PACIFIC RIM ADVISORY COUNCIL

Pacific Rim Advisory Council
October 2020 e-Bulletin

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PRAC - Let's Talk!

upcoming virtual meetings
October 26/27, 2020 | November 23/24, 2020 | December 14/15, 2020

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

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Coronavirus
COVID-19

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

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PRAC TOOLS TO USE

COVID-19 SITE FOR ALL UPDATES

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BAKER BOTTS CONTINUES CORPORATE DEPARTMENT GROWTH WITH PARTNER HIRE IN DUBAI

LONDON - 05 October, 2020: Baker Botts L.L.P., a leading international energy, technology and life sciences law firm, today announced that Haitham Hawashin has joined the firm's Corporate Department as a partner based in the Dubai office. Mr. Hawashin has extensive international and regional experience in public and private M&A, capital markets, private equity, and complex cross-border transactions across many sectors, including energy and technology.

"Haitham is a well-known and highly regarded transactional practitioner. As we strategically invest across the firm, we continue to add high performing talent who can offer our clients a unique level of service and deep expertise. Not only will Haitham provide demonstrable value for our clients in the UAE and wider Middle East region, he will also significantly contribute to our growing cross-border corporate capabilities in the energy and technology sectors," said John Martin, Managing Partner of Baker Botts.

The arrival of Mr. Hawashin, who joins the firm from Herbert Smith Freehills in Dubai, comes on the heels of strategic investments in the firm's Corporate Department in London, where the firm recently announced the addition of corporate partner Nigel Stacey and special counsel Sian Williams from Gibson Dunn last month, and corporate TMT partner Stuart Blythe from CMS at the start of the year.

"Having experienced corporate partners like Haitham in the region enables us to offer clients a broad and distinctive skill-set on sophisticated deals in the UAE, Saudi Arabia and broader Gulf-region. Haitham's international practice, particularly in the public M&A space, also adds weight to our cross-border capabilities between London and the Middle East," said Mark Rowley, Partner-in-Charge of London and the Middle East at Baker Botts.

Mr. Hawashin has practiced in the UAE since 2013 and prior to that held positions with leading international firms in Australia, Taipei, Jordan, London, Singapore and Hong Kong. He is highly experienced in public company work covering both equity and debt transactions including IPOs, bond issuances, block trades and strategic investor investments, and is consistently recognized by all major legal directories for his work in the UAE and the wider Middle East region.

"Baker Botts has a very attractive international platform and deep sector expertise in energy and technology that fits well with my practice. I am very eager to help build on the firm's strategy in the UAE and wider Middle East region, particularly in the Kingdom of Saudi Arabia where the market is buoyant," said Mr. Hawashin.

For additional information visit www.bakerbotts.com

HAN KUN WELCOMES CAPITAL MARKETS PARTNER

BEIJING - 10 October, 2020: Han Kun Law Offices is pleased to announce that Mr. Wang Xikang has recently joined the firm, further strengthening Han Kun's capital markets and M&A practices. He will mainly be based in the firm's Beijing office.

Mr. Wang Xikang's practice focuses on capital markets transactions, corporate/M&A, private equity and venture capital investments, corporate financing, and foreign direct investments. Mr. Wang practiced with several Wall Street law firms in China, where he gained extensive expertise in cross-border capital markets and M&A transactions. Mr. Wang regularly advises private and public companies, their management and boards of directors on corporate governance and regulatory compliance matters in connection with issues arising under U.S. and PRC securities laws. He also represents corporate and investor clients in transactions involving equity investments, joint ventures, mergers and acquisitions, and financing, covering industries including technology, internet, fintech, education, consumer and retail, healthcare, etc.

Prior to joining Han Kun, Mr. Wang worked at another leading PRC law firm. He was also Executive Director of Goldman Sachs Group in China, where he advised on many onshore and offshore investment banking transactions from both legal and compliance perspectives.

For additional information visit www.hankunlaw.com

NAUTADUTILH LAUNCHES THE FINANCIAL UPDATE PLATFORM

Today, 1 October 2020, NautaDutilh launched the Financial Update platform. This platform offers a select group of clients all relevant information in the areas of Financial Law, Corporate Law and Civil Law in a clear and user-friendly way. The platform provides access to both legislative developments and relevant case law.

Through this platform, we can keep our clients up to date with the latest legal news and recent developments. The Financial Update platform also offers 24/7 access to an extensive database. The platform can be used on any device (including mobile phones and tablets).

'With the new Financial Update platform we want to help clients navigate through the overload of information and sources that are relevant for their work, and help them to keep oversight in a constantly changing playing field', says Financial Law partner Larissa Silverentand, who led the team responsible for the development of the platform.

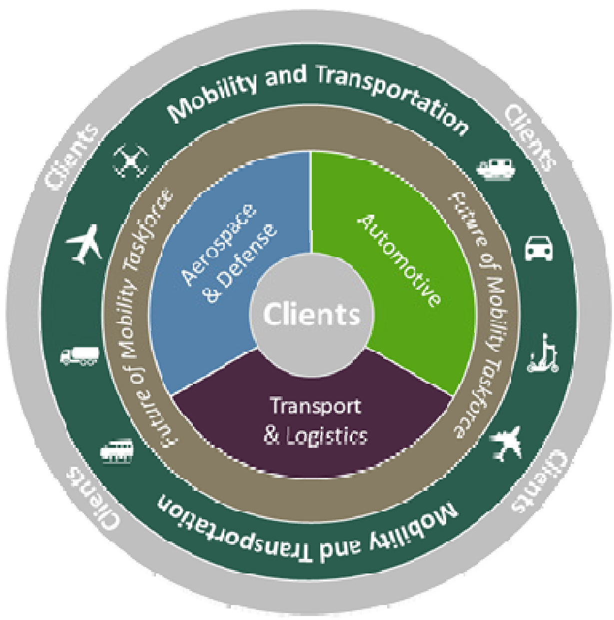
For additional information visit www.nautadutilh.com

HOGAN LOVELLS ANNOUNCES NEW MOBILITY & TRANSPORTATION SECTOR GROUP

14 September, 2020: We are excited to announce our refreshed sector structure and leadership to you.

Why change a running system?
We are closely monitoring the evolving convergence of industries and disruption opportunities that the future of mobility creates. As a result of this industry transformation not only traditional OEMs and suppliers develop their "mobility strategies" as part of their strategic vision. Across all modes of transport our clients are leading the way on mobility, we have taken their cue. To ensure we continue to provide the best service to you we joined forces and took the next step to adjust our sector approach accordingly.

What is new?
We have created the Mobility & Transportation sector group, led by Patrick Ayad that will include three dedicated industry sectors, to better capture where the industry is heading and allow us to collaborate even more under the umbrella of the new sector group and to further drive innovation. The chart below illustrates the new structure:



What is changing?
The current Aerospace, Defense & Government Services industry sector will be renamed Aerospace & Defense. Mike Mason will continue to lead **Aerospace & Defense**.

- The current Automotive & Mobility industry sector will be renamed Automotive. Sebastian Polly and Will Yavinsky will transition into leadership for **Automotive,** in the near term, working alongside Patrick Ayad.
- A newly formed industry sector, **Transport and Logistics**, will be led by Joanne Rotondi. This industry sector will focus on other modes of transportation including rail and shipping.
- A new **"Future of Mobility" task force**, focusing on new mobility developments combining all modes of transport across industry sectors will also be formed, that Patrick Ayad will be leading.

For additional information visit www.hoganlovells.com

TOZZINIFREIRE WELCOMES NEW TAX PARTNER

SAO PAULO - 10 October, 2020: Brazil's TozziniFreire Advogados has boosted its tax practice by hiring a partner from boutique Schneider Pugliese Advogados in São Paulo.

Lisandra Pacheco joined TozziniFreire on 5 October from Schneider Pugliese where she led their indirect tax and foreign trade practice from 2017. Lisandra also advises on administrative litigation.

Managing partner Fernando Serec says Pacheco's hire is part of the firm's strategy to boost its tax practice ahead of the new tax reform that is currently being debated in Brazil's congress.

For additional information visit www.tozzinifreire.com.br

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

ARIAS

REPRESENTS DELIVERY HERO IN ACQUISITION OF GLOVO'S OPERATIONS IN LATIN AMERICA

20 September, 2020: Arias represented Delivery Hero in the acquisition of Glovo's operations in Latin America. The firm was responsible for the representation in Costa Rica, Honduras and Guatemala, working together in the transaction with Cuatrecasas in Madrid, leading as international counsel, Ferrere in Ecuador, and Cuatrecasas in Peru. The sale was valued in 230 million euros (US$272 million).

Delivery Hero is a leading global business in online food ordering, headquartered in Berlin, Germany, operating in 44 countries, offering delivery services in more than 600 cities globally and with 25 000 employees around the world.

Arias advised in the due diligence process and the negotiation and execution of the share purchase agreement.

"This transaction is of great relevance to the firm given that it represents a significant movement in the delivery app industry, which has become more relevant within the framework of Covid-19. In coordinating the representation for all the Central American jurisdictions, we reflect our firm's leadership as the preeminent legal advisor for regional M&A work. We are proud to have assisted in this transaction along with Cuatrecasas and Ferrere which are first tier firms in their markets.", stated Diego Gallegos, who led the transaction for Arias.

Arias team of advisors to Delivery Hero (buyer): Regional coordinator: Diego Gallegos (senior counsel) Partners: Costa Rica: Vicente Lines; Guatemala: Luis Pedro del Valle and Liz Gordillo; Honduras: Evangelina Lardizábal ; Associates: Costa Rica: Diego Gallegos (senior counsel); Guatemala: Florencio A. Gramajo, Vivian Morales and Jorge Ordóñez; Honduras: Antonio Montes.

Foror additional information visit www.ariaslaw.com

BAKER BOTTS

REPRESENTS GCI LIBERTY IN $600 MILLION NOTES OFFERING

07 October 2020: Deal Description: GCI Liberty, Inc. announced today that its wholly-owned subsidiary, GCI, LLC ("GCI"), has completed the previously announced sale to initial purchasers in a private offering of $600 million aggregate principal amount of new 4.750% senior notes due 2028. The net proceeds of the offering, together with cash on hand and net proceeds from expected incremental borrowings under GCI's senior credit facility, will be used to fund the redemption of all $450 million aggregate outstanding principal amount of GCI's 6.875% Senior Notes due 2025 and the redemption of all $325 million aggregate outstanding principal amount of GCI's 6.625% Senior Notes due 2024.

Baker Botts L.L.P. represented GCI in the Offering.

For additional information visit www.bakerbotts.com

PRAC EVENTS

UPCOMING EVENTS

PACIFIC RIM ADVISORY COUNCIL

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Like millions around the globe, the COVID-19 pandemic has impacted our members and how we work.
We pivot. We adapt.
As we adapt, we continue to meet and talk virtually face to face
Across the miles, oceans and regions
In varying places and at varying hours of the day.

It isn't the same - we can all admit to that.
But we remain committed to continue forming new bonds and strengthening our long-standing ties
With our friends and colleagues around the world.

Together, we will see it through.

May 19, 2020 - *Conducting Business in the time of Covid-19 Part 1- wrapped up!*
June 22, 2020 - *Conducting Business in the time of Covid-19 Part 2 - wrapped up!*
July 28/29, 2020 - *Conducting Business in the time of Covid-19 Part 3 - wrapped up!*
August 24/25, 2020 - *Recent developments in Foreign Direct Investments - wrapped up!*
September 28/29, 2020 - *Mentoring, Training and Conducting Business - the Long View - wrapped up!*
October 26/27, 2020 - *Corporate Social Responsiblity*
November 23/24, 2020
December 14/15, 2020

PRAC - Let's Talk! events are open to PRAC Member Firms only
Registration required
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ARIFA

ADVISES BLADEX RAISE US4550 MILLION IN FINANCING DEALS

PANAMA CITY - 22 September, 2020: Arias, Fábrega & Fábrega have advised on a debt tap and a loan deal to help Panama-based Banco Latinoamericano de Comercio Exterior (Bladex) raise a total of US$550 million.

In the most recent transaction, Holland & Knight and ARIFA helped Bladex issue notes for US$400 million. The initial purchasers turned to Clifford Chance LLP in New York and Panama's Morgan & Morgan. The deal closed on 14 September. The notes have a 2.4% coupon and are due in 2025. They were four times oversubscribed.

In the second deal, ARIFA helped Bladex get a US$150 million loan from Wells Fargo and BNP Paribas. The deal closed on 20 August. The loan was provided by a syndicate of lenders, including financial institutions in China, Hong Kong and Germany.

Bladex will use the money from both transactions for general corporate purposes and projects that support local trade in Latin America.

For the issuance Counsel to Bladex Arias, Fábrega & Fábrega Partner Estif Aparicio and associates Fernando Arias and Ana Isabel Quijano in Panama City.

For the loan Counsel to Bladex Arias, Fábrega & Fábrega Partner Estif Aparicio and associate Fernando Arias in Panama City.

For additional information visit www.arifa.com

BRIGARD URRUTIA

ADVISES IN LANDMARK COLOMBIAN TRANSMISSION LINE FINANCING

BOGOTA - 29 September, 2020: Norton Rose Fulbright in São Paulo and New York, Colombia's Brigard Urrutia and Leite, Tosto e Barros Advogados in São Paulo have helped Brazilian holding company Alupar get a US$164 million project financing to build a transmission line in Colombia.

Milbank in New York and Holland & Knight (Colombia) helped MUFG, Japan's largest bank, provide the loan. This is the first time a foreign bank grants a project financing for a transmission line in Colombia. The deal was signed on 11 August.

Counsel to Alupar **Brigard Urrutia** Partner Manuel Fernando Quinche and associates Natalia Arango and María Mónica Latorre in Bogotá.

For additional information visit www.bu.com.co

BENNETT JONES

ADVISES ON $3.2 BILLION AGREEMENT TO ACQUIRE K+S AMERICA'S SALT BUSINESS, INCLUDING MORTON SALT AND WINDSOR SALT

CALGARY, 05 October, 2020: Bennett Jones served as Canadian counsel to Stone Canyon Industries Holdings LLC (SCIH) and Kissner Group Holdings in their agreement to acquire K+S Aktiengesellschaft's North and South American salt business, including Morton Salt and Windsor Salt, for US$3.2 billion.

The closing of the transaction is expected to occur by summer 2021, subject to customary closing conditions, including anti-trust approvals.

