PACIFIC RIM ADVISORY COUNCIL

Pacific Rim Advisory Council

SEPTEMBER 2022 e-Bulletin

MEMBER NEWS

►DAVIS WRIGHT TREMAINE Leading Expert in Charitable Organizations and Nonprofit Healthcare Law Rejoins Firm
►HOGAN LOVELLS Former Deputy Chief of the Criminal Division, Southern District of New York Kristy Greenberg Joins Firm

COUNTRY ALERTS

►ARGENTINA Export Increase Program Aimed At Exporters of Soybeans (grains or pellets) soybean meal and/or BioDiesel and Blends ALLENDE BREA
►BRAZIL Anti-dumping Sunset Review on Exports of Seamless Carbon Steel Pipes from China and Romania Initiated TOZZNIFREIRE
►CANADA Alberta Court of Appeal Provides Helpful Guidance Regarding Time for Employee To Claim Constructive Dismissal BENNETT JONES
►CANADA Triggering the Doctrine of Equitable Contribution RICHARDS BUELL SUTTON
►CHILE Central Bank Amends Regulations on Entities That Can Be Part of Formal Exchange Market CAREY
►CHINA Cyberspace Administration of China ("CAC") Issues Guidelines for Data Export Security Agreement HAN KUN
►COLOMBIA Free Trade Zones: A Catalyst for for Regional Integration BRIGARD URRUTIA
►FRANCE Adoption of the CSRD : Sustainability— A New Pillar of Business Performance? GIDE
►GUATEMALA New Insolvency Law Now in Force ARIAS
►HONG KONG Court Issues Stunning Criticism of Provisional Liquidators for Abusing Winding-up Procedure HOGAN LOVELLS
►INDIA Enhancement of Monetary Limits Gives Relief to Importers and Exporters from Arrest and Prosecution KOCHHAR & CO.
►MALAYSIA Road to Sustainability: New Initatives Announced SKRINE
►NICARAGUA Incentives for Sustainable Development ARIAS
►PHILIPPINES Tax Issues and Practical Solutions SyCIP
►SINGAPORE SGX Regco Considers Requiring Disclosure of Directors' and CEO Remuneration and 9-Year Cap on ID Tenure DENTONS RODYK
►TAIWAN Court Finds National Health Insurance Database Lacking Proper Privacy Protection and Ordered Relevant Laws Be Amended or New Laws Promulgated Within Three Years LEE and LI
►UNITED STATES NLRB Proposed Standard Would Increase Potential Liability for Businesses Employing Third Parties DAVIS WRIGHT TREMAINE
►UNITED STATES Court Invalidates Text Message Option Under Bioengineered Food Disclosure Standard HOGAN LOVELLS

CONFERENCES & EVENTS

PRAC Let's Talk!

Virtual meeting - September 26, 2022

CONFERENCES

Mexico City April 22-25, 2023
Hosted by Santamarina y Steta

Oct-Nov New Delhi 2023
Hosted by KOCHHAR & Co.

Paris TBA
Hosted by GIDE

MEMBER EVENTS

30 October - 04 November, 2022 IBA Miami: PRAC Event Connect
Let us know your plans to attend upcoming industry events
Prior to event start we will put you in touch with other attending PRAC Delegates.

www.prac.org/events

Coronavirus
COVID-19

Visit us online for the latest up-to-date, country specific information
www.prac.org/member_publications.php

MEMBER DEALS MAKING NEWS

►ARIFA | Google's Central American Advertising Partner Divests Stake in Sale of Minority Stake
►BENNETT JONES | Field Trip Closes Spin-Out of Drug Development and Clinics Businesses Under Plan of Arrangement
►CAREY | International investors halve stake in Chile's Consorcio Financiero
►GIDE | Counsel to the Avril Group on the Acquisition of Solteam
►HAN KUN | A-Share Private Placement Xinjiang Daqo New Energy Co., Ltd
►HOGAN LOVELLS | HK$400 million IPO of Sinohealth Holdings
►KOCHHAR | Arka Fincap Limited
►NAUTADUTILH | Lightyear With Recent Financing Round
►SANTAMARINA | Mexico's Saltillo Amend US$245 million credit line

PRAC TOOLS TO USE
COVID-19 SITE FOR ALL UPDATES

PRAC CONTACTS MEMBER DIRECTORY EVENTS

LEADING EXPERT IN CHARITABLE ORGANIZATION AND NONPROFIT HEALTHCARE LAW REJOINS DAVIS WRIGHT TREMAINE

SEATTLE, 07 September 2022 – Davis Wright Tremaine LLP is significantly expanding its capacity to advise charitable foundations, nonprofit healthcare organizations, and other tax-exempt clients with the addition of Thomas C. Schroeder, who brings to the firm more than 15 years' experience representing high-profile national institutions, both in-house and in private practice.

Schroeder comes to Davis Wright from the Office of the General Counsel at the University of California, where he served for almost a decade, advising on nonprofit organization and charitable giving matters. Previously he worked in-house at the William and Flora Hewlett Foundation, a $13+ billion private foundation. Schroeder launched his legal career as an associate in Davis Wright's highly-regarded Tax-Exempt Organizations (TEO) practice group, to which he now returns as a partner in Seattle.

"Tom will be an extraordinary asset to our clients and I'm thrilled to welcome him back," said LaVerne Woods, who is chair of the group. "His energy, talent, and exceptional client service ethic were apparent from early on. With the expertise and relationships he has built while serving in-house at two premiere organizations, he is the perfect catalyst for further growth in our dynamic TEO practice on the West Coast and beyond."

Said Schroeder: "This is a once-in-a-career opportunity to join a preeminent firm with a remarkable culture of collaboration and extraordinary potential for growth. I have kept in close touch with my Davis Wright colleagues over the years and engaged them on many matters, including on health law issues and innovation activities. I know their tireless commitment to helping nonprofits fulfil their missions and achieve their strategic goals. LaVerne and her team do it with grace, creativity, and the highest standards of excellence. It's a privilege to be able to rejoin the TEO group and Davis Wright in order to support the clients they represent."

"Tom is a rare find," said Adam Romney, co-chair of the healthcare practice at Davis Wright. "His expertise is closely aligned with ours, while also presenting opportunities to diversify the clients and industries we serve. His experience advising the UC system, including its five academic medical centers, will enable him to work seamlessly with our healthcare practice to foster growth. Our clients will also benefit from his strategic advice on significant M&A transactions that involve TEO issues, including those requiring approvals from the California attorney general and other state officials."

Schroeder graduated from Bowdoin College, summa cum laude, with an A.B. in Art History and English. He later got his J.D., with honors, from the University of Washington School of Law. Prior to commencing his legal career, he worked at the Metropolitan Museum of Art, earned an M.A. in Art History from the Courtauld Institute of Art, and worked in project management for the Fred Hutchinson Cancer Research Center.

Schroeder noted that he is excited to contribute to Davis Wright's DEI efforts. "As a member of the LGBTQ+ community, I've been deeply impressed with Davis Wright's commitment to DEI and to social impact causes generally," he said. "It's real, it suffuses the firm, and it came through loud and clear to me as a client. I am eager to be a part of this culture of inclusion."

For more information, visit www.dwt.com

FORMER DEPUTY CHIEF OF THE CRIMINAL DIVISION, SOUTHERN DISTRICT OF NEW YORK KRISTY GREENBERG JOINS HOGAN LOVELLS' NEW YORK OFFICE AS PARTNER

NEW YORK, 12 September 2022 – Global law firm Hogan Lovells announced today that Kristy Greenberg has joined the firm as a litigation and investigations partner in New York. Greenberg joins the firm from the U.S. Attorney's Office for the Southern District of New York (SDNY), where she served for more than a decade—most recently as the Deputy Chief of the Criminal Division.

"We are thrilled to welcome Kristy to the firm," said Des Hogan, global Head of Hogan Lovells' Disputes practice. Stephanie Yonekura, global Head of the firm's Investigations, White Collar, and Fraud practice area, added: "With her significant litigation experience in high-profile matters, Kristy will be a great resource to our clients—particularly on issues involving cybersecurity, cryptocurrency, financial services, health care, and executive conduct."

As a senior member of SDNY's management team, Greenberg oversaw the work of the Criminal Division, supervising the Securities and Commodities Fraud Task Force, Complex Frauds and Cybercrime Unit, and Money Laundering and Transnational Criminal Enterprises Unit. Greenberg supervised ground-breaking cryptocurrency and securities fraud cases, including the first-ever cryptocurrency insider trading tipping scheme, and she authorized significant corporate Foreign Corrupt Practices Act (FCPA) and tax fraud resolutions, including one of the Department of Justice's largest FCPA resolutions. As SDNY's health care fraud coordinator, Greenberg managed SDNY's large-scale health care fraud investigations and prosecutions. She also previously served as Acting Co-Chief of the General Crimes Unit, supervising SDNY's new Assistant U.S. Attorneys in their investigations, cases, and trials.

Greenberg was the lead prosecutor on a wide array of white collar and cybercrime cases of national significance: investor fraud by the founder of the Fyre Festival, cyber hacking of hundreds of celebrities, and a major health care fraud involving two dozen former professional athletes and healthcare professionals. In 2018, Greenberg received a "Top Prosecutor" award from the Women in Federal Law Enforcement Foundation.

Greenberg, who will be a member of the firm's Financial Industry & Insurance Sector, said: "I am thrilled to be joining Hogan Lovells, which has an unparalleled global platform with strong experience in handling cross-border investigations and enforcement matters. I look forward to collaborating with my colleagues to advise the firm's clients on complex white collar matters."

Greenberg worked at a top New York law firm before joining the U.S. Attorney's Office. She earned her JD, cum laude, from Harvard Law School and is a summa cum laude and Phi Beta Kappa graduate of Yale University.

The addition of Greenberg to the New York office is the latest in a series of lateral moves that have significantly expanded the office in recent years.

"We have traditionally had a strong litigation practice here in New York, and Kristy fits in perfectly with our strength in commercial litigation, employment, international arbitration, and white collar and investigations," said New York Office Managing Partner Michael DeLarco. "Kristy's addition will complement our recent growth in New York on the corporate side, further providing our clients with a strong suite of services across their needs in this key commercial market."

Partners who have joined in New York this year include: M&A partners Luke Iovine, Peter Cohen-Millstein and Megan Ridley -Kaye, as well as Adrienne Ellman (M&A/private equity), Parikshit Dasgupta (private equity/investment funds), and Jessica Millett (tax).

For additional information visit www.hoganlovells.com

ARIFA

HELPS GOOGLE'S CENTRAL AMERICAN ADVERTISING PARTNER DIVEST STAKE IN SALE OF MINORITY STAKE

PANAMA CITY, August 2022: Advertising company Mediam Group has hired Holland & Knight LLP in Miami and Arias, Fábrega & Fábrega in Panama City to sell a minority stake in the business to Miami-based counterpart Aleph Group.

The deal closed on 12 July for an undisclosed amount.

Mediam assists companies in Costa Rica, Guatemala and Panama optimise their advertising across Google products.

Counsel to Mediam Group Arias, Fábrega & Fábrega Partner Andrés Rubinoff, associates Javier Yap Endara, Daniel Abad, María Cristina Guardia and Jennifer Sales, and international associate Donald Canavaggio in Panama City.

For additional information visit www.arifa.com

BENNETT JONES

FIELD TRIP CLOSES SPIN-OUT OF DRUG DEVELOPMENT AND CLINICS BUSINESSES UNDER PLAN OF ARRANGEMENT

TORONTO, 24 August 2022: Bennett Jones acted as lead counsel to Field Trip Health Ltd. in the spin-out of its drug development and medical clinics businesses into two independent public companies, Reunion Neuroscience and Field Trip Health & Wellness, by plan of arrangement. The spin-out transaction was supported by a private placement financing led by Oasis Management Company.

Reunion Neuroscience Inc., a global leader in psychedelics focused on the next generation of molecules and conducting advanced research on plant-based psychedelics, remains listed on the NASDAQ Stock Market and Toronto Stock Exchange.

Field Trip Health & Wellness, a global leader in psychedelic therapies with health centres across North America and Europe, is listed on the TSX Venture Exchange.

More details are available in Reunion's press release.

The Bennett Jones deal team, led by Aaron Sonshine (M&A), includes:

Jeff Kerbel, Marshall Eidinger, Corey Yermus, Blanchart Arun and Biancha Jacob-Okorn (M&A); Alan Gardner and Joseph Blinick (Securities and Commercial Litigation); James Morand and Hennadiy Kutsenko (Tax); Kim Lawton, Lisa Kakoske and Adam Shumka (Capital Markets); Dominique Hussey and Shelby Morrison (Intellectual Property)

For additional information visit www.bennettjones.com

CAREY

ASSISTS INTERNATIONAL INVESTORS HALF STAKE IN CHILE'S CONSORCIO FINANCIERO

SANTIAGO, 30 June 2022: Simpson Thacher & Bartlett LLP in New York and Washington, DC and Carey in Santiago have helped Chilean financial holding company CorpGroup obtain approval for its Chapter 11 plan in New York.

The plan was approved on 15 June and subsequently confirmed by the US bankruptcy court for the district of Delaware after an evidentiary hearing.

CorpGroup will restructure nearly US$2 billion worth of debt in the Chapter 11 process, including US$500 million worth of bonds on which the company defaulted in 2020.

Counsel to CorpGroup Carey Partners Ricardo Reveco and Salvador Valdés, and associates Roberto Villaseca, Francisco Torm and Matías Garcés in Santiago

For additional information visit www.carey.cl

GIDE

COUNSEL TO THE AVRIL GROUP ON THE ACQUISITION OF SOLTEAM

PARIS, 05 September 2022: Gide has advised Feed Alliance, a subsidiary of the Avril group specialised in the purchase and sale of raw materials necessary for the production of complete animal feeds on behalf of third parties and the Avril group, in the context of its acquisition of a majority stake in the capital of Solteam, itself a specialist in the importation and marketing of soya meal.

Gide's team advising Feed Alliance comprised partner Emmanuel Reille and associate Marie Fleurisson on competition aspects.

Gide was in charge of the notification of the transaction to the French Competition Authority, which authorized it without any commitment or condition.

Feed Alliance was advised by Karman Associés on M&A aspects.

For additional information visit www.gide.com

PACIFIC RIM ADVISORY COUNCIL

PRAC Let's Talk!

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

open to PRAC Member Firms only

Register Email: events@prac.org

Visit www.prac.org

GIDE

COUNSEL TO INSTITUT MERIEUX ON SIGNING A LONG-TERM PARTNERSHIP WITH EXOR

PARIS, 04 July 2022: Gide has advised Institut Mérieux, an independent holding company owned by the Mérieux family and specialised in global health, on signing a long-term partnership with Exor N.V., a diversified holding owned by the Agnelli family.

Under the agreement, Exor will acquire, by way of a reserved capital increase, a 10% shareholding in Institut Mérieux, representing an investment of EUR 833 million.

The Gide team was made up of partner **Olivier Diaz** and associate **Corentin Charlès** on M&A/Corporate aspects.

For additional information visit www.gide.com

HAN KUN

ADVISES ON A-SHARE PRIVATE PLACEMENT XINJIAN DAQO NEW ENERGY CO., LTD.

BEIJING, 28 July 2022: Han Kun has advised on the A-share private placement of Xinjiang Daqo New Energy Co., Ltd. ("Daqo Energy", Stock Code: 688303), acting as legal counsel to CICC, the sponsor and lead underwriter for the transaction.

This private placement, with an issuing scale of about RMB11 billion, is the largest private placement by a company on the A-share market in the photovoltaic industry, the largest refinancing project on the SSE STAR market, and the largest sole sponsor / sole underwriter private placement under the A-share registration-based system.

Daqo Energy has since its establishment been focusing on the research, development, manufacture, and sale of high purity polysilicon through continuous R&D input and technical innovation centering on China's new energy strategic planning, and is one of the forerunners in this field in China. Han Kun has also advised on Daqo Energy's initial public offering and listing on the SSE STAR market as legal counsel to CICC, the sponsor and lead underwriter of the A-share IPO.

For additional information visit www.hankunlaw.com

KOCHHAR & CO.

ADVISES ARKA FINCAP LIMITED

NEW DELHI, 18 July 2022: Kochhar & Co. advised Arka Fincap Limited in relation to the financial assistance of INR 100,00,00,000/- (Indian Rupees One Hundred Crores Only) availed by Sterling and Wilson Renewable Energy Limited.

The matter was led by Partner Ms. Parul Verma and supported by Associate Mr. Swapnil Sant.

Related Media Link-https://www.barandbench.com/dealstreet/kochhar-co-acts-on-financial-assistance-extended-to-sterling-and-wilson-renewable-energy

For additional information visit www.kochhar.com

HOGAN LOVELLS

ADVISES ON THE HK$400 MILLION IPO OF SINOHEALTH HOLDINGS LIMITED

HONG KONG, 13 July 2022 – Global law firm Hogan Lovells acted for the sole sponsor, BNP Paribas Securities (Asia) Limited, and the underwriters, in the HK$400 million Initial Public Offering (IPO) of Sinohealth Holdings Limited on the Main Board of the Hong Kong Stock Exchange.

Sinohealth Holdings Limited is a leading healthcare insight solutions provider in China. It primarily provides integrated healthcare insight solutions including data insight solutions, data-driven publications and events and SaaS products to its multinational and domestic medical product manufacturer clients, based on healthcare big data and associated technologies.

The underwriters were BNP Paribas Securities (Asia) Limited, CCB International Capital Limited, Orient Securities (Hong Kong) Limited, Haitong International Securities Company Limited, UOB Kay Hian (Hong Kong) Limited, Guotai Junan Securities (Hong Kong) Limited, Eddid Securities and Futures Limited, Zhongtai International Securities Limited, Futu Securities International (Hong Kong) Limited, Innovax Securities Limited, Fosun Hani Securities Limited and Livermore Holdings Limited.

Hong Kong corporate partner Nelson Tang led the Hogan Lovells team, with support from senior associates Jeffrey Lee and Jessica Shing, senior paralegal Ruby Wang and paralegal Pamela Pang.

For additional information visit www.hoganlovells.com

NAUTA DUTILH

ASSISTS LIGHTYEAR WITH RECENT FINANCING ROUND

AMSTERDAM 06 September 2022: NautaDutilh assisted Lightyear, the high-tech company developing the first solar car, with raising EUR 81 million in additional capital from a consortium of public investors, anchored by Invest-NL, and further consisting of regional development agencies for the provinces of North Brabant and Limburg (BOM and LIOF). Additional investments came from certain private funds and the existing investors SHV and DELA. The funds received will ensure that Lightyear advances in the production of Lightyear 0 and continues to achieve the development milestones for its follow-up model, Lightyear 2.

Lightyear 0 (as shown in the header image) is the world's first solar electric car set to hit roads this year. Lightyear 0 features five square meters of patented, double curved solar arrays, allowing the vehicle to charge itself while commuting or simply parked outdoors, and thus, relieves drivers of charging station dependency and offloads a congested grid. Concurrently, Lightyear has been developing Lightyear 2, the company's second, high-volume model, with a starting price of EUR 30,000. Already, 10,000 reservations have been placed from leasing and car-sharing companies LeasePlan and MyWheels, each reserving 5,000 respectively. It's Lightyear's goal to bring Lightyear 2 to the world by 2025, and new funding like this is crucial to its fulfilment.

Lex Hoefsloot, CEO and Co-Founder of Lightyear, said, "In the current market environment, our technology has incredible potential for positive societal influence, so I see investments of this calibre as a testament to Lightyear's product vision. Thanks to the support of Invest-NL, the entire consortium, and our other investors and strategic partners, Lightyear is well positioned and remains on track to deliver the world's first solar car and work towards a more sustainable future."

"Terms like 'disruption' and 'innovation' are easily thrown around these days, but this company and its mission truly raise the bar in this respect and I am convinced they will shape the way we approach mobility", says lead partner Sybren de Beurs.

