PACIFIC RIM ADVISORY COUNCIL

Pacific Rim Advisory Council

September, 2023 e-Bulletin

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CONFERENCES & EVENTS

PRAC Let's Talk!

Virtual meeting - TBA

PRAC Conferences

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

Paris May 25 - 28, 2024
Hosted by GIDE

PRAC 2023 Event Connect

Get On The List!

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.
IBA Competition Conf Sep 15-15 Florence
SCCE Compliance & Ethics Institute Annual Conference - October 2-5, Chicago
IBA Annual Meeting Paris Oct 29-Nov 30

Full Details
www.prac.org/events

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

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PRAC CONTACTS MEMBER DIRECTORY EVENTS

BRIGARD URRUTIA PROMOTES FOUR TO PARTNERSHIP

BOGOTA, 27 June 2023: Colombian Elite firm Brigard Urrutia has strengthened its litigation, tax, corporate and M&A and insurance practices by promoting four lawyers to its partnership.

Brigard Urrutia announced María Victoria Munévar, Daniel Duque, Johann Schomberger and Lucas Fajardo have been appointed to the senior rank of the firm, which now has a total of 27 partners.

Maria Victoria Munévar specialises in litigation, arbitration and insolvency matters. She has advised national and international companies in a number of cases, including matters relating to corporate disputes, unfair competition and consumer protection, among others. Munévar first joined Brigard Urrutia in 2005, before leaving the firm in 2016 to join Covington & Burling LL. She returned to the outfit in 2018 as a senior associate.

Daniel Duque joined Brigard Urrutia in 2018. He focuses his legal work on tax-related matters and has worked with local and international clients on a variety of cases, including corporate restructurings and mergers. He has also advised on other tax matters related to payroll, stock options and retirement plans. Prior to joining Brigard Urrutia, Duque gained experience as an international tax service manager for professional services group PricewaterhouseCoopers. He also spent two years at full-service firm Cuberos Córtes Gutiérrez (CCG), which merged with Holland & Knight (Colombia) earlier this year.

Johann Schomberger, who is part of the commercial and corporate law team at Brigard Urrutia, works with companies on matters concerning contractual, consumer and transportation law, among others. He also helps start-ups navigate complex financial regulation, along with assisting them in other legal challenges those new companies typically encounter after they launch. Schomberger joined the firm in 2012, and counts previous experience as an attorney at the Colombian subsidiary of Mexican cement maker Cemex. The partner has also previously worked as a legal adviser for Colombia's Ministry of Trade, Industry and Tourism.

Lucas Fajardo forms part of the insurance and reinsurance team. Since his arrival in 2012, he has advised clients in insurance law matters and has represented companies in the drafting of commercial agreements and schemes for insurance policies, among other things. Up until last month, Fajardo spent three years on the board of directors for Insuralex, a network comprised of independent law firms that focus on insurance and reinsurance matters. Between 2022 and 2023, he chaired the board.

Managing partner Carlos Fradique-Méndez says that the team sees the appointments as a testament to the hard work undertaken by the lawyers, as well as their commitment to the firm's clients. "Maria Victoria, Daniel, Lucas, and Johann are recognized for their exceptional skills, knowledge and leadership in the legal community, and we are confident that they will contribute to the consolidation of the firm," he comments.

For additional information visit www.bu.com.co

GIDE ELECTS MANAGEMENT COMMITTEE

Gide re-elects Frédéric Nouel and Jean-François Levraud to the helm, on a promise of stepping up the firm's development

PARIS, 06 July 2023: The Gide partners have voted in their new Management Committee, with Frédéric Nouel, Senior Partner, and Jean-François Levraud, Managing Partner, both having been re-elected for a second term. They are joined on the Committee by three other partners, likewise elected by their peers at the firm: Franck Audran, Jean-Gabriel Flandrois and Laetitia Lemercier. Frédérique Misk-Malher, the firm's Secretary-General, also sits on the Management Committee.

Gide is the undisputed leader in a wide range of fields in business law. Our exceptional teams cultivate and serve the unique and loyal client base we have built up over the more than 100 years since the firm's foundation.

It is thanks to these teams and the recognition they have earned not only from our clients but also from their peers and others within the French and international legal spheres that Gide was recently crowned "France Law Firm of the Year" by Chambers Europe 2023. It is the second time the firm has held this prestigious title. We also regularly top a number of other French and international rankings, such as the Mergermarket Global & Regional M&A Rankings, in which our M&A team ranked first in France for H1 2023 in terms of both value and deal count.

Frédéric Nouel, Senior Partner, said: "I am honoured to be re-elected and to have the opportunity, together with Jean-François Levraud and the rest of the Committee, to take our firm to the next level. With the unique blend of expertise our 117 partners bring to the table, we offer our clients a service that is second to none."

Jean-François Levraud, Managing Partner, added: "The firm can always rely on its partners to put their heads together and come up with solutions to even the most complex legal issues, offering our clients exceptional added value. Our strategy focuses on leveraging these synergies and building on the already considerable skills available within the firm."

Frédéric Nouel has been Senior Partner since 2021. He specialises mainly in M&A, real-estate and financing transactions for investment funds and listed operators on the European hotel and real-estate markets. Consistently ranked in Band 1/Tier 1 and as a Leading Individual by Chambers Europe and Legal 500 (Hall of Fame), Frédéric also featured among the Forbes Top 40 Lawyers advising CAC 40 companies in 2022 and has been named a Thought Leader in real estate by Who's Who Legal. He was voted "Lawyer of the Year: Real Estate" by Best Lawyers in France in 2017 and again in 2020.

Jean-François Levraud has been Managing Partner since 2021. Within the firm's Real-Estate Transactions & Financing practice group in Paris, he advises primarily on real-estate transactions, especially construction and development transactions, in France and abroad. He headed up Gide's Casablanca office from 2014 to 2018. International legal directories such as Chambers Global, Legal 500, IFLR1000 and Best Lawyers recognise Jean-François as a leading expert in real-estate law in both France and Morocco.

Franck Audran, newly elected Member of the Committee, joined the firm in 2007 and made partner in 2019. He specialises in French and EU competition law, assisting the firm's clients on merger control aspects of complex acquisitions and restructuring projects, some of which require commitments to and/or an in-depth investigation by the French competition authority, the EU Commission or other national competition authorities. He also acts for the firm's clients in investigations, inspections and seizures, as well as in litigation proceedings before the competition authorities and the courts (on charges relating to cartels, vertical restraints or abuses of dominant position and in private enforcement suits). Franck regularly features in the main international rankings (Chambers and Legal 500) as well as in the Best Lawyers peer review guide.

Jean-Gabriel Flandrois, newly elected Member of the Committee, joined the firm in 1999 and made partner within the M&A/Corporate practice group in 2009. He also heads up the firm's Restructuring practice. He has gained extensive experience in the acquisition and restructuring of banks and other financial institutions, as well as in distressed M&A transactions, and regularly coordinates cross-border operations involving multiple jurisdictions. Jean-Gabriel is recommended as a Leading Individual in M&A in the Legal 500 guide and ranked by IFLR1000 and Best Lawyers in both M&A and Insolvency.

Laetitia Lemercier, newly elected Member of the Committee, joined the firm in 2001 and made partner in 2016. She specialises in structured finance and has significant experience in real-estate and project financing and refinancing – including development, acquisition, corporate and green financing. Her expertise also extends to debt restructuring. She regularly advises financial institutions, funds, borrowers, issuers and investors on complex and innovative financing transactions, from the initial structuring through to completion. Laetitia is recommended by Legal 500 EMEA and Best Lawyers in the categories of Banking and Finance, Real-Estate Finance and Project Finance, as well as by Chambers Europe for Projects and Energy Domestic Finan

Frédérique Misk-Malher, Gide's Secretary-General since 2015, oversees all of the firm's support functions. She supports the Committee in defining and implementing its development plan and in leading strategic projects both in France and abroad. She also heads up projects that cut across the firm's various different departments. Frédérique previously held positions as Financial Auditor, Chief Financial Officer and Secretary-General/Director-General for a number of companies before pursuing her career within law firms as from 2011.

For additional information visit www.gide.com

HAN KUN WELCOMES RETURN OF INVESTMENTS AND CAPITAL MARKETS DUO

Han Kun welcomes Mr. Sheldon Chen and Mr. Clarence Chung in rejoining the firm

BEIJING/SHANGHAI, 21 July, 2023: Han Kun is pleased to announce that Mr. Sheldon Chen and Mr. Clarence Chung have recently rejoined the firm, further enhancing the firm's service capabilities.

Mr. Chen focuses on private equity/venture capital investments, mergers and acquisitions, equity incentives, and general corporate matters. He has participated in and been in charge of a significant number of investment, restructuring, and M&A projects in a wide variety of industries, including hard technology, advanced manufacturing, healthcare, and consumer & retail, etc. Mr. Chen has accumulated extensive experience in more than ten years of practice. Based on his understanding of transactions and business, Mr. Chen is able to quickly identify legal risks and provide creative solutions for clients in complex transactions. Mr. Chen graduated from Fudan University with an LL.B. degree and later from the Chinese University of Hong Kong with an LL.M. degree. Before joining Han Kun, Mr. Chen practiced with two other prestigious law firms in China.

Mr. Chung focuses on private equity/venture capital investments, capital markets, and foreign direct investment across a broad range of industries, including new energy, logistics, semi-conductors and digital economy, etc. He has represented numerous high-profile investment institutions and fast-growing enterprises. Mr. Chung has accumulated extensive experience in the areas of fund-raising, investment, management, and withdrawal. He excels at assisting financial and strategic investors to realize their business objectives while controlling legal risks. He is also familiar with the various stages of development of startups and their potential legal issues to provide practical solutions. Mr. Chung graduated from Peking University with a bachelor's degree in law. Before joining Han Kun, Mr. Chung served in well-known law firms and one of the top internet companies in China. He has been highly recognized by authoritative legal directories such as CLECSS and Legalband.

Owing to Mr. Chen's and Mr. Chung's extensive experience in investments and capital markets, their rejoining Han Kun will further enhance the firm's service capabilities in related fields.

For additional information visit www.hankunlaw.com

HOGAL LOVELLS CONFIRMS CEO MIGUEL ZALDIVAR RE-APPOINTED FOR SECOND TERM

WASHINGTON, D.C., 05 September 2023: Partners at Hogan Lovells have voted to confirm that CEO Miguel Zaldivar should be re-appointed to a second four-year term, ending 30 June 2028.

Zaldivar began his first term as Hogan Lovells CEO on 1 July 2020, and he and his management team have achieved record financial results across a wide range of metrics including revenue, PPEP, RPL and PPL. Despite challenges including the war in Ukraine, the pandemic, unprecedented inflation levels, and a drop in legal services globally, Zaldivar and the management team have continued to elevate the firm's position as a leading global firm.

Marie-Aimée de Dampierre, Chair of the Hogan Lovells Board, said: "Miguel and his management team have delivered outstanding results over the past three years, steering our firm through turbulent and unprecedented times to achieve our highest ever financial performance. He has a clear vison and strategy, which we believe will lead us to even greater success, while continuing to foster our ambitious and supportive culture. We are thankful to Miguel for his leadership and commitment to our firm."

Zaldivar and his team have had a strong focus on quality, and also driven efforts to build on the firm's recognized strengths in highly-regulated sectors – energy, financial institutions, life sciences, media and telecoms, mobility, and technology. The firm has also prioritized deepening and strengthening its relationships with many of its global clients, and restructuring its business operations (including a comprehensive review of all of its real estate holdings). In addition Zaldivar has developed robust business plans for the firm's four economic engines: Washington, D.C., London, Germany, and Paris, and focused on significant growth in the strategic markets of New York, Texas, California, and Asia.

Zaldivar said: "I am deeply honored to serve another term as CEO of Hogan Lovells, a firm where I have spent the majority of my career. As one of a few truly integrated global law firms, Hogan Lovells is fortunate to represent many of the world's leading companies and top brands in their most complex matters across jurisdictions. We know that to earn this trust we need to deliver value and a consistently high quality service.

"We have accomplished so much over the past three years, despite the many global market challenges. This is a high-performing, culturally-distinct organization that is unique in our industry. It is why we are known as a great place to work and to thrive. I am looking forward to the opportunity to continue to grow and evolve our firm."

About Miguel Zaldivar: Before being appointed as CEO, Zaldivar served in several leadership positions, including as the firm's Regional Managing Partner for the Asia Pacific Middle East region, co-leadership of the Infrastructure, Energy, Resources and Projects practice, a member of the Board, and co-head of the Latin American practice group.

As a practicing lawyer Miguel is widely recognized as a leading lawyer in complex international cross border transactions and he has facilitated multi-billion-dollar investments and transactions in highly regulated markets. This continues to be a core practice for Hogan Lovells and a key driver of success and growth. Miguel brings a unique multi-cultural and strategic approach to complex transactions and investments, which is an important focus area for many of our key clients.

For additional information visit www.hoganlovells.com

ARIAS

ADVISED TWO SPAC IN MERGER WITH LATAM LOGISTICS PROPERTIES S.A. CREATING A LEADING PUBLICLY TRADED DEVELOPER

Costa Rica, August 2023: TWO, a Special Purpose Acquisition Company (SPAC), has entered into a definitive business combination agreement with LatAm Logistic Properties (LLP). LLP is engaged in the development, acquisition, and operation of industrial real estate assets with 28 facilities in Costa Rica, Peru, and Colombia.

Arias Costa Rica oversaw the consolidation of the Costa Rican and Panamanian due diligence. The law firm assisted TWO with closing documents from a local law perspective and assessing whether a merger control filing was required.

"As the popularity of SPAC's acquisitions have grown in the past few years in the US, it is not yet standard to see them in the Centra American region, which makes this a complex and innovative transaction. This leveraged acquisition will definitely provide LatAm Logistics with the capacity both of continuing and expanding their operations in the region." – Andrey Dorado, Partner at Arias Costa Rica

The estimated post-transaction enterprise value is $578 Million. LatAm Logistic Properties' management will roll 100% of their existing shares into the equity of the combined company, upon closing, it is expected to go public on the New York Stock Exchange.

This merger brings the development of class-A warehouses to undersupplied markets. LatAm Logistic Properties is one of the only Institutional Industrial Platforms operating across Central and South America; and one of the only vertically integrated logistics real estate platforms operating across the region.

Their portfolio consists of approximately 4.8 million square feet of operating gross leasable area across a network of 28 facilities in Costa Rica, Colombia, and Peru, primarily located in high-growth consumption centers with high barriers to entry.

LLP's properties are designed and developed to offer greater accessibility, security, and maximum optionality, which provides cost efficiencies for its multi-national and regional customers. With modern specifications, LLP is able to drive operational efficiencies in parallel with technology advancements for timely delivery of goods, implementing forward-thinking operational processes that provide clients with best-in-class service.

For additional information visit us at www.ariaslaw.com

HAN KUN

ZHEJIANG DOER BIOLIGICS CO. LTD ON ITS GLOBAL LICENSE OUT DEAL WITH BIONTECH SE

BEIJING, 11 July 2023: On July 11, 2023, Zhejiang Doer Biologics Co., Ltd. ("Doer") announced that it had entered into a license agreement with BioNTech SE (NASDAQ: BNTX, "BioNTech"), a German biotechnology unicorn company. Pursuant to the agreement, Doer will grant BioNTech a worldwide license for an innovative discovery, allowing BioNTech to research, develop, manufacture, and commercialize innovative biotherapeutics against an unnamed therapeutic target by utilizing this innovative discovery, and Doer is entitled to receive an upfront payment and will be eligible for potential development, regulatory, and commercial milestone payments. This license-out transaction involves various innovative patents, technologies, and other kinds of intellectual property at multiple levels and different dimensions, indicating Doer's excellent research and development capabilities in innovative biotherapeutics, as well as the great commercial value and prospects for Doer's products and technologies in the world. In short, this transaction is strategically important for Doer's continuous R&D and vigorous future development.

Han Kun Law Offices, acting as Doer's sole legal counsel in this global licensing transaction, provided legal advice and legal services for the entire process, including design of transaction structure, drafting, negotiation, revising, and finalizing the legal documents.

Zhejiang Doer Biologics Co., Ltd., a subsidiary of Huadong Medicine Co., Ltd. (SZ.000963), is a clinical stage biopharmaceutical company that focuses on the discovery and development of multi-domain based multi-specific biotherapeutics to address unmet medical need in the field of metabolic diseases and cancers.

For more information visit www.hankunlaw.com

GIDE

COUNSEL TO EP EQUITY INVESTMENT ON THE ACQUISITION OF ATOS SE'S TECH FOUNDATIONS BUSINESS

Gide, counsel to EP Equity Investment on the acquisition of Tech Foundations

PARIS, 02 August 2023: Gide has advised EP Equity Investment ("EPEI"), a recognized and financially strong European industrial conglomerate with a long-term global vision, on the acquisition of 100% of Atos SE's Tech Foundations business, on the basis of an enterprise value of €2.0bn.

Atos SE and EPEI have entered into a put option agreement providing for exclusive negotiations to sell to EPEI 100% of Atos' subsidiary which will hold its Tech Foundations business at the end of the internal reorganization under finalization ("TFCo"). The contemplated sale would result for Atos SE in a net cash positive impact of €0.1bn and the transfer of €1.9bn of on-balance sheet liabilities, leading to an enterprise value of €2bn. TFCo will continue using Atos brand and will become its sole owner. Tech Foundations has more than 52 000 employees globally.

