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June 2020 e-Bulletin

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68th International Conference - New Zealand Hosted by Simpson Grierson TBA
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70th International Conference - Paris Hosted by GIDE TBA

Coronavirus
COVID-19

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

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

http://www.prac.org/member_publications.php

MEMBER DEALS MAKING NEWS

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HOGAN LOVELLS APPOINTS NEW BOARD MEMBERS

LONDON and WASHINGTON, D.C.- 01 June 2020: Hogan Lovells has elected or re-elected the following four partners to serve on its Board –Joaquín Ruiz Echauri, Celine Jimenez Crowson, Bruce Oakley and Mahvesh Qureshi. Board members can serve up to two terms, each lasting three years.

- Joaquín Ruiz Echauri has been re-elected to the Continental Europe seat
- Celine Jimenez Crowson has been elected to The Americas seat
- Bruce D. Oakley has been elected to the U.S. (except DC) seat
- Mahvesh Qureshi has been elected to the 45 and under seat

The Hogan Lovells Board comprises 12 members and supervises the affairs of the firm and its management on behalf of the partners. Many partner related matters, such as partner compensation, opening of offices, appointment of new partners and a number of financial decisions require approval by the Board. The Board does not, however, have executive responsibility for strategy, management or operating decisions which are vested with the CEO and the IMC. Membership of the Board is designed to reflect the broad scope of the business, with members drawn from a variety of geographic and other backgrounds.

Biographical details on new Board members can be found here: https://www.hoganlovells.com/en/news/hogan-lovells-appoints-new-board-members

The Board will now comprise:

Chair (and “At Large”):	Leopold von Gerlach
CEO:	Steve Immelt (From 1 July, Miguel Zaldivar)
Asia Pacific Middle East:	Owen Chan
Continental Europe:	Joaquín Ruiz Echauri
Washington, D.C. area:	Cate Stetson
London:	Adrian Walker
The Americas:	Celine Jimenez Crowson
U.S. (except D.C.):	Richard Lorenzo (From 1 July, Bruce D. Oakley)
45 and under:	Mahvesh Qureshi
“At Large” representatives:	Karen Hughes, Clay James, Phoebe Wilkinson

Chair Leo von Gerlach said: "I'd like to welcome Celine and Mahvesh as new members of the Board, congratulate Bruce on his new seat on the Board, and Joaquín on his re-election to the Continental Europe seat. I also offer my thanks and gratitude to Richard Lorenzo, who has served on the board since 2018, and Ben Higson, who served on the board since 2014."

For additional information visit www.hoganlovells.com

NAUTA DUTILH REAPPOINTS BOARD FOR A NEW TWE-YEAR TERMOGAN LOVELLS APPOINTS NEW BOARD MEMBERS

Nauta Dutilh committed to continuity and a long-term focus

AMSTERDAM – 01 June, 2020: We are pleased to announce that the firm's current board has been reappointed for a new term of two years. The three-member board consists of Petra Zijp, Jaap Jan Trommel and Chris Warner. They took office on 1st June 2017 and were reappointed last week by the partnership at the firm's annual meeting of shareholders. The board does not have a chairperson and operates as a collective body. The three members remain active in their respective practice groups, namely Capital Markets, M&A and Corporate, and Tax.

The decision to reappoint the board was based on its excellent leadership of the firm over the past three years and the value the partnership places on maintaining continuity, stability and a long-term focus, particularly during these unprecedented times. Many of our clients are affected by the current pandemic, which is why our strategic focus remains on providing high-quality legal advice, centred on the interests of our clients.

Managing partner Petra Zijp on the reappointment: "I am incredibly honoured that we, as a team, have been reappointed. This show that the partnership is on the same page when it comes to the future of the firm. We have a lot to do in the next two years and are committed to furthering our client-centred strategy. In addition, we will continue to focus on the 'new style of law firm', with professionals who can think alongside and empathise with clients and know how to combine legal acumen with civic awareness."

Managing partner Jaap Jan Trommel adds: "Ours clients currently have their hands full with the coronavirus crisis. From state aid measures to negotiations that are coming under pressure, the majority of our practice groups are working round the clock, like our successful Restructuring & Insolvency team and our Competition practice. Our lawyers sometimes have to act immediately in order to keep a business afloat. Here as well our starting point is to think together about sustainable, long-term solutions. Those who are aware of the power of adaptive thinking are often the first to see the opportunities a crisis provides to lead the way."

L-R: Petra Zijp; Jaap Jan Trommel; Chris Warner

For additional information visit us at www.nautadutilh.com

NAUTA DUTILH REAPPOINTS BOARD FOR A NEW TWE-YEAR TERMOGAN LOVELLS APPOINTS NEW BOARD MEMBERS

RBS Welcomes New Associate

VANCOUVER – 28 May, 2020: Congratulations to Alex Pedlow on joining the firm as an Associate. He came to RBS as an Articling Student in 2019, and was called to the bar in 2020. Alex practices as a solicitor in the Estate & Wealth Advisory Group.

Prior to joining the firm, he attended the Peter A. Allard School of Law at UBC where he participated in the Law Students' Legal Advice Program and as the Clinic Coordinator for the Artists' Legal Outreach Clinic.

For additional information visit us at www.rbs.ca

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

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www.prac.org/member_publications.php

ARIAS

ASSISTS DUTCH ENTREPRENEURIAL DEVELOPMENT BANK (FM)) LOAN TO SUPPORT SMES IN COSTA RICA

Arias Costa Rica advised the Dutch Entrepreneurial Development Bank (FMO) in structuring the guarantee for the first disbursement of the US$30 million credit for green loans and financing of small and medium-sized enterprises (SMEs) in the country, granted to Banco Promerica de Costa Rica.

This is a result of the loan signed in 2019 between Banco Promerica and FMO as part of the FI-LAC program (Financial Institutions, Latin America & the Caribbean) where Arias also served as a local lawyer.

This trust includes a loan portfolio from Banco Promerica to guarantee the operation, which will be financing loans to SMEs and to green projects, aligned with the FMO criteria, related to renewable energy and energy efficiency.

Diego Gallegos, who coordinates the firm's banking and finance area, led the transaction for Costa Rica.

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

IP DEPARTMENT SECURES STRING OF RECENT VICTORIES FOR CLIENTS

NEW YORK – 31 March, 2020: Baker Botts' Intellectual Property attorneys have secured a series of recent victories for clients in the technology, media and telecommunications (TMT) and life sciences sectors, showcasing a broad range of the practice's capabilities. The wins include a District Court jury verdict, key Federal Circuit and Patent Trial and Appeal Board (PTAB) rulings, and a case dismissal.

"These successes are indicative of Baker Botts' IP practice being a market leader across the TMT, life sciences and energy industries," said Robert Scheinfeld, Global Chair of Baker Botts' Intellectual Property Department. "We have a deep bench of diverse, technically-trained, forward-thinking trial lawyers and professionals around the country who efficiently achieve winning results in the courtroom beyond our client's expectations."

Baker Botts has over 200 lawyers and patent professionals, one of the largest IP groups among general practice firms, who collectively hold over 240 technical degrees spanning diverse fields.

The firm's recent, significant wins include:

Oxford Nanopore Favorable Jury Verdict in Patent Infringement Case Involving Innovative DNA Sensing Tool
Baker Botts secured a favorable jury verdict for UK-based Oxford Nanopore Technologies Ltd., developer of a DNA analysis tool used in 100 countries for a range of scientific applications including viral/bacterial outbreak surveillance, cancer research and human genetics, in a landmark patent infringement case in the U.S. District Court for the District of Delaware, involving two of the leading companies in the sequencing technology space.

Precedential Win on Patent Eligibility for DISH Network
The U.S. Court of Appeals for the Federal Circuit ruled in favor of Baker Botts client DISH Network by holding that merely configuring a computer to implement an improvement to an abstract concept is not patent-eligible. In the case, Customedia Technologies v. DISH Network, the Court affirmed the Patent Trial Appeal Board's decision to strike down claims directed to an improvement to user-targeted advertising in a media network such as a set-top box and content network. The precedential decision provides much-needed guidance to courts and the USPTO when facing the difficult problem of applying the U.S. Supreme Court's Alice v. CLS Bank decision to computer-implemented inventions.

Dismissal for Samsung in Patent Case
Baker Botts secured a dismissal for its client Samsung Electronics America, Inc. in a patent litigation action brought by plaintiff William Grecia (Grecia v. Samsung Electronics America, Inc.) in the Southern District of New York. United States District Judge Valerie Caproni granted Samsung's motion to dismiss Mr. Grecia's complaint with prejudice, finding that the sole claim of the patent-in-suit is invalid because it is directed to patent-ineligible subject matter. This is the second summary judgment win for Samsung against Mr. Grecia. In a prior case, Mr. Grecia asserted a related patent and Baker Botts won a finding of patent invalidity for Samsung based on indefiniteness of all of the asserted claims.

Dispositive Win on Patent Eligibility
The U.S. Court of Appeals for the Federal Circuit ruled in favor of a Baker Botts client, affirming that the asserted patents of Voip-Pal.com, Inc. are not patent eligible. The Federal Circuit affirmed the Northern District of California's decision to strike down Voip-Pal's patents as being directed to the abstract idea of routing a call based on characteristics of the caller and callee in a computer network.

For more information, please visit www.bakerbotts.com

CAREY

ASSISTS CHILEAN COPPER GIAN CODELCO RAISE US$1.2 BILLION THROUGH DEBT AND LOAN TRANSACTIONS

SANTIAGO, 04 June 2020: Cleary Gottlieb Steen & Hamilton LLP in New York and Carey in Santiago have helped Chile's state-owned copper company Codelco obtain nearly US$1.2 billion through several debt offerings and credit facilities.

Codelco raised US$931 million through two separate debt taps. In the largest, Cleary and Carey helped the company issue debt for US$800 million. The deal closed on 6 May. In the second debt transaction, Codelco relied only on Cleary to raise another US$131 million. That deal closed on 8 May.

Davis Polk & Wardwell LLP in New York and Philippi Prietocarrizosa Ferrero DU & Uría (Chile) advised the underwriters in both deals.

Codelco also enlisted Cleary and Carey to obtain two loans, the most recent a US$100 million from BNP Paribas. The deal was signed on 6 May.

Codelco also obtained a US$165 million credit line from Nova Scotia, which was signed on 24 April. Mayer Brown LLP in Charlotte and New York and PPU in Santiago advised the bank.

Codelco is the world's largest copper producer, with vast mines which account for almost a third of global output.

On the US$800 million issuance Counsel to Codelco Cleary Gottlieb New York; Carey Partner Diego Peralta and associates Paluska Solar, Nadia Jara and Kriss Andía in Santiago.

Counsel to BNP Paribas Securities, HSBC Securities, Mizuho Securities and Scotia Capital - Davis Polk & Wardwell LLP New York; Philippi, Prietocarrizosa, Ferrero DU & Uría in Santiago.

On the US$131 million issuance Counsel to Codelco Cleary Gottlieb New York

Counsel to BNP Paribas Securities, HSBC Securities, Mizuho Securities and Scotia Capital - Davis Polk; Philippi, Prietocarrizosa, Ferrero DU & Uría in Santiago

On the US$100 million loan deal Counsel to Codelco Cleary Gottlieb New York; Carey Partner Diego Peralta and associates Paluska Solar, Nadia Jara and Kriss Andía in Santiago

On the US$165 million loan dealCounsel to Codelco - Cleary Gottlieb New York; Carey Partner Diego Peralta and associates Nadia Jara and Kriss Andía in Santiago

Counsel to the Bank of Nova Scotia Mayer Brown New York; Philippi, Prietocarrizosa, Ferrero DU & Uría in Santiago.

For additional information visit www.carey.cl

CLAYTON UTZ

ACTS ON LANDMARK $643 MILLION RIALTO SALE

MELBOURNE - 05 June 2020: A Clayton Utz team has acted on the largest property deal in Australia this year to date, the sale of a 50% interest in the iconic Rialto building in Melbourne, for over $643 million. The transaction completed on 3 June.

Clayton Utz represented the vendor, which sold its interest to Dexus Wholesale Management Limited. Dexus joins Grollo Australia Pty Ltd as the Rialto's joint owner.

Clayton Utz partner Andrew Norman led the firm's team, which included special counsel Jerome Martin, senior associates Angus Roy and Nick Chan and lawyer Henry Matthys.

Andrew said the completion of the Rialto sale was a great fillip for the Australian property sector, and had shifted the thinking around what deals were possible during the COVID period.

"The property sector has been hit hard by COVID. There are not many Rialtos, but as restrictions start to loosen, a transaction like this can put some bounce right back into the whole sector," said Andrew.

Andrew said despite the intervention of COVID-19, the transaction had run smoothly, with exchange taking place only six weeks from the date of signing of the Heads of Agreement (HOA) for the sale in late February.

"It is a credit to the parties and deal teams involved that we were able to achieve a successful completion within the timeframe we did. Our client is very pleased with the outcome, and we're pleased to have been a part of such a landmark deal."

Andrew has an established reputation as one of Australia's top legal advisers for premium commercial property deals, with a track record of leading Clayton Utz teams in advising both purchasers and vendors on transactions, including recently:

acting for AMPC on the purchase of three separate 25% interests for a total of around $1.5b in Brookfield's Wynyard Place development (scheduled to complete in 2021);

the sale of a 50% interest in an $800m Melbourne office portfolio (535 Bourke Street and 459 and 440 Collins Street) to the Juilliard Group (signed 2019);

Myer's anchor HQ tenancy at 1000 La Trobe Street, Docklands (signed early 2020);

Blackstone's acquisition of three portfolios of logistics assets from the Goodman Group ($1.7b).

The reputation of the Tier 1 Clayton Utz Real Estate team more broadly continues to see the firm engaged on both the government and private client side on many of the largest and highest profile deals taking place around the country, including advising:

the Victorian Government on the North East Link Project ($16b) and the Level Crossings Removal Project (over $13b);

Invesco on its fund through deal for a 50% interest in the $800m Chevron Tower in Perth (April 2020);

Dahua on its greenfield community development in Sydney's South-Western Growth Region ($3.5b); and

Infrastructure NSW on the $15b Barangaroo Project, Australia's most significant urban renewal project.

For additional information visit www.claytonutz.com

GIDE

ADVISES ARCHICOM ON THE SALE OF CITY ONE IN WROCLAW, POLAND

WARSAW - 02 June 2020: Gide Warsaw's Real Estate department has advised Archicom, a Polish developer listed on the Warsaw stock exchange, on the sale of “City One”, an office building located in Wrocław, Poland. “City One” is part of the City Forum complex. It is A-class and LEED Gold-certified, with a leasable area of 12,000 sq.m.

“City One” was acquired by an international institutional investor, for EUR 33.8 million.

Gide’s transactional team was headed by partner Marcin Muszel, working with advocate Tomasz Roszczyc and advocate trainees Rafał Ćwikliński and Aleksandra Kobylińska from the Real Estate department, as well as tax advisor Maciej Grela from the Tax department.