The team further consisted of Ruud Smits, Harm van Schaijk, Joris Willems, Eva Reinders (M&A / tech team), Teun Struycken, Boudewijn Smit (Finance), Jeroen Boelens and Lauren Delleman (IP).

For more information visit www.nautadutilh.com

SANTAMARINA

ASSISTS MEXICO'S GRUPO INDUSTRIAL SALTILLO AMEND US$245 MILLION CREDIT LINE

MONTERREY, 15 September 2022: Santamarina y Steta in Monterrey has helped Mexican manufacturer Grupo Industrial Saltillo amend an existing US$245 million loan.

The lenders – HSBC, BBVA, Citigroup, Comerica and Scotiabank – relied on Paul Hastings LLP in New York and Mijares, Angoitia, Cortés y Fuentes SC in Mexico City.

The deal closed on 24 August.

The amendments relate to the terms of the loan, but no further details were disclosed.

Saltillo first obtained the US$245 million loan in 2019, structured as a six-year US$195 million secured term facility and a US$50 million revolving credit line. The financing also involved collateral governed under Spanish law.

Founded almost 100 years ago, Saltillo manufactures parts for the automotive industry as well as materials for the construction sector. It operates in Mexico, China, Europe and the US.

Counsel to Grupo Saltillo Industrial Santamarina y Steta Partner Carlos Argüelles and associates Lisa Carral and Daniela Flores in Monterrey

For additional information visit www.santamarinasteta.mx

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 Events and Event Connect

As we reboot our own in-person conferences in line with other 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
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


PRAC @ INTA


PRAC @ PDAC


PRAC @ IPBA

PACIFIC RIM ADVISORY COUNCIL

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

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

www.prac.org

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

ALLENDE
ALLENDE & BREA

Arias

ARIFA
ARIAS, FABREGA & FABREGA

BAKER BOTTS LLP

Bennett Jones

Brigard Urrutia

/Carey

CITY-YUWA PARTNERS

GIDE
GIDE LOYRETTE NOUEL

Davis Wright Tremaine LLP

DENTONS RODYK

Hogan Lovells

KOCHHAR&CO.
ADVOCATES & LEGAL CONSULTANTS

GOODSILL

漢坤律師事務所
HAN KUN LAW OFFICES

KIM, CHANG & LEE

理律法律事務所
LEE AND LI
ATTORNEYS-AT-LAW

LEGA
ABOGADOS

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

ESTUDIO MUÑIZ
MUÑIZ OLAYA MELÉNDEZ CASTRO ONO & HERRERA
Abogados

NautaDutilh

RBS
RICHARDS BUELL SUTTON LLP
Established in 1871

Santamarina + Steta

SKRINE

SyCip Salazar Hernandez & Gatmaitan

TozziniFreire
ADVOGADOS

Decree 576/2022: Export Increase Program

Practice Areas:

Customs, International Trade and Dumping

Lawyers:

Carlos M. Melhem, Jorge I. Mayora

Under Decree 576 (the "Decree"), the Executive Power created the Export Increase Program (the "Program") aimed to exporters of soybeans (in grains or pellets), soybean meal and/or biodiesel and their blends obtained from soybeans during the last 18 months.

The Program is voluntary and will be implemented through the web platform of the Tax Authority (AFIP).

Subject to implementation by the Central Bank, the countervalue of the exported goods (including pre-financing, advance and/or post-financing export settlements) will be settled in the Foreign Exchange Market within the terms applicable to each type of product at a fixed exchange rate of $200 per U.S. dollar. In practice, the Program implies the application of a differentiated exchange rate with an incremental of approximately 43% over the exchange rate of the official foreign exchange market. The Program, and in particular the differentiated exchange rate, will apply until September 30, 2022.

As a precedent condition to applying to the Program, local exporters must waive any judicial or administrative procedure which purpose is to claim the application of procedures to those foreseen in an extraordinary way in the Decree and with respect to the operations reached by the same.

In order to encourage producers to sell soybean products related for exports under the Program -in a percentage of no less than 85% of their 2021-2022 harvest- locally for export before September 30, the Secretariat of Agriculture will establish benefits and programs for the 2022-2023 harvest. To date these benefits have not yet been disclosed.

In addition, the Central Bank enabled producers who sell their soybean products for export under the Program to affect the net amount received to the special accounts with retribution at the weighted exchange rate of the Exchange Market published by the Central Bank.

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

THE ANTI-DUMPING SUNSET REVIEW ON EXPORTS OF SEAMLESS CARBON STEEL PIPES FROM CHINA AND ROMANIA HAS BEEN INITIATED

On August 22, 2022, Circular SECEX No. 38/2022 (https://www.in.gov.br/en/web/dou/-/circular-n-38-de-19-de-agosto-de-2022-423854124) initiated the sunset review of the anti-dumping duties applied to exports from China and Romania to Brazil of seamless carbon steel line pipe, up to five inches in diameter, commonly classified under the NCMs codes 7304.19.00, 7304.31.90, 7304.39.10 and 7304.39.90.

Seamless carbon steel pipes are mainly used in the construction of oil and gas pipelines for conducting and storing fluids. They are also used in refineries, in chemical and petrochemical industries, in shipbuilding and shipyards, and in gas treatment and distribution plants. Additionally, they are used to transport petroleum products over small distances.

The petition was filed by Vallourec Tubos do Brasil S.A.

The analysis of the dumping's evidence considered the period from January to December 2021 and the injury analysis considered the period from January 2017 to December 2021.

Considering the possibility of resumption of dumping during the validity of the anti-dumping duty, the average domestic normal values in the Brazilian market and the average sales price of the similar domestic product in the same market in the analysis period of resumption of dumping were constructed. The difference between both in relative and absolute terms were not disclosed for both countries.

Thus, it was concluded that there were indications that the termination of anti-dumping duties would most likely lead to continuation of dumping on exports from China and Romania of the product subject to the anti-dumping measure, as well as sufficient indications as to the likelihood of resumption of injury caused by these imports in the event of termination of the anti-dumping duty.

A public interest procedure will be optional, upon request submitted based on a duly completed Public Interest Questionnaire or ex officio at the discretion of SDCOM (Subsecretariat of Trade Defence and Public Interest). The public interest procedure aims to identify possible impacts of the imposition of the anti-dumping measure on economic agents, which could be potentially more harmful when compared to the positive effects of the application of the trade defense measure. It has the same deadlines as the anti-dumping sunset review.

The interested parties (Exporters, Importers, and other Domestic Producers) can cooperate with the investigation by submitting their response to the Questionnaire, ensuring that the final decision is based on precise data, and benefiting from an individual dumping margin, which tends to be lower than the margin calculated based on the facts available.

Alberta Court of Appeal Provides Helpful Guidance Regarding Time for Employee to Claim Constructive Dismissal

Written By Michael VanderMeer, John Gilmore and Talia Bregman

Key Highlights

- A constructive dismissal does not occur automatically just because an employer has unilaterally changed a key term of employment—the employee must reject the change.
- The employee must reject the change to their employment within a reasonable period of time, otherwise they will be considered to have agreed to it.
- What constitutes a "reasonable period of time" may vary based on individual circumstances, the nature of the change, and the jurisdiction, but according to a recent Alberta Court of Appeal decision, employees in Alberta should not expect to have longer than two or three weeks to reject substantial changes to their compensation.

In most cases, if an employer unilaterally and substantially changes an essential term of employment an employee is not required to accept the change. The employee has the option of rejecting the change and claiming that they have been constructively dismissed at common law, even if the employer has not outright dismissed the employee. If an employee is constructively dismissed, it is the same as if the employee has been terminated on a without cause basis and an employer's severance obligations will then be triggered.

However, if the employee wishes to claim that the change to their employment constitutes a constructive dismissal, they must act quickly. If they wait longer than what a court considers to be reasonable, they could be deemed to have accepted or condoned the change. A recent decision from the Alberta Court of Appeal in *Kosteckyj v Paramount Resources Ltd*, 2022 ABCA 230 [*Kosteckyj*] is

noteworthy in that it underscores the consequences for an employee failing to act rapidly in the face of this kind of change. The decision also articulates some of the factors that could lengthen or shorten the amount of time an employee has to react to a substantial alteration of a term of employment.

Background

Under Canadian common law, a non-union employee can claim constructive dismissal in two scenarios:

- **Single unilateral change**: If the employer violates an essential term of the employee's employment contract, for example, by substantially reducing the employee's compensation.
- **Course of conduct**: If the employer demonstrates through its conduct that it does not intend to follow the terms of the employee's employment contract, for example, by subjecting the employee to a toxic work environment.

Whether a unilateral change or course of conduct amounts to constructive dismissal requires an objective analysis. In other words, it is not enough for an employee to simply believe that their employer has violated the employment contract; rather, it must be proven by the employee on an objective basis. In addition, the changes or breach in question must be significant and to the employee's detriment.

The Facts in This Case

In *Kosteckyj*, the plaintiff was an Alberta-based employee who had worked for the defendant for around six and a half years. To cut costs, the employer introduced across-the-board reductions to employee compensation. The plaintiff's base salary was lowered by 10 percent, her bonus was delayed or cancelled, she lost access to training and seminars, and the employer stopped making RRSP contributions on her behalf.

Despite being unhappy about the changes, the plaintiff continued to work from the office and perform her duties and did not communicate her unhappiness about the changes to her employer. Approximately three weeks later, the employer dismissed her and a number of her co-workers on a without cause basis.

The plaintiff sued, and argued that she had been constructively dismissed as of the date the changes to her compensation were first made. Therefore, the plaintiff claimed damages based on her original and unreduced compensation before the constructive dismissal.

On appeal, the Alberta Court of Appeal accepted that the changes to the plaintiff's employment were sufficient to ground a claim of constructive dismissal. However, the Court concluded that the plaintiff acquiesced to the fundamental changes because she did not object to those changes within a reasonable period of time.

In deciding what would be considered a "reasonable period of time", the Court acknowledged that this could vary depending on both the characteristics of the employee as well as the nature of the changes to their employment. Nonetheless, an employee who finds themselves in this position must act quickly: "A worker who confronts dramatically different conditions of employment also needs to decide promptly if he or she wishes to continue as an employee." The Court concluded that 10 business days should have been a

sufficient period of time for her to decide whether she would accept or reject the changes.

Notably, the Court gave no weight to the length or brevity of the plaintiff's tenure with the employer, commenting that where all other factors are the same, both short-service and long-service employees are equally required to decide whether they should accept or reject unilateral changes to their employment in prompt fashion.

The Court also indicated that while another employee who lacked the plaintiff's wherewithal might be justified in taking more time to make their decision, "it would be a rare case that a reasonable period would exceed fifteen business days."

Even though it was undeniable that the employer had acted unilaterally to fundamentally alter the plaintiff's terms of employment for the worse, the plaintiff could not prove that she had rejected the changes within a reasonable period of time. Therefore, she could not rely on a claim of constructive dismissal as she was deemed to have accepted the changes. Her damages were then calculated as of the date on which her employer dismissed her and based on her reduced compensation.

While *Kosteckyj*, is helpful for employers in Alberta, it should be noted that this decision is not binding on courts in other jurisdictions and those courts may approach this issue differently.

Takeaways

Whether changes to terms of employment could constitute grounds for a successful claim of constructive dismissal depends on many factors, and will vary case-by-case and may also vary jurisdiction-by-jurisdiction.

Regardless, *Kosteckyj,* provides a reminder that even if those grounds exist, that itself does not mean that an employee is in a position to claim that they have been constructively dismissed.

An employee who wishes to claim constructive dismissal has the onus of proving that they acted within a "reasonable period of time" to decisively reject the change. If they cannot do so, a court is likely to infer that the employee decided that they would prefer to remain employed even under the worsened terms, and have therefore tacitly accepted the changes, which then become binding.

What precisely constitutes a reasonable period of time could vary based on factors including the nature, severity, and clarity of the changes themselves, as well as the employee's level of sophistication, and other factors that could affect the employee's ability to consider and respond to the changes (such as a pressing medical issue or the state of the job market).

Whatever the jurisdiction, if you are an employer and considering implementing changes in your workplace, or are facing a situation where an employee is claiming to have been constructively dismissed, please contact the Bennett Jones Employment Services group.

Authors

Michael H. VanderMeer
403.298.4478
vandermeerm@bennettjones.com

John R. Gilmore
403.298.3297
gilmorej@bennettjones.com

Talia K. Bregman
416.777-4833
bregmant@bennettjones.com

This update is not intended to provide legal advice, but to high-light matters of interest in this area of law. If you have questions or comments, please call one of the contacts listed.

At Bennett Jones, your privacy is important to us. Bennett Jones collects, uses and discloses personal information provided to us in accordance with our Privacy Policy, which may be updated from time to time. To see a copy of our current Privacy Policy please visit our website at bennettjones.com, or contact the office of our Privacy Officer at privacy@bennettjones.com.

To subscribe to our publications, please visit **BennettJones.com/Subscribe**.

Posted on: August 3, 2022

TRIGGERING THE DOCTRINE OF EQUITABLE CONTRIBUTION

By: Salona Nainaar

Oftentimes an individual or business may have more than one insurance policy cover the same issue that could potentially arise. A recent decision from the Ontario Court of Appeal provided guidance when both policies cover the same loss and include language claiming to be excess insurance over the other.

In *Northbridge General Insurance Company v. Aviva Insurance Company*, 2022 ONCA 519 the court re-affirmed that if two insurance policies apply to an insured's loss and are irreconcilable, then both insurers are expected to share equally the costs of defence and indemnity.

The court outlined that the doctrine of equitable contribution between insurers applies when two insurance policies are irreconcilable to the extent that they both cover the loss at issue and neither is clearly in excess to the other. When these circumstances occur both insurers will be required to equally contribute to the insured's defence and indemnification.

Background

In *Northbridge* the plaintiff sought a declaration that the defendant be required to contribute equally to the defence and indemnification of an insured party that was sued in the underlying action.

The underlying action involved a pharmacist who was sued for professional misconduct. The pharmacist's employer, a pharmacy, was also named as a defendant in the action. The plaintiff had issued a professional liability insurance policy to members of the Ontario Pharmacists Association (the "Association Policy") that included the pharmacist. The defendant had issued a commercial general liability policy to the pharmacy (the "CGL Policy"). The CGL Policy included a Pharmacists Professional Liability Endorsement that extended liability coverage to the pharmacy's employed pharmacists. As such, the pharmacist was an insured covered by two policies.

The plaintiff settled the underlying action without contribution from the defendant and thereafter sought a declaration from the court that the defendant must contribute equally to the defence and indemnification of the pharmacist.

The Association Policy contained as a general condition an "other insurance" clause that stated "This

insurance is excess over any other valid and collectible insurance…[and] does not apply to insurance which is purchased by the insured to apply in excess of the Policy". The CGL policy contained an Additional Condition that stated "The insurance provided under this endorsement is excess over any other valid and collectible insurance available to individual pharmacists…".

At trial the court found that the two policies were irreconcilable because they covered the same loss and had equivalent "other" insurance clauses wherein each policy claimed to be excess to the other. These two findings led the court to apply the doctrine of equitable contribution and grant the application that both insurers equally split the cost of the defence and indemnification.

The defendant appealed the trial judge's decision arguing that he erred in his conclusion that the two policies were irreconcilable.

Ruling

The Court of Appeal upheld the decision and found it was not in error, whether reviewed on the standard of palpable and overriding error or the standard of correctness.

In the context of the standard of appellate review, the court affirmed that matters of contractual interpretation are questions of mixed fact and law unless those questions involve the interpretation of standard form contracts or contracts with precedential value and there is no meaningful factual matrix relevant to the interpretation. In this case, the court concluded that the "other insurance" and other relevant provisions of the policies at issue are not "standard form contracts' or contracts with significant precedential value. This conclusion meant that the deferential standard of palpable and overriding error applied.[1]

The court cited *Family Insurance Corp. v. Lombard Canada Ltd*, 2002 SCC 48 and noted In this case the Association Policy and the CGL Policy both had the intention of achieving the same goal; rendering them excess if other insurance was available. This goal made them irreconcilable. Further, since the pharmacist was not the one that purchased the CGL Policy it did not fit within the Association Policy's other insurance exception. Finally, the "individual pharmacists" language in the CGL Policy, though intended to require pharmacists to have a separate professional liability policy, did not alter the CGL Policy's scope or context to one of a true excess insurance policy.

Consequently, the court dismissed the appeal.

Practical Considerations

This decision flags for insurers that when it comes to other insurance clauses and clauses aimed at limiting insurer obligations, specificity of language and the intention of specific clauses, though clearly important, may not be determinative. Perhaps more determinative is the "contextual analysis" the court referred to from *McKenzie v. Dominion of Canada General Insurance*, 2007 ONCA 480 at para 39. That analysis requires that an insurance policy be considered as a whole and that the availability of primary coverage, including a duty to defend obligation, cannot operate to change the nature of a policy to an excess or umbrella policy. This contextual analysis, if applied in a pre-eminent fashion, will render much of the competing "other insurance" clause litigation largely moot as most policies in these disputes can readily be found as primary insurance thus triggering the equitable contribution doctrine.

Finally, evidentiary care must be taken when advancing these types of applications in order to ensure, as much as possible, that any appellate review can proceed on the correctness, as opposed to palpable and overriding error, standard.

[1] *Northbridge General Insurance Company v. Aviva Insurance Company*, 2022 ONCA 519 at paras 15-16.

For more information about this article, contact the author, Salona Nainaar here.

September, 2022

CENTRAL BANK AMENDS REGULATIONS REGARDING ENTITIES THAT CAN BE PART OF THE FORMAL EXCHANGE MARKET

On August 30, 2022, and upon a public consultation opened in the context of a process of modernization of its foreign exchange regulations, the Central Bank of Chile added a new Chapter III to its Foreign Exchange Regulations Compendium ("FERC"). The amendments introduced aim to allow a more expedite access to the Formal Exchange Market, to financial entities supervised by the Financial Market Commission ("FMC") and simplifying the provision of information by non-banking entities.

Particularly, the new Chapter III of the FERC:

1. Allows that foreign banks with a representation office in Chile, supervised by the FMC, can request authorization to be part of the Formal Exchange Market;

2. Simplifies the entry requirements to the Formal Exchange Market by non-banking entities. Such entities must be legal persons domiciled and resident in Chile, keep a net equity of at least 12,000 Unidades de Fomento (USD453,000 approx..), request the issuance of a banking performance bond of 8,000 Unidades de Fomento (USD302,000 approx..) to secure fulfillment of its obligations, and comply with the additional requirements set forth in this regulation, and

3. Sets regulations on the use of electronic transactional platforms by the Formal Exchange Market entities, distinguishing between platforms managed by third parties established in Chile or abroad. In the first case, the Formal Exchange Market entities shall have an obligation to verify that such platforms have adequate operational risk mitigation mechanisms and objective, transparent and non-discriminatory access rules. In case of foreign transactional platforms, the Formal Exchange Market entities shall verify they are either regulated or supervised abroad as such.

The Central Bank of Chile expects that these changes will encourage a greater participation in the Formal Exchange Market by non-banking entities.

The new Chapter III of the FERC entered into force on September 1, 2022, except for the provisions on electronic transactional platforms referred to in number 3 above, which will enter into force as from September 1, 2023.

AUTHORS: ***Diego Peralta, Vesna Camelio, Diego Lasagna.***

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

Legal Commentary

September 13, 2022

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

BEIJING | SHANGHAI | SHENZHEN | HAIKOU | WUHAN | HONG KONG

CAC Issues Guidelines for Data Export Security Assessment

Authors: Kevin DUAN | Kemeng CAI | Zihuan XU | Ziqian ZHANG

On August 31, 2022, the Cyberspace Administration of China (the "**CAC**") issued the *Application Guidelines for Security Assessment of Cross-border Data Transfer (1st Edition)* (the **"Application Guidelines"**), which specify and implement the provisions on cross-border data transfer security assessments ("**security assessments**") in the *Measures for Security Assessment of Cross-border Data Transfers* (the "**Assessment Measures**"). The Application Guidelines clarify the application scope of security assessments, stipulate the means, procedures and required materials for the application, and provides contact information for inquiries regarding the application. The Application Guidelines also contain template documents, including the Cross-border Data Transfer Security Assessment Application Letter (the "**Application Letter**") and the Cross-border Data Transfer Risk Self-Assessment Report Template (the "**Self-Assessment Report Template**"), which offer effective guidance and assistance to data handlers who seek a security assessment.

