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Pacific Rim Advisory Council
February 2021 e-Bulletin

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CONFERENCES & EVENTS

PRAC - Let's Talk!

upcoming virtual meetings
February 22/23, 2021 | March 22/23, 2021

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

www.prac.org

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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►BRIGARD URRUTIA Assists Underwriters in Colombia debt transactions worth US$4 billion
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COVID-19 SITE FOR ALL UPDATES

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GIDE NEW TEAM AND THE HELM OF GIDE'S EXECUTIVE COMMITTEE

PARIS - 08 February 2021: Gide announces the appointment of its new Executive Committee, with **Frédéric Nouel** as Senior Partner and **Jean-François Levraud** as Managing Partner. The new executive team also includes partners **Olivier Diaz**, **Nicolas Jean**, **Emmanuel Larere**, as well as Chief Operating Officer **Frédérique Misk-Malher**. This Executive Committee took office on 1 January 2021.

Elected 2020 Law Firm of the Year by The Lawyer, Gide intends to uphold its unique position on the domestic market and consolidate its leading position in Europe and further afield.

The firm, which celebrated its 100th anniversary in 2020, actively furthered its development after demonstrating agility and quick measures to efficiently meet the new challenges wrought by the pandemic.

The alliance of different profiles within this new Committee fully illustrates the variety of practices and experience that embodies the firm's approach since its establishment.

Senior Partner Frédéric Nouel states: "I am very happy to begin this term of office with Jean-François Levraud, Olivier Diaz, Nicolas Jean, Emmanuel Larere and Frédérique Misk-Malher. Our collective ambition is to perpetuate our leadership in a context imposing a certain number of restrictions, as well as challenges and opportunities. In particular, we are looking to strengthen our working relationship with our clients in order to offer them tailored solutions that will help them meet the challenges facing their industry, and work with them to boost their capacity to look to the future."

Managing Partner Jean-François Levraud adds: "The health crisis has had an indelible effect on our clients. The previous Committee carried out essential work by adapting the Gide model to this complex and uncertain environment. We are now looking to continue the development of Gide to meet, in the best way possible, our clients' needs in particular by supporting mergers and acquisitions, which are increasing in number given the economic situation; boosting our services working with executive teams; and expanding our activities in Africa."

For more information visit www.gide.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
http://www.prac.org/member_publications.php

ARIFA WELCOMES BACK CORPORATE SERVICES PARTNER

PANAMA – January, 2021: We are pleased to announce that Dr. Federico Alfaro has rejoined the ARIFA Corporate Services legal team as a full-time partner after serving as Deputy Minister of Foreign Affairs of the Republic of Panama. Dr. Alfaro was appointed to the position of Deputy Minister of Foreign Affairs of the Republic of Panama in 2019 at the invitation of His Excellency President Laurentino Cortizo.

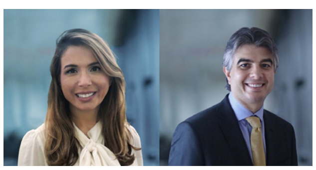
A partner of ARIFA since 2017, Dr. Alfaro a has developed a distinguished career in the area of corporate services in Panama, the BVI and Belize, providing tax efficient structures and sophisticate estate planning vehicles to ensure the preservation, transfer, and management of clients; wealth. Dr. Alfaro is a key ARIFA lawyer, responsible for overseeing the operations of ARIFA's network of liaison and affiliated offices overseas, and their high standard services to high net worth clients worldwide.

Dr. Alfaro received his Juris Doctor from Loyola University, New Orleans and Bachelor of Sciences and Political Communication from George Washington University.

For additional information visit www.arifa.com

TOZZINIFREIRE WELCOMES LITIGATION AND TAX PARTNERS

SAO PALO, 01 February, 2021: Brazil's TozziniFreire Advogados has strengthened its tax and litigation practices by hiring a partner from Stocche Forbes Advogados and the general counsel of logistics company Rumo.



Renata Emery Elias Marques

Renata Emery, 47, and Elias Marques, 43, joined the firm last week, taking the overall partner count to 86.

Emery joins from Stocche Forbes and will head her new firm's tax practice with partner Gustavo Nygaard. She focuses on transactional tax advice for M&A deals and reorganisations, as well as tax planning and consulting.

Fellow new partner Marques boosts TozziniFreire's litigation and arbitration offering with both in-house and private practice experience. He spent nearly 12 years at Brazilian energy company Cosan, including the last two years as general counsel of the company's logistics subsidiary Rumo. He previously held the position as general legal director at Cosan, fronting the legal department's disputes division. Marques has also worked at Brazilian firm BMA - Barbosa, Müssnich, Aragão for nearly a decade.

Emery is TozziniFreire's third new tax partner in the last 12 months. Lisandra Pacheco joined from boutique Schneider Pugliese Advogados in October, while Ricardo Maitto was hired from Rayes & Fagundes Advogados Associados in early 2020.

TozziniFreire is noted for its transactional capabilities in corporate, finance and capital markets, among others. It is often seen on innovative transactions. Most recently it helped UK open banking and technology company Raidiam – the company responsible for the successful rollout of open banking infrastructure in the UK – in a deal where Raidiam agreed to provide infrastructure solutions to Brazil's proposed open banking system. Brazil began the first of four implementation phases of its open banking system on 1 February.

For additional information visit www.tozzinifreire.com.br

PRAC EVENTS

UPCOMING EVENTS

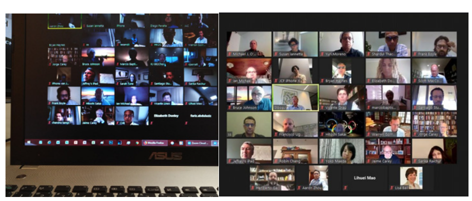
PACIFIC RIM ADVISORY COUNCIL

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!



Join us in 2021 for our monthly live one-hour virtual meetings
January 25/26 - "Vaccines I – The Legal Fine Print Leading to Shots in Arms"
February 22/23 "Vaccines II – Practical & Legal Issues for Employers "
March 22/33

PRAC - Let's Talk! events are open to PRAC Member Firms only
Registration required
Visit www.prac.org for details

ARIAS

ADVISES IDB INVEST ON US$75 MILLION FINANCING

GUATEMALA January, 2021: November 25, 2020 was the execution date of the loan and guarantee agreement among IDB Invest, a member of the Inter-American Development Bank Group, and Corporación Multi Inversiones (CMI Alimentos), in which Arias took part by providing our advice to IDB Invest, to provide a US$75 million financing to CMI Alimentos, with the aim of ensuring its liquidity in the medium term and supporting the continuity and reactivation of its operations. The transaction strengthens food security and revenue generation in Guatemala, El Salvador, and Honduras.

At Arias, we provided legal advice on the various stages of financing: due diligence; review and legal assistance for negotiation and preparation of the term sheet; review of the loan agreement and related documentation; negotiation and preparation of all documentation governed by local law; and closing and post-closing matters of the transaction.

Our lawyers who provided legal advice for this transaction were: **Roberta Gallardo (**Partner) with **Ernesto Sánchez** (Senior Associate) of our offices in El Salvador, acting as coordinator of the team in the region; **Jorge Luis Arenales** (Partner) with **Cindy Arrivillaga** (Associate) of our offices in Guatemala; and **Evangelina Lardizábal** (Partner) with **Antonio Montes** (Associate) of our offices in Honduras.

The transaction took place in El Salvador, Guatemala, and Honduras, and is governed by the laws of New York, United States of America.

Through this project IDB Invest plays a countercyclical role, providing long-term financing to alleviate food security challenges, a key aspect of the fight against COVID-19. CMI Alimentos will support the supply of food in local markets (animal protein, flours, and derived products) despite operational, logistical, and labor restrictions.

In addition, the operation supports the reactivation of income generation, through direct and indirect employment, in rural areas of Central America with vulnerable populations heavily affected by the health emergency and hurricanes.

It is an honor for Arias to participate in a transaction of this nature and to contribute, through this project, with the accomplishment of the Sustainable Development Goals of the United Nations: Decent Work and Economic Growth (SDG 8), Industry, Innovation, and Infrastructure (SDG 9) and Responsible Consumption and Production (SDG 12).

For additional information visit www.ariaslaw.com

BAKER BOTTS

REPRESENTS BRISTOW GROUP INC IN USD$400 MILLION PRIVATE OFFERING OF SENIOR SECURED NOTES

HOUSTON - 12 February 2021: Deal Description: Bristow Group Inc. (NYSE: VTOL) announced on February 10, 2021, that it has priced its previously announced private offering to eligible purchasers pursuant to Rule 144A and Regulation S under the Securities Act of 1933, as amended, of $400 million aggregate principal amount of 6.875% senior secured notes due 2028 (the "notes"). The closing of the offering is expected to occur on February 25, 2021 and is subject to the satisfaction of customary closing conditions.

The notes will mature on March 1, 2028. The notes will pay interest semi-annually and will be fully and unconditionally guaranteed, jointly and severally, on a senior secured basis, by Bristow's existing material wholly owned domestic subsidiaries and certain existing material wholly owned foreign subsidiaries, as well as certain future subsidiaries. The notes will be secured by first priority liens, subject to limited exceptions, on collateral that will consist of certain helicopters and related assets, together with substantially all of the other tangible and intangible property assets of Bristow and the subsidiary guarantors (other than certain excluded assets), including approximately 93 pledged aircraft.

Bristow intends to use the net proceeds from the offering of the notes, together with cash on hand, to repay its secured equipment term loan with Macquarie Bank Limited and its term loans with PK AirFinance S.à R.L. (collectively, the "Term Loans") and to fund the redemption of all of its outstanding 7.750% Senior Notes due 2022 (the "7.750% Senior Notes"). In connection with the closing of the offering, Bristow intends to terminate the term loan credit agreements relating to the Term Loans. The offering of the notes is not conditioned on the redemption of the 7.750% Senior Notes or the repayment of the Term Loans.

Baker Botts L.L.P. represented Bristow in the private offering of the notes.

Value: $204.0 million

For additional information visit www.bakerbotts.com

BENNETT JONES

ACTS FOR PREMIUM BRANDS ON COMPETITION LAW MATTERS IN ACQUISTION OF CLEARWATER

TORONTO – 29 January, 2021: Premium Brands Holdings Corporation and a coalition of Mi'kmaq First Nations announced the successful completion of the previously announced acquisition of Clearwater Seafoods Incorporated, for approximately $1 billion, including debt.

The transaction is a groundbreaking First Nations partnership and represents the single largest investment in the seafood industry by any Indigenous group in Canada.

Bennett Jones team Adam Kalbfleisch, Kyle Donnelly and Alysha Pannu advised advised Premium Brands on competition law matters relating to the transaction.

For additional information visit www.bennettjones.com

BRIGARD URRUTIA

ASSISTS UNDERWRITERS IN COLOMBIA DEBT TRANSACTIONS WORTH US4$BILLION

BOGOTA – 06 February, 2021: The Republic of Colombia with the assistance of Arnold & Porter raised US$2.8 billion in a sovereign debt tap and launch a tender offer to buy back existing debt. The New York and Washington, DC offices of Sullivan & Cromwell LLP and Colombia's Brigard Urrutia advised the underwriters in the deal, which closed on 22 January.

Colombia issued the debt in two tranches. In the first, the sovereign re-opened notes issued last June by raising another US$1.5 billion. The notes have a coupon of 3.13% and mature in 2031.

In the second portion, Colombia made a US$1.3 billion debt tap of 40-year notes, which carry an interest rate of 3.88%. Both sets of notes are listed on the Luxembourg stock exchange. The country will use the proceeds to fund the country's fiscal budget for 2021.

Along with the debt issuance, the Republic of Colombia launched a tender offer to buy back a portion of its existing debt due in 2021, 2024, 2026 and 2027 for US$1.2 billion. The total outstanding debt on those notes is around US$7.4 billion.

Local Counsel to Credit Suisse, Deutsche Bank and JP Morgan -Brigard Urrutia Partners Carlos Urrutia Valenzuela, Carlos Fradique-Méndez and Luís Gabriel Morcillo, and associate Viviana Araújo Angulo in Bogotá

For additional information visit www.bu.com.co

GIDE

COUNSEL TO NIPPON STEEL ON THE FINANCIAL RESTRUCTURING OF VALLOUREC

PARIS - 10 February 2021: Gide has advised Nippon Steel Corporation, steel producer and long-standing shareholder in listed world leader in premium tubular solutions, Vallourec, as part of the financial restructuring of Vallourec.

The agreements between Nippon Steel Corporation and Vallourec will be implemented as part of a safeguard procedure for Vallourec.

Gide's team advising Nippon Steel Corporation, alongside law firm Jeantet, comprised partners **Olivier Diaz**, **Charles de Reals**, and associate **Corentin Charlès** on corporate aspects; and partner **Jean-Gabriel Flandrois**, counsel **Nadia Haddad** and associates **François Lépany** and **Matthieu Cougnenc** on restructuring and insolvency proceedings.

For additional information visit www.gide.com

HAN KUN

ADVISES QINGCLOUD TECH ON ITS SSE STAR MARKET IPO

BEIJING - 02 February, 2021: Beijing QingCloud Technology Co., Ltd. ("QingCloud Tech"), a PRC-based company primarily engaging in the business of providing cloud computing products and services, recently obtained registration consent from the China Securities Regulatory Commission for its initial public offering on the SSE STAR Market.

Han Kun is advising QingCloud Tech as its legal counsel for the initial public offering.

For additional information visit www.hankunlaw.com

HOGAN LOVELLS

ASSISTS EYEPOINT PHARMACEUTICALS ON TRANSFORMATIVE FOLLOW-ON PUBLIC OFFERING OF COMMON STOCK

PHILADELPHIA - 09 February, 2021: A team from global law firm Hogan Lovells has advised EyePoint Pharmaceuticals, Inc., a pharmaceutical company committed to developing and commercializing therapeutics to help improve the lives of patients with serious eye disorders, on a US$115 million public offering of shares of its common stock. Cowen and Guggenheim Securities acted as joint book-running managers for the offering.

Among other uses, this capital raise sets the stage for EyePoint's continued advancement of EYP-1901, its potential twice-yearly sustained delivery intravitreal anti-VEGF treatment initially targeting wet age-related macular degeneration, the leading cause of vision loss in people over 65.

The Hogan Lovells team was led by Philadelphia-based partner Steve Abrams and counsel Stephen Nicolai. They were assisted by partners Susan Lee (Washington, D.C.) and Bob Underwood (Boston), counsel Teresa Lavenue (Washington, D.C), and associates Gibby Wagner (Philadelphia) and Sally Gu (Washington, D.C.).