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

ADVISES GRUBHUB ON ITS COMBINATION WITH JUST EAT TAKEAWAY.COM

AMSTERDAM – 11 June, 2020: On 10 June 2020, Netherlands-based Just Eat Takeaway.com N.V. and US-based Grubhub Inc. entered into a merger agreement providing for the combination of their businesses. The combination leads to the creation of the world's largest online food delivery company outside of China.

The transaction is structured as a merger, with Grubhub shareholders receiving (American Depositary Receipts (ADRs) representing) Just Eat Takeaway.com shares in exchange for their Grubhub shares. The ADRs will be listed in the US. The merger consideration implies an equity value of approximately USD 7.3 billion. The transaction is subject to the satisfaction of customary closing conditions. More information is available here: *https://s2.q4cdn.com/723557020/files/doc_downloads/2020/06/Just-Eat-Takeaway.com-to-combine-with-Grubhub-to-create-a-leading-global-online-food-delivery-player.pdf*

NautaDutilh's team advising Grubhub was led by Stefan Wissing and further consisted of Paul van der Bijl, Jos Somers, Petra Zijp, Dirk Panis, Chris Warner and Nina Kielman.

For additional information visit www.nautadutilh.com

HOGAN LOVELLS

ADVISES GREYSTAR REAL ESTATE PARTNERS IN THE ACQUISITION OF ALLIANCE RESIDENTIAL COMPANY

WASHINGTON, D.C. - 04 June 2020: International law firm Hogan Lovells represented Greystar Real Estate Partners, LLC, a global leader in the investment, development, and management of high-quality rental housing properties, in its acquisition of the property management business of Alliance Residential Company ("Alliance"). The value of the transaction is undisclosed.

Comprising more than 500 multifamily properties and nearly 130,000 primarily Class A units across 21 states, the Alliance portfolio and its diversified base of clients will complement Greystar's leading property management platform to deliver numerous benefits that enhance property operations, services and offerings.

M&A partner Elizabeth Donley led the Hogan Lovells deal team, which included partner Bruce Gilchrist, senior associates Daniel Levisohn and Ashlee Sawyer Gilson, and associate Nick Eckstein. The team also included counsel Robert Baldwin on antitrust, partner Margaret (Meg) McIntyre on employee benefits, partner Lee Berner on real estate, partner Meryl Rosen Bernstein on IP, and partner Jasper Howard and senior associate Caitlin Piper on tax.

For additional information visit www.hoganlovells.com

SIMPSON GRIERSON

ADVISING SHINSEI BANK ON PROPOSED NZ$762 MILLION ACQUISITION OF UDC

AUCKLAND – 03 June, 2020: We're pleased to have advised Japan's Shinsei Bank on its recently announced proposed NZ$762m acquisition of iconic New Zealand finance company, UDC. The purchase is a significant vote of confidence in the New Zealand economy, and would mean UDC Finance would continue to operate as an independent finance company and enhance competition in the asset finance market.

Our team on this work was led by commercial partners James Hawes and Andrew Matthews, and banking & finance partner Andrew Harkness. It also included commercial team members senior associate Tom Heard, and senior solicitors Courtney Mearns and Louw Wessels. The transaction was entered into on 2 June and remains subject to the consent of the Overseas Investment Office.

For additional information visit us at www.simpsongrierson.com

SYCIP ADVISES MPIC SHARES SALE 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

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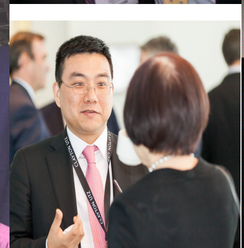
PRAC @ Vancouver



PRAC @ PDAC

PRAC @ IPBA

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Release in some of the FX restrictions set by Communiqué “A” 7030

On June 11, 2020, pursuant to Communiqué No. "A" 7042, the Argentine Central Bank (the "Central Bank") provided a series of adjustments and clarifications with respect to Communiqué No. "A" 7030, issued on May 28, 2020, as a result of the requests made by the various local financial institutions. Communiqué No. “A” 7030 established a new series of restrictions to the access to the Foreign Exchange Market (the “FX Market”), mainly aimed at obliging the use of liquid foreign assets for the payment of foreign obligations before requesting access to the FX Market.

The restriction of not having any local financings in Argentine pesos by MiPyMEs is lifted

Through Communiqué No. "A" 7001, the Central Bank had established the need to have prior written authorization of such entity to access the FX Market to cancel principal and/or interest of all types of foreign indebtedness pending as of March 19, 2020, when the payment does not have a maturity date or when the maturity date has been set prior to such date, unless the interested party submitted an affidavit stating that it does not have outstanding financings in Argentine pesos provided by Communiqué No. "A" 6937[1] (as amended) and will not request such financing within the following 30 calendar days.

By means of Communiqué "A" 7042, the Central Bank has waived such requirement. Therefore, companies benefiting from subsidized rate financing as a result of the COVID-19 pandemic will be able to access the FX Market to cancel their external financings.

The limit of external liquid asset holdings allowed to access the FX Market is increased to USD 100,000

The new Central Bank regulation relaxed the restriction on holding foreign liquid assets to access the FX Market, establishing that, as of June 12, 2020, prior written authorization from the Central Bank won’t be required to access the FX Market to carry out expenditures[2] to the extent that all of its foreign currency holdings in the country are deposited in local bank accounts and that it does not have external liquid assets available at the beginning of the day in which it requests access to the FX Market for an amount greater than the equivalent of USD100,000.

The obligation, of who accesses the FX Market after May 28, 2020, to transfer to Argentina and exchange for Argentine pesos (within five working days of its availability), any proceeds received abroad from the collection of loans granted to third parties, the collection of fix-term deposits or the sale of any type of asset, when the asset has been acquired, the deposit constituted or the loan granted after May 28, 2020, is maintained in this new regulation.

If the amount of USD100,000 in external liquid assets available is exceeded, the new regulation sets that aforementioned affidavit may also be deemed to have been fulfilled if the interested party provides evidence that such amount is not exceeded when it is considered that, partially or totally, such assets:

1. were used during that day to make payments that would have had access to the local exchange market;
2. were transferred on behalf of the client to a correspondent account with a local entity authorized to operate in foreign exchange;
3. are funds deposited in foreign bank accounts that result from: (i) collections of exports of goods and/or services or advances, pre-financing or post-financing of exports of goods granted by non-residents; or (ii) the sale of non-produced non-financial assets; for which a period of 5 working days has not elapsed since their collection; or
4. are funds deposited in foreign bank accounts resulting from financial indebtedness abroad and their amount does not exceed the equivalent due for principal and accrued interests in the next 120 calendar days.

Moreover, it is pointed out that funds deposited abroad that cannot be used by the client because they are reserve funds or guarantee funds set up in accordance with the requirements of foreign indebtedness agreements or funds set up to guarantee foreign derivative transactions will not be considered as external liquid assets.

The restrictions on payment of imports'is adjusted

- Through this new regulation the Central Bank exempts from the restrictions provided for by Communiqué No. "A" 7030 the payments for imports of: (i) pharmaceutical products and fertilizers; and (ii) supplies for the local production of medicines, to the extent that such payments are deferred or on account of operations that have been shipped on or after June 12, 2020 or that, having been shipped earlier, have not arrived to the country before that date. In other words, it will be allowed to access the FX Market for the payment of imports (and prepayments) of such goods and supplies, even in the event that: (a) the aggregate amount of import payments and prepayments made during the year 2020 - including the intended payment - exceeds (b) 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.

- Access to the FX Market for advance payments on imports was raised from USD250,000 to USD1,000,000. This means that those payments of imports with pending clearing customs are excluded from the aforementioned requirement set by Section 2.1. of Communiqué No. "A" 7030 to the extent that the amount to be settled by the customer for prepayments made on or after September 1, 2019 does not exceed the equivalent of USD1,000,000.

The effectiveness of the restriction period for transactions with public securities is modified

Finally, the scope of the 90 days restriction period[3] was limited until May 1, 2020 for those who had carried out sale operations in the country of securities against foreign currency or transfers to depository institutions abroad. Sales of securities against foreign currency or transfers of securities abroad, operated before the effective date of Communiqué No. "A" 7001 (i.e. May 1, 2020), do not restrict subsequent FX transactions. Thus, the effect of the rule, which in practice worked as retroactive, is amended.

This report should not be considered as legal or any other type of advice by Allende & Brea or as including all the subjects of the topics described herein.

[1] Originally set at 30 days by Communiqué No. "A" 7001 and then extended to 90 days by Communiqué No. "A" 7030.

[2] Financings in pesos to MiPyMEs granted at a nominal annual interest rate of a maximum of 24%.

[3] Except those carried out by individuals for saving purposes in accordance with Section 3.8. of the Central Bank's FX regulations.

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

CLAYTON UTZ

11 JUN 2020

Significant Australian foreign investment reforms announced

BY GEOFF HOFFMAN, MEGAN WILLIAMS

There are a significant number of reforms proposed, including a new set of stricter controls designed to protect "national security", and loosening the rules applying to certain investment funds that have large foreign government investors.

The Government has announced very significant reforms to Australia's foreign investment review framework. Unlike the temporary COVID-19 measures announced on 29 March 2020, these reforms are proposed to be permanent.

When will the changes be made?

The reforms are proposed to come into effect on 1 January 2021. The Government has stated that it will release draft legislation for consultation in July. Clayton Utz will be participating in the consultation process when the draft legislation is produced, and would welcome any specific observations you may have at that time.

What are the changes?

There are a significant number of reforms proposed, including:

- a new set of stricter controls designed to protect "national security";
- loosening of the rules applying to certain investment funds that have large foreign government investors;
- an increase in penalties and enforcement powers;
- changes to fees; and
- an ability for the government to extend the application review period (to up to 120 days).

New rules for protecting "national security"

The reforms will introduce new rules for investments that raise national security concerns, with a permanent $0 financial threshold. The Treasurer will be able to review any acquisition of a direct interest (at least 10%) by a foreign person on national security grounds, regardless of the value of investment, and impose conditions or block investments if this is necessary to protect national security (a "direct interest" includes an interest (normally 10% or more) in an upstream entity).

The new test will involve the following specific changes:

- **Mandatory pre-investment notification:** require mandatory notification:
  - of any proposed acquisition of a direct interest (at least 10%) by a foreign person in a "sensitive national security business", regardless of the value of the investment (ie. the financial threshold is $0); or
  - where a business or entity owned by a foreign person starts to carry on a "sensitive national security business";
- **"Call-in" power:** allow any investment that would not otherwise require notification under the existing national interest or new national security mandatory notification processes to be "called in" for screening (requiring the investor to submit an application for screening) on "national security" grounds. This power will be time-limited. Investors will be able to voluntarily notify to receive investor certainty from ‘call in’ and will be able to apply for a time limited investor-specific exemption certificate which enables them to make eligible acquisitions

without case -by-case screening; and

- **Review power *after* approval:** allow the Treasurer to reassess approved investments where "national security" risks emerge **after** approval. The Treasurer will be able to impose new conditions, vary existing conditions, or, as a last resort, require divestment where:
  - the investor's activities have changed substantially, posing "national security" risks which could not be reasonably foreseen at the time of approval;
  - a material change occurs to the operating environment, which alters the nature of "national security" risks posed at the time of approval; and/or
  - "national security" risks have emerged in relation to the acquirer or target, which could not be reasonably foreseen at the time of approval.

What is a "sensitive national security business"?

The definition of a "sensitive national security business" is subject to consultation. The Government is considering the following types of businesses:

- a businesses regulated under the Security of Critical Infrastructure Act 2018 (Cth) (**Critical Infrastructure Act**) or the Telecommunications Act 1997 (Cth);
- any business involved in the manufacture or supply of defence or national security-related goods, services and technologies, or any business that can create vulnerabilities in the security of Defence and national security supply chain, the Defence estate and/or other core Defence interests;
- any business or land situated in or proximate to Defence or national security installations; and
- any business that owns, stores, collects or maintains sensitive data relating to Australia's national security and/or defence.

Significantly for the energy, resources and infrastructure industries, the Critical Infrastructure Act regulates Australia's critical electricity assets, critical ports, critical water assets and critical gas assets (see definitions below) and the reforms could result in those industries being sensitive national security businesses and subject to a financial foreign investment threshold of $0.

Expand all

Critical electricity assets

- a network, system, or interconnector, for the transmission or distribution of electricity to ultimately service at least 100,000 customers; or
- an electricity generation station that is critical to ensuring the security and reliability of electricity networks or electricity systems in a State or Territory - to satisfy this test the station must:
  - be contracted to provide a system restart ancillary service in the State or Territory (i.e. able to start without an external power supply and connect, and provide energy, to an electricity network or an electricity system for the transmission or distribution of electricity); or
  - be a synchronous electricity generator, in the State or Territory, that has an installed capacity of at least the amount specified for the State or Territory:
    - NSW: 1,400 megawatts
    - NT: 300 megawatts
    - QLD: 1,300 megawatts
    - SA: 600 megawatts
    - TAS: 700 megawatts
    - VIC: 1,200 megawatts
    - WA: 600 megawatts

(Section 10 of the Security of Critical Infrastructure Act 2018 (Cth) and rule 6 of the Security of Critical Infrastructure Rules 2018 (Cth))

Critical ports

- Broome Port
- Port Adelaide
- Port of Brisbane
- Port of Cairns
- Port of Christmas Island
- Port of Dampier
- Port of Darwin
- Port of Eden
- Port of Fremantle
- Port of Geelong
- Port of Gladstone
- Port of Hay Point
- Port of Hobart
- Port of Melbourne
- Port of Newcastle
- Port of Port Botany
- Port of Port Hedland
- Port of Rockhampton
- Port of Sydney Harbour
- Port of Townsville

(Section 11 of the Security of Critical Infrastructure Act 2018 (Cth))

Critical water assets

One or more water or sewerage systems or networks that:

- are managed by a single water utility; and
- ultimately deliver services to at least 100,000 water connections or 100,000 sewerage connections.

(Section 5 of the Security of Critical Infrastructure Act 2018 (Cth))

Critical gas assets

- a gas processing facility that has a capacity of at least 300 terajoules per day;
- a gas storage facility that has a maximum daily quantity of at least 75 terajoules per day;
- a network or system for the distribution of gas to ultimately service at least 100,000 customers;
- the Tasmanian Gas Pipeline; and
- a gas transmission pipeline that is critical to ensuring the security and reliability of a gas market - to satisfy this test the pipeline must have a nameplate rating of the following amount specified for the gas market:

- Eastern gas market – 200 terajoules per day;
- Northern gas market – 80 terajoules per day; and
- Western gas market – 150 terajoules per day.

(Section 12 of the Security of Critical Infrastructure Act 2018 (Cth) and rules 7 and 8 of the Security of Critical Infrastructure Rules 2018 (Cth))

Loosening of rules for investment funds with large foreign government investors

Most private equity funds and institutional investors regularly require Foreign Investment Review Board (**FIRB**) approval under the existing "Foreign Government Investor" (**FGI**) screening rules (which have lower ownership thresholds and a $0 financial threshold) due to large investments by FGIs (eg. sovereign wealth funds and state pension funds) in their funds.

Investment funds which fall under the reforms described below will no longer be classified as FGIs where no FGIs have management rights and all of their FGIs have no influence or control over the investment or operational decisions of the entity or any of its underlying assets. This passive investment model is typically adopted by most large private equity funds and institutional investors.

