PACIFIC RIM ADVISORY COUNCIL

Pacific Rim Advisory Council
August 2021 e-Bulletin

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CONFERENCES & EVENTS

PRAC Let's Talk!

upcoming virtual meetings
September 27/28, 2021

International Conference - New Delhi Hosted by KOCHHAR & Co. TBA
International Conference - Mexico City Hosted by Santamarina y Steta TBA
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.

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

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

MEMBER DEALS MAKING NEWS

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COVID-19 SITE FOR ALL UPDATES

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CAREY BOLSTERS PUBLIC LAW PRACTICE WITH HIRE OF PROMINENT CHILEAN CONSTITUTIONALIST PATRICIO ZAPATA

SANTIAGO - 02 August 2, 2021: In a period in which Chile will be marked by the constitutional debate, which should lead to the approval of a new Constitution, the Chilean leading law firm Carey, hired prominent constitutionalist expert, Patricio Zapata, to lead its Public Law practice group.

Patricio Zapata holds a Master's degree in Law from Harvard University as well as a Master's degree in Political Science from Universidad Católica de Chile. His work and experience led him to be elected to head the Citizen Council of Observers of the constituent process convened by President Michelle Bachelet in 2016. Previously he held important positions in the government of two other Chilean presidents.

His practice has focused on constitutional and administrative issues. He is an experienced litigator on matters regarding constitutional and administrative legal issues and he has authored numerous articles and technical columns regarding such issues. Since 1995 he has taught Constitutional Law at the Law School of the Universidad Católica de Chile.

Jaime Carey, Managing Partner of the firm, commented: "We are very excited about Patricio's incorporation to Carey. Adding one of the foremost public law national experts to our team, particularly in the context of Chile's current challenges, is a tremendous contribution to be able to fulfill our mission as a firm, which is to provide an excellent service to our clients".

Patricio Zapata stated that "directing the public law area of a premier firm such as Carey, which I join with great enthusiasm, will be a challenge, but I hope to contribute with my experience to strengthen its prestigious team of professionals".

Carey is the largest law firm in Chile with more than 270 legal professionals. It's Public Law practice group has extensive experience in highly complex constitutional and administrative matters and has represented its clients before the Comptroller General of the Republic, the Constitutional Court, as well as Chilean courts in general and ICSID arbitration courts. Carey's team also provides legislative advice to public and private organizations.

For additional information visit www.carey.cl

GOODSILL WELCOMES FIVE LITIGATION ATTORNEYS

HONOLULU, 30 July, 2021: Goodsill welcomed ***Jason M. Tani, Daniel M. Chen,*** and ***Bryan M. Harada*** to the firm on July 12, and will welcome ***Kristie M. Kutaka*** and ***Alyssa N. Simbahon*** to the firm on August 2.

"We are excited to welcome five experienced, highly talented litigators to our team," said Johnathan Bolton, a Goodsill Partner and member of the firm's Executive Committee. "Jason, Daniel, Bryan, Kristie, and Alyssa will strengthen our litigation group and broaden our services to our many commercial and trust and estate litigation clients."

Jason Tani and Daniel Chen join the firm as partners with practices that focus in the areas of commercial litigation, trust and estate litigation, real estate litigation, construction litigation, and insurance defense.

Bryan Harada will join the firm as counsel and practices law in the areas of civil litigation, trusts & estates litigation, and intellectual property matters.

Kristie Kutaka will also join the firm as counsel and practices law in the areas of insurance defense, premises liability, commercial litigation, real estate disputes and transactions, and trust and estate litigation.

Alyssa Simbahon will be an associate within the firm and focuses her practice on commercial and business litigation, construction law, and premises liability cases.

Goodsill Anderson Quinn & Stifel LLP, founded in Hawaii in 1878, has over 50 attorneys representing local, national and international clients. Goodsill lawyers handle a wide range of business and legal matters, extending personalized legal services with cutting-edge resources.

For additional information visit www.goodsill.com

SYCIP LAW ADMITS FOUR NEW PARTNERS

MANILA – August, 2021: SyCip Salazar Hernandez & Gatmaitan (SyCipLaw) is pleased to announce the admission to the partnership of Easter Princess U. Castro-Ty, Joanna Marie O. Joson, Maria Viola B. Vista, and Maria Christina C. Ortua-Ang .

SyCipLaw is one of the largest law firms in the Philippines and it celebrated its 75th anniversary last year. With the admission of these four women as partners, more than 40% of the partnership is now comprised of women.

Easter Princess U. Castro-Ty is a labor law specialist. She also has broad experience in handling commercial transactions.

Ms. Castro-Ty regularly counsels clients on employment law issues such as those involving labor standards compliance, disciplinary actions and terminations, retirement issues, job contracting/labor-only contracting, occupational safety & health standards, and audits. She also advises clients on union issues and handles complex collective bargaining work. In addition, she specializes in expatriate employment and immigration work. She regularly provides professional advice and assistance to clients in the procurement and renewal of work visas and permits. Ms. Castro-Ty also has extensive experience in advising clients on the requirements for hiring of locals for overseas employment.

She melds her expertise in employment law with commercial practice where she has M&A, and corporate restructuring and reorganization experience. Easter handles general corporate services, and acts as corporate secretary for several corporations.Ms. Castro-Ty obtained her undergraduate degree (cum laude) and her Juris Doctor degree (Dean's Medal for Academic Excellence) from the University of the Philippines College of Law. She is a member of the firm's Employment & Immigration Department and Special Projects group.

Joanna Marie O. Joson is an experienced commercial lawyer and a tax specialist. She specializes in acquisitions, investments, and restructuring.

Her tax-related work includes rendering tax advice in connection with deals involving acquisitions, investments and divestments, and corporate reorganisations, as well as applications of foreign residents availing of preferential tax treatment under tax treaties. She also handles requests for confirmation of tax exemption, refund applications, responses to assessment notices and appeals against adverse rulings issued by the tax authority.

Ms. Joson has handled key acquisition as well as divestment projects in a number of industries including food, advertising, manufacturing, logistics, real estate, and business process outsourcing.

She also has labor law experience having worked on several labor-litigation cases involving illegal dismissal, certification election, and money claims. Ms. Joson obtained her undergraduate degree and Juris Doctor (second honors) from Ateneo de Manila University School of Law. She has a Master of Laws degree in taxation from New York University. She is a member of the firm's Special Projects group, Tax Department and Employment and Immigration Department.

Maria Viola B. Vista applies her expertise in tax and employment law in both litigation settings and commercial transactions, where she specially handles M&A and restructuring work.

Ms. Vista's employment practice includes advisory work on various areas such as employment and contracting arrangements, hiring of expatriates, union issues, disciplinary proceedings, employee-related data privacy issues, and employment transfers or terminations in corporate transactions.

In tax, Ms. Vista regularly advises clients on tax implications of corporate transactions and structures. She also handles tax assessments and refunds both at the administrative and court levels, representing companies from different sectors such as renewable energy and air transportation.

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The corporate projects she has led have been in a range of industries including those in the trading, pharmaceutical, advertising, information technology, financial technology, and airline industries. Ms. Vista obtained her undergraduate degree (magna cum laude) and finished her Juris Doctor degree (Dean's Medal for Academic Excellence) from the University of the Philippines College of Law. She is a member of the firm's Employment and Immigration, Tax and Special Projects practice groups.

Maria Christina C. Ortua-Ang is a tax, M&A, banking, and securities lawyer. She is also a certified public accountant in the Philippines.

She is a tax specialist who also handles a broad range of corporate work and commercial transactions from structuring and regulatory advice to drafting and negotiation of transaction documentation. She handles financing projects as well. In tax, she regularly works on requests for rulings, refund claims and tax treaty relief applications, and appears before courts and revenue authorities in connection with tax assessments and other tax issues.

Her recent significant projects include an approximately USD300 million investment in a storage and pipeline corporation, a USD 706 million investment in a local hospital business, and the acquisition of a thermal power business. Ms. Ortua-Ang obtained her Juris Doctor degree from the University of the Philippines College of Law (with honors) and obtained her Master of Laws (with distinction) from the Queen Mary University of London. She is with SyCipLaw's Special Projects, Taxation and Banking, Finance & Securities practice groups.

For additional information visit www.syciplaw.com

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

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

Visit us online for full coverage
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BAKER BOTTS

REPRESENTS TALLGRASS ENERGY IN $500 MILLION OFFERING OF SENIOR NOTES AND CASH TENDER OFFER FOR ITS 6.000% SENIOR NOTES DUE 2024

HOUSTON, 12 August 2021: Deal Description: On August 11, 2021, Tallgrass Energy Partners, LP ("TEP") announced that it, along with Tallgrass Energy Finance Corp., a wholly-owned subsidiary of TEP, priced an offering (the "Notes Offering") of $500 million in aggregate principal amount of 6.000% senior unsecured notes due 2031 at an offering price equal to 100% of par.

The Notes Offering is expected to close August 18, 2021, subject to satisfaction of customary closing conditions.

TEP intends to use the net proceeds of the Notes Offering, together with borrowings under its existing senior secured revolving credit facility, to fund a concurrent cash tender offer (the "Tender Offer") to purchase any and all of its outstanding 5.50% Senior Notes due 2024 (the 2024 Notes"), and to redeem the 2024 Notes that remain outstanding following the consummation of the Tender Offer. The Tender Offer is being made pursuant to an Offer to Purchase dated August 11, 2021.

Baker Botts L.L.P. represented TEP in the Notes Offering and the Tender Offer. Baker Botts Lawyers/Office Involved: Corporate: Mollie Duckworth (Partner, Austin); Justin Hoffman (Partner, Houston); Grace Matthews (Senior Associate, Austin); Dillon Sebasco (Associate, Austin); Jenna Kabrich (Associate, Austin); Brian Golde (Associate, Austin) Tax: Michael Bresson (Partner, Houston), Chuck Campbell (Special Counsel, Houston).

For more information, please visit www.bakerbotts.com

BRIGARD URRUTIA

ADVISES COLOMBIAN TELECOMS COMPANY COLTEL ON ITS ACQUISITION OF FIXED INTERNET BUSINESS

BOGOTA - June, 2021: Colombian telecoms company Coltel has hired Brigard Urrutia to buy the fixed internet business of the local branch of US satellite television service DirecTV. The parties signed the deal on 24 May for an undisclosed value.

Coltel bought DirecTV's wireless network and the internet services of around 200,000 of its clients. Of those clients, about 60% will keep their satellite television services from DirecTV.

Coltel, which operates as Movistar Colombia, is the local subsidiary of Spanish telecoms company Telefónica, which operates in 20 Latin American countries, including Brazil, Chile and Mexico.

Counsel to Coltel Brigard Urrutia Partner Darío Laguado and associates Daniel Moncaleano, Catalina Manga and María Márque.

For additional information visit www.bu.com.co

NAUTADUTILH

ADVISES ALLEGO ON ITS $3.14BN BUSINESS COMBINATION WITH APOLLO-AFFILIATED SPARTAN ACQUISITION CORP III

ROTTERDAM, 29 July 2021: On 28 July, Allego announced its $3.14 billion business combination with Apollo-Affiliated Spartan Acquisition Corp. III (NYSE: SPAQ). The transaction will raise a total of $702 million (assuming no redemptions), including $150 million from a fully committed PIPE.

The PIPE is anchored by institutional investors, including Hedosophia and funds and accounts managed by ECP as well as strategic partners, including Fisker and Landis+Gyr. Funds managed by affiliates of Apollo Global Management, Inc., as sponsor behind Spartan Acquisition Corp. III, and Meridiam, as long-term owner of Allego, also participated in the PIPE. The transaction will be used, among other things, to fund the combined company's expansion plans.

The combined company will become a Dutch N.V. listed on NYSE under the symbol "ALLG". Allego, a leading Pan-European EV charging company, has over 26,000 public EV charging ports across 12,000 public and private locations in 12 European countries, with leading utilization rates and a substantial recurring user base, as well as a secured backlog of 500 premium sites providing near-term visibility on network development. The pro forma implied equity value of the combined company is $3.14 billion. The transaction is expected to close in the fourth quarter of 2021, subject to customary closing conditions.

NautaDutilh advised Allego alongside Weil, Gotshal & Manges LLP. The core deal team was led by Gaike Dalenoord and Paul van der Bijl and included Jules van de Winckel, Sanne Mesu, Dirk Panis, Marc Orval, Nina Kielman, Ashley Beesemer and Peter Vogels.

For additional information visit www.nauadutilh.com

GIDE

ADVISED OKAM CAPITAL ON ITS LANDMARK TRANSACTION IN WARSAW

WARSAW, 06 August 2021: OKAM Capital acquired 62 ha of the real properties located in Żerań, Warsaw, comprising the post production car manufacturing land and facilities. This is a transaction on an unprecedented scale on the Polish market.

Gide advised OKAM at all stages of this spectacular investment, from the legal due diligence through negotiations to signing the transaction documentation.

The team was supervised and led by partner Piotr Sadownik and included the real estate team led by counsel Błażej Czwarnok, with associates Tomasz Roszczyc and Aleksandra Kobylińska.

For additional info visit www.gide.com

HAN KUN

ADVISES ON DAQO ENERGY'S STAR BOARD PUBLIC LISTING

BEIJING, 22 July 2021: Han Kun has provided legal services in connection with the initial public offering and listing on the A-share STAR board of Xinjiang Daqo New Energy Co., Ltd. (stock code: 688303), as the PRC counsel to CICC, the sponsor and lead underwriter.

Daqo Energy is one of the earliest enterprises engaged in research and development and manufacturing of photovoltaic high purity polysilicon in China. Since its establishment, Daqo Energy has focused on the research and development, production, and sale of high purity polysilicon, and has centered on the national new energy strategic planning, relying on continuous R&D investment and technical innovation.

For additional information visit www.hankunlaw.com

ARIAS

NICARAGUA ADVISES INERNATIONAL FINANCE CORPORATION IN FINANCING INGENIO MONTE ROSA

MANAGUA - 12 August, 2021: Arias acted as Nicaraguan advisor to the International Finance Corporation (IFC) in the negotiation, structuring and formalization of a financing for Ingenio Monte Rosa, part of the Pantaleón group of companies, dedicated to the processing of sugar cane for the production of sugar, honey, alcohols and electrical energy.

The IFC loan consists of a short-term facility of US $ 15 million, renewable annually for a period of four years, and a long-term loan of US $ 10 million, intended to finance the working capital needs of Monte Rosa and the purchase of machinery and equipment for the operation of its business. The financing documents were signed on April 9, 2021 and the transaction was successfully closed on July 15th 2021.

IFC legal advisers: Arias, legal advisers in Nicaragua. Arias attorneys involved in the transaction:
Partner Bertha M. Argüello and Paola Gutiérrez, Associate.

For additional information visit www.ariaslaw.com

HOGAN LOVELLS

ADVISES VICI PROPERTIES, INC. ON US $17.2 BN ACQUISITION OF MGM GROWTH PROPERTIES

WASHINGTON, D.C., 04 August 2021 – Global law firm Hogan Lovells is advising VICI Properties, Inc. (VICI) on its US$17.2bn strategic acquisition of MGM Growth Properties LLC, (MGP), a transaction which will create America's largest owner of experiential real estate.

VICI, MGP and MGM Resorts International, MGP's controlling shareholder, announced today that they have entered into a definitive agreement for VICI to acquire MGP for total consideration of US$17.2bn, inclusive of the assumption of approximately $5.7bn of net debt.

Upon completion of the merger, the combined company will have an estimated enterprise value of US$45bn, firmly solidifying VICI's position as the largest experiential net lease REIT by market cap while also advancing VICI's strategic

NAUTADUTILH

ADVISES SIGNA SPORTS UNITED ON ITS $3.2 BILLION BUSINESS COMBINATION WITH YUCAIPA

goals of portfolio enhancement and diversification.