For additional information visit www.hoganlovells.com

MULLA & MULLA AND CRAIGIE BLUNT CAROE

ADVISES HOEGH LNG IN 10 YEAR CHARTER FOR LNG IMPORT TERMINAL IN INDIA

MUMBAI – 01 February, 20201: India law firm Mulla & Mulla and Craigie Blunt & Caroe acted for Hoegh LNG in regard to a 10-year charter with H-Energy for their LNG import terminal at Jaigarh, India.

Höegh LNG will be the first FSRU operating in India and will replace a coal consumption with natural gas reducing CO2 emissions of 120 million tonnes, NOx emissions 97% and SOx 99% over the 10-year period.

Hoegh LNG was advised by Mulla team led by Shardul Thacker, Partner along with Divya Dharod Rambhia and Saloni Ajmera.

MUNIZ

ASSISTS CHINESE STATE OWNED POWER COMPANY CHINA THREE GORGES IN USD$ 569 MILLION BID IN LUZ DEL SUR

LIMA – 06 February, 2021: Muniz, Olaya, Meléndez, Castro, Ono & Herrera (Peru) has helped Chinese state-owned power company China Three Gorges launch a US$569 million bid to acquire an additional stake in the Andean country's largest electricity company, Luz del Sur.

The Chinese company made the bid through its local subsidiary, Peruvian Opportunity Company, which relied on Berninzon & Benavides. Luz del Sur was represented by Rodrigo, Elías & Medrano Abogados.

China Three Gorges launched the public bid on 22 January. It is expected to close on 19 February. If successful, the deal will hand the company a further 13.7% interest in Luz del Sur and increase its holding to 96.7%. China Three Gorges intends to buy 66,622,985 shares, paying US$8.5 each.

The hydropower-focused company completed its acquisition of 83% of the shares in Luz del Sur in April last year. The deal, which was made through its subsidiary, China Yangtze Power, was worth US$3.6 billion and was labelled one of the largest Chinese overseas investments when the deal was announced in 2019. Muñiz and Rodrigo Elías advised on those transactions.

Counsel to China Three Gorges—Muñiz, Olaya, Meléndez, Castro, Ono & Herrera Partners **Jorge Muñiz, Sergio Oquendo and Mercedes Fernandez,** and associates **Alesandra Azcárate, Rocío Izquierdo** and **Alessandro Heredia.**

For additional information visit www.munizlaw.com

NAUTADUTILH

ASSISTS ABN AMRO, BERENBERG AND KEMPEN & CO WITH THE IPO OF ESG CORE INVESTMENTS

AMSTERDAM - 12 February, 2020: NautaDutilh assisted ABN AMRO, Berenberg and Kempen & Co as underwriters with the IPO on Euronext Amsterdam of ESG Core Investments B.V., a special purpose acquisition company (SPAC).

ESG Core Investments is the first European based SPAC with a special focus on Environmental, Social and Governance (ESG) industries and aims to unlock a unique investment opportunity within the sustainability sector. ESG Core Investments successfully raised EUR 250 million and received overwhelming interest from investors. Infestos Sustainability B.V. acted as sponsor in the transaction. Infestos has a proven track record for investing in the sustainable industries (e.g. through the IPO of Alfen N.V. in 2018, for which NautaDutilh also assisted the underwriters).

The NautaDutilh Capital Markets team is excited to be on the forefront of this rapidly developing new trend in Amsterdam.

The NautaDutilh team was led **by Petra Zijp** and **Antonia Netiv** and included **Mariëlle van Nimwegen, Maaike Lelifeld** and **Sabrina Legerstee** as its core-members with invaluable input throughout the firm from, among others, **Pieternel Verhoeven – van den Brink, Jules van de Winckel, Ashley Beesemer** and **Mark den Bleijker.**

For additional information visit www.nautadutilh.com

SKRINE

ADVISES TYSON INTERNATIONAL HOLDING COMPANY ON CONDITIONAL SALE AND PURCHASE AGREEMENT FOR 49% ACQUISITION OF DIDNING SUPREME SDN BHD

KUALA LUMPUR - 15 February 2021: Tyson International Holding Company ('Tyson') entered into a conditional sale and purchase agreement on 10 February 2021 ('SPA') to acquire 49% of Dindings Supreme Sdn Bhd ('DSSB') from Malaysian Flour Mills Berhad ('MFM') for a cash consideration of up to RM420 million. The proposed acquisition by Tyson is part of a proposed strategic partnership with MFM.

DSSB is presently a wholly owned subsidiary of MFM and holds the entire equity interests of Dindings Poultry Processing Sdn Bhd ('DPP') and Dindings Poultry Development Centre Sdn Bhd ('DPDC') (except for one ordinary share in DPDC which is held by Perak State Agricultural Development Corporation ('PPPNP'). DSSB, DPP and DPDC ('DSSB Group') collectively undertake vertical integrated poultry business comprising poultry farming, feed milling and poultry processing.

The SPA is conditional upon various approvals and consents being obtained, including the approval of the shareholders of MFM, PPPNP and the creditors or lenders of MFM and/or DPP and DPDC.

On the completion date of the SPA, Tyson, MFM, DSSB and certain parties related to the aforesaid parties will enter into five agreements to give effect to the strategic partnership between Tyson and MFM, including a shareholders agreement between Tyson and MFM to regulate the management and affairs of the DSSB Group.

The SPA and the strategic partnership agreements are expected to be completed in the second quarter of 2021.

Tyson's ultimate holding company is Tyson Foods, Inc., which is listed on the New York Stock Exchange, whilst MFM is listed on the Main Board of Bursa Malaysia.

Our Firm advised Tyson on the Malaysian aspects of the SPA and the strategic partnership agreements. The main lawyers involved in the transaction were Phua Pao Yii (Lead Partner), Jesy Ooi (Partner), Tan Wei Liang (Associate) and Ting Shi Jing (Associate).

For additional information visit www.skrine.com

PRAC EVENTS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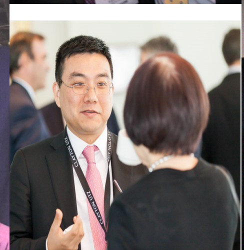
PACIFIC RIM
ADVISORY COUNCIL


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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Arias

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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

Simpson Grierson

RICHARDS BUELL SUTTON LLP — Established in 1871

Santamarina + Steta

SKRINE

SyCip Salazar Hernandez & Gatmaitan

TOZZINIFREIRE ADVOGADOS

Amendments to Communication “A” 7030 of the Central Bank of Argentina

On December 30, 2020, by means of Communiqué “A” 7193 (the “Communiqué”), the Central Bank of the Republic of Argentina (hereinafter, the “Central Bank”), established additional considerations for argentine importers to access the Foreign Exchange Market.

In first place, the term of Communiqué “A” 7030 and its supplementary provisions were extended until March 31, 2021.

In addition, the requirement of the Central Bank’s authorization for the payment of imports of goods was also extended until March 31, 2020, and the scope of the exceptions thereof were modified, as detailed below:

1. Payments within the established quota: In order to access the official Foreign Exchange Market, an affidavit must be filed before the Central Bank stating that the total amount of payments for imports of goods made through the Foreign Exchange Market as of January 1, 2020, does not exceed in more than the equivalent of US$ 1,000,000 the amount that arises from computing: (i) the goods registered on behalf of the relevant entity in the SEPAIMPO system; (ii) the goods officially registered between January 1, 2020 and the day prior to the access to the Foreign Exchange Market; (iii) plus the sum of the payments made within the framework of sections 2.2. to 2.6. of the Communiqué that were not associated with imports included in sections (i) and (ii) above; and (iv) minus the amount pending to be regularized for payments of imports with pending customs registration between September 1, 2019 and December 31, 2019.

2. Advance payments of imports for goods or supplies related to the provision of medicines or linked to medical and/or health care: the maximum amount allowed has been increased from US$ 2,000,000 to US$ 3,000,000. Furthermore, it has been established that the amount must arise from the calculation of sections (i) to (iv) abovementioned.

3. Increase in the amount to access the Foreign Exchange Market: Although the amount by which importers access the Foreign Exchange Market had already been increased up to 50% of the amounts liquidated as of October 2, 2020 for advances or pre-financing of exports from a foreign jurisdiction with a minimum term of 180 days, it is now permitted that, in the case of operations liquidated as of January 4, 2021, the remaining 50% may be used to access the Foreign Exchange Market, to the extent that the additional part corresponds to advance payments of capital goods.

4. Elimination of the requirement established in point 10.3.2.5. of the Foreign Exchange Regime regulations: The requirement linked to the limit of up to US$ 2,000,000 per month for the payment of debts outstanding as of August 31, 2019 for imports of goods with related counterparties where no due date has been agreed or which have an earlier due date, was eliminated.

Finally, the Communiqué has established that the prior Central Bank authorization will be required for the purchase of foreign currency when an entity is included in the apocryphal invoices issuers of the Argentine Revenue Office (AFIP), with the exception of operations of cancellation of financing in foreign currency granted by local financial entities, including payments for purchases in foreign currency made by means of credit or purchase cards.

This report cannot be considered as legal or any other kind of advice from Allende & Brea.

Practice Areas

Banking

Lawyer

Carlos M. Melhem
Jorge I. Mayora

Allende & Brea
Maipú 1300, C1006ACT
Buenos Aires, Argentina
+54 11 4318-9900

View this mailing online

NautaDutilh

Employment & Pensions

Belgium

New CBA on mandatory or recommended teleworking in the context of Covid-19

Tuesday, 2 February 2021

On 26 January, the National Labour Council signed a collective bargaining agreement concerning the terms and conditions for teleworking that is compulsory or recommended by public authorities in the framework of the measures taken to combat the spread of coronavirus (hereinafter "**CBA 149**").

First, it should be noted that CBA 149 only applies until 31 December 2021 and does not concern companies that concluded agreements on teleworking before 1 January 2021.

Second, CBA 149 sets out principles that should be taken into account in the context of teleworking. It states, amongst other things, that teleworkers should benefit from the same rights and obligations as other employees. In addition, teleworkers must be provided with information concerning the conditions for teleworking. In this context, the employer should conclude an agreement with each employee concerned regarding provision of the necessary equipment for teleworking and the costs and expenses to be reimbursed. The work schedules, monitoring possibilities of the employer and the periods during which teleworkers must be reachable or can be disconnected should also be laid down in a policy or agreement.

Finally, CBA 149 mentions the well-being of employees. Employers should in particular inform teleworkers of the measures taken to ensure their well-being and the person they can contact in this regard.

Contact us

Philippe François | Brussels | +32 2 566 8514

Alix de la Barre d'Erquelinnes | Brussels | +32 2 566 8521

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TozziniFreire Advogados

January 08, 2021

COVID-19 | Life Sciences - Telemedicine

PRICING OF COVID-19 VACCINES

The CMED Resolution No. 6/2020, published on December 23, 2020, established procedures for the analysis of price information documents regarding requests for pricing of COVID-19 vaccines.

The analysis and approval of the price will be the responsibility of the Technical Executive Committee of the Brazilian Drug Market Regulation Chamber (CMED), within 90 days from the receipt of all necessary documents.

It is noteworthy that the vaccine prices with temporary emergency use authorization will not be analyzed by CMED due to its experimental nature.

Finally, it was established that the vaccines designated to the National Operationalization Plan of Vaccination against COVID-19, of the Ministry of Health, or for sale to Federal agencies, or any of the sub-national entities, may be commercialized for the price presented by the pharmaceutical company that files the Informative Price Document, until a final decision of CMED is made.

From our point of view, the regulation provides for immediate access to the vaccine and gives reasonable legal certainty as to the price practiced during emergency use and during the evaluation by CMED.

The Resolution is already in force.

Contact Partners

Elysangela de Oliveira Rabelo Maurer
Marco Aurélio Torronteguy

www.tozzinifreire.com.br

BLOG

Corporations Canada Holds Public Consultations on Proposed CBCA Amendments

February 12, 2021

Written by Kristopher Hanc, Will Osler, Matthew Cunningham and Kate McGrath

Corporations Canada has launched public consultations on proposed regulations under the *Canada Business Corporations Act* (CBCA) related to recent amendments to the CBCA regarding executive compensation and the well-being of employees, retirees and pensioners.

Under Bill C-97, *An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2019 and other measures*, which received Royal Assent on June 21, 2019, the CBCA was amended by:

- requiring prescribed corporations to hold non-binding shareholder advisory votes on executive compensation to facilitate conversations about more balanced executive compensation schemes in certain cases (known as say-on-pay);
- requiring prescribed corporations to report on policies that pertain to workers' and pensioners' interests, and the recovery of certain incentive-based compensation to provide more market oversight and encourage conversations about factors impacting corporate strategy and decision-making processes (often called clawbacks); and
- clarifying that corporate directors may consider employee and pensioner interests in their decision-making, to encourage directors to take a more comprehensive approach to assessing the long-term interests of the corporation.

However, before the amendments to the CBCA can come into force, certain details in the proposed regulations require clarification. Accordingly, Innovation, Science and Economic Development (ISED) is seeking feedback and suggestions from stakeholders on the following points:

A. which corporations will be subject to the new obligations;

B. the definitions of "members of senior management", "retirees" and "pensioners";

C. the time and manner for disclosing the results of the say-on-pay vote;

D. information that needs to be disclosed to shareholders regarding clawbacks; and

E. the information to be disclosed to shareholders about the well-being of employees, retirees and pensioners.

Issue A: Prescribing the Corporations That Are Subject to the New Obligations

Distributing corporations, which are publicly-traded CBCA corporations, are intended to be subject to the amendments to the CBCA. Given the scope of the amendments, which corporations will be subject to them and what, if any, exemptions may apply, are important questions. ISED is seeking input on whether distributing corporations should be subject to the new obligations under the CBCA amendments.

Issue B: Prescribing the Definitions of “Members of Senior Management”, “Retirees” and “Pensioners”

Members of Senior Management

The term "members of senior management" is referred to in the current diversity and disclosure provisions of the CBCA. The *Canada Business Corporations Regulations* defines "members of senior management" as:

a. the chair and vice-chair of the board of directors;

b. the president;

c. the chief executive officer and chief financial officer;

d. the vice-president in charge of a principal business unit, division or function, including sales, finance or production; and

e. an individual who performs a policy-making function in respect of the corporation.

ISED proposes to use this definition in relation to the new obligations under the amendments regarding say-on-pay and clawbacks. As such, input is sought on whether stakeholders agree with this proposed definition of "members of senior management" under the new obligations and whether stakeholders have other suggestions or comments in relation to this definition.