Subject to final agreements and certain financial and other customary conditions to be provided for therein (including relevant shareholders' approvals, regulatory clearances and other third-party consents), the transaction is expected to be completed by Q4-2023 or Q1-2024.

As part of this transaction, the EPEI group has also undertaken to subscribe to a reserved capital increase of €180m in Atos SE (renamed Eviden SE) giving EPEI 7.5% of the post-money this reserved share capital increase, and to subscribe for €37.5m to a subsequent rights issue of €720m, for a total investment by EPEI of €217.5m.

Gide drew on a team made up of 24 lawyers based in Paris, Brussels and London. The team was headed by partners Anne Tolila and Charles de Reals, and comprised :

Counsel Pierre-Antoine Degrolard (London), as well Paris-based associates Corentin Charlès, Jonathan Navarro, Mélanie Chailloleau, Apolline Couderc and Louis Etienne on M&A/Corporate aspects; Partner Laurent Godfroid and associates Perceval Renié and Pauline Cabany on competition law aspects; Partner Foulques de Rostolan and associate Pauline Manet on employment law aspects; Partner Jean-Hyacinthe de Mitry and associate Enora Guénon on intellectual property aspects; Partners Thierry Dor and Julien Guinot-Deléry and associate Nina Khalfi on GDPR/IT aspects; Partner Hugues Moreau and associates Sophie Gillard and Samuel Sellam on real estate law aspects; Partner Sophie Scemla and associates Marion David and Calypso Korkikian on litigation aspects.

Gide's Warsaw office was assisting on Polish aspects of the Project.

For additional information visit www.gide.com

HOGAN LOVELLS

COUNSELS BIORETEC IN FIRST EVER DE NOVO GRANT FOR BIORESORBABLE METAL TRAUMA SCREW

HOGAN LOVELLS

ADVISES SUSTAINABLE SKYLINES IN FIRST-EVER FAA AUTHORIZATION FOR DRONE ADVERTISING BANNERS

WASHINGTON, D.C., 30 August 2023 – Global law firm Hogan Lovells advised drone advertising and data analytics company Sustainable Skylines in securing the first-ever approval from the Federal Aviation Administration (FAA), which, when combined with a soon-to-be-issued banner towing waiver, will enable commercial towing operations of advertising banners, allowing the company to launch full-size banner advertisements towed by a drone along Miami Beach. More about the approval, which allows for environmentally clean and safe advertising, was issued 24 August and can be found here.

The commercial drone industry has been working towards regulatory approvals for a wide range of new and innovative drone applications for the past decade and this FAA approval is undoubtedly the first of many that will transform the aerial advertising industry. Sustainable Skylines' drone operations are more environmentally friendly, safe, and scalable in comparison to traditional aircraft banner towing, which faces constraints caused by small plane logistics and the proximity of events to airfields. Additionally, by eliminating the need for airport or runway access, drone banner towing operations can occur in various locations where traditional banner towing operations are not possible.

Jacob Stonecipher, founder and CEO of Sustainable Skylines, said: "Our team has worked tirelessly toward this regulatory approval; we wouldn't be here without the guidance of Lisa Ellman and her team at Hogan Lovells. We're excited to work with our partners to safely launch and integrate banner advertising by drone into the local airspace and community."

Lisa Ellman, Partner and Chair of Hogan Lovells' Uncrewed Aircraft Systems (UAS) practice, said: "Banner advertising is another exciting example of the new opportunities that commercial drones bring to our economy while enhancing the safety of the National Airspace System. Sustainable Skylines is an industry with a new technology and delivering exponential value through the use of safe, clean drone technology that can scale, entertain and create new jobs, too."

In addition to Ellman, Hogan Lovells senior associate Matt Clark (Washington, D.C.) served on Sustainable Skylines' legal team.

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About Sustainable Skylines: Sustainable Skylines is the first to market full-size drone advertising banner towing operations, driving innovation around antiquated aerial advertising practices by using sustainable drone technology and in-depth data analytics. Aggregating data from cellular, geospatial, and real-time footage from flight operations, Sustainable Skylines leverages the latest advances in computer vision, big data, and artificial intelligence to create actionable insights for our clients. Building the drone, pilot, and fleet management infrastructure alongside our partners and the FAA, Sustainable Skylines will drive innovation and sustainability across the country. Sustainable Skylines was founded in 2020 and headquartered in Miami, FL. For further information visit www.sustainableskylines.com.

For additional information visit www.hoganlovells.com

NAUTADUTILH

ASSISTS FOUNDING SHAREHOLDERS OF ROUTE MOBILE IN SELLING MAJORITY STAKE TO PROXIMUS

BRUSSELS, 18 July 2023: NautaDutilh assisted the founding shareholders of Route Mobile, an Indian cloud communications platform as a service (CPaaS) company, sell a majority stake in the company. Route Mobile is listed on NSE and BSE in India with a market capitalization of EUR 1.1 billion.

As a part of the agreement, some of the founding shareholders of Route Mobile will reinvest in a minority stake in Proximus Opal, a subsidiary of Belgium's digital services and communication provider Proximus Group, and the holding company of Telesign, Proximus' US-based affiliate. The combined group will have significantly expanded customer reach and would become the world's third largest player (based on messaging volume). Proximus' CPaaS portfolio will be significantly enhanced by the addition of Route Mobile's capabilities, particularly in the area of omnichannel. This will help to capture value from the current generative AI-driven transformation in customer engagement. Upon closing of the transaction, the CPaaS activities of the combined group will be led by Rajdip Gupta, CEO of Route Mobile, who will continue in his current role.

Geographically, Route Mobile's presence in the Indian sub-continent, Africa, Asia-Pacific and Latin America perfectly complements Telesign's presence in Europe and North America, giving the combined group global customer coverage in over 200 countries and territories and exposure to high growth markets.

NautaDutilh acted as Belgian counsel. The NautaDutilh core team consisted of Nicolas de Crombrugghe, Olivier Van Wouwe, Don Baudewyns, Hussein Dagher (Corporate & Finance), Vincent Wellens, Sigrid Heirbrant (GDPR, IP & Tech), Ken Lioen, Aurélien Lenaerts (Tax), Mauricette Schaufeli, Evi Mattioli, Jurriaan Bos (FDI & Competition), Philippe François and Frédérique Czanik (Employment).

"We are glad we can contribute to the partnership between Proximus' Telesign and Route Mobile, which will create a leading global communications platform (CPaaS)." says lead partner Nicolas de Crombrugghe.

For additional information visit www.nautadutilh.com

PRAC EVENTS
BULLETIN BOARD

Like millions around the globe, the COVID-19 pandemic has impacted our members and how we work.
Our industry follows others with a mix of restart and pause.
We meet in person where and when we can
while continuing to also meet and talk virtually face to face
Across the miles, oceans and regions
In varying places and at all hours of the day and night.
It isn't the same. We can all admit to that.
We pivot. We adapt.
What remains the same is our commitment to continue forming new bonds
and strengthening our long-standing ties with our friends and colleagues around the world.

Together, we will see it through.

PRAC Events — 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
with other attending PRAC Delegates prior to event start
Get on the List! Register for upcoming Event Connect: events@prac.org

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

SYCIP

HYDROPOWER BOOST: CHINA BANK IN IPO OF REPOWER ENERGY

MANILA, 25 July 2023: SyCipLaw was legal counsel to China Bank Capital Corporation in the Initial Public Offering (IPO) of Repower Energy Development Corporation (REDC), the hydropower arm of Pure Energy Holdings Corporation (PEHC). The IPO involved 200 million primary common shares, with an over-allotment option of up to 30 million secondary common shares, with an offer price of PhP5 per share. China Bank is the IPO's Sole Issue Manager, Lead Underwriter and Sole Bookrunner.

The IPO proceeds of Php1 billion (less taxes, costs and expenses) from the sale of the primary common shares are intended to partially fund REDC's existing hydropower projects, the development and acquisition of other renewable energy projects, and operating and capital requirements.

In a statement, REDC president and chief executive Eric Peter Roxas said, "[A] public listing is a key milestone for REDC, with majority of the use of proceeds allocated for the completion of two of its ongoing projects. This will lead towards fulfilling our goal of uplifting Filipinos' living standards through clean, accessible, and affordable energy consistent with the United Nations' Sustainable Development Goals."

Apart from hydropower, the PEHC group has member-companies involved in bulk water and distribution, solar and geothermal energy.

The SyCipLaw team included Melyjane G. Bertillo-Ancheta (lead partner), together with Hiyasmin H. Lapitan (partner), and Javierose M. Ramirez (senior associate).

Here are other articles on the IPO:

"Repower Energy Development Corp. joins the ranks of publicly-listed companies." The Philippine Stock Exchange, Inc. July 24, 2023 https://www.pse.com.ph/repower-energy-development-corp-joins-the-ranks-of-publicly-listed-companies/

"Repower Energy shares gain in P1.15 billion IPO." Business World Online, July 25, 2023 https://www.bworldonline.com/corporate/2023/07/25/535755/repower-energy-shares-gain-in-p1-15-billion-ipo/

"Tiu-led Repower gains on stock trading debut." Inquirer Business, July 25, 2023 https://www.philstar.com/business/2023/07/25/2283460/repower-market-debut

"Repower up in market debut." Philippine Star Business, July 25, 2023 https://www.philstar.com/business/2023/07/25/2283460/repower-market-debut

"Repower bucks PSEi dip, gains on market debut." The Manila Times, July 25, 2023 https://www.manilatimes.net/2023/07/25/business/top-business/repower-bucks-psei-dip-gains-on-market-debut/1902234

For additional information visit www.syciplaw.com

SANTAMARINA STETA

ADVISES SAMSONITE GLOBAL CREDIT RESTRUCTURING

MEXICO CITY, 14 July 2023: Samsonite International S.A., the leading global company in the lifestyle bag industry and renowned as the largest and most recognized travel luggage brand, has successfully concluded a substantial global credit restructuring valued at a total amount of $2,500’000,000.00 (two billion five hundred million dollars 00/100, legal currency of the United States of America).

By implementing this restructuring plan, Samsonite is well-positioned to navigate its financial commitments with reliability.

The legal counsel entrusted with carrying out this operation on behalf of Samsonite in Mexico was Santamarina y Steta, led by Jorge León-Orantes B., Ilse Bolaños A., and Mauricio Garibaldi B. These legal experts provided invaluable guidance and representation to the Mexican subsidiaries to guarantee the obligations of Samsonite International S.A. under the second amended and restated credit and guaranty agreement entered into on June 21, 2023.

For more information visit www.santamarinasteta.mx

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NEW DELHI - November, 2022 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)

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ADVOGADOS

This report cannot be considered as legal or any other kind of advice by Allende & Brea. For any questions, do not hesitate to contact us.

The Argentine national government ordered payment of bonus to employees

31 de August de 2023(https://allende.com/en/2023/08/31/)
Labor (https://allende.com/en/labor/)

On August 31, 2023, Decree 438/2023 (the “Decree”) was published in the Official Gazette.

The Decree establishes a non-remunerative allowance for workers who work as employees in the private sector, regulated by Laws N° 20.744 (t.o. 1976) and its amendments 22.250, 26. 727 and its modification and other special professional statutes, which shall amount to the sum of SIXTY THOUSAND PESOS (ARS 60,000), to be paid by the employers in TWO (2) payments of THIRTY THOUSAND PESOS (ARS30,000) each, with the salaries accrued in the months of August and September 2023.

The non-remunerative allowance shall be applied to workers who receive net salaries, including remunerative and non-remunerative items, for the salary accrued in the month of August 2023, lower than FOUR HUNDRED THOUSAND PESOS (ARS400,000) or the proportional amount in the event that

the employee's rendering of services is lower than the legal or conventional working day.

The monthly amount of the allowance shall be equivalent to:

- THIRTY THOUSAND PESOS (ARS 30,000) for workers who receive net salaries less than or equal to THREE HUNDRED SEVENTY THOUSAND PESOS (ARS370,000) for the amount earned in the month of August 2023;
- The difference between PESOS FOUR HUNDRED THOUSAND (ARS400,000) and the net salaries higher than PESOS THREE HUNDRED SEVENTY THOUSAND (ARS370,000) for the amount earned in the month of August 2023, for male and female workers who receive net salaries higher than the last mentioned amount, but lower than PESOS FOUR HUNDRED THOUSAND (ARS$400,000).

When the services rendered by the employee are less than the legal or conventional working day, the amounts shall be expressed proportionally to the working hours.

The non-remunerative allowance may be absorbed in the concept of salary increases set out in the agreements, within the framework established by the Negotiating Committees of their respective Collective Bargaining Agreements.

The payment of the first amount of the non-remunerative allowance for the salary accrued in August 2023 shall be made within a maximum period of FIFTEEN (15) working days as from September 1, 2023.

The second payment of the non-remunerative allowance for the salary accrued for the month of September 2023 shall be paid in accordance with the terms of the legal regulations in force.

Authors: Nicolás Grandi and Lucas Tamagno

Brazilian Patent and Trademark Office publishes new regulations on technology agreements

July 19, 2023

On July 11th, the Brazilian Patent and Trademarks Office (BPTO) published new regulations on the registration of technology agreements: Ordinances Nos. 26 and 27 of 2023. They make the formal and technical aspects of the registration process more flexible by incorporating the rules discussed by the BPTO's Board of Directors at the end of last year. Moreover, the main purpose of the new rules is to simplify the process for registering technology agreements by adapting it to the demands of the technology market.

After the Minutes of the Meeting convened by the presidency in December 2022 were published, the BPTO stated that the deliberations from this meeting would still need to be incorporated into the BPTO rules and the petitioning system itself.

Thus, with the publication of these ordinances, we will certainly have more security in relation to the application of the new BPTO guidelines for the registration of agreements:

- **Ord** nsing and ments.
- **Ordinance No. 27/2023:** implements new examination guidelines for registering the

technology agreements mentioned above.

These ordinances revoke BPTO's prior rules for registration of technology agreements - Normative Instructions No. 16/2013, No. 39/2015 and No. 70/2017 and INPI/PR Resolution No. 199/2017.

The main modifications brought by these Ordinances for the registration procedure are:

- **Digital signatures:** in cases involving digital signatures by foreign parties, notarization and apostille/legalization are no longer required and digital signatures that do not meet the ICP-Brazil (Brazilian Public Key Infrastructure -PKI) standard are now admitted.
- **Initials:** initialing is no longer required on all pages of the agreements and their exhibits.
- **Signature by witnesses:** the signature of two witnesses is no longer required.
- **Corporate documents of the Requesting Party:** the presentation of the corporate documents of the assignee, franchisee, or licensee, located or based in Brazil (e.g., bylaws, articles of incorporation, etc.) and the Registration Form are no longer required.
- **Licensing of non-patentable technology:** the adoption of the non-patented technology licensing modality (know-how licensing) is recognized, according to the best international practices.
- **Payment of royalties for patent, industrial design, and trademark applications:** the payment of royalties under agreements concerning patent, industrial design and trademark applications will not be hindered, provided that these applications are filed before the BPTO. Thus, the BPTO recognizes that these assets, even if still pending applications, are subject to legal protection and have proprietary value.

With the publication of Ordinances No. 26 and 27 of 2023, which came into force on their publication date, the processes for registering and recording technology agreements become less bureaucratic, more straightforward, and faster – essential characteristics for business involving technologies protected by intellectual property.

The new rules are beneficial not only for registering new agreements, but also for fulfilling office actions and renewing agreements previously registered with the BPTO and their respective registration certificates.

The new regulations, as well as the position that the BPTO has been adopting in recent years, certainly reflect on the development and research of new products and technology, boosting innovation and the economy. The initiative meets the demand of the technology market, including attracting foreign investment to the country by streamlining the process for registering technology agreements.

Posted on: July 26, 2023

DUTY TO DEFEND: ONCE AGAIN, PLEADINGS ARE PARAMOUNT

By: Alexander Bogdan

In the recent case of *Surrey (City) v. Co-Operators General Insurance Company,* 2023 BCSC 955, the Supreme Court of British Columbia found that an insurer had a duty to defend an additional named insured after ruling that extrinsic evidence tendered by the insurer could not be used to trigger an exclusion clause.

Factual Background:

In the underlying action, Mr. Lanki claimed that, among other things, the City of Surrey had improperly maintained a leg press machine (the "Machine") at the Surrey Recreation and Leisure Centre causing an injury to Mr. Lanki (the "Underlying Action"). In particular, Mr. Lanki alleged that an incorrect pin was placed in the Machine which had fallen out and led to his injury.

In regards to the Machine, Surrey had contracted with Roland Cerf, Dorothy Cerf, and Elk Fitness Repair (collectively, "Elk") to provide the maintenance and repair of its fitness machines and, as part of the agreement, for Elk to obtain general commercial liability insurance that included Surrey as an additional insured.

Elk took out an insurance policy with the insurer (the "Policy") which contained an Additional Insured Endorsement noting that the additional insured, i.e. Surrey, would not be covered by the Policy where there was

> "Bodily Injury" or "Property Damage" arising out of any act or omission of [Surrey] or any of its employees (the "Exclusion Clause").

Surrey brought an action to compel the insurer to defend it with respect to the allegations made by Mr. Lanki. In particular, Surrey alleged that the pleadings in the Underlying Action allege negligence in the maintenance and condition of the Machine, for which Elk was at least partly responsible.