A Hogan Lovells team advising VICI is led by Global Managing Partner of the Corporate practice David Bonser, M&A partner Stacey McEvoy and tax partner Cristina Arumi in Washington, D.C. Key support includes M&A partner Bruce Gilchrist, employment partner George Ingham, antitrust partners Chuck Loughlin and Michele Harrington, debt capital markets partners Eve Howard and Evan Koster, capital markets partner Andy Zahn, banking partner Nathan Cooper, employee benefits and executive compensation partner Meg McIntyre, real estate partner Lee Berner, and environmental partner Scott Reisch.

Additional team support includes capital markets counsel Tifarah Allen, senior associates Dan Levisohn (M&A), Caitlin Piper (tax), Malaz Moustafa (employee benefits and executive compensation), Amy Kett (labor and employment), Leslie Graham (real estate), Ao Chen (banking), Marta Orpiszewska (environmental), Conlon Danberg (capital markets), and associates Lena Al-Marzoog (capital markets), Dylan Hays (tax), Billy Clinton (tax), Nirupa Persaud (employee benefits and executive compensation), Zachary Siegel (labor and employment), Lauren Kimmel (debt capital markets), Sarah Branch (capital markets), and Jason Lee (corporate and finance).

Hogan Lovells has advised VICI on a number of transactions including on its US$3.2bn partnership with Eldorado Resorts, Inc. in connection with Eldorado's combination with Caesars Entertainment Group and simultaneous US$2.47bn equity offering, the largest REIT follow-on offering in history.

The firm has also advised on the tax aspects of VICI's recent US$4bn acquisition in cash of all the land and real estate assets associated with The Venetian Resort Las Vegas and the Sands Expo and Convention Center from Las Vegas Sands Corp.

VICI's latest transaction has been approved by the Board of Directors of each of MGM Resorts, MGP and VICI (and, in the case of MGP, the Conflicts Committee). The transaction is expected to close in the first half of 2022, subject to regulatory approvals and approval by the stockholders of VICI.

For additional information visit www.hoganlovells.com

RICHARDS BUELL SUTTON

WINS LANDMARK DECISION: GOVERNMENT LIABLE FOR TRADEMARK INFRINGEMENT

VANCOUVER, June 21, 2021: In a landmark case involving multiple levels of appeal, RBS successfully represented a Vancouver-based energy consulting business against the Government of Ontario for trademark infringement. The decision established that public bodies can also be held liable for trademark infringement when adopting an official mark that may be confused with a prior registered trademark.

Full overview follows:

In Quality Program Services Inc. v. Ontario (Energy), 2018 FC 971, aff'd 2020 FCA 53 (leave to appeal to SCC denied), RBS LLP partner Jonathan M.S. Woolley successfully protected our client's registered trademark "EMPOWER ME" from infringement by the Government of Ontario. The Government of Ontario was ordered to pay damages of $10,000 to Quality Program Services Inc. (QPS) on the basis that the Ontario Ministry of Energy's campaign slogan "emPOWERme" and website launch of the same name was confusing with, and therefore infringed, QPS's registered mark. The key issue in this decision was whether the Government of Ontario could become immune to an infringement claim by adopting QPS's mark "emPOWERme" as an "official mark" of the government, even though it had been already registered by and accumulated goodwill associated with QPS.

Significance:

Under the Trademark Act, government and public authorities are entitled to adopt particular marks as "official marks". Once notice of the adoption is provided, these marks become removed from the realm of commerce, and any use of the official mark, or any mark confusing with it, becomes strictly prohibited. The trademark Registrar is not entitled to decline the registration of an official mark, no matter if it is confusing with, or even identical to, a company's pre-existing trademark. Examples of symbols intended to be protected by "official mark" status include the Canadian flag and the crests of Crown corporations.

The case is a landmark decision, as it is the first time anyone has ever successfully defended its trademark against a government agency seeking "official mark" or "super trademark" status for the same mark. The Federal Court of Appeal not only upheld the lower court's decision and sided with QPS, it sent the strong message that "a public authority that chooses to use a mark that is confusing to a registered trademark does so at its peril". As this case illustrates, official marks are controversial. They offer extremely broad protections, with few limitations. This decision changed the law by delineating the limitations of official mark protection.

The decision is significant to trademark and intellectual property professionals, and has received media attention. For example, CBC article "Move to 'emPOWER' Ontario energy consumers ends in $10K trademark confusion". https://www.cbc.ca/news/canada/british-columbia/power-trademark-ontario-slogan-1.4867595.

Factual Background:

QPS is a BC company that originated and used the phrase "EMPOWER ME" in connection with energy awareness since 2013, when the mark was displayed at QPS's booth at a festival in Surrey, BC. The trademark application for exclusive use of the mark was granted by the Canadian Intellectual Property Office on July 23, 2014.

In 2015, QPS became aware of the Government of Ontario's website using the name "emPOWERme" in connection with a campaign to educate Ontario residents about Ontario's energy system and energy conservation. QPS wrote to the Government of Ontario, requesting that it cease and desist its use of the mark. The Government of Ontario refused. Subsequently, it attempted to adopt PQS's mark "emPOWERme" as an official mark of the government pursuant to s. 9(1)(n) of the Trademark Act.

The Federal Court found that QPS owned the trademark EMPOWER ME for use in association with energy awareness, conservation and efficiency services, and that QPS has the exclusive right to the use of such trademark not only in BC, but throughout Canada. The Government of Ontario had wrongfully infringed QPS's trademark, contrary to the Trademark Act. The adoption of an official mark is powerful as it prohibits use by others, but does not go as far to protecting the government agency from itself contravening the Act, nor does it eliminate rights already conferred upon the owner of a registered trademark.

As a result, the Government of Ontario was ordered to pay $10,000 in damages to QPS. The Government of Ontario was unsuccessful in challenging the decision in the Federal Court of Appeal. The Supreme Court of Canada refused to grant leave to appeal, effectively solidifying QPS's win in the lower courts.

More Information: At RBS, we have a knowledgeable and experienced group of trademark agents and lawyers who manage all aspects of trademark portfolios in Canada, the USA, and around the world. For more information on protecting your trademark, or for general inquiries about trademark registration, please contact our Technology & Innovation Practice Group Leader Sze-Mei Young at syeung@rbs.ca.

For additional information visit www.rbs.ca

PRAC EVENTS

BULLETIN BOARD

Like millions around the globe, the COVID-19 pandemic has impacted our members and how we work.

We pivot. We adapt.

We continue to meet and talk virtually face to face

Across the miles, oceans and regions

In varying places and hours of the day and night.

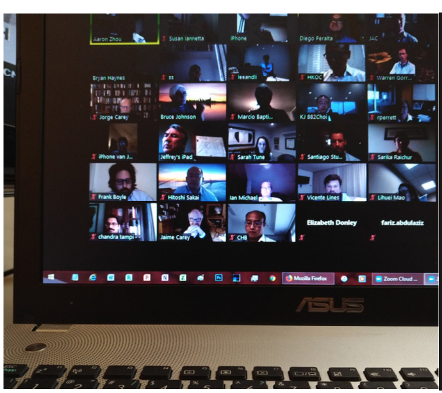
It isn't the same . We can all admit to that.

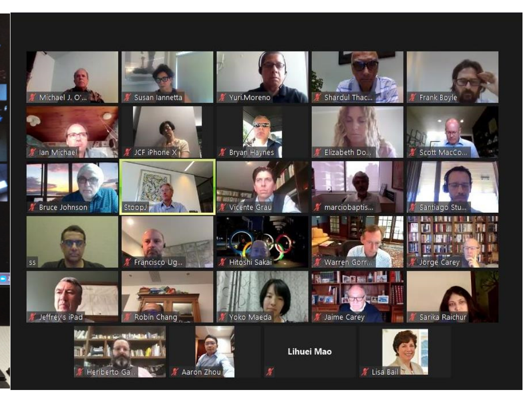
What remains the same is our commitment to continue forming new bonds

and strengthening our long-standing ties with our friends and colleagues around the world.

Together, we will see it through.

PRAC-Let's Talk!





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PRAC LET'S TALK!

PRAC @ NEW DELHI MICRO-CONFERENCE HOSTED BY KOCHHAR & CO.

NEW DELHI - 17 April, 2021: PRACites around the globe gathered online for PRAC @ New Delhi micro-conference hosted by member firm KOCHHAR & CO. Congratulations to the entire Kochhar Team for a successful e-hosting!

Agenda
Opening Remarks - Jaap Stoop, PRAC Chair; Marcio Baptista, PRAC Vice Chair; Jeff Lowe, PRAC Corp Secretary
Greetings & Welcome - Rohit Kochhar, Chairperson and Managing Partner
Country Update - India - Pradeep Ratnam
Visual Presentation - Essense of India!
Kochhar Practice Update - M&A - Chandrasekhar Tampi
Kochhar Practice Update - Banking & Finance - Pradeep Ratnam
Firm update - Rohit Kochhar
Panel Discussion on "Regulation of Content on Social Media" - Moderator, Stephen Mathias, Kochhar & Co (Bangalore); Mark Brennan, Hogan Lovells (Washington); Mauricette Schaufeli, NautaDutilh (Amsterdam)

PRAC EVENTS


2019
PRAC
COSTA RICA


PACIFIC RIM
ADVISORY COUNCIL

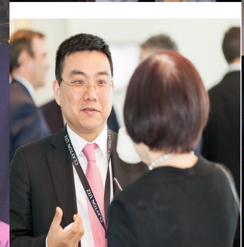

PRAC @ SAO PAULO
PACIFIC RIM
ADVISORY COUNCIL


PRAC @ Taipei 2014


2020-21 monthly PRAC Let's Talk! online event
Lihuei Mao


PRAC @ INTA


PRAC @ Vancouver




PRAC @ PDAC


PRAC @ IPBA

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

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ARIAS, FABREGA & FABREGA

BAKER BOTTS LLP

Bennett Jones

Brigard Urrutia

/Carey

CITY-YUWA PARTNERS

GIDE
GIDE LOYRETTE NOUEL

Davis Wright Tremaine LLP

DENTONS RODYK

Hogan Lovells

KOCHHAR & Co.
ADVOCATES & LEGAL CONSULTANTS

GOODSILL

漢坤律師事務所
HAN KUN LAW OFFICES

KIM, CHANG & LEE

理律法律事務所
LEE AND LI
ATTORNEYS-AT-LAW

LEGA
ABOGADOS

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

ESTUDIO MUÑIZ
MUÑIZ OLAYA MELÉNDEZ CASTRO ONO & HERRERA Abogados

NautaDutilh

RICHARDS BUELL SUTTON LLP
Established in 1871

Santamarina + Steta

SKRINE

SYCIP SALAZAR HERNANDEZ & GATMAITAN

TOZZINIFREIRE
ADVOGADOS

ALLENDE
ALLENDE & BREA

The Argentine Central Bank and the Securities Regulator increase restrictions on securities transactions settled in foreign currency

On 10 July 2021, the Argentine Central Bank ("BCRA") issued the Communique "A" 7327 (the "Communique") which extends the sworn statement regarding securities transactions that individuals and legal entities must provide to access the foreign exchange market. The practical effect of the new Communique is to increase the limitations to operate simultaneously in the securities market and the foreign exchange market.

Firstly, the Communique added the exchange of securities for foreign assets to the transactions that individuals and legal entities must declare not to have executed in the 90 (ninety) days prior and subsequent to carrying out a transaction in the foreign exchange market. Notwithstanding this amendment, the affidavit of not having entered into (i) sales in the country of securities with settlement in foreign currency, and (ii) transfers of securities to foreign depositories, is still mandatory as a condition to operate in the foreign exchange market.

In addition, when the person seeking access to the foreign exchange market is a legal entity, the Communique incorporated the following additional sworn declarations as a condition for accessing the foreign exchange market, as of July 12, 2021:

- Details of the persons or legal entities that have a direct control relationship over the legal entity seeking access to the foreign exchange market; and
- That at the time of requesting access to the foreign exchange market and in the previous 90 (ninety) calendar days, it has not transferred to the country any funds in local currency or other local assets, to any individual or legal person that has a direct control relationship over it, except for those directly associated with regular transactions for the acquisition of goods and/or services.

In the event that, the legal entity seeking access to the exchange market has actually delivered funds in local currency or other liquid local assets to its direct controller, it may also access the exchange market by submitting a sworn statement from its direct controller that it has not entered into sales of securities with settlement in foreign currency in the previous and subsequent 90 days.

Local banks and financial institutions are also included in the requirement to submit these two new sworn declarations for their own operations.

In accordance with these restrictions issued by the BCRA, on July 8, 2021, the Securities Regulator ("CNV"), approved General Resolution 895/2021, to increase the minimum holding periods for the settlement of securities against foreign currency and in foreign jurisdiction. The General Resolution does not incorporate modifications for the settlement of securities against local currency.

The minimum holding period, locally known as "Parking Period", for securities in the local custodian to be applied to the settlement of transactions in foreign currency and in foreign jurisdiction (i.e., settlement against "Dollar Cable" in a foreign account) was set to two (2) business days. This Parking Period does not apply in the case of purchases of securities with settlement in foreign currency and in a foreign jurisdiction. In the case of sales of securities with settlement in foreign currency, but in local jurisdiction (i.e., settlement against a MEP transfer to a local account), the Parking Period remains one (1) business day. This Parking Period shall not apply in the case of purchases of securities settling in foreign currency.

The Parking Period prior to settlement against foreign currency and in foreign jurisdiction (i.e. settlement against "Dollar Cable" in a foreign account) for locally credited securities from foreign depositories (i.e. acquired from foreign agents) has also been set to two (2) business days. In the case of transactions with settlement in foreign currency and in local jurisdiction (i.e., settlement against a MEP transfer to a local account), the Parking Period remains at 1 (ONE) business day.

Finally, the CNV also modified the maximum limits for weekly transactions in sovereign securities issued by the Argentine Republic for each principal sub-account in the time-priority bidding segment (BYMA), which prior to the entry into force of the General Resolution was one hundred thousand (100,000) nominal amounts (only for securities issued under local law). According to the new General Resolution, the limit was split into (i) fifty thousand (50,000) nominals for securities issued under local law, purchased with settlement in such currency and jurisdiction, and (ii) fifty thousand (50,000) nominals for securities issued under foreign law. These limits continue not to apply to wholesale transactions (MAE/SENEBI).

