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August 2020 e-Bulletin

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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

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PRAC TOOLS TO USE

COVID-19 SITE FOR ALL UPDATES

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BRIGARD URRUTIA APPOINTS NEW DIRECTORS

BOGOTA - 01 August, 2020: Brigard Urrutia is pleased to announce that it has appointed three new Directors. Our new directors are experts and highly recognized attorneys in their respective practice areas. Please find below the details:

Guillermo Tejeiro - Environment and Sustainable Business Director
https://bu.com.co/en/abogados/guillermo-tejeiro-gutierrez

Johann Schomberger – Corporate Director
https://bu.com.co/en/abogados/johann-schomberger-tibocha

Juan Carlos Puentes - Banking and Financial Services
https://bu.com.co/en/abogados/juan-carlos-puentes

For additional information visit www.bu.com.co

HAN KUN WELCOMES NEW DISPUTE RESLUTION PARTNER

Han Kun welcomes Ms. Yang You as a new dispute resolution partner

BEIJING, 05 August, 2020: Han Kun Law Offices is pleased to announce that Ms. Yang You has joined the firm as a partner. The addition of Ms. You will further boost the firm's dispute resolution practice.

Ms. You focuses her practice mainly on asset management-related litigation/arbitration and compliance services, and has extensive experience in advising on legal issues involving real estate and general corporate matters, among others. Ms. You has represented clients, including trust companies, securities companies and fund companies and their subsidiaries, in dispute resolutions involving trusts, funds, and asset management and nested asset management products.

Prior to joining Han Kun, Ms. You practiced law for nearly two decades with a leading Chinese law firm in the firm’s dispute resolution department. Ms. You has expertise in handling groundbreaking and complex asset management-related disputes through litigation and arbitration procedures. She has handled case subject matters covering trust loans, equity investments, stock and debt, specific asset income rights/ repurchases of equity (stock) income rights, securities investment, and the application and implementation of compulsory execution for the satisfaction of debt claims, objections to execution, and lawsuits objecting to execution.

Ms. You has been recognized as a "Client Choice Top 20 Lawyers in China" by ALB in 2015 and 2017. Ms. You currently serves as a member of the 13th Beijing Municipal Political Consultative Conference and also a member of the 13th Chaoyang District Political Consultative Conference.

For additional information visit www.hankunlaw.com

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

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HOGAN LOVELLS CONTINUES GROWTH WITH PHARMACEUTICAL AND BIOTECHNOLOGY REGULATORY COUNSEL

Hogan Lovells continues growth with pharmaceutical and biotechnology regulatory counsel Scott Kaplan's move to the firm's Boston office

BOSTON - 31 July, 2020: Global law firm Hogan Lovells announced that Scott Kaplan has joined the firm's Boston office as a regulatory counsel in the Life Sciences and Health Care industry group.

Kaplan arrives from the Hogan Lovells Washington, D.C. office, where he has been a member of the Pharmaceutical and Biotechnology practice. This leveraging of the firm's Global Regulatory platform is the latest example of the firm's expansion of its Boston office. This builds off of the recent additions of Life Sciences Transactions partner Suzanne Filippi, the Intellectual Property team of Kristin Connarn and Bob Underwood, and Antitrust senior counsel David Walsh.

Drawing on his previous experience as Associate Chief Counsel for Enforcement at the Food and Drug Administration (FDA) and his years in the firm's Washington, D.C. office, Kaplan helps pharmaceutical and biotechnology clients achieve and maintain compliance with FDA requirements, focusing on FDA inspections and enforcement actions, current good manufacturing practice (cGMP) requirements, Drug Supply Chain Security Act (DSCSA) implementation, and data integrity responsibilities, among other compliance needs.

"Scott provides creative and practical solutions to help our clients successfully operate in a highly regulated environment, relying on his knowledge of the law, his understanding of the client's business, and his years of experience at FDA. His move to Boston further expands our life sciences regulatory capabilities in this key market," said Philip Katz, Head of the Pharmaceutical and Biotechnology practice at Hogan Lovells.

"We are excited to welcome Scott to the Boston office as part of our continued growth and expansion. We are pleased to be able to offer Scott's exceptional knowledge of FDA compliance matters, combined with the firm's preeminent Regulatory practice, to our life sciences clients in the Boston area and beyond," added Maria Durant, Office Managing Partner of the Hogan Lovells Boston office.

Kaplan earned his J.D., magna cum laude (Order of the Coif) from the University of Pennsylvania Law School, along with a master's degree in bioethics from the university's Center for Bioethics in 2009; his B.A., cum laude, also from the University of Pennsylvania, was awarded in 2002.

For additional information visit www.hoganlovells.com

NAUTADUTILH WELCOMES CSR SPECIALIST TO FURTHER SHAPE AND PROMOTE ITS SUSTAINABLE BUSINESS AND ESG AMBITIONS

AMSTERDAM – 04 August, 2020: On 1 August, Shirley Justice joined NautaDutilh as corporate social responsibility (CSR) specialist. In this position, she will help to promote the firm's ambitions in the area of corporate social responsibility. Shirley previously worked at MVO Nederland as senior project manager and legal compliance officer. She studied both Dutch and international law, with a focus on human rights, amongst other issues. Shirley has extensive experience in the development and implementation of CSR policies for companies and public authorities.

As NautaDutilh’s CSR specialist, Shirley will support the firm’s growing Sustainable Business and Climate Change practice, led by Freerk Vermeulen and Harm Kerstholt, which focuses on identifying environmental, social and governance (ESG) risks and opportunities. The team has expertise in areas such as the impact of climate change, corporate governance, sustainable financing, and business human rights and works with clients to develop future-proof solutions to the complex and interrelated challenges associated with corporate social responsibility, from ESG testing of contracts to anticipating changing regulatory requirements in regulated markets.

In addition, together with the Board, Shirley will help to shape NautaDutilh's CSR policy, including our sustainability objectives.

"Sustainability and corporate social responsibility are high on the list of priorities of many of our clients. Their stakeholders - not only investors and regulators but also employees and consumers - demand that they pay attention to these issues. In a rapidly changing playing field, we see that the legal goalposts are also regularly moved. The hardening of soft law is an example of this. We want to and can help our clients in this area. It goes without saying that we are also taking a critical look at our own business operations. We are therefore very pleased that Shirley is joining the firm. Thanks to her unique experience at the intersection of CSR and the law, we can take an important step towards embedding these values more strongly within the firm in order to better serve our clients," says Petra Zijp, managing partner at NautaDutilh.

For additional information visit www.nautadutilh.com

SIMPSON GRIERSON WELCOMES NEW SENIOR ASSOCIATES

AUCKLAND - 30 July, 2020: We're pleased to welcome senior associates **Sonia Bannister** and **Richard Broad** to our Auckland and Wellington offices.

Sonia joins our Wellington office, bringing 15 years’ legal experience gained in the UK and New Zealand. She advises on all commercial property matters, including leasing, acquisitions and disposals, developments and finance, as well as providing general property advice to private clients.

Trusts and estates expert Richard joins the Auckland office, adding a depth of experience gained from private legal practice together with in-house legal and management roles in trust companies. A specialist in private client work, he advises clients on all areas of succession planning and asset protection – including on developments brought about by the introduction of the Trusts Act 2019.

Sonia and Richard are great additions that will enhance client service across key areas for our firm. In addition to taking on leadership roles in their teams, both also bring significant private client experience which is a growth area for Simpson Grierson.

For additional information visit www.simpsongrierson.com

BAKER BOTTS

REPRESENTS SUNNOVA ENERGY INTERNATIONAL INC IN ITS SECONDARY OFFERING OF COMMON STOCK

HOUSTON - 14 August, 2020: Deal Description: On August 13, 2020, Sunnova Energy International Inc. priced its secondary offering of 10,000,000 shares of its common stock by certain of its stockholders, including affiliates of Energy Capital Partners (collectively, the "Selling Stockholders") at a price to public of $25.00 per share. The underwriters will have a 30-day option to purchase an additional 1,500,000 shares from certain of the Selling Stockholders. The offering is expected to close on August 18, 2020, subject to customary closing conditions. Sunnova is not offering any shares of its common stock in the Offering and will not receive any proceeds from the sale of shares by the Selling Stockholders in the Offering.

Baker Botts L.L.P. represented Sunnova in the transaction. Baker Botts Lawyers/Office Involved: Corporate: Travis Wofford (Partner, Houston); Josh Davidson (Partner, Houston); Jennifer Gasser (Associate, Houston); Gita Pathak (Associate, Houston); Malakeh Hijazi (Associate, Houston);Tax: Michael Bresson (Partner, Houston); Jon Nelsen (Partner, Austin); Advisory Counsel: Danny David (Partner, Houston).

For more information, please visit www.bakerbotts.com

CAREY

ASSISTS VTR'S US$2.4 BILLION DEBT TRANSACTIONS

SANTIAGO - 12 August, 2020: Chile's Carey has helped local telecoms company VTR make several international debt transactions worth US$2.4 billion in total. VTR issued new notes worth nearly US$1.2 billion across two offerings. The first portion, for US$600 million, carries a 5.125% coupon, while the second, worth US$550 million, carries a coupon of 6.375%. The notes are due in 2028. VTR used the proceeds to redeem existing notes due in 2024 and worth nearly US$1.3 billion. The transactions closed on 1 July. The issuance involved multiple jurisdictions including Chile, England, the Netherlands, the Cayman Islands and Spain, as well as Colorado and New York law in the US.

Counsel to VTR Carey Partners Pablo Iacobelli and Patricia Silberman, and associates Fernando Noriega, Feliciano Tomarelli, Francisca Castillo and Carolina Said in Santiago

For additional information visit www.carey.cl

BRIGARD URRUTIA

ASSISTS COLTEL IN USD2.5 BILLION LOAN AND DEBT DEALS

BOGOTA - 13 August, 2020: Brigard Urrutia in Bogotá helped Coltel, a Colombian subsidiary of Spanish telecoms company Telefónica, in several financing and debt transactions worth a combined US$2.5 billion.

Clifford Chance LLP in New York and Colombia's Dentons Cardenas & Cardenas advised lenders BNP Paribas, Bank of America, JP Morgan and Santander, as well as the group of banks that acted as initial purchasers in the debt transactions. The deal, made across multiple transactions, closed on 17 July.

In the first transaction, Coltel obtained a US$320 million loan and four bilateral credit facilities governed by Colombian law, worth a total of 1.8 trillion Colombian pesos (US$474 million) from the lenders. That was followed by a notes issuance worth US$500 million. The notes have a 5% interest rate, and mature in 2030.

Following the two transactions to raise new money, the Colombian telecoms company also launched two offerings to tender previously issued notes.

Counsel to Coltel In-house counsel; White & Case LLP (New York, Miami, Chicago) White & Case SC (Mexico City); Brigard Urrutia Partners Carlos Fradique-Méndez and Luis Gabriel Morcillo, and associate Felipe Calderón in Bogotá

For additional information visit www.bu.com.co

GIDE

ADVISES DELTA OFFSHORE ENERGY SHAREHOLDERS ON THE DEVELOPMENT OF 3,200 MW LNG-TO- POWER PLANT IN VIETNAM

PARIS - 24 July, 2020: Gide's Energy team is pleased to support on the development of Vietnam's first LNG-to-Power project, a flagship 3,200 MW facility in Bac Lieu Province.

Gide is pleased to be advising the shareholders in Delta Offshore Energy ("DOE") with respect to DOE's development of a 3,200 MW LNG-to-Power Plant and related floating storage and regasification unit and terminal at Bac Lieu Province, Vietnam (the "Project") following the issuance of the Investment Registration Certificate ("IRC") for the Project on 21 January 2020.

Gide partner Colin Graham will lead the Gide team with counsel Alix Deffrennes (Paris) and energy associate Vanessa Fullerton (London).

The Project is to be fully implemented by 2027 with the first 750MW (800MW gross) CCGT by 2024, if not earlier. The Project is the first registered energy infrastructure project in accordance with Vietnam's Law on Investment. The project company to be incorporated in Vietnam will be 100% foreign owned and will implement and represent the collective interests of the committed Strategic Partners to the Investment Project Consortium in the Project.

This new private sector initiated model for energy infrastructure under the Law on Investment is attracting world-class industry operators to compete in de-risking the development and investment in the LNG-to-Power value-chain in Vietnam. The demand-driven framework aligns Vietnam's socio-economic objectives with commercial incentives in a risk-allocated contractual structure with a long-term PPA from the state utility in accordance with international common practice. The single point planning interface delivering an integrated project will enable global financial institutions to provide innovative investment and financing solutions with the most competitive cost of capital. The Project will provide affordable, clean and reliable energy to Vietnam through a bankable and technically optimised structure using proven floating regasification technology.

Colin Graham, said : "The Delta Offshore Energy management team brings with them years of experience on complex offshore and gas to power engineering projects. This is a world-class project of many firsts and we're excited to support its development."

Gide's energy and infrastructure team has a long track record on major projects, including Sizewell C and Jaitapur nuclear power projects, the Australian Future Submarine project and major gas pipelines.

DOE has appointed Hogan Lovells as international legal counsel and Vietnam-based ACSV Legal as in-house and local legal counsel.

For additional information visit www.gide.com

HAN KUN

ADVISES KE HOLDINS INC ON ITS U.S. IPO

BEIJING - 13 August, 2020: Han Kun advised and acted as the PRC counsel to KE Holdings Inc. on its U.S. initial public offering and listing on the New York Stock Exchange under the symbol "BEKE".

Beike is the leading integrated online and offline platform for housing transactions and services. The company is dedicated to providing solutions for existing and new home sales, home rentals, home renovation, real estate financing, and other related services. Beike owns and operates Lianjia, China's leading real estate brokerage brand.