In response, the insurer brought a separate action to summarily dismiss the claims made against it in the Underlying Action on the basis that Elk was not negligent with respect to Mr. Lanki's injury. The insurer then opposed Surrey's action by claiming its summary dismissal application should be heard first, as a finding that Elk was not negligent will allow it to rely on the Exclusion Clause and thereby oust its duty to defend

Surrey under the Policy. The insurer also sought to tender extrinsic evidence that would indicate Elk had not placed the problematic pin.

The Ruling:

The court started its analysis with the test for triggering a duty to defend, otherwise known as the "pleadings rule", as described in the Supreme Court of Canada decision *Monenco Ltd. v. Commonwealth Insurance Co.,* 2001 SCC 49 [*Monenco*]. First, the court had to determine whether the pleadings alleged facts which, if true, would require the insurer to defend Surrey in the Underlying Action. The court clarified by stating that this principle will apply even when the actual facts may differ from the allegations pleaded.

Based on the allegations contained in the pleadings of the Underlying Action, the court found that the insurer would be obligated to defend Surrey.

In addressing the Exclusion Clause, and whether it would oust the insurer's duty to defend, the court relied on the ruling in *Co-operators General Insurance Company v. Kane*, 2017 BCSC 1720 stating that unless all occurrences which potentially caused or contributed to the loss or damage are clearly and unambiguously excluded in the Policy, coverage for the duty to defend will not be ousted. Here, the court found that:

> ...based on the pleadings, it cannot be said that all claims against Surrey are divisible from those which are covered within the insurance policy thus the exclusion clause does not oust the [insurer's] duty to defend.

Of important note, and in reference to the extrinsic evidence submitted by the insurer, the court stated that to review and make findings on said evidence would amount to a trial within a trial. At this stage of the Underlying Action, it did not matter whether Elk would ultimately be found liable in their placement of the pin, as the analysis related to the duty to defend is based primarily on the pleadings alleged. Furthermore, in referencing *Monenco*, the court stated that only extrinsic evidence which has been expressly referred to in the pleadings and which may assist in determining the substance and true nature of the allegations may be considered.

Ultimately, the court refused to consider the extrinsic evidence submitted by the insurer in support of its claim and held that the insurer had a duty to defend Surrey based on the allegations in the pleadings alone.

Practical Implications for Insurers and Insured:

This case is a good reminder of the fact that an insurer's duty to defend is triggered by the allegations contained in the pleadings of an underlying action which, if true, could establish liability on the part of the

insured. While extrinsic evidence *may* be considered, this is limited only to its effect on the courts' ability to determine the substance and nature of the allegations in the pleadings. Furthermore, any extrinsic evidence will only be considered where it is expressly referred to in the pleadings of the Underlying Action.

Practically speaking, it is important to remember that an insurer may have a duty to defend an insured regardless of whether the insured is ultimately liable. Further, it will indeed be a rarity where an insurer can take steps to trigger an exclusion clause by advancing a parallel procedure to obtain a supportive factual determination; courts are unlikely to accede to such procedural endeavours, particularly when prejudice to an insured's coverage position may be the natural outcome of the procedure.

For more information about this article, contact the author, Alexander Bogdan here.

/Carey

News Alerts

Financial Market Commission opens consultation process on new rule on banks' early regularization

On August 29, 2023, the Financial Market Commission ("**FMC**") published, for public consultation, the proposal of a new Chapter 1-19 of its Updated Regulations Compendium (the "**Regulation Proposal**"), with the purpose of ruling three key aspects regarding banking regularization whose regulatory treatment was pending, i.e.:

1. the way and term for banks to communicate to the FMC the occurrence of any of the events indicative of financial instability or deficient management that may have occurred;
2. the suitability and technical capacity requirements that the delegate inspectors and provisional managers shall meet, and
3. the suitability and technical capacity requirements that the liquidator shall meet, in case of a bank´s mandatory liquidation.

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I. *Communication to the FMC of an event indicative of financial instability or deficient management*

Should an event that indicates financial instability or deficient management occur, pursuant to Article 112 of the General Banking Act ("**GBA**"), the banks shall confidentially communicate this to the FMC within one business day.

Additionally, if the FMC identifies any such events during its supervisory role, it will use its regular communication channels with regulated entities to request information from the bank. This information is necessary to assess whether a regularization plan needs to be developed, according to Article 113 of the GBA.

II. *Suitability and technical capacity requirements for delegate inspectors and provisional managers.*

Article 117 of the GBA establishes that individuals designated by the FMC as delegate inspectors or provisional administrators (with the agreement of the Chilean Central Bank´s Council) can either be FMC´s officials, excluding its Prosecutor, or external professionals who fulfill the following requirements:

1. Holding a professional title of auditor-accountant or a professional degree of a career with no less than 10 semesters of duration, granted by either a State university, or a State-recognized university.
2. Having served for at least 5 years as a director, general manager, or main officer of an open stock or special corporation, a loans and savings cooperative supervised by the FMC, a bank organized in Chile, or a similar foreign entity, as the case may be; or having similar work experience in a public organization.

Additionally, the following individuals will be ineligible for the mentioned positions:

1. Those unable to be appointed as a director of a

corporation for being affected by some inability described in No. 1, No. 2, and/or No. 3 of Article 35 and No. 1 of Article 36 of the Corporations Law.

2. Those who fall under any of the hypotheses described in Article 28 letter d) of the GBA, regarding requirements that the banks´ founding shareholders or controllers shall fulfill.

Delegate inspectors, provisional administrators, and bank liquidators will be subject to the provisions of Articles 28 and 31 of Law No. 21,000, which establishes the FMC, concerning duties and prohibitions applicable to officials or service providers thereof.

III. *Suitability and technical capacity requirements for liquidators*

Same as for delegate inspectors or provisional managers, pursuant to Article 130 of the GBA, FMC´s officials (other than its Prosecutor) can be appointed as liquidators, as well as external professionals that meet the following cumulative requirements:

1. Holding a professional title of auditor-accountant or a degree of at least 10 semesters of duration, granted by a State university a State-recognized university, or by the Supreme Court of Justice, as the case may be.
2. Having at least 5 years of such professional experience.
3. Pass the qualifying exam for Liquidators, and
4. Being actually registered in the Liquidators List of the Superintendency of Insolvency.

The liquidator shall serve within a 3-year period and will have the same faculties, duties and liabilities that legislation mandates for corporation liquidators.

Finally, the Regulation Proposal also amends Rule 108 of the FMC, with the purpose of making applicable these provisions to the Savings and Credit Cooperatives (*Cooperativas de Ahorro y*

Crédito) supervised by the FMC.

The full text of the Regulation Proposal is available at the following **link.**

The public consultation period of the Regulation Proposal will be extended until October 3, 2023, inclusive.

AUTHORS: ***Diego Peralta, Diego Lasagna, José Luis Enberg, Tomás Águila.***

Legal Commentary

August 1, 2023

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China DCT Regulation and Implementation[1]

Authors: Aaron GU | Pengfei YOU | Duzhiyun ZHENG | Fengqi YU[2]

The concept of "patient-centered" has become the core guiding principle in current research and development ("**R&D**") of drugs. "Patient-centered" drug R&D refers to the process of drug discovery, design, implementation and decision-making based on the patient's point of view, with the aim of efficiently developing clinically valuable drugs that better meet the needs of patients. Decentralized Clinical Trials ("**DCT**") are a new type of clinical trial that embodies the "patient-centered" concept, providing new solutions and motivation for drug R&D activities for marketing registration purposes. According to the *latest Technical Guidelines for the Implementation of Patient-Centered Drug Clinical Trials (for Trial Implementation)* ("*Technical Guidelines for Implementation")* released by the Center for Drug Evaluation ("**CDE**") of the National Medical Products Administration ("**NMPA**") on July 27, 2023, DCT refers to a new patient-centered clinical trial model, the implementation of which is not limited to the traditional on-site clinical trials. In simple terms, usually, DCT would be conducted using telemedicine as well as mobile or local medical care, allowing clinical trials to take place remotely while the subjects can remain at home.

Compared with traditional on-site clinical trials, DCT has several advantages. For instance, it significantly reduces the burden on the subjects, enabling them to participate even if they cannot visit the site in person. It also enhances the representativeness of the subjects and breaks the traditional limitations on the frequency of subject visits, thus gathering more comprehensive clinical data. Furthermore, DCT may reduce the errors caused by human intervention or data transcription, thus improving the quality of clinical trials. However, due to uncertainties such as the complexity of the new processes and technology operations, the practice of DCT may also present challenges such as the uniformity of clinical trial evaluation standards, data integrity, comparability of results, and operational standardization, etc.

DCT has already been practiced in some Western countries. As early as June 2011, Pfizer announced its first "virtual" clinical trial, aiming at conducting the first-ever randomized clinical trial under an investigational new drug ("**IND**") application that manages study participation entirely using electronic tools

[1] For the Chinese version, please click 《*汉坤 • 观点 | 中国DCT(去中心化临床试验)的实施与监管*》.

[2] Leyi Wang and Shuwen Sun have contributions to this article.

and allows patients to participate in the clinical trial regardless of their proximity to clinical sites[3]. The outbreak of the COVID-19 pandemic in early 2020 posed significant challenges to global drug clinical trials, but it also accelerated the rapid development of DCT. To address issues related to the conduction of clinical trials during the pandemic, the US Food and Drug Administration ("**FDA**") released the *Conduct of Clinical Trials of Medical Products During the COVID-19 Public Health Emergency: Guidance for Industry, Investigators, and Institutional Review Boards* in March 2020, providing regulatory guidance for issues such as electronic signatures and remote monitoring in the conduction of DCT. Recently, the FDA also issued a draft guidance titled Decentralized Clinical Trials for Drugs, Biological Products, and Devices, which specifically focused on the compliance issues for implementing DCT. Moreover, some countries and regions such as the European Union, Canada, Denmark, and Sweden have also issued DCT-related guidance documents.

In China, although the practices are not yet abundant, the industry has been actively exploring the implementation of DCT in recent years. For example, in 2022, an expert consensus on the conduction of remote intelligent clinical trials was released to provide references for exploring DCT compliance in China. The development of DCT has also received support from regulatory authorities. In recent years, regions such as Beijing have been continuously encouraging DCT pilot projects in various policies. On July 27, 2023, after nearly a year of solicitation of public opinions, CDE formally released the three documents: Technical Guidelines for the Design of Patient-Centered Drug Clinical Trials (for Trial Implementation), Technical Guidelines for the Implementation of Patient-Centered Drug Clinical Trials (for Trial Implementation), and Technical Guidelines for the Benefit-Risk Assessment of Patient-Centered Drug Clinical Trials (for Trial Implementation). Among them, the Technical Guidelines for Implementation have provided crucial guidance for DCT compliance in China. Compared with its previous draft for public comments, the formally adopted Technical Guidelines for Implementation have more explicitly reflected the regulatory authorities' embracing openness while maintaining cautious supervision regarding the practice of DCT. It emphasizes that new models such as DCT may be adopted subject to evaluation by the sponsors, investigators, and clinical trial sites, and that such new models and new methods should be pre-set in the protocols and shall comply with regulations such as the Good Clinical Practice ("**GCP**") and shall be approved by ethics committees. New models and new methods shall not be blindly pursued without exploring their rationality, necessity, and feasibility.

To facilitate the recognition and management of legal risks in the implementation of DCT, the following section will, based on the Technical Guidelines for Implementation and other regulations closely related to clinical trials, explore and discuss the compliance and regulatory issues for conducting DCT in China. The key points cover various aspects including responsibilities of sponsors and investigators, electronic informed consent, telemedicine, drug distribution, privacy and personal information protection, and handling of safety incidents.

[3] See *Pfizer Conducts First "Virtual" Clinical Trial Allowing Patients to Participate Regardless Of Geography*, https://www.pfizer.com/news/press-release/press-release-detail/pfizer_conducts_first_virtual_clinical_trial_allowing_patients_to_participate_regardless_of_geography.

Responsibilities of sponsors and investigators

As a specific form of clinical trial, DCT shall, first and foremost, comply with a series of basic laws and regulations governing clinical trials, such as the *Drug Administration Law*, *Measures for the Administration of Drug Registration*, and the *GCP*. The *Technical Guidelines for Implementation* also emphasize that the *GCP*, the guidelines from the International Council for Harmonisation of Technical Requirements for Pharmaceuticals for Human Use ("**ICH**"), and other relevant guidelines shall be followed. It highlights that clinical trials shall strictly follow relevant laws, regulations, the *GCP*, and ethical requirements. Therefore, in the process of DCT, the sponsors, the investigators, and other key participants shall strictly abide by their respective responsibilities under the above-mentioned laws and regulations.

As the primary responsible party in clinical trials, the sponsors should conduct a comprehensive and thorough evaluation of the design and operation of the clinical trials and should establish a sound quality management system. As the ultimate responsible party for the quality and reliability of clinical trial data in drug registration, the sponsors should also pay attention to key issues such as the formulation of the protocols, the qualification and supervision of vendors, and the establishment of sound standard operating procedures ("**SOPs**"), to ensure the smooth conduct of the clinical trials and the successful progress of drug registration.

On the other hand, the investigators are responsible for the quality of the clinical trial and the rights and interests of the subjects. They should establish corresponding SOPs and quality management systems for the conduct of DCT and make contingency plans for potential challenges during the DCT process, such as handling safety incidents and addressing data transmission failures.

Electronic informed consent

Informed consent is an essential measure to safeguard the rights of the subjects and a prerequisite for their participation in clinical trials. In previous practice, sites and investigators usually would introduce and discuss the project face-to-face with the subjects and obtain handwritten informed consent from them. However, with the development of DCT, electronic informed consent may achieve broader application. The *Technical Guidelines for Implementation* explicitly state that electronic informed consent may be considered for clinical trials.

When implementing electronic informed consent, attention should be paid to the following matters. Firstly, regarding the effectiveness of electronic signatures, according to the *Electronic Signature Law*, electronic signatures are only recognized as legally effective and equivalent to handwritten signatures or seals when they meet certain criteria such as data exclusivity and controllability, and being capable of detecting changes in the electronic documents. To ensure the effectiveness of electronic informed consent, it is recommended to seek certification of the signature's validity from qualified electronic certification service providers. Secondly, the way of implementing electronic informed consent is crucial. By using multimedia resources, electronic informed consent has advantages in introducing the clinical trial information to the subjects in a way that is easier to accept. However, it may also raise the barrier for communicating with the subjects. Therefore, the T*echnical Guidelines for Implementation* emphasize that the investigators shall focus on real-time communication with the subjects and shall ensure the subjects'

full understanding of the content under remote conditions. They can also provide assistance or offer traditional methods to the subjects who are not familiar with or unable to use electronic informed consent. In addition, the implementation of electronic informed consent shall also comply with the *GCP*, the *Personal Information Protection Law* and other regulatory requirements while adapting to the characteristics of DCT. Therefore, special attention should be paid to fully informing the subjects about the instruction on the digital medical technologies and other new technical methods used in the clinical trial, the scope of data collection, the risks and benefits from the clinical trial, the access and scope of use of the subjects' data, and other relevant information.

Telemedicine activity

Clinical drug trials are built upon diagnosis and treatment activities, which are also carried out between the research site, the investigators and the subjects (who are also medical institutions, doctors and patients). During the implementation of DCT, investigators may conduct research through a combination of telemedicine and in-person visits. Consequently, these telemedicine activities shall also comply with regulations related to diagnosis and treatment, such as the *Administrative Measures for Internet-based Diagnosis and Treatment (for Trial Implementation)*, the *Administrative Measures for Internet Hospitals (for Trial Implementation)*, and the *Supervision Rules for Internet-based Diagnosis and Treatment (for Trial Implementation)*.

The key points of regulation for telemedicine activity include site qualifications, applicable scope of internet-based diagnosis and treatment, and quality control of diagnosis and treatment activities, among other aspects. For instance, in the process of conducting telemedicine activities for clinical trials, it is essential that the diagnosis and treatment activity are always provided directly by the doctors themselves, without delegation to artificial intelligence technology or clinical research coordinators ("**CRC**"). In recent years, the practice of CRC performing some responsibilities on behalf of doctors has led to increased risks in certain clinical trial projects, drawing attention from the industry and regulatory authorities. During the implementation of DCT, it is crucial to emphasize the doctors' responsibility and ensure the compliance of CRC involvement in the research. Additionally, the administration of online prescriptions must be stringent, prescriptions shall only be issued by the doctors and become effective after approval by pharmacists. Under no circumstances should any prescription drug be provided before the prescription is issued.

Drug delivery

With the development of DCT, the delivery of drugs for clinical trials will undergo more flexible changes. The *Technical Guidelines for Implementation* stipulate that, considering factors like drug safety and subjects' medication adherence, certain drugs can be directly delivered to the patient (Direct to Patient, DTP) in combination with some home visits (if necessary). To ensure the safety of subjects and the quality of the trial, the following key points should be considered:

- **Determine delivery methods based on specific characteristics of drugs.** When considering whether to adopt DTP, factors such as drug safety characteristics, storage conditions, routes of administration, and geographical locations of subjects should be carefully evaluated to control risks

during drug delivery and usage. For example, drugs that require intravenous infusion or interventions by physicians are generally not recommended for DTP. On the other hand, drugs that are administered orally or self-administered, with a longer shelf life and can be stored at room temperature may be suitable for DTP.

- **Strengthen sites and investigators' responsibilities for drug administration.** According to *GCP*, investigators and clinical trial sites are always responsible for drug administration during the clinical trial. Changes in the clinical trial models should not lead to relaxed administration requirements for sites and investigators. Instead, they should reinforce drug administration practices by engaging qualified third-party drug distributors, providing subject training, conducting necessary home visits, devising appropriate plans for safety events, closely monitoring safety events, actively following up on drug usage by subjects, and strictly regulating the return of unused investigational drugs.

