PACIFIC RIM ADVISORY COUNCIL

Pacific Rim Advisory Council

March 2023 e-Bulletin

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CONFERENCES & EVENTS

PRAC Let's Talk!

Virtual meeting - TBA

Conferences

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

New Delhi - October 7 - 10, 2023
Hosted by KOCHHAR & Co.

Paris 2024 TBA
Hosted by GIDE

PRAC 2023 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.
Get on the List! events@prac.org

IBA Cartagena March 22-24
INTA Singapore May 16-20
ABA Denver August 3 – 8
ABA Antitrust Wash DC March 29-31
IBA M&A New York— June 6 – 7
IBA Annual, Paris - Oct 29—Nov 3

Full Details
www.prac.org/events

MEMBER DEALS MAKING NEWS

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► BRIGARD URRUTIA | Assists Lenders to Colombia's Canacol in US$200 million Refinancing

►DAVIS WRIGHT TREMAINE | Wins Unanimous State Supreme Court Ruling for TVI, Inc., Ending Years-Long Litigation Campaign by Washington AG Office

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COVID-19 SITE FOR ALL UPDATES

PRAC CONTACTS MEMBER DIRECTORY EVENTS

BENNETT JONESQWCOMES 10 LAWYERS TO PARTNERSHIP

March 08, 2023

Bennett Jones is pleased to announce that 10 lawyers have been admitted to the partnership. These remarkable individuals and leaders at the firm serve clients from our offices across Canada in our key industry groups and practice areas.

Bennett Jones' new partners are:

Jason Berall – Commercial Litigation
Stephanie Henry – Employment Services, Health Law
Sarah Huot – Employment Law, Estate Litigation, Health Law
Emily Kettel – Intellectual Property Litigation, Regulatory Law
Bosa Kosoric – Securities, Corporate Commercial
Dom Sorbara – Banking and Finance
Christopher Travascio – Mergers & Acquisitions, Private Equity, Capital Markets
Osie Ukwuoma – Securities, Corporate Law
David J. Wahl – International Arbitration, Construction Law
Corey Yermus – Mergers & Acquisitions, Capital Markets, Commercial Transactions

For additional information visit www.bennettjones.com

HOGAN LOVELLS ADDS HEALTH CARE ANTITRUST LEADER IN WASHINGTON, D.C STRENGTHENING GLOBAL ANTITRUST CAPABILITIES

WASHINGTON, D.C., 15 March 2023: Global law firm Hogan Lovells is pleased to announce that Kenneth W. Field has joined the firm as leader of the health care antitrust practice and a partner in the Global Regulatory & Intellectual Property, Media & Technology (IPMT) practice group in Washington, D.C. Field joins Hogan Lovells from Jones Day, where he was an antitrust partner and co-chaired the firm's global Health Care Practice.

"We are delighted to welcome Ken to the firm," said Janice Hogan, Global Head of Hogan Lovells' Global Regulatory & IPMT practice group. "As a nationally recognized leader in both antitrust and health care law, Ken's addition builds on our strategic commitment as one of Washington, D.C.'s top regulatory firms to grow and maintain the strength of our key practices."

Field, who will be part of the firm's Antitrust, Competition, and Economic Regulation (ACER) practice area, advises clients across the antitrust and competition law sectors before the United States Department of Justice (DOJ), Federal Trade Commission (FTC), and relevant state antitrust enforcement authorities. He has a broad range of transactional and M&A experience, as well as a deep understanding of complex health care regulatory issues.

Logan Breed, who co-leads the firm's global ACER practice area, said: "Over the past two decades, the firm has built one of the nation's leading antitrust practices—including one that is well known for its work in both the health care provider and payer sector. Ken's experience handing complex merger clearance, investigations, and counseling matters across the spectrum of health care and other sectors will make him a key asset for clients, and his addition not only adds to the strength of our team but also demonstrates the practice's commitment to excellent client service."

Michele Farquhar, Managing Partner for the Washington, D.C. office, added: "We are thrilled to welcome Ken to the Washington, D.C. office. He joins extremely skilled antitrust and health care teams—and with his strong track record of leadership and collegiality, is a welcome addition."

Field previously served as FTC Counsel to the Director of the Bureau of Competition and lead attorney on significant FTC investigations and merger challenges, as well as with the Antitrust Division of the DOJ. He has been recognized as a Law360 Health Law MVP for his work on high-profile merger and litigation matters, as a Health Care/Life Science Trailblazer by the National Law Journal, and as a BTI Client Service All-Star.

Field said: "The Hogan Lovells antitrust team has successfully represented clients in the most high profile merger challenges in recent history—from Meta/Within, to United/Change, to Jefferson/Einstein, and now Assa Abbloy—and I am thrilled to join this dynamic and accomplished practice. I am particularly excited to draw on our combined experience representing health care clients before state and federal antitrust enforcers and continuing to help those clients meet their strategic objectives."

Field earned his J.D. and MBA from the Georgetown University Law Center and holds a B.A. in Political Science from the University of California, San Diego.

For more informatno visit www.hoganlovells.com

ARIAS

ADVISES UNIVAR SOLUTIONS IN THE ACQUISITION OF CHEMSOL IN CENTRAL AMERICA

COSTA RICA, 15 Mar 2023: At Arias we provided legal advice to Univar Solutions Inc. in the acquisition of the regional chemical company Chemsol. Univar Solutions Inc. is a leading global distributor of specialty chemicals and ingredients representing a premier portfolio of the world's leading producers. Chemsol, on the other hand, has important companies in Panama and subsidiaries in Costa Rica, El Salvador, Guatemala and Honduras.

Univar Solutions chose us as their primary point of contact for the due diligence process and pre-closing stage; In addition, we advised them in the identification of risks and the coordination of corporate, labor and tax matters essential for the transaction. We also advised the buyer with antitrust assessments.

The deal consisted on a purchase of shares from the entire company, including affiliated target companies. This agreement involves a great deal of detail for the purchase of shares, and our office in Costa Rica was the coordinating law firm of the Central American jurisdictions.

The acquisition of Chemsol will enhance Univar Solutions Inc.'s geographic footprint in the Central American region, as well as its formulation and commercial offering in a wide range of key growth markets, including beauty and personal care, pharmaceutical excipients, groceries, coatings, adhesives, sealants and elastomers, lubricants and metallurgical fluids.

Our advice to Univar Solutions Inc. has been a success in legal and strategic terms, and we have demonstrated once again our leadership in corporate legal matters in the Central American region.

We congratulate Univar Solutions on this acquisition and wish them success in their business journey! We are honored to have been part of this process as your legal counsel.

Advising Univar: (Costa Rica) Andrey Dorado, Tracey Varela, Desiree Barahona; (El Salvador) Robert Gallardo, Ernesto Sanchez; (Guatemala) Luis Pedro Del Valle; Florencio Gramajo; (Honduras) Mario Aguero; Rodolfo Salgado; (Panama) Maria Fabrega; Paula Vives.

For additional information, visit us at www.ariaslaw.com

BRIGARD URRUTIA

ASSISTS LENDERS TO COLOMBIA'S CANACOL IN US$200 MILLION REFINANCING

BOGOTA, 07 March 2023: Colombian oil and gas exploration company Canacol has hired three offices of Nelson Mullins Riley & Scarborough LLP to obtain a new US$200 million revolving credit facility to replace its previous loans. The lenders relied on Skadden, Arps, Slate, Meagher & Flom LLP in New York and London and Brigard Urrutia in Bogotá.

The new credit line has an annual interest rate linked to the secured overnight financing rate (SOFR), plus an additional 4.5%. The loan will expire in February 2027. Canacol will be able to repay the new facility at any time within the four-year term without penalty.

Canacol is a natural gas exploration and production company operating in Colombia. The company's stock is traded on the Toronto and Colombian stock exchanges, in addition to the OTC Markets Group exchange in New York.

lOCAL Counsel to Citigroup Global Markets, Deutsche Bank, JP Morgan, Bancolombia (Panama) and Banco Davivienda - Brigard Urrutia Partner César Felipe Rodríguez and associates Nicolás Alonso and María Camila Ordoñez in Bogotá

For additional information visit www.bu.com.co

DAVIS WRIGHT TREMAINE

WINS UNANIMOUS STATE SUPREME COURT RULING FOR TVI, INC. ENDING YEARS-LONG LITIGATION CAMPAIGN BY WASHINGTON ATTORNEY GENERAL OFFICE

SEATTLE, 15 March 2023: A unanimous Washington State Supreme Court has found in favor of TVI, Inc., which runs the Value Village and Savers thrift store chains, and affirmed dismissal of all claims brought against the company by Washington's attorney general, Bob Ferguson.

The justices found that the attorney general's claims under the Consumer Protection Act (CPA) were unconstitutional and affirmed that speech related to charitable solicitation is fully protected by the First Amendment. The winning TVI defense team was led by Davis Wright litigators Jim Grant and Ross Siler.

TVI, based in Bellevue, Wash., is the largest for-profit operator of thrift stores in the country. The company works with and pays local nonprofits for the donated used goods that it sells in stores, an innovative business model that not only reduces waste but provides a significant source of funding for TVI's nonprofit partners.

Beginning with an investigation in 2014, the attorney general's office asserted a number of claims against TVI, ultimately focusing on claims that TVI's marketing could give a "deceptive net impression" that TVI itself is a charity—despite extensive signs and disclosures saying the opposite and the State's admission that it could provide no evidence that any consumer was ever deceived.

In its ruling last month, the Supreme Court unanimously held that:

TVI's marketing and promotion of donations to its charity partners is fully protected charitable solicitation;

TVI "has the right to advertise its lawful business model";

the State's CPA claims fail to satisfy the required exacting scrutiny and exacting proof standards under the First Amendment; and

the State's pursuit of CPA claims against TVI "clearly discourages" other companies from working with and supporting charities.

"This is the most comprehensive decision following and applying the U.S. Supreme Court precedents protecting charitable solicitation for more than two decades," said Grant. "It is also the culmination of eight years of investigation and litigation, and now five appellate decisions, all unanimous, rejecting the State's arguments."

The case now returns to the superior court for assessment of fees and costs that TVI is entitled to recover.

TVI's defense team also included paralegal Jason Schattenkerk, legal assistant Daniela Najera, and former Davis Wright attorneys Sarah Cox and Max Hensley.

For more information visit us at www.dwt.com

GIDE

COUNSEL TO AGEAS GROUP IN ITS EXCLUSIVE NEGOTIATIOINS WITH CARAC FOR THE SALE OF ITS FRENCH ACTIVITIES

PARIS, 15 March 2023: Gide has advised the international insurance group Ageas in connection with its entry into exclusive negotiations with La Mutuelle Epargne Retraite Prévoyance Carac ("Carac") for the sale of its French life insurance, savings and pension activities.

Gide's team advising Ageas group comprised partner Hugues Scalbert, working with counsel Pierre-Guillaume Sagnol and associate Léo Bouchet on corporate/M&A aspects, and partner Richard Ghueldre with of counsel Charles-Eric Delamare-Deboutteville and associates Constantin Beytout and Thomas Jardin on insurance regulatory aspects.

Carac was advised by Bichot & Associés with partner Nicolas Bichot, counsel Ali Afshar Saber and associates François Sauvageot, Niya Stefanova and Axel Djemia on corporate/M&A aspects.

For more information visit www.gide.com

HAN KUN

ADVISES ON THE LISTING OF MIOTECH ESG RATINGS ON THE SHANGHAI DATA EXCHANGE

SHANGHAI, 16 March 2023: MioTech (Yingtou Information Technology (Shanghai) Co., Ltd.) has successfully listed its "MioTech ESG Ratings" data product on the Shanghai Data Exchange. The product, powered by full-coverage datasets that enable overall and cross-sector market analytics, effectively addresses major challenges faced by traditional financial institutions in their evaluation of corporate sustainability. MioTech ESG Ratings provides individualized analytics by taking into account industry-specific, region-specific, market-specific and company-specific material factors, substantive topics, and Chinese-specific elements, presenting company performance in and exposure to critical ESG factors, risks, and opportunities in a dynamic manner.

Han Kun acted as legal counsel to MioTech and advised the company on its listing of the "MioTech ESG Ratings" product on the Shanghai Data Exchange, providing legal opinions on compliance issues such as the legality, tradability, and liquidity risks of the data product.

For more information visit www.hankunlaw.com

HOGAN LOVELLS

WINS APPEAL IN DECISION AFFIRMING HISTORIC JURY VERDICT IN WRONGFUL CONVICTION CASE

WASHINGTON, D.C., March 2023: a team from global law firm Hogan Lovells has successfully defended a jury verdict on appeal that awarded two North Carolina brothers the largest wrongful-conviction award in history following their release from prison after serving 31 years for a murder they did not commit.

A federal jury concluded that Kenneth Snead and Leroy Allen, North Carolina Special Bureau of Investigations agents, had unconstitutionally coerced the confessions of half-brothers Leon Brown and Henry McCollum for the 1983 murder of a young girl.

Brown, who was 15 at the time of his conviction, was sentenced to life without parole; McCollum, who was 19 at the time, was sentenced to death. The two were released only in 2014, following an investigation by the North Carolina Innocence Inquiry Commission that proved their innocence, and both men subsequently received Pardons of Actual Innocence issued by the Governor of North Carolina. By the time the brothers were released from imprisonment, Henry McCollum had spent longer on Death Row than any other North Carolina prisoner.

Brown and McCollum were awarded US$75 million in 2021 following a jury trial in which a Hogan Lovells team represented the brothers. More information on the jury's pathbreaking verdict can be found here.

On March 8, a unanimous panel of the United States Court of Appeal for the Fourth Circuit sustained the jury's verdict against multiple legal challenges. The Court of Appeals also concluded that $10 million of the $75 million award had been contributed to the brothers by other defendants, and remanded one narrow issue to the district judge to consider if a previous US$1.5 million award to the brothers from a state statutory compensation fund should be further offset against the $75 million verdict.