Retirees and Pensioners

"Retirees" and "pensioners" are not currently defined in the CBCA. ISED proposes the following definitions for "retiree" and "pensioner":

> [A] "retiree" - person who has concluded their working or professional career with a corporation, and receives or will receive post-employment benefits other than a pension from that corporation.
>
> [A] "pensioner" - person who receives regular payments from a corporation from a fund accumulated during that person's employment with that corporation, or a spouse or dependents of such a person receiving the payments after the person is deceased.

The aim of the definitions is to distinguish between ex-employees who receive a pension (pensioners) from those who receive other benefits (retirees). A person may be both a retiree and a pensioner, or only one. Both definitions are used in relation to the disclosure to shareholders of information on the well-being of employees, retirees and pensioners under the amendments. The intent is for the proposed disclosure to cover both a pension received from a corporation as well as other benefits received by employees and retirees, such as health or life insurance.

ISED is seeking feedback on whether stakeholders agree with the proposed definitions of "retirees" and "pensioners" and whether stakeholders have other suggestions or comments in relation to these definitions.

Issue C: Prescribing the Time and Manner for Disclosing the Results of the Say-on-Pay Vote

The amendments to the CBCA require corporations to develop approaches regarding the remuneration of directors and senior management. The new section 125.1 of the CBCA reads:

> A prescribed corporation shall develop an approach with respect to the remuneration of the directors and employees of the corporation who are "members of senior management" as defined by regulation.

The corporation's approach to compensation is to be put to a non-binding shareholder vote at the corporation's annual meeting. Say-on-pay votes are common practice globally, with both the United States and United Kingdom mandating them in prescribed circumstances. Further, many Canadian companies—notably, the major banks and certain other senior reporting issuers—already hold say-on-pay votes voluntarily. However, the mechanics of disclosing the results of say-on-pay votes differ between jurisdictions. The CBCA amendments will require results to be disclosed in the following manner:

a. reporting the results at the meeting itself;
b. posting the results on the corporation's website no more than 30 days after the meeting; and
c. setting out the results in the next annual general meeting's management proxy circular.

ISED is seeking feedback on this proposed approach to the time and manner of disclosing the results of say-on-pay votes. For reference, in the United States, pursuant to the Securities and Exchange Commission's (SEC) rules, say-on-pay votes must be disclosed within four business days after the shareholder meeting at which the vote is held.

Issue D: Prescribing the Information That Needs To Be Disclosed to Shareholders About the Recovery of Incentive and Other Benefits

The CBCA amendments would require disclosure to shareholders regarding the recovery of incentives and other benefits from directors and members of senior management in certain circumstances (often referred to as clawbacks). New section 172.3 of the CBCA reads:

> The directors of a prescribed corporation shall place before the shareholders, at every annual meeting, the prescribed information respecting the recovery of incentive benefits or other benefits, which is included in the remuneration referred to in section 125, paid to directors and employees of the corporation who are "members of senior management" as defined by regulation.

Similar to say-on-pay votes, clawback legislation providing for the recovery of undeserving incentive payments or other compensation exists in some form in the United States and certain other jurisdictions. Some groups within Canada, such as the Canadian Coalition for Good Governance, have advocated for the adoption of clawback policies by issuers for some time.

The CBCA amendments propose that information to be disclosed to shareholders regarding any clawback policy adopted by the issuer include:

a. a comply-or-explain provision requiring the corporation to state whether it has a written policy regarding clawbacks and, if it does not, why it has not adopted a policy; and

b. if the corporation has a policy, a summary of same, including its objectives and key provisions such as (a) which incentives and benefits are covered, (b) what triggers a clawback and whether it is discretionary, (c) the period in which clawbacks may be required, (d) who makes the decision that a clawback is needed; and (e) information on clawbacks made in the previous fiscal year.

ISED is seeking input regarding whether additional information should be disclosed or if items on the current proposed list should be excluded.

Issue E: Prescribing the Information That Needs To Be Disclosed to Shareholders About the Well-Being of Employees, Retirees and Pensioners

The CBCA amendments will also require boards to put information about the well-being of employees, retirees and pensioners before shareholders at annual meetings. New section 172.2 of the CBCA reads:

> The directors of a prescribed corporation shall place before the shareholders, at every annual meeting, the prescribed information respecting the well-being of employees, retirees and pensioners.

In theory, this will motivate boards to consider the interests of these stakeholders in their decision-making. Further, the annual requirement is meant to provide ongoing oversight and accountability regarding the interests of the corporation's human resources.

The prescribed information in the above provision is proposed to include the following:

a. a comply-or-explain section requiring the corporation to state whether it has adopted a written policy relating to the well-being of employees, retirees and pensioners and if not, why; and

b. if the corporation has such a policy, a summary of it, including (a) the policy's objectives and key provisions, (b) activities taken pursuant to the policy, (c) the corporation's progress in achieving the policy's objectives; and (d) whether the corporation measures the policy's effectiveness and how.

Whether this amendment reflects changing Canadian demographics or codifies the expansion of stakeholder groups from *BCE Inc. v 1976 Debenture Holders*, corporations subject to the CBCA will likely have to begin collecting additional information about stakeholders to comply with its requirements. ISED is seeking submissions about whether additional information should be disclosed or whether any of the information currently proposed to be disclosed should be excluded.

Participation in the Public Consultation

Written submissions regarding the above issues for consultation may be sent to Corporations Canada until March 31, 2021. Bennett Jones would be pleased to discuss the issues with you, and assist in preparing a submission.

AUTHORS

 Kristopher R. Hanc, *Partner*

 William S. Osler, *Partner*

 Matthew Cunningham, *Associate*

 Catherine (Kate) A. McGrath, *Associate*

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Posted on: December 18, 2020

INSURANCE ACT APPRAISALS – A COURT'S GUIDE ON MECHANICS

By: Ola N. Stoklosa

The Ontario Superior Court of Justice recently examined the interaction of various provisions in the *Insurance Act,* R.S.O. 1990, c.1.8 (the "Act") for the purpose of determining multiple issues before it that arose in the context of a statutory appraisal under the Act and a series of lawsuits commenced by insureds against their insurer for tornado damage done to their homes. In *Campbell v. Desjardins,* 2020 ONSC 6630 the court provides guidance to insurance professionals, lawyers, and adjusters on the various processes involved in an appraisal. Given the similarity of legislation concerning appraisal or dispute resolution processes across Canada, *Campbell* offers guidance to the entire nation.

The Facts

In *Campbell,* three families (collectively, the "Insureds") each owned homes that were damaged by a tornado that hit the city of Ottawa in September 2018. As a result of the tornado, two of the homes were deemed total losses and the other sustained significant damage.

All three losses were covered and in order to determine the amount of the losses the Insurer used both internal and external construction and property restoration personnel. The Insureds however chose to use different parties to assess and rebuild or repair their homes. While significant funds had been advanced to the Insureds under their respective dwelling, contents, and additional living expense coverages, the amount required to rebuild or repair their homes (which processes remained underway), remained at issue. In order to resolve these cost issues, and despite the fact that final proofs of loss had not been provided, appraisals under the Act were triggered by either the Insurer or the Insured.

Concurrently with the appraisal process, the Insureds commenced suit against the insurer. It was in the context of those suits that procedural disputes that arose within the appraisal processes came to be addressed by the court.

The Ruling

While *Campbell* stands as recommended reading due to its extensive overview of the appraisal process, the court's rules was focussed on three issues:

1. A party's right to retain a representative of its choice;
2. An insured's right to rely upon actual costs incurred as opposed to estimates of repair costs; and
3. Whether legal proceedings should be stayed until appraisal process is concluded.

In respect of the first issue, the court found that there was no restriction on a party's right to retain the representative of its choosing. In doing so it relied on the lack of limitation in the Ontario legislation's language. It also considered other jurisdictions' limiting language (ex. BC, NS, PEI and NL) and the overarching role of a representative being to be an advocate for its client. The representative's role was to be distinguished from an umpire's which was to weigh the competing positions advanced by the representatives and make a determination. As such, only the umpire must be impartial and independent.

In respect of the third issue, the court gave considerable weight to the consumer protection objective of appraisal legislation. This objective was found to outweigh the legislative requirement that an insured deliver a sworn proof of loss "as soon as practicable". The court held that an insured is entitled to rely upon actual costs incurred, provided that the insured has acted diligently and in good faith throughout with full transparency to the insurer. So long as an insured did not act in a manner that impeded the insurer's ability to investigate, monitor, and assess the progress of the repair or rebuild the insured was not running afoul of the requirement to deliver a proof of loss, final or interim. In the instant case no such impeding had occurred and thus the Insureds were entitled to conclude their repairs prior to submitting a proof of loss.

Finally, the court followed a long line of jurisprudence that stood for the proposition that a stay of proceedings would not be granted when a legal action entailed claims other than a valuation of lost property. Since the pleadings, as in most cases, disclosed claims beyond the valuation of the lost property (ex. breach of contract and fiduciary duty, bad faith, etc.) the lawsuits were allowed to proceed concurrently with the appraisals.

Practical Considerations for Insurers, Adjusters and Property Claims Professionals

As referenced above, *Campbell* stands as recommended reading for its overview of the appraisal or dispute resolution process. Caution however must be exercised as there are nuanced differences in the legislation across multiple Canadian jurisdictions. Just one of these differences may be found in limitations on the parties' right to choose their representatives.

We consider the court's decision to allow an insured to rely on actual costs instead of estimates in its proof of loss as a valid signal to insurers that the need for certainty and security of its insureds outweighs the need for expediency in this type of process. In situations where an insured wishes to delay the delivery of a proof of loss until actual costs are incurred insurers are well within their rights and well advised to work closely with the insured in respect of assessing the work being done and the costs for that work. Again, requirements and timing of proof of loss delivery varies across jurisdictions but the consumer protection aspect of this legislation is universal.

If correctly and scrupulously followed, the appraisal or dispute resolution process remains a cost-effective and efficient tool to resolve disputes regarding the value of an insured's loss or damage due to an insured risk.

Should you have any questions about this article, contact Insurance Lawyer, Ola N. Stoklosa here.

/Carey

News Alerts

Regulation of the Law 21,299, that rules postponement of mortgage loans, comes into force

February 11, 2021

On February 6, 2021, the Ministry of Treasury's Decree, that established the regulation of the **Law 21,299** , on mortgage loan postponements, was published in the Official Gazette (the "Regulation").

The Regulation sets rules the following topics: (i) Certain characteristics, terms and conditions of the postponement loans; (ii) postponement mandate; (iii) additional loan agreements; (iv) payment of mortgage loan; (v) third parties' consent; (vi) rules on registry annotations, and (vii) functioning of the Small and Middle Enterprises Guaranty Fund (*Fondo de Garantía para Pequeños y Medianos Empresarios*, "Fogape").

Characteristics of the postponement loans

The Regulation supplement the legal provisions on the content of these loans, their formalities, purpose, destination of funds and includes a regulation on related insurances.

Postponement mandate

It is set the minimum content of the mandate by means of which the borrowers may instruct the relevant financial institution to execute a postponement loan on their behalf, stating that no marginal annotation of such mandate in the Real Estate Registrar is required.

On an innovative manner, it is included several examples of remote communication means by means of which this mandate may be granted, including mobile apps and others.

Payment of mortgage loans

Legal provisions in this regard are reiterated and supplemented. In case there are 2 or more borrowers of the same loan, both shall request the postponement loan and grant the mandate referred to above, on a jointly basis.

The abovementioned rule is not applicable to personal guarantors and joint and several guarantors, both of which shall solely guarantee the obligations under the postponement loans if they agree so.

State Guaranty

Access conditions and characteristics of the state guaranty to guarantee postponement loans

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

Diego Lasagna
Associate
+56 2 2928 2216
dlasagna@carey.cl

Diego Peralta
Partner
+56 2 2928 2216
dperalta@carey.cl

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

(the "State Guaranty") are set, including the following:

1. The borrower of the relevant mortgage loan cannot have more than 30 days of payment default, at the time of the request.
2. The requestor shall have experienced at least a 25% income reduction, regarding 2019 or 2020 average.
3. The Fogape's manager shall tender the State Guaranties to the eligible financial institutions, with charge to the Fogape's resources and shall set the requirements for the relevant financial institutions to enforce the relevant guaranty.
4. The State Guaranty shall have a maximum validity of 60 months as from its granting and the renegotiation of guaranteed loans can solely be made prior consent from the Fogape.
5. The maximum amount the State Guaranty may guarantee will be equivalent to 6 installments of the mortgage loan whose installments are to be paid with the relevant postponement loan.
6. To enforce the State Guaranty, the relevant financial institutions shall, among others, demonstrate they performed collection actions, which did not succeed.

Validity

The Regulation came into force upon it was published in the Official Gazette and shall remain valid as long as Law 21,299 does so.

Legal Commentary

January 13, 2021

Analysis of China's "Blocking Statute"

Authors: Kevin DUAN | Xuezhen LU | Shasha ZHOU

On January 9, 2021, with the approval of the State Council of China, the Ministry of Commerce (**"MOFCOM**") issued in its first decree of 2021 the *Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Legislation and Other Measures* (the "**Rules**"), which took immediate effect[1]. On January 10, the head of the MOFCOM Department of Treaties and Laws answered questions from reporters (the "**Briefing**") on issues related to the Rules[2]. The promulgation of the Rules is in line with the prevailing practices worldwide when confronting unjustified extra-territorial application of foreign legislation and other measures. The Rules demonstrate China's wisdom and determination to protect the legitimate rights and interests of its citizens, legal persons and other organizations. In this article, we illustrate the provisions of the Rules, analyze future implementation scenarios by combining international practices, and finally conclude by sharing our thoughts.

Regulatory intent: to safeguard national interests and maintain normal economic and trade order

Article 1 of the Rules specify their regulatory intent, i.e., to block the impact of unjustified extraterritorial application of foreign legislation and other measures in China, safeguard national sovereignty, national security and development interests, and protect the legitimate rights and interests of citizens, legal persons, and other organizations of China. Formulation of the Rules is consistent with international practice. Since the middle of the 20th century, enacting blocking laws to address extraterritorial jurisdiction problem has been a growing trend worldwide. The European Union, Canada, Australia and many other countries have successively introduced their own blocking laws to prohibit the unjustified application of certain foreign laws which have extraterritorial effects in their territories. These laws cover many areas, ranging from securities, anti-monopoly, foreign economic sanctions to restrictive trade measures. For example, the European Union legislated its *Regulation on protecting against the effects of extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom* (Council Regulation (EC) No 2271/96, "**EU Blocking Statute**"), Australia passed its *Foreign Proceedings*

[1] http://www.mofcom.gov.cn/article/zwgk/zcfb/202101/20210103029710.shtml.

[2] http://www.mofcom.gov.cn/article/news/202101/20210103029779.shtml.

