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Pacific Rim Advisory Council
January 2021 e-Bulletin

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PRAC - Let's Talk!

upcoming virtual meetings
January 25/26, 2021 | February 22/23, 2021

67th International Conference - New Delhi Hosted by KOCHHAR & Co. TBA
68th International Conference - New Zealand Hosted by Simpson Grierson TBA
69th International Conference - Mexico City Hosted by Santamarina y Steta TBA
70th International Conference - Paris Hosted by GIDE TBA

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Coronavirus
COVID-19

The coronavirus (COVID-19) health pandemic continues to impact countries around the globe, presenting a large scale public health crisis.

Visit us online for the latest up-to-date, country specific information on potentially relevant legal questions and issues relating to the coronavirus pandemic.

http://www.prac.org/member_publications.php

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ARIAS ANNOUNCES THREE PARTNER APPOINTMENTS FOR THE REGION

04 January, 2021: At **ARIAS**, we focus on promoting our human talent and even in moments of crisis we make growth and quality our priority to offer the best to our clients.

2020 has been a year full of challenges, but we continue to move forward by working hand in hand with our clients with a driven team of attorneys. We are very proud to announce that as of 2021, **Mario Lozano, Fernando Montano and Diego Gallegos,** have been promoted to partners.

Mario Lozano has been part of the firm's corporate department as associate since 2010, he began his professional experience at the banking sector, working at Citibank El Salvador, S.A. for over 7 years in corporate, registration, regulatory and administrative matters.

Taking advantage of his banking experience, since joining Arias, he has provided advice to the most important financial institutions operating in El Salvador, including complex sales, mergers, and acquisitions.

He has also participated in corporate restructuring of a high degree of complexity for several multinational companies in regulated and non-regulated sectors, and in the implementation of economic and corporate structures of prestigious business groups. He has been involved in the pensions sector through sales processes as well as in the insurance sector through the incorporation of broker and reinsurance companies, advising in the process of obtaining regulatory authorizations and at the beginning of their operations.

Mario has been active in mergers and acquisitions, analyzing regulatory aspects of competition concerning the analysis and approval of economic concentrations, due diligence and closing of transactions within different sectors such as: telecommunications, banking, pensions, real estate, and franchise, among others. He has advised on matters of international financing and syndicated loans, issuance of guarantees by means of securitizations, sale of credit portfolios, dissolution, and liquidation of companies, advise in financial derivatives, among other issues.

Mario is recognized by The Legal 500 as a "Rising Star" and his clients seek for his assistance in their most important issues.

Fernando Montano joined the firm in 2006 and has participated in different judicial and arbitral processes in which the firm has successfully represented the interests of important national and international companies, as well as in administrative procedures before different regulatory entities in the field of competition law, energy, and other regulated sectors, such as food and beverages, tobacco, pharmaceutical industry, among others.

He also provides corporate advice to national and international companies on commercial, labor, money laundering prevention, anti-corruption, data privacy, among other aspects of regulatory compliance.

Fernando is a Lawyer and Notary Public of the Republic of El Salvador and during 2010 he completed professional internship in litigation and intellectual property in a prestigious law firm based in Madrid, Spain.

Fernando is recognized by the most prestigious international directories, he is ranked in Who's Who Legal for his experience in Administrative Law and Litigation, in Chambers Global and Chambers Latin America as "Associate to Watch" in the practice of Litigation, He has also been named for two consecutive years as "Future Star" in Litigation by Benchmark Litigation, in addition, Fernando won the CLIENT CHOICE AWARD in El Salvador, recognition given mostly to firm partners, and being an Associate, clients voted for him for his efficiency, knowledge and focus on client service, also The Legal 500 categorize him as a "Rising Star" for several years.

In addition to being highly awarded and rated internationally by the most prestigious ranking firms in the legal world, Fernando is recognized as one of the "Leading Lights of Latin America" by Latin Lawyer and Vance Center for his *Pro-Bono* work.

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ARIAS ANNOUNCES THREE PARTNER APPOINTMENTS FOR THE REGION

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Banking and finance lawyer, **Diego Gallegos,** was promoted to partner in our Costa Rica offices on January 4th.

Diego rejoined Arias in 2017 after pursuing his LL.M degree at Columbia University and holding positions in the Washington D.C. offices of Chadbourne & Parke LLP (now Norton Rose Fulbright) and the International Finance Corporation (IFC). There, Diego specialized in project finance transactions, infrastructure projects and advisory work on political risk mitigation and FDI attraction.

Currently, Diego leads major international transactions with prominent clients such as IDB Invest, FMO, JP Morgan, Goldman Sachs, Bank of America, USDFC, Proparco, First Citizens Bank and HSBC.

"I feel very proud and grateful to Arias for allowing me to achieve this career milestone. Arias is the firm where I have developed professionally for more than ten years and returning to the firm after my experience in the United States was one of the best decisions I have made, since the firm has been improving its performance and positioning in the market. We have been fortunate to work with the main financial institutions worldwide, in large scale projects for Costa Rica and the region. I hope as a partner to continue contributing to this great track record and to provide our clients with the first-class service they know they can rely on", said Gallegos.

This decision also reinforces our commitment to increase our expertise in the practice areas with greater opportunities for growth and diversification. "Diego is a key figure within the firm due to his relationship skills, communication style, his vision, business projection and broad experience both at the academic and work levels. This recognition strengthens the commitment to our clients to have the highest quality technical and legal knowledge in the region, prominent features in Diego during all these years" added Vicente Lines, partner in Arias Costa Rica.

We warmly welcome our partners and are proud and honored that Mario, Fernando and Diego chose to make Arias their professional home. With their experience and professionalism, we strengthen the offer of legal services to our clients in key areas of practice, and materialize our organizational vision, bringing to the region great young talent with recognized experience.

We thank our clients for their trust in their relevant and daily legal matters, thanks to the work they entrust in our firm we are building up top lawyers, since experience makes great lawyers, along with knowledge, constant evolution, and learning.

For additional information visit us at www.ariaslaw.com

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Visit us online for full coverage
http://www.prac.org/member_publications.php

CITY-YUWA WELCOMES NEW PARTNER AND SEVEN ATTORNEYS; ANNOUNCES OF COUNSEL AND PARTNER PROMOTIONS

T**OKYO, 01 January 2021:** City-Yuwa is pleased to announce the following:

Seven attorneys newly admitted**, Mimoe Furihata, Ryo Ida, Yuta Kakura, Ken Kishimoto, Ryota Morimura, Misako Oishi** and **Takako Okamura** have joined the Firm.

Taketomo Morita, Koji Mizutani, Yoshitaka Hagiwara, Shuichi Nagaoka and Yasuhiro Okuhara have been promoted to Partners of the Firm.

Yusuke Shimata has been promoted to counsel of the Firm.

Reiko Yoshida has joined the Firm as a Partner.

For additional information visit us at www.city-yuwa.com

DAVIS WRIGHT TREMAINE ANNOUNCES 2021 CLASS OF NEW PARTNERS

SEATTLE - 04 January 2021: Davis Wright Tremaine LLP has promoted 15 lawyers across eight practice areas to partner, effective Jan. 1, 2021. Ten of those partners are women or otherwise diverse.

"We support entrepreneurial lawyers building strong practices," said Jeff Gray, firmwide managing partner at Davis Wright Tremaine. "This year's class has shown exceptional client service skills, legal excellence, and dedication to the firm's culture that's earned them high regard from clients and colleagues alike. I'm delighted to welcome them to the partnership and proud of the diversity they represent."

The new partners are:

Elaine Albrich, Real Property (Portland)
Darby Allen, Healthcare (Seattle)
Geoffrey Brounell, Litigation (New York)
Jeremy Chase, Media (New York)
Kaley Fendall, Litigation (Portland)
Kate Tylee Herz, Employment (Bellevue)
Joseph Hoag, Employment (Seattle)
David Maas, Litigation (Seattle)
Rachel Marmor, Privacy & Security (New York)
Meghan Moran, Business & Tax (Portland)
Dayna Nicholson, Healthcare (Los Angeles)
Diana Palacios, Media (Los Angeles)
Lauren Rainwater, Litigation (Seattle)
Brant Rockney, Financial Services (Seattle)
Giancarlo Urey, Employment (Los Angeles)

About Davis Wright Tremaine:
Davis Wright Tremaine LLP is a national, full-service law firm with over 580 attorneys.

For more information, visit www.dwt.com

HAN KUN STRENGTHENS ITS M&A AND PRIVATE EQUITY PRACTICES

BEIJING, 05 January 2021: Han Kun Law Offices is pleased to announce that Mr. Luo Shaolin has recently joined the firm, further strengthening Han Kun's M&A and private equity practices. He will mainly be based in the firm's Beijing office.

Prior to joining Han Kun, Mr. Luo Shaolin was a partner of Loyal Valley Capital. Before that, he served as an assistant to the chairman and as the general counsel of YF Capital, and as a partner of Simpson Thacher & Bartlett LLP, based in the firm's Beijing and Hong Kong offices. Mr. Luo has over 20 years of experience in mergers and acquisitions, foreign direct investment, private equity, and securities transactions.

Mr. Luo has represented Chinese, U.S., and European corporations in stock and asset purchase transactions, venture capital and private equity transactions, and in the establishment of Sino-foreign joint ventures. Mr. Luo's core practice includes the representation of large Chinese State-owned companies and private companies in connection with their overseas business development transactions and strategic co-operations with foreign investors as well as the representation of U.S. and European multinational companies and private equity firms in connection with their investments in China.

Mr. Luo has been recognized as one of the China Top 10 M&A Lawyers by Asian Legal Business (International Law Firms) and Dealmaker of the Year by China Law and Practice in 2017.

We believe that the addition of Mr. Luo Shaolin will further boost the firm's overall practice capabilities and competitiveness, laying a solid foundation for the firm's steady development.

For additional information visit www.hankunlaw.com

NAUTADUTILH BOOSTS PUBLIC & REGULATORY PRACTICE

BRUSSELS, 07 January 2021: NautaDutilh has appointed Maxime Vanderstraeten as counsel, effective 4 January 2021, thereby strengthening its Public & Regulatory practice in Brussels.

Maxime has particular expertise in the area of public contracts involving European institutions and agencies, mainly in the context of litigation before the EU courts in Luxembourg.

He also regularly argues cases before Belgium's highest administrative court, the Council of State, as well as the Constitutional Court and the lower courts and tribunals. In addition, he has experience in gambling litigation.

Maxime is not a new face at NautaDutilh as he was a member of the firm's Public & Regulatory practice from 2011 to 2016, first as a trainee and then as an associate. The practice has grown substantially in the past two years with the arrival of Jens Mosselmans and other hires.

"*I am delighted that Maxime has decided to join NautaDutilh. He is known to the market as a talented, down-to-earth lawyer, who has an exceptional eye for what clients need. His arrival lays another cornerstone in the development of our practice, which has grown steadily over the past two years thanks to talented colleagues of whom I am truly proud. Maxime's arrival also means that our clients have a perfectly bilingual team at their disposal, able to answer the most challenging questions in a wide variety of fields relating to all three Belgian regions*," says Jens Mosselmans, head of the Public & Regulatory practice at NautaDutilh Brussels.

For additional information visit us at www.nautadutilh.com

SKRINE ADDS TWO NEW PARTNERS TO BANKING & FINANCE PRACTICE GROUPS

KUALA LUMPUR, 01 December 2020: We are delighted to welcome today our two new Partners, **Sharifah Shafika Alsagoff** and **Hafidah Aman Hashim**, into our Banking and Finance practice group.

Shafika will lead the new Islamic Investments and Capital Markets practice group. Shafika and Hafidah bring with them vast experience particularly in the Islamic Finance and Islamic Capital Markets areas and will allow Skrine to provide even greater support to our clients in their fundraising activities.

SHARIFAH SHAFIKA ALSAGOFF has more than 25 years of experience in Islamic finance and capital markets.

Shafika's practice is diverse, including both retail, and corporate Islamic finance, project bonds, restructurings, real estate and regulatory issues.

Her clients include sovereigns and other government-related entities, international financial institutions and corporate service providers. She also advises clients internationally on various capital markets, Islamic investments, waqf and crowd funding structures

E: shafika@srine.com

HAFIDAH AMAN HASHIM's key practice areas include Islamic finance and capital markets.

Hafidah is familiar with and able to advise clients on various Shariah financing concepts such as Ijarah, Istisna, Murabahah, Musyarakah and Mudaragah.

Hafidah's experitse has been called upon by various financial institutions in relation to their corporate and retail Islamic and conventional financing documentation, including preparing / updating standard financing documents.

E: hafidah@skrine.com

For additional information visit us at www.skrine.com

PRAC EVENTS

UPCOMING EVENTS

PACIFIC RIM ADVISORY COUNCIL

Like millions around the globe, the COVID-19 pandemic has impacted our members and how we work.
We pivot. We adapt.
We continue to meet and talk virtually face to face
Across the miles, oceans and regions
In varying places and hours of the day and night.
It isn't the same . We can all admit to that.

What remains the same is our commitment to continue forming new bonds
and strengthening our long-standing ties with our friends and colleagues around the world.

Together, we will see it through.

PRAC-Let's Talk!

Join us in 2021 for our monthly live one-hour virtual meetings
January 25/26
February 22/23

PRAC - Let's Talk! events are open to PRAC Member Firms only
Registration required
Visit www.prac.org for details

Stay Safe. Stay Well.

ARIAS

ADVISES INTERNATIONAL FINANCE CORPORATION IN ITS SUPPORT OF BANCO AGROMERCANTILE FOR FINANCING SMES IN GUATEMALA

GUATEMALA CITY - November 2020: After the economic instability for small and medium-sized companies due to the contingency generated by the COVID-19 pandemic, and several months of negotiation, the granting of a loan of US $ 20 million was achieved by International Finance Corporation (IFC), to the Agromercantil bank, to be used exclusively in the development area.

Arias represented IFC, in what was the first transaction of this type, since it is the first granting of funds in Guatemala, as part of a global economic rescue plan, to mitigate the impact of the pandemic on the global economy.

The representation of this initiative, which seeks to promote the sustainable development of the economy for the well-being of all Guatemalans, was carried out by the banking and finance team of Arias Guatemala, with Jorge Luis Arenales founding partner of the country's office, along with Arias associate, Manuel Montenegro.

Foror additional information visit www.ariaslaw.com

BAKER BOTTS

REPRESENTS QURATE RETAIL IN ITS INVESTMENT IN COMSCORE

DALLAS - 08 January 2021:

Deal Description: On January 7, 2021, Comscore, Inc. ("Comscore" or the "Company"), a third-party source for planning, transacting and evaluating media across platforms, announced investments from Qurate Retail, Inc. ("Qurate"), Charter Communications, Inc. (together with its affiliates, "Charter"), and an affiliate of Cerberus Capital Management, L.P. ("Cerberus").

Specifically, Qurate, Charter, and Cerberus each will make a cash investment in exchange for shares of convertible preferred stock. Proceeds from the Investment will be used to retire the Company's existing debt and significantly improve the Company's financial flexibility and liquidity position.

Baker Botts represented Qurate in the transaction.

Value: $204.0 million

For additional information visit www.bakerbotts.com

BENNETT JONES

ACTS FOR TUNDRA IN $99.1 MILLION ACQUISITION BY WAJAX

CALGARY, 31 December 2021: Bennett Jones is acting for Tundra Process Solutions in its $99.1-million acquisition by Wajax Corporation. The transaction is expected to close early in the first quarter of 2021.

Calgary-based Tundra provides maintenance and technical services to customers in the western Canadian midstream oil and gas, oil sands, petrochemical, mining, forestry and municipal sectors. Founded in 1858, Wajax is one of Canada's longest-standing and most diversified industrial products and services providers.

Transaction highlights: Consistent with Wajax's strategy, the acquisition of Tundra is expected to provide meaningful growth in the Corporation's Engineered Repair Services (ERS) and industrial parts categories. For the twelve months ended November 30, 2020, Tundra had revenues of approximately $147.8 million.

Tundra's operations are complementary to Wajax's existing ERS and industrial parts businesses, adding extensively to its service offering and product portfolio, and further enhancing the "One Wajax" value proposition as macro tailwinds support the potential for a return to pre-COVID-19 activity levels.

Key Contacts: Bryan Haynes, Partner; Steven Bodi, Associate; Zach Johnson, Associate and Beth Riley, Partner.

For additional information visit www.bennettjones.com

CAREY

ASSISTS MULTINATIONAL FOOD GROUP NESTLE IN LOCAL ACQUISITION

SANTIAGO, 04 January 2020: Chilean law firm Carey has helped food multinational Nestlé acquire local premium chocolate company La Fête Chocolat for an undisclosed value.

Vicuña Abogados advised La Fête Chocolat and Ugarte & Correa acted as antitrust counsel. The deal was signed on 23 December.

With the investment, Nestlé strengthens its presence in the luxury chocolate market. With 400 employees, La Fête Chocolat, in business for nearly 15 years has 48 stores throughout Chile and will retain its current management.

Swiss company Nestlé is the world's largest food and beverage company. It is based in 18 locations across Latin America.

Counsel to Nestlé - Carey Partner Cristián Figueroa and associates Angélica De la Carrera, Ignacio Valenzuela and Vicente Güell.

