

## Pacific Rim Advisory Council April 2020 e-Bulletin

### MEMBER NEWS

- BENNETT JONES Names 26 to Partnership
- CITY-YUWA Welcomes Two Associates
- CLAYTON UTZ Partners with Nuix to Develop Industry First Graduate Program for Future Technology Experts
- HOGAN LOVELLS Refreshes Practice Structures and Leadership

### COUNTRY ALERTS

- **ARGENTINA** COVID-19 Potential Effect on Contracts ALLENDE BREA
- **AUSTRALIA** No Time to Hibernate as NSW Govt Moves to Maintain Development During the Pandemic CLAYTON UTZ
- **BRAZIL** CADE and Antitrust Law in Times of Crisis TOZZINIFREIRE
- **CANADA** COVID-19 Relief for Employers - The Canada Emergency Wage Subsidy is Approved BENNETT JONES
- **CANADA** Employment Contract Impossible to Perform - COVID-19 An Unforeseeable Event RICHARDS BUELL SUTTON
- **CHILE** New Law on Guaranteed Minimum Income CAREY
- **CHINA** Strengthening Fight Against Malicious Trademark Registrations HAN KUN
- **COLOMBIA** New Interest Rate and Exchange Rate Risk Coverage Percentages BRIGARD URRUTIA
- **COSTA RICA** Legal Task Force COVID-019 Update ARIAS LAW
- **EUROPEAN UNION** EU Copyright: Lending Out Vehicles with Radio Receivers is Not a Communication to the Public NAUTADUTILH
- **FRANCE** Measures Implemented to Mitigate the Effects of COVID-19 Pandemic Over Business GIDE
- **INDIA** COVID Counterfeit Products and Fake Goods KOCHHAR
- **MALAYSIA** COVID-19: Construction Industry Players, Start Your Engines! SKRINE
- **MEXICO** Administrative Benefits Granted to Issuers Due to COVID-19 SANTAMARINA
- **NEW ZEALAND** Government's RMA Reform Agenda Takes Another Step Forward SIMPSON GRIERSON
- **PANAMA** Implements System to Protect the Private Information of Final Beneficiaries of Legal Entities
- **SINGAPORE** Impact on Loan Facilities Under COVID-19 Temporary Measures Act DENTONS RODDYK
- **TAIWAN** Intellectual Property Office Releases Taiwanese Patent Information for Novel Coronavirus Clinical Trial Drugs LEE AND LI
- **UNITED STATES** IRS Extends More Deadlines in Response to Covid-19 BAKER BOTTS
- **UNITED STATES** New COVID-19 Developments for Employer Sponsored Health Plans DAVIS WRIGHT TREMAINE
- **UNITED STATES** COVID-19: Considerations for Commercial Landlords and Tenants in Hawaii GOODSILL
- **UNITED STATES** HHS Issues Advisory Opinion Encouraging a Broad Reading of its PREP Act Declaration HOGAN LOVELLS

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### CONFERENCES & EVENTS

- 67th International Conference - New Delhi Hosted by KOCHHAR & Co. TBA
- 68th International Conference - New Zealand Hosted by Simpson Grierson TBA
- 69th International Conference - Mexico City Hosted by Santamarina y Steta TBA
- 70th International Conference - Paris Hosted by GIDE TBA

### Coronavirus COVID-19

The coronavirus (COVID-19) health pandemic continues to impact countries around the globe, presenting a large scale public health crisis.

Visit us online for the latest up-to-date, country specific information on potentially relevant legal questions and issues relating to the coronavirus pandemic.

[Visit us online for full coverage](#)

[www.prac.org/member\\_publications.php](http://www.prac.org/member_publications.php)

### MEMBER DEALS MAKING NEWS

- ARIFA Advises Underwriters and Initial Purchasers as Carnival Corporation Seeks to Improve its Liquidity Position During the Covid-19 pandemic.
- BAKER BOTTS Represents Delek US Holdings, Inc. in Dropdown Transaction
- BENNETT JONES Assists Canadian Pacific Railway in \$300 million Public Debt Offering in Canada
- GIDE Advises Council of Europe Development Bank on Issuance of Covid-19 Bonds
- HOGAN LOVELLS Advises Luminovo on pre-seed round of more than €2 million
- MUNIZ Advises Acquaventure in its sale of US Water Services Company Seven Seas Venture
- NAUTADUTILH Assists NWB Bank with a €2 billion SDG Housing Bond issuance

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[Events](#)

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**BENNETT JONES NAMES 26 TO PARTNERSHIP**

**06 April 2020:** Bennett Jones is pleased to announce that 26 lawyers have been admitted to the partnership. They serve clients from our offices throughout the firm and represent a cross section of our key industry groups and practice areas including corporate, litigation and dispute resolution, regulatory, and tax.

Bennett Jones' new partners are:

**Alison L. Archer**, Construction and Commercial Litigation  
**Sean Assié**, Regulatory, Environmental and Indigenous Law  
**Sabrina A. Bandali**, International Trade, Regulatory and Investment  
**Artem N. Barsukov**, International Arbitration and Construction  
**Nicholas Chan**, Corporate Commercial, Corporate Finance and Commercial Real Estate  
**Andrew N. Disipio**, Securities, Corporate Finance and Mergers & Acquisitions  
**Kyle H. Donnelly**, Competition, Antitrust and Foreign Investment  
**Christopher J. Doucet**, Corporate Finance, Mergers & Acquisitions and Securities  
**Jacob B. Dubelaar**, Commercial Real Estate  
**Elizabeth K. Dylke**, Private Funds  
**Craig R. R. Garbe**, Commercial Real Estate Acquisition, Disposition, Financing and Leasing  
**Marshall R. Haughey**, Corporate Tax  
**Natalia E. Iamundo**, Commercial Real Estate  
**Ilan Ishai**, Class Action and Appellate Litigation  
**Mathieu J. LaFleche**, Commercial Litigation and Health  
**John Lawless**, Private Equity, Mergers & Acquisitions, Corporate and Securities  
**Ciara J. Mackey**, Commercial Litigation  
**Kevin Myson**, Corporate, Commercial Transactions, Energy, Natural Resources and Mergers & Acquisitions  
**Ashley L. Paterson**, Product Liability, Class Action and Commercial Litigation  
**George W. H. Reid**, International Trade, Investment and Public Procurement  
**David S. Rotchtin**, Financial Services and Corporate Commercial  
**Nathan J. Shaheen**, Commercial and Fraud Litigation  
**Sharon G. K. Singh**, Corporate and Regulatory  
**Christine A. Viney**, Commercial Litigation  
**Philip B. Ward**, Tax  
**Ashley White**, Corporate, Commercial Transactions, Power & Energy

For additional information visit [www.bennettjones.com](http://www.bennettjones.com)

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## CITY-YUWA WELCOMES TWO ASSOCIATES

**TOKYO, 01 April 2020:** City-Yuwa has welcomed two new associates to the firm. Fumiya Hirakoba, admitted in 2020, and Kentaro Moriya, admitted in 2016, have joined the Firm as Associates.

For additional information visit [www.city-yuwa.com](http://www.city-yuwa.com)

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## CLAYTON UTZ PARTNERS WITH NUIX TO DEVELOP INDUSTRY FIRST GRADUATE PROGRAM FOR FUTURE TECHNOLOGY EXPERTS

**SYDNEY, 23 March 2020:** Top-tier law firm Clayton Utz has partnered with leading global technology company Nuix to create the industry's first specialised Graduate program backed by business expertise in forensic technology.

The program has been custom-built for students who have an interest in forensic technology to undertake their graduate training in the firm's Forensic and Technology Services (FTS) practice area.

Speaking on the growing popularity of forensic technology as a discipline, Clayton Utz's FTS National Practice Group Leader, Paul Fontanot said the new Graduate program would provide an excellent foundation for the next generation of forensic technology specialists.

"As part of our FTS Graduate program, graduates will learn about how strong forensic technology expertise can deliver better outcomes for our clients. It offers a technologically rich pathway and an introduction to key forensic areas including accounting, discovery, investigations and transactions," Paul said.

Working alongside the firm's legal teams, the FTS Graduates will help clients with a range of complex legal and forensic technology needs. Through an integrated legal and forensic expertise approach, the graduates will be trained in how to help companies better understand their data and its impact and potential from the perspective of both legal risk and in informing future business decisions, and how to better manage potential cybersecurity breaches.

Nuix CEO for Asia Pacific & Japan, Paul Muller, said: "For the past decade, Nuix has trained and advised the world's top forensic and legal teams including federal and state police, intelligence agencies, regulatory authorities and global law firms. We are excited to partner with Clayton Utz in this important first-to market initiative that will give graduates the right foundations to succeed in this industry."

Available from this year, the program is designed to lead graduates to the industry-recognised Nuix eDiscovery and Forensic Practitioner Certifications and will validate their eDiscovery and forensic technology expertise.

The new Graduate program builds on the FTS Graduate program developed in 2018 (an industry first), following the launch of the FTS practice area in 2017.

For more information on the FTS Graduate program visit: <https://graduates.claytonutz.com/graduate-careers/our-programs/fts-graduate-program> .

For additional information visit [www.claytonutz.com](http://www.claytonutz.com)

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**HOGAN LOVELLS REFRESHES PRACTICE STRUCTURES AND LEADERSHIP**

**08 April 2020:** Hogan Lovells is making a series of changes to its practice group structure and the leadership of its International Management Committee (IMC). The IMC is the body that is responsible for setting and implementing the strategic direction and business operations of the firm and is made up of the heads of Hogan Lovells' practice groups and administrative regions plus clients and markets.

These changes take effect from 1 July 2020 under the leadership of the new incoming CEO Miguel Zaldivar and Deputy CEO Michael Davison.

According to Miguel Zaldivar: "We are uniquely placed as a fully-integrated global firm. We have a high-quality business, great clients, genuine international reach, and extremely talented people. The combination of our industry sector knowledge and our market-leading position at the meeting point between business and government is admired by clients and competitors alike. These are the strengths on which we are building our firm."

"I set out my priorities in December as being: client service; investment in our key markets; incentivizing even more collaboration across the partnership; managing our profitability; and supporting citizenship, diversity & inclusion, and sustainability. The changes to our structures help achieve those priorities by bringing increased speed and efficiency to our management decision-making, continuing the work which Steve Immelt started in 2014 in moving from co-leaders to single leaders."

The firm's practice groups will shift from five to three. The Corporate and Finance practice groups will be combined to create a new Corporate & Finance practice made up of around 400 partners. Hogan Lovells will also more closely align its Global Regulatory and IPMT practice groups and put them together under one umbrella, Global Regulatory & IPMT, comprising around 230 partners.

Commenting on these changes Miguel Zaldivar said: "There is already a significant amount of overlap between Corporate and Finance, particularly in the capital markets space as well as in areas such as joint ventures, M&A, and commercial work. Bringing them together creates a powerful force for our clients. With Global Regulatory and IPMT there are already synergies between them in areas such as privacy and cybersecurity; pharmaceutical and technology patent litigation; and antitrust investigations. Both are also top-rated practices groups in their own right in the market and we will protect those positions in terms of how we go to market."

The firm's regions will also shift from five to three. The firm's current Americas and D.C. regions will be combined into a single region. The firm is also creating a single Europe, Middle East, and Africa (EMEA) region which combines its existing UK and Africa region with Continental Europe and its offices in the Middle East. The current Asia Pacific and Middle East region will focus on the emergent markets of Southeast Asia as well as the established economies of Australia, Greater China, and Japan.

Zaldivar commented: "Having a 'One Americas' region will enable us to more easily take a holistic and integrated approach to sharing clients, work, investments, and resources."

We have already adopted the same approach very successfully with our offices in Germany and Greater China. Having a single EMEA region is an approach taken by many of our clients and competitors, and reflective of the economic and social ties in that part of the world as well as time zone and geographical proximity."

He continued: "I have tried to ensure continuity of leadership while prioritizing bringing on a new and diverse generation of leaders."

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## HOGAN LOVELLS REFRESHES PRACTICE STRUCTURES AND LEADERSHIP

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### Hogan Lovells IMC from 1 July 2020

Standing members attending all meetings – practice group leaders and regional managing partners:

CEO	Miguel Zaldivar
Deputy CEO	Michael Davison
Clients & Industries	Ina Brock
Corporate & Finance	David Gibbons
Global Regulatory & IPMT	Alice Valder Curran
Litigation Arbitration & Employment	Desmond Hogan
Americas	Richard Lorenzo
Asia Pacific	Lloyd Parker
EMEA	Marie-Aimee de Dampierre

Attendees to IMC meetings by invitation when relevant – practice and office/country managing partners:

Finance	Matthew Cottis
IPMT	Burkhart Goebel
UK	Penny Angell
Germany	Stefan Schuppert
Washington, DC	Michele Farquhar

Zaldivar said: "The UK and Washington, D.C. offices will continue to have participation in IMC discussions where relevant and, with Stefan Schuppert also attending IMC meetings by invitation, we are now adding Germany, given the importance of that market to the firm."

"Susan Bright, Eve Howard, and Cole Finegan will be stepping down from the IMC after many years of hard work and significant contributions to the firm. We all owe them a huge debt of gratitude in managing very important regions through some of our strongest and most successful years as well some uniquely challenging times."

Susan will take on a new responsibility as Global Managing Partner for Diversity & Inclusion and Responsible Business. In addition she will continue to act as the OMP for the UK until the end of the year. This is in order to ensure a smooth transition to accommodate Penny Angell's current intense workload advising lenders on financings impacted by COVID-19. Eve Howard will serve as Global Head of our combined Capital Markets practice. Cole Finegan will continue serving as office managing partner of the Denver office and support the expansion efforts of the Government Relations and Public Affairs practice in the Americas.

For additional information visit [www.hoganlovells.com](http://www.hoganlovells.com)

**BAKER BOTTS**

REPRESENTS DELEK US HOLDINGS, INC. IN DROPDOWN TRANSACTION

**HOUSTON, 31 March 2020:** Deal Description: On March 31, 2020, Delek US Holdings, Inc. (NYSE: DK) ("Delek US") and Delek Logistics Partners, LP (NYSE: DKL) ("Delek Logistics") announced an agreement for the dropdown of the Big Spring gathering system to Delek Logistics for total consideration of \$100 million in cash and 5.0 million common units representing limited partnership interest in Delek Logistics. The transaction is effective March 31, 2020 and is expected to be immediately accretive to Delek Logistics' distributable cash flow per unit.

These assets and services are projected to generate incremental annual earnings before interest, taxes, depreciation and amortization (EBITDA) of approximately \$30 to \$32 million. Delek Logistics will finance the cash component of this dropdown through a combination of cash on hand and borrowings on its revolving credit facility.

Baker Botts L.L.P. represented Delek in the dropdown.

Baker Botts Lawyers/Office Involved: **Corporate:** A.J. Ericksen (Partner, Houston); Ieuan List (Associate, Houston); Shumaila Dhuka (Associate, Houston); **Global Projects:** Scott Looper (Partner, Houston); Austin Jennings (Associate, Houston); Casey Polivka (Associate, Houston); **Finance:** Rachael Lichman (Partner, Houston); Chad Davis (Senior Associate, Houston); **Tax:** Michael Bresson (Partner, Houston); Jared Meier (Senior Associate, Houston). Evan Skeenhttp: (Associate, Houston).

For more information, visit [www.bakerbotts.com](http://www.bakerbotts.com)

**ARIFA**

ADVISES UNDERWRITERS AND INITIAL PURCHASERS AS CARNIVAL CORPORATION SEEKS TO IMPROVE ITS LIQUIDITY POSITION DURING THE COVID-19 PANDEMIC

**PANAMA CITY, 06 April 2020:** ARIFA has advised BofA Securities Inc., Goldman Sachs & Co. LLC and JPMorgan Securities LLC as representatives of the Underwriters and Initial Purchasers in the negotiation of a convertible note and common stock offering by Carnival Corporation, the world's largest travel company and a publicly traded company in the United States.

The cruise ship operator issued 71,875,000 shares of common stock and US\$2,012,500,000 in 5.75% Convertible Senior Notes due 2023.

ARIFA also advised the Initial Purchasers in connection with the issuance by Carnival Corporation of US\$4,000,000,000 in 11.500% First Priority Senior-Secured Notes due 2023.

ARIFA lawyers acting in this transaction: Estif Aparicio, partner, Andrés N. Rubinoff, partner, Pilar Castillo, partner, Javier Yap Endara, associate; and Donald P. Canavaggio, international associate.

Client represented in this transaction: Goldman Sachs Group Inc., JPMorgan Chase & Co., Bank of America Corp.

Matter value: US\$6 billion

Completion date: April 6, 2020

For additional information visit [www.arifa.com](http://www.arifa.com)

**BENNETT JONES**

ASSISTS CANADIAN PACIFIC RAILWAY IN \$300 MILLION PUBLIC DEBT OFFERING IN CANADA

## Mandate Details

Date Announced: March 05, 2020  
Date Closed: March 09, 2020  
Deal Value: \$300,000,000  
Client Name: Canadian Pacific Railway Company

On March 9, 2020, Canadian Pacific Railway Company ("CPRC"), a wholly-owned subsidiary of Canadian Pacific Railway Limited ("CPRL" and together with CPRC, "CP"), completed a public offering of CAD\$300 million aggregate principal amount of 3.05% unsecured unsubordinated notes due 2050. The notes are fully and unconditionally guaranteed by CPRL.

The offering was made in Canada under a base shelf prospectus of CPRC dated March 1, 2019, as supplemented on March 5, 2020.

The offering was completed through a syndicate of agents led by RBC Dominion Securities Inc., BMO Nesbitt Burns Inc. CIBC World Markets Inc., and Scotia Capital Inc., as joint book-runners, and including Merrill Lynch Canada Inc., Wells Fargo Securities Canada Ltd., Barclays Capital Canada Inc., Citigroup Global Markets Canada Inc., HSBC Securities (Canada) Inc., SMBC Nikko Securities Canada Ltd., AltaCorp Capital Inc., Desjardins Securities Inc., Morgan Stanley Canada Limited, and MUFG Securities Canada, Ltd.