Under the reforms:

- entities with more than 40% foreign government ownership in aggregate (without influence or control) but less than 20% from any single foreign government will no longer be classified as FGIs; and
- entities that have a single foreign government with at least 20% foreign government ownership (without influence or control) will still be classified as FGIs but will be able to apply for a broad exemption certificate on a case-by-case basis which could apply for a specified time period (such as 5 or 10 years, or up to the life of the entity) and could include conditions.

Investment funds that get the benefit of these new reforms will still be subject to screening at the thresholds for private foreign investors (A$275 million, or A$1.192 billion for FTA-partner countries). The real benefit is that these investment funds may, for example, more quickly close deals or acquire sizeable pre-bid stakes below the thresholds for private investors, without the cost and delay of the FIRB process.

Stronger penalties, compliance and enforcement powers

These reforms will provide additional enforcement powers and resources to Treasury and the ATO to enforce conditions of FIRB approvals.

The Government will introduce:

- monitoring and investigative powers (in line with those of other business regulators), including access to premises with consent or by warrant in order to gather information;
- powers to give directions to investors in order to prevent or address suspected breaches of conditions or of the foreign investment laws;
- increased civil and criminal penalties to provide a more effective deterrent (see below);
- an expanded infringement notices regime to cover all types of breaches relating to foreign investments and enable proportionate action in response to non-compliance;
- powers (including introducing a civil penalty and triggering the Treasurer's powers under Part 3 of the Foreign Acquisitions and Takeovers Act 1976 (Cth) (**FATA**)) to remedy situations where foreign persons are given an approval based on an application that makes an incorrect statement or omits an important piece of information and that statement or omission was material to the approval;
- powers with respect to an investment that was originally made in breach of the FATA where the interest has subsequently been transferred to another foreign person; and
- the power to accept enforceable undertakings from investors to manage non-compliance or to give weight to commitments made by investors in their application; and
- a requirement for investors who have received approval for an investment to notify the Government of certain events, including that the action has occurred or did not occur within the period of the approval.

Integrity of the foreign investment review framework

The Government will introduce the following changes to improve the integrity of the framework:

- confirming the application of the existing regime to share buybacks and selective capital reductions;
- narrowing the scope of the moneylending exemption so that the exemption does not apply to foreign money lenders obtaining interest in a "sensitive national security business" – the change could have a significant impact on project financing for Australia's critical infrastructure projects, including critical gas, water and electricity assets and critical ports such that foreign persons will need approval before entering into money lending arrangements that result in the acquisition of an interest, by way of a security, in securities, assets, a trust, Australian land or a tenement in a sensitive national security business;
- requiring a foreign person to seek approval for acquisitions of interests from the Commonwealth, State or Territory Governments or local government bodies (which otherwise may have not have been subject to the FATA if the government entity was not an existing "Australian business" for the purposes of the FATA) that may raise national security risks or involve the acquisition of an interest in a "sensitive national security business";
- amending the tracing rules to apply to unincorporated limited partnerships so that beneficial interests can be traced; and
- requiring a foreign person, who is a parent or spouse of an Australian resident, to seek approval prior to the purchase of Australian land where they provide money to their Australian family member for the purpose, other than by way of a gift.

Changes to information gathering and sharing / new register of foreign ownership

The Government will increase the scope of the information sharing provisions under the FATA and the Tax Administration Act 1953 (the **TAA**) to allow greater sharing of foreign investment information across government agencies (including the ATO). The Government will also introduce new information sharing provisions to allow sharing of protected information with international counterparts in certain circumstances where there are national security considerations.

The Government is considering a new Register of Foreign Ownership that will expand the existing agricultural land, water and residential registers so that the following interest must be registered: interests in Australian land, water entitlements and contractual water rights and business acquisitions that require foreign investment approval.

Changes to fees

Fees will be reviewed to ensure they continue to cover the (increasing) costs of administering the system and with a view to updating the fees framework to make it fairer and simpler for investors.

Changes to application review periods

The reforms will include a new measure for extensions to the statutory deadline for review of applications, beyond the current 30 day review period. In certain circumstances, the Government will have the power to extend the deadline by up to another 90 days without the need to issue an interim order or for the applicant to request the extension.

Other amendments

The reforms will also include a number of technical amendments to provide greater clarity, including by improving the readability of existing provisions, rectifying inconsistencies and unintended consequences, and addressing feedback from investors seeking greater certainty. One such technical amendment is an update of the definition of "Australian media business".

To clarify a long-standing inconsistency regarding the rights to occupy land under exploration tenements in different Australian jurisdictions, a proposed amendment will exempt exploration tenements acquired by private foreign investors from the FATA. The exemption may not extend to certain investments, such as acquisitions that are subject to the new national security test, and exploration tenements acquired by Foreign Government Investors, which will continue to be subject to the FATA.

To address feedback from investors, acquisitions of revenue streams in relation to mining and production tenements will be exempted from the FATA where the revenue stream does not entail rights to occupy the land or have direct control or influence over the land. Following the amendment, a foreign person, who had already received approval to acquire a mining and production tenement, would not need to seek further approval if they wanted to on-sell their interest and receive a revenue stream as consideration. Any revenue streams that offer occupancy, control or influence over the land would still be subject to the FATA.

More information

The Government has released a booklet detailing the changes.

Disclaimer

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June 08, 2020

ANVISA publishes new regulation on the importation of products by healthcare facilities

updated on Jun 08 at 03:51 pm

On May 13, 2020, the National Health Surveillance (ANVISA) published the ANVISA Resolution RDC No. 383/2020, which sets forth the new regulation on the direct importation of products subject to health surveillance by healthcare facilities (hospitals, ambulatories, doctor offices and clinics) or through its foundations and linked civil society organizations of public interest or event through health insurance companies.

In addition to the direct importation, the Resolution sets forth that healthcare facilities may outsource the importations to dully licensed companies, that is, legal entities that hold sanitary license before local sanitary authorities and Operating License (in Portuguese, "Autorização de Funcionamento de Empresa – AFE") before ANVISA.

According to Resolution, the holder of the above-mentioned importation permit must (i) hold the sanitary licenses for the importation of products subject to health surveillance, as mentioned to the outsourced companies; (ii) appoint a technical responsible; (iii) import through bonded warehouse that holds sanitary license and AFE for warehousing of products subject to health surveillance; and (iv) comply with other requirements and documents that set forth by the applicable legislation on the importation of products, such as the ANVISA Resolution RDC No. 81/2008, which determines the technical regulation on the importation of products for health surveillance purposes.

The ANVISA Resolution RDC No. 383/2020 sets forth the documents that must be filled within the importation proceeding, including a declaration from the product's MA Holder authorizing the activity, which must be linked only with a healthcare facility, which is also prohibited from transferring such right.

Therefore, the Resolution sets forth a detailed regulation on the importation of products subject to health surveillance by healthcare units, provided that they must comply with other applicable and current regulation.

CLINICAL TRIALS AND THE IMPACT OF COVID-19 - ANVISA EDITS TECHNICAL NOTE
updated on Mar 30 at 10:56 am

By means of the Technical Note (NT) No. 3/2020, the National Health Surveillance Agency (ANVISA) has published orientations to sponsors, research centers and investigators involved in the conduction of clinical research and bioequivalence studies, given the COVID-19 pandemic.

The pandemic may affect the research and studies by making it more difficult to comply with the clinical protocol as approved by the ethical and regulatory panels, due to possible infections of participants by the novel coronavirus, to their isolation, quarantine or even to travel restrictions, etc.

ANVISA has advised sponsors, centers and investigators to modify the clinical protocol when necessary, communicating the participants of the research or study. The alteration of the protocol shall be informed in the annual clinical research report, which shall also contain the reason of the alteration, the potential impacts on the research and participants, as well as measures taken to manage potential interruption to the investigation, among other information.

As long as aiming at preserving the participant's protection, the alteration may be exempt from authorization from ANVISA, though if they result in alteration of statistics analysis and/or data management plans the sponsor shall consider discussing it with ANVISA by means of the official service channels, reporting in the statistics analysis plan how the protocol deviations related to COVID-19 shall be treated with regard to the pre-established analysis.

It may be possible to interrupt the investigation, or to discontinue a participant if so demanded by the actual situation.

The NT also provides that, except if the investigation itself holds regard to COVID-19, the sorting procedures for the disease in clinical research participants do not need to be reported to ANVISA as an amendment to the protocol. Anyhow, ANVISA states that "there is no prohibition from a sanitary point of view to deliver directly the experimental drug to the clinical research participant at their residence in case it is supposed to be used at home, as long as the participant is properly advised as to the use by the research center and that all necessary records are kept, including drug delivery receipts, so that traceability of all information and maintenance of the adequate transport and storage conditions are assured. All these measures shall be informed at the annual study report".

Specifically concerning bioequivalence studies, its postponement is suggested in case they have not started yet, as well as those that have already initiated, but have not performed planned admissions yet (the impact of this postponement must be included in the final reports).

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E-PRESCRIPTION AND REMOTE SALE OF CONTROLLED DRUGS ARE PARTIALLY ALLOWED
updated on Mar 27 at 11:38 am

RDC No. 357/2020 allows the remote delivery of controlled drugs, provided that certain requirements are met. The permit is temporary, for six months, and can be extended as long as the COVID-19 crisis lasts.

Some restrictions remain. For example, the purchase and sale of medicines to be delivered remotely over the Internet remains prohibited.

The resolution also increases the permitted quantities of drugs subject to special control.

In addition to publishing the Resolution, the National Health Surveillance Agency (ANVISA) published a statement on its website, recognizing that the digital signature with ICP-Brazil certificates will be accepted, but only for some of the controlled drugs (see here – Portuguese only).

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ANVISA PROVIDES FOR SUSPENSION OF SOME DEADLINES AMID COVID-19 CRISIS
updated on Mar 24 at 06:55 pm

In line with the Provisional Measure (MP) No. 928/2020, ANVISA RDC No. 355/2020 suspends some procedural term for 120 days. It is applicable to deadlines concerning public approval requirements, procedures related to sanitary infractions, as well as to the statute of limitation regarding punitive intention purposes in sanitary administrative procedures, except for those of a fiscal nature.

The Resolution also suspends the provision of copies of procedure documents and examination request services, “except if indispensable to guarantee and prove the applicant’s right, as justified and specifically motivated”. As to digital procedures, online applications shall be admitted if the applicant proves their identity and powers.

The norm shall not take effects, however, on deadlines for compliance with requirements in procedures in connection with marketing authorization (MA) for inputs, drugs and biological products, nor their post-MA modifications (except for inputs), etc. In those specific cases, deadlines before ANVISA shall not be altered, without prejudice to the possibility of requesting the procedure’s temporary closure in case the company shall not be able to comply with the relevant requirements.

Moreover, this suspension shall not be applicable to field actions and connected measures, and shall not be adopted in case there is the need for ANVISA to take actions against blatant infractions to the regulation or against the new coronavirus.

During the period when the Resolution is in force, all documents shall be digitally signed.

ANVISA RDC No. 355/2020 shall be in force for 120 days, being subject to further renewal(s) for further one hundred and twenty days, for as long as the public health emergency due to COVID19 lasts.

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ANVISA SIMPLIFIES ACCESS TO HEALTH PRODUCTS TO COMBAT COVID-19
updated on Mar 24 at 04:31 pm

In an extra edition of the Official Gazette of March 23, 2020, the National Health Surveillance Agency (ANVISA) published the Resolution RDC No. 356/2020, which determines the waiver of Federal Operating Permits (AFE) and other health authorizations for companies that manufacture and import “surgical masks, particulate respirators N95, PFF2 or equivalent, goggles, face shields, disposable hospital garments (waterproof and non-waterproof aprons/cloaks), caps and flaps, valves, circuits and respiratory connections for use in services of health".

These are less risky medical products, used to combat the international public health emergency related to the novel coronavirus. The new rule also exempts such products from regularization before ANVISA. This is because other companies (which are not manufacturers of medical products) are making efforts to manufacture these products due to the risk of shortages.

Notwithstanding these flexibilities, ANVISA determined that the manufacturer or the importer will still be responsible for guaranteeing the quality, safety and effectiveness of the products, and must comply with all the requirements applicable to sanitary control, technical standards, and to carry out post-market controls.

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ANVISA WILL PRIORITIZE FEDERAL OPERATING PERMIT (AFE) REQUESTS REGARDING COVID-19 AND COMPANIES WILL NOT NEED TO WAIT FOR PERMIT’S PUBLICATION IN THE OFFICIAL GAZETTE
updated on Mar 20 at 9:52 pm

The National Health Surveillance Agency (ANVISA) announced on its website that it will prioritize the analysis of the Federal Operating Permits (AFE) requests for companies that carry out, or intend to carry out, activities related to products for the diagnosis, prevention or treatment of COVID-19.

The Agency also indicated that companies do not need to wait for the AFE publication in the Official Gazette (DOU) to start their activities. An official confirmation via ANVISA’s system with the authorization will be enough.

To request the prioritization, e-mail should be sent to the address coafe@anvisa.gov.br, with the subject “PRIORIDADE COVID19”. The e-mail must also indicate the request number, the Taxpayer’s Registry Number (CNPJ) of the establishment and the name of the product.

The orientation was made available at: ANVISA - Pedidos de AFE relacionados à Covid-19 terão prioridade

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ANVISA ALLOWS DRUG, SANITIZERS AND COSMETICS MANUFACTURERS TO PRODUCE AND TRADE ANTISEPTIC SUBSTANCES OR OFFICINAL SANITIZERS WITHOUT PREVIOUS AUTHORIZATION
updated on Mar 20 at 3:40 pm

On March 20, 2020, the National Health Surveillance Agency (ANVISA) published the ANVISA RDC No. 350/2020, allowing duly licensed drug, sanitizing product and cosmetics manufacturers to produce and trade antiseptic substances or officinal sanitizing products, temporarily and extraordinarily, without previous authorization.

Thus, due to the COVID-19 pandemic, drug manufactures will be able to manufacture and trade 70% ethyl alcohol, 80% glycerine ethyl alcohol, alcohol gel, 75% glycerine isopropyl alcohol and 0,5% chlorhexidine gluconate, whereas sanitizing products and cosmetics manufacturers will be able to manufacture and trade 70% ethyl alcohol. Products’ expiration date shall not exceed 180 days.

Moreover, the substitution of ingredients mentioned by the National Brazilian Pharmacopeia Form can now be replaced by others with the same pharmacotechnical function, as long as they provide the same efficiency and stability.

To maintain the manufacturing and trading of the products after the expiration of the RDC ANVISA No. 350/2020, the interested companies shall apply for the corresponding marketing authorization following the applicable regulations.

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ANVISA PUBLISHES RESOLUTION ON PROCEDURES TEMPORARILY APPLICABLE TO REGULARIZATION OF MEDICAL DEVICES DUE TO COVID-19
updated on Mar 20 at 12:22 pm

On March 20, 2020, the National Health Surveillance Agency (ANVISA) published the ANVISA RDC No. 349/2020, regulating extraordinary and temporary procedures for applications concerning the regularization of individual protection equipment, medical devices related to lung ventilation, and other medical devices recommended for COVID-19 diagnosis or treatment. The regulation shall remain in force for 180 days.