The Bennett Jones team was led by John Mercury and James McClary (Corporate/M&A) and included Sander Grieve (Mining); Nicholas Emter, Steven Bodi, Osie Ukwuoma and Zach Johnson (Corporate/M&A); Melanie Aitken, Adam Kalbfleisch and Kyle Donnelly (Competition); Darcy Moch and Marshall Haughey (Tax); Jane Helmstadter, Alixe Cameron, Giovanna Campagna, Michael Ramsay and Samantha Lush (Real Estate); Radha Curpen, Sharon Singh and Venetia Whiting (Environmental/Regulatory); Ashley White (Oil and Gas); Karen Dawson and Noriko Shimura (Banking/Finance); Carl Cunningham and Talia Bregman (Labour/Employment); Susan G. Seller and Jaspreet Kaur (Pensions/Benefits); Simon Foxcroft (OH&S); Jeilah Chan and Matthew Flynn (IP/IT); Darrel Pearson and Jessica Horwitz (Trade); Julia Schatz (Product Regulatory); and Jesslyn Maurier (Insurance); and was assisted by Lavery de Billy, L.L.P. (Quebec counsel) and McInnes Cooper LLP (Nova Scotia and Maritime counsel).

SCIH is a global industrial holding company and owner of Kissner Group Holdings, a leading pure-play producer and supplier of salt in North America.

For additional information visit www.bennettjones.com

CAREY

ADVISES IN WATER SERVICES LOAN IN CHILE

SANTIAGO - 05 October 2020: Chile's Carey has helped state-owned Banco del Estado de Chile provide a US$66 million loan to local water utility company Nuevosur.

The borrower was advised by in-house counsel. The deal closed on 8 September.

Nuevosur provides water services in Chile, including water purification, storage, distribution, sewage and wastewater decontamination.

Counsel to Banco del Estado de Chile Carey Partner Felipe Moro and associate Fernando Noriega in Santiago.

For additional information visit www.carey.cl

GIDE

ADVISES AGENCE FRANCE-PRESSE (AFP) ON THE DISMISSAL OF GOOGLE'S APPEAL REGARDING THE IMPLEMENTATION OF PRESS AGENCY AND PUBLISHER NEIGHBOURING RIGHTS

PARIS - 8 October 2020: The Paris Court of Appeal (Cour d'appel de Paris) today rejected Google's action for annulment of the interim measures decision issued by the Competition Authority on 9 April 2020, in the case regarding neighbouring rights of press agencies and publishers.

On 9 April 2020, the French Competition Authority acceded to the requests of the AFP and two press publisher syndicates (APIG and SEPM), recognising in particular that Google's practice of no longer displaying press content protected by neighbouring rights, except by demanding that it be free, was liable to be deemed as abuse of dominant position.

Considering the serious and immediate damage caused to the press sector, the Authority imposed several interim measures and ordered Google to enter into negotiations in good faith with the publishers and press agencies.

Google filed an action for annulment of this decision. In a judgment handed down on 8 October 2020, the Paris Court of Appeal dismissed Google's appeal and confirmed the Authority's decision and the measures issued.

Following this decision, discussions will now resume between Google and press industry players, under the conditions set by law.

The AFP was represented by Gide, with partner Antoine Choffel (competition law) and counsel Julien Guinot-Deléry (media and new technologies). APIG was represented by Latham & Watkins. SEPM was represented by cabinet Darrois Villey Maillot Brochier.

For additional information visit www.gide.com

HAN KUN

TENCENT MUSIC ENTERTAINMENT GROUP ON USD $800 MILLION SENIOR NOTE OFFERING

BEIJING 05 September, 2020: Han Kun advised and acted as the PRC counsel to Tencent Music Entertainment Group (NYSE: TME) on a USD 800 million senior note offering.

Tencent Music Entertainment Group is the largest online music entertainment platform in China, and currently operates several well-known brands, including QQ Music, Kugou Music, Kuwo Music and WeSing.

For additional information visit www.hankunlaw.com

NAUTADUTILH

ASSISTS FRAMELCO WITH ITS SALE TO BLUESTAR ADISSEO COMPANY

ROTTERDAM – 11 September, 2020: NautaDutilh assists the founder and shareholders of Framelco Group, a family owned multinational feed additive company, with the international auction sale of FRAmelco to Bluestar Adisseo Company (Adisseo). The Framelco Group is headquartered in The Netherlands and operates 3 plants located in The Netherlands, Spain and Thailand.

FRAmelco is specialized in the development, manufacturing and marketing of feed and drinking water additives worldwide. It provides the industry with additive solutions that allow both agriculture and aquaculture to increase productivity and profitability in a sustainable manner. FRAmelco's industrial footprint, its product range, its technologies and its target markets are highly complementary to Adisseo's. Adisseo is one of the world's leading experts in feed additives. The group relies on its 10 research centres and its production sites based in Europe, USA, and China to design, produce and market nutritional solutions for sustainable animal feed. Adisseo is one of the main subsidiaries of China National BlueStar, leader in the Chinese chemical industry with nearly 21,000 employees and a turnover of 6,8 billion USD.

Joost den Engelsman: "This was an exciting process for a number of reasons. Firstly, our client, family Snijders (father Frank Snijders and his two sons Lars and Benjamin), were great to work with in this intensive transaction process. Secondly, a broad auction with Dutch and international corporates and financial sponsors and, ultimately, a Chinese/French trade buyer. And thirdly and certainly not in the least, because the process and negotiations took place right in the middle of the COVID-19 pandemic. What makes me proud is that the client is very happy with our guidance. We are confident that we will bring this deal to closing soon."

The NautaDutilh team was led by Joost den Engelsman and Joost Kloosterman and consisted of Naomi Asscheman, Ernst van de Luijtgaarden, Olaf Baks (Corporate M&A), Mauricette Schaufeli, Jasmijn van Koetsveld, Arnout Koeman (Competition), Edward Rijnhout, Sjuul Jentjens (Tax) and Florine Kuipéri (Corporate).

For additional information visit www.nautadutilh.com

HOGAN LOVELLS

ADVISES VOTING RIGHTS ORGANIZATIONS IN SUCCESSFUL LAWSUIT TO EXTEND VIRGINIA VOTER REGISTRATION DATE

NORTHERN VIRGINIA, 14 October 2020: In response to a lawsuit filed by global law firm Hogan Lovells and other groups, the U.S. District Court for the Eastern District of Virginia ruled today that Virginia must extend the Commonwealth's voter registration deadline to 11:59 p.m. on October 15 in order to remedy the harm caused to Virginia voters yesterday, when the Commonwealth's voting systems went down on what was set to be the final day for voter registration.

The ruling was reached in response to a lawsuit filed yesterday by Advancement Project National Office, the Lawyers' Committee for Civil Rights Under Law and Hogan Lovells on behalf of the Virginia Civic Engagement Table, New Virginia Majority and the League of Women Voters of Virginia.

"We are grateful that the court recognized the serious issues and important rights at stake when the Department of Elections website went down yesterday on the last day of registration. This order granting additional time for voter registration will help to ensure that every eligible voter in Virginia has the opportunity to participate in this historic election," said Tom Connally, Partner at Hogan Lovells, which represents the New Virginia Majority Education Fund, Virginia Civic Engagement Table, and the League of Women Voters of Virginia.

"The decision to extend the registration deadline was the right thing in 2016, and it's the right one now. It's unfortunate that an accident caused a system wide failure, but Virginia voters should not have to bear the burden and lose their franchise due to a technology error through no fault of their own, said Tram Nguyen, co-executive director of New Virginia Majority. "Virginians are excited to vote in this election as evidenced by the high turnout during the last several weeks of early voting. We encourage every eligible Virginia to check their registration status and register to vote."

"This year has been tough for everybody in so many ways. The portal being unavailable on the last day for people to register to vote was another hurdle," said Deb Wake, President of the League of Women Voters of Virginia. "Extending voter registration to compensate for those who did not get a chance to use the portal is just a matter of fairness."

"We applaud the court's decision to right this wrong and extend Virginia's voter registration deadline," said Irene Shin, Executive Director of the Virginia Civic Engagement Table. "But beyond this ruling alone, we hope this decision is an indicator of the durability of our democracy, that all eligible Virginians have a right to vote and to help shape our future. We will do everything in our power to continue protecting that right."

"This is a victory for the people of Virginia. We are pleased the court recognized that extending the registration deadline and undertaking a campaign to educate the public about this change was the only way to preserve Virginians' voting rights," said Jorge Vasquez, Power and Democracy Director of Advancement Project National Office. "Mistakes and mishaps happen—but our fundamental voting rights should not hang in the balance. This should serve as a wake-up call for election officials and policymakers not only in Virginia but nationwide: our leaders must act proactively to secure the right to vote. We will continue to vigorously advocate for every person's right to have their voice heard."

"Voting is a right, not a privilege, and everyone who is eligible must have the chance to cast their ballot during the 2020 election season," said Kristen Clarke, President and Executive director of the Lawyers' Committee for Civil Rights Under Law. "This extension is critical to ensuring that no eligible voter across Virginia is locked out and penalized as a result of the state's failure. This underscores the need for states to put in place backstops to address 11th hour issues and disruptions in our electoral process."

The Hogan Lovells team who worked on this matter included partners Tom Connally and Christopher Pickens (Northern Virginia), as well as senior associate Kaitlyn Golden (Washington, D.C.)

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For additional information visit www.hoganlovells.com

MUNIZ

ASSISTS IN COFIDE'S RETURN TO THE INTERNATIONAL CAPITAL MARKETS

LIMA – 12 October, 2020: Muñiz, Olaya, Meléndez, Castro, Ono & Herrera in Lima along with Clifford Chance LLP have helped Peru's Corporación Financiera de Desarrollo (COFIDE) return to the international capital markets after five years with a US$500 million issuance. The deal closed on 30 September.

The notes carry a 2.4% interest and are due in 2027. COFIDE used the proceeds to redeem US$600 million worth of notes in a concurrent tender offer. That debt would have matured in 2022 and carried a higher interest rate of 4.75%.

COFIDE is a key part of the Peruvian government's economic and social development programmes and involved in governmental support funds. It signed a loan deal with German state-owned development bank Kreditanstalt für Wied-eraufbau (KfW) in September worth 250 million euros (US$296 million), which COFIDE will use to support small and medium-sized enterprises affected by covid-19.

The last international offering by COFIDE was in 2015, when it issued notes worth US$800 million.

Counsel to COFIDE Clifford Chance LLP (New York)

Local Counsel to COFIDE Muñiz, Olaya, Meléndez, Castro, Ono & Herrera Partners Mercedes Fernandez and Jorge Otoya, and associates Alesandra Azcárate, Jessica Mercado and Alessandro Heredia in Lima

Counsel to HSBC Securities and JP Morgan Securities Simpson Thacher & Bartlett LLP New York; Estudio Echecopar member firm of Baker McKenzie International Lima

For additional information visit www.munizlaw.com

TOZZINIFREIRE

ADVISES IN BRAZILIAN AUTOMOTIVE DEAL

SAO PAULO - 29 September 2020: TozziniFreire Advogados has helped Brazilian automotive solutions company Fras-Le buy car parts manufacturer. Nakata Automotiva for 457 million reais (US$87 million).

Pinheiro Neto Advogados advised Nakata in the acquisition, which closed on 1 September.

Fras-Le acquired all of Nakata's company shares, which handed it the target's operations in the Brazilian states of São Paulo and Minas Gerais. Nakata has 416 employees in Brazil.

The acquisition is part of Fras-Le's Latin American expansion plans. Headquartered in the Brazilian state of Rio Grande do Sul, the company currently has operations in Argentina, Brazil, Chile, Colombia, Mexico, Uruguay and the US, as well as China, Germany and India.

Fras-Le is a subsidiary of Brazil's vehicle manufacturer Randon Group.

Counsel to Fras-Le TozziniFreire Advogados Partner Luis Renato Ferreira da Silva, Maria Bofill and Gustavo Nygaard, and associates Ligia Pereira Schlitter, Daniel Born Roman and Leonela Otília Sauter Soares.

For additional information visit www.tozzinifreire.com.br

PRAC EVENTS

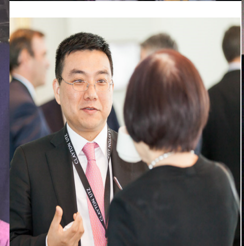
PRAC @ SAO PAULO

PRAC @ Taipei 2014

PRAC @ Brisbane

PRAC @ INTA

PRAC @ Vancouver



PRAC @ PDAC

PRAC @ IPBA

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ALLENDE
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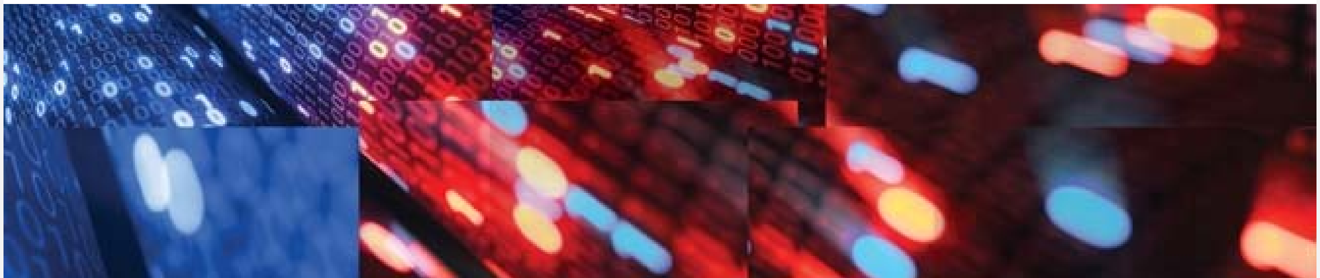

Belgium | Luxembourg

What to do with ex-employee mailboxes?

Belgian DPA fines post-dismissal use of e-mails

Wednesday, 7 October 2020

When a person leaves your organisation, how should you handle e-mail sent to their professional e-mail address? In a decision of 29 September published yesterday, the Belgian Data Protection Authority (BDPA) has taken a very practical and strict stance on how to manage mailboxes of former personnel (in this case: the former CEO) – and chances are, many organisations will have to rethink their processes as a result.

This new decision by the BDPA covers questions such as:

- **Should you forward e-mails to a new recipient, or display an automated response to say the person no longer works within your organisation?**
- **Should the (former) member of personnel be permitted to review e-mails to collect or delete private ones, and if so, when?**
- **Under which circumstances is an organisation allowed to access the professional mailbox of a member of personnel after dismissal or departure?**

The decision is not without criticism and contains assertions that could be disputed – but at least it offers clarity on the BDPA's position.

A. The facts and procedure

In the case examined by the BDPA, the organisation in question was once a family-run company. The company abruptly dismissed its CEO, the son of the founder, in November 2016, after which some other members of the founding family appear to have left the company. In March 2019, however, many professional e-mail addresses of those family members (in the format firstname@company.com) were still in use. As a result, the former CEO demanded a halt to the use of those e-mail addresses.

After a failed mediation attempt, the BDPA's First-Line Service transferred the case over to the Litigation Chamber, which in turn requested an investigation by the Inspection Service.

