PACIFIC RIM ADVISORY COUNCIL

Pacific Rim Advisory Council
July 2020 e-Bulletin

MEMBER NEWS

►DENTONS RODYK Appointments Announced
►HOGAN LOVELLS Former Bristol Myers Squibb VP Joins Firm

COUNTRY ALERTS

►ARGENTINA Central Bank Releases Regulations to Allow Payments of More Commercial Debts ALLENDE BREA
►BRAZIL Sanitation Infrastructure new law and (finally) US$ 130 billion for investment opportunities TOZZINIFREIRE
►CANADA Understanding the CUSMA/USMCA : A Look at the Uniform Regulations and New Canadian Guidance BENNETT JONES
►CANADA Essential Information Employers Need to Know about COVID-19 Temporary Layoffs and ESA Termination Pay RICHARDS BUELL SUTTON
►CHILE New Tax Measures Published CAREY
►CHINA The Next Connective Initiative Cross Boundary Wealth Management HAN KUN
►COLOMBIA Integral Research Pilot Projects Through Fracking BRIGARD URRUTIA
►FRANCE Financial Action Task Force Report on Virtual Assets: A First Overview and New Prospects Outlined GIDE
►MALAYSIA High Court Issues Key Judgment for Aviation Service Providers SKRINE
►MEXICO Twelfth Transitory Provision Added to Anti-Money Laundering Applicable to Insurance Companies SANTAMARINA
►NETHERLANDS Registration of UBO's NAUTADUTILH
►NEW ZEALAND Financial Services Regulation Update SIMPSON GRIERSON
►PHILIPPINES New Legislation in the Pipeline SYCIP LAW
►SINGAPORE Tax—Singapore and Indonesia Signed Updated Tax Treaty DENTONS RODYK
►TAIWAN Telecommunication Act Effective July 1 LEE AND LI
►UNITED STATES As Congress Negotiates, States Create Immunity for Wider Range of Businesses Facing COVID-related Claims BAKER BOTTS
►UNITED STATES California Ramps Up Independent Contractor Misclassification Enforcement DAVIS WRIGHT TREMAINE
►UNITED STATES EEOC: No Good Deed Goes Unpunished - Don't Try to Protect High Risk Employees by Summarily Barring Them From the Workplace GOODSILL
►UNITED STATES Second Circuit Confirms: No Discovery for Private International Arbitrations HOGAN LOVELLS

CONFERENCES & EVENTS

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

Coronavirus
COVID-19

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

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

Visit us online for full coverage

MEMBER DEALS MAKING NEWS

►ARIAS Assists IDB Invest in US$389million to fund Salvadorean SMEs
►ARIFA Advises Norwegian Cruise Line as the company takes decisive action to significantly strengthen its financial position in response to the COVID Pandemic
►BAKER BOTTS Represents McDermott International in Completion of Sale of Lummus Technology.
►BRIGARD URRUTIA Advises Colombia's Ecopetrol in landmark US$2 billion debt issuance
►CAREY Assists Enel Américas Obtain US$150 Million Syndicated Loan
►GIDE Advises on the issuance of Tier 2 Subordinated Notes due 2051 by CNP Assurances
►HAN KUN Advises UCLOUDLINK GROUP INC. on its U.S. IPO
►HOGAN LOVELLS Files lawsuit along with civil rights organizations and Harvard CHLPI challenging rule removing ACA's non-discrimination protections
►NAUTADUTILH Winds EU Trademark Battle on Behalf of Tier 1 Reinsurer Scor SE
►SANTAMARINA Assists Kimberly-Clark de Mexico, S.A.B. de C.V. issuance of senior notes worth US $500 million
►SyCip Law Advises MPIC in Sale of Shares in MPLRC to Sumitomo Corp

PRAC TOOLS TO USE

COVID-19 SITE FOR ALL UPDATES

PRAC CONTACTS MEMBER DIRECTORY EVENTS
VISIT US ONLINE AT WWW.PRAC.ORG

DENTONS RODYK ANNOUNCES SEVEN PROMOTIONS TO PARTNER LEVEL

SINGAPORE – 01 July, 2020: As a law firm, we exist for two reasons: first to serve clients, and secondly to give everyone in the firm the best possible careers. To do so, we must continue to recruit, develop and promote, undaunted by downturns.

As such, Dentons Rodyk is pleased to announce two sets of promotions that will be effective 1 July 2020.

The following seven lawyers will be promoted to the position of Partner:

Regional Practice Group:

Sook Zhen Ng

Litigation:

Weilin Chua

Junhui Sim

Wen Jin Lau

Chia Ming Lee

Geraldine Yeong

Terence Wah

At the same time, 12 lawyers will also be promoted to the position of Senior Associate:

Corporate:

Beverly Chong

Hui Qi Lim

Jeremy Goh

Ann Louise Chia

Finance:

Teng Wei Ng

Litigation:

Avril Tay

Beverly Tan

Qiu Li Lee

Ashwin Nair

John Paul Koh

Corporate Real Estate:

Katherine Ho

Geena Liaw

For additional information visit www.dentons.rodyk.com

FORMER BRISTOL MYERS SQUIBB VICE PRESIDENT JOINS HOGAN LOVELLS

Former Bristol Myers Squibb vice president Jonathan Wasserman joins Hogan Lovells

WASHINGTON, D.C. - 06 July 2020 : Global law firm Hogan Lovells is pleased to announce that Jonathan Wasserman has joined the firm's Litigation, Arbitration and Employment practice, as a member of the firm's Life Sciences and Health Care industry group. Wasserman joins from Bristol Myers Squibb, where he served as Vice President and Associate General Counsel – Litigation & Government Investigations.

"We are extremely pleased to welcome Jon. Over the years he has worked with firm lawyers across a number of firm practices, so he knows us well," said Des Hogan, Head of Hogan Lovells' Litigation, Arbitration and Employment Practice Group. "His addition is part of our commitment to continue building a power-house litigation practice that clients trust to handle the largest, most complicated matters."

Wasserman will focus his practice on product liability, mass torts, and class action litigation, as well as other complex commercial litigation. He will be working from the firm's Washington, D.C. office.

"With its global litigation platform and strong brand within the Life Sciences industry, Hogan Lovells has long been a go-to firm for pharmaceutical companies and others in this sector," Wasserman said. "I am very happy to be part of this premier team of life sciences litigators."

Wasserman has worked at Bristol Myers Squibb since 2008, where he was the head of litigation and government investigations for over a decade, overseeing multiple product liability, Federal multidistrict litigation, and state mass torts matters. He helped create and co-managed BMS's outside law firm preferred vendor program. He oversaw a wide range of complex commercial litigation, including securities, antitrust, shareholder derivative, environmental, and trade secrets lawsuits, as well as enforcement actions and investigations.

Before his tenure at Bristol Myers Squibb, Wasserman worked at Schering-Plough Corporation for eight years. He began his legal career working as a Trial Attorney at the United States Department of Justice.

"Jon has spent the bulk of his career immersed in the Life Sciences industry, and we are thrilled to welcome someone of his vast knowledge and experience," said Asher Rubin, Global Head of the firm's Life Sciences and Health Care Industry Group.

Wasserman earned his J.D. from the Washington University School of Law and a B.A. from Hobart and William Smith Colleges.

For additional information visit www.hoganlovells.com

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.

www.prac.org/member_publications.php

ARIAS

ASSISTS IDB INBVEST IN US$389 MILLION TO FUND SALVADOREAN SMES

SAN SALVADOR - 03 July 2020: Hunton Andrews Kurth LLP in Washington, DC, and **ARIAS (El Salvador)** assisted IDB Invest lend almost US$38 million to help fund SMEs in El Salvador.

Skadden, Arps, Slate, Meagher & Flom LLP in New York advised the borrowing bank, Banco Cuscatlán. The deal closed on 28 May.

The loan is part of the China Co-Financing Fund for Latin America and the Caribbean, established between the IDB – the bank to which IDB Invest belongs – and the Central Bank of China in 2013.

IDB Invest is headquartered in Washington, DC. It finances projects in renewable energy, agriculture and transport, as well as funding increasing access to finance.

ARIAS (El Salvador) team was led by Partner Roberta Gallardo and associate Rolando Alvarenga in San Salvador.

For additional information visit www.ariaslaw.com

BRIGARD URRUTIA

ASSISTS COLOMBIA ECOPETROL IN LANDMARK US$2 BILLION DEBT ISSUANCE

BOGOTA - 13 May, 2020: Brigard Urrutia in Bogotá have helped state-owned oil company Ecopetrol in its largest ever debt tap, worth US$2 billion.

This is Ecopetrol's first international issuance in four years, and its largest to date. Ecopetrol will use the proceeds to partly finance the company's investment plan for 2020 and 2021.

Counsel to Ecopetrol Shearman & Sterling LLP, New York; Brigard Urrutia Partners Carlos Fradique-Mendez, Manuel Fernando Quinche and Luis Gabriel Morcillo, and associates
Viviana Araújo Angulo and Miguel Londoño Gómez in Bogotá.

Counsel to Goldman Sachs, JP Morgan Securities and Scotia Capital Milbank New York; Gómez-Pinzón Bogotá.

For additional information visit www.bu.com.co

BAKER BOTTS
REPRESENTS MCDERMOTT INTERNATIONAL IN COMPLETION OF SALE OF LUMMUS TECHNOLOGY

HOUSTON - 07 July 2020: Deal Description: July 7, 2020 – On June 30, 2020, McDermott International, Inc. ("McDermott") successfully completed the sale of its Lummus Technology business in connection with completing its restructuring process. Lummus Technology was sold to a joint partnership between Haldia Petrochemicals Ltd., a flagship company of The Chatterjee Group, and Rhône Capital. Proceeds from the sale of Lummus Technology were used to repay McDermott's debtor-in-possession financing in full, as well as fund emergence costs and provide cash to the balance sheet for long-term liquidity.

McDermott is a premier, fully integrated provider of engineering and construction solutions to the energy industry. McDermott's customers trust its technology-driven approach to design and build infrastructure solutions to responsibly transport and transform oil and gas into the products the world needs today. From concept to commissioning, McDermott's expertise and comprehensive solutions deliver certainty, innovation and added value to energy projects around the world. It is called the "One McDermott Way." Operating in over 54 countries, McDermott's locally focused and globally integrated resources include approximately 40,000 employees, a diversified fleet of specialty marine construction vessels and fabrication facilities around the world. To learn more, visit www.mcdermott.com .

Baker Botts L.L.P. represented McDermott in the transaction. Corporate, Antitrust and Regulatory Counsel to McDermott: Baker Botts L.L.P. Financial Advisors to McDermott: Evercore Group L.L.C.

For more information, please visit www.bakerbotts.com

ARIFA
ADVISES NORWEGIAN CRUISE LINE AS THE COMPANY TAKES DECISIVE ACTION TO SIGNIFICANTLY STRENGTHEN ITS FINANCIAL POSITION IN RESPONSE TO THE COVID-19 GLOBAL PANDEMIC

Closing Date: May 14, 2020
Client NCL Corporation LTD
Matter Value: US $675 million

Arias, Fabrega & Fabrega has acted as special Panamanian Counsel to Norwegian Cruise Line in connection with an indenture issued by NCL Corporation Ltd regarding US$675,000,000.00 12.25% senior secured notes due 2024. In addition, ARIFA advised on unsecured guarantees from Panamanian subsidiaries of NCL Corporation Ltd., and the creation of security interests over intellectual property owned by Panamanian entities.

The proactive measure of securing US$675 million in additional liquidity is part of the NCL's efforts to respond to the effects of the
COVID-19 pandemic on the cruise industry.

"We have now replaced all of our higher rate debt with facilities with more favorable rates and terms and enhanced our maturity profile to better match the increased cash flow generation that accompany our upcoming fleet additions."
Kevin Sheehan, President and Chief Executive Officer of Norwegian Cruise Line.

ARIFA multidisciplinary team acting in this transaction: Roy C. Durling, Partner, Pilar Castillo, Partner; Carin Stelp, Senior Associate; Melissa Del Buto, Associate; and Jesus De Luca, Associate.

For additional information visit www.arifa.com

CAREY

ASSISTS ENEL AMERICAS OBTAIN US$150 MILLION SYNDICATED LOAN

SANTIAGO – 15 June, 2020: Winston & Strawn in New York and Chile's Carey helped South American power company Enel Américas obtain a US$150 million syndicated credit facility. The banks – BBVA, Bank of Nova Scotia and Crédit Agricole – enlisted Davis Polk & Wardwell LLP in São Paulo and New York and Morales & Besa in Santiago. The deal closed on 22 May.