For additional information visit www.carey.cl

GIDE

COUNSEL TO YAREAL ON SALE OF PART OF YAREAL'S FLAGSHIP OFFICE INVESTMENT—LIXA PROJECT

WARSAW - 05 January 2021: Gide has advised Yareal on the sale of part of Yareal's flagship office investment - LIXA project. Congratulations to Yareal and Commerz Real acting on behalf of South-Korean investor Hana Financial Investment on closing this spectacular transaction, Gide team is proud to be part of this project!

The transaction concerned two buildings A and B covering over 28,000 sq. m. of office area including the new headquarters of BNP Paribas Bank Polska of ca. 22,000 sq.m.

Many thanks to Yareal for continuous trust and the opportunity to work together on this transaction, from the very begging including in the scope of acquisition of the plot, leasing the premises to BNP Paribas Bank Polska (one of the biggest office lease on the market) and selling the buildings in the forward sale transaction.

Congratulations and many thanks to Yareal team Eric Dapoigny, Christophe Calmel, Jacek Zengteler, Mikołaj Płonka, France Koperska, Anna Szelc, Marta Zieniewska, as well as to the CBRE team Przemek Lachmaniuk MRICS and Michal Berski MRICS involved in the deal.

Gide's team led by counsel Blazej Czwarnok included associates Rafał Osetek and Agnieszka Dąbrowska.

For additional information visit www.gide.com

DENTONS RODYK

SUCCESSFULLY REPRESENTS INDONESIAN SHIPBUILDER IN ITS INTERNATIONAL ARBITRATION CLAIM ASGAINST A SINGAPORE BUYER CONCERNING A BUSINESS EMAIL IMPERSONATION SCAM

SINGAPORE - 19 October, 2020: Business email impersonation scams are on the rise. Scammers utilise highly sophisticated means to hack or spoof business email accounts, or create new accounts that closely mimic genuine ones. The scammers lurk within the email database of their unsuspecting victims to learn about business practices and transactions, and the personal email traits of employees. The scammers then use these fraudulent spoof accounts to issue fraudulent payment instructions to victims, for funds to be transferred to a new bank account controlled by the scammers.

In the legal context, would payment based on fraudulent instructions discharge a buyer's payment obligation? Much would depend on the facts, but in an ad hoc international arbitration, Dentons Rodyk successfully represented a prominent Indonesian shipbuilder (Client) in persuading the Tribunal that the answer ought to be a firm 'no'.

Our Client had commenced arbitration for an unpaid milestone payment of about S$900,000 for new vessels under a shipbuilding contract. The buyer (Buyer) claimed it had already paid based on (fraudulent) payment instructions that "emanated" from our Client. The case involved highly technical features which, in the Tribunal's words, allowed the unknown fraudster(s) to be "well aware of the parties' practices and exchanges".

Nevertheless, the Tribunal ultimately rejected, amongst other things, the Buyer's pleas that the fraudulent payment instructions were issued by email accounts allegedly under our Client's control, and that our Client had owed the Buyer a duty of care to protect it from third party fraud, finding in our Client's favour.

The case is a timely reminder for companies and their employees to remain vigilant in their online business dealings, particularly where payment instructions are concerned.

The Dentons Rodyk team was led by Senior Partner Rodney Keong, and assisted by Partner Terence Wah and Associate Chong We Feng.

For additional information visit www.dentons.rodyk.com

HAN KUN

ADVISES SINOVAC LS ON ITS US$500 MILLION FINANCING FOR COVID-19 VACCINE PROJECT

BEIJING - 07 December 2020: Sinovac Biotech Ltd. (NASDAQ: SVA), a leading provider of biopharmaceutical products in China, recently announced that Sinovac Life Sciences Co., Ltd. ("Sinovac LS"), a subsidiary of Sinovac Biotech Ltd., has secured approximately US$500 million in funding for further development, capacity expansion and manufacturing of CoronaVac, its COVID-19 vaccine candidate, as well as to conduct other development and operational activities.

Han Kun, acting as PRC legal counsel to Sinovac LS, provided legal services throughout the transaction, including providing legal advice on the transaction structure, drafting and negotiating transaction documents, and assisting Sinovac LS in closing the transaction.

For additional information visit www.hankunlaw.com

HOGAN LOVELLS

ADVISES ROKU, INC. ON ACQUISITION OF QUIBI'S GLOBAL CONTENT DISTRIBUTION RIGHTS

WASHINGTON, D.C. and DENVER, 08 January 2021: Global law firm Hogan Lovells is advising Roku, Inc. on its acquisition of exclusive global distribution rights to Quibi's award-winning shows, a transaction that will make the content available for free on an ad-supported basis in 2021 to all Roku users.

The Quibi content includes Emmy award-winning scripted series, alternative and reality programming and documentaries featuring stars such as Idris Elba, Kevin Hart, Liam Hemsworth, Anna Kendrick, Nicole Richie, Chrissy Teigen, and Lena Waithe. The Roku Channel is the home for free and premium news and entertainment and in Q4 2020 reached U.S. households with an estimated 61.8 million people.

The transaction will deliver a distinctive array of premium content geared towards the highly coveted 18-35 age demographic, further building out The Roku Channel's diverse lineup of more than 40,000 free movies and programs and 150 free live linear television channels. Following an internal restructuring by Quibi, Roku acquired Quibi Holdings, LLC, the company that holds all of Quibi's content distribution rights. Financial terms of the transaction were not disclosed.

For additional information visit www.hoganlovells.com

KOCHHAR & CO

ADVISED INDIA TECH GIANT TECH MAHINDRA ON ITS ACQUISITION OF ASSETS OF TRANSYS GROUP

NEW DELHI - Nov 2020 : Kochhar & Co. advised Indian technology giant, Tech Mahindra on its Assets Purchase of TransSys Group of Cos. with business presence in Asia, the Middle East and Africa. The transaction was structured as an 'asset purchase' and involved the acquisition of substantial assets of TransSys on an as is where is basis by Tech Mahindra.

This was a multi-jurisdictional deal involving India, UAE, Kenya and Malaysia and therefore the transaction had to be structured to comply with the local law requirements in the said jurisdictions.

The deal involved comprehensive advice on contractual obligations; employment and HR issues including compensation and benefits, liability and indemnification. It also involved extensive liaising with customers to ensure a smooth transition and related issues.

The Kochhar team comprised Managing Partner Rohit Kochhar, Dubai Resident Partner Anjuli Sivaramakrishnan, Partner Anshuman Sahijpal, Principal Associate Arshiya Mohan, Associates Shweta Varier and Prarit Sharma.

Lee Hishammuddin Allen & Gledhill, Malaysia and Wamae & Allen Advocates, Kenya advised Tech Mahindra in the said jurisdictions.

For additional information visit www.kochhar.com

MULLA & MULLA & CRAIGIE BLUNT & CAROE

ADVISES LUBRIZOL MANUFACTURING & SUPPLY AGREEMENTS OF CPVC RESINS IN INDIA INNOW FILMS FOR

MUMBAI – 01 December, 2020: Mulla & Mulla and Craigie Blunt & Caroe represented Lubrizol for their entering into definitive agreements with Grasim Industries Ltd. to manufacture and supply CPVC resins in India. We also advised them on all Indian regulatory issues that were relevant for this deal. The said manufacturing plant is the state of the art CPVC plant at Grasim site in Vilayat at Gujarat and will be the single largest site capacity for CPCV resins production globally. Upon commissioning it will manufacture 1,00,000 metric tonnes of CPVC annually.

The client's site is set up at the Grasim unit since Grasim would be supplying the feedstock of viscose staple fibre. This collaboration is in support of the Government of India's Make in India initiative.

The deal was led by Shardul Thacker, Partner.

NAUTADUTILH

ASSISTS DUTCH STATE ON EXTENDED EUR 12 BILLION COVID-19 STATE AID REINUSRANCE SCHEME FOR TRADE CREDIT INSURANCE

AMSTERDAM, 06 January, 2021: After the COVID-19 outbreak, the Dutch government implemented a EUR 12 billion state aid reinsurance scheme to stabilize the trade credit insurance market during 2020. In December 2020, the Dutch State has extended its support by setting up a reinsurance scheme for another six months. Trade credit insurance is an essential part of the trade supply chain by enabling companies to protect themselves from the risk of non-payment by their clients. Given the economic impact of the COVID-19 outbreak, the risk of insurers not being willing to issue this insurance became significantly higher. The Dutch scheme ensures that trade credit insurance continues to be available, avoiding the need for buyers of goods or services to pay in advance and limiting disruptions in the trade supply chain.

NautaDutilh is proud to have assisted the Dutch State in this state aid measure aimed at helping the Dutch economy and Dutch companies during these very difficult times. NautaDutilh assisted the State in the State Aid Notification and approval procedure with the European Commission. The NautaDutilh team furthermore led the negotiations with the participating credit insurers together with the State and drafted all extension documentation.

The team assisting the Dutch State on the State Aid Notification and obtaining approval from the European Commission was led by Mauricette Schaufeli and included Paul Deza de Massiac and Felix Seuntjens.

The team leading the negotiations on behalf of the Dutch State with the credit insurers and drafting the scheme reinsurance documentation was led by Jasha Sprecher and included Edger Kleijer and Janneke Reijnders.

For additional information visit www.nautadutilh.com

PRAC EVENTS

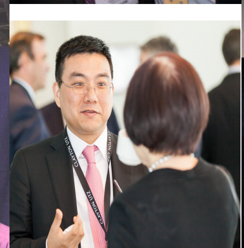
PRAC @ SAO PAULO

PRAC @ Taipei 2014

PRAC @ Vancouver

PRAC @ Brisbane

PRAC @ INTA



PRAC @ PDAC

PRAC @ IPBA

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Amendments to Communication “A” 7030 of the Central Bank of Argentina

On December 30, 2020, by means of Communiqué “A” 7193 (the “Communiqué”), the Central Bank of the Republic of Argentina (hereinafter, the “Central Bank”), established additional considerations for argentine importers to access the Foreign Exchange Market.

In first place, the term of Communiqué “A” 7030 and its supplementary provisions were extended until March 31, 2021.

In addition, the requirement of the Central Bank's authorization for the payment of imports of goods was also extended until March 31, 2020, and the scope of the exceptions thereof were modified, as detailed below:

1. Payments within the established quota: In order to access the official Foreign Exchange Market, an affidavit must be filed before the Central Bank stating that the total amount of payments for imports of goods made through the Foreign Exchange Market as of January 1, 2020, does not exceed in more than the equivalent of US$ 1,000,000 the amount that arises from computing: (i) the goods registered on behalf of the relevant entity in the SEPAIMPO system; (ii) the goods officially registered between January 1, 2020 and the day prior to the access to the Foreign Exchange Market; (iii) plus the sum of the payments made within the framework of sections 2.2. to 2.6. of the Communiqué that were not associated with imports included in sections (i) and (ii) above; and (iv) minus the amount pending to be regularized for payments of imports with pending customs registration between September 1, 2019 and December 31, 2019.

2. Advance payments of imports for goods or supplies related to the provision of medicines or linked to medical and/or health care: the maximum amount allowed has been increased from US$ 2,000,000 to US$ 3,000,000. Furthermore, it has been established that the amount must arise from the calculation of sections (i) to (iv) abovementioned.

3. Increase in the amount to access the Foreign Exchange Market: Although the amount by which importers access the Foreign Exchange Market had already been increased up to 50% of the amounts liquidated as of October 2, 2020 for advances or pre-financing of exports from a foreign jurisdiction with a minimum term of 180 days, it is now permitted that, in the case of operations liquidated as of January 4, 2021, the remaining 50% may be used to access the Foreign Exchange Market, to the extent that the additional part corresponds to advance payments of capital goods.

4. Elimination of the requirement established in point 10.3.2.5. of the Foreign Exchange Regime regulations: The requirement linked to the limit of up to US$ 2,000,000 per month for the payment of debts outstanding as of August 31, 2019 for imports of goods with related counterparties where no due date has been agreed or which have an earlier due date, was eliminated.

Finally, the Communiqué has established that the prior Central Bank authorization will be required for the purchase of foreign currency when an entity is included in the apocryphal invoices issuers of the Argentine Revenue Office (AFIP), with the exception of operations of cancellation of financing in foreign currency granted by local financial entities, including payments for purchases in foreign currency made by means of credit or purchase cards.

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

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COVID-19 | Life Sciences - Telemedicine

PRICING OF COVID-19 VACCINES

The CMED Resolution No. 6/2020, published on December 23, 2020, established procedures for the analysis of price information documents regarding requests for pricing of COVID-19 vaccines.

The analysis and approval of the price will be the responsibility of the Technical Executive Committee of the Brazilian Drug Market Regulation Chamber (CMED), within 90 days from the receipt of all necessary documents.

It is noteworthy that the vaccine prices with temporary emergency use authorization will not be analyzed by CMED due to its experimental nature.

Finally, it was established that the vaccines designated to the National Operationalization Plan of Vaccination against COVID-19, of the Ministry of Health, or for sale to Federal agencies, or any of the sub-national entities, may be commercialized for the price presented by the pharmaceutical company that files the Informative Price Document, until a final decision of CMED is made.

From our point of view, the regulation provides for immediate access to the vaccine and gives reasonable legal certainty as to the price practiced during emergency use and during the evaluation by CMED.

The Resolution is already in force.

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BLOG

Supreme Court of Canada: Silence Can Breach the Contractual Duty of Good Faith Honesty

January 05, 2021

Written by Scott Bower, Michael Theroux, Ranjan Agarwal, Russell Kruger and Patrick Schembri

Good faith requires a party to a contract whose actions or words have created a false impression in the mind of a counterparty to take positive steps to correct it, the Supreme Court of Canada recently held in *C.M. Callow Inc. v Zollinger*, 2020 SCC 45. If a party to a contract remains silent when it becomes aware it has caused a counterparty to misapprehend a matter directly connected to the performance of the contract or the exercise of a contractual right, that party may be liable for a breach of the duty of honest performance.

Building on *Bhasin*

In *Bhasin v Hrynew*, 2014 SCC 71, the Supreme Court of Canada recognized the organizing principle of good faith in contract law and a new duty "to act honestly in the performance of contractual obligations." The Court explained this duty "means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract." In *Callow*, the Court expanded on this duty and confirmed it also applies to the exercise of rights under a contract.

Background

In *Callow*, a company, Baycrest, and its designated property manager managed the joint and shared assets of ten condominium corporations. In 2012, Baycrest renewed a winter maintenance services agreement with C.M. Callow Inc. and entered into a new summer contract as well. The winter contract had a two-year term, though it allowed Baycrest to unilaterally terminate the contract on ten days' notice without cause.

During the first year of the winter contract, in March or April 2013, Baycrest decided it would terminate the contract early, but did not inform Callow. Subsequently, a representative of Baycrest had communications with Callow that created the false impression that the winter contract would not be terminated early and in fact would likely be renewed for a longer term. Callow exceeded its obligations under the summer contract by providing free work to Baycrest in an effort to encourage Baycrest to renew the winter contract. Baycrest was aware of Callow's false impression, but took no steps to correct it. In September 2013, when it was too late for Callow to secure alternative winter work, Baycrest gave notice to Callow that it was exercising its right to terminate under the contract.

The Lower Court Decisions

At trial, the Court held that Baycrest had breached the duty of honesty in contractual performance. The Court awarded damages, including a sum that represented the profit Callow would have received during the remaining term of the winter contract. The Ontario Court of Appeal reversed the trial decision. While acknowledging that Baycrest's conduct may have been less than honourable, the Court held it did not reach the "high level required to establish a breach of the duty of honest performance."

The Supreme Court of Canada Decision

A five-member majority allowed the appeal. The majority held that when a party to a contract is aware its conduct or representations have created a misapprehension in the counterparty's mind in relation to the performance of an obligation or the exercise of a right under a contract, the duty of honesty requires that party to correct it. The determination of whether the duty was breached in this case turned on two central issues: (a) whether Baycrest knowingly misled Callow; and (b) if so, whether that dishonesty was "directly linked" to the performance of an obligation, or the exercise of a right under the winter contract.

Knowingly Misleading

As for the first issue, the majority concluded that Baycrest had knowingly misled Callow. The majority reasoned that an outright lie, or a half-truth told in a knowingly misleading way, would breach the duty of honesty. On the other hand, a failure to disclose a material fact, without more, would not breach this duty. The majority explained:

> ... whether or not a party has "knowingly misled" its counterparty is a highly fact-specific determination, and can include lies, half-truths, omissions, and even silence, depending on the circumstances. I stress that this list is not closed; it merely exemplifies that dishonesty or misleading conduct is not confined to direct lies.

A party need not intend for the other party to rely on their dishonest conduct. The party's motives are not relevant to whether the duty of honesty is breached, unless such motives show dishonesty.

Applying these principles to the facts, the majority concluded that Baycrest knowingly misled Callow in the way in which it exercised the termination clause. Baycrest had engaged in a series of acts and active communications it knew had caused Callow to misapprehend the likelihood that the winter contract would be terminated early, and then intentionally failed to correct that misunderstanding prior to exercising the termination clause. While the majority upheld the trial judge's conclusion that the duty of honesty had been breached, it clarified the trial judge had erred in stating the duty required Baycrest to inform Callow of perceived performance issues, and to provide prompt notice of its intention to terminate. This went beyond what was needed to comply with the duty of honesty.