This article briefly analyzes the new requirements set out in the Application Guidelines and highlights critical issues throughout the security assessment application while building on the key points of the Assessment Measures explained in our July 19 article, *CAC Formally Promulgates the Assessment Measures for Data Export.*

Reaffirming the scope of security assessments

The Application Guidelines reaffirm the circumstances subject to mandatory security assessments in accordance with Article 4 of the Assessment Measures[1], and further clarify the criteria for determining cross-border data transfer activities, which is:

[1] Article 4 of the Assessment Measures: "Where a data handler transfers data abroad under any of the following circumstances, it shall, through the local Cyberspace Administration at the provincial level, apply to the State Cyberspace Administration for security assessment for the outbound data transfer: (1) a data handler who transfers Important Data abroad; (2) a critical information infrastructure operator, or a data handler processing the personal information of more than 1 million individuals, who, in either case, transfers personal information abroad; (3) a data handler who has, since January 1 of the previous year cumulatively transferred abroad the personal information of more than 100,000 individuals, or the sensitive personal information of more than 10,000 individuals, or (4) other circumstances where the security assessment for the outbound data transfer is required by the State Cyberspace Administration."

- Data handlers who transfer and store data collected and generated in the course of operations in Chinese Mainland to overseas;
- Data handlers who store data collected and generated in Chinese Mainland, but provide overseas institutions, organizations, and individuals with right of access, retrieve, download and export;
- Other cross-border data transfer activities prescribed by the CAC.

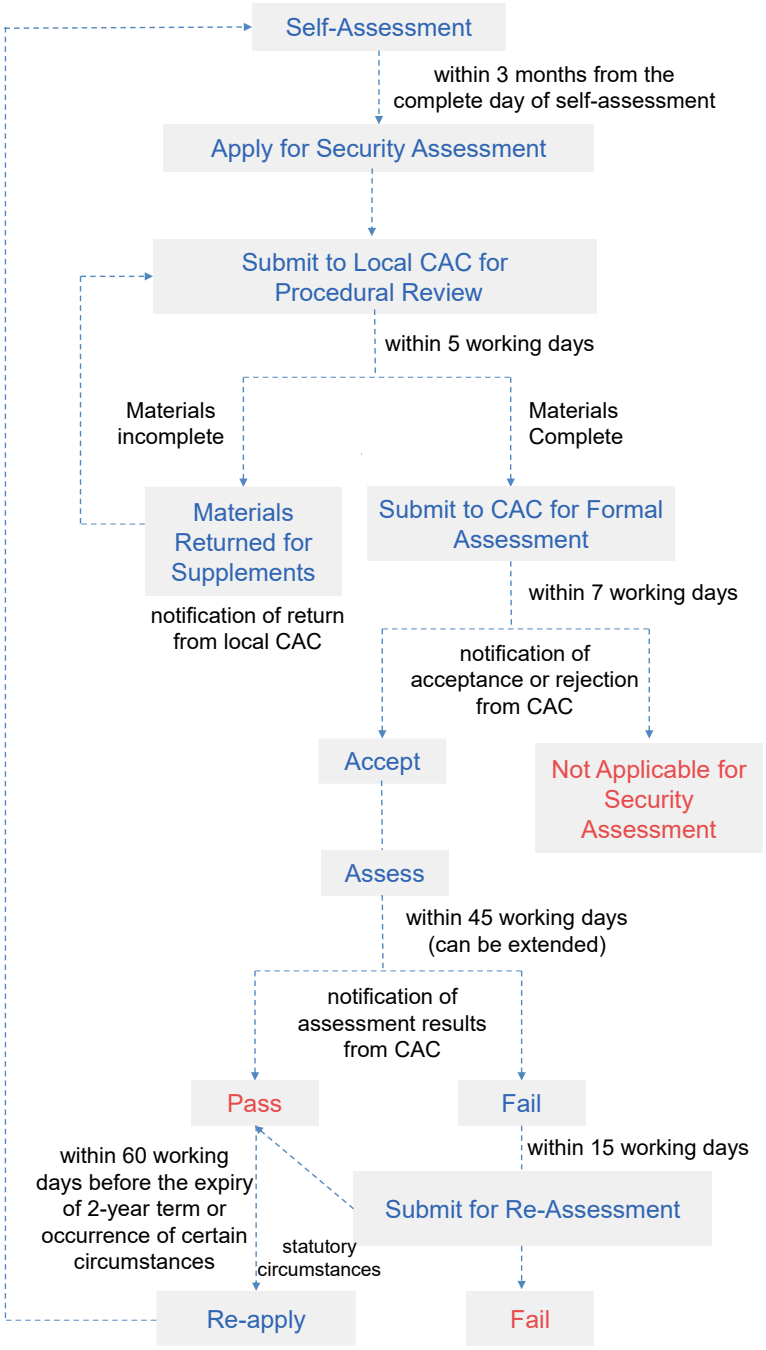
Compared to the CAC's introduction in a press briefing on July 7, 2022[2], in which the second circumstance was described as "provide overseas institutions, organizations, and individuals with the right to access and use such data", the Application Guidelines further specify remote access as "providing overseas institutions, organizations, and individuals with the right of access, retrieve, download, and export".

Notably, the Application Guidelines add a miscellaneous provision to cover "other cross-border data transfer activities prescribed by the CAC", which leaves room for future interpretations when the regulatory authorities deal with complicated data export situations. However, the Application Guidelines do not directly address the direct collection of data from overseas, i.e., where overseas entities directly collect personal information from personal information subjects residing in Chinese Mainland. Therefore, it is advisable for relevant enterprises to closely monitor regulatory developments in this regard and to take corresponding compliance measures when appropriate.

Specifying the application method and procedures

On the basis of Article 7 and Articles 11-13 of the Assessment Measures, the Application Guidelines detail the method and procedures for applying for security assessments with the CAC. The basic process is illustrated by the following diagram:

[2] CAC's press briefing on the Assessment Measures, published on July 7, 2022; for more details, please refer to: http://www.cac.gov.cn/2022-07/07/c_1658811536800962.htm (last accessed on September 7, 2022).



Key points of the aforementioned procedures are as follows:

I. Self-assessments must be completed within three months of the date of application

According to the templates provided as annexes to the Application Guidelines, the Letter of Commitment and the Self-Assessment Report Template both require that a cross-border data transfer risk self-assessment ("**self-assessment**") be completed within three months of the date of application, and no significant changes have occurred on or before the date of application.

II. Applications to be submitted on-site

According to Application Guidelines, data handlers will submit application materials to the provincial-level CAC in written form and also attach a digital version. A digital version of materials is to be

submitted via a compact disc.

III. Three types of notifications may be sent during the application process

On the basis of the Assessment Measures, the Application Guidelines provide three notifications that data handlers may receive at three important stages during the application process. These notifications are as follows:

- When data handlers fail to pass the completeness check, the CAC at the provincial level will send a notification to return the materials and to request supplements.
- When the formal assessment is completed, the CAC will send a written notification to inform the data handlers whether their application is accepted.
- When the security assessment is completed, the CAC will send data handlers notification of the assessment results. If there is no objection to the results, the data handlers will regulate their cross-border data transfer activities in accordance with the relevant laws and regulations and requirements stipulated in the notification. In case of any objection, data handlers have a 15-day period to submit for a re-assessment, starting from the date of receipt of the notification of the assessment results, according to Article 13 of the Assessment Measures.

Regarding the official assessment period, Article 12 of the Assessment Measures provides a 45-working-day period, while permitting an extension in the case of complicated situations or material supplements and corrections. However, an abundance of applications may be expected in the short term, given the generally low thresholds for mandatory security assessments as stipulated in the Assessment Measures and the short six-month cure period. Hence, it is possible that the regulatory authorities will not conduct a substantive review in certain cases and permit data exports within a relatively short time for applications that are from less sensitive industries, present a high level of need to engage in cross-border transfer activities, and contain less sensitive outbound data.

IV. Application inquiries may be made

To provide the enterprises a channel to seek official instructions in case of practical problems, the Application Guidelines contain contact information for inquiries related to the security assessment as follows:

- E-mail address: sjcj@cac.gov.cn
- Tel: 010-55627135

As of the date of this newsletter, the Beijing Cyber Administration has set up a hotline for inquiries regarding the security assessment application (010-67676912) and some other provincial-level CACs release their own contact information accordingly. It is advisable for enterprises to take notice of the relevant information disclosed by the regulatory authorities.

Specifying the requirements of the application materials

Compared with Article 6 of the Assessment Measures, the Application Guidelines further specify the

application materials that data handlers should submit when applying for a security assessment and provide corresponding templates, including:

- Photocopy of unified social credit code certificate;
- Photocopy of ID card of the legal representative;
- Photocopy of ID card of the case handler;
- Power of attorney for the case handler;
- Application letter for Security Assessment, including the letter of commitment and the Application Form;
- Photocopies of cross-border transfer related contracts or other legally binding documents to be concluded with the overseas receivers;
- Self-Assessment report on cross-border data transfer risks;
- Other relevant supporting materials.

Key points of the aforementioned materials are as follows:

I. Security assessment "case handler" is introduced for the first time

The Application Guidelines introduces the role of "case handler" for the first time. According to the power attorney for the case handler and the Application Letter of the Security Assessment in the appendix, the case handler shall be the authorized employee of the data handler and in charge of the application work on behalf of the data handler, including filing in the Application Letter of the Security Assessment.

II. Both the data transferor and the data receiver should appoint personnel and a management department responsible for data security

Pursuant to the Application Letter annexed to the Application Guidelines, data handlers need to provide information regarding their personnel and management department responsible for data security and those of their overseas receivers.

This data security personnel and management department requirement is imposed on data handlers who process important data or personal information, and who are critical information infrastructure operators, by Article 27 of *Data Security Law*, Article 52 of *Personal Information Protection Law,* and Article 14 of *Regulation on Protecting the Security of Critical Information Infrastructure*. In addition, *Information security technology-Personal Information Security Specification (GB/T35273-2020)* [3]

[3] Article 27 of Data Security Law: "The carrying out of data handling activities shall be in accordance with laws and regulations, establishing and completing data security management systems for the entire process, organizing and carrying out education and training on data security, and employing corresponding technical measures and other necessary measures to safeguard data security. The carrying out of data handling activities through information networks, i.e., the Internet, shall fulfill the duties to protect data security on the basis of the multi-level protection system for cybersecurity.

Those processing important data shall clearly designate persons responsible for data security and data security

further specifies the criteria for determining whether a person and a department responsible for personal information protection are needed. Building on these laws and regulations, the Application Guidelines require data handlers to fill in the information of data security personnel and management department. However, this may raise the question what information data handlers should provide if they are not required to designate data security personnel and management department under the aforesaid laws, regulations and standard, and we consider such handlers may provide the information of the IT responsible personnel instead.

In addition, it should be highlighted that information should be submitted regarding the personnel and management department of the overseas data receiver. Therefore, enterprises who may be involved in applying for security assessments due to use of overseas data processing services are advised to take into account the conditions of responsible personnel and organization when selecting their service providers. Enterprises should also consider including relevant clauses to guarantee that providers appoint the personnel and department as required, so as to fulfil the requirements of the security assessment.

III. Applications can be made for exports of important data and personal information at the same time

In column "09 Information of Proposed Cross-border Data" in the annexed Application Form, applicants are allowed to fill in the cross-border transfer information of both important data and personal information at the same time. Also, the "Information of Proposed Cross-border Data" section in the Application Letter no longer requires their distinction. This implies that personal information and important data transferred to the same overseas receiver can be the subject of the same application for security assessment. However, it remains unclear whether this is applicable in cases where data is provided to multiple overseas receivers within the corporate group under the same export circumstances, which is an issue facing many multinationals. The Application Guidelines have left this issue for future clarification as the regulations are implemented in practice.

---

management bodies to implement responsibilities for data security protection."

Article 52 of the PIPL: "A personal information processor that processes the personal information reaching the threshold specified by the national cyberspace administration in terms of quantity shall appoint a person in charge of personal information protection to be responsible for overseeing personal information processing activities as well as the protection measures taken, among others.

The personal information processor shall disclose the contact information of the person in charge of personal information protection, and submit the name and contact information of the person in charge of personal information protection to the authority performing personal information protection functions."

Article 14 of the Regulation on Protecting the Security of Critical Information Infrastructure: "The operator shall set up a special security management organization, and conduct security background examination on the person in charge of the special security management organization and the personnel in key positions. During the review, the public security organ and the state security organ shall provide assistance."

Information security technology personal information security specification (GB/T 35273-2020) 11.1: "Organizations meeting one of the following conditions shall set up full-time personal information protection director and personal information protection work organization to be responsible for personal information security: (1) the main business involves personal information processing, and the number of employees is more than 200; (2) the organization meets one of the following conditions: Processing personal information of more than 1 million people, or expected to process personal information of more than 1 million people within 12 months;(3) Processing sensitive personal information of more than 100,000 people. "

IV. "Legal Documents" defined

Article 8 of the Assessment Measures[4] lists "the legal documents to be concluded between the data handler and the overseas receiver" as one of the key contents of the security assessment, but does not define the "legal documents" concept. The Application Guidelines clearly interpret the concept as "cross-border data transfer-related contracts or other legally binding documents".

Pursuant to the Application Guidelines, to complete the application form, data handlers need to provide the clauses in accordance with the necessary contents one by one as required by Article 9 of Assessment Measures[5].

In view of the strict legal document requirements for a security assessment, it is advisable that enterprises refer to or use the standard contractual clauses of cross-border transfer of personal information issued by the CAC, or ensure that relevant provisions are introduced strictly as prescribed in the Assessment Measures in other legal documents (such as the unilateral letters of commitment from the overseas receiver, or the data security management system or policy of the groups of the parties in Chinese Mainlandor overseas).

In addition, the Application Guidelines clearly state that the Chinese version of legal documents shall prevail. In the case where only a non-Chinese version is available, an accurate Chinese translation is required to be submitted alongside.

V. Compliance with Chinese laws and regulations is highlighted

The Application Guidelines require data handler to submit in its application form its "compliance with Chinese laws, administrative regulations and department regulations". In particular, the data handler is required to briefly describe the administrative penalties and the investigation and rectification by the relevant competent regulatory authorities in its business operations over the past two years, focusing on data security and cybersecurity.

---

[4] Article 8 of the Assessment Measures: "Prior to applying for the security assessment for the outbound data transfer, a data handler shall, in advance, conduct a self-assessment on the risks of the outbound data transfer, and the self-assessment shall focus on the following matters:…(5) whether the responsibilities and obligations for data security protection are fully agreed in relevant contracts for the outbound data transfer, or other legally binding documents to be concluded with the foreign receiver…"

[5] Article 9 of Assessment Measures: "A data handler shall expressly agree on the responsibilities and obligations for data security protection in the Legal Documents concluded with the foreign receiver, which shall, at least, include the following matters: (1) the purpose, method and scope of the data to be transferred abroad, and the purpose and method for processing the data by the foreign receiver; (2) the location and duration for the storage of the data located abroad, as well as how to process the data located abroad upon the expiry of the storage period, achievement of the agreed purpose, or termination of the Legal Documents; (3) restrictions on the foreign receiver's re-transfer of the data located abroad to another organization or individual; (4) security measures which should be taken in case of a material change to the actual control or business scope of the foreign receiver, or in case of a change to the data security protection policies or regulations, or network security environment of the country or region where the foreign receiver is located, or in case that the data security cannot be guaranteed as a result of any other force majeure event; (5) remedial measures, liability for breach of contract and dispute resolution mechanism in the event of a violation of data security protection obligations as agreed in the Legal Documents; and (6) requirements on properly responding to a data security incident, as well as channels and method to safeguard individuals' personal information rights, when the data located abroad is tampered with, destroyed, leaked, lost, transferred, illegally obtained or illegally used."

Providing the Self-Assessment Report Template

According to Article 5 of the Assessment Measures[6], data handlers must conduct a cross-border data transfer risk self-assessment ("**self-assessment**") prior to submitting an application for security assessment. Furthermore, Article 6 requires the data handlers to submit the cross-border data transfer risk self-assessment report to the competent authorities, which means that the self-assessment report is a significant subject of the security assessment process. Annex 4 to the Application Guidelines contains the Self-Assessment Report Template, in which the factual materials to be submitted and evaluation criteria are to be addressed are clarified through instructions.

I. Submission of the Self-Assessment Report

When applying for a security assessment to the CAC at the provincial level, the data handler shall submit a complete and authentic Self-Assessment Report alongside. It should be noted that if a third-party organization involves in the Self-Assessment, its basic information and involvement shall be stated in the Self-Assessment Report. Meanwhile, official seals of the third-party organization on relevant pages are mandatory. Analyzing from the overall requirements of the Application Guidelines, "basic information of the third party organization" may include the name, nature of entity, main business situation, registered address and business address, while "participation" may refer to the work and role of the third party in the Self-Assessment.

II. Coverage and new requirements in the Self-Assessment Report Template

The Self-Assessment Report Template is divided into four parts: a brief introduction of self-assessment work, the overview of cross-border data transfer activities, the risk assessment of proposed cross-border data transfer activities, and a conclusion of the risk assessment.

The first part of the Self-Assessment Report Template mainly summarizes the self-assessment work, including the start and end time, organization, implementation process, and methods, etc. We believe third-party involvement may be disclosed in this section. The second part is intended to cover the business of the data handler and the facts of the cross-border data transfers, including the basic information of the data handler, the design of the transfer business, the conditions of the information systems, the overview of proposed cross-border data transfer, the security assurance capabilities of the data handler, the information of the overseas data receiver, data security protection obligations and responsibilities agreed in the legal documents, and other circumstances the data handler considers

[6] Article 5 of the Assessment Measures: "Prior to applying for the security assessment for the outbound data transfer, a data handler shall, in advance, conduct a self-assessment on the risks of the outbound data transfer, and the self-assessment shall focus on the following matters: (1) the legality, legitimacy and necessity of the purpose, scope and methods of the outbound data transfer, and the processing of the data by the foreign receiver; (2) the scale, scope, type and sensitivity of the outbound data transfer, and the risks to national security, the public interest or to the legitimate rights and interests of individuals or organizations, caused by the outbound data transfer; (3) the duties and obligations which the foreign receiver commits to perform, and whether the foreign receiver's organizational and technical measures and capabilities in terms of performing the duties and obligations can guarantee the security of the outbound data transfer; (4) the risks of the data being tampered with, destroyed, divulged, lost, transferred, illegally obtained or illegally used during and after the outbound data transfer, and whether there is a smooth channel for safeguarding personal information rights and interests; (5) whether the responsibilities and obligations for data security protection are fully agreed in relevant contracts for the outbound data transfer, or other legally binding documents to be concluded with the foreign receiver; and (6) other matters that may affect the security of the outbound data transfer."

necessary to describe. Among them, the "data security protection obligations and responsibilities agreed in the legal documents" are in line with Article 9 of the Assessment Measures concerning the data security protection responsibilities and obligations. It should be stressed that the second part of the self-assessment report has extended the coverage of the material facts related to cross-border data transfers. The added items are as follows:

- In addition to the facts involved in the cross-border data transfer activities, other basic information of the data handler, other than the enterprise information open to the public, are to be submitted, including basic information of organization or individual, information of equity structure and actual controller, information of organization structure, information of data security management department, overall information of business and data, information of domestic and overseas investment;
- The basic information of the facilities that may be involved in the cross-border data transfer activities shall be introduced comprehensively, including information of data assets related to the business of cross-border data transfers, information of information system in Chinese Mainland and overseas, information of data centers (including cloud services) related to cross-border data transfers, information of cross-border data transfer links (such as the provider, number and bandwidth of the links);
- It is necessary to disclose information about providing cross-border data to other overseas receivers through onward transfers after the cross-border data transfer;
- In terms of the security assurance capabilities of the data handler, the self-assessment report builds on the *Information Security Technology- Guidelines for Data Cross-Border Transfer Security Assessment (Draft for Comments)* and further requires the data handler to illustrate its internal categorization and classification of data, the development of its risk assessment system, as well as its compliance with laws and regulations pertaining to data and cyber security;
- As regards to the overseas receiver, the self-assessment report adds that it shall include a "description of the whole process of data processing by the overseas receiver", which covers the data life cycle from the collection by the overseas receiver from Chinese Mainland, to the use, retention, disclosure and deletion.