Through its subsidiaries, Enel Américas generates, transmits and distributes power across Argentina, Brazil, Colombia and Peru. It is one of South America's largest utilities companies, with some 25 million customers. Enel Américas is headquartered in Chile, but the Chilean market is operated by Enel Chile.

Counsel to Enel Américas Winston & Strawn(New York); Carey Partner Diego Peralta and associates Nadia Jara and Kriss Andía in Santiago.

For additional information visit www.carey.cl

GIDE

ON THE ISSUANCE OF TIER 2 SUBORDINATED NOTES DUE 2051 BY CNP ASSURANCES

PARIS - 02 July 2020: Gide advised CNP Assurances on the issuance of Tier 2 subordinated notes for an amount of €750,000,000 due 2051. The notes are admitted to trading on Euronext Paris. Allen & Overy Paris advised Barclays, BNP Paribas, Crédit Agricole CIB, Goldman Sachs Bank Europe SE, HSBC and Natixis as joint bookrunners. Gide's team was led by Hubert du Vignaux (partner), assisted by Bastien Raisse (senior associate) and Victor Delion (associate).

For additional information visit www.gide.com

HAN KUN

ADVISES UCLOUDLINK GROUP INC. IN ITS U.S. IPO

BEIJING – 10 June, 2020: Han Kun Law Offices has advised and acted as the PRC counsel to UCLOUDLINK GROUP INC. in its U.S. initial public offering and listing on the Nasdaq Global Market under the symbol "UCL". UCLOUDLINK GROUP INC. is the world's first and leading mobile data traffic sharing marketplace.

For additional information visit www.hankunlaw.com

NAUTADUTILH

WINS EU TRADEMARK BATTLE ON BEHALF OF TIER 1 REINSURER, SCOR SE

BRUSSELS – 10 July, 2020: NautaDutilh successfully represented Scor SE, one of the world's leading reinsurers, in trademark proceedings before the General Court of the EU against Scorify UAB, a Lithuanian company that uses AI to predict consumer habits.

Scorify UAB sought to register its logo as a trademark. However, the General Court ruled that Scorify UAB's logo is not distinct enough from Scor SE's and that there is thus a likelihood of confusion. Consequently, the Court refused to allow Scorify to trade mark its logo.

Scor SE was represented by Tanguy de Haan and Colombe de Callataÿ.

For additional information visit www.nautadutilh.com

HOGAN LOVELLS

FILES LAWSUIT ALONG WITH CIVIL RIGHTS ORGANIZATIONS AND HARVARD CHLPI CHALLENGING RULE REMOVING ACA'S NON-DISCRIMINATION PROTECTIONS

BOSTON, 9 July 2020 — Today Hogan Lovells, with the National Women's Law Center (NWLC), the Transgender Law Center (TLC), the Transgender Legal Defense & Education Fund (TLDEF), and the Center for Health Law and Policy Innovation (CHLPI) of Harvard Law School, filed a lawsuit in the U.S. District Court for the District of Massachusetts against the Administration's June 19, 2020 rule undermining the Affordable Care Act's (ACA's) non-discrimination protections, which prohibit discrimination in health care on the basis of race, color, national origin, age, disability, and sex — including pregnancy, gender identity, and sex stereotyping.

The lawsuit was filed on behalf of plaintiffs Darren Lazor, the Boston Alliance of Gay, Lesbian, Bisexual and Transgender Youth (BAGLY), the Callen-Lorde Community Health Center, the Campaign for Southern Equality, Equality California, Fenway Health, and the Transgender Emergency Fund. Lazor, 35, is a transgender man who experienced numerous counts of discrimination from healthcare providers on the basis of his gender identity from 2012 to 2017.

The lawsuit asserts that the new rule violates the Administrative Procedures Act by being contrary to law and arbitrary and capricious. Notably, it was published just days after the June 15, 2020 U.S. Supreme Court ruling in Bostock v. Clayton County, which found that it is unlawful sex discrimination to fire employees based on sexual orientation or gender identity. The lawsuit also asserts that the new rule will embolden discrimination and harm LGBTQ+ patients and people seeking reproductive health care, further stigmatize abortion and other pregnancy-related care, harm patients with limited-English proficiency, especially immigrants, and harm people with chronic illnesses, including those living with HIV. The rule will also create confusion about the scope of protections against discrimination under federal law.

Trans people, like plaintiff Darren Lazor, already face disproportionate discrimination in health care settings, including mistreatment by insurers and humiliation and harassment by doctors – problems that are exacerbated for Black and Latinx trans people, and trans people living in rural regions and the South. In seeking to deny trans people access to the healthcare they need, the Administration is putting trans people, and especially Black trans women, in danger through deliberately harmful governmental action.

"I have experienced feeling like a doctor doesn't care if I live or die — which is just shameful," said Darren Lazor. "No one should be denied life-saving health care or be discriminated against the way I have simply because of who they are. I hope that sharing my story can help others understand that transgender people are who we are, and we deserve to be treated fairly under the law."

"The rule will embolden discrimination in health care and make it more difficult for patients—particularly transgender people and women—to access the care and insurance coverage they need," said Kirti Datla, senior associate at Hogan Lovells. "We represent a broad group of plaintiffs whose experiences make clear just how devastating the effects of this action will be. Working alongside partner organizations, we hope to secure a ruling that the rollback is unlawful several times over, and that no person should be denied health care due to discrimination."

The Hogan Lovells team from the firm's Washington, D.C., Boston, and New York offices included senior associates Kirti Datla and Jo-Ann Tamila Sagar, and associates Erin Chapman, Kristina Alekseyeva, and Peter Bautz, with help from partners Jessica Ellsworth and Bill Kettlewell, and paralegal Alicia Balthazar.

For additional information visit www.hoganlovells.com

SANTAMARINA

ASSISTS KIMBERLY CLARK DE MEXICO, S.AB. DE C.V. ISSUANCE OF SENIOR NOTES WORTH US$500 MILLION

MEXICO CITY - -1 July, 2020: On July 1st, 2020, Kimberly-Clark de Mexico, S.A.B. de C.V., issued in the cross-border bond market senior notes with partial maturities worth US $500 million.

The Notes were offered in the United States to qualified institutional buyers pursuant to Rule 144A under the Securities Act of 1933, as amended (the "Securities Act"), and outside the United States pursuant to Regulation S under the Securities Act. The company intends to use the proceeds from this offering for general corporate purposes.

S+S, with a team led by Alberto Saavedra, Juan Pablo Rodríguez Sada, Bernardo Aguado, and Alejandro Matute, acted as special Mexican counsel to the company relating to the issuance.

For additional information visit www.s-s.mx

SYCIPLAW

ADVISES MPIC IN SALE OF SHARES IN MPLRC TO SUMITOMO CORPORATION

SyCipLaw acted as legal advisor to Metro Pacific Investments Corporation (MPIC) in relation to MPIC's sale of shares representing 34.9% interest in Metro Pacific Light Rail Corporation (MPLRC) to Sumitomo Corporation -- one of Japan's largest trading and investing companies.

MPLRC holds an effective 55% stake in the Light Rail Manila Corporation (LRMC), which has a 32-year concession to operate, maintain and extend the 20.7 km Light Rail Transit System – Line 1 (LRT-1), a vital light rail infrastructure asset in the heart of Metro Manila. LRT-1, which currently with 20 stations, has started works on the extension of the system to Cavite.

SyCipLaw previously advised the consortium constituting LRMC in relation to its bid for the concession over LRT-1 and advised LRMC in relation to the project financing for the extension to Cavite.

Arlene M. Maneja headed the SyCipLaw team, assisted by partner, Leah C. Abutan, senior associate Mark Xavier D. Oyales, and associates Anne Katherine P. Navarrete, Nathaniel Andrew Y. Uy, Russel Stanley Q. Geronimo, and Paolo Dominic G. Macariola.

For additional information visit www.syciplaw.com

PRAC EVENTS

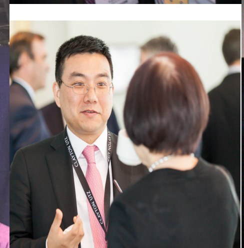
PRAC @ SAO PAULO

PRAC @ Taipei 2014

PRAC @ Vancouver

PRAC @ Brisbane

PRAC @ INTA



PRAC @ PDAC

PRAC @ IPBA

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

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

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

www.prac.org

The Central Bank released regulations to allow payments of more commercial debts

On July 8, 2020, through Communiqué "A" 7068, the Argentine Central Bank (the "Central Bank") enabled new scenarios to access the foreign exchange market (the "FX Market") to cancel commercial obligations by Argentine importers. In this sense, Argentine importers will be able to access the FX Market for the payment, on their maturity date, of letters of credit drawn and other financing granted by foreign banks, financial entities and credit agencies.

For the sake of clarity and as a summary of the new regulations, we detail below the payments of imports of goods[1] or cancellations of principal of debts related to imports of goods[2] that do not require prior written authorization from the Central Bank as from July 13, 2020 to July 31, 2020.

If the amount of nationalized imports in 2020 exceeds payments made

To the extent that the aggregate amount of import payments and prepayments made during the year 2020 - including the intended payment – does not exceeds the aggregate amount of imports of goods that are registered in the importer's name in the system for monitoring the payment of imports of goods (*"SEPAIMPO"*) and that the clearing custom (i.e., nationalization) was between January 1, 2020 and the day prior to access to the FX Market., the prior written authorization from the Central Bank will not be required.

Although the Central Bank will carry out an ongoing inspection, this requirement will be deemed fulfilled by the submission of an affidavit by the importer.

Deferred payments or on demand of new imports

Payments (deferred or on demand) of imports that have been shipped after July 1, 2020[3] or that, having been shipped earlier, have not arrived to the country before that date, don't require prior written authorization from the Central Bank.

Payments to foreign financial entities and credit agencies

Payments for the cancellation of commercial debts for imports of goods with export credit agencies or foreign financial institutions, insofar as they are not payments associated with the operations included in the preceding paragraph, do not require prior written authorization from the Central Bank.

Payments from the public sector

Payments from the public sector, companies with majority state participation or trusts set up with contributions from the national public sector do not require prior written authorization from the Central Bank.

Essential medicines

Payments for imports of goods with pending customs entry registration to be made by a legal entity responsible for the provision of essential medicines to be imported by the request of the beneficiary of such medical coverage, do not require prior written authorization from the Central Bank.

COVID-19 Kits

Payments for imports of goods with pending customs entry registration made for the purchase of COVID-19 coronavirus detection kits[4] do not require prior written authorization from the Central Bank.

Other import payments of up to USD 1,000,000

Other payments for imports of goods shall not require prior written authorization from the Central Bank to the extent that the aggregate amount of: (i) the amount pending regularization (i.e., nationalization) for payments of imports made on or after September 1, 2019, and (ii) payments for imports of goods with clearing custom (i.e., nationalization) on or after July 13, 2020 (which do not fall under sections 1, 2 and 3 above); do not exceed the equivalent of USD 1,000,000[5]

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

[1]Codes B05, B06, B07, B10, B12 and B13.

[2]Code P13.

[3]This date will be 12 June 2020 for goods under Chapters 30 and 31 of the Mercosur Common Nomenclature (*Nomenclatura Común del Mercosur*) or for supplies for the local production of medicines.

[4]Or other goods whose customs tariff positions are included in the list of Decree No. 333/2020 (as amended).

[5]This amount shall be raised to USD 2,000,000 in the case of payments for the import of products related to the provision of medicines or other goods related to the medical and/or health care of the country or supplies required for local production.

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

Sanitation Infrastructure in Brazil - A new law and (finally) US$ 130 billion for investment opportunities in the next years

June 29, 2020

Infrastructure

After many years of stalling on political debates, the Brazilian Congress has just approved a bill of law that is expected to unlock Brazil's sanitation sector for private investment. The President is expected to sanction the new law in the next days.

With more than 200 million inhabitants and more than 5,000 cities, the country has always suffered from a poor and confusing regulation structure controlled by municipalities, but with a significant weight of state-owned enterprises (SOEs) created by some states.

Together with the budget limitations of states and municipalities, nearly 60% of the population do not have sewage treatment, 50% have no sewage collectors, and 20% have no access to treated water, with only 6% of the current sanitation infrastructure privately owned.

Considering this dreadful scenario, the Federal Government claims leadership for the future of the sector to solve this gigantic gap, fixing universalization goals for 2033. The National Water Agency (ANA) will now have the task of creating a federal guideline to steer the several municipal sanitation regulations in the right direction and follow up on the implementation of the development plans by the municipalities to achieve these goals. Municipalities will have 12 months from the sanctioning of the law to design their plan to achieve these goals.