Bennett Jones acted as external counsel to CP in connection with the offering, with a team led by Harinder Basra and that included Brent Kraus, John Piasta and Steven Bodi (Capital Markets), Anu Nijhawan (Tax), and Karen Dawson and Noriko Shimura (Banking & Finance).

For additional information visit [www.bennettjones.com](http://www.bennettjones.com)

**GIDE**

ADVISES COUNCIL OF EUROPE DEVELOPMENT BANK ON ISSUANCE OF COVID-19 BONDS

**PARIS, 15 April 2020:** Gide has advised the Council of Europe Development Bank (CEB) on its syndicated issuance of Covid-19 Response Social Inclusion Bonds for a total amount of EUR 1 billion at a rate of 0.000 per cent. and due 2027. The funding will be used to support CEB member countries in mitigating the social and economic impact of the ongoing Covid-19 crisis.

The Covid-19 Bonds are issued within the CEB Social Inclusion Bond framework, which is being adapted so that financing can be extended to the health sector, where countries have increased needs because of the pandemic.

The proceeds raised will also finance new or existing social projects which support micro, small and medium-sized enterprises (MSMEs) in order to create and preserve jobs.

Gide's team was led by partner Hubert du Vignaux, working with associate Lou Recht.

The bank syndicate, composed of Citigroup Global Markets Limited, Crédit Agricole Corporate and Investment Bank, DZ BANK AG Deutsche Zentral-Genossenschaftsbank, Frankfurt am Main, and HSBC Bank plc, was advised by Clifford Chance LLP's team in London.

For additional information visit [www.gide.com](http://www.gide.com)

**HOGAN LOVELLS**

ADVISES LUMINOVO ON PRE-SEED ROUND OF MORE THAN €2MILLION

**MUNICH, 09 April 2020:** Led by Munich-based Senior Associate Peter Lang, international law firm Hogan Lovells advised Munich-based AI company Luminovo on a pre-seed financing round of more than EUR 2 million.

Since its foundation in 2017, the Munich-based start-up offers its clients tailor-made AI solutions for electronic processes across all industries. With the fresh capital, which comes from venture capitalists Cherry Ventures and La Famiglia, Luminovo aims to drive its new course in the electronics industry and accelerate the development of new solutions in the field of electronics development and manufacturing.

Hogan Lovells advised Luminovo on all legal issues regarding the financing round. Hogan Lovells Team for Luminovo GmbH: Dr. Peter Lang (Senior Associate), Dr. Nikolas Zirngibl (Partner) (both Corporate/M&A, Munich); Dr. Sabrina Gäbeler (Counsel, Employment, Frankfurt).

For additional information visit [www.hoganlovells.com](http://www.hoganlovells.com)

**MUNIZ**

ADVISES ACQUAVENTURE IN ITS SALE OF US WATER SERVICES COMPANY SEVEN SEAS VENTURE

**LIMA 03 April 2020:** Fund manager Morgan Stanley Infrastructure Partners acquired US water services company Seven Seas Water from AquaVenture. The buyer is a global infrastructure investment platform of financial institution Morgan Stanley.

Goodwin Procter in New York and Muñiz, Olaya, Melendez, Castro, Ono & Herrera in Lima advised AquaVenture, a water services company listed on the New York stock exchange. No value was disclosed.

Counsel to AquaVenture Holdings: Goodwin Procter NYC; Muñiz, Olaya, Melendez, Castro, Ono & Herrera Partner Mercedes Fernandez and associates Jessica Mercado and Alesandra Azcarate in Lima.

For additional information visit [www.munizlaw.com](http://www.munizlaw.com)

**NAUTADUTILH**

ASSISTS NWB BANK WITH A €2BILLION SDB HOUSING BOND ISSUANCE

**AMSTERDAM 15 April, 2020:** NWB Bank has successfully issued a 3-year €2 billion SDG Housing Bond. This is the bank's largest sustainable bond so far. Despite difficult market conditions, the bank managed to draw a significantly oversubscribed order book, which in turn allowed NWB Bank to revise the credit spread down. The proceeds of the SDG Housing Bond will be used for the financing of affordable, and sustainable social housing in the Netherlands.

In total, NWB Bank has issued more than €13 billion in sustainable bonds, making NWB Bank the largest issuer of SRI bonds in the Netherlands. Internationally, the bank is considered a leading issuer of SRI bonds within the SSA (Sovereigns, Supranationals, and Agencies) space. NWB Bank has committed itself to raising at least 25% of its annual long-term funding through sustainable bond issuances.

The €2 billion 3-year SDG Housing Bond was issued under NWB Bank's €60,000,000,000 Debt Issuance Program. The 3-year bond settled on the 14th of April 2020 and will be repaid in full on the 14th of April 2023. The bond has a coupon of 0.00% and a re-offer price of 100.548%, for a re-offer yield of -0.182%. The notes are listed on the Luxembourg Stock Exchange.

NWB Bank is a longstanding client of NautaDutilh. Our team for this issuance consisted of Petra Zijp, Dirk Panis (Capital Markets) and Nina Kielman (Tax).

For additional information visit [www.nautadutilh.com](http://www.nautadutilh.com)



PRAC EVENTS







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A D V O G A D O S



## COVID-19 and its potential effect on contracts

The global health emergency resulting from the spread of the COVID-19 virus and its declaration as a pandemic by the World Health Organization may affect the possibility to materially comply with many contractual obligations in different sectors of the economy.

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In Argentina, this situation led to a number of emergency regulations issued by the public authorities at various levels and areas of the State, having restrictive effects on social and economic activity, as well as on the free movement of people and goods within the country and across its borders.

The COVID-19 pandemic and the regulations issued may consequently lead to the material or legal impossibility of complying with all or part of the obligations undertaken in certain agreements, either permanently or temporarily.

### Is there a legal solution to this problem?

Under certain commercial contracts, the material or legal impossibility of complying with contractual obligations could be considered a force majeure event. A force majeure event takes place when there is a current and absolute impossibility to perform certain obligations, arising from unforeseeable and unavoidable events beyond the debtor's control.

The requirements for an event to be considered as a force majeure event are the following:

- Objectively **unpredictable**.
- **Unavoidable**.
- **Current**, that is, taking place at the moment the damage or the breach is caused, without being an eventual threat or impossibility.
- **Unrelated** to the breaching party, occurring beyond its range of control.
- **Subsequent** to the creation of the obligation.
- **Absolute and unsurpassable**, that is, an unavoidable obstacle for the compliance of obligations.
- **Prior**, in the sense that there was no default by the debtor before the triggering event occurs.

## Proof

Proving the existence of a force majeure event lies on the party who invokes it. Although the COVID-19 pandemic is a publicly known notorious fact, whoever claims it as a force majeure event must provide evidence as to how and why it affects its ability to meet its contractual obligations.

## Effects

The effect of a force majeure event shall be the waiver of liability of the debtor who is unable to comply with its contractual obligations.

In order to analyze the specific effect on contracts, it is necessary to consider whether the impossibility is definitive or temporary:

- **Definitive impossibility:** it causes the termination of the obligation with all its accessories as well as the termination of the contract, without creating any type of liability to the breaching party. If both parties have yet to comply with their mutual obligations, the risk must be borne by both parties and, in that case, mutual and simultaneous restitutions shall be made, with the exception of those obligations already fulfilled. If the obligation has been performed solely by one of the parties, that party will have rights of recovery against the other.
- **Temporary impossibility:** it solely relieves the debtor from the consequences of default as long as the situation persists. The contractual tie remains in place –but suspended– unless the compliance of said obligations needs to be rendered within an essential period of time, or if the creditor's interest is lost, in which case the contractual tie shall be terminated.

## Exceptions

The impossibility to comply due to a force majeure event does not *per se* imply in every situation the waiver of liability, as there are several exceptions, including:

- The assumption of responsibility for force majeure events under the agreement.
- The transfer of responsibility for the force majeure event by a legal provision.
- The force majeure event that follows a default.
- The debtor's fault.
- Inherence of the force majeure event to the property or activity performed.
- Duty of restitution for a wrongful act.
- Particular situations in consumer agreements.

### Unaffected party by a force majeure event

The unaffected party in a force majeure event may, as a preventive measure and to avoid the aggravation of the damage, suspend its own performance until the other party complies or provides a guarantee.

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For further information and an analysis of your case in particular, please contact

Santiago Sturla ([ssurla@allende.com](mailto:ssurla@allende.com) or by phone at +54.11.4318.9932),  
Diego Botana ([dbotana@allende.com](mailto:dbotana@allende.com) or by phone at +54.11.4318.9928),  
David Gurfinkel ([dgurfinkel@allende.com](mailto:dgurfinkel@allende.com) or by phone at +54.11.4318.9901)  
Laureano Genin ([lgenin@allende.com](mailto:lgenin@allende.com) or by phone at +54.11.4318.9963)

This report shall not be considered as legal advice or any other form of advice rendered by Allende & Brea. The effective possibility of invoking a force majeure event is subject to a more in-depth analysis of the particular circumstances in the specific case and the absence of any cause obstructing the configuration or invocation of the force majeure event.

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08 APR 2020

# No time to hibernate as NSW Government moves to maintain development during the pandemic

Public and private sector developments are starting to benefit from major initiatives which the NSW Government has announced in an effort to maintain economic activity through development projects, and proponents should consider their development pipeline as further details on these initiatives are expected over the coming weeks.

Further to the changes to planning controls permitted by COVID-19 Legislation Amendment (Emergency Measures) Act 2020, the NSW Minister for Planning and Public Places on Friday 3 April 2020 announced that the NSW Government was going to cut green tape and fast-track planning processes to keep people in jobs, including the construction industry, in an attempt to support the economy.

## Planning Acceleration Program

As part of its response to support the economy the NSW Government has introduced the Planning Acceleration Program which includes:

- creating opportunities for more than 30,000 construction jobs in the next six months;
- fast-tracking assessments of State Significant Developments, rezonings and development applications, with more decisions to be made by the Minister if required – this may include, for example, deploying additional Department of Planning Industry and Environment (**DPIE**) personnel to assessment teams;
- supporting councils and planning panels to fast-track local and regionally significant DAs;
- introducing a "one stop shop" for industry to progress projects that may be "stuck in the system" – this could take many forms, and one which has been mentioned is a new agency with similarities to Queensland's State Agency Referral Agency;
- clearing the current backlog of cases stuck in the Land and Environment Court with additional Acting Commissioners – four new Acting Commissioners were appointed today, and we have commented more on Court processes and timelines below; and
- investing \$70 million to co-fund vital new community infrastructure in North West Sydney including roads, drainage and public parks to unlock plans for the construction of thousands of new houses – we understand this is separate from other reforms to development contributions schemes which are being considered.

It is not clear yet how the Program will operate as no further details have been released at this stage. The Program is likely to commence in the coming few weeks and we have already seen real engagement from parts of DPIE which have been tasked with COVID-19 responses.

## **Emergency Planning Measures**

As previously indicated the Act permits the Minister for Planning and Public Spaces to authorise development to be carried out on land without the need for any approval under the Act if it is necessary to protect public health, safety and welfare during the COVID-19 pandemic.

The following Orders have now been made by the Minister to permit specified development without consent:

1. Environmental Planning and Assessment (COVID Development - Extended Operations) Order 2020 - permits extended hours of trading;
2. Environmental Planning and Assessment (COVID Development - Health Services Facilities) Order 2020 - permits changes of building use to health services facilities;
3. Environmental Planning and Assessment (COVID Development - Construction Work Days) Order 2020 - permits construction and building works to be carried out on Saturday, Sunday and Public holidays (the order currently is expressed to apply only to development which is the subject of a "development consent", but we understand work is underway to extend it to development which is subject of a State significant infrastructure approval;
4. Environmental Planning and Assessment (COVID Development - Takeaway food and beverages) Order 2020 - permits the use of existing premises to prepare and sell food, beverages or any other goods.

## **Land and Environment Court Changes**

The Land and Environment Court has been one of a number of Courts to release a policy to deal with all court sittings during this crisis. According to the COVID 19 Pandemic Arrangements Policy (which commenced on 23 March 2020) all Court sittings, including directions hearings, section 34 conferences and hearings, are to be conducted so as to ensure social distancing is accommodated.

After the release of this Policy, the Court further updated its procedures to minimise personal attendances at Court listings (including hearings, conciliations, mediations and onsite views) and directed that all listings proceed by telephone or AVL. If it is determined that the matter cannot proceed, the listing date will be vacated and the matter will be listed for further directions. At this stage matters that cannot proceed are being listed for directions in October/November 2020. While the Government's proposal to increase the number of Commissioners to reduce the backlog of cases is a welcome initiative, these restrictions are likely to limit the Court's ability to reduce that backlog.

## **Matters to remain aware of**

While the NSW Government has relaxed the planning controls for certain development and is now looking to fast track approvals, the NSW Government has not relaxed the timing for deemed refusal appeals, or the requirement for compliance with environmental requirements. This needs to be borne in mind, particularly by property developers.

A failure to miss the deemed refusal period coupled with a potential delay for assessment and determination (subject to the effect of the Acceleration Program) could mean lengthy delays before development can ultimately be approved and therefore commenced.

For more details on how the changes to the planning legislation may affect you, please contact our team.

## **RELATED KNOWLEDGE**

- NSW COVID-19 Emergency Measures Act to provide rent and termination relief for tenants in NSW

## GET IN TOUCH

### Brendan Bateman

PARTNER, SYDNEY  
+61 2 9353 4224  
bbateman@claytonutz.com

### Claire Smith

PARTNER, SYDNEY  
+61 2 9353 4713  
csmith@claytonutz.com

### Nick Thomas

PARTNER, SYDNEY  
+61 2 9353 4751  
nthomas@claytonutz.com

### John Clayton

SPECIAL COUNSEL, SYDNEY  
+61 2 9353 4403  
jclayton@claytonutz.com

### Wagih Doueih

SENIOR ASSOCIATE, SYDNEY  
+61 2 9353 4718  
wdoueih@claytonutz.com

### Emma Whitney

SENIOR ASSOCIATE, SYDNEY  
+61 2 9353 4754  
ewhitney@claytonutz.com

### Rachelle Wilson

SENIOR ASSOCIATE, SYDNEY  
+61 2 9353 4944  
rwilson@claytonutz.com

### Mark Brady

SENIOR ASSOCIATE, SYDNEY  
+61 2 9353 4716  
mbrady@claytonutz.com

### Alison Packham

SENIOR ASSOCIATE, SYDNEY  
+61 2 9353 5733  
apackham@claytonutz.com

### Lauren Smith

SENIOR ASSOCIATE, SYDNEY  
+61 2 9353 5675  
lasmith@claytonutz.com

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## CONTACT US

**Sydney** +61 2 9353 4000  
**Brisbane** +61 7 3292 7000  
**Canberra** +61 2 6279 4000

**Melbourne** +61 3 9286 6000  
**Perth** +61 8 9426 8000  
**Darwin** +61 8 8943 2555





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ADVOCADOS

April 02, 2020

## COVID-19 | Antitrust - CADE and Antitrust Law in times of crisis

### CADE and Antitrust Law in times of crisis

Our Antitrust team has reviewed the main news and trends from the Brazilian competition agency (CADE)'s practice during the COVID-19 crisis. These are the highlights:

- CADE's personnel continue to work remotely, dealing with cases and holding meetings through video and audio conferences;
- Only certain procedural deadlines for defendants in formal investigations are suspended, most deadlines continue to run;
- Merger control analysis will be prioritized, but may see delays due to the difficulty in obtaining data from companies;
- Partnerships among companies specifically aiming to deal with the crisis need to be clearly structured to avoid an investigation;
- Companies are already under scrutiny for alleged abusive pricing, and price increases especially in sensitive areas should be carefully considered; and
- There are legislative proposals under discussion in Congress that could relevantly affect CADE's practice during the crisis.

### CADE's Activities

The President of CADE released a statement reinforcing the agency's commitment to continue its activities, adapting to the health restrictions in place. Most of the agency's staff is working remotely, which has made video and audio conferences a routine.

The agency further amended its Internal Regulations to make it possible to carry out online sessions, provided they comply with information security requirements, ensure transparency and publicity, and allow full participation of interested parties.

CADE's ongoing activities during this challenging moment will be essential to allow for an efficient analysis of possible emergency transactions among companies – aimed at meeting the demand arising from the fight against COVID-19 – and to restrain potential abuses.

## Procedural Deadlines

After the enactment of the Provisional Measure No. 928 by the Brazilian President, which included in the list of exceptional measures to fight COVID-19 “the suspension of procedural deadlines imposed on defendants in administrative proceedings for as long as the state of calamity remains,” CADE clarified that:

- **Deadlines imposed on defendants in the following proceedings will be suspended:** (i) proceedings with formal charges that can result in fines (cartel and unilateral conduct investigations); (ii) proceedings to investigate failure to comply with merger control rules (APAC); and (iii) proceedings that can result in fines for breach of incidental procedural rules.
- **There will be no changes to the deadlines in the following proceedings:** (i) merger control cases; (ii) preliminary investigations; (iii) leniency agreements negotiations; (iv) settlement agreements and merger control agreements negotiations and compliance; and (v) consultations.

## Impacts on Merger Control Cases

CADE intends to prioritize the analysis of merger control cases. The purpose is to maintain the 2019 average time of analysis (17 and 90 days for fast track and regular proceedings, respectively).

However, in practice the terms may be extended for several reasons, such as problems arising from remote work, difficulty in obtaining information by the companies, or delays caused by third parties in responding to questionnaires sent by CADE. Filings should be made with all information and documents necessary for their approval without additional questioning by CADE in order to avoid delays.

