

**Pacific Rim Advisory Council
July 2019 e-Bulletin**

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66th International Conference
Seattle - Hosted by DAVIS WRIGHT TREMAINE
October 5 - 8, 2019

67th International Conference
New Delhi - Hosted by KOCHHAR & Co.
March 14 - 17, 2020

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DENTONS RODYK ANNOUNCES PARTNER PROMOTION

Dentons Rodyk announces the promotion of Andrea Gan to Partner

SINGAPORE – 01 July, 2019: Dentons Rodyk is proud to announce the promotion of Andrea Gan from Senior Associate to Partner, with effect from 1 July 2019.

Andrea graduated from King's College London with First Class Honours in 2011, and won the 3 Sergeants Inn 1st Prize in Medical Law. She served as a Justices' Law Clerk to the Chief Justice, Judges of Appeal and High Court Judges of Singapore, before entering private practice at Dentons Rodyk.

Andrea's practice broadly includes commercial litigation and arbitration, as well as medico-legal matters. She has advised, represented, and acted for various companies, healthcare institutions, statutory boards, insurers, doctors and other individuals on a wide array of matters.

Apart from her core practice, Andrea also believes in contributing back to the profession and society. She helps as an advocacy trainer in the Singapore bar admission course for law school graduates. She is also an active volunteer with various pro bono initiatives, including criminal defence representation.

For additional information visit www.dentons.rodyk.com



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HAN KUN WELCOMES TWO NEW PARTNERS

Han Kun welcomes Two New Partners

Han Kun Law Offices is pleased to announce that **Mr. Li Huhuan** has joined the firm as a partner. Mr. Li works primarily in the firm's Shanghai office.

Mr. Li Huhuan focuses his practice on asset securitization, insurance fund management, and mergers and acquisitions. Prior to joining Han Kun, Mr. Li practiced with several well-known PRC law firms for more than eleven years.

Mr. Li has long engaged in legal practice and research related to structured financing products and asset securitization. He has led or been involved in various investments and financing projects of standard/ non-standard claims or alternative products, and legal service projects related to insurance fund management covering all kinds of insurance fund investment targets. Mr. Li has solid experience in insurance fund equity investment, real estate investment and other financial asset investment. Mr. Li has also led or been involved in a variety of M&A projects and is especially sophisticated in the areas of equity investment and M&A involving financial institutions, including the establishment and acquisition of, and equity investment in, banking/ non-banking financial institutions.

Han Kun Law Offices is pleased to announce that **Mr. Li Baofu**, an expert in civil and commercial dispute resolution, has recently joined the firm. Mr. Li has more than 30 years of judicial experience. He is familiar with the adjudication of civil and commercial cases, and is well-versed in judicial practice in China.

Mr. Li is an expert in dealing with issues related to property law, contract law, guarantee law, company law, civil procedure law, bankruptcy law and various hot topics in civil and commercial trials. Before joining Han Kun, Mr. Li served as general counsel for a well-known energy group company. Prior to that, from 1986, Mr. Li began to work for a provincial high people's court and successively served as a clerk, acting judge, judge and deputy presiding judge. Mr. Li then worked for a first-instance people's court as a court president and then worked for an intermediate people's court as a court vice president.

Mr. Li is currently a member of the Legal Advisory Board, Supervision and Judicial Committee of a provincial People's Congress. Mr. Li has also served as the vice president of provincial civil law, commercial law, economic law and arbitration law research institutes, and has unique insights through combining theoretical research and judicial practice.

For additional information visit www.hankunlaw.com

FORMER GLOBAL HEAD OF CYBERSECURITY LAW AT JPMORGAN JOINS HOGAN LOVELLS

NEW YORK - 15 July 2019: Global law firm Hogan Lovells is pleased to announce that Peter Marta has joined the firm's New York office as a partner in its Privacy and Cybersecurity practice.

Marta joins Hogan Lovells from JPMorgan Chase & Co., where he served as the bank's global head of Cybersecurity and Global Security and Investigations Legal. In this role, he provided cybersecurity legal support to the bank's senior leadership and helped JPMorgan Chase establish an industry leading cybersecurity program. He served as the primary point of contact for interactions with law enforcement and the intelligence community on all matters related to cybersecurity and cybercrime.

"We have been strategically expanding our Privacy and Cybersecurity practice. The competition for the best people in the legal industry is intense," said Harriet Pearson, leader of Hogan Lovells' Global Cybersecurity Practice. "Hiring someone with Peter's in-demand mix of industry and government experience and ability confirms our position as one of the world's leading practices. We are delighted that Pete has decided to return to private legal practice and join our team."

Prior to joining JPMorgan Chase in 2013, Marta spent several years with the U.S. Intelligence community.

"Hogan Lovells has built an enviable track record by representing clients involved in many of the world's largest data security matters," said Marta. "I am excited to join the firm's multidisciplinary cyber team and to work with clients across industry sectors drawing on my experience in banking and financial services as well as government."

Burgeoning cybersecurity risks present potent challenges to companies operating in major financial centers.

"Peter will be a valuable resource for our clients in the New York area," said Oliver Armas, Office Managing partner of the firm's New York office. "Cybersecurity advice is critical to our clients in the financial sector, and New York is home to many of the largest global financial institutions."

Cybersecurity issues faced by financial companies can be particularly complex.

"Peter offers a rare level of insight into managing end-to-end cybersecurity risk," said Sharon Lewis, Global Head of the firm's Financial Institutions Sector. "His experience in both building a comprehensive cybersecurity program and overseeing interactions with public officials aligns well with our commitment to stay ahead of the challenges our clients face even as the pace of change in our industry continues."

Marta graduated summa cum laude from the College of William and Mary in 1998, and earned his J.D. from Harvard Law School in 2003.

For additional information visit www.hoganlovells.com

TOZZINIFREIRE WELCOMES BACK FORMER ASSOCIATE AS TAX PARTNER

SAO PAULO - 05 July, 2019: TozziniFreire Advogados continues to strengthen its tax practice - welcomes back former associate as tax partner Thiago Medaglia.

Thiago Medaglia, 39, rejoined the firm on 1 July. He left TozziniFreire in 2006, working first at Felsberg Advogados for 11 years and then at Cascione Pulino, which he joined in 2017 as tax co-chair and partner.

Medaglia specialises in M&A transactions, corporate restructuring and consultancy work related to indirect taxes and customs levies.

TozziniFreire's managing partner Fernando Serec is happy to welcome Medaglia back. "Thiago has worked in our firm before and he starts in full gear from day one. Medaglia brings valuable experience in taxation related to financial products, which is in growing demand, says Serec. "He brings this tech-savvy approach he was developing at Felsberg," he adds.

For additional information visit www.tozzinifreire.com.br

ARIFA

ADVISED LENDERS IN MULTIBANK'S US\$138 MILLION UNSECURED SYNDICATED LOAN

PANAMA - 01 July, 2019: Arias, Fabrega & Fabrega advised Sumitomo Mitsui Banking Corporation and Standard Chartered Bank, as joint lead arrangers and bookrunners, in an unsecured syndicated loan of 12 international financial institutions, in favor of Multibank Inc., for an amount of US\$138 million and a term of three years.

Acting in the transaction Estif Aparicio, Partner and Javier Yap Endra (Associate).

For additional information visit www.arifa.com

BAKER BOTTS

REPRESENTS CARRIZO OIL & GAS IN \$3.2 BILLION MERGER WITH CALLON PETROLEUM COMPANY

HOUSTON - 15 July 2019: Deal Description: July 15, 2019 – Carrizo Oil & Gas, Inc. (NASDAQ: CRZO) ("Carrizo") has agreed to merge with Callon Petroleum Company (NYSE: CPE) ("Callon"), in a transaction valued at approximately \$3.2 billion, with Callon being the surviving entity at the conclusion of the transaction. The consideration to each Carrizo common shareholder will consist of 2.05 shares of Callon common stock for each share of Carrizo common stock.

The merger is expected to create a premier mid-cap oil and gas company with scaled development operations across a portfolio of core oil-weighted assets in both the Permian Basin and Eagle Ford Shale. At the closing, three members of Carrizo's board of directors will be added to the combined company's board of directors. The merger, which is subject to shareholder approvals from both companies and customary closing conditions and regulatory approvals, is expected to close in the fourth quarter of 2019.

Baker Botts L.L.P. is representing Carrizo in the transaction.

Outside Counsel to Carrizo: Baker Botts L.L.P.

Inside Counsel to Carrizo: Gerald R. Morton and Mike Kennington

Financial Advisor to Carrizo: RBC Capital Markets, LLC and Lazard

Outside Counsel to Callon: Kirkland & Ellis LLP

Financial Advisors to Callon: J.P. Morgan LLC

Value: Approximately \$3.2 billion

Baker Botts Lawyers/Office Involved:

Corporate: Gene Oshman (Partner, Houston); Jim Marshall (Partner, Houston); Lakshmi Ramanathan (Associate, Houston); Sunil Jamal (Associate, Houston); Steven Lackey (Associate, Houston); Jack Chadderdon (Associate, Houston); Employee Benefits: Rob Fowler (Partner, Houston); Gabriela Alvarez (Associate, Houston); Tax: Derek Green (Partner, Houston); Jon Lobb (Partner, Houston); Dominick Constantino (Associate, Houston); Finance: Andrew Thomison (Partner, Houston); Antitrust: Thomas Fina (Partner)

For more information, please visit www.bakerbotts.com

BENNETT JONES

ASSISTS BROADRIDGE FINANCIAL SOLUTIONS, INC. IN ITS APPROXIMATELY US\$300 MILLION ACQUISITION OF RPM TECHNOLOGIE

Date Announced: May 21, 2019
Date Closed: June 10, 2019
Deal Value: \$300,000,000
Client Name: Broadridge Financial Solutions, Inc.

Broadridge Financial Solutions, Inc., a global Fintech leader and part of the S&P 500® Index, acquired RPM Technologies, a leading Canadian provider of enterprise wealth management software solutions and services. The acquisition brings important new capabilities and next-generation technology to clients of both RPM and Broadridge.

RPM's state-of-the-art technology platforms support over 15 million customer accounts and build on Broadridge's strong Canadian wealth management business, providing a solution set for the retail banking sector and adding enhanced mutual fund and deposit manufacturing capabilities. RPM has proven capabilities in the Mutual Fund Dealers Association of Canada marketplace with a suite of services and solutions and a successful track record of winning and on-boarding new clients.

For additional information visit www.bennettjones.com

BRIGARD URRUTIA - CAREY

ASSIST UNITEDHEALTH INVEST IN COLOMBIAN HEALTHCARE ENTITIES

BOGOTA and SANTIAGO - 26 June 2019: US healthcare provider UnitedHealth has hired Brigard Urrutia in Bogotá and Carey in Santiago to buy full control of three Colombian healthcare entities.

Some of the sellers turned to Colombian firm Leal Angarita, while others enlisted counterpart Salazar Abogados. The deal closed on 12 June.

The transaction hands UnitedHealth the remaining stake, some 50%, in Clínica del Country, Administradora Country and Administradora Clínica La Colina. No value for the deal was disclosed.

The buyer already owned the other 50% stake in the entities through Chilean private health insurer Banmédica, which it bought in 2018 for US\$2.7 billion. Brigard Urrutia and Carey advised on that deal too. It marked UnitedHealth's entry into the Chilean, Colombian and Peruvian markets.

Counsel to UnitedHealth:

Brigard Urrutia Partner Jaime Robledo and associates Luis Miguel Centanaro and Elisa Escobar in Bogotá

Carey Partners Cristian Eyzaguirre and Francisco Guzman, and associate Sergio Mesías in Santiago

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

CLAYTON UTZ

ADVISES PATERSON SECURITIES LIMITED ON PROPOSED SCHEME OF ARRANGEMENT WITH CANACCORD GENUITY GROUP, INC.

PERTH - 11 June, 2019: Clayton Utz is advising Patersons Securities Limited, a premier independent Australian securities business, on its proposed scheme of arrangement with an Australian subsidiary of TSX-listed Canaccord Genuity Group Inc.

Patersons' wealth management business has more than A\$13.6 billion in client assets under advice, and the business combination of Patersons and Canaccord will create a leading Australian capital markets, stockbroking and wealth management business.

The total consideration payable under the scheme is A\$25 million, with \$0.015 per share to be escrowed for a period of time. The implementation of the scheme is subject to various conditions, including the approval of Patersons shareholders and the Court.

