

Pacific Rim Advisory Council May 2020 e-Bulletin

MEMBER NEWS

► DAVIS WRIGHT TREMAINE Launches Reopening Hollywood Working Group

COUNTRY ALERTS

- **ARGENTINA** Recent Antitrust Developments ALLENDE BREA
- **AUSTRALIA** Overcoming a Post Judgment Barrier to Settlement CLAYTON UTZ
- **BELGIUM** First Significant Amendments to the Code of Companies and Associations NAUTADUTILH
- **BRAZIL** International Trade—Extension of Deadlines Under the Drawback Regime TOZZINIFREIRE
- **CANADA** COVID-19 Medical Devices Fast Tracking Authorizations BENNETT JONES
- **CANADA** Employment Contract Impossible to Perform - COVID-19 An Unforeseeable Event RICHARDS BUELL SUTTON
- **CHILE** Update on Actions and Procedures in Mining Matters CAREY
- **CHINA** Securities Regulatory Commission to Open Up Securities Funds Investment Advisory Industry HAN KUN
- **COLOMBIA** Promotion of Technologies to Ease Interaction with Public Entities BRIGARD URRUTIA
- **COSTA RICA** Legal Task Force COVID-019 Update ARIAS LAW
- **FRANCE** Covid-19 Adaptation of Terms and Conditions Granting Supplementary Indemnity and for Payment Allotted Under Mandatory and Optional Profit Sharing Schemes GIDE
- **MEXICO** Determination of Essential Activities and Enabling Dates and Hours by the National Forestry Commission SANTAMARINA
- **NEW ZEALAND** Post-lockdown M&A - Earn-outs back in fashion SIMPSON GRIERSON
- **SINGAPORE** Moves by SGX RegCo to aid listed companies DENTONS RODKY
- **TAIWAN** New Law Authorizes CECC to Publicize Personal Data of Individuals Violating Isolation of Quarantine Orders LEE AND LI
- **UNITED STATES** As Congress Negotiates, States Create Immunity for Wider Range of Businesses Facing COVID-related Claims BAKER BOTTS
- **UNITED STATES** New COVID-19 Developments for Employer Sponsored Health Plans DAVIS WRIGHT TREMAINE
- **UNITED STATES** COVID-19: Considerations for Commercial Landlords and Tenants in Hawaii GOODSILL
- **UNITED STATES** Commodities and Trading Commission Brings Charges in \$20m International Binary Options and Digital Fraud Scheme HOGAN LOVELLS

Reach. Reliability. Resources.

CONFERENCES & EVENTS

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

Coronavirus COVID-19

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

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

[Visit us online for full coverage](#)

MEMBER DEALS MAKING NEWS

- BAKER BOTTS Liberty Media Corporation in its Reattribution of Live Nation Interest and Other Assets and Liabilities between the Formula One Group and the Liberty SiriusXM Group
- BRIGARD URRUTIA Advises Local Utilities company Electricaribe US\$1.6 Billion Sale
- CAREY Advises Two Main Creditors in AD retail US\$180 Million Debt Restructure
- CLAYTON UTZ Advising Eagle View Technologies on Strategic sale
- DAVIS WRIGHT TREMAINE Plays Key Role in Roughly \$2B Broadband Acquisition
- DENTONS RODKY Successfully Defends PNG Sustainable Development Program Ltd ("PNGSDP") in Singapore's Apex Court
- GIDE Advises Europcar Mobility Group on Several Financing Facilities, including a EUR 220 million French State-guaranteed loan
- HANKUN Advises the Underwriters on the U.S. IPO of Kingsoft Cloud
- MUNIZ Assists China Yangtze Power complete US\$3.6 billion Power Buy in Peru
- NAUTADUTILH Advised private investment firm Bain Capital on \$3 Billion Financing Package
- HOGAN LOVELLS Advises Vayu Global Health Innovations in Obtaining Emergency Use Authorization for bCPAP device to Alleviate Ventilator Shortage due to COVID-19

PRAC TOOLS TO USE

[COVID-19 SITE FOR ALL UPDATES](#)

[PRAC CONTACTS](#) [MEMBER DIRECTORY](#) [EVENTS](#)
VISIT US ONLINE AT WWW.PRAC.ORG

DAVIS WRIGHT TREMAINE LAUNCHES REOPENING HOLLYWOOD WORKING GROUP

LOS ANGELES - 12 May, 2020: We have established a cross-practice task force of entertainment transactional lawyers and litigators, labor and employment lawyers, and healthcare attorneys to provide clients with risk-reduction solutions when restarting production.

Like all industries, content creators and distributors are faced with an unprecedented situation. But the importance of relaying information and telling stories remains as vital as ever. Although it remains to be seen when and how production will resume, it is certain that digital, television, and motion picture production will come back.

When production does return, production companies, studios, and platforms will face a variety of novel issues caused by COVID-19, including keeping crew and talent safe during travel and production, respecting medical privacy, and grappling with the overlay of competing and possibly conflicting federal, state, and local rules and guidance.

Our group includes attorneys specializing in content-related litigation, entertainment transactions, guild issues, employment and health care. Whether you are working on a scripted, documentary, interview, variety or animated production, we can help develop specific plans for reopening, or review and comment on plans you've created already.

Issues we can help with include:

- Creating and reviewing safety guidelines and protocols;
- Navigating state, county, and/or city department of public health orders during reopening.
- Managing health screenings and addressing medical privacy concerns for cast and crew.
- Managing risk for production-related travel;
- Strategies for safer location or soundstage production;
- Approaches to lawfully address situations such as requests for "hazard pay," safety concerns, and other potentially concerted activity, and employees who refuse to return to work;
- Sick leave;
- Workers' compensation;
- Safer craft services and catering;
- Guild issues;
- Developing appropriate riders to address risk of illness;
- OSHA and Cal/OSHA issues;
- Insurance (claims and litigation); and
- Force Majeure.

Contact us at ReopeningHollywood@dwt.com or connect with any of your DWT contacts for assistance with restarting production.

Further, we can help you develop frameworks to comply with laws regarding COVID-19 safety and guidance that are:

- Hyper-localized (state, county, and/or city public health departments issue shutdown orders and workplace guidance);
- Heavily-regulated (every agency has something);
- Frequently-updated (guidance changes daily/weekly); and
- Industry-specific to content creation, production and distribution.

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

For more information visit us at www.dwt.com

BAKER BOTTS

LIBERTY MEDIA CORPORATION IN ITS REATTRIBUTION OF LIVE NATION INTEREST AND OTHER ASSETS AND LIABILITIES BETWEEN THE FORMULA ONE GROUP AND THE LIBERTY SIRIUSXM GROUP

Deal Description: On April 23, 2020, Liberty Media Corporation ("Liberty Media") (NASDAQ: LSXMA, LSXMB, LSXMK, BATRA, BATRK, FWONA, FWONK) announced that its board of directors approved the change in attribution of its Live Nation interest along with other assets and liabilities between the Formula One Group and the Liberty SiriusXM Group (the "Reattribution"). The Reattribution, which is based on recent market prices for the publicly traded securities, is effective immediately. \$1.5 billion of net asset value has been reattributed from each of Formula One Group and Liberty SiriusXM Group to the other.

Baker Botts is representing Liberty Media in the transaction.

For more information, visit www.bakerbotts.com

BRIGARD URRUTIA

ADVISES LOCAL UTILITIES COMPANY ELECTRICARIBE US\$1.6 BILLION SALE

BOGOTA - 25 April 2020: Brigard Urrutia assisted local utilities company Electricaribe sale to Colombian energy companies Empresas Públicas de Medellín (EPM) and Consorcio Energía de la Costa, respectively, for a total value of 6.5 trillion pesos (US\$1.6 billion).

The deal was signed on 31 March.

Electricaribe was split into two new electricity providers: CaribeMar and CaribeSol. Upon completion, EPM will pay 3.5 trillion Colombian pesos (US\$862 million) for CaribeMar, while Consorcio Energía de la Costa will buy CaribeSol for 3 trillion Colombian pesos (US\$740 million).

The purpose of the split is to supply power to two different areas in northern Colombia. EPM will distribute electricity through CaribeMar to the northwestern departments of Bolívar, Cesar, Córdoba and Sucre, while Consorcio Energía de la Costa and CaribeSol will serve the departments of Atlántico, La Guajira and Magdalena along the northern Caribbean coast.

The acquisition is subject to closing conditions, including the government's absorption of Electricaribe's existing pension liabilities among other aspects. The deal is expected to close in the second quarter of this year.

Electricaribe's former majority stakeholder, Spain's Gas Natural Fenosa, opened an arbitration procedure against Colombia before a United Nations Commission on International Trade Law (UNCITRAL) tribunal back in 2016, after the government took over the business. The Spanish energy group, now known as Naturgy, is still awaiting a decision, which is expected by the end of 2020.

Counsel to Electricaribe Brigard Urrutia Partners Darío Laguado and Fernando Castillo, and associate Laura Ricardo.

For additional information visit www.carey.cl

CLAYTON UTZ

ADVISING EAGLE VIEW TECHNOLOGIES ON STRATEGIC SALE

PERTH, 24 April 2020: Clayton Utz is advising Eagle View Technologies, Inc. (Eagle View) on its entry into a conditional agreement with ASX-listed Aerometrex Limited for the sale of Australian aerial imagery company Spookfish Australia Pty Ltd. The transaction was announced to the market today.

Clayton Utz corporate partner Mark Paganin and special counsel Stephen Neale are leading the firm's team. Other core team members are partners David Benson (Intellectual Property), Peter Feros (Tax) and Anna Casellas (Workplace Relations), and lawyers William Davies and Matthew Johns.

Under the agreement, Eagle View and Aerometrex will also explore opportunities to collaborate in respect of the analytical tools offered by the Eagle View group and the offering of Aerometrex's 3D modelling service in the United States.

Eagle View is a North American market leader in aerial imagery, machine learning-derived data analytics and software, helping customers in different industries use property insights for smarter planning, building and living.

For additional information visit www.claytonutz.com

DAVIS WRIGHT TREMAINE

PLAYS KEY ROLE IN ROUGHLY \$2B BROADBAND ACQUISITION

MAY 1, 2020: Davis Wright Tremaine LLP congratulates its client, Northwest Fiber d/b/a Ziplly Fiber, on its acquisition of operations and assets of Frontier Communications in the Pacific Northwest. DWT represented Ziplly in securing all required state and local regulatory approvals required to consummate the transaction, which will position the company to deliver high-speed broadband service to roughly a half-million customers across Washington, Oregon, Montana, and Idaho.

"We are thrilled to see this deal close today and delighted to have been able to help our client navigate the complex regulatory landscape in which this innovative broadband provider will now operate," said Mark Trincherro, a partner in the communications practice group of Davis Wright Tremaine and co-lead on the client team.

The transaction, which was first announced last year, is valued at \$1.352 billion, with an additional \$500 million being invested in network and service improvements for a total commitment of approximately \$2.0 billion. Ziplly Fiber, based in Kirkland, Wash., is backed by global private investment firm Searchlight Capital Partners, LP, and numerous other investors.

"The regulatory challenges presented by this kind of forward-thinking deal are always complex and we're very glad to have a team with the depth of expertise to pave the way," said K.C. Halm, also a partner in Davis Wright Tremaine's communications practice. "At a time when connectivity has become more essential than ever to the national economy, it's a privilege to help leading clients like Ziplly bring the benefits of fast, reliable Internet to more consumers."