The third part of the Self-Assessment Report Template basically restates the requirements of the cross-border data transfer risk assessment in Article 5 of the Assessment Measures, which instructs data handlers to conduct risk assessment based on the facts specified in the second part. Meanwhile, the Self-Assessment Report Template adds a requirement to explain the risk assessment and focus on the problems and potential risks found in the assessment, as well as the corresponding rectification measures and rectification effects. Thus, in addition to the risk assessment of the proposed cross-border data transfer, the data processor also needs to disclose the rectification measures taken to mitigate the risk and the outcomes therefrom.

Our comments

As the Assessment Measures take effect, enterprise cross-border data transfers are entering a phase of compliance rectification, for which the Application Guidelines offer detailed instructions and a roadmap. Pursuant to the Assessment Measures and the Application Guidelines, it is advisable for enterprises to mitigate compliance risks for their data exports by addressing the following:

- Specify the circumstances of cross-border data transfers throughout data processing activities and examine the relevant facts. Determine whether these circumstances fall within the scope of the security assessment and select a data export strategy accordingly (such as to pursue complete data localization or apply for a security assessment as prescribed by laws and regulations);
- Refer to the second part of the Self-Assessment Report Template to conduct a self-assessment in a timely manner. Identify the potential risks and take corresponding mitigation measures so as to pass the security assessment within the six-month period provided in the Assessment Measures;
- Prepare the application materials as required by the Application Guidelines and submit to the relevant CAC at the provincial level, including the photocopy of unified social credit code certificate, photocopy of ID card of the legal representative, photocopy of ID card of the case handler, power of attorney for the case handler, the Application Letter for Security Assessment, including the letter of commitment and the Application Form, photocopies of cross-border transfer related contracts or other legally binding documents to be concluded with the overseas receivers, a self-assessment report, etc.;
- Establish an internal compliance system for cross-border data transfer security assessments. Continue to monitor the conditions of all data exports. Update the submitted materials and re-apply for a security assessment when required.

Important Announcement

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

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

Kevin DUAN

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

Kemeng CAI

Tel: +86 10 8516 4289
Email: kemeng.cai@hankunlaw.com

Brigard Urrutia

29 August 2022

Free Trade Zones: A Catalyst for Regional Integration

Regional integration has been a top priority for Latin-American countries for a long time. Ever since the establishment of the United Nations Economic Commission for Latin America and the Caribbean (ECLAC) in 1948, countries of the region have worked together to overcome the limitations of national markets, and take advantage of economies of scale This was especially the case during the 1990s up until the early 2010s, a period of time in which the average rate at which regional trade grew was 15% –a number much higher than the global average for the same period[1] . One of the main drivers of this growth were the different Regional Trade Agreements (RTAs) that were signed by Latin-American countries, particularly the Andean Community (1969), MERCOSUR (1991), and more recently, the Pacific Alliance (2011). As a result, according to a 2021 ECLAC report, these initiatives have translated into significant outcomes such as a high level of liberalization of trade in goods. According to August 2020 data, approximately 78% of intra-regional imports from Latin America and the Caribbean have access to a zero tariff as a result of trade preferences[2].

However, these efforts still have a long way ahead of them. In this regard, in 2019 just 14% of exports from Latin America and the Caribbean went to countries of the region, a figure that has been steadily declining since 2014. This lack of substantial progress can also be identified by the persistence of non-tariff measures applicable to intra-regional imports, which in most countries reach ad valorem equivalents higher than the tariffs applied to the imports in question[3].

In relation to this increasing need of promoting regional integration, Regional Value Chains (RVCs) have been identified as a highly effective way of achieving said goal. RVCs allow different actors located in different countries within the same region to participate gradually in the production of the same finished product. RVCs consist on the “delocalization” of production, which involves a process known as upgrading. Through this process each stage of the production contributes to the addition of further value to the product, hence the name of the concept: value chain. Through RVCs, developing countries have the opportunity of increasing their exports while also increasing their productivity and technological capabilities[4]. The benefits of developing RVCs are numerous. Their objectives are to increase export diversification, achieve economies of scale in productions where the scale of the local market is small, increase value-added and technological capabilities, and expand the access of small and medium-sized enterprises to foreign markets[5].

Despite these numerous benefits, Latin America has had a slow consolidation of RVCs. An analysis of foreign value-added in domestic exports versus domestic value-added in foreign exports shows the lack of RVCs in the region. According to 2015 data, Latin America lags both Europe and Asia in terms of these two metrics which shows a lack of backward participation in Global Value Chains (the global equivalent of RVCs), as well as forward participation[6]. The factors contributing to this are certainly many. However, one of the main reasons is the aforementioned existence of multiple Regional Trade Agreements (RTAs) with highly different scopes and rules; a situation often described as a spaghetti bowl[7]. This wide array of different regimes results in a series of substantial negative consequences that in turn affect the ability of companies to establish RVCs. These consequences are, among others: (i) redundant information and documentation requirements; (ii) delays in customs clearance; (iii) lack of coordination between customs and other national inspection agencies, etc[8].

Given these circumstances, Latin-American countries must continue to work together towards a more integrated region. One way to achieve this is, for example, by doubling down on MERCOSUR's and the Pacific Alliance's commitment to the Puerto Vallarta Declaration's Action Plan. This 2018 declaration in which all 8 presidents of the two most important Latin-American RTAs pledged to preserve, and strengthen the multilateral trading system, promote free trade, and open regionalism, among other issues, represents a unique opportunity to achieve higher regional integration[9]. Off course, there are certainly many other different ways in which Colombia together with its neighbors can tackle the challenges that have prevented Latin-American countries from truly accessing the benefits of RVCs, but this article will dedicate the following paragraphs to one specific alternative that is deemed to be able to enhance the ability of Latin-American RVCs to conduct trade more efficiently: the Free Trade Zones (FTZs) (or Special Economic Zones) and the harmonization of their different regimes across Latin America.

FTZs are undoubtedly a big engine of Colombia's international trade and even of Colombia's economy as a whole. For instance, the outflow of goods from Colombian FTZs in 2021 represented 9.5% of the country's GDP, while the inflows amounted to 9.6%. That was an increase of 0.8% and 1.4% in comparison to 2020's numbers, respectively[10]. There is a total of 120 FTZs in Colombia, located in 22 of the country's 32 departments[11]. In Colombia, this mechanism has attracted an astonishing sum of over COP $44.000 Billion in investment since 2007 (13% of which was FDI), has contributed to the creation of 114,603 direct and indirect jobs between 2007 and 2021[12], and is responsible for yearly exports worth around USD $2.8 Billion[13]. Furthermore, the fact that the FTZs regime has been in place for more than six decades is additional proof of its robustness. For all these reasons, FTZs' positive role in Colombia's international trade environment is undeniable.

Recently, FTZs have been deemed by UNCTAD as "a crucial development tool for nations"[14]. Therefore, there have been a number of both global and regional initiatives to amplify their role in international trade. One of said initiatives is the newly established Global Alliance of Special Economic Zones (GASEZ) which "seeks to drive the modernization of these zones across the world and maximize their contribution to the UN Sustainable Development Goals (SDGs)"[15]. But exactly how do FTZs relate to RVCs? Easy. The RCV consolidation process can greatly benefit from taking place in neutral spaces that are free of taxes, formalities, and procedures, and that are also equipped with an extraordinary infrastructure that facilitates the flow of goods from one country to another[16]. These characteristics are, of course, a description of an FTZ. According to Colombia's current regulation of FTZs, the benefits of these zones are[17]: (i) single income tax rate of 20% (the current rate in the National Customs Territory is 32% for 2020, 31% for 2021), (ii) customs taxes (VAT and customs duties) are not triggereed or paid on merchandise that is introduced into the Free Trade Zone, (iii) possibility of exporting from a Free Trade Zone to third-party countries, (iv) goods of foreign origin introduced into the free trade zone may remain there indefinitely, and (v) VAT exemption for raw materials, parts, inputs, and finished goods that are sold from the national customs territory to industrial users of Free Trade Zone goods or services. Because of this, it is inarguable that RVCs can highly benefit from FTZs' special economic conditions, which in turn means that FTZs are an excellent tool for increasing regional integration.

In conclusion, given the fact that there is substantial evidence of the benefits of regional integration –with RVCs playing a crucial role in that process– and the fact that there is still plenty of room for development in this area, there is certainly a huge opportunity for Colombia to find a way of better participating in those value chains and through that, fostering the economic development of the country. In this context, FTZs appear as an excellent alternative to take advantage of this situation. For this reason, Colombia must keep enhancing the reach of this special regime and fostering the development of the already-existing FTZs. In the same way, the private sector should also look into this mechanism as a way of reducing costs, increasing revenue, and creating synergies with other companies from the region, especially after Colombia's recent implementation of a new FTZ regime: Decree 278 of 2021, which –among other things– seeks to simplify the process of declaration of new FTZs[18]. Lastly, Colombia should also advocate for a higher degree of harmony between different FTZs regimes across different Latin-American countries so that the seamless flow of goods across the region is guaranteed. For this purpose, Colombia should continue to promote initiatives such as the Puerto Vallarta Declaration or the recent Decision 856 of the Commission of the Andean Community, which established that products or goods from free trade zones of the member countries must enjoy the same tariff reductions as other products or goods, provided they comply with the rules of origin of the Andean Community.

1 ECLAC. (2019). Integración regional y facilitación de la logística en América del Sur. Retrieved July 20, 2022 from HTTPS://REPOSITORIO.CEPAL.ORG/BITSTREAM/HANDLE/11362/45062/1/S1900861_ES.PDF

2 ECLAC. (2021). Perspectivas del Comercio Internacional de América Latina y el Caribe. La integración regional es clave para la recuperación tras la crisis. Retrieved July 20, 2022 from HTTPS://REPOSITORIO.CEPAL.ORG/BITSTREAM/HANDLE/11362/46613/1/S2000805_ES.PDF

3 ECLAC. (2019). Integración regional y facilitación de la logística en América del Sur. Retrieved July 20, 2022 from HTTPS://REPOSITORIO.CEPAL.ORG/BITSTREAM/HANDLE/11362/45062/1/S1900861_ES.PDF

4 ECLAC. (2019). Cadenas regionales de valor en América del Sur. Retrieved July 20, 2022 from HTTPS://WWW.CEPAL.ORG/SITES/DEFAULT/FILES/PUBLICATION/FILES/45002/S1900878_ES.PDF

5 CELAG. (2018, October 10). Las cadenas regionales de valor en América Latina. Retrieved July 20, 2022 from HTTPS://WWW.CELAG.ORG/LAS-CADENAS-REGIONALES-DE-VALOR-AMERICA-LATINA/

6 DB. (2020, January). Global Value Chains and Latin America: A Technical Note. Retrieved July 21, 2022 from HTTPS://PUBLICATIONS.IADB.ORG/PUBLICATIONS/ENGLISH/DOCUMENT/GLOBAL_VALUE_CHAINS_AND_LATIN_AMERICA_A_TECHNICAL_NOTE_EN.PDF

7 ECLAC. (2016). Desarrollo e integración en América Latina. Retrieved July 20, 2022 from HTTPS://REPOSITORIO.CEPAL.ORG/BITSTREAM/HANDLE/11362/40896/1/S1421004_ES.PDF

8 ECLAC. (2019). Integración regional y facilitación de la logística en América del Sur. Retrieved July 20, 2022 from HTTPS://REPOSITORIO.CEPAL.ORG/BITSTREAM/HANDLE/11362/45062/1/S1900861_ES.PDF

9 ECLAC. (2021). Opciones para la convergencia entre la Alianza del Pacífico y el MERCOSUR en la facilitación del comercio. Retrieved July 20, 2022 from HTTPS://REPOSITORIO.CEPAL.ORG/BITSTREAM/HANDLE/11362/47587/1/S2100873_ES.PDF

10 MinCIT. (2022, January). Comercio exterior Zonas Francas. Informe enero 2022. Retrieved July 22, 2022 from HTTPS://WWW.MINCIT.GOV.CO/GETATTACHMENT/ESTUDIOS-ECONOMICOS/ESTADISTICAS-E-INFORMES/INFORMES-DE-ZONA-FRANCA/2022/ENERO/OEE-JE-COMERCIO-EXTERIOR-ZONAS-FRANCAS-ENERO-2022-23MAR21.PDF.ASPX

11 Legis. (2021, July 29). ¿Cuántas zonas francas hay en Colombia? Retrieved 21 2022, July from HTTPS://BLOG.LEGIS.COM.CO/COMERCIO-EXTERIOR/CUANTAS-ZONAS-FRANCAS-HAY-EN-COLOMBIA

12 La República. (2022, April 22). Las zonas francas son nodos clave de la reactivación nacional tras la pandemia. Retrieved July 21, 2022 from HTTPS://WWW.LAREPUBLICA.CO/ESPECIALES/ZONAS-FRANCAS-2022/LAS-ZONAS-FRANCAS-SON-NODOS-CLAVE-DE-LA-REACTIVACION-NACIONAL-TRAS-LA-PANDEMIA-3347633

13 La República. (2022, February 22). Las exportaciones desde zonas francas crecieron más de 14% durante el año pasado. Retrieved July 21, 2022 from HTTPS://WWW.LAREPUBLICA.CO/ECONOMIA/LAS-EXPORTACIONES-DESDE-ZONAS-FRANCAS-CRECIERON-MAS-DE-14-DURANTE-EL-ANO-PASADO-3308142

14 UNCTAD. (2021, October 21). Steps to establish a global alliance of special economic zones taken at UNCTAD investment forum . Retrieved July 21, 2022 from HTTPS://UNCTAD.ORG/NEWS/STEPS-ESTABLISH-GLOBAL-ALLIANCE-SPECIAL-ECONOMIC-ZONES-TAKEN-UNCTAD-INVESTMENT-FORUM

15 UNCTAD. (2022, May 17). New global alliance of special economic zones to boost development. Retrieved July 21, 2022 from HTTPS://UNCTAD.ORG/NEWS/NEW-GLOBAL-ALLIANCE-SPECIAL-ECONOMIC-ZONES-BOOST-DEVELOPMENT

16 Ibarra Pardo, M. G. (n.d.). Las Zonas Francas deben convertirse en el nuevo motor de las exportaciones regionales de Colombia. Retrieved July 21, 2022 from HTTPS://AMCHAMCOLOMBIA.CO/ES/NOTICIAS-COLOMBIA/LAS-ZONAS-FRANCAS-DEBEN-CONVERTIRSE-EN-EL-NUEVO-MOTOR-DE-LAS-EXPORTACIONES-REGIONALES-DE-COLOMBIA/

17 Invest in Colombia. (2022). Free Trade Zones - Benefits. Retrieved July 22, 2022 from HTTPS://INVESTINCOLOMBIA.COM.CO/EN/HOW-TO-INVEST/INVESTMENT-INCENTIVES/FREE-TRADE-ZONE-REGIME-COLOMBIA#:~:TEXT=BENEFITS,%2C%2031%25%20FOR%202021)

18 Brigard Urrutia. (2021, March 19). Investment opportunity: New competitive free trade zone regime. Retrieved July 22, 202 from HTTPS://BU.COM.CO/EN/INSIGHTS/NOTICIAS/INVESTMENT-OPPORTUNITY-NEW-COMPETITIVE-FREE-TRADE-ZONE-REGIME

FOR MORE INFORMATION CONTACT OUR TEAM
info@bu.com.co
www.bu.com.co

Contacts

Romain Rard

Didier G. Martin

Adoption of the CSRD: sustainability, a new pillar of businesses' performance?

20 July 2022

The topic of non-financial information as such is not new; the so-called "Non-financial Reporting Directive" (Directive 2014/95/EU) already requires a number of companies to disclose and include in their management reports a non-financial statement containing information relating to at least environmental matters, social and employee-related matters, respect for human rights, anti-corruption and bribery matters.

Transposed into French law in 2017,[1] the companies[2] in scope are required to publish a "*declaration of extra-financial performance*" (the "**DPEF**"), integrated into their management report, which presents information regarding how they take into account the social and environmental consequences of their activities.

However, the implementation of these requirements has highlighted significant shortcomings: many companies do not provide reliable, comparable and relevant information on sustainability risks, opportunities and impacts.

These shortcomings prove all the more problematic in light of the European Green Deal and the European Commission's objectives of promoting sustainable finance and investment, and ensuring a just transition.

This is the context in which the European Commission published its legislative proposal (April 2021) which aimed to thoroughly revise applicable rules on non-financial reporting (renamed "corporate sustainability reporting") in view of improving the flow of information on sustainability matters. On 21 June, after several months of negotiations, the Council and the European Parliament reached a political agreement on this new directive - the *Corporate Sustainability Reporting Directive*) (the "**CSRD Directive**").

The CSRD, which broadens the scope of non-financial reporting, will oblige more companies to disclose precise information, on the basis on harmonised standards and subject to reinforced control. Thus, the CSRD will require companies to communicate with respect to both sustainability risks to which they are exposed as well as and about their own impact on people, the environment and society at large. In that respect, sustainability can be of relevance for the measure of companies' performance.

1. **Extending the scope of non-financial reporting**

The CSRD will require the following entities to disclose information on sustainability matters :

- all companies listed in EU regulated markets (with the exception of micro-companies[3]), including those not established in the Union but whose securities are listed on a European regulated market;

- non-listed companies with more than 250 employees and either a balance sheet total or a turnover of more than EUR 20 million or EUR 40 million, respectively.

European subsidiaries and sub-groups whose parent company is not established in an EU Member State will also be required to disclose sustainability information. Small and medium-sized companies[4] are also encouraged to publish sustainability information according to simplified standards. Finally, all parent companies of large groups will have to publish sustainability information.

As a result, it is estimated that an additional two thousand French companies will have to publish sustainability information.

2. **Towards more granularity and greater comparability of sustainability information**

The CSRD strengthens significantly the list of sustainability indicators that companies will be required to report on.

From now on, companies will notably have to provide information about i) their business strategy and the resilience of the undertaking's business model and strategy to risks related to sustainability matters; ii) any plans they have developed to ensure that their business strategy and model are compatible with the transition to a sustainable and climate-neutral economy; iii) their targets related to sustainability matters and the progress made towards achieving those targets; as well as iv) the role of the administrative, management and supervisory bodies with regard to sustainability matters.

This information will have to be clearly identifiable in a specific section of the management report and will have to include precise descriptions, including for example the plans defined by the company to ensure that its business model and strategy are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement and climate-neutrality.

Although certain derogations may apply in exceptional cases (impending developments, matters under negotiation, information seriously prejudicial to the commercial position of the company) and transitional periods are provided for, the spirit of the reform is undeniably to move towards greater transparency and comparability of the information provided by companies in scope of the CSRD.

In this respect, sustainability reporting standards[5] will be prepared on the basis of technical advice and contributions from the working group set up by the European Financial Reporting Advisory Group (EFRAG). They will be adopted by the European Commission by means of delegated acts and will aim to ensure that the information disclosed is understandable, relevant, verifiable, comparable and is represented in a faithful manner.