ANVISA will prioritize such proceedings and waive the presentation of documents required by the ANVISA RDC No. 185/2001 and ANVISA RDC No. 40/2015 if there is enough technical evidence of the product’s safety and efficiency. Moreover, such products will be exempt from certification by the Brazilian Conformity Evaluation System (SBAC).

Furthermore, in case of absence of the Good Manufacturing Practices Certification (CBPF), ANVISA will exceptionally accept the Medical Device Single Audit Program (MDSAP) Certification or an ISO 13485 Quality Management System Certification.

Concerning the requirement of presenting proof of register, free trade certificate or any other equivalent document (as set by the ANVISA RDC No. 185/2001), a simple declaration issued by the legal and technical responsible parties of the company informing the relevant product is regularized and traded in a jurisdiction member of the International Medical Device Regulators Forum (IMDRF) shall suffice.

Marketing authorizations, enrollment and notifications granted pursuant to the new ANVISA RDC No. 349/2020 shall be valid for one year, not subject to renewal. However, the nine remaining years in connection to the extension of the marketing authorization may be granted, in compliance with the current regulation, in case the interested company timely presents the documentation originally exempted.

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ANVISA PRIORITIZES COVID-19-RELATED PRODUCTS
updated on Mar 20 at 10:27 pm

On March 18, 2020, the National Health Surveillance Agency (ANVISA) published ANVISA RDC No. 348/2020, regulating the extraordinary criteria and procedures applicable to petitions applying for marketing authorization (MA) to drugs, biological products and products for in vitro diagnosis and post-MA modifications concerning drugs and biological products, due to public health emergency of international concern caused by the novel coronavirus.

For applications to obtain MA for drugs, the applicant needs to demonstrate that the case involves specific therapeutic indication to the prevention or treatment of the disease caused by the novel coronavirus (COVID-19) or in vitro diagnosis for SARS-CoV-2, whereas for petitions for post-MA modifications, it needs to be demonstrated that the case involves a drug that is (i) essential to support life or used in situations in which there is high risk to health and (ii) likely to be in short supply due to the coronavirus.

Post-MA modifications need to be directly connected to coronavirus and proved so by corresponding documents, being restricted to (i) substitution or inclusion of new manufacturer of the active pharmaceutical ingredient (IFA); (ii) substitution or inclusion of the drug manufacturing site; (iii) modifications regarding the methods of analysis applicable to the IFA or the drug; (iv) modifications regarding the IFA’s manufacturing process; (v) inclusion of new therapeutic indication or extension of the use of the drug; and (vi) extension of the expiration date of the drug. In case the MA holder identifies that the modification needs to be performed urgently and, thus, obtaining the documents for proof would be unreasonable, they may apply for a contingent approval before ANVISA, committing to present them in the future.

Specifically on destocking, ANVISA had already requested, by means of the Public Summon No. 5/2020, information from manufacturers and importers on which products could be in short supply in the market. In other words, ANVISA has been adopting measures continuously to assure there is enough stock of products indicated for acting against coronavirus.

In addition, by the recent Coronavirus Law (Law No. 13,979/2020), it is possible to authorize the importation of medicine which has not yet been registered in Brazil, if registered abroad and through an act of the Ministry of Health.

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BLOG

Ontario Court of Appeal Opens the Door to ETF Securities Class Actions

June 09, 2020

Written by Alan Gardner, Jonathan Bell and Douglas Fenton

In *Wright v Horizons ETFS Management (Canada) Inc.*, 2020 ONCA 337, the Court of Appeal for Ontario has opened the door to investor class actions related to exchange-traded funds (ETFs), holding that the creator/manager of an ETF may owe a duty of care in negligence to investors in the creation, marketing and management of the ETF. The Court of Appeal also clarified the doctrinal boundaries between s. 130 of the Ontario *Securities Act*, R.S.O. 1990 c. S. 5, (which creates a statutory cause of action for misrepresentations in respect of securities purchased in the "primary market") and s. 138.3 of the *Securities Act* (which creates a separate cause of action for misrepresentations relating to securities purchased in the "secondary market"), holding for the first time that ETF investors in certain circumstances may be entitled to bring a claim under s. 130 of the *Securities Act* for misrepresentations in a prospectus. Given the proliferation of ETFs and similar products, the Court of Appeal's decision has potentially far-reaching implications for participants in capital markets.

Background

The defendant Horizons ETFS Management Inc. is one of the largest providers of ETFs in the Canadian market. Among its many ETF products, Horizons created and passively managed a complex derivate-based ETF, designed to provide inverse exposure to stock market volatility (the Fund).

The Fund was intended to track the daily performance of the VIX Index and S&P 500 VIX Short-Term Futures Index (the VIX Futures Index), which are measures of expected market volatility. The Fund was designed so that when the VIX Futures Index declined by a certain percentage on a given day, the Fund's net asset value automatically went up by that percentage. Conversely, when the VIX Futures Index increased on a given day, the Fund's net asset value went down by that percentage.

The Fund was a complex—and risky—ETF product. If volatility remained low, the Fund generated income by selling longer-term VIX futures contracts at a premium in relation to nearer term contracts. But if market volatility increased, the price to repurchase VIX futures contracts could increase exponentially. As a consequence, the cost of rebalancing the Fund at the end of each trading day following increased market volatility could erase any gains over months or years, in as little as a single day. One of the prospectuses prepared in connection with the Fund cautioned investors that the Fund was "highly speculative and involved a high degree of risk".

On February 5, 2018, effectively overnight, investors in the Fund lost almost their entire investment. Shortly thereafter, the plaintiff commenced a proposed investor class action, seeking damages for the capital losses experienced by investors in the Fund.

The plaintiff's primary cause of action was a common law negligence claim grounded in an argument that Horizons had allegedly breached a duty of care owed to its investors by, among other things:

1. designing and developing the Fund when it knew that the fund was excessively complex and too risky for retail investors;
2. offering and promoting the Fund to retail investors knowing it contained "structural flaws", such that it was "doomed to fail";
3. failing to properly explain the risks involved in investing in the Fund; and
4. offering a product that was fundamentally unsuited to passive management.

The plaintiff also brought a claim under s. 130 of the *Securities Act*, alleging misrepresentation in a prospectus prepared in connection with the issuance of certain units in the Fund. This was a novel claim: an Ontario court had not previously considered whether an investor in an ETF could maintain a claim for primary market misrepresentation under s. 130 of the *Securities Act*. The plaintiff likely chose to proceed under s. 130 of the *Securities Act*—rather than s. 138.3 of the *Securities Act*, which concerns securities in the "secondary market"—for strategic reasons. Section 138.3 of the *Securities Act* includes a damages cap of the greater of 5 percent of the issuer's market capitalization or $1 million for a responsible issuer, and a "loser-pays" cost rule. Moreover, a plaintiff who brings a claim under s. 138.3 must first obtain leave of the court to commence an action, unlike a plaintiff who commences an action under s. 130 of the *Securities Act*. As a result, s. 130 of the *Securities Act* provides a more attractive cause of action (assuming it is validly pled) and more powerful remedies than s. 138.3 of the *Securities Act*.

Certification Decision: 2019 ONSC 3827

The certification judge refused to certify the plaintiff's action as a class proceeding on the basis that it was "plain and obvious" that the plaintiff's claim did not disclose a "reasonable cause of action" (i.e., the claim was not tenable at law).

Duty of Care in Negligence?

The parties agreed that the plaintiff's negligence claim—which focused on the allegedly negligent design and management of the Fund—was a claim for pure economic loss. The certification judge rejected that the plaintiff's claim fell within any of the previously recognized categories of duties of care for pure economic loss (including, for example, negligent supply of a "shoddy good" or negligent performance of a service), which required the certification judge to consider whether it was appropriate to recognize a "novel" duty of care.

The certification judge referred to the Supreme Court of Canada's decision in *Deloitte & Touché v Livent Inc. (Receiver of)*, 2017 SCC 63, which directs that, in considering whether to recognize a novel duty of care for pure economic loss, it is relevant to consider (a) whether the parties are in a sufficiently close and direct (or proximate) relationship and whether the harm suffered is reasonably foreseeable, such that a *prima facie* duty of care exits; and (b) if so, whether there are residual policy considerations that should insulate the defendant from liability.

Ultimately, the certification judge determined that it was not appropriate to recognize a novel duty of care in these circumstances. While the certification judge was prepared to accept that there was a legally "proximate" relationship between Horizons and its investors (on the basis that harm to investors would be a "reasonably foreseeable" consequence of Horizons' negligence), the certification judge found that any resulting duty of care was limited by the narrow scope of Horizons' undertaking. In his view, Horizons had not agreed to guarantee returns, to actively manage the Fund, or to step in to prevent investor loss if things went awry. Rather, Horizons had simply undertaken to put on the market an ETF product that operated as described in the accompanying disclosure documents (which the Fund did). As a result, Horizons could not be held responsible for its investors' losses.

The certification judge also held that there were policy reasons that militated against extending a duty of care for pure economic loss in the manner proposed by the plaintiff. In the Court's view, imposing a duty to exercise care in the design and management of a passively-managed ETF product would:

1. deter useful economic activity where the parties are best left to allocate risks through the autonomy of contract, insurance, and due diligence;
2. encourage a multiplicity of inappropriate lawsuits;
3. arguably disturb the balance between statutory and common law securities actions envisioned by the legislator; and
4. have the courts take on a significant regulatory function when existing causes of action, the regulators, and the marketplace already provide remedies.

As a result, the certification judge concluded it was "plain and obvious" that the plaintiff/class members' claims in negligence could not succeed.

Primary Market Misrepresentation? Or Secondary Market Misrepresentation?

The certification judge accepted that there "should be a statutory cause of action for misrepresentations in the selling of ETFs, which now represent a substantial and growing share of the investment marketplace." But the novel issue before the certification judge was whether a claim for misrepresentations arising out of the sale of ETFs could be brought under s. 130 of the *Securities Act* (concerning primary market misrepresentation), or whether a claim only arose under s. 138.3 of the *Securities Act* (concerning secondary market misrepresentation).

ETFs sit somewhat uneasily within the civil liability regime created by the *Securities Act*. In this regard, the process by which units in the Fund were distributed to investors was somewhat complex, and differed from "typical" distributions of securities. In the instant case, Horizons distributed all units in the Fund to designated brokers/dealers pursuant to a continuous distribution agreement, with those newly created units referred to as "Creation Units." A broker/dealer would then make the units available for purchase over various stock exchanges. In order to fulfill the retail investors' orders over each stock exchange, the broker/dealer would either sell a unit from its existing inventory, or subscribe for additional Creation Units from Horizons.

Under applicable securities law, the first sale of a Creation Unit to an investor is a "distribution" of a security within the meaning of the *Securities Act*, which required Horizons and the designated broker/dealer to file a prospectus with the relevant securities regulator. At the same time, Creation Units were comingled with other units in the Fund purchased by the broker/dealer, such that it was impracticable to determine whether a particular re-sale involved Creation Units, units purchased in the secondary market, or both. To obviate this problem, securities regulators provide the designated broker/dealer an exemption from the obligation to deliver a prospectus with each re-sale of a Creation Unit, and instead allows the designated broker/dealer to provide a summary document (referred to as an ETF Facts Document) to first time purchasers of units. Importantly, an investor in the Fund had no way of knowing whether his or her purchase over the stock exchange involved the primary sale of Creation Units or a resale of units in the secondary market.

This raises a problem: were investors in the Fund purchasing units pursuant under a prospectus, such that they could bring a claim under s. 130 of the *Securities Act*? Or were they purchasing already circulating units in the secondary market? Could one tell?

The certification judge held that the plaintiff had improperly framed his claim under s. 130 of the *Securities Act*, and could not bring a claim for alleged misrepresentation in the Fund's prospectus. In the certification judge's view, ETFs were fundamentally connected to the "secondary market" because retail investors purchased units from designated broker/dealers that had made the units available for purchase over a stock exchange, and did not purchase the units directly from the issuer. The only connection between ETFs and the primary market was that before an ETF could begin trading on a stock exchange, the ETF manager was required to file a prospectus. However, purchasers of the units, for all practical purposes, were trading in the secondary market.

On this basis, the certification judge held that it was plain and obvious that the plaintiff's claim under s. 130 of the *Securities Act* could not succeed.

Ontario Court of Appeal: 2020 ONCA 337

On appeal, the Court of Appeal determined that the certification judge had erred in concluding that the plaintiff's claims were "doomed to fail." Writing for a unanimous panel of the Court of Appeal, Thorburn J.A. held that an ETF manager may owe a duty of care in negligence arising out its creation and management of an ETF product and that investors in ETFs could, in some circumstances, bring a claim under s. 130 of the *Securities Act*.

ETF Manager's May Owe a Duty of Care in Negligence

As a preliminary matter, the Court of Appeal disagreed with the certification judge that it was plain and obvious that the plaintiff's claim did not fall within the previously recognized categories of duty of care for pure economic loss. In its view, it was arguable that Horizons owed its investors a duty of care arising out of the negligent performance of a service, on the theory that Horizons was providing a service in designing and managing the Fund. In this regard, it was arguable that Horizons had negligently designed the Fund and failed to ensure it was an appropriate investment product for retail investors.

More significantly, the Court of Appeal held that the certification judge had erred in concluding that it was plain and obvious that this was an inappropriate case to recognize a novel duty of care requiring ETF managers to exercise reasonable care in the creation and management of ETF products. In particular, the Court of Appeal disagreed with the certification judge that Horizons had only undertaken to "place on the exchange a financial product that operated in accordance with the accompanying financial disclosure." Instead, it was suggested that Horizons had undertaken to its investors to act honestly, in good faith and in the best interests of the investment fund, and to exercise reasonable care and diligence, in accordance with s. 116 of the *Securities Act*.

The Court of Appeal emphasized that, at this early stage of the proceedings and for the purpose of the certification motion, the allegations in the plaintiff's statement of claim had to be assumed to be true. Since the plaintiff had alleged that Horizons had created a fund that was not suitable for any investor because it was structurally flawed and "doomed" to fail, it was arguable that Horizons had breached a duty of care in the circumstances. Nor was it plain and obvious at this early stage of the litigation that policy considerations ought to negate any such duty of care.

Some ETF Investors Can Bring a Section 130 Primary Market Misrepresentation Claim

The Court of Appeal also disagreed with the certification judge's conclusion that all purchases of ETF units should be treated as secondary market purchases, such that an ETF investor could *only* bring a claim under s. 138.3 of the Securities Act. In the Court of Appeal's view, an ETF investor could bring a claim under s. 130 of the *Securities Act*, if the investor had purchased a Creation Unit.

To begin, as the certification judge had recognized, Horizons was required to prepare and file a prospectus in connection with the distribution of the Creation Units to the broker/dealer and in connection with the first-resale of Creation Units to retail investors. While the broker/dealer was not required to deliver a prospectus in connection with each sale of a unit (as the result of the exemption provided by securities regulators) the ETF Facts Document provided by the broker/dealer incorporated by reference information in the relevant prospectuses. As a result, retail investors that purchase Creation Units qualified as purchasers of a security offered by prospectus during a period of distribution, and could therefore maintain a claim under s. 130 of the *Securities Act*.