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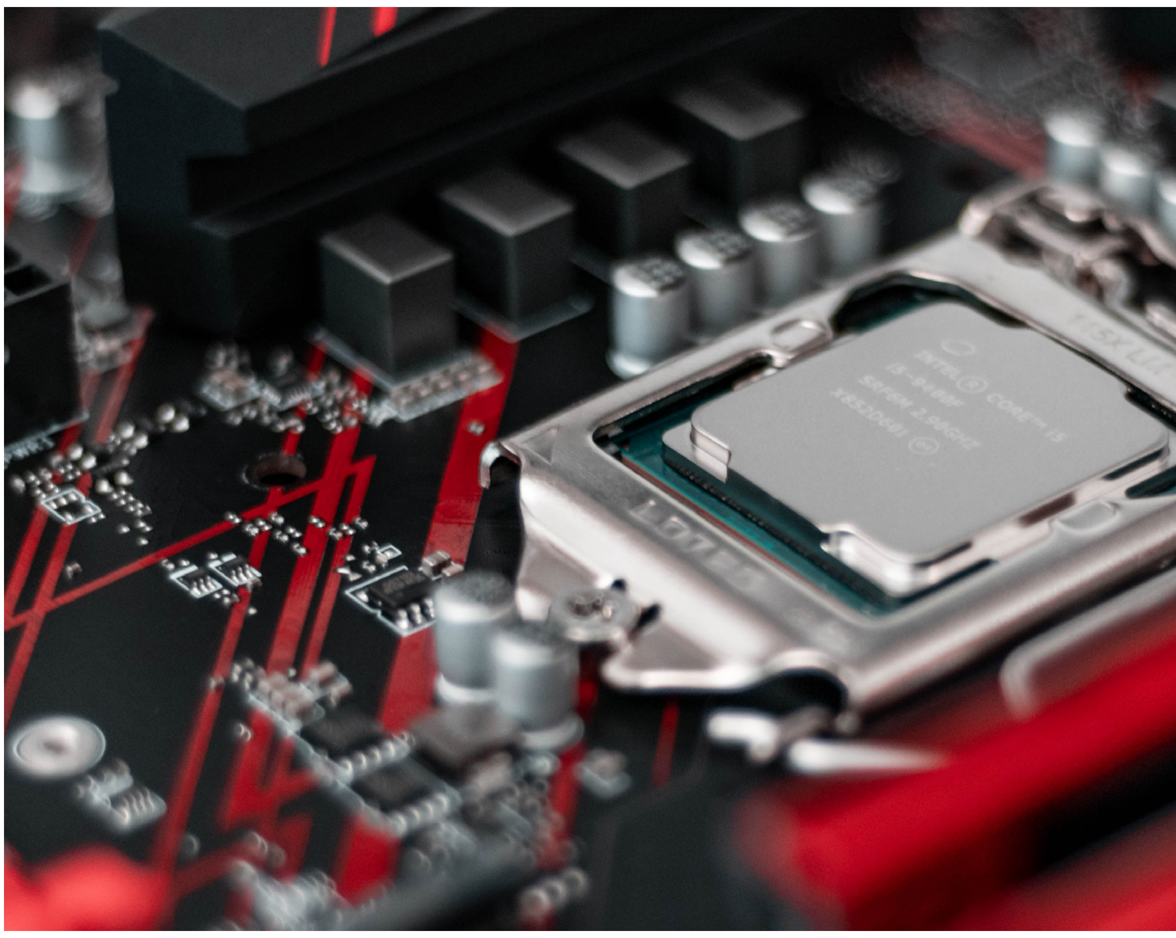
Brazilian Context

Electronic means of payment industry supports Bill that discusses storage of consumer data by providers



Representatives of the electronic means of payment industry have supported the new version of Bill No. 786/2019, which discusses the storage of consumer payment data by service providers and product suppliers, pending before Consumer Defense Commission of Brazilian Chamber of Deputies. It is important to note that the previous version of the Bill prohibited the storage of data relating to credit and debit cards and other means of payment, without the consumer's prior authorization.

Under the original terms of the Bill, if the data subject consented to the storage, this authorization would be valid for a period of twelve (12) months, with the possibility of revocation at any time. It is also noteworthy that, with the consumer's consent, the service provider and product supplier could not use the data for new purchase operations, nor transfer them to third parties, without the data subject's prior authorization.

During the Commission's debate, the representatives argued that Brazilian General Data Protection Law (LGPD) already sufficiently provides for consumer security and that there is already strong regulation about these transactions by Brazilian Central Bank. As the representatives pointed out, the original text of the Bill would lead to too much bureaucracy, without stimulating more security. In their words, most frauds that harm consumers are not related to data storage by payment institutions.

In this regard, the industry representatives also highlighted the market growth, during the first three months of 2021, with a 17.3% increase in transactions with credit, debit, and prepaid cards, totaling more than BRL 500 billion, compared to the same period last year. Finally, it was highlighted the 35.6% increase in remote purchases, in the first quarter of this year, reaching more than BRL 120 billion, which could be negatively impacted by the original Bill, according to the industry representatives.

Newsletter content produced by TozziniFreire's Cybersecurity & Data Privacy practice.

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Ontario Superior Court Limits Potential Class Action Entitlement for Pure Economic Loss

Written by Cheryl Woodin, Ilan Ishai and Ethan Schiff

The authors acted for the defendants in these motions.

While the effects of the Supreme Court of Canada's decision in *1688782 Ontario Inc v Maple Leaf Foods Inc.,* 2020 SCC 35 [*Maple Leaf*], begin to reverberate in the decisions of lower courts, Justice Paul Perell's certification decision in *Carter v Ford Motor Company of Canada* [*Carter*] illustrates the significant impact of the *Maple Leaf* analysis in the ever-busy landscape of auto liability class actions. The Court issued two sets of reasons cited as 2021 ONSC 4137 and 2021 ONSC 4138. The *Carter* decision interprets and applies *Maple Leaf* and provides much needed guidance on the limited scope of claims for pure economic loss in this area. Relying on *Maple Leaf,* Justice Perell also rooted out various causes of action which have crept into claims against auto manufacturers over the last several years.

The plaintiffs in *Carter* sought to certify multiple causes of action in tort, contract and restitution for a proposed class of current or former owners or lessees of the allegedly defective vehicles. The plaintiffs alleged that the defect in the vehicles' water pumps created a propensity to fail after "moderate mileage" (claimed to be after 100,000 km), potentially causing catastrophic engine damage, which may be dangerous. The plaintiffs were seeking not only the cost of repair for the allegedly dangerous defect but also economic loss damages, including diminution in value. The Court struck the majority of the pleaded claims, certifying only the cause of action in negligent design for class members who owned or leased vehicles damaged by manifestation of the alleged defect (including those who suffered personal injury). The Court also determined that issues of causation and damage for each class member would be reserved for individual trials. The decision provides a valuable precedent for future products liability class actions, particularly for its application of *Maple Leaf*.

The Narrow Exception for Real, Substantial and Imminent Danger

As with many auto products liability class actions, the plaintiffs sought costs to repair the alleged defect and diminution in value for all of the impugned vehicles. Such claims are allegedly based on the real and substantial danger exception to the general bar on negligence claims for pure economic loss. Applying *Maple Leaf*, the Court held that the claim did not meet the test for the exception because the plaintiffs failed to plead an imminent threat—instead, they pleaded "a yet to be borne danger and one that may never be borne." The Court also held the claims lacked commonality because some of the vehicles' values had diminished so greatly that the class members could have simply discarded the vehicles to avoid the alleged real and substantial danger. Accordingly, the Court dismissed the negligence claims in pure economic loss.

Separately, the Court held that, even if the plaintiffs properly pleaded a claim for pure economic loss, damages for diminution in value were not compensable because the exception only provides for the cost to remove real and substantial danger. This determination follows from *Maple Leaf*, but it is a notable limitation as applied to an auto products liability class action.

Breach of Contract—Variability in Warranty Claims

The plaintiffs pleaded various claims under this heading, including for breach of express warranty and implied warranty at common law and under consumer protection legislation. The Court held that claims in express warranty were untenable for class members who had not experienced vehicle failure because the manufacturer's warranty only covered "actualities not potentialities." Additionally, though the alleged defect related to the defendants' choice of material used in the water pump, the express warranty (which covered defects in materials) did not cover defects in the choice of material, but rather defects within the materials.

The Court generally concluded that the breach of warranty claims lacked commonality due to variability among the class members as to whether (a) any water pump failure occurred; (b) a warranty claim was made and granted; (c) the vehicle was purchased used or new, and within the coverage period; and (d) the claimant disposed of the vehicle before the water pump failure. The Court also held that variability across applicable legislative regimes, including the variable privity requirements, further removed commonality. This variability made the proposed causes of action unmanageable for a common issues trial. Further, the Court held that claims for implied warranty under Ontario's *Consumer Protection Act, 2002,* SO 2002, c 30, Sch A, were untenable because none of the plaintiffs had an agreement with the defendants to supply goods—the only agreement between any of the plaintiffs and defendants (the express warranty) was an agreement to supply services. In this respect, the Court followed *Williams v Canon Canada Inc.*, 2011 ONSC 6571, over the plaintiffs' objection.

Unjust Enrichment—No Enrichment

The Court also declined to certify claims in unjust enrichment because the defendants were not enriched by the class members' payments unless they purchased directly from the defendants. In this respect, the Court made a critical determination that franchised Ford dealers are not agents of the defendants. The applicable agreements of purchase and sale also provided a valid juristic reason for any enrichment.

Conclusion

The Court in *Carter* has helpfully applied the Supreme Court's much needed return in *Maple Leaf* to delineating the contours of the limited exceptions which exist to recovery for pure economic loss analysis to the consumer product context. In so doing, it has specifically distinguished this case from more broadly certified class actions by noting that they pre-dated or did not reference *Maple*

Leaf. *Carter*'s interpretation and application of *Maple Leaf* should now provide much greater certainty over what types of claims for pure economic loss are tenable and appropriately adjudicated on their merits.

Please contact the Bennet Jones' Commercial Litigation group, Class Action Litigation group or any of the authors for more information about any of the cases or issues discussed in this post.

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BRITISH COLUMBIA COURT OF APPEAL CLARIFIES LIMITS ON RIGHT OF SUBROGATION

By: Sabdeep Sidhu

Often times, before an injured plaintiff settles a claim with a defendant, or receives a court award, they receive “collateral benefits” from third parties to help cover medical expenses, missed time from work, or other losses sustained due to their injuries. Since the law only requires defendants to put a plaintiff back in the position they would have been in if they were never injured, questions about when a defendant can deduct a collateral benefit paid to a plaintiff frequently arise.

The general rule is that defendants can deduct collateral benefits from what they may owe the plaintiff. However, there are a number of exceptions to this. If the collateral benefit was a voluntary payment or gift or if it falls within the “private insurance” exception, defendants cannot deduct the benefit.

The most common exception is when the party that provided the collateral benefit has a right of subrogation, since allowing defendants to deduct the collateral benefit would deprive the third party of their right to recover what they paid to the plaintiff to the unjust benefit of the defendant.

The recent BC Court of Appeal decision *Provost v. Dueck Downtown Chevrolet Buick GMC Limited et al* 2021 BCCA 164 provides guidance on what third parties need to do to ensure they have a right to subrogation and clarity on when deductions are available for defendants.

Prior to ***Provost,*** a line of cases in BC allowed a third party to assert a right of subrogation so long as they indemnified the injured plaintiff, even if there was no contract of indemnity between them. ***Provost*** has overturned these cases, finding that a third party only has a right of subrogation if it has an indemnity contract with the plaintiff.

Background

Provost concerned personal injuries an RCMP officer sustained while involved in a police chase (the “Accident”). At trial, the court awarded $461,142.29 in damages.

$36,995.00 of the damages award was for wage loss and other benefits the plaintiff received from the RCMP following the Accident (the “RCMP Payments”). The RCMP Payments were not made pursuant to a legally binding obligation, but rather were part of the RCMP's long standing practice to pay full wages to officers injured in the line of duty.

At trial, the judge found the Attorney General of Canada ("AG Canada"), on behalf of the RCMP, had an equitable right of subrogation since the RCMP had fully indemnified the plaintiff and that this equitable right of subrogation existed even without a contract between the plaintiff and the RCMP.

The issue on appeal was whether the trial judge erred by including the RCMP Payments as part of the damages award. Specifically, the appellants argued the judge erred by finding AG Canada had right of subrogation despite it not having a contract of indemnity with the plaintiff.

A secondary issue was whether the RCMP Payments qualified under the voluntary payments exception because, if they did, the trial judge's order could stand.

The Ruling

The appellants argued the trial judge erred in finding that a simple payment to the plaintiff granted AG Canada subrogation rights. The appellants relied on two BC Court of Appeal decisions that were not brought to the trial judge's attention, both of which endorsed the position that a contract must exist between parties for a right of subrogation to exist.

AG Canada argued that an equitable right of subrogation can exist absent a contract if: 1) it is necessary to prevent unjust enrichment; 2) the third party benefactor fully indemnified the plaintiff; and 3) the third party has not waived its right of subrogation.

In the end, the Court determined that for a right of subrogation to exist, the payment by a third party to the plaintiff must be made pursuant to a contract of indemnity. Without that contract, any payments made by a third party do not, on their own, give rise to a right of subrogation.

The Court also determined that equitable subrogation only applies if a contract of indemnity exists between parties but it does not include an express *contractual term* outlining the right of the subrogation. In that situation, equitable subrogation can be used by a third party to assert a right of subrogation where they made a payment to the plaintiff under the contract. However, this does not allow a third party to assert a right of subrogation if it made a payment to the plaintiff but does not have an underlying indemnity contract with the plaintiff.

As for whether the RCMP Payments fell under the voluntary payment exception, the Court found it could not rule on the issue: the evidentiary basis was lacking because AG Canada did not argue the RCMP Payments were voluntary payments at trial, and the appellants would be unduly prejudiced if AG Canada was allowed to adopt the position for the first time at the appeal.

As such, the Court deducted the RCMP Payments from the damages award.

Practical Considerations

Ultimately, ***Provost*** clarified that in order for a third party to assert a right of subrogation it must have made a payment to the plaintiff pursuant to a contract of indemnity. Absent such a contract, a third party cannot rely on equitable subrogation to assert a right of subrogation.

For parties providing collateral benefits, ***Provost*** demonstrates that in order to recover the benefits pursuant to a right of subrogation, you need to ensure a formal contract of indemnity is in place. At the very least, you should have a contract with the plaintiff where the plaintiff agrees to repay you from any judgment or settlement they receive. The corollary to this is that without a contract of indemnity a party should be wary of providing collateral benefits since they may not be able to recover them.

Provost could also be a useful tool for defending certain claims as it allows defendants to claim deductions when no indemnity contract exists between a third party and an injured plaintiff. However, the fact that the voluntary payment issue was not addressed means ***Provost*** may be of limited use. The Court of Appeal indicated in ***Provost*** that if AG Canada had handled the case differently, the voluntary payment exception might apply. As such, if a plaintiff can show a payment they received was a voluntary payment the defendant cannot claim a deduction.

Should you have any questions about this article, contact Insurance Lawyer, Sabdeep Sidhu here.

/Carey

News Alerts

Pro Consumer bill is unanimously approved by the Senate and sent to the Executive for enactment

On August 10th, 2021, the Senate unanimously approved the final text of the Pro Consumidor bill - Bulletin No. 12,409-03-. The Bill is known as the "Pro-Consumer Bill", since it amends Law No. 19,496 Consumer Protection Act ("CPA"), seeking to reinforce the rights of consumers and incorporate new obligations for suppliers.

Despite having been approved unanimously by the Senate, several members of the ruling party requested the executive to veto the reformulation of the final paragraph of article 17H of the law, which establishes the prohibition of the application of exclusive discounts associated to a means of payment managed or operated by the same supplier, by a related company or by a company supporting the transaction, which has been called the Bianchi indication.

The remaining content of the bill has already been approved and is pending enactment by the Executive. A detailed brief of the modifications to the CPA are available in this link. https://www.carey.cl/en/pro-consumer-bill-that-amends-the-consumer-protection-act-moves-forward-after-being-approved-by-the-chamber-of-deputies/

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Legal Commentary

July 29, 2021

The Next Stage of Data Export Compliance

Authors: David TANG | Michelle GON | Chen MA

China has recently taken a series of actions to safeguard data security, particularly with respect to cross-border transfers of sensitive data. These actions include the following.

- **June 10**. The NPC Standing Committee adopted the *Data Security Law of the People's Republic of China*[1] (the "**Data Security Law**"), which will provide greater clarity for cross-border data transfer requirements and, among others, strengthen oversight of data provided to foreign law enforcement and judicial authorities.

- **July 6**. The Chinese cyberspace authority issued a take-down order of Didi apps from domestic app stores over data security concerns, following the company's high-profile U.S. public listing. Chinese authorities have since commenced a cybersecurity review of Didi's operations.

- **July 6**. The central government issued important policymaking opinions that call for capital market reforms, including increased supervision of overseas-listed companies, enhancement of related data security matters, and increased intergovernmental cooperation, among others.

- **July 10**. The Chinese cyberspace authority issued an exposure draft of proposed revisions to the *Measures for Cybersecurity Review*, which highlights the authority's position toward enhancing reviews of data security requirements in China, notably with respect to large-scale data processing activities and foreign public listings of certain Chinese companies.

These developments in part reflect the clear intent of the Chinese government to restrict sensitive data flows between China and foreign jurisdictions and their government authorities. In this article, we provide highlights of these developments as they relate to cross-border data transfer compliance. We then provide our insights and recommendations as we move toward the next stage of cross-border data transfer compliance in China.

Precursors: Cybersecurity Law and piecemeal approach to cross-border transfer restrictions and approvals

[1] 《中华人民共和国数据安全法》 [Data Security Law of the People's Republic of China] (29 Standing Comm. 13 Nat'l People's Cong., P.O. 84; adopted June 10, 2021, effective Sept. 1, 2021).