Clayton Utz corporate partner Mark Paganin and special counsel Stephen Neale are leading the firm's team, with key support from Benjamin Depiazzi and Matthew Johns.

For additional information visit www.claytonutz.com

CLAYTON UTZ

ADVISES PATERSON SECURITIES LIMITED ON PROPOSED SCHEME OF ARRANGEMENT CANACCORD GENUITY GROUP INC.

On 27 June, KGHM Polska Miedź S.A. issued two series of bonds, with a maturity of 5 and 10 years respectively, for a total amount of PLN 2 billion (approx. EUR 471 million).

The bond issue was carried out as part of a bond issue programme worth up to PLN 4 billion (approx. EUR 942 million) set up by KGHM on 27 May 2019.

To manage the programme, KGHM Polska Miedź S.A. appointed a consortium of dealers comprising PKO BP S.A., Bank Handlowy w Warszawie S.A., Bank Pekao S.A. and Santander Bank Polska S.A.

Gide's legal advice covered all stages from setting up the bond issue programme to its implementation, via transaction structuring, preparing the transaction documentation, and providing support for the registration and settlement of the first bond issue under the programme. Additional advice regarded agreeing on the principles under which an international financial institution could take up bonds issued under the first bond issue of the programme.

Gide's team advising KGHM Polska Miedź S.A. on this operation comprised partner Robert Dulewicz, counsel Michał Śmiechowski, associate Natalia Skomorowska from Gide's Warsaw office, and associate Sarah Whitley from Gide's London office.

KGHM Polska Miedź S.A. is a State Treasury strategic company and one of the world's leading copper and silver producers.

For additional information visit www.gide.com

DAVIS WRIGHT TREMAINE

PARTNERS WITH AMAZON FOR A LARGE-SCALE PROJECT TO AID IMMIGRANT KIDS

In July 2017, Ajay Patel, associate general counsel at Amazon Studios in Los Angeles, contacted Kids in Need of Defense (KIND) and Bet Tzedek about providing legal services to unaccompanied immigrant and refugee children on a large scale in partnership with DWT. Ajay and Amazon Studios corporate counsel Archana Lannin, together with DWT's Julie Orr, Jonathan Segal, and Jill Cohen, organized planning calls with KIND and Bet Tzedek to create an innovative, multicity pro bono project with substantial impact. KIND proposed a Special Immigrant Juvenile Status (SIJS) project, where case teams of Amazon and DWT attorneys would represent children on SIJS cases. The teams launched their cases with multicity kickoff events.

Both Amazon and DWT employees disseminated information about the project, recruiting 134 associate general counsel, corporate counsel, partners, associates, contract managers, paralegals, and legal assistants in Arlington, Va.; Los Angeles; New York; Newark, N.J.; San Francisco; Seattle; Sunnyvale, Calif.; and Washington, D.C. Lawyers and non-lawyers from across Amazon's legal department, Amazon Studios, Audible, Twitch TV, and Lab126, signed up to help.

In October 2017, KIND broadcast a national webinar from Amazon Studios in Los Angeles to the participating cities. The next month, KIND and Bet Tzedek conducted in-depth trainings with the teams at six Amazon locations across the country. A month later, the teams met their clients for the first time to kick off their cases in a clinic-type setting. The kickoff events were held at DWT offices in the five cities and at Audible's offices in Newark, N.J. The following year, the San Francisco office met with additional clients who had not been screened earlier.

The 26 teams include 52 DWT lawyers and 75 Amazon lawyers and staff. Over a year into the project, the teams are representing 28 unaccompanied migrant children who left their homes in Mexico, Guatemala, El Salvador, and Honduras to come to the United States to escape gangs and other dangerous conditions. These kids were picked up by immigration officials and placed into foster homes or with relatives or into government facilities. They hope to obtain Special Immigrant Juvenile Status which will allow them to stay in the United States. Some of them may also have claims for asylum.

So far, the teams have already obtained SIJS status for two of the children and are getting very close to obtaining that status for several more.

For additional information visit www.dwt.com

DENTONS RODYK

REPRESENTS OXLEY HOLDINGS IN LARGEST COMMERCIAL BUILDING SALE IN SINGAPORE

SINGAPORE, 02 May 2019: Dentons Rodyk is acting for listed real estate company Oxley Holdings in their sale of Chevron House for a deal size worth S\$1.025 billion, making this the largest commercial building sale in Singapore this year.

Chevron House is situated at 30 Raffles Place, within the prime Central Business District in Singapore. Chevron House is a 32- storey office and retail development of about 261,280 sq feet of net lettable area.

The deal is structured by way of sale of Oxley Holding's 100% share interest, subject to conditions, in Oxley Beryl, the company which owns Chevron House.

Corporate Senior Partner Jacqueline Loke and Partner Sarah Chan are leading on the Corporate aspects of this deal.

Corporate Real Estate Senior Partner Lee Liat Yeang and Partner Chua Shang Chai are leading the Real Estate aspects of this deal, including advising the client on the strata subdivision and project development sales issues for Chevron House.

For additional information visit www.dentons.rodyk.com

HAN KUN

ADVISES YUNJI INC. ON ITS U.S. IPO

BEIJING: Han Kun advised and acted as the PRC counsel to Yunji Inc. on its U.S. initial public offering and listing on the NASDAQ Global Market under the symbol "YJ".

Yunji Inc. is a leading membership-based social e-commerce platform in China.

For additional information visit www.hankunlaw.com

MUNIZ

ADVISES IN PERUVIAN FOOD MANUFACTURER CORPORATION TDN IN US \$35 MILLION SALE

LIMA, 07 June 2019: Peruvian firm Muñiz, Olaya, Meléndez, Castro, Ono & Herrera advised Peruvian panettone manufacturer Corporación TDN in its sale to multinational food producer Empresas Carozzi acquirefor US\$35 million.

The deal closed on 31 May. Empresas Carozzi completed the acquisition through its Peruvian affiliate, Molitalia. TDN is a well-known name in the Peruvian pastry industry, producing a wide range of panettonnes and cakes.

Counsel to Corporación TDN Muñiz, Olaya, Meléndez, Castro, Ono & Herrera Partners Mauricio Olaya and Juan Carlos Vélez, and associate Rolando Wilson in Lima.

For additional information visit www.munizlaw.com

NAUTADUTILH

ADVISES BC PARTNERS ON ACQUISITION OF SYNTHON INTERNATIONAL

July 04, 2019: NautaDutilh assists BC Partners, a leading international private equity firm, on its contemplated acquisition of a majority stake in Synthon International Holding B.V., a global market leader in the development of complex generic medicines, from its parent company Synthon Holding B.V. BC Partners will work together with Synthon's founder Dr. Jacques Lemmens, who will remain a shareholder of the company. Synthon will be carved out from its parent company and continues to operate under the Synthon brand. The contemplated transaction is subject to regulatory approvals and is expected to close in the coming months.

Joost den Engelsman, who heads the NautaDutilh deal team, comments: "We are delighted to assist the BC Partners team on this exciting, high pace pharmaceutical carve-out deal, including the financing, the reinvestment by the founder and the management participation. These elements enable us to employ the firm's full private equity experience and capabilities advising the BC Partners team with a multidisciplinary team consisting of experts in Corporate M&A, Corporate Notarial, Warranty & Indemnity Insurance, Finance, Employment and Tax."

Synthon focuses on developing, manufacturing and out-licensing complex generics and hybrid medicines for patients around the world. The company was founded by Dr. Jacques Lemmens in 1991 and has since developed a diversified base of over 200 customers serving around 100 countries worldwide.

NautaDutilh advised BC Partners on this transaction working alongside teams from Latham & Watkins and PwC. The team from NautaDutilh consists of: Joost den Engelsman, Olaf Baks and Annet Vis (Corporate M&A), Joost Kloosterman and Erik Poorthuis (W&I); Wijnand Bossenbroek, Jules van de Winckel, Florine Kuipéri (Corporate Notarial); David Vietor, Linda To-massen and Eefke Janssen (Finance); Edward Rijnhout and Sjuul Jentjens (Tax).

For additional information viist www.nautadutilh.com

HOGAN LOVELLS

ADVISES IBM IN ACQUISITION OF RED HAT, INC.

WASHINGTON D.C. and LONDON—09 JULY 2019:

Hogan Lovells advised International Business Machines Corp. (NYSE: IBM) as antitrust counsel in its US\$34 billion acquisition of Red Hat, Inc., an enterprise software provider that builds technologies on open source platforms such as Linux and Kubernetes. The transaction closed on July 9.

Together, IBM and Red Hat will accelerate innovation by offering a next-generation open hybrid multicloud platform that will enable enterprises to maximize the value of the cloud. Red Hat will continue to exist as a wholly owned subsidiary of IBM. More information about the acquisition can be found [here](#).

Our international team worked together to secure the necessary regulatory approvals of this complicated transaction around the world, including the U.S. Department of Justice and the European Union, to ensure the success of this deal.

The Hogan Lovells EU and ROW team consisted of senior advisor and foreign legal consultant Rachel Brandenburger in New York, as well as London-based partner Ciara Kennedy-Loest, counsel Paul Castlo, senior associate John Embleton and associates Zoe Bartlett, Joshua Esam, and Sophie Vriezen. The EU team also included partner Falk Schoening, counsel May Lyn Yuen, and associate Philip Heuser in Brussels.

The Hogan Lovells U.S. team included partners Logan Breed, Janet McDavid, and Edith Ramirez in Washington, D.C. The team also included senior counsel David Walsh in Boston, senior associates Robert Baldwin, Lauren Battaglia and Zuzanna Knypinski, and associates Olga Fleysh, Suparna Reddy, and law clerk Daniel Landesberg in D.C.

Partner Lesley Morphet in South Africa also advised on the deal.

For additional information visit www.hoganlovells.com

PRAC EVENTS





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11 JUL 2019

New Bill aims at protecting Australian primary producers from activist-incited trespass or property damage/theft

BY ANDREW HAY, CAITLIN MCCONNEL

The introduction of the Bill is an encouraging step towards protecting Australian farmers and agricultural businesses from trespass or property damage/theft incited through the online distribution of activist materials.

Agriculture is identified as a main pillar of the Australian economy, having already contributed over \$10.7 billion in production in the year to date, despite facing some of the toughest climatic conditions on record.

In light of the vital role primary producers play in the Australian economy, and indeed internationally, it is therefore no surprise that the Australian Government has taken action to safeguard farmers and agricultural businesses in light of recent activist groups targeting abattoirs and farms (enabled and encouraged by personal information shared online), by introducing the Criminal Code Amendment (Agricultural Protection) Bill 2019 (Cth) into the House of Representatives on 4th July 2019.

Criminal Code Amendment (Agricultural Protection) Bill 2019 (Cth)

While trespass on private property is a criminal offence under existing State and Territory legislation, the Australian Government has identified the need to strengthen protections for farmers and agricultural businesses.

The Bill, if passed, will amend the Criminal Code Act 1993 (Cth) to introduce two new offences relating to the incitement of trespass or property offences on agricultural land, such as the dissemination of information through a carriage service, such as the internet, to encourage others to unlawfully trespass, or unlawfully damage property, on agricultural land.

"Agricultural land" is defined by the Bill as land in Australia used for primary production, regardless of whether part of the land is used for residential or a non-primary production business. What constitutes a "primary production business" in accordance with the Bill is strictly defined, and includes any business involving, amongst other things, grazing, dairy farming, aquaculture, operating an abattoir, bee-keeping or viticulture.

The two new offences are defined as being "offences relating to use of a carriage service":

- for inciting trespass, property damages, or theft, on agricultural land; or
- for inciting property damage, or theft, on agricultural land.

Trespass

Under the Bill, a person (the **offender**) will commit an offence by using a carriage service for inciting trespass on agricultural land if the offender:

- transmits, makes available, publishes or otherwise distributes material; and
- does so using a carriage service; and
- does so with the intention of inciting another person to trespass on agricultural land; and
- is reckless as to whether:
 - the trespass of the other person on the agricultural land; or
 - any conduct engaged in by the other person while trespassing on agricultural land

could cause detriment to a primary production business that is being carried out on the agricultural land.

If an offender is found guilty under this provision, they could incur a penalty of imprisonment for up to 12 months.

Property damage or theft

Under the Bill, a person (the **offender**) will commit an offence by using a carriage service for inciting property damage or theft if the offender:

- transmits, makes available, publishes or otherwise distributes material; and
- does so using a carriage service; and
- does so with the intention of inciting another person to:
 - unlawfully damage property on agricultural land; or
 - unlawfully destroy property on agricultural land; or
 - commit theft of property on agricultural land.

