PACIFIC RIM ADVISORY COUNCIL

Pacific Rim Advisory Council

March 2022 e-Bulletin

MEMBER NEWS

►ARIAS Continues Strengthening Offices Across Central America
►BENNETT JONES Welcomes 12 Partners
►HAN KUN Further Boosts Firm's Overall Capabilities
►HOGAN LOVELLS Expands Medical Device and Technology Practice with former FDA Regulator

COUNTRY ALERTS

►ARGENTINA Competition Authority Updates Notification Thresholds for Economic Concentrations and Fines for Infractions ALLENDE BREA
►BRAZIL 2022 Infrastructure and Energy Newsletter TOZZNIFREIRE
►CANADA Sanctions Targeting Russia, Belarus and Separatist Territories in Ukraine Expanded in Response to the Russian Invasion of Ukraine BENNETT JONES
►CANADA Commercial Leasing Tips to Know When Registered and Beneficial Ownership are Separate RICHARDS BUELL SUTTON
►CHILE Update to Protected Borders Plans CAREY
►CHINA New Rules for Bond Lending HAN KUN
►COLOMBIA Pacific Alliance and Singapore Sign Free Trade Agreement BRIGARD URRUTIA
►GUATEMALA Amendments to the Regulatoins of Law on Copyright and Related Rights ARIAS
►HONG KONG Corporate and Regulatory Updates HOGAN LOVELLS
►INDIA Analysis of Shareholders' Disputes in India From a Foreign Investor's Perspective KOCHHAR & CO.
►MALAYSIA No Limit on Quantum for Construction Sector Disputes Under Pusat Mediasi Covid-19 SKRINE
►MEXICO Official Mexican STANDARD NOM-241-SSA1-2021, Good Manufacturing Practices of Medical Devices SANTAMARINA y STETA
►NETHERLANDS Update of the Dutch Corporate Governance Code 2022 NAUTADUTILH
►PANAMA Changes to the Law Regulating Horizontal Property ARIFA
►PHILIPPINES Tax Tips and Practical Solutions SYCIP LAW
►SINGAPORE Can a Course of Dealing Between Parties Change or Add to the Terms of a Concluded Contract? DENTONS RODYK
►TAIWAN Dispute over the Vesting of Derivative Technology During Technological Collaboration LEE AND LI
►TURKEY Amendments to the Regulation on Commercial Advertising and Unfair Commercial Practices GIDE
►UNITED STATES Oregon Joins California and Washington in Adopting Its Own Program Capping and Reducing Greenhouse Gas Emissions DAVIS WRIGHT TREMAINE
►UNITED STATES Forced Arbitration of Sexual Harassment and Sexual Assault Claims Now Invalid GOODSILL
►UNITED STATES FSIS Issues Proposed Rule Designating Avian Leukosis as a Trimmable Condition HOGAN LOVELLS

CONFERENCES & EVENTS

PRAC Let's Talk!

upcoming virtual meetings
visit www.prac.org/events

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

►ARIAS |Advises Telefonica in Sale of Operations to Liberty Latin
►BENNETT JONES | Advising Equitable Bank in its Agreement Acquire Concentra Bank
►BRIGARD URRUTIA | Itaú Unibanco in US$414 million Acquisition Colombian assets from Chile's CorpGroup
►GIDE | Counsel to Mirova on Structuring a Fund Dedicated to Orange Group to finance Reforestation and Ecological Restoration Projects
►HAN KUN | Advises Bright Dairy on its private placement of A shares
►HOGAN LOVELLS | Secures Jury Verdict for PPG in Patent Dispute
►KOCHHAR | Advises Eximius on Seed Investment Round in Finarkein Analytics
►NAUTADUTILH | Advises HAL on intended public offer for Boskalis

PRAC TOOLS TO USE
COVID-19 SITE FOR ALL UPDATES

PRAC CONTACTS MEMBER DIRECTORY EVENTS
VISIT US ONLINE AT WWW.PRAC.ORG

ARIAS CONTINUES STRENGTHENING OFFICES ACROSS CENTRAL AMERICA

GUATEMALA CITY, 03 March 2022: Arias (Guatemala) has appointed an associate as senior counsel, strengthening its intellectual property group. Ivón Hernández became senior counsel on 25 February. She is also head of the firm's intellectual property practice in Guatemala. Arias now counts six partners and two senior counsel in Guatemala.

Hernández, 40, specialises in trademarks, patents, copyrights, data protection and consumer protection. She also has experience in litigation cases related to civil and criminal IP claims. She joined Arias in 2014 after a 10-year stint at the Elite firm now known as Consortium Legal (Guatemala).

Liz Gordillo, Arias' managing partner in Guatemala, says the firm's IP practice "has grown significantly both locally and regionally." She expects that in 2022, the IP team "will attend to more cases related to the fight against piracy and counterfeiting." The firm's Guatemala office is regularly seen on multi-jurisdictional M&A transactions. Together with some of Arias' other offices in the region, it helped Telefónica sell its operations in El Salvador to Jaguar Fund for US$144 million in October. Earlier in 2021, French business solutions provider Webhelp enlisted several Arias offices, including Guatemala, to acquire Colombia's OneLink.

Recently the firm added firepower to its other offices in the region, including Roberto Cordero from highly recommended EY Law (Costa Rica) and appointed him as head of its environmental and ESG group; promoting Sonia Urbina to partner in Honduras stregthening its IP group; and electing Rodrigo Ibarra to partner in Nicaragua.

For additional information visit www.ariaslaw.com

BENNETT JONES WELCOMES 12 PARTNERS

CALGARY/TORONTO – 12 March, 2022: Bennett Jones is pleased to announce that 12 lawyers have been admitted to the partnership. They serve clients from our offices throughout the firm and represent a cross section of our key industry groups and practice areas.

Bennett Jones' new partners are:

Lamont Bartlett – Commercial Litigation, Construction Law
Gannon Beaulne – Commercial Litigation, Class Actions, International Arbitration
Talia Bregman – Employment Law
Keely Cameron – Insolvency, Regulatory, Commercial Litigation
William Edwards – Mergers & Acquisitions, Corporate Finance
Brynne Harding – Commercial Litigation, Estate Litigation, Public Law
Ceilidh Hemmati – Corporate, Commercial, Mergers & Acquisitions
Lisa Kakoske – Capital Markets, Securities, Corporate/Commercial Law
Kim Lawton – Securities, Corporate, Mergers & Acquisitions
Jesse Mighton – Corporate Restructuring and Insolvency
Noriko Shimura – Financial Services, Aviation
Michelle Yung – Commercial Real Estate, Capital Projects

Bennett Jones is celebrating its 100th anniversary in 2022. Information on the firm's centenary and a message from Bennett Jones' Chairman and CEO, Hugh MacKinnon, is available here: https://www.bennettjones.com/Publications-Section/Announcements/Bennett-Jones-Marks-100-Years-of-Service-and-Trust

For additional information visit www.bennettjones.com

HAN KUN FURTHER BOOSTS FIRM'S OVERAL CAPABILITIES

BEIJING, 07 March, 2022: Han Kun is pleased to announce that Ms. Juexi (Jessie) Liu has recently joined the firm. She has extensive experience in venture capital and private equity investment, mergers and acquisitions, and foreign direct investment. The addition of Ms. Liu to the firm will further strengthen Han Kun's overall capabilities.

Ms. Liu started her legal career in 2002. She specializes in venture capital and private equity investment, mergers and acquisitions, foreign direct investment, and general corporate matters. Ms. Liu has advised multinational corporations on their foreign direct investments, mergers and acquisitions, and outbound investments. She has also accumulated extensive TMT-related experience in venture capital and private equity investment, cross-border investment, mergers and acquisitions, strategic joint ventures, restructuring and reorganization, and corporate compliance.

Before joining Han Kun, Ms. Liu practiced law for nearly ten years with King & Wood Mallesons, Jun He Law Offices, and Chen & Co Law Firm. Ms. Liu also has extensive in-house experience, having served several Internet giants, including serving as the senior legal director for a large online retailer and e-commerce company.

Ms. Liu is a member of both the PRC Bar and the New York State Bar.

For additional information visit www.hankunlaw.com

PACIFIC RIM ADVISORY COUNCIL

PRAC Let's Talk!

Join us in 2022 for our monthly live one-hour virtual meetings

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

Registration required

Visit www.prac.org for details

HOGAN LOVELLS EXPANDS MEDICAL DEVICE AND TECHNOLOGY PRACTICE WITH FORMER FDA REGULATOR

Former FDA Regulator Ryan Foringer joins Medical Device and Technology practice as a Senior Regulatory Specialist.

WASHINGTON, D.C., 03 March, 2022: Global law firm Hogan Lovells has added Ryan Foringer to the firm's Medical Device and Technology practice as a Senior Regulatory Specialist. In this role, Foringer will assist clients with FDA regulations and policies focused on medical device technology, bringing FDA and private sector experience in developing regulatory strategies, new product development, design controls, quality management systems, clinical study development, and authoring regulatory submissions.

Foringer joins Hogan Lovells from Renew Research, where he served as senior director of regulatory operations for projects focusing on neurological and cardiovascular medical devices. In that position, he led an international, interdisciplinary team in the preparation of FDA regulatory submissions including pre-submissions, breakthrough device designation requests, and de novo submissions. He also advised international affiliates on FDA regulatory matters and compliance. Before joining Renew Research, Foringer served in a similar capacity at Stage 2 Contract Engineering, where he led projects focusing on neurological, cardiovascular, and diabetes devices.

Prior to his work in the private sector, Foringer spent nearly four years at the FDA. He served as a consumer safety officer in the CFSAN Office of Compliance, as a lead reviewer and chemical engineer in the CDRH Office of Device Evaluation, and as an engineer in the CTP Office of Science. In his time at FDA, he focused on dietary supplement and food labeling compliance, evaluating the safety and effectiveness of regulated medical devices, and evaluating the safety of tobacco products.

Foringer obtained his bachelor's degree in chemical engineering from Rochester Institute of Technology.

For additional information visit www.hoganlovells.com

ARIAS

ADVISES TELEFONICA IN SALE OF OPERATIONS TO LIBERTY LATIN

SAN JOSE CR, 02 March 2022: Telefónica completed the sale of its regional operations in Central America to Liberty Latin America in Costa Rica for a value of $538 millions USD, and at Arias we advised them with the coordination of the entire transaction related to Costa Rica, including advice on the applicable legal and regulatory aspects required to carry out the sale, the preparation of the seller's due diligence and support in the negotiation and drafting of the transaction documentation.

This purchase expands Liberty Latin America's existing presence in Costa Rica. The company already owns an 80% stake in fixed-line operator Cabletica. Liberty intends to make the new assets part of its subsidiary VTR, which already owns Cabletica.

Our team involved in Costa Rica incluided Partners Carlos Ubico, Andrey Dorado and Carolina Flores; and Associates Tracy Varela, Luis Diego Obando and Ligia Alfaro.

We congratulate Telefónica for completing the sale and Liberty Latin America for this important acquisition. We strongly thank Telefónica for their trust in our team to carry out such a relevant transaction for their business. Congratulations to our team for the excellent work done!

For additional information visit www.ariaslaw.com

BRIGARD URRUTIA

ASSISTS DIESCO IN US$275M LOAN FROM GOLDMAN SACHS

BOGOTA, 08 December 2021: Multinational Grupo Diesco has hired Brigard Urrutia in Bogotá, Headrick Rizik Alvarez & Fernández in Santo Domingo and Wakefield Quin in Bermuda to obtain a US$275 million investment from Goldman Sachs in an agreement signed in October 2021.

Diesco plans to use the proceeds from the investment to accelerate its expansion in the Dominican Republic. The new capital will also allow Diesco to invest in environmental, social and governance initiatives.

Acting in the transaction were Brigard Urrutia Partner César Felipe Rodríguez and associates Verónica Umaña Obregón, Santiago Jaramillo Martínez and Juan Pablo Tello Martínez in Bogotá.

For additional information visit us at www.bu.com.co

BENNETT JONES

ADVISING EQUITABLE BANK IN ITS AGREEMENT TO ACQUIRE MAJORITY INTEREST IN CONCENTRA BANK

TORONTO - 11 February, 2022: Bennett Jones is acting for Equitable Bank in its agreement to acquire a majority interest in Concentra Bank and Equitable Group's concurrent $200-million bought deal offering of subscription receipts. Concentra is the 13th largest Schedule I bank in Canada. Based on Concentra's book value of $11.3 billion in assets at November 30, 2021, the acquisition would result in a total purchase price of $470 million, subject to customary adjustments at the time of closing. Equitable Bank is expected to become the 7th largest Canadian-owned bank by assets.

Equitable's internal legal team is led by Michael Mignardi, Equitable's General Counsel. The Bennett Jones team is led by Suzana Lobo and John Teolis and includes Curtis Cusinato, Jeff Kerbel, Matthew Hunt, Gordon McKenna, Adam Kalbfleisch, Jessica Thrower, Nusrat Ali, Benjamin Gal and Tyler McAuley.

For additional information visit www.bennettjones.com

BRIGARD URRUTIA

ITAU UNIBANCO IN US$414 MILLION ACQUISITION COLOMBIA ASSETS FROM CHILE'S CORPGROUP

BOGOTA, 09 March 2022: Itaú Unibanco has turned to Brigard Urrutia in Bogotá to acquire a stake in one of its subsidiaries from Chilean financial holding company CorpGroup for US$414 million.

Itaú CorpBanca in Chile, the country's fourth largest commercial bank and subsidiary of Itaú Unibanco, was co-purchaser and enlisted a separate team from Brigard Urrutia in Bogotá.

The deal closed on 22 February.

For additional information visit www.bu.com.co

GIDE

COUNSEL TO MIROVA ON STRUCTURING A FUND DEDICATED TO ORANGE GROUP REFORESTATION AND ECOLOGICAL RESTORATION PROJECTS

PARIS, 01 March 2022: Gide has worked with Mirova on launching the "Orange Nature" fund, dedicated to investing in assets that respect the environment and that aim to support pro-climate and pro-biodiversity projects, and the preservation of natural spaces, in particular forests and oceans.

The fund, whose target size is EUR 50 million, will invest directly or indirectly in various carbon sequestration projects around the world: afforestation, reforestation, and restoration of natural ecosystems (mangroves or agroforestry projects). Specific attention will be paid to the economic and social development of the regions and populations affected by the projects, as well as the positive impacts they have on biodiversity.

The returns from the Orange Nature fund will be in the form of high-quality carbon credits only. This project is part of Orange's commitment to become Net Zero Carbon by 2040.

Orange Nature will have a co-investment agreement with the Nature+ Accelerator Fund, a Luxembourg-based investment fund managed by Mirova and launched at the initiative of the International Union for Conservation of Nature (IUCN), to roll out a part of its investment strategy.

Gide's team assisting Mirova on fund structuring aspects was headed by partner Stéphane Puel, working with senior associate Clothilde Beau and junior associate Olivia Le Goff. Partner Laurent Modave and associate Vincent Michaux also acted on several aspects of tax structuring.

For additional information visit us at www.gide.com

HAN KUN

ADVISES BRIGHT DAIRY ON ITS PRIVATE PLACEMENT OF A SHARES

SHANGHAI, 24 December, 2021: Recently, Bright Dairy & Food Co., Ltd. ("Bright Dairy", Stock Code: 600597) concluded a private placement of A shares. Registration and custody formalities for the new shares were completed on December 20, 2021, at China Securities Depository and Clearing Corporation Limited Shanghai Branch. As legal counsel to Bright Dairy, Han Kun Law Offices was engaged throughout this project and provided Bright Dairy with professional, full-scope, and efficient legal services.

Bright Dairy, a dairy conglomerate principally engaged in dairy cow husbandry, the development, production, processing and distribution of dairy products, as well as logistics and distribution businesses, is a high-end brand leader in China's dairy industry. The RMB 1.93 billion raised by Bright Dairy through this private placement will be used to advance the company's milk-source ranch projects and supplement its working capital, which will help expand Bright Dairy's business, further improve the self-sufficiency of its milk sourcing and the quality of its products, thereby enhancing Bright Dairy's core competitiveness and sustainable development.

For additional information visit www.hankunlaw.com

HOGAN LOVELLS

SECURES JURY VERDICT FOR PPG IN PATENT DISPUTE

WASHINGTON, D.C., 14 March 2022: Global law firm Hogan Lovells secured a unanimous jury verdict for global supplier of paints and coatings PPG Industries in a multi-year patent infringement dispute against Sherwin-Williams Co. over beverage can coatings. On March 8, a jury in the U.S. District Court for the Western District of Pennsylvania found in favor of PPG, invalidating the five Sherwin-Williams patents that Sherwin claimed PPG infringed. The jury's decision shielded PPG from potentially substantial monetary damages and a possible injunction.

The suit originally was filed in May 2016, when Sherwin-Williams alleged PPG had copied its internal BPA-free coating for beverage containers. During a nearly two-week trial in Pittsburgh, Hogan Lovells helped PPG to prove that it actually had invented and patented the technology more than two decades prior in the early 1990s. Sherwin's patents should have never issued.

Hogan Lovells' trial team representing PPG was led by Intellectual Property, Media and Technology (IPMT) Americas Practice Lead Celine Jimenez Crowson.

She commented: "We were extremely gratified by the jury's decision, siding with our client on all five claims under dispute. Patent dispute trials are extremely technical, and few ever make it before a jury. We appreciate the jurors' time and attention to the many details of this case."

Along with Crowson, the Hogan Lovells team included partner Joseph J. Raffetto (Washington) and senior associates Ryan J. Stephenson (Washington), Corey T. Leggett (San Francisco), and Nicholas W. Rotz (Washington).

A team from Blank Rome led by Andrew Fletcher served as Pittsburgh-based co-counsel.
For additional information visit www.hoganlovells.com

NAUTADUTILH

ADVISES HAL ON INTENDED PUBLIC OFFER FOR BOSKALIS

AMSTERDAM - 14 March 2022: On 10 March 2022, HAL announced that it intends to launch a public offer for all outstanding ordinary shares in Royal Boskalis Westminster. The offer price represents an implied equity value for 100% of Boskalis of EUR 4.2 billion. NautaDutilh acts as legal advisor to HAL.

HAL has been a shareholder of Boskalis since 1989. It believes that given Boskalis' business characteristics, the long-term nature of its larger projects (typically spanning multiple years) and the cyclicality of its underlying markets, Boskalis could benefit from private ownership with a long-term investment horizon, and that such private ownership could also enhance M&A opportunities. HAL supports Boskalis' existing strategy, and has no intention to change its management or governance. HAL is committed to the long-term interests of Boskalis and its business, taking into account the interests of its stakeholders, including its employees. HAL does not envisage reductions of Boskalis' workforce as a direct consequence of the Offer or completion thereof. HAL will finance the intended offer from its available cash resources. The offer will not be subject to a minimum acceptance threshold. Closing of the offer will be subject to obtaining the requisite regulatory and competition clearances, which HAL expects to obtain in Q3 of 2022.

