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Pacific Rim Advisory Council
July 2021 e-Bulletin

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CONFERENCES & EVENTS

PRAC Let's Talk!

upcoming virtual meetings
August 23/24, 2021 | September 20/21, 2021

International Conference - New Delhi Hosted by KOCHHAR & Co. TBA
International Conference - Mexico City Hosted by Santamarina y Steta TBA
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.

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MEMBER DEALS MAKING NEWS

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ARIAS WELCOMS IP EXPERT AND TEAM

The new partner, an expert in intellectual property, and her core team, will contribute to the expansion of the department in Arias. Pilar has more than 20 years leading a sophisticated IP practice.

Today, with great enthusiasm we announced the incorporation of the renowned attorney **María del Pilar López** to our practice in Costa Rica. Pilar is recognized as a leader in the field of Intellectual Property in the country and the region with over 20 years of professional experience.

Regarding this important change, Pilar affirms that "I am very excited about the decision to join Arias, to be a team player in a very collaborative environment. I am sure that this new challenge will allow me to continue growing professionally and personally, providing innovative and creative solutions. Arias is a firm made up of professionals with extensive experience, that is constantly updating itself, following and adapting to market trends to satisfy the needs of its clients. I have no doubt that together we will continue to provide the highest quality services and create lasting relationships with our clients".

Carolina Flores, Managing Partner comments: “Pilar's arrival fills us with great joy and optimism and allows us to continue focusing on our growth and regional projection. At ARIAS we have a vision of teamwork, and we are pleased to incorporate people who we know will contribute to our dynamics. Pilar´s experience and charisma fit perfectly in our Firm.

Pilar has a Law Degree from the Universidad Libre de Derecho and a Master's degree in Notary Law. She is also a member of the INTA (International Trademark Association), of ASIPI (Inter American Association of Industrial Property) and of APPICR (Association of National Professionals in Intellectual Property in Costa Rica), the Brazilian IP Association (ABPI) among others. For several consecutive years, legal directories such as Chambers & Partners, Legal 500, Latin Lawyer 250, Best Lawyers and Who's Who Legal have ranked her in the highest positions as leader in Intellectual Property.

According to Luis Diego Castro, Partner, and leader in Intellectual Property: "At Arias we continue to build an intellectual property practice that, in addition to being robust and specialized, is the strategic ally of innovators seeking to take the country to the next level of development. The incorporation of Pilar, a leading lawyer in the intellectual property environment in the region, is a fundamental ingredient in this project.”

Simón Valverde, Partner of the Firm, affirms that "we are very pleased with the incorporation of Pilar and her team to our intellectual property practice. They are well known for their excellence, and this allows us to continue offering our clients robust and highly specialized services.

This event is a very important strategic move for Arias in the Costa Rican legal market, not only signifying an expansion, but also, supporting a continuous update process of the Intellectual Property practice area.

For additional information visit us at www.ariaslaw.com

DENTONS RODYK ANNOUNCES PARNTER AND SENIOR ASSOCIATE PROMOTIONS

Dentons Rodyk Announce Partner and Senior Associate Promotions

SINGAPORE , 01 July, 2021: Dentons Rodyk is pleased to announce the promotions of Zhi Hao Loy, Desmond Chew, Martin See and Yi Rong Ang to the position of Partner, with effect from 1 July 2021.

Zhi Hao Loy (Corporate): Zhi Hao has extensive experience advising on blockchain and DLT fundraisings including equity, debt and token offerings (ICOs, IEOs, IDOs and STOs). Aside from project companies, Zhi Hao also advises cryptocurrency and digital asset exchanges (both centralized and decentralized exchanges (DEX)), over-the-counter (OTC) intermediaries, stablecoin issuers and other FinTech payment service providers on regulatory and licensing matters. Zhi Hao also advises decentralized finance (DeFi) platform developers, cryptocurrency miners and proof-of-stake aggregators. Aside from blockchain-related matters, Zhi Hao's broader transactional practice includes corporate finance, private equity, mergers and acquisitions and general corporate and commercial transactions and he has advised companies from start-ups in early stage financing to issuers in initial public offerings (IPOs) in Singapore and Hong Kong.

Desmond Chew (Intellectual Property & Technology): Desmond's area of practice primarily focuses on technology, privacy and cybersecurity laws. He has represented and advised several clients in some of Singapore's largest data breaches, including the SingHealth Cyber Attack. In the technology space, Desmond has also assisted clients to advise, draft and negotiate contracts involving cutting edge technologies, including self-sovereign identity and smart city solutions. Desmond also has extensive experience in intellectual property laws, with a particular focus on trademark litigation, border
enforcement actions, and cross border licensing arrangements.

Martin See (Litigation & Dispute Resolution): Martin's practice focuses on complex commercial litigation, investigations, and arbitration. In his court practice, Martin has represented clients in proceedings before the Singapore High Court and Court of Appeal – most notably as part of the team that successfully represented PNG Sustainable Development Program in one of the highest-value disputes in Singapore's litigation history. Martin is also experienced in other forms of dispute resolution, including in international arbitrations conducted under the rules of major arbitral institutions.

Yi Rong Ang (Real Estate): Yi Rong started her legal practice in the firm's Litigation and Dispute Resolution Practice, before joining the firm's Real Estate Practice in 2015. Yi Rong's areas of practice include real estate acquisitions and divestments, project development, collective sales and en bloc purchase of strata titled developments. She has advised real estate developers in all aspects of project development work, including the acquisition of development sites and the sale of residential, commercial and mixed-use developments. In the course of her practice, Yi Rong has also been involved in many collective sale projects and has experience acting for both the vendors and purchasers in such transactions.

The Firm is also pleased to announce the promotion of 12 lawyers to the position of Senior Associate, effective from 1 July 2021:

Corporate: Pearlene Han
Finance: Kwok Meang Choo; Lee Min Lau
Intellectual Property & Technology: Joshua Woo
Litigation & Dispute Resolution: Alexander Choo, Allison Foo, Elias Arun, Geraldine Toh, Hern Wei Leong, Kim Koh, Sean Sim, and Zoe Pittas

For additional info visit www.dentonsrodyk.com

GIDE APPOINTS SEVEN PARTNERS

PARIS, 08 July 2021: Gide is delighted to announce the appointment of seven new partners.

The promotion of these talented lawyers, 3 women and 4 men, strengthens Gide's leadership and advances its development. With their acknowledged and respected skills in their respective practice areas, these new partners are committed to promoting Gide's primary purpose, which is to provide the best service to its clients.

Gide now has 117 partners across its 11 offices worldwide.

The new partners are :

Banking & Finance / Project Finance
Nathalie Benoit
Farah El-Bsat

Economic and European Law
Laura Castex

Mergers & Acquisitions / Venture Capital
Louis Oudot de Dainville

Real Estate Transactions & Financing
Antoine Mary

Intellectual Property, Telecommunications, Media & Technology
Julien Guinot-Delery

Regulatory & Investment funds
Benjamin Delaunay

Frédéric Nouel, senior partner, said: "*Congratulations to these 7 talented individuals whom we are proud to welcome to our partnership. As well as being experienced lawyers who are highly valued by their clients, these new partners excel in their respective areas of expertise. With them, and all of our teams, our goal is to advance Gide's development with the sole aim of providing the best service to our clients who, faced with very uncertain circumstances, are looking for sound, precise and confident advice*."

Jean-François Levraud, Managing Partner, added: "*These appointments are in line with the firm's desire to place the promotion of our talent at the heart of our development strategy. With the health crisis having made the law more central than ever to the economic issues facing businesses, it is invaluable to have a new generation of partners at our side who are agile and innovative in their practice of the profession*."

For additional info visit www.gide.com

HAN KUN BOOSTS CROSS BORDER CAPABILITIES

Han Kun welcomes Mr. Nick Shu in joining the firm, further boosting the firm's overall capabilities

BEIJING, 11 July 2021: Han Kun Law Offices is pleased to announce that Mr. Nick Shu has recently joined the firm, further strengthening Han Kun's overall capabilities. He will mainly be based in the firm's Shanghai office.

Mr. Shu's legal practice covers cross-border mergers and acquisitions, private equity and venture capital investment, capital markets, foreign direct investment, and other general corporate matters. He has represented various private equity firms, venture capital funds, strategic investors, portfolio companies, and multinational companies in connection with their cross-border mergers and acquisitions and diverse types of cross-border investments and financings. Mr. Shu's practice extends across all industries, with a particular emphasis on technology, media, and telecommunications.

Prior to joining Han Kun, Mr. Shu served as the director of corporate development of a leading US-listed e-commerce group from 2018 to 2021. Before that, he practiced law for many years with White & Case LLP, Skadden, Arps, Slate, Meagher & Flom LLP, and another major PRC law firm in Beijing and Shanghai. Earlier in his career, Mr. Shu also worked as a tax consultant with a big-four accounting firm.

Mr. Shu holds a PRC bar qualification, is a member of the New York State Bar, and is also a CFA® charterholder. He is currently in the process of handling his lawyer relationship and other relevant formalities.

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

For additional information visit www.hankunlaw.com

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

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

HOGAN LOVELLS ADDS FORMER STAFF DIRECTOR FOR THE HOUSE INTELLIGENCE COMMITTEE

WASHINGTON, D.C., 12 July 2021: Global law firm Hogan Lovells announced today that Timothy S. Bergreen, the former staff director for the House Permanent Select Committee on Intelligence and Chief of Staff to Committee Chairman Rep. Adam Schiff (D-CA), has joined the firm as a partner in its Government Relations and Public Affairs practice.

Bergreen has more than two decades of experience advising and legislating across a range of policy issues relating to national security, including intelligence, foreign policy, defense, trade, sanctions, cybersecurity, cryptocurrencies, telecoms, satellite communications, and appropriations in the House, Senate, and Department of State. A respected Washington professional, Bergreen established a reputation for working across party lines to navigate the political and policy dynamics needed to achieve success in polarized and complex times.

"An important lesson I learned while serving in Congress is that nothing in government happens in a vacuum. Every decision involves a careful analysis of how it intersects and impacts business, law, policy, and politics -- both here and abroad -- which is something Hogan Lovells has a reputation for doing at an extraordinarily high level," said Bergreen. "I am excited to join the firm to help our clients maximize and extend the breadth of the firm's capabilities to achieve their goals." As Staff Director of the House Intelligence Committee, which oversees U.S. intelligence agencies including components of the Departments of Defense, Homeland Security, Justice, State, Treasury and Energy, Bergreen developed excellent working relationships with contacts in Congress and across the intelligence, foreign policy, and defense communities.

"Hogan Lovells has a leading global regulatory practice with more than 650 lawyers, and adding a partner of Tim's caliber only solidifies that reputation," said Alice Valder Curran, who leads the firm's Global Regulatory & IPMT practice. "I'm excited to bring Tim onto our team. He deepens our bench of professionals who know the players as well as the rules and will be a key asset to help our clients in the U.S. and around the world, helping them approach the evolving and complex global regulatory landscape not as an obstacle, but as a source of opportunity."

"As a global firm with roots firmly planted in Washington, D.C., I am thrilled that Tim is joining us," said Michele Farquhar, D.C. Office Managing Partner. "Hogan Lovells operates at the intersection of business and government, and Tim's experience at the highest levels of government will give our clients a competitive advantage when it comes to thinking ahead and looking around corners for what's next."

For additional information visit www.hoganlovells.com

TOZZINIFREIRE CONTINUES PARTNER REIINFORCEMENT WITH ADDITION OF M&A CAPITAL MARKETS EXPERT

SAO PALO, 08 July, 2021: Brazil's TozziniFreire Advogados has appointed its third partner in less than a month by recruiting a counsel from Pinheiro Neto Advogados, strengthening its M&A and capital markets practices. Beatriz Seixas joined TozziniFreire on 6 July, taking its partner count to 87.

Beatriz Seixas

Focusing on mergers and acquisitions, debt restructuring and IPO transactions, Seixas spent nearly 20 years at Pinheiro Neto, starting as a trainee in 2004. Most recently, she held a counsel position there. During her time at her former firm, she worked as a visiting attorney at Gibson, Dunn & Crutcher LLP in New York from 2012 to 2013.

TozziniFreire's CEO Fernando Serec says the addition of Seixas is a significant reinforcement for the firm. "Handling milestone transactions, Beatriz has accumulated deep expertise in coordinating several mergers and acquisitions, private equity investments, debt restructuring and IPO operations," he highlights.

"Beyond strengthening our practice's performance in the market, Beatriz comes to confirm the prominence of the female participation in our group of partners," says partner Maria Elisa Verri, who also co-heads the M&A practice.

Seixas is TozziniFreire's third partner appointment in less than a month, and follows up with several of Tozzini's recent additions to its partnership in the energy and regulatory, tax, and litigation practice groups.

For additional information visit www.tozzinifreire.com

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Registration required

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BAKER BOTTS

REPRESENTS RIVERSTONE CREDIT PARTNERS LLC IN 50 MILLION SENIOR SECURED TERM LOAN CREDIT Z FACILITY

HOUSTON, 07 July 2021: Blackbuck Resources LLC ("Blackbuck"), which designs, builds, and operates water infrastructure, entered into a sustainability-linked term loan with Riverstone Credit Partners LLC, a dedicated energy and power credit fund managed by Riverstone Holdings LLC ("Riverstone"). The financing provides an initial commitment of $50 million plus an accordion feature, which gives Blackbuck additional liquidity for growth.

The facility's pricing will be adjusted based upon Blackbuck's adherence to certain sustainability performance targets, which are defined by key performance indicators set internally by Blackbuck.

Baker Botts represented Riverstone in the transaction.

For more information, please visit www.bakerbotts.com

BRIGARD URRUTIA

ADVISES COLOMBIAN TELECOMS COMPANY COLTEL ON ITS ACQUISITION OF FIXED INTERNET BUSINESS

BOGOTA - June, 2021: Colombian telecoms company Coltel has hired Brigard Urrutia to buy the fixed internet business of the local branch of US satellite television service DirecTV. The parties signed the deal on 24 May for an undisclosed value.

Coltel bought DirecTV's wireless network and the internet services of around 200,000 of its clients. Of those clients, about 60% will keep their satellite television services from DirecTV.

Coltel, which operates as Movistar Colombia, is the local subsidiary of Spanish telecoms company Telefónica, which operates in 20 Latin American countries, including Brazil, Chile and Mexico.

Garrigues (Colombia) advised DirectTV.

Counsel to Coltel Brigard Urrutia Partner Darío Laguado and associates Daniel Moncaleano, Catalina Manga and María Márque.

For additional information visit www.bu.com.co

CAREY

ASSISTS CHILEAN BIOTECH COMPANY LAND EQUITY INVESTMENT

SANTIAGO, 01 July 2021: Chilean biotechnology company Phage Technologies has relied on Carey in Santiago to raise US$30 million in an equity financing round. The deal closed on 15 June. The company will use the proceeds from the deal to finance its international expansion.

This is not the first funding round obtained by the South American company. In 2018, Phage Technologies raised US$4 million from investors to expand its business operations in Europe. Carey advised on that deal too.

Counsel to Phage Technologies Carey Partner Francisco Guzmán and associates Constanza Rivera and Andrés Latorre in Santiago.

For additional information visit www.carey.cl

DENTONS RODYK

ADVISING ARA TRUST MANAGEMENT IN DIVESTMENT OF STRATA UNITS

SINGAPORE, 05 July 2021: Dentons Rodyk is acting for ARA Trust Management (Suntec) Limited (as manager of the Suntec Real Estate Investment Trust) in the divestment of ten (10) office strata units located across Suntec Towers One and Two, both Grade A office buildings in the city centre of Singapore, to six (6) third-party purchasers (each of which is wholly-owned by the same parent). The divestment is done on a collective basis and subject to existing tenancies, with the total divestment consideration being S$197.1 million, or about S$2,510 per square foot based on the total strata area of 78,491 square feet.

ARA Trust Management (Suntec) Limited is a wholly-owned subsidiary of ARA Asset Management Limited, a leading APAC real assets fund manager with a global reach across 28 countries including Singapore, Australia and the US. One of the real estate investment trusts it manages in Singapore is the Suntec REIT, which owns the Suntec City Mall, part of the Suntec Singapore Convention and Exhibition Centre and part of the Suntec City Office Towers. Suntec Towers One and Two (in which the divested strata units are located) are both Grade A office buildings located in a prime location at the Singapore's city centre, the Marina Centre District. Directly connected to the iconic Suntec City Mall and the Suntec Convention Centre, the office towers are highly sought after for its excellent connectivity, accessibility and convenience.

The divested office strata units have an aggregate strata area of 78,491 square feet (and net lettable area of 77,813 square feet), and are sold subject to existing tenancies.

The Dentons Rodyk team of lawyers acting for the manager are Senior Partner Pat Lynn Leong, Partner Claire Wu, and Senior Associate Geena Liaw.

For additional info visit www.dentonsrodyk.com

GIDE

ADVISING TEMASEK ON MANOMANO USD 355 MILLION FUNDING ROUND

PARIS, 13 July 2021: Gide has advised Temasek on the USD 355 million funding round of ManoMano, Europe's leading online home improvement company (home, garden, DIY), led by the Californian growth and cross-over fund Dragoneer.

Existing investors who participated include Temasek, General Atlantic, Eurazeo, Bpifrance Large Venture, Aglaé Ventures, Kismet Holdings and Armat Group.

With USD 725 million raised in eight years by Philippe de Chanville and Christian Raisson, ManoMano is now valued at USD 2.6 billion.

Gide's team advising Temasek comprised partner David-James Sebag, counsel Paul Jourdan Nayrac, as well as associates Julien Negroni and Marie-Sophie Chevreteau.

ManoMano was advised by Jones Day; the new investor, Dragoneer Investment Group, was advised by Latham & Watkins.

For additional info visit www.gide.com

HAN KUN

ADVISES MISSFRESH LIMITED ON ITS U.S. IPO

BEIJING, 28 June 2021: Han Kun, as the PRC legal counsel to the issuer, has advised Missfresh Limited ("Missfresh") on its U.S. initial public offering and listing on the Nasdaq Stock Exchange under the symbol "MF".

Missfresh is a leading digitalization platform for China's neighborhood retail businesses. Founded in October 2014, Missfresh invented the distributed mini warehouse (DMW) model by building and operating DMWs in May 2015 with the focus on first- and second-tier cities in China, and operated a technology-enabled network of 631 DMWs in 16 cities as of March 31, 2021.