There will be funding and other incentives for the municipalities to adopt ANA guidelines, which will foster standardization of the regulations. From now on, new projects will be awarded exclusively as a long-term concession, through open competitive processes. SOEs and private investors will compete in these bids in identical conditions.

In order to respect existing contracts, the current partnerships between SOEs and municipalities will be allowed to continue. Still, the renewal will be conditioned to the achievement of the universalization goals.

Since the implementation of universalization plans will require significant investments by SOEs, it is expected that this will drive privatizations throughout the country. BNDES, the Brazilian Development Bank, is already structuring privatizations in two states.

According to the new law, there will be binding mechanisms to allow neighbor municipalities to form clusters, so that projects will gain scale and sustainability. BNDES will also take the lead role in modeling these mechanisms. The plan is to attract investments to the whole country and not only for the already big cities.

The new sanitation law is expected to have a significant role in moving the Brazilian economy in the years following the Covid-19 crisis. The estimates for all businesses are that it can originate amounts to R$ 700 billion (approximately US$ 130 billion), not to mention the strong impact the law will have on public health, environmental, and development matters throughout Brazil.

The Infrastructure team of TozziniFreire is closely following these developments. We are at your disposal for any information that your company may need in order to invest in the sanitation sector in Brazil.

Partners

- Antonio Felix de Araujo Cintra
- Claudia Elena Bonelli
- José Augusto Dias de Castro
- Jun Makuta
- Leonardo Miranda
- Pedro G. Seraphim

www.tozzinifreire.com.br

Understanding the CUSMA/USMCA: A Look at the Uniform Regulations and New Canadian Guidance |

Written by Sabrina A. Bandali and Jessica Horwitz

After months of anticipation by the Canadian trading community, and just days before the agreement's entry into force on July 1, implementation details were published for the Canada-United States-Mexico Agreement (CUSMA, also known as the USMCA or T-MEC). Companies with North American supply chains will now need to consider this guidance to determine how to leverage the opportunities presented by the new Agreement.

We provided an overview of the Agreement's key new elements in previous blog posts: *Introducing the U.S.-Mexico-Canada Agreement (USMCA)* and *NAFTA "2.1"—The Amended and Final Canada-United States-Mexico Agreement*. As the 2,300+ pages of the Agreement and nearly 200 pages of Uniform Regulations suggest, the devil is very much in the details when it comes to free trade agreements. Canadian businesses that have claimed NAFTA tariff preference or provided NAFTA certificates of origin to customers in the past should conduct a comprehensive review of their operations and supply chains as soon as possible to confirm that they meet the rules of origin, and that they are satisfying the operational and compliance requirements to claim preferential tariff treatment under the new Agreement. **Businesses should *not* assume that goods would still qualify under the CUSMA just because they qualified under the NAFTA**. We provide a resource list at the end of this post of the various publications that provide additional guidance on how Canada will administer the trade pact.

Key Clarifications in the New Uniform Regulations

Chief among the recently published resources are the Uniform Regulations on the interpretation of rules of origin and origin procedures negotiated among the three CUSMA member states. The Uniform Regulations provide important details about the how customs authorities will interpret and administer the rules contained in the Agreement's text. Key changes clarified in the Uniform Regulations include, among other things:

- support for electronic documentation in a variety of contexts; for example, where customs authorities have received an electronic certification of origin under the Agreement, they can no longer require paper origin documentation to release imported goods;
- details on recordkeeping requirements to evidence transit or transshipment and how records must be maintained to enable verification by customs authorities;
- procedures for origin verifications/audits, including rules for verifications of textile and apparel goods;
- procedures for customs advance rulings, including their review, appeals, and a commitment to publish advance rulings quarterly;
- calculation methodologies for regional value content (value-added) under the product-specific rules of origin, including rules for valuation, unacceptable uses of transaction value, reasonable allocation of costs, valuation of materials, treatment and inventory management of identical (fungible) inputs, non-allowable interest costs, and general accepted accounting principles;
- interpretation rules for textile and apparel rules of origin;
- rules for accumulation and permissible averaging and for treatment of recovered materials;
- illustrative examples of regional value content calculations for various products; and
- the unique definition by each of Canada, the United States and Mexico of what constitutes

a "series of importations" that would disqualify an importer from benefitting from the certification of origin exemption for low-value shipments.

Special Notes for the Automotive Industry

The automotive industry is particularly affected by the change from NAFTA to CUSMA. The Uniform Regulations contain:

- product-specific rules of origin for certain automotive goods (Section 13);
- additional calculation rules for regional value content under the updated automotive rules of origin;
- specification of the US$16 average base hourly wage rate thresholds in CAD ($20.88) and MXN ($294.22), assuaging previous concerns over foreign exchange rate risk and unclear calculation methodology (Section 12 definitions);
- tables that specify which types of parts are classified as "core", "principal", or "complementary"; and
- details of the alternative staging regime (Section 19).

The CUSMA introduces certain steel and aluminum content requirements for originating automotive goods. The Uniform Regulations specify the types of steel and aluminum products that qualify for purposes of this threshold (Section 17 and "Table S" of the Uniform Regulations) and the permissible methods for calculating their value, including rules about time periods and aggregation across categories of vehicles. The Uniform Regulations clarify that the steel and aluminum content requirement applies only to purchases of (or self-produced) inputs by the vehicle producer for use in the production of passenger vehicles, light trucks or heavy trucks; the requirement does not apply to the production of other types of vehicles or for tools and equipment.

Although the Uniform Regulations address the calculation methodology for the new labour value content requirement for passenger vehicles (Section 18), they do not contain any illustrative calculation examples for this requirement, and how it will be applied in practice remains somewhat unclear.

The Uniform Regulations clarify that importers of vehicles and auto parts will receive additional time to respond to origin verification information requests concerning those goods until December 31, 2020.

Looking Ahead

The culmination of nearly three years of negotiation, renegotiation and procedural detailing, the CUSMA's entry into force—and the publication of its administrative procedures—are a relief for Canadian businesses desperate to regain equilibrium in their North American trading relationships. However, trade uncertainty remains, particularly the risk of resumed U.S. "section 232" national security tariffs against Canadian metal exports and the corresponding risk of Canadian retaliatory countermeasures against imports of the same categories of U.S. goods, or new actions in respect of other products.

Importers that claim duty benefits under a free trade agreement bear the burden of documenting and demonstrating to customs authorities that the goods qualify for preferential treatment. Failing to meet these compliance obligations may result in hefty duty reassessments or commercial disputes with trading partners. In deciding whether to claim preferential treatment under a free trade agreement, businesses must weigh the potential benefits against the risk and costs of compliance.

Government of Canada Publications and Other Resources

The following is a non-exhaustive list of recent Government of Canada instruments and publications that contain important information for importers and exporters on the Agreement implementation:

Uniform Regulations

- Trilateral Uniform Regulations for Rules of Origin
- Trilateral Uniform Regulations for Origin Procedures

Customs Notices

- Customs Notice 20-23 – Import prohibition on goods produced wholly or in part by forced labour
- Customs Notice 20-22 – The Canada-United States-Mexico Agreement's (CUSMA) - Regulatory Amendments and New Regulations Made Pursuant to the Customs Act
- Customs Notice 20-20 – Amendments to the Departmental Consolidation of the Customs Tariff
- Customs Notice 20-18 – Implementation of the Canada-United States-Mexico Agreement (CUSMA) De Minimis Thresholds with Respect to Customs Duties and Taxes for Courier Imports
- Customs Notice 20-15 – Increase to the Low Value Shipment (LVS) Threshold and Simplification to the Proof of Origin Requirements for Goods Imported into Canada
- Customs Notice 20-14 – Implementation of the Canada-United States-Mexico Agreement (CUSMA)
- Customs Notice 20-13 – Canada-United States-Mexico Agreement (CUSMA): Amendment to the Definition of "Specially Defined Mixtures" in the Canadian Customs Tariff, Chapter 16, Supplementary Note 1 (regarding prepared meat products)

CBSA D-Memos

- Memorandum D11-4-34 – Uniform Regulations: Chapters five, six, and seven of the Canada-United States-Mexico Agreement
- Memorandum D10-18-7 – Importation of certain dairy products and the Import Control List (ICL)
- Memorandum D10-18-8 – Importation of certain poultry and egg products and the Import Control List (ICL)

Orders in Council

- Order Amending Order in Council P.C. 2020-215 of April 3, 2020 under the *Canada – United States – Mexico Agreement Implementation Act* (PC No. 2020-0497), specifying the date of entry into force of the agreement as July 1, 2020
- *Regulations Amending Certain Department of Transport Regulations Concerning CUSMA (Miscellaneous Program)*, SOR/ 2020-0150 under the Aeronautics Act and the Motor Vehicle Safety Act (PC No. 2020-0495)
- *Order Amending the Order Amending the Export Control List*, SOR/ 2020-0148 under the Export and Import Permits Act (PC No. 2020-0493) to implement CUSMA tariff rate quotas
- *Regulations Amending the Issuance of Certificates Regulations*, SOR/ 2020-0147 under the Export and Import Permits Act (PC No. 2020-0492), to implement CUSMA tariff preference levels for textile/apparel goods
- *Order Amending the Import Control List*, SOR/ 2020-0146 under the Export and Import Permits Act (PC No. 2020-0491), to implement CUSMA tariff preference levels for textile/apparel goods.
- Order authorizing the entry into force of the *Agreement on Environmental Cooperation among the Governments of Canada, the United States of America, and the United Mexican States* (ECA) of December 18, 2018, (PC No. 2020-0502)
- Order authorizing the termination of the *Exchange of Letters constituting an Agreement between the Government of Canada and the Government of the United States of America*, (PC No. 2020-0501) concerning imports of broiler hatching eggs and chicks

TRQ Information

- [Global Affairs Notices to importers](), including notices on Tariff Rate Quotas for Supply Managed Products (Dairy, Poultry, Eggs)
- [Global Affairs Notices to exporters]()

Other New Regulations and Regulatory Amendments

- *CUSMA Rules of Origin Regulations* – will incorporate the Uniform Regulations for rules of origin.
- *CUSMA Rules of Origin for Casual Goods Regulations* – will incorporate the Uniform Regulations for rules of origin.
- *CUSMA Verification of Origin Regulations* – will incorporate the Agreement's updated procedures for customs authorities to verify originating status of goods for which tariff preference is claimed.
- *Certification of Origin of Goods Exported to a Free Trade Partner Regulations, SOR/97-332* – amended to allow certificates of origin for U.S. customs purposes in English, French or Spanish.
- *Exporters' and Producers' Records Regulations*, SOR/97-71 – amended to update the advance ruling provisions of the Agreement.
- *Free Trade Agreement Advance Rulings Regulations*, SOR/97-72 – amended to update references from NAFTA to CUSMA and updated advance ruling rules.
- *Refund of Duties Regulations*, SOR/98-48 – amended to update references from NAFTA to CUSMA and specifying effective date for refund eligibility as July 1, 2020.
- *Proof of Origin of Imported Goods Regulations*, SOR/98-52 – numerous amendments including updated origin certification rules as well as increasing the "Low Value Shipment" threshold to $3,300.
- *Accounting for Imported Goods and Payment of Duties Regulations*, SOR/86-1062 – amended to increase the "Low Value Shipment" threshold for goods eligible for release of express courier shipments prior to accounting and payment of duties from C$2,500 to C$3,300.
- *Fees in Respect of Mail Regulations*, SOR/92-414 – amended to increase the "Low Value Shipment" threshold for goods eligible for release of express courier shipments prior to accounting and payment of duties from C$2,500 to C$3,300.
- *Courier Imports Remission Order*, SI/85-182 – amended to increase de minimis (duty/tax free) value of goods shipped to Canada via commercial courier to C$150 for duties, and C$40 for taxes. Note that the Postal Imports Remission Order, SI/85-181 will not be amended, meaning that the value limit for duty and tax free shipments sent by regular mail (Canada Post) will remain at C$20.
- *Canadian International Trade Tribunal Procurement Inquiry Regulations*, SOR/93-602 – amended to remove references to the NAFTA, as Canada's government-procurement market access commitments were eliminated in the Agreement. (Procurement matters between Canada and the United States will now be governed by the World Trade Organization Agreement on Government Procurement and with Mexico in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.)
- *Canadian International Trade Tribunal Regulations*, SOR/89-35 – amended to remove references to bilateral safeguard provisions repealed under the Agreement.
- *Canada Grain Regulations*, C.R.C., c. 889 – amended to implement Canada's commitments to the United States under the Agreement in relation to grain including grades recognition and removing the requirement to list U.S. origin on inspection certificates
- *Import Control List*, C.R.C., c. 604 and other various regulations under the *Export and Import Permits Act* – amended to implement various changes to market access commitments and tariff preference levels under the Agreement including for textile and apparel goods
- *Food and Drug Regulations*, C.R.C., c. 870 – amended to implement changes to allow low-risk drug products to be shipped directly to retailers, distributors or wholesalers and exempt them from certain testing requirements.