Led by Halm and Trincherro, the team of Davis Wright Tremaine professionals on both coasts that secured approvals for the deal includes Dan Reing, Alan Galloway, Heather Moelter, Ashlee Aguilar, Alicia LeDuc, and Ryan Appel.

For additional information visit www.dwt.com

HOGAN LOVELLS

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

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

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

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

For additional information visit www.hoganlovells.com

MUNIZ

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

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

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

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

For additional information visit www.munizlaw.com

NAUTADUTILH

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

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

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

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

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

For additional information visit www.nautadutilh.com

DENTONS RODYK

SUCCESSFULLY DEFENDS PNG SUSTAINABLE DEVELOPMENT PROGRAM LTD IN SINGAPORE'S COURT

SINGAPORE, 30 April, 2020: PNGSDP has vindicated its position that it was established to promote sustainable development in Papua New Guinea under an independent structure free from state control.

The Dentons Rodyk team, led by Philip Jeyaretnam S.C. and Mark Seah, successfully defended PNGSDP against the State's appeal to the Court of Appeal. This follows the team's earlier success in the High Court reported here.

In its written judgment, the Court of Appeal accepted Mr Jeyaretnam's submissions that "the parties' recorded agreements bear all the hallmarks of a finely calibrated arrangement, the product of extensive care and deliberation". The State's case, which was premised on a partly oral agreement that purportedly conferred rights of oversight and control over PNGSDP (a Singapore incorporated company limited by guarantee), was therefore wholly dismissed. The State's alternative case based on a purported trust was also rejected.

This is an important result for PNGSDP, and its mission of promoting sustainable development in Papua New Guinea, in particular the Western Province. Formed in 2001 as part of the exit by global mining giant BHP from the Ok Tedi Mine, PNGSDP now has approximately US\$1.4 billion of assets, to continue to pursue this mission.

Having successfully defended the appeal, PNGSDP is free to chart an independent course, in accordance with the contractual framework, to aid and promote sustainable development in Papua New Guinea.

For additional information visit www.dentons.rodyk.com

GIDE

ADVISES EUROPCAR MOBILITY GROUP ON SEVERAL FINANCING FACILITIES, INCLUDING A EUR 220 MILLION FRENCH STATE-GUARANTEED LOAN

PARIS, 7 May 2020: Gide has advised Europcar Mobility Group on structuring and implementing new financing facilities in a total amount of EUR 307 million, including a EUR 220-million French State-guaranteed loan (Prêt Garanti par l'Etat Français, or PGE) aiming at securing the liquidity of the Group to face the current Covid-19 crisis and preparing for the Group's operations' restart.

Gide acted on the three following facilities:

A EUR 220 million loan, benefiting from a 90% guarantee from the French State (PGE), entered into with Bank of America Merrill Lynch International, Banque Européenne du Crédit Mutuel, BNP Paribas, Crédit Agricole Corporate and Investment Bank, Crédit du Nord, Crédit Industriel et Commercial, Deutsche Bank Luxembourg S.A., Goldman Sachs Bank Europe SE, HSBC France, ING Bank N.V. (French branch), Natixis and Société Générale as lenders;

Eight new credit lines for the Group's Spanish subsidiaries, totalling EUR 67.25 million and benefiting from a 70% guarantee from the Spanish State; and

A EUR 20 million incremental tranche to the Group's revolving credit facility, guaranteed by Eurazeo via a risk participation agreement.

Gide's team was headed by partner Eric Cartier-Millon, working with counsel Jérémie Bismuth and associate Sarah Whitley. Partner Stéphane Hautbourg and associate Corinne Rydzynski acted on aspects of state aid, while partner Melinda Arsouze advised on aspects pertaining to capital markets.

Darrois Villey Maillot Brochier also advised Europcar Mobility Group on securities and finance law. White & Case advised the banking syndicate. Sullivan & Cromwell advised Eurazeo.

For additional information visit www.gide.com

HAN KUN

ADVISES THE UNDERWRITERS ON THE US IPO OF KINGSOFT CLOUD

09 May, 2020: Han Kun Law Offices has advised the underwriters as the PRC counsel in connection with the U.S. initial public offering and listing of Kingsoft Cloud Holdings Limited ("Kingsoft Cloud") on the Nasdaq Global Select Market under the symbol "KC".

Kingsoft Cloud is a leading cloud service provider in China, providing cloud infrastructure, cloud products and industry-specific solutions across cloud services, and other related services.

For additional information visit www.hankunlaw.com

MUNIZ

ASSISTS CHINA YANGTZE POWER COMPLETE US\$3.6 BILLION POWER BUY IN PERU

LIMA 05 May 2020: Muñiz, Olaya, Meléndez, Castro, Ono & Herrera in Lima have helped China Yangtze Power International (CYPI) complete its acquisition of US energy group Semptra's Peruvian assets for US\$3.6 billion, in a deal that was one of China's largest foreign investments in 2019.

Peru's antitrust authority Indecopi approved the deal on 10 April.

Following the completion, CYPI received Semptra's 83% stake in one of Peru's largest power suppliers Luz del Sur, which operates mainly in southern Peru. The transaction also handed the buyer a majority stake in Luz del Sur's

Logistics operator Tecsur and its electricity generation service Inland Energy, which serve various areas of the country.

The deal was submitted for approval in late March, in the middle of strict lockdown and curfew measures due to the coronavirus outbreak. This created further obstacles to overcome in the final stages of the deal-making process.

"Once approved, the challenge was how to materialise a global closing in the context of the worldwide restrictions in place due to covid-19," says Sergio Oquendo, banking and finance partner at Muñiz.

Current travel restrictions meant that shareholders' meetings could not be held face-to-face while corporate books and documents presented at closing could not be delivered. Lawyers overcame such hurdles by hosting virtual meetings and using technology to sign documents digitally. The relevant parties also made apt adjustments to the closing checklist, enclosed in the sales and purchase agreements, to adapt to the unprecedented times "with creativity" remarks Oquendo. "The result was a successful closing amid extraordinary circumstances," he adds.

Hong Kong-based China Yangtze Power International is a subsidiary of state-owned China Yangtze Power, which is headquartered in Beijing.

Counsel to China Yangtze Power International; Baker McKenzie LLP (Chicago/Miami); Muñiz, Olaya, Meléndez, Castro, Ono & Herrera Partners Jorge Muñiz, Pierino Stucchi, Jorge Otoyá, Frezzia Saavedra and José Antonio Bezada, and associates Raúl Alosilla and Fernando Ballón in Lima.

For additional information visit www.munizlaw.com

NAUTADUTILH

ADVISED PRIVATE INVESTMENT FIRM BAIN CAPITAL ON \$3BILLION FINANCING PACKAGE

AMSTERDAM, May 12, 2020: NautaDutilh successfully advised private investment firm Bain Capital on the USD \$3 billion financing package of its award winning acquisition of a majority stake in Kantar from British multinational advertising and public relations firm WPP.

Bain Capital is one of the world's leading private multi-asset alternative investment firms with approximately USD \$105 billion in assets under management. Kantar is a London-headquartered market research business with more than 30,000 employees in 100 countries. The Dutch Kantar entities were formerly known as the Nederlands Instituut voor Publieke Opinie (NIPO). The financing comprised dollar- and euro-denominated leveraged loans and high yield bonds.

The closing of the notes offering and the facility agreement took place in December 2019. The Dutch Kantar entities acceded on 24 April 2020, which completed the transaction. NautaDutilh worked alongside lead issuers-counsel Weil, Gotshal & Manges LLP. NautaDutilh's team working on this transaction consisted of David Viëtor, Stephan Huis in het Veld (Finance), Dewi Walian, Dirk Panis (Capital Markets), Nico Blom, Eva Roosendaal (Tax) and Florine Kuipéri (Corporate M&A).

Due to its complexity, this transaction has been recognised by IFLR as "Deal of the Year" for 2020 (category High Yield).

For additional information visit www.nautadutilh.com

HOGAN LOVELLS

ADVISES VAYU GLOBAL HEALTH INNOVATIONS IN OBTAINING EMERGENCY USE AUTHORIZATION FOR BCPAP DEVICE TO ALLEVIATE VENTILATOR SHORTAGE DUE TO COVID-19

WASHINGTON D.C., 8 May 2020: International law firm Hogan Lovells advised Vayu Global Health Innovations in obtaining an Emergency Use Authorization (EUA) from the Food and Drug Administration that allowed its bubble CPAP (bCPAP) device to be used to help alleviate the ventilator shortage associated with COVID-19. Vayu is a non-profit company supported by the Gates Foundation and the National Institutes of Health (NIH), and collaborates with thought leaders and faculty from Harvard, MIT and the Massachusetts General Hospital.

The COVID-19 crisis has led to a nationwide shortage of ventilators, and many of those life-saving devices are reserved for neonatal ICUs (NICU's) where they are used not for mechanical ventilation, but rather to provide non-invasive breathing support, or continuous positive airway pressure (CPAP). It was a novel idea: the simple, ultra-low cost bCPAP invented by Vayu Global Health Innovations founder Dr. Thomas Burke, Director of the Global Health Innovation Lab at Massachusetts General Hospital, could replace some of these ventilators, allowing them to be freed up immediately to treat adult COVID-19 patients and thus save lives. The company was fielding daily requests for the device from local governments, hospitals, and aid organizations in the U.S. and around the world.

With the help of Hogan Lovells attorneys, the company was able to secure EUA approval for the device on 5 May, which allows it to be immediately distributed to hospitals where it is needed. In addition to freeing up ventilators, the EUA also authorizes the bCPAP device to treat certain infants with COVID-19 who require breathing support and to be used in community settings where more women are giving birth as they avoid hospitals during the crisis.

The Hogan Lovells team was led by partner Jonathan Kahan and counsel Kristin Zielinski Duggan, with help from partners Lina Kontos and Mike Heyl, and senior associate Arthur Kim.

For additional information visit www.hoganlovells.com

PRAC EVENTS





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

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

www.prac.org

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

ALLENDE
ALLENDE & BREA

Arias

ARIFA
ARIAS, FABREGA & FABREGA

BAKER BOTTS LLP



Bennett Jones

Brigard
Urrutia

/Carey

CITY-YUWA PARTNERS

CLAYTON UTZ

Davis Wright
Tremaine LLP

DENTONS **RODYK**

GIDE
GIDE LOYRETTE NOVEL



GOODSILL

Hogan
Lovells

K **KOCHHAR & CO.**
ADVOCATES & LEGAL CONSULTANTS



漢坤律師事務所
HAN KUN LAW OFFICES

KIM, CHANG & LEE

理律法律事務所
LEE AND LI
ATTORNEYS-AT-LAW

LEGA
ABOGADOS

Mulla & Mulla
& Craigie Blunt & Caroe
Advocates, Solicitors and Notaries

ESTUDIO
MUÑIZ

MUÑIZ
OLAYA
MELENDEZ
CASTRO
ONO
& HERRERA
Abogados

NautaDutilh



Simpson Grierson

RB
SS

RICHARDS
BUELL
SUTTON LLP
Established in 1871

Santamarina
+ Steta

SKRINE

SyCIP
SALAZAR
& **HERNANDEZ**
& **GATMAITAN**

TOZZINI FREIRE
A D V O G A D O S

RECENT ANTITRUST DEVELOPMENTS IN ARGENTINA - May 5, 2020

Below we share the latest developments in antitrust enforcement in Argentina.