Matters Directly Linked to Performance

As for the second issue, the majority concluded that Baycrest's dishonesty was directly linked to the performance of the contract. Drawing on the civil law doctrine of abuse of rights, the majority stated that the requisite connection is established where "it can be said that the exercise of a right or the performance of an obligation under that contract has been dishonest." It is not enough for the dishonesty to occur during the performance of the contract alone. There must be a direct link to the performance of an obligation or the exercise of a right. The majority concluded that Baycrest's dishonesty led Callow to make the reasonable inference that Baycrest would not exercise the termination clause, and that this dishonesty was sufficiently connected to the actual exercise of the termination clause to establish the required link.

Damages for Breach of the Duty of Honesty

The majority confirmed that a breach of the duty of honesty generally creates expectation damages, which are intended to place the wronged party in the position the party would have been in had the contract been performed without dishonesty. How the contract was to be performed is to reflect the least onerous means of performing the contract without dishonesty. Here, that would have been for Baycrest to correct Callow's misapprehension that the contract would not be terminated early. Had Baycrest done that, Callow would have had a chance to secure a different contract for the second winter and that new contract would have likely generated similar profits to those under the old contract.

Conclusion

The Supreme Court of Canada's decision confirms that the duty of honesty applies to the performance of obligations and the exercise of rights under a contract. Where a party knows that its conduct or representations have led a counterparty to hold a false impression in connection with the contract, the duty of honesty requires that party to correct the misapprehension it created. This holds true whether the party intended to create the false impression or not. Whether a party has knowingly misled its counterparty is a highly fact-specific determination that can include lies, half-truths, omissions and even silence, depending on the circumstances. Highly fact-specific determinations that depend on the circumstances often give rise to litigation. Parties will want to reduce this risk through careful drafting and managing expectations in advance of exercising contractual rights that may have significant, adverse effects on a counterparty, such as early termination rights.

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Posted on: December 18, 2020

INSURANCE ACT APPRAISALS – A COURT'S GUIDE ON MECHANICS

By: Ola N. Stoklosa

The Ontario Superior Court of Justice recently examined the interaction of various provisions in the *Insurance Act,* R.S.O. 1990, c.1.8 (the "Act") for the purpose of determining multiple issues before it that arose in the context of a statutory appraisal under the Act and a series of lawsuits commenced by insureds against their insurer for tornado damage done to their homes. In *Campbell v. Desjardins,* 2020 ONSC 6630 the court provides guidance to insurance professionals, lawyers, and adjusters on the various processes involved in an appraisal. Given the similarity of legislation concerning appraisal or dispute resolution processes across Canada, *Campbell* offers guidance to the entire nation.

The Facts

In *Campbell,* three families (collectively, the "Insureds") each owned homes that were damaged by a tornado that hit the city of Ottawa in September 2018. As a result of the tornado, two of the homes were deemed total losses and the other sustained significant damage.

All three losses were covered and in order to determine the amount of the losses the Insurer used both internal and external construction and property restoration personnel. The Insureds however chose to use different parties to assess and rebuild or repair their homes. While significant funds had been advanced to the Insureds under their respective dwelling, contents, and additional living expense coverages, the amount required to rebuild or repair their homes (which processes remained underway), remained at issue. In order to resolve these cost issues, and despite the fact that final proofs of loss had not been provided, appraisals under the Act were triggered by either the Insurer or the Insured.

Concurrently with the appraisal process, the Insureds commenced suit against the insurer. It was in the context of those suits that procedural disputes that arose within the appraisal processes came to be addressed by the court.

The Ruling

While *Campbell* stands as recommended reading due to its extensive overview of the appraisal process, the court's rules was focussed on three issues:

1. A party's right to retain a representative of its choice;
2. An insured's right to rely upon actual costs incurred as opposed to estimates of repair costs; and
3. Whether legal proceedings should be stayed until appraisal process is concluded.

In respect of the first issue, the court found that there was no restriction on a party's right to retain the representative of its choosing. In doing so it relied on the lack of limitation in the Ontario legislation's language. It also considered other jurisdictions' limiting language (ex. BC, NS, PEI and NL) and the overarching role of a representative being to be an advocate for its client. The representative's role was to be distinguished from an umpire's which was to weigh the competing positions advanced by the representatives and make a determination. As such, only the umpire must be impartial and independent.

In respect of the third issue, the court gave considerable weight to the consumer protection objective of appraisal legislation. This objective was found to outweigh the legislative requirement that an insured deliver a sworn proof of loss "as soon as practicable". The court held that an insured is entitled to rely upon actual costs incurred, provided that the insured has acted diligently and in good faith throughout with full transparency to the insurer. So long as an insured did not act in a manner that impeded the insurer's ability to investigate, monitor, and assess the progress of the repair or rebuild the insured was not running afoul of the requirement to deliver a proof of loss, final or interim. In the instant case no such impeding had occurred and thus the Insureds were entitled to conclude their repairs prior to submitting a proof of loss.

Finally, the court followed a long line of jurisprudence that stood for the proposition that a stay of proceedings would not be granted when a legal action entailed claims other than a valuation of lost property. Since the pleadings, as in most cases, disclosed claims beyond the valuation of the lost property (ex. breach of contract and fiduciary duty, bad faith, etc.) the lawsuits were allowed to proceed concurrently with the appraisals.

Practical Considerations for Insurers, Adjusters and Property Claims Professionals

As referenced above, *Campbell* stands as recommended reading for its overview of the appraisal or dispute resolution process. Caution however must be exercised as there are nuanced differences in the legislation across multiple Canadian jurisdictions. Just one of these differences may be found in limitations on the parties' right to choose their representatives.

We consider the court's decision to allow an insured to rely on actual costs instead of estimates in its proof of loss as a valid signal to insurers that the need for certainty and security of its insureds outweighs the need for expediency in this type of process. In situations where an insured wishes to delay the delivery of a proof of loss until actual costs are incurred insurers are well within their rights and well advised to work closely with the insured in respect of assessing the work being done and the costs for that work. Again, requirements and timing of proof of loss delivery varies across jurisdictions but the consumer protection aspect of this legislation is universal.

If correctly and scrupulously followed, the appraisal or dispute resolution process remains a cost-effective and efficient tool to resolve disputes regarding the value of an insured's loss or damage due to an insured risk.

Should you have any questions about this article, contact Insurance Lawyer, Ola N. Stoklosa here.

December, 2020

NEW SANITARY MEASURES TAKEN BY CHILEAN GOVERNMENT FOR TRAVELERS THAT ENTER FROM ABROAD

Given the detection of the first case in Chile of the new Covid-19 variant, on December 30th, 2020 the Exempt Resolution No.1,147 of the Ministry of Health was published in the Official Gazette, establishing the following sanitary measures from December 31st, 2020:

1 Any individual who enters national territory, regardless of the place of origin, must complete a mandatory 10-day quarantine upon his/her arrival to Chile or until he/she leaves the country, if the stay is shorter than such term.
Those travelers who have as final destination a region different than the one of entry into Chile will be able to continue their trip, during the first 24 hours after entering the country.

2 The measure of quarantine indicated in number 1 above can be ended earlier in case of a negative PCR test for Covid-19, that has been taken after 144 hours (6 days) from their arrival to Chile. For this purpose, the person may leave only once the place of quarantine, exclusively to take such test. The non-applicability of this exemption continues for those who enter the country after being in the United Kingdom during the prior 14 days.

3 Notwithstanding the latter, individuals could be exempted of the quarantine measure indicated in number 1 above, among others: (i) those who enter national territory due to the freight of load from and into Chile; (ii) those who enter the country with the sole purpose of continuing in transit to a foreign country; and (iii) those who hold a diplomatic or official visa issued by the Ministry of Foreign Affairs of Chile. Along with the last exemptions, Chileans and foreigners regularly residing in the country, who are crew of vessels or aircrafts that enter national land, may end their quarantine at any moment in case of a negative PCR test for Covid-19 that has been taken in Chile, in a moment after their last entry to the country.

Additionally, on December 29th, 2020 Exempt Resolution No.1,117 of the Ministry of Transportation and Telecommunications was published in the Official Gazette, which suspended all direct commercial passengers' flights between the United Kingdom and Chile, in force from the 00.00 hours of December 22nd, 2020 and for a term of 2 weeks.

If you have any questions regarding the matters discussed in this news alert, please contact the following attorneys or call your regular Carey contact.

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Analysis of China's Foreign Investment Security Review Measures

Author: Han Kun Law Offices

On December 19, 2020, the Ministry of Commerce (the "**MOFCOM**") and the National Development and Reform Commission (the "**NDRC**") jointly promulgated the *Measures for Security Review of Foreign Investment* (the "**FISR Measures**"), which will take effect on January 18, 2021.

The FISR Measures should not come as a surprise, as they form part of the broader framework of the Foreign Investment Law that came into force on January 1, 2020. The FISR Measures, coupled with the annually updated *Special Administrative Measures (Negative List) for the Access of Foreign Investment* (the "**Foreign Investment Negative List**"), the recently promulgated revised Export Control Law and the announcement of the Unreliable Entities List, provide a framework for foreign investment and trade administration that on paper aligns itself with international standards (e.g. the Committee on Foreign Investment in the United States (CFIUS), U.S. export controls, and the U.S. entity list and SDN list).

What has concerned market participants is the scope of the FISR Measures and their potentially broad application through vague provisions, though this is not uncommon with foreign investment review regimes (e.g. the lack of defined parameters and constantly evolving contours of "national security" in the context of CFIUS). We are hopeful that further guidance will soon be issued to clarify these vague provisions, and in fact a Q&A issued by the NDRC on December 19, 2020 strongly suggests that further guidance is forthcoming. In this note, we introduce the background and context of the FISR Measures, summarize the key takeaways of the FISR Measures, compare the FISR Measures with the U.S. Foreign Investment Risk Review Modernization Act of 2018 and its implementation regulations ("**FIRRMA**") as well as related U.S. foreign investment review laws and executive actions, and provide our preliminary analysis on the potential impact of the FISR Measures. The key points of the FISR Measures and comparable provisions in FIRRMA are set forth in <u>Exhibit I</u>.

Background and context

Foreign investment review regimes are nothing new in China, and have co-existed with robust foreign direct investment and venture capital and private equity in Chinese targets, though in practice few reviews have been publicized. Relevant rules include the *Provisions on the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* (the "**M&A Security Provisions**") and supporting regulations and the *Measures for Trial Implementation of National Security Review of Foreign*

Investment in the Pilot Free Trade Zones (the "**FTZ Security Measures**"). Accordingly, the FISR Measures may be viewed as an update of China's foreign investment review regime, akin to how FIRRMA was an update to CFIUS. Similarly, China's new Export Control Law may be viewed as an update to the existing export control regime, just as the Export Control and Reform Act of 2018 was an update of U.S. export controls. Other Western jurisdictions have also recently updated their foreign investment review regimes, such as the European Union's Foreign Direct Investment Framework regulations and the White Paper on foreign subsidies, the Canadian Policy Statement on Foreign Investment Review and Covid-19 relating to the implementation of the Investment Canada Act, the proposed U.K. National Security and Investment Bill, the amendments to Australia's Foreign Acquisitions and Takeovers Act and Foreign Acquisitions and Takeovers Regulations, the amendments to the German Foreign Trade and Payment Ordinance, and the amendments to the German Foreign Trade and Payments Act, the French decree and ministerial order relating to foreign investment, and Italian Law Decree No. 23.

Accordingly, while the existence of an updated foreign investment review regime is not surprising, and in line with international trends, the elephant in the room is whether China will use the FISR Measures in a manner that in any way reciprocates the intent and application of Western foreign investment review regimes as they apply to Chinese outbound investment. The implementation of predecessor rules (i.e. the M&A Security Provisions and the FTZ Security Measures) suggest a measured approach.

Key takeaways of the FISR Measures

I Regulatory body

The FISR Measures establish a new Foreign Investment Security Review Working Mechanism to be led by NDRC and MOFCOM (the "**Working Mechanism**"), which will oversee implementation of the measures. Like CFIUS, the Working Mechanism is an inter-disciplinary body, though its internal members and composition is yet to be made public. As the Working Mechanism is a new body, we anticipate a transition period will be needed for the body to be established and become operational.

II Scope

The FISR Measures cover both investments and the establishment of subsidiaries. A filing obligation is required for matters relating to the military and where "actual control" is obtained over enterprises in industries designated as "important", a term that is currently undefined. The list of "important" industries is as follows: agricultural products, energy and resources, equipment manufacturing, infrastructure, transportation services, cultural products and services, information technology and online products and services, financial services, "critical" technologies (an undefined term) and other "important" fields. Actual control is deemed to occur in cases of (i) greater than 50% shareholding, (ii) less than 50% shareholding but where voting rights significantly influence the board of directors and shareholders resolutions, (iii) or other means whereby the foreign investor exercises significant influence over business decisions, personnel, finance, and the enterprise's technology. There is no further elaboration on "significant influence" or "other means".

"Important" is a key undefined term in the FISR Measures. However, "important" is similar to the term "sensitive" in the M&A Security Provisions and the FTZ Security Measures, a term which also remains undefined. However, what is "sensitive" and what is not has always been tied in practice to the Foreign Investment Negative List (items for which foreign investment is prohibited or restricted). We would welcome clarity on whether the term "important" will follow a similar approach. If it does, then multinationals can breathe a sigh of relief.

The FISR Measures contain catch-alls for "other means" and "significant influence on an enterprise", which are currently undefined. However, the M&A Security Provisions and the FTZ Security Measures may service as a reference, as they both clearly set forth the types of transactions that fall within their ambits—namely, contractual control, proxy holdings, trusts, reinvestments, and overseas structures. We see two methods of interpreting these terms in subsequent guidance, which is hopefully forthcoming. One method would be to follow the specific list of "control" items in the M&A Security Provisions and the FTZ Security Measures, which would follow traditional understandings of "control". Alternatively, the definition of "control" could be broadened to include veto rights over operational matters, board representation, and/or shareholdings of over 10%, which would conform to the definition in FIRRMA.

III Filing procedures

The FISR Measures allow for an advance consultation to ascertain whether the foreign investor is subject to a filing obligation. Assuming a filing obligation exists based on the advance consultation, there are three potential review periods, set forth below.

Step 1: Initial period of 15 business days from the date the submission is accepted to determine whether a review is necessary. If not, approval is granted.

Step 2: If a review is deemed necessary in Step 1, 30 business days to determine whether there are national security concerns. If not, approval is granted.

Step 3: If the review in Step 2 reveals national security concerns, 60 business days, which may be extended in "special circumstances". Decision may be approval, conditional approval, or denial. Conditional approval may involve follow-up compliance requirements.

IV Addition of financial institutions

The FISR Measures add "important financial services" to their scope, a deviation from the M&A Security Provisions and FTZ Security Measures. The item "important financial services" applies to both domestic and foreign financial institutions. In light of recent reforms permitting foreign investors to establish certain wholly-owned subsidiaries in China, there will need to be further guidance clarifying what types of financial services are "important" so as to invite a filing.

V Enforcement

The FISR Measures contain additional provisions on enforcement that give teeth to its provisions. For example, there is a whistleblower provision and consequences for non-filing, including the unwinding of unreported transactions and the imposition of conditions.

The FISR Measures do not set forth any factors for the Working Mechanism to consider when evaluating transaction filings. However, the M&A Security Provisions and the FTZ Security Measures may serve as a guide in this regard. Under those measures, factors include the "influence on national defense security, stable operation of the national economy, basic social order, national cultural security, public morals, national cybersecurity, and research and development capabilities for critical technologies." In addition, a consultation draft of the Foreign Investment Law set forth other factors to be considered, namely, the "influence on the proliferation of dual-use items and technology subject to import and export control, whether the foreign investment is controlled by a foreign government, and the country's long-term demand for energy, food, and other critical resources." These standards, while arguably also vague, at least suggest that the review will be narrowly tailored and not targeted at specific policy goals under the guise of "national security".

Comparison with FIRRMA

The FISR Measures contain many concepts that are similar to FIRRMA, but there are also crucial differences. We believe a comparative analysis is helpful given these similarities, and the reference to potential control of the purchase of securities, which mirrors recent U.S. actions. The timing of the FISR Measures is also noteworthy, as the date of release is just one day after U.S. President Donald Trump signed the Holding Foreign Companies Accountable Act (which will potentially impact U.S.-listed Chinese companies and was passed unanimously by the U.S. House and Senate), while the effective date is just two days prior to the inauguration of President-elect Joe Biden. We stress that these similarities (and differences) do not necessarily mean that the FISR Measures will be applied similarly to FIRRMA.

I Greenfield investments

The FISR Measures include in their scope "greenfield" investment, or the establishment of subsidiaries in China by non-Chinese entities. These are largely exempted by FIRRMA, which contains an "investment" requirement (i.e. direct or indirect investment), though we note that U.S. subsidiaries established by non-U.S. entities will still be subject to export controls for controlled items created by those U.S. subsidiaries. The inclusion of "greenfield" investment in the FISR Measures could create complications for multinationals and non-Chinese companies looking to expand into China, but this uncertainty can be greatly reduced if further guidance or market practice rely on the Foreign Investment Negative List as the barometer for filing obligations.