- **Strengthen the whole process of drug safety control.** Comply with or refer to the provisions of the *Good Supply Practice* ("**GSP**"), the *Good Manufacturing Practice Appendix for Investigational Drugs*, *GCP* and other regulations related to investigational drugs and reference drugs for clinical trials. Ensure drug safety throughout the entire process of drug delivery and storage, including delivering the drugs to the subjects and storing them in the subjects' homes. Additionally, ensure that participants return any leftover drugs from the trials in a proper manner.

- **Conduct subject training.** In DCT, the significance of subjects is emphasized, and providing them with training is a crucial aspect of ensuring drug safety and maintaining the quality of clinical trials. Investigators should offer comprehensive training to subjects, covering various aspects such as drug usage methods, drug storage requirements, and countermeasures for safety events. Additionally, when providing drug guidance to subjects, investigators shall also adhere to the requirements stipulated in the trial protocol, such as implementing blinding studies.

Privacy and personal information protection

In recent years, privacy and personal information protection have emerged as significant concerns for regulatory authorities, which the industry shall pay significant attention to throughout the process of conducting DCT. This becomes particularly crucial in DCT when incorporating innovative technologies, methods, and models for collecting, storing, and processing subjects' personal information. The T*echnical Guidelines for Implementation* stress the significance of following privacy and personal information protection requirements throughout the entire process of DCT, which includes subject recruitment, trial data collection, drug delivery, data monitoring, and subject injury compensation. This shall be achieved through the compliant obtaining of informed consent, management of raw data, preservation data and data retrospectivity, data de-identification processing, administration of data access permission, and other approaches.

For example, the implementation of DCT may involve the use of innovative artificial intelligence technologies and devices for information collection, potentially involving various participants such as digital device suppliers. Therefore, when obtaining informed consent from subjects, investigators must thoroughly inform them about the privacy and personal information risks related to the use of digital

technologies. This includes providing subjects with comprehensive information about the scope and methods of using the trial data and other personal information, whether the data will be shared or reused, and the corresponding measures for confidentiality. Additionally, investigators should pay special attention to regulatory requirements regarding data exports, sensitive personal information, and important data.

Safety data monitoring and reporting

To ensure subject safety in DCT, timely monitoring and reporting of safety data are essential. The *Technical Guidelines for Implementation* recommend prioritizing the use of digital technology platforms to monitor and report subjects' safety data in real time. This can be achieved through methods such as subjects' smartphone apps, remote visit platforms, or wearable devices to collect subjects' safety data and directly transmit it to investigators.

To prevent delays in data viewing and processing during remote monitoring, the guidelines emphasize the need for a robust mechanism to handle safety data. Investigators should consider factors such as the characteristics of the investigational drug and team resources to set appropriate frequencies for viewing and processing safety data. Furthermore, investigators should inform subjects beforehand about specific circumstances in which they may contact investigators directly through phone calls or other means in case of safety events. The data monitoring platform should also have a well-developed mechanism for promptly processing severe adverse events.

Communication and training

The *Technical Guidelines for Implementation* also outline certain specific requirements for communication and training among research participants. Since DCT involves the adoption of various innovative technologies and models, practices in this area are continuously evolving and being explored. Compared to more mature traditional on-site clinical trials, effective communication among research participants becomes even more crucial in addressing challenges during DCT implementation.

Firstly, sponsors, investigators, and other parties should strengthen communication with trial subjects, especially when employing remote methods like remote visits, timely and effective communication will greatly help in understanding their needs, building a trusting relationship, and facilitating the implementation of DCT. Secondly, communication between sponsors, investigators, and contract research organizations ("**CROs**") should also be enhanced to promptly stay updated on the trials' progress, make necessary adjustments in a timely manner, and ensure the smooth implementation of DCT. Additionally, research teams should communicate with regulatory authorities in a timely manner, especially when using new technologies and models. Sponsors should provide detailed explanations regarding the necessity, scientific rationale, and feasibility of incorporating certain new elements into the DCT in the clinical trial protocol. This should include basic information about the new elements, the purpose and scenarios of their use, evaluation and validation data, comparison trial data with traditional methods, risk assessment and mitigation measures, and other relevant details.

In addition, training for investigators and subjects is also essential for the successful implementation of

DCT. Sponsors and investigators should provide comprehensive training to research staff on the methods of use, precautions, potential risks, and countermeasures for the various new technologies. This ensures that the trial is conducted properly and safely. Moreover, providing trial subjects with sufficient training will help them better understand the various new technologies and methods in DCT. It will also raise their awareness of potential risks and precautionary measures, enhance their adherence, and safeguard their rights and safety.

Conclusion

With the development of telemedicine and digital technology, the industry is actively exploring DCT, gaining increasing recognition and support from regulatory authorities. DCT is expected to provide trial subjects with improved research experiences, promote greater representativeness and diversity of clinical trial data, elevate the quality of clinical trials, and provide new avenues and impetus for innovative drug development. Despite the promising potential of DCT, it still encounters several challenges that need to be addressed before it can become a dependable alternative to traditional on-site clinical trials. Areas requiring further experience and verification include participant responsibility, effective control of safety risks, proper administration of investigational drugs, and privacy and information protection.

The issuance of the *Technical Guidelines for Implementation* and other relevant documents indicate that regulatory authorities have attached great importance to the adoption and innovation of the "patient-centered" approach in drug development. It also demonstrates the regulatory authorities' proactive exploration of DCT supervision. The industry should pay attention to the *Technical Guidelines for Implementation* and other applicable regulatory requirements to effectively identify and control legal risks throughout the DCT process. We eagerly look forward to collaborative efforts between regulatory authorities and the industry to drive the successful implementation and advancement of DCT in China.

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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State Council nullifies Directives on Prior Consultation

BOGOTA, 29 August, 2023: By judgment dated August 10th, 2023 (the "Judgment"), the State Council decided on the nullity of certain provisions of Presidential Directives 1 of March 26, 2010, referred to the "Guarantee of the Fundamental Right to Prior Consultation of National Ethnic Groups," and Directive 10 of November 7th, 2013, titled "Guide for Conducting Prior Consultation with Ethnic Communities" (the "Directives").

The annulment arises from a lawsuit filed by certain citizens and the Governing Councils of the Kankuamo, Kogui, Aruhaco, and Wiwa Peoples, where they argued that the Directives violated the principles of legality, due process, and statutory law reserve by defining essential aspects of the fundamental right to prior consultation without being enacted through statutory law. They also contended that the right to participation was violated by issuing the Directives without prior consultation. The Presidency of the Republic argued that the Directives were instructions for various authorities and did not affect the core of the right to prior consultation. Furthermore, according to the jurisprudence of the Constitutional Court, they did not require consultation as they did not directly impact any community.

In the Judgment, the State Council emphasized a crucial aspect for the annulment of the provisions within the Directives. Specifically, it highlighted that presidential directive could encompass both mere informative and confirmatory instructions (aimed at guiding public entities in internal procedures) and, concurrently, provisions that can be considered actual regulatory orders (constituting binding decisions aimed at regulating or implementing laws). Within these latter provisions, there might exist regulatory decisions that, instead of regulating a law, end up regulating a fundamental right. This scenario would be inappropriate for this type of normative instrument.

Based on this, the State Council addressed the charges against the Directives in two distinct ways.

First, it raised the exception of res judicata ex officio to determine the nullity of chapters 1, 3, 4 (second paragraph), and 5 (rules b, c, and d) of presidential directive 1 of 2010 based on a previous decision dated November 24th, 2022, that had declared the nullity of those provisions since the directive was issued exceeding the regulatory powers because said legal instrument pertained to the exercise of a fundamental right and, consequently, should have been processed through a statutory law. Additionally, the State Council found that the directive was irregularly issued due to its failure to comply with the prerequisite of prior consultation, as it directly affected specific communities.

Secondly, when addressing the charges against presidential directive 10 of 2013, the State Council differentiated the purpose of its provisions as informative and confirmatory instructions and regulatory orders. As a result, it determined that certain regulatory orders modified existing norms regarding prior consultation by establishing limits and restrictions on the exercise of the fundamental right to prior consultation and regulated the content of prerogatives derived from the right, without processing them through a statutory law. Moreover, the State Council found that prior to adopting the same presidential directive, it was necessary to carry out prior consultation with ethnic communities since, according to the criteria outlined in Judgement C-1051, 2012, these communities were directly affected.

In this manner, the State Council declared the nullity of the following excerpts from Presidential Directive 10 of 2013:

- In Stage 1: The second duty assigned to the Prior Consultation Directorate regarding the verification of the presence of ethnic communities in the project area.

- In Stage 2: The second objective regarding whether the consultation requires prior, free, and informed consent, and activities 2, 3, 4, and 5 related to the absence of representatives from the ethnic communities invited to the meetings during the pre-consultation and consultation stages.

- In Stage 3: The second step concerning the call for pre-consultation meeting(s) and the consequences of non-attendance, as stipulated in steps 4 and 5 of the stage.

- In Stage 4: The first step related to the call for pre-consultation meeting(s) and the scenarios regulated in steps 2 and 3 for cases where an agreement is not reached.

However, the State Council clarified that the decision does not halt ongoing prior consultation processes or those that need to be carried out. These processes should continue based on the applicable regulations, including the current provisions of Decree 1320 of 1998, the Directives, and other presidential directives issued on the subject, such as Directive 8 of 2020 (which is likely to be subjected to the same nullity control in the future).

Finally, the State Council invited the Congress of the Republic to regulate prior consultation matters related to the Judgment, without specifically specifying the mandate's scope.

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COSTA RICA

RENEWAL OF CHEMICAL PRODUCTS REGULATION

May/2023

The Central American Technical Regulation "RTCR 478:2015 Chemical Products. Hazardous Chemical Products, Registration, Importation and Control" Decree No. 40705-S, entered into force on May 03, 2018, abrogating the "Regulation for the Registration of Chemical Products" Decree No. 28113-S. This approved regulation established new hazard classification criteria for chemicals based on the Globally Harmonized System of Classification, which obliges holders of chemicals registered with the Ministry of Health prior to 2018 to apply for a new sanitary registration.

Decree 40705-S included a transitional provision which obliges holders of raw materials or chemicals registered or notified before the Ministry of Health to apply for renewal no later than May 3, 2023, five years after the entry into force of the decree, completing the requirements established by this same regulation in numeral 7.2.

If you would like more information about the decree and its application, please do not hesitate to contact us.

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Implementation of the Company Mobility Directive: effects on cross-border and domestic transactions

6 July 2023

The transposition of the Company Mobility Directive of 27 November 2019 was eagerly awaited. The resulting Ordonnance and Decree not only implement the various requirements of this directive in a cross-border context, but also make some welcome changes to purely domestic operations.

It should be remembered that, in the wake of the liberal case law of the Court of Justice of the European Union, most recently in its *Polbud* judgment (see *CJEU, 25 Oct. 2017, C-106/16, Polbud-Wyskonawstwo sp. z.o.o.*), the European Commission undertook to relaunch the construction of a harmonised framework concerning so-called cross-border mobility transactions within the EU. Although this framework had already been set up for mergers (see *Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited liability companies*), albeit imperfectly, it was sorely lacking for divisions and, above all, cross-border conversions, the new term used by the Commission to designate the cross-border transfer of registered offices, an operation which until then had only been permitted for European companies.

The result was the adoption of a directive dated 27 November 2019 (*Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border transformations, mergers and divisions, OJEU L 321, 12 December 2019*), providing in particular for measures (i) to control abuse and (ii) to protect stakeholders in view of the change in *lex societatis* brought about by these transactions, and which had to be transposed by the Member States by 31 January 2023 at the latest.

Following the example of a number of Member States, France transposed the directive a few months late, having been given the legislative authority to legislate - as has become customary for this purpose - by executive order (*ordonnance*) under Law no. 2023-171 of 9 March 2023 containing various provisions for adapting to European Union law. However, the authorisation was broader than expected, in that Article 13 of the aforementioned law authorised the government, in addition to the actual transposition, to "*simplify, complete and modernise the rules governing mergers, divisions, partial transfers of assets and transfers of registered offices of commercial companies as provided for in Chapter VI of Title III of Book II of the Commercial Code*".

It was therefore to be expected that the text finally published by the government would not simply transpose the directive by dealing solely with cross-border mobility transactions, but would also make a more general adjustment to the regime for internal restructuring transactions. On the whole, these expectations have not been disappointed on reading *Ordonnance* 2023-393 of 24 May 2023, supplemented a few days later by its implementing Decree 2023-430 of 2 June 2023.

In addition to setting out a comprehensive framework for cross-border mobility transactions (I), these new texts make a number of changes, some of them significant, to domestic operations (II).

The regime for cross-border reorganizations

The provisions concerning these transactions are now grouped together in a single section of the Commercial Code (see art. L. 236-31 to L. 236-53 for the legislative part, and R. 236-20 to R. 236-40 for the regulatory part), on the understanding that the rules laid down for internal transactions in the three previous sections also apply to them on a subsidiary basis.

While the provisions of the Commercial Code resulting from the aforementioned *Ordonnance* and Decree deal successively with cross-border mergers, demergers, partial transfers of assets and conversions, those relating to mergers actually serve as a common core for the other three types of transaction.

The result is that for each of them:

- A unified procedure: in particular, a joint draft of the transaction, a written report from the directors of each participating company and an independent expert opinion on the financial terms of the transaction must be drawn up successively;
- Approval of the operation by the shareholders by a qualified majority: since the Directive requires that this majority be at least 2/3 and at most 90% of the votes, the *Ordonnance* transposes this requirement to the articles of association of SARLs and SASs, which cannot therefore provide for a majority below this floor or above this ceiling for the adoption of the operation, but remain free to set the cursor as they wish between these two limits;
- A compliance check carried out exclusively by the registrar of the commercial court within whose jurisdiction the participating company was initially registered: this check becomes more substantial, with the registrar being responsible for ensuring that the transaction is not carried out for abusive, fraudulent or criminal purposes. This leads to a significant lengthening of the timetable for the transaction, since the primary investigation period is set at 3 months from approval of the transaction, but may be extended several times for a total of up to 8 months;
- A right of withdrawal for shareholders who (i) would be exposed to a change in the *lex societatis* and (ii) have opposed the transaction, including holders of securities without voting rights and shareholders temporarily deprived of their voting rights: this right of withdrawal must be exercised by each shareholder within 10 days of approval of the draft terms of transaction by the shareholders' meeting and applies to all the shares held on the date of the request, and the company must, within the following 10 days, make an offer to buy back the shares, although the price offered may be challenged in court;
- Protection for employees and other creditors of participating companies: for the former, their opinion within the framework of the employee representative bodies must always precede publication of the proposed transaction and communication of the directors' report, and their right to participate in the management bodies must be preserved after the transaction; as for the latter, they will have a period of 3 months - compared with 30 days in an internal transaction - from publication of the transaction to claim for adequate safeguards.

Changes to the regime for domestic operations

In addition to a more readable layout that finally gives partial transfers of assets the specific place they deserve in the texts, there are two points of particular interest here:

- On the one hand, welcome corrections have been made to past blunders on the part of the legislator: we might mention in particular (i) the extension of the "quasi-simplified" merger regime to transactions involving an *SARL*, (ii) the restoration of the simplified partial transfer of assets in the presence of a parent or subsidiary in the form of *SARL*, or (iii) the reinstatement of the simplified merger regime for demergers between joint stock companies where the recipient companies hold the entire capital of the demerged company.
- Secondly, there is a genuine innovation resulting from the introduction into the Commercial Code of the partial division : in accordance with what Article 115 2° of the CGI allowed in order to make the operation tax-neutral, it is now possible to allocate directly to the shareholders of the transferring company the securities issued by the receiving company in consideration for the contribution. In addition, the legislation allows the shares given to the shareholders of the transferring company to be, in whole or in part, those of the transferring company, and not exclusively those of the transferee company, according to an allocation that must be specified in the proposed transaction, and which might not be made in proportion to the shareholding of the shareholders of the transferring company, a point that is bound to give rise to discussion.

Hogan Lovells

Agree to disagree - does winding-up or arbitration take precedence in insolvency?

4 September 2023

Three recent Hong Kong first instance court decisions have left undecided the question of whether a winding-up petition will trump an agreement to arbitrate when it comes to a winding-up and particularly in the context of cross-claims. A Court of Final Appeal decision this spring had seemed to provide pointers that the parties' agreement would be upheld but the issue – particularly when it comes to unmeritorious and late arbitration applications – is dividing the courts.

In *Shandong Chenming Paper Holdings Ltd [2023]* HKCFI 2065, the Honourable Mr. Justice Harris in the Court of First Instance (CFI) stayed a winding up petition presented by the company because of an agreement to arbitrate.

The parties, Arjowiggins HKK2 Ltd and Shandong Chenming, entered into a joint venture agreement in 2005. The relationship between the parties broke down and in 2010 the respondent applied to the mainland court for a judicial dissolution of the joint venture (JV) company. Arjowiggins then commenced arbitration proceedings in Hong Kong in October 2012, alleging breach of the JV contract by the respondent. A damages award in favour of the applicant was issued in 2015.