For additional information visit www.hankunlaw.com

HOGAN LOVELLS

U.S. CAPITAL MARKETS PRACTICE CLOSES THREE DEBT OFFERINGS WORTH OVER US1.95 BILLION IN TWO WEEKS

WASHINGTON, D.C./NEW YORK - 11 August, 2020 -- Global law firm Hogan Lovells advises Choice Hotels International, FLIR Systems, and Reliance Steel & Aluminum on an aggregate of US$1.95 billion of debt issuances between 23 July 2020 and 3 August 2020.

"Despite the economic uncertainties wrought by the COVID-19 pandemic, clients across different sectors have continued to enjoy favorable conditions in the U.S. bond market, with particularly robust activity in investment grade senior notes offerings, often at oversubscribed levels, and often coupled with liability management transactions involving existing debt. We are pleased to have guided numerous issuers, including those in industries most impacted by the pandemic, to market in recent months and look forward to helping our clients continue to navigate a complex financial landscape," said Eve Howard, the Global Head of the firm's Capital Markets practice.

More details about each of the three offerings can be found below.

On **23 July 2020**, the firm represented Choice Hotels International, Inc. in its issuance of US$450 million aggregate principal amount of its 3.7% senior notes due 2031 and concurrent tender offer for US$183.4 million of its 5.750% notes due 2022. Choice Hotels is one of the largest hotel chains in the world. More details about the offering can be found here. The Hogan Lovells team was led by Capital Markets partners John Beckman, Eve Howard and Alex Bahn. Counsel Tiffany Posil, senior associate Liz Graffeo and associate David Allen also advised on the transaction. Partner Scott Lilienthal advised on tax.

On **3 August 2020**, the firm represented FLIR Systems, Inc. in its issuance of US$500 million aggregate principal amount of its 2.5% senior notes due 2030. FLIR Systems is a world leader in the design, manufacture, and marketing of thermal imaging infrared cameras. More details about the offering can be found here. The Hogan Lovells team was led by Capital Markets partners Lillian Tsu and Stuart Morrissy. Counsel Tiffany Posil, Senior associates Catalina Santos Parkinson and Chloe Chung, and associate Yiyang Cheng also advised on the transaction. Partner Scott Lilienthal advised on tax.

And on **6 August 2020**, the firm also represented Reliance Steel & Aluminum Co., a leading diversified metal services supplier, on the issuance and sale of US$900 million in investment grade bonds, consisting of US$400 million aggregate principal amount of its 1.3% senior notes due 2025 and US$500 million aggregate principal amount of its 2.15% senior notes due 2030. about the offering can be found here. The Hogan Lovells team was led by Capital Markets partners John Beckman and Eve Howard. Counsels Andrew Zahn and Tifarah Roberts Allen, senior associates Weston Gaines and Philip Schuster, and associates Brendan Oldham and Jeff Nwagbo also advised on the transaction. Partner Scott Lilienthal advised on tax.

Each of these successful transactions happened on a very short time frames in order to take advantage of favorable market conditions. Our Hogan Lovells U.S. capital markets team regularly advises clients on complex and high-value offerings of debt, equity, and hybrid securities. Our issuer clients include some of the most recognizable corporate names in America. We are able to structure and execute capital markets transactions in order to maximize client goals, including developing innovative transactional structures.

For additional information visit www.hoganlovells.com

MUNIZ

STEERS PERUVIAN PORT DEAL

LIMA - 13 August, 2020: Muñiz, Olaya, Meléndez, Castro, Ono & Herrera assisted port operator Terminales Portuarios Peruanos ("TPP") buy an industrial site in the port city of Callao and obtain a loan to fund the acquisition.

Estudio Echecopar member firm of Baker McKenzie International advised the seller, real estate fund Fondo de Inversión en Bienes Raíces Larraín Vial (Fibra LVC II).

TPP, which paid US$21 million for the property, received a US$16 million acquisition financing from BBVA and Banco de Credito del Perú, which relied Hernández & Cía Abogados. Both transactions closed on 2 July.

Counsel to TPP Muñiz, Olaya, Meléndez, Castro, Ono & Herrera Partners Mauricio Olaya and Yuri Vega, and associate Carlos Martíneza

For additional information visit www.munizlaw.com

NAUTADUTILH

ADVISED ON USD 375 MILLION NOTES OFFERING BY CLEAR CHANNEL

AMSTERDAM - 14 August, 2020: NautaDutilh advised the initial purchasers in connection with a USD 375 million 6,625% senior secured notes offering by Clear Channel International B.V. (CCI). The notes are guaranteed by certain of CCI's subsidiaries. Both the notes and guarantees are secured by pledges over shares, intercompany receivables and material bank accounts of CCI and certain of its subsidiaries.

CCI is the international business division of Clear Channel Outdoor Holdings and a leading international out-of-home advertising company with operations primarily in Europe and Singapore. Through its extensive inventory and technology-based enhancements, CCI delivers innovative, effective marketing campaigns for advertising partners in their target markets.

The group of initial purchasers consisted of: U.S. Bank Trustees Limited, Deutsche Bank Securities Inc., Morgan Stanley & Co. LLC, Barclays Capital Inc., Citigroup Global Markets Inc., Credit Suisse Securities (USA) LLC, Goldman Sachs & Co. LLC, J.P. Morgan Securities LLC and Wells Fargo Securities, LLC.

The closing of the notes offering took place on 4 August 2020. NautaDutilh worked alongside lead counsel Davis Polk & Wardell London LLP. Our team was led by David Viëtor and consisted of Dewi Walian, Tessa van Berkum (Capital Markets), Jinne van Belle (Finance), Nina Kielman and Alissia Sudibyo (Tax).

For additional information visit www.nautadutilh.com

SANTAMARINA

ASSISTS INVESTOR GROUP ACQUIRE GALLOS BLANCOS QUERÉTARO

MEXICO CITY – 18 June, 2020: Quegat, S.A. de C.V., formed by a group of investors in Mexican soccer clubs, acquired the affiliation certificate for the Querétaro Fútbol Club Gallos Blancos, a longstanding club established in 1950, affiliated with the Federación Mexicana de Fútbol Asociación, A.C., starring at its major league, Liga BBVA MX.

S+S provided legal advice to Quegat, S.A. de C.V. during the negotiations of the complex legal documentation required for the transaction. Our team was led by Ricardo Orea Montaño, Juan Pablo Rodríguez Sada and Karim Chabero.

This is one of the soccer club transactions that have occurred following the cancellation of the 2020 Clausura tournament due to the COVID-19 global pandemic, and one of the few major virtual acquisition transactions that have closed amidst the suspension of activities and related restrictions since the pandemic impacted Mexico.

For additional information visit www.s-s.mx

SIMPSON GRIERSON

ADVISING ON THE FUNDING AND FINANCING OF NEW ZEALAND'S GROWTH INFRASTRUCTURE

AUCKLAND - 07 August, 2020: This week a significant milestone was reached for infrastructure funding in New Zealand, with the Infrastructure Funding and Financing Act 2020 officially coming into force.

Our infrastructure team was selected to work with The Treasury and the Department of Internal Affairs at the end of 2018, helping to develop the Government's new Infrastructure Funding and Financing (IFF) programme.

The Act is designed to support a new Special Purpose Vehicle funding and financing model for the provision of bulk infrastructure for housing and urban development. It is expected to enable a number of viable bulk infrastructure projects to proceed that would otherwise be delayed by the financing and funding constraints impacting many local authorities across the country.

Our team is continuing to provide advice on the implementation of the model, led by finance partner Josh Cairns with support from partners Jonathan Salter and Simon Vannini, special counsel David Cochrane, and senior associates Mace Gorringe, Graeme Palmer and Lizzy Wiessing.

For additional information visit www.simpsongrierson.com

TOZZINIFREIRE

HELPS MITSUI TOYOTA JV WITH LAUNCH OF MOBILITY SERVICES APP IN BRAZIL

SAO PALO - 29 July 2020: TozziniFreire Advogados in São Paulo has helped the Brazilian subsidiary of Japanese conglomerate Mitsui & Co and car manufacturer Toyota enter a joint venture to develop mobility services in Brazil, as the companies plan further expansion in Latin America.

Toyota also relied on Japanese firm Hibiya-Nakata for the deal, which was announced on 3 July. The deal value remains confidential.

Sfera Legal advised on antitrust matters in Costa Rica along with counsel from a separate TozziniFreire team in Brazil.

The two Japanese companies formed Kinto Brazil, a new company that will provide a range of shared mobility services in the country. Toyota will hold a 51% stake in the new entity, while Mitsui holds onto the remainder. The tie-up will provide car-sharing, leasing and other mobility services, including an app, through which clients can browse Kinto's mobility options and hire vehicles.

Brazil already had a similar service, called Kinto Share, which was set up by the same Japanese companies in February 2019 and was previously operated by Toyota's mobile mobility app. The service was also offered in Argentina.

The new joint venture will refresh the existing service, leasing more Toyota and Lexus-branded cars to clients, who can hire the vehicles for days or hours at a time through the platform. The two companies also plan to roll out the app in Uruguay later this year.

The new entity will also launch a service to businesses in Brazil, called Kinto One, which will allow companies in the country to hire vehicles for its employees for periods between three and six years. It is expected that the same project will be launched in Argentina and Uruguay too.

Mitsui & Co is a subsidiary of Mitsui Group, which also operates mining, energy and lifestyle businesses among others. Its car manufacturing division has assets in Chile, Colombia and Peru alongside its Brazilian and Argentine facilities.

Counsel to Toyota Financial Corporation, TozziniFreire Advogados Partner Jun Oyafuso Makuta in São Paulo

Counsel to Mitsui & Co (Brazil), TozziniFreire Advogados Partner Jun Oyafuso Makuta in São Paulo

For antitrust matters Counsel to Toyota and Mitsui, TozziniFreire Advogados Partners Marcelo Calliari and Marcel Medon Santos in São Paulo

For additional information visit www.tozzinifreire.com.br

PRAC EVENTS

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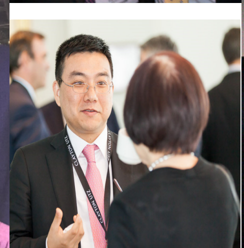
PRAC @ INTA


PRAC @ Vancouver




PRAC @ PDAC


PRAC @ IPBA

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www.prac.org

The Central Bank extends restrictions on trade related payments

On July 30, 2020, through Communiqué "A" 7079, the Argentine Central Bank (the "Central Bank") enabled access to the foreign exchange market (the “FX Market”) to cancel outstanding commercial obligations guaranteed by foreign financial institutions or export credit agencies abroad.

Restrictions provided by Communiqué "A" 7030 were extended until August 31, 2020

The Central Bank extended the applicability of the restrictions[1] on the access to the FX Market for the payment of imports and to cancel principal of foreign financial indebtedness when the creditor is a related party to the debtor until August 31, 2020.

The payment of outstanding trade obligations secured by foreign guarantors are allowed

Through Communiqué “A” 7068, the Central Bank had allowed access to the FX Market to cancel commercial debts for imports of goods with export credit agencies or foreign financial institutions, insofar as they are not payments associated with imports shipped after July 1, 2020 or which, having been shipped before that date, had not arrived in the country before that date.

The Central Bank extends this possibility to allow access to the FX Market to cancel of commercial debts for imports of goods secured by foreign financial institutions or export credit agencies abroad.

This report should not be considered as legal or any other type of advice by Allende & Brea.

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[1] Set forth in Sections 2 and 3 of Communiqué “A” 7030, as amended by Communiqués “A” 7042, 7052 and 7068.

For further information on this topic please contact Carlos M. Melhem and Jorge I. Mayora

Carlos M. Melhem
cmelhem@allende.com
+54 11 4318 9962

Jorge I. Mayora
jmayora@allende.com
+54 11 4318 9987

www.allendebrea.com

July 31, 2020

São Paulo Court of Appeals Launches Microsite About LGPD

São Paulo Court of Appeals Launches Microsite About LGPD and Includes "Personal Data Protection" as a New Procedural Subject

São Paulo Court of Appeals (TJSP) launched, on July 24, 2020, a microsite about the Brazilian General Data Protection Law (LGPD), developed by the Information Technology Secretariat and the Presidency Secretariat.

TJSP informs on its microsite that its creation intends to give visibility and transparency to the implementation of the organizational governance model for the LGPD compliance.

On the microsite, sections that inform all the attributions of the Data Protection Management Committee were made available, as well as other internal divisions and a brief compliance schedule. In addition, TJSP informs general aspects of the LGPD, such as the rights of the data subjects, besides mentioning policies that are being revised or elaborated.

Additionally, on July 23, 2020, TJSP made available the following procedural subjects: "50297 – Personal data protection", for the Civil Law category and "50296 – Personal data protection", for the Administrative Law category and other matters of Public Law.

TJSP reported that the inclusion of the new subjects was carried out for the purpose of measuring the number of lawsuits before and after LGPD's effectiveness date.

Once again, through the mentioned initiatives, TJSP demonstrates its concern about the implementation and compliance with the LGPD, added to already being prepared to receive the lawsuits that will arise with the entry into force of the Law.

TozziniFreire Partners

Carla do Couto Hellu Battilana
Marcela Waksman Ejnisman
Patrícia Helena Marta Martins

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BLOG

Capital Markets Modernization Taskforce Releases Initial Consultation Report

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Written by Will Osler, Christopher Doucet and Matthew Cunningham

In February 2020, the Ontario Government established the Capital Markets Modernization Taskforce to review and modernize Ontario's capital markets. Given the events that have transpired since the last review in 2003, including the Great Recession and the ongoing COVID-19 pandemic, this is a much-needed undertaking. The taskforce issued its initial consultation report on July 7, discussing 47 of the most pressing policy issues raised by stakeholders during the consultation process.