The panel also affirmed a total of approximately US$6.25 million in lawyers' fees in addition to the larger award. These fees will be included in the costs against all defendants.

The Hogan Lovells appeal team was led by partner and Co-Head of our Appellate practice Cate Stetson, alongside senior associates Matthew Higgins and Patrick Valencia and paralegal Ashley Johnson. The Hogan Lovells appeal team was supported by members of the Hogan Lovells trial team that secured the record-breaking verdict: our Global Head of Litigation, Arbitration and Employment practice, Des Hogan, senior associate David Maxwell, former Hogan Lovells lawyer Elizabeth Lockwood (now of Ali & Lockwood LLC) and local counsel Elliott Abrams of Cheshire Parker Schneider, PLLC.

For more information visit www.hoganlovells.com

MUNIZ
HELPS STEER PERUVIAN CHEMICALS DEAL

LIMA, 01 March, 2023: Muñiz, Olaya, Meléndez, Castro, Ono & Herrera advised Grand Investment Group in in sale to US chemicals company Solenis.

Lima-headquartered Grand Investment Group serves companies in multiple industries, including the pulp and paper, oil and gas, mineral processing and sugar production sectors.

Solenis acquired all the shares in chemical manufacturing company GI Industria, wholesales enterprise Grupo Andino de Inversiones and water and irrigation group Andino Servicios y Montajes Industriales, as well as strategic production and warehouse facilities.

The transaction closed on 6 February. No value was disclosed.

Counsel to Solenis Garrigues (Peru)

Counsel to Grand Investment Group Muñiz, Olaya, Meléndez, Castro, Ono & Herrera Partners Mauricio Olaya, Santiago Quiroz and Víctor Lazo in Lima.

For additional info visit us at www.munizlaw.com

NAUTADUTILH
ASSISTS LIFETRI WITH PLANS TO ENTER INTO LONG-TERM STRATEGIC RELATIONSHIP WITH LEGAL & GENERAL

AMSTERDAM, 16 March 2023: NautaDutilh assisted Lifetri on its announced plans to enter into a long-term strategic relationship with Legal & General. Under this relationship, Legal & General will support Lifetri as it expands to write further Dutch pension risk transfer business for defined benefit arrangements. The agreement remains subject to regulatory review.

The Netherlands is in the process of adopting significant changes to its pension regime, as a result for which pension funds are expected to seek insurance solutions in the coming years to support the transition of pension arrangements into insurance-based, capital-backed guarantees for members.

The planned relationship, which is fully supported by Lifetri's principal shareholder, global investment firm Sixth Street, brings together the capabilities of all involved parties, which cover Dutch market expertise, global PRT knowledge and global investment expertise, and aims to deliver best-in-class solutions to the Dutch pension market.

NautaDutilh's team led by Larissa Silverentand and Roderick Watson, consisted of Geert Raaijmakers, Thari van den Berg, Maarten Klaassen, Wijnand Bossenbroek, Mechteld Flohil, Esther Schreiber, Jacqueline Clement, Joost Kloosterman, Nico Blom, Nina Kielman, Mauricette Schaufeli, Evi Mattioli, David Viëtor, Maaike Heijink, Chantal van Sermond, Antonia Netiv, Felix Seuntjens and Carlijn Storm.

For more informatoin visit www.nautadutilh.com

RICHARDS BUELL SUTTON

ADVISE ON AWARD-WINNING DEAL FOR THE SALE OF ECOFISH RESEARCH LTD

VANCOUVER, 07 March, 2023: Our client, Adam Lewis, won the Association for Corporate Growth's (ACG) 2022 Dealmaker of the Year Award for the sale of Ecofish Research Ltd.

Adam founded Ecofish, and created significant value for the shareholders and the broader B.C. environmental community by being instrumental in the development of provincial and federal environmental assessment and monitoring guidelines.

Adam was advised by members of our Business Law Group including Silvana Facchin, Douglas Cottier and Georg Reuter, along with Sequeira Partners, and KPMG on this award-winning transaction.

We congratulate Adam and his team on this well-deserved win!

For additional information visit www.rbs.ca

PACIFIC RIM ADVISORY COUNCIL

WELCOME BACK!

67th International PRAC Conference

Four Season Hotel

April 22 - 25, 2023

Mexico City

Hosted by Santamarina y Steta

Register online

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Open to PRAC members only

PRAC EVENTS
BULLETIN BOARD

PACIFIC RIM ADVISORY COUNCIL

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 — Stay Connected

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
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PRAC Let's Talk!

Join us in 2023 for our live one-hour virtual meetings
PRAC - Let's Talk! events are open to PRAC Member Firms only
Register : events@prac.org

Visit www.prac.org for full event details

PRAC LET'S TALK!

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

NEW DELHI - 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)

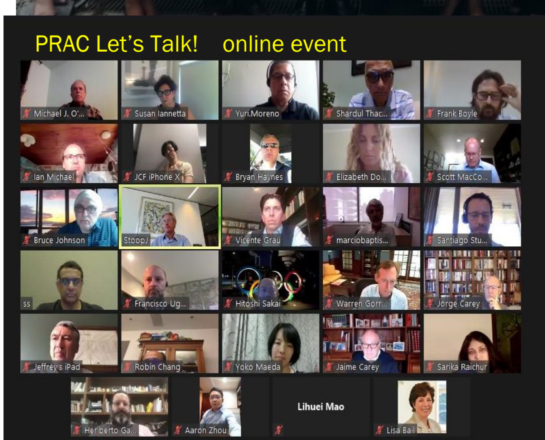
PRAC EVENTS


2019 PRAC COSTA RICA


PACIFIC RIM
ADVISORY COUNCIL

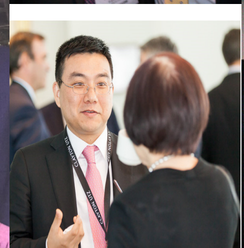

PRAC @ SAO PAULO
PACIFIC RIM
ADVISORY COUNCIL


PRAC @ Taipei 2014


PRAC Let's Talk! online event
Michael J. O'...
Susan Iannetta
Yuri.Moreno
Shardul Thac...
Frank Boyle
Ian Michael
JCF iPhone X
Bryan Haynes
Elizabeth Do...
Scott MacCo...
Bruce Johnson
Stoopj
Vicente Grau
marciobaptis...
Santiago Stu...
Francisco Ug...
Hitoshi Sakai
Warren Gorr...
Jorge Carey
Jeffrey's iPad
Robin Chang
Yoko Maeda
Jaime Carey
Sarika Raichur
Heriberto Ga
Aaron Zhou
Lihuei Mao
Lisa Bai


PRAC @ INTA


PRAC @ Vancouver




PRAC @ PDAC


PRAC @ IPBA

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

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

www.prac.org

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

The Secretariat of Trade fines local AB InBev subsidiary for non-compliance with the corrective measures issued in a prior dominance infringement decision

Practice Areas:

Antitrust

Lawyers:

Federico Rossi, Julián Peña

On March 3, 2023, the Secretariat of Trade (the ?Secretariat?) issued Resolution No. 96/23 whereby a fine of approximately AR$389 million (approximately US$1.8 million) was imposed to Cervecería y Maltería Quilmes S.A.I.C.A.Y G. (?Quilmes?) -a local subsidiary of the AB InBev group and Argentina?s leading beer company- for failing to comply with the corrective measures issued by the Secretariat in August 2021, all in accordance with the Antitrust Law No. 27,442.

In August 2021, the Secretariat (based on the investigation carried out by the CNDC) imposed a fine worth AR$150 million(approximately US$ 1.4 million, taking in consideration the exchange rate in force at the time) to Quilmes for abusing its dominant position in the domestic beer market by means of deploying a loyalty-enhancing strategy with the objective of creating exclusive spaces for the commercialization of Quilmes? brands.

In addition to the fine, the Secretariat imposed severe and overarching corrective measures to prevent Quilmes from further abusing its dominant position and to restore effective competition in the domestic beer market. Among these, the Secretariatprohibited Quilmes to implement any type of formal or informal commercial agreement with both on-premise and off-premise points of sale with the object or effect of generating vertical restrictions, such as: requesting or imposing exclusivities;requesting its products to be the first option for consumers; eliminating competing brands from the menu; or limiting the exhibition of competing brands on shelves. Furthermore, the Quilmes was ordered to communicate the new commercialization conditions to all its points of sale in the country.

Thereafter, in December 2021, certain competitors reported to the CNDC that Quilmes was not complying with the corrective measures previously imposed by the Secretariat. In particular, the CNDC verified that Quilmes had failed to comply with the notification of the new commercialization terms and conditions to the points of sale imposed by the Secretariat. According to the CNDC, 209 days had elapsed from the time the Secretariat issued its original infringement decision, and the time Quilmes began to notify the points of sale of the new commercialization terms and conditions dictated by the Secretariat.

Therefore, based on the CNDC?s recommendation, the Secretariat imposed a periodic penalty fine amounting to 11,467 administrative units per each day of non-compliance with the corrective measures, thus the total fine imposed to Quilmes amounted to AR$389 million (approximately US$1.8 million).
The Secretariat?s decision to make use of the periodic penalty fines in relation to anticompetitive conducts constitutes an unprecedented measure. This decision could pave the way for future enforcement actions, and companies object of a past infringement decisions containing cease-and-desist orders and/or corrective measures should remain watchful.

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

Ontario Initiates Consultation on Permanent Framework for Target Benefit Pension Plans

Written By Jordan Fremont and Ben Sissons

As promised in the 2022 Budget, the Ontario Ministry of Finance has launched consultations on proposed regulations for Ontario's *Pension Benefits Act* (PBA) to implement a permanent target benefit framework for pension plans in Ontario. The framework will replace temporary solvency funding regulations for eligible Multi-Employer Pension Plans (MEPPs) that are able to reduce accrued benefits. The temporary regulations, which are set to expire in 2024, were intended to be in place only until a permanent and comprehensive legislative and regulatory framework was developed. The government's consultation on proposed regulations will be of particular interest to eligible MEPPs that have previously obtained or wish to gain access to solvency funding relief.

Objectives of Permanent Target Benefit Framework

As described in the government's consultation document, the objective of the permanent target benefit framework is to promote and enhance retirement security through various regulatory measures, falling under the following three fundamental pillars:

- **Governance best practices**: Promote best practices through required governance and funding policies.
- **Enhanced communications**: Enhance communication to members with required disclosures.
- **New funding rules**: Permanent funding rules to manage risk and support benefits.

The consultation document sets out additional details respecting each of these fundamental pillars, and reviews other significant matters to be addressed by way of regulation, respecting the conversion of eligible MEPP benefits to target benefits, asset transfers, wind-ups, administrative monetary penalties, multi-jurisdictional pension plans and transitional considerations. As touched on below, certain parts of these proposed target benefit regulations might foretell requirements for other pension plans.

Proposed Governance and Funding Policy Requirements and Potential Implications for Other Ontario Pension Plans

As indicated in our blog, *Governance and Funding Policies Reintroduced for Ontario Pension Plans*, in November 2022 Ontario reintroduced proposed amendments to the PBA to require governance and funding policies both for target benefit as well as other pension plans. Governance and funding policy requirements are, for target benefit plans, to be included in the proposed regulations respecting the permanent target benefit framework. The government's consultation document indicates that the proposed regulations will provide for the following:

Governance Policies

Governance policies will be required to address:

- The roles, responsibilities and reporting relationships of the persons involved in the administration of the pension plan and pension fund.
- The operational policies in place to support the administration of the pension plan or pension fund, including any applicable organizational structures.
- The measures in place for carrying out the supervision of the persons involved in the administration of the pension plan or pension fund, including measures to monitor, review and assess their performance, skills and knowledge and to provide them with training to maintain and enhance their qualifications.
- The skills, knowledge, experience and other attributes required of persons involved in the administration of the pension plan or pension fund to enable them to meet their obligations under the PBA and regulations.
- The systems in place to identify, quantify and manage material risks to the pension plan or pension fund.
- The processes in place to assess what changes to the pension plan or the administration of the plan may be appropriate based on the results of the stress testing in filed reports. A requirement to perform a stress test would enhance governance processes for risk management but would not affect funding requirements.
- The processes in place to ensure that persons involved in the administration of the pension plan or pension fund have access to relevant, timely and accurate information.
- The processes in place for the communication of relevant, timely and accurate information to members, former members, retired members and other persons entitled to benefits under the pension plan, to employers participating in the pension plan, to trade unions representing members of the plan and to the CEO of the Financial Services Regulatory Authority of Ontario.
- The code of conduct established for persons involved in the administration of the pension plan or pension fund, including the process for identifying, monitoring and addressing conflicts of interest.

Funding Policies

In addition, because accrued benefits can be reduced under a target benefit plan, the government consultation document indicates that funding policies will be critical for establishing and describing how related risk is managed. The proposed regulations would require that a plan’s funding policy address:

- The funding objectives for the pension plan as they relate to:
  - the pension benefits provided under the plan and the stability of those benefits;

- the stability of the contributions required under the plan; and
- the equitable treatment of current and future members of the plan.

- The methods for achieving the funding objectives mentioned above, including use of any additional funding margin that may be appropriate.
- The material risks relating to the funding of the pension plan, including the risk of reductions to accrued benefits provided under the plan, and the measures to be taken to quantify and manage those risks.
- The method and process to be applied to reduce benefits, including accrued benefits, under the pension plan, if the circumstances require a reduction of those benefits.
- Circumstances when benefit improvements could be made and how improvements would be funded, including any use of surplus.
- The circumstances that will cause the funding policy to be reviewed and amended.

Notwithstanding the unique structural and regulatory features of pension plans providing target benefits, certain aspects of the governance and policy requirements that are eventually established for target benefit plans could provide clues as to what might be required of other Ontario registered pension plans. This is most likely the case respecting requirements for governance policies. Accordingly, this component of the government's consultation could be of particular interest to administrators of Ontario registered pension plans more generally.