If an offender is found guilty under this provision, they could incur a penalty of imprisonment for up to 5 years.

For the purposes of this section, theft of property is committed by a person if:

- the property belongs to another person; and
- the person dishonestly appropriates the property with the intention of permanently depriving the other person of the property.

Protections for journalists and whistleblowers

Significantly, the following exceptions have been included in the Bill for the purposes of ensuring journalists or whistleblowers are protected from lawfully disclosing animal cruelty or mistreatment, or other criminal activity.

The proposed offences will not apply to material transmitted, made available, published or otherwise distributed if the material relates to a news report, or a current affairs report, that:

- is in the public interest; and
- is made by a person working in a professional capacity as a journalist.

Moreover, the proposed offences will not apply to conduct engaged in by a person if, as a result of the operation of a Commonwealth, State or Territory law, the person is not subject to any civil or criminal liability for the conduct.

Protecting Australian primary producers

The introduction of the Bill is an encouraging step towards protecting Australian farmers and agricultural businesses from trespass or property damage/theft incited through the online distribution of activist materials. It has been introduced as a deterrent for people considering entering farms and other agricultural land illegally, and has wide-ranging support from farming organisations in Australia.

The Bill has been referred to the Senate Legal and Constitutional Legislation Committee, which will report on the Bill by Friday, 6 September 2019.

GET IN TOUCH



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Canberra	+61 2 6279 4000	Darwin	+61 8 8943 2555



July 12, 2019

The Brazilian Data Protection Law is amended by Law No. 13,853/2019 (former MP No. 869/2018)

After months of voting procedures, the Law No. 13,853/2019 (former Provisional Measure No. 869/2018) was published on July 9, 2019. Its provisions amend the original text of the General Law on Data Protection (Law No. 13,709/2018 - LGPD).

One of the main changes is the creation of the National Data Protection Authority (ANPD), a public administration body responsible for overseeing, implementing and enforcing sanctions, as well as for the compliance with matters related to the personal data protection throughout the national territory.

ANPD will be composed of the Board of Directors, National Council for Personal Data Protection and Privacy, Legal Affairs, Ombudsman, its own legal advisory body and administrative units and specialized units.

In addition, nine vetoes were made to the law, and the National Congress shall still evaluate them.

Partners

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- Carla do Couto Hellu Battilana

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New Report from the Ontario Privacy Commissioner: Key Takeaways for Ontario Businesses

July 16, 2019

Written by Ruth Promislow and Katherine Rusk

The Office of the Information and Privacy Commissioner of Ontario (OIPC) released its 2018 Annual Report: *Privacy and Accountability for a Digital Ontario* on Wednesday, July 10, 2019. This report signals a move toward increased regulatory oversight and expectations from the provincial commissioner. Ontario organizations can likely expect increased scrutiny of how they collect, use, transfer, and disclose personal information.

Some of the key takeaways for Ontario businesses from the report include:

Cyberattacks

The OIPC reports a rise in the frequency of ransomware incidents, with Ontario municipalities and health care institutions being particular targets of such attacks.

The OIPC underscores the need for organizations to regularly update "measures in place to secure their systems and enable early detection" as well as a protocol to deal with the attack once it happens. Outsourcing data processing to third parties does not relieve the original organization of their accountability for protecting the personal information.

Surveillance

The OIPC flags the increased use of video surveillance by both the public and the private sector as a risk to Ontario's privacy. The OIPC guides organizations to limit surveillance and the amount of personal information collected and retained in order to balance individual privacy with security.

Smart Cities

Referring to the development of "smart cities" and in particular the federal government's Smart Cities Challenge, the OIPC states that data and technology should "not come at the expense of privacy". Privacy should not be treated as an afterthought—it must be built into the plan from the beginning.

For businesses involved with smart cities, the OIPC recommends the following considerations: avoid "tech for tech's sake"; remember that accountability rests with the original institution when outsourcing; de-identify personal data when possible; engage the community; and be transparent.

Artificial Intelligence

The report remarks favourably on a pilot project where "artificial intelligence was used to detect and interpret network activity in ways that would not be possible through manual auditing and other preventative mechanisms". In particular, the OIPC is optimistic about the use of artificial intelligence to improve detection rates, improve accuracy, and address unauthorized access—all of which could result in fewer data breaches.

Fax Machines

6,000 of the reported 11,000 health information privacy breaches in 2018 were the result of misdirected faxes. The OIPC recommends Ontario's health care organizations "reduce or eliminate dependence on fax machines". Ontario private businesses may also wish to consider following this guidance.

Conclusion

This recent guidance from the OIPC reflects the increasing trend in Canada (and worldwide) toward increased regulatory oversight of privacy matters, and the heightened expectation of public and private organizations. A high-level overview of these expectations includes the following:

- ingrain privacy into your operations;
- regularly assess your risks and vulnerabilities so that you understand the potential sources of an attack (hostile outsider; disgruntled employee; negligent employee; etc), and how those risk could materialize;
- ask the pertinent questions such as:
 - Do you regularly train employees about privacy and cybersecurity?
 - Do you have a password policy? Is your password policy up-to-date?
 - Do you encrypt sensitive data?
 - Do you require multi-factor authentication for remote access?
 - Are hard copy files containing personal information secured?
 - Can you exclude outsiders from your physical premises and detect them if they enter?
 - Do you limit the collection of personal information as much as possible?
 - Do you limit access to personal information to those who need to know?
 - Do you have valid and meaningful consent from individuals regarding the collection, use, transfer and disclosure of their personal information?
 - Do you destroy all personal information once you no longer require it?
 - Do you know what safeguards are employed by all third parties with whom you contract to process or store personal information you have collected?

- Do you know whom to call in the event of a data breach or security incident?
- take reasonable steps to address your risks and vulnerabilities;
- recognize that a failure by a third party retained to process personal information remains your responsibility, and address that risk through contractual terms;
- implement measures for early detection of an attack; and
- have an incident response plan in place so you have a well-thought-out and rehearsed plan for how to deal with a breach.

Address these critical business risks with the assistance of legal and forensic experts in advance of an attack. It will save your organization the expense of being caught off-guard. Being pro-active not only reduces the potential for being subject to an attack; it also reduces the potential exposure from an attack.

If you would like further information or advice in respect of privacy and cybersecurity matters, the Data Protection and Privacy team at Bennett Jones is available to assist.

www.bennettjones.com



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A photograph of a green rectangular sign with white, bold, sans-serif capital letters that read "TIME TO SAY GOODBYE". The sign is mounted on a wall, and the background is slightly blurred, showing what appears to be a crowd of people.

BC Workplace Blog

Authored By Michelle Quinn & Colleagues

27

June

I Thought You Were Pushing Me Out – BC Court Finds Employee’s Erroneous Beliefs Not Constructive Dismissal

By Michelle Quinn

This post was co-authored by Michelle Quinn and Catriona Chevalier, summer student.

The Facts

In *Baraty v. Wellons Canada Corp.*, 2019 BCSC 33, Reza Baraty (“Mr. Baraty”) claimed he had been constructively dismissed from Wellons Canada Corp (“Wellons”) on June 2, 2017. Mr. Baraty worked for Wellons for approximately 7 years as the chief estimator. Cris Corilla (“Mr. Corilla”) was the only other person who worked in the estimation department with Mr. Baraty. The two men had a strained relationship that had required intervention by Wellons on a number of occasions.

Mr. Baraty claimed he had been constructively dismissed for two reasons. First, he believed incoming changes to the estimation department substantially changed his employment. From his perspective, the department no longer existed, and therefore his position as the head of that department no longer existed either.

Second, Mr. Baraty believed a series of events that had occurred at work indicated Wellons no longer intended to be bound by Mr. Baraty's employment contract. Such events included his beliefs that Wellons had failed to put an end to Mr. Corilla's bullying and harassment, and attempts to get him to retire prematurely.

The Issues

The primary issues before the Court were twofold:

1. whether Mr. Baraty was constructively dismissed from his position as chief estimator with Wellons, either as a result of:
 - a) a change in or elimination of his role as chief estimator?
 - b) failing to protect him from being subject to an intolerable work environment?
2. if yes, what would be the appropriate notice period?

The Decision

The Court considered the legal principles underlying a claim for constructive dismissal and applied the two "branches" of constructive dismissal that were identified in the leading case of *Potter v. New Brunswick Legal Aid Commission*, 2015 SCC 10 to determine whether Mr. Baraty had been constructively dismissed.

The first branch occurs when a single act breaches an essential term of an employment contract. The test under this branch is whether there has been a breach of the employment contract and whether that breach substantially altered the employment contract.

Mr. Baraty's position was that an email from his general manager explaining that the estimation

department was not its own department, but was part of the sales department, established that Wellons had eliminated his department and his position.

After considering all of the evidence, the Court found that prior situations in the office had led Mr. Baraty to misunderstand the email in question. The Court found that the general manager's email actually confirmed the continued existence of Mr. Baraty's position as chief estimator.

[80] The plaintiff's role as chief estimator was neither eliminated nor fundamentally changed. The plaintiff was therefore not entitled to treat his contract of employment as having being breached by the defendant.

Consequently, Mr. Baraty failed to prove that he had been constructively dismissed under the first branch.

The second branch is when a series of acts, taken together, show that the employer no longer intends to be bound by the employment contract. The test under this second branch is whether there has been conduct that would lead a reasonable person to conclude, in light of all of the circumstances, that the employer no longer intends to be bound by the employment contract.

Mr. Baraty's position was that Mr. Corilla was insubordinate and rude and that Wellons did not take sufficient or appropriate action to stop Mr. Corilla's behaviour because, he believed, the company wanted Mr. Baraty to retire so it could promote Mr. Corilla. The Court disagreed with Mr. Baraty's characterization of the situation, and found that Wellons handled Mr. Baraty's complaints about Mr. Corilla quickly and appropriately by conducting independent investigations, speaking with other employees and giving warnings to Mr. Corilla.

Mr. Justice Wilson commented that:

The communications between the two were often curt and terse and often did not have a friendly tone. However, each contributed to the dysfunctional relationship. Viewed objectively, there was no harassment or bullying by Mr. Corilla and the workplace was not poisoned such that the plaintiff could not perform the functions of his job.

Additionally, the Court accepted Wellons' inquiries regarding Mr. Baraty's retirement plans had to do with business planning and not with any attempt to push him out. As a result, Mr. Baraty also failed to prove he had been constructively dismissed under the second branch.

His claim for constructive dismissal was dismissed and as such, it was not necessary for the Court to address the appropriate notice period.

Constructive dismissal law is complex and whether an employee has in fact been constructively dismissed will depend on the individual and unique facts.

If you have any questions regarding constructive dismissal, please contact either myself at mquinn@rbs.ca, or any other member of our Employment & Human Rights Group.

June, 2019

➤ LAW NO. 20,797 ON THE NEW VOLUNTARY REGISTRY OF AGRICULTURAL CONTRACTS

The new **Voluntary Registry of Agricultural Contracts** (the “Registry”), created by Law No. 20,797 (the “Law”) and its regulation (the “Regulation”) began operating on June 6, 2019.

Whoever enters into a term purchase agreement that refers to the first transaction of agricultural products (the “Agricultural Contract”), may voluntarily register its execution, amendments and cancellation in the Registry. Such registration triggers relevant legal consequences for the contracting parties, providing transparency to the agricultural industry, and simplifying compliance and enforceability of Agricultural Contracts.

Agricultural Contracts may be voluntarily and freely registered, whenever they are entered by an agricultural producer and, either: **a)** an intermediary (buys with the intention of reselling); or **b)** an agroindustrial party (processes and utilizes the produce).

Registrable Agricultural Contracts may refer to any vegetable or livestock related produce, already harvested or pending harvest.

Why would the parties of an Agricultural Agreement choose to register their agreement in the Registry?

During their registration, Agricultural Agreements are:

1. Enforceable against third parties;
2. Produce legal evidence between the parties as to the fact of its execution and its essential terms, and;
3. Grant the rights and impose the obligations set out by the Law and its Regulation, of which we highlight:
 - a. *Legal solidarity in double sales hypothesis:* Should a person/entity different than the buyer in the registered Agricultural Agreement acquire the relevant products; such person/entity will be jointly and severally liable with the selling person/entity, for damages caused to the registered buyer.
 - b. *Speedy resolution of disputes:* Any dispute regarding the interpretation, application or execution of a registered Agricultural Agreement will be substantiated by the rules of the summary procedure.