There are two overall themes of these policy issues. First, to supplement the Ontario Securities Commission's (OSC) policing function. Second, to grow Ontario's capital markets. The report proposes some significant changes, and a number of them are discussed in more depth below. A number of the proposals would impact policy across multiple provinces, and implementation would require cooperation on a harmonized approach.

1. Streamline Disclosure Timing

Currently, Canadian public companies are required to provide quarterly disclosure of their interim financial results and accompanying management discussion & analysis (MD&A). Stakeholders consulted by the taskforce noted that this can be an onerous process, particularly for smaller issuers. To alleviate this, the report recommends moving from quarterly disclosure to semi-annual disclosure at the discretion of the issuer. This would reduce issuer expenditure and should present a better value proposition for those issuers whose finances do not change significantly between quarters.

2. Introduce an Alternative Offering Model for Reporting Issuers

The taskforce is proposing an alternative offering model that would rely on an issuer's continuous disclosure record in lieu of a prospectus. Under this model, issuers in compliance with continuous disclosure requirements and fulfilling certain other conditions would be able to offer securities listed on an exchange to the public up to a certain maximum dollar amount. The issuer would also have to file a short disclosure document in conjunction with the offering.

3. Building an "Access Equals Delivery" Model of Information Dissemination

This proposal would permit companies to disclose documents to investors and stakeholders in electronic format, including by posting them on websites, instead of having to provide hard copy versions. This would dovetail with the Canadian Securities Administrators' SEDAR+ project and help provide investors and regulators with more timely disclosure. Further, this should alleviate the effort and cost issuers currently expend on disclosure as well as impacts on the environment. Documents affected by this proposal would include annual and interim financial statements, MD&A and management reports of fund performance, with the potential to extend to other types of disclosure.

4. Allow Exempt Market Dealers to Participate in Prospectus Offerings and Reverse Takeovers

Exempt market dealers (EMDs) provide support for start-ups and smaller issuers seeking to raise capital prior to engaging in an initial public offering. However, EMDs are often unable to continue supporting these entities when they subsequently undertake prospectus offerings. The report proposes to allow EMDs to participate in prospectus offerings as selling group members, which would allow them to maintain relationships with issuers and open up additional financing channels. Further, the report recommends that EMDs be allowed to act as sponsors in reverse-takeover transactions.

5. Consolidating Reporting and Regulatory Requirements

The report recommends streamlining reporting and regulatory requirements, including combining form requirements for MD&A, annual information forms and financial statements. The proposal also contemplates the removal of some reporting requirements where the information is available via other disclosure.

6. Removal of Four-Month Hold Period on Exempt Securities

The taskforce is proposing to remove the four-month hold period currently in place on securities issued by an exempt issuer under the accredited investor exemption. The proposal would allow secondary trades immediately where the issuer has been a reporting issuer for four months before the trade. However, issuers and any dealers would be required to take steps to ensure that the accredited investor is purchasing securities for its own account and not to distribute, in order to avoid indirect underwritings to non-accredited investors. This may require expanded representations and warranties in subscription agreements, should this proposal be adopted.

7. Developing a Well-Known Seasoned Issuer Model

The Well-Known Seasoned Issuer (WKSI) model, currently employed in the United States, permits issuers to undertake a less burdensome shelf registration process. WKSI requirements under the U.S. model include that the issuer maintains a certain public float or that it has issued a certain number of debt securities in a specified time period while maintaining an appropriate disclosure record. The taskforce is recommending an amendment to the *Securities Act* (Ontario) to allow the development of a WKSI model in Canada. This would allow large issuers to raise capital in a more cost-effective manner and minimize regulatory burdens.

8. Prohibit Short Selling in Connection with Prospectus Offerings and Private Placements

Stakeholders consulted by the taskforce noted that short selling in connection with prospectus offerings is a growing problem with the current system, particularly with respect to bought deals. Among other issues, short selling hinders pricing and execution of offerings. The report proposes that the OSC adopt a rule prohibiting market participants that have previously short sold securities of the same type being offered under a prospectus from acquiring securities under such prospectus or private placement.

9. Introduce Additional Accredited Categories

The accredited investor exemption applies to individuals meeting certain income and asset thresholds, among other requirements. The taskforce proposes to expand this exemption to include individuals with relevant proficiencies, such as those who have completed the CFA Charter.

10. Corporate Board Diversity; Director Term Limits

TSX-listed companies have been required to disclose their approaches to improving gender diversity since 2014. However, in the taskforce's view, development of diversity has been slow. This may be attributable to the current "comply or explain" model whereby companies are not necessarily obligated to follow rules designed to improve diversity. The report is proposing that securities legislation move away from this model in favour of setting targets and requiring issuers to provide data in relation to diversity representation on boards and in executive officer positions. Additional amendments would also impose a 10-year maximum term on directors with some exceptions, in order to increase board renewal. Further, the taskforce recommends that the OSC impose similar targets on itself to ensure representation similar to the companies it regulates.

11. Introduce a Regulatory Framework for Proxy Advisory Firms

The taskforce proposes that the OSC begin regulating proxy advisory firms (PAFs). This would include requiring that PAFs' institutional clients be provided with the issuer's perspective along with the PAF's report, introducing a statutory right for an issuer to rebut PAF reports and implementing a conflict of interest framework to ensure that PAFs are not simultaneously providing consulting services to issuers and voting recommendations to clients in respect of those same issuers. It is worth noting that the US Securities and Exchange Commission (SEC) has recently adopted new rules on proxy voting advice. The SEC's new rules include requiring that PAFs provide conflict of interest disclosure and give companies that are the subject of proxy voting advice access to such advice before or when the PAF provides the advice to its clients.

12. Decrease the Early Warning Threshold from 10% to 5%

Currently, shareholders are required to provide early warning disclosure regarding their control or direction over, or beneficial ownership of, securities of an issuer when they exert such control or direction over 10 percent of the voting or equity securities of an issuer. However, shareholders can often requisition a shareholder meeting while only holding 5 percent of such securities. With the rise of investor activism, the taskforce proposes decreasing the early warning disclosure requirement to 5 percent. This would better reflect the rules of other jurisdictions, such as the United States and United Kingdom, as well as harmonize with the ability to call shareholder meetings.

13. Require Annual Shareholder Say on Pay Vote

The taskforce is proposing to require TSX-listed issuers to undertake a periodic mandatory shareholder vote on their own approach to executive compensation. This would provide boards with useful input and encourage shareholder engagement. Further, this would align with developments in Canada and other jurisdictions, such as recent amendments to the *Canada Business Corporations Act* that require advisory say-on-pay votes. However, the report refrains from recommending that such votes be binding, in order to preserve boards' decision-making processes.

14. Require Enhanced Disclosure of Environmental, Social and Governance (ESG) Information

To reflect increased investor interest in ESG information, the taskforce is recommending the adoption of a standardized framework through which to disclose this information. There are currently two prevalent frameworks, the Sustainability Accounting Standards Board and the Taskforce on Climate-Related Financial Disclosures. The report recommends adopting one of the frameworks and using it to phase in mandated disclosure of ESG information over time.

15. Require Additional Requirements and Guidance for Independent Directors in Conflicts of Interest

As drafted, Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* (MI 61-101) does not fully cover the role of committees of independent directors in considering and advising on conflict of interest transactions. The taskforce recommends the codification of best practices for such committees, currently split between Multilateral Staff Notice 61-302 *Staff Review and Commentary on MI 61-101* and OSC decisions, into a single document. This would improve access to such best practices and increase minority shareholder confidence in the event an issuer engages in transactions regulated by MI 61-101.

16. Provide the OSC with More Remedies Regarding M&A Matters

The taskforce notes that while the OSC is responsible for regulating many aspects of M&A matters, the remedies currently available to it in this regard are inadequate. Following the footsteps of the BC Securities Commission, the report proposes granting the OSC additional remedies, including the power to rescind transactions and to require persons to dispose of securities acquired in connection with an M&A transaction.

17. Eliminate Non-Objecting Beneficial Owner and Objecting Beneficial Owner Categories

In Canada, issuers generally correspond with beneficial owners of their securities via an intermediary. This means that the intermediary, not the issuer, has a clear view on who owns the issuer's securities. Further, these intermediaries are responsible for determining whether such an owner wishes to be a non-objecting beneficial owner (NOBO) or an objecting beneficial owner (OBO). The taskforce recommends removing the NOBO and OBO categories and giving issuers direct access to the list of all beneficial owners of their securities. The removal of the categories will allow issuers to contact all beneficial owners of their securities and, with the elimination of the NOBO and OBO categories, allow the solicitation of voting instructions directly from such owners.

The balance of the proposals contained in the report cover a wide range of areas, including the mandate of the OSC, a governance and oversight framework for self-regulatory organizations, capital raising activities for reporting issuers and access to capital for start-ups and entrepreneurs. Taken together, if implemented the proposals would represent significant change for public companies in Canada.

The taskforce is seeking further submissions on these proposals. Submissions must be received by September 7, 2020. If you have further questions regarding the above proposals or any of the others in the report, please contact one of the authors.

AUTHORS

 William S. Osler, *Partner*

 Christopher J. Doucet, *Partner*

 Matthew Cunningham, *Associate*

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CANADA'S COVID ALERT APP: WHAT BUSINESSES AND INDIVIDUALS NEED TO KNOW

On July 31, 2020, the federal government released the COVID Alert app. The COVID Alert app has been approved by the Privacy Commissioner of Canada as a reasonable and necessary tool to reduce the spread of COVID-19 while minimizing the privacy impact on individuals.

From a privacy perspective, it is important to note that the COVID Alert app addresses "exposure notification" and does not trace contacts or a user's location. Unlike the concepts discussed early in the pandemic which raised concerns among the privacy commissioners across Canada, the COVID Alert app is entirely voluntary and collects very little information.

This newsletter provides more information about the COVID Alert app and how it works, and answers some frequent questions. If you have any other questions or want further information, please contact me at jfacchin@rbs.ca or at 604-661-9276.

What data does it collect and how does it work?

The COVID Alert app does not collect any personal information from you, other than to ask which province you live in.

The app does not track your location or any health information about you. It does not know your name or address. It is not a "contact tracing app" that keeps a record of every phone you have been in contact with and provides that information to the government.

Instead, it generates random codes, which change every five to 20 minutes. These codes do not contain any information about you.

The smartphone on which the app is installed then both sends out its code and "listens" for codes from other smartphones nearby. It stores the codes that it "hears".

If a person who uses the app tests positive for COVID-19, provincial health authorities will give that person a new code and instructions on how to enter it into the app. If the person does so and consents, the app sends certain random codes to a server. The server then sends notifications to other smartphones that have "heard" codes with the diagnosed person's smartphone within the last 14 days.

The users of the other smartphones then receive a notification from the COVID Alert app that they may have been exposed.

For a more technical explanation about how the COVID Alert app works, see the Government of Canada's Privacy Impact Assessment or this blog written by the Government of Canada employees who worked on the app.

I am a business owner. Can I require my employees or customers to use it?

The short answer is no.

A primary reason the Privacy Commissioner of Canada has approved the COVID Alert app is that it is based on consent. That is, users have to indicate their consent to download it, use it, receive notifications from it, and enter the code to notify others if they have tested positive.

Generally, businesses cannot require their employees or customers to consent to the collection, use or disclosure of any personal information beyond what is necessary to employ them or provide them with a service.

Businesses are already required to collect the names and contact information of customers to provide to public health officials if there is an exposure at their business for contact tracing. That means there is already a procedure in place to notify people who have been exposed to COVID-19 at that business. Since the COVID Alert app also notifies people, it duplicates this same process and so it is not necessary as set out in the privacy legislation.

Can the government or other people identify me through the COVID Alert app?

The short answer is that it is not completely impossible for you to be identified through the COVID Alert app, but it is highly unlikely except in certain circumstances.

No level or part of government can identify you. The app does not collect, store or send out any personal information about you to the government or anyone else. Because of that, no level of government obtains any information about you from the app at all.

There is a small possibility of being identified by other people. If you have interacted with only a very small number of people over the previous 14 days and you receive a notification that you have been in contact with someone who has tested positive, you may be able to identify that person. Similarly, if you test positive, the small number of people who have been in contact with you may be able to identify you.

As the Privacy Commissioner of Canada has noted, there are only very limited circumstances where this is possible, and so it is very unlikely.

Do I have to download it?

No, you do not have to download it.

The COVID Alert app is based on the concept of consent. Using it is completely voluntary. As explained above, businesses and employers cannot require you to download and use it.

Where can I get the COVID Alert app?

If you choose to download the COVID Alert app, you can find it in the Apple App Store or the Google Play Store.

For more information on COVID-19 and privacy, read these previously published articles:

- Avoiding and Managing Privacy Breaches in Remote Working Environments
- COVID-19 Privacy FAQs: Answering the Questions You've Been Wondering About

July, 2020

ELECTRONIC SIGNATURES IN CHILE - WHEN YOU CAN USE THEM AND WHEN YOU CAN'T?

The pandemic revealed a great need to remotely execute acts and contracts, avoiding the need to meet to sign the documents or appear before a notary. This increased the doubts about the regulation on electronic signatures, especially in order to understand under what circumstances they can be used and when not.

In this article, we will briefly explain: (i) how electronic signatures are regulated in Chile; (ii) which acts may and may not be executed through electronic signatures; (iii) the bill of law that aims to expand the number of acts that may be executed with electronic signatures; and (iv) proposals for changes to the bill in order to extend the usefulness of electronic signatures.