Consultation Period Ends June 30, 2023

The consultation drafts of proposed regulations respecting the permanent target benefit framework will be posted to the Ontario government's regulatory registry in stages. The consultation period is to remain open until June 30, 2023.

We will monitor the progress of the proposed regulations and the government's consultation. Members of the Bennett Jones Pension & Benefits group would be pleased to discuss any questions respecting the proposed regulations or to provide any other assistance with the consultation process.

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Posted on: February 22, 2023

THE FAILURE TO PREVENT CLAUSE: INSURER HAS NO DUTY TO DEFEND PARENTS NAMED IN NEGLIGENCE CLAIM

By: Sim Harry

In the recent case of *Reeves v. Co-Operators General Insurance Company*, 2022 BCSC 2258 [*Reeves*], the Supreme Court of British Columbia found that an insurer was not under a duty to defend parents in a lawsuit, which alleged they failed to prevent their minor son from assaulting another student.

Factual Background

Zarina Salehian filed an action in the Supreme Court of British Columbia alleging that she was assault by Isaac Reeves, while at school in September 2019 (the "Personal Injury Action"). Ms. Salehian sued Isaac, his parents, the school district, and some school district employees, for injuries she sustained from the alleged assault.

The parents held a home insurance policy, which included coverage for personal liability because of unintentional bodily injury damage arising out of personal actions (the "Policy").

The parents sought coverage from the insurer pursuant to the Policy.

The claims against the parents were in negligence, and in particular, that they failed to properly supervise, adequately discipline, and take reasonable steps to avoid a reoccurrence of violence from Isaac.

The insurer denied coverage to the parents on the basis of the following exclusion referred to by the court as the Failure to Prevent Exclusion:

- We do not insure claims made against you, nor do we provide voluntary payments under this policy, arising from or in relation to:
- …failure of any insured to take steps to prevent sexual, physical, psychological or emotional abuse, assault, molestation, harassment or corporal punishment.

The Ruling

The court started its analysis with the three part test, for interpreting insurance policies in the context of a duty to defend and right to indemnify, set out by the Supreme Court of Canada in *Non-Marine Underwriters,* *Lloyd's of London, v. Scalera*, 2000 SCC 24 [*Non-Marine Underwriters*].

The first stage of the *Non-Marine Underwriters* test was met, as the court found the claims were properly plead in the Personal Injury Action. The claim against the son was for battery, and the action against the plaintiff parents was in negligence.

The second part of the test involved determining whether the claims were derivative in nature, and the court found they were not. The actions of the parents, and the son, did not arise out of the same actions, and were clearly separable. While the alleged assault by the son was an intentional tort, the same could not be said of the alleged negligence of the parents.

The court noted a number of analogous cases which treated claims against parents as distinct causes of action in negligence: *Durham District School Board v. Grodesky*, 2012 ONCA 270, *R.C. and J.M. v. Western Assurance Company*, 2022 ONSC 100, *Unifund Assurance Company v. D.E.*, 2015 ONCA 423 [*Unifund*].

The third part of the *Non-Marine Underwriters* test required determining whether any of the properly plead, non-derivative claims, could potentially trigger the insurer's duty to defend, followed by determining whether the Failure to Prevent Exclusion applied.

The court held that the terms of the Failure to Prevent Exclusion were "clear, and unambiguous even if using the lens of an ordinary and reasonable person". The court held that the allegations against the plaintiff parents were "that they failed to take various steps such as: the failure of the parents to anticipate another occurrence of violence, to take reasonable steps to avoid a reoccurrence of violence, and to supervise and discipline their son." The court found that these allegations fell within the concept of being a "measure or action".

Ultimately, the court found that the Failure to Prevent Exclusion applied, and denied coverage, adopting the approach taken in *Unifund* and *Dube v. BCAA Insurance Corporation,* 2012 BCSC 1958, where a similar exclusion clause applied in the context of negligently failing to prevent abuse.

Practical Implications for Insurers and Insureds

Reeves reminds us of the importance of the methodical step by step approach to determining coverage the "pith and substance" of a claim, as set out in *Non-Marine Underwriters*:

(a) Determine whether a claim can trigger indemnity requires an examination of the substance of the allegations contained in the pleadings. It goes beyond a superficial readings of the words selected by the plaintiff, to determine the true nature of the claims;

(b) Determine whether the claims are entirely derivative; and

(c) Determine whether any of the properly plead non-derivative claims could potentially trigger the duty to defend, and whether an exclusion applies.

Reeves also reminds of the high hurdles faced by insureds in obtaining coverage for negligent supervision allegations, particularly when facing an exclusion similar to the Failure to Prevent Exclusion.

For more information about this article, contact the author, Sim Harry here.

/Carey

News Alerts

Illegal commerce: Court of Appeal of Santiago orders the Municipality of Santiago to take action

On March 3, 2023, the Court of Appeal of Santiago granted a constitutional petition for protection ("*recurso de protección*") filed by a bookstore chain against the Municipality of Santiago for not adopting adequate and effective measures to prevent the installation of street vending in Ahumada Street. This judgment is an important step in the fight against unregulated street vending and the negative consequences it causes, among others, the sale of counterfeit products that infringe the industrial property rights of trademark owners.

The claimant argued that the failure of the Municipality of Santiago to adopt specific measures that contribute to the eradication of street vending corresponds to an illegal omission that affects its constitutional guarantees. The claimant's main argument is that the street vending that has been set up on Ahumada street obstructs the visibility of its commercial premises and hinders easy access to it, as well as constituting acts of unfair competition that the defendant allows by not exercising its legal oversight powers in this matter.

The Second Chamber of the Court of Appeal of Santiago, composed of the judges Héctor Plaza Vásquez and Jessica González

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Troncoso, and the member-attorney Óscar Torres Zagal, in a split decision, granted the petition for protection filed by the claimant. The Court found that illegal street vending affects the right to "develop any economic activity," as enshrined in article 19 N° 21 of the Political Constitution of the Republic, as such vending hinders free access to the claimant's commercial premises and obstructs its visibility, thereby affecting the aforementioned constitutional guarantee. The Court further recognized that the disturbance cannot be exclusively attributed to an action or omission of the Municipality of Santiago, making it appropriate to evaluate this phenomenon from a multisystemic perspective.

According to our point of view, the Court's ruling calls for institutions such as Customs, the Internal Revenue Service, the police, the Governorship, the Intendancy, the Regional Ministry of Health, and affected private entities to work together to eradicate illegal commerce.

Considering the above, the Court of Appeal of Santiago ordered the creation of a working group with the various entities involved in the prevention and combat of illegal commerce in the area (Ministry of the Interior and Public Security, National Service for the Prevention and Rehabilitation of Drug and Alcohol Consumption, and other relevant entities) with the purpose of coordinating actions to suppress informal commercial activities that take place on the aforementioned street in the commune of Santiago.

Furthermore, the Court of Appeal of Santiago established a deadline of forty-five days from the date the judgment became final for the Municipality of Santiago to provide a detailed report on the agreements reached by the working group and the specific measures adopted to guarantee and protect the constitutional rights of the claimant.

This ruling consolidates efforts to combat illicit trade and counterfeiting. The decision issued by the Court of Appeal of Santiago is directly related to the entry into force of Law No. 21,426 on Illegal Trade of the Ministry of the Interior and Public Security, which strengthens the investigative and oversight powers of various authorities in this area, such as municipalities. In this regard, among other things, the Law on Illegal Trade gave municipal inspectors powers to oversee street vendors, authorizing them to require those engaged in such trade to display the corresponding municipal or sanitary permits, as well as documents proving the origin of the products being sold. Additionally, it expressly regulated the duty of municipalities to establish in their respective regulations the places where street vending may be exercised.

AUTHORS: ***Francisco Carey, Jorge Gatica, Carolina Baeza.***

Legal Commentary

January 13, 2023

Highlights of the Draft Revision to the Anti-Unfair Competition Law

Authors: Michelle GON | Sophie SHI | Jolie YAN | Fengmian CHEN

On November 22, 2022, the State Administration for Market Regulation ("**SAMR**") issued for public comments a draft revision to the *Anti-Unfair Competition Law of the People's Republic of China* (the "**Draft Revision**", the "**AUCL**"), which reflects the government's ongoing efforts against unregulated unfair competition activities emerging in tandem with fast-evolving market forces that continue to give rise to new business forms and models.

The AUCL, first coming into force in 1993, has been revised and amended in 2017 and 2019, respectively, which focused on following aspects: The 2017 revision pinpointed the scope of parties taking bribes in business activities as individuals or entities that work for or entrusted by the transaction counterparty or can influence the transaction, excluding the counterparty itself; it also added rules to regulate unfair competition using the Internet and increased the amount of fines. The 2019 amendment focused on enhancing provisions for trade secrets protection. Likewise, the Draft Revision, representing what would be the third revision or amendment to the AUCL, with 48 articles as opposed to the current 33 articles, demonstrates a number of highlights: It refines rules to address unfair competition in the digital economy; it improves rules against existing types of unfair competition, including enhanced provisions against misleading commercial acts and false promotions, explicitly prohibits taking bribes in transaction activities, and strengthens systems for trade secrets protection; it adds new types of unfair competition, such as acts that harm fair trade and malicious transactions; it improves the legal liability section by introducing penalties on some unfair competition acts while reasonably adjusting the degree of punishment for certain violations. This commentary provides a summary and analysis of the focuses and highlights of the Draft Revision.

Refined rules to address unfair competition in the digital economy

Most significantly, the Draft Revision further specifies unfair competition acts existing in the digital economy, refining rules to regulate the acquisition and use of data and online unfair competition through the use of algorithms and technologies. These changes involve nearly ten articles in the Draft Revision, reflecting the great importance Chinese lawmakers attach to maintaining fair competition and data protection in the digital economy. Article 4 of the Draft Revision directly provides the overarching principle that the State intends to establish and improve the rules for fair competition in the digital economy, and that business operators may not use data and algorithms, technologies, capital advantages, or platform rules to engage in unfair competition. With respect to specific practices, in addition to traffic hijacking, improper interference, and malicious incompatibility that are already prohibited under the current AUCL, the Draft Revision would establish new types of illegal practices such as malicious transactions, influencing user choices, misleading users by using keyword association, by setting false operation options or by other means, intercepting or blocking other operators' pages without justified reasons, hindering the normal provision of online services or products, improper acquisition or use of commercial data, and big data-enabled price discrimination.

Meanwhile, given the complexity of determining unfair competition in the digital economy and the need for greater institutional foreseeability and greater consistency in law enforcement, Article 21 of the Draft Revision sets out several considerations when determining whether an act constitutes unfair competition, which include: (1) the impact on the lawful rights and interests of consumers and other business operators and on public interests; (2) whether such means as force, coercion and fraud are used; (3) whether the act contravenes industry practices or business ethics; (4) whether the act contradicts the principles of fairness, reasonableness and non-discrimination; and (5) the impact on technological innovation, industry development, and the Internet ecosystem.

As indicated above, the Draft Revision uses multiple provisions to regulate new types of unfair competition in the digital economy. Both platform providers and business operators using the platforms should pay close attention to these provisions and accordingly reassess their compliance in regard to relevant issues in their contract execution, performance, and daily operations.

More stringent enforcement of commercial bribery

The Draft Revision tightens rules against commercial bribery in the following four aspects:

- Counterparty returns as a potential bribed party. Article 8 of the Draft Revision provides that a business operator may not, by itself or instigate others to, bribe the counterparty in a transaction or any of its employees by offering money or valuables or by any other means. This means that the counterparty itself would again be included as a potential bribed party. The 1993 AUCL provides that, where a business operator secretly pays kickbacks to the transaction counterparty, be it an entity or individual, off the books, the operator will be punished for offering bribes; where the counterparty, be it an entity or individual, secretly accepts kickbacks or other benefits off the books, the counterparty will be punished for accepting bribes. By comparison, the 2017 AUCL sets forth the potential bribed parties, which include employees of the transaction counterparty but exclude the counterparty itself. Whether to include the "counterparty" as a bribed party has been a difficult issue in unfair competition law enforcement. On the one hand, business to business payments are normally a market practice resulting from equal, voluntary negotiations between the transaction parties. Commercial arrangements not involving a "power-for-money deal", namely the essence of bribery, should not be deemed as commercial bribery. For example, "secret" payments that are made "off the books" caused by accounting errors should not be considered commercial bribery. On the other hand, however, business to business arrangements with special market entities, such as hospitals, may still cause problems. For example, providing equipment for free with bundled consumables sales as a condition may cause a hospital to skip procurement through open tenders or even lead to collusive bidding or internal corruption within the hospital. Given that, the AUCL is still a useful tool to resolve such systematic problems concerning these special entities. The Draft Revision restores the "transaction counterparty" as a potential bribed party, but still needs to strike a balance given the above two considerations, with the elements to establish illegality to be further clarified in subsequent rules for implementation.

- Provisions are added to prohibit and punish the act of accepting bribes in transactions, which is explicitly specified as an unfair competition practice. A prohibitive provision is introduced in Article 8 of the Draft Revision that "no entity or individual may accept bribes in transaction activities". The legal liability for accepting bribes is prescribed in Article 29.2 that, where a business operator or any of its employee accepts bribes in transaction activities, if laws and administrative regulations have laid down relevant provisions to punish the act of accepting bribes in certain types of transactions, such provisions shall prevail; if laws and administrative regulations are silent, the bribed party will be punished in accordance with provisions to penalize the bribing party. Article 29.2 provides an alternative means to punish a bribed party that falls short of the standard of criminal prosecution, which would facilitate smooth transition between administrative and criminal penalties against a bribed party, as well as the two-way transfer of cases between judicial organs and administrative organs.
- Article 8 of the Draft Revision stresses that "instigating others" to engage in bribery also constitutes commercial bribery, which lays a more solid basis for punishing business operators who offer bribes through distributors or other third parties.
- The maximum fine for commercial bribery is raised from RMB 3 million to RMB 5 million.