Stefan Wissing: "We know the team at HAL well, having worked with HAL on previous occasions including the sale of HAL's majority stake in GrandVision. It is great to be working together with them again on this major and exciting transaction."

The NautaDutilh team is led by Stefan Wissing and includes Leo Groothuis and Dineth de Graaf (Corporate M&A), Paul van der Bijl and Sanne Meester (Notarial), Homme ten Have and Daniël Kuiper (Employment), Nina Kielman (Tax) and Jinne van Belle and Stephan Huis in het Veld (Finance).

For additional information visit www.nautadutilh.com

KOCHHAR & CO.

ADVISES EXIMIUS ON SEED INVESTMENT ROUND IN FINARKEIN ANALYTICS

NEW DELHI, 01 March 2022: Kochhar & Co. advised Eximius Ventures on its participation in a seed investment round of an undisclosed amount in Finarkein Analytics. The round also saw participation from IIFL's Fintech Fund and Redstart Labs, an Info Edge company.

Finarkein Analytics is building a low/no code workflow orchestration and data analytics platform for India's current and upcoming Open Digital Ecosystems (ODEs) like the Account Aggregator, ABDM/UHI, ONDC etc.

The transaction was led by Partner Sarika Raichur and supported by Senior Associate Sidhartha Jatar.

Our role involved conducting legal due diligence, advising on the transaction structure, drafting, negotiating, and settling of all transaction documents such as the Share Subscription and Shareholders' and other agreements and providing all related legal advice and support until the closing of the transaction.

For additional information visit www.kochhar.com

PRAC EVENTS
BULLETIN BOARD

Like millions around the globe, the COVID-19 pandemic has impacted our members and how we work.
We pivot. We adapt.
We continue to meet and talk virtually face to face
Across the miles, oceans and regions
In varying places and at all 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 2022 for our monthly live one-hour virtual meetings
PRAC - Let's Talk! events are open to PRAC Member Firms only

Visit www.prac.org for details

PRAC LET'S TALK!

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

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

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

PRAC EVENTS


2019
PRAC
COSTA RICA


PACIFIC RIM
ADVISORY COUNCIL


PRAC @ SAO PAULO
PACIFIC RIM
ADVISORY COUNCIL


PRAC @ Taipei 2014


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


PRAC @ Vancouver


PRAC @ INTA


PRAC @ PDAC


PRAC @ IPBA

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

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

www.prac.org

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

Current trends in merger control in Argentina

The objective of this brief article is to comment on some current trends in merger control in Argentina, especially those that have arisen as a result of the adoption of Law No. 27,442 for the Defense of Competition (hereinafter, "LDC") in May of the year 2018.

1. The effective implementation of the *ex-ante* merger control regime, although provided for in the LDC, currently remains uncertain

In May 2018, Argentina sanctioned the LDC with the intention of substantially modifying and modernizing the legal framework for the defense of competition that had been in force in the country for almost 20 years.

The LDC introduced several substantial modifications, two of which are relevant to this brief article: (1) the adoption of an *ex-ante regime* or suspension of merger control pursuant to which the economic concentrations that are subject to notification could not be consummated without the prior authorization of the Ministry of Internal Trade; and (2) the creation of a new and independent authority for the defense of competition, that is, the National Competition Authority (hereinafter, "ANC"), which would replace the Internal Trade Secretariat -of political appointment- as the enforcement authority of the LDC. According to the LDC, the members of the ANC will be selected by the Executive Branch and must subsequently receive the agreement of the Senate. *The LDC also established that the ex-ante* regime of merger control would only enter into force one year after the commissioning of the ANC by the Executive Power.

To date, the Argentine government has not constituted the new ANC that commands the LDC, which, once it has happened, will allow the one-year transition period to begin to run, after which the *ex* -ante control system would come into effect mergers.

Notwithstanding the foregoing, on February 4, 2021, the Senate gave half sanction to a bill presented by the ruling party in order to modify the LDC, which was sent to the Chamber of Deputies for its treatment. The bill intends to introduce important modifications to the LDC approved in 2018, but in this article we will only address those related to merger control.

If the project is approved, the *ex-ante regime* of merger control will enter into force 90 business days after the publication of the new law in the Official Gazette (and not one year after the creation of the new ANC established in the current LDC, as explained previously). Once the term of 90 business days has elapsed, the economic concentrations that are subject to notification in Argentina may not be perfected without the prior approval of the Ministry of Internal Trade. If the bill is not approved by the Chamber of Deputies before November 30, 2022, it will lose parliamentary status. After losing parliamentary status, that bill could only become law if it re-enters Congress and goes through the full parliamentary approval process (in particular,

Consequently, the Argentine merger control system continues to be *ex-post*, so that the notification of an economic concentration operation subject to notification in Argentina can be made up to one week after the closing or the acquisition of control, whichever occurs first.

2. A novel tool: the use of the Objection Report in merger analysis

The LDC introduced a new tool in the framework of merger analysis: the issuance of a preliminary report by the Ministry of Domestic Trade (called Objection Report) for those economic concentration operations that are considered to have the potential to restrict or distort competition.

The Objection Report is only a preliminary and initial report, which does not imply a definitive finding of infringement or opposition by the Secretary of Domestic Trade. Once notified to the notifying parties, they have a period of 15 business days to present their opinions and comments on the Objection Report and/or offer mitigation measures.

Once notified to the notifying parties, the Objection Report is published on the CNDC website so that third parties can present their opinion and considerations (if they so wish) on the Objection Report, which are not binding for the Authority .of Competition. Subsequently, the notifying parties will be convened for a special hearing to discuss possible mitigation measures to resolve the concerns set forth in the Objection Report.

From May 2018 when the LDC entered into force until today, the Ministry of Internal Trade has issued Objection Reports in four economic concentrations (all of them since the end of 2020).

3. The issuance of precautionary measures to suspend the execution of an already perfected operation

In June 2021, as part of the Objection Report on the Mirgor/Brighstar Argentina merger, the Ministry of Internal Trade -to avoid potential irreparable damage to competition- issued for the first time a precautionary measure that ordered the buyer to maintain its business. separated from the acquired *target* company , as they were prior to the closure of the notified economic concentration, until a final decision is taken. It is important to note that the precautionary

measure that prohibited the parties from merging their activities was issued almost 8 months after the closing of the transaction.

The use of precautionary measures in merger review is extremely rare and the last time the CNDC used this tool was more than 10 years ago in a highly political transaction (*Telefónica de España/Telco*), which had been perfected for almost 2 years.prior to the issuance of the precautionary measure.

This report cannot be considered as legal or any other advice by Allende & Brea.

www.allendebra.com

Tozzini Freire. ADVOGADOS

São Paulo, Rio de Janeiro, Brasília, Porto Alegre, Campinas, New York

INFRASTRUCTURE AND ENERGY NEWSLETTER

February **2022**

Auctions of toll roads, the new legal framework for railways, contracts in foreign currency, and other news in the infrastructure sector.

IMAGEM: JARED MURRAY

INFRASTRUCTURE

Long-Term Integrated Plan for Infrastructure is published

The report of the first version of the Long-Term Integrated Plan for Infrastructure (PILPI), which covers the 30-year period between 2021 and 2050, was approved on December 14, 2022. The PILPI is prepared based on the sector-specific plans and will be updated every two years.

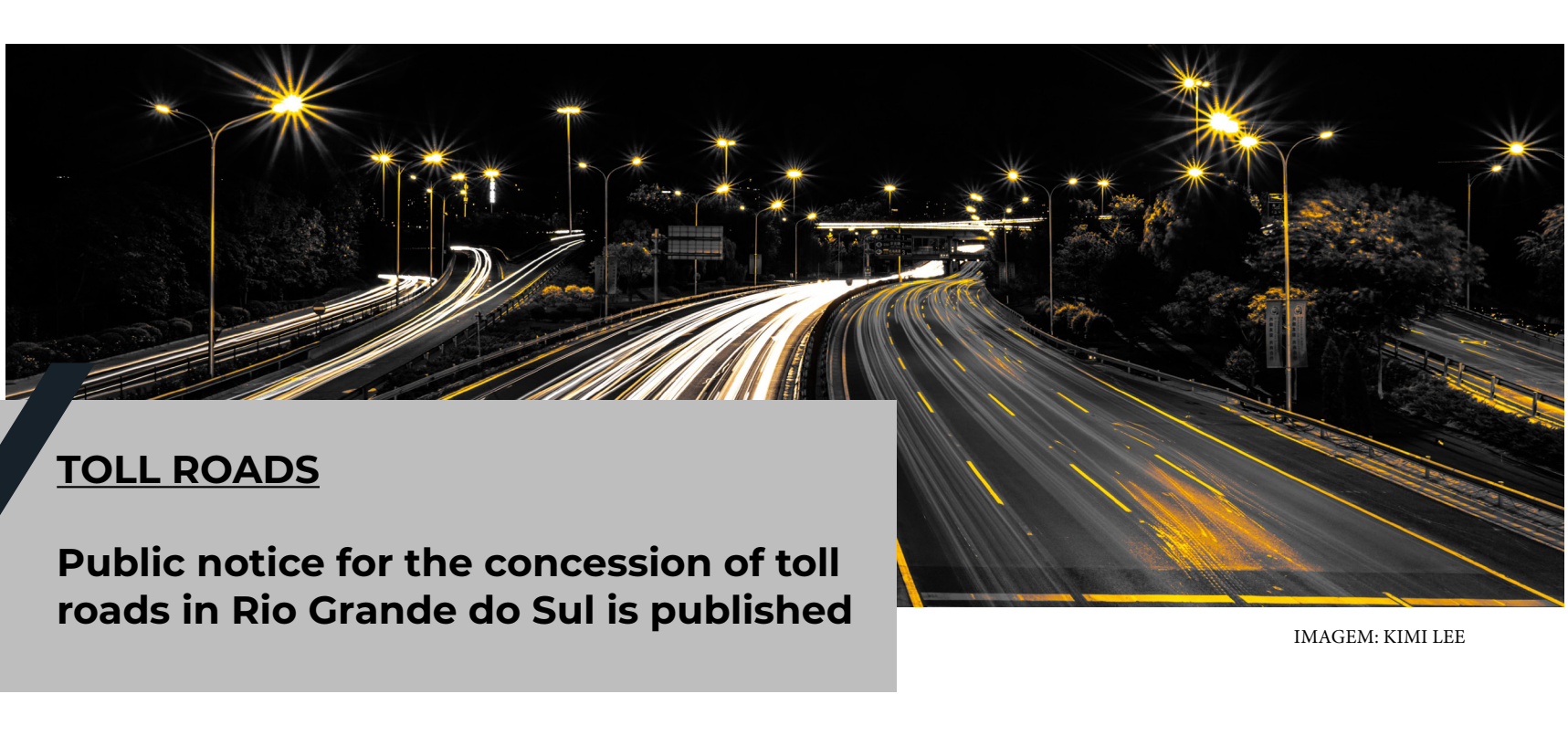

IMAGEM: KIMI LEE

TOLL ROADS

Public notice for the concession of toll roads in Rio Grande do Sul is published

The public notice for the concession of 271,5 kilometers of state toll roads in Block 3 of the RS Parcerias program was published on January 10, 2022. Bid bonds shall be submitted by April 7, at B3, São Paulo stock exchange, and the auction is scheduled for April 13, 2022. The Invitation to Bid, draft concessions contract and other documents can be found here.

ANTT opens public hearing for toll roads in the North and Midwest regions

The Brazilian National Land Transport Agency (ANTT) has opened public hearings to collect contributions for the drafts of the invitation to bid and contract related to the concessions of four groups of federal toll roads: (i) BR 060-452 (GO), with 425.70 km; (ii) BR 060-364 (GO) and BR 364 (MT), with 502.80 km; (iii) BR O70-174-364 (MT), with 887.60 km; and (iv) BR 364 (RO), with 729 km. Contributions may be sent until February 25, 2022 here.

ANTT schedules auction for the concession of BR 381-262 (MG-ES)

After successive postponements, the invitation to bid has been approved and the auction for the concession of BR 381-262, as known as the "Highway of Death", was for February 7, 2022, at B3, São Paulo stock exchange. In an effort to increase private interest in the toll road, a risk-sharing optional mechanism for the price of inputs has been included to mitigate the risk of variation in construction costs. Invitation to bid and draft concession contract can be found here.

Authorization for the opening of the bidding for the Northern Stretch of Rodoanel is published

The concession is structured as a sponsored concession (concessão patrocinada) of public services for the expansion, operation, maintenance and investments of the "Northern Stretch of Rodoanel". In addition to tariffs, the concessionaire will receive revenues from investments made by the State. The concession contract will have a term of 31 years with investments of R$3 billion. The Northern stretch is 44 km long and passes through the cities of São Paulo, Guarulhos and Arujá. The future concessionaire will be responsible for completing the construction work on the Northern stretch that has been suspended since December 2018. The public notice was published on January 28, 2022 in the São Paulo Partnerships website.

IMAGEM: KS KYUNG

RAILWAYS

New Legal Framework for Railroads is sanctioned

Law No. 14,273/2021 was published on December 23, 2021, instituting the regime for private exploitation of railroads by means of authorization. So far, more than 70 applications have been filed and more than 20 authorizations have been granted. See more details about the new framework in our newsletter, and see the article published on the bankability of rail projects after the new framework in the Agência Infra.

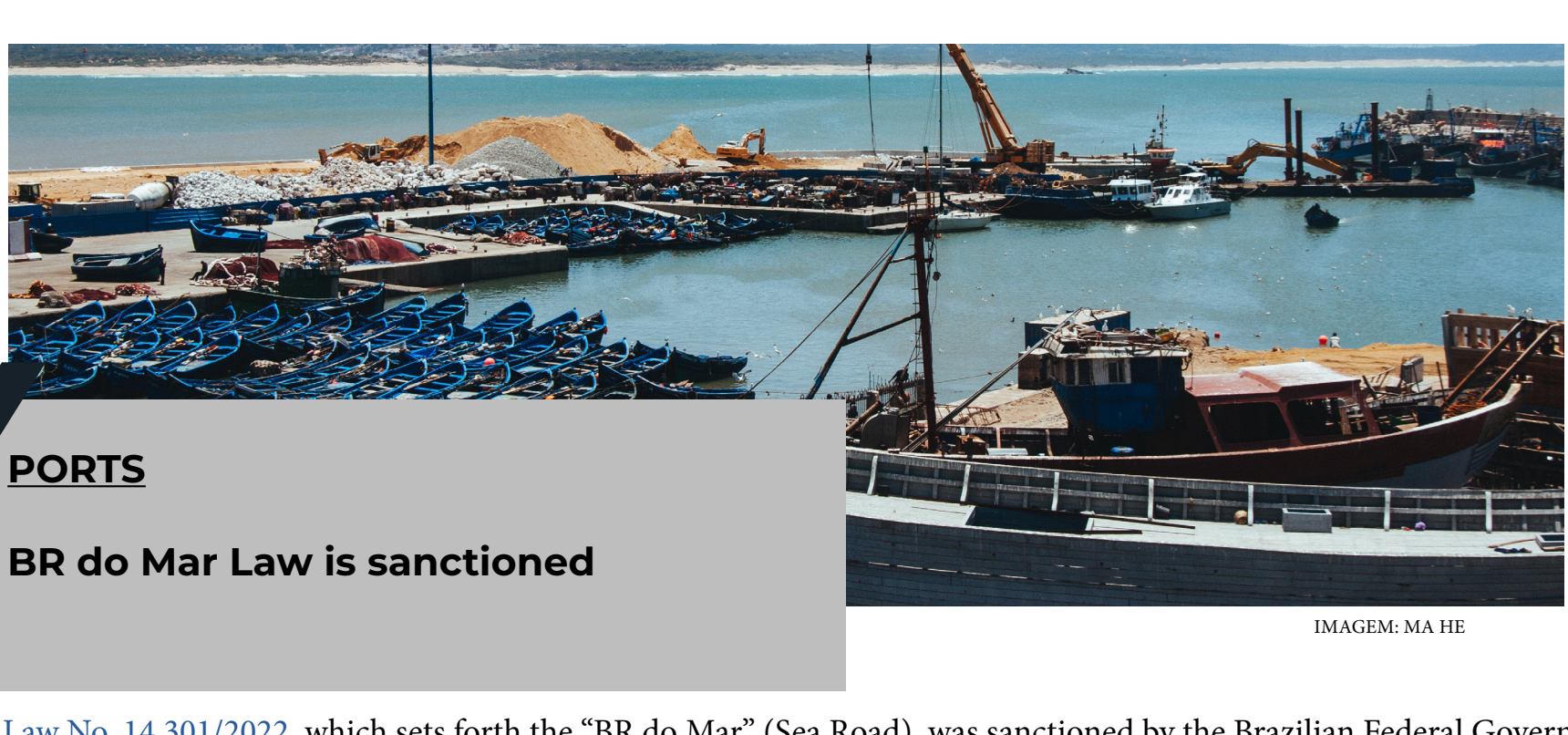

IMAGEM: MA HE

PORTS

BR do Mar Law is sanctioned

Law No. 14,301/2022, which sets forth the "BR do Mar" (Sea Road), was sanctioned by the Brazilian Federal Government and published in the Official Gazette on January 10, 2022. The program encourages cabotage, the navigation between the country's ports, and aims to rebalance the Brazilian transport matrix, as well as to reduce costs.

Auction of the first privatization of a Brazilian port authority is scheduled

The auction for the privatization of Companhia Docas do Espírito Santo (CODESA), which manages the ports of Vitória and Barra do Riacho, is scheduled for March 25, 2022. The privatization includes the transfer of control of Companhia Docas do Espírito Santo (CODESA) and the concession of the ports of Vitória and Barra do Riacho.

Invitation to Bid, Concession Agreement, and Share Purchase Agreement can be found here.

Terminals in the Ports of Paranaguá, São Francisco do Sul, and Rio Grande are qualified in PPI

On January 25, 2022, Decree No. 10,944 was published, qualifying three terminals of mineral and vegetable bulk in the South region of Brazil in the Investment Partnership Program of the Presidency of the Republic (PPI): the Port of Paranaguá, the Organized Port of São Francisco do Sul, and the Organized Port of Rio Grande.

Public Consultation Opened for the Privatization of the Port of Santos

The Brazilian National Agency for Waterway Transportation (ANTAQ) opened, on January 31, 2022, a public consultation to collect contributions in the documents relating to the tender of the Port of Santos. The tender will involve the transfer of control of the Santos Port Authority and the concession of the Port of Santos. Contributions can be sent until March 16, 2022, here.

IMAGEM: VOO QQQ

AIRPORTS

Fernando de Noronha Airport concession is approved

On January 17, 2022, the concession for the Governador Carlos Wilson Airport, located in the State District of Fernando de Noronha/PE was approved. The approval is conditioned to the adequacy of the bid to the "Management Plan of the Fernando de Noronha Environmental Protection Area".

The concession project was developed under Pernambuco's Strategic Partnerships Program (PPE). Further information here.

