PACIFIC RIM ADVISORY COUNCIL

Pacific Rim Advisory Council

May 2022 e-Bulletin

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CONFERENCES & EVENTS

PRAC Let's Talk!

upcoming virtual meetings - May 25, 2022

International Conference - Mexico City Spring, 2023 Hosted by Santamarina y Steta
International Conference - New Delhi Hosted by KOCHHAR & Co. TBA
International Conference - Paris Hosted by GIDE TBA
Visit www.prac.org/events

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.
www.prac.org/member_publications.php

MEMBER DEALS MAKING NEWS

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PRAC TOOLS TO USE
COVID-19 SITE FOR ALL UPDATES

PRAC CONTACTS MEMBER DIRECTORY EVENTS

CAREY BRINGS PROMINENT LAWYER ON BOARD TO LEAD PRACTICE AREA

SANTIAGO – 06 April, 2022: Rodrigo Aldoney has joined Carey to lead the firm's Criminal Law team as a senior advisor. Rodrigo received his law degree from the Universidad de Chile, and he has a Doctorate in Criminal Law from the Albert-Ludwigs-Universität Freiburg, in Germany, where he also earned an LL.M.

In the area of Criminal Law, Carey has extensive experience in highly complex litigation at the national and international level. In addition, the firm provides specialized advice on economic and environmental crimes, cybercrime, violations of anti-corruption laws, money laundering, infringements of industrial and intellectual property laws and criminal liability, among others.

Rodrigo's practice extends to all areas of criminal law, including economic crimes, fraud, environmental crimes, competition crimes, corporate criminal liability and, in general, highly complex litigation. Additionally, advises on corporate governance activities that generate criminal risks, on conflict resolution and on internal investigations.

His practice also focuses on compliance, specifically in the criminal field. He has developed vast experience in the design and implementation of prevention models in accordance with corporate criminal liability law and various international standards.

Rodrigo is also a professor of Criminal Law and Economic Criminal Law at the Universidad Católica Law School in Chile, as well as a professor of the Master's Degree in Criminal Law program at the University of Talca and the Pompeu Fabra University, in Barcelona, Spain. He has also been a professor of multiple Criminal Law and Compliance subjects in undergraduate and postgraduate programs at various universities, such as Universidad de Chile, Universidad de los Andes, Universidad Adolfo Ibáñez, Universidad Diego Portales and Universidad Alberto Hurtado, and in public institutions such as the Public Criminal Defender's Office, the Criminal Prosecutor's Office and the Judicial Academy.

He has authored numerous publications, both in Chile and abroad, on matters related to corporate criminal law, corruption and economic crimes, among others.

For additional information visit www.carey.cl

CITY-YUWA ANNOUNCES SEVERAL ADDITIONS TO FIRM

TOKYO – May, 2022: City-Yuwa made several hire announcements over the past months, welcoming the following to the firm:

Partner Hidetomo Futami;

Seven newly admitted Associate attorneys, Shizuka Kamiya, Fumiya Nishikawa, Shoko Tanaka, Yota Uno, Kyosuke Yamada, and Takahiro Zaima;

Associate Ken Kurokawa, admitted in 2020;

Foreign Attorney Seunghoon Kim, admitted to the Korea Bar;

Associate Jaedong Han, admitted in 2018;

Associate Tsubasa Ito, admitted in 2019

For additional information visit www.city-yuwa.com

PACIFIC RIM ADVISORY COUNCIL

PRAC Let's Talk!

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May 25, 2022

Registration required

Visit www.prac.org for details

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

GIDE BOOSTS DISPUTES PRACTICE WITH ARRIVAL OF FINANCE EXPERT

PARIS - 23 March, 2022


Stéphanie Philippe

By recruiting an expert in accounting and financial investigations, Gide is innovating and broadening its practice with a new skillset to develop ever-more efficient strategies in the service of the most complex matters.

Stéphanie Philippe joins Gide's team that specialises in repressive disputes, corporate investigations and compliance matters alongside partners Bruno Quentin, ean-Philippe Pons-Henry and Sophie Scemla. A chartered accountant by training and former auditor, she has nearly fifteen years' experience in financial investigations, developed within the Investigations division of the French Financial Markets Authority, and in criminal matters within the Instruction department of the Paris Tribunal Judiciaire Finance division.

Stéphanie Philippe joins Gide's team that specialises in repressive disputes, corporate investigations and compliance matters alongside partners Bruno Quentin, Jean-Philippe Pons-Henry and Sophie Scemla. A chartered accountant by training and former auditor, she has nearly fifteen years' experience in financial investigations, developed within the Investigations division of the French Financial Markets Authority, and in criminal matters within the Instruction department of the Paris *Tribunal Judiciaire* Finance division.

Bruno Quentin, Jean-Philippe Pons-Henry and Sophie Scemla are very pleased with the appointment: "*We are delighted to have Stéphanie join our team, whose precious skills provide us with the innovative and integrated combination of legal and accounting expertise. Her arrival will help advance every day the quality of our factual analyses, whether in terms of corporate investigations or financial and criminal disputes".*

Stéphanie Philippe is a graduate from the ESSEC business school and in chartered accountancy. She began her career in the Key Accounts auditing team of EY from 1999 to 2006. She then joined the French Financial Markets Authority where she was a senior investigator for 5 years, prior to joining in 2013 the Instruction department of the Paris *Tribunal Judiciaire* Finance division as an accounting expert. In 2021, she joined the Control Division of the regulatory authority of the audit profession in France (H3C, or Haut Conseil des Commissaires aux Comptes).

For additional information visit www.gide.com

HAN KUN OPENS OFFICE IN HAIKOU; WELCOMES NEW PARTNERS

BEIJING - 18 April, 2022: On April 18, 2022, with the approval of Hainan Provincial Department of Justice, the Haikou office of Han Kun Law Offices was officially opened.

Han Kun's Haikou office will further meet the growing demand in the Hainan Free Trade Port for a legal-based business environment and for legal professionals able to provide high-quality foreign-related services. In the meantime, the Haikou office will collaborate with Han Kun offices in Shenzhen and Hong Kong in providing full-scope, efficient, and reliable legal services to clients in South China.

The opening of the Haikou office is concurrent with the launch of an "Adream Center", which is co-founded by Han Kun and Shanghai Adream Foundation ("Adream Foundation") and supported by Hainan Provincial Department of Education. The "Adream Center" aims to propel the construction of the Central School of Xinzhu Town, Ding'an County of Hainan Province. It is Han Kun's aspiration to both establish a solid foothold in Hainan to serve domestic and overseas clients and to strive for the development of primary education in China. We are committed to playing a positive role in Hainan's sustainable development and regional economic growth.

The "Adream Center" network is developed by the Adream Foundation to further its mission of bolstering quality-oriented education in China by delivering multimedia classrooms and interactive courses to create competency-based education spaces and systems for children. Han Kun participates in this non-profit project hoping to generate a warm, open, interactive and thought-provoking environment for K12 students, helping them build the capabilities and character that are needed for exploring a broader world and more possibilities in the future.

Han Kun has been an active participant in philanthropic causes, especially education. The Han Kun Youth Legal Scholarship program has been held for ten consecutive years and has supported over a hundred law students in the pursuit of their dreams. While opening the Haikou office to enhance our legal presence in the local market, we also expect to plant the seed of dreams and the public good to cultivate better quality-oriented education in the region.

Han Kun's Haikou team will give full play to the firm's strengths in fields of funds establishment, financial and wealth management, equity investment, dispute resolution, intellectual property, and corporate compliance, among others, to provide high-quality legal services for clients' business arrangements in Hainan. Meanwhile, we will actively fulfill our social responsibilities and contribute to the overall development and construction of the Hainan Free Trade Zone and the Hainan Free Trade Port.

28 April, 2022: Han Kun is pleased to announce that Ms. Shuting Qi has recently joined the firm. She has extensive experience in private equity and venture capital investment, mergers and acquisitions, foreign direct investment and general corporate matters. Ms. Qi's joining the firm will further strengthen Han Kun's capabilities in private equity and cross-border mergers and acquisitions. Ms. Qi will be primarily based in Han Kun's Shanghai office.Before joining Han Kun, Ms. Qi was a partner at Kirkland & Ellis LLP and has practiced for more than 14 years. Ms. Qi has extensive experience in representing private equity funds and strategic clients in a wide array of business transactions, including mergers and acquisitions, buyouts, growth equity investments, divestitures, joint ventures, foreign direct investment and general corporate matters. Ms. Qi has also represented Chinese companies in their outbound investments and other financing transactions outside China. Ms. Qi represents clients across diverse industries, including TMT, healthcare, education, finance, industrial manufacturing, retail and logistics. Ms. Qi received her LL.B. degree from Nanjing University in 2005. She also graduated from Fudan University and from Harvard Law School in 2008 and 2012, respectively, both with an LL.M degree.

Han Kun welcomes Mr. Jianhui Li in joining the firm, enhancing the firm's practice capabilities in South China. Mr. Li started his career in 1993 and has nearly 30 years of experience as a legal professional. Prior to joining Han Kun, Mr. Li was a partner at two renowned PRC law firms. His practice focuses on onshore and offshore capital markets, venture capital and private equity investment, mergers and acquisitions, as well as dispute resolution in related areas. Mr. Li has represented and provided legal services to numerous PE/VC investment funds, multinational companies, state-owned and private enterprises, public companies, and research institutions in relation to their various PRC legal matters, covering industries such as semiconductor, manufacturing, life science and healthcare, TMT, consumer goods and retail, new energy and new materials, fin-tech and financial services, real estate and infrastructure, transportation and logistics, and education.

Mr. Li also undertakes social duties such as serving as an arbitrator at the Shenzhen Court of International Arbitration (also known as the South China International Economic and Trade Arbitration Commission, the Guangdong-Hong Kong-Macao Greater Bay International Arbitration Center, or the Shenzhen Arbitration Commission), as an arbitrator at the Guangzhou Arbitration Commission, and as a mediator at the Shenzhen Securities and Futures Dispute Resolution Center.

Mr. Li graduated from Peking University Law School with an LL.B. degree in 1991. He has been recognized for years as a leading lawyer in capital markets by authoritative legal directories such as IFLR1000 and LEGALBAND. Mr. Li will be primarily based in Han Kun's Shenzhen office. The addition of Mr. Li to the firm will further strengthen the firm's capital markets practice and will provide strong support for Han Kun's market development in South China.

For additional information visit www.hankunlaw.com

HOGAN LOVELLS ANNOUNCES NEW BOARD APPOINTMENTS

Washington D.C. and London - 16 May, 2022: Hogan Lovells is pleased to announce new appointments to the firm's Board. Board members can serve up to two three-year terms.

The new Board appointments, as of 1 May, are as follows:
David Gibbons – elected to the "At Large" seat, succeeding Phoebe Wilkinson who had served two terms
Owen Chan – re-elected to the Asia Pacific Middle East seat
Bruce Oakley– re-elected to the U.S. (except Washington D.C. region)
Karen Hughes – re-elected to the "At Large" seat

Commenting on the appointments, Chair Marie-Aimée de Dampierre added: "I'd like to welcome David Gibbons as a new member of the Board and to congratulate Owen, Bruce, and Karen on their re-election to the Board. I also offer my thanks and gratitude to Phoebe Wilkinson."

In line with our strategic priority to deliver on our commitments to Diversity & Inclusion and Responsible Business, 42% of the members of the Board are women, and our Board includes underrepresented partners. Biographic details for Board appointments follows:

Owen Chan: Owen, our Hong Kong Office Managing Partner and head of our China Banking practice, joined the Board three years ago and has been appointed for a second term. He acts for Chinese as well as international clients in cross-border transactions with a focus on financial institutions, Private Equity funds, and multinational companies. Since joining the firm in 2008, Owen has built a strong bilingual team which assists our clients on their most complicated financing deals and provides advice under Chinese, English, and Hong Kong law. He also has extensive experience in regulatory and insolvency matters.

David Gibbons: Based in the Baltimore office, David joined the firm 15 years ago and has a broad transactional practice focusing on cross border M&A, joint ventures and capital raising transactions. He regularly advises management and Boards of Directors on disclosure and governance matters. He represents clients that the globe and across sectors including ADG, Life Sciences, Diversified Industrials, Transportation and Automotive. David previously served as the Global Head of our Corporate & Finance practice. Outside of Hogan Lovells, David serves on a number of non-profit Boards.

Karen Hughes: Karen joins the Board in her second term on the At Large seat. Based in London, she co-leads our global Tax, Pensions & Benefits practice and is a member of the firm's Corporate & Finance leadership team, a global management team focused on the business strategy of the worldwide Corporate & Finance practice group. Her practice involves advising multi-nationals on a range of corporate tax matters, particularly international M&A and structuring.

Bruce Oakley: Bruce is the Managing Partner of our Houston office, and has previously served one term on the Board, holding the U.S. (except Washington D.C. region) seat. A member of our Litigation, Arbitration, and Employment practice group, he joined the firm more than 16 years ago, and has more than 25 years of experience as a trial lawyer. Prior to joining the firm, Bruce served as a Judge of the 234th Judicial District Court. He regularly represents clients facing complex cross-border disputes, with a particular focus on energy – from exploration and production, to drilling operations, refineries, pipelines, and the services sector. Bruce continues his public service having previously served as President of Children's Protective Services and now as a Director of the Harris County Houston Sports Authority.

The Hogan Lovells Board comprises 12 members and supervises the affairs of the firm and its management on behalf of the partners. Membership of the Board is designed to reflect the broad scope of the business, with members drawn from a variety of geographic and other backgrounds.

As of 1 May 2022, the Hogan Lovells Board will be:
Chair (and "At Large"): Marie-Aimée de Dampierre
CEO: Miguel Zaldivar
Asia Pacific Middle East: Owen Chan
Continental Europe: Tobias Faber
Washington, D.C. region: Lillian S. Hardy
London: Adrian Walker
The Americas: Celine Jimenez Crowson
U.S. (except D.C. region): Bruce Oakley
45 and under: Mahvesh Qureshi
"At Large": David Gibbons, Andreas von Falck, Karen Hughes

For additional information visit www.hoganlovells.com

ARIFA

ASSISTS BANKO ITAU UNIBANCO IN THE ACQUISTION OF 30% STAKE IN URUGUAYAN FINTECHS PREX AND PAIGO

PANAMA CITY - March 14, 2022: Arias, Fabrega & Fabrega has advise Banco Itau Unibanco, with the Panamanian legal aspects related to the acquisition of a 30% of the share capital in Uraguayan payment and credit fintech leading companies Prex and Paigo, in line with its strategic vision of regional expansion and incursion into digital banking.

ARIFA's team in this transaction was led by banking and finance partner Fernando Arias F. with the valued assistance of associate Daniel Abad.

For additional information visit www.arifa.com

BENNETT JONES

ADVISING ASANTE GOLD ANNOUNCES PURCHASE OF CHIRANO GOLD MINE FOR US$225 MILLION

TORONTO - 26 April, 2022: Bennett Jones is acting for Asante Gold Corporation in its share purchase agreement with Kinross Gold Corporation to acquire Kinross' 90% interest in the Chirano Gold Mine for a total consideration of US$225 million. The Ghanaian government retains a 10% carried interest in Chirano—an operating open-pit and underground mining operation located in southwestern Ghana, immediately south of Asante's Bibiani Gold Mine.

The Bennett Jones team is led by Ali Naushahi and includes Will Edwards, James Morand, Jessica Horwitz, Olivier Caron and Mitchell Dorbyk.

For additional information visit www.bennettjones.com

CAREY

BROOKFIELD ACQUIRED MAJORITY STAKE IN CHILEAN SOLAR POWER GROUP

SANTIAGO - 14 April 2022: Local Chilean firm Carey assisted the renewable energy branch of Canadian asset management fund Brookfield to acquire a majority stake in Chilean solar project company Solarity.

Prieto advised the seller, Chilean energy-focused holding company Light E, while the Solarity's co-founders, Horacio Melo and José Luis Carvallo, enlisted Echeverría Ilharreborde Scagliotti.

The deal closed on 17 March for an undisclosed amount.

Brookfield invested in Solarity to help the Chilean energy group expand and achieve its goal of having 1,000 operational plants by 2030. This plan is in line with Chile's national pledge to become carbon neutral by 2050. The transaction included the acquisition of shares held by SCL Energía Activa – the energy-focused branch of Chilean investment fund manager Larraín Vial – in the target company.

Headquartered in Toronto, Brookfield has over US$630 billion worth of assets under management. The fund invests in real estate, renewable energy and infrastructure projects and is regularly seen in Latin American transactions.

Counsel to Brookfield Renewable: Carey Partners Salvador Valdés, José Miguel Bustamante and José Pardo, and associates Carmenmaría Poblete, Gabriela García, Francisco Contreras, Tomás Guevara and Nicolás Fosk in Santiago.