The above changes reflect stronger efforts of market regulators to crack down on commercial bribery, which, after coming into force, would pave the way for a new level in law enforcement against commercial bribery.

Aiding unfair competition underlined as a regulatory focus

Another highlight of the Draft Revision lies in stricter constraints on the provision of aid to unfair competition. In the *Provisions on Prohibition of Unfair Competition Acts on the Internet (Draft for Comment)* released by the SAMR in August 2021, business operators are prohibited from aiding others in committing unfair competition acts over the Internet. The Draft Revision underlines the prohibition against aiders who in fact indirectly engage in unfair competition.

Article 2 of the Draft Revision provides a general principle that business operators must not aid other persons in committing any act of unfair competition, with specific requirements set forth in the following provisions: (1) Misleading commercial acts: A business operator may not sell goods that are misleading or facilitate misleading acts by providing storage, transportation, delivery, printing, concealment, premises, etc. (Article 7.2); (2) False commercial promotion: A business operator may not help another business operator in conducting any false or misleading commercial promotions by way of organizing false transactions, fictitious evaluations or otherwise, or provide planning, production, release or other services for false promotion (Article 9.3); (3) **Trade secrets**: A business operator may not help others to violate confidentiality obligations or the right owners' requirements for keeping confidential trade secrets by obtaining, disclosing, using, or allowing any other party to use such trade secrets (Article 10). The legal liability of aiders of unfair competition is the same with that of those who directly commit unfair competition acts, meaning that they may be ordered to cease the illegal acts, have their illegal gains and articles used for illegal activities confiscated, be fined, have their business license revoked, etc.

The above provisions would impose greater obligations on platform providers to supervise and examine unfair competition on their platforms. The provisions would also raise the bar for other companies and service providers to examine compliance of their services in a more prudent manner. Also, the protection of trade secrets is further consolidated in the Draft Revision.

Enhanced legal liability and increased cost of violations

With respect to legal liability, the Draft Revision introduces penalties for some unfair competition acts while reasonably adjusting the degree of punishment for certain violations.

I. Expand the scope of application of punitive damages and statutory damages

Under the current AUCL, punitive damages only apply to "trade secrets infringement committed by a business operator in bad faith", where, if the circumstance is grave, the amount of compensation may be determined as between one time and five times the actual losses suffered by the right holder as a result of the infringement or the benefits gained by the infringer from the infringement (Article 17.3). The Draft Revision would expand the scope of application of punitive damages to all types of unfair competition that are "in violation of the provisions of this Law". In addition, as opposed to the current AUCL where the statutory damages of up to RMB 5 million only applies to misleading commercial acts and trade secrets infringement (Article 17.4), such punitive damages would apply to all types of unfair competition under the Draft Revision.

II. Introduce legal liability for certain illegal acts

The Draft Revision introduces penalties for newly added types of unfair competition such as practices that impair fair trade, malicious transactions, and new types of online unfair competition practices. It also sets out legal liabilities for aiding the misleading acts and false promotions. On the basis of the current AUCL, Article 29 of the Draft Revision pursues liability against parties who take bribes in commercial transactions by imposing penalties on accepting bribes in transactions.

III. Impose heavier punishment for certain illegal acts

On the whole, the Draft Revision raises the upper limit of fines for unfair competition practices, with the maximum limit reaching RMB 5 million for violations such as trade secrets infringement, commercial defamation, abuse of a comparative dominant position, malicious transactions, and online unfair competition practices. Where the circumstances are particularly serious and of an extremely grave nature, thereby severely impairing the fair competition order or public interests, the business operator who carried out the corresponding unfair competition act may also have its illegal gains confiscated, be fined in the amount between 1% and 5% of its sales of the preceding year, be ordered to suspend business operations, or have its relevant business permits or business licenses revoked. The business operator's legal representative, principal in charge, and directly responsible person may also be personally subject to fines of between RMB 100,000 and RMB 1 million.

IV. Reduce punishment for certain illegal acts

Under the Draft Revision, the minimum fine for false promotion is reduced from RMB 200,000 to RMB 100,000 to better serve law enforcement realities and ensure congruence between punishment and wrongdoing. Also, Article 41 sets out special circumstances where exemption from punishment is available: if the business operators concerned have reached a settlement on the assumption of civil liability for the unfair competition act in question or if a people's court has adjudicated on civil liability and the act in question causes no harm to the fair competition order or public interests. In these instances, an investigation that has been initiated may be terminated; or, if an investigation has been concluded, an exemption from penalty will be granted.

In addition to the above highlights, the Draft Revision also delineates the features of commercial promotion and distinguishes it from advertising (Article 9); puts forward the concept of "comparative dominant position" to better protect the rights and interests of small and mid-sized operators in the market (Articles 13 and 47); and enhances protection of personal privacy and personal information (Article 25). The Draft Revision represents a significant revision to the current AUCL in that new types of unfair competition are brought under its umbrella for regulation, while a higher and broader perspective is adopted to re-examine the impact on public interests and business ethics in addition to protecting the rights and interests of business operators and consumers. The AUCL has served as a fundamental basis for market regulation over many years. It is our hope and belief that, after thorough consultation, discussion, and deliberation of the Draft Revision, a newly revised AUCL will be adopted to further optimize the regulatory scope spanning all links of the industrial and commercial chain, so as to safeguard an operable business environment and promote a better social order for fair competition.

Important Announcement

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

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Brigard Urrutia

10 of March

The New unified standards for companies

The IFRS Foundation (for its English acronym), started in 2021, leads the project of creating global standards, hand in hand with GRI, TCFD (for its acronym in English) and the VRF (for its English acronym), in response to the request by companies, investors and consumers around the world to simplify and unify the standards of financial information, sustainability and to integrate information on climate issues.

On February 17th, 2023, the International Sustainability Standards Board - ISSB - approved the project's content on the new global standards. The next step is the final drafting and then the vote.

The disclosure of the new ISSB standards is scheduled for June 2023, organised into: IFRS S1 (General Requirements for the Financial Information on Sustainability disclosure) and IFRS S2 (Climate-related Disclosures).

For the first time, the integration of a non-financial information with a financial information will be required. In addition, the reference to European standards (ESRS, for its acronym in English) is also integrated into the S1.

To facilitate the market flow, S1 and S2 build on existing frameworks and standards, the ESG (Environmental, Social, and Governance) and Sustainability SASB, created in 2011, and the TCFD reporting framework. This means that companies that have already adopted these recommendations will have the task simplified.

The project for the new standards is designed to have a global application, at a territorial level and customised to the company size, since its application is also planned for small companies.

Therefore, what are the implications of these new standards for companies? The need to develop and implement sustainability plans and integrated reporting strategies in the coming months, as IFRS S1 and S2 become effective in January 2024, considering the content of Annex 2 of Circular 031 of the Colombian Financial Superintendence.

The next IFRS event will take place in London on the 26th and 27th of June.27 December

For more information contact our team
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Arias

COSTA RICA

COSTA RICA - ORDINARY FILING OF THE ULTIMATE BENEFICIAL OWNER (UBO) REPORT

Feb/2023

During the month of April, the Ultimate Beneficial Owner (UBO) Report of legal entities incorporated in the country must be submitted. In this report, the entire shareholder’s structure of the legal entities must be reported up to their final beneficiaries, whether they are individuals or public entities that are listed on the stock exchange.

In case of non-compliance, the entity will be exposed to the following penalties:

- Monetary penalty corresponding to 2% of the gross income reported in the last fiscal year, with a minimum of 3 base salaries (USD$2400 approximately) and a maximum of 100 base salaries (USD$80,000 approximately).
- The Public Registry of Costa Rica will not process any registration or issue certificates of the legal entity.
- The legal entity will appear on the public list of non-compliant entities.

Arias can assist you with the filing of the report, as well as gathering the information related to shareholders and final beneficiaries.

If you have any questions or concerns regarding this topic, please contact our experts
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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.

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[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.

Arias

GUATEMALA

COMPANIES’ ANNUAL GENERAL MEETINGS AS PART OF THEIR STATUTORY OBLIGATIONS

Mar/2023

Companies incorporated in the Republic of Guatemala shall hold a general meeting at least once a year, within the four months following the end of the fiscal year, according to the Commercial Code of Guatemala Decree 2-70 of the Congress of the Republic of Guatemala.

In such meetings, at least the following matters should be addressed:

Discuss, approve, or disapprove the company’s Profit and Loss Statement, and balance sheet of the past tax period.

- Discuss, approve, or disapprove of the administration body’s report.
- Approval of the company’s supervisory body’s report, if any.
- If necessary, remove or appoint the administration body that will act on the company’s behalf, as well as the company’s external auditors or, in its case, the supervisory body.
- Discuss and decide over the profit distribution plan prepared by the company’s administration body.

Should you require additional information or request our assistance to hold the annual meeting, please communicate with us to your contact within the Firm, or at contact.guatemala@ariaslaw.com

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The final frontier - Hong Kong Court of Final Appeal grants leave to appeal in arbitration escalation clauses dispute

4 January 2023

The Hong Kong Court of Final Appeal has granted leave to appeal in the case of *C v D* [2022] HKCFA 25, against last year's finding by the Court of Appeal that the validity of "escalation clauses" – multi-tiered dispute resolution provisions which require negotiation or mediation before formal proceedings can be commenced – should be determined by the arbitrators themselves, not the courts. The Court of Appeal had previously refused leave to appeal their decision. The appeal is set to be heard in April 2023.

Space to negotiate?

In *C v D* [2021] HKCFI 1474, disputes arose from a cooperation agreement entered into between Company C, a Hong Kong company and Company D, a Thai company, for the development and building of a satellite. The agreement provided that the parties were to attempt in good faith promptly to resolve any disputes arising by negotiation between the parties' respective chief executive officers (CEOs) and that if that a dispute could not be resolved amicably within 60 business days, it was to be referred to arbitration in Hong Kong.

On 24 December 2018, the CEO of Company D issued a letter to the chairman of the board of directors of Company C, copied to other directors of Company C, alleging that Company C was in repudiatory breach of the agreement and with the letter meaning to serve as a "written request" for negotiation under the agreement. On 18 April 2019, Company D issued a notice referring the dispute to arbitration. In response, Company C claimed that the arbitral tribunal did not have jurisdiction because the letter had been addressed to Company D's directors but not the CEO, thus not fulfilling the condition in the agreement.

The tribunal dismissed Company C's objection and held that the relevant clause only made it mandatory that the parties should attempt in good faith to resolve any disputes by negotiation, but the reference of disputes to the respective CEOs was optional. The tribunal issued an award in favour of Company D, ruling that the letter constituted a request for negotiation under the agreement (the partial award).

Company C sought to set aside the partial award under section 81 of the Arbitration Ordinance (Cap. 609) (Ordinance)[1] on the ground that the partial award concerned a dispute "not contemplated by or not falling within the terms of the submission to arbitration" under Article 34(2)(a)(iii) of the Model Law.

The Court of First Instance dismissed Company C's application and held that compliance with an "escalation clause" was an issue of admissibility and did not go to the jurisdiction of the tribunal (see Hogan Lovells alert *C v D – Hong Kong court rules on compliance with pre-arbitration procedural requirements*).

Court of Appeal

Company C was granted leave to appeal. The issues upon appeal were:

- Whether the award should be set aside under Article 34(2)(a)(iii) of the Model Law (as implemented by section 81(1) of the Ordinance) since the failure to comply with preconditions meant that the dispute was "not contemplated by or not falling within the terms of the submission to arbitration under Article 34(2)(a)(iii)".

- The arbitral award was not in accordance with the agreement of the parties.

- The true construction of the relevant contractual provisions in particular, whether Company D was obliged to refer the disputes for determination by the companies' respective CEOs.

The Court of Appeal in *C v D* [2022] 3 HKLRD 116 (Cheung, Yuen and Chow JJA) dismissed all three grounds of appeal, citing recent English authority that it is arbitrators who are in the best position to decide issues relating to whether preconditions in the parties' agreement have been satisfied.

Whether an objection went to the jurisdiction of the tribunal rather than the admissibility of the claim ultimately depended on the agreement of the parties. It was not Company C's argument that Company D's claim could never be referred to arbitration, only that the reference to arbitration was premature in that some pre-arbitration procedural requirements had to be observed first. The issue therefore went to the admissibility of the claim rather than the jurisdiction of the tribunal.

The Court of Appeal found that disputes which went to the admissibility of the claim should be viewed as disputes "falling within the terms of the submissions to arbitration" under Article 34(2)(a)(iii) of the Model Law. Such an interpretation would in all likelihood give effect to the parties' agreement that all disputes should be resolved by the same tribunal and further the objective under section 3 of the Ordinance to facilitate the fair and speedy resolution of disputes.

It would also tie in with practice in other major international arbitration centres (see Hogan Lovells alert *Rising to the top – Hong Kong Court of Appeal rules that escalation clauses compliance queries are best left to arbitrators*).

Leave to appeal

In their decision of 12 December 2022, the Court of Final Appeal (Ribeiro, Fok and Lam PJJ) have now given leave to appeal on the question: "Is an arbitral tribunal's determination on whether a pre-arbitration condition precedent in an arbitration agreement that the parties thereto should first attempt to resolve their dispute by a specified mechanism has been fulfilled subject to recourse to the Court under Articles 34(2)(a)(iii) of the UNCITRAL Model Law (as incorporated into Hong Kong law under sections 81(1)(2)(a)(iii) of the Arbitration Ordinance (Cap. 609)."

The CFA said it was satisfied that this was a question of general importance and since this was the first case in which the issue had fallen to be considered by a Hong Kong court, granted leave to appeal.

The appeal is listed for hearing on 27 April 2023.