(Prohibition of Certain Evidence) Act, Japan implemented *Special Measures Law concerning the obligations to return profits gained in connection with the 1916 Act* and France published *Law No. 68-678, relating to the transfer of documents and information of an economic, commercial, industrial, financial or technical nature to foreign natural or legal persons*[3].

Applicable scenarios: *"citizens, legal persons or other organizations of China"* facing unjustified extra-territorial application of foreign legislation and other measures

A prerequisite in applying the Rules is the existence of an extraterritorial action, according to Article 2. Specifically, the Rules apply to "situations where the extra-territorial application of foreign legislation and other measures, in violation of international law and basic principles of international relations, unjustifiably prohibits or restricts the citizens, legal persons or other organizations of China from engaging in normal economic, trade and related activities with a third State (or region) or its citizens, legal persons or other organizations." Such *"citizens, legal persons, or other organizations of China"* includes all subsidiaries, offices, and representative offices of multinational companies that are domiciled in China. It should be noted that the Rules do not explicitly limit the obligations of prohibition orders only to Chinese entities. That being said, we do not rule out the possibility that such application may be expanded to relevant foreign entities via extensive interpretation.

According to Article 2 of the Rules, unjustified extra-territorial application of foreign legislation and other measures refers to laws and measures that *"prohibit or restrict the citizens, legal persons or other organizations of China from engaging in normal economic, trade and related activities with a third State (or region) or its citizens, legal persons or other organizations."* Therefore, the implementation of the Rules is mainly for combatting the so-called secondary sanctions, that is, prohibiting or restricting normal economic and trade activities between domestic parties and those of third countries by virtue of an unjustified application of extra-territorial foreign legislation and other measures. Han Liyu, a professor from Renmin University of China Law School, expressed similar views in an interview[4]. It should be pointed out that the Rules adopt an open legislative approach, i.e., first an assessment by the Working Mechanism (as defined below) and then issuance of a prohibition order, which enables the related Working Mechanism office to have flexibility in conducting law enforcement. In other words, the Rules could be interpreted in an extensive manner to counter unjustified extra-territorial application of foreign legislation and other measures.

Reporting obligations, compliance obligations and relief measures

Article 4 of the Rules provides the operating mechanism. The State will establish a working mechanism composed of relevant central departments (the "**Working Mechanism**"), to be responsible for counteracting unjustified extra-territorial application of foreign legislation and other measures. In particular, the Working Mechanism is to be led by MOFCOM in coordination with the National Development and Reform Commission and other relevant departments. Notably, the Working Mechanism arrangement is similar to that of the "Unreliable Entity List", which is also under the governance of the competent

[3] Ye Yan, On the EU Blocking Statute, 2020 Pacific Journal 3, 50-66.

[4] http://www.mofcom.gov.cn/article/news/202101/20210103029706.shtml.

department of commerce of the State Council. It is thus possible that these two mechanisms will be merged into one.

I Reporting obligations, compliance obligations and punishment

The Rules explicitly provide that "*where a citizen, legal person or other organization of China is prohibited or restricted by foreign legislation and other measures from engaging in normal economic, trade and related activities with a third State (or region) or its citizens, legal persons or other organizations, he/it shall truthfully report such matters to* ***the competent department of commerce of the State Council within 30 days****.*"

When the Working Mechanism, upon assessment, confirms an unjustified extra-territorial application of foreign legislation and other measures, the competent department of commerce of the State Council will issue a prohibition order, which requires the relevant foreign legislation and other measures not to be accepted, executed, or observed.

To ensure compliance with the reporting and compliance obligations, the Rules further provide corresponding penalty measures. Pursuant to Article 13 of the Rules, the competent department of commerce of the State Council may give a warning, order the Chinese party to rectify within a specified period of time, and may concurrently impose a fine according to the severity of the circumstances.

II Judicial remedies and State support

In addition to administrative penalties, non-compliance with a prohibition order may also trigger the risk of civil damage claims in China. According to Article 9 of the Rules, Chinese citizens, legal persons, or other organizations may initiate legal proceedings and claim for damages where they suffer losses due to an unjustified extraterritorial application of foreign legislation and other measures.

Specifically, with respect to the foreign legislation and other measures within the scope of a prohibition order, a Chinese party that losses suffers losses may claim for damages through legal proceedings against (1) a party who violates the prohibition order by observing and executing the foreign legislation and other measures within its scope, thereby infringing upon the Chinese party's legitimate rights and interests; and (2) a party who benefits, to the Chinese party's detriment, from a judgment or ruling made in accordance with the foreign legislation and other measures within the scope of the prohibition order.

Furthermore, according to Article 11 of the Rules, where a Chinese party suffers significant losses resulting from non-compliance with the relevant foreign legislation and other measures, relevant government departments may provide necessary support based on specific circumstances, which provides further guarantees for the implementation of the Rules. Though the Rules and the Briefing do not specify the exact nature of such support, it may, according to the rulemaking background, include policies, industries, channels and financial advantages that would offset the losses suffered by these parties and weaken the substantial impact of foreign economic sanctions against China.

III Applications for exemptions to prohibition orders

Similar to the EU Blocking Statute, the Rules stipulate an exemption mechanism for parties frustrated from practically complying with a prohibition order. Thus, upon issuance of a prohibition order, Chinese parties subject to it may apply for an exemption to the competent department of commerce of the State Council. Decisions on whether to approve the application will be made within 30 days from the date of acceptance of the application and may be made sooner under exigent circumstances.

Notably, exemptions are available under the Rules only to citizens, legal persons or other organizations of China, not to foreign parties.

Implementation scenarios

In the global context of unilateralism and "decoupling", unjustified application of foreign laws and other measures has negatively affected the normal economic and trade activities of Chinese parties. In response, China has promulgated the Rules, which focus on prohibiting Chinese parties from complying with measures issued by foreign competent authorities that have extra-territorial effects and which unjustifiably affect the sovereignty and interests of China, preventing Chinese authorities from recognizing or implementing such measures, and providing affected Chinese parties with means to claim and seek redress.

In practice, the Rules may apply in scenarios where the U.S. export control system imposes extra-territorial restrictions on certain Chinese entities and/or its third-country trading partners. Such as trade restrictions under the List of Specially Designated Nationals and Blocked Persons (the "**SDN List**") and the U.S. Entity List. Trade restrictions under Export Administration Regulations may also be included, which target products involving U.S. controlled items during the re-export and in-country transfer processing by applying the direct product rule or *de minimis* rule. If the application of the aforementioned U.S. export control system affects normal economic and trade activities between Chinese parties and those of a third country (or region), such application may be deemed to fall within the scope of Article 2 of the Rules, and thus trigger the blocking mechanism.

Potential issues

As China's first blocking regulation, the Rules establish a system for China to respond to threats posed by foreign laws and regulations based on "long-arm jurisdiction", reflecting China's protection of judicial sovereignty and the legitimate interests of Chinese parties. However, due to the overarching nature of the Rules, detailed operating rules remain to be specified in future supporting provisions and guidelines. In the absence of specific guidelines and examples, enterprises may face practical problems requiring observation and answers during implementation.

I Criteria and frequency of issuing prohibition orders based on the assessment of the Working Mechanism

Instead of specifying assessment criteria, the Rules merely summarize in Article 6 several factors for the Working Mechanism to consider when assessing whether an application of law or other measure is unjustified. In addition, unlike the EU Blocking Statute, the Rules contain no similar annex that lists the exact scope of "foreign laws and other measures". As a result, the competent authorities may determine on a case-by-case basis the criteria for issuing prohibition orders. As the MOFCOM spokesperson stated in the Briefing, in practice, the Working Mechanism will focus on the specific circumstances of each case, comprehensively consider the factors listed in Article 6 of the Rules, and prudently carry out the assessment and determination in accordance with law.

During the Briefing, the MOFCOM spokesperson did not clearly indicate how frequently prohibition orders would be issued. In light of the experience of other countries, blocking statutes serve more as a symbolic, rather than practical, piece of legislation. For example, since the EU Blocking Statute came into effect, it has only attempted to be preliminarily implemented twice, but has never been actually implemented[5]. Given the above, the implementation and frequency of the enforcement of the Rules remains to be further observed in practice.

II Performance of reporting obligations

Article 5 of the Rules stipulates that Chinese parties are required to truthfully report within 30 days the unjustified extra-territorial application of foreign legislation and other measures. The failure to truthfully do so may result in warnings or penalties. Considering that the Rules adopt an open approach based on assessments and no prohibition orders have yet been issued, relevant parties will face the problem of a scarcity of guidance when judging whether a prohibition or restriction on trade and other relations constitutes an unjustified extra-territorial application under the Rules. Overall assessments and judgments are thus required. As for multinationals, relevant assessments and judgments may involve many factors and processes. Uncertainty exists as to whether all parties will be able to fulfill the reporting obligation within the stipulated period. In practice, it remains to be further clarified how the relevant authorities will guide affected parties in the internal evaluation and judgment process, and how the authorities will determine whether the enterprise has timely fulfilled its reporting obligations.

III Conflict of Laws

Considering that the Rules inherently give rise to conflicts of laws, their application will undoubtedly conflict with foreign laws. Hence, relevant parties will often be caught in a dilemma, especially in the case of multinationals. As an analogy, in recent anti-monopoly litigation on the global royalty rates of standard-essential patents (“**SEP**”), occasions repeatedly occur where courts in different jurisdictions separately issue anti-suit injunction orders and anti-anti suit injunction orders for the determination of the same rates[6]. Thus, how to simultaneously comply with the rulings made by the courts of different jurisdictions but which are in substantial conflict is a real predicament faced by the parties.

As a solution, the Rules establish a mechanism for Chinese parties to be exempted from complying with prohibition orders. However, the exemption mechanism does not apply to foreign entities operating in China. This circumstance could present challenges for such parties.

Compliance advice

I Chinese enterprises should strengthen their internal assessment measures and promptly

[5] Ye Yan, On the EU Blocking Statute, 2020 Pacific Journal 3, p. 50-66.

[6] https://www.sohu.com/a/426244010_166680.

report prohibitions or restrictions on economic, trade or other relations caused by extra-territorial foreign legislations or measures. Enterprises should monitor for prohibition orders and also apply for exemptions in a timely manner

If a Chinese enterprise encounters a prohibition or restriction on trade involving a third country or region that may result from foreign legislation or other measures such as the U.S. Export Control System, the enterprise should first conduct an internal assessment in accordance with Article 6 of the Rules and determine whether its application may be unjustified. If so, the Chinese entities should report to the relevant authorities in a timely manner within the stipulated 30-day period.

In addition, Chinese enterprises should actively monitor the issuance of prohibition orders in their respective industries. If a Chinese enterprise has special difficulties or circumstances in practically complying with a prohibition order, the enterprise may submit a written application for an exemption from the prohibition order to the Ministry of Commerce, which includes the reasons and scope of the exemption.

II For multinationals, the promulgation of the Rules does not necessarily mean that they will have to continue to cooperate with Chinese enterprises and institutions on the U.S. Entity List

As to the spotlighted U.S. Entity List issue, the promulgation of the Rules does not necessarily mean that multinational companies will have to immediately continue to cooperate with Chinese enterprises and institutions on the U.S. Entity List.

On the one hand, currently, the Rules present only framework provisions. It remains to be seen whether the U.S. Entity List would constitute an unjustified extra-territorial application of law. Even after being confirmed, relevant enterprises could still proactively seek exemptions through their Chinese affiliates to protect their interests.

On the other hand, in accordance with the Briefing, the Rules aim to block unjustified extra-territorial applications that prohibit or restrict normal economic and trade activities between Chinese parties and those of third countries, so as to maintain a normal business environment. Thus, if an enterprise intends to continue a transaction, the Rules can help to ensure the transaction proceeds unhindered by unjustified extra-territorial applications of law. However, where a party chooses to terminate a transaction, the Rules fail to provide clear guidance for distinguishing between normal commercial decision-making as opposed to compliance with the unjustified extra-territorial application of foreign law. In this respect, it is doubtful whether the Rules could practically require multinationals to continue to cooperate with Chinese companies and institutions on the U.S. Entity List.

Conclusion and prospects

The Rules provide several groundbreaking mechanisms and introduce measures such as judicial remedies, which ensure the protection of legitimate trade activities between Chinese entities and transaction counterparties in third countries. However, several practical issues such as the scope of foreign legislation and other measures, the specific implementation scenarios, and the manner in which the Rules may coordinate with judicial authorities remain to be explained by future ancillary rules, guidelines, and practical observations.

Important Announcement

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

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

Kevin DUAN

Tel: +86 10 8516 4123
Email: kevin.duan@hankunlaw.com

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Modification of regulation on management of containers and packaging

By means of Resolution 1342 dated December 24, 2020, the Ministry of Environment and Sustainable Development "Ministerio de Ambiente y Desarrollo Sostenible" ("MADS") modified Resolution 1407 of 2018 (reverse logistics plans and systems for the management of containers and packaging).

Resolution 1342 of 2020 modified the scope of the reverse logistic plans and systems for the management of containers and packaging. Said resolution excluded containers and packaging that correspond to: (i) hazardous wastes; (ii) word and natural fibers, different from paper and cardboard; (iii) drugs and medicines.

New definitions were introduced in the Resolution 1407 of 2018, such as: (i) recovery of packaging and containers and waste; (ii) packaging of different materials; (iii) returnable packaging; and (iv) recycling.

Additionally, Resolution 1342 of 2020 extended the term for submitting, before the National Authority of Environmental Licenses (Autoridad Nacional de Licencias Ambientales) ("ANLA"), the packaging reverse logistic plans and the progress reports.

- The producers established before December 31, 2018 must submit their packaging reverse logistic plan before January 31, 2021.
- The producers established after January 01, 2019 must submit their packaging reverse logistic plan before December 31 of the year after the first fiscal year.

The progress reports must be submit before the environmental authority according to the following terms:

Term to report	Month for submitting the report	Number in the 4thposition of the docket number of the logistics plan for the management of containers and packaging.
From January 1 to December 31 of the previous year.	March	1-5
	April	6-0

The producers that filled a pilot plan before the ANLA before December 31, 2019, must submit the progress report before March 31, 2020.

Resolution 1342 of 2020 included new obligations for the companies that transform waste to use it as raw material or products. As of 2021, said companies must be registered before the regional or urban environmental authority. Additionally, as of 2022 said companies must inform to the regional or urban environmental authority all the modifications to the reverse logistic systems.

Resolution 1342 of 2020 also established the terms of the certificates of efficiency and returnability.

Finally, Resolution 1342 of 2020 extended the definition of final consumer and established the following obligations: (i) accurately classify containers and packaging waste; and (ii) deliver containers and packaging waste in the collection points established by the reverse logistic systems.