*[**Did you know?** Not every request by a data subject to the BDPA is a "complaint"; instead, data subjects can choose to request a "mediation", where the BDPA's First-Line Service acts as an intermediary, trying to see whether its*

intervention can help resolve certain data protection issues. If a mediation attempt fails, the First-Line Service transforms the mediation request into a complaint, which then gets handled by the BDPA's Litigation Chamber. In turn, if the Litigation Chamber considers that an investigation is required before the parties are invited to file submissions in adversarial proceedings, it can request the intervention of the Inspection Service. That is what happened in this case.]

After the Inspection Service noted that certain e-mail addresses remained active, the company closed those mailboxes but stated that *"at the time of departure of the individuals in question, these mailboxes had already been deactivated with the creation of a redirection for the simple purpose of not losing important e-mails of [various third parties], as these individuals held key positions (Manager, Quality Manager, …)"* in the company.

In its report, the Inspection Service set out its own position:

> *"[…] it is recommended for employers to block the mailbox of an employee who has left his position as soon as possible and after inserting an automatic message informing all future senders of the fact that the employee has left his position, and this during a reasonable period of time (typically 1 month). Beyond this time, the mailbox will ideally be deleted. Under no circumstances can the professional e-mail address in the name of a former employee be used. The fact that these mailboxes still exist without any notification to senders for these three recipients that these individuals are no longer the users of these e-mail addresses is moreover of a nature to enable the potential collection and use of personal data without the knowledge of the senders."*

B. The Litigation Chamber's decision

The Litigation Chamber – which took its decision after the rest of the procedure was followed – appears to have taken note of this recommendation of the Inspection Service. It states that **due to the principles of purpose limitation, data minimisation and storage limitation, any controller must block the mailbox of a person who has left his/her position – and must do so *"at the latest on the day of their actual departure"***.

It sets out various additional requirements throughout its decision, which we have tried to group together based on actions and timing:

1. Prior to dismissal / departure:

a. Have an IT policy that covers all of the elements hereunder

The litigation Chamber states explicitly that *"the case of departure or dismissal and the consequences thereof should be dealt with in an internal policy relating to the use of IT resources"*. While this quote specifically relates to the sorting of private and professional e-mails (see below), it is important to have an IT policy covering all the points set out hereunder, as it can also be an imporant means of informing data subjects of all aspects of the process.

b. Sort private & professional e-mails

Before a person leaves an organisation, *"[i]n the same way that the person in question must be allowed to collect his/her personal belongings, he/she must also be allowed to collect or delete his/her private electronic communications prior to his/her departure"*.

Similarly, *"if a part of the content of the mailbox must be recovered to ensure the good functioning of the organisation […] this must take place before his/her departure and in his/her presence"*, and in case of any dispute, *"the intervention of a trusted person is recommended"*. Interestingly, in a footnote, the Litigation Chamber refers to guidance offered by its predecessor, the Belgian Privacy Commission. However, this guidance is no longer available online since the BDPA changed its website in July 2020 – suggesting that no one within the Litigation Chamber has looked at that footnote since the website was adapted.

c. Provide information on the blocking of the mailbox

Prior to the blocking of the mailbox, the person in question must be informed thereof. The decision does not explicitly state if this information can be provided through an IT policy, but it does appear to be an implicit possibility.

d. Activate an automatic response

Prior to the blocking of the mailbox, the organisation must activate an automatic response, which must (i) indicate that the person in question no longer exercises his/her role in the organisation and (ii) inform senders of the contact details of the person (or generic e-mail address) to contact instead.

The Litigation Chamber states that this is preferable to a simple forwarding of e-mails because in the case of mere forwarding, senders are not informed and moreover the new recipient might become aware of potentially sensitive private information without the knowledge of either the sender or the person in question.

Duration: see below ("After dismissal/departure").

e. Block the mailbox

"[A]t the latest on the day of their actual departure", block the mailbox of the person in question – i.e. make it unavailable.

2. After dismissal / departure:

a. Maintain the automatic response for a limited time

The automatic response must be active during a *"reasonable period (typically 1 month)"*. That timeframe can be extended depending on the context and the *"degree of responsibility"* of the person in question, provided that (i) the duration is *"ideally"* no longer than 3 months, (ii) a justification is provided for the extension and (iii) the person must at least be informed of this extension (though the Litigation Chamber would clearly prefer it if the person *agrees* to the extension and is not just informed thereof).

b. Delete the mailbox

Once the (maximum) timeframe for the automatic response has run out, the mailbox *"must be deleted"*.

In support of these requirements, the Litigation Chamber quotes principle 14.5 and recital 122 of the Council of Europe's Recommendation CM/Rec(2015)5 of the Committee of Ministers to member States on the processing of personal data in the context of employment (which notably advocates recovering business-relevant e-mails prior to the departure of the employee in question and ideally in his/her presence, but also blocking of access after departure), stating that this recommendation *"illustrates the way in which the principles of purpose limitation, data minimisation and proportionate retention […] must be applied"*.

Finally, the Litigation Chamber states that the **legal ground** for the continued use of the e-mail address could be the organisation's *"legitimate interest in ensuring the good functioning of the organisation and the continuity of its work"* . However, beyond the maximum timeframe it sets out for the automatic response, *"no legal ground allows the processing to continue"*.

In this particular case, the Litigation Chamber imposed **a fine of 15.000** EUR on the company in question – likely a significant amount given the small size of the company (13 people work for the company).

C. Closing comments

The decision, available in French, is not without its faults. Its many assertions are prescriptive and limit organisations' freedom, but they appear to be rapid conclusions on the precise implications of the data protection principles. Certain comments are made on the basis of recommendations that are not statutory law, and it is sometimes unclear whether a "must" was intended to be "should" – or vice-versa.

Still, this decision (and the amount of the fine relative to the organisation's size) will serve as an important reminder that well thought-out, properly documented and strictly observed procedures can be of great support in matters of compliance. If you are unsure of whether your approach meets the BDPA's expectations, do feel free to reach out – it's best to check in advance rather than await a data subject complaint (or mediation request).

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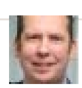
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September 22, 2020

COVID-19 | Life Sciences - Telemedicine

Brazilian National Congress overrides vetoes of the Telemedicine Law

updated on Sep 22 at 10:25 am

On August 12, 2020, the Brazilian National Congress rejected two vetoes of the President of the Republic to Law No. 13,989/2020 (Telemedicine Law).

With the overriding of vetoes, the regulation of telemedicine after the pandemic is once again the responsibility of the Federal Council of Medicine (CFM).

In note published on the CFM website (link), https://portal.cfm.org.br/index.php?option=com_content&view=article&id=28769:2020-08-13-16-39-51&catid=3
the Council stated that a Special Commission is already reviewing the telemedicine practice in the country, and a draft of resolution to be discussed at the CFM Plenary should be presented in the coming months.

Another veto overridden by the Congress concerns the validity of digitally presented medical prescriptions, provided they have an electronic or digital signature of the prescriber, being dismissed the presentation of the prescription form.

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BLOG

Canada Announces Intention to Add "Plastic Manufactured Items" to List of Toxic Substances

October 13, 2020

Written by Brad Gilmour, Stephanie Ridge, Greg Whiteside, and Sydney Olsen

On October 7, 2020, the Canadian government released the next steps in its plan to move Canada to zero plastic waste by 2030.

In his announcement, Environment and Climate Change Canada (ECCC) Minister Wilkinson advised that the Canadian government will publish a proposed Order to add "plastic manufactured items" to the List of Toxic Substances set out at Schedule 1 of the *Canadian Environmental Protection Act, 1999* (*CEPA*) on October 10, 2020, and use the regulation-making powers under *CEPA* to "ban" six plastic waste products by the end of 2021.

Concurrently, ECCC published a Discussion Paper, "A proposed integrated management approach to plastic products to prevent waste and pollution", which sets out the Canadian government's policy direction and objectives, as well as ECCC and Health Canada's Final Science Assessment of Plastic Pollution, which appears to be intended to provide the Canadian government with a scientific basis for the designation of "plastic manufactured items" as toxic.

This announcement raises interesting questions regarding the use of the *CEPA* to control substances that do not fall within the common usage of "toxic". Below, we outline the legislation, science, and policy objectives that are intermingled in the Canadian government's plans for plastic.

The Legislation: Using *CEPA* and the Toxic Substances Designation to Manage Plastics

The Canadian government's authority to control toxic substances is set out at Part 5 of the *CEPA*. Once a substance is listed on the List of Toxic Substances at Schedule 1, the *CEPA* provides the Canadian government with powers to manage these substances through various tools, including regulations.

A substance may be designated as "toxic" and added to Schedule 1 through a variety of information collection or risk assessment pathways that typically involve review and information gathering by ECCC. In this case, the Ministers of ECCC and Health appear to have moved directly to making a recommendation under section 90, which provides that where the Governor in Council is satisfied that a substance is toxic, an order may be made to list the substance in Schedule 1.

In contrast with the other specific substances on the list, such as "lead" or "polychlorinated biphenyls (PCBs)", the Canadian government will designate the broad category of "plastic manufactured products" as toxic. No definition of "plastic manufactured items" has yet been published, but the use of a category of products will presumably provide the Canadian government with considerable discretion in categorizing plastic substances as toxic. The potential scope is illustrated in the Science Assessment, which categorized plastics into "micro plastics" or "macro plastics", and notes that developments in the plastics industry have "resulted in the production of a myriad of plastic materials with varying physical and chemical properties" (Science Assessment at 15).

Once added to Schedule 1, the Discussion Paper provides some insight into the tools being contemplated to control plastic manufactured products, noting that the "enabling authorities" under the *CEPA* will be used "... to enact regulations that target sources of plastic pollution and change behaviour at key stages in the lifecycle of plastic products, such as design, manufacture, use, disposal and recovery in order to reduce pollution and create the conditions for achieving a circular plastics economy" (Discussion Paper at 3).

In his announcement, Minister Wilkinson directly addressed concerns about adding plastics to Schedule 1, suggesting that the title of Schedule 1, "List of Toxic Substances", reflects an outdated perception of the list. The Minister further suggested that the Canadian government does not consider plastics "toxic", but rather, detrimental to the environment much like greenhouse gases, another Schedule 1 listing. Minister Wilkinson stated that adding plastics to Schedule 1 merely ensures the regulations apply to plastic products, but the Canadian government is open to conversation about nomenclature.

It is noteworthy that by a narrow majority, the Supreme Court of Canada in *R v Hydro-Québec* [1997] 3 SCR 213 upheld the toxic substances provisions of the CEPA pursuant to the Parliament's criminal law powers under section 91(27) of the *Constitution Act* after they had been struck down by three levels of court in Quebec. In consideration of the potential scope of the toxic substance provisions to control chemicals generally, the court stated that the prohibition of the substances on the List of Toxic Substances in Schedule 1 of the CEPA "is a limited prohibition applicable to a restricted number of substances" (para 146) where such substances are "toxic in the ordinary sense" (para 146) and "of a kind akin to those already listed in Schedule I" (para 145). These already listed substances included lead, mercury and asbestos, which the court found to be substances that "even to the uninitiated are well known to be toxic" (para 145). In light of these holdings of the court, some may ask whether single-use plastics, such as plastic grocery bags, straws and stir sticks, are appropriately characterized and regulated as toxic substances.

The Science: Contents of the Final Science Assessment of Plastic Pollution

As noted above, the Minister's announcement was accompanied by the publication of the Final Science Assessment of Plastic Pollution, which finalized the draft published in January 2020. Public comments submitted to ECCC on the Draft Science Assessment were accepted until May 2020.

The purpose of the Science Assessment is to "summarize[s] the current state of the science on the potential impacts of plastic pollution on the environment and human health and informs future research and decision-making on plastic pollution in Canada" (section 1.1). In doing so, the Science Assessment sets out available research on the sources, occurrence, and fate of plastic pollution in the environment, as well as the potential impacts of plastics on human health and the environment. In addition to reviewing specific scientific studies, the assessment reached several conclusions regarding plastics in Canada's environment, including:

- In 2016, Canadians discarded over three thousand kilotonnes of plastics as waste, with only nine percent being recycled;
- In 2016, 29,000 tonnes of plastic pollution entered the Canadian environment;
- Microplastics (plastic particles less than or equal to 5mm in size) have been found in fresh and marine surface waters, sediment and soil, indoor and outdoor air, and food and drinking water; and
- Macroplastics (plastics greater than 5mm in size) have been shown to cause physical harm and mortality to organisms and have the potential to adversely affect habitat integrity.

On the basis of the studies reviewed, the Science Assessment concludes that based on the precautionary principle, action is needed to reduce plastics in the environment. The precautionary principle, as defined in the preamble to the *CEPA*, states that "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

The Policy: ECCC Discussion Paper Regarding an Integrated Management Approach to Plastic Products to Prevent Waste and Pollution

In accordance with the Science Assessment and the Canadian government's target of zero plastic waste by 2030, the Discussion Paper proposes actions to ban and restrict certain single-use plastics and move Canada towards a circular plastics economy.

Managing Single-use Plastics

In the Discussion Paper, "plastic waste" includes all plastics that enter the waste stream through landfills, recycling or incineration, while "plastic pollution" is plastic discarded in the environment outside of a waste management system. "Single-use plastics" include plastic products designed to be thrown away after one use, such as food wrappers, shopping bags, straws and drink cups.

After analyzing various single-use plastics to determine if management is needed to reach waste management objectives, the Canadian government proposes to ban the following single-use plastics: plastic checkout bags, stir sticks, six-pack rings, cutlery, straws and food service ware.

The ban is targeted to be in place by the end of 2021 and is anticipated to be imposed using a regulation under *CEPA*. Until then, the Canadian government has committed to working with provinces, territories, industry and other stakeholders to implement this framework.

Establishing Performance Standards

The Canadian government plan considers enacting recycled content requirements for all plastic products and packaging in order to establish a market demand for recycled plastics. This would involve establishing minimum recycled content percentages, measuring and reporting rules and technical guidelines, which may be based on resin type, product or sector grouping, or an undifferentiated economy-wide requirement. The Canadian government has proposed a minimum target of 50-percent recycled content in plastic products by 2030.

Ensuring End-of-Life Responsibility

Lastly, the Canadian government has committed to working with provinces, territories and industry to develop national targets, standards and regulations that will hold companies that manufacture or sell plastic products (including the sale of items with plastic packaging) responsible for their collection and recycling. This is referred to as extended producer responsibility. Performance standards to guide recycling programs, options to encourage innovation and monitoring standards, among others, will be contemplated to help extend the life and improve the value recovery of plastic products.

What's Next? Questions and Opportunities for Comment

Given the extensive level of action planned, a number of impactful questions remain unanswered. Issues such as the appropriateness of using the toxic substance provisions of the CEPA to enact broad sweeping prohibitions on plastic products and wastes, what consultative processes will be held in determining additional prohibited plastics, and how the Canadian government will move forward with its definition of "plastic manufactured items" are all considerations for both industry and government alike. What is certain however, is the impact of these plans on the life cycle of plastic products across the country.