If you have any questions regarding the matters discussed in this news alert, please contact the following attorneys or call your regular Carey contact.

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- c. *Proof of the Act of God or Force Majeure*: Declarations of emergency or agricultural catastrophe issued by local authorities will be considered as basis for a legal presumption about the occurrence of an Act of God or Force Majeure; softening their burden of proof, in order for a producer to be exempt from liability arising from a breach of contract.

What is included in the Registry and becomes public?

By including an Agricultural Contract in the Registry, not all their terms and conditions will become public. Although it is possible to upload full scanned agreements to the online platform, the Registry does not require them. Instead, a form has to be completed, with certain “essential mentions” of the contract.

Among such essential mentions, are included: (i) the agreement’s parties, (ii) the relevant agricultural produce; and (iii) the real estate where production occurs.

Price of the Agricultural Contract is not included as an “essential mention” by the Regulation, and therefore, its disclosure is not necessary for registry.

The Registry’s platform operates online at www.registrodecontratosagricolas.cl, which is managed by the Ministry of Economy, Promotion and Tourism.

If you have any questions regarding the matters discussed in this news alert, please contact the following attorneys or call your regular Carey contact.

Legal Commentary

July 2, 2019



漢坤律師事務所
HAN KUN LAW OFFICES

BEIJING | SHANGHAI | SHENZHEN | HONG KONG

Restrictions Lifted on FDI in the Entertainment Sector

Authors: Jun HE | Yawen LIAN

On June 30, 2019, the National Development and Reform Commission and the Ministry of Commerce promulgated the *Special Administrative Measures (Negative List) for Foreign Investment Access (2019 Version)* (“**2019 National Negative List**”) and the *Special Administrative Measures (Negative List) for Foreign Investment Access in Pilot Free Trade Zones (2019 Version)* (“**2019 FTZ Negative List**”). In comparison with their respective 2018 versions, the 2019 negative lists reduce the number of industries restricted to foreign investment from 48 to 40 nationwide and from 45 to 37 in Pilot Free Trade Zones. Both the 2019 National Negative List and the 2019 FTZ Negative List will be effective on July 30, 2019.

With respect to the culture, sports and entertainment sector, the 2019 National Negative List and the 2019 FTZ Negative List make the following adjustments:

	2018 Version	2019 Version
<i>Special Administrative Measures (Negative List) for Foreign Investment Access</i>	The construction and operation of cinemas must be controlled by Chinese parties.	Cancelled
	Performance brokerage agencies must be controlled by Chinese parties.	Cancelled
<i>Special Administrative Measures (Negative List) for Foreign Investment Access in Pilot Free Trade Zones</i>	The construction and operation of cinemas must be controlled by Chinese parties. (Film screenings shall conform to the ratio of screening time between domestic movies and imported movies as stipulated by the Chinese government. A screening entity's annual screening time for domestic movies shall not be less than two thirds of its annual total screening time.)	Cancelled

I. Cancellation of Restrictions on Foreign Investment in Cinemas

Both the 2019 National Negative List and the 2019 FTZ Negative List cancel the restrictions requiring Chinese parties to control the construction and operation of cinemas. Currently, however, the *Regulations on Administration of Films* stipulate that “the State permits the construction and renovation of cinemas in the form of Sino-foreign equity joint ventures and Sino-foreign contractual joint ventures,” and the *Interim Provisions on Foreign-invested Cinemas* stipulate that foreign investors are not permitted to establish wholly-owned cinemas. It is foreseeable that once the negative list restrictions are cancelled, these conflicting provisions may be amended or adjusted accordingly.

II. Cancellation of Restrictions on Foreign Investment in Performance Brokerage Agencies

The *Special Administrative Measures (Negative List) for Foreign Investment Access in Pilot Free Trade Zones (2018 Version)* previously cancelled the restriction requiring Chinese parties to control performance brokerage agencies. The 2019 National Negative List now cancels this restriction on a nationwide basis.

According to the currently effective *Regulations on Administration of Commercial Performances*: “foreign investors may establish Sino-foreign equity joint performance brokerage agencies and Sino-foreign contractual joint performance brokerage agencies with Chinese investors in accordance with law ... but shall not establish wholly foreign-funded performance brokerage agencies ... For establishing a Sino-foreign equity joint performance brokerage agency ... the investment ratio of the Chinese party shall not be less than 51%; for establishing a Sino-foreign contractual joint performance brokerage agency ... the Chinese party shall have the dominant operating power.” Upon the cancellation of the restriction requiring Chinese parties to control performance brokerage agencies pursuant to the 2019 Nationwide Negative List, the conflicting provisions in the *Regulations on Administration of Commercial Performances* may be amended accordingly.

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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Important Reminder Transfer Pricing Returns - Country by Country Report Notification

04 July 2019

Due dates for the Transfer Pricing obligations start next week, including the Country by Country Report Notification.

Colombian companies that are members of a multinational enterprise and are not obliged to file informative Transfer Pricing returns, must notify the Colombian Tax Office regarding their group's Country by Country Report status.

It is worth noticing that the due dates for notifying the Colombian Tax Office regarding the obligation of filing the Country by Country Report are approaching. This obligation is applicable for companies which are members of multinational enterprise and that are not obliged to comply with the formal obligations of the Colombian transfer pricing regime. These companies must notify the Colombian Tax Office (DIAN) if their multinational group is obliged - or not - to file the Country by Country Report (either in Colombia or abroad).

The Country by Country Report is an obligation in force in Colombia since FY 2017 applicable to multinational enterprises that have revenues exceeding 81,000,000 Tax Units (FY 2018: COP\$ 2,685,636,000,000; approx. USD \$895 Million). The report contains information related to the global allocation of income, taxes paid, number of employees, among other indicators related to its global economic activities.

The due dates for this obligation are the following:

Last digit of the Company's Tax ID	Due Date
0	July 9
9	July 10
8	July 11
7	July 12
6	July 15
5	July 16
4	July 17
3	July 18
2	July 19
1	July 22

If you have any query or require our support for compliance with this obligation, please do not hesitate to contact [Edgar Ruiz \(eruiz@bu.com.co\)](mailto:eruiz@bu.com.co) or [Daniel Benítez \(dbenitez@bu.com.co\)](mailto:dbenitez@bu.com.co).

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REGULATION OF AUTHORIZED PUBLIC ACCOUNTANTS AS OBLIGATED SUBJECTS IN MONEY LAUNDERING MATTERS

On July 20th, 2018 was published in the Official Gazette No. 187 the Law No. 977 *“Law against Asset Laundering, Financing of Terrorism and Financing of the Proliferation of Weapons of Mass Destruction”*, through which Authorized Public Accountants (CPA) who are members of the Association of Public Accountants of Nicaragua were appointed as Obligated Subjects in money laundering matters, under the supervision of the Association of Public Accountants as Supervising Entity.

Afterwards, on May 10th, 2019 it was published in the Gazette No. 87 the Regulation CCPN-PLA/FT/FP *“Autoregulation of the Association of Public Accountants of Nicaragua for the Prevention of Asset Laundering, Financing of Terrorism and Financing of the Proliferation of Weapons of Mass Destruction applicable to Authorized Public Accountants”*.

Through the Regulation CCPN-PLA/FT/FP, the Association of Public Accountants has established the regulations in asset laundering, financing of terro-

Through the Regulation
CCPN-PLA/FT/FP, the Asso-
ciation of Public Accountants
has established the regula-
tions in asset laundering...

rism and proliferation of weapons of mass destruction (“AL/FT/FP”) that would apply for all CPAs who perform or intend to perform with their clients the following transactions: (i) purchase and sale of real estate properties; (ii) management of cash, bonds or other assets; (iii) management of bank, savings or bond accounts; (iv) organization of contributions for the creation, operation or management of companies; and (v) creation, operation or management of juridical persons or juridical structures, and purchase of commercial entities. In this manner, the Association of Public Accountants has reserved the right to issue future regulations that would be applicable to all other CPAs who do not perform or intend to perform the aforementioned transactions.

The Regulation CCPN-PLA/FT/FP creates the Compliance Committee of PAL/FT/FP and the Directorate of PAL/FT/FP who will function as complementary organs to the Board of Directors within the Association of Public Accountants, who would be in charge of the registry, control, audit and sanction of

supervised CPAs in AL/FT/FP matters, including their power to filter the reports of unusual operations originated from supervised CPAs and sending the corresponding reports to the Financial Analysis Unit when there is legitimate suspicion of a link with a crime related to AL/FT/FP.

This regulation includes also obligation for all CPAs and accounting firms that provide the aforementioned services to request their inscription in a special registry of supervised CPAs, to implement a Prevention Program for AL/FT/FP, to create a Manual of Measurements and Procedures of Internal Risk Management in AL/FT/FP, to partake in hours of continued training in these matters, and to report any unusual operation, as described in the regulation. Additionally, the accounting firms will be obligated to appoint a Compliance Officer, who will be in charge of ensuring the application and compliance of the Prevention Program for AL/FT/FP and the Manual of Measurements and Procedures of Internal Risk Management in AL/FT/FP and who will also serve as liaison with the Association of Public Accountants and shall submit the corresponding reports and assessments.

If you have further questions or concerns, do not hesitate to contact us.

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HOW CAN LAW COPE WITH INNOVATION?

A case study of France and its reform
of crypto-assets

March 2019

HOW CAN LAW COPE WITH INNOVATION?

A case study of France and its reform of crypto-assets

Reconciling law with innovation is often a challenge for legislators since, by definition, innovation departs from existing standards and frameworks. Some may therefore question the ability of the law to address innovative trends.

However, the reform about to be finalised in France, known as the PACTE draft bill¹, includes provisions on crypto-assets and the token economy, which go against this common statement. Quite the contrary. This bill illustrates how regulators can innovate through law to support innovation.

◆ In what way is this reform innovative for the crypto economy?

The objective of the PACTE draft bill is to establish in France a regulatory framework for the crypto economy that is both attractive and comprehensive.

ATTRACTIVE

Because it strikes an original balance between

- (i) maintaining enough flexibility to support innovation,
- (ii) defining credible rules to facilitate interaction of this new economy with incumbent players (such as banks and institutional investors).

The new regime would indeed mainly provide for optional regulatory requirements, leaving it up to the market players to decide whether to opt for the regime.

COMPREHENSIVE

Because it addresses the entire crypto-ecosystem, based on the conviction that regulating both the primary and secondary markets of utility tokens is key in the efficiency of the future regime.

It includes regulatory provisions for (i) issuers of utility tokens, (ii) service providers on these utility tokens, (iii) investment funds likely to invest in utility tokens, and lastly (iv) credit institutions to ensure that the said issuers and service providers have access to banking services.

¹ Projet de loi relatif à la croissance et la transformation des entreprises

◆◆ What will change for utility token issuers?

The PACTE draft bill aims to introduce into French law **the possibility for utility token issuers to obtain a visa** for their tokens' issuance.

For the purpose of this reform, utility tokens shall be understood as digital goods giving rise to one or more rights and which may be issued, registered, stored or transferred via distributed ledger technology². The tokens, which qualify as financial instruments pursuant to MiFID II, are excluded from the scope of this regime.

This visa would be delivered by the French public authority supervising financial markets (the *Autorité des marchés financiers*, or AMF), if the offer and its issuer comply with a number of requirements, including the following:

- ◆ The issuer must provide token subscribers with a **document containing all information** relevant for the public and regarding the offer and the issuer. Such information, together with the information in the relevant marketing documents, shall be clear, fair and not misleading.
- ◆ The issuer must be a legal person **incorporated or established in France**.
- ◆ The issuer must put in place the appropriate means to **monitor and safeguard the funds** raised following the tokens' issuance.
- ◆ The issuer must comply with the obligations provided under French law on preventing the use of the financial system for the purposes of money laundering or terrorist financing (**AML/CTF**).

The General Regulation of the AMF will specify how these requirements must be implemented. These specifications should be finalised by the end of the first semester 2019, with the first visas potentially delivered by the AMF in September 2019.

Obtaining such a visa will be optional: issuers may decide whether they seek the visa from the AMF. There will be no regulatory obligation compelling the issuer to do so. However, if an issuer does decide to obtain a visa, the requirements conditioning such visa become binding. The AMF would hence be granted the power to monitor and supervise compliance by said issuer with said obligations.

With this reform, the visa is intended as an incentive to facilitate issuers' approach of potential subscribers and other stakeholders. The legal framework is meant as a marketing tool for innovative players. The same approach is also used for service providers.