The adoption of these standards will face both opportunities and challenges: the standards could pave the way to the emergence of a sustainability data ecosystem, and contribute to the coherence of the legal and regulatory framework relating to the European Taxonomy and the so-called SFDR[6], all while striving to find the right balance by taking into account to the greatest extent possible the work of global standard-setting initiatives for sustainability reporting, as well as existing standards and frameworks.[7]

The CSRD will therefore result in a double upheaval: an amendment of the current non-financial reporting provisions under French law, in particular the Commercial Code, and the emergence of a new body of harmonised standards at EU level. The new legal framework is bound to have strategic implications and be demanding for companies, under the guise of the concept of "sustainability", and will require all activities of companies in scope to factor in the objective of sustainable development. It is therefore a real revolution which companies face, which they will have to adapt to and prepare for by 2024.[8]

3. **Strengthening the audit and assurance of sustainability reporting**

The absence of an assurance requirement on sustainability reporting would undermine their credibility and fail to meet the needs of the investors and other users of sustainability information for whom they are intended. It is therefore appropriate to consider a gradual increase in the level of assurance required for sustainability disclosures, starting with a requirement for the statutory auditor or audit firm to give an opinion on the compliance of sustainability disclosures with EU requirements, based on a limited assurance engagement.

The co-legislators also wanted to offer undertakings a broader choice of independent assurance services providers for the assurance of sustainably reporting. Member States should, therefore, be allowed to accredit independent assurance providers to provide an opinion on published sustainability information.

It should be noted that French law already provided such an assurance mechanism for a certain number of companies.

Conclusion

The European Commission's ambition, with the proposed CSRD, was to ensure a consistent flow of sustainability information within the financial system, in order to achieve the transition objectives and prevent greenwashing.

The broader scope of CSRD, the principle of greater comparability through common benchmarks for sustainability reporting, and the assurance mechanism agreed by the co-legislators should all be welcomed and will contribute to deliver on the Commission's objectives. Companies may now start preparing and assessing the operational impacts resulting from the CSRD.

That said, the reform is not complete yet: the Union is still to adopt the European sustainability standards which will have to further transcribe the principle of double materiality and provide a common framework for the latest waves of sustainability-linked rules and regulations. This will be the true test that will determine whether the EU can become a front-runner in setting global sustainability reporting standards, and whether sustainability can become a new pillar of businesses' performance.

---

[1] Article L.225-102-1 of the French Commercial Code.

[2] These are companies which employ, on average, more than 500 employees and whose turnover or balance sheet total exceeds (i) for companies listed on a regulated market, their turnover or balance sheet total must exceed 40 million euros or 20 million euros respectively and (ii) for other companies, their turnover or balance sheet total must exceed 100 million euros.

[3] Namely, companies that employ less than 10 people and whose annual turnover or annual balance sheet total does not exceed 2 million euros.

[4] These are companies that employ less than 250 people and whose annual turnover does not exceed 50 million euros or whose balance sheet total does not exceed 43 million euros.

[5] Simplified standards will apply to SMEs.

[6] Cf. Regulation (EU) 2019/2088.

[7] Including existing standards and frameworks for natural capital accounting and for greenhouse gas accounting, responsible business conduct, corporate social responsibility, and sustainable development.

[8] From 1st of January 2024 for companies already subject to the non-financial reporting directive; from 1st of January 2025 for large companies that are not presently subject to the non-financial reporting directive; and from 1st of January 2026 for listed SMEs, small and non-complex credit institutions and captive insurance undertakings.

GUATEMALA

NEW INSOLVENCY LAW NOW IN FORCE

Sep/2022

The entry into force of the Insolvency Law, Decree 8-2022 of the Congress of Guatemala, on September 6, 2022, implies a total change in the regulations related to insolvency and bankruptcy of individual and legal persons, for both merchants and non-merchants.

The Insolvency Law introduces the possibility for persons dealing with financial stress to opt for a reorganization plan and make payment of their debts, without having to liquidate their patrimony. This is a step further in the modernization of insolvency law in Guatemala. Likewise, the new legislation introduces clearer rules and terms for insolvency proceedings.

JORGE LUIS ARENALES
Partner
jorgeluis.arenales@ariaslaw.com

CINDY ARRIVILLAGA
Senior Associate
cindy.arrivillaga@ariaslaw.com

ANDRÉS MARROQUÍN
Associate
andres.marroquin@ariaslaw.com

Hogan Lovells

Hong Kong court issues stunning criticism of provisional liquidators for abusing winding-up procedure

25 August 2022

A Hong Kong court has severely criticised the provisional liquidators (PLs) appointed by the court in the company's place of incorporation in the Cayman Islands, for trying to interfere with the rights of creditors in Hong Kong and to bypass the statutory scheme of winding-up in Hong Kong. In GTI Holdings Limited [2022] HKCFI 2598, the Honourable Madam Justice Linda Chan said it was a matter of concern to see that solicitors and counsel engaged by the PLs in Hong Kong "did not bring home to the provisional liquidators their duties owed to the creditors and to this court".

Winding up here…and there

On 22 November 2021, the Hong Kong court made a winding-up order against the company which was listed on the Hong Kong stock exchange and which carried on financing activities in Hong Kong, finding it "grossly insolvent".

The PLs then sought to reverse the findings "through the backdoor" by asking the Cayman court to approve a proposed scheme of arrangement and requesting the Hong Kong court to assist them in carrying out their work in Hong Kong. They did this by engineering an "urgent" hearing and filing two affirmations which Linda Chan J observed contained a number of significant misrepresentations.

The company procured a bondholder investor to whom the company owed HK$21.2 million to apply for a regulating order under section 227A of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) (CWUMPO), the purpose of which the court said was "no more than an attempt to bypass the creditors' statutory rights."

The investor funded the work of the PLs and the PLs continued to work with the investor and the directors of the company to "ensure they could remain in office".

The PLs sought a hearing of the winding up petition by the Cayman court on 22 February 2022, making representations among other that due notice of the hearing had been given to the creditors and that the Hong Kong court had been notified of the hearing but had not provided a response.

On the basis of the representations and submissions, the Cayman court made a winding up order which had the effect of appointing the PLs as joint official liquidators (JOLs) of the company. Linda Chan J said it was clear that significant information had been withheld from the attention of the Cayman judge when he made the order.

On 18 March 2022, the JOLs placed an "ex parte Summons" before the Honourable Mr. Justice Harris seeking recognition and assistance, including to take all steps necessary to implement the debt restructuring plan and seeking an urgent hearing. Harris J directed that the Official Receiver should be notified of the application and given the opportunity to state her preliminary views.

On 8 April 2022, Harris J informed the parties that in light of the response received from the Official Receiver, the papers had been passed to the court of the main winding-up action.

A "complete turn"

Matters then "took a complete turn" with the JOLs no longer asking the court to deal with the application urgently and instead informing the court that they were abandoning the application, as the investor had "decided not to fund the Application due to commercial concerns".

What was described as the "complete volte-face" on the part of the JOLs showed "that the JOLs would only pursue the Application if it was heard by their chosen Judge" and outside the main winding-up proceedings.

Linda Chan J said it was a "matter of grave concern" that the JOLs had chosen to act in this way. Despite the JOLs' offering to pay the costs of the application, Linda Chan J said it was "for the court to uphold the high standards required of officers of the court".

She then went on to remind the parties of the duties of PLs, including the duty to act honestly and to exercise powers bona fide for the purpose for which they are conferred and not for any private or collateral purpose. A liquidator should "at all times act with complete impartiality as between the various persons interested in the property and liabilities of the company".

Where liquidators accept appointments on the basis that their remuneration depends on the approval of a funder, there risked the impression that "they had subjected themselves to the control or influence of the funder".

The court commented that the JOLs had not disclosed to the court the terms of the funding agreement, illustrating a wider problem, namely where foreign-appointed provisional liquidators/liquidators are given certain powers by the Hong Kong court through a recognition order obtained outside the main winding-up proceedings. Such persons "are able to act as provisional liquidators/liquidators in Hong Kong but are not subject to the supervision and control of the liquidators" under CWUMPO.

This was illustrated in the present case, where one of the PLs had ignored the winding-up judgment and "put forward the contrary views and contentions" which the investor and directors wanted him to say – despite these views being misleading or inaccurate.

An unnecessary application

The obvious route for the PLs to have pursued, would have been to request the Official Receiver to appoint them as her special managers for the purpose of pursuing the scheme of arrangement. Had the Cayman court been alerted to this possibility, it would have concluded that there was "no justification for the PLs to take the elaborate (and costly) steps of seeking orders from the Cayman court for the purpose of pursuing the Scheme".

All the time and costs incurred could have been avoided had the PLs and their legal representatives paid heed to the statutory scheme under CWUMPO. As such, the court took the view that the PLs should not be allowed to recover the costs of the application from the assets of the company.

The court went further, saying that in light of the misconduct on the part of the JOLs, this was a case where the court should exercise the discretion to disallow the JOLs' right to receive remuneration and to recover any costs incurred in making the application, as a means of making doubly sure that the JOLs would not look to the assets of the company to pay their costs.

Pause for reflection

The decision is noteworthy not only for the criticism of the insolvency practitioners involved, but also for the wider questions to which it alludes in terms of the interplay between the Hong Kong insolvency regime and the laws of offshore jurisdictions.

It is another reminder that the Hong Kong courts will carefully examine the viability of proposed restructurings and that the bar is set high, where the interests of the general body of creditors is concerned (see our alert "A magical incantation" – Hong Kong court warns it will carefully examine restructuring viability").

Authored by Jonathan Leitch and Nigel Sharman.

Contacts

Chris Dobby
Partner
Hong Kong
chris.dobby@hoganlovells.com

Jonathan Leitch
Partner
Hong Kong
jonathan.leitch@hoganlovells.com

Mark Lin
Partner
Hong Kong
mark.lin@hoganlovells.com

Antonia Croke
Partner
Hong Kong
antonia.croke@hoganlovells.com

Byron Phillips
Partner
Hong Kong
byron.phillips@hoganlovells.com

Nigel Sharman
Senior Knowledge Lawyer
Hong Kong
nigel.sharman@hoganlovells.com

KOCHHAR&CO.
ADVOCATES & LEGAL CONSULTANTS

Customs Alert
August 2022

Customs Alert

1 Enhancement of Monetary Limits gives relief to Importers and Exporters from Arrest and Prosecution

Arrest and Prosecution are the most feared weapons in the armory of the Tax administrator. The recent guidelines introduced by the Government, put restraints on the manner of exercise of these powers to rule out arbitrariness, unfairness and to restrict such actions to serious offenders.

There is no monetary limit for the exercise of the powers of arrest under the statute, but by Circular Nos. 12/2022-Cus. and 13/2022-Cus. both dated August 16, 2022, the Board has clarified that arrest should be made only in exceptional circumstances.

Under the new guidelines, no arrests or prosecutions can be initiated in the following cases:

- Unauthorized baggage imports made under Transfer of Residence and smuggling of precious metals, restricted and prohibited items, and notified goods, where market value of goods is below Rs. 5 million.

- Unauthorized bringing in or taking out of foreign currency of a value below Rs. 5 million.
- Import or export of misdeclared goods or concealment of restricted or prohibited goods, fraudulent evasion of customs duty or availment of drawback, where the market value of imported goods is below Rs. 20 million.
- Obtaining an instrument from any authority by fraud, collusion, willful misstatement or suppression of facts and utilization of such instrument, where the duty involved is below Rs. 20 million.

The notable exceptions to these limits are serious offences relating to items such as fake Indian currency, arms, ammunitions and explosives, antiques, art treasures, wildlife items and endangered species of flora and fauna.

2 Withdrawal of facility for Manufacture in Warehouse for Solar Power Generating Units - Instruction No. 13/2022 dated July 9, 2022

Under Section 65 of the Customs Act, 1962, read with the Manufacture and Other Operations in Warehouse Regulations, 2019 importers have been extended the facility of duty free import of capital goods for undertaking manufacture in the customs warehouse. The facility is sought to be withdrawn for Solar Power Generating Units on the pretext, that electricity, their end product cannot fulfil the requirement of being kept under one time lock at the time of storage and removal. The Instructions appear to be at variance with the statutory intent and may not survive legal scrutiny. These instructions will have devastating consequences for solar power units operating in the bonded warehouses.

This issue is under consideration by the Delhi High Court in a challenge made by one of the Solar Power Generating Units. The Court has stayed the operation of the customs show cause notice and posted the matter for hearing later this month.

3 Free Trade Agreements to override CAROTAR in case of inconsistency – Instructions No. 19/2022-Cus. dated August 17, 2022

Bilateral and multilateral trade agreements strengthen partnerships and boost trade. India has inked FTAs with several countries, including the UAE, Mauritius, Japan, South Korea, Singapore, and ASEAN members. The Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020 ["**CAROTAR**"] were introduced to streamline the rules of origin and curb the misuse of the preferential rate of duty. With these Rules, came more stringent obligations on exporters and importers for establishing the origin of goods, and authorities questioned or sought validation for certificates issued by agencies in the exporting country, by calling for extensive information from the importer. This caused delays and diluted the benefit sought to be conferred by the Free Trade Agreements (FTAs).

Now, the Board has issued Instructions clarifying that in case of inconsistency, provisions of FTA would override the CAROTAR. The Customs officers can call for information, date or evidence only to the extent permissible under the FTA. This comes as a huge relief to importers and exporters grappling with uncertainties and delays caused by the CAROTAR, and confirms the legal position maintained by us, that the FTAs have a legal binding effect.

REENA KHAIR

Senior Partner
E-mail : reena.khair@kochhar.com

Reena is a Senior Partner and Head of the International Trade & Indirect Taxation Practice at the Firm.

She is a lawyer of eminence with more than 25 years of work experience and specialisation in the areas of international trade and indirect taxation. She represents clients regularly before the Customs, Excise, and Service Tax Appellate Tribunal, as well as before various High Courts and the Supreme Court of India. She has extensive court room experience with more than 300 reported cases argued by her.

In the domain of international trade, Reena has represented clients comprising domestic and foreign industries, as well as user industries in India before the Designated Authority, Directorate General of Trade Remedies, and higher forums. She has also successfully argued the highest number of anti-dumping and anti-subsidy cases before the Tribunal. She has also assisted clients in trade remedial investigations in foreign jurisdictions.

She has been regularly providing advisory services and has been involved in dispute resolution for high-profile matters relating to customs, excise, service tax, FEMA, and GST. Critical issues handled by her include classification under the Harmonized System Nomenclature, valuation, export promotion schemes, drawback, EOUs, SEZs, inverted duty structure, admissibility of credits, transitional issues in GST, export refunds.

She regularly assists clients in the transition to the GST regime.

She has also conducted Internal Management audits for optimization of tax liability, identifying issues/risks for potential disputes with departmental authorities and restructuring of transactions undertaken for various clients including some of India's major conglomerates and multinational corporations in the oil & gas, specialty materials and chemicals, steel, and manufacturing sector.

Awards & Recognitions

Recognised among India's 'Top 100 Lawyers' by FORBES Legal Powerlist 2020; felicitated for expertise in Anti-Dumping.

SHAMPA BHATTACHARYA

Partner
E-mail : shampa.bhattacharya@kochhar.com

Shampa is a Partner in the Indirect tax practice of the Firm. She has more than 15 years of post-qualification experience in corporate and civil law with exclusive specialisation of more than 11 years in the domain of indirect taxes. She has worked extensively on various indirect taxes including Customs, Goods & Services Tax (GST), erstwhile Service tax, Excise laws, Value Added Taxes, Foreign Trade Policy and other ancillary laws.

Prior to joining Kochhar & Co., Shampa has an enriching extensive experience of having worked with two of the Big 4 international consultancy firms namely Deloitte and Ernst & Young in the indirect tax practice in Delhi and Gurgaon.

She has advised clients and assisted them in litigation matters by way of drafting, pleading and strategizing. Her experience includes advising large MNC and Indian companies on structuring of transactions by devising tax efficient models, identifying potential revenue and tax leakages in existing operations and providing feasible remedies, guiding through assessments, audit and investigations by the revenue authorities and compliance services for clients.

Shampa has advised extensively on revenue investigations by custom authorities, classification of goods as per Harmonized System of Nomenclature ('HSN') including imports under free trade agreements, issues with regard to customs valuation including special valuation bench matters, anti-dumping matters and advising on export benefits and authorisations viz EPCG, SCOMET, AA under the Foreign Trade Policy. She has had the expertise of assisting IT based corporates in setting up special economic zone (SEZ') units and other export -oriented units. She has been a part of the GST implementation for MNCs and also offers supports for periodical compliances including GST/ VAT/ Service tax audit. Shampa has been actively involved in rendering policy advocacy support as an alternative to tax litigations by reaching out to policy makers / tax authorities to pre-empt any business disruption. She also assists clients in their anti – profiteering matters and conducting detailed diagnostic tax reviews of the existing business operations of clients. Her focus is also on central and state incentives offered in India.

Her area of industry expertise includes automobile, infra and power, pharmaceutical, telecom and information technology services, FMCG, consumer durables, defence, oil & gas and several others.

SKRINE

Malaysia's Road to Sustainable Energy: New Initiatives Announced

09 SEPTEMBER 2022

At the fifth International Sustainable Energy Summit (ISES) 2022 which recently took place, Malaysia's Prime Minister, Dato' Sri Ismail Sabri bin Yaakob, announced several new initiatives to support Malaysia's transition to sustainable energy. The Ministry of Energy and Natural Resources ('KETSA') has since published a statement on these new initiatives[1], which are considered below.

ALLOCATION AND REDISTRIBUTION OF 1,200MW FOR SOLAR RESOURCES

The Malaysian Government has approved the allocation and redistribution of a 1,200 MW quota for solar resources. Solar energy has been identified as a key renewable energy resource for Malaysia, and it is not surprising that it constitutes one of the focus areas for the new initiatives.

The allocation of the 1,200MW quota will be made through the following:

i. Utilisation of existing RE mechanisms
   These include rooftop solar installations which currently fall under the Net Energy Metering (NEM) programme as well as the New Enhanced Dispatch Arrangement (NEDA). The enhancement of existing RE mechanisms was one of the considerations in Malaysia's Renewable Energy Roadmap and it would seem that this is on its way to being implemented.

ii. Exploration of new RE programmes

Among the programmes envisaged are the development of solar parks, supply of green electricity to data centres, and green hydrogen generation. With the introduction of the Green Electricity Tariff ('GET') programme in late 2021, it is possible that there will be an extension or variation of GET that will apply to data centres and consumers with similarly high electricity consumption.

It will be interesting to see how green hydrogen generation will be approached, as Malaysia's RE framework does not presently cater to or consider the specific requirements and challenges of hydrogen projects.

iii. Procurement of green electricity via Virtual Power Purchase Agreement

Commercial consumers will have an option to procure green electricity by entering into a Virtual Power Purchase Agreement[2] ('VPPA'). This option will be introduced in the fourth quarter of 2022 and an initial quota of 600MW will be available for allocation.

It is pertinent to note that Malaysia's electricity market operates on a single buyer model, with tariff rates for power producers fixed under their respective power purchase agreements with the utility company. In contrast, VPPAs are designed for wholesale markets where the power producer sells electricity at the market price. Given the difference in market structure, it will be interesting to see how the VPPA concept will be rolled out.

DEVELOPMENT OF GREEN ENERGY ISLANDS

As a pilot initiative, three islands in Malaysia, namely Pulau Redang, Pulau Perhentian and Pulau Tioman, will become "green energy islands". These islands will fully use RE for their electricity supply, with the aim of having electricity supply that is consistent, low-cost and low-carbon. Based on the Prime Minister's announcement, the target is for consumers at Pulau Redang and Pulau Perhentian to receive 24-hour electricity by 2025[3].

At this stage, it is unclear how the green energy islands will be materialised. The Minister of KETSA has stated that a proposal paper on this initiative has been presented to Cabinet[4], but no details have been made publicly available at the time of writing.