EL SALVADOR

ENFORCEMENT OF THE SPECIAL TRANSITORY LAW TO CONTAIN THE PANDEMIC DUE TO COVID-19 DISEASE

EL SALVADOR - ENFORCEMENT OF THE SPECIAL TRANSITORY LAW TO CONTAIN THE PANDEMIC DUE TO COVID-19 DISEASE

Jan/2021

On January 23, 2020, the President of the Congress of El Salvador, based on his constitutional powers, published in “La Prensa Gráfica” newspaper, the Legislative Decree No. 757, which contains the "Special Transitory Law to Contain The Pandemic due to Covid-19 Disease", approved by the Congress on October 29, 2020, which establishes the provisions for the comprehensive care, management and control of the COVID-19 pandemic, as well as the epidemic areas subject to sanitary control, ensuring in all cases free movement, the right to work, respect for human rights, respect for democratic institutions and comprehensive health of the population.

It is important to highlight certain sanitary rules for different economic and social activities established in said decree, which command to expand the occupational risk prevention management programs to include the following extraordinary measures:

- GENERAL MEASURES
    - Physical distancing.
    - Intensification of health conditions in workplaces.
    - Intensification of order and cleanliness in the workplace.
    - Prepare a specific training, awareness, and promotion program for prevention measures against COVID-19.
    - Uses of personal protection equipment.

- IMPLEMENTATION OF WORK MODALITIES
    - Home office.
    - Rotating shifts.
    - Adjustable working hours and days

- REVIEW AND / OR EXTENSION OF HYGIENE AND HEALTH MEASURES.
    - Permanent use of masks.
    - Promote hand washing.
    - Disinfect workstations, among others.

Furthermore, said decree establishes that public and private employees subject to isolation, quarantine, observation, and surveillance may not be subject to dismissal, sanctions, or discounts in their workplace, and that the sickness allowance provided for in the article 48 of the Social Security Law and article 24 of the Regulations for the Application of the Social Security System will apply for them.

The aforementioned law will be considered as a current applicable law as of the date of its publication, that is, as of January 23, 2021, ending its effects eight months after its entry into force.

If you have any questions or want to know more information on the subject, please do not hesitate to contact us.

Mario Lozano
Partner
mario.lozano@ariaslaw.com

Julissa Castro
Associate
julissa.castro@ariaslaw.com

A NEW CHAPTER FOR RELATIONS BETWEEN THE EUROPEAN UNION AND CHINA?

An investment agreement between the European Union ("EU") and China has been the subject of discussions since 2013, with over 35 rounds of negotiations. A decisive step was taken on 30 December 2020, with the announcement of an "agreement in principle" on a Comprehensive Investment Agreement ("CAI") between the Parties. Even if negotiations are still ongoing, the provisory text was published recently, on 22 January 2021. The released draft covers the preamble, six sections, and three annexes, the remaining parts expected to be published in February.

The CAI covers commitments on market access, level playing field and sustainable development. It also provides a State-to-State dispute settlement mechanism. The chapter on investment protection and improvements to the dispute settlement mechanism are to be agreed upon between the Parties within the next two years.

The agreement has been presented by the European Commission as pioneering and very ambitious. Indeed, the text confirmed expectations: it aims to improve the Chinese business environment for European investors, thanks to disciplines that forbid forced transfers of technology, that intend to establish a level playing field granting European companies national treatment, and to promote greater transparency and regulation of subsidies and licences. Several obstacles to establish a company within the Chinese territory will also be removed, such as the obligation to form joint ventures in some sectors, the limitation of the number of companies or of foreign capital in operation.

However, even if these concessions may look like an important win to the EU, most of them have already been granted by China in its recent Foreign Investment Law ("FIL") and in the US-China Phase One Trade Deal, both of which entered into force in 2020. Hence, the benefits to the EU might not be that ground-breaking.

Even if we consider otherwise, another relevant point is how to enforce Chinese compliance with the far-reaching commitments of the CAI. Disputes on subsidies regulations and sustainable development, for instance, are not subject to the dispute settlement mechanism set forth by the agreement, and can only be solved through consultations between the Parties.

NOT THAT INNOVATIVE CONCESSIONS ON MARKET ACCESS

The agreement aims to promote trade relations by facilitating investments, improving the rules and conditions for investment.

Among the important provisions on market access are that, in sectors where market access commitments have been agreed upon, Parties cannot impose limitations on the number of enterprises that may carry economic activities, the total value of transactions, the total number of operations or the total number of people to be employed. Parties also cannot restrict or require the constitution of a joint venture or a specific legal entity as a condition to operate within the territory (Section II, Article 2), as China used to request. Moreover, there is a prohibition to force transfers of technology (Section II, Article 3).

To ensure the level playing field, the CAI also establishes non-discriminatory treatment for foreign invested enterprises, granting national (Section II, Article 4) and most-favoured nation treatment (Section II, Article 5). State-owned enterprises should act according to commercial considerations (Section II, Article 3bis).

Most of these concessions, however, had already been granted indistinctly by the recent Chinese FIL. It replaces the three previous laws governing foreign investment in China - Chinese-Foreign Equity Joint Venture Law, Chinese-Foreign Cooperative Joint Venture Law and Wholly Foreign Owned Enterprise Law - providing greater protection for foreign investment and enhancing regulatory transparency.

When analysing the FIL that currently regulates all foreign investment in China, we realise that the country did not make that many concessions to the EU through the CAI. To promote a transparent and level playing environment, the FIL already prohibited forced transfers of technology (Article 22) and granted national treatment for foreign invested enterprises (Article 4), ensuring equal rights of participation in bidding for government procurement for foreign investors (Article 16).

Moreover, on the progressive opening of market access to foreign ownership, the FIL also represented a major step forward. Since the establishment of a Foreign Investment Catalogue, first published by the Chinese Ministry of Commerce ("**MOFCOM**") in 1995, China has classified industries into "encouraged", "restricted" or "prohibited" for purposes of access to foreign investments. The Catalogue was later replaced by the Negative List, listing 190 "restricted" or "prohibited" industries. When last updated in 2020, it had only 34 sectors. Even if some remain inaccessible for foreign investment under the FIL (Article 28), the law marks a Chinese commitment to continue to reduce the industries under the list, particularly in the financial sector. In that respect, one may note that some of the market opening commitments made by China under the CAI are already covered by existing regulations or policies applicable to all foreign investors (automotive sector, private hospitals, cloud services).

Chinese market access concessions regarding full foreign ownership have also been made with regard to the United States. US-China Phase One Trade Deal includes commitments to remove the foreign equity cap in several sectors, such as life, pension, health insurance and fund management (Article 4.6). China also allowed US companies to acquire the majority stake in their existing joint ventures with Chinese companies.

Thus, the biggest concessions of the CAI in terms of market access had already been assured by the FIL. One possible step further would be to remove the foreign equity cap in more sectors under the CAI than in previous or existing Chinese commitments. However, that cannot be affirmed so far, since the annex listing sectors and subsectors in which market access commitments have been undertaken is not available yet. The final text should be released in February.

REGULATION AND TRANSPARENCY OF SUBSIDIES

Section III of the CAI addresses regulatory framework, and Article 8 of Sub-section 2 specifically addresses the transparency of subsidies. The agreement adopts the Agreement on Subsidies and Countervailing Measures ("**ASCM**") definition of subsidies, and does not apply to subsidies for fish and fisheries, or for audio-visual services.

This Article establishes that Parties should, until 31 December of the year subsequent to the one in which a subsidy was granted, publish information on the objectives, legal basis, form, amount and recipient of every subsidy. These transparency commitments should be put into practice no later than two years after the entry into force of the agreement.

If a Party considers that a particular subsidy can have a negative effect on its investment interests under the CAI, it can request consultations with the other Party, which has 90 days to respond. Disputes over subsidies cannot be a matter for the dispute settlement procedure set forth by the agreement. This raises questions regarding the strength of the enforcement mechanisms available on the CAI in terms of regulation of subsidies.

An annex clarifies the sectors to which the commitments on transparency of subsidies apply: business services, communication services, construction and related engineering services, distribution services, environmental services, financial services, health-related services, tourism- and travel-related services and transport services. The provisions in Article 8 do not undermine World Trade Organization ("**WTO**") rights and obligations expressed under Article XV of the General Agreement on Trade in Services ("**GATS**"), Article VI of the General Agreement on Trade in Goods 1994 ("**GATT**"), the ASCM Agreement and the WTO Agreement on Agriculture.

WEAK COMMITMENTS ON SUSTAINABLE DEVELOPMENT

A big issue during the negotiations that preceded the CAI was the fight against forced labour and the need to engage China into committing to ILO Conventions and environmental protection instruments.

The CAI establishes a commitment to continue to improve a high level of environment and labour protection (Section IV). Parties shall not weaken protection as a way to attract more foreign investment, and environmental or labour protection shall not constitute a disguised restriction to foreign investment (Section IV, Sub-Sections 2 and 3, Article 2).

More specifically, China commits to effectively implementing the United Nations Framework Convention on Climate Change and the Paris Agreement (Section IV, Sub-Section 2, Article 6). The Party also agrees to effectively implement ILO Conventions that it has already ratified, and to work towards ratifying other ILO fundamental conventions, specifically Conventions no. 29 and 105 (Section IV, Sub-Section 3, Article 4).

While Chinese commitments on climate and labour on this Section are unprecedented, the mechanisms to secure enforcement raise doubts over the efficacy of these provisions. Disputes raised under the sustainable development section cannot be settled by the dispute settlement mechanism established by the CAI.

Disputes should at first be settled through consultations with the other Party. If the Parties fail to agree on a solution, a Party may request the establishment of an ad hoc Panel of Experts of three Members that should be chosen in concert with the Parties. The Panel shall examine the matter in accordance with the Section and the Vienna Convention of the Law of Treaties. A final report shall be issued within 180 days from the date of composition of the Panel (Section IV, Sub-section 4).

DISPUTE SETTLEMENT MECHANISM

Section V of the CAI establishes a State-to-State dispute settlement mechanism to solve disputes relating to the agreement, except for those related to transparency of subsidies and sustainable development.

It first encourages Parties to solve disputes by entering into consultations (Article 3). Parties can also opt for mediation (Article 4). If Parties cannot achieve a mutually agreed solution, the requesting Party may demand the establishment of an arbitration panel (Article 7). Panellists would be selected by both Parties, to be chosen from a list prepared by the Investment Committee (Article 8).

The arbitration should be held under the rules of the Vienna Convention of the Law of Treaties. Panellists may also take into account relevant case-law of the WTO Dispute Settlement Body (Article 11). An interim report shall be delivered within 120 days, and the final report no later than 180 days after the composition of the Panel (Article 12). Decisions are to be unconditionally accepted by the Parties, but shall not create rights or obligations to natural or legal persons.

After the final report is released, the Party complained against shall deliver a notification to the complaining Party explaining its intentions and measures to comply with the arbitral award, unless a compensation or other mutually satisfactory solution is agreed upon between the parties (Article 13). If immediate compliance is not possible, it should not exceed 15 months from issuance of the Panel's final report (Article 14).

If there is a disagreement regarding the fulfilment of an obligation established by the award, a Compliance Review Panel may be requested. The Compliance Review report should be delivered within 50 days (Article 15). Section V also sets forth the possibility for Parties to impose temporary remedies as a reaction to failure to comply with the arbitral award (Article 16). Among those, there is the possibility for cross-retaliation - violation in one sector, suspension of rights/obligations in another. Suspension of obligations shall be temporary and removed as soon as the Party complained against notifies measures that prove conformity with the Panel's award.

The text also contains provisions on the choice of forum for the settlement of the disputes. When a particular measure has allegedly breached an obligation under the CAI and an equivalent one under another international agreement to which both Parties are party, including the WTO Agreement, the Party seeking redress shall select the forum (Article 21). The forum selected shall be used to the exclusion of other fora. The WTO Agreement or any other international agreement shall not be invoked to preclude a Party from suspending obligations set out in the covered provisions pursuant to this Section.

Despite this first draft, final provisions of the CAI (Section VI) establish Parties' commitment to negotiate an agreement on investment protection and pursue negotiations on the investment dispute settlement mechanism within two years from the signature of the agreement (Section VI, Sub-Section 2, Article 3).

INSTITUTIONAL AND FINAL PROVISIONS

Section VI establishes institutional committees and working groups to ensure the proper functioning of the CAI. The Investment Committee (Article 1), co-chaired by co-chairs of the EU-China High Level Economic and Trade Dialogue established between EU and China, should meet once a year and supervise the functioning of the agreement, considering amendments if necessary. The Working Group on Investment (Article 3), co-chaired by the Director-General of the European Commission for Trade and investment and the Vice-Minister of the MOFCOM, shall meet every six months. They shall prepare the meetings of the investment committee and undertake their assigned tasks. The Working Group on Sustainable Development (Article 4) should meet once a year, and facilitate and monitor effective implementation of the sustainable development obligations.

Among the final provisions detailed under Section VI, Sub-section 2, some exceptions to the provisions of the CAI are measures necessary to protect public morals or to maintain public order, to protect human, animal or plant health or safety, to secure compliance with laws and regulations and other exceptions of GATT Article XX.

Previous agreements between Members States or the EU and China are not superseded by the CAI (Article 15).

CONCLUDING REMARKS

The full text of the agreement between the EU and China has not been published yet, and still needs to be finalised on a technical level before being submitted for ratification by the Council of the EU and the European Parliament. Therefore, many of the provisions hereby assessed may undergo changes.

Ratification by the European institutions is not expected before the second half of 2021, and will most likely be a tough battle. Some consider that the deal was reached with last-minute compromises, without sufficient mechanisms to guarantee implementation of the commitments made. Criticisms have also been made regarding access to the Chinese market, which remains limited within the scope of this agreement.

In February, when the full text of the agreement is expected to be released, our team will reassess the matter. So far, considering that the concessions on market access (the most attractive part of the deal for the EU) had for the most part already been granted by Chinese law, what remains to be seen is whether the dispute settlement mechanisms will be strongly enforced to guarantee the commitments agreed upon. As for the commitments on transparency of subsidies and on sustainable development, the CAI appears to have a high political cost for few benefits for Europe, as the Agreement excluded such matters from the dispute settlement mechanism (they can only be dealt with through a non-binding consultation procedure) . One should also remember that the announcement of this deal was not well-received by the United States, which had expressed its wish to coordinate efforts with the EU when dealing with China.

