

Pacific Rim Advisory Council
September 2019 e-Bulletin

MEMBER NEWS

- DAVIS WRIGHT TREMAINE Set to Host PRAC 66th Intl Conference
- GIDE Boosts its M&A and Compliance Corporate Investigations Teams

COUNTRY ALERTS

- **AUSTRALIA** Hacked? Don't Expect Legal Professional Privilege To Stop Others Using Your Documents CLAYTON UTZ
- **BRAZIL** Agency Opens Public Consultation on Rules for the Internet of Things TOZZINIFREIRE
- **CANADA** Border Services Agency Publishes Update of Trade Verification Priorities - Are You Ready? BENNETT JONES
- **CANADA** Insurance: Include Mandatory Policy Language or Face Severe Consequences RICHARDS BUELL SUTTON
- **CHILE** New Public Consultation: Amendments to the Sanitary Foods Regulations Regarding Dietary Supplements and Other Matters CAREY
- **CHINA** Beijing Arbitration Commission Makes a Breakthrough Revision to Arbitrators Fees Schedule, Further Aligns with International Practices HAN KUN
- **COLOMBIA** Draft Constitutional Amendment of the Royalty System Moves Forward BRIGARD URRUTIA
- **COSTA RICA** Bill No. 21.292 Intends to Allow Non-resident Banks to Open a Local Branch in Costa Rica ARIAS
- **INDIA** Corporate Law Update KOCHHAR & CO.
- **MALAYSIA** Workers' Minimum Standards of Housing and Amenities (Amendment) Act 2019 SKRINE
- **LUXEMBOURG** Mandatory Disclosure Obligations for Intermediaries and Taxpayers Relating to Certain Cross-border Arrangements NAUTADUTILH
- **NEW ZEALAND** Guidance and Acceptance for Overseas Banks SIMPSON GRIERSON
- **S. KOREA** Immigration Alert on New National Health Insurance Service (NHIS) Rule Applicable to Foreigners in Korea KIM CHANG LEE
- **TAIWAN** Flexibility of and Accounting Rules for Surplus-Earning Distribution, and Effects on Taxation LEE AND LI
- **UNITED STATES** Fifth Circuit Says Texas Citizens Participation Act Does Not Apply in Federal Court BAKER BOTTS
- **UNITED STATES** Illinois Becomes First State to Regulate Employers' Use of Artificial Intelligence to Evaluate Video Interviews DAVIS WRIGHT TREMAINE
- **UNITED STATES** FDA Announces Public Meeting on Modernizing Food Standards of Identity HOGAN LOVELLS

Reach. Reliability. Resources.

CONFERENCES & EVENTS

66th International Conference
Seattle - Hosted by DAVIS WRIGHT TREMAINE
October 5 - 8, 2019
Registration Deadline September 01

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

Visit www.prac.org for Details

MEMBER DEALS MAKING NEWS

- ARIAS Nicaragua advises Banco Lafise Bancentro on a DPR transaction
- ARIFA Advises CitiGroup and JP Morgan in the Republic of Panama's Dual Offering of Global Bonds for an aggregate principal amount of US\$2 billion
- BAKER BOTTS Represents BP in \$5.6 Billion Sale of Alaska Business to Hilcorp
- BENNETT JONES Assists Business Development Bank of Canada
- CAREY Assists Mainstream Renewable Power Chile in New Financing Projects
- CLAYTON UTZ Software company FINEOS Successfully Lists on ASX
- DAVIS WRIGHT TREMAINE Helps Secure Appellate Decision Blocking Indiana Voter Purge
- DENTONS RODYK Advises Red Dot Payment in Acquisition
- GIDE and Chiomenti Advise in Sale of Mondadori France Share Capital to Group Reworld Media
- HAN KUN Advises Vipshop on its fully acquiring Shan Shan Commercial Group Co
- HOGAN LOVELLS Advised on Three HK Main Board IPOs
- NAUTADUTILH Assists Blauwtrust Groep
- SKRINE Advises Halliburton on Sale of Partial Stake in Bayan Project to Dialog Group Berhad
- TOZZINIFREIRE Assists FEMSA Enter Brazil's Convenience Store Market in Joint Venture

PRAC TOOLS TO USE

[PRAC Contacts](#)

[PRAC Member Directory](#)

[Events](#)

DAVIS WRIGHT TREMAINE LLP SET TO HOST PRAC 66TH INTERNATIONAL CONFERENCE

The Pacific Rim Advisory Council ("PRAC") member law firm DAVIS WRIGHT TREMAINE LLP will host the 66th International PRAC Conference, October 5-8 in Seattle. Member Firm delegates from around the globe will gather to participate in the various business sessions featuring topical professional development programs and business development opportunities. Invited local clients, guests and general counsel will also attend, lending insight on the various panel discussions. Included among the business sessions on tap:

- **Business Session #1** | Host Firm Briefing presented by Davis Wright Tremaine
- **Business Session #2** | Keynote Presentation: **Gary Locke**, Senior Advisor & Consultant, Davis Wright Tremaine and Former U.S. Secretary of Commerce and Ambassador to China; with **Mercy Kuo**, Vice President Strategic Services Pamir Consulting; former President Exec Director Washington State China Relations Council
- **Business Session #3** | PRACTice Management - *"Transforming Service Delivery Models"*
- **Business Session #4** | PRACTice Management - *"In-House Counsel - The View from Inside"*
- **Business Session #5** | PRACTice Development - *"Where Tech Disrupts Traditional Industries and Areas of Law"*
- **Business Session #6** | PRACTice Development - *"Shifting Landscapes in the Financial and Services Practice Sectors"*
- **Business Session #7** | PRACTice Management - *"Uphill, Into The Wind, In Deep Sand: Leading Changes in a Law Firm"*
- **Business Session #8** | PRACTice Management - *"Doing Good Across Borders"*
- **Business Session #9** | PRAC Business Development (a) *Member Firm Spotlight - Carey, Chile;* (b) *Group Roundtables - Bring a Message"*



Davis Wright Tremaine LLP is an internationally recognized AmLaw 100 law firm with more than 550 lawyers representing clients based throughout the United States and around the world. For more information about Davis Wright Tremaine visit www.dwt.com



ABOUT US: The Pacific Rim Advisory Council is an international law firm association with a unique strategic alliance within the global legal community providing for the exchange of professional information among its 29 top tier independent member law firms. Since 1984, Pacific Rim Advisory Council (PRAC) member firms have provided their respective clients with the resources of our organization and their individual unparalleled expertise on the legal and business issues facing not only Asia but the broader Pacific Rim region. Whether you are an institutional client or an emerging business our member firms are leaders in their fields and understand your business needs and the complexities of your industry.

With over 12,000 lawyers practicing in key business centers around the world, including Latin America, Middle East, Europe, Africa, Asia and North America, our prominent member firms provide independent legal representation and local market knowledge. For additional information about Pacific Rim Advisory Council or our member law firms, visit us online at www.prac.org

GIDE BOOSTS EXPERTISE IN M&A AND COMPLIANCE & CORPORATE INVESTIGATIONS TEAMS

PARIS 02 September 2019: Gide is pleased to announce the arrival of partners Caroline Lan and Jean-François Louit within its M&A practice. Caroline and Jean-François will join, with their team, with the aim of developing the practice area, which assists CEOs, managers, entrepreneurs and family shareholders.

Jean-François Louit and **Caroline Lan** are among the most active and most respected lawyers in this area, particularly with respect to the structuring and implementation of management packages, incentive plans and employee shareholder plans related to IPOs and private equity operations, and more generally on matters of governance and executive compensation.

They have advised management on major transactions involving listed and non-listed companies, such as: the merger of Idemia and Morpho; the acquisition of IPH by Advent; the takeovers of Primonial by Bridgepoint, of April by CVC and of Harvest by Five Arrows; CDPQ's investment in Delachaux; and the spin-off of Accor Invest.



Jean-François Louit (l) Caroline Lan (r)

In addition, they have advised management on IPOs, such as those of SPIE in 2015 or that of Sandro Maje in 2017, or more generally with respect to the implementation of incentive plans for listed companies.

They also advise family offices or leading family groups on corporate and M&A matters.

Their proximity to management teams with a strong entrepreneurial spirit focused on growth and internationalisation, and their ability to promote innovative solutions to management teams, aligns perfectly with Gide's entrepreneurial culture. They will give the firm's clients the benefit of their vast experience in a fast-growing field, essential for transactions and the development of company groups.

Together with their two associates, Vincenzo Feldmann and François Bossé-Cohic, Caroline and Jean-François join a Mergers-Acquisitions department which is among the most significant in the French market. With nearly 70 lawyers, including 20 partners, this team has advised on more than 70 transactions since the beginning of 2019.

Senior Partner, **Xavier de Kergommeaux**, and Managing Partner, **Stéphane Puel**, commented: *"We are delighted to welcome Caroline Lan and Jean-François Louit to the Gide partnership. The arrival of this new team and these appointments are perfectly in line with the firm's development plans in key areas for our clients."*

Caroline Lan and **Jean-François Louit** added: *"We are very happy to join Gide's teams in Paris, particularly its corporate team led by Olivier Diaz. The reputation and quality of their different practice areas in Paris will allow us to offer an even better and broader service to our clients. The Gide network and its international partners will support the development of our practice in France and abroad."*

.....CONTINUES NEXT PAGE

GIDE CONTINUED

PARIS August 2019: Gide is pleased to announce the arrival of Sophie Scemla as partner in its Paris office. Along with her team, Sophie will strengthen Gide's White Collar Crime and Compliance & Corporate Investigations practices.



Sophie Scemla

Drawing on over 20 years' experience in the fields of dispute resolution and white collar crime, Sophie Scemla is a recognised expert admitted to the Paris and New York Bars who specialises in preventing and managing criminal risks, combating international corruption, and leading corporate investigations.

Gide is a major player in compliance and corporate investigations, drawing on the firm's cross-border expertise, developed through its international network, and multi-disciplinary skills, in particular white collar crime, banking and finance law, international trade law, economic and competition law, tax law, employment law and data protection law.

Gide Paris numbers over 20 lawyers who specialise in white collar crime, including three dedicated partners, making it one of the largest and most recognised teams in France. Together, they steer the firm's anticorruption / anti-fraud group, part of its Compliance & Corporate Investigations practice.

Senior partner Xavier de Kergommeaux and managing partner Stéphane Puel indicate: "We are delighted to welcome Sophie Scemla to our firm. Her international experience in the fields of white collar crime, management of corporate investigations, and preventing corruption, constitutes a real asset for our clients, as they are increasingly facing significant compliance challenges in France and abroad. The arrival of this team and this appointment are perfectly in line with our firm's development ambitions and our role as advisor to our clients, so that we may help them face in the best possible way the challenges and developments of tomorrow."

Sophie Scemla adds: *"I am very pleased to join forces with Bruno Quentin and Jean-Philippe Pons-Henry, whom I have known for many years. Our complementary experience will enable us to offer our clients services that are dedicated to solving compliance issues and managing criminal risks, both in France and abroad. These fields are strategic and economic pressure points for companies and their leaders, as they are increasingly faced with the extraterritoriality of foreign legislations and must be defended by specialists. With its leading full-service offer and its multi-disciplinary positioning as an international law firm made in France, Gide was an obvious choice."*

For more information visit www.gide.com

ARIAS

ADVISES BANCO LAFISE BANCENTRO ON A DPR TRANSACTION

MANAGUA, 01 August, 2019: Arias acted as Nicaraguan counsel to Banco Lafise Bancentro in the sale, assignment, transfer, and conveyance of all the bank's Diversified Payment Rights and all collections thereunder to a Cayman Islands entity, as well as an issuance of bonds with the participation of the Bank of New York Mellon, as program agent.

Arias likewise advised the bank on a US\$100 million loan granted by various financial institutions, including Credit Suisse AG, Cayman Islands Branch, Bancaribe Curacao Bank N.V., Multibank Inc., Finantia UK Limited, Pacific Life Insurance Company, and Société de Promotion et de Participation pour la Coopération Economique S.A., amongst others, destined to financing Nicaraguan exporters. The Firm's role included advising on the financial structure of the transaction, but most importantly on local banking and supervisory regulations, ensuring compliance of local laws, validity and enforceability of the transaction. The deal closed August 6th, 2019.

This transaction is particularly relevant, as it is the first of its kind in Nicaragua, opening possibilities to diverse and innovative financing structures to local entities.

Counsel to Banco Lafise Bancentro:

Hogan Lovells, US counsel.

Arias, Nicaraguan counsels where Partners Bertha M. Argüello and Gustavo-Adolfo Vargas and Rodrigo Ibarra, Associate.

For additional information visit www.ariaslaw.com

ARIFA

ADVISES CITIGROUP AND JP MORGAN IN REPUBLIC OF PANAMA'S DUAL OFFERING OF GLOBAL BONDS FOR AN AGGREGATE PRINCIPAL AMOUNT OF US\$2 BILLION

PANAMA, 01 August, 2019

Completion Date: July 23, 2019

Client: Citigroup Global Markets Inc. and JP Morgan Securities LLC

Matter Value: US\$2 billion

Arias, Fabrega & Fabrega advised Citigroup Global Markets Inc. and JP Morgan Securities, acting as underwriters, in connection with a dual public offering by the Republic of Panama of US\$1.25 billion aggregate principal amount of 3.160% Global Bonds due 2030 and US\$750 million aggregate principal amount of 3.870% Global Bonds due 2060.