Missfresh has pioneered the intelligent fresh market business model and developed an end-to-end intelligent system, namely, the Retail AI Network (RAIN), which includes smart supply chain, smart logistics and smart marketing, among others.

For additional information visit www.hankunlaw.com

HOGAN LOVELLS

ADVISES CHINA CUSTOMER RELATIONS CENTERS ON A U.S. PUBLIC M&A AND GOING PRIVATE TRANSACTION

HONG KONG, 12 July 2021: Global law firm Hogan Lovells acted as the U.S. counsel to the special committee of the board of directors of China Customer Relations Centers, Inc. (Nasdaq: CCRC), a leading e-commerce and financial services business process outsourcing service provider in China, in its approximately US$119 million management buyout and take-private transaction. As a privately held entity, the management of the company will now have greater flexibility to focus on improving long-term profitability and to pursue its business strategies.

For additional information visit www.hoganlovells.com

NAUTADUTILH

ADVISES SIGNA SPORTS UNITED ON ITS $3.2 BILLION BUSINESS COMBINATION WITH YUCAIPA

AMSTERDAM - 11 June, 2021: SIGNA Sports United announced its $3.2 billion business combination with Yucaipa Acquisition Corporation. The transaction encompasses up to $645 million of gross proceeds through a cash contribution of and a fully committed upsized PIPE offering.

The combination will accelerate SSU's international expansion, including the concurrent acquisition of WiggleCRC, the second-largest online bike retailer globally, and investment in SSU’s technology platform. The combined entity will be listed on NYSE and become one of the largest pure-play sports e-commerce and technology platform companies, serving over 7 million active customers, 1,000+ brand partners, 500+ connected retail stores, and more than 15 million sports community users globally.

NautaDutilh acted alongside Skadden, Arps, Slate, Meagher & Flom LLP. The NautaDutilh team was led by Paul van der Bijl and included Jules van de Winckel, Nina Kielman, Pedro Paraguay, Joppe Schoute, Koen Biesma and Marloes van der Laan.

For additional information visit www.nautadutilh.com

RICHARDS BUELL SUTTON

WINS LANDMARK DECISION: GOVERNMENT LIABLE FOR TRADEMARK INFRINGEMENT

VANCOUVER, June 21, 2021: In a landmark case involving multiple levels of appeal, RBS successfully represented a Vancouver-based energy consulting business against the Government of Ontario for trademark infringement. The decision established that public bodies can also be held liable for trademark infringement when adopting an official mark that may be confused with a prior registered trademark.

Full overview follows:

In Quality Program Services Inc. v. Ontario (Energy), 2018 FC 971, aff'd 2020 FCA 53 (leave to appeal to SCC denied), RBS LLP partner Jonathan M.S. Woolley successfully protected our client's registered trademark "EMPOWER ME" from infringement by the Government of Ontario. The Government of Ontario was ordered to pay damages of $10,000 to Quality Program Services Inc. (QPS) on the basis that the Ontario Ministry of Energy's campaign slogan "emPOWERme" and website launch of the same name was confusing with, and therefore infringed, QPS's registered mark. The key issue in this decision was whether the Government of Ontario could become immune to an infringement claim by adopting QPS's mark "emPOWERme" as an "official mark" of the government, even though it had been already registered by and accumulated goodwill associated with QPS.

Significance:

Under the Trademark Act, government and public authorities are entitled to adopt particular marks as "official marks". Once notice of the adoption is provided, these marks become removed from the realm of commerce, and any use of the official mark, or any mark confusing with it, becomes strictly prohibited. The trademark Registrar is not entitled to decline the registration of an official mark, no matter if it is confusing with, or even identical to, a company's pre-existing trademark. Examples of symbols intended to be protected by "official mark" status include the Canadian flag and the crests of Crown corporations.

The case is a landmark decision, as it is the first time anyone has ever successfully defended its trademark against a government agency seeking "official mark" or "super trademark" status for the same mark. The Federal Court of Appeal not only upheld the lower court's decision and sided with QPS, it sent the strong message that "a public authority that chooses to use a mark that is confusing to a registered trademark does so at its peril". As this case illustrates, official marks are controversial. They offer extremely broad protections, with few limitations. This decision changed the law by delineating the limitations of official mark protection.

The decision is significant to trademark and intellectual property professionals, and has received media attention. For example, CBC article "Move to 'emPOWER' Ontario energy consumers ends in $10K trademark confusion". https://www.cbc.ca/news/canada/british-columbia/power-trademark-ontario-slogan-1.4867595.

Factual Background:

QPS is a BC company that originated and used the phrase "EMPOWER ME" in connection with energy awareness since 2013, when the mark was displayed at QPS's booth at a festival in Surrey, BC. The trademark application for exclusive use of the mark was granted by the Canadian Intellectual Property Office on July 23, 2014.

In 2015, QPS became aware of the Government of Ontario's website using the name "emPOWERme" in connection with a campaign to educate Ontario residents about Ontario's energy system and energy conservation. QPS wrote to the Government of Ontario, requesting that it cease and desist its use of the mark. The Government of Ontario refused. Subsequently, it attempted to adopt PQS's mark "emPOWERme" as an official mark of the government pursuant to s. 9(1)(n) of the Trademark Act.

The Federal Court found that QPS owned the trademark EMPOWER ME for use in association with energy awareness, conservation and efficiency services, and that QPS has the exclusive right to the use of such trademark not only in BC, but throughout Canada. The Government of Ontario had wrongfully infringed QPS's trademark, contrary to the Trademark Act. The adoption of an official mark is powerful as it prohibits use by others, but does not go as far to protecting the government agency from itself contravening the Act, nor does it eliminate rights already conferred upon the owner of a registered trademark.

As a result, the Government of Ontario was ordered to pay $10,000 in damages to QPS. The Government of Ontario was unsuccessful in challenging the decision in the Federal Court of Appeal. The Supreme Court of Canada refused to grant leave to appeal, effectively solidifying QPS's win in the lower courts.

More Information: At RBS, we have a knowledgeable and experienced group of trademark agents and lawyers who manage all aspects of trademark portfolios in Canada, the USA, and around the world. For more information on protecting your trademark, or for general inquiries about trademark registration, please contact our Technology & Innovation Practice Group Leader Sze-Mei Young at syeung@rbs.ca.

For additional information visit www.rbs.ca

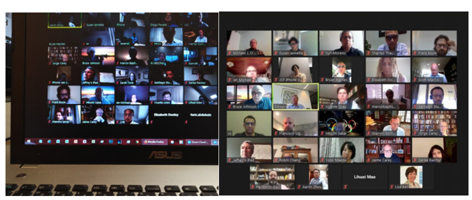
PRAC EVENTS
BULLETIN BOARD

Like millions around the globe, the COVID-19 pandemic 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!



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PRAC LET'S TALK!

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

NEW DELHI - 17 April, 2021: PRACites around the globe gathered online for PRAC @ New Delhi micro-conference hosted by member firm KOCHHAR & CO. Congratulations to the entire Kochhar Team for a successful e-hosting!

Agenda
Opening Remarks - Jaap Stoop, PRAC Chair; Marcio Baptista, PRAC Vice Chair; Jeff Lowe, PRAC Corp Secretary
Greetings & Welcome - Rohit Kochhar, Chairperson and Managing Partner
Country Update - India - Pradeep Ratnam
Visual Presentation - Essense of India!
Kochhar Practice Update - M&A - Chandrasekhar Tampi
Kochhar Practice Update - Banking & Finance - Pradeep Ratnam
Firm update - Rohit Kochhar
Panel Discussion on "Regulation of Content on Social Media" - Moderator, Stephen Mathias, Kochhar & Co (Bangalore); Mark Brennan, Hogan Lovells (Washington); Mauricette Schaufeli, NautaDutilh (Amsterdam)

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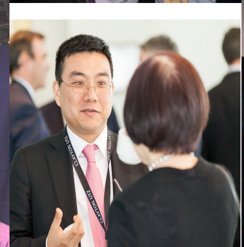


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The Argentine Central Bank and the Securities Regulator increase restrictions on securities transactions settled in foreign currency

On 10 July 2021, the Argentine Central Bank ("BCRA") issued the Communique "A" 7327 (the "Communique") which extends the sworn statement regarding securities transactions that individuals and legal entities must provide to access the foreign exchange market. The practical effect of the new Communique is to increase the limitations to operate simultaneously in the securities market and the foreign exchange market.

Firstly, the Communique added the exchange of securities for foreign assets to the transactions that individuals and legal entities must declare not to have executed in the 90 (ninety) days prior and subsequent to carrying out a transaction in the foreign exchange market. Notwithstanding this amendment, the affidavit of not having entered into (i) sales in the country of securities with settlement in foreign currency, and (ii) transfers of securities to foreign depositories, is still mandatory as a condition to operate in the foreign exchange market.

In addition, when the person seeking access to the foreign exchange market is a legal entity, the Communique incorporated the following additional sworn declarations as a condition for accessing the foreign exchange market, as of July 12, 2021:

- Details of the persons or legal entities that have a direct control relationship over the legal entity seeking access to the foreign exchange market; and
- That at the time of requesting access to the foreign exchange market and in the previous 90 (ninety) calendar days, it has not transferred to the country any funds in local currency or other local assets, to any individual or legal person that has a direct control relationship over it, except for those directly associated with regular transactions for the acquisition of goods and/or services.

In the event that, the legal entity seeking access to the exchange market has actually delivered funds in local currency or other liquid local assets to its direct controller, it may also access the exchange market by submitting a sworn statement from its direct controller that it has not entered into sales of securities with settlement in foreign currency in the previous and subsequent 90 days.

Local banks and financial institutions are also included in the requirement to submit these two new sworn declarations for their own operations.

In accordance with these restrictions issued by the BCRA, on July 8, 2021, the Securities Regulator ("CNV"), approved General Resolution 895/2021, to increase the minimum holding periods for the settlement of securities against foreign currency and in foreign jurisdiction. The General Resolution does not incorporate modifications for the settlement of securities against local currency.

The minimum holding period, locally known as "Parking Period", for securities in the local custodian to be applied to the settlement of transactions in foreign currency and in foreign jurisdiction (i.e., settlement against "Dollar Cable" in a foreign account) was set to two (2) business days. This Parking Period does not apply in the case of purchases of securities with settlement in foreign currency and in a foreign jurisdiction. In the case of sales of securities with settlement in foreign currency, but in local jurisdiction (i.e., settlement against a MEP transfer to a local account), the Parking Period remains one (1) business day. This Parking Period shall not apply in the case of purchases of securities settling in foreign currency.

The Parking Period prior to settlement against foreign currency and in foreign jurisdiction (i.e. settlement against "Dollar Cable" in a foreign account) for locally credited securities from foreign depositories (i.e. acquired from foreign agents) has also been set to two (2) business days. In the case of transactions with settlement in foreign currency and in local jurisdiction (i.e., settlement against a MEP transfer to a local account), the Parking Period remains at 1 (ONE) business day.

Finally, the CNV also modified the maximum limits for weekly transactions in sovereign securities issued by the Argentine Republic for each principal sub-account in the time-priority bidding segment (BYMA), which prior to the entry into force of the General Resolution was one hundred thousand (100,000) nominal amounts (only for securities issued under local law). According to the new General Resolution, the limit was split into (i) fifty thousand (50,000) nominals for securities issued under local law, purchased with settlement in such currency and jurisdiction, and (ii) fifty thousand (50,000) nominals for securities issued under foreign law. These limits continue not to apply to wholesale transactions (MAE/SENEBI).

This report shall not be construed as legal or other advice by Allende & Brea or as including all of the matters described herein.

Practice Areas

Banking

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Carlos M. Melhem

Brazilian Superior Court of Justice decides for annulment of the Power Bull trademark registration before BPTO

On April 13, 2021, the Brazilian Superior Court of Justice (STJ) unanimously decided for the provision of the Special Appeal No. 1,922,135 filed by Red Bull, regarding the improper association of its trademark Red Bull with the Power Bull trademark.

STJ ultimately decided to annul the registration of the Power Bull trademark before the Brazilian Patent and Trademark Office (BPTO) based on item XIX of article 124 of the Brazilian Industrial Property Law (Law No. 9,279/1996), which prohibits the registration of trademarks composed by reproduction or imitation, in whole or in part, of a registered trademark, to indicate an identical, similar or equivalent product or service, likely to cause confusion or association with another's trademark. Despite the lack of visual similarity between such trademarks, according to STJ's understanding, the Power Bull trademark would be a partial reproduction of the Red Bull trademark to identify similar products, which may cause confusion before the public or risk of improper association.

This decision reinforces the importance of the protection and monitoring of trademarks, in order to ensure the investment and efforts spent by their owners on the creation, development and dissemination of their trademarks, in addition to guarantee trademark protection to ensure the trademark owner the exclusive right to use its trademark, this measure also serves to avoid unfair competition and passing-off.

TozziniFreire Partners

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Bennett Jones Spring 2021 Economic Outlook: Beyond COVID

June 22, 2021

While economic recovery from the pandemic to date, internationally and in Canada, has been uneven and bumpy, a large share of output and jobs have been regained, and the prospects for advanced economies are strong.

If immediate attention must still be focused on overcoming the pandemic durably, the time is right for Canada to look beyond COVID, and to articulate and execute a strategy for investment and long-term improvement in our competitiveness, productivity, and standard of living.

The Outlook to the End of 2023

In our baseline scenario, on the assumption that the pace of vaccination is maintained, if not accelerated, we expect the recovery in advanced economies to shift into higher gear in the second half of 2021, before easing gradually during the next two years. Output would return to its pre-pandemic level by the third quarter of 2021, and back to its pre-pandemic trend level by the end of 2022.

These near-term prospects are considerably improved since last fall. A stronger U.S. economy, aided by larger fiscal stimulus and a faster roll out of vaccines than we assumed, underpins a more positive outlook.

For Canada, similarly, we expect that growth will accelerate in the second half of 2021, before slowing during the next two years. Real GDP would grow 5.5% during 2021 (i.e., between the fourth quarter of 2020 and the fourth quarter of 2021), 2.6% during 2022, and 1.9% during 2023.

Several factors will support the Canadian economy in getting back to its potential in the second half of 2022, and to exceed it slightly in 2023: improved household confidence and spending; strong U.S. demand for our exports, including tourism; high commodity prices; the response of business investment to the improved outlook; and continued, overall accommodative financial conditions. This will be mitigated, but only in part, by reduced fiscal support from governments, a strong Canadian dollar and a shortage of industrial inputs and labour in some sectors of the economy.

Key Risks to the Outlook

The evolution of the pandemic continues to represent the predominant risk to the global and Canadian economic outlooks. Sustained vaccination and effective public health measures, including at our borders, are necessary to contain the pandemic durably. Indeed, no solution will be definitive until there is wider global success in managing and hopefully eradicating COVID-19.

The second key risk is inflation and interest rates. Buoyant growth of demand for goods in the United States and China has already stimulated demand for industrial inputs and pushed up the prices of commodities. Tightness in supply chains and adjustment to the recovery has also resulted in sharp rises in the prices of some intermediate inputs, from shipping to semi-conductors.

While there is much uncertainty about how persistent such cost pressures will be, on balance we expect that they will start to ease by the end of 2021. Against our outlook for the U.S. economy, we think that a "data-dependent" Federal Reserve, applying its new framework, will begin to taper bond purchases in the first half of 2022, and finally begin to raise the policy rate by the end of 2022.

There is, however, a risk that U.S. inflation rises more, and for longer, than anticipated because of more persistent cost pressures and/or overheating of the economy. This could lead to higher interest rates in 2022, and slower than projected growth thereafter. Indeed, there is a serious debate underway regarding the prospects that trend inflation in advanced economies could be higher in the medium term than has been experienced in the last two decades of generally below-target inflation.

Against this backdrop, we propose in this outlook some planning assumptions for businesses to the end of 2023, including GDP growth, inflation, and interest rates in the United States and in Canada.

Solid Recovery in Labour Market but Pandemic Has Highlighted Structural Challenges

Consistent with our baseline scenario, total employment in Canada is expected to be back to the pre-pandemic level as early as the end of this year. By the second quarter of 2023, the employment rate and the unemployment rate may also be expected to return to their levels of February 2020.

In Budget 2021, the Government of Canada initiated a tapering and adjustment of emergency programs introduced during the pandemic. Given the robust recovery, the distorting effects of interventions if prolonged, and the large costs of the programs, this is broadly appropriate.

The disruption in the labour market caused by the pandemic was sharply differentiated by sector and by segment of the labour force. Its impacts will be felt longer by more vulnerable workers. There will also be permanent changes in the way we work, for example with more Canadians expected to continue working from home, at least for part of their work week.

Drawing lessons from the pandemic, and looking beyond at the changing nature of work, labour market policies require heightened attention to foster growth and inclusion.

In particular, the pandemic accelerated the structural trend of loss of lower-skilled jobs to automation. The need is greater than ever for a framework of life-long learning and skills development that encompasses early learning, education (literacy skills and micro credentials), apprenticeship and on-the-job training, and the re-skilling and upskilling of workers.
Unfortunately, Canada historically has under-invested in skills development. In the public sector, there is no standardized report card publicly available on the success of existing skills training programs at federal and provincial levels. In the private sector, hiring requirements and training programs typically

do not favour acquisition of experience and skills by the most vulnerable workers. Numerous reports, and an emerging consensus among experts, identify avenues for improvement.

The pandemic has also added to pressure for Canada to enhance access to childcare. Low-wage, young female workers were among the hardest hit by the pandemic. Many exited the workforce to care for their children.

A Canada-wide Early Learning and Child Care Plan represented the most significant long-term commitment in federal Budget 2021. While the proposed new funding is significant, the details of implementation are not tied down. The goal of 50/50 federal-provincial cost-sharing and the intention to apply federal standards for delivery mean that reaching agreement with provinces will be a daunting task. The best approaches to support long-term growth would address not only the needs of working parents, but also the early development needs of children.

Governments in Canada Not on Track of Fiscal Sustainability for Medium Term

Our last outlook proposed two fiscal anchors for governments to ensure fiscal sustainability: a declining debt-to-GDP ratio; and a *10% rule* under which program spending should be restrained so that the projected ratio of debt service costs to revenues does not exceed 10%.

Taking into account debt accumulated during the pandemic, the current fiscal plans of governments, and reasonable assumptions for growth and interest rates, we conclude that the federal fiscal framework is unlikely to be sustainable. The sustainability of national finances, including the budgets of federal and provincial governments, is even more tenuous.