1. SUSPENSION OF LEGAL TERMS FOR ONGOING PROCEEDINGS

The government, through the issuance of successive decrees and resolutions, has suspended the legal terms of all ongoing proceedings under Argentina's Antitrust Law –conducts and mergers alike- between March 16, 2020 and May 10, 2020.

During the lockdown that, if not further extended, will last until May 10, 2020, the offices of the CNDC (i.e., the technical agency that advises the Secretary of Domestic Trade, Argentina's Antitrust Authority) will remain closed. In that regard, we have been informally conveyed that the CNDC's staff is working remotely whilst their premises remain closed.

Since the suspension of legal terms refers exclusively to "ongoing proceedings" and allows "urgent presentations", new proceedings -such as the notification of mergers and the submission of new antitrust claims- are not included in the suspension and shall thus be submitted for the analysis of the CNDC.

"Urgent presentations" such as the notification of new mergers and claims, can either be done in person at the Ministry of Productive Development or electronically by sending the relevant documents via email to the CNDC. Electronic presentations shall follow certain formal requirements specified on the CNDC's website.

In this regard, we have been informally conveyed that CNDC has received a handful of new merger notifications by electronic means since the beginning of the lockdown.

2. INITIATION OF ANTITRUST SECTOR INQUIRIES INTO THE BEEF AND MEDICAL OXYGEN MARKETS

In April 2020, the Argentine Antitrust Authority has instructed the CNDC to launch a sector inquiry into the beef market in light of the alleged shortage and price hikes experienced in the distribution and commercialization of beef. The Argentine Antitrust Authority issued a market report in relation to the same market in 2017, which found a low degree of concentration and low entry barriers.

Furthermore, pursuant to an official communication issued on April 29, 2020, the Argentine Antitrust Authority has instructed the CNDC to launch an investigation into the production and commercialization of bulk and cylinder medical oxygen. It is worth remembering that a prior market inquiry into this sector was initiated in mid-2019.

3. THE CNDC IS CURRENTLY OPERATING WITH ONE OUT OF ITS FIVE STATUTORY MEMBERS

Since the Fernandez administration took office in December 10, 2019, the five members of the CNDC appointed by the prior administration have either resigned or their statutory terms have expired. Hence, since April 23, 2020, the CNDC is acting with only one member, President Rodrigo Luchinsky appointed earlier this year.

Although there is contradicting case law on the matter, some courts have in the past held that the CNDC is not prevented from acting with a single member given that the applicable regulations do not require the agency any minimum quorum.

The reduction in the number of the CNDC's members, though in principle not a legal obstacle to the enforceability of its powers under the Antitrust Law, could bring about further delays in all the agency's activities going forward.

4. THE CREATION OF THE NEW NATIONAL ANTITRUST AUTHORITY HAS BEEN POSTPONED

The Antitrust Law enacted in May 2018 provided for the creation of a new National Antitrust Authority to replace the existing Antitrust Authority.

On December 6, 2019, a handful of days before leaving office, the Macri administration sent a communication to Congress with the list of nominees to the new National Antitrust Authority. However, on January 26, 2020, the Fernandez administration requested Congress to disregard the nominees to the new National Antitrust Authority, thus withdrawing the proposed candidates.

At present, the creation of the new National Antitrust Authority (which will trigger the 1-year term to effectively implement the *ex ante* merger control regime in the country) remains a question mark and there are no known official plans to proceed with its establishment.

This briefing does not contain a full analysis of the law nor shall it be deemed as a legal or any other type of advice by Allende & Brea. For additional information please contact Julián Peña at jpena@allende.com or Federico Rossi at rossi@allende.com.

[back](#)

30 APR 2020

Overcoming a post-judgment barrier to settlement

BY CAMERON BELYEA AND CAYLI BLOCH

Two court decisions allow both parties to resolve primary and appeal proceedings with a commercial settlement and setting aside of judgment, thus removing the perception of an adverse judgment.

Parties to concurrent appeals often struggle to find common ground when attempting to settle disputes.

Matters relating to perception around the relative importance of different findings to truth – the so-called "Rashomon effect"; concerns as to reputational damage and the human response to adverse findings of fact or credit, amongst others, can each influence the willingness of parties to engage in sensible commercial negotiations. These epistemic problems are exacerbated if both parties have an equal, and presumably contradictory, belief in the strength of each side of the argument.

Bradken Limited v Norcast S.ar.L [2013] FCAFC 123 and Rules 39.11 and 39.05(f) of the Federal Court Rules 2011 (Cth) provides a mechanism for parties to consent to primary (trial) orders being set aside. This removes the level of perception and has the effect of releasing the parties concerned from any adverse orders, or the legal consequence of such orders, made against them.

In Bradken, the parties applied, unsuccessfully, for orders that an appeal be allowed by consent, without any adjudication on the merits. The Full Court was not prepared to allow the appeal in circumstances where it was not satisfied of error in the primary judge's reasons.

The Court recorded that "there was another means by which the parties could have procured the outcome which they sought, but without seeking the imprimatur of the Full Court (in the sense explained in Telstra^[1] about the existence of appealable error and without the implicit consequence that the error or errors were pervasive across the grounds of appeal. That means was the use of Rules 39.05(f) and 39.11."

The Full Court in Bradken stated that "It should not be thought that Telstra provides any impediment whatsoever for the settlement of appeals in the Court." The orders setting aside the declarations granted by the primary judge, and dismissing the primary action, were made by consent pursuant to the Rules. The appeal was discontinued.

The Full Court most recently made orders in accordance with Bradken in the proceeding of Termite Resources NL (in liq) v Meadows (No 2) [2019] FCA 354. The Full Court made orders on 5 March 2020 setting aside the judgment in Termite, and in effect relieving the former directors as to the legal effect of adverse findings in that matter. Here, although the Appeal Court had heard argument, it had not determined the appeals nor given direction as to likely outcomes.

Bradken and Termite allow both parties to resolve primary and appeal proceedings with a commercial settlement and setting aside of judgment, thus removing the perception of an adverse judgment.

^[1] Telstra Corporation Limited v Minister for Broadband, Telecommunications and Digital Economy (2008) 166 FLR 64 (Telstra). [Back to article](#)

GET IN TOUCH



Cameron Belyea

PARTNER, PERTH

+61 8 9426 8510

cbelyea@claytonutz.com

Disclaimer

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

CONTACT US

Sydney +61 2 9353 4000

Brisbane +61 7 3292 7000

Canberra +61 2 6279 4000

Melbourne +61 3 9286 6000

Perth +61 8 9426 8000

Darwin +61 8 8943 2555



Belgium

First Significant Amendments to the Code of Companies and Associations (CCA)

Tuesday, 12 May 2020

The Act of 28 April 2020 (the "**Act**") amends the CCA in order to align it to the requirements of the Shareholder Rights Directive (see the [newsletter of 20 April 2020](#)). The Act was published in the *Moniteur belge/Belgisch Staatsblad* on 6 May 2020.

The Act also introduces a large number of amendments to the CCA based on comments made by legal scholars and practitioners. It is therefore important to consult the amended CCA as soon as it becomes available on the website of the Ministry of Justice and in the meantime to keep a copy of the Act at hand in order to be able to determine what has changed.

Most changes are technical in nature or intended to correct errors. In total, 175 articles of the CCA have been amended.

Some of the amendments relate to material provisions of the CCA.

1. The identity of the sole shareholder of a *BV/SRL* or an *NV/SA* must be submitted to the business court so that this information is publicly available in the company's file.
2. If the company has adopted internal rules, the latest version of which must be mentioned in the articles of association and sent to the company's shareholders or members, posting of the rules on the company's website will be deemed to constitute disclosure.
3. The court can decide to wind up a foundation if the annual accounts for a given financial year are not made public in time. The CCA previously provided that involuntary winding up of a foundation was only possible if the annual accounts for three consecutive financial years were not made public. This amendment brings the rules applicable to foundations in line with those applicable to companies and associations.
4. The CCA provided that a *BV/SRL* could issue only registered bonds. This restriction has been deleted. It will now be possible for a *BV/SRL* to issue dematerialized bonds and, under certain limited conditions, bearer bonds.
5. The requirement that an international non-profit association have an authorisation in its articles in order to establish a daily management body has been abolished.
6. Only actual cooperatives will have their capital converted into a reserve. Other types of cooperatives will be entitled to maintain their capital and must be converted by 1 January 2024 into an *NV/SA* or a *BV/SRL* without capital (see the [newsflash on Conversion of Capital into a Reserve by Operation of Law](#)).



Dirk Van Gerven | Brussels | +32 2 566 81 14

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



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

DISCLAIMER

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



May 04, 2020

COVID-19 | International Trade - Extension of deadlines under the Drawback regime

International Trade -*updated on May 04 at 06:38 pm*

Provisional Measure allows extension of deadlines under the Drawback regime

The Provisional Measure No. 960, published in the Official Gazette on May 4th, 2020, exceptionally allows the extension of the deadline for the suspension of the payment of taxes due upon importation for the beneficiaries of the Drawback regime under the modality Suspension.

The measure is applicable to the drawback concessions that have already been extended for a year and will expire in 2020. These drawback concessions may be extended for another year, counting from its respective date of expiration.

www.tozzinifreire.com.br



Bennett Jones

BLOG

COVID-19 Medical Devices: Fast-Tracking Authorizations

May 07, 2020

Written by **Dominique T. Hussey** and **Melissa M. Dimilta**

As a result of the COVID-19 pandemic, protective medical equipment including masks and gowns, and medical devices for use in testing and treating COVID-19 patients are in high demand. Manufacturers of these medical devices are attempting to scale up production in the face of supply shortages while industry and government are innovating to address the issue.

To expedite the sales authorization of medical devices for use in relation to COVID-19, the Canadian government issued an Interim Order on March 18 and several accompanying guidance documents that have been updated throughout the month of April. In response, manufacturers and importers in a variety of industries have pivoted their businesses to try to produce or import essential medical devices in high demand.

Medical Device Regulations in Canada

The term "medical devices", as defined under the *Food and Drugs Act* (RSC 1985, c F-27, s. 2), covers a wide range of health or medical instruments used in the treatment, mitigation, diagnosis or prevention of a disease or abnormal physical condition. This definition covers ventilators and COVID-19 test kits, and all personal protective equipment (PPE), including masks and gowns used by health care professionals. The term would not include PPE that is

not sold or represented for medical use, such as masks that can be purchased at a hardware store.

There are four classes of medical devices—Classes I, II, III and IV—which broadly correspond to the level of risk associated with the device. As defined by classification rules set out in Schedule 1 of the *Medical Devices Regulations* (SOR/98-282, s. 2), Class I represents the lowest risk and Class IV represents the highest risk. Most PPE falls under Class I; sterilizers and thermometers tend to fall under Class II; and ventilators and testing kits tend to fall under Class III or IV.

There are two types of licences required for medical devices: the device licence and the establishment licence. Generally, a medical device licence is issued to the manufacturer of the medical device and is only required for Class II, III and IV medical devices. An establishment licence is issued to either the manufacturer or the importer of the medical device and is required for the importation or sale of any medical device, with certain exceptions.

COVID-19 Medical Device Authorizations

Following the Interim Order, Health Canada has issued and been updating guidelines on expediting the authorization of COVID-19 medical devices that are new and not yet licensed in Canada, existing licensed devices for COVID-19 related uses, and medical devices authorized by a trusted foreign regulatory authority.