- Other various technical amendments will be made, or have already been made, to update references from NAFTA to CUSMA, including in the *Marking of Imported Goods Regulations*, *Determination of Country of Origin for the Purposes of Marking Goods (NAFTA Countries) Regulations*, *Duties Relief Regulations*, *Goods Imported and Exported Refund and Drawback Regulations*, *Temporary Importation (Tariff Item No. 9993.00.00) Regulations*, *Investment Canada Regulations*, *Members of Panels (NAFTA) Regulations*, *Members of Committees and Special Committees (NAFTA) Regulations*, *Special Import Measures Regulations*, the *Designation of Countries (Standards Council of Canada) Order*, certain General Import Permits, and so forth.

For advice and assistance in understanding what the new North American trade agreement, CUSMA, and the above changes mean for your business, please contact a member of the Bennett Jones International Trade and Investment group.

www.bennettjones.com

RICHARDS BUELL SUTTON LLP
Established in 1871

Posted on: June 23, 2020

ESSENTIAL INFORMATION EMPLOYERS NEED TO KNOW ABOUT COVID-19 TEMPORARY LAYOFFS AND ESA TERMINATION PAY

By: Georg Reuter

Many BC employers will have issued temporary layoffs to employees with the start of BC's COVID-19 lock down in March. Soon after the start of the provincial lock down, the BC Government extended the temporary layoff period under the *BC Employment Standards Act* (ESA) from 13 weeks to 16 weeks for COVID-19 related layoffs. On June 26, 2020, the BC Government announced a further extension to 24 weeks expiring on August 30, 2020 and information about this latest extension can be found here.

Employers should be aware that a COVID-19 layoff which extends beyond the 24 week temporary layoff period will result in a deemed termination, and therefore an obligation on the employer to payout ESA termination pay. Furthermore, for employers that have laid off 50 or more employees, this will trigger the ESA group termination pay provisions requiring the employer to pay **each** employee their regular termination pay based on their length of service, **plus** group termination pay (an additional 8 weeks per employee if between 50 to 100 employees are affected, 12 weeks per employee if 101 to 300 employees are affected, and 16 weeks if 301 or more employees are affected).

The liability for such termination pay could therefore be very significant. For example, if an employer has laid off 75 full time employees earning $15/hr. with 5 years' service, then **each** such employee would be entitled to 13 weeks termination pay (5 weeks regular termination pay + 8 weeks group termination pay). The total liability would therefore be in excess of half a million dollars:

(($15/hr. x 40 hrs.) x (5 weeks + 8 weeks)) x 75 employees = $585,000 in ESA termination pay

Although there is a potential exemption from paying termination pay in s. 65(1) (d) of the ESA where an employment contract *"is impossible to perform due to an unforeseeable event or circumstance"*, we are concerned that this exemption will likely not apply to protect employers now that many BC businesses are able to reopen with the easing of COVID-19 restrictions.

Employers who continue to have employees on layoff, and especially those employers with 50 or more employees laid off, should therefore get legal advice on their situation as soon as possible. They should also consider recalling back to work as many employees as possible

before the expiry of the 24 week temporary layoff period on August 30, 2020 to avoid incurring substantial liabilities for termination pay.

Should you have questions about this article or require legal support, contact Georg Reuter, Leader of our Employment & Human Rights Practice Group.

/Carey

News Alerts

Ministry of Energy establishes criteria for requests of Unique Collective Permit applicable to power generation companies

July 10, 2020

By means of Ordinary Resolution No. 675/2020 dated July 8th, 2020 ("Ordinary 675"), the Ministry of Energy established the criteria of the requests of Unique Collective Permits applicable to companies with power generation businesses in the context of the transit instructions issued by the sanitary authority due to the COVID-19 outbreak.

Ordinary 675 indicates that the electric sector has been qualified as a public service for the purposes of the transit instructions, where workers of such companies must hold a Unique Collective Permit which is requested by each entity/company through the "Comisaría Virtual" platform.

In this context, Ordinary 675 clarifies the application of transit permits for projects in stages of construction and commissioning, regulating the following situations:

1. **Projects under construction stage located totally or partially in quarantined zones.** As a general rule, it is established that these must suspend their construction as long as the quarantine measures are in force. Notwithstanding, in the case title-holders of power generation project under construction are able to demonstrate that the suspension of the activities may create an alteration in the functioning of the electric system to which it pertains, it may exempt such project from the suspension, which shall be duly informed to the Ministry of Energy by means of an affidavit indicating the technical reasons in which its petition is substantiated. Titleholders of projects under construction within quarantined areas shall diligence the Unique Collective Permit of their workers and contractors and deliver to the Ministry of Energy the status of advance of the works and the reasons that support the necessity of continuing their activities.

2. **Projects under construction located outside quarantined zones but next to the latter.** They may continue with their activities adopting all the corresponding sanitary

measures, decreasing the number of workers and the transit to and from quarantined areas.

   a. Even though Ordinary 675 does not specify what is considered as “next to quarantined zones”, it is understood that this refers to zones located within quarantined boroughs that are not affected by such measure.

3. **Projects under construction located outside quarantined zones and their surroundings.** These projects may pursue their normal activities having to adopt the corresponding sanitary measures. Additionally, in case there are workers that need to transit from a quarantined zone to the area of the project, the titleholder shall diligence the Unique Collective Permit or such workers.

4. **Projects under commissioning or operation stages.** Regardless if they are located within quarantined zones or outside the same but next to quarantined zones, they may continue with their necessary activities for the correct functioning of the essential works of such project, taking all precautionary measures and obtaining the permits through the “Comisaría Virtual” platform.

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

Juan Francisco Mackenna
Partner
+56 2 2928 2210
jfmackenna@carey.cl

José Tomás Hurley
Associate
+56 2 2928 2211
jthurley@carey.cl

José Miguel Bustamante
Partner
+56 2 2928 2211
jmbustamante@carey.cl

Valentina Mendoza
Associate
+56 2 2928 2381
vmendoza@carey.cl

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

The Next Connect Initiative – Cross-boundary Wealth Management

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

Days before the 23rd anniversary of Hong Kong's return to Mainland China, on 29 June 2020, the People's Bank of China, the Hong Kong Monetary Authority, and the Monetary Authority of Macao jointly issued an announcement on the launch of a cross-boundary wealth management connect pilot scheme in the Guangdong-Hong Kong-Macao Greater Bay Area (the "**Wealth Management Connect**"). The Wealth Management Connect was officially proposed by the *Opinions on Financial Support for Guangdong-Hong Kong-Macao Greater Bay Area* jointly issued by the People's Bank of China, China Banking and Insurance Regulatory Commission, China Securities Regulatory Commission and State Administration of Foreign Exchange on April 24, 2020, and it embarks on a new cross-boundary connect scheme following the Shanghai/Shenzhen-Hong Kong Stock Connect, the Bond Connect, the China-Japan ETF Connect, and the Shanghai-London Stock Connect. In contrast to earlier connect schemes, the Wealth Management Connect is intended to link three jurisdictions under one scheme and will not involve intermediary platforms, such as stock exchanges under the Stock Connects or CFETS and offshore electronic bond trading platforms under the Bond Connect.

The key features of the Wealth Management Connect are:

I Two components: Southbound and Northbound

Under the Southbound Wealth Management Connect, residents of Mainland cities in the Greater Bay Area can invest in eligible investment products by opening designated investment accounts with banks in Hong Kong and Macao. Under the Northbound Wealth Management Connect, residents of Hong Kong and Macao can invest in eligible wealth management products by opening designated investment accounts with Mainland banks in the Greater Bay Area.

II RMB fund transfer in a closed loop with quotas

Cross-boundary fund flows under the Wealth Management Connect will be conducted and managed in a closed loop through the bundling of designated bank accounts to ensure that the relevant funds will be used only to invest in eligible investment products. Only RMB may be transferred cross-boundary, and currency conversion will take place in the offshore jurisdictions. Cross-boundary fund remittance will be subject to aggregate and individual investor quotas, with the aggregate quota being adjusted through a macro-prudential coefficient.

III Legal and regulatory frameworks

The Wealth Management Connect will be governed by the respective laws and regulations on retail wealth management products applicable in the Mainland, Hong Kong, and Macao, with due regard to international norms and practices. The relevant financial regulators in the three jurisdictions are expected to provide details on implementing the Wealth Management Connect, including investor eligibility, mode of investment, scope of eligible investment products, investor protection, and dispute resolution. The regulators will enter into memoranda of understanding on regulatory co-operation to protect investors' interests and to maintain orderly and fair trading, and also to take actions necessary to tackle any illicit activities based on the principle of territorial administration.

The formal launch of the Wealth Management Connect will depend on the implementation details, which will be released in due course. When officially launched, the Wealth Management Connect will facilitate cross-boundary investment by individual residents in the Greater Bay Area, and promote RMB internationalization and the opening-up of the Mainland's financial markets as well as the mutual social and economic developments of the Mainland, Hong Kong and Macao.

Important Announcement

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

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

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

Integral Research Pilot Projects through Fracking

The Draft Agreement to amend Agreement 2 of 2017 is available for comments until Wednesday, July 1, 2020.

July 01, 2020

On the first semester of 2019, the Independent Interdisciplinary Expert Commission commissioned by the National Government concluded that in Colombia it is possible to carry out Integral Research Pilot Projects ("PPII" from its acronyms in Spanish) through the horizontal drilling and hydraulic rock fractures technique (better known as "Fracking"), provided that some requirements are met. Accordingly, the Expert Commission published a full report, which contains the main conclusions and recommendations that the National Government must consider when implementing PPII related to unconventional deposits using Fracking.

In that sense, on February 29, 2020, the Ministry of Mines and Energy ("MME") published Decree 328 of 2020 "By means of which the guidelines for the exploration activities in PPII on unconventional hydrocarbon in a multi-stage horizontal drilling and hydraulic rock fractures technique are established FH-PH and other provisions."

Considering this context, based on the decree published by the MME and in compliance with the article 8 of the Colombian Administrative Procedure Code (related to the obligation of the authorities to maintain available to all interested parties the complete and updated information, among others, of the specific regulatory projects and the information used to build them, in order to receive opinions, suggestions or alternative proposals), the National Hydrocarbons Agency ("ANH") published the draft agreement "By which Agreement 2 of 2017 is amended in order to incorporate the rules that allow carrying out Research Projects in development of Integral Research Pilot Projects on unconventional deposits -YNC of hydrocarbons through the horizontal drilling and hydraulic rock fractures technique –FH-PH" (the" Draft Agreement").

The Draft Agreement and other relevant information about it, can be found in the following link: http://www.anh.gov.co/transparencia/normatividad

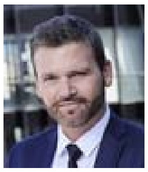
Until Wednesday July 1, 2020, the ANH will receive the observations, comments and proposals to the Draft Agreement through the following email: comentariosnormativa@anh.gov.co

It is important to bear in mind that such observations, comments, and proposals shall be submitted in the editable form for the reception of comments, which is available on the ANH website, where the Draft Agreement is also published.

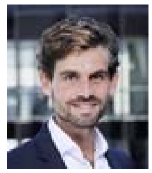
For more information contact our team: info@bu.com.co

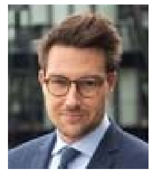
GIDE

GIDE LOYRETTE NOUEL


Franck Guiader


Jennifer D'hoir


Matthieu Lucchesi


John Le Guen

FATF report on virtual assets: a first overview and new prospects outlined

9 July 2020

Banking & Finance | FinTech | France

The Financial Action Task Force ("FATF"), which is responsible for setting international standards in combating money laundering and terrorist financing ("AML/CFT"), published on 7 July 2020 two new reports[1] on virtual assets. These two publications mark an important milestone in raising awareness among jurisdictions and stakeholders on the specific AML/CFT risks in virtual assets and the providers of services related to such assets. They also announce new work stages for the FATF by June 2021.

In October 2018, the FATF updated its Recommendations by explicitly targeting those providing services related to "virtual assets". In June 2019, they were usefully supplemented by an interpretative note[2] and a guide[3] specifying the manner in which these new recommendations were to be implemented by member jurisdictions.

The FATF draws up an initial assessment

The merits of the FATF Recommendations and their implementation by its member jurisdictions are subject to assessments, the findings and related recommendations of which are publicly reported. The first report published on 7 July 2020 falls precisely within this framework. One year after the publication of this interpretative note, the FATF shares the results of its analysis regarding the implementation of the new recommendations by the jurisdictions and the private sector.