For additional information visit www.carey.cl

GIDE

COUNSEL TO COLONIES ON ITS EUR 1 BILLION PARTNERSHIP WITH ARES MANAGEMENT

PARIS - 16 May, 2022: Gide has advised coliving specialised French start-up Colonies on the conclusion of a partnership with alternative investment fund Ares Management, to acquire, renovate and lease 2,000 extra accommodation units in major European cities. The end objective is to house over 10,000 young professionals in shared accommodation.
Gide's team comprised partner Bertrand Oldra and counsel Etienne Chesneau, both members of the firm's Real Estate Transactions & Financing practice group.

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

NAUTADUTILH

NAUTADUTILH ASSISTS NATIONAL-NEDERLANDEN BANK IN FIRST GREEN COVERED BOND ISSUE

AMSTERDAM - 17 May, 2022: NautaDutilh assisted Nationale-Nederlanden Bank in the first Green Covered Bond issuance in the Netherlands. Today, 17 May 2022, Nationale-Nederlanden Bank successfully issued EUR 500,000,000 Green Covered Bonds. Nationale-Nederlanden Bank is the first issuer in the Netherlands to issue a Green Covered Bond.

The Green Covered Bonds were issued in compliance with Nationale-Nederlanden Bank's Green Bond Framework, which is aligned with the ICMA Green Bond Principles and the EU Taxonomy. The proceeds of the issue will be used to finance and/or refinance new and/or existing mortgage loans for energy efficient residential buildings in the Netherlands that meet the requirements of Nationale-Nederlanden Bank's Green Bond Framework.

Partner Arjan Scheltema adds: "Very exciting to be involved in the first ever Green Covered Bond issuance in the Netherlands, which was very well received by the market".

Our team advising Nationale-Nederlanden Bank on the Green Covered Bond issue consisted of Arjan Scheltema, Sascha van Gerrevink and Charlotte Sonneveld.

For additional information visit www.nautadutilh.com

HOGAN LOVELLS

ADVISES MAJOR LEAGUE CRICKET IN FINANCING TO DRIVE AMERICAN CRICKET DEVELOPMENT

New York - 18 May, 2022: Global law firm Hogan Lovells advised Major League Cricket (MLC) as it completed an initial close of a US$44 million Series A and A1 Fundraising Round. With an additional commitment of US$76 million in further fundraising over the next 12 months in place, MLC intends to deploy more than US$120 million to launch the country's first -ever professional Twenty20 cricket league and open a new era for the world's second most popular sport in the United States.

The $120 million investment into MLC will primarily be dedicated to building premier cricket-specific stadia and training centers to develop a new generation of American cricketers. This infrastructure investment will transform the landscape for professional cricket and enable the United States to host global events over the next decade and beyond. As well as international games, world-class T20 action will be played annually with MLC bringing the best cricketers in the world to play in cricket-specific venues with natural turf wickets and first-class amenities for fans. Read more on MLC's announcement and some of the investors involved here.

Hogan Lovells' sports and entertainment team has strong ties to the sport of cricket and other global sports. The team represented USA Cricket, which governs the sport in the United States, on its successful bid to co-host the International Cricket Council's (ICC) Men's T20 World Cup in 2024. The event will be the first global cricket tournament to be staged in the United States. Similarly, the team advised USA Rugby in its successful effort to bring the World Rugby Cup to the United States. On May 12, the World Rugby Council announced that it had unanimously voted to officially select the United States as the host nation of the 2031 Men's Rugby World Cup and the 2033 Women's Rugby World Cup.

The Hogan Lovells team advising MLC was led by counsel Steve Argeris (Washington, D.C. and New York) and law clerk Danielle Litwak (New York), with support from partners Michael Kuh and Mark Weinstein (both New York), Matt Eisler (Denver and New York), and Carin Carithers (Washington, D.C.) and senior associate Ben Shellhorn (Denver).

For additional information visit www.hoganlovells.com

KOCHHAR

ADVISED EXIMIUS VENTURES ON SEED INVESTMENT 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

SYCIP

BPI TO FINANCE LANDMARK PHP 77B SALE OF PLDT TOWERS

BPI to Finance Landmark Php 77B Sale of PLDT Towers to Leading Global Tower Operators

MANILA - May 5, 2022: Bank of the Philippine Islands (BPI) recently inked two term loan facility agreements amounting to Php 77 billion, enabling the sale of PLDT's telecom towers to international tower operators, ComWorks Infratech Corp. (CIC) and ISOC edotco Towers, Inc.

In a statement, BPI said this tower sale "represents the largest cross-border acquisition in the technology, media and telecommunications space in the Philippines and the largest acquisition of assets in the country by international investors."

CIC was awarded 2,934 towers in Luzon, while ISOC edotco with 2,973 tower assets in Luzon, Visayas and Mindanao, according to BPI.

According to the edotco Group, this financing will allow the group to "future-proof" the country's digital economy infrastructure. This move underscores the government's efforts to improve connectivity in the country by co-locating facilities especially in the underserved and unserved areas.

BPI Capital Corp. served as the mandated lead arranger, while BPI Asset Management and Trust Corp. was the facility and security agent for both loan facilities. SyCip Salazar Hernandez & Gatmaitan (SyCipLaw) acted as counsel to the mandated lead arranger and the lender for each of the loan facilities.

For additional information visit www.syciplaw.com

TOZZINIFREIRE

GLOBAL TOWER OPERATORS DXT INTERNATIONAL IN RENEWABLES JOINT VENTURE WITH ASSET MANAGER PRIMSA CAPITAL

SAO PALO - 06 May, 2022: Brazilian firm Tozzini Friere assisted DXT International, a subsidiary of Swiss holding company Duferco, setting up a renewables joint venture with asset manager Prisma Capital worth 1 billion reais (US$200 million). The deal was announced on 19 April.

Under the agreement, both parties will merge their energy-related assets in Brazil to create the joint venture, which will be known as Matrix Participações.

Prisma and Duferco will have a 50% stake each in the venture. The merged entity will hold companies such as Matrix Comercializadora de Energia Eletrica – the largest independent energy trader in Brazil and fully owned by Duferco. The joint venture aims to consolidate the companies' position in the Brazilian renewables market and intends to develop wind and solar projects with more than 1.5 gigawatts of installed capacity. The facilities, which require investments of around 6 billion reais (US$1.3 billion), are expected to become operational by 2026.

Counsel to Prisma Capital Machado Meyer Advogados

Counsel to DXT International - TozziniFreire Advogados Partners Fernando Silveira Carvalho, João Busin and Leonardo Miranda, associate Mylla Brandão Mattar.

For additional information visit www.tozzinifreire.com.br

PRAC EVENTS
BULLETIN BOARD

Like millions around the globe, the COVID-19 pandemic has impacted our members and how we work.
Our industry follows others with a mix of restart and pause.
We meet in person where and when we can
while continuing to also 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.
We pivot. We adapt.
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 Event Connect

As we begin to shift to in-person industry related events PRAC delegates can ***STAY CONNECTED!***
Let us know your plans to attend upcoming industry events and we will put you in touch
with other attending PRAC Delegates prior to event start
Contact Email: events@prac.org

PRAC Let's Talk!

Join us in 2022 for our live one-hour virtual meetings
PRAC - Let's Talk! events are open to PRAC Member Firms only
Upcoming: May 25, 2022 @ 10::00 AM EDST
Register Email: events@prac.org

Visit www.prac.org

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


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Current trends in merger control in Argentina

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Antitrust

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The goal of this note is to briefly cover some recent trends in Argentinean merger control, especially, those arising as a consequence of the adoption of the Competition Law No. 27,442 (hereafter, ?Competition Law?) in May 2018.

1. The effective implementation of the ex-ante merger control regime, although envisaged by the Competition Law, today remains uncertain

In May 2018 Argentina adopted a new Competition Law which intended to substantially amend and modernize the competition law framework that had been in force in the country for almost 20 years.

The Competition Law envisaged several substantial modifications, two of which are relevant to merger control enforcement: 1) the adoption of a ex-ante or suspensive merger control regime whereby reportable economic concentrations could not be consummated without prior clearance from the National Competition Authority; and (2) the creation of a new, independent competition authority, i.e. the National Competition Authority, which would supersede the Secretary of Domestic Trade -a political appointee- as the enforcement authority of the Competition Law. Pursuant to the Competition Law, the National Competition Authority?s members are to be selected by the Executive Branch and subsequently agreed to by the Senate. The Competition Law also established that the ex-ante merger control regime would only enter into force one year after the establishment of the National Competition Authority by the Executive Branch.

Until now the Argentine government has not set up the new National Competition Authority as mandated by the Competition Law, which would in turn allow the one-year transition period to start running and thus allow the implementation of the suspensory merger control review.

However, a bill to amend the Competition Law, introduced by the ruling party, was approved by the Senate on February 4, 2021 and subsequently sent to the House of Representatives for analysis. The bill intends to introduce sweeping modifications to the Competition Law passed in 2018, but in this note we will only address those changes relating to merger control review.

If the bill is approved, the ex-ante merger control regime will enter into force 90 business days after the new law is published in the Official Gazette (and not one year after the creation of the new National Competition Authority as

established in the current Competition Law as explained above). Once the 90-business-days period elapses, reportable economic concentrations cannot be consummated in Argentina without prior antitrust approval by the Secretary of Domestic Trade. If the bill is not approved by the House of Representatives by November 30, 2022, it will lose its parliamentary status. After losing its parliamentary status, such bill could only be passed into law if it re-enters Congress and goes through the whole congressional approval process (notably, requiring the approval of both chambers of Congress).

Consequently, the Argentinean merger control system continues to be ex-post, whereby the notification of a reportable transaction can be lodged up until 1 week after closing or the acquisition of control, whichever occurs first.

2. A novel tool: the use of Objection Reports in merger control review

The Competition Law of 2018 introduced a novel tool in the framework of merger control review: the issuance of a preliminary report by the Secretary of Domestic Trade (so-called Objection Report) for those transactions deemed to pose competition concerns.

The Objection Report is only a preliminary and initial report, which does not entail a definitive finding of infringement or opposition by the Secretary of Domestic Trade. Once communicated to the merging parties, these have 15 business days to submit their views and comments to the Objection Report and/or offer mitigating measures.

Once notified to the merging parties, the Objection Report is subsequently published on the CNDC?s website for third parties to submit their opinion and views (if they so wish) on the Objection Report, which are not binding on the Competition Authority. Thereafter, the merging parties shall be summoned to a special hearing to discuss potential mitigating measures to address the concerns laid out in the Objection Report.

Since May 2018 when the Competition Law entered into force until today, the Secretary of Domestic Trade has issued Objection Reports in four different economic concentrations (all of them since late 2020).

3. The issuance of injunctions to suspend the implementation of a consummated merger

In June 2021, as part of the Objection Report in the Mirgor/Brighstar Argentina merger, the Secretary of Domestic Trade -to prevent a potential irreparable harm to competition- issued for the first time ever an injunction ordering the purchaser to keep its business separated from the target in the manner they were prior to the closing of the reported economic concentration until a final decision was adopted. Importantly, the injunction preventing the parties from effectively merging their activities was issued almost eight months after the closing of the transaction.

The use of injunctions in merger review is extremely uncommon and such tool was last used by the CNDC more than 10 years ago in a highly political transaction (Telefónica de España/Telco), which had been consummated almost two years prior to the injunction.

Tozzini Freire. ADVOGADOS

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

INFRASTRUCTURE AND ENERGY NEWSLETTER

April **2022**

Check out the April edition of our Infrastructure & Energy newsletter, featuring hot topics about Public Lighting bidding processes, outcome of the port auctions, new toll road projects, among others.

IMAGEM: LINH LE

PUBLIC LIGHTING

Barreiras opens public consultation and holds public hearing for the concession of Public Lighting services

On March 7, 2022, the Municipality of Barreiras, in the State of Bahia, opened a public consultation for the improvement of technical and legal documents related to the bidding process for the administrative concession of public lighting services. The project includes the modernization, efficiency, expansion, management, operation, and maintenance of the Municipal Public Lighting System. Contributions can be submitted until April 7, 2022. The bidding documents and other information about the project can be found here.

Public Lighting PPP project auction of Jaboatão dos Guararapes/PE is held at B3

On March 16, 2022, the auction for the administrative concession of the public lighting services of Jaboatão dos Guararapes, in Pernambuco State, was held at B3 (São Paulo Stock Exchange). The winning consortium, comprised of Enel X Brasil S.A., MOBIT – Mobilidade Iluminação e Tecnologia Ltda. and Selt Engenharia Ltda., presented a proposal of BRL 495,509.41 for the monthly payment, representing a discount of 54.6% in relation to the limit of BRL 1,095 million established in the public bidding. The successful conclusion of another Public Lighting PPP (Public-Private Partnership) project is a demonstration of the sector's heating up, with good expectations for 2022. More information can be found here.

Bidding documents for the Public Lighting PPP of Toledo/PR are published

On March 9, 2022, the Municipality of Toledo, in Paraná State, published the call for bids for the administrative concession to provide the services of installation, development, improvement, modernization, expansion, energy efficiency, operation, and maintenance of the municipal lighting network. The concession term is of 13 years and the estimated investment is BRL 35.3 million. The proposals shall be delivered at B3, in São Paulo, on April 25, 2022. The public judging session will take place on April 29, 2022, also at B3. Further information can be found here.

Camaçari/BA publishes public bidding for its Public Lighting PPP

The Camaçari City Hall published, on March 10, 2022, the public bidding for the PPP for the provision of public lighting services for a term of 13 years. The documents and proposals shall be delivered on April 25, 2022, at B3, in São Paulo. The public session will take place on April 29, 2022, also at B3. The judging criterion will be the lowest monthly payment to be made by the Municipality to the Concessionaire. The bidding documents can be found here.

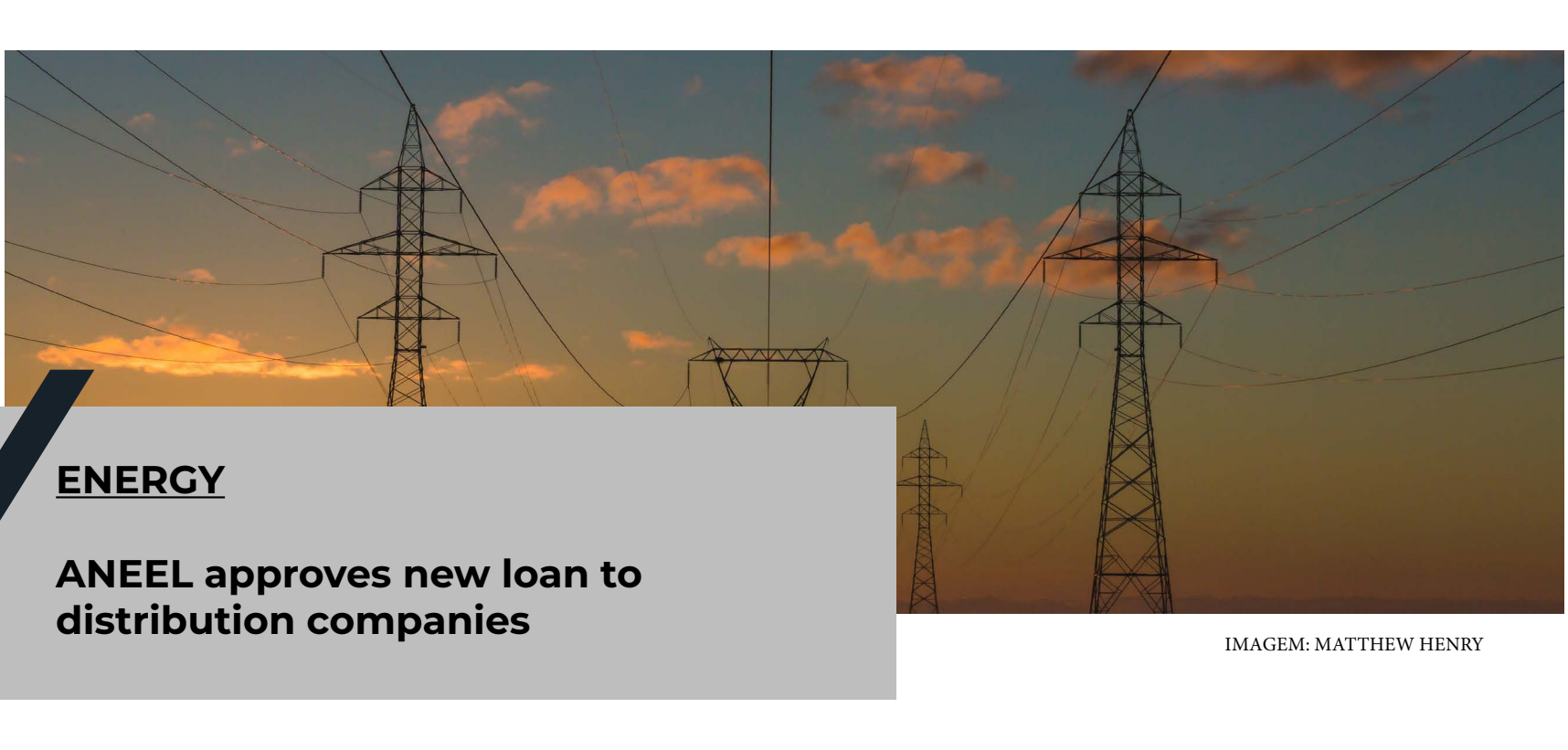

IMAGEM: MATTHEW HENRY

ENERGY

ANEEL approves new loan to distribution companies

The board of the National Electric Energy Agency (ANEEL) approved, on March 15, 2022, a new loan to the electricity sector, which will involve the amount of up to BRL 5.3 billion. Authorized by Provisional Measure No. 1,078/2021 and Decree No.10,939/2022, these resources will be used to cover measures adopted with the objective of avoiding failures in the supply of energy in the year 2021, when Brazil faced a period of severe drought.