◆◆ What will change for crypto-asset service providers?

Pursuant to the reform, **crypto-asset service providers established in France may opt into an optional regime**. If they decide not to opt in, service providers established in France will still be able to run their activities without being suspected of unlawful conduct in France.

However, **if they decide to opt in, they will have to comply with all the requirements applicable under the optional regime and will be put under the authority of the AMF as licensed crypto-asset service providers** (just like utility token issuers).

In other words, as soon as a crypto-asset service provider established in France decides to opt in, all the applicable requirements pursuant to the optional regime become binding.

² The PACTE draft bill refers to « *tout bien incorporel représentant, sous forme numérique, un ou plusieurs droits pouvant être émis, inscrits, conservés ou transférés au moyen d'un dispositif d'enregistrement électronique partagé permettant d'identifier, directement ou indirectement, le propriétaire dudit bien.* » - see Article 26 of the draft bill.

At this stage, crypto-assets-related services covered by the optional regime are the following (where the services are provided in relation to crypto-assets that do not qualify as financial instruments under MiFID II):

- ◆ custodian wallet provider;
- ◆ crypto/fiat exchange provider;
- ◆ crypto/crypto exchange provider;
- ◆ crypto trading platform;
- ◆ execution of orders on crypto-assets on behalf of clients;
- ◆ crypto-asset portfolio management;
- ◆ investment advice on crypto-assets;
- ◆ underwriting of crypto-assets on a firm commitment basis;
- ◆ placing crypto-assets on a firm commitment basis; and
- ◆ placing crypto-assets without a firm commitment basis.

A decree will further define each of the services mentioned above. This decree is likely to be published by the end of 2019.

To seek a license from the AMF, crypto-asset service providers established in France must permanently fulfil the following requirements:



Maintain a professional liability insurance coverage or own funds (the amount of which will be set in the AMF General Regulation).



Have in place adequate safety and internal control mechanisms.



Have in place a resilient IT system.



Maintain a professional liability insurance coverage or own funds (the amount of which will be set in the AMF General Regulation).

The PACTE draft bill defines further requirements that must be fulfilled on an ongoing basis by licensed crypto-asset service providers, such as the obligation to communicate to their clients clear, accurate and not misleading information (including in marketing communications); the obligation to disclose the fee policy; the obligation to put in place an effective policy for handling complaints; etc. The PACTE draft bill also lays down specific requirements for each of the services listed above. The details of the applicable requirements will be listed in the decree.

One specific exception to the optional nature of the regime is that **certain service providers** (i.e. custodian wallet providers and crypto/fiat exchange providers) **must “register” with the AMF** and will be subject to AML/CFT requirements. In this context, registration means “declaration” and is different from licensing (which refers to the licence given by the AMF to those providers that opt-in). On this basis, the AMF will regularly publish a list of registered crypto-asset service providers. **The provision of such services will be prohibited if the providers of such services are not registered with the AMF.**

This exception on the optional nature of the regime emphasises the significance of AML/CFT for France. It follows on from the implementation in France of the 5th Directive³ on the prevention of money laundering or terrorist financing to address the specific issues of the token economy in this field.

◆◆ What are the other key provisions on the crypto-economy in this reform?

Two set of provisions must be highlighted.

First, **the PACTE draft bill will allow certain professional investment funds to invest in crypto-assets**, which was not possible until now in France. This proposal recognises that the development of this new economy may depend on the existence of appropriate investment vehicles capable of channelling the investments into it. Taking nevertheless into account the risks that this new category of assets may bear, the reform intends to rely on the skills and expertise of professional asset managers to manage these vehicles, the marketing of which shall be restricted to professional investors and high-net-worth individuals.

Second, the reform should address the difficulties that members of the crypto-ecosystem have encountered to date when dealing with banks. **The proposal intends to require from credit institutions that they set up objective, non-discriminatory and proportionate internal rules governing access to banking services for utility token issuers having obtained a visa, and licensed Crypto-Asset Service Providers.** The legislator thus creates a new incentive to seek the regulatory authorisations described above.



The PACTE draft bill has been under discussion at the French Parliament since June 2018. In February 2019, the French National Assembly started its second review of the last version of the proposal, for a possible enactment of the reform by the end of the first semester of 2019. It should hopefully provide interesting prospects for crypto-players throughout the world.

³ European directive 2018/843

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As the debates on the PACTE draft law are still ongoing, this article was prepared on the basis of the French Parliament's working documents, not the final law text. The information contained herein is therefore liable to change.

You can find this article on our website in the News & Insights section: [gide.com](https://www.gide.com).

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THE USE OF MERCURY IN HONDURAS IS NOW REGULATED

On June 10th, 2019 the Sanitary Regulation Agency (ARSA) issued a statement to regulate the use of mercury in products of sanitary interest, in compliance the the Minimata Convention on Mercury.

Honduras joins the countries that seek to protect human health and the environment from anthropogenic emissions and releases of mercury and mercury compounds. Although the Minima-ta Convention on Mercury was published in the Official Gazette on February 28th, 2017, it is through the Communiqué C-003-ARSA-2019 that the Sanitary Regulation Agency rules in regards with the use of mercury, determining the following:

1. Medical devices with added mercury listed in Part I of Annex A the Minimata Convention on Mercury are prohibited as of 2020.
2. A "special authorization" may be granted after analysis, only in the case that the product containing mercury is of vital importance to providing health-care services, when no other secure substitute may be used.
3. The medical devices with added mercury that are risk-based classified or with sanitary registration with expiration after 2020 may be commercialized.
4. Import or commercialization of cosmetics containing mercury is prohibited.

Honduras joins the countries that seek to protect human health and the environment from anthropogenic emissions and releases of mercury...

5. Vaccines containing thiomersal (Thimerosal) as a preservative are excluded from the statement, until there is an effective and safe substitute for thiomersal.

6. In order to comply with the provisions of Agreement 181-2019 "Customs Tax Procedures for the Control of Products with Added Mercury", importers must use the precision codes contemplated in Part I of Annex A of the Minimata Agreement on Mercury.

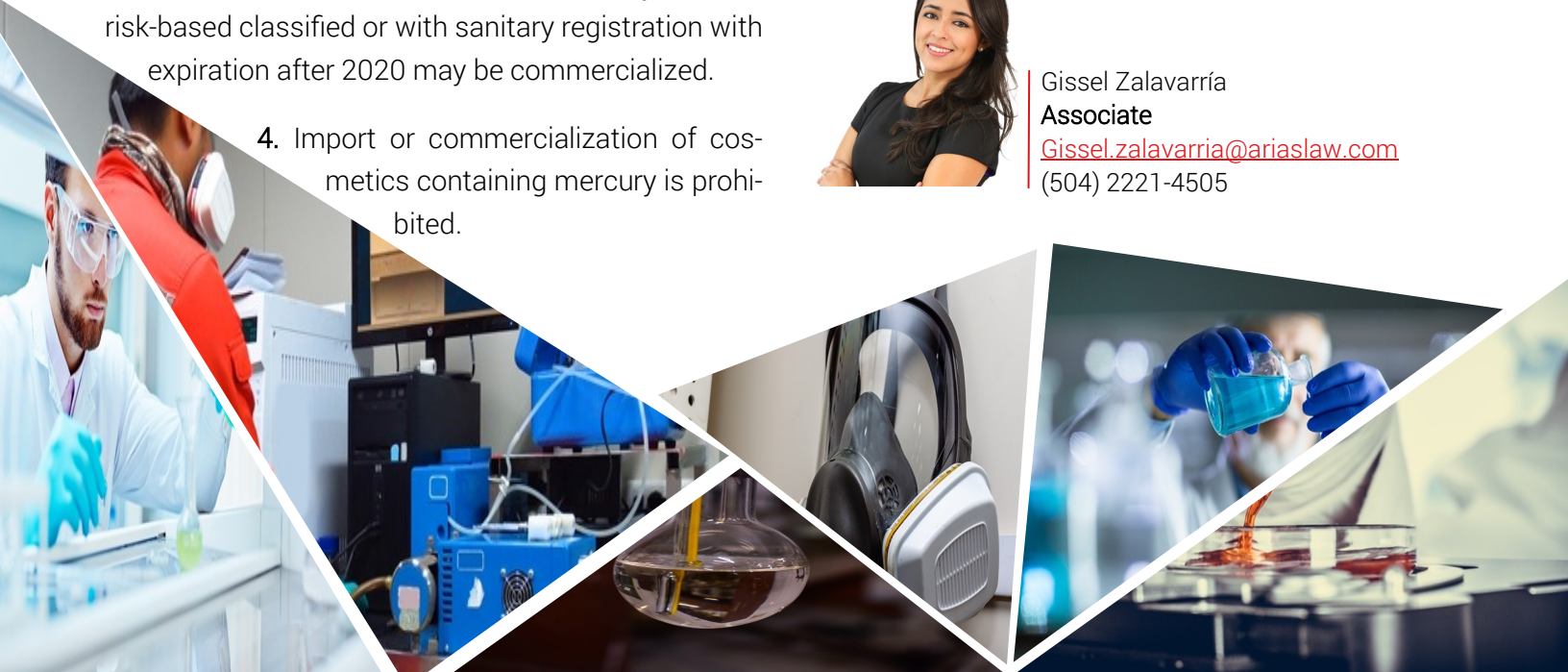
7. As of 2020, antiseptic products for topical use and pesticides with added mercury cannot be imported.

As of 2020, the importation and exportation, of the following products –among others- will not be allowed: batteries, switches and relays, fluorescent lamps, steam lamps, pesticides, biocides, non-electric measuring devices such as barometers, hygrometers; manometers, thermometers; sphygmomanometers; all those that have added mercury and that are not among the established exceptions.

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SCOPE OF ENQUIRY BY THE COURT AS TO EXISTENCE OF AN ARBITRATION AGREEMENT AT THE PRE-ARBITRAL STAGE: AN INDIAN ARBITRATION LAW PERSPECTIVE

*Manish Dembla**

BACKGROUND

In the past few years, the Indian Government has realised that its justice delivery system especially in respect of commercial disputes needs to keep pace with India's economic growth. Though the Indian Arbitration and Conciliation Act, 1996 ("Act") is based on the UNCITRAL principles, judicial decisions had virtually obliterated the original intent of the Act and gravely undermined its avowed objective of expeditious dispute resolution. In fact, in certain kind of agreements, the author had started advising his clients not to incorporate arbitration clauses.

In order to resurrect arbitration as an efficient and preferred method of dispute resolution, the Law Commission of India in its 246th Report had suggested sweeping changes to the Act. Pursuant to the said Report, the Act was amended with effect from 23rd October 2015.

One of the significant amendments was insertion of sub-section (6A) in Section 11 of the Act which provided that at the stage of appointment of an arbitrator, the judicial authority exercising the power of appointment is to confine itself to the examination of the existence of an arbitration agreement. However, the judicial decisions which followed have been contrary to the intent of the amendment and have diluted this provision.

This article attempts to trace the history of the exercise of judicial power at the stage of appointment of arbitrators and offers a critical analysis of the most recent judgment of the Supreme Court on the issue in *Garware Wall Ropes v. Coastal Marine Constructions & Engineering Ltd.*¹ ("**Garware Wall Ropes**")

Power Under Section 11: Judicial or Administrative

In *Konkan Railway Corporation Ltd. v. Mehul Construction Co.*², a three judge bench of the Supreme Court held that the powers of the Chief Justice under Section 11(6) of the 1996 Act are administrative in nature, and that the Chief Justice or his designate does not act as a judicial authority while appointing an arbitrator. It was further held that when the matter is placed before the Chief Justice or his nominee under Section

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¹ 2019 SCC OnLine SC 515

² (2000) 7 SCC 201

11 of the Act it is imperative to bear in mind the legislative intent that the arbitral process should be set in motion without any delay whatsoever and all contentious issues are left to be raised before the arbitral Tribunal itself. This decision was confirmed by a five-judge bench in *Konkan Railway Corporation v. Rani Constructions*³

However, in *SBP & Co. v. Patel Engineering Ltd.*⁴ ("**SBP & Co.**"), a seven-Judge Bench of the Supreme Court overruled this view and held that the power to appoint an arbitrator under Section 12 is judicial and not administrative. It was held that while appointing an arbitrator under Section 11 of the Act, the court is entitled to decide the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of power under Section 11 and the qualifications of the arbitrator(s).