II Defined terms

As of now, FIRRMA contains more defined terms when compared with the FISR Measures, though the absence of a definition for "national security" in FIRRMA (and its predecessor) continues to present deal risk for Chinese investors who obtain "control" (as expanded by FIRRMA) and do not submit a voluntary filing.

One area to keep an eye on is the definition of "critical technology" in the FISR Measures, which may correlate to the definition of "critical technology" in FIRRMA, including newly designated "emerging and foundational technologies". Another area of focus is the role of data-rich companies, as is the case with the definition of "sensitive personal information" of over 1 million users.

III Voluntary or mandatory?

The FISR Measures state that if a transaction is subject to filing, the parties are "actively" required to file prior to the closing of the transaction. We interpret this to mean that the filing obligation is mandatory and not voluntary.

IV Securities purchases

In a not-so-subtle move, the FISR Measures explicitly state that securities regulators are permitted to issue rules restricting foreign investment in listed Chinese companies. This stipulation is unusual, given that MOFCOM and NDRC do not regulate securities. Perhaps, the stipulation is a reference to a U.S. Executive Order dated November 12, 2020, which prohibits U.S. persons from investing in "Communist Chinese Military Companies" as determined by the Department of Defense (which currently includes entities listed outside of mainland China such as China Mobile, Hikvision and AVIC). It remains to be seen whether China will actually follow through and prohibit foreign investment in listed Chinese companies, as that would arguably be contrary to recent reforms such as easing QFII/RQFII access, expanding investment scope, and the Shanghai-Hong Kong Stock Connect.

Unresolved issues

I Role and application of the foreign investment negative list

As stated above, the predecessors to the FISR Measures tied filing obligations to the Foreign Investment Negative List as applied by the Foreign Investment Law. Assuming this mechanism continues to be applied to the FISR Measures, questions remain over whether partially restricted industries such as value-added telecommunication services are "important" information technology and online cultural products as stipulated in the FISR Measures. There is also a question of filing obligations for businesses upon their receipt of foreign investments that arguably fall into more than one category listed in the FISR Measures. Finally, questions arise over the treatment of Chinese subsidiaries of multinational companies if they change their scope of business activities to one that may fall under the ambit of the FISR Measures. All of these important questions will need to be clarified by further guidance.

II Treatment of foreign investment in VIE structures

Recent proposed antitrust legislation helpfully noted that entities with variable interest entity (VIE) structures would be required to submit merger review filings if the underlying transaction met the relevant thresholds. The FISR Measures currently contains no such provisions on the treatment of VIE structures. Therefore, questions remain over what happens when an enterprise creates a VIE structure (i.e. enters into VIE contracts, and obtains through a VIE entity value-added telecommunications licenses restricted or prohibited to foreign investment) and then receives foreign investment (e.g. from international venture capital and private equity funds). We note that the M&A Security Provisions and the FTZ Security Measures expressly list contractual arrangements as a form of "control", but there are questions over the application of the FISR Measures in partially restricted industries (see the analysis immediately above), the extent of "control" under the FISR Measures, and the consequences of non-filing.

In the absence of specific guidance, international venture capital and private equity funds may consider adopting risk allocation provisions similar to the provisions over the stability of the VIE structure in current practice.

III Treatment of investment activities of red-chip enterprises and PRC USD funds

Market participants include investors who themselves have VIE structures or other "red-chip" structures where the parent entity of a Chinese business is located outside of China. Furthermore, the market also contains USD fund investors whose general partners are themselves Chinese. A consultation draft of the *Regulations for the Implementation of the Foreign Investment Law* once stated that investments from "red-chip" enterprises will not be subject to the Foreign Investment Negative List restrictions (as they are in fact Chinese). We believe that the regulatory intent of the FISR Measures is to exclude from their purview investments made by entities or funds whose ultimate controller is Chinese, but this will have to be clarified by further guidance.

IV Consequences of regulatory action

The FISR Measures contain no provisions on whether transaction parties can seek redress or demand reconsideration for a decision made by regulators, such as rights available under the Administrative Reconsideration Law. One additional option would be a fresh filing or a re-negotiation of conditions. These issues will need to be settled during the actual implementation of the FISR Measures.

What's next

The FISR Measures, like most Chinese legislation, is a beginning, not an end. That is to say, the measures set parameters to be followed by further guidance that should be forthcoming. The context of the FISR Measures' promulgation should not be surprising in light of the updates to the foreign investment review regimes in other jurisdictions. What will be important while the market waits for additional clarity is to understand the contours and various iterations of the FISR Measures so as to perform a risk analysis for each transaction. We note there was a time period between the passage of FIRRMA (August 13, 2018) and the issuance of detailed implementation guidelines (January 13, 2020, which still did not clarify all matters). During this stub period, we noticed that market participants carefully monitored regulatory developments and clues from regulators on a rolling basis. We believe that a similar approach can be taken with the FISR Measures. In particular, multinational companies should perform an internal review and risk analysis and consider availing themselves of pre-filing consultations as the FISR Measures allow. International venture capital and private equity funds should work with current and prospective portfolio companies to develop an agreed-upon strategy and, where appropriate, include risk allocation provisions in transaction documents. Chinese enterprises with red-chip structures and PRC USD funds should also monitor developments to confirm that they are indeed excluded from the ambit of the FISR Measures.

Exhibit I: Comparison of the FISR Measures with FIRRMA

Item	FISR Measures	FIRRMA
Regulatory body	Newly established Foreign Investment Security Review Working Mechanism, led by the National Development and Reform Commission and the Ministry of Commerce.	Federal inter-agency committee (Department of the Treasury, Department of Justice, Department of Homeland Security, Department of Commerce, Department of Defense, Department of State, Department of Energy, Office of the U.S. Trade Representative, Office of Science & Technology Policy) led by the U.S. Department of Treasury, as part of the executive branch.
Investment scope	FDI (including establishing subsidiaries in the PRC), equity or asset acquisition, investment through other means.	Direct or indirect investment in a U.S. business (any person engaged in interstate commerce in the U.S.), which includes investments in parent entities that have U.S. subsidiaries. "Greenfield" safe harbor (i.e. a PRC entity that has not received investment establishing a U.S. subsidiary).
Filing obligation	"Active" (i.e. mandatory) filing for the following: ■ Military ■ "Important" (an undefined term) agricultural products, energy and resources, equipment manufacturing, infrastructure, transportation services, cultural products and services, information technology and online products and services, financial services, "critical" technologies (an undefined term) and other "important" fields where actual control over the invested enterprise is obtained (over 50% shareholding, less than 50% shareholding but where voting rights significantly influence the board and shareholders resolutions, other means whereby the foreign investor exercises significant influence over business decisions, personnel, finance, technology of the enterprise).	<u>Voluntary filing</u> Control and national security (except Mandatory Declarations as set forth below): ■ Control: not necessarily determined by board control or over 50% equity ownership. Exists where a party has the right to determine, direct, or decide important matters affecting an entity, including without limitation the entry into significant contracts, major expenditures, the appointment and dismissal of officers, and relocating R&D facilities. ■ National security: never been defined (even under the old CFIUS law), at the discretion of CFIUS. Minority investment in a "TID" business (except mandatory declarations as set forth below): ■ "TID" business: critical technology (list provided, includes military dual use items and "emerging and foundational technology", which has not been defined yet), critical infrastructure (specific list provided), sensitive data (over 1 million U.S. users). ■ Minority investment: access to material nonpublic information, board or observer seat or involvement in "substantive decisionmaking" (e.g. operational veto rights). <u>Mandatory filing</u> ■ Whether a control transaction or a minority investment, in a TID business, substantial interest (direct or indirect

Item	FISR Measures	FIRRMA
		voting interest of 25% or more) by a government entity (other than the Canada, U.K., Australia). ■ Whether a control transaction or a minority investment (including 25% ultimate beneficial owners along with the investor itself), in a TID business that involves "critical technology", which would require an export control license if exported to the investor's jurisdiction.
Request by governmental authority	Permitted at the discretion of the Working Mechanism Office	Permitted at the discretion of CFIUS
Advance consultation	Available prior to filing	Available prior to filing
Review period	Step 1: Initial period of 15 business days from the date the submission is accepted to determine whether a review is necessary. If not, approval is granted. Step 2: If a review is deemed necessary in Step 1, 30 business days to determine whether there are national security concerns. If not, approval is granted. Step 3: If the review in Step 2 reveals national security concerns, 60 business days, which may be extended in "special circumstances". Decision may be approval, conditional approval, or denial. Conditional approval may involve follow-up compliance requirements.	Short-Form notice: 30 days from date of acceptance of submission. OR Long-Form notice: 45 days from date of acceptance of submission, with an additional 45 day investigational period if needed, and a 15 day presidential review if needed. Conditions may be attached to an approval with subsequent follow-up compliance requirements. Only the president can block a transaction where the parties do not voluntary withdraw the transaction.
Third-party feedback	General public may submit feedback on the security review of relevant transactions.	Not expressly permitted by law, but occurs in practice.
Retroactive action	May order filing by parties who failed to file, may unwind unfiled transactions.	Permitted at the discretion of CFIUS.
Foreign investment in public companies	Specific rules may be adopted by securities regulators.	Not within the remit of CFIUS, but restrictions may be instituted by the executive branch (e.g. executive orders, regulations from agencies such as the Securities and Exchange Commission) or the legislative branch (i.e. legislation passed by Congress).

Important Announcement

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

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Brigard Urrutia
Nuevos tiempos / Nuevas soluciones

CREG issues draft regulation for the connection to the SIN

January 7th, 2021

The Energy and Gas Regulatory Commission (CREG) published last December 30th, through Resolution CREG 233, a draft resolution with the proposal of modifications to the procedure for connection of different types of projects to the National Interconnected System (SIN). This regulation has been an expected by the market since the promotion of renewable energies in Colombia, which begun in 2015, has caused a drastic increase in the conection requests to the system. Several of these requests have been made for areas that require expansion of transportation capacity, especially in the Caribbean region, which has congested the procedure for allocating transportation capacity and has caused an increase in analysis and dispatch times for connection concepts by the transporters and the Mining and Energy Planning Unit (UPME).

In this context, the Ministry of Mines and Energy issued Resolution 40311 of 2020, which established the public policy guidelines to be followed by CREG for the new connection procedure to the SIN. Based on this resolution, CREG had already published a draft resolution through CREG Resolution 208 of 2020 (of which there is no definitive version yet) for the temporary connection of generation projects. However, the draft resolution of CREG 233 of 2020 is the one that proposes the general regulatory framework in development of Resolution 40311.

As it is of great interest to several of our clients, this document presents an overview of nine main changes contained within this draft resolution:

1. Project classes: the draft resolution divides projects into class 1 and 2. Class 1 projects are for the connection of generation and cogeneration of any capacity, self-generation projects with a capacity higher than 5 MW and projects for the connection of end users to the SIN with an electrical load higher than 5 MW. On the other hand, class 2 projects are those connection projects, or modifications of connection conditions, of end users to the Regional Transmission Systems or Local Distribution Systems. The main consequence of this division is that the UPME will be responsible for the allocation of transport capacity for class 1 projects, whereas transporters will be responsible for the allocation of transport capacity for class 2 projects in the systems for which each is responsible. The centralization of the allocation of transport capacity for class 1 projects in the UPME requires that the system's transporters provide UPME with the necessary information for this work and for the completion of connection studies by the interested parties. For this reason, it is proposed as an obligation for the transporters to deliver the required information, through the one-stop shop information system. This division into classes also has impacts on the type of procedure to be followed, the information that projects must present, the type of guarantees that must be granted, among others.

2. Assignment of transportation capacity: transportation capacity may be assigned (i) when the project is already in operation or (ii) when there is assignment of capacity from one project to another, provided that the two projects connect to the same connection point, are owned by the same interested agent, and use the same primary generation resource, or one that causes a lower variable cost to the system.

3. Causes for modification of the Commercial operation Date (COD): the COD is defined by the UPME. The draft resolution raises four causes for any change of the COD: (i) force majeure; (ii) reasons of public order accredited by the competent authority; (iii) delays in obtaining licenses, permits or procedures, for reasons beyond the due diligence of the interested agent; and (iv) when the expansion works of the SIN present delays that do not allow the project to start up. In any case, it is the UPME that must approve such changes.

4. Guarantees: the main change with respect to guarantees is an increase in value to 10 USD per each kW of transmission capacity assigned for class 1 projects, as opposed to 1 USD as indicated in CREG Resolution 106 of 2006. This amount must be converted into pesos with the market rate of the date of the constitution of the guarantee. In addition, the draft resolution states that these guarantees must be granted by the representatives of class 1 projects and does not establish any guarantee requirement for class 2 projects. On the other hand, if the agents demonstrate that the guarantees they have granted to the system to cover their projects exceed the amount of the guarantee in the draft resolution, they should not update the guarantee. All of the above is without prejudice to the fact that the transportation agent may require other types of guarantees in the connection contract.

5. Monitoring of ass 1 projects: one of the aspects in which major changes are proposed is that related to the verification of compliance with the commitments made by the stakeholders in order to ensure that all projects are connected and that this is done within the deadlines. Non-compliance with project schedule milestones would lead to penalties ranging from an increase in the amount of the capacity reserve guarantee to the loss of the connection point. To this end, the representative of the assigned capacity must submit periodic reports to the UPME.

6. Connection contract: for the connection contract, the provisions of the Network Code regarding the content of the contract are maintained. In addition, two clauses must be included: the first, establishing the way in which the effects of the connection of the new project on the system's loss rates will be measured, and the procedure for crossing money, either by increasing or decreasing losses; and the second, related to the termination of the contract if, in accordance with the provisions of the draft resolution, the assigned capacity is released. The term to sign the connection contract would be increased from 30 days to 3 months. If this term is not met, the parties must inform the Superintendence of Public Utilities of this situation so that it may analyze the possibility of imposing sanctions.

7. Release of assigned capacity: the agents interested in the connection of projects to the SIN accept that the assigned transport capacity is maintained if the conditions established in the proposed resolution are met and the project is developed in accordance with the S curve. In accordance with the above, the assigned capacity is released when any of the following causes are occur: (i) When it is concluded that the project cannot be executed; (ii) The agent does not obtain the ratification of the capacity allocation: (iii) The agent does not extend the guarantee or update the value of the coverage; (iv) A third failure to comply with the milestones of the S curve is reached. Only one of the above causes will be sufficient and, for information purposes, the UPME will send a communication to the interested agent. However, to allow the completion and connection of projects that show significant progress in their construction process, the possibility will be given to maintain the assigned capacity if the project is more than 60% advanced. To this end, the draft resolution proposes a partial execution of the current guarantee, an adjustment of the remaining value and a commitment to deliver the project before the FPO.

8. Information platform: for the UPME and the SIN agents in general to have centralized procedures and centralized project information, the UPME must create a unified information platform.

9. Transition regime: the draft resolution gives projects with expired COD's a period of one month to request their respective modification based on the rules of the resolution. On the other hand, the projects whose FPO has not expired will have two months, from the effective date of the resolution, to deliver the additional information required by the resolution.

Arias

COSTA RICA

PAYMENT OF CORPORATE TAX DUE JANUARY 31, 2021

Jan/2021

We remind you that the annual Corporate Tax for 2021 fiscal year must be paid on January 31st at the latest.

The Corporate Tax must be paid by any company, assigned identification number or branch of a foreign company, as well as any individual limited liability company, currently registered at the Public Registry.

According with the law number 9428 "Corporate Tax" and the official list of minimum salaries for the year 2021, the amount to be paid for Corporate Taxes are described as follows:

The aforementioned Corporate Taxes must be paid before January 31st, 2020. Failure to comply with this obligation could lead to economic penalties including additional interests. Also, the entities that do not pay the tax cannot sign any agreements with the Costa Rican Government or any of its dependencies, nor will be able to register any act or obtain certificates from the Costa Rican Public Registry.

We can gladly assist you with the timely payment of the Corporate Tax of your companies for a fixed fee. If you require any additional information on this matter, please contact Melania Dittel, our Partner in charge of corporate practice [melania.dittel@ariaslaw.com]and Sebastián Solano [sebastian.solano@ariaslaw.com].

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TRADE & INVESTMENT | EUROPE | EUROPEAN UNION & UK 7 JANUARY 2021

THE FUTURE OF RELATIONS BETWEEN THE EUROPEAN UNION AND THE UNITED KINGDOM - BASIC GUIDELINES ON TRADE AND INVESTMENT

After a great deal of uncertainty up until the very last minute, a compromise was ultimately found with the signature on 24 December 2020 of a “Brexit” Agreement (the "**TCA**") that purports to respect the red lines of both parties. The EU maintains the integrity of the single market and a robust enforcement mechanism. The UK achieves a free trade agreement for zero-tariff, zero-quota in trade in goods and avoids any role for the European Court of Justice in settling disputes (other than in Northern Ireland). On the other hand, it does not cover areas which were essential for the UK when it was part of the Union. In particular, services, which represent the vast majority of the UK economy, are by and large absent from the TCA.

FAMILIAR PROVISIONS, A BESPOKE MODEL

The TCA was inspired by trade agreements already concluded by the EU with third countries, whose terms are familiar to international trade and investment specialists. However, the level of economic integration achieved between the EU and the UK over almost 50 years makes this agreement unlike any other. Thus, while the TCA makes extensive reference to the provisions of WTO law, governing relations between the European Union and third countries, it also relies on additional provisions that reveal the proximity of the UK to the EU.