Under the Interim Order, manufacturers or importers of COVID-19 medical devices are exempt from the requirements of an establishment licence if Health Canada has issued an authorization for the sale of the medical device. Accordingly, manufacturers or importers of COVID-19 medical devices such as Class I masks, can obtain an authorization for the device without holding an establishment licence, which can take a long time for first-time applicants to obtain. Relief from this requirement has been key to allowing manufacturing businesses in different industries to adapt their businesses to address supply shortages. The Interim Order also provides that COVID-19 medical devices are exempt from the requirement to file licence applications for Class II, III or IV medical devices where an authorization has been granted.

The guidance provides the information required in an application for expedited approval to import or sell a COVID-19 medical device, including labelling requirements as well as record keeping and reporting obligations. COVID-19 medical devices are exempt from the strict Mandatory Reporting requirements under the *Medical Devices Regulations* but manufacturers or importers of COVID-19 medical devices must still report any incident to Health Canada within 10 days and must follow the recall procedures provided for under the *Regulations*.

In addition, Health Canada provides specific guidance on the pathways for expedited approval of personal protective equipment, masks and respirators, ventilators, diagnostic tests, medical gowns, and medical gloves. Health Canada encourages stakeholders to refer to the US FDA's guidance document, "*Enforcement Policy for Ventilators and Accessories and Other Respiratory Devices During the Coronavirus Disease 2019 (COVID-19) Public Health Emergency*," in addition to Health Canada's required review elements when compiling their submissions to Health Canada for expedited approval of ventilators and other respiratory devices and their accessories.

Importing COVID-19 Medical Devices

The Interim Order relaxes the usual requirements for importers of medical devices. As is the case with local manufacturers of medical devices, importers do not need an establishment licence if Health Canada has issued an authorization for the importation of the device.

Further, if a medical device has been and is approved by a trusted foreign authority the requirements for the submission of the medical device authorization are reduced. In those circumstances, for example, an importer of a COVID-19 medical device would not need to provide information in relation to the quality, safety and effectiveness of the device.

Health Canada issued another Interim Order on March 30, 2020, allowing for the exceptional importation and sale of drugs, medical devices and foods for special dietary purposes specifically identified by Health Canada as being in short supply due to the COVID-19 pandemic. This Interim Order allows holders of Canadian Drug Establishment Licences to import designated drugs, medical devices and foods without meeting the full complement regulatory requirements. The Interim Order relaxes a variety of drug labelling, sampling and release requirements. The Minister maintains up-to-date lists of the drugs, medical devices, and foods eligible for this exceptional importation pathway on Health Canada's website.

To date, the fast-track initiative appears to have been a success. More than 125 protective, treating and diagnostic medical devices have been authorized for importation or sale by Canadian and international companies to address the urgent need for COVID-19 tests, PPE, ventilators, sterilizing solutions and thermometers.

If your business or organization has questions respecting the authorization of COVID-19 medical devices, please contact us. In addition, please visit our COVID-19 Resource Centre for other COVID-19-related materials.

AUTHORS



Dominique T. Hussey, *Vice Chair and Toronto Managing Partner*



Melissa M. Dimilta, *Associate, Trademark Agent*

The firm that businesses trust with their most complex legal matters.

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

© Bennett Jones LLP 2020 All rights reserved. Bennett Jones refers collectively to the Canadian legal practice of Bennett Jones LLP and the international legal practices and consulting activities of various entities which are associated with Bennett Jones LLP



RICHARDS
BUELL
SUTTON
Established in 1871



BC Workplace Blog

Authored By Michelle Quinn & Colleagues

14

April

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

👤 By Michelle Quinn

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

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

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

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

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

The group notice requirements are as follows:

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

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

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

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

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

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

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

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

Vancouver Office:

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

Surrey Office:

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

May, 2020

➤ UPDATE ON ACTIONS AND PROCEDURES IN MINING MATTERS DUE TO COVID-19 PANDEMIC.

I. *Update on Travel Permits: Instructions for their requesting in the Mining Industry.*

Together with safe conducts, granted to circulate during curfew periods, and that are applicable for all the national territory, **only for those boroughs subject to total quarantine by the Government**, the Ministry of Internal Affairs and Public Security issued Instructions for Travel Permits, which last update was published on April 3rd, 2020. These instructions establish which industries are those whose employees and collaborators can continue circulating in those boroughs, **out of curfew periods (that is, between 5.00hrs and 22.00hrs).**

Number 10.b of the said instructions include people that work in activities that given their nature cannot be stopped and their interruption implies an alteration of the operation of the country, which shall be duly determined by the relevant authority.

Being **mining companies, their contractors and suppliers** considered as part of those basic services, of public utility or with a high degree of social worth, which cannot be interrupted without causing a great alteration of the operation of the country, on **May 4th, 2020**, the Ministry of Mining published an update to the protocol for detailing the application within the mining industry of the mentioned number 10.b.

Given the restrictive nature of the indicated exception and the discretionary powers of the relevant authority, in order to enable workers and services providers of the mining industry to fulfill their duties (including transfers between their places of residence and their places of work) **in areas under territorial quarantine and sanitary cordons** out of curfew periods, the request of this permit additionally requires the issuance of a resolution by the Undersecretary of Internal Affairs:

This travel permit shall only be requested when currently:

1. the mining sites are in quarantined boroughs or with sanitary cordons;
2. workers are domiciled in quarantined boroughs or with sanitary cordons; and/or
3. workers must pass through quarantined boroughs or with sanitary cordons to get their workplaces.



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

Rafael Vergara

Partner

+56 2 2928 2210

rvergara@carey.cl

Francisco Corona

Counsel

+56 2 2928 2210

fcorona@carey.cl

Esteban Fresno

Associate

+56 2 2928 2205

efresno@carey.cl

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

Carey y Cía. Ltda.

Isidora Goyenechea 2800, 43rd Floor.

Las Condes, Santiago, Chile.

www.carey.cl

The validity of this permit is indefinite. In order to obtain it, mining companies are required to report to the Undersecretary of Mining, together with the travel application:

1. Staffing, and how much this will be reduced (%) for a minimum operation continuity:
 - a. the mining company; and
 - b. the contractors and suppliers (for each one of them).
2. How will the mining companies reduce travels, both of its own staff and of its contractors (shifts, prioritization of local workers or other measures).
3. If the request includes workers who do not provide services in workplaces located in quarantined boroughs or with sanitary cordons, or who are not domiciled in quarantined boroughs or with *sanitary cordons*, the reason for their inclusion in the staff listing must be expressly justified. Through this information, the authority seeks that mining companies justify that the functions performed by these workers and contractors are essential for the continuity of their operation.
4. If the permit is being requested for workers traveling within or to the Region of Antofagasta, this situation must be explicitly indicated

Each mining company must send its application by email to the Undersecretary of Mining, Mr. Ricardo Irarrázabal (rirarrazabal@minmineria.cl) with copy to his Chief of Cabinet, Mr. Jaime Flores (jflores@minmineria.cl) and to the Head of Legal Division of the Ministry of Mining, Mrs. María Luisa Baltra (mlbaltra@minmineria.cl), **also including and when appropriate, the applications of the respective contractors and suppliers**, under the same standards of the mining company. In the body of the said email, the questions of the protocol indicated in the previous letters must be answered, attaching **only one Excel file** with the listing of workers of the mining companies, their contractors and suppliers, in **only one spreadsheet**, with the following data:

1. Name of the entities (mining company, contractors and suppliers);
2. Tax ID number of the entities;
3. Address of the facilities where the authorized staff will work; and
4. Information on the workers for whom the permit application is being submitted (name, position, ID card number and domicile).

Any additional information out of the fields or provided in a different form from that of the Excel file will not be considered as part of a valid request. Applications will be processed within 72 hours on business days, unless a different period is requested in a reasonable manner, which may not be less than 48 hours on business days.

Upon obtaining the resolution, it must be sent to each of the above-mentioned staff members **so that they may show the document, either in hardcopy or digital form, together with their ID card and mining company, contractor or supplier ID card.**

II. *Proceedings before the Chilean Copper Commission.*

The Chilean Copper Commission (“**Cochilco**”) will not be able to issue in its offices the origin certificates for exportations which are necessary to conduct the export of those products which tariff codes Chochilco certifies.

However, in case of extreme need in obtaining the certificates, the following email addresses have been made available for this purpose:

Eduardo Ramírez eramirez@cochilco.cl
Tabata Acevedo tacevedo@cochilco.cl
Kareen Castillo kcastill@cochilco.cl

In addition, since April 2nd, 2020 Cochilco has been receiving documents (antecedents and certificates) by email, to issue origin certificates for exportations with destination to MERCOSUR, Colombia, Ecuador and Peru.

For more information, send an email to certificaciondeorigen@cochilco.cl.

[download instrucciones here \(Spanish\)](#)

Legal Commentary

April 21, 2020

HANKUN
汉坤律师事务所
Han Kun Law Offices

BEIJING | SHANGHAI | SHENZHEN | HONG KONG

Banking & Finance Law

CSRC to Open up Securities/Funds Investment Advisory Industry

Authors: TieCheng YANG | Yin GE | Lin ZHOU | Ting ZHENG | Eryin YING | Virginia QIAO

Background

Securities investment advisory services are regulated in China as an important part of capital market intermediary services, with the key rules being the *Interim Measures for Administration of Securities and Futures Investment Advisory Services*, promulgated by the Securities Commission of the State Council (the regulatory predecessor to the China Securities Regulatory Commission/CSRC) in 1997 (《证券、期货投资咨询管理暂行办法》, the “**1997 Measures**”). Under the 1997 Measures, securities/futures investment consulting is broadly defined as the provision of analysis, predictions or recommendations for investments in securities or futures and such service is subject to a prior license from CSRC. As of today, CSRC has granted 84 investment advisory licenses in total but has suspended issuing such license since 2014¹, due to relevant issues in the investment advisory industry, such as unsustainable business models and lack of sufficient internal control, among other reasons.

To proactively address the issues and to resume grants for market entry driven by the continuous development and demands of the market, on 17 April 2020, CSRC issued the long-awaited consultation draft of the *Measures for Administration of Securities and Funds Investment Advisory Services* [《证券投资基金投资咨询业务管理办法（征求意见稿）》, the “**Consultation Draft**”].

We have summarized below notable key aspects of the Consultation Draft.

Key Aspects

I Opening Up of Securities/Funds Investment Advisory Industry

Due to the lack of clear legal basis, in practice, CSRC has never granted an investment advisory

¹ The full list of 84 investment advisory licensees:
http://www.csrc.gov.cn/pub/zjhpublic/G00306205/201510/t20151028_285725.htm.

license to a wholly foreign-owned enterprise (WFOE). As an encouraging development, the Consultation Draft specifically provides eligibility requirements for foreign shareholders of securities/funds investment advisors, which suggests that WFOEs may be allowed to apply for securities/funds investment advisory licenses from CSRC after the Consultation Draft takes effect. This is consistent with the current regulatory trend toward further opening up financial service industries to foreign investors, particularly the recent development that, as of 1 April 2020, both fund management companies and securities firms can be WFOEs.

II Definition and applicable scope of “securities/funds investment advisory services”

In the Consultation Draft, “securities/funds investment advisory services” is defined to include securities investment advisory, funds investment advisory, publishing securities research reports, and other securities and funds investment advisory services as provided by laws, regulations and CSRC. “Securities” is defined to include stocks and bonds issued and traded either on domestic or overseas exchanges.

