questions about your company's timekeeping polices and compliance, please contact a member of DWT's Employment Services Group.

FTC's proposed ban of employer non-competes: Are non-profits exempt?

17 January 2023

The Federal Trade Commission's (FTC's) January 5, 2023 Notice of Proposed Rulemaking (NPRM) for the Non-Compete Clause Rule, which would ban nearly all post-employment non-competes, signals a possible sea-change for employers across industries. Significantly, however, non-profit entities—including non-profit health systems and universities—are generally exempt from coverage under the Federal Trade Commission Act, and thus if the proposed rule is finalized, it will not apply to most non-profits. Even so, as a result of the FTC's focus on the issue, non-profits may find their non-competes and other restrictive covenants subject to greater scrutiny under state and local laws that increasingly prohibit or restrict such agreements, as well as under existing antitrust law.

As we previously reported, the FTC's proposed rule defines a non-compete as a contractual agreement between an employer and worker that prevents the worker from seeking or accepting employment with another employer, or operating a business, after the conclusion of the worker's employment with the employer. Under the proposed rule, such non-compete agreements (with one limited exception for certain non-competes involving acquisitions) are unlawful "unfair methods of competition" under Section 5 of the FTC Act.

The proposed rule covers not only non-compete agreements with employees, but also extends to agreements with independent contractors, interns and externs, volunteers, apprentices, and sole proprietors who provide a service to a client or customer. Effectively, the rule would make post-employment noncompete agreements *per se* illegal for employers subject to the rule (i.e., the existence of the agreement alone violates the law, and a plaintiff need not meet the high burden under existing antitrust law of proving that the agreement had an adverse effect on competition).

According to the FTC, nearly 1 in 5 U.S. workers is covered by a non-compete,[1] but the percentage may be even higher among employed physicians and other health care providers.[2]

FTC's Section 5 enforcement authority

As noted above, the NPRM relies on Section 5 of the FTC as its legal underpinning. The NPRM explicitly notes that some employers, including most non-profits, would be exempt from the proposed rule.[3] The reason for the exemption is that the FTC can only enforce Section 5 against "persons, partnerships, or corporations.[4] Critically, the FTC Act defines "corporations" as those entities "organized to carry on business for [their] own profit or that of [their] members."[5] Accordingly, the FTC Act does not give the FTC the ability to enforce Section 5 against non-profit entities unless the non-profit is organized by and operates for the benefit of for-profit members, or the non-profit status of the organization is based on a sham. As a threshold matter, therefore, most non-profits would effectively be exempt from the proposed rule, if adopted.

State laws increasingly limit non-competes and other restrictive covenants

Even though the proposed rule, if finalized, generally would not apply to non-profits, non-profits still face ever-increasing scrutiny under state laws that limit the right of employers—including non-profit employers—to enter into post-employment non-competes or other restrictive covenants with workers.

Non-profits already face the challenge of crafting non-competes and other restrictive covenants that are enforceable under the laws of varying jurisdictions. Some examples of these challenges include:

- Bans on post-employment non-competes, such as in California, North Dakota, and Oklahoma.
- Bans on post-employment non-competes for workers earning below a certain threshold. For example, in the District of Columbia, employers generally may offer non-competes only to workers who earn at least $150,000 per year (and in the case of physicians, at least $250,000 per year).

Status of Non-Profit Non-Compete Agreements Going Forward

Notwithstanding the fact that the FTC's proposed rule generally would not cover non-profit entities, non-profits, including non-profit health systems and universities, should carefully consider the non-competes and other restrictive covenants they include in their contracts and policies.

- As noted above, and separate from the NPRM, non-profits must comply with state and District of Columbia laws that impose restrictions or prohibitions on entry into restrictive covenants and particularly non-competes.
- The existence of the proposed rule (or the final rule, if approved) is likely to create significantly more scrutiny of, and interest in, the impact of non-competes and other restrictive covenants in general. We expect that non-competes will be more under the microscope going forward, including those involving non-profit entities, and the subject of non-competes will garner more academic and political interest. In particular, we expect that the proposed rule may cause some state legislatures to consider whether to tighten their own non-compete laws further, or ban non-competes altogether.
- While the FTC is not attempting in the proposed rule to assert jurisdiction over non-profit entities, non-profits should bear in mind that the FTC can always refer potential violations of the antitrust laws to the Department of Justice Antitrust Division ("DOJ"), which does have jurisdiction over non-profit entities. Private plaintiffs also could seek to challenge non-competes. These parties, however, would have to demonstrate that the use of non-compete agreements has led to an adverse effect on competition in a relevant market (as the FTC must do generally until the proposed rule is adopted).
- For non-profit entities entering into transactions that require Hart-Scott-Rodino Premerger Notifications, the FTC may investigate the use of non-competes pursuant to its authority to enforce Section 7 of the Clayton Act. While the FTC again would be unable to challenge the transaction based on an alleged violation of Section 5 of the FTC Act alone, an investigation of a company's non-competes during a merger investigation could significantly affect the timing of the overall review and the FTC may push for consent decree provisions governing the non-competes as a condition to closing its investigation of a proposed transaction, or use them as a basis for alleging anticompetitive effects in a court challenge.[6]

We expect that the FTC's proposed rule will likely take considerable time to wind its way through the administrative process; moreover, it will likely meet substantial legal challenges, and its ultimate fate is uncertain. But in the short run, just by making the proposal, the FTC has ratcheted up the scrutiny of such agreements that has already been increasing under state and District of Columbia laws in recent years.

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References

1 *See* FTC Press Release, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2023) (citing Starr, Prescott & Bishara, Noncompete Agreements in the U.S. Labor Force (2021)).

2 For example, one study cited by the FTC has estimated that 45% of primary care physicians are covered by non-competes. *See* Kurt Lavetti, Carol Simon & William D. White, The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians, 55 J. Hum. Res. 1025, 1042 (2020).

3 Non-Compete Clause Rule NPRM at 111 (proposed Jan. 5, 2023) (to be codified at 16 CFR Part 910).

4 15 U.S.C. § 45(a)(2).

5 15 U.S.C. § 44.

6 *See e.g.,* Analysis of Agreement Containing Consent Orders to Aid Public Comment, In the Matter of Renown Health, File No. 111 0101, Docket No. C-4366 (Aug. 6, 2012), available at https://www.ftc.gov/sites/default/files/documents/cases/2012/08/120806renownhealthanal.pdf.

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