While it highlights that it will monitor all changes in virtual asset types in a quickly evolving market, the FATF notes that most public and private sector players have made progress in implementing the new recommendations. It should be noted in this regard that this assessment for the public sector is based on a self-assessment by jurisdiction.

To date, the FATF has not identified any fundamental issues that would require further amendments to the recommendations. However, the FATF has indicated that, on the whole, the jurisdictions are requesting more information on how to implement certain recommendations, in particular as regards the travel rule[4]. With regard to this sore point, the FATF emphasises that technological solutions have been developed to meet the challenges of its implementation. While the FATF recognises that these solutions do not always make it possible to answer the practical issues raised by the travel rule, it nevertheless insists on the need to comply with this provision.

The FATF looks into the specific case of stablecoins

In its second report published on 7 July 2020, the FATF focuses more specifically on stablecoins, a type of virtual asset whose purpose is to make a payment or an exchange and whose objective is to achieve a relatively stable value.

Here again, the context is particularly rough, since this report comes a few months after the European Commission and the European Council issued a joint statement on the subject[5] and the Financial Stability Committee ("FSC") has started working on global stablecoins[6]. One of the issues under discussion is the legal classification of this type of asset, which can be considered as digital assets, electronic currency or financial instruments.

In the end, the issue is of little importance to the FATF, which considers that these assets do indeed fall within the scope of its recommendations. Indeed, the FATF report considers that these stablecoins share many of the potential AML/CFT risks already identified for virtual assets because of their potential anonymity and the scale at which they could be exchanged. Depending on the way in which the stablecoins are structured, the entities subject to AML/CFT may thus vary.

Although the FATF does not consider it necessary for its new recommendations to be amended at this stage to take into account this new type of asset, it nonetheless recognises that their development needs to be closely monitored, particularly if they are to be adopted more widely.

The next steps

In these two reports, the FATF clarifies that, at this stage, there was no need to make any further changes to its recommendations. However, the FATF is planning a further compliance review by June 2021. It also announces the publication of new guidelines to clarify the conditions for implementing the existing texts. Specific details will be provided on the subject of stablecoins and, in particular, on the way in which the AML/CFT obligations should be dealt with in relation to them.

These reports, and the further work that they announce, are thus crucial in the light of the work currently being carried out by the European Commission on the introduction of a regulatory framework for crypto-assets and the revision of existing European texts on AML/CFT[7].

They should also be read in the light of the review of the French system scheduled for autumn 2020, during which the FATF will examine the compliance of the French legal framework with the new FATF recommendations on virtual assets. They could thus have a direct influence on the report that the French Government is due to submit to Parliament by the end of the year on the need to reform the current framework on AML/CFT applicable to providers of services on digital assets (Article 86 of France's Loi Pacte No. 2019-486 of 22 May 2019).

---

[1] FATF, 12-Month review of the revised FATF standards on virtual assets and virtual asset service providers, June 2020 : https://www.fatf-gafi.org/publications/fatfrecommendations/documents/12-month-review-virtual-assets-vasps.html; FATF, Report to the G20 Finance Ministers and Central Bank Governors, June 2020 : https://www.fatf-gafi.org/media/fatf/documents/recommendations/Virtual-Assets-FATF-Report-G20-So-Called-Stablecoins.pdf..

[2] "FATF Recommandations ", updated in June 2019.
[3] Guidance for a risk-based approach to virtual assets and virtual asset service providers, June 2019.
[4] In virtual asset transfers, the originator service provider and the beneficiary service provider must both have accurate information on the originator and the beneficiary of the asset transfer.
[5] European Commission and European Council, Joint statement by the Council and the Commission on "stablecoins", 5 December 2019.
[6] CSF, Addressing the regulatory, supervisory and oversight challenges raised by “global stablecoin” arrangements: Consultative document, April 2020; CSF, Regulatory issues on stablecoins, October 2019.
[7] See in particular: European Commission, Communication from the Commission on an Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing, 7 May 2020; European Commission, Public consultation on an action plan for a comprehensive Union policy on preventing money laundering and terrorist financing, 7 May 2020; European Commission, Towards a new comprehensive approach to preventing and combating money laundering and terrorism financing, 12 February 2020.

SKRINE

High Court issues key judgment for aviation service providers

03 July 2020

In July 2019, the Kuala Lumpur High Court awarded summary judgment for a combined sum exceeding RM40 million for unpaid passenger service charges in the three civil suits brought by Malaysia Airports (Sepang) Sdn Bhd ("MA Sepang") against AirAsia Berhad and AirAsia X Berhad (collectively, "AirAsia").[1]

The recently released written grounds of judgment for this matter has provided welcome clarification on several important issues for providers of aviation services.

Facts

The civil suits were filed after AirAsia had refused to collect from its passengers and pay to MA Sepang the newly revised passenger service charges for long haul flights from klia2 which had been increased and gazetted by the nation's economic aviation regulator, the Malaysian Aviation Commission ("MAVCOM"), pursuant to its powers under the Malaysian Aviation Commission Act 2015 ("MAVCOM Act"). This non-payment was mainly due to AirAsia's contention that the revised charge merely represented a ceiling rate and that the applicable rate should be determined in accordance with the level of services and facilities at each airport.

Further, AirAsia had applied to strike out the civils suits on the basis that the matter ought to be determined pursuant to the dispute resolution mechanism prescribed under Part XI of the MAVCOM Act, which stipulates that any dispute between two or more aviation service providers regarding any matter under the MAVCOM Act must first be resolved through mediation, failing which MAVCOM will commence to decide on the dispute.

The dispute resolution mechanism under the MAVCOM Act cannot be used as a backdoor to challenge the regulator's decisions

The core issue of these civil suits was regarding the imposition of the newly increased rate of passenger service charges. The High Court determined that in actuality this was not really a dispute between AirAsia and MA Sepang, but instead was a dispute between AirAsia and MAVCOM itself, given that it was the regulator which had determined the increased rate. MA Sepang had simply been seeking to collect from AirAsia the revised statutory rate prescribed by MAVCOM. As such, the dispute resolution mechanism under Part XI the MAVCOM Act was not applicable to the present case.

The High Court stated that if AirAsia had disagreed with the increased passenger service charge, then AirAsia should have applied for a judicial review against MAVCOM's decision to raise the rate. Given that AirAsia was far beyond the prescribed three-month time limit to launch such an application, the High Court held that AirAsia could not attempt to use the Part XI dispute resolution mechanism as a backdoor opportunity to bring this issue before MAVCOM and challenge the regulator's decision.

The relevant portions of the judgment are produced below:

"[48] If indeed the Defendant genuinely disputes the imposition of the increased PSC rate, then the Defendant should have mounted a challenge against the statutory decision laid down by the Commission and not vex the Plaintiff who is merely enforcing what is statutorily incumbent upon the Plaintiff to claim. …Instead of faulting the Plaintiff for allegedly failing to adhere to the Mavcom Act's dispute resolution mechanism, the Defendant should have accordingly moved its own initiative to challenge the Commission's decision. This court is in full agreement with the Plaintiff's counsel that the Defendant should have move for Judicial Review against the Commission's statutory decision years ago when the Increased PSC Rate was coined to be applicable. But even years afterwards, this is exactly what the Defendant has failed or outright refused to do."

…

"[52] …the Defendant ought not to be allowed to abuse the present proceeding as a backdoor Judicial Review against the Commission's statutory decisions…"

The power to determine the prevailing rate of passenger service charges lies solely with MAVCOM

The High Court determined that the sole body which is empowered to determine the applicable passenger service charge rate is MAVCOM. Further, the High Court stressed that aviation service providers cannot negotiate or opt-out from the rates prescribed by MAVCOM.

The relevant portion of the judgment is produced below:

"[72] …It must be stressed that neither the Plaintiff nor the Defendant can simply agree to opt out of the New PSC Rate set by the Commission. Even if both the Plaintiff and the Defendant are in agreement to dispute the New PSC Rate, such agreement can never override a statutory decision by the Commission."

The specified rate for passenger service charges is a fixed rate

The High Court stated in no uncertain terms that the passenger service charge rate prescribed by MAVCOM was indeed a fixed rate, rather than a ceiling rate.

The relevant portions of the judgment are produced below:

"[60] It is immensely clear as specified under the Second Schedule of the Present ASC…is set at RM67. This Court fully agrees with the Plaintiff's counsel that there is nothing whatsoever in the Second Schedule to suggest or imply that RM67 is a ceiling rate."

"[61] There is no necessity at all for this Court to examine beyond the clear, precise, plain and ordinary meaning of the words of the Present ASC. This Court has no difficulty in concluding that the rate stipulated in the Second Schedule of the Present ASC is a fixed rate. If indeed the

Commission has intended of such allowance to negotiate a 'ceiling rate' then the Commission would have included such an allowance."

The Airport Conditions of Use are valid and enforceable

The use of almost every airport in Malaysia by aircraft operators and ground handlers is governed by a contract known as the Conditions of Use, which was first introduced in 2010 and has since been amended on a few occasions. Similarly to the Conditions of Use for other airports around the world, such as London Heathrow Airport, Singapore Changi Airport and Dubai International Airport, the Conditions of Use in Malaysia do not need to be signed by each individual aircraft operator and ground handler. Instead, the terms of the Conditions of Use are deemed binding on such parties upon their use of the airport's services and facilities. MA Sepang's Conditions of Use for KLIA and klia2 specifies that the applicable passenger service charge rate for aircraft operators will reflect any revisions made by MAVCOM.

The High Court determined that the statutory passenger service charge rate, as determined by MAVCOM, remains enforceable regardless of an aircraft operator's acceptance of the Conditions of Use. However, the High Court went on to add that AirAsia's conduct throughout the years, including *inter alia* its uncontested and continued usage of the airport's services and facilities, showed an unequivocal acceptance of the Conditions and Use and consequently AirAsia was estopped from denying the applicability and enforceability of the terms therein.

The relevant portions of the judgment are produced below:

"[84] Thus, as the PSC rate is prescribed by law, the Defendant's obligation to pay the New PSC Rate to the Plaintiff remains enforceable regardless of whether the Defendant has agreed to the COUs or not."

"[85] Furthermore, it is severely unjust for the Defendant to now claim that it has never agreed to the COUs, while on the extreme contrary, all their conducts throughout the years have clearly indicated unequivocal adherence, acceptance, and enforcement of the COUs."

…

"[90] Thus, with all of the above in mind, the Defendant here clearly ought to be estopped from denying the validity and enforceability of the terms of the COUs."

Comment

The grounds of judgment serve as a timely reminder for providers of aviation services to commence any challenge against a contested decision from MAVCOM by way of judicial review proceedings within the prescribed three-month period. The High Court has made it clear that the dispute resolution mechanism under Part XI of the MAVCOM Act cannot be used as alternative avenue to scrutinise and dispute decisions made by MAVCOM, even if said dispute is framed as being against another aviation service provider.

The High Court's decision regarding the non-negotiability and fixed rate nature of the passenger service charges may also extend to the other aviation service charges regulated by MAVCOM under the *Malaysian Aviation Commission (Aviation Services Charges) Regulations 2016*. These include landing charges, security charges, housing charges and parking charges.

The plaintiff was represented by our Partner Shannon Rajan and our Associate Eric Gabriel Gomez.

---

[1] **https://www.theedgemarkets.com/article/airasia-pay-least-rm406m-mahb-unit**

www.skrine.com

July, 2020

The Mexican Ministry of Finance and Public Credit adds a twelfth transitory provision to the general provisions on anti-money laundering applicable to insurance companies

On July 3, 2020, the Mexican Ministry of Finance and Public Credit published in the Mexican Official Gazette of the Federation (the "Gazette") an administrative ruling (the "Ruling"), by which a Twelfth Transitory Provision is added to the General provisions referred to in article 140 of the General Insurance Institutions and Mutual Companies Law (the "Provisions"), in connection with Article 492 of the Insurance and Surety Institutions Law.

Under the Twelfth Transitory Provision, insurers are permitted for six months (counted from the day following the publication of the Ruling) to abstain from verifying the identity of their clients and beneficiaries at the time they appear to exercise their rights or request payment of funds, provided payments are made through:

a. Transfer to the client's or beneficiary's bank account; or

b. A check issued to the customer or the beneficiary for deposit in their corresponding own bank account.

Please feel free to reach us to more fully address any particular concern you may have as a result of the above situation.