Shandong Chenming failed to pay and Arjowiggins issued a statutory demand in October 2016 and a winding-up petition in June 2017. Shandong Chenming disputed the court's jurisdiction all the way to the Court of Final Appeal, but lost (see Hogan Lovells alert *Hong Kong Court of Final Appeal confirms mere threat of winding-up is enough to confer jurisdiction*).

Shandong Chenming then began a second arbitration citing a cross-claim which it claimed in excess of the amount awarded in the first arbitration. On 25 October 2022, the company issued a summons seeking a dismissal or adjournment of the petition.

Guidance from above

Both the petitioner and the company agreed that a recent Court of Final Appeal (CFA) decision Re *Guy Kwok-Hung Lam* [2022] HKCFA 9 would have a bearing on the issue (see Hogan Lovells alert *Petition barred - Hong Kong CFA confirms primacy of exclusive jurisdiction clause in bankruptcy*). In that decision, the CFA confirmed that the court should respect the effect of the parties' agreement (in that case an exclusive jurisdiction clause, EJC) in bankruptcy proceedings, just as it does in ordinary civil actions.

Harris J summarised that the requirement for a debtor "*to demonstrate a bona fide defence on substantial grounds in order to defeat a petition, is not appropriate where an EJC is involved*".

Harris J said the same was true in the case of an arbitration clause. This was an approach he had set out in his 2018 decision *Lasmos Limited v Southwest Pacific Bauxite* [2018] HKCFI 426, which the Court of Appeal (CA) had cause to question the following year (see Hogan Lovells alert *Hong Kong Court of Appeal queries approach to winding-up petitions where arbitration is involved*).

Elsewhere in the CFI, however, the Honourable Madam Justice Linda Chan was viewing things somewhat differently. In *Simplicity & Vogue Retailing (HK) Co., Limited* [2023] HKCFI 1442 and *Re NT Pharma International Co Ltd* [2023] HKCFI 1623, she expressed doubts about whether the CFA ruling in Guy *Kwok-Hung Lam* applies where an arbitration clause is present.

In *Simplicity*, Linda Chan J dismissed an argument founded on *Lasmos* that the petition should be stayed because of the presence of an arbitration clause in a bond instrument and guarantee, since the company had taken no steps to commence arbitration.

She said that in her view, the ratio in Guy *Kwok-Hung Lam* applied only to EJCs, not arbitration clauses. Even if Guy *Kwok-Hung Lam* did apply, the court would still have the discretion to evaluate whether a defence "*borders on the frivolous or abuse of process*". The court made the winding-up order.

Likewise in *Re NT Pharma International Co Ltd* [2023] HKCFI 1623, the court noted that a request for arbitration had been filed late on in proceedings. Linda Chan J ruled that the company should not be allowed to withhold payment of a debt of nearly US$4 million until determination of its cross-claim in arbitration.

Harris J though in *Shandong Chenming* had no doubt that the *Lasmos* approach "*applies to arbitrations just as it has been expressly found to apply to EJCs (this is not in dispute) and that, secondly, the judgment applies to disputed debts and cross-claims*".

Room for manoeuvre

So where does this leave creditors wanting to issue winding up proceedings when faced with unmeritorious and late applications to arbitrate?

It was clear from *Guy Kwok Hung-Lam* that, in the case of an ordinary EJC, parties should be held to their bargain, absent countervailing factors such as the risk of insolvency affecting third parties or a dispute that borders on the frivolous or abuse of process.

In *Shandong Chenming*, Harris J said that there was nothing to suggest from Guy Kwok Hung-Lam, that different principles should apply in the case of defences and cross-claims. In this regard, he referred to the Singapore Court of Appeal judgment of *AnAn Group (Singapore) Pte Ltd* [2020] SGCA 33; [2020] 1 SLR 1158, which (i) does not distinguish between claims and cross claims; and (ii) holds the parties to their contractual bargain to arbitrate, provided that the dispute is not raised by the debtor as an abuse of the court's process.

Harris J noted that "*although the Petitioner asserts that there is no merit in the cross-claim and complains that it is being advanced years after it obtained the judgment on which the Petition is founded, the Petitioner does not go so far as to suggest that the present case is sufficiently obviously an abuse as to bring it within that rare category in which the court will consider rejecting the debtor's opposition despite the existence of an arbitration clause - it not being in dispute that merits and delay are not of themselves capable of bringing a case within that category*".

The question as to the limits of the court's discretion to investigate whether there is indeed a *bona fide* dispute over the debt on substantial grounds, remains in play for the present.

However, it is to be noted that both the CA and CFA drew on the reasoning of *Lasmos* in respect of arbitration clauses, and were

of the view that the same principles and approach applied to both an EJC and an arbitration clause.

There are some things that can be done whilst this degree of uncertainty exists. From the point of view of the debtor, applications to arbitrate must be genuine and filed in good time. Concrete steps should be taken to show as evidence to the court of a genuine intention to arbitrate.

A creditor seeking a winding-up petition should come to court with a complete understanding of the factual matrix. Although it is uncertain whether the court will have discretion to proceed with a winding-up (even where an arbitration clause is present), the creditor will want the court to use the discretion to the fullest and take into account any bad faith or impropriety on behalf of the debtor.

The situation may be less than ideal but calm heads and good legal advice can eventually win through.

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Technology Law Advisory – Digital Personal Data Protection Act, 2023

INTRODUCTION

During the week of August 7, 2023, the Indian Parliament passed the Digital Personal Data Protection Act ("Act") thereby bringing to a close a 5 year process to introduce a data privacy law for India. The Act was assented to by the President of India and will come into force once notified by the Government. It is now a foregone conclusion that this Act will be the data privacy law of India in the days to come.

The Act follows on the lines of the previous version – a much simpler version that departs substantially from the GDPR model of privacy laws that is commonplace today. However, it contains significant changes apart from dealing with several of the concerns relating to the previous draft.

DEFINITIONS

The Act uses similar nomenclature as in previous versions. A data subject is referred to as a data principal and a data controller is referred to as a data fiduciary. There is no concept of sensitive personal data. The Data Protection Authority is referred to as the Data Protection Board of India ("DPBI").

APPLICABILITY

The law applies only to personal data that is maintained in digital form. The law will apply to processing of personal data outside India if such processing is "in connection with any activity related to offering goods or services to data principals within the territory of India".

GROUNDS FOR COLLECTION AND PROCESSING

Consent continues to be the main ground for processing of personal data. It must be "freely given", "'specific", "informed", "unconditional", and an "unambiguous indication of consent" through a "clear affirmative action". It seems clear that explicit consent would be required. Consent can also be withdrawn, the consequences of which would be borne by the data principal. One can also use a consent manager to manage the consent process.

The Act also includes obvious grounds for processing personal data without consent, for 'legitimate uses' such as compliance with laws and court orders, actions dealing with medical emergencies and epidemics and law & order situations. Further, processing of personal data for certain employment purposes or for protecting an employer from liability, constitutes legitimate use under the Act, and consent is not required for such processing.

Another key ground which qualifies as a legitimate use, is where the data principal voluntarily provides her personal data to the data fiduciary for a specified purpose and where the data principal has not indicated that she does not give her consent for use of her personal data. This appears to deal with automatic collection of personal data – the illustration covers a situation where a person visits a shop and hands over her personal information.

LEGITIMATE INTEREST

As in the previous versions, there is no clear "legitimate interest" ground. The situations of legitimate uses are borne of necessity and don't cover as much ground as the concept of legitimate interest under the GDPR. Except for the limited grounds that qualify as 'legitimate use', consent seems to be the only route to processing personal data.

NOTICE

The notice to be given to the data principal covers two key aspects – the personal data to be processed and the purposes of processing. In addition, the data principal should be informed of her right to withdraw consent and the grievance redressal procedure available to her. It appears that the notice must be made accessible in English and in all 22 languages specified in the Eighth Schedule of the Constitution.

APPLICABILITY TO CHILDREN

The law keeps the threshold for children at 18 years. This will be seen as a disappointment for the online world as global standards tend to be closer to 16 years. Verifiable parental consent is required for collection of personal data of children. Further, the Act prohibits processing that may have a detrimental effect on the well-being of the child as well as behavioral monitoring or targeted advertising to children. However, the Government has the power to exempt some of these restrictions through a notification.

RIGHTS AND DUTIES OF DATA PRINCIPALS

There are several rights of data principals. These include the right to know what personal data is being processed and the right to have inaccurate personal data corrected or personal data to be updated. A data principal can also ask for personal data to be deleted unless it is still required for the specified purpose for which it was collected. However, these rights exist only when personal data is provided voluntarily or with consent. Interestingly, the Act includes duties of data principals. This pertains essentially to a duty not to provide false information and not to lodge frivolous or false grievances.

STORAGE OF PERSONAL DATA

The law requires the data fiduciary to ensure completeness, accuracy, and consistency of personal data where it is used to make a decision that affects a data principal or where it is disclosed to another data fiduciary. This may have implications for the use of AI on personal data. Data fiduciaries must also use reasonable security measures to prevent data breaches. A data

fiduciary must delete personal data when the specified purpose for which it was collected has been served unless such personal data is required to be retained for compliance with any law.

PERSONAL DATA BREACH

The law defines a 'personal data breach' to mean any unauthorized processing or accidental disclosure, use, alteration, or destruction of personal data, that compromises its confidentiality, integrity, or availability. In case of a personal data breach, the data fiduciary or data principal must inform both the DPBI as well as the affected data principal, in a manner prescribed by the government. The broad definition of a personal data breach would cover even small instances of data breaches and situations of vulnerability for which notification to the DPBI and data principals seems quite onerous.

SIGNIFICANT DATA FIDUCIARY

The law retains the concept of a Significant Data Fiduciary ("SDF"). This is a data fiduciary that fulfills the criteria set forth by the government. In determining who would be a SDF, the government will consider factors such as volume of data processed by the data fiduciary and risk to rights of the data principal. Interestingly, such factors also include "potential impact on the integrity and sovereignty of India" and "risk to electoral democracy". An SDF's is required to appoint a Data Protection Officer, who must report to the Board of the company. Further, it must appoint an independent data auditor to audit compliance with the privacy law. They also have to conduct privacy impact assessments.

DATA PROTECTION OFFICER

Only an SDF is required to appoint a Data Protection Officer. However, every data fiduciary must appoint a person to act as the point of contact for data principals who wish to raise any issues. The contact details of the Data Protection Officer and the grievance officer need to be published.

DATA PROCESSORS

The law requires data fiduciaries to execute a data processing agreement with a data processor. Data fiduciaries are responsible for compliance of the law by data processors.

DATA LOCALIZATION AND DATA TRANSFERS

The law includes a right on the government to notify a "negative list" of countries to whom personal data cannot be transferred. Other than this list and in the absence of a notification being issued, one can transfer personal data to any country. There is no requirement for adequacy in the statute or for retaining copies of the personal data in India. Other means of transferring personal data to blacklisted countries such as standard contractual clauses, explicit consent or inter-group transfers are not covered in the Act. The Act does however permit sectoral data localization regulations such as the one that exists in the payments sector.

EXEMPTION TO GOVERNMENT

The Act grants the power to the government to exempt itself and its agencies from most requirements of the Act. The grounds mentioned, such as sovereignty and integrity of India, security of state, etc., are taken from the Constitution of India and are also cited by the Supreme Court of India as grounds on which privacy rights can be restricted. These grounds are however quite broad, and proportionality and reasonableness are not essential ingredients. These are also grounds of legitimate use for which processing of personal data by the government does not require consent. Unfortunately, the law has extended a direct exemption to the judiciary to bodies that have regulatory or supervisory functions. No government notification is required for this exemption to apply; these organizations are directly exempted under the law.

EXEMPTION TO OTHERS, START UPS

The Government has the power to exempt certain data fiduciaries including start ups from some provisions of the law (right to access, requirement to give notice, limitation on retention). It appears the government will implement some kind of regulatory standbox for start ups to make it easier for them to comply with the new law.

CONTENT BLOCKING

The law grants powers to the government to block public access to any information generated, received, stored, or hosted in any computer resource used for providing services within India, in the 'interests of the general public', upon receiving a reference from the DPBI. While the government has similar powers under the Information Technology Act, 2000, such powers do not relate directly to the protection of personal information.

PENALTIES

The law prescribes penalties for non-compliance. There is a schedule which mentions a maximum penalty for specific violations. For example, failure to take reasonable security safeguards to prevent personal data breach would involve a penalty of up to Rs. 2.5 billion (approx. USD 30 million). This is the maximum penalty prescribed. Interestingly, there is no provision for awarding compensation to affected data subjects.

ANALYSIS

Approach. When the previous draft was released in 2022, we said that the government's approach was appropriate for a country like India. India does not have a long history of compliance with privacy standards and also has a huge unorganized and SME sector. At the same time, most businesses will have stored some personal data, especially payment information, in digital form. This means that almost all of Indian industry will be covered by the law. In this context, a simpler legislation with fewer obligations will be a good start.

Notice. The requirement to make the notice accessible in English and in 22 other languages, would be too onerous for most data fiduciaries and may not serve its purpose, since most digital

services and related documentation are anyway made available exclusively in English. Perhaps there will be a clarification that the data fiduciary can provide the notice in English and the most appropriate language among the list of 22 languages.

Legitimate Interest. The government has stuck to its stand from the beginning that legitimate interest, as it is understood in the EU, will not be a part of the law. There are legitimate uses such as statutory necessity, but these are standard and fairly narrow grounds.

Consent. The main ground for processing personal data is consent. The language defining consent is identical to the GDPR leading us to wonder whether India will require consent based on the same standards as in the EU. The addition of the word "unconditional" for collection of all personal information sets a potentially higher standard for obtaining consent than under GDPR.

Voluntary provision of personal data. The provision which allows processing of personal data shared "voluntarily", is poorly drafted as a data fiduciary can list various specified purposes and the data principal will then "voluntarily" provide her personal data. Perhaps the government meant to refer to a situation where the personal data is provided on the initiative of the data principal. It remains to be seen whether this provision would be abused. The reference to "specified purpose" is also confusing in a situation where personal data is given automatically as part of a transaction and no notice of specified purpose is given.

Purpose Limitation. The language on purpose limitation is not well defined. It is not entirely clear that there is a prohibition on a data fiduciary providing a laundry list of "specified purposes". It can be interpreted that as long as the personal data is processed for the specified purpose mentioned in the notice, it is permitted. Legitimacy of purpose does not appear to be a part of the law.

Exclusion to Government. The Act contains provisions that exclude the government directly and indirectly. While granting power to the government to exclude some of its instrumentalities is justified, the lack of standards to do so, such as reasonableness and proportionality, is unfortunate. This may however be supplied by the judiciary as the jurisprudence is already developed through past judgments. However, the most unfortunate provision is where the exception granted to the judiciary has been expanded to include bodies that have regulatory or supervisory powers. This would directly exclude vast sections of the government.

Foreign Personal Data. The law excludes most provisions from applicability to foreign personal data that is processed in India. This is somewhat counterproductive as one of the reasons for having a privacy law is to assure the world that it is safe to send personal information to India. It also means that the legislation will fail to obtain an adequacy ruling from the EU. In any case, due to not having independent oversight over government surveillance, Indian law does not fully comply with Schrems II. The extraordinary powers and exemptions to the government would also make that seemingly impossible.

Data Breach Notification. The insistence on notification of data breach or vulnerability in every case, not just to the DPBI but to concerned data principals goes against global standards. This is one of those instances where the law is stricter than the GDPR. Added to that is the existing and

CITY-YUWA PARTNERS

Will Establishment of the Green Guidelines under the Antimonopoly Act Open the Way to Resolve "2024 Issue" of Transportation Industry?

-From "Defensive" Compliance for Preventing Cartel to Efficiency Creating "Offensive" Business Alliance-
2023.7.12

1. Expansion of Business Alliances to Resolve the "2024 Issue" of Transport Industry and the Antimonopoly Act as an Obstacle

On June 19, 2023, Japan Post Group and Yamato Group jointly announced a business alliance ("Business Alliance") for a mail delivery business under the heading "Basic Agreement on Promotion of Sustainable Logistics Services," whereby mails collected by Yamato Group will be delivered by post office. Looking back on the history of Yamato Group's investment and passion for the mail delivery business, the Business Alliance seems to be a tough decision for Yamato Group.

As a background to the Yamato Group's decision, it is reported that application of Act on the Arrangement of Related Acts to Promote Work Style Reform to the transportation industry, which had been suspended, will become effective on April 1, 2024, and the upper limit of overtime work for truck drivers of 960 hours a year will be enforced with a criminal penalty, thereby enhancing the restriction of working hours per driver. This is known as "2024 issue." The danger of not being able to transport cargo is approaching near, and transportation industry is not in a situation in which the industry has options to provide sustainable logistics services.

However, how will the Business Alliance be evaluated under the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade ("Antimonopoly Act")? Since delivery is a core part of the mail delivery business, business alliance that integrates delivery is similar to a business transfer. In the mail delivery business, Yamato Group, which provides services ranging from collection service to delivery service, seems to have been the largest and virtually sole competitor of Japan Post Group in the nationwide market of Japan and therefore, its impact on competition is not expected to be small[1]. I would infer that both companies certainly consulted with the Japan Fair Trade Commission ("JFTC") in advance and/or has taken other methods to make sure that they would not violate the Antimonopoly Act. However, in light of the current practice under the Antimonopoly Act, if the Business Alliance had an effect of restricting competition, the purpose of improving the driver's work environment would not have been a sufficient justification.