Collectively, federal and provincial governments must publicly acknowledge that if the quality of public services (including income transfers) is to be even maintained, let alone improved or expanded, tax increases will be required. In the long run, fiscal sustainability depends also critically on economic growth, which in turn depends on investment and productivity growth.

The Case for a Growth Strategy

With governments and businesses focused to date on reopening the economy and recovering losses of output and jobs, there has been lesser attention on the rebuilding of our economy for a post-COVID world.

While Canadians understandably may wish after a historic crisis for the economy to get back to normal, and for businesses and workers to enjoy a greater measure of security, there is, in fact, no comfortable steady state ahead. Looking beyond COVID, Canada has to reverse two trends that pre-dated the pandemic, and that, left unchecked, will be adverse to our wealth and prosperity.

The first trend is declining productive investment as a share of our economy, which has been significant since the global financial crisis. The second trend, in part the natural consequence of the first, but also longstanding and the result of many factors, is a gradual erosion of our position in global markets.

The two trends together result in higher net borrowing from the rest of the world.

Thus, it is a priority for Canada to allocate a larger share of economic activity to investment in the factors of production—physical, human, and intangible capital—that will enable our economy to perform better in global markets. This will be aided by a growth strategy for the country.

A growth strategy is not old-style industrial policy, with heavy intervention and spending by government in every sector of the economy. At its core, a successful strategy needs to be one which is easily understood, represents a consensus between policy makers and the other major actors in the economy, and can be counted upon to last through the medium term and even beyond.

At a more granular level, a strategy requires an assessment of structural policies such as competition, taxation (tax rates and structure of the system), regulation, intellectual property, international trade and investment, as well as targeted initiatives to support adjustment to change.

There have already been many contributions, including from private sector leaders, to the development of a strategy. What is required now is a clear articulation, ongoing public and private sector engagement, and a focus on execution.

A growth strategy must be responsive, in particular, to two global forces: climate change and the digitization of the economy.

On climate, Canada must not only pursue domestic emission targets, it must seek sources of competitive advantage as the global energy system and economy drive toward lower and ultimately net-zero emissions. This includes decarbonization of our oil and gas industry in a manner that realizes the value of our resources, and that creates opportunities for future exports of energy solutions. Similarly, our motor vehicle and parts industry must situate its future in global supply chains for smart, clean vehicles. Our approach to climate can fit in a commitment to take the initiative on ESG, thus also addressing the evolving expectations of investors and consumers.

Similarly, our economy must take the full measure of the impact of digitization across the economy, and the value of technology platforms and data for the generation of wealth and prosperity. The digital economy and its winner-take-all forces require that there be concerted effort through competition, investment, intellectual property and data management policy frameworks to create the space for Canada-based firms to emerge, grow and capture global market share.

Positioning Canada Globally and Managing Our Trade Relationships

A growth strategy will be informed by, and then help guide, our relationships with key global economic partners.

Despite many challenges, and irritants past, present and future, there remains no relationship more important to Canada than the one with the United States, and no economic, policy and business signals more germane for us than those that come from south of our border. In its first months, the Biden administration has put in motion ambitious plans that create a new and evolving context for Canadian governments and businesses on a least five fronts: the macroeconomy, competitiveness, taxation, climate, and international relations. On each of these fronts, there are opportunities for Canada, some potential hazards, and areas for cooperation. Managing the relationship productively, including on trade, will not be easy, but it is a *sine qua non* for any growth strategy.

The global trading system is at a critical juncture. The pandemic has highlighted the fragile state of global supply chains and a need to make them more resilient. The World Trade Organization (WTO) is struggling to restore both its negotiation and dispute settlement functions. The Biden administration's trade policy is still in its formative stages. Canada's major partners—from China to the United Kingdom—are all grappling with how to manage their trade agenda in this evolving context.

As the rules of global trade are negotiated, our businesses not only have to adapt their business strategies and investment plans for greatest advantage, they have to engage with governments in shaping our trade agenda. At this time, priorities for Canada include the continued implementation of the Canada-United States-Mexico Agreement (CUSMA), reform in the WTO for a well functioning multilateral trading environment and the diversification of our trade to take advantage of new growth opportunities, geographically and sectorally.

Expanded investment and improved global trade could help drive long-term growth and ensure, well beyond COVID, and beyond what is now a strong recovery, rising incomes, improved balance sheets for governments, businesses and households and better standards of living for Canadians.

For the full report visit www.bennettjones.com

Posted on: June 24, 2021

BRITISH COLUMBIA COURT OF APPEAL CLARIFIES LIMITS ON RIGHT OF SUBROGATION

By: Sabdeep Sidhu

Often times, before an injured plaintiff settles a claim with a defendant, or receives a court award, they receive "collateral benefits" from third parties to help cover medical expenses, missed time from work, or other losses sustained due to their injuries. Since the law only requires defendants to put a plaintiff back in the position they would have been in if they were never injured, questions about when a defendant can deduct a collateral benefit paid to a plaintiff frequently arise.

The general rule is that defendants can deduct collateral benefits from what they may owe the plaintiff. However, there are a number of exceptions to this. If the collateral benefit was a voluntary payment or gift or if it falls within the "private insurance" exception, defendants cannot deduct the benefit.

The most common exception is when the party that provided the collateral benefit has a right of subrogation, since allowing defendants to deduct the collateral benefit would deprive the third party of their right to recover what they paid to the plaintiff to the unjust benefit of the defendant.

The recent BC Court of Appeal decision *Provost v. Dueck Downtown Chevrolet Buick GMC Limited et al* 2021 BCCA 164 provides guidance on what third parties need to do to ensure they have a right to subrogation and clarity on when deductions are available for defendants.

Prior to ***Provost,*** a line of cases in BC allowed a third party to assert a right of subrogation so long as they indemnified the injured plaintiff, even if there was no contract of indemnity between them. ***Provost*** has overturned these cases, finding that a third party only has a right of subrogation if it has an indemnity contract with the plaintiff.

Background

Provost concerned personal injuries an RCMP officer sustained while involved in a police chase (the "Accident"). At trial, the court awarded $461,142.29 in damages.

$36,995.00 of the damages award was for wage loss and other benefits the plaintiff received from the RCMP following the Accident (the "RCMP Payments"). The RCMP Payments were not made pursuant to a legally binding obligation, but rather were part of the RCMP's long standing practice to pay full wages to officers injured in the line of duty.

At trial, the judge found the Attorney General of Canada ("AG Canada"), on behalf of the RCMP, had an equitable right of subrogation since the RCMP had fully indemnified the plaintiff and that this equitable right of subrogation existed even without a contract between the plaintiff and the RCMP.

The issue on appeal was whether the trial judge erred by including the RCMP Payments as part of the damages award. Specifically, the appellants argued the judge erred by finding AG Canada had right of subrogation despite it not having a contract of indemnity with the plaintiff.

A secondary issue was whether the RCMP Payments qualified under the voluntary payments exception because, if they did, the trial judge's order could stand.

The Ruling

The appellants argued the trial judge erred in finding that a simple payment to the plaintiff granted AG Canada subrogation rights. The appellants relied on two BC Court of Appeal decisions that were not brought to the trial judge's attention, both of which endorsed the position that a contract must exist between parties for a right of subrogation to exist.

AG Canada argued that an equitable right of subrogation can exist absent a contract if: 1) it is necessary to prevent unjust enrichment; 2) the third party benefactor fully indemnified the plaintiff; and 3) the third party has not waived its right of subrogation.

In the end, the Court determined that for a right of subrogation to exist, the payment by a third party to the plaintiff must be made pursuant to a contract of indemnity. Without that contract, any payments made by a third party do not, on their own, give rise to a right of subrogation.

The Court also determined that equitable subrogation only applies if a contract of indemnity exists between parties but it does not include an express *contractual term* outlining the right of the subrogation. In that situation, equitable subrogation can be used by a third party to assert a right of subrogation where they made a payment to the plaintiff under the contract. However, this does not allow a third party to assert a right of subrogation if it made a payment to the plaintiff but does not have an underlying indemnity contract with the plaintiff.

As for whether the RCMP Payments fell under the voluntary payment exception, the Court found it could not rule on the issue: the evidentiary basis was lacking because AG Canada did not argue the RCMP Payments were voluntary payments at trial, and the appellants would be unduly prejudiced if AG Canada was allowed to adopt the position for the first time at the appeal.

As such, the Court deducted the RCMP Payments from the damages award.

Practical Considerations

Ultimately, ***Provost*** clarified that in order for a third party to assert a right of subrogation it must have made a payment to the plaintiff pursuant to a contract of indemnity. Absent such a contract, a third party cannot rely on equitable subrogation to assert a right of subrogation.

For parties providing collateral benefits, ***Provost*** demonstrates that in order to recover the benefits pursuant to a right of subrogation, you need to ensure a formal contract of indemnity is in place. At the very least, you should have a contract with the plaintiff where the plaintiff agrees to repay you from any judgment or settlement they receive. The corollary to this is that without a contract of indemnity a party should be wary of providing collateral benefits since they may not be able to recover them.

Provost could also be a useful tool for defending certain claims as it allows defendants to claim deductions when no indemnity contract exists between a third party and an injured plaintiff. However, the fact that the voluntary payment issue was not addressed means ***Provost*** may be of limited use. The Court of Appeal indicated in ***Provost*** that if AG Canada had handled the case differently, the voluntary payment exception might apply. As such, if a plaintiff can show a payment they received was a voluntary payment the defendant cannot claim a deduction.

Should you have any questions about this article, contact Insurance Lawyer, Sabdeep Sidhu here.

/Carey

News Alerts

July 7, 2021

“Pro Consumer" Bill that amends the Consumer Protection Act moves forward, after being approved by the Chamber of Deputies

On January 24th, 2019, the Executive Power submitted to Congress a bill of law that establishes measures to encourage the protection of consumers' rights -Bulletin No. 12,409-03- (hereinafter, the "Bill"). The Bill is known as the "Pro-Consumer Bill", since it amends Law No. 19,496 Consumer Protection Act ("CPA"), seeking to reinforce the rights of consumers and incorporate new obligations for suppliers.
After resolving the divergences formulated by the Joint Commission regarding the intended article 15 bis of the LPDC (on data protection matters), on June 30, 2021, the Bill was unanimously approved by the Chamber of Deputies, being sent to the Senate, for its approval.

The following is a summary of the main guidelines of the Bill and the most important modifications to the current regulations:

I. *“Pro Consumer” principle*

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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The Bill seeks to incorporate the new article 2 ter to ensure that the rules contained in the CPA are always interpreted in favor of consumers, in accordance with the pro-consumer principle.

II. *Enactment of new basic consumer rights*

The Bill incorporates a letter g) and h) to Article 3, setting forth the basic rights of consumers, in particular:

1. The right to always resort to the competent court in accordance with the CPA. The supplier must inform the consumer of this right when entering into the contract and at the time of any dispute, complaint or claim. Likewise, once the dispute has arisen, it may be submitted to mediation, conciliation or arbitration, which will in any case be free of charge for the consumer (details in point III below).
2. The other rights established in the laws related to consumer rights, especially those set forth in Law No. 18,010, which establishes rules for credit operations and other money obligations. For such operations, the prepayment fee and commission will be applicable, regardless of the amount of the balance owed, thus eliminating the 5,000 UF limit currently contained in Law No. 18,010 with respect to consumer financial operations.

III. *Incorporation of alternative dispute resolution methods to which suppliers may subscribe (mediation, conciliation or arbitration)*

The Bill incorporates the possibility that the parties, once their conflict has arisen, may submit it to mediation, conciliation or arbitration. For this purpose, suppliers must inform the nature of each of the mechanisms offered, which will be free of charge and will only be initiated by the express will of the consumer, which must be in writing.

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Financial and non-financial suppliers will be able to freely subscribe and offer the electronic Dispute Resolution System within the framework of the Sernac Seal rules.

IV. *New rights in the area of electronic or distance commerce*

The Bill proposes to incorporate the following amendments in the area of electronic commerce:

1. It establishes the duty of all suppliers to inform, prior to purchase, the cost and time it will take to ship their products, constituting "basic commercial information".
2. The right of withdrawal or repentance, within 10 days from the receipt of the product, without expression of cause, with respect to the generality of the purchases of goods, without conditioning the right to the will of the supplier (except in the case of the contracting of services, where the supplier will maintain the possibility of excluding the right of withdrawal, having to inform it unequivocally, accessible and prior to the execution of the contract and its respective payment, where the supplier shall maintain the possibility of excluding the right of withdrawal, having to inform it in an unequivocal, accessible and prior to the signing of the contract and its respective payment, or in the case of goods that by their nature cannot be returned, may deteriorate quickly, have been custom-made or are for personal use).
3. A new hypothesis of application of the right of withdrawal is established, including also face-to-face purchases in which the consumer has not had direct access to the good.

V. *Personal Data*

The Project intends to incorporate a new Article 15 bis regarding personal data, with the purpose of establishing that:

1 In the case of personal data, within the framework of consumer relations, the following Articles are applicable: (i) 2 bis letter b) of theCP, which allows initiating actions in protection of the collective or diffuse interest of consumers and requesting indemnities in their favor; (ii) 58 of the CPA, which allows SERNAC to exercise functions in protection of consumers' rights (such as those supervisory, interpretative, propositive, initiation of collective voluntary procedures, formulation of information requirements), and; (iii) 58 bis of the CPA, which requires sectorial supervisory agencies with sanctioning powers to send SERNAC a copy of the resolutions imposing sanctions.

2 However, the aforementioned powers shall not be applicable in the event that they fall within the legal competencies of another body.

VI. *Legal Warranty*

1 The Bill introduces amendments in the area of legal guarantee of goods, in particular:

2 The term is extended from 3 to 6 months.

3 It establishes the non-waivable right of the consumer to choose, at his discretion, between the free repair of the good or, after restitution, its replacement or refund of the amount paid, without prejudice to compensation for damage caused, which must be communicated by the supplier in each of its premises, stores, websites or others.

4 It is established that in order to exercise any of the rights granted by the legal guarantee it is not necessary to exhaust the voluntary warranties granted by the supplier. Likewise, the exercise of any of the warranty will suspend the term of the guarantee policy granted by the supplier.

5 The supplier is prevented from offering consumers the contracting of products, services or policies whose coverage corresponds to obligations that the supplier must assume in accordance with the law.

VII. *Higher education, vocational and technical education institutions*

The Bill introduces a new Article 3 quater in order to establish the duty of higher education institutions, professional and technical education institutions, to grant free of charge the certificates of studies, grades, debt status or other similar, at the request of the student, former student or those who have suspended their studies or are in arrears in the respective educational institution.

Such certificates may be requested up to two times in one year by the student and must be issued within ten working days from the presentation of the respective request.

VIII. *Adhesion contracts, abusive clauses and termination of contracts*

In the case of adhesion contracts, the Draft establishes:

1. The abusive nature of those clauses that limit the means through which consumers may exercise their rights, in accordance with the law.
2. That ambiguous clauses in adhesion contracts shall be interpreted in favor of the consumer.
3. That in the case of contradictory clauses, the clause or part of the clause that is more favorable to the consumer shall prevail.
4. The duty to inform, when entering into the contract, the mechanisms and conditions for the consumer to terminate the contract. For this purpose, suppliers may not condition the termination of the contract to the payment of amounts owed or restitution of goods (without prejudice to the payment of the corresponding prepayment commission, in the case of financial products or services) and, in no case establish more burdensome conditions than those required for its

conclusion. Any agreement to the contrary shall be deemed not to be in writing.

IX. *New obligations for motor vehicle suppliers*

Regarding motor vehicles, the Bill incorporates the new Article 12 C in the CPA in order to:

1. Establish the duty of every supplier of motor vehicles to inform the consumer, in a clear and unequivocal manner, prior to the execution of the purchase contract or lease-purchase contract, those mandatory requirements justified to maintain in force the vehicle's voluntary warranty.
2. In the event of mandatory maintenance, the list of all these must be informed, including their estimated values, as well as the authorized technical service establishments that perform them. The freedom of choice of the technical service may only be limited with respect to maintenance that is not related to the voluntary warranty, when the specific technical characteristics justify being carried out by expressly authorized workshops or establishments.
3. Establish the duty of every supplier of motor vehicles to provide the consumer with another vehicle of similar characteristics for the duration of the repair, when the use of the legal or voluntary warranty entails depriving the consumer of the use of the vehicle for a term exceeding five working days.

X. *New obligations for financial suppliers*

In financial matters, the Bill incorporates obligations and prohibitions for suppliers, in particular:

1. The duty of the financial supplier, prior to a money credit operation, to analyze the economic solvency of the consumer in order to be able to comply with the

obligations arising therefrom, based on sufficient information obtained through official means for such purpose, and must inform the consumer of the result of such analysis. Likewise, the supplier must provide the consumer with specific information on the transaction in question.

2. It is forbidden in higher education institutions to offer money credit operation contracts that are not related to the financing of contracts for the provision of educational services.
3. It establishes the right of the consumer to request, without expression of cause, the permanent blocking of payment cards, without the supplier being able to charge the costs of administration, operation and/or maintenance during said period.

XI. *Air transport contract*

The Bill intends to amend the Aeronautical Code, establishing new obligations for air transport providers. In particular, it establishes:

1. The duty of the supplier to inform passengers of their rights in accordance with the conditions established by the Civil Aeronautics Board, after consultation with the National Consumer Service, without prejudice to the obligation of the carrier to make available to the public information brochures specifying their rights, both in sales offices and at airport counters.
2. The duty of the carrier to inform the passenger of any change in the itinerary, due to an advance, delay or cancellation of the flight, by means of written communication by the most expeditious means possible, to the contact previously requested to the consumer, indicating the reason for the change.
3. The duty of the carrier, in case a trip does not take place -whether due to causes attributable to the carrier, the passenger or for reasons of security or supervening force majeure-, to reimburse the taxes, charges or

aeronautical rights paid by the passenger, with or without the passenger's request, within ten days, through the same means used to pay the ticket, or the one indicated by the consumer after having been consulted by the carrier when such information is not available. In case of unjustified delays, the refund shall be increased by 50% in favor of the passenger for every thirty days. After the first thirty days without obtaining the refund, the consumer may demand it from the authorized agent who made the sale, without prejudice to the agent's claim against the carrier.

4 The right of the passenger to change the date scheduled for a trip, paying the difference of the ticket or to request the refund of the amount paid, if he proves through a medical certificate, that he is unable to travel. In case of requesting a new date, it may be set within a period of up to one year from the originally scheduled date.