Accordingly, the Consultation Draft applies to the following categories of services:

1. securities investment advisory services refer to the business activities of accepting client appointments, providing clients with investment advice on securities, derivatives and other CSRC-approved investment types, and assisting clients in making investment decisions in accordance with agreements;
2. funds investment advisory services refer to the business activities of accepting client appointments, providing clients with investment advice on securities investment funds and other CSRC-approved investment products, and assisting clients in making investment decisions or processing transactions on behalf of clients in accordance with agreements;
3. publishing securities research reports refers to the business activities of analyzing and predicting the overall or partial trends in securities markets, or analyzing the investment value and price fluctuations of stocks, bonds, and other CSRC-approved investment types, and publishing research reports or analyses to clients to directly or indirectly obtain economic benefits; and
4. other securities or funds investment advisory services recognized by CSRC.

It is worth noting that, under the Consultation Draft, funds (but not securities) investment advisors are allowed to make investment decisions on behalf of their clients, which is referred to as discretionary investment advisory (“管理型投顾”) and subject to additional requirements which will be separately issued by CSRC. This is the first time for formal CSRC rules to expressly distinguish between discretionary and non-discretionary investment advisory services. We expect the market to welcome this distinction as a response to the more sophisticated and diversified practices.

It is worth noting that CSRC issued the *Circular on the Pilot Work of Publicly-offered Securities Investment Funds Investment Advisory Services* (《关于做好公开募集证券投资基金投资顾问业务试点工作的通知》)² and launched a pilot program in October 2019 for discretionary investment advisory

² http://www.xinhuanet.com/finance/2019-11/05/c_1210341159.htm.

services that allows funds investment advisors to have full investment discretion over their clients' accounts. The pilot program aims to test a new business model for discretionary funds investment advisors (buy-side funds investment advisory model), i.e. discretionary funds investment advisors may charge their clients based on fund assets under management and performance-based fees, in addition to the traditional consulting fees. To date, CSRC has approved 18 participants for the pilot program, including 5 fund management companies (or their subsidiaries), 7 securities companies, 3 commercial banks, and 3 third-party fund distribution firms. In particular, an affiliate of Ant Financial, Ant (Hangzhou) Fund Distribution Co., Ltd., ("**Ant Hangzhou**"), is one of the three approved fund distribution firms and, according to public information, the joint venture set up by Ant Hangzhou and Vanguard Investment Management (Shanghai) Limited in June 2019 has started to provide discretionary funds investment advisory services since March 2020.

III Licensing Requirements and Applicable Exemptions

As a general principle under the Consultation Draft, CSRC requires prior approval to engage in securities investment advisory services or publishing securities research reports, and requires prior registration to engage in public funds investment advisory services.

For now, considering the sensitivity around securities research reports, only CSRC-regulated securities firms and their subsidiaries are qualified to apply for a securities/funds investment advisory license to publish securities research reports.

The above license or registration will be valid for three years and may be extended, subject to separate applications with CSRC within six months prior to the expiry of the license or registration.

The Consultation Draft also provides limited scenarios which may be exempted from the above licensing requirements, which include:

1. securities companies providing securities investment advisory services to their brokerage clients as part of the brokerage service, provided that securities companies do not sign a separate investment advisory agreement with such clients or charge fees separately for the investment advisory services so provided, nor do such securities companies provide discretionary investment advisory services;
2. publicly-offered securities investment fund distribution companies which provide fund investment advisory services to their clients as part of distribution services, provided that fund distribution companies do not sign a separate investment advisory agreement with such clients, or charge fees separately for the investment advisory services so provided, nor do such fund distribution companies provide discretionary investment advisory service; and
3. securities companies, fund management companies and futures companies, or their asset management subsidiaries providing securities and funds investment advisory services to asset management products³, provided that they shall report with the local CSRC bureau within five business

³ The Consultation Draft does not provide a definition of "asset management products", but by reference to the *Guiding Opinions on Regulating the Asset Management Business of Financial Institutions* (《关于规范金融机构资产管理业务的指导意见》) jointly issued by CSRC and other financial regulators, the scope should generally cover both publicly-offered products and privately-placed asset management products offered by securities companies, fund management companies,

days of their commencing securities/funds investment advisory services.

IV Eligibility Requirements

The Consultation Draft provides eligibility requirements for securities/funds investment advisory institutions in terms of, amongst others, net assets, shareholding structure, staffing requirements, business premises, IT systems, business facilities, effectiveness and efficiency of internal controls, compliance management and risk control systems, and track records. CSRC will separately provide for additional requirements for discretionary fund investment advisors.

1. Staffing

For example, staff members of a securities/funds investment advisory institution that engage in certain activities must satisfy relevant qualification requirements and register as practitioners, and senior management personnel must additionally have at least three years of experience in the securities or funds industry or five years of experience in another financial industry, and two years of experience in the management of the business for which he or she is responsible.

For a securities/funds investment advisory institution that engages in only one of the three investment advisory services stated above in Section II.1-3, it may have not less than 10 staff members with the required qualifications and more than three years of relevant business experience; for an securities investment advisory institution that engages in more than one of the three investment advisory business stated above in Section II.1-3, it shall have not less than 20 staff members with the required qualifications and more than three years of relevant business experience.

2. Requirements for Shareholders

The shareholder(s) of a securities/funds investment advisory institution also need to satisfy relevant eligibility requirements in terms of, amongst others, net assets, financial condition, capital replenishment capability, and track records. Specifically, for an offshore shareholder, the offshore shareholder must be a financial institution and the securities regulatory authority in its home jurisdiction must have signed a regulatory memorandum of understanding and maintain an effective regulatory cooperative relationship with CSRC.

3. Rule of “Control One and Participate in One”

As with other financial institutions, the Consultation Draft provides that any shareholder (together with its controllers) in a securities/funds investment advisory institution may take equity stakes in up to two investment advisory institutions and may control only one of those institutions, unless otherwise provided by CSRC. This is consistent with CSRC’s position applicable to shareholders of fund management companies and securities companies.

Generally speaking, the Consultation Draft has greatly increased the threshold requirements for setting up a securities/funds investment advisor, which demonstrates CSRC’s intention to only allow market

futures companies and their respective subsidiaries, insurance asset management companies and financial asset investment companies.

players with stronger overall capabilities (in terms of capital, staffing, shareholder backgrounds, infrastructure, internal controls, etc.) to enter into this form of regulated business activity.

V Investor Suitability

The Consultation Draft introduces investor suitability management obligations and requires securities/funds investment advisory institutions to classify their clients, fully disclose relevant risks, provide products and services corresponding to clients' ability to identify and tolerate risk based on a risk-matching principle.

As a general principle, investors are classified as common investors and professional investors, and securities/funds investment advisory services for high-risk assets, such as stocks, structured products and derivatives, cannot be made available to common investors, unless the common investors are proactively willing to receive such services and certain CSRC-prescribed prudential requirements are satisfied.

VI Outsourcing Permissible

The Consultation Draft allows securities/funds investment advisors to outsource parts of their services, e.g. provision of research reports, investment advice, and design, operation and maintenance of algorithms and models, to another licensed securities/funds investment advisor. Such outsourcing arrangements, however, do not exempt outsourcing advisors from the obligations and liabilities they owe to their clients.

VII Risk Reserve Requirement

The Consultation Draft requires securities/funds investment advisory institutions that provide discretionary investment advisory services or high-risk asset investment advisory services to provide for risk reserves to indemnify their clients for any losses caused by their violations of law, breaches of contractual agreements, operational errors or technical failures.

VIII Special Carve-outs

While the Consultation Draft is intended to unify the relevant rules applicable to securities and funds investment advisory services and standardize market practices, it specifically provides for the application of carve-outs as below to harmonize with the existing regulatory framework:

1. For Financial Institutions

Certain requirements in the Consultation Draft will not be applicable to financial institutions providing securities/funds investment advisory services, because they are already under competent regulatory supervision in respect of eligibility criteria, such as securities companies, fund management companies, futures companies, commercial banks, insurance companies and other CSRC-recognized financial institutions. Such requirements include but are not limit to eligibility requirements for shareholders and requirements for corporate governance, internal controls and compliance and licensing extensions.

Where any of the above financial institutions uses its wholly-owned subsidiary to apply for a securities/funds investment advisory license, CSRC will consider the application on a consolidated

basis for the purpose of eligibility requirements (considering the subsidiary and its parent financial institution as a single entity).

2. For Private Fund Managers (PFMs)

Where PFMs provide investment advisory services for asset management products, or affiliated qualified overseas institutional investors (R/QFIIs), the provisions as otherwise provided by CSRC will prevail.

Notably, under currently valid PRC laws and rules, a PFM (including a WFOE PFM) may apply for an investment advisory license from the Asset Management Association of China (AMAC), provided that the PFM satisfies the so-called “1+3+3” eligibility requirements of AMAC membership, staffing requirements and track record. The AMAC-issued investment advisory license allows a PFM to provide investment advisory services for private asset management products issued by securities companies, futures companies and fund management companies and their subsidiaries, and commercial bank wealth management subsidiaries in China⁴. Once the Consultation Draft is formally promulgated, subject to CSRC’s discretion, it is possible that PFMs may still be subject to the current AMAC licensing requirements, rather than the licensing requirements under the Consultation Draft, to the extent that PFMs only provide investment advisory services for private asset management products issued by the aforementioned financial institutions.

It should also be noted that currently R/QFIIs may not appoint PFMs to provide investment advisory services, until the consultation drafts for the amended R/QFII rules, which were issued by CSRC on 31 January 2019, are formally promulgated and become effective.

IX Programmatic Advisory Service

The Consultation Draft specifically provides for reporting obligations over the provision of programmatic advisory services, i.e. a securities/funds investment advisory institution using algorithms, models and other information technology means to provide clients with automated securities and funds investment advisory services. These obligations include reporting to the local CSRC bureau relevant technical solutions, model parameters, investment logic and other information and materials.

X Transitional Period

The Consultation Draft provides transitional periods for institutions to conform to the requirements as follows:

1. for institutions which have previously obtained a securities investment advisory license under the 1997 Measures but do not meet the requirements of relevant internal management and business norms under the Consultation Draft, rectifications are to be completed within one year from the effective date of the Consultation Draft;
2. shareholders which do not meet the eligibility requirements provided in the Consultation Draft are to

⁴ As from 1 May 2020, a PFM with an AMAC-issued investment advisory license may also be allowed to provide investment advisory services for private asset management products issued by insurance asset management companies.

complete rectifications within five years from the effective date of the Consultation Draft;

3. institutions which have not obtained a securities/funds investment advisory license before effectiveness of the Consultation Draft but have engaged in securities/funds investment advisory services in accordance with relevant rules (e.g. discretionary funds investment advisors under the pilot program) should apply for approval or registration with CSRC within one year from the effective date of the Consultation Draft in accordance therewith; and
4. institutions (a) which are not securities companies or their subsidiaries but have engaged in publishing securities research reports or (b) which have provided common investors with high-risk asset investment advisory services but do not meet relevant requirements for the protections afforded to common investors before effectiveness of the Consultation Draft must cease developing new business by the effective date of the Consultation Draft and allow the existing business to terminate upon its expiration.