The Canadian government has invited stakeholders and industry to comment on any aspect of the Discussion Paper and the proposed Order, including categorization of single-use plastics and proposed management approaches. Any comments are to be submitted to ECCC by December 9, 2020.

The Bennett Jones Environmental Law group is actively engaged with these developments. If you have any inquiries, please contact us.

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Posted on: September 9, 2020

COVID-19 AND COMMERCIAL LANDLORDS: WHAT CAN YOU TELL TENANTS?

By: Julie Facchin

COVID-19 has required all of us to navigate new situations, with little guidance from the past. One particular tension lays between privacy law, which limits the collection, use and disclosure of personal information, and the public desire to have as much information as possible to manage risk.

One issue that faces commercial landlords in particular arises when they learn that someone who works in their tenanted premises has tested positive for COVID-19. Other tenants may clamour for information about the positive case, to assess their risks and calm their employees.

Other issues include what health screening landlords can require of individuals entering their buildings, and what they can require tenants to tell them about employee illness.

This article will cover some privacy basics, and answer some of these common questions.

Privacy Basics

Private sector organizations, such as commercial landlords, are governed by the *Personal Information Protection Act*, S.B.C. 2003, c. 63, often called *PIPA*.

Under *PIPA*, “personal information” is not limited to a person’s name. Anything which might identify a person, or permit a person to be identified, counts as personal information. Health information, such as a COVID-19 diagnosis, is considered particularly sensitive.

As a general rule, you may only collect, use or disclose personal information with the consent of the person whose information it is, and only when the collection use or disclosure is “necessary”.

Because health information is considered to be particularly sensitive, a high standard of necessity is applied. Also, with so few people are working from offices right now, disclosing any information about where they are working could identify them. That means that, generally, you should disclose as little information as possible.

That obviously presents a difficulty for a commercial landlord.

There are exceptions to the consent requirement. In particular, you can collect, use or disclose information when it is "required or authorized by law". In the COVID context, the *Public Health Act* and Dr. Henry's various orders would permit you to disclose the information only if public health professionals consider it to be necessary.

What Can Landlords Tell Tenants About Positive COVID Test Results?

Commercial landlords who learn about a positive COVID result are in a difficult situation. Tenants, and their employees, likely want as much information as possible in order to assess their risk levels. Tenants may want to know which other tenant had the positive diagnosis or what floor the diagnosed person worked on, and what days and times the person was in the building.

As landlords, however, you are limited in what you can disclose.

You could, potentially, seek the consent of the person with the positive COVID diagnosis to disclose this information. However, that may be challenging since you likely do not have a direct relationship with the individual, and you may place their employer in a position of disclosing information in breach of its privacy obligations (more information about employer disclosure obligations is available in this other article I previously wrote).

As a result, your best option is to rely on disclosure without consent where "required or authorized by law".

In the COVID context, for disclosure to be required or authorized by law, public health officials must consider the disclosure to be necessary.

That means that the local health authorities and the BCCDC are your best source for guidance. Contact the BCCDC or your local health authority and follow their advice regarding what information to provide to tenants.

If the BCCDC or your local health authority is of the view that the risk of exposure for others in the building is low enough that you do not need to disclose anything to tenants, follow that advice. For instance, if your property has retail units with direct street access, and a customer to one of those units has tested positive, the risk to staff and customers of other units is likely low. As a result, you should consider not disclosing the positive test to other tenants.

A high rise office building with common elevators presents a higher risk situation. In that context, you likely will have to disclose some information to other tenants who share the elevator bank.

If tenants hear about the positive COVID diagnosis some other way and ask you, reassure them that public health officials are contacting all the people who are at risk and remind them of all the steps you are taking to keep the building safe through enhanced cleaning or other measures.

If public health officials do recommend that you disclose information about a positive COVID-19 test, disclose the least information possible. Under no circumstances should you disclose the person's name, if you know it. Disclose the floor that the person works on or their employer only if public health officials recommend that you do so. Public health officials may also recommend that you disclose the dates and times during which exposure may have occurred at your building.

What Health Screening Can Landlords Require?

In short, health questionnaires likely comply with *PIPA*, but temperature screening does not.

Under *PIPA*, simply asking a person about their health or scanning their forehead with a thermometer qualifies as "collecting" their personal information. The information does not need to be stored in any way for it to be "collected".

One of the principles underlying *PIPA* is that organizations may not collect any more information than is necessary. "Necessary" in this context is based on what the Public Health Officer, or public health officials, consider necessary to prevent infections and contain the spread of COVID-19.

Many businesses have implemented a health questionnaire, where the customer is asked to confirm that they are not suffering from any COVID symptoms, are not COVID positive, have not been in contact with someone who is COVID positive, and have not travelled outside of Canada in the last 14 days. These questions likely are necessary, as defined by the Public Health Officer.

From a privacy standpoint, landlords are at less risk if this questioning takes place orally rather than in writing. If you do collect this information in writing, make sure to store it securely and destroy it after 30 days.

Temperature checks, however, are likely a breach of *PIPA*, even if the customer agrees. Body temperature is a person's health information, which is considered to be highly sensitive. Taking a temperature reading is also a medical test which is still invasive even if only a forehead reading.

Taking the temperatures of everyone who enters your buildings involves collecting a large amount of very sensitive information. For *PIPA* to allow that collection, it would have to be absolutely necessary. As it currently stands, the medical evidence is that temperature screening may not be effective, because many people may have mild symptoms or be asymptomatic.

What Can Landlords Require Tenants To Tell Them About Employee Illness?

Tenants are also bound by *PIPA* (or, if you have public sector tenants, by the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165). That means that, as employers, they face similar restrictions on what they can disclose to you, as their landlord, about their employees.

Essentially, landlords can require that tenants provide only the least information necessary about employee illness. Tenants should also be taking guidance from the local health authority or the BCCDC. If the tenant has not spoken with your local health authority or the BCCDC, you should recommend that they do so.

As with disclosure to other tenants, whether information is "necessary" depends on the risk of exposure. As a result, it would be reasonable to require tenants in a high rise office building to notify you if one of their employees or a visitor has tested positive, and the dates on which the person was in the building.

You should not require tenants to report possible cases, or illnesses other than COVID.

More Questions

For further information or other answers, please contact me at jfacchin@rbs.ca or at 604-661-9276. You may also find some of my other COVID privacy articles interesting:

- A How-To Guide for Restaurants and Small Businesses: How to Do Contact Tracing and Other COVID Precautions Without Breaching Privacy Laws
- Canada's COVID Alert App: What Businesses and Individuals Need to Know
- Avoiding and Managing Privacy Breaches in Remote Working Environments
- COVID-19 Privacy FAQs: Answering the Questions You've Been Wondering About

October, 2020

MINISTRY OF ECONOMY SUBMITS PROPOSAL FOR E-COMMERCE REGULATION FOR PUBLIC CONSULTATION

The Ministry of Economy, Development and Tourism has published on its website a proposal for E-commerce Regulations, which has been submitted to a citizen consultation to receive opinions and comments from citizens in order to improve and enrich the final text.

This regulation is in compliance with the provisions of Articles 30 and 62 of Law No. 19,496 Consumer Protection Act (CPA) –incorporated through the amendment of the CPA by Law No. 20,555 of 2011– and aims to regulate the information and the quality, form and opportunity in which it should be delivered to consumers by e-commerce suppliers, in order to ensure informed decision-making and strengthening the right to free choice of consumers.

The preliminary text of the Regulations is structured through 23 articles and a transitory article that covers the following matters:

1. General provisions, with special reference to consent;

2. Delivery of information online, and in particular about: (i) the seller; (ii) the role of the platform operator; (iii) the essential features and benefits of the products and services; (iv) the acquisition or contracting; (v) the total cost; (vi) the stock and availability; (vii) delivery, dispatch or withdrawal of the products; (viii) right of withdrawal; (ix) contact support; (x) terms and conditions; (xi) contracts of adhesion of successive tract.

3. Transaction Confirmation Process;

4. Integration of advertising, publicity and commercial practices.

This proposal of Regulation will be submitted for citizen consultation until October 27th, 2020. The consultation links are the following: minutes of the consultation; proposal of Regulation and format for consultation comments.

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

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Legal Commentary

September 27, 2020

A Great Leap Forward in R/QFII Liberalization

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

China has the second largest stock and bond markets in the world. By the end of June 2020, foreign investment in China's stock and bond markets amounted to US$737.5 billion, accounting for 4.5% of China's stock markets and 2.4% of China's bond markets. With U.S. trade and diplomatic relations remaining strained, Chinese regulators have been determined to make continuous efforts to accelerate and deepen the opening-up of the country's financial markets. On 25 September 2020, the China Securities Regulatory Commission (CSRC), the People's Bank of China (PBoC), and the State Administration of Foreign Exchange (SAFE) jointly released the *Measures for Administration of Domestic Securities and Futures Investment by Qualified Foreign Institutional Investors and RMB Qualified Foreign Institutional Investors* (《合格境外机构投资者和人民币合格境外机构投资者境内证券期货投资管理办法》) (the "**R/QFII Measures**") and CSRC simultaneously published the *Provisions on Issues Concerning the Implementation of the Measures for Administration of Domestic Securities and Futures Investment by Qualified Foreign Institutional Investors and RMB Qualified Foreign Institutional Investors* (《关于实施<合格境外机构投资者和人民币合格境外机构投资者境内证券期货投资管理办法>有关问题的规定》) (the "**CSRC Implementing Provisions**", together with the R/QFII Measures, the "**R/QFII Rules**").[1]

The R/QFII Rules will take effect on 1 November 2020. It has been over a year and a half since the regulators issued consultation drafts of the R/QFII Rules to solicit public comments in January 2019. During this period of time, PBoC and SAFE revised rules in May 2020 relating to R/QFIIs' onshore capital management, which removed R/QFII quotas, simplified repatriation processes, and unified the relevant rules applicable to R/QFIIs.

As the market expected, the R/QFII Rules mark a great leap forward in further liberalizing China's capital markets. The key highlights of the R/QFII Rules include further combining the QFII and RQFII programs, lowering eligibility requirements, simplifying application processes, expanding investment scopes, and removing limits on the number of onshore service providers which R/QFIIs may engage (including local custodians and securities/futures brokers).

[1] The full versions of the R/QFII Rules are available at http://www.csrc.gov.cn/pub/newsite/zjhxwfb/xwdd/202009/t20200925_383649.html (in Chinese) and http://www.csrc.gov.cn/pub/csrc_en/newsfacts/release/202009/t20200925_383652.html (in English).

Merging QFII and RQFII Programs

QFII and RQFII programs have been subject to separate rules and application procedures. The R/QFII Rules consolidate all QFII and RQFII regulations into one set of unified rules to further harmonize the qualification requirements applicable to R/QFIIs and to mitigate regulatory arbitrage by investors. R/QFIIs are encouraged to use offshore RMB to make domestic investments.

Lowering Eligibility Requirements

There is no longer any track record or AUM requirement for R/QFII applicants. The major requirements include that an applicant must have securities and futures investment experience and not have received significant regulatory punishments in the past three (3) years or since its inception. Compared to the consultation draft, the R/QFII Measures impose a new eligibility requirement: the applicant may not have significant impact on the operation of China's domestic capital markets, which leaves more discretion with CSRC in the application review process.

Simplification of Application Process

The R/QFII application process is further simplified and there are no longer time-consuming notarization or certification requirements; CSRC's review timeline has been shortened from 20 working days to 10 working days.

Expansion of Investment Scope

In addition to the currently permissible asset classes, which mainly include A-shares, bonds, public securities investment funds and stock index futures, R/QFIIs will be allowed to invest in:

1. depositary receipts, bond repos and asset backed securities traded on securities exchanges;
2. shares traded on the National Equities Exchange and Quotations;
3. private investment funds;
4. financial futures listed and traded on the China Financial Futures Exchange;
5. commodity futures traded on futures exchanges approved by CSRC;
6. financial products traded on the China Interbank Bond Market and PBoC-approved derivatives products related to bonds, interest rates, and foreign exchange (under current rules, R/QFIIs are only permitted to invest in fixed-income products traded on the China Interbank Bond Market);
7. foreign exchange derivatives products permitted by SAFE for hedging purposes;
8. options traded on exchanges approved by the State Council or CSRC; and
9. other financial instruments permitted by CSRC.

For investments in private investment funds, the underlying investment of the private investment funds must fall within the permissible investment scope of R/QFIIs.

RQFIIs will also be allowed to participate in issuance of asset backed securities, margin trading and securities lending on the exchanges, and securities lending to the securities finance company (currently China Securities Finance Corporation Limited).

Engaging Affiliated Investment Advisors

An R/QFII may engage as its investment advisor a controlled or affiliated domestic private investment fund manager. This means an R/QFII may appoint a PFM manager or potentially a QDLP manager within its group as its investment advisor.

Clarifying Securities/Futures Account Structure

The R/QFII account naming requirements are further clarified and asset management R/QFIIs are encouraged to adopt "R/QFII + Client Name" or "R/QFII + Fund" format to specify the underlying investors or products. For omnibus accounts in the name of "R/QFII + Client Assets", the R/QFII will report relevant information about the underlying investors and their assets in accordance with relevant requirements.

Reporting Offshore Hedging Positions

Under the consultation draft, it was contemplated that R/QFIIs would report to CSRC on a quarterly basis their overseas hedging positions related to the domestic securities/futures investments. Now, the R/QFII Rules merely require reporting upon CSRC's request based on its regulatory needs.

Enhancing Ongoing Supervision

The R/QFII Rules have also enhanced ongoing supervision on R/QFIIs, including broker account and transaction monitoring, information sharing by exchanges and depositaries, additional information disclosure on offshore hedging positions related to onshore investment, and the "look-through" approach for underlying investors' compliance with holding limits and disclosure of interest requirements. For example, the CSRC Implementing Provisions specifically require investors that invest in China's markets via R/QFIIs (i.e. the underlying clients of R/QFIIs) submit through R/QFIIs the information disclosure materials with relevant stock exchanges if the relevant information disclosure obligations are triggered, and R/QFIIs are required to monitor the onshore shareholdings of their underlying clients and urge those clients to strictly perform their information disclosure obligations. The corresponding penalties for violations are also specified.

Outlook

The R/QFII Rules also make some reservations in terms of investment scope expansion. For example, with respect to the financial futures, commodities futures and options available to R/QFIIs, the specific types and trading models are subject to CSRC's separate approvals based on the relevant exchange's proposals. Implementing details may also be required as to R/QFIIs' participation in margin trading and securities lending on the exchanges, securities lending to the securities finance company, etc.

Given the size of China's securities markets and the current low level of foreign participation in those markets, there remains great potential for China to continue its opening-up policies. Beyond R/QFII, we expect more initiatives to be rolled out to serve China's agenda to develop more internationalized capital markets.