Taking it to the top

The CFA's ruling will be of great significance as it will be the highest court in a Model Law jurisdiction to consider the position. Until the position is clarified, one way of making sure that recourse to such clauses cannot be used by a party dissatisfied at the findings of a tribunal, is to place a time limit on when negotiations should take place. If they do not take place within the time limit, the precondition can be shown to have been complied with.

1. which gives effect to Article 34 of the UNCITRAL Model Law

Authored by Nigel Sharman.

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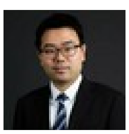

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Unconventional trademark - Sound mark

By Aparna Venkat **February 2023**

A trademark is a brand or logo that represents one's business. In simple words, it is an identity. The conventional and traditional trademarks such as plain words, devices, logos, designs, labels and packages have been used since long for distinguishing goods and services. Over time, other elements besides words, logos, colour combinations and graphic designs have come to serve as identifiers of the source of goods/services, thus serving the function of trademarks. The concept of trademark function can be examined based on the rudimentary essentials a mark needs to satisfy such as being inherently distinctive, indicating commercial origin of products/ services, creating a nexus serving as a source identifier thereby holding an exclusive identity.

Unconventional marks go beyond the traditional trademarks in nature, characteristics, scope and economic potentials. The following are the main categories of non-traditional trademarks that can be registered.

i. Sound/aural marks/audio signature,
ii. Smell/scent/olfactory marks,
iii. Tactile/touch/texture/haptic marks,
iv. Single colour marks,
v. Shape marks/three dimensional/3D marks,
vi. Taste/gustatory marks,
vii. Holograms; and
viii. Moving images/motion/animated marks.

Each kind of unconventional trademark presents challenges in terms of meeting one of the basic criteria of a trademark i.e., 'a mark must be capable of being represented graphically'. Over the course of time, measures are undertaken in such a manner either to accommodate the requirement or amend the procedures to make way for the new emerging trends.

Sound Mark

This write up will focus on the registrability of a Sound Mark under the Trade Marks Act, 1999. (Act). The definition of the term "mark" and "trademark" under Sections 2(1)(m) and 2(1)(zg) respectively is inclusive and not exhaustive of accommodating registration of a sound mark within the existing framework of the Act. Sound/ Music is one of the best channels to be employed for marketing a product/ service, as it is etched in the minds of the public more rapidly than any other type of a source identifier. It acts as an audio signature.

The whole idea is to recognize and protect varied untapped potential elements in the market that serves as the origin of a source and links the public to a commercial business, sound mark being one of them. The art of launching products into the market by organizations along with a song, jingle, tune, chimes, etc., has been in practice for the longest time and subconsciously it seeks indefinite refuge in our head making it memorable and immortal which provides an edge to the organization, thereby providing exclusivity. Also, there exists a persuasive ability to embed messages in the minds of the consumers.

Procedure to file a Sound Mark

There was no mention of registering a sound mark under the Trade Marks Rules, 2002 (Rules), yet few proprietors registered their sound mark. On August 18, 2008, a sound mark registration was granted to Sunnyvale, California-based Internet firm Yahoo Inc.'s three-note Yahoo yodel by the Delhi branch of the Trademark Registry. It was registered in classes 35, 38 and 42 for a series of goods including email, advertising and business services and managing websites.

Post the amendment of the Rules in 2017, Rule 26(5) provides provisions to file and register a sound as a trademark. Requirements for filing:

a. Submit recording in MP3 format not exceeding 30 seconds,
b. Clearly audible and capable of replaying, and
c. Graphical representation of its musical notations.

The procedure to assess the registrability of a sound mark thereafter is same as that of any other mark filed before the Office of the Trade Marks Registry relating to preliminary objections, examination reports, evidentiary documents, acceptance and advertising a mark, opposition and registration.

Few other registered sound marks are, Tarzans yell (TM# 1748778 [2015]), National Stock Exchange (theme song) (TM# 2152244 [2016]), ICICI Bank (Corporate jingle) (TM# 1807772 [2018]), Britannia Industries (four note bell sound) (TM# 1904243 [2011]), Eicher Motors (TM# 3044834 [2017]), Reliance Industries, (TM# 3838573 [2018]) Tata Coffee (TM# 4211214 [2021]), Netflix (TM# 5236448 [2023]), etc.

Copyright and Sound mark overlap

As per Rule 26(5) of the Rules, only a 30 second segment of a musical work is subjected to sound mark protection under the Act. The remaining music will continue to be protected under the Copyright Act, 1957. Also, Section 11(3)(b) of the Act prohibits registration of a trademark if its use in India is prevented by the law of copyright. While this being so, the circumstances surrounding each sound mark application will determine the proper course of action with respect to adducing relevant documents of evidentiary value, that includes no objection certificate, agreements between parties with respect to transfer of rights or any other form of arrangements, to ensure proper and clean title to the sound mark.

Conclusion

The amendment of the Rules in 2017 has streamlined the process of registering a sound mark by making it fairly simple. Like any other subject matter, over a period of time, many nuances will unfold and as the unconventional nature of the mark itself, the measures to tackle them will likely differ from the conventional manner of adjudging and enforcing the rights vested in such marks.

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Santamarina
+ Steta

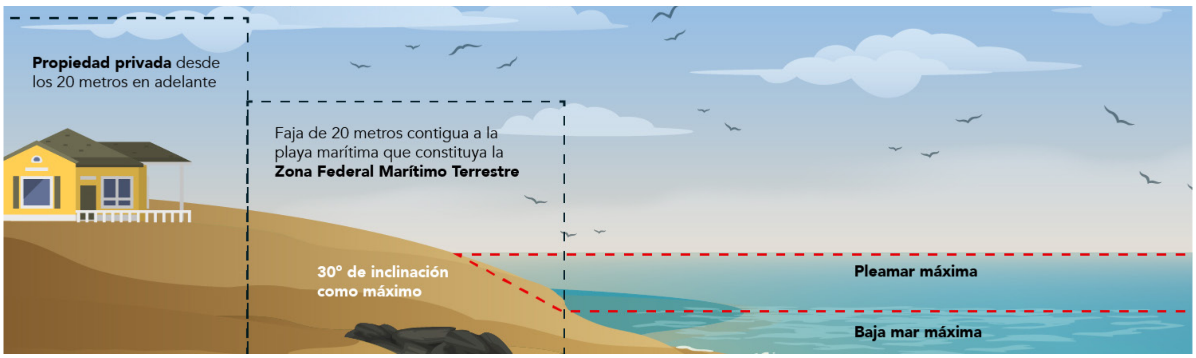
FEDERAL MARITIME TERRESTRIAL ZONE AND TOURISM PROJECTS

S+S INSIGHTS

The Federal Maritime Terrestrial Zone (ZOFEMAT, for its acronym in Spanish) is relevant for specific projects since it is usually the main attraction of some hotels and real estate developments in coastal areas, given that it is linked to what is commonly known as the beach.

The ZOFEMAT is the portion of land contiguous to the sea, established by the Ministry of Environment and Natural Resources (SEMARNAT, for its acronym in Spanish), with a width of 20 meters from its upper and highest level without extraordinary circumstances (this level is known as pleamar). This portion of the land shall be accessible and with a slope of no more than 30°. In this regard, where the ZOFEMAT ends, private property can be found.

An example of the abovementioned is shown below:



Source: SEMARNAT

Notwithstanding, anyone with a concession title issued by SEMARNAT may access and use the ZOFEMAT if the intention is to offer some particular touristic facilities, such as swimming pools, beach club, or lounge chairs, among others.

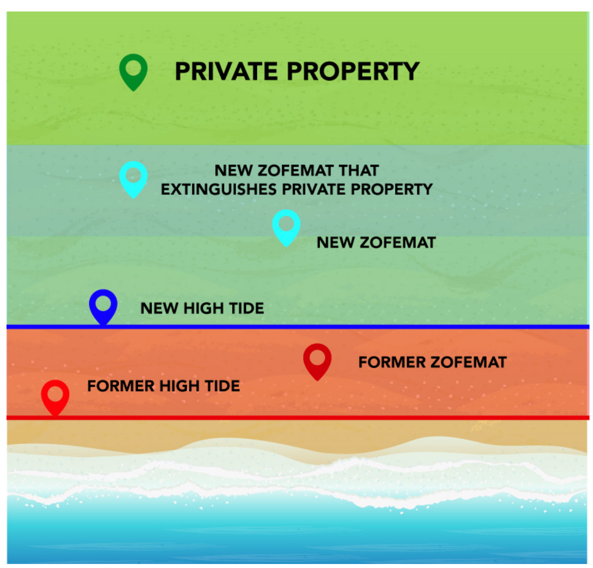
Please note that obtaining said concession title and complying with the terms and conditions set forth therein might be a complicated task to carry out. However, based on our experience in this matter, we offer the following recommendations:

1. THE ZOFEMAT'S LIMIT CHANGES ACCORDING TO THE LEVEL OF THE HIGH TIDE.

The maximum sea level is not permanent, so the delimitation of the ZOFEMAT will depend on the delimitation made by SEMARNAT based on the high tide.

In this regard, if the high tide enters the land, SEMARNAT will establish a new delimitation of the ZOFEMAT inland. However, if the new delimited strip overlaps the property of third parties, these lands and their buildings will cease to be private property and will become part of ZOFEMAT, leaving the prior owners without the right to compensation.

For a better exemplification, the following map is shown:



Derived from the abovementioned, we recommend that properties neighboring the ZOFEMAT are aware of the delimitations that may be established by SEMARNAT regarding the high tide, especially if they have built any construction directly in or near the ZOFEMAT.

In the event that ZOFEMAT's limit overlaps with private property, we suggest requesting SEMARNAT for the studies that led it to establish the new delimitation. In case of any inaccuracy and/or miscalculation found therein, legal action may be initiated, requesting the authority to recognize the validity of the previous limit.

2. ONLY ONE CONCESSION TITLE MAY BE ISSUED FOR EACH ZOFEMAT STRIP.

This is one of the most common reasons that SEMARNAT can not grant a concession title since some concession applications have partial or total overlaps with previous concession titles.

3. TO OBTAIN THE CONCESSION TITLE FOR THIS STRIP, IT IS NOT NECESSARY TO BE THE OWNER OF THE PROPERTY NEIGHBORING THE ZOFEMAT.

Anyone may request a concession title for a ZOFEMAT strip and carry out any economic activity in this area, for example, the provision of tourism services.

4. THERE ARE NO PRIVATE BEACHES. THE HOLDER OF A CONCESSION TITLE IS ONLY ENTITLED TO CARRY OUT CERTAIN ECONOMIC ACTIVITIES IN THE ZOFEMAT.

Furthermore, the property built and/or located in this area may only be used by those authorized by the concession holder, such as bedding areas or tourist facilities. However, prohibiting the access or use of the ZOFEMAT to people not involved in tourism development could lead to SEMARNAT's revoking the concession title and the imposition of fines.

5. CARRYING OUT AN ECONOMIC ACTIVITY IN THE ZOFEMAT ENTAILS THE OBLIGATION TO OBTAIN A CONCESSION TITLE AND PAY FEES.

Therefore, compliance with these payments is important since failing to fulfill this obligation could lead to fines, updates, and surcharges.

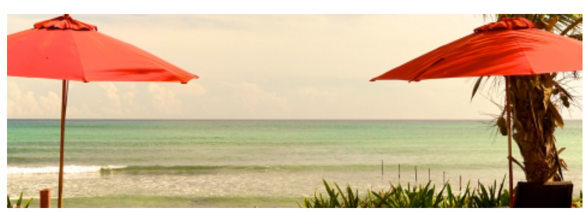
6. IT IS ESSENTIAL TO ENSURE THAT THE USE OF THE ZOFEMAT SPECIFIED IN THE CONCESSION TITLE IS FOLLOWED.

The applicable environmental regulations establish three possible uses for this area: (i) protection or ornamentation, which is recommended for environmental preservation activities, therefore an area where economic activities cannot be carried out; (ii) some productive activities, such as fishing and agriculture, among others; and (iii) general use, which allows the development of all economic activities, including the construction of some projects.

The payment of fees corresponds to the type of use for which the ZOFEMAT is intended. Accordingly, duties in the protection and ornamental area can be up to MXN$ 45.57 per square meter, while for general use, they can be up to MXN$ 163.31 per square meter of ZOFEMAT.

7. IF THE ZOFEMAT IS USED WITHOUT A CONCESSION TITLE OR WITH AN EXPIRED CONCESSION TITLE, ADMINISTRATIVE, FISCAL, AND CRIMINAL LIABILITIES COULD BE GENERATED.

In this regard, we recommend paying attention to the delimitations of the high tide and the ZOFEMAT established by SEMARNAT and the term of the concession title, which may be extended if it is about to expire. In addition, it is important to mention that the loss of a concession title entails the loss of rights for specific use in the ZOFEMAT.



Due to the abovementioned, it is advisable that the owners of properties neighboring the ZOFEMAT obtain the corresponding concession title. In addition, proper planning and legal advice are essential to use this area, protect private property from neighboring projects, and preserve one of the main attractions of this type of development: the beach.

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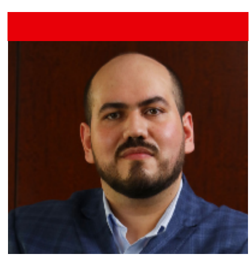

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NautaDutilh

The Dutch Hydrogen Roadmap: a map in transition – three key insights

15-03-2023

The Netherlands wants to play an important role in the global hydrogen market. The November 2022 Dutch Hydrogen Roadmap, which was prepared at the request of the Dutch Ministry of Economic Affairs and Climate Policy, describes how a broad group of stakeholders aims to make this happen. The text starts by stating that the map will be outdated at the moment of publication, as developments in this field are moving at a rapid pace. This prompted us to research the latest developments, by initiating a roundtable discussion with academic and industry experts, among others. By doing so, we identified three key transition insights.