Although the TCA preserves a UK alignment with the EU in a number of respects, the UK has chosen to leave the customs union in favour of a free-trade area relationship with the EU. As a result, the degree of UK’s legal integration with the EU is substantially reduced and does not match the closer integration, at least from a trade and customs point of view, of certain agreements with other third countries in the region , namely:

Norway, Iceland and Liechtenstein, whose trade relationship with the EU is governed by the deeply integrative European Economic Area (EEA) agreement. For instance, under the EEA agreement, no anti-dumping or countervailing duties may be imposed by any party on industrial goods originating in the EEA. The same will not apply in EU-UK relationship;

Switzerland, which did not join the EEA but signed numerous wide-ranging sector-specific agreements with the EU. Even with other agreements in prospect, the TCA does not suggest a similar direction of travel to the level of market opening achieved by Switzerland; in this respect, Switzerland may also be viewed as enjoying closer links with the EU compared to post-Brexit UK.

Against this background, from a trade point of view, the UK’s relationship with the EU, although of a rather particular nature to the UK's lengthy past EU membership, may be more accurately compared to that of a non-European third country like Japan with which the EU has signed an Economic Partnership Agreement including a far-reaching trade component. This may provide the UK with more ability to diverge on trade relationships and create some regulatory arbitrage in a way that other third countries, like Switzerland or Norway, cannot.

TRADE IN GOODS

Trade in goods is not subject to any tariffs or quotas, but customs and conformity checks will be introduced, making flows in goods less fluid and creating more formalities. Although the introduction of trusted trader programmes may alleviate the burden for companies certified in the schemes, becoming certified will be a considerable administrative burden.

As regards "rules of origin", U.K. firms will have to certify the origin of their exports in order to qualify for tariff-free access to the EU as the proportion of parts made overseas will have to be limited to escape tariffs. For electric vehicles, a lower threshold is applied for the first years but a requirement of 55% local content will apply as from 2027 for these to qualify for tariff free trade between the UK and the EU.

In addition, new certifications will have to be performed as the UK agencies lose the automatic recognition of their standards for products such as chemicals, pharmaceuticals, cars, aircraft, and in fact many manufacturing products subject to EU safety or other standards (e.g. phyto-sanitary rules for agriculture). The experience of the REACH Regulation on the registration of chemicals, which has spawned a compliance industry of itself, may give some indication of the new compliance burdens. In this particular area, there will continue to be an EU REACH, on the island of Ireland, but a UK REACH elsewhere in the UK. The UK will therefore be setting up its own costly system of regulation in parallel for what many UK and third party commentators had viewed as a structural barrier to trade.

For fisheries, which seemed to absorb much of the time of the negotiators before the agreement was reached, 25% of the EU's fisheries quota in UK waters will be transferred to the UK over a period of five years. After this, there will be annual discussions on fisheries opportunities. In this area, as in others, the TCA is the end of the beginning, rather than a final arrival point.

Northern Ireland will remain part of the EU single market in goods as part of a Protocol on Northern Irish status within the single market in goods. This imposes a de facto customs border in the Irish Sea between the province and the rest of the UK, which is leaving the single market. This means that, although the UK will be responsible for implementation, Northern Ireland will remain part of the EU law on VAT. It will also be the one area of the UK in which the EU Commission and the European Court of Justice will have jurisdiction to enforce EU rules. Further, four years after the transition period, the TCA provides that the UK must give Northern Ireland the opportunity to give consent to the trade elements of the Protocol, giving it a potential exit from the Protocol.

TRADE IN SERVICES

On financial services, the agreement does not include any commitments on market access, only the plan to discuss specific equivalence decisions (but without any commitment on the possible outcome). A Declaration, which accompanied the TCA, provides for the EU and UK to establish structured regulatory cooperation on financial services, with the aim of establishing a durable and stable relationship. A Memorandum of Understanding is to be agreed by March 2021 covering, amongst other things, the approach to equivalence. In the absence of this, the UK FCA has put in place temporary measures to preserve the operation of the UK-based euro-denominated derivatives market, for example. The absence of a detailed financial services chapter in the TCA, combined with a patchwork of third country regimes in the EU financial services regulatory framework and recent or forthcoming legislative changes, creates some risks and uncertainty, partly alleviated however by transitory EU measures regarding notably central clearing counterparties and central securities depositaries. For example, some Euro-denominated trade carried out in London may just stay there and switch to USD rather than moving to EU centres to stay in Euro. This is one of the many issues that should be dealt with in further negotiations by March 2021 and beyond.

On professional services, service providers (doctors, engineers, architects, lawyers etc.) will lose their ability to automatically work in the EU as mutual recognition of professional qualifications is ended.

On transport, the single market rights are removed. For road transport, the validity of drivers' permits and transit rights are maintained, but the right of cabotage is removed, limiting UK and EU road hauliers to two journeys within the other's territory before having to return to their own territory. For a UK operator, this means a single journey in a particular country in the EU before they would need to move to another EU member state to achieve their maximum of two journeys.

On air transport, flying rights between the EU and UK are maintained, but British carriers will not be able to fly between two points within the EU. Although code sharing and blocked-share agreements will be maintained, "5th freedom" routes with an intermediary stop in the EU or UK will only be negotiable (as new bilateral deals) for all-cargo flights.

On energy, the UK is losing access to the EU's internal energy market but arrangements will be developed to guarantee supply of the energy between the UK and Ireland and continental Europe. This may mean a slight divergence in pricing signals between the UK and north-west European energy markets as some UK-traded gas will now be traded at the Netherlands' TTF hub. More LNG may be traded between the UK and the EU, which has been rare to date. Ireland becomes a single electricity market and UK/EU power trade is possible on only a day-ahead transitional mechanism. In addition, the UK is no longer part of the EU emissions trading system and UK/EU energy traders will need to apply to re-register in the relevant jurisdictions. Even though the EU keeps most of what it needs to trade with the UK and the UK faces substantial red tape to trade with the EU, it appears that, in some areas, such as potentially "new energies" (e.g. hydrogen) which are not covered by the power/gas provisions, it may become harder for EU companies to access UK markets.

On digital services, a bridge of 6 months has been agreed to maintain data flows until an EU adequacy decision is made (equivalent to the one existing for Japan) to recognise the equivalence of data protection rules. The agreement also bans data localisation, allows electronic signatures for digital services and maintains existing consumer protection obligations for electronic commerce. But it ends free roaming and excludes audio visual services from the agreement, meaning that UK audio visual companies lose the rights to offer pan European services.

LEVEL PLAYING FIELD FOR OPEN AND FAIR COMPETITION AND SUSTAINABLE DEVELOPMENT

The UK and the EU are free to set their own standards in areas such as environment and labour law but with the risk of counter measures and cross-sector retaliation in case substantial divergence is distorting trade as established by a system of independent arbitration rulings.

Regarding subsidies/state aid, the UK committed to establish a system of subsidy control with independent oversight, essentially reflecting the EU system (e.g. transparency, no unlimited state guarantees, need for restructuring plans for failing companies receiving aid).
In cases of trade distortions either party will be able to impose measures that could take various forms, including remedial measures and the so-called “trade defense” measures (e.g. countervailing, anti-dumping measures).

FREEDOM OF MOVEMENT

Although this document does not pretend to be exhaustive, it may be helpful to draw attention to the provision made in relation to the movement of persons. Freedom of movement between the UK and the EU is ended and temporary visas for work-related purposes are re-introduced. Staff seconded to the EU on business can stay for up to three years if they are managers and specialists and up to one year for trainee employees. Those on short-term business will need a work permit and may stay for a period of up to 90 days in any 6-month period.

GOVERNANCE

With regard to Governance, the Agreement is overseen by a UK-EU Partnership Council supported by other committees, a structure typical of most traditional trade agreements.

As mentioned above, there are binding enforcement and dispute settlement mechanisms covering the different sectors of the partnership: this goes beyond traditional trade agreements enabling effective counter-measures in case of non-compliance.

The TCA will be reviewed every five years. It can be terminated by either side with 12 months’ notice, and more swiftly on human rights and rule of law grounds.

FINAL REMARKS

While there is debate on how balanced the TCA is for each side, it is undeniable that a compromise that seems to be satisfactory – at least at this stage – for both the EU and the UK has ultimately been reached. In reality, only the concrete implementation of the TCA in each relevant sector will reveal whether the deal meets all parties' goals in the long-term.

An interesting aspect is that the concrete implementation of the EU-UK Trade and Cooperation agreement in the coming months and years could also give a "boost" to the application of the many other agreements recently negotiated by the EU. While each agreement is of course specific, there are many commonalities between them and the attention the TCA will certainly get at all levels may have a positive cascading effect on the implementation of those other agreements, which is unfortunately still deficient due to a lack of stimulus from businesses, Member States and the European Commission.

A better enforcement of European trade agreements offers the necessary tools for a more effective discipline of globalisation, something that multilateralism has failed to fully achieve over the last twenty years.

Some useful basic points of reference as far as trade and investment is concerned:

Table 1 : Border Measures - General

Freedom of transit	• Article V GATT 1994 (including energy goods via inter alia pipelines or electricity grids)
Customs duties	• Prohibited for *originating* products (based on EU/UK preferential origin, as described in Table 2); Prohibition also apply to *repaired*[1] goods temporarily imported/exported *regardless of their origin*; Prohibition does not apply to fees and formalities linked to services • Exception of Article XX of GATT 1994 and of security exceptions
Customs classification	• Respective (UE and UK) tariff nomenclature in conformity with the Harmonised System. Likely to be the same for some time or forever
Customs valuation	• Article VII of GATT 1994 and the Customs Valuation Agreement
Customs origin	• Preferential Rules of origin (see specific table below) • Non-Preferential Rules of origin (e. g. applicable for implementing Trade Defence measures): may be found: - for UK at: *https://www.gov.uk/government/publications/reference-document-for-the-customs-origin-of-chargeable-goods-eu-exit-regulations-2020* - for the EU cf. relevant provision of the Union Customs Code Both sets of rules are based on the WTO Agreement on Rules of Origin and are endorsing the existing agreed outcome of the WTO "harmonisation work programme"
Export duties and charges	• Prohibition, including discriminatory duties or charges (except fees and formalities linked to services)
Import / Export restrictions	• Prohibited, except when necessary under Article XI GATT 1994, when permitted in enforcement of countervailing and anti-dumping duty orders and undertakings and in the context of import licensing conditioned on the fulfilment of a performance requirement
Import and export monopolies	• Prohibited
Import licensing procedure[2]	• Possible under certain conditions, including those of Articles 1 to 3 of the WTO Agreement on Import Licensing Procedures (including import control)

[1] "Repair" means any processing operation undertaken on a good to remedy operating defects or material damage and entailing the re-establishment of the good to its original function or to ensure compliance with technical requirements for its use. Repair of a good includes restoration and maintenance, with a possible increase in the value of the good from restoring the original functionality of that good, but does not include an operation or process that: (i) destroys the essential characteristics of a good, or creates a new or commercially different good; (ii) transforms an unfinished good into a finished good; or (iii) is used to improve or upgrade the technical performance of a good.

[2] means an administrative procedure, whether or not referred to as licensing, used by a Party for the operation of import licensing regimes, requiring the submission of an application or other documentation, other than that generally required for customs clearance purposes, to the relevant administrative body or bodies as a prior condition for importation into the territory of the importing Party

Export licensing procedure[3]	• Possible under certain conditions (including export control and sanctions)
WTO tariff rate quotas	• Relevant EU WTO TRQs are not eligible to imports originating (non-preferential rules) in the UK and vice versa
Antidumping measures	• Article VI of GATT 1994, the Anti-Dumping Agreement. • The EU has a well-established antidumping rules and practice. The UK adopted recently new antidumping rules
Antisubsidy measures	• SCM Agreement. The EU has a well-established anti-subsidy rules and practice. The UK recently adopted new anti-subsidy rules https://www.gov.uk/government/publications/complying-with-the-uks-international-obligations-on-subsidy-control-guidance-for-public-authorities/technical-guidance-on-the-uks-international-subsidy-control-commitments-from-1-january-2021
Safeguard measures	• Article XIX of GATT 1994, the Safeguards Agreement
Agricultural safeguard	• Article 5 of the Agreement on Agriculture
Breaches or circumvention of customs legislation	• Possible temporary suspension of preferential treatment, subject to consultations with the Trade Partnership Committee unless the importer is not able to satisfy the importing customs authority that its products are fully compliant with the importing Party's customs legislation
Management of administrative errors	• In case of systematic errors by the competent authorities or issues concerning the proper management of the preferential system at export, concerning notably the application of the origin provisions, the Trade Partnership Committee to examine the possibility of adopting decisions, as appropriate, to resolve the situation

Table 2 : Border Measures - Rules of origin

Border measures: Fight against counterfeit goods	• In this field, a close cooperation is set up between the EU and UK: See Article IP.53, part two, heading one, title V of the TCA
Preferential rules of origin: Definition and General Requirements	• In line with provisions of most existing EU preferential agreements, notably EU-Japan
Cumulation	• "Classical" **bilateral cumulation** is foreseen. Compared to other EU FTA like EU-Japan, an additional flexibility is available, allowing the use, instead of a standard supplier's declaration, of "an equivalent document" containing the same information
Definition of Wholly obtained products	• In line with provisions of most existing EU preferential agreements, notably EU-Japan

[3] means an administrative procedure, whether or not referred to as licensing, used by a Party for the operation of export licensing regimes, requiring the submission of an application or other documentation, other than that generally required for customs clearance purposes, to the relevant administrative body as a prior condition for exportation from that Party.

Tolerances	• In line with provisions of most existing EU preferential agreements, notably EU-PEM (Pan-Euro-Med) or EU-Japan
Insufficient Production, Unit of qualification, Accessories, spare parts and tools, Sets and Neutral elements	• In line with provisions of most existing EU preferential agreements, notably EU-Japan
Accounting segregation	• In line with provisions of most existing EU preferential agreements, notably EU-Japan and EU-PEM. Paragraph 4 of Article ORIG.14 provides for an additional flexibility allowing common storage in a Party of certain originating and non-originating fungible *products* before exportation to the other Party
Returned products	• In line with provisions of EU-PEM
Non-alteration principle	• In line with provisions of EU-Japan
Drawback of, or exemption from, customs duties	• Article ORIG.17 provides for a "rendez-vous" close for reviewing the Parties' respective duty drawback and inward-processing schemes
Origin procedures	• In line with provisions of EU-Japan with some additional elements: - additional flexibility concerning post-clearance claims for preferential tariff treatment - Paragraph 4 of Article ORIG.26 (Denial of preferential tariff treatment) put the stress on the principle that "in all cases, the settlement of differences between the importer and the customs authority of the Party of import shall be under the law of the Party of import"

Table 3 : Domestic regulations

National treatment	• No discriminatory internal tax or regulation
Remanufactured goods[4]	• A Party shall not accord to remanufactured goods of the other Party treatment that is less favourable than that which it accords to equivalent goods in new condition. • Import and export restrictions applies to import and export prohibitions or restrictions on remanufactured goods. • If a Party adopts or maintains import and export prohibitions or restrictions on used goods, it shall not apply those measures to remanufactured goods.
Sanitary and Phytosanitary measures (SPS)	• Inspired by the WTO SPS Agreement, but with its owns specificities and setting up bilateral decision-making process mechanisms concerning SPS measures that would negatively affect EU/UK trade

[4] "remanufactured good" means a good classified in HS Chapters 32, 40, 84 to 90, 94 or 95 that: (i) is entirely or partially composed of parts obtained from used goods; (ii) has similar life expectancy and performance compared with such goods, when new; and (iii) is given an equivalent warranty to as that applicable to such goods when new.