Important Announcement

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

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Brigard Urrutia

Reform of the Royalties System will bring more benefits for Colombia

Royalties from the energy mining sector have contributed to the reduction of poverty and have generated development for the country.

October 8th, 2020

In recent days, the Congress approved and the National Government sanctioned Law 2056 of September 30, 2020, by means of which the organization and operation of the General System of Royalties is reformed and structured (the "Reform").

The Reform is part of the National Government's program for the economic reactivation and the generation of investment opportunities in equity and development projects. Therefore, the Reform undertakes, in general terms, the strengthening of the decentralization and autonomy of territorial entities, especially for the mining and O&G production regions. Likewise, greater efficiency in the investment of resources is expected, so that these can be translated into benefits for the country.

Among the most important changes implemented by the Reform are:

More royalties for the producing regions. Resources for social investment in regions that participate in the mining and oil sector will go from 11% to 25%.

Municipalities with unsatisfied basic needs will receive 15% of the resources from royalties.

5% of the resources coming from royalties will be destined to projects related to the conservation of strategic environmental areas and to projects against deforestation.

5% of royalties will be destined to finance educational infrastructure projects or investment projects aimed at improving the expansion of coverage, permanence and quality of public high education.

10% of the royalties will be allocated to resources for projects to finance science, technology and innovation.

34% will be invested in projects with regional impact under population, poverty and unemployment criteria.

A 7% will be allocated for the implementation of peace.

The Reform is therefore important, considering that the resources from royalties have contributed 17% to the reduction of poverty in Colombia, thus betting on the hydrocarbon and mining sectors (which is where royalties are generated) would be indispensable for the fulfillment of the Government's objectives of social investment with equity.

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

COSTA RICA

REGULATION TO TITLE II OF THE CORPORATE CRIMINAL LIABILITY ACT, NO. 9699

PUBLIC CONSULTATION TO THE REGULATIONS TO LAW NO. 9736 "STRENGTHENING THE COMPETITION AUTHORITIES OF COSTA RICA"

Oct/2020

The Antitrust Authority ("COPROCOM") has initiated the public consultation on the Regulations to Antitrust Law No. 9736. The term to file comments expires on October 14th, 2020.

The Regulations revolve around the new instruments that seek preventing anti-competitive practices and promote competition, as well as strengthen COPROCOM and the Superintendency of Telecommunications (SUTEL). As a highlight, the proposal regulates a special procedure to sanction anticompetitive practices, illegal transactions and other violations that are not of mere verification; as well as the imposition of precautionary measures, the summary proceeding, deadlines and other rights and duties of the parties that are subject to said process.

The Regulations are under review via public consultation by the business sector and other interested parties; thus, we have the opportunity to file pertinent comments to protect the rights and interests of the companies.

Arias is committed to help our clients, protect and safeguard their rights, consequently, we are at your disposal to further review the Regulations according to your interests and make the corresponding comments to the document to file them before COPROCOM.

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BREXIT | FRANCE | DERIVATIVES 12 OCTOBER 2020

THE FRENCH LAW ISDA MASTER AGREEMENT, A CIVIL LAW ALTERNATIVE POST BREXIT

On 31 January 2020 the United Kingdom ("**UK**") left the European Union ("**EU**") and entered into a transition period (currently planned to end on 31 December 2020) during which EU law will continue to apply to and in the UK, even though the UK is no longer an EU member state.

Although the UK and the EU have set out their positions on their future relationship, the negotiations have been protracted and are ongoing. As the end of the transition period approaches fast, great uncertainty remains regarding the precise shape of the future relationship between the UK and the EU.

Since the Brexit referendum took place in June 2016, France has implemented an ambitious strategy to develop Paris as a prime European financial centre and to incentivise international banking and financial institutions (in particular parties to derivatives agreements) to select Paris as their place of business and destination of choice for international dispute resolution.

Amongst the most significant measures taken in pursuit of this objective were: the signature of two protocols relating to the procedural rules applicable to the international chamber of the Paris Commercial Court (the "**ICCC**") and the international chamber of the Court of Appeal of Paris (the "**ICCA**") in February 2018 (respectively the "**ICCC Protocol**" and the "**ICCA Protocol**", and together the "**Protocols**"); the publication of a French law version of the 2002 ISDA Master Agreement in June 2018 (the "**French law ISDA**"); and the publication by the French government of an ordinance relating to the withdrawal of the UK from the EU in February 2019 (the "**Brexit Ordinance**")[1].

So far, these steps have not had the desired results; in particular use of the French law ISDA has been slow to get off the ground. But now that Brexit has happened and given that the terms of the future relationship between the UK and the EU remain uncertain, the advantages of the French law ISDA may finally become more apparent to market participants and result in increased use.

The French law ISDA deviates little from the English law ISDA

The French law ISDA was developed by the International Swaps and Derivatives Association ("**ISDA**") to provide institutions with an option, on the UK leaving the EU, to continue trading derivatives under an ISDA Master Agreement governed by an EU member state law and containing EU court jurisdiction clauses.

The French law ISDA is the first version of an ISDA Master Agreement governed by a civil law system[2]. In order to facilitate its adoption by market participants, the approach taken was to deviate as little as possible from the 2002 Master Agreement governed by English law (the "**English law ISDA**") which is predominantly used in the market (and well known by market participants) and to limit changes only to clarifications / technical adaptations which were strictly necessarily in order to comply with French law.

[1] Ordinance n° 2019-75 dated 6 February 2019 relating to the contingency measures for the withdrawal of the United Kingdom from the European Union in respect of financial services.
[2] The ISDA Master Agreements are governed by English law or the law of the State of New York (and since June 2018, by Irish law) which are all common law systems.

The main deviations of the French law ISDA from the English law ISDA are as follows:

- **Section 2(a)(iii) - Flawed Assets**. The provision was adapted to maintain the proper functioning and effect of the flawed asset mechanism (which has no equivalent under civil law) but using the principles of the French Civil Code as the legal basis. The flawed asset provisions have been highly debated in the context of the Lehman Brothers bankruptcy, leading to conflicting case law in the UK and in the US[3] and to the publication by ISDA of amendments to Section 2(a)(iii) to insert a time limit. That standard wording developed by ISDA was reproduced with no modification in the French law ISDA.

- **Section 2(c) - Netting of Payments.** Payment netting under French law does not operate by way of novation (as under English law) but as a means of payment. The provision was adapted to reflect that conceptual difference but the change does not have any consequence in practice for the negotiation of the French law ISDA.

- **Section 3 - Representations.** The reference to 'equity as a source of law' was deleted as equity is a concept specific to common law. The word '*équité*' was retained as it is important in relation to the French law principle of interpretation of the intention of the parties. A reference to '*bonne foi*' (good faith), a very important French law principle, was also added[4].

- **Sections 9(f) - No Waiver of Rights.** A party which has not exercised a right under the ISDA Master Agreement is not deemed to have waived it. The provision was adapted to take into account French law on time limitations (*délais de prescription*) applicable to contractual obligations: these may be shortened but not extended.

- **Section 13 - Governing Law / Jurisdiction / Process Agent.** French law was specified as the governing law and jurisdiction was granted to the Commercial Court and Court of Appeal in Paris (either on an exclusive or non-exclusive basis at the election of the parties to be made in the Schedule to the French law ISDA)[5]. The service of process provisions were adapted to refer to the equivalent French concept of 'Election of Domicile'. Election of domicile is not mandatory under French law and it is therefore up to the parties to elect domicile or not for the purpose of the French law ISDA.

It is worth noting that since the Brexit Ordinance[6], there is no more need to modify the standard ISDA provisions regarding compounding of interest. Under French law, interest can only be compounded if due for over one year[7]. The Brexit Ordinance modified that point for derivatives contracts and, derogating from French law principles, permitted compounding of interest (*anatocisme*) due for less than a year under a master agreement governing derivatives

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[3] In *re Lehman Brothers Holdings, Inc, et al* (Case No 08-13555 (JMP) Bankr SDNY, 15 September 2009) and *Lomas v JFB Firth Rixson Inc*. [2012] EWCA Civ 419.

[4] Pursuant to Article 1104 of the French Civil Code, *"contracts must be negotiated, concluded and performed in good faith. This provision is of public order"*.

[5] The form of Schedule attached to the French law ISDA also provides an option for arbitration. The provisions reflect the ISDA arbitration guide. Note that the *Haut Comité Juridique de Place* in Paris published a report in respect of arbitration for banking and financial disputes, that could also facilitate the use of the French law ISDA.

[6] The Brexit Ordinance is part of the wider strategy to develop Paris as a prime European financial centre. It provides in particular for two changes aimed at adapting certain aspects of French law to derivatives contracts and therefore supporting the adoption of the French law ISDA. In addition to the change to compounding of interest, the Brexit Ordinance extends the scope of the close-out netting to Spot FX transactions and sale, purchase and delivery of precious metals and transactions relating to CO2 allowances, removing uncertainty as to the enforceability of the close-out netting in respect of ISDA Master Agreements covering such type of transactions.

[7] Article 1343-2 of the French Civil Code.

transactions (which is in line with the English law ISDA, where compounding of interest applies from the first day of non-payment).

These changes between the French law ISDA and the English law ISDA have very little impact in practice on the negotiation of the French law ISDA (which is a significant advantage for institutions: there is no need to specifically train ISDA negotiation teams on a new type of Master Agreement or put in place new negotiation policies).

The adoption of the French law ISDA by market participants will ultimately depend on the willingness of institutions and their legal departments to have their derivatives business governed by French law and their being comfortable using the French courts as a venue to resolve disputes, particularly where a significant monetary or reputational stake is involved. This prospect might not be initially appealing to institutions familiar with the English courts. However in the post-Brexit context, with English judgments expected to lose mutual automatic recognition within the EU under the Recast Brussels Regulation[8], the uncertainty as to the effect of English jurisdiction clauses in cross-border disputes[9] and the questions surrounding the accession by the UK (in its own right) to the Hague Convention[10] or the Lugano Convention[11] (which would in any case not be as comprehensive as the current regime[12]), the French law ISDA may begin to look more attractive, especially now that France has undertaken a modernisation of its judicial system, creating specialised international chambers with procedural rules inspired by English law proceedings.

The French law ISDA grants jurisdiction to the Commercial Court of Paris and the Paris Court of Appeal (the ICCC and ICCA), which both feature chambers specially designed to handle complex international disputes

The ambition to attract institutions looking to relocate from the UK to Paris and promote Paris as a destination of choice for international dispute resolution made the modernisation of the French judicial system a prerequisite. This modernisation was also particularly necessary to encourage the launch of the French law ISDA and its adoption by market participants.

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[8] Mutual recognition of judgments is set out in the Brussels I Regulation Recast dated 12 December 2012 (the "**Recast Brussels Regulation**") and provides that a judgment obtained in an EU member state is automatically recognised in every EU member state and can be directly enforceable by any EU enforcement authority. At the end of the transition period, and unless a deal is reached on that point, an English court decision would no longer benefit from the automatic and immediate recognition of judgments and simplified enforcement in the EU under the Recast Brussels Regulation.

[9] There is the potential for an increase in the risk of parallel 'torpedo style' proceedings. Under the Recast Brussels Regulation, a court seised pursuant to an exclusive jurisdiction clause - even if not the court first seised - determines its own jurisdiction while all other proceedings are stayed. The position would be different under the Lugano Convention where the court first seised is to take such initial step while all other proceedings are stayed, including those of any court seised pursuant to an exclusive jurisdiction clause.

[10] There is currently uncertainty as to the application of the 2005 Hague Convention on Choice of Court Agreements (the "**Hague Convention**") to exclusive jurisdiction clauses in favour of the UK courts in agreements entered into before the UK accedes to the Hague Convention in its own right. The UK deposited its instrument of accession to the Hague Convention on 28 September 2020 (following the earlier withdrawal of the UK's previous accession notice in 2019 pursuant to then moving timelines of the Brexit effective date at the time). According to the official press release, the Hague Convention will enter into force for the UK on 1 January 2021 (as for now it continues to apply to the UK as part of the transitional arrangements).

[11] On 8 April 2020, the UK deposited an application to accede to the 2007 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the "**Lugano Convention**"). However, for the UK to accede to the Lugano Convention, all the contracting parties (EU, Denmark as an independent state, Iceland, Norway and Switzerland) need unanimously to approve the UK's application. The position of the European Commission is reported to be unwelcoming so far.

[12] For instance, the Hague Convention does not provide for automatic recognition of EU judgments and simplified enforcement, in the same way as the Recast Brussels Regulation. Moreover, the scope of the Hague Convention is limited: it only applies to UK judgments rendered on the basis of an exclusive jurisdiction clause. As for the Lugano Convention, although it provides for automatic recognition of all judgments issued by the courts of parties to the convention, obtaining *exequatur* is still necessary prior to enforcement.

The Protocols which created the ICCA, a new international chamber within the Paris Court of Appeal, and modernised the rules applicable to the ICCC (created over 25 years ago) have this objective.

The Protocols aim to promote a more flexible conduct of commercial litigation with procedural rules inspired by the rules governing English law proceedings (notably the examination of experts and witnesses and a form of 'specific' disclosure) and to facilitate the use of foreign languages, in particular English. At the same time important characteristics of the French commercial judicial system, such as the reduced cost of proceedings and the absence of 'systematic' disclosure, are preserved. The aim is to present the ICCC and the ICCA as a real alternative to the English courts to which participants in the financial markets are accustomed, especially the prestigious London Commercial Court, which is the leading forum for commercial litigation in the world.

Broadly speaking the ICCC and the ICCA have jurisdiction over economic and commercial cases with an international element, notably where foreign or EU law may apply. The ICCA is the appropriate forum to hear appeals against judgments rendered by the ICCC. The Protocols provide a non-exhaustive list of disputes over which the ICCC and ICCA have jurisdiction, and expressly include disputes relating to transactions on financial instruments, market standard master agreement, as well as financial contracts, instruments and products. Jurisdiction may also be based on a contractual stipulation granting jurisdiction to the courts within the district of the Paris Court of Appeal[13].