The Provisonal Measure issued by the government also foresees a second transfer to the sector, estimateed at BRL 5.2 billion, totaling a loan of up to BRL 10.5 billion. However, the amount has not yet been approved by ANEEL and will be submitted for public consultation – the date of which remains open. This portion will cover a percentage of the cost of the emergency purchase of energy, carried out last year.

ANEEL defines criteria for revision of photovoltaic projects implementation schedule

On February 8, 2022, ANEEL approved changes to the implementation schedule for certain photovoltaic plants. The changes do not alter the starting dates of the Transmission System Use Agreements (CUST) already signed by the plants. The effectiveness of the change in the schedule is conditional on evidence that construction has started and evidence of the performance bond - in a transfer of shareholder control scenario; issuance of the Installation License (LI), execution of the connection contracts, among others. This decision is a relevant precedent for future requests for schedule changes for power plants that are undergoing change of control.

IMAGEM: JACK SLOOP

RAILROADS

Published Declaratory Act of the Brazilian National Congress on the termination of the Railways Provisional Measure

On March 11, 2022, the Brazilian National Congress published Declaratory Act No. 5/2022, informing that the term of the Provisional Measure No. 1,065/2021 (MP das Ferrovias) expired on February 06, 2022. Check here.

ANTT publishes resolutions on rail transport of dangerous products and on production and safety targets under rail concessions and on passenger rail transport

The National Agency for Land Transportation (ANTT) published, on March 11, 2022, Resolution No. 5,964/2022, which determines the application, to the rail transportation of hazardous products, of the Complementary Instructions of the Regulation for the Road Transportation of Hazardous Products (foreseen in the Appendix to ANTT's Resolution No. 5,947/2021). ANTT also published, on March 22, 2022, Resolution No. 5,966/2022, which promotes changes on the review and calculation of production goals and safety standards in the scope of railway concessions.

ANTT publishes resolution regulating passenger rail transportation

Resolution No. 5,974/2022 was published on March 11, 2022, regulating Passenger Rail Transportation. The resolution defines, among others, rules regarding users' rights, ticketing, cases of gratuity, reimbursement and delays, and authorizations for touristic, historical-cultural, and commemorative transport services.

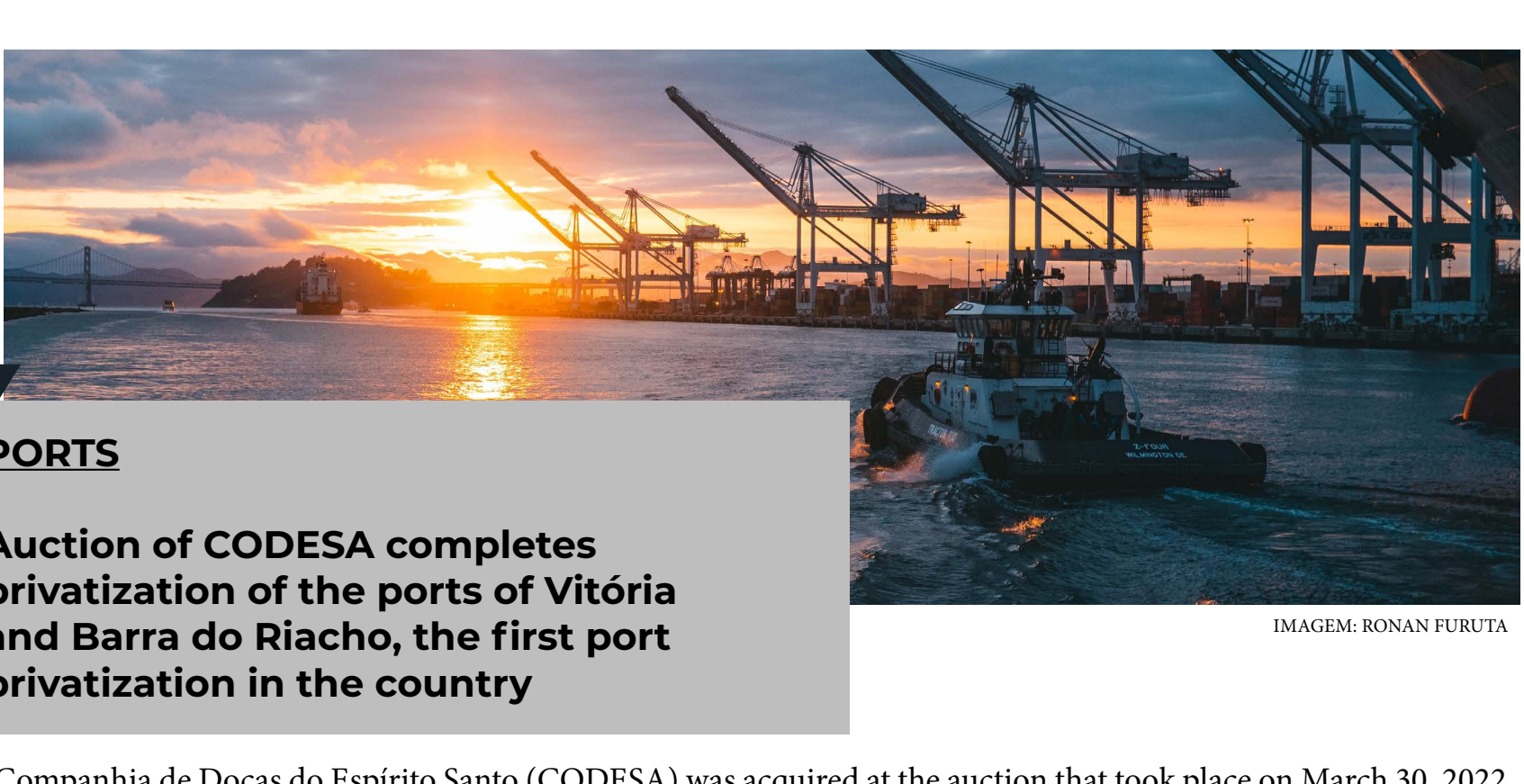

IMAGEM: RONAN FURUTA

PORTS

Auction of CODESA completes privatization of the ports of Vitória and Barra do Riacho, the first port privatization in the country

Companhia de Docas do Espírito Santo (CODESA) was acquired at the auction that took place on March 30, 2022, at B3, in São Paulo, by the investment and participation fund (FIP) Shelf 119 Multiestratégias, managed by Quadra Capital. CODESA is the concessionaire of Ports of Vitória and Barra do Riacho. The winning bid was for BRL 106 million upfront, and the commitment to pay BRL 186 million in 25 annual concession payments. The price of acquisition of the company's shares was of BRL 326 million. Investments expected are of BRL 855 million over the 35 years of the concession. This is the first port privatization process carried out in Brazil. More information can be found here and here.

The auction for the leasing of the PAR32 area of the Port of Paranaguá/PR has been carried out

Portos do Paraná held, on March 30, 2022, the auction of Terminal PAR32 of the Port of Paranaguá, in the State of Paraná, dedicated to handling general cargo, mainly sugar. The terminal, which has an area of 6,651 m², was granted to FTS PARTICIPAÇÕES S/A for the bid of BRL 30 million. The contract is valid for ten years. More information about the process can be found here.

Areas in the Port of Santos/SP and in the Port of Suape/PE are auctioned

The National Agency for Waterway Transport (ANTAQ) and the Ministry of Infrastructure held, on March 30, 2022, the auction of the STS 11 Terminal of the Port of Santos, in São Paulo State, dedicated to handling and storage of solid vegetable bulks, and the SUA 07 Terminal of the Port of Suape (PE), dedicated to handling and storage of mineral bulks and general cargo. COFCO International Brazil assumed STS 11 and the SUA 07 area was won by SUA Granéis Consortium (Agemar Transportes, Loxus and Marlog). Both leases have a term of 25 years and, jointly, have estimated investments of approximately BRL 825 million. For more information, click here.

9 vetoes related to BR do Mar program have been overturned

On March 17, 2022, the Brazilian National Congress reverted 9 of the 14 vetoes of the President of the Republic to Bill No. 4,199/2020, which originated Law No. 14,301/2022, responsible for creating the Program to Stimulate Cabotage Transport, known as BR do Mar (Sea Road). One of the main vetoes that was overturned was the one referring to the recreation of the Reporto, a tax benefit guaranteed to the port sector and extinguished at the end of 2021. Besides this, the Congress also overturned the veto to the device that dealt with the Additional Freight for the Renewal of the Merchant Marine (AFRMM), which relates to the rules for calculating freight in shipping. In the House of Representatives, 377 votes were cast to overturn the vetoes, against 6 in favor of maintaining them.

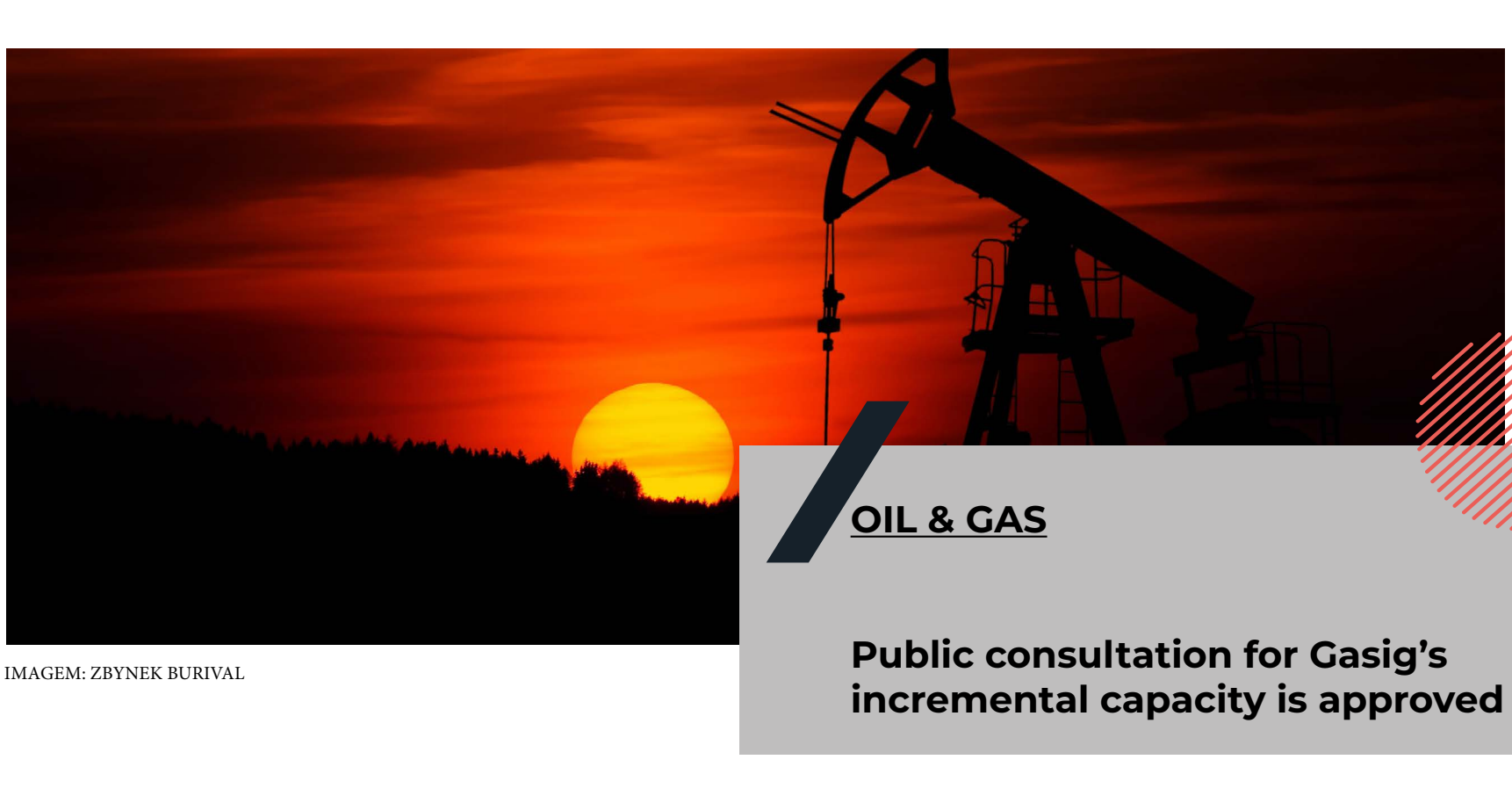

IMAGEM: ZBYNEK BURIVAL

OIL & GAS

Public consultation for Gasig's incremental capacity is approved

The National Petroleum, Natural Gas and Biofuels Agency (ANP) approved, on March 17, 2022, the public consultation for the Public Call Notice for contracting incremental natural gas transportation capacity in the Itaboraí-Guapimirim gas pipeline, the so-called Gasig, to be built by Nova Transportadora do Sudeste (NTS). The project foresees an extension of 11 km and a nominal capacity of 18.2 million m³ per day, connecting the natural gas processed in Gaslub Itaboraí to the national network of gas pipelines. The period for contributions to the public consultation will be 15 days from March 25 to April 8, after which the Public Call will be conducted indirectly by NTS.

Bill that aims to change the Budget Guidelines Law does not unburden gasoline

The bill sent in March by the Federal Government to the Brazilian National Congress, seeking to amend the Budget Guidelines Law (LDO) of 2022, aims to enable the reduction of taxes on domestic sales and imports of biodiesel, diesel fuel, liquefied petroleum gas, natural gas and aviation kerosene, but did not include gasoline. In addition, the proposal also exempted the exemption of fuels from the obligation to demonstrate absence of harm to the achievement of fiscal targets.

Bill aims at inserting hydrogen in gas pipelines

Senator Jean Paul Prates (PT/RN) presented, in the last week of March, the Bill No. 725/2022, which aims to include hydrogen as the Brazilian energy matrix and establishes goals for the insertion of this source in the national pipelines. The newest bill foresees that by 2032 a minimum of 5% of hydrogen will be incorporated into the gas pipelines network, with 10% as the minimum percentage by 2050. The project adds hydrogen to the Petroleum Law (No. 9,478/1997) and passes the regulation of the fuel to the ANP. It is also worth mentioning that 60% should be sustainable hydrogen, increasing to 80% from 2050 on.

IMAGEM: PASCAL MEIER

AIRPORTS

Rebidding of Viracopos Airport

On March 8, 2022, the Brazilian National Civil Aviation Agency (ANAC) approved the drafts of the public notice and concession contract for the rebidding of Viracopos airport in Campinas and submitted the documents with the respective studies for evaluation by the Federal Audit Court. The next step will be the publication of the public notice and the definition of the auction date, which is foreseen for the third quarter of 2022. The new concession will have a 30-year term, and investments of approximately BRL 4.25 billion are expected. To know more, click here.

Studies for the expansion of Americana Airport are authorized

On March 14, 2022, the Ministry of Infrastructure authorized the studies to enable the expansion and renovation of the Augusto de Oliveira Salvação Regional Airport, located in Americana, in São Paulo State. The studies will be financed by the Federal Government, through resources from the National Civil Aviation Fund. For more information, click here.

IMAGEM: NIKOLA MARKELOV

HIGHWAYS

BR-101/RJ is qualified for rebidding

The President of the Republic qualified the rebidding of the BR-101/RJ toll road within the Investment Partnership Program (PPI), through Decree No. 11,005/2022. The toll road is located between the border of the State of Rio de Janeiro with the State of Espírito Santo and the Presidente Costa e Silva Bridge, totaling 320.1 km in length. The request for the rebidding of the concession has been approved by ANTT, the Ministry of Infrastructure, and the PPI Council. To find out more, click here.

Rebidding of BR-163/MT toll road

On March 10, 2022, ANTT approved the rebidding of BR-163/MT, a toll road used to transport Mato Grosso commodities. The concessionaire Rota do Oeste filed for the return of the concession in 2014. The rebidding process is now under analysis by the PPI Council. For more information, click here.

Auction for toll road concession in Rio Grande do Sul will take place in April

The auction for the concession of the 271.5 km of toll roads – block 3, in the State of Rio Grande do Sul, is scheduled for April 13, 2022. The concession will be awarded to the bidder that offers the lowest tariff. The expected investment in the concession is of BRL 3.4 billion. The public notice and the draft contract can be seen at this link.