In the Court of Appeal's view, the fact that an investor was unable to tell at the time of purchase whether they were purchasing a Creation Unit or a unit in the secondary market should not disentitle purchasers of Creation Units from bringing a claim under s. 130 of the *Securities Act*. The investors were obviously not responsible for the manner in which the units were distributed and, in the circumstances, it would be unfair to deny purchasers of Creation Units the advantages of proceeding by way of s. 130 of the Securities Act. Importantly in this regard, the Court of Appeal noted that, on the evidence before the court, it was not clear whether Horizons or the broker/dealer could distinguish between sales of Creation Units and other units. While this was a practical issue that would have to be addressed if the litigation were to proceed as a class proceeding, it did not mean the plaintiff's claim was "doomed to fail."

The Court of Appeal recognized that this created a somewhat artificial distinction between purchasers of Creation Units (who could bring a claim under s. 130 of the *Securities Act*) and purchasers of re-sale units (who could only bring a claim under s. 138.3 of the *Securities Act*), particularly given that investors could not know whether they were receiving Creation Units or re-sale units at the time of purchase. However, this conclusion was thought to be consistent with the manner in which ETFs were distributed and regulated, as well as the text of s. 130 of the *Securities Act*.

Takeaways

The Court of Appeal's decision may have significant implications for ETF managers, investors and other capital markets participants:

1. The decision suggests that managers of ETFs may face significantly greater potential liability than previously recognized at Canadian law. While it is important to emphasize that the Court of Appeal was dealing with an appeal from a certification decision (and therefore only concluded that it was not "plain and obvious" that the plaintiff's claim would fail), its

decision indicates a willingness to expand previously recognized duties of care for pure economic loss to account for the proliferation of ETFs and other index-based securities products. In this regard, an ETF manager *may* owe a duty of care in negligence to investors to properly design the EFT product and to fully disclose all risks associated with the ETF product. If the ETF manager is found to have breached the duty of care, it could be liable for investors' losses, even when the ETF operates exactly as described in the accompanying disclosure documents.

2. In holding that purchasers of Creation Units could maintain a claim under s. 130 of the *Securities Act* for misrepresentation in a prospectus, while purchasers of re-sale units could only maintain an action under s. 138.3 of the *Securities Act*, the Court of Appeal adopted an interpretative approach that emphasized the text of the *Securities Act* and the broader scheme of securities regulation. For example, the Court of Appeal found it significant that securities regulators formally regard the first distribution of Creation Units to retail investors as a "distribution" of securities (which required the ETF manager to file a prospectus), notwithstanding that trading in ETFs might be intuitively thought to be more akin to trading in the secondary market.

3. Passively managed ETFs have become widely popular among investors because of their low-fee structures. In light of the Court of Appeal's decision, it remains to be seen whether ETF managers will be able to maintain these low fee structures for all products. As a consequence of the decision, ETF managers may decide they need to actively manage more ETF products, which may require higher fees. ETF managers may also charge higher fees to offset their potential liability for investor losses, either at common law or under the *Securities Act*.

4. ETFs came to prominence as simple, low-cost alternatives to mutual funds, designed to allow retail investors to de-risk their portfolios through broad exposure to particular indexes and industries. But as *Wright* demonstrates, ETFs have become increasingly complicated and now include complex, derivative-backed securities. Paradoxically, a retail investor may now be able to invest through ETFs in securities they would not be able to purchase directly from broker/dealers (due to the "know your client" and investment suitability obligations that apply to investment trading accounts and investment advisors). In this context, ETF managers need to carefully consider whether certain of their products are appropriate for retail investors and, if not, what they can do to prevent casual investors from purchasing product not commensurate with investors' risk tolerance and degree of sophistication.

5. ETF managers should also carefully consider what disclosure must be provided in connection with particular ETF products. The Court of Appeal's decision in *Wright* emphasizes the importance of providing comprehensive disclosure, including details as to the mechanics of the ETF (for example, how the value of the product calculated at the end of each trading day), key risk factors (for example, exposure to market volatility or irregular trading patterns), and the suitability of the ETF for particular investing audiences (including, for example, whether the product is suitable for retail investors).

If you or your business have any questions, please contact a member of the Bennett Jones Securities Litigation or Corporate Finance groups.

RICHARDS BUELL SUTTON LLP
Established in 1871

Posted on: May 21, 2020

AVOIDING AND MANAGING PRIVACY BREACHES IN REMOTE WORKING ENVIRONMENTS

By: Julie Facchin

COVID-19 has caused a fundamental shift in the way many of us work. Instead of being in an office, we are working from home. We no longer have our colleagues close by, we are working on our own computers and other devices, and we are trying to make do with less than ideal setups.

It also appears that remote work, at least part time, will be the new normal for the foreseeable future. Because of that, employers who did not have remote work policies in place should be thinking about how to create and implement them.

At the same time, every organization and public body will experience privacy breaches, and remote work has increased the risks. Knowing what a breach is, and being prepared for it, are key to both preventing breaches and limiting the damage when one happens.

Background: What is a Privacy Breach and Why Should I Care?

Under BC's privacy legislation (the *Personal Information Protection Act* for the private sector in BC, and the *Freedom of Information and Protection of Privacy Act* for the public sector in BC,) a privacy breach occurs when there is unauthorized access to or collection, use, disclosure or disposal of one or more person's information.

That person can be a client or an employee. The types of information can include:

- Names and contact information (emails, phone numbers, addresses);
- Financial information (SIN's, bank account information, payroll information); and
- Health information (clinical records, prescription information).

The information which falls within the legislation must be about a person. For example, a company's bank account information is not personal information. That kind of information is nonetheless sensitive. You may want to consider taking some of the steps for privacy breaches for this kind of information as well, as a matter of customer relations.

The most common types of privacy breaches are:

- Theft: through cyber attacks or theft of computers, hard drives, or memory sticks;
- Loss: an employee loses a computer, hard drive(s), or memory stick(s); and
- Accidental disclosure: an employee accidentally sends (e.g. by fax or email) personal information to the wrong person.

Employers should care about privacy breaches because they can impose substantial costs in dollars, time, and goodwill. Senior staff will have to devote time to investigating the breach and preparing new policies and procedures to prevent it from happening again. Hackers may demand a ransom to return information they have stolen. Investigation by the Office of the Information and Privacy Commissioner and lawsuits can result in additional legal costs and payouts to the individuals affected. Organizational reputations can be damaged, especially if the breach is not handled well.

What are the Risks with Remote Work?

The rapid move to remote work has highlighted the risks that already existed. These risks fall into four categories:

1. Failure to prepare remote work policies;
2. Employee training and error;
3. Improper use of technology; and
4. Compromised physical workspace.

Failure to Prepare Remote Work Policies

Remote work policies are important to prevent and manage privacy breaches because they force employers to think ahead and consider where the risks are, and how to manage them.

Many employers did not have remote work policies in place before COVID-19. These employers either moved to remote work without any policies, or set them up in very short order. Both of these situations lead to increased risk for breaches due to employee error, improper use of technology, or compromised physical workspace.

Employee Training and Error

Many breaches are, in part, due to failures in employee training and resulting employee errors. Someone clicks on the link in a fraudulent email, thinking it is in fact from their superior, and installs ransomware.

Someone else takes hard copy files home and then puts them in municipal recycling. Both of these situations can result in privacy breaches.

Employee training is vital to prevent and manage these breaches. Employees who have been trained on their organization's remote work and privacy breach policies are less likely to make mistakes, and more likely to report a breach if it occurs.

Training is particularly important for remote workers, since there are more opportunities to make mistakes and fewer opportunities for supervision.

Improper Use of Technology

When most of us think of technology risks, we think of cyber attacks. Phishing and ransomware attacks in particular have been on the rise since the move to remote work. As noted above, employee training is key to preventing breaches as a result of cyber attack.

However, these are not the only technological risks. There are three, in particular, that arise from the rapid move to a remote work environment.

One risk is in relation to anti-virus and security software. When employees are working from an office, the employer is able to keep anti-virus and security software up to date on their work computers. If employees are now using home computers, they may need to update the software. Having out of date software increases the risk of cyber attack.

A second risk is in relation to unauthorized apps. We have all been looking for ways to work efficiently when our usual tools are not available. Some employees may choose to download and use apps – for example for smartphone scanning or videoconferencing – that have not been vetted by IT departments, resulting in security risks.

The third risk relates to use of free or inexpensive apps. Typically, when an app is free for the user, the developer earns income by gathering and selling information that is processed through the app. If the information includes personal information, this may be a privacy breach.

Compromised Physical Work Spaces

When employees are working from their employer's office, the employer has control over their physical workspace. For instance, hard copy files with personal or sensitive information can be put away in locked cabinets or shredded when no longer needed. Calls or meetings with clients can take place in secure environments.

Employees working from home are in a much less secure environment. Many are working from kitchen tables, with other members of their household walking by and able to see their work or hear their calls. Sensitive papers may end up in municipal recycling. Either of these can result in a privacy breach.

What Can I Do To Avoid a Breach?

The two most important steps an organization or public body can take are to prepare thoughtful and thorough policies, and educate employees on them.

In particular, think about preventing cyber attacks, ensuring appropriate app use, and (to the extent possible) maintaining secure physical work spaces for employees. The details will depend on the nature of your work and the personal information you collect and use.

The Office of the Information and Privacy Commissioner for BC published a short and basic tips sheet to help employers set up remote working. It is available here.

How Can I Make Managing a Breach Easier?

Privacy breaches are inevitable. But you can take three steps to make them easier when they do happen.

1. Do the hard work now: prepare a breach protocol and train staff on it. For the breach protocol, think about:

- What kind of information is at risk and how sensitive it is;
- What kinds of breaches are likely to occur;
- How and to whom you want employees to report the breaches;
- Who will investigate and respond to the breach (in a large organization or public body, this may include the privacy officer, senior management, IT, security, and PR or communications) and how they will do so;
- What outside experts will be contacted and hired and when;
- How breaches will be contained;
- How and when individuals whose personal information was compromised will be notified; and
- Whether you have any obligations to notify anyone else (insurers, privacy commissioners, regulatory bodies, or commercial partners).

2. Contain the breach: do what you can, as quickly as you can, to limit the damage. For example,

unplug the computer that is transmitting data, or call the person who accidentally received the fax to ask them to shred it.

3. Contact counsel and your insurance broker early. Some organizations and public bodies have insurance coverage for cyber attacks and other privacy breaches. If you do, your insurer will appoint a breach coach to help you through the rest of the steps. If not, contact our Privacy Lawyer, Julie Facchin, to get advice on policies and training ahead of time, and to learn how to respond to a breach when one happens.

/Carey

News Alerts

Superintendence of the Environment issues a general instruction for carrying out environmental inspection activities

June 12, 2020

On May 28, 2020, the Superintendence of the Environment ("SMA") issued Resolution No. 897, which established the following exceptional measures for environmental inspection activities carried out by Technical Environmental Inspection Entities ("ETFA"):

- Environmental inspectors who are unable to supervise in person the sampling and measurement activities for which they have authorization, may carry out said supervision remotely.
- Said activity may be carried out by another person and needs to be videotaped. The video needs to show the date and time of the activity, its format must be JPG and not exceed 50 MB in size.
- The ETFA must deliver to the project holder, together with its report of results, a copy of the video and a sworn statement from the environmental inspector that accounts for their impossibility to supervise the activity and the necessary records to corroborate such information, which will be assessed by the SMA
- In the event of any other type of inconvenience to fully comply with the guidelines established by the SMA, the ETFA must produce all the necessary evidence, in accordance with the provisions of the technical document approved by Resolution No. 127/2019.

These exceptional measures will be in force as of June 1, 2020.

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

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Legal Commentary

May 11, 2020

Will Quota Removal Put R/QFII Back in the Game?

Authors: TieCheng YANG | Yin GE | Ting ZHENG | Eryin YING | Flora WEI

Background

In an effort to reinvigorate interest in the Qualified Foreign Institutional Investor (QFII)/RMB Qualified Foreign Institutional Investor (RQFII) program, the People's Bank of China (PBOC) and the State Administration of Foreign Exchange (SAFE) announced their decision to abolish the investment quota restrictions for QFII and RQFII on 10 September 2019. The market has expected relevant implementing rules since then. On 7 May 2020, PBOC and SAFE issued the *Provisions on Administration of Securities and Futures Investment Funds of Foreign Institutional Investors* (《境外机构投资者境内证券期货投资资金管理规定》) (the "**New Rules**")[1] to implement the above decision and to further facilitate R/QFIIs' onshore capital management. Interestingly the New Rules came out after the issuance of guidance by the U.S. Securities and Exchange Commission (SEC) and the U.S. Public Company Accounting Oversight Board (PCAOB) on emerging market investments, e.g. the *Emerging Market Investments Entail Significant Disclosure, Financial Reporting and Other Risks; Remedies are Limited* issued on 21 April 2020[2], which, in particular, advised U.S. funds and registered investment advisors to consider more risk factors for exposure to securities traded on Chinese stock exchanges (e.g. A-shares).

As expected, the New Rules will unify the existing capital management rules applicable to QFIIs and RQFIIs, namely the *Measures on the Foreign Exchange Administration of Domestic Securities Investment by Qualified Foreign Institutional Investors* (《合格境外机构投资者境内证券投资外汇管理规定》) and the *Circular on the Management of Domestic Securities Investment by RMB Qualified Foreign Institutional Investors* (《关于人民币合格境外机构投资者境内证券投资管理有关问题的通知》) (collectively, the "**Existing Rules**"). The New Rules will take effect and supersede the Existing Rules from 6 June 2020.

We have summarized below notable key aspects of the New Rules.

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[1] Our in-house English translation of the New Rules is available upon request.
[2] https://www.sec.gov/news/public-statement/emerging-market-investments-disclosure-reporting.

Key Aspects

I Quota restrictions abolished

After the effectiveness of the New Rules, R/QFIIs will no longer be required to apply for investment quotas from SAFE. Instead, after obtaining R/QFII licensure from the China Securities Regulatory Commission (CSRC), R/QFIIs will only need to register with SAFE (via their respective main custodian) before being permitted to open custody accounts. PBOC, in a Q&A for the New Rules[3], further clarified that current R/QFIIs will be allowed to directly open custody accounts using their existing registration information and need not again register with SAFE.

II Free selection of remittance timing and currency

An R/QFII may freely choose the timing and currency in which investment capital will be remitted into China, which can be RMB and/or foreign currency. However, in principle, the currency of an inward remittance shall be consistent with future repatriation to avoid currency arbitrage between RMB and the foreign currency.

III Simplified process for routine repatriations

The Existing Rules require a special audit report by a PRC certified accountant and a tax clearance or filing form before an R/QFII may repatriate investment proceeds out of China. The New Rules substantially simplify the documentation requirements for routine repatriations – an R/QFII is only required to provide a repatriation application/instruction and a tax payment undertaking letter. A special audit report and a tax clearance or filing form will still be required when an R/QFII or its product is liquidated.