The ICCC Protocol and the ICCA Protocol are drafted in very similar terms. The main characteristics of the procedural rules in the ICCC and the ICCA as set out in the Protocols are:[14][15]

- **Use of foreign languages.** The Protocols facilitate the use of foreign languages, in particular English: documentary evidence can be submitted in English without translation[16], parties, experts, witnesses and counsels, when they are non-native French speakers, are authorised to express themselves in English (however simultaneous translation in French must be organised with the cost borne by the requesting party[17]) and arguments conducted in French can be subject to simultaneous translation[18] (at the expense of the requesting party). The Protocols

[13] This contractual possibility raised several questions as to how parties could effectively designate the international chambers as the appropriate forum in specific cases. Indeed, the international chambers are not jurisdictions but divisions of the Commercial Court of Paris and the Paris Court of Appeal and could therefore not be elected per se by the parties (the allocation to such chambers is subject to an administrative decision by the judge). As a compromise, Chantal Arens, the First President of the Paris Court of Appeal between 2014 and 2019, suggested that parties should incorporate traditional jurisdiction clauses, but with reference in brackets to the international chambers. The French law ISDA however follows a conservative approach and refers only to the jurisdiction of the Commercial Court of Paris and the Paris Court of Appeal (without any reference to the international chambers).
[14] For a further detailed presentation of the Protocols, please refer to the article *"A critical view of the Protocols relating to proceedings before the international chambers of the Commercial Court of Paris and the Paris Court of Appeal"* by Rupert Reece and Gabriel Hannotin.
[15] The ICCC and the ICCA are currently developing a practical bilingual (French-English) procedural guide intended to present in detail the course of proceedings in the international chambers in Paris.
[16] Article 2.3 of the ICCC Protocol and Article 2.2 of the ICCA Protocol. This is an important point as this will prevent judges from rejecting evidence that is exhibited in English, which is currently permitted on the basis of case law of the French Supreme Court (*Cour de Cassation*).
[17] Article 6.3 of the ICCC Protocol provides that simultaneous translation is at the cost of the party requesting to speak in a language other than French. This wording is unclear as to the allocation of costs when a party expresses itself in French, but its counsel, expert or witness expresses itself in another language, or where a party, expert or witness who expresses itself in another language is called to give evidence by the opposing side. Article 3.3 of the ICCA Protocol puts the burden of these costs on the applicant requesting the hearing, which seems an appropriate solution.
[18] Simultaneous translation is a right in the ICCC (Article 6.2 of the ICCC Protocol); however the consent of the judge must be obtained in the ICCA (Article 3.2 of the ICCA Protocol).

however continue to require legal submissions to be drafted in the French language and the judgment of the Court to be delivered in French (but the judgment will be accompanied by a sworn English translation).

- **Procedural timetable.** The Protocols introduce the possibility for the judge to order a procedural timetable (*calendrier de procédure*)[19] specifying the keys dates of the procedure, such as the dates on which the parties have to appear before the Court or exchange their submissions, when the witnesses and the experts will be heard or when legal counsels must deliver their oral arguments or even the date on which the decision of the Court will be rendered[20]. A procedural timetable is mandatory in the ICCA[21].

- **Production of evidence and documents.** The Protocols allow a party to require that a document held by the opposing party or a third party is produced[22]. The Protocols go further than the French Civil Procedure Code by allowing requests for the production of 'specifically identified categories of documents' (while case law in France traditionally tends to confine these requests to documents specifically identified). This practice of document production is reminiscent of the English law practice of specific disclosure, even though it remains more limited and controlled by the judge.

- **Hearings and examinations.** The Protocols put considerable emphasis on oral evidence, with hearings of the parties, experts and witnesses. This a novelty in the French judicial system where hearing the parties, witnesses or experts is extremely rare outside criminal cases. The Protocols provide that the judge may invite a party to answer the questions asked by another party or invite witnesses to answer the questions asked by the parties. Witness examination will be conducted on the basis of the filed written statements, but the judge may then invite witnesses to answer the questions asked by the parties[23], which is again reminiscent of English law proceedings where testimonial evidence is provided in written form but is then tested through examination of the witness, allowing important issues to be clarified and the witness being asked to explain apparent contradictions of its statement. Hearing of technicians - and in particular experts[24] - will be subject to the same rules as for the hearing of witnesses.

The initial reaction of market participants to the ICCC and ICCA is encouraging but it remains to be seen how attractive they will be for the settlement of disputes relating to derivatives.

It will likely depend largely on the willingness of parties to agree to apply the Protocols. The Protocols do not apply automatically to proceedings in the ICCC and the ICCA[25] and should a party object to their application, the normal procedural rules of the French Civil Procedure

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[19] Article 3 of the ICCC Protocol.
[20] Jean-Michel Hayat, the First President of the Paris Court of Appeal, declared at the hearing marking the beginning of the Court's judicial year on 13 January 2020, that the ICCA has the ability to decide on its jurisdiction within four months and to render a judgment on the merits within eleven months.
[21] Article 4.3 of the ICCA Protocol.
[22] Article 4.1 of the ICCC Protocol and Article 5.1 of the ICCA Protocol.
[23] This departs from the general position set out in Article 214 of the French Civil Procedure Code which currently prohibits a party from directly addressing a witness, and instead requires them to ask their questions through the judge, who can refuse to transmit them.
[24] Experts are judicially appointed upon the parties' request or at the judge's own initiative. When the experts are appointed by the parties, the judge assesses the relevance of such request and has the power—but is not obliged—to order their attendance. In such a case, the parties will also file the report of the expert's testimony.
[25] The ICCA Protocol expressly provides that its application must be agreed by the parties during the first pre-trial hearing (Article 4.1.1 of the ICCA Protocol). The ICCC Protocol is however silent on this point.

Code will apply[26]. In fact, the use of the Protocols has not been properly tested yet, as most of the cases allocated to these international chambers to date were there by reason of the existence of a genuinely international element in the dispute, rather than as a result of the parties' choice.

It will be interesting to see how the ICCC and the ICCA practice will develop further in the future when they start to handle cases involving parties who have specifically chosen to submit their dispute to the Protocols in order to take advantage of their provisions.

Although the uptake of the French law ISDA was initially rather slow, in recent months, more French market participants (in particular corporates) have been considering its adoption and requesting their banking counterparties to trade derivatives under the French law ISDA and implement the necessary arrangements to convert their stock of English law governed ISDA Master Agreements into French law. The ISDA Brexit Working Group published a form of amendment agreement aiming at facilitating such conversion to the French law ISDA. Will the French law ISDA finally appear as a real alternative to the English law ISDA and be embraced by the market in a post-Brexit world? Only time will tell.

[26] Provisions allowing parties contractually to agree the application of the Protocols in the ICCC and the ICCA are currently developed. However, their enforceability is questionable.

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GUATEMALA

REGULATION TO TITLE II OF THE CORPORATE CRIMINAL LIABILITY ACT, NO. 9699

GUATEMALA - REFORMS TO THE ELECTRONIC REGISTY INSTRUCTIONS FOR THE INTERNAL LABOR REGULATIONS

Oct/2020

On 1 October, 2020, was published in the Official Gazette of the Government Agreement No. 333-2020 of the Ministry of Labor, which establishes reforms to the Electronic Registry Instruction of the Internal Labor Regulations, as regards establishing the 30-business-day period for returning the priors or observations submitted by the Inspector in charge of the review. If the General Labor Inspection considers that the Internal Labor Regulations submitted are entitled and comply with the legal requirements, it will be authorized by means of advanced electronic signature and that regulation will be sent to the user with all sheets marked with a quick response code (QR code), to give certainty and security to it.

Any employer who has previously initiated the procedure for the authorization of the Internal Labor Regulations may send in electronic form, through the web page of the Ministry of Labor, a requesting the withdrawal of such process and initiating a new one through the Electronic Registry. It is important to note that at this date the Web referred to in the Electronic Registry of Labor Regulations is not yet available.

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Hong Kong relaxes regulations on TV and radio advertising

In September 2020, the Communications Authority (CA) in Hong Kong announced its revised advertising codes which relax the restrictions on advertisements of real properties on television and radio and those on the insertion of advertising material in sports events TV programmes. The CA also decided to extend the permitted broadcast hours for mature categories TV programmes.

A one-month public consultation was conducted by the CA back in June 2020 to collect views from the general public and the broadcasting industry/licensees regarding the proposed relaxation of the measures. Based on the outcome of the consultation, the CA announced the following changes:

Real property advertisements

- Advertisements of real properties that are regulated under other regulatory regimes (Estate Agents Ordinance and Residential Properties (First-hand Sales) Ordinance) will be exempted from substantiation requirements as currently prescribed under the TV Advertising Code and the Radio Advertising Code.
- For advertisements concerning real properties situated outside Hong Kong, it is no longer a requirement to obtain confirmation from a firm of solicitors/attorneys registered and recognised in the country/region where the real property is located that housing loan is available to prospective purchasers.
- To safeguard the interests of the audience of such advertisements, the CA requires that such advertisements should carry messages to remind audience to consider carefully or seek professional advice before making any property purchase decisions.

Live and related sports events programmes

- To allow broadcasters greater flexibility in inserting advertising material for sports and live events, the CA now permits the insertion of in-programme advertising material in sports events programmes and exempts such advertising materials from being counted towards the aggregate advertising limit applicable to free-to-air TV.
- However, there are certain conditions/restrictions as to the time, size, frequency, location of display of sponsorship references (i.e. the sponsor's name/trade marks/slogans etc.). For example:
    - there can only be one sponsorship reference of one sponsor at any one time;
    - the size of the sponsorship references should not exceed 5% of the TV screen;
    - the sponsorship references should not appear too frequently; and
    - there are prescribed time limits on the duration of the sponsorship references (the TV Advertising Code sets out further details on these prescribed time limits).

Broadcast hours of mature programmes

- The CA takes the view that TV viewership among children and young viewers after 11:00pm is relatively low and therefore proposes to advance the start of broadcast hours for mature programmes from 11:30pm to 11:00pm.
- The public's views on this were divided. There were criticisms as to there being no data supporting a significant decrease in the number of children viewers after 11:00pm. With the COVID situation, parents may be more lenient as to imposing TV screen time for children. However, people supporting the revised policy argued that since there are now 12 free-to-air TV programme channels and the amount of available online content, there should not be a significant impact on children viewers in advancing the broadcast hours of mature programmes.

All in all, these revised policies should provide the TV and radio licensees with more flexibility in advertising contents and scheduling programmes. These revised policies also reflect the CA's continued willingness to modernise its TV and radio advertising regimes (e.g. see our previous article on: Hong Kong relaxes regulations on product placement).

Authored by Eugene Low and Catharine Lau

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SKRINE

Is a gambling debt illegal and unenforceable in Malaysia?

14 October 2020

In the case of ***Wynn Resorts (Macau) S.A. v Poh Yang Hong [2019] MLJU 2003***, the Malaysian High Court sided with Wynn Resorts (Macau) in a multi-million-dollar lawsuit against a punter who had gambled at the Macau-based casino and had owed it millions of dollars.

In His Lordship's decision in January 2019, Justice S. Nantha Balan allowed Wynn Resorts (Macau)'s claim to be entered against the Defendant in the sum of HK$33,186,554.00 (equivalent to RM17,257,000.00), with interest thereon, being the amount owing under a gaming credit facility.

The Defendant's appeal to the Court of Appeal had been dismissed. The Defendant has filed an application for leave to appeal to the Federal Court, which is fixed for hearing in November 2020.

Key points

a. Credit agreements and money owing under credit agreements are not "wagering agreement" or money won on wager under the Civil Law Act 1956 and the Contracts Act 1950.

b. Enforcement of a debt owing under a credit facility is not contrary to public policy.

Background

The Plaintiff is a licensed casino operator in Macau, whose concessionaire status was given judicial recognition by the Hong Kong High Court. The Plaintiff offers credit facilities to patrons with sound credit ratings. The Defendant is a Malaysian citizen, who is ordinarily resident in Malaysia and gainfully employed in Malaysia. The Defendant is a "seasoned gambler" with a high credit reputation. During many of his visits to the Plaintiff's casino, the Defendant was able to obtain substantial gaming credit facilities to gamble at the casino.

The Plaintiff's claim in this action arose out of the Defendant's gambling stint at the Plaintiff's casino on 22nd May 2014. The Defendant sought and was given a gaming credit facility of up to HK$40 million, to enable the Defendant to gamble at the casino. The gaming chips are only useable within the Plaintiff's casino and that too at the gaming tables only.

The Defendant made partial repayment of the amounts that were outstanding under the credit facility. The claim against the Defendant in the action is for the balance sum of HK$33,186,554.00 with interest thereon at 18% per annum from 22nd May 2014, until the date of full payment or realisation and cost.

Issues

The issues that arose were:

i. whether the credit agreement which facilitated the Defendant's gambling activity by way of gaming credit and which then enabled him to be given the requisite number of gaming chips is a "wagering agreement";

ii. whether this is an action by the plaintiff to recover money "won" on a "wager";

iii. whether the enforcement of such a debt is contrary to public policy; and

iv. whether Malaysian law is applicable under the doctrine of *lex fori*.

Decision

In allowing the Plaintiff's claim, Justice S Nantha Balan held as follows:

<u>The Credit Agreement is not a "wagering agreement"</u>

a. What is prohibited by the Civil Law Act 1956 and the Contracts Act 1950 are "agreements by way of gaming or wagering", and no action shall be brought or maintained in any Court for recovery of any sum or valuable thing alleged to be "won upon any wager".

b. If an activity is to be construed as a game or a wager, then the obligation to pay under a casino game must depend upon the outcome of the "game" or "wager", thus having an element of chance or uncertainty. On the other hand, under a gaming credit, the obligation to repay arises immediately once the casino chips are made available to the casino player (punter) on credit regardless of whether the player engages in a gaming activity or not.

c. The “bet” or “game” or “wager” is made when the bet is placed and not when the credit facility is given or when drawdown is made to obtain gaming chips. Thus, the credit agreement is merely a prelude to the making of a bet, but the credit agreement or the signing of the markers or promissory notes are not themselves “the bet” or “wager”. Regardless of the fortune or misfortune of the customer at the gambling table, the amount that was given on credit must be repaid.

d. Although the credit agreement and the “markers and promissory notes were “intricately linked” to gaming or wagering, it adds nothing to the search for the definition of the agreement.

<u>Enforcement of such a debt of not contrary to public policy</u>

e. The enforcement of a debt which arises under a credit facility to enable the defendant to gamble at the Plaintiff’s casino is not contrary to Malaysian public policy.

f. Freedom to contract should prevail and flourish and contracts which have been freely and voluntarily entered into should not be arbitrarily invalidated or declared as void on grounds of public policy.

g. Since Malaysia allows for legalised betting gaming and gambling activities to take place and collects tax revenue from these activities, it cannot be said that legal action for recovery of amounts outstanding under gaming credit facilities which relates to gambling activity is frowned upon in Malaysia.

h. Rather than precluding any recovery action to compel a gambler to settle his gaming credit debt, there is in fact a strong and compelling public policy which supports the position that those who borrow in order to gamble should not be entitled to seek refuge under the protection of a nebulous and tenuous argument of “public policy” to evade and avoid their legal obligation to repay their debt which is owed to those who gave them credit facilities, albeit to gamble.

<u>The Macau law which is applicable in relation to the credit agreement</u>

i. Under the *lex fori* doctrine, it is mandatory for the Malaysian procedural law to be applied rather than the procedural or adjectival law of Macau, but in terms of the substantive law vis-a-vis the credit agreement, it is Macau law which is applicable. There is no dispute that under Macau law, the credit agreement is valid and lawful.

j. Thus, the Civil Law Act 1956 and the Contracts Act 1950 do not apply to the facts of this case.