The combined offering of US\$2 billion aggregate principal amount of Global Bonds represents one of the largest, if not the largest single-day public offering of sovereign debt in Panama's history.

All firms involved: Sullivan & Cromwell, Arnold & Porter

ARIAS FABREGA & FABREGA team led by Estif Aparicio, lead partner, Cedric Kinschots, international senior associate, Ricardo E. Arosemena, associate.

For additional information visit www.arifa.com

BAKER BOTTS

REPRESENTS BP IN \$5.6 BILLION SALE OF ALASKA BUSINESS TO HILCORP

HOUSTON 27 August 2019: BP today announced that it has agreed to sell its entire business in Alaska to Hilcorp Alaska, based in Anchorage, Alaska. Under the terms of the agreement, Hilcorp will purchase all of BP's interests in the state for a total consideration of \$5.6 billion.

The sale will include BP's entire upstream and midstream business in the state, including BP Exploration (Alaska) Inc., that owns all of BP's upstream oil and gas interests in Alaska, and BP Pipelines (Alaska) Inc.'s interest in the Trans Alaska Pipeline System (TAPS). Subject to state and federal regulatory approval, the transaction is expected to be completed in 2020.

Baker Botts Lawyers/Office Involved:

Energy Projects: Dan Mark (Partner, Houston); Craig Vogelsang (Partner, Houston); Luke Burns (Senior Associate, Houston); Justin Clune (Associate, Houston); Alia Heintz (Associate, Houston); Branden Lankford (Associate, Houston); Tax: Robert Phillipott (Partner, Houston); Thor Fielland (Associate, Houston); Finance: Daniel Tristan (Partner, Houston); Litigation: Louie Layrisson (Partner, Houston); Laura Shoemaker (Associate, Houston)

For more information, please see BP's news release by clicking here. https://www.bp.com/en_us/united-states/home/news/press-releases/bp-to-sell-alaska-business-to-hilcorp.html

For additional information visit www.bakerbotts.com

BENNETT JONES

ASSISTS BUSINESS DEVELOPMENT OF CANADA IN \$5 MILLION SUBSCRIPTION SHARE

Mandate Details

Date Announced:	July 08, 2019
Date Closed:	June 28, 2019
Deal Value:	\$5,000,000
Client Name:	Business Development Bank of Canada

Bennett Jones LLP represented the Business Development Bank of Canada in the subscription by BDC Capital Inc., a subsidiary of BDC, for 987,763 Class D Preferred Shares of HiFi Engineering Inc. which closed on June 28, 2019. A strategic investor invested \$5,000,000 concurrently with the investment of BDC Capital.

For additional information visit www.bennettjones.com

CAREY

ASSISTS MAINSTREAM RENEWABLE POWER CHILE IN NEW FINANCING PROJECTS

SANTIAGO September 2019: Senior executives from Mainstream Renewable Power Chile and lawyers from Carey and Morales & Besa, marked the kickoff of the financing of the second portfolio of the Mainstream Renewable Power renewable energy project platform called Huemul. This portfolio, which includes three wind and two solar projects for a total of 621 MW, involves a bank financing of around US\$550 million. These projects are in addition to the Condor portfolio which already includes three wind projects and one solar for a total of 570 MW and financing of more than US\$500 million.

The financing process for the Condor portfolio is already underway.

For additional information visit www.carey.cl

CLAYTON UTZ

SOFTWARE COMPANY FINEOS SUCCESSFULLY LISTS ON THE ASX

SYDNEY 19 August 2019: Clayton Utz congratulates Irish technology company FINEOS Corporation Holdings plc on completing its initial public offering and listing on the Australian Securities Exchange on Friday, 16 August 2019 - making it the largest foreign technology company listed on the ASX to date.

Clayton Utz partner Stuart Byrne led the legal team advising FINEOS alongside Jonathan Algar. Other core team members included special counsel Natalie Krahe and senior associate Kwan Leung. FINEOS was also advised by Macquarie Capital and Moelis Australia as joint lead managers, as well as William Fry, KPMG and Mazars.

Commenting on the transaction, Stuart Byrne said: "FINEOS' admission to the ASX highlights the significant opportunity for foreign technology companies to seek liquidity and capital here in Australia."

"The successful listing of companies like FINEOS and the deep pools of capital available here will encourage more quality foreign businesses to consider the ASX as an attractive listing venue."

FINEOS listed on the ASX with an opening market capitalisation of around \$713 million.

For more information visit www.claytonutz.com

DAVIS WRIGHT TREMAINE

HELPS SECURE APPELLATE DECISION BLOCKING INDIANA VOTER PURGE LAW

AUGUST 28, 2019 – A 7th Circuit panel has affirmed a lower court's preliminary injunction, blocking an Indiana law that would have allowed county election officials to kick voters off the rolls immediately without notice.

On behalf of Common Cause Indiana and other plaintiffs, a DWT team led by Matt Jedreski—together with the ACLU, ACLU of Indiana, and the progressive public policy group Demos—challenged the law, which allows purging of voters, without notice or waiting period, based on a match in the Crosscheck program, which is known to frequently flag people incorrectly as potential double voters, especially those with unusual or ethnic names.

The law was scheduled to go into effect July 1, 2018, but in June, our team helped secure a preliminary injunction, blocking enforcement. We also defeated a motion to stay the case pending appeal of the injunction.

Working pro bono, a team including Jedreski, Grace Thompson, Kate Kennedy, and Erika Buck has since conducted additional depositions of county officials, issued public records act requests, and collected and reviewed over 30,000 documents from state contractors. The team will soon move for summary judgment. Trial is scheduled for 2020.

The Indiana litigation is part of a nationwide voting rights campaign, in partnership with the ACLU, involving more than 160 Davis Wright Tremaine attorneys and staff.

For more information visit www.dwt.com

HAN KUN

ADVISES VIPSHOP ON ITS FULLY ACQUIRING SHAN SHAN COMMERCIAL GROUP CO LTD.

BEIJING, 11 July 2019: Vipshop, a leading online discount retailer for brands in China, has recently signed a share purchase agreement in Shanghai with Shan Shan Group Co., Ltd. and Ningbo Xingtong Chuangfu Equity Investment Partnership. Pursuant to this agreement, Vipshop will fully acquire Shan Shan Commercial Group Co., Ltd. for RMB 2.9 billion in cash installments through Vipshop International Holdings Limited, a Vipshop's wholly-owned subsidiary in Hong Kong.

Han Kun represented Vipshop in the transaction as its PRC legal counsel, and was fully involved in designing the transaction structure, drafting and revising the transaction documents, and other ancillary documents.

For additional information visit www.hankunlaw.com

DENTONS RODYK

ADVISES RED DOT PAYMENT IN ACQUISITION

Dentons Rodyk were exclusive legal advisers to the founder and selling shareholders in the acquisition by PayU, the payments and fintech business of Naspers, of a majority stake in Red Dot Payment ("RDP").

PayU's acquisition of the majority stake in RDP is at a valuation of RDP at US\$65 million.

The founder, Mr Randy Tan, will continue to retain a stake in RDP, while the majority of other shareholders will exit.

Formed in 2011 by a group of payment experts from various Fortune 500 companies in the industry, RDP has grown into Singapore's largest home-grown and trusted online payment solutions fintech company, delivering innovative, secure and customised payment solutions for all enterprise sizes across Asia and beyond.

Senior Partner Valerie Ong and Partner Eunice Yao led the deal, supported by Associate Lim Hui Qi.

For additional information visit www.dentons.rodyk.com

GIDE

AND CHIOMENTI COUNSEL TO ARNOLDO MONDADORI EDITORE ON SALE OF ALL MONDADORI FRANCE SHARE CAPITAL TO GROUP REWORLD MEDIA

PARIS 01 August 2019: Law firms Gide and Chiomenti advised Italian press group Arnoldo Mondadori Editore on the sale of 100% of shares in Mondadori France to French media group Reworld Media. The sale was finalised on 31 July 2019.

Under the agreement, Mondadori France was valued at EUR 70 million, plus a potential earn-out.

The deal also provides for Arnoldo Mondadori Editore to hold an 8-10% stake in the share capital of Reworld Media.

This operation is part of Mondadori group's repositioning strategy that places increasing focus on its core business.

The Gide team advising Mondadori was led by partner Jean-Gabriel Flandrois, working with counsel Cira Caroscio on corporate/M&A aspects, partner Foulques de Rostolan and associate Benjamin Krief on labour law aspects, partner Franck Audran and associate Mehdi El Alem Champeaux on competition law aspects, and partner Thomas Binet on financing aspects.

The Chiomenti team was led by partners Luca Fossati and Luca Liistro, working with associate Alessandro Buscemi on corporate/M&A aspects, and partner Giorgio Cappelli on financing aspects.

For additional information visit www.gide.com

HOGAN LOVELLS

ADVISED ON THREE HONG KONG MAIN BOARD IPOs: TAI HING, MANPOWERGROUP GREATER CHINA, AND S.A.I. LEISURE

HONG KONG 22 July 2019 - In the past month Hogan Lovells has advised in relation to the Hong Kong IPOs of three companies, Tai Hing Group Holdings Limited ("Tai Hing"), ManpowerGroup Greater China Limited ("ManpowerGroup | Greater China"), and S.A.I. Leisure Group Company Limited ("S.A.I. Leisure") on the Main Board of the Stock Exchange of Hong Kong. The Hogan Lovells team, based in Hong Kong and led by partner Sammy Li and senior associate Samson Suen, worked tirelessly to ensure the success of these IPOs.

The high volume of IPO work being undertaken by the Hogan Lovells team is testament to their depth of experience, and knowledge of the sectors in which their clients and the issuers operate. Despite market volatility in the first half of this year, the team is currently advising on further deals, at least three of which are expected to close by year end. Further details about each completed IPO are set out below.

Tai Hing: Hogan Lovells advised BOCOM International (Asia) Limited (as sole sponsor), BOCOM International Securities Limited, Nomura International (Hong Kong) Limited, and China Tonghai Securities Limited (as joint global coordinators and underwriters) in the initial public offering and listing of Tai Hing on the Main Board of the Stock Exchange of Hong Kong.

Tai Hing is a leading multi-brand casual dining restaurant group originating from Hong Kong, with over 190 restaurants across Hong Kong, China, Taiwan, and Macau. Its brands include its flagship Tai Hing brand, as well as TeaWood, Trusty Congee King, Men Wah Bing Teng, Pho Le, Tokyo Tsukiji, Fisher & Farmer, Rice Rule, and Hot Pot Couple. In 2017 Tai Hing was the largest self-operated casual dining restaurant group in Hong Kong in terms of revenue, as well as the largest Taiwanese casual dining group in Hong Kong in terms of number of restaurants, and second largest in the self-operated casual dining restaurant market in China in terms of revenue, according to Frost & Sullivan. Tai Hing raised HK\$750m, and its shares began trading on the Main Board of the Stock Exchange of Hong Kong on 13 June 2019 under the stock code 6811.

The Hogan Lovells team was led by partner, Sammy Li, and supported by senior associate Samson Suen, and associate Tiffany Lam. Tai Hing's listing is the latest addition to Sammy Li's capital markets experience in the food and beverage sector, having previously advised in relation to the IPOs of other notable groups, including Tsui Wah, Tenwow, Hung Fook Tong, Fulum, and 1957 & Co.

ManpowerGroup Greater China: Hogan Lovells advised Huatai Financial Holdings (Hong Kong) Limited (as sole sponsor), Huatai Financial Holdings (Hong Kong) Limited, CLSA Limited, and Orient Securities (Hong Kong) Limited (as joint global coordinators), and the other underwriters in the initial public offering and listing of ManpowerGroup Greater China on the Main Board of the Stock Exchange of Hong Kong.

ManpowerGroup Greater China was the largest workforce solutions provider in the Greater China region (being China, Hong Kong, Taiwan, and Macau) by revenue in 2018, according to China Insights Consultancy. The workforce solutions provided by ManpowerGroup Greater China include headhunting, flexible staffing, recruitment process outsourcing services, and other human resources services. Its largest shareholder is ManpowerGroup Inc., a New York Stock Exchange-listed world leader in workforce solutions and services and a Fortune 500 company with a long history of over 70 years. ManpowerGroup Greater China raised HK\$495m, and its shares began trading on the Main Board of the Stock Exchange of Hong Kong on 10 July 2019 under the stock code 2180.

The Hogan Lovells team was led by partner, Sammy Li, and supported by senior associate Samson Suen, and associate Isabella Wong.

S.A.I. Leisure: Hogan Lovells advised BOCOM International (Asia) Limited (as sole sponsor), BOCOM International Securities Limited, China Everbright Securities (HK) Limited, and Haitong International Securities Company Limited (as joint global coordinators), and the other underwriters in the initial public offering and listing of S.A.I. Leisure on the Main Board of the Stock Exchange of Hong Kong.

S.A.I. Leisure is a leading leisure tourism group in Saipan and Guam, and operates a diversified and full-range leisure tourism business in Saipan, Guam, and Hawaii that is segmented into the hotels & resorts sector, luxury travel retail sector, and destination services sector. In 2017 S.A.I. Leisure's hotel & resorts business was ranked first in terms of revenue, number of properties, and number of rooms sold in Saipan, while its luxury travel retail business was a market leader in terms of number of boutiques and number of brands, according to Frost & Sullivan. S.A.I. Leisure raised HK\$318.6m, and its shares began trading on the Main Board of the Stock Exchange of Hong Kong on 16 May 2019 under the stock code 1832.