Auctions for the first two lots of the Minas Gerais State Highway Concession Program are postponed

On March 15, 2022, the Minas Gerais Secretary of State for Infrastructure and Mobility postponed the dates for the auction of Lot 1 – Triângulo Mineiro and Lot 2 – Sul de Minas, to July 21, 2022. The concessions have a total of 1,100 km in length, covering 38 municipalities. According to studies, investments for the two lots are estimated to be around BRL 4.5 billion over the 30-year concession period. For more information about the project, access link1 and link2.

Public Hearing for the Concession of the Arco Rodoviário Metropolitano de Fortaleza

A public hearing was held on March 11, 2022, to gather contributions on the proposed concession for the Arco Rodoviário Metropolitano de Fortaleza. The highway connects BR-116 highway, to the Port of Pecém, in São Gonçalo do Amarante. The auction will take place through a public bidding process with a minimum concession payment of BRL10 million. For more information, click here.

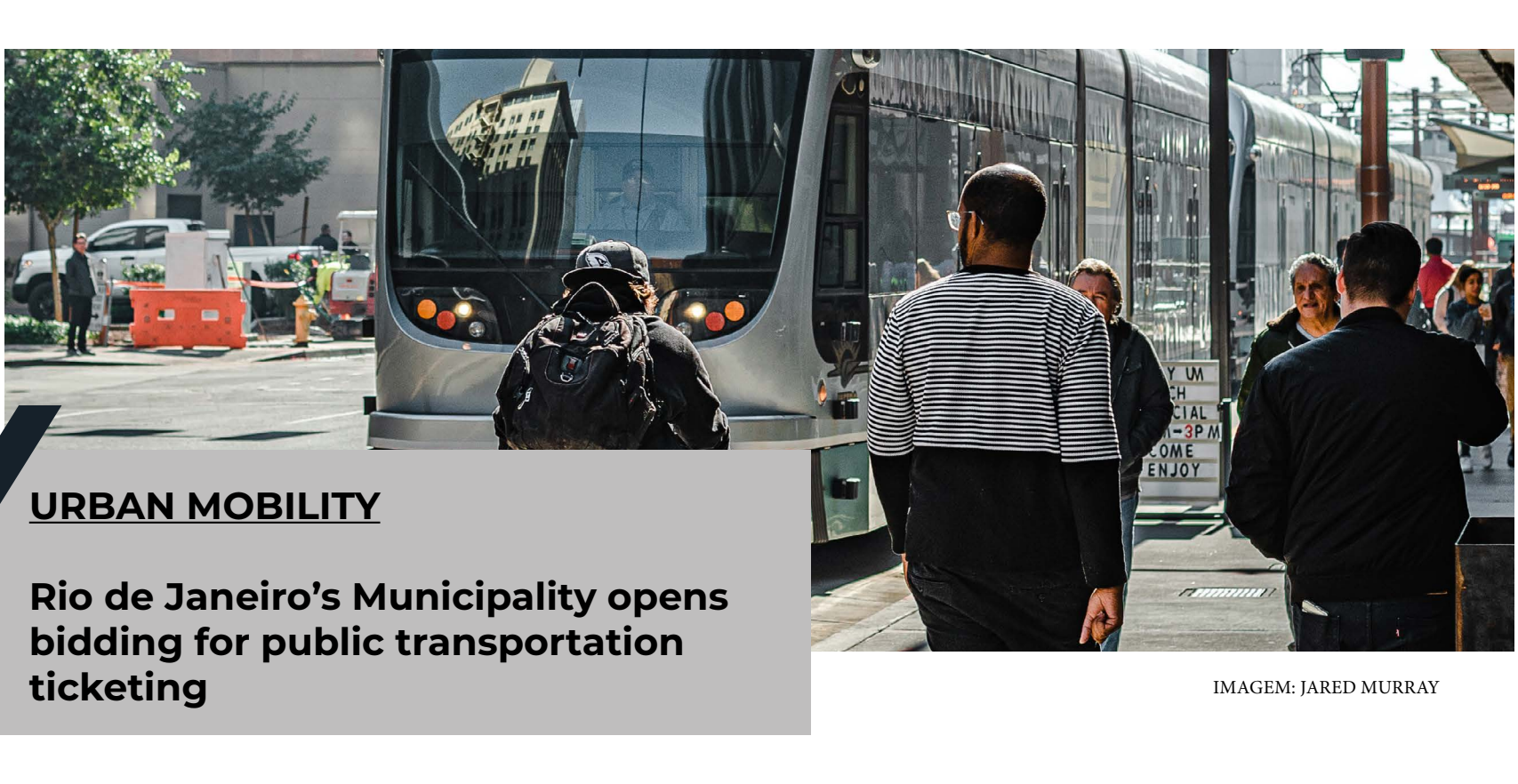

IMAGEM: JARED MURRAY

URBAN MOBILITY

Rio de Janeiro's Municipality opens bidding for public transportation ticketing

The Rio de Janeiro Municipality published invitation to bid for the concession of the Digital Ticketing for Public Transportation in Rio de Janeiro. The contract will cover the provision of services for the organization and operation of the Digital Ticketing System in all public transport systems owned by the Municipality, with an estimated value of more than BRL 1 billion and a term of 12 years. The envelopes with the qualification documents and proposals must be delivered to the public session, which will take place on May 24, 2022, at the Port of Rio de Janeiro Region Urban Development Company. More information and the bidding documents can be found here.

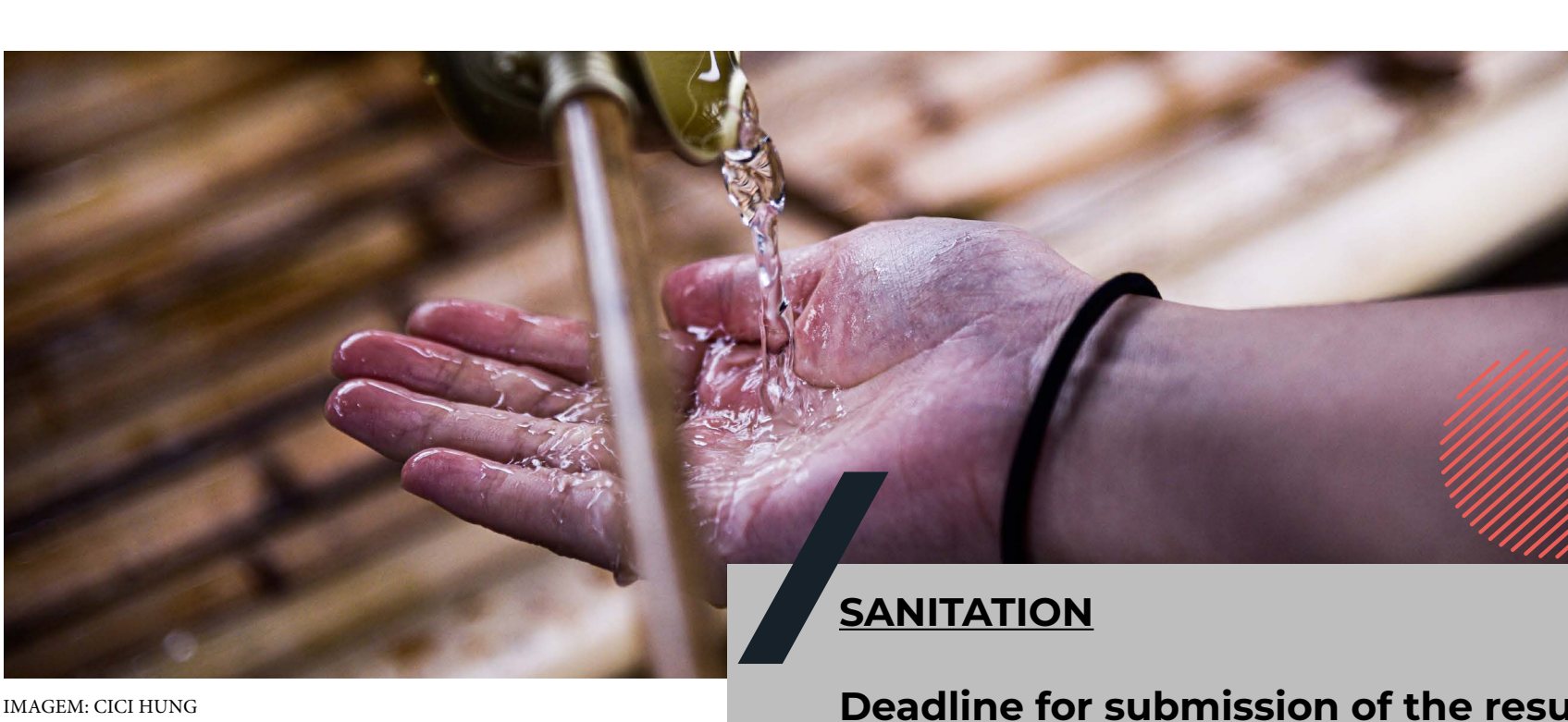

IMAGEM: CICI HUNG

SANITATION

Deadline for submission of the results of the evaluation of the evidence of economic-financial capacity of service providers has expired

On March 11, 2022, the National Water and Sanitation Agency (ANA) published a rectification of the Notice No. 03/2022 in the Official Gazette of the Union. The amendment aims to inform that the subnational regulatory entities should send to the agency, by March 31, a copy of the evaluation process for proving the economic and financial capacity of water supply and sanitary sewage providers.

IMAGEM: CLAUDIO SCHWARZ

SOLID WASTE

Ceará's solid waste State Policy is discussed in public hearing

The Secretary of Environment of the State of Ceará (SEMA) presented, in a public hearing held on March 28, 2022, the guidelines of the State Policy for solid waste. A further 11 public hearings are scheduled in various municipalities of Ceará, to discuss the "Public Policies for Solid Waste Management ". To learn more, click here.

Protocol of intent signed for technical cooperation in the State of São Paulo

The Secretariat of Infrastructure and Environment of the State of São Paulo (SIMA) has signed a Protocol of Intent with Fundação Ezute for technical cooperation in solid waste management. The agreement was signed on March 23, 2022 and has the objective of structuring Concessions and Public-Private Partnerships (PPPs) for inter-municipal consortia in São Paulo. To know more, click here.

IMAGEM: MIKE BENNA

SOCIAL INFRASTRUCTURE

Consórcio Novo PNI wins Iguaçu National Park concession

In an auction held at B3, on March 22, 2022, the New Iguaçu National Park Consortium, comprised of Cataratas Group and Construcap, won the concession for tourism services in the Iguaçu National Park. According to the Ministry of the Environment, the site has an average of more than 2 million tourists per year, and the project is one of the largest in the sector. The concession provides for investments of more than BRL 500 million in new infrastructure and another BRL 3 billion in the park's operation over the next 30 years.

Rio Grande do Sul State holds road show to present PPP project for the Erechim Prison Complex

The State of Rio Grande do Sul held, between March 22 and March 23, 2022, a roadshow with potential domestic and foreign investors. The project covers the concession of support services to the operation, including construction, equipping and maintenance of the Prison Complex. TozziniFreire Advogados is part of the consortium of consultants hired by BNDES to help structure the PPP pilot project of the Erechim Prison Complex.

Auction of the Urban Parks concession - Água Branca, Villa-Lobos and Cândido Portinari

The auction for the concession of the Água Branca, Villa-Lobos, and Cândido Portinari Parks, located in the city of São Paulo, took place on March 31, 2022, at B3, in São Paulo. The winner, with an offer of BRL 62.7 million, was the Consórcio Novos Parques Urbanos, formed by 7 companies, among which the current operators of the Zoo, Zoo Safári, and the Botanical Garden, which will be responsible for the cleaning, surveillance, operation, maintenance, and economic exploitation services of the Parks for a period of 30 years. The concessionaire will not be able to charge admission fees to the parks, but will be allowed to commercially exploit the site with real estate rental, events, and revenue from food kiosks. In addition, the new administration must follow master plans and preserve the historical characteristics of the spaces, especially in the case of Água Branca.

IMAGEM: JOSH APPEL

FUNDS

Public Call for the manager selection of the Development Fund for Sustainable Regional Infrastructure

The Council of the Development Fund for Sustainable Regional Infrastructure submitted to public consultation, between March 14 and March 21, 2022, a draft of the Public Call Notice for the selection of the manager of the fund. The fund aims to support the structuring and development of concession projects and public-private partnerships, to provide risk coverage, among others; also, it will prioritize projects in the North, Northeast and Center-West regions.

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Alberta Court of Appeal Releases Reference Opinion on Constitutionality of the Federal Impact Assessment Act

Written by Brad Gilmour, Bruce Mellett and Sean Assie

The Province of Alberta referred two constitutional questions to the Alberta Court of Appeal:

a. whether the federal *Impact Assessment Act* (IAA), part of Bill C-69, is unconstitutional in whole; and

b. whether certain regulations made under the IAA are unconstitutional in whole or in part.

The case was argued before the Alberta Court of Appeal in February of 2021.The Court released its opinion on May 10.

Opinion of the Court

By a four to one majority, the Alberta Court of Appeal is of the opinion that the IAA and its Regulations are unconstitutional. The opinion can be found on the Court of Appeal Alberta website.

In arriving at its opinion that the IAA and itsRegulations are outside the jurisdiction of Parliament, the Majority concluded that:

- the IAA and Regulations should be considered together and their pith and substance defined as "the establishment of a federal impact assessment and regulatory regime that subjects all activities designated by the federal executive to an assessment of all their effects and federal oversight and approval;"
- "[t]he subject matter of the IAA cannot be classified as falling within federal jurisdiction on the basis of the claimed heads of powers, individually or collectively" and "[t]he subject matter of the IAA, when applied to intra-provincial designated projects, falls squarely within several heads of provincial power;"
- the legislative scheme is an example of federal overreach into areas of exclusive provincial jurisdiction, including section 92A of the *Constitution Act*, 1982, which grants provinces power over non-renewable natural resources;
- the IAA would give the federal executive an effective veto over intra-provincial activities designated in the Project List, including *in-situ* oil sands projects over a certain size; and

- the legislation would allow the federal executive to impose its view of the public interest over whether and how intra-provincial projects should proceed.

The majority also expressed its concern over the IAA's duplication of existing provincial assessment regimes and for the impact on investor confidence.It further observed thatthere is no general federal jurisdiction over GHG emissions or projects and activities that may create them.

The opinion declined to attempt to sever the offending provisions and thus concluded that the IAA and Regulations are *ultra vires*.

In a dissenting opinion, Justice Greckol concluded that the IAA was a constitutional exercise of federal jurisdiction to facilitate planning and information gathering in decision-making, as well as to regulate activities' effects on matters within its jurisdiction in cooperation with the provinces and First Nations.

Bennett Jones LLP was counsel for Alberta on the Reference, with Bruce Mellett,Brad Gilmour and Sean Assie appearing for the Province.

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COURT ESTABLISHES SIGNIFICANT COSTS CONSEQUENCES FOR WRONGFULLY FILED BUILDERS LIENS

By: Ryan A. Shaw

A builder's lien is a powerful tool available to contractors to secure payment for work done or materials supplied to an owner's land. However, there are strict pre-conditions in the *Builders Lien Act* (the "BLA") that must be satisfied for a contractor to be entitled to a lien. A recent decision from the Supreme Court of British Columbia has established significant cost implications for lien claimants that fail to satisfy those pre-conditions.

Section 19 of the BLA creates a statutory right of recovery for costs and damages incurred by a landowner in circumstances where a claim of lien is improperly filed:

A person who files a claim of lien against an estate or interest in land to which the lien claimed does not attach is liable for costs and damages incurred by an owner of any estate or interest in the land as a result of the wrongful filing of the claim of lien.

However, the BLA is silent regarding the extent of, or the method of calculating, the costs and damages that are recoverable. The jurisprudence to date under s.19 similarly provided little guidance to would-be lien claimants and owners.

In *Century Group GP Co. Ltd. v KRS Excavating Ltd.*, 2022 BCSC 357 [*Century Group*], the Court considered the question as a matter of first instance in a summary trial application against a lien claimant who had been found to have registered a lien out of time. The owner had expended significant amounts of money to initially discharge and secure the claim of lien (by way of letter of credit) and on legal fees to establish that the claim of lien did not attach to the land.

In its summary trial application, the landowner advanced a claim for both the expenses incurred to secure the letter of credit and the actual legal fees incurred both to negotiate the security and establish that the lien was invalidly filed. The lien claimant argued that only party-and-party costs were recoverable by the landowner under s.19; a cost award that is assessed under the *Supreme Court Civil Rules* and inevitably significantly less than the actual legal fees paid.

In finding for the landowner, the Court found that legal expenses were clearly included within the term

"costs" in s. 19 of the BLA. The Court interpreted those "costs" as comprising two categories:

1. legal expenses incurred for releasing and replacing the lien, including expenses incurred in the investigation of the lien, the facts and law relevant to it, advising the client contemplating the discharge of the lien, and possibly including negotiating replacement security; and
2. legal expenses incurred in the legal proceedings taken to challenge the lien, which in this case included a court application to have the lien declared invalid and the within application under s.19 of the BLA.