Technical Barrier to Trade (TBT)	• Inspired by the WTO TBT Agreement, but with its owns specificities and setting up bilateral decision-making process mechanisms concerning TBT measures that would negatively affect EU/UK trade

Table 4 : Investment

Market access	• Subject to exceptions, a Party shall not adopt or maintain, with regard to establishment of an enterprise by an investor of the other Party or by a covered enterprise, or operation of a covered enterprise, either on the basis of its entire territory or on the basis of a territorial sub-division, measures that: (a) impose limitations on: (i) the number of enterprises that may carry out a specific economic activity, whether in the form of numerical quotas, monopolies, exclusive rights or the requirement of an economic needs test; (ii) the total value of transactions or assets in the form of numerical quotas or the requirement of an economic needs test; (iii) the total number of operations or on the total quantity of output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test; (iv) the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment; or (v) the total number of natural persons that may be employed in a particular sector or that an enterprise may employ and who are necessary for, and directly related to, the performance of an economic activity, in the form of numerical quotas or the requirement of an economic needs test; or (b) restrict or require specific types of legal entity or joint venture through which an investor of the other Party may perform an economic activity
National treatment	• Subject to exceptions, each Party shall accord to investors of the other Party and to covered enterprises treatment no less favourable than that it accords, in like situations, to its own investors and to their enterprises, with respect to their establishment and operation in its territory
Most favoured nation treatment	• Subject to exceptions, each Party shall accord to investors of the other Party and to covered enterprises

	treatment no less favourable than that it accords, in like situations, to investors of a third country and to their enterprises, with respect to establishment and operations in its territory

Table 5 : Level playing field

Competition Policy	• Respective EU and UK competition law and enforcement regarding a) concerted practices which have as their object or effect the prevention, restriction or distortion of competition; b) abuse of a dominant position and c) merger. • Competition policy is not subject to the specific bilateral dispute settlement provided for by the TCA (part six)
Subsidy	• Respective domestic (EU and UK) State aid control: ○ each Party shall establish or maintain an operationally independent authority or body with appropriate role in its subsidy control regime, courts or tribunals competent to deal with State aid issues and an effective mechanism of recovery in respect of subsidies. ○ Prohibited subsidies and subsidies subject to conditions under this national control covers in particular: Unlimited state guarantees, Rescue and restructuring, Banks, credit institutions and insurance companies, Export subsidies, Subsidies contingent upon the use of domestic content, Large cross border or international cooperation projects, Energy and environment and Subsidies to air carriers for the operation of routes. • Bilateral mechanism ○ For subsidy having a negative effect on trade or investment, possible *consultations* within the Trade Specialised Committee on the Level Playing Field for Open and Fair Competition and Sustainable. ○ This Committee shall make every attempt to arrive at a mutually satisfactory resolution of the matter. • Remedial measures ○ A Party may unilaterally take appropriate ***remedial*** measures if there is evidence that a subsidy of the requested Party causes, or there is a serious risk that it will cause a significant negative effect on trade or investment between the Parties. ○ The remedial measures shall be restricted to what is strictly necessary and proportionate in order to remedy the significant negative

	effect caused or to address the serious risk of such an effect[5]. ○ The notified Party may request the establishment of an ***arbitration tribunal*** with no suspensive effect on the remedial measures. The arbitration tribunal shall conduct its proceedings in accordance a special and expeditious proceeding (INST.34B) and deliver its final ruling within 30 days from its establishment. • Future policies ○ The Parties recognise the right of each Party to determine its future policies and priorities with respect to subsidy control. At the same time, the Parties acknowledge that significant divergences in these areas can be capable of impacting trade or investment between the Parties in a manner that changes the circumstances that have formed the basis for the conclusion of the TCA. ○ If material impacts on trade or investment between the Parties are arising as a result of significant divergences between the Parties in the areas referred to in paragraph 1, either Party may take appropriate ***rebalancing measures*** to address the situation. ○ Such measures shall be restricted with respect to their scope and duration to what is strictly necessary and proportionate in order to remedy the situation. Specific ***arbitration*** system is also provided
State-owned enterprises, enterprises granted special rights or privileges and designated monopolies	• Subject to given exceptions, each Party shall ensure that each of its covered entities, when engaging in commercial activities: (a) acts in accordance with commercial considerations in its purchase or sale of a good or service, except to fulfil any terms of its public service mandate that are not inconsistent with points (b) or (c); (b) in its purchase of a good or service: i.e accords to a good or service supplied by an enterprise of the other Party treatment no less favourable than it accords to a like good or a like service supplied by enterprises of the Party; and ii. accords to a good or service supplied by a covered entity in the Party's territory treatment no less favourable than it

[5] When the same product is restricted to what is strictly necessary or proportionate for the purposes of this Article, a Party: (a) *shall* take into account countervailing measures applied or maintained and (b) *may* take into account anti-dumping measures applied or maintained

	accords to a like good or a like service supplied by enterprises of the Party in the relevant market in the Party's territory; and (c) in its sale of a good or service: i. accords to an enterprise of the other Party treatment no less favourable than it accords to enterprises of the Party; and ii. accords to a covered entity in the Party's territory, treatment no less favourable than it accords to enterprises of the Party in the relevant market in the Party's territory
Antidumping and anti-subsidy measures	• Article VI of GATT 1994, the Anti-Dumping Agreement and the SCM Agreement • Fair competition between the European Union and the United Kingdom on State aid could be one of the most sensitive areas in the coming years. It is likely that the instruments provided for in the agreement will be largely insufficient and that recourse to more traditional instruments, such as the anti-subsidy instrument, or, when available, the EU tool on foreign aid, will be necessary to pave the way toward a real level playing field
Taxation	• No compulsory obligations (other than (i) not to regress from certain OECD agreed standards, and (ii) to cooperate in relation to VAT administration and enforcement) and no provision for dispute settlement
Labour and social standards	• Non-regression from level of protection. Horizontal dispute settlement not available. One specific dispute settlement available
Environment and climate	• Non regression from the level of protection. Horizontal dispute settlement not available. One specific dispute settlement available
Other multilateral instruments for trade and sustainable development	• Various commitments including on trade and responsible supply chain management
Horizontal Dispute settlement provisions	• Consultations and panel of experts
General exceptions	• Public security, public morals (Article XX GATT) • Taxation exception: measures aiming at ensuring the equitable or effective imposition or collection of direct taxes; or distinguishes between taxpayers, who are not in the same situation, in particular with regard to their place of residence or with regard to the place where their capital is invested. • Security exceptions (Article XXI GATT)

Table 6 - Horizontal State to State Dispute resolution

State to State DSU	• Consultations • Arbitration Procedure • Arbitration Tribunal • Ruling • Compliance • Temporary remedies
Scope	• This DSU shall apply (rule), except when specific procedural rules are provided for (specific fields)

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DEFENCE: KEY CHANGES IN THE REGULATORY LANDSCAPE PURSUANT TO ATMANIRBHAR BHARAT

Suhas Srinivasiah and Ajay G Prasad, Kochhar & Co[1]

The Government of India has been very active in putting in place the necessary framework to implement the objectives of the 'Atmanirbhar Bharat Abhiyan'. The 'Atmanirbhar Bharat Abhiyan' or a program of self-reliance announced by the Government of India intends to focus on the five key pillars of economy, infrastructure, system, vibrant demography, and demand. The program focusses on India achieving strategic self-reliance in key areas to reduce external dependencies which tend to be unreliable even in the best of times. One of the key focus areas of the Government of India has been achieving such strategic self-reliance in defence. This article briefly describes the various steps taken by the Government of India in this regard.

Very briefly, three key changes have occurred since July 2020 vis a vis the defence sector – (a) changes to Foreign Direct Investment regime, (b) promulgation of the 'Defence Acquisition Procedure 2020' (including revamped Offset Guidelines); and (c) some new programs to encourage investments in defence sector.

Changes to the foreign direct investment regime

- The Government has issued Press Note 4 of 2020 on 17 September 2020 in terms of which foreign direct investment ("**FDI**") up to 74% is permitted under the automatic route in the defence sector. The earlier FDI limit was 49% under the automatic route.

- FDI beyond 74% and up to 100% is also permitted under the government approval route wherever it was likely to result in access to modern technology or for other reasons to be recorded.

- A key condition is that foreign investment in the defence sector is subject to security clearance by the Ministry of Home Affairs as per guidelines of the Ministry of Defence.

- Another key condition is that the Indian company (whether JV or the WOS) should be "self-sufficient in the areas of product design and development", should have a manufacturing facility and should also have maintenance and life cycle support facilities for the product being manufactured in India.

- There is also an overarching review power available on the grounds of national security. The government reserves the right to review any foreign investment in the sector that affects or may affect national security.

- The intent of the new policy seems to be quite clear that the Government only wants serious players in the sector to look at the Indian market.

- The enhancement of the FDI limit to 74% coupled with the certain other changes to labor laws is a welcome change for foreign investors looking at alternative global options for managing their supply chain requirements.

- Additionally, foreign companies looking to invest in India will find ownership up to 74% more attractive as they will own a majority stake and will give them the much-needed control over

[1] Views expressed are personal and not necessarily that of the Firm.

the operations and management of the Indian venture. Further, this will help them implement global best practices and governance regimes without much resistance or push back from local partners. Please note that these policy changes to the FDI regime take effect once the relevant exchange control rules are formally amended.

Defence Acquisition Procedure, 2020

The second big development has been the Defence Acquisition Procedure, 2020, dated 29th September 2020 ("**DAP**").
"

- Three documents are relevant here – (a) the DAP itself, (b) the new and revamped offset requirements and (c) a list of 101 items which cannot be imported henceforth by the Indian Military from December 2020 to December 2022 has been notified. This list not only contains embargo on simple parts but also on hi-tech weapons and weapons systems. This Embargo 101 list does not mean that foreign players are excluded from selling these products to the Indian defence establishment. They can still set up entities in India to undertake such supply.

- **Definition of "Indian Company".** The DAP provides that the list of items under the Embargo list can be procured from an "Indian Company". The definition of an "Indian Company" includes any company incorporated in India. Therefore, subsidiaries of foreign companies are entitled to bid under the categories reserved for the Indian market such as – Buy Indian India Design, Buy Indian and Buy and Make Indian procurements. In an indirect manner, this system encourages foreign players to set up in India and manufacture their products here. It is expected that about USD 60 billion will be spent by the Indian Armed Forces to procure the 101 items over the next 5 – 7 years. The list is already available, so serious foreign players will be encouraged to start thinking of setting up Indian operations to meet the anticipated needs of the armed forces.

- **Exemption from offset requirements.** The Inter-Governmental Agreements have been specifically exempted from offset requirements. This is an important step as India moves away from buying from private suppliers to buying from friendly Governments. Private parties who are sub-contractors to foreign governments stand to gain enormously from this development as meeting the offset requirements and actual offset implementation delays were blamed to be the bane of the Indian defence industry.

- **Leasing option.** Another important development is that for the first time, "leasing" has been introduced in the draft DAP 2020 as a category of defence acquisition in addition to the existing 'buy', 'buy and make' acquisition categories. Leasing is however not new to India since India has previously leased submarines from the former Soviet Union and Russian previously. The leasing category encourages firms supplying critical equipment and weapons to enter long term/medium term contracts. The contractor would be responsible for maintenance and repair for the duration of the contract. This may be the perfect short-term solution to the highly volatile border situation of India whereby the Indian Armed Forces can possess and operate costly platforms required for a limited period and avoid huge capital expenditure on outright purchase.

- **Transfer of Technology.** The Government has also identified a list of 49 technologies for Transfer of Technology (TOT). Previously, grant of offset credits for TOT was subject to buyback conditions. That is, the foreign vendor was required to undertake a mandatory purchase of products from its Indian TOT partner. Further, offset claims for non-equity investments were also restricted to a percentage of subsequent buyback. A significant change proposed in the DAP is the enhanced viability of Transfer of Technology (TOT) and non-equity investment as modes for discharge of offset obligations. The non-equity route is proposed to be merged with the equity route, making full offset credits available to vendors subject to verification. Similar provisions have also been issued for the TOT route.

- **Information Communications and Technology.** A new chapter on Information Communications and Technology (ICT) acquisition has been introduced in the DAP. The IP in the ICT systems would however belong to the buyer of the products. India and Indian IT companies have already established themselves globally as being the best in the IT industry. Now, foreign companies which supply IT to Armed Forces as well as home grown IT companies will gain immensely since this category has now been recognised as a procurement avenue leading to more investment and employment in the IT sector.

New Initiatives

- **Encouragement to "start-ups".** The 'Innovations for Defence Excellence (iDEX) framework, was launched by Department of Defence Production, with the aim to achieve self-reliance and to foster innovation and technology development in Defence and Aerospace Sectors by engaging Industries including MSMEs, start-ups, individual innovators, R&D institutes and academia. The projects or problem statements are identified based on the requirements projected by the armed forces and certain other stakeholders involved in the defence ecosystem. According to publicly available information, 58 iDEX winners have so far been identified for 18 problem statements/challenges under three rounds of Defence India Start-up Challenge (DISC).

- **Establishment of defence corridors.** The Government has also unveiled plans to establish two defence corridors at Uttar Pradesh and Tamil Nadu. The Defence Industrial Corridors are expected to encourage indigenous production of defence and aerospace related items and reduce reliance on imports and promoting export of these items to other countries. This is expected to generate direct/indirect employment opportunities and growth of private domestic manufacturers, Micro Small and Medium Enterprises (MSMEs) and Start-ups.

NautaDutilh

Tax

Luxembourg

Luxembourg Tax Alert 2021: What's New?

Wednesday 6 January 2021

On 19 December 2020, the Luxembourg Parliament voted into law the Budget Act 2021 (the "Budget Act"). In the unprecedented context of COVID-19, the main objectives of the Budget Act are to ensure a swift revitalization of the economy, secure businesses regardless of their size, and maintain employment and household spending power. Other goals, such as taking steps towards greater tax fairness and further improving the attractiveness of Luxembourg, are also reflected in the Budget Act. The introduction of a new real estate tax applicable to certain investment funds (UCIs, SIFs and RAIFs) investing locally, the repeal of the circular providing for a simplified valuation method for warrants and stock option plans, and the encouragement of sustainable investment through the introduction of a reduced subscription tax for UCIs (both Part I and Part II funds) are the main drivers in this respect. With regard to improving the attractiveness of Luxembourg and retaining highly qualified employees in the country, the Budget Act improves on the current tax regime applicable to "impatriates" and introduces a 50% tax exemption for employee participation bonuses. Finally, the Budget Act amends the tax unity regime in order to comply with the decision of the Court of Justice of the European Union ("CJEU") of 14 May 2020 (C-749/18).

Special real estate tax (*prélèvement immobilier*) for funds investing in Luxembourg real property

As from 2021, a 20% non-deductible real estate tax applies to certain undertakings for collective investment ("**UCIs**"), referred to as **Part II UCIs**, specialized investment funds ("**SIFs**"), and reserved alternative investment funds ("**RAIFs**") with legal personality, but excluding *sociétés en commandite* simple ("**SCS**"), on rental income and capital gains arising from real estate located in Luxembourg, held directly or through a tax-transparent entity or entities.

Whilst the tax is only expected to adversely affect certain types of funds investing in real estate located in Luxembourg, the associated reporting obligation has a broader scope and applies to any Part II UCI, SIF or RAIF (whether or not earning income from qualifying real property). For 2020 and 2021, such funds are required to report to the tax authorities, by 31 May 2022 at the latest, if they (i) held Luxembourg real estate directly or through a tax-transparent entity or entities or (ii) changed their corporate form from a company to a tax-transparent entity whilst owning at least one Luxembourg real estate asset (directly or through a tax-transparent entity or entities). Non-compliance with this reporting obligation can trigger a fine of up to EUR 10,000 (i.e., in the absence of filing or for late filing even if no Luxembourg real estate was owned in the relevant years).

New restriction for private wealth management companies ("SPFs") in the context of real estate investments

As from 1 July 2021, SPFs will no longer be allowed to own real estate through (Luxembourg or foreign) tax-transparent entities. No particular restrictions on indirect ownership through non-transparent entities have been introduced.

Real estate transfer taxes upon the contribution of real property to Luxembourg commercial and civil companies

Since 1 January 2021, the gap between (real estate) asset and share deals has been minimized through an increase in the real estate transfer taxes (including the transcription tax) due upon a contribution in kind of real property to a Luxembourg (civil or commercial) company. The increase is as follows:

	Property located in Luxembourg City	Property located outside Luxembourg City
Until 31.12.2020	1.4%	1.1%
As from 1.1.2021	4.6%	3.4%

Furthermore as from this same date, an allocation of real property further to the winding-up, liquidation or capital reduction of a company to a shareholder that did not contribute the asset(s) in question only qualifies for an exemption from real estate transfer taxes as from 10 years following the initial contribution (rather than five years as was previously the case).

Update of the tax rules applicable to highly skilled and qualified workers (impatriates)

Effective 1 January 2021, the requirement to hire or commit to hiring at least 20 full-time employees was lifted and the duration thereof extended from five to eight years. However, the required minimum gross remuneration (i.e., excluding benefits in kind or allowances/bonuses in cash) has been raised from EUR 50,000 to EUR 100,000.

The rules provide that 50% of the cost-of-living allowance (*prime d'impatriation*) is tax exempt, provided the allowance constitutes less than 30% of the employee's gross annual remuneration (excluding benefits in kind or allowances/bonuses in cash).

Introduction of a participation bonus (*prime participative*)

Further to the repeal of Circular No 104/2 on warrants and stock option plans, a 50% tax exemption for participation bonuses (*primes participatives*) paid to employees has been introduced. Such bonuses are in principle tax deductible by the employer and 50% tax exempt for the employee. The exemption is available if, amongst other conditions, (i) the bonus does not exceed 25% of the employee's gross annual remuneration (excluding benefits in kind or allowances/bonuses in cash), (ii) the total participation bonuses granted to all employees does not exceed 5% of the company's profits for the immediately preceding tax year, and (iii) the Luxembourg tax authorities are provided with a list of all employees receiving this benefit.

Changes to the tax unity regime

Following a recent decision of the CJEU, an existing "vertical tax group" may now, under certain conditions, be allowed to form a new "horizontal tax group" without triggering retrospective taxation of the members of the existing group on a stand-alone basis. The ability to form a horizontal tax group is expected to open more alternatives to corporate groups with a common foreign shareholder.