The Hogan Lovells team was led by partner, Sammy Li, and supported by senior associate Samson Suen, and associate Tiffany Lam.

For additional information visit www.hoganlovells.com

NAUTADUTILH

ASSISTS BLAUWTRUST GROEP

AMSTERDAM 06 September 2019: NautaDutilh assisted Blauwtrust Groep with the set-up of its multiple investors' mortgage investment platform. This platform enables (institutional) investors to invest in Dutch NHG mortgage loans under the label 'HollandWoont'. The HollandWoont platform establishes a flexible programme to which investors can accede and select their portfolio from time to time.

Blauwtrust Groep (which among others includes Quion Group and De Hypotheker) will manage the portfolio, supervise the mortgage loans' allocation and assist with Originator's daily management. It will also assume responsibility for the administrative settlement and servicing of the mortgage loans. This differs from similar platforms from other sponsors in which the mortgage loans' administrative settlement and servicing has been outsourced.

With this deal the NautaDutilh Structured Finance team has strengthened its position as market leader of structuring of (mortgage) lending platforms.

For additional information visit www.nautadutilh.com

SKRINE

ADVISES HALLIBURTON ON SALE OF PARTIAL STAKE IN BAYAN PROJECT TO DIALOG GROUP BERHAD

KUALA LUMPUR: 27 August 2019: Asia Energy Services Sdn. Bhd. ("AES"), an indirect wholly owned subsidiary of Halliburton Corporation today completed its disposal of a 25% equity interest in Halliburton Bayan Petroleum Sdn. Bhd. ("HBP") to Dialog D & P Sdn. Bhd. ("Dialog D & P"), a wholly owned subsidiary of Dialog Group Berhad, a Malaysian listed integrated oil & gas company. Post-completion, AES will continue to hold 25% equity interest in HBP with the remaining equity being held by Dialog D & P.

HBP is the independent technical service contractor for the Oilfield Services Contract entered into with Petronas Carigali Sdn. Bhd., to provide Contractor Services required to enhance the recoverable reserves from the Bayan Field. The Bayan Field is located offshore Bintulu, Sarawak with a term of 24 years (up to 2036).

Skrine advised Halliburton on all aspects of the transaction with the team being led by oil & gas partner, Fariz Abdul Aziz and supported associates, Karyn Khor and Jeralyn Kan.

For additional information visit www.skrine.com

TOZZINIFREIRE

ASSISTS FEMSA ENTER BRAZIL'S CONVENIENCE STORE MARKET IN JOINT VENTURE

SAO PALO 26 August 2019: TozziniFreire Advogados has helped Mexican beverage and retail company FEMSA purchase a 50% stake in convenience stores owned by Brazilian energy company Raízen for 560 million reais (US\$135 million).

Raízen Conveniências, the target, is a petrol station-based independent operator or franchise convenience store business with over sixty-two hundred Shell petrol stations across Brazil. FEMSA and Raízen will operate the target company as a joint venture.

Counsel to FEMSA TozziniFreire Advogados Partners Maria Elisa Verri and Francisco Neto, and associates Felipe Loiola and Verônica Campos.

For additional information visit www.tozzinifreire.com.br

PRAC EVENTS





The Pacific Rim Advisory Council is an international law firm association with a unique strategic alliance within the global legal community providing for the exchange of professional information among its 28 top tier independent member law firms.

Since 1984, Pacific Rim Advisory Council (PRAC) member firms have provided their respective clients with the resources of our organization and their individual unparalleled expertise on the legal and business issues facing not only Asia but the broader Pacific Rim region.

www.prac.org

With over 12,000 lawyers practicing in key business centers around the world, including Latin America, Middle East, Europe, Asia, Africa and North America, these prominent member firms provide independent legal representation and local market knowledge.



14 AUG 2019

Hacked? Don't expect legal professional privilege to stop others using your documents, says High Court

The High Court has not weakened the underlying principles of legal professional privilege in any way, but some unresolved issues mean you should seek independent advice on its availability and claiming it when dealing with the regulators.

Legal professional privilege won't stop documents taken as part of the Paradise Papers hack being used by the Australian Taxation Office in assessing tax liability, in a decision that both affirms traditional views of legal professional privilege, and leaves three key issues undecided:

- what, if any, legal remedy exists for someone whose privileged documents are hacked and then used against them by a government decision-maker;
- the admissibility of hacked documents in subsequent court cases; and
- limited use disclosure of privileged documents to government regulators.

(Glencore International AG v Commissioner of Taxation [2019] HCA 26).

Legal professional privilege a shield, not a sword

The High Court did not need to consider the particular statutory framework of the tax legislation, in finding that Glencore's case disclosed no cause of action.

While it affirmed that the public interest that supports LPP is paramount to "more general public interests" and that LPP, once found, is absolute, it confirmed the received wisdom: legal professional privilege is a shield, and not a sword. Where it applies it is a complete immunity from compulsory production of documents and information, but it does not provide a positive right to claim a remedy (for example, you cannot get an injunction to restrain the use of privileged documents and information).

There thus has been no change to the underlying law of legal professional privilege, and this case does not change or limit a client's right to claim legal professional privilege.

Is there another remedy for protecting hacked information?

Traditionally, threatened or actual misuse of LPP documents would be actionable in equity for breach of confidence. Glencore could not rely on this, however, as this cause of action requires some wrongdoing (or complicity in the wrongdoing).

of a third party) – and there were no allegations of wrongdoing made against the Commissioner or his officers in obtaining the documents. Furthermore, it was acknowledged that the fact of the Paradise Papers being in the public domain caused a significant difficulty for successfully arguing breach of confidence.

The case therefore leaves open for another day the question of whether a different outcome would be reached on a claim based on breach of confidence, either because there was wrongdoing by the party seeking to use the documents, or because the hacked or stolen documents are not made publicly available.

Are hacked documents admissible in Court?

The High Court recognised there could be undesirable inconsistency in having a government authority make decisions while disregarding publicly available documents, but it did not address the separate question of what happens if that decision is challenged in Court and the government authority wants to rely on those hacked documents.

In a tax context, this could mean that, while the Commissioner can use hacked documents in assessing a taxpayer's tax and issuing a notice of assessment, he might not be able to introduce them into evidence if the taxpayer commenced judicial proceedings to challenge the assessment, as documents subject to LPP cannot generally be admitted, and the Court has a separate discretion to exclude improperly obtained evidence. This may be equally true for judicial proceedings following decisions of the other major regulators and government decision-makers. The question of admissibility may be further complicated by the possibility in future cases that hacked documents may show some wrongdoing sufficient to trigger the fraud or illegality exception to legal professional privilege.

Protecting your documents subject to legal professional privilege post-Glencore

The High Court has not weakened the underlying principles of legal professional privilege in any way and made some strong comments affirming the paramount public interest in legal professional privilege and that LPP, when found is absolute. Clients' entitlement to claim LPP has not been weakened or qualified in any way.

But because of these unresolved issues, you should:

- seek independent advice on the availability of legal professional privilege and the process for claiming privilege when dealing with the regulators;
- stop the common but risky practice of limited use disclosure of LPP documents to government regulators, to allow for careful reflection on whether this decision tips the balance against doing so; and
- ensure that all Terms of Inspection, which are commonly prepared to facilitate LPP claim processes in the context of a statutory notice, expressly exclude the possibility of housing any documents or data with the Commissioner or under his control, example, with his legal advisers, to allow for careful reflection on the decision and how the decision is being understood by the ATO and the other regulators.

GET IN TOUCH



Andrew Sommer

PARTNER, SYDNEY
+61 2 9353 4837
asommer@claytonutz.com



Jonathan Donald

PARTNER, SYDNEY
+61 2 9353 4160
jdonald@claytonutz.com



Peter Feros

PARTNER, SYDNEY
+61 2 9353 4824
pferos@claytonutz.com



Mark Friezer

PARTNER, SYDNEY
+61 2 9353 4227
mfriezer@claytonutz.com



Allan Blaikie

CONSULTANT, SYDNEY
+61 2 9353 4201
ablaikie@claytonutz.com



Amber Agustin

PARTNER, MELBOURNE
+61 3 9286 6322
aagustin@claytonutz.com



Philip Bisset

PARTNER, BRISBANE | PERTH
+61 7 3292 7199 | +61 8 9426 8459
pbisset@claytonutz.com



Nicholas Mavrakis

PARTNER, SYDNEY
+61 2 9353 4621
nmavrakis@claytonutz.com



Jonathan Slater

PARTNER, SYDNEY
+61 2 9353 4715
jslater@claytonutz.com



Ian Bloemendal

PARTNER, BRISBANE
+61 7 3292 7217
ibloemendal@claytonutz.com

Disclaimer

Clayton Utz communications are intended to provide commentary and general information. They should not be relied upon as legal advice. Formal legal advice should be sought in particular transactions or on matters of interest arising from this communication. Persons listed may not be admitted in all States and Territories.

CONTACT US

Sydney	+61 2 9353 4000	Melbourne	+61 3 9286 6000
Brisbane	+61 7 3292 7000	Perth	+61 8 9426 8000
Canberra	+61 2 6279 4000	Darwin	+61 8 8943 2555



August 14, 2019

ANATEL opens Public Consultation on Rules for the Internet of Things

Telecommunications & Information Technology

The Brazilian Telecommunications Agency (ANATEL) opened, on August 2, 2019, the Public Consultation No. 39 to hear public opinion on a new regulation for Internet of Things (IoT) and machine to machine (M2M) technologies in Brazil.

This consultation aims to simplify the regulatory framework in order to expand IoT applications, and to determine which technologies can be framed as Value Added Services (VAS) and which ones are properly telecommunication services.

The new regulation also intends to discuss the business models that will require a telecommunication license, as well as which would be the most appropriate telecommunications service for IoT – Multimedia Communication Service (SCM), Private Limited Service (SLP), Personal Mobile Service (SMP) for terrestrial applications, or Global Mobile Satellite Service (SMGS) for mobile satellite applications – or even if it would be necessary to create a new telecommunication service.

The proposal for the IoT regulation is available on the ANATEL's Library website (<http://sistemas.anatel.gov.br/sacp>), and the deadline for submitting comments and suggestions is on September 19, 2019. ANATEL also informed that a public hearing to discuss these rules will be held in Brasília, but its date has not been determined yet.

www.tozzinifreire.com.br



Bennett Jones

Blog

CBSA Publishes Update of Trade Verification Priorities: Are You Ready?

September 04, 2019

Written by Darrel H. Pearson, Sabrina A. Bandali and Julie Wilson

The Canada Border Services Agency (CBSA) updated its online statement of its current trade verification (audit) priorities in July 2019. Importers of goods targeted for verification would be wise to ensure that they have reviewed their current customs compliance practices and are ready to respond if they are contacted by the CBSA.

Audits cover tariff classification, customs valuation and origin, and will commonly focus on one of these programs for a defined "verification period" (generally the last complete fiscal year). The result of the verification is considered "reason to believe", on the part of the importer, that it has contravened the *Customs Act*, and requires the amendment of past import entries made commencing up to four years prior to the date of correction.

Tariff classification, origin and value for duty are the elements that collectively determine the amount of regular customs duties and goods and services tax (GST) payable when goods are imported into Canada:

- The **tariff rate** (i.e., duty rate) applicable to imported goods is derived from their **tariff classification** (that is the category of goods in which they fall as set out in the *Schedule* to the *Customs Tariff*), and their **origin** (under rules of origin that determine the applicable tariff preference).
- **Customs valuation** relates to the basis of appraisal of their import value (**value for duty**).



- **Duty amounts payable** are calculated by multiplying the **value for duty** by the **tariff rate**.
- **GST** applicable at the border is calculated by multiplying the **duty paid value** of the imported goods (the **sum** of the **value for duty** and the applicable **customs duty**) by five (5) percent.

Verification priorities are established throughout the year and reflect the CBSA's assessed risk of non-compliance with customs rules for certain categories of imported goods.

Not all audits are based on verification priorities. To promote compliance, the CBSA also conducts random verifications based on a number of factors including risk assessment, revenue, and complaints. All importers are at risk of random verifications. Compliance with trade rules not only ensures that correct amounts of duties and taxes are collected, but also supports Canada's trade negotiations by ensuring the accuracy of government trade data.