I. *REGULATION OF ELECTRONIC SIGNATURES IN CHILE*

Electronic signatures are regulated by Law Nº 19,799 about Electronic Documents, Electronic Signatures and Certification Services of such Signature ("LFE", by their initials in Spanish), and its Regulations .[1]

1.1. Principle of equivalence between electronic and paper documents. As a general rule, acts and contracts executed by means of electronic signatures are valid in the same way and produce the same effects as those executed in writing and on paper. For all legal purposes, these acts and contracts are deemed to be in writing and their signature is regarded as a handwritten signature, whatever its nature.

1.2 Types of electronic signature. The LFE recognizes two types of signatures, the simple electronic signature ("**SES**") and the advanced electronic signature ("**AES**").

(i) Simple electronic signature. A simple electronic signature is "any type of sound, symbol or electronic process that enables the recipient of an electronic[2] document to identify, at least formally, its author"[3].

Therefore, the following can be an SES: the incorporation of a person's name at the end of an e-mail or even the mere act of sending that e-mail from her/his personal mailbox; the scanned image of a handwritten signature incorporated at the end of an electronic document; a biometric sign (e.g. fingerprint); the marking of a checkbox on an electronic form; or other electronic processes that allow the identification, at least formally, of the author of an electronic document. A mechanism that is not compatible with the concept of an electronic document could not be considered a simple electronic signature.

[1] The Regulations of the LFE are contained in the Decree No. 181/2002 of the Ministry of Economy, and regulate electronic documents, their effects; the types of electronic signature; and the certification and accreditation process.
[2] Electronic documents are defined by the LFE as "any representation of a fact, image or idea that is created, sent, communicated or received by electronic means and stored in a suitable way to allow its subsequent use."
[3] Art. 2 letter f) LFE.

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Isidora Goyenechea 2800, 43rd Floor.
Las Condes, Santiago, Chile.
www.carey.cl

In accordance with the principle of equivalence of the medium, a contract signed by SES will have the same legal value as a contract signed with a handwritten signature.

(ii) Advanced electronic signature. An advanced electronic signature is a signature "certified by an accredited provider and which has been created using means that the holder keeps under her/his exclusive control, so that it is linked only to the holder and the data to which it refers, allowing the subsequent detection of any modification, verifying the identity of the holder and preventing her/him from being unaware of the integrity of the document and its authorship"[4].

The Under-Secretariat for the Economy and Smaller Businesses, through the **Accreditation Body**, is responsible for accrediting the providers of advanced electronic signature certification services and keeping their records up to date [5].

1.3. Restrictions on the use of electronic signatures. The general rule is that simple and advanced electronic signatures can be used without distinction to execute all kinds of acts and contracts, with the exception of the following:

a. SES cannot be used where the law expressly requires the use of AES, for example:

(i) Public instruments in electronic form must bear the AES of the issuing official: an authorized electronic copy of a public document must bear the AES of the authorizing notary; a certificate of the civil registry must bear the AES of the issuing official, etc.
(ii) Judicial powers-of-attorney granted in an electronic document must be signed with the AES of the principal.
(iii) The forms for the constitution, modification, dissolution or annotations of companies from the Registry of Companies and Corporations must be signed with the AES of the constituents, partners or shareholders; or with the AES of the notary who authorizes the act if they do not have their own AES.

b. An electronic signature (FES or FEA) cannot be used when the LFE or other laws forbid the use of an electronic signature:

i) When the law requires a solemnity that cannot be complied with by electronic document.
ii) When the law requires the personal attendance of any of the parties.
iii) In acts and contracts related to family law.

[4]Art. 2° letra g LFE.
[5]The current accredited providers of this type of firm are: (i) BPO-Advisors (IDok): https://bpo-advisors.net; (ii) TOC: http://www.toc.cl/; (iii) E-PARTNERS (Paperless): http://www.pkichile.cl/; (iv) CERTINET S.A .: http://www.certinet.cl/; (v) E-SIGN S.A.: http://www.e-sign.cl; (vi) ACEPTA.COM: http://www.acepta.com; (vii) E-CERT CHILE: http://www.e-certchile.cl; and (viii) Thomas Signe: http://www.thomas-signe.cl.

II. *Practical application of these rules*

2.1 Acts that must be executed by public deed cannot be executed with an electronic signature

The executing of acts for which the law requires the formality of a public deed (e.g. the sale of real estate or easements or the granting of mortgages[7]) cannot be executed by electronic signature, neither AES nor SES, since this formality is not susceptible to be fulfilled by means of an electronic document, as it can be seen from articles 403 and following of the Chilean Organic Courts Code ("COT").

According to those rules, the granting of a public deed requires (i) the personal appearance of the parties before the notary (article 405) and (ii) the fulfilment of a series of formalities that are incompatible with the notion of electronic signature and electronic document.[8]

Articles 4 and 5 number 2 of the LFE often create confusion on this matter: article 4 provides that "electronic documents that have the quality of public instruments must be signed by means of an advanced electronic signature". Because of its concise wording, this provision could lead to the misconception that a public instrument -such as a public deed- could be created directly by the contracting parties if they execute it using their advanced electronic signatures. But that conclusion is not correct.

To understand the true meaning of this rule, we must bear in mind the definition of "public instrument" in Article 1699 of the Civil Code:

"Public or authentic instrument is the one authorized with the legal solemnities **by the competent official**.

Granted before a notary public and incorporated in a protocol or public registry, it is called a public document".

As can be seen, the public instrument is always authorized by "the competent official", which in the case of the public deed is the notary. However much private individuals may sign their private documents with an advanced electronic signature, they cannot give it the status of a public instrument, since that can only be done by the official who has the legal power to authorize it (e.g. the Civil Registry and Custodians of Real Estates are empowered to issue certain certificates within their sphere of competence; notaries may authorize copies of public deeds, etc.). The meaning of this rule, then, is that those officials are obliged to use AES to authorize this type of instrument.

[6]Art. 1801 of the Civil Code
[7] Art. 2409 of the Civil Code
[8] For example: (i) the notary must incorporate the deed in her/his protocol or public registry (art. 403) and render useless, with her/his signature and seal the unwritten back of its pages (art. 404, final paragraph); (ii) the deed must be initialed and sealed in all its pages by the notary (art. 406); (iii) the parties must have the opportunity to demand that the notary public reads the deed aloud (art. 407); (iv) the notary or any of the grantors must have the opportunity to require the rest of the parties to leave their fingerprint on the document (art. 409).

Article 5 No. 2 of the LFE could also lead to some confusion, as it gives private documents signed with AES the same evidential value as public documents. This rule does not make both instruments equivalent in terms of their legal value, since the evidential value at trial is not the same as the absolute legal value of a document. To illustrate: the declarations on facts that are contained in a private instrument of sale of real estate subscribed with AES may have the same probative value that if they had been formulated in a public deed, but this does not mean that that private instrument will be accepted by the Real Estate Custodian to carry out the tradition of the real estate, since such instrument does not comply with the requirement that the law demands for the valid sale of a real estate, which is the execution of the act by public deed.

A very recent case illustrates this very well. In consideration of the constitutional state of catastrophe affecting our country, on April 7 of this year the 11th Civil Court of Santiago, in case C-6045-2018, resolved to sign a public deed of award of an auction sale using an advanced electronic signature and then to send it digitally to the respective notary's office. However, when required to register this document, the Real Estate Custodian of Santiago refused to do so, noting that the instrument in question would not be a true public deed.

In view of this refusal, the interested party requested the court to order the Custodian to practice the registration anyway. Based on articles 3° and 4° of the LFE, which we have already analyzed, on April 30, 2020 the 11th Civil Court of Santiago ordered the Custodian to register the instrument of award signed with AES. In response, on May 11, 2020, the Custodian informed the court about the grounds for its decision, explaining that the instrument in question could not be registered because it was not a true public deed:

«So that we compare the provisions relating to the public deed contained in Articles 403, 405, 426 No. 5 and 401 No. 7 of the Organic Code of Courts and Articles 1699 and 1770 of the Civil Code with the document accompanied for registration dated April 8 of the notary's office of Ms. Valeria Ronchera, it is possible to conclude that it is not a public deed as a public or authentic instrument that meets the requirements of the above-mentioned articles, but an electronic document whose original is in a repository for verification and the wording and expressions used in its drafting **appear to be a public deed without being so**».

Resolving this controversy, on June 23, 2020, the plenary of the Court of Appeals of Santiago ordered to leave the instrument of award without effect, requiring the court to execute the award by true public deed ("the Judge of the Eleventh Civil Court of Santiago is instructed to arrange for the necessary actions to be taken so that an instrument in material form is granted for this purpose"). In addition, and evidencing a clear concern with what happened, the plenary of the Court ordered all civil courts in Santiago to report on how they are proceeding with the public auctions and officiated its decision to the Supreme Court and to all those involved in the dispute (the court, the notary who authorized the instrument and the Real Estate Custodian of Santiago).

2.2. The acts that must be granted by private instrument subscribed before a notary admit the use of electronic signature, but appearing before a notary

The acts or contracts that the law requires to be signed by private instrument granted before a notary will not produce their effects if they are only signed by means of an electronic signature, for the same reasons we have given for the case of public deeds.

However, unlike the case of public deeds, the use of electronic signatures is not totally prohibited for this type of acts and is possible under the following circumstances: if the parties agree to sign the electronic document in the presence of the notary, who in turn certifies the granting of the document using her/his own advanced electronic signature.

This possibility is recognized in the fourth and eighth agreements of the Auto Acordado (Court Agreement) on the use of documents and electronic signatures by notaries, custodians and judicial archivists adopted by the Supreme Court in 2006:

«Fourth: Holders of electronic signatures, within the scope of their functions and competence, **may electronically issue, through the use of advanced electronic signatures, all documents that the law allows**, especially authorized copies of public and private instruments, notarized documents, certifications of digital signatures stamped in their presence, protests and findings of fact and certifications referring to records and proceedings.

Eighth: In cases in which the Notary **authorizes a digital signature stamped in his presence**, he must attest to the identity of the signatory as laid down in the Organic Courts Code».

The practical usefulness of this method is very low, since it still requires the presence of a notary, so that the most important advantage of electronic signatures, which is the possibility of concluding a contract remotely, is not exploited.

Some examples of acts and contracts that the law requires to be notarized are the assignment of copyrights[9] , the granting of a pledge without conveyance[10] or the incorporation of a non-profit association or foundation[11].

[9] Art. 73 of Law 17,336 on intellectual property. According to the article, this act can also be granted by public deed.
[10] Art. 14 of Law 20.190. According to this article, the instrument must also be registered in the registry of the same notary who authorizes it.
[11] Art. 548 of the Civil Code.

2.3 The possibility and usefulness of issuing promissory notes in electronic form is controversial

The possibility of subscribing to a promissory note in electronic form faces two difficulties:

(i) Can a promissory note be signed by electronic signature? Part of the legal scholars hold that the legal nature of the promissory note is intrinsically related to its uniqueness and materiality: the promissory note is a physical document, not an abstract obligation that can subsist intellectually regardless of the medium on which it is recorded. For this position, the electronic promissory note would be no more than a private instrument in which a debt is recognized, but it would not be a promissory note itself, to which the rules that are specific to it could be applied (Law 18,092).

Against this position, it has been argued that the existence of an electronic promissory note would be possible in accordance with the principle of equivalence between supports embodied in the LFE, and that being this law later and more specific, it should prevail over the classic and previous scholar notions on the matter.

ii) For the promissory note to have "executive merit" (i.e. direct enforceability as a judgment debt), the participation of a notary is also required, either for the protest procedure or at the time of its granting.
Even overcoming the previous scholar debate, there is still another inconvenience for the electronic promissory note: in order for a promissory note to have executive merit -which is one of its main advantages- it must **(i)** undergo the protest procedure regulated in article 60 and following of Law 18,092, which implies the intervention of a notary or a civil registry official; or **(ii)** have been subscribed to before a notary[12] , either by handwritten or electronic signature, as explained in section 2.2. As shown, both requirements involve the intervention of a notary, either to authorize the document or to make the protest, which makes the practical usefulness of an electronic promissory note considerably less than it is intended to be.

Due to these considerations, in 2012 the President presented a bill (bulletin 8466-07) to modify the rules regarding the promissory note -to which we refer below- expressly recognizing the possibility of its granting by advanced electronic signature and timestamping and granting it with executive merit under such circumstances.

2.4 Examples of acts and contracts that can be concluded by electronic signature

i) Simple mandate agreement. There have been divided positions between legal scholars and court rulings on the need for the mandate to have the same formalities as the law requires for the act entrusted[13].

[13] In favor of the thesis that the mandate must be solemn if the act commissioned is solemn, see the opinion of Fernando Alessandri and recital 24 of the Supreme Court ruling issued on May 31, 2017 in case role 50.064-2016. For the contrary thesis, see the opinion of David Stitchkin and recital 7 of the Supreme Court ruling issued on December 27, 2017 in case role 42.458-2017.

This debate becomes relevant in determining whether or not a mandate can be held in electronic form. If it were accepted that the formality of the mandate should be the same as that of the act entrusted, a mandate for acts that, for example, require a public deed, could not be concluded by means of an electronic signature.

(ii) Contracts for the authorization or licensing of works protected by copyright or industrial privilege.
(iii) Acceptance of terms and conditions of use on an electronic commerce website.
(iv) Assignments of industrial property rights.
(v) Authorizations for the processing of personal data.
(vi) Commercial agreements, such as distribution contracts, franchises, etc. (insofar as they do not contain acts that cannot be concluded by electronic signature, such as the sale of real estate, for example).
(vii) Confidentiality agreements.
(viii) Subscription of minutes of Board meetings (see NCG 434/2020 of the Financial Market Commission).