Conditions for the re-bid of São Gonçalo do Amarante are published

The Council of the Investment Partnership Program published, on January 17, 2022, a resolution approving the minimum conditions for the re-bid of São Gonçalo do Amarante Airport.

The re-bid will be through a concession, with a 30-year term, and the winning bid will be the highest concession payment. The project is currently being analyzed by the Federal Audit Court (TCU).

Ministry of Infrastructure creates Working Group to study the concession model for Santos Dumont Airport

The creation of the temporary Working Group was determined on January 18, 2022 due to concerns regarding damage caused by the concession of Santos Dumont Airport to the traffic at Galeão Airport. The working group is comprised of members of the Ministry of Infrastructure and the State Government of Rio de Janeiro.

IMAGEM: ZBYNEK BURIVAL

OIL & GAS

The permanent offer model for bidding on oil and gas fields is approved

On December 23, 2021, the Resolution CNPE No. 27/2021 was published, authorizing the application of the permanent offer model for bidding of exploratory blocks for oil, natural gas, and other fluid hydrocarbons, for both onshore and offshore basins, except for reserves in the pre-salt area or other strategic areas.

The new resolution extends the permanent offer modality, by which the Brazilian National Agency of Oil, Gas and Biofuels (ANP) offers exploration fields on an uninterrupted basis and grants them according to investor demand. This structure will also be adopted for the bidding of fields that have been returned or are in the process of being returned.

The deadline for contributions to the public consultation on third-party access to waterway terminals has been extended

The Brazilian National Agency of Oil, Gas and Biofuels (ANP) has extended, until February 11, 2022, the deadline for contributions to Public Consultation 27/2021, about the rule that establishes criteria for the use by third parties of waterway terminals for handling oil, oil products, natural gas products, and biofuels.

Contributions can be made here.

IMAGEM: MÉLISSA JEANTY

WATER & SEWAGE

ANA opens public consultation on quality and efficiency indicators

The Brazilian National Water Agency (ANA) has opened Public Consultation 1/22 to receive contributions to the proposed reference standard on indicators and standards of quality, efficiency and effectiveness for evaluating the provision, maintenance and operation of water supply and sanitation systems.

The Agency will receive contributions until February 17, 2022, at this link.

ANA invites contributions on the tariff regulation model

The Agency has opened the Call for Subsidies 1/22 to collect contributions for the drafting of a reference standard for the tariff regulation model for the water and sewage sectors, for existing and new contracts.

The Agency will receive contributions until February 11, 2022, at this link.

The deadline for submitting evidence of economic-financial capacity has expired

Decree No. 10,710/2021, which regulates the process of evidencing the economic and financial capacity of the sanitation companies, provided that the companies should send evidence of economic and financial capacity to meet the goals of the sector's new legal framework until December 31, 2021. The regulator will now analyze the documents provided by March 31, 2022.

Bids for Blocks B and C in the state of Alagoas are approved

The Government of Alagoas approved on January 7, 2022 the results of the public service concession bids for water supply and sanitary sewage in Block B (Agreste and Sertão) and Block C (Zona da Mata and Litoral Norte) of the State. The projects were awarded in favor of Consórcio Alagoas, formed by Allonda and Conasa (Block B) and of Consórcio Mundaú, formed by Cymi and Aviva Ambiental (Block C).

IMAGEM: RYOJI IWATA

SOCIAL INFRASTRUCTURE

Recife hires BNDES to model PPP in the educational area

The Municipality of Recife signed on January 25, 2022 a contract with Brazilian Development Bank (BNDES) for structuring and modeling a Public-Private Partnership (PPP) for the implementation and operation of 44 new educational units. It is expected that at least 5,000 new students will be received in day-care centers in the city. The concessionaire will receive monthly payments from the Municipalities, to be determined in the studies, and will be responsible for making the infrastructure available. The Municipality will be responsible for structuring and coordinating the educational project, as well as for hiring teaching staff.

Company selected for the studies of PPP of school units in Divinópolis

In January 2022, Divinópolis City Hall, together with the Public-Private Partnership Management Board (CGPPP), has announced that the company BTC Consultoria e Concessões Eirelli was qualified in PMI (Expression of Interest Procedure) No. 01/2021 to develop studies for modeling the construction and operation of public school units, including the provision of non-educational support services through PPP.

The initial project, to be presented in 30 days, will be evaluated by the PMI Special Evaluation Commission and, if approved, the company will have a new period of 90 days to present additional studies related to the PPP modeling.

IMAGEM: JOSH HILD

PUBLIC LIGHTING

Invitation to bid for administrative concession of the Public Lighting services of Jaboatão dos Guararapes (PE) is published

The public notice for the PPP, structured by the BNDES, was published on January 29, 2022. The concession involves the works services related to the modernization, expansion, operation, and maintenance of the infrastructure of the municipal public lighting network.

The concession term is of 22 years and the estimated value of the contract is R$ 280 million. The commercial proposals and bidding documents must be delivered to B3, in São Paulo, on March 11, 2022. The public session will take place on March 16, 2022 also at B3. The invitation to bid, the draft concession contract, and other documents can be found here.

Várzea Paulista opens public consultation for Public Lighting PPP

The project involves the administrative concession for the management, optimization, expansion, modernization and maintenance of the municipal public lighting system. Contributions can be sent until March 02, 2022. The drafts invitation to bid, concession contract, and other documents are available here.

IMAGEM CHRISTIAN DUBOVAN

FINANCING

Legal Framework of the Foreign Exchange Market allows contracts in foreign currency

Law No. 14,286/21, published on December 30, 2021, includes in the list of possibilities for payment in foreign currency, "contracts entered into by exporters in which the counterparty is a concessionaire, permissionaire, licensee or lessee in the infrastructure sectors."

Upon the entry into force (within one year of its publication), exporters will be able to enter into contracts with infrastructure companies with payment linked to foreign currency, thus matching their revenues with their costs.

The infrastructure company, in turn, will be able to use the revenues from these dollarized contracts as collateral to obtain financing in dollars, expanding its funding possibilities. Check out more details in our newsletter and see article authored by our members on the subject, published by Estadão newspaper.

IMAGEM: ÁLVARO SERRANO

ENERGY

Brazilian Federal Government publishes rules for development of offshore wind energy projects

On January 25, 2022, the Federal Government published Decree No. 10,946/2022, which provides the initial guidelines for the development of offshore wind projects in Brazil. The rule deals with one of the main challenges related to ventures of this nature – the assignment of the use of physical spaces and the use of natural resources for this type of electricity source.

The Ministry of Mines and Energy (MME) may hold specific auctions for contracting offshore power if sector planning requires. The MME will issue complementary rules within 180 days from the date they come into effect on June 15, 2022.

75.25 GW in projects were registered for the 2022 A-4 Generation Auction

A total of 1,894 generation projects, totaling 75.25 GW, were registered for the 2022 A-4 Auction, scheduled to take place on May 27. With 1,263 projects, accounting for 51,824 MW, the solar photovoltaic source represents more than half of all the energy registered for the auction, followed by wind, with 542 projects and 21,432 MW registered.

The A-4 Auction of 2022 will be the first in which wind and solar projects will compete in the same category, which, according to the Energy Research Company (EPE), will bring more competitiveness and benefit consumers.

Federal Government publishes legal framework for distributed generation

On January 7, 2022, the Law No. 14,300 was sanctioned, establishing the Legal Framework for Distributed Generation (DG) in Brazil.

Law No. 14,300 addresses the gradual remuneration for the use of the grid, subject to transition rules, establishing new forms of operation of shared generation. It also sets forth the requirement to submit a bond in certain cases and provides for the need for valuation of costs and benefits of DG, both by the National Energy Policy Council (CNPE) and the National Agency for Electrical Energy (ANEEL). ANEEL is still expected to publish regulations on some aspects provided for in Law No. 14,300/2022.

A legislative change makes it possible to enter into PPAs in foreign currency

As detailed in the item "Financing" of this newsletter, the Brazilian Federal Government published the Legal Framework for the Foreign Exchange Market.

Specifically with respect to the electric power sector, the new law makes it possible to enter into Power Purchase Agreements (PPAs) in foreign currency, when the offtaker is an exporter, a structure much discussed in the energy market in recent years. When the law comes into force, in December 2022, Power producers will, in turn be able to access foreign currency financing, using their revenues - also in foreign currency – as a "natural hedge".

For more energy news, see our newsletter Papo de Energia.

Newsletter content produced by TozziniFreire's Infrastructure & Energy team

Partners responsible for the content:

- Ana Carolina Calil
- José Augusto Dias de Castro
- Jun Makuta
- Karin Yamauti Hatanaka
- Leonardo Miranda
- Marcelo Zenkner

www.tozzinifreire.com.br

UPDATED Canadian Sanctions Targeting Russia, Belarus and Separatist Territories in Ukraine Expanded in Response to the Russian Invasion of Ukraine

Written by Jessica Horwitz, George Reid, Mitchell Dorbyk and Serge Dupont

This blog was originally published on February 25, 2022, and has been updated to reflect further developments.

On February 21, 2022, Russia formally recognized the purported independence of two regions in Eastern Ukraine, Donetsk and Luhansk. The next day it ordered Russian troops into the separatist-occupied territories, and the incursion escalated into a multi-pronged invasion of Ukraine on February 24, 2022. Canada swiftly announced new sanctions that target Russia and the occupied Ukrainian regions, as it warned it would do if Russia were to continue its aggressive policies against Ukraine.

Prime Minister Trudeau announced on February 22, 2022, that Canada would, in coordination with like-minded NATO partner states, issue additional sanctions targeting Russia, Belarus and the separatist-controlled territories of Ukraine. Since February 24, 2022, Canada has implemented a series of escalating restrictions on trade and financial transactions with these regions, including some that leverage seldom used legal mechanisms beyond economic sanctions legislation. Canada's new sanctions include the following measures:

- Over 500 individuals and entities have been added to Schedule 1 of Canada's Special Economic Measures (Russia) Regulations, the Schedule of the Special Economic Measures (Ukraine) Regulations and Schedule 1 of the Special Economic Measures (Belarus) Regulations. Some of these listings are new, while other entities that were previously on Schedules 2 and 3 of the Russia regulations, which impose targeted sectorial sanctions limited to debt and/or equity financing constraints, were shifted to Schedule 1, which prohibits all financial transactions and trade in goods and technology. Entities now on Schedule 1 include the Central Bank of Russia, the Russian National Wealth Fund and the Russian Ministry of Finance, VTB Bank, Sberbank, Bank Otkritie, Novikombank, Sovcombank, Promsvyazbank PJSC, VEB Bank, the Russian Direct Investment Fund, Gazprom, Gazprombank and Gazpromneft, Rostelecom, Rostec, Wagner paramilitary group, Transneft, and United Aircraft Corporation among others, as well as on President Vladimir Putin, Foreign Minister Sergei Lavrov, individual members of the Russian Federal Assembly, Russian Security

Council, and other Russian oligarchs and businesspeople such as Roman Abramovich (Owner of Chelsea FC). A consolidated reference list of currently sanctioned persons is available on the Global Affairs Canada website. Note that this consolidated list sometimes has an approximately 24 hour delay between the entry into force of new sanctions listings and the list being updated. The consolidated list also does not include anti-terrorism listings or asset freeze listings under Canada's *Freezing of Assets of Corrupt Foreign Officials Act* (under which there are no regulations affecting Russia or Belarus at present, but there are regulations related to Ukraine).

- Effective on February 24, 2022, Canada has cancelled all Canadian export permits for goods listed on Canada's *Export Control List* to Russia, effectively banning the export of all controlled goods and technology including dual-use (civilian) items. Canada also announced that no further permits will be issued barring exceptional circumstances involving medical/ humanitarian need. See Notice to Exporters No. 1071.
- Effective March 3, 2022, Canada issued Tariff Withdrawal Order 2022-1 that removes the entitlement of Russia and Belarus to Canada's Most-Favoured-Nation ("MFN") tariff status under the Customs Tariff. This means that virtually all goods originating from Russia or Belarus will now face a 35 percent Canadian import tariff. The only other country currently excluded from Canada's MFN rates is North Korea. Order 2022-1 does not apply to goods that were already in transit to Canada on or before March 3, 2022. Russian and Belarussian goods are excluded from Canada's MFN rates for 180 days following March 3, 2022, unless both Canada's Parliament and Senate vote to extend the exclusion.
- Canada has banned all investments and related financial transactions, trade in goods, tourism and related financial transactions, and the provision of technical assistance to the regions of Ukraine controlled by the self-declared Donetsk People's Republic and Luhansk People's Republic. Technical assistance is defined as "any form of assistance, such as providing instruction, training, consulting services or technical advice or transferring know-how or technical data." See *Regulations Amending the Special Economic Measures (Ukraine) Regulations* and Customs Notice 22-01.
- Transport Canada implemented a no-fly zone for Russian aircraft in Canadian airspace, effective February 27, 2022, and Canada closed its territorial waters and ports to Russian-owned or flagged vessels effective March 6, 2022.
- Effective March 10, 2022, it is prohibited for persons in Canada, or Canadian citizens or entities operating outside Canada, to import, purchase or acquire petroleum oil, petroleum gas, or other gaseous hydrocarbons from Russia or any person in Russia.
- On March 8, 2022, the Honourable François-Philippe Champagne, Minister of Innovation, Science and Industry issued a policy statement advising non-Canadian investors and Canadian businesses to review their investment plans involving potential connections to Russian investors and entities, including controlling and minority interests. Minister Champagne stated that Russia's invasion of Ukraine has created an "environment of elevated national security and economic risk to Canada", and that both net benefit reviews and national security reviews under the *Investment Canada Act* will be impacted. Effective immediately, investments involving direct or indirect ties to Russian investors and/or entities will face increased scrutiny under both review mechanisms: acquisitions of control of a Canadian business involving Russian investors will be found to be of "net benefit" to Canada on an exceptional basis only, and the fact that an investment has ties to or is subject to influence by the Russian state will support a finding that there are reasonable grounds to believe the investment could be injurious to Canada's national security. For more detail regarding Minister Champagne's statement, please see our additional insight, *Government of Canada Issues Policy Statement Impacting Russian Foreign Investment in Canada*.

The listed person restrictions are subject to grandfathering clauses, which authorize payments by a listed person to a non-listed

person owed under a contract that was entered into before the person was listed (in the case of Russian Schedule 1, Belarus Schedule 1 and Ukraine Schedule sanctions), or the performance of contracts entered into before the sanctions came into force (in the case of the Donetsk and Luhansk geographic sanctions). However, no new transactions or business is permitted with these individuals, entities or regions.

International Impact

Canada acted in coordination with like-minded security partners to develop these sanctions. The European Union, United Kingdom, United States, Japan, South Korea, Switzerland, Australia and other countries also announced sanctions over recent weeks that are largely aligned with Canada's, although there are notable differences. For example, Germany halted certification of the Nord Stream 2 pipeline project.

One non-Canadian measure that has implications for Canadian businesses is the United States' imposition of two new "foreign direct product rules" to supplies or transfers of goods and technology to Russia and to Russian military end users or end uses. This prohibits, under U.S. law, the supply of goods or technology made outside of the United States that were produced using specified categories of U.S. origin software or technology, such as testing or production equipment, or in a plant or "major component" of a plant located outside the United States that is itself a direct product of specified categories of U.S. origin software or technology. In certain circumstances and depending on available license exemptions, U.S. foreign direct product rules can have the effect of making a broader range of items manufactured wholly outside the United States subject to U.S. export control laws when being exported to Russia and imposing significant U.S. export license requirements when these items are exported from third countries (such as Canada) to Russia. The U.S. Department of Commerce has granted Canada a license exemption in connection with the Russia-related foreign direct product rules because Canada has committed to implementing substantially similar export controls in connection with supplies of export controlled goods and technology to Russia. Exporters should confirm their eligibility for this license exemption with U.S. trade counsel to ensure that it applies in their particular circumstances.

Russian Central Bank and SWIFT Sanctions

Sanctions on Russia were toughened significantly further to a February 26, 2022 joint statement by authorities from the European Commission, France, Germany, Italy, the United Kingdom, Canada, and the United States. Specifically, Canada and its partners together committed to sanction the Russian central bank, preventing it from deploying its international reserves to contain the effects of sanctions on its economy and financial system. They also agreed to block selected Russian banks from accessing the global inter-bank messaging system SWIFT, disconnecting the targeted institutions from the global financial system. The EU later extended the SWIFT ban to certain Belarussian banks. Earlier U.S. actions, among other effects, had cut off Russia's two largest banks Sberbank and VTB—with a combined value of assets representing more than half of the total banking system in Russia—from processing payments through the U.S. financial system. The U.S. steps have already severely constrained the capacity of Russian financial institutions to conduct foreign exchange transactions globally, 80 percent of which are in U.S. dollars.

These added measures affect mostly financial institutions, not specifically Canadian businesses engaged in trade and investment with Russian entities or subsidiaries of Russian entities. However, the measures will work their way through many channels to all parts of

the Russian financial system, its economy and even beyond. For example, the measures against the Russian central bank will impede its ability to protect the value of the ruble, to sustain a flow of imports into the economy, and to control domestic interest rates. Early consequences have been a freefall of the ruble and a spike in domestic interest rates. Sanctions have also forced the reported imposition a ban on the transfer of foreign currency abroad (capital controls) by Russia on February 28, 2022. Meanwhile, the Russian banks targeted by the sanctions will rapidly incur liquidity shortages of hard currencies and will be unable to process international transactions for their clients.

The bottom line is that the sanctions will be felt—perhaps not immediately but soon—by virtually all Russian entities and their subsidiaries funded by, or exposed, to the Russian financial system, and hence to any commercial entity dealing with these Russian entities. Canadian businesses will be well advised to assess their direct and indirect exposure to this risk in their commercial dealings.

Next Steps

As these sanctions imposed by Canada and other countries have the potential to affect the operations of Canadian businesses that trade with, provide services to or engage in financial transactions with Russia or Ukraine, businesses should evaluate their current exposure in these regions and monitor developments closely. Canada and its allies have indicated that they could further expand the sanctions if the crisis escalates.

These are complex and rapidly evolving matters, with significant exposure risks. The Bennett Jones International Trade group is available to assist companies to evaluate risk exposure, develop response plans, and advise on the impact of Canadian sanctions on Canadian and foreign businesses.

Authors

Jessica B. Horwitz
416.777.6517
horwitzj@bennettjones.com

George W. H. Reid
416.777.7458
reidg@bennettjones.com

Mitchell Dorbyk
416.777.6544
dorbykm@bennettjones.come

Serge Dupont
613.683.2310
duponts@bennettjones.com

Posted on: January 27, 2022

COMMERCIAL LEASING TIPS TO KNOW WHEN REGISTERED & BENEFICIAL OWNERSHIP ARE SEPARATE

By: Tamara Huculak & Justin Leung (articled student)

For many commercial properties, it has become common for a property to have both a registered owner and a beneficial owner. Therefore, it has become increasingly important for registered and beneficial owners to be aware of certain pitfalls they can avoid in the commercial leasing context.