Sources:

- EU-China Comprehensive Agreement on Investment
- Chinese Foreign Investment Law
- US-China Phase One Trade Deal

CONTACTS

ANNA DIAS
anna.dias@gide.com

OLIVIER PROST
prost@gide.com

* *We would like to thank Julia Marssola for her valuable contribution in preparing this document.*

You can also find this legal update on our website in the News & Insights section: **gide.com**

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Hogan Lovells

Partially relieved – Hong Kong court judgment highlights difficulties facing cyber fraud victims in seeking recovery

3 February 2021

The Hong Kong Court of First Instance in *Edison Norge As v. BZZ Ltd* [2021] HKCFI 135 has granted default judgment against email fraudsters whilst granting the declaratory relief applied for only in part. This decision provides further clarification and guidance as to best practice in formulating a claim for proprietary relief.

The facts and legal principles

The plaintiff was the victim of email fraud and sought, in addition to default judgment against the first and second defendants (first-level recipients) and fifth and ninth defendants (second-level recipients), declarations that:

- He had a proprietary interest over the sums that were paid into the defendants' accounts.
- The defendants each held the minimum balance in their account on constructive trust for the plaintiff.
- He was entitled to trace the sums that were paid into the defendants' accounts into all funds and assets acquired by or representing the amounts so paid.

Recorder Manzoni SC said he concurred with the decision of Mr. Recorder Eugene Fung, SC in *Milestone Electric, Inc v. Meihoukang Trading Co. Ltd.* [2020] HKCFI 2542 as to the principles. (see Hogan Lovells client alerter, *To trace or not to trace? Hong Kong court reiterates applicable principles for obtaining proprietary relief in email fraud cases*).

Where the plaintiff is a victim of fraud, he may be entitled (subject to proving the same) to a constructive trust over any identifiable stolen property. The court would apply the doctrine of tracing to determine the nature of the original property interest and study what had become of it.

The declarations

Having reviewed the bank statements, Recorder Manzoni SC was satisfied that the plaintiff could assert a proprietary interest over the amounts that were paid into each of the four accounts, and granted the first type of declaration sought against all four defendants.

With respect to the second-level recipients, citing the rule in *Re Hallett's Estate* [1880] 13 Ch 696 (that the first sum paid into a mixed fund will be held to have been first drawn out), he found that the bank statements showed the same monies leaving the second defendant's account were paid into the fifth and ninth defendants' accounts.

However, Recorder Manzoni SC was not prepared to grant the second and third type of declaration sought against all four defendants. For all four defendants' accounts, he was provided with the bank statements from the date of receipt of the fraudulent payment to a certain date (Date A) showing a remaining balance, and also a letter from the bank confirming the same remaining balance as of a later date (Date B).

Whilst he considered on "the balance of probability" that it was likely there had been no movement between Date A and Date B, he was not prepared to make that assumption for the purposes of granting declaratory relief. The court noted this was something that would have to be proved at a later time with evidence and explained:

> The reason is not because the plaintiff is not necessarily entitled to trace, but the reason is that I am not prepared to make a declaration which may be used subsequently by the Plaintiff in any way to support propositions that have not been put before me or so as to bind other people or entitles.

Interest

On interest to be awarded to the plaintiff, unlike in many other fraud cases, the court thought it more appropriate to grant the usual interest rate at HSBC prime rate plus one percent from the date on which each defendant received the relevant sums, rather than the rate payable on the judgment that was claimed by the plaintiff.

Implications

The judgment illustrates the difficulties facing plaintiffs when trying to recover monies by asserting a proprietary right over monies in a defendant's account. Plaintiffs should not expect the court to simply rubber stamp an uncontested application where declaratory relief is sought. In cases where documentary evidence of tracing is incomplete, the court will not be prepared to make any assumptions in the plaintiff's favour.

As ever, prompt and decisive action is advised in the battle with the fraudsters and the most appropriate type of relief may differ in each case depending on the facts and the availability of evidence before the court.

Contacts

Chris Dobby
Partner, Hong Kong
T +852 2840 5629
chris.dobby@hoganlovells.com

Antonia Croke
Partner, Hong Kong
T +852 2840 5092
antonia.croke@hoganlovells.com

Mark Lin
Partner, Hong Kong
T +852 2840 5091
mark.lin@hoganlovells.com

Yolanda Lau
Senior Associate, Hong Kong
T +852 2840 5059
yolanda.lau@hoganlovells.com

Brigitte Kiu
Associate, Hong Kong
T +852 2840 5016
brigitte.kiu@hoganlovells.com

Nigel Sharman
Senior Knowledge Lawyer, Hong Kong
T +852 2840 5637
nigel.sharman@hoganlovells.com

www.hoganlovells.com

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SKRINE

Exemption of Stamp Duty on Purchase and Financing of First Residential Property

11 February 2021

The following Orders were gazetted under the Stamp Act 1949 on 10 February 2021 to exempt the stamp duty payable on an instrument of transfer and a loan agreement relating to the purchase of a residential property by a first time home buyer. The Orders are deemed to have come into operation on 1 January 2021.

Stamp Duty (Exemption) Order 2021

This Order exempts from stamp duty any instrument of transfer executed in relation to the purchase of one unit of residential property having a market value not exceeding RM500,000.00 by an individual, subject to the following conditions being fulfilled –

1. the sale and purchase agreement for the purchase of the property is executed on or after 1 January 2021 but not later than 31 December 2025;
2. the individual has never owned any residential property including one which is obtained by inheritance or gift, whether held individually or jointly; and
3. the application for exemption is supported by a statutory declaration by the individual confirming the matters referred to in paragraph (2) above.

Stamp Duty (Exemption) (No. 2) Order 2021

This Order exempts from stamp duty any loan agreement to finance the purchase of one unit of residential property having a value not exceeding RM500,000.00, subject to the following conditions being fulfilled –

1. the loan agreement is executed by the individual named in the sale and purchase agreement and any of the following –

1. a licensed bank under the Financial Services Act 2013;
2. a licensed bank under the Islamic Financial Services Act 2013;
3. a development financial institution prescribed under the Development Financial Institutions Act 2002;
4. a licensed insurer under the Financial Services Act 2013;
5. a licensed takaful operator under the Islamic Financial Services Act 2013;
6. a co-operative society registered under the Co-operative Societies Act 1993;
7. an employer who provides an employee housing loan scheme;
8. the Borneo Housing Mortgage Finance Berhad (Company No. 25457-V); and
9. the Mutiara Mortgage and Credit Sdn Bhd (Company No. 257663-T);

2. the sale and purchase agreement for the purchase of the property is executed on or after 1 January 2021 but not later than 31 December 2025;

3. the individual has never owned any residential property including one which is obtained by inheritance or gift, whether held individually or jointly; and

4. the application for exemption is supported by a statutory declaration by the individual named in the sale and purchase agreement confirming the matters referred to in paragraph (3) above.

For the purposes of both Orders -

1. 'residential property' means a house, a condominium unit, an apartment or a flat purchased or obtained solely to be used as a dwelling house; and

2. 'individual' means a purchaser or co-purchaser of a residential property who is a Malaysian citizen.

Comments

The exemptions from stamp duty under the above-referred Orders were announced by the Finance Minister during the 2021 Malaysian Budget Speech. These are not new initiatives but enhancements of similar exemptions that had expired on 31 December 2020. The previous exemptions applied where the residential property has a market value not exceeding RM300,000.00 but the current Orders increase this threshold to RM500,000.00.

Alert by Kok Chee Kheong (Partner) in the Corporate Practice of Skrine

February 2021

Amendment to the General Law for the Protection of Personal Data in Possession of Governmental Entities

On February 3, 2021, the resolution of the Transparency and Anticorruption Commission of the House of Representatives was published in the Parliamentary Gazette, approving the amendment to Section X of Article 3 of the General Law for the Protection of Personal Data in Possession of Governmental Entities (the "Law"). The Law is applicable at all levels (federal, state and municipal) to any authority, entity, agency, and organization of the Executive, Legislative, and Judicial branches of the government, political parties, trusts, and public funds.

The amendment to the Law seeks to modify the definition of sensitive personal data in order to make it broader and adapt such definition to the technological changes that the country has undergone and that have allowed the processing of additional and different personal data. By virtue of the foregoing, such amendment includes as sensitive personal data the religious, philosophical or moral convictions, union affiliation, information related with the sexual orientation, and biometric information intended to univocally identify a person.

Finally, it is important to mention that, unlike the Law, the Federal Law for the Protection of Personal Data in Possession of Private Entities does not mention biometric data as sensitive personal data, and an amendment to such law to include the same has not yet been proposed.

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

Mexico City Office: **Mr. Jorge León Orantes B., jleon@s-s.mx (Partner)**
Ms. Paola Morales V., pmorales@s-s.mx (Counsel)
Phone: (+52 55) 5279-5400

Monterrey Office: **Mr. César Cruz A., ccruz@s-s.mx (Partner)**
Phone: (+52 81) 8133-6000

Queretaro Office: **Mr. José Ramón Ayala A., jayala@s-s.mx (Partner)**
Phone: (+52 442) 290-0290

Simpson Grierson

February 02, 2021 | 2 min read

Climate change (Zero Carbon Act) (/resources/climate-change-zero-carbon-act)

On Sunday 31 January 2021, the Climate Change Commission released a draft package of advice [PDF] **to the Government. The advice sets out the "**immediate and decisive action (https://www.climatecommission.govt.nz/news/our-draft-advice/)**" Aotearoa New Zealand (NZ) must take to drastically reduce greenhouse gas emissions in order to meet its responsibilities under the Paris Agreement.**

We outline below the Climate Change Commission's role, the main points of its draft advice and what happens from here.

Background: Climate Change Commission

The Commission was established by the Climate Change Response (Zero Carbon) Amendment Act 2019, the piece of legislation that set NZ's domestic greenhouse gas emissions reduction target for 2050. The Commission's purpose is to provide expert advice to the Government on reducing emissions, adapting to the impacts of climate change, and monitoring and reviewing the Government's progress towards its emissions reductions and adaptation goals. The Commission is not setting new emissions targets, rather it is proposing carbon emissions budgets to enable NZ to meet its 2050 target.

What the draft advice includes

- The first three emissions budgets for NZ. These comprise an average reduction of 2% each year between 2022 and 2025; a 17% reduction each year between 2025 and 2030; and 36% each year between 2030 and 2035.
- Recommendations for NZ's first Emissions Reduction Plan, providing policy guidance to Government on how the emissions budgets could be met. Priority areas include electric vehicles, renewable energy, farm practices, and planting native trees.
- A review that finds NZ's first Nationally Determined Contribution (NDC) is not

Contacts

Mark Baker-Jones
Consultant
+64 9 977 5409
mark.baker-jones@simpsongrierson.com

Gerald Lanning
Partner
+64 9 977 5406
gerald.lanning@simpsongrierson.com

Joanna Lim
Senior Associate
+64 3 968 4017
joanna.lim@simpsongrierson.com

Josh Cairns
Partner
+64 4 924 3409
josh.cairns@simpsongrierson.com

compatible with the country's responsibilities under the Paris Agreement. NZ has committed to contribute to global efforts to limit warming to 1.5°C above pre-industrial levels, and the Commission found that NZ will need to strengthen its NDC to do so.

- A consideration of the potential reductions in biogenic methane, examining decreases of emissions from both agriculture and waste.

What happens from here?

Meeting the emissions budgets will require significant change, across the economy. To meet the 2050 target, the Commission advises that NZ would need to almost completely decarbonise energy use in land transport and buildings, as well as industrial processes that use heat. While electricity demand will rise as a result, this will need to be met with rapid growth in low emissions generation capacity. Divestment of carbon assets is increasing here and internationally, as energy producers and users switch to renewables. The Commission's path phases out fossil-fuelled energy generation, aiming for 60% renewable energy no later than 2035.

All sectors of the economy will need to be involved in the transition, including agriculture as a major emitter. But these shifts are also anticipated to provide significant potential for economic opportunities. The Commission foresees that employment will grow in development of biofuels and hydrogen, the circular economy, and in deploying and supporting new technologies.

The Commission's recommendations are advisory only. But given the NZ Government's ambition on climate change, they are politically difficult to ignore. Once the Government receives the Commission's final advice (due by 31 May 2021), it will release an Emissions Reduction Plan before the end of the year. The plan will contain policies and strategies to reduce emissions and increase removals to meet the emissions budget.

Next steps / Get in touch

Public consultation on the draft advice began on Monday 1 February and runs until Sunday 14 March (submissions can be made via the Commission's **consultation website (https://haveyoursay.climatecommission.govt.nz/)**). Please get in touch with our contacts (pictured right) if you would like assistance with preparing a submission.

Contributors **Laura.Green@simpsongrierson.com (mailto:Laura.Green@simpsongrierson.com)**

Contacts continued

Andrew Matthews
Partner
+64 9 977 5402
andrew.matthews@simpsongrierson.com

Charlotte McLoughlin
Consultant
+64 9 977 5411
Charlotte.McLoughlin@simpsongrierson.com

Simplified Insolvency Programme

February 4, 2021

The Simplified Insolvency Programme (SIP) has been instituted to facilitate the restructuring or liquidation of micro and small companies (MSCs). The SIP was ushered in by the *Insolvency, Restructuring and Dissolution (Amendment) Act 2020* (IRDA Amendment Act), with the relevant provisions recently commencing on 29 January 2021. It modifies the *Insolvency, Restructuring and Dissolution Act* (IRDA) which itself entered into force only on 30 July 2020 (See "The Insolvency, Restructuring and Dissolution Act 2018 – A New Chapter in Singapore's Insolvency Laws").

What is the SIP's purpose?

The SIP is in fact part of a suite of measures to help MSCs in view of COVID-19. It provides simpler, faster and lower-cost processes for:

- Debt restructuring
- Winding up

With much of the economy continuing to reel from the shockwaves of COVID-19, the SIP seeks to tailor a more cost efficient process for struggling MSCs. MSCs which have explored other options may be looking to restructure or to liquidate where there are no better alternatives. The IRDA Amendment Act unfortunately cannot stand in way of the inevitable, where liquidation is the only real option. In this case, it meets the grim reality by providing a winding up framework that allows the MSC to be wound up expeditiously at minimum costs.

Who qualifies for the SIP?

To qualify for the SIP, the applicant MSCs must have:

- 30 or fewer employees
- 50 or fewer creditors
- Maximum liabilities (including contingent and prospective liabilities) of S$2 million
- Maximum annual sales turnover of S$10 million
- In the case of the simplified winding up programme, the value of its realisable unencumbered assets not exceeding S$50,000

In addition, the MSC has to be a company incorporated in Singapore and there must be not be any circumstances that make the MSC unsuitable for the SIP. For example, a company would be unsuitable if:

- Any Court applications or orders have been made to wind up or restructure the company; or
- The restructuring or winding up of the company is likely to require significant resources or specialised knowledge or expertise.

Creditors of an applicant MSC should take note that they can object to its acceptance into the SIP by submitting a notice of objection within the stipulated period.

Why is the SIP a simplified process?