The CBSA's current verification priorities for the programs of tariff classification, customs valuation, and origin are as follows:

Tariff Classification	
Air Heaters and Hot Air Distributors	Heading 73.22
Articles of Apparel and Clothing Accessories	Heading 39.26
Articles of Plastics	Subheading 3926.90
Bags	Heading 42.02
Batteries	Heading 85.06
Castors with Mountings of Base Metal	Heading 83.02
Cell Phone Cases	Headings 39.26, 42.02 and 85.17
Disposable and Protective Gloves	Subheadings 3926.20.91 and 4015.19
Flashlights and Miners' Safety Lamps	Heading 85.13
Footwear (\$30 or more per pair)	Heading 64.03
Furniture for Non-Domestic Purposes	Headings 94.01 and 94.03
Gloves	Headings 39.26 and 42.03
Import Permit Numbers (i.e., for goods subject to tariff rate quotas under Canada's supply management system)	Chapters 2 and 4
Olive Oil	Headings 15.09 and 15.10
Other Chemical Products	Heading 38.24
Other Mountings and Fittings, Suitable for Furniture	Heading 83.02
Parts for Use with Machinery of Chapter 84	Heading 84.31
Parts of Lamps	Heading 94.05
Parts of Machines and Mechanical Appliances	Heading 84.79
Pasta	Heading 19.02

Pickled Vegetables	Heading 20.01
Safety Headgear	Subheading 6506.10
Spent Fowl	Headings 02.07, 16.01 and 16.02
Stone Table and Counter Tops	Heading 94.03
Vices and Clamps	Heading 82.05

Customs Valuation	
Apparel	Chapters 61 and 62
Footwear	Chapter 64

Origin	
Bedding and Drapery <i>(risk focuses on U.S. manufacturers using non-NAFTA inputs and NAFTA origin claims)</i>	Various goods of Headings 63.01, 63.02 and 63.03

The CBSA provides the identified risks of non-compliance for each verification priority on its website.

While most current verification priorities are continued from previous years, two tariff classification priorities are new: (i) Other Chemical Products, and (ii) Parts of Machines and Mechanical Appliances. Several verification priorities have been removed since the CBSA's last publication in January 2019.

The CBSA also publishes aggregated audit results by verification priority. The rates of non-compliance are high, and exceed 50 percent for the majority of the results published as of July 2019. Several rounds of verification had 100 percent non-compliance. Non-compliance results in assessments of duties, GST, and, frequently, administrative monetary penalties, on a retroactive basis.

The high rates of non-compliance serve as a reminder to importers to review their customs practices, especially for goods covered by the CBSA's verification priorities. Related party transactions and transfer pricing arrangements are particularly important aspects of customs valuation practices that should be carefully reviewed on a regular basis to ensure contemporaneous documentation (written intercompany agreements and transfer pricing studies) are appropriate and up to date and that practices conform.

If you would like to discuss your company's compliance with Canada's customs rules, please contact the authors, or any member of the Bennett Jones International Trade and Investment group.

AUTHORS

Darrel H. Pearson, *Partner*

Sabrina A. Bandali, *Associate*

Julie Wilson, *Associate*

[Privacy Policy](#) [Disclaimer](#) [Terms of Use](#)

© Bennett Jones LLP 2019 All rights reserved. Bennett Jones refers collectively to the Canadian legal practice of Bennett Jones LLP and the international legal practices and consulting activities of various entities which are associated with Bennett Jones LLP





Posted on: September 4, 2019

INCLUDE MANDATORY POLICY LANGUAGE OR FACE SEVERE CONSEQUENCES

By: Julie Facchin

The British Columbia Supreme Court in *PCL Constructors Westcoast Inc. v. Royal & Sun Alliance Insurance Company of Canada*, 2019 BCSC 822, addressed whether an insured's claim to coverage was subject to a \$250,000 deductible. Although the insured builder had agreed to the deductible in its contract with the property owner and the subject insurance policy referenced the same deductible, the insurer did not include in the policy wording required by section 31 of the British Columbia *Insurance Act*. Based on this omission the court concluded that the claim was not subject to a deductible.

The Facts

In 2012, PCL entered into a contract with the City of Victoria to build a bridge (the "Construction Contract"). The Construction Contract included terms that the City would obtain builder's risk insurance that would require a \$250,000 deductible and that PCL would be responsible for payment of the deductible in the event of a claim on the policy.

The City obtained the builder's risk insurance policy (the "Policy") but the Policy omitted a statement on the first page that "This policy contains a clause which may limit the amount payable" as required by s. 31 of the *Insurance Act* (the "Mandated Alert")

During construction in 2015, water damage occurred to the concrete foundations of the new bridge. PCL provided notice of the occurrence and requested coverage for its loss of about \$544,000.

Following a court determination that PCL was an insured under the Policy the insurer adjusted the claim at \$520,000 and reduced the amount payable to PCL to \$270,000 based on PCL's obligation to pay the \$250,000 deductible. PCL challenged the insurer's decision to withhold payment of the deductible amount from the claim.

The Ruling

PCL argued that its claim was not subject to a deductible because the Policy was missing the Mandated Alert. The insurer countered that it would be inequitable to refuse to enforce the deductible given that the



Construction Contract included a term requiring PCL to pay it. PCL knew of and accepted this Construction Contract term and the Policy, with PCL's knowledge, was consistent with the Construction Contract. The insurer argued that acceding to PCL's position on the missing Mandated Alert would give it a windfall at the insurer's expense.

In considering the effect of the missing Mandated Alert the court examined cases dating back to 1977 that dealt with similar legislative provisions in both British Columbia and Ontario. The court concluded that provisions such as section 31 are to be "strictly construed against the insurer whether or not" the insured was aware of the deductible. If the Mandated Alert does not appear on the front page of the policy the deductible is not in effect. Underlying this conclusion is a determination that this statutory requirement is for the benefit of the insured.

The court went on to consider the insurer's equitable arguments and rejected each of them. It concluded the law is settled that section 31 is to be strictly construed even when an insured is aware of a deductible and agreed to it and that equitable remedies are not available against statutory duties. The latter conclusion precluded the insurer's attempt to rectify its "drafting" or "clerical" error.

We pause to note that although the court does not make any findings regarding the insurer's conduct in response to PCL's claim, there is a flavour of disapproval. This comes through in the otherwise irrelevant review of the insurer's ill-conceived initial denial of coverage, its subsequent failure to take a position on PCL's coverage hearing and its subsequent delay in adjusting PCL's claim.

Practical Considerations for Insurers

This case stands as a stark reminder that compliance with technical legislative requirements in the context of insurance policy contents is absolutely imperative. These technical requirements extend to exact wording, location of that wording and in some cases the colour of ink with which that wording must be impressed. Failure to comply with any single of these technical requirements can render insurance policy provisions that limit the amount payable under a policy meaningless not only with respect to deductibles, but, in British Columbia, co-insurance or similar clauses and conditional or unconditional specified percentage of value clauses.

We strongly recommend that insurers review their policy forms in order to ensure strict compliance with the legislative provisions in the various jurisdictions in which they provide insurance.

At a more general level, this case highlights the importance of complying with statutory requirements in policy drafting. Even if an insured has otherwise agreed to a term or there are other documents proving that



the insured intended a term to be included, if the policy does not meet the statutory requirements, that term will not be enforceable.

Finally, this case demonstrates the potential effects of taking steps which a court considers to be objectionable such as unfounded initial coverage denials, delays in adjusting claims, and the taking of inconsistent legal positions. Even if these steps do not rise to the level of punitive cost awards or claims in bad faith they can lead to court criticism or worse.

This decision has not been appealed.

This article was authored by Associate, Julie Facchin. If you have any questions related to this, please contact Julie directly at 604.661.9276 or jfacchin@rbs.ca.

September, 2019

NEW PUBLIC CONSULTATION: AMENDMENTS TO THE SANITARY FOODS REGULATIONS REGARDING DIETARY SUPPLEMENTS AND OTHER MATTERS

The Ministry of Health has recently published a new public consultation process regarding proposed amendments to Titles: Preliminary; II "Of Foods"; XX-VII "Of Non-Alcoholic Beverages, Fruit and Vegetable Juices and Bottled Waters"; and XXIX "Of Dietary Supplements and Foods for Athletes" of Decree No. 977/1997 which sets forth the Sanitary Food Regulations (herein, "RSA").

This public consultation process will open for comments until [October 5, 2019](#).

Among the most relevant aspects of this public consultation are important modifications to the regulation applicable to food supplements in Chile, regarding which we can highlight the following:

- 1. Limitation of the concept of "Product for Athletes":** The new proposed article 537 bis provides a closed list of foodstuff that may use the denomination "Product for Athletes" and *all of the provisions that currently regulate "Foods for Athletes" in the RSA are eliminated*.

According to said article, the denomination "Product for Athletes" can only be used for foodstuff that qualifies as: *isotonic beverages, protein supplements, amino acid supplements or creatine supplements*. Hence, the use of the concept "Product" or "Food" for athletes would be forbidden for any product which does not fulfill the regulatory requirements for such categories.

- 2. New category of "Supplemented Foods":** The proposal replaces Paragraph II of Title XXIX of the RSA, currently referred to "Foods for Athletes", creating a new category, "Supplemented Foods" (art. 538 and subsequent). Thus, proposed article 538 defines "Supplemented Foods" as *"foods that do not have a pharmaceutical presentation, which have one or more added vitamins or minerals in supplement concentrations, or that have addition of other substances naturally present in foodstuff"*.

In this context, the proposal sets forth that the compounds or ingredients used in order to add vitamins, minerals or other substances to this type of food shall be those indicated in document CAC/GL 10-1979 of the Codex Alimentarius.

Additionally, the proposal establishes the prohibition to formulate foodstuff that qualify as "High in" one or more critical nutrients as "Supplemented Foods".



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

Ignacio Gillmore
Partner
+56 2 2928 2612
igillmore@carey.cl

Cristina Busquets
Associate
+56 2 2928 2665
cbusquets@carey.cl

Alejandra Del Rio
Regulatory Affairs Manager
+56 2 2928 2766
adelrio@carey.cl

Javiera Péndola
Patent and Regulatory Affairs Specialist
+56 2 2928 2766
jpendola@carey.cl

This news alert is provided by Carey y Cía. Ltda. for educational and informational purposes only and is not intended and should not be construed as legal advice.

Carey y Cía. Ltda.
Isidora Goyenechea 2800, 43rd Floor.
Las Condes, Santiago, Chile.
www.carey.cl

Advertisement of “Supplemented Foods”: The proposal provides that healthy nutritional declarations may be used for this type of products insofar as they comply with the corresponding requirements for such use (Resolution No. 860/2017).

These foods shall indicate, on the main face or panel of their labeling or in a visible part thereof, “SUPPLEMENTED FOOD WITH ...”, followed by the corresponding nutrient or substance, in compliance with the graphic requirements set forth therein. Also, the proposal includes the obligation to incorporate the following caption on the label and advertisement of these products: “FOR CHILDREN AND PREGNANT WOMEN OR WHILE BREASTFEEDING, THIS PRODUCT SHALL BE RECOMMENDED BY A HEALTH CARE PROFESSIONAL”, as well as the application of the same requirements set forth regarding the nutritional information table for dietary supplements.

- 3. Change of the definition of “dietary supplements”:** The proposal contains an amendment of the definition of dietary supplements contained in article 534 of the RSA. Although the new proposed definition contains all of the elements of the currently applicable definition, it includes certain new aspects, mainly, the requirement that, in order to be qualified as a dietary supplement, products, *“shall have presentations for oral consumption exclusively, such as powder, liquids, granulates, tablets, capsules or similar, of conventional liberation.”*

In this context, the proposed new second paragraph of article 535 restricts the compounds or ingredients that may be used to add vitamins, minerals or other substances *to those indicated in document CAC/GL 10-1979 of the Codex Alimentarius.*

Moreover, *the definitions of supplementation and complementation, currently contained in numbers 5 y 6 of article 106 of the RSA are eliminated.*

- 4. Rules regarding advertisement:** The proposal includes a change in the drafting of the first paragraph of article 537, clarifying that the labeling and advertisement of dietary supplements must comply, both with the general rules applicable to all foodstuff, as well as with the special rules applicable to this particular category.

Further, new proposed article 537 provides the graphic requirements applicable to the denomination “Dietary Supplements” and modifies the warning messages that said products must include in their label and advertisement.

Also, this proposal incorporates a *new obligation with regard to advertisement* of dietary supplements, setting forth the obligation to include the message, *“Supplements do not replace a balanced diet in accordance with the Dietary Guidelines”*, in all advertisement of these products made through means of mass communication.

5. Nutritional Information Table: On the other hand, the new drafting of article 537 includes the obligation of incorporating the content of the nutrients or other especial substances that have been used with supplementation purposes, in the nutritional information table of the product, for every 100 g y and per serving. Moreover, the proposal sets forth the obligation to label the **maximum amount of daily servings** of the product.

Finally, the proposal sets forth that dietary supplements shall always be sold packed from the manufacturing facility, forbidding sales of these products in other formats (e.g., fractionated or in bulk).

6. Modification of the exceptions to the obligation of labeling the descriptor "High in": Lastly, the consultation modifies the exceptions to the obligation of labeling the nutritional descriptor "High in", set forth in article 120 bis of the RSA, by eliminating, "foods for athletes", which, *"comply with the requirements established in letters a), b), c) and d) of article 540."* from such exemption. It is worth noting that the proposal does not incorporate "Supplemented Foods" within the exempt categories.

Finally, the public consultation also includes three additional documents to the proposed amendments to the RSA, regarding supplementation levels and declarations that can be made regarding dietary supplements. These supplementary documents are:

a) Resolution that, *"Sets forth the Guidelines for the Declaration of Nutritional Properties in Dietary Supplements"*;

b) Resolution that, *"Sets forth Authorized Nutritional Properties for Dietary Supplements"*; and

c) Resolution that, *"Sets Forth Nutritional Guidelines for Dietary Supplements and Supplemented Foods and their content of Vitamins, Minerals and other substances"*.

Please find more information and the complete text of the public consultation [here](#).