1) Expressly State the Identity and Status of the Beneficial and Registered Owners on the Lease

Directly informing the tenant of the fact that there is a beneficial owner and identifying the beneficial owner can be extremely important in preventing the tenant from voiding a lease and in ensuring that the beneficial owner still has remedies against the tenant for breaching the terms of the lease. In *Laidar Holdings Ltd. v Lindt & Sprungli (Canada) Inc.* [2018] BCSC 66, the tenant tried to walk away from the lease and took the position that it was entitled to void the lease. The landlord did not accept the termination of the lease and sued the tenant. The tenant argued that the lease was void or voidable because the lease identified Laidar Holdings Ltd. as the registered owner of the property and bare trustee for Shery Wittenberg when, in fact, Laidar Holdings Ltd. was the beneficial owner of the property and Shery Wittenberg was the registered owner and bare trustee of the property for Laidar Holdings Ltd. Fortunately for the landlord in this case, the tenants had knowledge that Shery Wittenberg was the registered owner. At paragraph 232 the court stated,

In my view, the fact that Dr. Wittenberg was the person Lindt viewed as the decision-maker is not an answer to this issue. However, in my view there was no uncertainty about the Landlord. Lindt signed the Lease with Laidar as Landlord. [The tenant's]' attention was directed to the issue of the identity of the Landlord. She was aware that Ms. Wittenberg was the registered owner. She advised Lindt that the Lease was acceptable to her and waived the tenant-solicitor's condition.

Due to the fact that the tenant was advised of the landlord situation when they had agreed to the lease, they could not seek to use this mistake to render the lease void. At paragraph 248 the court ruled that,

The parties were clearly in agreement concerning the physical space that was to be rented. By the time the solicitor's condition was waived and the Lease signed, the parties were in agreement that Laidar was to be the Landlord. This is evidenced by what the parties said and wrote to one another in coming to their

agreement. Both parties were aware that Shery Wittenberg, not Laidar, was the registered owner.

In the example above, the landlord was fortunate that the tenant had actual knowledge of the identity of the registered and beneficial landlords. However, to avoid voiding a lease, it is prudent to expressly set out in the lease the identity of both the registered and beneficial owners. In the following example, the landlords were not as fortunate. In *Price Security Holdings Inc. v Klompas & Rothwell* [2019] BCCA 36, the beneficial landlord, was not permitted to collect on arrears from the tenant because there was nothing in the lease to show such an intention. The court stated,

… I do not agree with Price Security that it can be found that the Landlord and Tenant intended to extend the Landlord's benefit under the Lease (and the overholding tenancy) to beneficiaries of trusts of which the Landlord may be or become the trustee. There is nothing in the Lease to evince such an intention, and there was no extrinsic evidence that such an intention existed at the time the Lease was entered into. The mere possibility that the Landlord held, or may in the future hold, the Property in trust for another person is not sufficient, in my view, to establish and intention on the party of the contracting parties to extend the benefits of the Lease to the beneficiary of the trust.

While the key point in this case was that there was no evidence the Tenant and Landlord shared an intention that a "potential" beneficial owner would receive the benefits of the Landlord under the Lease, the court also considered other factors. Among the factors considered, was that this situation only arose because Price Security deliberately structured their position as beneficial landlord to take advantage of certain tax benefits. As a result, the court decided that the beneficial landlord could not "have his cake and eat it too". The court held that,

It may be that the relaxation of the doctrine of privity will not prejudice the Tenant. However, it must be borne in mind that Price Security made the decision to have the Property held in trust for it by the Landlord. It admits that it did so to achieve tax savings. If it wishes to take advantage of a trust structure, it should be prepared to accept the limitation of such a structure, particularly when it was open to it to ameliorate those limitations.

Therefore to avoid this result, it would be good practice to ensure that the beneficial and registered landlords are both expressly inserted into the lease and that there is supporting evidence that the tenant had knowledge of the identity of both the registered and beneficial landlords and their status on the lease.

2) Wording Insurance and Indemnification Clauses

In *The Commercial Lease: A Practical Guide* (5th Edition) Harvey Haber suggests:

The Landlord should ensure that the Lease, in the context of insurance and indemnification, has the following wording, "for greater certainty, solely for the purpose of enforcing the Tenant's indemnification of the Owner in this Section, the parties agree that the Landlord shall be the agent or trustee of the Owner". This is because otherwise the Owner is not a party to this Lease, and in order to include the Owner as part of the indemnification clause from the Tenant, the Landlord is designated as the agent or trustee of the Owner.

…. The Landlord should also ensure that the proceeds of the insurance should be payable jointly to the Landlord, the Owner and the Tenant and expressly state this on the Lease.

Again, it is important to insert the beneficial owner into the lease, particularly the insurance and indemnification clauses if the beneficial owner hopes to have access to any insurance proceeds that would be payable to the registered owner and the tenant.

3) Wording Covenants for Quiet Enjoyment

There are a number of effects on both the landlord and the tenant when a party is relying on either a covenant for quiet enjoyment that is implied by the common law or an express covenant for the same. Landlords should be cautioned against inserting an absolute covenant for quiet enjoyment into the lease as it is a commitment against interruption by those who have a superior title to that of the landlord (i.e. the beneficial owner), meaning that if the beneficial owner takes any action that disturbs the "quiet enjoyment" of the tenant, the beneficial owner and the registered owner will be in breach of the covenant for quiet enjoyment. This covenant is more burdensome than the covenant implied by common law, which is a qualified covenant from the landlord assuring against interruption by either the landlord or by those claiming under it. This means that only the registered owner must abide by the covenant for quiet enjoyment, and even if the beneficial owner takes any actions that are contrary to the covenant, the covenant has not been breached. Thus, it is important when drafting such clauses to consider whether it is intended to bind both the registered and beneficial owner. These clauses should be carefully worded to ensure that both the landlords, whether registered or beneficial, and the tenant are satisfied by the terms.

Should you have any questions about this article, contact Leasing Lawyer, Tammy Huculak at thuculak@rbs.ca.

/Carey

News Alerts

Update Protected Borders Plan

March 11, 2022

Exempt resolution N° 325 of the Ministry of Health was published March 8th, 2022, modifying exempt resolution N°672, which establishes the "PROTECTED BORDERS" plan.

By means of this resolution, the following sanitary measures of entry into the country were eliminated:

1. PCR test or antigen for SARS-CoV-2 taken in Chile upon entry to the country. The following persons may be exempted from isolation:
    a. Chileans and foreigners residing regularly in Chile with an enabled mobility pass.
    b. Non-resident foreigners with a complete vaccination schedule against SARS-CoV-2 validated by the Ministry of Health for entry into Chile.

    Children under 2 years of age who travel with any of the persons indicated above, will be exempt from isolation, as long as the person they accompany complies with the rest of the requirements established in this resolution.

    The foregoing is applicable notwithstanding the fact that any person entering from abroad, regardless of their nationality, place of origin or region of destination in Chile, may be randomly selected by the health authority, at the time of entry or up to 7 days after, to be subjected to direct detection tests for SARS-CoV-2 determined by the health authority.

2. Tracking of travelers during 7 days following entry into national territory or exit, in case the length of stay is less than 7 days.

AUTHORS: Francisca Corti, Monserrat Nova.

Legal Commentary

February 24, 2022

HAN KUN
汉 坤 律 师 事 务 所
Han Kun Law Offices

BEIJING | SHANGHAI | SHENZHEN | HONG KONG

New Rules for Bond Lending – A Comparation with Bond Repos

Authors: TieCheng YANG | Eryin YING | Krystal HE[1]

China's unified bond market now comprises the inter-bank market, exchange market, and commercial bank counter market; among these, the inter-bank market serves as the principal market with more than 85% of the total bond custody balance by the end of 2021[2]. Bond transactions in the inter-bank market include cash bond transactions, bond repo transactions (including pledged bond repo transactions and outright transfer bond repo transactions), bond lending transactions, and bond forward transactions, of which the transaction volume of cash bond transactions and bond repo transactions accounts for more than 90%. Bond lending business has facilitated the needs of market participants to borrow bonds and improved liquidity and stability of the overall bond market. With the rapid growth of the transaction volume of bond lending business since 2015, the settlement volume of bond lending business in 2021 has increased about sixfold compared to 2015, making bond lending the third largest business in the inter-bank bond market after pledged bond repo transactions and cash bond transactions[3]. In response to the rapid development of bond lending business and in order to further enhance regulation and market activity of bond lending business, the People's Bank of China (the "**PBoC**") has recently promulgated the *Measures for Administration of Bond Lending Business in the Inter-bank Bond Market* (the "**2022 Measures**"), which will take effect from July 1, 2022, and the *Interim Provisions on Administration of Bond Lending Business in the National Inter-bank Bond Market* (the "**2006 Provisions**") promulgated in 2006 will be invalidated accordingly on the same date.

As for the implications of these two rules on the inter-bank bond market, in comparison to the 2006 Provisions, the 2022 Measures further facilitate the conducting of bond lending business by market participants and improve the efficiency of the bond lending market. For instance, each market participant has to formulate its own bond lending agreement under the 2006 Provisions, which is time-consuming and inefficient when negotiating transaction documents with different counterparties. By contrast, the 2022 Measures will require market participants to sign a unified bond lending master agreement, which is likely to significantly save time in negotiations and facilitate transactions. In addition, the 2022 Measures newly

[1] Shirley Liang and Lin Zhu have contributions to this article.

[2] PBoC, Financial Market Operation in 2021 (中国人民银行《2021 年金融市场运行情况》) (http://www.pbc.gov.cn/goutongjiaoliu/113456/113469/4463448/index.html).

[3] CCDC, Bond Market Statistical Analysis Report 2021 中央结算公司《2021 年债券市场统计分析报告》 (https://www.chinabond.com.cn/cb/cn/yjfx/zzfx/nb/list.shtml).

introduce a centralized bond lending mechanism, which may help to avoid the risk of settlement failure under bond transactions and improve market efficiency.

In light of the issuance of the 2022 Measures, this newsletter briefly introduces the differences between bond lending and bond repo business in the inter-bank market as well as the main changes between the 2022 Measures and 2006 Provisions.

Transaction type / Element	Bond lending	Outright transfer bond repo	Pledged bond repo
Definition	"Bond lending" refers to bond financing whereby the bond borrower borrows the underlying bonds from the bond lender by providing a certain amount of performance assurance assets and both parties agree that on a future date the underlying bonds shall be returned and the bond lender shall return the performance assurance assets.	"Outright transfer bond repo" refers to a transaction wherein the bond holder (repo party) sells bonds to the bond buyer (reverse repo party) and both parties agree that, on a future date, the repo party shall buy back bonds of the same type and quantity from the reverse repo party at an agreed price.	"Pledged bond repo" refers to the financing transaction where the funds receiver (repo party) receives the funds by pledging bonds to the funds provider (reverse repo party), and both parties agree that, on a future date, the repo party shall return the funds to the reverse repo party at the amount calculated at a stipulated interest rate and the reverse repo party shall release the pledge on the pledged bonds.
Transaction mechanism	Transactions are concluded at the China Foreign Exchange Trade System ("**CFETS**") through bilateral negotiation or centralized lending mechanism. The 2022 Measures newly introduce a centralized bond lending mechanism. Centralized lending refers to the matching and concluding of bond lending transactions by bond settlement service institutions (i.e., China Central Depository & Clearing Co., Ltd. ("**CCDC**"), Shanghai Clearing House ("**SHCH**")	Transactions are concluded at the CFETS through bilateral negotiation.	

Transaction type / Element	Bond lending	Outright transfer bond repo	Pledged bond repo
	and custodian banks), pursuant to their prior agreements with the market participants that have insufficient bonds for delivery on any bond settlement date and on their behalf, with other market participants at CFETS. Centralized lending service may effectively avoid the risk of settlement failure. The specific centralized bond lending mechanism is still subject to the implementation rules to be stipulated by CCDC, SHCH, CFETS and other financial infrastructures.		
Collateral	The 2022 Measures change references to collateral from "pledged property" to "performance assurance asset", which indicates that the form of security will no longer be limited to pledge. The 2022 Measures also provide room for the introduction of all types of performance assurance (such as "transfer by way of security") as permitted under the PRC Civil Code and relevant security-related regulations, and even the performance assurance in the form of outright transfer which commonly used under derivatives master agreements. That said, in practice, implementing new forms of performance assurance is	Applicable law does not impose restrictions on the form of performance assurance, so parties can at their discretion determine the form of performance assurance based on their commercial needs. According to the form of the NAFMII Bond Repurchase Master Agreement (2013 version), under outright transfer bond repo transactions, parties may adjust the net risk exposure via cash margin or collateral securities; under pledged bond repo transactions, parties may adjust the net risk exposure by creating or releasing the pledge on the underlying bonds. In addition, the parties may also agree on other forms of performance assurance.	

Transaction type / Element	Bond lending	Outright transfer bond repo	Pledged bond repo
	still subject to the bond lending master agreement and other relevant documents, as well as further observation of the market.		
Function	■ Lending bonds to earn a yield. ■ Exchanging bonds to reduce funding costs; for example, a borrower can reduce its funding costs if it borrows funds through a pledged repo transaction by pledging interest bonds which are borrowed in by collateralizing credit bonds under a bond lending transaction, and the interest rate in the bond lending transaction is lower than the differences of funding rates between the pledged bond transaction with credit bonds being pledged collateral and those with interests bonds being pledged collateral.	■ Financing - repo party borrows funds by using bonds in its possession.	
	■ Short selling bonds - borrowing bonds and selling them when the bond price is expected to go down, and buying the bonds of same issue and return them when the price goes down, so as to earn a spread gain. ■ Borrowing bonds for delivery purposes in other businesses (such as cash bond transactions, pledged bond repo transactions, and physical delivery to settle treasury futures short positions).		N/A
Market participants	■ Various types of onshore financial institutions that satisfy	■ Various types of onshore financial institutions that satisfy bond market access requirements and non-legal person products they issue.	

Transaction type / Element	Bond lending	Outright transfer bond repo	Pledged bond repo
	bond market access requirements and non-legal person products they issue. ■ Offshore institutional investors may engage in bond lending transactions for hedging purposes.	■ Offshore central banking institutions, offshore RMB clearing banks, and offshore participating banks that satisfy bond market access requirements; other types of offshore commercial institutions cannot currently engage in bond repo transactions.	
Underlying bonds/repo bonds	Bonds traded in the inter-bank market. The 2022 Measures delete the requirement in the 2006 Provisions that underlying bonds must be self-owned by the bond lender. This can solve the practical problem where the manager is acting as the nominee holder for non-legal person products while the product is the transacting counterparty. In addition, diversified bond lending needs can be satisfied; for example, institutions holding underlying bonds may be entrusted as agents to conclude bond lending transactions.	Bonds traded in the inter-bank market.	
Transaction period	The maximum period shall be no more than 365 days.		
Settlement institutions	Bond registration and settlement institutions and custodian banks recognized by PBoC, i.e., CCDC, SHCH and recognized custodian banks. Compared with the 2006 Provisions, the 2022 Measures add SHCH and custodian banks as the settlement institutions of	CCDC and SHCH.	

Transaction type / Element	Bond lending	Outright transfer bond repo	Pledged bond repo
	bond lending business.		
Agreement form	There is currently no applicable standard agreement form, and each participant formulates its own bond lending (master) agreement. The 2022 Measures newly provide that market participants shall sign a master agreement recognized by PBoC, which is formulated by the self-disciplinary organization in the inter-bank market (i.e., the National Association of Financial Market Institutional Investors ("**NAFMII**")) and filed with PBoC for record.	NAFMII Bond Repurchase Master Agreement (2013 version) issued by NAFMII in January 2013.	

The 2022 Measures provide a framework and foundation for a more efficient bond lending market that is more consistent with international practice. In comparison with the 2006 Provisions, the 2022 Measures newly add a bond lending master agreement, allow the use of various forms of performance assurance, and introduce a centralized bond lending mechanism. As early as 2017, the staff of NAFMII's Secondary Market Surveillance and Development Department (whose functions include regulating transactions and formulating standard agreement forms and transaction term documents) published an article entitled "Title Transfer Bond Lending Transactions: Experience, Status and Development", in which they suggested introducing title transfer bond lending business in the inter-bank market and publishing a standard agreement form for bond lending business, and mentioned the Global Master Securities Agreement (the "**GMSLA**") and the Master Securities Loan Agreement (the "**MSLA**") prevalent in the international bond lending market. We understand NAFMII will draft a Chinese counterpart to the bond lending master agreement by reference to the GMSLA and MSLA, and we will continue to closely monitor the publication of this master agreement and provide timely updates on how the master agreement implements the innovative points of the 2022 Measures (e.g. the performance assurance mechanism and centralized lending mechanism) as well as on the similarities and differences between the Chinese counterpart master agreement and those agreements prevalent internationally.

Important Announcement

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

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

TieCheng YANG

Tel: +86 10 8516 4286
Email: tiecheng.yang@hankunlaw.com

Brigard Urrutia

The Pacific Alliance and Singapore Sign Free Trade Agreement

31 January

On January 26, 2022, the Pacific Alliance and Singapore signed the Free Trade Agreement at the XVI Summit of the Pacific Alliance. After concluding negotiations in July 2021, Singapore became an associated country of this international organization whose members are Colombia, Chile, Mexico and Peru.

The Agreement contains 25 chapters that regulate highly relevant aspects, such as e-commerce, public procurement, telecommunications, maritime services, cooperation, good regulatory practices, SMEs and the temporary entry of business persons. In addition, essential points for the exchange of goods between the parties are regulated, such as market access, customs procedures and trade facilitation, technical barriers to trade and sanitary measures.

The signing of the Agreement represents an opportunity to expand the region's integration area thanks to the free circulation of goods, services and capital to and from Singapore. For Colombia in particular, Singapore joins the list of strong trade allies thanks to which Colombian products will have easier access to new markets with significant tariff benefits. In turn, Singapore will be a strategic ally for the region thanks to its geographic location, its logistical development and the fact that it is a recognized hub for innovation and technology.

Singapore is among the 10 countries with the highest GDP per capita in the world, with USD 66,263 according to the International Monetary Fund. Singapore's statistics department recorded a GDP growth of 7.2% during 2021, and a volume of exports of USD 454 billion and USD 404 billion of imports. In addition, Singapore has made direct investment in other countries for about USD 690 billion.

The Pacific Alliance is the eighth-largest exporter in the world with a combined population of 230 million, a combined GDP of more than USD 2.6 trillion, and annual exports totaling USD 627 billion.

All Member States must now complete their internal ratification procedures to formalize the entry into force of the Agreement. In the case of Colombia, the final text will be reviewed by the Congress of the Republic and the Constitutional Court. Once accepted, the President may formally ratify it. In Singapore, the text will be reviewed and ratified by the executive branch.