Mexico City Office: **Mr. Carlos Olvera F., colvera@s-s.mx (Partner)**
Mr. Roberto Fernández del Valle M., rfernandez@s-s.mx (Partner)
Phone: (+52 55) 5279-5400

Monterrey Office: **Mr. Francisco Torres G., ftorres@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

Registration of UBOs in the Netherlands as of 27 September 2020

08-07-2020

From 27 September 2020, Dutch legal entities will be obliged to register their ultimate beneficial owners (UBOs) with the UBO register. Existing Dutch entities are subject to a registration period of 18 months (i.e. until the end of March 2022). New Dutch entities incorporated as of 27 September 2020 will be obliged to register their UBOs when they first register with the trade register. This overview (url: https://www.e-nautadutilh.com/40/4089/uploads/ubo-register-who-is-ubo.pdf)sets out which entities are obliged to register their UBOs and who shall be regarded as UBOs. Our newsletter of 23 June 2020 (url: https://www.e-nautadutilh.com/40/4089/landing-pages/dutch-ubo-register-coming-soon.asp?sid=f142aa2a-f5c9-4185-9709-15f57f84804b) contains further information about the UBO register.

Written by

Netherlands

Maarten Buma (url: /en/our-people/buma-maarten)
Partner

Marianne de Waard - Preller (url: /en/our-people/waard-preller-marianne)
Partner

Suzanne Rutten (url: /en/our-people/rutten-suzanne)
Professional Support Lawyer

Expertises

Corporate / M&A (url: /en/our-expertise/services/corporate-ma)

The act will enter into force in stages:

- From 8 July 2020, all Dutch legal entities will be obliged to obtain information about their UBOs. Foundations are also obliged to keep an internal register of distributions.
- From 27 September 2020, the above obligation to register UBO's will become effective.
- On a date yet to be determined, rules will enter into force relating to the identification of persons who consult the UBO register and providing UBOs with insight into the number of times their information has been provided to third parties other than government parties.

We expect that in the near future more will be known about the way in which the registration of UBOs can take place (e.g. forms and guidance issued by the trade register).

Simpson Grierson

July 01, 2020

Financial services regulation (/resources/financial-services-regulation)

Keep up-to-date with the key developments affecting the financial services sector.

Key areas this month are:

Privacy

The new Privacy Act 2020 has been enacted. It will come into force on 1 December 2020.

Credit

The Farm Debt Mediation Act 2019 is now fully in force. Separately, the Commerce Commission has published the final "fit and proper" criteria for directors and senior managers of consumer creditors.

Financial advisers

The start date for the new financial regime has been set at 15 March 2021. The new regime's disclosure requirements have been prescribed. The FMA is consulting on the standard conditions for full licenses.

Overseas investment

The Overseas Investment Act 2005 and Regulations have been amended in several respects, to manage the risks posed by Covid 19's economic fallout.

Unclaimed money

A new tax Bill will overhaul the Unclaimed Money Act 1971. The period before money is "unclaimed" will be shorter, physical registers will not be required, and it will be easier for Inland Revenue to find owners.

Competition

The Government has announced its decisions on changes to the Commerce Act 1986. These include changes to section 36, which relates to the misuse of market power.

For a full copy of this month's update, please register on our law guides page here (http://www.simpsongrierson.com/lawguides#).

Insight Briefing:

Philippine Legislation in the Pipeline: Can They "De-contract" the Economy?

13 June 2020

Analysts predict that the Philippine economy may contract by as high as 9% in the second quarter of 2020. The country's financial managers and some policymakers are asking that Congress prioritize some key bills -- the *Corporate Recovery and Tax Incentives for Enterprises Act* (CREATE), the *Digital Economy Taxation Act*, and *An Act Ensuring Philippine Financial Industry Resiliency Against the COVID-19 Pandemic* – in the hope that these measures can address the impact of the pandemic on business and the economy.

This briefing notes the status and highlights of these bills, as well as a look at a COVID relief measure for small and medium enterprises.

A. Corporate Recovery and Tax Incentives for Enterprises Act (CREATE)[1]

B. Digital Economy Taxation Act of 2020[2]

C. Financial Institutions Strategic Transfer Act[3]

D. Aid to Micro, Small, and Medium Enterprises

[1] House Bill No. 4157 (http://www.congress.gov.ph/legisdocs/third_18/HBT4157.pdf; last accessed on June 12, 2020, 4 PM) was approved by the House of Representatives on September 13, 2019 and was transmitted on September 16, 2019 to the Senate. Senate Bill No. 1357 (https://www.senate.gov.ph/lisdata/3236229216!.pdf; last accessed on June 12, 2020, 4 PM), as of February 18, 2020, is "[p]ending Second Reading, Special Order."
[2] House Bill No. 6765 (http://www.congress.gov.ph/legisdocs/basic_18/HB06765.pdf; last accessed on June 12, 2020, 4 PM), as of May 20, 2020, is "[p]ending with the Committee on Ways and Means."
[3] House Bill No. 6816 (http://www.congress.gov.ph/legisdocs/third_18/HBT6816.pdf; last accessed on June 12, 2020, 4 PM) was approved on June 2, 2020 by the House of Representatives on third and final reading, and was transmitted on June 3, 2020 to the Senate.

A. Can CREATE Create New Jobs, New Business, More Opportunities?

In response to the COVID-19 pandemic and as part of government's economic recovery program, the *Corporate Income Tax and Incentives Reform Act* (CITIRA) passed by the House of Representatives in September 2019 was repurposed into the *Corporate Recovery and Tax Incentives for Enterprises Act* (CREATE) in an effort to make it more relevant and responsive to the needs of businesses for the current situation. CREATE is now pending with the Senate Ways and Means committee as a substitute bill.

CREATE introduces the following changes to CITIRA:

1. an outright five percent (5%) reduction in the corporate income tax (CIT) rate starting July 2020, and a one percent (1%) point reduction from 2023 until the CIT rate reaches 20% in 2027 (The CITIRA proposed a gradual reduction of only one percent (1%) over 10 years starting in 2020 until 2029.);

2. an extension of the applicability of the net operating loss carryover (NOLCO) for losses incurred in 2020 by non-large taxpayers, from the current three (3) to five (5) years (The CITIRA did not amend the NOLCO provision.);

3. a lengthened maximum sunset period for registered business activities enjoying the 5% gross income earned (GIE) incentive under special laws, from two (2) to seven (7) years in the previous version, to four (4) to nine (9) years (The CITIRA had a shorter maximum sunset period.); and

4. a more flexible mechanism in granting fiscal and non-fiscal incentives by giving the President the power to grant "beefier" tax and non-tax incentives for investments, upon recommendation by the Fiscal Incentives Review Board. (The CITIRA did not provide such power to the President.)

Proponents hope that the redesigned CITIRA, now CREATE, will help revive the Philippine economy post-pandemic.

However, even as CREATE's 5% CIT reduction and other improved set of tax incentives are designed to stimulate the economy, they can also be revenue-eroding measures. Tax revenues foregone from the 5% percent point cut in CIT alone are estimated to be at P42 billion in 2020 and P625 billion more over the next five years. Given the significant amount of lost revenues by way of tax, the government is likely to turn to new sources to tax as it waits for tax reductions and incentive-giving to result in new investments and the building up of business.

B. Taxing the Digital Economy

With CREATE having a tax reduction effect, there is definitely interest in making up revenue loss in some way. On May 19, 2020, Representative Jose Maria Salceda filed House Bill (HB) No. 6765, dubbed as the "*Digital Economy Taxation Act of 2020*" or DETA, to help raise funds needed by the government for its COVID-19 response. HB No. 6765 has been pending with the Committee on Ways and Means since its filing, while the Department of Finance studies the said digital tax reform.

According to its proponents, DETA is estimated to generate P29.1 billion annually in incremental revenues by specifically subjecting to income tax and value-added tax (VAT) both local and cross-border digital transactions. DETA amends the following provisions of the Tax Code:

1. Section 57 (on withholding of tax at source), by making a “network orchestrator” -- a person who creates a network of accredited service providers and service consumers and acts as an intermediary -- a withholding tax agent of the income of its service providers;

2. Sections 105 and 108, by imposing VAT on services rendered electronically in the ordinary course of trade or business, such as digital advertising services, subscription-based services, and any other supply of services that can be delivered through an information infrastructure such as the Internet, either by a resident or nonresident person; and

3. Section 114 (on withholding of VAT). by making a network orchestrator or an electronic commerce platform a withholding agent of the VAT imposed in (2) above.

If DETA is passed, “network orchestrators” will be constituted as withholding agents and mandated to withhold income tax and VAT, as applicable, on fees earned by its accredited services providers.

Further, while the DETA did not amend the situs rules of the Tax Code, it requires nonresident network orchestrators or electronic commerce platforms, and nonresident suppliers of digital services, to be “domiciled” in the Philippines. They are allowed to render digital services in the Philippines only through a resident representative office or agent, presumably to make them easier to tax. This triggers legal issues outside of tax -- for example, would this result in nonresidents not just being made subject to this tax regime, but to other local laws, including those on nationality restrictions and on licensing? Such a result may make cross-border digital transactions untenable. Even as policymakers seek new streams of tax revenue, the idea is to keep the source of that revenue robust; creating regulatory uncertainty as a by-product of the proposed tax measure may have the opposite effect.

C. Banking on the Financial Institutions Strategic Transfer (FIST) Act

House Bill No. 6816, or “*An Act Ensuring Philippine Financial Industry Resiliency Against the COVID-19 Pandemic*,” seeks to assist banks and financial institutions (FIs) deal with the adverse effects of the COVID-19 pandemic by providing a legal framework for the full transfer of their bad loans and assets, allowing them to clean their books and re-channeling their resources to improve liquidity in the financial system.

The main mechanism under the bill is to allow for the establishment of special purpose corporations, known as Financial Institutions Strategic Transfer Corporations (FISTC), and the proposed law then provides tax and other incentives for the transfer of non-performing assets (NPAs) to and from these FISTCs.

The bill intends to repeal the *Special Purpose Vehicle Act of 2002*[4] (SPV Act). The SPV Act was passed to help banks dispose of their NPAs in the aftermath of the Asian financial crisis by providing a legal framework for this purpose and granting fiscal incentives. However, banks have stopped setting up SPVs under the SPV Act because transactions are no longer entitled to incentives. The law provides limited periods for transfers to or by SPVs to qualify for incentives and these periods have now expired. The proposed measure is essentially the same as the SPV Act in terms of the creation and powers of the special purpose company, the conditions for the disposition of NPAs, and the incentives given at the various stages of the contemplated transactions. SPVs created under the SPV Act may avail of the incentives granted under the proposed law, subject to certain requirements.

The salient features of the proposed FIST Act include the following:

1. A FISTC must be a stock corporation with the power to invest in, or acquire NPAs of FIs and to engage third parties to manage, operate, collect and dispose of NPAs acquired from FIs, among other powers. It must be established within 24 months from the effectiveness of the regulations implementing the law or the applicable revenue regulations, whichever comes later. This period can be extended for another 24 months.

2. The transfer of NPAs from an FI to an FISTC, and from an FISTC to a third party, or a dation in payment by the borrower or by a third party in favor of an FI or an FISTC, is exempt from the following taxes, when applicable: (a) documentary stamp tax; (b) capital gains tax on the sale of certain capital assets, or creditable withholding tax on the income from the sale of ordinary assets; and (c) VAT.

   These transfers are also subject to reduced fees on the following: (a) registration and transfer fees on the transfer of real estate mortgage and security interest to and from the FISTC; (b) filing fees for any foreclosure initiated by the FISTC in relation to any NPA acquired from an FI; and (c) land registration fees.

   The incentives are time bound. For example, transfers of NPAs from FIs to an FISTC must be done with two years from effectiveness of the implementing regulations or the revenue regulations, whichever comes later, while transfers from a FISTC to third parties are given a five-year window from the acquisition of NPAs to dispose of the same with incentives. These periods may be extended for the same number of years.

3. The bill also gives tax exemptions and privileges to FISTCs, including exemption from income tax, documentary stamp tax, and mortgage registration fees on certain new loans. FISTCs are also exempt from documentary stamp tax in case of capital infusion to a borrower with non-performing loans.

As the bill mirrors the provisions of the SPV Act, it remains to be seen if this measure will be more effective than its predecessor in addressing the problems of the financial sector with non-performing assets. One provision of the bill that may provide relief to FIs and FISTCs is the prohibition on injunctive reliefs against certain transfers of assets involving FISTCs and participating FIs. This provision was not in the SPV Act.

[4] Republic Act No. 9182.

Another factor that favors this new measure is that it will operate under a different insolvency regime, the *Financial Rehabilitation and Insolvency Act*, which allows more options for, and expedites, the rehabilitation of distressed companies. The SPV Act operated under the Insolvency Act, an archaic legal framework that was passed in 1909. The bill clarifies that non-Philippine nationals can participate in the foreclosure sale of real properties and possess the same for five years.