漢坤律師事務所
HAN KUN LAW OFFICES

Han Kun Newsletter

Issue 148 (8th edition of 2019)

1. Beijing Arbitration Commission Makes a Breakthrough Revision to Arbitrator's Fee Schedule, Further Aligns with International Practices

Authors: Xianglin CHEN | Ying SUN

On July 19, 2019, the Beijing Arbitration Commission (“**BAC**”) issued a new version of the *Beijing Arbitration Commission Arbitration Rules* and an appendix “Fee Schedule” (which will be effective on September 1, 2019, the “**New Rules**”). The New Rules introduce revisions or formulate new provisions, including with respect to the fee schedule, the administration of arbitration procedures, and multi-contract arbitrations. Among them, the revision of the arbitrator's fee schedule is considered to be groundbreaking and of great significance.

How arbitrator's fees are charged is a significant issue in international and domestic arbitrations

Arbitrator's fees are of importance because:

- First, they determine to a certain extent the cost of the parties to participate in arbitration proceedings.
- Second, they relate to and influence the arbitrators' commitment to the case in terms of time and energy.
- Third, a reasonable fee schedule can effectively improve the specialization and professionalism of arbitrators, and provide assurance as to the independence and impartiality of arbitrators.

There have long been substantial differences in the arbitrator's fee schedule between domestic and international arbitration institutions

These differences mainly include:

- First, in domestic arbitration, the arbitrator's fee charging standards and amounts are not transparent. Domestic arbitration institutions typically publish the fee schedule, which mainly includes a case acceptance fee and a case handling fee. However, the percentage of the fees which will be paid to the arbitrator is unclear to the parties, nor is such percentage specified in the arbitral award. This differs from international arbitrations, where the calculation and amount of the arbitrator's fee is disclosed and clear to the parties.
- Second, in domestic arbitration, the parties have no right to decide the arbitrator fees charging rules. The arbitrator fee charging rules are essentially determined by the arbitration institution, while the parties and arbitrators have no say in that process. However, in international arbitrations, the parties may negotiate with the arbitrators regarding their fees.
- Third, in most cases, domestic arbitration institutions do not charge arbitrator fees on an hourly basis (especially for domestic arbitrators). However, in the course of international arbitrations, hourly billing is a widely adopted and accepted charging method for arbitrators.

The New Rules make breakthrough revisions to the arbitrator's fee schedule, further aligning with international arbitration practices

The revisions mainly include:

I. Giving transparency to arbitrator fees by clearly dividing arbitration fees into arbitrator's fees and administration fees

According to the 2015 edition of the *Beijing Arbitration Commission Arbitration Rules* (the "**Current Arbitration Rules**"), like most domestic arbitration institutions, the fees BAC charges are divided into two parts: the case acceptance fee and the case handling fee.

The New Rules divide the fees charged by the BAC into "arbitrator's fees" and "administration fees", to replace the previous "case acceptance fees" and "case handling fees", which improves the transparency of BAC arbitrator fees.

II. Setting minimums and maximums for arbitrator's fees and administration fees

■ Appropriately raising minimum fees

According to the Current Arbitration Rules, the minimum fee is RMB 14,550 for arbitration cases involving amounts in dispute of up to RMB 250,000. Since the current charging standards are insufficient to cover the arbitrator's fees and administration costs, the New Rules provide that for cases involving amounts of RMB 250,000 or less, the minimum arbitrator's fee is RMB 12,000 and the minimum administration fee is RMB 5,000, a total of RMB 17,000.

■ Setting a maximum fee amount

In addition to raising minimum fees, the New Rules also set capped fees to reduce arbitration costs of parties when administering cases involving large amounts in dispute. Specifically, the arbitrator's fee may not exceed RMB 18 million (for three arbitrators), which corresponds to an amount in dispute of RMB 8.682 billion. The administration fee may not exceed RMB 8.761 million, which corresponds to an amount in dispute of RMB 5 billion. This means that the total fee cannot exceed these capped amounts for arbitrator's fees and administration fees, even if the amount in dispute in an arbitration case exceeds RMB 8.682 billion or RMB 5 billion, respectively.

Compared with the fee schedule in the Current Arbitration Rules, the use of these capped amounts will effectively control the arbitration costs of the parties.

III. Allowing parties the option to pay arbitrator fees on an hourly basis

It is common in international arbitration for arbitrators to bill at hourly rates. Hourly billing has its advantages, for example, it may encourage arbitrators to invest adequate time and effort in the case and ensure quality case handling. In addition, the arbitrator's fees will be proportionate to his or her efforts and therefore better reflect the value of the arbitrator's professional skills and service.

According to the New Rules, arbitrators may charge fees on an hourly basis, provided it is so provided in an agreement between the parties. However, the hourly rate cannot in principle exceed RMB

5,000, in order to control the parties' arbitration costs.

IV. Implementing a new fee schedule for emergency arbitrator procedures

According to the Current Arbitration Rules, the fee schedule for emergency arbitrator procedures are as follows: RMB 10,000 for a single interim measure and an additional RMB 2,000 for each interim measure thereafter.

The New Rules revise the original charging method and divide the fees into administration and emergency arbitrator's fees. Generally, the administration fee is fixed at RMB 10,000 and the emergency arbitrator's fees are a minimum of RMB 20,000. The fees may be increased appropriately depending on the specific circumstances of the case. The parties may also agree that the emergency arbitrator's fees be calculated at an hourly rate, which should be determined by the parties and the emergency arbitrator through negotiations.

V. Expedited procedures are now available for cases involving amounts not exceeding RMB 5 million, rather than the previous RMB 1 million

According to the Current Arbitration Rules, expedited procedures generally apply to cases in which the amount in dispute does not exceed RMB 1 million. The New Rules increase this amount to RMB 5 million. The parties may, however, continue to apply the ordinary procedures in cases not exceeding RMB 5 million if they so agree.

The primary differences between the expedited procedure and the ordinary procedure are that the expedited procedure is tried by a sole arbitrator and the timing of the arbitration is more compact. Handling cases with amounts in dispute of not more than RMB 5 million through the expedited procedure, can effectively improve the efficiency of resolving such cases. At the same time, however, greater requirements are placed on the professional competence of the arbitrator.

Overall review of the breakthrough revisions to the arbitrator's fee schedule in the New Rules

In general, the BAC's latest revisions to the arbitrator's fee schedule are of great significance for promoting the integration of domestic institutional arbitration with international arbitration practices and promoting the professionalism of domestic arbitrators, which are reflective of BAC's efforts to promote the internationalization of Chinese arbitration.

How arbitrators charge their fees is, of course, only one of the main aspects of arbitration. It is necessary to ensure that these revisions can actively promote the overall development of the arbitration system and ensure that arbitration, as the primary method for dispute resolution, achieves the dual value objectives of fairness and efficiency, which still relies on the advancement of other elements.

Important Announcement

This Newsletter 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.

If you have any questions regarding this publication, please contact:

Beijing	Wenyu JIN	Attorney-at-law
	Tel:	+86-10-8525 5557
	Email:	wenyu.jin@hankunlaw.com

Shanghai	Yinshi CAO	Attorney-at-law
	Tel:	+86-21-6080 0980
	Email:	yinshi.cao@hankunlaw.com

Shenzhen	Jason WANG	Attorney-at-law
	Tel:	+86-755-3680 6518
	Email:	jason.wang@hankunlaw.com

Draft Constitutional Amendment of the Royalty System Moves Forward

August 1, 2019

The National Government aims at reforming the Royalties System.

The National Government issued Decree 1297 of 2019 by means of which it ordered the publication of the draft Constitutional Amendment of article 361 of the Political Constitution regarding the Royalties System.

The National Government issued Decree 1297 of 2019 by means of which it ordered the publication of the draft Constitutional Amendment of article 361 of the Political Constitution regarding the Royalties System (the "Draft").

Currently, royalties are distributed in equal parts among all departments and municipalities of the country and are destined to various funds with the purpose of promoting science, technology and innovation, public savings, among others.

With the amendment proposed by the Draft, the distribution of royalties will change dramatically as indicated below:

- 34% for regional investment projects of regional governments, prioritized on the base of criteria of unsatisfied basic needs, population and unemployment.
- 20% for departments and municipalities in which exploitation of non-renewable natural resources is carried out, as well as municipalities with ports used for transporting such resources or their by-products. In addition, municipalities where non-renewable natural resources are produced will be entitled to an additional 5% participation on royalties.
- 15% for municipalities with the lowest income in the country, prioritized based on criteria of unsatisfied basic needs.
- 10% for investments on science, technology and innovation.
- 3% for the performance, operation and administration of the Royalty System, for the oversight of exploration and exploitation of deposits, the study and drafting of geological cartography of the subsoil, the evaluation and follow-up on the environmental licensing of exploration and production projects involving non-renewable natural resources, among others.
- 1% for the conservation of strategic ecosystems, national parks and water sources, as well as the national fight against deforestation.
- The remaining 17% will be destined to savings for pension liabilities and for the stabilization of the investment.

In addition, transitional paragraph 2 of the Draft sets forth that the National Government will have a maximum term of six months, counted as from the enactment of the Constitutional Amendment, to file before Congress a bill that adjusts the General Royalty System to the new text of article 361.

After this first round of debates before Congress, the Project will have to undergo a second round of four debates in which it will have to be approved by absolute majority in both, the Senate and the Chamber. This second round of debates must conclude before December 16, 2019, date in which the ordinary period of sessions of Congress ends.

For more information contact our team info@bu.com.co

www.bu.com.co



Bill No. 21.292 intends to allow non-resident banks to open a local branch in Costa Rica

August, 2019

As part of the process of entering the OECD and with the aim of guaranteeing financial stability, the Costa Rican congress recently approved a Bill of Law allowing branches of foreign banks to operate in Costa Rica and form part of the National Banking System.

Currently, only locally constituted corporations (sociedades anónimas) can obtain a banking license and perform financial intermediation which allows them to receive deposits from the public and use that money in lending or other financial activities (lending activity per se by local or foreign lenders does not require a banking license).

With this legal reform, foreign banks will be allowed to establish a local branch and perform financial intermediation as well as all financial activities authorized to private banks in Costa Rica. These branches will be considered as extensions of the foreign bank and not as a separate legal entity.

To register a branch of a foreign bank, the law establishes the following requirements:

- a)** Proxy to a local representative who will head the branch, in accordance with the requirements established in Article 226 of the Code of Commerce;
- b)** Proof that the foreign bank is duly authorized by the competent authority in its country of origin;
- c)** An indication that the object of the branch is exclusive and limited to the banking activity in accordance with Costa Rican laws;
- d)** Indication of the domicile in which the branch will have its physical presence;
- e)** The branch shall have assigned a minimum capital, in accordance with the regulations issued by CONASSIF;
- f)** The foreign bank is subject the regulations and competent financial supervisor in its country;
- g)** The competent authority in the country of the foreign bank shall grant a "no objection" with respect to the creation of the branch.

Additionally, CONASSIF (the financial regulator) will need to issue further regulations detailing additional requirements that must be met to register foreign bank branches (including capital requirements). These branches will also be supervised by the banking regulator (SUGEF).

Bill 21.292 has already been approved in Congress and is awaiting the signature of the President and publication in the official newspaper to become a law.

Written by:

Diego Gallegos-Senior Associate

Felipe Volio –Paralegal

www.ariaslaw.com



Suit no. 1120-21, 11th Floor, Tower A, DLF Towers Jasola,
Jasola District Center, New Delhi – 110025, India

Tel: 91 11 41115222,

Fax: 91 11 40563813,

E-mail: delhi@kochhar.com

INDIAN OFFICES:

New Delhi, Mumbai, Bangalore, Chennai, Gurgaon, Hyderabad

OVERSEAS OFFICES: Atlanta, Dubai, Singapore, Jeddah (affiliate office)

www.kochhar.com


Dear Sirs,

We are writing to you to provide an update on the current development in the Companies Act, 2013. We hope that the update would be useful to you, your organisation and your clients.

Warm regards,

Kochhar & Co.