Finally, four developments are expected to occur during the crisis:

- i. Increase in the volume of filings involving mergers and acquisitions of companies with financial difficulties or in bankruptcy;
- ii. Increase in requests for the faster preliminary (“precarious”) authorization in transactions, provided the deal can be reversed in the case of a subsequent prohibition;
- iii. Greater scrutiny of clauses for maintenance of the regular course of business between signing and closing, as well as actions taken by companies in this period, avoiding the occurrence of gun jumping; and
- iv. Increase in consultations and notifications of collaborative agreements and joint ventures (see below news regarding the proposal to amend the Brazilian Competition Law in this specific point).

## Caution with Cooperation between Competitors

CADE will pay special attention to companies' activities during the Covid-19 crisis to prevent anticompetitive practices (see below information on CADE's recently launched investigation regarding excessive pricing). In particular, contacts among competitors are expected to be under the authority's intense scrutiny.

It is important to be very cautious in any interaction of this nature, either directly or through trade associations. Conducts such as price fixing, customer or geographic allocation and bid rigging will continue to be targeted by the authority.

Potential associations with competitors specifically aiming to deal with aspects of the crisis must be entered into in a very transparent way, with the adoption of antitrust protocols and other measures to preserve the independence of the businesses involved.

### **Investigation on Abusive Pricing Increase**

During the crisis, it is likely that companies – especially those active in sectors considered “essential” – are questioned for price increases that may be considered abusive. On March 18, 2020, CADE launched a preliminary investigation on alleged abusive price increases by companies in the health sector such as hospitals, laboratories, drug stores, surgical masks alcohol-based hand sanitizers and Covid-19 treatment drugs distributors and manufacturers. Up to date, more than 50 requests for information have been sent.

### **Proposal to Amend the Brazilian Antitrust Law**

On March 31, 2020, a Draft Bill (No. 1,179) was presented to the Brazilian Senate proposing the following amendments to the Antitrust Law:

- i. Until October 31, 2020, the mandatory notification of collaborative contracts, joint ventures and consortia shall be suspended;
- ii. Until October 31, 2020, CADE shall be prevented from investigating and deciding on cases resulting from (i) the sale of goods and services at below cost prices, and (ii) the closing and partial termination of business activities without cause; and
- iii. Antitrust violations shall be assessed by CADE taking into account “the extraordinary circumstances resulting from the pandemic.”

As to the first item, the proposal seems very broad and might suffer adjustments to restrict its application to collaborative agreements aiming to maintain the supply and production of goods directly related to the Covid-19 crisis. The Bill is still being reviewed by Congress.

### **Drugs Price Freeze Proposal**

On March 24, 2020, another Draft Bill (No. 881/2020) was presented in the Senate proposing to freeze prices of drugs during the state of public calamity.

CADÉ expressed its opposition to the project, indicating that it might trigger a reduction in the volume of products offered by smaller companies, as well as lead to market concentration and products shortage. It is uncertain whether this Bill will move forward.

We are monitoring the situation closely and will keep you informed of all relevant antitrust developments. If you have any specific interest or question, please do not hesitate to contact any of us.

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# Bennett Jones

## BLOG

# COVID-19 Relief for Employers: The Canada Emergency Wage Subsidy is Approved

April 13, 2020

Written by Jordan Fremont, Carl Cunningham, Anu Nijhawan and Katelyn Weller

On Saturday April 11, 2020, the *COVID-19 Emergency Response Act, No. 2* received Royal Assent, thereby amending the *Income Tax Act* (Canada) to give effect to the Canada Emergency Wage Subsidy (CEWS) framework that the federal government had previously proposed. The legislation is largely consistent with the details of the CEWS that had previously been announced (see our previous blog postings, *Canada Emergency Wage Subsidy for Employers Impacted by COVID-19* from March 30, *Additional Details on the Canada Emergency Wage Subsidy for Employers Impacted by COVID-19* from April 1, and *The Proposed Canada Emergency Wage Subsidy Takes Another Turn* from April 8), but also includes notable clarifications and additions that enhance the ability of employers to access the CEWS.

The CEWS provides "eligible entities" with a wage subsidy of up to 75 percent of "eligible remuneration" paid to an "eligible employee" per week for a 12-week period between March 15 and June 6, 2020, up to a maximum of \$847 per week. The CEWS is deemed by the legislation to be an overpayment of tax by the eligible entity and, as such, is expected to operate to reduce future tax payable by the eligible entity or to generate a refund. As adopted, the key concepts are as below.

## Eligible Entities

The CEWS is available to a broad range of employers that are "eligible entities", including individuals, taxable corporations (including public and private corporations), certain tax-exempt organizations, and partnerships between eligible entities. As previously announced, the CEWS is not generally available to public bodies, including municipalities, Crown corporations, public universities, colleges, schools and hospitals.

Although broad, it is important to note that not all common business forms are included in the term "eligible entity". A notable example is a partnership the members of which include a tax-exempt pension fund or an aboriginal band. It remains to be seen whether such partnerships or other entities will be prescribed by regulation as eligible entities. Entities which do not fall squarely within the listed entities are encouraged to consult with their legal and tax advisors to determine next steps, including seeking clarity through future regulations.

In order to qualify for the CEWS, eligible entities must be able to evidence a reduction in "qualifying revenue" of at least 15 percent in March or 30 percent in April or May by comparing revenue to the corresponding period in 2019. To provide flexibility for new businesses and businesses in expansion mode, eligible entities are permitted, in the alternative, to calculate changes in revenue by comparing revenues in each of March, April and May to an average of their revenues earned in January and February 2020. If this alternative method of calculating a revenue reduction is used, it must be used for any future qualifying period.

The qualifying periods and available approaches to measuring revenue changes are as follows:

<b>Claim Period</b>	<b>Required Reduction in Revenue</b>	<b>Reference Period for Reduction in Revenue</b>
March 15 to April 11, 2020	15%	March 2019 or, by election, the average of January and February 2020.
April 12 to May 9, 2020	30%	April 2019 or, if elected above, the average of January and February 2020.
May 10 June 6, 2020	30%	May 2019 or, if elected above, the average of January and February 2020.



Other qualifying periods may be prescribed by regulation.

An eligible entity that qualifies in one qualifying period will be deemed to qualify for next subsequent qualifying period. This measure was, we understand, adopted to provide certainty that, if an eligible entity qualifies for the March 15 to April 11 period, it will also be deemed to qualify for the April 12 to May 9 period. The language of the deeming rule suggests that re-qualification would nevertheless be necessary for the May 10 to June 6 period.

## Qualifying Revenue

For the purposes of calculating the reduction in qualifying revenue, revenue is defined as the revenue (cash, receivables, or other consideration) from the eligible entity's ordinary business activities carried on in Canada, provided such amounts are derived from arm's-length persons or partnerships. Extraordinary items are excluded.

The legislation includes specific elective rules governing the computation of revenue where substantially all (generally 90 percent or more) of an eligible entity's revenue is derived from non-arm's length transactions. Such provisions are expected to apply, for example, where an eligible entity sells all of its production to a related company that in turn earns arm's length revenue but does not itself have employees.

Qualifying revenue is to be determined in accordance with the eligible entity's normal accounting practices, subject to certain rules adopted for flexibility. For example, while revenue is generally determined on an accrual basis, an eligible entity may elect to use the cash method. Eligible entities that normally prepare consolidated financial statements are able to compute revenue on a consolidated basis (where an election is made) or a separate basis, provided every member of the group is consistent.

Notably, the reduction in revenue test is computed on an entity-by-entity basis. Thus, where an eligible entity carries on more than one business, the CEWS may not be available where the reduction thresholds are not met for the entity as a whole, even where one particular business line does so qualify. Entities which may be in this position are encouraged to review their organizational structures with their legal and tax advisors to determine eligibility.

Specific rules apply to the revenue computation for charities and non-profit organizations, which are allowed to include or exclude government funding in their revenues for the purpose of applying the revenue reduction test. Once selected, the same approach will apply for the duration of the program.

## Scope and Duration

For eligible entities, the CEWS will cover up to 75 percent of "eligible remuneration" paid to new hires (up to up to a maximum benefit of \$847 per week) who are employed in Canada. For current employees who are employed in Canada, the amount of the CEWS for a given employee will be the greater of:

- 75 percent of the amount of eligible remuneration paid, up to a maximum benefit of \$847 per week; and
- the amount of eligible remuneration paid, up to a maximum benefit of \$847 per week or 75 percent of the employee's pre-crisis weekly remuneration, whichever is less.

For non-arm's length eligible employees (for example, employees of family corporations and professional corporations), the subsidy amount will be limited to the eligible remuneration paid in any pay period between March 15 and June 6, 2020, to a maximum benefit of \$847 per week and 75 percent of the employee's pre-crisis weekly remuneration (whichever is lower), and will only be payable in respect of non-arm's length employees who had been employed prior to March 15, 2020.

Eligible employees are all individuals employed in Canada by the eligible entity in the qualifying period, other than individuals who are not remunerated for 14 or more consecutive days in such period. Two items are noteworthy in respect of this definition:

- Where an employee has been subject to a temporary layoff or other unpaid leave of absence, it should be noted that the CEWS will not be available for a qualifying period in respect of that employee if the employee has been recalled to employment after having been without remuneration for 14 more consecutive days in that qualifying period.
- Although uncertainty exists on the issue, this might be interpreted to include non-residents of Canada who perform employment services in Canada and who have eligible remuneration that is subject to withholdings for Canadian income tax purposes.

Eligible remuneration generally includes salary, wages, fees, commissions and other remuneration (such as taxable benefits) that are typically subject to income tax withholdings, but excludes retiring allowances, stock option benefits, and certain other amounts. Notably, there is an express exclusion for amounts that can be expected to be paid or returned, directly or indirectly, to the eligible entity or a non-arm's length person. This exception could, for example, be read as applying where an owner/manager typically contributes salary back to the employer entity for working capital purposes. Any such arrangements should be scrutinized carefully as part of the CEWS analysis. Eligible remuneration also excludes any accelerated

remuneration paid to an employee that is in excess of such employee's baseline remuneration where one of the main purposes for the accelerated payment is to increase the amount of the CEWS.

Although previous announcements had emphasized that employers would be expected to, where possible, maintain employees' remuneration at pre-crisis levels, there does not appear to be a legislative requirement to do so.

Notably, the legislation does not contemplate providing CEWS amounts in respect of owners/managers of small businesses who have remunerated themselves and any other non-arm's length employees solely through dividends rather than employment income, or who do not receive eligible remuneration in the baseline remuneration period of January 1, 2020, through March 15, 2020.

## **Refund for Certain Payroll Contributions**

Employer-paid contributions to Employment Insurance (EI), the Canada Pension Plan, the Quebec Pension Plan, and the Quebec Parental Insurance Plan in respect of an employee will be added to the amount of the CEWS payable to an eligible entity for the period of time that the employee is on paid leave (i.e., not performing any work). Eligible entities are not eligible to be paid any amounts in respect of employer-paid contributions for employees who are actually working during the period that the employer is eligible to claim the CEWS.

Employers are required to continue collecting and remitting employer and employee contributions to EI, the Canada Pension Plan, the Quebec Pension Plan, and the Quebec Parental Insurance Plan as usual.

## **Anti-Avoidance Measures and Penalties**

The legislation includes two anti-avoidance rules that, if applicable, will deny the CEWS and potentially expose the entity to penalties. This is further to the Department of Finance's statements that employers that engage in artificial transactions to reduce revenue for the purpose of claiming the CEWS would be subject to a penalty equal to 25 percent of the value of the subsidy claimed, in addition to the requirement to repay in full the subsidy that was improperly claimed.

The legislation contains a targeted anti-avoidance rule which will deny the CEWS to an otherwise eligible entity where: (A) the employer, or a non-arm's length person or partnership, enters into a transaction or participates in an event (or a series of transactions or events) or takes an action (or fails to take an action) that has the effect of reducing the qualifying

revenues of the employer for a reference period; and (B) it is reasonable to conclude that one of the main purposes of the transaction, event, series or action is to cause the employer to qualify for the CEWS. The breadth of this rule—referring to actions or failure to take actions—is perhaps necessary given the scope of the relief provided, but, prior to applying for the CEWS, we recommend that eligible entities review, with their legal and tax counsel, any out-of-the ordinary transactions or events which could potentially be caught by the rule.

Further, any eligible entity subject to the above provision is liable to an additional penalty of 25 percent of the value of the CEWS amount claimed.

## Interactions with Other Programs

- **10% Wage Subsidy:** Employers that do not qualify for the CEWS may continue to qualify for the previously announced wage subsidy of 10 percent of remuneration paid (from March 18 to before June 20) up to a maximum subsidy of \$1,375 per employee and \$25,000 per employer. For employers that are eligible for both the CEWS and the 10 percent wage subsidy for a period, the CEWS will generally be reduced by any amount paid through the 10 percent wage subsidy.
- **Canada Emergency Response Benefit (CERB):** Eligibility for the CEWS in respect of an employee's remuneration is limited to those employees who have not been without remuneration for more than 14 consecutive days in the claim period (i.e., from March 15 to April 11, from April 12 to May 9, and from May 10 to June 6).

If an employee has been laid off for 14 or more consecutive days within a claims period, the employer will not be eligible to receive the CEWS for the employee in respect of the same claim period. The objective is to avoid an overlap between payments under the CEWS and the CERB, for same period of time and for the same employee. However, in earlier announcements the government had indicated that it will consider other approaches that might limit duplication, including a process to allow individuals rehired by their employer during the same eligibility period to cancel their CERB claim and repay that amount. Unless other approaches are subsequently adopted, it appears that if an employer recalls an employee who had been laid off for 14 or more consecutive days within a particular claim period (e.g., March 15 to April 11) the employer will not be eligible for the CEWS in respect of the employee for that particular claim period. This would appear to limit the ability to recall the employee and make a retroactive payment of wages that will qualify for the CEWS in respect of the employee's layoff.

- **Work-Sharing Program:** For employers and employees that are participating in a Work-Sharing program, EI benefits received by employees through the Work-Sharing program will reduce the benefit that their employer is entitled to receive under the CEWS.

The CEWS (i.e., 75% subsidy) or 10% subsidy will be considered government assistance and included in the employer's taxable income. Either subsidy will reduce the amount of remuneration expenses eligible for other federal tax credits calculated on the same remuneration.

## How to Apply

Eligible entities will be required to file an application before October 2020, and will need to attest that the revenue reduction thresholds are established. To receive the CEWS, the entity must, as of March 15, 2020, have been registered to make payroll remittances. It is anticipated that eligible entities will be able to apply for the CEWS through the Canada Revenue Agency's *My Business Account* portal as well as a web-based application to be established.

Notably, eligible entities will need to maintain evidence as to their qualification for the CEWS, although such documentation will not generally need to be submitted to the CRA at the time of making an application.

## Conclusion

While the passage of the *COVID-19 Emergency Response Act, No. 2* marks a crucial step in making the CEWS relief widely available, there remain many important outstanding issues, some of which may be dealt with through future regulations. For employers looking to structure their business affairs in ways that will best allow them to utilize the assistance available through the CEWS and/or other programs, there is no one-size-fits-all approach. The Bennett Jones Employment Services, Tax and Public Policy groups continue to work with employers, government and other national and local organizations to work through these issues, and would be pleased to assist you as you look to identify and implement strategies in connection with the COVID-19 pandemic.

In addition, please visit our COVID-19 Resource Centre for other COVID-19-related materials.

[www.bennettjones.com](http://www.bennettjones.com)

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## BC Workplace Blog

Authored By Michelle Quinn & Colleagues

14

April

### Employment Contract Impossible to Perform: COVID-19 An Unforeseeable Event?

👤 By Michelle Quinn

Businesses all across Canada continue to be significantly impacted by the growing coronavirus pandemic. In the last few weeks we have witnessed, and continue to witness, unprecedented business and office closures, terminations and large-scale employee lay-offs that seem to be connected to the current COVID-19 global pandemic.

As a reminder, employees are entitled to a certain amount of notice (or pay in lieu of notice) when their employment is terminated without cause.

Under section 63 of the *BC Employment Standards Act* (the "ESA"), where an employer terminates an employee without just cause, the following amount of notice (or pay in lieu) must be provided:



- After three consecutive months of employment – one week's pay;
- After 12 consecutive months of employment – two weeks' pay;
- After three consecutive years of employment – three weeks' pay, plus one week's pay for each additional year of employment to a maximum of eight weeks

If an employer has terminated 50 or more employees at a single location within a short time-frame, then section 64 of the *ESA*, which governs group terminations, applies.

The group notice requirements are as follows:

<b>NUMBER OF EMPLOYEES</b>	<b>NOTICE REQUIRED</b>
50 to 100 employees	8 weeks before effective date of first termination
101 to 300 employees	12 weeks before effective date of first termination
301 or more employees	16 weeks before effective date of first termination

However, section 65 of the *ESA* outlines exceptions for when the requirements for employers to provide employees with individual notice of termination or pay in lieu of notice, or to provide notice of group termination, do not apply. Most notably, section 65(1)(d) provides that:

**65** (1) Sections 63 and 64 do not apply to an employee

*employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, action under section 427 of the Bank Act (Canada) or a proceeding under an insolvency Act,*

If the closures are directly linked to COVID-19, and there is no way for the employee to perform work, such as working from home, the exception may apply to exclude employees from receiving compensation for length of service and group termination pay. In order to rely on this section, an employer must show two things:

1. it was impossible to perform the contract; and
2. impossibility of performance was due to an unforeseeable event or circumstances

The present situation involving COVID-19 is unprecedented and so it is difficult to determine at this time whether the “frustration” exception in section 65(1)(d) will apply to employees who are terminated. Therefore, each case will need to be closely assessed on its own set of facts.

If you have any questions or need specific advice about any of these statutory provisions, please contact a member of our Employment and Human Rights team. We are, as always, available by phone, email or video.