A. Simplified Debt Restructuring Programme (SDRP) (for viable businesses)

i. **Single Court application:** The SIP is adapted from the existing pre-packaged scheme of arrangement under the IRDA, and requires only one application to the High Court.
ii. **Temporary moratorium and restriction on *ipso facto* clauses:** Once a company has been accepted into the SDRP (until the date of its discharge), no creditor actions will be allowed in court to give company time to formulate the restructuring plan. Clauses that lead to an automatic default or termination of contracts on insolvency in supplier and third party contracts (also called *ipso facto* clauses) will also be rendered ineffective.
iii. **Lower approval requirement by creditors:** Only two-thirds in value approval (with no requirement of a majority in number) is required for the debt restructuring plan as compared with a majority in number representing 75% in value required for a scheme of arrangement under section 210 of the Companies Act.

B. Simplified Winding Up Programme (SWUP) (for non-viable businesses)

i. **No Court winding up application required:** The process is fashioned on the voluntary winding up regime under the IRDA, and does not require a court application to wind up the company.
ii. **Early dissolution without distribution of dividends, etc.:** The company can also be dissolved quickly without steps such as the distribution of dividends, when the liquidator is of the view that the company's assets are not sufficient to meet its liabilities, and there is no necessity for any further investigation into the affairs of the company.
iii. **Reduced scope of liquidator's functions (no creditors' meeting):** The liquidator's functions are reduced in scope, for example, doing away with the need for creditors' meetings.

The winding up will be administered by the Official Receiver (OR) or assigned to private liquidators, as the case may be.

How much does it cost?

There are fees payable under the SIP, in particular, at the stages of submission and acceptance of the SIP application, as illustrated in the table below:

S/No.	Applicable fees under the SIP	SDRP	SWUP
1	Application Fee *To be paid upon submission of application.*	$450	
2	Administration Fee *To be paid to the OR in the form of a deposit upon acceptance into the SIP.*	$18,750[6]	$2,700
3	Fees for additional services, e.g. legal advice, valuation etc. *To be paid directly to the service provider.*	To be borne entirely by the company as incurred	

According to the Ministry of Law, the deposit of $18,750 for the SDRP takes into account an average government subsidy of 25% for the companies.

(Background: See https://io.mlaw.gov.sg/corporate-insolvency/sip-faq/ (accessed on 1 February 2021))

Further, the OR has a discretion to waive or remit the deposit (in whole or in part).

How long will the SIP last?

The SIP will be available to qualifying MSCs for a period of 6 months from 29 January 2021 to 28 July 2021, unless such period is further extended by the Minister for Law.

How does a company apply for SIP?

A company will need to submit an online application, with the required documents and information, via the Ministry of Law's website at: https://eservices.mlaw.gov.sg/io/.

How can the SIP help?

If you are an MSC that meets the eligibility criteria, the SIP presents an expeditious path forward. It focuses on efficiency. It supports restructuring efforts by providing a lower costs environment to facilitate this. It also helps to bring businesses that are no longer viable to a swift and less painful end, thereby allowing resources and capital to be re-allocated quickly to other business ventures.

Further details can also be found on the Ministry of Law's website at: https://io.mlaw.gov.sg/corporate-insolvency/sip-faq/ and https://www.mlaw.gov.sg/news/press-releases/simplified-insolvency-programme-commences.

Dentons Rodyk thanks and acknowledges Associate Kim Koh for her contributions to this article.

Your Key Contacts

Mark Seah
Senior Partner, Singapore
D +65 6885 3652
mark.seah@dentons.com

Shobna Chandran
Partner, Singapore
D +65 6885 3623
shobna.chandran@dentons.com

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Newsletter

Draft Amendment to Patent Act — Major Changes in Patent Remedy System

02/08/2021

Shih-I Wu

On December 30, 2020, the Taiwan Intellectual Property Office (TIPO) announced draft amendments to certain articles of the Patent Act ("Draft Amendments") making substantial revisions to the litigation procedures for patent cases and consolidating the levels of appeal. Changes include abandoning the re-examination mechanism for patent applications, the introduction of a review procedure into the patent remedy system, and simplification of appeal levels. In addition, patent dispute lawsuits are handled as civil rather than administrative proceedings. The Draft Amendments involve a wide range of articles amounting to the biggest change to the Patent Act in recent years.

The key amendments to the patent remedy system are as follows:

1. A Re-examination and Dispute Review Committee ("Review Committee") is to be established and the examination process is to be strengthened (Articles 66-1 to 66-7).

   The TIPO will set up a Review Committee. Review of re-examination and dispute cases is to be handled by three or five examiners of the Review Committee. Measures such as direct trial, oral argument, preparatory proceedings and examination plans are introduced. In the review process, examiners will appropriately disclose their opinions and may make an interim decision; a notification of review closure will be provided. The nature of the review process is an administrative adjudication procedure for patent disputes.

2. The re-examination system handled by the Review Committee is introduced into the patent application process, the original re-examination mechanism handled by an officer of the TIPO is abandoned, and appeal levels are simplified (Articles 66-8 to 68-1).

   The types of patent re-examination cases specified in the Draft Amendments are as follows: (1) cases challenging decisions to dismiss a patent application, (2) applications for patent term extensions, (3) correction cases, and (4) cases challenging decisions on other related patent applications and procedures. The fourth type of re-examination cases refers to cases in which a person is dissatisfied with the decisions rendered by the TIPO excluding the other three types of cases. Examples include claims of priority rights not being recognized, applicant ineligibility, licensing, license transfer, and pledge registration cases.

   Examination of patent applications under the current Patent Act is divided into "preliminary examination" and "re-examination." The amendment abolishes the re-examination procedure. If dissatisfied with the preliminary decision, an applicant may file for a re-examination with the Review Committee. If dissatisfied with the re-examination decision, they may file a lawsuit with the Intellectual Property and Commercial Court. Although re-examination review cases are handled by the TIPO, they are equivalent in level to an administrative appeal handled by the Ministry of Economic Affairs (the "MOEA"), so administrative appeal is not further required.

   If there is cause for review of a final and binding re-examination decision, the Draft Amendments also grant the party involved a special remedy procedure, which shall apply mutatis mutandis to the provisions of the re-examination or dispute case procedures (Articles 86-1 to 86-2).

3. A dispute review system is introduced into the patent cancellation cases (Articles 71 to Article 82).

   The Draft Amendments specify two types of dispute cases handled by the Review Committee: patent cancellation and patent term extension cancellation. Cancellation reviews shall be conducted through oral argument and in a public manner. However, if the TIPO deems it necessary, the review may be conducted in writing upon consent of the parties involved or at the discretion of the TIPO.

4. Dispute over patent ownership is no longer a matter for filing a cancellation action. Parties involved should seek a civil solution (Articles 10, 59, 71, 119, and 141).

   A dispute over the ownership of a patent application or a patent right has traditionally a matter for filing a cancellation action. However, it often involves conflicts over the privacy rights between parties and does not pertain to professional judgment of the patents' technicality. In practice, it is difficult for the TIPO to substantively investigate the ownership issue, as done by the courts. Therefore, the current Article 71-3 concerning cancellation matters is deleted in the Draft Amendments, and the parties should follow civil litigation procedures to resolve their disputes.

5. The lawsuits concerning patent re-examination and dispute are handled as civil rather than administrative proceedings (Articles 91-1 to Article 91-10).

   Due to the complexities of the dual civil and administrative remedy system, people are easily confused when filing lawsuits. Therefore, the Draft Amendments take a page from international to clarify the judicial authority of patent re-examination and cancellation dispute litigation, which are all under the jurisdiction of civil courts. Those who disagree with the result of a review decision by the Review Committee of the TIPO need not undergo an administrative appeal process, and can instead file a lawsuit with the Intellectual Property and Commercial Court.

   For example, according to the current law, the patent application procedure is adjudicated by the TIPO. If dissatisfied with the decision, a party may file an administrative appeal with the MOEA. If dissatisfied with the MOEA's administrative appeal decision, the party may file an administrative lawsuit against the TIPO with the administrative court. But the amended articles stipulate that if an applicant is unsatisfied with the decision of the TIPO in regard to a decision on an application, it shall still in essence be handled as an administrative decision and the TIPO shall be the defendant; however, in order to avoid any discrepancy in the judgment, a civil action for patent review should be filed.

   As for patent cancellation procedures, cases are reviewed by the TIPO as well according to the current law. If dissatisfied with a decision, a party may file an administrative appeal with the MOEA. If dissatisfied with the administrative appeal decision, the party may file an administrative lawsuit with the court against the TIPO. However, the amendments adopt the module that the disputing parties are listed as plaintiff and defendant and change the current administrative litigation to civil litigation. The reasons for the amendments are that: patent disputes in the lawsuits are not only on the appropriateness of the TIPO's decision; the issue is whether there is a cause for cancellation for patents themselves; therefore, the patent dispute litigation should be conducted by the actual parties with opposing interests.

   As for disputes over patent validity, if the court believes that a patent is invalid, the court may render a judgment on the validity of the patent that is the subject of the action; the TIPO is not required to further revoke the patent. However, only after the court judgement on the invalidity of patent right is final and binding is the effect of patent right void ab initio.

In addition to the aforementioned amendments, the Draft Amendments also expand the grace period for design patents to twelve months (Article 122); clarify the legal basis for electronic patent applications and delivery; prohibit divisional applications during the re-examination period; specify the review procedures related to compulsory licensing and its revocation (Articles 19, 34, 88, 89, and 130); and specify the transitional provisions of the current and new laws (Article 157-5).

The TIPO held several public hearings at the end of January to collect public opinion, so adjustments to the Draft Amendments may be made. The Amendments have far-reaching effects on the patent application and remedy system. Patent owners and related professionals should pay close attention to the changes to the Patent Act and related laws and regulations to understand how their rights and interests may be affected.

8F, No.555, Sec. 4, Zhongxiao E. Rd., Taipei 11072, Taiwan, R.O.C. Tel: +886-2-2763-8000

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Thought Leadership

Is Your Company's Patent Assignment Agreement Too Broad?

29 January 2021
Client Updates

In the recently decided *Whitewater West Industries, Ltd. v. Alleshouse* case, the Federal Circuit invalidated a company's employment agreement that required an employee residing in California to assign his patent rights for a post-employment invention to the company.[1] While the district court found the company's employment agreement to be enforceable, the Federal Circuit disagreed, holding that the assignment provision in the employment agreement had a broad restraining effect that rendered the agreement invalid under the California Business and Professions Code.[2]

Background of the Case

Wave Loch, Inc. is a company that designed sheet-wave attractions.[3] Sheet-wave attractions are large, sophisticated water rides used in amusement parts by wave riding enthusiasts.[4] In 2007, Wave Loch hired Richard Alleshouse to work on the sheet-wave attractions.[5] Alleshouse's responsibilities during his employment with Wave Loch included assessing and documenting the physical condition of existing sheet-wave rides, improving the existing sheet-wave rides through research and design, and developing new rides using engineering principles such as 3D parametric modeling and numerical analysis.[6]

In 2008, Alleshouse signed a Covenant Against Disclosure and Covenant Not to Compete (Agreement) with Wave Loch that included the following assignment provision:

a. Assignment: In consideration of compensation paid by Company, Employee agrees that all right, title and interest in all inventions, improvements, developments, trade-secret, copyrightable or patentable material that Employee conceives or here-after may make or conceive, whether solely or jointly with others:

(a) with the use of Company's time, materials, or facilities; or
(b) resulting from or suggested by Employee's work for Company; or
(c) in any way connected to any subject matter within the existing or contemplated business of Company shall automatically be deemed to become the property of Company as soon as made or conceived, and Employee agrees to assign to Company, its successors, assigns, or nominees, all of Employee's rights and interests in said inventions, improvements, and developments in all countries worldwide. Employee's obligation to assign the rights to such inventions shall survive the discontinuance or termination of this Agreement for any reason.[7]

In July 2012, Alleshouse contacted Yong Yeh, a licensed attorney, to discuss his obligations under the Agreement and the possibility of starting a joint venture (later known as Pacific Surf Designs) with Yeh.[8] Alleshouse resigned from Wave Loch late July 2012, and in October 2012, Alleshouse and Yeh filed two provisional patent applications related to sheet-wave water attractions.[9] The provisional patent applications resulted in U.S. Patent No. 9,044,685, U.S. Patent No. 9,302,189, and U.S. Patent No. 9,592,433 (collectively, the "Patents").[10] The Patents list Alleshouse and Yeh as the inventors and were assigned to Pacific Surf Designs.[11]

District Court Finds in Favor of Whitewater

In March 2017, Whitewater West Industries, Ltd. (Whitewater), the successor of Wave Loch, sued Alleshouse, Yeh, and Pacific Surf Designs (Defendants) in the United States District Court for the Southern District of California, alleging that the Agreement required Alleshouse to assign his rights in the Patents to Whitewater.[12] The Defendants challenged the validity of the Agreement in part on the ground that it violated the following provision of California Business and Professions Code § 16600:[13]

Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.[14]

The district court held that "the Agreement does not restrain Alleshouse from engaging in the sheet wave profession. It only requires him to assign inventions resulting from his work at Wave Loch or relating to Wave Loch's business at the time he was there."[15] The district court ultimately ruled in favor of Whitewater, finding that Alleshouse breached the assignment provision of the Agreement by failing to assign the rights in the Patents to Whitewater.[16]

Whitewater further alleged that Yeh should be removed from inventorship status on the Patents since he did not contribute to the conception of the inventions.[17] The district court agreed, finding that Yeh should not have been listed as an inventor since Alleshouse alone conceived the inventions.[18]

Federal Circuit finds Assignment Provision Invalid

On appeal, the Federal Circuit held that the assignment provision of the Agreement is invalid under § 16600 since the assignment provision's restraining effect impairs an individual's right under § 16600 to pursue his profession, trade, or business.[19] The assignment provision, which is unlimited in time and geography, applies when Alleshouse's post-employment invention is “suggested by” his work for Wave Loch and when his post-employment invention is “in any way connected to any subject matter” that was within Wave Loch’s “existing or contemplated” business when Alleshouse worked for Wave Loch.[20] Since the inventions of the Patents were conceived without use of any trade secret or other confidential information after Alleshouse left Wave Loch, the Federal Circuit held that the Agreement is invalid under § 16600’s strict standards governing restraints on former employees.[21]

The Federal Circuit also reversed the judgment of the district court’s correction of inventorship claim.[22] In this case, correcting inventorship under 35 U.S.C. § 256 depended on Whitewater’s acquisition of an ownership interest in the Patents based on the assignment provision on which its contract claim rests.[23] Since the assignment provision was invalidated, Whitewater lacked standing to contest inventorship, and therefore its claim to correct inventorship failed.[24]

Invention Assignment Provision Drafting Considerations
While broad assignment provisions extending to post-employment inventions likely violate § 16600, California law allows for assignment provisions that apply to inventions conceived by *current* employees that relate to the employer’s business.[25] Also, assignment provisions directed to inventions developed or derived from an employer’s trade secret or other confidential information, even if conceived post-employment, may still be enforceable.[26] Several other states including Delaware, Kansas, Minnesota, Nevada, North Carolina, Utah, and Washington have statutes similar to § 16600 addressing invention assignment agreements.[27] Thus, companies should draft the assignment provisions of their employment agreements to include language that complies with the requirements of these state statutes. Companies should also consider clearly outlining the confidentiality provisions in their employment agreements and taking measures within the company to protect that confidential information. Had Wave Loch extended its confidentiality provisions to protect the information used by Alleshouse to arrive at his patented inventions, Whitewater may possess full ownership of the Patents today.