1. Scaling up electrolysis capacity: important, but not easy

The Roadmap urges the government to increase its ambition of having 3-4 GW electrolysis capacity by 2030 to 6-8 GW. In a recent debate with the Minister for Climate and Energy Policy Rob Jetten, several Members of Parliament shared this view on raising the level of ambition. Minister Jetten emphasised that electrolysis capacity has to be scaled up in sync with the development of wind and solar farms in order to achieve current targets. This statement underlines the Dutch government's focus on green hydrogen. Besides the availability of (green) electrons, the road to scaling up is paved with several other hurdles. These include: protracted permitting procedures, the need for a stable hydrogen market, the question of whether blue hydrogen will help kickstart the low-carbon hydrogen economy, insufficient manufacturing capacity for electrolyser components and general concerns about health and safety risks.

2. Hydrogen market regulation: perfect is the enemy of good

The Roadmap states that scaling up renewable and low-carbon hydrogen production requires mature production technologies, proper market functioning and availability of (preferably green) energy resources. At EU level, hydrogen market regulation is envisaged to take the form of a revised Gas Directive and Gas Regulation. This entails applying the traditional gas market principles of third-party access and unbundling of transmission and distribution system operators. This presents a challenge as the gas market is a fully developed market, whereas the hydrogen market is still maturing. Several market parties consider the regulatory proposal too rigid, as it leaves little flexibility to react to the new technical and market developments that will undoubtedly occur. A transition period is needed to enable the market to develop. Some experts fear that implementing a 2050-proof regulation from the start will prevent a healthy development of a stable and reliable green hydrogen market. Perhaps perfect is the enemy of good in this case.

3. Unlocking the potential of hydrogen: overcoming import challenges

Importing green hydrogen carriers from parts of the world that have the necessary wind and solar hours seems an inevitable step for the Netherlands, since it cannot generate sufficient green electricity within its own territory. According to the Roadmap, no concrete import goals have as yet been set. Imports can only flourish with clear import and transport conditions and a functioning and reliable certification system.

Although challenges remain, the first necessary steps have been taken. EU legislation envisages that hydrogen imported into the EU may be qualified as green provided it meets certain eligibility criteria. In relation to green hydrogen for use in the European transport sector, the long-awaited publication of the revised EU Renewable Energy Directive (RED II) delegated acts on renewable electricity used in hydrogen production and the methodology to assess greenhouse gas emissions savings https://energy.ec.europa.eu/system/files/2023-02/C_2023_1087_1_EN_ACT_part1_v8.pdf brought much-needed clarity. The delegated act on renewable electricity also reiterates that green hydrogen (for the purpose of the transport sector) may be produced both within and outside EU territory.

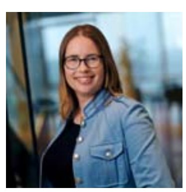
In terms of realising a functioning and reliable certification system, a certification pilot https://www.rvo.nl/sites/default/files/2022-12/Report-RFNBO-pilot-RVO.pdf for domestic production has proven successful. Certification of green hydrogen is now possible in the Netherlands in the form of guarantees of origin. At this stage, imported green hydrogen is not yet supported by the certification system, which covers the well-to-gate aspects of green hydrogen, i.e. the origin of the hydrogen and the greenhouse gas intensity, including upstream emissions up to the point of production, but not the gate-to-wheel aspects, including transportation from the production site to the dispensing point and the dispensing itself. Certification of these aspects is necessary for the hydrogen to count towards the renewable transport targets under RED II. In addition, RED II relies on a mass balancing system that allows hydrogen to be mixed with differing sustainability and greenhouse gas emissions saving characteristics. The challenge, therefore, lies in ensuring compatibility between guarantee of origin certification and mass balancing certification, thereby allowing for full "well-to-wheel" certification.

Hydrogen-related matters to discuss?

Our multidisciplinary hydrogen team will gladly assist you with the challenges and opportunities in this field, whether these concern the regulated transport and import of hydrogen carriers, the development and financing of infrastructure and storage capacity, or the conclusion of contracts. Are you interested in discussing any hydrogen-related matter?

Do not hesitate to contact Gaike Dalenoord, Iris Kieft or Shirley Justice.

Gaike Dalenoord
Partner



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SyCip Salazar Hernandez & Gatmaitan

The SyCipLaw PPP Update
OCTOBER 2022

2022 Revised Implementing Rules for the Build-Operate-Transfer Law

On 1 September 2022, the Build-Operate-Transfer Law Implementing Rules and Regulations (IRR) Committee approved the Revised 2022 IRR of Republic Act No. 6957, as amended by Republic Act No. 7718, otherwise known as the Build-Operate-Transfer (BOT) Law (the Revised 2022 IRR).

The Revised 2022 IRR seeks to address the concerns raised by the private sector with the amendments introduced by the 2022 BOT IRR approved on 31 March 2022. The Revised 2022 IRR was published on 27 September 2022 and will take effect on 12 October 2022.

EXPANDED SCOPE OF ELIGIBLE PROJECTS

The Revised 2022 IRR includes the construction, rehabilitation, improvement, betterment, expansion, modernization, operation, financing and maintenance of the following types of projects: (i) land transportation systems, including railways, road-based transportation systems, bus rapid transit, high priority public utility vehicle systems, active transportation, transit-oriented developments, public utility vehicle stations, transport plazas, intermodal terminals, park & ride, and related facilities; (ii) transport and traffic management projects, including transportation databases, automated fare & toll collection systems, traffic signaling, traffic monitoring systems, traffic enforcement systems, congestion and management systems; (iii) energy efficiency and conservation, renewable energy, and electric vehicle charging stations with related infrastructure; (iv) flood control projects; (v) urban redevelopment, townships, and housing projects; and (vi) heritage preservation and adaptive reuse projects.

FLEXIBILITY IN ESTABLISHING BIDDER QUALIFICATION

The Revised 2022 IRR permits a bidder to establish the required track record through (i) its own experience; (ii) the experience of the member firms, in case of a consortium; or (iii) through contractors, nominated affiliates, proposed facility operators and/or entities bound by a technical services agreement (collectively, Nominated Entities). Certain required key personnel may also come from these Nominated Entities.

In relation to financial capability, the Revised 2022 IRR permits for the ability of the bidder to provide equity to be measured in terms of the latest net worth of the bidder and, in case of a consortium, of the lead member or the combined net worth of member firms. Thus, in computing net worth, it is no longer required (i) to deduct from the net worth of an entity its equity commitments to other projects; and (ii) to pro-rate the net worth of member firms based on the proposed ownership structure.

The Revised 2022 IRR seeks to address the concerns raised by the private sector with the amendments introduced by the 2022 BOT IRR approved on 31 March 2022

UNSOLICITED PROPOSALS

The Revised 2022 IRR clarifies that it is the grant of a Direct Government Guarantee, Direct Government Subsidy or Direct Government Equity (as these terms are defined therein) that is not permitted in unsolicited proposals. Previously, the scope was ambiguous since what was prohibited was a "Direct Government Guarantee, subsidy or equity," which did not use the defined terms.

It also relaxes the requirements for New Concept or Technology, which is required to support an unsolicited proposal. It is described as a concept or technology that is new or pioneering where the project is intended to be implemented" and no longer requires that it be "untried in the Philippines." Further, the track record showing successful implementation may now be established not only by the bidder but also by any consortium member or Nominated Entity, which shall be subject to a lock-in period pursuant to the contract.

The Revised 2022 IRR further provides that the 80-day negotiation period for unsolicited proposals may be subject to extension pursuant to rules and procedures to be issued by the PPP Governing Board.

DIRECT GOVERNMENT SUBSIDY

The Revised 2022 IRR has recognized the concept of Availability Payments, which refer to predetermined payments by the agency or local government unit to the project proponent in exchange of delivering an asset or service in accordance with the contract. It is expressly states that Availability Payments shall not be construed as Direct Government Subsidy.

The Revised 2022 IRR also provides that, if the final approval of the franchise by the regulator shall result in a decrease in the amount of tolls, fares, fees, rentals, and/or charges stipulated under the contract, the government shall ensure that the project proponent recovers the difference between the amount stipulated under the contract and the amount approved by the regulator (or appropriate regulatory body) through measures consistent with the Constitution and other applicable laws. The payment of such difference between the amounts shall also not be considered as Direct Government Subsidy.

MATERIAL ADVERSE GOVERNMENT ACTION (MAGA)

The Revised 2022 IRR widens the scope of MAGA to refer to any act of the government (and not just the executive branch) and has deleted the carve-out for (i) acts of the agency or local government unit and approving body; (ii) acts of the executive branch, made in the exercise of regulatory powers; and (iii) acts of the legislative and judicial branches of government. The deletion of the carve-outs is a very welcome development as it gives project proponents real and meaningful recourse against acts of the government. However, the requirement that "the project proponent had no, or could not reasonably be expected to have had, knowledge of the MAGA prior to the effectivity of the contract" has been retained.

Further, for a MAGA to occur, the act of the government must specifically discriminate against the "sector, industry or project," which is broader in scope compared to the previous requirement that the act must specifically discriminate against the project proponent. The Revised 2022 IRR, however, requires that the contract provide for rules, including materiality or amount threshold, nature and manner of recourse, and a cap in case of monetary compensation.

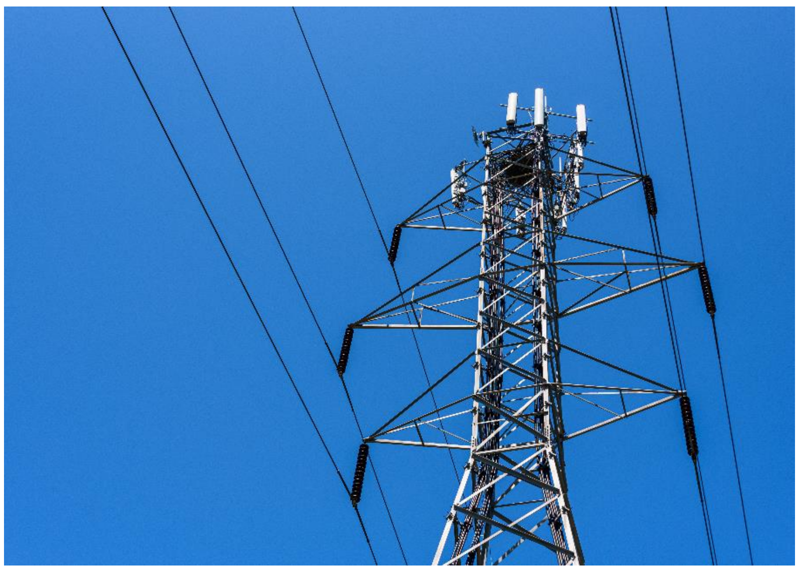
ALLOWABLE CONCESSIONAIRE ACTIVITIES

The Revised 2022 IRR has deleted the prohibition against the concessionaire (which is a special purpose company) from engaging in other concessions, businesses, or undertakings not approved by the relevant regulator, which may conflict with the approved project or otherwise lead to anti-competitive behavior or abuse of dominant position.

The Revised 2022 IRR widens the scope of Material Adverse Government Action (MAGA) to refer to any act of the government (and not just the executive branch) and has deleted the carve-out for (i) acts of the agency or local government unit and approving body; (ii) acts of the executive branch, made in the exercise of regulatory powers; and (iii) acts of the legislative and judicial branches of government.

RELAXATION OF NATIONALITY REQUIREMENT

For Public Utilities



The Revised 2022 IRR retains the requirement that, for projects requiring a public utility franchise for its operation, the operator must be (i) a Filipino, or (ii) if a corporation, must be duly registered with the Securities and Exchange Commission and owned up to at least 60% by Filipinos; or (iii) if a consortium of local and foreign firms, Filipinos must have at least 60% interest in said consortium.

Given the passage of Republic Act No. 11659, which amended Commonwealth Act No. 146, otherwise known as the Public Service Act, the term "public utility" now has a narrower definition and refers only to a public service that operates, manages or controls for public use any of the following: (i) distribution of electricity; (ii) transmission of electricity; (iii) petroleum and petroleum products pipeline transmission systems; (iv) water pipeline distribution systems and wastewater pipeline systems, including sewerage pipeline systems; (v) seaports; and (vi) public utility vehicles. Thus, other activities that previously required a franchise, including the operation of railways and airports, are no longer considered public utilities and do not require any minimum Filipino ownership.

For Solar, Wind and Hydro Power Projects

The Philippine Department of Energy (DOE) has announced that it is preparing the necessary amendments to Rule 6, Section 19 of the implementing rules and regulations (IRR) of the Renewable Act of 2008 to lift the 40% cap on foreign ownership of renewable energy project proponents.

This development came after the Philippine Department of Justice (DOJ) issued on 29 September 0222 DOJ Opinion No. 21 opining that the exploration, development, and utilization of inexhaustible renewable energy sources are not subject to the 40% foreign equity limitation provided under Section 2, Article XII of the 1987 Constitution of the Philippines. Said provision reads that "[a]ll lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least 60% of whose capital is owned by such citizens."

In said opinion, the DOJ said that the enumeration accompanying the term "natural resources" are properties that are within the State's power of dominium pursuant to the Regalian Doctrine (such as lands, fisheries, forests, and wildlife), which are all susceptible to appropriation and, thus, excludes the sun, the wind, and the ocean. The DOJ also said that constitutional debates centered on the strong concern and fear against fully opening to foreign exploitation the natural resources in Section 2, Article XII as it may lead to the possibility of running out of these limited and exhaustible resources. Thus, this compelling reason behind the imposition of the foreign ownership cap finds no application to inexhaustible renewable energy sources.