[www.rbs.ca](http://www.rbs.ca)

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**Vancouver Office:**

700 – 401 West Georgia Street  
Vancouver, BC Canada V6B 5A1  
**TEL:** 604.682.3664 **FAX:**  
604.688.3830

**Surrey Office:**

200 – 10233 153 Street  
Surrey, BC Canada V3R 0Z7  
**TEL:** 604.582.7743 **FAX:**  
604.582.7753

## New Law on guaranteed Minimum Income

April 13, 2020

On April 3rd, 2020, Law No.21,218 (the “Law”), which creates a monthly subsidy (the “Subsidy”) borne by the State of Chile, in order for employees to reach a minimum guaranteed income, was published on the Official Gazette.

### Requirements that employees must fulfill in order to be eligible for the Subsidy

- Having a valid employment contract, pursuant to the Labor Code.
- Their regular working schedule must exceed 30 hours a week.
- Their monthly gross remuneration must be lower than \$384,363 (currently USD 451 approximately).
- They must belong to a home which is part of the 9 first income deciles, pursuant to the socioeconomic characterization instrument to which article 5 of Law No.20,379 (which “creates the inter-sectional protection system and institutionalizes the ‘Chile Crece Contigo’ infancy integral protection subsystem) refers to.

### Amount of the Subsidy

Employee's gross monthly remuneration	Regular weekly working schedule (hours)	Monthly amount of the Subsidy
≥\$301,000 and <\$384,363 (≥\$353 and <\$451 approximately)	45	CLP 59,200 - (Monthly gross remuneration – CLP 301,000) x 0.7101 = Amount to be paid.
	<45 and >30	Same rule as the above cell, in proportion to the employee's weekly working schedule.
<\$301,000 (USD <353 approximately)	45	19.67% of the monthly gross remuneration.
	<45 and >30	Same rule as the above cell, in proportion to the employee's weekly working schedule.

### Particularities of the Subsidy.

- Neither subject to any deduction, social security contribution or tax, nor is it seizable.
- Extinguished upon termination of the employment relationship or when the relevant employee ceases to comply with the requirements set forth by Law in order to be eligible for it.
- Employees who are receiving the Subsidy will continue to receive it during the time they make use of their vacations, sick leave (“licencia médica”) and Parental Post-Natal leave.
- It will be in force until December 31st, 2023.

### Employer's obligations

Employers must inform to all of their employees who may be eligible for the Subsidy about its

existence, based on the employees' respective gross monthly remunerations.

## **Prohibitions**

- Whether an employee is eligible to receive the Subsidy under no circumstance may derive in an unjustified reduction over the employee's remuneration or any other of its components, as compared to the ones paid by the employer on the previous 3 months. Any clauses which imply a reduction over the employees' remuneration will be deemed non-written.
- The employer will not be able to terminate an employee's employment contract and execute a new one, in which a lower remuneration is agreed, with the sole purposes of making such employee eligible to receive the Subsidy.
- The remunerations received by the employees who are beneficiaries of the Subsidy must not be agreed in attention to this amount, or any other arbitrary consideration. They must always be agreed in an objective manner, only being possible to agree them based on the employee's qualifications, suitability, responsibility or productiveness.

## **Sanctions**

- Employers which incur in any of the aforesaid prohibitions may be sanctioned with administrative fines that will amount up to: (i) 30 Unidades Tributarias Mensuales "UTM" (USD 1,774 approximately) in case of companies with 1 to 49 employees; (ii) 120 UTM (USD 7,096 approximately) in case of companies with 50 to 199 employees; and (iii) 180 UTM (USD 10,643 approximately), in case of companies with more than 200 employees. These fines will be imposed taking into account each employee who falls under any of the prohibitions. Likewise, in case of a relapse in the conduct and when applicable, shut down of the establishment or worksite for a 10-day term may be declared.
- Everyone who, whether for their own or of a third party's benefit, knowingly supply, declare or give false background or information in order to illegally obtain the Subsidy, will be sanctioned with fines and imprisonment, varying their amount and length based on the amount of the Subsidy maliciously obtained.

## **Validity**

The Law will come into force on May 3rd, 2020, being the first payment of the Subsidy made within 30 days as of such date.

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

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

## Intellectual Property Law

### China Strengthens Fight Against Malicious Trademark Registrations

Authors: Yan WANG | Vivian HE | Xiaomeng DONG

A focus for Chinese trademark law and practice in recent years has been strengthening the fight against malicious trademark registrations. On November 1, 2019, the amended *Trademark Law of the People's Republic of China* (the “**Trademark Law**”) was officially implemented, in which Article 4 primarily embodies China's determination to strengthen the fight against malicious trademark registrations, **greatly lowering the threshold for attacking malicious registrations and also potentially serving as the latest weapon in cracking down on malicious registrations**. In addition, the Trademark Law, as amended, also provides other provisions to fight against malicious trademarks, such as defenses against malicious trademark agencies and raising the amount of compensation for malicious trademark infringement, etc. At the judicial level, it is clear that the number of cases has increased significantly, such as raising damage awards against trademark infringers and not supporting malicious trademark infringement lawsuits.

For example, Article 4 of the Trademark Law stipulates that “[m]alicious registration applications for trademarks not for the purpose of use shall be rejected”. A short time has passed since this legal provision came into effect, but many national intellectual property administrations around the world which have actively invoked similar legal provisions to strike a blow against malicious registrations, including one dental company in the United States that submitted an application for invalidation against a U.S. company over a trademark on nine types of electrical switch goods. Moreover, one U.K. company submitted an application for invalidation against another U.K. company for the same trademark on three types of cosmetics. The China National Intellectual Property Administration has actively cited Article 4 of the Trademark Law in analyzing the maliciousness of disputed trademarks, an example of which is presented in the following ruling excerpt:

*Where the respondent repeatedly applied for registration of the same trademark in multiple product categories ... and the respondent failed to defend and prove the source of the trademark design of the disputed trademark, our administration reasonably believes that the respondent has the purpose of making a profit by improperly utilizing the trademark of the applicant. **This form of rushed registration violates***

***the principle of acquiring trademark rights based on the necessity of actual use as stipulated in Article 4 of the Trademark Law of the People's Republic of China.***

Under the framework of the Trademark Law, Article 4.1 and Article 44.1 are the operative provisions of law primarily aimed at fighting malicious registrations. **However, the threshold in Article 4 for “malicious” is lower compared to Article 44.1.**

The important requirements in Article 4 of the Trademark Law are: “not for the purpose of use” and “malicious”. The requirement of “**not for the purpose of use**” can be judged, for example, by whether actions have been taken to prepare the trademark for use or the registrant actively defends the trademark. **For the second element, “malicious”, relevant judicial interpretations** identify as malicious circumstances such as: the trademark applicant has no legitimate reason for the application, knew or should have known of others who were using the trademark, or the trademark has a certain degree of visibility or strong influence. As in the above cases, it can be proven that a respondent meets **the two requirements of Article 4 at the same time** if the disputed trademark for registration is the same as that of a previous registrant of the trademark which has a strong influence, the respondent has no explanation for the origin of the trademark, or the respondent has used the trademark across the multiple product categories.

Compared to Article 4 of the Trademark Law, in Article 44.1, the “other improper means” provision protects the public interest rather than individual civil rights and interests. **Therefore, the malicious registration of a trademark by an applicant must be considered to have resulted in “harming the public interest” to a severe degree, such as hoarding hundreds of trademarks.** In the trademark invalidation case “SHEER LOVE”, the court applied Article 44.1 to reject the registration applications of the respondent, who had copied for sale over 700 of the trademarks of others.

Before the implementation of the amended Trademark Law, Article 44 of could only be applied when the number of trademarks an applicant had hoarded in bad faith was especially large (such as hundreds or thousands) or the applicant’s conduct was particularly malicious. Article 4 of the Trademark Law lowers the threshold for attacking malicious trademark registrations and allows for action to be taken against malicious trademark registrations which have not reached the level of harming the public interest. In light of the amended Trademark Law, the key point for us is to make full use of the relevant judicial interpretations to clarify the two elements of “not for the purpose of use” and “malicious”, so as to effectively and accurately strike against malicious trademark registrations.

### ***Important Announcement***

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

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

#### **Yan WANG**

Tel: +86 21 6080 0200

Email: [yan.wang@hankunlaw.com](mailto:yan.wang@hankunlaw.com)

#### **Vivian He**

Tel: +86 755 3680 6589

Email: [vivian.he@hankunlaw.com](mailto:vivian.he@hankunlaw.com)

April 7, 2020

## New interest rate and exchange rate risk coverage percentages

*The Superintendence of Finance by means of Resolution 359 certifies the interest rate and exchange rate risk coverage percentages for the projection of interest*

Resolution 0359 of 2020, which certifies the interest rate and exchange rate risk coverage percentages for the purpose of projecting the interest and balance of the debt of territorial entities.

For the projections of the debt balance and interest payments referred to in Law 819 of 2003, a stressed exchange rate will be used, which includes risk coverage, is calculated as follows:

a) For the purpose of calculating the debt balance as of December 31, 2020, the exchange rate will be as follows:

$$TRM'_t = TRM_t * (1 + (0.14229 * \sqrt{n} / 365))$$

In this case, the  $TRM_t$  is the exchange rate in force on the calculation date and  $n$  corresponds to the number of current days between the calculation date and 31 December 2020.

b) As regards the estimate of the balance of the debt for subsequent periods, the stressed rate corresponds as follows:

$$TRM'_j = TRM_j * (1 + 0.14229)$$

The  $TRM_j$  shown here corresponds to the exchange rate projected for the end of period  $j$ . The projections are based on the latest available Medium-Term Fiscal Framework.



If the projections for periods subsequent to those covered by the last Medium Term Fiscal Framework, in this case, the  $TRM_j$  to be used would be the exchange rate of the last projected year, adjusted by the last available nominal devaluation in the assumptions of the Multi-annual Macroeconomic Program of the respective MFMP, therefore, the formula would be as follows:

$$TRM'_i = TRM_k * (1 + dev.nomMFMP)^{i-k} * (1 + 0.14229)$$

$TRM_k$  corresponds to the exchange rate of the last year projected in the MFMP (year k), where i is a period not covered by the respective MFMP.

Regarding the estimation of the foreign interest rate risk coverage, a stressed reference interest rate will be used which would be:

$$r'_j = r_j * (1 + 0.741)$$

$R_j$  corresponds to the reference interest rate projected for the J period.

Finally, the internal interest rate risk coverage, will use a stressed interest rate that is defined:

$$r'_j = r_t * (1 + 0.741)$$

Where  $r_t$  corresponds to the reference interest rate in force on the day of calculation.

Click here to get the full text of [Resolution 0359 of 2020](#).

For more information contact our team: [info@bu.com.co](mailto:info@bu.com.co)

[www.bu.com.co](http://www.bu.com.co)

## PRESS ROOM

## COVID-19 LEGAL TASK FORCE COSTA RICA – UPDATE 14

*April, 2020*

Arias created an interdisciplinary task force with the participation of different practice areas, that is monitoring and informing about measures taken by the Government to mitigate the impact of COVID 19.

The Government of the Republic announced new vehicle restrictions measures to contain the spread of COVID-19:

Provisions related to the registration, renewal and post registration changes of healthcare products on the “Regístrelo” platform:

- The validity of the products is extended for 6 months starting from April 2020.
- The terms of procedures are maintained as established in the current regulations.
- For post registration changes of products already been entered, will be granted a 3-month extension for managing documents from other Regulatory Authorities that require legalization.
- If the 3-month extension expires and the documents are not duly legalized, **the Legal Representative must present a letter of commitment indicating the presentation of documents within a period not exceeding 6 months from approval**, through a post registration change.
- For post registration changes requiring legalized documents, the Legal Representative must present a letter of commitment indicating the presentation of documents within a period not exceeding 6 months from approval.
- All the documentation established by current regulations must be

provided on the website, and, if that any document is not written in Spanish, an official translation is required.

At Arias we remain at your disposal in case you need help. Do not hesitate to contact our specialized team at the following email: [Mariana.Vargas@ariaslaw.com](mailto:Mariana.Vargas@ariaslaw.com)

Our task force will be monitoring all the actions and possible legal implications ordered by the Costa Rican Government during this global crisis.

Arias Costa Rica team

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## CONTACT

[Mariana.Vargas@ariaslaw.com](mailto:Mariana.Vargas@ariaslaw.com)

# Arias

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Belgium | Luxembourg | Netherlands | EU

## EU Copyright: lending out vehicles with radio receivers is not a “communication to the public”

Thursday 2 April 2020

On 2 April 2020, the Court of Justice of the European Union (“CJEU”) rendered a judgment (**C-753/18**) in which the much-discussed concept of “*communication to the public*”, relevant for copyright-protected works in the EU, is further elucidated.

To refresh our minds, the right to authorise or prohibit any communication to the public of copyright protected works, such as songs, exclusively belongs to the author and the performer (e.g. the songwriter, the producer, the singer and the musician) (articles 3(1) of Directive 2001/29/EC and 8(1) Directive 2006/115/EC). Performers and producers must be equitably remunerated for the communication to the public of their songs (article 8(2) of Directive 2006/115/EC). It is thus extremely important to be well aware of what is and what is not considered as a *communication to the public*.

In a request for a preliminary ruling from a Swedish court, the CJEU was asked to determine whether the hiring out of cars equipped with radio receivers means that the person who hires the cars out is a user who makes a *communication to the public*.

The dispute opposes the Swedish collective management companies “STIM” and “SAMI” (the equivalents of SABAM, Playright, SACEM, BUMA/Stemra and SENA in the Benelux) against Swedish motor vehicle rental companies. The activity of these motor vehicle rental companies is to hire out vehicles equipped with radios, directly or via professional intermediaries. The duration of the rental term is limited to 29 days.

According to STIM and SAMI, the activity of the motor vehicle rental companies is considered as a contribution to copyright infringement, by making vehicles with a radio available to third parties - namely intermediary car rental companies - for short-term hire to private customers. The motor vehicle rental companies did not agree and started a legal action against STIM and SAMI.

In its analysis, the CJEU first reiterates that the two cumulative elements of a communication to the public are (1) an “act of communication” of the work, and (2) the communication of this work to a “public” (the reasoning of the Court’s decisions in C 161/17 *Renckhoff*, C 610/15 *Stichting Brein* and C 138/16 *AKM* is once again substantiated).

The crux that leads to the Court’s decision is recital 27 of Directive 2001/29, which states that *the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication [...]*. Hence, the making available of a radio, integrated in a rental car, which makes it possible for users to receive the terrestrial broadcasts that are available in a certain area, without the further intervention of the leasing company, is not considered as an “act of communication” of a protected work. The

Court hereby follows Advocate-General Szpunar's opinion of 15 January 2020.

Additionally, the Court underlines that the provision of rental cars equipped with a radio receiver is essentially different from a communication of musical works to clients through receivers placed in professional establishments (reference is made to C-117/15 *Reha Training*) and that the provision of passenger spaces in rental cars (just like the provision of radios) is not to be considered as a "communication".

The Court thus confirms and concludes that the hiring out of rental cars equipped with a radio does not constitute a "communication to the public" within the meaning of Article 3(1) of Directive 2001/29/EC and Article 8(2) of Directive 2006/115/EC.

This decision usefully clarifies what a "communication to the public" means.

#### Contact us



**Tanguy de Haan** | Brussels | +32 2 566 8430



**Sien Vandezande** | Brussels | +32 2 566 8224



**Anne Marie Verschuur** | Amsterdam | +31 20 71 71 821



**Vincent Wellens** | Luxembourg | +352 26 12 29 34



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## Contacts

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Benoit Le Bret

# French measures implemented to mitigate the effects of COVID-19 pandemic over businesses

14 April 2020

**This document has been drafted on the basis of information available as on 10 April 2020, and is without prejudice to any measure that may be taken by the French Government in the coming days.**

In order to deal with the COVID-19 pandemic and its consequences on the French economy, immediate measures have been put in place by the French Government to support businesses. These measures are summarized here below.

## 1. MEASURES IMPLEMENTED BY BPI FRANCE (French public investment bank)

- 90% guarantee for 3- to 6-year loans granted by French private banks to affected companies;
- Guarantee up to 90% of the bank overdraft if the bank confirms the overdraft over a period of 12 to 18 months;
- Extension of conventional guarantees for investment loans for a period of 6 months, free of charge;
- 3 to 5 years unguaranteed loans up to €5 million for SMEs and €30 million for “mid-cap” companies (ETIs), with a 1 year deferral (so-called “prêt Atout”);
- Together with French regions, possibility for companies to be granted an unguaranteed loan from €10 to €200 000, subsidised over a period of 7 years with a 2-year deferral (so-called “prêt Rebond”);
- Extension for BPI clients of the invoices deadlines and granting of cash credit facility equivalent to 30% of the receivables’ amount;
- Suspension of repayments for loans granted by Bpifrance, for a duration up to 6 months;
- Readjustment upon request of medium and long-term loans for Bpifrance clients;
- Specific measures to support exporting companies:

- Strengthening state guarantees through BPI France Assurance Export for guarantees and pre-financing of export projects to secure the cash flow of exporting companies;
- Extending prospecting-insurances in progress by 1 year, allowing an extension of the prospecting period covered;
- Amplification of the "Cap Francexport" public reinsurance scheme, implemented in October 2018, with a doubling of the ceiling on outstanding amounts reinsured by the State (to €2 billion);
- Strengthening support and information by the operators of the France Export Team, in conjunction with the regions and the network of foreign trade advisers, in addition to private support players;
- Specific measures for start-ups (€4 billion, notably through a "French Tech Bridge" envelope of €80 million), SMEs and small ETIs (assistance from the SME Strengthening Fund of between €0.5 and 5 million);
- Introduction of an online application form and a toll-free number (**0 969 370 240**) to facilitate access to information and guide entrepreneurs.