III. *Bill to ammend the law on electronic signatures*

As we have shown, there are still several impediments to adopting the mass use of electronic signatures. There are acts and contracts that must necessarily be concluded by public documents and others that, although they can be concluded by electronic signature, they still require that the signature is made in the presence of a notary, thus losing the usefulness of electronic means.

In order to eliminate some of these impediments and promote the mass use of electronic signatures, in 2012 the President presented a bill (bulletin 8466-07) which currently is in its third constitutional stage, and that intends to introduce a set of improvements to the LFE and other regulations, among which we will highlight three:

i) The concept of "time stamping" is introduced, which is defined as the "assignment by electronic means of the date and time when an electronic document is signed with the intervention of a certified certification service provider, who attests to the accuracy and integrity of the document's time stamp". This concept is then required to replace the work of the notary in the granting of certain acts.

ii) The possibility that the use of AES and time stamping replace the legal requirement to authorize an act before a notary: "In all cases where the legal system requires that the signatures of the grantors of a given legal act must be authorized before a notary, either as a formality of the act or as a requirement to make it effective against third parties or for any other legal effect, **such requirement or solemnity shall be deemed to be fulfilled by the sole fact that the act is recorded in an electronic document signed by the grantor or the parties, as the case may be, with an advanced electronic signature and time stamp".**[14]

[14] New art. 4th paragraph 4th of the LFE, if the project was approved.

(iii) Law No. 18,092 is amended to expressly provide that the bill of exchange and the promissory note may be issued in an electronic document and signed with AES and time stamped, and that they will have executive merit under such circumstance. It is also stated explicitly that the protest of these documents may be made by means of an electronic document, in which case the officer carrying out the procedure must sign it with AES and stamp it with a time stamp.

These modifications are a great contribution to overcome some of the obstacles that the electronic signature faces today and that have been felt so much in these times of pandemic that demand the possibility of executing acts and contracts remotely. However, the bill leaves a major issue pending: to introduce facilities so that acts and contracts that require the solemnity of a public deed can also be performed remotely.

In fact, the possibility of satisfying this solemnity by means of AES and time stamp was expressly forbidden in the project, through the following rule "The provisions of paragraph four[15] **shall not apply to public deeds**."

We understand that acts that require the formality of a public document are of great importance and that it would be imprudent or reckless to allow them to take place without making an exhaustive verification of the identity of the contracting parties, as allows the appearance before a notary. However, we believe that the legislator could find ways to reconcile the formality of these acts with the pressing social need to facilitate their remote execution.

One possible way could be to modify the rules of the Organic Courts Code in order to allow public deeds to be granted remotely as well, requiring the executing parties to appear before the notary by means of some technological tool (for example, by video conference) to verbally ratify their willingness to execute the act, and to sign the electronic document at that precise moment, using their advanced electronic signature and time stamp. As an additional safeguard, technical and organizational security measures associated with the use of the tool by the parties and notaries could be required; and strict storage obligations could be created for notaries (e.g., keeping a recording of the video appearance).

[15] It refers to the subsection that allows the use of advanced electronic signature and time stamp to supply the legal requirement to authorize an act before a notary.

IV. *Conclusions*

Current legislation does not allow electronic signatures to be used for the conclusion of all types of acts and contracts, considering that electronic signatures, especially in their simple form, can easily allow identity fraud. In that context, it is understandable that the legislator may wish to protect certain acts by requiring the parties to appear in person.

However, the use of technological means and the need for appropriate verification of the identity of the contracting parties are not mutually exclusive. The pandemic that hits us today has made it clear how urgent it is to modernize our legislation in order to design creative ways that allow us to execute the most solemn acts by remote means, but with robust mechanisms for the authentication of the contracting parties.

Legal Commentary

August 5, 2020

CSRC to Overhaul Mutual Fund Manager Rules

Authors: TieCheng YANG | Yin GE | Ting ZHENG | Sherry SI

On July 31, 2020, the China Securities Regulatory Commission ("**CSRC**") issued consultation drafts of the *Administrative Measures for Publicly-Offered Securities Investment Fund Managers* （*《公开募集证券投资基金管理人监督管理办法（征求意见稿）》*）and the *Provisions on Issues Concerning the Implementation of the Administrative Measures for Publicly-Offered Securities Investment Fund Managers* （*《关于实施<公开募集证券投资基金管理人监督管理办法>有关问题的规定（征求意见稿）》*）[1] (collectively the "**Draft Rules**"). The Draft Rules are revised versions of earlier consultation drafts issued by CSRC on May 17, 2013[2].

The Draft Rules are intended to apply to both fund management companies ("**FMCs**") and other asset management institutions that are allowed to obtain mutual fund licenses, including wealth management subsidiaries of commercial banks ("**WMSs**"), securities firms' asset management subsidiaries, insurance asset management companies and private securities investment fund managers ("**PFMs**") registered with the Asset Management Association of China ("**AMAC**"), all of which are collectively referred to as "**Mutual Fund Managers**".

This article is focused on the key aspects that may affect the business strategies of foreign asset management firms to set up, make equity investments in, mutual fund management platforms (such as FMCs, WMSs and securities firms) in China, or to apply for mutual fund licenses in the future via existing PFM WFOEs.

Requirements for FMC shareholders

The Draft Rules propose to classify shareholders of FMCs into three types: (i) shareholder with no more than 5% stake, (ii) non-major shareholder with more than 5% stake, and (iii) major shareholder with more than 5% stake, each of which is subject to different regulatory/qualification requirements. For example, the Draft Rules add negative requirements for any shareholder with no more than 5% stake and increase the net capital requirement for any non-major shareholder holding more than 5% stake. It is also worth

[1] Please see the details at: http://www.csrc.gov.cn/pub/zjhpublic/zjh/202007/t20200731_380932.htm.

[2] Please see the details at: http://www.csrc.gov.cn/pub/zjhpublic/G00306201/201305/t20130517_228404.htm.

noting that the definition of "major shareholder" (“主要股东”) of an FMC is "the largest shareholder with more than 5% stake" under the Draft Rules, rather than "the largest shareholder with no less than 25% stake" under the current FMC rules.

The Draft Rules also provide further specific requirements for foreign shareholders of an FMC. For example, foreign shareholders are required to comply with relevant regulatory indicators in their local jurisdictions in the past three years, hold leading positions in the past three years in international markets in respect of assets under management, income, profits and market share, and maintain high credit statuses for the past three years.

Further, under the Draft Rules, subject to limited exceptions, the lock-up period is 48 months for major shareholders of FMCs (i.e. the largest shareholder with more than 5% stake) and the lock-up period is 36 months for non-major shareholders of FMCs with more than 5% stake. By contrast, the current FMC rules only require major shareholders of FMCs (i.e. the largest shareholder with no less than 25% stake) to hold their shares for three years.

The Draft Rules also require FMC shareholders to report to CSRC on an ad hoc basis under certain situations (including changes to its financial status), which indicates regulators' intention to strengthen the oversight of FMC shareholders.

PFM as Mutual Fund Manager

Based on the Draft Rules, a PFM is allowed to apply for a mutual fund license if it satisfies the applicable requirements provided in the Draft Rules. The Draft Rules also provide some general principles on how to handle existing private fund management business for a PFM which has obtained a mutual fund license. In addition, the Draft Rules clearly provide that a PFM with a mutual fund license (among other types of Mutual Fund Managers) may convert to an FMC upon CSRC approval, which is expected to provide more clarity on the means of conversion.

WMS as Mutual Fund Manager

The Draft Rules also allow any qualified WMS to apply for a mutual fund license, which is a novel initiative. Based on the current WMS rules, WMSs may issue public wealth management products that are regulated by the China Banking and Insurance Regulatory Commission ("**CBIRC**"). If a WMS also obtains a mutual fund license from CSRC, its asset management business would be regulated by both CSRC and CBIRC, whose regulatory regimes are expected to be further clarified.

Following the *11 Measures on Further Opening-up the Financial Industry (《关于进一步扩大金融业对外开放的有关举措》)* issued by Office of the Financial Stability and Development Committee on July 20, 2019[3], foreign asset management firms may set up foreign-controlled joint venture WMSs with a level-1 WMS of a commercial bank. In the meantime, foreign asset managers are also allowed to establish wholly-owned FMCs since April 1, 2020. Considering WMSs can also apply for mutual fund licenses and the trend of more overlapped business scope between FMCs and WMSs, foreign asset managers may want to further

[3] Please see the details at: http://www.pbc.gov.cn/goutongjiaoliu/113456/113469/3863019/index.html.

consider how to optimize their presence in China.

Rule of "One control, One participation, One license（一参一控一牌）"

The Draft Rules specifically allow a single shareholder to concurrently control an FMC and another type of Mutual Fund Manager (such as a WMS with a mutual fund license) while participating in another FMC, or the shareholder is allowed to have one controlling stake in a non-FMC Mutual Fund Manager and hold participating (minority) stakes in two FMCs. Foreign asset managers may further plan their onshore equity investments accordingly, to make the best of the relevant platforms and resources.

Impact on FMC establishment application

Once the Draft Rules become formal rules, they will generally apply to all the outstanding FMC applications already submitted to CSRC before the effective date unless the applications were submitted before July 2016 but yet to be approved. As a result, for the WFOE FMC applications, CSRC may require the relevant applicants to submit supplemental documents to comply with the Draft Rules. Foreign asset managers considering to set up WFOE FMCs are also advised to take into account all the new requirements applicable to FMCs and their shareholders earlier than later at the preparation stage.

FMC subsidiaries

Based on the current FMC rules, an FMC may set up specialized subsidiaries to provide services to the FMC, such as private fund management business, fund distribution, private equity fund management business and IT services. Notably, according to the Draft Rules, FMC subsidiaries can engage in business broader in scope than under the current FMC rules, including mutual fund management, private asset management, investment advisory services, pension financial services, and fund distributions, etc.

The Draft Rules also provide specific requirements on setting up FMC subsidiaries (including financial requirements such as net capital, AUM and risk reserve funds), how to manage FMC subsidiaries and how to deal with the FMC subsidiaries during exit procedures.

FMC personnel requirements

Compared to the current FMC rules, the Draft Rules impose stricter requirements on FMC personnel. For example, the Draft Rules provide that (i) where the total stake of a single shareholder and its affiliates exceeds 50% or the major shareholder is a natural person, the number of independent directors can be no fewer than 1/2 of the total directors on the board; while the current FMC rules generally require FMCs to have no fewer than three independent directors and the number of independent directors can be no fewer than 1/3 of the total directors; (ii) FMC applicants are required to have at least 30 employees while the current FMC rules only require 15; (iii) where an FMC sets up a board of supervisors, the number of the employee representative supervisors can be no fewer than 1/2 of the total number of the board of supervisors, which is stricter than the current requirements under the PRC Company Law (i.e. 1/3).

Data transfer

Consistent with the current FMC rules, the Draft Rules require FMCs to segregate business and key client information from their shareholders. The Draft Rules further prohibit any individual or entity from transferring offshore any documents and materials related to securities business without approval from CSRC and other competent regulators. This is one of the aspects which will require special attention for foreign asset managers proposing to set up WFOE FMCs.

While there is no timetable for issuance of the final rules, the revision of the current FMC rules is included in CSRC's legislation plan for 2020[4]. Therefore, it is highly likely that the Draft Rules will be finalized and promulgated within this year. Once the Draft Rules become effective, they will replace the existing FMC rules, namely the *Measures for the Administration of Securities Investment Fund Management Companies （《证券投资基金管理公司管理办法》）*, the *Provisions on Issues Concerning the Implementation of Measures for the Administration of Securities Investment Fund Management Companies （《关于实施<证券投资基金管理公司管理办法>有关问题的规定》）* and the *Interim Provisions on Public Securities Investment Fund Management Business Engaged by Asset Management Institutions （《资产管理机构开展公募证券投资基金管理业务暂行规定》）*.

We will continue to monitor the development of the Draft Rules and work with industry players to make submissions in the consultation period.

[4] Please see details at: http://www.csrc.gov.cn/pub/newsite/zjhxwfb/xwdd/202004/t20200417_373996.html.

Important Announcement

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

TieCheng YANG

Tel: +86 10 8516 4286
Email: tiecheng.yang@hankunlaw.com

Yin GE

Tel: +86 21 6080 0966
Email: yin.ge@hankunlaw.com

Brigard Urrutia

Free Trade Agreement with Israel enters into force

After a negotiation process that began in 2012 and finalized in 2015, the Free Trade Agreement between Colombia and Israel is now in force.

August 11, 2020

Colombia and Israel have moved forward with the implementation of the Free Trade Agreement (FTA) negotiated between 2012 and 2015.

With this agreement, 97% of the agricultural and agro-industrial goods and 99% of the industrial goods exported from Colombia to Israel are from now on exempted from the payment of customs duties.

The FTA established a schedule for the gradual reduction of customs duties which foresees that all remaining goods, will be exempted from the payment of customs duties within a maximum period of five (5) years, as from the date of implementation of the FTA.

This agreement represents an opportunity for the parties to explore new markets and foster the creation of new value chains. It is expected to boost cooperation between both countries and increase and diversify foreign direct investment.

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

PRESS ROOM

COSTA RICA - NEW ANTITRUST RULES DURING COVID-19 CRISIS

August, 2020

The Costa Rican Antitrust Authority ("COPROCOM"), with the purpose of supporting the economic reactivation of the country, issued new provisional rules for the treatment of agreements among competitors to collaborate or coordinate certain actions. These rules establish that the following actions will not be sanctioned, provided they meet certain conditions:

- Collaboration between competing companies to make joint purchases and ensure the supply and distribution to consumers, either private or public, of essential products.
- Joint offers between competitors to supply needs of the public sector.