DEVELOPMENT OF RENEWABLE ENERGY CERTIFICATE FRAMEWORK

A national Renewable Energy Certificate ('REC') framework is being developed in order to ensure Malaysian RECs have credibility, transparency, and high value.

Currently, RECs[5] are issued by TNBX Sdn. Bhd., a subsidiary of Tenaga Nasional Berhad, and can be either sold or purchased on the Malaysia Green Attribute Tracking System (mGATS). There is a lack of clarity on the regulation and trading of RECs and it is hoped that the new national framework will address these aspects.

ESTABLISHMENT OF LEGAL FRAMEWORK FOR EV INFRASTRUCTURE DEVELOPMENT

The Malaysian Government also intends to establish a legal framework to regulate the development of electric vehicle ('EV') infrastructure, with the objective of ensuring public safety. In connection with this, the Energy Commission's "Guide on Electric Vehicle Charging System (EVCS)" which was published in late July 2022[6] will be enforced in the fourth quarter of 2022.

Electric vehicles, with their low to zero emissions, are commonly viewed as the future of the automotive industry. However, the use of EV is not without its challenges – the availability of charging stations, battery capacity, and consumer mindset being among them. Having a legal framework in place to regulate EV infrastructure is a positive step forward in combating these challenges, but there is certainly more work to be done in order to materialise the shift from fossil-fuel powered vehicles to EV.

The new initiatives are commendable efforts towards reaching the target 40% RE share in national capacity by 2035 and realising the commitment to be a net zero nation by 2050. At the same time, they are ambitious plans and will require a significant amount of investment and time. The details of how these initiatives are to be implemented and their effectiveness also remain to be seen.

There is still a long road ahead for Malaysia's clean energy transition, but the journey is certainly shaping up to be an eventful one.

Alert by Richard Khoo (Partner) and Rachel Chiah (Senior Associate) of the Projects and Infrastructure Practice of Skrine.

---

[1] The full text of KETSA's statement is available here. https://www.ketsa.gov.my/ms-my/pustakamedia/KenyataanMedia/SIARAN MEDIA ISES 2022 PERALIHAN KEPADA TENAGA LESTARI.pdf

[2] A VPPA is a long-term electricity supply agreement between a consumer and a power producer. Under a VPPA, the electricity generated by a power producer is not actually delivered to the consumer but is instead sold to the electricity market. In the event the market price is lower than the VPPA price, the power producer will pay the difference for the electricity produced to the consumer. However, if the market price is higher than the VPPA price, the consumer will pay the difference to the power producer.

[3] "*Revised renewable energy quota sees new potentials being explored*" published in the New Straits Times on 29 August 2022 and which is available here.

[4] "*Renewable energy proposed for three islands: Takiyuddin*" published in The Sun daily on 29 August 2022 and which is available here.

[5]A REC represents the delivery of 1MWh of renewable energy to the grid and all associated environmental benefits arising from the displacement of the equivalent amount of conventional electricity. It acts to certify that the owner of the REC has the rights to the said 1MWh of green electricity and environmental benefits, which has the effect of reducing the owner's carbon footprint.

[6]The Energy Commission's Guide on Electric Vehicle Charging System (EVCS) is available here.

This alert contains general information only. It does not constitute legal advice nor an expression of legal opinion and should not be relied upon as such.

For further information, kindly contact skrine@skrine.com

www.skrine.com

NICARAGUA

INCENTIVES FOR SUSTAINABLE DEVELOPMENT

Sep/2022

For several years now, Nicaragua has been paving the way for national and foreign companies operating in the country or wishing to do so, to develop their investment plans and operating policies within the framework of sustainable development; however, there are still many challenges to overcome in order to achieve a real transformation of the ecological awareness of companies, and to make these plans and internal policies effective in a generalized manner, throughout the business sector and not only in some subsectors as we will see here.

These challenges include not only financial aspects or special incentives, but also other less tangible aspects that are generally applicable in different areas. In this regard, he considered it appropriate to refer to the book Laws of Fear Beyond the Precautionary Principle by Professor Cass R. Sunstein, which raises considerations on the issue of the precautionary principle. Sunstein, which raises considerations on loss aversion (i.e., the fear of losing the status quo of what has always been done), the neglect of probability (often generated by the lack of attention to non-visible but existing risks), or beliefs in the benevolence of nature (where it is worth reflecting, is everything natural necessarily good, or can technology help us to improve and achieve greater harmony and balance), among others.

More concretely, the preparation of the ground for the creation of sustainable business initiatives or companies has focused mainly on the energy, forestry, and national water sub-sectors, through the creation of economic and tax incentives. Since 1998, with the entry into force of the Electricity Industry Law, private investment in the energy sector began to be promoted through the exemption of all taxes on imports of machinery, equipment, materials, and inputs associated with the industry's activities, as well as taxes on fuels used in electricity generation.

In 2003, a Special Law for the Promotion of the Hydroelectric Subsector was enacted with broader benefits than those established in 1998, exempting all import taxes, Value Added Tax (VAT), Income Tax (IR), Municipal Income Tax (IMI), stamp duties and any tax related to the exploitation of natural resources. Then, in 2005, with the entry into force of the Law for the Promotion of Generation with Renewable Sources, all new electricity generation projects with renewable sources and their expansions were benefited with tax incentives that previously only applied to the hydroelectric sub-sector. Said incentives have remained in force to date, and the entrepreneurs of the sector and new investors have until January 1, 2023 to be able to take advantage of them. It is not yet known if the National Assembly will extend this term but given the government's policy of promoting the energy sector (especially renewables), it is very likely that this extension will be granted.

Additionally, in the last few years, several electricity generations projects with renewable or clean energy sources have received important and significant incentives for large investors to come to the country to contribute to the change of the energy matrix from fossil fuels to renewable energies.

In 2022, the first legal provisions on Electric Mobility were created, exempting electric vehicles from DAI, ISC, and VAT. Likewise, the imports to be made by the companies that establish the Charging or Recharging Centers were exempted from these same taxes. Last July, the Ministry of Finance and Public Credit issued the tax lists of exempted goods, so it will only be a matter of time before Nicaragua begins to see a change in the transportation sector, aligning itself with a more sustainable development.

Regarding the conservation of forests, in 2003 the Law of Conservation, Promotion and Sustainable Development of the Forestry Sector was enacted, which sought, among other things, the promotion of forest restoration, and the creation of an incentive fund for forest owners, through national funds and financing. Likewise, various special exemptions were established for the sector, including the municipal tax on sales of registered plantations, the tax on real estate used for forest management through Forest Management Plans, income tax deductions, and taxes for the importation of machinery and equipment.

On the other hand, since 2006, there has been a Law of Prohibition for the Cutting, Use and Commercialization of Forest Resources, which from time to time activates a period of forest prohibition in areas and forest resources that merit it, contributing to the rational and prudent use of the same.

And finally, it is important to mention that the creation of the General Water Law in 2007 has been another milestone in Nicaragua in terms of promoting a more sustainable development, which came to regulate the ways in which companies can use and exploit this resource in a sustainable manner. This law also incorporated the limitations for the granting of water use concessions, as well as everything related to the discharge of wastewater generated by the activity of the applicable business.

Rodrigo Ibarra
Partner
rodrigo.ibarra@ariaslaw.com

SyCip Salazar Hernandez & Gatmaitan

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

1. Can a corporation which availed itself of the tax amnesty under Republic Act No. 9480 be held liable for deficiency withholding taxes?

Yes. In *Bureau of Internal Revenue vs. Samuel Cagang* (G.R. No. 230104, March 16, 2022), the Supreme Court upheld the deficiency withholding tax assessment against a taxpayer, notwithstanding the fact that the taxpayer availed itself of a tax amnesty. In this case, the Bureau of Internal Revenue (*BIR*) assessed deficiency income taxes, VAT, and expanded withholding taxes against CEDCO, Inc., where Samuel Cagang (*Cagang*) acted as treasurer. CEDCO argued that since it had already filed its amnesty tax return and paid the corresponding taxes thereon, it cannot be assessed deficiency taxes.

The Supreme Court ruled that the tax amnesty under Republic Act No. 9480 applies only to income taxes, VAT, estate taxes, donor's tax, capital gains tax, excise tax, and other percentage taxes. It does not extend to withholding taxes. As provided in Republic Act No. 9480, the following are disqualified from availing themselves of the tax amnesty:

a) Withholding agents with respect to their withholding tax liabilities;

b) Those with pending cases falling under the jurisdiction of the Presidential Commission on Good Government;

c) Those with pending cases involving unexplained or unlawfully acquired wealth, revenue or income under the Anti-Graft and Corrupt Practices Act;

d) Those with pending cases filed in court involving violation of the Anti-Money Laundering Law;

e) Those with pending criminal cases for tax evasion and other criminal offenses under Chapter II of Title X of the National Internal Revenue Code of 1997, as amended, and the felonies of frauds, illegal exactions, and transactions, and malversation of public funds and property under Chapters III and IV of Title VII of the Revised Penal Code; and

f) Tax cases subject of final and executory judgment by the courts.

When CEDCO availed itself of the tax amnesty, only its liabilities for unpaid income taxes and VAT were deemed fully settled. Its liabilityfor deficiency withholding taxes remained since Republic Act No. 9480 expressly disqualified withholding agents from availing of the taxamnesty with respect to their withholding tax liabilities.

SyCipLaw TIP 1:

A taxpayer who wishes to avail itself of a tax amnesty under a law must review the law granting the amnesty and its implementing rules to ensure that, first, it is qualified and not disqualified from availing itself of the amnesty and, second, all of its tax liabilities are covered by the amnesty. Tax amnesty laws typically provide who are disqualified from availing of the tax amnesty. While nothing prevents the Congress from declaring otherwise, withholding agents are usually disqualified from availing themselves of a tax amnesty with respect to their withholding tax obligations. This is because a withholding agent collects and pays taxes on behalf of another person and not for his/her own behalf. Therefore, a tax amnesty usually does not apply to the liability of a withholding agents as such.

SyCip Salazar Hernandez & Gatmaitan

Managing Partner:
Hector M. de Leon, Jr.

Tax Department Head:
Carina C. Laforteza

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

Of Counsel:
Rolando V. Medalla, Jr.

Special Counsel:
Catherina M. Fernandez

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

Tax Department Associates:
Spencer M. Albos
Diane Elaine B. Bataller
Kevin Joseph C. Berbaño
Roman George P. Castillo

Editor:
Ronald Mark C. Lleno (Partner)

Contributors:
Carina C. Laforteza
Benedicto P. Panigbatan
Russel L. Rodriguez
Ronald Mark C. Lleno
Leah C. Abutan
Joanna Marie O. Joson
Maria Viola B. Vista
Maria Christina C. Ortua-Ang
Catherina M. Fernandez
Rei Luis Anton A. Domingo
Mark Joshua L. Faderguya
Monica Therese B. Lee

Coordinators:
Marie M. Ingcoco
Joanne V. Lacsina
Angelita O. Dizon

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

2. May a company treasurer be held criminally liable for the corporation's failure to withhold taxes?

Yes. In the *Cagang* case discussed above, as the treasurer of CEDCO, Cagang was criminally prosecuted for failure to file tax returns and pay taxes of CEDCO. Cagang's main defense was that CEDCO cannot be assessed deficiency taxes since CEDCO availed of the tax amnesty under Republic Act No. 9480, which covers "all unpaid internal revenue taxes for the taxable year 2005 and prior years, with or without assessments duly issued therefor, and have remained unpaid as of December 31, 2005".

The Supreme Court held that, since withholding taxes were not covered by the amnesty, CEDCO remains liable for deficiency withholding taxes. As the treasurer of CEDCO, Cagang may be criminally charged for failure to file tax returns and pay taxes as regards withholding taxes.

3. Is a court order allowing the production and inspection of documents considered a separate tax audit if a Letter of Authority has been previously issued against the taxpayer for the same taxable period?

No. In *Smart Communications, Inc. v. Hon. Arreza* (CTA EB No. 2386, August 15, 2022), the Court of Tax Appeals (*CTA*) En Banc upheld the grant of a motion for production and inspection of documents in a case pending in court, notwithstanding that a Letter of Authority (*LOA*) had already been issued against the taxpayer.

In this case, the City of Makati issued a Notice of Assessment against the taxpayer for deficiency franchise taxes, fees, and charges for taxable years 2012 to 2015. The taxpayer contested the assessment, asserting that it already paid its tax liabilities. Previously, the City of Makati issued a LOA, which compelled the taxpayer to produce its books of account, financial statements, summary/breakdown of gross sales per calendar year, and proof of payment of franchise taxes in other localities. As the taxpayer was unable to produce a summary/breakdown of gross sales, as well as proof of payment of franchise tax in other localities, despite repeated demands, the City of Makati assessed the taxpayer deficiency franchise taxes based on the total gross receipts of the taxpayer appearing on its financial statements. The assessment is based on Section 7A.08 of the Revised Makati Revenue Code, which provides for a presumptive assessment.

The taxpayer assailed the assessment before the Regional Trial Court of Makati (*RTC*). The City of Makati filed with the RTC a motion for production and inspection of documents, seeking to compel the taxpayer to produce its books of account, financial statements, summary/breakdown of gross sales per calendar year, and proof of payment of franchise taxes in other localities. The RTC granted the motion.

On appeal to the CTA, the taxpayer questioned the grant of the motion for production and inspection of documents arguing that it is tantamount to another examination or audit of the taxpayer's books of account for the same taxable period, as well as the conduct of anexamination without a valid LOA, which are not allowed by the Local Government Code and the Revised Makati Revenue Code.

SyCipLaw TIP 2:

If a corporation violates certain provisions of the National Internal Revenue Code, as amended (*Tax Code*), criminal liability may be imposed on the partner, president, general manager, branch manager, treasurer, officer-in-charge, and the employees responsible for the violation. The identity of these officers may be established based on corporate records, including board resolutions appointing such officers and the General Information Sheets submitted by corporations to the Securities and Exchange Commission. For these named corporate officers, the mere fact of having occupied the position during the period of the corporation's tax violation is sufficient to give rise to probable cause to file criminal charges against such officers for the corporation's violations of the Tax Code.

In ruling that the motion for production and inspection of documents was properly granted, the CTA held that when the taxpayer contested the tax assessment before the RTC, the City of Makati had every right to assert its power to examine the taxpayer's records to ascertain the correct tax liabilities due. The grant of the motion would not amount to another tax audit since it was an exercise of the RTC's power of judicial review. As a court of competent jurisdiction, the RTC has the authority to look into the correctness of the tax assessment against the taxpayer and to require the production of material and relevant evidence necessary for its determination of the factual issues involved in the assessment case, such as the documents in this case.

SyCipLaw TIP 3:

A taxpayer should properly maintain and keep records of its books of account and other accounting records and should be ready to present such books of account and accounting records in the event of a tax audit. In case a court case is filed as regards a disputed assessment, the court can still compel the production of these documents even if the taxpayer did not present the documents to the BIR or the local government during the tax audit. Failure to obey the court's order may result in contempt of court, which is punishable by imprisonment and/or fine.

4. Can a local taxing authority require the production and inspection of documents of a taxpayer's nationwide sales and receipts, as well as its sales and receipts in other localities?

Yes. In the *Smart* case discussed above, the CTA ruled that the City of Makati cannot simply accept the taxpayer's self-assessment as a true and accurate declaration of the taxpayer's income. The local taxing authority has the power to issue a LOA to compel the examination of books, records, and other accounts to ascertain the amount paid, including books, records, and other accounts pertaining to other localities. In this regard, the local taxing authority's examination power under Section 171 of the Local Government Code and Section 7A.07 of the Revised Makati Revenue Code is extensive and necessary to enforce local tax laws. Accordingly, the City of Makati has the authority to compel production of documents showing nationwide sales and receipts, including those documents in localities other than the City of Makati as these documents are relevant and material to the determination of the correct basis and computation of any deficiency local tax in the City of Makati.

SyCipLaw TIP 4:

Taxpayers should be mindful that, while a local government unit (*LGU*) exercises taxing power only within its territorial jurisdiction, it can request the production and inspection of documents showing nationwide revenues, as well as revenues in other localities outside of the LGU's territorial jurisdiction, in order to determine the correct amount of taxes due to the LGU.

5. Is an audit investigation conducted pursuant to a Mission Order, but without a Letter of Authority, valid?

No. An audit and examination of a taxpayer's books and accounting records, to be valid, must be based on a valid LOA.

In *Commissioner of Internal Revenue v. Autostrada Motore, Inc.* (CTA EB No. 2375, July 21, 2022), the CTA En Banc invalidated an assessment that was based solely on a Mission Order and conducted without a LOA. The CTA En Banc ruled that the absence of an LOA violates the taxpayer's right to due process and renders the entire assessment void.

An LOA is the authority given to the appropriate revenue officer assigned to perform assessment functions. Unless authorized by the Commissioner of Internal Revenue (*CIR*) himself, or by his duly authorized representative, through a LOA, an examination of the taxpayer cannot ordinarily be undertaken. Due process requires the identification of the names of the tax agents authorized to conduct the examination and assessment of the taxpayer's books and accounting records through a LOA. Identifying the authorized revenue officers in the LOA is a jurisdictional requirement of a valid audit or investigation by the BIR. There must be a link between the LOA and the revenue officer who will conduct an examination of the taxpayers' books of accounts and accounting records.

The CTA En Banc explained that the purpose of a Mission Order is different from a LOA. A Mission Order is issued to authorize the surveillance pursuant to Section 6(C) of the Tax Code, not the audit and the assessment of the taxpayer. The allowable acts covered by a Mission Order include the tax agent's observation and surveillance of the taxpayer's business operations, verification of specific documents, and the determination of whether the taxpayer complies with the pertinent tax laws and regulations, without conducting a full-blown audit.

In this case, the authority of the revenue officers under the Mission Order was limited to the exercise of the CIR's verification and surveillance powers. The revenue officers were not authorized by a LOA to conduct an examination and inspection of the taxpayer's books of accounts. Thus, the assessments resulting therefrom are void.

SyCipLaw TIP 5:

Taxpayers undergoing an audit investigation should first check whether a LOA has been issued, granting authority to the revenue officer or tax agent conducting the audit investigation. The revenue officer named in the LOA must be the same officer conducting the examination and assessment of the taxpayer's books of accounts and accounting records. Otherwise, the audit investigation and resulting assessment is void for violating the taxpayer's right to due process.

6. Can the reversal of a Bureau of Internal Revenue ruling be given retroactive application if the same would be prejudicial to the taxpayer?

No. Section 246 of the Tax Code prohibits the retroactive application of a reversal of a BIR ruling if the same would be prejudicial to the taxpayer, unless the exceptions under the provision are present, namely, misstatement or misrepresentation of material facts and bad faith. Any change of opinion or position by the CIR with respect to a BIR ruling, which is prejudicial to the taxpayer, shall only be applied prospectively.

In *Commissioner of Internal Revenue v. Meridien East Realty & Development Corporation* (CTA EB No. 2287,July 14, 2022), the CTA En Banc rejected the retroactive application of Revenue Memorandum Circular No. 20-2010 (*RMC No. 20-2010*), which overturned BIR Ruling No. DA-245-05. In the BIR ruling, the BIR initially opined that the transaction was not a sale subject to income tax, expanded withholding tax, documentary stamp tax, and value-added tax. However, RMC No. 20-2010 abandoned the prior position and set out a new one declaring that the transaction was part of a pre-selling arrangement, hence, subject to the aforementioned taxes. Accordingly, the retroactive application of RMC No. 20-2010 would be prejudicial to the taxpayer.