The legal position was further expounded in *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*⁵ ("**Boghara Polyfab**") wherein the preliminary issues which may arise for consideration in an application under Section 11 were divided into three categories: (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

SPB & Co. and *Boghara Polyfab* widened the scope of enquiry under Section 11 to a large number of issues which could have been left to be decided by the arbitrator under Section 16 of the Act. The said decisions were widely criticised as being opposed to the principle of Kompetenz-kompetenz and contributing to delays in constitution of arbitral tribunals.

246th Report of Law Commission of India and Insertion of Sub-Section (6A) in Section 11

In the aforesaid context, the Law Commission of India in its 246th Report suggested the insertion of sub-section (6A) in Section 11 so as to restrict judicial intervention only to situations where the judicial authority finds that the arbitration agreement does not exist or is null and void. The relevant portion of the Report is extracted below:

"...If the judicial authority is of the opinion that *prima facie* the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not *prima facie*."

Pursuant to the recommendations of the Law Commission, Section 11(6A) was introduced with effect from October 23, 2015. The same is reproduced hereunder:

³ (2002) 2 SCC 388

⁴ (2005) 8 SCC 618

⁵ (2009) 1 SCC 267

“(6A) The Supreme Court or, as the case may be, the High Court while considering any application under sub-section(4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.”

Judgments on the scope and interpretation of Section 11(6A)

In October 2017, a two-Judge Bench of the Supreme Court in *Duro Felguera S.A. v. Gangavaram Port Ltd.*⁶ (“**Duro Felguera**”) rightly held that after the 2015 Amendment, “... all that the Courts need to see is whether an arbitration agreement exists - nothing more, nothing less. The legislative policy and purpose is essentially to minimize the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11 (6A) ought to be respected.”

In May 2018, a three-Judge Bench of the Supreme Court in *Oriental Insurance Company Ltd. v. Nardheram Power and Steel Private Limited*⁷ (“**Oriental Insurance**”) while interpreting an arbitration clause in an insurance policy held as under: “If a clause stipulates that under certain circumstances there can be no arbitration, and they are demonstrably clear then the controversy pertaining to the appointment of arbitrator has to be put to rest.”

Though the said judgment does not pertain to Section 11(6-A), it formed the basis for another decision by the same three-Judge Bench in *United Insurance Company Ltd. v. Hyundai Engineering and Construction Company Ltd.*⁸ (“**United Insurance**”). *United Insurance* involved a similar insurance policy containing an arbitration clause which provided that no difference or dispute shall be arbitrable if the insurance company had disputed or not accepted liability. The three-Judge Bench in *United Insurance* distinguished *Duro Felguera* and held that the matter before it was not arbitrable as the insurance company had in fact raised a dispute.

The Delhi High Court in *NCC Ltd. v. Indian Oil Corporation Ltd.*⁹ analysed the effect of insertion of Section 11(6-A) after referring to *Duro Felguera*, *Oriental Insurance* and *United Insurance* and in the author’s opinion arrived at the correct conclusion. The relevant portion of the said judgment is extracted below:

“59.1To my mind, once the Court is persuaded that it has jurisdiction to entertain a Section 11 petition all that it is required to examine, is, as to whether or not an arbitration agreement exists between the parties which is relatable to the dispute at hand. The latter part of the exercise adverted to above, which, involves correlating the dispute with the arbitration agreement obtaining between the parties, is an aspect which is implicitly embedded in Subsection (6A) of Section 11 of the 1996 Act, which, otherwise, requires the Court to

⁶ (2017) 9 SCC 729

⁷ (2018) 6 SCC 534

⁸ 2018 SCC OnLine SC 1045

⁹ ARB.P 115/2018

confine its examination only to the existence of the arbitration agreement. Therefore, if on a bare perusal of the agreement, it is found that a particular dispute is not relatable to the arbitration agreement, then, perhaps, the Court may decline the relief sought for by a party in a Section 11 petition. However, if there is a contestation with regard to the issue as to whether the dispute falls within the realm of the arbitration agreement, then, the best course would be to allow the Arbitrator to form a view in the matter.

59.2 Thus, unless it is, in a manner of speech, a chalk and cheese situation or a black and white situation without shades of grey, the concerned Court hearing the Section 11 petition should follow the more conservative course of allowing parties to have their say before the Arbitral Tribunal."

Thereafter, a two-Judge Bench of the Supreme Court in *Vidya Drolia and Ors. v. Durga Trading Corporation*¹⁰ ("**Vidya Drolia**") after referring to Section 11 (6-A), Section 16, the relevant portion of the 246th Law Commission Report, and *Duro Felguera*, observed as follows:

"It will be noticed that "validity" of an arbitration agreement is, therefore, apart from its "existence". One moot question that therefore, arises, and which needs to be authoritatively decided by a Bench of three learned Judges, is whether the word "existence" would include weeding-out arbitration clauses in agreements which indicate that the subject-matter is incapable of arbitration."

In *Gautam Landscapes Pvt. Ltd. v. Shailesh Shah and Ors.*¹¹ ("**Gautam Landscapes**"), two questions were considered by a Full Bench of the Bombay High Court:

- (a) Whether any interim relief under Section 9 of the Act can be granted when a document containing arbitration clause is unstamped or insufficiently stamped?
- (b) Whether an arbitrator can be appointed under section 11 in respect of an arbitration clause in an agreement that is not stamped or is insufficiently stamped?

The Bombay High Court answered the first question in the affirmative and held that awaiting adjudication on stamp duty before granting relief would defeat the scheme and provisions of the 1996 Act. It was further held that the arbitration agreement was separate and distinct from the document in which it was contained, and would not require stamping. While answering the second question, it held that the appointment of arbitrators need not await adjudication of stamp duty and penalty.

The Supreme Court has very recently on April 10, 2019 held in *Garware Wall Ropes* that when a court is called upon to decide on an application for appointment of an arbitrator under Section 11 of the Act on the basis of an arbitration clause in an

¹⁰ Civil Appeal No. 2402 of 2019

¹¹ (2019) SCC OnLine Bom 563

agreement which is unstamped or deficiently stamped, the court must first impound the agreement, send it to the concerned authority for adjudication and payment of stamp duty and penalty (if any), and proceed with the application only after such stamp duty and penalty have been paid.

In holding so, the Supreme Court reiterated its earlier judgment in *SMS Tea Estates v Chandmari Tea Company Pvt. Ltd.*¹² ("**SMS Tea Estates**") and stated that the law laid down in *SMS Tea Estates* continues to apply even after introduction of Section 11(6A). It has also overruled the judgment of the full bench of the Bombay High Court in *Gautam Landscapes* expressly with respect to the 2nd question mentioned above.

Comments

Garware Wall Ropes lays down that even though Section 11(6A) requires the courts to examine only the existence of an arbitration agreement, it would include within its sweep the issue whether the agreement is duly stamped or not. While this judgment is binding and would have to be followed as of now, the following issues may require a re-examination by a larger bench at an appropriate time:

- (a) The legislature seems to have deliberately used the term "existence" in Section 11(6A) as opposed to the word "valid" as used in Sections 8, 36, 48 and 54. An agreement on account of not being sufficiently stamped, may not be capable of being acted upon or enforced. However, it cannot be said that such an agreement is not in existence. As correctly observed in *Vidya Drolia*, this issue needs to be decided by a three-judge bench.
- (b) Section 11(6A) requires the court to confine itself to examination of the existence of an arbitration agreement "*notwithstanding any judgment, decree or order of any Court*". It is clear that the intent behind introduction of Section 11(6A) was to avoid a comprehensive examination at the pre-arbitral stage and to nullify the effect of any prior judgment to the contrary whether it be *SPB & Co.*, *Boghara Polyfab* or *SMS Tea Estates*. However, it has been held in *Garware Wall Ropes* that since there is no mention of *SMS Tea Estates* in the Law Commission Report, it continues to be binding. If the intent of Section 11(6A) was only to address the mischief caused on account of the two judgments mentioned in the Report, i.e. *SPB & Co.* and *Boghara Polyfab*, Section 11(6A) would not have used such wide language.
- (c) In the course of the judgement, the bench also observed that an arbitration clause contained in an agreement does not have an independent existence. However, it has been repeatedly held by the Supreme Court in prior judgments especially, *Reva Electrical Car Company Private Ltd. v. M/s Green Mobil*¹³, *Today Homes and Infrastructure Pvt. Ltd. v. Ludhiana Improvement Trust*¹⁴

¹² (2011) 14 SCC 66

¹³ 2012 (2) SCC 93

and *Enercon (India) Ltd. & Ors. v. Enercon GmbH & Anr.*¹⁵ that an arbitration clause which forms part of a contract has to be treated as an independent agreement. The observation of the Supreme Court in paragraph 83 of *Enercon (Indihyup) Ltd.* in this regard is extremely pertinent and is reproduced below:

“83. The concept of separability of the arbitration clause/agreement from the underlying contract is a necessity to ensure that the intention of the parties to resolve the disputes by arbitration does not evaporate into thin air with every challenge to the legality, validity, finality or breach of the underlying contract. The Indian Arbitration Act, 1996, as noticed above, under Section 16 accepts the concept that the main contract and the arbitration agreement form two independent contracts. Commercial rights and obligations are contained in the underlying, substantive, or the main contract. It is followed by a second contract, which expresses the agreement and the intention of the parties to resolve the disputes relating to the underlying contract through arbitration. A remedy is elected by parties outside the normal civil court remedy. It is true that support of the national courts would be required to ensure the success of arbitration, but this would not detract from the legitimacy or independence of the collateral arbitration agreement, even if it is contained in a contract, which is claimed to be void or voidable or unconcluded by one of the parties.”

- (d) If a document were to be impounded at the stage of an application under Section 11(6), the 60 day period provided in Section 11(13) of the Act would most likely be breached and the avowed objective of the amendment to expedite the arbitration process and ensure minimal intervention of the courts would be defeated. It may have been more prudent to appoint an arbitrator while simultaneously impounding the agreement and directing the party responsible for payment of stamp duty to submit the duly stamped agreement with the arbitrator(s) during the course of arbitration proceedings. This would have ensured expeditious disposal of the Section 11 application while at the same time avoiding any delay to the arbitration proceedings.

¹⁴ (2014) 5 SCC 68

¹⁵ (2014) 5 SCC 1

Act implementing the Fifth Anti-Money Laundering Directive filed. AML regulations will also apply to crypto service providers that operate in or from the Netherlands

July 10, 2019

On 2 July 2019, the Act Implementing Amendments to the Fourth Anti-Money Laundering Directive ('AMLD5 Implementation Act') and the Explanatory Memorandum ('Memorandum') were filed to the Dutch House of Representatives. The AMLD5 Implementation Act will implement the Fifth Anti-Money Laundering Directive in Dutch legislation. Under the Act, certain crypto service providers now for the first time fall within the scope of the Dutch Anti-Money Laundering and Counter-Terrorist Financing Act (Wet ter voorkoming van witwassen en financieren van terrorisme ('Wwft')). This blog addresses the main requirements that crypto service providers must observe in (the course of) 2020, if they offer their services in or from the Netherlands.

For which crypto service providers will the rules apply?

The new rules discussed below will apply to two types of crypto service providers:

- parties that provide wallets in the conduct of their profession or business; and
- parties that offer exchange services between virtual currencies and fiat currencies (such as the euro) in the conduct of their profession or business.

Not all wallet providers fall within the scope of the AMLD5 Implementation Act: it applies only to custodial wallet providers. These are providers that are able to independently access virtual currencies that users keep in their wallets. This is in any event the case where a provider has a user's private key, also where the private key can be shared with multiple users besides the provider. This restriction also means that providers of wallets that can be managed only by their users, (as yet) fall outside the scope of the anti-money laundering regulations.

The Memorandum clarifies that ‘providers of virtual exchange services’ include providers of physical ATMs that offer such exchange services, whereas it does not, for example, include shop owners who only make such ATMs available.

Providers of custodial wallets and virtual exchange services are collectively referred to below as ‘crypto providers’.

What do the rules entail?

Mandatory registration with DNB

The draft version of the AMLD5 Implementation Act stated that crypto providers had to apply for a license from the Dutch Central Bank (De Nederlandsche Bank, ‘DNB’). However, in the filed version of the Act this license requirement has been relaxed to a registration requirement. To register with DNB, crypto providers must demonstrate, among other things, that they are able to comply with the Wwft. DNB may reject a registration application if the information submitted is incomplete or if it believes that the information is inaccurate.