The DOJ further noted that limiting participation in these renewable energy projects will work only to the detriment of the country as there is no clear evil to be remedied and the adoption of these inexhaustible renewable energy source technologies would not only help in the attainment of a healthful and balanced ecology but also provide clean energy that would not be subject to price fluctuations and market forces similar to fossil fuels. Finally, the DOJ noted that the technical knowledge and experience, as well as the immense capital required to set up these inexhaustible renewable energy power stations to utilize solar, wind, hydro and ocean or tidal energies is akin to large-scale exploration, development and utilization of minerals, petroleum, and other mineral oils, which necessitates the aid of foreign capital, technology and/or expertise.

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SIAC's revised model arbitration clause 2023: Two features you need to know

DENTONS RODYK

March 14, 2023

Key Takeaways

- The SIAC Model Clause contains a general choice-of-law clause for the main commercial contract. In view of recent case law, apart from the general choice-of-law clause which governs the main contract, it may be prudent for commercial parties to insert a clause specifying their choice of law for the arbitration clause contained in a main contract, preferably within the arbitration clause itself. This is particularly so if the law governing the main contract is different from the law of the seat.
- The SIAC Model Clause now provides an optional clause for parties who select Singapore as the seat of the arbitration to specifically choose the Singapore International Commercial Court (SICC) as the supervisory court of the arbitration. International parties may wish to choose SICC as the supervisory court of the arbitration because of the following reasons/factors: (a) diverse and highly respected judges on the SICC (including international judges drawn from both civil law and common law traditions); (b) the judges have arbitration practice experience; (c) if one of the parties to the commercial contract is a Singapore party, but the non-Singapore party to the contract has some reservations about choosing the Singapore High Court (excluding the SICC) as the supervisory court of the arbitration; (d) the internationalised procedure for SICC proceedings; (e) speed of judgment; and (f) better recovery of legal costs.

Introduction

The Singapore International Arbitration Centre (SIAC) recently revised its model arbitration clause on 12 January 2023 (SIAC Model Clause), which states as follows:

> "In drawing up international contracts, we recommend that parties include the following arbitration clause:
>
> Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre (SIAC) in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (SIAC Rules) for the time being in force, which rules are deemed to be incorporated by reference in this clause.
>
> The seat of the arbitration shall be [Singapore].
>
> The Tribunal shall consist of __________________ arbitrator(s).
>
> The language of the arbitration shall be _________________.
>
> [In respect of any court proceedings in Singapore commenced under the International Arbitration Act 1994 in relation

to the arbitration, the parties agree (a) to commence such proceedings before the Singapore International Commercial Court (the SICC); and (b) in any event, that such proceedings shall be heard and adjudicated by the SICC.]

APPLICABLE LAW

Parties should also include an applicable law clause. The following is recommended:

This contract is governed by the laws of ________________."

There are 2 features worth noting about the SIAC Model Clause, namely:

1. It provides a general choice-of-law clause for the main commercial contract instead of a specific choice-of-law clause for the arbitration agreement.
2. It provides an option of choosing Singapore International Commercial Court (SICC) as the supervisory court of the arbitration.

(1) The importance of specifying the law governing the arbitration agreement in view of recent case law developments

The SIAC Model Clause contains a general choice-of-law clause for the main commercial contract, instead of a specific choice-of-law clause for the arbitration agreement. It states: "This contract is governed by the laws of ________________." This provision is not new and has been in the previous iteration of the SIAC Model Clause. However, is the general choice-of-law clause contained in the SIAC Model Clause adequate to expressly select the law governing the arbitration agreement? Or would more specific language be required? This is the issue to be explored in this commentary.

At the outset, it should be noted that the law governing the arbitration agreement is of critical importance because it governs issues such as these: (a) Is the arbitration agreement valid? (b) How should the arbitration clause be interpreted to determine whether the dispute at hand falls within the scope of the clause? (c) Who are the parties to the arbitration clause?

What commercial parties may not realise is that the law governing the arbitration clause is distinct from the law governing the main contract containing both the commercial terms and the arbitration clause, and these two laws may or may not be the same. This is because the arbitration clause is commonly treated as a distinct agreement which is separate from the commercial terms in the main contract due to the doctrine of separability, albeit not for all purposes. The doctrine of separability serves to give effect to the parties' expectation that their arbitration clause remains effective even if the main contract is alleged or found to be invalid (as embodied in Art 16 of the UNCITRAL Model Law). For that same reason, even though an arbitration clause is contained within a main contract together with the other commercial terms, it is often referred to as the "arbitration agreement".

What commercial parties may also find surprising is this: When an arbitration agreement is in the form of a clause in the main contract, one might expect that a generally worded choice-of-law clause contained in the main contract would be taken to apply to the arbitration clause such that the chosen law governs both the main contract and the arbitration agreement. However, that is not necessarily the case, at least under Singapore law (recently confirmed by the Singapore Court of Appeal in *Anupam Mittal v Westbridge Ventures* [2023] SGCA 1 (*Anupam*)), as well as under English law. For a case note on Anupam, please click here.

As confirmed by the Singapore Court of Appeal in *Anupam*, the Singapore courts apply the BCY 3-stage test (from *BCY v BCZ* [2017] 3 SLR 357 (BCY)) to determine the law governing the arbitration agreement:

- Stage 1: First, the court will determine whether parties have expressly chosen a law to govern the arbitration agreement.
- Stage 2: Second, in the absence of an express choice, whether parties have made an implied choice of law to apply to the arbitration agreement. A choice of law for the main contract is a strong indicator of the law governing the arbitration agreement unless there are clear indications to the contrary.
- Stage 3: Third, failing any of the above two stages, the court will ascertain the system of law with the closest and most real connection to the arbitration agreement. This law is usually the law of the seat of arbitration.

An important point to note is that under Singapore law, a general and express choice-of-law clause governing the main contract would not suffice as an express choice of law for the law governing the arbitration agreement under Stage 1 (recently confirmed by *Anupam*, also see *BNA v BNB* [2020] 1 SLR 456; and *BCY*). For example, in *Anupam*, the Court of Appeal found that the reference to Indian law in Clause 20.1 of the shareholders' agreement does not constitute an express choice of law for the arbitration agreement. The relevant part of Clause 20.1 states: "This Agreement and its performance shall be governed by and construed in all respects in accordance with the laws of the Republic of India". The Court stated in rather strong terms that an express choice of law for an arbitration agreement "would only be found where there is explicit language stating so in no uncertain terms". As will be explained below, this is the first time in Singapore that this has a practical consequence on the outcome of the case.

If there is no express choice of law governing the arbitration agreement, the analysis proceeds to Stage 2 of the BCY 3-stage test, and the inquiry there is whether parties have made an implied choice of law to apply to the arbitration agreement. At this stage, a choice of law for the main contract is a strong indicator of the law governing the arbitration agreement, even though the law of the seat is more closely connected to the arbitration agreement. However, that presumption can be rebutted in favour of the law of the seat.

The case of *Anupam* is significant because it is the first time a Singapore court has rebutted this presumption resulting in a practical effect on the outcome of the case. Hence, the Court in *Anupam* found that even though the law governing the main contract (Indian law) is a strong indicator that the same law also governs the arbitration agreement, there were sufficient indications to negate the implication that Indian law was intended to govern the arbitration agreement. This is because such an implication would frustrate the parties' intention to arbitrate all their disputes, given that minority oppression disputes were non-arbitrable under Indian law (with the Court having decided that Indian law is relevant to the issue of arbitrability in the pre-award stage). Accordingly, the Court found that the law governing the arbitration agreement was the law of the chosen seat under Stage 3 of the BCY 3-stage test, *ie*, Singapore law, and that the fact that the dispute in that case was not arbitrable under Indian law was of no consequence. The rejection of Indian law in favour of the law of the seat illustrates the so-called "validation principle" which seeks to uphold the validity of the arbitration agreement on the basis that commercial parties are generally unlikely to have intended a choice of governing law for the contract to apply to an arbitration agreement if there is a serious risk that a choice of that law would "significantly undermine" that agreement.

The position under English law is similar. As a general rule, where the law applicable to the arbitration agreement is not specified, a choice of law to govern the main contract is construed as applying to an arbitration agreement contained as a clause in the main contract, even where the parties have chosen a different country as the seat. This general rule is an inference which may be negated by factors which imply that the arbitration agreement was intended to be governed by the law of the seat, and such factors include the existence of a serious risk that, if governed by the same law as the main contract, the arbitration agreement would be ineffective (*ie*, the validation principle) (see *Enka v Chubb* [2020] UKSC 38 (UKSC)).

Conclusion on the general choice-of-law clause in the SIAC Model Clause

The significance of the analysis above is that even though the law governing the main contract would ordinarily be taken to govern the arbitration agreement contained within, that is not always the case, and there can be practical consequences. To further complicate matters, the approach stated above is part of the conflict of laws rules of Singapore (and England), but each country has its own conflict of laws rules which may not necessarily be the same. It is thus conceivable that another jurisdiction may prefer the law of the seat over the law of the main contract as the law governing the arbitration agreement, failing express and specific designation by the parties. This could be on the basis that the arbitration clause is to be treated as a separate agreement from the commercial terms of the contract and that the law of the seat (rather than the law of the main contract) is more closely connected to the arbitration clause. Importantly, the issue of the applicable law can arise not only at the seat court, but also at the courts of multiple places of enforcement of the arbitral award, which can potentially give rise to a variety of approaches to the issue.

Therefore, given the above (including the strict approach under *Anupam*), if parties want certainty on the issue of the law governing the arbitration agreement, it would be prudent for commercial parties to consider inserting a clause specifying their choice of law for the arbitration agreement, preferably within the arbitration agreement/clause itself, which is apart from the general choice-of-law clause which governs the main contract. This is particularly so if the law governing the main contract is different from the law of the seat. Moreover, the SIAC Arbitration Rules do not contain a clear default provision on what the law governing the arbitration agreement is, unlike Art 16.4 of the London Court of International Arbitration (LCIA) Arbitration Rules, which states: “Subject to Article 16.5 below, the ***law applicable to the Arbitration Agreement*** and the arbitration shall be the law applicable at the seat of the arbitration, unless and to the extent that the parties have agreed in writing on the application of other laws or rules of law and such agreement is not prohibited by the law applicable at the arbitral seat.” (emphasis added) Lastly, it should be noted that the Hong Kong International Arbitration Centre’s model arbitration clause contains such a specific choice-of-law clause which states: "The law of this ***arbitration clause*** shall be ... (Hong Kong law). " (emphasis added)

(2) Option of choosing the Singapore International Commercial Court (SICC) as the supervisory court of the arbitration

By way of background, if parties have chosen Singapore as the seat of an international arbitration, the effect is: (a) parties have chosen Singapore law as the law governing the arbitral procedure (also known as the lex arbitri or curial law) (*ie*, International Arbitration Act 1994), and (b) the General Division of the High Court in Singapore shall be the supervisory court of the arbitration. Accordingly, the General Division of the High Court in Singapore, as the supervisory court, would determine matters such as whether the arbitral tribunal has jurisdiction, whether to grant any interim orders in aid of the arbitration proceedings, and whether the arbitral award should be set aside pursuant to International Arbitration Act 1994.

If parties choose Singapore as the seat, the SIAC Model Clause now provides an optional clause which parties can adopt to specifically submit to the jurisdiction of the SICC as the supervisory court of the arbitration (Optional Clause). The Optional Clause is in fact the SICC model jurisdiction clause for international arbitration matters launched by the SICC on 12 January 2023. The Optional Clause states:

> “In respect of any court proceedings in Singapore commenced under the International Arbitration Act 1994 in relation to the arbitration, the parties agree (a) to commence such proceedings before the Singapore International Commercial Court (the SICC); and (b) in any event, that such proceedings shall be heard and adjudicated by the

SICC."

In other words, parties can, by way of inserting the Optional Clause, expressly choose the SICC to be the supervisory court of the arbitration. The SICC was established in 2015 as a division of the General Division of the Singapore High Court to hear international commercial disputes, including those governed by foreign law. In 2018, the Supreme Court of Judicature Act 1969 was amended to make it clear that the SICC also has the jurisdiction to hear the same kind of proceedings relating to international commercial arbitration that the Singapore High Court can hear, and which satisfies such conditions as the Rules of Court may prescribe (s 18D Supreme Court of Judicature Act 1969).

Is the Optional Clause necessary if parties want to choose SICC to be the supervisory court? By way of background, in general, the SICC has the jurisdiction to hear and try an action if:

1. the claim in the action is of an international and commercial nature;
2. the parties to the action have submitted to the SICC's jurisdiction under a written jurisdiction agreement; and
3. the parties to the action do not seek any relief in the form of, or connected with, a prerogative order (including a mandatory order, a prohibiting order, a quashing order or an order for review of detention).

Moreover, the SICC may also hear cases which are transferred from the Singapore High Court.

The Optional Clause seeks to be a written jurisdiction agreement, and it avoids the need for the claim to satisfy the statutory requirements prescribed for being "international" or "commercial" in nature.