[1] Whitewater West Indus., Ltd. v. Alleshouse, Nos. 2019-1852, 2019-2323, 2020 WL 6788760, *12 (Fed. Cir. Nov. 19, 2020).
[2] See id. at *6.
[3] See id. at *1.
[4] See id.
[5] See id. at *2.
[6] See id.
[7] See id.
[8] See id. at *3.
[9] See id.
[10] See id.; see also U.S. Patent Nos. 9,044,685 (issued June 6, 2015), 9,302,189 (issued Apr. 5, 2016); and 9,592,433 (issued Mar. 14, 2017).
[11] Whitewater West Indus., Ltd., Nos. 2019-1852, 2019-2323, 2020 WL 6788760 at *3.
[12] See id.
[13] See id. at *4.
[14] Cal. Bus. & Prof. Code § 16600.
[15] Whitewater West Indus., Ltd., Nos. 2019-1852, 2019-2323, 2020 WL 6788760 at *4.
[16] See id.
[17] Whitewater West Indus., Ltd. v. Alleshouse, Case No. 17-cv-00501, 2020 WL 4261884, *13 (S.D. Cal. 2019).
[18] See id.
[19] Whitewater West Indus., Ltd., Nos. 2019-1852, 2019-2323, 2020 WL 6788760 at *6.
[20] See id.
[21] See id. at *4.
[22] See id. at *12.
[23] See id.
[24] See id.
[25] See Cal. Labor Code § 2870(a).
[26] See Applied Materials, Inc. v. Advanced Micro-Fabrication Equipment (Shanghai) Co., 630 F. Supp. 2d 1084, 1086 (N.D. Cal. 2009).
[27] Del. Code Ann., Title 19, § 805; Illinois Revised Stats., Chapter 140, §§ 301-303; Kansas Stats. Ann., §§ 44-130; Minnesota Stats. Ann., § 181.78; Nevada Stat., § 600.500; North Carolina General Stats., §§ 66-57.1, 66-57.2); Utah Code Ann., §§ 34-39-2, 34-39-3; Washington Revised Code Ann., §§ 49.44.140, 49.44.150.

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Davis Wright Tremaine LLP

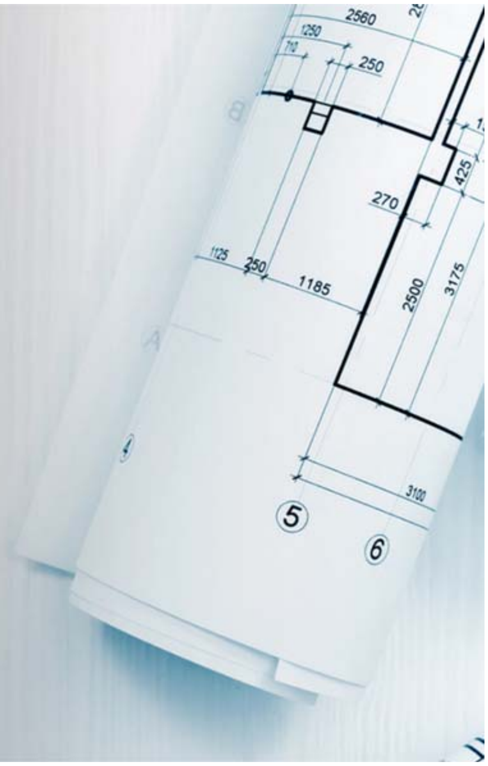
BLOG POST / GOVERNMENT CONTRACTS INSIDER

Government Contracts Counseling & Litigation

ASBCA Asserts Jurisdiction Despite Contracting Officer's Assertions of Fraud

By Jordan Harris

02.11.21



Generally, an agency only has jurisdiction to review a contracting officer's final decision if that outcome was made on a basis other than fraud. In *Mountain Movers/Ainsworth-Benning, LLC*,[1] the Armed Services Board of Contract Appeals (ASBCA) addressed whether it maintains jurisdiction when the appeal concerns a contracting officer's final decision made on a basis other than fraud but that decision is later *rescinded* by the contracting officer on suspicion of contractor fraud. The Board found that the rescission did *not* affect its jurisdiction.

Background

In *Mountain Movers*, the contractor was a joint venture that had difficulty obtaining a bond for the task order due to the financial difficulties of one of the members. After failing to secure the bond, the contracting officer terminated the contractor for default but later rescinded that termination upon assurances from the contractor that they could ultimately secure the bond.

These assurances included representations about the identity and financial status of one of the contractor's joint venture members. After the contractor had performed the contract, it filed a claim, and the contracting officer issued a final decision finding partial merit. This final decision was the basis for the contractor's appeal before the Board.

Two months *after* the appeal was docketed, the contracting officer rescinded the final decision (that was the basis of the appeal) after discovering the contractor had made misrepresentations when it had given the government assurances that it could still secure the bond. The government argued that this 'reasonable suspicion of fraud deprives the Board of jurisdiction.'

Relying on the general rule that an agency only has jurisdiction to review a contracting officer's final decision if that decision is made on a basis other than fraud, the government claimed that the contracting officer's *previous* final decision had been rescinded, and that the *current* final decision was based on contractor fraud.

Decision

The Board determined that 'the government's statement is plainly incorrect as a matter of law' and stated that the government 'essentially seeks to create a government right of removal that would allow the government to unilaterally compel contractors to litigate their appeals before the United States Court of Federal Claims.'

The Board refused to allow the contracting officer's later rescission of the final decision to affect its subject matter jurisdiction. Instead, the Board determined that '[o]nce the Board is vested with jurisdiction over a matter, the contracting officer cannot divest it of jurisdiction by his or her unilateral action.'

The Board further reasoned that the final decision regarding the partial merits determination (the decision that the contractor appealed) could not have been based on fraud because the contracting officer admitted he was unaware of any potential fraud at the time of that decision.

Because the decision that the contractor appeal was not made on the basis of fraud and the later rescission of that final decision had no impact on the Board's jurisdiction, the Board denied the government's motion to dismiss the contractor's appeal.

Key Takeaways

While generally true that an appeal of a contracting officer's final decision based on allegations of contractor fraud cannot be brought before an agency like the ASBCA (a contractor in that situation would need to seek relief from the Court of Federal Claims), the Government's allegations of fraud made *after* submission of the appeal will not divest the ASBCA of jurisdiction.

FOOTNOTE

1 ASBCA 62164 (Aug. 7, 2020).

Hogan Lovells

Virginia poised to enact comprehensive consumer privacy law

10 February 2021

Virginia is on track to be the second U.S. state to enact comprehensive consumer privacy legislation. Both the Virginia House of Delegates and the Virginia Senate have passed nearly identical versions of the Consumer Data Protection Act (CDPA) with bipartisan support, which suggests that reconciliation may be reasonably straightforward. The CDPA incorporates concepts from the EU General Data Protection Regulation (GDPR), the California Consumer Privacy Act (CCPA), and the proposed Washington Privacy Act (WPA). If enacted as currently drafted, the Virginia CDPA would take effect on January 1, 2023.

The House bill is HB 2307 and the Senate bill is SB 1392. Virginia Governor Ralph Northam (D) has convened a special legislative session beginning February 10, 2021, during which the state legislature can continue consideration and reconciliation of the CDPA. At the time of writing, the special session has no scheduled end date.

CDPA: An approach to consumer privacy influenced by GDPR, CCPA, and WPA

The CDPA contains definitions, obligations, and rights familiar to many privacy professionals. We identify a few of the key concepts below.

Scope

- **Covered Entities**: The CDPA would apply to persons that: (i) conduct business in Virginia or that produce products or services that are targeted to VA residents and; (ii) either (a) control or process personal data of at least 100,000 VA residents or (b) derive 50% or more of gross revenue from the sale of personal data and control or process personal data of at least 25,000 VA residents.

  The CDPA would exempt financial institutions subject to the GLBA, as well as HIPAA covered entities and business associates. The bill would also exempt data subject to FCRA, FERPA, and certain other laws.

- **Data Subjects**: Unlike some comprehensive laws, the CDPA defines "consumer" in terms of state residents acting in only an individual or household context. The bill would expressly (and permanently) exclude natural persons acting in a commercial or employment context.
- **Entity Qualifications**: The CDPA would follow the GDPR in categorizing covered entities as either "controllers" or "processors." Like the GDPR, the CDPA would require specific terms to govern a controller's relationship with a processor and would impose distinct obligations on controllers and processors. The requirements for a controller-processor contracts are similar to those under Article 28 of the GDPR (*i.e.*, they are more detailed than the requirements for a CCPA "service provider" contract).
- **Definition of Personal Data**: "Personal data" would mean "any information that is linked or reasonably linkable to an identified or identifiable natural person" and would exclude "de-identified data or publicly available information." The definitions for "de-identified" and "publicly available" are both drafted more broadly than the analogous terms in the CCPA. De-identified data is defined as "data that cannot reasonably be linked to an identified or identifiable natural person, or a device linked to such person." "Publicly available" information includes information from government records, as well as "information that a business has a reasonable basis to believe is lawfully made available to the general public through widely distributed media, by the consumer, or by a person to whom the consumer has disclosed the information, unless the consumer has restricted the information to a specific audience."
- **Definition of Sensitive Data**: Sensitive data would mean personal data revealing racial or ethnic origin, religious beliefs, mental or physical health diagnosis, sexual orientation, or citizenship or immigration status; the processing of genetic or biometric data to identify a natural person; personal data collected from a "known child;" and precise geolocation data.

Controller Obligations

The CDPA would require controllers to: (i) be transparent about data practices, including by maintaining a privacy notice and informing consumers of certain processing activities such as "selling" personal data or using personal data for targeted advertising; (ii) adhere to purpose limitation, data minimization, and security requirements; (iii) complete "data protection assessments" for certain processing activities considered high risk (*e.g.*, processing sensitive data and targeted advertising); and (iv) obtain "freely given, specific, informed, and unambiguous" consent before processing sensitive data or processing any personal data for secondary purposes that are not compatible with previously disclosed purposes, among other requirements.

Processor Obligations

The CDPA would impose independent obligations on processors, including requirements to: (i) adhere to controller instructions; (ii) assist the controller by implementing appropriate technical and organizational measures to help the controller respond to consumer rights and by securing the processing of personal data; and (iii) provide necessary information to support data protection assessments. Contracts between controllers and processors would have to include additional provisions, including requirements relating to auditing, data retention, data confidentiality, and subcontracting.

Consumer Rights

The CDPA would grant consumers five rights, which are the rights to:

1. Confirm whether a controller is processing data about that consumer and to access such data;
2. Receive personal data received from the consumer in a portable and readily usable format;

3. Correct inaccurate personal data;
4. Delete personal data; and
5. Opt out of the processing of personal data for "sales," targeted advertising, and profiling in furtherance of decisions that produce legal or similarly significant effects concerning the consumer.

The CDPA defines "sale" to mean the exchange of personal data for monetary consideration by the controller to a third party, with several exceptions (*e.g.*, transfers of personal data to an affiliate or processor). While the definition of "sale" under the CDPA would be narrower than that under the CCPA, the CDPA's right to opt out extends beyond sales to processing for targeted advertising and certain profiling that does not involve data sharing.

In addition, the CDPA would prohibit controllers from discriminating against consumers for exercising any of their rights under the Act. The CDPA also would require that controllers establish a process for consumers to appeal a denial of a request to exercise the above rights. If an appeal is denied, the controller would need to provide a mechanism for the consumer to submit a complaint to the Attorney General.

Enforcement

The Virginia Attorney General would receive exclusive responsibility to enforce the CDPA. Private rights of action are expressly barred in the bill.

Like the CCPA, the CDPA would include a 30-day cure period before alleged non-compliance becomes a violation. Violations can be subject to a maximum penalty of $7,500 per violation.

Effective Date

The CDPA would take effect January 1, 2023.

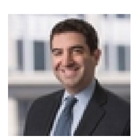
***

Harsimar Dhanoa and Erik Lampmann, Law Clerks in our Washington, D.C. office, contributed to this post.

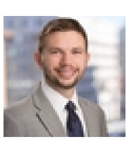
Authored by: Mark Brennan, Bret Cohen, Scott Loughlin, Tim Tobin, Paul Otto, James Denvil, Roshni Patel, Arielle Brown, Ryan Woo, Filippo Raso, Julian Flamant, Sophie Baum, Jacob Wall.

Contacts

Mark Brennan
Partner
Washington, D.C.
mark.brennan@hoganlovells.com



Bret Cohen
Partner
Washington, D.C.
bret.cohen@hoganlovells.com

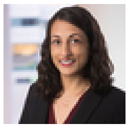


Scott Loughlin
Partner
Washington, D.C.
scott.loughlin@hoganlovells.com

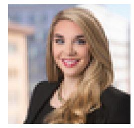
Tim Tobin
Partner
Washington, D.C.
tim.tobin@hoganlovells.com

Paul Otto
Partner
Washington, D.C.
paul.otto@hoganlovells.com

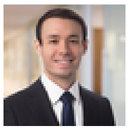
William Denvil
Counsel
Washington, D.C.
w.james.denvil@hoganlovells.com



Roshni Patel
Senior Associate
Washington, D.C.
roshni.patel@hoganlovells.com



Arielle Brown
Senior Associate
Denver
arielle.brown@hoganlovells.com

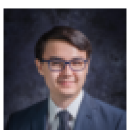


Ryan Woo
Associate
Washington, D.C.
ryan.woo@hoganlovells.com

Filippo Raso
Associate
Washington, D.C.
Filippo.Raso@hoganlovells.com

Julian Flamant
Associate
Washington, D.C.
Julian.Flamant@hoganlovells.com

Sophie Baum
Associate
Washington D.C.
sophie.baum@hoganlovells.com



Jacob Wall
Associate
Washington D.C.
jacob.wall@hoganlovells.com

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