XII. *New Regulations of the Ministry of Economy, Development and Tourism*

The Bill also contemplates the drafting of three new implementing regulations by the Ministry of Economy, Development and Tourism:

(i) A regulation regulating the application of dispute resolution mechanisms that may be offered by the supplier to consumers;
(ii) A regulation referring to the form and conditions in which the supplier must communicate the exclusion of the right of withdrawal, and the goods in which such exclusion is exceptionally applicable;
(iii) A regulation that will determine the form and conditions to be observed in order to comply with the obligations introduced in the area of financial products and services in the new article 17 N, regarding the analysis of the economic solvency of the consumer and its timely communication.

Legal Commentary

July 11, 2021

Analysis of Revised Draft Cybersecurity Review Measures

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On 10 July 2021, the Office of the Central Cyberspace Affairs Commission and the Office of Cybersecurity Review under the Cyberspace Administration of China ("**CAC**") promulgated the Measures for Cybersecurity Review (the "**Review Measures**") (Revised Draft for Comments) (the "**Draft**"). The Draft extends the scope of cybersecurity reviews to data processors ("**Processors**") engaging in data processing activities that affects or may affect national security, including listing in a foreign country. This article is a preliminary interpretation of the Draft, and analyses its potential impact.

Overview of the Draft

I Expansion of the scope of review to include specific data processors who list in a foreign country

Based on the Cybersecurity Law and the Review Measures, the target subjects of the cybersecurity review system are critical information infrastructure operators ("**CIIO**") who purchase Network Products and Services, as set out by Article 2 of the Review Measures[1]. In addition, the relevant regulatory authorities are also entitled to impose security reviews on Network Products and Services that are deemed capable of affecting national security, as set out in Article 15 of the Review Measures, without the need for the operator to be a CIIO. Building on the foundation of the Review Measures, Article 2 of the Draft clearly sets forth that data processors ("**Operators**") who engage in data processing activities, which affects or may affect national security, are included in the scope of cybersecurity review.

II Operators with more than 1 million users' personal information data, which are listing in a "foreign country", are obliged to apply for a mandatory cybersecurity review

[1] "Network Products and Services" mainly refer to core network equipment, high-performance computers and servers, large-capacity storage equipment, large databases and application software, network security equipment, cloud computing services, and other Network Products and Services that may substantially impact Critical Information Infrastructure.

The Draft states that "**Operators listing in a foreign country with more than 1 million users' personal information data must apply for a cybersecurity review with the Cybersecurity Review Office**." Therefore, non-CIIOs are still obliged to file for a cybersecurity review prior to a non-PRC listing if they process data exceeding this threshold. To better facilitate the review, the Draft adds the CSRC to the review bodies, which is led by CAC and joined by twelve other authorities. This provision on the number of users contains ambiguities, such as whether the term "1 million users" refers to PRC users only or includes non-PRC users.

III Review focus and the expansion of review standards from cybersecurity to data security

In the past, the Review Measures mainly focused on supply chain security risks associated with CIIOs purchasing specific Network Products and Services. The Draft expands this scope by confirming that its legislative basis is the Data Security Law, which is apart from the Cybersecurity Law and will take effect on 1 September 2021. Namely, the scope of review now extends to CIIOs, Processors carrying out data processing activities, and national security risks related to a non-PRC listing, especially "*risks of core data, important data or substantial personal information being stolen, leaked, damaged, illegally used or exported; risks of Critical Information Infrastructure, core data, important data or substantial personal information data being affected, controlled and maliciously used by foreign governments after a foreign listing.*" It should be noted that "core data"[2] and "important data"[3] are important concepts in the Data Security Law. The scope of these concepts is yet to be determined.

IV Changes to application materials and the review process

Taken as a whole, the application materials and the review process set forth in the Review Measures have stayed relative intact. However, companies listing in a foreign country need to submit "proposed IPO materials" for review. Considering the quantity of materials that needs to be submitted for a non-PRC IPO, the specific scope and focus of review requires clarification in practice.

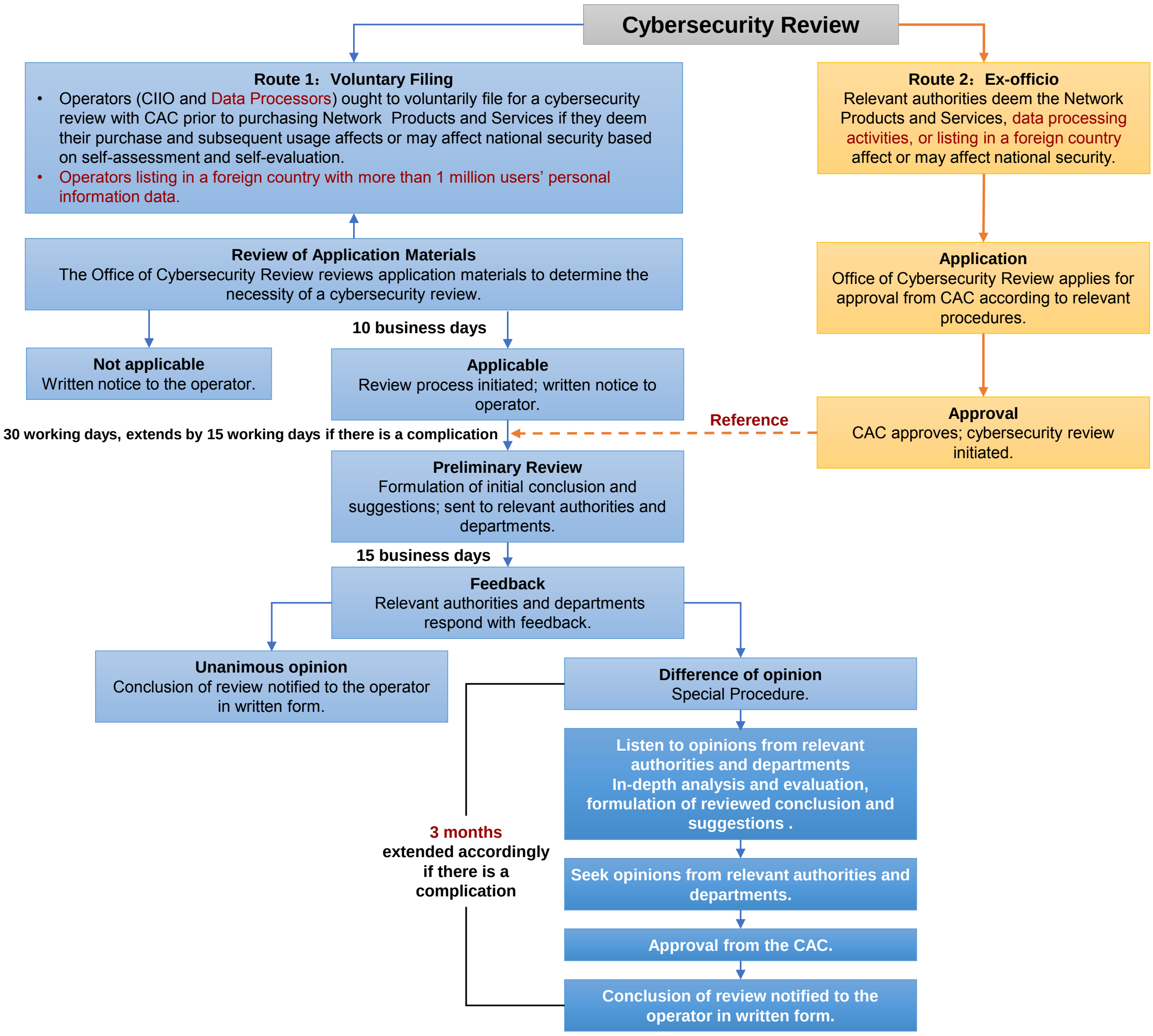
According to a response to a journalist's question when the Review Measures were issued, cybersecurity reviews are delegated to the China Cybersecurity Review Technology and Certification Center (the "**CCRTC**"), who is responsible for tasks including the admission of materials, preliminary review of materials, and organisation of each specific review under the leadership of the Cybersecurity Review Office.

The review process set forth in the Draft follows that of the Review Measures, but adds that in case there is disagreement between the members of the cybersecurity review group and the relevant Critical Information Infrastructure protection departments, there will be a special review process seeking the

[2] Article 21 of the Data Security Law states that "*data that have a bearing on national security, the lifelines of national economy, people's key livelihood and major public interests shall constitute the core data of the State and shall be subject to stricter management system*."

[3] Article 21 of the Data Security Law states that "*the national data security coordination mechanism shall make overall planning for and coordinate relevant departments in formulating the catalogues for important data and strengthening the protection of important data… Each region and department shall, in accordance with the classified and graded data protection system, determine the specific catalogue for important data for the respective region and department, and in relevant industries and areas, and undertake special protection for the data included in the catalogue*".

opinions of relevant authorities and the case will be reported to CAC. In this case, the review period is extended from 45 business days to 3 months, subject to further extensions should complications arise. The overall review process according to the Draft is shown in the figure below. If adopted in their current form, this means that in practice, transaction parties in an foreign IPO should be prepared to wait potentially 5-6 months, to allow for a cybersecurity review to be completed.



The impact on China concepts companies listing in a "foreign country"

I Whether "listing in a foreign country" includes listing in Hong Kong

We note that the Draft uses the concept of "listing in a foreign country" [typically understood to mean outside of China, including Hong Kong], which deviates from concepts used in prior laws and regulations, such as the Securities Law and its subordinate policies and in data security policies, which used the "domestic" and "abroad" / "overseas" [typically understood to mean the jurisdiction of Chinese mainland and a jurisdiction outside of Chinese mainland.]. For example, Article 2 of the Securities Law state that "*[t]he Law is applied to the issuance and trading of stocks, corporate bonds, depository receipts and other securities lawfully recognized by the State Council within the territory of the People's*

Republic of China"; Article 224 states that "[*any] domestic enterprise that seeks to issue securities abroad either directly or indirectly or that lists its securities to be traded abroad shall comply with the relevant provisions of the State Council*." Article 37 of the Cybersecurity Law states that "[*CIIO] shall store personal information and important data gathered and produced during operations within the territory of the People's Republic of China. Where it is really necessary to provide such information and data to overseas parties due to business requirements, a security assessment shall be conducted in accordance with the measures formulated by the national cyberspace administration authority in concert with the relevant departments under the State Council. Where the laws and administration regulations have other provisions, those provisions shall prevail*." Therefore, given this context, the linguistic choice of "listing in a foreign country" as opposed to the more commonly used phrases in securities regulations "abroad" / "overseas", appears to be intentional. This suggests that the scope of the cybersecurity review does not extend to companies listing in Hong Kong. However, as the Draft lacks explicit explanation, the verdict is still out on the scope of the term and is subject to the finalization of the Review Measures by relevant authorities or clarifications in practice.

II Whether "listing in a foreign country" includes SPACs, RTOs, Directing Listings etc.

Apart from IPOs, CCS companies may list in the US via SPACs (Special Purpose Acquisition Companies), RTO (Reverse Takeovers), direct listings etc. Although the Draft only requires the disclosure of "proposed IPO materials", in light of the fact that CCS companies will need to publicly disclose or provide information to foreign exchanges during the listing process, regularly disclose information after listing, and remain subject to investigation and supervision by foreign exchanges and securities regulatory authorities, these other methods of listing may also give rise to the same cybersecurity risks. Namely, these risks are national security risks associated with listing in foreign countries as mentioned in the Draft, including "*risks of core data, important data or substantial personal information being stolen, leaked, damaged, illegally used or exported; risks of Critical Information Infrastructure, core data, important data or substantial personal information data being affected, controlled and maliciously used by foreign governments after foreign listing*." In our view, regardless of the method of listing, listing in the US or other foreign countries may give rise to PRC cybersecurity review.

III Whether "listing in a foreign country" includes a secondary listing in Hong Kong

If "listing in a foreign country" excludes listing in Hong Kong as interpreted in Section (1), then we take the view that a secondary listing in Hong Kong should not give rise to cybersecurity reviews either.

However, if the finalized Review Measures confirm that cybersecurity reviews will apply to companies listing in Hong Kong, then we take the view that the scope of review will extend to secondary listings in Hong Kong. This is because during and after a secondary listing in Hong Kong, CCS companies may need to disclose or provide additional information in accordance with the Listing Rules of Hong Kong, and will be subject to supervision and investigation by the Stock Exchange of Hong Kong and securities regulatory authorities. Therefore, for CCS companies that have passed a cybersecurity review or listed prior to the implementation of the Review Measures, a secondary listing in Hong Kong present additional data security risk.

IV Impact on follow-on offerings and bond offerings of CCS companies listed in foreign country

The Draft does not specify whether follow-on offerings and bond offerings of CCS companies already listed in foreign country are subject to cybersecurity reviews. We are inclined to believe that follow-on offerings and bond offerings, especially of companies that have already passed cybersecurity reviews during their listing, may be outside the scope of review. First, the Draft states that "***Operators*** *listing in a foreign country with more than 1 million users' personal information data*" are subject to cybersecurity review, not issuing or listing securities. Second, for CCS companies already listed in foreign countries, follow-on offerings and bond offerings will not impact the information disclosure rules to which they are subject, and supervision and investigation by foreign exchanges and securities regulatory authorities. Therefore, in this respect, the data security risk will not materially increase. However, as the CCS companies may disclose additional financial information apart from what is disclosed in regularly disclosed annual or quarterly reports for follow-on offerings and bond offerings, additional data security risks cannot be eliminated. Therefore, the verdict on (ii) the application of the cybersecurity review on follow-on offerings and bond offerings of CCS companies, (ii) whether CCS companies that have passed cybersecurity reviews during listing still need to complete cybersecurity reviews for follow-on offerings and bond offerings and (iii) whether the cybersecurity reviews apply to CCS companies that have not completed cybersecurity reviews (including those listed prior to the implementation of the Review Measures, or those not meeting the standard of review at the time of listing), is still unclear, and subject to the finalized Review Measures by the relevant authorities or clarification in practice.

V Whether the Draft operates retrospectively on CCS companies already listed in foreign countries

The Draft does not explicitly require CCS companies that have already listed in foreign countries prior to the implementation of the Review Measures to apply for cybersecurity reviews. However, Article 16 of the Draft states that: "*the Network Products and Services, data processing activities and listings in foreign countries deemed to affect or may affect national security by members of the cybersecurity review group are subject to review in accordance with this Measures, after approval is obtained from the CAC by the Cybersecurity Review Office.*" Under this provision, the regulatory authorities are entitled to conduct security reviews on foreign-listed CCS companies in respect of their day-to-day data processing activities. During such a review, the authorities may take into account the fact that the company is listed in a foreign country.

Not passing cybersecurity reviews imposed on listings (and follow-on offerings and bond offerings) of CCS companies has clear consequences, namely the listing, follow-on offering and bond offering of the company will be restricted. However, if the cybersecurity review does not pass with respect to an already listed CCS company, the consequences are yet to be clarified by laws and regulations.

Recommendations

For companies processing substantial personal information or sensitive data, especially those that plan on listing outside of Chinese mainland, to maximize their chances of passing the cybersecurity review, we recommend:

- Stay up-to-date on the personal information protection policies of regulatory authorities; avoid collecting personal information irrelevant to services, especially sensitive personal information; continuously improve user information protection.

- Closely follow subsequent identification standards for “important data” released by regulatory authorities; implement requirements, such as important data protection, security risk assessment, data localization, etc. comprehensively; establish a data security impact assessment system and an internal compliance governance system to carry out prior assessment of high-risk data processing activities and continuous data compliance audits.

- Further refine the supply chain security review of Network Products and Services by (i) advanced assessment of supplier compliance; (ii) imposition of undertakings in agreements; (iii) auditing during and after cooperation, to mitigate the risk that the Network Products and Services cause the Operator’s system to be illegally controlled or interfered, or its data disclosed, stolen or damaged. Also, to ensure that the supply chain is safe, open, transparent, diverse and sustainable, and will not be subject to illegal control or interference, and can effectively prevent data leakage, theft or damage.

- Prior to submitting data and information to foreign exchanges and regulatory authorities, seek the prior consent from CAC, the CRSC and other relevant authorities in accordance with Section 36 of the Data Security Law, Section 17 of the Securities Law and other laws and regulations. Formulate an internal system explicitly confirming the preceding requirement.

- Pay close attention to the subsequent issuance and implementation of supplementary review standards.

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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Modifications to the Rules of the Renewables' Auctions.

May, 2021

On May 11, the Ministry of Mines and Energy ("Minenergía") published Resolution 40141 of 2021 (the "Resolution"), which modifies the rules for renewable auctions. These modifications follow announcements made by Minenergía since last year, stating that a third renewables' auction would be held in the second half of 2021. Specifically, according to a draft Resolution of this same entity, the auction must be held before December 31 of this year: https://www.minenergia.gov.co/documents/10192/24281146/Resoluci%C3%B3n+MME+Convocataria+3ra+Subasta.pdf .

For Whom are these Modifications Relevant?

This Resolution is relevant for those individuals or companies that own or represent generation projects from non-conventional renewable energy sources whose date of entry into operation is after the date of the Auction.

The Resolution is also relevant for electric energy trading agents, who will be the buyers of electric energy. It is important to remember that, since the enactment of Resolution 40060 of 2021, traders are required to purchase at least 10% of their energy to serve end users from non-conventional renewable energy sources as of January 1, 2024.

What are the main changes in the Resolution?

The Resolution contains mainly four modifications:

a) Change in the Auction Manager

The entity that must conduct the auctions will not necessarily be the UPME. According to Article 1 of the Resolution, Minenergía may implement the auctions directly or it may designate a different entity, or the Manager of the Commercial Exchanges System ("ASIC", per its acronym in Spanish), as the auction manager. This article states that the auction manager is the entity that must publish the specific terms and conditions of the auction.