Additionally, strategic alliances between competing companies that must be notified to COPROCOM may be justified in this exceptional context; which will be taken into consideration by the Authority when analyzing these transactions.

Finally, transactions in which the "failing firm" argument is alleged will be prioritized.

For further information, please contact:

Andrey Dorado
Partner
andrey.dorado@ariaslaw.com

Tracy Varela Calderón
Senior Counsel
tracy.varela@ariaslaw.com

GIDE
GIDE LOYRETTE NOUEL

New rules governing the posting of workers in France

7 August 2020

In Community law, the rules on the posting of workers within the scope of service provisions, governed by Regulations (EC) no. 883/2004 of April 29, 2004 and (EC) no. 987/2009 of September 16, 2009, and Directive 96/71 of December 16, 1996, were last amended by the Posted Workers Directive (EU) no. 957 of June 28, 2018, the provisions of which were to be transposed into national law by July 30, 2020 at the latest. As regards French law, this transposition was carried out by way of a Government Ordinance no. 2019-116 of February 20, 2019, with an entry into force on July 30, 2020, and was completed by Decree no. 2020-916 of July 28, 2020 relative to posted workers and the fight against unfair competition, also effective on July 30, 2020.

It must be noted that the provisions resulting from the transposition ordinance do not apply to road transport companies, which shall continue to be governed by the former provisions of the French Labor Code while awaiting the entry into force of the reform of the European road transport sector (known as the "*Mobility Package*") adopted by the European Parliament on July 8, 2020.

- Clarification of temporary worker posting situations in France

Henceforth, the following case scenarios are governed by Article L.1262-2 of the French Labor Code on posting rules: (i) the situation where a company that carries out a temporary work activity established outside national territory temporarily seconds employees to a user company established on national territory; and (ii) the situation where this same company temporarily seconds employees **to a user company that is established outside national territory and temporarily carries out an activity on national territory**.

In application of the amended Article L.1262-2-1 of the French Labor Code, with effect from July 30, 2020 this second category of user company is now required to inform, prior to the posting, the temporary work company (*i.e.*, the employer of the employee(s) posted to the former) "*of its intention to second these posted employees to France*", as well as "*the rules that apply to these employees*" –these rules were listed and defined by Decree on July 28, 2020. In particular, this list comprises the information relative to the expected duration of the temporary workers' posting in France, to the formalities to be fulfilled prior to the posting, and to the list of documents to be kept in France, as well as the content of the "*core provisions*" to be complied with throughout the posting, including the reference to the collective agreements and collective bargaining agreements applicable during the posting.

- Reinforced "*core provisions*" of law, collective bargaining agreements and collective agreements applicable to posted workers in France

Article L.1262-4 of the French Labor Code already provides for "***core provisions***" for which the rules of the host State –legal rules, as well as those of the collective bargaining agreement and the collective agreements applicable to the industry concerned– must be applied to the posted workers in the same conditions as for local workers.

This principle has been maintained and extended through the transposition of the June 28, 2018 Directive to:

- **remuneration, in the broad sense**, as defined by Article L.3221-3 of the French Labor Code, which not only includes minimum salary set forth by law or collective agreement (already stipulated in the core provisions), but also salary-related items also set forth by law or collective agreement. Equitable remuneration set forth by law or collective agreement thus includes salary, bonuses of all sorts, allowances and any other benefit paid, in cash or kind, based on the job position held;
- **professional expenses**, as the employer is henceforth required to ensure that the posted worker benefits from the same treatment as workers regularly employed in France in terms of "*reimbursement of professional expenses incurred by the posted worker and corresponding to specific costs inherent to his/her duties or job, during the performance of his/her mission, in relation to travel, meals and accommodation*". Such reimbursement of professional expenses cannot be taken into account to determine if equality of remuneration is complied with, unlike lump-sum secondment allowances.

In order to avoid a circumvention of the distinction made between lump-sum secondment allowances taken into account as part of remuneration and expense refunds not taken into account as part of remuneration, the July 28, 2020 Decree specifies that when the employer does not substantiate the payment of all or part of the specific secondment allowance or of expenses effectively incurred as a result of the posting, the entire allowance must be considered a reimbursement of professional expenses and therefore be excluded from remuneration.

- Limitation of posting in time, with exclusive application of "*core provisions*"

The June 28, 2018 Directive created **a new category of "*long-term*" posted workers**: if the posting lasts **more than 12 months**, as of the 13th month not only are the posted workers subject to the core provisions, but also to **all the provisions of the French Labor Code** applicable to companies established in France, with the exception of those regulating the performance, transfer and amendment of the employment contracts (except as regards rules on telework, which remain applicable) and the termination of indefinite-term and fixed-term employment contracts, as well as cheques and simplified working papers (*chèques et titres simplifiés de travail*).

The 12-month duration of the posting is assessed:

- on the basis of a given job position, and not per posted worker. Hence, in the event that a posted worker replaces another on a same job position, the duration of the posting will be calculated by adding together the duration of the posted workers having held the same job position;
- by taking into account the posting periods already carried out on the date of the Directive's transposition, i.e. on July 30, 2020.

The last paragraph of amended Article L.1262-4 of the French Labor Code provides for the possibility of requesting **an extension of the "*short-term*" posting period**, with the application only of the core provisions up to 18 months (*i.e.*, six months more), "*where justified by the performance of the service*" and "*upon submitting a well-reasoned declaration to the administrative authority prior to expiry of the 12-month period*". This request must be filed via the SIPSI online service and must mention the length of the requested extension, together with the reason therefor.

As a transition, it is provided that where the length of the posting reached 12 months before July 30, 2020 or in the fifteen days thereafter, the extension can be sent up to **August 30, 2020**, knowing that the employer is considered as benefitting from this extension during that time frame.

- Mitigation of previously increased sanctions with notion of bona fide of the person having committed the breach

The June 4, 2019 Decree passed in application of the law no. 2018-771 of September 5, 2018 for the freedom to choose one's professional future had notably increased the amount of the administrative fines in case of breaches of posting obligations (set at €4,000 per posted worker concerned and €8,000 in case of repeated offences within a period of two months) and had broadened the causes for sanction by way of fines as a result of the enactment (including, since July 30, 2020, non-compliance with the obligation to submit a well-reasoned declaration to request a posting extension over and above 12 months).

The Ordinance for the transposition of the June 28, 2018 Directive mitigates the increasingly heavy sanctions, by integrating the notion of **bona fide of the person having committed the breach**, in order to determine and individualize the amount of the administrative fines that can be applied pursuant to Article L.1264-3 of the French Labor Code.

- Adjustment of posting formalities

Various articles mentioned in the regulatory section of the French Labor Code relative to posting formalities were adjusted by the July 28, 2020 Decree, in order to take into account the evolutions resulting from the Ordinance for the transposition of the June 28, 2018 Directive and those linked to the SIPSI online service.

The main modifications include:

- replacing the obligation to provide a copy of the posting declaration to the prime contractor or the user company with the obligation to provide the **posting declaration's acknowledgment of receipt**;
- adding the posting declaration acknowledgments of receipt to the host company's staff register instead of copies of said declarations;
- giving the employer the possibility to cancel the posting declaration or to modify the posting dates directly via the SIPSI online service.

Contacts:

Foulques de Rostolan

Lisa Chézé-Dartencet

Kochhar & Co. Tax Newsletter

Chennai Tribunal, holds loan foreclosure charges not subject to Service tax

The issue of applicability of Service tax on foreclosure charges collected by banks and non - banking financial companies ('NBFCs') on premature termination of loans has been a matter of contention with divergent opinions amongst various division benches of Ahmedabad[1] and Kolkata[2].

Recently, the Larger Bench of Customs, Excise and Service Tax Appellate Tribunal ('CESTAT') Chennai[3], upheld that foreclosure charges shall not be leviable to Service tax.

The principles of this judgement shall have a wide reaching implication on interpretation of service provision, i.e., agreeing to the obligation to tolerate an act introduced in the negative list and continuing in the Goods and Services Tax (GST) regime. It would also be a relevant guide to determine the nature of amount received as compensation for premature termination of services.

Background

- The assessee provides housing loan to customers and was registered for service tax under the category of 'banking and other financial services'. The definition of 'banking and other financial services' was amended to include 'lending' with effect from 10 September 2004.

- For the period from October 2004 to June 2007, the foreclosure charges where shown as miscellaneous income in the books of accounts and no service tax was paid on such charges. Subsequently, Revenue issued a show cause notice demanding service tax alongwith interest and penalty for the period prior to the negative list under service tax regime.

Tribunal's Ruling

- The Tribunal held that loan foreclosure charges collected by banks and NBFC shall not be subject to Service tax

Consideration for Service

- Service tax would be leviable only when an activity is considered to be a service and such service classifies as a 'taxable service' defined in section 65(105) of the Act. There has to be a 'consideration' for the provision of a service.

- Thus, only an amount that is payable for the taxable service can be considered as consideration.

- Reliance was placed in the case of *Bhayana Builders (P) Ltd*[4] of the Delhi Tribunal, that:

[1] 2012 (26) STR 531 (Tribunal-Ahmedabad)
[2] 2016 (4) TMI 21-CESTAT Kolkata
[3] TS -506 CESTAT 2020-ST
[4] 2013 (32) S.T.R. 49 (Tri.-LB)

- Consideration, whether monetary or otherwise, should have flown or should flow from the service recipient to the service provider and should accrue to the benefit of the latter.
- Reference was made to Australian GST Rules which make a categorical distinction between conditions to a contract and consideration. The said rules provide that certain conditions contained in the contract cannot be seen in the light of consideration for the contract. Merely because the service recipient has to fulfil such conditions would not mean that this value would form part of the value of the taxable services that are provided.

- The Supreme Court[5] , while deciding the appeal filed by the Revenue in the above case (Bhayana Builders), observed that any amount charged which has no nexus with the taxable service and is not a consideration for the service provided, does not become part of the value which is taxable.

- The above rationale was reiterated by the apex court in the case of *Intercontinental Consultants and Technocrafts*[6], wherein it was held that the valuation of service *cannot be anything more or less than the consideration paid as quid pro quo for rendering such a service.*

- Reference was also made to the judgement of the European Court of Justice in the case of *Societe Thermale d'Eugenic-les-Bains*[7]*:*

  - The question was whether the deposit amount, retained by the hotelier due to cancellation by a client, could be regarded as consideration for the supply of reservation service and hence be subjected to VAT or the deposit amount was to be treated as a fixed compensation for cancellation and not subjected to VAT.
  - The Court observed that since the obligation to make a reservation had arisen from the contract for accommodation and not from the payment of a deposit, there is no direct connection between the service rendered and the consideration received. Such compensation does not constitute the fee for a service and forms no part of the taxable amount for VAT purposes.
  - Parties may make contractual provisions applicable in the event of non-performance, for compensation or penalty.

- Thus, there is a marked distinction between conditions to a contract and considerations for the contract. Further, reference was made to the definition of consideration as provided in section 2(d) of the Indian Contract Act, 1872 ('Contract Act'). As per the definition in the Contract Act, consideration should flow at the desire of the promisor. Thus, if the consideration is not at the desire of the promisor, it ceases to be a consideration.

- The banks would not desire pre-mature termination of the loan as it is in their interest that the loan runs the entire agreed tenure. As premature termination of a loan results in loss of future interest income, the banks charge an amount for foreclosure of loan to compensate for the loss in interest income.[8]

Breach of Contract

- A customer on initiating foreclosure of loan, results in a breach of one of the essential terms of the loan agreement (i.e., period of loan) and such breach may give rise to a claim for damages. This amounts to a unilateral act of the customer in repudiating the contract.

[5] 2018 (2) TMI 1325
[6] 2018 (10) GSTL 401 (SC)
[7] C-277/2005
[8] ILR 2008 KAR 1311

- The foreclosure charges, therefore, are not a consideration for performance of lending services but are imposed as a condition of the contract to compensate for the loss of identified interest, on pre-mature termination of the contract.

Damages (Liquidated) received for breach of Contract

- Damages can be determined by Courts or they can also be incorporated in the loan agreements and other commercial contracts so as to ensure certainty in dealings and also serve as a deterrent measure. This aspect of damage is known as liquidated damages. The clauses relating to damages for foreclosure of loan do not and cannot give rise to any consideration. They come into effect only after the contract comes to an end.

- Section 74 of the Contract Act deals with compensation for breach of contract where penalty is stipulated for. The section would be applicable only in cases where the eventuality of damage and the quantification for damages is specified in the agreement.

- To attract the provisions of section 74, it is not necessary that the entire contract should come to an end.[9]

- Contract Act, eliminates the refinement between stipulations governing payment of liquidated damages and stipulations in the nature of penalty. A penalty is a sum of money so stipulated in terrorem and liquidated damages are a genuine pre-estimate of damages.

- Therefore, Tribunal observed that foreclosure charges are recovered as compensation for disruption of a service and not towards ‘lending’ services.

- Foreclosure charges cannot be viewed as an alternate mode of performance since they arise upon repudiation of the contractual terms, whereas alternate mode of performance still contemplates performance. Thus, merely because the clause relating to damage is featuring in a contract, it would be incorrect to conclude that the party has been given an option to violate the contract.

- The amount of damages is clearly stipulated in the contract and no element of service is sought to have been rendered by the banks to borrowers. Thus, foreclosure charges collected by the banks and non-banking financial companies on premature termination of loans are not leviable to service tax under ‘banking and other financial services’.