SyCipLaw TIP 6:

A taxpayer has the right to rely upon a BIR ruling issued in his favor until the same has been reversed, amended or overruled by the CIR or by the Supreme Court. However, a reversal of a BIR ruling cannot be retroactively applied if doing so would be prejudicial to the taxpayer, unless the taxpayer deliberately misstates or omits material facts from his return or any document required of him by the BIR, the facts subsequently gathered by the BIR are materially different from the facts on which the ruling is based, or the taxpayer acted in bad faith in securing the BIR ruling. While the general rule is that the government cannot be estopped by mistakes or errors by its officials or agents, this rule is not without an exception, such as the provision in the Tax Code on the non-retroactivity of a revocation, modification, or reversal of a BIR ruling.

In this case, the CTA En Banc ruled that the CIR failed to prove the existence of any of the exceptions under Section 246 of the Tax Code which would allow retroactive application of the RMC. The CIR failed to adduce evidence that: (1) the taxpayer deliberately misstated or omitted material facts from its return or in any document required of it by the BIR; (2) the facts subsequently gathered by the BIR are materially different from the facts on which the BIR ruling was based; or (3) that the taxpayer acted in bad faith. The CTA En Banc found that the change of position made by the CIR was not brought about by a subsequent learning of a fact misrepresented or withheld by the taxpayer. Rather, the reversal was merely due to a change of opinion by the CIR on the tax consequences of the same set of facts, which the taxpayer presented in obtaining the ruling. Thus, the deficiency tax assessments against the taxpayer were declared null and void as they arose from the retroactive application of the RMC.

7. If a taxpayer believes that an action taken by one or both contracting states to a Double Taxation Agreement (*DTA*) will subject him to double taxation or taxation in contravention of the DTA, can he avail himself of the Mutual Agreement Procedure provided in the DTA?

Yes. Revenue Regulations No. 10-2022 (*RR No. 10-2022*) provides for the guidelines and procedures for requesting Mutual Agreement Procedure (*MAP*) assistance in the Philippines. A MAP provides the procedure by which the competent authorities of contracting states to a Double Taxation Agreement (*DTA*) may, through mutual agreement, resolve disputes arising from differences or difficulties in the interpretation or application of the DTA.

Typical Scenarios Requiring MAP Assistance

RR No. 10-2022, sets out the typical examples of scenarios that would necessitate a MAP assistance:

a) The withholding tax rate imposed on an item of income earned by a domestic corporation or resident citizen is beyond the maximum rate fixed under the DTA.

b) A taxpayer is deemed a resident of the Philippines and of the other contracting state based on their domestic laws (which triggers the application of the tiebreaker rules under the DTA).

c) A domestic corporation or a resident citizen is taxed in the other country on the business profit or income from independent services despite not having a permanent establishment or a fixed based in that country under the tax convention.

d) A resident citizen or domestic corporation has been or will be subject to taxation not in accordance with the provisions of the applicable tax treaty regarding the amount of profit attributable to the permanent establishment or fixed base.

e) A taxpayer is uncertain whether the convention covers a specific item of income or is unsure of the characterization or classification of the item related to a cross-border issue.

f) A taxpayer is subject to additional tax in one country because of a transfer pricing adjustment to the price of goods or services transferred to or from a related party in the other country.

Filing of a MAP Request

The taxpayer may file a formal request with the BIR International Tax Affairs Division (*ITAD*). The request must be in writing and signed by the taxpayer or its authorized representative. It must also contain the minimum required information and documentation specified by the BIR.

Subject to the provision of the relevant DTA, the taxpayer may file the MAP request with (i) the competent authority of the contracting state of which the taxpayer is a resident, (ii) the competent authority of the contracting state of which the taxpayer is a citizen (only if the DTA with the United States of America is invoked), or (iii) the contracting state of which the taxpayer is a national if the case falls under the Non-Discrimination article of the DTA.

The request must be filed within the time limit specified in the applicable DTA. If the DTA is silent on the time limit, the request must be submitted within three (3) years from the first notification of the action resulting in taxation not in accordance with the provisions of the DTA, *i.e.*, the date of receipt of the Final Assessment Notice, or of a ruling denying the claim for treaty benefit, or any equivalent document which contains the action that results in double taxation.

MAP Process

The MAP request shall be assessed preliminarily to determine compliance with the following requisites: (i) the minimum information and documentation; (ii) existence of a DTA which contains a MAP article; and (iii) the request was filed with the proper competent authority within the prescribed time limit. If any of the requisites is missing, the request shall not be considered as valid. If only the first requisite is missing, the taxpayer shall be notified of the deficiencies to be completed and submitted.

Once the request is determined to be valid, the Rulings and MAP Section of the ITAD (*MAP Office*) shall determine if the taxpayer's objection is justified. If the objection is justified, the MAP Office will then determine whether the Philippine Competent Authority (the BIR Commissioner) could resolve the case unilaterally. Note that MAP requests arising from measures taken in the Philippines may be resolved unilaterally by the Philippine Competent Authority.

Consultation between Competent Authorities

If the MAP Office determined that the request cannot be unilaterally resolved, the Philippine Competent Authority shall endeavor to resolve the case with the competent authority of the other contracting state. Note, however, that both competent authorities are under no obligation to enter into a mutual agreement for every MAP case.

An agreement reached between the competent authorities must be communicated to the taxpayer within thirty (30) days after the consultation or meeting. The taxpayer shall have another thirty (30) days from receipt of notice to convey its acceptance or disapproval to the agreement. Should the taxpayer accept the agreement, the Philippine Competent Authority shall give effect to such mutual agreement and ensure its implementation. If the taxpayer rejects the agreement, it may proceed with any available domestic remedies, *i.e.*, judicial or administrative appeal.

If no agreement is reached between the competent authorities, the taxpayer may pursue any available domestic remedies after receiving a notice of the failure to reach an agreement.

Resolution of a MAP Case

The MAP request may result in any of the following outcomes:

a) Access to MAP is denied (*i.e.*, not an admissible request or denied for any other reasons);

b) Objection is not justified;

c) Objection is resolved via domestic remedy;

d) Unilateral relief will be granted;

e) Competent authority agreement for full or partial elimination of double taxation;

f) Competent authority agreement stating that there is no taxation not in accordance with the tax treaty;

g) No competent authority agreement is reached; and

h) Any other outcome.

All MAP requests must be resolved within an average timeframe of twenty-four (24) months from the receipt of a complete MAP request.

SyCipLaw TIP 7:

MAP provides a new remedy to taxpayers in contesting double taxation arising from the action of a competent authority of a contracting state to a DTA. Taxpayers should take note of the instances where MAP assistance is available and consider whether it may be beneficial in a particular case (considering, among others, any other available domestic remedy and the speed by which such remedy may be completed).

MAP Request and Domestic Remedies

MAP requests may be filed even when there is a pending judicial or administrative appeal, and even where a decision, ruling, or final assessment has already been rendered by the BIR. Moreover, audit settlements reached between the tax authority and the taxpayers do not preclude access to MAP assistance.

However, a MAP request cannot proceed simultaneously with the determination of a judicial or administrative appeal. Hence, the taxpayer must indicate which process shall be held in abeyance pending the outcome of the preferred process. Cases decided by the courts with finality can no longer be a subject of a MAP request.

Taxpayers who avail themselves of the MAP Assistance may request for the suspension of the collection of taxes if a tax assessment is involved. The Philippine Competent Authority may grant such request pursuant to the Tax Code and relevant rules and regulations. In case the request for suspension is granted, but the MAP Office upholds the tax liability, the enforcement of the collection of taxes shall proceed after the MAP decision had been released, mailed, or sent by the BIR to the registered address of the taxpayer.

8. Can the Bureau of Internal Revenue share taxpayer-specific rulings with other jurisdictions?

Yes. Revenue Regulations No. 11-2022 (*RR No.11-22*) provides the procedure for the Spontaneous Exchange of Taxpayer-Specific Rulings (*Transparency Framework*). Under DTAs entered into by the Philippine Government, a competent authority is mandated to exchange information which are necessary to carry out the provisions of the DTA or domestic laws concerning taxes to which the DTA applies.

The Exchange of Information (*EOI*) Section of the BIR ITAD is responsible for exchanging taxpayer-specific rulings to the foreign tax authority of the potential exchange jurisdictions on or before the prescribed deadline.

Information Subject to the Exchange and Potential Exchange Jurisdictions

The rulings subject to the spontaneous exchange of information and the potential exchange jurisdictions are summarized in the table below:

Type of Ruling	Potential Exchange Jurisdictions
Rulings related to a preferential regime	i. The countries of residence of all related parties (subject to a 25% threshold), with which the taxpayer enters into a transaction for which a preferential treatment is granted, or which gives rise to income from related parties benefiting from a preferential treatment; and ii. The residence country of (a) the ultimate parent company and (b) the immediate parent company.
Cross-border unilateral Advance Pricing Arrangements (*APA*) and any other cross-border unilateral tax ruling (such as an Advance Tax Ruling) covering transfer pricing or the application of transfer pricing principles	i. The countries of residence of all related parties with whom the taxpayer enters into transactions covered by the APA or cross-border unilateral tax ruling; and ii. The residence country of (a) the ultimate parent company and (b) the immediate parent company.
Cross-border rulings giving a unilateral downward adjustment to the taxpayer's taxable profits in the country giving the ruling	i. The countries of residence of all related parties with whom the taxpayer enters into transactions covered by the ruling; and ii. The residence country of (a) the ultimate parent company and (b) the immediate parent company.
Permanent Establishment (*PE*) rulings	i. The residence country of the head office, or the country of the PE, as the case may be; and ii. The residence country of (a) the ultimate parent company and (b) the immediate parent company.
Related party conduit rulings	i. The country of residence of any related party making payments to the conduit (directly or indirectly); ii. The country of residence of the ultimate beneficial owner (which in most cases will be the ultimate parent company) of payments made to the conduit; and iii. To the extent not already covered by (ii), the residence country of (a) the ultimate parent company and (b) the immediate parent company.

Deadline for the Exchange of Information

The EOI Section of ITAD shall ensure that the exchange of information is transmitted to the relevant jurisdiction within the following timelines:

i. Past rulings – as soon as possible after identifying the potential exchange jurisdictions; and

ii. Future rulings – as soon as possible and no later than three (3) months after the issuance thereof.

Past rulings are limited only to PE rulings or rulings concerning the existence or absence of a PE of a foreign enterprise in the Philippines that were issued either:

a) January 1, 2015 to August 31, 2017; or

b) January 1, 2012 to December 31, 2014, provided they were still in effect as of January 1, 2015.

Future rulings refer to rulings issued beginning September 1, 2017 on the following:

a) Rulings related to a preferential regime;

b) Cross-border unilateral APAs and any other cross-border unilateral tax ruling (such as an Advance Tax Ruling) covering transfer pricing or the application of transfer pricing principles;

c) Cross-border rulings giving a unilateral downward adjustment to the taxpayer's taxable profits in the country giving the ruling;

d) PE rulings; and

e) Related party conduit rulings.

Power of the BIR to Request Information

To properly identify the countries with which the information shall be exchanged, the BIR or its responsible offices may request information and other relevant documents from the taxpayer, both domestic and foreign. Note, however, that all requests for information in relation to the exchange of past rulings must be signed by the Assistant Commissioner for Legal Service of the BIR. For future rulings, the request for information must be signed by the respective heads of offices responsible for the issuance of the taxpayer-specific ruling.

SyCipLaw TIP 8:

Requests for information in relation to the exchange of information on future rulings must have the signature of the respective heads of office of the BIR while requests for information in relation to past rulings must have the signature of the Assistant Commissioner for Legal Service of the BIR. In the absence of the signature of these officers, a taxpayer may resist any request for information in connection with the spontaneous exchange of taxpayer-specific rulings.

9. Are there guidelines and procedures on the manner and payment of penalties for violations by Registered Business Enterprises in the Information Technology-Business Process Management sector of the Work-From-Home requirements?

Yes. The BIR issued Revenue Memorandum Circular No. 120-2022 (*RMC No. 120-22*) on August 18, 2022 providing guidelines and procedures on the manner and payment of penalties relative to violations incurred by Registered Business Enterprises (*RBEs*) in the Information Technology-Business Process Management (*IT-BPM*) sector of the Work-From-Home (*WFH*) arrangement allowed under the Fiscal Incentive Review Board Resolution No. 17-2022 (*FIRB Resolution No. 17-2022*) for the period April 1, 2022 until September 12, 2022.

FIRB Resolution No. 17-2022 allows RBEs to continue implementing the WFH arrangement without adversely affecting their fiscal incentives from April 1, 2022 until September 12, 2022 provided the number of employees under the WFH arrangement shall not exceed thirty percent (30%) of the total workforce of the RBE while the remaining seventy percent (70%) of the total workforce shall render work or service within the geographical boundaries of the ecozone or freeport zone being administered by the investment promotion agency (*IPA*) with which the project or activity is registered. The total workforce refers to the total employees directly or indirectly engaged in the registered project or activity but excludes third-party contractors rendering janitorial or security services and other similar activities.

RMC No. 120-22 took effect immediately and will remain in force until September 12, 2022, which is the end of the current FIRB-sanctioned WFH arrangement.

a) Would a violation of the WFH arrangement for one day result in the suspension of the RBE's income tax incentives for the month?

Yes. Non-compliance of the RBE with the 70:30 WFH arrangement prescribed under FIRB Resolution No. 17-2022 even for only one (1) day shall result in the suspension of its income tax incentives for the month when the violation took place. The RBE will thus be liable to pay as penalty the regular income tax rate of twenty-five percent (25%) or twenty percent (20%) (as applicable) for the month of violation.

RMC No. 120-22 provides sample illustrations for the computation of the penalty for non-compliant RBEs.

b) How will RBEs with violation of the WFH arrangement file and pay their Quarterly Income Tax Returns?

RBEs with violations shall continue to file their Quarterly Income Tax Returns and pay their quarterly income tax following their usual procedure of computation of the tax due as if no violation was committed; however, such non-compliant RBEs must attach an additional schedule showing a separate computation for the penalty on the WFH arrangement violation and the RBEs must pay the penalty using BIR Form No. 0605.

c) When is the deadline to pay the penalty?

The penalty must be paid on or before the due date prescribed for the filing and payment of the quarterly income tax, subject to adjustment upon the filing of the annual income tax return.

SyCipLaw TIP 9:

RBEs in the IT-BPM sector should closely monitor compliance with the 70:30 WFH arrangement because even a single day of violation will result in a penalty. RBEs with violations must file their Quarterly Income Tax Returns and pay their quarterly income tax as if no violation was committed, but they must also pay the penalty using BIR Form No. 0605 on or before the due date prescribed for the filing and payment of the quarterly income tax; otherwise, the RBEs will also be subject to administrative penalties for late payment of the penalty.

d) How will non-compliant RBEs file their annual income tax returns?

RBEs with the Income Tax Holiday (*ITH*) incentive shall continue to file their annual income tax returns (*AITR*) using BIR Form No. 1702-EX. RBEs enjoying the Gross Income Tax (*GIT*) incentive or those with mixed transactions shall continue to file their AITR using BIR Form No. 1702-MX.

However, these RBEs are mandatorily required to complete the required information pertaining to allowable deductions pursuant to existing tax laws and regulations, *i.e.*, RBEs with ITH incentive should complete Part VI-Schedule I of BIR Form No. 1702-EX, while RBEs with the GIT incentive should complete Part IV-Schedule 5 of BIR Form No. 1702-MX.

e) If an RBE committed violations of the WFH arrangement but did not pay the penalty when it filed its quarterly income tax returns, can the RBE still pay the penalty?

Yes. For the fiscal quarter with month/s subject to the penalty that already ended, and returns have been filed, but no penalty has been paid, RBEs may file BIR Form No. 0605 and pay their penalty within ten (10) days after the issuance of RMC No. 120-22 or until August 28, 2022. If the penalty is paid beyond the said period, administrative penalties will be imposed.

SGX Regco considers requiring Disclosure of Directors' and CEO Remuneration and 9-Year Cap on ID Tenure

DENTONS RODYK

September 15, 2022

I. Key findings on independent directors (IDs) and remuneration matters

Singapore Exchange Regulation (SGX RegCo) has stated that intends to introduce changes relating to board renewal and remuneration matters, with the aim of raising corporate governance standards of companies listed on the Singapore Exchange (SGX). This move follows an independent corporate governance review conducted by KPMG of 585 listed companies whose financial years ended between 1 July 2020 and 30 June 2021, key findings of which included the following:

a. About half the companies disclosed that they had IDs serving beyond nine (9) years.
b. Only 24% of the directors surveyed thought a hard limit of nine (9) years should apply to IDs.
c. Disclosures on why companies considered individual long-serving IDs as independent were often lengthy but not meaningful.
d. Only 35% and 18% of companies disclosed director and CEO remuneration in dollar value respectively.
e. Disclosures on how remuneration was determined were mostly high level, and companies often did not explain how remuneration, performance and value creation were related.

II. Board Renewal

Currently, the SGX Listing Rules provide that a director will be deemed as not being independent if he has been a director for an aggregate period of more than nine (9) years unless his continued appointment as an ID has not been sought and approved in separate resolutions by:

- all shareholders; and
- shareholders, excluding the directors and the CEO of the issuer, and associates of such directors and CEO.

Since there is currently no absolute bar as to the length of time a director can serve as an ID under the SGX Listing Rules currently, it is not uncommon in Singapore to see IDs in their positions for a decade and beyond.

While the 2-tier vote was intended to be used sparingly to retain quality IDs beyond nine (9) years, SGX RegCo has found that the actual outcome was a rush to use the 2-tier vote to retain long-serving directors.

SGX RegCo warns that such a trend may impede the renewal and diversity outcomes that are sought by SGX RegCo.

III. Remuneration disclosures

The KPMG review found that only 35 per cent of companies disclosed director remuneration in dollar value, and just 18 per cent did so for CEOs. The majority of companies disclosed remuneration in salary bands.

Remuneration disclosure provisions for individual directors and CEOs are currently set out in the Corporate Governance Code, which applies on a comply or explain basis. SGXRegco noted that the commonly used competitive reasons for explaining the non-disclosure for both directors as well as key executives" is a much less compelling argument when it comes to directors.

In a separate statement, the Corporate Governance Advisory Committee (CGAC) (established by the Monetary Authority of Singapore) recommended SGXRegco consider making such remuneration disclosures mandatory so as to enable shareholders to have clear visibility on companies' remuneration structure and practices. CGAC also noted that such disclosures are required in jurisdictions such as the United Kingdom, Australia, Hong Kong and Malaysia.

SGCRegco's stance is that remuneration details of directors and CEOs are important for understanding the link between business performance and financial rewards, and should be more transparent as the fiduciary duties owed by these officers to their companies should outweigh the importance of keeping their remuneration details vague for competitive reasons.

IV. Concluding thoughts

SGX RegCo will be conducting public consultations on the codification of the nine (9) year limit for IDs as well as whether the disclosure of the actual remuneration of directors and CEOs should be made mandatory. It would certainly be interesting to see the outcome of these public consultations, and the changes SGXRegco will implement thereafter as part of its continuing measures to enhance board independence, increase transparency and improve corporate governance as a whole amongst Singapore listed companies.

Your Key Contacts

Marian Ho
Senior Partner, Singapore
D +65 6885 3610
marian.ho@dentons.com

Wei En Tan
Associate, Singapore
D +65 6885 3692
weien.tan@dentons.com

Constitutional Court Found National Health Insurance Database Lacking Proper Privacy Protection and Ordered Relevant Laws be Amended or New Laws be Promulgated within Three Years

09/16/2022

Katherine Juang

After a decade of controversy over the research database of the National Health Insurance (the "NHI"), the Constitutional Court finally handed down its judgment thereon (Ref. No. 111-Shien-Pan-13, the "Judgment") on August 12, 2022, finding that Subparagraph 4 of the proviso to Paragraph 1, Article 6 of the Personal Data Protection Act (the "PDPA") is not unconstitutional. However, the Constitutional Court also found that, because the PDPA and the National Health Insurance Act (the "NHI Act") are indeed inadequate in terms of the protection of information privacy, the relevant laws should be amended or new laws should be specifically promulgated within three years of the date of the Judgment to stipulate the following issues:

1. the establishment of an independent monitoring mechanism for the protection of personal data;

2. the requirements and controls governing the use of the NHI data by the competent authority, i.e., the National Health Insurance Administration (the "NHIA") under the Ministry of Health and Welfare, for the purpose of establishing databases, as well as the release of the personal data (i.e., establishing the rules for material issues such as the subject, purpose, requirements, scope and manner of storage, processing, external transmission and external access of the database and the organizational and procedural supervision and protection mechanisms); and

3. the rules relating to the cessation (opt-out) of the use of the NHI data as requested by the data subject (where the relevant laws are not amended or new laws are not promulgated within three years, data subjects may request the cessation (opt-out) of the use of his/her NHI data for out-of-scope use).