## **2. MEASURES IMPLEMENTED BY THE MINISTRY OF ECONOMY AND FINANCE**

- Possibility for companies facing payments difficulties to apply for a settlement plan aiming at spreading or deferring payment of tax debts;
- In the event of more serious difficulties, possibility for these companies to be granted direct taxes rebates (free of charge) on a case-by-case basis, following an individualized assessment;
- Possibility for companies to benefit from an accelerated proceedings for the refund of corporate tax claims refundable in 2020 (without waiting for the filing of the profit and loss statement), as well as from an accelerated processing of claims for VAT credits refunds;
- Deferral and possible rescheduling of rents, water, electricity and gas bills for small businesses eligible to the solidarity funds financed by the State and the Regions, for a 6-month period:
  - Companies experiencing difficulties in paying their rents, water, electricity and gas bills can file a request for an amicable postponement to their water, gas or electricity supplier without delay by e-mail or telephone;
  - On 20 March 2020, the main federations of malls lessors called its members to implement monthly payments for rents and charges invoiced for the second quarter;
  - Prohibition on water, gas and electricity suppliers to cut off supplies in the event of non-payment; and on lessors to apply penalties, late payment interests, or to activate guarantees or deposits in the event of unpaid rent.
- Flat-rate aid of €1,500 (or, alternatively, the equivalent of the loss of turnover, if less than €1500) for all small businesses, self-employed persons and micro-entrepreneurs and self-employed persons which have a turnover of less than €1 million and an annual taxable profit of less than €60,000 and which:
  - Are subject to administrative closure;
  - Or who experience a loss of turnover of at least 50% in March 2020, compared to March 2019.
- Possibility of an additional flat-rate aid of €2 000 paid by the Region to companies which employ at last one person and which are unable to pay their debts within 30 days and who have been refused a cash loan by their bank;
- State guarantees up to €300 billion to cover bank lines credit that businesses may need as a result of the pandemic. This cash loan will be able to cover up to 3 months of turnover or 2 years of payroll for innovative enterprises or enterprises created since January 1, 2019. The loan benefits from a State guarantee of 70 to 90%, depending on the size of the company;
- €10 billion guarantee scheme to enable companies to continue to benefit from the credit insurance cover they



need in order to continue doing their activity;

- Recognition by the State and local authorities of the Coronavirus as a case of force majeure for their public contracts. Consequently, for all State and local government procurements, penalties for delays will not be applied.

### 3. MEASURES IMPLEMENTED BY THE TAX AUTHORITIES

- Possibility for companies to defer next direct instalments (corporate tax, payroll tax) without penalty:

=> possibility for companies, which already paid their instalments due in March 2020, to object the corresponding SEPA debit or to apply for a refund from tax authorities if the debit has been processed.

The Single Euro Payments Area (SEPA) makes it possible for consumers, businesses, traders and administrations to make payments under the same conditions throughout the European area.

- Possibility to suspend monthly contracts for the payment of business tax (CFE) or property tax ; remaining amount to be deduced from the balance, without penalty;

The CFE is the corporate property tax. It is due in each city where the company has premises and land.

- Possibility for companies experiencing financial difficulties to be granted payment delays for the payment of their tax and social security debts.

### 4. MEASURES IMPLEMENTED BY THE URSAFF NETWORK

URSSAF is a network of private organizations whose main task is to collect employees' and employer's social security contributions that finance the French social security system.

- Possibility for employers to defer the payment of all or part of their employees' and employer's social security contributions due to URSSAF up to 3 months with no penalties:
  - Employers whose URSAFF payment due date is the 15th of each month already had the opportunity to defer the payment of the contributions due by 15 March;
  - Employers whose URSAFF payment due date is the 5th of each month had the opportunity to defer the payment of the contributions due by 5 April.
- Possible postponement of supplementary pension contributions.

### 5. MEASURES IMPLEMENTED BY THE MINISTRY OF LABOR

- Modification of the partial activity working scheme in order to facilitate access and reduce the amounts to be borne by employers;
- Safeguard of employment in companies through a simplified and reinforced partial activity working scheme:
  - The company will pay a compensation equal to 70% of the gross salary (about 84% of the net) to its employees. Employees earning the minimum wage or less will be compensated 100%.
  - The company will be fully reimbursed by the State for salaries up to €6,927 monthly, i.e. 4,5 times the French minimum wage.
- Derogations from maximum working hours and weekly/Sunday rest rules in sectors seen as particularly necessary for the security of the Nation or the continuity of economic and social life;
- Possibility for companies to force employees to take paid holidays or to modify paid holidays already taken, within the limit of 6 working days;
- In the case of collective proceedings, possible extension of the time limits for finding an amicable solution and of the recovery plan;

- Support from the AGS (Association for the Management of the Employees' Claims Guarantee Scheme) for companies experiencing difficulties:
  - Exceptional arrangements for the repayment of debts owed by companies in difficulty.
  - Assistance with the payment of wage advances to employees of companies affected.
- Publication of a Q&A for entrepreneurs and employees, available [here](#).

## **6. MEASURES IMPLEMENTED BY THE BANQUE DE FRANCE (credit mediation) AND THE FRENCH BANKS**

### **Banque de France**

- Support to negotiate a deferral of bank loans with the relevant banks;
- Credit mediation to help firms that are experiencing difficulties with one or more financial institutions.French banks

### **French banks**

- Banks' commitment to provide state-guaranteed loans at cost;
- Introduction of fast-track credit appraisal procedures for tight cash flow situations, within 5 days and with special attention to emergency situations;
- Deferral of credit repayments for businesses for up to 6 months;
- Suppression of penalties and additional costs for deferrals and corporate credits;
- Communication and explanation of public support measures (deferral of social or fiscal deadlines, public guarantee mechanism such as BPI, etc.).

## **7. MEASURES IMPLEMENTED BY THE INSURERS**

- The Caisse centrale de réassurance (French public reinsurance fund) will support a public reinsurance mechanism on outstanding credit insurance liabilities, up to €10 billion, intended to ensure the sustainability of inter-company credit;
- In addition, insurers have committed themselves to:
  - Contribute up to €200 million to the solidarity fund which was created by the government to support companies facing a significant fall of activity;
  - Defer the payment of rents for very small enterprises, small and medium-sized enterprises belonging to one of the sectors whose activity is interrupted;
  - Maintain the insurance guarantees for very small enterprises experiencing payment difficulties or delays for the entire duration of the period of suspension of activity;
  - Work on the implementation of an insurance product in the event of a major health catastrophe to improve the future range of insurance cover for businesses.

## **8. MEASURES IMPLEMENTED BY ACCOUNTANTS**

- Mobilization of chartered accountants to finance additional working capital needs up to €50,000;
- Setting up of a single file for financing applications that can be filled online and sent simultaneously to 3 banks.

## **9. MEASURES IMPLEMENTED BY THE BUSINESS MEDIATOR**

- Support in dealing with a conflict with customers or suppliers.

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>> **Click here** to read the legal updates of Gide's multidisciplinary taskforce set up to answer all your legal issues relating to Covid-19.

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## COVID-19 COUNTERFEIT PRODUCTS AND FAKE GOODS – INDIAN LAW PERSPECTIVE

**Author: Lynn Lazaro, Partner, Kochhar & Co.**

As misinformation on COVID-19 continues to spread, there is another more serious threat being dispersed through back trade channels and that is of counterfeit goods either for sale at exorbitant prices or fake goods proclaiming to cure or treat the virus. In 2018, Forbes announced that counterfeiting was the largest criminal enterprise in the world<sup>1</sup> and the sales of counterfeit and pirated goods totals \$1.7 trillion per year, which is more than drugs and human trafficking. This was before we were hit by COVID-19.

As the demand for cleansing supplies, hand sanitizers and face masks increase, it has also opened up a black market where bad actors are exploiting the situation to their benefit. The lockdowns have pushed people to make all their purchases through e-commerce sites and this is allowing counterfeiters to prey on the vulnerability of the purchasers. Sellers have increasingly claimed that their face masks, sanitizers and cleaning agents, have the capability to kill the virus, when these products are simply ordinary goods used for the routine prevention of germs. In order to gain repute, they deceptively claim to be affiliated with the World Health Organisation (WHO) and other such Centres. Amazon, in particular, has specifically informed sellers that they “prohibit the listing or sale of products that are marketed as unapproved or unregistered medical devices.”<sup>2</sup> However, it has been to no avail and Amazon has been tasked with the onus to eliminate such sellers from the site. As of March 4th, of this year, Amazon reported that they removed more than one million counterfeit products with bogus corona virus claims and cures.<sup>3</sup>

Even more terrifying, is that Authorities have seized fake testing kits and antiviral medications that could leave the user with a false sense of security and facilitate the spread of the virus. Interpol member countries have attempted to raise awareness and implored the general public to the dangers of purchasing drugs from unregulated online sources.<sup>4</sup> In one of many instances, an unlicensed company in Noida, was ready to ship spurious hand sanitizers and inferior quality face masks before they were shut down by the Authorities and over 10,000 of such sanitizer bottles were seized.<sup>5</sup>

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1 "Meet The Man Fighting America's Trade War Against Chinese Counterfeits (It's Not Trump)", Forbes, March 29, 2018

2 <https://www.cnbc.com/2020/02/20/amazon-warns-sellers-on-listings-that-make-false-coronavirus-claims.html>

3 <https://www.forbes.com/sites/tedknutson/2020/03/04/marketplace-contagion-amazon-has-already-removed-a-million-fake-products-related-to-coronavirus/#6ed66ffa418c>

4 <https://www.interpol.int/en/News-and-Events/News/2020/Global-operation-sees-a-rise-in-fake-medical-products-related-to-COVID-19>

5 <https://www.indiatoday.in/mail-today/story/coronavirus-beware-fake-masks-sprays-going-viral-1655647-2020-03-15>

The conglomerate 3M issued a statement that they were receiving “increasing reports of fraudulent and counterfeiting activities involving 3M products,” and that they “strongly condemn any unethical actions taken to exploit the global pandemic.” Essentially, counterfeiters are producing inferior quality masks, marking the 3M label on them and passing them off as genuine 3M masks.

In India, we do not have specific laws relating to piracy and counterfeiting of goods. Under trademark laws in India, the rights holder or owner of the brand has rights under the law of “passing off”. Passing off refers to the production of goods under the same or similar brand attempting to cash in on the goodwill of the true owner of the brand. India is also a member of TRIPS and under the TRIPS Agreement ‘counterfeit trademark goods’ are goods that bear, without authorisation, a trademark that is identical to, or which cannot be distinguished in its essential aspects from, a registered trademark.<sup>6</sup> Article 61 of TRIPS provides that member states need to provide for criminal procedures and penalties to be applied in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale.<sup>7</sup>

The India Customs Act 1962, read with the IP Rights (Imported Goods) Enforcement Rules 2007 allows trademark, designs, brand owners to record their rights with Indian Customs Authorities for the seizure of imported counterfeit goods. Under the Customs Act, counterfeit goods are per se prohibited goods so the Authority will notify the rights holder of any imported goods and if found to be fake, the same will be destroyed in front of the rights holder. In some instances, the Authority will also notify the rights holder even if they haven’t registered with the Authority. Counterfeit and piracy in India are cognizable offences, that is, law enforcement has search and seizure rights. In addition, criminal liabilities may be attached to offences under the Trademarks Act, Copyright Act and Geographical Indications Act.

Counterfeiters of spurious drugs in India are also accountable under the Drugs and Cosmetics Act 1940 (DCA). Spurious drugs here are defined as those that “deliberately and fraudulently mislabeled and manufactured to mislead patients by concealing their identity, source of manufacture and its content to profiteer on the popularity of fast-moving branded or generic medicines”.<sup>8</sup> Substandard drugs refer to drugs that are deemed to be Not of Standard Quality (NSQ) or substandard if it fails to comply with the standards specified under the DCA.<sup>9</sup> Under the DCA, offences are cognizable and violators of the Act may be processed through the Indian Code of Criminal Procedure, 1973. Law enforcement is permitted under the DCA to inspect, seize and confiscate any spurious, adulterated and misbranded drugs.

Another interesting element is the definition of “drugs” under the DCA. The term ‘drugs’ has been very broadly defined under the act. It includes “*all medicines for internal or external use of human beings or animals and all substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of any disease or disorder in human beings or animals...and substances intended to be used for the destruction of vermin or insects which cause disease in human beings or animals as may be specified from time to time by the Central Government by notification in the Official Gazette*”<sup>10</sup>. Therefore, this definition encompasses all quintessential drugs and medicines but also includes “any substance” that is intended to mitigate or treat any disease in human beings or animals. The definition further gives the central government the right to issue notifications to include any such substance within the definition of “drug” under the DCA and bring it within the scope of the DCA and its rules. For example, by notifications (S.O. 1335 dated 02.06.1961 and X.11013/2/72-D dated 09.07.1975) the government stated that if the composition of the product possesses disinfectant properties or claim to possess disinfectant properties, these products would be considered within the definition of “drugs” under the DCA. Thereby, including all disinfectants for fabric, surfaces, air and water, sterilants, pesticides, etc within the scope of the DCA. In addition, in light of the Covid-19 situation, the government has

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6 Article 51, TRIPS Agreement - <http://www.cptech.org/ip/texts/trips/51.html>

7 [https://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_05\\_e.htm](https://www.wto.org/english/docs_e/legal_e/27-trips_05_e.htm)

8 Drugs and Cosmetics Act (1940), Section 17B, subsections (a) through (e)19, as amended by the Drugs and Cosmetics (Amendment) Act, 1982

9 Drugs and Cosmetics Act (1940), second schedule, Section 5 (a) and (b), Chapter V.

10 Sections 3(b)(i), 3(b)(ii) of the DCA.

issued a notification last month that all medical devices will also be treated as “drugs” and will be regulated under the DCA<sup>11</sup> from April 1, 2020.

We can only imagine the exhausting task of the law enforcement agencies to seize and prosecute such counterfeiters, in addition to maintaining the peace and security in this time of crisis. Therefore, we can do our part by doing our due diligence and purchasing products only by regulated sources, and by reporting any counterfeit product that we may come across. Online sites have their own procedures for reporting fake goods. Amazon, for example, has an Intellectual Property Right Infringement Report online form that can be accessed on their portal. Rights holders should register with the Customs Authorities and for any counterfeit product or spurious drugs we should contact the nearest law enforcement authority to initiate due process i.e. search and seizure remedies.

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<sup>11</sup> <https://www.businesstoday.in/current/economy-politics/medical-devices-to-be-treated-as-drugs-from-april-1/story/399773.html>

# SKRINE

## COVID-19: Construction Industry Players, Start Your Engines!

16 April 2020

As Malaysia transits into the third phase of the Movement Control Order ('MCO Phase 3'), the Malaysian Government has moved to allow additional economic sectors to operate during this period. This includes, among others, construction projects and services related to construction works. However, construction industry players who intend to resume operations during MCO Phase 3 should take note that they are required to comply with the provisions under the third set of Frequently Asked Questions ('MITI FAQs-III') issued by the Ministry of International Trade and Industry ('MITI'). This Alert sets out key information from the MITI FAQs-III, which is of relevance.

### **Type of Construction Projects and Related Services Allowed**

#### *Construction Projects and Related Services*

Pursuant to Appendix I of the MITI FAQs-III, only the following construction projects and services related thereto are allowed to operate during MCO Phase 3:

- a. Projects whereby the main contractors are registered with the Construction Industry Development Board of Malaysia ('CIDB') as Grade 1 or Grade 2 contractors;
- b. Projects that have achieved physical progress of 90% and above;
- c. Tunnelling works;
- d. Maintenance works;
- e. Sloping works;
- f. Emergency works that are consequent to contractual obligations;



- g. Maintenance, cleaning and drying of stagnant water, spraying of pesticides at construction sites which prevent the breeding of Aedes mosquitoes and other pests;
- h. Other works that, if left incomplete, may result in danger;
- i. Building projects with an Industrialised Building System (IBS) score of 70 and above;
- j. Construction projects with accommodation facilities for workers (such as centralised quarters for workers or workers' camp); and
- k. Professional services related to the construction industry, including architects, engineers, town-planners, land surveyors, quantity surveyors, project managers, facility managers and other relevant services.

In addition, MITI has clarified that contractors carrying out works such as building construction, renovation of premises, and installation of machines may apply for approval to operate despite such works not being specifically listed in Appendix 1.

As a matter to note, items (c) to (h) above were previously identified as critical works and were allowed to be carried out during the first and second phases of the Movement Control Order, subject to the company carrying out such works having obtained prior approval from the Ministry of Works or other relevant authorities<sup>[1]</sup>. Companies with approvals to operate during the first and second phases of the Movement Control Order should be aware that they are now required to re-apply for approval from MITI in order to operate and/or increase their workforce capacity during MCO Phase 3.

#### Relevant Products, Works, and Services

MITI has clarified that companies not carrying out the types of construction projects or services listed in Appendix 1 may also apply for approval to operate during MCO Phase 3, on the basis that such companies provide relevant products or services. Examples provided in the MITI FAQs-III include:

- Supply of products such as raw materials, components or spare parts;
- Provision of logistic services and machine maintenance services;
- Companies related to the machinery and equipment sector;
- Service suppliers within the supply chain of a specific construction project.

## **Industry-Specific Application Requirements**

Companies in the economic sectors listed in MITI FAQs-III are required to apply for approval from MITI prior to commencing their operations during MCO Phase 3 in accordance with the procedure set out thereunder<sup>[2]</sup>. In addition, there are certain application requirements which are specific to the construction industry. These are summarised below:

- i. Companies are required to apply for a separate approval for each and every construction project or related service which they are undertaking;
- ii. Subcontractors may only submit their applications for approval after the main contractors have received approval; and
- iii. Applications will be assessed by MITI based on the class of the contractor (that is, the contractor's grade of registration with CIDB) and the list of criteria in Appendix 1 of the MITI FAQs-III.