IV Removal of restrictions on number of custodians an R/QFII may appoint

The New Rules remove the restrictions on the number of custodians that an R/QFII may appoint and allow for the appointment of multiple custodians based on actual need. Where an R/QFII appoints more than two custodians, one of them is required to be designated as the main custodian for filing and registration purposes.

V General requirements on derivatives transactions remain substantially unchanged

1. The New Rules substantially retain the general requirements for derivatives transactions for R/QFIIs under the Existing Rules. Specifically, Article 16 provides that derivatives transactions conducted by an R/QFII within China are limited to foreign exchange derivatives for hedging purposes and other financial derivatives that comply with applicable rules. Exposure to derivatives should be reasonably related to the risk exposure under the underlying domestic securities investment. Based on our understanding, such other financial derivatives include stock index futures and other financial derivatives which may be available in the future (under CSRC's proposed R/QFII rules). However, it remains unclear whether transactions involving other financial derivatives must also be conducted

[3] The Q&A is available at http://www.pbc.gov.cn/goutongjiaoliu/113456/113469/4019498/index.html?from=timeline&isappinstalled=0.

only for hedging purposes or whether other applicable rules will apply (e.g. CSRC's new R/QFII rules).

2. Article 17 provides that foreign exchange derivatives positions held by a R/QFII must not exceed the scale of the underlying RMB-denominated assets relative to its domestic securities and futures investments, to ensure compliance with the principle of trading on an actual-need basis.

Outlook

While the New Rules mark another step forward in reforming the QFII and RQFII programs, issuance of the New Rules may not be sufficient to attract more foreign investors to participate in the R/QFII program. This is because limited investment scope is primarily responsible for the R/QFII program to be less attractive, rather than quota limits or the difficulty of repatriation. Another issue which may complicate matters is the issuance by SEC and PCAOB of guidance on emerging market investments as discussed above. While the full implication of the SEC and PCAOB guidance is not yet known, it may discourage certain foreign investors from investing in A-shares, either via R/QFII or otherwise.

As a result, the CSRC's new R/QFII rules[4] may be more helpful to put the R/QFII program back in the game, because they propose to substantially enlarge the investment scope of R/QFIIs to cover asset classes other than A-shares and bonds.

We will continue to monitor the developments and provide further insight on a timely basis.

[4] On 31 January 2019, CSRC issued the consultation drafts for amended QFII and RQFII rules (accessible at http://www.csrc.gov.cn/pub/csrc_en/newsfacts/PressConference/201901/t20190131_350613.html) which propose several changes to the current R/QFII program, e.g. merging QFII and RQFII regimes, expansion of the investment scope of R/QFIIs, requiring reporting of offshore derivatives positions relevant to domestic securities investment, etc. CSRC has not yet promulgated these R/QFII rules.

Important Announcement

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

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Brigard Urrutia

June 5th, 2020

NEW DECREE ON BANKRUPTCY PROCEEDINGS

On June the 3rd, 2020, the National Government issued Legislative Decree 722 of 2020 "which adopts special measures regarding bankruptcy processes, to mitigate the effects of the corporations resulting from the social, economic and environmental emergency". The decree modified some aspects of the current bankruptcy regime, and added mechanisms to protect the company and employment, which include a new expedite reorganization proceeding, and a simplified liquidation proceeding.

1. SCOPE OF APPLICATION

The measures adopted by the Decree are not permanent. The tools provided will be available for two years from its entry into force and will only apply to companies affected by the causes that led to the State of Economic and Social Emergency. To that extent, when applying these mechanisms, it will be necessary to justify and prove the effects of the emergency. The Decree does not establish a minimum or specific test for such proof, and it will be up to the Superintendence of Companies to verify that the company was indeed affected by the causes that gave rise to the emergency.

2. EXPEDITE ADMISSION PROCESS

The Decree simplifies the process of admission to reorganization mechanisms. Consequently, it provides that the judge will not audit the content or accuracy of the documents provided or the financial information or its compliance with the accounting policies of the applicant debtor. What is required is that the debtor certifies that the regular accounting is maintained and verifies the completeness of the documentation provided. The first decision about the admission of the proceedings may order to extend or to update such information.

3. TECHNOLOGICAL TOOLS

To handle the large number of applications, the Superintendence of Companies may request to fill out an electronic form and may use online tools and artificial intelligence -which could be permanently implemented-. Those who declare not have access to technological tools will be supported through the secretary by allowing them the technological access or the physical filing. The information may be online granting the access to third parties.

4. PROTECTION MECHANISMS

A. The company and the employment

The first decision about the admission of the insolvency proceedings of a debtor affected by the emergency should lift interim measures of executive or coercive collection proceedings regarding said debtor's goods not subject to registration. The executive or coercive collection proceedings' judge should return those goods or money. The promoter of the insolvency proceedings should inform the judge about the destination of the returned good or money.

B. Reorganization proceedings related to real state for housing

Affected debtors, whose purpose is the construction and sale of real estate destined for housing, who have mortgage credits, may, without authorization, make payments of the largest mortgage credit, directly or through a buyer of a housing unit, observing buyer's legal rights. Those operations must be reported, including data and supports, to the insolvency judge, within the next 5 days.

The clauses included in the reorganization agreement should comply with the "promise of purchase's" commitments, looking for the compliance of the purchase contract instead of the refund of the money.

C. VALUE RECOVERY IN LIQUIDATION PROCEEDINGS

The global adjudication of a productive unit should be preferred. If it is not possible, the divided adjudication should produce value.

The liquidator may submit to the creditors a proposal to perform one or multiple trust contracts to transfer partially or totally the adjudicated goods and pay the obligations with such fiduciary rights. The proposal shall be approved by most of the creditors. Silence by a creditor will mean its positive vote. Even though the judge is not in charge of developing the clauses of the trust contract, the existence and the terms of the trust contract may be informed to the judge.

5. STRENGTHENING OF THE LIST OF ASSISTANTS OF JUSTICE

The lists of justice assistants will be broadened, and it is indicated that the same person may act as promoter, liquidator, and inspector, in various processes, without exceeding 6. The assistant who is domiciled in the place where the process is conducted, is preferred.

6. RULES REGARDING DECREE 560, 2020

Postponement of administration payments (Numeral 3, Par. 1, Article 8, Decree 560) must be framed in the principle of good faith. Therefore, the use of the rule without justification should be identified as an abuse of the law.

Debtors who obtain financing under Article 5 of Decree 560 must be complying with their credits to obtain the judge confirmation of the reorganization agreement.

Paragraph 3 of article 8 of Decree 560 will be applicable to procedures before the chambers of commerce related to article 9 of said Decree.

The suspension of the “dissolution for losses” cause for company dissolution, is extended for two (2) years, for all types of companies.

7. EXPEDITE REORGANIZATION PROCEEDINGS, AND SIMPLIFIED LIQUIDATION PROCEEDINGS.

A. Expedite reorganization proceedings

Proceedings regarding companies which asset value is less than 5,000 monthly minimum wages, will be admitted in an expedite reorganization proceeding. The application must comply with general legal requirements and a cease of payments.

There are additional requirements to those included in the Article 19 of Law 1116 of 2006, to be included in the order opening the insolvency proceedings. The debtor must comply with the requirements and the order, and then report its compliance to the judge within 5 days after the expiration of each granted term.

Features and rules to follow in this type of proceedings are included.

B. Simplified judicial liquidation proceedings

The debtors whose assets are less than 5,000 monthly minimum wages will be part of small insolvencies. They will be admitted exclusively in a simplified judicial liquidation process.

The rules to develop this type of proceedings are included. It is also clarified how to establish and pay the liquidator’s fees in this type of proceedings.

It establishes that regarding matters not provided, in relation to this new type of proceedings, and compatible with Law 1116 of 2006 and Decree 560 of 2020, such regulations will be applied alternatively.

8. TREATMENT OF SOME DEBTOR INCOME TAX

For fiscal year 2020 and 2021, the reductions, discounts or capital withdrawals, fines, penalties or interests obtained by the debtors, will be taxed as capital gain and not as ordinary income. The foregoing, in the understanding it is within the framework of a reorganization agreement under Law 1116 of 2006, and Decrees 560 and 772 of 2020.

Likewise, within the framework of the provisions of this article, for the fiscal year 2020 and 2021 the capital gains may be compensated with the capital losses of the year or with the accumulated fiscal losses.

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GIDE
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Edmond
Schlumberger

The right of creditors to object to corporate transactions in Covid-19 period

5 June 2020

Point of view | France | Mergers & Acquisitions / Corporate

Among the many unsuspected consequences of the now famous "Time-limits" ordinance of 25 March 2020 (available here), some are of direct interest to companies of all sizes, and more specifically to the various restructuring processes employed by them.

Mergers, demergers, partial asset contributions, capital reductions not motivated by losses, dissolution-mergers - all these operations, which are extremely frequent in practice, have the common feature of offering the creditors of the companies concerned a right of opposition, to be exercised within a relatively short period of time (20 to 30 days depending on the case) before the operation in question is completed, the justification for which lies in the modification or even the cancellation of their initial lien. In concrete terms, if they consider that the prospects of payment of their claim are jeopardized, creditors must expressly apply to a judge to request immediate repayment or the provision of guarantees.

However, by extending a large number of legal deadlines in view of the practical difficulties caused by the epidemic in asserting their rights, the ordinance has undermined this mechanism. In that it covers any "legal action (…) prescribed by law (…) on pain of foreclosure", Article 2 of the Ordinance unquestionably applies to the right of opposition. The latter obviously takes the form of a legal action, imposed by various legal texts to protect the substance of the author's right, which can no longer be upheld after the time limit set by the said texts. The result is that, in accordance with Article 2 and in the case of restructuring operations implemented during the period legally protected under the health crisis[1], creditors may validly file an opposition on two occasions. On the one hand, the opposition could have been lodged within the "normal" period of 20 or 30 days from the various starting points provided for by the texts. On the other hand - and this is the novelty - the opposition can still be received within the same time limit, but this time from 24 June, it being specified that, since its revision on 13 May 2020[2], the Ordinance applies only to time-limits "which expired or will expire between 12 March 2020 and 23 June 2020 inclusive", so that it no longer applies to transactions decided during the 20 or 30 days preceding the latter date of 23 June 2020.

It remained to be seen whether the validation of this late action by the Ordinance would result in a corresponding postponement of the overall timetable of the operation. To the letter of the texts, this risk appeared to be particularly sensitive in cases of dissolution-merger and capital reduction not motivated by losses. In fact, Articles 1844-5 of the French Civil Code and L. 225-205 of the French Commercial Code expressly bind the effects or continuation of the transaction at the end of the opposition period or to the fate granted to the transaction by the court, whereas Article L. 236-14 of the French Commercial Code provides that such opposition "does not have the effect of prohibiting the continuation of the transactions" in the case of a merger, demerger or partial contribution of assets subject to the demerger regime. It could therefore have been deduced that, in the first case at least, the opening of a *new* deadline for creditors to file an objection postponed the final implementation of the transaction which also seemed in line with the opinion of the council of the national order of commercial court clerks[3].

This was not, however, the approach proposed by the Chancellery in a position first given on dissolution-mergers (available **here**) and later transposed to capital reduction not motivated by losses (available **here**). For the Chancellery, the ordinance does not strictly speaking introduce a classical extension of the time limit, but only deems an opposition lodged within a later open time limit not to be late, so that it would not affect the date of completion of the transaction.

This position was finally endorsed by the public authorities by means of an ordinance of 3 June 2020[4], which expressly provides the interpretation to be given to the provision under debate on the right of opposition. The ordinance states that, in respect of such a right, this provision does "not have the effect of postponing the date before which the act to expire at the end of this period cannot be lawfully performed or produce its effects". Consequently, there is no doubt that the timetable and the start of the restructuring operation, whatever its nature, will not be affected by the new deadline for creditors to object, which is confirmed in a particularly explicit manner by the report to the President of the Republic relating to the ordinance of 3 June 2020[5].

The reasoning is undeniably appealing, in that it is based on the ordinance's original spirit, which aims to preserve individual rights without paralysing economic activity. Nevertheless, this position leads to the somewhat paradoxical result that the *new* opposition period offered by the Ordinance to creditors will no longer be of much use to them, because of the final completion of the transaction and the underlying risks that it would have been likely to cause for their right of lien.

It should probably then be considered that, as in the case of a merger where the company does not comply with the protective measures imposed by the court, the transaction would be unenforceable against the plaintiff creditor whose opposition would be accepted by the court within the new time limit. This would be tantamount to giving him a priority of payment over the company's assets, a priority that would itself be enforceable against all of the company's creditors.

Beyond that, one can more certainly be of the opinion that these debates confirm the notoriously inappropriate nature of the right of opposition as it is conceived today, in that it makes restructuring operations considerably more cumbersome while being practically never used by its beneficiaries.

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[1] That is to say, the period beginning on 12 March and ending on 23 June at midnight, pursuant to Article 4 of Law No. 2020-290 of 23 March 2020 and Article 1 of Ordinance No. 2020-306, in its version resulting from Ordinance No. 2020-560 of 13 May 2020.
[2] See Article 1 of Ordinance No. 2020-560 of 13 May 2020, which amended Article 1 of Ordinance No. 2020-306 on this point.
[3] See Ministerial letter 50G-2020 dated 16 April 2020.
[4] See Ordinance No. 2020-666 of 3 June 2020 relating to the deadlines applicable in financial and agricultural matters during the state of health emergency.
[5] See the report to the President of the Republic relating to the ordinance No. 2020-666 of 3 June 2020 relating to the deadlines applicable in financial and agricultural matters during the state of health emergency.

♦ ♦ ♦

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The partners of Gide's **Mergers & Acquisitions / Corporate** practice group are available to answer any questions you may have in this respect. You may also get in touch with your usual contact at the firm.

SKRINE

Additional Powers of the Copyright Tribunal

10 June 2020

The Minister of Domestic Trade and Consumer Affairs has by a gazette notification published on 3 June 2020, appointed 1 July 2020 as the date on which the Malaysian Copyright (Amendment) Act 2020 ("Amendment Act") will come into operation.

The Amendment Act will amend the Copyright Act 1987 and introduce an additional section 59c, empowering the Copyright Tribunal to hear any dispute relating to royalties arising between a licensing body and any of its members subject to the agreement of such licensing body and such member, as an option to alternative dispute resolution.

Previously, disputes between the licensing body and any of its members relating to distribution of royalties were either resolved among themselves, by Music Rights Malaysia Berhad (MRM) acting as a mediator when required, or through Court proceedings.

The new provision section 59c will provide an alternate, cost reducing and time efficient platform for licensing bodies and their members to resolve disputes relating to royalties by providing additional powers to the existing Copyright Tribunal.

If you have any queries on the above, please contact our Ms Alyshea Low (Senior Associate) at ***alyshea.low@skrine.com***

Santamarina + Steta

Competition Provisions in the New Mexico-EU Free Trade Agreement

Author: Ivan Szymanski – iszymanski@s-s.mx

On April 28, 2020, Mexico and the European Union ("EU") announced that after more than four years of negotiations, an agreement had been reached for the modernization of the almost 20 year old "*Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part*".