Outlook

The Consultation Draft provides clear access standards for engaging in securities/funds investment advisory services, clarifies the applicable scope and strengthens on-going compliance requirements. However, there are still some outstanding issues or points which will require further clarification, such as how to address commodity futures investment advisory services, whether the securities covered by the Consultation Draft will also include relevant securities issued by overseas companies and traded on overseas exchanges, how to apply the “control one and participate in one” rule where financial institutions and their subsidiaries all engage in securities investment advisory services, and the relationship between AMAC’s investment advisory licenses available to PFMs.

The consultation period will end on 17 May 2020. According to CSRC’s 2020 legislation plan issued on 17 April 2020, the Consultation Draft is one of the key rules to be promulgated within this year. We will submit our comments to CSRC and will continue to work with market participants in exploring business opportunities as the market and regulatory framework develop.

We have prepared an English translation of the Consultation Draft. Please let us know should you wish to receive a copy.

Important Announcement

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

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

TieCheng YANG

Tel: +86 10 8516 4286

Email: tiecheng.yang@hankunlaw.com

Yin Ge

Tel: +86 21 6080 0966

Email: yin.ge@hankunlaw.com

Lin Zhou

Tel: +86 10 8516 4188

Email: lin.zhou@hankunlaw.com



Promotion of technologies to ease interaction with public entities | Brigard Urrutia

May 5th, 2020

The Ministry of ICT issued Decree 620 of 2020 to establish general guidelines that private (when performing administrative functions) and public entities must follow in the use and operation of digital citizen services. There are three basic digital citizen services: citizens' folder, electronic authentication, and interoperability of State systems.

This Decree defines, among others, (i) principles applicable to digital citizen services, (ii) structure of the ecosystem, (iii) functions of its actors, (iv) access patterns, (v) provision and use of services, (vi) rights and obligations of its actors and (vii) guidelines applicable to the processing of personal data, including considerations of security and privacy.

This Decree also regulates the electronic seat (sede electrónica), understood as the electronic address belonging to, administered, and managed by a competent authority. It is clarified that there is a shared electronic seat: State Portal (Portal Único del Estado), through which citizens will access contents, procedures and services made available by authorities.

Public entities of the national executive branch and private entities performing public functions will have nine months to implement the digital citizen services and the electronic seat. Other entities will implement these rules according to their budgetary availability. The Ministry of ICT will publish within six months guidelines with recommendations for digital citizen services, and guidelines for linking and using these services.

We will inform when the draft guidelines are published to assist with proposals for comments.

See Full text in:

<https://www.funcionpublica.gov.co/eva/red/publicaciones/servidor-publico-invita-mos-conocer-decreto-servicios-ciudadanos-digitales> (Spanish version only)

PRESS ROOM

COVID-19 LEGAL TASK FORCE COSTA RICA – UPDATE 22

May, 2020

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

The Government of Costa Rica announced the following measures for the gradual reactivation of the economy, which apply from May 16th to 31st:

- Daytime vehicle restriction:
 - Monday - Friday: from 5:00 a.m. until 10:00 p.m.
 - Weekends: from 5:00 a.m. until 7:00 p.m.
 - Plate number restriction remains from Monday to Sunday.
- Nighttime vehicle restriction:
 - Monday – Friday: from 10:00 p.m. until 5:00 a.m.
 - Weekends: from 7:00 p.m. until 5:00 a.m.
- Opening of establishments with sanitary operating permits from Monday to Friday from 5:00 a.m. until 10:00 p.m.: restaurants, shopping malls, shops, cinemas and theaters.
- Opening of establishments on weekends: home delivery services, supermarkets, pharmacies, hardware stores, self-service in restaurants, and others authorized by the Ministry of Health.
- Opening from Monday to Sunday: beaches between 5:00 a.m. and 8:00 a.m., 20-room hotels with 50% of their maximum capacity.
- Public institutions remain open with 20% capacity and work from home measures.

At Arias we remain at your disposal in case you need help. Do not hesitate to contact our specialized team at the following email: Laura.Perez@ariaslaw.com.

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

Contacts



Baudouin de
Moucheron



Guillaume
Navarro



Foulques de
Rostolan



Francois Vergne



Aurélien
Boulanger



David Jonin

Covid-19 | Adaptation of the terms and conditions for granting the supplementary indemnity and for paying sums allotted under the mandatory and optional profit-sharing schemes

13 May 2020

Presentation of Ordinance No. 2020-322 of 25 March 2020 relative to the temporary adaptation of the terms and conditions for granting the supplementary indemnity set forth in Article L.1226-1 of the French Labor Code and to the exceptional amendment of the deadlines, terms and conditions for paying sums allotted under the mandatory and optional profit-sharing schemes and Decree No. 2020-434 of 16 April 2020 relative to the temporary adaptation of the deadlines and terms and conditions for granting the supplementary indemnity set forth in Article L. 1226-1 of the French Labor Code

Among the measures taken to fight the spread of the Covid-19 epidemic, new grounds for taking a leave of absence (e.g., childcare or care to a vulnerable person) have been added entitling those eligible to the following (i) daily allowances paid by Social Security, with no length of service proviso and no waiting period for the benefit thereof; and (ii) maintained legal wage, as set forth for sick leave.

Article 1 of Ordinance No. 2020-322 of 25 March 2020 (**Ordonnance Arrêt Maladie et Épargne Salariale – Ordinance on leave of absence and employee savings schemes**) adjusts certain common-law rules so that all employees having taken a leave of absence benefit from maintained salary, without preconditions.

Article 2 of the Ordinance on leave of absence and employee savings schemes also allows companies to postpone the date of payment of the mandatory and optional profit-sharing sums.

TEMPORARY ADAPTATION OF MAINTAINED SALARY CONDITIONS DURING A LEAVE OF ABSENCE

Extension of the maintained salary scheme

Article 1 of the Ordinance on leave of absence and employee savings schemes temporarily suspends certain conditions governing the employer's payment to its employees on leave of the supplementary indemnity paid in addition to the daily Social Security allowances.

Thus, as a dispensation measure in order to benefit from the supplementary indemnity paid by the employer:

- the one-year length of service provision no longer applies;
- the exclusion of certain categories of employees (employees working from home, seasonal workers, intermittent employees and temporary workers) no longer applies.

Therefore, all employees are eligible for maintained salary, whatever their length of service, on condition that they can provide justification for (i) a leave of absence specifically obtained within the scope of the Covid-19 epidemic (e.g., childcare leave [the child must be under 16 years of age] or caregiver leave); or (ii) a leave of absence justified by an incapacity resulting from illness or an accident.

Initially, this scheme was not intended to apply until 31 August 2020.

Ordinance No. 2020-428 of 15 April 2020 removes this deadline and specifies that these adjustments are applicable to ongoing leaves of absence on 12 March 2020 as well as those which began afterwards, regardless of the starting date of these leaves of absence and will cease to apply on a date fixed by decree which may not be later than 31 December 2020.

Adaptation of the deadlines and terms and conditions for granting the supplementary indemnity

Decree No. 2020-434 of 16 April 2020 issued pursuant to the Ordinance on leave of absence and employee savings schemes adjusts the deadlines and terms and conditions under which the supplementary indemnity is granted during this period.

Article 1 of the Decree provides that:

- the waiting periods applicable to maintained salary are aligned with those applicable for payment of daily Social Security allowances:
 - for ordinary leaves of absence which started between 12 March and 23 March 2020, the supplementary indemnity is paid from the 4th day of absence (application of a 3-day waiting period);
 - for ordinary leaves of absence which started on 24 March 2020 and derogatory leaves of absence related to the Covid-19 epidemic, the **supplementary indemnity is paid from the first day of absence, without waiting period;**
- as a dispensation measure, for the calculation of the total duration of maintained salary, the following are not taken into account:

- compensation periods for ongoing leaves of absence or those taken after 12 March 2020;
- compensation periods paid during the last 12 months preceding the starting date of the leave of absence concerned.

The above-mentioned adjustments shall apply to supplementary indemnities paid:

- from 12 March to 31 May 2020 for derogatory leaves of absence related to the Covid-19 epidemic;
- from 12 March to the end of the state of health emergency for ordinary leaves of absence.

Article 2 of the Decree provides that for derogatory leaves of absence, the amount of the supplementary indemnity shall amount to 90% of the gross salary, less the amount of the daily Social Security allowances, regardless of the total duration of the compensation as from 12 March and until 30 April 2020.

According to a press release from the Ministry of Labor dated 17 April 2020, as of 1 May, employees on leave of absence for childcare or care to a vulnerable person will be placed in a situation of partial activity and will receive a partial activity indemnity of 70% of their gross salary.

POSTPONEMENT OF PROFIT-SHARING PAYMENT DEADLINES

In principle, the sums accrued under the mandatory and optional profit-sharing schemes must be paid to the beneficiaries or paid into an employee savings scheme before the 1st day of the sixth month following the end of the company's financial year, subject to late-payment penalties.

As an exemption to this rule, Article 2 of the Ordinance on leave of absence and employee savings schemes provides that it will be possible to postpone, up to 31 December 2020, the payment of the mandatory and optional profit-sharing sums that were supposed to be paid in 2020 (particularly before 1 June 2020 for mandatory and optional profit sharing accrued in 2019 by companies whose accounting period corresponds to a calendar year).



Gide's **Employment practice group** is available to answer any questions you may have in this respect. You may also get in touch with your usual contact at the firm.

This legal update is not intended to be and should not be construed as providing legal advice. The addressee is solely liable for any use of the information contained herein and the Law Firm shall not be held responsible for any damages, direct, indirect or otherwise, arising from the use of the information by the addressee.

To read all the legal updates of Gide's multidisciplinary taskforce set up to answer all your legal issues relating to Covid-19. visit www.gide.com

May 2020

Determination of essential activities and enabling dates and hours by the National Forestry Commission

On May 11th, 2020, the National Forestry Commission ("CONAFOR") published, in the Official Gazette of the Federation, a Resolution communicating the activities considered as essential by CONAFOR (those related to forest fires and sanitation), as well as setting forth as non-working days those from May 6th to May 29th, 2020, as a result of the sanitary situation generated by the COVID-19 outbreak. On such dates, terms will not be computed in the administrative proceedings filed before CONAFOR associated with (i) review petition, (ii) administrative rescission procedure, (iii) asset claim, and (iv) other procedures foreseen in the Law for Sustainable Forest Development.

Notwithstanding the above, the Resolution does not apply for filing of procedures associated with the allocation of support to forestry assistance programs handled by CONAFOR, prohibiting those acts that require movement and concentration of people.

Finally, such Resolution establishes that the following procedures may be submitted before the authorized offices of CONAFOR from 10:00 to 14:00 hours during May 7, 12, 14, 19, 21, 26, and 28 of 2020:

- I. for the granting of forestry remission permits, which prove the legal origin and transportation of forestry raw material;
- II. vegetation removal and transportation of non-forest land;
- III. annual notices of volume of harvested forests;
- IV. permit for forestry storage and transportation centers and for non-integrated centers to a primary transformation center;
- V. procedure to obtain proof of vegetation removal from non-forest land;
- VI. phytosanitary certificate for export and application form for the importation into Mexico of forestry raw material, products, and sub-products;
- VII. notices of the possible presence of forestry pests and diseases;
- VIII. notices of the existence of a risk to forestry ecosystems and the implementation of the required activities to avoid or minimize such risk; and

- IX. the recordation at the National Forestry Registry of those commercial forestry plantations established prior to the entry into force of the Law for Sustainable Forest Development, which have not been registered.