The Court determined the actual reasonable legal expenses incurred under the first category of costs were recoverable on an indemnity basis, but those falling within the second category were to be assessed under the *Supreme Court Civil Rules*. In support of its analysis, the Court drew an analogy to the jurisprudence developed under BC's environmental legislation where the court had distinguished between "remediation legal costs" and "litigation legal costs". The Court likened the first category of "lien investigation/removal costs" to "remediation legal costs" which courts had found to be recoverable on an indemnity basis.

The Court also found that under s.19 the owner can recover any out-of-pocket 'costs' or other damages arising from the wrongful filing of the lien, which in this case included the costs related to the letter of credit which was initially posted by the owner as security for removing the lien from title to its property.

There are some important takeaways from *Century Group* for contractors and owners to consider when deciding to file or challenge a claim of lien, most notably the following potential cost consequences:

1. an owner who successfully challenges a wrongfully filed lien is entitled to recover its reasonable out-of-pocket legal expenses incurred in investigating and removing the lien before the commencement of litigation;
2. the owner is entitled to recover legal expenses incurred during the legal proceedings taken to challenge a lien, but those costs are to be assessed according to the Supreme Court Civil Rules, and will generally be on a party-and-party basis; and
3. the owner is entitled to recover damages for financial losses caused by the wrongful filing of the lien.

For lien claimants, it is important to note that these costs consequences flow from any lien that is found to have been improperly filed, regardless of whether the lien claimant believed at the time of filing the statutory pre-conditions were met. Accordingly, contractors and their legal counsel should take special care to ensure those pre-conditions are satisfied before filing a lien. Conversely, owners and their legal counsel should take time at the earliest possible stage to assess and determine the validity of a lien as most up-front legal expenses incurred will be recoverable if the lien is later found to have been improperly filed.

Century Group is a reminder of the importance of seeking timely legal advice in the context of any builders lien claim. For further information relating to claims of lien, or any other issues relating to construction projects, please feel free to contact Ryan Shaw.

/Carey

News Alerts

Central Bank of Chile opens public consultation on new access requirements and operating rules for the Formal Exchange Market

May 4, 2022

On April 21, 2022, a public consultation process on new access requirements and operating rules for the Formal Exchange Market was opened, in the context of the third stage of the modernization of the Central Bank's exchange regulations.

The main goals of the intended changes at this stage are the following: First, to facilitate the access of stockbrokers, securities agents and foreign banks with representative offices in Chile to the Formal Exchange Market (hereinafter "FEM"), lowering and easing up the requirements in this regard. Second, to have the entities participating in the FEM verify that the digital platforms they use for their transactions comply with certain minimum requirements and last, to repeal Chapter VIII of the Central Bank's Compendium of International Exchange Regulations as of July 1st of this year.

The specific modifications that are to be implemented regarding the first two points mentioned in the previous paragraph are briefly described below:

To facilitate access to the FEM

First, for the previously mentioned entities, meaning stockbrokers, securities dealers and foreign banks with representative offices in Chile, all supervised by the Financial Market Commission (hereinafter “CMF”), automatic access to the FEM will be granted, without the need to previously verify their compliance with integrity requirements or the creation of a guarantee.

Additionally, for smaller entities participating in the FEM (threshold yet to be defined), the periodicity of the information to be submitted to the CMF will be extended from its current daily basis to laxer and more spread-out periods, also yet to be defined.

Finally, the powers to approve the access of an entity to the FEM, to suspend it and even to revoke these authorizations, which currently require Resolutions issued by the Central Bank's Board, will be delegated upon the Financial Policy Division Manager.

Requirements for digital platforms used by FEM entities

This new regulation will require all FEM entities using digital platforms to verify that such platforms have adequate operational risk mitigation mechanisms, as well as objective and transparent access rules for their participants, to avoid any type of discrimination in them, so that participation on these platforms is not limited to entities participating in the MFC.

The reason for repealing Chapter VIII of the Compendium of International Exchange Regulations is due to the existence of alternative sources of information, through which the Central Bank can easily and reliably access this data, making the entities´ duty to inform the transactions required in this chapter, superfluous. The repeal will become effective on July 1, 2022.

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Legal Commentary

April 6, 2022

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Overseas IPOs: Key Issues in the Draft Archives Rules

Author: Transaction Group

On April 2, 2022, the China Securities Regulatory Commission (the "**CSRC**") published the revised *Provisions on Strengthening Confidentiality and Archives Administration of Overseas Securities Offering and Listing by Domestic Companies (Draft for Comments)* (the "**Draft Archives Rules**"). The *Draft Archives Rules* is now open for public consultations until April 17, 2022.

This newsletter summarises the key content in the Draft Archives Rules that are relevant for overseas securities offerings and listings of domestic companies.

Background to the revision of the confidentiality and archives administration rules

The Draft Archives Rules updates and revises the *Provisions on Strengthening Confidentiality and Archives Administration for Overseas Securities Offering and Listing* (Announcement No. 29 [2009] of the CSRC, "**Current Provisions**") jointly issued by the CSRC, the Ministry of Finance of the PRC, the National Administration of State Secrets Protection, and the National Archives Administration of the PRC.

The Draft Archives Rules are intertwined with and echo at the legislative level two key documents[1] in relation to the reform of the overseas listings record-filing system, which are still in draft form:

- *Provisions of the State Council on the Administration of Overseas Securities Offerings and Listings by Domestic Companies (Draft for Comment)* (the "**Administration Provisions on Overseas Offerings and Listings**");
- *Administrative Measures for the Record-Filing of Overseas Securities Offerings and Listings by Domestic Companies (Draft for Comments)* (the "**Filing Measures for Overseas Offerings and Listings**").

[1] The Administration Provisions on Overseas Offerings and Listings and the Filing Measures for Overseas Offerings and Listings are still in the legislative process and have not yet come into effect.

Analysis of the key constructs of the rules for the administration of confidentiality and archives

I Explicit expansion of the scope of application

Under the Current Provisions, the confidentiality and archives administration rules are applicable to an "overseas securities offering and listing", including companies to be listed, as well as securities companies and securities service institutions that provide relevant securities services. The term "overseas listed company" under the Current Provisions refers to a domestic joint stock limited company that issues overseas-listed shares abroad. In other words, the Current Provisions mainly apply to "H-shares" projects where the listed entity is incorporated in the PRC.

In light of the Administration Provisions on Overseas Offerings and Listings and the Filing Measures for Overseas Offerings and Listings, the scope for the application of the Draft Archives Rules has been adjusted to be consistent with the overseas listing record-filing system that is currently underling the legislative process. In other words, the Draft Archives Rules includes both overseas direct offerings (i.e. where the listed entity is incorporated in the PRC) and overseas indirect offerings (i.e. where the listed entity is not incorporated in the PRC, but where the PRC operating company is part of the group).

II Further clarification of regulatory aims

As a result of the above expansion of scope, the Draft Archives Rules adjusts its scope from "overseas listed companies (including proposed listed companies") under the Current Provisions to "domestic enterprises" covering both domestic joint stock companies directly listing overseas and domestic operating entities that indirectly list overseas through non-PRC incorporated listing vehicles.

At the same time, the Draft Archives Rules also clearly define "securities companies" and "securities service institutions", both of which are subject to its supervision, to include **domestic and overseas** securities companies, securities service institutions, as well as their domestic member institutions, representative institutions, affiliated institutions, and cooperative institutions, etc. This builds on the Current Provisions, by accounting for the complexities of overseas listings (i.e. subjecting indirect listings to its jurisdiction to account for the creation of overseas structures), and by refining and filling in regulatory gaps.

In addition, the Draft Archives Rules explicitly include within the scope of its supervision overseas accounting firms that engage in auditing business related to overseas issuances and listings of domestic enterprises. Overseas accounting firms that engage in auditing business related to overseas issuances and listings of domestic enterprises are required to abide by corresponding procedures in accordance with relevant state regulations. At present, according to the *Interim Provisions on the Audits Conducted by Accounting Firms Concerning the Overseas Listings of Domestic Companies* (effective July 1, 2015) issued by the Ministry of Finance, if a PRC company retains an overseas accounting firm, such overseas accounting firm should carry out business cooperation with a PRC accounting firm and fulfil its regulatory procedures, such as making a report to the provincial finance department where the PRC company is located, with a copy to the Ministry of Finance. After these Draft Archives Rules come into effect, whether new regulatory policies will be

adjusted for the cross-border practices of overseas accounting firms will be further clarified by regulators.

III Confidentiality and management system implementation requirements

1. Confidentiality and archives system

The Draft Archives Rules require that, in relation to the overseas listing activities of domestic enterprises (which as stated above also includes indirect listings), such domestic enterprises, as well as securities companies and securities service institutions providing relevant securities services, are required to strictly comply with the relevant requirements on confidentiality and archives management, **establish a sound confidentiality and archives system**, and take necessary measures to implement their confidentiality and archives management responsibilities.

It should be noted that "whether a sound and complete, standardized confidentiality and archives management system has been established and put in place" is currently a key point of review by the CSRC in H-share listings (the listed entity is incorporated in the PRC), and legal advisors are required to comment on this when filing an H-share listing application with the CSRC.

We understand that in the context of the Administration Provisions on Overseas Offerings and Listings, which sets out clear requirements for the establishment of confidentiality and archives management, companies proposing to submit record-filing applications to the CSRC under the Administration Provisions on Overseas Offerings and Listings should have established and implemented the relevant confidentiality and archives management systems prior to the filing. This will apply after the Administration Provisions on Overseas Offerings and Listings and the Filing Measures for Overseas Offerings and Listings take effect.

2. Regulatory procedures for materials involving state secrets or archives with a sensitive impact

According to the Draft Archives Rules, if during the course of an overseas offering and listing (whether listed directly or indirectly), if a PRC company needs to publicly disclose or provide to securities companies, accounting firms or other securities service providers and overseas regulators, any materials that contain relevant state secrets or that have a sensitive impact (i.e. be detrimental to national security or the public interest if divulged), the PRC company should complete the relevant approval/filing and other regulatory procedures.

Compared to the Current Provisions, where materials containing "state secrets" are subject to approval from competent authorities and a filing with state secrecy departments, the Draft Archives Rules expand such scope to include materials containing "state secrets and government work secrets". Unlike state secrets, the definition of which is relatively clear (i.e. bearing the "state secret" mark by the holder), "government work secrets" are determined respectively by responsible government organs and units without any uniform standard or marking requirement. Accordingly, "government work secrets" may include (but are not limited to), government documents and materials marked as "internal document", "internal matter", "internal material", and the like. Therefore, prospective listed companies should closely monitor secrecy or sensitive impact issues when providing service institutions and overseas regulators with documents and materials obtained from government departments (including

communications and correspondences with those departments).

The Draft Archives Rules also require a PRC company to complete relevant procedures stipulated by applicable national regulations if it plans to publicly disclose or provide documents and materials that, if divulged, would jeopardize national security or the public interest. This revision is consistent with the set of laws and regulations on national security, cybersecurity, and data security issued in recent years, stressing the need to stay compliant with relevant regulatory policies when disclosing listing-related documents and materials to service institutions and overseas regulators.

3. Divulgence reporting system

The Draft Archives Rules also require domestic companies, securities companies and securities service providers that discover the divulgence or possible divulgence of state secrets, to take immediate remedial measures and timely report the same to relevant organs and departments.

4. Archives administration requirements

- The Draft Archives Rules retain the requirement in the Current Provisions that archives such as **working papers produced in the PRC** by securities companies and securities service institutions, which provide PRC companies with securities services during its overseas issuance and listing, **should be stored in the PRC**. Furthermore, under the Draft Archives Rules, **the transmission of all such working papers to recipients outside of the PRC is required to be approved by competent authorities of the PRC**. This approval requirement no longer just applies to state secrets, national security or the vital interests of the state as stipulated by the Current Provisions;
- Article 8 of the Draft Archives Rules states, "Domestic companies that provide securities companies, securities service providers and overseas regulators with accounting archives [including working papers] or copies thereof, which have important preservation value to the nation and the public shall complete due procedures in compliance with applicable national regulations";
- Article 9 of the Draft Archives Rules also states, "Where archives [including working papers] or copies of archives, which have important preservation value to the nation and the public needs to be transmitted to recipients outside the PRC, due approval procedures shall be followed in accordance with applicable national regulations". Although the term "important preservation value to the nation and the public" is consistent with the terminology in the Archives Law of the PRC, neither has elaborated on the specific meaning of such expression. Also, the Archives Law prohibits "selling or gifting" such archives "to non-PRC or non-PRC organizations", which does not appear to be consistent to this Article 9. The specific requirements still need to be clarified in subsequent implementation rules.

IV Regulatory coordination mechanisms

1. Domestic regulatory coordination mechanism

On the basis of the regulatory coordination mechanism established between PRC regulators under the Current Provisions, the Draft Archives Rules adds the Ministry of Finance as another PRC regulatory authority (being the primary regulator of accounting firms), which reflects the overall content of the

Draft Archives Rules.

2. Cross-border regulatory cooperation mechanism

The Draft Archives Rules establishes a cross-border regulatory cooperation mechanism as prescribed in Article 177 of the PRC's Securities Law and strengthens cross-border regulatory cooperation under the principles of reciprocity and mutual benefit as prescribed in the Administrative Provisions Regarding Overseas Issuance and Listing. It shifts the overall direction of cross-border supervision of overseas listings from a "PRC dominant" approach under the Current Provisions to a "cross-border regulatory cooperation mechanism". Specifically,

(1) There is no differentiation between an "on-site inspection" and an "off-site inspection"

Under the Current Provisions, overseas securities regulators and other relevant bodies may conduct an on-site inspection or an off-site inspection on companies that have listed (or intend to list) overseas, as well as securities companies and institutions providing services for the overseas issuance and listing of securities (including accounting firms). An on-site inspection had to be conducted at the relevant site in the PRC, required prior approval from competent PRC authorities, and had to be carried out mainly by PRC regulators or had to have relied on the inspection results of PRC regulators. With respect to an off-site inspection, companies that have listed (or intend to list) overseas, securities companies and securities service providers (including accounting firms) had to obtain prior approval from competent PRC regulators only if the relevant case involved state secrets, archives (including working papers) administration and other matters subject to such prior approval.

In light of the extended jurisdiction under the Draft Archives Rules, regulating both direct and indirect overseas issuances and listings by domestic enterprises, and considering international cross-border audit supervision practices, the Draft Archives Rules no longer differentiate inspections by overseas bodies on geographical or methodological grounds, but rather places them under unified regulation of a common cross-border cooperation mechanism. This also addresses and consolidates Article 177 of the PRC's Securities Law, which provides that "overseas securities regulatory authorities shall not carry out investigation, evidence collection, etc. directly in the PRC", by enabling the cross-border cooperation mechanism to regulate investigations, inspections and evidence collection by overseas securities regulators and relevant authorities with respect to the overseas issuances and listings by domestic enterprises.

In addition, the Draft Archives Rules require relevant domestic enterprises, securities companies and securities service institutions to report to the CSRC or relevant authorities before cooperating with overseas regulators or relevant authorities in their investigations and inspections or providing materials to them. We tend to believe that this reporting obligation arises where those overseas regulators or authorities carry out an investigation or inspection under the cross-border regulatory cooperation mechanism, with the assistance from the CSRC or competent PRC authorities pursuant to relevant mechanisms. To some extent, it means the burden of obtaining the CSRC's prior approval for an investigation or inspection is shifted to overseas securities regulators or relevant overseas authorities pursuant to the cooperation mechanism. It is also consistent with Article 177 of the PRC's Securities Law, the enabling law of the Draft Archives Rules, in terms of the principle that "no organization or

individual is allowed to provide the documents and materials relating to securities business activities to overseas parties without the consent of the securities regulatory authority of the State Council and the relevant State Council department(s)." Where a cross-border regulatory cooperation mechanism is not established between the PRC and certain countries and organizations, Article 177 of the Securities Law will directly apply.

(2) Submission of the overseas listing application is separate from the provision of materials under the cross-border regulatory cooperation mechanism

After the promulgation of the PRC's Securities Law, the question of whether prior consent from the CSRC and relevant State Council department(s) was required prior to submitting overseas listing applications to securities exchanges and regulators outside of the PRC was a hotly debated and constantly inquired issue. As Article 177 is under Chapter 12 (Securities Regulatory Authorities) of the PRC's Securities Law, Paragraph 1 of Article 177 focuses on establishing a cross-border regulatory cooperation mechanism, and the first sentence of Paragraph 2 stresses that overseas securities regulators should not carry out evidence collection for an investigation directly in the PRC, the common belief in practice was that the provision of securities business related documents and materials under Paragraph 2 of Article 177 tended to exclude the submission of listing applications to overseas securities exchanges and regulators.