Comment

The High Court decision is useful in clearing the uncertainties as to whether it is lawful to sue on a "gambling debt" in Malaysia. Justice S Nantha Balan reviewed many of the earlier cases decided by the Malaysian Courts, and opined:

'The previous cases such as for example, Star Cruise and Jupiters which had by a strained and convenient interpretation, construed an action to recover monies owing under gaming credit as an action by the casino to recover monies "won on a wagering agreement" are in my view plainly, fundamentally and conceptually wrong.'

Contrary to earlier cases where the Courts have conflated gaming debt or gaming credit with gaming contract or wagering contract, Justice S Nantha Balan explained in great details the distinction between the two, and that Malaysian law only prohibits the latter.

If the Defendant's application for leave to appeal to the Federal Court is allowed, we will await further guidance or confirmation on the law by the Federal Court. Otherwise, Justice S Nantha Balan's decision stands as good law and would serve as a useful precedent for future cases of the same nature.

If you have any queries, please contact our partner, Mr. ***Leong Wai Hong*** *(lwh@skrine.com) and associate Mr.****Kwang Qi Xiang*** *(qi.xiang@skrine.com).*

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October, 2020

Electronic issuance of securities certificates subject to deposit in Central Securities Depositories

On September 30th, 2020, the Mexican Central Bank published, in the Official Gazette of the Federation, the "General Provisions Applicable to the Electronic Issuance of Securities Certificates subject to deposit in Central Securities Depositories" (hereinafter, the "**Provisions**").

The purpose of the Provisions is to establish the securities certificates subject to deposit in Central Securities Depositories (Institutions for the Deposit of Securities) that, in accordance with Article 282 of the Securities Market Law, may be issued electronically (hereinafter, "**Electronic Securities Certificates**"), as well as the specific and safety features that such securities certificates must have, which will produce the same legal force and effect that the laws grant to those printed, issued and signed with an autograph signature and, consequently, will have the same evidentiary value.

Electronic Securities Certificates must be issued in accordance with the agreements entered into by the securities issuers and the Central Securities Depositories and, for their issuance, the securities issuers must generate a Data Message[1] that will be delivered to said Institution accompanied by the Electronic Signatures[2] of the persons who, in accordance with the applicable legislation and regulations, are authorized to represent said issuer in the issuance of securities, which must contain, among others, the following information:

i. Security type.
ii. Ticker.
iii. Corporate name of the issuer.
iv. Number of securities to be issued.
v. Issuance amount, face value and legal name of the security to be issued.
vi. Place and date of issuance.
vii. Place and date of payment, if applicable.
viii. Series.
ix. Maturity date, if applicable.
x. Discount or interest rate, if applicable.
xi. Account of the issuer where the Electronic Securities will be deposited.

Prior to the issuance of Electronic Securities Certificate and delivery of the Data Message, securities issuers must provide the names of the people who have the power to represent

[1] Information generated, sent, received, stored and/or communicated through electronic or other technologies.

[2] The set of data that is added to a Data Message, which is logically associated to it and is attributable to the person who generates it once the Qualified Information System of Banco de México has been used, and which complies with the Advanced or Reliable Electronic Signature requirements referred to in Articles 89 and 97 of the Commercial Code, as subsequently modified or replaced.

the issuer and who will sign the Qualified Digital Certificates[3] to the Central Securities Depositories, which must be valid within six months after the date they are sent.

Once the Data Message has been received, the Central Securities Depositories must verify the authenticity of the Qualified Digital Certificates corresponding to the Electronic Signatures, as well as the integrity of the Data Message and the sufficiency of the information contained therein and, afterwards, must file and keep the Electronic Securities in the Electronic Vault[4] kept by such Central Securities Depositories. Later, said institution must generate and send a Data Message with the Electronic Signature of its representative, containing the copy of the Electronic Security and stating that it has been issued and is duly deposited.

The Provisions will enter into force the day immediately after their publication in the Official Gazette of the Federation. The full text of the publication can be consulted here.

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

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[3] To that Digital Certificate issued, according to the Rules for Operating as a Registration Agency and/or Qualifying Agency in the Extended Security Infrastructure, by the Tax Administration Service, in its capacity as a Certification Agency, also called "e.firma", which is stored in a digital file with the extension ". cer", when it is obtained from said authority in accordance with the provisions established for such purpose, as well as that other Digital Certificate issued by an authorized third party, if applicable, by Banco de México, subject to the determination by the latter that said Digital Certificate complies with the same security requirements and accreditation of the identity of the interested party as observed by the Tax Administration Service for its issuance.

[4] To the information system of the Institution for the Deposit of Securities used for the storage of Electronic Securities, constituted and operated in accordance with the technical requirements established in the Provisions.

September 29, 2020 | 1 min read

Covid-19 (Coronavirus) (/resources/covid-19-coronavirus)


John Shackleton


Donna Hurley


John Craig

Covid-19 has affected many commercial lease arrangements. There are lessees who have been unable to pay rent as their business was negatively affected by the closedowns, and lessors may have been unable to meet their loan obligations due to lack of rental income.

Subsidised mediation and arbitration services are now available for small and medium sized businesses who have suffered a loss of revenue during Covid-19 Lockdown levels 3 and 4.

The subsidy is applicable to both national and regional lockdowns that applied to where the lease site is located. Businesses may be eligible to receive up to $6,000 (including GST) of subsidised arbitration services and full funding of mediation services up to $4,000 (including GST) per dispute. The funding is available for businesses who use Ministry-approved suppliers only.

To access the subsidy, the parties to the dispute must establish both that their dispute is a qualifying dispute and that at least one of the parties satisfies the eligibility criteria. Additionally, the parties must not previously have accessed subsidised services in respect of the dispute, and the services must commence during the Subsidy Period (between 25 September 2020 and 26 March 2021). Arbitration services are available where the parties' lease includes a clause that allows for the reduction of rent in an emergency, and where both parties agree to arbitrate the dispute using the subsidised service. Mediation services are available where both parties agree to mediate (there is no additional requirement for a rent abatement clause in the lease).

What is a Qualifying Dispute?

A dispute is a Qualifying Dispute if:

- it is about the payment of rent and outgoings where a lessee has experienced a material loss of revenue during a Lockdown Period because of government restrictions put in place to combat Covid-19; and
- the payment of rent and outgoings during the relevant Lockdown Period has not previously been the subject of an agreement or arbitral award between the lessor and the lessee.

What are the Eligibility Criteria?

- the business is New Zealand based (registered and operating in New Zealand, physically located in New Zealand, and its employees can legally work in New Zealand); and
- if a lessee, has 20 or fewer Full-Time Equivalent staff per lease site; or
- if a lessor, has 20 or fewer Full-Time Equivalent staff in total

More information can be found on the Ministry of Justice's website (https://protect-au.mimecast.com/s/rlmsCANZp8F9RGYnl9_rOa?domain=sites-simpsongrierson.vuture.net), which includes contact details for Ministry-approved suppliers.

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PCC Issues Rules Implementing Section 4(eee) of Bayanihan 2 on the Transaction Value Threshold for the Exemption from Compulsory Notification

October 6, 2020

The Philippine Competition Commission (PCC) has issued the rules for the implementation of Section 4(eee) of Republic Act No. 11494, the "Bayanihan to Recover as One Act" (Bayanihan 2)[1] on October 5, 2020 and these rules (PCC Rules on Bayanihan 2)[2] were published, and thus became effective, from the same date.

To recall, Section 4(eee) of Bayanihan 2 provides for the following, as part of the government's economic recovery measures, and for the stated purpose of "promot[ing] business continuity and capacity building":

(a) exempts from the compulsory notification requirement under Section 17 of the Philippine Competition Act all mergers and acquisitions with transaction values below Php50 billion if entered into within two years from Bayanihan 2's effectivity; and

(b) exempts such transactions from the power of the PCC to review mergers and acquisitions *motu proprio* (or on the PCC's own initiative) for a period of one year from Bayanihan 2's effectivity.

We have issued a briefing on these measures under Bayanihan 2.[3]

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[1] https://www.officialgazette.gov.ph/downloads/2020/09sep/20200911-RA-11494-RRD.pdf.
[2] https://phcc.gov.ph/crn22-2020-merger-rules-sec4eee-ra11494-baro/.
[3] See Bayanihan 2 Increases Compulsory Merger Notification Threshold to Php50 Billion for 2 Years.

The PCC Rules on Bayanihan 2 now clarify that the Php50 billion “transaction value” threshold applies to both “size of party” and “size of transaction” thresholds, which are the compulsory notification thresholds historically applied by the PCC. In other words, for a transaction to be compulsorily notifiable, both of the following must be at least Php50 billion: (a) the size of party (which refers to the aggregate gross Philippine revenues, or value of Philippines assets of the ultimate parent entity of at least of the acquiring or acquired entities, including that of all entities that such ultimate parent entity controls), and (b) the size of transaction (which varies depending on the nature of the transaction, *e.g.*, joint venture formation, voting shares acquisition, acquisition of assets inside the Philippines, etc.).

The PCC Rules on Bayanihan 2 also clarify that for a transaction to benefit from Bayanihan 2, the “definitive agreement” must be signed within two years from the effectivity of Bayanihan 2 (which is reckoned by the PCC from September 15, 2020).

The PCC Rules on Bayanihan 2 emphasize that:

(a) it is the continuing policy objective of the PCC to ensure the “efficiency of market competition”;

(b) transactions entered into during the effectivity of Bayanihan 2 (which is from September 15, 2020 to September 15, 2022) may be reviewed by the PCC *motu proprio* (or on its own initiative) after one year from the effectivity of the Bayanihan 2; and

(c) transacting parties may avail of voluntary notification even where their transaction is exempt from compulsory notification under Bayanihan 2.

The foregoing seems to indicate that the PCC will not hesitate to review transactions *motu proprio* starting September 16, 2021 and that transacting parties may be better off voluntarily notifying their transaction if it is subject to a risk of being viewed by the PCC as a transaction that can lead to a substantial lessening of competition in the relevant market.

The PCC Rules on Bayanihan 2 have shortened the review periods for voluntary notification. The Phase 1 review period is now for 45 days (instead of the 75 days provided under the Merger Review Procedure or MRP) while Phase 2 review is for 90 days (reduced from 120 days under the MRP).

It should be noted however that availing of a voluntary notification would be considered a waiver of the exemption under Bayanihan 2. What this highlights is the need for transacting parties – to a transaction where there are horizontal overlaps or vertical relationships between and among the seller, the buyer, and the target companies and assets -- to conduct a competitive assessment of their transaction to (a) assess whether or not the transaction would raise competition-related concerns, (b) consider the risks of the PCC conducting a *motu proprio* review after one year from the effectivity of the Bayanihan 2, (c) prepare possible defenses that may be asserted in the event that such a *motu proprio* review is conducted, and (d) evaluate if a voluntary notification would be the more prudent course of action to obtain deal certainty and avoid a subsequent review by the PCC.

For more information about the legal issuance discussed in this briefing, please contact any of the following:

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SyCipLaw's Special Projects Department

This briefing was prepared by the firm's Competition and Anti-trust practice group which is under the Special Projects Department.

SyCipLaw has extensive experience in analyzing the competition law impact of various types of vertical restraints such as resale price restrictions, exclusivity and non-compete provisions, and sole supply arrangements.

We are active in the area of policy development, having worked closely with the PCC in developing implementing regulations and having provided critical feedback on rules relating to joint ventures and land acquisition.

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Singapore codifies the legal test to determine the standard of care for the provision of medical advice

DENTONS RODYK

October 15, 2020

Amendments were recently made by Parliament to the Civil Law Act (Chapter 43) (the Act) to introduce a new section 37 which sets out a codified legal test to determine whether a healthcare professional has met the standard of care for the provision of medical advice. The amendments to the Act were passed in Parliament on 6 October 2020, and section 37 will come into force on a date to be determined by the Minister.

The amendments to the Act came in the wake of the Ministry of Health's (MOH) acceptance of the MOH Workgroup's recommendations on the taking of informed consent (our earlier article on this can be found here).

The new statutory test replaces the current 3-stage common law test for a doctor's duty to advise, as laid down by the Court of Appeal in *Hii Chii Kok v Ooi Peng Jin London Lucien and another* [2017] SGCA 38 (our earlier article on the 3-stage test can be found here). Compliance with the *Hii Chii Kok* test (also commonly known as the Modified Montgomery test) requires a tailored approach to consent-taking, as the doctor is obliged to give relevant and material information and advice, customised to the particular patient. According to the MOH Workgroup, doctors perceived that the *Hii Chii Kok* test introduced an element of uncertainty as to what constitutes relevant and material information from a patient's perspective.

In place of the *Hii Chii Kok* test, the Workgroup had proposed a test based on peer professional opinion, which respects patient autonomy and takes into account what is material to the patient. The test proposed by the Workgroup has now been given effect by the amendments to the Act.

The statutory test will apply to all healthcare professionals including doctors and dentists for the standard of care for the provision of medical and dental advice after the date the amendment comes into effect. The Modified Montgomery test will continue to apply for medical and dental advice provided prior to that date, if the treatment has already been completed. However, where the medical or dental care (diagnosis, treatment or advice) on the same matter straddles the period before and after the Act comes into force, the statutory test will apply.

It should be noted that the *Bolam-Bolitho* test remains the applicable law for the determination of the standard of care for the aspects of diagnosis and medical/dental treatment.

The standard of care for the provision of medical advice

Under the new statutory test, a healthcare professional will meet the standard of care for the provision of medical advice to a patient (or a person responsible for making medical decisions for a patient under a legal disability) if the following criteria are met:

1. the manner in which the healthcare professional acts is accepted by a respectable body of medical opinion (called

the peer professional opinion) as reasonable professional practice in the circumstances; and
2. the peer professional opinion is logical.

The peer professional opinion is logical where:

1. the body of healthcare professionals holding the opinion has directed its mind to the comparative risks and benefits relating to the matter; and
2. the opinion is internally consistent and does not contradict proven extrinsic facts relevant to the matter.

The fact that there are differing professional opinions held by other respected healthcare professionals does not, by itself, prevent the peer professional opinion from being relied on, provided that the opinion is logical.

What should the patient be advised on?

The peer professional opinion must require the healthcare professional to have given or caused to be given to the patient:

1. information that a person in the same circumstances as the patient (which circumstances the healthcare professional knows or ought reasonably to know) would reasonably require to make an informed decision about whether to undergo a treatment or follow a medical advice; and
2. information that the healthcare professional knows or ought reasonably to know is material to the patient for the purpose of making an informed decision about whether to undergo the treatment or follow the medical advice.

What is information that is material to the patient?