As defined in Article 2 of the Project, these specific terms and conditions must have "no prior objection from the Ministry of Mines and Energy" and will contain the rules for the presentation and evaluation of the proposal, requirements, schedule, among other central aspects of the auction. In addition, Article 14 of the Resolution establishes the general obligations of the auction manager. Among others, it must hire the auction comptroller, establish and maintain the auction management system, and provide a report to the Ministry of Energy, within ten days after the end of the auction, in which it shall evaluate, in a complete and detailed manner, the awarding of the auction and the results obtained.

b) Draft of the Power Purchase Agreement of the Auction

Article 4 of the Resolution states that Minenergía, and not the UPME (as it was in the past), must define the draft of the power purchase agreement of the auction ("PPA"). Note that Minenergía has already published a provisional draft for consultation (link)

c) Buyer's offer

Article 6 of the Resolution eliminates the condition (V) established in Article 20 of Resolution MME 40590 of 2019 regarding the Buyers' offer, which prevented the sum of the quantities of the purchase offers from exceeding the average daily commercial demand of the buyer for the year prior to the publication of the specific terms and conditions.

d) Sellers' Offers

Article 6 of the Resolution determines that generation projects that have been awarded long-term contracts through this auction mechanism in the past are entitled to participate. However, the maximum amount of energy of their offers will be the result of subtracting the daily energy awarded in these contracts from the calculation of the average daily energy of the generation project, as specified in the specific bidding terms and conditions.

e) Changes on the Projects that are Entitled to Participate

Article 7 of the Resolution adds a paragraph to Article 22 of Resolution MME 40590 of 2019, establishing that projects that (i) do not have firm energy obligations assigned and (ii) have not executed energy supply contracts resulting from long-term contracting auctions, may participate and bid in any intraday block. On the other hand, projects that have been awarded with firm energy obligations, or that have executed energy supply contracts as a result of the long-term contracting auctions, may only participate by submitting their bids in Block No. 3, that is, for the 7 one-hour periods between 17:00 hours and 24:00 hours.

Next Steps

The following documents are expected to be published in the upcoming months:

Publication of the definitive Resolution of Minenergía calling for the auction.

Publication of the definitive version of the draft PPA by Minenergía.

Selection of the auction manager by Minenergía, if this entity decides that it will not administer the auction on its own.

Publication of the specific bidding terms and conditions by the auction manager.

For more information contact our team: info@bu.com.co

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GUATEMALA

AMENDMENTS TO THE FREE ZONE LAW (DECREE 65-89)

Jun/2021

On July 1st, 2021, Decree 6-2021 of the Congress of the Republic of Guatemala amending the Free Trade Zone Law, decree 65-89, was published in the Official Gazette.

This reform is derived from the Guatemalan Government's intention to promote an economic reactivation in the country, as well as to strengthen the international trade and limit the restrictions enacted in 2016.

The amendment includes:

- The cancellation of the status of "prohibited activities" linked to the production or commercialization in the Free Trade Zone of:

- Fishing and breeding of marine and freshwater species.

- Recreation centers and hotels.

- Forestry, exploitation, and commercialization of wood in logs, rounds, board, and planks.

- Cane sugar refined and molasses, their derivatives, and substitutes.

- Processed foods, cookies, oils, margarine, pastas, sauces, dairy products, soups, and beverages of any kind.

- Animal food.

- Leather and footwear.

- Plastic and its manufactures.

- Medicines.

- Cosmetic industries.

- Paints.

- Furniture.

- Ceramic products.

- Toys.

- Electronic devices and household appliances whose purpose is to be sold or leased into Guatemalan customs territory.

A prohibition in relation to the production and commercialization of the following products is included:

- Alcoholic beverages and vinegars, except for wines and ciders.
- Natural or artificial mineral water, and gassed water with or without sugar or other sweeteners or aromatized, ice and snow, beer, and malt.

Persons or companies are not eligible to apply for the benefits of the regime if:

- They have been sanctioned with the revocation of the benefits granted by this Law of other laws that grant tax exemptions or benefits.
- According to the Tax Administration Office ("SAT"), they have pending tax or customs obligations or that are currently part of judicial processes. This prohibition includes the partners or shareholders of the applicant.
- They already have tax incentives granted by other laws in place.
- They have pending employers' contributions or sanctions before the Guatemalan Social Security Institute ("IGSS"), or complaints before the Labor and Social Prevision Ministry.
- They induce to error the Economy Ministry or SAT through simulation, occultation, or any other form of deceit to benefit from the tax benefits.
- Those whose activities in national customs territory are taxed and from which they pay taxes.

A new special form of customs fraud is established by obtaining the qualifications of the Law by simulation, occultation, of any other form of deceit to the Economy Ministry or SAT.

Furthermore, it is confirmed that the previously authorized persons according to the Law of Free Trade Zones will maintain their obtained legal condition and will continue operation.

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C v D – Hong Kong court rules on compliance with pre-arbitration procedural requirements

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In a recent anonymized judgment, the Hong Kong Court of First Instance held that compliance with an "escalation clause," a procedural requirement for the commencement of arbitration, was an issue to be decided by the arbitral tribunal but not the court on an application for setting aside the award. The court also considered the approach adopted by the courts of Singapore, also a Model Law jurisdiction, in deciding on the same issue.

Background

In *C v D* [2021] HKCFI 1474, disputes arose from a cooperation agreement entered into between Company C and Company D for the development and building of a satellite.

The dispute resolution clause of the agreement was unremarkable and provided, *inter alia*, that:

- "14.2 Dispute Resolution. The Parties agree that if any controversy, dispute or claim arises between the Parties out of or in relation to this Agreement, or the breach, interpretation or validity thereof, the Parties shall attempt in good faith promptly to resolve such dispute by negotiation. Either Party may, by written notice to the other, have such dispute referred to the Chief Executive Officers of the Parties for resolution. The Chief Executive Officers (or their authorized representatives) shall meet at a mutually acceptable time and place within ten (10) Business Days of the date of such request in writing, and thereafter as often as they reasonably deem necessary, to attempt to resolve the dispute through negotiation."

- "14.3 Arbitration. If any dispute cannot be resolved amicably within sixty (60) Business days of the date of a Party's request in writing for such negotiation, or such other time period as may be agreed, then such dispute shall be referred by either Party for settlement exclusively and finally by arbitration in Hong Kong at the Hong Kong International Arbitration Centre ('HKIAC') in accordance with the UNCITRAL Arbitration Rules in force at the time of commencement of the arbitration (the 'Rules')."

"Tiered" dispute resolution clauses of this nature can give rise to disputes as to extent of the obligations involved and whether there has been compliance. This was one such case.

On 24 December 2018, the CEO of Company D issued a letter to the chairman of the board of directors of Company C, copied to other directors of Company C, serving as a "written request" for negotiation under Clause 14.2. On 18 April 2019, Company D issued a notice referring the dispute to arbitration.

Company C claimed that the arbitral tribunal did not have jurisdiction because the notice was addressed to Company D's directors but not the CEO, thus not fulfilling the condition in Clause 14.2. The tribunal dismissed Company C's jurisdictional objection and held that Clause 14.2 of the agreement only made it mandatory that the parties should attempt in good faith to resolve any disputes by negotiation, but the reference of disputes to the respective CEOs was optional.

Company C then sought to set aside the tribunal's Partial Award on Jurisdiction and Liability made in Company D's favor on the ground that it was made without jurisdiction, pursuant to Section 81 of the Arbitration Ordinance, which gives effect to Article 34 of the UNCITRAL Model Law on International Commercial Arbitration.

Decision

It was common ground that the request in writing for negotiation under Clause 14.2 was a condition precedent to any reference to arbitration. However, the parties disagreed on what the condition meant and whether it was fulfilled. The primary issue that the court had to decide was whether compliance with Clause 14.2 was a question of the tribunal's *jurisdiction* or merely a question of *admissibility* of the claim. This matters because only issues of jurisdiction are susceptible to an application to the courts to set aside the award.

After considering leading academic works and cases of the English, Singapore, and U.S. courts, the court observed that the "generally held view of international tribunals and national courts is that non-compliance with procedural pre-arbitration conditions such as a requirement to engage in prior negotiations goes to admissibility of the claim rather than the tribunal's jurisdiction."

The court also recognized that the distinction between jurisdiction and admissibility is a concept rooted in the nature of arbitration itself, and the differential treatment of them is justified by policy reasons including the following:

- Pre-arbitration conditions such as cooling off, negotiation, or mediation inherently involve aspects of the arbitral procedure and often require interpretation and application of institutional arbitration rules and resolving procedural issues in arbitration, which are best suited for resolution by the arbitral tribunal.
- Parties to an arbitration agreement are presumed to have intended for a single, neutral arbitral tribunal to resolve disputes, including all questions regarding the procedural requirements and conduct of the parties' dispute resolution mechanism. Fragmenting the resolution of procedural issues between national courts and the arbitral tribunal would produce a risk of multiple proceedings, delay, and inconsistent decisions.

As to the position in Hong Kong, the court noted that the Honorable Madam Justice Mimmie Chan in *X v Jemmy Chen* [2020] HKCFI 286 held that the court must confine itself to true questions of jurisdiction in approaching applications to set aside arbitral awards. As such, the distinction between jurisdiction and admissibility, although not explicitly drawn in the Arbitration Ordinance (Cap. 609), should be relied upon to inform the construction and application of Section 81 of the Arbitration Ordinance.

The court concluded that compliance with pre-arbitration conditions is a question of admissibility rather than jurisdiction, with the following reasoning:

- Such an approach has considerable advantages as the arbitral tribunal chosen by the parties will usually be well-placed to consider and determine what needs to be done having regard to commercial realities and practicalities.

- This is entirely consistent with the policy in Hong Kong law, which represents the "parties' autonomy in choosing arbitration as the means to resolve their dispute with its incident of speed and finality as well as privacy."
- The fact that a condition is regarded as going to admissibility rather than jurisdiction does not deny contractual force to that condition, nor does it mean the condition is unimportant. It merely means that it would be for the arbitral tribunal to decide what the condition means and whether it has been satisfied on the facts.

The court also noted that the same approach as to how to determine whether an issue is a question of admissibility or jurisdiction has been adopted by the Singapore Court of Appeal in *BBA & others v BAZ* [2020] SGCA 53. A similar approach was also adopted in *Swissbourgh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho* [2018] SGCA 81. Singapore's arbitration legislation is also Model Law-based. The court did not follow English cases to the contrary where the distinction between admissibility and jurisdiction had not been argued.

For completeness, *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2013] SGCA 55 is still good law for the proposition that Singapore courts will enforce pre-arbitration conditions. Singapore courts have not specifically considered whether compliance with pre-arbitration conditions is a jurisdictional or admissibility issue. However, the natural corollary of the "tribunal versus claim" approach set out in the two Court of Appeal decisions is that Singapore courts are likely to reach a similar conclusion as the Hong Kong court did in *C v D*.

Accordingly the Hong Kong Court of First Instance held that Company C's objection was one of admissibility rather than jurisdictional and dismissed Company C's application with indemnity costs.

Conclusion

Arguments about whether there has been compliance with the pre-conditions to arbitration contained in an escalation clause are common and likely to become more so as – for better or for worse – many standard forms and other contracts contain increasingly elaborate pre-arbitration processes. There can be scope for debate as to the utility of such clauses in avoiding escalation of disputes, but *C v D* does not signal any change in the position on their enforceability.

Instead its significance is to confirm that questions as to compliance with an escalation clause do not go to the jurisdiction of the arbitral tribunal. Compliance with such conditions prior to commencing arbitration is, therefore, a matter left to be decided by the arbitral tribunal and cannot be challenged before the court. In practical terms, rather than dismissing cases of non-compliance on grounds of jurisdiction, tribunals may be more likely to be prepared to stay cases or make other appropriate orders to allow for compliance.

C v D also means the positions in Singapore and Hong Kong are aligned. This has significance beyond these leadings seats in Asia given that Article 34 of the Model Law is part of the arbitration legislation of many countries. As the judgment in *C v D* demonstrates, the courts are increasingly willing to draw on jurisprudence from other jurisdictions on Model Law-related questions.

Authored by Kent Phillips, Benson Lim, and Jessie Wong.

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Technology Law Advisory –OSP Regulations, 2021

INTRODUCTION

On June 23, 2021, the Department of Telecom ("DoT") released revised regulations relating to Other Service Providers ("OSP") replacing the previous OSP regulations that were issued last year. This client update provides a summary of key issues that have been addressed by the new regulations.

SUMMARY OF NEW OSP REGULATIONS

1. Effective Date. The regulations are stated to come into force immediately.

2. Who is an OSP – The regulations make it clearer as to who is an OSP. An OSP is one that provides "Voice based BPO services" to its customers. "Voice based BPO services" is defined to mean "call centre services". This narrows the scope further and largely excludes non voice based services that may involve some element of voice calls (as is the case with almost any service), In many cases however, whether or not one is an OSP would still be based on multiple factors, especially whether there is extensive PSTN and private network inter-connectivity.

3. Type of connectivity. The regulations state that incoming traffic or aggregated switched voice traffic between the PoP and the OSP centre can be over "any wide area networking technology". This includes IPLC/NPLC/MPLS or SD Wan (over IPLC/NPLC/MPLS). Though the clause refers to any WAN technology, the reference to only leased lines and MPLS gives the impression that only these two forms of connectivity are allowed.

4. No distinction between international and domestic. The regulations do away with the distinction between international and domestic call centres. Subject to other regulations and meeting toll bypass rules, a single call centre can handle both domestic and international calls seamlessly.

5. Definition of toll bypass. For the first time, the regulations actually set out what is the toll bypass that is not permitted. It essentially covers (a) connecting a private network with PSTN at the domestic end; (b) connecting long distance PSTN calls within India through a private network.

6. PBX outside India. Perhaps the biggest change in the new regulations is the flexibility given to for an OSP (including domestic OSP) to use an "EPABX" outside India. In the previous regulations, this was permitted only for international OSP's.. This benefits multinationals who have both a domestic business and an offshore centre and may want to use the same ACD. It also opens the doors to cloud PBX providers to service the Indian market from outside India. Issues relating to legality of termination of Indian PSTN calls outside India would however still remain.

7. Distributed architecture – Another significant clarification is that an OSP can place its EPABX (owned by it) at a third party data centre. It can also avail of EPABX services from a telecom service provider. However, it does not clarify what license a telecom service provider must hold. The suggestion of TRAI to create a new category – hosted contact solution provider has not been accepted.

8. Work from Home Another important clarification is that an employee working from home can directly connect with the EPABX of the customer. This means that for work from home, an employee can connect directly through internet with the EPABX of the customer located overseas and does not need to first connect with a VPN in India or use the international MPLS connectivity of the OSP.

9. Data retention. There are more extensive provisions on data retention. By and large, the OSP's must maintain call data records, usage data records and system logs for a period of one year. Where the EPABX is not located at the OSP site, remote access should be provided. However, remote access would also need to cover the configuration of the EPABX and routing tables.

CONCLUSION

The new regulations are an improvement over the previous regulations. Several issues have been clarified and the regime has been further liberalized. The key change is the flexibility for a domestic OSP to use a call distribution solution located outside India. However, the regulations do not appear to allow connectivity through the internet.

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SKRINE

Key Changes – Draft AIAC Arbitration Rules 2021

12 July 2021

On 20 June 2021, the AIAC announced the public consultation process for the AIAC Arbitration Rules 2021 and made available the draft AIAC Arbitration Rules 2021 ("**Draft 2021 Rules**"). The amendments to the AIAC Arbitration Rules 2018 ("**2018 Rules**") are designed to enhance efficiency and reflect the standards and practices in international arbitration.

A summary of the key proposed changes is set out below.

Merging of UNCITRAL Arbitration Rules and AIAC Arbitration Rules

The 2018 Rules consist of the AIAC Arbitration Rules in Part 1, the UNCITRAL Arbitration Rules (as revised in 2013) ("**UNCITRAL Arbitration Rules**") in Part 2 and Schedules in Part 3. In the event of conflict between Part 1 and Part 2, the provisions in Part 1 shall prevail.[1] With this format, the AIAC Arbitration Rules were more basic as it was supplemented by the more detailed UNCITRAL Arbitration Rules.

In the Draft 2021 Rules, there are only two parts consisting of the AIAC Arbitration Rules in Part 1 and Schedules in Part 2. This is a welcome change as the AIAC Arbitration Rules are merged with the UNCITRAL Arbitration Rules resulting in a comprehensive uniform set of rules.

Consolidation of disputes (Rule 9)

The Draft 2021 Rules have introduced detailed and more sophisticated provisions on the procedure for the appointment of the Arbitral Tribunal where there are multiple parties as claimant and respondent. Where a sole arbitrator is to be appointed, the parties can either agree to the sole arbitrator or, a request can be made to the Director of the AIAC ("**Director**") to appoint the sole arbitrator where there is no agreement.[2] Where two or more arbitrators are to be appointed, there are detailed rules on nomination and appointment of the arbitrators for both even and odd numbered Arbitral Tribunal, enabling parties to attempt to agree on the arbitrators.[3]

Where two or more arbitrators are to be appointed and parties are unable to agree on a joint nomination, the Director shall constitute the entire Arbitral Tribunal and any nominated arbitrators shall be excluded from consideration and appointed arbitrators shall be released unless otherwise agreed by the parties.[4]

The introduction of these rules will encourage parties to seek to resolve disputes between parties arising from a variety of related contracts in the same set of arbitration proceedings. Although this is done quite often in court proceedings, it is not as straightforward to carry out in arbitration proceedings as the process is consensual in nature. In order to facilitate multi-party appointments, parties to multi-party contracts or related contracts should also consider drafting the arbitration agreement in each contract in a compatible manner.

Fast Track Procedure (Rule 8)

The Fast Track Procedure governs the expedited conduct of arbitral proceedings in arbitration administered by the AIAC. A party may submit the request for Fast Track Procedure in three instances. Firstly, where it has been agreed between parties that the Fast Track Procedure or any edition of the AIAC Fast Track Arbitration Rules are to be adopted[5]; secondly, where the amount in dispute is less than USD500,000.00 (international arbitration) or RM2,000,000.00 (domestic arbitration); and thirdly, in the case of an exceptional urgency.[6] In relation to the second and third instances, the Director shall decide on the same having regard to all relevant circumstances.[7]

The arbitration under Fast Track Procedure is to be heard by a sole arbitrator and proceed as a documents-only arbitration unless otherwise agreed by the parties or determined by the Arbitral Tribunal.[8] The fees of the Arbitral Tribunal shall be fixed by the Director and the AIAC shall request a deposit to cover 100% of the estimated costs.[9]

Timelines for the response to notice of arbitration, appointment of sole arbitrator, challenge to appointment of arbitrators, case management meeting and delivery of first Procedural Order are expressly provided in the Draft 2021 Rules and are shorter as compared to the standard arbitral proceedings and comparable to statutory adjudication proceedings.[10] Stricter timelines are also set out for service of pleadings and proceedings are to be closed no later than 90 days from the delivery of the first Procedural Order by the Arbitral Tribunal (even where oral hearings are allowed).[11] The Final Award is to be submitted by the Arbitral Tribunal to the AIAC for technical review within 90 days from the date when the proceedings are declared closed.[12] Where there is repeated non-compliance to the rules by a party, the Arbitral Tribunal may, after consulting the AIAC and the parties, order that the proceedings are no longer be done in accordance to the Fast Track Procedure.[13]

With the incorporation of the Fast Track Procedure and the application of the remainder of the AIAC Arbitration Rules to a fast track arbitration[14], it appears that the AIAC Fast Track Arbitration Rules (effective as of 9 March 2018) may no longer be needed.