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

www.bu.com.co

GUATEMALA -

AMENDMENTS TO THE REGULATIONS OF THE LAW ON COPYRIGHT AND RELATED RIGHTS OF GUATEMALA

Mar/2022

On March 8, 2022, Governmental Agreement No. 52-2022 was published in the Official Gazette of Guatemala, which contains amendments to the Regulations of the Law on Copyright and Related Rights of Guatemala.

Amendments are mainly due to the "Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or otherwise Print Disabled ". The amendments include, among others, the following topics:

► Duties of authorized entities, including, among others, the following: Make, distribute, communicate and make available in encrypted form copies in accessible format of published literary or artistic works, only to beneficiaries within the Republic of Guatemala or to other authorized entities, as well as create and maintain their own database, which must contain information and individualized identification of published literary or artistic works, whose copies have been adapted, reproduced or are available in accessible format.

► Powers of the authorized entities, including among others the following: Agree on the creation, administration, financing, and maintenance of a single national database to concentrate published literary or artistic works, whose copies are in accessible format.

The Governmental Agreement will enter into force 90 days after its publication in the Official Gazette.

Do not hesitate to contact us if you need more information.

Ivón Hernández
Senior Counsel
ivon.hernandez@ariaslaw.com

Hong Kong Corporate and Regulatory Insights

February 2022

Hogan Lovells

Contents

Equity Capital Markets

The Stock Exchange of Hong Kong (SEHK) takes disciplinary action against Fantasia Holdings Group Co., Limited (Stock Code: 1777) (Fantasia), Colour Life Services Group Co., Limited (Stock Code 1778) (Colour Life) and four directors

Key messages:

- Issuers contemplating a spin-off should bear in mind the requirement that there should be a clear delineation between the business retained by the parent and the business of the company to be spun off.
- To ensure compliance with such arrangement, issuers should ensure that adequate and effective internal controls are in place.

SEHK criticizes:

- Fantasia.
- Colour Life.
- Mr. Pan Jun, Executive Director (ED) of Fantasia; ED and former Non-Executive Director (NED) of Colour Life.
- Mr. Tang Xue Bin, former ED and former NED of Colour Life.
- Mr. Lam Kam Tong, former ED and former NED of Fantasia, and former NED of Colour Life.
- Mr. Zhou Qin Wei, former ED of Colour Life.

Fantasia was listed on 25 November 2009. Subsequently on 30 June 2014, Fantasia spun off Colour Life and remains the controlling shareholder of Colour Life. Fantasia and Colour Life entered into a deed of non-competition (the Deed), and a business delineation scheme (the Scheme) to eliminate potential competition and provide a clear business delineation.

SEHK found that both Fantasia and Colour Life failed to maintain effective and adequate internal controls, as required under the Corporate Governance Code, for procuring their compliance with the Deed and Scheme. Such failure had led to Colour Life failing to provide in its annual reports dated from 2015 to 2018 accurate disclosures, as required under Rule 2.13(2) of the Listing Rules. SEHK also found that Mr. Pan, Mr. Tang, Mr. Lam and Mr. Zhou breached Rule 3.08(f), and their directors' undertakings by failing to use their best endeavors to procure the companies' compliance with the Deed, the Scheme, the Corporate Governance Code and Listing Rules.

SEHK directs Mr. Pan to attend 17 hours of training on regulatory and legal topics including Listing Rule compliance within 90 days. SEHK also directs Mr. Tang, Mr. Lam and Mr. Zhou to attend the same training, but also as a prerequisite of any future appointment as a director of any company listed or to be listed on SEHK.

Please click here to view the statement of disciplinary action against Fantasia, Colour Life, Mr. Pan and Mr. Tang, and here to view the statement of disciplinary action against Mr. Lam and Mr. Zhou.

HKEx, 28 February 2022

SEHK updates Frequently Asked Questions (FAQs) on joint statement in relation to results announcement and general meetings

SEHK updated the FAQs to help issuers understand the application of the joint statement issued by the SEHK and the Securities and Futures Commission in relation to results announcements and general meetings in light of travel restrictions related

to the COVID-19 pandemic (the Joint Statement). The updated FAQs confirm that the SEHK will continue to adopt a similar approach as described in the Joint Statement in view of the recent COVID-19 situation. The updated FAQs also clarify the requirements imposed on issuers in relation to publishing result announcements and holding general meetings.

Please click here to view the updated FAQs.

HKEx, 21 February 2022

SEHK takes disciplinary action against Beijing Media Corporation Limited (Stock Code 1000) (the Company) and its directors and supervisors

Key messages:

- Issuers must comply with the disclosure and shareholder approval requirements of the Listing Rules.
- Issuers must ensure that adequate and effective internal controls are in place at their subsidiary level.
- Issuers must cooperate with SEHK's investigations without delay.

SEHK censures:

- The Issuer.
- Mr. Ji Chuan Pai, former ED and chairman of the Company.
- Ms. Li Xin, former ED of the Company.
- Mr. Peng Liang, former ED of the Company.
- Mr. Zhuang Yan Ping, former ED of the Company.

Between 23 January 2018 and 29 March 2019, the Company through its subsidiaries (a) provided 13 loans totaling RMB333.2 million to its controlling shareholder, which constituted advances to an entity under Chapter 13 of the Listing Rules; and (b) seven loans to totaling RMB 220 million to its associate, which constituted major and connected transactions under Chapters 14 and 14A of the Listing Rules (the Loans). Some of these loans did not have written agreements.

SEHK found that the Company failed to comply with the announcement, circular, shareholders' approval, written agreement and reporting requirements under Chapters 13, 14 and 14A of the Listing Rules. SEHK also found that the relevant directors breached Rule 3.08(f) of the Listing Rules and their directors' undertakings by failing to ensure the Company maintained adequate and effective internal controls. Furthermore, Mr. Li Xiao Bing, Mr. Chow Bing Chuen and Mr. Liu Hong, whom are former NEDs of the Company, failed to cooperate with the investigation of SEHK.

SEHK states that had Mr. Li, Mr. Liu or Mr. Chow remained on the board of directors of the Company, their retention of office would have been prejudicial to the interests of investors. SEHK directs the relevant directors to attend 24 hours of training on regulatory and legal topics, including Listing Rules compliance.

Please click here to view the statement of disciplinary action.

HKEx, 10 February 2022

HKEx publishes the SEHK's Enforcement Bulletin

The Hong Kong Exchanges and Clearing Limited (HKEx) published the SEHK's Enforcement Bulletin on internal controls. The Enforcement Bulletin provides guidance on what constitutes adequate and effective internal control as required in the Corporate Governance Code, and the approach of SEHK

in investigating the internal controls of issuers. We highlight some of the key messages from the SEHK in the Enforcement Bulletin:

- Its important for each issuer to have an adequate and effective internal control framework in order to mitigate risks of non-compliance and negative impact on its business.

- In an enforcement action against an issuer, the SEHK will investigate into not only the matter that gives rise to the enforcement action, but also whether the issuer has adequate and effective internal controls in place to mitigate the risk of problematic events. Disciplinary action will follow for the failure of internal controls even if the matter that causes SEHK to begin its investigation involves no breach or misconduct.

- In such investigations, SEHK will typically ask for evidence of internal controls in place, and the steps taken by the issuer to review them. SEHK will consider an issuer's culture towards internal controls and compliance with the Listing Rules. SEHK expects all issuers to review their internal controls at least annually.

- Issuers are required to cooperate with SEHK's investigations. A failure to cooperate will be viewed as serious misconduct.

Please click here to view the Enforcement Bulletin.

Financial Services Regulation

Supplemental circular on streamlined requirements for eligible exchange traded funds adopting a master-feeder structure

The Securities and Futures Commission (SFC) published a supplemental circular to the circular on streamlined requirements for eligible Exchange Traded Funds (ETFs) adopting a master-feeder structure issued on 16 December 2019, which sets out the requirements under which the SFC would consider authorizing an index tracking feeder ETF investing in an overseas-listed master ETF without SFC authorization.

Requirements have now been revised to relax the fund size and track record requirements for overseas-listed master ETFs. Going forward, an eligible master ETF must have a fund size of not less than USD 400 million and a track record of more than 1 year at the time of the feeder ETF's listing on the Stock Exchange of Hong Kong.

Please click here to view the circular.

SFC, 25 February 2022

SFC consults on implementation details of proposal to regulate trustees and custodians of public funds

The SFC concludes consultations and initiates a further consultation on the proposal to regulate trustees and custodians of SFC-authorized collective investment schemes (Depositaries) on 22 February 2022.

The consultations concluded were on the proposal to introduce a new regulated activity under the Securities and Futures Ordinance. Under the proposal, a Type 13 regulated activity will be introduced as to put Depositaries under the SFC's direct and on-going supervision (i.e. Type 13 regulated activity – acting as a depositary (trustee/custodian) of an SFC-authorized collective investment scheme). Similar to other types of regulated activities, licensing requirements will apply. The SFC will be empowered under the proposed regulatory regime to take enforcement and disciplinary actions against the Depositaries.

Response has been generally positive and supportive, with a few seeking clarifications on implementation details. Now, the SFC is open to accepting comments from the public, on or before 30 April 2022, on the proposed amendments to the subsidiary legislation, as well as the implementing codes and guidelines.

Please click here to view the news article.

SFC, 22 February 2022

Circular on the launch of Greater Bay Area fintech pilot trial facility

Starting from 18 February 2022, the Hong Kong Monetary Authority (HKMA) and the People's Bank of China (PBoC) began accepting applications from financial institutions and technology firms to conduct pilot trials of cross-boundary fintech initiatives in the Greater Bay Area (GBA).

Institutions and firms that wish to participate in the pilot scheme can contact the HKMA. After submitting all requisite information to the HKMA, which will then be shared with the PBoC and the relevant Mainland authorities, the applicant will be notified once a decision is made.

The above initiative builds on the basis of the Memorandum of Understanding signed between the HKMA and the PBoC in October 2021, which aims to provide a "one-stop platform" for financial institutions and technology firms to pilot test their cross-boundary financial technology (fintech)

initiative, simultaneously in Hong Kong and cities in the GBA.

Please click here to view the circular.

HKMA, 18 February 2022

Insurance Authority welcomes the China Banking and Insurance Regulatory Commission to regularize preferential treatment for the Hong Kong insurance industry

The Insurance Authority (IA) has issued a press release, expressing its approval for the decision made by the China Banking and Insurance Regulatory Commission (CBIRC) to include the preferential treatment for the Hong Kong insurance industry as part of the Solvency Regulatory Rules II for Insurance Companies (Rules).

The preferential treatment has been in operation since 2018, and has since allowed the capital requirement of Mainland insurers ceding businesses to qualified Hong Kong professional reinsurers to be lowered. The treatment has been extended on an annual basis.

Moreover, the Rules set out the capital requirement for Mainland insurance instructions that issue catastrophe bonds in Hong Kong.

Please click here to view the press release.

IA, 17 February 2022

Hong Kong Mortgage Corporation Limited signs Memorandum of Understanding with 14 partner banks on infrastructure loans framework

On 11 February 2022, the Hong Kong Mortgage Corporation Limited (HKMC) announced the signing of a Memorandum of Understanding (MoU) on infrastructure loans framework with 14 partner banks. This is conducive to filling the infrastructure financing market gaps and to further Hong Kong's position as an infrastructure financing hub.

The MoUs set out the major terms for potential infrastructure loan cooperation between the HKMC and the partner banks on primary participation and secondary sale bases.

Please click here to view the press release.

HKMA, 11 February 2022

Data Protection

The Privacy Commissioner investigates a data breach incident involving Harbour Plaza hotel group

The Office of the Privacy Commissioner (PCPD) was notified by Harbour Plaza Hotel Management Limited (Harbour Plaza) of a data breach incident, in which some of its accommodation reservation databases suffered from a cybersecurity attack. On 9 February 2022, the PCPD was informed that personal data of approximately 1.2 million customers were affected.

Given the nature of the incident and the significant number of data subjects involved, the PCPD commenced an investigation into the incident and requested Harbour Plaza to provide more information of the incident, including the details of the incident and the types of personal data involved.

The Privacy Commissioner appeals to citizens who have previous stayed in and provided personal data to Harbour Plaza to be vigilant about potential theft of their personal data.

Those who are in doubt about whether their personal data have been leaked may make enquires with Harbour Plaza and/or the PCPD.

To protect personal data privacy, affected citizens are advised to:

- Change the passwords of relevant accounts and enable two-factor authentication function (if any).
- Stay vigilant when they receive any suspicious calls, text messages or emails from unknown sources.
- Stay vigilant against phishing or other possible scams.
- Review their payment card statements to spot any unauthorized transactions.
- Beware of any unusual logins or any registered accounts and personal emails.

Please click here to read the media statement.

PCPD, 11 February 2022

Special Work Arrangements implemented by PCPD in light of COVID-19; hotline and online services still available

In light of COVID-19 and government announcements, the PCPD has implemented special work arrangements, and appeals to members of the public to make enquiries or complaints by telephone or online channels:

- Media enquiries (90997517; media@pcpd.org.hk).
- General enquiries, matters relating to data breach notifications and complaints: hotline (28272827).
- Enquiry/complaint about doxxing: hotline (34236666), fax (28777026) or email (communications@pcpd.org.hk, dbn@pcpd.org.hk, complaints@pcpd.org.hk).
- Online services: www.pcpd.org.hk.

The PCPD warns that it will take longer time than usual to process complaints and enquiries during the period of special work arrangements.

Given that no new statements have been released by the PCPD in relation to the special work arrangements, it is assumed that this arrangement is extended until further notice.

Please click here to read the media statement.

PCPD, 3 February 2022

Contacts

Mark Parsons
Partner, Hong Kong
T +852 2840 5033
mark.parsons@hoganlovells.com

Laurence Davidson
Partner, Hong Kong
T +852 2840 5034
laurence.davidson@hoganlovells.com

Sammy Li
Partner, Hong Kong
T +852 2840 5656
sammy.li@hoganlovells.com

Andrew McGinty
Partner, Hong Kong
T +852 2840 5004
andrew.mcginty@hoganlovells.com

Nelson Tang
Partner, Hong Kong
T +852 2840 5621
nelson.tang@hoganlovells.com

Stephanie Tang
Head of Private Equity – Greater China, Hong Kong
T +852 2840 5026
stephanie.tang@hoganlovells.com

www.hoganlovells.com

KOCHHAR & CO.
ADVOCATES & LEGAL CONSULTANTS

ANALYSIS OF SHAREHOLDERS' DISPUTES IN INDIA FROM A FOREGIN INVESTOR'S PERSPECTIVE

AUTHOR(S): INDER RAJ GILL (PARTNER), AVICHAL PRASAD (PARTNER) FEB,2022

Investing in India can be challenging in view of the myriad of laws at both the Central and State level, as well as cumbersome sector specific requirements. Many-a-times, foreign investors tie up with Indian promoters to overcome these hurdles. However, difficulties get amplified when they get embroiled in litigation / arbitration with Indian promoters over issues related to mismanagement, control, earn-out payments etc.

The disputes which generally arise between the shareholders can be broadly classified into three categories viz., contractual disputes arising out of shareholders/ joint venture agreements, oppression and mismanagement issues and criminal matters.

Contractual disputes: In practice, arbitration is the most popular dispute resolution mechanism for resolution of issues arising under shareholders' agreements. The contractual rights of investors are best protected when highly qualified arbitrators, preferably of a neutral nationality, conduct international commercial arbitrations in accordance with time-bound arbitration rules.

Choice of seat of arbitration also play a key role. For avoiding difficulties in enforcement of foreign awards in India, it is advisable to choose a country which has a reciprocity arrangement with India i.e., territories notified by the Government of India as having reciprocal provisions for enforcement of Indian awards. In the absence of such reciprocity, enforceability of the foreign arbitral awards could potentially take longer. Foreign awards passed in arbitrations seated in territories having a reciprocity arrangement can be put to execution in India straightaway. However, the process for executing awards passed in arbitrations seated in non-reciprocating territories is cumbersome and expensive as the award holder is required to file a fresh civil action in India based on the award and obtain an Indian decree for execution.

In our experience, some of the most hard-fought contractual disputes between shareholders are in relation to earn-out payment. Earn-out is a contractual provision for the seller to receive further compensation if certain criteria (generally financial) are met at a future point in time. It is commonly used in transactions where there is a gap in perceived value of a company between a buyer and a seller. The earn-out allows the transaction to take place and bridges the gap between the parties' expectations of the value of the company, allowing the buyer to only pay for a successful business. To avoid disputes on the valuation of an earn-out, the contractual terms must be as clearly defined and unambiguous as possible. Therefore, it is important for the buyer and seller to mutually agree on a business plan and the level of input which the seller will maintain following the investment / acquisition. This input can include protections and vetoes regarding the management of the business going forward.

Oppression and mismanagement issues: Such disputes generally relate to exercise of undue control, denial of access to company information, oppressive conduct, etc. Over the years, we have seen several instances of Indian promoters continuing to exercise control and direct the policies of joint venture companies despite divesting majority stake. Foreign investors are prone to such risks given their inclination to have expats in senior management roles, at least in the nascent stages of the joint venture investment. Their lack of familiarity with Indian laws gives Indian promoters the opportunity to remain in the driving seat. More often than not, such conflicting controlling interests spiral into serious disputes over time.

These matters constitute violation of the (Indian) Companies Act, 2013 and must be agitated before the National Company Law Tribunal having jurisdiction in the matter. However, care must be taken to segregate the contractual issues and the petition filed must not be a '*dressed-up petition*' for adjudication of matters that ought to be determined by an arbitral tribunal.

Criminal matters: We have seen an increasing trend of criminal proceedings being instituted against expats deputed to Indian joint venture companies as a strategic tool to arm-twist the foreign investor. Therefore, it may be worthwhile for foreign investors to conduct a thorough due diligence of not only the target company but also the background and reputation of the prospective Indian JV partner(s). Also, to handle the practical challenges and mitigate day-to-day compliance risks, foreign investors (who commonly depute expats for key management positions) should consider recruiting new and reliable Key Managerial Personnel (Company Secretary, CFO etc.) locally in India to support them for efficient handling of the operations of the joint venture company.

With the right advise, risks of foreign investors can be mitigated, and a strategy devised for efficiently handling (or possibly even avoiding) shareholders disputes.

SKRINE

No limit on quantum for construction sector disputes under Pusat Mediasi Covid-19

18 MARCH 2022

We previously wrote on "An Overview of Mediation under the Pusat Mediasi Covid-19", linked **here**. https://www.skrine.com/insights/alerts/november-2020/an-overview-of-mediation-under-the-pusat-mediasi-c

On 8 March 2022,[1] the Minister in the Prime Minister's Department (Parliament and Law), Datuk Seri Wan Junaidi Tuanku Jaafar, announced the abolishment of the amount limit for construction sector disputes under the Covid-19 Mediation Centre ("**PMC-19**"), previously capped at RM500,000.00.[2] These construction sector disputes include disputes relating to *"construction work contract or construction consultancy contract and any other contract related to the supply of construction material, equipment or workers in connection with a construction contract."*[3] However, the RM500,000.00 amount limit of disputes still applies for mediation of disputes arising from other categories of contract under the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020 ("**Covid-19 Act**").[4]

Henceforth, construction players may pursue mediation at PMC-19 for disputes of any amount under the construction sector category, in respect of any contracting party's inability to perform any contractual obligation due to the measures prescribed, made or taken under the Prevention and Control of Infectious Diseases Act 1988 ("**PCID Act**") to control or prevent the spread of Covid-19.[5]

As the Covid-19 Act will cease to operate after 22 October 2022,[6] construction players should expediently leverage on the abolition of the RM500,000.00 limit by the Government specifically for construction sector disputes, and pursue mediation as a first avenue to resolve disputes arising from a party's inability to perform its contractual obligation under a construction contract as a result of measures prescribed or taken under the PCID Act to control or prevent the spread of Covid-19.