Material information falls into either of the two categories below:

1. a specific concern or query the patient has, which the patient expressly communicates to the healthcare professional; or
2. a specific concern or query the patient has, which the patient does not expressly communicate to the healthcare professional, but which ought to be apparent to the healthcare professional from the patient's medical records that the healthcare professional has reasonable access to and ought reasonably to review.

To what extent must a healthcare professional review a patient's old medical records?

During the second reading of the Civil Law (Amendment) Bill, the Second Minister for Law clarified that the litmus test is that of reasonableness.

Factors relevant to the assessment of reasonableness may include:

1. the age of the medical records;
2. the discussion between the patient and the doctor – for example, whether the patient's remark was made in passing; and
3. whether the patient's query or concern featured prominently in past medical records.

The example cited by the Minister was that it would not ordinarily appear reasonable for a doctor to trawl through old medical records going back 10 years; but if a particular old record is being taped to the front of the patient's file in a prominent way, then it would appear reasonable for the doctor to review that old record.

Can information be withheld from patients?

Healthcare professionals can withhold information from the patient during the giving of medical advice only when there is reasonable justification. The Act contains some illustrations in this regard.
In the following circumstances, there may be reasonable justification for not providing information:

- in a medical emergency, when the patient is unconscious/mentally incapacitated and there is no person present with legal capacity to make medical decisions on behalf of the patient, and there is insufficient time to locate or appoint such a person; or
- where the patient expressly tells the healthcare professional that he/she had earlier consulted other doctors who had already advised him/her of the treatment options including their risks and benefits, and that he/she does not want to be given this information again. The healthcare professional is also satisfied that the patient appreciates the seriousness of his/her decision to waive the right to hear such information.

However, a healthcare professional is not entitled to withhold information e.g., on the risks of a procedure, merely because he thinks the procedure is in the best interests of his/her patient, and hearing about the risks would dissuade the patient from undergoing it.

Implications

The new statutory test provides assurance to healthcare professionals that the provision of medical advice will be evaluated on the basis of peer professional opinion. Healthcare professionals need to make reasonable efforts to ascertain what would be reasonably required and material to a patient, including checking with the patient directly and reviewing the patient's medical records where appropriate. A specific concern or query ought to be addressed.

As a risk-management measure, healthcare professionals should also ensure that the patient's concerns or queries, as well the advice provided to the patient, are adequately and properly documented in the medical records.

The Second Minister for Law has indicated in parliament that the Ethical Code and Ethical Guidelines of both the Singapore Medical Council and Singapore Dental Council, insofar as the taking of informed consent is concerned, will be revised in step with the amendments to the Act. Medical and dental practitioners should keep an eye out for the revisions to the ECEG in the near future.

Dentons Rodyk thanks and acknowledges Senior Associate Lee Qiu Li for her contributions to this article.

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Newsletter

Newly Issued Directions for Supervision Information Filing Deficiencies Related to Operation of Insurance Enterprises

08/31/2020

Trisha Chang/Jade Wang

The Financial Supervisory Commission ("**FSC**") issued the Directions for Supervision Information Filing Deficiencies Related to Operation of Insurance Enterprises ("**Directions**"), per the letter Ref. No. Jin-Guan-Bao-Cai-Zi No. 10904922661 dated July 6, 2020. The Directions shall become effective on October 1, 2020. The main stipulations are as follows:

1. Source of Law and Purpose

   According to Article 148-1 of the Insurance Act, an insurance enterprise shall make a truthful filing, within a specified time limit, all the required information. Any insurance enterprise which fails to make a truthful filing or fails to make such filing in time may be punished by FSC for violations deemed severe. The Directions are specifically stipulated in order to increase the accuracy and timeliness of the filing of supervision information by an insurance enterprise and to establish objective standards for the FSC's punishment of such violation.

2. Scope of the record of violation points

The Directions' scope of the record of violation points is based on the monthly report, all kinds of annual reports, business statistics, verified filing information, and other materials filed and submitted regularly as stipulated by the FSC in accordance with Article 148-1 of the Insurance Act. The Directions' scope of the record of violation points covers the following types of filing deficiency:

(1) Delay in filing or information missing

(2) Error in filing or mismatch of information

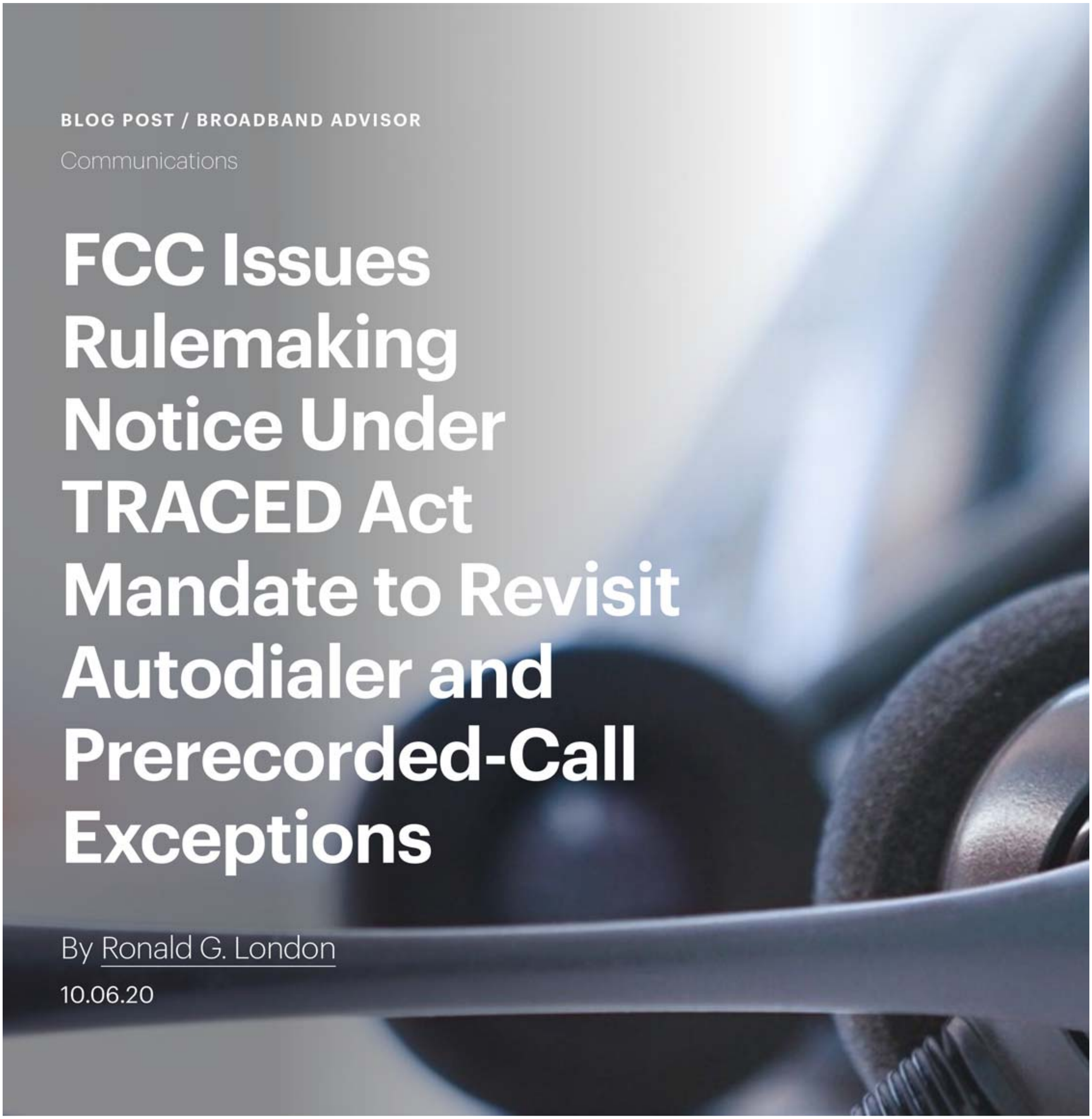
a. Filing error which has been corrected or mismatch of information found during system examination.

b. Filing error which has been corrected or mismatch of information found by the FSC inspection bureau, FSC insurance bureau, Taiwan Insurance Institute, or Taiwan Insurance Guaranty Fund.

c. Filing error which has been corrected or mismatch of information found in field examination, including any examination opinion and on-site improvement recommendations.

Newly revised filing items, categories and inspection rules or error in filing or mismatch of information found within half a year of the launch of a new system will not be included in the record.

Davis Wright Tremaine LLP



BLOG POST / BROADBAND ADVISOR

Communications

FCC Issues Rulemaking Notice Under TRACED Act Mandate to Revisit Autodialer and Prerecorded-Call Exceptions

By Ronald G. London

10.06.20

Taking its next step to implement the Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (TRACED Act), the Federal Communications Commission (FCC) has issued a Notice of Proposed

Rulemaking (NPRM) by seeking input on potential adjustments to exceptions and allowances the FCC has adopted over the years to restrictions on autodialed and prerecorded calls and texts under the Telephone Consumer Protection Act (TCPA).

In addition to codifying exceptions for certain healthcare, financial-institution, and package-delivery calls/texts that until now existed only in declaratory rulings, the NPRM proposes to revise longstanding exceptions for prerecorded calls to residential lines for informational, transactional, and non-profit purposes, to require that they allow recipients to opt out of such calls in the future, including via automated means, to make them subject to other company-specific do-not-call rules, and to potentially limit the number of such calls. The NPRM also proposes on the allowance for wireless carriers to autodial/prerecorded-call their own customers if no cost is imposed to require honoring opt-out there as well.

There is a very short comment window, and the TRACED Act requires the FCC to adopt final rules by the end of the year.

Background

The TCPA and the FCC's implementing rules are the principal source of federal restrictions and requirements for autodialed and prerecorded calls to cell phones and residential lines, do-not-call rights relating to telemarketing and telephone solicitations (under shared power with the Federal Trade Commission and its Telemarketing Sales Rule), and unsolicited fax ads. In relevant part here, the TCPA makes it unlawful to initiate autodialed and/or prerecorded calls (and texts) to cell phones and prerecorded calls to residential lines, other than for emergency purposes or with the prior express consent of the called (or texted) party.

The statute allows the FCC to exempt certain calls from the residential line restriction, and it has exempted calls for other than commercial purposes, including calls by or for nonprofits and calls for commercial purposes that do not adversely affect privacy rights. The statute also allows exemption from the cell phone restriction of calls not charged to the called party, subject to conditions necessary to protect privacy rights. In this latter case, the FCC has through declaratory rulings adopted allowances for non-marketing healthcare and financial-services calls, certain inmate-related calls, and package-delivery notifications.

The TRACED Act, in addition to directing various FCC actions relating to call authentication and call blocking and expanding enforcement authority over illegal "robocalls," requires it to revisit the exemptions granted under the authority outlined above. The Act instructs the FCC to ensure the exemptions include terms specifying the classes of parties that may make such calls and be called, and the number of such calls that are permissible, and to complete any necessary rule adoption or amendment by December 30, 2020. The NPRM proposes various codifications and amendments to the TCPA rules to that end and seeks comments on the proposed changes.

A Short NPRM Packing a Potentially Big Punch

Though in significant part the NPRM simply codifies relatively recently created exemptions while tweaking what might be viewed as one of the oldest exceptions, as discussed below, the FCC perhaps most notably proposes changes that would substantially alter the longstanding exceptions for informational, transactional and nonprofit prerecorded calls to residential lines.

From the earliest years of the FCC's implementation of the TCPA well over two decades ago, the rules have exempted from the prohibition on prerecorded calls to residential lines (unlike cells, autodialed calls to residential lines are not restricted) any such calls that are not made for a commercial purposes, that are made for a commercial purpose but do not involve marketing, or that are made by or on behalf of a tax-exempt non-profit organization. These calls have never been subject to any opt-out or do-not-call obligations.

While maybe prudent from the perspective of customer relations and/or complaint-avoidance, there has never been an obligation per se to refrain from making suchprerecorded calls to residential lines upon request or objection. Nor has there been any limit on the number or frequency of these calls.

The FCC proposes to change that in the NPRM. Under the draft rule changes, prerecorded calls to residential lines for noncommercial purposes, non-marketing commercial purposes, and by or for nonprofits would become subject to the TCPA company-specific do-not-call rules. First, the prerecorded calls would have to cease upon an opt-out—i.e., a do-not-call— request. To enable this, the prerecorded call would be required to have an automated, interactive voice- and/or keypress-activated mechanism to enable opt-outs.

Further, while these calls have always had disclosure requirements identifying the calling party and its phone number, they would now be required—like prerecorded telemarketing—to make the phone number one that can field do-not-call requests during normal business hours. They would also be required to adhere to other do-not-call rules pertaining to having a written policy for maintaining a do-not-call list, training personnel in that policy, and keeping opt-out residential numbers on that list for five years, among other rules.

These are all significant operational changes that until now have applied only to telemarketers and telephone solicitation. The NPRM seeks comment on these proposals.

The NPRM also asks whether there should be any numerical limit on prerecorded calls falling within these exemptions. The FCC asks, if such a limit is imposed, whether it should be an overall numerical limit or one based on a number of calls per week or month. This, too, would be a sharp break from historical practice.

Elsewhere, the NPRM largely proposes to codify existing policy. With respect to exceptions the FCC has created by declaratory ruling for cellphone-directed autodialed and/or prerecorded healthcare and financial institution calls and texts of certain types, for inmate-related messaging, and for package delivery notifications, the NPRM proposes to codify them into the FCC rules without material substantive change.

The healthcare, financial-institution, and package-delivery exceptions are all essentially for free-to-called/texted-party messages that are autodialed and/or prerecorded and must, among other things, include automated opt-out mechanisms, keep to prescribed length and frequency restrictions, and be limited to a handful of certain specified, non-marketing topics. In short, the proposed rules track the declaratory rulings in which the exemptions were adopted.

The FCC created the allowance for wireless carriers to autodial/prerecorded-call their subscribers without cost back in the 1990s, when it first implemented the TCPA (and as technology evolved, later extended it to autodialed texts). As this allowance was not created pursuant to the statutory authority underlying the above exemptions, the FCC was not required by the TRACED Act to revise the allowance or embody it in a rule, and the NPRM proposes no codification. However, the FCC nonetheless proposes to newly subject it to the same opt-out requirements as the other exemptions (i.e., enabling out-outs, including through automated means), and seeks comment on whether calls/texts under this allowance should be limited in number and/or frequency.

The FCC has set a tight comment period for this inquiry, with comments on the proposal and questions in the NPRM due 15 days after it appears in the Federal Register, and replies due 10 days after that. As noted at the outset, the TRACED Act requires the FCC to adopt new rules based on the NPRM by December 30, 2020.

This article was originally featured as a privacy and security advisory on DWT.com on October 05, 2020. Our editors have chosen to feature this article here for its coinciding subject matter.