The registration requirement applies to all crypto providers that offer services in or from the Netherlands, regardless of whether they are already registered in another Member State. However, crypto providers from countries outside the EEA (‘third countries’) cannot register with DNB. That means that these parties will be barred from offering their services in the Netherlands, unless they are based in a third country approved by the Minister.

Suitability and trustworthiness

The crypto provider’s policymakers must be suitable and trustworthy. DNB will examine this requirement before registering a crypto provider. To determine whether policymakers are suitable, DNB will assess whether they possess sufficient knowledge and skills and whether they act professionally. To determine whether policymakers are trustworthy, DNB will examine whether their intentions, acts or – in particular – antecedents (if any) prevent them from holding that position. DNB will also examine the trustworthiness of parties with a qualifying holding (a stake of 10% or more) in a crypto provider.

Customer due diligence

To identify cases or potential cases of money laundering and terrorist financing, it is important that crypto providers know who their customers are. In certain cases, therefore, crypto providers must conduct a customer due diligence (‘CDD’) before they start providing their services. The intensity of the

CDD to be conducted depends on the risk associated with the type of customer, business relationship, product or transaction. Given that transactions involving virtual currencies carry greater risks, the legislature is of the opinion that crypto providers will have to conduct an enhanced CDD in many cases.

Monitoring transactions

To be able to identify unusual transactions, crypto providers must have a transaction monitoring process in place. With regard to that process, the Memorandum states that crypto providers must not only establish who the customer is, but also what the customer's projected profile is. That will enable crypto providers to determine the extent to which the customer's profile deviates from the intended transaction(s) or the transaction(s) performed, and whether the transaction(s) may be unusual. This may be the situation in the case of deviating amounts, times or numbers and/or the use of non-standard technical devices or tools.

Monitoring virtual currency-related transactions may well be the biggest challenge that crypto providers will face, especially where it concerns identifying the origin and destination of the virtual currencies. If crypto providers are not able to monitor this properly, this may result in them not being allowed to offer their services or having to terminate their services.

Reporting unusual transactions

When monitoring transactions, if crypto providers encounter transactions that could be classified as unusual, they must immediately report them to the Dutch Financial Intelligence Unit. Transactions are unusual if they are deemed to be unusual based on subjective or objective indicators. We expect that these indicators will be fleshed out in regulations based on the Wwft for crypto providers.

When do the rules come into force?

The rules addressed above will be incorporated into the Wwft and are scheduled to take effect on 10 January 2020. Crypto providers must ensure that they are registered with DNB no later than 6 months after that, so by 10 July 2020 at the very latest. Crypto providers that operate in or from the Netherlands would do well to make proper preparations and to contact DNB in a timely fashion.

Any questions?

If you have any questions about the new rules, please feel free to contact us. Our Block-chain & Tokens Group consists of experts in financial regulatory law, corporate law, privacy, liability law, tax and compliance, as well as other areas of law.

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Overseas investment office flexes its enforcement muscles again IO grants first standing consent for residential land purchases

July 09, 2019

Contacts Partners Greg Allen, James Hawes, Don Holborow, Andrew Matthews, Robert McLean, Michael Pollard; Senior Associates Tara Wylie

The Overseas Investment Office (OIO) has once again proven its willingness to take significant enforcement action against those who breach the Overseas Investment Act's consent requirements.

Last week the High Court ordered the overseas owners of two rural properties to pay penalties of \$2.95 million (which included sale proceeds received on voluntary disposition of one of the properties) for acquiring sensitive New Zealand land without the required OIO consent. This hefty penalty comes just months after Agria was fined \$250,000 for breaching its 'good character' condition to an earlier OIO consent (read more about the Agria decision [here](#)).

While the OIO has always had enforcement powers, the spike in enforcement action and larger penalties may be signalling a shift towards the OIO being a more active and punitive regulator.

In summary - what you need to know

- A spike in OIO enforcement action and larger penalties could be the new norm, and overseas investors need to take extra care not to run afoul of the Overseas Investment Act.
- Understand the OIO regime, have internal processes in place to ensure that you comply, demonstrate what you are doing to promote compliance, and seek professional advice on consent requirements.
- If you breach the Act, notify the OIO as soon as possible and cooperate with any investigation.

Circumventing the Act

Mr. Hong and Mr. Ke (both Chinese residents) acquired two rural properties in 2012 and 2014 through different structures set up to avoid the need for OIO consent. The properties were acquired either by New Zealand residents acting as an agent of companies in which Mr. Hong and Mr. Ke held the beneficial interest, or through a partnership arrangement. The Court found that Mr. Hong and Mr. Ke both knew of the requirement to obtain OIO consent and took deliberate steps to circumvent the operation of the Overseas Investment Act.

Retrospective consents not enough

In 2014 Mr. Hong and Mr. Ke filed two retrospective consent applications with the OIO for each of the two properties. One application was declined on the grounds that it did not satisfy the consent criteria of demonstrating a net benefit to New Zealand, and the other application was withdrawn.

Retrospective consents are an avenue for overseas persons who have inadvertently breached the Act to apply for consent and pay an administrative penalty. The retrospective consent avenue is unlikely to be appropriate where an overseas person has acquired sensitive New Zealand assets in way that has deliberately, recklessly or negligently broken the Act or where the overseas investor has tried to disguise its behaviour.

Penalties

The OIO stated that the penalties totalling \$2.95 million recognised the significant breach by Mr. Hong and Mr. Ke. The penalty was made up of the quantifiable gain of one of the properties, agreed to be \$2.3 million, and Mr. Hong and Mr. Ke were each fined an additional penalty of \$307,500. As part of the settlement arrangements Mr. Hong and Mr. Ke also agreed to dispose of the other property (which didn't have any quantifiable gain).

When assessing the quantifiable gain on the properties, agreed expenses and interest was taken into account. So while one property was acquired for \$4.5 million in 2014 and sold for \$10.1 million in 2019, only \$2.3 million of quantifiable gain was recognised.

The Act in place at the time the properties were acquired allowed penalties to be the higher of \$300,000, or the quantifiable gain on the property. This was amended in 2018 to be the higher of \$300,000 **or** three times the quantifiable gain, giving the OIO the ability to impose greater penalties in the future.

How to stay on the right side of the OIO

The OIO regarded the nature and extent of the breaches by Mr. Hong and Mr. Ke to be serious, and the penalties reflect this.

However, breaches of the Overseas Investment Act can, and do, inadvertently occur. Following the steps below can ensure you don't find yourself on the wrong side of the OIO:

- Understand the OIO regime and have internal processes in place to ensure that you comply, and continue to do so.
- Determining whether OIO consent is required in relation to a given piece of land is not always straightforward. Seek professional advice to identify whether consent will be required, and what consent pathways may be available.
- If you become aware of a breach, notify the OIO as soon as possible, and cooperate with any investigation.
- Demonstrate what you are doing, and have been doing, to promote compliance.

If you have any questions about the consent requirements, or the overseas investment regime generally, please get in touch with one of our contacts above.

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Gaining popularity of green loans in Singapore

July 4, 2019

1. Introduction

Green loans are increasingly gaining prominence in the corporate lending market in Singapore. We observed that the changing corporate social responsibility (CSR) direction of both banks and borrowers have contributed significantly to such growth.

A key feature of a green loan facility is the “green” purpose clause, whereby proceeds of the facility can only be used to finance or re-finance green projects which deliver environmental benefits. For instance, the development of commercial or residential properties with environment-friendly features can be financed by green loans.

Notably, a S\$1.2 billion syndicated green loan facility was granted to an indirect wholly-owned subsidiary of Frasers Property Limited (Frasers) in September 2018. The facility was a first of its kind in Singapore, and used by Frasers to refinance its existing loans related to the development of Frasers Tower and an adjacent three-storey cascading retail podium. Frasers Tower is a 38-storey Premium Grade A office tower located in the Central Business District of Singapore, and utilises recycled water for irrigation purposes.

With the Building and Construction Authority of Singapore’s (BCA) goal of ensuring 80% of the buildings in Singapore are certified “green” by 2030, the real estate sector could potentially be a key beneficiary of green financing.

We are acting for DBS Bank in its grant of a S\$300 million multi-currency sustainability-linked loan to CapitaLand. Whilst this is not strictly a green loan, the five-year term loan and revolving credit facility is the first and largest sustainability-linked loan in Asia’s real estate sector. It is also Singapore’s largest sustainability-linked financing provided by a sole lender. The multi-currency loan is linked to the developer’s listing on the Dow Jones Sustainability World Index, which tracks established firms in areas such as environmental, social and governance efforts. Unlike green loans, where the funds are used for certain types of projects, CapitaLand is able to use the loan for general corporate purposes.

This article seeks to provide a brief overview on the general principles applicable to green loans and the key reasons spurring its demand in Singapore. Potential limitations that may hinder the development of the green loan market are also highlighted.

2. Green Loan Principles – a useful benchmark

The Green Loan Principles (GLP) was jointly released by the Loan Markets Association and Asia Pacific Loan Market Association in March 2018. The GLP includes a non-exhaustive list of eligible green projects and provides guidance on the characteristics of a green loan. This facilitates the growth of the green loan market in a coherent manner by

having a consistent framework in place for parties to adopt.

The GLP is based on four core components, namely: -

- i. use of proceeds;
- ii. process for project evaluation and selection;
- iii. management of proceeds; and
- iv. reporting.

Essentially, there has to be clear specification on the use of loan proceeds for green projects only and the loan proceeds should as far as possible be credited to a designated projected account. The borrower's environmental sustainability objectives should also be clearly communicated to the lender(s).

Additionally, the borrower should perform regular reporting to the lender(s) regarding how the loan proceeds are being used or allocated. This allows consistent monitoring on the usage of loan proceeds, thereby maintaining the integrity of the overall green loan market.

3. Reasons for demand in green loans

Corporate borrowers' perspective

Many large corporates are motivated to exhibit responsible corporate behaviour as this leads to long term reputational enhancement. "Green" culture is growing prevalent as each organisation seeks to reduce its carbon footprint in a bid to mitigate the effects of climate change. This translates to a greater alignment between the business decisions made by large corporates with environmental and sustainability goals.

Large corporates are increasingly keen to take up green loans as they value the intangible benefits of tying their ecologically responsible behaviour with their funding options. By securing green loans, it is an effective way to display the company's commitment towards improving environmental sustainability. Portraying itself as a responsible "green" corporate citizen will also be a positive credential which can be shared with shareholders and relevant stakeholders.

Banks' perspective

Over the years, banks have gradually shifted their focus towards building a sustainable future whilst promoting the banks' performance and business growth. Banks recognise that by providing green financial solutions, it would be a great opportunity to create a positive impact in the global collective effort towards mitigating climate change. The provision of green financial solutions also aid banks in the diversification of their portfolios to a more sustainable one.

Furthermore, the Monetary Authority of Singapore takes into consideration the bank's sustainability practices as part of its supervisory assessments over banks licensed in Singapore. This will invariably influence the manner in which banks conduct their businesses and the development of their financial products.

4. Potential limitations

It bears noting that the integrity of the "green" label can only be maintained if market players are disciplined in adopting and adhering to the GLP. Whilst market players are encouraged to adopt the GLP in the structuring of a green loan facility, it is still subjected to the agreement between the parties.

With the growth of the green loan market, it also carries the risks of green-washing. Green-washing refers to incidences where projects have the appearance of bringing about environmental benefits, but in substance do not. The

current green loan market is largely self-regulated and the lack of a unified “green” definition poses the risk of green-washing occurring.

Further, green covenants such as regular review and reporting requirements are not typically stipulated as events of default in green loan documentation. In the event of a failure to comply with these covenants, it will only lead to a declassification of the facility. As such, accountability of how loan proceeds are utilised throughout the loan tenor may remain an issue.

5. Conclusion

Moving forward, we expect the growth of the green loan market to accelerate with increased worldwide environmental awareness. Banks and corporate borrowers ought to continuously monitor the progressive development of market principles, which will shape the way in which green loan facilities are structured in future.

Dentons Rodyk thanks and acknowledges practice trainee Ashlyn Toh for her contributions to this article.