## **Compliance with Health and Safety Protocols and Operating Conditions**

Companies which are granted approval to operate during MCO Phase 3 will be subject to health and safety protocols. These protocols are available on the Covid-19 Intelligent Management System (CIMS 2.0), which is the online system through which applications for approval from MITI are to be made, and must be agreed to by the applicant companies before they can register in CIMS 2.0.

In addition, such companies are required to comply with the operating conditions imposed by MITI. Failure to comply with these conditions is a criminal offence under Regulation 7 of the Prevention and Control of Infectious Diseases (Measures Within the Local Area of Infection 2020) and a person convicted of such an offence will be liable to a fine not exceeding RM1,000, imprisonment for a term not exceeding six months, or both. Where the offence is committed by certain non-individuals<sup>[3]</sup>, the directors, certain officers, partners and managers of the non-individual may also be charged severally or jointly with the non-individual offender.

## **Commentary**

While the MITI FAQs-III provide that only companies involved in the types of construction projects and related services listed in Appendix I thereto are allowed to operate during MCO Phase 3, it would seem the Malaysian Government recognises that allowing the resumption of operations will only be meaningful if relevant suppliers or service providers for these companies are also allowed to operate.

This move may also assist construction industry players with managing or resolving aspects of construction projects which have been impacted by the Movement Control Order, in particular project timelines and costs.

Further, construction industry players will have to give careful consideration with respect to their compliance with health and safety protocols. Given that the COVID-19 pandemic is still at a severe stage, the implementation and enforcement of such protocols is a necessary measure to protect the welfare of employees and workers as well as the community at large.

Our Construction and Engineering Practice Group will continue to keep you updated on the latest developments.

If you have any queries, please contact our Mr. Shannon Rajan (Partner) at [shannonrajan@skrine.com](mailto:shannonrajan@skrine.com) , Ms. Rachel Chiah (Associate) at [rachel.chiah@skrine.com](mailto:rachel.chiah@skrine.com) or Mr. Jeremiah Ch'ng (Associate) at [jeremiah@skrine.com](mailto:jeremiah@skrine.com) .

[1] Our Alerts on critical works for the first and second phase of the Movement Control Order are available [here](https://www.skrine.com/insights/covid-19-updates/covid-19-faqs-by-the-ministry-of-works-for-the-con) <https://www.skrine.com/insights/covid-19-updates/covid-19-faqs-by-the-ministry-of-works-for-the-con> and [here](https://www.skrine.com/insights/covid-19-updates/covid-19-faqs-by-the-ministry-of-works-for-the-1). <https://www.skrine.com/insights/covid-19-updates/covid-19-faqs-by-the-ministry-of-works-for-the-1>

[2] Our Alert on the overview of the MITI FAQs-III, including the application process for approval, is available [here](https://www.skrine.com/insights/covid-19-updates/covid-19-miti-issues-third-set-of-faqs). <https://www.skrine.com/insights/covid-19-updates/covid-19-miti-issues-third-set-of-faqs>

[3] A non-individual includes a company, limited liability partnership, firm, society or other body of persons.

April, 2020

### **Administrative benefits granted to issuers due to COVID-19**

Considering the different measures that have gradually been adopted by various government levels in Mexico to mitigate the economic effects that may be caused by COVID-19, on April 8, the National Banking and Securities Commission ("**CNBV**", for its acronym in Spanish), by virtue of the extraordinary authorities granted to its President by its Governing Board, submitted an official communication to the Issuers' Committee of the Mexican Stock Exchange (*Bolsa Mexicana de Valores*), in which it announced various administrative benefits, so that securities issuers can address the health situation and continue to comply with their obligations in terms of presenting periodic information. The facilities granted have the following general characteristics:

- + The deadline for issuers with securities registered in the National Securities Registry ("*Registro Nacional de Valores*" or "**RNV**") to present their annual information regarding the results obtained by the issuer during the previous fiscal year is extended to **July 8, 2020**.
  - In the case of annual financial statements (or their equivalents) for issuers of development equity certificates (CKD) or investment projects (CERPI) allocating at least 70% of the resources of their issue to investment in collective investment schemes not listed on a stock exchange, these shall be submitted to the CNBV and to the stock exchange on which their securities are listed, no later than **September 1, 2020**.
- + The deadline for issuers to file the report referred to in Article 49 Bis 2 of the *General Provisions applicable to Securities Issuers and other Securities Market Intermediaries* (known as the *Sole Issuer's Circular* or "**CUE**") before the CNBV is extended to **September 1, 2020**.
- + In addition, the deadline for fulfilling the obligations referred to in the first and second paragraphs of Article 49 Bis 3 of the CUE is extended to **July 3, 2020**.

# LEGAL UPDATE

- Regarding the obligation to submit the report contained in Annex V of the CUE (whose original delivery date was May 15), the deadline for its submission is extended to **July 19, 2020**.
- + Moreover, **July 3, 2020** is set as the deadline for the issuers to file the annual report referred to by the CUE before the CNBV and the stock exchange where their securities are listed.
  - In the case of annual reports for issuers of development equity certificates (CKD) or investment projects (CERPI) allocating at least 70% of the resources of their issue to investment in collective investment schemes, not listed on a stock exchange, these shall be submitted to the CNBV and to the stock exchange on which their securities are listed no later than **September 1, 2020**.
- + In order to comply with the provisions of article 34, section V, of the CUE, the deadline is extended to **September 1, 2020** for the issuers to deliver to the CNBV and the stock exchange where they list their securities, the registration of the general shareholders' meeting in which the approval of the compulsion of the bylaws of the Issuer with the registration information before the Public Registry of Commerce or the certification of the secretary of the Board of Directors, if the bylaws have not been modified.
- + Regarding the quarterly information that the issuers were obliged to report to the CNBV and to the stock exchange on which they list their securities before April 30, 2020, the deadline is extended to **July 3, 2020**.
- + The deadline for the issuers to submit the document referred to in Article 39 of the *"General provisions applicable to entities and issuers supervised by the National Banking and Securities Commission that hire external audit services for basic financial statements"* ("**Audit Provisions**") to the CNBV and the stock exchange where they list their securities will be **July 3, 2020**.
  - In the case of such information for issuers of development equity certificates (CKD) or investment projects (CERPI) allocating at least 70% of the resources of their issue to investment in collective investment schemes not listed on a stock exchange, these shall be submitted to the CNBV and to the stock exchange on which their securities are listed, no later than **September 1, 2020**.

- + Finally, **July 8, 2020** is set as the deadline for the issuers to submit to the CNBV and the stock exchange where they list their securities, the information referred to in Articles 32, 35, 36 sections 11, 37 and 38 of the Audit Regulations.
  - In the case of such information for issuers of development equity certificates (CKD) or investment projects (CERPI) allocating at least 70% of the resources of their issue to investment in collective investment schemes not listed in a stock exchange, these shall be submitted to the CNBV and to the stock exchange on which their securities are listed, no later than **September 1, 2020**.

It is important to emphasize that the above mentioned benefits do not constitute a temporary or definitive limitation of the CNBV's attributions and powers, nor will they generate greater benefits to the securities issuers except for those expressly mentioned.

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**For additional information, please contact our experts:**

<b>Mexico City Office:</b>	<b>Mr. Alberto Saavedra O., <a href="mailto:asaavedra@s-s.mx">asaavedra@s-s.mx</a> (Partner-Transactional)</b> <b>Mr. Sergio Chagoya D., <a href="mailto:schagoya@s-s.mx">schagoya@s-s.mx</a> (Partner-Transactional)</b> <b>Phone: (+52 55) 5279-5400</b>
<b>Monterrey Office:</b>	<b>Mr. Heriberto Garza C., <a href="mailto:hgarza@s-s.mx">hgarza@s-s.mx</a> (Partner-Transactional)</b> <b>Mr. Carlos Argüelles G., <a href="mailto:carguelles@s-s.mx">carguelles@s-s.mx</a> (Partner-Transactional)</b> <b>Phone: (+52 81) 8133-6000</b>
<b>Querétaro Office:</b>	<b>Mr. José Ramón Ayala A., <a href="mailto:jayala@s-s.mx">jayala@s-s.mx</a> (Partner-Transactional)</b> <b>Phone: (+52 442) 290-0290</b>



April 16, 2020 | 4 min read

[Resource Management Act \(/resources/resource-management-act\)](#)

[Climate change \(inc Zero Carbon Act and Emissions Trading Scheme\) \(/resources/climate-change-inc-zero-carbon-act-and-emissions-trading-scheme\)](#)

**The Government is currently proceeding with a two stage process to reform the Resource Management Act 1991 (RMA). The Resource Management Amendment Bill 2019 (Amendment Bill) is the outcome of the first stage.**

The Environment Committee recently reported back on the Amendment Bill. The report does not discuss all of the proposed minor, technical or consequential amendments. Instead the report focuses on the four key areas of reform in the Amendment Bill.

### Summary

- As we have outlined in previous FYIs (<https://www.simpsongrierson.com/articles/2019/government-to-transform-resource-management-act>), the Amendment Bill reverses some of the previous government's RMA amendments, increases infringement fines and introduces a new planning process for regional plan changes needed to protect freshwater.
- The Environment Committee has recommended a series of changes to the Amendment Bill. Its recommendation to allow local authorities to consider and manage the adverse effects of greenhouse gases on climate change is particularly significant.

### Changes to the general resource management process

The Committee did not alter the parts of the Amendment Bill removing preclusions on public notification and appeals for subdivision and residential activity resource consents.



The Amendment Bill proposed allowing applicants to suspend the processing of non-notified consent applications for up to 20 working days. The Environment Committee supports that proposal, but recommends that the commencement of this new regime be three months after the commencement of the Amendment Bill.

Finally, the Committee supported the repeal of the collaborative planning process.

### **New enforcement powers given to the Environmental Protection Authority**

The Amendment Bill gives significant new powers to the Environmental Protection Agency (EPA) that would enable it to:

- initiate its own investigations into breaches of the RMA;
- assist councils with investigations into breaches of the RMA; and
- intervene in RMA cases to become the lead agency of an investigation and subsequent enforcement actions.

The Environment Committee supported these new powers but recommended changes to clarify that if the EPA ceases its intervention in an RMA case, the council may resume taking enforcement action.

### **Significant reform to planning processes for freshwater management**

The Committee supports the Amendment Bill's new planning process for freshwater management.

Regional or unitary councils that are carrying out regional freshwater functions will be required to follow the new freshwater planning process for proposed regional policy statements and regional plans (including changes to them) set out in the proposed amendments to the National Policy Statement for Freshwater Management.

The Amendment Bill proposes introducing a new freshwater planning process to assist regional or unitary councils that are carrying out regional freshwater functions to meet the 2025 deadline for implementing the requirements of the proposed National Policy Statement for Freshwater Management. This process is similar to the Auckland Unitary Plan process. It establishes a Chief Freshwater Commissioner (Commissioner) who convenes freshwater hearings panels (Hearings Panels).

Regional councils would be required to prepare regional planning documents, notify, and call for submissions on their freshwater planning instruments, which then would then be referred to the Commissioner and in turn to a Hearings Panel who would make recommendations. The council would then make a decision about those recommendations. Appeal rights would be limited.

The Environment Committee recommends:

- making it clear that all freshwater planning instruments must go through the

proposed process;

- clarifying the powers of the Commissioner and Hearings Panel has in conducting hearings, including those relating to cross examination, and the Hearing Panel's ability to commission reports, convene pre-hearing meetings and run expert conferencing;
- ensuring key RMA provisions relating to plan preparation would be complied with if the Hearings Panel recommendations were to be accepted; and
- clarifying the limited appeal rights available, specifically on what grounds submitters can appeal to the Environment Court. The Environment Committee also proposes making it clear that there is no avenue of appeal to the Supreme Court, and that an appeal to the Court of Appeal requires leave and is limited to points of law only.

## **Climate change mitigation and adaption to be considered in RMA processes**

Currently, the RMA prevents regional councils from considering the effects on climate change when making rules or assessing applications relating to discharges of greenhouse gases - "except to the extent that the use and development of renewable energy enables a reduction" in greenhouse gas emissions. Significantly, the Environment Committee recommends reversing this position to reflect the climate change policy framework that is evolving under the Climate Change Response Act 2002 (CCRA).

However, the Committee acknowledges that "it is vital to have direction at a national level about how local government should make decisions about climate change under the RMA". This is because of the risks of "inconsistencies, overlap of regulations between councils and emissions pricing, and litigation". Accordingly, the Committee recommends delaying the effect of these proposed changes until 31 December 2021 - to provide time for the development of the national guidance, aligned with the first emissions reduction plan under the CCRA.

To ensure alignment with national policy and planning, the Committee also recommends adding "emissions reductions plans" and "national adaptation plans", prepared by the Minister for Climate Change under the CCRA, to the list of matters that local authorities must have regard to when making and amending regional policy statements, regional plans, and district plans.

## **Our comment**

The Amendment Bill represents further change to the RMA. While the reversal of the previous government's RMA amendments were expected, some of the Environment Committee's recommendations, particularly in relation to freshwater management and climate change, are very significant.

Allowing local authorities to consider and manage the adverse effects of greenhouse gases on climate change creates a range of significant issues, such as 'what is the

receiving environment', 'what is the climate change effect of a new discharge on that environment'? Therefore, the proposed national guidance will be critical.

In the background the second stage of the Government's RMA reform agenda, a review of "all RMA functions and process" by the Resource Management Review Panel, continues.

### **Get in touch**

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BULLETIN

PANAMA IMPLEMENTS SYSTEM TO PROTECT THE PRIVATE  
INFORMATION OF FINAL BENEFICIARIES OF LEGAL ENTITIES

Through Law No. 129 of March 17, 2020, it has been approved the transfer of the custody of the information on the identity of the Final Beneficiaries of legal entities to the Superintendence of Non-Financial Subjects. The obligation on the part of the Resident Agents to identify the final beneficiaries of all the entities for which they provided their services was already in place before the Law was adopted.

The Superintendence must keep the information in a restricted access database. Only Panamanian public investigation entities expressly authorized by the Law, namely the Financial Analysis Unit, the Public Ministry, the Ministry of Economy and Finance, the Superintendence of Banks and the Superintendence of the Securities Market, may request the Superintendence information about the Final Beneficiaries through the submission of a formal request related to specific cases within investigative processes related to money laundering, terrorism financing and weapons of mass destruction, or of assistance under treaties or international agreements signed by Panama.

The Superintendence shall only exercise custody, conservation and access functions of the information it receives from the Resident Agents and it is not allowed to carry out investigative functions, nor will it allow third parties to have access to said information.

In addition, the Law prohibits the adoption of precautionary or discovery measures in cases of judicial proceedings between individuals, so that a third party may not have access or obtain such information as a result of legal disputes.

The system is designed so that the Resident Agents directly files the information in the Superintendence database. The Registered Agent is obliged by law, and is responsible for, updating the information, under penalty of sanction.

The information shall only be made available to Panamanian public investigation entities expressly authorized by the Law, by the two officials appointed by the Superintendence to have access to the information and who must go through a rigorous investigation process before their appointment in order to give certainty to the reservation and confidentiality of the information.

The Resident Agents must file with the Superintendence the following minimum information on the Final Beneficiaries, which they must have collected during their due diligence process and which they must keep in their files along with updates:

- (i) full name;
- (ii) personal identification document number;
- (iii) date of birth;
- (iv) address;
- (v) date as of having the condition of Final Beneficiary of the entity;
- (vi) main activity.

This information must be filed into the system within 30 business days following the constitution of the entity, its establishment in Panama or since the change in the previously registered information occurred. The Resident Agent is obliged to resign if the client does not provide the information required to complete its due diligence process and from which the Resident Agent shall obtain the information with which the Superintendence database must be fed.

The law defines as the Final Beneficiary of an entity, in general terms, the person or individuals who, directly or indirectly, own or control 25% or more of the shares or voting rights in the legal person, or whoever owns, control and/or exercise significant influence over the account relationship, contractual and/or business relationship or the natural person in whose name or benefit a transaction is made, which also includes natural persons who exercise final control over a legal person.

The Resident Agents must have completed the filings at the database of the Superintendence of all their clients within a period of 6 months from the date on which the Superintendence has informed them that the database is enabled for access.

With the adoption of this legislation, Panama implements a technological platform already used and tested by other competing countries, which puts us at the forefront of new corporate trends providing an adequate balance between the duty to know the identification information while avoiding abuses of the corporate system and maintaining a high degree of confidentiality for those who use legal persons for commercial, inheritance and estate planning purposes that are not contrary to the Law.

Please contact us at [panama@arifacorporate.com](mailto:panama@arifacorporate.com)  
for additional information or clarification  
regarding your Panama entity.

# The Impact on Loan Facilities under the COVID-19 (Temporary Measures) Act (Singapore)

April 14, 2020

## A. Introduction

The new COVID-19 (Temporary Measures) Act 2020 (the “**Act**”) was passed by Parliament on 7 April 2020. It seeks to provide temporary relief to companies who are unable to fulfil their loan repayment obligations if their inability to do so was due to the COVID-19 pandemic. This article will look at the impact the Act could have on loan facility agreements and what institutional lenders should be aware of.

## B. Scope of the Act

Before going into the temporary relief provisions, it is important to know which contracts the Act covers in the first place.

Section 4(1) of the Act provides:

4.—(1) This Part does not apply to a scheduled contract entered into or renewed (other than automatically) on or after 25 March 2020.

There are two things to be aware of:

1. The Act only applies to a “scheduled contract”;
2. The Act does not apply to contracts entered into on or after 25 March 2020.