The Fast Track Procedure compels parties to proceed expeditiously as speed is achieved by imposing strict deadlines on both the parties and the Arbitral Tribunal. This allows parties to receive the award within months which is a sharp contrast to the time usually taken for a standard arbitration.

Summary Determinations (Rule 19)

Similar to summary judgment proceedings in court, the Draft 2021 Rules have introduced summary determinations to allow any party to submit a request to dismiss, in whole or in part, a claim, counterclaim or defence where such claim is manifestly without merit or falls outside the jurisdiction of the Arbitral Tribunal.[15] Any such application has to be made within 30 days after filing of the statement of defence and counterclaim[16] and the other party has 15 days to respond to the same.[17]

The Arbitral Tribunal shall within 45 days of its receipt of the final submission make a decision to allow or dismiss the request, in whole or in part.[18] This time limit can be extended by the Director at the request of the Arbitral Tribunal, after consulting Parties[19]. Pending the outcome of the summary determination process, the Arbitral Tribunal can, after consulting the parties, decide the extent to which the proceedings are to continue.[20]

The decision of the Arbitral Tribunal shall take the form of an Award and the rules relating to technical review and manner of delivery of Award apply to this decision as it would to a standard arbitral award.[21]

The summary determination procedure in the Draft 2021 Rules - like its SIAC and ICC counterparts, seeks to promote flexibility and efficiency in the arbitration process by giving parties an opportunity of early dismissal of manifestly unmeritorious claims or claims falling outside the jurisdiction of the Arbitral Tribunal. This in turn, will hopefully reduce the drawback in arbitration of lengthy time and excessive costs.

Joinder and consolidation (Rules 21 and 22)

Joinder (Rule 21)

Whilst joinder of parties is already available under Rule 9 of 2018 Rules, the Draft 2021 Rules seek to provide further clarity. In particular, the time for request for joinder after constitution of the Arbitral Tribunal has been clarified in that the request may be made prior to the filing of the statement of defence and counterclaim.[22] This request may be made in two instances. Firstly, where the parties have consented including the additional party, and secondly, where the additional party is prima facie bound by the arbitration agreement that gives rise to the arbitral proceedings.[23] In deciding whether to allow a joinder request, the considerations by the Director or Arbitral Tribunal after consulting all the parties including the additional party, are similar to and include the two instances set out above when allowing a party to make a request for joinder.[24]

In the 2018 Rules, the parties irrevocably waive their rights to challenge the validity and/or enforcement of the award on the basis of a decision to join or not to join an additional party.[25] This waiver has been removed from the Draft 2021 Rules. The rules on joinder have also been revised to protect the Arbitral Tribunal's power to decide any question as to its jurisdiction arising from its decision whether to allow or dismiss the request for joinder.[26]

Consolidation of proceedings (Rule 22)

Similar to joinder of parties, rules governing consolidation of proceedings are available under Rule 10 of the 2018 Rules. The main revisions in the Draft 2021 Rules are:

- The agreement of the parties for the request to consolidate is to be in writing.[27] This requirement for the agreement to be in writing is not specified in the 2018 Rules.

- The particulars that are to be included in the consolidation request are now spelled out, and these include the case reference number of the relevant arbitrations to be consolidated, copy of the document in which the arbitration agreement is contained or in respect of which the dispute referred to arbitration arises from, and any relevant communication between parties relating to the intended consolidation.[28]

- The circumstances to be considered by the Director in allowing the consolidation request include the stage of the arbitration proceedings and whether arbitrator has been nominated or appointed, whether the rights and reliefs claimed are in respect of, or arise out of, the same transaction or series of related transactions, compatibility of the arbitration agreements, any prejudice to the parties, and the efficiency of the proceedings.[29]

- Where the consolidation request has been allowed, and the parties are unable to agree on the arbitrators to be appointed, the Director shall reconstitute the entire Arbitral Tribunal and release and exclude arbitrators previously nominated or appointed. In such case, the Director shall determine a reasonable sum for any fees and expenses payable to any arbitrators released.[30]

- Similar to joinder, the parties irrevocable waiver of their rights to challenge the validity and/or enforcement of the award on the basis of a decision to consolidate or not to consolidate has been removed from the Draft 2021 Rules.[31]

- The Director's decision to allow a consolidation request shall not affect the validity of any act done or order made by any arbitrator who is released from the arbitral proceedings pursuant to Rule 22.8.[32]

The revisions in the Draft 2021 Rules pertaining to joinder and consolidation of proceedings have made the process clearer which would encourage and facilitate parties' use of these procedures.

Confidentiality (Rule 44)

The rules relating to confidentiality have been amplified in the Draft 2021 Rules as compared to the 2018 Rules. In the Draft 2021 Rules, waiver of confidentiality by agreement of the parties has been introduced.[33] The obligation to maintain confidentiality has been extended to specifically cover the Director, any tribunal secretary, any witness or expert appointed by the Arbitral Tribunal, and all those that parties involve in the arbitration, including any authorised representative, witness of fact, expert and service provider.[34]

In the event of any non-compliance with the undertaking as to confidentiality, the Arbitral Tribunal is empowered to take appropriate measures, including issuing order for costs or damages against the relevant party.[35]

The Draft 2021 Rules have also introduced publication of the Award with the express consent of the parties, subject to the redaction of all references to the parties' names and other identifying information.[36] This initiative by the AIAC to publish awards will be beneficial as it enables arbitration practitioners to familiarise themselves by reviewing past rulings on application of the AIAC arbitration rules and substantive legal challenges. This will also create more certainty and uniformity in the application of the arbitration rules.

Closure of Proceedings (Rule 32)

With the aim of providing more clarity to closure of proceedings, the Draft 2021 Rules include requirements for closure of proceedings in respect of each award where the arbitral proceedings are bifurcated and separate awards are to be issued for the bifurcated issues.[37] Similarly, where there are multiple parties, and the Arbitral Tribunal intends to issue several awards, the Arbitral Tribunal shall declare the closure of proceedings in respect of each final award.[38]

The declaration and the date of the closure of proceedings shall be notified in writing to the parties and to the AIAC, following which no further evidence or submissions in respect of the matters to be decided in the Final Award shall be allowed.[39] In exceptional circumstances, the Arbitral Tribunal may re-open the arbitral proceedings at the request of the parties or on its own initiative, following a consultation with the Director.[40] Consistent with the UNCITRAL Arbitration Rules, the details of exceptional circumstances have not been listed.[41] It would be interesting to see whether exceptional circumstances would include discovery of new evidence.

Conclusion

The Draft 2021 Rules is an attempt to address some of the shortcomings or procedural lacunae in the Rules and will certainly be an impetus to improve the efficiency of arbitrations administered by the AIAC.

Article by ***Ashok Kumar Mahadev Ranai*** *(Partner) and* ***Loshini Ramarmuty*** *(Partner) of the Construction Litigation, Arbitration and Adjudication Practice of Skrine*.

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[1] Rule 1.3 of the 2018 Rules.
[2] Rule 9.7(a).
[3] Rule 9.7 (b).
[4] Rule 9.7 (c).
[5] The AIAC has published its Fast Track Arbitration Rules (effective as of 9.3.2018) which contain the rules governing a fast track arbitration.
[6] Rule 8.2.
[7] Rule 8.3.
[8] Rule 8.5.
[9] Rules 8.6 and 8.7(a).
[10] Rule 8.8.
[11] Rules 8.8(k) and (l).
[12] Rule 8.8(m).
[13] Rule 8.10.
[14] Rule 8.12.

[15] Rule 19.1.
[16] Rule 19.2.
[17] Rule 19.4.
[18] Rule 19.5.
[19] Rule 19.6.
[20] Rule 19.7.
[21] Rule 19.8.
[22] Rule 21.1.
[23] Rule 21.1.
[24] Rule 21.6.
[25] Rule 9.
[26] Rule 21.7.
[27] Rule 22.1(a).
[28] Rule 22.3.
[29] Rule 22.5.
[30] Rule 22.9.
[31] Rule 5 of the AIAC 2018 Rules.
[32] Rule 22.10.
[33] Rule 44.1.
[34] Rules 44.3 and 44.4.
[35] Rules 44.5.
[36] Rule 44.6.
[37] Rule 32.2.
[38] Rule 32.3.
[39] Rule 32.4.
[40] Rule 32.5.
[41] Article 31(2) of the UNCITRAL Arbitration Rules.

May 2021

Guidelines for the registration of individuals or legal entities providing specialized services or executing specialized tasks

The Official Gazette of the Federation published, on May 24th, 2021, the Guidelines for the registration of individuals or legal entities that provide specialized services or execute specialized tasks referred to in Article 15 of the Federal Labor Law (the "Guidelines") and issued by the Ministry of Labor and Social Welfare ("STPS"). The main aspects of the Guidelines are the following:

- Only individuals or legal entities that execute specialized services or perform specialized tasks and that for such purpose **provide or make available their own staff for the benefit of another** will be subject to registration.

- **Specialized services or tasks are defined as** *"those that combine distinctive elements or factors of the activity performed by the contractor, which are supported, among others, by training, certifications, permits or licenses that regulate the activity, equipment, technology, assets, machinery, risk level, average salary range and experience, which provide added value to the beneficiary*".

- The computer platform http://repse.stps.gob.mx is made available to register before the Public Registry of Contractors of Specialized Services or Specialized Works (the "Registry") as well as the requirements that must be met to obtain the Notice of Registration (including the docket number to follow up the process), which will be handled by the Dignified Work Unit of the STPS, that may require additional information and documents, if deemed necessary.

- The STPS must rule on the request within 20 business days after submission on the platform;. If there is no ruling, the submitting party may demand the STPS to do so, but if the Ministry does not issue the registration within the following 3 business days, it will be deemed as being made for all legal purposes.

- In case of **acceptance**, the STPS will issue the registration and docket of the specialized activity or work in force that must be added to the Service contract. Such registration must be **renewed** every three years, by means of a new request submitted through the internet platform, within three months prior to the date on which the registration expires.

- In the event of **refusal**, for the reasons set forth in the Guidelines, individuals and legal entities may initiate the process again after amending the omission detected by the STPSI In the event of **cancellation** of the Registration (for various reasons, including the rendering of services that were not registered and the existence of firm credits derived from the non-compliance with tax and social security obligations), a term of five business days is established for the applicant to state what deems appropriate.

- The individuals or legal entities that obtain the registration will be obliged to identify their workers, by means of the image, name, badge or identity code that they deem convenient, to distinguish them from the rest of the employees of the beneficiary of the services that work in the same facilities.

The official publication of the Guidelines can be consulted directly at the following link: https://www.dof.gob.mx/nota_detalle.php?codigo=5619148&fecha=24/05/2021.

In case you require additional information, please contact the partner responsible of your account or any of the following attorneys:

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Netherlands | EU

Modified entry into force of Management and Supervision of Legal Entities Act

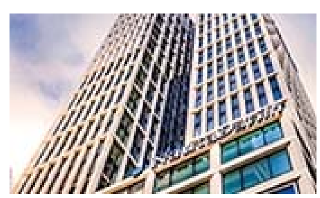
Thursday 24 June 2021

On 1 July 2021, the Management and Supervision of Legal Entities Act (Wet bestuur en toezicht rechtspersonen or WBTR) will enter into force. However, two parts will enter into force at a later – to be determined – date pursuant to the amended Act of 11 June 2021 (Stb. 2021, 284). These parts concern the one-tier management model for associations, cooperatives, mutual insurance societies and foundations and the rules on absence and inability to act applicable to the board members of an NV. With regard to the one-tier management model, it did not yet appear technically possible to indicate in the trade register whether a board member is an executive or non-executive director. According to the minister for legal protection, these types of legal entities may still have a one-tier board structure, despite the current absence of a legal basis for this model. This practice can consequently continue unaffected. With regard to the rules on absence and inability to act applicable to the board members of an NV, it turned out that transitional provisions on this subject were inadvertently left out of the WBTR. Therefore, it will be provided in a bill containing miscellaneous provisions, currently in preparation, that, upon the next amendment of their articles of association, NVs must include provisions governing the absence or inability to act of supervisory board members. This is in line with the transitional rules applicable to other corporate forms (the BV, association and foundation). In addition to this update on the new date of entry into force for certain parts of the WBTR, this newsletter provides an overview of the most important changes the WBTR will introduce.

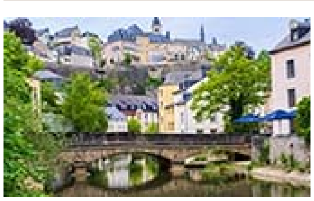
Statutory basis for the establishment of a supervisory board by foundations and associations

Some associations and foundations have already set up a board of supervisors or a supervisory board on the basis of their articles of association, but there is currently no statutory basis for doing so. As from its entry into force, the Act will provide such statutory basis. In addition, there will be a statutory description of the powers, duties and responsibilities of the directors and members of the supervisory bodies of foundations and associations.

One-tier board for foundations, associations, cooperatives and mutual insurance companies



The Act facilitates the choice by foundations, associations, cooperatives and mutual insurance companies of a supervisory board or one-tier model (as is already the case for the BV and NV). However, it should be noted that sector-specific legislation could require a separate supervisory board, as is the case for banks and insurers under the Financial Supervision Act. As mentioned above, this statutory basis will not be introduced on 1 July 2021, but rather at a date to be determined.

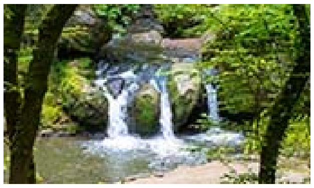


Uniform rules on conflicts of interest

Associations, cooperatives and mutual insurance companies will become subject to the same conflict-of-interest rules as NVs and BVs. Foundations will be subject to slightly different rules, however, as this type of legal entity does not have a general meeting. If, due to a conflict of interest, the board of a foundation is unable to take a decision, the supervisory board will decide in its stead. In the absence of a supervisory board, the decision may be taken by the management board, with a written explanation of the considerations underlying the decision, unless the articles of association provide otherwise. If the supervisory board of a foundation has a conflict of interest, it may nevertheless take the decision in question, subject to the provision of a written explanation of the considerations on which the decision is based, unless the articles of association provide otherwise. Once the Act enters into force, it will no longer be possible to invoke conflict-of-interest provisions in the articles of association of associations, cooperatives and mutual insurance companies that are based on the old statutory rules.

Uniform rules on the liability of directors and supervisory board members in the event of bankruptcy

Under the current rules, the trustee in bankruptcy may hold directors and supervisory board members of a BV, NV, cooperative company, mutual insurance company, or commercial foundation or association (meaning one subject to corporate tax) jointly and severally liable under certain circumstances for mismanagement. These rules will be extended to informal associations and non-commercial foundations and associations. It should be noted that the presumption of mismanagement if, in short, the accounts are not in order will not apply, except in the case of directors and supervisory board members of semi-public institutions that are subject to an alternative annual accounts requirement pursuant to sector-specific rules (e.g. housing corporations, educational institutions, healthcare institutions and pension funds).



Mandatory statutory rules on absence and inability to serve

For NVs, BVs, foundations, associations, cooperatives and mutual insurance companies, the Act introduces uniform requirements for provisions in the articles on absence or inability to serve: the articles of association must contain provisions on the absence or inability to serve of *all* directors and supervisory board members and *may* contain such provisions for the absence or inability to serve of one or more directors or supervisory board members. Provisions to this effect must be included upon the first amendment to the articles of association following the entry into force of the Act. For NVs, provisions to this effect were inadvertently left out of the WBTR but will be inserted in a bill containing miscellaneous provisions, currently in preparation.

Limit on the exercise of multiple voting rights

The Act provides that a given director or supervisory board member cannot cast more votes than the other directors or supervisory board members combined. This requirement already applies to BVs and NVs and will be extended to all other Dutch legal entities. Provisions of the articles of association that are not in line with the new voting rights rules will be deemed invalid after five (5) years. Derogating provisions in the articles of association must be modified upon the first amendment to the articles of association following the entry into force of the Act.

Extended grounds for the removal of directors and supervisory board members of foundations

The Act introduces more extensive grounds for the removal of directors and supervisory board members of foundations. At the request of an interested party or the Public Prosecution Service, directors and supervisory board members can be removed by the court for neglecting their duties, other important reasons, a significant change of circumstances based on which continuation of the directorship/membership cannot reasonably be expected, or failure to comply or properly comply with an order issued by the preliminary relief judge to provide information to the Public Prosecution Service.

What do these changes mean for you?

After the entry into force of the WBTR, associations and foundations will be able to maintain their existing management and supervisory structures, such as general and daily management bodies or a supervisory board in the case of a foundation. While the act does not aim to change this state of affairs, in the case of a foundation with general and daily management bodies, it is recommended to assess to which extent the new statutory rules on supervisory boards could apply to the general management body. Thanks to the transitional rules, foundations, associations, cooperatives and mutual societies do not have to bring their articles of association into line with the new legislation immediately. However, it is advisable for these types of legal entities to assess whether the existing provisions of their articles of association and by-laws need to be amended at this time or shortly after the WTBR enters into force. In particular, the current rules on conflicts of interest, the discharge of supervisory board members (in the case of foundations), the absence or inability to act of board members and multiple voting rights should be examined. In addition, having regard to the professionalization of duties and heightened liability introduced by the WBTR, it is recommended to take a close look at the liability insurance and the description of the objects in the articles of association.

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NICARAGUA

OPTS TO START REGULATING VIRTUAL ASSETS

Jun/2021

On May 17, 2021, Law No. 1072 Law of Amendments and Additions to Law No. 977 Law against Money Laundering, Financing of Terrorism and Financing of the Proliferation of Weapons of Mass Destruction ("LA/FT/FP") and Addition to Law No. 561 General Law of Banks, Non-Banking Financial Institutions and Financial Groups ("Law No. 1072") entered into force, whereby -among other issues- it regulates in a general manner virtual assets service providers.

To begin with, Law No. 1072 introduces the following key definitions:

Virtual assets, which are defined as the digital representation of value that can be traded or transferred digitally and can be used for payments or investments. Nonetheless, virtual assets do not include digital representations of fiat currency (i.e. referring to the legal tender issued by the Central Bank of Nicaragua, the Cordoba currency), values and other financial assets.