Even though the official text of the agreement has not been yet made public, as it is in the legal review procedure, the Mexican Government, and just for informative purposes, published in its website the preliminary texts of the new agreement. This short article will try to summarize the provisions of each section of the Competition chapter and the evolution of the competition provisions therein in an effort to analyze the development of the competition provisions from the agreement reached in the year 2000 (the "2000 Agreement") and the ones to be included in the new agreement (the "New FTA").

It is important to take into account that in the year 2000, when the 2000 Agreement was signed, the Mexican competition system was in its first years of existence and was still fully controlled by the Executive Branch. Therefore, as you will notice from this analysis, the Federal Economic Competition Commission and the Federal Institute of Telecommunications have gained valuable experience and sophistication in the past 20 years, that is now reflected in the scope of the obligations set forth in New FTA for both parties.

Competition Section – Agreement of 2000

As mentioned above, and considering the relatively newly created antitrust system in Mexico, the competition provisions included in the 2000 Agreement were, so to say, basic and limited. In essence, Article 11 of the 2000 Agreement only set forth that "*The Parties shall agree on the appropriate measures in order to prevent distortions or restrictions of competition that may significantly affect trade between Mexico and the Community*". Then, it was all about cooperation and coordination between the two parties to implement competition rules and to ensure transparency in its enforcement. Needless to say there were no true obligations imposed on the parties.

Then it continued to say that to reach this goal (which we understand is "to agree on the appropriate measures…"), the Joint Council would decide on the following:

(a) agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings;
(b) the abuse by one or more undertakings of a dominant position;
(c) mergers between undertakings;
(d) state monopolies of a commercial character; and
(e) public undertakings and undertakings to which special or exclusive rights have been granted.

As it results evident, nowhere in in the 2000 Agreement is the nature or effect (or even the objective pursued) by such decisions of the Joint Council mentioned; reason why I believe, in its 20 years of existence, the Joint Council never took a single decision related to this article.

The New FTA

A long time has passed since the very basic competition provision included in the 2000 Agreement and with it, the authorities of both the European Union and Mexico have faced new challenges in a multiplicity of old and new markets, from very traditional retail and agriculture markets to the now in *vogue* digital markets.

As a reflection of this, the New FTA included not just an article dealing with competition policy (as in the 2000 Agreement) but a complete chapter on this topic. As mentioned in Annex I of Chapter 23, the Competition Authorities, for the purposes of competition issues, are:

In the case of Mexico:
+ Federal Economic Competition Commission
+ Federal Telecommunications Institute (exclusive and limited jurisdiction over competition matters dealing with telecommunications and broadcasting)

In the case of the EU:
+ The European Commission

This Chapter (that everything indicates will become Chapter 23 of the New FTA) is organized as follows:

Article 23.1 – General Principles

Key points:

a) The parties recognize that free and undistorted competition is important and that anticompetitive business practices and state intervention have the potential to distort the proper functioning of markets.
b) By proscribing such conducts, implementing competition policy, advocacy and cooperation the parties believe the benefits of the New FTA will be greater.

Article 23.2 – Competition Law and Anticompetitive Business Practices

Key points:

a) Action shall be taken with respect to anticompetitive business practices "with the objective of promoting competition policy."
b) Obligation to maintain comprehensive competition law, that applies to all sectors of the economy and to all economic agents (i.e. public and private undertakings). Such competition law shall, at least, deal in an effective way with:

    i. Cartel infringements: agreements, decisions and concerted practices between undertakings which have, as their purpose or effect, the prevention or distortion of competition.
    ii. Abuse of dominant position: abuses by or more undertaking, which individually or jointly have *substantial market power in the relevant market* that have or may have, as object or effect, the prevention, restriction or distortion of competition in that *relevant market or any related market.*

iii. Concentrations: concentrations between undertakings which result or may result in a substantial lessening of competition, or which (may) significantly impede effective competition.

c) The application of competition law shall not obstruct the performance of tasks of public interests.
d) Exemptions to competition law

Article 23.3 – Implementation

Key points:

a) Autonomy for amending and enforcing law is retained by each party.
b) Competition authorities shall be maintained as independent entities with the necessary authority to apply and enforce competition law.
c) Law shall be applied in a transparent and non-discriminatory manner. Procedural fairness, the right to be heard and right of defense shall be respected.
d) Competition authorities shall not discriminate on the basis of nationality.
e) The opportunity to seek judicial review of a decision made by Competition Authorities shall be granted.

Article 23.4 – Transparency

Key points:

a) The value of transparency in enforcement policies is recognized.
b) Parties shall publish their administrative rules and provisions of procedure under which their investigations and enforcement procedures are conducted. These procedural legal instruments shall give the parties certainty on the procedure to be followed, including well defined timeframes for introducing evidence.

c) Non-confidential versions of enforcement decisions shall become public.
d) All final decisions or decisions finding a violation to competition law shall (i) be in writing; (ii) include fact finding and reasoning, including, if applicable, economic analysis.

Article 23.5 – Cross-Border Cooperation and Coordination

Key points:

a) The New FTA recognizes the importance of cooperation and coordination between the competition authorities. The parties' competition authorities shall endeavor to cooperate in relation to their respective competition law.
b) Parties shall strengthen cooperation in the enforcement of their laws to the extent permitted by their respective laws. For this purpose, the parties shall endeavor to exchange non-confidential information, experiences and views in regard to its competition law, practices, policies, enforcement and advocacy actions.
c) Parties' authorities shall strengthen coordination in areas of mutual concern and, to the extent possible, focus their enforcement activities to the same or related cases.
d) Parties' authorities have full discretion to decide to take action on particular requests from other Parties' authorities.
e) Competition authorities may consider entering into a separate cooperation agreement.

Article 23.6 – Technical Cooperation

Key points:

a) It is of the common interest of the Parties to cooperate in technical matters aiming to develop and implement better competition policies and enforcement.

Article 23.7 – Consultation

Key points:

a) For mutual understanding between the Parties or to address some specific matters on the interpretation or application of this Chapter, each Party upon the request of the other Party, shall enter into consultation on such issues. There shall be an effect on trade between the Parties.
b) Parties shall promptly discuss any question arising from this Chapter.

Article 23.8 – Confidentiality of Information

Key points:

a) Parties are not required to share information if such communication is prohibited by the laws of the Party possessing the information.
b) Information shared under the New FTA shall be kept confidential.
c) When the Party´s competition authority receives confidential information, pursuant to a confidentiality waiver, it should use the information received in accordance with the terms of the waiver.

Article 23.9 – Dispute Settlement

Key points:

a) Parties may not recourse to the dispute settlement mechanism set forth in the New FTA for violations to this chapter.

As it is possible to see, the New FTA reflects, in a much more accurate way, the reality of the Mexican and European competition systems. In this New FTA cooperation and coordination between the antitrust authorities from both parties will be fostered, but not under vague premises but on certain provisions of a legally binding international agreement.

NautaDutilh

Corporate Litigation Alert - Netherlands

Deal Certainty – Contracts upheld despite COVID-19

Courts in the Netherlands have been asked to consider whether the COVID-19 pandemic justifies walking away from a deal. So far, the courts have upheld the terms of the transaction. In other words, it's business as usual. This newsflash discusses two recent decisions.

Private equity firm ordered to sign share purchase agreement

In one of the first COVID-19-related cases, the Amsterdam District Court ordered a private equity firm (the buyer) to proceed with the signing of a share purchase agreement (SPA) and rejected their argument that they could not be expected to sign in view of COVID-19. NautaDutilh's Paul Olden and Marieke Faber successfully represented the sellers. The decision in summary proceedings can be read here.

> Nordian Capital (Nordian) was selected in a controlled auction, after the firm submitted a binding offer with fully committed financing. Nordian and the sellers of target J-Club entered into a signing protocol on February 28, 2020, which provided for the signing of an SPA in agreed form. At that time, the first case of COVID-19 in the Netherlands had already been reported. The signing of the SPA was made subject only to Nordian taking out Representations and Warranties (R&W) insurance.
>
> On March 19, 2020, Nordian tried to walk away from the signing, claiming that they had not been able to obtain R&W insurance and that they wished to first obtain clarity with respect to the effects of the COVID-19 outbreak on J-Club. The sellers lodged summary proceedings to secure the signing of the SPA.
>
> The court ruled in favor of the sellers, finding that Nordian had not honored its best effort obligation to obtain R&W insurance and that the condition must be deemed fulfilled (Article 6:23(1) Dutch Civil Code (DCC)). Nordian relied on Article 6:258 DCC, citing "unforeseen circumstances" and argued that the sellers could not expect the SPA to be signed in its agreed form in view of the circumstances resulting from the COVID-19 outbreak. The court dismissed this defense. The potential consequences of COVID-19 for J-Club had been discussed prior to execution of the signing protocol, and Nordian had not opted to include a material adverse change clause after this possibility was discussed.

Contractual risk allocation upheld despite COVID-19

The second decision is from the Netherlands Commercial Court (NCC). A letter of intent (LOI) was signed with respect to the acquisition of a 50% stake in an equestrian show-jumping business. The LOI contained a EUR 30 million break fee. The buyer decided not to pursue the transaction and argued that the break fee should be reduced in light of the COVID-19 crisis. The NCC rejected the buyer's arguments, upheld the risk allocation laid down in the LOI and ordered the prospective buyer to pay the EUR 30 million break fee. The decision can be read here.

> “The fee allocates risk and expresses commitment. The fee caps the defendant’s exposure. The harm to the business may be substantial and structural (as the defendant contends), or it may be short-term and minimal (as the claimant insists). Either way, the best “share the pain” solution, to preserve the contractual equilibrium in the agreement, is for the defendant to pay the fee as written. This allocates a defined risk to the defendant, but substantial actual or potential risks are borne by the claimant. If the fee were to be reduced in any business

downturn, the fee's purpose – comfort and confidence to get the deal done – would not be accomplished. The fee would be eviscerated in precisely the circumstances in which the parties intended it to be robust. The Court therefore allows the alternative claim, and orders the defendant to pay the EUR 30 million fee."

For more information


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NautaDutilh

Netherlands | Luxembourg | Belgium Law Firm

June 10, 2020 | 2 min read

Employment law (/resources/employment-law)

New laws come into effect on 27 June 2020 with potential impacts on arrangements such as labour hire, temping and secondments.

The Employment Relations (Triangular Employment) Amendment Bill covers 'triangular' employment situations where an employee is employed by one organisation but performs work for the benefit of and under the control and direction of another organisation (controlling third party). For example, this could cover labour hire workers, temps and secondees.

When the Act comes into effect later this month, employers and/or workers in a triangular employment relationship can apply to the Employment Relations Authority to join the controlling third party to proceedings to resolve a personal grievance claim.

The Authority must grant the application if it is satisfied that:

- there is an arguable case that the party is a controlling third party; and
- that the controlling third party's actions caused or contributed to the personal grievance; and
- the controlling third party was advised of the personal grievance by the employee within 90 days of the alleged personal grievance occurring or coming to the notice of the employee. Alternatively, an employer may notify the controlling third party within 90 days of the employee raising a personal grievance with the employer.

The Authority may also, of its own motion, join a controlling third party to proceedings.

What are the consequences?

If you are joined to proceedings as a controlling third party:

- You may be directed to attend mediation; and/or
- The Authority may order that you and the employer pay compensation for lost earnings and/or distress in a way that reflects your respective contributions to the situation giving rise to the grievance.

The Authority can't order reinstatement of the worker to your organisation. However, based on existing case law, it is already open to a worker to bring an alternative claim arguing that they are, in fact, an employee directly of the controlling third party. This involves an assessment of the 'real nature of the relationship' and considering issues such as control, supervision and integration into the organisation. If a worker is successful in a claim of this nature, then reinstatement is a potential remedy.

Preparing for the changes

In preparation for the upcoming changes, we recommend that organisations review contractual arrangements/template documents in relation to workers performing work as part of a 'triangular' relationship. The way in which these relationships operate in practice should also be carefully reviewed to identify and address any risk factors.

Get in touch

If you have any queries, or if we can assist further, please don't hesitate to contact one of the team.

Arias

PRESS ROOM

NICARAGUA: TELCOR EXPANDS THE OBLIGATION OF TELECOM OPERATORS TO INFORM APPOINTMENTS RELATED TO MANAGEMENT POSITIONS

June, 2020

On May 18 of 2020, through the Official Gazette number 88, the new Administrative Agreement number 004-2020 came into force by which it was amended the article number 1 of the previous Administrative Agreement number 006-2013, both issued by the Nicaraguan Telecommunication Regulator ("TELCOR").

The previous Administrative Agreement 003-2013 initially established as an obligation of every telecom operator company in the country to report before the regulator entity TELCOR every internal appointment made in the management category. Nevertheless, as of the entry into force of the new Administrative Agreement 004-2020, such obligation has been increased and new position has been includedin the list of officers whose appointments must be reported to TELCOR, being the obligation of every operator to keep such reports duly updated and submitted before TELCOR as established in both administrative agreement.

On the other hand, it is important to mention that in matters of prevention, investigation and prosecution of Organized Crime in the country, TELCOR through the Administrative Agreement 004-2020 emphasizes the obligation of each telecom operator to keep an official and updated record of users or customers who use the services commercialized in the country, which may be required by each competent authority for purposes of investigation, prosecution and criminal proceedings.

All the above has been arranged by TELCOR to fulfil with the public interest obligations and any contravention of such provisions will be subject to the initiation of disciplinary proceedings as the case may be.

Should you have any questions or would like more information on the subject, please do not hesitate to contact us.

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Starboard: Priority of legal expenditure in maritime disputes

June 8, 2020

The ability to recoup legal expenditure is a feature of common law jurisdictions. In a recent case, the Singapore High Court decided on the priority-ranking to be given to legal expenditure in relation to payment out of the sale proceeds of ships sold judicially.

In *The Songa Venus* [2020] SGHC 74, there was a dispute between a shipyard and a mortgagee over the priority to be accorded to the ship-repairer's legal expenditure in advancing successfully a ship-repairer's claim that enjoyed priority over the mortgagee's claim. Although ship-repairers' claims *per se* do not normally enjoy priority higher than mortgagee claims, they could do so if the ship was in the ship-repairer's possession at the time the ship was arrested and the ship-repairer can be said to have a *possessory lien* over the ship (which the ship-repairer in this case had). When the ship is arrested, she is usually released into the custody of the Sheriff (court bailiff) on the Sheriff's undertaking to protect the ship-repairer's *possessory lien*. The Singapore High Court decided that the ship-repairer's legal expenditure should have the same priority as its claim. In doing so, the Singapore High Court applied the general principle that legal expenditure normally enjoys the same priority as the principal claim. The decision should be noted by ship-mortgagees in particular, whose right to be paid a ship's sale proceeds is subject to the prior claims of Sheriff's fees and expenses, the legal expenditure of arrest and judicial sale, maritime lien claims and legal expenditure, and possessory-lien claims and legal expenditure. Ship-mortgagees may need to scrutinize the amount of legal expenditure said to have been incurred by a prior claimant if they are unable to defeat the general rule that legal expenditure enjoys the same priority as the principal claim.

Dentons Rodyk thanks and acknowledges Senior Associate Junhui Sim for his contributions to this article.