*Alert by **Shannon Rajan** (Partner) and **Jeremiah Ch'ng** (Associate) of Skrine.*

---

[1]https://www.bheuu.gov.my/index.php/en/media/press-statement/2234-pusat-mediasi-covid-19-pmc-19

[2]The quantum for all cases submitted for mediation at PMC-19 was initially set at RM300,000.00. The maximum amount was increased to RM500,000.00 on 30 December 2020 (*Source: Reply by PMC-19 to enquiry on 18 March 2022.*)

[3]Section 7 read with Schedule to Part II of the Covid-19 Act.

[4]Under Section 7 read with Schedule to Part II of the Covid-19 Act, the other categories relate to performance bond, event contract, contact by a tourism enterprise, professional services contract, lease or tenancy of non-residential immovable property, religious pilgrimage-related contract, certain categories of hire purchase agreement, and credit sale agreement.

[5]Section 9 of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020 ("Covid-19 **Act**").

[6]See Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) (Extension of Operation) (No. 4) Order 2021 [PU(A) 485/2021].

January 2022

Official Mexican STANDARD NOM-241-SSA1-2021, Good manufacturing practices of medical devices

On December 20, 2021, the Ministry of Health published, in the Official Gazette of the Federation, the new *Mexican Official Standard NOM-241-SSA1-2021, Good manufacturing practices of medical devices,* which aims to establish the minimum requirements for the processes of design, development, manufacture, storage, and distribution of medical devices, based on their level of risk, so that medical devices may be used by the patient or final consumer. According to the General Health Law, medical devices include medical equipment, prostheses, orthoses and functional aids, diagnostic agents, dental supplies, surgical and healing materials, as well as hygienic products.

The aforementioned NOM classifies medical devices according to the risk posed by their use, following these categories: Class I, Class II, and Class III. Likewise, the Quality Management System, through the measures adopted, guarantees the quality of the medical devices for the intended use, incorporating the standards of GMP, BPD, BPAD, GLP, and the principles of Risk Management.

Additionally, the standard establishes criteria for the design and development of medical devices, which must be planned by the Development Area Manager. As well as the requirements that must be met by the facilities and equipment used at the time of manufacture, storage, and release of finished products on the market, to guarantee the quality of medical devices.

Derived from the above requirements, a system of qualification and validation of compliance with the standard is incorporated, as well as studies of stability and final destination of the waste. It also establishes a complaint system so users can communicate the devices failures in an effective manner.

The entry into force of this Standard will nullify the Official Mexican Standard NOM-241-SSA1-2012, Good Manufacturing Practices for Establishments Dedicated to the Manufacture of Medical Devices.

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

Mexico City Office: **Mr. Alejandro Luna A., aluna@s-s.mx (Partner)**
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

Update of the Dutch Corporate Governance Code 2022

On 21 February 2022, the Corporate Governance Code Monitoring Committee (**Committee**) submitted for consultation a proposal to update the Dutch Corporate Governance Code (**Code**). The consultation document provides for updating of the Code in areas such as long-term value creation, diversity and the role of shareholders. It also contains proposals to amend provisions of the Code due to changes in Book 2 of the Dutch Civil Code, such as the introduction of a statutory cooling-off period and statutory rules on the remuneration policy and report. This overview briefly outlines the most important proposals.

1 Long-term value creation and ESG

- Companies should formulate an ESG strategy with concrete objectives and render account for this in their management report.
- The interests of relevant stakeholders should be taken into account in determining the ESG strategy and, to this end, a policy for stakeholder dialogue shall be established. Such dialogue should be facilitated by the management board.
- The annual report should describe the culture, values and behaviour encouraged within the company and explain how this contributes to long-term value creation.

2 Role of shareholders

- Shareholders acknowledge the importance of a strategy aimed at long-term value creation.
- Dialogue between shareholders and companies is further encouraged. In addition, the informed and discretionary exercise of voting rights by shareholders is fostered, and institutional investors are expected to encourage dialogue between proxy advisors and companies.
- Rules are added to the Code regarding institutional investor engagement policies, abstention from voting by shareholders with larger short positions than long positions, and the recall of lent shares when voting on significant matters.

3 Diversity and inclusion

- The management board, the supervisory board and the executive committee (if any) should be composed in such way that there is a good balance between expertise, experience, competencies, personal qualities, age, gender identity, nationality and (cultural) background and, with regard to the supervisory board, independence.
- Companies should have a firm-wide diversity and inclusion policy that covers all aspects and personal characteristics in which people differ, such as gender identity, age, ethnicity, occupational disabilities and sexual orientation.
- Reporting in the area of diversity and inclusion will be expanded.

4 Other adjustments

- The overlap between the response period in the Code and the statutory cooling-off period has been addressed.
- The explanatory notes on provisions of the Code relating to the remuneration policy and report will be amended in line with the revised rules in Book 2 of the Dutch Civil Code. Pay ratios are also explained in more detail, in line with previous guidance of the Committee.
- The performance of the internal audit function should be evaluated by an independent third party at least every five years. The reporting lines between the internal audit function and the audit committee are also clarified.
- In board assessments, more explicit attention should be paid to behaviour and culture.

Next steps
The consultation runs until 17 April 2022. The proposals to update the Code may be commented on until that date. The Committee aims that the updated Code will come into force as of the financial year starting on or after 1 January 2023.

For more information please contact

Geert Raaijmakers
+31 20 71 71 992
+31 6 53 68 08 43
Geert.Raaijmakers@nautadutilh.com

Maarten Buma*
+31 20 71 71 197
+31 6 20 21 06 44
Maarten.Buma@nautadutilh.com

*Maarten Buma serves as an external legal advisor to the Committee

ARIFA

ARIAS, FABREGA & FABREGA

ARIFA Building, 10th Floor,
West Boulevard
Santa Maria Business District
P.O. Box 0816-01098
Panama, Republic of Panama
T.: +507 205 7000
F.: +507 205 7001/02

www.arifa.com

LEGAL BULLETIN

CHANGES TO THE LAW REGULATING HORIZONTAL PROPERTY

On February 14, 2022, Law No. 284 of February 14, 2022 came into force, which regulates the horizontal property (condominium) regime and replaces Law No. 31 of June 18, 2010, which previously regulated this matter.

The main changes to the horizontal property regime under the new Law 284 are the following:

• Article 2 defines the guiding principles that govern the horizontal property regime, such as peaceful coexistence and social solidarity, right to due process, right to petition, confidentiality, respect for decisions, respect for human dignity and sustainability and social function.

• Real estate "given in concession" is excluded from buildings or projects that may be incorporated under the horizontal property regime.

• Article 6 introduces new terms, such as *"Management", "Sumptuous Goods", "Biosafety", "Support Committee", "Horizontal Property Management Support Committee", "Component Committee", "Transition Committee", "Components", "Extraordinary Disbursements", "Emergency Fund", "Property", "Good Standing Certificate", "Voting Power", "Owner Up-to-date", "Initial Owner", "Surcharge", "Reserve", "Construction Reserve", "Common Property Reserve", and "Constitutive Title"*. It should be noted that the law also introduces new concepts where under the old law there was a legal vacuum, such as *"Primary Condominium"*, and *"Sub Condominium"*. The definition of *"In Arrears"* eliminates the previous 2-month grace period, and now provides that the term may be established in the Coownership Regulations, and, if not defined in the Regulations, the last day of the month shall be considered as the payment deadline.

• The new law includes additional details to as to what are considered common assets, and reduces to 51% the percentage of the Homeowners' Association that is require to approve certain decisions, such as: (i) that some common assets be assigned exclusively for the use of one or more owners; (ii) the acquisition by the Homeowners' Association of a private asset offered by its owner to be used as a common asset; (iii) the modification of the ownership percentage of each owner in the common assets; and (iv) the establishment of parameters for payment arrangements, incentives for advance payments, and other actions that promote the payment of common fees. Previously, for the approval of the issues detailed in numerals (i) and (iii), an approval of 66% of the Homeowners' Association was required.

• Article 28 details a series of measures that can be applied to owners in arrears in the payment of common expenses, including a surcharge of up to 20% on unpaid fees.

• The new law establishes that in order to determine the economic amount and the origin of the damage caused to common or private property attributable to any unit and its owner, the administrator must have the opinion of a qualified expert, and the report on damages must be prepared with the participation of the administrator and the affected owners, who may also contract the services of experts in the matter.

• Fines of $500 to $1,000 may be applied in case of repeat violations of the law.

• The new law establishes that 51% of all of the units that are up to date in their common fees may approve the modification of the common fees or approve extraordinary fees. Previously a threshold of 66% was required. In addition, the minimum quorum required in the second call for a meeting (where quorum is not reached in the first call) is reduced to 30%, instead of 33% as required under the old law. The favorable vote to approve the construction of additional improvements that will be part of the horizontal property was also reduced to 51% of all the units that are up to date in the payment of the common fees. Previously, 66% approval was required.

• The developer must pay a fee for the ancillary assets (such as parking spaces and storage deposits) that are reserved by the developer and that have not been assigned to a particular unit, once the sale of all units is registered. The amount of this fee must be determined in the Coownership Regulations.

• Under the new law, once 51% of the units in the horizontal property have been sold, the owners will have the right to elect a new board of directors to replace the directors appointed by the Promoter.

• The law includes new provisions to regulate the Contingency Fund, the figure of the Promoter, the Owners and Committees.

• The law now permits owners to grant powers of attorney electronically for their representation in the Homeowners' Association meetings, as well through public and private documents, and allows meetings to be held remotely.

• The law establishes that with the favorable vote of 51% of all the units that are up to date in the payment of fees, the Homeowners' Association can order the Board of Directors to appoint a new administrator, if it is considered urgent or necessary. The law allows those horizontal properties with less than 20 units to operate without an administrator, in which case the work of the administrator may be carried out by the officers designated by the Board of Directors (previously this exception was limited to horizontal properties with less than 10 units).

• The functions of the administrator now include the obligation to notify mortgage creditors of the units that are four months behind in the payment of their common fees.

• The penalties that the Horizontal Property Department can apply to those who fail to comply with the provisions of the law and the regulations have been modified, from US$500.00 to a maximum of US$5,000.00. Before, the maximum was US$1,000.00.

• The new law now enables owners to submit disputes to arbitration processes for resolution, and the Judicial Branch is empowered to create specialized courts to hear exclusively horizontal property matters.

• Actions against decisions of the Homeowners' Association, the Board of Directors and the Administrator, prescribe in 3 months counted from the publication, delivery to the owners, or registration in the Public Registry of such decisions, as applicable.

• Under the new law, mortgage creditors or trustees may include the payment of common fees in the monthly installments they collect, which must subsequently be sent to the horizontal property administration.

We hope you will find this information useful, and we are available in case you have any questions.

María C. Arroyo
Partner
mcarroyo@arifa.com

SyCip Salazar Hernandez & Gatmaitan

SyCipLaw Center, 105 Paseo de Roxas
Makati City 1226, Philippines
T: +632 8982 3500 | +632 8982 3600 | +632 8982 3700
F: +632 8817 3570 | +632 8848 2030
www.syciplaw.com

SyCipLaw TIPS

TAX ISSUES AND PRACTICAL SOLUTIONS

1.What tax relief can private schools look forward to?

On December 10, 2021, the President signed into law Republic Act *(R.A.*) No. 11635 amending Section 27(B) of the National Internal Revenue Code, as amended (*Tax Code*). R.A. No. 11635 provides that the taxable income of qualified proprietary educational institutions is subject to the 10% corporate income tax rate (or 1% from July 1, 2020 until June 30, 2023 as provided under R.A. No. 11534 or the Corporate Recovery and Tax Incentives for Enterprises (*CREATE*) Act). If the gross income of a private or proprietary educational institution arising from trade, business or other activity that is not substantially related to the exercise or performance of its primary purposes or function exceeds 50% of the total gross income derived from all sources, the general regular income tax rate of 25% will be imposed on the entire taxable income. A 'proprietary educational institution' is defined as any private school maintained and administered by private individuals or groups with a permit to operate from the Department of Education, the Commission on Higher Education, or the Technical Education and Skills Development Authority.

SyCipLaw TIP 1:
The promulgation of R.A. No. 11635 has hopefully cleared the confusion brought about by the issuance of RR No. 5-2021. The amendment to Section 27(B) of the Tax Code has made it clear that the "non-profit" qualification applies to hospitals only. Qualified private schools can avail of the lower tax rate of 10% provided that their gross income from unrelated trade, business or other activities does not exceed 50% of their total gross income.

R.A. No. 11635 is a welcome development to the private school sector after the issuance of Revenue Regulations (*RR*) No. 5-2021 on April 8, 2021 (implementing certain provisions of the CREATE Act) which defined 'proprietary educational institutions' as private schools which are non-profit. This meant that private schools should have been established as non-profit corporations in order to qualify for the lower corporate income tax rate of 10% (as well as the temporary tax rate of 1%). The definition of 'proprietary educational institutions' under RR No. 5-2021 could have been brought about by the language in Section 27(B) of the Tax Code which states that "[p]roprietary educational institutions and hospitals which are nonprofit shall pay a tax…" The implementation of RR No. 5-2021 with respect to the taxation of proprietary educational institutions was suspended under RR No. 14-2021 issued on July 28, 2021.

2. When a taxpayer with a pending protest against a deficiency business tax assessment of a local government unit (*LGU*) has been denied renewal of its business permit, prompting it to file a Petition for Declaratory Relief with the trial court and ask for interim relief, will the Court of Tax Appeals (*CTA*) have jurisdiction over a petition for certiorari questioning interlocutory orders issued by the trial court?

Yes. In *Mactel Corporation v. The City Government of Makati* (G.R. No. 244602, July 14, 2021), the Supreme Court ruled that under R.A. No. 1125, as amended by R.A. No. 9282, the jurisdiction of the CTA includes jurisdiction over "decisions, resolutions, or orders of the Regional Trial Courts (*RTC*) in local tax cases originally decided or resolved by them in the exercise of their original or appellate jurisdiction." However, it must be noted that before the case can be raised on appeal to the CTA, the action before the RTC must be in the nature of a tax case, or one which primarily involves a tax case.

SyCip Salazar Hernandez & Gatmaitan

Managing Partner:
Hector M. de Leon, Jr.

Tax Department Head:
Carina C. Laforteza

Tax Department Partners:
Carlos Roberto Z. Lopez
Ramon G. Songco
Benedicto P. Panigbatan
Russel R. Rodriguez
Ronald Mark C. Lleno
Hiyasmin H. Lapitan
Leah C. Abutan
John Christian Joy A. Regalado
Ma. Patricia B. Paz
Joanna Marie O. Joson
Maria Viola B. Vista
Maria Christina C. Ortua-Ang

Of Counsel:
Rolando V. Medalla, Jr.

Special Counsel:
Catherina M. Fernandez

Tax Department Senior Associates:
Austin Claude S. Alcantara
Mark Xavier D. Oyales
Camille Angela M. Espeleta-Castillo
Kristina Paola P. Frias
Hailin D.G. Quintos-Ruiz
Renz Jeffrey A. Ruiz

Tax Department Associates:
Spencer M. Albos
Diana Elaine B. Bataller
Kevin Joseph C. Berbaño
Roman George P. Castillo
Muhammad Murshid M. Marsangca

Editor:
Ronald Mark C. Lleno (Partner)

Contributors:
Carina C. Laforteza
Benedicto P. Panigbatan
Russel R. Rodriguez
Ronald Mark C. Lleno
Hiyasmin H. Lapitan
Joanna Marie O. Joson
Maria Viola B. Vista
Maria Christina C. Ortua-Ang
Austin Claude S. Alcantara
Diana Elaine B. Bataller

Coordinators:
Marie Antoinette M. Ingcoco
Dhan Michael L. dela Peña
Angelita O. Dizon

For more information regarding the issuances discussed in this briefing, please contact:
Carina C. Laforteza
cclaforteza@syciplaw.com

In order for the CTA to take cognizance of a petition for certiorari, the interlocutory order must have been issued by the RTC on a local tax case. A local tax case is understood to mean as a dispute between the LGU and a taxpayer involving the imposition of the LGU's power to levy tax, fees, or charges against the property or business of the taxpayer concerned.

In this case, however, the taxpayer has in its favor a final and executory judgment establishing the proper basis for the assessment of its business taxes. The interlocutory orders being questioned did not rule on the validity of the assessments but merely ordered the LGU to refrain from proceeding further with the assessments until the computation of the taxpayer's business taxes has been determined in accordance with the previous final and executory decision.

In its petition for declaratory relief with the RTC, the taxpayer merely asked the trial court to define its rights and obligations under the final and executory judgment. Hence, while the case may be related to a tax case because the previous final and executory judgment sought to be enforced is a local tax case, the declaratory relief petition is already civil in nature. The assailed orders, therefore, do not fall under the appellate jurisdiction of the CTA.

SyCipLaw Tip 2:
Before elevating a case from the RTC to the CTA, the petitioner must ensure that the case is anchored on a tax issue, *i.e.*, will it involve the application of tax laws?

Examples of local tax cases may involve: the legality or validity of the real property tax assessment, protests of assessments, disputed assessments, surcharges or penalties; the validity of a tax ordinance; claims for tax refund/ credit; claims for tax exemption; actions to collect the tax due; and even prescription of assessments. For these cases, they may be filed with the RTC and eventually, elevated or appealed to the CTA.

3. Are there exceptions to the mandatory nature of the 120-day period given to the Commissioner of Internal Revenue (*CIR*) to rule on an administrative claim for value-added tax (*VAT)* refund before a taxpayer can file a judicial claim?

Yes. In *Hedcor Sibulan, Inc. v. CIR* (G.R. No. 202093, September 15, 2021), the Supreme Court ruled that there are two recognized exceptions to the mandatory and jurisdictional nature of the 120-day period. First, if the CIR, through a specific ruling, misleads a particular taxpayer to prematurely file a judicial claim with the CTA. Second, if the CIR issued a general interpretative rule in accordance with Section 4 of the Tax Code which misleads all the taxpayers into prematurely filing judicial claims with the CTA. The CIR, in such cases, is not allowed to later on question the CTA's assumption of jurisdiction since equitable estoppel has set in.