The Administrative Provisions Regarding Overseas Issuance and Listing of Securities and the Measures for the Overseas Issuance of Securities and Listing Record-Filings set forth record-filing requirements for domestic enterprises that intend to list and issue securities overseas, while the Draft Archives Rules establish a reporting system for relevant investigations, inspections and the provision of materials under a cross-border regulatory cooperation mechanism. These rules and regulations viewed together form the basis for regulating the overseas issuance and listing of securities by domestic enterprises.

We hope the above policy adjustments will positively promote a consensus to be reached soon between PRC regulators and overseas regulators on cross-border audit supervision, which will create a favourable regulatory environment for the development of PRC issuers listed overseas.

Important Announcement

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

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Brigard Urrutia

WORK FROM HOME REGULATION

May 2, 2022

On April 27th Decree 649 of 2022 (the "Decree") was issued, which regulates and establishes the general guidelines for implementing work from home in Colombia.

The following are the main changes of Decree 649 of 2022, regarding work from home:

What are exceptional, occasional, or special circumstances that give rise to work from home? They are extraordinary and unusual situations, which are estimated to be overcome in time, and are caused by external, non-work-related events or by events proper to the employee or the employer. They allow the employee to perform his/her duties in a place other than the usual workplace.

To whom does it apply? To employers and employees of the private sector, to the Administrators of Labor Risks (ARL), both in the national territory and abroad (exceptionally).

Request for work from home. If there are occasional, exceptional or special circumstances, work from home may be requested by the employee to his/her employer (in writing, on physical or digital media). In no case shall the employee's request for authorization to work from home give rise to an automatic entitlement to work from home. Likewise, in such circumstances, the employer shall be entitled to opt for the authorization to work from home with respect to one or more of its employees.

Proceeding for implementing work from home

a. If the request is submitted by the employee, written communication must be sent to the employer, clearly stating the reason for the request, with proof thereof.

b. Within a term of 5 days, the employer must review the request and the applicability of the reason invoked by the employee. The employer must give a positive or negative answer to the employee in writing.

c. In addition to the existence of exceptional, special or occasional circumstances, the following criteria must be considered (i) the employee's duties can be performed outside the usual place of work; (ii) the tools required for the enabling of work from home are available; and (iii) allowing work from home does not generate a lower productivity of the employee.

What are the aspects that must be included in the written authorization to work from home? The employer's authorization for an employee to perform his/her duties under the work from home modality must be include the following:

a. The description of the occasional, exceptional or special situation that justifies the implementation of work from home.

b. The term of the authorization to work from home, which must comply with the provisions of Law 2088 of 2021 (3 months, extendable only once, for an equal term).

c. The functions of the employee during work from home.

d. The means of communication to be implemented between employer and employee, as well as the channels for filing complaints for violation of the right to disconnection from work and/or labor harassment.

e. The address from which the services will be provided.

f. If the employee uses his/her own working tools to perform his/her duties, there must be a statement of the mutual agreement to do so.

g. If the working tools are provided by the employer, it must be indicated which tools are to be used, as well as the responsibilities for their safekeeping and return.

h. The IT security measures to be implemented.

Special obligations. The Decree also established the obligations of the employer, the employee, and the Labor Risks Administrator (ARL).

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Arias

COSTA RICA -

PRESIDENTIAL ELECTIONS 2022 – SUMMARY OF MAIN EVENTS

May/2022

During April, a new election process was completed in Costa Rica. After two electoral rounds, the presidential candidate Rodrigo Chaves of the Social Democratic Party was elected as the next President of Costa Rica. This electoral process also appointed the new 57 Congressman who will be part of the Legislative Assembly.

President-elect Chaves has a Ph.D. in economics from Ohio State University, worked for the World Bank for 28 years, and has extensive experience in macroeconomics, public policy, and finance. As part of his political career, he was Minister of Finance for the current administration, for a period of seven months.

The legislature for the 2022-2026 term will have a representation of six political parties. On May 1, 2022, in compliance with the constitutional mandate, the Legislative Assembly held the opening session of a new term, electing the six people that form the Legislative Directory. Rodrigo Arias was elected as president of the Legislative Assembly for the period 2022 to 2023, he will be accompanied by Gloria Navas as vice president, Melina Ajoy as first secretary and Luz Mary Alpízar as second secretary.

In relation to the cabinet, the new incoming Government has already made some announcements of Ministers, among which the following stand out:

- Ministry of Presidency, Natalia Diaz.
- Ministry of Finance, Nogui Acosta.
- Ministry of Foreign Affairs and Worship, Arnoldo André Tinoco.
- Ministry of Foreign Trade, Manuel Tovar.
- Costa Rican Social Security Administration, Álvaro Ramos.

In parallel to this process, the new administration is working on bills and executive decrees to solve immediate needs. So far, some issues have been discussed such as: regulation of administrative procedures, reduction of the cost of living, measures for the economic stability of the country, among others.

Finally, on May 8th, 2022, the transfer of powers will take place in the legislative building. In this act, the president-elect will take office.

The Department of Government Affairs of ARIAS will keep you informed of the main changes and proposals of the new administration. If you would like to manage regulatory and Government risk, please do not hesitate to contact us and we will gladly send you a quote. This type of low-cost service generates a high added value during the decision-making process.

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EL SALVADOR -

LAW AMENDMENTS TO BE CONSIDERED FOR DOCUMENTING CREDIT OBLIGATIONS

May/2022

On April 26 of this year, the Legislative Decrees No. 293 containing amendments to the Law against usury (the "Law"); No. 294 containing amendments to the Civil Code and No. 295 containing amendments to the Commercial Code were published in the Official Gazette, all with the purpose of having an updated legal framework and adopting the pertinent measures to avoid abusive practices in credit relationships.

The amendments to the Law are principally aimed to establish the powers of the Superintendence of the Financial System ("SSF") and the Consumer Protection Authority ("DC") as regulators and supervisors of compliance with the Law, as well as to incorporate infractions and sanctions for its non-compliance; also, the amendments to the Civil Code and the Commerce Code are aimed to establish that credit obligations agreed with usurious interest will be null and void as to the interest agreed upon that constitutes usury.

Among the main amendments to the Law, it is established that the following, among others, are considered as infractions: charging or consigning in credit contracts interest rates higher than those established in the Law; not registering in the creditors' registry of the Central Reserve Bank ("BCR"); not having credit operations segmentation policies and charging interest on interest, establishing also that any agreement referring to interest on interest will be null and void.

The amendments provide that infractions to the Law will be sanctioned with a fine, the amount of which will be determined in accordance with criteria such as the seriousness of the infraction, economic capacity of the offender, damage caused, establishing that:

- For supervised creditors, fines will be imposed through the SSF, of up to 1,000 minimum wages, without prejudice to other sanctions that may be determined in accordance with the Law of Supervision and Regulation of the Financial System.
- For non-supervised creditors, fines will be imposed through the sanctioning court of the CD, of up to 500 minimum wages, without prejudice to other sanctions that may be determined in accordance with the Consumer Protection Law.
- In the event that it is determined that collective or diffuse interests are affected, the fine will be established from 500 up to 1200 minimum wages.

As a special provision it is established that the judges of the Republic, when receiving an executive claim derived from the non-payment of credits, must request from the BCR a report as to whether the creditor is registered in the creditors' registry and if not, shall warn the creditor so that within 12 business days from the notification of such resolution, the creditor registers in the BCR. If the creditor does not proceed with the registration, the judge shall inform the CD or the SSF, as the case may be.

The BCR will have 90 business days from the effective date of the amendments to adapt the corresponding technical norms.

The decrees containing the aforementioned amendments will become effective 8 days after their publication in the Official Gazette.

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THE COMMISSION ADOPTS ITS NEW BLOCK EXEMPTION REGULATION FOR VERTICAL AGREEMENTS AND THEIR NEW GUIDELINES

In the context of the revision of the Vertical Block Exemption Regulation (the "VBER"), the European Commission has adopted, on 10 May 2022, the new text of the exemption regulation, which enters into force from 1st June 2022 and expires on 31 May 2034. A transition period is foreseen until 31 May 2023 (see the Commission's press release here).

As far as the Guidelines are concerned, the Commission has so far approved the content of the draft published on 10 May and their formal adoption will take place at a later stage, when all language versions are available.

This publication follows an extensive consultation process which lasted more than three years. During this process, the Commission published a Staff Working Document (our alert here), an Initial Impact Assessment (our alert here) and, in July 2021, the draft texts (our alert here), which gave rise to a final consultation on the subject of information exchange under dual distribution scenarios.

The main objectives pursued by the Commission in drafting the new Regulation were:

(i) readjusting the safe harbor offered by the VBER to eliminate "false positives" and reduce "false negatives";
(ii) providing stakeholders with updated guidance adapted to the current environment, which is being reshaped by the growth of e-commerce and online platforms;
(iii) reducing compliance costs for businesses by simplifying the current rules

THE MAIN DEVELOPMENTS

The main changes concern the following points:

Dual distribution

- The Commission has found that, in particular as a result of the growth of e-commerce, dual distribution situations (where a supplier sells its products not only through independent distributors but also directly to final consumers, in direct competition with its independent distributors) have become common. The Commission, therefore, considers that the current exception for dual distribution could lead to the exemption of vertical agreements where horizontal issues may no longer be negligible with regard to the exchange of information between competitors linked by a vertical relationship.

- The new Regulation thus clarifies that, while vertical agreements between competitors may be exempted, **the exemption does not apply to exchanges of information that are either not directly related to the implementation of the vertical agreement or are not necessary to improve the production or distribution of the contract goods or services** (or do not fulfil either of these conditions). The Guidelines (§100) provide examples of exchanges of information that may not be exempted, such as information on future prices.

In the event that a supplier and a buyer exchange information that does not fulfill the conditions of Article 2(4) (a) or (b), the exchange of information will have to be subject to an individual analysis under Article 101(1) TFEU. In this case, the other provisions of the vertical agreement concerned may nevertheless continue to benefit from the exemption.

In practice, suppliers operating a distribution network while also selling goods or services directly will therefore have to be particularly cautious to ensure that the information exchanged with their distributors or reported back to them does not concern (non-exhaustive list):

(i) the future prices of the supplier or buyer;

(ii) individually identifiable information about final consumers - unless the information is intended to meet the particular requirements of a final consumers (loyalty program, after-sales service, etc.) or if the information is used to monitor compliance with a selective distribution network.

This latest exception shows the Commission's willingness to recognize the special status of selective distribution networks, which need specific protection.

(iii) products sold by the distributor under its own brand name when this information is exchanged with a manufacturer of competing products, unless the latter has manufactured the products sold by the distributor.

Platforms

- The Commission introduced a new exception to the exemption applicable to dual distribution scenarios regarding vertical agreements relating to the provision of online intermediation services if the intermediation service provider **also sells goods or services in competition with undertakings to which it provides online intermediation services** (Article 2.6).

- In other words, vertical agreements relating to the provision of online intermediation services entered into by so-called “hybrid” platforms can no longer benefit from the block exemption, marking a willingness of the Commission not to allow these players to benefit from "false positives" when they could have a key role in the market.

- The Commission has also maintained the definition according to which **online intermediation platforms are considered to be acting as “suppliers” and seems to assume** that, generally, these platforms would not fulfil the conditions to benefit from the **exception applicable to agency relationships** and their relationships with their users will, in fact, be subject to Article 101(1) TFEU.

  There is no doubt that this approach will raise difficulties of interpretation, particularly with regard to commission relationships which traditionally fall outside the scope of Article 101(1) TFEU and for which it will be necessary to clarify whether or not the status of agent applies when the intermediary in question decides to digitize its activities by developing a platform.

- The consequences of such a definition are likely to be structuring and will need to be carefully analyzed

Regarding restrictions on active sales

- The Commission has taken a step forward by providing a **clearer definition of the concepts of active and passive sales, adapted to the development of e-commerce**, by specifying that certain types of online behavior, when they **specifically target a customer**, can constitute active sales. This is particularly the case for any means of targeting a customer, such as targeted advertising, the use of price comparison or referencing tools, the use of country extensions beyond the country of establishment, etc. (cf. Article 1 (l) and (m) of the Regulation).

- In effect, the Commission is giving new meaning to territorial or customer exclusivity in the context of online sales which were previously considered by default to be passive sales and therefore could not be restricted.

- It also introduces, in Article 4(b), the possibility of **shared exclusivity**, allowing a supplier to designate, in a given territory or for a customer group, a maximum of **5 other exclusive distributors**.

- Article 4(c) gives greater protection to selective distribution systems against sales by unauthorized distributors located in the territory to which the selective distribution extends.

A more flexible approach to organizing the conditions of online and offline sales...

The Commission has taken into account the major development of online trade and the need to provide operators with greater flexibility in the organization of their distribution systems. It has rightly noted that, contrary to the environment that prevailed in 2010, all operators have now largely embraced online trade, so that there is no longer any legitimate reason to maintain safeguards to promote this form of trade.

It therefore proposes to relax the rules on **dual pricing** and on the **equivalence principle**.

- **With regard to dual pricing**: Article 4 of the Regulation **no longer qualifies dual pricing as a hardcore restriction** and therefore allows suppliers to set different wholesale prices for online and offline sales of the same distributor, provided that the dual pricing is intended to encourage or reward an appropriate level of investment, corresponding with the costs associated with each channel, and is not intended to restrict the distributor's ability to sell the products online, which would constitute a hardcore restriction.

- **With regard to the principle of equivalence**: the Guidelines provide that, in the context of selective distribution, **the selection criteria imposed for online sales need no longer be broadly equivalent** to those imposed on physical outlets, since these two channels are intrinsically different in nature.

... But, an extension of the notion of restricting online sales

- However, the new flexibility is not without a counterpart, as the Commission has adopted a rather broad definition of the notion of online sales restrictions.

For example, and this is new compared to the draft published in July, **restrictions on online sales** are now listed as a hardcore restriction in a new Article 4(e) of the Regulation, which provides that constitutes a hardcore restriction the fact for a supplier to prevent its buyer or its buyer's customers from effectively using the internet to sell the contract goods or services, while clarifying that this principle does not prevent the supplier from imposing on the buyer "other restrictions of online sales".

Paragraph 206 of the Guidelines provides examples of restrictions that may indirectly have the object of preventing the effective use of the internet within the meaning of Article 4(e), such as requiring the distributor to seek prior approval from the supplier for each individual online sale (however leaving open the possibility of seeking general prior approval for online sales), prohibiting the buyer from using the supplier's trademark on its website or prohibiting the buyer from using online advertising tools such as search engines or price comparison tools.

- Also in relation to online sales restrictions, the Commission provides updated guidance to clarify and harmonize the applicable rules and to incorporate the guiding principles for the assessment of online restrictions derived in particular from the case law of the Court of Justice of the EU, notably in the ***Pierre Fabre and Coty*** cases, for which it clarifies the scope.

***

Although the Regulation does not revolutionize the field, its entry into force will undoubtedly raise a large number of practical questions in the context of their implementation, particularly in the organization of distribution networks and their commercial strategies

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Educational lesson – Hong Kong court stays just and equitable winding-up petition to arbitration

3 May 2022

A Hong Kong court has stayed a petition presented on the just and equitable ground to arbitration, on the basis of arbitration agreements found within what the petitioner described as quasi-partnership agreements formed in 2007. The court also dismissed claims that the appointed arbitrator lacked the requisite qualifications and experience, and that a stay would lead to further costs and duplication of resources.

The court in *China Europe International Business School v Chengwei Evergeen Capital LP* [2021] HKCFI 3513 found that the substance of the disputes fell within the arbitration agreements and rejected the petitioner's argument that the issues in the petition affected third parties who were not parties to the arbitration agreements.

The petitioner, China Europe International Business School (China Europe), was established in 1984 as a non-profit making joint venture under an agreement made between the PRC government and the European Commission.

In 2006, China Europe intended to launch a publishing business in the mainland to cater to the growing needs of business executives for state-of-the-art management concepts and skills. The parties entered into a memorandum of understanding to set up a joint venture company that was followed by a suite of agreements dated 3 May 2007 between China Europe, the Joint Venture (JV) company and the first to third respondents (R1-R3), which were companies incorporated in the Cayman Islands. The agreements all contained an identical or substantially similar arbitration clause.

China Europe sought to wind up the 7th respondent in the action, CEIBS Publishing Group Ltd (the company) on the just and equitable ground under section 177(1)(f) of the Companies (Winding Up and Miscellaneous Provisions) ordinance, claiming that the company was in effect a quasi-partnership between China Europe and R1-R3 which had acted in breach of the agreements and the *"common understandings"* regarding share ownership and control that were said to exist between the parties.

The company applied for an order to stay the petition claiming that the substance of the disputes in the petition fell within the ambit of the arbitration agreements.

Applicable principles

The Court of First Instance observed that Hong Kong was a pro-arbitration jurisdiction and added that in most legal systems, arbitration clauses in corporate or partnership documents are valid and enforceable. Although winding-up proceedings do not fall within the scope of section 20 of the Arbitration Ordinance on the basis they are not an action, the court had inherent jurisdiction to grant a stay on a petition presented on the just and equitable ground in favour of arbitration.