MCA UPDATE – JULY 2019

What	When	Summary	Resources
1. Notification of Ministry of Corporate Affairs ("MCA") with regards to filing / verification of KYC details of the directors	25.07.2019	<p>The Ministry of Corporate Affairs ("MCA") has notified the Companies (Appointment and Qualification of Directors) Third Amendment Rules, 2019. With the notification of these Rules, the ambiguity as regards the filing of KYC details of the directors every year has been removed. As per the aforesaid Rules, every director (who is having a Director Identification Number (DIN) as on March 31, 2019 is required to file / update / verify his KYC details with the MCA on or before September 30, 2019.</p> <p><u>Who has to file DIR-3 KYC</u></p> <ol style="list-style-type: none"> 1. Every director who holds DIN as on March 31, 2019. Those directors who have already filed DIR-3 KYC last year and there are no changes in the details furnished earlier, have to verify the details through <u>(Web Service) DIR-3 KYC-Web</u>. No documents are required to be submitted in such a case. However, an online verification shall be done through an OTP, to be generated and sent on the mobile number and e-mail id of the director (as furnished last year while filing the KYC). 2. However, in the event there is any change in the information (with regards to the e-mail id and mobile number) provided earlier, the directors have to file an online Form DIR-3 KYC. For filing the Form DIR-3 KYC, we would require the following documents / information. 	<p><u>KYC Directors.pdf</u></p>  <p>MCA notification KYC.pdf</p>

		<p><u>Information required</u></p> <ul style="list-style-type: none"> • Personal mobile number along with country code • Personal e-mail id <p><u>Documents required</u></p> <p>➤ <u>Foreign citizen</u></p> <ul style="list-style-type: none"> • Notarised and apostilled copy of passport; • Notarised and apostilled copy of bank statement / mobile bill / electricity bill / telephone bill in the name of the applicant (any one)- not older than 2 months <p>➤ <u>Resident of India</u></p> <ul style="list-style-type: none"> • Self-attested copy of passport / voter id / aadhaar card / driving license (self-attested) • Self-attested copy of PAN Card (self-attested) • Self-attested copy of bank statement / mobile bill / electricity bill / telephone bill in the name of the applicant (any one)- not older than 2 months (self-attested) <p>3. For a director who has not filed the KYC earlier, the documents / information would remain same as mentioned in Point 2 above.</p>	
--	--	--	--



Luxembourg

Luxembourg Tables DAC 6 Bill

Monday 26 August 2019

*On 8 August 2019, the Luxembourg government tabled Bill No 7465 (the "**Bill**") implementing Council Directive (EU) 2018/822 ("**DAC 6**") on mandatory disclosure obligations for intermediaries and taxpayers relating to certain cross-border arrangements. The Luxembourg government decided not to extend the minimum requirements set by DAC 6. The Bill must now pass through the legislative process and is thus subject to amendment.*

Reporting obligations

The reporting obligations apply primarily to intermediaries, defined as any person designing, marketing, organising, making available for implementation or managing the implementation of a reportable arrangement, including persons that know, or could reasonably be expected to know, that they have agreed to provide assistance or advice in relation to the abovementioned services. In view of the attorney-client privilege, lawyers will be subject to less stringent reporting obligations, limited to anonymised information of a general nature in relation to reportable cross-border arrangements. Lawyers will however still be responsible for informing intermediaries (or, in the absence thereof, taxpayers) of their obligations.

Reportable arrangements

Cross-border arrangements will be considered reportable if at least one of the hallmarks listed in the Bill is satisfied, including transactions involving companies not effectively subject to tax, round-tripping, the conversion of income into low-tax or tax-exempt revenue, and double deductions of payments, expenses or costs. Some of these hallmarks will only lead to a reporting obligation if a "main benefit test" is satisfied, meaning that obtaining a tax advantage is one of the main benefits of the arrangement.

Information to be disclosed

The information to be disclosed includes inter alia the identity of the taxpayer(s) and intermediaries, the hallmark(s) concerned, a summary of the arrangement and the value thereof.

Entry into force

As from 1 July 2020, intermediaries will be required to file the abovementioned information within 30 days from the time implementation of the reportable cross-border arrangement becomes possible. Cross-border arrangements initiated between 25 June 2018 and 1 July 2020 must be reported by 31 August 2020.

Penalties

The Bill imposes penalties on both intermediaries and taxpayers for non-compliance with the mandatory reporting obligations, up to a maximum of EUR 250,000.

Next steps

Luxembourg taxpayers should prepare for the entry into force of the new reporting obligations. To this end, it is important to identify all reportable cross-border arrangements and ensure that the appropriate notifications are made, in keeping with the new rules.

Contact us



Jean-Marc Groelly | Partner | [Email](#)



Johan Léonard | Partner | [Email](#)

Follow us:



International Law Firm | Amsterdam · Brussels · London · Luxembourg · New York · Rotterdam

DISCLAIMER

This publication highlights certain issues and is not intended to be comprehensive or to provide legal advice. NautaDutilh Avocats Luxembourg S.à r.l. is not liable for any damage resulting from the information provided. Luxembourg law is applicable and disputes shall be submitted exclusively to the Luxembourg District Court. To unsubscribe, please use the unsubscribe link below. For information concerning the processing of your personal data we refer to our privacy policy: www.nautadutilh.com/privacy.

Filling the Gap in Trade Marks: The Trademarks Bill 2019

Yang Shuh and Rui Rong provide a précis of what's in store for brand owners

The Trademarks Bill 2019 ("2019 Bill") was passed by the House of Representatives and the Senate of the Malaysian Parliament on 2 and 23 July 2019 respectively. The 2019 Bill now awaits royal assent from the Yang di-Pertuan Agong. Thereafter, it will come into operation on a date to be appointed by the Minister of Domestic Trade and Consumer Affairs by notification in the Federal Gazette.

The 2019 Bill is a total revamp and overhaul of the current Trade Marks Act 1976 ("1976 Act") and seeks to fill the gaps in the trade marks regime in Malaysia, both figuratively and literally (note that it will soon be 'trademarks' as opposed to 'trade marks'). Below are some of the main takeaways on the 2019 Bill.

Definition of "trademark"

To come within the definition of 'trademark' under the 2019 Bill, a sign must be capable of:

- "distinguishing goods or services of one undertaking from those of other undertakings"; and
- "being represented graphically".

Most notably, trademark protection will extend to cover non-traditional trademarks, such as colours, sounds, scents, and holograms. The new definition of 'trademark' recognises that such signs are capable of being trademarks and accordingly, may be registered trademarks provided they are capable of graphical representation. In view of the advancements in non-traditional marketing methods, this will be a welcomed development for businesses seeking to rely on non-traditional marks as part of their corporate branding.

The 2019 Bill also provides that a registered trademark shall be a personal or moveable property and may be the subject of a security interest in the same way as other personal or moveable property. The concept of a "registrable transaction" is introduced, and the particulars of a registrable transaction may be entered in the Register of Trademarks upon approval by the Registrar of Trademarks ("Registrar") of an application by a person claiming to be entitled to an interest in or under a registered trademark by virtue of the registrable transaction or any other person claiming to be affected by the transaction. The 2019 Bill itself does not identify what are "registrable transactions"; section 2 provides that "registrable transactions" are transactions determined by the Registrar in guidelines or practice directions issued pursuant to section 160.

Madrid Protocol

Malaysia will be taking its first step in acceding to the Protocol relating to the Madrid Agreement concerning the International Registration of Marks, adopted on 27 June 1989 ("Madrid Protocol"). The Madrid Protocol is an international system that allows the simultaneous registration of trademarks in several jurisdictions with the filing of one application in a single office.

Malaysia's accession to the Madrid Protocol will eliminate the need for an applicant filing an application with the Malaysian office to file separate applications in each member country in which it seeks to protect its trademark. The exact manner in which the Madrid Protocol will be implemented in Malaysia will be set out in subsequent subsidiary legislation.

Multi-Class Applications

Multi-class applications (i.e. one trademark application claiming goods and services of several classes under a single trademark application) will be implemented. This may have some impact on

costs and may simplify the application, maintenance, and renewal processes, as there would only be one application or registration number and one renewal date.

Collective Marks

Collective marks (i.e. a trademark owned by an association that is used by its members to identify and distinguish the goods and services of the members of that organisation from others) will be afforded trademark protection. An example of a collective mark is the “CA” mark used by accountants to identify their membership in the Institute of Chartered Accountants.

Acquired Distinctiveness

The 2019 Bill provides that subsequently acquired distinctiveness may be a defence against revocation for non-use actions. This means that a trademark which, at the time of registration, was devoid of distinctive character or consists exclusively of signs or indications which are descriptive of the goods or services or which are generic, will not be expunged if it is shown to have acquired distinctiveness after registration.

Trademark Infringement

Under the 1976 Act, acts amounting to infringement are strictly limited to use of an infringing mark in relation to the goods or services in respect of which the plaintiff's trademark is registered. Under the 2019 Bill, however, the unauthorised use of a sign even in relation to similar goods or services would amount to trademark infringement.

Further, the approach to determining the likelihood of confusion established in past Malaysian case law, that the Registrar or the courts may take into account all factors relevant in the circumstances, is expressly codified in the 2019 Bill.

The 2019 Bill also provides a number of new defences to trademark infringement, including a provision that the use of a trademark to indicate the intended purpose of the goods bearing the sign, including accessories or spare parts or service, will not constitute infringement of a registered trademark, provided that such use is in accordance with honest practices in industrial or commercial matters.

Remedies for infringement

The 2019 Bill explicitly provides that in addition to damages, a plaintiff may be awarded an account of profits attributable to the infringement that has not been taken into account in computing damages. Under the 1976 Act, damages and account of profits are mutually exclusive in all circumstances.

Further, additional damages (akin to exemplary and aggravated damages) will only be an available remedy where the infringement involves use of a counterfeit trademark as opposed to being awarded in relation to use of any infringing trademark.

Groundless Threats of Infringement

An aggrieved person who receives groundless threats of trademark infringement may institute proceedings to seek reliefs such as a declaration that the threats are unjustifiable, an injunction against continuance of the threats, and damages for any loss sustained by the threats. This is an entirely new concept in Malaysian trademark jurisprudence that may have an impact on the method of enforcement of the trademark rights by registered proprietors.

Well-Known Marks

The scope of protection under the 2019 Bill for well-known marks which are not registered in Malaysia will be expanded to cover the use of an infringing mark in relation to similar goods or

services, and use which would indicate a connection with, and is likely to damage the interests of, the proprietor of the well-known mark.

Licensee

The ‘registered user’ concept under the 1976 Act will be removed and is now subsumed under the licensing provisions set out in Part X of the 2019 Bill. This amendment reflects the commercial reality and recognition that trademark licensing arrangements are increasingly common and complex. The 2019 Bill provides a welcomed framework for the rights and remedies of licensees.

The 2019 Bill differentiates between an “exclusive licensee” and a “licensee”. An exclusive licensee refers to a licensee who is authorised to use the registered trademark to the exclusion of all other persons including the person granting the licence. The definition of a “licensee” has been expanded to include sub-licensees. The rights and remedies of a licensee under the 2019 Bill will differ depending on whether the licensee is an exclusive or a non-exclusive licensee.

Licence agreements may provide exclusive licensees extensive rights and remedies as if the licence has been an assignment, e.g. the exclusive licensee shall be entitled to bring infringement proceedings in his own name against any person other than the registered proprietor.

New Criminal Offences

The criminalisation of the use of a false trade description in relation to trade mark is presently provided for in the Trade Descriptions Act 2011 (“TDA”). However, once the 2019 Bill comes into force, various new criminal offences will be introduced under the 2019 Bill and the Sessions Court will have jurisdiction to try such offences.

The Trade Descriptions (Amendment) Bill 2019, which has also been passed by both Houses of the Malaysian Parliament, will amend the TDA to remove all references to ‘trade mark’. All trademark-related offences, such as counterfeiting a trademark, falsely applying a registered trademark to goods or services, importing or selling goods with falsely applied trademarks, falsely representing trademark as protected international registration designating Malaysia, and false entries to the Trademarks Office or in the Register of Trademarks, will be consolidated under the 2019 Bill.

Transitioning from the 1976 Act to the 2019 Bill

The 2019 Bill has a whole host of transitional provisions, providing for the potential effects on pending matters such as applications, registered trade marks, rectification applications, rights and remedies of licensees, infringement actions, and revocation actions. To highlight a few:

- Trade marks registered under the 1976 Act before the commencement of the 2019 Bill (“existing registered marks”) shall continue to be registered trademarks under the 2019 Bill;
- Pending applications for registration of a trade mark under the 1976 Act shall be reviewed according to the provisions of the 1976 Act, and if registered, shall be treated as an existing registered mark;
- Applicants with pending applications which have not been examined under the 1976 Act, may apply to have those applications determined according to the provisions of the 2019 Bill;
- The provisions of the 1976 Act continue to apply to any infringing act committed before the commencement of the 2019 Bill; and
- Pending applications under section 46 of the 1976 Act for non-use of trade mark will continue to be dealt with according to the provisions of the 1976 Act.

Conclusion

The 2019 Bill paves the way for a new era of trademark protection in Malaysia to streamline Malaysia’s trademark regime with current commercial realities and the international trademark protection landscape. That said, as with all development efforts, there will always be concerns that in attempting to plug the current gaps under the 1976 Act, new lacunae may inadvertently arise. To

date, no proposed subsidiary legislation or guidelines have been sighted to provide clarification as to how the 2019 Bill will be implemented.

GOOI YANG SHUH
(gooi.yang.shuh@skrine.com)

LAM RUI RONG
(lam.rui.rong@skrine.com)

Yang Shuh and Rui Rong are Associates in the Intellectual Property and Technology Media and Telecommunications Practice of SKRINE. Yang Shuh graduated from the University of Hertfordshire in 2015 and Rui Rong graduated from the Australian National University in 2014.

This article was first published in Issue 2/2019 of Legal Insights – A Skrine Newsletter



Banking in New Zealand - Guidance and exceptions for overseas banks

September 06, 2019

Contacts

Partners Josh Cairns (<https://www.simpsongrierson.com/people/josh-cairns>), Stuart Evans

(<https://www.simpsongrierson.com/people/stuart-evans>), Andrew Harkness

(<https://www.simpsongrierson.com/people/andrew-harkness>)

Senior Associates Laurette Barnard (<https://www.simpsongrierson.com/people/laurette-barnard>), Mace

Gorringe (<https://www.simpsongrierson.com/people/mace-gorringe>)

The Reserve Bank of New Zealand (Reserve Bank) has recently released two guidance notes and a class authorisation that will be relevant to overseas banks seeking to offer products or services in New Zealand.