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Latest Amendments to Government Procurement Act

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Pauline Wang/ Frank S. Huang

The new amendments of Government Procurement Act (“the new Act”) were promulgated by the President on May 22, 2019 and have taken effect on May 24, 2019. Provided below is a summary of the important amendments of the new Act:

1. The new Act adds that the restrictions and review methods for the qualifications of domestic or foreign supplier may be established in the government procurement involving national security (see Article 17).
2. The new Act modifies the terms of “forging or altering documents” related to tendering or contract performance to the term of “using false documents”. The new Act clearly broadens the scope of prohibition. Thus, when the supplier uses false documents in tendering or contract performance, it will meet the requirements of “confiscating the bid bonds” or “the ban from bidding government contracts”. The new Act apparently puts more duties on the supplier and thus the supplier shall strengthen the management in the documents related to tendering or contract performance (see Articles 31, 50 and 101).
3. The new Act modifies that the government procurement contract shall stipulate the responsibility of either party in the event that its erroneous performance, false representation, or poor management has caused damages to the other party. In the past, the original provision is only applicable to the responsibility of the supplier (see Article 63).
4. The new Act strengthens the protection of occupational safety and health. Under the new Act, the procuring entity shall prepare safety and health drawings and specifications in accordance with occupational safety and health regulations in the tender documentation and set out safety and health expenses. It shall also specify in the tender documentation that the supplier shall take necessary equipment or measures in accordance with occupational safety and health regulations and implement safety and health management and training in order to avoid occupational disasters. In the event of an occupational disaster, the procuring entity shall bear the responsibility in accordance with the government procurement act and the contract made by the parties. (see Article 70-1)
5. In order to avoid the procuring entity’s delay on correcting illegal procurement conduct, the new Act adds that the procuring entity shall proceed with a lawful alternative within 20 days from the date following the date of receipt of the review decision of the Complaint Review Board for Government

Procurement ("CRBGP") which specifies that the procuring entity is in breach of regulations. The supplier may file a written complaint with the CRBGP within fifteen days from the expiration of the 20-day period if the procuring entity fails to dispose the case within the 20-day period. Where a review decision specifies that the procuring entity is in breach of regulations, the supplier may request the procuring entity to reimburse the necessary expenses incurred by the supplier for the preparation of tender and the filing of protest and complaint. (see Article 85)

6. The new Act modifies and adds some provisions regarding the requirements and procedure of the ban from bidding government contracts (see Articles 101 and 103):

(1) The new Act adds that the supplier who offers, agrees to offer, or gives improper benefits to the personnel of government procurement shall be subject to the ban from bidding government contracts.

(2) The new Act adds the new requirement that the violation is of a serious nature for some circumstances of the ban from bidding government contracts. Furthermore, the new Act also prescribes that the procuring entity shall consider the damages of the procuring entity, the degree of supplier's accountability, and the correction or compensation measure made by the supplier when determining whether the violation is of a serious nature.

(3) The new Act also adds some "due process" provisions for the procedure of the ban from bidding government contracts. Under the new Act, the procuring entity shall give the supplier an opportunity to state its opinions before notifying the ban from bidding government contracts and shall establish a special task force to determine whether the supplier meets the requirements of the ban from bidding government contracts.

(4) The new Act also shortens the ban period for some circumstances regarding the violation of procurement contract, and the new ban period is from three months to one year depending on the times of violation.

(5) The new Act is also applicable to the ban which has not become final.

www.leeandli.com

FCC Makes Significant Changes to Children's Programming Rules

By Christopher A. Cook and David M. Silverman

July 10, 2019: At today's open meeting, the FCC voted 3-2 on party lines to amend its rules that currently require television stations to broadcast specific amounts of educational and informational programming directed to children, also known as the "KidVid" requirements. The existing KidVid rules that have been in place for roughly fifteen years, requiring broadcasters to air at least three hours of so-called "Core Programming" on their primary program stream between 7 am and 10 pm.

Today's Order relaxes these requirements, eliminating the obligation for broadcasters to air additional hours of children's programming for multicast channels.

In determining to amend the existing KidVid rules, the FCC evaluated the current landscape of children's programming and concluded "[t]here has been a major change in the way children consume video programming." Perhaps most importantly, the FCC's own analysis showed children's live viewing of broadcast television has decreased substantially in favor of video content on other media platforms, like Netflix, Hulu, and YouTube.

Consequently, the FCC's new requirements are intended to reflect this dramatic evolution in the media landscape, while both maintaining the obligation to air 156 hours of core programming per year and recognizing that children from low income and minority households may still rely primarily on broadcast programming.

Significant Changes to KidVid rules

The Report and Order includes a number of significant changes to the KidVid rules, including the following:

- Permits broadcast stations to air up to one-third of total Core Programming hours (i.e., up to 52 hours per year) on a multicast stream. This means that broadcasters must continue to air at least two-thirds of their total annual Core Programming hours (i.e., 104 hours per year) on their primary broadcast stream;
- Eliminates the requirement to air any additional children's programming relating to multicast streams;
- Allows core Programming to be aired anytime between 6 am and 10 pm, adding the 6-7 am hour to the currently permitted Core Programming hours;

- Permits up to 52 hours per year (i.e. averaging one hour per week) of not regularly scheduled programming at least 30 minutes long to count as Core Programming;
- Authorizes up to 52 hours per year of a combination of not regularly scheduled programming and short-form programming (i.e., less than 30 minutes in length), such as public service announcements and interstitials, to count as Core Programming;
- Updates safe harbor guidelines to account for the above-described revisions, so long as the station continues to broadcast at least 26 hours per quarter (i.e., averaging 2 hours per week) of regularly scheduled programs that are at least 30 minutes long;
- Changes the filing timeline for the KidVid reporting requirements (FCC Form 398) to annually instead of quarterly, and broadcast stations are no longer obligated to publicize the FCC Form 398 filings;
- Enables broadcasters, cable operators and DBS operators to file Certificates of Compliance annually rather than quarterly, although the commercial limits are unchanged.

As these highlights show, the Report and Order significantly changes the children’s programming regime for broadcasters that has been in place for much of the past fifteen years. Additionally, the FCC approved a further notice of proposed rulemaking (FNPRM) proposing to further relieve a station’s children’s programming obligations if the broadcaster financially sponsors children’s programming on a noncommercial in-market broadcast station.

The Report and Order becomes effective 30 days after publication in the Federal Register, which will likely occur in the next month or two. In the meantime, the FCC said stations must continue to comply with the current children’s programming requirements prior to the effective date.

Therefore, we urge all video programmers to closely monitor these changes and to be aware of their obligations both before and after the effective date of this Order.

www.dwt.com

U.S. Supreme Court ruling expands scope of Medicare notice-and-comment requirement

June 7, 2019

On June 3, 2019, the U.S. Supreme Court held in *Azar v. Allina Health Services* that Medicare interpretive guidance must go through notice-and-comment if it establishes or changes a substantive legal standard governing payment, coverage, or eligibility.¹ The 7-1 decision affirmed a ruling by the D.C. Circuit vacating a Centers for Medicare & Medicaid Services (CMS) policy used to calculate disproportionate share hospital (DSH) payments for hospitals serving a disproportionate share of low-income patients in fiscal year (FY) 2012.² The majority opinion, authored by Justice Gorsuch, may have ramifications well beyond the Medicare DSH payment formula: it may expand the number and types of Medicare policies that are required to be promulgated through notice-and-comment.

The Supreme Court's decision

The Medicare Act has its own notice-and-comment provisions, which are distinct from the notice-and-comment provisions applicable to most non-Medicare programs under the Administrative Procedure Act (APA). In the *Allina Health Services* decision, the Court answered the long-standing question whether the Medicare Act's notice-and-comment provisions are coterminous with those in the APA, which, among other things, exempt interpretive rules (i.e., guidance interpreting statutory or regulatory provisions) from the requirements of notice-and-comment. The answer is no.

The Court's ruling is a victory for a group of hospitals that sued CMS over the agency's interpretation of the Medicare DSH payment formula for FY 2012. CMS had originally adopted that interpretation through notice-and-comment. That rule was challenged and vacated due to procedural defects. CMS then engaged in another round of notice-and-comment and adopted the same interpretation, but only for FY 2013 and later years. The agency did not apply the new rule to FY 2012, presumably because that would have been impermissibly retroactive. Rather, for FY 2012, CMS readopted the interpretation in an interpretive rule (i.e., interpretive guidance, which, here, took the form of a website notice) that CMS viewed as exempt from the requirements of notice-and-comment.

¹ See *Azar v. Allina Health Servs.*, No. 17-1484, slip. op., at 7–10, 12 (S. Ct. June 3, 2019).

² See *id.* at 17. Justice Kavanaugh, who authored the appellate court decision below, took no part in the Supreme Court's consideration or decision.

In taking this approach, CMS assumed that the Medicare Act parallels the APA in exempting interpretive rules from the requirements of notice-and-comment. Under the APA, notice-and-comment are typically required when an agency adopts "substantive" rules (i.e., rules that have the force and effect of law). But "interpretive" rules (i.e., interpretive guidance that does not carry the force and effect of law) are expressly exempted from the notice-and-comment requirement. Manual provisions, transmittals, and other guidance are therefore often issued by agencies as interpretive rules to avoid the time and expense of notice-and-comment.

The Supreme Court, however, rejected CMS's view that, like the APA, the Medicare Act incorporates an interpretive rule exception to notice-and-comment.

The text of the Medicare Act requires notice-and-comment for any rule (other than a national coverage determination) that establishes or changes a "substantive legal standard governing the scope of benefits, the payment for services, or the eligibility of individuals, entities, or organizations to furnish or receive services or benefits under [Medicare]."³ Unlike the APA, the Medicare Act does not expressly exempt interpretive rules from its notice-and-comment requirement.

The Supreme Court reasoned that the Medicare Act's omission of an express interpretive rule exception is by design. The Court conducted a comparison of the text and structure of the Medicare Act and those of the APA, and concluded that the language of the Medicare Act makes clear that Congress did not intend interpretive Medicare rules to be categorically excluded from the notice-and-comment requirement. The Court observed that a rational Congress could have determined that the benefits of public notice-and-comment are "especially valuable when it comes to a program where even minor changes to the agency's approach can impact millions of people and billions of dollars in ways that are not always easy for regulators to anticipate."⁴

Implications for the Medicare program

The most immediate question is how CMS will respond to the Supreme Court's ruling. CMS appears likely to seek to narrow the impact of the ruling on its administration of the Medicare program by concluding, to the extent reasonably possible, that existing and future guidance does not in fact constitute a statement of policy that establishes or changes a substantive legal standard governing payment, coverage, or eligibility. In support of any such conclusion, CMS might point to the *Allina Health Services* Court's express skepticism of the government's suggestion that a significant number of manual provisions would need to be readopted through notice-and-comment rulemaking.⁵ Thus, there may be limited change in Medicare program administration, at least to start.

That said, because the *Allina Health Services* decision could be read expansively to mean that notice-and-comment is required any time CMS interprets an ambiguous Medicare statutory or regulatory provision to establish a new or modified substantive legal standard governing payment, coverage, or eligibility, CMS could be more inclined to engage in notice-and-comment than it otherwise would be, at least going forward, with respect to more controversial or aggressive interpretations, which the agency could view as potentially more vulnerable to an *Allina Health Services*-based challenge.

Stakeholders dissatisfied with an interpretive guidance that CMS may issue without notice-and-comment may wish to consider whether it would appropriate to invoke the *Allina Health Services* decision to argue procedural infirmity. One strategic potential consideration is that a broader

³ Social Security Act § 1871(a)(2).

⁴ Slip op. at 16.

⁵ *Id.* at 15.

understanding of the *Allina Health Services* decision could inhibit CMS from quickly issuing interpretive guidance in instances where stakeholders would welcome such guidance.

Ultimately, the full ramifications of the Supreme Court's decision are likely to take years to become clear, after substantial additional litigation. Like CMS, lower courts will have to wrestle with whether to give the *Allina Health Services* decision broad or narrow effect. If lower courts endorse an expansive understanding of the decision, it could dramatically alter the landscape of Medicare regulation, as CMS currently implements large swathes of the Medicare program through manuals, transmittals, and other guidance that do not go through notice-and-comment. But lower courts may instead ultimately apply the *Allina Health Services* decision much more narrowly: as noted above, the decision itself appears to imply that the Supreme Court did not think that its holding would dramatically expand notice-and-comment⁶, and courts may be reluctant to construe the decision's reasoning in a way that would practically impede the operation of the Medicare program.

If you have any questions about the Supreme Court's *Allina Health Services* decision and its implications, please contact any of the authors of this alert or the Hogan Lovells lawyer with whom you regularly work.

⁶ See *id.*

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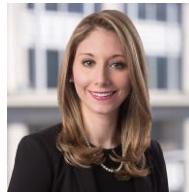
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