Restrictions in China on cross-border data flows are not new. The *Cybersecurity Law of the People's Republic of China*[2] (the "**Cybersecurity Law**") formally imposed in 2017 certain data localization and cross-border transfer requirements. The Cybersecurity Law at Article 37 requires localization and cross-border transfer assessments for operators of critical information infrastructure ("**CII operators**") that intend to transfer cross-border either personal information or so-called "important data". As many readers will attest, the compliance environment for CII operators and cross-border data transfers under the Cybersecurity Law has continued to be murky, despite a series of proposed rulemakings intended to better define these requirements.

Following the Cybersecurity Law, other laws have restricted cross-border data transfers of certain types of data and in specified instances. Competent authority approval is generally required under these circumstances.

- **Foreign authority investigations and data transfers**. Restrictions were imposed for evidence gathering by, and cooperation with, foreign authorities in China in the context of civil matters (2017)[3] and criminal matters (2018)[4,5]. These legal developments generally reiterate the need for parties to adhere to protocols of existing treaties or to obtain Chinese competent authority approval before cooperating with foreign authorities in evidence gathering and related activities. Similar legal provisions have been adopted specifically in the context of foreign securities regulatory investigative activities (2020)[6].
- **Industry-specific data transfer restrictions**. Competent authority approval is required by law for cross-border transfers of certain types of sensitive data. For example, genetic materials are now subject to strict limitations and approval requirements for cross-border transfer, such as for use in clinical trials[7].

Highlights of recent developments

I Data Security Law

In this regard, we observe the Data Security Law assists in better classifying types of sensitive data, reiterates general cross-border data transfer requirements, and imposes broader oversight of data to

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[2] 《中国人民共和网络安全法》 [Cybersecurity Law of the People's Republic of China] (24 Standing Comm. 12 Nat'l People's Cong., P.O. 53; adopted Nov. 7, 2016, effective June 1, 2017).

[3] 《中华人民共和国民事诉讼法》 [Civil Procedure Law of the People's Republic of China] art. 277 (restricting foreign civil investigative activities) (*as amended by* 28 Standing Comm. 12 Nat'l People's Cong., P.O. 71; adopted June 27, 2017, effective July 1, 2017).

[4] For further insights, see *A Look at China's New Criminal Judicial Assistance Law* (Han Kun Law Offices, Nov. 22, 2018).

[5] 《中华人民共和国国际刑事司法协助法》 [Law of the People's Republic of China on International Judicial Assistance in Criminal Matters] art. 4 (requiring competent authority approval to assist in foreign criminal investigations) (6 Standing Comm. 13 Nat'l People's Cong., P.O. 13; adopted and effective Oct. 26, 2018).

[6] 《中华人民共和国证券法》 [Securities Law of the People's Republic of China] art. 177 (restricting foreign securities investigative activities) (*as revised by* 15 Standing Comm. 13 Nat'l People's Cong., P.O. 37; adopted Dec. 28, 2019, effective Mar. 1, 2020).

[7] 《中华人民共和国生物安全法》 [Biosecurity Law of the People's Republic of China] art. 56 et seq. (imposing restrictions on cross-border transfer of genetic materials) (22 Standing Comm. 13 Nat'l People's Cong., P.O. 56; adopted Oct. 17, 2020, effective Apr. 15, 2021).

be transferred to foreign law enforcement and judicial authorities. We address each of these in turn.

- **Data classification.** The Data Security Law calls for important data classification catalogues to be developed by each industry competent authority. In addition, the law introduces a new type of data, "core state data", which will be subject to stricter oversight and is defined as "data that are related to national security, lifelines of the national economy, and are important to people's livelihoods and major public interests." Cross-border data transfer restrictions will no longer be based on the transferor's designation as a CII operator, but rather based on the nature and importance of the data.

- **Clarity for transfer requirements.** The Data Security Law reiterates that CII operators must follow the Article 37 requirements of the Cybersecurity Law, while empowering the Chinese cyberspace and other authorities to formulate separate rules for other data processors. We expect these provisions to allow the authorities to provide further clarity for business operators in China to comply with Article 37.

- **Restrictions as to foreign law enforcement authorities.** The Data Security Law stipulates that, absent an applicable treaty, intergovernmental agreement, or reciprocity, the Chinese competent authorities must approve *any* transfer of data in China to foreign law enforcement and judicial authorities. This blanket approval requirement adds clarity to the previous piecemeal approach adopted in prior legislation.

II Policymaking opinions and Revision Draft to the Measures for Cybersecurity Review

1. Policymaking opinions

On July 6, 2021, central policymakers issued important opinions on reforming China's capital markets, *Opinions on Strictly Cracking Down on Illegal Securities Activities in Accordance with the Law*[8] (the "**Opinions**"). The Opinions call for enhancing law enforcement in China's capital markets and set certain goals in this regard to be achieved by 2025. In relevant part, we observe that the Opinions call for (i) strengthening cross-border regulatory and judicial cooperation and enforcement; and (ii) improving laws and regulations in respect of data security, cross-border data flows, and the management of confidential information.

2. Proposed revisions to the Measures for Cybersecurity Review

China's cyberspace authority issued on July 10, 2021 an exposure draft[9] of proposed revisions to the *Measures for Cybersecurity Review*[10] (the "**Measures**"; the "**Revision Draft**"). The Measures presently require a cybersecurity review process for the procurement activities of CII operators that

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[8] 《关于依法从严打击证券违法活动的意见》 [Opinions on Strictly Cracking Down on Illegal Securities Activities in Accordance with the Law] (Gen. Office Cent. Comm. CPC, Gen. Office St. Council; promulgated July 6, 2021).

[9] 《关于《网络安全审查办法（修订草案征求意见稿）》公开征求意见的通知》 [Circular on Seeking Public Comments for the Measures for Cybersecurity Review (Revision Draft for Comment)] (Cyberspace Admin. China; issued July 10, 2021 for public comment until July 25, 2021).

[10] 《网络安全审查办法》 [Measures for Cybersecurity Review] (Cyberspace Admin. China et al, Decr. 6; promulgated Apr. 13, 2020, effective June 1, 2020).

could affect national security. However, the Revision Draft would:

A. Expand the scope of cybersecurity reviews to include:

- Data processors whose data processing activities could affect national security; and
- Foreign listings of CII operators and data processors that hold the personal information of more than 1 million individuals.

B. Consider in cybersecurity reviews procurement activities, data processing activities, and foreign listings that:

- Could risk core data, important data, or a large amount of personal information being stolen, leaked, destroyed, and illegally used or exiting China; and
- Could risk CII, core data, important data, or a large amount of personal information being influenced, controlled, or maliciously used by foreign governments after listing in foreign countries.

The Revision Draft would adapt the Measures to realize relevant provisions of the Data Security Law and the Opinions by mandating competent authority review and approval for potential cross-border transfers of personal information and important data by CII operators and data processors in the context of foreign listings.

Han Kun's observations

Taken as a whole, we believe the Data Security Law may have finally ended the years-long wait for an expected step up in administrative rulemaking and enforcement activity around cross-border data transfers. We have the following observations at the current juncture.

I The Data Security Law provides a clearer roadmap for administrative rulemaking around data classification and cross-border transfer requirements

Upon adoption of the Data Security Law, we now see the following important highlights for data classification.

- **Core state data**. Core state data will presumably be prohibited from transfer cross-border, although the scope of core state data is to be further clarified by administrative rules and/or national standards.
- **Important data and personal information (CII operators)**. The Data Security Law reiterates the Cybersecurity Law Article 37 requirements, we expect localization and competent authority approval for cross-border transfers of personal information and important data.
- **Important data and personal information (network operators).** Other network operators will be subject to to-be-formulated administrative rules that we expect will be more relaxed in scope.
- **Provision of data to foreign authorities.** As opposed to the former piecemeal approach, Chinese lawmakers have taken a clear position on the provision of data to foreign law enforcement

and judicial authorities – no provision without approval, absent an applicable treaty, intergovernmental agreement or reciprocity.

The Data Security Law provides an important milestone for advancing administrative rulemaking in respect of cross-border transfers. Already, the Revision Draft clearly contemplates the cross-border transfer of important data and personal information when it proposes a cybersecurity review for foreign listings of CII operators and other companies that hold such data. We expect more rulemaking on cross-border data transfers to be forthcoming.

II “Foreign law enforcement authority” to be broadly defined, presumed to include foreign securities authorities

The Data Security Law, by its language, will apply to all provisions of data to foreign law enforcement and judicial authorities. This will include evidence gathering and information requests for foreign criminal proceedings, civil proceedings, and administrative investigations. We believe the term “**foreign** law enforcement authority” should be viewed broadly, including foreign securities and other authorities. This is reflected in the Opinions, which envision greater intergovernmental cooperation with foreign jurisdictions in respect of capital markets.

III Emphasis on treaties and intergovernmental agreements, uncertainty around other foreign authority data transfers

Intergovernmental agreements currently exist for the cross-border transfer of data. For example, a joint regulatory cooperation memorandum exists between the U.S. securities authority, the Securities and Exchange Commission, and its Chinese counterpart regarding the production of evidence in connection with foreign securities litigation and investigative proceedings. In this case, once the Data Security Law takes effect, we believe evidence production to the U.S. securities authority will more or less follow the same protocol; except that the necessary requirements under the Data Security Law must be followed with respect to “important data” and “core state data”, for which the Revision Draft provides a prelude.

It remains unclear how the Data Security Law will apply to other foreign proceedings that are not subject to an existing treaty or intergovernmental agreement, such as cartel investigations, consumer protection class actions, and ordinary commercial litigation. Based on the Data Security Law, as long as the data receiver is a foreign law enforcement or judicial authority, approval by a Chinese competent authority will be required.

IV Business operators in sensitive industries must be mindful

Business operators in sensitive industries that intend to transfer data cross-border may be subject to industry-specific legal requirements. These include operators in the biotechnology and life sciences industries. It is necessary to identify and observe these industry-specific requirements when structuring business arrangements.

V Enforcement has begun, compliance cannot be an afterthought

We believe the recent Didi app take-down order and cybersecurity review actions to represent a milestone case of enforcement vis-à-vis cross-border data transfers. Viewed as such, these actions set the tone for future enforcement and compliance activities. The future is now to comply with cross-border data transfer requirements.

Recommendations

The restrictions on cross-border data transfers have been long awaited. As we discuss, we expect administrative rulemaking to provide further guidance in this area soon, with the Revision Draft being only the first of many such developments. In this respect, we recommend business operators to take the following actions.

- Data classification will be critical. Create internal controls that classify data types and establish protocols for cross-border transfers.
- Allocate more resources to cross-border transfer compliance. Besides a general increase in enforcement activities, we anticipate cross-border transfer reviews and assessments may serve as a tool to counter foreign sanctions and advance policy interests.
- Consult with counsel before completing cross-border transfers of data to foreign law enforcement or judicial authorities to determine the applicable approval requirements.
- Continue to monitor administrative rulemaking and standard setting in this area to ensure continued compliance with the Data Security Law and other applicable provisions.

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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Colombia and Turkey agree to grant temporary importation benefits

13 August 2021

Temporary importation shall be granted with total suspension of import duties and taxes and without application of import prohibitions or restrictions of an economic nature.

The goods that are subject to these benefits are detailed in the annexes of Law 2145 of 2021. Some examples are sporting goods, some transportation means, merchandise for humanitarian and educational purposes, animals, containers and pallets.

Goods (including means of transport) that are temporarily imported must be re-exported within a fixed period of time, which is considered sufficient to fulfill the purpose of the temporary importation.

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

COSTA RICA

APPROVAL OF NEW LAWS BENEFITTING FOREIGNERS RELOCATING TO COSTA RICA (DIGITAL NOMADS, INVESTORS, RENTERS, RETIREE)

Jul/2021

In order to increase foreign investment and flow, Costa Rican Government has approved Law Project Number 22,215: Law to attract international workers and remote service providers and Bill 9996 (which has already been published and is already in effect): Law to attract investors, renters and retirees.

Law to attract international workers and remote service providers: a new Immigration category of estancia in Costa Rica called "International Worker or Remote Service Provider" is created. This category will apply to those foreigners who have a fixed and stable monthly income of USD 3,000. In case it is a complete family (children, spouses, elderly), the required income will increase to USD 4,000. This worker will be exempt from paying income tax, nor will he/she be considered a habitual resident of Costa Rica for taxing purposes. The foreigner will also be able to import basic personal computer, telecommunications, or similar equipment necessary to fulfill work tasks, without paying importation taxes.

Law to attract investors, renters and retirees: this law aims to attract foreign residents to Costa Rica by providing various benefits that will make the country more attractive to those benefited by the law. These benefits include duty free and import taxes on household goods, import tax exemption for up to 2 vehicles, exempt from income tax, exemption of 20% of the real estate transfer tax and exemption from import taxes for professional or scientific practice tools.

Finally, although this is good news for expatriates, the regulations (bylaws) for both laws are yet to be issued, which will deepen and further specify each law and its specific application.

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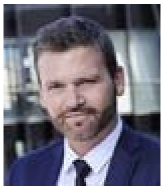
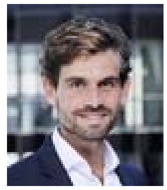
GIDE
GIDE LOYRETTE NOUEL





Franck Guiader   John Le Guen   Matthieu Lucchesi

Combating money laundering and terrorist financing (AML/CFT): a European Commission proposal for a stronger European Framework

21 July 2021

On 20 July 2021, the European Commission published a set of proposals to improve the fight against money laundering and terrorist financing in the European Union (AML/CFT). Its aim is to strengthen its provisions in this area, ensuring in particular that they are suited to market developments, particularly with regard to the development of crypto-assets. The European Commission is also proposing the creation of a European authority on AML/CFT.

On 20 July 2021, the European Commission published four reform proposals aimed at comprehensively strengthening AML/CFT in the European Union. These proposals include:

- a draft European regulation for the creation of a European AML/CFT authority, with specific tasks and powers *vis-à-vis* certain market players and national supervisory authorities;
- a draft directive, known as the "Sixth Directive", to amend the existing EU directive governing AML/CFT in the European Union;
- a draft regulation, which would complement the above-mentioned Sixth Directive to provide directly applicable rules within Member States in the areas of customer due diligence and beneficial ownership for obliged entities;
- a draft amendment to EU Regulation 2015/847/EU on money transfers, to provide for specific obligations on crypto-asset service providers, in line with the recent work of the Financial Action Task Force (FATF).

The publication of these proposals was announced in May 2020 by the European Commission in its AML/CFT Action Plan and taken up in July 2020 in the Commission's Communication on the European institutions' Security Union Strategy.

This initiative marks a strong political will to make the European Union a reference in AML/CFT with regard to international standards, by reinforcing the obligations of the players and the effectiveness of the supervision mechanisms. To this end, the proposals pay particular attention to certain issues, particularly the crypto-assets sector and coordination with third countries.

These proposals will now be submitted to the European Parliament and the Council, with the aim of having this reform operational by 2024. Their publication by the European Commission also gives market players the opportunity to actively contribute to the definition in the European Union of a regulatory framework that is relevant to their activities.

Useful link: Beating Financial Crime (europa.eu)

Hogan Lovells

A "magical incantation" - Hong Kong court warns it will carefully examine restructuring viability

10 August 2021

The Hong Kong court has taken aim at Hong Kong-listed companies that are incorporated offshore, carry on business primarily in the mainland and that appear to want to engineer de facto moratoria on winding-up actions often to the detriment of the company's creditors. Insolvency proceedings launched from offshore "letterbox" jurisdictions – and where the powers of the provisional liquidators to properly supervise any restructuring appear light – are less likely in future to receive recognition and assistance in Hong Kong.

In four similar decisions, the Hong Kong companies court has taken aim at Hong Kong-listed companies that are incorporated offshore, carry on business primarily in the mainland and that appear to want to engineer de facto moratoria on winding-up actions often to the detriment of the company's creditors.