2. Establishment of Green Guidelines and Close-Up of View of Cooperative Logistics

Japan Post Group and Yamato Group announced that contributions to alleviate the 2024 issue (e.g., lack of truck drivers) and contributions to tackling environmental issues (e.g., carbon neutral) are the main purposes of the Business Alliance. In addition, on March 31, 2023, JFTC published the "Guidelines Concerning the Activities of Enterprises, etc. Toward the Realization of a Green Society Under the Antimonopoly Act[2]," which is also known as the Green Guidelines. Is the overlap of timings of these two events a coincidence? The argument that enhancement of efficiency by eliminating redundancy in delivery will contribute to greenhouse gas reductions may be difficult to demonstrate quantitatively, but there may be an argument for it qualitatively at least.

The Green Guidelines are attracting attention not only as guidelines under the Antimonopoly Act in efforts to reduce greenhouse gas, but also as the first guideline to present JFTC's views on business alliances in general. The Green Guidelines also set forth in the "Basic Concept" that in many cases, the activities of enterprises toward the realization of green society will not pose problems under the Antimonopoly Act. Such wording can be read that JFTC actively supports companies in their efforts to reduce greenhouse gas.

The Green Guidelines also divide the acts into three categories, which are acts with no anti-competitive effect ("First Category"), acts with only anti-competitive effect ("Second Category"), and acts with both anti-competitive effect and pro-competitive effect ("Third Category"), and made overall consideration of the anti-competitive effect

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1 The author does not have more information than what has been published about the Business Alliance. Therefore, the author has no opinion on whether or not the Business Alliance has any impact on restricting competition.

2 https://www.jftc.go.jp/en/pressreleases/yearly-2023/March/230331.html

and pro-competitive effect on the lawfulness of the Third Category, by taking into account the reasonableness of purposes and appropriateness of means. Furthermore, the Third Category is broadly divided into establishment of voluntary standards and business alliances, and cooperative logistics are cited as one example of business alliance. The Green Guidelines contemplate the cooperative logistics of shippers.[3]

Cooperative logistics by shippers have appeared a couple of times in JFTC's Consultations Case Reports[4]. The Green Guidelines, however, can be read that JFTC is actively promoting cooperative logistics due to the addition of the wording "Cooperative logistics are not only expected to streamline logistics, but also able to reduce greenhouse gas emissions thereby, depending on cases. In such cases, it can be considered that cooperative logistics can contribute to the realization of green society." (Part 1, Section 3(2) B (E)) as well as the examples of reduction of greenhouse gas, which refocus on cooperative logistics.

3. Factors to be Considered in Determining the Lawfulness of Cooperative Logistics by Shippers in the Green Guidelines

The factors to consider under the Antimonopoly Act concerning cooperative logistics listed in the Green Guidelines are as follows (Part 1, Section 3(2)B(E)), which are not anything new:
- It is only incidental to the main business of purchasers of the logistics service (shippers), and it has little impact on price of product. Therefore, competition is unlikely to be substantially restrained compared with joint production or joint sales.
- However, when the total share of purchasers of the logistics service (shippers) participating in cooperative logistics in the procurement market for logistics services is high, competition in the procurement market may be substantially restricted.
- In addition, a high proportion of cost of products sold by shippers may encourage coordinated conducts among shippers and substantially restrict competition for the product.
- Agreement on price or quantity of product substantially restrains competition. Therefore, in the case that prices and quantities of products sold are shared among competitors through cooperative logistics and the competitors agree on price increases, it will be regarded as a cartel.

The lawful case (Example 30) is a joint delivery of three retailers, but it is obviously a lawful case with factors which are as follows: (a) the three retailers take necessary measures to block the transfer of information on price, quantity, etc. of the goods; (b) the ratio of cooperative logistics cost to the selling cost of the goods is extremely small; and (c) there are various enterprises in the procurement market for the delivery service, and the total market share of the three retailers is about 10%. On the other hand, unlawful case (Example 31) is a mere case of price cartel. Neither of these cases are helpful. In particular, (c) above means that there are numerous other shippers and therefore, (c) is often satisfied.

Many cooperative logistics cases that improve efficiency appear to be somewhere between clearly lawful and clearly unlawful. In such cases, the interpretation of issues that cannot be fully understood from the Green Guidelines and the Consultation Case Reports as explained below becomes an issue.

4. Issues that Cannot be Fully Understood from the Green Guidelines and the Consultation Case Reports

(1) Is it possible to stop competition in terms of quality of logistics services?

One of the reasons why joint delivery between competing enterprises did not necessarily progress is that delivery was one of the services in competition. If shippers compete for delivery, joint delivery will reduce costs, but will halt competition for some of the services. If delivery bases and routes are consolidated thereby, some service outages may become irrecoverable. Furthermore, reduced costs may not pass on to the shippers, who are the customers, and solely be used to improve the driver's work environment.

Thus, if there is deterioration in the quality of services due to reduction in costs, then there will be Third Category

[3] Therefore, the Business Alliance mentioned above between Japan Post Group and Yamato Group is not directly related to the items of cooperative logistics provided in the Green Guidelines. Case No. 8 of the FY2018 Consultation Case Report discusses cooperative transportation among competing carriers in the main transportation routes and provides improvement of drivers' work conditions as a reason for cooperative transportation. However, the size of joint business provided in Case No. 8 is small.

[4] For example, in Case No. 6 of the FY2020 Consultation Case Report published on June 9, 2021, there was a case where "15 manufacturers of office equipment set up delivery bases in various places and jointly deliver office equipment from the delivery bases to the designated delivery locations of the customers."

issue in which it is determined that there are both anti-competitive effect and pro-competitive effect on competition. However, it is not necessarily clear how JFTC thinks about this issue.

There might be many cases in which excessive competition in delivery services returns to an appropriate level However, the Antimonopoly Act does not necessarily justify an agreement between competitors to restore excessive competition to an appropriate level. According to the description in the Green Guidelines, JFTC is perhaps only looking at the impact on product prices.

(2) Are measures to block the transfer of information at minimum necessary level?

Joint delivery by shippers may become more efficient if it is made between competitors (i.e., delivery of same type of goods to a common customer), and since the aggregation of goods among a few number of same type of certain shippers will be carried out repeatedly, there is a potential to significantly improve efficiency through AI which will learn the delivery statuses.

However, in many cases, information on to which customers products are sold, when the products are sold, and what products are sold is important sales information. If joint delivery is made, there is a possibility that such sales information will leak among shippers making joint delivery. Moreover, the response to rivals' actions will vary from shipper to shipper and may facilitate competition by making it easier for shipper to sell goods to rivals' customers. However, this may also lead to a coordinated actions among shippers in which natural segregation of areas will occur, in which each of the shippers decides not (i) to get involved in area of business which multiple shippers are good at and focus on or (ii) to deal with rivals' customers. That is why the measures to block the transfer of information were expected in cooperative logistics among shippers up to now[5].

However, the measures to block the transfer of information, which had been proposed as a matter of course in the past may hinder the analysis of optimal delivery patterns, etc., and may hinder the improvement of efficiency. In addition, the measures to block the transfer of information within a company group can become a major problem in personnel allocation, and this in and of itself can become a reason for companies to hesitate to form a business alliance. For example, if it becomes necessary to take actions, such as making it impossible for employees, who engage in work involving other companies' information, to return to their original departments, it will become difficult to internally allocate personnel. However, if such work is completely conducted by someone outside the company, corporate governance will no longer work.

As explained above, with respect to business alliances to achieve a fundamental pro-competitive effect, it is not necessarily clear how JFTC thinks about the necessity and degree of strength of measures to block the transfer of information if it is unavoidable for business alliances to include acts that are considered to have an anti-competitive effect including exchange of business information. The measures to block the transfer of information that are not at minimum necessary level may also make the business alliance meaningless.

In Case No. 2 of Consultation Case Reports of the FY2022 released by JFTC on June 30, 2023, Carrier X has a real-time tracking service system for packages and a shipper asked Carrier X to track packages of Carrier X's competitors with this system and therefore, Carrier X requested its major competitors to participate in the joint tracking service. The points of this case are that (a) operation of joint tracking service is entrusted to Company P, which has no capital ties with Carrier X, (b) Carrier X and each carrier cannot check information other than their own transportation status, (c) each shipper cannot check information other than the transportation status of package requested by such shipper, and (d) information such as fares is not entered into the system, in order to prevent the backflow of sensitive information. JFTC concluded that there is no problem under the Antimonopoly Act. This case can be deemed as a case in which the measures to block the transfer of information was taken at a minimum necessary level. This case shows that the measure, in which shipper's or carrier's proposal of innovations to improve efficiency, outsourcing of their operation to a third party with no capital ties, and aggregation of information at such third party, is one of the measures to block the transfer of information.

5. Is JFTC trying to change the way law enforcement should be?

Joint delivery by shippers could have been useful means to solve the 2024 issue, but as mentioned in 4 above, there were still factors that caused the shippers to hesitate. JFTC's past published cases were also obvious lawful cases in which the shared costs were low and information sharing was blocked. It could therefore be understood from these published cases that it was necessary to pile up the elements of legality which might be deemed as excessive, in order to avoid violating the Antimonopoly Act and therefore, cooperative logistics must be considered in the context of "defensive" compliance.

However, returning to the case of the Business Alliance between Japan Post Group and Yamato Group, the Business Alliance was a substantial integration in the delivery market (in which one of them withdrew), and the impact on competition was not considered to be small. Is it possible to explain the lawfulness of the Business Alliance under the existing concepts of the Antimonopoly Act?

JFTC explained that the Green Guidelines were compiled by collecting and organizing the guidelines and case studies published to date, and not by establishing new standards. On the other hand, there is an impression that JFTC may take a more tolerant stance toward the realization of green society.[6] JFTC has clearly indicated its willingness to actively provide consultations to business enterprises on individual cases.

In addition to reducing greenhouse gas, the Green Guidelines also state that "It is highly possible that the analysis framework and other matters indicated in the Guidelines can also be applied to the activities of enterprises, etc. toward the achievement of the Sustainable Development Goals ("SDGs") implemented similarly for socially and publicly desirable objectives, considering the characteristics of acts conducted as such activities." (Introduction-2). The heading of the Business Alliance between Japan Post Group and Yamato Group was "Basic Agreement on Promotion of Sustainable Logistics Services," and the resolution of 2024 issue was precisely a head-on challenge to the sustainability of transportation industry.

For this reason, the Antimonopoly Act to date was only "defensive" compliance in preventing the exchange of information and business alliances among competitors from falling under cartel, and now it seems to be an opportunity for JFTC to turn "offensive" in which enterprises can actively propose and consult with JFTC on an audacious business alliance that has not existed before. In particular, although there was a hesitation up to now to discuss the minimum necessary level of measures to block the transfer of information, it might now become possible to have a head-on discussion on the need to have a certain amount of information exchange for reduction of greenhouse gas and to have sustainable logistics. This could be a significant turning point in transportation industry which is facing the 2024 issue.

6. Remaining theoretical issue – time lag in efficiency

Improving the competition in transport industry benefits all shippers, carriers, drivers and consignees and therefore, agreements, including those among competitors and business counterparties, which cover up to rectification of certain excessive competition, may be beneficial in the long term, including shippers and consignees, even if they are temporarily anti-competitive. In particular, avoiding the fatal situation in which the cargo cannot be transported due to the 2024 issue will greatly benefit both shippers and consignees.

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[5] In addition to the case mentioned Footnote No.4 above, there are Case No. 4 in 2004, Case No. 6 in 2015, Case No. 7 in 2016 and Case No.4 in 2021 of Consultation Case Reports.

[6] Yusuke Takamiya "Some Considerations from the Characteristics and Practical Perspectives of the Green Guidelines" (Fair Trade, No. 872 (2023), p. 22)

According to the conventional theory of the Antimonopoly Act, it was considered that a wide range of benefit of efficiency, which will occur later, would not justify the substantial restraint of competition. However, the reduction of greenhouse gas will inevitably result in the spread of benefits to non-participants of transportation industry, and there will be a time lag in the occurrence of benefits. Therefore, the Green Guidelines may be deemed as having opened the door to study theoretical questions about acts which cause a wide range of efficiency after going through a time lag such as the time lag mentioned above.

End

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DISTRICT COURT RULES AS UNCONSTITUTIONAL THE CAP ON PROFIT SHARING

AUGUST 2023

EXECUTIVE SUMMARY

- On August 3rd, 2023, the Judge from the Eighth District Court in Labor Matters in Mexico City granted an Amparo to a group of workers in connection with the Decree that establishes a maximum limit on the profit sharing for workers ("PTU" per its acronym in Spanish).
- The protection granted to the relevant workers regarding the Decree was issued exclusively in favor of those workers who signed the Amparo and evidenced the payment of PTU with such cap.
- This resolution only is applicable to the group of workers who received such favorable Amparo, thus being as of this moment merely an isolated precedent.

On August 3rd, 2023, the Judge from the Eighth District Court in Labor Matters in Mexico City, granted an Amparo to a group of workers belonging to the Section 120 of the Ciénega, in Santiago Papasquiaro, Durango, as part of the union named Sindicato Nacional Minero Metalúrgio "Frente", in connection with the "Decree by which several provisions on labor subcontracting were reformed, added or derogated", that was published on April 23rd, 2021, in the Official Federal Gazette (the "Decree"), and which added a new section VIII in Article 127 of the Federal Labor Law, to establish a maximum limit on the profit sharing for workers ("PTU" per its acronym in Spanish), equal to 3 months of the employee´s salary or the average received during past 3 years, whichever is more beneficial for the worker.

In terms of the resolution, the workers who appealed the Decree (considering the first time it was applied when paying the PTU from fiscal year 2021, which was limited to the average of the last 3 years, and covered in April 2022) proved an affectation derived from the aforementioned rule, since "…the Constitution orders that profit sharing within a company shall be paid in full to the workers…", and moreover "…the right to receive profit sharing is established in Article 123 of the Constitution, on which, the law shall not establish any cap, in view that the Mexican Constitution does not include any limitation". To reach this determination, the Judge also considered the rationale supporting the subcontracting reform of 2021.

In this sense, the protection granted to the relevant workers regarding the Decree, was issued exclusively **in favor of those workers who signed the Amparo and evidenced the payment of PTU with such a cap**, so that:

> *"The Section VIII, of Article 127 of the Federal Labor Law, which was added in the Decree, is not observed within the legal sphere of the complaining workers, since it limits the payment of profit sharing."*

It is important to highlight that this resolution is only applicable to the group of workers who received such favorable Amparo, thus being as of the moment in which this document is published, merely an isolated precedent.

Likewise, it is relevant to consider that this resolution could still be challenged through an appeal motion ("Recurso de revision") which, if filed, should be settled by the Supreme Court of Justice, considering this is a constitutionality issue.

Considering the relevance of this criterion, we recommend following up closely on the related procedural repercussions, since the same could eventually generate a definitive and binding precedent on the constitutionality aspect of the PTU cap.

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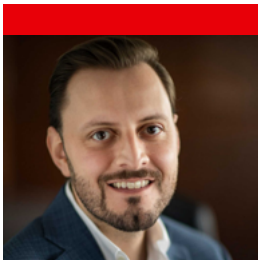

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Digital General Meeting of Legal Entities under Private Law Act

Corporate law 07-07-2023

Meetings of management and supervisory boards can be conducted entirely in a digital manner, subject to any conditions specified in the articles of association or regulations, with the understanding that certain restrictions may apply from a tax perspective. Pursuant to the Temporary Covid-19 Justice and Security Act (url: https://wetten.overheid.nl/BWBR0043413/2020-12-17), legal entities were formally permitted to conduct completely digital general meetings. However, the respective provision ceased to be effective on 1 February 2023. At present, general meetings are restricted to physical attendance or, if allowed by the articles of association, in a hybrid format that involves remote participation through electronic communication methods.

On 7 December 2022, a consultation was published for a draft bill proposing the implementation of fully digital general meetings of a public limited company ('naamloze vennootschap' or 'nv'), private limited companies ('besloten vennootschap' or 'bv'), association (including the association of owners ('Vereniging van Eigenaars', or 'VvE'), cooperative, mutual insurance association, European Public Limited Company (SE) and European Cooperative Society (SCE). The draft bill introduces additional requirements for both fully digital and hybrid general meetings. In addition, it aims to simplify and modernise the digital convocation process. The consultation period

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- Listed Companies (url: /en/our-expertise/industries/listed-companies)

concluded on 6 February 2023.

Requirements for fully digital and hybrid meetings
Similar to the hybrid meetings, fully digital general meetings will be optional. The draft bill outlines the following conditions for fully digital or hybrid general meetings:

- The articles of association of public limited companies, private limited companies, cooperatives and mutual insurance associations must explicitly include provisions for conducting fully digital or hybrid general meetings. Hence, any nv, bv, cooperative, mutual society, SE or SCE aiming to have the option of fully digital general meetings should amend its articles of association.
- The general meeting of members of associations and VVEs must authorise the board for conducting hybrid as well as fully digital general meetings of its members.
- The participant (shareholder or member) can be identified. The choice of identification method is left at the discretion of the legal entity.
- Participants have the opportunity to exercise their voting right in real time. The articles of association may incorporate a provision on digital voting,
- Participants can actively engage in the meeting by both listening to the proceedings ('hearing') and taking part in the deliberations ('speaking') through a two-way audio-visual means of communication (i.e., with visuals and sound).