Virtual asset service providers, who are defined as persons who perform one or more of the following activities or operations, for or on behalf of another natural or legal person:

exchange between virtual assets and fiat currencies;

exchange between one or more forms of virtual assets;

transfer of virtual assets;

custody and/or management of virtual assets or instruments that allow control over virtual assets; and

participation in and provision of financial services related to an issuer's offering and/or sale of a virtual asset.

Pursuant to the aforementioned Law No. 1072, the Central Bank of Nicaragua ("BCN") is designated as the regulator of commercial activity and the authorization of licenses and registrations related to financial payment technology and virtual asset services (PSAV), authorizing it to approve any other provision that may be necessary. The BCN is hereby authorized to publish on its website the official list of the digital asset service providers that have been authorized.

For its part, the Financial Analysis Unit ("UAF" in Spanish) will be in charge of supervising the activities of virtual asset service providers for LA/FT/FP prevention purposes.

On the other hand, Law No. 1072 also granted banks the right to provide virtual asset services, obliging them only to obtain a registration with the BCN.

It is worth mentioning that with this law, Nicaragua has taken its second step in the regulation of digital assets, since in September 2020 the BCN issued the Regulation of Financial Technology Providers of Payment Services, through Resolution No. CD-BCN-XLIV-1-20, by which it began to regulate, among other things, the operating licenses of companies that carry out this type of activities.

If you have any questions or would like to know more information on this matter, please do not hesitate to contact us.

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The Revised Rules of Practice and Procedure of the Energy Regulatory Commission

June 30, 2021

The Energy Regulatory Commission (ERC) has revised its Rules of Practice and Procedure (Revised RPP) which govern the proceedings before the ERC through the issuance of ERC Resolution No. 01, Series of 2021.[1] The Revised RPP took effect on April 13, 2021 (or 15 days after its publication in *Business Mirror,* a newspaper of general circulation). It allows the ERC to adapt to changes brought about by the COVID-19 pandemic and modernizes the ERC rules of procedure. It amends the RPP issued on June 22, 2006.

Under Republic Act No. 9136 or the Electric Power Industry Reform Act (EPIRA), the ERC is tasked to "promote competition, encourage market development, ensure customer choice and penalize abuse of market power in the restructured electricity industry." The ERC has jurisdiction over "all cases contesting rates, fees, fines and penalties imposed by the ERC in the exercise of the [EPIRA-granted] powers, functions and responsibilities and over all cases involving disputes between and among participants or players in the energy sector."

A. Electronic Proceedings

B. Spotlight on New Provisions

1. Prohibited Pleadings
2. Formal Amendments
3. Transfer of Interest: Substitution
4. Procedure for Hearings
5. Request for Additional Documents
6. New Procedure for Non-Rate Cases

A. Electronic Proceedings

The Revised RPP incorporates ERC Resolution No. 09, Series of 2020[3] (E-Filing Guidelines) which provides for the guidelines governing electronic applications, filings, and virtual hearings before the ERC.

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[1] Please see https://www.erc.gov.ph/Files/Render/issuance/30791 and https://www.erc.gov.ph/Files/Render/issuance/30794 for reference.
[3] Please see https://www.erc.gov.ph/Files/Render/issuance/30582 for reference.

"Filing" refers to the submission of pleadings, applications, comments, petitions, protests, motions, notices, compliance, and other similar papers in accordance with the RPP or the E-Filing Guidelines.[4] In this regard, the Revised RPP provides, among other things, that:

- All pleadings, motions, and other similar papers may also be filed electronically pursuant to the E-Filing Guidelines issued by the ERC;[5]

- Pleadings shall be written in English or Filipino, typewritten or printed, and filed with the Central Records Division, or via e-mail through the official e-mail addresses of the Central Records Division;[6]

- The public consultation necessary before finalizing the language of a proposed new rule or amendment to, or repeal of an existing ERC rule may be conducted through video conferencing;[7] and

- Unless otherwise ordered by the ERC, service shall be made upon a party or upon its counsel-of-record, either by personal service, registered mail, or private courier delivery, to its principal place of business or residence, or to the address specifically stated by the party in the application, petition, complaint, or intervention. Service may also be made through e-mail.[8]

The Revised RPP also allows consumer complaints to be filed with the ERC electronically[9] and the threshold for complaints to be heard through the rules of summary procedure has been raised from PhP200,000 to PhP400,000.[10]

B. Spotlight on New Provisions

1. Prohibited Pleadings

Rule 5, section 7 of the Revised RPP is a new provision that enumerates the pleadings, motions, and petitions that are prohibited. These are as follows:

(a) Motion to Dismiss, except on the grounds of lack of jurisdiction, *Res judicata*, prescription, and *litis pendentia*;
(b) Motion for Bill of Particulars;
(c) Petition for Relief from Judgment; and
(d) Such other pleadings, motions, and petitions of similar nature intended to circumvent this Section.

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[4] ERC RPP, Rule 2 Section 1 (l).
[5] ERC RPP, Rule 3 Section 7.
[6] ERC RPP, Rule 5 Section 1.
[7] ERC RPP, Rule 21 Section 4.
[8] ERC RPP, Rule 10 Section 2.
[9] ERC RPP, Rule 20 F. Section 4.
[10] ERC RPP, Rule 17 Section 2 (a) (1).

2. Formal Amendments

Under the Revised RPP, a defect in the designation of the parties and other clerical or typographical errors may now be summarily corrected by the ERC at any stage of the proceedings, *motu proprio* or upon motion of any party, provided that no prejudice is caused thereby to the adverse party.[11]

3. Transfer of Interest: Substitution

The Revised RPP clarifies what will happen in case of any transfer of interest. Specifically, a complaint, petition or application shall only be continued by or against the original party, unless the ERC, *motu proprio* or upon motion of the original party, directs the person to whom the interest is transferred, to be substituted in the action or be joined with the original party.[12]

4. Procedure for Hearings

The Revised RPP now allows hearings to be conducted through video conferencing pursuant to the E-Filing Guidelines issued by the ERC.[13] In case the hearing is conducted through video conferencing, the applicant or petitioner shall host the virtual hearing in the locality within the affected area as the designated venue for the conduct thereof and ensure that the same is open to the public and that their participation shall not be impaired.[14]

The Revised RPP also allows the cancellation of hearings due to force majeure or suspension of work in the government. "In the event that the hearing is cancelled due to force majeure, or declaration of suspension of work in the government, the [ERC] shall issue a new notice of hearing. The applicant or petitioner must publish the new notice of hearing once (1x) in a newspaper of general circulation within the franchise and/or affected areas, at least ten (10) days before the scheduled hearing, and must furnish a copy thereof to the Offices of the Governor, Mayor, and the Sanggunian concerned within the franchise and/or affected areas, to the end that persons who may be affected by the application or petition shall be apprised thereof and will have an opportunity to file their intervention, comment, or opposition thereto."[15]

Further, the Revised RPP provides that postponements or continuance of hearings may be allowed by the ERC or presiding officer upon good cause shown.

The Revised RPP has also deleted the provision on rebuttal and sur-rebuttal during the hearings.

[11] ERC RPP, Rule 7 Section 3.
[12] ERC RPP, Rule 8 Section 5.
[13] ERC RPP, Rule 18 Section 2.
[14] ERC RPP, Rule 18 Section 4.
[15] ERC RPP, Rule 13 Section 4.

5. Request for Additional Documents

Notwithstanding the provisions on the reopening of cases in the Revised RPP, the ERC may require additional documents from the parties after the submission of their formal offer of evidence, or after a motion for reconsideration is filed by any party. Such documents, copy furnished all parties, shall be considered by the ERC in the evaluation of the application or petition, or resolution of the motion for reconsideration even absent a formal offer.[16]

6. New Procedure for Non-Rate Cases

Rule 20 of the Revised RPP provides for the procedures and requirements for particular cases before the ERC. The Revised RPP introduces a catch all provision for applications for approval of other rate and non-rate cases that do not explicitly fall under the ones previously provided. All other applications within the jurisdiction of the ERC shall be filed for approval pursuant to the relevant rules and regulations of the ERC.[17] The application shall be accompanied by documents and information as specified in the relevant rules and regulations of the ERC, or as may be required, when necessary.[18]

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SyCipLaw's Special Projects Department undertakes the firm's project and transactional work, which constitutes the firm's traditional focus and largest practice area. This includes M&A, privatization, power and energy, mining and natural resources, environmental law, infrastructure, construction, real estate and property development, telecommunications, aviation, shipping, and transportation. Our lawyers are recognized as experts and leaders in their fields of specialization and, we believe, appreciated for their experience, expertise, and innovative approach to business issues.

[16] ERC RPP, Rule 19 Section 5.
[17] ERC RPP, Rule 20 E. Section 1.
[18] ERC RPP, Rule 20 E. Section 2.

The links to our earlier bulletins and briefings can be found at the SyCipLaw information hub, https://syciplawresources.com/.

For more information about the regulations covered by other bulletins and briefings, please contact your account partner or sshg@syciplaw.com or info@syciplaw.com.

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The Rise and Rise of Ransomware

DENTONS RODYK

July 5, 2021

Introduction

More organisations have shifted their operations online and have their staff work from home because of the COVID-19 pandemic. From a cybersecurity perspective, this broadens the potential attack surface by nefarious hackers through an increase in the number of devices used to facilitate business operations. The larger attack surface, coupled with more sophisticated methods adopted by hackers, increase the risk of organisations falling prey to ransomware – a type of malware used by hackers to encrypt and block access to the victim's data until the demanded ransom is paid.

In some instances of ransomware attacks, there may not have been any exfiltration or removal of data from the organisation. However, even where there is no exfiltration of data, organisations may find themselves in breach of their protection obligation under Singapore's Personal Data Protection Act (PDPA). This is a key learning point in the recent Personal Data Protection Commission decision of *HMI Institute of Health Sciences Pte. Ltd.* [2021] SGPDPC 4.

Brief Facts

HMI Institute had collected personal data from its employees and the participants of its training courses. The personal data were stored in a file server which was protected by a firewall that blocked all connections to the server except those through a standard port used for the Remote Desktop Protocol (RDP Port). HMI Institute kept the RDP Port open to allow for quick remote access to the server for recovery and maintenance works.

On 4 December 2019, the server suffered a ransomware attack which encrypted the personal data of approximately 110,080 participants and 253 employees. Affected personal data included names, NRIC numbers and financial information.

An expert assessment concluded that the attacker had likely discovered the open RDP Port. Subsequently, the attacker used brute force attacks to obtain the administrator account password for the server, thereby gaining access to it.

Decision

HMI Institute was found to have breached its obligation to protect the personal data as it failed to make reasonable security arrangements to protect the personal data in the server from the risk of unauthorised access, modification and disposal for the following reasons:-

1. HMI Institute did not adequately regulate remote access to the server. It lacked sufficiently robust processes to ensure safe remote access to the server via the RDP Port, which it kept open permanently for more than four years.
2. HMI Institute failed to enforce proper password management policies. Whilst HMI Institute had adopted a password policy setting out guidelines which were consistent with the standards recommended by the PDPC, the policy was not complied with in practice.
3. HMI Institute allowed for the sharing of login credentials for the administrative account among several users despite that being the only access control.

Therefore, even though there was no exfiltration of personal data and all affected personal data were retrieved, HMI Institute had breached its obligation under section 24 of the PDPA. Having considered all the relevant factors of the case, the PDPC imposed a $35,000 financial penalty on HMI Institute.

Case comment

- **Absence of data exfiltration does not necessarily mean that an organisation cannot be found in breach of the PDPA.**

The PDPC would review and consider the security arrangements that an organisation has instituted on a holistic basis. These include assessing access management to servers (whether mission critical or otherwise), password management policies, or the extent of any other security measures that an organisation may have in place to protect the data (e.g. anti-hammering features).

- **Regular review of IT security posture needed**

In view of the evolving cybersecurity landscape, it is also important for organisations to regularly review their IT security posture. For example, all ports to servers that contain high volumes of personal data and/or highly sensitive personal data should be kept closed. If it is necessary to keep any ports open, then organisations should institute measures to ensure the security of any incoming RDP connection.

- **Organisations must consider if the data breach is a notifiable breach even if no data seems to have been taken**

Organisations should also note that they are subject to the mandatory data breach notification regime under the amended PDPA. Having suffered from a ransomware attack, an organisation must consider whether the ransomware attack falls within the scope of a notifiable data breach, even if it thinks that there has been no exfiltration of personal data. Organisations may still be in breach of the protection obligation for failing to institute reasonable security arrangements to address the risk of ransomware. When in doubt, organisations are advised to approach a professional.

Practical tips for the new normal

As work-from-home continues to be the default arrangement, organisations must be cognisant of the increasing risks associated with ransomware. Arising out of the new normal of work-from home arrangements, organisations would have to grapple with a broader attack surface with employees conducting work business from their home networks. For most organisations, this raises the tension between usability, cost, and cybersecurity when adopting ICT security measures.

In order to address the risk of ransomware in the new normal, and ensure that an organisation meets its regulatory obligations under the PDPA, we have set out some practical tips below:-

- **Technical measures**: As the attack surface broadens, it is important for organisations to institute strong technical measures to mitigate the risk of ransomware. For example, organisations should regular review RDP connections, log reviews for unusual activities, require strong authentication methodologies, and implement defence-in-depth measures.
- **Organisational measures**: Organisations should also ensure that it prepares a drawer plan or incident response management plan in the event that a ransomware occurs. The amended PDPA requires organisations to notify the PDPC within three calendar days once it has been determined that a data breach constitutes a notifiable data breach. Given that time is of the essence, it will serve an organisation well to prepare such documentation during "peacetime".
- **People measures**: The PDPC decisions regularly reveal that people are the weakest link in data protection matters. Therefore, it is very important that employees be given lessons on cyber hygiene. For example, employees should, where possible, keep their work and personal e-mail accounts and devices separate. Regular training should also be conducted to help employees identify phishing or nefarious e-mails. Employees should also verify e-mails from the purported senders, especially if they contain unusual instructions.

Dentons Rodyk thanks and acknowledges Intern Lee Lyi Shyuenn for her contributions to this article.

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Newsletter

Recent Amendments to the Regulations Governing the Approval of Investments in Taiwan by PRC Person(s) and Subsequent Influences on Cross-Border M&A Transactions

06/30/2021

Christina Hsuan Chiang/ Chi Lee

Since the structure of foreign investments in Taiwan is becoming more diverse and complex in recent years, in an effort to ensure more comprehensive reviews and reinforce control over investments in Taiwan by PRC persons by broadening the statutory scope of PRC persons, on December 30, 2020, the Investment Commission, Ministry of Economic Affairs ("**IC**") promulgated the amendments to Articles 3, 4 and 6 of the Regulations Governing the Approval of Investments in Taiwan by PRC Persons (the "**Approval Regulations**"), and announced the new administrative rules on Article 3, Paragraph 2 of the Approval Regulations (the "**New Administrative Rules**"), both of which took effect on the same date. Such amendments and new rules will result in certain influences on international M&A transactions.

1. Summary of Amendments to Approval Regulations and New Administrative Rules

(1) The rules on the definition of "third-area PRC investors" are becoming stricter.

According to Article 3, Paragraph 2 of the Approval Regulations, a "PRC Investor" is statutorily defined to include any company located in any "third area" (an area other than the PRC or Taiwan) and invested in by PRC person(s) whereby the shares held or capital contributed by PRC person(s) in aggregate exceed 30% of the total number of issued shares or total amount of capital contribution of said third-area company, or any PRC person(s) has an effective control over said third-area company. In addition, with respect to the above 30% shareholding rule, according to the New Administrative Rules, the 30% shareholding threshold must be examined on each offshore holding level, rather than being understood as the ultimate shareholding percentage in a third-area company by one or more PRC persons (similar to a weighted calculation method).

In the case of a multi-layer shareholding structure, if PRC person(s) holds more than 30% shareholding in any level, such shareholder level will be also regarded as a PRC investor, and its total shareholding in the next-level shareholder will be included in the calculation base of the said 30% shareholding threshold to decide whether the next-level shareholder is a PRC investor. Consequently, the New Administrative Rules have become stricter since it is more possible to regard a third-area company as a PRC investor.

(2) There are more types of structures that would be considered "PRC investments" requiring the IC's prior approval.

Furthermore, in addition to holding equity or director seats, considering that in practice certain contractual arrangements that involve PRC investors may also give rise to concerns regarding PRC investors having potential control over the finances and operations of Taiwan companies, the IC amended Article 4 of the Approval Regulations to provide that PRC investors must also obtain the IC's prior approval if, by contracts or otherwise, such PRC investors are considered by the IC as having control of Taiwan sole proprietorships, partnerships, limited partnerships or non-TWSE/TPEx listed or non-emerging stock companies pursuant to the Approval Regulations.

From the aforesaid summary of the amendments, it is understood that the regulations on the definition of PRC investors and types of PRC investments requiring the IC's approval are becoming stricter. Some structures or contractual arrangements that were previously not considered PRC investments (hence no prior approval is required) will be possibly regarded as PRC investments under the new regulations and thus should be subject to the IC's stricter review for what is considered PRC investments.

2. Influences on the International Private Equity Funds' M&A Activities

In recent years, due to the emerging growth of international private equity funds ("**PE Funds**"), M&A transactions led by or involved with international PE Funds are becoming more prevalent. In Taiwan, since there are different investment regulations and intensities of review required for general foreign investments and PRC investments respectively, the applicable standard of review to the acquisitions by international PE Funds of Taiwan companies' shares is based on whether international PE Funds involve PRC investors or only foreign investors.

In practice, the IC usually requests international PE Funds to disclose their upper-level shareholding structure so as to confirm the PE Funds' identities (i.e., whether there are any PRC investors involved) and applicable review regulations, while reviewing their investment cases. After the new regulations took effect, it can be reasonably expected that the IC will request for more comprehensive disclosure of the upper-level shareholding structure of international PE Funds.

The said IC review practice usually has a major impact on investments and M&A activities of international PE Funds in Taiwan because general partners and limited partners of PE Funds usually enter into confidentiality agreements to avoid disclosing the investment status of individual limited partners. If, due to these confidentiality agreements, it is challenging for international PE Funds to fulfill the IC's disclosure requests, the timeline of the IC's review may be prolonged. In this connection, it is recommended that investors should formulate their plan in the pre-transaction stage in order to avoid the delay in the transaction process.