Bureau of Internal Revenue (*BIR*) Ruling No. DA-489-03 falls under the second exception, *i.e.*, a general interpretative rule. Issued on December 10, 2003, the ruling expressly provides that a taxpayer-claimant may seek judicial relief with the CTA by filing a petition for review without waiting for the 120-day period to lapse. It was not until October 6, 2010 that BIR Ruling No. DA-489-03 was reversed in *CIR vs. Aichi Forging Co. of Asia, Inc.*, *G.R. No. 184823 (Aichi)*. Hence, all taxpayers can rely on BIR Ruling No. DA-489-03 from the time of its issuance on December 10, 2003 up to its reversal in *Aichi* on October 6, 2010.

In this case, the administrative claim was filed on June 25, 2010. Four days later, or on June 29, 2010, the taxpayer filed its judicial claim. The judicial claim was filed well within the issuance of BIR Ruling No. DA-489-03 before it was invalidated by *Aichi*. Thus, the taxpayer's immediate filing of the petition for review before the CTA without waiting for the prescribed period of 120 days to lapse is permissible.

SyCipLaw Tip 3:
Although the case is about exceptions, it is important for taxpayers to keep abreast of general rules – particularly those relating to prescriptive periods for filing refund claims. Such periods are not just mandatory, but also jurisdictional. Since the burden in claiming tax refunds rests upon the taxpayers, they should ensure compliance with all technical and substantive requirements so their refund claims will not be denied.

Notably, the previous 120-days given to the CIR to process and decide the VAT refund claims had now been reduced to 90 days under the Tax Reform for Acceleration and Inclusion (*TRAIN*) Law. The TRAIN Law also deleted the remedy of the taxpayer in case of unacted VAT refund claims. However, despite the lack of clarificatory guidelines, it appears that the better rule is to allow a taxpayer the option to appeal to the CTA within 30 days from the lapse of the 90-day period. This would treat the inaction as "deemed a denial." After all, RA No. 1125, as amended by RA No. 9282, provides that the CTA has jurisdiction over inaction by the CIR in cases involving refunds where the Tax Code provides for a specific period of action, in which case the inaction shall be deemed a denial.

4. May a supervening event suspend the two-year reglementary period to file a claim for refund of internal revenue taxes?

No. In *PMFTC, Inc. v. Commissioner of Internal Revenue* (CTA Case No. 10110, November 25, 2021), the Second Division of the CTA ruled that "it is clear that the administrative and judicial claims for refund or credit of internal revenue taxes must be filed within the two (2)-year prescriptive period, which commences from the payment of the tax; that such period is mandatory and jurisdictional regardless of any supervening cause that may arise after payment".

In this case, the Philippine Tobacco Institute, Inc. (*PTI)*, to which PMFTC, Inc. (*PMFTC*) is a member, filed a petition for declaratory relief with the Regional Trial Court (*RTC)* to question RR No. 17-2012 and Revenue Memorandum Circular (*RMC*) No. 90-2012 – which imposed excise tax on cigarette packs containing 5 and 10 sticks of cigarettes – for imposing taxes not authorized under R.A. No. 10351, or the Sin Tax Reform Law. The RTC granted PTI's petition for declaratory relief. The CIR appealed the RTC's decision to the Supreme Court, which issued a temporary restraining order (*TRO*), restraining the enforcement of the RTC's decision. During the effectivity of the TRO, PMFTC paid the excise taxes for its cigarette packs, containing less than 20 sticks of cigarettes, for taxable years 2014 to 2015. The Supreme Court eventually affirmed the RTC's decision in the PTI case in a decision rendered in 2017.

In 2019, PMFTC filed an administrative claim for refund and, thereafter, a judicial claim for refund for the excise taxes it paid under protest in taxable years 2014 to 2015. PMFTC argued that the Supreme Court's TRO in the PTI case is a "special circumstance" and that it was "legally and practically prevented from filing a claim for refund or credit on its alleged overpaid excise tax."

SyCipLaw Tip 4:
Considering that the two-year prescriptive period in claims for tax refund is mandatory and jurisdictional, regardless of any supervening cause that may arise after payment, the taxpayer should be mindful of the date when it paid the tax and ensure that both its administrative claim and judicial claim are filed before the lapse of the two-year period.

A motion for reconsideration of the decision is currently pending.

CTA decisions, while persuasive, do not become the law of the land, unlike decisions of the Supreme Court.

The CTA ruled that "[t]he second paragraph of the aforequoted Section 229 of the NIRC of 1997 is plain and clear: 'In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment' Thus, no supervening cause may interrupt the running of the said two (2)-year prescriptive period." The CTA further ruled that it "does not subscribe to [PMFTC's] reasoning to the effect that the filing of the refund claim concerning the subject excise taxes would be a futile exercise. While it may be true that considering [the CIR] would have the tendency to adhere to, and uphold, its issuances, he may deny outright [PMFTC's] administrative claim, upon the filing thereof, or not act on the same at all, the law allows [PMFTC] to lodge its appeal, within the time prescribed, on the denial or inaction of [the CIR], before [the CTA], which would act on it objectively and judiciously." Thus, "nothing prevented [PMFTC] from complying with the mandate of Section 229 of the NIRC of 1997, whether it be the filing of the administrative and judicial claims and/or in observing the two (2)-year prescriptive period."

SyCipLaw Tip 5:
To the extent possible, service agreements and supporting documents (such as invoices and receipts) should indicate the location of the performance of services. Should parties intend that the subject services will be performed only in the Philippines and cannot be performed by the service provider outside the Philippines, it would be helpful to expressly state this in the service agreement, especially for purposes of showing that the services qualify for VAT zero rating.

A motion for reconsideration of the decision is currently pending.

CTA decisions, while persuasive, do not become the law of the land, unlike decisions of the Supreme Court.

5. Are taxpayers required to show that services were performed in the Philippines in order to qualify for VAT zero rating?

Yes, Section 108(B) of the Tax Code, requires that, in order to qualify for VAT zero rating, the services must be performed in the Philippines by VAT-registered persons.

In *Procter & Gamble Asia Pte. Ltd. v. Commissioner of Internal Revenue* (CTA EB No. 2301 [CTA Case Nos. 7581 and 7639], November 24, 2021), the CTA En Banc held that "[i]t is indispensable that a claimant of tax refund must prove that the services it rendered to its foreign affiliates must have been performed or rendered in the Philippines and not abroad."

In this case, the petitioner, Procter & Gamble Asia Pte Ltd., filed a claim for refund of unutilized input taxes attributable to its zero-rated sales covering the taxable periods January to March 2005 and April to June 2005. However, the CTA En Banc upheld the decision of the CTA in Division, denying the refund claim on the ground, among others, that petitioner failed to provide adequate evidence that the subject services were performed in the Philippines.

Upholding the finding of the Court in Division, the CTA En Banc held that "there is no evidence on record that will fully convince this Court that the services rendered by petitioner to its client-affiliates abroad were performed in the Philippines. In petitioner's Formal Offer of Evidence filed on July 3, 2009, petitioner did not offer any specific evidence to establish that the subject services were performed in the Philippines." The CTA En Banc held that petitioner cannot rely on the independent certified public accountant's report considering that the report did not refer to any documents or evidence that would show that the services were rendered in the Philippines. Neither can petitioner rely on the Service Agreements which contain a provision allowing the services to be provided by various service providers including the petitioner's head office and regional branches. Thus, the CTA En Banc held that "[c]onsidering that the services may be rendered not only in the Philippines but also in Singapore and in Japan, or outside the normal place of business of the service provider, the Service Agreements submitted by petitioner are not sufficient to prove that the services were rendered in the Philippines."

Finally, as tax refunds are in the nature of tax exemptions, a claimant has the burden of proof to establish the factual basis of the claim for tax credit or refund. Unfortunately, petitioner failed to discharge this burden when it failed to present adequate evidence that the subject services were performed in the Philippines.

6. How should airline companies treat the collection and remittance of domestic/international passenger service charges, also known as terminal fees, that are integrated into the sale of airline tickets?

The BIR issued RMC No. 122-2021 clarifying the tax treatment of integrating the terminal fee at the point of sale of airline tickets. The RMC provides that domestic airline companies collecting the terminal fee from passengers should include the terminal fee in the official receipt that will be issued by the airline company to the passenger. The official receipt should reflect the 12% VAT and VAT exempt components of the terminal fee. The share of the Manila International Airport Authority (*MIAA*) in the terminal fee should be shown in the official receipt to be issued by the airline company as part of the receipts subject to VAT, while the airport aviation security fee and other fees under Presidential Decree (*P.D.*) No. 1957 should be reflected as VAT exempt. The VAT component of the terminal fee should be included in the total VAT.

In the case of international airline companies, the terminal fee should be reflected in the airlines' official receipt. The share of the MIAA in the terminal fee, the aviation security fee and other fees under P.D. No. 1957 will be reflected as VAT exempt.

RMC No. 122-2021 illustrates how domestic airline companies subject to VAT or international airline companies that are resident foreign corporations and, thus, subject to VAT on service fees should record in their books (i) the collection of the terminal fee (*i.e.*, the share of the MIAA, the aviation security fee and other fees under P.D. No. 1957) and (ii) the remittance to the MIAA of the terminal fees they have collected.

SyCipLaw Tip 6:
RMC No. 122-2021 clarifies the tax treatment and illustrates the invoicing requirement and proper recording of terminal fees that airline companies collect for, and remit to, the MIAA when the airline companies sell airline tickets to their customers, including the service fees that airline companies earn for collecting the terminal fees on behalf of the MIAA. Airline companies should thus be able to ensure compliance with the invoicing requirements and recording of the terminal fees as well as the service fees received from the MIAA. Airline companies may find it difficult to justify non-compliance given the guidance set out in RMC No. 122-2021.

When the MIAA pays the service fee to the airline companies for collecting the terminal fee, the payment shall be subject to creditable withholding VAT at the rate of 5% and creditable withholding tax of 2% of gross payments. The domestic airline companies shall issue a VAT official receipt for the service fees received from the MIAA. International airline companies, on the other hand, shall treat MIAA's payment of service fees as "other income" subject to the regular corporate income tax.

RMC No. 122-2021 further states that the terminal fee should be treated independently from the Gross Philippines Billings (*GPB*) tax imposed under Section 28(A)(3) of the Tax Code and the 3% common carrier's tax imposed under Section 118 of the Tax Code because the GPB refers to the amount of gross revenue derived from the carriage of persons, excess baggage, cargo and mail originating from the Philippines in a continuous and uninterrupted flight while the percentage tax on international carriers under Section 118 refers to gross receipts derived from the transport of cargo from the Philippines to another country. RMC No. 122-2021 clarifies that the terminal fee is a service charge for services performed within the Philippines, and thus, the terminal fee should be treated independently from taxes imposed on revenues derived from the carriage of persons, excess baggage, cargo and mail originating from the Philippines.

SyCipLaw Tip 7:
The heirs should be aware that their acts (*i.e.*, a specific waiver or renunciation of their inherited share to another heir) in a testate or intestate succession has tax consequences (*e.g.*, donor's tax and DST). Failure to pay the taxes due as a result of the specific waiver or renunciation will not only make the heirs liable to pay a deficiency tax, but also to penalties such as the 25% surcharge and interest of 12% on the amount of tax that should have been paid. The BIR may likewise refuse to issue the Certificate Authorizing Registration for the transfer of the shares of stock if the taxes are not paid.

7. Is Documentary Stamp Tax (*DST*) due on the transfer of shares of stock in a Philippine company from the decedent to the heirs?

It depends. In RMC No. 6-2022, the BIR observed that taxpayers appear unaware that certain transactions relating to the transfer of shares of stock are subject to DST. Accordingly, in the case of transfers via succession, the BIR clarified in RMC No. 6-2022 that the following are subject to DST under Section 175 of the Tax Code at the rate of Php1.50 on each Php200.00, or fractional part thereof, of the par value of the shares being transferred:

> (i) Transfer of shares of stock from the decedent's estate to the heirs pursuant to a decedent's will approved by the probate court in a judicial settlement of estate; or
>
> (ii) Transfer by an heir who specifically waives or renounces his share over the inherited shares to another heir/s, regardless of whether the transfer occurs pursuant to a judicial settlement of estate approved by a probate court or through an extrajudicial settlement of estate.

The transfer of shares of stock from the decedent's estate to the heirs through intestate succession (*i.e.*, transfer without a will), on the other hand, is not subject to DST under Section 175 of the Tax Code since ownership over the inherited shares is transferred to the heirs by operation of law.

Starboard: Can a course of dealing between parties change or add to the terms of a concluded contract?

March 9, 2022

Introduction:

The Court of Appeal held in *Nambu PVD Pte Ltd v UBTS Pte Ltd and another appeal* [2021] SGCA 98 that documents unintended by the parties to affect their transactional relationship cannot give rise to a course of dealing from which contractual terms may be incorporated. Thus, standard terms and conditions referenced in invoices and delivery orders which were not meant to have contractual effect were not incorporated into the contract between parties.

Brief facts of case:

In *Nambu PVD Pte Ltd v UBTS Pte Ltd* [2021] SGCA 98 (*Nambu v UBTS*), Nambu PVD Pte Ltd (Nambu) and UBTS Pte Ltd (UBTS) entered into a contract (the Contract) for UBTS to transport a Prefabricated Vertical Drain machine (the Machine). UBTS' vehicle caught fire during the course of the carriage, and the Machine was damaged as a result. Nambu made a claim against UBTS for fire damage to the Machine. UBTS argued that its own standard terms and conditions (UTBS T&Cs) or the Singapore Logistics Association's standard terms and conditions (SLA T&Cs) were incorporated into the Contract, and that its liability for negligence was limited. The High Court judge held that the fire was caused by UBTS's negligence and that UBTS could not rely on UTBS T&Cs or the SLA T&Cs to limit its liability, since the terms were not incorporated into the Contract.

Nambu then appealed in respect of the quantum of damages and costs awarded to it while UBTS appealed in relation to the finding that the SLA T&Cs were not incorporated into the Contract. In the appeal, UBTS argued that the SLA T&Cs were incorporated into the Contract by virtue of reasonable notice or previous course of dealing on the basis of invoices and delivery orders that had been issued by UBTS for past contracts, and which contained express references to the SLA T&Cs.

In this article, Starboard will be focusing on Court of Appeal's analysis of whether the SLA T&Cs were incorporated into the Contract between UBTS and Nambu by virtue of either reasonable notice or a previous cause of dealing.

The Court of Appeal's Decision:

In rejecting UBTS's arguments that the standard terms were incorporated by reasonable notice, the Court of Appeal noted that the invoices and delivery orders were always issued by Nambu to UBTS after a contract between Nambu and UBTS had been orally concluded (i.e. notice of the purported terms was only given after the Contract was entered into).

In this regard, the Court of Appeal noted two scenarios where timing may not be crucial.

First, where there has been a previous course of dealing between the contracting parties. In such circumstances, the

court would be prepared to incorporate a term into a contract despite the fact that it was not otherwise incorporated (for example, by way of signature or reasonable notice) because the contracting parties had consistently contracted with reference to that term on previous occasions in the past.

The second scenario would be where the contracting parties intended to supplement an otherwise bare agreement with more detailed terms subsequently. However, the further documentation must have contractual effect in that it must have been objectively intended to supplement the contract.

The Court of Appeal emphasized an important general point that terms sought to be incorporated into a contract must have the requisite contractual force. Generally, if it can be proven that the document containing the particular term is intended merely as a receipt and not as a contractual document as such, that term will not be incorporated. In the current case, the Court of Appeal agreed with the High Court's judge finding that the invoices and delivery orders issued were not meant to have contractual effect. On that basis, as a matter of both principle and authority, it was difficult to rationalise how non-contractual documents could ever amount to a course of dealing sufficient to justify the incorporation of the SLA T&Cs. The Court of Appeal therefore dismissed UBTS's appeal and held that a reference to the SLA T&Cs in non-contractual documents such as the invoices and Delivery Orders would have no contractual force.

In the course of so deciding, the Court of Appeal referred to its previous decision in *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 (*Vinmar*) where a course of dealing was found to have been effective in incorporating an exclusive jurisdiction clause. Unlike the present case, the Court of Appeal noted that in *Vinmar*, the exclusive jurisdiction clause was an express term of the previous contracts between parties, and thus formed a course of dealing between the parties that had contractual effect (see Starboard's previous update here).

Starboard's observations:

The Court of Appeal's decision in *Nambu v UBTS* provides several helpful clarifications with regard to the law on the incorporation of terms. Starboard observes that the case of *Nambu v UBTS* serves as an important reminder to businesses that any standard terms & conditions that they intend to rely on should be expressly referred to at the time the contract is formed. Depending on the specific facts and circumstances of each case, parties may be able to rely on a previous course of dealings, trade practices or supplementary documentation to incorporate terms that govern the parties' rights and liabilities into the contract. As a matter of prudence, parties should expressly include all salient terms into their contracts and seek professional legal advice where necessary to ensure that the relevant terms of contract are properly incorporated.

Dentons Rodyk represented Vinmar the successful applicant in *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 (see Starboard's previous update here).

Dentons Rodyk thanks and acknowledges Associates Kavitha Ganesan and Arina Rashid for their contributions to this article

Your Key Contacts

Lawrence Teh
Senior Partner, Global Co-Head of Dentons' International Arbitration Group, Singapore
D +65 6885 3693
lawrence.teh@dentons.com

Jen Wei Loh
Senior Partner, Singapore
D +65 6885 3647
jenwei.loh@dentons.com

Dispute over the Vesting of Derivative Technology During Technological Collaboration

03/16/2022

Shih-I Wu

Although a patentee often tends to ensure his/her vesting of derivative technology in a technological collaboration by entering into a collaboration agreement with relevant provisions, in practice, disputes still arise over the vesting issue. A real case for reference can be seen in the 2021 Min-Zhuan-Shang No. 2 Civil Judgment rendered by the Intellectual Property and Commercial Court (IPCC) on December 23, 2021.

In this reference case, plaintiff A claimed that he was the patentee of patent A and entered a collaboration agreement ("Agreement") with company C represented by defendant B. Both parties agreed that plaintiff A would provide the technology of patent A to company C to assist in its mass production of the contracted products. Company C would then be exclusively responsible for the sales by paying a certain amount of royalties to plaintiff A as profits based on the sales volume.

Having found that company C failed to perform its obligation following the Agreement, plaintiff A discontinued said agreement. Nevertheless, plaintiff A later observed that defendant B had already applied for other patents (i.e., patents 1 and 2 in dispute) in the names of others by imitating the technical features of patent A. Plaintiff A then filed a litigation claiming the Agreement as a cause of action, and requested a declaratory judgment confirming the vesting of the patent rights as well as assignment of the preceding patent rights to plaintiff A.

After confirming the content of the Agreement, the IPCC held that plaintiff A could not claim the vesting of patents 1 and 2 in dispute. According to Article 1 of the Agreement:

> Definition: Product's Patent Number: As listed in Attachment (A) (where patent A is recorded), any patents extended from improvements or revisions of the patent in Attachment (A) shall still be covered by the claims of the patent referred to herein in the agreement. The preceding rule shall also apply to any utility model patents extended from specific products.