In *Li Yiqing v. Lamtex Holdings Limited* [2021] HKCFI 622, *Re Ping An Securities Group (Holdings) Limited* [2021] HKCFI 651, *Re Joint Provisional Liquidators of China Bozza Development Holdings Ltd.* [2021] HKCFI 1235, and *Re Joint and Several Provisional Liquidators of Victory City International Holdings Limited* [2021] HKCFI 1370, the Honorable Mr. Justice Harris criticized debtor companies for using "soft touch" provisional liquidation as a delaying tactic whilst remaining in control of the company under the supervision of provisional liquidators.

In a "soft touch" provisional liquidation, the company remains under the day to day control of the directors, but is placed under the general oversight of provisional liquidators. The approach, as it has evolved over time, is similar to debtor-in-possession under the United States Chapter 11 regime.

Over time, the powers granted to the provisional liquidators and the level of oversight exercised by officeholders appear to have dwindled in the cases being brought before the Hong Kong court, causing the court to rethink the merit of such applications.

Listed companies, similar issues

Lamtex Holdings Limited (Lamtex), Ping An Securities Group (Holdings) Limited (Ping An), and Victory City International Holdings Limited (Victory City) were incorporated in Bermuda while China Bozza Development Holdings Limited (China Bozza) was incorporated in the Cayman Islands. All four companies were listed in Hong Kong.

The companies were insolvent and were subject to winding-up petitions in Hong Kong. In each case, after the winding-up petition was presented in Hong Kong, the companies appointed soft-touch provisional liquidators in Bermuda and Cayman Islands and obtained letters of request from the respective courts seeking the recognition and assistance of the provisional liquidators for restructuring purposes.

Place of incorporation vs. centre of main interests (COMI)

As a general principle, the constitution and management of a foreign company is determined by the law of the place of its incorporation. Under common law and private international law, the Hong Kong court will cooperate with the courts in the country of the principal liquidation to ensure that the company's assets are distributed to creditors under a single legal system.

In Lamtex, Harris J. explored the question of whether primacy should be given to the proceedings in Bermuda, the place of incorporation, or Hong Kong, the company's COMI, for the purposes of winding-up of the company and distribution of its assets.

The current position in Hong Kong is that recognition and assistance of foreign liquidators is limited to providing assistance in respect of foreign insolvency proceedings commenced in the company's place of incorporation and where there is an equivalent provision in Hong Kong law to the type of assistance being sought.

However, Harris J. suggested that there was no particular rule that prevented the recognition and assistance of liquidators appointed in a company's COMI or a jurisdiction with which it has a strong connection. If a company's assets, management, and creditors had little connection with the place of incorporation, it would be more efficient and effective for an insolvency process to be managed out of the location of the COMI.

Harris J. commented that, "ultimately... this means that which insolvency process should be given primacy will depend on the circumstances of the case and involve giving appropriate weight to the location of a company's COMI."

Stalling tactics?

Lamtex, *Ping An* and *China Bozza* represent a continuation of themes first advanced in *Re FDG Electric Vehicles Ltd* [2020] HKCFI 2931(see Hogan Lovells client alert *Managing misconceptions: Hong Kong court issues dual warnings over cross-border insolvency*), in which the court held that an offshore provisional liquidation order would not lead to an automatic stay of the Hong Kong winding-up proceedings.

Harris J. granted a winding-up order in *Lamtex* and adjourned the petition in Ping An, the key difference being that the court felt that *Lamtex* had no prospect of a viable restructuring while *Ping An* had already demonstrated some progress with its restructuring plans.

In *Lamtex*, the company failed to demonstrate a good reason (i.e. a credible restructuring plan at the time of appointment of provisional liquidators) as to why the petition should be adjourned. Harris J. criticized the information provided about the restructuring as being "scanty in the extreme."

It seemed more likely to the court that the application in Bermuda was an attempt to engineer a de facto moratorium which could not be obtained under Hong Kong law, with a view to then search for a way out of the company's financial problems. Harris J. commented that this was a questionable use of soft-touch provisional liquidation and warned that the court would view future applications with care.

In *Ping An*, Harris J. applied *Lamtex* and reiterated that, when faced with a Hong Kong petition to wind up a foreign incorporated company whose COMI is located in Hong Kong, primacy was not automatically to be given to a soft-touch provisional liquidation in the place of incorporation, where the purpose of the application appeared to be to gain time to formulate a restructuring proposal.

The company would still be required to satisfy the criteria by reference to which the Hong Kong court assess applications on similar grounds by companies incorporated in Hong Kong. If the company were unable to do so, it would be wound up and an application for recognition of the soft-touch provisional liquidation denied.

Harris J. cited his previous decision in *Re China Huiyuan Juice Group Ltd*. [2020] HKCFI 2940 regarding the test for determining whether the company has satisfied the requirements allowing for petitions to be adjourned (see Hogan Lovells client alert *Show us the evidence – Hong Kong court sets out principles on the adjournment of winding-up petitions*).

The court held that the restructuring plan was straightforward as it involved the subscription for new shares by the chief executive director of *Ping An*, which served as a loan to provide working capital for the company. The approval process and completion of subscription agreement would take about two months, which was the adjournment period that the provisional liquidators of *Ping An* were seeking.

Application refused

In *China Bozza*, although Harris J. recognized the appointment of the provisional liquidators under private international law grounds, he refused to grant an order granting them active assistance. He expressed his concern that the approach used to facilitate soft-touch restructuring, known as the Z-Obee technique (named after the case of *Re Z-Obee Holdings Ltd* [2018] 2 HKLRD 338, in which the technique was first used) was "being abused to obtain a de facto moratorium of enforcement action by creditors in Hong Kong."

Harris J. noted that the Cayman Islands courts' criteria for adjourning winding-up petitions appeared to be less onerous than the test used by the Hong Kong court and emphasized the need for evidence that describes a company's financial position and a possible solution. He commented that, "simply referring to a possible 'debt restructuring' and treating the expression as a kind of magical incantation, the recitation of which will conjure up an adjournment of the petition is as inadequate as it is facile."

The court went on to criticize both the board for focusing on their own interests rather than on those of the creditors, and the provisional liquidators for, "selling their ability to find an investor and work with it to avoid a liquidation and retain some shareholder value. The creditors were a group to be bought off; not the group whose financial interests took priority to other considerations."

In the most recent decision, *Victory City*, which concerned a company incorporated in Bermuda and with its principal place of business in Hong Kong, Harris J. granted the application by Hong Kong and Bermudan liquidators for recognition and assistance whilst making further comments on the misuse, as he saw it, of soft-touch provisional liquidation.

He suggested that often "the companies that use (provisional liquidations) are more concerned with the interests of the owners with whom the board is aligned than the creditors" and also, referring to the appointment of the initial provisional liquidators said to be for "restructuring purposes", cited the "involvement of professionals who are not ensuring that creditors' interests are being properly protected."

The importance of COMI

The concept of COMI is underlined in the new cross-border insolvency cooperation mechanism between mainland China and Hong Kong (see Hogan Lovells client alert *Hong Kong and mainland China agree new co-operation mechanism for cross-border insolvency*).

For mainland China insolvency proceedings to be recognized in Hong Kong, it must be demonstrated that Hong Kong has been the debtor's COMI for a continuous period of at least six months at the time of making the application. The likely purpose of including the six-month track record requirement is to prevent forum shopping, which is consistent with the use of COMI in determining eligibility of recognition and assistance as discussed in *Lamtex* and *Ping An*.

In all four cases, the soft-touch provisional liquidators were appointed by a court in the offshore jurisdiction on application by the company. *Lamtex*, *Ping An*, and *Victory City* are now in liquidation.

Harris J. warned in *Victory City* that he will approach future applications for recognition and assistance which exhibit similar characteristics to these four cases with the "greatest circumspection." As the court is often guided by the views of creditors, it would be prudent for insolvent companies to seek creditors' support for the adjournment of petitions to avoid being wound-up and to be mindful of the directors' duties owed to creditors.

Taken together, the decisions show the way forward for cross-border insolvency recognition in Hong Kong, affirming that in the future, the Hong Kong court is likely to give primacy to insolvency proceedings in the company's COMI (i.e. Hong Kong) rather than its place of incorporation for the purposes of winding-up of company and distribution of the company's assets to creditors.

Insolvency proceedings launched from offshore "letterbox" jurisdictions – and where the powers of the provisional liquidators to properly supervise any restructuring appear light – are less likely in future to receive recognition and assistance in Hong Kong.

Authored by Jonathan Leitch, Yolanda Lau, and Nigel Sharman.

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Half-hearted refunds for inverted duty structure supplies

By Reena Khair & Shreya Dahiya

Even after four years of the introduction of Goods and Service Tax, there is a lack of clarity on many substantive and procedural issues. One such issue is the absence of complete relief from the ill effects of an inverted duty structure, that is where the GST rate paid on purchases is more than the GST rate payable on sales, resulting in an accumulation of credits. The difficulty arises because the taxpayer has to pay tax to its vendors on its purchases in cash. If it is unable to fully offset this tax against its output supplies, there will remain balances in the Credit Ledgers, affecting liquidity as well as creating an additional tax burden.

Even though the accumulation of credit could be a result of the rate of tax on inputs or input services being higher than the rate of tax on output supplies, Section 54 of the CGST Act, 2017 read with Rule 89 of the CGST Rules, 2017 appears to provide for refund of accumulated credit only in respect of inputs. The fate of credits relating to input services remains unclear.

Initially, when GST was introduced in 2017, Rule 89 allowed refund of credits for both goods and services, but by a retrospective amendment, the refund of credit has been restricted to inputs. The retrospective amendment is not only inequitable but has resulted in litigation before different High Courts yielding divergent views on the issue.

The Gujarat High Court in its judgment, in the case of VKC Footsteps India Pvt. Ltd. Vs. Union of India has struck down that part of Rule 89 which denies refund of unutilized credit on input services as ultra vires Section 54 of the Act. The Gujarat High Court has observed that keeping in mind the scheme and object of the CGST Act, it cannot be the intent of the government, while framing the rules, to restrict the statutory provision providing for refund of tax paid on input services, as part of refund of unutilized tax credit.

Taking a contrary position, the Madras High Court, in the case of TVL. Transtonnelstroy Afcons Joint Venture Vs. Union of India, has held that Section 54 provides for benefit only on unutilized credit accumulated on account of inputs used in the provision of output supplies and not on input services. The High Court also holds that differentiation between inputs (goods) and input services is a valid classification and not violative of Article 14 of the Constitution of India.

Noting the difference in opinion of the Madras and Gujarat High court, the Supreme Court is now seized of the matter and will take a final view on the issue. In the interim taxpayers have been left to suffer the ill effects of the inverted duty structure and face uncertainty in taking business and financial decisions.

The GST Council has also considered this issue from time to time but has not offered any tangible solutions to the problem, so far. The Government has assured industry, that this issue will be addressed by the Council in its upcoming meetings.

While we wait for the outcome of the cases pending before the Supreme Court, the government must look beyond revenue considerations, and remove the ambiguity in the GST law. This anomaly puts those facing inverted duty structure at a significant disadvantage as compared to other taxpayers, who are able to pass on their tax liability in full to their customers.

Needless to say, that the inverted duty structure is a creation of the Government and not the taxpayer, and therefore there appears to be no justification for the reluctance to allow refund of the tax paid on input services, where credits accumulate due to the lack of avenues for utilization.

The failure to adequately address this problem has meant higher manufacturing costs for production units in textiles, steel, rubber, footwear, etc., who are already suffering from the slow demand due to the covid pandemic. If the Government is serious about programs like the Make in India and Atmanirbhar Bharat, it will have to be more proactive in finding answers to problems affecting the viability and competitiveness of manufacturing in India.

For any queries, you may reach Reena Khair at reena.khair@kochhar.com

x------------------------------x

SKRINE

Recognition of Peer-to-Peer (P2P) Financing By The Court

11 AUGUST 2021

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In the case of ***Pyo Travel (MY) Sdn Bhd & Anor v Modalku Ventures Sdn Bhd*** **[2020] MLJU 575**, the Malaysian High Court affirmed the Sessions Court's decisions in granting summary judgment in favour of Modalku Ventures Sdn Bhd ('the Plaintiff'). The Plaintiff was represented by Messrs Skrine.

In the two appeals heard together, Justice Darryl Goon (now Court of Appeal Judge) found that there were no issues to be tried in both the Plaintiff's suits against the borrowers and their guarantors ('the Defendants') for default of financing. The decision is significant as it is the first reported case whereby the Court analysed the legality of peer-to-peer financing, a growing Fintech business model which is gaining popularity in Malaysia.

Key points

a. Peer-to-Peer financing is outside the ambit of the Moneylenders Act 1951.

b. Modalku Ventures is legally licensed by the Securities Commissions to provide financial facilities.

c. The interests charged by Modalku Ventures of between 12.5% to 15% per annum and late payment interest of 0.10% were not illegal, unconscionable nor exorbitant.

d. Modalku Ventures has *locus standi,* or the capacity to bring an action to court, against the borrowers, despite Modalku Ventures acting as 'Agents' between named 'Investors' and the borrower.

Background

The Plaintiff acting as an 'Agent' of a list of investors ('Investors') granted financial facilities to the Defendants through its electronic platform. The facilities were secured by an Investment Note Facility Agreement ('INFA') executed by the Plaintiff, the Defendants and the Plaintiff's Investors. The Plaintiff is a Recognized Market Operator registered with the Securities Commission and the electronic platform is governed by the Capital Markets and Services Act 2007.

The Defendants defaulted in payments. The Plaintiff commenced two separate suits at the Sessions Court for RM648,311.26 against the Defendants in the first suit and RM595,221.57 against the Defendants in the second suit. The Sessions Court granted Summary Judgment and the Defendants appealed to the High Court. As the individual guarantors, issues raised and counsel for parties in both suits were the same, the High Court heard both appeals together.

Issues

The issues to be tried raised by the Defendants before the High Court were *inter alia*, as follows:

i. The Plaintiff and the Plaintiff's Investors were not legally licensed to provide the financing facilities and therefore the facilities provided and the contracts entered into were illegal;

ii. The interests charged were illegal, unconscionable, and exorbitant;

iii. No consideration was provided between the Plaintiff and the 2nd Defendant in respect of both the financial facilities provided, and if they were, they were past consideration; and

iv. The Plaintiff did not have *locus standi* to initiate legal proceedings for recovery of the moneys in respect of the financial facilities provided.

Decision of the High Court

The High Court held, *inter alia,* the following:

a. <u>The Plaintiff was, and is, legally licensed to provide financing facilities</u>

The Plaintiff is legally licensed to provide financial facilities under the purview of the Capital Market Services Act 2007. As such, the Plaintiff's financing is exempted from the provisions of the Money Lenders Act 1951 ("MA 1951"), as per Section 2A(1) and Paragraph 12 (now Paragraph 10) of the First Schedule of the MA 1951.

Moreover, the High Court accepted that the Plaintiff was registered with the Securities Commission as a Recognised Market Operator as per section 34 of the CMSA 2007, and therefore legally licensed to provide financing facilities. It follows that the facilities provided and the contracts entered into were at all material times legal.

b. <u>The interests charged by the Plaintiff were not illegal, unconscionable nor exorbitant</u>

Darryl Goon J (as he then was) observed that the Defendants have not denied agreeing to the terms of the INFA regarding the interests rate. If at all, the rates of interest chargeable may be alleged to be a penalty under section 75 of the Contracts Act 1950 whereby the Plaintiff can only recover reasonable compensation for the breach of the contract not exceeding the penalty stipulated. However, following the Federal Court decision of *Cubic Electronics Sdn Bhd (In Liquidation) v Mars Telecommunications Sdn Bhd* [2019] 2 CLJ 723, the burden would be on the Defendants to demonstrate that the interests charged were unreasonable which, in the two appeals, was not done.

c. <u>The Plaintiff had *locus standi* to initiate legal proceedings despite the fact that the Plaintiff acted as 'Agents' between the Plaintiff's Investors and the Defendants</u>

The High Court found that the Plaintiff had *locus standi* to initiate legal proceedings against the Defendants, on the basis that the Plaintiff was a party to the INFA in question.