Similar to the SPV Act, the period to establish a FISTC and the incentives provided under the bill remain time-bound. FIs may see this as a negative feature of the law, given the slow judicial processes in the country and the various approval and regulatory requirements to set up and operate a FISTC and to transfer assets.

D. In the Meantime: Aid to Micro, Small, and Medium Enterprises

The government has put in place measures to aid micro, small and medium enterprises (MSMEs) in addressing the economic impact of COVID-19.

1. Under *Republic* Act *No. 11469*,[5] or the *Bayanihan to Heal as One Act* (Bayanihan Act), MSMEs have been granted mandatory grace periods on the payment of loans falling due within the enhanced community quarantine (ECQ) period.[6] In particular, the implementing rules of the Bayanihan Act provide that covered institutions shall not apply interest on interests, fees, and charges during the 30-day grace period to the future payments or amortizations of MSMEs.[7]

2. Under Memorandum Circular No. 20-12[8] dated April 4, 2020 issued by the Department of Trade and Industry (DTI), MSMEs that temporarily ceased operations during the ECQ period have been given a minimum 30-day grace period on the payment of rent, without any interest, penalties, fees and charges.[9] The benefit of the grace period was extended by the DTI to businesses that are not permitted to operate during ECQ, modified ECQ (MECQ) and general community quarantine (GCQ).[10] The DTI also clarified that the mandatory grace period applies to rentals that became due during ECQ, MECQ and GCQ.[11]

[5] https://www.officialgazette.gov.ph/2020/03/24/republic-act-no-11469/#_blank; last accessed on June 13, 1 PM.
[6] Republic Act No. 11469, Section 4(aa).
[7] Implementing Rules and Regulations of Republic Act No. 11469, Section 3.02.
[8] https://dtiwebfiles.s3-ap-southeast-1.amazonaws.com/COVID19Resources/COVID-19+Advisories/040420_MC2012.pdf; last accessed on June 13, 12:30 PM.
[9] DTI Memorandum Circular No. 20-12 dated April 4, 2020, Section 3.2.
[10] See DTI Memorandum Circular No. 20-29 dated June 2, 2020 (https://dtiwebfiles.s3-ap-southeast-1.amazonaws.com/COVID19Resources/COVID-19+Advisories/020620_MC2029.pdf; last accessed on June 13, 12:30 PM).
[11] See DTI Memorandum Circular No. 20-31 dated June 4, 2020 (https://dtiwebfiles.s3-ap-southeast-1.amazonaws.com/COVID19Resources/COVID-19+Advisories/060620_MC2031.pdf; last accessed on June 13, 12:30 PM.)

3. The government intends set up a PHP 1 billion Enterprise Rehabilitation Financing (ERF) Facility under the *Pondo sa Pagbabago at Pag-asenso* (P3)[12] for MSMEs, which shall be implemented after the community quarantine is lifted.[13] Specifically --

   a. The ERF loan fund will be available for micro and small enterprises with at least one year of continuous operation prior to March 2020, and whose businesses suffered drastic reduction in sales.

   b. The loan amount will depend on an enterprise's asset size. An enterprise with an asset size of (i) not more than PHP 3 million will be allowed to borrow between PHP10,000 to PHP200,000, and (ii) not more than PHP 10 million will be allowed to borrow up to PHP500,000.

   c. The loan shall be used to help stabilize or recover from losses, such as (i) updating loan amortizations of the business, (ii) inventory replacement for perishable stocks damaged, or (iii) restarting the business through a working capital replacement.

   d. The interest rate shall be at 0.5% per month (discounted basis), with grace periods for payments until the economic crisis has abated.[14]

   e. The ERF shall be run by the Small Business Corporation (SBC), which is a government financial institution under the DTI. The SBC was created through the *Magna Carta for MSMEs*[15] and is primarily responsible for the implementation of comprehensive policies to aid MSMEs in all areas, including finance and information services, training and marketing.[16]

For more information about the matters covered by this briefing, please contact any the following:

Carina C. Laforteza
Partner
Head of the Tax Department
cclaforteza@syciplaw.com

Vicente D. Gerochi IV
Partner
Head of the Banking, Finance and Securities Department
vdgerochi@syciplaw.com

John Christian Joy C. Regalado
Partner
jcaregalado@syciplaw.com

Ma. Patricia B. Paz
Partner
mpbpaz@syciplaw.com

[12] P3 is a loan program wherein enterprises with an asset size not exceeding PHP 3 million may avail of loans without any service charge and with an interest of not exceeding 1.5% per annum; https://www.sbgfc.org.ph/programs-and-services/p3-program; last accessed May 1, 2020, 8:26 PM
[13] SB Corporation Opens P1B Loan Facility for MSMEs Affected by COVID 19; https://www.sbgfc.org.ph/news/sb-corporation-opens-p1b-loan-facility-msmes-affected-covid-19; last accessed on April 30, 2020, 10:38 AM.
[14] SB Corporation Opens P1B Loan Facility for MSMEs Affected by COVID 19; https://www.sbgfc.org.ph/news/sb-corporation-opens-p1b-loan-facility-msmes-affected-covid-19; last accessed on April 30, 2020, 10:38 AM.
[15] https://www.officialgazette.gov.ph/2008/05/23/republic-act-no-9501/; last accessed on June 13, 1 PM.
[16] Magna Carta for MSMEs, Section 11.

Other bulletins and briefings

We have prepared COVID-19 related bulletins and briefings. The links to those materials are here.

Please note that there are other issuances which are not covered by our bulletins and briefings. For more information about other regulations, please contact your account partner or sshg@syciplaw.com; info@syciplaw.com.

SyCip Salazar Hernandez & Gatmaitan
SyCipLaw Center, 105 Paseo de Roxas
Makati City 1226, The Philippines
t: +632 8982 3500; +632 8982 3600; +632 8982 3700
f: +632 8817 3145; +632 8817 3896
e: sshg@syciplaw.com
www.syciplaw.com

Tax Update: Singapore and Indonesia Sign Updated Double Tax Treaty

DENTONS RODYK

April 27, 2020

On 4 February 2020, the respective Governments of Singapore and Indonesia signed an updated avoidance of double taxation agreement (DTA), bringing to fruition nearly five years of bilateral negotiations to update the DTA for the first time since 1992. The updated DTA will enter into force upon its ratification by both countries.

In this article, we provide key updates relevant to businesses and individuals.

New Article 13 on Capital Gains

One of the more significant updates is the introduction of Article 13 in the updated DTA, which provides for the taxation of capital gains. Article 13 is largely in line with the 2017 OECD Model Tax Convention (the OECD Model).

Capital gains are not presently included within the scope of the existing DTA. Under domestic tax laws in Indonesia, a Singapore resident deriving capital gains from the sale of Indonesian assets would be subject to Indonesian capital gains tax on a deemed basis of 5% of the transaction value.

The new Article 13 is a noteworthy addition to the DTA. It essentially provides that capital gains arising from disposals of immovable property and movable business property will be taxed in the State where such property is situated. On the other hand, capital gains from disposals of shares will be taxed in the State of residence of such person disposing of the shares, subject to certain exceptions. In other words, a Singapore resident disposing of Indonesian shares under certain circumstances would avail an exemption from Indonesian capital gains tax under Article 13 of the updated DTA.

Withholding Tax

Notably, the updated DTA introduces lower withholding tax rates for royalties under Article 12.

The maximum withholding tax rate for royalties will be lowered from the existing rate of 15% to the new rates of either 10% or 8%, depending on the type of royalty income, as follows:

a. **10%**, for the use of or the right to copyright of literary, artistic or scientific work including cinematograph films, or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process; and

b. **8%**, for the use of or the right to use, industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience.

For example, pure intellectual property royalties (e.g. licensing of copyright, patents, trade marks) are likely to fall under category (a) above and subject to a maximum withholding tax rate of 10%.

On the other hand, equipment leasing (e.g. aircraft leasing) would generally fall under category (b) above and hence subject to a maximum withholding tax rate of 8%.

The withholding tax rates for interest and dividends under the updated DTA will generally remain unchanged.

New Anti-Tax Avoidance Provisions

To safeguard against the abuse of treaty benefits, the updated DTA also introduces anti-avoidance provisions which are in line with recent updates to the OECD Model contained in the Multilateral Instrument (MLI).

Since 2013, the OECD and G20 Leaders have embarked on a major revamp of international tax rules through the Base Erosion and Profit Shifting (BEPS) Project. The BEPS Project aims to address artificial tax planning, including treaty abuse. In 2016, the MLI was introduced to modify the existing global network of tax treaties to implement treaty-related BEPS measures. Singapore and Indonesia are signatories to the MLI, which entered into force in Singapore on 1 April 2019, but has yet to be ratified by Indonesia.

Nonetheless, we note that the updated DTA contains certain anti-avoidance provisions of the MLI.

For instance, the preamble to the DTA has been modified, in line with the MLI, to set out that the objective of the DTA is to eliminate double taxation "without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this Agreement for the indirect benefit of residents of third jurisdictions)".

A new Article 28 has also been introduced in the updated DTA. Article 28 provides that a party may not avail treaty benefits in respect of an arrangement or transaction where one of the "principal purposes" of the arrangement or transaction was to obtain that benefit. This is a general anti-abuse rule also known as the Principal Purpose Test (PPT), as set out in the MLI.
The PPT is notable. Once Article 28 comes into effect, businesses that are unable to satisfy the PPT may not be entitled to treaty benefits under the updated DTA.

Overall, the new anti-avoidance provisions will place a greater emphasis on the requirement for substance to claim treaty benefits. For example, persons investing in Indonesia using a Singapore holding entity may be required to have substance in Singapore in order to claim treaty benefits. For example, the making of key decisions or management of investments in Singapore may indicate substance in Singapore. Correspondingly, a lack of substance could lead to a higher likelihood of triggering the anti-avoidance provisions.

The concept of substance is not new to Singapore nor Indonesia. Under Singapore's existing tax rules, a Certificate of Residence (COR) must first be obtained from IRAS in order to claim treaty benefits. In this regard, a COR will be granted by IRAS only if the applicant is able to demonstrate that such applicant has substance in Singapore. Similarly, Indonesia has implemented the concept of substance through some tax regulations to interpret tax treaty abuse and also the concept of beneficial ownership since 2009.

Mutual Agreement Procedure

Article 25 of the DTA provides a dispute resolution mechanism regarding the application of the DTA.

The MAP is not a new concept in the existing DTA, and it could even be said that the MAP was ahead of its time when it was originally introduced as a provision in the 1992 DTA. Nonetheless, the wording in Article 25 has been tweaked slightly to align with the OECD Model and MLI.

In recent years, Singapore has improved her dispute resolution capabilities to enhance the effectiveness of the MAP. In March 2018, the OECD published a Stage 1 MAP Peer Review Report, evaluating Singapore's implementation of BEPS measures relating to the resolution of MAP cases. Overall, the Report concludes that Singapore satisfies almost all the elements of the relevant BEPS minimum standard.

Amendments to provisions on Exchange of Information

Finally, Article 26 of the DTA on the exchange of information for tax purposes (EOI) has been brought in alignment with the OECD Model and international tax developments. This change is in line with the global trend towards transparency.

Both Singapore and Indonesia have endorsed the Convention on Mutual Administrative Assistance in Tax Matters in 2010 and international Standard for Automatic EOI in 2014, which facilitate EOI between countries on request, spontaneously and automatically. In light of these developments, the veil of secrecy, which previously allowed taxpayers to "conceal" their assets offshore, has been lifted, enabling tax authorities to obtain information previously beyond their reach.

In determining whether information may be exchanged, Article 26 will adopt a broader test of "foreseeable relevance" in the OECD Model, in place of the existing test of "necessity". The scope of Article 26 will also be expanded to encompass all information relating to the administration or enforcement of domestic laws concerning all types of taxes, and not merely items covered by the DTA. The updated Article 26 will also restrict the ability of a Contracting State to decline to supply foreseeably relevant information to the other Contracting State, unless any of the exceptions are satisfied.

Common Reporting Standard (CRS)

On a separate but related note, Singapore and Indonesia are signatories of the Multilateral Competent Authority Agreement (MCAA), a multilateral framework agreement for the implementation of the Common Reporting Standard (CRS). The CRS represents a major step in global information exchange, by introducing a single global standard for the automatic exchange of financial account information between over 100 participating jurisdictions.

Singapore and Indonesia have since activated their relationship under the CRS MCAA and conducted their first exchange of information under the CRS in September 2018.

The above changes may affect relevant industry players (e.g. banks and professional trustees) by imposing various obligations to comply with the new exchange of information provisions under the updated DTA, as well as under the CRS.