Comments

There has been much ambiguity on the taxability of payments towards damages for breach of contract, liquidated damages, notice pay recovery, etc., in the pre-GST and the GST regime. As the ruling pertains to the period prior to July 2012, it would be relevant to examine the applicability of this ruling in the negative list and GST regime in light of the declared service provision.

[9] AIR 1985 Bom 186

SKRINE

Federal Court: Maintenance and Service Charge Owed to Management Corporation are not Secured Debts

03 August 2020

In the recent case of *Dubon Berhad v Wisma Cosway Management Corporation* [2020] 5 AMR 33, the Federal Court held that outstanding amounts due to the management corporation ("MC") under section 77 of the Strata Management Act 2013 ("SMA") is not a secured debt and will not give the MC lawful preference as a secured creditor over the assets of a company in liquidation, notwithstanding the word *"guarantee"* under section 77 of the SMA.

Brief Facts

Dubon Berhad ("Company") is the beneficial owner of a unit in Wisma Cosway ("Unit"). The Company was wound up and in the process of realising the Company's assets, the liquidators required the developer, Stephens Properties Sdn Bhd ("Developer") to execute the transfer of the Unit into the Company's name in order for the liquidators to sell the Unit to pay off the Company's debts.

The Developer refused to execute the transfer instrument without a clearance letter from the MC in relation to an outstanding sum which includes administrative and application fees owed to the Developer, as well as outgoings and service charges owed to the MC in respect of the Unit.

The Company, through the liquidators, took the position that the MC should be treated as an unsecured creditor, and any payment to them for the sums owed was subject to the availability of funds for unsecured creditors. Moreover, any such payment had to adhere to the order of priority of creditors who had proven their debts, as well as the *pari passu rule*.

The Company, through the liquidators, filed a claim at the Strata Management Tribunal ("Tribunal"), seeking, *inter alia*, an order that the MC issues the clearance letter upon the Company's payment of a portion of the outstanding sum. The MC on the other hand, filed a counterclaim for the sum it was owed followed by an application in the winding up court for leave to commence or proceed with the counterclaim in the Tribunal under section 226(3) of the then Companies Act 1965.

Decision of the High Court

In refusing the MC's application for leave, the High Court held that the MC is an unsecured creditor and any payment of the sums demanded by the MC would amount to an undue preference in favour of the MC which contravenes the statutory insolvency regime prescribed under section 292 of the then Companies Act 1965 (currently section 527 of the Companies Act 2016).

Decision of the Court of Appeal

The MC appealed against the decision of the High Court and relied on section 77 of the SMA.

The Court of Appeal reversed the High Court's decision and granted leave to the MC to proceed against the Company in liquidation to recover the sums of money owing to the MC. The Court of Appeal was of the view that the use of the word *"shall"* in section 77 imposes a mandatory obligation on the parcel proprietor to pay any outstanding amount due to the MC prior to the disposal of the unit. Further, by virtue of section 77 which uses the phrase *"guaranteed"* sum, the claim of the MC is no longer an unsecured debt but is accorded priority and elevated to a position equivalent to that of a secured creditor.

Decision of the Federal Court

The Company was granted leave to appeal to the Federal Court. The relevant leave question posed to the Federal Court was **"whether section 77 of the SMA creates a preferred or priority status equivalent to a secured debt within the insolvency regime?"**

The Federal Court referred to section 292 of the then Companies Act 1965 (currently section 527 of the Companies Act 2016), which sets out the priority of payments due to secured and unsecured debtors in liquidation. The Federal Court decided that section 77 does not dislodge the statutory priority regime in the Companies Act or elevate the payment of management fees to the status of a secured debt.

Nallini Pathmanathan FCJ, who delivered the judgment of the Federal Court, was of the view that the word *"guaranteed"* in section 77 denotes at best, a **statutory obligation** between the MC and a parcel proprietor, entitling the MC to recover maintenance and other related service charges from the proprietor.

According to the Federal Court, this is reinforced by subsection (3) of section 77 which refers to the sum due from a parcel proprietor to the MC as a "debt" which is actionable by the MC vide a suit filed in court or in the strata tribunal. That right to sue for a debt is a right *in personam* and not a right *in rem*. The MC therefore enjoys a right *in personam* to recover the debt from the parcel proprietor and it goes no further than that.

The Federal Court went further to explain that section 77 was never crafted nor intended to encroach upon, or disrupt the priority regime in the Companies Act. Instead, it served to statutorily provide that the non-payment of management fees creates an undisputed debt. The term 'guaranteed' ensures the fact of the existence of such a debt, and the recovery of such debts is thus assured and can simply be effected under the section.

Therefore, the outstanding sum payable to the MC under section 77 of the SMA is not a secured debt. It is a guaranteed debt *vis a vis* the Company and the MC, and has no effect on the rights of third party creditors. The Federal Court answered the leave question in the negative and ordered the decision of the Court of Appeal to be set aside and the order of the High Court to be restored.

This case is noteworthy as it authoritatively determines that the sums owed by a parcel proprietor to an MC under section 77 of the SMA has the character of an undisputed debt, but not a preferential debt which is conferred priority over unsecured debts under the insolvency law regime in Malaysia.

The principles laid down by the Federal Court will apply equally to sums owing by a parcel proprietor to a joint management body under section 33 of the SMA.

Article by Jesy Ooi (Partner) and Seen Qin Ying (Associate) of the Real Estate Practice Group of Skrine.

July, 2020

Temporary measures adopted by IMSS during the health emergency

On July 29, 2020, an Agreement was published in the Federal Official Gazette (ACDO.AS2.HCT.240620/173.P.DPES) issued by the Technical Council of the Mexican Social Security Institute in session dated June 24, authorizing the extension of benefits in kind and/or money to the insured during the health contingency period, as a result of COVID-19.

The relevant aspects of the aforementioned Agreement are described below:

- The Economic and Social Benefits Department is authorized, in conjunction with the Medical Benefits Department, to carry out the following during the COVID-19 contingency period:

    1. Once the legal term has expired, and in the absence of the worker, a relapse must be qualified for the cases of insured persons who have a certificate of Temporary Incapacity due to Occupational Risk.

        Once the contingency has concluded, the Department of Health at Work of the Mexican Social Security Institute must summon the insured party in order to issue him/her with the "Report of Discharge due to Work Risk ST-2" or, if applicable, the "Report of Permanent Disability or Death ST-3".

    2. In the absence of the worker, once the term of the law has expired, a "Report of Disability ST-4" shall be prepared which shall be based on the background of the insured's clinical file and shall be valid for three months.

    For COVID-19 cases confirmed or suspected in relation to personnel of the Mexican Social Security Institute, whether they work in Medical or Non-Medical Units, the Agreement also establishes certain measures to benefit them.

Finally, and prior to the certification of the validity of the rights of beneficiaries who are children of insured or pensioners who have reached the age of 16 and who have contracted a disabling illness, the Occupational Health Services are authorized to omit the preparation of the "Report of Disabled Beneficiary ST-6", in order for beneficiaries to continue to have the right to medical attention for up to one year, during which time the Mexican Social Security Institute will prepare the necessary studies for the issuance of the aforementioned Report.

The official publication can be consulted directly at the following link:

https://www.dof.gob.mx/nota_detalle.php?codigo=5597452&fecha=29/07/2020

In case you require additional information, please contact the partner responsible of your account or any of the following attorneys:

Mexico City Office: **Mr. Andrés Rodríguez R., arodriguez@s-s.mx (Partner)**
Mr. Francisco Udave T., fudave@s-s.mx (Partner)
Phone: (+52 55) 5279-5400

Monterrey Office: **Mr. Juan Carlos de la Vega G., jdelavega@s-s.mx (Partner)**
Phone: (+52 81) 8133-6000

Queretaro Office: **Mr. José Ramón Ayala A., jayala@s-s.mx (Partner)**
Phone: (+52 442) 290-0290

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Insurance

Regulatory & IP/IT | Benelux

Benelux Regulators to Apply EIOPA Guidelines on Outsourcing to Cloud Service Providers by Insurance and Reinsurance Undertakings

Friday 14 August 2020

On 24 April 2020, the European Insurance and Occupational Pensions Authority (EIOPA) issued new guidelines on outsourcing to cloud service providers (the "Guidelines") which apply to insurance and reinsurance undertakings, supplementing the general regulatory framework based on the Solvency II Directive and Delegated Regulation 2015/35.

Pursuant to Article 16(3) of Regulation (EU) No 1094/2010 establishing the EIOPA, which requires the competent authorities of the EU Member States to make every effort to comply with EIOPA guidelines and confirm that they intend to comply with them, the Benelux regulators have indicated their intention to apply the Guidelines.

In **Belgium**, the prudential regulator for the insurance and reinsurance sector, the National Bank of Belgium ("NBB"), published a circular on 5 May 2020 (NBB_2020_018) implementing the Guidelines and clarifying the NBB's recommendations on outsourcing to cloud service providers active in the sector (available here).

For many years, the prudential regulator of **the Netherlands**, the Dutch National Bank ("DNB"), has been actively been focusing on outsourcing by financial institutions, including insurance companies, to cloud service providers. EIOPA guidelines are deemed authoritative by the DNB, taken into account by the DNB and often form the basis for the DNB's own recommendations. One example is the DNB's Good Practice document for outsourcing insurers, issued in May 2019. In this document, the DNB refers extensively to the outsourcing provisions of the EIOPA Guidelines on System of Governance. The DNB applies these guidelines, specifically when supervising cloud outsourcing, to supplement the Good Practices. The DNB has indicated that it expects insurers to apply the Guidelines from 1 January 2021 to all cloud outsourcing agreements entered into or amended on or after this date.

In **Luxembourg**, the supervisory authority for the insurance sector, the *Commissariat aux Assurances* ("CA"), confirmed in Circular 20/13 of 24 June 2020 that it will fully apply the Guidelines. Luxembourg insurance and reinsurance undertakings are therefore required to abide by the Guidelines. On this occasion, the Luxembourg regulator also recalled that outsourcing operations must comply with the obligation of professional secrecy set out in Article 300 of the amended Act of 7 December 2015 on the insurance sector.

For further information about the scope, requirements and timeline for implementation of the Guidelines, please refer to our article on the EIOPA Guidelines on outsourcing to cloud service providers by insurance and reinsurance undertakings.

Our Benelux Regulatory Insurance and IP/IT teams have extensive experience in the area of cloud outsourcing and would be happy to assist you with a wide range of issues. More information about our Benelux insurance practice can be found at www.nautadutilh.com

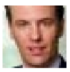
Contact us

Miryam Lassalle | London | +44 207 786 9103

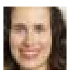
Vincent Wellens | Luxembourg | +352 26 12 29 34

Anne Fontaine | Brussels | +32 2 566 8146

Pierre De Pauw | Brussels | +32 2 566 8220



Frans van der Eerden | Amsterdam | +31 20 71 71 697



Larissa Silverentand | Amsterdam | +31 20 71 71 716

Roderick Watson | Amsterdam | +31 20 71 71 533

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Simpson Grierson

August 04, 2020 | 3 min read

Digital & new technologies (/resources/digital-new-technologies)

Last week, the Minister for Statistics, Hon James Shaw, launched the Algorithm Charter for Aotearoa New Zealand (https://data.govt.nz/use-data/data-ethics/government-algorithm-transparency-and-accountability/algorithm-charter) **(**Charter**) following a period of public consultation. The Charter - which Minister Shaw claims to be a world first - commits signatory government agencies to improving transparency and accountability in their use of algorithms.**

Algorithm Charter implications for private sector organisations

- The Charter only applies to those government agencies that have signed up, but it is expected to have a flow down impact on private sector organisations
- Government agencies procuring algorithms from suppliers in the private sector may need assistance from the suppliers to comply with the Charter, and may make this a contractual requirement
- Organisations may also choose to voluntarily adopt the Charter as a way of building trust for their use of algorithms and, more generally, artificial intelligence (AI)
- The Charter may provide a helpful starting point for organisations that don't already have their own ethical frameworks for the development/use of AI technologies

Background: what are algorithms?

Algorithms are used widely by government agencies in the course of providing public services and to support decision-making. They can range from simple algorithms that standardise business processes, through to complex algorithms that can reveal insights from large datasets.

While there are many benefits in using algorithms, the Charter recognises that there are also some risks. These include the potential for algorithms to create unintended consequences such as perpetuating (or even amplifying) bias, which has led to concern about their use.

Algorithm Charter principles

The Algorithm Charter seeks to improve public confidence in use of algorithms in the public sector. Signatory government agencies must commit to a set of broad principles governing their use. These include:

- transparency about how decisions are informed by algorithms
- embedding a Te Ao Māori perspective in the development and use of algorithms
- making sure data is fit for purpose, including by identifying and managing bias
- ensuring that privacy, ethics and human rights are safeguarded
- retaining human oversight.

Implementation of the Charter

The Charter recognises that it is not practical for agencies to comply with the principles for all algorithms, and adopts a risk-based approach to determining when it should be applied. Generally, it is expected that the Charter will be applied where:

- an algorithm can signficantly impact on the wellbeing of people; or
- there is a high likelihood that many people will suffer an unintended adverse impact as a result of the algorithm.

The success of the Charter will depend on how well its implementation is supported and monitored by the government. It is not yet clear if and when any practical guidance for agencies is planned to be released, but it is noted in the Charter that it is an "evolving piece of work". A review of the Charter is planned to be conducted in 12 months to ensure that it is achieving its intended purpose.

Impact on the private sector

The Charter applies only to those government agencies that have signed up to the Charter, including the 24 founding signatory agencies. However, it is also expected that the Charter will have a flow down impact on organisations in the private sector. Government agencies procuring algorithms from suppliers in the private sector may need assistance from the suppliers to comply with the Charter, for example by:

- providing clear documentation explaining how decisions are informed by the algorithm(s)
- screening algorithms for bias, and remedying any issues identified
- assisting the government with any public inquiries about the relevant algorithm(s).