Being a party and privy to the agreements, the Plaintiff had the right to sue on it as may any party to a contract seeking to enforce it. In addition, a clause within the INFA allowed the Plaintiff to commence legal proceedings against the Defendants as an Agent for the Investors for default of repayments.

Therefore, though it was the Plaintiff's investors and not the Plaintiff itself who had advanced monies to the Defendants via the Plaintiff's electronic platform, the Plaintiff still had *locus standi* to pursue legal proceedings against the Defendants.

Comment

This is a significant decision as it is the first reported decision whereby the terms and conditions governing peer-to-peer lending have been tested in court. It is also a much welcomed decision as peer-to-peer lending gains popularity amongst investors and borrowers in Malaysia as a new way of financing through electronic platform.

If you have any queries, please contact our partner, <u>Ms. Claudia Cheah Pek Yee</u> (<u>cpy@skrine.com</u>), senior associate, <u>Ms Aufa Radzi</u> (<u>aufa.radzi@skrine.com</u>) and associate <u>Mr. Kwang Qi Xiang</u> (<u>qi.xiang@skrine.com</u>).

August, 2021

How will the amendments to the Civil Code and the Public Notary Law of Mexico City impact real estate transactions in Mexico City?

On August 4, 2021, the Decree whereby articles of the Civil Code for Mexico City (the "Civil Code") and the Public Notary Law of Mexico City (the "Notary Law") were added and amended was published in Mexico City's Official Gazette.

Through these reforms, different concepts were introduced to the Civil Code that will help give greater certainty to the acts celebrated through electronic means. For these purposes, the following modifications, among others, were made:

a) **Offers**. When an offer is made by electronic or optical means or any other technology that allows the expression of the offer and the acceptance thereof, and when there is no time limit for the acceptance, if the offer is not accepted immediately, the offeror will no longer be bound by it.

b) **Formality**. When an agreement is required to be executed in writing, the related documents shall be signed by all those on whom such obligation is imposed, and this may be done by using the Advanced Electronic Signature or the Mexico City Electronic Signature.

In those cases in which the law provides as a requirement that a legal act must be executed before a notary public, such execution may also be made in the digital protocol entrusted to the notary public in the terms established by the Notary Law.

Along with the amendment to the Civil Code, the Notary Law was amended to incorporate provisions that will allow Notary Publics to act remotely, through digital means. Thus, the figure of Digital Notarial Intervention was incorporated to the Law, which shall be understood as the exercise of the notarial function through electronic or optical means or any other technology.

In addition, Electronic Certificates, the Notarial Electronic Signature, and Electronic Instruments were introduced; the latter will be the electronically signed deeds issued by Notary Publics in the exercise of their functions.

This reform revolutionizes and updates the notarial function by allowing the use of said means for the formalization of agreements that may require the intervention of a Notary Public, such as real estate purchase, sale agreements, and some real estate lease agreements, among others.

One of the main benefits may be reflected in a possible reduction in response times for the location of information thanks to the implementation of electronic indexes and computer systems for the storage of Electronic Instruments and, therefore, it can be foreseen that response times for the registration of notarial instruments in the Public Registry of Property and Commerce shall be expedited.

These amendments became effective as of August 5, 2021, except for the provisions related to the Digital Notarial Intervention and correlative concepts such as Digital Protocol, Electronic Instrument, Appendix of the Electronic Instrument, Book of Extracts, Electronic Signature for the Digital Notarial Intervention, and any other analogous or related to such activity, which will become effective two years after the date of the amendment's publication in Mexico City's Official Gazette.

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

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Modified entry into force of Management and Supervision of Legal Entities Act

24-06-2021

On 1 July 2021, the Management and Supervision of Legal Entities Act (Wet bestuur en toezicht rechtspersonen or WBTR) will enter into force. However, two parts will enter into force at a later – to be determined – date pursuant to the amended Act of 11 June 2021 (Stb. 2021, 284).

These parts concern the one-tier management model for associations, cooperatives, mutual insurance societies and foundations and the rules on absence and inability to act applicable to the board members of an NV. With regard to the one-tier management model, it did not yet appear technically possible to indicate in the trade register whether a board member is an executive or non-executive director. According to the minister for legal protection, these types of legal entities may still have a one-tier board structure, despite the current absence of a legal basis for this model. This practice can consequently continue unaffected. With regard to the rules on absence and inability to act applicable to the board members of an NV, it turned out that transitional provisions on this subject were inadvertently left out of the WBTR.

Therefore, it will be provided in a bill containing miscellaneous provisions, currently in preparation, that, upon the next amendment of their articles of association, NVs must include provisions governing the absence or inability to act of supervisory board members. This is in line with the transitional rules applicable to other corporate forms (the BV, association and foundation). In addition to this update on the new date of entry into force for certain parts of the WBTR, this newsletter provides an overview of the most important changes the WBTR will introduce.

Read the full newsletter here. (url: https://www.e-nautadutilh.com/40/4503/landing-pages/modified-entry-into-force-of-the-management-and-supervision-of-legal-entities-act.asp?sid=1ac34185-c0e9-4d26-bd75-6d9d79426976)

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ARIFA NEWS


Panama includes the Republic of Peru in the migratory category of Friendly Countries

On July 20, 2021, Executive Decree No. 226 was issued by which Peru was included in the list of friendly countries of the Republic of Panama.

Said Executive Decree shall be effective as of August 7 2021 and will offer new options to Peruvians interested in obtaining the status of residence in Panama, in order to exercise economic or professional activities in the country.

All interested parties must meet any of the following requirements:

(1) work in Panama,

(2) show your willingness to invest in real estate in Panama for a value not less than US$200,000.00, or

(3) must have a fixed term deposit with a minimum term of three (3) years for a value not less than US$200,000.00.

This permit will be granted for two (2) years. Once this period has elapsed, the interested party may apply for a Permanent Residence permit.

The expertise of our legal team spans thirty (30) practice areas including a full range of immigration, tax and corporate services.

You can find a PDF copy of this recently published Executive Decree attached to this note.

For detailed information on our services please contact

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Environmental, Social, and Governance (ESG) Investing in the Philippines

June 25, 2021

Broadly speaking, environmental, social, and governance (ESG) investing is understood as investing that incorporates ESG factors in investment decisions. It is often used interchangeably with the terms sustainable investing, responsible investing, ethical investing and impact investing.

The growing importance of ESG factors in investment decision-making was highlighted by Larry Fink, Chairman and Chief Executive Officer (CEO) of BlackRock, the world's largest asset manager, in his annual letter to CEOs in 2018. In the letter, Mr. Fink said, "[s]ociety is demanding that companies, both public and private, serve a social purpose. To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society. Companies must benefit all of their stakeholders, including shareholders, employees, customers, and the communities in which they operate."[1]

In the Philippines, regulators have in recent years steadily deployed a stream of policy measures designed to enable investors to consider ESG factors in their investment, and to encourage companies to behave in a manner that benefits society and the environment. These policy measures are discussed below.

[1] Larry Fink's 2018 Letter to CEOs: A Sense of Purpose, available at https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter.

Securities and Exchange Commission

Code of Corporate Governance.

In 2016, the Philippine Securities and Exchange Commission (SEC) issued the Code of Corporate Governance for Publicly-Listed Companies (CG-PLC),[2] which superseded the Revised Code of Corporate Governance and related issuances insofar as they relate to publicly-listed companies (PLCs). Significantly, the CG-PLC adopted an expansive view of corporate purpose, reinforced the idea of stakeholder governance, and introduced sustainability reporting in the governance framework of PLCs.

The CG-PLC defines corporate governance as "the system of stewardship and control to guide organizations in fulfilling their long-term economic, moral, legal and social obligations towards their stakeholders." It further states that the purpose of corporate governance is to maximize an organization's long-term success, creating sustainable value for its shareholders, stakeholders, and the nation. It defines the term "stakeholder" to include customers, creditors, employees, suppliers, investors, as well as the government and community in which an organization operates.[3]

Principle 10 of the CG-PLC states that a company should ensure that material and reportable non-financial and sustainability issues are disclosed. Pursuant thereto, the CG-PLC recommends that the board of directors have a clear and focused policy on the disclosure of non-financial information, with emphasis on the management of economic, environmental, social and governance issues of its business which underpin sustainability. It also recommends that companies adopt a globally-recognized standard/framework in reporting sustainability and non-financial issues.

On the other hand, Principles 14 to 16 of the CG-PLC articulate a company's duties to its stakeholders. Principle 16 states that a company should be socially responsible in all of its dealings with the communities where it operates, and should ensure that its interactions serve its environment and stakeholders in a positive and progressive manner that is fully supportive of its comprehensive and balanced development. Among others, the CG-PLC recommends that a company recognize and place importance on the interdependence between business and society, and promote a mutually beneficial relationship that allows the company to grow its business, while contributing to the advancement of the society where it operates.

In 2019, the SEC issued the Code of Corporate Governance for Public Companies and Registered Issuers (the *CG-PC & RIs*).[4] The CG-PC & RIs is the counterpart of the CG-PLC for public companies and registered issuers. It contains the same concepts, principles and recommendations on stakeholder governance and sustainability reporting as those in the CG-PLC.

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[2] Please see SEC Memorandum Circular No. 19 s.2016 at https://www.sec.gov.ph/wp-content/uploads/2019/11/2016_memo_circular_no.19.pdf for reference.

[3] While a similar definition of the term "stakeholders" and the duties of the board of directors towards a corporation's stakeholders (alongside its duties to the corporation's shareholders) were first introduced in a 2014 amendment to the Revised Code of Corporate Governance, the latter did not go as far as to explicitly recognize that corporate purpose encompasses creating sustainable value for a corporation's stakeholders.

[4] Please see SEC Memorandum Circular No. 24 s.2019 at https://www.sec.gov.ph/mc-2019/mc-no-24-s-2019-code-of-corporate-governance-for-public-companies-and-registered-issuers/ for reference.

Sustainability Reporting Guidelines for Publicly-Listed Companies

In 2019, the SEC took a step further and transformed the recommendation under the CG-PLC that PLCs report on their non-financial and sustainability issues into a mandatory requirement. The SEC's *Sustainability Reporting Guidelines for Publicly-Listed Companies* (the *Sustainability Reporting Guidelines*)[5] require PLCs to submit a sustainability report together with their Annual Report.

The Sustainability Reporting Guidelines seek to, among others, help PLCs identify, evaluate and manage their material economic, environmental, and social risks and challenges, and measure and monitor their contribution towards achieving universal targets of sustainability, such as the United Nations Sustainable Development Goals (SDGs), and national policies and programs. Its reporting template draws heavily from the Global Reporting Initiative's (GRI) *Sustainability Reporting Standards*, the Sustainability Accounting Standards Board's (SASB) *Sustainability Accounting Standards*, and the recommendations of the Task Force on Climate-related Financial Disclosure (TCFD).

Recognizing that sustainability reporting is a journey in which PLCs would be at different levels, with some being in a more advanced stage than others, the Sustainability Reporting Guidelines adopt a "comply or explain" approach for the first three years of its implementation. This means that reporting companies are required to attach the reporting template to their Annual Report but they can provide explanations for items where they still have no available data on.

The Sustainability Reporting Guidelines is on its second year of implementation.

Guidelines on the Issuance of Green, Social and Sustainability Bonds

In 2018 and 2019, the SEC promulgated, in series, guidelines on the issuance in the Philippines of green, social and sustainability bonds under the *ASEAN Green Bond Standards*, the *ASEAN Social Bond Standards*, and the *ASEAN Sustainability Bond Standards*, respectively (collectively and for ease of reference, the *ASEAN Bond Standards*). The ASEAN Bond Standards were developed by the ASEAN Capital Markets Forum based on the International Capital Markets Association's *Green Bonds Principles*, *Social Bonds Principles* and *Sustainability Bond Guidelines*.

The SEC's *Guidelines for Issuance of ASEAN Green Bonds*[6] govern the issuance of ASEAN Green Bonds where proceeds will be exclusively applied to finance or refinance, in part or in full, new and/or existing eligible "Green Projects". Eligible Green Project categories include, but are not limited to, the following:

- Renewable energy;
- Energy efficiency;
- Pollution prevention and control;
- Environmentally sustainable management of living natural resources and land use;
- Terrestrial and aquatic biodiversity conservation;
- Clean transportation;

[5] Please see SEC Memorandum Circular 4 s.2019 at https://www.sec.gov.ph/corporate-governance/sustainability-report/ for reference.
[6] Please see SEC Memorandum Circular No. 12 s.2018 at https://www.sec.gov.ph/wp-content/uploads/2019/11/2018MCNo12.pdf for reference.

- Sustainable water and waste water management;
- Climate change adaptation;
- Eco-efficient and/or circular economy adapted production technologies and processes; and
- Green buildings which meet regional, national or internationally-recognized standards.

Green Projects may relate to more than one category. Fossil fuel power generation projects are excluded from the *ASEAN Green Bonds Standards*.

On the other hand, the SEC's *Guidelines on the Issuance of Social Bonds Under the ASEAN Social Bond Standards in the Philippines*[7] govern the issuance of ASEAN Social Bonds where proceeds will be exclusively applied to finance or refinance, in part or in full, new and/or existing eligible "Social Projects". Eligible Social Project categories include, but are not limited to, the following:

- Affordable basic infrastructure;
- Access to essential services;
- Affordable housing;
- Employment generation;
- Food security; and
- Socioeconomic advancement and empowerment.

Social Projects may relate to more than one category. Projects which involve activities that pose a negative social impact related to alcohol, gambling, tobacco and weaponry are excluded from the *ASEAN Social Bond Standards*.

Lastly, the SEC's *Guidelines on the Issuance of Sustainability Bonds Under the ASEAN Sustainability Bond Standards in the Philippines*[8] govern the issuance of ASEAN Sustainability Bonds where proceeds will be exclusively applied to finance or refinance a combination of both Green and Social Projects that respectively offer environmental and social benefits.

According to the SEC, the Philippines is a leader in the issuance of ASEAN-labelled Green, Social and Sustainability Bonds,[9] with Philippine companies accounting for 35% of such issuances as of May 31, 2021.[10]

Insurance Commission

Following the lead of the SEC, the Insurance Commission issued the *Revised Code of Corporate Governance for Insurance Commission Regulated Companies*[11] (ICRCs) in June 2020. Like the CG-PLC, the *Revised Code of Corporate Governance for ICRCs* incorporates the concepts of stakeholder governance and sustainability reporting in the governance framework of

[7] Please see SEC Memorandum Circular No. 9 s.2019 at https://www.sec.gov.ph/wp-content/uploads/2019/10/2019MCNo09.pdf for reference.
[8] Please see SEC Memorandum Circular No. 8 s. 2019 at https://www.sec.gov.ph/wp-content/uploads/2019/10/2019MCNo08.pdf for reference.
[9] Keynote Address of SEC Commissioner Ephyro Luis B. Amatong at the webinar on "Green Social Sustainable Bonds (GSSBs): Launching the Philippine Initiative" held on February 24, 2021.
[10] Sustainable Finance Market Update As of May 31, 2021 available at https://www.sec.gov.ph/cm-sustainable/sustainable-finance-market-update-9/.
[11] Please see IC Circular Letter No. 2020-71 at https://www.insurance.gov.ph/wp-content/uploads/2020/06/CL2020_71.pdf for reference.

ICRCs. It mirrors the definitions of “corporate governance” and “stakeholders” in the CG-PLC, and its principles and recommendations on the disclosure of non-financial and sustainability issues, and on a company’s duties to its stakeholders.

Bangko Sentral ng Pilipinas

In April 2020, the *Bangko Sentral ng Pilipinas* (the Philippine Central Bank or *BSP*) issued *Circular No. 1085* or the *Sustainable Finance Framework*.[12] It requires banks to embed sustainability principles, including those covering environmental and social risk areas, in their corporate governance framework, risk management systems, and strategic objectives consistent with their size, risk profile and complexity of operations. It imposes corresponding obligations on the board of directors and senior management of a bank. It also requires banks to disclose matters relating to their sustainability strategy, standard and practices, and environmental and social risks in their Annual Report. Banks were given a period of three years from the issuance of the Circular within which to comply with its provisions.