Digital convening notice simplified and modernised
The draft bill introduces a set of revised several requirements for digital convening notices:

- The prerequisite for the party to whom the convening notice is sent by electronic means to have consented to receiving convening notices by electronic means will no longer be applicable.
- The obligation for a non-listed public limited company to announce the convening notice in a national daily newspaper will be lifted. The meeting may be convened by means of a digital public announcement which is directly and permanently accessible until the

commencement of the general meeting (e.g., by posting it on the website).

If the general meeting is conducted in a hybrid or fully digital form, the convening notices of all legal entities must include the procedure for participating in the general meeting and exercising the voting rights through electronic communication channels.

Transitional law

Four transitional provisions are proposed:

1. A convening notice sent before the Act takes effect will continue to be valid once it enters into force, provided that it complied with the statutory requirements applicable at that time.
2. Until one year after the date of entry into force of the Act, a general meeting may also be conducted electronically in accordance with the law and the articles of association of the legal entity as they read before the Act entered into force. Accordingly, legal entities have one year after entry into force to amend their articles of association.
3. A provision in the articles of association that refers to a statutory provision or reflects its content prior to the Act's enactment will be deemed to refer to the new statutory provision after the Act entered into force, unless such interpretation contradicts the intended meaning of the provision.
4. Any provision in the articles of association of an association or a VvE that pertains to the exercise of voting rights through electronic means or participation of a person entitled to vote via electronic means of communication will also be considered applicable in the case of a fully digital general meeting after the Act comes into effect. This principle remains valid unless such interpretation directly conflicts with the intended meaning of the provision.

Follow-up steps

The bill is expected to be forwarded to the Advisory Division of the Council of State for its opinion in 2023. The timing of the submission to the Dutch parliament is currently unknown. Amendments could be made to the

draft bill, both prior to submission to parliament and during the legislative process. We will update this blog as soon as any new developments arise.

Related articles

NICARAGUA

NEW POLICY TO AVOID DEFORESTATION AND FOREST DEGRADATION

August 2023 | Nicaragua

This past June 13, 2023 was published the Presidential Decree 06-2023 "On the Creation of the National Policy to Avoid Deforestation and Forest Degradation" in the Official Gazette, which is of general application to all governmental entities, natural or juridical persons, national or foreign, throughout the national territory (the "Forest Policy").

The purpose of the Forest Policy is to promote actions to avoid deforestation and forest degradation, as well as to restore the right of native peoples, afro-descendants, and rural communities to enjoy the benefits generated by forest ecosystems in an environmentally sustainable manner.

The Forest Policy is composed of six strategic lines that are aligned with the Nicaraguan Constitution, the Policy for Food Security and Sovereignty and the National Plan for the Fight against Poverty and for Human Development 2022-2026. These strategic lines are the following:

- Strengthen awareness, education, communication, promotion of values and information related to the protection of Mother Earth, considering the territorial identity and the cosmovision of native peoples and afro-descendants.
- Strengthen national, regional, and local coordination focused on the good use of land and natural resources, considering environmental, forestry and agricultural laws and policies.
- Promote the protection, conservation and restoration of landscapes and biological corridors through afforestation, reforestation, and natural regeneration in the country.
- Promote low-emission primary production models, as well as producers' income and employment.
- Promote investments and the strengthening of the forestry value chain with a focus on sustainable markets; that value sustainability and the reduction of deforestation and forest degradation.
- Strengthen initiatives to adapt to climate change in the territories of indigenous peoples and afro-descendants in the country.

The following are some of the specific actions addressed by the Forest Policy:

- Promote lines of forestry investments and incentives through forest conservation on farms.
- Promote incentives for good environmental practices that encourage forest conservation in the country.
- Strengthen and update the current environmental, forestry and agricultural legal framework.
- Promote financial mechanisms and products to improve access to credit related to the adoption of conservation measures.
- Promote private investments, the public-private partnership model and shared responsibility for forestry projects that expand forest cover, reduce degradation, and contribute to ecosystem restoration.
- Promote forest restoration with a carbon market approach.

If you would like more information about the Forest Policy, please do not hesitate to contact us.

SyCip Salazar Hernandez & Gatmaitan

The SyCipLaw Corporate Services Bulletin

AUGUST 2023

SEC MC No. 9-2023 Bulletin

The Philippine Securities and Exchange Commission ("***SEC***") has further extended to September 30, 2023 the deadline for amnesty applications for late and non-filing of annual financial statements ("***AFS***"), general information sheets ("***GIS***"), as well as non-compliance with SEC Memorandum Circular No. 28, series of 2020 (Requirement for Corporations, Partnerships, Associations and Individuals to Create and/or Designate Email Account Address and Cellphone Number for Transactions with the Commission) ("***MC28***"), and streamlined the application process to further encourage qualified corporations to avail of the amnesty. The further extension and streamlining of the application process was granted through SEC Memorandum Circular No. 9, series of 2023, titled Further Extension of the Deadline for Amnesty Applications under SEC Memorandum Circular No. 2, Series of 2023, and Streamlining of the Application Process (SEC MC No. 9-2023 or the "***Circular***").

In its efforts to inform the public about the streamlined process under the Circular, the SEC conducted a Webinar titled SEC Amnesty Program Made Easier (Streamlined Requirements and Procedure) on July 17, 2023 (the "***Webinar***").

Amnesty Program

The amnesty program is part of the SEC's efforts to encourage its supervised entities to comply with their reportorial requirements under Republic Act No. 11232 or the Revised Corporation Code of the Philippines. It was launched in March for (a) non-compliant corporations or those that have not submitted reportorial requirements within the prescribed period by the SEC, and (b) suspended/revoked corporations or those whose certificates of registration have been suspended/revoked due to non-submission of reportorial requirements.

Deadline Extension

The Circular provides that eligible companies are given until September 30, 2023 to signify their intent to apply

for amnesty, submit the supporting reportorial documents, and settle the corresponding amnesty fees.

Thereafter, an updated scale of fines and penalties for the covered reportorial requirements will be implemented effective October 1, 2023.

Streamlined Process

The Circular still provides that the application for amnesty must be filed by the duly authorized representative or resident agent of the corporation through the Electronic Filing and Submission Tool ("***eFAST***") of the SEC on or before the stated deadline. To further streamline the amnesty application process, however, the SEC has adopted various changes in the process.

First, in lieu of the notarized Expression of Interest ("***EOI***") Form and the Amnesty Application Form, amnesty applicants will just be required to confirm their interest in availing the amnesty through a web-based Unified Amnesty Application Form ("***Amnesty Application Form***") via eFAST. The Amnesty Application Form shall include appropriate tick boxes indicating concurrence and/or consent to certain conditions of the amnesty process.

Once the applicant has agreed to the terms and conditions of the amnesty, the applicant will be redirected to the Electronic System for Payment to the SEC ("***eSPAYSEC***") where a Payment Assessment Form ("***PAF***") will be automatically generated showing the applicable amnesty fees, as follows:

a. PhP 5,000 amnesty fee for non-compliant corporations, including those whose only violation is the non-filing of the MC28 report; or

b. PhP 3,060 petition fee and additional 50% of the assessed fines and penalties for suspended/revoked corporations.

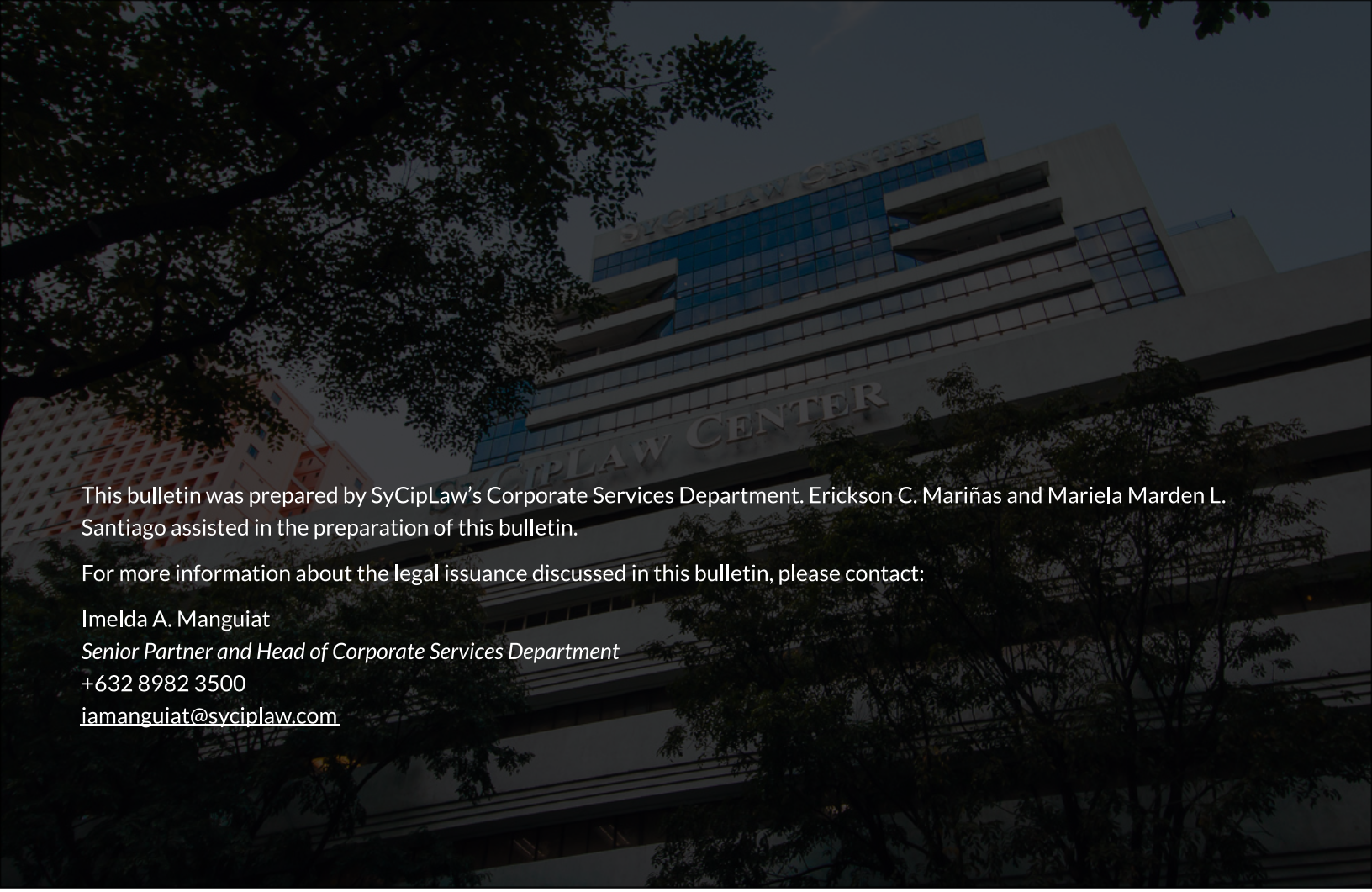
After payment, the applicant must click "*Go back to eFAST*" to avoid delays in the processing of the payment and application. A confirmation email will be sent to the applicant's registered email address confirming that the SEC has accepted the amnesty application and payment. The email will also contain further instructions on how to finish the application process.

To complete the application, the applicant must submit the reportorial requirements via eFAST, namely the latest due AFS and GIS. For suspended/revoked corporations, the Petition to Lift Order of Suspension or Revocation also needs to be uploaded. The Circular has expressly removed the *Undertaking for Latest Due AFS Submission* requirement since it is understood that the AFS should already be available by the end of the extended amnesty period or until 30 September 2023. Hence, for amnesty applications starting July 1, 2023, the Undertaking to submit the AFS within ninety (90) days from date of payment of amnesty fee is no longer be applicable.

Finally, the Circular now provides for the turnaround time for the release of Confirmation of Payment ("***COP***"), which shall be fifteen (15) working days from the date of complete submission of reportorial requirements by the applicant. For suspended/revoked corporations, however, only after the Order of Suspension/Revocation has been lifted can it resume its operations.

Corporations that are able to upload and submit the correct reportorial requirements (*i.e.*, latest due GIS and AFS), including those reverted for compliance, within the submission period or until **September 30, 2023**, shall be considered to have undergone the complete process and may thus be entitled to a COP; otherwise, payment of their respective amnesty fees will be forfeited. The Circular provides that refund of amnesty fees for non-compliant corporations shall not be accommodated, except in highly meritorious cases. For suspended or revoked corporations, the petition fees shall not be refunded but shall be re-applied to the payment of the 50% assessed fines, subject to existing accounting and auditing guidelines.

The full text of the Circular may be accessed at SEC MC No. 9-23. The Webinar on the streamlined amnesty application process held on July 17, 2023 may be accessed through the SEC's Facebook page. ■



This bulletin was prepared by SyCipLaw's Corporate Services Department. Erickson C. Mariñas and Mariela Marden L. Santiago assisted in the preparation of this bulletin.

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Crypto assets – Legally enforceable property right in Singapore! But for all types?

DENTONS RODYK

August 7, 2023

I. Introduction

In the recent case of *ByBit Fintech Ltd v Ho Kai Xin and others* [2023] SGHC 199 (**ByBit**), the Singapore High Court ruled that the holder of a crypto asset, what is commonly known as United States Dollar Tether or USDT, has a property right which was legally enforceable in common law. Observers of the Singapore Courts in this space saw this coming with a string of recent cases that keenly pointed in the direction that the cryptocurrencies and NFT in those cases were capable of being regarded by the common law to be property that was capable of legal protection.

Justice Philip Jeyaretnam held that crypto assets are things in action (or choses in action) and are capable of being held on trust, making this the first time a common law court, and a Singapore court, has made such a ruling. This decision marks a watershed moment in the area of law regarding cryptocurrency as it goes beyond the Singapore Court of Appeal's decision in *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 02 which held that cryptocurrencies (or specifically bitcoin or BTC I in that case) have fundamental characteristics of intangible property and can be treated as property.

II. Background

The Claimant, a Seychellois company which owns and operates a cryptocurrency exchange, had engaged WeChain Fintech Pte Ltd (**WeChain**) for its payroll services to handle the remuneration of the Claimant's employees which comprises traditional currency, cryptocurrency, or a mixture of both. The Defendant, an employee of WeChain, was responsible for the payroll processing of the Claimant's employees.

The Claimant discovered that there were unusually large cryptocurrency payments made into four addresses where a total of 4,209,720 United States Dollar Tether (**USDT**) (the **Crypto Asset**) had been transferred. While these transactions were initially attributed by the Defendant as an inadvertent mistake, the Claimant subsequently discovered that the Defendant had prior knowledge of these four addresses and therefore suspected that the Defendant owned the wallets associated with these addresses. While the Defendant has accepted that the Crypto Asset belonged to the Claimant and that she was not entitled to the same, her defence was that she had no knowledge of such transactions.

The Claimant sought summary judgment against the Defendant, asserting that the Defendant had breached her employment contract by transferring the Crypto Asset to addresses controlled by herself. The main relief sought by the Claimant is a declaration that the Defendant holds the USDT in question on trust for the Claimant and sought an order for the return of the same.

As such, the key issue before the Singapore High Court was whether crypto assets are property capable of being held

on trust and if so, the type of property they constituted. It is important to bear in mind that the crypto asset here is what is commonly described as a stablecoin, and is backed, by its issuer, with an equivalent value in fiat currency or other reserves which verified holders of such crypto asset have the right to redeem for fiat currency, i.e. USDT.

III. Whether USDT is property capable of being held on trust

In determining whether USDT is property capable of being held on trust, the Court firstly recognised that crypto assets were a form of property which were capable of being identified and segregated. Justice Jeyaretnam found that crypto assets have not only been transferred for value but were also recognised on the balance sheets of companies given that the accounting profession had developed standards for how to value and report them. Furthermore, the Court made reference to the recent consultation paper issued and published by the Monetary Authority of Singapore (**MAS**) entitled: MAS, "Response to Public Consultation on Proposed Regulatory Measures for Digital Payment Token Services" which proposed amendments to implement segregation and custody requirements for digital payment tokens. This serves to underline the possibility of identifying and segregating such digital assets and that it is legally possible to hold them on trust.

The Court also recognised that cryptocurrency has been given more recognition as evidenced in Order 22 of the Rules of Court 2021. Order 22 Rule 1(1) includes "cryptocurrency or other digital currency" in its definition of "movable property", thus suggesting that cryptocurrency has been expressly recognised as a form of property capable of being the subject matter of an enforcement order.

Secondly, the Court clarified that while crypto assets are not categorized as physical assets given that they do not have a fixed physical identity, but would nonetheless manifest themselves in the physical world. The Court took guidance from Professor Kelvin Low who argued that the right that the holder of the private key has is "properly conceptualised as a narrow right to have the unspent transaction output of a crypto asset locked to a holder's public address on a blockchain". As such, while the Court acknowledged that the physical manifestation at the level of digital bits and bytes is not permanent and changes with every transaction, it likened a crypto asset to how a river is given a name despite the water contained within its banks constantly changing.

Furthermore, Justice Jeyaretnam acknowledged the scepticism regarding the value of crypto assets but noted that value is not inherent in an object but rather a judgement made by an aggregate of human minds. He proceeded to conclude that the exchange value tied to an object is by virtue of a collective act of mutual faith and noted that what is treated as money by the general consent of mankind is given the credit and currency of money to all intents and purposes.

As such, the Court concluded that crypto assets were capable of being defined and identified as they could be traded and valued as holdings, therefore finding that it falls squarely within the categorisation of property laid out in *National Provincial Bank v Ainsworth* [1965] 1 AC 1175 which states that the right affecting property must be "definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability".