The Agreement simply defines the patent claims without expressly providing the vesting of the derivative patent rights. Furthermore, the other provisions of the Agreement, as the IPCC prudentially deemed, do not explicitly provide for the vesting of derivative patent rights. Moreover,

as the parties to the Agreement were plaintiff A and company C, not defendant B, the IPCC considered it doubtful whether plaintiff A could claim the Agreement as a cause of action.

Plaintiff A, though evidencing that the product manufactured according to the patent in dispute fell within several claims of patent A after undergoing a patent infringement assessment, claimed that the patent in dispute was a derivative patent of patent A. However, the IPCC held that the litigation filed by plaintiff A was to request a declaratory judgment confirming the vesting of a patent right, not litigation related to patent infringement. Deeming that the preceding ground held by plaintiff A had nothing to with the vesting of the patent in dispute, the IPCC finally rejected plaintiff A's request. Such judgement was upheld by the second-instance court.

Consequently, regarding whether a patentee could claim the vesting of the derivative technology from his/her licensed patented technology during technological collaboration, the collaboration agreement thereof shall clearly define what subject identities shall apply. Furthermore, the agreement shall also specify the vesting of the derivative technology in order to avoid ambiguity and disputes arising from different interpretations in the future.

www.leeandli.com

GIDE
GIDE LOYRETTE NOUEL

ÖZDİREKCAN DÜNDAR ŞENOCAK AK
AVUKATLIK ORTAKLIĞI

CLIENT ALERT

CORPORATE LAW | TURKEY MARCH 2022

AMENDMENTS TO THE REGULATION ON COMMERCIAL ADVERTISING AND UNFAIR COMMERCIAL PRACTICES

The Regulation on Commercial Advertising and Unfair Commercial Practices no. 29232 dated 10 January 2015 (the "**Regulation**") has been amended by the Amendment Regulation published in the Official Gazette no. 31737 dated 1 February 2022 (the "**Amendment Regulation**"), and new amendments have come into force as of 1 March 2022.

The purposes of the Regulation as well as the Amendment Regulation are to set out main principles and procedures that must be followed by the advertisers, advertising agencies, media organizations, natural persons and legal entities engaged in commercial practices related to advertising and to protect consumers against unfair commercial practices.

You may find below a summary of the main changes introduced by the Amendment Regulation:

PERSONALIZED PRICING

Amendment Regulation has introduced a "personalized pricing" concept and determined its application principles under Article 13 of the Regulation.

Personalized pricing is defined as *"the price offered by analyzing purchasing behavior and other personal data of the consumer in relation to a good or a service"*. While implementing personalized pricing (i) information regarding such implementation, (ii) current sales price of the good or service determined by the seller or service provider, (iii) personalized price shall be provided in the same field.

As a result of the relevant amendment, the personalized pricing shall be offered personally to the consumer and meet the above conditions.

DISCOUNT SALES

As per the Amendment Regulation, in the advertisements announcing a discount on a product or service, "price applicable before the discount" shall also be indicated along with the start and end dates of the discount sales and the amount of goods/services limited to such discount (if applicable).

Whilst determining the sales price applied before the discount as the non-discounted price, the lowest price applied within 30 days before the discount date shall be taken as basis. This being said, with regards to perishable products such as fruit and vegetables, the previous price before the discounted price shall be taken into account.

Advertisers shall bear the burden of proof for the above requirements. With these amendments, the Ministry of Commerce aims to ensure that consumers benefit from actual and true discount rates.

FINANCIAL SERVICES RELATED ADVERTISEMENTS

In advertisements related to financial services, the following paragraph has been included as a new provision under Article 25 of the Regulation:

"(4) In advertisement indicating that a good or a service is offered for sale with linked loan, the credit period, interest rate, monthly and annual percentage value of the total cost and repayment conditions shall be provided in the area where the advertisement is published or on a pop-up screen to be easily seen where consumers can be directed through a link or a warning sign and where consumers can obtain detailed information."

RANKING PRACTICES

With Article 28/A introduced by the Amendment Regulation, a new provision has been included regarding ranking practices. Accordingly;

"(1) In the event that a ranking is made by comparing price, qualification and similar aspects of a good or a service offered for sale on the internet, "the information with regards to ranking criteria" shall be provided in the same field or on a pop-up screen to be easily seen where consumers can be directed through a link or a warning sign and where consumers can obtain detailed information.

(2) In the ranking results shown by relying on an advertisement or sponsorship or similar agreements, it is mandatory to state the term "advertisement"."

CONSUMER EVALUATIONS

As a new provision, Article 28/B states "where a seller or provider or intermediary service provider provide the opportunity for the consumers to evaluate a good or service, a seller or provider, such evaluation opportunity shall only be granted to the purchaser(s) of the relevant goods or services".

Furthermore, principles and rules regarding the publication of these evaluations shall be provided in the area where the evaluations are published or on a pop-up screen where consumers are directed by a link or a warning sign.

The consumer evaluations shall be published according to objective criteria such as date, evaluation grade etc. for at least 1 year after the necessary examinations are made, without making any positive or negative distinction. In the event that the evaluation is not published due to non-compliance with the evaluation principles and rules, the evaluation shall be disregarded and the consumer shall be notified immediately in this respect.

The consumer evaluations consisting of health declarations or statements in violation of the relevant legislation shall not be published.

The new provision does not allow the sellers and service providers to conclude any kind of agreement with third parties for the purpose of increasing the sale of a good or service by making inaccurate evaluations or by usage of confirmative indications for a related good or service.

PUBLICATION OF CONSUMER COMPLAINTS

If a complaints platform's main field of activity is to provide a publishing opportunity on the Internet for complaints of consumers partaking in evaluations regarding a good or service, or a seller or provider of that good or service, a new

provision of Article 28/C provides that said complaint platform shall comply with the obligations relating to consumer evaluations explained above, as well as the following obligations:

72 hours period: A minimum of seventy-two hours shall be granted to the sellers or providers who are evaluated, in order to use their right to explanation or respond before the publication of the evaluation.

Publication condition: Evaluations shall not be published before the expiry of this period or if it is understood that they do not reflect the truth.

Effective communication: An effective communication method shall be provided to the sellers or providers who will exercise their right to explanation or response regarding the evaluation, notwithstanding the platform membership, fee or other practices.

By virtue of aforementioned amendments, the Advertisement Board is committed to preparing and publishing specific guidelines for the purpose of protecting consumers against commercial advertisements and unfair commercial practices.

SANCTIONS

As to the sanctions to be applied in case of non-compliance with the above requirements, sanctions foreseen under the Consumer Protection Law no.6502 would apply. In this respect, an administrative fine amounting from TRY 15,566 to TRY 622,853 depending on the type of broadcast (*e.g.* television, radio, internet, sms etc.), suspension or correction of the advertisement, precautionary suspension for three months would be imposed either separately or cumulatively.

◆ ❖ ◆

In compliance with Turkish bar regulations, opinions relating to Turkish law matters that are included in this client alert have been issued by Özdirekcan Dündar Şenocak Ak Avukatlık Ortaklığı, a Turkish law firm acting as correspondent firm of Gide Loyrette Nouel in Turkey.

CONTACTS

ARPAT ŞENOCAK
senocak@odsavukatlik.com

PINAR VEZIROĞLU DILEK
veziroglu@odsavukatlik.com

BLOG POST / ENERGY & ENVIRONMENTAL LAW BLOG

Environmental

Oregon Joins California and Washington in Adopting Its Own Program Capping and Reducing Greenhouse Gas Emissions

By Derek D. Green, Olivier Jamin, and Taylor Sutton*

03.17.22

With Oregon's recent implementation of rules to cap greenhouse gas (GHG) emissions, the entire West Coast is now subject to some form of GHG emissions cap program. We have previously discussed California's and Washington's cap and trade policies, as well as the multi-year efforts by Oregon policymakers to enact the state's own cap program.

Below we summarize key aspects of Oregon's newly enacted administrative program, known as the Climate Protection Program (CPP).

DEQ's Climate Protection Program and How It Works

How Oregon Got Here

After legislative efforts to pass a cap and trade bill shut down the Oregon legislature two years in a row, Oregon Governor Kate Brown signed Executive Order 20-04 in 2020, a sweeping administrative order aimed at reducing GHG emissions in Oregon by at least 80 percent below 1990 levels by 2050. A primary component of EO 20-04 was tasking the Department of Environmental Quality (DEQ) with developing and implementing rules to cap and reduce GHG emissions in order to meet the stated reduction goals. Late last year, the Oregon Environmental Quality Commission voted to adopt the CPP to fulfill that task.

Establishes a Greenhouse Gas Cap, Through Fuel Suppliers

As we've discussed previously, the CPP imposes a cap on GHG emissions attributable to fuel suppliers, measured by metric tons of carbon dioxide equivalent (CO_2e) emitted annually, from the combustion of fossil fuels within the state. The program imposes an overall cap on the covered fuel suppliers' emissions, with the cap decreasing annually, and allocates emission allowances to the fuel suppliers to comply with their program obligations. Compliance is measured over three-year compliance periods, with the first compliance period running from this year through 2024.

The rules cover GHG emissions from fuel and natural gas combustion, with some notable exceptions. Fuel suppliers subject to the declining emission cap include local natural gas utilities, as well as gasoline, diesel, kerosene, and propane distributors with covered GHG emissions above the program's annual threshold amount. That threshold significantly decreases over time, with the program expected to eventually cover nearly all suppliers of sources using liquid fuels and propane combustion emissions in the state.

As referenced above, however, there are some notable exceptions to covered emissions. These include emissions derived from biofuels and biomass fuels, as well as natural gas used at large electricity-generating facilities.

Compliance Options for Fuel Suppliers

The CPP will issue annual emission allowances, known as compliance instruments, to covered fuel suppliers for use in Oregon. Each compliance instrument authorizes the emission of one metric ton of CO_2e emissions. The number of available compliance instruments will be reduced over time. Fuel suppliers will be allowed to trade their compliance instruments among themselves with banked remaining balances capable of being rolled over.

Fuel suppliers can also meet part of their obligations through Community Climate Investments (CCIs) credits, through which DEQ-approved third parties invest CCI funds in projects to reduce GHG emissions, with a particular emphasis on assisting environmental justice communities historically disproportionately affected by air pollution and vulnerable to the impacts of climate change. A fuel supplier's contributions to CCIs as a compliance mechanism is capped at 10 percent of a company's emissions reduction requirement for the first compliance period. That limit increases up to 20 percent for the third compliance period.

Stationary Sources Subject to Best Available Emissions Reductions

In addition to the cap for covered fuel suppliers, the CPP also includes rules to reduce GHG emissions from certain covered large stationary sources. These rules implement a best available emissions reduction (BAER) approach for facilities that emit at least 25,000 metric tons of covered CO_2e from processes that are not regulated through covered fuel suppliers, such as from industrial processing.

As with fuel suppliers, not all emissions (including those from larger electric power plants) are covered by the rules. The BAER rules require covered stationary sources to submit assessments to DEQ of potential strategies to reduce their emissions, which DEQ takes into consideration in developing site-specific compliance obligations moving forward. It remains uncertain what the results of the BAER process will look like, but the CPP establishes twin goals of reducing total

covered emissions from covered stationary sources (without specifying a particular amount) and reducing covered emissions from covered stationary sources that are the result of combustion of solid or gaseous fuels by 50 percent by 2035.

With implementation of the CPP just underway, it is not yet evident how all the components of the program will work in practice, as well as both their environmental and economic effects. The rules require DEQ to perform periodic reviews of the CPP and to investigate increases in fuel prices in comparison to changes in prices in some neighboring states.

It will be interesting to see how the program develops and whether, over time, the CPP relates—or does not—to the programs in the neighboring states. But that's a subject for another blog.

** Taylor Sutton is a law clerk in the Washington, D.C. office of Davis Wright Tremaine.*

DWT's Climate and Sustainability Commitment

DWT is committed to fighting climate change. That means assisting our clients as they grapple with both the pitfalls and opportunities ahead, reducing our own carbon footprint and becoming more sustainable as a business, and helping to reform the law. Please join us.

GOODSILL

Forced Arbitration of Sexual Harassment and Sexual Assault Claims Now Invalid

On March 4, 2022, President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, H.R. 4445, which allows victims of sexual assault or sexual harassment to litigate claims in court regardless of any arbitration agreement they may have signed. The House previously passed the Bill on February 7, 2022 with a 335 to 97 vote, showing overwhelming bi-partisan support for this new law.

Writing in support of the Bill, President Biden noted that "[m]ore than 60 million Americans are subject to mandatory arbitration clauses in the workplace, often without realizing it until they come forward to bring a claim against their employer."[1] This indicates a large number of employers will be affected by this new law.

The new law applies only to claims that arise or accrue from March 4, 2022 going forward; it is not retroactive to claims that arose or accrued prior to the H.R. 4445 becoming law. The law is retroactive, however, to the extent it may render a forced arbitration agreement voidable for applicable claims that arise or accrue from March 4, 2022 on. Determining the applicability of H.R. 4445 is not an arbitrable issue and that determination must be made by a judge under federal law rather than an arbitrator.

Another important note is that H.R. 4445 is not limited to an employee-employer relationship; it applies more widely in other situations where there may be a forced arbitration agreement or clause for sexual harassment or assault claims, such as consumer services, ridesharing apps, etc.

Employers should reconsider use of arbitration agreements. The new law does not prohibit employers from using arbitration agreements for discrimination claims, including sex discrimination claims that do not involve sexual harassment or assault, but legal trends and public demand are increasingly pushing for more limited use of arbitration agreements.

From a public policy perspective, individuals asserting civil rights violations are typically given the opportunity to avail themselves of the judicial process to seek redress. Forced arbitration of employment discrimination claims denies employees this opportunity, which employees are increasingly pushing back on. One may also question whether forced arbitration of discrimination claims, like race discrimination or harassment, is equitable in light of this exemption for sexual harassment and assault claims.

Not only is there a growing trend pushing back on arbitration agreements, the benefits of forced arbitration may also not serve an employer's best interest. Arbitration limits an employer's defense and options. Arbitrators may be disinclined to dismiss a case without a full hearing even where a court would grant summary judgment. An arbitrator, who may not even be a lawyer or judge, plays the role of both judge and jury, but if the arbitrator makes a mistake or the decision is unfavorable, there is very rarely an ability to successfully appeal that mistake or decision. Unfavorable decisions may also result in counsel refusing to select an arbitrator in the future and potentially narrow down the pool of arbitrators to those with less experience or knowledge. Perhaps most surprising to many employers is that arbitration is not always cheaper or faster than a court proceeding.

Employers should speak to legal counsel about arbitration agreements and whether it makes business sense to continue using these clauses. At a minimum, employers should revise arbitration agreements going forward to carve out sexual harassment and assault claims.

Goodsill labor and employment attorneys are available to assist:
John S. Mackey, Esq. jmackey@goodsill.com
Ashley C. Chinen, Esq. achinen@goodsill.com

♦♦♦♦

This Goodsill Alert was prepared by Ashley C. Chinen (achinen@goodsill.com or (808) 547-5715) of Goodsill's Labor and Employment Law Practice Group.

#EndingForcedArbitrationofSexualAssaultandSexualHarrassment #H.R.4445 #ForcedArbitration

[1] *See* Statement of Administration Policy, H.R. 4445 – Ending Forced Administration of Sexual Assault and Sexual Harassment Act of 2021, February 1, 2022.

Hogan Lovells

FSIS issues proposed rule designating avian leukosis as a trimmable condition

18 March 2022

In response to an industry petition, the U.S. Department of Agriculture Food Safety and Inspection Service (FSIS) is proposing to amend the poultry products inspection regulations to designate avian leukosis as a trimmable condition rather than one that requires condemnation of the entire carcass.

Avian Leukosis Complex (avian leukosis) is a rare condition in chickens that may lead to virally induced, tumor-causing diseases, none of which can be transmitted to humans. Under current regulations, FSIS inspects each carcass and condemns any that appear to be affected by avian leukosis.[1] In a proposed rule issued on March 14, 2022,[2] FSIS announced plans to rescind this regulation and instead permit tumors to be trimmed from carcasses affected with avian leukosis, allowing the unaffected parts of the carcass to pass inspection and continue through processing.[3] The proposed rule explains and summarizes current research that supports the position that avian leukosis does not present a human health concern and that poultry affected with the disease are not unsound or otherwise unfit for human food.

The proposed rule would also rescind two other regulations that require young chicken establishments operating under the New Poultry Inspection System (NPIS) to provide a leukosis inspection area during processing and prescribe procedures for this inspection.[4] FSIS currently inspects the first 300 carcasses and viscera (internal organs) of each new flock for avian leukosis during processing at these establishments. The change would provide modest flexibility in that NPIS plants would no longer need to provide space and time for leukosis checks.

The proposed rule was prompted by a March 2019 petition from the National Chicken Council (NCC) that asked FSIS to amend the regulations and designate avian leukosis as a trimmable condition.[5] The petition asserted that the existing regulations requiring condemnation of the entire carcass do not reflect current science, which demonstrates avian leukosis is not a food safety concern and cannot be transmitted to humans. It noted that the condemnation and inspectional requirements impose unnecessary costs on industry, presenting a barrier to young chicken establishments that may want to convert to NPIS. FSIS advised NCC in March 2020 that it would grant the petition and move forward with drafting the recently-released proposed rule.[6]

Next steps

Comments on the proposed rule are due May 13, 2022. Please do not hesitate to reach out if we can assist with drafting comments regarding these changes.

Authored by Brian D. Eyink and Connie Potter.

References

1 9 CFR § 381.82.

2 Condemnation of Poultry Carcasses Affected With Any Form of Avian Leukosis Complex; Rescission, Proposed Rule, 87 Fed. Reg. 14182 (Mar. 14, 2022), https://www.federalregister.gov/documents/2022/03/14/2022-05294/condemnation-of-poultry-carcasses-affected-with-any-form-of-avian-leukosis-complex-rescission.

3 9 CFR. § 381.87. If the entire carcass is affected or if the disease has metastasized, FSIS would condemn the entire carcass.

4 *See id.* §§ 381.36(f)(3), 381.76(b)(6)(iv). The regulations apply only to chicken processors and do not apply to turkey establishments operating under the NPIS; avian leukosis is extremely rare in turkeys.

5 Petition 19-01, To Treat Avian Leukosis as a Trimmable Condition, National Chicken Council (Mar. 1, 2019), *available at* https://www.fsis.usda.gov/federal-register/petitions/petition-treat-avian-leukosis-trimmable-condition.

6 Letter from FSIS to A. Peterson, NCC (July 16, 2020), *available at* https://www.fsis.usda.gov/sites/default/files/media_file/2021-04/19-01-fsis-final-response-071620.pdf.

Contacts

Brian Eyink
Partner
Washington, D.C.
brian.eyink@hoganlovells.com

Connie Potter
Associate
Washington, D.C.
connie.potter@hoganlovells.com