The guidance and class authorisation relate primarily to section 64 of the Reserve Bank of New Zealand Act 1989 (RBNZ Act). Under section 64, it is an offence for persons to include “restricted words” (bank, banker, banking, or translations of those words in other languages) in their names or titles, or carry on an activity directly or indirectly in New Zealand using names or titles that include those restricted words (the Restricted Words Rule), except where an exemption applies or the Reserve Bank has issued a formal authorisation.

In Summary - what you need to know

- Where the Restricted Words Rule is engaged, the Reserve Bank is discontinuing the informal practice of issuing "non-objection letters" and instead is requiring all overseas banks to apply for a statutory authorisation.
- The Reserve Bank has issued two guidance notes - on their approach to interpreting when the Restricted Words Rule is engaged, and on the authorisation eligibility and process.
- The Reserve Bank has announced the Overseas Banks Class Authorisations Notice 2019 (Wholesale Class Authorisation), that provides for authorisation to overseas banks to use a name or title that includes a restricted word - in respect of a defined list of wholesale activities and services.
- Overseas banks with existing "non-objection letters" will be able to continue to rely on those letters in respect of activities carried on in New Zealand for the time being.

In our view, the guidance notes and class authorisation should bring welcome certainty and clarity to overseas banks wishing to undertake activities in New Zealand.

In particular, the class authorisation addresses many of the wholesale activities that clearly did not offend the policy underpinning the Restricted Words Rule, for which non-objection letters were frequently sought.

The guidance note should also provide further transparency as to when the rule is engaged, although we anticipate many overseas banks will still wish to engage directly with the Reserve Bank for direction in fringe cases.

Overseas banks wishing to assess their position under the new regime, or requirements in respect of any proposed activities in New Zealand, should contact their usual Simpson Grierson lawyer.

Background

As new technology and modern banking platforms make it easier to offer products and services across borders, an increasing number of overseas entities have engaged the Restricted Words Rule - perhaps in circumstances that would not have been in the minds of the legislative drafters when it was introduced into the RBNZ Act in 2003. As a result, the Reserve Bank developed a practice of issuing informal "non-objection letters" for particular activities that were not considered to offend the policy underpinning section 65 but which did not justify a formal authorisation application.

However, the Reserve Bank will now discontinue this informal practice, and instead require all overseas banks to apply for a statutory authorisation under section 65 of the RBNZ Act where the Restricted Words Rule is engaged.

This new approach, combined with the establishment of a new public register of overseas banks able to use restricted words in New Zealand, is designed to achieve the Reserve Bank's goal of providing for a more transparent approach to the regulation of banking activities in New Zealand.

In the context of this new approach, the new guidance is intended to:

- assist overseas banks understand the intended scope of the Restricted Words Rule - particularly in light of the apparent breadth of the rule as drafted ("*any activity directly or indirectly in New Zealand*") (Restricted Words Guidance); and
- provide direction to overseas banks that wish to apply for a statutory authorisation (Authorisation Guidance).

Restricted Words Guidance

The Restricted Words Guidance (<https://www.rbnz.govt.nz/-/media/ReserveBank/Files/Publications/Policy-development/Banks/Section%2065-1%20authorisations-for-use-of-restricted-words/Guidance-note-for-overseas-banks-on-limitations-on-the-use-of-restricted-words.pdf?revision=70a1e29a-e870-45f4-9535-6aa8919549e6&la=en>) provides an outline of the relevant legislative provisions, sets out the purpose of the rule, and provides guidance on some of the factors that the Reserve Bank considers should be taken into account by overseas banks.

A key purpose of the rule is to prevent potential customers being misled about the status or standing of an entity as a registered bank supervised by the Reserve Bank. This purpose will inform the Reserve Bank's interpretation of the scope of the Restricted Words Rule.

To further assist overseas banks the Reserve Bank has broken the rule down into five key elements and provided guidance on the requirement of each element. In this regard, the Reserve Bank has noted that there must be (1) an activity (2) being carried on (3) either directly or indirectly (4) in New Zealand (5) that uses a name or title that includes a restricted word, where:

- "*Activity*" should be interpreted broadly - it includes electronic and telephone communication and online services.
- "*Carried on*" requires an activity to have repetition or continuity. The frequency and nature of the activity will

be taken into account. A “one-off” activity is not "carried on".

- "*Directly or indirectly*" will include activities carried on through intermediaries who use the overseas bank's name.
- "*In New Zealand*" requires more than the involvement of a customer in New Zealand. An overseas bank's permanent physical presence in New Zealand clearly suffices, but in absence of this, the Reserve Bank will look at where pre-contractual activities took place and where the contract will be performed.
- "*Used*" requires the restricted words to be used for the furtherance of the activity - they must be used to advance or promote it.

The Restricted Words Guidance also sets out three general scenarios in which overseas banks may establish and maintain relationships with New Zealand persons, and considers whether they would be likely to amount to *carrying on an activity directly or indirectly in New Zealand* such that the Restricted Words Rule would be engaged. In summary:

- A New Zealand person opening a bank account with an overseas banks while living abroad and maintaining it upon coming to New Zealand should not engage the rule.
- A New Zealand person, on their own initiative, approaching an overseas bank to open a bank account ("reverse solicitation") should not engage the rule.
- An overseas bank actively offering New Zealand persons accounts with the overseas bank by targeting marketing efforts in the New Zealand market ("direct solicitation") would be likely to engage the rule.

Authorisation Guidance

As a starting point, the Reserve Bank generally expects overseas banks wanting to carry on activities in New Zealand to seek registration under the RBNZ Act. However, it recognises that allowing specific activities, through the authorisation process rather than requiring full registration, should expand the scope of products and services available in New Zealand and bring efficiency benefits.

Against that backdrop, the Authorisation Guidance (<https://www.rbnz.govt.nz/-/media/ReserveBank/Files/Publications/Policy-development/Banks/Section%2065-1%20authorisations-for-use-of-restricted-words/Guidance-note-on-the-Reserve-Banks-approach-to-section-65-authorisations-for-overseas-banks.pdf?revision=8a831307-a660-42f7-af82-1a1c3706c91a&la=en>) addresses the circumstance under which an overseas bank may be eligible for an authorisation, what activities may be authorised, and what conditions may be attached to an authorisation. It also set out the process for how an overseas bank should apply for an authorisation.

Key takeaways from the guidance include:

- To be eligible for an authorisation, an overseas bank must have no place of business in New Zealand (an overseas bank wanting to establish a place of business in New Zealand should first become a registered bank in New Zealand).
- Reserve Bank policy is that authorisations will typically not be granted to overseas banks for activities that involve retail investors.
- An application for authorisation should clearly define the proposed activities - a broadly defined activity (such as "services to wholesale customers") will not likely be given authorisation.
- The Reserve Bank will consider a number of factors listed in the guidance, but may also consider any other factor that it deems to be relevant in the circumstances.

The following conditions will generally be applied to any authorisation:

- The overseas bank must continue to have no place of business in New Zealand.
- The overseas bank must maintain an authorised agent in New Zealand for the purpose of accepting service of documents.
- The overseas bank must submit to the Reserve Bank any information requested regarding its authorised activities.

The Reserve Bank may also impose other conditions in relation to advertisements, solicitation of customers, business visits to New Zealand or any other matter it deems appropriate.

The Authorisation Guidance also provides for transitional arrangements, specifically in relation to overseas banks that hold existing "non-objection letters". Those letters will remain in place, and activities carried on under those letters "can continue for the time being". However, the clear inference is that the "transitional" arrangements will not last forever and accordingly overseas banks will need to keep abreast of the status of these letters to ensure that any authorisations can be applied for in time if required.

Wholesale Class Authorisation

The Reserve Bank has also announced the Overseas Banks Class Authorisations Notice 2019 (<https://gazette.govt.nz/notice/id/2019-au3999>) (Wholesale Class Authorisation), which will come into force on 23 September 2019.

Under section 65(1)(b) of the RBNZ Act, the Reserve Bank is able to grant a statutory authorisation to use a name or title that includes a restricted word to a class of persons.

The Wholesale Class Authorisation provides for authorisation to overseas banks to use a name or title that includes a restricted word in respect of:

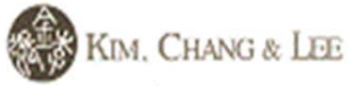
- wholesale banking activities;
- wholesale lending activities;
- financial advisory services;
- involvement in capital market issuances;
- acting in roles supporting capital market issuances;
- undertaking its own capital market investment activities;
- acting in wholesale foreign exchange and derivatives markets; and
- acting in roles supporting the derivatives markets.

It is important to note that the class authorisations only apply to overseas banks that:

- are licensed or registered as banks in a country other than New Zealand; and
- do not have a place of business in New Zealand.

Any overseas bank wishing to rely on the authorisation must first notify the Reserve Bank of its intention to carry on activities on the basis of the authorisation.

Contributors daniel.bradfield@simpsongrierson.com (<mailto:daniel.bradfield@simpsongrierson.com>)



Immigration Alert on New National Health Insurance Service (NHIS) Rule Applicable to Foreigners in Korea

Effective Aug. 1, 2019, the Korea Immigration Service (KIS) is restricting the granting of visa extensions (and some work / residence permits) to any registered foreigner who is subject to Korean national health insurance coverage but has defaulted on premium payments.

This new immigration measure came into effect in line with a new national health insurance rule that generally requires all registered foreigners staying in Korea for 6 months or longer to be enrolled in Korean national health insurance coverage (unless they duly opt out by filing an exclusion application with NHIS). This measure seeks to combat the abuse of the national health insurance system by those who receive expensive medical treatment in Korea after paying only nominal health insurance premiums and then depart Korea.

When an extension application is filed, KIS is able to detect anyone who is in default of health insurance premium payments.

Based on its access to such information, KIS will grant only a limited visa extension, not to exceed six months, to foreigners who defaulted on premium payments up to three times, and no visa extension will be granted to those who defaulted more than three times.

For more information visit us at www.kimchanglee.co.kr

Flexibility of and Accounting Rules for Surplus-Earning Distribution, and Effects on Taxation

08/30/2019

Dennis Yu

I. Introduction

Before the latest amendment of the Company Act, companies in Taiwan were required to, in the case of making profits, pay their taxes, make up previous losses and set aside certain earning as the legal reserve before they distribute surplus earnings to their shareholders. However, it is quite common in the US and many European countries that some companies distribute quarter or semi-annual dividends, so many found the regulation, before amendment, quite rigid. Since dividends were allowed to be paid only at the end of each fiscal year, economic flexibility was lost and such earnings were not able to be injected back into markets in time.

Therefore, the latest amendment to the Article 228-1 of the Company Act has added two more options for companies: they are now allowed to distribute surplus earnings quarterly or semi-annually as well. Shareholders may receive their returns not long after companies make earnings.

II. Accounting Rules

According to the amended Article 228-1, if a company adopts the resolution to distribute surplus earnings quarterly or semi-annually, it has to settle the account accordingly, and report to its shareholders its result of business activities during such period. In addition, it has to make up its previous losses, retain certain earnings for taxes payable, and set aside the legal reserve before distributing surplus earnings to shareholders.

If such dividends are to be paid in cash, the board of directors' resolution is required. But if a company decides to distribute dividends in stock, a proposal shall be submitted by the board and specifically passed in a general meeting of shareholders, since the shareholders' interest are involved and the extent of change will be larger.

How shall a company handle any over-distribution occurring in the middle of a fiscal year when they close accounts at year end? Pursuant to Article 228-1, the shareholders are not required to return distributed dividends even if there is any loss and over-distribution, retrospectively. Instead, such losses shall be made up from any surplus earning in the future.

III. Effects on Taxation and Responses

The consolidated income tax in Taiwan is generally based on cash; that is, cash income or distribution received during that year shall be subject to taxation of the year. Under this principle, the dividends distributed in the middle of 2019 fiscal year shall be recognized as a part of the shareholder's income and taxed in the tax reporting of the year. If the shareholders are non-residents defined in Income Tax Act (such as foreign corporate shareholders or foreign individuals), they are subject to income tax withholding by the company within ten days of the dividend payment, based on a prescribed withholding percentage (usually 21%, unless a tax cap in a tax treaty/agreement is applicable). If the shareholders are ROC residents (ROC corporates or citizens), no withholding is necessary but the company has to file for a dividend statement by the end of January in the following year.

For ROC-citizen shareholders, the dividends received in the middle of 2019 shall be reported for income tax in 2020. Under the current Income Tax Act, such individuals may choose to separate such dividend income from other incomes for a 28% tax rate imposed on dividend incomes when calculating and reporting their income tax under the category of individual shareholders and others.

The other option for ROC-citizen shareholders is that they can, combine the dividend income into their consolidated income, which shall be subject to tax brackets, with a tax deduction as much as 8.5% of the dividend received in the fiscal year but subject to a cap of NT\$80,000 in this deduction item for each taxpayer/tax household.

For ROC corporate shareholders, if the dividends received in the middle of 2019 are reinvested in other profit-seeking enterprises in accordance with Article 42 of the Income Tax Act, such dividends shall not be subject to taxation.