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The Supreme Administrative Court's Elaboration on the Claim Construction

06/09/2020
Tsung-Yuan Shen

When it comes to the dispute of either patent validity or infringement, the most critical point is how to construct the scope of the claims. In this regard, the Supreme Administrative Court elaborated the "Doctrine of Claim Differentiation" and the doctrine of not reading the limitations into the claims from the specification in the 2020 Pan Zi No. 130 judgment made on March 12, 2020.

In the said case, the appellee requested an invalidation in the Taiwan's Intellectual Property Office (TIPO) against the appellant's patent in dispute. After a final and binding invalidation decision of revocation was rendered by the TIPO, the appellant subsequently filed an administrative action in the Taiwan's Intellectual Property Court (IPC). Nevertheless, the IPC, upon its case adjudication, also held that the said patent in dispute was in lack of non-obviousness and should be revoked, against which the appellant consequently filed an appeal in the Supreme Administrative Court.

The Supreme Administrative Court, upon its case adjudication, first elaborated that, "*the 'Doctrine of Claim Differentiation' means that each claim in a patent is different in scope and meaning from all other claims. One certain claim should not be interpreted as another claim lest they both cover the same scope. Therefore, where the technical features corresponding to the claims are recorded in different terms, it shall be presumed that the claim scope defined by the different terms is different. The above doctrine is only used to construct the scope covered by the claims and should not be used to amend the scope of patent rights determined based on the scope, the patent specification and the file wrapper of the patent application. Hence, there should be no need to apply the 'Doctrine of Claim Differentiation' in the patent in dispute if no two claims in the same patent are interpreted to cover the same scope.*" In this case, the claim 2 further is a dependent claim to the claim 1,and therefore both claims neither have the same limitations nor have the same scope of patent right. The "Doctrine of Claim Differentiation" is therefore not applicable in the said patent in dispute, which justifies the judgment made by the Taiwan's IPC.

The Supreme Administrative Court further stated that "*the extent of the protection conferred by an invention patent shall be determined by the claim(s), and the description and drawing(s) in the interpretation of the claim(s) so that the purpose, function and effect of the invention can be understood. As the claims are generalized definitions of the ways for carrying out the invention or the embodiments specified in the specification, the limitations specified in the specification and drawings shall not be imported (read) into the claim scopes, nor should the objective aspects of the proclaimed* *patent scope be amended unless the specification has clearly stated that the claim scope is limited to the said embodiments and drawings.*" Even though the appellant pointed out that the said " coupling" specified in the claims only refers to the direct electrical connection and so on according to the components disclosed in the drawings of the patent at dispute, IPC held that the said "coupling" specified in the claims includes both direct and indirect electrical connection after referring to the content of the patent specification at dispute. As a result, the appellant's foregoing argument violates the foregoing doctrine are shall not be accepted. The judgment made by the IPC shall be affirmed.

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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.

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FCC Adopts Final Order Clarifying Wireless Buildout Streamlining Rules

By T. Scott Thompson and John C. Nelson Jr.

06.12.20

On June 9, 2020, at its monthly open meeting and by a 3-2 vote, the Federal Communications Commission (FCC) adopted a Declaratory Ruling and Notice of Proposed Rulemaking clarifying certain aspects of its rules governing the deployment of wireless equipment on existing telecommunications infrastructure.

With only minor alterations from the draft released by the FCC on May 19, 2020, the Order provides important clarifications regarding the Commission's rules governing collocations and modifications of existing installations in response to attempted evasions by local governments that remain a deterrent to rapid deployment of wireless infrastructure.

The primary clarifications, as issued in the draft, were adopted without material change in the final Order. These clarifications include:

- When the 60-day shot clock commences for a locality's review of modifications under Section 6409 of the Spectrum Act of 2012 (codified at 47 U.S.C. § 1455);
- What constitutes a "substantial change" in the existing infrastructure's physical dimensions and the extent to which certain elements of a proposed modification affect the proposal's eligibility for streamlined review; and
- The rules associated with proposed modifications involving historic preservation and environmental reviews.

The Order, as adopted, also still seeks comment on defining the boundaries of a tower site for purposes of determining when excavation or deployment outside the original boundaries qualify for streamlined review. Certain additional proposals have, however, been added since the draft was first released by the FCC almost one month ago.

Revisions to Action as Adopted

As noted above, the final Order still maintains the same clarifications that were initially proposed in the FCC's draft (a complete summary of which can be found here). Thus, those revisions that were made between May 19 and June 9, 2020, largely provide further description and a more extensive understanding of the manner in which the FCC expects local governments and the telecommunications industry to act moving forward.

The most relevant alterations and additions to the draft that were adopted in the final Order include the following:

- In Paragraph 17, the FCC added a sentence detailing the types of documents submitted by an applicant that are sufficient to start the shot clock. These documents include "a description of the proposed modification and an explanation of how the proposed modification is an eligible facilities request."

- In Paragraph 19, the FCC added a sentence noting its expectation that modification applicants will "act in good faith to fulfill reasonable steps set forth by a local government that can be completed within the 60 day period." The FCC, however, still places the onus on the local government to meet all of the application steps it requires within the 60-day period and to otherwise keep the application on track for review and approval.

- In Paragraph 20, the FCC clarified that local governments may not delay the start of the shot clock by requiring an applicant to submit documents "that [are] not reasonably related to determining whether the proposed modification is an eligible facilities request."

- Finally, the FCC added a clarification that an applicant for modification will not be permitted to place an unlimited number of cabinets on a structure as a modification. Rather, the number of cabinets added to a structure as a modification will be limited to "the standard number of new equipment cabinets for the technology involved."

Revisions to Notice of Proposed Rulemaking

The Order as adopted still seeks comment on changes to the FCC's rules regarding "excavation or deployment outside the boundaries of an existing tower site," including the definition of a tower site's boundaries. The FCC, however, has added certain new proposals on which it seeks comment, one of which is a proposed revision to the definition of "site."

The FCC's Declaratory Ruling is effective as of its release on June 10, 2020. Comments on the adopted Notice of Proposed Rulemaking are due 20 days after the action's publication in the *Federal Register*, with reply comments due 10 days thereafter.

GOODSILL

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.

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

Hogan Lovells

Court of Appeals affirms limited injunction on NCAA compensation restrictions for student-athletes

10 June 2020

On 18 May 2020 the U.S. Court of Appeals for the Ninth Circuit ruled against the National Collegiate Athletic Association (NCAA) in an antitrust case challenging the association's policy of limiting the compensation paid to student-athletes.[1] The decision is the latest concerning the NCAA's amateurism rules, which have been challenged over the past few years as athletes and their advocates have argued for student-athletes to be compensated for their participation in competitive college sports. However, for the time being, the decision will not result in any significant practical changes in compensation for student-athletes at some NCAA member institutions.

In March 2019 the U.S. District Court for the Northern District of California ruled in favor of a plaintiff class comprised of current and former men's Division I (D1) football players and men's and women's D1 basketball players (the student-athletes) in a suit against the NCAA and eleven of its conferences. The student-athletes alleged that the NCAA's rules limiting the compensation they may receive in exchange for their athletic services unreasonably restrained trade and affected interstate commerce in violation of § 1 of the Sherman Act.[2] The district court held that "the Defendants agreed to and did restrain trade in the relevant market" – which it defined as either the market for a college education or the market for student-athlete labor – and that the "challenged limits on student-athlete compensation produce significant anticompetitive effects."[3]

The district court also held that, while there are procompetitive effects stemming from the defendants' rules preventing unlimited cash payments unrelated to education – specifically, that the challenged rules "implement 'amateurism,' which drives consumer interest in college sports because 'consumers value amateurism'"[4] – these procompetitive effects could be achieved through less restrictive means.[5] In its decision, the court identified the following less restrictive alternatives (LRA): "(1) allow[ing] the NCAA to continue to limit grants-in-aid at not less than the cost of attendance; (2) allow[ing] the [NCAA] to continue to limit compensation and benefits

[1] See *In re: National Collegiate Athletic Association Grant-in-Aid Cap Antitrust Litigation (In re: NCAA Antitrust Litigation)*, No. 14-md-02541-CW (9th Cir. 18 May 2020).
[2] See *In re: NCAA Antitrust Litigation* at 32 (citing *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig. (Alston), 375 F. Supp. 3d 1058, 1062 (N.D.Cal. 2019))*.
[3] See *Alston*, 375 F.Supp. 3d. at 1062.
[4] See *In re: NCAA Antitrust Litigation* at 21 (citing *Alston*, 375 F.Supp.3d at 1070).
[5] See *Alston*, 375 F.Supp.3d at 1087.

unrelated to education; and (3) enjoin[ing] NCAA limits on most compensation and benefits that are related to education, but allow it to limit education-related academic or graduation awards and incentives, as long as the limits are not lower than its limits on athletic performance awards now or in the future."[6] Under the current rules, the NCAA may impose limitations on certain education-related compensation and benefits for student-athletes including computers, science equipment, musical instruments, and other items that are not included in the cost of attendance calculation but are "nonetheless related to the pursuit of various academic studies."[7] Pursuant to the district court's proposed LRA, limitations on these types of education-related benefits are prohibited.

On appeal to the Ninth Circuit, defendants argued that the widely-recognized dividing line between collegiate and professional sports is that college athletes are not paid to play. According to defendants, this distinction allows schools to provide payments to student-athletes to cover reasonable education-related expenses, but also allows the NCAA to impose limits on non-education-related payments. According to defendants, the court may not simply rewrite the NCAA's reasonable judgments about where to draw those limits; pursuant to the rule of reason, federal courts are prohibited from striking down "broadly reasonable restraints," and may only invalidate procompetitive restraints if the plaintiff successfully proves that the "restraints are significantly more restrictive than necessary to achieve their procompetitive ends."[8] Defendants argued that the district court's proposal, which prohibits the NCAA from limiting education-related benefits to student-athletes, would "eradicate" the no "pay for play" distinction that separates amateur athletes from professional athletes.[9]

The Ninth Circuit's majority opinion

The Ninth Circuit's 18 May 2020 decision affirms the district court's judgment. The Ninth Circuit held that the lower court "properly applied the Rule of Reason in determining that the enjoined rules were unlawful restraints of trade under § 1 of the Sherman Act,"[10] and outlined a three-step framework for applying the rule of reason to the NCAA's amateurism rules: (1) student-athletes bear the initial burden of showing that the amateurism rules produce significant anticompetitive effects within a relevant market; (2) if they meet that burden, the NCAA must produce evidence that the challenged rules have procompetitive effects; and (3) if the NCAA does so, student-athletes must show that those benefits can be achieved in a substantially less restrictive manner.[11]

The lower court correctly determined that the NCAA's limits on education-related benefits for student-athletes violate the Sherman Act

The Ninth Circuit concluded that the student-athletes had "carried their burden" of showing that the alleged restraint produced significant anticompetitive effects within a relevant market. It agreed with the lower court that the student-athletes had properly carried this burden because "elite student-athletes lack any viable alternatives to [D1], they are forced to accept, to the extent they want to attend college and play sports at an elite level after high school, whatever compensation is offered to them by [D1] schools, regardless of whether any such compensation is an accurate reflection of the competitive value of their athletic services."[12]

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[6] *Id.*
[7] *Id.*
[8] Defendants' Joint Opening Brief at 22, *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, No. 19-15566, 19-15662 (9th Cir. 16 Aug. 2019).
[9] See *id.* at 24.
[10] See *In re: NCAA Antitrust Litigation* at 6.
[11] See *id.* at 36-37 (citing *O'Bannon II*, 803 F.3d 1049, 1070 (9th Cir. 2015)).
[12] See *id.* at 37.

The lower court correctly determined that the NCAA failed to show that procompetitive effects justify limits on education-related benefits

On the second step under the rule of reason, the Ninth Circuit held that only some of the challenged rules fall within the NCAA's proffered procompetitive justification: that the current rules preserve amateurism and widen consumer choice by maintaining a distinction between college and professional sports.[13] The Ninth Circuit agreed with the lower court that the NCAA's procompetitive justification was insufficient to justify caps on non-cash, education-related benefits because those benefits did not adversely affect consumer demand for college sports.[14]

The lower court correctly determined that certain NCAA rules have procompetitive effects, but that they could be achieved through less restrictive means

The Ninth Circuit also agreed that there are less restrictive means of ensuring the NCAA's asserted procompetitive benefits. The Ninth Circuit found that certain NCAA rules "serve the procompetitive end of distinguishing college from professional sports."[15] Accordingly, it allowed the NCAA to impose limits on above-cost-of-attendance payments *unrelated* to education, the cost-of-attendance cap on athletic grants-in-aid, and certain restrictions on cash academic or graduation awards and incentives. But the court affirmed the injunction against the NCAA's limits on most non-cash compensation and benefits related to education.[16]

Judge Smith's concurring opinion

In a concurring opinion, Judge Smith agreed that Ninth Circuit precedent supported the decision in this case, but expressed concern that the "current state of our antitrust law reflects an unwitting expansion of the Rule of Reason inquiry in a way that deprives the young athletes in this case of the fundamental protections that our antitrust laws were meant to provide them."[17] He explained that the relevant market in this case was defined by the district court as student-athletes' "labor in the form of athletic services."[18] As a result, it was inappropriate in step two of the rule of reason analysis for the majority to "not limit its consideration to the procompetitive effects of the compensation limits in the market for Student-Athletes' athletic services."[19] By holding that the NCAA's limitation on student-athletes' pay was "justified because that restraint drove demand for the distinct product of college sports in the consumer market for sports entertainment," the majority failed to limit step two of the rule of reason to the defined market established in step one. According to Judge Smith, the majority found instead that it "was enough for the NCAA to meet its Step Two burden that it could show (however feebly) a procompetitive effect in a collateral market."[20] In Judge Smith's view, allowing defendants to "offer procompetitive effects in a collateral market as justification for anticompetitive effects in the defined market"[21] is an improper extension of the rule of reason analysis.

Conclusion

The Ninth Circuit's decision demonstrates that the growing opposition to the NCAA's policy regarding student-athlete compensation is finding a voice in the courts. However, for a number of institutions playing D1 football and basketball, this decision will not result in any significant practical changes, as many of those institutions have been providing grants-in-aid up to the full cost of attendance for several years. The Ninth Circuit's decision serves to highlight the difficulty

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[13] See *id.* at 6.
[14] See *id.* at 39 (citing *Alston*, 375 F.Supp.3d at 1076-1080).
[15] See *id.* at 53.
[16] See *id.* at 26.
[17] See *id.* at 57.
[18] See *id.* at 20 (citing *Alston*, 375 F.Supp.3d at 1067, 1097).
[19] See *id.* at 65.
[20] See *id.* at 66.
[21] See *id.* at 61.

that plaintiffs face in trying to alter the NCAA's long-standing rules with respect to student-athlete compensation.

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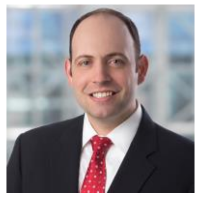

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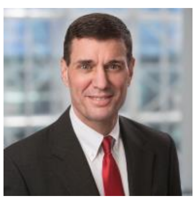

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