Most loan facilities by institutional lenders are likely to be a scheduled contract. Paragraphs 1(a) and (b) of the Schedule to the Act provides:

1. The following are scheduled contracts:

a) a contract for the grant of a loan facility by a bank licensed under the Banking Act (Cap. 19) or a finance company licensed under the Finance Companies Act (Cap. 108) to an enterprise, where such facility is secured, wholly or partially, against any commercial or industrial immovable property located in Singapore;

b) a contract for the grant of a loan facility by a bank licensed under the Banking Act or a finance company licensed under the Finance Companies Act to an enterprise —

- (i) where such facility is secured, wholly or partially, against any plant, machinery or fixed asset located in Singapore and
- (ii) where such plant, machinery or fixed asset (as the case may be) is used for manufacturing, production or other business purposes;

As such, institutional lenders with loan facilities extended to an enterprise where such facilities are secured and where such agreements had been entered into prior to 25 March 2020, may potentially be affected by the Act. However, unsecured loan facilities to enterprises and loan facilities to individuals (whether secured or not) do not fall within the ambit of the Act. Loan facilities extended on or after 25 March 2020 also do not fall within the ambit of the Act.

## C. Requirements for Temporary Relief

Even if the Act applies to a loan facility in question, the borrower still has to meet certain requirements before he can obtain temporary relief under Section 5 of the Act.

Section 5(1) sets out 3 requirements:

(i) the borrower is unable to perform an obligation in the contract, being an obligation that is to be performed on or after 1 February 2020 (the “**Obligation Requirement**”);

(ii) the borrower’s inability to do so is to a material extent caused by a COVID-19 event (the “**Materiality Requirement**”); and

(iii) the borrower has served a notification for relief in accordance with section 9(1) on —

- the other party or parties to the contract;
- any guarantor or surety for A’s obligation in the contract; and
- such other person as may be prescribed (the “**Notification Requirement**”).

### (i) The Obligation Requirement

Only obligations that are to be performed on or after 1 February 2020 but cannot be performed by the borrower will entitle the borrower to temporary relief. This means that payment instalments that were due prior to 1 February 2020 may still be enforced in the usual manner. However, given that the COVID-19 pandemic started gaining commercial significance after that date in Singapore, it is likely that this requirement will be easily met.

### (ii) The Materiality Requirement

The borrower’s inability to repay an instalment due on or after 1 February 2020 must be caused by COVID-19 to a “material extent”. The question of “material extent” is likely to be the subject of much controversy. However, some guidance may be obtained from the Explanatory Statement to the Act, before it was passed.

One example illustrated is where the borrower is unable to generate sufficient revenue to repay a loan instalment when his ability to manufacture goods was adversely affected due to the outbreak of COVID-19 globally.

If the borrower’s inability to repay is due to other reasons unconnected with COVID-19, then it may be possible to pursue legal proceedings against the borrower. Alternatively, the borrower may seek an assessor’s determination on whether section 5 applies under Division 4 of the Act.

### (iii) The Notification Requirement

If the borrower intends to seek relief under section 5 of the Act, it must also serve a notification on the lender and any guarantor or surety for the borrower’s obligation. The borrower must do so within specified timelines and either party to the loan facility agreement may make an application for an assessor to determine whether section 5 applies.

## D. Scope of Temporary Relief

Assuming that the borrower has met the requirements as set out in section 5(1) of the Act for temporary relief, lenders are prohibited from taking certain actions against the borrower for a period of time.

### (i) Duration of Temporary Relief

The lender is prohibited from taking certain actions the borrower until after the earliest of the following milestones:

1. The expiry of the prescribed period of 6 months from 7 April 2020 (section 5(2)(a) of the Act);
2. The withdrawal by the borrower of the borrower's notification for relief (section 5(2)(b) of the Act); or,
3. An assessor makes a determination that section 5 does not apply (section 5(2)(c) of the Act).

### (ii) Prohibited Actions Against the Borrower

Section 5(3) of the Act sets out a full list of actions that a lender is prohibited from commencing against the borrower. These include, but are not limited, to:

1. Commencing an action in court against the borrower or the borrower's guarantor or surety;
2. Enforcing any security over any immovable property;
3. Enforcing any security over any movable property used for the purpose of trade, business or profession;
4. Filing an application for winding-up, judicial management, or for a scheme of arrangement; and,
5. Appointing a receiver or manager.

However, this does not mean that lenders are left without any recourse for enforcing their loan facilities. Section 5(6) of the Act makes it clear that these prohibited actions only apply in relation to a security mentioned or the part of the obligation that is secured by such security.

What this means is that lenders may still enforce the security over the borrower's stock-in-trade, commence an action in Court against the borrower in relation to any part of the loan facility that is unsecured, take any action against the borrower in relation to any part of the loan facility that is unsecured, commence an action against the guarantor in relation to any part of the loan facility that is unsecured.

If you wish to seek further clarification and advice on how the Act affects your agreements, please contact us.

Please see below for our other articles on the COVID-19 (Temporary Measures) Act:

- Rights and obligations of landlords in view of the COVID-19 pandemic and under the COVID-19 (Temporary Measures) Act
- Singapore plans to enact COVID-19 (Temporary Measures) Bill to mitigate risk of deposit forfeitures under events and tourism-related contracts due to pandemic
- Singapore plans to enact COVID-19 (Temporary Measures) Bill to mitigate economic pressures on tenants due to pandemic
- Singapore plans to enact COVID-19 (Temporary Measures) Bill to mitigate disruptions to construction industry due to pandemic
- Singapore plans to enact COVID-19 (Temporary Measures) Bill to mitigate economic pressures due to pandemic



## Your Key Contacts



**Doreen Sim**

Senior Partner, Singapore

D +65 6885 3697

[doreen.sim@dentons.com](mailto:doreen.sim@dentons.com)



**Ajinderpal Singh**

Senior Partner, Singapore

D +65 6885 3619

[ajinderpal.singh@dentons.com](mailto:ajinderpal.singh@dentons.com)

## The Taiwan Intellectual Property Office (TIPO) Releases Taiwanese Patent Information for Novel Coronavirus Clinical Trial Drugs

04/09/2020

Tsung-Yuan Shen

The World Health Organization (WHO) announced that the novel coronavirus (COVID-19, commonly known as Wuhan virus) has reached global pandemic proportions, and as a result, both domestic and international research and development efforts for related diagnosis and treatment methods are in full swing. To promote and protect the results of this research and development, recently the Taiwan Intellectual Property Office (TIPO) has verified the Taiwanese patent database by comparing it with clinical trials related to the novel coronavirus currently registered in the US clinical trial database website (<http://clinicaltrials.gov/>). On March 13, 2020, the TIPO released current patent information on the coronavirus-related clinical trial drugs in Taiwan to the public for reference.

According to the announcement, current Taiwanese patent information on related clinical trial drugs are as follows:

1. Drugs not registered before TIPO, including small molecule drugs (umifenovir, oseltamivir, ribavirin, chloroquine phosphate, hydroxychloroquine, and thalidomide) and therapeutic proteins (recombinant human interferon  $\alpha$ -2b, pegylated interferon  $\alpha$ -2b, recombinant human interferon  $\beta$ -1 $\beta$ , eculizumab, mepolizumab, thymosin, and rhACE2).
2. Drugs registered for Taiwanese patents that have claims involving patents of the specific salts, related compound preparation, applications or preparation methods of active ingredients (chemical compounds or antibody molecules), including small molecule drugs (lopinavir/ritonavir, favipiravir, and fingolimod) and therapeutic protein (bevacizumab).
3. Drugs registered for Taiwanese patents with claims that contain core patents of major active ingredients (chemical compounds or antibody molecules), including small molecule drugs (remdesivir, ASC09F or ASC09/ritonavir, darunavir/cobicistat, and danoprevir) and therapeutic proteins (novaferon and anti-PD-1 antibody).

For more details, please refer to the TIPO website ( <https://www.tipo.gov.tw/tw/dl-273500-bbecaa7ba4f84ab68107a391086aaac0.html> ). The public information above will benefit pharmaceutical companies and help with patent planning for the development and research of novel coronavirus diagnosis and treatment methods. It will also help avoid redundant resource allocation and other waste of resources. Therefore, it is well worth the attention of pharmaceutical companies and research organizations.

**[www.leeandli.com](http://www.leeandli.com)**

## IRS Extends More Key Deadlines in Response to COVID-19

13 April 2020

### Firm Thought Leadership

On April 9, 2020, the Internal Revenue Service (“IRS”) issued Notice 2020-23, which extends key deadlines for nearly all taxpayers that have a filing or payment obligation falling on or after April 1, 2020, and before July 15, 2020. The full press release is available at IRS News Release IR-2020-66.

Notice 2020-23 expands on prior relief announced last month in Notices 2020-18 and 2020-20, in which the IRS extended the deadline for filings and payments of federal income taxes and federal gift (and generation skipping transfer) taxes to July 15, 2020. The IRS had also recently announced the People First Initiative (discussed by us here), which provides deadline extensions and other relief to taxpayers under audit or subject to enforced collection actions.

Noteworthy provisions in Notice 2020-23 include the following:

- **July 15, 2020 Extension for Tax Filings and Payments.** Taxpayers have until July 15, 2020 to meet filing and payment obligations for a wide variety of taxes. This extension specifically applies with respect to “all schedules” and “other forms that are filed as attachments” to the tax returns, including for example Schedule H and Schedule SE and Forms 3520, 5471, 5472, 8621, 8858, 8865, and 8938.
- **July 15, 2020 Extension for Petitions, Claims, and Suits.** Taxpayers have until July 15, 2020 to perform all “Specified Time-Sensitive Actions,” which include:
  - i. filing all petitions with the Tax Court,
  - ii. filing a claim for credit or refund of any tax, and
  - iii. bringing suit upon a claim for credit or refund of any tax.Notice 2020-23 does not provide relief for the time period for filing a petition with the Tax Court, or for filing a claim or bringing a suit for credit or refund, if that period expired before April 1, 2020.
- **30-Day Extension for IRS Employees.** IRS employees have an additional 30 days to perform all “Time-Sensitive IRS Actions,” including:
  - i. assessing any tax,
  - ii. giving or making any notice or demand for the payment of any tax,
  - iii. collecting the amount of any liability in respect of any tax,
  - iv. bringing suit in respect of any liability in respect of tax, and
  - v. allowing a credit or refund of any tax.

This 30-day extension applies to certain taxpayers when these deadlines fall on or after April 6, 2020 and before July 15, 2020.

The relief under Notice 2020-23 is automatic. Taxpayers do not need to call the IRS or file any extension forms, or send letters or other documents to receive this relief. Also, it does not appear that an IRS employee must notify the taxpayer if the IRS employee takes advantage of the 30-day extension on certain actions offered under Notice 2020-23.

Should you have any questions or concerns about Notice 2020-23, please contact any of the authors of this update.

**ABOUT BAKER BOTTS L.L.P.**

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BLOG POST / EMPLOYMENT ADVISOR

Benefits and Executive Compensation

# New COVID-19 Developments for Employer Sponsored Health Plans

By Dipa N. Sudra and Christine C. Hawkins

04.15.20

On April 11, 2020, the Departments of Labor, Treasury, and Health and Human Services issued new [COVID-19 FAQs regarding health plans](#). This advisory summarizes the key components of the FAQs, including notice requirements for COVID-19 changes, warning against offsetting COVID-19 costs, encouraging use of telehealth, and clarifying COVID-19 related requirements for employer-sponsored group health plans, both insured and self-insured. In addition, we cover a recent development in Washington State requiring employers to maintain health insurance benefits for certain high-risk workers who exhaust paid time off.

## **Provide Summary of Material Modifications ASAP**

The FAQs confirm that plans must provide participants notice of any COVID-19 related changes to group health plans as soon as reasonably practicable (in contrast to the rule requiring 60 days' advance notice if an employer makes material modifications to its group health plan impacting, information in the summary of benefits and coverage).

The FAQs confirm no enforcement action will be taken against any plan that is modified but does not provide at least 60 days' advance notice, but only during the period an emergency exists under applicable law. Therefore, employers should notify participants as soon as reasonably practicable of greater coverage related to the diagnosis and/or treatment of COVID-19, and any telehealth related changes (e.g., addition of telehealth component or reduced telehealth cost-sharing).

## **No Offsetting**

The FAQs warn that enforcement action may be taken against any plan that attempts to limit or eliminate other benefits or to increase cost-sharing to offset the costs of diagnosis and/or treatment of COVID-19.

## **Using Employee Assistance Programs (EAPs) for COVID-19 Diagnosis and Testing**

The FAQs confirm that an EAP will not lose its "excepted benefit" status by allowing EAPs to cover COVID-19 diagnosis and testing. Specifically, an EAP will not be considered to provide benefits that are significant in the nature of medical care solely because it offers benefits for diagnosis and testing for COVID-19 while a public health emergency declaration or a national emergency declaration is in effect.

## **Encouraging Telehealth**

The FAQs strongly encourage all plans to promote the use of telehealth and other remote care services, including by notifying consumers of their availability and by covering them without cost-sharing or other medical management requirements. See our previous [advisory](#) for more information

regarding CARES Act telehealth changes.

## Requirements for Group Health Plans

The FAQs confirm the following, some of which we have discussed in a previous [advisory](#).

- Federal mandates for COVID-19 testing apply to group health plans (both fully-insured and self-insured), grandfathered health plans, non-federal governmental plans, and church plans. The mandates **do not** apply to short-term limited duration insurance, excepted benefits, or retiree plans.
- Plans subject to the mandates are required to cover COVID-19 testing and items or services related to COVID-19 testing furnished during a visit (which could be at a doctor's office, ER, or via telehealth). This applies on or after March 18, 2020, and during the applicable emergency period. The FAQs confirm there is no requirement to cover items and services not related to COVID-19 testing but clarify that blood tests to detect antibodies against the virus must be covered. In addition, the FAQs require coverage for testing related to other causes of respiratory illness (e.g., flu tests or blood tests), but only if those tests are needed to determine whether to test an individual for COVID-19 and the individual is, in fact, tested for COVID-19.
- Cost-sharing requirements (including deductibles, copayments, and coinsurance), prior authorization or other medical management requirements are **not** permitted for COVID-19 testing and related items or services.
- Any provider of COVID-19 diagnostic testing must be reimbursed the negotiated rate or, if the plan does not have a negotiated rate with the provider, the cash price listed by the provider on a public website. (The plan or issuer may negotiate a rate with the provider that is lower than the cash price.)



## **Federal and State Level Mandates**

There is still no federal mandate to cover COVID-19 treatment, but this may be required for insured plans under state law.

Sponsors of self-insured plans should also consider whether to cover COVID-19 treatment and should be aware of recent state-level developments. For example, on April 13, 2020, Washington Governor Inslee issued Proclamation 20-46 “High-Risk Employees – Workers’ Rights,” requiring Washington State employers to provide certain rights and protections to high-risk workers, defined by the Centers for Disease Control and Prevention as workers 65 years of age or older and workers with underlying medical conditions. Read our blog on Governor Inslee’s Proclamation [here](#).

Among other protections, the Proclamation requires employers to maintain or continue all employer-related health insurance benefits until the high-risk worker is deemed eligible to return to work, even if the worker exhausts his or her paid leave. Although ERISA should preempt the application of this requirement to self-insured plans, the Proclamation is likely intended to interpret “health insurance benefits” broadly, and we anticipate that self-insured plans will be pressured to follow suit.

For fully insured plans, unless existing health plan policies extend insurance benefits throughout the duration of a leave of absence, whether paid or unpaid, this means employers must negotiate with their insurance carriers (or stop-loss carriers if self-insured and including these benefits) and amend plans to extend coverage for either all workers or those workers who fall within a high-risk category until the workers are able to return to work.

## **Employer Action Items**

In light of the FAQs, employers should contact their insurance carrier or administrator to ensure required changes have been made and participants are informed of any modifications to health plans as soon as practicable. Employers should also be aware of other changes, such as state-level mandates, and any optional changes, and work with their insurer or



administrator to revise their plans.

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The facts, laws, and regulations regarding COVID-19 are developing rapidly. Since the date of publication, there may be new or additional information not referenced in this advisory. Please consult with your legal counsel for guidance.

DWT will continue to provide up-to-date insights and virtual events regarding COVID-19 concerns. Our most recent insights, as well as information about recorded and upcoming virtual events, are available at [www.dwt.com/COVID-19](http://www.dwt.com/COVID-19).

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Real Estate Practice Group  
**GOODSILL ALERT**

March 28, 2020

**COVID-19: CONSIDERATIONS FOR COMMERCIAL  
LANDLORDS AND TENANTS IN HAWAII**



Faced with evidence of community spread of the COVID-19 virus in Hawaii, the state and county governments have announced various measures to contain transmission of the virus, quarantine visitors to the islands, and encourage social distancing, all of which have greatly impacted our local businesses. With the spread of the virus and the governmental response to the pandemic both rapidly evolving, commercial landlords and tenants in Hawaii should proactively review their leases and applicable loan documents and communicate with all impacted parties during this unprecedented challenge to our local economy.

In particular, landlords and tenants should be considering the following:

**Obligations, Rights, and Remedies Under Their Commercial and Ground Leases**

The obligations, rights, and available remedies of the parties set forth in the applicable lease should inform any decisions with respect to leased property. While every lease is different, Landlords and Tenants should consider the following legal issues. Where the lease is silent, common law rights or obligations may apply.

1. Tenants

Tenants should review their leases carefully to proactively address any potential issues with their landlords. For example, common tenant covenants include:

- (a) **Payment of Rent.** Tenants should contact their landlords prior to missing any scheduled rent payments and keep an open dialogue with the landlord throughout the pandemic.
- (b) **Continuous Operations.** Most retail leases require the tenant to continuously operate on the premises and/or state that “abandonment” of the premises is a default. Leases may also require a tenant to maintain minimum business hours or full staffing.
- (c) **Compliance with all laws.** Commercial leases often contain a tenant covenant to comply with all laws. This covenant would likely require a tenant to comply with any quarantine, shut-down, or reporting orders from governmental authorities. However, whether non-mandatory guidelines from the CDC or other governmental bodies fall within the scope of this covenant may turn on the exact language used in the lease.