Whilst it was correct that in general, a company should not take an active role in a dispute between shareholders, the court did not have to take a *"blinkered approach"* and reject any application made by the company in a petition on the just and equitable ground. It was also not correct to say that the company had no interest in the petition.

The court was of the view that the substance of the disputes in the petition fell within the scope of the arbitration agreements for several reasons.

Until the incorporation of the company, there was no prior relationship or dealings between the petitioner and R1-R3 which was necessary for the court to find there was "something more" beyond what the shareholders had agreed in the 2007 agreements.

The point was fundamental because *"in considering a petition on the just and equitable or unfair prejudice ground, the starting point is that shareholders are required to act in accordance with the contractual bargains, and the burden is on the petitioner to satisfy the court that there is 'something more' beyond what the parties agreed to in contract"*.

In the court's view, the arbitration agreements were wide enough to cover the disputes over the existence and effect of the common understandings regarding share ownership and control as they were plainly disputes *"relating to"* the agreements. It followed that the disputes should be determined in arbitration unless the plaintiff could discharge the burden of satisfying the court as to why it should be allowed to pursue the petition.

In this regard, the court dismissed the plaintiff's claims that the issues in the petition affected third parties who were not parties to the arbitration agreements and rejected the idea that a stay would necessitate further costs and expenses and lead to duplication of resources. The court also rejected claims that the sole arbitrator was not qualified to hear the dispute.

Key takeaways

- The decision is not the first time a Hong Kong court has stayed a petition to wind up a solvent company under the just and equitable ground.
- That occurred in *Re Quiksilver Glorious Sun JV Ltd* [2014] 4 HKLRD 759, which was cited in China Europe, and in which the court observed that winding-up proceedings were not an "action". However, the *Quiksilver* case marked the first time a Hong Kong court stayed a petition to wind up a solvent company so that an underlying shareholder joint venture dispute arising from a China joint venture could be resolved in accordance with an arbitration agreement between the shareholders.
- Where petitions are presented on other grounds than on the just and equitable ground, the Hong Kong court may use its discretion to refuse an application for a stay.
- The general pro-arbitration stance of the Hong Kong courts means that the courts will generally try to ensure that the parties' contractual bargain will be realised where the parties have clearly opted for arbitration as their preferred means of dispute resolution.

Read about other key decisions in the past year in our Arbitration Highlights in the Year of the Tiger

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Luxembourg

CSSF Circular 22/810 - Pre-marketing and Cross-border Marketing Notification Procedures

Friday 13 May 2022

*On 12 May 2022, the CSSF published Circular 22/810 on the procedures to be followed by Luxembourg-based undertakings for collective investment in transferable securities (**UCITS**) and investment fund managers in order to notify pre-marketing or cross-border marketing of units or the discontinuation of such activities. The circular follows the introduction of an additional notification procedure for the discontinuation of cross-border marketing of sub-funds of UCITS and alternative investment funds (**AIFs**) and new requirements for alternative investment fund managers (**AIFMs**) in the event of pre-marketing, as described in Directive 2019/1160 of the European Parliament and the Council of 20 June 2019.*

Circular 22/810 indicates that the new procedures will gradually be made available on the CSSF's eDesk. CSSF Circular 22/810 is available only in French.

Due to the introduction of Circular 22/810, Circular 11/509 will be repealed.

Scope of Circular 22/810

The circular applies to supervised entities and to certain notification procedures, including for the marketing (and discontinuation of the marketing) of units of UCITS and pre-marketing in Luxembourg or another Member State by Luxembourg-based AIFMs (pursuant to Article 28-1 of the AIFM Act 2013).

eDesk information and procedures

The CSSF indicates that it will be possible to complete certain procedures relating to pre-marketing and cross-border marketing only via eDesk (ePassporting eDesk).

A list of relevant procedures can be found on the eDesk homepage. This list will be updated regularly and should be consulted by the entities concerned. Additional information and instructions in the form of a user guide will also be made available on eDesk.

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SKRINE

Merger Control: The Third Pillar of Malaysian Competition Law

13 May 2022

On 26 April 2022, the Malaysia Competition Commission ('**MyCC**') issued a **Consultation Paper on the Proposed Amendments to the Competition Act 2010 (Act 712)** ('**Consultation Paper**') that was accompanied by a supplementary document, **Salient Points of the Proposed Amendments to the Competition Act 2010 (Act 712)** ('**Supplementary Document**').

As mentioned in the Consultation Paper, the MyCC proposes, among others, to amend 25 existing provisions of the Competition Act 2010 ('**the Act**') and more significantly, to introduce 40 new provisions, of which 20 will establish a merger control regime of general application into the Malaysian legal landscape.

This article will focus only on the proposed amendments outlined in the Consultation Paper and the Supplementary Document that will introduce a merger control regime in Malaysia.

Key features of the proposed merger control regime

The merger control regime will prohibit mergers or anticipated mergers (if consummated), within or outside of Malaysia, which may result in a substantial lessening of competition ('**SLC**') within any market for goods or services ('**section 10A prohibition**').

The merger control regime would be a hybrid regime instead of a pure voluntary regime whereby it:

a. makes it mandatory under section 10F to notify the MyCC of anticipated mergers which exceed the threshold to be prescribed by the MyCC ('**applicable threshold**'); and

b. allows anticipated mergers or mergers which do not exceed the applicable threshold to be voluntarily notified to the MyCC under sections 10H and 10I respectively, whether before or after the mergers or anticipated mergers have been consummated.

The proposed merger control regime would be suspensory in nature. This means that parties to any anticipated mergers which are notified to the MyCC are prohibited under section 10G from implementing all or any part of the merger before the MyCC's clearance. A breach of this requirement will render the merger **void**.

Failure to notify mergers or anticipated mergers will result in a merger violation which attracts a financial penalty of up to 10% of the value of the merger transaction or anticipated merger transaction.

What is, and is not, a merger

For the purposes of the merger control regime, a merger occurs (and may be subject to the section 10A prohibition) in the four circumstances stipulated in section 10B:

a. two or more previously independent enterprises combine into one single enterprise and cease to exist as separate legal entities;

b. the acquisition of direct or indirect control of the whole or part of one or more enterprises;

c. the acquisition of assets of one enterprise by another enterprise results in the acquiring enterprise replacing or substantially replacing the enterprise whose assets are being acquired, in the business or the part concerned of the business, in which the acquired enterprise was engaged immediately before the acquisition; or

d. the creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity.

Having said that, section 10C sets out four circumstances in which a commercial or economic activity in a market will not amount to a merger for the purposes of the Act:

a. the control is acquired by a person acting in his capacity as a receiver or liquidator or an underwriter;

b. all of the enterprises involved in the merger are, directly or indirectly, under the control of the same enterprise;

c. the control is acquired solely as a result of a testamentary disposition, intestacy or the right of survivorship under a joint tenancy; or

d. the control is acquired by an enterprise whose normal activities include the carrying out of transactions and dealings in securities for its own account or for the account of others where:

- the securities are acquired on a temporary basis (i.e. twelve months from the date on which control of the other enterprise commences); and

- the acquiring enterprise must not exercise the voting rights with a view to determining the strategic commercial behaviour of the target enterprise or must exercise these rights only to prepare the total or partial disposal of the enterprise, its assets or securities.

Relief of liability

Section 10D will provide an avenue for enterprises to relieve their liability from the section 10A prohibition on the grounds that the economic efficiencies of the merger or anticipated merger outweigh any adverse effect from the SLC caused by the merger or anticipated merger ('**section 10D relief**'). The burden lies on the enterprise seeking the benefit of a section 10D relief to establish the existence of economic efficiencies.

Limitation on the merger control regime under the Act

The merger control regime under the Act will not apply to four categories of mergers that are set out in a revised First Schedule of the Act, namely:

a. mergers involving commercial or economic activities regulated under industry-specific legislation, namely the Communications and Multimedia Act 1998, Malaysian Aviation Commission Act 2015, Energy Commission Act 2001, Petroleum Development Act 1974 (for upstream activities), Gas Supply Act 1993 and Postal Services Act 2012;

b. mergers between enterprises licensed, approved, registered or prescribed by the relevant licensing or regulatory authority under the Financial Services Act 2013, Islamic Financial Services Act 2013, Development Financial Institutions Act 2002, Money Services Business Act 2011, Capital Markets and Services Act 2007, Securities Industry (Central Depositories) Act 1991, Labuan Financial Services and Securities Act 2010, Labuan Islamic Financial Services and Securities Act 2010 and Water Services Industry Act 2006;

c. mergers engaged in order to comply with a legislative requirement; and

d. mergers carried out in relation to an enterprise entrusted by the Federal or a State Government with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the section 10A prohibition would obstruct the performance of the task assigned to the enterprise.

Review and decision making powers of the MyCC

Parts IIIA and IVA will confer on the MyCC various powers in relation to anticipated mergers or mergers. These include the power to review and issue decisions pertaining to anticipated mergers or mergers notified to the MyCC under sections 10F, 10H or 10I.

The types of decisions which the MyCC may issue in relation to an anticipated merger or a merger are set out in section 43C. They are as follows:

a. the section 10A prohibition will be infringed if the merger or anticipated merger is consummated; or

b. the section 10A prohibition has not been infringed due to:

- the effect of a section 10D relief;
- the acceptance of a commitment that addresses the SLC concerns which have been identified (see below); or
- the merger does not result, or anticipated merger, if consummated, may not be expected to result in a SLC within any market for goods or services.

Clearance decision

Where the MyCC has determined that a merger or anticipated merger, if consummated, does not infringe the section 10A prohibition, the MyCC may issue a clearance decision under section 43F.

The MyCC may, if it thinks fit, specify a validity period for the clearance decision for an anticipated merger. In such event, the anticipated merger must be consummated within the specified validity period (or any extension thereof granted by the MyCC).

Prohibition decision

Where the MyCC has determined that a merger or anticipated merger, if consummated, infringes the section 10A prohibition, the MyCC may issue a prohibition decision under section 43G.

Upon the issuance of a prohibition decision, the MyCC may require any infringement to be ceased immediately, and specify steps to be taken by the enterprise to end the infringement. The MyCC may also impose a financial penalty not exceeding 10% of the worldwide turnover of an enterprise over the period during which the infringement occurred and give any other direction as the MyCC deems appropriate.

Interim decision

Where the MyCC proposes to make a decision that a merger or an anticipated merger, if consummated, will infringe the section 10A prohibition, the MyCC may give notice of a provisional decision under section 43D. The provisional decision must specify the reasons for the provisional finding, any remedial action that the MyCC proposes to apply, and the period within which the enterprise may make a written representation on matters specified in the provisional decision.

Review period

Section 10F requires the MyCC to issue its decision on the anticipated merger that was notified to it within 120 working days from the date when it accepts the notification as complete ('**merger review period**'). An anticipated merger is deemed approved if the MyCC has not made any decision on the anticipated merger upon the expiry of the merger review period.

The MyCC may stop or suspend the merger review period in the following circumstances:

a. the MyCC requests further information from the enterprise pursuant to section 34C;

b. the enterprise seeks an extension of time to file their written representation under section 43D;

c. the enterprise requests to make an oral representation under section 43E; or

d. the enterprises submit a commitment offer under section 43H.

The Consultation Paper suggests that an anticipated merger that is mandatorily notified can be cleared within 40 working days if the MyCC is satisfied that it does not result in a SLC in any market

for goods or services. Where the MyCC has concerns that an anticipated merger which is mandatorily notified raises SLC concerns, the MyCC may take up to 120 working days to complete an in-depth assessment and arrive at a decision whether to clear or prohibit the anticipated merger.

Request for information and documents

Section 34C will confer power on the MyCC to request for additional information or documents while reviewing mergers or anticipated mergers notified under sections 10F, 10H or 10I. The issuance of such a request will suspend the merger review period until the additional information or documents are received by the MyCC.

The notification of a merger or anticipated merger will be deemed to be withdrawn (without affecting the right to file a fresh notification) if the additional information or documents are not provided to the MyCC within the time stipulated by the MyCC (or any extended period granted by the MyCC).

In addition, the MyCC may require any person or government entity to provide information and documents relating to any market that is the subject of the notification. A person who fails to comply with the MyCC's request commits an offence. This provision has far-reaching effects as it may require a person who is not involved in the merger or anticipated merger to provide information or documents that are proprietary or confidential.

Commitment

Where a merger or anticipated merger may have the effect of SLC in any market, the enterprises involved may at any time before the MyCC makes its decision on the merger or anticipated merger, offer a commitment to the MyCC under section 43H to remedy, mitigate or prevent the SLC caused by the merger or anticipated merger so that the MyCC can give a clearance decision for the merger or anticipated merger.

The offer of a commitment results in a suspension of the merger review period for up to 60 working days to enable the MyCC to review the commitment offer.

Where a commitment offer has been accepted by the MyCC, it shall issue a clearance decision and make a finding that the anticipated merger or merger does not infringe the section 10A prohibition.

If the MyCC has reasonable grounds to suspect that a commitment which forms the basis of a clearance decision is based on information that is incomplete, false or misleading, or a party providing the commitment fails to implement or comply with the terms of the commitment, the MyCC may revoke the clearance decision.

Upon the request from the merging enterprise, the MyCC may accept a variation of a commitment or accept another commitment in place of an earlier commitment received by the MyCC.

Powers of investigation

The proposed amendments confer various powers of investigation onto the MyCC in relation to mergers and anticipated mergers, including:

a. whether or not an anticipated merger or merger exceeds the applicable threshold;

b. whether a merger has resulted, or anticipated merger may be expected to result, in a SLC within any market for goods or services; and

c. whether there has been a violation of the mandatory notification requirement under section 10F or the requirement to not consummate an anticipated merger under section 10G before receiving a clearance decision from the MyCC ('**merger violation**').

An investigation may only be commenced by the MyCC upon receipt of a complaint from a person or a direction of the Minister of Domestic Trade and Consumer Affairs, and only after it has conducted an inquiry to determine the merits of the complaint or the Minister's direction.

Penalty for merger violation

The MyCC is empowered under section 43L to impose a financial penalty of up to 10% of the value of the merger transaction or anticipated merger transaction on enterprises that have committed a merger violation.

Key dates

The consultation period ends on 27 May 2022. Submissions received by the MyCC (**amendment@mycc.gov.my**) or the Malaysia Productivity Corporation (**Unified Public Consultation (UPC) Portal**) after this date will not be entertained by the MyCC.

The proposed amendments are targeted to be tabled in Parliament in October 2022. If the proposed amendments are passed, a further consultation will be conducted in February 2023 with stakeholders on the applicable threshold, notification fee and notification procedures. Thereafter, the MyCC will issue the practice standard and merger-related guidelines in July 2023 and the merger control regime is expected to come into effect one year after the proposed amendments are passed by Parliament, i.e. in October 2023.

Comments

The major pieces of the Malaysian merger regime that remain to be unveiled are the applicable threshold, the practice standard and the merger-related guidelines. The indicative quantum of the applicable threshold will be disclosed when the next round of consultation begins in February 2023, whilst the standard and guidelines are targeted to be issued in July 2023.

The proposed amendments are timely as the Act has not been amended since it came into operation over a decade ago on 1 January 2012. As mentioned in the Consultation Paper, Malaysia is one of about 20 out of 140 countries that has a competition law framework without a merger control regime. We also have the dubious distinction of being the only country in the ASEAN region that does not have such a regime.

Hitherto, the Act only contained provisions that deal with anti-competitive conduct and abuse of dominant position. The introduction of the merger control regime, which establishes the third pillar of the competition law framework, will be a game changer for the mergers and acquisitions

landscape in Malaysia.

Article by Tan Shi Wen (Partner), To' Puan Janet Looi (Partner) and Angela Hii (Associate) of the Competition Law Practice.

Santamarina + Steta

S+S UPDATES

THE UNITED STATES ELIMINATES THE MASK MANDATE IN THE AIRLINE INDUSTRY

APRIL 2022

EXECUTIVE SUMMARY:

- As of April 18, 2022, the use of masks on domestic flights and some international flights to and from the US, as well as in airport terminals, is no longer mandatory.
- In Mexico, the use of masks on flights to and from national territory, as well as in airport terminals, continues to be mandatory, in compliance with the requirements of the Federal Civil Aviation Agency.

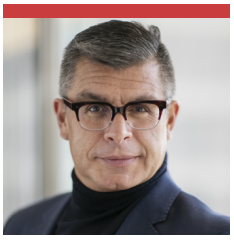
As a result of a Florida Federal Court ruling, the U.S. Centers for Disease Control and Prevention (CDC) order requiring the mandatory use of masks on public transportation conveyances and at transportation hubs is no longer in effect. The court ruling stated that the CDC order was unlawful because it exceeded the statutory authority of the CDC and because its implementation violated administrative law.