International parties may wish to choose SICC as the supervisory court of the arbitration because of the following reasons/factors:

1. **Diverse and highly respected judges**: SICC positions itself to be a neutral venue for international commercial litigation for parties with little or no connection to Singapore but who value a neutral jurisdiction with strong rule of law, experienced and highly respected judges and access to high quality legal and professional services for their dispute resolution. In addition to local judges, a diverse panel of eminent international judges sit as judges in the SICC. The international judges are drawn from both civil law and common law traditions, and include retired judges from other jurisdictions (such as England and Wales, Australia, China, India, and Japan). This diversity in legal traditions which the judges are familiar with is a plus because international arbitration procedure often involves accommodating parties from different legal traditions.
2. **Judges with arbitration practice experience**: Some of the international judges are practising arbitrators, who would be expected to be in touch with the practical reality on the ground of arbitration proceedings, and be updated with the current best practices of arbitration procedure. Further, some of the local judges have significant experience practising international arbitration as counsel and arbitrator before their appointment as judges, and continue to adjudicate on arbitration-related court proceedings. All this may give international parties a certain level of comfort that the rulings from the SICC on arbitration-related litigation would be informed by a wealth of arbitration practice experience of the judges.
3. **Perception of neutrality**: The SICC may be an attractive option if one of the parties to the commercial contract is a Singapore party, but the non-Singapore party to the contract has some reservations about choosing the Singapore High Court (excluding the SICC) as the supervisory court of the arbitration. Afterall, one of the benefits of arbitration is that the adjudication of the dispute is not conducted by any of the parties' national courts. The non-Singapore party may be more comfortable with the SICC adjudicating on arbitration-related litigation because a diverse panel of eminent international judges sits as judges in the SICC. Even though all appeals from the SICC will be heard by the Court of Appeal of Singapore (usually a panel of 3 judges), the Chief Justice may designate local judges as well as international judges to hear appeals from the SICC.
4. **Internationalised procedure**: The SICC has its own set of rules which are distinct from the set of rules of court which govern local procedural matters dealt with by the Singapore High Court. The SICC is not bound to apply any rule of evidence under Singapore law in such cases and to such extent as the SICC Rules may provide. The SICC

may, in such cases as the SICC Rules may prescribe, order that any question of foreign law be determined on the basis of submissions instead of proof. The internationalised procedural rules would fit the international character of international commercial arbitration well.

5. **Speed of judgment**: The SICC has also received positive reviews for the quality and speed of its judgments. Most judgments were delivered within three months or less of the date of the last hearing.
6. **Better recovery of legal costs**: A successful party in SICC proceedings is entitled to costs from the unsuccessful party, and the quantum of any costs award will generally reflect the costs incurred by the party entitled to costs, subject to the principles of proportionality and reasonableness: O 22 r 3 SICC Rules. Indeed, the successful party would typically provide a breakdown of the costs in terms of the number of hours claimed, the hourly rates charged, and some explanation as to what work those hours were incurred for (see *Senda International Capital Ltd v Kiri Industries Ltd* [2022] SGCA(I) 10). The recovery of costs on this approach would generally be higher than the approach applied in proceedings in the General Division of the Singapore High Court (excluding the SICC), which does not generally refer to the actual costs incurred by the successful party, but to the applicable costs guidelines which prescribe a pre-quantified range for each category of proceedings. For example, the guidelines prescribe a daily tariff of SGD$13,000 to SGD$40,000 for arbitration-related proceedings.

Conclusion on the option of choosing the SICC as the supervisory court of the arbitration

The SIAC Model Clause now provides an optional clause for parties who select Singapore as the seat of the arbitration to specifically choose the Singapore International Commercial Court (SICC) (instead of the Singapore High Court) as the supervisory court of the arbitration. International parties may wish to choose SICC as the supervisory court of the arbitration because of the following reasons/factors: (a) diverse and highly respected judges on the SICC (including international judges drawn from both civil law and common law traditions); (b) the judges have arbitration practice experience; (c) if one of the parties to the commercial contract is a Singapore party, but the non-Singapore party to the contract has some reservations about choosing the Singapore High Court (excluding the SICC) as the supervisory court of the arbitration; (d) the internationalised procedure for SICC proceedings; (e) speed of judgment; and (f) better recovery of legal costs. Indeed, the SIAC recommends, in its footnotes to the SIAC Model Clause, the inclusion of the Optional Clause when the SIAC Model Clause is adopted for international commercial arbitration. With this recommendation from SIAC, and the attractiveness of selecting the SICC as stated above, it is expected that international parties would increasingly select the SICC as the supervisory court if Singapore is the chosen seat of the arbitration.

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MODA illustrated qualified electronic signatures with internationally common algorithms and cybersecurity technical standards

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Ken-Ying Tseng/ Sam Huang/Peggy Tsai

The Electronic Signatures Act ("ESA") is the general law regulating the validity of electronic signatures in Taiwan. Pursuant to Paragraph 1, Article 9 of the ESA, where a physical signature or seal is required by law for a certain document, only a qualified electronic signature has the same legal effect as a physical signature or seal on said document. Under the ESA, an "electronic signature" refers to a signature attached to, integrated into, or logically associated with an electronic record and can be used to identify and verify (i) the signatory's identity/qualification and (ii) the electronic record's authenticity. Hence, it is generally acknowledged that a qualified electronic signature should be "undeniable" and "unfalsified". However, there has been no clear guidance as to what types of algorithms and cybersecurity technologies would meet the above-mentioned requirements for "electronic signatures" under the ESA.

For the convenience of practical application, on 2 December 2022, the Administration for Digital Industries, the Ministry of Digital Affairs ("ADI") issued a ruling to illustrate qualified electronic signatures with the following internationally common algorithms and cybersecurity technical standards (Ref. No.: Chan-Jing-Zi No. 1114000229):

1. The electronic signatures using PKI (Public Key Infrastructure) technology and structure, such as standards established by the IETF PKIX Working Group.

2. The electronic signatures using signature formats or algorithms established by international organizations or major countries, such as:

(1) The signature formats established by the ETSI, including CAdES (CMS Advanced Electronic Signatures), XAdES (XML Advanced Electronic Signatures), PAdES (PDF Advanced Electronic Signatures), ASiC (Associated Signature Containers), JAdES (JSON Advanced Electronic Signatures), etc.

(2) The signature algorithms established or approved by the NIST or ISO.

The ADI hopes this ruling will facilitate the practical application of electronic signatures, and it encourages electronic signature service providers to self-certify that their solutions comply with any of the technology listed above.

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ADVISORIES

Healthcare

No Surprises Act: Washington State Rethinks IDR Transition Amid Federal Court Showdown

By John Barnes, Christine Parkins Johnson, and Wei Wei*

03.15.23

Washington State's Office of the Insurance Commissioner (OIC) is delaying its transition to the federal No Surprises Act (NSA) Independent Dispute Resolution (IDR) process for at least six months. As a result of this decision, out-of-network providers in Washington State will be able to continue using the state-regulated process for resolving out-of-network billing disputes. The OIC's decision comes after a recent decision by the Centers for Medicare & Medicaid Services (CMS) to pause the general federal IDR process indefinitely, except for disputes about services provided prior to October 25, 2022.

At the end of February, the OIC announced that in light of recent litigation in federal court related to the NSA IDR process and comments the OIC received in response to a request for information (RFI), the OIC would delay adoption of the federal IDR process for at least six months. The OIC had issued the RFI on February 1 to solicit comments about whether Washington should transition to the federal NSA IDR process on July 1, 2023, or continue to use the state's Balance Billing Protection Act (BBPA) dispute resolution mechanism to resolve disputes between payers and out-of-network providers.

The BBPA is a Washington state law that predates the NSA and seeks to protect consumers from balance billing by out-of-network providers for emergency services, as well as by out-of-network providers of nonemergency services at in-network hospitals and ambulatory surgical facilities. For carriers and providers who cannot agree on a "commercially reasonable payment," the BBPA created a dispute resolution system administered by the OIC. The system has been in place in Washington since January 1, 2020. In 2022, the Washington State Legislature amended the BBPA to give the OIC discretion to migrate most disputes to the NSA IDR process as of July 1, 2023, or a later date.

The OIC's announcement of the decision to delay the tentative transition date comes only three weeks after a February 6 win by the Texas Medical Association (TMA) in an action challenging an NSA Final Rule that would have given preference to health plans' Qualifying Payment Amount (QPA) in the IDR process (*Texas Medical Association et al. v. United States Department of Health and Human Services et al.*, case number 6:22-cv-00372 (U.S. District Court for the Eastern District of Texas, 2023)). After the February 6 ruling, CMS instructed IDR entities to hold all payment determinations in out-of-network disputes until CMS issues further guidance. CMS then further instructed IDR entities to recall any payment determinations issued between February 6, 2023, and February 10, 2023. However, CMS allowed that, starting February 27, IDR entities can resume making payment determinations for payment disputes concerning items or services provided before October 25, 2022, using the standards provided in the revised October 2021 *interim* final rules. Certified IDR entities will continue to hold payment determinations for disputes involving items or services furnished on or after October 25, 2022, until further guidance is in place.

**Wei Wei (University of Washington School of Law) is Davis Wright Tremaine's first 2L Diversity Healthcare Law Clerk. We are pleased to have Wei join our team for the spring term.*

U.S. Commerce, Treasury Departments issue reports on pending outbound investment screening regime

17 March 2023

Congressionally-mandated reports recently issued by the U.S. Department of the Treasury and the U.S. Department of Commerce reinforce previously reported details of the outbound investment screening regime that the Biden Administration is currently contemplating. Media reports indicate that the White House will issue an executive order relatively soon—perhaps in a matter of weeks—to establish the new regime. The Biden Administration's recent reports to Congress suggest that the regime will be implemented and administered by the U.S. Department of the Treasury and focus on investments in advanced technologies not currently subject to other existing U.S. trade controls. However, the reports leave unstated the precise scope and nature of the regime, including which investors and foreign technology sectors will be impacted.

In December 2022, Congress passed the Consolidated Appropriations Act, 2023 (Public Law 117-328), which directed the U.S. Department of Commerce (Commerce) and the U.S. Department of the Treasury (Treasury) each to submit a report to Congress within 60 days, (i) describing each agency's efforts to establish and implement a program to "address national security threats emanating from outbound investments from the United States in certain sectors critical for U.S. national security" and (ii) identifying the resources required for such a regime. This "Outbound Investment Regime" seeks to address concerns that U.S. companies' investments in adversarial countries' critical technology industries could harm U.S. national security.

On 7 March 2023, Commerce and Treasury released their respective reports, which largely confirmed the limited details currently available about the proposed Outbound Investment Regime. The key points from the reports are set forth below:

Framework

Treasury would implement and administer the Outbound Investment Regime in coordination with Commerce and other federal departments and agencies. Commerce would aim to leverage its "core sector-specific technical expertise and industry connectivity necessary to accurately define, scope, and assess the appropriate sectors that may be covered by any regime...." The Commerce report notes that the participation of Commerce in this process will bring a commercial perspective, which the Biden Administration believes will be key to the successful implementation of the regime. These details appear to confirm that Treasury will play a lead role in the Outbound Investment Regime, allowing the U.S. Government to leverage Treasury's existing expertise in leading the CFIUS regime.

Scope

The focus of the Outbound Investment Regime would be on (i) "investments that could result in the advancement of military and dual-use technologies by countries of concern" and (ii) "certain entities involved in a sub-set of certain key advanced technologies that are critical to U.S. national security." The Outbound Investment Regime would cover investments that "are not presently captured by export controls, sanctions, or other related authorities," reinforcing Biden Administration officials' statements that the regime is an effort to fill in gaps in the U.S. Government's efforts to address the range of national security threats posed by strategic adversaries, such as Russia and China.

Actions

The Outbound Investment Regime "may include prohibiting certain investments and/or collecting information about other investments to inform potential future action." The Biden Administration appears to be considering a wide range of options for the regime—from the most severe (e.g., blocking certain investments) to less burdensome ones (e.g., gathering information about certain investments).

Goals

Commerce and Treasury intend to facilitate swift implementation and strike a balance between preventing investments that harm U.S. national security and not placing undue burden on U.S. investors and businesses. Administration officials have repeatedly emphasized the importance of this balancing effort. An executive order establishing an Outbound Investment Regime has not yet been issued, partly because of ongoing Biden Administration outreach to the financial and technology sectors.

International Cooperation

The United States is discussing the Outbound Investment Regime with its international partners and allies. The Biden Administration has stressed the importance of getting allied country support for the Outbound Investment Regime, in part due to a recognition that the effectiveness of such a regime could be undermined if non-U.S. investors, including allied country investors, replace any U.S. investors whose investments in foreign technology sectors are prohibited by the regime.

Timeline

Final policy determinations on the Outbound Investment Regime are expected to be made in the near future, and Treasury and Commerce "anticipate" that "an opportunity for public comment will be provided." Although the precise timing of establishing the Outbound Investment Regime is still unclear, we still expect that the regime will initially be established by executive order rather than legislation. Whether the public's ability to comment on the regime before or after it is rolled out remains unclear.

Anticipated Resources

Treasury estimates that “organizational adjustments and considerable resources” will be necessary to implement the regime and that approximately US$10 million in FY 2023 will be required for “labor costs for staff to draft regulations, set up program operations, and conduct international engagement; IT system development; data and subscriptions; and travel and training.” For FY 2023, Commerce will use its appropriated resources to “hir[e] sector-specific industry experts and investment security officers” who will work on the Outbound Investment Regime and the promotion of supply chain resiliency. Both Treasury and Commerce recommend additional resources for the Outbound Investment Regime effort in the president’s FY 2024 budget. Although the president’s budget request is very unlikely to be enacted as proposed, the respective funding requests do inform our understanding of the agencies’ needs when the Outbound Investment Regime is formally established. We note that Commerce envisions a significant role for the International Trade Administration (ITA) in particular. ITA would “provide singular, sector-specific industry expertise to prevent U.S. private capital from financing adversary advances in critical sectors that undermine U.S. national security.”

Although the Treasury and Commerce reports largely reinforce previously reported features of the proposed Outbound Investment Regime, they do not clarify the key concepts that will define it, notably the precise scope and nature of the regime, including which investors and which foreign technology sectors will be impacted or whether the regime will involve more than a reporting requirement with respect to high-priority sectors.

Next steps

Despite the lack of amplifying details on the Outbound Investment Regime, U.S. companies can still take certain actions now, such as examining their existing exposure to Russia and China—countries likely to be targeted by the regime—as a head start on the potential impact of the regime on their business and operations. In addition, companies should closely monitor developments in this area and consider hiring an advisor now to quickly react when the regime becomes law.

Please contact any of the listed Hogan Lovells lawyers with questions on the development of, and how to prepare for, the U.S. Outbound Investment Regime.

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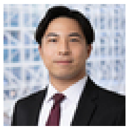

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