3. Influences on the Structure of International M&A Transaction

In addition to PRC investors not able to make investments in Taiwan without the ICs prior approval, PRC businesses may not engage in "business activities" in Taiwan without approval or without establishing a Taiwan branch or office. Violation of the said restriction will be subject to imprisonment of not more than 1 year and a criminal fine according to Act Governing Relations between the People of the Taiwan Area and the Mainland Area (the "**Relations Act**") and other civil liabilities.

There are no clear rules on the definition of "business activities". Whether the activities constitute the business activities is decided by the court on a case-by-case basis. According to a court decision, business activities, which should be restricted according to the Relations Act, refer to constant and continual activities carried out by PRC businesses that will influence the rights of a Taiwanese person(s) who also engages in such activities, which may pose a substantial or potential danger to trade safety in Taiwan. Business activities may not be limited to business operations provided in the Company Act but also specifically include selling PRC real estate, opening a bank account in Taiwan, engaging in wire transfer, serving as a manager in a Taiwan company, recruiting talent, or arranging the execution of employment agreements in Taiwan for PRC companies.

Therefore, if the buyers in international M&A transactions are PRC investors or involve PRC investors, such investors should carefully consider the transaction structure at the planning stage in order to ensure that the applicable IC approvals are duly obtained in accordance with the laws for any changes in offshore shareholding structures, and to prevent any circumstance where PRC investors invest, or engage in business activities, in Taiwan without the IC's prior approval. PRC investors should also avoid the misconception that it is fine to close the Taiwan subsidiaries or branches and still engage in business activities in Taiwan without any entity.

Conclusion

Since the amendments to the Approval Regulations and the current review practice of the IC will significantly influence international investments and M&A transactions, investors should assess all possible legal risks in Taiwan at the early stage arising from the potential PRC investments while planning and engaging in cross-border M&A transactions.

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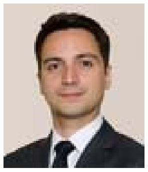

Arpat Şenocak

Regulation on activities to be evaluated under insurance services and on distance insurance contracts

8 July 2021

Turkey | Client Alert | Insurance

The Regulation on Activities to be Evaluated Under Insurance Services and On Distance Insurance Contracts ("**Regulation**"), published in Official Gazette no. 31513 dated 16 June 2021, aims to determine the procedures and principles regarding insurance activities and activities that do not fall under this scope, insurance contracts concluded to the benefit of consumers, insurance contracts concluded without the physical gathering of the parties and insurance contracts offered in relation to the sale of goods and services.

THE INSURANCE ACTIVITY AND INSURANCE CONTRACTS CONCLUDED IN FAVOUR OF THE CONSUMER

Prohibition to carry out other activities

According to the provisions of Article 5 of the Regulation, insurance and pension companies providing an insurance coverage cannot transfer to third parties their primary obligation of performance of the insurance contract, i.e. their obligation to carry the risk and to compensate once the risk is realised, with the exception of reinsurance contracts. The same Article emphasises that insurance companies cannot carry out activities other than the insurance operations and the activities directly related to it, and that the provisions of this Article will also apply to reinsurance companies.

Contracts and activities that cannot be evaluated under insurance services

Pursuant to the provisions of Article 7, those activities devoted to the compensation within the scope of Article 1401 of the Turkish Commercial Code ("TCC") no. 6102, will be qualified as insurance services, regardless of their name. The same article states that insurance activities will only be carried out by insurance companies, pension companies giving insurance coverage, reinsurance companies and persons and establishments offering insurance services in accordance with their special laws. It also specifies that the carrying out of these insurance services by other persons will be deemed an unauthorised insurance service and will thus be subject to a criminal sanction.

Insurance contracts concluded to the benefit of consumers

Article 8 of the Regulation highlights the conditions to be met in insurance contracts concluded to the benefit of consumers. Accordingly, if the insurance contracts within the scope of the said article are awarded to the insured in a service package, the premium amount of the insurance product cannot be directly or indirectly collected from the consumer. Otherwise, the collection of the premium from the consumer will be deemed an unauthorised intermediary activity and will be subject to a criminal sanction.

DISTANCE INSURANCE CONTRACTS AND INSURANCES OFFERED IN RELATION TO THE SALE OF GOODS AND SERVICES

Distance insurance contracts

Article 9 of the Regulation emphasises that the authorised establishments that conclude or mediate the conclusion of distance insurance contracts through a remote communication tool shall have the necessary and sufficient organisational and technical infrastructure, and that intermediary institutions are also included in the scope of the provision. However, the "obligation to inform the Ministry of the necessary and sufficient organisational and technical infrastructure", which was present in the previous regulation, has been repealed.

It is further specified that the provisions of the Regulation on Informing in Insurance Contracts will also apply to distance insurance contracts and that the obligation to issue policies as regulated under the TCC can also be realised for these contracts through a permanent data logger.

Regarding the marketing and sale of goods and activities, paragraph 4 of the aforementioned article stipulates that the goods and services of insurance and pension companies giving insurance coverage, other than the insurance policies provided under Article 10, cannot be put on the e-market where goods and services are marketed or sold, excluding the authorised institutions' e-commerce environments. Authorised institutions can nevertheless place advertisements in these environments.

The last paragraph of the same article provides a significant regulation emphasising that, in principle, a distance insurance contract is concluded by the insured using the remote communication tool in person. Subsequently, in workplaces belonging to real and legal persons other than the authorised institutions, it is not possible to mediate the conclusion of insurance contracts by using remote communication tools by persons who are not among the technical staff. The violation of this prohibition will be once again subject to criminal sanction, as it is defined as an unauthorised intermediary activity.

Under the Regulation, the "3D Secure" system included in the previous regulations and required for collections made with debit and credit cards, is no longer a necessity, and the obligation to provide the technical infrastructure required for this system has thus been abolished.

Lastly, the statement made by the Insurance and Private Pension Regulation and Supervision Agency ("IPPRSA") regarding the provisions of the Regulation underlines that, in the new and abovementioned regulations, the authorised institutions are only allowed to sell in their own electronic environment, and that they are only allowed to place advertisements in other electronic commerce environments. The purpose is to help approximately 16,000 intermediary institutions to adapt easily to the digitisation process affecting all sectors.

Insurance offered on the sale of goods and services

Article 10 of the Regulation determines the conditions for providing electronic device, machine breakage and theft insurance to be realised after the sale of devices such as computers, tablets, mobile phones and white goods. Accordingly, it is required that:

- the insurance is complementary to the goods or services sold and is purchased together with the devices listed above or in connection with the same device after the sale;
- the annual premium for insurance does not exceed the amount to be calculated by taking into account the change of the Consumer Price Index at the end of each year, as compared with the amount in December of the previous year;
- the coverage term is a maximum of two years, except for insurance offering an extended warranty coverage.

Another provision aimed at preventing unauthorised intermediary activities is in paragraph 3 of Article 10, which states that one cannot act in any way that shows or creates the impression that the insurance coverage has been provided by companies other than insurance companies and pension companies providing insurance coverage, and that such statements cannot be included in the contract that forms the basis for the conclusion of the insurance contract.

Paragraph 4 of the same article makes a distinction between offering an insurance policy in-store and offering it in the e-commerce environment; the conditions for offering it in the electronic commerce environment have been determined.

The obligation of insurance companies to inform and issue policies is also regulated, and must be fulfilled through call centre or permanent data logger.

The Regulation states that the insurance premium will be collected together with the goods sold and will be transferred to the insurance company. In this case, the amount of the insurance premium will be shown separately in the payment document. If the premium is paid in cash or by means of a bill of exchange, the insured will also receive the premium collection receipt, either in printed form or through the permanent data logger. The payment will thus be deemed to have been made to the insurance company.

Pursuant to paragraph 7 of the same article, the service fee to be paid to insurance providers in connection with the sale of goods and services cannot be linked to the premium.

The Regulation also imposes certain obligations on the authorised institutions under Article 10, and makes it mandatory for these institutions to take all the necessary precautions and to keep all information and documents ready for inspection. Again, it is stipulated that IPPRSA will be informed by the authorised institutions one month prior to the implementation under the scope of Article 10, and that IPPRSA may request changes in practice when deemed necessary, without prejudice to the administrative sanction decision.

Security measures in premium collection

Article 11 of the Regulation specifies that the authorised institutions will be responsible for designing processes in accordance with Law No. 5464 on Bank Cards and Credit Cards, Law No. 6493 on Payment and Securities Settlement Systems, Payment Services and Electronic Money Institutions and their secondary legislation, and for providing necessary and sufficient security precautions in premium collections for distance insurance contracts.

Final provisions

With this Regulation, the Regulation On Activities To Be Evaluated Under Insurance Services, On Insurance Contracts Concluded In Favour Of The Consumer And On Distance Insurance Contracts published in Official Gazette no. 28982 dated 25 April 2014 was repealed. Business processes carried out in accordance with the repealed regulation must be brought into compliance with the new Regulation by 1 September 2021.

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In compliance with Turkish bar regulations, information relating to Turkish law matters which are included in this client alert is given by Özdirekcan Dündar Şenocak Ak Avukatlık Ortaklığı, a Turkish law firm acting as correspondent firm of Gide Loyrette Nouel in Turkey.

BAKER BOTTS

Thought Leadership

Colorado Joins the Consumer Privacy Bandwagon

12 July 2021
Client Updates
Issue in Brief: Colorado is the third state to pass comprehensive consumer privacy legislation—the second in 2021—following the Virginia Consumer Data Protection Act (CDPA), which was signed into law earlier this year, and the California Consumer Privacy Act (CCPA), which passed in 2018.

On the Horizon: The Colorado Privacy Act largely tracks the prior state consumer privacy laws, requiring covered businesses to observe transparency requirements, honor consumer requests, and implement security controls to protect personal data. As a slight divergence, however, the CPA requires covered business to observe stricter consent requirements, implement "single-click" opt-out requests and readily-available appeals processes associated with consumer requests, and conduct—in certain instances—data protection impact assessments.

Key Takeaways: The CPA comes into effect on July 1, 2023, along with implementing regulations that the Colorado attorney general is required to develop. Businesses covered by the CPA should begin aligning their privacy programs and practices with the CPA, including the development of the more unique aspects of the law like the "single-click" opt-out mechanism and the readily-available appeals process.

CPA Scope & Key Definitions

On July 7, 2021 Colorado Governor Jared Polis signed the CPA into law, which is set to take effect on July 1, 2023.

The CPA largely tracks the prior state privacy legislation, the CCPA and the CDPA, but also borrows elements from Europe's General Data Protection Regulation (GDPR). Similar obligations include transparency requirements, honoring consumer requests, observance of data minimization principles, implementing data security efforts, and adhering to vendor management requirements.

In addition to the commonly shared obligations with the CCPA and CDPA, such as transparency requirements and a short list of explicit consumer rights, the CPA has some unique and nuanced differences in scope, including:

Covered Businesses. Companies engaged in business in Colorado that either (1) process the personal data of 100,000 consumers or (2) process the personal data of 25,000 consumers and receive any revenue or discount from the sale of personal data must comply with the CPA. Unlike the CCPA, Colorado's framework has no revenue threshold that subjects a company to the CPA.

Consumer. A consumer is a Colorado resident acting in an individual or household context and, like the CDPA, explicitly excludes those persons acting in a commercial or employee context.

Consent. A significant deviation from other consumer privacy legislation, the CPA requires that consent be in the form of a "clear affirmative act signifying a consumer's freely given, specific, informed, and unambiguous agreement," which aligns more closely with the GDPR and has proven to be a hurdle for companies.

Novel CPA Requirements & Obligations

Similarly, the CPA also creates unique (for US state consumer privacy) requirements, including:

Data Protection Assessment. The CPA requires businesses to conduct data protection assessments in cases of processing that present a "heightened risk of harm" to consumers. Certain categories include processing that involves targeted advertising where profiling can lead to unfair treatment of, or financial injury to, consumers, as well as the sale of personal data and any processing of sensitive data.

Single-Click Universal Opt-Out Procedure. Consumers will have the right to opt-out of processing of their personal data for purposes of targeted advertising, the sale of personal data, and consumer profiling. The CPA is unique here in that it mandates businesses to provide a universal opt-out option, such as a one-click button, to exercise all opt-out rights simultaneously. The attorney general's office has until the July 1, 2023, to establish technical regulations regarding the universal opt-out requirement.

Right to Appeal. Under the CPA, a business must provide consumers with a conspicuously available and convenient-to-use appeal process in connection with the exercise of applicable consumer rights. If an appeal is denied, the business must inform the consumer of their ability to contact the attorney general to submit a complaint.

Entity & Data Category Exemptions

The CPA includes certain exemptions, either by entity or by data set:

Exempt Entities. Principally, the CPA exempts financial institutions subject to the Gramm-Leach-Bliley Act.

Exempt Data Categories. The CPA further excludes protected health information and de-identified information under HIPAA information, data collected through certain activities of consumer reporting agencies, and data maintained for employment purposes, as well as data regulated by other laws, such as the Children's Online Privacy Protection Act (COPPA)

CPA Enforcement & Penalties

A violation of the CPA constitutes a deceptive trade practice, and noncompliant businesses can be fined up to $20,000 per violation, with no cap on the overall fine amount. The CPA, however, does not provide for a private right of action. Rather, it is enforced by the attorney general or a district attorney.

Upon an enforcement action, the relevant office must provide notice to the business, after which time the business will have 60 days to cure the violation. This provision, though, is set to expire January 1, 2025, after which businesses in violation of the CPA will not have an automatic right to cure before a proceeding commences.

Next Steps

Businesses complying with the CPA as a first instance or even businesses already subject to other privacy frameworks but need to update its program to comply with the CPA, critical steps should include:

- **Data Mapping and Inventory Practices.** Identifying the personal data a business collects is a critical and important step to compliance. This often includes identification of data elements, the purpose of the collection, storage locations, retention periods, and access rights to the data, including transfers to third parties.
- **Developing Formal Processes and Procedures.** Such procedures and processes include timely observing consumer requests, ensuring defensible collection of consumer consent where necessary, implementing data protection impact assessment processes, establishing the newly created appeals process, protecting personal data, and—as necessary—establishing a universal opt-out mechanism.
- **Creating a Third-Party Management Program.** This process involves diligence around contracting requirements for third parties that a business may use to process personal data, as well as tracking the sale or transfer of personal data to third parties.

For more information, please contact the Baker Botts Privacy and Data Security Team.

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BLOG POST / EMPLOYMENT ADVISOR

Employment Counseling

Biden's Executive Order Takes Aim at Non-Competes

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On July 9, 2021, President Biden signed an Executive Order seeking to curtail the use of non-compete agreements and other terms of employment that arguably limit worker mobility—an area of employment law that has traditionally been regulated by the states, not the federal government. The Order is not a mandate, but rather a roadmap that appears to be a policy directive only.

By its own terms, the Order "does not[] create any right or benefit, substantive or procedural, enforceable at law or in equity by any party . . . ." All eyes will be on the Federal Trade Commission (FTC), the agency tasked with defining what, if any, non-compete agreements may be deemed unenforceable or anticompetitive.

A Statement of Sweeping Policy

The Order is broad in scope and aimed at creating an open and competitive economy, including 72 initiatives that impact a wide swath of economic sectors, including agriculture, healthcare, and technology. In the employment context, the Order strives to ensure "a competitive marketplace [that] creates more high-quality jobs and the economic freedom to switch jobs or negotiate a higher wage."

The Order notes that non-compete agreements restrict workers' ability to change jobs, seek higher wages, and bargain for better work conditions. While President Biden's remarks on July 9 suggest that non-compete agreements are fair when they protect company trade secrets or other sensitive business information, his remarks also reflect what we may expect from the FTC, that is requiring non-compete agreements for all employees (particularly hourly employees who earn low wages) may be an unfair use.

To that end, federal enforcement could align the rest of the country with California, which has banned non-competes since 1872, with certain limitations relating to sale of a business and protection of trade secrets.

Action Primarily Through Existing Antitrust Laws and Government Procurement

The statutory basis for the Order is found in federal antitrust laws, including the Sherman Act, the Clayton Act, and the Federal Trade Commission Act. The Order expressly directs action from the FTC, which regulates unfair business practices, including those within the labor market. We anticipate, however, other agencies (including the Department of Labor) will take action to curtail non-competes as well.

Beyond regulatory actions taken under the guise of federal antitrust laws, the Order also contemplates that agencies can "influence the conditions of competition . . . through the procurement process." Thus, to the extent that efforts to regulate private agreements, including non-competes, fail under federal antitrust authority, federal contractors should still expect that additional obligations may be imposed through the federal procurement system.

Creation of a White House Competition Council

The Order establishes a White House Competition Council that will develop procedures and best practices for federal agencies to further the policy objectives of the Order. The Council is empowered to implement the administrative actions identified in the Order—although it initially appears that the substantive implementation of those administrative actions will occur within (and among) the federal agencies themselves. Importantly, the Council is prohibited from discussing any current or anticipated enforcement actions.

The Council shall be chaired by the Assistant to the President for Economic Policy and Director of the National Economic Council. Its members will include many members of the President's Cabinet, including the Secretary of Treasury, Secretary of Defense, Attorney General, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health and Human Services, and the Secretary of Transportation.

The Chair of the FTC and Director of the Consumer Financial Protection Bureau, among others, will also be invited to participate on the Council. The broad range of members of the Council merely underscores the breadth and potential reach of the Order.

Strong Reactions from the Business Community

The breadth of the Order—affecting business and employment practices across large sectors of the economy—and the uncertainty of the types of regulations that may be imposed, have prompted strong reactions from the business community.

The potential expansion of federal antitrust law to regulate a variety of industries and employment practices without Congressional action is likely to be met with challenges in the courts. At this early stage, employers are left guessing what new regulations may be imposed, as the Order does not create any substantive or procedural rights or benefits on its face.

Advice for Employers

Employers (particularly those employers who rely on non-compete provisions) should monitor developments coming from the President's Council and FTC rulemaking authority, as the regulatory details have yet to be worked out. If the FTC does not make non-competes illegal, but rather unenforceable, not much may change moving forward. Employers interested in challenging the forthcoming regulations may want to consider working with counsel and engaging industry groups to object to proposed rulemaking to preserve arguments for future court challenges.

All employers, and particularly federal contractors, who may have fewer options to challenge regulations affecting federal procurement, may want to begin assessing their policies and practices regarding the use of non-compete agreements.

Employers should also monitor activity at the state level, where state legislatures remain active in legislating restrictions on non-compete