Signatory agencies may seek to reflect these requirements in their contracts with algorithm suppliers. It is unclear whether any standard government contractual terms will be updated to reflect the Charter requirements, but we will be monitoring this.

Organisations in the private sector may also choose to adopt the Charter principles on a voluntary basis as a way of building trust or a 'social licence' for the use of algorithms or artificial intelligence (AI) applications more generally. While some organisations already have their own ethical frameworks for the development/use of AI technologies, the Charter may provide a helpful starting point for those that don't.

Starboard: ITLOS can sit in Singapore

July 23, 2020

Singapore's reputation for neutrality and the peaceful settlement of disputes between States within the framework of international rule of law recently received a boost from the signing of a model agreement enabling the International Tribunal for the Law of the Sea (ITLOS) or one of its chambers to sit and exercise its functions in Singapore.

The virtual ceremony conducted by video link which establishes Singapore as the first country in the world to host cases before ITLOS outside of its headquarters in Hamburg, marks an end to a long and ultimately fruitful process which began more than a decade ago. In 2007, ITLOS and the Singapore Law Ministry organised a regional workshop on the role of ITLOS in settling disputes relating to the law of the sea in Northeast, Southeast and South Asia. The success of that workshop led to consultations on the possibility of an arrangement for the provision of facilities in Singapore for the hearing of such disputes. After a visit to Singapore by the then President of ITLOS in 2015, a joint declaration was signed not only expressing both parties' continued commitment to ensuring that international rule of law is respected in Asia, but also their support for Singapore becoming a venue for the hearing of cases relating to the law of the sea. This provided further drive for the negotiations on the terms and conditions of the model agreement, which was ultimately signed on 11 June 2020.

Established as an independent judicial body to hear disputes relating to the 1982 United Nations Convention on the Law of the Sea, ITLOS has not always received enthusiastic support from Asian States due to the traditional hesitation when it comes to resolving sea-related disputes by international adjudication. The model agreement may therefore help to pave the way for dispute resolution through ITLOS to become more commonplace in Asia now that Singapore is a viable venue for proceedings. With luck, similar agreements will also be signed with African and Latin American States, and thereby expand the reach of international rule of law to more countries as the barriers to using the services of ITLOS are reduced. Lastly, the model agreement may mark the start of a trend for international organisations to explore ways of operating effectively through modern technology to overcome restrictions and limitations, especially in the current Covid-19 world.

Your Key Contacts

Lawrence Teh
Senior Partner, Singapore
D +65 6885 3693
lawrence.teh@dentons.com

Jen Wei Loh
Partner, Singapore
D +65 6885 3647
jenwei.loh@dentons.com

Junhui Sim
Partner, Singapore
D +65 6885 3733
junhui.sim@dentons.com

National Communications Commission has announced draft "Internet Audiovisual Service Management Act"

07/24/2020

Ken-Ying Tseng/ Vick Chien/Po-Chih Yu

In response to the digital convergence, and to promote the development of the Internet audiovisual service industry, maintain the diversification of audiovisual content, and safeguard audiovisual rights of the public, National Communications Commission ("NCC") has passed the draft "Internet Audiovisual Service Management Act ("Draft") on July 15, 2020 and has announced the Draft on July 22, 2020. The highlights of Draft are summarized as below:

1. Scope for the OTT service being regulated:

The term "Internet audiovisual service" ("OTT") defined in the Draft refers to the service where the edited and filtered video content is provided by service operator in its name to local viewers through the Internet for the operator's profits, such as Netflix. User Generated Content ("UGC") and shared information on social media platforms are not subject to the Draft, since the aforesaid contents are mainly edited and uploaded by the users themselves, rather than by the service operator.

2. Registration

(1) In principle, the Draft adopts voluntary registration mechanism, encouraging OTT operators to actively register with the NCC. Registered OTT operators will be subject to the requirements under the Draft accordingly.

(2) However, the Draft authorizes NCC to consider certain factors, such as the number of users, turnover, click flow, Internet traffic volume, market influence, and other significant public interests, to exceptionally require the OTT operators with any of the said nature to register. For the OTT operators that are obligated to register, they are required to establish a special page about its efforts made for local contents on its website disclosing its measures adopted for the local content it produced or co-produced and the ratio of local content in the current year to the public. For those obligated to register but without a fixed address of business in Taiwan, it is required to designate an agent in charge of handling the matters stipulated under the Draft and such OTT operator shall report the NCC about its agent's basic information, such as agent's name, agency period, and scope of agency.

3. Obligations

Registered OTT operator is obligated to regularly report business information to the NCC, such as the number of subscribers, the sales revenue, and the conditions of use, and to publicly disclose related information and terms of service and use on its website. Besides, it should ensure the OTT content shall not disrupt public order or adversely affect good social customs, impair the physical or mental health of children or juvenile, or interferes with national security, and it should classify its content and adapt the clear and workable protective measures. In addition, it should jointly establish or join the self-regulatory organization, follow rules of the organization, and submit the self-regulatory rules set up by the organization to the NCC for review.

4. Special treatment to PRC and other illegal OTT operators:

In order to halt PRC OTT operators that illegally provide OTT services, either by itself or through an agent, in Taiwan without obtaining permission in accordance with the Act Governing Relations between the People of the Taiwan Area and the Mainland Area, the Draft explicitly demands that operators of telecom business, Public switched telecommunications network (PSTN), Internet Data Center (IDC), Content Delivery Network (CDN) services, cloud service, and other internet services such as connection, caching, information storage (collectively "related internet service providers"), should not provide equipment or service to PRC OTT operators. And the related internet service providers should, upon being notified, cooperate with the competent authorities, i.e. Mainland Affairs Council, to block or adopt other necessary measures to prevent the public in Taiwan from accessing those OTT services.

5. Guidance and Awarding

The Draft explicitly states that the government should perform related measures of guidance and to award and propose encouragement projects, so as to promote continuous investment in locally-made content in Taiwan.

Please do not hesitate to contact our Telecommunications and Media practice group if you have further inquiry about the Draft.

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Davis Wright Tremaine LLP

BLOG POST / FAMILY BUSINESS RESOURCE CENTER

Corporate and Business Transactions

Effective Exit Interviews Can Help Your Family Business

08.10.20

Almost every employee must participate in at least one interview, if not multiple before being hired. However, in many cases, once employment starts, the interviews stop. The following article contemplates the value of completing one last interview, an exit interview, when an employee voluntarily leaves a company.

An exit interview is exactly what it sounds like: an employer asks questions of an employee who is set to leave the company. However, unlike a standard interview, the conversation centers on the employer's strengths and weaknesses, rather than the employee's. It can act as a valuable tool for employers to grow and learn, and give departing employees a chance to share their own concerns with their employer.

Benefits

An exit interview is a valuable opportunity for an employer to learn how it compares to their competitors with respect to salaries, benefits, and other compensation it offers. When conducting an exit interview, employers should consider asking about these metrics, and whether they were a motivating factor for the employee's departure. With this information, an employer may be able to readjust its payment structures to stay competitive.

Employers should be mindful of local and state laws that may limit or restrict their ability to ask employees about salary and benefits information. While pay equity laws generally come into play at the start of employment, employers should remain mindful of asking questions that could cross the line.

Furthermore, exit interviews are a chance for employers and employees to reflect on the positive aspects of their experience together. This helps to foster goodwill. Ending an employment relationship on a positive note may lead the exiting employee to refer customers and/or potential employees to the business or may provide an avenue for the departing employee to return down the road.

However, perhaps the most valuable take-away from an exit interview is the employee's feedback on the company itself. Employees who are set to leave the company are free to share their true thoughts and any observations that could be beneficial moving forward. This degree of candor is hard to replicate in other situations, making exit interviews particularly valuable.

Best Practices

The usefulness of an exit interview is greatly increased if the interviewer is someone who did not regularly supervise or work with the exiting employee. This distance between interviewer and interviewee helps preserve the honesty that is crucial to a useful exit interview.

It is important to consider the timing of the exit interview. It's advisable that employers not conduct the exit interview during the periods immediately before or immediately after the employee's departure. The employee is most likely to be disengaged from the job during those times. If there is sufficient time between when the employee gives notice that they will be leaving and the time that they actually leave, doing the interview while the employee is still in-house can yield helpful results.

Having a mix of structured and open-ended questions is more likely to produce useful criticisms and responses. Specific questions targeted at managerial styles, the type of work assigned, and deadline expectations can help an employer fine-tune the way the business is operated. Conversely, by asking open-ended questions, employers can access employee's ideas on how to improve the business as well as gain any information related to potential concerns around discrimination and harassment in the workplace.

Most employees either do not have the chance to share these kinds of ideas or are too timid to do so. Broad questions allow employers to tap into the creativity and unique perspectives of their employees and incorporate them into their broader strategy and vision. As is noted by Professor Everett Spain, "Standardized interview questions rarely deliver unexpected insights."

Simply put, exit interviews provide an opportunity for employers to receive honest, valuable feedback, and thus improve how they operate their businesses.

Proposed rule defines “habitat” under the Endangered Species Act

12 August 2020

Executive Summary:
On 5 August 2020, the U.S. Fish and Wildlife Service (FWS) along with the National Marine Fisheries Service (NMFS) published a proposed rule to define “habitat” for purposes of the Endangered Species Act (ESA). The ESA prohibits federally-authorized or funded activities to destroy or harm the critical habitat of endangered or threatened species. To date, the FWS has not defined the term “habitat” even though the ESA generally requires the identification of “critical habitat” when a species is listed. FWS may exclude land from its characterization of “critical habitat” only when “the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless . . . [it is determined] . . . that the failure to designate such an area as critical habitat will result in the extinction of the species concerned.” 16 U.S.C. § 1533 (b)(2).

The proposed definition is intended to address an issue identified by the Supreme Court in ***Weyerhaeuser Co. v. U.S. FWS*, 139 S. Ct. 361 (2018)**. A landowner had sought to invalidate the designation of its real property as “critical habitat” under the ESA. The Court agreed that “critical habitat” could not be ascertained without first determining that it is in fact habitat for the subject species. Once a critical habitat designation is made, federal agencies cannot take action that “result[s] in the destruction or adverse modification of habitat of such species.” 16 U.S.C. § 1536(a)(2). The FWS and NMFS are currently accepting comments on the proposed definition for “habitat.”

What happened in *Weyerhaeuser Co. v. U.S. FWS?*
In ***Weyerhaeuser***, the Supreme Court considered whether the FWS had correctly included 1,544 acres of St. Tammary Parish, Louisiana as “critical habitat” of the dusky gopher frog. The landowner argued successfully that “critical habitat” must exhibit the attributes of “habitat.” The Court held that “[o]nly the ‘habitat’ of the endangered species is eligible for designation as critical habitat.” The Supreme Court found that the lower court erroneously failed to consider habitability when it upheld the FWS’ decision, considering that the frog no longer occupied the disputed acreage, presumably because the habitat’s natural characteristics had been altered over time.

For this reason, the Court vacated the Fifth Circuit’s decision to uphold FWS' identification of critical habitat, and its failure to exclude the Weyerhaeuser land.

What happened to the dusky gopher frog?
In 2019, the FWS asked the Fifth Circuit if the agency itself could address the landowner's concerns without resort to judicial action. The Fifth Circuit sent the case back to the district court, which decided that the FWS could re-consider the matter. The FWS and the Weyerhaeuser

plaintiffs settled under a consent decree that vacated the FWS designation of the acreage as "critical habitat" for the dusky gopher frog. For additional information on this case please see our previous publication, Supreme Court grants a shy frog the chance to shape critical habitat designations.

How does the proposed rule define "habitat"?
Following the ***Weyerhaeuser*** ruling, the Department of the Interior in 2019 announced a set of revisions to the criteria for designating *critical* habitat, as discussed in our client alert, ESA Revised Regulations: What to Expect. 84 Fed. Reg. 45053. At that time, however, FWS specifically declined to "resolve the full meaning of the term 'habitat.'" In their current proposal, however, FWS and NMFS request public comment on two alternative definitions of "habitat" to implement section 4 of the ESA:

1) The physical places that individuals of a species depend upon to carry out one or more life processes. Habitat includes areas with existing attributes that have the capacity to support individuals of the species.

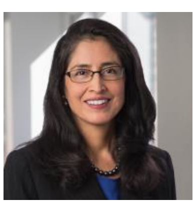
2) The physical places that individuals of a species use to carry out one or more life processes. Habitat includes areas where individuals of the species do not presently exist but have the capacity to support such individuals, only where the necessary attributes to support the species presently exist. 85 Fed. Reg. 47333 (Aug. 5, 2020).

The proposed rule is meant to clarify that an unoccupied area (an area where the species in question does not actually live, but which may be essential for its conservation) may be designated as *critical* habitat when it meets the underlying criteria for "habitat." However, environmental advocates have already expressed concern that this constraint on the definition of "unoccupied habitat" as "critical" will preclude anticipation of changed circumstances, such as global warming, in meeting the needs of endangered species.

What are the next steps?
Clients are encouraged to offer comment on this rulemaking, which takes an important and unprecedented step to address the ESA's failure to provide a definition of "habitat." The FWS is accepting public comments through 4 **September 2020**.

Please contact us for more information on submitting a comment.

Contacts



Hilary C. Tompkins
Partner, Washington, D.C.
T +1 202 664 7831
hilary.tompkins@hoganlovells.com

Douglas P. Wheeler
Senior Counsel, Washington, D.C.
T +1 202 637 5556
douglas.wheeler@hoganlovells.com