Very recently, the BSP issued a press release[13] stating that it will engage banks in discussions during the three-year transitory period before the full implementation of Circular No. 1085. Within that period, banks are expected to identify and execute specific actions on the implementation of board-approved strategies and policies on the integration of sustainability principles into their strategic objectives, corporate governance, risk management systems, and operations.

The BSP is also working closely with the Department of Finance and other government agencies to embark on the development of a principles-based taxonomy to facilitate the mobilization of funds towards green or sustainable projects. Meanwhile, the industry associations, in collaboration with the World Wide Fund for Nature Philippines, are developing an analytical framework to assess the impact of climate physical risks on the loan portfolio of banks.

Conclusion

It is widely expected that the flow of capital towards undertakings that contribute to sustainable development will further intensify in the foreseeable future. Many international investors have long acknowledged that companies must not only deliver financial performance, but also make a positive contribution to society. On the other hand, Philippine regulators have more than amply demonstrated their willingness to use their regulatory powers to encourage companies to align their activities with environmental, social and sustainability goals, and to direct investors towards companies that do so. Together, the international investment climate and local policy environment present tremendous growth opportunities for Philippine companies. However, market analysts have noted that, at present, very few companies in the Philippines integrate sustainability goals into their business operations.[14] It would therefore serve Philippine companies well to take steps re-assess their business model and strategies to examine how they can address sustainability goals and “produce profitable solutions to the problems of people and planet.”[15]

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[12] Please see BSP Circular No. 1085 at https://bsp.gov.ph/regulations/issuances/2020/c1085.pdf for reference.
[13] Please see BSP’s Press Release at https://pia.gov.ph/news/articles/1076543 for reference.
[14] *The Philippines sees first SDG-focused fund* by Francis Nikolai Acosta available at https://esgclarityasia.com/the-philippines-sees-first-sdg-focused-fund/.
[15] This view on corporate purpose is espoused by Prof. Colin Mayer of the Said Business School, University of Oxford.

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This is a briefing from the Banking, Finance, and Securities Department and Corporate Services Department of SyCipLaw.

The links to our earlier bulletins and briefings can be found at the SyCipLaw information hub, https://syciplawresources.com/.

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CIZ v CJA - A case note of the High Court's latest decision on excess of jurisdiction by tribunals

July 30, 2021

The General Division of the Singapore High Court recently issued *CIZ v CJA* [2021] SGHC 178, where **Senior Partner** Ajinderpal Singh and **Senior Associate** John Paul Koh successfully acted in the setting aside of an SIAC arbitral award on grounds that the arbitral tribunal exceeded its jurisdiction.

Introduction

1. Singapore adopts the UNCITRAL Model Law on International Commercial Arbitration (Model Law) in its legislation on international arbitration, the International Arbitration Act (IAA). Under this regime, parties seeking the setting aside of an award are limited to establishing the grounds set out in Article 34 of the Model Law and the Section 24 of the IAA.

2. In *CIZ v CJA* [2021] SGHC 178, Dentons Rodyk successfully acted for a plaintiff in setting aside the adverse portion of an international arbitration award issued by an extremely eminent tribunal (the Tribunal) under the auspices of the Singapore International Arbitration Centre (SIAC).

3. Dentons Rodyk argued that the portions of the award against their client's interests had been issued in excess of the arbitral tribunal's jurisdiction pursuant to Article 34(2)(a)(iii) of the Model Law. We are pleased to report that the Singapore High Court granted the Plaintiff's application and set aside the offending portions of the award.

4. Owing to the need to preserve confidentiality, the names of all parties involved in *CIZ v CJA* [2021] SGHC 178 have been anonymised in the report that follows.

Background

5. We summarise the facts of the case, as set out in the judgment.

The Parties and their Agreements

6. The Plaintiff to the setting aside application is an integrated oil company which was the respondent in the SIAC arbitration proceedings. The Defendant is a company providing consultancy services, and was the claimant in the arbitration.

7. On 7 September 2012, the Plaintiff entered into a consultancy agreement (the Agreement) with the Defendant's sister company. The Agreement expired on 31 December 2012. Following the Agreement's expiration, on 28 February 2013, the sister company requested an extension of the Agreement to 31 December 2013, and assignment of the Agreement to the Defendant.

8. This was duly done, and on 21 October 2013, the Amended and Restated Consultancy Agreement (the Amended

Agreement) was entered into to document the extension to 31 December 2013.

The Salient Terms

9. Under the Agreement and Amended Agreement, the Defendant was to provide the Plaintiff with information and consultation/advisory services relating to opportunities for the Plaintiff to “acquire an interest in producing oil and gas fields around the world”. In return, the Plaintiff agreed to pay the Defendant a success fee subject to certain terms in the agreements.

The X Opportunity

10. In 2012, the Defendant’s sister company presented an opportunity for the acquisition shares in Company X, which operated oil fields (the X Opportunity). The Plaintiff gave a non-binding preliminary indication of interest to Company X for the acquisition of its shares, and began its due diligence in September 2012.

11. However, issues which prevented the acquisition arose, and no sale and purchase agreement relating to the X opportunity was entered into by 31 December 2013, when the Amended Agreement expired. There was no written extension of the Amended Agreement.

12. Ultimately, on 14 April 2014, the Plaintiff informed Company X that it was not proceeding with the proposed investment in Company X.

Subsequent Acquisition of Company X

13. Later in December 2015, the Plaintiff decided to acquire a company as part of its expansion plans. It considered Company X as one of its potential targets and began to work towards its acquisition.

14. On 31 July 2016, the Plaintiff signed an agreement to acquire Company X’s shares. The Plaintiff did not involve either the Defendant or its sister company in the acquisition of Company X’s shares.

The Demand for Success Fees and Arbitration Proceedings

15. After the agreement for Company X’s shares was entered into, the Defendant demanded success fees for the X Opportunity. However, as the Amended Agreement had expired about two and a half years before, the Plaintiff refused payment.

16. Following a “without prejudice” discussion and a mediation – which failed to resolve the dispute, the Defendant commenced SIAC arbitration proceedings.

17. In the arbitration, the Defendant acknowledged that the Agreement and Amended Agreement had expired on 31 December 2013. Its case, therefore, was that:

> 17.1. There was an oral agreement between the plaintiff and the defendant to extend the Agreement for “*a further period*” during which the Defendant would continue to provide services to the Plaintiff. The oral agreement would be reflected in a written contract in due course.
>
> 17.2. Alternatively, there was an implied contract as between the Plaintiff and Defendant, governing the period between the expiration of the Amended Agreement and the execution of the new written contract. The terms of the implied contract were the same as the Agreement.
>
> 17.3. The Plaintiff was estopped from asserting that the Agreement and Amended Agreement were no longer valid.

18. This remained the Defendant’s position throughout its pleadings, witness statements, opening statement, and in

its closing submissions.

19. The Plaintiff, for its part, denied the alleged oral agreement, implied contract and estoppel.

The Tribunal's decision

20. In its Final Award, the Tribunal agreed with the Plaintiff's case. Crucially, the Tribunal found that (a) there was "plainly no express contract in existence" and "simply no extension by mutual agreement after 31 December 2013" (b) "no such implied contract(s) as pleaded by [the Defendant] exist(s)".

21. However, despite having found against the Defendant on its pleaded case, the Tribunal nevertheless held that the Plaintiff was liable to pay success fees. In coming to its conclusion, the Tribunal held that that success fees were payable as long as there was a clear link between the oil fields which were acquired by the Plaintiff and the X Opportunity. Having found that the acquisition of Company X was part of the X Opportunity, the Tribunal held that the Plaintiff was liable to the Defendant for success fees.

22. Accordingly, the Plaintiff applied to the Singapore High Court to set these portions of the Tribunal's award aside.

The High Court's decision in *CIZ v CJA* [2021] SGHC 178

23. In the High Court, the Plaintiff argued that the Tribunal had exceeded its jurisdiction pursuant to Article 34(2)(a)(iii) of the Model Law, which states:

> "Article 34. Application for setting aside as exclusive recourse against arbitral award
>
> …
>
> (2) An arbitral award may be set aside by the court specified in Article 6 only if:
>
> (a) the party making the application furnishes proof that:
>
> …
>
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the matters submitted to arbitration can be separated from those not so submitted, only that part of the awa contains decisions on matters not submitted to arbitration may be set aside; or
>
> …"

24. In *CIZ v CJA* [2021] SGHC 178, the Court agreed with the Plaintiff, and held that the Tribunal had exceeded its scope of jurisdiction by finding for the Defendant on grounds that were entirely different from the Defendant's case in the arbitration. It was not possible to describe the Tribunal's findings as being ancillary to the matters submitted to arbitration.

25. The Court stated that whilst the Defendant's claim ought to have failed after its case that there was a subsisting agreement following the expiry of the Amended Agreement was rejected, the Tribunal nevertheless found for the Defendant on grounds that had not been set out in its Notice of Arbitration, pleadings or submissions. The Court also noted that the Tribunal had arrived at findings which were inconsistent with the Defendant's case at the arbitration.

26. In coming to its decision, the Court found that the facts of *CIZ v CJA* [2021] SGHC 178 were similar to that of *GD Midea Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd* [2018] 4 SLR 271 (*GD Midea*). In *GD Midea*, an arbitrator's award was premised on a finding that was never part of the successful party's case, and was, in fact, inconsistent with that party's position.

27. The Court also considered *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 (*TMM*), which states:

> "an issue which surfaces in the course of the arbitration and is known to all the parties would be considered to have been submitted to the arbitral tribunal even if it is not part of any memorandum of issues or pleadings"

28. However, the Court highlighted that the statement above must be looked upon in its proper context. Citing *CAI v CAJ* [2021] SGHC 21 (*CAI v CAJ*), the Court held that *TMM* was referring to the scenario where the law had changed or a new fact arose after the arbitration reference had started and such change was not known to the parties. The Court also noted that even in that scenario, what may be raised in the arbitration, although not pleaded, are only matters that are ancillary to the dispute submitted for arbitration.

29. In its analysis of *TMM*, the Court agreed with the view expressed in *CAI v CAJ* that:

> "... TMM, read in its proper context, does not ... open the door for an arbitrant to raise a new claim, defence or issue at any stage of the arbitration and in any manner it pleases. ... one has to always bear in mind that in an arbitration, the tribunal's jurisdiction is demarcated by what the parties agree to submit to the tribunal for determination ..."

30. The Court therefore granted a partial setting aside of the Final Award, and the holding that the Plaintiff ought to pay success fees was accordingly set aside.

Conclusion

31. While the Singapore Court adopts a favourable approach to arbitration as a dispute resolution mechanism and may be slow to set aside arbitral awards, as shown by the instant case, tribunals do not possess an unfettered jurisdiction in relation to the disputes brought before them. A tribunal can exceed its jurisdiction if it makes an award based on grounds entirely different from the parties' cases in the arbitration, which cannot be said to be ancillary to the matters submitted for arbitration.

The judgment, *CIZ v CJA* [2021] SGHC 178, can be downloaded from this link. The Defendant has brought an appeal before the Court of Appeal.

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Newsletter

Recent Amendments to the Regulations Governing the Approval of Investments in Taiwan by PRC Person(s) and Subsequent Influences on Cross-Border M&A Transactions

06/30/2021

Christina Hsuan Chiang/ Chi Lee

Since the structure of foreign investments in Taiwan is becoming more diverse and complex in recent years, in an effort to ensure more comprehensive reviews and reinforce control over investments in Taiwan by PRC persons by broadening the statutory scope of PRC persons, on December 30, 2020, the Investment Commission, Ministry of Economic Affairs ("**IC**") promulgated the amendments to Articles 3, 4 and 6 of the Regulations Governing the Approval of Investments in Taiwan by PRC Persons (the "**Approval Regulations**"), and announced the new administrative rules on Article 3, Paragraph 2 of the Approval Regulations (the "**New Administrative Rules**"), both of which took effect on the same date. Such amendments and new rules will result in certain influences on international M&A transactions.

1. Summary of Amendments to Approval Regulations and New Administrative Rules

(1) The rules on the definition of "third-area PRC investors" are becoming stricter.

According to Article 3, Paragraph 2 of the Approval Regulations, a "PRC Investor" is statutorily defined to include any company located in any "third area" (an area other than the PRC or Taiwan) and invested in by PRC person(s) whereby the shares held or capital contributed by PRC person(s) in aggregate exceed 30% of the total number of issued shares or total amount of capital contribution of said third-area company, or any PRC person(s) has an effective control over said third-area company. In addition, with respect to the above 30% shareholding rule, according to the New Administrative Rules, the 30% shareholding threshold must be examined on each offshore holding level, rather than being understood as the ultimate shareholding percentage in a third-area company by one or more PRC persons (similar to a weighted calculation method).

In the case of a multi-layer shareholding structure, if PRC person(s) holds more than 30% shareholding in any level, such shareholder level will be also regarded as a PRC investor, and its total shareholding in the next-level shareholder will be included in the calculation base of the said 30% shareholding threshold to decide whether the next-level shareholder is a PRC investor. Consequently, the New Administrative Rules have become stricter since it is more possible to regard a third-area company as a PRC investor.

(2) There are more types of structures that would be considered "PRC investments" requiring the IC's prior approval.

Furthermore, in addition to holding equity or director seats, considering that in practice certain contractual arrangements that involve PRC investors may also give rise to concerns regarding PRC investors having potential control over the finances and operations of Taiwan companies, the IC amended Article 4 of the Approval Regulations to provide that PRC investors must also obtain the IC's prior approval if, by contracts or otherwise, such PRC investors are considered by the IC as having control of Taiwan sole proprietorships, partnerships, limited partnerships or non-TWSE/TPEx listed or non-emerging stock companies pursuant to the Approval Regulations.

From the aforesaid summary of the amendments, it is understood that the regulations on the definition of PRC investors and types of PRC investments requiring the IC's approval are becoming stricter. Some structures or contractual arrangements that were previously not considered PRC investments (hence no prior approval is required) will be possibly regarded as PRC investments under the new regulations and thus should be subject to the IC's stricter review for what is considered PRC investments.

2. Influences on the International Private Equity Funds' M&A Activities

In recent years, due to the emerging growth of international private equity funds ("**PE Funds**"), M&A transactions led by or involved with international PE Funds are becoming more prevalent. In Taiwan, since there are different investment regulations and intensities of review required for general foreign investments and PRC investments respectively, the applicable standard of review to the acquisitions by international PE Funds of Taiwan companies' shares is based on whether international PE Funds involve PRC investors or only foreign investors.

In practice, the IC usually requests international PE Funds to disclose their upper-level shareholding structure so as to confirm the PE Funds' identities (i.e., whether there are any PRC investors involved) and applicable review regulations, while reviewing their investment cases. After the new regulations took effect, it can be reasonably expected that the IC will request for more comprehensive disclosure of the upper-level shareholding structure of international PE Funds.

The said IC review practice usually has a major impact on investments and M&A activities of international PE Funds in Taiwan because general partners and limited partners of PE Funds usually enter into confidentiality agreements to avoid disclosing the investment status of individual limited partners. If, due to these confidentiality agreements, it is challenging for international PE Funds to fulfill the IC's disclosure requests, the timeline of the IC's review may be prolonged. In this connection, it is recommended that investors should formulate their plan in the pre-transaction stage in order to avoid the delay in the transaction process.

3. Influences on the Structure of International M&A Transaction

In addition to PRC investors not able to make investments in Taiwan without the ICs prior approval, PRC businesses may not engage in "business activities" in Taiwan without approval or without establishing a Taiwan branch or office. Violation of the said restriction will be subject to imprisonment of not more than 1 year and a criminal fine according to Act Governing Relations between the People of the Taiwan Area and the Mainland Area (the "**Relations Act**") and other civil liabilities.