Reduced subscription tax (*taxe d'abonnement*) for UCIs investing in sustainable projects

Effective 1 January 2021, any UCI (whether a Part I or Part II fund) can benefit from a reduced subscription tax rate when making sustainable investments within the meaning of the relevant EU regulations. A gradual decrease in the subscription tax rate is provided, depending on the fund's volume of sustainable investments: 0.04% if the percentage of net assets under management dedicated to sustainable investments is at least 5%, 0.03% if this percentage is at least 20%, 0.02% for a percentage of at least 35%, and 0.01% if the percentage is 50% or more. The standard subscription tax rate of 0.05% remains applicable to other assets of UCIs.

Other points of interest

Accelerated depreciation rate for real property dedicated to rental accommodation

The accelerated depreciation rate has been reduced from 6% over 6 years to 4% over 5 years for properties acquired or built after 1 January 2021 and for depreciable renovation costs incurred for older properties. However, under certain conditions, tax relief of 1% (capped at EUR 10,000) may be available.

In addition, the Budget Act introduces a specific accelerated depreciation rate of 6% for investment expenses incurred in the context of making energy-efficiency improvements to existing properties.

VAT

In order to extend the scope of the VAT exemption for small businesses, the threshold under which taxable persons are VAT exempt has been raised from EUR 30,000 to EUR 35,000.

Tax cards

As from tax year 2022 (in certain cases as from tax year 2021), the Luxembourg tax authorities will issue electronic tax cards to employers (potentially valid for several years under certain conditions) via a secure online platform, meaning employees will no longer be required to provide the employer with a paper version of their tax card. On 18 November 2020, the Luxembourg tax authorities issued a newsletter providing practical information on this subject available here.

For more information, please contact our tax experts:


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SKRINE

Wynn Wins – Federal Court Dismisses Punter's Application for Leave to Appeal

08 JANUARY 2021

In the case of *Wynn Resorts (Macau) S.A. v Poh Yang Hong* [2019] MLJU 2003 ("*Poh Yang Hong Case*"), the Malaysian High Court allowed a Macau-based casino's claim against its patron in the sum of HK$33,186,554 (equivalent to RM17,257,000), with interest thereon, being the amount owing under a gaming credit facility.

In coming to its decision, the High Court distinguished a wagering agreement (i.e. where the obligation to pay depends on the outcome of the wager, thus having an element of chance or uncertainty) from a gaming credit agreement (i.e. where credit is granted to a person for purposes of gaming). While a wagering agreement is unenforceable in Malaysia, the High Court held emphatically that enforcement of a debt owing under a credit facility, albeit for gaming, is not contrary to public policy. A summary of the High Court's decision is available here https://www.skrine.com/insights/alerts/october-2020/is-a-gambling-debt-illegal-and-unenforceable-in-ma.

Following the Court of Appeal's dismissal of the Defendant's appeal on 21 July 2020, the Defendant applied for leave to appeal to the Federal Court. On 12 November 2020, the Federal Court dismissed the Defendant's application as the threshold to appeal the matter under Section 96(a) of the Courts of Judicature Act 1964 was not met, namely:-

i. The appeal did not involve a question of general principle decided for the first time; or

ii. The appeal did not involve a question of importance upon which further argument and a decision of the Federal Court would be to public advantage.

This necessarily means that the High Court's decision which was affirmed by the Court of Appeal now stands as a landmark precedent with regards recovery of debts pursuant to credit agreements between foreign casinos and Malaysians who avail themselves to gaming or casino credit to gamble in these casinos.

Comment

Gaming or casino credit is commonly offered by foreign casinos to creditworthy patrons for the sole purpose of gaming / gambling in such places. Credit agreements of such nature are lawful in, amongst others, Macau and Singapore. Whilst there may be sentiment that granting such credit encourages or promotes gaming / gambling and thus is against Malaysian values and public policy, punters who voluntarily and knowingly obtain such credit must take responsibility and be accountable for repayment of such credit. As Justice Noorin Badaruddin once stated in ***Wynn Resorts (Macau) S.A. v Wang Yen Liang*** [2017] 8 CLJ 93:

"*… there is no doubt that the facility was not and is not intended to be given gratuitously and the defendant never denied that he had taken the benefit of the plaintiff's facility. Further, the plaintiff's submission that the fact the defendant went to Macau, obtained a huge facility, gambled away and comes back to Malaysia and cloaks himself by saying "no you can't touch me, I am in the safe haven of Malaysia" is the kind of inequitable conduct which equity would prevent…*"

In the ***Poh Yang Hong Case***, Justice S. Nantha Balan (as His Lordship then was) had, after a detailed analysis, drawn a clear distinction between an action to recover monies owed under gaming credit and an action to recover monies won on a wagering agreement. Whilst previous Malaysian cases illustrate the trend or practice of foreign casinos obtaining judgment in the country where they are based for unpaid debts under the gaming credit before registering the said judgment in Malaysia and pursuing enforcement proceedings thereafter, the ***Poh Yang Hong Case*** now affords some certainty in the more direct avenue of suing to recover the monies owed under a gaming credit facility in Malaysia.

Alert prepared by Siew Ka Yan *(Associate) of Skrine.*

Landmark lockdown decision on minimum wage entitlements

December 22, 2020 |2 min read

The first Employment Court decision on Covid-19 issues has just been released (in *Gate Gourmet New Zealand Limited and Ors v Sandhu and Ors* [2020] NZEmpC 237) with the majority of the Full Court finding that the Minimum Wage Act did not require an employer to pay employees the minimum wage in circumstances where those employees did not perform work during New Zealand's Level 4 lockdown earlier this year.

Background

This case concerned whether Gate Gourmet had breached the Minimum Wage Act 1983 (MWA) during New Zealand's Level 4 lockdown by paying employees who had not been rostered to work, at the rate of 80% of their normal pay (being 80% of the minimum wage).

The Employment Relations Authority had held that if the applicants were ready, willing, and able to work, Gate Gourmet was required to pay them at least the minimum wage, notwithstanding any agreement to only pay 80% of the minimum wage. The Authority held that the decision whether to work or not was not a decision made at the election of the employees, but rather at the direction of Gate Gourmet. The Authority concluded that by paying 80% of the employees' normal pay, Gate Gourmet had breached the MWA.

Court decision

On appeal, the majority of the Court found that the purpose of the MWA is to ensure that employees receive a base wage for their work to enable them to meet living expenses for themselves and their family, but that the MWA does not provide for a guaranteed minimum income. Instead, section 6 of the MWA provides for a minimum payment in exchange for work performed by an employee. The Court stated that accepting the employees' expansive interpretation of what constituted work (namely, the employees being ready, willing and able to work) "*would undermine the core concept of section 6*", which provides the exchange of payment for work.

The Court relied on the decision of *Idea Services Ltd v Dickson* [2009] ERNZ 116 (EmpC) which identified the factors to be considered when determining whether an activity constituted work. Applying these factors, the Court found that the employees were not 'working' during the periods where they were not rostered on, as:

- There were no constraints placed on the employees' activities by Gate Gourmet;
- The employees had no responsibilities to Gate Gourmet; and
- There was no benefit to Gate Gourmet.

While the Court acknowledged that Parliament has made it clear that the preservation of minimum employment rights is of the utmost importance, it saw no persuasive basis for departing from the well-established approach to assessing work for the purposes of section 6 of the MWA. Accordingly, the Court concluded that "*when the defendants stayed home, they were not working for the purposes of the MWA, the MWA was not engaged, and no statutory minimum wage entitlements arose*".

The Chief Judge of the Employment Court dissented from the majority and considered that Gate Gourmet's actions were in breach of the MWA.

Comment

The Court's decision will be welcome news for any employers who took a similar approach to Gate Gourmet due to the effects of the lockdown. However, the Court's decision does not detract from the fact that employers cannot contract out of the MWA or unilaterally reduce employee wages.

Please contact our team if you would like to discuss the implications of this decision for your business, including in relation to any issues that may have arisen regarding decisions to reduce employees' pay as a result of New Zealand's Alert Level lockdowns.

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Mediating joint venture disputes

DENTONS RODYK

January 8, 2021

Mediation has shown itself to be a powerful tool for bringing a speedy and effective end to cross-border disputes while preserving the commercial relationship between them

India has been on an unabated growth trajectory - supported by a Gross Domestic Product (GDP) of nearly US$11.5 trillion (S$15.9 trillion). India is also the world's third largest economy after China and the United States, according to 2019 International Monetary Fund estimates. Rising affluence and growing urbanisation in India has attracted investors who are keen to tap on India's elite and affluent households - two of the fastest-growing income segments in the country, expected to double to 16 percent of the population by 2025. The rapid growth of India has not stopped despite the COVID-19 pandemic. Indeed, the authors continue to observe increasing number of investments in tech-related start-ups in India by foreign venture capital funds and institutional investors and also the shift in supply chains with more companies looking to set up their manufacturing plants and factories in India, even in the last 6 months.

It is therefore not surprising that for two consecutive financial years, Singapore has been the top source of foreign direct investment (FDI) into India, accounting for about 30% of FDI inflows in 2019 to 2020. In the last financial year, India attracted a staggering US$16.23 billion in FDI from Singapore. This increase in investments is further buttressed by the support from various tax treaty amendments that Singapore and India have signed in recent years, such as the revised Avoidance of Double Taxation Agreement in late 2016. This has created an environment well-suited for investments and joint venture partnerships between Singaporean and Indian businesses. This article seeks to focus on joint venture companies as typically, such joint ventures involve the long-term cooperation and synergy of commercial parties, each bringing different but complementary skill sets to the table. For instance, one party (usually the international party) may be equipped with the technical know-how, industry expertise, design thinking, positive branding or funding, while the other party (usually the local party) leverages on its contacts, operations and local commercial acumen (and navigation of Indian politics and complex laws and regulations) to help the joint venture project expand in the local and / or regional market.

However, joint venture projects carry the possibility of dispute arising between partners. Such disputes may be aggravated by the cross-border nature of joint ventures and arise if there are shareholder deadlocks (or parties holding 50:50 shareholdings as a result of equal partnerships) or arise due to the different legal and cultural backgrounds of parties. Whilst parties generally conduct due diligence on the counterparty before entering any agreement, disputes may still arise in the course of their relationship and it is therefore imperative that parties agree on a quick and effective form of dispute resolution in their contracts. In this context, mediation has shown itself to be a powerful tool for bringing a speedy and effective end to such disputes between parties, while preserving the commercial relationship between them.

The evolution of mediation

Mediation has undoubtedly attained mainstream popularity, as an effective and cost-efficient solution to resolving disputes. Mediation is popular in Singapore, and is well supported by the appropriate infrastructure and institutions. The Singapore International Mediation Centre (SIMC) maintains a panel of over 65 international mediators from 14 jurisdictions who are experienced in cross-border dispute resolution, including seven mediators active in India. The Singapore Mediation Centre (SMC) with a panel of mediators with wide-ranging expertise, boasts a settlement rate of 70%, where 90% of these matters are resolved within one working day.

The uptake of mediation as a means of dispute resolution was marked by a significant milestone, when the Singapore Convention on Mediation (Convention) attracted signatories from 46 countries in 2019. Subsequently, the Singapore Convention on *Mediation Act 2020* came into force on 12 September 2020 and has 53 signatories which include the United States, China and India. Under the Convention, settlement agreements have been given teeth - the Convention provides a uniform efficient framework for the recognition and enforcement of mediated settlement agreements that resolve international corporate disputes. With the Convention, businesses can rely on mediation as an appropriate dispute resolution option for their cross-border transactions, with greater certainty and assurance that their mediated outcomes are enforceable, which translates to savings in time and legal costs. Under the Convention, parties to a joint venture may thus be assured that any settlement they enter into can be recognised and enforced with the same degree of finality as a court judgment. Indeed, businesses seeking enforcement of a mediated settlement agreement across borders under the Convention can do so by applying directly to the courts of countries that have signed and ratified the treaty, instead of having to enforce the settlement agreement as a contract in accordance with each country’s domestic process.

Increasingly, the authors have observed mediation increasingly being included in multi-tiered dispute resolution clauses in various investment and joint venture agreements. Very often, parties will agree in a dispute resolution clause to submit a dispute for resolution by mediation, failing which the parties can choose to arbitrate. The Arb-Med-Arb protocol, created by the Singapore International Arbitration Centre and SIMC, goes one step further in combining the advantages of arbitration and mediation.

The Arb-Med-Arb protocol is an innovation that allows parties to submit the dispute to mediation shortly after commencement of the arbitration (the mediator will not be one of the arbitrators appointed in the case). If the mediation is unsuccessful, the parties can pick things up where they left off in the arbitration process. The opportunity to mediate while arbitration proceedings are ongoing increases the likelihood of settlement. This is because the commencement of arbitration raises the tempo and adds impetus to the parties to reach a commercial resolution of their dispute. However, the mediation takes place during the preliminary stages of the arbitration, when parties’ positions may still be relatively fluid and may not have been set in stone. This allows enough flexibility for dynamic commercial negotiations to facilitate a settlement. A successful mediation can also lead to a result that satisfies both parties and preserves the working relationship between them. Any settlement agreement can then be recorded as an arbitral award and enjoy close to universal enforceability under the New York Convention.

To illustrate our points above, it will be helpful to consider the following case of an Indian joint venture dispute which was successfully settled via mediation.

Case Study

The case study involves a joint venture dispute that arose out of a complex investment agreement between a Finnish and Indian company. The dispute resolution clause in the joint venture agreement was a multi-tiered clause that provided for mediation prior to arbitration. Over the course of four years during the subsistence of the joint venture, several disputes arose between the parties. Notably, the relationship between the parties had broken down considerably and parties were eager to put a quick end to their disputes. Crucially, the parties seriously engaged in the mediation with the genuine aim of resolving their differences, instead of treating it as a formal step prior to the commencement of arbitration. With the right frame of mind, and mutual commitment to reaching a commercial deal that would assuage both parties, mediation proved to be a swift and effective method of satisfactorily resolving the dispute between the parties.

This case illustrates how parties can arrive at a commercial resolution if they take full and proper advantage of mediation and its benefits. A robust and commercially savvy mediator can then help parties navigate their disputes and hone in on their goals.

According to the World Bank's Ease of Doing Business index, India climbed to the 77th spot in 2018, up an impressive 23 positions from 2017. Notwithstanding these improvements, making a foray into a new market like India may prove intimidating at the outset for foreign parties. Often, market entrants may prefer to enter a consortium or joint venture agreement to tap into India's growing market. It is therefore advisable for foreign parties in this position to insert mediation as part of a tiered dispute clause in their agreements. As mentioned above, mediation can serve as a platform for parties across borders to explore creative yet practical ways to settle their disputes without having to compromise their own respective commercial interests. Importantly, parties can avoid protracted and costly litigation, and a complete breakdown of the relationship between them. The availability of mediation, with the strengthened enforceability offered by the Convention, would allow parties to enter into joint ventures with confidence, and relative peace of mind.

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AMENDMENTS TO RULES ON TECHNICAL COLLABORATION IN THE PRC

Lee and Li Attorneys-at-Law

01/06/2021

Amendments to Rules on Technical Collaboration in the PRC

On December 30, 2020, the Investment Commission, the Ministry of Economic Affairs (the " **Investment Commission**") promulgated the amendments to Article 5 of the Regulations Governing the Approval of Investment in or Technical Collaborations in the People' s Republic of China (PRC) (the " **Approval Rules**") and Article 4 of the Regulations Governing the Review Criteria of Investment in or Technical Collaborations in the PRC (the " **Review Criteria**") to further prevent any direct or indirect transfer or license of Taiwanese proprietary technologies or intellectual property rights to individuals and/or corporations of the PRC without approval. The key points of the amendments are as follows:

A. The scope of technical collaborations in the PRC that are subject to regulatory approval now includes those involving the transfer and/or license, either directly or indirectly through a third-area company, of Taiwanese technologies and/or intellectual property rights.

Under the pre-amendment Approval Rules, " technical collaborations in the PRC" refers to the " license" of Taiwanese proprietary technologies or intellectual property rights to the PRC entities by Taiwanese nationals in exchange for compensation other than equities, while the " transfer" of such technologies and intellectual property rights to the PRC entities, and the transfer or license of such technologies and intellectual property rights " indirectly through a third-area company" were not covered under the Approval Rules. Nevertheless, under the newly amended Approval Rules, all the above-referenced scenarios of transfer and license are subject to regulatory approval, i.e., all future transfer and license of Taiwanese technologies and intellectual property rights to the PRC entities either directly or indirectly through a third-area company will fall within the scope of technical collaborations that are covered by the Approval Rules and therefore subject to the prior approval of the Investment Commission.

B. Investment and technical collaborations in the PRC are now subject to different review procedures.

Under the pre-amendment Review Criteria, " investment in the PRC" and " technical collaborations in the PRC" are subject to the same review procedure. Considering that, unlike investment in the PRC, technical collaborations in the PRC can only be implemented with prior approval and, in practice, the review procedure thereof is not divided into simplified and standard procedure based on the technical value of such collaborations, the newly amended Article 4 of the Review Criteria sets forth a separate review procedure (without the distinction between simplified or standard) specifically for the applications of technical collaborations in the PRC. Under such review procedure, the review of such applications will take into consideration of factors such as the collaboration’ s impact on the core competitiveness of Taiwanese companies, Taiwan’ s research and development roadmaps in the relevant industries, and any potential infringement on the intellectual property rights of any entities in Taiwan. The application may also be further reviewed at the Commissioners’ Meeting held by the Investment Commission where a special circumstances necessitates a closer scrutiny.