Therefore, effective immediately and as of April 18, 2022, the use of masks on domestic flights and some international flights to and from the U.S. and at U.S. airport terminals is no longer mandatory. However, the unexpected ruling has generated uncertainty in the U.S. aviation industry, with several U.S. airlines calling for understanding and patience while U.S. regulators assess potential next steps.

MASK MANDATE IN MEXICO

In Mexico, the use of masks on board flights to and from Mexican territory and at Mexican airport terminals remains mandatory pursuant to Mandatory Circular CO SA-09. 1/13 R4 dated November 27, 2020, issued by the Mexican Federal Civil Aviation Agency.

The Circular establishes the civil aviation emergency plan for events of public health importance (health emergency response plan) applicable to both domestic and international operators –including passengers and crew– and to any person in transit or visiting Mexican airport facilities.



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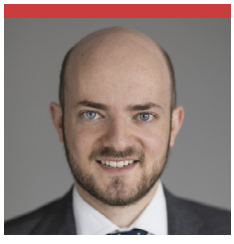

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Additional Buyer's Stamp Duty and Additional Conveyance Duty to apply for transfers of residential property into a living trust

May 17, 2022

Introduction

On 8 May 2022, the Ministry of Finance (MOF) announced that with effect from 9 May 2022, any transfer of residential property into a living trust will be subject to additional buyer's stamp duty (ABSD) at the rate of 35% (ABSD (Trust)). In addition, with effect from 10 May 2022, additional conveyance duties (ACD (Trust)) will now apply to transfers of equity interests in Property Holding Entities (PHEs) into living trusts, and where applicable, buyer's stamp duty (BSD), ABSD, and seller's stamp duty (SSD) will also be imposed when a beneficial owner renounces his or her interest in residential property held on a bare trust.

According to the MOF, these new measures aim to plug a gap in the existing ABSD and ACD regimes, and will largely affect those who use trusts with unidentified beneficiaries to avoid the high ABSD rates on their subsequent purchases of property.

The previous ABSD regime and the relevance of this change

Generally, ABSD liability depends on the profile of the buyer as at the date of purchase of the residential property, which generally consists of two factors:

a. The profile of the buyer (whether the buyer is an entity or an individual, and; if buyer is an individual – whether buyer is a Singaporean citizen, permanent resident, or foreigner); and
b. Count of residential properties owned by the buyer.

Previously, when a trust was structured such that it had no identifiable beneficial owners at the time residential property was transferred into the trust, ABSD was not payable. To address this lacuna, the MOF has since introduced ABSD (Trust), which takes effect on and from 9 May 2022. Under the ABSD (Trust), instruments transferring residential property into a **living trust** will be subject to ABSD at the rate of 35%, even if there is no identifiable beneficial owner at the time of transfer. For the purposes of ABSD (Trust), a "living trust" is defined by the MOF as a trust that is created by the settlor during his or her lifetime, *i.e.*, an *inter vivos* trust. This definition is broad and seems to affect **all transfers** of residential properties into an *inter vivos* trust.

Nonetheless, as an administrative concession, trusts which only consist of identifiable individual beneficiaries (*e.g.*, fixed trusts) may be eligible for remission of ABSD (Trust) under the Stamp Duties (Trusts for Identifiable Individual Beneficiary) (Remission of ABSD) Rules 2022 (ABSD (Trust) Rules). An "identifiable individual beneficiary" is defined in Article 3 of the First Schedule of the Stamp Duties Act 1929 as an individual:

a. Who is identified in a declaration of trust as the beneficiary of the estate or interest (whether solely or with other individuals); and
b. Who, because of the trust, has a beneficial interest in the estate or interest (whether solely or with other individuals) and the terms of the trust do not stipulate that the estate or interest is revocable, variable, or subject to any condition subsequent,

excluding an individual who is entitled to any estate or interest in property in remainder or reversion.

For the avoidance of doubt, the Inland Revenue of Singapore (IRAS) has further clarified that each of the following is not an identifiable individual beneficiary:

a. An individual who has not been born on the date of the declaration of trust;
b. An individual who is only entitled to the income of the property under the trust; or
c. An individual whose estate or interest in the property under the trust is a contingent or discretionary interest, or who becomes entitled to an estate or interest in the property only upon revocation of the trust.

Under the ABSD (Trust) Rules, the refunded amount will be based on the difference between the ABSD (Trust) rate of 35% and the highest applicable ABSD rate corresponding to the profile of the beneficial owner(s). For reference, we include here a table of the current ABSD rates:

Summary of ABSD rates		
Profile of buyer		**ABSD rates (on or after 9 May 2022)**
Singapore Citizens	First residential property	NIL
	Second residential property	17%
	Third and subsequent residential property	25%
Singaporean Permanent Resident	First residential property	5%
	Second residential property	25%
	Third and subsequent residential property	30%
Foreigners	Any residential property	30%
Entities	Any residential property	35%
Housing Developers	Any residential property	35% (remittable, subject to conditions) + 5% (non-remittable)
Trustee (NEW)	**Any residential property**	**35%**

To apply for the remission of ABSD (Trust), the following conditions must be met:

a. The residential property is held on trust for one or more identifiable individual beneficiaries only;
b. ABSD (Trust) of 35% has been paid; and
c. The claim is made within 6 months after the date of execution of the instrument.

If you wish to find out more on the remission process of ABSD (Trust), please feel free to reach out to us and we can advise further.

Additional Conveyance Duty (Trust)

Prior to the current amendments, ACD has already applied to transfers of equity interest in Property Holding Entities (PHEs) into living trusts with identifiable beneficial owners who are or become significant owners of the PHEs. Where there is no identifiable beneficial owner when the equity interests in the PHEs are transferred into the trust, ACD treatment has been unclear.

In line with the ABSD (Trust) update above, ACD will, on or after 10 May 2022, also be payable on transfers of equity interests in PHEs into all living trusts executed, where the significant owner threshold has been reached, **even if there is no identifiable beneficial owner** of the equity interests at the time of transfer (ACD (Trust)). To determine if the significant owner threshold is reached for a living trust with no identifiable beneficial owner, IRAS would look at the equity interests that **the trustee** holds in addition to those held by his associates.

For the avoidance of doubt, IRAS has also clarified that ACD will be payable where:

a. Equity interest in a PHE was transferred to the trust on or after 10 May 2022;
b. The trustee subsequently executes a conveyance of the trust equity interest to a beneficiary who was previously not an identifiable beneficial owner at the time the equity interests were transferred to be held on trust; and
c. This beneficiary remains or becomes a significant owner as a result of this conveyance.

Renunciation of Residential Property Held on Trust

BSD, and where applicable, ABSD and SSD, will be imposed where:

a. A residential property is transferred into a living trust on or after 10 May 2022;
b. All the beneficial owners of the residential property are identified at the time of transfer; and
c. A beneficial owner of that property renounces his interest in the property on or after 10 May 2022.

The beneficial owner renouncing his interest must give notice of the renunciation in writing (i.e. through a Prescribed Notice (Renunciation)) to the settlor and the Commissioner of Stamp Duties within a specified period, on which the applicable stamp duties will be imposed. As a result of this renunciation, the original beneficial owner may also be liable for SSD.

Where the settlor attains interest in the residential property upon the renunciation, he/she becomes the new beneficial owner, and he/she will have to pay the relevant stamp duties (e.g., BSD, ABSD) within a prescribed period.

Potential issues that require further clarity

At this juncture, since the announcement by the MOF only refers to transfers into a “living trust”, it appears that a transfer of residential property into a testamentary trust would not be subject to ABSD (Trust).

Further, given the absence of transitional provisions, the treatment of an option-to-purchase for a residential property that has already been issued to a trustee, but not yet exercised before 9 May 2022, or a purchase where the option has already been exercised but completion has not yet occurred before 9 May 2022, has not been clearly spelt out.

While we await for more definitive guidance on the issues above, please feel free to reach out to us if you require any advice or assistance on ABSD (Trust) or ABSD (ACD).

Dentons Rodyk thanks and acknowledges Practice Trainee Sam Cho Joo and Intern Rachael Ang for their contributions to this article.

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Newsletter

Rulings of the Taiwan Supreme Court Criminal Grand Chamber and the Constitutional Court of the R.O.C. (Taiwan) in March 2022 on Interlocutory Appeals against Rulings involving the Code of Criminal Procedure

04/29/2022

Wen-Ping Lai/ Sophie Kao

I. Taiwan Supreme Court Criminal Grand Chamber Ruling 110 Tai-Kang-Da-Tzu Nos. 427 and 1493

i. According to Article 376 of the Code of Criminal Procedure, criminal cases involving larceny, fraud or offenses that carry a maximum sentence of less than three years' imprisonment shall not be appealed to the third instance court, in order to lighten the Supreme Court's caseload. However, a defendant receiving an acquittal in the first instance that is appealed by the prosecutor will not be offered judicial remedies if found guilty in the second instance. Since Article 376 could not adequately protect the defendants' right to litigation, it was amended on November 16, 2017, with the proviso to paragraph 1 and paragraph 2 added. These amended regulations permit, as an exception, an defendant found guilty in the second instance to appeal to the third instance where the defendant was found not guilty, exempt from prosecution, or dismissed from prosecution, or where there was a jurisdictional defect, in the first instance.

ii. Nevertheless, Article 405 of the Code of Civil Procedure states, "No interlocutory appeals shall be filed against a decision made by the court of second instance regarding a case which is not appealable to the court of third instance." It was not amended as Article 376 was, which causes controversies. Therefore,

the rulings of the Taiwan Supreme Court Criminal Grand Chamber explicitly state "where the decision of the first instance court was not guilty, exempt from prosecution, or dismissed from prosecution, or there was a jurisdictional defect, and is revoked by the second instance court and a guilty ruling is pronounced," the ruling falls under the proviso to Paragraph 1, Article 376 of the Code of Criminal Procedure as well as the exception in Article 405, and the ruling could be appealed to the third instance one time.

II. Constitutional Court Judgment 111 Hsien-Pan-Tzu No. 3

i. Parts III and IV of the Code of Criminal Procedure stipulate the procedures for appeal and interlocutory appeal. A defendant could file an interlocutory appeal against a detention decision made by prosecutor in accordance with Paragraph 1 of Article 403, reading: "A party may file an interlocutory appeal to the direct appellate court if he/she disagrees with the court ruling, unless otherwise provided." However, there are no stipulations regarding whether counsel for the defense could file an interlocutory appeal for the defendant.

ii. The Constitution Court affirms that to effectively protect defendants' right to litigation, counsel for the defense could file an interlocutory appeal against a detention or remand decision for the interests of the defendant in accordance with Article 419 of the Code of Criminal Procedure, which reads: "Except otherwise stipulated in this Chapter, interlocutory appeals shall apply mutatis mutandis Chapter I of Part III regarding Appeals," and thus apply Article 346 of Chapter I of Part III, which reads: "An agent or defense attorney in the original trial may appeal for interests of the defendant; provided that it may not be contrary to defendant’s express will."

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BLOG POST / ENERGY & ENVIRONMENTAL LAW BLOG

Environmental

Biden Administration Reinstates Supplemental Environmental Projects as Enforcement Tool

By Gerald F. George

05.10.22

As part of the Biden Administration's overall strategy of enhancing environmental justice, the Department of Justice (DOJ) and Environmental Protection Agency (EPA) jointly announced last week the return (with modifications) of an old environmental enforcement tool—the Supplemental Environmental Project (SEP).

Reflecting hostility to expansive use of environmental enforcement both by EPA/DOJ and through citizen suits, the Trump Administration's Justice Department issued a memorandum on June 5, 2017, to prohibit settlement provisions that called for contributions to third parties. Those contributions were typically for the purpose of carrying out SEPs, environmentally useful projects executed by the third party and paid for by the defendant to offset some of the latter's potential civil or criminal penalty risk.

Corporate defendants liked SEPs, which look better and certainly feel better than a payment to the U.S. Treasury. Municipal agency defendants also favor SEPs, given that their violations often occurred because they were cash-strapped and the project might provide some otherwise unavailable public benefit (such as training for inspectors), as opposed to a large cash penalty that simply diverts funds from operations to the federal government.

Those benefits aside, the Trump Administration felt the SEPs could be used to avoid legislative approval for expenditure of federal funds and provide public relations benefits to groups they considered hostile to their goals. The policy was then placed in the regulations governing DOJ policies, at 28 CFR 50.28.

Not surprisingly, there has been considerable opposition and some litigation challenging the old policy. To address these issues, the current DOJ has revoked the former SEP policy, issuing a statement recognizing the long history and high value of SEPs and noting their particular benefits to disadvantaged communities. DOJ has replaced the Trump policy with an interim guidance while it prepares a new regulation.

The new guidance, however, does not give carte blanche to all SEPs. As had been EPA and DOJ SEP policy for several years, a project cannot be something that would otherwise be required or which a federal agency would carry out as part of its normal functions. It has to be a specific project with a specific connection to the alleged violations (air-related SEPs for air quality violations, for example) and cannot designate a specific third party as a recipient.

None of this is surprising or particularly limiting. A creative advocate should not be hampered in finding a project with genuine public value. SEPs are old friends to those subject to environmental enforcement actions. Welcome back!

04.14.22

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.

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#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

Restrictions on Lawyer Ads Involving Drugs and Medical Devices Are Not Unconstitutional, Says Federal Court

18 May 2022

The Fourth Circuit has found that a West Virginia state law restricting how attorneys can solicit clients in pharmaceutical and medical device cases does not violate the First Amendment. At the end of April, a three-judge panel reversed a lower court ruling that had handed summary judgment to two personal injury lawyers and their client in their suit that alleged the law was unconstitutional.

Recently, in *Recht v. Morrisey*, the Fourth Circuit rebuffed a First Amendment challenge to a West Virginia law that places restrictions on legal advertisements soliciting clients for lawsuits regarding the use of prescription drugs and medical devices.[1] We've all seen these advertisements on TV – a lawyer announces that a particular drug or medical device is potentially causing harm, and urges users of the product to join a lawsuit against the manufacturer. A growing focus in recent years, however, has been on the potential harm from the advertisements themselves. In 2019, the Federal Trade Commission (FTC) sent letters to seven legal practitioners and lead generators expressing concern that these advertisements "may be deceptive or unfair under the FTC Act."[2] The FTC noted that the Food and Drug Administration (FDA) had received reports of "consumers who saw lawsuit ads about the prescription drugs they were taking, discontinued those medications, and suffered adverse consequences as a result."

In response to concerns over these advertisements, West Virginia passed a law in 2020 – the Prevention of Deceptive Lawsuit Advertising and Solicitation Practices Regarding the Use of Medications Act (the "Act") – prohibiting certain legal advertising practices and requiring disclosures and warnings for the protection of patients.[3] The requirements of the Act are intended to prevent these legal advertisements from being misrepresented as professional, medical, or government agency advice about prescription drugs or medical devices. Among other requirements, the Act states these advertisements must specifically disclose that they are "paid advertisement[s] for legal services," to identify the sponsor of the advertisement and the attorney or law firm that will represent clients, and to warn viewers against discontinuing use of FDA-approved drugs or medical devices without consulting with their doctors.

Shortly after the Act was passed, it was challenged by two plaintiffs' attorneys in court on First Amendment grounds. The District Court for the Northern District of West Virginia held for the plaintiffs, and permanently enjoined and prohibited West Virginia from enforcing the Act. On appeal, however, the Fourth Circuit reversed the District Court's decision.[4] The technical legal issue was whether the Act was within the bounds of permissible regulation of commercial speech. The Fourth Circuit opinion concludes that the Act "survives constitutional challenge" and works to "protect the health of West Virginia citizens who

may be misled into thinking that attorneys are reliable sources of medical advice." Although the plaintiffs have indicated they intend to appeal the decision,[5] with the Act having survived this initial "constitutional challenge," we may see more efforts in other states to enact similar laws placing restrictions on lawsuit advertisements involving drugs and medical devices.[6]

Authored by Lauren Colton, Philip Katz, Bert Lao, and Julie Schindel.

References

1 No. 21-1684, 2022 WL 1233240 (4th Cir. Apr. 27, 2022).

2 Federal Trade Commission, *FTC Flags Potentially Unlawful TV Ads for Prescription Drug Lawsuits* (Sept. 24, 2019), https://www.ftc.gov/news-events/news/press-releases/2019/09/ftc-flags-potentially-unlawful-tv-ads-prescription-drug-lawsuits.

3 W. Va. Code §§ 47-28-1 *et seq*.

4 *Recht*, 2022 WL 1233240.

5 *See* B. Pierson, *State law restricting attorneys' drug ads revived by 4th Circuit*, REUTERS (Apr. 27, 2022), https://www.reuters.com/legal/litigation/state-law-restricting-attorneys-drug-ads-revived-by-4th-circuit-2022-04-27/. Indeed, on May 10, 2022, Plaintiffs filed a petition for rehearing *en banc* urging the full Fourth Circuit to rethink the panel's decision. *See* Attys Urge 4th Circ. To Revisit W.Va. Law On Drug Case Ads - Law360

6 Other states, including Tennessee and Texas, already have similar statutes in place. *See id.*

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