(d) Landlord Consent to Alterations. Many leases require the landlord's consent to any alterations. Tenants should confirm these requirements and seek consent as appropriate when efforts to decrease density of work spaces or efforts to otherwise comply with social distancing guidelines affect improvements on the premises.

## 2. Landlords

Landlords should also review their leases to determine whether the COVID-19 outbreak may impact their ability to perform any landlord obligations. Landlord lease covenants may include:

(a) Common Area Maintenance. Typically, commercial leases give the landlord virtually unlimited control over common areas. Hawaii law requires that landlords of multi-tenant developments keep common areas reasonably safe for permitted users, including tenants and visitors of tenants. Landlords should evaluate their obligations to their tenants and the risk that failure to properly sanitize common areas, enforce compliance with governmental mandates in the common areas, or follow appropriate virus response protocols may expose the landlord to liability for negligence. A lawsuit has already been filed in a California federal district court by a Princess Cruise Line guest alleging cruise line negligence for allowing passengers to board a departing ship despite knowledge regarding the contamination of other ships. Ultimately, landlord liability for COVID-19-related negligence in local lawsuits will likely hinge on commercial reasonableness. Landlords should therefore keep an eye on how similarly situated landlords are responding to the crisis as it evolves and proactively set and then follow appropriate virus response protocols.

(b) Covenant of Quiet Enjoyment or Constructive Eviction. When considering any voluntary project-wide closures of office or retail developments, landlords should evaluate the risk that tenants may claim a breach of landlord's covenant of quiet enjoyment or actual or constructive eviction based on inability to reasonably access its leased space.

(c) Landlord's Work. If the landlord is committed to performing work, the landlord should consider the lease timelines and whether to seek any extension of deadlines for delivery of possession, permitting or entitlements, build-out and/or completion.

(d) Co-Tenancy Requirements. Commercial leases sometimes contain a co-tenancy clause that provides the tenant with lease termination, rent reduction or rent abatement rights if a particular tenant or group of tenants in the larger project ceases operating or if the occupancy of the project falls below a specified percentage.

## 3. Force Majeure, Supervening Impracticability, Frustration of Purpose, or Impossibility of Performance

With respect to all of the foregoing landlord and tenant covenants, it is important to keep in mind that force majeure (typically a contract clause providing that certain acts outside the parties' control may excuse performance under the contract), supervening impracticability (a common law defense), frustration of purpose (a common law defense), and impossibility of performance (a common law cause of action for contract rescission) may be asserted by a party alleged to be in breach of a lease obligation. Hawaii state and/or federal courts have acknowledged all four legal doctrines. The potential availability of these defenses and cause of action due to the

unprecedented COVID-19 outbreak in Hawaii make legal enforcement of the foregoing lease covenants uncertain.

### **Negotiation of Alternative Arrangements**

In addition to the legal uncertainty surrounding lease covenant enforcement due to COVID-19, parties' legal rights and remedies may be further limited by business or social pressures and emergency governmental measures. Landlords must consider that struggling tenants forced to lay off employees to meet rent payment obligations may take longer to resume operations or may not be able to resume operations at all. The municipalities of Los Angeles, Hermosa Beach, and Seattle have all taken extraordinary action to assist impacted commercial tenants as of the date of this article - including, for example, mandatory rent grace periods and various moratoria on commercial evictions, late fees, and/or charging rent during a business shut down in response to the municipality's emergency order.

Landlords and tenants should be motivated to come to a mutual arrangement which provides relief to tenants without shifting the entire burden to landlords and should consider the following:

1. Short-term arrangements to accommodate temporary inability to pay rent. Rent abatement can take many forms, including a rent holiday (free rent period), partial base rent reduction, abatement of base rent but continuation of common area maintenance payments, tacking missed payments to the end of the lease, incremental payment of deferred rent, application of security deposit, or deferred payments with a future guaranty or promissory note. The parties may also consider creative percentage rent or profit-sharing arrangements that could allow landlords to recoup some lost rents in the case of a robust economic recovery. Regardless of the arrangement agreed upon by the parties, any lease modification should be in writing, should include defined reinstatement dates, should indicate its effect on any prepaid rent and any impacted lease covenants, and should consider the parties' obligations to third parties such as a ground lessor or lender.
2. Temporary relaxation of continuous operation or operating hour covenants. Ideally, tenants should communicate any need for relaxation of lease covenants, and landlords should reasonably accommodate tenant requests for short-term adjustments. Formal written acknowledgment of the relaxation of any covenants should consider the impact, if any, on other lease covenants and set a clear window for reinstatement of the covenants.
3. Insurance coverage. Landlords and tenants should consult any business interruption insurance policies required by the lease prior to entering into any alternate payment arrangements.

### **Obligations to Lenders**

It is important to note that the parties should review their loan documents and consider any obligations they may have to their respective lenders. For tenants, leasehold mortgagors typically covenant with their lenders to keep the lease in full force and effect and not in default. An uncured lease default would also be an event of default under a leasehold mortgagor's loan. For landlords, before agreeing to alternative payment arrangements, loan documents should be reviewed for any debt to income ratios or other covenants which may require minimum monthly or annual rental revenue. If the COVID-19 outbreak has a lasting impact on our economy, loan documents should also be reviewed for vacancy or tenant delinquency rate covenants which may

need to be addressed. Finally, borrowers should also consider that lender consent is required for most lease amendments and seek consent as needed.

## **RECOMMENDATIONS**

The global COVID-19 pandemic has wreaked unparalleled havoc on our local economy, and the duration and extent of the disruption is yet to be seen. Given the legal uncertainty surrounding strict enforcement of lease covenants and the rapidly changing governmental responses to the local outbreak, we recommend that landlords and tenants come together to find creative solutions which allow tenants to maintain operations and landlords to maintain their investments and compliance with their loans. Negotiations should be undertaken with the understanding that the parties will only be bound by a written lease amendment executed by both parties and not by any verbal or email statements made by brokers or other representatives.



**This Goodsill Alert was prepared by Jennifer Chin and Dale Zane of Goodsill's Real Estate Practice Group. For more information or assistance with negotiating or documenting lease modifications due to COVID-19, contact a member of Goodsill's Real Estate Practice Group.**

**Notice: We are providing this Goodsill Alert as a commentary on current legal issues, and it should not be considered legal advice, which depends on the facts of each specific situation. Receipt of this Goodsill Alert does not establish an attorney-client relationship.**

# HHS Issues Advisory Opinion Encouraging a Broad Reading of its PREP Act Declaration

April 15, 2020

On April 14, 2020, the Department of Health and Human Services (HHS) General Counsel issued an [advisory opinion](#) (“the Opinion”) on the March 10, 2020 Public Readiness and Emergency Preparedness Act (“PREP Act”) Declaration (“the Declaration”) related to COVID-19, in response to numerous requests for guidance from manufacturers, distributors, and health care providers. Although the Opinion is not binding law and does not answer every question about the Declaration, it does provide insight into the intended scope of the Declaration.

By way of background, the PREP Act<sup>1</sup> confers a significant benefit to manufacturers, distributors, and providers of certain products by providing an affirmative defense to product liability lawsuits with respect to use of those products to respond to a declared emergency. The PREP Act provides immunity “from suit and liability under federal and state law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or use by an individual of a covered countermeasure if a Declaration has been issued with respect to such countermeasure.”<sup>2</sup> There are three key elements necessary to obtain PREP Act immunity, all of which are addressed in the Opinion and are discussed below:

## “Reasonable Belief” Standard

Importantly, the Opinion provides further confirmation on the intended breadth of the PREP Act’s immunity protections by adding critical language suggesting a “reasonable belief” standard for determining whether PREP Act requirements have been satisfied. Specifically, the Opinion states that “Given the broad scope of PREP Act immunity, Congress did not intend to impose a strict-liability standard on covered persons for determining whether a product is a covered countermeasure. Instead, we believe that a person or entity that otherwise meets the requirements for PREP Act immunity will not lose that immunity—even if the product is not a covered countermeasure—if that person or entity reasonably could have believed that the product was a covered countermeasure.” Opinion at 4-5. The Opinion goes on to explain that the same “reasonable belief” standard applies to the “covered persons” requirement under the PREP Act. Opinion at 7.

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<sup>1</sup> Codified at 42 USC § 247d-6d.

<sup>2</sup> 42 USC § 247d-6d(a)(1).

### Covered Person

The Declaration limits PREP Act immunity to covered persons, which comprises manufacturers, distributors, program planners, and “qualified persons” who prescribe, administer, or dispense a covered countermeasure. The Declaration defines “qualified persons” as “a licensed health professional or other individual authorized to prescribe, administer, or dispense Covered Countermeasures under the law of the state in which the Covered Countermeasure was prescribed, administered, or dispensed; or a person within a category of persons identified as qualified in the Secretary’s Declaration.” Declaration at Section V.

The Opinion clarifies two points with respect to “covered person”. First, it explains that a state, Federal, or local agency has the authority to designate additional qualified persons that would be eligible for PREP Act immunity. As discussed above, the Opinion also provides that an entity need not actually be a covered person to receive PREP Act immunity “if that entity or person reasonably could have believed, under the current, emergent circumstances, that the person was a covered person.” Opinion at 7 citing 42 USC 247d-6d(a)(4)(B).

### Covered Countermeasure

The Declaration defines “covered countermeasure”, in relevant part, as “any antiviral, any other drug, any biologic, any diagnostic, any other device, or any vaccine, used to treat, diagnose, cure, prevent, or mitigate COVID-19, or the transmission of SARS-CoV-2 or a virus mutating therefrom, or any device used in the administration of any such product, and all components and constituent materials of any such product.” Moreover, to be a covered countermeasure, the product must be a qualified pandemic or epidemic product or a drug, biological product, or device authorized for investigational or emergency use, as those terms are defined in the PREP Act, the Food Drug & Cosmetic (FD&C) Act, and the Public Health Service Act.

In turn, a “qualified pandemic or epidemic product” is defined in the Declaration as “a drug or device, as defined in the FD&C Act or a biological product, as defined in the PHS Act that is (i) manufactured, used, designed, developed, modified, licensed or procured to diagnose, mitigate, prevent, treat, or cure a pandemic or epidemic or limit the harm such a pandemic or epidemic might otherwise cause; (ii) manufactured, used, designed, developed, modified, licensed, or procured to diagnose, mitigate, prevent, treat, or cure a serious or life-threatening disease or condition caused by such a drug, biological product, or device; (iii) or a product or technology intended to enhance the use or effect of such a drug, biological product, or device.”

The Opinion provides a more in-depth discussion about covered countermeasures under the Declaration, including links to the long list of Emergency Use Authorizations that FDA has issued in response to COVID-19 regarding [therapeutics](#) and [medical devices](#). The Opinion also highlights the fact that the Coronavirus Aid, Relief, and Economic Security (CARES) Act expanded the definition of covered countermeasure to include certain respirators that may not meet the definition of medical device under the FD&C Act. As with covered person, the Opinion explains that PREP Act immunity could extend to a product that does not meet the technical definition of covered countermeasure, “if [a covered] person or entity reasonably could have believed that the product was a covered countermeasure.” Opinion at 4 citing 42 USC 247d-6d(a)(4)(B).

### Limitation on Distribution

The Declaration provides that PREP Act immunity is afforded to Covered Persons only for Recommended Activities related to:

- a. Present or future federal contracts, cooperative agreements, grants, other transactions, interagency agreements, memoranda of understanding, or other federal agreements; or
- b. Activities authorized in accordance with the public health and medical response of the Authority Having Jurisdiction to prescribe, administer, deliver, distribute or dispense the Covered Countermeasures following a Declaration of an emergency.

This section of the Declaration has proven to be the most difficult to parse, and the Opinion provides helpful explanation. HHS explains that paragraph (a) of the Limitation on Distribution is satisfied by “any arrangement with the federal government” and that paragraph (b) can be read more simply to mean “any activity that is part of an authorized emergency response at the federal, regional, state, or local level.” Although the “Authority Having Jurisdiction” requirement is not perfectly clear, the Opinion states that a covered person undertakes “activities in accordance with the public health and medical response” of an Authority Having Jurisdiction if such activities are authorized through, “among other things, guidance, requests for assistance, agreements, or other arrangements.” Opinion at 2. Consistent with [our prior analysis](#) of HHS’s April 8 [Guidance for Licensed Pharmacists, COVID-19 Test, and Immunity Under the PREP Act](#), the Authority Having Jurisdiction can be either a state, local, or even Federal agency. The Opinion then explains that HHS itself constitutes an Authority Having Jurisdiction under the PREP Act, though it notes “it is not the only Authority Having Jurisdiction to respond to the COVID-19 emergency.” Opinion at 6. Finally, the Opinion provides that the HHS Secretary’s Public Health Emergency Declaration dated January 31, 2020 fulfills the emergency declaration requirement at the end of paragraph (b), without the need for a state or local government declaration, although all 50 states have now issued such declarations.

### Willful Misconduct and Serious Physical Injury or Death

The Opinion reiterated that PREP Act immunity is broad, but it does not cover claims involving willful misconduct causing death or serious physical injury (Willful Misconduct Exception). And the PREP Act sets a high bar for demonstrating willful misconduct: a plaintiff must show clear and convincing evidence that the conduct must be (i) “intentionally to achieve a wrongful purpose”; (ii) “knowingly without legal or factual justification”; **and** (iii) in disregard of a known or obvious risk that is so great as to make it highly probable that the harm will outweigh the benefit.” HHS also noted two key instances where the Willful Misconduct Exception does not apply. First, where program planners<sup>3</sup> or qualified persons “acted consistent with applicable directions, guidelines, or recommendations by the Secretary regarding the administration or use of a covered countermeasure” as long as certain notice requirements are met. Second, if the misconduct involves an FD&C Act or Public Health Service regulated activity, the action will not constitute “willful misconduct” if neither HHS or DOJ has initiated an enforcement action<sup>4</sup> or an enforcement action has been resolved without a covered remedy.<sup>5</sup>

<sup>3</sup> Defined as a “State or local government, including an Indian tribe, a person employed by the State or local government, or other person who supervised or administered a program.” 42 U.S.C. § 247d-6d(i)(6).

<sup>4</sup> Defined as a criminal prosecution, an action seeking an injunction, a seizure action, a civil monetary proceeding based on willful misconduct, a mandatory recall of a product because voluntary recall was refused, a proceeding to compel repair or replacement of a product, a termination of an exemption under section 505(i) or 520(g) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355(i), 360j(g)], a debarment proceeding, an investigator disqualification proceeding where an investigator is an employee or agent of the manufacturer, a revocation, based on willful misconduct, of an authorization under section 564 of such Act [21 U.S.C. 360bbb-3], or a suspension or withdrawal, based on willful misconduct, of a biologics approval or clearance or of a licensure.

<sup>5</sup> A criminal conviction, an injunction, or a condemnation, a civil monetary payment, a product recall, a repair or replacement of a product, a termination of an exemption under section 505(i) or 520(g) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355(i), 360j(g)], a debarment, an investigator disqualification, a revocation of an authorization under section 564 of such Act [21 U.S.C. 360bbb-3], or a suspension or withdrawal of a biologics approval or clearance under chapter 5 [1] of such Act or of a licensure; and that results from a final determination by a court or from a final agency action.



Where companies, states, municipalities, and individuals meet the elements of PREP Act immunity, the immunity protection is broad, and the willful misconduct exception sets a high hurdle for plaintiffs to overcome. Injured parties, however, are not without any recourse. The Secretary noted that parties with claims of serious physician injury or death may apply for benefits to the Health Resources and Services Administration's Countermeasures Injury Compensation Program (CICP). HHS noted that CICP should be the "payer of last resort." Under the Declaration, the "causal connection between the countermeasure and the serious physical injury must be supported by compelling, reliable, valid, medical and scientific evidence in order for the individual to be considered for compensation." The CICP was established by Congress in 2010, and it is administered by the Health Resources and Services Administration. More information on the CICP can be found at <https://www.hrsa.gov/cicp/>.

If you have any questions about how the PREP Act may apply to a product that your company is selling or donating to assist in the response to COVID-19, please do not hesitate to contact our team.

## Contacts



**Allison Pugsley**  
Partner  
Washington, D.C.  
T +1 202 637 6817  
[allison.pugsley@hoganlovells.com](mailto:allison.pugsley@hoganlovells.com)



**Robert Church**  
Partner  
Los Angeles  
T +1 310 785 4646  
[robert.church@hoganlovells.com](mailto:robert.church@hoganlovells.com)



**Joy Sturm**  
Partner  
Washington, D.C.  
T +1 202 637 5990  
[joy.sturm@hoganlovells.com](mailto:joy.sturm@hoganlovells.com)



**David Horowitz**  
Partner  
Washington, D.C.  
T +1 202 637 5403  
[david.horowitz@hoganlovells.com](mailto:david.horowitz@hoganlovells.com)



**Peter Spivack**  
Partner  
Washington, D.C.  
T +1 202 637 5631  
[peter.spivack@hoganlovells.com](mailto:peter.spivack@hoganlovells.com)



**Emily Lyons**  
Senior Associate\*  
Washington, D.C.  
T +1 202 637 6156  
[emily.lyons@hoganlovells.com](mailto:emily.lyons@hoganlovells.com)

\* Admitted only in Colorado. Supervised by principals of the firm.



**Lauren Colton**  
Partner  
Baltimore  
T +1 410 659 2733  
[lauren.colton@hoganlovells.com](mailto:lauren.colton@hoganlovells.com)



**Julie Schindel**  
Associate  
Baltimore  
T +1 410 659 5058  
[julie.schindel@hoganlovells.com](mailto:julie.schindel@hoganlovells.com)

**[www.hoganlovells.com](http://www.hoganlovells.com)**

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