IV. Can USDT be classified in the category of things in action (or chose in action)?

In determining whether USDT may be classified in the category of things in action, the Court acknowledged the

general argument that such rights associated with things in action are often enforceable by action against persons. Justice Jeyaretnam cited the example of contractual rights and the right to be paid money, further noting that there is no individual counterparty to the crypto holder's right. However, he noted that the category of things in action has evolved and expanded to also include both documents of title to incorporeal rights of property as well as incorporeal rights such as copyrights. The Court recognised the diversity of incorporeal property that has been classified as things in action and therefore found that the categories of things of action should not be closed off but rather broad and flexible. As such, the Court held that the holder of a crypto asset has in principle an incorporeal right of property recognisable by the common law as a thing in action and is therefore enforceable in court.

V. Conclusion

The Court ultimately declared a constructive trust over the USDT, finding that the Claimant was the legal and beneficial owner of such assets. As such, given the relative ambiguity surrounding the treatment of crypto assets in Singapore, this landmark decision in ByBit firmly establishes the principle that the holder of a crypto asset has a legally enforceable property right which can be recognised in common law as a thing in action. This provides welcome clarity to the status of crypto assets, that crypto assets can be held on trust, and the possibility of using crypto assets as collateral. This clarity provides greater guidance for players in this space on how they can be dealing with crypto assets vis-à-vis one another, and how their rights can be enforced.

That said, the world of crypto assets is not limited to tokens such as cryptocurrencies and include NFTs, convertible virtual currency products, and even forms of digital capital markets products such as digital debentures and crypto derivatives. The Singapore cases thus far involved cryptocurrencies (BTC, ETH, and USDT) and NFTs. Whether the same arguments, based on Justice Jeyaretnam's reasoning, can be applied to all crypto assets, therefore classifying all of them as property, may be subject to further argument. The fast-developing nature, characteristics and types of digital and crypto assets, means that the body of jurisprudence in this area of law, can only continue to grow.

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Reform in Remedies Following Dismissal of Reconsideration for Non-Prosecution

08/29/2023

Wen-Ping Lai/ Johnny Chung-Wei Liao

On June 21, 2023, Article 258-1 and other concerned provisions of the Code of Criminal Procedure ("CCP") were amended and promulgated, changing the procedure of applying to the court for transfer to trial after non-prosecution to initiating private prosecution.

The CCP adopts a dual system of public prosecution and private prosecution. In *public prosecution*, the victim of a crime can choose to report the crime to a public prosecutor, who then has to open an investigation to determine whether there is sufficient evidence to prosecute and present the case to the court. After the case is prosecuted, the public prosecutor remains involved as the accuser. In *private prosecution*, the victim (the private prosecutor) can skip the prosecutor's investigation and directly file a criminal lawsuit with the court. However, the private prosecutor needs to gather and present evidence independently to prove the criminal facts, persuading the judge to find the defendant guilty. The prosecutor will not be involved during the trial.

Where the victim has filed a criminal complaint, the public prosecutor has to conduct an investigation. And if there is sufficient evidence to suspect the defendant of committing a crime, the prosecutor has to initiate a public prosecution. Otherwise, a non-prosecution decision will be rendered. If the complainant refuses to accept the non-prosecution decision, they can apply for reconsideration to the chief prosecutor of the higher-court prosecutors' office. If the chief prosecutor finds grounds for reconsideration, they will revoke the decision and instruct the local prosecutors' office to continue the investigation or initiate a prosecution. Before the CCP was amended, if the reconsideration was dismissed, the further recourse for the complainant was to apply to the first-instance court for a "transfer to trial." If the court found the application justified, the case would be treated as if it were prosecuted by a public prosecutor.

However, in the recent amendment to the CCP, the provision for "transfer to trial" has been removed. Now, the victim can, within 10 days of receiving the dismissal of the reconsideration, apply to the first-instance court for permission to initiate a private prosecution. If the court deems the application justified, it has to issue a ruling within a reasonable period permitting a private prosecution (Article 258-3(2) of the CCP).

When the transfer-to-trial mechanism was in place, it was widely criticized for treating the court-approved transfer *as if it were a public prosecution*, meaning that the prosecution had deemed the evidence insufficient to prosecute the case, leading to a non-prosecution decision, but owing to the court's approval, the prosecutor was required to act as the accuser in court. The reason for the amendment to Article 258-1 of the CCP states:

The current mechanism of criminal transfer to trial has been accused of violating the principle of separation of trial and prosecution and the principle of no trial without complaint. To avoid such accusation and maintain external judicial supervision over prosecutors' non-prosecution or deferred prosecution decisions, and to grant the applicant the choice of initiating a private prosecution, the mechanism of 'permission to initiate private prosecution' as shown in the first paragraph is adopted, which is anchored in the dual system of public prosecution and private prosecution in our country.

The other key points of the mechanism of "permission to initiate private prosecution" under the amended CCP are as follows:

1. *Enhancing the right of the parties to state their opinions.* During the court's review of whether to permit the initiation of private prosecution, the applicants, their representatives, the prosecutor, the defendant, or the defense counsel may be given the opportunity to present their opinions orally or in writing (Article 258-3(3) of the CCP).

2. *The right to withdraw the application or private prosecution.* The applicant permitted to initiate a private prosecution may withdraw the application before the court makes a ruling on the case or withdraw the private prosecution during the trial, allowing the victim to make use of the restorative justice process (Articles 258-2 and 258-4 of the CCP).

3. *Mandatory legal representation and access to case files.* The mechanism of mandatory legal representation is adopted, and the appointed lawyer is allowed to review the investigation files and evidence and make copies or take photographs (Articles 258-1(1) and 258-3(1) of the CCP). Lawyers should apply for access to case files to the relevant prosecutors' office, not the first-instance court (Point 135 of the guidelines for the courts' handling of criminal cases).

4. *Preventing pre-judgment.* The judges rendering the decision to permit a private prosecution should not be involved in the trial for the private prosecution (Article 258-4(2) of the CCP).

5. *Defining the scope of new facts/evidence for re-prosecution.* The facts and evidence presented during the application for permission to initiate private prosecution are deemed new facts and evidence that the prosecutor may rely on for re-prosecution of the same case (Article 260-2 of the CCP).

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FEC Considers Possible Restrictions on AI and Deepfakes in Campaign Ads

Petition for Rulemaking asks the Federal Election Commission to clarify that existing law prohibits deliberately deceptive AI generated advertisements

By K.C. Halm, John Seiver, and Edlira Kuka*

08.31.23

On August 16, 2023, the Federal Election Commission (FEC) published a Notice of Availability of Petition for Rulemaking (Notice) seeking

comment on whether it should initiate a formal rulemaking to clarify that existing federal election law and FEC regulations prohibit any deliberately deceptive use of Artificial Intelligence (AI) technology and "deepfakes" in campaign advertisements, unless such use is clearly satire or parody "where the purpose and effect is not to deceive voters." The Petition filed by Public Citizen in July asks the FEC to require ads with "fictitious actions and statements" to prominently disclose that the content is generated by AI and does not represent real statements or events. Although the FEC is seeking comment on whether to commence a formal rulemaking, it has not taken a position on the Petition and will not consider the merits until the comment period concludes.

Existing Federal Regulation Framework

The Petition maintains that the use of generative AI technology to "create convincing images, audio and video hoaxes" designed to manipulate elections through campaign advertisements, including the use of deepfakes, is not clearly prohibited by existing federal laws. "Deepfakes" are AI-generated audio, video, or other visual depictions and impersonations of someone that are manipulated and made to appear as convincing originals, making it difficult or nearly impossible for the average person to detect that they are not real.

Under the Federal Election Campaign Act, 52 U.S.C. 30124(a)(1) (Act), and the FEC's implementing regulations, 11 C.F.R. § 110.16, it is illegal for a political candidate to fraudulently misrepresent another political candidate, but the law and regulations do not explicitly ban the use of AI in carrying out the wrongful conduct. More specifically, candidates running for federal office, their agents, or employees are prohibited from misrepresenting themselves or any committee or organization under their control from speaking, writing, or acting for or on behalf of

any *other* candidate or political party in a damaging manner, or from willfully or knowingly participating, or conspiring to participate, in any plan or scheme to do so. The Act and regulations also prohibit fraudulent misrepresentations, including participating in or conspiring to do so, for the purpose of soliciting campaign contributions or donations.

In short, existing law prohibits creating and disseminating fake videos, audios, or photos of another party's political candidate, and depicting them as saying words they never actually said or acting in ways they never actually acted, such as falsely portraying them making completely fabricated speeches or acting illegally. The Petition goes a step further to suggest that the FEC's regulations should be amended to expressly prohibit the use of AI technology to create altered deepfake content since that conduct is not clearly prohibited by the Act or the FEC's regulations. The Petition also asks that unless the deepfake content is clearly satire or parody and *not* intended to deceive voters, it should be required to include a "clear and conspicuous disclosure" that the "content is generated by artificial intelligence and does not represent real events."

Regulatory Challenges and Next Steps

As AI technology continues to rapidly evolve, changing existing regulatory frameworks to keep up with emerging technologies remains challenging. Creating and distributing fake content about political candidates intended to deceive voters poses significant risks where voter disinformation can influence elections. While prohibiting harmful tactics is important, the lawful and beneficial use of AI should not be restricted. For example, the First Amendment would protect the use of deepfakes where the content is clearly a parody or satire

that is not intended to deceive voters. Although some states have passed deepfake laws, current federal law and regulations do not provide clear guidance on this issue. The AI team at DWT has closely followed deepfake legislation and provided an overview of California's legislation and past steps the federal government has taken to address deepfakes in campaign ads.

The current FEC rulemaking is an opportunity for commenters to suggest how amendments to the existing regulations should be framed to appropriately address fraudulent use of deepfakes in elections while ensuring that the regulations do not inadvertently limit political expression, opinion, or satire protected by the First Amendment.

Next Steps

Comments on the Petition for Rulemaking are due by October 16, 2023. Our AI team will continue to actively monitor and report on emerging AI-powered technology and regulations at the state and federal levels. We are available to prepare comments or advise on policy and regulatory implications of this emerging area of law.

**Edlira Kuka, a recent graduate of Seattle University School of Law, is a Communications Law, Regulation, and Policy Manager at DWT.*

GOODSILL

It's High Time for Hawaii Employers to Update their Reasonable Accommodation Practices with Respect to Medical Marijuana

by christinelau | Jul 26, 2023 | Labor And Employment Law

Employers who deny or terminate employment for medical marijuana users who test positive for Tetrahydrocannabinol (THC) may soon run afoul of Hawaii Civil Rights Commission (HCRC) regulations.

Two points to emphasize first: (i) this does not impact Department of Transportation (DOT) required drug testing; and (ii) this is a proposed rule change – it has not yet gone into effect.

The HCRC proposes to add to its regulations on disability discrimination language which would make it potentially unlawful to deny a reasonable accommodation to a disabled employee with a 329 card, also informally known as a medical marijuana license, who tests positive for THC, unless they were using or under the influence on work premises or during working time.

The full text of the proposed new rule can be found on the HCRC website here. https://labor.hawaii.gov/hcrc/accepting-public-comments-on-the-proposed-amendments-to-the-hawaii-administrative-rules-title-12-chapter-46-rules-regarding-the-civil-rights-commission/

What should Hawaii employers who conduct non-DOT drug testing for THC do?

First, if you have opinions about this possible rule change, you can let the HCRC know by e-mailing the HCRC's chief counsel at robin.wurtzel@hawaii.gov (include "HCRC Proposed Rule Amendments" in the subject line of the email). The public comment period has passed, but they are continuing to accept comments via email.

Second, you could just throw up your hands. Many Hawaii employers have already given up on testing for THC. A positive test does not indicate current impairment. And the use of marijuana, whether for medical reasons or still-unlawful-in-Hawaii-for-now recreational reasons, has become sufficiently common that, in combination with a tight labor market, it is simply no longer making sense to many employers to rule out otherwise qualified candidates for this.

Third, for those employers who do and will continue to test for THC, it will be necessary to consider a reasonable accommodation when an applicant or employee tests positive for THC and produces a 329 card. Obtaining a 329 card is supposed to require a debilitating medical condition. So if properly issued, it is very likely that the card itself is indicative of a "disability."

That said, employers may be entitled to request medical information to verify a disability if that is not obvious. And employers should request medical information verifying that the employee's use of marijuana for medical reasons does not and will not result in impairment at work or during work hours. With that information, an employer will likely be obligated to bend its drug testing policies by not taking action on a positive test result for THC when the employee or applicant has a 329 card. Because employers need not tolerate use or impairment at or during work, supervisors and managers should be trained on observing and documenting signs of impairment. Employees who meet the criteria can be sent for reasonable suspicion testing under applicable policies, and could be subject to discipline if the employer reasonably concludes that the employee was impaired at or during work.

Finally, the proposed rule says that employers may deny an accommodation if that would create an "undue hardship on the operation of its business." But if the employer has received medical documentation verifying the employee can make use of medical cannabis without being high at or during work, how would you establish hardship? Demonstrating "undue hardship" is a difficult and uncertain burden under any circumstances. As a defense in this situation, this option is likely no more than a mirage. Don't count on it. If you believe your circumstances warrant denying an accommodation based on undue hardship, talk to an employment lawyer before taking action.

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Department of Labor proposes exempt-status overhaul

05 September 2023

On August 30, 2023, the U.S. Department of Labor (DOL) proposed significant increases in the compensation thresholds that must be met for employees to be classified as exempt from overtime pay requirements under the Fair Labor Standards Act (FLSA). If the proposal is finalized as presented, DOL estimates that 3.6 million employees currently classified as exempt will be impacted, requiring employers to either raise their salaries or begin paying them overtime and tracking the time that they work.

Current law

Under the current legal standard, an employee must meet three requirements to be classified as exempt from overtime under the FLSA executive, administrative, or professional exemptions – the so-called "white collar" exemptions:

- Satisfy a "duties test" (i.e., have and perform certain white-collar job duties);
- Be paid on a salary or fee basis (as opposed to an hourly basis); and
- Be paid at least $684 per week, which is roughly $35,568 a year.

There are some exceptions to the above requirements. For example, employees earning at least $107,432 a year may also be exempt under the "highly-compensated employee" exemption if they satisfy a relaxed version of the "duties" test. Likewise, certain types of employees need not meet the above salary tests to be exempt, such as doctors, lawyers, and teachers.

DOL's proposed rule

DOL's August 30 Notice of Proposed Rulemaking proposes to substantially increase the dollar thresholds applicable to these exemptions. Specifically, the proposed rule would make two changes:

- Increase the threshold for the white-collar exemptions to $1,059 per week, or $55,068 a year; and
- Increase the threshold for the highly-compensated employee exemption to $143,998 a year.

Notably, DOL acknowledges that the white-collar threshold will likely be higher when a final rule is promulgated, because the dollar amount will be pegged to then-current wage information from the Bureau of Labor Statistics. DOL predicts that if the rule is finalized by the end of this year, the white-collar threshold could be as high as $59,285 a year, and, if the rule is finalized in early 2024, $60,209.

The proposed rule also provides for automatic updating of the compensation thresholds every three years based on then-current wage data and adjusts compensation thresholds for exempt status currently applicable in the U.S. territories and to the motion picture industry.

What happens next?

Because the proposed rule must undergo notice-and-comment review, it is unclear how soon DOL might issue a final rule. However, we anticipate that a final rule is at least several months away. The proposed rule is expected to elicit significant commentary and could be modified when a final rule is published. Notably, the Obama administration's proposed rule to substantially increase the compensation thresholds was not finalized until approximately 10 months after it was proposed. The rule may also invite legal challenges. Indeed, the Obama administration's final rule was blocked by a Texas federal court back in 2017.

Next steps for employers

DOL states that, once the proposed rule is finalized, employers will have only 60 days to come into compliance. This is less time than DOL has previously given employers to respond to changes to the overtime rules, including the blocked Obama rule. Although the exact compensation thresholds are not known at this time, employers can prepare for a final rule now by taking the following steps:

- Identify all employees currently classified as exempt under the white-collar or highly-compensated employee exemptions who may not be exempt under the proposed new thresholds.
- Estimate the additional payroll costs your organization will incur if the impacted employees are reclassified as nonexempt.
- Determine the potential actions to take with respect to each affected employee if the rule is finalized. Options include reclassifying the employee as nonexempt; increasing the employee's salary to the new compensation threshold in order to maintain exempt status; determining whether another exemption applies (such as the exemption for hourly computer professionals); and/or restructuring or reassigning work in order to reduce the need for overtime.
- Plan for reductions in compensation and/or fringe benefits, or potential layoffs, which may be necessary as a result of increased payroll costs imposed by the new rule.
- Identify organizational changes that will be required when employees are reclassified as nonexempt, such as stricter regulation of after-hours or remote work (which can create unexpected overtime obligations if nonexempt employees work after hours without authorization), and train newly nonexempt employees on accurate timekeeping.
- Consider whether to conduct a comprehensive wage-and-hour audit to identify and correct current FLSA misclassification issues.
- Consider whether to provide comments to the Department of Labor as part of the notice-and-comment process.

Employers should also consider their state wage-and-hour law obligations, which may be more stringent than the FLSA

requirements (for example, the compensation threshold for overtime exemption in California is currently $64,480).

For assistance in planning your organization's response to DOL's proposed overtime rule, or to provide comments to the rule, please contact one of the authors of this post or the Hogan Lovells lawyer with whom you regularly work.

Authored by George Ingham, Amy Folsom Kett, and Muhammad Burney.

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