This Resolution entered into effect the date of its publication.

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

Mexico City Office:	Mr. Aarón Levet V., alevet@s-s.mx (Partner) Phone: (+52 55) 5279-5400
Monterrey Office:	Mr. César Cruz A., ccruz@s-s.mx (Partner) Phone: (+52 81) 8133-600
Queretaro Office:	Mr. José Ramón Ayala A., jayala@s-s.mx (Partner) Phone: (+52 442) 290-0290



May 13, 2020 | 3 min read

[Covid-19 \(Coronavirus\) \(/resources/covid-19-coronavirus\)](#)

POST-LOCKDOWN M&A - Earn-outs Back in Fashion

Earn-outs have started to become popular again in the last 2 or 3 years, and the economic impact of the Covid-19 crisis is likely to mean this trend will continue.

With low earnings expected for most businesses in 2020, we expect more buyers to look for earn-outs and deferred consideration structures. Earn-outs have never been straightforward, with most of the risk lying with the seller who is no longer in control of the business. The fundamental change in economic outlook, including the new “EBITDAC” measure, are likely to make things even harder.

In this FYI we explain more about how earn-outs operate, and the likely impact of the Covid-19 recovery environment.

What is an earn-out?

An earn-out is a form of deferred consideration based on performance of a business after it has been purchased by the buyer. A purchase price structured with an earn-out will typically have an initial purchase price paid on completion of the transaction, with additional amounts payable at certain times in the future if certain earnings thresholds are met.

Some key features

- **EBITDA-Based Payment:** The payment is calculated with reference to earnings for a defined period ending after completion, usually using a normalised EBITDA calculation. There may be multiple payments, based on successive financial periods. With the onset of Covid-19 we have seen a new metric “EBITDAC”, being earnings before interest, tax, depreciation, amortisation and coronavirus, designed to look at earnings without the impact of Covid-19. Sellers may look to use this metric in the coming months.
- **Caps and Collars:** There may be a maximum amount the payment can be and possibly also a minimum amount.
- **Conditions:** There may be conditions attached to the payment. For example, the payment is only payable if key individuals remain employed by the business or if a defined event has occurred.
- **Required Conduct in Earn-out Period:** The buyer will usually have some parameters within which they can operate the business in the period from completion until the earn-out payments have been made. For example, restrictions on making material changes to the business or the accounting policies used, or incurring material expenditure outside an agreed business plan.
- **Acceleration:** The payment may be due early in some circumstances, for example if the business is disposed of by the buyer (or another type of exit event occurs) for a price above a threshold, before the earn-out payment has been made.

Advantages

For a buyer, an earn-out can be a great way to de-risk a transaction. Deferred consideration is payable only if the business meets certain future performance targets is a true performance measure - if the business makes more, the seller gets more. Looking forward to a post lockdown transaction environment, we expect this will be a very attractive structure for buyers.

An earn-out structure also means only an initial purchase price needs to be funded upfront. Post lockdown, the initial purchase price component is likely to be a smaller percentage of the total price than has been the norm, with deferred payments making up a larger proportion rather than just being the “cream on top”.

For a seller, in the current environment an earn-out may also be seen as a positive as it gives the business a chance to recover and boost its earnings in future periods. In turn, this gives the seller a chance to make more from the sale than might otherwise be the case in the current market.

Where there is uncertainty about the value of a business, an inevitability in the coming months, an earn-out can operate to manage that uncertainty and bridge the gap between a buyer’s valuation and a seller’s valuation.

Disadvantages

The inherent tension an earn-out creates between buyer and seller has always been the main disadvantage with earn-outs. A seller loses control of the business and

must rely on a buyer to operate the business in a way that enhances the buyer's obligation to pay that seller more. There is an element of trust in this. The calculation of any earn-out payment is often heavily scrutinised and can become contentious. The risk of a dispute is high. Careful drafting and expert legal and financial input are recommended.

For a seller, the Covid-19 crisis has highlighted another key disadvantage with earn-out payments. Calculation of an earn-out payment is generally a straight financial calculation based on EBITDA. There is no force majeure concept or other relief for a seller if there is an external economic shock that, through no fault of either party, makes the earn-out targets impossible to meet. There will be some real challenges with previously negotiated earn-outs based on FY2020/21 financial results, which may make sellers wary of accepting an earn-out structure.

For a buyer, the restrictions on conduct during the period from completion until the earn-out payment is made limit the buyer's discretion to change the direction of the business in a material way until after the earn-out period has ended. This can be frustrating for a buyer and may mean future business plans need to be delayed if they represent a material change to how the business operates.

Next Steps / Get in touch

There are certainly pros and cons to using an earn-out structure for both buyers and sellers, but in a buyer friendly market with much uncertainty regarding earnings and business valuations, we expect earn-outs to be more popular than ever as we move through 2020 and into 2021.

Please get in touch with any of our contacts to discuss this topic in more detail, and if you have any queries relating to the impact of Covid-19 on your business or transaction.

Click here (<https://www.simpsongrierson.com/articles/2020/back-to-business>) to visit Back to Business - our Covid-19 recovery resource for the New Zealand business sector.

To receive all updates on Covid-19 you can click here (<https://www.simpsongrierson.com/resources/>) and fill out the Register for Updates form.

www.simpsongrierson.com

[COVID-19] Moves by SGX RegCo to aid listed companies

May 13, 2020

The pandemic is driving the business world on-line in more ways.

Arrangements for listed companies' general meetings between March 27 and September 30, 2020 have to have certain arrangements in place e.g.:

- Issuers have to conduct their meetings through electronic means;
- Shareholders must vote by proxy as they are unable to attend physically;
- Proxy forms can be submitted electronically;
- Shareholders can pose questions before the meeting;
- All documents relating to the meeting must be published on SGXNET; and
- Issuers must publish minutes within one (1) month of the general meeting on SGXNET.

On **6 May 2020**, the Singapore Exchange Regulation (SGX RegCo) together with the Monetary Authority of Singapore (MAS) and the Securities Industry Council (SIC), announced that it will allow listed issuers and parties involved in rights issue and takeover or merger transactions, the option to electronically disseminate offer documents through publication on the SGXNET and their corporate websites, as opposed to the usual requirements to despatch hardcopy offer documents as required under the Securities and Futures Act (Cap. 289), the Singapore Code on Take-overs and Mergers, and the SGX Listing Rules. This temporary measure on the electronic dissemination of offer documents came into effect on 6 May 2020 and will be in force until 30 September 2020.

Electronic Dissemination of Rights Issue and Take-over Documents

The usual requirements to despatch hardcopy offer documents or offer information statement under the relevant laws and regulations would have entailed printing a large number of documents of a substantial volume due to the compliance with disclosure requirements prescribed under, for instance, the Sixteenth Schedule of the Securities and Futures (Offers of Investments) (Securities and Securities-based Derivatives Contracts) Regulations 2018. Typically offer information statements and offer documents exceed 50 pages.

The temporary measures to allow electronic dissemination of rights issue and take-over documents are welcome amidst the stringent safe distancing requirements imposed by the Multi-Ministry Taskforce on all firms (including printers and mailing houses) to minimise risks of COVID-19 transmissions at their workplaces.

Not only will these measures remove the headaches associated with logistical hurdles involved in organising printing

and despatch from home, listed companies will also enjoy costs-saving from printing.

Notification instructions

Under the temporary measures, issuers and parties who opt to disseminate their offer documents electronically must send a hardcopy notification to shareholders with instructions on how they can access the electronic version of the offer documents. They must also send the hardcopy application or acceptance forms to shareholders. These requirements will ensure that shareholders continue to be informed of these significant corporate actions by mail during this time and facilitate their participation in the corporate actions.

Electronic payment

SGX RegCo also strongly encourages parties undertaking rights issues or take-over or merger transactions to allow shareholders to apply and pay for the subscription of rights issues, accept offers and inspect documents through the internet. For instance, acceptance and payment for provisional allotments of rights shares may be made through an ATM of a participating bank or an electronic application through the online application website of the issuer. Details on these internet channels may be set out in the hardcopy notification provided to shareholders.

Cautionary statement

MAS has, on 6 May 2020, issued further guidelines on inter alia the publication of an electronic version of an offer information statement pursuant to Section 277 of the *Securities and Futures Act* (Cap. 289). In particular, the electronic version of the offer information statement must not differ significantly in form or content from the lodged offer information statement and the issuer must ensure that the physical document in which the offer is made includes cautionary statements which warn potential investors that:-

- a. All investments come with risk, including the risk that the investor may lose all or part of his investment; and
- b. The potential investor is responsible for his own investment decisions.

Further information on the electronic dissemination of rights issue and take-over documents may be accessed [here](#).

Enhanced Share Issue Limit for Mainboard Issuers

Earlier in April 2020, SGX RegCo allowed for Mainboard issuers to seek a general mandate for an issue of pro-rata shares and convertible securities of up to 100% of their share capital (excluding treasury shares and subsidiary holdings in each class) as compared to the previous limit of 50% (the Enhanced Share Issue Limit).

Temporary loosening of fund raising limit

The Enhanced Share Issue Limit came into effect on 8 April 2020 and will be in force until 31 December 2021. The limit on the aggregate number of shares and convertible securities issued other than on a pro-rata basis remains at not more than 20%.

Issuers intending to raise funds using the Enhanced Share Issue Limit must seek shareholders' approval by way of an ordinary resolution either through obtaining a general mandate for the Enhanced Share Issue Limit at their annual general meeting or via specific shareholder approval by convening an extraordinary general meeting (EGM).

The Enhanced Share Issue Limited is also subject to several conditions including, confirmation from the board of directors to SGX RegCo that the Enhanced Share Issue Limit is in the interest of the issuer and its shareholders and the issuer disclosing in its notice of general meeting:

- a. Why the Board of Directors is of the view that the Enhanced Share Issue Limit is in the interest of the issuer and its shareholders and their basis for forming such views;
- b. That the Enhanced Share Issue Limit may be renewed annually during the issuer's annual general meeting and is only valid until 31 December 2021, by which date the shares and/or convertible securities issued pursuant to the

- Enhanced Share Issue Limit must be listed and no further shares and/or convertible securities shall be issued under this limit; and
- c. If the issuer is seeking shareholders' approval via an EGM and has utilised any part of the existing share issue mandate (the Existing Amount Used), the issuer is to disclose as at the latest practicable date, the remaining balance that would be available under the Enhanced Share Issue Limit after deducting the Existing Amount Used.
- Further details on the requirements may be found in SGX RegCo's news release [here](#).

Suspension of Entry into the Financial Watch-List

SGX RegCo had also announced that it will provisionally suspend the half-yearly reviews on the first market days of June 2020 and December 2020 to place issuers on the Financial Watch-List (the Suspension).

Breathing space

Prior to the temporary measures, SGX RegCo will place issuers on the Financial Watch-List if they record pre-tax losses for the three (3) most recently completed consecutive financial years and also fail to maintain an average daily market capitalisation of at least S\$40 million over the last six (6) months. In light of current conditions as a result of the COVID-19 outbreak, placing listed issuers on the Financial Watch-List during this period might cause undue prejudice to companies in navigating the business challenges in this climate.

The Suspension is to enable issuers to focus on meeting the current business and economic challenges and dealing with any resultant **liquidity crunch**. Companies which meet the exit criteria under the listing rules will continue to be able to exit the Watch-List and SGX RegCo will determine where appropriate, if the Suspension requires further extension in due course.