It is noteworthy that a company shall amend its Article of Incorporation if it has decided to distribute dividends quarterly or semi-annually, pursuant to the amended Article 228-1 of the Company Act. Since early distribution of dividends has the effects of prompting shareholders to reinvest, companies should be prudent as to whether to change their own dividend policy.

www.leeandli.com

Fifth Circuit Says the Texas Citizens Participation Act Does Not Apply in Federal Courts

27 August 2019

Firm Thought Leadership

On Friday, August 23, the Fifth Circuit issued its much-anticipated opinion in *Klocke v. Watson*, No. 17-11320, holding that defendants cannot move to dismiss federal court lawsuits based on the Texas Citizens Participation Act (TCPA), often referred to as an anti-SLAPP (strategic litigation against public participation) statute. At least one federal district court had allowed a party to pursue a TCPA motion to dismiss, and the Fifth Circuit had permitted a federal-court defendant to bring a motion to dismiss under Louisiana's similar anti-SLAPP statute. In *Klocke*, however, a three-judge panel that included Judges Jones, Barksdale, and Willett unanimously held that the TCPA is incompatible with federal rules and procedures and is therefore unavailable in federal lawsuits.

In *Klocke*, the Fifth Circuit concluded that the TCPA is procedural and not substantive law. As a result, a federal court sitting in diversity should not apply the statute because its procedural mechanisms conflict with the procedural requirements found in Federal Rules 12 and 56, which already specify the requirements for a case to proceed at the same stage of litigation addressed by the TCPA. As the Fifth Circuit explained: "Because the TCPA's burden-shifting framework imposes additional requirements beyond those found in Rules 12 and 56 and answers the same questions as those rules, the state law cannot apply in federal court." This decision is in line with similar holdings in the Tenth, Eleventh, and D.C. Circuits, but conflicts with decisions in the First, Second, and Ninth Circuits which have permitted the use of state anti-SLAPP statutes in federal actions.

Like other state anti-SLAPP statutes, the TCPA permits a party to file a motion to dismiss a legal action that is "based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association." Tex. Civ. Prac. & Rem. Code § 27.003. Texas courts have broadly interpreted and applied the statute, which provides for mandatory awards of attorneys' fees and sanctions to a prevailing movant. The act has had a significant impact on Texas litigation in recent years.

Criticisms of Texas courts' broad application of the TCPA led the Texas Legislature to amend the act in the most recent legislative session. The revised version takes effect next week, on September 1. Although the amended version of the TCPA has narrowed some of the relevant defined terms, such as the "legal actions" to which it applies, and has expanded the types of actions that are exempted from the act's reach, some practitioners believe that the amendments do not do enough to rein in the TCPA's expansive scope and predict that some of the same problems that existed under the original act will persist.

Although the impact of the TCPA as amended is uncertain, *Klocke* provides a clear, bright-line rule prohibiting use of the TCPA in federal court.

Related Professionals



Gavin R. Villareal
Partner



Margaret L. Wittenmyer
Associate



Amy Pharr Hefley
Partner

ADVISORIES

Communications

Illinois Becomes First State to Regulate Employers' Use of Artificial Intelligence to Evaluate Video Interviews

By Matthew Jedreski, Jeffrey S. Bosley, and
K.C. Halm

09.04.19

With so many questions surrounding artificial intelligence's effect on the workplace and workforce, one wonders whether future Labor Day celebrations will take on new meaning. Employers in Illinois may face these questions

sooner than others following passage of a new Illinois law that regulates the use of artificial intelligence (“AI”) to analyze and evaluate job applicants’ video interviews. The Artificial Intelligence Video Interview Act imposes duties of transparency, consent and data destruction on organizations using AI to evaluate interviewees for jobs that are “based in” Illinois. The measure, passed unanimously in the Illinois legislature and approved by the Governor in early August, becomes effective January 1, 2020.

Applying AI-based analytics to job interviews is an increasingly common practice. Some companies claim their technology analyzes an applicant’s facial expressions, gestures, tone, and word choice to evaluate the applicant’s honesty, attitude, positivity, overall sentiment, and language competence. Others claim their AI will help ensure interview questions focus on effective job performance indicators, or will serve as an initial screening to find candidates with the right skills.

Proponents of the technology suggest it allows companies to reach and interview more candidates from more backgrounds, removes bias from human interviewers performing the same assessments during live interviews, and performs these assessments more scientifically. At the same time, some have raised concerns that this technology may introduce algorithmic bias, wherein the AI technology draws inaccurate or unfounded conclusions about applicants based on their race, ethnic background, gender, or even a medical condition because the technology relied on data that was not representative of the general population or was otherwise insufficient. Still others have raised concerns about the data use and privacy aspects of AI-based video analytics.

Transparency, Consent and Data Destruction Duties Central to AI Video Interview Act

Rather than ban the use of this technology, the Illinois legislature adopted a framework to provide job candidates information about, and some control over, the use of video interview evaluation systems that rely on AI. The new law requires companies hiring for jobs “based in” Illinois that use “artificial intelligence analysis” of video interviews to:

- (1) NOTICE - Notify the applicant, in advance, that the organization is using the technology to analyze video interviews;
- (2) TRANSPARENCY - Explain to the applicant “how the [AI] works” and what general characteristics the technology uses to evaluate applicants;
- (3) CONSENT - Obtain, in advance, the applicant’s consent to use the technology;
- (4) LIMITS ON DISTRIBUTION - Limit the distribution and sharing of the video to only those persons “whose expertise or technology” is necessary to evaluate the applicant; and
- (5) DUTY TO DESTROY - Upon request from the applicant, destroy the video (and all backup copies) within 30 days upon request of the applicant.

Ambiguity in the Statute Leaves Significant Questions Unanswered

The Illinois legislature left some big questions unanswered when adopting the AI Video Interview Act. The statute does not define some key terms, including “artificial intelligence” and “artificial intelligence analysis.” As such, the precise scope and reach of the new law is ambiguous. Companies might use AI to evaluate a specific candidate who interviews by video (for example, by analyzing the applicant’s positivity or sentiments), which would clearly be covered. However, employers might also use AI to analyze how well an interviewer is doing, to track data about its candidates, to analyze and improve the questions it asks during interviews, or to generate broader analytics about its hiring process – activities that the new measure does not appear to cover. Further, purely administrative tasks – like ensuring a video interview is processed into a particular format and sent to the right human recipients for review – might also be a result of AI analysis but would not trigger the statute.

Other open questions center around the law’s transparency obligation, which does not prescribe how much detail about the AI technology an employer must provide when “explaining how artificial intelligence works” to an applicant. Nor does the measure detail what kinds of “characteristics” of the AI employers must disclose. Notably, the legislature declined to require that notice, consent, or the explanation be in writing (although that obligation was

explicitly included in an earlier version of the bill). As such, verbal communications would appear to satisfy these duties (although written communications would be advantageous as discussed below). It is also unclear how Illinois will enforce the new law, given that it does not include a private right of action or any explicit penalties. One could imagine applicants who are not hired following a non-compliant, AI-assisted video interview bringing a tort claim and citing the new law as a duty of care that the employer failed to follow. Such applicants might also have a claim under existing state and federal anti-discrimination laws based on algorithmic bias.

Further, it is not clear whether data that an employer extracts or derives from the video interviews (both important data elements in the functionality of robust machine learning AI systems) is subject to the destruction duty under the law. The statute is silent on this point. Similarly, the statute's video destruction mandate may create risk for employers concerning compliance with record retention or preservation obligations under federal law or other state laws, including regulations mandating that employers maintain certain documents and records related to hiring decisions for a longer period of time.

Finally, there is no guidance on what it means for a job to be "based in" Illinois, and the statute is silent as to whether employees may refuse to consider applicants who refuse to consent.

Before deploying this technology, employers should thoughtfully consider how to address these ambiguities as well as other questions, including when a vendor is used, how to ensure compliance by the vendor with these legal requirements, and issues concerning indemnification.

AI Video Interview Act May be a Precursor to Other Laws Regulating Use of AI

Illinois is at the forefront of regulating technology and personal data. Its biometric privacy law – known as BIPA – is the most robust of its kind in the country and is the only one with a private cause of action under which someone can sue for penalties and attorneys' fees even if they have not

suffered a concrete injury.

However, as noted below, data that falls under the video interview law may very well be subject to BIPA, too. For this reason, employers who have jobs “based in” Illinois and utilize video interview analytics should ensure their process complies both with BIPA and the new law. This means preparing necessary disclosures and AI transparency explanations for job candidates to review and sign prior to the interviews, ensuring the data remains protected, and having a system in place to destroy the videos upon request.

The Society for Human Resource Management recently explained that companies around the world are increasing investments in AI for human resource functions. As AI technology adoption increases, it is possible (if not likely) that other states will follow Illinois’ example and adopt new rules limiting the use of AI in hiring, or other functions. For example, California, New York, and Washington have all adopted or introduced measures that focus on the increasingly prevalent role of AI in commerce, society and the workplace. As the technology continues to gain in proficiency and adoption, state legislatures (as well as federal and local lawmakers) will be watching and testing out different approaches to regulation.

DWT’s AI Team advises companies on the issues presented by the adoption of AI and machine-learning technologies. Please contact the authors for more information about Illinois’ AI Video Interview Act and compliance issues raised by this new measure.

MEMORANDUM

From: Steven B. Steinborn
Elizabeth Barr Fawell
Mary B. Lancaster

Date: September 4, 2019

Re: **FDA Announces Public Meeting on Modernizing Food Standards of Identity**

The U.S. Food and Drug Administration (FDA) recently announced it will be holding a full day public meeting on September 27, 2019, to address “Horizontal Approaches to Food Standards of Identity Modernization.” ^{1/} As explained in more detail below, FDA’s “horizontal” approach to standards reform would look at amending wide groups of standards rather than evaluating standards on a case-by-case basis. Requests to make oral comments are due by September 12th and in-person attendees should register by September 20th. ^{2/} Written comments are due by November 12, 2019 and can be submitted to FDA docket number FDA-2018-N-2381-1371.

Background

Since 1938, FDA has established over 280 standards of identity (SOIs) codifying prescribed ingredients and manufacturing processes for a variety of food products. ^{3/} FDA has suggested revisiting SOIs multiple times throughout the decades, though the agency has not taken broad action to implement changes to the system as a whole (with the exception to its 1993 allowances for certain modifications to standardized foods that qualify for an express nutrient content claim). ^{4/} In March 2018, FDA indicated it was considering revisiting these established standards when it announced a Nutrition Innovation Strategy (“NIS”) focused, in part, on incentivizing food manufacturers “to produce more healthful foods that are still affordable.” ^{5/} Commissioner Gottlieb’s speech announcing the NIS emphasized that modernized standards of identity would still play a key role in

^{1/} 84 Fed. Reg. 45497 (Aug. 29, 2019).

^{2/} To register, visit the Event Page, Public Meeting on Horizontal Approaches to Food Standards of Identity Modernization, <https://www.fda.gov/food/workshops-meetings-webinars-food-and-dietary-supplements/public-meeting-horizontal-approaches-food-standards-identity-modernization-09272019-09272019>.

^{3/} 21 CFR Parts 130 – 169.

^{4/} 21 CFR § 130.10.

^{5/} Speech by FDA Commissioner Scott Gottlieb, M.D., “Reducing the Burden of Chronic Disease” (Mar. 29, 2018), available at <https://www.fda.gov/news-events/speeches-fda-officials/reducing-burden-chronic-disease-03292018>.

protecting against economic fraud and advancing public health by maintaining the “basic nature and nutritional integrity of products,” but suggested that added flexibility in standards could allow industry innovation that would bring “products with more healthful attributes” to consumers.

Following the March announcement, FDA held a public meeting in July 2018 to discuss the NIS. According to FDA, the July meeting yielded significant stakeholder support for and interest in modernization of SOIs. A key outcome of the July 2018 meeting was that FDA identified that a “horizontal” approach (e.g., revisions that provide “flexibility across all or a broad category of standardized foods”) as opposed to a vertical approach (updating individual standards) would be the more efficient way of maximizing the agency’s limited resources.

Public Meeting

The September 26th meeting is aimed at learning how horizontal approaches could accommodate the use of new technologies and new or novel ingredients in foods subject to a current SOI. FDA’s meeting announcement states that “modernizing SOI can give manufacturers the flexibility to improve the nutrition and healthfulness of standardized foods, promote honesty and fair dealing in the interest of consumers, and help achieve the goals of the NIS.”

Although a formal agenda has not yet been published, at this time FDA has identified three breakout sessions addressing broad categories of discussion: (1) nutrition topics, (2) accommodating innovation and changes in science and technology, and (3) consumer expectations and standardized foods. The first breakout session will explore what barriers exist in current standards of identity and how changes to standards of identity could encourage production of more nutritious foods. The second breakout session will explore the types of flexibility that advances in science and technology necessitate, including changes to permitted processes and ingredients that could promote innovation, as well as changes to specific food standards of identity. The third breakout session will discuss the vital role that consumer expectations play in the standards of identity regime and how horizontal modernization could meet new consumer demands while preserving consumer confidence in existing standards. In its announcement regarding the public meeting, FDA explains that in addition to the opportunity to comment at the public meeting, there will be an opportunity for interested stakeholders to submit written comments following the meeting.

The formal meeting agenda will be posted by FDA in mid-September, approximately two weeks before the scheduled meeting.

* * *

We will continue to monitor FDA’s updates related to this public meeting, as well as other guidance and rulemaking generally related to food standards of identity. Please contact us with any questions regarding this or other matters.