As this round of amendments aim to strengthen the control on the technical collaborations in the PRC and to avoid unapproved transfer or license of Taiwanese technologies and intellectual property rights, corporations shall conduct careful evaluation on their PRC activities that involve Taiwanese proprietary technologies or intellectual property rights so as to prevent any inadvertent violation of the laws or unnecessary legal risks. If your company has any questions about the Approval Rules or the Review Criteria, or would like to obtain more information thereon, please feel free to contact Lee and Li’ s Corporate and Investment Practice Group.

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Thought Leadership

Carbon Capture Tax Credit: IRS Issues Much-Anticipated Final Section 45Q Regulations

07 January 2021

Client Updates

On January 6, 2020, the Department of the Treasury and the IRS released final regulations under Internal Revenue Code section 45Q. Section 45Q offers a federal income tax credit for carbon capture and sequestration to incentivize investment in projects that will reduce emission of greenhouse gases, including through use of captured carbon oxide in enhanced oil recovery ("**EOR**").

Legislation in 2018 significantly enhanced the credit but delegated development of certain key rules to the Treasury. Proposed regulations were issued on May 28, 2020, followed by a public comment period and hearing. For our analysis of the proposed regulations click here.

The final regulations have revised and provided clarification in the following areas, among others:

- Secure geological storage of captured carbon oxide - confirmation that taxpayers may choose to comply with either EPA or ISO standards
- Definition of "commercial markets" for utilization of captured carbon oxide - broad definition with taxpayer substantiation
- Measurement of utilization of captured carbon oxide - lifecycle analysis conforming to ISO standards required
- Procedures for transferring the credit to third-party taxpayers – transfer to subcontractors prohibited
- Recapture of credit upon leakage – recapture period now limited to three years.
- Definition of "carbon capture equipment" - a list of specific items of equipment has been deleted with the new definition dependent upon the functional use of the equipment
- Definition of "qualified facility" – aggregation of multiple facilities to meet minimum required capture levels

The final regulations contain certain changes that respond to public commentary on the proposed regulations. The many public comment letters filed with respect to the proposed regulations can be accessed using Baker Botts' Finding Tool for 45Q Comment Letters here.

With the release of these final regulations, it is anticipated that investors and developers of carbon capture, storage and utilization ("**CCUS**") projects will have enough certainty regarding credit availability to move forward with CCUS projects that have been tabled pending final guidance.

Section 45Q Tax Credit Overview

Section 45Q offers a credit against federal income tax liability in a specific dollar amount per metric ton of qualified carbon oxide (both carbon dioxide and carbon monoxide, whether man-made or pulled directly from the ambient air) that is captured and sequestered by injecting the captured carbon oxide for secure permanent storage in underground geological formations, injecting the captured carbon for use in EOR or utilizing it for any purpose for which a commercial market exists. Captured carbon oxide that would otherwise have been emitted as a by-product of an industrial production process, such as LNG, ethanol or fertilizer production, is also eligible for the credit.

The amount of the credit depends on the date the carbon capture equipment is placed in service and whether the qualified carbon oxide is disposed of in secure storage, used in EOR or utilized for a purpose for which there is a commercial market. In the case of carbon oxide captured using equipment placed in service on or after February 9, 2018, the credit is available during the 12-year period beginning on the placed-in-service date. The credit amounts can be as much as $50 per ton captured and permanently sequestered and $35 per ton captured and used in EOR or other qualifying utilization.

The Meaning of "Secure Geological Storage"

The majority of captured carbon oxide currently is used for EOR and it is expected that most companies that install carbon capture facilities will do so with the intention of selling the captured carbon to producers who will use it for that purpose. Section 45Q(a) requires that, in order to be eligible for the credit, the captured carbon oxide, including that used in EOR, "must be disposed of by the taxpayer in secure geological storage."

Prior IRS guidance (Notice 2009-83 and Form 8933) required that "secure geological storage" meant compliance with the EPA's greenhouse gas reporting rules, including monitoring and verification requirements, that apply to Class VI wells used for permanent carbon sequestration ("subpart RR"). This was problematic for taxpayers engaged in EOR because it did not reference the other EPA well class, Class II, that has long been used for oilfield operations including EOR, which are governed by subpart UU of EPA's greenhouse gas reporting rules.

The proposed regulations resolved this problem by offering an additional standard: taxpayers that comply with EPA subpart RR rules may self-certify the volume of captured carbon oxide but taxpayers may also use a standard provided by the International Standards Organization, ISO 27916, as long as the documentation is accompanied by certification from a qualified independent engineer or geologist that the documentation, including the mass balance calculations and information regarding monitoring and containment assurance, is accurate and complete.

The final regulations have retained this resolution by continuing to allow taxpayers to satisfy "secure geological storage" under either EPA or ISO standards and have provided additional detail regarding the certification process and credentialing of the those certifying. The certification must contain an affidavit from the certifying engineer or geologist stating that he or she is independent from the taxpayer.

Utilization of Carbon Oxide – Commercial Markets

In addition to sequestration of carbon oxide through burying or use in EOR, section 45Q also offers the credit for utilization of the captured carbon through photosynthesis, conversion to a material or chemical compound or use for "any other purpose for which a commercial market exists as determined by Treasury."

The proposed regulations did not address what commercial markets Treasury determined exist for carbon oxide and requested public comment on the topic. Many very specific descriptions of commercial markets for captured carbon oxide were provided in public comment letters. The IRS has, however, helpfully chosen to define commercial markets very broadly as any "market in which a product, process, or service that utilizes carbon oxide is sold or transacted on commercial terms." Rather than calling for IRS sanctioning of markets as "commercial," the regulations state that a taxpayer must submit a statement attached to its claim for the credit substantiating that a commercial market exists.

Lifecycle Analysis ("LCA") of Utilization

Although commercial markets in which the captured carbon can be utilized are broadly defined, the amount of the credit from sales into those markets is determined by performing an analysis of the amount of the captured carbon so utilized through an analysis of lifecycle greenhouse gas emissions (an "**LCA**"). In general, an LCA systematically evaluates the environmental impact of a product, activity or process over its entire lifecycle.

Both the proposed and final regulations provide that the term "lifecycle greenhouse gas emissions" means the direct and significant indirect emissions related to the full product lifecycle, including all stages of product and feedstock productions and distribution, from feedstock generation or extraction through the distribution and delivery and use of the finished product to the ultimate consumer, adjusting the mass values for all greenhouse gases to account for their global warming potential. The final regulations now include a requirement that the "LCA must demonstrate that the proposed process results in a net reduction of carbon dioxide equivalents when compared to a comparison system."

The LCA must be performed by or verified by an independent third party and must contain documentation consistent with ISO 14044 regarding LCAs. The proposed regulations previously said that the IRS that would determine whether to approve the LCA "in consultation with the DOE and the EPA." The final regulations now provide that the LCA will be subject to a technical review by the DOE but the IRS will determine whether to approve the LCA.

The final regulations contain additional detail regarding the DOE templates to be used for LCAs and retain the requirement that the LCA must be approved by the IRS *before* the taxpayer files a claim for the credit on the basis of utilization of the carbon oxide. The IRS has indicated it will issue separate procedural guidance regarding the submission and review process, including the length of time necessary for review.

Transferring the Credit

Under section 45Q(f)(3), the taxpayer otherwise eligible for the credit may make an election to cause the credit to be transferred to the person that sequesters or utilizes the captured carbon. The proposed regulations made clear that the taxpayer may transfer part or all of the credit and may divide the credit among multiple parties when multiple parties are performing the sequestration or disposition activity, although the division must be pro rata according to the amount of carbon oxide disposed of by each party. The election is to be made annually and the regulations contain specific instructions as to the information that should be provided by both the electing and the recipient taxpayers.

The final regulations have clarified that the credit may not be transferred to a party that performs the carbon oxide capture on behalf of the taxpayer or to a subcontractor of the party contracted to perform the sequestration or utilization.

Credit Recapture

The tax credit can be lost or recaptured, thereby triggering tax liability, if the carbon with respect to which the credit was claimed subsequently escapes back into the atmosphere or ceases to be used in a manner consistent with the statutory requirements. Section 45Q does not, however, contain specific instructions regarding the method for determining that a release back into the atmosphere has occurred, nor does it provide an outside date after which leakage would not result in credit loss.

The final regulations, like the proposed regulations, provide that a recapture event occurs when the carbon oxide for which a credit has been claimed ceases to be captured, disposed of, or used as a tertiary injectant during the recapture period and that recapture events are determined separately for each project. Recapture occurs when the leaked amount of carbon oxide in a taxable year exceeds the amount of carbon oxide disposed of or used as a tertiary injectant in that same taxable year and the recaptured tonnage is the excess of the leaked amount over the disposed of or used amount. Accordingly, the recapture amount is equal to the product of the recaptured tonnage and the applicable statutory credit rate.

The final regulations have reduced the recapture period from five years to three years. The proposed regulations would have limited the recapture period to the earlier of five years after the last taxable year in which the taxpayer claimed a credit or the date monitoring of leakage ends under the requirements of either subpart RR or ISO27916. Under the final regulations, even if compliance with environmental regulations calls for monitoring for leakage for many years after the credit is claimed, the **taxpayer would not be exposed to recapture beyond three years** from the last year of the credit.

Recapture is taken into account in the taxable year in which it is identified and reported, not by adjusting the year in which the credit was claimed, so a taxpayer would add the recapture amount to their tax due in the year in which the recapture event occurs. The regulations also contain rules for assigning the recapture amount to credits claimed in prior years (a last-in, first-out basis up to a maximum of three preceding years), among multiple units (allocate pro rata) and among multiple taxpayers (allocate pro rata).

Additional Provisions

The final regulations contain many additional provisions, including:

- For purposes of determining whether a facility satisfies the requisite annual carbon oxide capture thresholds, taxpayers may aggregate and treat multiple facilities as a single facility in certain circumstances.
- The election under section 45Q(f)(6) to allow pre-2018 carbon capture facilities to receive the credit at post-2018 amounts, which is available to facilities that capture over 500,000 metric tons of carbon oxide, may be satisfied by treating multiple facilities as a single facility in certain circumstances. The regulations also clarify that such election is not a one-time election but must be made each year when applicable.
- Under section 45Q, the taxpayer that owns the carbon capture equipment is not required to physically carry out the capture, disposal, injection or utilization of the carbon oxide if the taxpayer contractually ensures in a binding written contract that such activity will be carried out in the manner required under the regulations and containing the provisions required by the regulations. With respect to this rule the final regulations provide:
    - The owner of the carbon capture equipment may enter into a contract with a general contractor that hires subcontractors to carry out the capture, disposal, injection or utilization as long as the contract binds the subcontractors the same regulatory requirements.
    - A contract will be considered a binding contract even if it limits damages as long as the limitation equals five percent or more of the total contract price.
    - Taxpayers with pre-existing contracts that do not have such required provisions will have 180 days from the date of filing of the regulations in the Federal Register to revise their contracts to contain the required provisions.

Baker Botts' multidisciplinary teams are at the forefront of CCUS developments and activities. We assist clients with CCUS-related projects and transactions around the world, and have been involved in the development of the regulatory framework for CCUS at the federal and state level in the United States. For more information about this practice, visit the CCUS Practice Group page at bakerbotts.com

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BLOG POST / PRIVACY & SECURITY LAW BLOG

Technology + Privacy & Security

WA Notify COVID-19 Exposure Tracking Tool Poses Privacy and Implementation Considerations for Employers

By Kate Berry and Angela R. Vogel

01.06.21

Washington State has a new COVID-19 exposure-notification smartphone tool, WA Notify. Introduced on Nov. 30 by the Department of Health, University of Washington, and Brotman Baty Institute, WA Notify has since been downloaded or enabled by more than 1.5 million users. As the official exposure notification tool for Washington, WA Notify alerts users of potential exposure to COVID-19.

Given the tool's potential to help reduce COVID-19 infections, employers in Washington are rightfully considering its application in the workplace. In this advisory, we provide an overview of WA Notify, its privacy protections, and key considerations for employers.

How Does WA Notify Work?

WA Notify was designed to allow users to receive notices when potentially exposed to COVID-19—but without tracking where the users go, collecting users' personal information, or sharing personal information between users.

When WA Notify is enabled on a smartphone, the phone uses Bluetooth technology to send a code to nearby phones that also have WA Notify enabled. The codes swapped by the phones are random and anonymous, so neither the recipient nor WA Notify can identify the person or device associated with the code. Codes received are saved on the phone, not by WA Notify or any government agency or private entity, for 30 days.

If a WA Notify user tests positive for COVID-19, the public health department will provide them with a "verification code" to enter into the tool. Entering the verification code will send an anonymous alert to other WA Notify users who were near the positive user for a significant length of time (e.g., 15 or more minutes) in the previous 14 days. These exposure alerts do not identify the person who tested positive, or where the two users were near each other, only that the alert recipient had a potential exposure event. This alert could encourage the recipient to follow appropriate public health guidelines related to the potential exposure, including quarantine and testing.

iPhone users can enable WA Notify through the Exposure Notifications setting on their device. Android users can download WA Notify as an app on Google Play. More information about the tool, including privacy protections, is available from the Washington State Department of Health or the University of Washington.

WA Notify and the Workplace

While the privacy risks associated with enabling WA Notify on devices appear to be minimal, the potential privacy concerns around the tool when used in the employment context are significant. As employers continue to adapt to a workplace that includes COVID-19 exposure issues, some employers may evaluate whether to require or encourage employees to enable the WA Notify tool on phones and devices used to perform work.

In particular, the tool could be valuable in preventing COVID-19 transmission in the workplace because it alerts individuals regarding potential COVID-19 exposure and thus encourages them to quarantine and/or get tested if they receive an alert about a potential exposure. In addition, an employee who receives such a notification would be deterred from entering the workplace and exposing others, including coworkers and customers, thereby preventing potential COVID-19 transmission in the workplace. Also, employers could establish workplace screening and safety policies that take the WA Notify exposure alerts into account. However, employers should keep in mind the following legal and employee relations considerations related to the tool and privacy issues:

- Employees will likely be skeptical of the tool and have privacy concerns, particularly since the tool is enabled around the clock unless disabled by the user and use of the tool is not limited to work hours or responsibilities. As a result, requiring employees to use the tool may create unwanted morale issues with limited business protections related to reducing the transmission of COVID-19 in the workplace.
- It may be difficult for employers to provide business justification for mandating the use of the tool, since its function greatly exceeds workplace exposure issues, and the tool

does not provide users with specific exposure location information. Employers who have employees performing in-person services will have stronger business-related justifications for encouraging the use of the tool because of the risks to the workforce and the public. Employers with a remote workforce, where exposure risks to other employees and the public is limited, will have a more difficult time directly tying the use of the tool to workplace-related protections.

- Educating employees about the tool and the privacy protections within the tool may minimize privacy concerns and incentivize employees to use the tool.

- If employers require or encourage employees to use the tool, they should consider how to handle potential exposure alerts employees may receive in order to comply with Washington Safe Start workplace requirements and applicable state and federal exposure guidance and recommendations, including requiring employees who have potential exposures to quarantine and/or follow other applicable guidelines and recommendations. This could mean updating applicable workplace safety plans and educating employees on what to do if they receive an alert, including notifying the appropriate workplace contact.

- If employers require employees to use the tool, appropriate reimbursement for personal device use should be provided if the employee does not have a work-provided device or does not already receive reimbursement for using a personal device for work purposes. Employers could also offer to provide reimbursement to incentivize the use of the tool if encouraging, but not requiring, employees' use of the tool.

- Employers may face liability if they require or encourage employees to use the tool and personal information is compromised because of the tool. Employees may seek indemnity for any losses due to the exposure of information

Recommendations for Employers:

- In most situations, employers should encourage rather than require the use of the tool because of the privacy considerations that extend beyond the workplace. If an employer requires the use of the tool, the requirement should be limited employees who have regular in-person interactions with others.

- Employers should update workplace safety plans to reflect use of the tool by employees, and to specify what to do if an employee receives a potential exposure alert from the tool.

- Employers should provide employees with training related to the tool, including the privacy protections, and what to do if they receive a potential exposure alert.

- If employers want to encourage the use of the tool, consider incentives, such as small rewards to each employee when there is evidence that they enabled the tool. Incentives might include providing gift cards or chances to receive a larger award.

- Employers should provide appropriate reimbursement for personal device use if requiring the tool and if the employee does not have a work-provided device or does not already receive reimbursement for using a personal device for work purposes.

This article was originally featured as an employment advisory on DWT.com on December 23, 2020. Our editors have chosen to feature this article here for its coinciding subject matter.

D.C. employers have continuing COVID-19 leave obligations in 2021

11 January 2021
All in a Day's Work: The Employer's Legal Guide

As we explained in a recent post, as of January 1, 2021, COVID-19 leave is no longer mandated under the federal Families First Coronavirus Relief Act (FFCRA), although covered employers who voluntarily provide paid leave outlined in the FFCRA may take advantage of the FFCRA tax credit through March 31, 2021. Notwithstanding this change in federal law, District of Columbia employers should be aware of their continuing obligations to provide leave to eligible employees for COVID-19 related reasons at least through the first quarter of 2021 under D.C. law.

Read more: D.C. employers have continuing COVID-19 leave obligations in 2021

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