Striking the right balance

SGX RegCo has applied a firm hand when it comes to adherence to the rules but demonstrates it has its hand on the business pulse, and is willing to calibrate its listing requirements to keep pace with the developing fallout of the pandemic.

Dentons Rodyk thanks and acknowledges Associate Hui Qi Lim for her contributions to this article.

Your Key Contacts



Valerie Ong
Senior Partner, Singapore
D +65 6885 3625
valerie.ong@dentons.com

New Law Authorizes CECC to Publicize Personal Data of Individuals Violating Isolation or Quarantine Orders

04/30/2020

[Ken-Ying Tseng/Sam Huang](#)

On February 25, 2020, the Legislative Yuan (i.e., the Congress) passed the Act Governing the Prevention, Bailout and Revitalization Packages in response to the COVID-19 Outbreak (“Act”). Article 8 of the Act authorizes the Chief Commander of the Central Epidemic Command Center (CECC), during the period of epidemic prevention and control, to take the following measures on any person who (i) violates or intends to violate any isolation or quarantine orders or (ii) has tested positive for COVID-19 for the purpose of preventing epidemics from spreading:

1. Record a video or take pictures of him/her;
2. Publicize his/her personal data; or
3. Take any other necessary epidemic prevention and control measures.

All personal data so collected shall be processed in accordance with the provisions of the Personal Data Protection Act (“PDPA”) after the epidemic end.

www.leeandli.com

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.

Share



Follow



.....

Practices

Litigation

Health and Safety

General Commercial Litigation

Featured

Coronavirus (COVID-19) Crisis Response Group

Related Professionals



Greg Dillard
Partner



Rebeca A. Huddle
Partner



Jonathan Havens
Senior Associate



BLOG POST / EMPLOYMENT ADVISOR

Employment Counseling

Los Angeles County Passes COVID-19 Supplemental Paid Sick Leave

By Laura D. Heckathorn and Maria Arakelian

05.13.20

On April 28, 2020, the Los Angeles County Board of Supervisors unanimously approved an [interim urgency ordinance](#) to require employers with *500 or more employees nationally* to provide supplemental paid sick leave to covered employees working in *unincorporated areas of Los Angeles County* for qualifying reasons related to COVID-19.

The ordinance is aimed at employers who are not already covered by the [Families First Coronavirus Response Act](#) (FFCRA) or Governor Newsom's [Executive Order N-51-20](#) providing supplemental paid sick leave for covered food sector workers. It is unclear whether additional clarification on the new ordinance is forthcoming given that the law is silent on which county agency is responsible for implementation and enforcement. Below are the key parts of

the ordinance.

Does the Ordinance Apply to My Geographical Area?

The ordinance only applies to employees who perform any work within the geographic boundaries of the unincorporated areas of Los Angeles County.

Does the Ordinance Apply to My Business?

The ordinance applies to private employers with 500 or more employees in the United States. The ordinance is silent as to how and when an employer calculates its size. Federal, state, and local government agencies are not considered employers under the ordinance.

Who Are the Covered Employees?

An “employee” under the ordinance is any individual who is employed on April 28, 2020, by an employer, and performs any work within the geographic boundaries of the unincorporated areas of the County of Los Angeles for an employer.

The ordinance contains a presumption that a worker is an employee, and the employer has the burden to demonstrate that a worker is an independent contractor instead.

Are Any Employees Excluded from Receiving Supplemental Paid Sick Leave Under the Ordinance?

Food sector workers (as defined in the California governor’s Executive Order N-51-20) are excluded from the definition of employee in the ordinance.

Employers may exclude employees who are emergency responders or healthcare providers from the leave requirement.

- **Emergency Responder:** An employee who provides emergency response services. This category includes, but is not limited to: 1) peace officers; 2) firefighters; 3) paramedics; 4) emergency medical technicians; 5) public safety dispatchers or safety telecommunicators; 6) emergency response communication employees; 7) rescue service

personnel; and 8) employees included in the definition of emergency responder in the regulations issued by the U.S. Department of Labor.

- **Healthcare Provider:** The category of healthcare providers includes, but is not limited to: 1) medical professionals; 2) employees who are needed to keep hospitals and similar healthcare facilities well supplied and operational; 3) employees who are involved in research, development, and production of equipment, drugs, vaccines, and other items needed to combat the COVID-19 public health emergency; and 4) employees included in the definition of healthcare provider in the regulations issued by the U.S. Department of Labor.

When May Employees Use the Leave?

Employers shall provide supplemental paid sick leave to an eligible employee upon the written request (including requests made by email or text) if the employee cannot work or telework because:

1. A public health official or healthcare provider requires or recommends the employee isolate or self-quarantine to prevent the spread of COVID-19;
2. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19 (stipulating the employee is at least 65 years old or has a health condition such as heart disease, asthma, lung disease, diabetes, kidney disease, or a weakened immune system);
3. The employee needs to care for a family member (defined as the employee's child, parent, or spouse) who is subject to a federal, state, or local quarantine order related to COVID-19 or has been advised by a healthcare provider to self-quarantine related to COVID-19; or
4. The employee takes time off work because the employee needs to provide care for a family member whose school or child care provider ceases operations in response to a public health or other public official's recommendation.

How Is Paid Sick Leave Calculated?

An employee who works at least 40 hours per week or who is **classified as a**

full-time employee by the employer is entitled to receive 80 hours of supplemental paid sick leave. The leave is calculated based on the employee's highest average two-week pay over the period of January 1, 2020, through April 28, 2020.

An employee who works less than 40 hours per week and **who is not classified as a full-time employee** by the employer is entitled to receive supplemental paid sick leave in an amount no greater than the employee's average two-week pay over the period of January 1, 2020, through April 28, 2020.

Employees of joint employers are only entitled to the total aggregate amount of leave specified for employees of one employer.

In no event is an employee entitled to be paid more than \$511 per day and \$5,110 in the aggregate.

Can Employers Require Employees to Provide a Doctor's Note?

Yes. An employer can seek the same documentation as allowed under the FFCRA, including related Department of Labor Rules and Regulations. However, an employee may begin using this leave before employer-requested documentation is obtained.

The Los Angeles County ordinance differs from other [California local emergency paid leave ordinances](#) as it explicitly allows employers to require a doctor's note or other documentation to support an employee's need to use supplemental paid sick leave. The ordinance is effective immediately until December 31, 2020.

Can Employers Require Employees to Sign a Waiver of Rights?

No. Any waiver by an employee of any or all provisions of this ordinance is unenforceable.

What if Employers Already Provide Emergency Paid Sick Leave Under Another Law?

If an employer has already provided paid leave for COVID-19-related purposes since March 31, 2020, beyond the employer's regular or previously accrued leaves, each hour will be offset against the 80-hour requirement. The ordinance provides that employers cannot require employees use other paid or unpaid leave, time off, or vacation time an employer provides before using this new benefit.

Exemption for Collective Bargaining Agreements

Employees who are subject to a collective bargaining agreement (CBA) can expressly waive any or all of the law's requirements if the waiver is explicitly set forth in the agreement in clear and unambiguous terms.

What Conduct Is Prohibited Under the Ordinance?

Employers cannot discharge, reduce in compensation, or otherwise discriminate against any employee for:

1. Opposing any practice the law proscribes;
2. Requesting to use or actually using supplemental paid sick leave;
3. Participating in proceedings related to the law;
4. Seeking to enforce rights under the law by any lawful means; and/or
5. Otherwise asserting rights under the law.

What Are the Consequences of Violating the Ordinance?

Any employee claiming a violation of the ordinance may be awarded:

1. Reinstatement;
2. Back pay and supplemental paid sick leave unlawfully withheld, calculated at the employee's average rate of pay;
3. Other legal or equitable relief; and
4. Attorneys' fees and costs to prevailing employee.

The facts, laws, and regulations regarding COVID-19 are developing rapidly. Since the date of publication, there may be new or additional information not

referenced in this advisory. Please consult with your legal counsel for guidance.

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



Real Estate Practice Group
GOODSILL ALERT

March 28, 2020

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



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

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

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

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

1. Tenants

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

(a) Payment of Rent. Tenants should contact their landlords prior to missing any scheduled rent payments and keep an open dialogue with the landlord throughout the pandemic.

(b) Continuous Operations. Most retail leases require the tenant to continuously operate on the premises and/or state that “abandonment” of the premises is a default. Leases may also require a tenant to maintain minimum business hours or full staffing.

(c) Compliance with all laws. Commercial leases often contain a tenant covenant to comply with all laws. This covenant would likely require a tenant to comply with any quarantine, shut-down, or reporting orders from governmental authorities. However, whether non-mandatory guidelines from the CDC or other governmental bodies fall within the scope of this covenant may turn on the exact language used in the lease.

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

2. Landlords

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

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

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

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

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

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

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

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

Negotiation of Alternative Arrangements

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

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

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

Obligations to Lenders

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

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

RECOMMENDATIONS

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



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

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



CFTC brings charges in \$20m international binary options and digital fraud scheme

13 May 2020

The U.S. Commodity Futures Trading Commission (CFTC) has charged a man from Miami, Florida and two men from Israel with "two massive fraudulent solicitation schemes" involving binary options and other digital assets including bitcoin and ethereum.

What happened?

The CFTC alleged that the defendants made over \$20 million by fraudulently soliciting millions of customers and prospective customers with marketing campaigns to entice them to open and fund off-exchange trading accounts that traded foreign exchange currency pairs, metals and digital assets through websites operated by unregistered binary options and digital asset brokers.

What does this mean?

According to the CFTC [press release](#), charges have been filed against Daniel Fingerhut of Miami, Florida, and three companies he worked with, Florida corporation Digital Platinum, Inc, Israeli company Digital Platinum, Ltd and Bulgarian company Huf Mediya Ltd, as well as the operators of the three companies Tal Valariola and Itay Barak of Israel.

The [complaint](#) alleges that from at least October 2013 to August 2018, the defendants created fraudulent marketing materials that promised "astronomical profits with no risk of loss" and used spam emails and online videos to promote the fake trading accounts.

The defendants received over \$20 million in commission payments after more than 59,000 customers opened and funded the trading accounts as a result of the fraudulent marketing campaigns.

It is alleged the marketing materials contained fake trading performance using advertised binary options and digital asset trading software and systems. Marketing videos featured actors posing in front of mansions and private jets and falsely claiming they had become rich by trading.

Fingerhut is also charged with making materially false or misleading statements to CFTC staff, including under oath, to hide the extent of his role in the fraud and to avoid producing documents. The complaint is related to [another filed multimillion-dollar retail binary options fraud action](#).

The CFTC is seeking full restitution to defrauded individuals, disgorgement of ill-gotten gains, civil monetary penalties, permanent registration and trading bans, and permanent injunctions against further violations of the Commodity Exchange Act and CFTC regulations, as charged.

Next steps

If you want to take advantage of blockchain's huge potential and disruptive impact, while avoiding falling foul of ever-developing regulatory and legal requirements, visit our Hogan Lovells Engage [Blockchain Toolkit](#).

Contacts



Gregory Lisa

Partner

Washington D.C.

gregory.lisa@hoganlovells.com

© 2020 Hogan Lovells. All rights reserved. "Hogan Lovells" or the "firm" refers to the international legal practice that comprises Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses, each of which is a separate legal entity. Attorney advertising. Prior results do not guarantee a similar outcome.