Conclusion

At present, Singapore ranks as the top foreign investor in Indonesia since 2014. Singapore is often utilised as a holding jurisdiction for investing in Indonesia. The updated Singapore-Indonesia DTA is therefore a welcome development and will attract further investments and trade between both countries.

Dentons Rodyk thanks and acknowledges the Dentons HPRP tax team (Wisaksono Soegandhi and Donny Rahman Geasill), Legal Executive Audrey Thng and Practice Trainee Susheela Chitrasanan for their contributions to this article.

Your Key Contacts

Edmund Leow, SC
Senior Partner, Singapore
D +65 6885 3613
edmund.leow@dentons.com

Al Hakim Hanafiah
Partner, Jakarta
D +62 21 5701837
M +62 816 850744
alhakim.hanafiah@dentons.com

The Telecommunications Management Act Becomes Effective on July 1, 2020

07/01/2020

The Telecommunications Management Act (the "TMA"), which cleared the legislative floor on May 31, 2019, will take effect on July 1, 2020. For the key points of the TMA, please refer to Lee and Li's newsletter, “Legislative Yuan passed the Telecommunications Management Act”, published on June 6, 2019, and “The new era of the telecom industry: discussing the opportunities and challenges after the Telecommunication Management Act passed”, published on August 30, 2019.

After the TMA takes effect on July 1, 2020, other than the Spectrum Supply Plan and Frequency Allocation Schedule, which are still pending before the Ministry of Transportation and Communications, the relevant regulations, including the Regulations Governing the Manufacture, Import and Declaration of Controlled Telecommunications Radio-frequency Devices and the Regulations Governing the Application and Examination of the Establishment of the Public Telecommunications Network, will soon replace the previous corresponding regulations enacted under the Telecommunications Act.

As the TMA significantly liberalizes the regulatory framework under the Telecommunications Act, Type I and Type II telecommunications operators are no longer subject to the mandatory registration requirements under the Telecommunications Act. Instead, the TMA adopts a voluntary registration system (with certain exceptions), where a new market entrant may freely elect whether to apply for the telecommunications business registration with the National Communication Commission (the "NCC"), if it does not need to use certain telecommunications resources, such as radio frequency or telecommunication numbers. According to Article 83 of the TMA, within three years after the TMA becomes effective, the existing Type I and Type II telecommunications operators that have not yet obtained the telecommunication business registrations from the NCC pursuant to the new requirements under the TMA, will continue to be regulated under the Telecommunications Act by the NCC. As a result, the existing Type I telecommunications operators will need to apply with the NCC for the telecommunications business registrations and obtain the required permits within three years following the effective date of the TMA; the existing Type II telecommunications operators may decide whether to obtain the telecommunications business registrations from the NCC pursuant to the TMA depending on their operation needs.

If you would like to know more about the TMA or whether it is advisable for your telecommunication business to be re-registered under the TMA, please do not hesitate to contact the Communications and Media Practice Group of Lee and Li for further discussions.

www.leeandli.com

BAKER BOTTS

Insights

As Congress Negotiates, States Create Immunity for Wider Range of Businesses Facing COVID-related Claims

13 May 2020

Firm Thought Leadership

After immunizing the health care sector and manufacturers of personal protective equipment from certain types of claims arising out of the COVID-19 pandemic, the federal government and several states are contemplating expanding similar protections to a broader swath of businesses. Those in favor argue immunity is needed to avoid further economic harm to businesses and to help jump start an economic recovery. Opponents worry creating immunity will incentivize businesses to be too lax about health, safety, and environmental protocols as stay-at-home orders evolve to allow more personnel to return to the workplace.

But state governments are not waiting for federal action. Some have already enacted legislation to bar or limit liability for COVID-related claims, and still more are considering it:

- Utah enacted S.B. 3007 creating immunity from civil liability for damages or an injury resulting from exposure of an individual to COVID-19 on premises owned or operated by the business or during activity managed by it, except in cases involving recklessness, willful or intentional conduct.
- North Carolina's S.B. 704 is similar, but protects only essential businesses in claims by customers or employees for injuries or death alleged to have been caused as a result of the customer or employee contracting COVID-19 while doing business with or while employed by the essential business. Like Utah, North Carolina's immunity shield does not apply in cases involving gross negligence, reckless misconduct, or intentional infliction of harm.
- Several other states are considering similar measures. In Texas, the Texans Back to Work Task Force has recommended a safe harbor from liability for businesses acting in good faith and following COVID-19 safety protocols. Alabama and Ohio legislatures have proposed immunity, and others appear to be considering it or, alternatively, damages caps on COVID-related claims.

We expect this trend to take hold and produce a patchwork of new defenses to claims arising out of COVID-19 exposure. We anticipate wide variations among the new laws—some will apply only to certain sectors, some may be retroactive, some may limit rather than eliminate liability, and some will explicitly address the effect these measures have on existing workers' compensation and other regulatory regimes.

The legal landscape will continue to shift, albeit at an unpredictable pace, for businesses facing COVID-related claims by customers, employees and contractors. Be aware that many jurisdictions may implement an applicable immunity defense or other protective measure even after a claim arises or is filed. The uncertainty of governmental action on defenses to COVID-19 claims, however, requires businesses to remain vigilant in complying with COVID-19 safety protocols and documenting the good faith reasons the business departs from the protocols.

Practices

Litigation

Health and Safety

General Commercial Litigation

Featured

Coronavirus (COVID-19) Crisis Response Group

Related Professionals

Greg Dillard

Partner

Rebeca A. Huddle

Partner

Jonathan Havens

Senior Associate

BLOG POST / EMPLOYMENT ADVISOR

Employment Counseling

California Ramps-Up Independent Contractor Misclassification Enforcement

By Laura D. Heckathorn and Aaron N. Colby

07.09.20

Classifying a California worker as an independent contractor instead of an employee comes with risk, but the consequences are increasing on several fronts.

Before AB 5 went into effect on January 1, 2020, the classification test depended on the type of claim or worker right at issue – e.g., workplace conduct, unpaid wages, unemployment insurance, workers' compensation insurance. AB 5 means all workers are presumed to be employees unless the employer proves otherwise by using the "ABC test" to determine if a worker may be classified as an independent contractor instead of an employee. AB 5 enables the California attorney general, city attorneys, and local prosecutors to sue companies over violations. See our prior blog posts on AB 5 here.

Recent AB 5 Developments

On July 1, 2020, AB 5 became effective for purposes of workers' compensation coverage. California has taken steps to expand workers' compensation benefits during the pandemic, such as creating a rebuttable presumption that COVID-19 positive essential workers contracted the illness at work. See our prior blog post here.

On June 29, 2020, Governor Newsom signed the Budget Act of 2020, which approved a $21.68 million investment in resources to enforce AB 5. The state budget funds "resources to implement AB 5, including $17.5 million for the Department of Industrial Relations (DIR), $3.4 million for the Employment Development Department (EDD) and $780,000 for the Department of Justice."

The budget does not detail how the funds will be allocated within each agency (or require any specific internal allocation within the agencies). Instead, the budget provides that the funds will be used to enable agencies to "train employees on the employment determination test and to conduct more hearings, investigations, and litigation related to AB 5."

Dozens of new DLSE positions are expected to be added, all of which will focus solely on AB 5 compliance and enforcement. The Division of Workers' Compensation (DWC) is a division of the DIR, and importantly, will directly benefit from the financial boost to step up its prosecution of failure to provide coverage to misclassified workers.

The California Public Utilities Commission (PUC), a regulatory agency which oversees transportation network companies like ride-sharing, sought proof of workers' compensation coverage for drivers. In June, the PUC warned ride-sharing companies that drivers are employees for workers' compensation insurance purpose, based on AB 5's July 1, 2020, effective date. PUC threatened suspension of the ride sharing companies' ability to provide services in the state.

PAGA Liability Under AB 5

In addition to agency enforcement of AB 5 boosted by a financial push from the state, California employers can also expect related claims directly from workers. For example, the Private Attorney General Act (PAGA), which provides for civil penalties for violations of the Labor Code on a representative basis – e.g., on behalf of all similarly situated California employees. PAGA creates enormous penalties in large part because Labor Code violations can be stacked such that individuals can bring claims for multiple perceived wrongs, including misclassification under AB 5 and failure to provide workers' compensation coverage.

As California employers navigate a new normal, they can expect sustained and increased scrutiny of worker classification from state agencies and both public and private litigants. AB 5 is here to stay, until and unless the November 2020 ballot measure is successful in repealing the law.

07.10.20

BLOG POST

COVID-19

Labor and Employment Group

CLIENT ALERT

June 12, 2020

NO GOOD DEED GOES UNPUNISHED – DON'T TRY TO PROTECT HIGH RISK EMPLOYEES BY SUMMARILY BARRING THEM FROM THE WORKPLACE

♦♦♦♦

The Equal Employment Opportunity Commission (EEOC) this week underscored the need for employers to be very cautious about action taken to protect employees who are at higher risk of severe illness from COVID-19. Even if an employer acts with a benevolent purpose, such actions may well be unlawful.

The Centers for Disease Control and Prevention (CDC) advises that older adults and people of any age who have serious underlying medical conditions may be at higher risk for severe illness from COVID-19. The CDC advises that this higher risk group includes people who are age 65 or older. The higher risk group also includes people of any age who have a serious underlying medical condition, particularly if not well controlled. The CDC includes in this group:

- People with chronic lung disease or moderate to severe asthma,
- People who have serious heart conditions,
- People who are immunocompromised, which may be caused by many conditions such as cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications,
- People with severe obesity (BMI of 40 or higher),
- People with diabetes,
- People with chronic kidney disease undergoing dialysis, and
- People with liver disease.

While pregnant people are not included on this list, the CDC notes that pregnant people are at greater risk from other respiratory viruses than people who are not pregnant and advises that pregnant people be mindful about reducing their risk of getting sick.

As businesses begin to reopen in Hawaii and across the nation, employers may seek to protect employees who fall within the higher risk group, including pregnant employees, by excluding them from the workplace. While the CDC does encourage employers with higher risk employees to protect them by *supporting and encouraging* options to telework as it recommends that higher risk employees shelter in place during steps 1 and 2 of reopening, *it does not advise employers to exclude such employees from the workplace*.

On June 11th, the EEOC supplemented its Guidance on COVID-19 to make it clear that it is unlawful sex discrimination for an employer to involuntarily exclude an employee from the workplace due to pregnancy. Similarly, the EEOC indicates that it is unlawful age discrimination to involuntarily exclude an employee age 65 or older from the workplace. A benevolent purpose, such as protection of higher risk employees, will not be a defense to such claims.

For employees with underlying medical conditions, the EEOC has also made it clear that such employees should not be excluded from the workplace solely because they have a disability that puts them at higher risk for severe illness from COVID-19. And this is where it gets complicated.

The Americans with Disabilities Act (ADA) may allow an employer to take such action if the employee poses a direct threat to their own health that cannot be eliminated or reduced by a reasonable accommodation. Proving a direct threat is challenging as a "direct threat" is a significant risk of substantial harm that must be determined on an individualized assessment based upon reasonable medical judgment about the individual's disability. The fact that the employee's condition is on the CDC's list is not enough. Even if a direct threat is present, then the reasonable accommodation process with an interactive dialogue needs to take place. Without question, the direct threat assessment and reasonable accommodation process will be an extensive undertaking.

Bottom line, don't involuntarily exclude pregnant employees and employees who are age 65 or older from the workplace due to their higher risk for severe illness from COVID-19. And for those employees with underlying medical conditions that place them at higher risk, proceed with great caution. Knowledgeable experts such as your employment counsel can assist in guiding you through this difficult assessment.

♦♦♦♦

This **Client Alert** was prepared by Barbara Petrus (bpetrus@goodsill.com or (808) 547-5792) of Goodsill's Labor and Employment Group.

Second Circuit confirms: No discovery for private international arbitrations

10 July 2020

The Second Circuit confirmed this week that within the circuit, parties may not ask federal courts to order discovery for use in private arbitrations. The Second Circuit's ruling, *In re Application and Petition of Hanwei Guo*, No. 19-781 (2d Cir. July 8, 2020), confirms an existing split with the Fourth and Sixth Circuits, which allow such discovery, and means it will be harder for parties in private arbitrations to obtain evidence from people and companies residing within the Second Circuit[1]. This decision will have far-reaching consequences considering the number of companies headquartered within the Second Circuit and particularly in New York.

> Read the full article online www.hoganlovells.com

Contacts

Oliver (Ollie) J. Armas
Partner

Kieron O'Callaghan
Partner

Cate Stetson
Partner

Catherine Bratic
Senior Associate

Irina Goga
Associate