The following is a brief description of the background of the case and the main points of the Constitutional Court's decision and the implications thereof.

A. Case Background

The NHI system has been implemented in Taiwan since 1995, and the NHIA, the competent authority for the NHI business, has collected considerable amount of NHI data, including personal NHI data, over the years. The NHIA formerly entrusted the NHI data to the National Health Research Institute (the "NHRI") to build the National Health Insurance Research Database, which had been available for external use between 2000 and 2016. The NHIA has also established the National Health Insurance Information Integration Service to provide access to the NHI data, which has been pseudonymized through encryption algorithms, for external use.

In 2012, the claimants (seven natural persons) sent separate letters to the NHIA refusing to allow the NHIA to release their personal NHI data to third parties for purposes other than those related to the NHI business, and the NHIA rejected their claims. The claimants filed subsequent petitions and administrative lawsuits that resulted in unfavorable final judgments against them, and in 2017, they filed a petition for interpretation of the Constitution, requesting that the relevant statute be declared unconstitutional.

B. Summary of Reasoning

1. Scope of personal data: The NHI data is a highly sensitive kind of special personal data with a high degree of individual differences, which may be objectively restored via extreme means to indirectly identify a specific data subject, which is a scientific fact; therefore, the NHI data of an individual, whether in its original form or after processing (such as encryption or anonymization), is still "directly or indirectly identifiable to that individual", that is, "personal data" protected under the PDPA.

In addition, the Judgment also mentions the possibility of processing the NHI data of individuals as anonymous data with no possibility of reversionary identification, which is no longer personal data protected under Article 22 of the Constitution on information privacy, but has lost the characteristic of being able to selectively cross-reference variables and establish correlation, and therefore may not be able to achieve statistical or academic research purposes. In any event, it appears that such data is no longer the subject of the Judgment.

2. Reaffirmation and clarification on the privacy of personal data under personal control. The Judgment reaffirms that privacy is protected under Article 22 of the Constitution, that people may decide whether and how to disclose their personal data, and that they have the right to ex ante control through consent prior to use, and ex

post control during and after use, including the right to request deletion, cessation of use or restriction of use of personal data.

3. Subparagraph 4 of the proviso to Paragraph 1, Article 6 of the PDPA is not unconstitutional: The exception to the provision that highly sensitive and specific personal data may be collected, processed or used without the consent of the data subject is "(iv) where it is necessary for statistics gathering or academic research by a government agency or an academic institution for the purpose of healthcare, public health, or crime prevention, provided that such data, as processed by the data provider or as disclosed by the data collector, may not lead to the identification of a specific data subject". This paragraph allows a government agency or academic research institution to collect, process, and use personal NHI data for medical or health purposes, and provides the relevant requirements. The Constitutional Court opines that the meaning of which is still understandable and foreseeable, and can be subject to judicial review; it is not contrary to the principle of legal certainty. In addition, the purpose of collection, processing, and use is limited to medical and health care, and the purpose is to promote the development of medical and health care through statistical or academic research, which is in line with the public interest of particular importance. Moreover, this paragraph already requires the obligation to take de-identification measures (although re-identification may still be possible), but the means are sufficient to significantly reduce the possible infringement, so it is not contrary to the principle of proportionality.

4. Independent monitoring mechanism for personal data protection should be established: In terms of information privacy protection, the necessary organizational and procedural safeguards should be taken for the personal data collected. In particular, the NHI data of individuals is no longer in the control of individuals, and how to avoid its abuse or improper leakage depends on the independent mechanism of supervision to ensure that the specific circumstances are in accordance with the principle of proportionality. However, the PDPA and other related laws and regulations as a whole do not have an independent monitoring mechanism for the protection of personal data, and the protection of personal information privacy is inadequate, so the authorities should establish the relevant legal framework within three years from the date of the Judgment.

5. Relevant laws should be amended or new laws should be promulgated to govern the establishment of databases and release of personal data: Article 79 and Article 80 of the NHI Act only provide for the NHIA's collection of the NHI data and related data. The PDPA regulates how the NHIA should preserve and use the NHI data collected, the legal requirements and proper procedures to be followed, and the appropriate protection mechanism to prevent the misuse and improper leakage of such information. However, the PDPA is a framework regulation, not a specific law on the collection and use of personal NHI data, and its provisions do not cover the legal organizational and procedural requirements related to the external transmission, processing, or use of personal NHI data. Therefore, in order to amend the law or adopt a special law to provide for the retention, processing, external transmission, and external use of the NHI data in the database, the subject, purpose, requirements, scope, and manner, as well as the related organizational and procedural supervision and protection

mechanisms, as well as other important matters, the authorities should complete the relevant legal framework within three years from the date of the Judgment.

6. The right of the data subject to request the cessation of use should be stipulated under amended laws or new laws: Based on the right to ex post facto control of personal data, regarding the NHIA's restriction on the privacy of personal information by collecting personal NHI data for the purpose of conducting NHI business and providing it to government agencies or academic research institutions for purposes other than original collection, the right to request the cessation of use of a data subject's personal data shall remain protected under Article 22 of the Constitution. The NHI Act and the NHI database, as a whole, do not allow data subjects to request the cessation (opt-out) of use, and the procedures to be followed for cessation of use are not stipulated. The authorities shall complete the relevant legal framework within three years from the date of the Judgment. If the relevant law is not enacted or amended after the deadline, the data subject may request the cessation (opt-out) of the use for out-of-scope purposes.

C. Implications of the Case

1. The Judgment adopts a broader definition of highly sensitive special personal data, and where, objectively, the data subject may still be indirectly identified in extreme means, the NHI data is still considered personal data under the Judgment. Therefore, even though the highly sensitive personal data has been encrypted or anonymized, it may still be considered as personal data based on the circumstances of the case, and the application of the PDPA cannot be ruled out, so attention should be paid when handling the relevant circumstances.

2. The Judgment recognizes that the NHI database is still necessary to be established and the NHI data still need to be released for medical or health purposes, but it should comply with the principle of proportionality of means. Therefore, the balance between public interest and information privacy should be achieved by establishing an independent monitoring mechanism, regulating the establishment of a database and the requirements and controls for the release of personal data, and ensuring the data subjects' right to request an opt-out. We will continue to monitor the progress of the relevant authorities in amending relevant laws or promulgating new laws, and assist clients in responding to the relevant authorities with legal and regulatory opinions, so as to promote the establishment of a legal system that best strikes the balance among different legal interests.

BLOG POST / EMPLOYMENT ADVISOR

Employment Counseling

NLRB Proposed Standard Would Increase Potential Liability for Businesses Employing Third Parties

By John Hodges-Howell, Peter G. Finch, and Brandon Braithwaite

09.15.22

If a National Labor Relations Board proposed rule is implemented as drafted, businesses that contract with third parties to provide labor or services would face significantly more risk of being held jointly liable with these third-party providers when they're involved in labor disputes.

In what some are calling the latest example of the NLRB's attempt to reverse the perception that the Board has become employer-friendly, the rule that the NLRB is proposing would make a mere reserved right to control terms and conditions of employment sufficient to establish joint employment status, *even if that reserved right exists on paper only and is never actually exercised*.

Potential Joint Employer Situations

Questions about the existence of a joint employment arrangement often involve franchisors or staffing agencies, but they can also arise in a wide variety of situations in which the employees of one business work under terms set by a contract with another. For example, joint employer relationships have been found when one entity contracts for cleaning services or when a company employs delivery drivers employed by another company. In effect, anytime a company's employees provide service under a contract with another company, the potential for joint employer liability exists.

The definition – and implications – of joint employer status are important in the labor relations context because the Board will order joint employers to share responsibility for any collective

bargaining obligations and/or labor law violations, regardless of either employer's relative involvement in the underlying conduct. In the cleaning services example, the entity desiring cleaning services at its office headquarters might be required to bargain with the cleaning service company and the services union over wages, schedules, and working conditions.

The Current and Proposed Standards

Under the Board's current standard, an employer must "exercise substantial direct and immediate control" over essential terms and conditions of work to qualify as a joint employer. Basically, to be joint employers, both employers must "actually determine" wages, fringe benefits, hours of work, or another of the employment subjects expressly enumerated in the rule (29 C.F.R. § 103.40). As a result, indirect control and a never-exercised contractual reservation of a right to control essential terms and conditions of employment are insufficient to create a joint employment relationship.

But that is all set to change under the proposed rule. Under the Board's proposed rule, merely "possess[ing] the authority to control" essential terms and conditions of employment will be enough to establish joint employer status – even if the business never exercises its contractual authority to influence wages, hours, or other working conditions. Evidence of indirect control or control exercised through an intermediary person or entity will also be sufficient to establish status as a joint employer. Consequently, significantly more businesses will be at risk of incurring bargaining obligations and unfair labor practice liabilities.

What Would Change Mean for Alleged Joint Employers?

In practical terms, this means a business could be required to bargain over the terms and conditions of a supplier's employees, even though the business does not control all the terms or conditions of employment for these employees. Joint employer status also could deprive the business of its status as a neutral employer if there is a strike or labor dispute and also expose the business to liability for actions by the supplier that violate the NLRA. Given the Board's recently demonstrated willingness to entertain special remedies for labor violations, this should be of particular concern.

Employees may also be required to bargain with different entities than they initially expected. Bargaining with two employers instead of one can be significantly more challenging. Not only are the logistics of bargaining more complicated, but different businesses may have different strategies and priorities for what they each want to achieve at the bargaining table. Two or more employers might also be concerned about reducing liability and maintaining separate status under other laws that apply a different joint employer standard. Negotiating collective bargaining agreements may thus become more contentious and drag out even longer before the parties reach an agreement.

Because the new standard puts businesses at risk for being responsible for violations of the NLRA by contracted parties, businesses may also opt to forgo subcontracting opportunities altogether, deciding that the benefits are not worth the risks that joint employment brings. Should that happen, it may mean fewer opportunities and fewer jobs in the marketplace.

The Board Has a History of Changing Its Joint Employer Test

This is not the first time the Board has dramatically shifted its position on this issue, and it's only one example of how a change in administration can lead to an overhaul of NLRB case law and rules.

Historically, the NLRB required a company to have direct and immediate control over the terms and conditions of employment of another company's workers before finding joint employment. But in 2015, the Obama Board handed down a decision in *Browning-Ferris Indus*. that broadened the joint employer test to allow consideration of indirect control and a contractual reservation of the right to control as factors in the joint employer analysis.

Then, in a Board decision commonly referred to as *HyBrand* issued just two years later, the Trump Board reversed *Browning-Ferris* and returned to the long-standing, pre-2015 standard. The Board then went one step further. The 2020 Board implemented agency rulemaking (rather than relying only on adjudication) to codify its return to the narrower standard, limiting the circumstances in which entities are considered joint employers. Businesses had hoped that codifying the standard through agency rulemaking would introduce stability and clarity to an important albeit changing legal issue. That hope may prove to be short lived. Now, just over two years out, a majority of the Biden NLRB is again using administrative rulemaking, but this time to broaden the standard.

Not all the Board members support the proposed rule change, however. The two Board members appointed under the Trump administration believe the proposed rule is a "step backwards." If enacted, they say disputes will lead to case-by-case decisions that ultimately provide less, not more, guidance to businesses, employees, and labor unions. They contend the proposed rule offers no meaningful guidance regarding which "common-law agency principles" apply or how those principles will be applied for determining the existence of an employment relationship. The two dissenting members also dispute the majority's assertion that case law supports a determination of joint employer status based solely on any never-exercised contractual reservation of a right to control essential terms and conditions of employment. They also argue that the proposed rule injects uncertainty into the definition of "essential terms and conditions of employment" where there had once been clarity. This is because the proposed rule exchanges an exhaustive and clearly defined list of "essential" subjects of employment with an open-ended, non-exhaustive list. It also provides no guidance for determining whether an unlisted subject is an "essential" term of employment or not, other than to suggest that it may depend on the particular industry.

What's to Come?

Whether any of the deficiencies identified by the dissenting members will be rectified remains to be seen. The proposed rule has not been finalized, and interested parties have until **November 7, 2022,** to submit initial comments. But for now, the pre-2015 standard still applies.

We anticipate the rulemaking process will likely yield a joint employer test that closely resembles the proposed rule. Businesses are likely to mount legal challenges, which may slow the implementation of the final rule. Assuming the rule survives these challenges, then businesses should expect increased labor risks as a result of the change.

This is an evolving area and there is still much to be determined. DWT will continue to monitor developments regarding the proposed rule and will keep you apprised of any developments. If you would like to learn more about the impending changes from the Board and minimize the risk of inadvertent joint responsibility, please reach out to any of the advisory's authors.

Hogan Lovells

Engage

Legal insight and analysis

Court invalidates text message option under Bioengineered Food Disclosure Standard

15 September 2022

A court has invalidated the portion of the U.S. Department of Agriculture's (USDA's) Agricultural Marketing Service's (AMS's) final rule implementing the National Bioengineered Food Disclosure Standard (BE Rule) that allows for a text message disclosure as an alternative to the electronic/digital link disclosure. The court found the text message option was contrary to the statute's requirement to "provide additional and comparable options to access the bioengineering disclosure", and accordingly unlawful under the Administrative Procedures Act (APA). All other elements of the final rule, including the definition of bioengineered food and the use of "bioengineered" for the disclosure language, remain valid. Further, in order to minimize disruption to consumers and the food industry, the status quo – which allows for both electronic/digital disclosure and a text message option – will be maintained until AMS revises the final rule consistent with the court decision.

Background

In a lawsuit filed against USDA, the USDA Secretary, and the AMS Administrator, plaintiffs –including retail stores that sell natural and organic food products, and food safety advocacy organizations – challenged the disclosure statute and implementing regulations issued by USDA.[1] Plaintiffs primarily argued the regulations violate the APA because they (1) permit a text message disclosure option as alternative to an electronic or digital link disclosure; (2) require disclosures that use the word "bioengineered"; and (3) exclude highly refined foods that do not contain detectable amounts of bioengineered. In its September 13, 2022, decision (available here), the court granted summary judgment in favor of the plaintiffs under the APA for the text message disclosure regulation, and denied plaintiffs' motion in all other respects.

As brief background, the statute directed USDA to conduct a study to "identify potential technological challenges that may impact whether consumers would have access to the bioengineering disclosure through electronic or digital disclosure methods." In the event USDA determined "that consumers, while shopping, would not have sufficient access to the bioengineering disclosure through electronic or digital disclosure methods," the agency was directed to "provide additional and comparable methods" to access the disclosure. AMS hired Deloitte Consulting to conduct the study, and based on the results of the study, concluded that "consumers would not have sufficient access to the bioengineering disclosure through electronic or digital means under ordinary shopping conditions at this time." To improve consumer access to the bioengineering information, AMS created a fourth disclosure option involving text messages, separate from the electronic disclosure method. Under the final rule, companies could choose among the text disclosure statement on the label, symbol, text message, or the electronic or digital link disclosure option. The digital option also requires a phone number on-pack that provides access to the disclosure.

Decision on Text Message Disclosure

The court found that AMS's decision to provide a separate text message disclosure option did nothing to fix the problem of inaccessible electronic disclosures. Instead, it merely provided a fourth disclosure option that regulated entities can select *instead of* the electronic disclosure method. As a result, the standalone electronic disclosure suffices under the regulations, even though USDA determined consumers would not have sufficient access to the electronic disclosure while shopping. The court found that Congress's aim in mandating the study was to ensure that the electronic methods were accessible and would achieve the goal of disclosure, while AMS's text message alternative did not achieve this goal. AMS also, according to the court, failed to adopt the Deloitte study's recommendation that the text message alternative be added as an additional requirement for the electronic disclosure. The court concluded that nothing in the statute permitted AMS to expand the disclosure options for manufacturers beyond the "text, symbol, or electronic or digital link" choices.

Accordingly, the final rule is now remanded to AMS with respect to the text message option specifically. However, the court was convinced that vacating the rule immediately would disrupt consumer access to BE disclosure and would be disruptive to the food industry. Accordingly, the rule is remanded *without vacatur,* meaning the status quo is maintained while AMS revisits the issue. This means that the final rule remains in place *as is*, until AMS revises the rule in a manner consistent with the court decision.

Decision on Other Elements of the BE Rule

- **Mandatory Disclosure Terminology ("Bioengineered")**: In response to plaintiffs' arguments that mandating use of the term "bioengineered" rather than using more consumer friendly terms such as GE or GMO, the court found that the statute supported the requirement to use bioengineered. By requiring USDA to supplement the statutory definition of bioengineering with "any similar term, as determined by the [USDA]", Congress gave USDA discretion to only require the term bioengineered. USDA's reasoning in determining that using terms such as GE or GMO could blur the scope of the regulations and lead to inconsistent disclosures, was found to be reasonable.
- **Definition of "Bioengineering" and Highly Refined Foods**: The court found that AMS's decision to define bioengineered foods to exclude foods that are highly refined and do not contain detectable modified genetic material was reasonable under the law. Because the statute required AMS to determine the amounts of a bioengineered substance that may be present in a food in order to be considered BE, and AMS determined that regulated entities must prove that rDNA is undetectable in foods derived from BE foods, AMS appropriately implemented the statutory mandate.
- **Restrictions on Use of the Terms GE/GMO, "May Be Bioengineered", and Disclosure of Animal-Derived Foods as BE When Derived from Animals Fed GMO Feed**: Regarding the First and Fifth Amendment challenges, where plaintiffs argued the word-use regulations unconstitutionally restricted their speech, the court found plaintiffs lack standing to bring these challenges. Nothing in the statute or regulations prohibits plaintiffs from using other terms such as GE or GMO, and the court concluded plaintiffs had failed to establish a likelihood of prosecution for using such terms. Similarly, the court concluded plaintiffs did not have standing to object to a provision that prohibits animal-derived products from being considered BE solely because the animals were fed GE feed, or the prohibition on using the phrase "may be bioengineered". Because plaintiffs did not demonstrate any "concrete" plans to label meat or dairy products as "bioengineered", or to use the phrase "may be bioengineered", there was no credible threat of enforcement needed to establish standing.

- **Tenth Amendment Challenge to Statutory Provision Preempting State Labeling Laws for GE Seeds**: The court upheld Congress's decision to set national standards and practices for disclosures about bioengineering, so as to ensure that suppliers of GE seeds would be free of a patchwork of state laws. The court rejected plaintiffs argument that preemption is valid only if Congress has enacted a federal law mandating disclosure of GE seeds.

Next Steps

AMS is now tasked with revising the final rule – and specifically considering amendments to the electronic/digital link disclosure – that would provide appropriate access to consumers given the lack of access to the electronic/digital disclosures while shopping. Before revising the rule, AMS would need to undertake notice and comment rulemaking, including issuing a proposed rule and providing an opportunity for public comment. The Center for Food Safety, one of the plaintiffs, has stated it is considering appealing the court's decision.

Authored by Martin Hahn and Veronica Colas.

References

[1] *Natural Grocers, et al. v. Thomas Vilsack, et al.*, Case No. 20-cv-05151-JD (N.D. Cal. September 13, 2022).

Contacts

Martin Hahn
Partner
Washington, D.C.
martin.hahn@hoganlovells.com

Veronica Colas
Counsel
Washington, D.C.
veronica.colas@hoganlovells.com