There are no clear rules on the definition of "business activities". Whether the activities constitute the business activities is decided by the court on a case-by-case basis. According to a court decision, business activities, which should be restricted according to the Relations Act, refer to constant and continual activities carried out by PRC businesses that will influence the rights of a Taiwanese person(s) who also engages in such activities, which may pose a substantial or potential danger to trade safety in Taiwan. Business activities may not be limited to business operations provided in the Company Act but also specifically include selling PRC real estate, opening a bank account in Taiwan, engaging in wire transfer, serving as a manager in a Taiwan company, recruiting talent, or arranging the execution of employment agreements in Taiwan for PRC companies.

Therefore, if the buyers in international M&A transactions are PRC investors or involve PRC investors, such investors should carefully consider the transaction structure at the planning stage in order to ensure that the applicable IC approvals are duly obtained in accordance with the laws for any changes in offshore shareholding structures, and to prevent any circumstance where PRC investors invest, or engage in business activities, in Taiwan without the IC's prior approval. PRC investors should also avoid the misconception that it is fine to close the Taiwan subsidiaries or branches and still engage in business activities in Taiwan without any entity.

Conclusion

Since the amendments to the Approval Regulations and the current review practice of the IC will significantly influence international investments and M&A transactions, investors should assess all possible legal risks in Taiwan at the early stage arising from the potential PRC investments while planning and engaging in cross-border M&A transactions.

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ADVISORIES

Antitrust

Antitrust State of Play for Healthcare Providers Under a New Administration - Part I: Mergers and Acquisitions

By Kaj Rozga and Douglas E. Litvack

08.10.21

Antitrust scrutiny of large technology companies may be in the headlines, but what some have dubbed "Big Med" is being eyed by the Biden Administration and federal agencies for heightened antitrust enforcement. Hospitals, physician groups, and health plans already accustomed to an active antitrust enforcement climate may need to prepare for even choppier regulatory waters ahead as a new President and new leadership at the Federal Trade Commission (FTC) and Department of Justice (DOJ) turn their focus on healthcare provider markets.

In the first of a series of articles, we look at the latest developments in competition policy and enforcement in provider markets, before turning to their impact on dealmaking during a time of rapid change and consolidation in the healthcare industry.

Pro-Enforcement Era for Healthcare Antitrust

President Biden's appointment of Lina Khan, a progressive reformer and supporter of aggressive enforcement of the antitrust laws, as the swing vote and Chair of the FTC was the first major harbinger of the changes to come. At that point, the federal antitrust agencies had already stopped granting "early termination" of merger reviews.[1] Without the discretionary practice, non-problematic deals have had to wait the full 30 days of an initial review period following their filing with the government, resulting in some delay.

But the first sign that the new FTC, under Chair Khan, would have its eyes on healthcare providers in particular came at an open meeting of the Commissioners held last month. At that meeting, a 3-2 majority voted to single out healthcare—including hospitals and other providers—among several other industries as "enforcement priorities" that would be subject to resolutions authorizing sweeping compulsory process probes.[2] The resolutions were described as removing "red tape bureaucracy" during a "massive merger boom," with both proposed and consummated transactions as potential targets.

Next came the Biden Administration's Executive Order on Promoting Competition in the American Economy, which singled out healthcare markets impacted by "hospital consolidation" for heightened antitrust scrutiny.[3] The Executive Order identifies lowering prices and improving quality and access to care, in particular in rural communities, as requiring more vigorous enforcement of federal antitrust laws. It directs the FTC and DOJ to "review and revise their merger guidelines," which influence how agency staff conduct merger investigations. Judges also rely on the guidelines to help them assess the legality of mergers.

Finally, at the most recent open meeting of the FTC, a majority of Commissioners voted to rescind a 1995 Policy Statement that had limited the use of "prior approval" requirements in merger consent decrees. These decrees are settlements that the agency sometimes reaches with merging parties as conditions for not opposing their deal in court.[4] Prior approval provisions require giving the FTC advance notice (before closing the transaction) of certain future deals and can even require the parties when presenting future deals to prove to the agency that they are not anti-competitive. The latter in effect flips the burden of proof, which normally lies with the government to challenge a deal, to the merging parties.

Active Enforcement Against Healthcare Provider Mergers

None of the recent actions of the Biden Administration or FTC are significantly out of step with the recent trend of vigorous merger enforcement against healthcare providers.

The healthcare industry has grown accustomed in the last decade to close scrutiny and frequent challenges to hospital and physician practice deals. A 2019 report from the FTC detailed at least nine hospital mergers and six physician group acquisitions that the agency challenged going back to 2008.[5] Since then, it has challenged at least three more hospital deals, in addition to launching a merger retrospective study earlier this year to analyze the market effects of physician group and hospital consolidation.[6]

But even with this recent history of active enforcement, there does seem to be some acceleration in the trendline. Following last summer's blockbuster "Big Tech" hearings, Congress held another round of less-publicized, though still significant, hearings that focused on healthcare markets. At two separate hearings in the Senate and House of Representatives, lawmakers elicited testimony seeking to show that hospital and physician practice acquisitions are driving up healthcare costs, failing to improve quality of care, and lowering employee wages.[7] Participants called for more aggressive enforcement of merger laws.

What an Executive Branch on Antitrust High Alert Means for Healthcare Provider Dealmaking

With so much interest from the Oval Office, federal enforcers, and Congress, healthcare providers—hospitals, physician groups, and integrated health systems—should anticipate heightened scrutiny of mergers and acquisitions.

At this time, with broader antitrust reforms still in draft bill form, nothing has changed about which types of deals will need to be reported to federal authorities. But companies should **expect more frequent review of "non-reportable" transactions**, which are deals falling under the thresholds that require pre-merger notification to the federal government.[8] Formal integrations in healthcare can often be non-reportable. Non-reported deals have always been subject to investigations by federal authorities, but the recent directives of the Biden Administration and policy shifts at the FTC suggest that the agency will be more proactive in scoping out such deals for review.

The FTC's recent posturing also suggests that parties should **expect additional scrutiny of consummated deals**. That could include, for example, non-reportable transactions that have closed. But it also may involve fresh looks at mergers previously reported to the government that did not result in any action being taken. It is important to keep in mind that the FTC and DOJ never "approve" a merger. Although their decision not to take action against a merger upon reviewing it is a very strong indicator that they never will, they reserve the right to challenge it as unlawful in the future.

The typical forward-looking merger review seeks to predict the future competitive effects of a merger that has not yet occurred. By contrast, a retrospective investigation of a consummated deal looks back at everything that has happened post-merger to determine if it has, in fact, harmed competition. For example, post-closing pricing changes can be attributed to the merger, as can quality improvements or cost efficiencies. Therefore, in a climate of more active enforcement against consummated deals, merging companies should be more mindful of what their post-closing integration activities could mean for a future investigation of the deal.

The recent directives from the Biden Administration and policy shifts at the FTC also indicate that merging parties should **be prepared to tackle a wider spectrum of theories of competitive harm** when interfacing with the agency. For example, agency staff reviewing a hospital merger might need to more fully vet its potential impact on workers in labor markets, such as nurses or physicians, arising from the consolidation of employers in the market. Enforcers will also likely look more closely than they have in the past at vertical theories of harm involving "exclusionary conduct." This might include concerns, for example, about whether a health system buying a rival hospital faces increased incentives to cause its integrated insurance plan to lock out a rival provider from its network. Another concern might be that a hospital buying a group of physicians causes rival hospitals to lose access to specialists.

All of this would, of course, come on top of the extensive analysis already being done in these cases to determine whether the elimination of horizontal competition between merging providers might harm insurers and their members by creating fewer market alternatives. Therefore, more consideration of novel theories of competitive harm will only add to the burden and complexity that companies already face in assessing the risk that the government might challenge the deal and what remedies it might require as a condition for permitting the deal to close.

A wider competitive effects analysis will also likely **lead to longer and more detailed government review** of deals. Under the FTC's new policy, early termination is now essentially out of the question. At the same time, the agency appears poised to more frequently go beyond the 30-day window for its initial review that the merger statute provides for. Traditionally, at the 30-day mark, it has relied on asking parties to "pull-and-refile" their merger filing to restart the clock. But with a recent announcement, it appears the FTC may instead send a "pre-consummation warning letter" to the merging parties telling them that a review is ongoing and that they consummate the deal at their own risk.[9] This could leave merging parties in a state of indefinite limbo if they are not willing to take the risk of closing on a deal that could later be challenged.

As for deals where the agency's concerns persist beyond the initial review period, parties should expect to receive an expansive "Second Request" for more information to trigger a detailed probe. Agency staff is likely to face pressure to ensure they capture all potentially relevant evidence, including anything needed to support the broader set of possible legal theories. Expansive Second Requests could also be used by overburdened agency staff as a tool to buy themselves more time to investigate.[10] Merging parties will need to **account for these potential delays and hurdles in the regulatory clearance process in their deal negotiations**, in particular in how they allocate the risks associated with a prolonged review and potential challenge from the government.

Finally, the agency's recent policy shifts also mean that parties might now **expect to see the FTC request a "prior approval" requirement** as a condition (among others in the consent decree) for allowing a challengeable transaction to go through. This would mean having to give advance notice to the government of future transactions in related markets, including ones that would otherwise be non-reportable under the merger laws.

The main effect of a prior approval requirement, especially if it also contains a provision that flips the government's burden onto the merging parties in future filings, is that hospitals or health systems in an expansion mode **cannot look at antitrust risk in isolation**. In looking at whether to do a deal today, they will need to consider the regulatory risk posed to future deals (some of which may have more significant strategic importance) that could be subjected to a prior approval requirement.

Rough Roads Ahead

Any way one looks at it, a tougher legal climate awaits healthcare providers. If Congress updates the merger guidelines,[11] that could make things even more difficult. Providers looking to navigate these challenges will need to have a sophisticated understanding of the new substantive and procedural risks they face with a more active White House and FTC. That will include assessing deal risk, negotiating around it, and then interfacing with federal authorities to maximize the chances for getting their deal through the regulatory process.

Be sure to come back for our next installment in this series, which will look at information sharing and competitor collusion in healthcare markets and how recent policy shifts at the DOJ could trigger criminal liability for providers caught unaware in their interactions with rivals.

FOOTNOTES

1 https://www.ftc.gov/news-events/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early

2 https://www.ftc.gov/news-events/press-releases/2021/07/ftc-authorizes-investigations-key-enforcement-priorities

3 https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/

4 https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-1995-policy-statement-

limited-agencys-ability-deter

5 https://www.ftc.gov/system/files/attachments/competition-policy-guidance/overview_health_care_june_2019.pdf

6 https://www.ftc.gov/news-events/press-releases/2021/01/ftc-study-impact-physician-group-healthcare-facility-mergers?utm_source=govdelivery

7 https://www.judiciary.senate.gov/meetings/antitrust-applied-hospital-consolidation-concerns-and-solutions; https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4528

8 The Hart-Scott-Rodino (HSR) Act sets out the federal pre-notification merger review regime.

9 https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings

10 Proposed bills in Congress would increase both FTC and DOJ funding.

11 The FTC and DOJ recently announced their intention to review and consider revision of the guidelines. https://www.justice.gov/opa/pr/statement-acting-assistant-attorney-general-richard-powers-antitrust-division-and-ftc-chair

FDA seeks comments on how to transition approved drug products to device status under Genus

Major regulatory changes for imaging agents, other medical products forthcoming

13 August 2021

On August 9, the U.S. Food and Drug Administration (FDA) published a notice announcing its implementation of the U.S. Court of Appeals for the D.C. Circuit's April 2021 decision in *Genus Medical Technologies LLC v. U.S. Food and Drug Administration*. As we previously summarized online here, the *Genus* decision critically ruled that, when classifying a medical product as either a "drug" or a "device," FDA does not have unfettered discretion to regulate that product as a drug, even if the product could reasonably meet either definition. Responding to the court's ruling, FDA now requests comments on the categories of products currently regulated by FDA solely as drugs that may be required to transition to device status based on the *Genus* holding, the timelines necessary for this transition, and other information as summarized below. Comments are due October 8.

Background

The Federal Food, Drug, and Cosmetic Act (FDCA) defines both drugs and devices as products "intended for use in the diagnosis of disease or other conditions," in the "cure, mitigation, treatment, or prevention of disease," or "to affect the structure or function of the body of man or other animals." However, the FDCA states that a medical "device" does **not** achieve "its primary intended purposes through chemical action within or on the body of man," and "is not dependent upon being metabolized for the achievement of its primary intended purpose." In other words, while there is overlap in the statutory definitions of the purposes of a "drug" and a "device," the way the device achieves its intended benefit is different and, when a product does not achieve its primary purpose by these defined drug-specific mechanisms, the mode-of-action clause sets forth a category of products that FDA must classify and regulate as medical devices.

Recognizing this statutory distinction, the majority opinion of the U.S. Court of Appeals for the D.C. Circuit in *Genus Medical Technologies LLC v. U.S. Food and Drug Administration* (summarized online here), recently ruled that FDA cannot classify as a drug any product that meets the definition of device, stating: "[e]xcepting combination products, . . . devices must be regulated as devices and drugs—if they do not also satisfy the device definition—must be regulated as drugs."

FDA invites comments on best practices for drug/device transition process

FDA decided not to appeal the Genus decision and on August 9, 2021, published a notice and request for information regarding its process for ensuring future classification decisions for drugs and devices comply with the *Genus* opinion, and for ensuring that *previously* classified products fall into line with *Genus*. FDA said it "intends to establish a process for the orderly and efficient determination of which products currently regulated as drugs must be regulated as devices under *Genus*."

In the notice, FDA said it "expect[s] the determining factor in many cases to be whether the product achieves its primary intended purposes through chemical action within or on the body or is dependent upon being metabolized for the achievement of its primary intended purposes." The agency noted it will also "examine whether other statutory provisions—beyond the drug and device definitions—indicate Congress intended a type of product to be regulated under either the drug or device authorities."

FDA expresses concern in the notice that the transitioning of some approved products from drug status to device status may "disrupt the supply of these important medical products or place undue burden on manufacturers or on the healthcare delivery system." Accordingly, FDA invites stakeholders to comment on the categories of products currently regulated as drugs that may be required to transition to device status under *Genus*. FDA also invites comments on statutory provisions [other than the drug and device definitions] that may indicate Congressional intention regarding the appropriate regulatory pathway (i.e., drug or device) for certain types of products.

The notice also requests comments on the timing of the transition process, acknowledging that there are differences between the drug regulatory requirements and the device regulatory requirements, and that sponsors of transitioning marketed products will need time to transition from compliance with one to the other. For example, sponsors of transitioning products may need to update labeling, bring facilities into compliance with quality system regulations, and prepare for device inspections. Thus, stakeholders are invited to comment on timelines necessary for this transition, as well as the timelines for the corresponding user fee transitions. Because user-fee deadlines for drugs and generics are approaching, FDA says firms should pay those fees now and ask for a refund after the transition.

Imaging agents

Some medical imaging techniques – such as ultrasound, computerized tomography (CT), magnetic resonance imaging (MRI), and traditional radiology – can depend solely on an imaging device to produce and display images. However, imaging agents (like the one in question in *Genus*) are sometimes used in conjunction with these imaging devices to provide image enhancement.

Historically, FDA stated that it has regulated the imaging agents used in these procedures as drugs without consideration of whether they appear to achieve their primary intended purposes through chemical action within or on the body or whether they are dependent upon metabolization for the achievement of their primary intended purposes. Now, due to the *Genus* decision, FDA said it will reexamine whether individual imaging agents meet the device definition, including whether they achieve their primary intended purposes through chemical action within or on the body or are dependent upon being metabolized for the achievement of their primary intended purposes.

Next steps

FDA said it plans to publish a list of approved drug products that the agency tentatively determined should transition to device status under *Genus*. After this preliminary list is released, stakeholders will have an opportunity to comment before classification determinations are finalized.

Comments on the notice are due October 8. If you have any questions on how FDA may regulate a certain product, or may wish to submit a comment on the *Genus* notice, please contact any of the authors of this alert or the Hogan Lovells attorney with whom you generally work.

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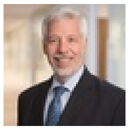

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